IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

INTRODUCTION

In August 2008, Kifah Jayyousi led a Muslim group prayer at the Communications Management Unit (CMU), to which he had recently been transferred. During that group prayer, he told his fellow prisoners that they had been sent to a psychologically abusive unit because they were Muslim and urged his fellow prisoners to "stand firm, stand strong, to stand steadfast" even though the CMU is "a hard place." Prison officials did not interrupt Mr. Jayyousi's speech, nor was there a finding that he had violated any prison rules. In fact, the unit manager and warden subsequently recommended Mr. Jayyousi's transfer out of the CMU, citing his good conduct and rapport with staff and other prisoners. But Leslie Smith, Chief of the Bureau of Prisons Counter Terrorism Unit (CTU), disagreed with that recommendation. More than *two and a half years* after the group prayer, he insisted that Mr. Jayyousi remain at the CMU because of what Mr. Jayyousi had said. Mr. Jayyousi, he claimed, was "a charismatic individual" who had made "highly inflammatory commentaries." Mr. Jayyousi remains at the CMU to this day.

Daniel McGowan, meanwhile, is a prominent advocate for a range of political causes, and the subject of an Oscar-nominated documentary, *If a Tree Falls*. He has published numerous articles and blog pieces expressing his views, both before and during his incarceration. He has urged unity in the environmental movement, and encouraged new members of social justice movements to learn from errors of the past and to focus on issues of global concern. Despite his perfectly clean disciplinary record, Mr. McGowan was designated to a CMU in August 2008. After several staff recommendations that he be released from the CMU, based on his spotless record and good rapport with staff and other prisoners, he was finally transferred back to general population in October 2010, only to be abruptly redesignated to a CMU in February 2011. At the time, Mr. McGowan received no meaningful explanation for why he was twice singled out

for CMU designation. Documents obtained in this litigation, however, reveal that Mr. Smith took issue with Mr. McGowan's political speech and views in recommending both his initial designation and his later redesignation to the CMU.

Even in prison, the First Amendment does not countenance this type of unjustified and content-based retaliation for protected speech.

Defendants' seek to dismiss Plaintiffs' retaliation claims, arguing that they must fail so long as defense counsel can come up with a hypothetical penological interest served by Plaintiffs' CMU designation. As demonstrated below, that is simply not the standard that governs a First Amendment retaliation claim. Defendants go on to argue that Plaintiffs' core political and religious speech is not protected by the First Amendment. But Supreme Court precedent analyzing both speech within a prison, and speech sent by a prisoner to the outside world, belies this argument. Defendants rely on these same points to argue that Plaintiffs' claims against Mr. Smith should be dismissed on qualified immunity grounds, along with the assertion that the First Amendment law relevant to this case is not clearly established. But as Plaintiffs demonstrate below, decades of precedent protect Mr. Jayyousi and Mr. McGowan's speech. Because Defendants' qualified immunity argument substantially overlaps with the question of whether Plaintiffs have adequately pled a claim for relief, Plaintiffs address both issues together.

Further, Defendants' argument that the Prison Litigation Reform Act (PLRA) precludes Plaintiffs' damages claims ignores the plain meaning of that statute. And Plaintiffs take no position as to Defendants' motion to dismiss certain claims on mootness grounds.

STATEMENT OF FACTS

This case arises from the federal Bureau of Prisons' (BOP) establishment, in 2006 and 2008, of two small and experimental prison units known as "Communications Management Units" or "CMUs." *See* First Amended Complaint ("FAC") (Docket #88-1) at ¶ 1. The CMUs are explicitly designed to isolate certain prisoners from the rest of the prison population and the outside world by limiting their access to telephone calls and social visits, including a permanent ban on contact visits. *Id*. ¶ 2. Daniel McGowan and Kifah Jayyousi are low security prisoners with innocuous disciplinary histories and no record of management or communications-related problems. *Id*. ¶¶ 132, 133, 142, 148, 183, 184, 191. Yet, they were designated to the CMUs and thereby subjected to communications restrictions harsher than those found in comparable prison facilities – and in some instances, harsher even than those restrictions found in super-maximum security confinement. *Id*. ¶ 58. Until discovery, Plaintiffs received no meaningful explanation of why they were designated to the CMU; to this day they have not been given a meaningful opportunity to demonstrate that they do not belong there. *Id*. ¶¶ 135-39, 147, 187, 188.

On November 20, 2012, this Court granted Plaintiffs permission to file a First Amended Complaint, bringing two new retaliation claims based on documents obtained in discovery. *See* Memorandum Order Granting Plaintiffs' Motion to Amend the Complaint (Docket #85). Plaintiffs have alleged that these documents, memoranda authored by Mr. Smith, reveal that Mr. McGowan was designated to the CMU in direct response to protected First Amendment activity. The documents also reveal that Mr. Smith successfully overruled recommendations at the facility level that Mr. Jayyousi be transferred to general population and ensured that Mr. Jayyousi be retained at the CMU based on First Amendment-protected religious and political speech.

I. Kifah Jayyousi's Religious and Political Speech has Resulted in his Continued CMU Designation.

Kifah Jayyousi has been confined at a CMU since June 2008. *Id*. ¶¶ 187, 194. According to the BOP, this initial designation was based on the nature of his criminal conviction. *Id*. ¶ 187. While in the CMU, in accordance with BOP rules allowing for inmate-led prayer, Mr. Jayyousi served as a Muslim prayer leader for Jumah prayer. *Id*. ¶ 189. His sermon was transcribed by the BOP; those transcripts are submitted herein as Exhibit A.[1] Although Mr. Smith later characterized this speech as incitement, the transcript shows that Mr. Jayyousi did not at any point advocate violence, terrorism or intimidation, or condemn any religious, ethnic, racial, or regional group. FAC ¶ 189; *see also* Exhibit A. Instead, he expressed his belief that CMUs were for Muslim prisoners, that he and his fellow prisoners were not criminals, that the units were evil and psychologically abusive, and that criminal cases against Muslims destroyed good U.S. citizens and tore them away from their families. *Id*. ¶ 197; Exhibit A. He urged his fellow prisoners to "stand firm, stand strong, to stand steadfast" even though the CMU is "a hard place." Exhibit A. Prison officials directly observed the speech, and allowed him to finish without interruption. *Id*. An incident report was drafted, charging Mr. Jayyousi with Encouraging a Group Demonstration, and a disciplinary hearing was held. FAC ¶ 191. The charge was dismissed and expunged from Mr. Jayyousi's disciplinary record. *Id*.

[1] Defendants have agreed to lift the protective order from these documents so that they can be publicly filed with this brief. Like the documents submitted by Defendants with their motion to dismiss, these documents were "referred to in the complaint and [are] central to plaintiff's claims." *Vanover v. Hantman*, 77 F. Supp.2d 91, 98 (D.D.C. 1999), *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002). As such, they "may be considered without converting the motion to one for summary judgment." *Id*.; *see also Krooth & Altman v. N. Am. Life Assur. Co.*, 134 F. Supp. 2d 96, 99 (D.D.C. 2001) (same); *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001) (same). Plaintiffs intend to rely on substantially more evidence than these few documents to prove their retaliation claims; like Defendants, they do not seek to convert this motion to dismiss into a motion for summary judgment.

On February 22, 2011, the Marion CMU Unit Manager authored a memorandum requesting that Mr. Jayyousi be transferred out of the CMU. *Id.* ¶ 195. The Unit Manager noted that "[s]ince his arrival in the Terre Haute CMU and continuing while at USP Marion, Jayyousi has maintained clear conduct and a good rapport with staff and other inmates. He has completed numerous ACE/Education courses. USP Marion staff have noted no continuation of actions which precipitated his placement in the CMU." *Id.* In the same memorandum, the USP Marion Warden noted that "in the time he has been here, he has acted within the regulations set forth. He has not presented issues which cause [illegible] concern." *Id.*

In a March 22, 2011 memorandum, Defendant Leslie Smith acknowledged that the Warden at USP Marion had submitted a recommendation that Mr. Jayyousi should be transferred from the CMU. *Id.* ¶ 196. However, Mr. Smith disagreed with that recommendation, and recommended that Mr. Jayyousi be kept at the CMU. *Id.* ¶ 197. Defendants have submitted this memorandum as Exhibit 2 to their Motion to Dismiss. In the memorandum, authored two and a half years after the prayer service in question, Mr. Smith wrongfully claimed:

> During one such prayer, which was directly observed by staff, inmate Jayyousi made statements which were aimed at inciting and radicalizing the Muslim inmate population in THA CMU. Characteristics, behaviors and unacceptable activities which describe an individual involved in prison radicalization and recruitment were displayed by inmate Jayyousi and included: a charismatic individual, who make highly inflammatory commentaries which elicit violence, terrorism or intimidation, and speech that disrespects or condemns other religious, ethnic, racial or religious groups.

Compare Defendants' Consolidated Motion to Dismiss ("MTD") (Docket #99) at Exhibit 2 *with* Exhibit A. In the intervening time between the prayer service and Mr. Smith's Memorandum, Mr. Jayyousi incurred no disciplinary infractions. FAC ¶ 183. He has been held at the CMU ever since. *Id.* ¶ 19.

II. Daniel McGowan's Political Speech Resulted in his Designation and Redesignation to the CMU.

Daniel McGowan was first designated to a CMU in August 2008, after serving a year in a low security prison without a single disciplinary infraction. *Id*. ¶¶ 130-33, 135. As explanation, he was provided only a one-page notice of transfer, which was compromised of information about his offense conduct that is demonstrably false, *id*. ¶ 136, and which the BOP has refused to correct. *Id*. ¶¶ 137, 138. A memorandum written by Mr. Smith on March 27, 2008, and made available to Mr. McGowan for the first time in February 2012 in discovery, more fully explains Mr. McGowan's CMU designation. *Id*. ¶ 134; *see also* MTD at Exhibit 3. In that memorandum, Mr. Smith states:

> In a letter published on the Portland Independent Media, inmate McGowan described the cooperation with government authorities by his co-defendants and complained about support provided to these cooperating defendants, from the environmental community, for persons who he claimed were responsible for the, "betrayal of (their) friends and allies."
>
> For an interview in the Earth First! Journal, inmate McGowan described "snitches," particularly his co-defendants, and made statements to discourage others from cooperating. He attempted to educate new members to the movement on what he considered errors of the past by cooperators. On direct action, inmate McGowan stated such tactics may not be the best option, but often have the most desired effect and detailed his support for such actions by members of the community. Regarding direct action, inmate McGowan stated: "We need to have serious conversations about whether militancy is truly effective in all situations. Certainly, direct action is a wonderful tool, but from my experience, it may not be the most effective one at all times or in all situations." "In some instances, direct action is the most effective tactic." "Actions that are understood by the public and seen as logical can have a positive impact on pre-existing campaigns and struggles." "Despite the fact that my particular case is over, it's imperative that we discuss tactics and strategies in a way that people can actually hear and listen to what each other is saying."
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> In an article for Earth First! Journal, inmate McGowan discussed the movement, tactics and cooperators as related to the so-called "Green Scare." Inmate McGowan was critical of cooperating defendants and supportive of direct action: "As things get worse in our society and as our demands for ecological sanity and compassion for animals get ignored, many people inevitably lose faith in polite ways of effective change and choose more radical methods…."

> In a social letter, inmate McGowan discussed bringing unity to the radical environmental movement by focusing on larger, global issues. Inmate McGowan has been publishing his points of view on the internet in an attempt to act as a spokesman for the movement.

Id. The memorandum goes on to list Earth First! Journal, Bite Back, and Portland Independent Media as websites on which Mr. McGowan had published his writings. *Id*.

On March 9, 2010, after almost two years in the CMU, the Warden at USP Marion and the Unit Manager at the Marion CMU requested in writing that Mr. McGowan be transferred out of the CMU to general population. *Id*. ¶ 142. They noted that, since his arrival at the CMU, Mr. McGowan had "maintained clear conduct and a good rapport with staff and other inmates . . . . While he has had several incoming publications and letters rejected based on content, USP Marion staff have noted no continuation of actions which precipitated his placement in the CMU." *Id*. On March 22, 2010, Mr. Smith authored another memorandum in which he opposed that recommendation. *Id*. ¶ 143; *see also* MTD Exhibit 5. He notes: "Through his communications, inmate McGowan continues to provide guidance, leadership and direction for activities, publications and movement practices in order to further the goals of radical environmental groups." *Id*.

In August 2010, CMU staff once again recommended Mr. McGowan's transfer from the CMU to general population, and in October 2010, Mr. McGowan was transferred from the CMU to general population at USP Marion. *Id*. ¶ 145. He remained there until February 2011, incurring no disciplinary infractions. *Id*.

On February 1, 2011, Mr. Smith authored a memorandum recommending that Mr. McGowan be redesignated to a CMU. *Id*. ¶ 146. Mr. Smith claimed that Mr. McGowan had directed his wife to "circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication." *Id*. The documents at

issue were CTU reports including information about Mr. McGowan, that were leaked to the public through the website www.publicintelligence.net. *Id*. While Plaintiffs' counsel have now properly obtained these reports through discovery and plan to introduce some as evidence to prove their claims against Defendants, neither Plaintiffs nor Plaintiffs' counsel was aware of their existence before the leak. According to Smith's memorandum, after the leak Mr. McGowan asked his wife to ask his attorneys whether they would mail him a copy of the documents, and this constituted an act of "circumventing monitoring through the use of legal mail." *Id*. In addition, Mr. Smith noted that:

> [I]nmate McGowan's communication with persons in the community since his release from MAR CMU has continued to demonstrate his support for anarchist and radical environmental terrorist groups, and presented his desire to remain in an influential and leadership position among these groups . . . . Prior to the completion of his 6 months [sic] step-down from the CMU, inmate McGowan has demonstrated the conditions for his original designation still exist through his espousing support for anarchist and radical environmental terrorist groups.

Id. Shortly thereafter, on February 24, 2011, Mr. McGowan was abruptly redesignated to the CMU at Terre Haute and held there until December 2012, when he was transferred to a halfway house in anticipation of his release from BOP custody. *Id*. ¶ 147, MTD at 5. Mr. McGowan was not disciplined for any mail or telephone violation, nor did he receive any warning from BOP officials about his conversation with his wife. FAC ¶ 148.

ARGUMENT

STANDARD OF REVIEW

On a motion to dismiss brought for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must "'treat the complaint's factual allegations as true . . . and must grant [Plaintiffs] the benefit of all inferences that can be derived from the facts alleged.'" *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 677 (D.C. Cir. 2009) (citation omitted). A

court may not dismiss so long as the pleadings "suggest a 'plausible' scenario that shows that the pleader is entitled to relief." *Id*. at 681. Indeed, a court may not grant a motion to dismiss for failure to state a claim "'even if it strikes a savvy judge that . . . recovery is very remote and unlikely.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Instead, a claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

I. PLAINTIFFS HAVE ADEQUATELY PLED RETALIATION, AND DEFENDANT LESLIE SMITH IS NOT ENTITLED TO QUALIFIED IMMUNITY.

In moving to dismiss Plaintiffs' retaliation claims, Defendants either misrepresent or misunderstand the requirements of a retaliation claim, and fail to grapple with decades of clear precedent that protects the speech at issue here. Applying the correct standard, Plaintiffs have adequately pled the three requirements of a retaliation claim. First, Plaintiffs have plausibly alleged that they have engaged in speech protected by the First Amendment. Second, Defendants do not dispute, and this Court has already assumed, that CMU designation is sufficient to chill lawful speech. Finally, Plaintiffs have plausibly alleged that they were confined to the CMU because of their protected speech. That is all that is required to survive a motion to dismiss.

A. Defendants Misstate the Requirements for a Retaliation Claim.

Defendants' motion to dismiss is premised on a misstatement of the standard for pleading a First Amendment retaliation claim. In his 2011 ruling on Defendants' first motion to dismiss, Judge Urbina correctly set forth the standard:

> A prisoner alleging a First Amendment claim of retaliation must allege that "(1) he engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position

> from speaking again; and (3) a causal link between the exercise of a constitutional right and the adverse action taken against him." *Banks v. York*, 515 F. Supp. 2d 89, 111 (D.D.C. 2007) (citing *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Friedl v. City of New York*, 210 F.3d 79, 85 (2d Cir. 2000)).

Aref v. Holder, 774 F. Supp. 2d 147, 169 (D.D.C. 2011). Applying this standard, the Court denied Defendants' motion to dismiss Plaintiffs' first set of retaliation claims, which were supported by fewer facts than now appear in the First Amended Complaint.[2] *Id.*

Rather than following the clear standard laid out by Judge Urbina, Defendants now advance a misleading and unsupported test for pleading retaliation. According to Defendants, a prison official may take adverse action against a prisoner because of his First Amendment protected speech, so long as defense counsel can point to any purportedly legitimate penological purpose that is advanced by the official's action, even if that purpose played no part in the prison official's actual motivation. *See* MTD at 13 ("in addition to [the three elements set forth in Judge Urbina's order] the plaintiff must allege 'that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline'") (citations omitted).

This argument, however, has been explicitly foreclosed by the Supreme Court. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), the Court considered the burden of proof applicable to a prisoners' claim that his property was purposefully misdirected in retaliation for exercising his First Amendment rights. The dissent argued unsuccessfully for exactly the standard that Defendants try to resurrect today. *See id.* at 612 (Scalia, J. *dissenting*) (arguing for a rule that "once the trial court finds that the asserted grounds for the official action were objectively valid (*e.g.*, the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine

[2] Mr. Jayyousi did not raise a retaliation claim in the initial Complaint, as he did not then have access to the documents, received in discovery, that form the basis for his current claim.

motive (*e.g.*, the incompetent person fired was a Republican)."). A majority of the Supreme Court disagreed, finding no justification in precedent or policy for a "rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Crawford-El*, 523 U.S. at 593-94. The Court reasoned that "the policy concerns underlying *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] do not support … [an] unprecedented proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper motive." *Id.*

Under *Crawford-El*, a prison official may not defeat a retaliation claim "simply by articulating a general justification for a neutral process, when there is a genuine issue of material fact as to whether the action was taken in retaliation for the exercise of a constitutional right." *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (finding that prison has a legitimate penological interest in stopping gang activity, but "if, in fact, the defendants abused the gang validation procedure as a cover or a ruse to silence and punish Bruce because he filed grievances, they cannot assert that Bruce's validation served a valid penological purpose, even though he may have *arguably* ended up where he belonged"). Thus, even where prison officials have discretion to move a prisoner to a less desirable location, an "ordinarily permissible exercise of discretion may become a constitutional deprivation if performed in retaliation for the exercise of a [F]irst [A]mendment right." *Banks v. York*, 515 F. Supp. 2d 89, 110-113 (D.D.C. 2007) (citing *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (prisoner's transfer to another prison and reclassification as a "special offender" were actionable notwithstanding Bureau of Prisons' "long-recognized discretion to decide where to house prisoners")); *see also Kimberlin v. Quinlin,* 199 F. 3d 496 (D.C. Cir. 1999) ("even if appellants provide an objectively valid reason for their actions in this case, the District Court must still inquire into whether there

is a disputed issue of fact as to whether appellants were actually motivated by an illegitimate purpose").

The precedent Defendants cite is not contrary to this well-settled law. Those cases do instruct a court to consider whether "the retaliatory action does not advance legitimate penological goals." *See Byrd v. Mosley*, 942 F. Supp. 642, 645 (D.D.C. 1996); *Anderson-Bey v. District of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C. 2006); *Pryor-El v. Kelly*, 892 F. Supp. 261, 275 (D.D.C. 1995). But this is simply a reference to the *Turner v. Safley* standard, which, in analyzing speech within a prison, requires the court to consider not just whether a prisoner's speech *implicates* First Amendment concerns, but also whether that speech may lawfully be infringed by legitimate penological concerns. *See Anderson-Bey*, 466 F. Supp. 2d at 66; *Pryor-El*, 892 F. Supp. at 275. Under *Turner,* a retaliation claim requires the Court to consider the legitimacy of any penological interests that actually motivated the adverse action. Plaintiffs undertake that inquiry in Section B, below. But *Crawford-El* forecloses Defendants' assertion that the Court should simply accept any penological interest articulated by counsel, thus insulating from review Defendants' true motivations. Improper motive matters in a retaliation case, and Defendants may only defend as legitimate the *actual reason* Mr. Jayyousi and Mr. McGowan were designated, retained and redesignated to the CMU.

B. Kifah Jayyousi and Daniel McGowan Have Plausibly Alleged Violations of their Clearly Established First Amendment Rights.

Under the first prong of a retaliation claim, a prisoner must allege that he engaged in speech or conduct protected by the First Amendment. *See Banks*, 515 F. Supp. 2d at 111. Notably, Defendants do not contest that Mr. Jayyousi and Mr. McGowan engaged in speech under the meaning of the First Amendment. Instead, they claim that, in light of restrictions on a prisoner's right to freedom of expression, the speech at issue here is simply not protected. *See*

MTD at 18-19, 24-25, 29-30. Defendants are incorrect. The Supreme Court has long made it clear that "[t]here is no iron curtain drawn between the Constitution and the prisoners of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). "Inmates clearly retain protections afforded by the First Amendment," *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987), and any restrictions on their speech must be consistent with "legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). A prisoner's First Amendment rights include the right to be free from interference that "is based on the content of [his] speech or proposed speech," *Kimberlin v. Quinklan*, 199 F.3d 496, 502 (D.C. Cir. 1999), or inflicted "solely because of [his] beliefs, whether religious or secular." *Sostre v. McGinnis*, 442 F.2d 178, 189 (2d Cir. 1971) (citing *Cooper v. Pate*, 378 U.S. 546 (1964)); *see also Sczerbaty v. Oswald*, 341 F.Supp. 571, 573 (S.D.N.Y. 1972) (punishment "solely because of the inmate's beliefs, whether religious or secular, violates his constitutional rights") (also citing *Cooper*). Accordingly, courts have held for decades that a prisoner's "[F]irst [A]mendment right to freedom of expression encompasses the right to express himself without punitive retaliation." *Simmat v. Manson*, 535 F. Supp. 1115, 1117-18 (D. Conn. 1982).

Proceeding from this premise, courts examine four factors to determine when a prisoner's speech inside prison may be restricted. *See Turner*, 482 U.S. at 90. Courts must consider: 1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; 2) whether there are alternative means of exercising the right that remain open to prison inmates; 3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and 4) whether there are ready alternatives to the restriction to secure

the penological interest. *Id*. at 89-90. Applying these factors to Mr. Jayyousi's speech compels a finding that it was protected by well-established precedent.

An even stricter standard applies when a prisoner's speech is directed to an audience outside the prison context – like Mr. McGowan's speech at issue here. First, restrictions on a prisoner's outgoing speech "must further an important or substantial governmental interest unrelated to the suppression of expression." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *see also Thornburgh v. Abbott*, 490 U.S. 401, 408-12 (1989) (overruling *Martinez* on other grounds but explicitly affirming its analysis of outgoing correspondence). "Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413-14. In light of this standard, Mr. McGowan's speech, which was comprised of correspondence with non-prisoners and published writing, was plainly protected.

i. Mr. Jayyousi's Speech Is Protected by the First Amendment.

Plaintiffs allege that, despite the CMU unit manager's and the prison warden's recommendations of a transfer to general population, Defendants continue to hold Mr. Jayyousi at the CMU because of the content of Mr. Jayyousi's speech rather than any legitimate penological reason. *See* FAC ¶¶ 195-99. Defendants, in contrast, argue that Mr. Jayyousi's speech was not protected by the First Amendment because, according to Mr. Smith, it "posed a threat of a 'group demonstration' and was therefore 'detrimental to the security, good order, or discipline of the institution.'" MTD at 18 (quoting Smith memorandum). By telling other prisoners at a BOP-sanctioned group prayer meeting that the CMU was "evil," that "not even staff understood or accepted the purpose of the unit," that Muslim inmates should "stand together," and should not cooperate with the government, Defendants claim that Mr. Jayyousi

was "clearly 'encouragin[ing] adversary relations with institution officials.'" *Id*. at 19 (citations omitted).

First *Turner* Factor: Defendants argue that Mr. Jayyousi's speech provided a purportedly "legitimate governmental interest . . . to justify" his retention at the CMU. *Turner*, 482 U.S. at 89. But an examination of Mr. Jayyousi's allegations establish that that there is no "valid, rational connection" between the two. *Id*.

First, Mr. Smith grossly mischaracterized Mr. Jayyousi's speech. Defense counsel's brief largely ignores these mischaracterizations, excluding from reference Mr. Smith's claims, in his March 22, 2011 memorandum justifying Mr. Jayyousi's continued CMU designation, that:

> During one such prayer, which was directly observed by staff, inmate Jayyousi made statements *which were aimed at inciting and radicalizing the Muslim inmate population* in THA CMU. Characteristics, behaviors and unacceptable activities which describe an individual involved in prison radicalization and recruitment were displayed by inmate Jayyousi and included: *a charismatic individual, who make highly inflammatory commentaries which elicit violence, terrorism or intimidation, and speech that disrespects or condemns other religious, ethnic, racial or religious groups.*

See FAC ¶ 197. Mr. Jayyousi denies making such comments. *Id*. ¶ 189. And the BOP transcripts of Mr. Jayyousi's sermon include no evidence whatsoever that he advocated violence, terrorism, intimidation, disrespect or condemnation of other groups. *See* Exhibit A.

Second, Defendants' claims that Mr. Jayyousi's speech encouraged a group demonstration, was detrimental to the security, good order, or discipline of the institution, and encouraged adversary relations with institution officials, are neither borne out by the record nor supported by the law. First, Mr. Jayyousi's speech did not result in a disciplinary violation – in contrast to the cases on which Defendants rely. *See*, *e.g.*, *Goff v. Dailey*, 991 F.2d 1437, 1438-39 (8th Cir. 1993) (finding that punishment for speech was reasonable where, *inter alia*, the prisoner was found guilty of verbal abuse, threats or intimidation, and obstructive or disruptive conduct in

a disciplinary proceeding); *Watkins v. Kasper*, 599 F3d 791, 794 (7th Cir. 2010) (same, where the prisoner was found guilty of disorderly conduct). Mr. Jayyousi was initially charged with Encouraging a Group Demonstration, but after a disciplinary hearing was held, the charge was dismissed and expunged from his disciplinary record. *See* FAC ¶ 191. That he was cleared of any wrongdoing strongly contradicts any claim that his speech posed danger to the institution. *See*, *e.g.*, *Bennett v. Goord*, 343 F.3d 133, 138 (2d Cir. 2003) (prisoner's retaliation claim was supported by the fact that disciplinary charges were subsequently found to have been unjustified); *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 240 (S.D.N.Y. 2005) (same).

Similarly, the fact that the prison officials who "directly observed" the speech, FAC ¶ 197, did not intervene or stop the speech sharply undermines Mr. Smith's claim that Mr. Jayyousi posed a danger of incitement or of a group demonstration – once again in contrast to the case law on which Defendants rely. *See Freemen v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 858 (5th Cir. 2004) (noting prisoner was ordered to stop reciting the statement he later claimed was the basis of a retaliatory transfer while he was delivering it at a religious service and that he was escorted from the chapel).

Moreover, Mr. Jayyousi's speech did not involve "concerted group activity, or solicitation therefor." *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 129 (1977). In *Jones*, the Supreme Court drew a distinction between a prisoner's speech that involves "the simple expression of individual views" and "an invitation to collectively engage in legitimately prohibited activity," noting that the former is protected by the First Amendment while the latter is not. *Id*. at 131-32. Defendants have failed to explain how Mr. Jayyousi's speech would lead to concerted and prohibited group activity, or to show that he solicited such activity. Indeed, Mr. Jayyousi's speech included only his individual views – that the CMUs were for Muslim

prisoners, that he and his fellow prisoners were not criminals, that the units were evil and psychologically abusive, and that criminal cases against Muslims destroyed good U.S. citizens and tore them away from their families. FAC ¶ 197. Mr. Jayyousi's generic statement that Muslim prisoners should "stand firm, stand strong, [] stand steadfast," Exhibit A at 2, simply does not involve "an invitation to collectively engage" in particular and forbidden conduct akin to "organized union activity within the prison walls." *Jones*, 433 U.S. at 132.

Nor have Defendants explained how Mr. Jayyousi's speech constitutes "encouragement of adversary relations with[] institution officials." *Id.* at 133. Mr. Jayyousi's speech did not even mention institution officials, except to purportedly state that "not even the staff understood or accepted the purpose of the unit." FAC ¶ 197.[3] This stands in marked contrast to cases "where the focus [of the speech] is on the presentation of grievances to, and encouragement of adversary relations with, institution officials," *Jones*, 433 U.S. at 133, or cases where a prisoner directly challenges an official's authority in front of other prisoners, *see, e.g.*, *Watkins*, 599 F.3d at 797 ("by openly challenging [the law librarian's] directives in front of other prisoner law clerks, Watkins impeded her authority and her ability to implement library policy"). Again, there is nothing to undermine Mr. Jayyousi's plausible allegations that his speech fell within the First Amendment's protections and justified no special restrictions.

That there is no valid, rational connection between Mr. Jayyousi's speech and his retention at the CMU is also demonstrated by the events between his speech and Mr. Smith's memorandum. The speech in question occurred in August 2008. See FAC ¶ 189. Mr. Smith relied on that speech as the rationale for Mr. Jayyousi's ongoing CMU retention in March 2011 –

[3] It should be noted that, while Mr. Smith's memorandum ascribes this statement to Mr. Jayyousi, it does not appear in the transcripts of Mr. Jayyousi's speech provided by Defendants in discovery. *See* Exhibit A. Further discovery is therefore necessary to determine whether or not Mr. Smith accurately quoted Mr. Jayyousi when he relied on this alleged statement in his March 22, 2011 memorandum.

over *two and a half years later*. *Id*. ¶ 196. In the intervening time, Mr. Jayyousi incurred no disciplinary infractions. *Id*. ¶ 183. There is no evidence that his speech resulted in any group demonstration or detriment to the security, good order, or discipline of the institution. In fact, the only evidence is to the contrary. In February 2011, the CMU Unit Manager and the Warden of Terre Haute recommended that Mr. Jayyousi be transferred out of the CMU, stating:

> Since his arrival in the Terre Haute CMU and continuing while at [the] USP Marion [CMU], Jayyousi has *maintained clear conduct and a good rapport with staff and other inmates* . . . . USP Marion staff have noted no continuation of actions which precipitated his placement in the CMU . . . in the time he has been here, *he has acted within the regulations set forth. He has not presented issues which cause [illegible] concern*.

FAC ¶ 195 (emphasis added). This recommendation, which specifically cites Mr. Jayyousi's clear conduct, good rapport with staff, comportment with prison regulations, and the unit manager and warden's lack of concerns about him, directly undermines and contradicts Defendants' assertion that Mr. Jayyousi's speech or its purported consequences provide a valid, rational reason for his retention at the CMU. Given Mr. Smith's unfounded characterization of Mr. Jayyousi's speech as involving statements about violence, terrorism, intimidation, and condemnation of other groups, and the fact that in the two and a half years between the speech and Mr. Smith's memorandum there is not a shred of evidence of any security issue arising from that speech, it is apparent that the connection between the speech and any valid penological purpose in retaining Mr. Jayyousi at the CMU is "so remote as to render [that decision] arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

Indeed, where there is no reliable evidence that retaining Mr. Jayyousi at the CMU is rationally related to any legitimate security concerns about his speech, the only reasonable conclusion at this juncture is that it was impermissibly based on disagreement with the *content* of that speech. *Id*. at 90 ("prison regulations restricting inmates' First Amendment rights [must]

operate[] in a neutral fashion, without regard to the content of the expression"). Though Defendants may disagree with Mr. Jayyousi's views, any such disagreement simply does not suffice to strip his speech of First Amendment protection.

Second *Turner* Factor: In *Turner*, the Supreme Court noted that "[w]here 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to the corrections officials . . . in gauging the validity of the regulations." 482 U.S. at 90 (internal citations and quotations omitted). Defendants object to Mr. Jayyousi's speech based on *what* he said, not where, how, or when he said it. Thus, Mr. Jayyousi is apparently constrained from engaging in religious or political speech anywhere in the CMU, to anyone, and at any time, without risk of punishment. *See* FAC ¶ 40 (many areas in each CMU are currently wired for audio and video recording). There are therefore no alternative means for Mr. Jayyousi to express his beliefs free from retaliation. *See Sostre*, 442 F.2d at 189 (citing *Cooper*, 378 U.S. at 546); *Sczerbaty*, 341 F.Supp. at 573.

Third *Turner* Factor: In assessing the impact of the asserted constitutional right on prison resources, staff and other inmates, the Supreme Court has noted that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90. As explained above, there is no evidence that Mr. Jayyousi's speech has strained prison resources, contributed to unrest among the inmate population, enhanced his status as a prisoner, or resulted in danger to himself or others. *See Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir. 1998) (finding no significant impact of a prisoner's speech in the absence of these factors). On the contrary, the CMU Unit Manager and prison warden specifically noted just weeks before the decision to retain Mr. Jayyousi at the CMU that he had

"*not* presented issues which cause . . . concern," and that he had "maintained clear conduct and a good rapport with staff and other inmates." FAC ¶ 195 (emphasis added). Thus, his speech has had no "ripple effect" that would justify the restrictions imposed on Mr. Jayyousi.

Fourth *Turner* Factor: The final *Turner* factor inquires as to whether there are ready alternatives to the restriction to secure the asserted penological interest. The existence of "obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner*, 482 U.S. at 91. Where Mr. Jayyousi's speech has not "attain[ed] a special status, threaten[ed] corrections officers, or incite[d] the inmate population, a more narrow [restriction] could sufficiently protect the [BOP's] security interests." *Abu-Jamal*, 154 F.3d at 135. Indeed, a ready alternative was specifically recommended by CMU staff – namely, Mr. Jayyousi's transfer into general population, FAC ¶ 195 – and so is readily available to Defendants.

Mr. Jayyousi's speech was simply an expression of his religious and political beliefs. It is clearly established law that a prisoner's right to express such beliefs is protected by the First Amendment in the absence of a countervailing and legitimate penological interest. *O'Lone*, 482 U.S. at 348; *Crawford-El*, 523 U.S. at 589 n.10; *Sostre*, 442 F.2d at 189 (citing *Cooper*, 378 U.S. at 546); *Sczerbaty*, 341 F.Supp. at 573; *Simmat*, 535 F. Supp. at 1117-18. Moreover, Mr. Jayyousi had a clearly established right to be free from government interference "based on the content of [his] speech." *Kimberlin*, 199 F.3d at 502 ("This right without doubt was clearly established in 1988"). These standards, and all the case law cited by and relied upon by Plaintiffs, were plainly governing when Mr. Smith authored the memorandum in question here. *See supra*. Mr. Jayyousi has plausibly alleged that he engaged in political and religious speech, and that there was no legitimate penological reason to restrict that speech. He has plausibly

alleged that the Defendants' actions were motivated by its content. Thus, he has stated a claim that his speech has been unconstitutionally restricted.

ii. Mr. McGowan's Speech Is Protected by the First Amendment.

Defendants also claim that Mr. McGowan's speech is not protected by the First Amendment. MTD at 29. In so arguing, they cite to what Mr. Smith describes as letters and interviews with members of the public and the press describing government cooperators as "snitches," efforts to discourage others from cooperating with the government, and endorsement of direct action, which they characterize as "discussions of criminal activities." *Id*. Defendants further claim that Mr. McGowan's redesignation to the CMU was based on a purported effort to circumvent inmate communication monitoring after Mr. McGowan asked his wife to request that his attorneys send him some documents. *Id*.

Defendants are again selective in what they highlight from Mr. Smith's memoranda. Along with speech that Defendants incorrectly characterize as related to criminal activity, Defendants fail to mention that Mr. Smith also relied on the following speech in justifying Mr. McGowan's designation and redesignation to the CMU, none of which could possibly be described as a discussion of criminal activity, but instead plainly expresses Mr. McGowan's political beliefs and ideas:

- Mr. McGowan's attempts to "unite" environmental and animal liberation movements;
- Mr. McGowan's attempt to "educate" new members of the movement about what he considers errors of the past;
- Mr. McGowan's writings about "whether militancy is truly effective in all situations";
- A social letter discussing bringing unity to the radical environmental movement by focusing on larger global issues;
- The fact that Mr. McGowan "has been publishing his points of view on the internet in an attempt to act as a spokesperson for the movement;"
- A list of organizations that have published Mr. McGowan's writings, including Earth First! Journal, Bite Back, and Portland Independent Media.

See FAC ¶ 134; *see also* Docket #99-3 (3/27/08 Smith Memorandum).

- An observation that, "through his communications, inmate McGowan continues to provide guidance, leadership and direction for activities, publications and movement practices in order to further the goals of radical environmental groups."

See Docket #99-5 (3/22/10 Smith Memorandum).

- An observation that "McGowan's communications with persons in the community since his release from MAR CMU has continued to demonstrate his support for anarchist and radical environmental terrorist groups, and demonstrate his desire to remain in an influential and leadership position among these groups."

See Docket #99-4 (2/1/11 Smith Memorandum). As explained below, this is all core political speech that is protected by the First Amendment.

Defendants claim that Mr. McGowan's speech is unprotected "given the danger posed to both the public and prison security." MTD at 29. However, Defendants ignore the fact that this speech was sent to an audience *outside* the prison, and thus their glib assertions of prison security are unavailing. *See Thornburgh*, 490 U.S. at 411-12 ("outgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison. In addition, the implications for security are much more predictable"); *see also Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1125 (D. Co. 2007) ("as with all other publications, particular content may give rise to a security risk only once the publication enters the prison. But as to entry of all publications into the prison, the BOP has adequate authority to screen and exclude dangerous content"). Given that there is no evidence that Mr. McGowan's writings entered the prison, Defendants' assertion of a "danger" to "prison security" is unfounded.

Because it was directed to an audience outside the prison, Mr. McGowan's speech implicates not only his own right to freedom of expression, but that of the public as well and is thus entitled to broader First Amendment protection. *See Martinez*, 416 U.S. at 409 (restrictions

on prisoner correspondence "works a consequent restriction on the First and Fourteenth Amendments rights of those who are not prisoners. Accordingly, we reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners"). First, prison officials must show that restrictions on a prisoner's outgoing speech "further an important or substantial governmental interest unrelated to the suppression of expression." *Id*. at 413; *see also Thornburgh*, 490 U.S. at 408-12 (affirming the *Procunier v. Martinez* analysis of outgoing correspondence). "Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413-14.

Defendants posit an entirely theoretical and unsubstantiated risk of danger posed by Mr. McGowan's speech to the public. None of the speech cited by Defendants in their briefing, or described above, describes or discusses criminal activity. Instead, his speech – including describing government cooperators as "snitches," discouraging others from cooperating with the government, and discussing environmental movements – is simply an expression of Mr. McGowan's political views, beliefs, and affiliations. Such core political speech is unequivocally protected by the First Amendment. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (freedom to associate with others for the common advancement of political beliefs and ideas is protected by the First Amendment). In the absence of criminal activity, Defendants fail to meet their heavy burden of demonstrating that Mr. McGowan's CMU designation and redesignation furthered an important or substantial interest, and that they were no greater than is

necessary or essential to the protection that interest. *Martinez*, 416 U.S. at 413; *see also Harrison v. Institutional Gang of Investigations*, No. C 07-3824, 2010 U.S. Dist. LEXIS 14944 at *19 (N.D. Cal. Feb. 22, 2010) (denying defendants' motion for summary judgment regarding outgoing mail where prison officials had not shown that correspondence "presented a danger to prison security or actually encouraged violence").

Moreover, these bedrock First Amendment rights do not dissipate simply because Defendants do not approve of the political organization in question, or because the speaker discusses organizations that may advocate criminal conduct. *See Martinez*, 416 U.S. at 413 (the purpose of restrictions of outgoing correspondence cannot be "to eliminate unflattering or unwelcome opinions"); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722, 2726, 2730 (2010) ("independently advocating for a cause is different from providing a service to a group that is advocating for that cause"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609-10 (1967) (striking down New York laws that "proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York"); *De Jonge v. Oregon*, 299 U.S. 353, 358, 366 (1937) (even where the Communist Party advocated criminal syndicalism, individual who attended a Communist Party meeting was "entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty"). Defendants offer a conclusory claim that Mr. McGowan's speech involved "references in support of 'direct action,'" MTD at 26, but offer no explanation of or facts to support that claim. In any event, well-established First Amendment jurisprudence makes clear that expressing support for direct action does not, in and of itself, fall outside of the First Amendment's protections and that restricting such protected

speech does not "further an important or substantial governmental interest unrelated to the suppression of expression." *Martinez*, 416 U.S. at 413.

There is no evidence that Mr. McGowan's political writing "has strained prison resources, contributed to unrest among the inmate population, or enhanced [his] status as a prisoner, resulting in danger to himself or others . . . . The record does not show that [Defendants'] actions were motivated by concerns about escape plans, plans about ongoing criminal activity, or threats. To the contrary, it appears that [Mr. McGowan's] activity has not heightened tensions at the prison, and that his writings do not advocate violence, have any impact on the prison population, threaten corrections officers, or burden prison security resources." *Abu-Jamal*, 154 F.3d at 134, 135 (applying the more permissive *Turner* standard). Thus, Mr. McGowan has plausibly alleged that "the limitation of [his] First Amendment freedoms [is] greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413-14.

In the absence of any evidence of a security risk posed by Mr. McGowan's writings, Mr. Smith's description of his speech – focusing on his attempts to "unite" and "educate" members of movements, publishing "his points of view on the internet," and demonstrating his "support" for anarchist and radical groups – suggests that Mr. McGowan's CMU designation and redesignation were based not on "legitimate and neutral" reasons, but instead were motivated by the "suppression of expression." *Id*. at 413; *see also Abu-Jamal*, 154 F.3d at 134 (applying the more lenient *Turner* standard and concluding "that it is likely that Jamal can demonstrate that the Department[] . . . was motivated, at least in part, by the content of his articles . . . and hence, the actions were not content neutral as required") (citations omitted). Mr. McGowan has received no

disciplinary infractions as a result of his speech. Like with Mr. Jayyousi, this demonstrates that he has engaged in no wrongdoing. *See Goff*, 991 F.2d at 1437; *Watkins*, 599 F.3d at 791.

Mr. McGowan's correspondence focused on his political beliefs and ideas, and all the law cited by and relied upon by Plaintiffs was clearly established at the time of his designation and redesignation to the CMU. *See supra*; *see also Kimberlin*, 199 F.3d at 502; *Treff v. Galetka*, 74 F.3d 191, 194 (10th Cir. 1996) ("correspondence between a prisoner and an outsider implicates the guarantee of freedom of speech"); *Searcy v. United States*, 668 F. Supp. 2d 113 (D.D.C. 2009) (collecting cases and recognizing a right to communicate with family and friends under the First Amendment). Moreover, Mr. McGowan has plausibly alleged that his writings did not impinge on any important governmental interests. *See*, *e.g.*, *Gandy v. Ortiz*, 122 Fed. Appx. 421, 423 (10th Cir. 2005) ("Prison officials . . . may not punish inmates for statements made in letters to outsiders that do not impinge on . . . important governmental interests"). His speech was therefore unambiguously protected by the First Amendment at the time Mr. Smith authored his memos, and he has plausibly alleged that his designation and redesignation to the CMU did not further an important or substantial governmental interest unrelated to the suppression of expression, and was a greater measure than necessary or essential to the protection of the alleged governmental interests.

Defendants also claim that Mr. McGowan was redesignated to the CMU because of "efforts to 'circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication.'" MTD at 27. Plaintiffs have already addressed this issue, *see* Docket #35, and the Court has already found that Mr. McGowan has plausibly stated a claim for First Amendment retaliation in light of these allegations. *See* Memorandum Opinion, Docket #37 at 32 ("The plaintiffs allege that this redesignation was in

direct response to a telephone conversation that he had with his wife, after being placed back in the general population, in which he requested that she ask his attorneys to send him certain legal documents. In light of these allegations, the court concludes that McGowan has also stated a plausible claim of retaliation"). Defendants provide no reason to depart from that analysis. *Cf. In re City of Phila. Litig.*, 158 F.3d 711, 720 (3d Cir. 1998) (where additional evidence only supports the prior panel's conclusion, law-of-the-case applies).

Nonetheless, given that Defendants raise this point again here, a brief response is appropriate. In February 2011, Mr. McGowan asked his wife to ask their attorneys, undersigned counsel, whether they could send him two CTU documents obtained and published online by a website called publicintelligence.net. *See* FAC ¶ 146; *see also* Docket #35 at 2-3. She agreed to make this request on his behalf. *See* Docket #35 at 2-3.

This cannot provide a legitimate basis to redesignate Mr. McGowan to the CMU. Requesting information from a lawyer that is relevant to one's case is not circumvention of mail monitoring. Indeed, Plaintiffs have requested a full set of these documents in discovery, have received them from opposing counsel without a relevance objection, and expect to use them to prove their claims in this case. Moreover, prisoners are of course entitled to seek advice and information from counsel. The right to access counsel, and thereby the courts, is fundamental, and protective of all other rights. *See*, *e.g.*, *Akers v. Watts*, 740 F. Supp. 2d 83, 96 (D.D.C. 2010) ("An inmate has a First Amendment right of access to the courts that is adequate, effective, and meaningful.") (citing *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977)); *see also Bieregu v. Reno*, 59 F.3d 1445, 1456 (3d Cir. 1995) ("Of all communications, attorney mail is the most sacrosanct"). Mr. McGowan was not disciplined as a result of his request, nor were his attorneys notified that he could not be sent these documents. Defendants' retaliation against Mr.

McGowan for an appropriate and relevant request for information from counsel unconstitutionally chills and interferes with the attorney-client relationship. *See* Docket #35 at 3. Like Judge Urbina, this Court should deny Defendants' motion to dismiss on these grounds.

The cases cited by Defendants, without explication, do not suggest otherwise. *Altizer v. Deeds* holds that a prison may inspect a prisoner's outgoing mail consistent with the First Amendment. 191 F.3d 540, 548 (4th Cir. 1999). That is uncontroversial and is unchallenged here. In fact, *Altizer*'s holding bolsters Mr. McGowan's argument that there are less restrictive ways for Defendants to achieve their interest in ensuring that Mr. McGowan's correspondence with individuals and publications outside of prison does not involve criminal activity: i.e. they can (and do) simply read his non-legal mail. *Gandy v. Ortiz* found that a prisoner *had* stated a claim for First Amendment retaliation where he sent a letter criticizing a prison program to an outside party. 122 Fed. Appx. at 423. Where Mr. McGowan has also expressed his views – which do not even pertain to prison policies or conditions – to non-prisoners, *Gandy* is of no aid to Defendants. And *Akers v. Watts* held that a prison may restrict a prisoner's correspondence to immediate family only, consistent with the First Amendment. 740 F. Supp. 2d 83, 96 (D.D.C. 2010). Again, Mr. McGowan does not challenge Defendants' ability to *restrict* his correspondence, but alleges that he was designated and redesignated to the CMU (clearly a more restrictive alternative) in retaliation for speech that is protected by the First Amendment. *Akers* is simply irrelevant.

C. Designation to the CMU Is Sufficient to Deter a Person of Ordinary Firmness From Speaking Again.

The second prong of a retaliation claim requires a plaintiff to allege that "the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again." *Banks*, 515 F. Supp. 2d at 111. Defendants do not contest that

CMU designation meets this standard. This stands to reason. The CMUs impose severe communications restrictions on prisoners – which, in some instances, are stricter than those imposed at the Administrative Maximum (ADX) facility USP Florence, the only "supermaximum" security facility in the federal system. FAC ¶ 58. These restrictions have negatively impacted Plaintiffs' ability to maintain relationships with their family and loved ones. *Id*. ¶¶ 151-54, 200-03. CMU prisoners are segregated from all other prisoners; the units are known and referred to throughout both prisons (and the BOP as a whole) as "terrorist units"; and the stigma of "terrorist" follows plaintiffs and other CMU prisoners even after their release. *Id*. ¶ 66. Plaintiffs have thus plausibly alleged that CMU designation is sufficiently harsh that its deterrent effect satisfies the retaliation standard. *See*, *e.g.*, *Anderson-Bey v. District of Columbia*, 466 F. Supp. 2d 51, 65-66 (D.D.C. 2006) (holding that "the denial of benefits that would otherwise generally be available" to a prisoner is 'likely to deter a person of ordinary firmness from [the] exercise [of protected activity]").

D. Plaintiffs Have Adequately Pled a Causal Link Between their Protected Speech, and their CMU Designations.

As explained in Section A, above, Defendants cannot defeat Plaintiffs' properly pled retaliation claims by reference to a hypothetical penological purpose that could allegedly be served by Defendants' actions. However, it is true that causation is a required element of a retaliation claim. *Aref*, 774 F. Supp. 2d at 169. A retaliation claim requires "but-for causation, without which the adverse action would not have been taken." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). The plaintiff bears the initial burden of proving that his constitutionally-protected conduct was a substantial or motivating factor in the defendant's decision; the burden than shifts to the defendant to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *See id.*; *Rauser*, 241 F.3d at 333. Of course,

Plaintiffs need not *prove* their claim on a motion to dismiss; rather for these purposes all Plaintiffs must do is plausibly allege that protected speech motivated Defendants' decision to designate them to the CMU. *See*, *e.g.*, *Banks*, 515 F. Supp. 2d at 112 (holding plaintiff's allegations that he was placed in solitary after he complained about his cellmate, and in retaliation for his complaints, sufficient to show causal connection on motion to dismiss, despite lack of factual detail). Plaintiffs' detailed allegations are more than adequate to make this showing.

With respect to Mr. McGowan, Judge Urbina's analysis in 2011 is instructive. The Court noted that Plaintiffs had alleged in their initial Complaint that Mr. McGowan had a clean disciplinary record, had been active in social justice movements during his incarceration, and was subsequently designated to a CMU; that information in his Notice of Transfer was patently untrue; and that Mr. McGowan was redesignated to the CMU after requesting that his wife ask his attorneys to send him legal documents. *See* Memorandum Opinion, Docket #37, at 32. Based on these allegations, the Court denied Defendants' motion to dismiss Mr. McGowan's retaliation claim. All of these allegations also appear in the First Amended Complaint. *See* FAC ¶¶ 133, 135, 136, 138, 147-49. Indeed, Mr. McGowan's retaliation claim has only changed in two ways since Judge Urbina's 2011 decision: first, Mr. McGowan has added a damages claim against Mr. Smith, and thus has advanced detailed allegations about Mr. Smith's role in designating, retaining, and redesignating him to the CMU; and second, he has included additional factual detail in support of his claim, including the excerpts of Mr. Smith's rationale for his CMU placement. *Id.* ¶¶ 134, 141-48. None of these new allegations provide a basis to depart from Judge Urbina's sound analysis. *Cf. In re City of Phila. Litig.,* 158 F.3d at 720.

Far beyond merely supporting an *inference* that Mr. McGowan's speech led to his CMU designation, retention, and redesignation, the memos Mr. McGowan cites provide direct proof of a causal connection between Mr. McGowan's political speech and his CMU placement. Plaintiffs have described at length the political speech that Mr. Smith cited in his memoranda to justify Mr. McGowan's CMU designation. *See* Section I(B)(ii), *supra* (describing how Mr. Smith referred to Mr. McGowan's writings about unity and efficacy in the environmental movement; guidance, leadership, and direction for activities, publications and movement practices in order to further the goal of radical environmental groups, and his "continued support for anarchist and radical environmental terrorist groups"). In each of the instances, Mr. Smith based his decision to recommend Mr. McGowan for CMU designation on political writings and speech.

Defense counsel's unsworn insistence that Mr. Smith was actually motivated by Mr. McGowan's conviction and past involvement with ELF, *see* MTD at 26, cannot defeat these allegations. While Mr. Smith may *testify*, at some point in the future, that Mr. McGowan would have been designated to the CMU regardless of his speech, due to the nature of his conviction, now is not that time. And even if Mr. Smith could credibly explain the long-identified errors in Mr. McGowan's notice of transfer that led Judge Urbina to find retaliation plausible, such testimony would only raise a material factual dispute, unlikely to be susceptible to summary judgment, much less dismissal prior to discovery. *See*, *e.g.*, *Allen v. Avance,* No. 11-6102, 2012 U.S. App. LEXIS 149045, *14 (10th Cir. July 10, 2012) (genuine issue of material fact as to whether prisoner was ordered into an observation cell for complaining about visitation policies or because he acted disruptively). As for Mr. McGowan's CMU retention and redesignation, it is hard to see how Mr. Smith could even attempt to refer back to Mr. McGowan's conviction, as

the relevant memos clearly identify Mr. McGowan's speech as the deciding factor, with his conviction merely included as background. *See* MTD Ex. 4 & 5.

Mr. Jayyousi's claim is equally well-pled. He does not challenge his initial CMU designation, which was the subject of Judge Urbina's 2011 decision. *See Aref,* 774 F. Supp. 2d at 170. Rather, he challenges Mr. Smith's recommendation, in 2011, to retain him at the CMU despite the warden's recommendation that he be cleared for transfer to a general population unit. FAC ¶ 195-98. Mr. Smith's recommendation provides a direct causal link between Mr. Jayyousi's speech and his CMU retention. Mr. Jayyousi's conviction is referenced as the reason for his initial designation – but it was his statements during Muslim rotational prayer that motivated Mr. Smith's recommendation to keep him in the CMU. *See* MTD at Ex. 2. Defense counsel cannot contradict the well-pled facts in the First Amended Complaint through unsworn argument in support of a motion to dismiss.

Plaintiffs have therefore adequately pled each prong of a First Amendment retaliation claim. Moreover, their allegations are supported by longstanding and well-established case law. Defendants' motion to dismiss these claims should thus be denied.

II. THE PRISON LITIGATION REFORM ACT DOES NOT BAR MR. JAYYOUSI AND MR. MCGOWAN FROM RECOVERING COMPENSATORY AND PUNITIVE DAMAGES.

Defendants also seek to dismiss Mr. Jayyousi and Mr. McGowan's First Amendment damages claims by mischaracterizing them as claims "for mental and emotional injury," for which they cannot recover compensatory or punitive damages. In so doing, Defendants ignore critical allegations in the First Amended Complaint and seek to expand the Prison Litigation Reform Act ("PLRA") beyond its text and meaning. The argument fails for two reasons: First, Mr. Jayyousi and Mr. McGowan do not bring suit merely for emotional and mental injury; they

have alleged other injuries that are neither emotional nor mental, for which recovery is not barred by the PLRA. Second, even if Plaintiffs had not alleged these injuries, they could still obtain nominal relief for the constitutional violations, which independently bars dismissal.

Contrary to Defendants' suggestion, section 803(d) of the PLRA does no more than what it says: it prevents prisoners who have not suffered physical harm from recovering damages for "mental or emotional injury."[4] The provision does not bar claims for compensatory damages in actions that allege other injuries. *See Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (explaining that if a prisoner had property taken away, causing him property loss and psychological but not physical injury, a court's disallowing of recovery for that property loss would be "gratuitous" and "contrary to the fundamental procedural norm"); *Jones v. Bock*, 549 U.S. 199, 221-23 (2007) (citing *Robinson*'s observation with approval and noting that requiring a dismissal of an entire suit instead of simply limiting recovery for emotional and mental injuries would "contravene our normal rules of statutory construction").

To the extent that Plaintiffs have pled emotional and mental injury, *see*, *e.g.*, FAC ¶¶ 156, 204, Defendants are correct that the PLRA bars compensatory damages for this harm. However, the PLRA has no impact on Plaintiffs' ability to collect compensatory damages for other injuries, including lost educational opportunity, ruptured family relations, restrictions on liberty, and chilled First Amendment speech and activity. *See Id.* ¶ 240. The First Amended Complaint describes the lack of programming available to the CMU inmates to prepare them for their eventual release, which has diminished Mr. Jayyousi's and Mr. McGowan's post-release

[4] As Defendants note, the relevant provision is 42 U.S.C. § 1997e(e), titled "Limitation on recovery." It provides that: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

prospects, thereby causing them to sustain further monetary damages. *See id.* ¶¶ 66-68.[5] Both Plaintiffs have also alleged in detail the lasting harm that the retaliatory CMU placement and retention have inflicted on their family relations – injury that for centuries has been recognized as a category of harm separate from mental and emotional distress. *See id.* ¶¶ 151-55, 200-04, 240; ARTHUR G. SEDGWICK & JOSEPH H. BEALE, JR., 1 SEDGWICK'S TREATISE ON DAMAGES 50-51 (8th ed. 1891). Also independent from emotional harm is the loss of liberty that Plaintiffs have suffered in the CMU, with its unprecedented restrictions on communication and visitation rights. *See* FAC ¶¶ 33-68; *Kerman v. City of New York*, 374 F.3d 93, 125-26 (2d Cir. 2004) ("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; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty.").

Lastly, Defendants ignore the harm that Mr. Smith has inflicted on Mr. Jayyousi's and Mr. McGowan's First Amendment rights. *See* FAC ¶¶ 237, 238. His retaliatory conduct has resulted in concrete injuries to both Plaintiffs by inhibiting their expression, engagement, and consumption of protected speech and activity. *See id.* ¶¶ 134, 143, 189-90, 191, 196-97. Mr. McGowan, for instance, has been prohibited from receiving material about lawful environmental and political prisoner advocacy, *see id.* ¶ 150, and Mr. Jayyousi has been punished for leading a Muslim prayer, *see id.* ¶¶ 189-90, 196-97. The D.C. Circuit has held that these types of First Amendment injuries stand apart from emotional distress and "merit 'fair compensation.'"

[5] At trial, Plaintiffs may establish other economic harm that was a direct result of their CMU placement and retention, such as less desirable jobs available to them at the CMU and inability to complete education programs started in the general inmate population. Because these damages were the "proximate and foreseeable consequences of the defendant's conduct," they need not have been pled with specificity. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1310 (3d ed. 2012).

Hobson v. Wilson, 737 F.2d 1, 61-62 (D.C. Cir. 1984) (noting that First Amendment compensable rights include inability to continue with demonstrations, restrictions of inmates' access to books, and deterrence from attending meetings); *see also Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 315-16 (1986) (Marshall, J., concurring) (explaining that when a plaintiff is deprived of his First Amendment right, there is a classic loss of opportunity, and "[t]here is no reason why such an injury should not be compensable in damages"); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1559 (7th Cir. 1986), aff'd, 479 U.S. 1048 (1987) (affirming an award of damages where defendant prevented a lawful exercise of First Amendment rights, noting that damages are recoverable even where "the monetary value of the particular injury is difficult to ascertain").

Defendants ignore all these damages pled by Plaintiffs, instead relying on *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), to make their case. *See* MTD at 30-31. But unlike Mr. Jayyousi and Mr. McGowan, the plaintiff in *Davis* alleged "emotional and mental distress, *but no other injury*," depriving him of recovery under the PLRA. 158 F.3d at 1345 (emphasis added). Nowhere in the opinion does the court suggest that failure to plead physical harm bars recovery for the types of injuries suffered by the two Plaintiffs in this action. Defendants' reliance on *Davis* and its progeny is therefore misplaced. *See Munn Bey v. Dep't of Corr.*, 839 F. Supp. 2d 1, 4, 6 (D.D.C. 2011) (dismissing claims that were based only on "stress and emotional injuries"); *Hunter v. Corr. Corp. of Am.*, 04-CV-2257, 2006 WL 463207, at *1 (D.D.C. Feb. 24, 2006) (dismissing lawsuit that sought damages solely for "mental anguish").[6]

[6] The absence of non-mental and non-emotional injuries in *Davis* (and their presence here) – though sufficient by itself to undermine Defendants' argument – is not the case's only significant distinction. The constitutional claim addressed in *Davis* was also not grounded in the First Amendment, which some courts have recognized to give rise to actions that fall outside of the PLRA's reach, regardless of the alleged injuries. *See*, *e.g.*, *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (observing that interference with the receipt of mail was an actionable violation of First Amendment rights even

Similarly misguided is Defendants' contention – tucked away in a footnote – that Mr. Jayyousi and Mr. McGowan cannot recover punitive damages. *See* MTD at 32 n.14. Like Defendants' assertions about compensatory damages, this argument requires a selective reading of the First Amended Complaint, which describes how Mr. Smith attempted to silence the two Plaintiffs by placing and keeping them in the CMU. *See* FAC ¶¶ 146-50, 196-97, 237-38. These allegations fairly suggest malice, though to sustain punitive damages even reckless disregard for Plaintiffs' constitutional rights would suffice. *See*, *e.g.*, *Huthnance v. District of Columbia*, 793 F. Supp. 2d 183, 213 (D.D.C. 2011) ("Defendants cannot, and indeed make no attempt to, explain how they could have arrested Huthnance based on the content of her speech and yet not acted with reckless disregard for her constitutional rights"). Accordingly, Mr. Jayyousi's and Mr. McGowan's rights to recover both compensatory and punitive damages provide further reasons why their claims of retaliation should not be dismissed.

Even if the Court were to disagree with Plaintiffs' position and hold that the PLRA precludes Plaintiffs from recovering compensatory and punitive damages, dismissal of their retaliation claims would still not be warranted because they can proceed with the claim to collect nominal damages. *See*, *e.g.*, *Dowd v. Calabrese*, 589 F. Supp. 1206, 1222-23 (D.D.C. 1984) (rejecting motion for summary judgment, holding that regardless of whether plaintiff could establish a compensable injury, "he would still be entitled to a judgment upon proof of deprivation of his First Amendment rights, although the damages might be nominal only").[7]

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though no other injury was alleged). *But see*, *e.g.*, *Searles v. Van Bebber*, 251 F.3d 869, 875-76 (10th Cir. 2001) (recognizing but disagreeing with authority that finds PLRA inapplicable to First Amendment claims in actions where "the only injuries are mental or emotional").

[7] Plaintiffs have sought nominal damages through their broad prayer for relief. *See*, *e.g.*, *Yniguez v. State*, 975 F.2d 646, 647 n.1 (9th Cir. 1992) (per curiam) ("Although the plaintiff's complaint does not expressly request nominal damages, it did request 'all other relief that the Court deems just and proper under the circumstances.' That is sufficient to permit the plaintiff to pursue nominal damages").

III. PLAINTIFFS TAKE NO POSITION ON DEFENDANTS' MOOTNESS ARGUMENT.

Finally, Defendants argue that Mr. McGowan's claims seeking equitable relief for his transfer to the CMU are now moot, given that he is currently housed at a Residential Reentry Center, or "halfway house." MTD at 8. Plaintiffs do not concede that Mr. McGowan's current confinement in a halfway house moots his equitable claims. Indeed, Defendants' assertion that former Plaintiff Avon Twitty's claims for equitable relief were dismissed following his transfer to a halfway house, *see* MTD at 8, is inaccurate. Mr. Twitty's claims were in fact dismissed after he was released from BOP custody altogether. *See* Plaintiffs' Notice Regarding Change in Confinement Status of Avon Twitty, Docket #33 (dated February 8, 2011); Memorandum Opinion, Docket #37 at 16 (dated March 30, 2011) (noting that Mr. Twitty "is no longer in BOP custody" and finding that his claims are moot). However, Mr. McGowan will be released from BOP custody on June 5, 2013, and his claims will then be moot under this Court's prior ruling. *See* Memorandum Opinion, Docket #37 at 16. Given that this will occur before resolution of his equitable claims, *see* Scheduling Order (Docket #95), Plaintiffs do not oppose dismissal of Mr. McGowan's equitable claims.

* * *

Pursuant to Sections 2C and 2F(4) of the Court's Standing Order, undersigned counsel certifies that he met and conferred by telephone with counsel of record for Defendants in an attempt to determine whether this motion could be avoided by filing an amended pleading. The parties' counsel concluded that it could not be. This Court's February 12, 2013 Minute Order authorized Plaintiffs to file an Opposition to Defendants' motion of not more than 40 pages. *See* Minute Order of Feb. 12, 2013.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Mr. Jayyousi's claims should be denied in its entirety, as should their motion to dismiss Mr. McGowan's damages claim.

Dated: March 19, 2013

By: /s/ Alexis Agathocleous
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CERTIFICATE OF SERVICE

I, Alexis Agathocleous, counsel of record for the Plaintiffs, hereby certify that on March 19, 2013, I placed a copy of the foregoing in the mail in a prepaid Federal Express envelope to the following person and address: "Royal Jones, Fed. Reg. No. 04935-046, Community Education Center – Casper, 10007 Landmark Lane, mills, WY 82644."

EXHIBIT A

United States Government
MEMORANDUM
United States Penitentiary
Terre Haute, Indiana

MEMORANDUM FOR: T. Coleman, CMU ~~Intel Officer~~

FROM: [redacted] Senior Officer

SUBJECT: Jayyousi, Kifah 39551-039

I, Senior Officer [redacted] did observe the Jumah Prayer service conducted on Friday, August 15, 2008 in the Communications Management Unit of FCC Terre Haute. The service is scheduled for 1:00 p.m. to 2:00 p.m., but did start at approximately 12:55 p.m. At approximately 1:15 p.m., while observing the service, I did hear inmate Jayyousi 39551-039 begin to speak in a way that could incite fellow Muslim-faith inmates. Statements included:

"The CMU is a place like no other, a place that's never been seen before in the 300 years of the Bureau."

"The CMU is evil, like it came from hell itself, it was put here by evil."

"The CMU is not for criminals, we are not here because we are criminals, we are here because we are Muslim. It is not the U.S. versus Jayyousi, or the U.S. versus any of us, it is the U.S. versus our Islamic faith, against Muslims."

"We are being watched as Muslims, not as criminals, sure all prisons are watched but not like this, we are being watched because we are Muslim. And our response needs to be standing strong, standing firm, standing steadfast, as to not give in."

"Do not give the prison mentality, that of a criminal, we are not criminals, we are not here as criminals, we are here because we are Muslim, because we believe in Allah. They turned us into criminals."

I then left the service at approximately 1:30 p.m. and the service finished a few minutes later.

UNITED STATES GOVERNMENT

MEMORANDUM

Federal Correctional Complex
Terre Haute, Indiana

DATE: August 20, 2008

REPLY TO ATTN OF: T. Coleman, Intelligence Research Specialist

SUBJECT: Attachment to Incident Report, RE: Inmate Jayyousi, Kifah, Reg. No. 39551-039

TO: All Concerned

"It's like a place that fell from some hell, some evil created this place because it does not belong to anything that BOP has done in the past 300 year history. And you know what is happening here? We are being observed, you are being studied, you are being watched. Other prisons are being watched, but in this place each one of you have been brought whether your case was started with a fabrication or the reason that brought you here was the fabricator. You were brought here because you are Muslim and we have our response to that; has to be to stand firm, stand strong, to stand steadfast. Yes, it is a hard place. Yes (Arabic word) but you have to remember and you are being tested and you are being tested by Allah and you have to remember you are here because you are Muslim. Not because you are a criminal."

"Always remember don't have a prison mentality you are not here because you are a criminal, you are here because you are Muslim. (Arabic statements) ....the only reason they are upset because we are believers. We believe in Allah. Somebody who is raised with his parents, with his family, brothers and sisters, going to work and good citizens, all of a sudden is plucked out of his family and a huge case is fabricated and they turned a few good American citizens into a criminal."

"Because remember, you are not the target, brother Smalls, brother al Salah, brother Mandhai, brother Alwan, you are not the target, I am not the target, it is not U.S. vs. Jayyousi, it is U.S. vs. Islam. You have to keep that in mind and the reason I say that is we need to never give up our faith. Never compromise our faith, and hey, if anyone of us compromise, you wouldn't be here right, right? Some people compromise and still they send them to prison anyway. But we have to remember to not to betray our faith."

"If someone comes an offer to you, oh you will get out but hey we would like to, uh uh, recruit you our ask you to help us get more people into the CMU, entrap more Muslims, and get them in jail; tarnish the image of Islam in America."

"We are not being tortured here except psychologically."

"It is hard but it is the way which Allah created us (Arabic statement). You are, you are going to return to your Lord to meet him with your hard work and the hardships that you have faced and done in this life; this is why we martyr but (Arabic statement) we created the human in hardship why full of hardship from the minute you are born do you feel pain from the minute you are born you grow teeth."