IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Regulations and Rules:

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities:

PRELIMINARY STATEMENT

This case arises from the Federal Bureau of Prisons' (BOPs') secret establishment, in 2006 and 2008, of two small and experimental prison units in the Midwest. These units, known as "Communications Management Units," or "CMUs," are explicitly designed to isolate prisoners from the rest of the prison population and the outside world. Plaintiffs are prisoners with innocuous disciplinary histories and no record of management or communications-related problems. Yet, they have been indefinitely designated to the CMUs, and there are subjected to communications restrictions that are harsher than those found in supermaximum security confinement. Plaintiffs have never been told why they were designated to the CMU. And more importantly still, they have never been given a chance to demonstrate that they do not belong there. This case presents their first chance to do so.

Rather than address Plaintiffs' individualized allegations about the deeply troubling circumstances under which they were designated to the CMU, Defendants move to dismiss their claims by relying on broad and alarmist abstractions. "There have been cases," they caution, "of imprisoned terrorists communicating with their followers regarding future terrorist activity." Motion to Dismiss ("MTD") at 25. The BOP, they assert, has a "legitimate penological interest in effectively monitoring the communications of high-risk inmates." *Id*. at 2.

Neither of these statements is controversial, and nowhere do Plaintiffs suggest otherwise. But in issuing their blanket admonitions, Defendants entirely evade – and attempt to obscure – the nature and substance of Plaintiffs' actual claims. As will be explained in the pages that follow, Plaintiffs present no unique security concerns. They are all low- and medium-security prisoners. They have no history of communications-related infractions that would justify their CMU designations. They have never been flagged as management problems at other facilities.

Two of them were convicted of crimes entirely unrelated to terrorism. There are, meanwhile, *thousands* of "high-risk" and terrorist prisoners within the BOP. Yet Plaintiffs, who are litigious, hold politically unpopular views, or are devout Muslims, were designated to the CMUs.

Defendants, in short, move to dismiss the wrong case. Plaintiffs do *not* argue that the government may not monitor the communications of high-risk prisoners consistent with Constitutional principles. And they do *not* contest that the BOP has broad discretion in realizing that goal. Rather, Plaintiffs assert that the draconian communications restrictions to which they are being subjected do not fulfill this purpose. And Defendants' conspicuous failure to provide for meaningful explanation or review of CMU placement has resulted in designations not based on security need, but on illicit rationales. Defendants' repeated and strained attempts to avoid these troubling allegations result in a motion that never departs from the general, and as a result completely fails to address Plaintiffs' well-pled and specific allegations.

Plaintiffs request an oral hearing.

STATEMENT OF FACTS

Plaintiffs are low- and medium-security prisoners who have been designated to CMUs and, as a result, have seen their ability to maintain meaningful relationships with spouses, children, and other loved ones deteriorate needlessly and cruelly. Complaint ("Compl.") at ¶ 9. Two "Family Plaintiffs" join this lawsuit to challenge the CMUs' unjustifiable interference with their ability to maintain relationships with their incarcerated loved ones. *Id*. at ¶ 10.

The BOP has broadly described who may be designated to the CMUs as those convicted of terrorism, sex offenders who repeatedly contact their victims, those who abuse communication methods, and those who make threats against judicial officers. *Id*. at ¶ 33. Though their CMU designation implies that Plaintiffs are "problem" prisoners, the opposite is true. Not a single

Plaintiff has received discipline for any communications-related infraction within the last decade, nor any major disciplinary offenses. *Id*. at ¶ 5. Two Plaintiffs (Daniel McGowan and Yassin Aref) have *completely* clean disciplinary histories. *Id*. Prior to their CMU designations, each Plaintiff who was incarcerated in a BOP prison facility was a general population prisoner, and received full telephone and visitation privileges without incident. *Id*. at ¶¶ 109, 129, 156-57, 185.

Even though literally thousands of BOP prisoners fit the broad criteria for CMU designation, *id*. at ¶ 34, two Plaintiffs are categorically unsuited for CMU placement. Royal Jones and Avon Twitty were convicted of solicitation of bank robbery and murder, respectively. *Id.* at ¶¶ 17, 20. Neither conviction had any relation to terrorism, and each man has spent decades in BOP facilities without any major disciplinary incident. *Id.* at ¶¶ 127, 130, 184, 186-87. But like two-thirds of the CMU population, both men are Muslim. Moreover, they are both litigious. *Id*. at ¶¶ 97, 99, 126, 188.

The remaining Plaintiffs, though convicted of crimes related to terrorism, have been classified by the BOP as *low* security prisoners. *Id*. at ¶¶ 16-18, 210. Their offense conduct alone cannot explain their designation to the CMU, yet their disciplinary histories are either non-existent or innocuous. In short, they present no unique security concerns. Mr. Aref, for example, was convicted of material support for terrorism, but his conviction arose from witnessing a loan transaction in his role as an Imam, and the government explicitly acknowledged at his trial that it was *not* seeking to establish or prove that Mr. Aref was a terrorist. *Id*. at ¶ 107. His institutional record is spotless. *Id*. at ¶ 110.

Although unsubstantiated, CMU designation is potentially permanent. Plaintiffs have languished between 24 and 39 months at the CMUs, *id*. at ¶¶ 160, 113, and have been given no

criteria for release into general population. *Id*. at ¶ 80, 81. Mr. Aref, for example, was initially told that he must wait 18 months before he could request a discretionary transfer from the Terre Haute CMU. *Id.* at ¶¶ 85-86. After 22 months of clean conduct, Mr. Aref's case manager recommended his transfer out of the CMU. *Id.* at ¶ 115. Instead, he was moved to the CMU at USP Marion, and told his must wait 18 months to be eligible for another transfer. *Id.* at ¶ 116-17. Kifah Jayyousi, meanwhile, has been told he will serve his entire sentence – over 12 years – at the CMU. *Id*. at ¶¶ 205, 214. Not a single Plaintiff has been able to discover what underlying allegations led to his CMU designation, or to challenge that designation. *Id*. at ¶ 78. Each expects to serve his entire sentence at the CMU as a result. *Id*. at ¶ 80.

In an agency normally committed to documentation, Plaintiffs were designated to the CMU without paper trail. *Id*. at ¶ 73. The relevant documentation that does exist (including progress reports and disciplinary records) contradicts the notion that Plaintiffs present security concerns or management problems. *Id.* at ¶¶ 110, 112, 129, 159, 186, 208-210. The BOP's terse one-paragraph explanation for each Plaintiff's designation to the CMU either exaggerates and mischaracterizes their offense conduct, or lodges allegations that are so vague and generic as to be meaningless. *Id.* at Exh. E; ¶¶ 113, 132, 160, 189, 212.

To avoid the process, documentation, and review that adhere to BOP designations to special or restrictive units, and might correct these mistakes, the CMUs are euphemistically described as "self-contained general population units." *Id.* at ¶ 2. But unlike all other general population units (and even most segregation units), the CMUs permanently impose severe restrictions on prisoners' access to telephone calls, visits, and prison programming. *Id*.

BOP facilities usually allow physical contact unless there is clear and convincing evidence that such contact would jeopardize the security of the institution. *Id*. at ¶ 38. The

CMUs, by contrast, are the only units within the federal system that impose, without process, a blanket and permanent ban on *all* physical contact during visitation. *Id*. at ¶ 37. The number and duration of visits are also heavily circumscribed at the CMU. Recognizing the important role of visits in rehabilitation, morale, and maintenance of family integrity, the BOP generally places no cap on the number or duration of visits prisoners may receive (within limits posed by visiting hours and physical capacity). *Id*. at ¶ 47. Until January 2010, by contrast, Plaintiffs received only a single four-hour visit (or two two-hour visits) per month. *Id*. at ¶ 52. The BOP voluntarily increased this to two four-hour visits per month in January 2010. *Id*. at ¶ 57. Notably, prisoners at the Administrative Maximum facility USP Florence, the only "supermaximum" facility in the federal system, receive four times as many visits. *Id*. at ¶ 61.

The BOP also recognizes the vital role that telephone calls play in maintenance of family integrity, and thus give most prisoners 300 minutes of calls per month. *Id*. at ¶ 63. For years, all CMU prisoners, including Plaintiffs, were permitted only one 15-minute telephone call per week. *Id*. at ¶ 64. In January 2010, Defendants voluntarily increased telephone access to two weekly 15-minute calls. *Id*. at ¶¶ 53-55, 65. Between them, Plaintiffs have 18 children, ranging in age from 4 to 35. *Id.* at ¶¶ 103, 126, 183, 198. These unparalleled restrictions on access to visits and telephone calls have made it exceedingly difficult, and in some cases impossible, for Plaintiffs to maintain relationships with these children, and with other family members. *Id*. at ¶ 67.

Even the creation of the CMUs deviated from the norm. The BOP itself initially recognized that the CMUs could be established only in accordance with the notice and comment rulemaking procedures set forth in the Administrative Procedure Act. Prior to opening the two CMUs and issuing the associated Institution Supplements, the BOP began a notice and comment proceeding proposing a rule aimed at restricting the communications of prisoners charged with

or convicted of terrorist offenses. *Id*. at ¶ 235. After civil rights and liberties groups criticized the proposed rule, the BOP abandoned this rulemaking process and never took final action on its proposed rule. *Id*. at ¶¶ 237, 238. Instead, less than six months later, it quietly opened the Terre Haute CMU and issued the corresponding Institution Supplement without notice and comment proceedings. *Id*. at ¶ 239. Fifteen months later it opened the CMU at USP Marion in the same manner. *Id.* at ¶ 29.

SUMMARY OF THE ARGUMENT

The CMUs impose unparalleled and permanent restrictions on Plaintiffs' ability to communicate with the outside world – to maintain relationships with family, to remain in meaningful contact with loved ones and the community, and to foster crucial familial bonds through physical contact. These limitations are far more restrictive than even those faced by maximum security prisoners. And yet Plaintiffs, who are low- or medium-security prisoners, have been indefinitely designated to the CMU without any meaningful procedural protections. They have been unable to contest their designations, learn of the reasons for those designations, or show that they do not belong in the CMU. As demonstrated in Point I, these facts state a claim that Plaintiffs have been denied their right to procedural due process.

This lack of process has predictably created a situation ripe for abuse. Plaintiffs have no history of communications infractions – or any serious disciplinary history – that would warrant such unusual restrictions. But most Plaintiffs, like most CMU prisoners, are Muslim; others are litigious, and some hold politically unpopular views. As a result, Plaintiffs were placed in the CMU not because they pose any particular security risk, but in retaliation for the exercise of their protected First Amendment rights and due to religious discrimination. As such, they state a

plausible claim that their CMU designations arise from illicit rationales, and thus offend the equal protection clause and the First Amendment (Point II).

Where there is no plausible non-discriminatory or non-retaliatory rationale for their CMU designations, and where Plaintiffs' communication with the outside world could be successfully and easily monitored without cruel restrictions, there is simply no justifiable penological purpose for subjecting them to a ban on contact visits and such limited access to calls and visits. These restrictions have destroyed – and continue to destroy – Plaintiffs' ability to maintain relationships with their children and other loved ones. As such, Plaintiffs have plausibly alleged free association and substantive due process claims (Point III). Given their effect on Plaintiffs and their families, and taken in the aggregate, the conditions also state a claim under the Eighth Amendment (Point IV).

Just as policies and procedures at the CMUs lack transparency, so too did their establishment. While the BOP initially gestured at opening its plans to public scrutiny, it abandoned those efforts and quietly established the CMUs. Because the units are unprecedented, the BOP is required to complete the notice and comment rulemaking process mandated by the Administrative Procedures Act (Point V). To date it has failed to do so.

ARGUMENT

STANDARD OF REVIEW

On a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, 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. A court may not, for example, 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).

In considering a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, the court may, where necessary, consider the Complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

I. PLAINTIFFS HAVE ADEQUATELY PLED A VIOLATION OF THE DUE PROCESS CLAUSE BASED ON THEIR DESIGNATION TO THE CMU WITHOUT ANY PROCEDURAL PROTECTIONS.

Plaintiffs allege that they were designated to the CMU, and there have been subjected to extraordinary and indefinitely-imposed restrictions, without notice, a hearing, meaningful review of their ongoing placement, information regarding the projected duration of their CMU confinement, or provision of any criteria for release. Compl. ¶ 253. First, the nature and duration of the restrictions to which Plaintiffs are subjected plainly establish a liberty interest in avoiding CMU designation. And second, because a liberty interest is involved, the lack of any procedural protections associated with these designations states a claim for violation of Plaintiffs' right to due process. As such, Defendants' motion to dismiss Plaintiffs' first cause of action must be denied.

A. Given the Atypical, Harsh and Indefinitely-Imposed Restrictions Experienced There, Plaintiffs Have a Liberty Interest in Avoiding Designation to the CMU.

The government creates a liberty interest protected by the Fifth Amendment's Due Process Clause when it subjects a prisoner to forms of "restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (citations omitted). Addressing *Sandin*'s comparative baseline, the D.C. Circuit has explained that prison conditions are atypical and significant if they are more restrictive than "the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999).

Identifying a liberty interest under *Sandin* involves three steps. First, a court must examine the nature of the deprivations at issue. *Id*. at 856. Conditions in administrative segregation serve as the comparative baseline that defines those incidents of prison life that are considered routine and ordinary. *Id*. The deprivations are considered in the aggregate, rather than individually. *See*, *e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (stating that, "[w]hile any of [the] conditions [at the Ohio State Penitentiary] standing alone might not be sufficient to create a liberty interest, *taken together* they impose an atypical and significant hardship") (emphasis supplied). Next, a court must look to the duration of the deprivation. *Hatch*, 184 F.3d at 856 (citing *Sandin*, 515 U.S. at 486). And finally, the length of the sentence the prisoner is serving is used to assess atypicality. *Id*.

i. Conditions and Policies at the CMU Are Considerably Harsher than Those in Administrative Segregation, Both in Nature and Duration.

1. Nature of the Deprivations

Under *Hatch*, conditions and procedural protections associated with designation to administrative segregation form the baseline that defines the ordinary incidents of prison life. 184 F.3d at 856. Conditions that fall below this baseline, in other words, trigger a liberty interest. The public record regarding administrative segregation within the Federal Bureau of Prisons, as laid out in the Code of Federal Regulations ("CFR"), shows that communications restrictions there are in fact considerably more favorable than those at the CMU. Moreover, designation to administrative segregation is necessarily limited in duration, and strict and regular procedural protections are mandated.

In conducting this comparison, the Court should be mindful that *Sandin*'s "complex and fact-specific inquiry into the conditions prisoners face," *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997), is neither possible nor appropriate at this stage of this litigation. The precise nature of conditions in administrative segregation at FCI Terre Haute and USP Marion, for example, will not become apparent until appropriate discovery has been conducted. Rather, what is determinative for purposes of this motion is that Defendants do not and cannot argue that conditions at the CMU are less onerous than those *actually* imposed in administrative segregation.

This is because taken together, and compared to conditions in administrative segregation, restrictions at the CMU impose unique and unparalleled hardships. For years, all CMU prisoners, including Plaintiffs, were permitted only a single 15-minute phone call per week. Compl. ¶ 64. In the wake of litigation, Defendants increased telephone access to two weekly 15-minute phone calls. *Id*. at ¶¶ 53-55, 65. Because this modest increase was voluntary, and the

BOP has yet to publish or adopt *any* formal rule regarding policies and conditions at the CMU, it could decrease phone access at any time.[1] Until January 2010, Plaintiffs received only a single four-hour visit (or two two-hour visits) per month. *Id*. at ¶ 52. Again, the BOP voluntarily increased this to two four-hour visits per month in January 2010, but has indicated its willingness to decrease visitation at any time.[2] *Id*. at ¶ 57. Moreover, the CMU remains the only general population unit in the federal prison system of which Plaintiffs are aware that imposes a blanket, permanent ban on contact visitation. *Id*. at ¶ 37.

Prior to CMU designation, all Plaintiffs who were previously incarcerated in a BOP prison facility were held in general population and received full telephone and visitation privileges – comprised of 300 minutes of calls per month, and visitation limited only by available general visiting hours and chronic overcrowding, *id*. at ¶¶ 63, 47 – without incident. *Id*. at ¶¶ 109, 129, 156-57, 185. Unlike at the CMU, visiting and telephone privileges in administrative segregation are designed to mimic those in general population. The CFR specifies that prisoners in administrative segregation receive "the same general privileges given to inmates in the general population." 28 C.F.R. § 541.22(d). "Ordinarily, an inmate retains visiting privileges while in detention or segregation status." 28 C.F.R. § 540.50(c). General regulations also specify that a Warden may limit the length or frequency of visits "only to avoid chronic overcrowding." 28 C.F.R. § 540.43. Only a prisoner in segregation who has committed "a prohibited act having to

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[1] Indeed, the BOP has already signaled its willingness to do so. In its recently-proposed rule, the BOP seeks to limit access to the telephone at the CMU to as little as a single 15-minute call per month. *See* Communication Management Units, 75 F.R. 17,324 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540); *see also County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (voluntary cessation of illegal conduct does not deprive a court of the power to consider that conduct if there is a reasonable expectation that the violation will recur and interim relief or events have not completely and irrevocably eradicated the effects of the alleged violation).

[2] The recently-proposed rule seeks to authorize as little as a single one-hour visit per month for CMU prisoners. *See* Proposed C.F.R. § 540.205(a).

do with visiting guidelines or has otherwise acted in a way that would reasonably indicate that he or she would be a threat to the orderliness or security of the visiting room" will have his or her visitation restricted or disallowed. 28 C.F.R. § 540.50(c). There is no provision in the CFR prohibiting prisoners in administrative segregation from enjoying contact visits. Communications deprivations at the CMU are therefore far harsher than those in administrative segregation. And courts have recognized that such fundamental changes in visitation conditions infringe on a liberty interest protected by due process. *See*, *e.g.*, *Bazzetta v. McGinnis*, 286 F.3d 311, 323 (6th Cir. 2002) (harsh restrictions on visitation constitute a "qualitatively greater isolation than is imposed by a prison sentence"), rev'd on other grounds, *Overton v. Bazzetta*, 539 U.S. 126 (2003).

The *Sandin* analysis also calls for comparison to "more restrictive conditions at other prisons if it is *likely* both that inmates serving sentences similar to appellant's will *actually* be transferred to such prisons and that once transferred they will *actually* face such conditions." *Hatch*, 184 F.3d at 847 (emphasis supplied). While it is premature to engage in this analysis – again, discovery is necessary before this fact-intensive inquiry is possible – several facts pled by Plaintiffs support the establishment of a liberty interest in light of this element.

First, and most fundamentally, the CMU is unique on its face. Only two CMUs exist in the entire federal prison system and there is no equivalent throughout the rest of the BOP. No other general population prison unit imposes such limited telephone access and a permanent blanket ban on contact visitation. Even prisoners at the "supermaximum" ADX Florence enjoy up to 35 hours of visits a month. Compl. ¶ 61.

Second, it is extremely unlikely that prisoners serving sentences similar to Plaintiffs would be subjected to comparable communications deprivations. After all, Mr. Aref, Mr.

McGowan, and Mr. Jayyousi are *low*-security prisoners, while Mr. Jones and Mr. Twitty are medium-security prisoners. *Id*. at ¶¶ 16-18, 20, 210. While low or medium security prisoners might lose communications privileges for a set term, as discipline for a given infraction, there is simply no factual or regulatory precedent for subjecting them to indefinite and strict communications restrictions. And Plaintiffs' disciplinary histories are either perfectly clean or minimal, meaning that they (and other prisoners like them) are ineligible for transfer to disciplinary segregation. *Id.* at ¶¶ 110, 130, 159, 186, 209.

2. Duration of CMU Confinement

The *Hatch* court made it clear that even if the conditions at issue are no more restrictive than those in administrative segregation, a court must still determine whether their duration is "'atypical' compared to the length of administrative segregation routinely imposed on similarly situated prisoners." 184 F.3d at 858. The atypically restrictive nature of the CMU is compounded by the indeterminacy – and apparent permanency – of CMU designation. Mr. Aref and Mr. Twitty have been confined at a CMU for 39 months, *id*. at ¶¶ 113, 132; Mr. McGowan for 24 months, *id*. at ¶ 160; and Mr. Jayyousi for 26 months, *id*. at ¶ 212. Mr. Jayyousi has been explicitly told by his Unit Manager that he will serve the entirety of his 152-month sentence at a CMU. *Id*. at ¶ 214. No Plaintiff has received any indication that he will be transferred out of the CMU. And while Mr. Jones was returned to general population after spending 21 months at the CMU, his transfer was based not on any review process but rather in exchange for withdrawing a *pro se* complaint about CMU conditions pending in federal district court. *Id*. at ¶¶ 195, 197. Moreover, he faces the ongoing threat of redesignation to the CMU. *Id*. at ¶ 196; *see also* Section VI, *infra*.

The indeterminacy of confinement at the uniquely-restrictive CMU, the fact that Plaintiffs have been confined there for years, and the threat that they will serve their entire

sentences there, combine to form an atypical and significant hardship. *See, e.g.*, *Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000) (305 days in segregated housing unit atypical and significant); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (one year in solitary confinement atypical and significant); *Brown v. Plaut*, 131 F.3d 163, 165, 172 (D.C. Cir. 1997) (remand to determine whether ten months in administrative segregation imposes atypical hardship); *Hatch*, 184 F.3d at 858 (remand to determine whether 29 weeks of segregation atypical); *Keenan v. Hall*, 83 F.3d 1083, 1087-89 (9th Cir. 1996) (remand to determine whether six months in administrative segregation atypical and significant).

Moreover, CMU designation appears to prolong incarceration. *See Sandin*, 515 U.S. at 487 (considering whether the State's action will affect the duration of the sentence in assessing whether a liberty interest is created). Mr. Twitty was approved for nine months of pre-release placement in a halfway house, and was eligible to be placed there in April 2010. Compl. ¶ 147. His pre-release program, however, would not accept him for that entire period because his assignment to the CMU suggested – falsely – that he was a management problem. *Id.* As a result, Mr. Twitty has still not been released, thereby serving a substantial amount of extra time in prison as a result of the stigma associated with his CMU designation.[3] *Id.*

In contrast to CMU designation, the duration of administrative segregation is curtailed as a matter of policy and practice. Administrative segregation is reserved for a specifically-enumerated set of circumstances, including holdover status, transfer, new commitments, and pending a disciplinary hearing or investigation. 28 C.F.R. § 541.22(a). As such, it naturally expires when, for example, a prisoner is transferred to a new facility, or when a disciplinary hearing is held. Moreover, the CFR requires that administrative segregation "is to be used only

[3] At the time this case was filed, Mr. Twitty had been told he would be transferred to a halfway house in August 2010. Compl. ¶ 147. Counsel for Plaintiffs put the Court on notice that since the filing, Mr. Twitty's release to a halfway house has been further delayed, this time until October 2010.

for short periods of time except where an inmate needs long-term protection, or where there are exceptional circumstances." 28 C.F.R. § 541.22(c). No such durational limits exist at the CMU.

Unlike at the CMU, the limited duration of administrative segregation is also guaranteed by strict procedural protections. The Warden must prepare an order detailing the reasons for placing a prisoner in administrative segregation, and a copy must be given to the prisoner within 24 hours of placement. 28 C.F.R. § 541.22(b). A review of administrative segregation status must occur within three work days of the prisoner's placement, and a hearing and formal review (attended by the prisoner) must occur if a prisoner spends seven continuous days in administrative segregation. 28 C.F.R. § 541.22(c). Cases must be reviewed weekly, and a hearing and review must be formally held, with the prisoner present, every 30 days thereafter. *Id*. As demonstrated *infra*, no such protections exist to limit the duration of CMU designation.

3. Plaintiffs' Sentences

The atypicality of deprivations also "depends in part on the length of the sentence the prisoner is serving." *Hatch*, 184 F.3d at 856. Prisoners serving exceptionally long sentences, in other words, can expect harsher conditions. The record in this case has not been sufficiently developed to perform a fact-intensive analysis of whether the restrictions to which Plaintiffs are being subjected are "within the range of confinement to be normally expected for one serving [similar sentences]." *Sandin*, 515 U.S. at 487. And Defendants have not argued as much. At this juncture, though, Plaintiffs have alleged facts that plainly state a claim under this prong.

Several Plaintiffs are serving relatively short, determinate sentences. Mr. McGowan, for instance, is serving a seven year sentence, Compl. ¶ 18, Mr. Jones a 94 month sentence, *id*. at ¶ 20, and Mr. Jayyousi a 12 year and eight month sentence, *id*. at ¶ 22. In *Sandin*, the Court determined that 30 days in disciplinary segregation was to be normally expected by someone serving the petitioner's sentence. *Sandin*, 515 U.S. at 475, 487. But that sentence was an

indeterminate term of *30 years to life*. *Id* at 487. Here, Plaintiffs are serving considerably shorter determinate sentences. Yet they have spent *years* at the CMU. Moreover, CMU restrictions cannot be "normally expected" by any prisoner within the BOP as they are unparalleled in nature and duration.

ii. Defendants Fail To Establish the Lack of a Liberty Interest.

Defendants' effort to persuade this Court that CMU designation does not trigger a liberty interest fails because it relies on inapposite cases, elides *Sandin*'s "atypical and significant" inquiry, and as such does not explain how or why the conditions to which Plaintiffs have been subjected are consistent with the "ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

Defendants first assert, relying on *Meachum v. Fano*, 427 U.S. 215 (1976), that Plaintiffs' so-called "transfer" to the CMU is not subject to procedural protections. MTD at 11-12. But Defendants' characterization of CMU designation as an unremarkable transfer is misleading. In *Meachum*, appellants were merely moved from one general population setting to another, albeit one that was "more disagreeable." 427 U.S. at 225.[4] Plaintiffs, by contrast, were nominated for and then *designated* to the CMU. The CMU is a unique, segregated unit that houses only about 70 out of hundreds of thousands of federal prisoners. Compl. ¶¶ 97, 99. Without any hearing whatsoever, it permanently imposes unparalleled restrictions, none of which are co-extensive with either general population or administrative segregation. *See* Section I(i), *supra*.

Where prisoners are removed to a penal setting that subjects them to deprivations that are unique in character and duration, courts have rejected the state's attempt to characterize designation to that setting as "a mere relocation" controlled by *Meachum*. *Hardwick v. Ault*, 447 F. Supp. 116, 123 (M.D. Geo 1978). Defendants' effort here is similarly unconvincing, as a

[4] Of course, *Meachum* does not comparatively analyze the conditions to which the transferred prisoners were subjected, as it predates the establishment of the *Sandin* "atypical and significant" test.

blanket ban on contact visits, for example, is unique and not within the "normal limits or range of custody." *Meachum*, 427 U.S. at 225.

Defendants also erroneously assert that CMU designation does not constitute punishment or increase the length of incarceration. MTD at 12. First, while the question of whether conditions are punitive was relevant under *Hewitt v. Helms*, 459 U.S. 460 (1983), that approach was explicitly abandoned by *Sandin*. 515 U.S. at 483. The distinction is now immaterial. But even if it were relevant, Defendants conspicuously ignore critical facts. First, Plaintiffs have almost entirely clear disciplinary histories, and have no history of communications-related disciplinary infractions (with a single, innocuous exception). *See* Compl. ¶¶ 110, 130, 159, 186, 209. Second, Plaintiffs were afforded access to contact visits without incident prior to their CMU designations. *Id*. at ¶ 41. Yet, they have been deprived of normal access to their families and loved ones – including being subjected to a blanket and permanent ban on physical contact – for years. *Id*. at ¶¶ 113 (Aref: 39 months); 132 (Twitty: 39 months), 160 (McGowan: 24 months); 212 (Jayyousi: 26 months). Third, Defendants have never demonstrated a need for these restrictions. Finally, Plaintiffs expect to serve their entire sentences at the CMU. Under these circumstances, it is difficult to discern what purpose CMU designation serves other than one that is punitive.

Moreover, as Mr. Twitty's case demonstrates, the stigma associated with CMU designation does in fact increase the length of incarceration. Compl. ¶ 147; *see also supra* at Section I(i). Clearly, this case does not involve innocuous transfers. It involves the imposition of deprivations that are "dramatically different from those which [Plaintiffs] experienced" in prior facilities, and which carry "a stigma qualitatively different from the stigma attached to imprisonment alone." *Caldwell v. Hammonds*, 53 F. Supp. 2d 1, 11 (D.D.C. 1999).

Next, Defendants attempt to argue that "the challenged restrictions on communication do not implicate a liberty interest *under the Constitution*." MTD at 13 (emphasis supplied). They address CMU restrictions on physical contact, visits, and phone calls one by one, and cite to a series of cases that address the freestanding constitutionality of each of those restrictions in isolation. *Id*. at 13-16. These arguments are also unavailing.

First, Plaintiffs' procedural due process claim was pled, and is properly analyzed, under the *Sandin* standard, *see* Compl. ¶ 253, rather than "under the Constitution" as Defendants erroneously suggest. MTD at 13. Nowhere have Plaintiffs claimed that their rights stem from the Due Process Clause of "its own force." *Sandin*, 515 U.S. at 484. Defendants' attempt to recharacterize Plaintiffs' claim, and thus invoke a more difficult legal standard, is misleading.

Second, Defendants incorrectly disaggregate the CMU restrictions and address them each in isolation – rather than applying the proper legal analysis that examines those restrictions "taken together." *Wilkinson*, 545 U.S. at 224; *see also* Section I(i), *supra*.

And finally, the cases upon which Defendants rely shed no light on the present inquiry. They are either not procedural due process cases, *see Block v. Rutherford*, 468 U.S. 576 (1984) (addressing a substantive due process challenge), *Overton v. Bazzetta*, 539 U.S. 126 (2003) (addressing substantive due process, First Amendment, and Eighth Amendment challenges), *Searcy v. U.S.*, 668 F. Supp. 2d 113 (D.D.C. 2009) (addressing a First Amendment challenge); or they address bans on visits by a particular visitor after a particular instance of that visitor's wrongdoing. *See Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989) (involving limited bans on visits by two inmates' mothers after contraband-related violations), *Robinson v. Palmer*, 841 F.2d 1151 (D.C. Cir. 1988) (involving ban on visits from a prisoner's wife after she attempted to smuggle him marijuana), *Jones v. Yanta*, 610 F. Supp. 2d 34 (D.D.C. 2009)

(involving ban on jail visits between three family members during a criminal investigation). Not one of these cases sheds light on whether or not the CMU imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *Sandin,* 515 U.S. at 484, or whether sweeping restrictions can be imposed on *all* communication with the outside world, irrespective of wrongdoing, and without due process.

When Defendants do turn to the *Sandin* analysis, they argue that the loss of contact visits and reduced access to visits and calls at the CMU do not constitute an atypical and significant deprivation because agency rules contemplate similarly harsh restrictions on calls and visitation. *See* MTD at 18. Again, Defendants misapprehend the relevant analysis. The liberty interest question at stake here is not whether the BOP is *ever* authorized to restrict communication; rather, as the D.C. Circuit has emphasized: "Properly construed, *Sandin*'s baseline requires *not* mere inquiry into the most restrictive conditions prison officials have legal authority to impose for administrative reasons, *but a factual determination of the most restrictive conditions prison officials 'ordinarily' or 'routinely' impose*." *Hatch*, 184 F.3d at 857 (emphasis added).

As noted *supra*, Defendants have not argued that conditions at the CMU are similar to those ordinarily and routinely imposed at FCI Terre Haute and USP Marion (particularly in administrative segregation, the comparative baseline identified in *Hatch*), or anywhere else. Plaintiffs, by contrast, have alleged restrictions that significantly exceed those contemplated by the CFR regarding administrative segregation. Similarly, Defendants have not argued that conditions at other prisons to which prisoners like Plaintiffs are likely be transferred are similar to those at the CMU, and any effort to do so would be premature before discovery. As such, Plaintiffs have stated a claim that must survive Defendants' motion to dismiss.

Indeed, Defendants do not engage in *any* of the comparative analysis required by *Sandin* and *Hatch*. They do not specifically address the conditions at the CMU in the aggregate, acknowledge the indefinite duration of those conditions, or argue that such restrictions are ordinarily and routinely imposed in settings to which prisoners like Plaintiffs are likely to be transferred and would likely actually face. Instead, Defendants blithely conclude that the CMU's restrictions "do not constitute the kind of 'extraordinary treatment' required to find a government-created liberty interest." MTD at 19 (citation omitted).

As argued *supra*, this is simply not the case. CMU restrictions are unique both in nature and duration. The very rules upon which Defendants rely make it clear, for example, that contact visits should not be withheld "unless there is clear and convincing evidence that such contact would jeopardize the safety or security of the institution." 28 C.F.R. § 540.51(h)(2). No evidence – clear, convincing, or otherwise – has been cited to justify the harsh restrictions imposed on Plaintiffs either in this litigation or elsewhere. The CMU subjects Plaintiffs to "extraordinary treatment" if for no other reason than this, and Defendants' say-so does not constitute evidence to the contrary.

For the foregoing reasons, Plaintiffs have plausibly alleged a liberty interest in avoiding CMU designation, thus dismissal is inappropriate.

B. Plaintiffs Have Been Denied Any Procedural Protections Around their Original and Ongoing Designation to the CMU.

Upon finding a liberty interest in avoiding designation to the CMU, a court must next determine what process is due prior to such placement. *See Wilkinson*, 545 U.S. at 224. The Supreme Court has considered three factors: first, "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Rather than address the three *Mathews* factors, Defendants simply assert that Plaintiffs were provided with constitutionally-adequate process. Defendants claim that Plaintiffs "received notice of the reason for their designation to the CMU," and "received reviews of their continued confinement in the CMU by the CMU's Unit Team in connection with regularly scheduled program reviews." MTD at 21. Before Plaintiffs address the *Mathews* analysis, some clarifications about these purported procedural protections are necessary.

First, Plaintiffs did not receive any meaningful notice about the reasons for their CMU designation. Unlike prisoners designated for Special Management Units or Control Units, Plaintiffs did not receive prior notification of transfer, an opportunity to be heard, a meaningful description of the information that led to their referral, or the right to an appeal. Compl. ¶ 75. Rather, after his transfer to the CMU, each Plaintiff received a one-page Notice of Transfer. *Id.* at ¶ 76; Exh. E. This document includes generic and unsubstantiated language indicating that Plaintiffs' "transfer to this facility for greater communication management is necessary to the safe, secure, and orderly operation of Bureau institutions, or protection of the public." *Id.*

The document then purports to explain why each Plaintiff was designated to the CMU. *Id.* at ¶ 77; Exh. E. But for a number of Plaintiffs, these "explanations" are so vague and generic as to provide no notice at all as to the factual premise that led to CMU designation. *Id.* Mr. Jones's and Mr. Twitty's transfer notices, for example, include almost identical language indicating that "[r]eliable evidence indicates your incarceration conduct has included involvement in recruitment and radicalization of other inmates through extremist, violence

oriented indoctrination methods to intimidate or coerce others." *Id*. at ¶¶ 132, 190; Exh. E. No reference whatsoever is made to any actual facts or events. When Plaintiffs attempted to learn those underlying facts through the administrative grievance process, they were told to file a Freedom of Information Request. *Id.* at ¶¶ 133, 134, 164, 193. Those requests, however, also failed to produce any information regarding whom Plaintiffs are alleged to have recruited, at what time and location, or toward what end. *Id.* Other Plaintiffs have been provided with reasons that are factually incorrect. *Id*. at ¶¶ 160-63; *see also* Sections II(A)(iii), II(B)(i) *infra*. Thus, Plaintiffs are unaware of why they were designated to the CMU, the underlying conduct that led to the designation, or what behavior to avoid in the future.

Second, to characterize Plaintiffs' program reviews as a meaningful review of their continued confinement in the CMU is similarly misleading. The reviews to which Defendants refer were announced in October 2009. *Id*. at ¶ 87. As such, Defendants apparently concede that no review occurred before that date. And indeed, for years the only avenue out of the CMU was through request for a "nearer release" transfer, a discretionary benefit that may be sought after 18 months of clean conduct. Compl. ¶¶ 85-86. There is some indication that this rule remains in effect. *Id*. at ¶ 90. Mr. Aref, for example, was told at his recent program review that he was categorically ineligible for transfer until he had spent 18 months at the Marion CMU, despite having already served 22 months at the Terre Haute CMU. *Id*.

But in any case, the new "review process" offers no protections. The reviews are not timely, as a prisoner must languish at the CMU for seven months before his first program review. *See* BOP Program Statement: Inmate Security Designation and Custody Classification, Ch. 6, p. 1. Moreover, they are substantively meaningless. First, according to their Notices of Transfer, each Plaintiff's designation to the CMU was based either on their conviction or offense conduct,

or upon undisclosed behavior that presumably occurred at a prior institution. Compl. ¶ 83; Exh. E. The new program reviews are merely an assessment of whether the "original reasons for CMU placement still exist." *See* Exhibit F at 1. As these facts cannot change, any "review" is by definition illusory.

Furthermore, Plaintiffs have no way to meaningfully contest their ongoing placement in the CMU because the actual facts that purportedly led to their designation have never been disclosed. Mr. Jayyousi, Mr. McGowan, and Mr. Jones each attended a program review since the Notice was posted, and no such information was forthcoming. *Id*. at ¶ 90. To compound the meaningless nature of these purported reviews, members of their unit teams have repeatedly informed Plaintiffs that neither the unit team nor the warden have the power to order a prisoner transferred from the CMU. *Id*. at ¶ 84. These decisions, they have stated, are made in Washington, DC. *Id*.

Plaintiffs have, in other words, been provided with no meaningful notice about, or review of, their CMU designations. And the *Mathews* analysis compels the conclusion that Defendants' failure to provide Plaintiffs with any process violates procedural due process principles.

First, Plaintiffs' interest in avoiding designation to the CMU is obvious. *Mathews*, 424 U.S. at 335. Conditions at the CMU profoundly interfere with their ability to maintain family ties. Compl. ¶ 9. Because Mr. Aref will not be released until 2018, for example, he will next be able to hug his 4-year-old child when she is 12. *Id*. at ¶ 44. Plaintiffs are subjected to an unparalleled and permanent ban on physical contact with visitors, leading to emotional stress and irreparably interfering with the *only* means of effective association with young children. *Id*. at ¶ 45. The uniquely strict limitations on access to the telephone and to visits compounds this harm.

Some Plaintiffs, like Mr. Twitty, face a longer prison term due to the stigma attached to CMU placement. *Id*. at ¶ 147.

Second, the risk of erroneous deprivation of these interests through the procedures used, and the probable value of additional safeguards, is clear. *Mathews*, 424 U.S. at 335. Plaintiffs have innocuous disciplinary histories, an almost uniform lack of any communications-related infractions, and some do not even fit into the alleged bases for CMU designation listed in BOP documents. *See* Compl. ¶¶ 33, 79. Plaintiffs have plausibly alleged that the lack of process has directly resulted in a pattern of discriminatory and/or retaliatory designations. *See* Section II, *infra*; *see also* Compl. ¶¶ 92-102. Such rationales are by definition illegitimate.

Defendants' suggestion that the administrative remedy program eases any concerns about erroneous deprivations, *see* MTD at 21, is unavailing. The administrative remedy system does not provide for proper notice, an opportunity to be heard, or the right to a meaningful appeal, and thus is no substitute for these due process protections. *See* 28 C.F.R. § 542; *Sattar v. Gonzales*, No. 07CV02698, 2008 U.S. Dist. LEXIS 112428 at *13 (D. Colo., Nov. 3, 2008) ("the Court does not agree that the administrative remedy program is 'all that is required' to satisfy procedural due process . . . . '[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner'") (citations omitted).

Plaintiffs' attempts to utilize the administrative remedy system to challenge their CMU placement demonstrate this fundamental disconnect. Mr. Twitty, for example, filed a grievance seeking any factual substance underlying the allegation that he was involved in "recruitment and radicalization" only to have that phrase repeated back to him again and again as justification for his CMU placement. Compl. at ¶¶ 140-41. And even where designations have been made on the basis of demonstrably erroneous information, the administrative process has yielded no relief.

Much of the information included on Mr. McGowan's Notice of Transfer as explanation for his CMU designation, for example, is false. Compl. ¶¶ 161, 163; *see also* Section II(A)(iii), *supra*. And yet, his administrative efforts to correct the information, and seek transfer out of the CMU, have been unsuccessful. *Id*. at ¶ 162.

Third, the Government has no identifiable interest in refusing additional or substitute procedures, *Mathews*, 424 U.S. at 335, nor has it asserted one. Given the small size of the CMUs, *see* Compl. ¶ 97, the burdens associated with such procedures would be minimal. Moreover, the BOP already mandates such procedures for Special Management Unit or Control Unit designations, *id*. at ¶ 75, demonstrating that they are manageable and affordable.

In light of the liberty interest at stake, Plaintiffs have adequately alleged that Defendants' failure to provide them with notice or review of their CMU designations violates their rights to procedural due process.

II. PLAINTIFFS HAVE ADEQUATELY PLED VIOLATION OF THE FIRST AND FIFTH AMENDMENT BASED ON THEIR DISCRIMINATORY AND RETALIATORY PLACEMENT IN THE CMU.

As the facts included in the Complaint adequately allege, Plaintiffs have been placed in the CMU not because they pose any particular security risk, but in retaliation for the exercise of their protected First Amendment rights and due to religious discrimination.

Mr. Jones, Mr. Twitty, and Mr. McGowan were all engaged in protected First Amendment activity prior to their CMU designation. Compl. ¶¶ 188, 131, 167. They were model prisoners and posed no management problem. *Id*. at ¶¶ 186, 129, 159. Mr. Jones and Mr. Twitty are both Muslim, and their convictions are unrelated to terrorism. *Id*. at ¶¶ 188, 184, 126, 127. Their abrupt CMU designation lacks any plausible explanation other than retaliation. Mr. Aref and Mr. Jayyousi, meanwhile, are also Muslim, also lack any serious disciplinary history, and also pose no management problem. *Id*. at ¶¶ 104, 110, 206, 209. In the face of the vast

overrepresentation of Muslim prisoners at the CMU, *id*. at ¶ 101, the only plausible explanation for their transfers is religious discrimination. The purportedly "obvious alternative explanations" for Plaintiffs' designations to the CMU offered by Defendants, MTD at 35, are so general and so contradictory of Plaintiffs' clean institutional histories as to be meaningless. Indeed, many of the BOP statements Defendants rely on to explain Plaintiffs' CMU designations are demonstrably incorrect. Id. at ¶¶ 107, 114, 161, 163. Thus, as explained in detail below, Plaintiffs have stated valid First and Fifth Amendment claims.

A. Plaintiffs Jones, Twitty, and McGowan Were Designated to the CMU in Retaliation For Protected First Amendment Activity.

To state a claim for retaliation, a prisoner 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 exists 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).

Defendants do not dispute that Mr. Jones, Mr. Twitty, and Mr. McGowan were engaged in protected First Amendment activities at the time of their designation to the CMU, or that placement in the CMU is sufficiently harsh to deter a person of ordinary firmness. They argue instead that Plaintiffs' claims of retaliation are not "plausible" under *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), because there are alternative explanations for each Plaintiff's designation. MTD at 34-37. But the facts demonstrate that retaliation is the only credible explanation for these abrupt designations. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) (stating that "when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences . . . retaliation is subject to recovery as the but-for cause of official action offending the Constitution").

Defendants do not, and cannot, argue that Plaintiffs engaged in communications-related misconduct, or *any* serious misconduct before they were assigned to the CMU. Compl. ¶¶ 110, 130, 159, 186, 209. Plaintiffs were, however, engaged in protected First Amendment activities just prior to their designations. *See Rauser v. Horn*, 241 F.3d 330, 334 (3rd Cir. 2001) (finding "suggestive temporal proximity" between the prisoner's exercise of his First Amendment rights and his transfer established a claim of retaliation); *see also Garcia v. District of Columbia*, 56 F. Supp. 2d 1, 13 (D.D.C. 1998) ("Evidence that actions by correctional officers were taken in retaliation for the exercise of protected conduct may be inferred from the fact that the acts occurred shortly after the filing of a grievance, and that the inmate previously had a good disciplinary record"). This timing, coupled with Defendants' inability to argue that Plaintiffs posed any communications risk, renders it not only plausible, but *probable*, that Plaintiffs' protected activity was the "substantial" or "motivating" factor behind Defendants' decision to designate Plaintiffs to the CMU. *El-Pryor v. Kelly*, 892 F. Supp. 261, 274 (D.D.C. 1995).

Moreover, even if Defendants' alternative explanations were also plausible, this in itself would not render Plaintiffs' allegations implausible. *See Iqbal*, 129 S. Ct. at 1949 ("[t]he plausibility standard is not akin to a 'probability' requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully"). To find a claim implausible under *Iqbal*, a defendant must offer an alternative explanation that is "a far more likely inference from the available facts" and is "so overwhelming, that claims no longer appear plausible." *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009); *see also Philips v. Bell*, 365 Fed. Appx. 133, 141 (10th Cir. 2010) (dismissing complaint were alternative explanation *more plausible* than that advanced by plaintiff).

i. Royal Jones

Mr. Jones' allegations of retaliatory designation to the CMU are plausible under the *Iqbal* standard, and thus must not be dismissed. Mr. Jones has always been an industrious prisoner, availing himself of available programs and educational opportunities. Compl. ¶ 187. His record contains no serious disciplinary infractions whatsoever, with only one minor communications-related infraction (asking a relative to make a three-way call to a fellow prisoner's parents) well over a decade ago, in 1997. *Id*. at ¶ 186. While housed in general population at FCI Englewood, Mr. Jones was allowed contact visits and 300 minutes a month of telephone use without incident, and was able to maintain a close relationship with his mother, sister, and five children. *Id*. at ¶ 185.

Mr. Jones, however, is an outspoken and litigious prisoner. *Id*. at ¶ 188. He has written several books and has publicized improper prison conditions. *Id.* He has not hesitated to file grievances and complaints as a means to advocate on his own behalf. *Id.* He also played a leadership role in the Muslim community in prison. *Id*. at ¶ 188. These valid exercises of his First Amendment rights provoked a threat from BOP staff at FCI Englewood that he would be "sent east" if he continued to file complaints. *Id.* Mr. Jones did not heed that warning, and on June 6, 2008, he was abruptly designated to the CMU at USP Marion. *Id*. at ¶¶ 188-89.

Defendants' own records demonstrate that their purported rationale for Mr. Jones' CMU designation is pretextual. For instance, Mr. Jones' referral to the CMU, issued by FCI Englewood Warden Davis, indicates that Mr. Jones "has not presented any management problems." *Id*. at ¶ 190. But then goes on to state, in boilerplate language, that "[r]eliable evidence indicates his crimes and incarceration conduct has included involvement in recruitment and radicalization efforts of other inmates through extremist, violence oriented indoctrination methods to intimidate or coerce others." *Id*. The discrepancy between these two statements is

entirely unexplained. And although the BOP lists as punishable many categories of behavior one might logically expect to be involved in such recruitment and radicalization, especially if undertaken by "coercion or intimidation," Mr. Jones was not disciplined. *See* BOP Program Statement 5270.07 Chapter 4 (including as punishable acts: threats; extortion; encouraging group demonstration; participating in an unauthorized meeting or gathering; using abusive or obscene language; and the catch-all "conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons"). Beyond the bald allegation of "recruitment and radicalization," Defendants can point to no indication of any of improper conduct.

En route to the CMU, Mr. Jones was housed briefly at FTC Oklahoma. There, the Holdover Unit Team generated documents that state: "Violation or Reason: Terrorist." *Id*. at ¶ 192. But Mr. Jones's conviction involves no association with or allegation of terrorism. *Id*. at ¶ 184. He has been given no opportunity to contest that categorization, or even discover its alleged basis. *Id*. at ¶192. These inconsistent and unsubstantiated justifications do not render Mr. Jones's allegations of retaliation implausible.

Defendants argue that the threat by BOP staff members to send Mr. Jones east is "vague" and that he does not allege sufficient facts showing the temporal proximity of the threat and his CMU designation. MTD at 36. If the threat to send Mr. Jones "east" was ever vague, it is no longer so. It was realized. Compl. ¶¶ 188-89. Moreover, Plaintiffs have alleged all the temporal detail necessary: the threat was issued *after* his protected First Amendment activity but *before* his CMU designation.[5] *Id.*; *see also Garcia*, 56 F.Supp.2d at 13. In light of Mr. Jones's almost spotless disciplinary history, and BOP records that plainly state that he has "not presented any

[5] Defendants appear to misunderstand Mr. Jones's allegations. MTD at 36-37. The alleged retaliation stems from his designation to the CMU *after* filing various administrative grievances. Compl. ¶ 188. He does not allege that his transfer *out* of the CMU, in exchange for voluntary dismissal of his *pro se* CMU case, was retaliatory. *Id.* at ¶¶ 195-96.

management problems," Compl. ¶ 190, it is Defendants who offer no plausible non-retaliatory explanation for Mr. Jones's CMU designation.

ii. Avon Twitty

Mr. Twitty has also alleged a plausible retaliation claim. He has been incarcerated since 1984, and has incurred no communications-related infractions and no serious disciplinary infractions during his decades in BOP custody. *Id*. at ¶ 130. He used his unrestricted telephone and contact visitation privileges at previous BOP facilities without incident to maintain a close relationship with his three children. *Id*. at ¶¶ 126, 130. A progress report issued by USP Hazelton on April 20, 2007, notes Mr. Twitty's spotless record since 2005, his good work performance ratings, specifically indicates that he is not a management problem, and cites his "good rapport" with staff and fellow prisoners. *Id*. at ¶ 129.

But like Mr. Jones, Mr. Twitty exercised his First Amendment rights in order to advocate on his own behalf. Throughout 2005 and 2006, he filed grievances and federal litigation against the BOP to resolve disputes over his good time credits and missing program documentation. *Id*. at ¶ 131. Then, on May 30, 2007, in the midst of this litigation – but only one month after his *positive* progress report – Mr. Twitty was designated to the CMU. *Id*. at ¶ 132.

In language almost identical to Mr. Jones's, Mr. Twitty's Notice of Transfer contains only the generic allegation that "reliable evidence indicates your incarceration conduct has included involvement in recruitment and radicalization of other inmates through extremist, violence oriented indoctrination methods to intimidate or coerce others." *Id.* at ¶ 132; Exh. E No specific allegations appear. *Id.* As Mr. Twitty has a good disciplinary record and no infractions that would substantiate the Notice, he sought to discover this "reliable evidence." *Id*. at ¶ 133. Through a FOIA request, he obtained his transfer referral, issued by the Warden of USP Hazelwood, *id*. at ¶ 135, which incorrectly stated that Mr. Twitty had received a

disciplinary report for a serious assault at USP Lewisburg. *Id*. at ¶ 136. After Mr. Twitty's repeated attempts to correct this fabrication, the BOP finally acknowledged the information was incorrect, characterizing it as a "typographical error." *Id*. at ¶ 141.

Defendants argue that Mr. Twitty fails to allege facts making it plausible that his advocacy and litigation was a substantial factor in his transfer to the CMU, because the BOP's unsubstantiated "concerns" about his involvement in "recruitment and radicalization" provide an alternate legitimate basis for his CMU designation. MTD at 35. But there is no indication that Mr. Twitty ever posed a problem of this nature – only evidence to the contrary from the BOP itself. Defendants cannot avoid a retaliation claim by contradicting Plaintiffs' allegations with an unsubstantiated, and in part avowedly false, alternative explanation. *Banks,* 515 F. Supp. 2d at 111 (discounting, on motion to dismiss retaliation claim, Defendants' contradictory explanation for discretionary placement in solitary confinement). Given the timing of Mr. Twitty's transfer – in the midst of his federal litigation against the BOP, and only one month after a positive progress report that indicated nothing about alleged recruitment or radicalization of other inmates, but rather he had "good rapport" with staff and prisoners – retaliation is the only plausible explanation for his transfer.

iii. Daniel McGowan

Mr. McGowan's First Amendment activities, coupled with the demonstrably false information on his Notice of Transfer, also state plausible allegations of retaliation. Mr. McGowan is a low security prisoner, and his disciplinary record is *completely* clean. Compl. ¶¶ 154, 159. His security point level, already low, has continued to drop due to his good conduct. *Id*. at ¶ 154. While housed at FCI Sandstone, Mr. McGowan used the available contact visitation and 300 minutes of telephone time without incident to maintain close relationships with his wife,

sisters, parents, and young niece. *Id*. at ¶¶ 156-57. At his final program review at FCI Sandstone, the BOP indicated clean conduct and no management problems. *Id*. at ¶ 159.

Mr. McGowan, in other words, has been a model prisoner. But he has also been very active in social justice movements during his incarceration. He has advocated for progressive causes since his arrest, argued for the rights of political prisoners, and communicated with law-abiding social justice activists from inside prison. *Id*. at ¶ 167. Then, in August 2008, he was abruptly designated to the CMU. *Id*. at ¶ 160. There, he has been unable to continue his communication with law-abiding activists, and has been limited in his ability to receive information regarding developments in progressive causes. *Id.* at ¶ 168.

The BOP's stated explanation for Mr. McGowan's CMU designation is in large part demonstrably incorrect. *Id*. at ¶ 161. After Mr. McGowan arrived at the CMU, he received a Notice of Transfer that incorrectly stated he had destroyed an energy facility, was "a member and leader in the Earth Liberation Front (ELF) and Animal Liberation Front (ALF), groups considered domestic terrorist organizations," and had taught others how to commit crimes of arson. *Id*. at ¶ 160; Exh. E. These allegations are patently untrue. *Id*. at ¶ 161. Mr. McGowan did not destroy an energy facility, has never been a leader of the ELF or ALF, has not been a member of either organization since 2001, and never taught anyone how to commit arson. *Id*. In response to Mr. McGowan's attempts to correct this misinformation, BOP Regional Director Nalley indicated that the information in Mr. McGowan's Notice to Transfer came from his Pre-Sentence Report (PSR). *Id*. at ¶ 162. But Mr. McGowan's PSR includes no statement that he ever taught others how to commit arson, and specifically indicates that there is no evidence he was a leader in either the ELF or the ALF. *Id.* at ¶ 163. The BOP has been unresponsive to Mr.

McGowan's attempts to correct his record, and he has received no further information explaining his designation. *Id*. at ¶ 164.

Defendants contend that Mr. McGowan has failed to allege sufficient facts to state a plausible claim of retaliation, in light of the "obvious alternative explanation" that his transfer was "motivated by his conviction related to domestic terrorism." MTD at 35. But if this were the case, one presumes the Notice of Transfer would refer only to that conviction – there would be no need to exaggerate and fabricate Mr. McGowan's offense conduct and associations.

B. Mr. Jayyousi, Mr. Aref, Mr. Twitty, and Mr. Jones Were Designated to the CMU for Discriminatory Reasons.

The Fifth Amendment's Equal Protection Clause mandates that "all persons similarly situated should be treated alike." *Pryor-El*, 892 F. Supp. at 269 (quoting *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985)). It also "forbids unequal enforcement of valid laws, where such unequal enforcement is the product of improper motive," and demands that the government "apply its laws in a rational and nonarbitrary way." *Id.* To state an equal protection claim, prisoners must show that: (1) they were treated differently from other prisoners in their circumstances, and (2) their unequal treatment was the result of intentional or purposeful discrimination. *Id.* at 270 (*citing Brandon v. District of Columbia Bd. of Parole*, 823 F.2d 644, 650-51 (D.C. Cir. 1997)). Purposeful discrimination must "[n]ecessarily . . . be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), and proof of discriminatory intent requires a "practical" inquiry. *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 n. 24 (1979). "What . . . any official entity is 'up to' may be plain from the results its action achieve." *Id.*

The staggeringly disproportionate percentage of Muslims at the CMU, compared to the population of Muslim prisoners in BOP custody overall, is notable. *Washington*, 426 U.S. at

242. While approximately 6% of prisoners in BOP facilities nationwide sought Muslim religious services in 2004, available statistics place the percentage of Muslim prisoners in the CMU at between 65 and 72%. Compl. ¶¶ 97-101. The statistics indicate that not only do Muslims compose upwards of two-thirds of the prisoners in the CMU, they are overrepresented by more than 1,000% compared to the overall Muslim population in BOP custody. *Id.* As media scrutiny began to focus on Defendants' targeting of Muslims, more non-Muslim prisoners were moved to the CMU, and referred to by guards as "balancers." *Id.* at ¶ 96.

Plaintiffs have plausibly alleged facts that demonstrate that they were designated to the CMU based not on a legitimate reason, but on the discriminatory notion that, as vocal Muslims, they pose a greater threat to prison security than other prisoners. There are 19,720 inmates within BOP custody who are classified as "high-risk," due to gang, international, or domestic terrorist associations, and the BOP has custody of 1,200 domestic or international terrorists. *Id.* at ¶ 34. Yet neither Mr. Twitty nor Mr. Jones was convicted of a crime related to terrorism. Beyond their near immaculate disciplinary records, the only characteristic Mr. Jayyousi, Mr. Aref, Mr. Jones, and Mr. Twitty share is adherence to Islam. All are vocal Muslims, and all were designated to the CMU while thousands of other high-risk prisoners were not. Given the religious disparity in the CMU, the lack of a reasonable justification for the designations of these Plaintiffs gives rise to their equal protection claims. *See, e.g.*, *Delaney v. Dist. of Columbia*, 659 F. Supp. 2d 185, 198 (D.D.C. 2009) (finding that plaintiff stated an equal protection claim where she alleged she was subject to discriminatory treatment when attempting to visits clients in prison, that defendants had no justifiable basis for doing so, and that defendants knew that she was an African-American female).

i. Kifah Jayyousi

Mr. Jayyousi is a 48 year-old United States citizen from Detroit, Michigan. Compl. ¶ 198. He is deeply committed to his wife, three daughters and twin sons. *Id*. at ¶ 198. Although Mr. Jayyousi is incarcerated for a terrorism-related conviction, his offense conduct principally involved charitable donations to the Global Relief Foundation. *Id*. at ¶ 202, 207. The trial court found that there was no evidence that Mr. Jayyousi continued his involvement in the offense past 1998, and that he had totally withdrawn from the alleged conspiracy in the case. *Id.* at ¶ 207. Judge Cook recommended that Mr. Jayyousi be housed at FCI Milan in Michigan, near his family. *Id*. at ¶ 205. Mr. Jayyousi is a low security prisoner with no history of communications or serious disciplinary infractions. *Id*. at ¶¶ 208-10. While housed at FDC Miami, Mr. Jayyousi enjoyed contact visits without incident. *Id*. at ¶ 208.

Nonetheless, in June 2008 the BOP designated Mr. Jayyousi to the CMU. *Id*. at ¶ 211. When shown a copy of his records at the CMU, Mr. Jayyousi noticed that they had been altered to elevate his sole infraction, a moderate category offense for pushing the emergency button in his cell when he was denied a scheduled call to his wife following his daughter's surgery, to a high category offense. *Id*. at ¶ 209. Furthermore, the Notice of Transfer he received after arriving at the CMU incorrectly stated that he "used religious training to recruit other individuals in furtherance of criminal acts in this country as well as many countries abroad," and that he had "significant communication, association and assistance to al-Qaida, a group which has been designated as a foreign terrorist organization." *Id*. at ¶ 212. Mr. Jayyousi immediately informed BOP officials at the CMU that the information in his Notice to Transfer was erroneous, consisting largely of allegations that were rejected at trial. *Id*. at ¶ 213. Despite his efforts to correct his record, Mr. Jayyousi's grievances were summarily denied. *Id.*

Defendants also refer to Mr. Jayyousi's terrorism-related conviction as the legitimate alternative explanation for his CMU designation, but as with Mr. McGowan, were his *conviction* itself Defendants' true motivation, there would be no need for Mr. Jayyousi's Notice of Transfer to exaggerate and misstate his offense conduct. Similarly, it is unclear why his disciplinary records have been altered, unless it is to provide cover for Defendants' true, discriminatory motivation. *Cf Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) ("The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent . . . . Such an inference is of course in line with how evidence of consciousness of guilt is treated in other cases, criminal or civil"). In light of the BOP's prevarications and the striking overrepresentation of Muslims at the CMU (including Muslims who were not convicted of crimes related to terrorism), Mr. Jayyousi has plausibly alleged religious discrimination.

ii. Yassin Aref

Mr. Aref is married with four young children, and resided with his family in Albany, New York after being granted refugee status in the United States. *Id*. at ¶ 103. His conviction arose from a well-publicized and controversial sting operation, and solely involved his witnessing of a loan transaction in his role as an Imam. *Id*. The government acknowledged at trial that it was not seeking to establish or prove that Mr. Aref was a terrorist. *Id*. Mr. Aref is a low security prisoner with a *completely* clean disciplinary record. *Id*. at ¶¶ 110, 112. While he was housed in Rensselaer County Jail, he enjoyed daily telephone calls and contact visits with his wife and children without incident. *Id*. at ¶ 109.

However, ignoring his clean institutional record and the court's express recommendation that he be housed as close to Albany as possible, the BOP designated Mr. Aref to the CMU for unspecified "security concerns." *Id*. at ¶¶ 110, 112. And just as with Mr. McGowan and Mr.

Jayyousi, the Notice of Transfer that Mr. Aref received shortly after his arrival at the CMU mischaracterized his conviction, stating that his "offense conduct included significant communication, association, and assistance to Jaish-e-Mohammed (JeM), a group which has been designated a foreign terrorist organization." *Id*. at ¶ 113. But Mr. Aref was convicted in an FBI *sting*; he never actually displayed a propensity – *or ability* – to reach out to any terrorist group. Mr. Aref exhausted the grievance process attempting to correct his record to no avail, and received no other information explaining his designation to the CMU. *Id*. at ¶¶ 113, 114.

Defendants claim that the nature of Mr. Aref's conviction explains his CMU designation. MTD at 38. But again, this is belied by Defendants' mischaracterization of Mr. Aref's conviction and offense conduct. Indeed, Defendants fail to address the government's own representation at trial that it did *not* seek to prove that Mr. Aref was a terrorist. *Id*. at ¶ 107. In light of the BOP's refusal to correct the misleading and inaccurate information on Mr. Aref's Notice of Transfer, and the lack of any evidence suggesting he warrants heightened monitoring, Mr. Aref has plausibly alleged that his CMU designation is not based on his offense conduct, but rather on discriminatory animus.

iii. Royal Jones and Avon Twitty

As explained above, Defendants claim that the nature of Mr. Jayyousi's and Mr. Aref's convictions, rather than their religion, explain their CMU designation. MTD at 38. But Mr. Jones's and Mr. Twitty's designations further illustrate why this alternative explanation is implausible. Both Mr. Jones and Mr. Twitty are Muslim, but neither of them was convicted of a crime related to terrorism. Compl. at ¶¶ 188, 184, 126, 127. Rather, they were placed in the CMU in retaliation for protected First Amendment activity, which includes playing a leadership role in Muslim communities at previous BOP facilities. *Id*. at ¶¶ 142, 188. A terrorist-related conviction cannot explain Mr. Jones's and Mr. Twitty's CMU designations, and Defendants'

explanations for these designations, strain credulity. *See supra*. In other words, Mr. Twitty's and Mr. Jones's designations, animated by religious discrimination, lay bare the fallacy of Defendants' attempt to suggest that Mr. Jayyousi's and Mr. Aref's designations were triggered by the nature of their convictions. *See Washington*, 426 U.S. at 242 (invidious discrimination must necessarily be "inferred from the totality of the relevant facts"). Here, the totality of the currently available facts leads to the plausible inference that it was Plaintiffs' common religion, and Defendants' discriminatory beliefs about that religion, that caused Plaintiffs' designation to the CMU. For these reasons, Plaintiffs' equal protection claim must survive Defendants' motion to dismiss.

III. PLAINTIFFS HAVE ADEQUATELY PLED VIOLATIONS OF THE FIRST AND FIFTH AMENDMENTS BASED ON RESTRICTION OF THEIR ABILITY TO COMMUNICATE WITH FAMILY WITHOUT REASONABLE RELATIONSHIP TO LEGITIMATE PENOLOGICAL INTERESTS.

In their second and third causes of action, Prisoner and Family Plaintiffs allege that the CMU's severe restrictions on communication with family members violate their right to freedom of association and substantive due process. Because these restrictions interfere with Plaintiffs' exercise of those rights without reasonable relationship to legitimate penological interests, Plaintiffs have adequately stated claims under the First and Fifth Amendments.

A. Prisoners and Their Family Members Retain a Limited Right to Freedom of Association and Family Integrity under the First and Fifth Amendments.

It is axiomatic that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). "A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Thus, the Supreme Court has consistently held that a prison regulation that

infringes on First Amendment rights must have a valid, rational connection to a legitimate governmental interest. *Turner*, 482 U.S. at 89-91.

The First Amendment protects the right, in the prison context, to maintain vital relationships with family members and members of the community both through visitation and through telephone calls. This right "may be defined expansively as the First Amendment right to communicate with family and friends." *Searcy v. United States*, 668 F. Supp. 2d 113, 122 (D.D.C. 2009) (citation omitted). While prisoners have no unfettered right to telephone calls or visits, these methods of communication are a means of exercising the broad First Amendment right, and thus are subject only to rational limitation in the face of legitimate security interests. *See id.* at 122 (collecting cases); *see also, Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (recognizing "legitimate demands of those on the 'outside'" who seek to enter the prison, including "families and friends who seek to sustain relationships") (citations omitted).

Defendants acknowledge the applicability of this precedent with respect to reasonable telephone access, but would deny the First Amendment implications of restricting visitation. MTD at 22. But neither logic nor precedent supports distinguishing between the two methods of communication, especially given the pivotal role visits play in preserving a prisoner's relationship with loved ones and other members of the community. Contact visitation, in particular, has unique properties that cannot be substituted by other forms of communication. Such a visit, for example, is the only possible way for a prisoner to maintain any relationship with a pre-verbal child. *See*, *e.g.*, *Boudin v. Thomas*, 533 F. Supp. 786, 793 (S.D.N.Y. 1982), appeal dismissed and remanded, 697 F.2d 288 (2d Cir. 1982). And while the Supreme Court has not squarely ruled, in *Overton* or elsewhere, on the question of whether there is a constitutional

right to reasonable opportunities for visitation, its close scrutiny of restrictions on visitation foreshadow that holding.

In *Pell*, for example, the Court upheld a ban on prison visits from journalists, but noted that the regulation was permissible in part because prisoners retained "an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison." 417 U.S. at 825. In so holding, the *Pell* Court cautioned that it would not defer to prison officials when there was "substantial evidence in the record to indicate that the officials [had] exaggerated their response" to a problem. *Id*. at 827. By subjecting the restrictions to close analysis, the Court clearly signaled its recognition that vital First Amendment interests are at stake in prison visitation policy. *See also, Steinbach v. Branson*, No. 1:05CV101, 2007 U.S. Dist. LEXIS 75156 at *19 (D.N.D. Oct. 9, 2007) (noting "suggestion in *Pell* that visitation has a free speech nexus"). Scrutiny is especially appropriate when, as is the case here, the challenged restrictions interfere with family relationships, including the parent-child bond, specially protected by the Constitution. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered against the State's unwarranted usurpation, disregard, or disrespect").

In light of these critical interests, Plaintiffs' First Amendment right to freedom of association with loved ones prohibits the arbitrary or unreasonable restriction of visitation, and requires application of the *Turner* standard. *See*, *e.g*., *Bazzetta v. McGinnis*, 286 F.3d 311, 316 (6th Cir. 2002), judgment rev'd on other grounds, 539 U.S. 126 (2003) (First Amendment right to visitation requires *Turner* scrutiny); *Caraballo Sandoval v. Onsted*, 35 F.3d 521, 525 (11th

Cir. 1994) (suggesting existence of First Amendment right, but upholding denial of visitation under *Turner*); *Towle v. Comm'r of N.H. Dept. of Corr.*, No. 06-CV-464, 2007 U.S. Dist. LEXIS 27905 at *19-23 (D.N.H. Apr. 16, 2007) (prisoners retain a First Amendment right to intimate association, but regulations at issue survive *Turner* inquiry); *Calderon v. State of Conn. Dept. of Corr.*, No. 04-CV-1562, 2006 U.S. Dist. LEXIS 81303 at *23-24 (D. Conn. Sep. 1, 2006) (suggesting a First Amendment right of association with regard to visitation); *King v. Frank,* 328 F. Supp. 2d 940, 945-46 (W.D. Wis. 2004) (Supreme Court's use of *Turner* test in *Overton* suggests that prisoners retain some right to visitation); *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1233 (M.D. Ala. 1998) (prisoners retain constitutional right to visitation subject to *Turner* analysis); *Ali v. Gibson*, 483 F. Supp. 1102, 1119 (D.V.I. 1980), aff'd in part and rev'd in part, 631 F.2d 1126 (3rd Cir. 1980) (same).

Defendants rely heavily on *Overton* to avoid First Amendment scrutiny of visitation restrictions, but that case lends them minimal support. In *Overton*, a class of prisoners challenged visitation restrictions under the First, Eighth, and Fourteenth Amendments. 539 U.S. at 130. The Court reaffirmed that the Constitution protects "highly personal relationships," indicating that prisoners surrender "*many* of the liberties and privileges enjoyed by other citizens." *Id*. at 131 (emphasis added). Far from extinguishing those rights, however, the Court noted that "*some* curtailment of that freedom must be expected in the prison context," *id*. (emphasis added), and explicitly summarized: "We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners." *Id.* at 131-32. Assuming that prisoners continue to enjoy constitutional rights to family association, the Court analyzed the reasonableness of the visitation restrictions under the *Turner* framework. *Id*.

Lack of physical contact during visitation was not an issue challenged by the plaintiffs in *Overton,* and thus the Court's failure to subject that aspect of Michigan's visitation rules to constitutional scrutiny is not surprising, nor does it provide any support for Defendants' argument. *See* MTD at 23. And while *Block v. Rutherford,* 468 U.S. 576 (1984), did squarely uphold a ban on physical contact during visits, it did not deny any constitutional dimension to the rule. Rather, the Court relied upon sworn testimony establishing the legitimate security purposes served by an across-the-board ban on contact visits at the largest jail in the country, where thousands of pre-trial detainees were held for a week or less pending trial. *Id.* at 577, 588-89.

While Defendants seem to acknowledge that telephone calls also play a critical role in allowing prisoners and their loved ones to maintain intimate relationships, *see*, *e.g.*, *Owens-El v. Robinson*, 442 F. Supp. 1368, 1386 (W.D. Pa. 1978) ("telephone access to the outside world is good for inmate morale, helps lessen stress, [and] helps maintain relationships"), Defendants would reframe Plaintiffs' claim to a plea for a certain number of telephone minutes. MTD at 23. But the relevant question is not whether prisoners have a constitutional right to 300 minutes of telephone access a month, but whether the CMU restrictions on telephone access are legitimate.

As this Court and others have consistently held, prisoners have a constitutional right to communicate with people outside prison, and the telephone provides a vital means to exercise that right. *Searcy,* 668 F. Supp. 2d at 121; *see also, Almahdi v. Ashcroft*, 310 Fed. Appx. 519, 522 (3rd Cir. 2009); *Valdez v. Rosenthal*, 302 F.3d 1039, 1048 (9th Cir. 2002). As such, "there is no legitimate governmental purpose to be attained by not allowing reasonable access to the telephone, and . . . such use is protected by the First Amendment." *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (citation omitted). Acknowledging the First Amendment speech and associational interests at stake, courts have consistently subjected curtailments on a prisoner's

telephone access to *Turner* analysis. *See*, *e.g.*, *Almahdi*, 310 Fed. Appx. at 521-22; *Valdez*, 302 F.3d at 1048; *Saenz v. McGinnis*, No. 98-2022, 1999 U.S. App. LEXIS 23246, at *5-6 (6th Cir. Sep. 17, 1999); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996); *Benzel v. Grammer*, 869 F.2d 1105, 1108-09 (8th Cir. 1989).

Along with the First Amendment, the Fifth Amendment's due process clause also protects the right "to enter into and maintain certain intimate human relationships." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). This right is insulated "against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id*. The Supreme Court has explicitly recognized that the "personal affiliations that exemplify these considerations [] are those that attend the creation and sustenance of a family – marriage; childbirth; the raising and education of children; and cohabitation with one's relatives." *Id*. at 619-20. Indeed, the "deep attachments and commitments" inherent in familial relationship warrant particular protection. *Id*.; *see also Moore v. East Cleveland*, 431 U.S. 414 (1977); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Defendants argue that this Court should disallow Plaintiffs the opportunity to challenge the restrictive CMU conditions under the Fifth Amendment because their status as prisoners deprives them of a "free-standing" constitutional right to reasonable telephone access and visitation. MTD at 22-23. In so arguing, Defendants again rely heavily on *Overton*. But as explained above, *Overton* actually provides support for the continued existence of the right, albeit with restrictions. And indeed, *Overton*'s recognition that a person's right to family association survives incarceration has been consistently followed. *See, e.g.*, *MacCool v. Schriro,* 280 Fed. Appx. 663, 664 (9th Cir. 2008) (analyzing family visitation regulation impinging on prisoner's due process rights under *Overton* and *Turner*); *Wirsching v. Colorado,* 360 F.3d 1191

(10th Cir. 2004) (same); *Poole v. Michigan Reformatory*, No. 10-CV-378, 2010 U.S. Dist. LEXIS 75222, at *29-32 (W.D. Mich. Jul. 26, 2010) (same).

CMU restrictions significantly burden and curtail Plaintiffs' freedom of association. Plaintiffs are subject to an exceptionally harsh categorical ban on contact visits, and their access to visits is severely circumscribed in number and duration. Compl. at ¶¶ 37, 46. The frequency and length of their telephone calls are restricted to a fraction of the telephone privileges afforded to almost all other federal prisoners. *Id*. at ¶¶ 64, 65. These communications restrictions have substantially impaired Plaintiffs' and Family Plaintiffs' familial relationships and rights of association with one another. *Id*. at ¶ 9.

Mr. Aref's ability to form a relationship with his youngest child, for example, has been completely blocked. *Id*. at ¶¶ 123-24. Other plaintiffs, such as Mr. McGowan and Mr. Twitty, have seen their relationships with family members deteriorate while at the CMU. *Id*. at ¶¶ 144, 169-71. Destroying any semblance of a normal parent-child relationship, Mr. Jayyousi and Mr. Aref have not hugged their young children since their CMU designation, and will not be able to do so until their children are teenagers, *id*. at ¶ 109 (Aref), or fully grown adults, *id*. at ¶¶ 216-19 (Jayyousi). Family Plaintiffs have experienced the same inability to maintain the integrity of their relationships with their loved ones at the CMU, *id*. at ¶¶ 176-82 (Synan), and have seen their family units suffer as a result. *Id*. at ¶¶ 227-31 (H. Jayyousi).

In light of longstanding precedent recognizing that both prisoners and non-prisoners retain free associational and due process rights when consistent with the legitimate penological objectives of the correctional system, *Pell*, 417 U.S. at 822, and in light of substantial interference with the means to exercise those rights at the CMU, the Court must examine CMU restrictions pursuant to the reasonableness test set forth in *Turner*.

B. The CMU Restrictions, and Their Impact on Plaintiffs' Constitutional Rights, Cannot Be Justified Under *Turner*.

"When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Courts consider four factors under *Turner*: (1) Whether "a valid, rational connection [exists] between the prison regulation and the legitimate governmental interest put forward to justify it" and whether "prison regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the expression"; (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. The allegations in the Complaint state valid claims for relief under each of these four factors.

i. First *Turner* Factor

The first *Turner* factor requires "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id*. at 89. The connection must not be "so remote as to render the policy arbitrary or irrational." *Id.* at 89-90.

Plaintiffs challenge excessive restrictions on their access to visits and telephone calls. Compl. ¶¶ 256, 258. As pleaded, and as described in detail *supra*, Plaintiffs are subject to a categorical ban on contact visits, *id*. at ¶¶ 37-45, and strict limitations on the number and duration of calls and visits. *Id*. at ¶¶ 37-45, 46-68. Those restrictions stand in stark contrast to BOP regulations allowing far more access to visits and calls for other federal prisoners. *Id*. Defendants, meanwhile, identify the "goal" of the CMU restrictions as "effective monitoring of

the communications of high-risk inmates," in order "(1) 'to protect the safety, security, and orderly operation of Bureau facilities,' and (2) to 'protect the public.'" MTD at 25.

Plaintiffs agree that protection of the safety and operations of a prison and protection of the public are legitimate penological interests under *Turner*. Similarly, Plaintiffs agree that "effective monitoring of the communications of high-risk inmates" could serve those interests. However, Defendants fail to adequately explain how *restriction* of Plaintiffs' access to visits or the telephone is rationally connected to *monitoring* that communication.

Defendants claim that limitation of physical contact "enables effective monitoring" but ignore Plaintiffs' allegations that equally effective monitoring can and does occur without limiting physical contact. Compl. ¶¶ 41-43. Defendants also argue that limiting Plaintiffs' access to telephone calls and visitation enhances monitoring because it reduces the total number of calls and visits that will occur. MTD at 28. For this, Defendants rely wholly on the Supreme Court's finding in *Overton* that a reduction in total number of visits in Michigan State prisons was rationally related to prison security. *Id.*, citing 539 U.S. at 129-33. But the *Overton* Court so held based on testimony that the restrictions in question arose in response to an increase in visits to Michigan prisons that strained prison resources and led to difficulties in maintaining order and preventing transmission of contraband. 539 U.S. at 129. There has been no such sworn testimony here. Nor is there evidence or even an allegation that the number of contact visits or telephone calls at the Marion or Terre Haute prisons, or within the CMUs, has posed any particular security concern.

Moreover, Defendants' arguments fail to demonstrate "a valid, rational connection between" the imposition of the CMU restrictions *on Plaintiffs* and their asserted interests. *Turner*, 482 U.S. at 89 (internal quotations omitted). Prior to their CMU designations, Plaintiffs

exercised their expressive and family associational rights without major incident. None of them had been disciplined for any communications-related infraction within the past ten years, nor incurred any major disciplinary offenses. Compl. ¶¶ 110, 130, 159, 186, 209. As a result, Plaintiffs have adequately alleged that there is no "valid, rational connection" between their histories and the CMU restrictions. *Cf Poole*, 2010 U.S. Dist. LEXIS 75222 at *29-30 (finding a valid connection between the infringement of a prisoner's right to intimate association by way of a visitation restriction on the basis of *that* prisoner's history of smuggling drugs into prison); *Steinbach*, 2007 U.S. Dist. LEXIS at *56 ("if [a particular inmate] had 'intentionally' attempted to introduce drugs into the prison, there is no question that prison officials should be allowed to impose tough restrictions" on that prisoner).

Defendants have also failed to explain why the imposition of CMU restrictions on Plaintiffs is rationally related to improving prison security and operations or to protecting the public. *See, e.g.*, *Beard v. Banks,* 548 U.S. 521, 535 (2006) ("*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective"); *King v. Federal Bureau of Prisons,* 415 F.3d 634, 639 (7th Cir. 2005) ("the government must present some evidence to show that the restriction is justified"); *see also Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034, 1042 (W.D. Wis. 2007) (requiring that "[p]rison officials have the initial burden to show a logical connection between the [regulation] and their legitimate interest" and collecting cases). Defendants do not refer to any specific misconduct or danger stemming from Plaintiffs that is addressed by the CMU restrictions. Instead, Defendants simply rely on general assertions that "[t]here have been cases of imprisoned terrorists communicating with their followers regarding future terrorist activity." MTD at 25-26 (quoting 75 Fed. Reg. at 17326). But Defendants do not argue that such a concern is applicable to

Plaintiffs themselves. Without more, any purported connection between the imposition of the restrictions on Plaintiffs and the claimed penological interests is "so remote as to render the [prison restriction] arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

Moreover, under the first *Turner* factor, "the governmental objective must be a legitimate and neutral one." *Id*. at 90. A restriction is neutral only if prison officials restrict communications "solely on the basis of their potential implications for prison security . . . unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415-16; *see also Amatel* v. *Reno,* 156 F.3d 192, 197 (D.C. Cir. 1998) ("as voiced by the Court, the 'neutrality' requirement is an absolute prerequisite . . . . [T]he Court's actual application of the requirement, with its focus on the existence of some legitimate goal and on assuring that rules are in fact not framed so as to advance illegitimate or unvetted goals, must control [courts'] understanding of its meaning").

The CMU restrictions are neither legitimate nor neutral under *Turner* and *Thornburgh*. Indeed, Plaintiffs have alleged both that the CMU's telephone and visitation restrictions have been imposed upon them discriminately, and in retaliation for exercise of First Amendment Rights. Compl. at ¶¶ 92-102.

The first *Turner* factor is the *sine qua non* of the four-part analysis. *Morrison v. Hall*, 261 F.3d 896, 901 (9th Cir. 2001); *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) ("[F]ailure on this prong ensures a finding of unconstitutionality"). Accordingly, since Defendants are unable to establish the first prong of the test, the Court need not address the remainder of the *Turner* factors. *Cole v. Me. Dep't of Corr*., 07-82-B-W, 2009 U.S. Dist. LEXIS 19921, at *88 (D. Me. Mar. 5, 2009); *Williams v. Donald*, No. 01-CV-292, 2007 U.S. Dist. LEXIS 89079, *9 (M.D. Geo. Dec. 4, 2007), vacated as moot, 322 Fed. Appx. 876 (11th Cir. 2009). Regardless, analysis of the remaining prongs does not support dismissal.

ii. Second *Turner* Factor

The second *Turner* factor requires the court to consider "whether there are alternative means of exercising the right that remain open to prison inmates." 482 U.S. at 90. "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." *Id.* (internal citations and quotations omitted).

Here, there are no alternative methods for Plaintiffs to exercise their First and Fifth Amendment rights. As pleaded in the Complaint, Plaintiffs have been unable to meaningfully maintain relationships with their family under the CMU restrictions. Compl. ¶¶ 44-45, 66-68, 118-25, 144, 153, 156-57, 169-74, 177-79, 180-81, 216-20, 226-32. There is no substitute for physical contact with loved ones – young children in particular. *Id*. at ¶¶ 109, 216-19. Similarly, real-time communication is crucial for Plaintiffs to communicate and maintain intimate relationships with family and friends. *Id*. at ¶¶ 45, 179. The visitation policy at the CMU is so restrictive as to be impossible for many of the Plaintiffs' families and intimates. *Id*. at ¶¶ 123, 144, 170, 181, 226-27.

Defendants argue that alternative methods of communication include mail and email. MTD at 29. Such alternatives are insufficient, however, because they do not allow any form of essential physical contact, which, as alleged, is crucial to forming intimate familial relationships. Compl. ¶ 45. Moreover, mail and email do not allow crucial real-time or live communication, which is equally essential. *Id.* at ¶¶ 45, 179. While alternatives "need not be ideal," *Overton*, 539 U.S. at 135, they should at least be sufficient to allow the inmate to exercise his limited constitutional rights. Plaintiffs have adequately alleged that here they are not.

iii. Third *Turner* Factor

The third *Turner* factor instructs courts to consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 482 U.S. at 90. "When 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." *Id.*

Plaintiffs have adequately alleged that modifying the CMU will not have a substantial, or negative, impact on prison officials or other prisoners. The CMUs are already equipped to allow contact visits and could be easily modified to allow more such visits. Compl. at ¶ 43. Given that only one social or attorney-client visit may currently take place in the CMU at any given time, and all social visits are monitored live by Unit staff, effective monitoring of communication could occur by allowing the visit to take place in the attorney-client contact visiting room at no additional cost. *Id*. Visits could easily be tape recorded, and many areas in the CMU are already wired for audio and video recording. *Id*. Thus, it is reasonable to assume that a visiting area could be similarly set up at little cost. Indeed, according to a 2006 OIG report, eight BOP facilities are already set up to audio record contact visits. *Id*. The minimal modifications required to allow for contact visits would have little impact on resource allocation by the prison.

Similarly, loosening CMU restrictions on the number and duration of visits would have no significant impact on BOP resources. Prisoners at the Administrative Maximum facility USP Florence, the only "supermaximum" facility in the federal system, receive four times more visitating time than CMU prisoners. *Id*. at ¶ 61. Thus, the BOP can and has harmonized the constitutionally-protected need for adequate visitation with security concerns.

Modification of the CMU telephone restrictions would also have little negative impact on prison staff and other officials. CMU officials already monitor every phone call made from the

CMU. *Id*. at ¶ 68. And contrary to Defendants' claims, MTD at 30, the small size of the CMUs means that such monitoring could continue with minimal cost or effect.

iv. Fourth *Turner* Factor

Finally, courts consider whether there are "ready alternatives" to the restriction to secure the penological interest. *Turner*, 482 U.S. at 90-91. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation . . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id*. The Court in *Turner* was careful to explain that the fourth factor is not a least-restrictive-means test, but "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id*. at 89.

Based on the arguments presented *supra*, *see* Section III(B)(iii), Plaintiffs have adequately alleged that *de minimis* alternatives exist to allow Plaintiffs to exercise their First and Fifth Amendment rights. The BOP already provides such opportunities to the vast majority of prisoners in a way which is economically feasible. And Defendants' unsubstantiated concerns about contact visits, MTD at 31, are easily addressed by continuing to search prisoners and visitors before and after visits.

In conclusion, Plaintiffs have plainly stated plausible claims for relief for violation of their First Amendment and Fifth Amendment substantive due process rights. As such, dismissal is inappropriate.

IV. PLAINTIFFS HAVE ADEQUATELY PLED CRUEL AND UNUSUAL PUNISHMENT ARISING FROM THE HARSH CMU RESTRICTIONS.

Plaintiffs' fourth cause of action challenges the totality of ways in which CMU designation – and Plaintiffs' resultant isolation from the outside world – works a deprivation of the essential human need for meaningful contact with one's family. *See Inmates of Occoquan v. Barry,* 844 F.2d 828, 836 (D.C. Cir. 1998), *citing Rhodes v. Chapman,* 452 U.S. 337, 348 (1981) (the Eighth Amendment prohibits deprivation of "essential human needs.").

A valid claim of cruel and unusual punishment involves both objective and subjective components: plaintiffs must allege conditions of confinement that "involve the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes,* 452 U.S. at 347. They must also allege "deliberate indifference" to the harmful impact of these conditions by prison officials. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). Plaintiffs have adequately alleged both prongs, and thus dismissal is inappropriate.

A. CMU Designation Deprives Plaintiffs of the Essential Human Need for Meaningful Contact with Their Families.

The maintenance of close and meaningful family relationships is an essential need, and is a part of the minimal civilized measure of life's necessities. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man . . . far more precious . . . than property rights") (citations omitted). "[C]onditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . when they have a mutually reinforcing effect that produces the deprivation of a single, identifiable human need." *Wilson,* 501 U.S. at 304. Thus, in deciding whether Plaintiffs have

stated a claim, the court must look to the combined impact of the CMU restrictions on the essential human need for family contact.

Plaintiffs have been designated to the CMU for the express purpose of restricting their access to the outside world. Compl. ¶¶ 1-2, 36. Not only are they denied all physical contact with loved ones, including children and spouses, but the opportunity for non-contact visitation is greatly circumscribed. *Id.* at ¶¶ 41, 46, 52-57. Where they might seek to compensate for the restrictive visitation policy by greater telephone communication, they have been limited to one or two short calls per week. *Id.* at ¶¶ 64-65. As explained below, these restrictions are arbitrary and lack penological purpose.

B. CMU Designation Involves Unnecessary and Wanton Infliction of Pain.

In protecting the minimal civilized measure of life's necessities, the Eighth Amendment prohibits "unnecessary and wanton" infliction of pain, including psychological pain. *Chandler v. D.C. Dep't of Corr.*, 145 F.3d 1355, 1360 (D.C. Cir. 1998). The CMU's denial of the essential human need for family contact works such "unnecessary and wanton" pain.

Mr. Aref, for example, was designated to the Terre Haute CMU in May 2007. Compl. ¶ 16. For two and a half years he received only one 15 minute telephone call per week, and four hours of non-contact visitation a month. *Id.* at ¶¶ 52, 64. He is serving a 15 year sentence and, as his designation to the CMU was based entirely on his offense conduct, he expects to serve the entirety of that sentence at the CMU. *Id.* at ¶¶ 44, 83, 113. A 15-year ban on all physical contact with one's children, combined with extremely limited telephone access, uncontrovertibly causes psychological pain. *Id*. at ¶¶ 45, 62, 123-125.

"The Eighth Amendment prohibits punishment that is 'totally without penological justification.'" *Campbell-El v. District of Columbia,* 881 F. Supp. 42, 43 (D.D.C. 1995), *quoting Rhodes*, 452 U.S. at 346 (equating punishment without penological justification to unnecessary

and wanton infliction of pain). Thus, while some conditions are so harsh they may not be imposed even with penological purpose, in other cases the existence or lack of a legitimate purpose is determinative. *See*, *e.g.*, *Overton,* 539 U.S. at 136-37 (denying Eighth Amendment claim because two-year visitation ban for repeated substance abuse violations served the legitimate penological purpose of effecting prison discipline); *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 899 F. Supp. 659, 674-75 (D.D.C. 1995) aff'd in part, r'vd in part, 93 F.3d 910 (D.C. Cir. 1996) (initially holding that a ban on contact visitation with children combined with inadequate child placement counseling violated the Eighth Amendment, but reversing based on a new declaration by the Director of the D.C. Department of Corrections identifying significant security risks in the visitation program to D.C. General Hospital, including escape, assaults, and passing of contraband).

As the Supreme Court recognized in *Overton*, incarceration necessarily limits access to one's family, as do legitimate security concerns and discretionary decisions of skilled prison administrators. Thus in *Women Prisoners*, the Court vacated the portion of its order holding that lack of child visitation violated the Eighth Amendment based on the Director's sworn evaluation of the security risks involved in a particular visitation program. By contrast, Plaintiffs allege restrictions that serve no penological purpose. Compl. ¶¶ 41-43, 62, 68; *see also* Section III(B), *infra*. Purposeless imposition of pain violates the Eighth Amendment. *See Inmates, DC Jail v. Jackson,* 416 F. Supp. 119, 123 n. 3 (D.D.C. 1976) ("The Court does, of course, realize that there may be valid security reasons for prohibiting contact visits in correctional institutions. Such a determination must, however, be the result of a reasoned analysis of the relevant factors, which the defendants' practice is clearly not"). As the parties have not had the opportunity for

discovery, the time is not yet ripe for Defendants to produce evidence, assuming any exists, to contradict these well-pled allegations.

C. CMU Designation Imposes Arbitrary or Disproportionate Punishment.

Plaintiffs also state an Eighth Amendment claim because they have been arbitrarily (or discriminatorily) subjected to psychological pain. Compl. at ¶¶ 77-79, 92-95. And even if CMU restrictions are imposed in response to specific acts, *see* MTD at 35-36, 38, that response may be disproportionate and thus also unlawful.

Conditions which pass Eighth Amendment scrutiny when applied evenhandedly are unconstitutional if imposed arbitrarily. *See Overton,* 539 U.S. at 137 ("If the withdrawal of all visitation privileges were permanent or for a much longer period, *or if it were applied in an arbitrary manner to a particular inmate*, the case would present different considerations") (emphasis added); *Furtado v. Bishop*, 604 F.2d 80, 88 (1st Cir. 1979) (segregation amounts to cruel and unusual punishment when imposed arbitrarily and without basis; collecting cases); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1308-09 (S.D.W.V. 1981) (courts will intervene when restrictions are imposed arbitrarily or in a punitive or discriminatory fashion; collecting cases); *Laaman v. Helgemoe*, 437 F. Supp. 269, 321 (D.N.H. 1977) (prison officials must "apply a visitation policy with an even hand, and the deprivation of a visit or visits to a specific individual calls for a justification greater than that demanded by the Constitution for the formation of the overall policy").

The question of whether CMU restrictions are imposed arbitrarily on Plaintiffs is not susceptible to dismissal on the pleadings. Plaintiffs have plausibly alleged that they have been singled out for CMU designation for discriminatory and/or retaliatory reasons, Compl. ¶¶ 77-79, 92-95, and that is enough to entitle them to discovery. *Black v. Warden,* 467 F.2d 202, 203-204 (10th Cir. 1972) (denying motion to dismiss Eighth Amendment claim based on arbitrary

segregation); *compare Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 816-818 (E.D. Mich. 2001) (describing full bench trial that resulted in the *Overton* decision); *see also, Williams v. Frank*, 06-CV-1051, 2007 U.S. Dist. LEXIS 78687 at *14 (E.D. Wis. Oct. 23, 2007) (denying Eighth Amendment claim based on visitation restriction because plaintiff failed *on summary judgment* to provide evidence the restriction was imposed arbitrarily); *Ricco v. Conner*, 146 Fed. Appx. 249, 251, 255 (10th Cir. 2005) (denial under similar circumstances).

Defendants appear to argue that Plaintiffs' designation to the CMU, and the resulting pain they must endure, is not arbitrary, but rather is based on the "reason" stated in each Plaintiff's notice of transfer. MTD at 21, 35-36, 38. As this assertion contradicts Plaintiffs' allegations, it may not be considered upon a motion to dismiss. But even if the restrictions on Plaintiffs' communication are imposed in reaction to a specific incident or series of incidents, that punishment may very well be disproportionate, and thus violate the Eighth Amendment regardless. The Supreme Court has repeatedly warned that punishment may not be "grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes*, 452 U.S. at 347. This Court and others have applied this principle to strike down prison conditions that are disproportionate to a given disciplinary infraction. *See Fulwood v. Clemmer,* 206 F. Supp. 370, 379 (D.D.C. 1962) (placement in restrictive "Special Treatment Unit cell" for six months, and subsequent denial of general population privileges, including access to programming and Saturday visits, held disproportionate to disciplinary infraction arising from unauthorized and offensive religious preaching); *Chapman v. Pickett,* 586 F.2d 22, 27 (7th Cir. 1978) ("Punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment, whether imposed without or within prison walls"); *Leslie v. Doyle,* 868 F. Supp. 1039, 1043 (N.D. Ill. 1994). *Hardwick v. Ault*, 447 F. Supp. 116 (M.D. Ga. 1978), provides a

helpful analogy to the present case. There, a class of prisoners challenged their designation to H-House, the disciplinary wing of a Georgia prison. Like the CMU, H-House was a "prison within a prison," *id*. at 119, to which "problem prisoners" were designated indefinitely, without meaningful explanation or criteria for transfer back to general population. *Id*. at 119, 122-23. Also like the CMU, some prisoners were transferred because they appeared to be leaders within their original prison, and H-House allowed prison officials to isolate them and thus prevent their influence over other prisoners. *Id.* at 122. Finding Eighth Amendment violations, the court held that H-House disproportionately and capriciously inflicted pain upon prisoners. *Id.* at 125. The across-the-board ban on contact visitation contributed to the court's holding, as it was based not on security needs but on economic and administrative convenience. *Id.* at 131.

It is impossible to discount a disproportionality claim here, as the alleged "reason" for Plaintiffs' transfers is not clear. According to Defendants, Mr. Jones and Mr. Twitty, for example, were designated to the CMU based on their alleged involvement in "recruitment and radicalization . . . through extremist, violence oriented indoctrination methods to intimidate or coerce others." Compl. at Exh. E. This alleged "reason" is so vague as to defy comparison to precedent. *Cf. Chapman,* 586 F.2d at 28 (contrasting appropriate punishment for an inmate who refused to shave his beard with that proportional to masterminding a large-scale escape attempt). Plaintiffs must be allowed the discovery necessary to undertake meaningful proportionality review, especially as Plaintiffs' alleged misbehavior here seems tied to their religious observation and teachings. *Id.* (striking down lengthy period of solitary confinement for prisoner's failure to perform work – touching pork on kitchen detail – "especially when viewed in light of the facts that the refusal was based on religious grounds").

In the face of Plaintiffs' allegations of arbitrary, unnecessary and disproportionate infliction of psychological pain, the few cases (all *pro se*) relied on by Defendants provide little support for dismissal. *See* MTD at 32-33. In *Perez v. Federal Bureau of Prisons,* 229 Fed. Appx. 55 (3d Cir. 2007), a federal prisoner was limited to one telephone call per week based on the BOP's finding that his conviction as a leader/organizer of a criminal conspiracy that utilized the telephone to further criminal activity presented a security risk to the institution and community. Perez's right to visit with his family was not limited, nor did he allege that the restrictions were imposed on him arbitrarily, or without penological purpose. *Id.* at 57. It is thus inapposite. *Saleem v. Helman*, No. 96-2502, 1997 U.S. App. LEXIS 22572, *1 (7th Cir. Aug. 21, 1997) challenged the denial of a prisoner's request for a *conjugal* visit with his wife without any allegations that the plaintiff's access to phone calls or non-conjugal, contact visitation was restricted in any way. *Ricco v. Conner*, 146 Fed. Appx. 249, 251 (10th Cir. 2005), is similarly irrelevant, as it involved a five-year denial of visitation as punishment for a prisoner's third stealing offense within a three month period. In dismissing the plaintiff's Eighth Amendment claim, the court specifically relied on the absence of any "indication that the prison officials acted in an arbitrary manner" and the prisoner's continued access to his family through normal telephone privileges. *Id.* at 255.

D. Evolving Standards of Decency

Finally, even if Defendants were correct that precedent does not support an Eighth Amendment challenge to arbitrary and wanton denial of contact visits and telephone access (and they are not), that does not end the inquiry. The nature of the Eighth Amendment belies blind reliance on precedent, because punishment that was once lawful may become "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted); *see*, *e.g.*, *Graham v. Florida,* 130 S. Ct.

2011, 2021 (2010) ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions . . . . The standard itself remains the same, but its applicability must change as the basic mores of society change") (internal citations omitted). Uniquely "flexible and dynamic," *Rhodes,* 452 U.S. at 345, *quoting Gregg v. Georgia*, 428 U.S. 153, 171 (1976), the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

Objective evidence indicates that contemporary standards of decency have evolved in the arena of contact visitation. A 1950s-era survey of 99.3 percent of all male prisoners in the United States discloses the relative rarity of contact visitation during that time. *See* Eugene Zemans & Ruth Shonle Cavan, *Marital Relationships of Prisoners*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 51 (1958). While every prison allowed some spousal visitation, the prisoner and his spouse were separated by a partial (17 prisons) or complete (17 prisons) barrier in 34 of the 46 prisons surveyed. *Id.* at 52. No physical contact at all was allowed at 21 prisons; 24 permitted one simple embrace or handshake. *Id*. at 53.

Fifty years ago contact visitation was the exception, rather than the norm. The story today is vastly different. Every single State correctional department allows for contact visitation for general population prisoners.[6] *Compare Estelle*, 429 U.S. at 97 (surveying State legislation

[6] **Alabama**: http://www.doc.state.al.us/docs/AdminRegs/AR303.pdf at 13; **Alaska**: http://www.correct.state.ak.us/corrections/pnp/pdf/810.02.pdfl at 3; **Arizona**: http://www.azcorrections.gov/Policies/900/0911.pdf at 27; **Arkansas**: http://www.adc.arkansas.gov/adcar_pdf/AR865.pdf at 3; **California**: http://government.westlaw.com/linkedslice/search/default.asp?tempinfo=find&RS=GVT1.0&VR=2.0&SP=CCR-1000 at title – 15: section – 3107; **Colorado**: http://www.doc.state.co.us/conduct-and-dress; **Connecticut**: http://www.ct.gov/doc/LIB/doc/PDF/AD/ad1006atta.pdf; **Delaware**: http://doc.delaware.gov/BOP/Visitation.shtml; **Florida:** https://www.flrules.org/gateway/RuleNo.asp?ID=33-601.728; **Georgia**: http://www.dcor.state.ga.us/pdf/Visitation_Policy.pdf at 15; **Hawaii**: http://hawaii.gov/psd/search?SearchableText=visitation; **Idaho**: http://www.idoc.idaho.gov/our_facilities/visiting_conduct.htm: **Illinois**: http://www.idoc.state.il.us/

and model standards on provision of medical care to prisoners). That the CMU stands alone in imposing a blanket ban on contact visitation for general population prisoners, in the face of a rare 50-state consensus, is compelling evidence of cruel and unusual punishment in violation of the Eighth Amendment. *See Coker v. Georgia,* 433 U.S. 584, 595-96 (1977) (that Georgia is the only state authorizing death penalty for rape of adult women "weighs very heavily" against constitutionality of that punishment).

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subsections/visitationrules/visitation.pdf at 4; **Indiana**: http://www.in.gov/idoc/files/Visitation.pdf at 19; **Iowa**: http://www.doc.state.ia.us/documents/OffenderVisiting.pdf at 11; **Kansas**: http://www.doc.ks.gov/facilities/lcf/inmate-visiting/visiting-conduct; **Kentucky**: http://www.corrections.ky.gov/ksr/visit/; **Louisiana**: no written policy: phone inquiry to Department of Corrections confirmed availability of contact visitation; **Maine**: http://www.maine.gov/corrections/Policies/PrisonerVisitation.pdf at 6; **Maryland**: http://www.dpscs.state.md.us/locations/prisons.shtml; **Massachusetts**: http://www.mass.gov/?pageID=eopssubtopic&L=5&L0=Home&L1=Law+Enforcement+%26+Criminal+Justice&L2=Prisons&L3=State+Correctional+Facilities&L4=State+Correctional+Facilities+Visiting+Policies&sid=Eeops; **Michigan**: http://www.prisontalk.com/forums/archive/index.php/t-26725.html; **Minnesota:** http://www.corr.state.mn.us/offenders/documents/StatewideVisitingRoomRulesEnglishforweb.pdf at 4; **Mississippi**: http://www.mdoc.state.ms.us/visitation.htm; **Missouri**: no written policy; phone inquiry to Department of Corrections confirmed availability of contact visitation; **Montana**: http://www.cor.mt.gov/Facts/visitors.mcpx; **Nebraska**: http://www.corrections.nebraska.gov/pdf/ar/mail/AR%20205.02.pdf; **Nevada**: http://www.doc.nv.gov/ar/pdf/AR719.1.pdf at 17; **New Hampshire**: http://www.nh.gov/nhdoc/documents/7-09_Visiting.pdf at 5; **New Jersey**: http://www.state.nj.us/corrections/pdf/cia_visitation/NJSP.pdf at 3; **New Mexico**: no written policy: phone inquiry to Department of Corrections confirmed availability of contact visitation; **New York**: http://www.docs.state.ny.us/FamilyGuide/FamilyHandbook.html#visig; **North Carolina**: http://www.doc.state.nc.us/DOP/visitation/; **North Dakota**: http://www.nd.gov/docr/family/visitation.html; **Ohio**: http://www.drc.ohio.gov/web/drc_policies/documents/76-VIS-01.pdf at 10; **Oklahoma**: http://www.doc.state.ok.us/Offtech/030118d.pdf; **Oregon**: http://www.oregon.gov/DOC/OPS/PRISON/osp_Visiting.shtml#Physical_Contact_With_Inmates; **Pennsylvania**: http://www.portal.state.pa.us/portal/server.pt?open=space&name=Dir&psname=SearchResult&psid=0&cached=true&in_hi_userid=2&control=OpenSubFolder&subfolderID=9534&DirMode=1; **Rhode Island**: http://www.doc.ri.gov/faq/policies/24.03-3%20DOC.pdf at 7; **South Carolina**: http://www.doc.sc.gov/family/VisitationRules.jsp; **South Dakota**: http://doc.sd.gov/about/faq/visitation.aspx; **Tennessee**: http://www.tennessee.gov/correction/pdf/507-01.pdf at 8; **Texas**: http://www.tdcj.state.tx.us/publications/cid/Offender%20Rules%20and%20Reg%20%288-13-08%29.pdf at 2; **Utah**: http://corrections.utah.gov/visitation_facilities/visiting_rules.html; **Vermont**: http://www.doc.state.vt.us/about/policies/rpd/327.01%20Inmate%20Visits.pdf/view?searchterm=visitation at 4; **Virginia**: no written policy; phone inquiry to Department of Corrections confirmed availability of contact visitation; **Washington**: http://www.doc.wa.gov/facilities/prison/default.asp (links to policy at individual prisons); **West Virginia**: http://www.wvdoc.com/wvdoc/PrisonsandFacilities/tabid/36/Default.aspx; **Wisconsin**: http://www.wi-doc.com/index_adult.htm; **Wyoming**: http://doc.state.wy.us/institutions/visitors.html.

E. Plaintiffs Have Adequately Pled Deliberate Indifference by Defendants.

Defendants do not dispute that Plaintiffs have met the second half of the Eighth Amendment test: that prison officials acted with "deliberate indifference" to Plaintiffs psychological pain and injury. In the context of unconstitutional conditions, deliberate indifference requires that a prison official know of and disregard an excessive risk to inmate health and safety. *Farmer v. Brennan,* 511 U.S. 825 (1994). Plaintiffs have pled that Defendants "willfully and maliciously" subjected Plaintiffs to cruel, inhumane and degrading conditions. Compl. ¶ 268. They have further pled that Defendants are aware of the importance of contact visitation, and reasonable access to visits and telephone calls, *id*. at ¶¶ 37, 63, yet created a policy allowing for Plaintiffs to be arbitrarily denied these fundamental outlets. *Id*. at ¶ 75. No more is required at the pleading stage. *See Chandler v. D.C. Dep't of Corr.,* 145 F.3d 1355, 1361 (D.C. Cir. 1998) (noting that plaintiff pled "with sufficient particularity that" that prison officials "acted with intent to harm him or in knowing disregard of his mental anguish and risk of being killed. Further inquiry may reveal that the correctional officers lacked the necessary intent, but such a conclusion is unwarranted at this stage of the litigation.")

For the above reasons, Defendants' motion to dismiss claim four should be denied.

V. PLAINTIFFS HAVE ADEQUATELY PLED A VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, AND RECENT EFFORTS TO CORRECT THIS VIOLATION ARE INCOMPLETE.

Plaintiffs validly state a claim for violation of the Administrative Procedure Act ("APA") because the Institution Supplements that established the CMUs are substantive rules within the meaning of the APA, but were not issued in accordance with APA procedures. While Defendants have begun the process of correcting this error, their actions are incomplete.

A. The CMU Institution Supplements Consist of Substantive Rules that Must Be Promulgated through Notice and Comment Rulemaking.

The APA requires federal agencies, including the BOP, to follow notice and comment rulemaking procedures before promulgating any legislative rule. 5 U.S.C. § 553(b). It also requires federal agencies to publish in the Federal Register any "substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). "Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that normally requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (internal quotation marks omitted).

Plaintiffs have adequately alleged that the CMU Institution Supplements were issued in violation of the APA. Compl. ¶¶ 240-49. The Institution Supplements are "rules" as defined by the APA because they are "agency statements of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describ[e] the organization [or] procedure . . . of an agency." *Id.* at ¶ 240; *see also* Exhs. A, B; *cf.* 5 U.S.C. § 551(4). This is readily apparent because they prescribe new and detailed requirements governing, *inter alia*, prisoners' written correspondence, telephone communication and visitation within the CMUs. Compl. at Exhs. A, B. Yet these rules were issued without notice of proposed rulemaking or opportunity for public comment, and were never published. *Id*. at ¶¶ 244-48.

Moreover, the government itself initially recognized that the CMUs could be established only through notice and comment rulemaking, but chose not to continue the rulemaking process after receiving unfavorable comments. *Id*. at ¶¶ 235-39. In 2006, the BOP published a notice of a proposed rulemaking ("NPRM") aimed at restricting the communications of prisoners charged or convicted of terrorism. *Limited Communication for Terrorist Inmates*, 71 Fed. Reg. 16,520 (proposed Apr. 3, 2006) (to be codified at 28 C.F.R. pt. 540). Just like the Institution

Supplements that Defendants now describe as interpretive, the NPRM proposed sharp restrictions on telephone calls and visitation for certain prisoners. *Id*. After commentators roundly criticized the proposed regulation in June 2006, calling it "poorly conceived, almost certainly unconstitutional, and entirely unnecessary," Compl. ¶ 237, the BOP abandoned the rulemaking process. *Id*. at ¶ 238. But less than six months later, and without ever taking final action on the NPRM, it quietly issued the Terre Haute CMU Institution Supplement without notice and comment procedures. Approximately fifteen months after that, it did the same with the Marion CMU Institution Supplement. *Id*. at ¶ 239.

Tellingly, the abandoned NPRM, which proposed restrictions essentially indistinguishable from those in the CMU Institution Supplements, explicitly recognized the need for regulatory action to impose the contemplated restrictions: "The proposed regulation *would give the [BOP] authority* for imposing limits and restrictions on the communications of inmates in the [BOP's] custody based on criteria or evidence, either from outside sources . . . or from internal sources." 71 Fed. Reg. at 16,521 (emphasis supplied). The NPRM also observed that the proposed regulation "constitute[d] significant regulatory actions" within the meaning of Executive Order 12,866, and so had been reviewed by the Office of Management and Budget.[7] *Id*. at 16,522 (internal quotation marks omitted).

Contradicting this prior position, Defendants now contend that "[t]he CMU Institution Supplements are not 'rules' within the meaning of the APA, but are akin to interpretive rules or agency policy statements" that are exempt from notice and comment requirements. MTD at 40. It is "well-established that an agency may not escape the notice and comment requirements . . .

[7] A "significant regulatory action" is defined as a rule that (1) has a material economic impact; (2) is inconsistent or interferes with action by another agency; (3) materially alters the budgetary impact of entitlements or other government programs; or (4) "*raise[s] novel legal or policy issues*." Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) § 3(f) (emphasis added).

by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000). Rather, it is for a court to determine whether the putative interpretation or policy statement "carries the force and effect of law," in which case it is a "substantive" or "legislative" rule that must be promulgated in accordance with the APA. *Id.* (citation omitted).

The government attempts to answer this question by means of a mechanical and superficial discussion of the four factors for identifying substantive rules articulated in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). *See* MTD at 40-43. Properly applied, these factors show that the Institution Supplements are indeed rules subject to the APA, as demonstrated below. But since *American Mining*, the D.C. Circuit has on several occasions provided a more direct means of distinguishing between substantive rules and interpretive rules or policy statements. This approach leaves no doubt as to the character of the Institution Supplements here. "[T]he crucial distinction . . . is that a substantive rule *modifies* or *adds* to a legal norm based on the agency's *own authority*." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Put differently, the "distinction [is] between rulemaking and a clarification of an existing rule." *Sprint Corp. v FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). A mere clarification of an already binding legal norm does not require notice and comment, but "an agency's imposition of requirements that affect subsequent agency acts and have a future effect on a party before the agency triggers the APA notice requirement." *Id.* at 373 (internal quotation marks and alteration omitted). "[W]hen an agency changes the rules of the game . . . more than a clarification has occurred. To conclude otherwise would intolerably blur the line between when the APA notice requirement is triggered and when it is not." *Id.* at 374.

The Institution Supplements at issue undoubtedly "change[d] the rules of the game" and imposed new requirements with "future effects" on the regulated parties. They established for the first time that "visiting between [CMU] inmates and persons in the community . . . will be . . . conducted using non-contact facilities," as well as "live-monitored by staff," "subject to recording," and "in English-only." *See* Compl. Exh. A at 2-3; *see also* Exh. B at 2. They imposed new and binding restrictions on calls and letters as well as other novel conditions and requirements. *Id*. Indeed, in the rare instances where the Institution Supplements did *not* change the previously applicable rules, they specifically so stated. Exh. A at 2 ("Unmonitored legal calls are not affected, and will continue to be managed according to national policy.").

Nor do the Institution Supplements interpret, or purport to interpret, the particular language of a statute or existing regulation. They never quote or attempt to tie the results they prescribe to the specific terms of any pre-existing rule of law. *See*, *e.g.*, *Paralyzed Veterans of America v. D.C. Arena*, *L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997)("The distinction between an interpretative and substantive rule . . . likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute or rule. If the statute or rule to be interpreted is itself very general . . . and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation") (internal citation omitted). Rather, they are sources of law in themselves.

For similar reasons, the Institution Supplements are not mere policy statements setting forth the agency's position on an already-governing legal norm. They are binding pronouncements newly authorizing the establishment of the CMUs. They do not suggest that the BOP *could* exercise discretion to establish a CMU in the future; rather, they *repeatedly* use the word "will" to describe polices and conditions that are to be applied. *See* Compl. Exhs. A, B,

passim; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (holding that a document cannot qualify as a mere statement of policy if it "appears on its face to be binding"; a binding intent is strongly evidenced "[i]f the document is couched in mandatory language, or in terms indicating that it will be regularly applied"). Substantive rules, such as these, may be promulgated only in accordance with the APA. *Id*.

The *American Mining* factors confirm this result. Three of those factors are satisfied here, and the presence of any one is sufficient to require notice and comment rulemaking. *American Mining*, 995 F.2d at 1112. First, "in the absence of the rule there would not be an adequate legislative basis" for the agency's conduct. *Id*. As the D.C. Circuit has explained, this factor "is another way of asking whether the disputed rule really adds content to the governing legal norms." *Syncor*, 127 F.3d at 96. No other instrument sets forth, even in general terms, the unique set of restrictions that the CMU Institution Supplements prescribe. Defendants resist this conclusion because, they note, Congress has vested "control and management" of prisons in the Attorney General, and "the BOP," in turn, "is granted broad authority and discretion for the management and regulation of all federal penal and correctional institutions." MTD at 40-41. But this could show, at most, that the BOP had the requisite authority to promulgate a rule establishing the CMUs – not that the substantive legal norms governing the CMUs were already set forth in other statutes or regulations. Indeed, Defendants never state what specific statutory or regulatory language is supposedly interpreted by the Institution Supplements, and nor could they. The unavoidable conclusion is that the Institution Supplements are substantive rules. *See Syncor*, 127 F.3d at 96 ("[W]e think the government misreads *American Mining Congress*. We never suggested in that case that a rule that does not purport to interpret *any* language in a statute or regulation could be thought an interpretative rule.")

Second, the Institution Supplements "invoked [the BOP's] general legislative authority." *American Mining*, 995 F.2d at 1112. As in *Syncor*, they use "wording consistent only with the invocation of its general rulemaking authority to extend [the BOP's] regulatory reach." *Syncor*, 127 F.3d at 95 ("[t]his Institution Supplement *establishes guidelines and procedures* for the operation and security of the [CMU]"); Exh. A, at 1; Exh. B at 1 (emphasis supplied).

Third, "the rule effectively amends a prior legislative rule." *American Mining*, 995 F.2d at 1112. Indeed, the BOP's now-abandoned NPRM specifically noted some of the changes made by the "proposed regulation" to the existing regulatory scheme: "*Unlike 28 CFR part 501*, the proposed regulations allow the Bureau to impose communication limits upon request from [the] FBI or [BOP] . . . [based upon] evidence which does not rise to the same degree of potential risk to national security or risk of acts of violence or terrorism which would warrant the Attorney General's intervention [under Part 501]." *Limited Communication for Terrorist Inmates,* 71 Fed. Reg. at 16,521 (emphasis added). In addition to the many other restrictions and features that are wholly unique to CMUs, this self-avowed expansion of authority establishes that the Institution Supplements amend prior rules. *Kotz v. Lappin*, 515 F. Supp. 2d 143 (D.D.C. 2007), on which Defendants rely, MTD at 40, 43, is not to the contrary. The BOP Program Statement held exempt from APA procedures in *Kotz* merely clarified *how* the agency would exercise its discretionary statutory authority under 18 U.S.C. § 3621(e), and was thus not a substantive legal norm.

Accordingly, Plaintiffs have plausibly alleged an APA violation.

B. Because the BOP Still Has Not Finalized and Published a Regulation Providing for the CMUs, Plaintiffs' APA Claim Is Not Moot.

Defendants argue in passing that the APA claim is moot because "on April 6, 2010, the agency published a proposed rule seeking to describe and codify the procedures governing the

CMUs." MTD at 43. But this is not the first time that the BOP has started notice and comment procedures in connection with CMUs. It never finished those procedures in 2006, and it has not yet finished them now. Compl. ¶¶ 238, 248. It has not responded to the hundreds of comments submitted in response to the notice, or issued and published a final rule in the Federal Register. Until it completes all of the steps required by the APA, it remains in non-compliance. Plaintiffs' APA claim is therefore not moot.

VI. ROYAL JONES HAS STANDING TO SUE DEFENDANTS BECAUSE HE FACES A REAL AND IMMEDIATE THREAT OF CMU REDESIGNATION.

Defendants' final argument in support of dismissal attacks the standing of one Plaintiff. MTD at 9. But even though Mr. Jones was transferred to the general population of USP Marion in March 2010, he faces a realistic danger of redesignation to the CMU.

Standing consists of three elements: (1) an injury in fact, that is (2) fairly traceable to the Defendant, and (3) likely redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Mr. Jones alleges facts that satisfy all three elements. Under the first factor, the injury or threat of injury alleged must be "real and immediate," not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). "Past wrongs [are] evidence bearing on 'whether there is a real and immediate threat of repeated injury.'" *Id.* (citation omitted). Furthermore, "personal experience" that an injury is "if not certain, definitely likely," can demonstrate injury in fact. *Biggerstaff v. FCC*, 511 F.3d 178, 183 (D.C. Cir. 2007). Plaintiffs need only "'demonstrate a realistic danger of sustaining a direct injury as a result' of the government action at issue." *Id.* (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988)).

Mr. Jones was initially designated to the CMU after a threat by BOP staff that he would be "sent east" if he did not stop filing complaints regarding prison conditions. Compl. ¶ 188. When he did not heed that warning, the threat was realized. *Id.* at ¶¶ 188-89. While at the CMU,

Mr. Jones filed a *pro se* lawsuit in December of 2008, raising many claims similar to those in the instant case. *Id.* He was subsequently told by CMU staff that he had "upset the big shots," and that unless he dropped the suit, things would "get bad" for him. *Id.* He was also promised that if he withdrew the complaint, he would be transferred to FCI Herlong, where he could see his children and grandchildren. *Id.* Mr. Jones dismissed the action in August 2009. *Id.*

Several months later, Mr. Jones was transferred out of the CMU to the general population in USP Marion. *Id.* at ¶ 196. He was given no written or verbal explanation for the transfer, but was told that if he misbehaved or engaged in the conduct that originally led to his CMU designation, he would immediately be sent back to the CMU. *Id.* Mr. Jones was warned again by CMU officials upon his transfer to cease complaining about the CMU, and has disregarded that warning by filing the instant lawsuit. *Id.* at ¶ 197.

Mr. Jones's experience demonstrates that the threat of redesignation is "a realistic danger," *Biggerstaff*, 511 F.3d at 183, and is not, as Defendants contend, based on speculation or conjecture. MTD at 9. BOP officials have realized their threats to Mr. Jones in the past. His present fears are the type of "prediction of injury based on experience" of past wrong that evidences "a real and immediate threat of repeated injury." *Biggerstaff*, 511 F.3d at 183 (citation omitted).

Moreover, Mr. Jones faces the threat of redesignation to the CMU because his transfer to general population came with a warning that, if he engaged in the conduct that originally led to his CMU designation, he would be returned there. Compl. ¶ 196. But Mr. Jones has never been told what that conduct was. *Id.* at ¶¶ 190, 196. Because he does not know what behavior to avoid, and it appears that his original designation was related to protected First Amendment activity, *see id.* at ¶ 188, Section II(A)(1), redesignation is a real danger.

In support of their contention that Mr. Jones faces no real or immediate threat of redesignation, Defendants cite *Whitmore v. Arkansas*, 495 U.S. 149 (1990). MTD at 9-10. But *Whitmore* is of absolutely no aid to them. In that case, a prisoner on death row sought appellate review of *another* prisoner's death sentence, hypothesizing that *if* he obtained federal habeas corpus relief, *then* was retried, *then* was reconvicted, *then* was resentenced to death, he would be able to challenge that sentence on appeal by invoking the comparative heinousness of the other prisoner's crimes. *Id* at 156. The Court rejected as "too speculative" Whitmore's allegation that failure to review another prisoner's case would result in future injury. *Id*. Mr. Jones's position is readily distinguishable from *Whitmore*. He has already been designated to the CMU once for undisclosed reasons, and has been directly warned that he faces redesignation should BOP officials decide that he has reengaged in that undisclosed conduct. Compl. ¶ 196. Moreover, he has entered the present litigation in spite of direct warnings that he should stop complaining about the CMU. *Id*. at ¶ 197. Unlike in *Whitmore*, there is nothing unrealistic or speculative about Mr. Jones's fears.

Mr. Jones also satisfies the remaining two elements. The concrete and definite threat of injury he suffers is directly traceable to Defendants' actions, and Defendants do not argue otherwise. Finally, the threat of injury is redressable by this Court. Relief affording Plaintiffs the same opportunities for communication as all other general population prisoners in the BOP would eliminate the harm Mr. Jones faces if he is redesignated to the CMU. Alternatively, an order by this court to house Mr. Jones at a BOP facility appropriate to his security classification would eliminate his well-grounded fear of redesignation. Thus, Mr. Jones has standing.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss should be denied.

Dated: New York, NY
September 8, 2010

Respectfully submitted,

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Certificate of Service

I certify that on September 8, 2010 I caused the foregoing OPPOSITION TO DEFENDANTS' MOTION TO DISMISS to be served by first class mail on the *pro se* Applicants listed below.

Dated: September 8, 2010

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