IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASSIN MUHIDDIN AREF, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 10-0539 (BJR)
ERIC HOLDER, *et al.*	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR CONSOLIDATED MOTION TO DISMISS

INTRODUCTION

As Chief of the Bureau of Prison's ("BOP's") Counter Terrorism Unit, Defendant Leslie Smith is responsible for making recommendations to BOP's Regional Director about whether placement in a Communications Management Unit ("CMU") is warranted for a BOP inmate. *See* Defendants' Consolidated Motion to Dismiss (Dkt. 99) ("MTD") at 13, 25-26. Pursuant to BOP policy, in making such recommendations, Mr. Smith considers all relevant evidence to determine whether an inmate's communications may pose a threat to institutional security or the public warranting the controls of the CMU. [1] MTD at 3. Here, Mr. Smith's written

[1] The CMUs are general population housing units where inmates are free to leave their cells during normal hours. *See* Am. Compl., Ex. A (Terre Haute Institution Supplement). Rather than the 300 minutes per month of telephone time inmates typically receive in a non-CMU general prison population, inmates in a CMU receive 120 minutes per month. Am. Compl. ¶ 62. Inmates are also required to have non-contact visits with social visitors. *Id*. ¶ 38. CMU inmates have access to email and correspondence to the same degree as inmates in a non-CMU general population environment. *See* Terre Haute Institution Supplement § 3; 11/13/2008 Marion Institution Supplement § 3B(a).

recommendations in favor of CMU placement for Daniel McGowan and Kifah Jayyousi — which they acknowledge have been incorporated into their Amended Complaint and may be considered for purposes of Defendants' motion to dismiss — show they have failed to plausibly allege that his recommendations did not further legitimate penological goals, or that their speech was protected under the First Amendment. As a result, they have failed to state a claim for relief and their official and individual capacity retaliation claims should be dismissed pursuant to Rule 12(b)(6). In addition, Plaintiffs point to no cases remotely analogous to the circumstances presented here, and thus Mr. Smith obviously did not violate clearly established law and is therefore entitled to qualified immunity.

Finally, because neither Royal Jones nor McGowan opposes Defendants' argument that their official-capacity claims are moot, Defendants respectfully refer the Court to their opening brief explaining why these claims have been mooted by their release to halfway houses. MTD at 8-12.

ARGUMENT

As set forth below, Defendants demonstrate that, contrary to Plaintiffs' contention, they have set forth the proper pleading requirements for a First Amendment retaliation claim and that Plaintiffs' allegations fail to plausibly allege that Mr. Smith's recommendations in favor of CMU placement for Jayyousi and McGowan were unlawful, much less that they violated clearly established law. Defendants also explain why the Prison Litigation Reform Act requires the dismissal of Plaintiffs' claims for compensatory and punitive damages.

I. DEFENDANTS HAVE CORRECTLY STATED THE PLEADING REQUIREMENTS FOR A FIRST AMENDMENT RETALIATION CLAIM.

Plaintiffs' Opposition is built on the mistaken assertion that Defendants have misstated the elements for pleading a First Amendment retaliation claim. Plaintiffs' Memorandum of Law

in Opposition to Defendants' Consolidated Motion to Dismiss ("Opp.") at 9-12. In particular, Plaintiffs erroneously contend that Defendants argue for dismissal based on the *post hoc* rationale offered by counsel, not the actual motivation of a prison official, and that this position is inconsistent with the Supreme Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Opp. to MTD at 10. Contrary to Plaintiffs' claims, however, Defendants rely on Mr. Smith's *own explanation* for his recommendation, as set forth in his written recommendations to BOP's Regional Director. Moreover, *Crawford-El* held that plaintiffs do not have to meet a heightened pleading standard for First Amendment retaliation claims, *id*. at 578, 601 (rejecting requirement to allege "clear and convincing evidence of improper motive"), but Defendants do not contend that Plaintiffs' retaliation claims should be dismissed because they have failed to satisfy a heightened pleading standard. Instead, Defendants contend that the contemporaneous explanations offered by Mr. Smith for his recommendations make it plain that he acted without retaliatory animus, and that Plaintiffs do not plausibly allege otherwise. As seen below, this argument is consistent with well-established law.

Here the parties agree that, to state a First Amendment retaliation claim, an inmate must allege that he engaged in protected conduct under the First Amendment, suffered an adverse action, and that there is a causal link between the two. MTD at 12-13 (citing formulation from *Aref v. Holder*, 774 F. Supp. 2d 147, 169 (2011)); Opp. at 9-10 (same). But as Defendants have pointed out, courts have also held that an inmate must allege "that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline." MTD at 13 (quoting *Byrd v. Moseley*, 942 F. Supp. 642, 645 (D.D.C. 1996) (internal quotation marks omitted) (also citing *Anderson–Bey v. Dist. of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C.2006) (same); *Pryor-El v. Kelly*, 892 F. Supp. 261, 274 -275 (D.D.C. 1995) (same)).

This requirement is derived from *Turner v. Safley*, in which the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). Plaintiffs recognize that "[u]nder *Turner*, a retaliation claim requires the Court to consider the legitimacy of any penological interests that actually motivated the adverse action." Opp. at 12. Thus, if the complaint fails to plausibly allege that Mr. Smith's *actual* reasons for his recommendations did not further legitimate penological goals, Plaintiffs' retaliation claims must be dismissed. *Byrd*, 942 F. Supp. at 645; *see also Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (stating that inmate "must do more than allege retaliation because of the exercise of his first amendment rights . . .; he must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution); *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (same); *Smith v. Bradley*, 53 F.3d 332 at *4 (6th Cir. 1995) (same).

In addition, the Supreme Court has explained that the animus at issue in a First Amendment retaliation case involves an effort to punish or censor speech based on the content of the speech unrelated to legitimate penological goals. *See Crawford-El*, 523 U.S. at 592 (explaining that where intent is an element of a constitutional violation, the primary focus is on whether there is "an intent to disadvantage all members of a class that includes the plaintiff, or to deter public comment on a specific issue of public importance") (internal quotation marks and citation omitted). Plaintiffs' do not plausibly allege that Mr. Smith sought to restrict or punish their speech based on a disagreement with its content. Instead the obvious alternative explanation for his recommendations, which is apparent on the face of his memoranda cited in the Amended Complaint, is that legitimate penological goals of prison security animated his recommendations to monitor Plaintiffs' communications in a CMU. *See Ashcroft v. Iqbal*, 129

S. Ct. 1937, 1949, 1951 (2009) (holding that plaintiff must offer allegations that state a claim to relief that is "plausible on its face" and rejecting allegation of discrimination where obvious alternative explanation was that action was taken pursuant to legitimate security concerns) (internal quotation marks omitted). Accordingly, under the standard of review that governs here, the legitimate penological goals identified by Mr. Smith may be taken into account for purposes of Defendants' motion to dismiss.[2]

II. JAYYOUSI DOES NOT PLAUSIBLY ALLEGE THAT HIS SPEECH WAS PROTECTED OR THAT MR. SMITH RECOMMENDATIONS FAILED TO FURTHER LEGITIMATE PENOLOGICAL GOALS.

Below, Defendants explain that Jayyousi has failed to state a claim for relief because he has failed to plausibly allege that he engaged in protected speech, that Mr. Smith's recommendations did not further legitimate penological goals, and that retaliatory animus was the "but for" cause of Mr. Smith's recommendation. Accordingly, both his official and individual-capacity retaliation claims should be dismissed. In addition, Jayyousi has failed to cite any cases that indicate that Mr. Smith's actions violated clearly established law.

A. Jayyousi's Speech Was Not Protected Under The First Amendment.

In the Amended Complaint, Jayyousi alleges that, in March 2011, Mr. Smith recommended that he remain in a CMU in retaliation for statements he made approximately two and a half years earlier in the CMU, in August 2008, during a Muslim Jumah prayer. Am. Compl. ¶¶ 196-99, Second Cause of Action. As Defendants' demonstrate below, Plaintiffs fail to plausibly allege that his speech was protected under the First Amendment, much less that it

[2] While the actual reasons for an official's actions may not be known at the motion to dismiss stage, in this case Plaintiffs have amended their complaint to include the official memoranda setting forth the basis for Mr. Smith's recommendations. These documents are incorporated into Plaintiffs' amended complaint, and Plaintiffs concede that they may be considered without converting Defendants' motion to one for summary judgment. Opp'n at 4 n.1.

was clearly protected. As a result, his retaliation claim should be dismissed. *Aref*, 774 F. Supp. 2d at 169 (inmate must allege that speech was protected when pleading First Amendment retaliation claim).

1. Standard for Determining Whether Speech Is Protected.

As noted above, the *Turner* Court held that "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. *Turner* identified four factors for a court to consider in evaluating the overall reasonableness of a prison regulation. *Turner*, 482 U.S. at 90. *First*, whether there is a valid, rational connection between the regulation and the legitimate governmental interest put forward to justify it; *second*, whether there are alternative means of exercising the right that remain open to prison inmates; *third*, the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally; and, *fourth*, whether there are ready alternatives to the restrictions that accomplish the penological goal at issue. *Id*. at 89-90. Although the *Turner* factors are intended as a single reasonableness standard, the first factor "looms especially large." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998); *see also* Mem. Op. at 21 (stating that "[t]he first [Turner] factor constitutes a *sine qua non*").

Although the *Turner* factors focus on whether a prison regulation is valid, *see Turner*, 482 U.S. at 89 (assessing validity of "prison regulation"), the D.C. Circuit has explained that, in the context of a First Amendment retaliation claim, this standard means that an inmate's speech will not be protected if it is inconsistent with legitimate penological goals, such as a prison's interest in security. *See Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996), *rev'd on other grounds*, 523 U.S. 574 (1998) (analyzing inmate First Amendment retaliation claim and stating that speech is not protected if "offensive to some penological interest").

As shown below, Mr. Smith made a reasonable determination that Jayyousi's speech was inconsistent with the security and order of the CMU, and that there was a "valid, rational connection" between Jayyousi's speech and the plainly legitimate goal of identifying inmates whose communications warrant the heightened monitoring of a CMU. Mem. Op. at 20 (finding that effective monitoring of high-risk inmates in a CMU is a legitimate interest). Therefore, it was not protected. *Turner*, 482 U.S. at 89-90; *Crawford-El*, 93 F.3d at 826.

2. Jayyousi's Speech Was Not Protected Because It Was Inconsistent With Legitimate Penological Goals and, Given His Offense History, Provided A Valid, Rational Basis To Conclude That His Speech Warranted Further Monitoring In a CMU.

It is well-established that speech that encourages confrontational relations with prison authorities or noncooperation among inmates, such as a group protest, is not protected by the First Amendment because such speech threatens the security and order of the prison environment. MTD at 16 (citing *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) ("Prison officials may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment."); *Jones v. N.C. Prisoners' Labor Union*, Inc. 433 U.S. 119, 131-33 (1977) (stating that "encouragement of adversary relations with institution officials surely would rank high on anyone's list of potential trouble spots"); *see also* MTD at 16 (citing additional cases).

Furthermore, while an inmate may have a general right to complain about prison conditions or to express his political and religious beliefs, a prisoner does not have a right to do so in a *manner* that is confrontational or disruptive. *See Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) ("[T]he confrontational, disorderly manner in which [the prison inmate] complained about the treatment of his personal property removed this grievance from First Amendment protection."). In addition, because *Turner* is designed to grant prison officials

appropriate deference when managing the volatile environment of a prison, courts defer to reasonable determinations that an inmate's speech threatened the security of a prison or the proper relations between inmates and staff. *See* Cons. MTD at 15-16 (citing *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (explaining that prison administrators are entitled to "appropriate deference and flexibility" when attempting to manage the volatile environment of a prison).

According to the allegations in the Amended Complaint, Mr. Smith concluded that "Jayyousi's comments encouraged activities which would lead to a group demonstration and are detrimental to the security, good order, or discipline of the institution." MTD at 15 (citing Am. Compl. ¶ 197); *see also* March 22, 2011 Memorandum for Regional Director, North Central Regional Office, BOP CMU 4613-4615 (attached as Ex. 2 to MTD). Mr. Smith also determined that Jayyousi's statements were "inflammatory" and "aimed at inciting and radicalizing the Muslim inmate population in [the Terre Haute] CMU." Opp. at 15 (citing transcript attached as Ex. A to opposition). Since there is no dispute about what Jayyousi said, the only question is whether Mr. Smith reasonably concluded that Jayyousi's speech was inconsistent with BOP's interest in the security and order of the CMU, or relatedly, whether the speech provided a legitimate basis to be concerned about Jayyousi's unmonitored communications. Thus, Plaintiffs' own interpretation of the speech at issue as "political and religious speech," and their view that "there was no legitimate penological reason to restrict that speech," Opp. at 20, does not govern where the allegations in the complaint show otherwise. Based on the undisputed content of the statements at issue, Mr. Smith reasonably concluded that "inmate Jayyousi claimed that inmates were sent to CMU because they were Muslim, and not that they were criminals." Am. Compl. ¶ 197. In addition, Mr. Smith also reasonably found that "[i]nmate Jayyousi purported that the unit was created by something evil, and not even the staff understood

or accepted the purpose of the unit." *Id.* In other words, Jayyousi claimed that inmates were sent to the CMU due to religious persecution — an inflammatory claim repeated in his original complaint but dismissed outright by Judge Urbina, *see* Mem. Op. at 34 — and that not even the guards accepted the legitimacy of the unit.

Mr. Smith further noted that "[i]nmate Jayyousi directed the Muslim inmates to stand together in response to being sent to CMU, that Muslims should not compromise their faith by cooperating with the government and Muslims should martyr themselves to serve Allah and meet hardships in their lives." Am. Comp. ¶ 197. Mr. Smith made a reasonable penological judgment that these statements urged confrontational relations with prison authorities and threatened the order and security of the CMU. Accordingly, they were not protected under the First Amendment. *See Freeman*, 369 F.3d at 864; *Watkins*, 599 F.3d at 798; *Jones*, 433 U.S. at 131-33; *see also* MTD at 16 (citing additional cases).

In reaching this conclusion, Jayyousi's statements cannot be divorced from his offense history. Although glossed over in Plaintiffs' opposition, the two are closely linked. As Jayyousi acknowledges, he was convicted of terrorism-related offenses; specifically, he was convicted of conspiracy to murder, kidnap and maim in a foreign country, and conspiracy to provide material support to terrorism. Am. Compl. ¶ 179.[3] In light of this offense history, and granting proper

[3] The Notice of Transfer Jayyousi received after being placed in a CMU cited his offense history as the reason for his designation and stated that Jayyousi had "acted in a criminal conspiracy to raise money to support [sic] mujahideen operations," and that his offense conduct "included significant communication, association and assistance to al-Qaida." Am. Compl., Ex. E. In his written recommendation, Mr. Smith cited the same offense history. BOP CMU 4613-4615 (attached as Ex. 2 to MTD). It was thus Mr. Smith's understanding that Jayyousi was convicted of Jihadist-inspired terrorism. This both supports the legitimacy of Mr. Smith's recommendations and renders it implausible that the "but for" cause of his recommendation was retaliatory animus against Jayyousi's speech, as opposed to a genuine concern about the security risks posed by his communications. *See infra*, II.C, discussing causation.

deference to Mr. Smith, Jayyousi's statements claiming that the CMUs were used to religiously persecute Muslims, that not even the guards accepted the legitimacy of the CMU, and his urging to his fellow Muslim inmates to martyr themselves, created a reasonable basis for Mr. Smith to conclude that these statements were inconsistent with BOP's legitimate interest in the security and order of the CMU, and that they provided "valid, rational" grounds to be concerned about the security risks posed by Jayyousi's unmonitored communications.[4] *Turner*, 482 U.S. at 90; Mem. Op. at 20. Thus, Mr. Smith's recommendation did not violate Jayyousi's First Amendment rights because the speech at issue was not protected. *Turner*, 482 U.S. at 89; *Crawford-El*, 93 F.3d at 826.

3. *The Remaining Turner Factors Used To Assess the Constitutionality of Prison Regulations Confirm That Mr. Smith's Recommendation Furthered Legitimate Penological Goals And Did Not Violate Jayyousi's First Amendment Rights.*

Mr. Smith's written recommendation in favor of Jayyousi's retention in a CMU makes it plain that there was a "valid, rational connection" between Jayyousi's speech and the legitimate goal of identifying inmates whose communications warrant the heightened monitoring of a CMU. Thus, the first *Turner* factor was satisfied. *Turner*, 482 U.S. at 89. Furthermore, contrary to Plaintiff's contentions, Opp. at 19-20, the three additional *Turner* factors also confirm the reasonableness of Mr. Smith's recommendation. *See Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) (although the *Turner* factors are intended as a single reasonableness standard, the first factor "looms especially large").

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[4] Consistent with this conclusion, BOP staff initially issued an incident report to Jayyousi. Am. Compl. ¶¶190-191. While the incident report was later expunged, Plaintiffs do not plausibly allege that this constituted a formal finding of innocence or no wrong doing.

***Second* Turner *Factor*.** The second *Turner* factor asks whether inmates have "alternative means of exercising the constitutional right they seek to assert." *Overton v. Bazzetta*, 539 U.S. 135 (2003). "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." *Turner*, 482 U.S. at 90 (internal quotation marks and citations omitted). Here, Jayyousi does not allege that he has refrained or been prohibited from engaging in any religious or political speech as a result of being sent to the CMU. Moreover, CMU inmates have a number of different ways to communicate with other inmates, family members and other persons outside the prison. They have access to in-person non-contact visits, telephone use, and email and written correspondence. *See* Terre Haute Institution Supplement at § 3 (Ex A. to Am. Compl.); 11/13/08 Marion Institution Supplement at § 3B (Ex. B. to Am. Compl.). As the Supreme Court has explained, alternative communication methods "not be ideal, however; they need only be available." *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003). Here, as alleged in Plaintiffs' Amended Complaint, ample alternative communication methods exist.

***Third* Turner *Factor*.** The third *Turner* factor involves consideration of the impact that accommodation of the asserted associational right will have on "guards, other inmates, the allocation of prison resources, and the safety of visitors." *Overton*, 539 U.S. at 135. The design of the CMU is motivated in part to avoid the impact of unnecessarily imposing communication restrictions on other inmates who do not need it.[5] Mr. Smith also reasonably concluded that

[5] *See* CMU Proposed Rule, 75 Fed. Reg. at 17325 ("By physically separating out the properly classified prisoners who need comprehensive monitoring . . . [the Bureau] hope[s] to lessen any adverse impact on the vast majority of other prisoners not subject to comprehensive monitoring but still only subject to random monitoring.")

Jayyousi's statements threatened the security and order of the CMU, and concluded that his communications with the public warranted monitoring. *See supra*. Thus, Mr. Smith's recommendation was tied to the safety of the guards at the CMU, other inmates, and the welfare of the public in general.

***Fourth* Turner *Factor*.** The final *Turner* factor asks whether there are "ready alternatives." *Overton*, 539 U.S. at 136. This is not a "least-restrictive-alternative test." *Id.* Rather, it "asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Id.* at 136. In this regard, Jayyousi has failed to plausibly allege that transferring him out of the CMU will not harm the Bureau's legitimate penological goals. Indeed, Judge Urbina has already found that Jayyousi was properly designated to a CMU and rejected Plaintiffs' argument that the CMU restrictions fail *Turner* scrutiny. *See* Mem. Op. at 20-21.

B. Jayyousi Was Required But Has Nonetheless Failed To Plausibly Allege That Mr. Smith's Recommendation Did Not Further Legitimate Penological Goals.

Even assuming, *arguendo*, that Jayyousi's speech is considered protected speech, Plaintiffs would still fail to state a plausible retaliation claim. As explained above, *see supra* Part I., Plaintiffs are required to allege that Mr. Smith's recommendation did not further legitimate penological goals. *Byrd*, 942 F. Supp. at 645; *Anderson–Bey*, 466 F. Supp. 2d at 65. Jayyousi's retaliation claim should be dismissed because he has failed to meet this pleading requirement.

At the outset of his March 2011 Memorandum, Mr. Smith explained that Jayyousi was originally placed in the CMU in 2008 based on his convictions for terrorism. BOP CMU 4613-4615 (Ex. 2 to MTD). Jayyousi does not dispute that he was convicted of terrorism-related offenses, nor can he dispute that this provided a legitimate basis for his designation. Am. Compl.

¶ 76. Indeed, such an argument is foreclosed by Judge Urbina's determination that Jayyousi's conviction for terrorism provided the "obvious alternative explanation" for his transfer to a CMU. 3/30/11 Mem. Op. at 34 (citing *Iqbal*, 129 S. Ct. at 1951). On this basis alone, the Court should dismiss Jayyousi's retaliation claim.

Mr. Smith also reasonably concluded that CMU staff at USP Marion, who recommended in favor of Jayyousi's release from the CMU, had not had an adequate opportunity to assess Jayyousi's behavior. At the time of their recommendation in 2011, Jayyousi had only been at the CMU at USP Marion for four months. *See* BOP CMU 4615 (Ex. 2 to MTD). Jayyousi's statements at issue here occurred over two years earlier in 2008 at the CMU at FCI Terre Haute, and CMU personnel at Terre Haute had not recommended in favor of his release. *Id*. Under these circumstances, it was reasonable for Mr. Smith to conclude that the four-month period staff at USP Marion had observed Jayyousi "was not sufficient to judge inmate Jayyousi's behavior, comments and communications." *Id.* Plaintiffs do not explain why these concerns failed to provide a legitimate basis for Mr. Smith's recommendation.

Finally, it was also reasonable for Mr. Smith to reference Jayyousi's statements in August 2008 that Muslim inmates were being religiously persecuted, that CMU guards did not accept the legitimacy of the unit, and that Muslim inmates in the CMU should martyr themselves. *See* Am. Compl. ¶ 197. While Jayyousi may have a right to protest prison conditions and express his political and religious beliefs, he did not have a right to do so in a confrontational or disruptive manner. *See Freeman*, 369 F.3d at 864; *Watkins*, 599 F.3d at 798; *Jones*, 433 U.S. at 131-33; *see also* MTD at 16 (citing additional cases). In light of the close nexus between his statements and his convictions for terrorism, these statements plainly provided additional, legitimate reasons for Mr. Smith to recommend that Jayyousi remain in the CMU. *See Pratt v. Rowland*, 65 F.3d 802,

807 (9th Cir. 1995) (stating that courts should afford deference to prison officials "in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory").

In short, the allegations of the complaint, which include the actual reasons for Mr. Smith's recommendation, make it plain that he acted in further of legitimate penological goals. As a result, Jayyousi's claim should be dismissed. *Byrd*, 942 F. Supp. at 645 (plaintiff must allege that "retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline").

C. Jayyousi's Allegations Fail To Render It Plausible That Retaliatory Animus Against His Speech Was The "But For" Cause of Mr. Smith's Recommendation.

Plaintiffs argue that they have adequately alleged that retaliatory animus was the cause of Mr. Smith's recommendation. Opp. at 29. As Judge Urbina explained, "[t]o satisfy the causation link, a plaintiff must allege that his . . . constitutional speech was the 'but for' cause of the defendants' retaliatory action." *Aref v. Holder*, 774 F.Supp.2d at 169 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). Plaintiffs do not satisfy this standard.

As noted above, Mr. Smith offered legitimate reasons for his recommendation in favor of CMU monitoring *unrelated* to Jayyousi's speech: specifically, Mr. Smith pointed to Jayyousi's convictions for terrorism and the fact that staff at USP Marion had not had a sufficient opportunity to observe Jayyousi's behavior. *See also* MTD at 14-17. These reasons, which are incorporated into the allegations of the complaint, are sufficient on their own to dismiss Jayyousi's retaliation claim. *Id*. They alone render it implausible that Mr. Smith was motivated by retaliatory animus, which as the Supreme Court has explained involves an intent to punish or deter speech based on a disagreement with its content. *See Crawford-El*, 523 U.S. at 592 (explaining that unconstitutional animus in First Amendment retaliation case involves "hostility to the content" of the plaintiff's speech). Even if Plaintiffs disagree about whether Mr. Smith's

concerns were reasonable — a conclusion that is owed considerable deference, *see Pratt*, 65 F.3d at 807, — it is not plausible that Mr. Smith's concerns about security were merely a pretext and that he was in fact motivated by a disagreement with Jayyousi's speech. No allegations in Plaintiffs' Amended Complaint support such a far-fetched claim. Consequently, because Jayyousi has not plausibly alleged that a desire to punish his speech unrelated to legitimate penological goals was the cause of Mr. Smith recommendation, his claims should be dismissed.

D. Mr. Smith's Recommendation That Jayyousi Remain In The CMU Did Not Violate Clearly Established Law And Consequently Mr. Smith Is Entitled To Qualified Immunity.

Mr. Smith is also entitled to qualified immunity with respect to Jayyousi's individual-capacity retaliation claim. For the reason set forth above, Mr.'s Smith recommendations were lawful and certainly did not violate clearly established law.

Qualified immunity requires dismissal of individual-capacity claims "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As shown herein, it is plain that Mr. Smith did not believe he was violating the law when he recommended that Jayyousi remain in the CMU given that he carefully documented the reasons for his recommendation in official correspondence. It is equally apparent that the doctrine of qualified immunity requires that it be clear to a reasonable official that what he is doing violates established law based on *the particular circumstances of the case*. *See Elkins v. Dist. of Columbia*, 690 F.3d 554, 567 (D.C. Cir. 2012) ("the relevant, dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted") (internal quotation marks omitted).

The Supreme Court has repeatedly stressed that in conducting this analysis, the court must define the right at issue with particularity, which Plaintiffs fail to do. *See Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (explaining that when considering First Amendment retaliation claims, "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from" retaliation for speech protected by the First Amendment in the context at hand). The issue is not, as Plaintiffs would have it, whether it was clearly established that Jayyousi had a general right to engage in political and religious speech free from retaliation.[6] That defines the right too broadly and, if accepted, would eviscerate the qualified immunity defense in First Amendment retaliation cases. Instead, the question here is whether, based on Jayyousi's particular statements and their nexus with his conviction for terrorism-related offenses, it was clearly established that his speech was protected, or that it should have been plain to Mr. Smith that it was unlawful to reference Jayyousi's speech as part of his overall assessment of whether Jayyousi's communications posed a threat warranting CMU monitoring. *See Elkins*, 690 F.3d at 567-68 (stating that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law") (internal quotation marks omitted).

Under Plaintiffs' view, unless speech clearly advocates criminal activity or clearly warrants disciplinary sanction, it cannot be cited in a recommendation to the final BOP decision-maker charged with determining whether CMU monitoring is appropriate, even if there is a

[6] *See* Opp. at 20 (stating that Jayyousi's speech "was simply an expression of his religious and political beliefs," and "[i]t is clearly established law that a prisoner's right to express such beliefs is protected by the First Amendment in the absence of a countervailing and legitimate penological interest").

nexus between the inmate's past crimes of terrorism and the speech at issue. That makes little sense, and unsurprisingly is not clearly established law. Indeed, Plaintiffs do not cite a *single* case which remotely suggests that it is unconstitutional for a prison official to recommend that a convicted terrorist be subjected to heightened monitoring of his communications where the inmate, among other things, urged his fellow inmates to martyr themselves, particularly where the same court had already approved of the constitutionality of these monitoring restrictions and found that the inmate was properly subject to them given his conviction for terrorism. *See* Mem. Op. at 20, 34. This is fatal to Plaintiffs' argument that Mr. Smith is not entitled to qualified immunity. *See, e.g., Atherton v. Dist. of Columbia Office of the Mayor*, 706 F.3d 512, 515 (D.C. Cir. 2013) ("Clearly established does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.") (internal quotation marks omitted). [7]

Mr. Smith should not be subjected to discovery and potential liability for damages for providing reasonable, legitimate reasons recommending that Jayyousi remain in a CMU. He did not violate clearly established law and is entitled to qualified immunity. *Iqbal*, 556 U.S. at 685 (explaining that because one goal of the qualified immunity doctrine is to "free officials from the concerns of litigation, including avoidance of disruptive discovery," a court should determine whether an official is entitled to qualified immunity on a motion to dismiss whenever possible, rather than waiting until summary judgment) (internal quotation marks omitted).

[7] "In determining whether the state of the law was clearly established at the time of the action complained of, [the court] look[s] to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view — if there is one." *Taylor v. Reilly*, 685 F.3d 1110, 1114 (D.C. Cir. 2012) (internal quotation marks omitted).

III. MR. SMITH'S RECOMMENDATIONS IN FAVOR OF CMU MONITORING FOR MCGOWAN DID NOT VIOLATE CLEARLY ESTABLISHED LAW.

In their opening brief, Defendants explained that McGowan's release to a halfway house mooted his official-capacity claims for declaratory and injunctive relief. MTD at 8-12. Plaintiffs do not oppose Defendants' mootness argument. As a result, Defendants only address the individual-capacity claims against Mr. Smith, and specifically whether Plaintiffs have plausibly alleged that Mr. Smith acted in violation of clearly established law in recommending that McGowan be placed in a CMU. As set forth below, Plaintiffs' have failed to plausibly allege that Mr. Smith's recommendation in favor of CMU placement for McGowan failed to further legitimate penological interests. Moreover, they have not plausibly alleged that the speech at issue here was clearly protected. As a result, McGowan has failed to state claim for relief, and certainly has not plausibly alleged that Mr. Smith violated clearly established law. *See supra* (citing cases requiring plaintiff to allege that speech was protected and also that retaliatory action did not advance legitimate penological goals).

A. Plaintiffs Are Wrong That Clearly Established Law Prohibited Mr. Smith From Considering McGowan's Correspondence.

Plaintiffs contend that Mr. Smith violated clearly established First Amendment law by allegedly considering excerpts of McGowan's correspondence when recommending that he be placed in a CMU in 2008 and then later in 2011. Am. Compl. ¶¶ 134, 146; Opp. at 26. In support, Plaintiffs rely heavily on the Supreme Court's decision in *Procunier v. Martinez* and *Thornburgh v. Abbott* for the proposition that McGowan's outgoing correspondence was clearly protected. Opp. at 22-23. However, these cases addressed very different security concerns from those ones at issue here. In *Martinez*, the Supreme Court held that prisons are permitted to censor inmate mail provided there is a substantial government interest and that any restriction is

"no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. 396, 413 (1974) (applying standard to state prison regulations that, among other things, prohibited outgoing inmate correspondence that contained complaints or grievances). The Court in *Thornburgh* limited the applicability of *Martinez* to outgoing inmate correspondence, finding it less likely to "pose a threat to prison order and security." *Thornburgh*, 490 U.S. 401, 411 (1989). Importantly, the Court clarified that the *Martinez* standard was not a "strict 'least restrictive means' test" but rather one that required a prison's regulation to be "generally necessary" to a legitimate government interest. *Id*.

As set forth in more detail below, Mr. Smith's recommendations in 2008 and 2011 that McGowan be placed in the CMU fell well within the scope of activity permitted by *Procunier* and *Thornburgh*, and they certainly did not violate clearly established law. As the Court made clear in *Thornburgh*, the overarching concern in this analysis is whether the regulation of an inmate's correspondence is "generally necessary" to advance a legitimate government interest. *Thornburgh*, 490 U.S. at 411. Here, Mr. Smith determined that McGowan's terrorism-related convictions and prior involvement with terrorism organizations, in concert with, for instance, his discussion of "snitches" and "direct action" in outgoing correspondence, warranted the monitoring of his communications in a CMU and was thus "generally necessary" to the accomplishment of important penological goals. *See infra*. The rationale for CMU monitoring is based, in part, on BOP's prior experience where inmates convicted of terrorism-related offenses sought to communicate in code or otherwise disguise their efforts to further criminal plots. *See* Am. Compl. ¶ 30 (citing Proposed Rule, "Communication Management Units," 75 Fed. Reg. 17324, 17326 (April 6, 2010)). The responsibility to effectively monitor the communications of

individuals convicted of terrorism-related offense is of paramount importance. *See* Mem. Op. at 20.

B. Mr. Smith's Recommendation In Favor of McGowan's 2008 CMU Placement Furthered Legitimate Penological Goals And Did Not Violate Clearly Established Law.

McGowan alleges that Mr. Smith illegally retaliated against him with respect to his initial placement in a CMU in 2008 based on excerpts from Mr. Smith's March 27, 2008 Memorandum to the Regional Director of the North Central Regional Office. Am. Compl. ¶ 134; BOP CMU 3374-3377 (Ex. 3). Although required to do so, Plaintiffs' have failed to plausibly allege that Mr. Smith's recommendation did not further legitimate penological interests. *Byrd*, 942 F. Supp. at 645. Moreover, as also required, their allegations do not plausibly allege that the speech at issue was clearly protected under the First Amendment. *Aref*, 774 F. Supp. 2d at 169.

As is apparent from Mr. Smith's 2008 memorandum, Mr. Smith determined that "McGowan's communications warrant heightened controls and review" due to his convictions for terrorism-related offenses, including his association with the domestic terrorist organizations the Animal Liberation Front and Earth Liberation Front. BOP CMU 3374-3377 (Ex. 3) (discussing numerous details regarding McGowan's offense conduct, including Mr. Smith's understanding that McGowan "used coded communications during the commission of the offenses"). Based on Mr. Smith's understanding that McGowan had been convicted of terrorism-related offenses in furtherance of radical environmental and animal causes, it was reasonable and did not violate clearly established law for Mr. Smith to cite various examples of McGowan's correspondence discussing direct action and militancy relating to these causes.

Among other examples cited by Mr. Smith, McGowan equated militancy with direct action and described direct action as a "wonderful tool." *See* BOP CMU 3375 (Ex. 3 to Cons. MTD). He also disparaged government cooperators as "snitches," and explained that "[a]s

things get worse in our society . . . many people inevitably lose faith in polite ways of effecting change and choose more radical methods." *Id*. In light of McGowan's offense history, these statements were "reasonably related" or "generally necessary" to the important goal of identifying inmates whose communications pose a risk that warrant CMU monitoring. *Thornburgh*, 490 U.S. at 411; *Turner*, 482 U.S. at 90.

Plaintiffs' contention (Opp. at 23) that the correspondence of inmates convicted of terrorism-related offenses may only support CMU monitoring if their prior communications evidence an attempt to further criminal activities or otherwise pose a clear security risk is far too limited to serve BOPs legitimate penological goals of maintaining safety and security, and is not the law. BOP is entitled to appropriate deference in determining whether inmates convicted of terrorist offenses warrant CMU placement in order to accomplish the important security goals of effectively monitoring the communications of such inmates. *See* Am. Compl. ¶ 30 (citing Proposed Rule, "Communication Management Units," 75 Fed. Reg. 17324, 17326 (April 6, 2010) (explaining that convicted terrorists have sought to communicate with persons outside a prison's walls to further terrorist activity).

C. Mr. Smith's Recommendation In Favor of McGowan's 2011 CMU Placement Also Furthered Legitimate Penological Goals And Did Not Violate Clearly Established Law.

Similarly, Mr. Smith's recommendation in favor of McGowan's 2011 CMU placement was lawful and did not violate clearly established law. In October 2010, McGowan was released from the CMU and placed in a non-CMU general population environment at USP Marion, but was "re-designated" to the CMU in February 2011. Am. Compl. ¶ 146. McGowan alleges that Mr. Smith retaliated against him with respect to his re-designation based on excerpts from Mr. Smith's February 1, 2011 Memorandum, recommending to the Regional Director that McGowan be returned to the CMU. BOP CMU 3381-3383 (Ex. 4). Again, the allegations in the Amended

Complaint and the Memorandum itself show that Mr. Smith offered legitimate penological reasons for his recommendation.

According to the Amended Complaint, Mr. Smith cited McGowan's efforts to "circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication." Am. Compl. ¶ 146. Mr. Smith, as made clear in his February 2011 memorandum, believed that McGowan desired access to CTU documents that he could not receive directly from his wife and thus sought to have his attorney mail them in correspondence that would not be inspected. It was this attempt to evade BOP's communication restrictions that Mr. Smith determined constituted a program failure warranting McGowan's return to the CMU. BOP CMU 3381-3383 (Ex. 4); *see also* Ex. A to Am. Compl. (Terre Haute CMU Institution Supplement) (CMU designation appropriate if an inmate has "committed prohibited acts involving the misuse or abuse of approved communications methods"). Mr. Smith reasonably concluded that this attempt to introduce prohibited materials into a prison was contrary to legitimate penological interests in security and thus was not protected under the First Amendment, much less that it was protected under clearly established law.[8] *Thornburgh*, 490 U.S. at 411.

Mr. Smith also cited McGowan's terrorism-related convictions, which provided a legitimate basis for his recommendation. BOP CMU 3382-83 (Ex. 4). In addition, Mr. Smith noted that "inmate McGowan has demonstrated the conditions for his original designation still

[8] Although McGowan's request was made in outgoing correspondence, this communication was akin to the incoming correspondence discussed in *Thornburgh*. *See* 490 U.S. at 411. Thus, the *Turner* standard applies and Mr. Smith reasonably concluded that there was a "valid, rational" connection between the attempt to evade restrictions on introducing documents about the Counter Terrorism Unit into a prison and his recommendation in favor of CMU monitoring. *See infra*.

exist through his espousing support for anarchist and radical environmental terrorist groups." BOP CMU 3382 (Ex. 4). Given McGowan's convictions for terrorism-related offenses, it was not unreasonable, and not clearly unlawful, for Mr. Smith to reference McGowan's correspondence in his recommendation. This is not a case where an inmate's communications are cited as a basis for CMU monitoring where those communications are unrelated to the inmate's offense history.

Plaintiffs urge this court to adopt a standard that will undermine the operations of the CMU, in which the correspondence of an inmate convicted of terrorism — with the exception of writing that specifically incites criminal activity or the like, *see* Opp. at 23 — cannot be considered in determining whether the inmate's communications pose a threat. For all the reasons explained above, that is not clearly established law for purposes of qualified immunity. It is therefore not appropriate to subject Mr. Smith to claims for damages for acting in good faith where no authority establishes that his particular conduct at issue was anything but lawful.

Contrary to Plaintiffs' argument, this conclusion is not inconsistent with Judge Urbina's prior ruling denying Defendants' motion to dismiss McGowan's official-capacity retaliation claim relating to his first designation.[9] The original complaint did not incorporate Mr. Smith's memoranda that explain the legitimate reasons for his recommendations, *see* Compl. (ECF No. 5), nor did Judge Urbina consider whether Mr. Smith had violated clearly established law since he was not sued in his individual-capacity at that time. Mr. Smith should not be subjected to personal liability based on a judicial finding that did not address the allegations in the amended complaint or the particular legal issues presented by Defendants' instant motion to dismiss.

[9] The original complaint did not include any allegations with respect to McGowan's 2011 CMU placement. *See generally* Compl. (ECF No. 5).

D. The *Turner* Factors Confirm That Mr. Smith's Recommendations In Favor Of McGowan's CMU Designations Were Lawful And Did Not Violate Clearly Established Law.

The *Turner* factors used to assess the constitutionality of a regulation also confirm the reasonableness of Mr. Smith's recommendations in favor of McGowan's CMU placement. As for the first factor, Defendants have explained above that there was a "valid, rational" connection between Mr.'s Smith recommendation and the goal of identifying inmates warranting the monitoring of a CMU. *Turner*, 482 U.S. at 90.

With respect to the second factor, there are "alternative means of exercising the constitutional right" at issue here. *Overton*, 539 U.S. at 135. In fact, CMU inmate correspondence and email is not restricted to any greater extent than in a non-CMU general population environment, Terre Haute Institution Supplement at § 3; 11/13/2008 Marion Institution Supplement at § 3B(a). The remaining *Turner* factors — namely, the impact that accommodating the asserted right will have on "guards, other inmates, the allocation of prison resources, and the safety of visitors," and whether "ready alternatives" exist, *Overton*, 539 U.S. at 135-36 — both support dismissal as well. Mr. Smith's recommendation was based on the security concerns posed by McGowan's speech relating to the welfare of the public and prison security, and this Court has already found by implication that no ready alternatives to the CMU exist given its finding that the CMU's communication restrictions survive *Turner* scrutiny. *See* Mem. Op. at 21.

D. McGowan's Retaliation Claim Should Be Dismissed Because He Has Failed To Plausibly Allege That Retaliatory Animus Was The But For Cause Of Mr. Smith's Recommendations.

Finally, McGowan's retaliation claim should be dismissed for failure to plausibly allege that retaliatory animus was the cause of Mr. Smith's recommendations. *Aref v. Holder*, 774 F.Supp.2d at 169 (finding that plaintiff bring retaliation claim must allege but for causation).

Plaintiffs have failed to plausibly allege that Mr. Smith's actual motivation was based on a disagreement with McGowan's speech as opposed to being motivated by legitimate security concerns. The claim that Mr. Smith sought to retaliate against McGowan based on the content of his speech, and then documented the evidence of this illegal retaliation, is highly implausible. On the contrary, Plaintiffs' allegations show that Mr. Smith believed that McGowan's convictions for environmental terrorism, as well as statements he made in his correspondence, created a reasonable basis to recommend in favor of CMU monitoring. Even if Plaintiffs disagree with that professional determination, it is not plausible that Mr. Smith acted with the true purpose to punish speech unrelated to legitimate security concerns. *Cf.* Mem. Op. at 34 (rejecting Jayyousi's claim that he was sent to the CMU because of his religion, and finding that his conviction for terrorism provided an "obvious alternative explanation" for his designation) (citing *Iqbal*, 129 S. Ct. at 1951)). The lack of retaliatory animus provides a separate and independent basis to dismiss McGowan's retaliation claims.

IV. THE PLRA BARS PLAINTIFFS' CLAIMS FOR COMPENSATORY AND PUNITIVE DAMAGES.

Even absent a finding of qualified immunity for Mr. Smith, the Prison Litigation Reform Act ("PLRA") bars Jayyousi's and McGowan's claims for compensatory or punitive damages. The D.C. Circuit has interpreted the PLRA to prevent an inmate from seeking damages for mental or emotional injuries in the absence of a prior physical injury, which Plaintiffs concede is not alleged here.[10] *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998). Attempting to avoid this prohibition, Plaintiffs argue that they suffered "harm . . . inflicted on

[10] This analysis is not altered because Plaintiffs' characterize their alleged losses as denials of constitutional liberties. "§ 1997e(e) precludes claims for emotional injury without any prior physical injury, regardless of the statutory or constitutional basis of the legal wrong." *Davis*, 158 F.3d at 1349.

their family relations" as well as the "loss of liberty" and chilling of their speech, contending that these injuries are not for mental or emotional suffering. Opp. at 34.

Such injuries, however, are consistently categorized as "mental" or "emotional" injuries. *See, e.g.*, Restatement (Second) of Torts § 905 cmt. f, g (1979) (categorizing "loss of companionship" and "loss of freedom" as forms of "emotional distress'); Jacob A. Stein, Stein on Personal Injury Damages § 1:5 (3d ed. 2009) ("Section 905's nonpecuniary losses also embraces a variety of *mental interests* including fear and anxiety, loss of companionship and society, loss of freedom . . .") (emphasis added); Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, Dobbs' Law of Torts § 47 (2d ed. 2011) (describing an "invasion of the plaintiff's rights" as a dignitary harm "loosely linked to the idea of mental distress."). Because Plaintiffs are in reality seeking damages for mental and emotional injuries, the PLRA mandates the dismissal of these claims.[11] *Davis*, 158 F.3d at 1348.

Likewise, Plaintiffs are not entitled to compensatory damages for "lost educational opportunity." Opp. at 33. Plaintiffs do not allege that either Jayyousi or McGowan have been denied educational programming because of their placement in the CMU, merely that they "fear" that they will be. Am. Compl. ¶ 68. Compensatory damages may only be awarded for actual injuries, however, not feared future injury. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S.

[11] Courts have indicated that compensatory damages for analogous injuries are generally barred under the PLRA absent a showing of prior physical injury. *See, e.g., Royal v. Kautzky*, 375 F.3d 720, 723, 724 n.2 (8th Cir. 2004) (holding PLRA barred compensatory damages for First Amendment violations and suggesting compensatory damages for other "loss of liberty" injuries are likewise barred); *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000) (holding PLRA barred compensatory damages for First Amendment violations); *Cassidy v. Ind. Dep't of Corr.*, 59 F. Supp. 2d 787, 792 (S.D. Ind. 1999), *aff'd* 199 F.3d 374 (7th Cir. 2000) (suggesting that compensatory damages for "loss of social contact" and other nonpecuniary losses associated with segregation or transfer are barred by the PLRA); *Harrison v. Univ. of Colo. Health Sci. Ctr.*, No. 08-cv-398, 2009 WL 103663, at *7 (D. Colo. Jan. 14, 2009) (holding claim for "loss of consortium" barred by PLRA).

299, 308 (1986) ("Where no injury was present, no 'compensatory' damages could be awarded."). Moreover, any such loss of educational opportunity also would be properly deemed a mental or emotional injury and thus not compensable under the PLRA. *See, e.g.*, *Compton v. Reid*, No. 1:10-cv-264, 2011 WL 628037, *2 (M.D.N.C. Feb. 11, 2011) (holding PLRA barred money damages for lack of educational classes); *Carvajal v. Lappin*, No. 3:06-cv-1324, 2007 WL 869011, *5 (N.D. Tex. Mar. 22, 2007) (same); *Mattes v. Brown*, No. C 97-923, 1997 WL 142796, *1 (N.D. Cal. Mar. 21, 1997) (citing PLRA when dismissing claim that prisoner had been denied educational programs).[12]

Plaintiffs also have not stated a claim for punitive damages. The D.C. Circuit has held that the PLRA, as codified at 42 U.S.C. § 1997e(e), bars punitive damages when plaintiffs are seeking damages for mental or emotional injuries, as Plaintiffs are here: "[M]uch if not all of Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages and an assertion that the defendant acted maliciously." *Davis*, 158 F.3d at 1348; *see also Al-Amin v. Smith*, 637 F.3d 1192, 1197 (11th Cir. 2011) (interpreting *Davis* as barring punitive damages). And, in any event, Jayyousi and McGowan have wholly failed to set forth any plausible basis for an award of punitive damages. Nothing in the complaint can plausibly be viewed as alleging that Mr. Smith intentionally violated their

[12] Plaintiffs also argue that, if they were to be denied access to educational program as a result of placement in the CMU, this denial might in turn diminish their post-release employment opportunities, resulting in pecuniary loss. Opp. at 33-34. Such speculation about remote future harm is inadequate to sustain a claim for compensatory damages. *See Stachura*, 477 U.S. at 308 (requiring actual, cognizable injury to sustain claim for compensatory damages); *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981) (holding complaint seeking damages for constitutional violation must allege more than the "mere possibility of remote or speculative future injury"). Similarly, because Plaintiffs' have not a pled a compensable injury, Plaintiffs' assertion that they "may establish other economic harm" at trial, Pls.' Opp'n at 34 n.5, cannot save their claim for compensatory damages from dismissal under the PLRA.

rights or otherwise acted recklessly or maliciously when he recommended that they be designated, re-designated, or retained in the CMU. *See G. Keys PC/Logis NP v. Pope*, 630 F. Supp. 2d 13, 17 (D.D.C. 2009) (finding claim for punitive damages inadequately supported because "[n]owhere in plaintiffs' complaint do they allege fraud, ill will, recklessness, or any of the other aggravating factors necessary to make an award of punitive damages appropriate").

CONCLUSION

For the aforementioned reasons, the Defendants respectfully request that their Motion to Dismiss be granted.

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Respectfully submitted,

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