ORAL ARGUMENT SCHEDULED MARCH 15, 2016

No. 15-5154

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

YASSIN MUHIDDIN AREF, DANIEL MCGOWAN, and KIFAH JAYYOUSI,

Plaintiffs-Appellants,

v.

LORETTA E. LYNCH, CHARLES SAMUELS, D. SCOTT DODRILL, LESLIE S. SMITH, and FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR OFFICIAL-CAPACITY APPELLEES AND ON BEHALF OF UNITED STATES AS AMICUS CURIAE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

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

Plaintiffs-Appellants in this Court include Yassin Muhiddin Aref, Kifah Jayyousi, and Daniel McGowan. Defendants-Appellees in this Court include Loretta E. Lynch, Charles E. Samuels, and Frank Strada. Although Leslie S. Smith is named as a defendant in this appeal, he is now deceased and at this time no substitute party has been entered for him.

The Legal Aid Society Of New York, the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Seton Hall University School of Law's Center for Social Justice have entered appearances as amici.

B. Rulings Under Review

Plaintiffs appeal from the Memorandum Opinion of the United States Court for the District of Columbia (Rothstein, J), July 12, 2013, JA-275-297, 953 F. Supp. 2d 133, which granted in part Plaintiffs' motion to dismiss, and from the Memorandum Opinion of the United States Court for the District of Columbia (Rothstein, J), March

16, 2015, JA-1649-1668, 2015 WL 3749621, which granted summary judgment in favor of Defendants.

C. Related Cases

This case has not previously been before this Court. Counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

s/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rules:

Other Authorities:

GLOSSARY

CMU	Communications Management Housing Unit
AOB	Appellants' Opening Brief
JA	Joint Appendix
SA	Supplemental Appendix (filed under seal)
ADX	Administrative Maximum Prison

INTRODUCTION

Plaintiffs were convicted of crimes related to terrorism. Based on facts underlying their crimes of conviction, Bureau of Prisons (BOP) officials determined that their communications posed a risk to prison security or to the general public, and accordingly assigned them to communications management housing units (CMUs), which are housing units designed to enable prison officials to monitor inmate communications. Other than moderate limitations on communications to allow for comprehensive monitoring, inmates in CMUs enjoy a similar degree of day-to-day freedom and autonomy general population inmates in other facilities. Pursuant to the BOP's standard procedures, all of the plaintiffs in this case were transferred out of CMUs years ago.

Plaintiffs (along with others no longer involved in this litigation) originally brought this suit in 2010, seeking transfer out of CMUs as well as other injunctive and declaratory relief. Two plaintiffs also brought official-capacity First Amendment claims and individual-capacity *Bivens* claims against the former chief of the BOP's Counter-Terrorism Unit, Leslie Smith, alleging that he recommended their assignment to the CMU in retaliation for protected speech. In this appeal, plaintiffs contest the dismissal of all of their claims.

As defendants informed the Court in a notice filed on December 22, 2015, Mr. Smith is now deceased, and no party has moved to substitute another entity for him. *See* Fed. R. App. P. 43. There is therefore no defendant to respond to the individual-

capacity claims, and government counsel does not represent any party with respect to those claims.

This brief therefore does not respond to the individual-capacity claims on behalf of Mr. Smith or any potential substitute party. However, the United States has an interest in the proper resolution of constitutional claims against its employees. This brief therefore addresses the reasons the individual-capacity claims should be dismissed on behalf of the United States as amicus curiae.

STATEMENT OF JURISDICTION

Plaintiffs asserted jurisdiction in the district court under 28 U.S.C. § 1331. JA-40. If Plaintiffs' claims are not moot, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' official-capacity claims, which seek equitable and declarative relief, are moot because all plaintiffs were transferred out of CMUs years ago and the procedures at issue have changed.
2. Whether the district court correctly dismissed plaintiffs' procedural due process claims, where the undisputed evidence established that CMU placement is not a significant hardship under this Court's standard in *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), and, in any event, the BOP's procedures provide inmates all required process.

3. Whether the district court correctly dismissed the official-capacity First Amendment claim brought by one plaintiff (Kifah Jayyousi), where the BOP concluded that plaintiffs' CMU placement reasonably furthered legitimate penological interests.

AMICUS CURIAE ISSUES

4. Whether the *Bivens* claims were extinguished by the recent death of the defendant because they are not claims for "injuries to the person."
5. Whether the district court correctly dismissed the *Bivens* claims because they are barred by the Prison Litigation Reform Act of 1995 (PLRA), and, in any event, because the defendant was entitled to qualified immunity.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Kifah Jayyousi, Yassin Aref, and Daniel McGowan, along with several other plaintiffs, brought this case to challenge their previous placements in CMUs.

A. Communication Management Housing Units

A CMU is a general population housing unit that is used by the BOP to monitor prisoner communications that pose heightened risks. The CMU was created in response to a September 2006 report by the Department of Justice, Office of the Inspector General, addressing the effectiveness of the BOP's communications monitoring for high-risk inmates. JA-298, 838, 1287-88. The report revealed that,

while incarcerated at BOP's most restrictive "Supermax" prison, three convicted terrorists involved in the first World Trade Center bombing corresponded with extremists in Spain, including those with links to the March 2004 Madrid train bombings. JA-1287. Among other things, the report criticized the BOP's monitoring of inmate communications as "deficient," in part because the BOP did not read "all the mail for terrorist and other high-risk inmates" and was not able to "effectively monitor high-risk inmates' verbal communications," including "telephone calls, visits with family and friends, and cellblock conversations." JA 1287-88.

BOP recognized the need for new procedures to ensure that inmates could not communicate with others to advance illicit activities from prison. Inmates in typical general population units have many opportunities to evade communications monitoring. For instance, an inmate might request that another inmate pass along a prohibited message. *See, e.g.*, JA-146 ("It is difficult to police inmate communication in the 'open' context of a general population setting because it is harder to detect activity such as inmates sending mail under another's name, or using another's PIN number, without constant monitoring."). The BOP also recognized that terrorism-related communications "can occur in codes which are difficult to detect and extremely time-consuming to interpret." JA-147.

Accordingly, to enable adequate monitoring of inmates who present communications-related risks, BOP established the CMU, in which inmates requiring communications monitoring are separated from other general population inmates.

Although BOP limits the volume and methods of CMU communications to the extent necessary to enable effective monitoring, *see* JA-146, inmates housed within a CMU receive ample opportunities to communicate, both among themselves and with others outside the prison.

Other than the communications controls, a CMU functions as a "self-contained general population housing unit," and inmates "'reside, eat, and participate in educational, recreational, religious, unit management, and work programming within the unit." JA-108; *see also* JA-117, JA-146, JA-397, JA-1650. Like other general population inmates, inmates housed in a CMU are not confined to their cells other than at night and during security checks, and instead have access to common areas for up to 16 hours per day. JA-119, JA-125, JA-111. Inmates are housed in single- or double-bunk cells, *see* JA-110, JA-125, JA-397. They have access to recreational facilities, exercise equipment, and library facilities. JA-111, JA-125-26. They receive psychological care and may be treated for medical conditions in the CMU or in the prison's main medical facilities. JA-110-11. Like other general population inmates, they may keep personal property in their cells consistent with national policy, participate in religious services, and they are eligible for work assignments. *Id.*

Placement in a CMU is non-punitive and has no impact on the length of a prisoner's sentence or eligibility for good-time credits, JA-146, nor does it have any impact on future housing or security classifications after an inmate completes the CMU step-down process, JA-941.

To enable the BOP to effectively monitor all communications, outside communications are limited.[1] In addition to attorney-client phone calls, which are not monitored, *see* 28 C.F.R. § 540.201(b), CMU inmates may generally make two fifteen-minute phone calls per week. *See* JA-132. CMU inmates are permitted up to eight hours of visitation per month, in increments of up to 4 hours. JA-132. Social visiting is non-contact, JA-132, which means that a glass wall separates inmates from their visitors and they communicate by speaking into a microphone. This enables the BOP to record and monitor the conversations and prevents inmates from passing physical communications or evading monitoring by whispering.

B. CMU Assignment Procedures

Although the CMUs were initially developed in response to concerns about terrorism and public safety, inmates may be assigned to a CMU for other reasons that warrant heightened monitoring of an inmate's communications; for instance, inmates who attempt to contact their victims or who have a history of abusing approved communications methods may warrant CMU placement. 28 C.F.R. § 540.201(b), (d). Consistent with the demonstrated history of communications-related threats associated with terrorism (as explained in the Inspector General report), BOP may also assign an inmate to the CMU based on a conviction involving "international or

[1] Recently-passed regulations establish a "floor" beneath which communications in CMUs cannot be further restricted, 80 Fed. Reg. 3168 (Jan. 22, 2015), but in practice, CMU policies are significantly less restrictive than those minimum required standards.

domestic terrorism," *id.* § 540.201(b), or whenever there is "substantiated/credible evidence" that an inmate's communications pose a "potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public." *Id.* § 540.201(e).[2]

Under the regulations, BOP's Assistant Director, Correctional Programs Division ("Assistant Director"), has final authority to approve CMU designations.[3] That approval "must be based on a review of the evidence, and a conclusion that the inmate's designation to a CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protection of the public." 28 C.F.R. § 540.202(a). In practice, the BOP has conducted a multi-stage review process in which multiple components review available information to determine whether the inmate satisfies the eligibility criteria and, if so, whether the inmate poses a sufficient security risk to warrant the monitoring controls of a CMU. *See, e.g.*, JA-918-920.

Inmates who are approved for CMU placement receive an explanation of the basis for their designation upon their arrival at the CMU, unless the Assistant Director determines that providing specific information would jeopardize prison operations or public safety. 28 C.F.R. § 540.202(b). They are informed that their continued CMU

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[2] The assignment criteria codified at 28 C.F.R. § 540.201 are similar to the criteria that have governed CMUs since their inception, *see, e.g.*, JA-431, which were formally codified in 2009, *see* JA-142-43.

[3] Prior to the 2015 regulations, the Regional Director, North Central Regional Office, had ultimate responsibility for CMU designation decisions.

placement will be regularly reviewed by the inmate's Unit Team and that they may challenge their placement or any condition of their confinement through the Bureau's administrative remedy program.

The current regulations provide that each inmate's Unit Team must conduct a formal review of the ened for continued assignment to the CMU at least once every 180 days. 28 C.F.R. § 540.202(c)(5); *id.* § 524.10 *et seq.* Inmates are given 48 hours advance notice of each such review, which is held in person. 28 C.F.R. § 524.10. These routine reviews regularly result in the transfer of inmates from the CMU. *See* ECF No. 69-1 ¶ 6 n.1.

C. Plaintiffs

1. Yassin Aref

Yassin Aref was convicted of intentionally helping a terrorist organization "prepar[e] a missile attack on American soil" using a surface-to-air missile. *United States v. Aref*, 285 F. App'x 784, 790 (2d Cir. 2008); *see* JA-1693-1708. He is serving a fifteen-year sentence for money laundering, providing material support for terrorism, conspiracy, and making a false statement to the FBI. JA-863. In May 2007, Aref was placed in a CMU based on his underlying convictions and associated offense conduct. JA-864, JA-927-28. He received a Notice of Transfer within 24 hours of his placement, explaining the basis for his placement. JA-865, JA-705. Aref appealed his placement in the CMU by pursuing administrative remedies, which were denied. *See* JA-865. The Regional Director denied the remedy. *Id.*

Aref was transferred out of the CMU on April 11, 2011, pursuant to a regular program review. JA-865-66 ¶¶ 175-78. He is currently incarcerated as a low security inmate at an institution in Pennsylvania. *Id.* ¶¶ 179, 181. He has been out of the CMU for more than four years.

2. Kifah Jayyousi

Kifah Jayyousi, along with codefendants Adham Hassoun and Jose Padilla, was charged with participating in a "support cell linked to radical Islamists worldwide," in which the participants "conspired to send money, recruits and equipment overseas to groups that the defendants knew used violence in their efforts to establish Islamic states." *United States v. Jayyousi*, 657 F.3d 1085, 1092 (11th Cir. 2011); *see also, e.g.*, *id.* at 1101-02. The co-conspirators communicated in code and disguised their activity by posing as charitable organizations funding international relief efforts. *Id.*; *see also, e.g.*, JA-1389-92; SA-10-16, SA-23. Jayyousi was convicted of conspiracy to murder, kidnap and maim in a foreign country, and conspiracy to provide material support to terrorism. JA-866; SA-4.

In June 2008, Jayyousi was placed in a CMU because of his underlying convictions and associated offense conduct. JA-866 ¶¶ 183-85, JA-1375. Like Aref, within 24 hours of his placement, he received a Notice of Transfer. JA-866 ¶¶ 186-87, JA-1398. In 2011, Jayyousi's Unit Team recommended his transfer from the CMU. JA-1402-03. As discussed below, the BOP's Counter-Terrorism Unit officials

opposed the request, and the Regional Director denied the transfer recommendation. JA-1400.

Pursuant to another semi-annual program preview, Jayyousi was transferred from the CMU in May 2013. JA-868, JA-1464-72. He is currently housed at a low-security facility in Pennsylvania. It has been more than two years since Jayyousi was transferred from the CMU.

3. Daniel McGowan

Daniel McGowan served a seven-year sentence for conspiracy and two counts of arson "credited to the Earth Liberation Front (ELF)," JA-73, a designated domestic terrorist organization. *See* JA-1737-42. In 2008, he was transferred to a CMU because of his convictions and association with designated terrorist groups. JA-76, JA-138, JA-1486. In October 2010, McGowan was transferred out of the CMU. JA-79-80. In February 2011, BOP officials determined that McGowan attempted to circumvent inmate communication monitoring controls and reassigned him to the CMU. JA-80; JA-1517-1525. In December 2012, McGowan was released from BOP custody to a halfway house, and he completed his sentence in June 2013. JA-943. As explained below, McGowan's appeal is limited to his *Bivens* claim against the now-deceased individual-capacity defendant, Leslie Smith.

D. Procedural History

A group of seven plaintiffs originally brought this case in 2010. After most of the original claims were dismissed, Aref, Jayyousi, and McGowan (the only remaining

plaintiffs) filed an amended complaint in September 2012, alleging violations of their First Amendment and procedural due process rights. JA-36-106. All three plaintiffs sought injunctive and declaratory relief against the defendants in their official capacities, and two—Jayoussi and McGowan—also sought compensatory and punitive damages from Leslie Smith, former head of the BOP's Counter Terrorism Unit, in his individual capacity.

In July 2013, the district court dismissed the individual-capacity claims against Smith, holding that the PLRA barred plaintiffs from recovering compensatory or punitive damages in the absence of physical injury, and that plaintiffs did not seek nominal damages. JA-292-97. The court also dismissed McGowan's equitable claims as moot because he had been released from BOP custody. JA-284-286. Because the court concluded that the PLRA barred Plaintiffs' individual-capacity claims, it did not address whether Smith was entitled to qualified immunity. JA-296.

The only claims that remained after the July 2013 order were Jayyousi and Aref's official-capacity procedural due process claims and Jayyousi's official-capacity First Amendment retaliation claim. The parties filed cross-motions for summary judgment on those claims. ECF Nos. 138, 145.

On March 16, 2015, the district court granted summary judgment in favor of defendants on those official-capacity claims. JA-1669. The Court rejected defendants' argument that the case was moot, "assum[ing] for the sake of its mootness analysis

that [the] voluntary cessation [doctrine] applies," JA-1655n.3, and concluding that there was a possibility that Jayyousi or Aref could be returned to the CMU.

On the merits, the district court granted summary judgment in favor of defendants. The court explained that under *Hatch v. District of Columbia*, 184 F.3d 846, 223 (D.C. Cir. 2005), inmates have a protected "liberty interest" in avoiding restrictions on their confinement only when those restrictions are an "atypical and significant hardship" going above and beyond "administrative segregation"—the "most restrictive confinement conditions" routinely imposed on inmates serving similar sentences. JA-1658-63. After considering the duration and conditions of confinement in CMUs, the district court concluded that "there is no question that CMU is less restrictive than administrative detention." JA-1662; *see also* JA-1661,1663 (CMU conditions "do[ ] not approach," are "far less restrictive than," and are "significantly less restrictive than" those in administrative confinement). Accordingly, the Court held that plaintiffs lack a "liberty interest that is implicated in their designation to the CMUs," JA-1663, and dismissed plaintiffs' due process claims.

The district court also granted summary judgment to defendants on Jayyousi's official-capacity First Amendment retaliation claims. Applying the standard from *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court held that defendants' recommendation that Jayyousi be housed in the CMU did not violate his First Amendment rights. JA-1666-1668. The court entered final judgment on March 16, 2015, JA-1699, and plaintiffs timely appealed, JA-1670.

This appeal concerns three sets of claims. First, Jayyousi and Aref appeal from the dismissal of their official-capacity procedural due process claims for equitable relief, which challenged the processes by which they were placed and retained in the CMU. Because he has been released from prison, McGowan's official-capacity claims are moot. Second, Jayyousi appeals from the dismissal of his official-capacity First Amendment claim, which is based on his contention that the BOP should not have considered a speech that he gave to CMU inmates in determining whether he continued to present a communications-related risk. Finally, Jayyousi and McGowan appeal from the dismissal of their individual-capacity claims for damages against Leslie Smith, the now-deceased former chief of the BOP's Counter-Terrorism Unit.

SUMMARY OF ARGUMENT

When plaintiffs brought this suit in 2010 and filed their amended complaint in 2012, they were housed in CMUs and sought declaratory and injunctive relief to compel their transfer out of those units. In 2012, McGowan was released from BOP custody, and there is accordingly no dispute that his claims for equitable relief are moot. To the extent they seek equitable relief, Aref and Jayyousi's claims are now also moot. They were transferred from the CMU to other general population units in 2011 and 2013, respectively, and they have not met their burden to demonstrate a more-than-speculative chance that they will be subject to the same procedures or returned to the CMU for the same reasons that form the bases of their complaints. To the contrary, plaintiffs will not be returned to the CMU unless new misconduct or

information triggers the new CMU designation procedures and ultimately results in a determination that they again present the sort of dangers that warrant CMU monitoring.

In any event, as the district court correctly held, plaintiffs' claims fail. Jayyousi and Aref's due process claims, which seek only equitable relief, must be dismissed because designation to a communications monitoring unit does not constitute an "atypical and substantial hardship" when compared to the relevant baseline of administrative segregation. The moderate communications-related restrictions imposed in the CMUs are well within the expected conditions of confinement for individuals like plaintiffs who have engaged in conduct that demonstrates risks related to their communications. Other than those calibrated restrictions designed to monitor inmate communications, CMUs function like other general population units.

Jayyousi's official-capacity First Amendment claim also lacks merit. Jayyousi—who was convicted for "conspiracy to murder, kidnap and maim in a foreign country and conspiracy to provide material support to terrorism," JA-90, and whose offense conduct included recruiting and funding jihadists to commit violent acts overseas and participating in a conspiracy whose members communicated in code, *see United States v. Jayyousi*, 657 F.3d 1085, 1095 (11th Cir. 2011), JA-1389-92, Supplemental Appendix (SA) 4-17—complains that the BOP violated the First Amendment by considering his statements to Muslim inmates in the CMU in determining whether continued CMU monitoring was necessary. But BOP officials

reasonably concluded that the statements in question gave rise to security concerns, especially against the backdrop of Jayyousi's particular terrorism-related crime of conviction and his other conduct, and the BOP's determination that he continued to require CMU monitoring served legitimate penological purposes. In any event, the undisputed evidence makes clear that the BOP would have continued Jayyousi's CMU confinement regardless of the speech.

The dismissal of Jayyousi and McGowan's individual claims for damages against Smith in his individual capacity should also be affirmed. Under West Virginia law, those tort claims are extinguished by the defendant's death. But even assuming those claims could proceed, the district court correctly held that the Prison Litigation Reform Act (PLRA) bars Jayyousi and McGowan's damages claims because any purported violations did not cause plaintiffs any physical injury. Finally, even if plaintiffs' damages claims were not barred by the PLRA, their claims must be dismissed because none of Smith's actions violated clearly established law. When Smith recommended Jayyousi and McGowan's CMU designations, no pre-existing (or current) case law addressed constitutional limits on communications monitoring or any comparable issue. To the contrary, established law provided that officials have significant discretion to take necessary steps to address security concerns.

STANDARD OF REVIEW

This Court undertakes de novo review of the district court's decision to dismiss the individual-capacity. *See Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 231 (2003).

Review of the district court's grant of summary judgment on the remaining claims is also de novo. *Pharmaceutical Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 204 (D.C. Cir. 2015).

ARGUMENT ON BEHALF OF OFFICIAL-CAPACITY DEFENDANTS

I. Plaintiffs' Official Capacity Claims Are Moot

A. Plaintiffs' Claims Are Moot

This Court's jurisdiction extends only to live cases and controversies. As the Supreme Court has "repeatedly held," under Article III of the Constitution, an ""actual controversy must exist not only at the time the complaint is filed, but through 'all stages' of the litigation." *Already LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013). Judicial review is precluded where "events have so transpired that [a judicial] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc). "Normally, a prisoner's transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in that prison." *Scott v. District of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998).

There is no longer a live controversy with respect to plaintiffs' official-capacity claims. When this action was filed, Jayyousi and Aref[4] plainly had standing to contest the BOP's procedures and reasons for their designations because they were still housed in the CMU, and the relief they sought would redress their claimed injury. JA-104-05 (seeking orders requiring the BOP to either "transfer [them] from the CMU . . . or provide [them] with due process to ensure their designation to the CMU was appropriate" and to grant increased communication opportunities).

It is now 2016, and it has been years since either Jayyousi or Aref was housed in the CMU. Plaintiffs' past CMU placement has no effect on their conditions of confinement, their security level, or the length of their sentence. JA-941, JA-945. In short, plaintiffs can no longer identify any injury, and this Court can provide them with no effective remedy. *See Schmidt v. United States*, 749 F.3d 1064, 1068 (D.C. Cir. 2014).

Plaintiffs' request for declaratory relief does not save the case from mootness because any hypothetical future injury that plaintiffs might suffer is too speculative and remote to confer standing and create a live controversy. *See, e.g.*, *ACLU v. United States Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("With limited exceptions . . . issuance of a declaratory judgment deeming past conduct illegal is also

[4] In discussing the official capacity claims, this brief uses the term "plaintiffs" to refer to Jayyousi and Aref, because plaintiffs do not dispute that the district court properly dismissed McGowan's official-capacity claims are moot. *See* JA-274.

not permissible as it would be merely advisory."); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (declaratory judgment warranted only where parties have adverse "legal interests, of sufficient immediacy"). Declaratory relief on Jayyousi's First Amendment claims would not affect any immediate legal interest, especially given that Jayyousi's claim is largely predicated on his (incorrect) contention that one now-deceased official's reaction to specific statements were exaggerated or pretextual. And there is no reason to believe Jayyousi would face a similar situation in the future.

Nor do the procedural due process claims involve a threat of imminent future injury. A string of conjectural events would have to occur for plaintiffs to be returned to CMU placement: the BOP would have to become aware of information suggesting that Jayyousi or Aref's communications once again presented a threat, and the BOP's current processes would have to culminate in the Assistant Director's determination, after review of all evidence, that such a threat is sufficient to warrant CMU placement. *See, e.g.*, JA-1589. This possibility is too hypothetical to establish a live controversy; *Spencer v. Kemna*, 523 U.S. 1, 14 (1998) (allegation that parole revocation could affect future proceedings too speculative to overcome mootness, because decision to grant parole is discretionary); *see also*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (speculative fear of injury does not confer jurisdiction to issue prospective equitable remedies).

Moreover, even if plaintiffs are ever reconsidered for placement, current procedures differ from the aspects of the prior procedures that form the basis of the

claims in this case. Jayyousi and Aref take issue with specific details about the proceedings that resulted in their now-ended CMU placements, but those concerns are not relevant to any possible future proceedings. They object to the contents of notices they received in 2007 and 2008, and to the responses they received in their administrative appeals. They contend that when they were first assigned to CMUs, they "could not compare the reasons for their placement against any criteria," AOB-8,[5] but subsequent policies and the 2015 regulations address that concern. *See, e.g.*, 28 C.F.R. § 540.201(Designation Criteria); JA-142. They say that before 2009, there were inadequate procedures for releasing CMU candidates (*see* AOB-9-10). But for the last six years, program reviews have regularly resulted in inmates' transfer out of the CMU (including Jayyousi and Aref). *See* ECF No. 69-1, ¶ 6 n.1. And they take issue with statements by a now-deceased BOP official about how he personally recorded the reasons behind his recommendations. AOB-8 n.4 (quoting JA-1554). But any further CMU assignments would involve different officials.

Even if Plaintiffs are someday again designated to the CMU, they would be subject to the current CMU procedures, and among other things, provided with new notices of the reasons for their placements, a new right to appeal, and a new set of ongoing semi-annual reviews. Their claims in this case, seeking review of past events, are now moot, and any challenge to future events is plainly not ripe.

[5] Appellants' opening brief is cited as AOB herein.

B. This Case Does Not Come Within Any Exception To The Mootness Doctrine

Neither of the two exceptions to the mootness doctrine applies here. First, this case does not present an "exceptional situation" giving rise to the "capable of repetition yet evading review" standard because there is no reason to believe that the same plaintiffs will be subject to the same action again, *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990), and in any event CMU placement is not "always so short as to evade review." *Spencer*, 523 U.S. at 17 (1998). CMU placement may last for several years, as plaintiffs' experiences indicate. In this case, district court proceedings were unusually protracted, in part because there were several years of litigation before the operative complaint was filed. But if plaintiffs are again assigned to the CMU, they will have an opportunity to litigate the procedures and rationales supporting any new decision.

Second, this case does not implicate the "voluntary cessation" doctrine, which provides an exception to mootness when a defendant claims that "its voluntary compliance moots [the] case." *Already*, 133 S. Ct. at 727. This exception applies where the defendant's voluntary cessation arose "because of the litigation." *Public Util. Comm'n of Cal. v. Federal Energy Regulatory Comm'n*, 100 F.3d 1451, 1460 (9th Cir. 1996); *see also, e..g.*, *Aref v. Holder*, 774 F. Supp. 2d 147 (D.D.C. 2011).[6]

[6] The district court did not address whether Aref and Jayyousi were transferred "because of this litigation." Instead, the court "assume[d] for the sake of its mootness

Continued on next page.

Here, Jayyousi and Aref were released pursuant to the BOP's semi-annual review procedures (which predate this litigation), not because of this case. In 2011, in accordance with those procedures, Aref was transferred from the CMU. *See* JA-1369. Two years later, in 2013, Jayyousi was transferred pursuant to a standard review that led BOP officials to conclude (based in part on law-enforcement sensitive information) that earlier concerns had been mitigated. *See* JA-865-66, JA-1577; JA-1417-63; JA-1473-80. Smith, a BOP official involved in the review process, testified that Jayyousi's participation in this lawsuit did not "have anything to do" with his transfer. JA-1570. No evidence, circumstantial or otherwise, suggests that either transfer resulted from this litigation, rather than from the BOP's evaluation of what prisoner communications required monitoring.

In any event, the voluntary cessation doctrine only applies where it is reasonable to expect that the underlying conduct will recur. *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349-50 (1997). For the reasons described above, any contention that recurrence is likely here is pure speculation that depends on a chain of hypothetical future events, especially given the particularized circumstances

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analysis" that they had been, based on its incorrect view that defendants had waived the issue. JA-1655. But even assuming it were possible to waive this jurisdictional issue, defendants were not required to anticipate plaintiffs' counter-arguments, and reasonably explained in their reply brief that the voluntary cessation doctrine does not apply, responding to plaintiffs' argument at the first opportunity.

of both the First Amendment and Due Process claims and the continued evolution of the BOP's processes.

Moreover, to the extent plaintiffs hypothesize that they might someday again be assigned to a CMU, any such challenge would not be ripe. Ripeness turns on "[1] the fitness of the issues of judicial decision and [2] the hardship to the parties of withholding court consideration." *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013). A case is not fit for decision where resolution may "prove unnecessary" or in which "the court's deliberations might benefit from letting the question arise in some more concrete form." *Cronin v. FAA*, 73 F.3d 1126, 1131 (D.C. Cir. 1996). And "the "'mere *potential* for future injury' … is not enough" to establish hardship to the parties. *See State Farm Mut. Auto. Ins. Co v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986). Review of an agency action is generally "best postponed to a specific application" of a policy. *Office of Commc'n of United Church of Christ v. F.C.C.*, 826 F.2d 101, 105 (D.C. Cir. 1987); *see also Cronin*, 73 F.3d at 1133 ("postponing review must impose a hardship on the complaining party that is immediate, direct, and significant"). Resolving plaintiffs' official-capacity claims here would require the court to evaluate hypothetical future applications of current procedures and would not relieve plaintiffs of any hardship.

II. Plaintiffs' Assignment To The CMU Did Not Violate Due Process

A. CMU Housing Is Not An Atypical And Significant Hardship Giving Rise To A Protected Liberty Interest

In prison, no inmate's right to communicate with the outside world is unlimited. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977). Restrictions on different forms of communication and on the frequency, duration, and manner of visits are inherent parts of prison life. *See, e.g.*, *Block v. Rutherford*, 468 U.S. 576 (1984) (ban on contact visits for low-risk pre-trial detainees was reasonable).

While the communications of all inmates are restricted, various considerations may require prison officials to impose additional constraints in particular circumstance. Prison officials may impose such restrictions and otherwise change the conditions of an inmate's confinement without triggering procedural requirements under the Due Process clause so long as such changes do not effect a "dramatic departure from the basic conditions of" the inmate's sentence. *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

As plaintiffs concede (AOB-23-24), under *Sandin*, CMU placement implicates a liberty interest protected by the Due Process clause only if it "imposes atypical and significant hardship" on a prisoner "in relation to the ordinary incidents of prison

life." *Sandin*, 515 U.S. at 484. In *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999), this Court unanimously explained that the baseline for making this comparison—that is, the "ordinary incidents of prison life"—encompass "the most restrictive confinement conditions that prison officials . . . routinely impose on inmates serving similar sentences," including the "usual conditions of administrative segregation" at prisons where inmates serving similar sentences may be incarcerated. *See also id.* at 848 (describing conditions of administrative confinement), 855, 856-58.

Here, there is "no question" that CMU conditions are dramatically less restrictive than the "usual conditions of administrative segregation," as the district court correctly held. JA-1660; *see also Hatch*, 184 F.3d at 847. Day-to-day conditions in CMUs are drastically less restrictive than those in administrative segregation. *See generally* Lara Decl., ECF No. 150, 1-17 (describing conditions in administrative segregation). For instance, inmates in administrative segregation units (referred to by BOP as Special Housing Units or SHUs), remain in their cells 23 hours per day, either by themselves or with another inmate. *See* JA-844-46. They do not control whether the lights in their cells are on or off; they are not permitted to hold jobs; their educational programming opportunities are reduced; and they are allowed fewer possessions than general population inmates. JA-845. They may exercise for one hour per day, five days per week, but when they leave their cells they are moved in restraints. *See* JA-1658, ECF No. 150 at 10.

By contrast, except for the carefully tailored limitation on communications, CMUs function as general population units. As in other general population units, inmates in CMUs have access to common spaces for roughly 16 hours per day, and are restricted to their cells only at night or during security checks. They receive educational, professional, and recreational opportunities. There are no additional restrictions on the possessions they may have. Although CMU inmates do not have contact with non-CMU inmates (because allowing such contact would enable easy circumvention of communications monitoring), they may move freely around their unit and are generally at liberty to interact with other inmates throughout the day.[7] *See* JA-840-42.

Even with respect to communications, CMU conditions are less restrictive than administrative detention. In CMUs, there are no restrictions on the quantity or frequency of social written or email correspondence. JA-844-45. Inmates in administrative confinement typically receive one fifteen-minute phone call every 30 days, while CMU inmates receive 120 minutes every four weeks. Inmates in

[7] Aref himself noted that the CMU facilities at Marion were "good," "quiet," and in a "beautiful, nice, new building." JA- 1036. He explained that during the day, CMU inmates were free to walk around the unit, talk with other inmates, watch TV, play handball in the recreation center. JA-1045-46. In contrast, he described administrative confinement as like being in a "box." JA-1035. Jayyousi described being in administrative confinement as "horrific," JA-1053, and noted the increased freedom and programming available in CMUs, JA-1056-58, including access to email, which he considered very important, JA-1058.

administrative confinement often do not have access to email. *See* JA-843-44, JA-1058. And they are generally restricted or prohibited from having social contact visits. *See* JA-848; ECF No. 150 at 7.

Other courts have concluded that communications restrictions on inmates—even explicitly punitive and long-lasting ones—do not implicate constitutional Due Process concerns. For instance, as the district court noted (JA-1663), the Third Circuit in *Henry v. Department of Corrections*, 131 F. App'x 847 (3d Cir. 2005) held that a permanent ban on contact visits did not implicate a protected liberty interest.[8] Numerous courts have reached similar conclusions. *See Phillips v. Norris*, 320 F.3d 844, 847 (3d Cir. 2003) (collecting cases and holding administrative segregation with no contact visitation did not implicate liberty interest). A fortiori, the tailored limits at issue here, which are necessary to permit BOP monitoring of outside communications by prisoners who pose particular communications-related risks, do not require scrutiny.

Plaintiffs do not dispute the district court's conclusion that CMU conditions are in every meaningful sense less restrictive than administrative confinement conditions; instead they suggest that either the duration of CMU placement or the

[8] Plaintiffs' contention that the *Henry* court did not reach this issue (AOB-32-33) is wrong. The Third Circuit squarely explained that under *Sandin,* "a loss of visitation privileges is one of the 'ordinary incidents' of prison confinement," and prisoners accordingly cannot have "a liberty interest in a particular type of prison visitation" like contact visitation. 131 F. App'x at 849.

purported risk of stigmatization creates a liberty interest in spite of the less restrictive conditions. *See* AOB-24. They are incorrect.

As the district court explained, the duration of confinement is the "*only* factor" on which CMU conditions are equal to or potentially more restrictive than those in administrative confinement. JA-1662.[9] But even years in administrative detention do not necessarily give rise to a protected liberty interest. *See, e.g.*, *Jordan v. Federal Bureau of Prisons*, 191 F. App'x 639, 652 (10th Cir. 2006) (five years in administrative detention did not create liberty interest); *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998) (administrative confinement of "approximately two and one-half years" did not implicate liberty interest). And even *permanent* restrictions may not trigger liberty interests if they are not unduly burdensome. *See, e.g.*, *Henry*, 131 F. App'x at 149 (permanent ban on contact visits); *Robinson v. Palmer*, 841 F.2d 1151, 1155-1156 (D.C. Cir. 1988) (permanent ban on visits between husband and wife). In any event, CMU placement is neither permanent nor indefinite; rather, each inmate's placement is regularly reevaluated. *See Rezaq v. Nalley*, 677 F.3d 1001, 1016 (10th Cir. 2012) (holding that placement in "administrative supermax" facility did not implicate liberty interest in part because of regular semi-annual reviews).

[9] Although Plaintiffs rely heavily on statistics about the median duration of confinement (AOB-25-26), in practice the duration of administrative confinement can vary significantly. *See, e.g.,* JA-849-850. For instance, Jayyousi spent more than two years in administrative detention before he was transferred to a CMU. JA-849-50.

Although plaintiffs argue that the relative rarity of CMU placement renders it "atypical," the limitations actually imposed by CMU designation—tailored, moderate communication restrictions—are common incidents of prison life, as suggested by the numerous cases addressing such restrictions in other contexts.[10] Transfers, even to less desirable prison units or across significant distances, are similarly ordinary and do not generally trigger the requirements of due process.[11] CMUs were created in part because adequately monitoring all prisoners would be inordinately resource-intensive, and the relative rarity of CMU designation accordingly reflects the BOP's efforts to focus its limited resources on individuals whose crimes of conviction or behavior suggest that their communications, in particular, warrant additional monitoring.

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[10] *See , e.g.*, *Block*, 468 U.S. at 587-88 ("There are many justifications for banning contact visits entirely."); *Bazzetta v. McGinnis*, 430 F.3d 795, 802-03 (6th Cir. 2006) (complete ban on visits, renewable every two years, is not atypical and significant); *Daniels v. Arapahoe Cty. Dist. Court*, 376 F. App'x 851, 855 (10th Cir. 2010) (no process triggered by loss of contact visits); *Robinson*, 841 F.2d at 1155-56 (D.C. Cir. 1988) (no liberty interest triggered by permanent ban on all visits between husband and wife); *Macedon v. Department of Corr.*, 67 F. App'x 407, 408 (9th Cir. 2003) (no liberty interest implicated by ban on all family visits).

[11] *See, e.g.*, *Sandin,* 515 U.S. at 480 (nonpunitive transfers are "ordinarily contemplated by a prison sentence"); *Olim v. Wakinekona,* 461 U.S. 238, 247 (1983) (noting variety of circumstances in which prisoners are transferred); *Hewitt v. Helms,* 459 U.S. 460, 468 (1983) ("[T]ransfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."), *disapproved on other grounds*, *Sandin*, 515 U.S. at 483; *Meachum v. Fano*, 427 U.S. 215 (1976) (transfer from medium to maximum security prison).

Plaintiffs' contention that their CMU placements gave rise to stigma, moreover, is pure speculation. CMU placement is based not on some formal status (such as "terrorist" or "sex offender"), but rather on a determination that an inmate's communications pose particular kinds of risks that warrant monitoring. Nor is there a direct correspondence between terrorist convictions and CMU placement. CMUs are not exclusively for inmates who were convicted of terrorism; conversely, convicted terrorists are housed in many different kinds of prison units, including both far more restrictive "administrative maximum" facilities and general prison populations.[12] *See, e.g.*, *Rezaq*, 677 F.3d at 1016. CMUs house the subset of inmates—with and without terrorist convictions—whose communications pose particular concerns. And the consequences of CMU placement are different in kind than those addressed in cases in which a legally protected right is extinguished, *see Paul v. Davis*, 424 U.S. 693, 711-12 (1974), or in cases involving sex-offender status—a status that may lead to formal legal restrictions outside of prison or to mandatory invasive medical or therapeutic treatments. *See, e.g.*, *Neal v. Shimoda*, 131 F.3d 818, 829-30 (9th Cir. 1997) (addressing sex offender designation that "mandates completion of an extensive treatment

[12] Inmates—including those with terrorist convictions—who pose more generalized risks may be placed in higher-security facilities, rather than in CMUs. And inmates whose communications give rise to risks beyond those warranting CMU placement may be subject to "special administrative measures" that impose greater communication restrictions than those in CMUs. Courts have held that even those greater restrictions do not implicate a liberty interest. *See, e.g.*, *Gowadia v. Stearns*, 596 F. App'x 667, 672-74 (10th Cir. 2014).

program," including confession to sex offenses as condition of parole eligibility); *Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237, 1238 (10th Cir. 2000) (addressing policy "virtually identical" to that in *Neal*).

Sandin makes clear that even expressly punitive restrictions trigger due process scrutiny only if they create atypical and significant hardships. 515 U.S. at 484. *Any* security classification decision or security-related restriction on particular inmates may give rise to some impression that the inmate presents a particular threat. But the Constitution does not prevent BOP from responding to security risks merely because an inmate might be subject to such an impression. *Cf. Paul*, 424 U.S. at 701 ("reputation" is not "a candidate for special protection over and above other interests" protected by the Fourteenth Amendment). While the CMU was developed in part to address concerns involving convicted terrorists, today CMUs house inmates with a variety of convictions.[13] To the extent plaintiffs are concerned that they have been stigmatized as terrorists, that is because they were convicted of crimes related to terrorism, not because they were once housed in the CMU.

[13] Contrary to plaintiffs' suggestion (AOB-30), the fact that, in 2009, the Attorney General accurately informed the Senate Judiciary Committee that those convicted of terrorism are housed in CMUs, maximum security facilities, and "in other facilities among different institutions around the country" in no way suggests that CMUs are used only for that purpose, and it hardly brands plaintiffs as terrorists. JA-553-54. Plaintiffs also suggest that CTU placement implicates a security interest in part because Counter-Terrorism Unit officials play a role in assessing which plaintiffs warrant CMU placement, but the liberty interest inquiry turns on the hardship imposed by a restriction, not the BOP's internal processes.

In sum, CMU placement does not come close to implicating a protected interest, especially measured against the baseline established in *Hatch*. Even as compared to general population units, where communications may be restricted for any number of reasons, *see, e.g.*, *Henry*, 131 F. App'x at 489, CMUs do not impose a "dramatic departure" from the ordinary conditions of prison life. *See Sandin*, 515 U.S. at 485.

B. The BOP's Procedures For CMU Placement Satisfy Due Process

Even assuming that plaintiffs' challenge to the BOP's procedures were ripe and that CMU placement implicates a protected liberty interest, the BOP's procedures meet the requirements of due process.

The Supreme Court has held that an inmate transferred to administrative segregation "must merely receive some notice of the charges against him," *Hewitt v. Helms*, 459 U.S. 460, 476 (1983), *disapproved on other grounds, Sandin*, 515 U.S. at 483, providing "a brief summary of the factual basis" for placement. *Wilkinson v. Austin*, 545 U.S. 209, 225-26 (2005). After his transfer, the inmate must have "an opportunity to present his views" to the relevant decisionmaker within a reasonable period of time. *Hewitt*, 459 U.S. at 476. No formal hearing is required. Instead, "[o]rdinarily a written statement by the inmate will accomplish this purpose." *Id.* "So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." *Id.* Given the heavier restrictions

and more severe consequences that result from disciplinary administrative confinement, such procedures are more than adequate to satisfy the requirements of due process for CMU placement.

All of those requirements are met here. Inmates receive a notice setting forth the basis for their placement within five calendar days of CMU placement. They may contest their designation to the CMU by filing an administrative grievance. If the grievance is denied, the inmate may appeal to the relevant decisionmaker.[14] CMU inmates also receive regular ongoing reviews of their placement, which further protect against unwarranted placements, *Hewitt*, 459 U.S. at 477 n.9, and inmates have an opportunity to participate in the review process. That review process regularly results in the transfer of inmates—including Aref and Jayyousi— from the CMU. *See* ECF No. 69-1, ¶ 6 n.1 (noting that as of May 16, 2012, 162 BOP inmates had been designated to a CMU, and of those, 75 had been transferred out of the CMU).

Due process considerations identified by the Supreme Court in *Mathews v. Eldridge*, 424 U.S 319 (1976), counsel against adopting the procedures plaintiffs urge. Because of plaintiffs' status as inmates with circumscribed liberty, their interest in avoiding transfer to a CMU is minimal. *See* JA-1659-63. On the other side of the

[14] Plaintiffs' appeals were reviewed by the Regional Director, who at the time had ultimate decision-making authority over CMU placements. JA-857-58 (¶¶ 129-30); *see also, e.g.*, JA-714, JA-730. Now that the Assistant Director makes CMU decisions, the record does not reflect the specifics of the current process, and any contentions related to the adequacy of the appeal procedure should be reviewed in a case where the current process is applied.

scale, additional procedures would not significantly reduce the risk of error and would significantly burden the BOP's ability to carry out its mission, especially given the security concerns and the sensitive nature of the information on which the BOP often relies to make CMU decisions. For instance, CMU placements often rely on sensitive or classified information, so listing every reason for CMU placement is not possible in all cases. In-person hearings are impractical, because BOP personnel who conduct administrative hearings do not generally have the security clearances required to make the determinations required here and because local hearing officers are also unlikely to have relevant background information and expertise. JA-863. And providing plaintiffs with advance notice of CMU placement would enable inmates to pass messages prior to their designation or interfere with the transfer process. JA-862-63.

III. Government Defendants Did Not Retaliate Against Jayyousi For Exercising Protected First Amendment Rights

One plaintiff, Kifah Jayyousi, contends that the BOP violated his First Amendment rights by extending his CMU assignment in part on the basis of statements he gave while leading a Muslim prayer service. That claim also lacks merit and was correctly dismissed by the district court.

Plaintiffs effectively contend that BOP is prohibited from taking into account an inmate's speech when determining whether that inmate's communications pose risks that require monitoring unless that speech falls outside the ambit of First Amendment protection. But the Constitution imposes no such restriction. Even the

cases plaintiffs cite, concerning prison restrictions or other actions that restrict an inmate's speech or impose punishment for particular statements or conduct make clear that a prisoner cannot bring a constitutional challenge to prison actions if there is a "reasonable relationship" between the contested action and legitimate penological interests. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 86-87 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).[15]

The deferential *Turner* standard recognizes that prison administration "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources," all of which are "peculiarly within the province of the legislative and executive branches." *Turner*, 482 U.S. at 84-85. Practically, the "reasonable relationship" approach "ensures the ability of corrections officials to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration, and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to resolution by decree." *O'Lone*, 482 U.S. at 349-50 (quotation marks and citation omitted).

Restrictions on speech and actions taken in response to speech are valid even when based on content or viewpoint so long as the action is in furtherance of a proper purpose. *Jones v. North Carolina Prisoners' Labor Union*, Inc., 433 U.S. 119, 133

[15] The Supreme Court has identified one exception to the *Turner* standard, for cases involving explicit racial classifications. *See Johnson v. California*, 543 U.S. 499 (2005). That concern does not apply here.

(1977). Thus, for instance, this Court has held that it does not violate the First Amendment to impose particularly restrictive conditions based on an inmate's support for a political group that might fund an escape attempt, even if the Constitution would not allow harsher confinement solely because of political disagreement. *Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989).

Whether an action circumscribing constitutionally protected interests should be upheld turns on whether the action was "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Four factors may be relevant to this inquiry: (1) whether there is a "valid, rational connection" between the prison action and the legitimate government interest; (2) whether an inmate has "alternative means" of exercising the right; (3) the impact that accommodating the right would have on guards, inmates, and prison resources; and (4) the "absence of ready alternatives" that will serve the government's legitimate interests. *Id.* at 89-90. These factors are not independent inquiries but "guides to a single reasonableness standard."[16] *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998).

[16] Although plaintiffs criticize (AOB-42-45) the court for not marching through the *Turner* factors after concluding that Jayyousi's speech posed a security threat, JA-1668, there is no such requirement. *See Beard v. Banks*, 548 U.S. 521, 532 (2006) (second, third, and fourth factors "add little" to analysis); *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002) (four factors are "not a mandatory part of the balancing test"); *Kimberlin v. U.S. Dep't of Justice*, 318 F.3d 228, 233 (D.C. Cir. 2003) (other *Turner* factors "largely encompassed by the first").

Here, plaintiffs take issue with the fact that BOP officials considered statements that Jayyousi made in the CMU in assessing whether Jayyousi's communications continued to warrant CMU monitoring. The record leaves no doubt, however, that the BOP's decision not to transfer Jayyousi from his CMU placement served the legitimate purposes of promoting prison security and protecting the public. The BOP was not required to ignore Jayyousi's jailhouse statements in assessing whether his communications might pose a risk, regardless of whether those statements would, in the abstract, be protected by the First Amendment. In context, *see* JA-1389-92, continued comprehensive monitoring of Jayyousi's communications was plainly a reasonable response to concerns raised by his speech.

Jayyousi's offense conduct was the reason for his initial CMU designation. He was serving a 12-year sentence for conspiracy to murder, kidnap, and maim in a foreign country and to provide material support to terrorism. JA-1381-82. Information included in his initial CMU designation packet indicated that he had "extensive contacts . . . with known terrorist persons, organizations, and groups," and "extensive influence to radicalize and recruit others," JA-1389, detailed his fundraising and recruitment efforts to facilitate violence, JA-1389-91, and included instances in which Jayyousi communicated in code to mask discussions about sending recruits and funds to terrorist organizations as innocuous conversations. *See, e.g.*, *Jayyousi*, 657 F.3d at 1095 (describing coded communications and offense conduct); SA-13, SA-15.

BOP professionals understood Jayyousi's speech against this backdrop. *See* JA-869, JA-880, JA-986, JA-1012-13. Although portions of Jayyousi's 2008 statements may appear innocuous out of context, they cannot be interpreted in a vacuum. For instance, the speech noted that "[i]t is not U.S. versus Jayyousi; it is U.S. versus Islam," JA-835—language that closely mirrors language that he used in his fundraising efforts for Sheikh Omar Abdel-Rahman (who was convicted of conspiring to blow up the World Trade Center), which were described in his initial designation packet. JA-1392 ("It was not Sheikh Raman who was being attacked, but rather Islam."). Jayyousi also noted that life is full of pain and that "[t]his is why we martyr"—a statement that reasonably gave rise to heightened concern when made by an individual convicted of a crime that involved funneling funds and recruits overseas to commit violent acts in the name of jihad. JA-836-27; JA-1392-93; *see also, e.g.*, SA 11, 12-13.

A straightforward application of the *Turner* factors confirms the reasonableness of the decision to continue monitoring Jayyousi's communications. The first, most important factor asks whether there is a "rational connection" between the purported government interest and the BOP action. CMU designation in response to a perceived attempt to "radicalize" other inmates in a similar manner to Jayyousi's earlier efforts to radicalize others is plainly rationally related to prison security and public safety, given that the very purpose of the CMU is to enable monitoring of potentially dangerous communications. The second factor asks whether the inmate

had an "alternate means" of expressing himself. This case, however, is not about any prohibition requiring alternate means of expression: plaintiffs do not contend that continued CMU placement (the consequences he complains of here) precluded him from giving similar speeches. In any event, Jayyousi had other avenues of expressing his dissatisfaction with the BOP besides delivering an oppositional speech to all of the inmates, such as the filing of grievances,[17] and he was free to continue practicing his religion.

The third *Turner* factor considers the effect on guards or other inmates of "accommodating" the constitutional right. 482 U.S. at 90. The BOP's administrators reasonably considered Jayyousi's speech a security threat and viewed it as a first step towards further radicalization, indicating that Jayyousi's communications required continued monitoring. Plaintiffs do not identify how the BOP would have been required to accommodate Jayyousi's speech, other than to exclude it from consideration when considering threats posed by his communications. That no specific acts of violence were directly traced to Jayyousi's speech does not mean that the speech was irrelevant to whether Jayyousi continued to present a risk warranting monitoring, regardless of whether any later incidents were traced to that specific speech. As the district court noted, it makes "little sense to inquire how Defendants

[17] Indeed, Jayyousi has filed an unusually large number of administrative grievances, including some related to his contention that the BOP's CMU assignment decisions are discriminatory. *See* JA-1140-1284.

could have accommodated" such speech. JA-1668. Finally, under the fourth factor, there are no obvious "alternative" actions the BOP could have taken. The CMUs exist precisely because inmates who present security risks related to communications require monitoring that could not be provided in less restrictive prison settings.

Plaintiffs incorrectly contend (AOB-39-42) that the district court erred by resolving the reasonableness inquiry on summary judgment. But courts regularly balance the *Turner* factors as a matter of law, even where plaintiffs raise allegations of exaggeration. *See, e.g.*, *Hatim v. Obama*, 760 F.3d 54, 60-61 (D.C. Cir. 2014). The retaliation claim implicates at most a "disputed matter[ ] of professional judgment," not a dispute of fact, *see Beard v. Banks*, 548 U.S. 521, 529-30 (2006): did Jayyousi's statements give rise to security concerns warranting continued monitoring? As the Supreme Court has explained, with respect to such disputes, this Court must "accord deference to the views of prison authorities" even at the summary judgment stage, and plaintiffs can survive summary judgment only if they demonstrate sufficient evidence to prevail on the merits. *Id.* at 530. Plaintiffs' efforts to point to such evidence fall far short of this standard. *See* AOB-4041. Numerous BOP officials expressed concern about Jayyousi's speech, *see* JA-1299, JA-1301, JA-1303, JA-1305; JA-1307-1308, and to the extent the record suggests varying views among BOP officials, defendants are entitled to deference in the resolution of such differences of opinion. *See Beard*, 548 U.S. at 529-30.

Plaintiffs seem to believe that if there is any evidence of any sort of "exaggeration," the case must go to trial. That misapprehends the *Turner* test, which establishes objective factors relevant to whether an official response to concerns was exaggerated or reasonable as a matter of law. *See, e.g.*, *Hatim*, 760 F.3d at 59-60. Contrary to plaintiffs' suggestion (AOB-38), nothing in *Bell v. Wolfish*, 441 U.S. 520 (1979) (which pre-dates *Turner*) suggests that the four-factor test is inapplicable merely because plaintiffs assert that an official's description exaggerated events. The approach taken in *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), on which plaintiffs rely, is instructive: there, the plaintiff demonstrated that a challenged policy was an "exaggerated response . . . *because* there are obvious, easy alternatives" (a *Turner* factor)—not that an official's assessment of a threat was inaccurate. *Id.* at 135 (emphasis added); *see also Hatim*, 760 F.3d at 60-62 (reversing and criticizing district court for rejecting official testimony as incredible).

Nor can plaintiffs prevail by speculating about Smith's motivation. AOB-42 (asserting that Smith's motivation was "his dislike of Jayyousi's criticism of the BOP."). That unsupported contention cannot "overcome the legitimate, rational connection" between Jayyousi's continued CMU designation and the BOP's articulated and reasonable security concerns. *Hatim*, 760 F.3d at 59-60. Even if motive were relevant, "tenuous evidence of an improper motive" could not overcome otherwise valid prison action. *Id.* at 62.

Because the BOP's decision to continue monitoring Jayyousi's communications must be upheld under *Turner*, there is no need for this Court to address whether Jayyousi's conduct was protected under the First Amendment more generally. The relevant question is whether the challenged conduct was reasonable, not whether there is some abstract protection afforded to an inmate's statement or whether a statement would be protected from other official actions. But even if this were a case about prohibitions on speech, the district court's conclusion that Jayyousi's speech was not entitled to First Amendment protection (JA-1665) was correct. Inmate speech is not protected when it interferes with prison administration. *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 228-29 (2001) (collecting cases and explaining that "some [First Amendment] rights are simply inconsistent with the status of prisoner or 'with the legitimate penological objectives of the corrections system'") (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Although prisoners retain a general First Amendment rights to express grievances, they must do so in a manner consistent with legitimate penological interests. *See, e.g.*, *Watkins v. Kasper*, 599 F.3d 791, 797-98 (7th Cir. 2010) (inmate's challenge to the law librarian in front of other inmate law clerks was disruptive and not consistent with legitimate penological interests); *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) (inmate's public expression of theological disagreement with prison chaplain was not protected by the First Amendment).

A "very motivating" (JA-1303) public speech describing the CMU as evil, discouraging cooperation with the BOP, and arguing that CMU placement or inmates' convictions are the result of "U.S. v. Islam" is contrary to the BOP's interests in security and order and thus not consistent with Jayyousi's status as an inmate. As multiple BOP officials explained, Jayyousi's speech raised particular security concerns because it set him up as a leader of the inmates, in opposition to the BOP, and such circumstances can lead to serious problems for prison security. *See, e.g.*, JA-881; JA-962-63 (explaining concerns about prisoners "circumventing the authority of the institution"); JA-1011-13; JA-1611, JA-1613, JA-1299. This concern was especially pertinent in light of Jayyousi's crime of conviction and his "rock star" reputation in prison. *See* JA-869, JA-880, JA-986; JA-1012-13. While Jayyousi had a general First Amendment right to express complaints with the BOP through other avenues, the Constitution does not protect an inmate's every statement, regardless of its context and manner.

Finally, Jayyousi's First Amendment claim fails for the additional reason that the undisputed evidence demonstrates that the BOP would have recommended Jayyousi for continued CMU placement even absent the 2008 speech. A claim for retaliation fails if the defendant demonstrates that "it would have reached the same decision absent the allegedly protected speech." *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). Here, Smith testified that he would not have recommended Jayyousi for transfer in 2011 even "had [Jayyousi] not engaged in this sermon," JA-

1565, in light of sensitive law enforcement information. Likewise, the Regional Director (the ultimate decision-maker at the time) testified that his "consistent practice has always been" to deny transfer requests when there is relevant sensitive law enforcement information, and that he would have denied Jayyousi's request solely on that basis. JA-882 (¶¶ 261-62); JA-929.

ARGUMENT ON BEHALF OF UNITED STATES AS AMICUS CURIAE

Plaintiffs Jayyousi and McGowan appeal from the 2013 dismissal of their claims against Mr. Smith, who is now deceased. As discussed above, at present there is no defendant with respect to those claims. As amicus curiae, the United States urges this Court—if it reaches the merits of those claims—to affirm the district court's dismissal. *See* Fed. R. App. P. 43 (a)(1), (a)(3); *Cf.* Fed. R. Civ. P. 25(a)(1) (requiring dismissal unless plaintiff moves to substitute within 90 days of statement noting the death).[18]

A. The Individual-Capacity Claims Against Smith Are Extinguished By His Death

State law determines whether *Bivens* actions survive the death of a party. *See, e.g.*, *Haggard v. Stevens*, No. 2:09-cv-1144, 2010 WL 3658809, at *3-6 (S.D. Ohio, Sept. 14, 2010) (collecting cases), *aff'd*, 683 F.3d 714 (6th Cir. 2012). Mr. Smith was domiciled in West Virginia, and as plaintiffs noted in their complaint, JA-44, he worked from West Virginia at the time of the relevant events. Accordingly, the survival of plaintiffs' claims against Smith turns on West Virginia law. *See Malone v. Corr. Corp.*, 553 F.3d 540, 545 (applying forum choice of law principles where constitutional tort did not occur in forum state).

[18] A substituted party (if any) should be afforded an opportunity to present arguments to this Court.

Under the common law, tort claims generally were extinguished by the death of a party. *See* 78 A.L.R. 600 (originally published in 1932). Like other states, West Virginia has partially abrogated that common law rule with a survivorship statute, which provides that "causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud" survive and "may be brought notwithstanding the death . . . of the person liable." W. Va. Code § 55-7-8a. Other torts such as "libel, defamation, false arrest, false imprisonment, and malicious prosecution . . . are excluded from statutory survivability." *Wilt v. State Auto. Mut. Ins. Co.*, 102 W. Va. 165, 170 (1998).

Applying a closely analogous Ohio statute, at least one federal court has held that a First Amendment retaliation claim does not constitute a claim for "injuries to the person or property." *See Haggard*, 2010 WL 3658809. As the *Haggard* court explained, applying the survivorship statute to preclude a First Amendment *Bivens* action is consistent with the Constitution because the primary policy underlying *Bivens* claims— the deterrence of unconstitutional conduct by federal officials—would not be undermined by such a rule in those rare instances where the defendant dies during the pendency of the action. *Id.* at *10-11. Indeed, even setting aside the idiosyncracies of state law, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), and extending the remedy to cases where the defendant is not alive would not serve the purpose of *Bivens* claims. *See FDIC v. Meyer*,

510 U.S. 471, 485 (1994) ("It must be remembered that the purpose of *Bivens* is to deter *the officer*"); *Haggard v. Stevens*, 683 F.3d 714, 717 (6th Cir. 2012) (rejecting survivorship of First Amendment *Bivens* claim because "virtually nobody is more inclined to commit [constitutional violations] based upon the prospect that they might die and obtain immunity from suit.").

B. The PLRA Bars Plaintiffs' Damages Claims

The Prison Litigation Reform Act (PLRA) provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). As the district court correctly held (JA-294-296), because Jayyousi and McGowan have not alleged physical injury, their claims for damages are barred by this provision.

This Court, like the majority of circuits, has construed section 1997e(e) to generally bar damages actions based on alleged violations of Constitutional rights absent physical injury.[19] In *Davis v. District of Columbia*, 158 F.3d 1342, 1348-49 (D.C. Cir. 1998), this Court addressed both whether Section 1997e(e) is constitutional and

[19] *See, e.g.*, *Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015) (holding that although the plaintiff had a meritorious Eighth Amendment claim, "[b]ecause [plaintiff] has not alleged any physical injury resulting from his hospital stay, under the Prison Litigation Reform Act he cannot recover compensatory or punitive damages"); *Thompson v. Carter*, 284 F.3d 411, 417 (2d Cir. 2002) (collecting cases and noting that the "weight of the authority" supports this view) (citation omitted); *Cassidy v. Indiana Dep't of Corr.*, 199 F.3d 374, 376 (7th Cir. 2000).

whether the plaintiff's claims had been properly dismissed because all of his damages were barred by section 1997e(e). The *Davis* court explicitly assumed that the plaintiff—who claimed that his privacy interests had been invaded—had suffered a violation of a fundamental constitutional right. *Id.* at 1345. And the Court held that the statute was not subject to strict scrutiny because it allowed for injunctive and declaratory relief, even though it barred compensatory damage claims for violations of constitutional rights absent physical injury.

The *Davis* court thus properly understood section 1997e(e) to bar most constitutional claims absent physical injury, explaining that "persons who are subjected to an on-going threat of unconstitutional conduct may sue for injunctive or declaratory relief, and of course ones with a qualifying physical injury may sue for damages." 158 F.3d at 1347. If, as plaintiffs contend, prisoners were also entitled to recover for a non-physical injury constituted by the purported constitutional violation itself, the Court's analysis would have been unnecessary.

The *Davis* court's understanding of section 1997e(e) is consistent with the Congressional intent behind the PLRA, which was to curb the massive numbers of prisoner lawsuits. Allowing compensatory damages for constitutional violations that do not give rise to physical injuries would dramatically undermine this purpose and be inconsistent with the statute's plain text. "The plain language of the statute does not permit alteration of its clear damages restrictions on the basis of the underlying rights being asserted." *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001); *see also, e.g.*,

Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("The plain language of [section] 1997e(e) makes no distinction between the various claims encompassed within the phrase 'federal civil action' to which the section applies.").

Plaintiffs and their amici mistakenly contend that the violation of a constitutional right leads to harm that is distinct from mental or emotional harm and also distinct from the value of the right itself, which they concede cannot form the basis for a compensatory damage award. *See* AOB-53. But as the *Davis* court understood, any intangible injuries suffered as a result of constitutional violations fall under the umbrella of mental or emotional injuries. Although plaintiffs contend that the phrase "mental or emotional" would be surplusage under this interpretation, that phrase simply emphasizes the distinction between physical and intangible harms. *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007). And the Supreme Court's explanation in *Carey v. Piphus* that plaintiffs may recover damages analogous to traditional tort remedies for constitutional violations only underscores that such intangible damages are fundamentally mental or emotional. 435 U.S. 247, 264, 262 (1974) (discussing "mental or emotional distress" and harm to "a feeling that the government has dealt with [plaintiff] fairly").

Plaintiffs' other claimed damages are likewise merely different species of mental and emotional harm. Injuries like "harm to family relationships" and "loss of liberty" are consistently classified as mental or emotional injuries in major treatises, and there is no reason to conclude that Congress intended to create a silent exception for these

specific forms of non-physical distress when it enacted the PLRA. *See, e.g.*, Restatement (Second) of Torts § 905 cmts. f, g (1979) (categorizing "loss of companionship" and "loss of freedom" as forms of "emotional distress'); 1 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); 1 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.").[20]

Even assuming that, as plaintiffs assert, they received less educational programming while housed in the CMUs, any resultant injury is barred by the PLRA. *See, e.g.*, *Compton v. Reid*, No. 1:10-cv-264, 2011 WL 628037, at *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). *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983) is not to the contrary; it

[20] Plaintiffs' claim for reputational injuries was raised for the first time on appeal and is waived. *See Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) (noting that it is "well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.") (quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984)). In any event, the distress of reputational harm does not create a compensable injury under the PLRA, and speculation that such an injury will lead to financial or other damages does not create a claim. Moreover, the notion that any future harm from plaintiffs' purported stigma as terrorists would stem from their CMU placement, rather than their criminal convictions for terrorism, is fanciful.

predates the PLRA and does not identify what injuries are "mental or emotional" for this or any other purpose. To the extent that plaintiffs suggest that reduced programming will someday harm their employment prospects (AOB-49-50), that suggestion is too speculative to support their claim, as the district court found (JA-293). In any event, such future injury claims are barred by the PLRA. Just as a claim based on emotional injury is barred by the PLRA even if that injury might give rise to costs in the form of reduced income or treatment expenses, a claim for mental injury does not avoid the PLRA bar by including conjecture that the injury will lead to other difficulties down the road. A contrary principle would create an enormous loophole in the bar imposed by Section 1997e(e) and would run counter to Congress's intent.

Finally, the district court correctly applied *Davis* and rejected plaintiffs' belated request for nominal damages. *See* JA-295-96. In *Davis*, in spite of the usual flexibility granted to pro se litigants, this Court refused to stretch to find a request for nominal damages in a *pro se* complaint. 158 F.3d at 1349. This approach serves the practical purpose of reducing prisoner litigation in cases where prisoners might not have initiated the suit if they had realized meaningful monetary relief was barred by the PLRA. This Court should not adopt a less stringent rule for well-counseled plaintiffs. Although the complaint includes a boilerplate request for "such other relief as this Court deems just and proper," the only references to damages are a request for "compensatory and punitive damages," JA-105, and recitations of particular damages which, as discussed above, are barred by the PLRA. JA-103-04.

C. The *Bivens* Claims Are Barred By Qualified Immunity

Because the district court dismissed the *Bivens* claims as barred by the PLRA, it did not reach the alternative argument that Smith would be entitled to qualified immunity because Jayyousi and McGowan failed to plausibly allege violations of clearly established law. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

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)). The "relevant, dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Elkins v. District Of Columbia*, 690 F.3d 554, 567 (D.C. Cir. 2012) (ellipsis omitted). To meet that standard, "existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

Because qualified immunity is intended to provide "breathing room" to make "reasonable but mistaken judgments" on the ground, the inquiry is narrowly focused on whether a right was clearly established in a particular context. *Reichle*, 132 S. Ct. at 2094. Accordingly, in the context of a First Amendment retaliation claim, "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 in the particular situation alleged by a plaintiff. *Id.*

1. To overcome qualified immunity, Jayyousi would have to demonstrate that Smith's recommendation for continued CMU confinement not only violated the First Amendment, but also that such violation was "clearly established" in 2011. For all of the reasons described in Part III, Jayyousi has not established a claim for First Amendment retaliation: Jayyousi's speech ran counter to legitimate penological concerns and was thus not protected, *see Pell v. Procunier*, 417 U.S. 817, 822 (1974); Smith's recommendation furthered legitimate BOP interests, *see Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989); and there is no dispute of material fact that Smith would have recommended further CMU confinement regardless of the speech. It follows that Smith's recommendation for continued CMU retention did not violate clearly established law.

Even were this Court to decide that Jayyousi stated a claim for First Amendment retaliation, Smith would still be entitled to qualified immunity because there is no case law establishing that a First Amendment violation exists in even remotely analogous circumstances. As the Chief of the Counter-Terrorism Unit, Smith was tasked with the weighty and difficult responsibility to protect prison security and public safety, and he was entitled to "breathing room" to assess what information is relevant to whether a particular inmate creates a risk warranting CMU

placement, and Smith's consideration of Jayyousi's speech was not unreasonable when he made his recommendation in 2011.

2. McGowan alleged that Smith recommended that he be placed in a CMU in August 2008 and in February 2011 "on the basis of his protected political speech and beliefs, rather than any misconduct in prison." JA-103-04; *see also* JA-75-78. Because McGowan has failed to plausibly allege that Smith's recommendation failed to advance legitimate penological goals or that the speech at issue was protected under the First Amendment, much less that Smith's recommendation violated clearly established law, Smith was entitled to qualified immunity.

McGowan alleges that Smith illegally retaliated against him in 2008 by recommending that he be assigned to a CMU. JA-256-60. The basis for this charge is a memorandum incorporated into Plaintiffs' complaint, in which Smith explained that McGowan's terrorist-related convictions justified his placement. The memo also accurately noted that McGowan's recent communications described government cooperators as "snitches" and expressed continued support for "direct action," which was understood to refer to criminal activity. JA-257-58.

McGowan also alleges that Smith illegally retaliated against him in February 2011, after he had been released from the CMU in October 2010. Smith recommended that McGowan be returned to the CMU in part because McGowan had attempted to "circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication." JA-262.

The memo explained that McGowan asked his wife to have his attorney send him leaked documents that he knew were considered law-enforcement sensitive, and noted that this indicated that "the original rationale for CMU designation has not been mitigated." JA-263.

Just as the BOP was entitled to consider Jayyousi's speech, in context, in assessing whether his communications posed a threat, the BOP was not required to ignore McGowan's statements related to his offense conduct in assessing whether his communications warranted monitoring. And there is nothing improper about considering an inmate's apparent attempt to gain access to prohibited materials via attorney-client mail in assessing whether CMU placement is warranted. McGowan's apparent attempt at circumvention was relevant to a CMU placement determination, and reliance on this incident plainly furthered penological interests. *A fortiori*, Smith's recommendation based in part on this incident did not violate clearly established law.

McGowan's suggestion that Smith acted on some hidden improper motive is wholly speculative and not plausible. The complaint incorporates Smith's own contemporaneous explanations for his actions in the form of his memoranda. Those explanations do not give rise to any plausible inference of animus or other improper motive.[21] *Cf. Iqbal*, 556 U.S. at 663 (plaintiff must plausibly allege that defendant acted

[21] Plaintiffs have argued that minor mistakes in the characterization of McGowan's role in the offense gave rise to an inference of improper motive or retaliation. But as plaintiffs themselves argue, any mistakes appear to have resulted

Continued on next page.

"not for a neutral, .investigative reason," but for unconstitutional purpose). To the contrary, based on plaintiffs' allegations, the "obvious alternative explanation" for Smith's recommendations was furthering prison security and protecting the public. *Id.* And in any event, as discussed above, because there was no clearly established law addressing the circumstances Smith faced, he was entitled to qualified immunity.

3. In short, plaintiffs have not plausibly alleged that Smith violated the First Amendment, let alone that his actions violated clearly established law. This Court "tread[s] carefully before recognizing *Bivens* causes of action when plaintiffs have invoked them in new contexts, especially in cases within the national security arena." *Meshal v. Higgenbotham*, 804 F.3d 417, 421 (D.C. Cir. 2015). The Supreme Court has emphasized that *Bivens* is a "limited" remedy, and it has elsewhere "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. 662, 675 (2009) (assuming but not deciding that there could be First Amendment *Bivens* action); *see also Reichle*, 132 S. Ct. at 2093 n.4 ("We have never held that *Bivens* extends to First Amendment claims."). This Court should be especially hesitant to extend that remedy to the sensitive circumstances here, where officials are tasked with the difficult duty of assessing when CMU monitoring is necessary to protect prison security and the public. By seeking damages from the official responsible for making those

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from the Counter-Terrorism Unit's use of a template based on the crimes of one of McGowan's co-conspirators. *See* AOB-17. Such mistakes, while not ideal, in no way give rise to any kind of inference of improper motive or animus, especially given the obvious alternative explanation for any errors.

determinations, plaintiffs effectively "ask[ ] the courts to intermeddle in the delicate area of balancing what would be the First Amendment right to expression against the crucial security concerns inherent in a custodial setting." *McGowan v. United States*, 94 F. Supp. 3d 382, 388 (E.DN.Y. 2015) (addressing different set of First Amendment retaliation claims raised by McGowan). The inherent difficulty of the judgments Smith was required to make as the chief of the BOP's Counter-Terrorism Unit, the sensitivity of the information on which those judgments were necessarily based, and the delicacy of the Executive's need to balance competing considerations in this area all counsel against extending the *Bivens* remedy to these circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Civil Procedure 32(a). This brief contains 13,468 words.

s/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

ADDENDUM

TABLE OF CONTENTS

42 U.S.C. § 1997e(e)

Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

28 C.F.R. § 540.200 PURPOSE AND SCOPE

(a) Purpose of this subpart. This subpart defines the Federal Bureau of Prisons' (Bureau) authority to operate, and designate inmates to, Communications Management Housing Units (CMUs) within Bureau facilities.

(b) CMU. A CMU is a general population housing unit where inmates ordinarily reside, eat, and participate in all educational, recreational, religious, visiting, unit management, and work programming, within the confines of the CMU. Additionally, CMUs may contain a range of cells dedicated to segregated housing of inmates in administrative detention or disciplinary segregation status.

(c) Purpose of CMUs. The purpose of CMUs is to provide an inmate housing unit environment that enables staff to more effectively monitor communication between inmates in CMUs and persons in the community. The ability to monitor such communication is necessary to ensure the safety, security, and orderly operation of correctional facilities, and protection of the public. The volume, frequency, and methods, of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart.

(d) Application. Any inmate (as defined in 28 CFR 500.1(c)) meeting criteria prescribed by this subpart may be designated to a CMU.

(e) Relationship to other regulations. The regulations in this subpart supersede and control to the extent they conflict with, are inconsistent with, or impose greater limitations than the regulations in this part, or any other regulations in this chapter, except 28 CFR part 501.

28 C.F.R. § 540.201 DESIGNATION CRITERIA

Inmates may be designated to a CMU if evidence of the following criteria exists:

(a) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;

(b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a substantial likelihood that the inmate will encourage, coordinate, facilitate, or otherwise act in furtherance of illegal activity through communication with persons in the community;

(c) The inmate has attempted, or indicates a substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;

(d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or

(e) There is any other substantiated/credible evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community.

28 C.F.R. § 540.202 DESIGNATION PROCEDURES

Inmates may be designated to CMUs only according to the following procedures:

(a) Initial consideration. Initial consideration of inmates for CMU designation begins when the Bureau becomes aware of information relevant to the criteria described in § 540.201.

(b) Assistant Director authority. The Bureau's Assistant Director, Correctional Programs Division, has authority to approve CMU designations. The Assistant Director's decision must be based on a review of the evidence, and a conclusion that the inmate's designation to a CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protection of the public.

(c) Written notice. Upon arrival at the designated CMU, inmates will receive written notice from the facility's Warden explaining that:

(1) Designation to a CMU allows greater Bureau staff management of communication with persons in the community through complete monitoring of telephone use, written correspondence, and visiting. The volume, frequency, and methods of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart;

(2) General conditions of confinement in the CMU may also be limited as necessary to provide greater management of communications;

(3) Designation to the CMU is not punitive and, by itself, has no effect on the length of the inmate's incarceration. Inmates in CMUs continue to earn sentence credit in accordance with the law and Bureau policy;

(4) Designation to the CMU follows the Assistant Director's decision that such placement is necessary for the safe, secure, and orderly operation of Bureau institutions, or protection of the public. The inmate will be provided an explanation of the decision in sufficient detail, unless the Assistant Director determines that providing specific information would jeopardize the safety, security, and orderly operation of correctional facilities, or protection of the public;

(5) Continued designation to the CMU will be reviewed regularly by the inmate's Unit Team under circumstances providing the inmate notice and an opportunity to be heard, in accordance with the Bureau's policy on Classification and Program Review of Inmates;

(6) The inmate may challenge the CMU designation decision, and any aspect of confinement therein, through the Bureau's administrative remedy program.