

[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5368

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

KIFAH JAYYOUSI,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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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

In the district court, plaintiffs were Yassin Muhiddin Aref, Avon Twitty, Daniel McGowan, Jenny Synan, Royal Jones, Kifah Jayyousi, and Hedaya Jayyousi. Defendants named in the initial or operative complaint in the district court, or substituted in their place, were Eric H. Holder, Jr., Attorney General of the United States; Harley G. Lappin, Director of the Federal Bureau of Prisons; D. Scott Dodrill, Assistant Director for the Correctional Programs Division of the Federal Bureau of Prisons; Charles E. Samuels, Jr., Acting Assistant Director for the Correctional Programs Division of the Federal Bureau of Prisons and Director of the Federal Bureau of Prisons; Thomas R. Kane, Acting Director of the Federal Bureau of Prisons; Leslie Smith, Chief of the Counter Terrorism Unit of the Federal Bureau of Prisons; and the Federal Bureau of Prisons.

In this Court, the only plaintiff-appellant is Kifah Jayyousi. Defendants-appellees, reflecting substitutions made pursuant to Federal Rule of Appellate Procedure 43(c)(2), are Merrick B. Garland, Attorney General of the United States; Michael Carvajal, Director of the Federal Bureau of Prisons; Andre Matevousian, Assistant Director for the Correctional Programs Division of the Federal Bureau of

Prisons; Guy Pagli, Chief of the Counter Terrorism Unit of the Federal Bureau of Prisons; and the Federal Bureau of Prisons.

There were no amici in the district court proceedings. When this case was previously before this Court (*Aref v. Lynch*, No. 15-5154), the following amici entered appearances: the Legal Aid Society of the City 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 Center for Social Justice.

Several parties moved to intervene in the district court. The district court denied the motions to intervene on March 30, 2011, November 17, 2014, November 4, 2019, and June 25, 2020. The movants in the district court were William Oscar Harris, Rex Russell Dean Landers, Ralph William Taylor, Daniel John Riley, Jeremy Pinson, Robert J. Whiteman, Jr., Melvin Fagan, Donte Rolando Harris, Montgomery Carl Akers, and Carlos Brutus.

B. Rulings Under Review

Jayyousi appeals from the district court's October 13, 2020 order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. The order (JA__[Dkt.212@1-15]) is unpublished but is available on Westlaw at 2020 WL 7251386. Also relevant to this appeal is the district court's November 1, 2019 order granting in part and denying in part

defendants' motion to dismiss the case as moot. The order (JA__[Dkt.189@1-12]) is unpublished but is available on Westlaw at 2019 WL 11593252.

C. Related Cases

This case was previously before this Court. *See Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016) (No. 15-5154). Counsel is aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Kevin B. Soter

Kevin B. Soter

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE ISSUES.....	2
PERTINENT REGULATIONS.....	3
STATEMENT OF THE CASE.....	3
A. Communications Management Housing Units	3
B. CMU Assignment Procedures.....	7
C. Plaintiff Kifah Jayyousi.....	10
D. Procedural History.....	12
SUMMARY OF ARGUMENT	17
STANDARD OF REVIEW	19
ARGUMENT	19
I. Jayyousi’s claim is moot because he is not in BOP custody.....	19
A. Jayyousi’s past placement in the CMU has no ongoing effect on his liberty.....	20
B. Expungement of BOP records related to Jayyousi’s CMU placement would not provide him meaningful relief.....	22
II. The BOP’s procedures for Jayyousi’s CMU placement satisfied the Due Process Clause.....	32
A. The BOP’s CMU procedures provided Jayyousi notice, an opportunity to respond, and ongoing review of his placement.....	34

- 1. Jayyousi received adequate notice of the factual basis for his placement.....34
- 2. Jayyousi had an opportunity to challenge his placement.....40
- 3. The BOP’s periodic reviews, pursuant to which Jayyousi was ultimately transferred out of the CMU, were adequate.45
- B. No additional procedures were constitutionally required.51
- CONCLUSION 54
- CERTIFICATE OF COMPLIANCE
- ADDENDUM

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Abdelfattah v. U.S. Dep’t of Homeland Sec.</i> , 787 F.3d 524 (D.C. Cir. 2015)	24, 31, 32
<i>Already, LLC v. Nike, Inc.</i> , 133 S. Ct. 721 (2013)	19
<i>Anyanwutaku v. Moore</i> , 151 F.3d 1053 (D.C. Cir. 1998).....	31
<i>Aref v. Lynch</i> , 833 F.3d 242 (D.C. Cir. 2016).....	1, 5, 6, 12, 13, 14, 15, 17, 19, 20, 21, 24, 32, 33, 50, 52, 53
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	26
<i>Ashcroft v. Mattis</i> , 431 U.S. 171 (1977)	25
<i>Barkley v. U.S. Marshals Serv. ex rel. Hylton</i> , 766 F.3d 25 (D.C. Cir. 2014).....	42
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	33
<i>Chastain v. Kelley</i> , 510 F.2d 1232 (D.C. Cir. 1975).....	24
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	25
<i>Clarke v. United States</i> , 915 F.2d 699 (D.C. Cir. 1990).....	19
<i>Connecticut Bd. of Pardons v. Dumschat</i> , 452 U.S. 458 (1981)	33

<i>Crosby-Bey v. District of Columbia</i> , 786 F.2d 1182 (D.C. Cir. 1986).....	49
<i>Greenholtz v. Inmates of Neb. Panel & Corr. Complex</i> , 442 U.S. 1 (1979)	33
* <i>Gul v. Obama</i> , 652 F.3d 12 (D.C. Cir. 2011).....	18, 22, 23, 30
<i>Hedgepeth v. Washington Metro.Area Transit Auth.</i> , 386 F.3d 1148 (D.C. Cir. 2004).....	31
* <i>Hewitt v. Helms</i> , 459 U.S. 460 (1983), <i>disapproved on other grounds</i> , <i>Sandin v. Conner</i> , 515 U.S. 472 (1995)	15, 32, 33, 41, 45, 48, 51, 53
<i>Isby v. Brown</i> , 856 F.3d 508 (7th Cir. 2017).....	48-49
<i>Lane v. Williams</i> , 455 U.S. 624 (1982)	21, 26, 27, 28
<i>Martinez v. BOP</i> , 444 F.3d 620 (D.C. Cir. 2006).....	33, 50
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	34, 51
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	33
<i>Propert v. District of Columbia</i> , 948 F.2d 1327 (D.C. Cir. 1991).....	42
<i>Qassim v. Bush</i> , 466 F.3d 1073 (D.C. Cir. 2006).....	19

* Authorities upon which we chiefly rely are marked with asterisks.

<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016)	41
<i>Scott v. District of Columbia</i> , 139 F.3d 940 (D.C. Cir. 1998).....	16, 19, 20, 21
<i>Sealed Case, In re</i> , 809 F.3d 672 (D.C. Cir. 2016).....	28, 29
* <i>Spencer v. Kemna</i> , 523 U.S. 1 (1998)	22, 23, 26, 27, 28, 30
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998)	25
<i>Superintendent v. Hill</i> , 472 U.S. 445 (1985)	38
<i>United States v. Epps</i> , 707 F.3d 337 (D.C. Cir. 2013).....	28, 29
<i>United States v. Jayyousi</i> , 657 F.3d 1085 (11th Cir. 2011).....	10
* <i>Wilkinson v. Austin</i> , 545 U.S. 209 (2005)	20, 24, 33, 37, 38, 41-42, 43, 45, 51, 53
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	32, 52
Statutes:	
18 U.S.C. § 3583(e)	27
28 U.S.C. § 1291	2
28 U.S.C. § 1331	2

Regulations:

28 C.F.R. § 524.11(a)(2).....	9, 11, 46
28 C.F.R. § 524.11(b)	9
28 C.F.R. §§ 540.200-540.205.....	22
28 C.F.R. § 540.200(b)	5
28 C.F.R. § 540.200(b)-(c).....	3
28 C.F.R. § 540.201	7
28 C.F.R. § 540.201(a).....	35
28 C.F.R. § 540.201(a)-(e).....	7
28 C.F.R. § 540.202(b)	8
28 C.F.R. § 540.202(c).....	8-9, 34, 37-38
28 C.F.R. § 540.202(c)(3).....	6
28 C.F.R. § 540.202(c)(5).....	9, 46
28 C.F.R. § 540.202(c)(6).....	9
28 C.F.R. § 540.203	6
28 C.F.R. § 540.204(b)	7
28 C.F.R. § 540.205(b)	7
28 C.F.R. §§ 542.10-542.19.....	40

Other Authorities:

Fed. Bureau of Prisons, U.S. Dep’t of Justice, BOP Program Statement 5321.08, <i>Unit Management Manual</i> (Aug. 10, 2017), https://www.bop.gov/policy/progstat/5321.08.pdf	27
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80 Fed. Reg. 3168 (Jan. 22, 2015).....3, 6

GLOSSARY

BOP	Bureau of Prisons
CMU	Communications Management Housing Unit
JA	Joint Appendix
Regional Director	Regional Director of the North Central Regional Office of the Bureau of Prisons

INTRODUCTION

Plaintiff Kifah Jayyousi was convicted of crimes related to terrorism. Based on the nature of his conviction and his underlying offense conduct, Bureau of Prisons (BOP) officials determined that his communications posed a risk to prison security or to the general public, and accordingly assigned him to a communications management housing unit (CMU), which is designed to enable prison officials to monitor inmate communications.

Jayyousi (along with others no longer involved in this litigation) originally brought this suit claiming that his assignment to the CMU violated due process, and seeking transfer out of the CMU as well as other injunctive and declaratory relief. In a prior appeal, this Court held that Jayyousi had a liberty interest in avoiding CMU placement and remanded for the district court to resolve, in the first instance, whether Jayyousi received adequate process—emphasizing that “only minimal process” was “likely due.” *Aref v. Lynch*, 833 F.3d 242, 252-58 (D.C. Cir. 2016). Before the district court reached that issue, however, Jayyousi was released from BOP custody upon completion of his term of imprisonment.

Jayyousi’s release from custody mooted this case. Nothing about Jayyousi’s past CMU placement continues to have an adverse effect on him that is redressable through this lawsuit. In any event, the district court correctly concluded that Jayyousi’s due process claim fails on the merits. The BOP provided him with a

notice summarizing the reasons for his placement in the CMU, gave him an opportunity to respond, and ensured ongoing review. That is all the process he was due.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA__[Dkt.88-1@5] ¶ 13. On October 13, 2020, the district court granted defendants' motion for summary judgment. JA__[Dkt.212@1-15]. Plaintiff filed a notice of appeal on December 8, 2020. JA__[Dkt.213@1]. This Court has jurisdiction over this appeal from the district court's final judgment. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Jayyousi's due process claim, which seeks only equitable relief, is moot because he is no longer in BOP custody and has not demonstrated any continuing adverse consequences from having been assigned to the CMU while in custody.

2. Whether the district court correctly held that Jayyousi received all the process he was due, where the undisputed evidence established that the BOP's procedures provided him with notice, an opportunity to respond, and periodic review of his assignment.

PERTINENT REGULATIONS

Pertinent regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Kifah Jayyousi, along with several other plaintiffs, brought this case to challenge his previous placement in the CMU. This appeal concerns only Jayyousi's claim that he was not afforded constitutionally adequate process.¹

A. Communications Management Housing Units

A CMU is a general population housing unit used by the BOP to monitor prisoner communications that pose heightened risks. 28 C.F.R. § 540.200(b)-(c); JA__[Dkt.88-1@73]. 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__[Dkt.145-1@1] ¶ 1. The report noted that, while incarcerated at the 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__[Dkt.147-20@3]. Among other things, the report criticized the BOP's monitoring of inmate

¹ Discovery in this case closed in 2014, *see* JA__[Dkt.Sheet@39-41], and the discussion that follows therefore does not reflect current CMU conditions and practices. In particular, the record does not contain details about how CMUs have operated since a final CMU rule, promulgated after notice and comment, took effect in 2015. *See* 80 Fed. Reg. 3168 (Jan. 22, 2015).

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__[Dkt.147-20@3-4].

The BOP recognized the need for new procedures to ensure that inmates could not communicate with others to facilitate 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. JA__[Dkt.145-1@2] ¶ 5. The BOP also recognized that terrorism-related communications “can occur in codes which are difficult to detect and extremely time-consuming to interpret.” JA__[Dkt.88-1@112].

Accordingly, to enable adequate monitoring of inmates who present communications-related risks, the BOP established the CMU, in which inmates requiring communications monitoring are separated from other general population inmates. Two CMUs have been established, one in Terre Haute, Indiana (which began operating in 2006), and the other in Marion, Illinois (which began operating in 2008). JA__[Dkt.145-1@3] ¶ 8. Although the BOP limits the volume and methods of CMU communications to the extent necessary to enable effective monitoring, *see* JA__[Dkt.88-1@111], inmates housed within a CMU receive

ample opportunities to communicate, both among themselves and with others outside the prison.

As this Court has previously recognized, other than the communications controls, “CMUs essentially function as ‘self-contained general population housing unit[s].’” *Aref v. Lynch*, 833 F.3d 242, 247 (D.C. Cir. 2016) (alteration in original) (quoting Institution Supplement, currently available at JA __[Dkt.88-1@73]); *see also* JA __[Dkt.88-1@82], JA __[Dkt.88-1@111], JA __[Dkt.138-4@26]; 28 C.F.R. § 540.200(b). Like other general population inmates, inmates housed in a CMU are not confined to their cells except at night and during security checks, and instead have access to common areas for up to 16 hours per day. *Aref*, 833 F.3d at 247; *see* JA __[Dkt.145-1@3] ¶¶ 11-12. CMU inmates have access to recreational facilities, exercise equipment, and the library. *Aref*, 833 F.3d at 247; *see* JA __[Dkt.145-1@4] ¶¶ 13-14, JA __[Dkt.88-1@75-77], JA __[Dkt.88-1@90-91]. Generally, CMU inmates can, to the same extent as other general population inmates, “keep personal property in their cells, participate in religious services, receive educational and professional training, and be designated for work assignments.” *Aref*, 833 F.3d at 247; *see* JA __[Dkt.145-1@4] ¶ 13, JA __[Dkt.88-1@75-77], JA __[Dkt.88-1@90-91].

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, nor does it have any impact

on future housing or security classifications after an inmate transferred out of the CMU completes a six-month “step-down” process. JA__[Dkt.88-1@111], JA__[Dkt.145-1@24] ¶ 149, JA__[Dkt.147-3@3] ¶ 8; *see also* 28 C.F.R. § 540.202(c)(3); *Aref*, 833 F.3d at 247.

To enable the BOP to effectively monitor all communications, outside communications are limited.² CMU inmates during the relevant period were generally permitted to make two fifteen-minute phone calls per week. *See* JA__[Dkt.88-1@97]. CMU inmates were permitted up to eight hours of visitation per month, in increments of up to four hours. *Id.* Social visiting was non-contact, *id.*, which means that a glass wall separated inmates from their visitors and they communicated by speaking into a microphone, JA__[Dkt.145-1@5] ¶ 23. This enabled the BOP to record and monitor the conversations and prevented inmates from passing physical communications or evading monitoring by whispering. JA__[Dkt.145-1@6] ¶¶ 26-27. Although the current regulations allow for restrictions related to frequency and length of written correspondence by mail or email, 28 C.F.R. § 540.203, at all times relevant here, there were no CMU-wide frequency or volume limitations for either mail or email. JA__[Dkt.145-1@7]

² Regulations that went into effect in 2015 establish a “floor” beneath which communications in CMUs cannot be further restricted, 80 Fed. Reg. 3168, but in practice, CMU policies have been significantly less restrictive than those minimum required standards.

¶ 31. Attorney-client communications are not subject to restrictions similar to those in place for other outside communications. *See, e.g.*, 28 C.F.R. § 540.204(b) (attorney-client phone calls are not monitored); 28 C.F.R. § 540.205(b) (attorney visits are not auditorily monitored); JA__[Dkt.145-1@5] ¶ 23 (attorney visits can be “contact” visits).

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 any of the following reasons that warrant heightened monitoring of the inmate’s communications: the inmate’s conviction or offense conduct involved “international or domestic terrorism”; the inmate’s conviction or offense conduct makes it likely that the inmate will use communication with persons in the community either to further illegal activity or to contact the inmate’s victims; the inmate abused approved communication methods while incarcerated; or there is otherwise reason to conclude that an inmate’s communications pose a “potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public.” 28 C.F.R. § 540.201(a)-(e).³

³ 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__[Dkt.138-6@51], which were formally memorialized in a 2009 memo, *see* JA__[Dkt.149@80-82] (2009 memo); JA__[Dkt.149@7-8] ¶ 17 (explaining that

The BOP has, in practice, 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__ [Dkt.145-1@16-20] ¶¶ 100-25, JA__ [Dkt.147-1@4-6] ¶¶ 7-10; *see also* 28 C.F.R. § 540.202(b) (current regulation specifying that assignment 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”). At all times relevant to Jayyousi’s CMU placement, the final decision-maker with respect to CMU placement was the Regional Director of the BOP’s North Central Regional Office (the Regional Director). *See* JA__ [Dkt.147-2@3] ¶ 4.⁴

Inmates who are approved for CMU placement receive a Notice of Transfer upon their arrival at the CMU. The notice summarizes the factual basis for the inmate’s placement in the CMU, except to the extent specific information supporting the placement cannot be provided without jeopardizing prison operations or public safety. *See* JA__ [Dkt.149@9-10] ¶¶ 22, 27; *see also* 28

the 2009 memo “accurately sets forth the criteria used for initial placement” in a CMU as well as “continued CMU placement” thereafter).

⁴ Under the current regulations, the BOP’s Assistant Director for the Correctional Programs Division is the final decision-maker with respect to CMU placement. 28 C.F.R. § 540.202(b).

C.F.R. § 540.202(c) (current regulation requiring written notice to inmate and specifying its contents). The notice also informs inmates that they may challenge their placement or any condition of their confinement through the BOP's administrative remedy program, and that their Unit Team will regularly review the need for continued assignment. *See, e.g.*, JA__[Dkt.138-19@2]; *see also* 28 C.F.R. § 540.202(c)(5)-(6).

The BOP regularly reviews the appropriateness of an inmate's ongoing placement in a CMU. JA__[Dkt.149@10] ¶ 28. BOP policy memorialized in 2009, and also reflected in the current regulations, specifies that each inmate's Unit Team must conduct a formal review of the need for continued assignment to the CMU at least once every 180 days. JA__[Dkt.145-1@22] ¶¶ 132, 136, JA__[Dkt.149@80]; *see also* 28 C.F.R. § 540.202(c)(5) (current regulation specifying that this periodic review must occur in accordance with the BOP's policy on Classification and Program Review of Inmates); 28 C.F.R. § 524.11(a)(2) (requiring "program review at least once every 180 calendar days"). Inmates are given 48 hours advance notice of each such review, which is held in person. JA__[Dkt.145-1@22] ¶ 136; *see also* 28 C.F.R. § 524.11(b). These routine reviews regularly result in the transfer of inmates from the CMU. *See* JA__[Dkt.69-1@5] n.1.

C. Plaintiff Kifah Jayyousi

Kifah Jayyousi, along with co-defendants and co-conspirators 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, 1091-92 (11th Cir. 2011). The co-conspirators communicated in code and disguised their activity by posing as charitable organizations funding international relief efforts. *Id.* at 1099-1102; *see also, e.g.*, JA__[Dkt.148-4@16-19], JA__[P.Ex.59(Sealed)@10-16], JA__[P.Ex.59(Sealed)@23]. Jayyousi was convicted of conspiracy to murder, kidnap, and maim in a foreign country; conspiracy to provide material support to terrorism; and providing material support to terrorism. *Jayyousi*, 657 F.3d at 1091-92; JA__[Dkt.145-1@29] ¶ 182, JA__[P.Ex.59(Sealed)@4]. In January 2008, Jayyousi was sentenced to a 152-month prison term to be followed by a 20-year period of supervised release. JA__[Dkt.148-4@8-10].

In June 2008, Jayyousi was placed in a CMU because of his underlying convictions and associated offense conduct. JA__[Dkt.145-1@29] ¶¶ 183-85, JA__[Dkt.147-2@5-6] ¶ 10, JA__[Dkt.148-4@2]. The placement decision had been approved by the Regional Director (the final decision-maker at the time), who

made the decision after the matter had also been reviewed by several BOP officials, including from the Counter Terrorism Unit, the Office of General Counsel, and several personnel who reported to the Regional Director. *See* JA__[Dkt.145-1@16-20] ¶¶ 100-25, JA__[Dkt.148-4@2-7].

Within 24 hours of being placed in the CMU, Jayyousi received a Notice of Transfer. JA__[Dkt.145-1@29] ¶ 186; JA__[Dkt.138-19@2] (notice). The notice explained that Jayyousi's convictions and associated offense conduct were the reasons why he was placed in the CMU, JA__[Dkt.138-19@2]; the Regional Director has subsequently confirmed that this notice "accurately summarized the reasons why [he] ordered [Jayyousi's] placement in a CMU," JA__[Dkt.147-2@5-6] ¶ 10. As the notice also explained, Jayyousi could appeal the transfer decision using the BOP's administrative remedy program. JA__[Dkt.138-19@2]. Jayyousi did so, and at each of several stages of review, Jayyousi's appeals were denied. JA__[Dkt.138-19@5-14].

Jayyousi's Unit Team conducted program reviews with him approximately every six months following his placement in the CMU. JA__[Dkt.138-2@58-62] ¶¶ 386, 388, 395, 413; *see* 28 C.F.R. § 524.11(a)(2). The BOP's documentation of Jayyousi's earliest program reviews does not indicate whether he was considered for transfer from the CMU in connection with those reviews. JA__[Dkt.138-29@47-65]. In connection with Jayyousi's December 2009 program review,

Jayyousi's Unit Team recommended against his transfer out of the CMU, and his appeals from that decision were denied. JA__[Dkt.138-29@82], JA__[Dkt.138-29@86-91]. In February 2011, Jayyousi's Unit Team and Warden recommended in favor of his transfer from the CMU based on his conduct while in the CMU. JA__[Dkt.138-2@60] ¶ 401, JA__[Dkt.148-5@4-5]. The BOP's Counter Terrorism Unit opposed the transfer, however, relying on: Jayyousi's offense conduct; the view of the National Joint Terrorism Task Force, informed by sensitive law enforcement information; and statements Jayyousi had made while in the CMU that the Counter Terrorism Unit understood "as an attempt to 'radicalize' other prisoners, thereby constituting a continued security risk," *Aref*, 833 F.3d at 260 (explaining that it was reasonable for the BOP to have viewed Jayyousi's statements as "troubling"). JA__[Dkt.148-5@6-8], JA__[Dkt.147-1@7] ¶ 13. The Regional Director denied the transfer. JA__[Dkt.148-5@3].

Pursuant to another semiannual program preview, Jayyousi was transferred from the CMU in May 2013. JA__[Dkt.145-1@31] ¶¶ 192-93, JA__[Dkt.148-6@2-9]. Jayyousi was released from BOP custody in September 2017 because he had completed his term of imprisonment. JA__[Dkt.183-1@2] ¶ 3.

D. Procedural History

1. A group of seven plaintiffs, comprising five inmates who had been placed in CMUs and two of their spouses, brought this case in 2010. JA__[Dkt.5@1-77].

After most of the original claims were dismissed, inmate plaintiffs filed the operative amended complaint in 2012, alleging violations of their procedural due process and First Amendment rights. JA__ [Dkt.88-1@1-115]. Only the procedural due process claim is relevant to this appeal.⁵ As to that claim, plaintiffs sought only injunctive and declaratory relief. JA__ [Dkt.88-1@68] ¶ 231. In 2011 and 2013, the district court held that two plaintiffs' efforts to obtain injunctive and declaratory relief became moot after their release from BOP custody. JA__ [Dkt.37@16-17], JA__ [Dkt.115@10-12]. As a result of those decisions as well as the dismissal of one other inmate plaintiff for failure to comply with court orders (JA__ [Dkt.110@1-2]), only two plaintiffs continued to press the due process claim beyond the pleading stage: Jayyousi and Yassin Aref.

After the close of discovery, the parties filed cross-motions for summary judgment on the procedural due process claim, and in 2015 the district court granted summary judgment in favor of defendants. JA__ [Dkt.161@9-16], JA__ [Dkt.161@20]. Defendants argued as a threshold matter that this claim had become moot because Jayyousi and Aref had both been transferred out of CMUs. The district court disagreed, relying on the possibility that these plaintiffs, who remained in BOP custody, might be returned to CMUs before completing their

⁵ In a prior appeal, this Court affirmed the district court's judgment in defendants' favor on plaintiffs' First Amendment claim. *See Aref*, 833 F.3d at 258-69.

sentences. JA__[Dkt.161@4-9]. On the merits, the district court held that plaintiffs lacked a constitutionally protected liberty interest given the moderate communications-related restrictions imposed in CMUs. JA__[Dkt.161@9-15]. The district court's 2015 decision therefore did "not reach the question of whether the process Plaintiffs received upon designation to the CMUs was adequate." JA__[Dkt.161@16].

2. Plaintiffs appealed, and in 2016 this Court reversed and remanded as to the procedural due process claim. *Aref*, 833 F.3d at 252-58, 268-69. With respect to mootness, the Court concluded that the BOP's decisions to transfer Jayyousi and Aref out of the CMUs represented "voluntary cessation of allegedly unlawful conduct," and that the government had not satisfied the "high bar" required to show that this particular changed circumstance mooted their claims. *Id.* at 251. On the merits, this Court concluded that although the question whether CMU placement implicates any protected liberty interest "is admittedly a close call," some process is due in light of the "selectivity and duration" of CMU assignment—but "not its severity," as "CMU confinement involves significantly less deprivation than administrative segregation." *Id.* at 256-57.

This Court remanded for the district court to resolve in the first instance whether Jayyousi and Aref had received adequate process. *Aref*, 833 F.3d at 258. The Court "note[d], however, that [plaintiffs] are challenging fundamentally

predictive judgments in an area where administrators are given broad discretion and the government's legitimate interests in maintaining CMUs must be accorded substantial weight." *Id.* This Court therefore relied on the Supreme Court's decision in *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), to emphasize that "only minimal process is likely due." *Id.*

3. After this case was remanded, Jayyousi and Aref were both released from BOP custody. JA__[Dkt.183-1@2] ¶ 3 (Jayyousi released in 2017); JA__[Dkt.180-1@2] ¶ 4 (Aref released in 2018). Defendants therefore moved to dismiss the case as moot (JA__[Dkt.183@1-12]), emphasizing that the voluntary cessation rationale that had previously kept these plaintiffs' claims alive no longer applied, and that plaintiffs' attempt to save the case from mootness by seeking expungement of CMU-related BOP records—a request mentioned only in passing in the operative complaint and absent from the prayer for relief—was unavailing. *See* JA__[Dkt.88-1@5], JA__[Dkt.88-1@69-70] (operative complaint's prayer for relief and separate reference to expungement); *see also* JA__[Dkt.184-1@26] (explanation of documents Jayyousi now seeks to expunge). While that motion was pending, Aref was deported from the United States. JA__[Dkt.187@1].

In 2019, the district court dismissed Aref's claim as moot but held that Jayyousi had a live claim. The district court recognized that "[n]ormally, 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.”

JA__ [Dkt.189@7] (quoting *Scott v. District of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998)). The court then evaluated plaintiffs’ contention that they should benefit from an “exception to this general principle”: that a former inmate may maintain a live claim for “equitable relief in the form of expungement of records” if those records have sufficiently meaningful ongoing adverse effects. *Id.* As to Aref’s claim, the district court concluded that any future injury traceable to the mere “existence of the CMU-related records” was “simply too remote and speculative to maintain a live controversy,” because after being deported, Aref could not show that his BOP file would have any ongoing “negative[] impact.” JA__ [Dkt.189@12]. The district court concluded that Jayyousi, by contrast, had “sufficiently alleged that the continued existence of the CMU-related documents has ongoing consequences,” by alleging that these records would impact his prospects for modifying the terms of his supervised release and that these records were connected with questions he was asked by the FBI after his release from custody. JA__ [Dkt.189@11-12].

On the merits, the district court in 2020 granted summary judgment in favor of defendants, concluding that Jayyousi (the only remaining plaintiff) had received adequate process in connection with his CMU assignment. JA__ [Dkt.212@1-15]. The court, “mindful of” this Court’s statement that ““only minimal process is likely

due,” reasoned that Jayyousi was accorded everything required for a “fair process”: notice of the factual basis for his assignment, a fair opportunity to respond, and periodic review of the assignment. JA__ [Dkt.212@8-10] (quoting *Aref*, 833 F.3d at 258). Specifically, “within hours of his designation to the CMU,” Jayyousi received a notice that, as the final decision-maker confirmed, “formed the basis of his decision to designate Jayyousi to the CMU”; Jayyousi was given an opportunity to rebut his assignment, “which he availed himself of within weeks of his transfer”; and Jayyousi’s placement was periodically reviewed to the extent required by the Constitution. JA__ [Dkt.212@10-14]. Balancing the low “risk[] of erroneous deprivation” of liberty attached to these procedures, the government’s “substantial” interest in not being burdened with additional process, and Jayyousi’s interest in avoiding assignment to a particular unit within prison where conditions were significantly less severe than in administrative segregation, the court concluded that Jayyousi received adequate process. JA__ [Dkt.212@9-15].

SUMMARY OF ARGUMENT

When Jayyousi brought this suit in 2010, he was housed in the CMU and sought declaratory and injunctive relief to compel his transfer out of that unit. He has since been released not only from the CMU, but from BOP custody entirely upon the completion of his term of imprisonment in 2017. Jayyousi’s claim is therefore moot—like the claims of other plaintiffs who were released from

custody, had their claims dismissed as moot, and did not appeal those dismissals to this Court. Jayyousi attempts to save this case from mootness by arguing that he could still benefit from expungement of BOP records, but he has not met his burden to demonstrate that he suffers any ongoing injury from those records. *See Gul v. Obama*, 652 F.3d 12, 16-21 (D.C. Cir. 2011). Neither Jayyousi's desire for a ruling, nor his fear that law enforcement is monitoring him, nor his aspiration for a court order modifying the terms of his supervised release give Jayyousi a more-than-speculative chance of benefitting from expungement.

In any event, as the district court correctly held, Jayyousi's due process claim fails. Before placing Jayyousi in the CMU, the BOP engaged in a multi-stage review process and concluded that he should be housed there based on his terrorism conviction and associated offense conduct. Then, upon being placed there, Jayyousi received a notice accurately summarizing the reasons for his placement, ample opportunity to contest the placement, and regular review of the continued need for him to be housed there. That is all the Due Process Clause requires. Jayyousi's complaints about the BOP's processes are unsupported by the record and would require unnecessary new procedures that improperly interfere with BOP's prerogative to administer the federal prison system effectively and efficiently.

STANDARD OF REVIEW

This Court reviews the district court's decisions on mootness and summary judgment de novo. *Aref v. Lynch*, 833 F.3d 242, 250 (D.C. Cir. 2016).

ARGUMENT

I. Jayyousi's claim is moot because he is not in BOP custody.

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.*, 568 U.S. 85, 90-91 (2013) (quotation marks omitted). 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) (quotation marks omitted). "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); *see also Qassim v. Bush*, 466 F.3d 1073, 1077 (D.C. Cir. 2006) (this Court has "repeatedly held that, while damages claims may survive release from incarceration, equitable claims do not").

The “[n]ormal[.]” rule, *Scott*, 139 F.3d at 941, applies here: there is no longer any basis for a judicial order affecting ongoing or future conditions of Jayyousi’s confinement, and there is not a more-than-speculative chance that Jayyousi will be adversely affected by the mere existence of BOP records related to his CMU placement.

A. Jayyousi’s past placement in the CMU has no ongoing effect on his liberty.

Given Jayyousi’s release from BOP custody, the primary forms of relief he has sought through this litigation no longer offer a more-than-speculative chance of affecting him in the future. When this action was filed, Jayyousi plainly had standing to contest the BOP’s procedures and reasons for his assignment to the CMU because he was still housed there, and the relief he sought was likely to redress his claimed injury. *See* JA__ [Dkt.88-1@69-70] (operative complaint seeking to order the BOP either to “transfer each Plaintiff from the CMU” or to “provide each Plaintiff with due process to ensure their designation to the CMU was appropriate” and to grant increased communication opportunities). There was also a close nexus between the remedy Jayyousi sought (equitable relief affecting ongoing or future conditions while in BOP custody) and the right that Jayyousi claimed was infringed—a “liberty interest ‘in avoiding particular conditions of confinement,’” *Aref v. Lynch*, 833 F.3d 242, 256 (D.C. Cir. 2016) (emphasis omitted) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005)). And while

Jayyousi remained in BOP custody after having been transferred out of the CMU, jurisdiction was premised on whether the injuries Jayyousi had claimed while housed in the CMU could reasonably be expected to recur. *See Aref*, 833 F.3d at 251 (relying on voluntary cessation exception to mootness).

But as Jayyousi has acknowledged (JA__ [Dkt.184@18] n.5), the voluntary cessation exception to mootness that previously supported his assertion of jurisdiction no longer has any bearing on this case. Jayyousi's release from custody occurred not because of any voluntary action by the BOP, but because Jayyousi had finished serving the term of imprisonment that had been imposed upon his conviction. Jayyousi does not argue—nor could he maintain—that it is likely he will again “violate [the] law,” be “returned to prison,” and thereafter be housed in a CMU based on allegedly inadequate procedures. *See Lane v. Williams*, 455 U.S. 624, 632 n.13 (1982) (jurisdiction cannot be premised on future possibilities that plaintiffs “themselves are able—and indeed required by law—to prevent”). There is thus no longer any likelihood that allegedly inadequate CMU assignment procedures will have a future effect on “the conditions of his confinement.” *See Scott*, 139 F.3d at 941. It follows that Jayyousi's challenge to those procedures is moot. *See id.*

B. Expungement of BOP records related to Jayyousi's CMU placement would not provide him meaningful relief.

Jayyousi has argued, and the district court agreed, that this case is not moot because he claims he could still benefit from a judicial order requiring expungement of records related to his confinement in the CMU. *See* JA__ [Dkt.189@11]. Jayyousi is mistaken. Any hypothetical injury that might be affected by expungement is too speculative and remote to create a live controversy over which there is jurisdiction.⁶

There is no jurisdiction to award equitable relief unless Jayyousi can “prove” that actions taken during his confinement have “a continuing consequence” that satisfies the requirements of Article III. *Gul v. Obama*, 652 F.3d 12, 17 (D.C. Cir. 2011). As the Supreme Court has emphasized in the habeas context, although some earlier cases were “willing to *presume* that a wrongful criminal *conviction* has continuing collateral consequences” sufficient to satisfy Article III even after a prisoner has been released from custody, such consequences must generally be proven (not presumed) when the former inmate seeks to invalidate something other than a conviction. *Spencer v. Kemna*, 523 U.S. 1, 8 (1998) (emphasis added). The

⁶ As the district court recognized, Jayyousi's only theory of injury would not confer jurisdiction to evaluate the BOP's procedures “as they exist today,” including procedures implementing the CMU rule codified at 28 C.F.R. §§ 540.200-540.205. JA__ [Dkt.212@7]. The issue at this stage of the case is whether there is nevertheless jurisdiction to opine on the “procedures that were used in both [Jayyousi's] initial and his continuing designation to the CMU.” *Id.*

former inmate bears the burden of showing that a live controversy remains. *See Gul*, 652 F.3d at 21 (citing *Spencer*, 523 U.S. at 11). Thus, when a former inmate sought to challenge the revocation of his parole, the Supreme Court required the inmate to “demonstrate[]” that the parole revocation itself had ongoing consequences “adequate to meet Article III’s injury-in-fact requirement” (and rejected each of the specific injuries asserted by the inmate). *Spencer*, 523 U.S. at 14-16. And when former Guantanamo Bay detainees argued that their release from detention did not moot their challenge to having been designated “enemy combatants,” this Court required them to “make an actual showing” that their “prior detention or continued designation burden[ed] [them] with ‘concrete injuries’” (and deemed each claimed harm insufficient). *Gul*, 652 F.3d at 17-21 (quoting *Spencer*, 523 U.S. at 14).

Jayyousi’s request for expungement falls short of what is necessary “to sustain the exercise of federal jurisdiction.” *Gul*, 652 F.3d at 18. The relevant question is whether there are any meaningful consequences still flowing from the mere existence of BOP records stating that Jayyousi was assigned to the CMU and documenting the reasons for his initial and continued assignment. *See* JA__[Dkt.184-1@26] (explanation of documents Jayyousi now seeks to expunge); *see also, e.g.*, JA__[Dkt.148-4@2-25] (records related to Jayyousi’s initial 2008 placement in the CMU); JA__[Dkt.148-5@2-65] (records related to the BOP’s

2011 decision not to transfer Jayyousi out of the CMU); JA__[Dkt.148-6@2-21] (records related to the BOP's 2013 decision to transfer Jayyousi out of the CMU). Expungement of those records, however, would not alleviate the claimed injury upon which jurisdiction was premised while Jayyousi was in custody: infringement of his "liberty interest 'in avoiding particular conditions of confinement,'" *Aref*, 833 F.3d at 256 (emphasis omitted) (quoting *Wilkinson*, 545 U.S. at 222). This disconnect between the right Jayyousi claims is infringed and the remedy he seeks illustrates the weakness of his contention that there is any ongoing injury to redress.⁷

Nevertheless, Jayyousi has argued (JA__[Dkt.184@12-15]) that expungement would redress three claimed consequences of his past CMU assignment: (1) ongoing "emotional injury"; (2) being "treated like a person-of-interest by the FBI"; and (3) his "prospects for relief" on a motion to modify the

⁷ The district court reserved the question whether Jayyousi "is entitled to the remedy of expungement." JA__[Dkt.189@12]. In conducting that inquiry, a court would consider whether expungement is "'necessary to vindicate rights secured by the Constitution or by statute,'" and would need to "grapple with separation of powers concerns that would arise from the judiciary assuming authority over routine maintenance of executive branch records." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 536-37 (D.C. Cir. 2015) (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975)). It is unlikely that Jayyousi could show he satisfies the criteria for expungement. Jurisdiction is not properly premised on the theoretical possibility of such an inapposite remedy.

terms of his supervised release. None of these consequences save this case from mootness.

First, Jayyousi's desire for a court to resolve his claim does not establish an injury cognizable under Article III. "The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant." *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[P]sychic satisfaction is not an acceptable Article III remedy."); *Ashcroft v. Mattis*, 431 U.S. 171, 173 (1977) (per curiam) ("Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.").

Second, Jayyousi speculates, based on his assertion that he was interviewed by the FBI shortly after his 2017 release from custody (JA__[Dkt.184-1@15] ¶ 5), that he is being treated as a "person-of-interest" by the FBI because of his CMU placement. But even if Jayyousi were subject to any ongoing FBI surveillance—and the BOP is in no position to confirm or deny this allegation—there is no reason to conclude that records related to Jayyousi's past placement in a CMU, which ended more than eight years ago, would be a determinative reason why. Instead, "it is at least as likely that the conduct underlying" Jayyousi's CMU placement—being convicted of serious terrorism-related offenses—might cause the FBI to wish

to speak with him. *Spencer*, 523 U.S. at 16; *see also Lane*, 455 U.S. at 632-33 (holding that a parole violation does not carry cognizable collateral consequences where the claimed consequences were based on future “discretionary decisions” that “may take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation”); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (where plaintiffs alleged a particular purpose behind the government’s decision to designate them “of high interest,” allegations merely “consistent with” this purpose were implausible “given more likely explanations”).

Third, there is no non-speculative reason to conclude that expungement of Jayyousi’s CMU-related BOP records would affect his prospects for modifying his ongoing supervised release. The Supreme Court’s decisions in *Spencer* and *Lane* show why Jayyousi’s argument fails. In each case, a plaintiff argued that a past parole revocation “could be used to [their] detriment” in future parole proceedings. *See Spencer*, 523 U.S. at 14; *see also Lane*, 455 U.S. at 632-33. The Court held, however, that it was not likely that the past parole revocation would affect the plaintiffs’ chances of success in the future proceeding: under state law, the prior revocation would be “one factor, among many, that may be considered by the parole authority” when that authority would, in connection with those future proceedings, be making “discretionary decisions.” *Spencer*, 523 U.S. at 13-14

(quoting *Lane*, 455 U.S. at 632-33, 632 n.13). And, even as to that potential factor, the future proceeding would be “more directly influenced” by “the underlying conduct that formed the basis for the parole violation.” *Lane*, 455 U.S. at 633.

Like the law governing future parole proceedings at issue in *Spencer* and *Lane*, the determination whether to modify the terms of Jayyousi’s supervised release is a discretionary, multi-factor decision: the supervising district court may “terminate” supervised release, for example, if after considering several listed factors, the court “is satisfied that [termination of supervised release] is warranted by the conduct of the defendant released and the interest of justice.” 18 U.S.C. § 3583(e).

There is not a more-than-speculative chance that a supervising court’s Section 3583(e) decision would be affected by records related to Jayyousi’s CMU assignment. Nothing in the BOP’s policies suggests that BOP would provide Jayyousi’s CMU-related records to the supervising district. *See* Federal Bureau of Prisons, U.S. Dep’t of Justice, BOP Program Statement 5321.08, *Unit Management Manual* at 6 (Aug. 10, 2017), <https://www.bop.gov/policy/progstat/5321.08.pdf> (listing the documents that the BOP should “forward[] to the proposed district of [an inmate’s] supervision,” and giving no indication that these would include materials like Jayyousi’s Notice of Transfer or the internal BOP memoranda discussing the reasons for initially assigning him to the CMU and

ultimately transferring him out of the CMU). Moreover, even if any of the CMU-related records were put before the supervising court, Jayyousi's claimed ongoing consequences are even weaker than those that failed to establish jurisdiction in *Spencer* and *Lane*. Whereas in those cases a prior parole revocation would have been among the factors considered in a future parole-related proceeding, *see Spencer*, 523 U.S. at 14, here it is unlikely Jayyousi's CMU-related BOP records—which in Jayyousi's view includes any record that merely “mention[s]” the accurate historical fact that he was housed in the CMU for part of his time in custody, JA__[Dkt.184-1@26]—would be relevant to the supervising court. As above with respect to independent decisions of law enforcement, Jayyousi's underlying convictions and conduct, not the specific prison management decisions about CMU placement that were made as a result, would likely be most relevant to the supervising court. *See Spencer*, 523 U.S. at 987; *Lane*, 455 U.S. at 633. Finally, even if a supervising court did obtain and take into account any records related to CMU placement, it is unlikely that the BOP's records would operate to Jayyousi's detriment, as these records ultimately show that Jayyousi was transferred out of the CMU after “maintain[ing] clear conduct” in prison. JA__[Dkt.148-6@4].

United States v. Epps, 707 F.3d 337 (D.C. Cir. 2013), and *In re Sealed Case*, 809 F.3d 672 (D.C. Cir. 2016), illustrate what is lacking here. In both cases, this

Court concluded that challenges to the length of a prison sentence were not moot “because of the relationship between a prison sentence and supervised release”: “there seems to be a very substantial likelihood” that a favorable ruling as to the correct length of the sentence “would influence the district court’s readiness to reduce” a term of supervised release. *Sealed Case*, 809 F.3d at 674-75 (quoting *Epps*, 707 F.3d at 345). That “very substantial likelihood” that the judicial decision sought would improve the individual’s prospects in future supervised release proceedings distinguished those cases from the circumstances “examined in *Lane* and in *Spencer*.” *Epps*, 707 F.3d at 345. Here, by contrast, Jayyousi has not and cannot make a similar showing about the relationship between the BOP records he challenges and a future supervised release decision.

Whatever force Jayyousi’s supervised release argument may have had when he raised the issue in 2019, his contention has become even more speculative since then. When the mootness issue was pending before the district court, Jayyousi stated that he planned to file a motion to modify his supervised release. *See* JA__ [Dkt.184-1@14] ¶ 4. While this case has been on appeal, Jayyousi filed a motion in the district where he is being supervised requesting that the court there terminate his supervised release. *See* Motion for Early Termination of Supervised Release, *United States v. Jayyousi*, No. 2:17-cr-20715 (E.D. Mich. Jan. 5, 2021), ECF No. 3. Briefing on the motion is complete. *See* No. 2:17-cr-20715 (E.D.

Mich.), ECF Nos. 6, 7 (response and reply briefs filed in March 2021). And the only mention in the briefing of Jayyousi's CMU assignment or any related records appears in Jayyousi's own motion. In addition to discussing the very CMU assignment that Jayyousi contends must be expunged, Jayyousi's motion quotes defendants' argument from this case that CMU-related BOP records "seem, if anything, helpful to Jayyousi's contemplated [supervised release] motion" because "the upshot of Jayyousi's CMU records is that he was placed in the CMU based on his offense conduct over a decade ago in June 2008, and then released in 2013 due to good behavior and was never returned." *See* No. 2:17-cr-20715 (E.D. Mich.), ECF No. 3 at 13-14 (quoting defendants' district court briefing in this case, JA__[Dkt.185@7]).⁸ By bringing up these records himself in an attempt to bolster his argument for termination of supervised release, Jayyousi has further undercut his already tenuous argument (JA__[Dkt.184@13]) that the records are likely to "harm his chances to prevail on a § 3583(e) motion."

For all these reasons, Jayyousi has failed to "make an actual showing" that any BOP records related to his CMU placement currently "burden[] him with 'concrete injuries'" that would be alleviated through the remedy he seeks. *Gul*, 652 F.3d at 17 (quoting *Spencer*, 523 U.S. at 14). This case is therefore analogous

⁸ Jayyousi's supervised release motion quotes the government's brief below but incorrectly attributes these statements to the district court. *See* No. 2:17-cr-20715 (E.D. Mich.), ECF No. 3 at 13.

to *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998). There, as here, the plaintiff alleged a due process violation arising out of BOP decisions, and requested equitable relief in the form of changes to his BOP records—in that case, to change allegedly incorrect parole eligibility information. *Id.* But because the plaintiff failed adequately to “explain[] what adverse impact he continues to suffer,” and this Court was left unable to “think of” any such adverse consequences, that claim was moot. *Id.*

The district court recognized that this case would be moot unless there are “continuing adverse effects from the challenged records.” JA__[Dkt.189@7]. In concluding that there are such effects on Jayyousi, the district court relied (JA__[Dkt.189@10-11]) on *Abdelfattah v. U.S. Department of Homeland Security*, 787 F.3d 524 (D.C. Cir. 2015), a case arising outside the prison context that held that a claim for expungement of government records presented an ongoing controversy. But *Abdelfattah* reinforces what is absent here. In *Abdelfattah*, the plaintiff claimed that the government had infringed various statutory and constitutional rights by creating and maintaining records about him in a federal database. *Id.* at 532. Because “the maintenance and use” of those records were sufficiently linked to alleged “future deprivation of his rights,” jurisdiction was available to consider expungement of the records. *Id.* at 534-35; *see also* *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C.

Cir. 2004) (claim was not moot because expungement of 12-year-old's arrest records would "relieve [her] of the burden of having to respond affirmatively to the familiar question, 'Ever been arrested?' on application, employment, and security forms"). Here, however, Jayyousi has not adequately shown that the mere maintenance of BOP records related to his past CMU assignment causes any ongoing injury for which a judicial order of expungement would provide meaningful redress. It follows that Jayyousi's due process claim is not justiciable.

II. The BOP's procedures for Jayyousi's CMU placement satisfied the Due Process Clause.

In any event, Jayyousi's claim fails on the merits because the BOP's procedures met the requirements of due process. This Court has already recognized that "only minimal process [was] likely due" to Jayyousi. *Aref*, 833 F.3d at 258. The district court correctly concluded Jayyousi received all the process he was due.

Prison administration requires frequent and often difficult judgments about where to house inmates and how to respond to administrative complaints. "[B]road discretionary authority" for prison officials "is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking.'" *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974)), *disapproved on other grounds*, *Sandin v. Conner*, 515 U.S. 472, 483 (1995). In deciding whether to house someone in a particular unit and how to

respond to inmate complaints about such decisions, officials’ “‘purely subjective evaluations’” and their “‘predictions of future behavior’” appropriately play a “‘central role.’” *Id.* at 474 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). In reviewing challenges to prison practices and procedures, “‘courts must give substantial deference to prison management decisions.’” *Wilkinson*, 545 U.S. at 228; *see also Martinez v. BOP*, 444 F.3d 620, 625 (D.C. Cir. 2006) (courts are “loath to second-guess” decisions that “reflect[] a judgment regarding prison administration” (citing *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) and *Procunier v. Martinez*, 416 U.S. 396, 405 (1974))).

Where, as here, an inmate is “challenging fundamentally predictive judgments in an area where administrators are given broad discretion,” *Aref*, 833 F.3d at 258, the Due Process Clause requires only “informal, nonadversary procedures.” *Wilkinson*, 545 U.S. at 229 (citing *Greenholtz v. Inmates of Neb. Panel & Corr. Complex*, 442 U.S. 1 (1979) and *Hewitt*, 459 U.S. 460). This means that an inmate transferred to the CMU “must merely receive some notice of the charges against him,” *Hewitt*, 459 U.S. at 476, providing “a brief summary of the factual basis” for placement. *Wilkinson*, 545 U.S. at 226. Within a reasonable period of time after the transfer, the inmate must have “an opportunity to present his views to the prison official charged with deciding whether to transfer him” to the CMU. *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.*

These requirements are met here, and Jayyousi’s quibbles with the details of the BOP procedures are not significant. The procedures afforded to Jayyousi amply satisfied due process under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A. The BOP’s CMU procedures provided Jayyousi notice, an opportunity to respond, and ongoing review of his placement.

1. Jayyousi received adequate notice of the factual basis for his placement.

Within 24 hours of being placed in the CMU, Jayyousi received a Notice of Transfer that set forth the basis for his placement. JA__[Dkt.145-1@29] ¶ 186; JA__[Dkt.138-19@2] (notice); *see also* JA__[Dkt.88-1@73] (BOP policy providing that inmates assigned to the CMU should receive a notice within five calendar days “indicating the reasons for their placement in the unit”); 28 C.F.R. § 540.202(c) (current regulation stating that inmates assigned to the CMU will receive written notice and specifying the contents of the notice). The notice explained that Jayyousi’s terrorism-related convictions and associated offense conduct were the reasons why he was placed in the CMU. JA__[Dkt.138-19@2].

Specifically, the notice informed Jayyousi that his transfer to the CMU was “based on the following specific information” about him:

Your current offenses of conviction are for Conspiracy to Commit Murder in a Foreign Country; Conspiracy to Kidnap, Maim, and Torture; and Providing Material Support to a Terrorist Organization. You acted in a criminal conspiracy to raise money to support mujahideen operations and used religious training to recruit other individuals in furtherance of criminal acts in this country as well as many countries abroad. Your offense conduct included significant communication, association and assistance to al-Qaida, a group which has been designated as a foreign terrorist organization.

Id.

The notice Jayyousi received, as well as the underlying reasons for his CMU placement, had been vetted by a series of BOP officials. Following their standard practice, these officials reviewed documents describing Jayyousi’s criminal history, such as his Presentence Investigation Report and Judgment and Conviction. *See* JA__ [Dkt.145-1@18] ¶ 109, JA__ [Dkt.148-4@8-23], JA__ [P.Ex.59(Sealed)@1-62], JA__ [P.Ex.59(Sealed)@74-77]. The BOP’s Counter Terrorism Unit recommended Jayyousi for CMU placement because these materials established that he met one of the criteria for that placement: a conviction or offense conduct related to “international or domestic terrorism.” JA__ [Dkt.148-4@4-7]; *see* 28 C.F.R. § 540.201(a); JA__ [Dkt.138-6@51], JA__ [Dkt.149@80]. The Counter Terrorism Unit’s recommendation was next reviewed by officials from the Office of General Counsel. JA__ [Dkt.145-1@18] ¶ 110. Then, the final

placement decision was made by the Regional Director, who reviewed, in addition to the materials documenting Jayyousi's conviction and offense conduct, a memorandum prepared by the Counter Terrorism Unit summarizing the rationale for the recommended placement (JA__[Dkt.148-4@4-7]); the recommendations of personnel on the Regional Director's staff, who had all concurred with the placement (JA__[Dkt.148-4@2]); and a draft of the notice to be provided to Jayyousi (JA__[Dkt.148-4@25]). *See* JA__[Dkt.147-2@4-5] ¶¶ 6-9 (declaration of the Regional Director who approved Jayyousi's placement, describing the materials he reviewed to determine whether "the eligibility criteria for CMU placement had been met" and whether "in [his] professional judgment the inmate warranted the enhanced monitoring of a CMU").

The Regional Director approved CMU placement based on his review of these materials and his professional judgment that Jayyousi's communications posed a security risk that warranted the degree of monitoring afforded by the CMU. *See* JA__[Dkt.148-4@2], JA__[Dkt.147-2@5-6] ¶ 10. And the Regional Director determined that the draft Notice of Transfer that had been prepared for his consideration "accurately summarized the reasons why [he] ordered [Jayyousi's] placement in a CMU," so he did not request that any changes be made—as he stated he would have done if a draft notice had "not accurately summarize[d] the reasons for placement" in the CMU. JA__[Dkt.147-2@5-6] ¶¶ 9-10.

Jayyousi does not dispute that he received the Notice of Transfer within twenty-four hours of being placed in the CMU or that he was convicted of the three terrorism-related offenses listed in that notice. *See* JA__ [Dkt.145-1@29] ¶¶ 182, 186. Jayyousi nevertheless argues that the notice was insufficient. As the district court stated, given the particular “context” of this case, the requisite amount of notice is not as “exacting” as Jayyousi claims. JA__ [Dkt.212@11].

First, Jayyousi contends that the BOP had a “practice” of including in a Notice of Transfer ““some but not necessarily all of the reasons the inmate was placed in a CMU.”” Pl. Br. 28 (quoting JA__ [Dkt.146-1@10] ¶ 144). That alleged “practice” is irrelevant, however, to the adequacy of Jayyousi’s own notice, which the Regional Director has confirmed “accurately summarized the reasons why [he] ordered [Jayyousi’s] placement in a CMU.” JA__ [Dkt.147-2@5-6] ¶ 10. The undisputed evidence therefore shows that Jayyousi received all that the Due Process Clause requires: a “brief summary of the factual basis” for his placement in the CMU. *Wilkinson*, 545 U.S. at 226.

Moreover, even if notices issued to non-parties were relevant (and they are not), the BOP’s policy is that a notice generally provides a summary of the reasons why the inmate was placed in the CMU—except to the extent specific information supporting the placement cannot be provided without jeopardizing prison operations or public safety. *See* JA__ [Dkt.149@9-10] ¶¶ 22, 27; *see also* 28

C.F.R. § 540.202(c). Consistent with that policy, a Notice of Transfer may omit law enforcement sensitive or classified information. *See* JA__ [Dkt.149@9,13] ¶¶ 22, 38. Constitutional due process does not require disclosure of such sensitive information. *See Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985) (due process analysis should account for “legitimate institutional needs of assuring the safety of inmates and prisoners”). Jayyousi’s challenge therefore distills to second-guessing BOP officials’ professional judgment in individual cases about what to include as “the most relevant information” that the inmate would need to know to understand the placement decision, as well as officials’ judgment that the relevant information could generally be conveyed to inmates in approximately one paragraph, using the space in a notice form that had been prepared for this purpose. *See* Pl. Br. 28 (quoting JA__ [Dkt.138-6@142] and citing JA__ [Dkt.152-2@8], JA__ [Dkt.152-6@67-68]). Judgments like these are inherent in the task of preparing “a brief summary of the factual basis” for placement, *Wilkinson*, 545 U.S. at 226, which is all due process requires.

Second, Jayyousi contends (Pl. Br. 30) that due process required the final decision-maker himself—at the time, the Regional Director—“to reduce to writing his reasons for designating Mr. Jayyousi to the CMU.” But as noted above, Jayyousi himself received a notice containing just that: what the Regional Director described in his declaration as an “accurate[] summar[y]” of “the reasons why [the

Regional Director] ordered [Jayyousi's] placement in a CMU.” JA__[Dkt.147-2@5-6] ¶ 10.⁹ Nothing in the flexible requirements of due process means that, in the particular situation presented by this case, a final decision-maker who reviews and agrees with a draft notice must nevertheless restate the notice.

The relevant question is whether the notice Jayyousi received included an adequate summary; it did. Moreover, even if due process could dictate the contents of the government's internal documentation of the underlying decision-making process, the documentation here was sufficient to dispel the need for any additional process: the Regional Director approved CMU placements including Jayyousi's following not only his review of detailed information about the inmate's background and the draft notice, but also his review of the recommendations of several BOP officials who explained in varying levels of detail why they were recommending the placement. JA__[Dkt.147-2@4-5] ¶¶ 6-9, JA__[Dkt.148-4@2-25], JA__[P.Ex.59(Sealed)@1-62], JA__[P.Ex.59(Sealed)@74-77]. Requiring the Regional Director to personally summarize or add more to this documentation

⁹ Jayyousi argues (Pl. Br. 32) that the Regional Director's declaration “does not state that he reviewed the Notice to ensure it adequately summarized *his* reasons for CMU designation.” But that is precisely what the declaration says, including most plainly in the paragraph immediately following the one quoted in Jayyousi's brief. See JA__[Dkt.147-2@5-6] ¶ 10 (“The Notices of Transfer for Kifah Jayyousi and Yassin Aref accurately summarized the reasons why I ordered their placement in a CMU.” (citations omitted)).

would amount to unwarranted judicial micromanagement of prison management processes.

2. Jayyousi had an opportunity to challenge his placement.

The BOP grants an inmate transferred to the CMU the right to contest the decision by filing appeals through the BOP's administrative remedy program—and informs them of that appeal right in the Notice of Transfer. *See* JA__[Dkt.145-1@21] ¶¶ 127-29 (detailing appeal process); JA__[Dkt.138-19@2] (notice to Jayyousi informing him of right to appeal); 28 C.F.R. §§ 542.10-542.19. This appeal process involves several stages for further review: an inmate may seek resolution informally with the Unit Team, then submit a formal request for response by the Warden, then appeal the Warden's decision to the Regional Director, then appeal the Regional Director's decision to the Office of General Counsel. JA__[Dkt.145-1@21] ¶¶ 127-29. At all times relevant here, the Regional Director had the authority to grant the requested relief and order the release of an inmate from the CMU. JA__[Dkt.145-1@22] ¶ 130, JA__[Dkt.147-2@7-8] ¶ 15, JA__[Dkt.157-7@10].

Consistent with these procedures, Jayyousi exercised his right to appeal his CMU assignment through each of these levels of review. JA__[Dkt.147-17@9], JA__[Dkt.147-17@11], JA__[Dkt.147-17@13]. At each level, his submissions were reviewed but deemed insufficient to change his placement. JA__[Dkt.147-

17@3-4], JA__[Dkt.147-17@7], JA__[Dkt.147-17@10]. As the acting Regional Director explained, Jayyousi failed to show that CMU placement was unwarranted: his placement was “deemed necessary due to [his] current offense[s]” of conviction, his offense conduct reflected that he had “maintained significant communication and association with foreign terrorist organizations,” and nothing he had submitted showed that his placement “violate[d] [his] constitutional rights, [was] inappropriate, or contrary to agency policy.” JA__[Dkt.147-17@7]. The record therefore shows that Jayyousi was provided an opportunity to submit “a written statement,” after which the relevant “decisionmaker review[ed] the charges and then-available evidence against the prisoner.” *Hewitt*, 459 U.S. at 476. It follows that, as the district court concluded (JA__[Dkt.212@12]), “the Due Process Clause is satisfied.” *Hewitt*, 459 U.S. at 476.

Jayyousi argues that the appeal process is a ““dead end.”” Pl. Br. 34-42 (quoting *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016)). But the case he cites has nothing to do with due process requirements, and the Court’s description of a hypothetically unavailable remedy process in the context of its analysis of the Prison Litigation Reform Act bears no resemblance to the appeal process here. The relevant question is whether a prison has afforded sufficient “informal, nonadversary procedures” to satisfy the Due Process Clause. *Wilkinson*, 545 U.S.

at 229. The BOP's appeal process for CMU placement decisions satisfies that modest requirement.

Jayyousi argues (Pl. Br. 40, 51) that someone other than the Regional Director should have been given authority to grant relief on appeals, because in Jayyousi's view, the fact that the Regional Director made the initial placement decision calls into question his ability to be "neutral" in responding to an appeal from that decision. But Jayyousi was not "constitutionally entitled to the review of a second, neutral decisionmaker" under the circumstances of this case. *See Barkley v. U.S. Marshals Serv. ex rel. Hylton*, 766 F.3d 25, 33 (D.C. Cir. 2014) (distinguishing *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991), and applying a context-specific inquiry in concluding that additional decision-makers were unnecessary to comport with due process). The insertion of an additional official with authority to overrule the Regional Director would have unduly hampered the government's interest in efficient and consistent CMU placement decisions, and would have been unnecessary toward avoiding erroneous decisions, particularly given the involvement of numerous other officials who gave their expert input to the Regional Director both before a CMU placement and as part of the process for any subsequent appeal. *See* JA__ [Dkt.145-1@17-19] ¶¶ 103, 110, 114-18 (initial decision to transfer inmate to the CMU was based on review and recommendations from the Counter Terrorism Unit, the Office of

General Counsel, several members of the Regional Director's staff, and the Regional Director); JA __[Dkt.145-1@21] ¶¶ 127-29 (administrative appeals involved review by Unit Team, Warden, Regional Director, and the Office of General Counsel).

Nor is there merit to Jayyousi's contentions (Pl. Br. 35-36) that the Regional Director should have sought written input from members of his staff in response to appeals, or that an appeal process's constitutional adequacy can be measured by the frequency with which inmates are granted relief. The BOP uses a detailed process before transferring someone to the CMU in the first place, and in many cases the materials most appropriate for officials to consider in making that discretionary decision are fixed (such as documentation of the inmate's conviction and offense conduct). These upfront processes are among the BOP's "safeguards against the inmate's being mistaken for another or singled out for insufficient reason." *Wilkinson*, 545 U.S. at 226. Because the initial process ensures that mistaken assignments are unlikely, there is no reason to expect a high rate of reversals following the administrative appeals that the BOP does make available, and it is unnecessary to add even more to that existing process.¹⁰

¹⁰ Jayyousi claims (Pl. Br. 36) there is "undisputed evidence" that, in practice, the Regional Director's Office did not "reconsider" CMU placement in connection with administrative appeals. The testimony Jayyousi cites, however, is that of a former staff member in the Regional Office, who referenced her

Jayyousi complains (Pl. Br. 36-39) that, when he appealed his initial transfer, he did not receive a direct response to each of the ways in which he argued that his Notice of Transfer had mischaracterized his offense conduct. The responses Jayyousi received, however, meaningfully engaged with his fundamental underlying claim that he had been placed in the CMU without proper justification. The acting Regional Director, for example, responded by listing Jayyousi's offenses of conviction, explaining that Jayyousi's offense conduct included "maintain[ing] significant communication and association with foreign terrorist organizations," and concluding that Jayyousi had failed to show that his placement was unwarranted. JA__ [Dkt.147-17@7]. Because this information was sufficient to support the placement decision, there was no need to address each of Jayyousi's specific criticisms of the way his offense conduct had been characterized. The specific experiences of other inmates (Pl. Br. 39-40) should not be considered because they do not bear on whether Jayyousi himself received an adequate opportunity to respond. But if such evidence were nevertheless taken into account,

recollection of administrative appeals as typically involving "review" of CMU placements. See JA__ [Dkt.138-15@72]. This does not undercut the testimony and declaration of the actual final decision-maker (the Regional Director), in which he explained that the appeal process presented an opportunity for him to ensure there were adequate grounds for CMU placement. JA__ [Dkt.157-7@10] (Regional Director testifying that if he determined while reviewing appeals that CMU assignment was unwarranted, he "had the final authority to move [inmates] out of the unit"); JA__ [Dkt.147-2@7-8] ¶ 15 (Regional Director's similar statement in declaration).

Jayyousi merely cites examples where it was similarly unnecessary to address every specific inmate claim about the details of offense conduct because the CMU placements were justified regardless. *See* JA__ [Dkt.147-16@4] (Regional Director's denial of Aref appeal); JA__ [Dkt.138-21@24] (Regional Director's denial of McGowan appeal).

3. The BOP's periodic reviews, pursuant to which Jayyousi was ultimately transferred out of the CMU, were adequate.

The Supreme Court has “consistently observed” that notice and an opportunity to respond “are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.” *Wilkinson*, 545 U.S. at 225-26. An additional consideration that has been deemed relevant in prison cases involving administrative segregation is that the placement “may not be used as a pretext for indefinite confinement.” *Hewitt*, 459 U.S. at 477 n.9. To safeguard against pretextual use of administrative segregation, “[p]rison officials must engage in some sort of periodic review of the confinement.” *Id.* Such reviews, however, do “not necessarily require that prison officials permit the submission of any additional evidence or statements,” because the relevant considerations are “singularly unsuited for ‘proof’ in any highly structured manner.” *Id.*

CMU inmates receive regular reviews of their placements that comport with these requirements. Pursuant to CMU-specific review procedures memorialized in

a 2009 memo, the BOP conducts a formal assessment at least every 180 days to determine whether CMU placement remains necessary. JA__[Dkt.145-1@22] ¶¶ 132, 136; JA__[Dkt.149@80]; *see also* 28 C.F.R. § 524.11(a)(2); 28 C.F.R. § 540.202(c)(5) (regulation that became effective in 2015). During these reviews, the Unit Team meets in person with the inmate (who is given 48 hours advance notice) and assesses whether CMU placement remains necessary. In making that determination, BOP officials are directed to use their “sound correctional judgment” to “consider whether the original reasons for CMU placement still exist,” as well as whether that “original rationale” has “been mitigated” such that “the inmate does not require the degree of monitoring and controls afforded at a CMU.” JA__[Dkt.149@80-81]. During the period relevant to this litigation, when the Unit Team and Warden recommended that an inmate be transferred out of the CMU, their recommendation was first routed to the Counter Terrorism Unit for its own review and recommendation, then these materials were reviewed by the Regional Director’s staff and the Regional Director, who made the final decision. JA__[Dkt.145-1@23-24] ¶¶ 139, 141, 147, 148. BOP policy requires that inmates who are denied transfer out of a CMU be “notified in writing by the Unit Team of the reason(s) for continued CMU designation.” JA__[Dkt.149@81]. Inmates may then administratively appeal any denial through the BOP’s administrative remedy

program. *Id.* There is no minimum amount of time an inmate must spend in the CMU before becoming eligible for transfer. JA__[Dkt.145-1@22] ¶ 135.

The BOP's review process regularly results in the transfer of inmates—including Jayyousi—from the CMU. *See* JA__[Dkt.69-1@5] n.1 (noting that as of May 16, 2012, 162 BOP inmates had been assigned to a CMU, and of those, 75 had been transferred out of the CMU); JA__[Dkt.145-1@31] ¶¶ 192-93 (Jayyousi released in May 2013 as a result of the periodic review process). In Jayyousi's case, he participated in a series of semiannual reviews that included, beginning in December 2009, assessments focused on whether CMU placement remained necessary. *See* JA__[Dkt.138-2@58-62] ¶¶ 386, 388-90, 395, 401, 413-14, 418. When the continued placement was deemed necessary, Jayyousi availed himself of the opportunity to appeal, but his appeals were unsuccessful. *See, e.g.,* JA__[Dkt.138-29@86-91]. Then, in February 2011, Jayyousi's Unit Team and Warden recommended in favor of his transfer, explaining in a memorandum to the Regional Director that their recommendations were based on Jayyousi's conduct. JA__[Dkt.148-5@4-5]. The Counter Terrorism Unit recommended against this transfer, relying on concerns falling within that Unit's expertise, and the Regional Director denied the transfer. JA__[Dkt.148-5@6-8], JA__[Dkt.147-1@7] ¶ 13, JA__[Dkt.148-5@3]. But when the Unit Team and Warden again recommended Jayyousi for transfer in 2013, the Counter Terrorism Unit and Regional Director

agreed, and Jayyousi was transferred out of the CMU. JA__[Dkt.145-1@31] ¶¶ 192-93, JA__[Dkt.148-6@2-9]. Far from showing an inadequate process, Jayyousi's ultimate release and the reviews he received in the interim demonstrate that, as the district court concluded (JA__[Dkt.212@12-14]), he received the type of meaningful periodic assessment necessary to satisfy due process.

Jayyousi acknowledges that semiannual informal review of CMU placement satisfies due process (Pl. Br. 52), but complains (Pl. Br. 43) that his first periodic review that expressly covered the possibility of transfer out of the CMU occurred approximately 18 months after his original assignment. The argument that semiannual reviews were required from the outset of Jayyousi's time in the CMU, however, has no ongoing impact on Jayyousi, so cannot serve as a basis for any of the equitable relief he has sought since filing this case in 2010: there has never been any prospective conduct to enjoin, and expungement of records would not redress any asserted shortcoming in the first 18 months of his assignment to the CMU. Notably, Jayyousi did not seek injunctive relief during the period when he claims earlier review was constitutionally required, and any such claim is now moot. In any event, given the purpose of avoiding pretextual confinement and the unsuitability of a "highly structured" periodic review process, *Hewitt*, 459 U.S. at 477 n.9, "the frequency of" of periodic review is properly "committed to the discretion of the prison officials." *Isby v. Brown*, 856 F.3d 508, 525 (7th Cir.

2017). Jayyousi has not shown that anything in his own experience warrants judicial second-guessing of officials' exercise of such discretion.

Similarly unavailing is Jayyousi's argument (Pl. Br. 46-47, 49) that he was not provided adequate written explanations in response to the denial of his transfer requests. Jayyousi acknowledges (Pl. Br. 52) that the BOP's procedures—requiring that inmates who are denied transfer out of a CMU be “notified in writing by the Unit Team of the reason(s) for continued CMU designation,” JA__[Dkt.149@81]—are adequate. Jayyousi is left to contend that these procedures were misapplied to him in a manner that rose to the level of a constitutional violation, but here too there is no prospective conduct to enjoin and expungement would not redress any asserted constitutional violation. In any event, Jayyousi fails to support any of his contentions about his review process with “substantial evidence of bad faith or pretext on the part of prison officials.” *See Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1184 (D.C. Cir. 1986) (holding that periodic reviews of an inmate's segregation “satisfied the Constitution” where there was no such evidence).

Finally, Jayyousi argues (Pl. Br. 52) that each time semiannual review occurs, it must be conducted by the decision-maker who is himself “authorized to actually make CMU release decisions”—at all times relevant to Jayyousi's placement, the Regional Director. That contention, which similarly goes to an

issue with no ongoing effect on Jayyousi, invites unjustified judicial micromanagement in conflict with the “broad discretion” this Court has recognized the BOP officials are due in designing an appropriate process. *Aref*, 833 F.3d at 258; *see also Martinez*, 444 F.3d at 625 (courts are “loath to second-guess” decisions that “reflect[] a judgment regarding prison administration”). Under the process afforded to Jayyousi, reviews were conducted by the Unit Team—officials who are well positioned to observe inmates’ day-to-day conduct. JA__[Dkt.145-1@24] ¶ 145. Where that team and/or the Warden to whom the team reports does not believe a transfer out of the CMU is appropriate, the BOP reasonably determined that those officials had authority to reject the transfer, and that routinely referring the matter for further review to other BOP officials would be burdensome without any sufficient benefit. The BOP could reasonably reserve the Regional Director’s resources for situations where there is a recommendation from the Unit Team and Warden that the inmate be transferred out of the CMU—at which point he would make the final decision. JA__[Dkt.145-1@23-24] ¶¶ 139, 141, 147, 148. Jayyousi thus requests additional procedures that are not necessary to guard against erroneous decisions. The Due Process Clause does not dictate the level of scrutiny of the BOP’s reasonable judgments that Jayyousi seeks here.

B. No additional procedures were constitutionally required.

The requirements of the Due Process Clause are flexible, calling for the balancing of three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335. These factors do not require additional or substitute procedures here.

First, Jayyousi’s interest in avoiding placement in the CMU is “not one of great consequence.” *Hewitt*, 459 U.S. at 473. “Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all.” *Wilkinson*, 545 U.S. at 225. The district court correctly explained that “the weight of the interest in this case must be assessed as something less than that in *Wilkinson*,” JA__[Dkt.212@9], where the Supreme Court upheld the procedures used in connection with assignment to a Supermax prison. In *Wilkinson*, Supermax assignment was “indefinite” and incarceration was “synonymous with extreme isolation,” with “almost all human contact” forbidden. 545 U.S. at 214, 223-24. This Court has previously reasoned

that CMU placement, though “indefinite,” “involves significantly less deprivation than administrative segregation.” *Aref*, 833 F.3d at 257. Inmates in CMUs may have “more limited and less private communications” than they would in a different general population unit, but they nevertheless “essentially” are in “self-contained general population housing unit[s].” *Id.* at 247 (alteration in original) (quoting Institution Supplement, currently available at JA__[Dkt.88-1@73]).

Second, for the reasons discussed above, Jayyousi was provided ample process to protect against erroneous placement and retention in the CMU. Jayyousi fails to propose any additional procedures that would be constitutionally required, given the particular private and government interests at stake here. As discussed in detail above, Jayyousi’s complaints about current procedures are not borne out in the record and would require unnecessary process changes. That Jayyousi describes his additional proposed procedures as “minimal” (Pl. Br. 52) underscores that his proposed approach would result in unwarranted judicial intervention into the details of prison management, while also understating the burden additional process would impose on the BOP’s ability to carry out its mission.¹¹

¹¹ Jayyousi has abandoned the argument he made in district court that he is entitled to procedural protections under *Wolff*, 418 U.S. 539, and its progeny. *Compare, e.g.*, ECF No. 138-1 at 41, 45 (arguing that CMU designation should include, among other things, advance notice and a hearing), *with* Pl. Br. 51 (“[T]he

Third, the government’s interest here “is a dominant consideration.”

Wilkinson, 545 U.S. at 227. The BOP’s “first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.”

Id. As this Court has already emphasized, “the government’s legitimate interests in maintaining CMUs must be accorded substantial weight.” *Aref*, 833 F.3d at 258.

Each of Jayyousi’s proposed interventions invites judicial interference with the

BOP’s “broad discretion,” *id.*, hampering its ability to effectively maintain the

CMUs. “[C]ourts must give substantial deference to prison management decisions

before mandating additional expenditures for elaborate procedural safeguards.”

Wilkinson, 545 U.S. at 228. Reviewing through that lens, this Court should

conclude that the procedures for CMU assignment incorporate ample safeguards to satisfy the Constitution.

process need not require an in-person hearing.”). Such procedures are, in any event, not required by precedent, and the record in this case confirms that additional procedure would interfere with weighty government interests. *See Wilkinson*, 545 U.S. at 229 (explaining that “informal, nonadversary procedures” under *Hewitt* suffice for purposes of Supermax assignment); *Aref*, 833 F.3d at 258 (“[O]nly minimal process is likely due” for CMU assignments (citing *Hewitt*, 459 U.S. at 472)); *see also, e.g.*, JA__ [Dkt.149@12] ¶ 36 (explaining the BOP’s determination that if it were to give inmates notice before transferring them to the CMU, this “could encourage the inmates to engage in prohibited communications prior to their transfer, which is a particular concern for inmates who warrant CMU placement”).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,953 words, excluding the parts of the brief exempted under Rule 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Kevin B. Soter

Kevin B. Soter

ADDENDUM

TABLE OF CONTENTS

28 C.F.R. § 540.200A1

28 C.F.R. § 540.201A2

28 C.F.R. § 540.202A3

28 C.F.R. § 540.203A5

28 C.F.R. § 540.204A6

28 C.F.R. § 540.205A7

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.

28 C.F.R. § 540.203 WRITTEN CORRESPONDENCE LIMITATIONS

(a) General correspondence. General written correspondence as defined by this part, may be limited to six pieces of paper (not larger than 8.5 x 11 inches), double-sided writing permitted, once per calendar week, to and from a single recipient at the discretion of the Warden, except as stated in (c) below. This correspondence is subject to staff inspection for contraband and for content.

(b) Special mail.

(1) Special mail, as defined in this part, is limited to privileged communication with the inmate's attorney.

(2) All such correspondence is subject to staff inspection in the inmate's presence for contraband and to ensure its qualification as privileged communication with the inmate's attorney. Inmates may not seal such outgoing mail before giving it to staff for processing. After inspection for contraband, the inmate must then seal the approved outgoing mail material in the presence of staff and immediately give the sealed material to the observing staff for further processing.

(c) Frequency and volume limitations. Unless the quantity to be processed becomes unreasonable or the inmate abuses or violates these regulations, there is no frequency or volume limitation on written correspondence with the following entities:

(1) U.S. courts;

(2) Federal judges;

(3) U.S. Attorney's Offices;

(4) Members of U.S. Congress;

(5) The Bureau of Prisons;

(6) Other federal law enforcement entities; or

(7) The inmate's attorney (privileged communications only).

(d) Electronic messaging may be limited to two messages, per calendar week, to and from a single recipient at the discretion of the Warden.

28 C.F.R. § 540.204 TELEPHONE COMMUNICATION LIMITATIONS

(a) Monitored telephone communication may be limited to immediate family members only. The frequency and duration of telephone communication may also be limited to three connected calls per calendar month, lasting no longer than 15 minutes. The Warden may require such communication to be in English, or translated by an approved interpreter.

(b) Unmonitored telephone communication is limited to privileged communication with the inmate's attorney. Unmonitored privileged telephone communication with the inmate's attorney is permitted as necessary in furtherance of active litigation, after establishing that communication with the verified attorney by confidential correspondence or visiting, or monitored telephone use, is not adequate due to an urgent or impending deadline.

28 C.F.R. § 540.205 VISITING LIMITATIONS

(a) Regular visiting may be limited to immediate family members. The frequency and duration of regular visiting may also be limited to four one-hour visits each calendar month. The number of visitors permitted during any visit is within the Warden's discretion. Such visits must occur through no-contact visiting facilities.

(1) Regular visits may be simultaneously monitored and recorded, both visually and auditorily, either in person or electronically.

(2) The Warden may require such visits to be conducted in English, or simultaneously translated by an approved interpreter.

(b) Attorney visiting is limited to attorney-client privileged communication as provided in this part. These visits may be visually, but not auditorily, monitored. Regulations and policies previously established under 28 CFR part 543 are applicable.

(c) For convicted inmates (as defined in 28 CFR part 551), regulations and policies previously established under 28 CFR part 543 are applicable.