ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5154

IN THE UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

YASSIN MUHIDDIN AREF, KIFAH JAYYOUSI, and DANIEL MCGOWAN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
Honorable Barbara J. Rothstein

BRIEF OF *AMICUS CURIAE*
SETON HALL LAW SCHOOL CENTER FOR SOCIAL JUSTICE
ON BEHALF OF APPELLANTS AND SUPPORTING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants. Amici appearing in this Court include 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.

Rulings Under Review. References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

Related Cases. This case has not previously been before this Court. Counsel is not aware of any related cases.

Dated: November 4, 2015

Respectfully submitted,

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CERTIFICATE REGARDING CONSENT TO FILE AS AMICUS, AUTHORSHIP AND FINANCIAL CONTRIBUTION

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Amicus Curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

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CERTIFICATE REGARDING BASIS FOR SEPARATE AMICUS BRIEF

Counsel for Amicus certifies that a separate brief is reasonably necessary because no other amicus brief of which Amicus is aware addresses the substantive constitutional claims in this case. *See* D.C. Circuit Rule 29(d). These issues are complex and of significant importance, and concern issues that Amicus regularly litigates in the United States Courts of Appeals. Amicus believes that it is able to assist the Court by offering arguments not developed by any other Amicus and that are raised, but not fully developed, by Plaintiffs-Appellants.

Dated: November 4, 2015

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Amicus state that Seton Hall University may be a parent company of the Seton Hall Law School Center for Social Justice, and that no publicly held corporation owns 10% or more of the stock of Amicus.

Dated: November 4, 2015

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GLOSSARY OF ABBREVIATIONS

BOP – Federal Bureau of Prisons

CMU – Communication Management Unit

CTU – Counter-terrorism Unit of the Federal Bureau of Prisons

NJTTF – National Joint Terrorism Task Force

INTEREST OF AMICUS CURIAE

Seton Hall University School of Law's Center for Social Justice (CSJ) is Seton Hall University Law School's primary means of putting into practice its deep commitment to social justice and public service. The CSJ houses the school's clinical programs and other public interest legal activities.

The CSJ has focused on litigating in support of inmates' constitutional rights. The CSJ has filed multiple class actions on behalf of inmates, and has represented or filed amicus briefs in dozens of cases in the federal courts of appeals supporting the constitutional rights of institutionalized persons.

LEGAL ARGUMENT

I. Plaintiffs Have a Liberty Interest in Avoiding Designation to and Continued Retention in the Communications Management Unit.

Communications Management Unit (CMU) confinement constitutes an atypical and significant hardship giving rise to a liberty interest. Amicus addresses the existence of a liberty interest to respond to the district court's misguided approach to atypicality and significance under *Sandin v. Conner*, 515 U.S. 472 (1995), and *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999). The district court erred by simply assessing the onerousness of the conditions in CMU as compared to those in administrative segregation.

This approach ignores two vital components of the proper liberty interest analysis: First, as explained in Point I.A., at the heart of *Sandin* and *Hatch* is the fundamental notion that brief, routine unpleasant conditions are an ordinary and unavoidable part of prison life, thus those and similar burdens, although disagreeable, do not give rise to a liberty interest; in contrast, a liberty interest does arise when, as here, inmates are subjected to long-term, highly unusual punishments that they could not have reasonably expected to encounter during their incarceration. Second, as explained in Point I.B., the district court's liberty interest analysis ignores the highly stigmatizing aspect of CMU placement, which—along with the "plus" factor of restricted conditions of confinement—establishes a liberty interest under the stigma plus theory, independent of the atypical and significant analysis;

moreover, the stigmatizing nature of CMU placement strongly informs analysis of atypicality and significance.

A. Plaintiffs' CMU Placement for Four and Five Years Imposed an Atypical and Significant Hardship, Establishing a Liberty Interest.

An inmate experiences a governmental deprivation of liberty, triggering Due Process protection, when he is subjected to an "atypical and significant hardship … in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. A deprivation can be atypical and significant due to its non-routine imposition, the duration and indefiniteness of the deprivation, the onerousness of the conditions, and the stigmatization arising from the deprivation. *See id.* at 486; *see also Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Royer v. Fed. Bureau of Prisons*, 933 F. Supp. 2d 170, 191 (D.D.C. 2013).

In this Court, the appropriate baseline against which to measure a deprivation is "the most restrictive conditions that prison officials … routinely impose on inmates serving similar sentences" for "non-punitive reasons related to effective prison management." *Hatch*, 184 F.3d at 847, 855. *Hatch* thus held that the *Sandin* baseline looks to the nature of routine confinement in administrative segregation, often for non-punitive reasons, i.e., "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Id.* at 855–56 (citation omitted).

In setting forth this framework, *Sandin* aimed to protect liberty interests of "real substance" that represent a "meaningful amount of liberty," without interfering in the day-to-day management of ordinary prison life. *Sandin*, 515 U.S. at 478, 482 (quotation marks and citation omitted); *Hatch*, 184 F.3d at 851 (quotation marks and citation omitted). *Sandin* thus held that Due Process protection does not arise from relatively brief imposition of restrictive conditions of the sort imposed on inmates as a matter of course in prison, but does arise when a prison subjects an inmate to an unusual deprivation of the sort that "work[s] a major disruption in his environment." *Sandin*, 515 U.S. at 486.

CMU placement is an atypical and significant hardship because it imposes precisely that which *Sandin* aimed to protect: meaningful and unanticipated deprivations of "real substance" that are not mere bumps in the road typical of prison life. *See id.* at 478, 483. Unlike administrative segregation—routinely and briefly imposed upon inmates for a myriad of non-punitive and administrative reasons as an "ordinary incident[] of prison life"—CMU placement is a rare and highly stigmatizing designation, imposed for years at a time, that inmates simply do not reasonably anticipate as an ordinary incident of incarceration. *See id.* at 484.

1. CMU Placement for Four to Five Years is Atypical and Significant.

A punishment is "atypical and significant" within the meaning of *Sandin* if it is not analogous to the sort of punishment routinely imposed in the ordinary course

of prison life, such that an inmate could not "reasonably anticipate receiving [it] at some point in [his] incarceration." *Hatch*, 184 F.3d at 855 (citation omitted). CMU placement is highly atypical and significant because it: segregates fewer than .1% of inmates from the rest of the federal prison population; imposes a severe stigma, by sequestering those inmates within a unit known to house those presenting an ongoing terrorist danger to the community; and imposes severe communication restrictions on them for years at a time, with only sporadic review and no indication of a release date. JA-1572; *see Royer*, 933 F. Supp. 2d at 191 (noting that the "terrorist" classification preceding CMU placement, along with "the associated, indefinite conditions of confinement," plausibly constituted an atypical and significant hardship).[*]

The baseline in this case is the administrative segregation conditions at FCI Terre Haute and USP Marion. JA-298 (¶1); JA-306 (¶¶41, 42, 45); JA-306 (¶46, 47). The BOP routinely assigns inmates at those institutions to administrative segregation for a number of non-punitive reasons not requiring an intensive, fact-based

[*] While inmates can also be placed in CMU for other highly stigmatizing, communication-related reasons, the CMU is overwhelmingly, and was originally, meant to house "terrorist" inmates presenting an ongoing public danger. JA-147; David M. Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, 44 Colum. Human Rights L. Rev. 47, 49–50, 51 (2012) (noting that the original proposed regulation creating the CMUs was entitled "Limited Communication for Terrorist Inmates"). Plaintiffs' only connection to the majority-Muslim CMU is their asserted link to terrorism.

determination regarding whether imposition of those conditions is warranted, such as temporary housing pending a security classification or transfer. JA-305 (¶40).

Conversely, a very small number of inmates are selectively designated to the CMU if they have "a history of or nexus to international terrorism" and "require increased monitoring of communications with persons in the community," a total of 178 out of the more than 200,000 federal prisoners. JA-301 (¶15); JA-302 (¶18); JA-1572. CMU designation is an intensively fact-based determination that particular, unusual circumstances apply such that a specific inmate presents such a present, terrorist danger to the community that his every written and spoken word must be monitored. It is hard to conceive of a more atypical condition imposed in federal prison than CMU confinement.

Apart from the intrinsically atypical nature of CMU designation, placement is also highly atypical and significant for a reason that the district court improperly brushed aside—the unusually lengthy and indefinite nature of CMU confinement. This Court has held that far shorter deprivations may be atypical and significant, given their length. In *Hatch* itself, the fact that the relevant deprivation was administrative segregation, the same as the baseline conditions, did not preclude atypicality and significance; this Court held that the inmate's claim had to be remanded to determine if a twenty-nine-week stint in administrative segregation was

atypical "compared to the length of administrative segregation routinely imposed on similarly situated prisoners." *Hatch*, 184 F.3d at 858.

The length of the plaintiffs' CMU confinement—and of inmates in CMU generally—is markedly longer than the brief period ordinarily spent in administrative segregation. The typical stays in administrative segregation at Terre Haute and Marion, respectively, are 1.07 and 3.59 weeks, whereas Aref and Jayyousi spent nearly four and five years, respectively, in the CMU, and all CMU designees remained for an absolute minimum of 18 months, and generally spent years, not weeks, in sharp contrast to routine stays in administrative segregation. JA-307 (¶52); JA-308 (¶53); JA-309 (¶64); JA-310 (¶65). *Compare Hatch*, 184 F.3d at 858 (seven-month deprivation may be atypical and significant given its duration).

Other temporal factors that help establish atypicality and significance are the indefiniteness of the deprivation period, and the absence of regular review. *See Wilkinson*, 545 U.S. at 224 (finding a liberty interest in part because "placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually."). CMU placement was similarly indefinite, and reviewed even more haphazardly and sporadically—sometimes not at all, for years at a time. *See* Plaintiffs' Brief at 9-10; JA-312 (¶81); JA-342–343 (¶¶293–295).

Indefinite prison deprivations that turn out to last a particular time are more burdensome than definite deprivations of that length, because of the oppressive

nature of the uncertainty. *See Toevs v. Reid*, 646 F.3d 752, 757 (10th Cir. 2011) (relying on the fact that inmates "had no knowledge of any end date" to support a finding of liberty interest). As in *Toevs*, the plaintiffs were never told how long they could expect to be in the CMU. JA-340 (¶276). Indeed, the BOP admits that it has "no general expectations as to the duration of CMU confinement," and that one "could theoretically be designated to the CMU for the entirety of his sentence." JA-340 (¶¶275, 277). Thus, the unusually lengthy, sporadically reviewed, and indefinite nature of CMU placement contribute strongly to its atypicality and significance. *See Wilkinson*, 545 U.S. at 214–15.

Next, while the conditions imposed in the segregated, stigmatizing, long-lasting, claustrophobic, and highly unusual CMU environment are not tremendously onerous in and of themselves, those restrictions are more meaningful than is obvious, and contribute to what is, overall, an atypical and significant deprivation. As plaintiffs document in detail, CMU communication restrictions are stringent, effectively cutting off a significant degree of an inmate's connections with his family and the outside world. Unlike administrative segregation inmates, CMU designees—despite the possibility of a strip search before and after any contact visit—are *never* permitted to hug their wives or hold their children's hand. JA-302 (¶20).

Moreover, inmates in CMU know that every word they utter, every spousal intimacy, not only theoretically might, but unquestionably will, be monitored.

Further, CMU inmates are housed only in Illinois and Indiana, often farther than the 500-mile radius from family the BOP ordinarily aims to achieve to facilitate rehabilitation. Record evidence, which must be taken as true, demonstrates that these restrictions in fact imposed significant burdens on Jayyousi and Aref, not only because of the deep emotional strain they suffered, but because the burden on their families made Jayyousi's distraught, elderly parents, and Aref's children, less able and willing to visit, resulting in further, severe isolation. JA-305 (¶¶33, 35). Finally, as explained in more detail below, CMU placement is highly atypical and significant because of the BOP's stigmatizing determination that plaintiffs are too dangerous to remain in the general population, even subject to stringent monitoring of their communications.

2. CMU Placement Sharply Differs from the Typical and Insignificant Burdens that *Sandin* and *Hatch* Hold Not to Implicate a Liberty Interest.

In sum, CMU designation is simply not comparable to administrative segregation: it is not a brief, run-of-the-mill burden of the sort that the majority of inmates undergo at some point during their incarceration, regularly imposed for non-punitive reasons; it is not a routine bump in the road of the sort that inmates reasonably anticipate as an ordinary incident of prison life, thus not implicating any liberty interest.

Ultimately, *Sandin* and *Hatch* are grounded on the principle that inmates should "reasonably anticipate" brief and modest burdens while serving their sentences because prison officials have the discretion to "fine-tun[e] the ordinary incidents of prison life." *Hatch*, 184 F.3d at 855 (citation omitted); *Sandin*, 515 U.S. at 483. Given the typical burdens inmates face as a matter of course during incarceration, the Supreme Court determined that Due Process protections do not attach to such typical and insignificant matters as "receiving a tray lunch rather than a sack lunch," or "transfer to a smaller cell without electrical outlets for televisions." *Sandin*, 515 U.S. at 483 (citations omitted). Nor does it apply to the types of burdens routinely imposed on inmates for "non-punitive reasons related to effective prison management," such as brief stays in administrative segregation while an inmate awaits a housing reassignment or security classification, or to parallel deprivations, even if for punitive reasons. *Hatch*, 184 F.3d at 856.

Such burdens are, in effect, not meaningfully distinguishable from the reasonably anticipated burdens imposed by the fact of incarceration itself. Such burdens do not implicate "the real concerns undergirding the liberty protected by the Due Process Clause." *Sandin*, 515 U.S. at 483; *Hatch*, 184 F.3d at 856.

Terre Haute and Marion utilized administrative segregation in exactly this manner: inmates were placed therein, often without any sort of fact-based assessment, and for short and definite terms, because administrative segregation was

used as a "flexible management tool" regulating ordinary prison life. JA-305 (¶40); JA-307 (¶52); JA-308 (¶53); *Hatch*, 184 F.3d at 856.

CMU placement, in contrast, is by no means an "ordinary incident of prison life" in any way comparable to the sorts of routine burdens briefly imposed in administrative segregation. It is extremely rare—imposed on less than .1% of the federal prison population—long-lasting, indefinite, fact-intensive, stigmatizing, and demoralizing. CMU placement implicates "the real concerns undergirding the liberty protected by the Due Process Clause." *Sandin*, 515 U.S. at 483.

CMU confinement is not a "flexible management tool" by which prison officials can respond to routine administrative concerns within a prison. *Hatch*, 184 F.3d at 856. Whereas placement in administrative segregation is regularly impromptu, non-punitive, and brief, CMU placement is a fact-intensive determination that a particular inmate must be separated from the general population, indefinitely, for years, in a segregated, tiny population of those identified as presenting an ongoing terrorist danger, subject to isolation from their loved ones and intensive monitoring of their every word. JA-301 (¶15); JA-302 (¶¶17, 18).

CMU placement is thus simply not "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Hatch*, 184 F.3d at 855 (citation omitted). Instead, some rational fact-finder, reading this record in its best possible light, could readily conclude that CMU placement

implicates a "meaningful amount of liberty," thereby warranting reasonable procedural protections. *Id.* at 851 (citation omitted).

B. CMU Placement Implicates a Liberty Interest Because it Imposes the "Stigma" of Being an Ongoing Terrorist Danger to the Community and the "Plus" of Direct Adverse Consequences.

As an alternative to the liberty interest arising from the atypical and significant nature of CMU placement explained above, a liberty interest is also independently established by the "stigma plus" that CMU designation imposes upon plaintiffs. "Stigma plus" is a theory recognizing that a liberty interest arises when a citizen is improperly classified by the government in a stigmatizing way, and the citizen suffers a resulting concrete harm because the State has determined to treat the citizen differently because of that classification. *Paul v. Davis*, 424 U.S. 693, 711-12 (1976).

As this Court explained in *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1095 (D.C. Cir. 1985), the stigma plus test is satisfied when the "government is the source of the defamatory allegations and the resulting stigma … involve[s] some tangible change in status vis-à-vis the government." *Id.* at 1108–09. The government must be the source of a stigmatizing label that is public and false; moreover, to satisfy the "plus" element, there must be tangible harm that arises from the designation beyond the stigmatization itself. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("[W]here a person's good name, reputation, honor, or

integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

The stigma plus theory is applicable in the prison context as an alternative basis for finding a liberty interest, co-existing with and not superseded by *Sandin*. *See Vega v. Lantz*, 596 F.3d 77, 81-82 (2d Cir. 2010) (holding that an inmate can bring a "'stigma plus' claim" to invoke due process protections if the "plaintiff can demonstrate 'a stigmatizing statement plus a deprivation of a tangible interest.'"); *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004) (recognizing the "'stigma plus' standard" as applicable to an inmate's due process claim); *see also Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997).

In this case, CMU designation operates as a severely stigmatizing label that an inmate presents a highly unusual, ongoing terrorist danger to the community—a peril so grave as to require segregation from 99.9% of other federal inmates, necessitating sequestration with others presenting a similarly grave danger, and requiring that his every word with the outside world be sharply limited and zealously monitored. Given the extremely stigmatizing nature of CMU placement, and the direct consequences imposed by the government resulting from that designation, the stigma plus test for a liberty interest is satisfied.

The first element of the stigma plus test is satisfied because the government's designation of plaintiffs as presenting an extreme, ongoing terrorist danger is highly

stigmatizing. In *Doe*, this Court found sufficiently stigmatizing Doe's claim that the government's manner of discharging her labeled her as "dishonest and unprofessional." *Doe*, 753 F.2d at 1097. In *Constantineau*, 400 U.S. at 434, the Court found sufficient stigma from the government's labeling the plaintiff as someone whose "'excessive drinking' expos[ed] himself or [his] family 'to want' or becoming 'dangerous to the peace' of the community." *Paul v. Davis* accepted as stigmatizing the designation as an "active shoplifter" following arrest for shoplifting. *Paul v. Davis*, 424 U.S. at 709 (finding stigma, but rejecting the existence of a liberty interest because of the absence of any "plus" factor tangibly altering rights resulting from that designation.) The stigmatization of plaintiffs in this case is orders of magnitude more serious than that in *Doe*, *Constantineau*, and *Paul v. Davis*.

Moreover, the stigmatization arising from CMU designation—and, even more plainly, from the CMU retention decisions challenged in this case—is materially more stigmatizing than the mere fact of an underlying terrorism-related conviction. Only a small subset of those with underlying terrorism-related offenses are ever designated to the CMU as not only having been convicted of a terrorism-related offense, but as presenting a severe, *ongoing* terrorist danger to the community, often many years after the conduct underlying their conviction. JA-319-320 (¶130). *Compare Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (no stigmatization

from placement of convicted sex offender on state sex offender registry because state law required that *all* sex offenders be placed automatically on that registry).

In addition to the plainly stigmatizing nature of CMU designation, plaintiffs' claims also readily satisfy, at the summary judgment stage, the requirements that the stigmatizing designation be public and false. First, the fact of CMU placement is widely known by other inmates within the BOP, and is disseminated to BOP employees. A stigma-plus claim is sufficiently public when the information is distributed within an agency, "whether or not" it is "released to persons outside the [agency]." *Okpala v. D.C.*, 819 F. Supp. 2d 13, 17 (D.D.C. 2011). Moreover, CMU status is regularly communicated to members of the public. When anyone outside the prison attempts to call or visit a CMU designee, they must be informed of the limits on communication arising from CMU placement.

Second, at the summary judgment stage, there is simply no evidence that Aref or Jayyousi presented any severe, ongoing terrorist danger requiring CMU retention, years after their convictions, and with completely untroubling prison records and clear conduct while in CMU. Neither plaintiff's conduct provided any reasonable basis to believe that he presented a severe ongoing threat, and both inmates were released from CMU without incident. JA-355 (¶382); JA-360 (¶423). Neither prisoner had a single communication infraction in their time leading up to their transfers to the CMU. JA-40 (¶15); JA-43 (¶19). A rational fact-finder reading the

record in its best possible light could conclude that the label of ongoing dangerous terrorist threat to the community was improperly applied.

The final element of the stigma plus test is the "plus" portion of that test, i.e., whether the stigmatizing designation is not simply a dignitary injury, but also results in a tangible alteration of the individual's status vis-à-vis the government. *Paul v. Davis*, 424 U.S. at 701. Courts applying the stigma plus theory have been rigorous in requiring that the burdens imposed by the government arise directly from the stigmatizing designation, and are not speculative, nebulous, or merely dignitary. *Id.* But those courts have *not* required that the "plus" arising from the stigmatizing designation be particularly onerous. For example, in *Constantineau*, the plus factor was a ban on "the sale or delivery of alcoholic beverages" to certain persons who were labeled as having engaged in "excessive drinking." *Paul v. Davis*, 424 U.S. at 707.

As detailed by plaintiffs, CMU designation directly and necessarily results in sharp restrictions on inmates' First Amendment rights of communication, beyond the restrictions the government would otherwise impose as a result of incarceration. Under the stigma plus theory, there is no requirement that the inmate's burdens serving as the plus factor be so onerous that those burdens would independently meet the atypical and significant test under *Sandin*, even apart from the stigma. *See, e.g.*, *Vega*, 596 F.3d at 81-82; *Gwinn*, 354 F.3d at 1216. The severely stigmatizing nature

of CMU designation, coupled with the directly resulting, tangible, non-speculative burdens imposed by the government as a consequence of CMU placement, satisfy the stigma plus test, thereby establishing a liberty interest. Framed differently, a claim satisfying the stigma plus standard is by definition atypical and significant under *Sandin*.

Finally, even assuming *arguendo* that, for some reason, the stigma plus theory is not an independently viable basis to establish a liberty interest, at the very least the highly stigmatizing nature of CMU placement is decidedly atypical and significant, compared to the ordinary incidents of prison life and routine classification decisions. The stigmatization thus deeply informs the existence of a liberty interest under *Sandin*, and highlights the district court's error in focusing, almost exclusively, on the superficial conditions of CMU confinement. *See, e.g.*, *Kritenbrink v. Crawford*, 457 F. Supp. 2d 1139, 1149 (D. Nev. 2006) ("Plaintiff was denied minimum custody status and work camp assignments as a result of the sex offender label. The denial of these privileges alone would certainly mirror that experienced by inmates in administrative segregation or protective custody. But, the stigmatizing label in conjunction with these disadvantages goes beyond the typical hardships of prison life.").

II. The District Court Erred in Dismissing Jayyousi's First Amendment Retaliation Claim.

Jayyousi has presented sufficient evidence to survive summary judgment on his First Amendment retaliation claim. "To establish a claim for retaliation under the First Amendment, an individual must prove (1) that he engaged in protected conduct, (2) that the government 'took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again;' and (3) that there exists 'a causal link between the exercise of a constitutional right and the adverse action taken against him.'" *Doe v. District of Columbia*, 796 F.3d 96, 107 (D.C. Cir. 2015) (citations omitted).

As explained in Point II.A., the district court erred under the first element of Jayyousi's retaliation claim by concluding that he could not possibly have been engaged in First Amendment-protected conduct when he led a peaceful prison prayer service that criticized BOP policy regarding the CMU. Such religious, political speech is at the heart of First Amendment protection. The district court failed to construe the record concerning that speech in its best possible light for Jayyousi, and failed to recognize that the record, so construed, could lead a rational fact-finder to conclude that Defendant Smith, Chief of the CTU, engaged in an exaggerated, alarmist interpretation of Jayyousi's speech rather than an exercise of reasoned judgment that actually assessed the existence of any material security risk. Moreover, as set forth in Point II.B., Jayyousi readily satisfies the second and third

elements of his retaliation claim: Defendants' decision to retain Jayyousi in CMU was causally linked to his protected speech, and retention in CMU is an adverse action that would deter an inmate of ordinary firmness from engaging in further speech.

A. Jayyousi's Sermon Was Speech Protected by the First Amendment.

The district court erred in finding that Jayyousi's speech was unprotected by the First Amendment. The standard for First Amendment protection in prisons is governed by *Turner v. Safley*, 482 U.S. 78, 89 (1987), which held that a prison action that impinges on prisoners' constitutional rights is invalid if it is not "reasonably related to legitimate penological interests." Under *Turner*, a vital threshold question is "whether a prison [action] that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id.* at 87. In this case, Jayyousi has demonstrated, at the least, a material dispute of fact about whether the BOP's reaction to his speech was an exaggerated response to security concerns, and thus that his speech was protected conduct under *Turner*.

Though courts properly defer to the expert judgment of prison officials, such deference is inappropriate where there is "substantial evidence in the record to indicate that the officials have exaggerated their response." *Id.* at 86. A prison official's action "cannot be sustained where the logical connection between the

[action] and the asserted goal is … remote," or where the prison's objective is not "legitimate and neutral." *Id*. at 89-90.

Here, the district court erred in its *Turner* analysis because the record, construed in its best possible light, could lead a rational fact-finder to conclude that Smith's decision to retain Jayyousi in the CMU was an exaggerated response to Jayyousi's sermon, which did not reasonably give rise to material security concerns. A rational fact-finder could read the actual transcript of Jayyousi's sermon and conclude that Smith's characterization of that speech was alarmist and substantially exaggerated. The district court's bald deference to Smith's conclusion that "Jayyousi's speech to other CMU inmates posed a security risk," JA-1666-67, and was thus unprotected by the First Amendment, entirely elides the required analysis.

The content of Jayyousi's speech completely belies Smith's assessment. Jayyousi, while leading a prayer service, offered strong, but peaceful, political criticism of the CMU. JA-834-836. Such political speech, in the course of religious exercise, is at the heart of First Amendment protection. The record in this case, construed in the best possible light with all inferences in favor of Jayyousi, shows that Smith's interpretation of Jayyousi's speech was a gross mischaracterization of the prayer service, and that Jayyousi's continued detention in the CMU was an exaggerated rather than reasoned response to security concerns.

A fair reading of Jayyousi's sermon is sharply inconsistent with Smith's assessment. Following prayer, Jayyousi begins his sermon by stating that "[s]ome evil created this place," and expressing his opinion that inmates were placed in the CMU "because [they are] Muslim," "[n]ot because you are a criminal." JA-834. He describes CMU inmates as "good citizen[s]," often with a "fabricated" case against them. *Id.* These statements—that CMU inmates are good citizens, with assertions of terrorist support often fabricated against them, with CMU inmates wrongfully held because of exaggerated fears grounded in their status as Muslims—reject, rather than exhort, terrorist activity.

Jayyousi then urges the others in the prayer service "to never give up our faith." JA-835. He draws an extended analogy between CMU inmates and the peaceful, heroic, imprisoned figures of John McCain, Nelson Mandela, and Admiral Jim Stockdale. JA-835. He explains that all three were imprisoned, and treated poorly by their captors, but each remained faithful and strong. *Id.* Each, of course, emerged from unjust prison conditions and ultimately made significant and *peaceful* contributions to their countries, through the political system, scarred but unbowed from their time in harsh prison conditions. Again, this is hardly the stuff of terrorist incitement.

Jayyousi then states that CMU inmates should, if offered the opportunity, refuse to "entrap more Muslims, and get them in jail, and tarnish the image of Islam

in America. Mandela refused" similar requests, he states, and so should CMU inmates. *Id.* The parallel to Mandela, and Jayyousi's expressed concern for the image of Islam in America, again paint a picture of someone who wishes for peaceful reform of what he sees as deep inequities in the United States'—and the BOP's—treatment of Muslims. "Keep faith that you are going to overcome this," he urges, because

> you are going to return to your lord to meet him with your hard work and the hardships that you have faced and done in this life. This is why we martyr, but [Arabic]. We created the human in hardship…. Whatever happens to us is what Allah has preordained to us—to us, not against us [Arabic]. But this hardship is good for us, but we have to be patient. We have to be patient.

JA-836. Jayyousi thus closes his sermon with a call for faith that CMU inmates will eventually leave CMU and ultimately return to their lord, and that they—like McCain, Mandela, and Stockdale—should use the strength of their faith to remain "patient" in the face of the hardship of CMU. This exhortation to patience and faith could hardly be further from incitement to terrorist action. And Jayyousi's use of the word "martyr," applied by many religions to those who remain faithful as they suffer, is far more indicative of Smith's exaggerated response to Jayyousi's Muslim faith than of any terrorist provocation by Jayyousi.

The discrepancy between Smith's characterization of the sermon and the actual content of the speech is palpable. Smith concluded that Jayyousi's sermon "was aimed at inciting and radicalizing the Muslim inmate population in THA

CMU," that it "encouraged activities which would lead to group demonstration and [that] are detrimental to the security, good order, or discipline of the institution," and that Jayyousi's speech "makes highly inflammatory commentaries which elicit violence, terrorism or intimidation, and … disrespects or condemns other religious, ethnic, racial, or regional groups." JA-792. Smith's hyperbolic, exaggerated reaction is manifest—or at the very least, some rational fact-finder, reading the record in its best possible light, could so conclude.

Moreover, Smith's Memorandum recommending CMU retention is grounded on numerous false assertions of fact. *See* Plaintiffs-Appellant's Brief at 40-42. This apparent cavalier disregard of the actual facts further demonstrates that Smith's fear was exaggerated, and that he did not engage in a genuinely reasoned, expert assessment of the security risk Jayyousi's speech presented.

For example, Smith's Memorandum states that, following his sermon, "Jayyousi was precluded from acting as the Muslim inmate prayer leader" while detained in the CMU, suggesting that the speech was found by CMU supervisors to be problematic; this is false. *Compare* JA-792 with JA-1584. Smith also ignores the absence of concern from the CMU officials who were present at the time, who made no effort to intervene. JA-797, JA-802. Smith's statement that "Jayyousi continued to espouse anti-Muslim beliefs [sic] as well as made inflammatory comments regarding the United States and other non-Muslim countries and cultures," JA-792,

is befuddling and completely unfounded. His assertion that Terre Haute CMU staff recommended against Jayyousi's release "due to his continued radicalized beliefs and associated comments," JA-793, was also flatly wrong.

The reasonableness of Smith's assessment of security risk is further belied by the fact that it contradicted the opinions of the actual CMU supervisory staff who personally interacted with Jayyousi, and who believed that his conduct was not at all concerning. The CMU's Unit Manager's initial report, which Smith's Memorandum reviewed, recommended that Jayyousi not be detained in the CMU. JA-785. Similarly, CMU Warden Hollingsworth had expressed his belief that Jayyousi "has acted within the regulations set forth [and] has not presented issues which cause … concern." JA-785. Jayyousi's Unit Manager complimented Jayyousi for his "good rapport with staff and other inmates." JA-790. This difference of opinion between Smith and those who actually supervised and interacted with Jayyousi sharpens the basis for concluding that Smith's concerns were exaggerated.

Furthermore, the record is silent as to how the alleged penological interest in security would be served by Jayyousi's continued detention in CMU. First, any conceivable *potential* for disruption that might have been perceived as arising from Jayyousi's speech, shortly after it occurred, had not in fact materialized more than two years later, when Smith recommended Jayyousi's continued detention; the passage of time had eliminated any arguably reasonable concern that might once

have existed. Second, Smith's concern was in significant part directed to Jayyousi's influence on CMU inmates. It is difficult to see how this concern, even if it had been legitimate, was reasonably connected to a decision to keep Jayyousi in CMU.

In sum, Jayyousi has met his burden at summary judgment to show that some rational fact-finder could believe his prayer service speech to be protected under the First Amendment: substantial evidence in the record suggests that Smith's response to the speech was exaggerated and alarmist, rather than reasonably connected to legitimate security concerns. *Cf. Abu-Jamal v. Price*, 154 F.3d 128, 135 (3d Cir. 1998) (finding likely First Amendment-protected conduct when inmate's speech "generated controversy," but did "not advocate violence, have any impact on the prison population, threaten corrections officers, … burden prison security resources," "or [issue] threats to those outside the prison"). Jayyousi's speech was a critique of the BOP's CMU policy, echoing the concerns raised in this lawsuit, urging patience and faith, and trust that justice would ultimately prevail, rather than in any way advocating for violence or unrest.

B. Jayyousi Satisfies the Final Two Elements of a First Amendment Retaliation Claim, Adverse Action and Causal Link to Protected Speech.

Once an inmate has demonstrated that he was engaged in First Amendment-protected conduct, as demonstrated above, his First Amendment retaliation claim must satisfy two additional elements: "(2) that the government 'took some retaliatory

action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again;' and (3) that there exists 'a causal link between the exercise of a constitutional right and the adverse action taken against him.'" *Doe*, 796 F.3d at 106 (citation omitted). Here, a reasonable fact-finder could readily conclude that continued CMU retention was an adverse action sufficiently onerous to chill an ordinary inmate's future speech, and that there was a causal link between Smith's recommendation that Jayyousi remain in CMU and Jayyousi's protected speech.

As to adverse action, placement in CMU is plainly sufficiently onerous to chill an ordinary inmate's exercise of protected First Amendment rights. As illustrated in Point I.A., CMU is a burdensome and stigmatizing placement. The prod of retention in CMU would quite plausibly chill an inmate's exercise of protected speech that could result in the extension of his stay in CMU.

The third and final element of a retaliation claim is a causal link between the protected speech and the adverse action. Here, the question is whether Jayyousi can show a nexus between his speech and Smith's recommendation that he be retained in CMU. Jayyousi readily meets this burden because the record provides compelling evidence that Jayyousi's sermon was a substantial or motivating factor for his CMU retention. The primary focus of Smith's recommendation is Jayyousi's sermon. *See* JA-791–793. Of the 24 pages in Jayyousi's Redesignation Packet, 17 are devoted to analyzing the purported security implications of the sermon. *See* JA-786–810. The

record—not only in its best possible light, but in any reasonable light—demonstrates that Jayyousi's sermon was a substantial motivating factor in BOP's decision to retain him in the CMU.

Thus, Jayyousi has met his burden at summary judgment to show that he satisfied each of the three elements of his First Amendment retaliation claim: some rational fact-finder could conclude that his sermon was protected speech, and that that speech caused Smith to recommend his retention in the onerous conditions of CMU.

The record gives rise to an entirely plausible inference that Smith's decision to retain Jayyousi in CMU was driven by Smith's exaggerated, alarmist reaction to Jayyousi's passionate expression of his protected political beliefs and his criticism of BOP policy, speech that gave rise to no reasonable basis for Jayyousi's retention in CMU. Moreover, the record demonstrates that Smith's assessment was driven by wholly implausible characterizations of Jayyousi's speech, and by palpable factual mistakes about the surrounding circumstances, plausibly demonstrating that Smith engaged in an exaggerated response to any scintilla of possible security risk, and thus did not engage in an actual reasoned judgment about the existence of a genuine security concern.

This entirely plausible state of Smith's mind fully supports Jayyousi's claim of First Amendment retaliation: when a prison official's reaction to controversial but

protected speech is exaggerated, precluding a reasoned assessment of the security risk entailed, an inmate would reasonably be deterred from future engagement in such speech. The record plausibly supports Plaintiffs' argument, at page 42 of their Brief, that Smith knew Jayyousi's sermon did not justify CMU retention, and thus exaggerated the threat it caused to provide cover for his aversion to Jayyousi's opinions. But this sort of willful animus and deception is sufficient, but unnecessary, for a First Amendment retaliation claim; Jayyousi need only show, as he has, that Smith's exaggerated response to his speech caused the adverse action of CMU retention, and that the nature of Smith's response would deter an inmate of ordinary firmness from risking a similar reaction to future protected speech.

C. Defendants Bear the Burden of Proving that They Would Have Retained Jayyousi in CMU, Regardless of His First Amendment-Protected Speech.

Finally, Defendants argued below that there was ultimately no causal connection between Jayyousi's speech and the BOP's decision to retain him in CMU; this is because, Defendants argued, they would have retained Jayyousi in CMU, regardless of his protected speech, because of information about Jayyousi the BOP had received from the National Joint Terrorism Task Force (NJTTF). The BOP bears the obligation to prove this implausible argument at summary judgment, which it simply cannot do on this record.

This Court set forth the causation requirement for an inmate's First Amendment retaliation claim in *Doe*, 796 F.3d at 106, by citing *Aref v. Holder*, 774 F. Supp. 2d 147, 169 (D.D.C. 2011); *Doe* and *Aref* both cite, on this causation element, to *Hartman v. Moore*, 547 U.S. 250, 256 (2006), which defines the standard for causation in a retaliation claim by applying the *Mt. Healthy* burden-shifting framework. *Hartman*, 547 U.S. at 256 (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–84 (1977)).

Under the governing causation standard of *Mt. Healthy*, if a plaintiff alleging retaliation shows that his protected conduct was a "substantial" or "motivating" factor in the decision to take adverse action against him, the burden of proof shifts to the defendant. *Mt. Healthy*, 429 U.S. at 287. To prevail, the defendant must meet his burden to prove that he would have taken the same action in the absence of the protected activity. *Id.* Such a burden of proof is particularly weighty when the moving party carries it in the summary judgment context.

As explained in Point II.B., the record plainly demonstrates that Jayyousi's protected sermon was a substantial, motivating factor in Smith's recommendation to retain Jayyousi in CMU. Thus, it is the Defendants' burden to prove that Smith would have recommended retaining Jayyousi in CMU even if Jayyousi had not engaged in his protected sermon. Defendants simply cannot meet that burden at summary judgment on this record.

An act taken in retaliation for the exercise of a constitutionally protected right is actionable even if the same action, when taken for a different reason, would have been proper. *Bloch v. Ribar*, 156 F.3d 673, 681–82 (6th Cir. 1998). Thus, the issue is not whether defendants can "show that they justifiably *could* have taken the adverse action; they must demonstrate that they *would* have done so," absent the protected conduct. *Allen v. Iranon*, 283 F.3d 1070, 1078 (9th Cir. 2002) (emphasis in original). Thus, defendants must prove that, absent Jayyousi's protected speech, and in light of Jayyousi's clean conduct record and CMU supervisors' uniform positive recommendation that he be released, Smith would nonetheless have recommended that he be retained in CMU.

Defendants' contention that they would have retained Jayyousi in the CMU even had he not led the prayer service falls well short of establishing that argument as a matter of law. If Smith truly would have recommended Jayyousi's detention based solely upon the NJTTF report, it would undoubtedly be featured prominently in both Smith's deposition and, even more importantly, in his contemporaneous CTU memo of recommendation, rather than only being mentioned in passing. Further, David Schiavone, who drafted the CTU memo that Smith approved, did not reference any NJTTF concerns when questioned about the basis for recommending Jayyousi's retention in CMU. *See* JA-545–JA-546.

Finally, even if Defendants were to make an argument they did not raise below—that Jayyousi's offense conduct alone would have resulted in the recommendation to retain him in CMU—this argument would also fail under *Mt. Healthy*. Rightly or wrongly, Defendants plainly retained Jayyousi in CMU because of his speech. And, as explained above, that decision was, in fact, wrong, because Smith's response to the speech was entirely plausibly alarmist and exaggerated, rather than an exercise of reasoned judgment.

CONCLUSION

For the foregoing reasons, *amicus curiae* joins Plaintiffs-Appellants in urging this Court to reverse the district court's entry of summary judgment.

Dated: November 4, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(2)

I hereby certify that this brief complies with the type-volume limitation stated in Fed. R. App. P. 32(a)(2). Specifically, using the word count feature of Microsoft Word, this brief is comprised of 6,988 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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