ARGUMENT SCHEDULED FOR MARCH 15, 2016

United States Court of Appeals
for the
District of Columbia Circuit

No. 15-5154

YASSIN MUHIDDIN AREF; KIFAH JAYYOUSI; DANIEL MCGOWAN,

Plaintiffs-Appellants,

– v. –

LORETTA E. LYNCH, Attorney General of the United States; CHARLES E. SAMUELS, JR., Director, Federal Bureau of Prisoners; D. SCOTT DODRILL, Assistant Director, Correctional Programs Division; LESLIE SMITH, Chief, Counter Terrorism Unit; FEDERAL BUREAU OF PRISONS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

RACHEL ANNE MEEROPOL
PARDISS KEBRIAEI
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6432

– and –

GREGORY STEWART SILBERT
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Plaintiffs-Appellants

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GLOSSARY

AOB – Brief for Plaintiffs-Appellants

BOP – Federal Bureau of Prisons

CMU – Communication Management Unit

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

DOB – Brief for Official-Capacity Appellees and On Behalf of United States as Amicus Curiae

FCI – Federal Correctional Institution

PLRA – Prison Litigation Reform Act

PSR – Pre-Sentence Report

RPP – Release Preparation Program

USP – United States Penitentiary

SUMMARY OF THE ARGUMENT

Plaintiffs-Appellants (hereafter "Plaintiffs") spent three to five years in restrictive Communication Management Units (CMUs) without notice of the *actual* reason for their segregation, a meaningful opportunity to challenge the factual basis for that segregation, or adequate periodic review. Defendants-Appellees (hereafter "Defendants") argue that Plaintiffs' challenge to these ongoing procedural deficiencies is moot, because in the midst of litigation Plaintiffs were released from the CMU. But Aref and Jayyousi may be returned there like other former CMU prisoners before them, and documentation from the CMU's flawed processes follow them to this day. Thus Aref and Jayyousi's official capacity claims are not moot.

Second, Defendants argue that CMU placement fails to trigger a liberty interest because prisoners generally lack a liberty interest in avoiding communications restrictions. But the routine communications restrictions on which Defendants rely are nothing like the fundamental disruption CMU placement imposes upon a select few. In the alternative, Defendants insist that current CMU procedures provide all the process that is constitutionally due. This ignores the voluminous evidence Plaintiffs presented to the District Court, establishing that CMU procedures fail to protect against erroneous and arbitrary decision-making.

Third, Defendants would have this court uphold the District Court's grant of summary judgment on Jayyousi's official capacity retaliation claim against Leslie Smith, former Chief of the Bureau of Prison's Counter Terrorism Unit (BOP CTU). Contrary to Defendants' argument, Smith's discretion to perform his job was not limitless, and the District Court erred in failing to consider Plaintiff's evidence that Smith abused this discretion by exaggerating the threat Jayyousi posed. Whether the BOP would have retained Jayyousi in the CMU regardless of his protected speech is the subject of a material factual dispute, and thus unsuited for summary judgment.

Fourth, the United States appears as Amicus Curiae to defend Jayyousi and McGowan's individual capacity retaliation claims against Smith, because Smith died during the pendency of the appeal. Such use of the Amicus Curiae vehicle is inappropriate, and is only necessitated by defense counsel's failure to meet their burden of identifying a proper personal representative, so that a motion for substitution can be made. This failure will have to be resolved by motion practice to this Court.

Regardless, Amicus are incorrect in arguing that Plaintiffs' *Bivens* claims are extinguished by Smith's death; these claims survive under all of the conceivable State survivorship laws in play. Contrary to Amicus' argument, the Prison Litigation Reform Act does not require a showing of physical injury anytime

constitutional rights violations are at issue, and Plaintiffs are not barred from recovering compensation for the non-mental and emotional injuries they have alleged. Finally, McGowan and Jayyousi have adequately pled plausible retaliation claims based on clearly established law, thus Amicus' claim that Smith is entitled to qualified immunity must be rejected.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT MOOT

Defendants assert that Aref and Jayyousi's transfers from the CMU, along with Defendants' codification of CMU policy, render Plaintiffs' equitable and declaratory relief claims moot. The District Court rejected various versions of this argument three times. *Aref v. Holder*, 774 F. Supp. 2d 147, 158-59 (D.D.C. 2011) (former-Plaintiff Royal Jones had standing to sue despite his transfer from the CMU because he faced a realistic threat of redesignation); JA-286-287 (Jayyousi's claim not moot for the same reason), JA-1653-1657 (Aref and Jayyousi's claims not moot for the same reason). These rulings are correct.

A claim is not moot when a judicial decision would presently affect the parties' rights or would have a more than speculative chance of affecting them in the future. *See Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (*en banc*). For both these reasons, Aref and Jayyousi's claims are not moot.

A. CMU Placement Continues to Affect Plaintiffs

A claim is not moot where a defendant continues to rely on flawed information. *See In re Kempthorne*, 449 F.3d 1265, 1268-69 (D.C. Cir. 2006) (case not moot where disputed and allegedly tainted reports continue to be used, even though plaintiffs did not request expungement as form of relief); *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970) (a prisoner "is punished anew each time his record is used against him"); *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012) (challenge to ADX designation procedures "is not moot [despite plaintiff's transfer] if the BOP made decisions under the old policies that have ongoing, long-term consequences for the plaintiffs that could be mitigated by an award of prospective relief").

The flawed information generated for Aref and Jayyousi's CMU designation has not been disavowed or discarded. Rather, it remains in their files. This flawed information resulted in Jayyousi being subject to restrictions on religious communication since his transfer from the CMU. *See* JA-816-817 (recounting instructions that Jayyousi was not to take part in religious group activities); *see also* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment, Exhibit 5 (hereafter "P. Opp. Ex."), Dkt. No. 152-2 (Agathocleous Decl) ¶¶3-5. And the information will be relied upon whenever Aref and Jayyousi

are reviewed for CMU redesignation. *See, e.g.*, JA-1517-1546 (showing that CTU used old, flawed information created for McGowan's initial CMU designation after his release from the CMU).

"A case is not moot when there is some possible remedy, even a partial remedy or one not requested by the plaintiff." *Rezaq*, 677 F.3d at 1010 (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992)). Meaningful prospective relief remains available to Plaintiffs, namely: expungement of the erroneous information created through the designation process, an injunction against future use of that information, and a declaration that Plaintiffs were designated to the CMU under constitutionally infirm procedures. *Cf. Preiser v. Newkirk*, 422 U.S. 395 (1975) (challenge to placement in maximum security prison mooted by prisoner's transfer and notation in file indicating that the challenged placement should have no bearing on future parole board determinations).

B. Plaintiffs Face a Realistic Threat of Redesignation to a CMU

Plaintiffs' claims also remain live because there is a more-than-speculative chance they will be redesignated back to a CMU. Such redesignations are commonplace. *See* JA-1571 (four prisoners redesignated to CMU after transfer to general population); JA-1517 (McGowan redesignated to CMU after transfer to general population). This should be no surprise, given the wide range of

information on which the BOP may rely in support of CMU designation, coupled with the BOP's failure to explain what one must do to get out and stay out of the CMU. JA-919-920 (¶7); JA-1566-67; JA-757; JA-815.

Both Jayyousi and Aref will be in BOP custody for years more, and both were sent to the CMU because of their offense conduct. JA-864 (¶165); JA-866 (¶184). Each remains eligible for CMU redesignation for the same reason. JA-925 (¶4).

Indeed, Jayyousi's risk of redesignation has been made explicit. In recommending his transfer from the CMU in 2013, the CTU stated that Jayyousi should be closely watched. *See* JA-1470 ("Though[] *at this time* [Jayyousi] may not warrant the monitoring levels afforded by a CMU, *he does warrant continuing monitoring and supervision* to preclude illicit activity.") (emphasis added); *see also*, JA-1577. And while the CTU did not express similar reservations about Aref's transfer, it stands by its analysis that Aref's communications with an undercover informant who pretended to be connected to a terrorist organization makes him a security risk. JA-282-283; JA-928 (¶11). Notably absent is any evidence that the CTU now rejects this initial assessment, or has ceased monitoring either Plaintiff.

Defendants argue that even if Plaintiffs face a realistic threat of redesignation to the CMU, they still have no live (or ripe) controversy because the

new CMU policy corrects Plaintiffs' procedural concerns. *See* Brief for Official-Capacity Appellees and On Behalf of United States as Amicus Curiae, hereafter "DOB"-19, 22. To support this argument, Defendants cherry-pick three issues the new CMU rule addresses out of the *dozens* of procedural deficiencies Plaintiffs identified for the District Court. *Id.* at 19. The balance of the flawed procedures Plaintiffs described below remain unchanged by the new regulation. *See* Section III, *infra*.

It is also irrelevant that upon redesignation Plaintiffs would be "provided with new notices of the reasons for their placements," and administrative review of those placements. DOB-19. Plaintiffs challenge the procedures used to deprive them of liberty, not the outcome of such procedures. *Cf. Rezaq*, 677 F.3d at 1010 (the relevant relief for procedural due process claim is new hearing with adequate procedural protections, regardless of likely outcome of that hearing).

C. Even If Plaintiffs' Claims Are Otherwise Moot, the Voluntary Cessation Exception to the Mootness Doctrine Applies

Even if the Court were to find that Plaintiffs' claims are otherwise moot, it should affirm the District Court's holding that the voluntary cessation exception saves these claims from mootness. *See* JA-1654-57. Under this exception, Defendants bear a "heavy burden" of proving that "subsequent events make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to occur," and "interim relief or events have completely and irrevocably

eradicated the effects of the alleged violation." JA-1654-55 (*citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000) and other cases).

Defendants disagree that the policy changes they have made, and Plaintiffs' resulting release from the CMUs, amount to "voluntary cessation" of illegal activity, because they deny that the changes were made in reaction to litigation. DOB-20-21. This is incorrect.[1]

Defendants insist that Jayyousi and Aref were transferred pursuant to BOP review procedures that "predate" this case, but it is undisputed that not a single prisoner was transferred from the CMU into general population for the first three

[1] Even if this were true, Defendants are wrong on the law. Supreme Court and D.C. Circuit precedent support application of the voluntary cessation exception whenever a party voluntarily ceases illegal action, regardless of whether it is in reaction to litigation. *See Friends of the Earth, Inc.*, 528 U.S. at 193-94 (assessing shutdown of a plant as voluntary cessation, without indication that the plant's shutdown—years after the case was filed—was a reaction to litigation), *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 202-203 (1968) (analyzing as voluntary cessation defendant's change in behavior after new regulation made the challenged conduct uneconomical), *Am. Iron & Steel v. EPA*, 115 F.3d 979, 1006-07 (D.C. Cir. 1997) (EPA change announced before litigation analyzed as voluntary cessation). This approach makes sense: while a defendant who has discontinued illegal conduct for a reason unrelated to litigation may have an easier time meeting his burden of proving no reasonable likelihood of reoccurrence, it does not follow that he should be able to avoid the inquiry altogether. Voluntary changes, which leave defendants free to "return to their old ways," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), must be contrasted with the involuntary result of intervening events outside a defendant's control. *See e.g.*, *ABA v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011), *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990).

years of the CMUs' existence, until the eve of this litigation, when an *Aref* plaintiff became the first such transferee. JA-1568-70. There is every reason to believe the BOP knew at that time that major litigation was imminent. *See* P. Opp. Ex. 5, Dkt. No. 152-2 (Agathocleous Decl.) ¶ 2 (CCR attorneys sent more than 80 letters to CMU prisoners in both CMU units in the six months leading up to the filing of this case); P. Opp. Ex. 8, Dkt. No. 152-4 (Oct. 2, 2009 BOP Memo) (alerting "all concerned" to legal visits by undersigned counsel). It is thus highly likely that the process for transferring prisoners out of the CMU was implemented in response to impending litigation.

And while it may be difficult to prove whether Plaintiffs' individual transfers had anything to do with their status *as plaintiffs*, it is noteworthy that the CTU, despite its mandate to investigate potential terrorist threats, has paid close attention to this lawsuit. For example, CTU intelligence summaries include a detailed description of both a June 2009 email between McGowan and counsel indicating that McGowan would be ready to file a lawsuit as soon as he finished exhausting his administrative remedies, and a November 2010 email between McGowan and counsel regarding Defendants' motion to dismiss on mootness grounds. *See* P. Opp. Ex. 9, Dkt. 152-5 (Intelligence Summary & Submission). Also telling is that Plaintiffs are identified in BOP documents as "current CCR

case." *See* P. Opp. Ex. 10, Dkt. No. 152-6 (Notice to Inmate of Transfer to CMU List).

Given this strong circumstantial evidence, the voluntary cessation exception allows a mootness finding only if Defendants meet their heavy burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Friends of the Earth, Inc.*, 528 U.S. at 189, *ABA v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011). They do nothing to meet this burden. As Plaintiffs face a substantial chance of redesignation to the CMU, and continue to feel the effects of their CMU placement, *see* Section I.A & B, *supra*, the claims are not moot.

II. PLAINTIFFS HAVE A LIBERTY INTEREST IN AVOIDING PROLONGED SEGREGATION IN A CMU

Defendants argue that Plaintiffs lack a liberty interest in avoiding being singled out for prolonged and indefinite confinement in a restrictive Communication Management Unit, where they are denied contact visitation, scrutinized by counterterrorism officials, and completely segregated from the general prison population. This argument fails to apply the operative legal standard: *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999).

A. Plaintiffs Do Not Claim a Liberty Interest in Avoiding the Routine Application of a Single Communication Restriction.

Defendants are correct that prisons routinely impose restrictions on particular avenues of communication, most frequently when a prisoner is found through disciplinary procedures to have violated a prison rule. *See* DOB-26–28. Such discipline is a predictable aspect of prison life, and thus may not give rise to a liberty interest, even if the resulting restriction is prolonged. *See e.g.*, *Bazetta v. McGinnis*, 430 F.3d 795, 797 (6th Cir. 2005) (visitation restrictions for prisoners found guilty of two or more major substance abuse violations); *Henry v. Dep't of Corrections*, 131 F. App'x 847, 849-50 (3d Cir. 2005) (declining to determine whether allegedly permanent ban on contact visitation gives rise to a liberty interest, explaining that "even if [the prisoner] was deprived of a liberty interest, the administrative procedures"—a full disciplinary hearing—satisfied due process.) [2]

Sometimes restrictions are imposed without discipline, but generally not for prolonged periods. *See, e.g.*, DOB-26 (*citing Phillips v. Norris*, 320 F.3d 844 (8th

[2] In describing *Henry*, Defendants insist that the Third Circuit *actually held* that a permanent ban on contact visits does not implicate a liberty interest. DOB-26n.8. Their reading cannot square with the language quoted above. Defendants also cite *Robinson v. Palmer*, 841 F.2d 1151 (D.C. Cir. 1988), for the proposition that a "permanent ban on visits between husband and wife" does not trigger a liberty interest (DOB-27), but that case establishes no such thing, as it predates *Sandin's* atypicality analysis.

Cir. 2003) (37 days in administrative segregation without contact visits after disciplinary charge "disappeared" doesn't violate due process)).

Plaintiffs, however, do not challenge the routine imposition of a specific restriction on one form of communication. At the CMU, prisoners spend years with the same small group of men, most of them Muslim, segregated from the rest of the prison population. JA-839 (¶6); JA-840 (¶10); JA-339 (¶272). All communication within and outside the unit is recorded and analyzed by counterterrorism officials. JA-842 (¶17, 23); 28 C.F.R. § 540.200 (c). They have limited telephone calls and visits, and they are barred from physical contact with loved ones. *See, e.g.*, JA-304 (¶33); JA-309 (¶64) (Jayyousi unable to hug his young daughters for almost five years). It may be, as Defendants imply, that the BOP has good reason to monitor some of these prisoners' communications, but others are inexplicably singled out despite having perfectly clean disciplinary records. *See, e.g.*, JA-328 (¶186).[3]

Under this Circuit's law the operative question is clear: is being singled out to spend three to five years in this type of unusual, segregated and restrictive unit harsher and more disruptive to normal prison life than a routine placement in

[3] Former-Plaintiff Avon Twitty, for example, was allegedly sent to the CMU for "prohibited activity related to communication," but all his unit team reviews indicated good behavior and no concerns, and he received no prison discipline. JA-332 (¶ 213, ¶ 215). His notice of transfer indicated that he was being sent to the CMU due to "involvement in recruitment and radicalization" of other inmates through "extremist, violence oriented indoctrination methods," but when he requested information on who he was alleged to have recruited, when, and toward what end, he was denied any further information. JA-331-333 (¶212-221).

administrative segregation? *See Hatch*, 184 F.3d at 858. The answer, which Defendants fail to provide, requires a detailed factual analysis of the "usual conditions" of administrative detention and the typical length of "administrative segregation routinely imposed on similarly situated prisoners." 184 F.3d at 858. Plaintiffs agree with Defendants that conditions in administrative detention are harsher than conditions in the CMU. But three aspects of CMU confinement make it far more disruptive to the normal prison experience than administrative detention: it is prolonged, it is rare, and it is stigmatizing.

B. A Typical CMU Stay is 55 Times Longer than a Typical Stay in Administrative Detention

Plaintiffs are unaware of any prior case in which a party has compiled a factual record sufficient for a court to determine the typical length of administrative detention. That information has now been gathered: as explained in our opening brief, a typical stay in administrative detention lasts one to three weeks. JA-606-607. This short disruption must be compared to CMU placement, which lasts *years*. *See* Brief for Plaintiffs-Appellants "AOB"-26.

In response to Plaintiffs' unrefuted evidence as to the length of CMU confinement, Defendants argue that "even years in administrative detention" would not necessarily give rise to a protected liberty interest. DOB-27. But the cases Defendants cite—*Jordan v. Federal Bureau of Prisons*, 191 F. App'x 639, 652 (10th Cir. 2006) and *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998)—arise in

circuits which utilize a different standard than the one this Court established in *Hatch*. *See, Jordan*, 191 F. App'x at 650; *Jones*, 155 F.3d at 812.

In this Circuit, it is clear that administrative detention triggers a liberty interest if it is atypically long. *See Hatch*, 184 F.3d at 858 (remanding for district court to determine if twenty-nine weeks in administrative segregation was an atypical and significant duration); *see also Brown v. District of Columbia*, 66 F. Supp. 2d 41, 46 (D.D.C 1999) (requesting development of a factual record to determine if ten month stay in administrative segregation was atypical). [4]

The D.C. Circuit is not alone in this approach. The Sixth Circuit has since limited *Jones v. Baker* to its facts, *see Harden-Bey v. Rutter*, 524 F.3d 789, 793-95 (6th Cir. 2008) (distinguishing *Jones*, and reinstating procedural due process challenge to three years in indefinite administrative detention); *see also, Fludd v. Fischer*, 568 F. Appx. 70, 73 (2d Cir. 2014) (two and half years in administrative detention gives rise to liberty interest as matter of law). [5]

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[4] Thus Defendants' point that, in practice, the duration of administrative detention "can vary significantly" is neither here nor there. DOB-27n.9. Under *Hatch*, Jayyousi's two year stay in administrative detention would likely give rise to a liberty interest. *See* 184 F.3d at 858.

[5] If there is an outlier, it is *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), relied upon by Defendants (DOB-27), holding that *many years* in extraordinarily harsh solitary confinement does not give rise to a liberty interest because it was *justified* by legitimate penological concerns. This improperly collapses the right to due process with the outcome of that process, and is wholly irreconcilable with the Supreme Court's admonition in *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) that

Defendants' only other response to the prolonged nature of CMU confinement is that it is regularly reviewed, and thus is not permanent or indefinite. DOB-27. This makes no sense: "indefinite" means lasting an unknown length of time. *See* JA-470 ("**Q**: Is there currently an expected duration for CMU confinement? **A**: No. **Q**: Is there a general range? **A**: No. **Q**: Are CMU prisoners provided any information regarding how long they can expect to spend in the CMU? **A**: No, because there is no range, there is no way to provide them with an expectation…"). A placement need not be permanent to give rise to a liberty interest. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (that segregation is indefinite—though subject to annual review—supports existence of a liberty interest).

C. CMU Placement is Rare and Stigmatizing

Defendants take issue with Plaintiffs' argument that CMU placement is *extremely* rare and thus atypical (AOB-31), arguing that transfers between prisons are commonplace and do not give rise to a liberty interest. *See* DOB-28. Be that as it may, transfers *to a CMU* are certainly not commonplace: With over 200,000 prisoners in the BOP, only 178 CMU transfers occurred in the first 8 years of the CMUs' existence. JA-339 (¶272). And even if Defendants are correct that this

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"harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. . . . That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance."

atypicality is a function of the BOP's efforts to focus its resources on individuals who most require monitoring, this says nothing as to whether a prisoner has a liberty interest in avoiding being one of the very few on whom the BOP focuses.

Defendants completely ignore Plaintiffs' evidence of the disproportionate use of these rare CMU transfers against Muslim prisoners, and the way this functions to increase the stigma of the CMU as a "terrorist" unit. *See* AOB-31-32. Instead, they argue that the CMUs aren't exclusively used for terrorists, and that not all convicted terrorists are placed in a CMU. DOB-29-30. This may be so, but given that the BOP continues to highlight CMUs as a major aspect of their anti-terror program it is hardly surprising that they are popularly understood as terrorist units. The BOP's website, for example, provides users with a short timeline of historical information; the CMU is described in an entry titled "2006-Combating Terrorism."[6]

III. CMU PROCEDURES ARE INADEQUATE

Defendants concede that due process requires notice of the factual basis for segregation, an opportunity to rebut this basis, and periodic review of the continued need for segregation, DOB-31-32, *citing Hewitt v. Helms*, 459 U.S. 460, 476, 477 n. 9 (1983), *Wilkinson*, 545 U.S. at 225-26, and argue that even if Plaintiffs have a liberty interest in avoiding CMU placement, the BOP provides

[6] *See* https://www.bop.gov/about/history/timeline.jsp.

such process. DOB-31-33. But Plaintiffs presented voluminous evidence to the District Court showing that none of these three minimum requirements are met in the CMU. Having found that Plaintiffs have no liberty interest in avoiding CMU placement, the District Court never considered this evidence. *See* JA-1664. We briefly summarize it below.

A. CMU "Notice" Does Not Describe the Actual Reason for CMU Placement

First, CMU "notice" makes a mockery of the word. Adequate notice must apprise a prisoner of the *actual* reason for a decision. *Brown*, 66 F. Supp. 2d at 45. "Obviously, the Due Process Clause requires not simply that the prisoner have an opportunity to address the decisionmaker, but that he have an opportunity to address the basis on which the decisionmaker reasonably expects to make its determination." *Id.* Notice must also be "sufficiently specific … to inform the inmate of what he is accused of doing so that he can prepare a defense." *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001).

While it is true that CMU prisoners "receive a notice," DOB-32, it is incorrect that this notice "set[s] forth the basis for their placement" in a CMU. *Id.* Instead, the notice lists *one* of the reasons the CTU has *recommended* a prisoner for CMU placement; other reasons for the CTU's recommendation are routinely left off, *not* because of security concerns, but, incredibly, due to lack of space on the notice form. *See* AOB-7-8n.4; *see also* JA-521-22:

> **Q.** Why is there no reference in this notice [of Transfer] to Daniel McGowan's communications while incarcerated?
>
> **A**. I wish I had a specific answer. It certainly was relevant in the referral. And through review, a determination was made that this was the most relevant information to put in this notice in the limited space available.")

Moreover, even if the CTU did list all its reasons on the notice of transfer, the CTU makes recommendations, not decisions. JA-647-648. The CMU decisionmaker, who does not work at the CTU, does not document *his* reason for CMU placement anywhere, and it may be completely different from the reason given to the prisoner on the Notice of Transfer. *See* JA-466-67. The only way to find out the decisionmaker's reason for designating a prisoner to the CMU is to ask him if he remembers. JA-533, JA-544.

There is no reason to believe this profound procedural failure has been fixed, as the CMU notice procedures set forth in the BOP's newly issued rule are identical to those that were set forth in the 2010 proposed rule and in place at the time the above evidence was gathered. *Compare* 28 C.F.R. § 540.202 (c)(4) *with* JA-149; JA-445-446.

Contrary to Defendants' argument, Plaintiffs have never insisted that notice should include classified information (*see* DOB-33). Rather, the notices should summarize the *actual* reason[s] the CMU decisionmaker *decided* on CMU placement.

B. CMU "Appeals" Provide Prisoners No Meaningful Opportunity to Refute the Basis for their Placement

A prisoner facing transfer to a unit that works an atypical and significant hardship must also receive at least some "opportunity to present his views to the prison official charged with deciding whether to transfer him." *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997) (citation omitted). The only opportunity for CMU prisoners to do this is through the BOP's administrative remedy process, but that process involves no consideration of whether the evidence supports CMU placement. Instead, it is a *review* of the previously stated reason for designation and a *reminder* to the prisoner of that stated reason. JA-323 (¶153). It is thus unsurprising that the process has never resulted in a single prisoner being released from the CMU. JA-323.

Aref's experience is instructive; he utilized the administrative remedy process to refute the statement in his notice of transfer that his offense involved "significant communication, association and assistance to [JeM]." *See* AOB-11-12. Though Defendants now concede the notice was *factually erroneous* (*see* JA-324 (¶160-162), JA-897), the BOP completely ignored this factual question in response to Aref's remedy. JA-326 (¶173-174); JA-898.

Far from a "fair opportunity" to rebut the factual basis for placement, one can tell from Aref's remedy packet exactly what type of "review" the BOP conducted because, as required by policy, the packet attaches the documents the

BOP consulted. *See* JA-1099-1109. First, the BOP consulted Aref's Judgment, which does not indicate whether or not he had any communication with JeM. JA-1107-1108. Second, it consulted Aref's CMU referral form, which is simply the summary *created by the BOP to support* its initial designation of Aref to the CMU. JA-1109. Thus it is clear the BOP's "review" involved looking at one document that shed no light on the facts Aref disputed, and another that was the source of the error in the first place. Although Aref stated repeatedly that his pre-sentence report would prove he had no communication with JeM, *see* JA-1102, 1104, no one in the BOP bothered to consult that crucial document.

McGowan's unsuccessful attempt to challenge the erroneous information included in his notice of transfer is equally illustrative. *See* AOB-16-17. Defendants characterize the inaccurate information as "minor mistakes" which are "not ideal." DOB-54-55n.21. Plaintiffs disagree that claiming an individual has destroyed an energy facility, and taught others to commit arson, when he has done neither, are minor mistakes. *See* AOB-16.[7]

[7] Defendants' sloppiness with respect to exactly what McGowan was convicted of continues to this day: it refers to the Earth Liberation Front, which was credited with McGowan's arson, as a "*designated* domestic terrorist organization" and state that he was sent to the CMU because of his association with "*designated* terrorist groups." DOB-10 (emphasis added). Plaintiffs are aware of no such designation, nor of any federal body empowered to designate groups as domestic terrorist organizations. Defendants provide no citation for their misleading statements.

Defendants note that the Assistant Director now makes CMU decisions, and argue that the record does not reflect the specifics of the current appeal process. DOB-32n.14. This is incorrect; the administrative remedy process continues to be the sole avenue for a prisoner to challenge CMU placement, *see* 28 C.F.R. 540.202 (c)(6), and that process has not changed.

C. CMU "Periodic Review" Fails to Disclose the Reason for the Review Outcome

Finally, due process also requires "periodic review" of the continuing need for segregation. *Hewitt*, 459 U.S. at 477 n. 9. If redesignation is denied, the prisoner must be told why, in writing. *Wilkinson*, 545 U.S. at 225-226. "This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior." *Id.*; *see also Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (review meaningless because of failure to explain with "reasonable specificity" why the prisoner continued to constitute threat to prison security).

When transfer from the CMU is denied, however, prisoners are not told why. JA-770, JA-771. Jayyousi, for example, received multiple reviews over his five years in a CMU, but was never told why he was repeatedly denied transfer. AOB-15. He learned through this litigation that the subject matter of his speech to other Muslim prisoners in the CMU (discussed in section IV, *infra*) led to one of his

transfer denials, but he was never told by BOP staff to refrain from such discussions. JA-815 (¶2). After his second denial, Jayyousi filed an administrative remedy noting that he did not understand the transfer review process and asking why he was being kept in the CMU. JA-357 (¶397). The BOP declined to respond. *Id.* at ¶398. A year later, after another transfer denial, Jayyousi again asked why he was being denied, and again was told nothing. JA-358-359 (¶407-412).

When he was finally approved for redesignation in 2013, after almost five years in a CMU without a single disciplinary infraction, this, too, came with no explanation. JA-359-360 (¶418-¶424); JA-815 (¶5).

The experiences described above are but a small piece of the voluminous and painstakingly detailed evidence Plaintiffs provided to the District Court to demonstrate the risk of erroneous deprivation of liberty that results from the BOP's flawed CMU procedures. A far fuller story of these failings is set forth in Plaintiffs' Statement of Undisputed Facts, at JA-312 through JA-369.

IV. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON JAYYOUSI'S OFFICIAL CAPACITY RETALIATION CLAIM

In arguing against Jayyousi's official capacity retaliation claim, Defendants assert that recommending Jayyousi for CMU retention in 2011 because of a sermon he gave in 2008 was "reasonably related to legitimate penological interests," under *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). This ignores

Jayyousi's substantial evidence that Smith's concerns with the 2008 speech were exaggerated and not credible. In the alternative, Defendants erroneously state it was "undisputed" that the BOP would have recommended Jayyousi's retention in the CMU regardless of the 2008 speech.

A. The Court Need Not Defer to Smith's Exaggerated Security Concerns

While there is no actual dispute between the parties as to the relevant legal standard, Defendants repeatedly mischaracterize Plaintiff's position. Jayyousi's position does not center on whether his 2008 sermon was protected speech in the "abstract[.]" DOB-36, 41. Nor does Jayyousi contend that Smith should not have "considered" his speech. DOB-36. Rather, Jayyousi challenges Smith's *reliance* on a political, non-disruptive speech to recommend Jayyousi for additional years of segregation. If Smith's perception of the sermon was unreasonable, and the speech is protected under *Turner*, then relying on it to recommend CMU placement amounts to unconstitutional retaliation.

Defendants argue that "CMU designation in response *to a perceived attempt* to 'radicalize' other inmates in a similar manner to Jayyousi's earlier efforts to radicalize others is plainly rationally related to prison security and public safety. . . ." DOB-35-37, 41-42 (emphasis added). But this ignores Plaintiff's central argument: that one cannot *rationally perceive* the sermon as an "attempt to

radicalize other inmates." Read in its entirety, it is clear the sermon does not exhort other inmates to violence or radical action. JA 834-836.

Defendants buttress Smith's exaggerated reaction to Jayyousi's sermon with Smith's testimony that Jayyousi was a "rock star" prisoner who raised particular concerns because he recruited Jose Padilla. DOB-42, *citing* JA-986. But this ignores Plaintiff's evidence, submitted to the District Court, that Smith was simply wrong about Jayyousi's offense conduct.

At his deposition, Smith explained:

> If I got a moderate Imam who's talking about martyr and Jihad I don't get as concerned. When Jayyousi is talking about it, with his documented history, with who his connectivity was, the fact that he tried to recruit Padilla to be a dirty bomber with the radiation, yes, I take serious concern when he starts making comments to martyr.
>
> **Q:** … You said he tried to recruit Mr. Padilla about – can you just explain what you mean by that?
>
> **A:** He was associated with inmate Padilla – from my understanding Padilla was radicalized in a county jail. And Padilla hung out, associated with Jayyousi. And Jayyousi, to my understanding, is credited with recruiting him to some form of violent action.
>
> **Q:** Okay. Can you tell me what you're basing this recollection on?
>
> **A:** Something I read. I just can't remember where it's at.

JA-1558-1559. In response to Plaintiffs' subsequent request for production of all documents substantiating this assertion, Defendants produced only Jayyousi's superseding indictment, which indicates that Jayyousi's *co-defendant* recruited Padilla. *See* P. Opp. Ex. 25, Dkt. No. 152-8 (Plaintiffs' Fourth Set of Production

Requests for all Defendants); P. Opp. Ex. 26, Dkt. No. 152-8 (Jayyousi Superseding Indictment).

Defendants are correct that *Turner* requires deference to prison actions taken "to anticipate security problems." DOB-34. But actions based on such inexcusable error are entitled to no deference.

Contrary to Defendants' argument, Jayyousi does not dispute that a district court may resolve the *Turner* reasonableness question on summary judgment. But it was error to resolve that inquiry through deferring wholesale to Smith's perception of the threat, without considering Plaintiff's evidence that his perception was exaggerated and not credible. Defendants do not acknowledge or address the bulk of this evidence.

Finally, Defendants contend in a footnote, DOB-35n.16, that a court applying the *Turner* test is not required to consider any factor beyond the first one — *i.e.*, whether there is a "valid, rational connection" between the prison action and a legitimate government interest. *Turner*, 482 U.S. at 89. Beyond isolated dicta in *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002), Defendants' citations do not otherwise provide adequate support for this contention.

B. There is a Material Factual Dispute as to Whether Jayyousi's Sermon Was the But-For Cause of Smith's Action

Defendants assert it is "undisputed" that the BOP would have recommended that Jayyousi be retained in the CMU regardless of the 2008 sermon. DOB-42-43. This mischaracterizes the record.

Jayyousi does not dispute that Smith *said* that he would have recommended against Jayyousi's transfer regardless of the sermon, because of one line of information from the National Joint Terrorism Task Force (NJTTF) that is redacted in the CMU recommendation memo. *See* DOB-42-43 (*citing* JA-1565), JA-793, JA-922 (¶13). But Plaintiff submitted substantial evidence to the District Court countering this self-serving assertion.

First, the structure of Smith's memo suggests that the NJTTF redaction does not present a reason *for or against* transfer, but was instead background information, as it appears at the very end of the memo, separate from the analysis as to whether or not Jayyousi posed a continuing threat, and follows technical information about Jayyousi's custody level and his clean disciplinary history. *See* JA-791-793.

When questioned at length about the redacted NJTTF information, Schiavone (who authored the CTU memo *and* served as Defendants' 30(b)(6) witness) refused to explain whether it was a basis for the recommendation or simply relevant background information. *See* P. Opp. Ex. 15 (Schiavone 30(b)(6)

Dep.) 295:4-301:24. Schiavone did testify, however, that the CTU's recommendation was based on Jayyousi's "incarceration conduct and his offense conduct and the additional information noted in the presentence report." JA-546. He did not include NJTTF information as a factor, *id.*, and explicitly denied that it was the "primary reason" for the recommendation. P. Opp. Ex. 15, Dkt. 152-6 (Schiavone Dep.) at 301:17-301:24.

Finally, the Regional Director's testimony that his "'consistent practice has always been' to deny transfer requests when there is relevant law enforcement information, and that he would have denied Jayyousi's request solely on that basis" adds little to no evidence that could support a grant of summary judgment. DOB-43. The record indicates that "[a]t his deposition, [the Regional Director] did not remember anything about Jayyousi's speech from August 15, 2008, or whether it played any role in his decision." JA-882 (¶261). As such, any statements regarding what he may have found to be dispositive would be barred both as speculation and because it is not based on personal knowledge. Fed. R. Evid. 602.

Given this material factual dispute affirmance of summary judgment on alternative grounds is not appropriate.

V. THE UNITED STATES' ARGUMENTS AGAINST MCGOWAN AND JAYYOUSI'S INDIVIDUAL-CAPACITY CLAIMS ARE UNAVAILING

The United States has asserted, as *amicus curiae*, that the individual-capacity retaliation claims against Smith are extinguished by his death and barred by the PLRA and qualified immunity. But such arguments by an amicus are inappropriate. While an amicus may offer assistance in resolving issues already before the court, it may not raise new issues or arguments not raised by the parties. *See, e.g.*, *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (noting that the Court typically will "not entertain an *amicus*' argument if not presented by a party").

This faulty approach is the unfortunate result of defense counsel's failure to properly notify Plaintiffs and the Court of Smith's death. While the Department of Justice (DOJ) did file a notice of death (nine months after the fact), *see* Doc. # 1590172, they did not identify and serve the representative of Smith's estate, as required. *See Rende v. Kay*, 415 F.2d 983, 986 (D.C. Cir. 1969) (defendant decedent's attorney bears the burden of identifying a proper representative).

Should Defendants continue to fail to meet their burden, it can be addressed by motion practice to the Court during the pendency of the appeal. *See e.g.*, *McSurley v. McClellan*, 753 F.2d 88, 98 (D.C. Cir. 1985) (where defense counsel disclosed defendants' deaths but failed to identify successors or representatives,

issue was resolved by Plaintiffs' letter to defense counsel requesting the relevant information, subsequent motion to the court seeking disclosure of the information, and ultimately, a motion to substitute).

Once a proper personal representative has been substituted, if the Department of Justice represents that party it will have the practical impact of converting Amicus' improper arguments here to proper arguments by counsel. Given the likelihood that a *McSurley* approach will render Amicus' arguments appropriate in time for the Court to consider them and come to a decision on the appeal, Plaintiffs address the merits of those arguments below.

A. Plaintiffs' *Bivens* Claims Survive Smith's Death

Contrary to Amicus' argument, Plaintiffs' *Bivens* claims survive Smith's death. There is no dispute that state law governs whether *Bivens* actions survive the death of a defendant. *See* DOB-44 (citing *Haggard v. Stevens*, 683 F.3d 714, 717 (6th Cir. 2012)). Without analysis, Amicus identifies West Virginia—the State of Defendant's domicile—as the relevant State. Plaintiffs disagree, *see infra*, but the Court need not delve deeply into choice of law analysis, as Plaintiffs' claims survive under all of the state laws which could possibly apply.

First, the West Virginia survivorship statute provides that causes of action for "injuries to the person" survive and "may be brought notwithstanding the death . . . of the person liable." W. Va. Code § 55-7-8a. With respect to matters that

define the substance of federal civil rights claims, such as *Bivens* actions, the Supreme Court has indicated that courts should apply "a simple, broad" rule "best character[izing]" all Section 1983 and *Bivens* claims as "general" personal injury actions. *See Wilson v. Garcia*, 471 U.S. 261, 273, 280 (1985) (superseded by statute on other grounds) (cited by *Haggard*, 683 F.3d at 720 (Clay, J., concurring)).

Instead, Amicus would compare Plaintiffs' *Bivens* retaliation claim to a tort such as "libel, defamation, false arrest, false imprisonment and malicious prosecution" which does not survive under West Virginia law. DOB-45. But here it is noteworthy that in the context of statutes of limitation, courts in this Circuit have declined to adopt the District of Columbia's one year limitation for such claims (D.C. Code §12-301(4)), instead applying the three year catch-all as more appropriate for *Bivens* actions. *See, e.g.*, *McDonald v. Salazar*, 831 F. Supp. 2d 313, 319-20 (D.D.C. 2011).

Plaintiffs' claims also survive under the law of the forum. The District's survivorship statute broadly states that "[o]n the death of a person in whose favor or against whom a right of action has accrued for *any cause* prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased." D.C. Code § 12-101 (emphasis added).

Like the District of Columbia, Illinois and Indiana (where Plaintiffs were domiciled in the CMUs and injured) unequivocally provide for the survival of Plaintiffs' claims. Under Indiana's broad survivorship law, "[i]f an individual who is entitled or liable in a cause of action dies, the cause of action survives . . . ." Ind. Code § 34-9-3-1. Furthermore, in Illinois, "actions for an injury to the person [and] . . . against officers for misfeasance, malfeasance, [or] nonfeasance of themselves or their deputies" survive the death of a party. 755 Ill. Comp. Stat. 5/27-6.

While the question of which State's law applies may thus be academic, Plaintiffs note that *Haggard*—the very case on which Amicus relies—expressly states that "the applicable state law is that of . . . the forum state." *Haggard*, 683 F.3d at 718; *see also id.* at 719 (Clay, J., concurring) (stating that Supreme Court precedent "clearly hold[s] that the law of the forum state supplies the interstitial rule in a federal civil rights suit," such as the *Bivens* first amendment retaliation claim at issue in *Haggard*).

Amicus relies on *Malone v. Corrections Corp. of America*, 553 F.3d 540 (7th Cir. 2009), to assert that the law of West Virginia, as the place of Smith's work and domicile, should be applied. But this interpretation of *Malone* makes no sense. *Malone* instructs the Court to look to the forum's choice of law rules. *Id*. at 542-43. Amicus provides the Court no information about the District of Columbia's choice of law principles, and thus engages in no analysis of why West

Virginia survivorship law should apply over the survivorship law of the forum state, or of the place where the injury occurred.

The District of Columbia's choice of law rules require courts to use the "governmental interests" analysis. *See Raflo v. United States*, 157 F. Supp. 2d 1, 5 (D.D.C. 2001); *Kaiser–Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985). Under this analysis courts must "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Wyatt v. Syrian Arab Republic*, 398 F. Supp. 2d 131, 138 (D.C. Cir. 2005); *see also Hercules & Co., Ltd. v. Shama Rest. Corp.*, 566 A.2d 31, 40 (D.C. 1989). As part of this analysis, District of Columbia courts consider four factors enumerated in Section 145 of the Restatement (Second) of Conflict of Laws, including: (1) "the place where the injury occurred"; (2) "the place where the conduct causing the injury occurred"; (3) "the domicile, residence, nationality, place of incorporation and place of business of the parties"; and (4) "the place where the relationship, if any, between the parties is centered." *Wyatt*, 398 F. Supp. 2d at 138 (citing Restatement (Second) of Conflict of Laws § 145 (1971)). Under this analysis, it is far from a foregone conclusion that West Virginia law should apply.

Regardless, Plaintiffs' claims survive under any of the relevant State laws.

B. The PLRA Does Not Bar McGowan and Jayyousi's Damage Claims

In urging affirmance of the District Court's dismissal of Plaintiffs' damage claims, Amicus argues for a physical injury requirement to the Prison Litigation Reform Act not only when plaintiffs bring damage claims for mental or emotional harm, as the plain language of the statute calls for, but anytime prisoner claims are premised on violations of constitutional rights. While Amicus relies on *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998), the Court in *Davis* did not state such a rule, nor have the majority of other circuits. Amicus also all but ignores Plaintiffs' argument for nominal damages.

In *Davis*, the plaintiff did not dispute that he alleged only mental or emotional harms resulting from the alleged violation of his constitutional right to privacy. 158 F.3d at 1345. The Circuit affirmed dismissal based on the fact that "in his complaint, Davis alleged resulting emotional and mental distress, but no other injury." *Id*.; *see also, e.g.*, *id*. at 1347 (plaintiff's suit "depend[s] entirely on claims of emotional or mental injury"). The Court did not state a broader rule requiring physical injury anytime a plaintiff alleges a violation of constitutional rights.

The Court's approach in *Davis* – in focusing on the nature of the harm the plaintiff alleged, not the underlying violation, and requiring a showing of physical injury because the plaintiff's claims were plainly *for* mental or emotional harm – is consistent with the text of Section 1997e(e). 42 U.S.C. § 1997e(e). A rule that

would bar substantial damages in the absence of physical injury when a claim is premised on constitutional wrongs, regardless of whether the harm alleged is for mental or emotional injury or some other type of distinct injury, goes beyond that plain language. Indeed, "[t]he plain language of the statute does not permit alteration … on the basis of the underlying rights asserted," *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001), as Amicus notes. DOB-47. But it is Amicus, not Plaintiffs, who emphasize the nature of the rights Plaintiffs' assert rather than the specific harms they allege.

Nor do other circuit cases cited by Amicus support such a broad rule, let alone show that the majority of circuits have adopted such a rule. DOB-46n.19. In *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002), the plaintiff unsuccessfully argued that his damage claims were exempt from Section 1997e(e) because they were premised on a constitutional wrong. In answer to this question, the Second Circuit held the provision does apply to constitutional torts, barring those *for* mental or emotional injury in the absence of physical injury – and went no further. *Id*. at 417. To the contrary, in finding that Section 1997e(e) was not a bar to the plaintiff's compensatory damages claim for loss of property, provided that he could show "actual injury," the court recognized that constitutional claims may be premised on a type of compensable injury separate from physical injury. *Id*. at 418.

While Amicus points to collected circuit cases in *Thompson* as support for a blanket rule requiring physical injury for constitutional damage claims, DOB-n.19, the *Thompson* court cited those cases in its analysis of whether constitutional claims are exempt from Section 1997e(e) – to show that the "weight of authority" is contrary to that view. *Id*. at 417. Those cases do not stand for Amicus' proposition that the majority of circuits support its broad rule. *See, e.g.*, *Herman v. Holiday*, 238 F.3d 660, 666 (5th Cir. 2001) (affirming dismissal of the plaintiff's Eighth Amendment damage claims, where the plaintiff "refers only" to mental stress, because the claims "can only be described as for mental and emotional damages"); *Cassidy v. Indiana Dep't of Corrections*, 199 F.3d 374, 376 (7th Cir. 2000) (affirming dismissal of the plaintiff's statutory damages claims for "emotional and mental harm, embarrassment and humiliation," but permitting his claims for distinct harms to proceed).

While Amicus insists that there can be no category of compensable injuries apart from physical injuries, arguing that every other form of injury is merely mental or emotional harm, it fails to address decisions of this Court and other circuits that hold otherwise. *See* AOB-46-47 (discussing, e.g., *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984)). Amicus cites *Carey v. Piphus*, 435 U.S. 247 (1978), as support for its contention that "intangible damages are fundamentally mental or emotional," DOB-48, but "*Carey*'s admonition that the common law should be

modified to provide 'fair compensation' suggests that intangible interests must be compensated" when actual harm can be shown. *Hobson*, 737 F.2d at 62 (discussing injuries resulting from violations of the plaintiffs' First Amendment rights apart from their mental or emotional injuries). Plaintiffs' inability to engage in political speech or maintain their primary family relationships are serious actual losses that should not be so easily dismissed.

Amicus' arguments about Plaintiffs' other harms are also unavailing. In arguing that Plaintiffs' denial of release preparation programming is akin to a mental or emotional injury, Amicus cites only two out-of-circuit district court cases for support. DOB-49. It also mischaracterizes Plaintiffs' claim as based on future harm. *Id*. at 50. But Plaintiffs seek damages for the actual disadvantage of having been deprived for years of programming meant to prepare prisoners for reentry. *See* AOB-48-49. This is not speculative.

Amicus also argues that Plaintiffs have waived their claim for reputational injuries. DOB-49, n.20. But this harm, alleged in Plaintiffs' complaint, is fully within Plaintiffs' central argument below for their damages claims – that they have alleged various non-mental or emotional injuries resulting from their CMU designations and conditions that are compensable under the PLRA. They do not raise for the first time on appeal a wholly new issue or legal theory. *See, e.g.*, *Huron v. Cobert*, 2016 U.S. App. LEXIS 788, *11-14 (D.C. Cir. 2016) (finding

waiver where the plaintiff decided "to roll out an entirely new argument … for the first time on appeal"). While Amicus goes on to argue that such harm is not compensable under the PLRA, it neither cites any support for this contention, nor addresses any of the authority that Plaintiffs cite – D.C. Circuit and Supreme Court caselaw, and torts treatises – that identify reputational harm as a type of injury distinct from mental or emotional harm. *See* AOB-50-51.

Second, in arguing for dismissal of Plaintiffs' basic request for nominal damages, Amicus relies on *Davis* while glossing over key facts that distinguish Plaintiffs' claim. The *Davis* plaintiff never sought damages – in a specific *or* general prayer for relief in his complaint – and his court-appointed amicus curiae failed ever to mention such a claim in their submissions. *Davis*, 158 F.3d at 1349. Rather, the issue arose for the first time at oral argument. *Id*. In contrast, Plaintiffs here included a specific request in their opposition brief below and a broad prayer for relief in their complaint. Amicus also ignores Plaintiffs' argument that the bulk of other circuits have interpreted general prayers for relief to include a request for nominal damages. *See* AOB-57-58 (citing cases).

C. Smith is not Entitled to Qualified Immunity

Amicus argues that Smith is entitled to qualified immunity because Jayyousi and McGowan "failed to plausibly allege violations of clearly established law." DOB-51. This argument is meritless.

1. Jayyousi has Plausibly Alleged Violation of Clearly Established Law

As argued in Part IV, *infra*, and in Plaintiffs' opening brief, Jayyousi's 2008 sermon was an expression of his religious and political beliefs and presented no legitimate security concerns. *See* JA-834-836. Smith's 2011 reliance on the sermon to retain Jayyousi in the CMU was thus not reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. The right to avoid retaliation based on protected speech is clearly established.

The Supreme Court has long made it clear that "[t]here is no iron curtain drawn between the Constitution and the prisoners of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). "Inmates clearly retain protections afforded by the First Amendment," *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987), and any restrictions on their speech must be consistent with "legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

It has also been long established that a prisoner's First Amendment rights include the right to be free from interference that "is based on the content of [his] speech or proposed speech." *Kimberlin v. Quinklan*, 199 F.3d 496, 502 (D.C. Cir. 1999); *see also Sostre v. McGinnis*, 442 F.2d 178, 189 (2d Cir. 1971) (citing *Cooper v. Pate*, 378 U.S. 546 (1964)); *Crawford-El v. Britton*, 523 U.S. 574 (1998). That Smith was a CTU employee tasked with the "weighty and difficult

responsibility to protect prison security," DOB-52, as opposed to a prison guard tasked with the same, does not render the law any less clear.

2. McGowan has Plausibly Alleged the Violation of Clearly Established Law

McGowan has also plausibly alleged retaliation for protected speech. Amicus suggests that McGowan's 2008 designation to the CMU occurred not because of protected speech, but because of McGowan's offense conduct and because "McGowan's recent communications described government cooperators as 'snitches' and expressed continued support for 'direct action,' which was understood to refer to criminal activity." DOB-53 (citing JA-257-58).[8] First, if McGowan required CMU placement based on his offense conduct alone, it makes no sense that he was not considered for such placement until 2008—a year into his sentence, and over a year after the opening of the CMU. *See* JA-74-75 (¶129-134).

Second, even if outgoing prison mail discussing "snitches" and "direct action," were unprotected—a dubious proposition—Smith's memo also recommends that McGowan be held in the CMU based on his attempts to "unite" environmental and animal liberation movements and "educate" new members of

[8] McGowan excerpted statements from Smith's memos in the First Amended Complaint. *See e.g.* JA-75 (¶134). Defendants attached the entirety of the relevant memos to their motion to dismiss. JA-252-265. Although other material that corroborates McGowan's claim has been submitted in support of Aref and Jayyousi's motion for summary judgment, the memos, along with the allegations of the First Amended Complaint, form the operative universe for purposes of this Court's review of the District Court's dismissal of McGowan's claim on the pleadings.

the movement about what he considers errors of the past, writings about "whether militancy is truly effective in all situations," a letter discussing bringing unity to the radical environmental movement by focusing on larger global issues, a list of organizations that have published McGowan's writings, including Earth First! Journal, Bite Back, and Portland Independent Media, and based upon the fact that Mr. McGowan "has been publishing his points of view on the internet in an attempt to act as a spokesperson for the movement." JA-257-259. None of these communications involve violence or criminal activity, but they do all implicate clearly established First Amendment rights. Smith's recommendation that McGowan be transferred to the CMU based on this protected outgoing correspondence states a plausible claim for retaliation. Indeed, that Smith recommended McGowan for CMU placement based on his communication in prison, and then drafted a notice of transfer excluding any mention of these communications suggests Smith's knowledge that he was treading on McGowan's First Amendment rights. JA-76 (¶135).

McGowan also alleges that Smith unconstitutionally retaliated against him for McGowan's conversation with his wife in which he requested that she ask undersigned counsel to send him certain documents. JA-79-81. Amicus asserts that this was an effort to "circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged

communication." JA-262. [9] But the allegations imply no "guise;" rather they state a plausible retaliation claim. *See Aref*, 774 F. Supp. 2d at 169. Prisoners are entitled to seek advice and information from counsel, whether directly or indirectly; the right to access counsel, and thereby the courts, is fundamental, and protective of all other rights. *See, e.g.*, *Akers v. Watts*, 740 F. Supp. 2d 83, 96 (D.D.C. 2010), *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977)).

The law regarding a prisoner's right to engage in speech sent outside prison walls is clearly established. Restrictions on such speech "must further an important or substantial governmental interest unrelated to the suppression of expression." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *see also Thornburgh v. Abbott*, 490 U.S. 401, 408-12 (1989) (overruling *Martinez* on other grounds but explicitly affirming its analysis of outgoing correspondence). Further, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413-14. As explained in Section 1, above, it is clearly established that a prisoner may not be retaliated against for such protected speech.

Finally, Amicus concludes by cautioning the Court against recognizing a *Bivens* action in the "sensitive circumstances" presented by the instant case. DOB-

[9] Amicus cites JA-263 for the proposition that McGowan knew the leaked documents in question were considered "law-enforcement sensitive." *See* DOB-54. The cited document provides no support for this assertion.

55-56. But the question of whether the law is "clearly established" for qualified immunity purposes is doctrinally distinct from the question of the existence of a *Bivens* cause of action, and this latter issue has been waived, as it was never raised below. *See Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004) (noting general rule that party may defend the judgment on any ground decided or raised below, and declining to address issue not presented to the district court absent good reason for departing from that general rule).

Even if the Court were to find reason to depart from its general waiver rule, no extension of *Bivens* is required by the current case. As the Supreme Court made clear in *Hartman v Moore*, 547 U.S. 250, 256 (2006), "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right' . . . When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." (citations omitted). *See also Dellums v. Powell*, 566 F.2d 167, 194 (D.C. Cir. 1977) (recognizing *Bivens* cause of action for First Amendment retaliatory arrest claim); *DeBrew v. Atwood*, 792 F.3d 118, 131 (D.C. Cir. 2015) (instructing district court to consider whether prisoner's amended complaint includes sufficient allegations against individual defendants to state First Amendment claim without questioning existence of *Bivens* cause of action); *Patterson v. United States*, 999 F. Supp. 2d 300 (D.D.C. 2013)

(*Dellums* still good law despite Supreme Court dicta questioning application of *Bivens* to First Amendment claims).

CONCLUSION

For the foregoing reasons, and for those stated in Plaintiffs' Opening Appeal Brief, this Court should reverse the decision of the District Court and remand for appropriate proceedings.

Dated: February 12, 2016

/s/Rachel Meeropol

RACHEL MEEROPOL
PARDISS KEBRIAEI
AZURE WHEELER
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6432
Fax: (212) 614-6499
rachelm@ccrjustice.org

GREGORY SILBERT
JOHN GERBA
LARA VEBLEN
EILEEN CITRON
NATHANIEL WEST
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-1000
Fax: (212) 310-8007
gregory.silbert@weil.com

KENNETH A. KREUSCHER
Kenneth A. Kreuscher Law LLC
1130 SW Morrison, Ste 407
Portland, OR 97205
Phone: (971) 303-9453
KennethKreuscher@gmail.com

Attorneys for Plaintiffs

*With assistance from law student Meredith Osborne

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the Court's February 10, 2016 Order allowing Appellants to file a reply brief not to exceed 10,000 words (*see* Doc. #1598434), because this brief contains 9,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced type face using Microsoft Office Word 2010 in 14-point Times New Roman.

Dated: New York, NY
February 12, 2016

s/Rachel Meeropol
Rachel Meeropol

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2016, I electronically filed the foregoing *Reply Brief for Plaintiffs-Appellants* with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users listed below.

H. THOMAS BYRON, III
CARLEEN MARY ZUBRZYCKI
U.S. DEPARTMENT OF JUSTICE
Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2000

Attorneys for Defendants-Appellees

/s/ Rachel Meeropol
Rachel Meeropol