IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CONSOLIDATED MOTION TO DISMISS ON BEHALF OF THE OFFICIAL CAPACITY DEFENDANTS AND INDIVIDUAL CAPACITY DEFENDANT, LESLIE SMITH

INTRODUCTION

On April 1, 2010, five federal prison inmates ("Plaintiffs") and two spouses ("Family Plaintiffs") brought this action arising out of Plaintiffs' designation to a "Communications Management Unit" (CMU), which is a self-contained general prison population unit that is used by the Bureau of Prisons ("Bureau" or "BOP") to monitor the communications of high-risk prisoners, such as those convicted of terrorism. On November 20, 2012, the remaining Plaintiffs in the case filed an Amended Complaint, which includes new allegations and new claims. Plaintiff Kifah Jayyousi alleges for the first time that he was retaliated against for engaging in First Amendment protected activities based on excerpts from a memorandum signed by Leslie Smith, Chief of BOP's Counter Terrorism Unit, recommending against Jayyousi's release from the CMU. Jayyousi seeks both equitable relief from the official-capacity Defendants and money damages from Mr. Smith. Pursuant to Rule 12(b)(6), the Court should dismiss Jayyousi's

official-capacity retaliation claim for failure to state a claim and dismiss Jayyousi's individual-capacity claim against Mr. Smith because of qualified immunity.

A First Amendment retaliation claim requires an inmate to plausibly allege that an allegedly adverse action did not advance legitimate penological goals and that the inmate's speech was protected under the First Amendment. Jayyousi has failed to allege facts that satisfy either element. Mr. Smith cited Jayyousi's convictions for terrorism as well as certain statements Jayyousi made in the CMU, which Mr. Smith reasonably determined threatened a group demonstration, as the bases for his recommendation. Because these reasons advanced the legitimate penological goals of protecting the public and prison security, and because Jayyousi's speech was not protected under the First Amendment, Jayyousi has failed to plausibly allege that Mr. Smith violated his constitutional rights, much less that any supposed violation was clearly established in light of the law at the time of the recommendation.

Plaintiff Daniel McGowan includes a new claim in his Amended Complaint that his second placement in a CMU in February 2011 was in retaliation for his protected speech and beliefs, and seeks both equitable relief from the official-capacity Defendants and damages from Mr. Smith. In addition, for the first time, McGowan brings an individual-capacity claim against Mr. Smith with respect to initial placement in a CMU, alleging that Mr. Smith recommended that McGowan be placed in a CMU in 2008 in retaliation for his protected speech and beliefs. As set forth below, Mr. Smith offered legitimate penological reasons for his recommendations, including the fact that McGowan had been convicted of terrorism-related offenses. Because Mr. Smith's actions were legitimate, they obviously did not violate clearly established law nor was it clearly established that the speech at issue here was protected under the First Amendment.

Consequently, Mr. Smith is entitled to qualified immunity and the Court should therefore dismiss McGowan's individual-capacity retaliation claims against Mr. Smith.

In addition, pursuant to Rule 12(b)(1), Defendants move unopposed to dismiss McGowan's official-capacity claims on grounds of mootness because he has been transferred to a halfway house and is no longer subject to the communication restrictions in the CMU.[1] For the same reason, the claims of plaintiff Royal Jones, which only seek equitable relief, are moot as well.[2]

BACKGROUND

I. OVERVIEW OF THE PURPOSE AND OPERATION OF THE CMUs.

Plaintiffs bring this case based on their current or past designations to a CMU. As described in greater detail in Defendants' first Motion to Dismiss, ECF No. 19, the CMU is a self-contained general population housing unit designed "to house inmates who, due to their current offense of conviction, offense conduct, or other verified information, require increased monitoring of communication between inmates and persons in the community in order to protect the safety, security, and orderly operation of Bureau facilities, and [to] protect the public." Am. Compl., Ex. A (Terre Haute Institution Supplement) at 1. Two CMUs exist: one at the Federal

[1] McGowan's counsel has informed counsel for the Government that McGowan does not intend to oppose the Government's mootness motion. In the event, however, that the Court does not dismiss McGowan's official capacity claims on grounds of mootness under Rule 12(b)(1), it should dismiss his official-capacity retaliation claims pursuant to Rule 12(b)(6). *See* Part III.B (explaining that these claims fail to state a claim for legal relief). In addition, Defendants are also entitled to judgment in their favor with respect to McGowan's first retaliation claim, because he failed to exhaust his administrative remedies. *See* Motion for Summary Judgment, ECF No. 47 (pending).

[2] The Center for Constitutional Rights has withdrawn as counsel for Mr. Jones, and the Court has directed the Clerk's Office to arrange for appointment of counsel from the Civil Pro Bono panel to represent Mr. Jones. 9/29/12 Minute Order. As of the date of this filing, however, no appearance on behalf of Mr. Jones has been entered on the docket. Government counsel has refrained from contacting Mr. Jones directly until his status is clarified.

Correctional Institution in Terre Haute, Indiana, ("FCI Terre Haute") and the other at the United States Penitentiary in Marion, Illinois ("USP Marion"). Am. Compl. ¶ 4. Inmates in a CMU receive two fifteen-minute telephone calls per week, and all visits, aside those with their attorneys, must be conducted using non-contact facilities, *i.e.*, in partitioned rooms where inmates and their visitors speak using telephone lines. *See, e.g.*, *id*. ¶¶ 34-65. These conversations are live-monitored and subject to recording. Am. Compl., Ex. A (Terre Haute Institution Supplement) at § 3C. Communication must be verbal and the use of hand signals may result in the termination of the visit. *Id.* CMU inmates are currently allowed up to eight hours of visiting time per month. Am. Compl. ¶ 54.

Transfer to a CMU may be warranted for inmates (1) who are convicted of or associated with terrorism; (2) who pose a risk of coordinating illegal activities by communicating with persons in the community; (3) who have attempted or have a propensity to contact the victims of their crimes; (4) who have committed prohibited acts involving the misuse or abuse of approved communications methods; and (5) where there is other evidence that the inmate's unmonitored communication with the public poses a threat to the security and orderly operation of Bureau facilities or the protection of the community. *See, e.g.,* Am. Compl., Ex. A (Terre Haute CMU Institution Supplement) at 6; Am. Compl. ¶ 30; 75 Fed. Reg. 17324, 17326 (April 6, 2010) ("CMU Proposed Rule") (listing criteria for CMU placement).

Inmates transferred to the CMU receive a notice indicating why they were transferred and are informed that they may appeal the decision to transfer them using the Bureau's Administrative Remedy Program. *See, e.g.,* Am. Compl., Ex. A (Terre Haute CMU Institution Supplement) at 6. Each CMU also has a team that regularly conducts program reviews to

determine whether an inmate warrants continued designation to the CMU. *See* Am. Compl., Ex. F (Notice to Inmates).

II. REMAINING PLAINTIFFS

A. Yassin Aref

Aref is serving a fifteen-year sentence for money laundering, providing material support for terrorism, conspiracy, and making a false statement to the FBI. Am. Compl. ¶ 105. When transferred to a CMU in 2007, he was given a notice of transfer citing his convictions and his offense-related communication with a terrorist organization as reasons for his designation to the CMU. *Id.* ¶ 111; Am. Compl., Ex. E. He was transferred out of the CMU to the general population in April 2011 based on a program review. *See* Am. Compl. ¶ 114.

B. Kifah Jayyousi

Jayyousi was convicted of conspiracy to murder, kidnap and maim in a foreign country, and conspiracy to provide material support to terrorism. *Id*. ¶ 179. He was transferred to a CMU in June 2008. *Id*. ¶ 189. His notice cited his convictions for terrorism as the reason for his designation to the CMU. *Id*. ¶187; Am. Compl., Ex. E.

C. Daniel McGowan

McGowan is serving a seven-year sentence for conspiracy and two counts of arson. Am. Compl. ¶¶ 125-26. He was transferred to a CMU in August 2008; his notice of transfer listed his terrorism-related convictions and association with the Earth Liberation Front and Animal Liberation Front as reasons for his transfer. *Id*. ¶ 135; Am. Compl., Ex E. In December 2012, McGowan was released from the CMU and transferred to a Residential Reentry Center in Brooklyn, New York. Ex. 1, Declaration of Kerry P. Kemble ("Kemble Decl.") ¶ 8. He is scheduled to complete his term of imprisonment on June 5, 2013. *Id*.

D. Royal Jones

Jones is serving a 94-month sentence for solicitation of bank robbery, which also constituted a probation violation for an earlier gun possession conviction. Am. Compl. ¶ 158. He was transferred to the CMU in June 2008. *Id*. ¶ 163. In March 2010, he was transferred out of the CMU and into the general population based on a program review. *Id*. ¶ 170. In July 2012, he was transferred to a Residential Reentry Center in Casper Wyoming. Kemble Decl. ¶ 7. He is scheduled to finish serving his term of imprisonment on May 17, 2013. *Id*.

III. PROCEDURAL HISTORY

In support of this motion, Defendants respectfully refer the Court to their first Motion to Dismiss, which provides additional background information on the Plaintiffs, including the terrorism convictions of Jayyousi and McGowan, as well as the nature and rationale for the communication restrictions in the CMUs. *See* Defendants' Motion to Dismiss, ECF No. 19. In addition, Defendants respectfully refer the Court to Judge Urbina's March 30, 2011 Memorandum Decision, granting Defendants' Motion to Dismiss in part. ECF No. 37. Judge Urbina found that Plaintiffs had failed to plausibly allege that the CMU's restrictions on contact visits and reduced time for phone calls and visits were not reasonably related to the legitimate penological interest in reducing and monitoring the communications of high-risk inmates, such as those convicted of terrorism. *Id*. at 20-21. As a result, he dismissed Plaintiffs' constitutional claims challenging the legality of the CMU's communication restrictions under the First, Fifth and Eighth Amendments, *id*. at 18-21, 28-30, as well as the claims of the Muslim Plaintiffs alleging that they were placed in a CMU because of their religion. With respect to Jayyousi, Judge Urbina held that his convictions for terrorism provided the "obvious alternative explanation" for his placement in the CMU. *Id*. at 34.

In addition, the Court dismissed the claims of the Family Plaintiffs, which were brought by Jennifer Synan and Hedaya Jayyousi, who are married to McGowan and Jayyousi, respectively, because their claims were based on the alleged illegality of the CMU's communication restrictions. 3/30/11 Mem. Op. at 20-21. The Court also dismissed Plaintiffs' notice-and-comment APA claim as moot given the BOP's decision to publish a proposed rule in the Code of Federal Regulations. *Id*. at 34-35. Lastly, the Court dismissed the claims of Avon Twitty, finding that his claims were moot because he was placed in Residential Reentry Center for reasons unrelated to the current litigation. *Id*. at 14-15.

Left standing by the Court's order were the following claims: (1) Plaintiffs' procedural due process claims, alleging designation to and retention within the CMU without constitutionally adequate process, Am. Compl., First Cause of Action; (2) Plaintiff McGowan's official-capacity claim that he was placed in a CMU in 2008 in retaliation for First Amendment protected speech and advocacy while in prison, Am. Compl., Second Cause of Action, and (3) Jones' official-capacity retaliation claim, alleging designation to the CMU in retaliation for filing grievances, Am. Compl., Second Cause of Action. *Id*. at 28, 32.

B. Plaintiffs' Amended Complaint

On December 3, 2012, Plaintiffs filed their Amended Complaint. *See* ECF No. 88-1. Both McGowan and Jayyousi have added new individual capacity retaliation claims against Mr. Smith. Am. Compl. ¶¶ 235, 237-38. In addition, McGowan has offered new factual allegations in support of his previous claim that his 2008 designation to a CMU was retaliatory.

See id. ¶ 134. Finally, Plaintiffs again allege that their designation to and retention in the CMU violated their rights to procedural due process. *See id*. ¶¶ 228-232.[3]

ARGUMENT

I. THE CLAIMS OF PLAINTIFFS ROYAL JONES AND DANIEL McGOWAN SEEKING EQUITABLE RELIEF ARISING OUT OF THEIR TRANSFER TO AND CONFINEMENT IN A CMU ARE NOW MOOT.

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants move to dismiss, as moot, the claims of Royal Jones, which are entirely equitable in nature, and move, unopposed, to dismiss the equitable claims of Daniel McGowan. *See* Am. Compl. (ECF No. 88-1), First and Second Causes of Action, Prayer for Relief (b) & (c) (stating nature of equitable relief sought). As explained in the attached Declaration of Kerry P. Kemble, Assistant Administrator in BOP's Residential Reentry Management Branch ("Kemble Decl.") (attached as Ex. 1), Jones and McGowan have been released from prison and transferred to Residential Reentry Centers ("RRCs"), commonly referred to as halfway houses. Kemble Decl. ¶¶ 4-9. Because Jones and McGowan are not subject to the CMU's communication restrictions and face no reasonable prospect of being returned to prison, they have no ongoing interest in receiving either an injunction or declaratory relief with respect to these restrictions. Therefore, as the Court did with respect to former Plaintiff Avon Twitty's claims for equitable relief following his transfer to an RRC, s*ee* 3/30/11 Mem. Op. (ECF No. 37) at 16-17, the Court should dismiss Jones's and McGowan's equitable claims as moot.

[3] The Court has granted Plaintiffs' attorneys' motion to withdraw as counsel for Jones. *See* Minute Order, Sept. 29, 2012. Thus, it is unclear whether Jones joins in these allegations. *See* Am. Compl. ¶ 17 n.1 (noting that Plaintiffs' attorneys have not advised Jones and that the allegations in the Complaint relating to Jones have not been amended).

A. Standard of Review For A Rule 12(b)(1) Motion.

Actions are subject to dismissal when the court lacks subject matter jurisdiction over the claims. Fed. R. Civ. P. 12(b)(1). In reviewing a motion to dismiss for lack of subject matter jurisdiction, the court may, where necessary, consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.[4] *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

B. Because Jones And McGowan Are No Longer Subject To The CMU's Communication Restrictions, Their Claims For Injunctive And Declaratory Relief Relating To Those Restrictions Are Moot.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Thus, where intervening events after the filing of a lawsuit prevent a court from ordering any relief, the case is moot. *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

As the D.C. Circuit has explained, "[n]ormally, a prisoner's transfer or release from a prison moots any claim he might have for equitable relief arising out of the conditions of his confinement in prison." *Scott v. Dist. of Columbia*, 139 F.3d 940, 941 (D.C. Cir. 1998); *see also Dorman v. Thornburgh*, 955 F.2d 57, 58 (D.C. Cir. 1992) (per curiam) (same); *Cameron v. Thornburgh*, 983 F.2d 253, 254-57 (D.C. Cir. 1993) (same). In this case, not only are Jones and McGowan no longer detained in a CMU, they are no longer detained in any prison facility, but in halfway houses. Kemble Decl. ¶¶ 4-9. Because they are no longer subject to the communication restrictions of the CMUs, *id*. ¶ 9, their equitable claims relating to these restrictions are now moot. *Scott*, 139 F.3d at 941.

[4] For this reason, the Court may consider the attached declaration of Mr. Kemble for purposes of determining whether the claims of Jones and McGowan are moot. *Herbert*, 974 F.2d at 197.

C. Jones's and McGowan's Claims Do Not Fall Within The Judicially-Recognized Exceptions To Mootness For Cases "Capable of Repetition, Yet Escaping Review," Or For Cases Involving A "Voluntary Cessation" Of Alleged Illegal Conduct.

Neither of the two recognized exceptions to mootness —for cases that are "capable of repetition, yet evading review," *Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975), or cases where a defendant has voluntarily ceased some challenged conduct in an effort to escape legal review, *United States v. W.T. Grant Co.*, 345 U.S. 629, 630-32 (1953) — applies here.

With respect to the first exception for claims that are "capable of repetition, yet evading review," the Supreme Court has explained that this "applies only in exceptional circumstances." *Spencer*, 523 U.S. at 17 (internal quotation marks omitted). Both of the following elements must be satisfied under this exception: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Id* (internal quotation marks omitted). Here, neither element is met.

Plaintiffs cannot show that their confinement in a CMU is "in its duration too short to be fully litigated prior to its cessation or expiration." *Spencer*, 523 U.S. at 17 (internal quotation marks omitted). For instance, Jayyousi has been in the CMU since June 2008. Am. Compl. ¶ 19. Furthermore, there is no "reasonable expectation" or "demonstrated probability" that Jones and McGowan will be returned to a CMU. *Spencer*, 523 U.S. at 17; *Murphy*, 455 U.S. at 482 (internal quotation marks omitted). As explained in Mr. Kemble's Declaration, the only reason why Jones or McGowan would be returned to prison is if they violated one of the rules or regulations of their halfway houses. *See* Kemble Decl. ¶¶ 10-11; *id.* ¶ 13 (stating that "provided they continue to comply with the RRC's rules and regulations, as set forth in the Community Corrections Manual, they will not be returned to prison"). Because it is within their control

whether they will be returned to prison, and courts must assume that inmates will abide by such rules, their clams are moot.[5] *See Knox v. McGinnis*, 998 F.2d 1405, 1413 (7th Cir. 1993) (noting that inmate "would be returned to segregation only if he were to violate a prison rule . . . [and] we must assume that [the inmate] will abide by prison rules and thereby avoid a return to segregation status"); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) ("finding no live controversy because "[i]t was to be assumed that '[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct'") (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974)).

Plaintiffs' claims also do not fall within the second exception to mootness for cases involving a "voluntary cessation of allegedly illegal conduct," where the defendant remains "free to return to his old ways" once the case is dismissed. *W.T. Grant Co.*, 345 U.S. at 630-632. This exception has no applicability here because Defendants have not ceased to operate the CMUs, and therefore the operations of the CMU will continue to be subject to legal review. In addition, Jones and McGowan were released from the CMU in accordance with routine statutory requirements and BOP's procedures.[6] Thus, because their transfers to RRCs were unrelated to

[5] Moreover, for minor violations of an RRC's rules, an inmate typically will not be returned to prison. Kemble. Decl. ¶ 13. In addition, because Jones's and McGowan's release dates are "imminent," *id*. ¶ 15 (stating that Jones's release date is May 17, 2013 and McGowan's release date is June 5, 2013), even if they committed a violation of the RRC's rules that was sufficiently severe to warrant a return to custody, "they would likely not be returned to the BOP facility from which they were released if they committed a violation," and "[i]nstead, inmate Jones and McGowan likely would complete their sentences locally and be released to supervision on their scheduled release dates." *Id*. As this further confirms, there is no reasonable prospect that McGowan and Jones will be returned to a CMU.

[6] As Mr. Kemble explains, the decision to place Jones and McGowan in a halfway house was made in accordance with statutory requirements that BOP provide conditions such as an RRC for "a portion of the final months of [the inmate's term] (not to exceed 12 months)." Kemble Decl. ¶ 4 (citing 18 U.S.C. § 3624(c)). McGowan and Jones were placed in a halfway house pursuant to statutory criteria and BOP's regulations because they had completed the majority of their sentences, not because of this litigation. *See Id*. ¶¶ 4-5, 7-8.

this litigation, the concerns underlying the voluntary cessation doctrine do not apply in this case. *See* 3/30/11 Mem. Op. 37 at 16-17 (Judge Urbina finding that because the decision to place Avon Twitty in a halfway house "was not the result of this litigation . . . the voluntary exception to mootness does not apply") (citing *Pub. Util. Comm'n of Cal. v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1460 (9th Cir. 1996)).

For the reasons set forth above, pursuant to Rule 12(b)(1), the Court should dismiss McGowan's and Jones's equitable claims because those claims are now moot.

II. JAYYOUSI'S OFFICIAL CAPACITY RETALIATION CLAIM SHOULD BE DISMISSED FOR FAILING TO STATE A CLAIM UNDER RULE 12(b)(6).

A. Standard of Review For A Rule 12(b)(6) Motion.

When ruling on a defendant's motion to dismiss under Rule 12(b)(6), "a judge must accept as true all of the factual allegations contained in the complaint." *Atherton v. District of Columbia Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (internal quotation marks omitted). Although "detailed factual allegations" are not required to withstand such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (emphasis added) (quoting *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949.

B. Elements Of A First Amendment Prisoner Retaliation Claim.

A prisoner bringing a First Amendment claim of retaliation must plausibly allege that "(1) he engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) a causal link [exists] between the exercise of [the] constitutional right

and the adverse action taken against him." 3/30/11 Mem. Op. (ECF No. 37) at 31 (internal quotation marks omitted). In addition, the plaintiff must allege "that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline." *Byrd v. Mosely*, 942 F. Supp. 642, 645 (D.D.C. 1996) (internal quotation marks omitted); *see also Anderson–Bey v. District of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C.2006) (explaining that an inmate bringing a retaliation claim under the First Amendment must allege that the adverse "action did not reasonably advance a legitimate correctional goal") (citations omitted); *Pryor-El v. Kelly*, 892 F. Supp. 261, 274 -275 (D.D.C. 1995) (same)).

C. Jayyousi Has Not Plausibly Alleged That The March 2011 Recommendation Of The Chief Of BOP's Counter Terrorism Unit That Jayyousi Remain In A CMU Did Not Advance Legitimate Penological Goals.

In the Amended Complaint, Jayyousi alleges that, in March 2011, Leslie Smith, Chief of BOP's Counter Terrorism Unit ("CTU"), recommended that he remain in a CMU in retaliation for statements he made approximately two and a half years earlier in the CMU, in August 2008, during a Muslim Jumah prayer. Am. Compl. ¶¶ 196-99, Second Cause of Action. Jayyousi's allegations are based entirely on an excerpt from a March 22, 2011 Memorandum, signed by Mr. Smith, recommending to the final BOP decision maker — here, the Regional Director of the North Central Regional Office — that Jayyousi remain in the CMU. *Id*. Because Mr. Smith's March 2011 Memorandum is quoted in the Amended Complaint and is central to Jayyousi's retaliation claim, Defendants have included a copy of the Memorandum that was produced in discovery to Plaintiffs as an exhibit to this motion. *See* March 22, 2011 Memorandum for Regional Director, North Central Regional Office, BOP CMU 4613-4615 (attached as Ex. 2).[7]

[7] "[W]here a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment." *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999) *aff'd*, 38 F.

As seen below, the allegations in the Amended Complaint, which fairly incorporate Mr. Smith's March 2011 Memorandum,[8] make plain that Mr. Smith offered legitimate penological reasons for his recommendation.

At the beginning of the March 2011 Memorandum, Mr. Smith explained that Jayyousi was originally placed in the CMU in 2008 based on his convictions for terrorism.[9] Jayyousi acknowledges, as he must, that he was convicted of terrorism-related offenses, Am. Compl. ¶ 76, which is one of five grounds used by BOP for placing an inmate in a CMU, *see id*. ¶ 30 (pursuant to BOP policy, the type of inmates who may be placed in the CMU include "(1) those convicted of, or associated with, international or domestic terrorism"). For this reason, Judge Urbina, in dismissing Jayyousi's claim in his original Complaint that he was placed in the CMU because he is a Muslim, found that Jayyousi's conviction for terrorism provided the "obvious alternative explanation" for his transfer to a CMU. 3/30/11 Mem. Op. at 34 (citing *Iqbal*, 129 S. Ct. at 1951)). Consequently, as Judge Urbina has already determined, Jayyousi's convictions for terrorism alone provide a legitimate basis for Mr. Smith's recommendation. Therefore, Jayyousi has not plausibly alleged, as he must, that Mr. Smith's recommendation did not further a

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App'x 4 (D.C. Cir. 2002); see also *Krooth & Altman v. N. Am. Life Assur. Co.*, 134 F. Supp. 2d 96, 99 (D.D.C. 2001) (same); *Lipton v. MCI Worldcom, Inc.*, 135 F. Supp. 2d 182, 186 (D.D.C. 2001) (same).

[8] The privilege assertions that are the basis of the redactions that appear in the attached memorandum were upheld by Magistrate Judge Robinson in response to Plaintiffs' Motion to Compel. *See* ECF No. 87.

[9] *See* BOP CMU 4613-4614 (stating that "Inmate Jayyousi was recommended and approved for placement in a CMU based on his offense of conviction for Conspiracy to Murder, Kidnap and Maim Persons in a Foreign Country; Conspiracy to Provide Material Support for Terrorism; Providing Material Support to Terrorists.) After being placed in the CMU in June 2008, Jayyousi received a Notice of Transfer explaining that his placement in a CMU was for his terrorism-related convictions. Am. Compl. ¶ 187; Jayyousi's Notice of Transfer (Ex. E to Am. Compl.).

legitimate penological interest. *See, e.g.*, *Anderson–Bey*, 466 F.Supp.2d at 65 (inmate bringing retaliation claim under First Amendment must allege the adverse "action did not reasonably advance a legitimate correctional goal") (citations omitted)).

In addition, Mr. Smith explained in the Memorandum that, in his judgment, Jayyousi's comments during a Jumah prayer in August 2008 in the CMU "encouraged activities which would lead to a group demonstration and are detrimental to the security, good order, or discipline of the institution."[10] Am. Compl. ¶ 197. Specifically, Mr. Smith pointed to Jayyousi's statements that "inmates were sent to the CMU because they were Muslim, and not that they were criminals," his assertion that "not even the staff understood or accepted the purpose of the unit," and his "direct[ion] to the Muslim inmates to stand together in response to being sent to the CMU." *Id*. ¶ 197. Based on his experience as a prison administrator, Mr. Smith made a reasonable penological judgment that these statements, which Jayyousi does not deny making, posed a threat of creating a group demonstration. *Id*. ¶ 197. As the Supreme Court has explained, prison administrators are entitled to "appropriate deference and flexibility" when

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[10] Plaintiffs quote the following description of this speech from the March 2011 Memorandum:

> Inmate Jayyousi's comments encouraged activities which would lead to a group demonstration and are detrimental to the security, good order, or discipline of the institution. Specifically, inmate Jayyousi claimed that inmates were sent to CMU because they were Muslim, and not that they were criminals. Inmate Jayyousi purported that the unit was created by something evil, and not even the staff understood or accepted the purpose of the unit. Inmate Jayyousi directed Muslim inmates to stand together in response to being sent to CMU, that Muslims should not compromise their faith by cooperating with the government and Muslims should martyr themselves to serve Allah and meet hardships in their lives. Claiming Muslim inmates in CMU are being tortured psychologically, inmate Jayyousi further purported that criminal cases against Muslims inmates were fabricated, intended to destroy good U.S. citizens and to tear them away from their families.

Am. Compl. ¶ 197.

attempting to manage the volatile environment of a prison, *Sandin v. Conner*, 515 U.S. 472, 482 (1995), and, accordingly, courts should afford deference to prison officials "in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory," *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

In the March 2011 Memorandum, Mr. Smith also explained that CTU staff had determined that Jayyousi, who had only recently been placed in the CMU at USP Marion after being transferred from the CMU at FCI Terre Haute, had not been in the CMU at USP Marion long enough for staff there "to judge inmate Jayyousi's behavior, comments and communications." BOP CMU 4615 (Ex. 1).

As seen above, Mr. Smith provided not only legitimate but eminently sound reasons for recommending that Jayyousi remain in the CMU. One of the principal reasons for creating the CMU was to ensure that the BOP would be able to place high-risk inmates, such as those convicted of terrorism, in an environment in which their communications could be effectively monitored in order to protect the public. *See* Mem. Op. at 20; Am. Compl. ¶ 30. BOP has cited examples where inmates attempted to further terrorist plots from prison, including inmates who spoke with visitors in code in an effort to do so. *See* Am. Compl. ¶ 30 (citing Proposed Rule, "Communication Management Units," 75 Fed. Reg. 17324, 17326 (April 6, 2010)). Understandably, then, in dismissing Plaintiffs' challenge to the legality of the CMU's communication restrictions, Judge Urbina concluded that effectively monitoring the communications of high-risk individuals in a CMU is a legitimate penological interest. *See* 3/30/11 Mem. Op. at 20-21. It follows, therefore, that Mr. Smith offered a legitimate penological justification for his March 2011 recommendation that Jayyousi remain in the CMU when he cited Jayyousi's convictions for terrorism. As noted above, Judge Urbina found that

Jayyousi's convictions for terrorism provided an "obvious" legitimate explanation for his placement in the CMU. *Id*. at 34. On this basis alone, the Court should dismiss Jayyousi's claims because the effective monitoring of the communications of such an inmate furthers legitimate penological goals. *Byrd*, 942 F. Supp. at 645 (stating that for a First Amendment retaliation claim, an inmate must allege that "the retaliatory action does not advance legitimate penological goals"); *see also Hartman v. Moore*, 547 U.S. 250, 256 (2006) (to establish constitutional violation, illegal retaliation must be the "but-for" cause of the challenged decision). Jayyousi's allegations fail to meet these requirements.

A fortiori, these convictions *in combination* with the inflammatory statements Jayyousi made in 2008 encouraging a group demonstration, Am. Compl. ¶ 197, as well as the CTU's determination that Jayyousi needed to be observed for a longer period of time in the CMU for staff there to judge whether his communications continued to pose a danger to the public, BOP CMU 4615 (Ex. 1), provided additional legitimate penological reasons for his placement. Because Jayyousi's allegations do not plausibly allege that Mr. Smith's recommendation did not advance legitimate penological goals, his retaliation claim should be dismissed. *Byrd*, 942 F. Supp. at 645; *Anderson–Bey*, 466 F.Supp.2d at 65; *see also Iqbal*, 129 S.Ct. at 1949 (stating that "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face") (internal quotation marks omitted)).

D. Jayyousi Has Failed To Plausibly Allege That The Speech At Issue Here Was Protected Under The First Amendment.

Pursuant to Rule 12(b)(6), Jayyousi's retaliation claim should also be dismissed because the allegations in the Amended Complaint fail to make it plausible that the statements he made in the CMU in August 2008 were protected by the First Amendment. *See* 3/30/11 Mem. Op. (ECF No. 37) at 31 (Judge Urbina explaining that retaliation claim includes requirement that plaintiff

allege that "he engaged in conduct protected under the First Amendment") (internal quotation marks omitted)).

As discussed above, Mr. Smith concluded that Jayyousi's speech posed a threat of a "group demonstration" and was therefore "detrimental to the security, good order, or discipline of the institution."[11] Am. Compl., ¶ 197. Courts routinely recognize that speech encouraging other inmates to engage in group protests or speech encouraging organized noncooperation in a prison is not protected under the First Amendment given the significant danger such speech poses to legitimate penological interests, such as the good order and discipline of a prison. *See, e.g., Jones v. N.C. Prisoners' Labor Union*, Inc. 433 U.S. 119, 131-33 (1977) (upholding prohibition on inmate-to-inmate solicitation of membership in a prisoners' union and noting that "[t]he case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with institution officials surely would rank high on anyone's list of potential trouble spots"); *see also Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) ("[T]he confrontational, disorderly manner in which [the prison inmate] complained about the treatment of his personal property removed this grievance from First Amendment protection."); *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) ("Prison officials may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment."); *Goff v. Dailey*, 991 F.2d 1437, 1439 (8th Cir.1993) ("[T]he prison has a legitimate penological interest in punishing inmates for mocking and challenging correctional officers by making crude personal statements about them in a recreation room full of other inmates."); *see also Pilgrim v. Luther*, 571 F.3d 201, 205 (2d Cir.

[11] Although Plaintiffs allege that the misconduct reports for the statements made by Jayyousi during the August 2008 Jumah prayer were ultimately expunged, Am. Compl. ¶¶ 190-191, Plaintiffs do *not* claim that Mr. Smith's description of Jayyousi's speech is inaccurate in any way. *See id*. ¶¶ 189-91, 196-8.

2009) (holding that entreaties to stop work in a prison were not protected under the First Amendment and noting that "[s]o long as inmates had grievance procedures available to them, regulations limiting their rights to organize and petition were reasonable restrictions designed to further the government's interest in the orderly administration of prisons."); *Nickels v. White*, 622 F.2d 967, 971 (8th Cir. 1980) (upholding prison prohibition on protest petitions as reasonably necessary to prison security).

Jayyousi, by telling his fellow inmates that prison institutions were "evil," that "not even staff understood or accepted the purpose of the unit," that Muslim inmates should "stand together in response to being sent to the CMU," and that Muslim inmates should not cooperate with the government, Am. Compl. ¶ 197, was clearly "encourag[ing] adversary relations with institution officials," *N.C. Prisoners' Labor Union*, Inc. 433 U.S. at 133. As such, Jayyousi fails to plausibly allege that his speech is protected by the First Amendment.

For all the reasons explained above, the Court should dismiss Jayyousi's official-capacity retaliation claim pursuant to Rule 12(b)(6) because he has failed to plausibly allege that Mr. Smith's recommendation was without legitimate penological justification, and, separately, because he has failed to plausibly allege that his speech was protected under the First Amendment.

III. THE INDIVIDUAL CAPACITY DEFENDANT, LESLIE SMITH, IS ENTITLED TO QUALIFIED IMMUNITY FROM SUIT.

Jayyousi and McGowan both bring individual-capacity claims against Mr. Smith, alleging that he recommended that they be placed in a CMU or retained there in retaliation for their First Amendment protected speech and beliefs. Am. Compl. ¶¶ 327-328. Both Plaintiffs seek compensatory and punitive damages. *Id.*, Prayer for Relief (d). As demonstrated below, neither Jayyousi nor McGowan plausibly alleges that Mr. Smith acted unlawfully or that the

speech at issue was protected under the First Amendment. Therefore, Mr. Smith is entitled to qualified immunity and the claims against him should be dismissed.

Individual-capacity claims against government employees "can entail substantial costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Accordingly, "[q]ualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Elkins v. Dist. of Columbia*, 690 F.3d 554, 567 (D.C. Cir. 2012) (internal quotation marks omitted). The doctrine "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Id*. at 568 (internal quotation marks omitted).

Qualified immunity requires dismissal of individual-capacity claims "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine whether an official is entitled to qualified immunity, "the relevant, dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted." *Elkins*, 690 F.3d at 567 (internal quotation marks omitted). As such, "existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (internal quotation marks omitted). "In determining whether the state of the law was clearly established at the time of the action complained of, [the court] look[s] to cases from the Supreme Court and this court, as well as to cases from other

courts exhibiting a consensus view — if there is one." *Taylor v. Reilly*, 685 F.3d 1110, 1113-14 (D.C. Cir. 2012) (internal quotation marks omitted).

To overcome qualified immunity, "the right allegedly violated must be established not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." *Reichle*, 132 S.Ct. at 2094 (internal quotation marks omitted); *see also Creighton*, 483 U.S. at 480 ("The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right") (emphasis added)). Thus, when considering alleged First Amendment retaliation claims, "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from" retaliation for speech protected by the First Amendment in the context at hand. *Reichle*, 132 S.Ct. at 2094

Because one goal of the qualified immunity doctrine is to "free officials from the concerns of litigation, including avoidance of disruptive discovery," *Iqbal*, 556 U.S. at 685 (internal quotation marks omitted), a court should determine whether an official is entitled to qualified immunity on a motion to dismiss whenever possible, rather than waiting until summary judgment, *id*.

A. Jayyousi Has Not Plausibly Alleged A Violation Of Any Clearly Established Right Under The First Amendment By Mr. Smith.

As demonstrated above in Part II, Jayyousi's allegations in the Amended Complaint fail to plausibly allege a violation of *any* constitutional right because Mr. Smith's recommendation that Jayyousi remain in the CMU was supported by legitimate penological reasons and, separately, because Jayyousi's speech was not protected under the First Amendment. Consequently, it follows that Jayyousi has not adequately alleged that Mr. Smith's conduct violated clearly established law. *Id*. It would not have been clear to a reasonable official that the

reasons Mr. Smith offered for his recommendation did not promote legitimate penological interests or that Jayyousi's speech was protected under the First Amendment. *See, e.g.*, *Creighton*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.") (emphasis added).

1. Mr. Smith Provided Legitimate Penological Reasons For Recommending That Jayyousi Remain In The CMU And Thus Did Not Violate Clearly Established Law.

As set forth in Part II., *supra*, Mr. Smith offered legitimate penological reasons for his recommendation that Jayyousi remain in a CMU. Mr. Smith's reliance on Jayyousi's convictions for terrorism, Jayyousi's statements in August 2008 during a Jumah prayer, and the CTU's conclusion that Jayyousi had not been in the CMU for a sufficient period of time all provided legitimate penological reasons for Mr. Smith's recommendation. *See supra* Part II.C; *Byrd* 942 F. Supp. at 645 (plaintiff must allege that the "retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline").

As the Supreme Court has repeatedly recognized, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). As a result, "the relevant inquiry [in the First Amendment context] is whether the actions of prison officials were reasonably related to legitimate penological interests." *Thornburgh v. Abbot*, 490 U.S. 401, 409 (1989) (internal quotation marks omitted). In dismissing Plaintiffs' challenge to the legality of the CMU's communication restrictions, Judge Urbina recognized that the goal of "promoting the safety of correctional institutions and the public" is a legitimate penological interest that is furthered by the CMU's communication restrictions. 3/30/11 Mem. Op. at 20 (internal quotation marks omitted). Furthermore, Judge Urbina also held that

Jayyousi's convictions for terrorism provided a legitimate basis for his placement in the CMU. *Id*. at 34 (stating that Jayyousi's conviction for terrorism provide the "obvious alternative explanation" for his designation to a CMU). Thus, when Mr. Smith cited Jayyousi's convictions for terrorism in support of his recommendation, he offered a legitimate penological justification that was not contrary to clearly established law. Once more, in doing so, he also acted in accordance with standard BOP policy. *See* Am. Compl. ¶ 30 (BOP policy lists conviction, or association, with domestic or international terrorism as a valid basis for designating an inmate to a CMU).

Similarly, because Mr. Smith determined that Jayyousi's statements in August 2008 during a Jumah prayer posed a risk of a "group demonstration" and were "detrimental to the security, good order, or discipline of the institution," Am. Compl. ¶ 191, they also provided a legitimate penological rationale for Mr. Smith's recommendation. Prison officials are entitled to "appropriate deference" when making such determinations, *Sandin*, 515 U.S. at 482, and there can be no question that the maintenance of the internal security of a prison is "perhaps the most legitimate of penological goals." *Overton v. Bazzeta*, 539 U.S. 126, 131 (2003).

For the reasons explained above, Mr. Smith is entitled to qualified immunity and sufficient "breathing room" when making such recommendations, especially given his responsibility to prevent Jayyousi and similar inmates from using available communication methods in prison to further criminal, including terrorist, activity. *Elkins*, 690 F.3d at 567 (explaining that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law") (internal quotation marks omitted).

2. It Was Not Clearly Established In March 2011 That Jayyousi's Speech Was Protected Under The First Amendment.

Jayyousi has also not pled facts that render it plausible that his speech was protected by the First Amendment — much less that it was clearly established that his speech was protected by the First Amendment. *See* Am. Compl. ¶¶ 197-98; *supra* Part II.D. As explained above, Courts have consistently found that speech that encourages a group disruption or adversarial relations with prison administrators is not protected by the First Amendment given the danger such speech poses to the good order and discipline of the prison. *See, e.g.*, *Watkins*, 599 F.3d at 798 ("[T]he confrontational, disorderly manner in which [the prison inmate] complained about the treatment of his personal property removed this grievance from First Amendment protection."); *Freeman*, 369 F.3d at 864 ("Prison officials may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment."); *see also* cases cited on pp. 18-19. As these cases demonstrate, the claim that Jayyousi's speech was protected under the First Amendment was anything but "clearly established" at the time of Mr. Smith's recommendation.

In sum, Jayyousi has not plausibly alleged that the reasons offered by Mr. Smith in support of Jayyousi's placement in a CMU were improper, much less that they violated clearly established law, or that Jayyousi's speech was clearly protected under the First Amendment. Consequently, Mr. Smith is entitled to qualified immunity and the Court should dismiss Jayyousi's individual-capacity claim.

B. McGowan Has Not Plausibly Alleged A Violation Of Any Clearly Established Right Under The First Amendment By Mr. Smith.

McGowan alleges that Mr. Smith, in violation of the First Amendment, recommended that he be placed in a CMU in August 2008 and again in February 2011 "on the basis of protected political speech and beliefs, rather than any misconduct in prison." Am. Compl.

¶¶ 134, 146, 149, 237. McGowan's allegations are based on excerpts from memoranda signed by Mr. Smith and addressed to the Regional Director of the North Central Regional Office that recommended that McGowan be placed in a CMU. *See* March 27, 2008 Memorandum For Michael K. Nalley, Regional Director North Central Regional Office From Leslie S. Smith, Chief, Counter Terrorism Unit, BOP CMU 3374-3377 (Ex. 3); February 1, 2011 Memorandum for Michael K. Nalley, Regional Director, North Central Regional Office, BOP CMU 3381-3383 (Exhibit 4).

As noted above, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. at 822. Thus, the relevant question in the First Amendment context is whether "the actions of prison officials were reasonably related to legitimate penological interests." *Thornburgh*, 490 U.S. at 409 (1989) (internal quotation marks omitted). In addition, a First Amendment retaliation claim requires that an inmate allege that the challenged action "does not advance legitimate penological goals." *Byrd*, 942 F. Supp. 642 at 645.

McGowan, however, has failed to plausibly allege that the reasons offered by Mr. Smith for placing him in a CMU did not advance legitimate penological goals, much less that these reasons were unlawful under clearly established law. Similarly, McGowan has not plausibly alleged that it was clearly established that the speech at issue in this case was protected under the First Amendment. *See* 3/30/11 Mem. Op. (ECF No. 37) at 31 (explaining that retaliation claim includes requirement that plaintiff allege that "he engaged in conduct protected under the First Amendment") (internal quotation marks omitted)). As a consequence, Mr. Smith is entitled to qualified immunity and the Court should dismiss McGowan's individual-capacity retaliation

claims. *See Elkins*, 690 F.3d at 568 (qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law") (internal quotation marks omitted)).

1. Mr. Smith Provided Legitimate Penological Reasons For Recommending That McGowan Be Placed In A CMU In 2008 And 2011 And Thus Did Not Violate Clearly Established Law.

First Designation. McGowan alleges that Mr. Smith illegally retaliated against him with respect to his initial placement in a CMU, in 2008, based on excerpts from Mr. Smith's March 27, 2008 Memorandum to the Regional Director of the North Central Regional Office. Am. Compl. ¶ 134; BOP CMU 3374-3377 (Ex. 3). Mr. Smith offered legitimate penological reasons for his recommendation. The document cites McGowan's terrorist-related convictions, including his prior involvement with the domestic environmental terrorist organization, the Earth Liberation Front, ("ELF"), as "justifying his placement" in the CMU. BOP CMU 3373, 3376 (Ex. 3). McGowan admits that he was convicted of terrorism-related offenses and admits his past involvement with the ELF. Am. Compl. ¶¶ 16, 76. For the reasons discussed above, McGowan's convictions for terrorism provided a legitimate penological basis for Mr. Smith's recommendation.[12] *See* 3/30/11 Mem. Op. at 21 (finding conviction for terrorism provided legitimate basis for placing Jayyousi in CMU). On this basis alone, the Court should dismiss McGowan's claim, given that he does not plausibly allege that Mr. Smith's recommendation did not further a legitimate penological interest. *Byrd*, 942 F. Supp. 642 at 645.

The March 2008 Memorandum also cites McGowan's communications, including his descriptions of government cooperators as "snitches" and McGowan's references in support of "direct action." *See* BOP CMU 3375-3377 (Ex. 3); Am. Compl. ¶ 134. McGowan does not

[12] In a March 22, 2010 Memorandum, which is also cited in the Amended Complaint, Am. Compl. ¶ 143, Mr. Smith recommended against McGowan being released from the CMU, stating that "Inmate McGowan was recommended and approved for placement in the CMU due to his association with the Earth Liberation Front (ELF)and Animal Liberation Front (ALF), groups considered domestic terrorist organizations." BOP CMU 3378-3379 (attached as Ex. 5).

allege that Mr. Smith has mischaracterized his correspondence. Given McGowan's convictions for terrorism-related offenses, and his acknowledgment that he was a former member of the ELF, these statements provided additional legitimate penological rationales for Mr. Smith's recommendation. Am. Compl. ¶¶ 16, 76. Consequently, McGowan has failed to plausibly allege the violation of any right under the First Amendment, let alone one that was clearly established at the time Mr. Smith made his recommendation.

Second Designation. In October 2010, McGowan was released from the CMU and placed in a non-CMU general population environment at USP Marion, but was "re-designated" to the CMU in February 2011. Am. Compl. ¶ 146. McGowan alleges that Mr. Smith retaliated against him with respect to his re-designation based on excerpts from Mr. Smith's February 1, 2011 Memorandum, recommending to the Regional Director that McGowan be returned to the CMU. BOP CMU 3381-3383 (Ex. 4). Again, the allegations in the Amended Complaint and the Memorandum itself show that Mr. Smith offered legitimate penological reasons for his recommendation.

According to the Amended Complaint, Mr. Smith cited McGowan's efforts to "circumvent inmate communication monitoring by having documents mailed to him under the guise of attorney-client privileged communication." Am. Compl. ¶ 146. McGowan further alleges that Mr. Smith stated in the Memorandum that McGowan had asked his wife to have his attorney send him reports prepared by the Counter Terrorism Unit, which were leaked to the public and placed on the website www.publicintelligence.net. *Id.* As explained by the Memorandum: "Inmate McGowan, understanding the web site leaked restricted government reports, and aware of Bureau of Prisons policies regarding inmate communications, specifically and directly instructed his wife to facilitate the attempted introduction of these documents into

the institution by circumventing monitoring through the use of legal mail from an identified attorney." BOP CMU 3382 (Ex. 4). According to the Memorandum, "Inmate McGowan's actions and behavior indicate the original rationale for CMU designation has not been mitigated, and that he continues to present a risk which requires the degree of monitoring and controls afforded at a CMU." *Id.*

Mr. Smith also cited McGowan's terrorism-related convictions, which provided a legitimate basis for his recommendation. BOP CMU 3382-83 (Ex. 4). Furthermore, as McGowan alleges in the Amended Complaint, Mr. Smith noted that "inmate McGowan has demonstrated the conditions for his original designation still exist through his espousing support for anarchist and radical environmental terrorist groups." BOP CMU 3382 (Ex. 4). McGowan has failed to plausibly allege that Mr. Smith's references to McGowan's correspondence render it plausible that Mr. Smith sought to retaliate against him without legitimate penological justification based on his protected speech. McGowan is an admitted former member of the ELF and was convicted of terrorism-related offenses**.** Am. Compl. ¶¶ 16, 76. In light of this conviction history, there was nothing improper about Mr. Smith's references to McGowan's correspondence. *A fortiori*, doing so did not violate clearly established law. *Creighton*, 483 U.S. at 638 ("The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.") (emphasis added); *see also* 3/30/11 Mem. Op. at 20-21 (finding that effectively monitoring the communications of high-risk inmates in a CMU is a legitimate penological interest).

Because McGowan has failed to plausibly allege that Mr. Smith's reasons for recommending that he be placed in a CMU did not advance legitimate penological interests,

much less that they violated clearly established law, his individual-capacity retaliation claims should be dismissed. *Byrd*, 942 F. Supp. at 645.

2. It Was Not Clearly Established That McGowan's Speech Was Protected Under The First Amendment.

McGowan's retaliation claims should also be dismissed because it was not clearly established that McGowan's speech was protected under the First Amendment. 3/30/11 Mem. Op. (ECF No. 37) at 31.

According to the Amended Complaint, in recommending that McGowan be designated and then re-designated to the CMU, Mr. Smith cited, *inter alia*, McGowan's letters and interviews describing government cooperators as "snitches," his efforts to discourage others from cooperating with the government, and his endorsement of "direct action." *See* Am. Compl. ¶¶ 134, 143, 146-47. In addition, in recommending that McGowan be re-designated to the CMU, Mr. Smith noted that McGowan had sought to receive CTU intelligence reports via legal mail. *Id*. ¶ 146-47.

This speech was not protected under the First Amendment. As noted above, a prisoner's speech is only protected under the First Amendment if is consistent with the legitimate penological interests of the institution in which he is detained. *Pell*, 417 U.S. at 822; *Thornburgh*, 490 U.S. at 409. Given the danger posed to both the public and prison security, courts have consistently held that prisoners do not have a right in engage in communications with non-inmates that include discussions of criminal activities or that attempt to circumvent prison regulations, including correspondence regulations. *See, e.g.*, *Martinez*, 416 U.S. at 414 n.14; *Altizer v. Deeds*, 191 F.3d 540, 548 (4th Cir. 1999); *Gandy v. Ortiz*, 122 F. App'x 421, 423 (10th Cir. 2005); *Akers v. Watts*, 740 F. Supp. 2d 83, 96 (D.D.C 2010). In light of this precedent,

Mr. Smith reasonably could have determined that McGowan's speech was not protected under the First Amendment.

For all the reasons set forth above, McGowan has not plausibly alleged that Mr. Smith failed to provide legitimate penological reasons for his recommendations, much less that they were clearly unlawful, or that it was clearly established that the portions of McGowan's correspondence cited by Mr. Smith were protected under the First Amendment. As a consequence, Mr. Smith is entitled to qualified immunity and McGowan's individual-capacity retaliation claims should be dismissed. *See Elkins*, 690 F.3d at 567 (for purposes of determining whether qualified immunity exists, "the relevant, dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted") (internal quotation marks omitted)).

IV. THE PRISON LITIGATION REFORM ACT BARS JAYYOUSI AND McGOWAN FROM RECOVERING COMPENSATORY AND PUNITIVE DAMAGES AGAINST MR. SMITH.

Jayyousi's and McGowan's claims for compensatory and punitive damages against Mr. Smith should also be dismissed because the Prison Litigation Reform Act ("PLRA") bars such relief based on the allegations in the Amended Complaint.

Section 803(d) of the PLRA, entitled "Limitation on Recovery," states that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).[13] The D.C. Circuit has interpreted this provision to "directly bar" claims for both compensatory and punitive damages unless a prisoner alleges that the violation of

[13] Although McGowan has been transferred to a Residential Reentry Center and is scheduled to be released in several months, he is still subject to the limitations of the PLRA. *See Banks v. York*, 515 F. Supp. 2d 89, 106 n.7 (D.D.C. 2007) (holding that the PLRA applies to a plaintiff who was in prison when he brought the action, regardless of his current status).

his constitutional rights resulted in a physical injury. *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (explaining that allowing an inmate to receive compensatory and punitive damages without establishing a prior physical injury would thwart "Congress's evident intent" in passing the PLRA).

Moreover, the D.C. Circuit in *Davis* made clear that an inmate cannot avoid this statutory limitation on damages by alleging that his mental and emotional injuries in turn caused harm to his physical well-being. "Both the explicit requirement of § 1997e(e) that the physical injury be 'prior,' and the statutory purpose of discouraging frivolous suits, preclude reliance on the somatic manifestations of emotional distress." *Id*. 1349.

Thus, to be entitled to recover compensatory and punitive damages, an inmate must allege a physical injury that occurs prior to, and which is distinct from, any emotional or mental suffering the inmate has experienced. *Id*.; *see also Mateo v. Sinclair*, No. 08-2242, 2009 WL 3806076, at *1 (D.D.C. Nov. 12, 2009) ("[B]ecause the plaintiff does not plead that he suffered any physical injury leading to emotional distress but instead pleads that his emotional distress led to physical symptoms of that distress, his suit is barred by § 1997e(e).")

In his Amended Complaint, Jayyousi does not allege that he was physically injured as a result of being placed in a CMU. Am. Compl. ¶¶ 172-204; Second Cause of Action. As for McGowan, the only alleged physical symptoms he identifies are allegedly related to his mental and emotional reaction to being confined in the CMU. *See id*. ¶ 156 (claiming increased heart rate and disruptions in sleep due to placement in CMU). This is precisely the kind of "somatic manifestation" of emotional distress that *Davis* determined was insufficient to overcome the PLRA's express requirement that an inmate establish a "prior showing" of physical injury to be entitled to recover compensatory and punitive damages. *Davis*, 158 F.3d at 1349 (finding that

"weight loss, appetite loss, and insomnia" after the allegedly unconstitutional act would not qualify as a "physical injury" under the PLRA).

Accordingly, because Jayyousi and McGowan do not satisfy the PLRA's pleading requirements for seeking compensatory and punitive damages, their claims for such damages should be dismissed. *Davis*, 158 F.3d at 1348-1349; *see also Duncan v. Williams*, No. 01-7123, 2002 WL 1364380, at *1 (D.C. Cir. Apr. 10, 2002) (per curiam) ("The district court correctly dismissed the portion of the complaint seeking damages. Appellant did not allege actual physical injury."); *Munn Bey v. Dep't of Corr.*, 839 F. Supp. 2d 1, 6 (D.D.C. 2011) ("Because [plaintiff] has not alleged any physical injury, his claims for damages based on stress or emotional injury are dismissed."); *Hunter v. Corr. Corp. of Am.*, No. 04-2257, 2006 WL 463207, at *1 (D.D.C. Feb. 24, 2006) ("Plaintiff has not pleaded a physical injury and therefore has failed to state a claim for damages.").[14]

* * *

Pursuant to Sections 2C and 2F(4) of the Court's Standing Order, undersigned counsel certifies that he met and conferred by phone with counsel of record for McGowan, Jayyousi and Aref in an attempt to determine whether this motion could be avoided by filing an amended pleading, and the parties' counsel concluded that it could not be.[15]

[14] Jayyousi's and McGowan's claims for punitive damages should also be dismissed because they have failed to plausibly allege, as required for an award of exemplary damages, that Mr. Smith intentionally violated their rights or otherwise acted recklessly or maliciously when he recommended that they be designated, re-designated, or retained in the CMU. *See G. Keys PC/Logis NP v. Pope*, 630 F. Supp. 2d 13, 17 (D.D.C. 2009) (finding claim for punitive damages inadequately supported because "[n]owhere in plaintiffs' complaint do they allege fraud, ill will, recklessness, or any of the other aggravating factors necessary to make an award of punitive damages appropriate").

[15] The Court's February 12, 2013 Minute Order authorized the Defendants to file a Motion to Dismiss of no more than forty pages.

CONCLUSION

For the aforementioned reasons, the official-capacity Defendants respectfully request that the Court grant, with prejudice, their Motion to Dismiss the official-capacity claims of Royal Jones and Daniel McGowan as moot pursuant to Rule 12(b)(1), Am. Compl., First and Second Causes of Action, and Kifah Jayyousi's official capacity retaliation claim pursuant to Rule 12(b)(6), *id.*, Second Cause of Action. The individual-capacity Defendant, Leslie Smith, respectfully requests that the Court grant, with prejudice, his Motion to Dismiss the individual capacity claims of Daniel McGowan and Kifah Jayyousi because he is entitled to qualified immunity from these claims, Am. Compl., Second Cause of Action.

Dated: February 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas Cartier, counsel of record for the Defendants, hereby certify that on February 12, 2013, I placed a copy of the foregoing in the mail in a prepaid Federal Express envelope to the following person and address: "Royal Jones, Fed. Reg. No. 04935-046, Community Education Center – Casper, 10007 Landmark Lane, Mills, WY 82644."