IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION TO DISMISS COMPLAINT

Pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants hereby respectfully request that the Court dismiss all claims in the Complaint for failure to state a claim for relief, and also dismiss for lack of jurisdiction the Sixth Cause of Action because the claim is moot and dismiss all of Plaintiff Royal Jones's claims because he lacks standing. The reasons in support of Defendants' Motion are set forth in the attached Memorandum of Points and Authorities.

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

This action is brought by five federal prison inmates ("Plaintiffs") and two spouses ("Family Plaintiffs) who challenge the decision of the Bureau of Prisons ("Bureau" or "BOP") to transfer the Plaintiffs to a "Communication Management Unit" (CMU). The CMU is a self-contained general population unit that is used by the BOP to monitor the communications of high-risk prisoners, such as terrorists. This monitoring is accomplished both by reducing the total amount of communication that takes place in the CMU, and by imposing certain restrictions on the communications that do occur in order to protect institutional security and the public.

Plaintiffs allege that their transfer to the CMU violated their procedural due process rights, and that the CMU's prohibition on physical "contact" visits and limitations on time for visits and telephone calls violate their substantive due process rights to family integrity, their First Amendment rights to freedom of speech and association, and constitute cruel and unusual punishment. They also allege their transfer was in retaliation for engaging in First Amendment protected activities, such as filing grievances, and/or because they are Muslim. Finally, Plaintiffs

contend that the Bureau was required under the Administrative Procedures Act ("APA") to provide notice and comment rulemaking before establishing the CMUs. Family Plaintiffs join in the claims that the Bureau's restrictions on visits and telephone communication violate the Due Process Clause and First Amendment.

As demonstrated below, this Court should dismiss all the counts in the Complaint. Plaintiffs do not have a liberty interest in avoiding a transfer to a CMU, and thus have no rights to procedural due process. Even if they did, they received notice of the reasons for their transfer and an opportunity to contest their initial designation and continued confinement to a CMU. No more process was constitutionally required. Plaintiffs and Family Plaintiffs are also wrong that they have a constitutional right to "contact visits" or a particular amount of time each month to visit or speak on the telephone. Assuming *arguendo* that they do, the restrictions survive scrutiny because they are reasonably related to the Bureau's legitimate penological interest in effectively monitoring the communications of high-risk inmates. Given this legitimate interest, and the lack of any allegation that the restrictions on communication amount to the denial of the minimal civilized measures of life's necessities, Plaintiffs also fail to state a claim under the Eighth Amendment. Finally, Plaintiffs fail to state a claim that their transfer to a CMU was done in retaliation for engaging in constitutionally protected activity or due to their religion because they fail to allege sufficient facts that, if believed, would render these allegations plausible.

Plaintiffs are also mistaken that the Bureau was required to provide notice and comment rulemaking before establishing the CMUs. The Institution Supplements governing the CMUs are interpretive rules or agency policy statements that are exempt from the APA's notice and comments procedures. Furthermore, Plaintiffs' demand for notice and comment rulemaking is now moot, since the Bureau has published a proposed rule in the Federal Register describing and

codifying the procedures governing the CMUs. As a result, this Court is without jurisdiction to hear Plaintiffs' APA claim.

For the aforementioned reasons, the Court should dismiss all of the counts in the Complaint for failure to state a claim for relief under Rule 12(b)(6), and dismiss Plaintiffs' APA claim under Rule 12(b)(1) for lack of jurisdiction. In addition, Plaintiff Royal Jones does not have standing because he was transferred out of the CMU prior to filing this lawsuit, and therefore his claims should be dismissed pursuant to Rule 12(b)(1) as well.[1]

BACKGROUND

I. Plaintiffs and Family Plaintiffs.

Three of the Plaintiffs, Yassin Aref, Daniel McGowan, and Kifah Jayyousi have been convicted of terrorism-related offenses. *See* Compl. ¶ 79 (acknowledging "their conviction is related to terrorism"). Upon their transfer to the CMU, each was provided notice that the reason for the transfer was based at least in part on their association with terrorism. *See* Compl. ¶ 113 (Aref informed that his transfer was because his "current offense of conviction includes Providing Material Support & Resources to a Foreign Terrorist Organization & Conspiracy to Use a Weapon of Mass Destruction"); *id.* ¶ 160 (McGowan informed that his transfer was

[1] The Prison Litigation Reform Act ("PLRA") requires a prisoner to exhaust administrative remedies before filing suit with respect to "prison conditions." 42 U.S.C. § 1997(e). This is not a pleading requirement, but rather an affirmative defense that is typically "analyzed as a motion for summary judgment." *See Miller v. Federal Bureau of Prisons*, 2010 WL 1172576, at *4 (D.D.C. 2010) (citing *Jones v. Bock*, 549 U.S. 199, 216 (2007)). Because it appears upon a preliminary review that at least one of the Plaintiffs has exhausted with respect to each issue in the Complaint, Defendants do not further address this issue here. However, they reserve the right to raise the affirmative defense of exhaustion with respect to each individual Plaintiff in a responsive pleading or summary judgment motion should their Motion to Dismiss not be granted in full.

because his "offense conduct included acts of arson, destruction of an energy facility, attempted arson, and conspiracy to commit arson," and that he has "been identified as a member and leader in the Earth Liberation Front (ELF) and Animal Liberation Front (ALF), groups considered domestic terrorist organizations"); *id.* ¶ 212 (Jayyousi informed transfer was because his "current offenses of conviction are for Conspiracy to Commit Murder in a Foreign Country; Conspiracy to Kidnap, Maim, and Torture; and Providing Material Support to a Terrorist Organization"). Avon Twitty and Royal Jones, who were convicted respectively of murder, *id.* ¶ 127, and solicitation of bank robbery, *id.* ¶184, were provided notice that their transfer to a CMU was because of their involvement in recruitment and radicalization efforts while incarcerated. *See id.* ¶ 132 (Twitty); *id.* ¶189 (Jones).

The Family Plaintiffs are Jenny Synan, the wife of Mr. McGowan, *id.* ¶182, and Hedaya Jayyousi, *id.* ¶ 232, the wife of Mr. Jayyousi, who each allege that the CMU's communication restrictions have injured her marital relationship.

II. Overview of The Purpose and Operation of CMUs.

The Bureau operates two CMUs, one located at the Federal Correctional Institution in Terre Haute, Indiana ("FCI Terre Haute"), and the other at the United States Penitentiary in Marion, Illinois ("USP Marion"). Compl. ¶ 4; 11/30/06 Terre Haute CMU Institution Supplement (Ex. A to Comp.); 3/20/08 and 11/13/08 Marion CMU Institution Supplement (Ex. B to Comp.).[2] The CMU is a "self-contained general population housing unit where inmates reside, eat, and participate in all educational, recreational, religious, unit management, and work

[2] For purposes of Rule 12(b)(6), the Court "may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002).

programming" within the unit itself. *See, e.g.,* 11/13/2008 Marion CMU Institution Supplement at § 1. As described in the Institution Supplements, the purpose of the CMU is "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 protect the public." 11/30/06 Terre Haute Institution Supplement at § 1; 11/13/08 Marion Institution Supplement at § 1.

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* Notice to Inmates (Review of Inmates for Continued Communication Management Unit (CMU) Designation) (Ex. F to Compl.); Compl. ¶ 33; Proposed Rule, "Communication Management Units," 75 Fed. Reg. 17324, 17326 (April 6, 2010) ("CMU Proposed Rule") (listing criteria for CMU placement).

Pursuant to the goal of reducing and effectively monitoring the communications of CMU inmates, the Bureau imposes the following restrictions:

A. Restrictions on Telephone Use.

All calls are made on the Inmate Telephone System ("ITS") and are live-monitored by staff and subject to recording. Terre Haute CMU Institution Supplement at § 3(b); 11/13/2008 Marion CMU Institution Supplement at § 3B(b). In accordance with the agency's legislative

regulations, inmate telephone use may be limited as necessary to protect institutional security and the safety of the public, but inmates must be provided with at least one three-minute call each month. 28 C.F.R. §§ 540.100, 540.101(d). The CMU Institution Supplements state that "[i]n no event" will the frequency of telephone use in the CMUs be reduced below this minimum level. Terre Haute CMU Institution Supplement at § 3(b); 3/20/2008 Marion CMU Institution Supplement at § 3B(b). As implemented, CMU inmates have been allowed more than one three-minute call per month. Effective January 3, 2010, CMU inmates are permitted two 15-minute calls per week for a total of 120 minutes per month, and calls may be made on any day except Saturday. Compl. ¶¶ 64-65; Notice to Inmates (Social Telephone and Social Visiting) (Ex. C to Compl.). Prior to January 3, 2010, CMU inmates were allowed one 15-minute call per week and were not permitted to schedule calls during the weekend. *Id.* As noted in Plaintiffs' Complaint, under the Bureau's national Program Statement on inmate telephone use, which is an interpretive rule, BOP prisoners in the general population are typically allowed 300 telephone minutes per month. Compl. ¶ 63 (citing Telephone Regulations for Inmates at 4).[3] Thus, the CMUs reduce the amount of telephone time that is generally available to inmates, while permitting more time than is legally required by the agency's legislative regulations.

B. Restrictions On Visiting.

CMU inmates may have "contact visits" with their attorneys, but for other members of the community visits are conducted "using non-contact facilities," which employ secure partitioned rooms where inmates and their visitors speak using telephone lines. Terre Haute CMU Institution Supplement at § 3(c); 11/13/2008 Marion CMU Institution Supplement at § 3B(c). These conversations are live-monitored and subject to recording. *Id.* Communication

[3] *Available at* http://www.bop.gov/policy/progstat/5264_007.pdf

must be verbal and the use of hand signals or sign language may result in the termination of the visit. *Id.* If this occurs, the visit is immediately terminated. *Id.* Prior to January 3, 2010, inmates were allowed 4 hours of visiting time during the weekdays. Compl. ¶ 52. Currently, they are allowed up to 8 hours of visiting time per month, and visits may take place every day except Saturday. *Id.* ¶ 57. Under the agency's legislative regulations, the warden "shall allow each inmate a minimum of four hours visiting time per month." 28 C.F.R. § 540.43. Thus, as with telephone calls, CMU inmates receive more visiting time than the agency's legislative regulations require.

C. Access to Correspondence and Email.

CMU inmates may communicate using the mail. Terre Haute Institution Supplement at § 3; 11/13/2008 Marion Institution Supplement at § 3B(a). All incoming and outgoing written general correspondence must be reviewed by staff prior to delivery to the inmate or further processing to the post office. *Id.* Outgoing special mail (i.e., addressed to an attorney, federal courts, probation officers) may be sealed and is not inspected. In addition, CMU inmates have access to email. Compl. ¶ 45.

D. Notice and Opportunity To Challenge CMU Designation.

Upon being transferred to a CMU, inmates receive a "Notice to Inmate of Transfer to Communication Management Unit" indicating the reasons for their placement in the unit. *See, e.g.,* Terre Haute CMU Institution Supplement, Attachment A. Inmates are told that they may appeal their transfer decision to the CMU, or any conditions of confinement while there, using the Bureau's Administrative Remedy Program. *See, e.g.,* Terre Haute CMU Institution Supplement, Attachment A. In addition to the Administrative Remedy Program, the CMU's Unit Team conducts a review of an inmate's continued designation to the CMU during regularly scheduled program reviews. Compl. ¶¶ 87-91; Notice to Inmates (Review of Inmates for

Continued Communication Management Unit (CMU) Designation). Inmates who are approved for further designation to a CMU are notified of the determination and, as with their initial designation, may appeal the decision using the Bureau's Administrative Remedy Program. Notice to Inmates (Review of Inmates for Continued Communication Management Unit (CMU) Designation).

ARGUMENT

STANDARD OF REVIEW

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. *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992). When ruling on a defendant's motion to dismiss under 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.

I. Mr. Jones Does Not Have Standing Because He Was Transferred Out of the CMU Before His Complaint Was Filed.

Standing to sue is "an essential and unchanging part of the case-or-controversy requirement," and without it a court lacks subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing requirement consists of three elements: (1) an "injury in fact" that is (2) "fairly . . . trace[able] to the challenged action of the defendant," and (3) "likely . . . redress[able] by a favorable decision." *Id.* at 560-561.

Mr. Jones fails to allege that he is suffering an "injury in fact," which requires him to show the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). As explained by the Supreme Court in *City of Los Angeles v. Lyons,* 461 U.S. 95, 102-03 (1983), a plaintiff cannot base his standing to sue for declaratory and injunctive relief on allegations of "[p]ast exposure to illegal conduct" because "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." Rather, a plaintiff must show a "sufficient likelihood" that he will suffer the same injury in the future to assure that the court does not entertain a suit based on speculative or hypothetical harms. *Id.* at 105-106, 111; *Lujan*, 503 U.S. at 563-65 n. 2.

Mr. Jones alleges that "[b]ecause he does not know what conduct resulted in his transfer to the CMU, he does not know how to avoid being sent back." Compl. ¶ 196. He also claims that after his transfer from the CMU, he "was warned by CMU staff once more to cease complaining about the CMU," and that because he has filed the instant complaint, he "faces re-designation to the CMU." *Id.* ¶ 197. These allegations do not establish "a real and immediate threat" or "sufficient likelihood" that he will be returned to the CMU. *City of Los Angeles*, 461 U.S. at 104-05, 111. Instead, they are based on "speculation" and "conjecture." *See Whitmore*

v. Arkansas, 495 U.S. 149, 158 (1990) (explaining that speculation and conjecture about "possible future injury do not satisfy the requirements" of standing).

Furthermore, Mr. Jones's claims are not redressable because he acknowledges he is no longer incarcerated in a CMU, and therefore the communication restrictions at issue in this case do not apply to him. *See* Compl. (Prayer for Relief). Therefore, he lacks standing for this reason as well. *Lujan*, 504 U.S. at 560 (redressability essential element of standing).

II. Plaintiffs Have No Procedural Due Process Rights That Are Triggered By A Transfer To A CMU.

Plaintiffs allege that their transfer to a CMU violated their rights to procedural due process. Compl. ¶ 253. Such claims are analyzed in two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). There is no liberty interest in avoiding a transfer to the general prison population of a CMU, nor is there any liberty interest in avoiding the particular communication restrictions imposed on CMU inmates. Thus, no constitutionally-mandated procedures were required. *Id.* at at 465. However, to the extent procedural protections were required by the Due Process Clause, the allegations in the Complaint show that the protections Plaintiffs received were sufficient.

A. Standard For Determining Whether A Liberty Interest Exists.

"A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state law or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). With respect to the former, the Supreme Court has explained, "the Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner." *Sandin v.*

Conner, 515 U.S. 472, 478 (1995). Instead, "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Thompson*, 490 U.S. at 460-61 (internal quotation marks omitted). In other words, "[t]he Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed." *Sandin,* 515 U.S. at 480 (internal quotation marks omitted).

In addition to liberty interests created by virtue of the Constitution, the government may create a protected liberty interest if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

B. The Transfer of Plaintiffs To The General Prison Unit of a CMU Does Not Deprive Them Of Any Liberty Interest.

"[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Austin*, 545 U.S. at 221. For instance, the Supreme Court has held that the Due Process Clause does not create a liberty interest in avoiding a transfer from a medium to a maximum security prison because such a transfer is "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). In *Meachum*, no liberty interest existed "even though the change of facilities involved a significant modification in conditions of confinement, later characterized by the Court as a 'grievous loss.'" *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (quoting *Moody v. Daggett*, 429 U.S. 78, 88 n.9) (1976)); *see also Franklin v. Dist. of Columbia*, 163 F.3d 625, 634-635 (D.C. Cir. 1998) (housing and classification decisions are the "ordinary consequence of confinement for committing a crime," and do not give rise to a liberty interest "[u]nless the prisoner is subjected to some extraordinary treatment"); *Miller v. Federal Bureau of*

Prisons, 2010 WL 1172576 at *6 (March 29, 2010 D.D.C.) ("The due process claim necessarily fails because it is settled law that a prisoner does not have a liberty interest in his place of confinement or custody classification that can be redressed by the due process clause of the constitution.")

Accordingly, Plaintiffs have no liberty interest protected by the Due Process Clause in avoiding a transfer to a CMU where they are able to leave their cells, have access to leisure and law libraries, table games such as chess, hobby crafts, and televisions, and recreational activities including handball, basketball courts, stationary biking, stair-stepping machines, and walking. Terre Haute CMU Institution Supplement at § 4; 11/13/2008 Marion CMU Institution Supplement at § 4. Furthermore, transfer to the CMU does not constitute punishment and does not by itself increase the length of incarceration, since inmates continue to earn good-conduct sentence credit in accordance with Bureau policy. *See, e.g.,* Terre Haute CMU Institution Supplement, Attachment A; CMU Proposed Rule, 75 Fed. Reg. at 17328 (explaining that "[d]esignation to the CMU is not punitive and, by itself, has no effect on the length of the inmate's incarceration.").

Nor is there any government-created liberty interest in avoiding a transfer to the CMU because such a transfer does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. Nothing about the conditions in the CMU qualify as the sort of "extraordinary treatment" that is required for a deprivation to be "atypical and significant." *See Smith v. United States,* 277 F. Supp. 2d 100, 113 (D.D.C. 2003) (Urbina, J.) (no "atypical and significant" deprivation by moving prisoner from community correction center (CCC); prisoner was not "subject to any 'extraordinary

treatment' because prison housing and transfers are issues within the 'day-to-day management of prisons.'") (quoting *Franklin*, 163 F.3d at 634-635).

C. The CMU's Elimination of Contact Visits and Restriction On Telephone Use Do Not Deprive Plaintiffs Of A Constitutionally-Protected Liberty Interest.

To the extent Plaintiffs allege a liberty interest in avoiding a transfer to a CMU because of the particular communication restrictions imposed on CMU inmates, this allegation also fails to state a claim. Below, Defendants first show that the challenged restrictions on communication do not implicate a liberty interest under the Constitution, and then demonstrate that no government-created liberty interest exists in avoiding such restrictions as well.

1. Plaintiffs Do Not Have A Liberty Interest Based On The Due Process Clause Itself In Avoiding The Communications Restrictions At Issue.

Contact Visits. In *Block v. Rutherford*, the Supreme Court addressed a due process challenge to a ban on contact visits between pretrial detainees and their family members and friends. 468 U.S. 576, 578 (1984). Because the case arose in the context of a challenge brought by pretrial detainees, who may not be "punished prior to an adjudication of guilt in accordance with due process of law," the Court asked whether the restriction on contact visits was punitive. *Id.* at 583-584 (internal quotation marks omitted). In making this determination, the Court considered whether the restriction was "reasonably related to a legitimate governmental objective," because if so, "it does not, without more, amount to punishment." *Id.* (internal quotation marks omitted).

The Court found the ban on contact visits helped to prevent the introduction of contraband and reduced the possibility of violent confrontations during visits, and, as a result, promoted the legitimate governmental objective of maintaining the internal security of the prison. *Id.* at 586. Once the Court decided that the restriction on contact visits did not qualify as

punishment, its analysis was at an end as there was no suggestion that the Constitution might independently provide a right to contact visits. Rather, the Court held "the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility." *Id.* at 589.

Following its decision in *Block*, the Supreme Court has continued to strongly indicate that there is no constitutional right to contact visits. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Supreme Court rejected a claim that a number of restrictions on visitation violated the right to association of prisoners and their families under the Due Process Clause and First Amendment. Importantly, the inmates who challenged the restrictions were all subject to noncontact visitation. *Id.* at 130. The prisoners were required to "communicate with their visitors through a glass panel," and had no opportunity for any physical contact. *Id.* In the course of upholding the restrictions barring entry to certain visitors, the Supreme Court never suggested that the restrictions on contact visits might themselves pose any constitutional problem.

While it does not appear that any decision in this Circuit has squarely addressed whether there is a liberty interest in maintaining contact visits,[4] a number of decisions outside this Circuit have decisively rejected the contention that such an interest exists. Many of these decisions also conclude that the Supreme Court in *Block* conclusively established that no constitutional right exists. *See, e.g., Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (noting it is "well-settled that prisoners have no constitutional right while incarcerated to contact visits"); *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) ("A prisoner does not have a liberty interest in contact

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[4] This Circuit has recognized that the decision in *Block* extends to prisoners as well as pretrial detainees. *See Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 899 F. Supp. 659, 674-675 (D.D.C. 1995); *Jones v. Yanta*, 610 F. Supp. 2d 34 (D.D.C. 2009).

visitation.") (citations omitted); *Corley v. Burnett*, No. 95-6451, 1997 WL 178876, at *1 (6th Cir. Apr. 11, 1997) ("[Plaintiff] has no constitutional right to contact visits.") (citations omitted); *Berry v. Brady*, 192 F.3d 504, 508 (5th Cir. 1999) ("Berry has no constitutional right to [any] visitation privileges.") (citation omitted); *Zimmerman v. Burge*, No. 06-CV-0176, 2008 WL 850677 at 2, *12 n.53 (N.D.N.Y. March 28, 2008) (stating that "there is abundant case law establishing that inmates have no liberty or property interest in contact visits") (collecting cases).

The claim that Plaintiffs have a right to contact visits guaranteed by the Due Process Clause cannot be squared with the limitations on visitation that the prison setting justifies and that the Supreme Court has endorsed. The Supreme Court has written that it cannot "seriously be contended . . . that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause," and thus "the denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause." *Thompson*, 490 U.S. at 461 (internal quotation marks and citation omitted); *id.* at 465 (no liberty interest under the Due Process in avoiding a six-month ban on inmate's ability to visit with his mother). Similarly, the D.C. Circuit has upheld a *permanent* ban on all visits between an inmate and his wife in response to the wife's attempt to bring marijuana into the prison. In *Robinson v. Palmer*, then-D.C. Circuit Judge Ruth Bader Ginsburg found that no liberty interest existed in the inmate being able to visit his wife despite the fact that the ban was permanent. 841 F.2d 1151, 1155-1156 (D.C. Cir. 1988); s*ee also Jones v. Yanta*, 610 F. Supp. 2d 34, 43 (D.D.C 2009) (finding neither wife, son, nor mother-in-law "has a constitutionally protected right to visitation"). If no liberty interest is triggered when a prison imposes a permanent ban on visitation between immediate family

members, then *a fortiori*, there is no constitutionally-mandated liberty interest when the government imposes the far less onerous restriction of "no-contact" visits.

Telephone Restrictions. Nor can it seriously be contended that Plaintiffs have a liberty interest protected by the Due Process Clause itself in receiving a set number of phone minutes each month. "An inmate has no right to unlimited telephone use.'" *Searcy v. United States*, 668 F. Supp. 2d 113, 122 (D.D.C. 2009) (internal quotation marks omitted). The Third Circuit has held that because "limits on telephone usage are ordinary incidents of prison confinement," their restriction "do[es] not implicate a liberty interest protected by the Due Process Clause." *Perez v. Federal Bureau of Prisons*, 229 Fed. Appx. 55, 58 (3rd Cir. 2007).

Scheduling Of Communication. There is also no liberty interest protected by the Due Process Clause that is implicated by the rules governing the scheduling of visits or phone calls in the CMU. Such restrictions are nothing like the transfer to a mental institution, the involuntary administration of psychotropic drugs, or the possibility of indefinite transfer to solitary confinement that the Supreme Court has found fall outside the normal boundaries of confinement needed to trigger a liberty interest under the Due Process Clause. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (transfer to mental hospital); *Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (involuntary administration of psychotropic drugs); *Austin*, 545 U.S. at 224 (indefinite transfer to solitary confinement).

In short, there is no liberty interest protected by the Due Process Clause that is implicated by these restrictions on visitation and communication because they are not "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Thompson*, 490 U.S. at 460-61 (internal quotation marks omitted); *see also Sandin*, 515 U.S. at 480.

2. Plaintiffs Do Not Have Any Government-Created Liberty Interest In Avoiding The Restrictions On Communication In The CMU Because They Are Not "Atypical and Significant."

As discussed above, even where the Due Process Clause does not itself create a liberty interest, the government may create one where a prison restriction imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. In *Sandin*, the Court found that the disciplinary transfer of an inmate for 30 days to solitary confinement "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." 515 U.S. at 486-487; *id.* at 494 (Breyer, J., dissenting) (describing conditions of confinement.) This is because the punishment "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* at 486.

Based on *Sandin*, the D.C. Circuit has sought to define the "ordinary incidents of prison life" for purposes of creating a baseline that can be used to determine whether a particular restriction is atypical and significant. In *Hatch v. District of Columbia*, the D.C. Circuit rejected treating the conditions of prison life in the general population as the appropriate baseline. 184 F.3d 846, 856-858 (D.C. Cir. 1999). Instead, *Hatch* explains that the conditions that are imposed in administrative segregation should be used in determining what constitutes the "ordinary incidents of prison life." *Id.* at 855-85. Accordingly, courts should determine what is atypical and significant in comparison with the "most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." *Id.* at 856. In making this determination, courts should not only consider the nature of the restriction but also its duration. *Id.* at 858.

Under *Sandin* and *Hatch*, the loss of contact visits and reduced time for visits and telephone calls do not constitute an "atypical and significant" deprivation. As noted, while the agency's legislative rules only require four hours of visitation per month, 28 C.F.R. § 540.43, CMU inmates are allowed eight hours of visits per month. Notice to Inmates (Social Telephone and Social Visiting). And consistent with the Warden's authority to "restrict inmate visiting when necessary to ensure the security and good order of the institution," 28 C.F.R. § 540.40, the agency's regulations expressly contemplate the possibility that inmates will lose contact visitation privileges based on security concerns. *Id.* § 540.51(h)(2) (noting that "[s]taff shall permit limited physical contact . . . unless there is clear and convincing evidence that such contact would jeopardize the safety or security of the institution). In this case, the Bureau has made a determination that threats to the security of its facilities and/or the public justify the imposition of no-contact visits. *See* Compl. ¶¶ 33, 79, 107, 127, 160, 184, 212 (referring to notice of transfers stating security reasons for Plaintiffs designation to CMU); *see also* Notice to Inmates (Review of Inmates for Continued Communication Management Unit (CMU) Designation) (listing criteria for CMU designation); CMU Proposed 75 Fed. Reg. at 17326 (same).

Inmate telephone use "is subject to those limitations which the Warden determines are necessary to ensure the security or good order, including discipline, of the institution or to protect the public," and require only that an inmate who is not on discipline receive one three-minute telephone call. *Id.* § 540.100(a)-(b); § 540.101(d); id. §540.100(a) (stating that "[t]elephone privileges are a supplemental means" of communicating with persons in the community). In contrast, CMU inmates receive 117 telephone minutes *more* than is required under the agency's binding regulations. *Id.*

In short, the CMU's communication restrictions do not constitute the kind of "extraordinary treatment" required to find a government-created liberty interest. *Smith v. U.S.,* 277 F. Supp. 2d at 113 (no "atypical and significant" deprivation due to prison transfer because prisoner was not "subject to any 'extraordinary treatment'" but instead transfer was an issue within the "'day-to-day management of prisons.'") (quoting *Franklin*, 163 F.3d at 634-35).

Finally, the Bureau's broad discretion to transfer an inmate to a CMU is incompatible with Plaintiffs' claim that specific constitutionally-mandated procedures must be followed before this discretionary determination is made. Decisions about where an inmate is confined and his security classification are left to the Bureau. *See* 18 U.S.C. §§ 3621 and 4001(b). This discretion is such that Congress has precluded all judicial review under the APA of claims that an inmate's particular place of imprisonment, transfer to other federal facilities, or security classification violates the agency's regulations. 18 U.S.C. § 3625; *Brown v. Federal Bureau of Prisons*, 602 F. Supp. 2d 173, 176 (D.D.C. 2009); *Jasperson v. Federal Bureau of Prisons*, 460 F. Supp. 2d 76, 82 n.4 (D.D.C. 2006); *Enigwe v. Bureau of Prisons*, 2006 WL 3791379, at *2 (D.D.C. 2006).

The Bureau's essentially unreviewable discretion (absent an improper constitutional purpose or *ultra vires* action) to determine appropriate confinement conditions means that Plaintiffs have no liberty interest implicated by a transfer to the CMU. As the Supreme Court has explained, "[i]f officials may transfer a prisoner 'for whatever reason or for no reason at all, there is no such [liberty] interest for process to protect." *Olim*, 461 U.S. 238, 250 (internal citation and quotation marks omitted); *see also Miller v. Henman*, 804 F.2d 421, 423 (7th Cir. 1986) ("When the jailer is free to move a prisoner for any or no reason, the due process clause does not require hearings."). Indeed, in response to a claim by an inmate that a BOP Program

Statement created a liberty interest in participating in a rehabilitative program, this Court concluded that "prison officials are vested with substantial discretion to set the terms of conditions of rehabilitative programs, and this discretionary function undercuts the plaintiff's argument that he has a protected liberty interest." *Kotz v. Lappin,* 515 F. Supp. 2d 143, 149-150 (D.D.C. 2007) (Urbina, J.). As a result, the Court found that no procedural requirements were mandated by the Due Process Clause. *Id.*

D. To The Extent A Liberty Interest Is Implicated By A Transfer To The CMU, The Procedural Protections Provided Were Constitutionally Sufficient.

Even assuming *arguendo* that Plaintiffs were deprived of a protected liberty interest by virtue of their transfer to the CMU, or because of the specific communication restrictions that have been imposed on them, the procedures they received satisfy constitutional requirements.

As the Supreme Court has made clear, the requirements of due process are "flexible and call[] for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Austin*, 545 U.S. at 224; *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (identifying factors used to determine procedures mandated by Constitution). For instance, the Due Process Clause does not invariably require an opportunity to be heard in advance of a decision. *See Hewitt*, 459 U.S. at 476 & n.8 (providing inmate opportunity to be heard within reasonable time after decision to place him in administrative segregation constitutionally sufficient). Nor does it require a formal hearing. In *Procunier v. Martinez*, after the Supreme Court noted that inmates have a First Amendment right to "uncensored communication," it held that, because an inmate is notified of the rejection of a letter addressed to him and there is an opportunity to protest that decision, adequate procedural protections were provided under the Due Process Clause. 416 U.S. 396, 418-419 (1974).

In this case, Plaintiffs allege they received notice of the reason for their designation to the CMU shortly after they were transferred, and they allege they have appealed that decision through the Bureau's Administrative Remedy Program.[5] *See* Compl. ¶¶ 113-114, 132, 138-141, 143, 160, 189, 193, 212-213. Plaintiffs have also received reviews of their continued confinement in the CMU by the CMU's Unit Team in connection with regularly scheduled program reviews. Ex. F to Compl. In short, Plaintiffs received notice of the reasons for their designation within a reasonable period of time after being transferred to a CMU and have had an opportunity to contest that decision. No more process was required. *See Wilkinson*, 545 U.S. at 225-26 (notice and fair rebuttal opportunity "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations" of liberty interests). The mere fact that these procedures have not produced the desire outcome for Plaintiffs do not mean they are constitutionally inadequate.

For the reasons stated above, Plaintiffs' procedural due process claim should be dismissed for failure to state a claim under Rule 12(b)(6).

III. The Restrictions on Communication In A CMU Do Not Implicate The Inmates' Constitutional Rights, And Even If They Do, The Restrictions Are Permissible.

Plaintiffs and Family Plaintiffs allege that Defendants have violated their substantive due process rights to family integrity "[b]y unreasonably and excessively restricting all Plaintiffs' access to visits and to telephone calls, and imposing arbitrary and unjustified rules regarding the

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[5] The Administrative Remedy Program provides multiple levels of review and is the means by which an inmate "seek[s] formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a). Generally, "an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy." *Id.* § 542.13(a). If an informal resolution is not achieved, the inmate may submit a formal written Administrative Remedy Request with the warden of the institution where he is confined. *Id.* § 542.14(a). If dissatisfied with the response, he may then appeal an adverse decision to the Regional Office and the Central Office of the BOP. *Id.* §§ 542.15(a) and 542.18.

scheduling of such communication." Compl. ¶¶ 256-260. They allege these restrictions also violate their rights to free speech and association protected by the First Amendment. *Id.* ¶¶ 261-265. In their prayer for relief, they request the Court to order that BOP provide Plaintiffs with 300 phone minutes a month (instead of their current allotment of 120 minutes) and allow them contact visits. Plaintiffs and Family Plaintiffs are mistaken that these restrictions implicate any constitutional rights they possess, and even if they do, the regulations are valid because they are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

A. Neither the Due Process Clause Nor The First Amendment Grants Plaintiffs A Constitutional Right To Contact Visits Or 300 Minutes Of Telephone Time Per Month.

For the reasons previously discussed, prisoners do not have a substantive due process right to contact visits, a set quantum of telephone use, or to schedule visits or telephone calls on precisely the same schedule that applies to prisoners in the general prison population at Terre Haute and Marion. Nor is the privilege of contact visits and telephone communication transformed into a constitutionally-protected right simply because Plaintiffs invoke the First Amendment's protection of freedom of association and speech. *Compl.* ¶¶ 261-265. In *Overton*, the Supreme Court left open the question of whether prisoners continue to enjoy a right of association or family integrity that survives incarceration and which encompasses a right to in-person visits. Like the Plaintiffs' claims here, respondents (inmates, family members and friends) alleged that certain visitor restrictions "infringe a constitutional right of association" protected under the Due Process Clause and First Amendment. *Overton,* 539 U.S. at 131. The Court began its analysis by observing that the "Constitution protects 'certain kinds of highly personal relationships.'" *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984)). However, the Court explained that "[t]he very object of imprisonment is confinement." *Id.*

Accordingly, "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Id*. And unsurprisingly, "freedom of association is among the rights least compatible with incarceration." *Id.*

Because the Court found the challenged restrictions to be reasonable, it did not have to reach the question of whether a right to association or family integrity survives incarceration. *Id.* at 132. However, at no point did the Court suggest that the restrictions on contact visits that were present in the case were of any constitutional dimension. *Id.* at 136 (upholding "the regulation as to all noncontact visits"). Thus, both *Block and Overton* are incompatible with the proposition that the Constitution creates a free-standing right to contact visits, and numerous courts have held that no such right exists. *See supra* pp. 14-15 (collecting cases).

As for Plaintiffs' claims regarding telephone use, some cases have viewed restrictions on telephone use "expansively as the First Amendment right to communicate with family and friends." *Searcy*, 668 F. Supp. 2d at 122 (quoting *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996)); *see also Valdez v. Rosenbaum,* 302 F.3d 1039, 1047-1048 (9th Cir. 2002) ("We have previously "stated in dicta that prisoners have a First Amendment right to telephone access, subject to reasonable security limitations," although "[t]he genesis of this purported constitutional right to use a telephone is obscure.") This does not imply, however, that a prisoner has a First Amendment right to unfettered use of the telephone; he does not. *Searcy*, 668 F. Supp. 2d at 122 (explaining "[a]n inmate has no right to unlimited telephone use" (internal quotation marks omitted)). In particular, there is no constitutional right to anything as specific as 180 more telephone minutes per month. *See* Compl. (Prayer for Relief).

B. To The Extent The Court Finds The CMU's Communication Rules Restrict Plaintiffs' Constitutional Rights, They Should Be Upheld Because They Are Reasonably Related To "Legitimate Penological Interests" Under The Supreme Court's *Turner* v. *Safley* Standard.

"[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This standard of review is based upon the need to reconcile the Supreme Court's "longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Harper*, 494 U.S. at 223-224. The burden is not on the government to prove the validity of prison regulations, but on the prisoner to disprove it. *Overton*, 539 U.S. at 132.

Turner identified four factors for a court to consider in determining whether a regulation is reasonable. *Overton*, 539 U.S. at 132. *First*, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner,* 482 U.S. at 89 (quoting *Block*, 468 U.S. at 586). *Second*, a court will inquire "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* *Third*, a court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* *Fourth*, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* Although the factors are intended as a single reasonableness standard, the first factor "looms especially large." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998). An application of the *Turner* factors based on the allegations in the Complaint, the materials attached to the Complaint, and the Bureau's Proposed CMU Rule, show the restrictions are reasonably related to legitimate penological goals and that Plaintiffs' constitutional claims fail to

state a claim for relief. *See Gustave-Schmidt*, 226 F. Supp. 2d at 196 (explaining motion to dismiss may consider materials attached to complaint, and matters about which the Court may take judicial notice).

1. First Turner *Factor.*

There is a "valid, rational connection" between communication restrictions imposed in a CMU and the goal of effective monitoring of the communications of high-risk inmates. *Turner,* 482 U.S. at 89. The objectives of this increased monitoring are: (1) "to protect the safety, security, and orderly operation of Bureau facilities," and (2) to "protect the public." *See* Terre Haute Institution Supplement at § 1; 11/13/08 Marion Institution Supplement at § 1. There can be no doubt that these are legitimate penological goals. *See, e.g.*, *Overton*, 539 U.S. at 133 (describing the maintenance of internal security of a prison as "perhaps the most legitimate of penological goals").

The connection between the restrictions on communications of high-risk individuals and the promotion of these legitimate goals is made plain by the criteria used to decide whether an inmate should be transferred to a CMU. For instance, inmates are eligible for CMU placement if there is evidence they will use their communication privileges to further criminal activity or contact their victims. *See* Review of Inmates for Continued Communication Management Unit (CMU) Designation; *see also* CMU Proposed Rule, 75 Fed. Reg. at 17326. The dangers posed by such communications are self-evident.

Inmates may also be transferred to the CMU if their current conviction or offense conduct "included association, communication, or involvement" related to international or domestic terrorism. *Id.* In its Proposed Rule, the Bureau explained that "[t]here have been cases of imprisoned terrorists communicating with their followers regarding future terrorist activity." 75

Fed. Reg. at 17326. In addition, terrorist-related communication "can occur in codes which are difficult to detect and extremely time-consuming to interpret." *Id*. The penological goal of preventing inmates from furthering terrorist activity while in prison is of the utmost importance.

An inmate may also be transferred to the CMU if he or she has "committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated." Review of Inmates for Continued Communication Management Unit (CMU) Designation; 75 Fed. Reg. at 17326. It is clearly "valid" and "rational" for the Bureau to decide on a case-by-case basis that individuals who abuse communication privileges require enhanced monitoring given the risks they pose to the internal security and orderly operation of Bureau prisons as well as to the safety of the public.

Finally, inmates may be sent to the CMU for the very penological reasons that justify the CMU in the first place. *See* Review of Inmates for Continued Communication Management Unit (CMU) Designation (CMU placement proper if there is "any other evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's unmonitored communication with persons in the community"); CMU Proposed Rule, 75 Fed. Reg. at 17326.

Given the stated goals of providing both increased and effective monitoring of high-risk inmates, the transfer of inmates who require such monitoring into a single facility promotes this goal. It allows the Bureau to concentrate limited resources, *see* CMU Proposed Rule, 75 Fed. Reg. at 17326, and avoids the dangers that inmates will be able to evade restrictions on communications as they can more easily do in a general prison population environment. *Id.* at 17325 ("It is difficult to police inmate communication in the 'open' context of a general prison

population setting because it is harder to detect activity such as inmates sending mail under another's name, or using another's PIN number, without constant monitoring.")

The specific restrictions on communication at the CMU also enable effective monitoring. The use of non-contact visits allows for visits to take place in "secure partitioned rooms" where the inmate speaks with his visitor using a telephone line that facilitates the monitoring of the visit. *See* Terre Haute Institution Supplement at § 3(c); 11/13/08 Marion Institution Supplement at § 3B(c). Any communication that occurs is recorded, which the Bureau has determined will "lead to greater protection for the public, since reconstruction of communications from random monitoring may not provide a full scenario if dangerous communications are discovered." CMU Proposed Rule, 75 Fed. Reg. at 17325-17326. In addition, if either an inmate or visitor breaks one of the rules governing such visits, the conversation is immediately terminated. Terre Haute Institution Supplement at § 3(c); 11/13/08 Marion Institution Supplement at § 3B(c). These restrictions are related to the legitimate goal of monitoring potentially dangerous communications.

The same goal is promoted by the CMU's treatment of inmate telephone calls, which are also live-monitored and subject to recording. Terre Haute CMU Institution Supplement at § 3(b); 11/13/2008 Marion CMU Institution Supplement at § 3B(b). Courts routinely uphold reasonable restrictions on telephone use in response to constitutional challenges. *See Searcy*, 668 F. Supp. 2d at 122 ("[R]egulations restricting inmates' telephone use are reasonable as long as they further the government's legitimate penological interests, including the safety and security of correctional institutions, inmates, staff, and the public."); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (a prisoner's right to telephone access is "subject to

rational limitations in the face of legitimate security interests of the penal institution") (internal quotation marks omitted).

The Bureau is also able to provide for more effective monitoring of inmates' communication by *reducing* the total amount of time for visits and telephone calls that take place in the CMU. *See* CMU Proposed Rule, 75 Fed. Reg. at 17327 ("Reducing the volume of communications will help ensure the Bureau's ability to provide heightened security in reviewing communications, and thereby increasing both internal security within correctional facilities, and the security of members of the public.") There is a clear relationship between reducing the time CMU inmates are allowed to visit and use the telephone and the goal of effective monitoring of such communication. *See Overton*, 539 U.S. at 129-133 (legitimate penological interest in reducing the total amount of individuals who can visit an inmate in response to security problems posed by visits).

As shown above, the means chosen by the Bureau and the goal of effectively monitoring the communication of high risk inmates is both "rational" and "valid." *Turner,* 482 U.S. at 89.

2. Second Turner *Factor*

The next question under *Turner* is whether inmates have "alternative means of exercising the constitutional right they seek to assert." *Overton*, 538 U.S. at 135. "Where other avenues remain available for the exercise of the asserted right . . . courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." *Turner*, 482 U.S. at 90 (internal quotation marks and citations omitted).

In *Overton*, where restrictions were imposed on visits from non-immediate family members, including a complete prohibition on visits from minor nieces and nephews, the Supreme Court found there were "alternative means of associating with those prohibited from

visiting" because the "inmates can communicate with those who may not visit by sending messages through those who are allowed to visit." 539 U.S. at 135. Even with respect to a *two-year ban on all visitation* for inmates found to have committed substance violations, the Court found alternative means of communicating: "Although this option is not available to inmates barred all visitation after two violations, they and other inmates may communicate with persons outside the prison by letter and telephone." *Id.*

The communication restrictions in this case are far less onerous than those approved in *Overton*. Here, CMU inmates have a number of different ways to communicate with family members and other persons outside the prison. They have access to in-person non-contact visits, telephone use, and email and written correspondence. Compl. ¶ 45 (alleging access to email); Terre Haute Institution Supplement at § 3; 11/13/08 Marion Institution Supplement at § 3B. In addition, attorney-client communication is not monitored. *Id.* Similar to Plaintiffs' allegations here, the respondents in *Overton* complained that "letter writing is inadequate for illiterate inmates and for communication with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient." 539 U.S. at 135. In response to this argument, the Court stated that "[a]lternatives to visitation need not be ideal, however; they need only be available." *Overton*, 539 U.S. at 135. Here, as alleged in Plaintiffs' Complaint, ample alternative communication methods exist.

3. Third Turner *Factor*

The third *Turner* factor requires a consideration of the impact that accommodation of the asserted associational right will have on "guards, other inmates, the allocation of prison resources, and the safety of visitors." *Overton*, 539 U.S. at 135. The design of the CMU is motivated in part to avoid the impact of unnecessarily imposing communication restrictions on

other inmates who do not need it. *See* CMU Proposed Rule, 75 Fed. Reg. at 17325 ("By physically separating out the properly classified prisoners who need comprehensive monitoring . . . [the Bureau] hope[s] to lessen any adverse impact on the vast majority of other prisoners not subject to comprehensive monitoring but still only subject to random monitoring.") In addition, to the extent Plaintiffs are allowed more opportunities for communication, this will obviously increase the burden on staff to monitoring such communications. *See Overton*, 539 U.S. at 135 (considering burden on guard of accommodating asserted right).

4. Fourth Turner *Factor*

The final *Turner* factor asks whether there are "ready alternatives." *Overton*, 539 U.S. at 136. This is not a "least-restrictive-alternative test." *Id.* Rather, it "asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Id.* at 136.

Plaintiffs fail to allege facts that, if believed, show that transferring them out of the CMU will not harm the Bureau's legitimate penological goals. The Bureau has explained the difficulties of imposing enhanced scrutiny of communications on inmates who remain in a general prison population, *see* CMU Proposed Rule, 75 Fed. Reg. at 17325, and the Supreme Court has recognized the legitimacy of similar concerns. *See, e.g.,* Block, 468 U.S. at 587 (rejecting argument that ban on contact visits should only apply to certain high risk pretrial detainees because "[i]t is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits").

Plaintiffs also fail to allege any alternatives to the current restrictions on visiting hours and telephone time other than to give them exactly what they would have if they were not in the

CMU. In *Overton*, the Court rejected a claim that a state's interest in maintaining order in its prisons would not be harmed by lifting a ban on inmate visits with nieces and nephews under the age of 18. The Supreme Court wrote that "[i]ncreasing the number of child visitors in that way surely would have more than a negligible effect on the goals served by the regulation," 539 U.S. at 136, and that "[t]o reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable." *Id.* at 133. The same is true here.

Finally, while Plaintiffs allege that the Bureau could provide contact visits because such visits could be monitored by guards and recorded, either with a tape recorder or by using a room equipped to record sound or video, Compl. ¶¶ 42-43, on their face these alternatives do not accommodate the Bureau's penological goal of total communication management. With respect to no-contact visits, communications can be immediately terminated because the CMU inmate must use a phone line to communicate with a visitor. Terre Haute CMU Institution Supplement at § 3(c); 11/13/2008 Marion CMU Institution Supplement at § 3B(c). This is not the case with contact visits. Also, the very act of physical contact at the beginning or end of a visit can be an opportunity for unmonitored communication.

The facts as alleged in Plaintiffs' Complaint and attached materials demonstrate that the Bureau's restrictions on communication are reasonably related to the legitimate penological goal of effectively monitoring the communication of high-risk inmates. Accordingly, Plaintiffs' and Family Plaintiffs' Second and Third Causes of Action should be dismissed for failure to state a claim.

IV. The CMU Communication Restrictions Do Not Violate The Eighth Amendment.

Plaintiffs allege that Defendants have subjected them to cruel and unusual punishment in violation of the Eighth Amendment based on the denial of "physical contact with their loved

ones, excessive restriction of other means of communication with family members; and extended detention in a unit segregated from other inmates." Compl. ¶ 268.

In order to establish that conditions of confinement violate the Eighth Amendment, both an objective and subjective element must be met. "First, the deprivation alleged must be, objectively, sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). This requires alleging that "a prison official's act or omission result[ed] in the denial of the minimal civilized measure of life's necessities." *Id.* (internal quotation marks omitted). Only "extreme deprivations" support an Eighth Amendment claim because "routine discomfort" is part of the penalty inmates pay for their crimes. *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992). To meet the second requirement, a prison official must have a "sufficiently culpable state of mind," which requires "deliberate indifference" to inmate health or safety. *Farmer*, 511 U.S. at 834.

Nothing about the conditions existing in the CMUs, (e.g., inmates not confined to cells, have access to leisure activities and exercise), Terre Haute CMU Institution Supplement at § 4; 11/13/2008 Marion CMU Institution Supplement at § 4, or the CMU's restrictions on communication deprive Plaintiffs of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (internal quotation marks omitted). They do not deny prisoners food, clothing, shelter, or medical care, or subject them to wanton pain or threat of physical harm. *Id.* at 832. In the absence of such conditions, even measures that may seem harsh do not offend the Eighth Amendment. *See Rhodes*, 452 U.S. at 346-347.

The Third Circuit has found that reducing the telephone privileges of a federal prisoner does not state a claim under the Eighth Amendment. *Perez*, 229 Fed. Appx. at 57.

("An altered security classification that allows limits on telephone privileges certainly does not rise to th[e] level" of an Eighth Amendment violation). And numerous courts have found that a restriction on contact visits likewise does not violate the Eighth Amendment. *See, e.g., Saleem v. Helman*, No. 96-2502, 1997 WL 527769, at *2 (7th Cir. Aug. 21, 1997) ("We have previously held that a denial of contact visitation altogether does not violate the Eighth Amendment."); *Ricco v. Conner*, 146 Fed. Appx. 249, 255 (10th Cir. 2005) ("[W]e conclude that the five-year restriction [on all visitation privileges] imposed in this case does not violate the Eighth Amendment].") The Court should reach the same conclusion and dismiss Plaintiffs' Fourth Cause of Action. Compl. ¶ 266-270.

V. The Inmates' Allegations That They Were Transferred To The CMU In Retaliation For Engaging In Protected First Amendment Activity, Or As A Result Of Discrimination Against Muslims, Are Not Plausible And Should Be Dismissed.

Plaintiffs allege that Defendants have violated their rights to freedom of speech, religion and equal protection of the law under the First and Fifth Amendment by "allow[ing] for and encourag[ing] the development of a pattern and practice throughout the BOP of designating individuals, including Plaintiffs, to the CMU in retaliation for their protected speech and beliefs, or based on their religion, national origin, and perceived political and/or ideological beliefs." Compl. ¶ 273. Specifically, Plaintiff McGowan alleges that he was "transferred to the CMU because of his political beliefs and continued involvement in lawful social justice movements while incarcerated. " *Id.* ¶ 94. Plaintiffs Twitty and Jones allege they were "transferred to the CMU in retaliation for grieving and litigating disputes over their treatment in prison." *Id.* ¶ 93. And the four Plaintiffs who are Muslim (Aref, Twitty, Jones, and Jayyousi) allege that the "CMUs were created to allow for the segregation and restrictive treatment of Muslim prisoners based on Defendants' discriminatory belief that Muslim prisoners are more likely than others to

pose a threat to institution security." *Id.* ¶ 95. In each instance these claims should be dismissed under Rule 12(b)(6).

A. Plaintiffs McGowan, Twitty and Jones Have Failed To State A Claim That Their Transfer To The CMU Was In Retaliation For Engaging In First Amendment Activity.

McGowan, Twitty and Jones allege that their transfer to the CMU was in retaliation for filing grievances and/or for their political and religious beliefs. Compl. ¶¶ 93, 142, 167. To state a valid claim for retaliation a prisoner must allege the following: (1) "the type of activity he engaged in was protected under the First Amendment"; (2) "the state impermissibly infringed on his right to engage in the protected activity"; and (3) "the retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." *Pryor-El v. Kelly*, 892 F. Supp. 261, 274 (D.D.C. 1995) (internal quotation marks omitted); *Anderson-Bey v. Dist. of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C. 2006). A plaintiff alleging retaliation for the exercise of constitutionally protected rights must show that his protected conduct was a "substantial" or "motivating" factor in the defendant's adverse decision. *See Pryor-El*, 892 F. Supp. at 274 (citing *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (to establish constitutional violation requires allegation that plaintiff's protected activities were the "but-for" cause of the challenge decision). Plaintiffs' allegations fail to meet these requirements.

1. McGowan's Claim of Retaliation.

McGowan alleges that "during his incarceration he has continued to speak out about social justice issues and the rights of political prisoners and to communicate with law abiding activists involved in these movements." Compl. at ¶ 167. Then, in an entirely conclusory fashion, he alleges that "[h]is designation to the CMU <u>seems</u> based not on any legitimate penological need, but rather in retaliation for Mr. McGowan's continued lawful communication

and speech." *Id.* (emphasis added); *see also id.* at ¶ 94 (alleging that "it appears" McGowan was transferred to the CMU because of his political beliefs and involvement in social justice issues).

McGowan has failed to allege "sufficient factual matter, accepted as true" to show that his claim of retaliation is "plausible" and not merely "possible." *See Iqbal*, 129 S. Ct. at 1949. It is not sufficient for a Plaintiff to allege merely that it "seems" or "appears" that he was retaliated against without more, particularly where the "obvious alternative explanation" is that his transfer was motivated by his conviction for activity related to domestic terrorism. *Iqbal*, 129 S. Ct. at 1951; Compl. ¶ 79 (acknowledging "conviction is related to terrorism").

2. Twitty's Claim of Retaliation.

Twitty alleges that throughout 2005 and 2006, and continuing through July 2008, he filed grievances and federal litigation over issues relating to good time credits and "missing program documentation." Compl. ¶ 131. His allegation of retaliation is based on the fact that, "[o]n May 30, 2007, in this midst of this advocacy on his own behalf," he was transferred to the CMU. *Id.* ¶ 132. Without any factual allegations making it "plausible" that there is connection between his protected advocacy and his transfer to the CMU, Twitty has failed to allege that the filing of grievances was a "substantial" factor in the Bureau's decision to transfer him to the CMU must be dismissed. Moreover, after arriving at the CMU at Terre Haute, Mr. Twitty was informed that his transfer was based on his "involvement in recruitment and radicalization of other inmates." *Id.* ¶ 132. These concerns provided the legitimate penological reason for his transfer. [6]

[6] Mr. Twitty alleges that he will be released from the CMU into a halfway house in August 2010. Compl. ¶ 147. Once he is released, this will moot his claims and require dismissal. *Qassim v. Bush*, 466 F.3d 1073, 1077 & n.4 (citing D.C. Circuit cases that have "repeatedly held" that a prisoner's release or transfer moots any claims for equitable relief).

3. Jones's Claim of Retaliation.

Prior to his designation to a CMU, and while incarcerated at FCI Englewood, Jones alleges that "staff at th[e] facility threatened [him] that he would be 'sent east' if he continued to file complaints." *Id.* ¶ 188. Jones contends that he then filed a complaint about being subjected to this threat, and after some unspecified amount of time transpired, he was transferred to the CMU at USP Marion on June 6, 2008. *Id.* ¶ 189. The threat by staff members to send him "east" is vague and the Complaint does not allege facts showing whether there was a close relationship in time between the threat and the transfer decision. At best, these allegations are merely consistent with a claim of retaliation, but in light of the alternative explanation that he was sent to the CMU for engaging in radicalization and recruitment efforts while incarcerated, *see* Compl. ¶ 189, his claim of retaliation is not plausible under the standard established in *Twombly* and *Iqbal*. *See Iqbal*, 129 S. Ct. at 1949 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief'") (quoting *Twombly*, 550 U.S. at 557).

Mr. Jones also alleges that, after being transferred to the CMU, he filed a *pro se* complaint in the Federal District Court for the Southern District of Illinois, raising many claims similar to those brought in the instant complaint. Compl. ¶ 195. He alleges that he voluntarily dismissed the action in August 2009 "after being told by CMU staff that he needed to drop his complaint because it had 'upset the big shots' and that things were going to get bad for him." *Id.* He alleges that he "was promised that if he withdrew his *pro se* action, he would be transferred to FCI Herlong." *Id.* Several months later, he was transferred out the CMU and has been in the main compound at Marion since early March 2010 and "is no longer subject to the communications restrictions described in this case." *Id.* ¶ 196. These allegations fail to state a

claim that he was transferred to the CMU in retaliation for filing the lawsuit. Compl. ¶ 273. Mr. Jones filed his complaint *after* he was transferred to the CMU, and therefore it is a logical impossibility that this conduct was a "substantial" or "motivating" factor in the Bureau's decision to initially transfer him to a CMU. *Mt. Healthy City Sch. Dist.*, 429 U.S. at 287; *Hartman,* 547 U.S. at 256; *Pryor-El*, 892 F. Supp. at 274.

Finally, as discussed above, Mr. Jones's claims must be dismissed because he lacks standing since he was released from the CMU prior to the filing of this lawsuit. *See supra* pp. 8-9.

B. Plaintiffs Have Failed To State A Claim That Their Transfer To The CMU Was Because Of Their Religion.

Plaintiffs allege that the percentage of Muslim inmates in the CMUs are far higher than the proportion of Muslim inmates in the rest of the federal prison system, and that this alleged discrepancy "cannot be explained by any non-discriminatory reason" and therefore demonstrates that Defendants have "allowed for and encouraged" retaliation against Muslim inmates. *Id.* ¶¶ 95-102, 273. These allegations fail to state a claim of invidious discrimination.

As this litigation involves no allegations that the Bureau has adopted a facially discriminatory classification, to state a claim of discrimination Plaintiffs must allege that some government officials acted with "discriminatory purpose." *Iqbal*, 129 S. Ct. at 1948; *Washington v. Davis*, 426 U.S. 229, 240 (1976). This requires proof of more than mere "intent as volition or intent as awareness of consequences," but rather a showing that a decisionmaker undertook a course of action "'because of,' not merely 'in spite of,' [the action's adverse effects upon an identifiable group]." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Here, there are no plausible allegations of discriminatory animus against Muslim inmates, let alone that these four inmates were transferred to the CMU "because of" their religion.

On the contrary, Plaintiffs Aref and Jayyousi admit that they were convicted of material support of terrorism. Compl. ¶¶ 16, 22,79. Such a conviction is one of the reasons that the Bureau, acting on a case-by-case basis, may designate an inmate to the CMU for heightened monitoring. Compl. ¶ 33; *see also* Notice to Inmates (Review of Inmates for Continued Communication Management Unit (CMU) Designation). This valid legitimate penological purpose shows that their claim of a Bureau-wide conspiracy to discriminate against Muslims is not plausible and should be dismissed.

Similarly, the Bureau informed Twitty and Jones that they were being transferred to the CMUs based on their "recruitment and radicalization" efforts committed while incarcerated. Compl. ¶¶ 132, 189. In the face of these reasons, Twitty and Jones offer no specific allegations to render it plausible that high-level Bureau officials "encouraged" wide-scale discrimination against Muslims in general and against Twitty and Jones in particular. Compl. ¶¶ 271-275; *see Iqbal*, 129 S. Ct. at 1949. The allegation that a large number of CMU inmates are Muslim is not sufficient, by itself, to state a claim of invidious discrimination as to these Plaintiffs given the alternative explanation for their designation to the CMU.

In *Iqbal*, the Plaintiffs alleged that former FBI Director Mueller and Attorney General Ashcroft engaged in individious discrimination against Muslims because the FBI "arrested and detained thousands of Arab Muslim men" following the 9/11 attacks. *Iqbal*, 129 S. Ct. at 1951, "Taken as true, the Court found these allegations are consistent" with Plaintiffs' claim that the men were detained "because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose." *Id.* In particular, the Court found that the "obvious alternative explanation" for the arrests was that they were a response to legitimate security concerns following the 9/11 attacks. *Id.* As the Court concluded, in the face

of this explanation, "the purposeful, invidious discrimination respondent asks us to infer . . . is not a plausible conclusion." *Id.* at 1951-1952.

So too here. The Complaint is devoid of allegations of any act, statement or other conduct that indicates any hostility whatsoever to Muslims on the part of the officials sued in their official capacity, nor of any unnamed BOP officials. Because Plaintiffs' claims of discrimination are not plausible in light of the individual reasons that support their transfer to a CMU, their claims of discrimination should be dismissed for failure to state a claim.

VI. The APA Did Not Require The Bureau To Provide Notice And Comment Rulemaking Before Creating The CMUs.

A. The Institution Supplements Are Interpretive Rules or Policy Statements That Do Not Trigger Notice and Comment Procedures.

Plaintiffs allege that the Terre Haute and Marion CMU Institution Supplements are "substantive rules that require notice and comment rulemaking under 5 U.S.C. § 553, and publication in the Federal Register under 5 U.S.C. §§ 553 and 552(a)." Compl. ¶ 279. Plaintiffs are mistaken.

Under the APA, an agency intending to engage in rulemaking must first publish a notice of the rule in the Federal Register and provide interested persons with the opportunity to comment. 5 U.S.C. § 553(b). This requirement only applies to agency "rules," which the APA defines as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4). The APA specifically exempts "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" from notice and comment requirements. *Id.* § 553(b)(3)(A).

The CMU Institution Supplements are not "rules" within the meaning of the APA, but are akin to interpretive rules or agency policy statements that the Bureau uses to advise the public and its staff of the manner in which it will exercise its discretionary statutory and regulatory authority. *Cf. Reno v. Koray*, 515 U.S. 50, 61 (1995) (BOP Program Statements are "akin to an interpretive rule that do[es] not require notice and comment [and] is still entitled to some deference) (internal quotation marks omitted). This conclusion is confirmed by controlling D.C. Circuit precedent. In determining whether a rule is interpretive, and thus not subject to the APA's notice and comment rulemaking requirements, the D.C. Circuit directs a court to consider:

> (1) Whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

American Mining Cong. v. Mine Safety and Health Administration, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). "If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule." *Id.* This Court has applied the *American Mining* test in holding that a BOP Program Statement is an interpretive rule that does not require notice and comment procedures. *See Kotz* v. *Lappin*, 515 F. Supp. 2d 143, 151 (D.D.C. 2007) (Urbina, J.). Applying this test here demonstrates that the CMU Institution Supplements likewise do not trigger the APA's requirement for notice and comment rulemaking.

First* American Mining *Factor. There is clear legislative authority for the creation of the CMUs. *American Mining*, 995 F.2d at 1112. "[T]he control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General . . . ." 18 U.S.C. § 4001(b)(1). And under the direction of the Attorney General, the BOP is granted broad authority

and discretion for the management and regulation of all federal penal and correctional institutions. *Id.* § 4042(a)(1). Prisoners are committed to the custody of the Bureau, and the agency is expressly authorized to designate the inmate's placement of confinement. *Id.* § 3621(a) and (b). In addition, the Bureau is charged with determining the proper security classification for federal prisoners based on the nature of their offenses. *Id.* § 4081. In addition to its statutory authority to create CMUs, the Bureau also has ample regulatory authority to implement the restrictions on the communications employed in the CMUs. *See*, *e.g.,* 28 C.F.R. § 540.12(a) (authorizing wardens to establish and exercise control to protect individuals, security, discipline, and good order of institution); *id.* § 540.14(b)-(c) (authorizing inspection of mail); *id.* § 540.102 (authoring monitoring of telephone communication); *id.* § 540.40 (authorizing restrictions and limits on inmate visiting). Thus, the agency did not need to issue a legislative rule to establish the CMUs, because it already had the legislative and regulatory authority to do so.

Second* American Mining *Factor. The Institution Supplements meet the additional test of a non-legislative rule because they were not published in the Federal Register. *American Mining*, 995 F.2d at 1112.

Third* American Mining *Factor. This factor requires the court to ask whether the "agency has explicitly invoked its general legislative authority." *American Mining*, 995 F.2d at 1112. The CMU Institution Supplements do not invoke any general legislative authority. *See generally* Terre Haute CMU Institution Supplement; 3/20/08 and 11/13/08 Marion CMU Institution Supplement.

Fourth* American Mining *Factor. The last factor asks "whether the rule effectively amends a prior legislative rule." *American Mining Congress*, 995 F.2d at 1112. In

implementing the CMUs, the agency did not amend any of its legislative rules, as the CMUs operate within the boundaries of preexisting regulations. Indeed, they provide more time for visiting and telephone use than is *required* by these substantive rules. *Compare* Notice to Inmates (Social Telephone and Social Visiting) (providing 120 telephone minutes per month and 8 hours of visitation) *with* 28 C.F.R. § 540.100 and § 540.101(d) (requiring a minimum of one monthly three-minute phone call); *id.* § 540.43 (warden "shall allow each inmate a minimum of four hours visiting time per month").

While Plaintiffs appear to allege that the operation of the CMUs are inconsistent with the agency's regulations regarding weekend visitation, *see* Compl. ¶¶ 47-48, 280, that is not the case. "Consistent with available resources, such as space limitations and staff availability, and with concerns of institution security, the Warden may limit the visiting period." 28 C.F.R. § 540.42(b). In particular, "[w]ith respect to weekend visits, for example, some or all inmates and visitors may be limited to visiting on Saturday or on Sunday." *Id.* Effective January 3, 2010, the inmates in the CMUs are entitled to visits on Sunday through Friday. *See* Notice to Inmates (Social Telephone and Social Visiting).

Nor is the establishment of the CMUs "inconsistent with existing regulations regarding control units, administrative detention, [and] disciplinary segregation." Compl. ¶ 280. These rules do not govern the CMUs. Similarly, Plaintiffs are mistaken to the extent they allege that notice and comment rulemaking was required because of the Bureau's Program Statement on telephone use, which provides that inmates in the general population are typically allowed 300 minutes of telephone time per month. Compl. ¶ 63. This Program Statement is an interpretive rule and therefore may take effect and be amended without following notice and comment procedures. *See Reno,* 515 U.S. at 61. *American Mining* focuses on whether an agency has

amended a prior legislative rule, not an interpretive rule such as a Program Statement. *American Mining*, 995 F.2d at 1112.

Because all of the *American Mining* factors demonstrate that the CMU Institution Supplements are not legislative rules, notice and comment rulemaking was not required. 5 U.S.C. § 553(b)(3)(A). As noted, this Court applied the same factors to conclude that a "[BOP] Program Statement is an interpretive rule, and the APA, including its notice and comment requirements, does not apply to it." *Kotz*, 515 F. Supp. 2d at 151 (Urbina, J.). The same test should control the outcome here with respect to the Institution Supplements. Accordingly, Plaintiffs have failed to state a claim that notice and comment rulemaking was required. It was not.

B. Plaintiffs' Claims for Notice and Comment Rulemaking Are Now Moot.

As set forth above, on April 6, 2010, the agency published a proposed rule seeking to describe and codify the procedures governing the CMUs. Proposed CMU Rule, 75 Fed. Reg. 17324. And as of June 7, 2010, the comment period closed. *Id.* at 17324. Thus, Plaintiffs' demand for notice and an opportunity to comment on a proposed CMU rule have been satisfied and are now moot. Accordingly, the Court should dismiss the APA claim under Rule 12(b)(1) for lack of jurisdiction as well as under Rule 12(b)(6) for failing to state a claim.[7]

[7] In the event the Court does not grant Defendants' Motion to Dismiss in full, a motion for transfer may be appropriate under 28 U.S.C. § 1404(a). *See Huskey v. Quinlan*, 785 F. Supp. 4, 6-7 (D.C. Cir. 1992) (holding that "because the implementation of [national] policy is at issue, and because that implementation took place at the Marion facility in Illinois, venue is more appropriately laid in Illinois" under § 1404(a)).

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant their Motion To Dismiss all of Plaintiffs' and Family Plaintiffs' claims with prejudice.

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Respectfully submitted,

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