IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yassin Muhiddin AREF, *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:10-cv-00539-RMU
	)	(Argument Requested, Renewing Prior Request)
Eric HOLDER, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

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ARGUMENT

By supplemental motion, Defendants ask this Court to dismiss all of Plaintiffs McGowan, Synan and Twitty's claims.[1] Since the filing of this lawsuit, Defendants have voluntarily chosen to remove Mr. McGowan[2] and Mr. Twitty from the CMU. On this basis, Defendants would deny to Mr. McGowan and Mr. Twitty the possibility of attaining the relief they sought in bringing this case, including a declaration that Defendants violated Mr. McGowan and Mr. Twitty's First, Fifth, and Eighth Amendment rights by designating them to the CMU and holding them in restrictive conditions of confinement for 26 and 40 months, and an injunction forbidding the BOP from continuing to subject the men to unlawful treatment.

Defendants have not met the heavy burden required to establish mootness. Their decision to transfer Mr. McGowan and Mr. Twitty from the CMU was voluntary and subject to reversal, and Mr. McGowan and Mr. Twitty thus face redesignation to the CMU. Moreover, it does not provide them with all requested relief, and has not completely and irrevocably eradicated the effects of Plaintiffs' prolonged CMU designation. For these reasons, and based on the information provided by Plaintiffs McGowan and Twitty in the attached declarations, Defendants' supplemental motion must be denied. *See* Declaration of Daniel McGowan, ("McGowan Decl."), attached as Exhibit A; Declaration of Avon Twitty, ("Twitty Decl."), attached as Exhibit B. In the alternative, should a question as to the existence of a live controversy remain, this Court should allow limited jurisdictional discovery.

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[1] Defendants' motion is limited to a discussion of the changed circumstances of Plaintiffs McGowan and Twitty, as is Plaintiffs' response. However, Plaintiffs also take this opportunity to alert the Court to the recent transfer of Plaintiff Jones from the general population at USP Marion to general population at FCI Oxford, a medium security prison, and the transfer of Plaintiff Jayyousi from the CMU at FCI Terre Haute to the CMU at USP Marion.

[2] Plaintiffs agree with Defendants that Ms. Synan's claims rise and fall with those of Daniel McGowan, her husband.

I. Defendants Have Not Met the "Heavy Burden" Required to Establish Mootness.

Defendants' motion arises primarily from their own voluntary cessation of illegal activity in response to litigation, but they have failed to meet the "heavy burden" of persuading the court that the "stringent" voluntary cessation standard has been met. *See Fund for Animals v. Jones*, 151 F. Supp. 2d 1, 5 (D.D.C. 2001). A case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id*. (internal citations and quotation marks omitted). In itself, a "defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)); *see also Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("generally voluntary cessation of challenged activity does not moot a case"). Rather, to establish mootness, a defendant must show: (1) that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur;" and (2) that "interim relief and events have completely and irrevocably eradicated the effects of the alleged violation." *Fund for Animals*, 151 F. Supp. at 5 (*quoting Friends of the Earth,* 528 U.S. at 189 and *Albritton v. Kantor,* 944 F. Supp. 966, 974 (D.D.C. 1996)).

Defendants' removal of Plaintiffs McGowan and Twitty from the CMU, after Plaintiffs' initiation of this lawsuit challenging that designation, amounts to voluntary cessation of illegal activity, and is thus analyzed under the strict standard described above. A skeptical analysis of Defendants' actions is especially warranted here as the available evidence strongly suggests that the transfers were a direct result of this litigation. With the sole exception of Mr. Jones' transfer from the CMU on the eve of Plaintiffs' filing of this case (at a point when Defendants must have

been aware litigation was pending), *not a single* CMU prisoner was transferred to a general population unit prior to initiation of this lawsuit. Since initiation of this lawsuit, by contrast, seven prisoners (excluding Mr. Twitty) have been transferred to general population units. *See* Complaint ("Compl.") (Docket # 5) at ¶ 196; McGowan Decl. at ¶ 6; Twitty Decl. at ¶ 4.

Despite this powerful circumstantial evidence, Defendants all but ignore the voluntary cessation standard, arguing in a footnote that it does not apply because Plaintiffs were released from the CMU "in accordance with normal prison procedures." Defendants' Supplemental Motion to Dismiss on Mootness Grounds (hereinafter "Def. Supp. Mot.") at 6 n. 7. But simply saying this does not make it so, especially as the only evidence Defendants marshal is the word of BOP employees who lacked the authority to order Plaintiffs' transfers. *See id*. at Exhs. A, B. According to the BOP's own "policy," the unit team may recommend a prisoner's transfer from the CMU, but the Warden, the Counter Terrorism Unit, and the Regional Director must all concur for a transfer to occur. Compl. at ¶ 89. The regional director has final say. *Id.* The declarations attached to Defendants' motion say nothing about what led to the regional director's decision to accept the unit teams' recommendation to transfer Mr. McGowan and Mr. Twitty this time around, when prior unit team recommendations were disregarded by the region. *See* McGowan Decl. at ¶ 2; Twitty Decl. at ¶ 2.

While it is true that Defendants have only voluntarily ceased their allegedly unlawful conduct as to a few Plaintiffs, *see* Def. Supp. Mot. at 6 n.7, that is of no moment. Each Plaintiff as an individual has the right to a day in court that cannot be circumvented by Defendants' voluntary and uncertain actions. *See*, *e.g.*, *Vitek v. Jones*, 445 U.S. 480, 486 (1980) (applying voluntary cessation standard to find that a prisoner's procedural due process challenge was not moot where State continued to employ the challenged policy but plaintiff had been transferred

from the unit). To hold otherwise would allow a defendant to cherry pick between plaintiffs, transferring those for whom it seeks to avoid judicial review, while retaining others.

As Defendants' motion is based on their own voluntary cessation of illegal activity in reaction to litigation, they must meet a "heavy burden" of persuading the court that the "stringent" voluntary cessation standard has been met. *See Fund for Animals*, 151 F. Supp. at 5. This they have failed to do.

A. Plaintiffs Face Redesignation to the CMU.

Although Plaintiffs McGowan and Twitty have been transferred out of the CMU, they remain in Defendants' custody,[3] and Defendants remain "free to return to [their] old ways" by redesignating Plaintiffs to the CMU. *See Friends of the Earth*, 528 U.S. at 189; *Inmates of Occoquan v. Barry*, 650 F. Supp. 619 (D.D.C. 1986), *vacated on other grounds,* 844 F.2d 828 (D.C. Cir. 1988). Defendants have given no indication that they have modified their finding that Plaintiffs require heightened communications management, nor removed it from Plaintiffs' central file. Defendants continue to defend the legality of the CMUs, and operate them without due process attached to designation. And Defendants have transferred Plaintiffs in reaction to litigation, without explanation, and without any guarantee against redesignation to the CMU. Thus, redesignation is an objectively reasonable possibility.

To establish mootness, Defendants must show with absolute clarity that Plaintiffs will not be redesignated to the CMU. *See*, *e.g.*, *Shahid v. Freeman*, No. 85-5876, 1987 U.S. App. LEXIS

[3] Mr. Twitty is currently being held at a Community Corrections Center (CCC) in Washington, D.C. *See* Twitty Decl. at ¶ 1; Def. Supp. Mot. at 2. Community Corrections is "an integral component of the Bureau's correctional programs." *See* BOP, Community Corrections, *available at* http://www.bop.gov/locations/cc/index.jsp. "The BOP's community-based programs are administered by staff of the Correctional Programs Division (CPD) in Central Office (in Washington, DC), community corrections regional management teams in each of the BOP's six regional offices, and the employees of 22 community corrections management (CCM) field offices serving specific judicial districts within their regions." *Id.*

3082, at *1 n.1 (D.C. Cir. Jan. 8, 1987) ("The key factor in determining whether appellant's claims for injunctive relief are moot is whether either party claimed that [the prisoner plaintiff] might be returned to the Lorton facility") (unpublished decision); *Barnett v. Rodgers,* 410 F.2d 995, 997 n.1 (D.C. Cir. 1969) (prisoner-plaintiffs' transfer from a D.C. jail to a Virginia prison did not moot their challenge to the jail's failure to provide them with a pork-free diet as prisoner-plaintiffs might be returned to the jail); *Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1241 (N.D. Ga. 2007) (denying mootness challenge to prisoners' claim of interference with religious exercise despite claimed revision of relevant policy because revision not shown to be state-wide, and defendants provided no assurance that plaintiff would not be subject to a similar policy if transferred to another prison). Defendants' motion and accompanying declarations are completely silent as to this question, and thus the Court must retain jurisdiction over Plaintiffs' claims.

The precedent upon which Defendants rely is not to the contrary, as none of the cases they cite include any analysis of voluntary cessation or the possibility of redesignation to challenged conditions. *See* Def. Supp. Mot. at 4, *citing Scott v. District of Columbia*, 139 F.3d 940 (D.C. Cir. 1998) (making no mention of voluntary cessation or any allegation that prisoner plaintiff might be transferred back to prison in question); *Cameron v. Thornburgh*, 983 F.2d 253 (D.C. Cir. 1993) (same); *Dorman v. Thornburgh*, 955 F.2d 57 (D.C. Cir. 1992) (same).

Indeed, Mr. McGowan and Mr. Twitty both fear redesignation to the CMU, and this fear is objectively reasonable. *See* McGowan Decl. at ¶ 13, Twitty Decl. at ¶¶ 13-15. Defendants designated Plaintiffs to the CMU based on their (unsupported) finding that Plaintiffs' "transfer to [the CMU] for greater communication management is necessary to the safe, secure, and orderly operation of Bureau institutions, or protection of the public." Compl. at Ex. E. To date,

Plaintiffs have no indication that Defendants have modified this finding, nor removed it from Plaintiffs' central file. *See* McGowan Decl. at ¶ 9, Twitty Decl. at ¶ 9. Defendants have not even explained why security needs no longer require that Plaintiffs be held in the CMU. *See* McGowan Decl. at ¶ 2. As long as Defendants' finding that Plaintiffs pose a security risk and require monitoring remains in official BOP records, it is reasonable to assume that they face redesignation to a CMU. *Cf. Vitek,* 445 U.S. at 486 (plaintiff faced possible recurrence of allegedly unlawful placement because State continued to credit its finding that plaintiff was mentally ill, and posed a threat to his own and others' safety). Indeed, Mr. Twitty was directly told that he faces the possibility of redesignation if while at his Community Corrections program he engages in the conduct that resulted in his initial designation to the CMU – even though that alleged conduct has never been disclosed. *See* Twitty Decl. at ¶¶ 13, 14.

Here, the possibility of recurrence is also high because Defendants continue to defend the legality of the challenged lack of process associated with CMU designation. *See* Defendants' Motion to Dismiss (Docket # 19). The possibility of recurrence faced by both men is heightened given the substantive claims at the core of Plaintiffs' challenge: that the BOP has refused to disclose the factual basis for Plaintiffs' CMU placement, has failed to implement procedures to ensure that CMU designation is based on legitimate criteria, and has instead facilitated an unchecked pattern of retaliatory and discriminatory designations. *See* Compl. at ¶¶ 92-102. Where an agency acts without process or legitimate criteria, recurrence is *always* possible.

In *Nichols v. Laundrieu*, No. 79-3094, 1980 U.S. Dist. LEXIS 17630, *2 (D.D.C. Sep. 12, 1980), for example, this Court considered a Section 8 tenant's procedural due process challenge to the Department of Housing and Urban Development's (HUD's) decision, without hearing or meaningful notice, to alter the plaintiff's eligibility from a three-bedroom to a two-

bedroom unit. After the case was filed, HUD granted the plaintiff a voluntary waiver to remain in her three-bedroom home, and then sought dismissal on mootness grounds. *Id.* at *2-3. The Court denied defendant's motion even after HUD published a handbook setting forth considerable procedural safeguards for Section 8 rent reductions, finding no assurance that HUD would not undertake the same allegedly wrongful action in future years because the handbook did not have the force of law. *Id.* at 4.

In the present case, even more than in *Nichols,* there is a high possibility of recurrence because the challenged lack of process remains, and Defendants continue to defend its legality. *See* Defendants' Motion to Dismiss (Docket # 19). All that has changed is its present application to certain plaintiffs. *See Payne Enterprises Inc., v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988) (challenge to *practice* of delaying response to FOIA request not mooted by release of specific documents that prompted suit). Finally, because Plaintiffs do not know exactly what they did to earn CMU placement in the first place, they cannot modify their behavior to avoid redesignation. *See* McGowan Decl. at ¶ 8, Twitty Decl. at ¶ 14.

While Defendants have voluntarily removed Plaintiffs McGowan and Twitty from the CMU, they have done so in reaction to litigation, without explanation, and without any guarantee against redesignation to the CMU. These voluntary and uncertain actions do not even approach the "formidable burden that a party alleging mootness must bear." *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008). Defendants say nothing in their motion, memorandum of law, or affidavits about the possibility of redesignation to the CMU. But even were they to swear against recurrence, a past history of consistent violations belies a finding of mootness. *See id.* (denying mootness challenge to procedural due process claim arising from a prison disciplinary proceeding because defendants' promise that sanction would not be imposed came late in the

game, was not sworn or notarized, and failed to detail basis for authority); *see also Payne Enters.*, 837 F.2d at 491-92; *Fund for Animals*, 151 F. Supp. 2d at 7. A finding of mootness requires much more definitive action. *Compare Nat'l Black Police Ass'n*, 108 F.3d at 449 (finding claim moot where District enacted legislation amending the challenged policy) *with City of L.A. v. Lyons*, 461 U.S. 95, 100-101 (1983) (administrative moratorium banning challenged police practice did not ensure the practice would not recur).

Finally, the possibility of recurrence is especially potent for Plaintiff McGowan, who is to serve three more years in BOP custody, *see* Compl. at ¶ 18, and has merely been moved to a different unit in the same prison facility, USP Marion. *See* McGowan Decl. at ¶ 5; *see also Brooks v. Frank,* No. 08-00504, 2009 U.S. Dist. LEXIS 38089, *11-12 (D. Haw. May 1, 2009) (prisoner's claim for injunctive relief not moot upon transfer from section of prison that included the challenged condition to another section of same prison); *Inmates of the Bucks County Corr. Facility v. County of Bucks,* No. 02-7377, 2004 U.S. Dist. LEXIS 30547, *8 (E.D. Pa. Dec. 20, 2004) (prisoner's claim not moot upon transfer to facility one quarter mile away, as prisoner remained in custody of same director, who had authority to reassign her to location of challenged conditions).

B. Transfer from the CMU Has Not Completely and Irrevocably Eradicated the Effects of the Alleged Violation.

Defendants have also failed to show that their voluntary transfer of Plaintiffs McGowan and Twitty out of the CMU has "completely and irrevocably" eradicated the effects of Plaintiffs' illegal designation to and retention within that unit. *Fund for Animals*, 151 F. Supp. 2d at 5 (citation omitted). Mr. McGowan continues to be held in a facility with an inappropriately high level of security; his communications continue to be routed through the Counter-terrorism Unit in West Virginia; and the harmful effects of the years he spent at the CMU linger. Moreover,

Mr. McGowan and Mr. Twitty both face the possibility of adverse treatment within and outside the BOP due to the retention in BOP files of their CMU designation, and its underlying rationale. Finally, their protected First Amendment activities continue to be chilled even though they have been transferred out of the CMU.

For Plaintiff McGowan, the weakness in Defendants' argument is quite clear. He remains incarcerated in a medium security facility, subject to the conditions and restrictions that adhere to such a setting, despite the fact that he is classified as a low security prisoner. *See* McGowan Decl. at ¶ 5. Prior to CMU designation, he was held in a low security prison; and there can be no denying that his current placement at Marion is a direct result of his CMU designation. *Id*. As long as he remains at a medium security prison, the effects of his CMU designation linger. Indeed, Mr. McGowan specifically requested transfer to the general population at a federal prison appropriate for his security classification in the Prayer for Relief. *See* Compl. at 76. Thus, Defendants' assertion that "Plaintiffs have already received the injunctive relief sought in their Complaint," Def. Supp. Mot. at 4, is incorrect.

Moreover, at USP Marion, all of Mr. McGowan's mail and telephone contact requests are being routed through the Counter-terrorism Unit in West Virginia, and all his mail and telephone calls continue to be monitored by that unit. *See* McGowan Decl. at ¶ 15. Upon information and belief, BOP policy requires this heightened monitoring of all prisoners ever designated to the CMU, even after their transfer away from the unit. *Id*. Although Plaintiffs do not claim that heightened monitoring, or placement of a low security prisoner in a medium security prison present constitutional claims in themselves, these conditions are cognizable lingering effects of CMU designation, and argue against mootness.

Other effects of CMU placement linger as well. At USP Marion, Mr. McGowan currently has access to the same number and type of visits and telephone calls as other prisoners. While this will undoubtedly assist Mr. McGowan in repairing the serious damage done to his relationships by the restrictive policies he was subjected to at the CMU, Defendants have not shown, nor even argued, that the effects of two years without physical contact or frequent telephone access have disappeared. Mr. McGowan's sentencing judge recommended he serve his time close to his family at FCI Fort Dix, New Jersey. *Id*. at ¶ 18. Mr. McGowan's transfer to a facility with easier and more frequent family access would allow Mr. McGowan and his family to repair the harm done to their relationships. *Id*. at ¶ 16. Despite this clear path, the BOP has given no indication that Mr. McGowan will *ever* be transferred back to a low security prison. This is another direct impact of his CMU designation.

In addition, Mr. McGowan and Mr. Twitty both face the possibility of adverse treatment within and outside the BOP due to the retention in BOP files of their CMU designation, and its underlying rationale. *See* Twitty Decl. at ¶¶ 5, 9, 10, 12 (information about Mr. Twitty's designation to the CMU has been shared with Community Corrections, the Parole Commission, and the Federal Bureau of Investigation (FBI), and may have resulted in his inclusion on the Terrorist Screening Center's no-fly list); McGowan Decl. at ¶ 10 (Mr. McGowan believes his CMU designation has resulted in his placement on a terrorist watch-list or the no-fly list).

The case *West v. Cunningham*, 456 F.2d 1264 (4th Cir. 1972), is instructive on this issue, as it involved a prisoner's challenge to placement in a maximum security unit without process. After two and a half years in the restrictive unit, the prisoner was returned to general population and defendants sought to dismiss his procedural due process challenge as moot. *Id.* at 1264-65.

The court denied dismissal based on the "possibility" that the prisoners' time in segregation might lead to an adverse legal consequence. *Id*. at 1265. The court stated:

> If, as [the plaintiff] alleges, he has been punished in an arbitrary manner, without a hearing, without specification of the charges against him and without an opportunity to defend himself, and when the adverse consequences of the disciplinary action are continuing, redress, when it is practicable, should be granted. Although the relief originally sought is no longer available, we should not shrink from doing whatever is possible to erase any lingering prejudice to [the plaintiff] from the allegedly unconstitutional activities of the prison administrators. To this end, plaintiff should have an opportunity to prove the allegations in the complaint and show his entitlement to appropriate relief.

Id. at 1265-66; *see also, Black v. Warden*, 467 F.2d 202, 204 (10th Cir. 1972) (procedural due process challenge to placement in isolation unit not mooted by transfer out of unit because "there may be a continuing effect in the penal institutions from the use of records maintained concerning this punishment. Unless such disciplinary records are expunged and not to be used against Black, we may not dismiss the matter as moot on the showing made to us, despite the transfer of custody") (citations omitted).

Here, the BOP has declined to take any steps, such as expungement or transfer to an appropriate facility, to mitigate the effects of the challenge conduct or limit its impact on Plaintiffs. *Cf. Preiser v. Newkirk,* 422 U.S. 395 (1975) (challenge to transfer of prisoner to maximum security prison without process mooted by transfer of prisoner to minimum security prison, and placement of notation in prisoner's file indicating that the challenged transfer should have no bearing on future parole board determinations); *Davidson v. Stanley,* No. 02-190, 2003 U.S. Dist. LEXIS 13520, *12-13 (D.N.H. Aug. 4, 2003) (consent to court order, proposed expungement of challenged prison program requirement, and letter to parole board appeared to constitute effective amelioration).

As such, Plaintiffs McGowan and Twitty are still subject to the reputational harms associated with CMU designation – including being labeled as management problems, and individuals who require enhanced monitoring and security measures. This lingering reputational harms means that there is still a live controversy that can be redressed by this Court. *See*, *e.g.*, *Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003). A declaratory judgment that the BOP was "wrong to single [them] out" and subject them to the CMU deprivations without due process would "give redress for [their] reputational injuries." *Id*. at 1216.

Finally, Mr. McGowan and Mr. Twitty's protected First Amendment activity has been, and continues to be, chilled as a result of their CMU designation. As explained at length in prior briefing and *supra*, McGowan and Twitty have not received any meaningful explanation of why they were designated to the CMU in the first place, nor why they were finally transferred away. *See* Plaintiffs' Memorandum in Opposition to Motion to Dismiss (Docket # 23) at 21-22; McGowan Decl. at ¶ 8; Twitty Decl. at ¶ 14. Both have alleged, and both continue to believe, they were transferred as a result of protected First Amendment speech and conduct, including discussion of social and political issues, and religious activity within prison. McGowan Decl. at ¶ 11; Twitty Decl. at ¶ 15. Both are currently chilled from engaging in such protected activity out of fear that they might be redesignated to the CMU. *See* McGowan Decl. at ¶ 13 (Mr. McGowan has ceased to speak out on social justice issues and write blogs and articles for fear that resuming prior advocacy might result in his redesignation to the CMU); Twitty Decl. at ¶ 15 (Mr. Twitty has kept silent about his religious beliefs and his Muslim faith in situations where he would ordinarily speak about them as he fears this is in part what resulted in his CMU designation and he fears redesignation). This chill is yet another continued adverse effect of Plaintiffs' CMU designation, and should be alleviated by declaratory and injunctive relief.

II. If There Is Any Question as to the Continued Existence of a Live Controversy, this Court Should Order Limited Jurisdictional Discovery.

Defendants' mootness argument is jurisdictional in nature, as Article III of the United States Constitution requires that a "case or controversy" subsist through all stages of federal judicial proceedings. *See Spencer v. Kemna,* 523 U.S. 1, 7 (1998). Thus, federal courts lack jurisdiction to hear moot cases. *Nat'l Black Police Ass'n,* 108 F. 3d at 349. As Plaintiffs have demonstrated above, Defendants have not met their heavy burden of establishing mootness.[4] However, should this Court be inclined to disagree, and as an alternative to dismissing Plaintiffs' claims, Plaintiffs McGowan, Twitty and Jones[5] respectfully seek leave to conduct limited jurisdictional discovery to establish: (1) the likelihood of Plaintiffs' re-designation to the CMU; and (2) any continuing adverse effects of CMU designation.

Jurisdictional discovery is appropriate to supplement jurisdictional allegations. *See Farouki v. Petra Int'l Banking, Corp.,* 683 F. Supp. 2d 23, 28 (D.D.C. 2010). Such a request may be made by motion, or in response to a motion to dismiss. *See Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 50 (D.D.C. 2009). This Circuit's standard for permitting jurisdictional discovery is "quite liberal," *Davis v. Grant Park Nursing Home LP,* 639 F. Supp. 2d 60, 75 n.12 (D.D.C. 2009) (citation omitted); discovery is justified when plaintiffs have a

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[4] Plaintiffs' counsel puts the Court and Defendants on notice that there are additional individuals currently incarcerated in both the Marion and Terre Haute CMUs, who were designated to those CMUs for alleged reasons similar and/or identical to Plaintiffs, including other CMU prisoners who were not convicted of crimes related to terrorism. These individuals have expressed interest in joining in this litigation. If appropriate, Plaintiffs may seek leave in the future to amend the complaint to add those individuals.

[5] The question of whether Plaintiff Royal Jones has standing was addressed in Defendants' initial Motion to Dismiss and Plaintiffs' original Memorandum in Opposition to that motion. Although Plaintiffs bear the burden of alleging standing, Mr. Jones' situation does bear some similarities to that of the Plaintiffs addressed in this briefing – Mr. McGowan in particular. Should Mr. McGowan and Mr. Twitty be granted limited jurisdictional discovery to resolve the question of mootness, that opportunity should also be extended to Mr. Jones.

good faith basis for believing the results will supplement jurisdictional questions. *See Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1998).

Here, Plaintiffs propose to take limited discovery directed solely to the question of mootness. Toward that end, proposed document requests and a 30(b)6 deposition notice are attached as Exhibit C.

CONCLUSION

For the reasons stated above, Defendants' supplemental motion to dismiss should be denied.

Dated: New York, NY
November 23, 2010

Respectfully submitted,

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Certificate of Service

I certify that on November 23, 2010 I caused the foregoing OPPOSITION TO DEFENDANTS' MOTION TO DISMISS to be served by first class mail on the *pro se* Applicants listed below.

Dated: November 23, 2010

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