IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	**Case No.: 1:17-cr-109 (APM)**
Plaintiff,	)	
v.	)	
AZAM DOOST, also known as	)	
Adam Doost,	)	
Defendant.	)	

ADAM DOOST'S SECOND EMERGENCY MOTION FOR A REDUCTION IN SENTENCE AND COMPASSIONATE RELEASE PURSUANT TO 18 U.S.C. §3582

Defendant Adam Doost, through his undersigned counsel, respectfully moves this Court for an order reducing his 54-month sentence to time served pursuant to 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling circumstances" in light of the COVID-19 pandemic and the conditions FPC-ATWATER, together with his multiple high-risk underlying health conditions, and the sentencing factors set forth in 18 U.S.C. §3553(a).

Mr. Doost is incarcerated at FPC-Atwater in Merced, California. He is at very high risk for serious illness, morbidity and mortality from COVID-19 because he suffers multiple comorbidities, including moderate persistent asthma, obesity, smoking, and potentially abdominal cancer. He has strong family support, has performed well on pretrial release and in prison, and can reside with his family upon release. He is not a danger to the community and his release is supported by the factors set forth in 18 U.S.C. §3553(a). In light of the reported cases of COVID-19 at USP-Atwater, the BOP's insufficient response to the pandemic, and the documented lack of medical care and attention at the prison and specifically in response to Mr. Doost's medical needs, a sentence reduction to time served will best serve the BOP's goals, is consistent with precedent, supported by the law, and most notably will greatly reduce the risk that Mr. Doost will suffer from serious illness, morbidity, or death from COVID-19 complications.

This motion is based the instant motion, the following memorandum of points and

authorities, exhibits, and any other evidence or argument presented at the hearing and before ruling on this motion. Due to the urgent nature of this motion and the COVID-19 pandemic, Mr. Doost requests expedited briefing and consideration by the Court.

I. FACTUAL BACKGROUND & HISTORY

Defendant Azam Doost is 42 years old. On June 7, 2017, he was charged by Indictment with three counts of Major Fraud against the United States in violation of 18 U.S.C. §§1031(a) and 2, eight counts of Wire Fraud in violation of 18 U.S.C. § 1343, four counts of False Statement on Loan Application or Extension in violation of 22 U.S.C. § 2197(n) and 18 U.S.C. § 2, and 22 U.S.C. § 2197(n), and eight counts of Money Laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2. On September 24, 2018 a jury found Mr. Doost guilty of Counts 1-20 in the Indictment and not guilty of Counts 21-23.

On September 19, 2019, Mr. Doost was sentenced to 54 months in prison, followed by 36 months of supervised release. Dkt No. 159, 160. On November 5, 2019, Mr. Doost surrendered to USP-Atwater's satellite camp (FPC-Atwater) located in the City of Atwater, Merced County, California. Currently, Mr. Doost's case is on appeal in the United States Court of Appeals for the D.C. Circuit.

On April 24, 2020, Mr. Doost filed an Emergency Motion for Compassionate Release. Dkt No. 176. On April 29, 2020, the government filed an opposition to Mr. Doost's motion. Dkt. No. 177. And on May 1, 2020, Mr. Doost filed his reply to the government's opposition. Dkt No. 179. Subsequently on May 6, 2020, the Court issued a ruling denying Mr. Doost's motion. Dkt # 180. The Court's order included the following findings:

1. Defendant failed to demonstrate evidence of "moderate to severe" asthma, and had no history of asthma prior to 2015.
2. At the time of sentencing, Defendant reported he was suffering from "seasonal asthma" and "does not use an inhaler."
3. Defendant did not demonstrate that USP-Atwater presents a greater risk of exposure to COVID-19 as there were no reported cases of the virus as of May 5, 2020.

4. Defendant was housed in a separate unit known as the "Camp."
5. Defendant did not demonstrate that remaining at USP-Atwater makes him more vulnerable to the disease than if on home confinement.
6. Defendant failed to present compelling evidence that the measures in place at USP-Atwater are inadequate to protect inmates.
7. Defendant did not present evidence about the conditions at the USP-Atwater "Camp" in the context of COVID-19 and its spread.

At the time Mr. Doost filed his initial motion for compassionate release, he did not have access to all of his medical records including from abroad, his complete medical chart from Kaiser Permanente, or his medical file from the Bureau of Prisons. He also had not consulted with an expert to review his medical history and assess his health conditions in the context of COVID-19 towards rendering a detailed medical opinion regarding the type of asthma, other qualifying illnesses, and the impact of COVID-19 infection thereon. The initial motion was therefore based primarily on Mr. Doost's April 2015 medical records from Kaiser Permanente and nothing more.

Here, Mr. Doost now provides a detailed declaration which addresses not only his multiple comorbidities, all of which warrant early release, but also conditions at the Camp and corroborating information that clearly establish an extraordinary level of neglect and disregard by the BOP in their response not only to COVID-19 but to Mr. Doost's health and wellbeing. This motion also provides the Court with up-to-date numbers of reported COVID-19 cases at USP-Atwater, to wit 7 reported cases (as of July 18, 2020), as well as an alarming increase in COVID-19 cases in the City of Atwater and Merced County, all of which pose a serious health risk to any vulnerable prison inmate with CDC-recognized underlying medical conditions like Mr. Doost.

Having had the opportunity to obtain a full copy of his medical documents, consult with an expert pulmonologist, and gather the supporting documentation that was not available to present to the Court at the time of his April 24, 2020 motion, Mr. Doost now moves the court in this new motion which provides the Court with a more detailed account and assessment of his underlying illnesses in the context of the COVID-19 pandemic, as well as

the housing conditions at the FPC-Atwater, reported COVID-19 cases, and the lack of adequate response by the health services staff at USP-Atwater.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. JURISDICTION

Notwithstanding the pending appeal, this Court has jurisdiction to consider this Motion. Fed. R. Crim. P. 37. *See United States v. Hammond*, CR 02-294 (BAH), 2020 WL 1891980, at *4 (D.D.C. Apr. 16, 2020) (granting an indicative ruling that district court would reduce defendant's sentence in light of COVID-19); *See also United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

Mr. Doost therefore seeks an "indicative ruling" that this Court would grant the motion should the D.C. Circuit remand for that purpose, so that Mr. Doost may request that the D.C. Circuit remand the case.

B. LEGAL STANDARD

Under the First Step Act of 2018, a court may reduce a previously imposed sentence where "extraordinary and compelling reasons warrant such reduction, and where "the defendant has fully exhausted all administrative rights" to seek release through the Bureau of Prisons. 18 U.S.C. 3582(c). In determining whether release is warranted, the court is to consider "the factors set forth in 18 U.S.C. §3553 to the extent that they are applicable." *Id.* Furthermore, a sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

"After considering" the sentencing factors in 18 U.S.C. §3553(a) "to the extent that they are applicable," a court may grant a motion to reduce the defendant's sentence in one of two circumstances: 1) "if it finds that …extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. §3582(c)(1)(A)(i), or 2) if the defendant is at least 70 years of age, and meets other conditions not applicable here. *Id.* Furthermore, a reduction under

§3582(c) must be "consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C. §3852 (c)(1)(A).

While the statute does not define "extraordinary and compelling reasons," courts have relied on U.S.S.G. §1B1.13 for "extraordinary and compelling reasons" that may warrant a reduction in sentence.[1]

There is also a strong line of authority in which courts have concluded that the §1B1.13 guidelines are no longer limiting, and the court has discretion to define what constitutes an "extraordinary and compelling" reason.[2]

Pursuant to §1B1.13, five circumstances that establish "extraordinary and compelling reasons" warranting a reduction in a defendant's sentence:

> 1. if "the defendant is suffering from a terminal illness;
>
> 2. **if the defendant is suffering from a "serious physical or medical condition**…serious functional or cognitive impairment, or…deteriorating physical or mental health because of the aging process…**that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover**";
>
> 3. if "the defendant is at least 65 years old; is experiencing serious deterioration in physical or mental health because of the aging process; and has served at least 10 years of 75 percent of his or her term of imprisonment, whichever is less";
>
> 4. family circumstances require the defendant to care for minor children or a spouse or registered partner;
>
> 5. if "as determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

In addition to listing possible "extraordinary and compelling reasons," section 1B1.13 "imposes an additional consideration of whether the defendant is a danger to the safety of

[1] *See United States v. Esparza,* No. 1:07-CR00294-BLW, 2020 WL 1696084 (D. Idaho, Apr. 7, 2020); *See also Riley v. United States* No. 19-1522 JLR, 2020 WL 1819838 (W.D. Washington, Apr. 10, 2020) ("In the absence of contrary controlling authority, and given the limited statutory exceptions to the general rule of the finality of judgments, this court will continue to follow the guidance of the Sentencing Commission's policy statement limited the scope of "extraordinary and compelling" reasons that warrant compassionate release under §3581(c)(1)." (citing *Dillon v. United States,* 560 U.S. 817. 827 (2010)).

[2] *See United States v. Rodriquez*, No. 17-cr-00021-WHO, 2019 WL6311388 (N.D.C.A., Nov. 25, 2019), 424 F. Supp.3d 674, *See also United States v. Chan,* No. 96-cr-00094-JSW, 2020 WL 1527895 (NDCA, Mar. 31, 2020); *United States v. Parker,* No. 2:98-cr-00759-CAS, 2020 WL 2572525 (C.D.C.A., May 21, 2020)

any other person or to the community." *See United States v. Numann,* No. 3:16-cr-00025-TMB WL 1977117 (District of Alaska, Apr. 24, 2020)

C. MR. DOOST HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES WITHIN THE BUREAU OF PRISONS

The 2018 First Step Act amended the BOP's protocol for compassionate release as codified in 18 U.S.C. §3582. An inmate may now move the court for compassionate release after having "exhausted all administrative rights" within the BOP "or the lapse of 30 days from the receipt of such a request by the warden of defendant's facility, whichever is earlier." 18 U.S.C. §3582.

On March 23, 2020, Mr. Doost sent an e-mail to the USP-Atwater Warden requesting compassionate release due to COVID-19. *See Defendant's BOP Compassionate Release Request* **Exhibit A**. The Warden's response was that Mr. Doost should seek his "Unit Team" since e-mailing was not the appropriate "venue." *Id*. Thereafter, on March 30, 2020, Mr. Doost submitted a *written* request as directed by the Warden and months later on July 2, 2020, Warden Ciolli sent a boilerplate response to Mr. Doost denying his request for early release. *Id.*

The statutory 30-day period since the warden's receipt of Mr. Doost's March 30, 2020 written request lapsed on April 30, 2020. Mr. Doost has therefore exhausted all administrative remedies prior to moving this court for an order for compassionate release pursuant to 18 U.S.C. §3582.

D. EXTRAORDINARY AND COMPELLING REASONS JUSTIFY A REDUCTION IN SENTENCE

The "extraordinary and compelling" reasons justifying Mr. Doost's early release from incarceration amid the deadly COVID-19 pandemic consist of his multiple underlying health conditions which individually and in combination place him at a higher risk of severe illness, morbidity and mortality if he were to contract the coronavirus; the growing COVID-19 cases at USP-Atwater; BOP's lack of adequate pandemic response; and its failure to provide Mr. Doost with medically necessary treatment and diagnosis of existing

and potential health conditions.

1. Dangers of Incarceration in the Era of COVID-19

On March 4, 2020 the Governor of the State of California "proclaimed a state of emergency in California as a result of COVID-19" *See Grano v. Sodexo Mgmt., Inc.,* No. 18-cv-01818-GPC, 2020 WL 1975057 (S.D.C.A., Apr. 24, 2020). " The World Health Organization declared COVID-19 a global pandemic on March 11, 2020" and the President "declared the outbreak to constitute a national emergency on March 19 2020." *See United States v. Lopez*, No. 1:20-mj-00046-SAB, 2020 WL 1433158 (E.D.C.A., Mar. 24, 2020). On March 26, 2020, and on April 3, 2020, the Attorney General of the United States issued memoranda directing the BOP "to grant home confinement to inmates seeking home confinement in connection with the ongoing COVID-19 pandemic" and "immediately process them for transfer." *See United States v. Percoco*, No. 16-cr-00776-VEC, 2020 WL 2143033 (S.D.N.Y., May 5, 2020).

It is undisputed that "due to the novel coronavirus pandemic, we are in extraordinary times." *See United States v. Daniels,* No. 19-cr-00709-LHK, 2020 WL 1815342 (N.D.C.A., Apr 9, 2020). The present global pandemic is a quintessential extraordinary circumstance beyond what Americans have experienced in their lifetimes. And the dangers which COVID-19 presents to incarcerated individuals are blatantly obvious.[3] At the Atwater prison where Mr. Doost is housed, the BOP has confirmed six staff and one inmate have tested positive for the virus as of July 18, 2020.[4] On June 24, 2020, the BOP reported only one confirmed case. Within a week, the facility reported three confirmed cases. And while, just one day prior, on July 12, 2020, the BOP still confirmed only three positive cases of COVID-19 among staff, in a period of 24-hours that number doubled to six. And within five days, one inmate is reported positive for COVID-19 *This is exactly the wildfire speed with which the virus spreads in the confines of prison.*

[3] *See* COVID-19 Outbreak Devastates California's San Quentin Prison (July 4, 2020) https://www.npr.org/2020/07/04/887239267/covid-19-outbreak-devastates-californias-san-quentin-prison.
[4] https://www.bop.gov/coronavirus/

"Correctional and detention facilities present unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors… Incarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced."[5]

"There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members. Some settings… have high turnover, admitting new entrants daily who may have been exposed to [COVID-19] in the surrounding community or other regions."[6] And "adequate levels of custody and healthcare staffing must be maintained to ensure safe operation of the facility…Incarcerated/detained persons and staff may have medical conditions that increase their risk of severe disease from COVID-19."[7]

Furthermore, "the ability of incarcerated/detained persons to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations. Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants."[8] And most notably "incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation."[9]

The ABA Journal cites to Homer Venters, the former chief medical officer at New York City's Riker's Island jail complex: "Jails and prisons are often dirty and have really very little in the way of infection control…[T]here are lots of people using a small number of bathrooms. Many of the sinks are broken or not in use. You may have access to water,

[5] *See* CDC Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html
[6] *Id.*
[7] *See* CDC Hand Hygiene Recommendations (updated May 17, 2020) - https://www.cdc.gov/coronavirus/2019-ncov/hcp/hand-hygiene.html.
[8] *Id.*
[9] *Id.*

but nothing to wipe your hands off with, or no access to soap."[10]

In a March 27, 2020 sworn affidavit, Dr. Brie Williams, Professor of Medicine at the University of California, San Francisco and Director of UCSF's Criminal Justice & Health Program attests "Because inmates live in close quarters, there is an extraordinary high risk of accelerated transmission of COVID-19 within jails and prisons. Inmates share small cells, eat together and use the same bathrooms and sinks. They eat together at small tables that are cleaned only irregularly. Some are not given tissues or sufficient hygiene supplies." *See United States v. McRae,* No. 2:16-cr-00566-TS, Dkt. No. 181-3, 2020 WL----- (D. Utah, May 26, 2020). "Effective social distancing in most facilities is virtually impossible, and crowding problems are often compounded by inadequate sanitation, such as a lack of hand sanitizer or sufficient opportunities to wash hands." *Id.* Dr. Williams further attests that, as of March 23, 2020, people ranging from age 18 to 44 accounted for 46 percent of positive tests and across the nation, 38 percent of those hospitalized were between the ages of 20 and 54 with 12 percent of the intensive care patients between age 20 and 44. *Id*. He concludes that jails and prisons are fundamentally ill-equipped to handle a pandemic, stating "…correctional health is public health. Decreasing risk in prisons and jails decreases risk to our communities." *Id.*

Another expert, Chris Beyrer, M.D., professor of Epidemiology, International Health, and Medicine at the Johns Hopkins Bloomberg School of Public Health states "COVID-19 poses a serious risk to inmates and workers in detention facilities…long been known to be associated with high transmission probabilities of infectious diseases…" *See McRae, supra* Dkt. No. 181-2. He further elaborates: "Infections that are transmitted through droplets, like influenza [and the COVID-19 virus], are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible. *Id.* Dr. Beyrer accurately identifies the features of prison facilities

[10] *See* How Can Prisons Contain Coronavirus When Purell is Contraband?, ABA Journal (Mar 13, 2020), https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus

that heighten risks for exposure and transmission of an infectious disease including "physical/mechanical risks such as overcrowding, population density in close confinement, insufficient ventilation, shared toilet, shower, and eating environments and limits on hygiene and personal protective equipment such as masks and gloves…" *Id.*

There is no shortage of expert findings that unequivocally establish the dangers of incarceration amid this pandemic. These findings are not theoretical assertions of possibilities. Rather, they detail facts and probabilities. And those dangers place inmates like Mr. Doost with underlying medical conditions at a higher risk or morbidity and mortality if infected.

FPC-Atwater *is* a detention facility not a suburban country club. It is a minimum security prison that presents an even more dangerously dense layout than the larger USP-Atwater facility and similar higher security prison facilities. The Camp is one single dorm with lines of bunk beds in close proximity. But for an hour of outdoor recreational time per day, this is where Mr. Doost and approximately 99 other inmates sleep, pass time, and eat. **Exhibit B**. They share faucets, showers, bathrooms, sinks, phones, and computers that are rarely cleaned and sanitized. *Id*. Not only do Camp inmates lack access to sanitizers, but they are often out of soap to wash their hands for days at a time. *Id.* And while Mr. Doost is confined to this crowded unsanitary dorm of nearly 100 inmates, neither he nor the other inmates are safe or protected against exposure to the virus. There is constant and daily comings and goings of BOP staff, inmates who work outside the Camp, newly transferred inmates, inmates returning from the SHU (located at USP-Atwater), outside delivery couriers, and others. *Id.* The fact that the BOP has suspended visitation and limited attorney visitation and recreational activity does not virus proof the Camp in any way.

Some courts have reasonably concluded that "the danger of COVID-19 to high-risk individuals who are imprisoned is likely much greater than to those who are free to take their own protective measures." *See United States v. Esparza*, No. 1:07-cr-00294-BLW, 2020 WL 1696084 (D. Idaho, Apr. 7, 2020). As there is currently no cure or vaccine for COVID-19, the CDC recommends individuals with asthma, obesity, a history of smoking

and those who may be immuno-compromised due to other health conditions protect themselves from the disease by "keeping space between you and others," "staying home," and "cleaning your hands often by washing with soap and water or using an alcohol-based sanitizer." The recommendations emphasize that "keeping a distance from others is especially important for people who are at high risk of getting very sick."[11] These recommendations are impossible to follow in a dormitory of 99 inmates with lines of bunks, no hand sanitizer, no soap, and unsanitary shared bathrooms, surfaces, and devices.

As this alarming crisis continues to spin out of control in the BOP, the universally recommended antidote is simple: reduce the prison population. Perhaps it is because of the inherently dangerous nature of incarceration during a pandemic that many courts have recognized the coronavirus pandemic alone -without any underlying health conditions - is an "extraordinary and compelling circumstance" warranting release of an inmate from custody.[12]

In Mr. Doost's case however, it is not the COVID-19 pandemic alone that presents an extraordinary and compelling reason warranting early release. Rather, it is the combined risk of exposure associated with the virus and his multiple comorbidities, the BOP's inadequate and callous response, and his inability to provide self-care while incarcerated that present extraordinary and compelling reasons warranting early release

[11] *See* CDC How to Protect Yourself and Others (Updated April 24, 2020) - https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

[12] *See United States v. Le*, No. 1:19-cr-10199, 2020 WL ----- (D. Mass., May 6, 2020) (releasing pretrial defendant even though he lacks physical conditions that put him at high risk from COVID-19 because "the reduction in the prison population in and of itself" is important in combatting the virus); *See also United States vs. Kelly*, No. 13-cr-69-CWR-LRA, 2020 WL 2104241 (S.D. Mississippi, May 1, 2020) (granting compassionate release to an individual in his late 20's without health issues where BOP failed to control the outbreak of COVID-19 at his facility); *United States v. Chestnut*, No. 09-cr-06071-DGL-MWP, 2020 WL ------ (N.D.N.Y., Apr. 29, 2020) (granting compassionate release request despite the fact that Mr. Chestnut was not vulnerable based on a compromised immune system or pre-existing medical condition); *United States v. Vazquez*, No. 18-cr-20530-Ungaro, 2020 WL------ (S.D. Fla., Apr. 13, 2020) (recommending to BOP that the defendant serve his remaining sentence on home confinement where the defendant was in his late 30's and did not claim to suffer from any health that increased his risk of illness from COVID-19).

pursuant to 18 U.S.C. §3582.

2. FPC-Atwater's Heightened COVID-19 Threat

(a) City of Atwater and Merced County v. City of Newark, Alameda County

Since late June, California has experienced a significant spike in COVID-19 cases.[13] Merced County was the fourth to make the "hot spot" list.[14] Notably, according to the California Department of Public Health (CDPH), Merced County falls substantially short of meeting the objectives and threshold for case rate per 100,000, testing positivity and percentage change in average COVID positive hospitalized patients.[15] To the contrary, Alameda County where Mr. Doost would reside upon release from prison is largely compliant with the CDPH objectives.[16]

On May 15, 2020 – amid the pandemic and in defiance of shelter-in-place orders- the City of Atwater declared itself a "sanctuary city" announcing that businesses could remain open despite state and county orders to shutter businesses and stay at home.[17] The City's Resolution states if *would not 'actively join forces with other agencies solely for the purpose of enforcing state or county COVID-19 order."*[18] The City of Atwater therefore is running its own show in response to the deadly pandemic and the existing guidance for safety and personal protection. The City's defiance is clearly reflected in its fast-rising number of COVID-19 cases. It would be fair to assume that many if not most of the BOP staff at USP-Atwater reside within the City of Atwater and in other parts of Merced County.

Expectedly, as of July 15, 2020, the City of Atwater has 322 positive cases of

[13] *See* Tracking the Coronavirus in California (July 11, 2020) - https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/

[14] *See* Changes to California's Stay at Home Order (June 30, 2020) - https://abc30.com/phase-3-california-opening-businesses-coronavirus-covid-19/6062736/

[15] https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyDataTable.aspx

[16] *Id.*

[17] *See* Atwater Declares Itself 'Sanctuary City' for business, allows owners to open: https://abc30.com/atwater-sanctuary-city-council-open-businesses-coronavirus/6186252/

[18] https://www.atwater.org/wp-content/uploads/2020/06/5-15-20-Special-Mtg.pdf

COVID-19.[19] In contrast, Newark, California where the Doost family resides reported 186 cases.[20] Also as of July 16, 2020, while Alameda County showed a case rate of less than 114 per 100,000 population over the past 14 days, Merced County showed a rate of 270.7 per 100,000 over the past 14 days.[21] As compared to Alameda County, Merced County is not in compliance with the California Department of Public Health thresholds or 100 or less cases per a population of 100,0000.

		Elevated Disease Transmission		Increasing Hospitalization	Limited Hospital Capacity	
Threshold	<150	Case Rate >100 OR Case Rate >25 AND Positivity >8%		>10% Increase	<20% ICU Beds Available OR <25% Ventilators Available	
County	Avg # tests per day (per 100,000 population) (7 day average with a 7 day lag)	Case rate per 100,000 (14 days)	Testing positivity (%) (7 day average with a 7 day lag)	% Change in 3-day avg COVID+ hospitalized patients	% ICU beds currently available	% Ventilators currently available
Alameda	193.7	114.6	✓	11.1	✓	✓
Merced	141.4	270.7	15.4	29.1	✓	✓

[22]

It is clear from the recent rates and statistics that, for an at-risk individual with comorbidities like Mr. Doost, the City of Newark and Alameda County are far safer than the City of Atwater and Merced County.

(b) FPC-Atwater Conditions

FPC-Atwater is a minimum security facility consisting of one single dormitory. It is

19 https://mercedcounty.maps.arcgis.com/apps/opsdashboard/index.html#/c1de145aa2c74e2891c4b9e76f408ace
20 https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9
21 https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyDataTable.aspx
22 *Id.*

separated by a small roadway from the main USP-Atwater facility. The two facilities are approximately 750 feet apart and share common staff.

The government and BOP's frequent representation that BOP's prison facilities are fortresses immune from the coronavirus is misleading fiction. Even without visitation and limited legal visits, FPC-Atwater is a passthrough for other inmates, medical staff, food services staff, and BOP staff and employees. There is ongoing daily ingress and egress between the two facilities, USP-Atwater and FPC-Atwater. For example, the Camp's correctional staff check in for work at USP-Atwater; the Camp administrator's office is at USP-Atwater; officers from USP-Atwater frequently assist with counts at the Camp; and the Camp counselor visits the SHU at USP-Atwater daily. And many inmates from Camp work at USP-Atwater. *See* **Exhibit B**, *Declaration of Azam Doost.* Mr. Doost therefore comes into contact with inmates and staff who are in constant movement between the Camp and USP-Atwater multiple times a day on a daily basis.

The FPC-Atwater dormitory is 92' x 92' room, in which approximately 99 inmates (as of July 10, 2020) sleep in 72 double-decker bunks that are separated approximately 4 feet horizontally and 3 feet vertically. *Id.*

Mr. Doost reports that the 99 men in the dorm share one community bathroom, with seven stalls, four urinals, five working toilets, ten sinks, twelve showers, and one ice machine. The men also share six phones, each separated by less than three feet, three "Trulincs" computers, and one law library computer, each within 2 to 3 feet of one another.

Soap is provided for the common bathroom area but runs out regularly, often for days at a time. Inmates are allowed to purchase soap at the commissary; however access to commissary is limited and inmate commissary budgets were recently reduced, forcing inmates to choose between food and other essential items and soap. Inmates are not provided hand sanitizer. *Id.*

Although there was no formal cleaning schedule prior to the pandemic, the facility floors and bathrooms are now cleaned once a day by inmates. Up until recently, this included weekdays only; however the inmates have recently started cleaning once on the weekend as well. *Id*. Nonetheless, multiple items and surfaces touched throughout the day by inmates are *never* cleaned, such as the computers and phones. Though the pandemic has raged through the world, the state of California, and BOP prisons, there has been no change in the cleaning schedule, products, or protocol at the Camp.

Furthermore, FPC-Atwater is identical to facilities which have been declared a "hazardous prison environment" for the mere fact that they make socially distancing impossible. As the court observed in *United States v. Salvagno,* No. 5:02-CR-51 (LEK), 2020 WL 3410601, (N.D.N.Y. Apr. 23, 2020), reconsideration denied (June 22, 2020), comparing the dormitory environment at FCI-Danbury to that of FCI- Otisville, in *United States v. Zukerman*, No. 16-CR-194, 2020 WL 1659880, (S.D.N.Y. Apr. 3, 2020),

> Like Defendant, Zukerman both [were] incarcerated in a relatively high-risk facility, FCI Otisville. [citation omitted.]...[L]ike FCI Danbury, Otisville's *internal architecture inhibits social distancing*. [citation omitted.] The court in Zukerman emphasized that an extraordinary risk of severe illness and death from COVID-19 can, under certain circumstances, provide an "extraordinary and compelling reason" for release as defined in U.S.S.G. § 1B1.13. n.1(A)(ii)(I), even when a significant term of imprisonment remains or the underlying offense is egregious. 2020 WL 1659880, at *4, 6. An emphasis on the latter facts, under circumstances in which individual COVID-19 *risk factors are compounded by an extraordinarily hazardous prison environment*, "misses the point and understates the gravity of the COVID-19 pandemic." *Id.* at *4 (emphasis added.)

See also, Martinez-Brooks v. Easter, No. 3:20-CV-00569 (MPS), 2020 WL 2405350, (D. Conn. May 12, 2020), also involving the FCI-Danbury dormitory, in which the court noted that,

> *The cornerstone of the public health response to COVID-19 is to practice "social*

> *distancing*."... In the meantime, the vast majority of the 140 inmates at the satellite prison live and sleep in a perpetual large gathering—a single dormitory hall with bunk beds separated by four feet or less, with shared common spaces such as bathrooms and showers. [citation omitted.] .... Most of the inmates at the camp and the men's prison live in dorms that house roughly 50 people each. [citation omitted.]. Put differently, at a time when public health officials are counseling strict adherence to social distancing practice, most inmates at FCI Danbury live in close contact with between 50 and 140 other inmates, in a facility with a serious, active COVID-19 outbreak. ....Put somewhat differently, even with the measures that the Warden has put in place, due to the impossibility of adequate social distancing, confinement at FCI Danbury—due to the very structure of the facility—continues to pose a grave risk to vulnerable inmates' health. *Id., at *21,* 23 (emphasis added.)

Moreover, the risk of COVID-19 transmission in a dormitory setting is exponentially heighted due to the BOP's policy of placing inmates in 23-hour a day "lockdowns" as a crude COVID-19 mitigation strategy. While a lockdown may *reduce* population density in low, medium and maximum security facilities with one and two-man cells, a dormitory "lockdown" only *increases* population density, in the case of FPC-Atwater, by confining all 99 men in the 92' x 92' room where they sleep, eat, and pass time, thus denying them access to the, albeit equally small areas where they may otherwise dine or recreate, and eliminating the time they might otherwise spend outdoors.[23]

At a time when public health officials are counseling strict adherence to social distancing practice and sanitization, the inmates at Mr. Doost's Camp are crowded in a filthy barrack-style dorm and too close to survive the pandemic.

/ / /

/ / /

[23] *See also, United States v. Asher*, No. 1:09-CR-414-MHC-AJB, 2020 WL 3424951(N.D. Ga. June 15, 2020) ["Asher's specific situation presents extraordinary and compelling reasons to do so. Asher contends that the *physical layout of the low security satellite camp where he is housed makes it impossible to socially distance*. (citation omitted.) *Asher cohabits a dormitory-style room rather than an individual or two-person cell.* Id. *Sixty inmates in the unit share four sinks, showers, and toilets.* Id....In short, Asher...is *unable to take the most basic precautions to protect himself and his fellow inmates from getting and transmitting the virus*. This Court's finding that Asher has demonstrated extraordinary and compelling circumstances in light of the COVID-19 pandemic is in accord the holdings of numerous other federal district courts within this district, the Eleventh Circuit, and beyond. *Id.,* at *4 (emphasis added.)]; *See also, Wilson v. Williams*, No. 4:20-CV-00794, —— F.Supp.3d ——, ——, 2020 WL 1940882, at *1 (N.D. Ohio Apr. 22, 2020), enforcement granted, No. 4:20-CV-00794, 2020 WL 2542131 (N.D. Ohio May 19, 2020), and vacated, No. 20-3447, —— F.3d ——, 2020 WL 3056217 (6th Cir. June 9, 2020) [FCI Elkton's "'*dorm-style' design guarantees that inmates remain in close proximity to one another*," which makes it nearly *impossible for inmates to socially distance*.; see also *United States v. Bass*, No. 1:10-CR-166 (LEK), —— F.Supp.3d ——, ——, 2020 WL 2831851, at *1 (N.D.N.Y. May 27, 2020) ("FCI Elkton has endured an outbreak of COVID-19 that has been exacerbated by features of the *prison's internal architecture that inhibit social distancing*.")].

(c) FPC-Atwater Presents an Increased Risk of Exposure Due to BOP's Failure to Conduct Universal Testing

With the exception of facilities with extreme COVID-19 outbreaks and fatalities, the BOP has refused to conduct mass testing at any of its facilities, simultaneously crediting the absence of confirmed cases to the success of its Pandemic Response Plan, a characterization dismissed by multiple courts for its absurdity, and widely viewed as disingenuous.

In aggressively opposing every compassionate release case filed by inmates with COVID-19 vulnerability, the government has consistently argued that the *absence* of confirmed COVID-19 positive cases at facilities where the BOP has *failed to conduct mass testing* is synonymous with a COVID-19-free prison environment. This couldn't be farther from the truth. As the court observed *in United States v. Amarrah*, No. 17-20464, 2020 WL 2220008, (E.D. Mich. May 7, 2020),

> Zero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases. The Bureau of Prisons recently discovered this when it found that 70 percent of the inmates it tested were positive for the disease. . . . The Southeast Regional Vice President of the Council of Prison Locals referred to "the inside of a[prison] institution" as a "little petri dish...a life and death situation [that prison officials then take] home to our families." This disease spreads asymptomatically, which means the Court and the prison system can take no comfort in a lack of confirmed cases, and all parties should be deeply concerned by the lack of universal testing of inmates and staff.

Id., at *6.[24]

24 *See also*, *United States v. Readus*, No. 16-20827-1, 2020 WL 2572280, at *3 (E.D. Mich. May 21, 2020) ["No inmates have tested positive for COVID-19 at FCI McKean. This fact is meaningless, however, for there is no evidence on the record that any inmates have been tested... without testing FCI McKean cannot identify and isolate early outbreaks."]; *United States v. Doshi*, No. 13-CR-20349, 2020 WL 2556794, at *3 (E.D. Mich. May 20, 2020) ["The Government has responded that the facility where Doshi is held, FCI Morgantown, has zero confirmed cases of COVID-19. This fact is meaningless, however, for there is no evidence of how many inmates have been tested."]; *United States v. Feucht*, No. 11-CR-60025, 2020 WL 2781600, at *3 (S.D. Fla. May 28, 2020) ["First of all, there have been no confirmed cases of COVID-19 at FCI-Jesup. As Judge Levy in the Eastern District of Michigan recently noted, '[z]ero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases." (citation omitted); *United States v. Conner*, No. CR07-4095-LTS, 2020 WL 3053368, at *8 (N.D. Iowa June 8, 2020) ["However, without knowing whether the BOP is actively testing inmates and staff members for COVID-19 at Rochester FMC, no active confirmed cases does not mean that COVID-19 is not present at the facility. Nor does it mean there will not be a future outbreak at the facility. As the Government acknowledges, despite extensive measures to prevent transmission, more federal inmates will inevitably contract COVID-19 going forward."]; *United States v. Agomuoh*, No. 16-20196, 2020 WL 2526113, at *9 (E.D. Mich. May 18, 2020) ["As to FCI Morgantown's lack of confirmed COVID-19 cases, the Court accords no weight to this statistic without evidence that FCI Morgantown has implemented a universal testing regimen. (citation omitted). To the contrary, the lack of any confirmed testing at FCI Morgantown 'aggravates [the Court's] concerns about Defendant's likelihood to contract COVID-19 while in federal custody.' *Id*. As West Virginia

The BOP has yet to conduct mass testing at USP and FPC Atwater. Clearly, not only does no testing not mean no problem, it presents a heightened risk to vulnerable inmates like Mr. Doost who are not being protected against the virus and asymptomatic carriers.

3. <u>COVID-19 Cases and Risks at FPC and USP Atwater</u>

The coronavirus has indeed arrived at the USP-Atwater prison. And it is can be expected to spread rapidly. At USP-Atwater where Mr. Doost is housed in a camp dormitory, the BOP has confirmed seven (7) positive cases of the virus as of July 18, 2020.[25] As noted above, while on June 24, 2020, the BOP reported one (1) positive case of a staff member, by July 8, 2020 the number of cases had risen to three (3) staff members at USP-Atwater who tested positive for COVID-19. And while the total number of cases remained at three (3) on July 12, 2020, it doubled overnight to six (6) cases as reported by the BOP on July 13, 2020.[26] Inevitably, by July 18, 2020, the BOP reported one (1) inmate positive case of COVID-19 at USP-Atwater.[27] This number will expectedly continue to grow rapidly over the next few weeks as these staff members and inmate were likely carriers of the virus before a positive test and have come into contact with other staff and inmates. Regardless of the number of COVID-19 cases at any given time, "infection can spread with a deadly speed." *See United States v. Etzel,* No. 17-cr-00001-AA, 2020 WL 2096423 (D. Or., May 1, 2020). As we have witnessed surges of cases in prisons and larger communities over the past few months, positive cases begin with one or more individuals and swiftly spread among an entire population. A devastating example is the recent outbreak at San Quentin Prison, which had no reported cases through May but, by early July, a third of its population was infected and three individuals died.[28] As such it would be

lawmakers recently urged in a petition to the Bureau of Prisons, increased testing is necessary to contain the otherwise rapid and often asymptomatic spread of this disease." (citation omitted).]

[25] https://www.bop.gov/coronavirus/
[26] *Id.*
[27] *Id.*
[28] *See* Covid-19 Outbreak Devastates California's San Quentin Prison - https://www.npr.org/2020/07/04/887239267/covid-19-outbreak-devastates-californias-san-quentin-prison.

reasonable to assume that both the BOP and the virus will follow the same pattern of every prison outbreak to date. As illustrated below, reflecting the COVID-19 data posted by the BOP, once the virus is introduced by staff, given the absence of decarceration, social distancing, testing, tracing, or isolation, it will inevitably be transmitted, among inmates who, if past testing is indicative of future results, will be approximately 70% of asymptomatic COVID-positive cases, at least initially.

Facility	Date	Staff C19+	Inmate C19+
ELKTON	3/29/20	0	0
	3/30/20	0	2
	4/3/20	3	2
	4/5/20	1	7
	4/10/20	10	10
	4/15/20	34	39
	4/20/20	40	51
	4/25/20	48	51
	4/30/20	49	58
	5/5/20	49	99
	5/10/20	12	92
	5/15/20	12	118
	5/20/20	8	119
	5/25/20	7	162
	5/30/20	7	333
	6/5/20	7	441
	6/8/20	7	438
	7/12/20	3	362

Facility	Date	Staff C19 +	Inmate C19+
SEAGOVILLE	3/29/20	0	0
	4/5/20	0	0
	4/10/20	0	1
	4/15/20	0	1
	4/20/20	0	1
	4/25/20	0	1
	4/30/20	0	1
	5/5/20	0	0
	5/10/20	0	0
	5/15/20	0	0
	5/20/20	1	0
	5/25/20	1	0
	5/30/20	1	0
	6/5/20	1	0
	6/8/20	1	0
	7/12/20	7	778

Facility	Date	Staff C19 +	Inmate C19+
BEAUMONT	3/29/20	0	0
	4/5/20	0	0
	4/10/20	0	0
	4/15/20	0	0
	4/20/20	0	0
	4/25/20	0	0
	4/30/20	1	0
	5/5/20	1	0
	5/10/20	1	0
	5/15/20	1	0
	5/20/20	1	0
	5/25/20	1	0
	5/30/20	1	0
	6/5/20	1	0
	6/8/20	1	0
	7/12/20	1	331

Facility	Date	Staff C19 +	Inmate C19+
TERMINAL ISLAND.	3/29/20	0	0
	4/5/20	0	0
	4/10/20	0	0
	4/11/20	1	1
	4/15/20	2	9
	4/20/20	3	57
	4/25/20	8	73
	4/30/20	11	615
	5/5/20	15	620
	5/10/20	15	693
	5/15/20	15	129
	5/20/20	6	111
	5/25/20	6	36
	5/30/20	7	37
	6/5/20	4	25
	6/8/20	4	26
	7/12/20	4	6

Undoubtedly, whereas, once upon a time a given BOP facility may show no or low reported cases of COVID-19, it suddenly experiences a spike in cases after one or more

staff and/or inmates are infected. "Federal correctional institutions which had reported COVID-19 cases only weeks ago, and despite the steps the BOP has taken to contain the disease within its facilities, are now reporting numerous virus-related deaths." *See United States v. Burrill*, No. 17-cr-00491-RS-1, 2020 WL 1846788 (N.D. Cal. April 10, 2020). As one judge wrote, the disease "is spreading through our nation's prisons like wildfire." *See United States v. Jackson,* No. 14-cr-00576, 2020 WL 1955402 (S.D. Tex. Apr. 23, 2020). With seven (7) confirmed cases, USP-Atwater is well on its way to a larger- scale spread of the virus and growing number of reported cases in the next days and weeks.

Social distancing, sanitization, hand washing,[29] and use of face masks[30] are among the CDC-recommended guidance to protect against the spread of the coronavirus. Social distancing is indisputably impossible. Due to alcohol content, hand sanitizers are contraband in a prison facility. And while soap is the only cleaning agent available to inmates, the Camp is often out of supply or short of supply for days. *See* **Exhibit B**.

According to the BOP's "Correcting Myths and Misinformation About BOP and COVID-19," cloth face masks have been issued to staff and inmates, and "staff are not required but can *opt* to wear masks while walking on the compound…"[31] Although inmates and staff are instructed to wear masks at all times, the guidance is most definitely not enforced at FPC-Atwater where inmates and staff are frequently seen without masks or face coverings, and inmates in the dormitory do not wear masks when sleeping despite their close proximity to one another. *Id.*

Furthermore, the BOP's "Correcting Myths and Misinformation About BOP and COVID-19"[32] is a disinformation campaign. The BOP represents that it has issued cloth masks to inmates and directed them to wear masks *where* social distancing is not possible.

[29]*See* CDC Hand Hygiene Recommendations (updated May 17, 2020) - https://www.cdc.gov/coronavirus/2019-ncov/hcp/hand-hygiene.html
[30] *See* CDC Considerations for Wearing Cloth Face Coverings (updated June 28, 2020) https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html
[31] *See* Correcting Myths and Misinformation about the BOP and COVID-19 https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf
[32]*Id.*

First, social distancing in a prison facility - especially the 100 person barrack-style dorm where Mr. Doost is housed – is never possible. It is *always* impossible. Second, the Camp staff and inmates at FPC-Atwater are not adhering to this rule and it is not being enforced as it should be. **Exhibit B**. Third, a mask or facial covering is *not* ever a substitute for social distancing. Rather, it is complementary to the paramount CDC guidance of social distancing.[33] And lastly, masks are not a panacea for the deadly coronavirus. If they were, the nation would resume frequenting congregate events and venues albeit with masks and face coverings.

The BOP also represents that "Health Services throughout the BOP are conducting rounds and checking inmate temperatures at least once day."[34]. This is also not true as for the inmates at the FPC-Atwater. Neither he, nor other inmates at in his dorm are having their temperatures monitored daily. **Exhibit B**.

Most significantly, in order to detect coronavirus infection among any population, there has to be *mass* testing of not only symptomatic individuals but also asymptomatic individuals who are virus carriers. *See Declaration of Mostafa Tabassomi, M.D.,* **Exhibit C.** According to the World Health Organization, 80% of COVID-19 cases involve asymptomatic to mild carriers of the virus.[35] Because asymptomatic individuals may unknowingly carry the virus, without universal testing the risk of infection cannot be ruled out. It takes one single case of asymptomatic (or symptomatic) infection to rapidly infect dozens and hundreds of inmates and/or staff in a prison facility where social distancing is not possible.[36] In the densely populated dormitory of 99 inmates where social distancing is impossible, where sanitization materials— and even soap—are unavailable, where the

[33] *Id,* Note 13, *See also* No, Face Masks Do Not Replace Social Distancing. Here's Why https://www.huffpost.com/entry/face-masks-do-not-replace-social-distancing-why_l_5e970b37c5b65eae709d3fc7

[34] https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf

[35] https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-c ovid-19.pdf?sfvrsn=96b04adf_4#:~:text=For%20COVID%2D19%2C,infections%2C%20requiring%20ventilation.

[36] *See* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html

temperature of inmates is not being monitored daily as mandated, where use of face masks is not enforced, where staff and inmates are going in and out of the facility without testing or consistent screening, and where, despite at least seven (7) positive COVID-19 cases among staff and inmates at USP-Atwater, the BOP is not following CDC guidance, or even its own protocol, the risk of exposure to the coronavirus to vulnerable inmates like Mr. Doost is extraordinarily high. At least in facilities where mass testing has been conducted and cases of infection have been identified responsive steps may be taken to protect vulnerable inmates and those not infected.

In *United States v. Tigran Sakisyan,* No. 15-cr-00234-CRB, 2020 WL2542032 (N.D.C.A., May 19, 2020) at a time when USP-Atwater had no *reported* positive COVID-19 cases but had 7 reported symptomatic staff and at least 1 symptomatic inmate, the government provided the court with information regarding testing protocol at USP-Atwater. *See Declaration of Claudia Quiroz,* **Exhibit D**. Ms. Quiroz confirms that the Health Services staff at USP-Atwater are following the directives of Merced County Health Officials that inmates and staff should not be tested unless they show symptoms of COVID-19. *Id.* The BOP and Merced County Health Officials are clearly operating under dangerous guidelines as they have evidently directed the USP-Atwater Health Services *not* to test seven (7) symptomatic staff and one (1) symptomatic inmate, instead recommending mere isolation of the inmate for an unspecified period of time. *Id.*

Furthermore, the BOP's own guidance for testing is to test only *symptomatic* inmates.[37] The BOP's May 7, 2020 "Bureau of Prisons To Expand Rapid Testing Capabilities" press release is vague and contradictory at best. While it confirms that only symptomatic inmates will be tested, it also states "Inmates who have a Negative test result and are asymptomatic will be placed in quarantine for a fourteen (14) day period."[38] This both begs the obvious question and highlights the need for universal testing: if

[37] *See* Bureau of Prisons to Expand Rapid Testing Capabilities (May 7, 2020) https://www.bop.gov/resources/news/pdfs/20200507_press_release_expanding_rapid_testing.pdf

[38] *Id.*

asymptomatic inmates are not being tested— which they are not—how would they produce a "negative test result?" Without testing there are no test results. The government's declaration in *Sarkisyan* also confirmed that despite the May 7, 2020 BOP announcement that symptomatic inmates are tested, USP-Atwater failed to test an inmate who presented with symptoms, instead isolating him with no testing. **Exhibit D.** Moreover, if it's true that "Health Services has directed clinical staff to administer a COVID-19 test if an inmate exhibits symptoms of the virus," then why -again- was a symptomatic inmate placed in isolation without testing? Whatever the BOP's response may be, it doesn't change the fact that no universal testing is being conducted USP-Atwater despite the presence of multiple growing number of cases during the pandemic. And one thing is unequivocally clear: USP-Atwater is not even following BOP's own guidance of testing only symptomatic individuals.

Failing to conduct universal testing of individuals in a congregate environment when 80% of the cases of COVID-19 globally have been found in asymptomatic to mildly symptomatic individuals places Mr. Doost in a dangerous environment where he cannot protect himself from the risk of COVID-19 morbidity and mortality if infected. For an inmate with multiple illnesses like Mr. Doost, continued incarceration poses substantial and unacceptable risk. It is a ticking time bomb.

It is also astonishing that the BOP's surveillance of COVID-19 at USP-Atwater includes not a single BOP-ordered test of the then-seven staff who had presented with symptoms and who were sent home as described by AUSA Quiroz. **Exhibit D**, Instead, it was left up to the symptomatic staff to decide whether to be tested or not. *Id*. It is evident from the government's attestation that the BOP played no role and received no official reporting on the outcome of those tests since they were neither ordered by the nor part of any official BOP activity.

Clearly, the entire approach taken by the BOP at USP-Atwater utterly fails to consider the now well-established fact that an extremely high percentage of COVID-19

cases are spread by asymptomatic individuals. *See* Asymptomatic Transmission: Achilles Heel of Current Covid Strategies - New England Journal of Medicine.[39] Thus even if followed, procedures such as taking staff temperatures upon entering the facility does nothing to identify asymptomatic carriers. Even if this measure was sufficient response, the prison population is comprised of not only staff, but inmates. The inmates leaving and entering the Camp are not being consistently screened. **Exhibit B**.

The USP-Atwater Health Services' is also not conducting "weekly cell checks." The medical staff at the Camp routinely disregards inmate-initiated emails and requests for medical attention. **Exhibit B and F**. They are most certainly not conducting staff-initiated checks on inmates regarding medical concerns or new symptoms – neither weekly nor with any frequency. **Exhibit B**.

Although test results may be a snapshot in time and universal testing poses challenges of cost and availability of tests, it remains the only manner by which the BOP can identify cases of infection and take the necessary steps to ensure the safety of the crowded prison population. It is in fact because of the challenges mass testing poses that the World Health Organization, CDC, and state and local public health officials have implemented social distancing mandates. Since social distancing is impossible in a congregate facility such as a prison, mass testing of all inmates and staff must be undertaken to identify positive cases-including asymptomatic ones- and protect vulnerable inmates like Mr. Doost.

Moreover, it is now widely understood that the BOP's reporting of confirmed inmate cases is more likely a result of its lack of testing than a lack of the virus' presence in the

39 *See* Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19
https://www.nejm.org/doi/full/10.1056/NEJMe2009758

prison.[40] In the case of *United States v. Tigran Sarkisyan,* U.S. District Court Judge Stephen Breyer correctly noted that a lack of reported cases of COVID-19 among USP-Atwater inmates is a "meaningless statistic" without testing. No. 15-cr-00234-CRB, 2020 WL 2542032 (N.D.C.A., May 19, 2020). While the Court's order was based on the government's representation that at the time no testing had been conducted of inmates or staff at USP-Atwater, the lack of *mass* testing that includes *asymptomatic* inmates who may be carriers is the equivalent of -and just as meaningless- as no testing at all.

Under the CARES Act, the BOP was awarded $100 million in funding for urgent needs, including "personal protective equipment, *testing materials*, home detention, electronic monitoring, and other alternatives to incarceration to improve prison conditions" with specific reference to the "high-risk and high-need populations, the distribution of infectious disease personal protective equipment and *COVID–19 test kits to the Bureau for use by inmates and personnel of the Bureau*."[41] Nonetheless, except when compelled by court order, or an explosive COVID-19 outbreak, the BOP has proven unable or unwilling to conduct mass testing at any of its facilities.

As the deadly coronavirus spreads rampantly through federal prisons from coast to coast, the BOP has failed to provide adequate testing, to wit, universal testing. Instead it tests prison populations *after* a devastating spread of the virus that causes hundreds or more

40 *See United States v. Knox*, No. 16-cr-116, 2020 WL 3207799 (N.D. Alabama, June 15, 2020) (noting that "[t]he Court does not have data about the extent of COVID testing at Aliceville FCT"); *See also United States v. Santiago*, No. 10-cr-555, 2020 WL 3121146 (S.D.N.Y., June 12, 2020 ("There is good reason to believe that the numbers report[ed] by the BOP understate the actual numbers of tested positive cases"); *United States v. Pabon*, No. 17-cr-165, 2020 WL 2112265 (E.D.P.A., May 4, 2020) ("[a]lthough the government represents that Lewisburg Camp has no cases of COVID-19, the government never says whether anyone has been tested" and that "[w]ithout mass testing-any any detailed information about the current conditions at the Lewisburg Camp- the Court may be getting a false picture"); *United States v. Haney*, No. 19-cr-541, 2020 WL 1821988 (S.D.N.Y., Apr. 13, 2020)(noting that BOP statistics "must be treated with great caution, as the BOP has so far only tested for COVID-19 those prisoners who seem to be sufficiently unhealthy as to be in need of possibly hospitalization"); *United States v. Esparza*, 07-cr-294, 2020 WL 1696084 (D. of Idaho, Apr. 7, 2020) (noting that "testing inside prisons has been scant except for people who self-report symptoms – which means that statistics about the number of infections already in BOP facilities is largely meaningless").

41 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 12003(b)(2) (2020).

inmates and staff to fall ill and in some cases die.[42] The BOP fails to test symptomatic staff and inmates pursuant to its own protocol. It has failed to provide proper screening, again, pursuant to its own guidance. It has also failed to provide basic supplies such as soap and hand sanitizer. And it has failed to enforce the guidance of masks and face coverings. Time is running out for Mr. Doost whose underlying conditions place him at a higher risk of severe illness and death due to COVID-19.

In fact, in April Mr. Doost requested a COVID-19 test and the BOP's response was that it would be administered "if warranted." No questions were asked about why he r requested a test, whether he had symptoms, and what his symptoms were. **Exhibits B and F**. Clearly the rule for testing within the BOP is that testing is the exception to the general rule of not testing: the less we know, the less we need to do and the less cases we will report.

In sum, the BOP strategy of limiting testing to only symptomatic inmates is premised on a dangerous misconception that "if we don't test, then it doesn't exist." And thus, the emphasis is on avoiding testing whenever possible. Mr. Doost cannot afford to be in any environment where the risk of illness is real but unidentified.

4. Mr. Doost's Underlying Medical Conditions Place Him at High Risk of Severe Illness, Morbidity and Mortality as a Result of COVID-19 and Are Individually and in Combination "Extraordinary and Compelling Reasons" Warranting Early Release

Mr. Doost is a 42-year old man who suffers from **moderate persistent asthma** (largely unmanageable due to allergic rhinitis), **obesity**, a long history of **smoking**, and **potentially abdominal cancer**. *See* **Exhibits B and C.** *See also* **Exhibit E**. Mr. Doost is not expected to recover from these medical conditions and the BOP is most definitely and demonstrably not equipped to provide the essential warranted care and treatment to Mr. Doost. **Exhibit**

42 *See* Terminal Island Prison Inmates Have Worst Coronavirus Outbreak in Federal System https://www.latimes.com/california/story/2020-04-29/coronavirus-terminal-island-prison-inmates-outbreak

B. *See also* **Exhibit F**.

Moderate (to severe) asthma, obesity, history of smoking, and compromised immunity (from cancer or other underlying conditions) are all medical conditions recognized by the CDC to lead to severe illness, morbidity and mortality due to COVID-19.[43] And the COVID-19 virus does not discriminate by age. Individuals of any age with certain underlying medical conditions are at a higher risk of severe illness, morbidity and mortality if they contract the virus.[44] COVID-19 has caused severe illness not only within the elderly population, but in children and adults many of whom are in their 30's and 40's. A recent notable example is the death of actor Nick Cordero on July 7, 2020. He was 41 years old and had no underlying health conditions. Nonetheless, he battled the virus for 95 days on a hospital ventilator, subsequently undergoing amputation of his leg and finally died due to COVID-19 complications.[45] According to the CDC, hospitalization rates increase by age category. At the age of 42 years Mr. Doost is 61% more likely to be hospitalized for COVID-19 complications than someone in the 30-39 year age category. **Exhibit C**. Individuals of "any age" who suffer from enumerated underlying conditions are considered at risk for severe illness, morbidity and mortality if infected with the coronavirus.[46] Mr. Doost suffers from not one but four of the CDC-identified underlying health conditions, namely **moderate persistent asthma**, **obesity**, a history of **smoking**, and possible **compromised immunity due to cancer**. *See* **Exhibit C**.

(a) Moderate Asthma

According to expert pulmonologist, Dr. Mostafa Tabassomi, Mr. Doost has moderate persistent asthma. While his asthma is exacerbated by underlying allergies to

[43] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html
[44] *Id.*
[45]*See* In Nick Cordero's Death, a Reminder of COVID-19's Unknowns, New York Times (July 6, 2020) - https://www.nytimes.com/2020/07/06/health/coronavirus-nick-cordero-underlying-conditions.html
[46] *See* CDC People of Any Age with Underlying Medical Conditions - https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#serious-heart-conditions

dust mites and mold and more challenging to control during allergic episodes, no aspect of his asthma is in any way mild, occasional or seasonal. *See* **Exhibits B, C, E,** and **F**.

Mr. Doost was first diagnosed with asthma in 2007 in Afghanistan. **Exhibit B**. There are subsequent medical records in 2014 (in Afghanistan) and 2015 (Kaiser Permanente) that corroborate his asthma condition. **Exhibit E**. As Mr. Doost has not had a designated primary care physician and consistent healthcare coverage in the U.S., his medical records are largely sporadic and disjunctive. **Exhibit B**. Nonetheless, they confirm his asthma condition as far back as 2014. His past medical records, his sworn declaration regarding the types of inhalers he has used along with corroborating photographs and declarations, as well as his BOP medical records demonstrating uncontrolled asthma and the inadequacy of the BOP-prescribed inhalers confirm that he suffers from moderate persistent asthma. *See* **Exhibits B, C** and **E** (BOP Medical Records). *See also Photographs of Asthma Inhalers,* **Exhibit G**; *Declaration of Zohra Razawi,* **Exhibit H**; *Declaration of Nangiyalai Khairy,* **Exhibit I**.

Although in its May 6, 2020 ruling denying compassionate release the Court noted that Mr. Doost's records regarding asthma only go back as far as 2015, the onset of asthma is not limited to children and individuals of younger age. Adults experience an onset of asthma in later years, even in their 50's and 60's. **Exhibit C**. Mr. Doost was diagnosed when he was approximately 29 years old. He has consistently used multiple inhalers including at least one daily combination (ICS + LABA) inhaler and one rescue inhaler. **Exhibits B, C, G** and **H**.

Not only does Mr. Doost suffer from moderate asthma, but he has underlying **allergic rhinitis** which exacerbates his asthma during severe allergic responses. In detailed laboratory tests performed at Kaiser Permanente in March 2017, it was confirmed that Mr. Doost is allergic to dust mites and mold. **Exhibit E**. He was instructed to avoid dust and mold and to maintain a highly sanitized and dust-free environment. *Id.* And while allergic rhinitis is not a high-risk condition in the context of COVID-19, it does exacerbate Mr.

Doost's asthma and make it difficult to manage, thus heightening his vulnerability should he contract the virus. Housed in a dormitory lacking in sanitization, with a dust-caked HVAC system, no air circulation, and mold in and around the showers and faucets, Mr. Doost's asthma has been unmanaged. **Exhibit B**. Mr. Doost's asthma is further unmanaged due to the inadequate types of inhalers he has been prescribed only recently by BOP medical staff. **Exhibits B, C,** and **E.** For the past thirteen years, Mr. Doost has used a combination daily inhaler as well as carrying a rescue inhaler for as-needed use. **Exhibits B, G,** and **I.** Nonetheless, he has not been issued a similar combination daily inhaler while in custody. Instead, he was prescribed a Mometasone inhaler (steroid inhaler lacking the LABA component) to use daily in addition to the Albuterol rescue inhaler. **Exhibits B, C,** and **E**. As such, while his asthma symptoms are heightened due to his allergies triggered by the abundant dust and mold at FPC-Atwater, he is not on the correct therapy to address his asthma. His over-reliance on the Albuterol rescue inhaler is further evidence of this medical inadequacy and neglect while in the custody of the BOP. **Exhibit C**.

Notably, despite having requested an inhaler from health services during his initial exam in November 2019, he was told that he would be re-examined at a later time and provided an inhaler. **Exhibit B.** Mr. Doost's asthma therefore remained uncontrolled and untreated, and by sometime in Dec. 2019, he was experiencing heightened symptoms. *Id.* And months before COVID-19 spread through the nation and a national emergency was declared, in January and February 2020, Mr. Doost again requested that his asthma be examined and sought a prescription for inhalers. *Id. See also* **Exhibit F.** Those requests were likewise ignored. He was finally seen by BOP health services staff on April 29, 2020 and later on May 13, 2020 when he was inadequately prescribed only a rescue inhaler, to wit Albuterol. **Exhibits B** and **E.**

After multiple emails from Mr. Doost to Health Services stating that he is overusing the Albuterol inhaler (a rescue inhaler for as-needed use), he was examined on June 24, 2020 at which time he was prescribed a Mometosone inhaler for daily use. **Exhibits B, C,** and **E**. From Jan. 4, 2020 to June 24, 2020 Mr. Doost has repeatedly requested medical

visits for asthma and inhalers. **Exhibit F**.

In its Opposition to Defendant's Emergency Motion for Compassionate Release, the government undermines Mr. Doost's asthma, largely relying on Mr. Doost's PSR wherein Probation Officer Crystal Lustig notes "He [Doost] stated he suffers from seasonal asthma but does not use an inhaler." Dkt. No. 177 (citing to Dkt. No. 73 at pg. 18). Whether due to a misunderstanding or otherwise, this notation is simply inaccurate. **Exhibit B**. Mr. Doost has never characterized his asthma as "seasonal." He has however routinely described it as harder to manage when he experiences allergic symptoms. *Id.* As Dr. Tabassomi points out, there is nothing seasonal about Mr. Doost's asthma or allergies. *See* **Exhibit C**. Rather, Mr. Doost's allergies are triggered by environmental factors (also not seasonal), and his asthma is moderate and persistent. *Id.* While allergies don't define the type of asthma, they do exacerbate Mr. Doost's symptoms and make his asthma more challenging to manage. *Id.* Dr. Tabassomi's findings are based a thorough review of Mr. Doost's medical and photographic records as well as his sworn declaration which confirm the type of inhalers Mr. Doost has used consistently for years. Dr. Tabassomi's opinion is also based on the unmanageability of Mr. Doost's asthma while incarcerated, to wit, the inadequacy of a daily steroid inhaler (Mometosone) lacking the essential so-called "LABA component" present in in the combination inhalers he had used in the past. *Id.*

Moreover, Dr. Tabassomi confirms that asthma is a condition that is long term even if you don't experience symptoms all year round. *Id.* In other words, while symptoms may worsen in certain seasons, the condition of asthma is not seasonal. If there was any aspect of Mr. Doost's asthma that was remotely mild, seasonal or occasional in any way, he would not repeatedly persist on being evaluated for it towards obtaining inhalers since he was incarcerated in Nov. 2019. Nor would he have to overuse his BOP-issued inhalers which are inadequate for moderate persistent asthma. The government's characterization of Mr. Doost's asthma as "seasonal" is therefore disingenuous and erroneous.

The CDC identifies moderate asthma as a condition that places individuals at high

risk for COVID-19 complications. As Dr. Tabassomi explains, "[t]his is because asthma is a reactive airway disease that causes sensitivity in the lungs. Any infection (including s COVID-19) can trigger asthma exacerbation (attack). COVID-19 heightens this inflammatory process and places individuals with moderate to severe asthma at higher risk of intubation." *Id.*

Courts around the nation have repeatedly found that asthma-—together with the COVID-19 virus in the prison setting—is a high-risk factor that warrants early release.[47] In *United States v. Brown,* No. 18-cr-00360-KOB, 2020, WL ----- (N.D. Ala., May 22, 2020), the defendant was 24- years old and suffered from asthma and continued to use an inhaler until he entered BOP custody. Likewise, since the onset of his asthma in 2007 and up until his incarceration when he had access to appropriate therapy. Mr. Doost routinely obtained, carried and used multiple combination inhalers. **Exhibits B, E, G** and **H**.

(b) Obesity

The CDC warns that individuals with a body mass index (BMI) of 30 or higher, which is clinically classified as "obese" have an increased risk of suffering severe illness from COVID-19.[48] *See also* **Exhibit C**.

BMI is calculated by dividing an individual's weight divided by their height. *Id.* At the time of his intake and physical exam at USP-Atwater in November 2019, Mr. Doost's weight was recorded at 234 lbs., indicating a BMI of 33.6%. *See* **Exhibit E**. By the time his

weight was next recorded, in approximately April 29, 2020, his weight had inexplicably dropped to 192, reflecting a loss of approximately 42 pounds. Despite this significant weight loss, as of July 1, 2020, he weighed 218 pounds. **Exhibit B**. As such, his most

47 *See United States v. Cardenas,* No. 11-cr-0414-APG, 2020, WL ------ (D. Nevada, Apr. 29, 2020) (without any specification of the type of asthma in defendant's moving papers or supporting exhibits, the court granted early release finding "Cardenas suffers from asthma, which the Centers for Disease Control lists as a higher risk factor for complications.").

48 *See* CDC People of Any Age with Underlying Medical Conditions - https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

recent BMI of 31.3% still places him above the threshold for clinical obesity.

According to Dr. Tabassomi, "[O]besity is a sole independent risk factor for increased morbidity and mortality COVID-19 infection." *See* **Exhibit C**. He confirms: "[P]atients who are obese are at greater risk of severe illness, morbidity and mortality if infected with the COVID-19 virus for several reasons. Mainly obese patients with COVID-19 require a higher level of care including higher oxygen support and possible intubation. While the connection between severe COVID-19 illness in obese patients remains under ongoing study and research, I know from my own patient case load that all of my COVID-19 patients who have been obese presented with more severe illness." *Id.*

People with obesity are indisputably more vulnerable to complications from viral infections such as COVID-19. "Obesity can increase inflammation and weaken a person's immune system, making it more difficult to combat infections."[49] "Excessive weight, and the poor-quality diet that causes it, is strongly associated with insulin resistance, chronic inflammation and other abnormalities that may lower immunity to viral respiratory infection or predispose to complications."[50] "In general, patients with obesity are a more challenging population to manage in the intensive care setting" and "will have less physiologic reserve if they develop any severe illness, particularly a respiratory infection like COVID-19."[51] "Extra weight can also put pressure on the lungs and make it more difficult to breathe, making complications from COVID-19 —a respiratory virus—more likely."[52]

While obesity is independently a COVID-19 risk factor, that risk is significantly heightened in combination with asthma. As Dr. Tabassomi explains, "Patients with **asthma and obesity** are especially prone to severe illness, morbidity and mortality if infected with

[49] *See* Are People Who Are Obese at Higher Risk of Coronavirus? Here's What Experts Say., Miami Herald (Mar. 26, 2020) -https://www.miamiherald.com/news/coronavirus/article241523151.html
[50] *See* Americans Are Already Too Diseased to Go Back to Work Right Now, N.Y. Times (Mar. 30, 2020), - https://www.nytimes.com/2020/03/30/opinion/obesity-us-health-coronavirus.html
[51] *See* Obesity May Be Fueling Coronavirus Hospitalizations- An Expert Explains Why, Yahoo Lifestyle (Apr. 2, 2020) - https://www.yahoo.com/lifestyle/obesity-may-be-fueling-coronavirus-hospitalizations-expert-explains-why-194605061.html
[52] *Supra* Note 49

the COVID-19 virus." *See* **Exhibit C**. This is because asthma is not only associated with "prolonged duration of intubation for coronavirus disease 2019," but the "co-occurrence of asthma with obesity, another predictor of poor outcome in these patients, places obese patients with asthma at markedly higher risk for a worsened disease course" from COVID-19. *Id.*

Recognizing it as a risk factor in light of COVID-19, courts have granted compassionate release to inmates who suffer from obesity. For example, in *United States v. Quintero*, No, 08-CR-6007L, 2020 WL 21757171 (W.D.N.Y., May 6, 2020), the Western District of New York granted early release to the defendant who suffered from comorbidities including obesity. And in *United States v. Furlow,* the defendant was granted compassionate release based on his obesity and diabetes, both individually and as combined risk factors. No. 2:06-cr-20020-01, 2020 WL 3967719 (W.D. La., July 13, 2020). *See also United States v. Collins*, No. 17-cr-0649-PWG, 2020 WL 3960831 (D. Maryland, July 13, 2020) (the court denied release but found that obesity alone, and in combination with other medical conditions supports a finding of extraordinary and compelling reasons for release).

Several other circuits have also found obesity to be a contributing factor in analyzing an extraordinary and compelling reason warranting release during the COVID-19 pandemic.[53]

(c) History of Smoking

For the past twenty four (24) years preceding his incarceration, Mr. Doost has been a heavy smoke. *See* **Exhibits B**. Smoking (past and current) is recognized as one of several

[53] *United States v. Zuckerman, supra* (defendant's age, hypertension and obesity satisfied an extraordinary and compelling reason); *See also United States v. Quintero, supra* (defendant's diabetes, obesity, and hypertension satisfied an extraordinary and compelling reason); *United States v. Foreman,* No. 3:19- cr-62, 2020 WL 2315908 (D.Conn., May 11, 2020) (defendant's age, hypertension, and obesity satisfied an extraordinary and compelling reason); *United States v. Hernandez,* No. 10-cr-1288-LTS, 2020 WL 3893513 (S.D.N.Y., July 10, 2020) (compassionate release was granted to a defendant who presented COPD and obesity, the court finding that his need for medical care weighs heavily in favor of release); and *United States v. Ullings*, No. 1:10-cr-00406, 2020 WL 2394096 (N.D.Ga., May 12, 2020) (finding defendant's hypertension and obesity satisfied an extraordinary and compelling reason).

underlying conditions that may lead to severe COVID-19 illness and mortality.[54]

According to the World Health Organization, "Smoking any kind of tobacco reduces lung capacity and increases the risk of many respiratory infections and can increase the severity of respiratory diseases. COVID-19 is an infectious disease that primarily attacks the lungs. Smoking impairs lung function making it harder for the body to fight off coronaviruses and other respiratory diseases. Available research suggests that smokers are at higher risk of developing severe COVID-19 outcomes and death."[55]

As Dr. Tabassomi explains, "[I]ndividuals with a history of smoking are in a high-risk category for serious illness, morbidity and mortality if infected with the coronavirus. This is primarily because patients with a history of smoking present with COPD and some also have compromised immunity. 70-80% of COPD'ers have a history of smoking. Numerous epidemiologic studies indicate that tobacco smoking is overwhelmingly the most important risk factor for COPD" which expectedly leads to severe illness, morbidity and mortality in the context of COVID-19. **Exhibit C**.

(d) Potentially Undiagnosed Chronic Obstructive Pulmonary Disease (COPD)

"Chronic obstructive pulmonary disease, or COPD, refers to a group of diseases that cause airflow blockage and breathing-related problems. It includes emphysema and chronic bronchitis. COPD makes breathing difficult for the 16 million Americans who have this disease. Millions more people suffer from COPD, but have not been diagnosed and are not being treated. Although there is no cure for COPD, it can be treated."[56]

According to Dr. Tabassomi, "Mr. Doost's records raise concern that he may suffer from undiagnosed COPD (chronic obstructive pulmonary disease). This is based on his 24-year history of smoking at least 1 pack of cigarettes per day. COPD is a lung condition that

[54] *See* CDC Being a cigarette smoker may increase your risk of severe illness from COVID-19 https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#smoking
[55] *See* WHO Tobacco & Covid-19 - https://www.who.int/news-room/q-a-detail/q-a-on-tobacco-and-covid-19
[56] https://www.cdc.gov/copd/index.html

is similar to asthma but is not reversible and is progressive. Patients with COPD who contract COVID-19 present with more severe illness and often require ventilator support. They pose a higher risk of severe illness, morbidity and mortality." **Exhibit C**.

On June 30, 2020, Mr. Doost emailed the Health Services team to request a pulmonary function test due to the dangers of exposure to COVID-19. The BOP Health Services' July 7, 2020 response was that the test "was not warranted." **Exhibits B and E**.

Individuals with COPD are a high risk of severe illness and mortality due to COVID-19 infection.[57] While Mr. Doost has not been diagnosed with COPD, he is certainly a candidate who -in light of the deadly pandemic- should undergo testing to determine his diagnosis in this regard. **Exhibit C.** Despite the dangerousness of this condition against the backdrop of the pandemic, the BOP has refused to test Mr. Doost for COPD.

(e) Undiagnosed Abdominal Cancer and Compromised Immune System

In early May, Mr. Doost identified a growth in his abdomen, on the left side of his umbilicus. **Exhibits B** and **E**. On May 13, 2020 in a visit with BOP physician Dr. Giron, Mr. Doost reported the concern and reminded Dr. Giron that he has a family history of cancer and has lost 42 pounds in a period of six months. *Id.* Dr. Giron's May 13 assessment stated "Neoplasm of unspecified behavior of bone, soft tissue, and skin" with a diagnostic code of "D492." **Exhibit E**. "Neoplasm" is defined as an "abnormal mass of tissue that results when cells divide more than they should or do not die when they should."[58] It is also known as a "tumor." Furthermore, "[U]nexplained weight loss of 10 pounds or more may be the first sign of cancer. This happens often with cancers of the pancreas, stomach, esophagus, or lung."[59] And, smoking is a common contributor to cancer

57 https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#copd

58 https://www.cancer.gov/publications/dictionaries/cancer-terms/def/neoplasm

59 https://www.cancer.org/cancer/cancer-basics/signs-and-symptoms-of-cancer.html

in individuals with a history of smoking. **Exhibit C**.

Mr. Doost has a long family history of cancer. His mother is a breast cancer survivor. His cousin, paternal aunt and maternal uncle have all had leukemia and his uncle died as a result of it. His maternal aunt has had GI cancer. Also, his paternal grandfather has prostate cancer and his paternal aunt also has leukemia. *See* **Exhibits B** and **E**.

The combination of unexplained weight loss, familial history of cancer, history of smoking, and the presence of neoplasm is extraordinary and medically alarming. It requires immediate and adequate medical attention. **Exhibit C**. As detailed by Dr. Tabassomi, "[T]he BOP physician noted a "neoplasm" and requested an x-ray of Mr. Doost's abdomen. The proper diagnosis for an abdominal tumor requires a CT- scan, *not a conventional x-ray* [emphasis added]. The CT-scan will show the anatomical location and density of the tumor…Once the tumor is confirmed in the CT-scan, a biopsy is required for further diagnosis. Therefore, an x-ray of the abdomen is insufficient for this purpose." *Id.*

Nonetheless, on May 15th, Dr. Giron ordered inadequate imaging, to wit, "General Radiology of the Abdomen" to be performed by June 27, 2020. That date has long passed and despite numerous requests and inquiries by Mr. Doost, he is yet to be further imaged, examined, tested, or diagnosed. **Exhibits B, E,** and **F**.

Specifically, beginning May 15, 2020, both verbally and by email, Mr. Doost has repeatedly inquired about the status of getting a CT-scan of his abdomen and on each occasion he has been told that because it has to be performed at an outside hospital, it cannot and will not be done until the "lockdown is over." **Exhibits B** and **F**. Mr. Doost has understood this to mean that he has to wait for a CT-scan until an unknown date in the future when the BOP resumes its normal operation and he can be transported to a local hospital. **Exhibit B**.

Moreover, the BOP has denied even the inadequate diagnostic recommendation of its own medical staff. Specifically, despite the May 15 assessment of "neoplasm", detailed description of the "presence of a vague, flat subcutaneous mass localized just left of the umbilicus…at 3cm in greatest dimension," and request (albeit inadequate) for "general

radiology*", the Bureau of Prisons Health Services denied its own physician's findings and requests.* **Exhibit B** and **E**. On July 7, 2020, Mr. Doost received two devastating emails from Health Services, one denying any pending scan request and the second denying any notation of needed medical intervention or the neoplasm. **Exhibit F**. The BOP's jarring failure to provide immediate and adequate CT-scan imaging and testing of a neoplasm is significant and dangerous in and of itself. But its continued failure and refusal and contradictory replies nearly two months later is not only astonishing, it highlights BOP's utter ineptitude and callous disregard of medical care that is critical and dire to an inmate. And given that Mr. Doost checks all the boxes for cancer, BOP's callous non-response is incredibly dangerous to his health and ability to care for his medical condition while in the custody of the BOP.

As Dr. Tabassomi confirms "[A]ny doctor who receives the type of complaint presented in the May 13, 2020 BOP medical record, should be prompted to *immediately* seek radiologic studies including at a minimum a CT-scan of the abdomen. Should a cancer diagnosis be confirmed through proper imaging and biopsy, Mr. Doost would most definitely present as an immune-compromised host if infected with COVID-19. It is a known medical fact that cancer weakens a patient's immune system and increases risk of severe illness, morbidity and mortality from infections including from the COVID-19 virus." **Exhibit C**. Therefore, the BOP's unjustifiable failure and refusal to provide adequate medical response to Mr. Doost's tumor is yet more jarring in the context of the deadly pandemic. If proper imaging and testing of Mr. Doost's abdominal neoplasm confirm a malignant (cancerous) tumor, he is considered immune-compromised and highly at risk if infected with COVID-19.[60] *Id.*

The "extraordinary and compelling" reasons set forth in U.S.S.G. §1B1.13 are neither exhaustive nor exclusive. This Court is therefore not limited to the U.S.S.G.

60 https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html

§1B1.13 guidance for what constitutes an "extraordinary and compelling" reason for a reduction in a defendant's sentence pursuant to 18 U.S.C. §3582a(c)(1)(A). Instead, the Court has wide discretion to define what constitutes an "extraordinary and compelling" reason.[61] The undiagnosed nature of Mr. Doost's tumor does not change the fact that it presents an "extraordinary and compelling" reason warranting a reduction in his sentence. In the unfortunate event that the tumor is malignant, Mr. Doost is at a minimum immunocompromised and at high risk of COVID-19 complication, morbidity and mortality. But even if he dodges his demise to cancer, the very nature of his medical complaint and the BOP's complete disregard of an alarming health concern of this nature and magnitude is in and of itself an "extraordinary and compelling reason" that merits a reduction in Mr. Doost's sentence.

In light of the rate of infection and spread of COVID-19 at USP-Atwater and the BOP's inadequate pandemic and medical response, Mr. Doost's multiple comorbidities undoubtedly place him at a higher risk of severe illness, morbidity and mortality if he were to contract the deadly coronavirus. Not only are his medical conditions sole independent factors that elevate his risk for COVID-19 morbidity and mortality, but Mr. Doost's combined comorbidities make him uniquely vulnerable to COVID-19 illness, morbidity, and mortality. As such, both independently and in combination, Mr. Doost's comorbidities establish extraordinary and compelling reasons warranting a sentence reduction. His serious and undiagnosed conditions of cancer and possible COPD are additional extraordinary and compelling reasons warranting a reduction in sentence and compassionate release.

5. <u>BOP's Callous Disregard of Mr. Doost's Health Conditions and Medical Needs Is an Independent Extraordinary and Compelling Reason Warranting a Reduction in His Sentence</u>

The BOP is required to provide adequate medical, mental health, and dental

[61] *See United States v. Rodriquez*, No. 17-cr-00021-WHO, 2019 WL 6311388 (N.D.Ca., Nov. 25, 2019); *See also United States v. Chan* No. 96-cr-00094-JSW, 2020 WL 1527895 (N.D.Ca., March 31, 2020); *United States v. Parker* No. 2:98-cr-00759-CAS, 2020 WL 2572525 (C.D.Ca., May 21, 2020) .

care and treatment to inmates in its custody. Instead, it has a proven record of callous disregard for the life and wellbeing of inmates. The deadly COVID-19 pandemic has both heightened and highlighted BOP's sub-standard and inadequate care of the health and healthcare needs of inmates in its facilities across the nation. The DOJ's own studies document that the BOP has struggled to provide adequate medical care to inmates in the last several years.[62] Specifically, the Office of Inspector General found that BOP experienced chronic medical staff shortages and failed to take adequate measure to address them, leading to problems meeting the medical needs of prisoners, requiring the use of outside hospitals, and endangering the safety and security of institutions.[63] That was the OIG's assessment of healthcare within the BOP *prior* to the pandemic and without the elevated concerns of COVID-19 spread and the BOP's inability to adequately respond thereto. The COVID-19 pandemic has exponentially worsened this inadequate care and neglect. *United States v. Parramore*, No. 18-cr-156-RSM, 2020 WL 3051300 (W.D. Washington, June 8, 2020) (the court found that the while under BOP's care during the health crisis, the defendant has been unable to obtain the necessary treatment for his medical condition).

Six months and over a dozen requests later seeking medical care for asthma and an inhaler prescription, it wasn't until mid-May when Health Services finally examined Mr. Doost for asthma. During this period and because of this long delay, Mr. Doost had to take the great risk of using another inmate's inhaler to keep his asthma symptoms at bay. This amid a deadly pandemic. And even then, he was not given the type of daily inhaler that he needs and has been using since the onset of his asthma, to wit a (ICS/LABA) combination inhaler similar to the Salmicort inhaler he used for years. *See* **Exhibit B** and **G**. It wasn't until June 24, 2020 when Mr. Doost was seen again and prescribed a Mometasone inhaler in conjunction with the previously inadequately prescribed Albuterol rescue inhaler.

[62] *See* U.S. Dept of Justice Office of Inspector General, *Review of Federal Bureau of Prisons' Medical Staffing Challenges* (Mar. 2016) – https://oig.justice.gov/reports/2016/e1602.pdf
[63] *Id*

Exhibit E. To this day, his asthma remains exacerbated and unmanaged as evidenced by his over-use of the Albuterol inhaler which is an as-needed “rescue inhaler.” **Exhibit B** and **C**. This is because a steroid inhaler like Mometasone – without the long-acting beta agonist component (LABA)- is not medically adequate therapy for Mr. Doost’s asthma. **Exhibit C**. This is evidenced by his over-use of the Albuterol inhaler multiple times a day despite using his daily inhaler. As Dr. Tabassomi concluded, Mr. Doost’s moderate persistent asthma is therefore unmanaged and requires “up-escalation” of therapy. **Exhibit C**.

Furthermore, since May 15, 2020, the BOP’s Health Services at USP-Atwater has been aware of Mr. Doost’s potentially undiagnosed abdominal cancer, calling it a “neoplasm” and acknowledging the need for a scan towards further diagnosis. Nonetheless, months later, the BOP continues to fail and refuse to provide Mr. Doost with the adequate diagnostic protocol, instead contradicting its own physician’s assessment and recommendations regarding a serious health concerns, to wit cancer. The pandemic and the dangers it poses to immunocompromised individuals elevates Mr. Doost’s dire need for immediate testing and diagnosis. It also highlights the BOP’s callousness in response. Each day past May 15 is a day too late for Mr. Doost.

The BOP’s failure to provide essential medical care to Mr. Doost will inevitably result in a deterioration of his health conditions from which he will not recover. It will also lead to precipitating long-term damage due to COVID-19 complications if infected. It therefore renders him unable to provide self-care while in the custody of the BOP.

In sum, pursuant to 18 U.S.C. 3582 and *United States v. Parramore, supra,* separate and independent of Mr. Doost’s COVID-19 vulnerabilities under U.S.S.G., §1B1.13, the BOP’s failure and refusal to provide adequate and necessary medical care to Mr. Doost is an additional extraordinary and compelling reason warranting a sentence reduction.

E. REDUCING MR. DOOST’S SENTENCE AND GRANTING COMPASSIONATE RELEASE IS CONSISTENT WITH 18 U.S.C. §3553

When extraordinary and compelling reasons are established, the Court must consider the relevant sentencing factors in 18 U.S.C. §3553(a) to further determine

whether a sentence reduction is warranted. 18 U.S.C. §3582(c)(1)(A)(i).

According to the PSR, Mr. Doost's total offense level was 33. Adopting U.S. Probation's recommended Guideline calculation, the government sought a sentence within the range of 135-168 months. Mr. Doost raised several objections to the PSR seeking a sentence within the 57-71 range at level 25. The Court adopted a guideline calculation at level 29 which at criminal history category I results in a guideline range of 87 to 108 months. The Court sentenced Mr. Doost to 54 months in prison.

Mr. Doost surrendered to custody on Nov. 5, 2019. While by the time of the hearing on this motion Mr. Doost will have served a little shy of 12 months of his sentence, the time he has served thus far is sufficient to satisfy the purposes of sentencing.

Here, the overriding factor under §3553(a) not present at sentencing is a deadly pandemic, the spread of COVID-19 in prison, and the grave danger it poses to inmates and staff at risk of suffering serious illness or death from its complications. The sentencing purpose of just punishment does not warrant a sentence that includes exposure to a life-threatening illness. *See United States v. Zukerman,* No. 16-cr-194 (AT), 2020 U.S. Dist. Lexis 59588 (S.D.N.Y. Apr. 3, 2020) (Although "the severity of Zukerman's conduct remains unchanged,…[w]hen the Court sentenced Zukerman, the Court did not intend for that sentence to 'include incurring a great and unforeseen risk of severe illness or death' brought on by a global pandemic.").

As detailed in this motion and its supporting exhibits, Mr. Doost suffers from multiple underlying medical conditions that indisputably lead to severe illness, morbidity and mortality if he were to contract COVID-19. None of Mr. Doost's comorbidities were before the Court at the time of his sentencing. Nor were they as relevant, if at all, in the absence of the backdrop of a deadly pandemic. Had Mr. Doost's comorbidities been before the Court at the time of sentencing, this Court would have considered them towards fashioning an appropriate sentence that is "sufficient but not greater than necessary" not only to "reflect the seriousness of the offense," "provide just punishment," and "afford

adequate deterrence," but to also avoid undue and cruel punishment that could lead to death. And certainly, had the Court known of the unfathomable and unforeseeable global pandemic, Mr. Doost would have been sentenced against the backdrop of the COVID-19 health crisis and its impact on his unique characteristics, to wit his bevy of illnesses and poor health. No court, and certainly not this Court, would have issued a sentence that could lead to death.

Furthermore, FPC-Atwater is a minimum security facility. While it is situated on the USP-Atwater prison grounds and is gated, Camp inmates are free to move about the grounds and the yard from early morning until the evening hours without restrictions. This movement is currently restricted due to the pandemic, but is otherwise the norm at FPC-Atwater. Mr. Doost is allowed to walk to UNICOR where he works. **Exhibit B**. But for the pandemic and the BOP's "lockdown" towards attempted mitigation, Camp inmates have substantially more freedom of movement than they would at a low or medium security prison facility. As such, the level of confinement to the dorm setting such as at FPC-Atwater is not drastically different than confinement to Mr. Doost's 2-bedroom family home.

With respect to §3553(a)(3), "[i]ncarceration…is not the only kind of sentence available." *United States v. Brown*, 4:05-cr-00227-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020). To the contrary, "[n]oncustodial sentences also curtail prized liberty interests and the Defendant always faces harsh consequences that wait if he violates the conditions attached to such a sentence." *Id.* Home confinement of several long months requiring strict adherence to terms and conditions will certainly not be a walk in the park for Mr. Doost who will continue to be punished for the offense for which he is currently incarcerated. The difference: whereas Mr. Doost clearly cannot practice hygiene and social distancing, and receive adequate medical care and treatment within the confines of the Camp, he *can* adhere strictly to public health protocol and seek the immediate and adequate medical care and treatment he requires if confined to his home.

Moreover, from March 2020 to present, consistently arguing against the satisfaction

of §3553(a) factors in the hundreds of compassionate release motions brought by defendants from coast to coast, the government disingenuously uses flawed math. Rather than calculating the balance of a sentence based on the defendant's early release date, the government argues that the defendant has served less than half of his sentence by using an artificial calculation based on the date the sentence expires. Mr. Doost began serving his 54-month sentence on Nov. 5, 2019. The BOP calculates his release date as Aug. 31, 2023[64] which appropriately reduces the sentence to reflect Mr. Doost's "good time" credits.[65] He is eligible for 6 months in RRC (Residential Re-entry Center) and would therefore be released to a halfway house as early as Mar. 1, 2023. As Mr. Doost is eligible for and intends to complete the 500-hour RDAP program, a more likely release date would be on or about Mar. 1, 2022. Based on this calculation, Mr. Doost would serve a total of 30 months of actual imprisonment (Nov. 5, 2019 to March 1, 2022). As of the time of this motion, he has therefore served approximately a third of his sentence. Courts have granted COVID-19-based sentencing reductions in circumstances where the defendant has not served at least half of his term of imprisonment.[66] Likewise, although Mr. Doost has not served at least half of his term of imprisonment, the extraordinary and compelling reasons herein weigh in favor of a reduction in his sentence.

Mr. Doost is remorseful and dedicated to rehabilitation. Beginning Dec. 2019, he

[64] https://www.bop.gov/inmateloc/

[65] It should be noted that the "good time" credits date is routinely used by courts in evaluating §3553 factors, [cites}. Nevertheless, in opposing compassionate release motions, the government uses the artificial release date which would apply if good time credits did not exist.

[66] *See United States v. Curtis*, 1:03-cr-00533-BAH, Dkt. 238 (D.D.C. Apr. 22, 2020) WL 1935543 (the court granted a sentencing reduction to a defendant serving a life sentence for sex trafficking minors. Despite the "heinous" nature of the crimes, "the spread of COVID-19 in BOP facilities, and defendant's particular susceptibility to the worst effects of that virus adds great urgency to his request." *Id* at 7.) *See also United States v. Ben-Yhwh*, 15-cr-00830-LEK, 2020 WL 1874125 (D. Haw. Apr.13, 2020) (releasing defendant after serving less than a year of 60-month sentence); *United States v. Park,* 16-cr-473-RA, Dkt 73 at 12 (SDNY Apr. 24, 2020) (the court released the defendant after 16 months of a 36-month sentence); *United States v. Hakim,* 4:05-cr-40025-LLP, Dkt. 158 (D.S.D. Apr. 6, 2020) (reducing sentence by 40 months in light of extreme danger posed by COVID-19); *United States v. Bess,* 16-cr-156, Dkt. 97 (W.D.N.Y. Apr. 22, 2020) (releasing defendant less than one year into a term of imprisonment of 84 months in light of the "substantial risk" that unless the court "lowers Bess's sentence…he will become seriously ill and, with an unsettlingly high degree of probability, serve a life sentence"); *United States v. Logan,* 1:12-cr-307, Dkt 179 (N.D.N.Y. Apr. 22, 2020) (releasing defendant 5 years into a 148-month sentence due to covid-vulnerability); and *United States v. Rodriguez,* (insert case #), 2020 WL 1536155 (E.D. Wash. Mar. 1, 2020) (releasing defendant approximately 1 month into her prison sentence because COPD made her vulnerable to COVID-19).

has worked at UNICOR doing disassembly for the recycling plant. From Dec. 2019 through Feb. 2020 and until operations were limited due to the pandemic, Mr. Doost has completed over a dozen educational courses offered at USP-Atwater. **Exhibit B**. He has also completed a 6-month non-residential drug program in May 2020. *See NRDAP Certificate* **Exhibit J**. It is evident from Mr. Doost's efforts during his period of incarceration that he is committed to a continued course of stringent rehabilitation.

Therefore based on the foregoing facts and authority, a reduction in Mr. Doost's sentence is consistent with and supported by the sentencing factors under 18 U.S.C. §3553(a).

F. MR. DOOST IS NOT A DANGER TO THE COMMUNITY

U.S.S.G. §1B1.13 "imposes an additional consideration of whether the defendant is a danger to the safety of any other person or to the community." *See United States v. Numann,* No. 3:16-cr-00025-TMB WL 1977117 (D. Alaska, Apr. 24, 2020). Having established extraordinary and compelling reasons that warrant a reduction in his sentence, Mr. Doost also submits that he is not a danger to the community.

Mr. Doost's conviction is an aberrant violation of the law involving non-violent conduct. He is a 42-year old hard-working family man who has lived a law-abiding life otherwise. Throughout more than two years when he was on pretrial supervision, he was in full compliance with the terms of conditions of his release and had no violations whatsoever. He is housed in a minimum security prison camp. While incarcerated, he has been a model inmate with no disciplinary infractions or incidents. He has a minimal PATTERN score (lowest BOP score for rate of recidivism).

The Court should note that at the time of Mr. Doost's sentencing hearing on Sept. 19, 2019, it recognized the aberrant nature of his offense and found that he does not pose a threat of danger to the community: "You've worked all your [l]ife, successfully had at least one business but otherwise doing odd jobs. And so you are the kind [of] person that certainly doesn't present as anybody who is a continuing threat to the community or

someone who has engaged in this kind of behavior for an extended period of time." *See Transcript of Sentencing Hearing Proceedings,* Dkt. No. 175 (Sept. 19, 2019) at 86.

Moreover, Mr. Doost has the full support of his family and has presented a solid re-entry plan that allows for self-quarantine in the home of his in-laws followed by home confinement pursuant to any and all terms and conditions to be imposed. He also has an offer of employment at a car dealership owned by his brother-in-law. *See* **Exhibits B, H, K, and L**.

It is therefore unequivocally clear from the nature of the offense, Mr. Doost's history prior to incarceration as well as since, and this Court's findings at sentencing that he does not pose a threat of danger the community.

G. MR. DOOST HAS A REASONABLE, DEMONSTRABLE, AND VERIFIABLE RE-ENTRY PLAN

As detailed above, Mr. Doost's county and city of residence are far more COVID-19 compliant and present better case rates than in the sanctuary city of Atwater and Merced County. Mr. Doost's home confinement during the pandemic is not only safer for him but it's safer for the community.

Once released, Mr. Doost will reside with his wife Zohra and their two young daughters at the two-bedroom home of his in-laws. He will have a separate designated bedroom wherein he's able to quarantine for 14 days. The family will then relocate to a new home in the same area so that they are closer to their parents and family members. *See* **Exhibits B** and **H**.

Mr. Doost has the financial support of his cousin and brother-in-law to include his employment and his healthcare needs. *See* **Exhibits K** and **L**.

III. CONCLUSION

In sum, this motion is not about dodging just punishment on a past crime. It is about the exercise of humanity given the unprecedented dangers that the COVID-19 pandemic poses to Mr. Doost in the confines of prison and in light of his underlying health conditions.

While a pandemic is not a substitute for punishment, the law recognizes what we all know: that at times there are "extraordinary and compelling reasons" that require unpopular and unprecedented solutions. This is one such instance.

Undoubtedly, Mr. Doost faces a high risk of severe COVID-19 illness, morbidity and mortality if he were to contract the virus in prison. And while the virus is everywhere and that risk exists in every place, city, county and community, Mr. Doost faces a far greater risk of infection and consequent morbidity and mortality at FPC-Atwater than he does within the confines of his family home. Surely, while the Court's sentence intended to punish and deter Mr. Doost, it was not intended to result in his demise.

Based on the foregoing Mr. Doost respectfully requests that the Court grant this motion for a reduction of his sentence of imprisonment to time served. Given the emergency nature of this motion and Mr. Doost's ability to quarantine in his family home, he also respectfully requests forthwith release.

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Certificate of Service

I, Sara Azari, do hereby certify under penalties of law that in accordance with Fed.R.Civ.P.5 and the General Order on Electronic Case Filing (ECF), I caused a copy of the above-titled motion to be served upon the all the named attorneys of record by CM/ECF filing methods on this the 19th day of July 2020.

/s/ Sara Azari

Sara Azari