

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	
)	
v.)	No. 11-cr-00066 (RJL)
)	
ERIC A. BRASSWELL,)	
)	
Defendant.)	
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REPLY TO GOVERNMENT’S OPPOSITION TO COMPASSIONATE RELEASE

The government acknowledges that “a change of circumstances has emerged in the form of the COVID-19 pandemic after [the] February denial [of Mr. Brasswell’s RIS request].” Gov’t Opp. (Apr. 20, 2020) at 11. It agrees that “the COVID-19 pandemic may affect whether an inmate can show an ‘extraordinary and compelling reason’ warranting compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), where, among other things, the defendant suffers from a medical condition or characteristic that elevates his risk of becoming seriously ill from COVID-19 under the CDC guidelines.” *Id.* And it recognizes that the CDC lists “serious heart condition,” “diabetes,” “chronic kidney disease undergoing dialysis,” and “chronic liver disease,” each of which Mr. Brasswell has, as conditions that elevate the risk of serious illness from COVID-19. *Id.* at 11 n.6. It still opposes compassionate release. This Court need not, and should not, wait until the first case is announced at FMC Devens to order Mr. Brasswell’s release: by then it will be too late.

I. THE NUMBERS.

FMC Devens may not have reported its first case—though, as noted below, it appears to have tested very few—but it is only a matter of time before it does. The virus is spread by asymptomatic and presymptomatic individuals, so that those exhibiting no symptoms may pass it

along to others.¹ In fact, after two weeks of universal screenings on a labor and delivery unit in New York, 88 percent of those who tested positive were asymptomatic.² And just like hospitals cannot control who enters and exits, staff and contractors are entering and exiting the prison at all times, with insufficient screenings of staff, contractors, and inmates (discussed further below). There is also not enough testing in BOP facilities, of symptomatic, asymptomatic and presymptomatic individuals alike.³ And there is insufficient personal protective equipment (PPE) in prisons,⁴ with some staff either lacking the knowledge, or unwilling, to use the PPE that is available correctly: “All guards are now supposed to be wearing masks and gloves but some

¹ Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

² Dena Goffman & Desmond Sutton, We tested all our patients for coronavirus — and found lots of asymptomatic cases, Washington Post (Apr. 20, 2020), <https://www.washingtonpost.com/outlook/2020/04/20/we-tested-all-our-patients-covid-19-found-lots-asymptomatic-cases/>.

³ Eric Heisig, *Judge grills federal prisons lawyer on lack of coronavirus tests at Ohio facility in wake of Trump’s claim that ‘anybody’ can get tested*, Cleveland.com (last updated Apr. 18, 2020). <https://www.cleveland.com/court-justice/2020/04/judge-grills-federal-prisons-lawyer-on-lack-of-coronavirus-tests-at-ohio-facility-in-wake-of-trumps-claim-that-anybody-can-get-tested.html> (“A federal judge weighing whether to order the release of hundreds of inmates from a federal prison in Ohio where the coronavirus has quickly spread seemed keenly interested as to why the prison had so few tests.”).

⁴ See, e.g., Keegan Hamilton, *Sick Staff, Inmate Transfers, and No Tests: How the U.S. Is Failing Federal Inmates as Coronavirus Hits*, Vice (Mar. 24, 2020), https://www.vice.com/en_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federal-inmates-as-coronavirus-hits (hereinafter “Sick Staff”); Joseph Neff & Keri Blakinger, *Federal Prisons Agency “Put Staff in Harm’s Way” of Coronavirus*, The Marshall Project (Apr. 3, 2020), <https://www.themarshallproject.org/2020/04/03/federal-prisons-agency-put-staff-in-harm-s-way-of-coronavirus>.

just wear their masks around their chin,” one inmate has explained. “I guess they are not concerned about our safety.”⁵

Notably, the social distancing measures in place in the rest of the United States—which are impossible in prison—are designed to “flatten the curve” of infections so that hospitals are not overwhelmed by a surge of cases. Until a vaccine is developed, they do not themselves *stop* the spread of the virus; the virus will spread, but more slowly.⁶ What this means for FMC Devens is that, while it may take more time for the institution to see its first case, it will see its first case, at which time, because inmates live side-by-side, touch highly-trafficked surfaces, and sit for dialysis one next to another, the spread will be hard to contain.

The total numbers of positive cases in the BOP make this clear. Mr. Brasswell’s emergency motion provided the numbers through April 14, 2020. At that time, 14 federal inmates had died of COVID-19, and an additional 747 individuals (486 inmates and 261 staff) had tested positive. As of 12:32 p.m. on April 20, 2020, the BOP reported total positive numbers of **988 individuals in the BOP**, including **650 inmates** (155 of whom had since recovered) and **338 staff** (29 of whom who had since recovered), while **22 inmates had died**. Less than 12 hours later, by 2:28 a.m. on April 21, 2020, the BOP revised the total number upwards to **1,052 individuals in the BOP**, including **702 inmates** (with 105 who have since recovered)⁷ and **352**

⁵ James Call, *Correctional officers file complaint about coronavirus at federal prison in Tallahassee*, Tallahassee Democrat (Apr. 17, 2020), <https://www.tallahassee.com/story/news/politics/2020/04/18/correctional-officers-file-complaint-coronavirus-tallahassee-federal-prison/5152879002/> (hereinafter, “Correctional officers file complaint”).

⁶ Thomas Peuyo, *Coronavirus: The Hammer and the Dance*, Medium (Mar. 19, 2020), <https://medium.com/@tomaspeuyo/coronavirus-the-hammer-and-the-dance-be9337092b56> .

⁷ It is not clear where the 45 who were recovered on April 20, 2020 have gone in the BOP’s opaque accounting.

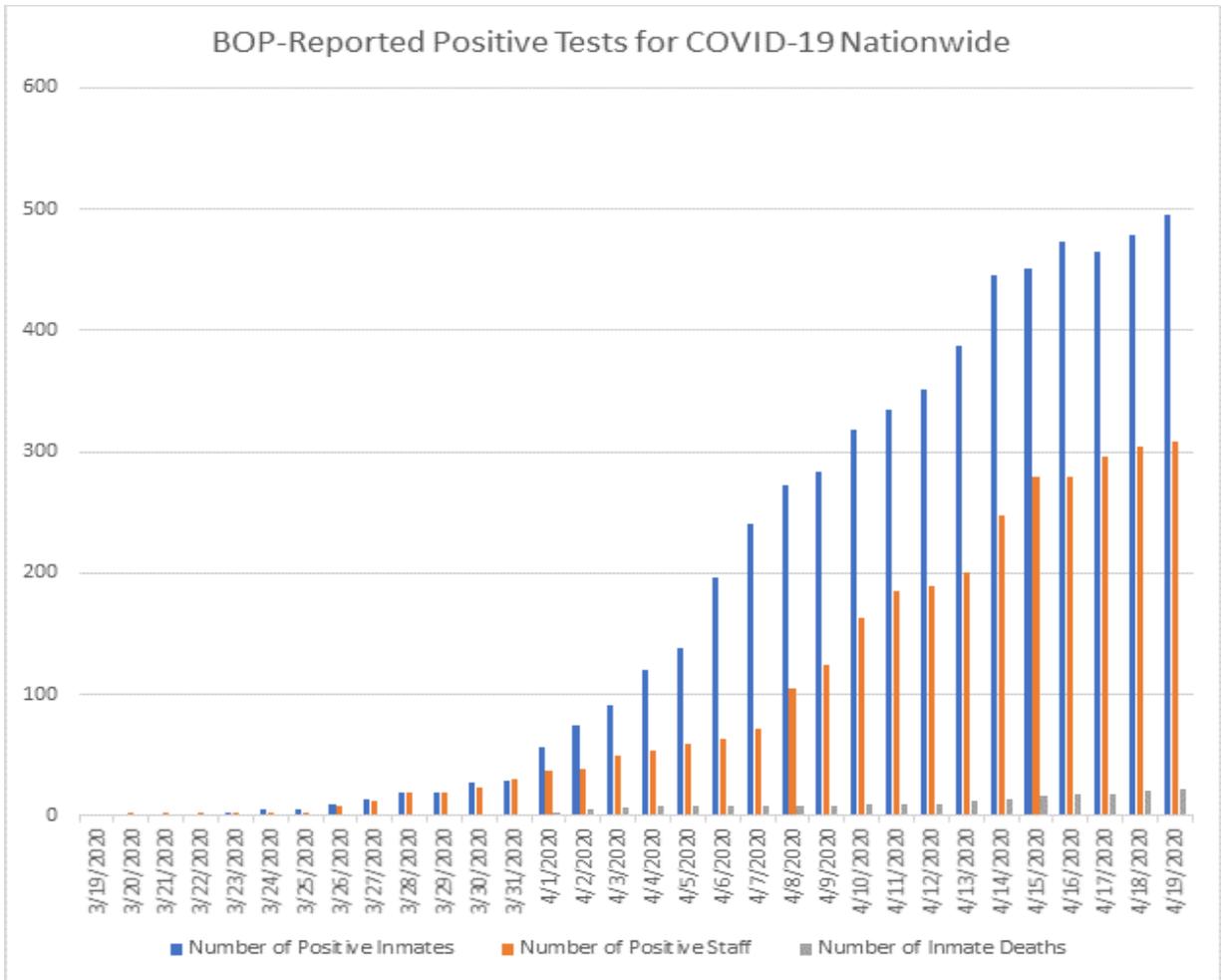
staff (with 22 who have since recovered). Although, in an apparent attempt to minimize the severity of the situation, the BOP reports the number of individuals who have recovered separately from those who currently test positive,⁸ “seemingly recovered patients” can “retest[] positive” for COVID-19⁹ and “at least a proportion of recovered patients still may be virus carriers.”¹⁰ BOP first began issuing medical and screening guidance in January and February, it instituted a nationwide lockdown on March 24th, and yet, BOP’s self-reported numbers continue to rise.¹¹

⁸ This is not how it is done at either the state or federal level when leaders announce the number of positive cases in a state or the country. Compare, for instance, the BOP’s reporting at <https://www.bop.gov/coronavirus/> with the transparency provided by the Maryland government at <https://coronavirus.maryland.gov/>.

⁹ CNN, *More than 140 seemingly recovered patients have retested positive for Covid-19, says South Korea* (Apr. 16, 2020), https://www.cnn.com/world/live-news/coronavirus-pandemic-intl-04-16-20/h_5fa6905b7b9aa8dd59305694147d605f

¹⁰ Stephanie Pappas, *Can people spread coronavirus after they recover?* Live Science (Feb. 29, 2020), <https://www.livescience.com/coronavirus-spread-after-recovery.html> (quoting researchers based in China whose study about reinfection was published in the journal JAMA).

¹¹ The Federal Defenders of New York, Southern and Eastern, update these statistics daily: <https://federaldefendersny.org/>.



BOP-Reported Positive Tests for COVID-19 Nationwide²

Date	Number of BOP Cases ³
3/20/2020	2
3/21/2020	3
3/23/2020	6
3/24/2020	9
3/26/2020	18
3/27/2020	27
3/29/2020	38
3/30/2020	52
3/31/2020	59
4/1/2020	94
4/2/2020	114
4/3/2020	141
4/4/2020	174
4/5/2020	197
4/6/2020	259
4/7/2020	313
4/8/2020	377
4/9/2020	408
4/10/2020	481
4/11/2020	520
4/12/2020	541
4/13/2020	589
4/14/2020	694
4/15/2020	731
4/16/2020	752
4/17/2020	761
4/18/2020	784
4/19/2020	804

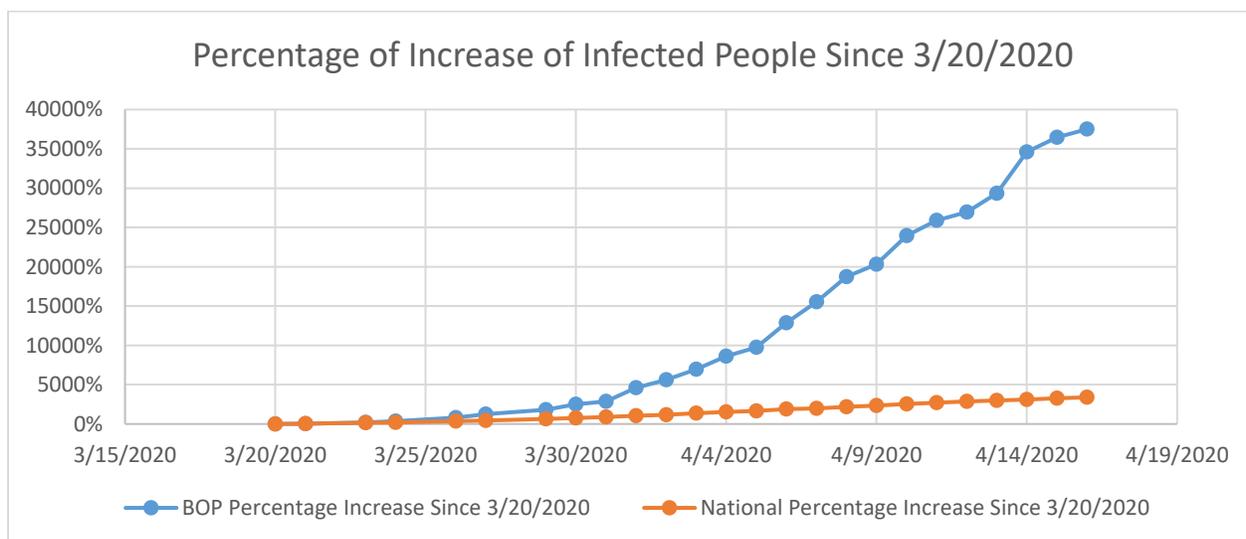
On Monday, April 13th, BOP's website showed 40 facilities with infections. A week later, 59 facilities had infections:¹²

¹² BOP, *Covid-19* (viewed on Apr. 21, 2020 at 2:47 a.m.).



The rate of growth of positive cases within the BOP compared to the rest of the United States continues to be much higher:¹³

Percentage of Increase of Infected BOP People (Inmates and Staff) Since 3/20/2020¹⁴



¹³ The Federal Defenders of New York, Southern and Eastern, update these statistics daily: <https://federaldefendersny.org/>.

¹⁴ National numbers obtained from www.cdc.gov and <https://coronavirus.jhu.edu/map.html>.

These numbers, as bad as they are, appear to drastically underreport what is actually happening. The BOP finally confirmed last week what many advocates had long suspected: **“that the bureau’s case tracking does not include the privately run prisons,”** which have **“a combined capacity for nearly 17,600 inmates.”**¹⁵ The Bureau “did not say why,”¹⁶ and indeed there is no reasonable explanation except that the BOP wants to artificially keep the numbers low. ““This is just another example of dereliction of duty as it relates to the safety of that population that’s incarcerated by our government[.]”¹⁷

That the BOP wishes to keep the numbers low at the expense of accuracy, transparency, and staff and inmates’ health is supported by the fact that, in at least one facility, BOP has declared all inmates presumptively infected, stopped testing altogether, and is refusing to release infection estimates.¹⁸ In another, the president of the correctional officers union estimates inmate infection at 600% of BOP’s public number.¹⁹ One BOP employee told news reporters

¹⁵ Dan Kane, *A second federal prison in NC has coronavirus cases, and U.S. officials aren’t tracking it*, News & Observer (Apr. 19, 2020), <https://www.newsobserver.com/news/local/article242125516.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronavirus Due To ‘Sustained Transmission,’* The Lens (Mar. 31, 2020), <https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/> (hereinafter, “Louisiana Prison No Longer Testing”) (“But the spokesperson said that the BOP would not be releasing the number of presumed positive cases, making it impossible to know how many prisoners at the facility have actually contracted the virus.”).

¹⁹ Staff report, *Elkton union president reports different COVID-19 stats than Federal Bureau of Prisons*, WKBN News, Lisbon Ohio (Apr. 9, 2020), <https://www.wkbn.com/news/coronavirus/elkton-union-president-reports-different-covid-19-stats-than-federal-bureau-of-prisons/> (stating that BOP was reporting just 10 inmate infections, but the union president had said management inside the prison gave “different numbers”: 67

that “the Bureau is playing with these numbers . . . , if they don’t test ‘em and they don’t get confirmed they don’t have to be reported.”²⁰

Indeed, the lack of any cases at FMC Devens may be the lack of meaningful testing: as of April 7, 2020, FMC Devens, housing over 1,014 of the most vulnerable inmates, had tested a mere 17. Reply Ex. A (Apr. 8, 2020 – COVID-19 at Devens). In fact, at one facility where six inmates have already died of COVID-19, which houses a total of 2,421 inmates, the government recently revealed that the facility only had 55 coronavirus tests, had only actually tested 37 inmates, and had only recently received 25 additional “rapid tests,” though it now expected 25 more each week.²¹ Indeed, at this facility, while the BOP lists on its website that there are 59 confirmed cases, “[o]fficials suspect another 207 have it.”²²

In view of both the numbers and what is missing, it rings especially hollow that “BOP institutions, as a matter of policy and procedure, have pandemic plans for preparedness in the event of any infectious disease outbreak,” and “BOP has a plan in place to protect inmates, including defendant.” Gov’t Opp. at 12-13. That the “BOP has been planning for potential

positive or symptomatic and isolated, 44 hospitalized, 14 on ventilators, 12 staff infected, three dead).

²⁰ *Louisiana Federal Prison No Longer Testing*, <https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission/>.

²¹ Eric Heisig, *Judge grills federal prisons lawyer on lack of coronavirus tests at Ohio facility in wake of Trump’s claim that ‘anybody’ can get tested*, Cleveland.com (last updated Apr. 18, 2020). <https://www.cleveland.com/court-justice/2020/04/judge-grills-federal-prisons-lawyer-on-lack-of-coronavirus-tests-at-ohio-facility-in-wake-of-trumps-claim-that-anybody-can-get-tested.html>.

²² *Id.*

COVID-19 transmissions since January,” Gov’t Opp at 8, makes its failed response at FCI Oakdale, which saw its first case in March 2020, a particularly devastating tale.

After Oakdale’s first positive inmate, Patrick Jones, died of COVID-19, a union representative at FCI Oakdale recounted that “[t]he bureau [only] last week banned family and friends from visiting inmates, but the officers’ union had lobbied the federal prison system to take this action *for weeks* to keep the disease from infiltrating the prison walls.”²³ The union representative explained that “staff also asked prison officials — weeks before the first coronavirus case — to shut down a prison labor program within the facility,” but that the program “was not shut down until after the first inmate tested positive.”²⁴ When one staff member questioned the warden about the possibility of COVID-19 coming to that facility, the warden responded, ““Oh, no, because we live in the South, and it’s warm here. We won’t have any problems.’ . . . Nobody gave us new direction on what we should be doing, how we should be preparing, what to look for, anything.”²⁵ Then, when Mr. Jones first exhibited COVID-19 symptoms, he was given a mask on his way to the hospital, but the two staff members who took him were deliberately told he only had asthma, and given no protection: “No one told us he

²³ Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples Federal Prison in Louisiana*, Wash. Post (Mar. 29, 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html (emphasis added) (hereinafter, “Explosion of Coronavirus Cases Cripples Federal Prison”).

²⁴ *Id.*

²⁵ Janet Reitman, ‘*Something Is Going to Explode*’: When Coronavirus Strikes a Prison, N.Y. Times (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html> (hereinfter, “Something is Going to Explode”).

might have Covid-19.”²⁶ And the two staff members were then cleared to return to duty 2 days later.²⁷ One correctional officer explained that:

Most of the [correctional officers] that tested positive were either working in the housing units or sitting on Covid-19 patients in the hospital. In the housing units, they were only wearing surgical masks. They say if you work in an isolation unit, you must wear an N95, but where do you think these inmates are coming from? They’re coming from a housing unit where they won’t give [the officers] that mask. That’s our biggest [complaint]. How is it that you don’t wear the N95 mask where the symptoms originate from? If an inmate gets sick in this area and lives in that area, you don’t wear a mask, but if you put him in an isolation area, you wear a mask.²⁸

After this bungled response, “people [keep] getting sick back to back to back to back.”²⁹

Oakdale has now had an additional 6 deaths.

Echoing these accounts of FCI Oakdale, “more than a dozen workers in the Bureau of Prisons” have reported that “federal prisons are ill-prepared for a coronavirus outbreak. Many lack basic supplies like masks, hand sanitizer, and soap.”³⁰ Staff at one low-security facility described a potential outbreak as “mass chaos,” and confirmed that BOP is “just not prepared to handle something of that nature.”³¹ In fact, an OSHA complaint filed by correctional officers at

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Explosion of Coronavirus Cases Cripples Federal Prison*, https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html.

³⁰ N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count* (last updated April 17, 2020, 8:24 A.M. E.T.) <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

³¹ See *Sick Staff*, https://www.vice.com/en_us/article/jge4vg/sick-staff-inmate-transfers-and-no-tests-how-the-us-is-failing-federalinmates-as-coronavirus-hits.

a federal women’s prison in Tallahassee reports a “lack of masks and other personal protective equipment during the coronavirus pandemic.”³² After “[w]eeks of requests from the [correctional officers’] union[] for a supply of protective equipment like masks and gloves,” anger “boiled over when officers were supplied with what they call counterfeit N95 masks.”³³ The president of the union reported that “[n]one of the labels, logos, the lot number, the inspection number ... none of that stuff was on there”; “[i]t makes no sense,” he added, “We spent thousands of dollars ordering masks and nobody checked the legitimacy of them to make sure they were real or came from a credible vendor.”³⁴

In fact, BOP’s modified operations touted by the government, *see* Gov’t Opp. at 10, 13, are facially insufficient and—as the increasing number of positive cases demonstrate—all but ensure the rapid transmission of COVID-19 within its facilities.³⁵ First, the modified operations do not sufficiently address presymptomatic or asymptomatic spread of COVID-19 among staffers, contractors, and inmates. For example, the “enhanced screening” only requires temperature checks and self-reporting of symptoms—it does not require testing (and could not since tests are in short supply), or for staff to disclose whether they have been in high risk areas or venues or exposed to other symptomatic people.³⁶ Since most COVID-19 transmission

³² *Correctional officers file complaint*, <https://www.tallahassee.com/story/news/politics/2020/04/18/correctional-officers-file-complaint-coronavirus-tallahassee-federal-prison/5152879002/>.

³³ *Id.*

³⁴ *Id.*

³⁵ BOP, *Implementing Modified Operations*, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited on 4/17/2020).

³⁶ *Id.*

occurs pre-symptomatically, and some people show no symptoms at all, these “enhanced screenings” are simply inadequate. The screening tool used for prison contractors is similarly defective.³⁷ Moreover, there is still inmate, staff, and contractor movement: staff do not live at the prisons; essential contractor services allowed into and out of prisons are “for example, medical services, mental health services, religious services and critical infrastructure repairs”; and “the BOP may need to move inmates to better manage the detention bedspace as well as assure that administrative facilities do not become overcrowded beyond available resources.”³⁸

As one correctional officer stated about the “enhanced screenings” for staff,

Originally, they gave us a form, and it asked if you’d been exposed, if you had any symptoms, if you had seasonal allergies, how long you had seasonal allergies. Now all they’re doing is checking our temperature. You pull up, they put a little forehead thermometer and check your temperature: “OK, you want a mask and gloves? Go on in.” No “How are you feeling? Do you have body aches, are you nauseated? Do you have a cough, a runny nose, any of that?” We’re not questioned at all.³⁹

³⁷ BOP, *Visitor/Volunteer/Contractor Covid-19 Screening Tool*, https://www.bop.gov/coronavirus/docs/covid19_screening_tool.pdf. For example, the contractor screening tool asks contractors whether they have traveled to China, Iran, South Korea, Italy, and Japan in the last 14 days, but does not screen those who have traveled to, for instance, Spain (184,948 cases), France (147,113 cases), Germany (138,273 cases), or elsewhere in the United States (671,493 cases). See *COVID-19 Map – Johns Hopkins Coronavirus Resource Center*, Johns Hopkins University & Medicine, <https://coronavirus.jhu.edu/map.html> (last visited Apr. 17, 2020). This tool also fails to screen for pre-symptomatic spread or whether contractors are practicing social distancing.

³⁸ BOP, *Implementing Modified Operations*, https://www.bop.gov/coronavirus/covid19_status.jsp.

³⁹ See *Something is Going to Explode*, <https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html>

Another opined that “they’re going to make the excuse of ‘We’re doing enhanced screening to catch it, come back to work.’ That’s their answer. Is it the right answer? Hell, no, it’s not the right answer.”⁴⁰

Moreover, the BOP provides conflicting information about inmate screening. It claims to require all newly admitted asymptomatic inmates to be quarantined for at least 14 days.⁴¹ But the inmate screening tool does not reflect this process, instead directing staff to conduct “normal intake” so long as an inmate has not traveled to a CDC-determined risk location or had close contact with anyone *diagnosed* with COVID-19 in the last 14 days.⁴² Phase 5 of BOP’s COVID-19 Action Plan purports to significantly decrease inmate movement by requiring that incarcerated individuals at every institution be “secured in their assigned cells/quarters.”⁴³ But this plan does not appear to correct the defective screenings of staff, contractors or inmates, nor does it change the reality that individuals remain in close quarters—still sharing living space, bathrooms, showers, laundry, recreation areas, and computer and phone access. In light of this evidence, waiting for FMC Devens to announce its first case will be waiting too long.

⁴⁰ *Id.*

⁴¹ See BOP, *COVID-19 Action Plan: Phase 5*, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp (last visited Apr. 17, 2020) (Background on Phases 1-4).

⁴² See BOP, *Coronavirus Disease 2019 (COVID-19) Inmate Screening Tool*, https://www.bop.gov/coronavirus/docs/covid19_inmate_screening_tool_20200202.pdf (last visited Apr. 17, 2020).

⁴³ See *COVID-19 Action Plan: Phase Five*, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

II. MR. BRASSWELL’S AGE, MULTIPLE, SERIOUS CO-MORBIDITIES AND COVID-19 ARE EXTRAORDINARY AND COMPELLING CIRCUMSTANCES.

The government acknowledges that each of Mr. Brasswell’s multiple conditions raises his risk of serious illness from COVID-19—save, that is, for hypertension, which is not included in the government’s preferred CDC citation, although the CDC itself reports that 50 percent of those with underlying conditions hospitalized for COVID-19 had hypertension.⁴⁴ But even putting aside Mr. Brasswell’s hypertension, the government’s unwillingness to consider Mr. Brasswell a good candidate for compassionate release lays bare that it is only giving lip-service to the idea that extraordinary and compelling reasons could ever exist where a “defendant suffers from a medical condition or characteristic that elevates his risk of becoming seriously ill from COVID-19 under the CDC guidelines.” Gov’t Opp. at 11. If an individual with advanced kidney disease requiring dialysis, diabetes, congestive heart failure, and cirrhosis of the liver, who has a single kidney and almost died in December 2019 from acute liver failure and a blood clot that traveled to both his lungs, cannot show extraordinary and compelling circumstances in light of the pandemic sufficient to satisfy the government, it is unclear what will.

As for the government’s requirement that a defendant be “more likely to contract COVID-19 in his or her particular institution than if released,” Gov’t Opp. at 11-12, this is both upside-down and reflects dated guidance from Attorney General Barr to the BOP about home confinement—it is certainly nowhere in the compassionate release statutes or the Guidelines’ policy statement aimed at this Court. This purported requirement appears to be taken from Attorney General Barr’s March 26, 2020 announcement of expanded home confinement, in

⁴⁴ Shikha Garg et al, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020*, CDC (Apr. 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm>.

which he stated that “[m]any inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care,” and added “[w]e should not grant home confinement when doing so is likely to increase their risk of COVID-19,” but only if “transfer to home confinement is likely not to increase the inmate’s risk of contracting COVID-19.”⁴⁵ But following criticism of this approach,⁴⁶ Attorney General Barr, in his April 3, 2020 memorandum, abandoned this formulation and instead indicated that “inmates with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations.”⁴⁷

⁴⁵ AG Barr, *Prioritization of Home Confinement as Appropriate Response to COVID-19 Pandemic* (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download> (“March 26, 2020 Memorandum”).

⁴⁶ See, e.g., Press Release, *After Rising Numbers of Federal Prisoners Test Positive for COVID-19 & First COVID-19 related Death Reported in Federal Prison, Nadler & Bass Renew Call for DOJ to Take Action* (Mar. 30, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2893> (“Nadler & Bass Press Release”) (“We are troubled by your statement that ‘[m]any inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care.’ While that may well be the case for some inmates, we hope this statement does not indicate that you believe that prison is a safe place for anyone to be during a pandemic. Quite the contrary, as already demonstrated by the death of a medically-compromised BOP prisoner and the growing numbers of infected persons in BOP facilities across the country. For instance, we are not aware that BOP facilities, as a whole, have ‘ready access to doctors’; a 2019 report by DOJ’s Office of the Inspector General found that ‘staffing prisoners with qualified healthcare workers is a challenge for the BOP.’ This is likely even more true at the present time, with large numbers of healthcare workers being deployed to battle COVID-19 outside the prison walls. In addition, the CDC have encouraged ‘social distancing’ and increased hygiene to prevent COVID-19. Unfortunately, many BOP facilities utilize close quarter housing, which makes it impossible to accomplish adequate distancing between prisoners. And, it is no secret that hygienic conditions are lacking in BOP facilities, as they are in prisons across the country. For all these reasons, the best way to ensure that our prisons do not become epicenters of this incredibly virulent, contagious, and deadly disease is to release as many people as possible.” (internal citations omitted)).

⁴⁷ AG Barr Memorandum, *Increasing Use of Home Confinement At Institutions Most Affected by COVID-19* (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download> (“April 3, 2020 Memorandum”)

In any event, in light of the incontestable evidence of how COVID-19 spreads (exponentially, by asymptomatic and presymptomatic alike), the way the spread can be mitigated (socially distancing at home and handwashing), and the rapidly rising numbers within the BOP, there should be a presumption that an inmate is more likely to contract COVID-19 in a prison facility than at home with family members. It is simply a false narrative that Mr. Brasswell has a higher risk of contracting COVID-19 if released, “where he will be required to navigate the community to obtain medical care,” Gov’t Opp. at 12, than at FMC Devens. When Mr. Brasswell is released from prison, he will be able to mitigate those risks in the same way that those of us lucky enough to be sheltered in our homes are able to do, by staying at home as much as possible, wearing masks in public, staying at least 6 feet away from others, using cars in place of public transportation if available, using disinfectants, sanitizer and soap without fail, and being seen at dialysis locations that are themselves prepared and able to implement strict COVID-19 procedures.⁴⁸ It is not a “generic” plan, but a realistic one, for Mr. Brasswell to live with his fiancée, to have the support (initially by telephone, and later in person) from his brother and his brother’s family, to access community healthcare, and to receive dialysis treatment in the same manner as other low-income D.C. residents do.

What is more, Mr. Brasswell meets the extraordinary and compelling criteria in the Guidelines. *See* U.S.S.G. § 1B1.13, appl. n. 1. For one, he is “suffering from a terminal illness” under Application Note 1(A)(i)—“[a] specific prognosis of life expectancy” is not required, *id.*; Mr. Brasswell was already close to death in December 2019; and he was hospitalized with the

⁴⁸ DaVita Kidney Care, *COVID-19 Information*, <https://www.davita.com/covid-19-information>; American Renal Associates (owners of Capital Dialysis Center), *COVID-19: Our Commitment to the Safety and Wellbeing of Patients, Staff and Physician Partners*, <https://www.americanrenal.com/coronavirus-covid-19-and-our-commitment-to-the-safety-and-wellbeing-of-patients-staff-and-physician-partners>.

identical life-threatening conditions as recently as March 2020. For another, while he is 3 years shy of 65 years old (as listed in Application Note 1(B)), the Department of Justice Inspector General reports that “an inmate’s physiological age averages 10–15 years older than his or her chronological age due to the combination of stresses associated with incarceration and the conditions that he or she may have been exposed to prior to incarceration.”⁴⁹ And as the DOJ’s Inspector General documented, aging inmates have more, and more severe, medical needs, a fact underscored by Mr. Brasswell’s increasingly serious conditions as he ages. He is therefore also experiencing a “serious deterioration” in his health “because of the aging process.” U.S.S.G. § 1B1.13, appl. n. 1(B). In fact, the risk of congestive heart failure increases with age, so that men 45 or older are more likely to have a heart attack than younger men.⁵⁰ Finally, Mr. Brasswell has been incarcerated for over 108 months (9 years) of his 144-month sentence and has thus “served . . . 75 percent of his [] term of imprisonment[.]” *Id.* appl. n. 1(B).⁵¹

Finally, even the government does not dispute that Mr. Brasswell is “suffering from a serious physical or medical condition” under Application Note 1(A)(ii), though it discounts the evidence provided that Mr. Brasswell’s multiple conditions diminish his ability to provide self-care. That those at BOP believe that Mr. Brasswell can provide self-care does not make it so: one of the key reasons § 3582(c)(1)(A) was amended to allow inmates like Mr. Brasswell to

⁴⁹ Office of the Inspector General U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (May 2015, rev. Feb. 2016) at 2, <https://oig.justice.gov/reports/2015/e1505.pdf>.

⁵⁰ See Mayo Clinic, Heart attack- Risk Factors (last accessed 4/20/2020), <https://www.mayoclinic.org/diseases-conditions/heart-attack/symptoms-causes/syc-20373106>.

⁵¹ With good time credit, Mr. Brasswell will be eligible for release after serving approximately 122 months. Thus, having served 108 months to date, Mr. Brasswell has already completed over 88% of his effective sentence.

bring their own motions before the court was because of Congress’s understanding that, too often, the BOP’s assessment of an inmate’s request for compassionate release was “superficial”⁵² and “short on both compassion and legal analysis.”⁵³ This Court need not defer to the BOP’s denial of Mr. Brasswell’s compassionate release requests, and should not now that COVID-19 has changed the risks. “Releasing a prisoner who is for all practical purposes deserving of compassionate release during normal times is all but mandated in the age of COVID-19.” *United States v. Resnik*, 2020 WL 1651508 (S.D.N.Y. Apr. 2, 2020); *see also United States v. Hammond*, No. 02-cr-294 (BAH), ECF No. 51 (Mem. Op. & Indicative Ruling) (Apr. 16, 2020) (providing indicative ruling that court will grant compassionate release to inmate with 7 more years to serve whose age and health conditions, along with COVID-19, were ““extraordinary and compelling” reasons for his release, and his release was “consistent with applicable policy statements issued by the Sentencing Commission”).

When this Court sentenced Mr. Brasswell, it did not “intend for that sentence to ‘include a great and unforeseen risk of severe illness or death’ brought on by a global pandemic.” *United States v. Zukerman*, No. 1:16-cr-194-AT, Dkt. No. 116 (Apr. 3, 2020) (“The severity of Zukerman’s conduct remains unchanged. What has changed, however, is the environment where Zukerman is serving his sentence.”). Mr. Brasswell’s conditions have worsened in prison, and COVID-19 threatens his health even further. This Court should therefore order his release.⁵⁴

⁵² *United States v. Haney*, No. 19-cr-00541, ___ F. Supp. 3d ___, 2020 WL 1821988 at *3 (S.D.N.Y., Apr. 13, 2020).

⁵³ Reply Ex. B (*United States v. Mitchell*, No. 4:09cr26-RH, ECF No. 144 at 6 (N. D. Fl., Feb. 3, 2020)).

⁵⁴ Among many others, the following additional compassionate release orders have been entered in contested cases since Mr. Brasswell’s emergency motion: *United States v. Cosgrove*, Case No. 15-cr-230-RSM, Dkt. No. 95 (W.D. Wash. Apr. 15, 2020) (reconsidering denial of

III. THE FALSE PROMISE OF THE EXPANDED HOME CONFINEMENT PROGRAM.

The government spends three pages of its opposition and two attachments touting the Bureau of Prisons' home confinement program, but leaves to a footnote the following:

The undersigned has been advised by BOP that defendant's Unit Team has determined that under the expanded program authorized by the CARES Act, defendant is ineligible for home confinement because of his "medium" recidivism score (recidivism scores are "minimum," "low," "medium," or "high"). Therefore, defendant will not be referred for home confinement. If defendant cannot obtain home confinement under BOP's priority program, then he is not a suitable candidate for compassionate release.

Gov't Opp. at 10 n.5. This footnote only serves to underscore that compassionate release is Mr. Brasswell's sole available recourse because the BOP's home confinement program is insufficient either by design or in its implementation.

compassionate release and releasing defendant because of "rapid" deterioration of conditions at Terminal Island FCI); *United States v. McPherson*, Case No. 3:94-cr-5708, Dkt. No. 209 (W.D. Wash. Apr. 14, 2020) (releasing defendant serving sentence on stacked § 924(c) based on injustice of sentence and risk factors for COVID-19, noting that no "civilized society" could permit continued incarceration under these circumstances); *United States v. Tran*, 8:08-cr-197-DOC, Dkt. No. 405 (C.D. Cal. Apr. 10, 2020) (ordering compassionate release in light of BOP's inability to protect vulnerable inmates from COVID-19); *United States v. Sawicz*, Case No. 08-cr-287, Dkt. No. 66 (E.D.N.Y. Apr. 10, 2020) (releasing inmate based on "[t]he COVID-19 outbreak at FCI Danbury, combined with the fact that the defendant is at risk of suffering severe complications if he were to contract COVID-19 because of his hypertension"); *United States v. United States v. Trent*, Case No. 16-cr-178, ECF No. 106 (N.D. Cal. Apr. 9, 2020) (granting compassionate release in light of COVID-19); *United States v. Plunk*, Case No. 3:94-cr-36-TMB (D. Alaska Apr. 9, 2020) (granting compassionate release in light of COVID-19); *United States v. McCarthy*, 2020 WL 1698732 (D. Conn. Apr. 8, 2020) (granting compassionate release for defendant at serious risk from COVID-19); *United States v. Hansen*, 2020 WL 1703672 (E.D.N.Y. Apr. 8, 2020) (COVID-19 pandemic and medical problems justifies 7-month reduction in sentence); *United States v. Foster*, No. 1:14-cr-324-02, Dkt. No. 191 (M.D. Pa. Apr. 3, 2020) (noting the "unprecedented" circumstances facing "our prison system" and finding that COVID-19 is an extraordinary and compelling basis for release; indeed, "[n]o rationale is more compelling or extraordinary").

First, the criteria of no more than a “minimum” recidivism score (defined by the PATTERN assessment, discussed further below) was laid out in Attorney General Barr’s March 26, 2020 memorandum on home confinement.⁵⁵ But, crucially, on April 3, 2020, Attorney General Barr made the requisite finding under the CARES Act that “emergency conditions are materially affecting the functioning of the Bureau of Prisons” so that the BOP could “expand the cohort of inmates who can be considered for home release.”⁵⁶ Attorney General Barr clarified the March 26, 2020 criteria by explaining that:

Your assessment of these inmates should thus be *guided* by the factors in my March 26 Memorandum, *understanding, though, that inmates with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations.*⁵⁷

Neither the attorney general nor BOP has defined the phrase “materially affecting their operations,” but even without a reported case at FMC Devens, “COVID-19 is materially affecting [the] operations” of that institution. It could hardly be otherwise if BOP institutions are truly committed to safety, and if FMC Devens’s operations are not being affected, then it is treating the pandemic too casually. Given that this is the case, and “guided” by criteria that prioritizes those in minimum security facilities (like Mr. Brasswell), who have not had disciplinary incidents within the past year (like Mr. Brasswell), and who are “vulnerable . . . in accordance with the [CDC] guidelines” (like Mr. Brasswell), “inmates with a suitable confinement plan [like Mr. Brasswell] will generally be appropriate candidates for home

⁵⁵ See March 26, 2020 Memorandum, <https://www.justice.gov/file/1262731/download>.

⁵⁶ See April 3, 2020 Memorandum, <https://www.justice.gov/file/1266661/download>.

⁵⁷ See *id.* (emphasis added).

confinement rather than continued detention.” Mr. Brasswell has a suitable confinement plan with his fiancée. However, while acknowledging the existence of the April 3, 2020 memorandum, the BOP appears to continue to exclusively apply the March 26, 2020 criteria not as guidance but as handcuffs,⁵⁸ and thereby remove Mr. Brasswell from consideration.

Second, even under the March 26, 2020 criteria as written, Mr. Brasswell is not *ineligible* for home confinement, and yet this is how FMC Devens is implementing the home confinement directives. Attorney General Barr only stated that those with higher than a minimum recidivism score should “not receiv[e] priority treatment” under the March 26, 2020 memorandum, not that they were *ineligible*. And now, under the April 3, 2020 memorandum, they *can* be considered if they are at institutions, like FMC Devens and all BOP facilities, in which COVID-19 is materially affecting their operations.

Third, if Mr. Brasswell is truly ineligible, the BOP’s implementation of the home confinement program would mean that the much-heralded home confinement program for non-violent, at-risk inmates is unavailable to a non-violent, at-risk inmate who has displayed no violence in or outside of prison. The government attaches Mr. Brasswell’s disciplinary record, but the most recent is from October 2017, and while against BOP rules, none are violent or involve any suggestion of violence.

⁵⁸ See, e.g., BOP, *Update on COVID-19 and Home Confinement* (updated Apr. 5, 2020 6:04 pm EST), https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp (in which it acknowledges 4/3/2020 emergency authority, but then provides a hyperlink to the March 26, 2020 memorandum in the following sentence: “Case management staff are urgently reviewing all inmates to determine which ones meet the criteria established by the Attorney General.”); see also BOP, *Frequently Asked Questions Regarding Potential Inmate Home Confinement In Response To The COVID-19 Pandemic* (undated), https://www.bop.gov/coronavirus/docs/hc_faqs.pdf (in which the BOP is still adhering to the 3/26/2020 memorandum).

Fourth, what the recidivism score has to do with the risk to a vulnerable inmate of remaining imprisoned during a pandemic is deeply in doubt. The PATTERN recidivism score was created pursuant to the First Step Act as a means for the BOP to determine an inmate’s score, provide that inmate with programming commensurate with that score, and allow that inmate to complete the programming *as an incentive to receive earned time credits towards early release*.⁵⁹ In other words, a tool developed to help inmates rehabilitate and leave prison early is being deployed to *deny* early release to home confinement (or compassionate release, according to the government). But “it is still an incomplete tool [and] it has yet to be independently validated, as required by the First Step Act.”⁶⁰ In fact, “many questions remain about PATTERN’s validity because of possible racial/ethnic and gender bias and because of the tool’s overemphasis on static factors such as criminal history.”⁶¹ Moreover, the very congressional leaders behind the First Step Act have told Attorney General Barr that “PATTERN was created for an entirely different purpose than for assessing whether prisoners should be released during a pandemic” and they “urge[d] BOP *not* to use a prisoner’s PATTERN score as a consideration for whether they should be released to home confinement during the COVID-19 pandemic.”⁶²

⁵⁹ DOJ, *Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation* (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act>.

⁶⁰ See Nadler & Bass Press Release, <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2893>.

⁶¹ See *id.*

⁶² See *id.*

