

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:
UNITED STATES OF AMERICA	:
	:
v.	:
	:
IVARS OZOLS,	: Case No. 16 Cr. 692 (JMF)
	:
Defendant.	:
-----X	:

MEMORANDUM OF LAW IN SUPPORT OF
IVARS OZOLS' MOTION FOR COMPASSIONATE RELEASE
AND IN RESPONSE TO THE GOVERNMENT'S OPPOSITION

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We respectfully submit this memorandum in support of Ivars Ozols' motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) (ECF No. 470), and in response to the government's May 11, 2020 Opposition (ECF No. 474).

PRELIMINARY STATEMENT

Ivars Ozols is incarcerated in the Federal Satellite Low prison facility in Jesup, Georgia, in a dorm-like housing unit with over 70 other inmates.¹ The men share a single bathroom and shower area. At night, Mr. Ozols sleeps in close quarters in a cell with two other inmates, one of whom recently self-surrendered and was moved into the cell from the outside community, apparently without any period of quarantine. By day, the 70+ inmates mill around the dorm unit and its common areas – they have not been permitted recreational time outside since April 1 – with no social-distancing measures in place. The prison does not distribute hand-sanitizer or soap to the inmates – prisoners are expected to purchase it from commissary with their own, limited funds. Corrections officers move in and out of the dorm, interacting in close proximity with the inmates, often without masks. While inmates have been sick over the last several weeks, none of them, to Mr. Ozols' knowledge, has been removed from or quarantined in the unit. Mr. Ozols is not aware of any COVID-19 testing that has taken place in the prison. In short, FSL Jesup – like prisons around this country – is a tinderbox for COVID-19 infection.

¹ According to the Bureau of Prisons, a total 448 inmates reside at FSL Jesup. The facility is adjacent to FCI Jesup, a medium-security prison that holds 907 inmates, and a minimum-security camp, holding 145 inmates. *Federal Bureau of Prisons*, FCI Jesup, <https://www.bop.gov/locations/institutions/jes/> (last accessed May 18, 2020)

In its opposition to Mr. Ozols' motion for compassionate release, the government relies on the data from the Bureau of Prisons indicating that no inmates or staff have tested positive for the virus. But that is an entirely meaningless statistic if few, or no one, at the prison has been tested. Conspicuously absent from the government's opposition is any representation regarding the extent of testing there. And if the virus is not already present in FSL Jesup, as it very likely is, the available medical evidence and experience of other prisons around this nation shows that it very soon will be.

The BOP itself has acknowledged, albeit belatedly, that the best and perhaps the only reliable way to limit the spread of the virus in the prisons is to reduce the federal prison population – currently almost 170,000 inmates – where doing so is consistent with public safety. Scientists, public health advocates, courts, and leading members of the law enforcement community have urged it to do so. Given that prisons exist within our communities and are not self-contained – prison staff, for example, move back and forth between prisons and the outside world – this is a measure necessary not just to halt the spread of COVID-19 within the prisons, but also within the larger national community. Yet the BOP has moved too slowly and has not done enough.

At issue in this motion is whether Mr. Ozols has demonstrated “extraordinary and compelling reasons” for his release from FSL Jesup, having already served what amounts to three-quarters of his sentence. We respectfully submit that he has. The need to protect the health of Mr. Ozols, his fellow inmates, and the larger community from imminent infection by meaningfully reducing the prison population surely is an extraordinary and compelling reason, and Mr. Ozols is precisely the type of inmate that must be released to achieve this goal. Mr. Ozols is a 42-year-old, non-violent offender, who has been a model inmate. His age, long work

history, family ties and the circumstances of his involvement in the crime of conviction suggest no risk of recidivism. Upon release, Mr. Ozols, a citizen of Latvia, will be immediately deported. In short, it is a national imperative that inmates like Mr. Ozols – who has served the majority of his sentence, presents no threat to the community, and can be released without offending the goals of 18 U.S.C. § 3553(a) – be released. That Mr. Ozols himself suffers from anxiety and depression, which medical evidence demonstrates weakens the immune system and increases susceptibility to illness, and has a family history of lung-related ailments, bolsters the need for his immediate release. And while the BOP has thus far declined to release him – and, as the government says in its opposition, will not consider him for release to home confinement under the CARES Act because he has no lawful immigration status in the country – this Court has the power to do so under the compassionate release statute.

We respectfully submit that the Court can and should exercise this power promptly. Contrary to the government's claims, the Court is not barred from doing so at this time by the exhaustion provision in 18 U.S.C. § 3582. We recognize that the Court found in *United States v. Roberts* that it could not grant compassionate release under the statute absent exhaustion of administrative remedies or the passage of 30 days from the inmate's request to BOP. But since that decision, courts in this District have ruled otherwise, including Judge Nathan, who reversed her initial view, cited by this Court in *Roberts*, that the exhaustion provision bars Court intervention prior to the period set forth in the statute. We ask that the Court do likewise, and adopt the analysis that Judges Nathan, Liman, and Rakoff, among others, have relied on since this Court decided *Roberts*.

BACKGROUND

I. Guilty Plea and Sentence

On October 22, 2018, Mr. Ozols pleaded guilty to one count of conspiracy to commit bank and wire fraud in violation of 18 U.S.C. § 1349. On February 22, 2019, the Court sentenced Mr. Ozols to 39 months' imprisonment, below the advisory range of 51 to 63 months calculated by Probation and the Court. In sentencing Mr. Ozols below that range, the Court indicated that it was "moved by Mr. Ozols' obvious remorse and contrition," which it found was corroborated by his decision to immediately confess to the FBI upon arrest. (ECF No. 234 at 30). The Court further concluded, based on Mr. Ozols' background, that there was not a "great need for specific deterrence or a need to protect the public from future crimes of Mr. Ozols." (*Id.*). Finally, the Court recognized that Mr. Ozols' had already endured substantial suffering while incarcerated at the MDC for the weeks leading up to sentence. In late January and February of 2019, following a fire, the power and heat had gone out at the MDC, temperatures in the prison dropped, and inmates were locked down in their cells, held incommunicado, for an extended period of time. In this respect, the Court observed that "the conditions that [the Court had] read about are the conditions that one associates with a third world country and not a country like this, and nobody in detention, whether convicted, not convicted, awaiting sentencing, should have to endure that as the detainees did at the MDC." (*Id.* at 31).

As described in Mr. Ozols' sentencing memorandum (ECF No. 219), prior to traveling to the United States for the first time in 2017, Mr. Ozols had worked for seven years as a factory production operator and nearly a decade as a small-business owner in Latvia and Norway, while at the same time achieving considerable success as a competitive bodybuilder. Following the financial crisis in 2008 and business setbacks thereafter, Mr. Ozols' became substantially indebted to creditors in Latvia who later assaulted and threatened him. Ultimately,

to work off his debt, Mr. Ozols agreed to travel to the United States at the direction of his creditors, and became involved in the fraud scheme leading to his guilty plea. Mr. Ozols' involvement was limited to withdrawing illicit funds from certain bank accounts and wiring them back to Latvia at the direction of the scheme's leaders. (*See* Ozols PSR at 6-10).

At sentencing, Mr. Ozols expressed his remorse, his desire to repair the harm he had caused, and intention to go back to Latvia and work to give back to his community. (ECF No. 234 at 26). Mr. Ozols' conduct since then has demonstrated that he has every intention of fulfilling this promise. He has an exemplary record, as is reflected in the BOP records attached to his April 11, 2020 letter to the Court. Mr. Ozols has availed himself of over 16 classes, many of which are focused on self-improvement and developing skills that he can use to reintegrate into society upon release. He has no disciplinary infractions and has been working since July 2019 in the prison's electrical maintenance shop. (ECF No. 470 at 9). By the BOP's calculation, Mr. Ozols' projected release date is January 21, 2021, which accounts for good-time credit. As the government acknowledges, by that measure Mr. Ozols has now served approximately three-quarters of his sentence. (ECF No. 472 at 2).

As Mr. Ozols is a citizen of Latvia and has no lawful immigration status in the United States, he will be deported upon his release from prison. As noted in Mr. Ozols' sentencing memorandum, Mr. Ozols' has elderly parents in Latvia who look to him for financial support, as well as two sons, one now 19 and one 10 years old.

II. The Threat Posed By COVID-19 to the Prison Population

The status of COVID-19 as a global pandemic, the rate at which it has swept through this country, and the unprecedented harm it has caused, and continues to cause, to the health and economy of our nation is now a matter of public record and does not need further explication here. This Court has previously noted the nature of the crisis and in particular the

threat it poses to men and women who are currently incarcerated. *See United States v. Nkanga*, 2020 WL 1529535, at *1 (S.D.N.Y. Mar. 31, 2020) (“The country faces unprecedented challenges from the novel Coronavirus (‘COVID-19’) pandemic. Those detained in jails and prisons face particularly grave danger.”). Numerous courts in this jurisdiction have found the same, calling COVID-19, among other things, “an extraordinary and unprecedented threat to incarcerated individuals.” *United States v. Scparta*, 2020 WL 1910481, at *7.²

The threat posed within our prisons is a natural consequences of the manner in which inmates are housed, the general lack of hygiene and quality medical care, and the overcrowding that are typical there.³ Healthcare professionals have called it “an urgent priority to reduce the number of people in detention facilities during this national public health emergency in order to limit exposure to COVID-19.”⁴ This Court has recognized the same,

² *See also Coronel v. Decker*, 2020 WL 1487274, at *3 (S.D.N.Y. Mar. 27, 2020) (“individuals in carceral settings are at a ‘significantly higher’ risk of spreading infectious diseases”); *United States v. Stephens*, 2020 WL 1295155, at *2 (S.D.N.Y. March 19, 2020) (“the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent,” and “inmates may be at a heightened risk of contracting COVID-19”).

³ *See, e.g.*, Timothy Williams et al., “Jails Are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars, *N.Y. Times* (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>. (“The coronavirus is spreading quickly in America’s jails and prisons, where social distancing is impossible. . . . Practices urged elsewhere to slow the spread of the virus – avoiding crowds, frequent handwashing, disinfecting clothing – are nearly impossible to carry out inside.”); *Remick v. City of Philadelphia*, No. 20 Civ. 1959, Doc. 1, Ex. A (E. D. Pa. Apr. 20, 2020) (Declaration of Joseph J. Amon, Ph.D., MSPH, Director of Global Health and Clinical Professor of Community Health and Prevention at the Drexel Dornsife School of Public Health, at 5); Joseph A. Bick, *Infection Control in Jails and Prisons*. *Clinical Infectious Diseases*, Healthcare Epidemiology, Oct. 15, 2007) at 1047-55 (noting that in prison facilities, “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”).

⁴ *Public Health Expert Letter to Trump*, The Justice Collaborative (Mar. 27, 2020), <https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf> (letter from public health experts to President Trump requesting that the President commute the sentences “for all persons who have one year or less remaining on their sentence”

concluding that “[r]ealistically, the best – perhaps the only – way to mitigate the damage and reduce the death toll is to decrease the jail and prison population by releasing as many people as possible.” *Nkanga*, 2020 WL 1529535, at *1 (internal citations omitted).

Indeed, even the highest levels of law enforcement across this country have acknowledged that reducing the prison population is absolutely critical – for the health of all inmates, prison staff, and those in surrounding communities. A joint letter issued by District Attorney’s offices across the country argued that because prisons can “become breeding grounds for the coronavirus,” it is crucial to “work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks.”⁵ And on the federal level, United States Attorney General William Barr has ordered the BOP to “prioritize the use of . . . various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic,”⁶ and later directed the agency to intensify efforts to “immediately review” and release “vulnerable inmates.”⁷

and further observing that incarcerated individuals are “housed cheek-by-jowl, in tightly-packed and poorly-ventilated dormitories; they share toilets, showers, and sinks; they wash their bedsheets and clothes infrequently; and often lack access to basic personal hygiene items. These facilities . . . are tinderboxes, ready to explode and endanger our entire country. Adequate medical care is hard to provide, even without COVID-19.”)

⁵ Joint Statement from Elected Prosecutors on Covid-19 and Addressing the Rights and Needs of Those in Custody (Mar. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>

⁶ See Memorandum from the Attorney General to the Director of the Bureau of Prisons re: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

⁷ *Id.*

III. Conditions in FSL Jesup

Notwithstanding the above, the BOP has to date moved too slowly in releasing those who can be released consistent with public safety. As of late April, the nonprofit media organization The Marshall Project reported that the number of people permitted to serve the remainder of their sentences in home confinement had gone up by only 1,027 following the issuance of Attorney General Barr’s guidance, or half of one percent of the federal prison population.⁸ At the same time, the BOP has done an abysmal job of keeping the inmates and staff entrusted to its care safe from infection. Lawsuits in the Eastern District of New York and the District of Connecticut have exposed and demonstrated the BOP’s failings in, respectively, MDC Brooklyn and FCI Danbury.⁹ In the former case, Dr. Venters, the former Deputy Medical Director of the Correctional Health Services of New York City, submitted a sworn declaration after touring the MDC and interviewing inmates there.¹⁰ Dr. Venters concluded that, despite the

⁸ Joseph Neff et al., “Few Federal Prisoners Released Under COVID-19 Emergency Policies,” *The Marshall Project* (Apr. 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>.

⁹ See also Alex Wigglesworth, “Prisons’ virus policies targeted; Officials mishandled outbreaks and didn’t take preventative action, ACLU claims,” *L.A. Times*, (May 18, 2020) (describing two lawsuits filed by the American Civil Liberties Union alleging that prison officials mishandled coronavirus outbreaks at two federal California prisons, resulting in 1,775 inmate infections and 10 deaths). See *Torres v. Milusnic*, No. 20 Civ. 4450 (C.D. Ca. May 16, 2020), Doc. No. 1, ¶¶ 1, 3 (“The Federal Bureau of Prisons (BOP’) is mismanaging one of the worst public health catastrophes related to COVID-19 anywhere in the country—and at the epicenter of the outbreak are FC Lompoc and USP Lompoc . . . where more than 1,000 incarcerated persons have tested positive for COVID . . . shockingly, these numbers, high as they seem are still underreported.”); and *Wilson v. Ponce*, No. 20 Civ. 4451 (C.D. Cal. May 16, 2020), Doc. No 1 ¶ 7 (noting that Respondent prison officials have “completely failed to prevent the deadly coronavirus from spreading rampantly . . . including by failing to prevent basic supplies like soap and hand sanitizer, refusing to provide adequate personal protective equipment (PPE) to prisoners and staff, and failing to conduct enough testing until it was too late.”)

¹⁰ See Facility Evaluation: Metropolitan Detention Center Covid-19 Response, *Chunn v. Edge*, 20-Cv-1590 (RPK) (E.D.N.Y. Apr. 30, 2020), Doc No 72.

BOP's claims to the contrary, the MDC is "ill-equipped to identify cases of COVID-19 within its population," and "has not implemented adequate infection control practices."¹¹ Indeed, Dr. Venters found that "several current practices in MDC *actually promote* a more rapid spread of COVID-19 inside the facility and serve to work against some of the infection control measures already in place."¹² In the Connecticut lawsuit, a TRO hearing uncovered evidence of seriously inadequate screening, testing, treatment, and quarantine practices.¹³

There is no reason to believe that the level of preparation and care in the prison complex in Jesup, Georgia is any better, and every reason to believe otherwise. The prison is in a rural county outside a major media center, but its failures to meet the challenges of this crisis have attracted attention nonetheless. In late March, the Associated Press reported that "officers at a medium-security federal prison in Jesup, Georgia described broken thermometers hampering screenings," and "[w]hen a staff member got a frighteningly low reading of 89 degrees – an indication of hypothermia – management argued that each person's body temperature is different and refused to replace the thermometer."¹⁴ The local union president at the Jesup facility added that "staff members who report being sick are still being told to work, their temperatures [not taken] by medical staff."¹⁵ One month later, the local news reported that the union still believed

¹¹ *Id.* at 2.

¹² *Id.* (emphasis added).

¹³ Motion for Temporary Restraining Order & Motion to Dismiss, *Martinez-Brooks v. Easter*, No. 3:30-cv-00569 (MPS) (D. Conn. May 12, 2020) ECF No. 30.

¹⁴ Michael Balsamo and Michael R. Sisak, "Federal Prisons Struggle to Combat Growing COVID-19 Fears." U.S. News & World Report. Mar. 27, 2020 Available at <https://www.usnews.com/news/health-news/articles/2020-03-27/federal-prisons-struggle-to-combat-growing-covid-19-fears>

¹⁵ *Id.*

that the BOP was unprepared.¹⁶ The union president told the local news outlet, “[i]f it comes to Jesup, it will be through the staff, and it will be because they did not provide us the equipment to prevent it,” noting that the face coverings provided to staff were “thin and not protective,” and “cannot be reused, even after washing.” According to the president, “It’s only a matter of time before COVID hits Jesup.”¹⁷

These accounts corroborate what Mr. Ozols has observed firsthand at FSL Jesup. Mr. Ozols sleeps in a cell with two other inmates, a confined space where it is impossible to practice social distancing. One of his cellmates (as well as two other inmates in the larger dorm-like space in which the cells are situated) arrived in the prison within the last six weeks, and according to Mr. Ozols, was not tested for COVID-19 or quarantined before his admission to the prison. During the daytime, Mr. Ozols shares common space with more than 70 other inmates. There are no social-distancing restrictions, and inmates crowd around televisions and couches in the common areas. Mr. Ozols reports that since April 1, the prison has been on lockdown, such that the inmates are not permitted recreation time outside, exacerbating an already dire situation. Staff members, who live outside the facility, interact at close quarters with inmates, frequently without masks. Hand sanitizer, soap, and cleaning supplies are not freely available – it is up to the inmates to purchase these necessities themselves from commissary. Over the last two months, Mr. Ozols has observed inmates coughing and sneezing, but is not aware of anyone at the facility being tested for COVID-19 or isolated from the rest of the inmate population.

¹⁶ Amanda Aguilar, “Jesup prison guards concerned over COVID-19.” *WTOC*. (April 24, 2020). Available at [https://www.wtoc.com/2020/04/24/jesup-prison-guards-concerned-over-covid-/](https://www.wtoc.com/2020/04/24/jesup-prison-guards-concerned-over-covid/)

¹⁷ *Id.*

Last month, a 60-year-old inmate in Mr. Ozols' dorm died. Mr. Ozols was told the man had a heart attack, but no one knows whether that was the truth, and rumor, distrust, and fear abound. The stress brought on by the current crisis has exacerbated feelings of anxiety and depression that have plagued Mr. Ozols throughout his life, which he attributes to traumatic experiences in the chaotic years of his childhood following the fall of the Soviet Union, and seeing a man killed during his time in military service. Knowing that his paternal uncle died of lung cancer and that his brother suffers from asthma have heightened his fear that he will contract the virus and die in the eight months remaining in his sentence, before he can return to his native Latvia.

On April 11, 2020, Mr. Ozols wrote a letter to this Court seeking compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A), among other relief.¹⁸ On May 3, 2020, Mr. Ozols wrote a letter to BOP officials seeking release in light of the COVID-19 crisis, and handed it to the corrections officer collecting mail that day.¹⁹ Mr. Ozols has not yet received a decision on his application from the BOP. The BOP apparently advised the U.S. Attorney's Office in this District that "it would respond to Ozols' application in or about the week beginning May 11, 2020," but the week of May 11 has come and passed without a response. (*See* ECF No. 474 at 4 n.2).

According to the government, the BOP has advised that, due to Mr. Ozols' immigration status, it will not consider him for release to community confinement pursuant to 18

¹⁸ The letter is dated April 11, 2020, and was docketed by the Court on May 4, 2020. (*See* ECF No. 470). It is not clear when it was post-marked or mailed by Mr. Ozols.

¹⁹ The BOP apparently advised the U.S. Attorney's Office that it received Mr. Ozols' letter on or about May 7, 2020. (*See* ECF No. 474 at 4). Mr. Ozols recalls that he submitted the letter the same date it is dated – May 3, 2020.

U.S.C. § 3624(c)(2) – an opportunity that would have otherwise been available to him in September 2020. (*See id.* at 4 n.1). For the same reason, it will not consider him for immediate release to home confinement under the CARES act and the Attorney General’s recent directive. (*id.*).

ARGUMENT

I. The Compassionate Release Statute Does Not Prohibit the Court from Granting Relief at this Time

The compassionate release statute, 18 U.S.C. § 3852(c)(1)(A)(i), as amended by the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5193, permits a court to reduce a defendant’s sentence upon finding that (1) “extraordinary and compelling reasons” warrant a reduction, (2) the reduction would be “consistent with applicable policy statements issued by the Sentencing Commission,” and (3) the applicable sentencing factors under §3553(a) warrant a reduction.

The applicable policy statement, U.S.S.G. § 1B1.13, sets forth four circumstances that constitute “extraordinary and compelling reasons” to justify a sentence reduction, relating to a defendant’s (A) medical condition, (B) age, (C) family circumstances, and (D) other reasons. *See* U.S.S.G. § 1B1.13, cmt. n.1. As for provision (D), “the so-called ‘catch-all provision’ purports to grant the BOP exclusive authority to determine whether an inmate has shown ‘extraordinary and compelling reasons’ warranting release beyond what is enumerated in provisions (A) through (C).” Memorandum & Order at 4-5, *United States v. Paul M. Daugerdas*, 9-CR-581 (WHP) (S.D.N.Y. May 1, 2020) (citing U.S.S.G. § 1B1.13, cmt. n.1(D)). However, the case law overwhelmingly supports the notion that “the amendments to the compassionate release statute ‘grant this Court the same discretion as that previously give[n] to the BOP Director, and therefore the Court may independently evaluate whether [a defendant] has raised

an extraordinary and compelling reason for compassionate release’ under the ‘catch-all’ provision.” *Id.* (citing *United States v. Lisi*, 2020 WL 881994, at *3 (S.D.N.Y. Feb. 24, 2020)).²⁰

With regard to the timing of the Court’s decision, § 3582(c)(1)(A) states that, upon a motion for compassionate release filed by a defendant, a court may modify its sentence “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” The government has conceded that this provision is (i) not jurisdictional and (ii) may be waived by the government. *See United States v. Gentile*, No. 19-CV-590, (S.D.N.Y. Apr. 6, 2020) Doc. No. 31; *see also United States v. Haney*, No. 19-CR-541 (JSR), 2020 WL 1821988, at *5-7 (S.D.N.Y. Apr. 13, 2020) (holding that the exhaustion provision is not jurisdictional). Notwithstanding this, in its oppositon, the government argues that the provision is not subject to equitable exception by the Court.

Courts in this District are split as to whether judges can, in light of the exigent and unprecedented circumstances presented by the COVID-19 crisis, grant compassionate release under § 3582(c)(1)(A) prior to the earlier of the exhaustion of administrative remedies or the expiration of the 30-day period. On April 8, this Court held in *United States v. Roberts* that the statute prohibited it from doing so. No. 18-CR-528-5 (JMF), 2020 WL 1700032 (S.D.N.Y. Apr. 8, 2020). The Court’s decision relied principally on the statutory language and, in particular, on the fact that § 3582 “itself includes a limited futlity-like exception,” which it viewed as an

²⁰ *See also United States v. Rodriguez*, 2020 WL 1627331, at *2 (E.D. Pa. Apr. 1, 2020) (stating that “the First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP Exclusive ‘gatekeeper role’”); *United States v. Beck*, 425 F. Supp. 3d 573, 579 (M.D.N.C. June 28, 2019).

indication of “Congress’s decision to mandate exhaustion and to specify a single alternative,” *i.e.*, the lapse of thirty days following the BOP’s receipt of an inmate’s request. *Id.* at *2. In support of its observation that strictly enforcing the exhaustion requirement makes sense under normal circumstances and is consistent with Congressional intent, the Court cited decisions by Judges Liman and Nathan in, respectively, *United States v. Russo* and *United States v. Gross*. *See id.* at *2 n.2 (citing *United States v. Russo*, No. 16-CR-441 (LJL), ECF No. 54, at 4, 2020 WL 1862294 (S.D.N.Y. Apr. 3, 2020) and *United States v. Gross*, No. 15-CR-769 (AJN), 2020 WL 1673244, at *2-3 (S.D.N.Y. Apr. 6, 2020)). While declining to recognize an equitable exception, the Court noted that the exigencies of the COVID-19 crisis threaten, perversely, to turn the 30-day rule into an obstacle to expedition, and thereby thwart Congress’s intention that delay by the BOP not render futile a defendant’s ability to obtain relief. *Id.*

Since this Court’s decision in *Roberts*, both Judge Liman and Judge Nathan have revisited this issue, and both have found that, in the context of the COVID-19 crisis, an equitable exception to the statute’s exhaustion provision *is* in fact consistent with Congressional intent. *See United States v. Russo*, No. 16-CR-441 (LJL), 2020 WL 1862294, at *7 (S.D.N.Y. Apr. 14, 2020); *United States v. Scparta*, No. 18-CR-578 (AJN), 2020 WL 1910481, at *5 (S.D.N.Y. Apr. 20, 2020). This same conclusion was reached by Judge Rakoff in *United States v. Haney*, No. 19-CR-541 (JSR), 2020 WL 1821988, at *4 (S.D.N.Y. Apr. 13, 2020), also decided subsequent to this Court’s opinion in *Roberts*.

In *Russo*, Judge Liman began his analysis by observing that the § 3582(c)(1)(A) exhaustion provision is a claims-processing rule, not a jurisdictional requirement. *See* 2020 WL 1862294, at *4. Looking to Supreme Court precedent in analogous contexts, Judge Liman reasoned that claim-processing rules are, like other statutory rules with “seemingly mandatory

language about when a claim can brought,” subject to equitable exceptions, such as waiver, forfeiture, tolling, and futility. *Id.* at *6 (citing *Holland v. Florida*, 560 U.S. 631 (2010) (holding that a nonjurisdictional federal statute of limitation is normally subject to a “rebuttable presumption” in favor “of equitable tolling.”); *Young v. United States*, 535 U.S. 43, 49 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling[.]”) (quotation marks omitted)). The court further observed that “[t]he Second Circuit itself has stated that a ‘claim-processing rule’ is ‘subject to equitable considerations such as waiver, estoppel or futility,’” and cited a line of cases supporting this principle. *Id.* (citing *Paese v. Hartford Life & Acc. Ins. Co.*, 449 F.3d 435, 443 (2d Cir. 2006); *Fed. Ins. Co. v. United States*, 882 F.3d 348, 361 (2d Cir. 2018); *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 311 (2d Cir. 2015), as corrected (Oct. 27, 2015); *Grewal v. Cuneo Gilbert & LaDuca LLP*, 2020 WL 897410 (2d Cir. Feb. 25, 2020)).

Having concluded that the § 3582(c)(1)(A) exhaustion provision may be subject to equitable exception, the court found that applying such an exception would be appropriate only if its application were consistent with congressional intent. *Id.* (citing *Young v. United States*, 535 U.S. 43, 49 (2002)). In analyzing Congress’s intent with respect to the First Step Act, Judge Liman observed that the law was a “distinctive federal statute” that “does not reflect unqualified commitment to administrative exhaustion” and “does reflect acknowledgement that the judiciary has an independent interest in, and responsibility for, the criminal judgments it is charged with imposing.” *Id.* He further found that the plain language of § 3582(c) evinces Congress’s intent that a defendant have a right to a prompt and meaningful judicial determination of whether he or she should be compassionately released, regardless of whether administrative remedies have been exhausted. *Id.* Accordingly, the court concluded that “it can grant the

requested relief on its own authority, given the extraordinary circumstances here, and because doing so would not be inconsistent with congressional intent.” *Id.*

In *Scparta*, Judge Nathan was persuaded by the court’s reasoning in *Russo*, and adopted that analysis over her prior analysis in *Gross*. 2020 WL 1910481, at *5. She further noted that the very “title of the First Step Act’s provision that enacted this exhaustion regime,” which is “Increasing the Use and Transparency of Compassionate Release,” reflects the efficiency that the statute sought to achieve. *Id.* at *7. “[C]onstruing the exhaustion requirement strictly” would only undermine the law’s clear aims, and “[w]ithout the application of equitable exceptions, prisoners bringing compassionate-release motions due to COVID-19 may *never* obtain timely judicial review before the virus takes its toll.” *Id.* (the legislative history indicates that that statute was designed “to ‘enhance public safety’ and ‘make[] . . . changes to Bureau of Prisons’ policies and procedures to ensure prisoner and guard safety and security.’” (quoting H.R. Rep. 115-699 at 22)).

Here, because every additional day that Mr. Ozols must wait for a judicial determination brings further risk of potentially deadly infection and the worsening of the crisis facing our prisons – precisely the risk this motion seeks to avoid – the statutory purpose is best-served by the Court’s granting relief prior to expiration of the 30-day waiting period.²¹

²¹ See also *Haney*, 2020 WL 1821988, at *4 (“in the extraordinary circumstances now faced by prisoners as a result of the COVID-19 virus and its capacity to spread in swift and deadly fashion, the objective of meaningful and prompt judicial resolution is clearly best served by permitting Haney to seek relief before the 30-day period has elapsed.”); *United States v. Smith*, No. 12 CR. 133 (JFK), 2020 WL 1849748, at *4 (S.D.N.Y. Apr. 13, 2020); *United States v. Pinto-Thomaz*, 18-CR-579 (JSR), 2020 WL 1845875, at *1 (S.D.N.Y. Apr. 13, 2020); *United States v. Zukerman*, No. 16 CR. 194 (AT), 2020 WL 1659880, at *2 (S.D.N.Y. Apr. 3, 2020); *United States v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020); *United States v. Livingston*, No. 18-CR-416 (ENV), 2020 WL 1905202, at *1 (E.D.N.Y. Apr. 17, 2020); *United States v. Gileno*, No. 3:19-CR-161-(VAB)-1, 2020 WL 1904666, at *5 (D. Conn. Apr. 17, 2020);; *United States v. Sawicz*, No. 08-CR-287 (ARR), 2020 WL 1815851, at *2

Accordingly, we respectfully submit that this Court is not prohibiting from granting Mr. Ozols' motion at this time.²²

II. Mr. Ozols Has Satisfied the Requirements for Compassionate Release under 18 U.S.C. § 3852(c)(1)(A)

In its opposition to Mr. Ozols request for compassionate release, the government argues that Mr. Ozols “cites no particular health condition, describing only the general danger posed by COVID-19, but does not explain why his release would ameliorate the risk he faces – as do people on every country on Earth – from the virus.” (ECF No. 474 at 7). The government further argues that “in light of the seriousness of his crime, the amount of time he has served, and the factors considered by the Court at his sentencing, a modification of his sentence is not warranted.” (*Id.*). The government’s analysis is flawed with respect to both of these claims. As set forth below, Mr. Ozols’ has demonstrated “extraordinary and compelling” reasons for his release, that he poses no danger to the public, and that his immediate release is consistent with the goals of sentencing set forth in 18 U.S.C. §3553(a).

A. Mr. Ozols’ Faces a Significantly Higher Risk from COVID-19 while in Prison and Extraordinary and Compelling Reasons Justify His Release

The government’s assertion that the risk Mr. Ozols faces from COVID-19 while held in FSL Jesup is no different from that faced by anyone else outside of prison, or the risk he would face if permitted to return to and live at liberty in his native Latvia, is demonstrably incorrect. As described above, *supra* at 8-10, the prison environment in general, and the conditions at FSL Jesup, in particular, present a far greater risk for the spread and contraction of

(E.D.N.Y. Apr. 10, 2020); *United States v. McCarthy*, No. 3:17-CR-0230 (JCH), 2020 WL 1698732, at *4 (D. Conn. Apr. 8, 2020); *United States v. Colvin*, No. 3:19CR179 (JBA), 2020 WL 1613943 (D. Conn. Apr. 2, 2020);.

²² Alternatively, we respectfully request that grant the requested relief no later than June 2, 2020, which will be thirty days after Mr. Ozols submitted his request to the BOP.

COVID-19 than is present in the outside world. In opposing compassionate release applications in this District and around the country, the government has repeatedly claimed, as here, that the BOP has taken adequate precautions and that inmates are in no particular risk of infection, particular in prisons where the BOP has reported few or no positive tests for COVID-19. But time and again, these claims have proven wrong.

For example, as recently reported in the media, the government had initially opposed a defendant's application for compassionate release from FMC Fort Worth in Texas, arguing that the "transmission of COVID-19 at the facility has been relatively controlled" because only six inmates had reportedly tested positive there.²³ Less than a week later, prosecutors were compelled to withdraw their opposition in the face of the "skyrocketing numbers of infections' at the facility."²⁴ Similarly, in *United States v. Fischman*, on April 10, 2020, when the defendant first filed his application for compassionate release from FCI Terminal Island in Los Angeles, the BOP reported no confirmed cases of COVID-19. Three weeks later, the Court granted the defendant's application, noting that by that point 615 inmates – more than half of the overall population of the prison – had tested positive, including the defendant himself. No. 16-Cr-246 (HSG) (N.D. Cal. May 1, 2020).

Indeed, because it takes only a few cases for the virus to take hold and spread exponentially within a prison setting, courts have recognized that defendants face an enhanced risk of contracting the virus, even in the absence of reported cases at the particular facility. *See*,

²³ Neena Satija, "Come on, we're human beings" Judges question response to coronavirus in federal prisons." *The Washington Post*. May 13, 2020, https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691_story.html

²⁴ *Id.*

e.g. United States v. Asaro, No. 17-cr-127 (ARR), 2020 WL 1899221, at *6 (E.D.N.Y. Apr. 17, 2020) (granting compassionate release because although “as of this writing, no confirmed cases of COVID-19 are present at Springfield [prison where defendant was housed], I cannot conclude that no cases are, in fact, present, without assurances that the BOP is routinely testing everyone within the facility”); Memorandum at 9, *United States v. Pabon*, No. 17-cr-165 (E.D. Pa. May 4, 2020) Doc. No. 118 (granting compassionate release because “[i]f the Court waits to act until the BOP confirms its first case of COVID-19 at Lewisburg, it may be too late for vulnerable inmates like [the defendant],” and “[t]he Court is not willing to take that risk”). And as noted, *supra* at 8, when the BOP has been pushed to provide evidence that the policies it trumpets on its website (which are parroted in the government’s opposition, (*see* ECF No. 474 at 9-11), are being consistently implemented or working as advertised, the BOP’s purported efforts have been proven deficient.

In any event, it is by no means clear that COVID-19 has not already come to FSL Jesup. Without a reliable indication as to the extent of testing at the facility, the BOP’s reported numbers are meaningless.²⁵ The government has not provided the Court with any evidence of testing at FSL Jesup, and the available evidence – including Mr. Ozols’ direct experience and the

²⁵ *See, e.g., United States v. Asaro*, 2020 WL 1899221, at *3 (E.D.N.Y. Apr. 17, 2020) (“Absent more information about how much testing the BOP is conducting, it is possible that undetected cases are present in the facility”); *United States v. Pabon*, No. 17-cr-165, at 8 (E.D. Pa. May 4, 2020) (“Although the government represents that Lewisburg Camp has no cases of COVID-19, the government never says whether anyone has been tested,” and “[w]ithout mass testing—and any detailed information about the current conditions at the Lewisburg Camp—the Court may be getting a false picture”).

lack of testing by the BOP that has been reported around the country²⁶ – indicate that testing has been inadequate or non-existent.

It is abundantly clear, as a matter of science, the available evidence, and common sense, that Mr. Ozols would be significantly safer from the virus outside of the prison setting, where he could practice social distancing and other basic health and safety measures. Yet the BOP has apparently foreclosed Mr. Ozols from the possibility of release to home confinement under the CARES act, and has not acted on his application for compassionate release. Mr. Ozols would also be safer in his own country, Latvia, than in the United States. Latvia, unlike the United States, is not a global hotspot for the virus – indeed, news reports from the Baltic region have highlighted Latvia’s success in combating the virus as compared to neighboring countries, pointing to, among other things, the greater availability of testing in the country.²⁷ As of May 17, 2020, the European Centre for Disease Prevention and Control reported 997 cases in Latvia

²⁶ See, e.g., *Pabon*, No. 17-cr-165, at 8 (As of May 1, 2020, “Only 2,700 of approximately 150,000 federal inmates in this country have been tested, and of those tested 70% have COVID-19”) (internal citations omitted); Letter from Senator Richard Durbin and Senator Chuck Grassley to DOJ Inspector General Michael Horowitz, April 21, 2020, <https://www.durbin.senate.gov/imo/media/doc/DOJ%20IG%20COVID-19%20BOP%20letter%20final%20signed.pdf> (last visited, May 13, 2020) (“We . . . worry that BOP is significantly underestimating the rate of COVID-19 infection in BOP facilities because BOP has not yet conducted the number of tests on staff or inmates appropriate for facilities where a highly contagious virus can easily spread.”); Katie Park, *et al.* “Tracking the Spread of Coronavirus in Prisons.” *The Marshall Project*, Apr. 24, 2020 (“While most prison systems are releasing information about the number of positive tests and prisoner deaths in their facilities, far less is known about how many people are being tested,” and “in the many states where tests have not been prevalent, far more people may be carrying it than are being reported.”)

²⁷ Latvia’s COVID-19 success puzzles Lithuanian pundits, draws global praises, Baltic News Network Apr. 29, 2020, <https://bnn-news.com/latvia-s-covid-19-success-puzzles-lithuanian-pundits-draws-global-praises-212874>

and the rate of infection has slowed in the past month.²⁸ In contrast, the state of Georgia, where FSL Jesup is located, has had more than 36 times that number of cases, with less than six times the population.²⁹

Finally, we respectfully submit that the Court should deem the need for Mr. Ozols' release from prison to be "extraordinary and compelling" under the statute, for at least two reasons. First, as discussed *supra* at 6 and n.4, we are in the midst of an urgent and unprecedented national emergency requiring that the prison population be reduced as much as possible, in a manner consistent with public safety. While an initial wave of compassionate release applications has properly focused on those inmates who are elderly or have critical health problems, it has not been enough.³⁰ It is vital then that the BOP – and where it fails to do so, the courts – modify the sentences of other inmates as well. Mr. Ozols – a model prisoner, who has served three-quarters of his sentence, poses no threat to the community, and will be deported following his release – is precisely the sort of inmate that merits release, and must be released if the goal of substantially reducing the risk of infection in the prisons and surrounding communities is to be achieved.

²⁸ "COVID-19 Geographic Distribution," *European Centre for Disease Prevention and Control*. Available at: <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases> (Accessed March 12, 2020).

²⁹ *Daily Status Report*, Georgia Department of Public Health (last visited May 13, 2020). <https://dph.georgia.gov/covid-19-daily-status-report>

³⁰ Joseph Neff et al., *Few Federal Prisoner Released Under COVID-19 Emergency Policies* (Apr. 25, 2020), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies>. We note that prisoners over 60 years of age make up less than 6% of the federal prison population. Federal Bureau of Prisons, *Inmate Age* (last accessed May 18, 2020 https://www.bop.gov/about/statistics/statistics_inmate_age.jsp).

Second, Mr. Ozols himself does in fact have health concerns – including abnormal levels of anxiety and depression – that, coupled with his current incarceration at FSL Jesup, put him at increased risk of contracting and falling seriously ill from COVID-19.³¹ While the government questions Mr. Ozols’ assertion that he suffers from post-traumatic stress disorder arising from his service in the Latvian military, its stated reason for doing so is patently baseless. The government suggests that that fact that Mr. Ozols “elect[ed] to join [the military] voluntarily before he was called into service,” and that he “achieved the rank of sergeant and receive[d] and award for courage, as well as forge[d] life-long friendships with his fellow soldiers,” is inconsistent with the possibility that Mr. Ozols also suffered psychological trauma during his service. (ECF No. 474 at 9 n.5). Although Mr. Ozols has apparently not received a formal diagnosis, he reported to the undersigned that he has, for years, struggled with anxiety and depression, which he traces to traumatic experiences in his younger life, including a shooting accident in the military that left a fellow soldier dead. That Mr. Ozols achieved success and made friendships during his service is of course not inconsistent with experience of serious

³¹ Both experts and courts have recognized that mental health issues like PTSD can make inmates significantly more vulnerable in the face of highly contagious viruses, like COVID-19. *See, e.g. Arevalo v. Decker*, No. 20 Civ. 2982 (S.D.N.Y. Apr. 13, 2020) Doc. 3-3, at 2-3 (Declaration of Robert M. Sapolsky, John A. and Cynthia Fry Gunn Professor at Stanford University) (“Of greatest relevance to this matter, the longest-recognized pathological consequence of chronic stress (since circa 1930) is suppression of the immune system, worsening of the outcome of immune diseases, and triggering of inflammation. Of critical relevance to COVID-19, this involves impaired immune defenses against viral infection, and compromised function of the lungs.”); *Doe v. Barr*, 2020 WL 1984266, at *3 (N.D. Cal. Apr. 27, 2020) (finding “undisputed evidence in the record that Petitioner’s PTSD and MDD have likely caused him to become immunocompromised and that people with weakened immune system have a reduced ability to fight infectious diseases in general, including viruses like COVID-19”); *Durel B. v. Decker*, 2020 WL 1922140, at *10 (D.N.J. Apr. 21, 2020) (finding that extraordinary circumstances warranted release where Petitioner suffered from various mental health issues, including PTSD).

trauma. He has only now begun to come to terms with these symptoms in the course of the anger management and addiction programs in which he has enrolled in prison (*see* ECF No. 470 at 9), as well as through meetings with counselors and the chaplain at Jesup.³²

B. The § 3553(a) Factors Support a Sentence Reduction for Mr. Ozols, a Non-Violent, First-Time Offender Posing Little Risk of Recidivism

Granting compassionate relief to Mr. Ozols would not be inconsistent with the relevant sentencing factors set forth in 18 U.S.C. § 3553(a). When the Court sentenced Mr. Ozols to a sentence below the advisory Guidelines range, it noted that it perceived little risk of recidivism and a great deal of remorse from Mr. Ozols. (*See* ECF No. 234 at 30). During the 15 months since he appeared before the Court, Mr. Ozols has further proven that his involvement in the charged offense was no indication of who he has been or who he will be when he finishes his sentence. Mr. Ozols has worked during this period in the prison's electrical maintenance shop and, seeking self-improvement and to better his prospects upon release, taken an array of courses – among others, Public Speaking, Real Estate, Parenting, Literacy Orientation, Introduction to Computers, French, and Microsoft Excel. (*See* ECF No. 470 at 9). He has no disciplinary infractions and has renewed his commitment to family and to his religion. He is a model prisoner who has effectively served three-quarters of his sentence, and his release at this time is entirely consistent with the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Finally, just as the Court credited Mr. Ozols at sentencing for what he suffered in MDC Brooklyn in January and February of 2019, *supra* at 4, granting him compassionate release at this time would recognize what Mr. Ozols has endured, again due to the failures and

³² Mr. Ozols also reports that his family has a history of lung disease, including his paternal uncle, who died of lung cancer, and Mr. Ozols' brother, who suffers from asthma. We are seeking further information regarding this history, including from Mr. Ozols' family in Latvia, and will provide any additional relevant details we are able to obtain.

indifference of the BOP, during the last two months of this current crisis. Indeed, it has come to our attention that Courts in this District have recently cited the unprecedented and unduly harsh conditions experienced by federal inmates under the pandemic as justifying the imposition of shorter terms of incarceration. *See, e.g., United States v. Morgan*, 19 Cr. 209 (RMB) (S.D.N.Y. May 5, 2020). In our conversations with Mr. Ozols last week, the fear and anxiety he lives with every day – knowing how ill-prepared, once again, the BOP is to protect him from sickness or death – was palpable in his voice. In light of this, reduction of Mr. Ozols’ sentence is wholly consistent with basic principles of justice.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant Mr. Ozols’ request for compassionate relief and reduce his sentence so that he is released upon the Court’s ruling on this motion.

Dated: New York, New York
May 18, 2020

Respectfully submitted,

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