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16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 vs.

19 PACIFIC EUROTEx CORP., MORAD
NEMAN, HERSEL NEMAN, MEHRAN
20 KHALILI, and ALMA VILLALOBOS,

21 Defendants.

) Case No. 14-CR-00521(A)-JAK

) **DEFENDANTS HERSEL NEMAN'S
) AND BEN NEMAN'S JOINT
) EMERGENCY MOTION FOR
) COMPASSIONATE RELEASE FROM
) INCARCERATION**

) **Emergency Telephonic Hearing Being
) Requested:**

) Judge: Hon. John A. Kronstadt

) Date: March 26, 2020, or as soon as
practicable

) Time: TBD

) Place: Telephonic

) **[Motion for Order Shortening Time and
) [Proposed] Order being filed
) concurrently herewith]**

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1 **NOTICE OF EMERGENCY MOTION FOR COMPASSIONATE RELEASE**

2 PLEASE TAKE NOTICE THAT on March 26, 2020, at 1:30 p.m., or at a time
3 set by the Court as soon as is practicable, via telephonic hearing, defendants Hersel
4 Neman (aged 61) and Ben Neman (aged 60), by and through their individual counsel of
5 record, move this Court for an Order granting the immediate compassionate release of
6 defendants Hersel Neman and Morad (Ben) Neman (collectively, the “Nemans”).¹ The
7 Nemans will also be filing a motion for order shortening time, permitting this Court to
8 hear this emergency motion on March 26, 2020, and requesting that the government
9 respond on or before Wednesday, March 25, 2020.

10 The emergency motion is made pursuant to 18 U.S.C. § 3582(c)(1)(A) to modify
11 the Nemans’ term of imprisonment to permit the Nemans to serve the remainder of their
12 custodial sentence in strict home detention in order to protect the Nemans from the spread
13 of the novel coronavirus (“COVID-19”). The motion will be based upon this Notice, the
14 attached Memorandum of Points and Authorities in Support, the Motion for Order
15 Shortening Time, the attached declarations and exhibits, and all other papers on file in
16 this matter and oral argument of counsel at the telephonic hearing.

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27 ¹ Pursuant to the Order of the Chief Judge in response to the Coronavirus Public
28 Emergency, Defendants request the hearing be held telephonically to prevent the
unnecessary congregation of individuals and promote social distancing. A copy of the
order is electronically available at:
https://www.cacd.uscourts.gov/sites/default/files/documents/Order_20-042.pdf

1 **I. INTRODUCTION**

2 We live in extraordinary and dangerous times. The spread of the Covid-19 virus
3 across our state and country threatens us with unprecedented dangers. We have been told
4 by the authorities to stay home, stay safe, and not be closer than six feet to anyone. Older
5 persons, persons with weakened immune systems and those with underlying health
6 problems need to take ever greater precautions because of the dangerous aspects of this
7 particular virus.

8 By this emergency motion, defendants Hersel Neman (“Hersel”) and Morad (Ben)
9 Neman (“Ben”) (collectively, the “Nemans”) seek their immediate release from the
10 federal prison camp at Lompoc USP to serve the remainder of their custodial term in
11 strict home detention. We seek this relief pursuant to 18 U.S.C. § 3582, as modified by
12 the First Step Act, and do so in order to protect the Nemans’ Eighth Amendment and
13 their Due Process rights. As discussed more fully below, the Nemans’ health profiles and
14 ages match those who are commonly identified as being most at risk of contracting and
15 suffering the most severe health consequences – hospitalization or death.

16 Indeed, a leading epidemiologist from John Hopkins University, Dr. Chris Beyrer,
17 has stated under oath regarding COVID-19 that the “fatality rate is higher in men, and
18 varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases)
19 for those with pre-existing medical conditions including cardio-vascular disease,
20 respiratory disease, diabetes, and immune compromise.” (Declaration of Chris Beyrer,
21 MD, MPH, in Support of Persons in Detention and Detention Staff, COVID-19,
22 (hereinafter “Beyrer Decl.”), attached hereto as Ex. A, at ¶ 6).

23 As of December 2018, Congress invested this Court with the power and duty to
24 consider reducing a limited number of its previous sentences where extraordinary
25 circumstances, not foreseen at the time of sentencing, make such reconsiderations
26 appropriate. Now, Section 3582(c)(1)(A) of Title 18 permits a defendant to file directly
27 with the Court a motion seeking reduction of his or her sentence for extraordinary and
28 compelling reasons if: (1) the defendant has fully exhausted his administrative remedies;

1 or (2) there has been a lapse of 30 days from the warden's receipt of the defendant's
2 request, whichever is earlier. 18 U.S.C. § 3582(c)(1)(A)(i). No longer is the Court
3 divested of jurisdiction after sentencing a defendant. Upon the proper showing and in
4 light of extraordinary circumstances this Court is permitted to release an inmate.

5 Accordingly, upon consideration of the Nemans' extraordinary and compelling
6 showing below, we ask this Court to act quickly and decisively by releasing them from
7 custody and permitting them to serve the last few months of their sentences in strict home
8 detention in order to protect the health and rights of these two defendants, as well as other
9 inmates and BOP's Lompoc staff.

10 Both Nemans are over 60 years old, have compromised pulmonary systems and
11 other health problems that have affected their immune systems, and have a short period
12 of time remaining on the custodial portions of their sentences. Most importantly today,
13 each defendant, like every person in this country, is in danger of contracting a pernicious,
14 aggressive life-threatening infection. Unlike most people in this country, however, they
15 have no way to practice the social distancing and sheltered protective measures that are
16 mandated by governments and health officials throughout the nation and which promise
17 some hope of surviving the consequences of infection. Indeed, the Nemans are prevented
18 from such practices due to the living conditions in which they are incarcerated. They
19 committed crimes that lead to their incarcerations, but the unforeseen health danger they
20 now face threatens their lives as well as those of other inmates and BOP staff.

21 Addressing and alleviating the risk of such dangers are both prudent and compassionate
22 without endangering others or deviating unreasonably from the intent and purpose of the
23 Court's original sentences for them. (*See* Docket No. 750 & 752, Hersel and Ben's
24 Judgement & Commitment Orders, respectively).

25 It is becoming clear that BOP's facilities and Staff are soon facing a tidal wave of
26 infections because BOP houses a large number of prisoners in very tight quarters across
27 this nation. Once the virus spreads inside BOP facilities, there will be little to stop
28 it. BOP has decided as a policy matter to battle this virus by treating the prisons as

1 fortifications that will nominally deny entry to outside infestation by among other things,
2 ending inmate visitation and requiring the Staff to self-report infections. *See*
3 https://www.bop.gov/coronavirus/covid19_status.jsp. While BOP’s strategy certainly is
4 well intentioned, it flies in the face of every health expert and governmental order in the
5 country. Indeed, on Sunday, March 22, the President of the United States discussed
6 openly that he is considering releasing all federal prisoners who are elderly and non-
7 violent, presumably based on recommendations received by his Coronavirus Task
8 Force. *See* [https://www.businessinsider.com/trump-consider-coronavirus-executive-](https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3)
9 [order-federal-prisons2020-3](https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3). BOP’s “Impenetrable Fortress” strategy is not going to
10 work, and senior people in this administration must be doubting its ability to protect
11 BOP’s elderly, non-violent prisoners.

12 The Nemans have sought to resolve this request for early release by petitioning BOP
13 through the Lompoc Warden for an immediate release. In the alternative they have asked
14 the Lompoc Warden and BOP to file a motion with this Court for such a release. *See*
15 Declaration of Pam Johnston in Support of Hersel Neman’s Emergency Motion for
16 Compassionate Release (“Johnston Decl.”), at ¶¶ 12-15, Exs. B-E).² To date, there have
17 been numerous similar such requests across the nation. BOP uniformly has rejected these
18 requests. It has steadfastly based its rejections on its impenetrable fortress policy of
19 stopping this pernicious virus at the walls of the prisons. Consequently, no inmate
20 seeking release because of the virus can reasonably expect a particularized evaluation of
21 his or her individual facts. On March 23, 2020, government counsel provided Nemans’
22 counsel with a stock “no” answer that did not include any individualized thought or
23 consideration of their situation.³ Again, litigants need to look to the courts for relief; the
24

25 _____
26 ² The letters include a March 19th and March 22nd letter sent on behalf of Hersel and
Ben Neman to Warden Engleman.

27 ³ According to the government’s March 23 response, the “government opposes the
28 request on the ex parte basis, procedurally and substantively -- for reasons including the
following: (1) the letter does not cite any authority to shorten the 30-day period; and (2)
the materials presented do not sufficiently demonstrate release under 3582.”

1 agencies here are locked in bureaucratic straitjackets.

2 As anticipated, the government objects to this Motion on the grounds that there has
3 been no exhaustion of administrative remedies in light of the fact that the government has
4 not had 30 days in which to consider the Defendants' requests. In light of the
5 extraordinary circumstances now facing our governments and more importantly each and
6 every one of us, such arguments are unavailing. There is a clear, wholly applicable
7 exception to the exhaustion requirement. As noted in *Hendricks v. Zenon*, this Court can
8 dispense with the administrative exhaustion requirement where there are "exceptional
9 circumstances of peculiar urgency" *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir.
10 1993) (quoting *Granberry v. Greer*, 481 U.S. 129, 134 (1987); see also 28 U.S.C.
11 § 2254(b) (authorizing application for writ of habeas corpus in the absence of exhaustion
12 of State remedies where "circumstances exist that render such process ineffective to
13 protect the rights of the applicant."). The instant case is precisely what *Hendricks*
14 anticipates. We have "exceptional" circumstances of peculiar urgency.

15 Moreover, the sad truth is that appeal to BOP for administrative assistance in this
16 matter is both futile and dangerously time consuming. The government already is on
17 record as opposing requests for reduction of sentence due the Coronavirus. See, e.g.,
18 *United States v. Paul Gileno*, No. 3:19-CR-161-(VAB)-1, 2020 WL 1307108 (D. Conn.
19 Mar. 19, 2020) (the court denied the request on the merits and on the grounds of lack of
20 exhaustion of administrative remedies). It is beyond peradventure that the nationwide
21 sheltering and social distancing of tens of millions of Americans and the threats of this
22 deadly viral infection are circumstances which are historically extraordinary. The threats
23 to the health and lives of these two inmates as well as the other inmates and Staff at
24 Lompoc require immediate consideration. Waiting for 30 or even 10 days might prove to
25 be too long. There is no valid reason to wait the full 30 days for the formal
26 denial. Nothing is going to change between now and then other than that the Nemans
27 will be in greater danger each day as they sit in their communal barracks, use their
28 communal bathroom, and travel on their communal bus to and from each meal. (Johnston

1 Decl., ¶¶ 2-3; Declaration of Terry W. Bird in Support of Morad (Ben) Neman’s
2 Emergency Motion for Compassionate Release (“Bird Decl.”), at ¶¶ 2-3).

3 At least one federal judicial officer in California has recently dismissed BOP’s
4 Impenetrable Fortress strategy. *See In the Matter of the Extradition of Alejandro Toledo*
5 *Manrique*, Case No. 19-mj-71055-MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal.,
6 Mar. 19, 2020).⁴ As Magistrate Judge Hixson in the Northern District of California
7 found, this idea of an impenetrable fortress is a fiction.

8 The Court is glad to hear that there are currently no reported cases of COVID-19 at
9 Maguire, but is unsure what that means if people are not being tested. And, as the
10 [prison’s] management plan itself acknowledges, symptoms of COVID-19 can
11 begin to appear 2-14 days after exposure, so screening people based on observable
12 symptoms is just a game of catch up. That’s why the Bay Area is on lockdown.
13 We don’t know who’s infected. Accordingly, the government’s suggestion that
14 Toledo should wait until there is a confirmed outbreak of COVID-19 in Maguire
15 before seeking release, *see* ECF No. 113 at 6 (“If the situation with respect to
16 COVID-19 at Maguire changes, Toledo is free to seek reconsideration of the issue
17 at that point.”), is impractical. By then it may be too late.

18 *Id.*, at *1.

19 Staff leave and enter every day. If you need proof of the falsity of the
20 impenetrable fortress approach, just look to see if it is working across the federal prison
21 system? It is not. The walls are porous. Other state and federal prisons and have already
22 reported that the virus has struck them. *See, e.g.*,

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25 ⁴ *But see Gileno*, 2020 WL 1307108 (Mar. 19, 2020). *Gileno* is distinguishable for
26 several reasons. First, the *Gileno* defendant is scheduled to be incarcerated until October
27 2020—whereas the Nemans are scheduled to finish the custodial portion of their sentence
28 in the next few months. And second, the *Gileno* health issues do not pose the same risks
with respect to contracting COVID-19, which attacks the respiratory system. *See id.*, at
*3 (identifying the defendant’s primary health concerns as being a pre-incarceration back
injury, anxiety, and some issues with cholesterol and blood pressure). As discussed
herein, both Hersel and Ben Neman have compromised lungs, among other serious health
issues.

1 [https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-](https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/)
2 [for-covid-19-on-rikers-island-officials/2338242/;](https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/)
3 <https://www.bop.gov/coronavirus/index.jsp>. The Fortress is not going to hold,
4 particularly in a hot spot state like California. It is built on a fiction – that you can
5 identify and segregate those who are infected. But in this country right now testing of the
6 virus is woefully lacking. As a country, we do not have enough tests to test all the
7 suspected cases. Additionally, this is a virus that is passed BEFORE any symptoms
8 show. Thus, there are likely persons in Lompoc USP who are already infected. Testing
9 is completely inadequate at this time, so we have no real idea of the true degree of spread
10 of the virus. These prisons are not airtight submarines or spaceships. They are organic
11 communities that depend on contact with and from local communities and citizens. They
12 are very porous facilities due to the movement in and out every day of guards, doctors,
13 and other staff. The virus will give no heed to BOP’s walls or strategies.

14 As discussed below, the untenable situation that the Nemans face poses Eighth
15 Amendment and Due Process problems. *See Helling v. McKinney*, 509 U.S. 25 (1993);
16 *Riley v. Rhay*, 407 F.2d 496, 497 (9th Cir. 1969). Should the Nemans not be released
17 from the petri dish in which they are now living, they are going to be exposed to a life-
18 threatening virus. This is certainly both a cruel and unusual punishment that need not be
19 inflicted upon non-violent, non-dangerous elderly, sickly prisoners who are almost ready
20 to be released.

21 The Nemans respectfully request that this Court not delay resolution of these
22 issues. There is no sound reason why a 30-day administrative process or the Fortress
23 Strategy should be honored in the face of BOP’s one-size-fits-all fortress approach and
24 the overwhelming medical authority and common sense to the contrary. Moreover, the
25 consequences of honoring this strategy do not warrant the apparent risks involved. This
26 motion is tailored and specific. It does not seek to “open the BOP gates” and effect a
27 blanket release of all those incarcerated. This motion is particularized to inmates whose
28 presence in the BOP facility is as much a threat to staff and other inmates as it is to the

1 Nemans. The Nemans are 60+ years old and have pre-existing immune system
2 characteristics that make them particularly susceptible to the virus and the reality of
3 becoming very sick or dying from it. Each of these defendants has served significant
4 portions of his original sentence and is due to leave Lompoc USP soon. What the
5 Nemans seek is a reasonable balance between the punishment originally ordered by this
6 Court and the unnecessary risk of sickness and even death should they be required to
7 serve the small number of months remaining on those sentences.

8 We all live together in unprecedented and extraordinary times. These times require
9 quick, decisive and reasonable exercise of judicial power in this matter. Congress has
10 provided this Court with that power, and we are respectfully asking it to exercise it by
11 ordering an immediate release to whatever restrictive home confinement the Court, BOP
12 or Probation Office deems necessary and appropriate.

13 **II. PROCEDURAL HISTORY**

14 On September 9, 2014, Hersel and Ben were indicted by a grand jury for the
15 Central District of California in a ten-count indictment alleging conspiracy to launder
16 monetary instruments, in violation of Title 18, United States Code, Section 1956(h);
17 conspiracy, in violation of Title 18, United States Code, Section 371, to (1) fail to file
18 currency transaction reports in a trade or business in violation of Title 31, United States
19 Code, Sections 5331 and 5324(b), and (2) structure transactions in violation of Title 31,
20 United States Code, Sections 5313 and 5324(a), and related substantive charges, as well
21 as forfeiture allegations. (Indictment, Docket No. 1). On September 10, 2014, Hersel and
22 Ben were arrested and arraigned on the indictment. On November 29, 2017, the
23 government filed a First Superseding Indictment (“FSI”) against the defendants. (FSI,
24 Docket No. 379).

25 On December 21, 2017, Hersel pleaded guilty to Counts 1, 16 and 18 of the FSI.
26 (Docket No. 415). Count 1 charged that during a period ending September 9, 2014,
27 Hersel and others conspired to launder monetary instruments, in violation of 18 U.S.C. §
28 1956(h); Count 16 charged that from 2012 through October 2014, Hersel and others

1 conspired to impede the collection of income taxes, in violation of 18 U.S.C. § 371; and
2 Count 18 charged that on October 15, 2014, Hersel made and subscribed to a false tax
3 return, in violation of 26 U.S.C. § 7206(1). (FSI, Docket No. 379).

4 On December 21, 2017, Ben pleaded guilty to Counts 2, 16, 17, and 19 of the FSI.
5 (Docket No. 414). Count 2 charged that during a period ending September 9, 2014, Ben
6 and others conspired to structure financial transactions and did so as part of a pattern of
7 illegal activity involving more than \$100,000 in a 12-month period, in violation of 18
8 U.S.C. § 371 and 31 U.S.C. § 5324(d)(2); Count 16 charged that from 2012 through
9 October 2014, Ben and others conspired to impede the collection of income taxes, in
10 violation of 18 U.S.C. § 371; Count 17 charged that on October 15, 2014, Ben made and
11 subscribed to a false tax return, in violation of 26 U.S.C. § 7206(1); and Count 19
12 charged that on September 14, 2014, Ben and Hersel aided in the filing of a false tax
13 return, in violation of 26 U.S.C. § 7206(2). (FSI, Docket No. 379).

14 On December 18, 2018, Hersel and Ben appeared before this Court for sentencing.
15 (Docket No. 750, 752). At the time of sentencing, Hersel, with a date of birth in October
16 1958, was 60 years old and Ben, with a date of birth in February 1960, was 58 years old.
17 This Court sentenced Hersel to 18 months of incarceration with the Bureau of Prisons on
18 each of Counts 1, 16, and 18 of the FSI, all to be served concurrently. (*Id.*). The Court
19 also sentenced Hersel to three years of supervised release, consisting of three years on
20 each of Counts 1 and 16 and one year on Count 18 of the FSI. (*Id.*). Moreover, this
21 Court ordered that Hersel “participate for a period of six (6) months in a home detention
22 program which may include electronic monitoring, GPS, alcohol monitoring or
23 automated identification systems and shall observe all rules of such program, as directed
24 by the Probation Officer.” (Docket No. 750).

25 On December 18, 2019, This Court sentenced Ben to 24 months of incarceration
26 with the Bureau of Prisons on each of Counts 2, 16, 17, and 19 of the FSI, all to be served
27 concurrently. (Docket No. 752). The Court also sentenced Ben to three years of
28 supervised release, consisting of three years on each of Counts 2 and 16 and one year on

1 Counts 17 and 19 of the FSI. (*Id.*). Finally, similar to Hersel’s sentence, this Court
2 ordered Ben “participate for a period of six (6) months in a home detention program
3 which may include electronic monitoring, GPS, alcohol monitoring or automated
4 identification systems and shall observe all rules of such program, as directed by the
5 Probation Officer.” (*Id.*).

6 On May 1, 2019, Hersel and Ben both self-surrendered to the Bureau of Prisons
7 and are currently incarcerated at the Lompoc USP. Both Hersel and Ben have been
8 assigned to Lompoc USP’s minimum security satellite camp.

9 As currently scheduled, the BOP expects to release Hersel Neman from custody on
10 or about May 14, 2020 and, thus, in less than two months. (Johnston Decl., at ¶ 1). As
11 currently scheduled, the BOP expects to release Ben Neman in or about July 2020 from
12 Lompoc UPS. (Bird Decl., at ¶ 10). However, it is hoped that Ben Neman’s release date
13 will be advanced, as he turned 60 years old in February and consequently now is eligible
14 for consideration under the First Step Act. Thus, it is likely that the BOP will schedule
15 Ben Neman to be released within months. Unfortunately, this schedule may not be short
16 enough to save the Nemans and other high-risk inmates from the COVID-19 virus and its
17 pernicious impacts

18 **III. HERSEL’S AND BEN’S CURRENT CONDITIONS OF CONFINEMENT** 19 **AND HEALTH CONDITIONS**

20 **A. Hersel’s and Ben’s Current Conditions of Confinement**

21 As noted above, both Hersel and Ben are in custody at Lompoc USP’s minimum
22 security satellite camp (“Camp”). (Bird Decl., at ¶ 2; Johnston Decl., at ¶ 2). At the
23 Camp, Hersel and Ben are living in single room barrack along with approximately 160
24 other inmates. (Bird Decl., at ¶ 2; Johnston Decl., at ¶ 2). Both Hersel and Ben sleep on
25 stacked beds in an open room, with their heads less than two feet away from other
26 inmates sleeping in nearby bunks. (Bird Decl., at ¶ 2; Johnston Decl., at ¶ 2). Moreover,
27 there are several other inmates in their immediate sleeping area who are in excess of 60
28 years old. (Bird Decl., at ¶ 2; Johnston Decl., at ¶ 2). The barrack in which both Hersel

1 and Ben sleep is not well ventilated, and the 160 inmates are required to share a total of
2 four toilets and eight sinks. (Bird Decl., at ¶ 2; Johnston Decl., at ¶ 2).

3 The Camp's commissaries (the dining areas) are currently not functioning as
4 designed and/or as previously used. (Bird Decl., at ¶ 3; Johnston Decl., at ¶ 3).
5 Accordingly, both Hersel and Ben must load onto buses with 40-45 other closely packed
6 inmates and travel to and from another prison commissary within Lompoc USP in order
7 to eat for each meal each day. (Bird Decl., at ¶ 3; Johnston Decl., at ¶ 3). As a part of
8 their Jewish faith, Hersel and Ben keep kosher, which limits their food options and they
9 are rarely able to eat fresh food. (Bird Decl., at ¶ 3; Johnston Decl., at ¶ 3). Moreover, in
10 light of the limitations at the Camp's commissaries, both Hersel and Ben are essentially
11 eating only canned food and junk food, i.e., food containing high level of calories from
12 sugar or fat, with little dietary fiber, protein, vitamins or minerals. (Bird Decl., at ¶ 3;
13 Johnston Decl., at ¶ 3).

14 **B. Hersel's Current Health Condition**

15 Hersel's father passed of lung cancer in 1976 at the age of 61, which is Hersel's
16 current age. (Docket No. 726, Hersel Neman Revised Presentence Report (hereinafter,
17 "Hersel PSR", at ¶ 69). In June 2015, Hersel had a cancerous bladder tumor removed
18 and underwent 18 months of Bacillus Calmette-Guerin ("BCG") immunotherapy.
19 (Hersel PSR, at ¶ 103). The BCG successfully treated Hersel's cancer and it is currently
20 in remission. (*Id.*). This cancer treatment has, however, lowered his body's ability to
21 fight off other problems. Moreover, Hersel has a history of chronic tobacco use and was
22 suspected to have chronic obstructive pulmonary disease. (*Id.* at ¶ 108).

23 While in custody at Lompoc USP, Hersel had routine x-rays taken of his chest
24 (presumably screening for TB). (Johnston Decl., at ¶ 7). During this review of Hersel's
25 x-rays, someone at Lompoc USP saw black spots on the x-rays of Hersel's lungs. (*Id.*).
26 About two months ago, the prison then x-rayed his lungs again. (*Id.*). The black spots
27 are still there. He has not been treated for his lung condition. (*Id.*).

28 While at Lompoc USP, Hersel contracted the flu. (Johnston Decl., at ¶ 8). Hersel

1 dealt with the flu and its attendant symptoms for over a month without any medication.
2 (*Id.*). According to Hersel, the Lompoc USP physician was unable to provide medication
3 to Hersel or other inmates to deal with the flu and its attendant symptoms. (*Id.*).

4 **C. Ben's Current Health Conditions**

5 Ben's father passed away of lung cancer in 1976 at the age of 61. (Bird Decl., at
6 ¶ 4). In or around 1998, Ben was diagnosed with high cholesterol and he takes
7 medication for this condition. (Bird Decl., at ¶ 5; Morad Neman's Pre-sentence
8 Probation Report, Docket No. 539 (hereinafter, "M. Neman PSR"), ¶ 123). In or around
9 2012, Ben was diagnosed with an enlarged prostate and he takes medication to reduce the
10 urination frequency caused by this condition. (Bird Decl., at ¶ 5; M. Neman PSR ¶ 124).
11 At approximately the same time, Ben was diagnosed with high blood pressure and he
12 takes medication, Tribenzor, to treat his high blood pressure. (Bird Decl., at ¶ 5; M.
13 Neman PSR ¶ 125). In 2012 or 2013, Ben had kidney stones, which passed
14 spontaneously through urination. (Bird Decl., at ¶ 5; M. Neman PSR ¶ 126). In the fall
15 of 2017, Ben spent a week in the hospital with kidney stones again, which were treated
16 by lithotripsy. (*Id.*).

17 While at Lompoc USP, Ben has suffered from the flu, which took him out of
18 commission for several weeks. (Bird Decl. ¶ 6). A 40-year tobacco smoker, Ben
19 currently has trouble breathing, has been coughing regularly, and he continues to suffer
20 from the effects of his high blood pressure and high cholesterol. (*Id.*). While Ben is
21 taking antibiotics to address his recent ailments, his immune system is compromised.
22 (*Id.*).

23 **IV. THE COURT HAS JURISDICTION TO ORDER THE IMMEDIATE**
24 **RELEASE OF THE NEMANS TO STRICT HOME DETENTION**

25 The Court has jurisdiction to decide this motion and to release the Nemans from
26 Lompoc USP. The Court should deem them satisfied or waive the First Step Act's
27 exhaustion requirements because of the extreme risk the Covid-19 pandemic presents to
28 the Nemans.

1 The compassionate release statute, first enacted as part of the Comprehensive
2 Crime Control Act of 1984, granted the district court authority to reduce a defendant's
3 term of imprisonment where there were "extraordinary and compelling reasons"
4 warranting such reduction. In 1984, the Court had such authority only on motion by the
5 Director of BOP. 18 U.S.C. § 3582(c)(1)(A)(i); *see also* PL 98-473 (HJ Res 648), PL 98
6 473, 98 Stat 1837 (Oct. 12, 1984). In 2018, Congress enacted the First Step Act, which
7 amended Section 3582(c)(1)(A). See P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21,
8 2018). As of December 2018, Section 3582(c)(1)(A) now permits a defendant to file
9 directly with the Court a motion seeking reduction of his or her sentence for
10 extraordinary and compelling reasons if: (1) the defendant has fully exhausted his or her
11 administrative remedies; or (2) there has been a lapse of 30 days from the warden's
12 receipt of the defendant's request, whichever is earlier. 18 U.S.C. § 3582(c)(1)(A)(i).

13 The Nemans have requested compassionate release from BOP. Their counsel on
14 March 19, 2020 transmitted letters to the Lompoc USP warden requesting their release to
15 strict home detention because they have immediate and indisputable health issues, and
16 administrative delay could have dangerous and even deadly consequences for them, other
17 Lompoc USP inmates, and Lompoc USP staff. The Nemans provided notice that they
18 would be filing an emergency request for release with the Court as early as Monday,
19 March 23, 2020. We have not yet heard from the BOP.

20 While BOP has not yet ruled on the Nemans' individual requests, the Court need
21 not and should not wait for such rulings. Moreover, the Court should not wait until April
22 18, 2020 (30 days from BOP's receipt of the Nemans' requests). Waiting for either of
23 these actions on the part of BOP would be futile because BOP appears to take the
24 position—both in its published material and in other cases that courts have considered in
25 the last week—that it is capable of protecting its inmates and staff from the pernicious
26 effects of COVID-19 by way of its "Impenetrable Fortress" (our words) strategy. *See*
27 Federal Bureau of Prisons COVID-19 Action Plan, available at
28 https://www.bop.gov/resources/news/20200313_covid-19.jsp. This strategy is wholly

1 inadequate to protect the Nemans, other prisoners, and BOP staff, as discussed above.
2 Just in the last few days, new positive cases at BOP—prisoners and staff—have been
3 reported, and the numbers go up by the hours. *See*
4 <https://www.bop.gov/coronavirus/index.jsp>. Sadly, it is highly likely that untested and
5 unreported cases already exist within BOP’s facilities at Lompoc in California, a hot-spot
6 for the virus.

7 There are extraordinary and compelling circumstances that require the Nemans’
8 immediate release from prison to strict home detention. The Court has jurisdiction and
9 should order the release of the Nemans for at least three reasons.

10 First, the purpose of the exhaustion requirement is satisfied given the COVID-19
11 pandemic. The purpose of the exhaustion requirement under Section 3582(c)(1)(A)(i) is
12 to provide BOP a chance to research a defendant’s request to determine whether it finds
13 there are extraordinary and compelling circumstances that justify moving the court for a
14 reduction in the defendant’s sentence. *See* United States Department of Justice Federal
15 Bureau of Prisons Program Statement 5050.50, Compassionate Release/Reduction in
16 Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g), ¶ 7,
17 available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf. In the usual case,
18 that envisions a detailed factual dive into the circumstances of each prisoner. Here,
19 however, there is no need for any such research on the part of BOP because the prison
20 has chosen to have a one-size-fits-all answer. It is just saying no.

21 Hersel and Ben Neman, aged 61 and 60, respectively, and with serious health
22 conditions, are at risk of serious illness or death should they be exposed to COVID-19.
23 For the Court to wait 30 days before determining whether the COVID-19 pandemic
24 presents sufficiently extraordinary and compelling circumstances for the Nemans to be
25 released to strict home detention not only would be counterproductive and inefficient, but
26 there is a real possibility it could be deadly for at least these two men.

27 Second, the Court’s exercise of jurisdiction here would not infringe on the BOP’s
28 jurisdiction given the unprecedented and deathly risks COVID-19 poses to the Nemans.

1 Even in the context of federal habeas proceedings, where the exhaustion doctrine is a
2 matter of federalism and comity, courts nevertheless may dispense of the requirement in
3 cases in which “exceptional circumstances of peculiar urgency are shown.” *Hendricks v.*
4 *Zenon*, 993 F.2d 664, 672 (9th Cir. 1993) (quoting *Granberry v. Greer*, 481 U.S. 129,
5 134 (1987); *see also Simmons v. Blodgett*, 910 F. Supp. 1519, 1524 (W.D. Wash.
6 1996), *aff’d*, 110 F.3d 39 (9th Cir. 1997), *as amended* (Apr. 18, 1997) (excusing
7 exhaustion and stating that “petitioner’s ability to prove his claim continues to diminish
8 rapidly over time, and is at risk of being lost,” such that “justice requires that his habeas
9 petition be heard expeditiously”); *see also* 28 U.S.C. § 2254(b) (authorizing application
10 for writ of habeas corpus in the absence of exhaustion of State remedies where
11 “circumstances exist that render such process ineffective to protect the rights of the
12 applicant.”). Permitting waiver of exhaustion under Section 3582 arguably is even more
13 appropriate than in the habeas context because federalism is not implicated in
14 compassionate release as it is in habeas proceedings. *See Braden v. 30th Judicial Circuit*
15 *Court of Kentucky*, 410 U.S. 484, 490-91 (1973) (in habeas proceedings, the exhaustion
16 doctrine is principally designed to protect the state courts’ role in the enforcement of
17 federal law and prevent disruption of state judicial proceedings). Moreover, unlike in the
18 habeas context, where state courts may be able to provide the relief the defendant seeks,
19 here, the BOP cannot, without involving the Court, provide the relief the Nemans seek.
20 The statute requires that the Court release the prisoner. Exhaustion with the BOP should
21 yield to the exceptional circumstances of particular urgency that the unprecedented
22 COVID-19 pandemic presents to the Nemans.

23 Third, at a minimum the Court should order the Nemans’ immediate release if the
24 Court defers ruling on this application until after BOP’s determination and any required
25 administrative appeals, or after 30 days from BOP’s receipt of the Nemans’ requests. As
26 discussed above, it is only a matter of time before COVID-19 spreads like wildfire in the
27 prisons. Indeed, as Judge Hixson put it last Thursday:

28 The Court is glad to hear that there are currently no reported

1 cases of COVID-19 at Maguire, but is unsure what that means
2 if people are not being tested. And, as the [prison's]
3 management plan itself acknowledges, symptoms of COVID-19
4 can begin to appear 2-14 days after exposure, so screening
5 people based on observable symptoms is just a game of catch
6 up. That's why the Bay Area is on lockdown. We don't know
7 who's infected. Accordingly, the government's suggestion that
8 Toledo should wait until there is a confirmed outbreak of
9 COVID-19 in Maguire before seeking release, *see* ECF No. 113
10 at 6 ("If the situation with respect to COVID-19 at Maguire
11 changes, Toledo is free to seek reconsideration of the issue at
12 that point."), is impractical. By then it may be too late.

13 *In the Matter of the Extradition of Alejandro Toledo Manrique*, Case No. 19-mj-71055-
14 MAG-1 (TSH), 2020 WL 1307109, at *1 (N.D. Cal., Mar. 19, 2020) (emphasis added).

15 With the speed and unpredictability of this pandemic in a hot spot like California,
16 waiting even 30 days will be too late. Accordingly, this Court should exercise
17 jurisdiction over the Nemans' emergency motion for compassionate release and dispense
18 with the BOP requirements under 18 U.S.C. § 3582(c)(1)(A)(i); namely, that (1) the
19 Nemans fully exhaust their administrative remedies; or (2) there has been a lapse of 30
20 days from the Lompoc USP warden's receipt of the Nemans' request, whichever is
21 earlier.

22 **V. THE COVID-19 PANDEMIC**

23 **A. COVID-19 Surfaces in China & Spreads Worldwide**

24 COVID-19 is a viral respiratory illness caused by a novel coronavirus first
25 identified, in Hubei Province, China, in December 2019. *See* CDC, What you need to
26 know about coronavirus disease 2019 (COVID-19), available at
27 <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>; *see*
28 *also* NewScientist, Covid-19, available at <https://www.newscientist.com/term/covid-19/>.

1 Since its discovery in Wuhan, cases of COVID-19 have spread to over 114 countries.
 2 See UN News, Coronavirus: Pandemic alert should be trigger for countries to do more
 3 against COVID-19 (Mar. 11, 2020), available at
 4 <https://news.un.org/en/story/2020/03/1059231>. The World Health Organization’s most
 5 recent Situation Report on COVID-19 identifies 292,142 confirmed global cases of
 6 COVID-19, and 12,784 deaths. See World Health Organization, Coronavirus disease
 7 2019 (COVID-19): Situation Report—62 (Mar. 22, 2020), available at
 8 [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200322-sitrep-
 9 62-covid-19.pdf?sfvrsn=f7764c46_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200322-sitrep-62-covid-19.pdf?sfvrsn=f7764c46_2).

10 **B. COVID-19 is Continuing to Spread Exponentially**

11 The virus is spreading exponentially. That is meaningful. We have no time to
 12 waste. Overall, COVID-19’s basic reproduction number is somewhere between 2.4 and
 13 3.8, which means that “each newly infected person is estimated to infect on average 3
 14 additional persons.” (Beyrer, Decl., at ¶ 10). Because of this, the virus is spreading at a
 15 rapidly accelerating rate. The following is the data showing the rapid acceleration of the
 16 COVID-19 worldwide from the World Health Organization:⁵

Date	Total Cases	Cases Since Yesterday
03.20.2020	234,073	24,247
03.19.2020	209,839	16,556
03.18.2020	191,127	15,123
03.17.2020	179,111	11,525
03.16.2020	167,515	13,903

26 COVID-19 is spreading exponentially. Indeed, the World Health Organization

27
 28 ⁵ See World Health Organization, Coronavirus Disease (COVID-2019) Situation Reports,
 Situation Reports 56-60, [https://www.who.int/emergencies/diseases/novel-coronavirus-
 2019/situation-reports](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports).

1 has noted that the “number of confirmed cases worldwide has exceeded 200,000. It
2 took over three months to reach the first 100,000 confirmed cases, and only 12 days to
3 reach the next 100,000.” [https://www.who.int/docs/default-
4 source/coronaviruse/situation-reports/20200319-sitrep-59-covid-
5 19.pdf?sfvrsn=c3dcdef9_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200319-sitrep-59-covid-19.pdf?sfvrsn=c3dcdef9_2).

6 **C. COVID-19 is an Uncontained Pandemic in the United States**

7 Since January 2020, COVID-19 has spread widely in the United States. It has now
8 been detected in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S.
9 Virgin Islands. *See* CDC, COVID-19 Cases in the US, available at
10 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. On Friday,
11 March 20, 2020, at 3:18 p.m. (PT), as undersigned counsel was drafting this section of
12 this brief, there were 1,163 discovered COVID-19 cases in California, with 21 deaths (an
13 overall mortality rate of 1.8%). *See* Los Angeles Times Staff, Tracking Coronavirus in
14 California, LA Times (updated March 2-, 2020, at 3:18 p.m. (PT)), available at
15 <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/>. This
16 number almost certainly understates the problem, as community spread has been ongoing
17 in California since January 2020, and the United States is vastly behind where it needs to
18 be in testing for this virus. California, New York, and Washington are all hot spots.

19 While the United States has not yet performed enough tests to accurately capture
20 the true scope of this disease within its borders, the overall trend in the United States
21 indicates continued exponential growth in cases of COVID-19.

22 **D. COVID-19 is Far Deadlier than the Flu**

23 COVID-19 is an extremely dangerous disease. The best estimate for its overall
24 fatality rate—i.e., its fatality rate among all demographics—is 0.3-3.5%, “which is 5-35
25 times the fatality associated with influenza infection.” *Beyrer Dec.* ¶ 5; *see also* Nick
26 Wilson et al., Case-Fatality Risk Estimates for COVID-19 Calculated by Using a Lag
27 Time for Fatality, 26(6) EID Journal (prepublication June 2020), available at
28 https://wwwnc.cdc.gov/eid/article/26/6/20-0320_article. Fatality rates vary wildly,

1 however, depending on both environmental and demographic risk factors.

2 **E. COVID-19 Places Certain Population Groups at Greater Risk**

3 COVID-19 causes some population groups to die at far greater rates than others. A
 4 person’s likelihood of dying from this disease varies dramatically depending on two key
 5 factors: 1) their demographic profile and 2) the environment where they live.

6 **1. COVID-19 Kills the Sick and Elderly at Heartbreaking Rates**

7 COVID-19’s death rate goes up 1) the older you are and 2) the sicker you are. The
 8 death rate increases dramatically with age. The best current evidence is that people aged
 9 10-39 years are roughly 0.2% likely to die from COVID-19 (still a mortality rate double
 10 the influenza mortality rate). Then it starts going up:

11

Age	Case Fatality Rate
40-49 years old	0.4%
50-59 years old	1.3%
60-69 years old	3.6%
70-79 years old	8%
80+ years old	14.8% ⁶

18 COVID-19 also kills the sick. *See* Beyrer Dec. ¶ 6. COVID-19’s comorbidity
 19 death rate is frightening. Across all age groups, COVID-19 kills:

20

Condition	Case Fatality Rate
Cardiovascular disease	13.2%
Diabetes	9.2%
Hypertension	8.4%
Chronic respiratory disease	8%

28 ⁶ This information derived from analysis of deaths in Hubei Province, China.

Cancer	7.6% ⁷
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In Wuhan, of the hospitalized population who ended up dying from COVID-19, 48% of them had hypertension, 31% had diabetes, and 24% had coronary heart disease. See Fei Zhou et al., Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study, *Lancet* (Mar. 11, 2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext).

Importantly for the Nemans, men are faring worse than women during this COVID-19 pandemic according to statistics emerging from around the world. See <https://www.latimes.com/science/story/2020-03-21/why-is-the-coronavirus-more-deadly-for-men-than-for-women>. Indeed, on Friday, March 20, 2020, the White House COVID-19 Task Force director Dr. Deborah Birx “cited a report from Italy showing that men in nearly every age bracket were dying at higher rates than women.” (*Id.*). Moreover, the LA Times noted that an “analysis of all COVID-19 patient profiles in China from December 2019 to February 2020 suggest[ed] that men account[ed] for roughly 60% of those who are infected and become sick.” (*Id.*). In addition, the LA Times noted “in a detailed accounting of 44,600 cases in mainland China as of Feb. 11, China’s Center for Disease Control reported that the fatality rate among men with confirmed infections was roughly 65% higher than it was among women.” (*Id.*). Importantly, one of the risks associated with the COVID-19 is smoking, which appears to be a factor associated with

⁷ See World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)* at 12 (Feb. 28, 2020), available at <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf>; see also Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv at 5 (Feb. 27, 2020), <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, and the number for two comorbidities was 2.59).

1 vulnerability to COVID-19. Specifically, “[a]cross the world, men are much more likely
2 to smoke cigarettes. That damages their lungs and primes them for inflammation and
3 further damage when they are battling an infection.” (*Id.*).

4 Here, the Court is aware that Hersel and Ben Neman are both long-time users of
5 tobacco and were smokers for many. In addition to their other health issues, as noted
6 above, their long-time tobacco use and their gender places them at an incredibly high
7 vulnerability to the COVID-19 virus. Hersel Neman’s black spots on his lungs also put
8 him into such danger it can hardly be expressed.

9 For these reasons, the best epidemiological advice to deal with this national health
10 emergency is that “[o]lder inmates and those with chronic conditions predisposing to
11 severe COVID-19 disease . . . should be considered for release.” Beyrer Dec. ¶ 18.

12 **2. COVID-19 Poses Acute Risks to Inmates and Correctional Staff**

13 Incarceration poses a grave public health threat during this crisis. “COVID-19
14 poses a serious risk to inmates and workers in detention facilities.” Beyrer Dec. ¶ 11. It
15 is well-known in the epidemiological community that such facilities are “associated with
16 high transmission probabilities for infectious diseases.” Beyrer Dec. ¶ 11; *see also*
17 Joseph A. Bick (2007), *Infection Control in Jails and Prisons*, *Clinical Infectious*
18 *Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>; Laura M. Maruschak. *et al.*
19 (2015), *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*. NCJ
20 248491, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at
21 <https://www.bjs.gov/content/pub/pdf/mpsfpj1112.pdf>. Outbreaks of the flu regularly
22 occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with
23 high numbers of cases. *See Prisons and Jails are Vulnerable to COVID-19 Outbreaks,*
24 *The Verge* (Mar. 7, 2020) at [https://www.theverge.com/2020/3/7/21167807/coronavirus-](https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap)
25 [prison-jail-health-outbreak-covid-19-flu-soap](https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap).

26 When outbreaks occur in prisons, this leads directly to increased spread beyond the
27 confines of jail. *See* Beyrer Dec. ¶ 12. “It is therefore an **urgent** priority in this time of
28 national public health emergency to reduce the number of persons in detention as quickly

1 as possible.” Beyrer Dec. ¶ 17 (emphasis added).

2 COVID-19 is coming to our prisons. It’s not a question of if, but when.
3 COVID-19 has already appeared in multiple prisons in China. *See* Beyrer Dec. ¶ 15.
4 When COVID-19 arrives in our prisons, as it will soon, the ramifications for both the
5 incarcerated population and correctional staff will be dire. “Infections that are
6 transmitted through droplets, like influenza and SARS-nCoV-2 virus, are particularly
7 difficult to control in detention facilities.” Beyrer Dec. ¶ 13. Social distancing and
8 decontaminating surfaces is “virtually impossible.” *Id.* Furthermore, “[t]he high rate of
9 turnover and population mixing of staff and detainees increases likelihoods of exposure.”
10 *Id.*

11 U.S. Detention Facilities already have a track record of mismanaging infectious
12 diseases, *see* Beyrer Dec. ¶ 13, and the fact that it remains business as usual in our jails is
13 highly troubling. At this moment in our national history there can be no doubt:
14 “[r]eleasing as many inmates as possible is important to protect the health of inmates, the
15 health of correctional facility staff, the health of health care workers at jails and other
16 detention facilities, and the health of the community as a whole.” Beyrer Dec. ¶ 19.

17 **F. The Bureau of Prison’s Fortress Approach to Deal with COVID-19**
18 **Falls Short of the Basic Preventative Steps Counseled by Health**
19 **Experts, the CDC and the President of the United States**

20 The BOP has announced steps to deal with COVID-19, including monitoring the
21 spread of the COVID-19 virus and implementing modified operations. *See*
22 <https://www.bop.gov/coronavirus/index.jsp>. Nevertheless, the BOP has explicitly
23 acknowledged that there will be “more confirmed cases in the coming weeks and also
24 noting that the population density of prisons creates a risk of infection and transmission
25 for inmates and staff.” https://www.bop.gov/resources/news/20200313_covid-19.jsp.
26 While the BOP’s guidelines generally discuss “social distancing,” suspending social and
27 legal visits for at least 30 days, screening of staff and inmates, and quarantining
28 asymptomatic inmates and symptomatic inmates with exposure risk factors, there do not

1 appear to be any systematic efforts to implement such practices at Lompoc USP. While
2 the BOP has suspended social and legal visits to prevent the introduction of the virus,
3 there are gaping holes in this approach. Specifically, Lompoc USP staff live and reside
4 in or around Santa Barbara, Ventura and San Luis Obispo Counties, which have (as of
5 March 20, 2020) a combined 38 confirmed COVID-19 cases.

6 Importantly, the BOP's procedures at Lompoc USP do not currently involve many
7 of the basic preventative steps counseled by health experts, the CDC, the Governor of
8 California and the President of the United States. As of the writing of this brief, neither
9 the Lompoc USP staff nor the inmates are using masks or gloves within the complex.
10 Moreover, Lompoc USP has not administered any COVID-19 testing and it is unlikely
11 that necessary testing kits are even available for such testing in a prison setting.
12 Moreover, commonly touched surfaces are not cleaned and disinfected regularly. In
13 addition, Lompoc USP staff have not made hand sanitizers available to the inmates.
14 Indeed, in many correctional institutions, hand sanitizer is considered contraband. *See*
15 [https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-](https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus)
16 [contain-coronavirus](https://www.abajournal.com/news/article/when-purell-is-contraband-how-can-prisons-contain-coronavirus). While inmates can, and do, wash their hands, it is difficult, if not
17 impossible at times, to line up to use the washing facilities on a regular basis.

18 As exemplified by the Nemans' sleeping and eating conditions within Lompoc
19 USP's minimum security satellite camp, "social distancing" is not practiced in advance of
20 and after eating period or while inmates are sleeping. The BOP's current guidance states
21 that current plans depend on each facility's physical layout and that its procedures will be
22 reevaluated in 30 days. Specifically, the BOP notes that for the next 30 days, "the BOP
23 will implement nationwide modified operations to maximize social distancing and limit
24 group gatherings in our facilities. For example, depending on the facility's population and
25 physical layout, the institution may implement staggered meal times, recreation, etc.
26 These modifications will be reevaluated in 30 days."

27 https://www.bop.gov/resources/news/20200313_covid-19.jsp.

28 While commendable, the 30-day evaluation period may well be too late, as

1 circumstances can change overnight and with one infection.

2 **VI. HERSEL’S AND BEN’S REQUEST FOR IMMEDIATE COMPASSIONATE**
3 **RELEASE**

4 **A. The COVID-19 Virus National Pandemic Presents an Extraordinary**
5 **and Compelling Reason for Compassionate Release**

6 The Nemans request for immediate compassionate release is based on the danger
7 and speed of the spreading of the COVID-19 virus. The BOP is fully aware of the
8 national pandemic in this country due to the spread of COVID-19 virus. Indeed, it has
9 promulgated practices and procedures for this pandemic. Unfortunately, those practices
10 and procedures, no matter how well-intentioned, are simply incapable of protecting the
11 Nemans and other at-risk inmates or BOP staff.

12 For older persons and persons with underlying health issues, the danger is very
13 real, and our government is instructing those persons to stay home and away from other
14 people. <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/get-ready.html>.
15 California is a “hot” spot for the virus, so this state is taking even greater measures than
16 most other states in order to protect its citizenry. We now have “shelter-in-place” orders
17 and other similar orders out there in order to keep vulnerable persons away from persons
18 who can spread the disease. Indeed, on March 19, 2020, Governor Gavin Newsom issued
19 a mandatory order, Executive Order N-33-20, requiring all Californians to “stay home or
20 at their place of residence except as needed to maintain continuity of operations of the
21 federal critical infrastructure sectors[.]” *See* Executive Department, State of California,
22 Executive Order N-33-20, at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.
23 “Essential Activities” are exempt from this restriction, but people in those Essential
24 Activities are still being directed to keep a distance of six feet from all people in order to
25 protect them and the public’s health.

26 Other jurisdictions have started to release elderly and susceptible inmates whose
27 presence in their incarcerated communities pose a danger to inmates and staff alike. *See*
28 e.g., <https://www.businessinsider.com/la-county-releases-inmates-reduces-arrests-to->

1 [blunt-coronavirus-spread-2020-3](https://www.turnto23.com/news/coronavirus/kcso-38-blunt-coronavirus-spread-2020-3); [https://www.turnto23.com/news/coronavirus/kcso-38-](https://www.turnto23.com/news/coronavirus/kcso-38-inmates-released-in-response-to-covid-19)
2 [inmates-released-in-response-to-covid-19](https://www.turnto23.com/news/coronavirus/kcso-38-inmates-released-in-response-to-covid-19).

3 Based on the foregoing, the COVID-19 national pandemic presents an
4 extraordinary and compelling reason for the compassionate release of the Nemans from
5 Lompoc USP. Moreover, at the time of the Nemans' sentencing in December 2018, no
6 one could have anticipated the need for their release based on a national health
7 emergency due to the spread of the COVID-19 virus.

8 **B. The Nemans' Request Seeks Only a Minimal Shortening of Their**
9 **Custodial Sentences**

10 As currently scheduled, the BOP expects to release Hersel Neman from Lompoc
11 USP on or about May 14, 2020 and, thus, in less than two months. As currently
12 scheduled, the BOP expects to release Morad Neman in or about July 2020. However, it
13 is hoped that this release date will be advanced, as he turned 60 years old in February and
14 consequently now is eligible for consideration under the First Step Act. Thus, it is likely
15 that the BOP will schedule Morad Neman to be released within months. Unfortunately,
16 this schedule may not be short enough to save the Nemans and other high-risk inmates
17 from the COVID-19 virus and its pernicious impacts.

18 On balance, it is respectfully suggested that the prudent and safe course of action
19 for all involved is to immediately release the Nemans and allow them to finish their
20 respective custodial sentences in restrictive home detention environments, along with
21 electronic monitoring or other restrictions, if required by the Court or their assigned
22 probation officers.

23 **C. The Nemans' Request is Based on the Extraordinary Circumstances**
24 **Surrounding the COVID-19 Pandemic**

25 Given the extraordinary health crisis washing over California at this time, these
26 elderly prisoners with short times to serve should be released immediately. Both Hersel
27 and Ben fall squarely within the most at-risk populations for the virus. Hersel and Ben
28 are 61 and 60 years old, respectively. Given the extraordinary health crisis washing over

1 California at this time, these older prisoners with short times to serve should be released
2 immediately. The Nemans are older, have underlying health issues and are thus severely
3 at risk. Statistically, the Nemans are more susceptible to contract and feel the serious
4 effects of COVID-19 than are younger, healthier inmates. Removing the Nemans from
5 Lompoc USP will benefit both the inmate population and BOP staff. This is small price
6 to pay for everyone's safety.

7 As you may recall, Hersel Neman has damaged lungs and he has a high risk of
8 getting very sick or dying. If he gets the COVID-19 virus, he may end up on a ventilator
9 or worse, but ventilators are in short supply at the moment. Hersel Neman caught
10 influenza in prison and was down with it for about a month. Unrelated to the flu, the
11 BOP twice x-rayed Hersel Neman's chest and found that he has "black spots" on his
12 lungs. The most recent of these two x-rays occurred approximately two months ago. He
13 is receiving no treatment for his compromised lung condition. In addition, Hersel Neman
14 had bladder cancer a few years ago and underwent treatment that weakened his immune
15 system. His age, his history of being sick for a month with the flu, his impaired lungs,
16 and his compromised immune system due to battle with bladder cancer put him at high
17 risk for getting very sick and needing a ventilator if he catches the virus.

18 At his sentencing, the Court viewed Morad Neman as a type of caretaker for his
19 brother, Hersel, while they are in custody. Yet the 60-year-old caretaker is not healthy.
20 A few months ago, Morad caught influenza and was incapacitated for several weeks.
21 Moreover, he has been a tobacco-smoker for over 40 years, which undoubtedly has
22 caused damage to his lungs and will make him only more at risk if he contracts COVID-
23 19. He has suffered repeatedly from kidney and blood pressure issues. His history
24 supports a finding that his immune system is at high risk of contracting the virus and
25 potentially needing a ventilator.

26 The Nemans' age and health conditions make their situations and these requests
27 unique from most inmates. Moreover, with respect to Morad, the Court already has
28 imposed home confinement at the end of his BOP incarceration, so the requested relief

1 Morad seeks is consistent with the Court’s original sentence. Again, these circumstances
2 were not and could not have been anticipated at the time of their sentencings in
3 December 2018.

4 **D. *Helling v. McKinney* – Unreasonable Risk of Exposure to COVID-19 is**
5 **Cruel and Unusual Punishment**

6 *Helling v. McKinney*, 509 U.S. 25 (1993), and subsequent cases show that the BOP
7 must take sufficient protective measures to prevent contraction of COVID-19 in the jail
8 population. Unreasonable risk of COVID-19 contraction will, in itself, constitute an
9 Eighth Amendment violation.

10 In *Helling*, a plaintiff alleged that he was assigned to a cell with another inmate
11 who smoked five packs of cigarettes per day. 509 U.S. at 28. At issue was whether this
12 exposure to environmental tobacco smoke (ETS) could constitute a valid claim under the
13 Eighth Amendment, even though the plaintiff had not yet suffered harm. *Id.* at 30. The
14 Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff
15 stated “a cause of action under the Eighth Amendment by alleging that petitioners have,
16 with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk
17 of serious damage to his future health.” *Id.* at 35.

18 “Though *Helling* directly addressed an inmate’s exposure to [secondhand smoke],
19 it tacitly acknowledged other situations in which environmental factors can pose an
20 unreasonable risk to an inmate’s health, including exposure to ‘infectious maladies such
21 as hepatitis and venereal disease’ caused by overcrowding, unsafe drinking water, and
22 ‘toxic or other substances.’ *Allen v. Kramer*, 2016 U.S. Dist. LEXIS 115024, 2016 WL
23 4613360, at *7 (E.D. Cal. Aug. 17, 2016) (quoting *Helling*, 509 U.S. at 33, 35.) In
24 *Wallis*, the Ninth Circuit applied *Helling* to exposure to asbestos finding it was
25 “uncontroverted that asbestos poses a serious risk to human health” and the plaintiff
26 “proffered specific evidence showing that the defendants knew of the existence of and
27 dangers posed by asbestos.” *Wallis v. Baldwin*, 70 F.3d 1074 (9th Cir. 1995). *Helling*
28 has also been applied to “contagious diseases caused by overcrowding conditions, *Brown*

1 *v. Mitchell*, 327 F. Supp. 2d 615, 650 (E.D. Va. July 28, 2004); contaminated water,
2 *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001); compelled use of chemical toilets,
3 *Masonoff v. DuBois*, 899 F. Supp. 782, 797 (D. Mass. Sep. 11, 1995), [and] paint toxins,
4 *Crawford v. Coughlin*, 43 F. Supp. 2d 319, 325 (W.D.N.Y. 1999).” *Allen*, 2016 U.S.
5 Dist. LEXIS 115024, 2016 WL 4613360, at *8.

6 Perhaps most applicable to COVID-19 is a number of cases have applied *Helling*
7 to the exposure of inmates to the lung ailment Valley Fever in California. Relying on
8 *Helling*, *Allen v. Kramer* concluded that an inmate plaintiff had alleged an Eighth
9 Amendment violation because he was housed in the Central Valley where there was a
10 relatively high risk of contracting Valley Fever. *See Allen*, 2016 U.S. Dist. LEXIS
11 115024, 2016 WL 4613360, at *1, 11. *Shabazz* adopted *Allen*’s reasoning and came to
12 the same conclusion. *Shabazz v. Beard*, 2018 U.S. Dist. LEXIS 31785, 2018 WL
13 1071173, at *7-9 (E.D. Cal. Feb. 27, 2018); *see also Jackson v. California*, 2014 U.S.
14 Dist. LEXIS 22966, at *32-38 (E.D. Cal. Feb. 20, 2014, No. 1:13-cv-01055-LJO-SAB)
15 (overruled on other grounds in *Hines v. Youseff*, 914 F.3d 1218, 1231 (9th Cir. 2019)
16 (explicitly declining to reach Eighth Amendment question but reversing on fact-specific
17 finding of qualified immunity)).

18 The reasoning of *Allen*, *Shabazz*, and *Jackson*, as well as other cases applying
19 *Helling* to exposure to environmental risks, applies with equal or greater force to
20 COVID-19. Indeed, the reasoning establishes that officials who fail to adequately protect
21 inmates from the risk of contracting COVID-19 violate the Eighth Amendment’s
22 proscription against cruel and unusual punishment.

23 Where, as here, the protections from COVID-19 for inmates are insufficient,
24 whether for the jail population as a whole or for particularly at-risk individuals, it raises
25 significant Eighth Amendment violation issues. Here, the Nemans are at-risk individuals
26 and the BOP is not taking sufficient precautions to prevent the transmission of the
27 COVID-19 virus within Lompoc USP. Accordingly, the BOP’s Eighth Amendment
28 violations warrant the immediate release of the Nemans to strict home detention.

VII. THE BOP IS VIOLATING THE NEMANS' DUE PROCESS RIGHTS

The BOP's continued confinement of the Nemans at Lompoc USP in spite of the risks posed to them by COVID 19 constitutes a violation of their due process rights. As the Ninth Circuit has recognized, "[w]hile it is true that prison medical officials have wide discretion in treating prisoners, it is also well recognized that the failure or refusal to provide medical care may violate the Fourteenth Amendment." *Riley v. Rhay*, 407 F.2d 496, 497 (9th Cir. 1969) (citation omitted). As discussed above, Lompoc USP is conducting no testing to prevent asymptomatic spread, and the nature of confinement limits the Nemans' access to prevention measures available in the community, such as maintaining a distance of six feet from other persons, personal sanitation, and frequent disinfection. These inactions constitute a refusal to provide adequate medical care to the Nemans.

Federal courts have long recognized that there is no greater necessity than keeping a defendant alive, no matter the charge. *See, e.g., United States v. Scarpa*, 815 F.Supp.88 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail because of the "unacceptably high risk of infection and death on a daily basis inside the MCC"); *United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July 10, 2019) (defendant charged with violation of the Mann Act and possession of child pornography and suffering from diabetes, heart conditions and open sores released on home detention because of his medical conditions); *United States v. Johnston*, No. 17-00046 (RMM) 2017 WL 4277140 (D.D.C. Sept. 27, 2017) (defendant charged with violation of the Mann Act and in need of colon surgery released to custody of his wife for 21 days); *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D.P.R. 2002) (badly-wounded defendant released to custody of his relatives).

Based on the BOP's violations of the Nemans' due process rights, this Court should order their immediate release from Lompoc USP.

1 **VIII. CONCLUSION**

2 The Nemans ask this Court to find that the *Hendricks* test is met here because we
3 have “exceptional” circumstances of a peculiar urgency. As such, the Court will reach
4 and consider the merits. We ask the Court to find on the merits that these defendants,
5 Hersel and Morad Neman, should be released forthwith from Lompoc USP to strict home
6 detention pursuant to 18 U.S.C. § 3582, as modified by the First Step Act.

7
8 Dated: March 23, 2020

RESPECTFULLY SUBMITTED.

9
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EXHIBIT A

Declaration for Persons in Detention and Detention Staff
COVID-19

Chris Beyrer, MD, MPH
Professor of Epidemiology
Johns Hopkins Bloomberg School of Public Health
Baltimore, MD

I, Chris Beyrer, declare as follows:

1. I am a professor of Epidemiology, International Health, and Medicine at the Johns Hopkins Bloomberg School of Public Health, where I regularly teach courses in the epidemiology of infectious diseases. This coming semester, I am teaching a course on emerging infections. I am a member of the National Academy of Medicine, a former President of the International AIDS Society, and a past winner of the Lowell E. Bellin Award for Excellence in Preventive Medicine and Community Health. I have been active in infectious diseases Epidemiology since completing my training in Preventive Medicine and Public Health at Johns Hopkins in 1992.
2. I am currently actively at work on the COVID-19 pandemic in the United States. Among other activities I am the Director of the Center for Public Health and Human Rights at Johns Hopkins, which is active in disease prevention and health promotion among vulnerable populations, including prisoners and detainees, in the US, Africa, Asia, and Latin America.

The nature of COVID-19

3. The SARS-nCoV-2 virus, and the human infection it causes, COVID-19 disease, is a global pandemic and has been termed a global health emergency by the WHO. Cases first began appearing sometime between December 1, 2019 and December 31, 2019 in Hubei Province, China. Most of these cases were associated with a wet seafood market in Wuhan City.
4. On January 7, 2020, the virus was isolated. The virus was analyzed and discovered to be a coronavirus closely related to the SARS coronavirus which caused the 2002-2003 SARS epidemic.
5. COVID-19 is a serious disease. The overall case fatality rate has been estimated to range from 0.3 to 3.5%, which is 5-35 times the fatality associated with influenza infection. COVID-19 is characterized by a flu-like illness. While more than 80% of cases are self-limited and generally mild, overall some 20% of cases will have more severe disease requiring medical intervention and support.
6. The case fatality rate varies significantly depending on the presence of certain demographic and health factors. The case fatality rate is higher in men, and varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases) for those with pre-existing medical conditions including cardio-vascular disease, respiratory disease, diabetes, and immune compromise.
7. Among patients who have more serious disease, some 30% will progress to Acute Respiratory Distress Syndrome (ARDS) which has a 30% mortality rate overall, higher in those with other health conditions. Some 13% of these patients will require mechanical

ventilation, which is why intensive care beds and ventilators have been in insufficient supply in Italy, Iran, and parts of China.

8. COVID-19 is widespread. Since it first appeared in Hubei Province, China, in late 2019, outbreaks have subsequently occurred in more than 100 countries and all continents, heavily affected countries include Italy, Spain, Iran, South Korea, and increasingly, the US. As of today, March 16th, 2020, there have been 178,508 confirmed human cases globally, 7,055 known deaths, and some 78,000 persons have recovered from the infection. The pandemic has been termed a global health emergency by the WHO. It is not contained and cases are growing exponentially.
9. SARS-nCoV-2 is now known to be fully adapted to human to human spread. This is almost certainly a new human infection, which also means that there is no pre-existing or "herd" immunity, allowing for very rapid chains of transmission once the virus is circulating in communities.
10. The U.S. CDC estimates that the reproduction rate of the virus, the R_0 , is 2.4-3.8, meaning that each newly infected person is estimated to infect on average 3 additional persons. This is highly infectious and only the great influenza pandemic of 1918 (the Spanish Flu as it was then known) is thought to have higher infectivity. This again, is likely a function of all human populations currently being highly susceptible. The attack rate given an exposure is also high, estimated at 20-30% depending on community conditions, but may be as high as 80% in some settings and populations. The incubation period is thought to be 2-14 days, which is why isolation is generally limited to 14 days.

The risks of COVID-19 in detention facilities

11. COVID-19 poses a serious risk to inmates and workers in detention facilities. Detention Facilities, including jails, prisons, and other closed settings, have long been known to be associated with high transmission probabilities for infectious diseases, including tuberculosis, multi-drug resistant tuberculosis, MRSA (methicillin resistant staph aureus), and viral hepatitis.
12. The severe epidemic of Tuberculosis in prisons in Central Asia and Eastern Europe was demonstrated to increase community rates of Tuberculosis in multiple states in that region, underscoring the risks prison outbreaks can lead to for the communities from which inmates derive.
13. Infections that are transmitted through droplets, like influenza and SARS-nCoV-2 virus, are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible. For example, several deaths were reported in the US in immigration detention facilities associated with ARDS following influenza A, including a 16-year old male immigrant child who died of untreated ARDS in custody in May, 2019.
14. A number of features of these facilities can heighten risks for exposure, acquisition, transmission, and clinical complications of these infectious diseases. These include physical/mechanical risks such as overcrowding, population density in close confinement, insufficient ventilation, shared toilet, shower, and eating environments and limits on hygiene and personal protective equipment such as masks and gloves in some facilities.
15. Additionally, the high rate of turnover and population mixing of staff and detainees increases likelihoods of exposure. This has led to prison outbreaks of COVID-19 in multiple detention facilities in China, associated with introduction into facilities by staff.

16. In addition to the nature of the prison environment, prison and jail populations are also at additional risk, due to high rates of chronic health conditions, substance use, mental health issues, and, particularly in prisons, aging and chronically ill populations who may be vulnerable to more severe illnesses after infection, and to death.
17. While every effort should be made to reduce exposure in detention facilities, this may be extremely difficult to achieve and sustain. It is therefore an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible.
18. Pre-trial detention should be considered only in genuine cases of security concerns. Persons held for non-payment of fees and fines, or because of insufficient funds to pay bail, should be prioritized for release. Immigrants awaiting decisions on their removal cases who are not a flight risk can be monitored in the community and should be released from immigration detention centers. Older inmates and those with chronic conditions predisposing to severe COVID-19 disease (heart disease, lung disease, diabetes, immune-compromise) should be considered for release.
19. Given the experience in China as well as the literature on infectious diseases in jail, an outbreak of COVID-19 among the U.S. jail and prison population is likely. Releasing as many inmates as possible is important to protect the health of inmates, the health of correctional facility staff, the health of health care workers at jails and other detention facilities, and the health of the community as a whole.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of March, 2020.

A handwritten signature in dark ink, appearing to read "Chris Beyrer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Professor Chris Beyrer¹

¹ These views are mine alone; I do not speak for Johns Hopkins University or any department therein.

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