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 SUSHOVAN HUSSAIN

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,
 14
 Plaintiff,
 15
 v.
 16 SUSHOVAN HUSSAIN,
 17
 Defendant.

Case No. 3:16-cr-00462-CRB
**NOTICE OF MOTION AND MOTION
 TO REDUCE SENTENCE**
 Date: October 7, 2020
 Time: 1:00 p.m.
 Dept.: Courtroom 6 - 17th Floor
 Judge: Hon. Charles R. Breyer
 Date Filed: November 10, 2016
 Trial Date: February 26, 2018

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE that on October 7, 2020, at 1:00 pm, or as soon thereafter as counsel may be heard, in Courtroom 6, 17th Floor of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Sushovan Hussain will and hereby does move to reduce his sentence pursuant to 18 U.S.C. § 3582(c).

This motion is based upon the following points and authorities, oral argument, and the pleadings and exhibits on file with the Court.

Dated: September 23, 2020

Respectfully submitted,
KEKER, VAN NEST & PETERS LLP

By: /s/ John W. Kecker
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Cases

United States v. Arceo,
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United States v. Austin,
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United States v. Brown,
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United States v. Burton,
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United States v. Evans,
No. 18-CR-00308-WHO-1, 2020 WL 3971620 (N.D. Cal. July 14, 2020).....7

United States v. Fabris,
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United States v. Fowler,
445 F. Supp. 3d 452 (N.D. Cal. 2020)11

United States v. Gonzalez,
No. 2:18-CR-0232-TOR-15, 2020 WL 1536155 (E.D. Wa. Mar. 31, 2020)8

United States v. Hatcher,
No. 92-cr-00001-CRB-1, 2020 WL 5257878 (N.D. Cal. Sept. 3, 2020)6

United States v. Hernandez,
No. 18-CR-834-04 (PAE), 2020 WL 1684062 (S.D.N.Y. Apr. 2, 2020)8, 11

United States v. Hodge,
No. 19-cr-10080-NMG (D. Mass.)6

United States v. Hussain,
2020 WL 5035816 (9th Cir. Aug. 26, 2020).....3

United States v. Jackson,
No. 5:02-cr-30020, 2020 WL 2735724 (W.D. Va. May 26, 2020)8

United States v. Jacobs,
No. 4:19-cr-00149, 2020 WL 3637625 (D. Iowa July 2, 2020)8

United States v. Johnson,
No. 1:16-cr-00457-NGG (E.D.N.Y.)13

1 *United States v. Jones*,
 2 No. 94-cr-20079-EJD-1, 2020 WL 5359636 (N.D. Cal. Aug. 27, 2020)6

3 *United States v. Joseph*,
 4 No. 00-CR-20217 CW, 2020 WL 3160172 (N.D. Cal. June 8, 2020).....7

5 *United States v. Kowalewsky*,
 6 No. 2:13-CR-00045-RWS (N.D. Ga. Apr. 30, 2020)10

7 *United States v. Krashna*,
 8 No. 17-CR-00022-JSW-1, 2020 WL 3053194 (N.D. Cal. June 8, 2020).....7

9 *United States v. Lee*,
 10 No. 19-cr-00419-SI, 2020 WL 2512415 (N.D. Cal. May 15, 2020)11

11 *United States v. Linsley*,
 12 No. 88-CR-00413-CRB-1, 2020 WL 4050872 (N.D. Cal. July 20, 2020)7, 10

13 *United States v. Maggay*,
 14 No. 19-cr-0468 (N.D. Cal. June 6, 2020).....5, 12

15 *United States v. Nemec*,
 16 No. 16-cr-00134-SI-1, 2020 WL 4547158 (N.D. Cal. Aug. 6, 2020).....7

17 *United States v. Osorto*,
 18 445 F. Supp. 3d 103 (N.D. Cal. 2020)6, 9

19 *United States v. Perez*,
 20 No. 17 CR 513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020)10

21 *United States v. Quinn*,
 22 No. 91-cr-00608-DLJ-RS, 2020 WL 3275736 (N.D. Cal. June 17, 2020).....7, 10

23 *United States v. Ramirez-Suarez*,
 24 No. 16-cr-00124-LHK-4, 2020 WL 3869181 (N.D. Cal. July 9, 2020)13

25 *United States v. Reid*,
 26 No. 17-cr-00175-CRB-2, 2020 WL 2128855 (N.D. Cal. May 5, 2020).....9

27 *United States v. Riley*,
 28 No. CR ELH-16-0402, 2020 WL 3034843 (D. Md. June 4, 2020)13, 14

United States v. Robinson,
 2020 WL 1982872 (N.D. Cal. Apr. 27, 2020)7, 9

United States v. Sarkisyan,
 No. 15-cr-00234-CRB-15, 2020 WL 2542032 (N.D. Cal. May 19, 2020).....4, 8

United States v. Shia,
 No. 15-cr-000257-VC-1, 2020 WL 5510723 (N.D. Cal. Sept. 11, 2020).....6

1 *United States v. Silva*,
 2 No. 4:17-cr-554-PJH-03, 2020 WL 4039218 (N.D. Cal. July 17, 2020).....12

3 *United States v. Simpson*,
 4 No. 11-CR-00832-SI-3, 2020 WL 2323055 (N.D. Cal. May 11, 2020).....11

5 *United States v. Tamayo*,
 6 No. 06-cr-00647-CRB-1, 2020 WL 4901635 (N.D. Cal. Aug. 20, 2020)6

7 *United States v. Ullings*,
 8 No. 10-cr-00406, 2020 WL 2394096 (N.D. Ga., May 12, 2020)8, 10, 15, 16

9 *United States v. Williams*,
 10 No. 12-CR-600 YGR, 2020 WL 3640016 (N.D. Cal. July 6, 2020)7

11 *United States v. Jay*,
 12 No. 17-CR-00176-CRB-1, 2020 WL 3103796 (N.D. Cal. June 11, 2020)7, 9

13 **Statutes & Regulations**

14 18 U.S.C. § 3142(g)7, 14

15 18 U.S.C. § 3582(c) *passim*

16 U.S.S.G § 1B1.13.....7, 10, 14

17 **Other Authorities**

18 John Beauge, *Staff Member at Allenwood Federal Penitentiary Tests Positive for*
 19 *COVID-19*, PENNLIVE (Apr. 8, 2020).....11

20 Keri Blakinger and Keegan Hamilton, “*I Begged Them To Let Me Die*”: *How*
 21 *Federal Prisons Became Coronavirus Death Traps*, THE MARSHALL PROJECT
 22 (June 18, 2020).....5

23 Bureau of Prisons, *BOP Implementing Modified Operations*,
 24 https://www.bop.gov/coronavirus/covid19_status.jsp6

25 Bureau of Prisons, *COVID-19 Coronavirus*, <https://www.bop.gov/coronavirus/>4

26 CA Dept. of Public Health, *Cases and Deaths Associated with Covid-19 by Age*
 27 *Group in CA*, [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx)
 28 [19/COVID-19-Cases-by-Age-Group.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx).....11

Megan Cassidy, *San Quentin Officials Ignored Coronavirus Guidance from Top*
Marin County Health Officer, Letter Says, S.F. Chronicle (Aug. 11, 2020)4

Centers for Disease Control and Prevention, *Older Adults*,
[https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html)
[adults.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html).....11

1 Centers for Disease Control and Prevention, *People with Certain Medical*
 2 *Conditions*, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
 3 [precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html).....11
 4 Zoe Cormier, *How Covid-19 Can Damage the Brain*, BBC (June 22, 2020)4
 5 Johns Hopkins University, Coronavirus Resource Center,
 6 <https://coronavirus.jhu.edu/map.html>1
 7 Denise Lu, *The True Coronavirus Toll in the U.S. Has Already Surpassed*
 8 *200,000*, NEW YORK TIMES (Aug. 12, 2020)1
 9 Walter Pavlo, *As Bureau of Prisons Enters “Phase-9” Of COVID-19 Plan, BOP*
 10 *Staff Wonder If There Is A Real Plan*, FORBES (Aug. 7, 2020).....4
 11 Brendan Saloner, et al., *COVID-19 Cases and Deaths in Federal and State*
 12 *Prisons*, American Medical Association (July 8, 2020)4
 13 Julia Sulek, *‘Catastrophe’: How California’s Worst Coronavirus Outbreak Burst*
 14 *from San Quentin into their Home in San Jose*, Mercury News (Aug. 1, 2020)4
 15 U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal*
 16 *Offenders* (December 2017).....10
 17 Amanda Watts, *Fauci Says Normal Life May Not Be Back Until the End of 2021*,
 18 *CNN* (Sept. 11, 2020)2
 19 Timothy Williams, et al., *Coronavirus Cases Rise Sharply in Prisons Even as*
 20 *They Plateau Nationwide*, NEW YORK TIMES (June 16, 2020)5
 21 Clare Wilson, *The Coronavirus is Leaving Some People with Permanent Lung*
 22 *Damage*, NEW SCIENTIST (June 25, 2020)4
 23
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1 **I. INTRODUCTION**

2 Two and a half years ago, in April 2018, Sushovan Hussain was convicted of wire and
 3 securities fraud offenses. Last year, in May 2019, he was sentenced to five years' imprisonment,
 4 the maximum \$4 million fine, and \$6.1 million in forfeiture. Last month, the Ninth Circuit
 5 affirmed his conviction. Now, Sushovan is ready to report to prison so that he can serve his
 6 sentence and ultimately be reunited with his family.

7 Through this motion, Sushovan respectfully requests that the Court reconsider its sixty-
 8 month term of imprisonment. While courts do not typically amend previously imposed sentences,
 9 these are not typical times, and this is not a typical case.

10 *First*, an unforeseeable, unspeakable tragedy has immeasurably altered the world. In the
 11 United States alone, COVID-19 has infected 6.9 million people and killed more than 200,000.¹
 12 Nowhere are the ravages of the pandemic as acute as in the U.S. federal prison system, where *one*
 13 *in ten* inmates has contracted the disease and where the infection rate is *seventeen* times what it is
 14 in the United Kingdom, Sushovan's home.² These new realities leave Sushovan with the most
 15 unenviable of choices: seek to delay his surrender date, as many others have done, or risk his
 16 health and life now so that he can rejoin his family sooner. And it is not just that Sushovan—a
 17 56-year-old man with chronic asthma—will be at serious risk of contracting a potentially fatal
 18 disease. As a result of the pandemic, whatever time Sushovan spends in prison will also be much,
 19 much harder than anyone contemplated when he was sentenced in 2019. When he surrenders, he
 20 will be forced to quarantine in solitary confinement for at least 21 days, during which time he will
 21 not be allowed to leave his cell but for three showers a week. Even after quarantine, he will
 22 encounter much stricter prison conditions across the board: he will not be allowed to work or

23 _____
 24 ¹ Johns Hopkins University, Coronavirus Resource Center, <https://coronavirus.jhu.edu/map.html>
 25 (last visited Sept. 22, 2020). By all accounts, the real death toll is significantly higher than the
 26 official one. *See, e.g.,* Denise Lu, *The True Coronavirus Toll in the U.S. Has Already Surpassed*
 27 *200,000*, NEW YORK TIMES (Aug. 12, 2020), [https://www.nytimes.com/interactive/2020/08/12/](https://www.nytimes.com/interactive/2020/08/12/us/covid-deaths-us.html)
 28 [us/covid-deaths-us.html](https://www.nytimes.com/interactive/2020/08/12/us/covid-deaths-us.html).

² The U.S. infection rate is approximately 2.1% of the population (6.9 million out of 328 million people). According to the BOP, there are approximately 126,845 federal inmates in custody, and 14,327 inmates have had or currently have the virus, which is an infection rate of approximately 10.1%. In the United Kingdom, Sushovan's home, there have been 406,000 infections among a population of 66.65 million, for an infection rate of 0.6%.

1 participate in educational programs, he cannot have any visitors, and his phone access will be
 2 restricted. No one knows how long these much-harsher conditions will persist, but recent reports
 3 suggest that the U.S. will not “get[] back to a degree of normality” until at least the end of 2021.³

4 **Second**, the past few years have taken a severe toll on Sushovan and his family. For most
 5 criminal defendants, bail pending appeal means living at home with their families and conducting
 6 their affairs as usual. But, because Sushovan is a U.K. citizen, he has been away from his home
 7 and family for almost *three* years, most of which he has spent confined to the Northern District of
 8 California with a GPS monitor strapped to his ankle. This post-trial period has been made all the
 9 worse by the COVID-19 pandemic. While Sushovan’s family was once able to visit him in
 10 California, they have been unable to do so since countries closed their borders in March. When
 11 Sushovan’s wife contracted COVID-19, he was unable to be with her or care for her. For
 12 Sushovan’s family, these stresses—coupled with his now-imminent five-year prison term, during
 13 which they will not be able to visit him—have taken a heavy toll: [REDACTED]

14 [REDACTED] and his mother—now 78—
 15 repeatedly tells Sushovan that she is worried she will never see him again. It speaks volumes that
 16 Sushovan would choose to surrender now, despite the harsh prison conditions that await him,⁴
 17 because he cannot stand to live in purgatory any longer.

18 Sushovan respectfully requests that the Court reevaluate his sentence and reduce it, under
 19 18 U.S.C. § 3582(c), to a shorter period of incarceration that recognizes both the much-harsher
 20 conditions he now faces and the years he has already spent away from his home and family.

21 **II. BACKGROUND AND STATEMENT OF FACTS**

22 **A. Procedural History**

23 Sushovan entered the United States on January 28, 2018 to meet with his attorneys and
 24 prepare for trial. Since then, he has never been home; indeed, he has never left the Northern
 25

26 ³ See, e.g., Amanda Watts, *Fauci says normal life may not be back until the end of 2021*, CNN,
 27 (Sept. 11, 2020), <https://www.cnn.com/2020/09/11/health/fauci-normal-life-2021/index.html>.

28 ⁴ Mr. Hussain now faces harsher conditions not just because of COVID-19, but also because he is
 a foreign national—a fact that renders him ineligible for a camp or for end-of-incarceration
 programs like home confinement or a halfway house. See Sickler Decl., Exs. A & B.

1 District of California.

2 Sushovan's trial began with jury selection in February 2018. He was found guilty after
3 trial on April 30, 2018. Dkts. 248, 394. On May 4, 2018, this Court ordered Sushovan to remain
4 in this District and to wear a GPS monitoring device while out on bond. Dkt. 400.

5 On May 13, 2019, the Court sentenced Sushovan to 60 months' imprisonment and ordered
6 him to self-report to prison, with a recommendation that the Bureau of Prisons ("BOP") designate
7 FCI Allenwood (Low Security) as the institution for Sushovan's incarceration. Dkt. 560.

8 Sushovan filed a notice of appeal the next day. Dkt. 561. The Court of Appeals for the
9 Ninth Circuit granted Sushovan's request for bail pending appeal. Dkt. 616. His appeal was
10 briefed by the parties and argued on May 11, 2020.

11 On August 26, 2020, the Ninth Circuit affirmed Sushovan's convictions, holding that the
12 "wire fraud convictions did not involve an impermissible extraterritorial application of United
13 States law" and that there was "sufficient evidence" to support his conviction on the securities-
14 fraud count. *United States v. Hussain*, --- F.3d ---, 2020 WL 5035816, at *1 (9th Cir. Aug. 26,
15 2020). Although Sushovan sought and obtained an extension to consider whether to file a
16 Petition for Rehearing or Rehearing *En Banc*, he has decided not to pursue any further appellate
17 remedies. Sushovan has so informed the Ninth Circuit and asked that it issue the mandate
18 immediately. *See* Declaration of John W. Keker ("Keker Decl."), Ex. A.

19 Consistent with the procedures laid out in 18 U.S.C. § 3582(c), defense counsel wrote to
20 the BOP on September 11, 2020, to ask that the BOP move the Court for a reduction of
21 Sushovan's sentence.⁵ On September 14, 2020, the BOP declined to pursue such a request
22 because Sushovan is "currently on bail" and "not an inmate within the Federal Bureau of
23 Prisons." *See* Keker Decl., Exs. B & C.

24 **B. The COVID-19 Pandemic**

25 This year will long be remembered for the COVID-19 pandemic, the worst public-health

26 ⁵ Defense counsel's understanding is that the BOP *only* considers requests that result in release; as
27 such, they proposed that the BOP move for a reduction of Sushovan's sentence to probation with
28 home confinement. However, Sushovan recognizes that will spend time in prison, and only ever
envisioned the relief he seeks through this motion: a reduction in the total number of months he
must serve.

1 crisis in over a century. COVID-19 is fatal to many, and even where it is not, it often wreaks
2 havoc on victims' bodies, leaving lasting or permanent damage.⁶

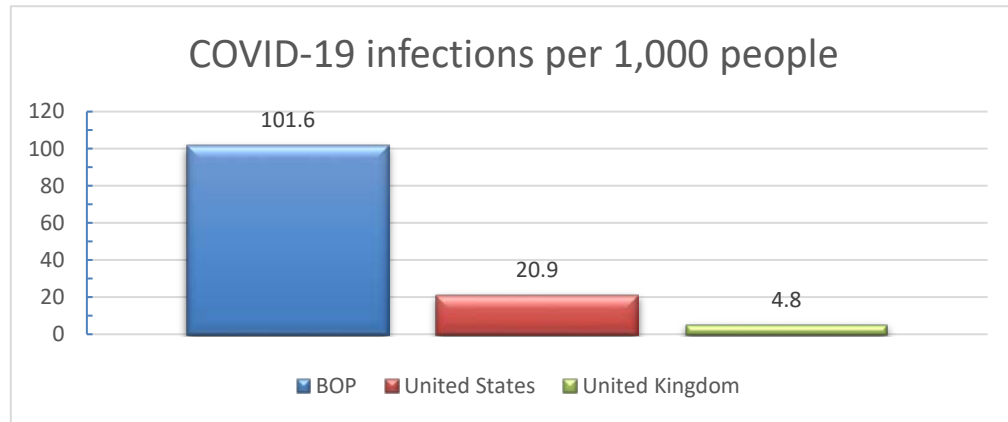
3 Nowhere has the virus's spread been as acute as in state and federal prisons. In San
4 Quentin, for instance, more than two-thirds of inmates have been infected.⁷ Conditions are less
5 dire in federal prisons, but still harrowing. As of September 22, 2020, 2,022 federal inmates and
6 669 BOP staff have COVID-19 nationwide, and an additional 12,184 inmates and 1,088 staff
7 previously tested positive but have supposedly recovered. In other words, more than **10%** of all
8 federal prisoners in this country either have or have had COVID-19 in the past few months. Of
9 those, 121 prisoners and 2 BOP staff members have died.⁸ The infection rate within prisons is
10 dramatically greater than in society at large:⁹

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14 ⁶ See, e.g., Zoe Cormier, *How Covid-19 can damage the brain*, BBC (June 22, 2020),
15 <https://www.bbc.com/future/article/20200622-the-long-term-effects-of-covid-19-infection>;
16 Clare Wilson, *The coronavirus is leaving some people with permanent lung damage*, NEW
17 SCIENTIST (June 25, 2020), <https://www.newscientist.com/article/2247086-the-coronavirus-is-leaving-some-people-with-permanent-lung-damage/>.

18 ⁷ See, e.g., Julia Sulek, *'Catastrophe': How California's worst coronavirus outbreak burst from*
19 *San Quentin into their home in San Jose*, Mercury News (Aug. 1, 2020),
20 <https://www.mercurynews.com/2020/08/01/from-san-quentin-to-san-jose-how-californias-worst-coronavirus-outbreak-burst-from-death-row-to-the-south-bay/> ("The official number of prisoners
21 infected has reached 2,181—about two-thirds of the prison population—but many refused to be
22 tested."); Megan Cassidy, *San Quentin officials ignored coronavirus guidance from top Marin*
23 *County health officer, letter says*, S.F. Chronicle (Aug. 11, 2020), <https://www.sfchronicle.com/crime/article/San-Quentin-officials-ignored-coronavirus-15476647.php> (noting that the infected
24 population had climbed to more than 2,400 prisoners and that more than 26 had died).

25 ⁸ See BOP, *COVID-19 Coronavirus*, <https://www.bop.gov/coronavirus/> (last visited Sept. 20,
26 2020). It is unlikely that these statistics reflect the full picture, particularly with regard to staff,
27 whom the BOP does not consistently test. "According to [] June 2020 Senate testimony from
28 Jeffery Allen, MD, BOP medical director, [] the BOP does not test employees as doing so would
limit the medical staff's ability to provide healthcare to the inmates." See Walter Pavlo, *As*
Bureau of Prisons Enters "Phase 9" Of COVID-19 Plan, BOP Staff Wonder If There Is A Real
Plan, FORBES (Aug. 7, 2020), <https://www.forbes.com/sites/walterpavlo/2020/08/07/as-bureau-of-prisons-enters-phase-9-of-covid-19-plan-bop-staff-wonder-if-there-is-a-real-plan/#794efb5f326f>. Nor do these statistics include privately managed prisons. This Court has
recognized that no inferences can be drawn from the lack of reported infections or deaths at an
institution, absent affirmative evidence of complete and accurate negative test results for inmates
and staff. See *United States v. Sarkisyan*, No. 15-cr-00234-CRB-15, 2020 WL 2542032, at *2
(N.D. Cal. May 19, 2020).

⁹ Brendan Saloner, et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, American
Medical Association (July 8, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249>.



8 Worse, once the virus has a foothold in a prison, the BOP seems powerless to combat it.¹⁰ The
 9 pandemic spreads rapidly because prisons are overcrowded and have inadequate access to
 10 cleaning supplies, and because prisoners share bathrooms and common areas and cannot practice
 11 appropriate social distancing.¹¹ Because Sushovan is a foreign national, he is ineligible for a
 12 prison camp and will be assigned to a low-security federal correctional institution, where
 13 conditions are more crowded and less sanitary than they would be at a camp. *See* Dkt. 487
 14 (sentencing memorandum); Dkt. 487-1 (Sickler Decl.). It is not hyperbole to say that COVID-19
 15 threatens to turn any prison sentence into a death sentence, even for those who enter prison in
 16 relatively good health.

17 **C. Harsher Prison Conditions**

18 Quite apart from the life-threatening risks that COVID-19 poses in federal prisons, the
 19 pandemic has made prison conditions significantly worse across the board:

20 COVID-19 means that inmates are at greater risk of contracting that disease and it
 21 also means that there is more confinement and less programming in prison as a
 22 consequence of the public health measures that prisons need to take. And as a
 23 consequence of all that, any time is just now harder to serve.

See Reporter's Tr. of Zoom Proceedings, *United States v. Maggay*, No. 19-cr-0468 (N.D. Cal.,

24 ¹⁰ *See* Keri Blakinger and Keegan Hamilton, "I Begged Them To Let Me Die": How Federal
 25 Prisons Became Coronavirus Death Traps, THE MARSHALL PROJECT (June 18, 2020),
 26 <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>; Timothy Williams, *et al.*, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, NEW YORK TIMES (June 16, 2020),
 27 <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

28 ¹¹ *See, e.g.*, Timothy Williams, *et al.*, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, NEW YORK TIMES (June 16, 2020),
<https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

1 June 6, 2020) (“Maggay Tr.”), at 31:7–14.

2 Today, when inmates arrive, they are forced to quarantine in solitary confinement for at
 3 least 21 days. *See generally* Declaration of Joel Sickler (“Sickler Decl.”) ¶¶ 4, 5. Sometimes,
 4 this period of total isolation lasts even longer. One defendant, Doug Hodge, recently explained
 5 that, for more than four weeks, he spent “every minute of every day in the same seven-by-eleven
 6 foot cell—save for his approximately two-minute round trip walk to pick up his meals, occasional
 7 shower, and the infrequent phone call he was able to place.” *United States v. Hodge*, No. 19-cr-
 8 10080-NMG (D. Mass.), Dkt. 1435, filed July 27, 2020. Once Sushovan is ultimately allowed to
 9 join the general population, his movements will be severely restricted. *See* Sickler Decl. ¶ 6.¹²
 10 Most likely, he will not be allowed to work. *Id.*¹³ He will have limited or no access to
 11 educational programs and reduced access to telephone calls.¹⁴ No one—not even his family—
 12 will be allowed to visit him for the foreseeable future. No one knows how long these restrictions
 13 will last, but it will likely be this way for at least another year. *See supra* at 2 n.3.

14 III. ARGUMENT

15 A. This Court should reduce Sushovan’s five-year term of imprisonment, 16 pursuant to 18 U.S.C. § 3582(c).

17 The devastating and unpredictable circumstances of 2020 have forced this Court (and
 18 others) to ask whether prison sentences are “set in stone, no what matter what happens,” or
 19 whether courts should instead “be able to reduce a sentence when unforeseeable tragedies change
 20 its consequences?”¹⁵ The answer those courts—including many in this District¹⁶—have reached is

21 ¹² The BOP’s own website notes that “inmate internal movement is suspended with limited
 22 exceptions.” *See* BOP, *BOP Implementing Modified Operations*,
https://www.bop.gov/coronavirus/covid19_status.jsp (last visited Sept. 20, 2020).

23 ¹³ *See id.* (“[I]nmates are limited in their movements to prevent congregate [*sic*] gathering and
 24 maximize social distancing. Essential inmate work details, such as Food Service, continue to
 operate with appropriate screening.”).

25 ¹⁴ Although the BOP’s guidance notes that inmates now have more, not fewer, monthly telephone
 minutes, it is in fact much harder for inmates to reach the phones because of pandemic-related
 restrictions on their movement within the prison.

26 ¹⁵ *United States v. Osorto*, 445 F. Supp. 3d 103, 104 (N.D. Cal. 2020).

27 ¹⁶ *See, e.g., United States v. Shia*, No. 15–cr-000257-VC-1, 2020 WL 5510723 (N.D. Cal. Sept.
 28 11, 2020); *United States v. Hatcher*, No. 92-cr-00001-CRB-1, 2020 WL 5257878 (N.D. Cal. Sept.
 3, 2020); *United States v. Jones*, No. 94-cr-20079-EJD-1, 2020 WL 5359636 (N.D. Cal. Aug. 27,
 2020); *United States v. Tamayo*, No. 06-cr-00647-CRB-1, 2020 WL 4901635 (N.D. Cal. Aug. 20,

1 that it is not just appropriate, but often necessary to revisit prior, pre-pandemic sentencing
2 decisions to account for the havoc that COVID-19 has wrought on the nation and its prisons.

3 Section 3582(c) permits a court to modify a term of imprisonment on the motion of either
4 the Director of the Bureau of Prisons or a defendant. 18 U.S.C. § 3582(c)(1)(A). Before filing a
5 § 3582(c) motion, a defendant must “fully exhaust all administrative rights to appeal a failure of
6 the Bureau of Prisons to bring a motion on [his] behalf” or wait until 30 days after the relevant
7 warden receives his request—whichever is earlier. *Id.* Then, after the court considers the
8 § 3553(a) factors “to the extent [] they are applicable,” it can reduce a term of imprisonment if it
9 finds, as relevant here, that “extraordinary and compelling reasons warrant such a reduction” and
10 “a reduction is consistent with applicable policy statements issued by the Sentencing
11 Commission.” *Id.* § 3582(c)(1)(A)(i), (ii). The applicable policy statement directs courts to grant
12 compassionate release only if “[t]he defendant is not a danger to the safety of any other person or
13 to the community, as provided in 18 U.S.C. § 3142(g).” U. S. Sentencing Guidelines (“U.S.S.G.”)
14 § 1B1.13(2) (U.S. Sentencing Comm’n 2018).

15 A sentence reduction is warranted here. Sushovan has satisfied the exhaustion
16 requirement; he is a non-violent, first-time offender who poses no danger to the community; his
17 age and health render him especially vulnerable to serious illness were he to contract COVID-19;
18 and a modification of his sentence would be consistent with U.S. Sentencing Commission policy.

19 **1. Sushovan has satisfied § 3582’s exhaustion requirement.**

20 Before moving for a sentence reduction, a defendant must typically exhaust the
21 administrative remedies available through the BOP. That requirement does not apply to pre-

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23 2020); *United States v. Nemec*, No. 16-cr-00134-SI-1, 2020 WL 4547158 (N.D. Cal. Aug. 6,
24 2020); *United States v. Linsley*, No. 88-CR-00413-CRB-1, 2020 WL 4050872, at *1 (N.D. Cal.
25 July 20, 2020); *United States v. Burton*, No. 18-CR-00094-JSW-1, 2020 WL 4035067, at *2
26 (N.D. Cal. July 17, 2020); *United States v. Arceo*, No. 5:09-CR-00616-EJD-1, 2020 WL
27 4001339, at *1 (N.D. Cal. July 15, 2020); *United States v. Robinson*, 2020 WL 1982872, at *3
28 (N.D. Cal. Apr. 27, 2020); *United States v. Evans*, No. 18-CR-00308-WHO-1, 2020 WL
3971620, at *1 (N.D. Cal. July 14, 2020); *United States v. Williams*, No. 12-CR-600 YGR, 2020
WL 3640016, at *1 (N.D. Cal. July 6, 2020); *United States v. Brown*, No. 18-CR-00535-VC-1,
2020 WL 3581838, at *1 (N.D. Cal. July 1, 2020); *United States v. Quinn*, No. 91-cr-00608-DLJ-
RS, 2020 WL 3275736 (N.D. Cal. June 17, 2020); *United States v. Jay*, No. 17-CR-00176-CRB-
1, 2020 WL 3103796, at *1 (N.D. Cal. June 11, 2020); *United States v. Krashna*, No. 17-CR-
00022-JSW-1, 2020 WL 3053194, at *2 (N.D. Cal. June 8, 2020); *United States v. Joseph*, No.
00-CR-20217 CW, 2020 WL 3160172, at *1 (N.D. Cal. June 8, 2020).

1 custody defendants, like Sushovan, however, because the BOP’s administrative process is not
 2 available to those who have not yet reported to a BOP facility. *See, e.g., United States v. Jacobs*,
 3 No. 4:19-cr-00149, 2020 WL 3637625, at *3 (D. Iowa July 2, 2020) (“Defendant need not satisfy
 4 the statute’s gatekeeping function because it would be impossible to do so.... Defendant is not in
 5 a BOP facility, and thus, cannot petition the BOP for his release.” (internal citation omitted));
 6 *United States v. Jackson*, No. 5:02-cr-30020, 2020 WL 2735724, at *1 (W.D. Va. May 26, 2020).

7 In any event, Sushovan has satisfied the administrative exhaustion requirement. On
 8 September 11, 2020, defense counsel wrote to the acting warden at FCI Allenwood and the BOP
 9 Regional Counsel assigned to the Allenwood facility to ask that the BOP move, on Sushovan’s
 10 behalf, to have his sentence reduced. *See* Kecker Decl., Ex. B. The BOP informed Sushovan that
 11 it would not process his request because he was not yet in BOP custody. *See id.*, Ex. C. These
 12 actions meet the requirements of Section 3582(c)(1)(A)(i).¹⁷

13 2. The Section 3553(a) factors favor a sentence modification.

14 The court’s bedrock function at sentencing is to “impose a sentence sufficient, but not
 15 greater than necessary,” to serve the purposes set forth in § 3553(a). Courts considering
 16 compassionate release motions must take a fresh look at those factors—“to the extent [] they are
 17 applicable”—to determine whether a reduced sentence would adequately serve the stated
 18 purposes. 18 U.S.C. § 3582(c). Today, given everything that has happened since Sushovan was
 19 first sentenced, the relevant factors in § 3553(a) favor a reduction of his sentence.¹⁸

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 21 ¹⁷ *See, e.g., United States v. Ullings*, No. 10-cr-00406, 2020 WL 2394096, at *2–3 (N.D. Ga.,
 22 May 12, 2020) (finding that defendant effectively exhausted administrative remedies where
 23 defendant wrote to BOP Regional Counsel and confirmed that BOP would not consider her
 24 request because she was not in BOP custody); *United States v. Hernandez*, 18-CR-834-04 (PAE),
 25 2020 WL 1684062, at *2 (S.D.N.Y. Apr. 2, 2020) (finding that defendant had exhausted
 administrative remedies where BOP denied request for compassionate relief because the
 defendant was “not in the custody of the BOP”); *United States v. Gonzalez*, No. 2:18-CR-0232-
 TOR-15, 2020 WL 1536155, at *1 (E.D. Wa. Mar. 31, 2020) (finding exhaustion requirement met
 where BOP informed defendant that it could not process her requests because she was not in
 custody).

26 ¹⁸ Sushovan’s below-guidelines-range sentence is not an impediment to a sentence modification.
 27 *See United States v. Sarkisyan*, No. 15-cr-00234-CRB-15, 2020 WL 2542032 (N.D. Cal. May 19,
 2020) (“The Court rejects the Government’s argument that the § 3553(a) factors weigh against
 28 early release because Sarkisyan’s sentence was below the low end of the Guidelines Range....
 Nothing about that initial determination forecloses the possibility of a reduced sentence on
 account of subsequent developments.”).

1 First, a reduced sentence would be consistent with the Court’s need to protect the public
 2 from further criminal activity. Sushovan is a non-violent offender, with no criminal history, who
 3 poses no danger to the community. *See, e.g., United States v. Reid*, No. 17-cr-00175-CRB-2,
 4 2020 WL 2128855, at *2 (N.D. Cal. May 5, 2020) (“Because Reid is a non-violent offender, with
 5 no criminal history ... early release is consistent with ‘protect[ing] the public from further crimes
 6 of the defendant.”); *United States v. Robinson*, No. 18-cr-00597-RS-1, 2020 WL 1982872, at *3
 7 (N.D. Cal. Apr. 27, 2020) (granting compassionate release in part because the defendant was “a
 8 non-violent offender whose early release will not endanger the community” and “[it] was his first
 9 offense”); *United States v. Jay*, No. 17-cr-00176-CRB-1, 2020 WL 3103796, at *2 (N.D. Cal.
 10 June 11, 2020) (same).

11 Second, a reduced sentence—at a time when even “a relatively brief term of imprisonment
 12 could be rendered a death sentence by an unprecedented pandemic,” *United States v. Osorto*, 445
 13 F. Supp. 3d 103, 109 (N.D. Cal. 2020)—will still promote respect for the law, provide just
 14 punishment, and deter criminal activity. What’s more, any observer or would-be offender must
 15 remain mindful that this case has already appropriated almost a decade of Sushovan’s life, and
 16 that Sushovan has suffered—and will continue to suffer—grave and lasting indignities. Among
 17 other things, he has been investigated and penalized by authorities on both sides of the Atlantic;
 18 he is still the subject of the Financial Reporting Council’s ongoing investigation; he has been
 19 branded a “fraud” and will bear the label “felon” in perpetuity; he will never be able to visit the
 20 United States again; he has lost his accounting license (ending his professional life as he knew it);
 21 he must still pay \$10.1 million in financial penalties—a sum that significantly *exceeds* the amount
 22 he earned when Hewlett Packard (“HP”) acquired Autonomy;¹⁹ he remains embroiled in an
 23 ongoing civil trial in the United Kingdom, where HP seeks his complete financial ruin; and he has
 24 been confined to this District—separated from his home and family—for two and a half years.
 25 These consequences signal the seriousness of Sushovan’s offense and send a powerful deterrent
 26 message to the broader community.

27
 28 ¹⁹ After withheld taxes and National Insurance contributions, the amount Sushovan actually took home that can be associated with the HP “premium” is \$2,628,291.

1 Third, as a 56-year-old man, Sushovan is very unlikely to recidivate. *See, e.g., Linsley,*
 2 2020 WL 4050872 at *2 (granting compassionate release in part because the defendant’s age
 3 made him “very unlikely to recidivate”); *United States v. Quinn*, No. 91-cr-00608-DLJ, 2020 WL
 4 3275736 at *6 (N.D. Cal. June 17, 2020) (same).²⁰ Indeed, at Sushovan’s sentencing, this Court
 5 made clear that it viewed Sushovan as committed to living a law-abiding life. Hr’g Tr. (May 13,
 6 2019) at 50:18–22 (“I can’t believe you would ever go out and commit another criminal offense.
 7 I just don’t believe it.”).

8 Finally, Sushovan’s personal history and characteristics make clear that he will ultimately
 9 live a productive life outside of prison, when given the chance, and that he will continue to make
 10 positive contributions both to society and those around him. *See id.* at 44:9–15 (“[Sushovan] has
 11 done, as the letters reflect, a number of very good things in his life. He cares a great deal about
 12 his family and his friends and people who are disadvantaged[.]”); *see also* Dkts. 487, 532, 533.

13 3. “Extraordinary and compelling” reasons warrant modification of 14 Sushovan’s sentence.

15 Section 3582 does not define the “extraordinary and compelling reasons” standard, but
 16 under the Sentencing Guidelines, “extraordinary and compelling” reasons to modify a sentence
 17 exist if a defendant is suffering from a serious physical or medical condition, is experiencing age-
 18 related deterioration, needs to care for a minor child, or if “an extraordinary and compelling
 19 reason other than, or in combination with, the [enumerated] reasons” exists. U.S.S.G. § 1B1.13
 20 app. n.1(A)–(D).²¹

21 Here, there are at least three such “extraordinary and compelling” reasons.

22 ²⁰ U.S. Sentencing Comm’n, *The Effects of Aging on Recidivism Among Federal Offenders*
 23 (December 2017) (hereinafter “*Effects of Aging*”), available
 24 at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf)
 25 [publications/2017/20171207_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf).

26 ²¹ Courts have repeatedly used the so-called “residual clause” to modify federal prison sentences
 27 due to the pandemic. *See, e.g., Ullings*, 2020 WL 2394096, at *2–3 (affirming that courts are
 28 “authorized to consider the enumerated circumstances, as well as circumstances other than, or in
 combination with, the enumerated circumstances” and granting compassionate release primarily
 based on COVID-19 risks to the defendant’s health); *United States v. Perez*, No. 17 CR 513-3
 (AT), 2020 WL 1546422, at *4 (S.D.N.Y. Apr. 1, 2020) (granting compassionate release after
 considering the residual clause); *United States v. Kowalewsky*, No. 2:13-CR-00045-RWS, Dkt.
 251 (N.D. Ga. Apr. 30, 2020) (court “authorized to consider the enumerated circumstances as
 well as circumstances other than, or in combination with, the enumerated circumstances”).

1 *First*, any prison term is now significantly more dangerous than it was when the Court
 2 sentenced Sushovan last year. Everyone knows how rapidly COVID-19 has torn through the
 3 country: in six months, more than 200,000 Americans have died; six million Americans—one in
 4 fifty—have been infected and continue to live with the ramifications. As tragic and inexcusable
 5 as those numbers are, the infection rates are *five times worse* inside the country’s federal prisons.
 6 Worse still, Sushovan’s age and health render him especially vulnerable to serious illness if he
 7 contracts COVID-19 while in prison.²² He is 56,²³ suffers from asthma severe enough to require
 8 use of a Salbutamol inhaler, and has high cholesterol. *See* Dkt. 427 (PSR ¶¶ 76–77.) Those
 9 factors place him at a much higher risk of severe illness, and possibly death, from COVID-19.²⁴

10 Courts in this District recognize that heightened vulnerability to the coronavirus—
 11 including where a defendant has asthma—constitutes an “extraordinary and compelling” reason
 12 for a sentence reduction under § 3582(c).²⁵ The government has elsewhere conceded that the

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 14 ²² These risks are not speculative. Sushovan was designated to FCI Allenwood (Low), where at
 15 least one inmate and one staff member have so far tested positive for COVID-19. *See* BOP,
 16 *COVID-19 Cases* (last visited Sept. 22, 2020) (showing 2 confirmed cases at Allenwood Low, 4 at
 17 Allenwood Medium, and 2 at Allenwood USP); John Beauge, *Staff member at Allenwood*
Federal Penitentiary tests positive for COVID-19, PENNLIVE (Apr. 8, 2020),
[https://www.pennlive.com/coronavirus/2020/04/staff-member-at-allenwood-federal-penitentiary-](https://www.pennlive.com/coronavirus/2020/04/staff-member-at-allenwood-federal-penitentiary-tests-positive-for-covid-19.html)
[tests-positive-for-covid-19.html](https://www.pennlive.com/coronavirus/2020/04/staff-member-at-allenwood-federal-penitentiary-tests-positive-for-covid-19.html) (stating that an inmate and a staff member tested positive for
 COVID-19 at the Allenwood facility).

18 ²³ Morbidity rates are higher for those over 50. For example, in California, people ranging in age
 19 from 50 to 59 account for 10.6% of COVID-19 deaths, while those ranging in age from 35 to 49—
 20 although they comprise a greater number of infections—account for a much lower death rate, just
 21 5.7%. *See* CA Dept. of Public Health, *Cases and Deaths Associated with Covid-19 by Age Group*
 22 *in CA*, [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx)
[Age-Group.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx) (last visited Sept. 20, 2020); *see also* Centers for Disease Control and Prevention
 (“CDC”), *Older Adults*, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html)
[precautions/older-adults.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html), (last visited Sept. 20, 2020) (“Among adults, the risk for severe
 illness from COVID-19 increases with age, with older adults at highest risk.... For example,
 people in their 50s are at higher risk for severe illness than people in their 40s.”).

23 ²⁴ *See* CDC, *People with Certain Medical Conditions* (Sept. 11, 2020),
 24 [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
[conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html).

25 ²⁵ *See, e.g.,* *Burton*, 2020 WL 4035067, at *2 (granting compassionate release to inmate with
 26 asthma who served less than half of sentence); *United States v. Fabris*, No. 17-cr-00386-VC-2,
 27 2020 WL 3481708 (N.D. Cal. June 25, 2020) (same); *United States v. Fowler*, 445 F. Supp. 3d
 28 452 (N.D. Cal. 2020) (granting compassionate release to inmate with chronic asthma); *United*
States v. Lee, No. 19-cr-00419-SI, 2020 WL 2512415 (N.D. Cal. May 15, 2020) (granting
 compassionate release to Santa Rita Jail inmate with moderate to severe asthma); *United States v.*
Simpson, No. 11-CR-00832-SI-3, 2020 WL 2323055 (N.D. Cal. May 11, 2020) (granting
 compassionate release to 62-year-old with asthma and diabetes); *see also Hernandez*, 2020 WL
 1684062, at *3 (“The COVID-19 pandemic is extraordinary and unprecedented in modern times in

1 “extraordinary and compelling reasons” standard can be met when chronic health conditions
 2 render a defendant especially vulnerable to serious illness in connection with COVID-19. *See,*
 3 *e.g., United States v. Silva*, No. 4:17-cr-554-PJH-03, 2020 WL 4039218, at *3 (N.D. Cal. July 17,
 4 2020) (“The government ... concedes the possibility that chronic health conditions that are known
 5 to elevate the risk of complications due to COVID-19, combined with the heightened risk of
 6 infection while incarcerated in a prison that experiences a COVID-19 outbreak, may satisfy the
 7 ‘extraordinary and compelling’ standard[.]”).

8 *Second*, the time Sushovan spends in prison will now be “much more difficult to endure”
 9 than anyone anticipated at last year’s sentencing. Maggay Tr. at 31:8. It’s important to
 10 remember that, even before COVID-19 hit, Sushovan was at a significant disadvantage because he
 11 is a foreign national: he is not eligible to serve his sentence at a prison camp,²⁶ he will not be
 12 eligible for pre-release to a halfway house or home confinement, and it is possible that his
 13 detention period will ultimately be *extended* to deal with deportation issues. *See generally* Sickler
 14 Decl., Ex. A. Indeed, this Court previously varied from the guideline range specifically because,
 15 unlike “a run-of-the-mill white-collar offender,” Sushovan will have to spend his time at a low-
 16 security federal correctional institution, not a camp. *See* Hr’g Tr. (May 13, 2019), 51:11–52:7
 17 (noting that “there’s a different kind of living arrangement than what would be available to
 18 somebody who’s at Lompoc as an example”). Those disadvantages are now significantly worse
 19 because of the severe lockdowns in place at federal prisons. For one thing, when Sushovan first
 20 surrenders, he will spend three or more weeks in quarantine—alone in a small, eight-by-ten cell,
 21 allowed out only three times a week, and then only for five-minute showers. He will see and
 22 interact with no one, will not be allowed outside, and will not be allowed to make or receive
 23 phone calls. Once he completes quarantine, he will join the general population, where he will

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 26 this nation. It presents a clear and present danger to free society for reasons that need no
 27 elaboration. COVID-19 presents a heightened risk for incarcerated defendants like Mr. Hernandez
 28 with respiratory ailments such as asthma. The Centers for Disease Control warns that persons
 with asthma are at high risk of serious illness if they contract the disease.”).

²⁶ Because he is not a U.S. national, Sushovan is will instead be sent to a federal correctional
 institution, where the chances of being assaulted are 143% greater and the chances of serious
 assault are 553% greater than at a prison camp. *See generally* Dkt. 487 at 25–29.

1 continue to feel the effects of the pandemic: he is unlikely to be allowed to work; educational and
 2 vocational programs have been shuttered; and no one—not even his wife—will be allowed to
 3 visit him.²⁷ As things stand today, it is certainly possible that Sushovan will spend *years* in
 4 prison without ever seeing his family.

5 Taken together, these unanticipated risks and restrictions profoundly change what it
 6 means to spend 60 months in prison. That is an “extraordinary and compelling reason” to reduce
 7 Sushovan’s sentence. *See, e.g., United States v. Riley*, No. CR ELH-16-0402, 2020 WL 3034843,
 8 at *8 (D. Md. June 4, 2020) (modifying sentence in part because the COVID-19 outbreak “has
 9 sufficiently increased the severity of the sentence beyond what was originally anticipated”).

10 Given how much worse prison conditions are today, the Court might reasonably wonder
 11 why Sushovan does not seek to delay his reporting date, as others have done. That brings us to
 12 the *third* “extraordinary and compelling” reason for a sentence reduction. Sushovan has been
 13 isolated from his home and friends for so long—two and a half years and counting—that he is
 14 determined to do whatever he must to finally “begin” serving his sentence. Sushovan moved to
 15 San Francisco in January 2018 to prepare for trial and has never left. For most of that time, he
 16 has been under Court order to stay in the District. While other white-collar defendants—even
 17 foreigners²⁸—are typically allowed to spend this time at home, Sushovan has not seen his home
 18 in almost three years. While his family was once able to travel here to see him, that too has been
 19 impossible this year because countries have closed their borders to limit the spread of COVID-19.
 20 Sushovan’s isolation, thousands of miles from home, has been very real punishment. He has
 21 missed his younger daughter’s graduation from high school and both his daughters’ moves to new

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 23 ²⁷ The BOP’s mitigation measures include “suspension of social visitation and internal inmate
 24 movements, extensive screening of staff and inmates, cleaning protocols, and quarantining[.]”
United States v. Ramirez-Suarez, No. 16-cr-00124-LHK-4, 2020 WL 3869181, at *3 (N.D. Cal.
 July 9, 2020).

25 ²⁸ U.K. resident Marc Johnson, for example, has been living at home in the U.K. during the
 26 almost three years since his conviction. *See United States v. Johnson*, No. 1:16-cr-00457-NGG
 27 (E.D.N.Y.) (convicted October 23, 2017 after trial; sentenced to 24 months imprisonment on May
 28 10, 2018, Dkt. 239; bail pending appeal granted June 20, 2018, Dkt. 245; permission to live in the
 U.K. on bail pending appeal granted June 27, 2018, Dkt. 250; convictions affirmed by Second
 Circuit on September 12, 2019, 939 F.3d 82; rehearing denied on January 23, 2020, No. 18-1503,
 Dkt. 149; motion to reconsider denied on Sept. 16, 2020, Dkt. 174; petition for writ of certiorari
 docketed on June 24, 2020, 19-1412).

1 universities. He has found himself separated from his wife of more than 27 years, including when
 2 she contracted COVID-19 (thankfully, she has since recovered). He has missed birthdays,
 3 holidays, and annual family traditions, and has few if any friends in the U.S. that he can turn to
 4 for support. He does not know whether he will ever see his mother again. And, unsurprisingly,
 5 his closest family members have struggled to deal with his conviction: [REDACTED]
 6 [REDACTED]. After
 7 decades of supporting his family, Sushovan has found himself powerless to do so just when they
 8 need him most.

9 Sushovan does not mean to suggest that these past two and a half years have been the
 10 equivalent of incarceration, and he acknowledges that he sought and secured bail pending appeal.
 11 But, to be sure, this has been a harsh and trying period for him and his family, made all the worse
 12 by COVID-19, lockdown orders, and his family’s inability to travel—and the defense respectfully
 13 submits that these extraordinary factors also counsel in favor of a reduction of his sentence.

14 **4. Sushovan is not a danger to the community.**

15 The policy statement in USSG § 1B1.13(2) directs courts to modify a sentence only if “the
 16 defendant is not a danger to the safety of any other person or to the community, as provided in 18
 17 U.S.C. § 3142(g).” U.S.S.G § 1B1.13(2). Section 3142(g), in turn, directs courts to account for
 18 various considerations when determining whether a person poses a danger to the community,
 19 including the nature of the offense and the person’s criminal history.

20 As discussed, Sushovan does not pose a danger to the community. Indeed, this Court
 21 reached that conclusion expressly when Sushovan sought bail pending appeal. Hr’g Tr. (May 13,
 22 2019) at 72:8–10 (“As to whether or not the defendant poses a danger, I would find by clear and
 23 convincing evidence that he does not pose a danger to the community.”); *see also id.* at 68:16–21
 24 (reflecting that the government did not contest this issue for purposes of bail pending appeal);
 25 Dkt. 427 (PSR, Sentencing Recommendation at 3) (“[Sushovan] is not viewed as [] a danger to
 26 the community.”).

27 **5. Sushovan qualifies for relief under Section 3582 even though he has**
 28 **not yet reported to prison.**

Although Sushovan is not yet in BOP custody, he nevertheless qualifies for relief under

1 Section 3582. Nothing in that statute requires “that a defendant be in the custody of the Bureau of
 2 Prisons (‘BOP’) at the time he petitions for compassionate release. Indeed, the relief available
 3 under the statute—a reduction in sentence, and not, specifically, release from custody—implies
 4 that the only absolute requirement is that a defendant be subject to a federal sentence.” *United*
 5 *States v. Austin*, No. 06-CR-991 (JSR), 2020 WL 3447521, at *2 (S.D.N.Y. June 22, 2020).²⁹

6 Other defendants—who, like Sushovan, were not yet in BOP custody for one reason or
 7 another—have sought and been granted relief in just this way.

8 In *Austin*, for instance, the defendant had spent years at FCI Allenwood before being
 9 released in light of a habeas petition that was subsequently vacated on appeal. Before his re-
 10 surrender date, he moved for “compassionate release” under Section 3582. Judge Rakoff held
 11 that there was no custody requirement; found that, in any event, Austin was “*de facto*” in the
 12 same position “as a defendant already in custody” because he was due to surrender within a week;
 13 determined that “extraordinary and compelling reasons” warranted a reduction in his sentence;
 14 and resentenced him to time served. *Id.* at *2–4.

15 In *Ullings*, a 66-year-old foreign national pleaded guilty to violating the Sherman
 16 Antitrust Act and filed a motion for compassionate release while in the custody of the U.S.
 17 Marshals Service, *not* the Bureau of Prisons. *United States v. Ullings*, No. 1:10-CR-00406, 2020
 18 WL 2394096, at *1 (N.D. Ga. May 12, 2020). The court granted her relief, finding that (1) she
 19 exhausted administrative remedies by writing to the BOP and confirming that it would not act on
 20 her request because she was not yet in custody, *id.* at *2–3; (2) the § 3553(a) factors supported
 21 release because she was a non-violent first-time offender who was “unlikely to reoffend as a
 22 result of her age,” *id.* at *3–5; (3) “extraordinary and compelling reasons” justified reducing her
 23 sentence because she was “in a high-risk category for contracting COVID-19”; and (4) she was
 24 “not a danger to anyone,” *id.* Those factors are all present in Sushovan’s case. The *Ullings* court

25 ²⁹ As Judge Rakoff noted in *Austin*, there are courts in the country that have concluded that “relief
 26 under Section 3582(c) is usually inappropriate for defendants who are not in BOP custody.” *See*
 27 *Austin*, 2020 WL 3447521, at *2. But they have reached that conclusion because the statute
 28 requires that a defendant start by “bring[ing] his motion to the warden of [his] facility,” not
 because there is any express statutory bar that would prohibit non- or pre-custodial defendants
 from seeking relief. *Id.* And, for Sushovan as for Mr. Austin, “incarceration is not a distant or
 hypothetical possibility,” because both men faced (or face) imminent surrender dates. *Id.* at *3.

1 ultimately reduced the defendant’s eight-month sentence to time served and ordered that she be
2 transferred to ICE custody immediately to be removed to the Netherlands, or alternatively, that
3 she be allowed to remove herself to the Netherlands at her own expense. *Id.* at *6.

4 It is true that, in most cases, defendants who file Section 3582 motions do so after they are
5 already in some form of custody. But custody is not a prerequisite, and this Court certainly has
6 authority to grant Sushovan the relief he requests through this motion.

7 **IV. CONCLUSION**

8 Sushovan respectfully requests that the Court reduce his sentence under § 3582(c). Had
9 the Court known at sentencing that a deadly pandemic was on the way; that Sushovan would be
10 separated from his family for almost three years before beginning his sentence; and that any time
11 Sushovan served would be even harsher and more restrictive than anticipated, we respectfully
12 submit that the Court would not have imposed a five-year term of imprisonment.

13
14 Dated: September 23, 2020

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