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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10 **FRESNO DIVISION**

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 LUKE SCARMAZZO
15 Defendants.

Case No. 1:06-CR-00342 LJO

**AMICUS BRIEF OF THE LAST
PRISONER PROJECT AND THE
WELDON PROJECT IN SUPPORT OF
DEFENDANT’S MOTION FOR
COMPASSIONATE RELEASE**

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Federal Cases

Brown, et al. v. Plata,
563 U.S. 493 (2011)..... 10, 11

Madrid v. Gomez,
889 F. Supp. 1146 (N.D. Cal. 1995) 10

Sandusky v. Goetz,
944 F.3d 1240 (10th Cir. 2019)..... 6

United States v. McIntosh,
833 F.3d 1163 (9th Cir. 2016)..... 7

Federal Statutes

18 U.S.C. § 3553(a) 8

18 U.S.C. § 3582(c)(1)(A)(i) 7, 8

First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) 1, 7, 8

Other Authorities

American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* 3, 4

American Civil Liberties Union, *Mass Incarceration*,
<https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited May 30, 2020) 3

Deputy Attorney General, *Memorandum for All United States Attorneys On Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> 6

Deputy Attorney General, *Memorandum for Selected United State Attorneys On Investigations And Prosecutions In States Authorizing The Medical Use Of Marijuana* (Oct. 19, 2009), available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> 6

Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* 4

Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3884, 116th Cong. (2019) 7

1 Marshall Project, *Tracking The Spread Of Coronavirus In Prisons*,
 2 [https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-](https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons)
 coronavirus-in-prisons (last visited May 30, 2020) 11

3 Ryan Reilly, *Man Serving 18 Years on Marijuana Charges Just Died in Federal*
 4 *Prison COVID-19 Outbreak*, HUFFINGTON POST, May 22, 2020, available at
 5 [https://www.huffpost.com/entry/covid-federal-prison-](https://www.huffpost.com/entry/covid-federal-prison-marijuana_n_5ec6c5fcc5b6cbe70930a988)
 marijuana_n_5ec6c5fcc5b6cbe70930a988 12

6 Secure and Fair Enforcement Act, H.R. 1468, 116th Cong. (2019) 7

7 Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093,
 8 116th Cong. (2019) 7

9 Taylor Dobbs, *The Slow And Painful Prison Death Of Roger Brown*, VERMONT
 10 PUBLIC RADIO, Nov. 14, 2017, available at [https://www.vpr.org/post/slow-and-](https://www.vpr.org/post/slow-and-painful-prison-death-roger-brown#stream/0)
 painful-prison-death-roger-brown#stream/0 11

11 Taylor Dobbs, *‘They Killed Him’: As A Vermont Inmate Suffered From Untreated*
 12 *Cancer, Officials Delayed Care*, VERMONT PUBLIC RADIO, Nov. 13, 2017,
 13 available at [https://www.vpr.org/post/they-killed-him-vermont-inmate-](https://www.vpr.org/post/they-killed-him-vermont-inmate-suffered-untreated-cancer-officials-delayed-care#stream/0)
 suffered-untreated-cancer-officials-delayed-care#stream/0 11

14 Tom Angell, *Marijuana Arrests Increased Again Last Year Despite More States*
 15 *Legalizing, FBI Data Shows*, FORBES, Oct. 1, 2019, available at
 16 [https://www.forbes.com/sites/tomangell/2019/10/01/marijuana-arrests-](https://www.forbes.com/sites/tomangell/2019/10/01/marijuana-arrests-increased-again-last-year-despite-more-states-legalizing-fbi-data-shows/#501ec9e07e21)
 increased-again-last-year-despite-more-states-legalizing-fbi-data-
 shows/#501ec9e07e21 4

17 Tom Angell, *Two Cannabis Bills Scheduled For Congressional Votes This Week*
 18 (March 11, 2020), [https://www.marijuanamoment.net/two-cannabis-bills-](https://www.marijuanamoment.net/two-cannabis-bills-scheduled-for-congressional-votes-this-week-newsletter-march-11-2020/)
 scheduled-for-congressional-votes-this-week-newsletter-march-11-2020/ 7

19 U.S. Department of the Treasury, Financial Crimes Enforcement Network, *FIN-*
 20 *2014-G001: BSA Expectations Regarding Marijuana-Related Businesses* (Feb.
 21 14, 2014), available at [https://www.fincen.gov/sites/default/files/shared/FIN-](https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf)
 2014-G001.pdf 6

22 U.S. Sentencing Commission, *Quick Facts: Marijuana Trafficking Offenses* (July
 23 2019) 5

24 Vera Institute of Justice, *The Prison Paradox: More Incarceration Will Not Make*
 25 *Us Safer*, 2017 9

26 Vera Institute of Justice, *Re-Imagining Prison*, 2018 *passim*

STATEMENT OF INTEREST

1
2 Despite prevailing trends at both the federal and state levels to decriminalize or legalize
3 cannabis use and distribution, there are still those prisoners of the War on Drugs who have been
4 condemned to die or serve decades in prison for nonviolent cannabis offenses. These sentences
5 were never just, and they are now egregiously inequitable considering hundreds of corporations
6 now make billions of dollars (and states collect millions in tax revenues) from legalized
7 commercial cannabis activity. The sentences should not be allowed to stand in light of society’s
8 newfound tolerance and promotion of legalized cannabis. No one should spend the rest of his or
9 her life in prison for a cannabis offense.

10 The Last Prisoner Project (“LPP”) is a non-profit organization that advocates on behalf of
11 currently or formerly incarcerated cannabis offenders who were sentenced to prison for
12 nonviolent cannabis offenses. LPP has adopted a multifaceted approach to addressing the
13 injustices and disparities in sentencing for cannabis offenses and the collateral consequences of
14 cannabis arrests and convictions. LPP redresses these injustices and disparities through policy
15 reform, legislative advocacy, and impactful direct service programs designed both to secure
16 release of nonviolent cannabis offenders from incarceration and to assist those coming out of
17 incarceration in rebuilding their lives through reentry programs and anti-recidivism efforts.

18 The Weldon Project (“TWP”), also a signatory to this amicus brief, is a nonprofit
19 organization that brings together leaders impacted by the criminal justice system and unlikely
20 allies spanning the political divide to push for criminal justice solutions. TWP works directly with
21 lawmakers, advocacy groups, incarcerated individuals, and the White House on a broad range of
22 criminal justice issues. Notably, TWP helped pass the historic, bipartisan criminal justice reform
23 legislation called the First Step Act which was signed into law in December 2018. TWP launched
24 the Mission Green initiative to focus exclusively on individuals incarcerated for marijuana related
25 offenses in the federal criminal justice system. The Mission Green campaign is led by people who
26 have been impacted by the justice system and have lived through the issues these advocacy
27 organizations are working to address. The people most harmed by the current system are uniquely
28 qualified to create and champion the solutions that will begin to transform it. Mission Green

1 assists prisoners with clemency petitions and advocates on their behalf throughout the process. As
2 these offenders are released, Mission Green assists them in finding second chance jobs to ensure
3 they have the resources they need to succeed in the free world.

4 LPP and TWP are committed to advocating for, and working to facilitate, the release of
5 individuals still incarcerated for nonviolent cannabis offenses. Amidst the current unprecedented
6 global pandemic (COVID-19), these organizations are working to ensure and encourage the safe
7 release of vulnerable, at-risk incarcerated individuals from uniquely dangerous prison
8 environments. LPP and TWP are focused on assisting petitioners who are incarcerated for
9 cannabis offenses that would no longer be considered criminal due to the rapid legalization of
10 cannabis in states across the country. These individuals, like the petitioner in this case, Mr.
11 Scarmazzo, pose no threat to the community if released, and keeping them unnecessarily
12 incarcerated during the COVID-19 crisis increases risk of infection and harm to these individuals
13 and to the wider community due to the risk of creating new vectors of the pandemic. LPP and
14 TWP submit this amicus brief in support of Mr. Scarmazzo's motion, and request that the Court
15 grant compassionate release and/or immediate sentence reduction.

16 ARGUMENT

17 **I. THE CRIMINALIZATION OF MARIJUANA HAS LED TO MASS** 18 **INCARCERATION**

19 The giant sweep of nonviolent cannabis offenders into the criminal justice system has
20 resulted in a clear miscarriage of justice, especially considering the well-documented harms
21 caused by incarceration. The policies and practices that catalyzed the criminalization and mass
22 incarceration of nonviolent cannabis offenders have been exposed as a direct result of racially and
23 politically biased policies that were systematically developed and implemented as part of the
24 "War on Drugs." This historical context further demonstrates the need for the judiciary to utilize
25 its discretion and intervene to provide justice and relief to those impacted individuals, like Mr.
26 Scarmazzo.

27 Federal drug policy during the 1980s and 1990s was focused on funding supply reduction
28 initiatives, such as drug law enforcement, which dramatically outpaced funding for demand

1 reduction initiatives, including treatment, prevention, and research. During this time, drug laws
2 also became harsher. Legislation at both the state and federal levels established mandatory
3 minimum sentences, three-strikes rules, and truth-in-sentencing laws. These policies eliminated
4 the ability of judges across the country to exercise their discretion in determining what was fair
5 and equitable in sentencing.

6 Before the War on Drugs, U.S. incarceration rates (seen circa 1970) reflected a rate of less
7 than one person per 1,000 behind bars. Vera Institute of Justice, *Re-Imagining Prison*, 2018, at 7.
8 In 2007, the high water mark of “mass incarceration”, one in 100 American adults were in prison
9 or jail. Paradoxically, “mass incarceration” is now widely viewed as a serious social problem in
10 and of itself. *Id.* at 4. The crime rate is now lower than it has been in decades, yet because of the
11 War on Drugs and the era of mass incarceration, over one million people are still serving
12 sentences in prisons throughout the country for drug offenses. The United States has an
13 incarceration rate that is unparalleled. The U.S. makes up approximately 5% of the world
14 population, and 25% of the world's incarcerated population. American Civil Liberties Union,
15 *Mass Incarceration*, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited
16 May 30, 2020). Compounding the problem is the racial inequities in how the U.S. incarcerates its
17 people. While black men and women make up just 13% of the country’s population, they
18 represent more than 35% of those incarcerated in American prisons. Black Americans are the
19 largest racial or ethnic group in state or federal prisons.

20 Like the “War on Drugs”, the implementation of “Broken Windows” policing policies
21 disproportionately implemented low-income people of color. Now debunked, these policies were
22 allegedly designed to combat low-level, quality-of-life offenses. However, these policing
23 programs systematically swept many users and dealers of then-illegal drugs, including marijuana,
24 into the criminal justice system – the vast majority of whom were people of color.

25 While rates of incarceration for drug offenses have declined since their peak in the early
26 2000s, a punitive response to drug use remains widespread. In 2018, there were an estimated
27 692,965 marijuana arrests, almost all of which (89.6%) were for possession. American Civil
28 Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana*

1 *Reform*, 2020, at 21. The crime of marijuana possession is enforced disproportionately against
2 people of color. *Id.* at 12.

3 Despite widespread legalization at the state level and changes in federal policy related to
4 same, “racial disparities in marijuana possession arrests have remained unchanged nationwide.
5 On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than
6 a white person, even though Black and white people use marijuana at similar rates.” *Id.* at 29.
7 Ultimately, America’s war on drugs and the overcriminalization of drug use is an issue of race
8 and class discrimination. Overwhelmingly, people of color are much more likely to be arrested
9 and charged with marijuana possession, although the rates of marijuana use do not substantially
10 differ across racial and ethnic groups.

11 Despite decriminalization of marijuana possession by states and municipalities, many
12 people (mainly people of color) are still being arrested. Approximately every minute, someone in
13 the U.S. is arrested for marijuana possession. See Tom Angell, *Marijuana Arrests Increased*
14 *Again Last Year Despite More States Legalizing, FBI Data Shows*, FORBES, Oct. 1, 2019,
15 available at [https://www.forbes.com/sites/tomangell/2019/10/01/marijuana-arrests-increased-](https://www.forbes.com/sites/tomangell/2019/10/01/marijuana-arrests-increased-again-last-year-despite-more-states-legalizing-fbi-data-shows/#501ec9e07e21)
16 [again-last-year-despite-more-states-legalizing-fbi-data-shows/#501ec9e07e21](https://www.forbes.com/sites/tomangell/2019/10/01/marijuana-arrests-increased-again-last-year-despite-more-states-legalizing-fbi-data-shows/#501ec9e07e21). In 2018, more
17 people were arrested for nonviolent marijuana possession than for all crimes that the FBI
18 classifies as violent. Exacerbating this problem is the fact that prosecutors routinely threaten
19 severe prison sentences in order to encourage those arrested with drug charges to plead guilty,
20 and 97% of federal drug offenders ultimately plead guilty. See Human Rights Watch, *An Offer*
21 *You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, 2013.

22 Historical context is important and continues to impact the enforcement of marijuana-
23 related offenses. Drug policies in the United States have been misguided and have led to mass
24 incarceration of nonviolent offenders. The Court should take this historical context into
25 consideration as an additional factor that lends support to Mr. Scarmazzo’s request for relief.

26 **II. CHANGES IN LAW: FROM PROHIBITION TO LEGALIZATION**

27 Since Mr. Scarmazzo was sentenced in 2006, significant changes have occurred with
28 respect to cannabis law and public policy. Today, commercial cannabis activity similar to the

1 conduct engaged in by Mr. Scarmazzo is now legal under state law in thirty-three (33) states.
2 State-licensed cannabis companies and their founders and executives are valued in their
3 communities, and are appreciated for providing jobs and paying taxes, both of which benefit the
4 state and local economy. Cannabis companies are now recognized for their contributions to the
5 communities they serve. This became even more apparent in the midst of the global COVID-19
6 pandemic, when many states declared some forms of cannabis businesses “essential services” and
7 have even enacted laws to enable new forms of cannabis distribution like home delivery and
8 curbside pick-up.

9 While federal law still formally prohibits cannabis activities, Congress has passed
10 spending limitations to preclude some businesses from being subject to any federal prosecutions,
11 and the Department of Justice has refrained from enforcing federal law with respect to licensed
12 cannabis operators in compliance with state laws and regulations. Even when marijuana
13 offenders are federally prosecuted for these activities, federal judges consistently impose
14 sentences that are far shorter than the nearly 22 year sentence received in Mr. Scarmazzo’s case.
15 *See generally* U.S. Sentencing Commission, *Quick Facts: Marijuana Trafficking Offenses* (July
16 2019) (detailing decline in the number and length of sentences for federal marijuana trafficking
17 and noting that in Fiscal Year 2018, the “average sentence for marijuana trafficking offenders was
18 29 months”). The legal landscape has changed, both at the state and federal level, since Mr.
19 Scarmazzo was sentenced, as evidenced by the following:

- 20 a. Thirty-three (33) states have legalized cannabis for medical and/or adult use. In
21 January 2020, Illinois became the eleventh state, along with the District of
22 Columbia, to fully legalize cannabis for adult use. An additional twenty-two (22)
23 other states have legalized cannabis for medical use, and a vast majority of states
24 have decriminalized cannabis.
- 25 b. In 2009, Deputy Attorney General Ogden issued an advisory entitled:
26 “Memorandum for United States Attorneys On Investigations and Prosecutions In
27 States Authorizing The Medical Use of Marijuana” advising federal law
28 enforcement to conserve resources and not prosecute medical patients duly

1 authorized under state laws to use medical cannabis. U.S. Department of Justice,
2 Office of the Deputy Attorney General, *Memorandum for Selected United State*
3 *Attorneys On Investigations And Prosecutions In States Authorizing The Medical*
4 *Use Of Marijuana (Oct. 19, 2009)*, available at
5 [https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-](https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf)
6 [marijuana.pdf](https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf).

7 c. In 2013, Deputy Attorney General Cole issued a Memorandum advising federal
8 law enforcement that, subject to eight specific federal enforcement priorities, both
9 medical and adult-use cannabis operators acting in compliance with state laws and
10 regulations should be subject solely to state and local law enforcement action.
11 U.S. Department of Justice, Office of the Deputy Attorney General, *Memorandum*
12 *for All United States Attorneys On Guidance Regarding Marijuana Enforcement*
13 *(Aug. 29, 2013)*, available at
14 <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (“Cole
15 Memorandum”).

16 d. In 2014, the Department of Treasury Financial Crimes Enforcement Network
17 recognizing the enforcement priorities of the Cole Memorandum, passed guidance
18 for financial institutions to facilitate the provision of banking services for state-
19 legal cannabis operators. U.S. Department of the Treasury, Financial Crimes
20 Enforcement Network, *FIN-2014-G001: BSA Expectations Regarding Marijuana-*
21 *Related Businesses (Feb. 14, 2014)*, available at
22 <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

23 e. Every year since 2014, Congress has passed spending appropriations amendments
24 prohibiting the Department of Justice from spending funds on federal interference
25 with lawful participants in state medical cannabis programs. *Sandusky v. Goetz*,
26 944 F.3d 1240, 1243 (10th Cir. 2019).

27 With regard to the last point, each of those spending appropriations amendments were
28 designed by Congress to preclude federal law enforcement agencies from using federal funds to

1 investigate and prosecute patients and companies operating in compliance with the law in states
2 that have legalized cannabis for medical use. The reach and import of these spending
3 appropriations restrictions have been given broad effect by the Ninth Circuit in *United States v.*
4 *McIntosh*, 833 F.3d 1163 (9th Cir. 2016) and subsequent cases Congress has effectively restricted
5 the ability of federal prosecutors to use the Controlled Substances Act to hinder or undermine
6 state-legal cannabis programs.

7 Efforts to reform cannabis law and policy at the state and federal level are gaining
8 momentum. Nearly 1,500 legislative bills related to the legalization and regulation of cannabis are
9 pending before Congress and state legislatures. See Tom Angell, *Two Cannabis Bills Scheduled*
10 *For Congressional Votes This Week* (March 11, 2020), [https://www.marijuanamoment.net/two-](https://www.marijuanamoment.net/two-cannabis-bills-scheduled-for-congressional-votes-this-week-newsletter-march-11-2020/)
11 [cannabis-bills-scheduled-for-congressional-votes-this-week-newsletter-march-11-2020/](https://www.marijuanamoment.net/two-cannabis-bills-scheduled-for-congressional-votes-this-week-newsletter-march-11-2020/).
12 Congress is currently considering several bills designed to further protect the medical and adult
13 use cannabis industries, and to provide greater access to financial services for companies
14 operating in the industry. They include: (a) the Strengthening the Tenth Amendment Through
15 Entrusting States Act, H.R. 2093, 116th Cong. (2019); (b) the Marijuana Opportunity
16 Reinvestment and Expungement Act, H.R. 3884, 116th Cong. (2019); and (c) the Secure and Fair
17 Enforcement Act, H.R. 1468, 116th Cong. (2019).

18 Marijuana laws and related enforcement priorities have changed significantly since Mr.
19 Scarmazzo was sentenced in 2006. His continued imprisonment is unjust given these legal
20 developments and the commercialization of cannabis activities. Many are profiting from
21 legalization, while Mr. Scarmazzo continues to suffer from prohibition.

22 **III. COMPASSIONATE RELEASE IS WARRANTED**

23 Against the backdrop of the social evolution towards acceptance of cannabis and
24 acknowledgment of the problematic history of prohibition, Mr. Scarmazzo is seeking
25 compassionate release. Mr. Scarmazzo exhausted his administrative remedies after seeking
26 compassionate release from the Warden and now seeks relief from the Court pursuant to 18
27 U.S.C. § 3582(c)(1)(A)(i) of the First Step Act.

1 In 2018, President Trump signed the First Step Act of 2018 into law. Pub. L. No. 115-391,
2 132 Stat. 5194 (2018). Congress reformed federal sentencing law because it recognized that the
3 federal Bureau of Prisons was exceedingly conservative in granting compassionate release
4 requests from inmates who qualified for relief. The First Step Act provides a pathway for
5 qualified inmates like Mr. Scarmazzo to seek direct relief for a reduction in sentence from the
6 District Court. Such relief is critical for Mr. Scarmazzo not only because he is currently serving
7 an unreasonably long cannabis-related sentence, but also because his life is in danger given the
8 exposure of inmates to the rampant problems posed by the COVID-19 virus in federal prisons.
9 Mr. Scarmazzo should be granted Compassionate Release to correct the harm caused by outdated
10 and unjust drug policies and to prevent future harm resulting from exposure to the coronavirus.

11 This Court, upon reviewing the extraordinary and compelling circumstances in Mr.
12 Scarmazzo's case outlined in his motion and herein, may, in its discretion, grant this motion and
13 release him or resentence him to time served.

14 Under 18 U.S.C. § 3582(c)(1)(A)(i), "the court, . . . upon motion of the defendant after the
15 defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons
16 to bring a motion on the defendant's behalf . . . may reduce the term of imprisonment (and may
17 impose a term of probation or supervised release with or without conditions that does not exceed
18 the unserved portion of the original term of imprisonment), after considering the factors set forth
19 in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and
20 compelling reasons warrant such a reduction."

21 Here, both the factors set forth in section 3553(a) and the extraordinary and compelling
22 reasons supporting Mr. Scarmazzo's motion warrant compassionate release under the First Step
23 Act. As described herein, law, policy and public opinion have evolved in a way that drastically
24 changes both the nature and circumstances of cannabis-related offenses, as well as the need for
25 sentences imposed for such offenses. The facts and circumstances of Mr. Scarmazzo's case,
26 which are outlined in his motion and alone should qualify him to seek such extraordinary relief,
27 should not be viewed in isolation. The Court should also consider the history and context of
28 cannabis prohibition and mass incarceration when deciding whether to grant relief. Misguided

1 drug enforcement policies and practices contributed to prevalent and persistent injustices,
2 especially in cases involving nonviolent cannabis offenders like Mr. Scarmazzo.

3 **A. Incarceration Of Non-Violent Cannabis Offenders Fails To Serve The Public**
4 **Interest**

5 Mr. Scarmazzo’s ongoing incarceration does not provide just punishment for his offense
6 or serve the public interest.

7 Recent research shows that incarceration does not promote public safety because it has a
8 diminishing impact on crime, has little to no effect on violent crime, and can actually increase
9 crime in areas with already high incarceration rates. Vera Institute of Justice, *The Prison*
10 *Paradox: More Incarceration Will Not Make Us Safer*, 2017. Beyond the lack of any positive
11 impact of long-term incarceration for nonviolent cannabis offenses, there are demonstrated
12 negative effects, including the significant public expense associated with mass incarceration and
13 the harm caused to offenders serving sentences in prison for activities that are now legal in the
14 majority of states. *Id.*

15 The impact of prison incarceration is vast and insidious. Incarceration disrupts social
16 networks, distorts social norms, and hollows out citizenship. Vera Institute of Justice, *Re-*
17 *Imagining Prison*, 2018, at 3. Its impact is also intergenerational—the children of incarcerated
18 parents are more likely to experience psychological trauma, difficulties in school, and financial
19 challenges. *Id.* Incarceration is detrimental to individual and public health and does not serve the
20 interests of justice or public safety. Research and history demonstrate that evidence-based
21 alternatives to incarceration are critical for effective and equitable public health policy, and that
22 incarceration is a poor tool for promoting public safety. *See* Vera Institute of Justice, *Re-*
23 *Imagining Prison*, 2018; Vera Institute of Justice, *The Prison Paradox: More Incarceration Will*
24 *Not Make Us Safer*, 2017. Indeed, some research shows that incarceration can make communities
25 less safe, and this is particularly true for communities of color. *Id.*

26 These findings have catalyzed the recent and sweeping bi-partisan reform movement
27 towards researching and implementing alternatives to incarceration. Making unnecessary use of
28 incarceration, rather than utilizing alternatives, is thus counterproductive to the aims of our

1 criminal justice system. It fails to serve justice, it fails to keep communities safe, and it fails to
2 treat the root causes of crime. The Court should consider these factors, all of which support the
3 granting of Mr. Scarmazzo’s motion.

4 **B. The Prison System Is Not Equipped To Protect Inmates From COVID-19**

5 The Bureau of Prisons is not equipped to manage the impacts of outbreaks of COVID-19
6 within its facilities, making Compassionate Release even more imperative for inmates like Mr.
7 Scarmazzo. The majority of American prisons are housing more people than the facilities are
8 actually intended to hold, sometimes operating far over capacity, putting both those incarcerated
9 and corrections staff at risk. In 2015, 27 states and the federal government operated their prisons
10 near or above 100% capacity. Vera Institute of Justice, *Re-Imagining Prison*, 2018, at 22. In
11 *Brown, et al. v. Plata*, the Supreme Court found that overcrowding in California prisons was the
12 “primary cause” of suffering and deaths among those incarcerated, stemming from the “grossly
13 inadequate provision of medical and mental health care”. *Brown, et al. v. Plata*, 563 U.S. 493,
14 502 (2011). In *Madrid v. Gomez*, a case challenging the constitutionality of conditions at Pelican
15 Bay State Prison in California, the court remarked that the sight of incarcerated people in the
16 facility’s barren exercise pens created an image “hauntingly similar to that of caged felines pacing
17 in a zoo.” *Madrid v. Gomez*, 889 F. Supp. 1146, 1229 (N.D. Cal. 1995).

18 Though prisons are constitutionally required to provide their residents with basic
19 necessities such as ensuring hygiene, food, and medical care, many facilities persistently fail to
20 provide sufficient basic care (adequate food and medical services) and prevent incarcerated folks
21 from securing those services for themselves. For example, hygienic supplies prisons provide to all
22 residents can be limited in volume and poor in quality, with reports of people running out of toilet
23 paper and other basic necessities.

24 In addition, the media keeps reporting on supply chain shortages in food and basic staples.
25 Well documented in recent years has been the acute lack of access to food which has become
26 increasingly limited in prisons – and that was before the immediate global pandemic. In the past
27 decade, reports of insufficient quantities of food have become more widespread-- while poor
28 quality food and improper food handling have contributed to a rate of foodborne illnesses among

1 people in prison at a rate six times that of the free population. Vera Institute of Justice, *Re-*
2 *Imagining Prison*, 2018, at 23. Without adequate sanitation and precautionary protocols, inmates
3 like Mr. Scarmazzo are at heightened risk of serious illness including COVID-19, which has
4 infected more than one million people throughout the world and has ravaged the prison
5 population.

6 Further exacerbating the impact these conditions have on already vulnerable, at-risk
7 populations, prison medical staff often struggle to appropriately respond to the needs of
8 incarcerated populations. The failure to provide adequate medical care and its extreme
9 consequences is well documented and has been a frequent subject of litigation in recent years.
10 For example, two Vermont prisoners died of cancer while incarcerated. One man was never
11 diagnosed with or treated for the disease by prison medical staff despite requesting care and
12 suffering increasing debilitation of movement and cognition, as well as significant pain. The other
13 man was diagnosed only after his femur snapped while he was dressing; he died within a year.
14 See Taylor Dobbs, *The Slow And Painful Prison Death Of Roger Brown*, VERMONT PUBLIC
15 RADIO, Nov. 14, 2017, available at [https://www.vpr.org/post/slow-and-painful-prison-death-](https://www.vpr.org/post/slow-and-painful-prison-death-roger-brown#stream/0)
16 [roger-brown#stream/0](https://www.vpr.org/post/slow-and-painful-prison-death-roger-brown#stream/0); Taylor Dobbs, *'They Killed Him': As A Vermont Inmate Suffered From*
17 *Untreated Cancer, Officials Delayed Care*, VERMONT PUBLIC RADIO, Nov. 13, 2017, available at
18 <https://www.vpr.org/post/they-killed-him-vermont-inmate-suffered-untreated-cancer-officials->
19 [delayed-care#stream/0](https://www.vpr.org/post/they-killed-him-vermont-inmate-suffered-untreated-cancer-officials-). See also *Brown, et al. v. Plata*, 563 U.S. 493 (2011).

20 Recent reports about federal and state prison systems readily demonstrate that while
21 removed from society they are not removed from the risks of contracting this deadly disease. See
22 The Marshall Project, *Tracking The Spread Of Coronavirus In Prisons*,
23 <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>
24 (last visited May 30, 2020). However, the mortality rate of such infection is not well known as
25 prison medical reports are not commonly made available for public consumption. Once
26 contracted, an inmate without proper medical intervention, faces an increased risk of serious
27 debilitation and death from COVID-19 and related complications. This became clear recently
28 when a 62-year-old inmate who had less than two years left on an 18-year sentence for marijuana

1 charges died in prison after contracting COVID-19. *See* Ryan Reilly, *Man Serving 18 Years on*
2 *Marijuana Charges Just Died in Federal Prison COVID-19 Outbreak*, HUFFINGTON POST, May
3 22, 2020, available at [https://www.huffpost.com/entry/covid-federal-prison-](https://www.huffpost.com/entry/covid-federal-prison-marijuana_n_5ec6c5fcc5b6cbe70930a988)
4 [marijuana_n_5ec6c5fcc5b6cbe70930a988](https://www.huffpost.com/entry/covid-federal-prison-marijuana_n_5ec6c5fcc5b6cbe70930a988).

5 Incarcerated people continue to experience acute and chronic health problems at higher
6 rates than the general population across all aspects of physical, mental, and behavioral health--
7 and all the while are subjected to cruel and unusual environmental conditions which include poor
8 air quality and high temperatures. The experience of incarceration alone has been proven to
9 exacerbate existing health problems, and in some instances create new ones. Vera Institute of
10 Justice, *Re-Imagining Prison*, 2018, at 22-27.

11 **CONCLUSION**

12 This Court has been empowered under the First Step Act to grant compassionate release to
13 inmates like Mr. Scarmazzo. Such relief is warranted in this case, especially given the fact that
14 Mr. Scarmazzo is serving a draconian sentence for engaging in activity that is now legal in the
15 vast majority of states across the country, including California. This Court cannot only undue the
16 injustice of his decades-long sentence, but also prevent future harm to Mr. Scarmazzo by
17 removing him from the threat caused by the COVID-19 epidemic and its impact on federal
18 prisons. The Last Prisoner Project and The Weldon Project respectfully request that this court
19 grant Mr. Scarmazzo's motion for compassionate release.

20
21 Dated: June 1, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed, or caused to be filed, the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of California by using the CM/ECF system on **June 1, 2020**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed **June 1, 2020**.

/s/ Jeremy Lateiner
JEREMY LATEINER