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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA

9 United States of America,
10 Plaintiff,
11 vs.
12 Jocelyn Anabeth Montes-Martinez,
13 Defendant.
14

19-cr-2740-TUC-DCB-LAB
and
10-cr-03764-DCB-LAB

**DEFENDANT'S EMERGENCY
APPEAL OF MAGISTRATE JUDGE'S
DETENTION ORDER**

15 Defendant, Jocelyn Anabeth Montes-Martinez, hereby moves for review of
16 Magistrate Judge Ferraro's order rejecting her motion for reconsideration of detention
17 issued on March 16, 2019. (Case No. 4:19-cr-02740-001, Doc. No. 20; Case No. 4:10-cr-
18 03764, Doc. No. 69.) Ms. Montes-Martinez is more than 7 months pregnant, with
19 preexisting medical conditions, and in light of the pandemic she moves this Court to set a
20 hearing as soon as possible, pursuant to 18 U.S.C. § 3145(b).
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23 Given the immediate threat posed by the COVID-19 pandemic, the grave health
24 risks to her and her unborn child, and the infection-amplifying conditions within the
25 CoreCivic facility where she is detained, this Court should immediately release her on
26 conditions of home confinement to the third-party custody of her mother. As discussed
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1 below, the current unsanitary conditions and lack of testing in the CoreCivic facility place
2 Ms. Montes-Martinez in grave danger given her high-risk pregnancy. This Court must
3 release her immediately to prevent a violation of her Fifth Amendment due process rights.
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5 Furthermore, an analysis under the Bail Reform Act shows that she is not a danger to the
6 community and this Court can impose conditions sufficient to ensure her appearance. She
7 notes that her pretrial release could be temporary, ending when the pandemic ends.

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9 **I. PROCEDURAL BACKGROUND**

10 Ms. Montes-Martinez is detained at the CoreCivic facility in Florence. The
11 Government has charged her by indictment with multiple iterations of counts of possession
12 with intent to distribute or import methamphetamine, fentanyl, and heroin. (19-cr-02740,
13 Doc. No. 7.) At the initial detention hearing in September, she submitted on the issue of
14 detention. (19-cr-02740, Doc. Nos. 3, 4.) Nor did she request release at the initial
15 appearance on her supervised release revocation in October. (10-cr-03764, Doc. No. 58.)
16 These hearings, of course, took place before the pandemic.
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19 On March 13, 2020, she filed a motion to reopen the detention hearing given the
20 pandemic and her high-risk pregnancy. (19-cr-02740, Doc. No. 18.) Magistrate Judge
21 Ferraro denied her request for release without prejudice on March 16, 2020, noting that
22 there were no confirmed cases of the virus at the CoreCivic facility, although he admitted
23 that CoreCivic had not actually conducted any testing for it. (4:19-cr-02740-DCB-LAB,
24 Doc. No. 20; 4:10-cr-03764-DCB-LAB No. 69.) Magistrate Judge Ferraro also stated that
25 he did not want to release her until the District Judge considered the matter of release in
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1 the supervised release case styled CR-10-03764. He instructed Counsel to either refile at
2 a later date or to appeal his decision immediately to the District Court. She hereby appeals
3 this decision, because as discussed below, given the high-risk setting, the failure of
4 CoreCivic to mitigate risk, and the high risk of asymptomatic stealth spread, it would put
5 her at further risk her to wait until CoreCivic actually decides to conduct testing.
6

7 **II. FACTUAL BACKGROUND**

8 As discussed below, COVID-19 presents a grave and deadly threat in high-risk
9 settings such as the CoreCivic Central Arizona Florence Correctional Complex in Florence,
10 in particular for detainees with preexisting health problems like Ms. Montes-Martinez, who
11 has underlying medical conditions and a high-risk pregnancy. As discussed below,
12 CoreCivic is not taking sufficient action to mitigate the risk of the pandemic in its facility.
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15 **1. COVID-19 is a National Crisis Without Precedent in our Lifetime**

16 As of March 18, 2020, SARS-COV-2, a novel coronavirus causing COVID-19, has
17 infected over 211,200 people worldwide, leading to at least 8,822 deaths, and 147 deaths
18 in the United States.¹ The President has declared a national emergency.² Our country is
19 still behind the curve on community testing, and we do not know the true extent of
20 community spread.³ Because of the virus' long latency period, studies show that "stealth"
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23 ¹ *Coronavirus Map: Tracking the Spread of the Outbreak*, N.Y. Times (March 18, 2020),
24 <https://nyti.ms/2U4kmud> (updated regularly).

25 ² Taylor Telford, *U.S. markets surge as massive economic stimulus plan takes shape to offset*
26 *coronavirus*, Wash. Post, (March 18, 2020) ,
27 <https://www.washingtonpost.com/business/2020/03/17/us-stock-markets-today-fed-funds/>.

28 ³ Sheri Fink, *'It's Just Everywhere Already': How Delays in Testing Set Back the U.S.*
Coronavirus Response, N.Y. Times, (March 10, 2020),
<https://www.nytimes.com/2020/03/10/us/coronavirus-testing-delays.html>.

1 transmission by infected persons with low or no symptoms has played a “major role” in
2 the pandemic.⁴ New data published in the New England Journal of Medicine yesterday
3 found that the highly-contagious “virus can remain viable and infectious in aerosols for
4 hours and on surfaces up to days.”⁵ The White House has advised the public to avoid
5 gathering in groups of more than 10 people.⁶ Governor Ducey declared a public health
6 emergency in Arizona, and the City of Tucson also declared an emergency.⁷ Arizona has
7 COVID-19 community spread; Pima County has five confirmed cases, and Pinal County
8 has eight confirmed cases.⁸ Furthermore, a March 18, 2020, email from Chief Judge Snow
9 stated that a Tucson Deputy U.S. Marshal has symptoms and is awaiting test results.

12 **2. COVID-19 Presents an Even Worse Threat in High-Risk Settings like Jails**

13 Much like cruise ships and nursing homes, jails are extremely dangerous in a
14 pandemic, given the impossibility of social distancing in a confined space.⁹ As the former
15 chief medical officer of Rikers explained, unlike free people, detainees cannot engage in
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18 ⁴ Melissa Healy, *How ‘silent spreaders’ are fueling the coronavirus pandemic*, L.A. Times
19 (March 17, 2020), <https://www.latimes.com/science/story/2020-03-17/how-silent-spreaders-are-fueling-the-coronavirus-pandemic>; CDC Emerging Infectious Diseases, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, (March 12, 2020),
20 https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (“persons with asymptomatic COVID-19
21 can spread the virus”).

22 ⁵ Neeltje van Doremalen, et. al, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, New England J. Med., (March 17, 2020), nejm.org/doi/10.1056/NEJMc2004973.

23 ⁶ Kevin Liptak, *White House advises public to avoid groups of more than 10*, CNN, (March 16,
2020), <https://www.cnn.com/2020/03/16/politics/white-house-guidelines-coronavirus/index.html>.

24 ⁷ *Mayor Romero: Tucson to close dine-in services at restaurants, bars, food courts*, KGUN,
25 (March 17, 2020), <https://www.kgun9.com/news/coronavirus/mayor-romero-tucson-to-close-restaurants-bars-food-courts-and-gyms>.

26 ⁸ *UPDATE: Pima County confirms fifth case of COVID-19*, KOLD (March 18, 2020),
<https://www.kold.com/2020/03/18/update-pima-county-confirms-fifth-case-covid/>.

27 ⁹ Dr. Jeffrey Keller, *COVID-19 in Jails? It Might Get Ugly*, Medpage, (March 12, 2020),
28 <https://www.medpagetoday.com/blogs/doing-time/85366>.

1 “‘social distancing’ and ‘self-quarantine’ and ‘flattening the curve’ of the epidemic—all of
2 these things are impossible in jails and prisons, or are made worse by the way jails and
3 prisons are operated.”¹⁰
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5 Dr. Robert Greifinger, an expert in health care for prisoners, explained these dangers
6 in a declaration filed in a civil suit seeking relief for vulnerable immigration detainees in a
7 privately-run facility in Washington State.¹¹ The conditions of confinement he describes
8 are highly similar to those in the privately-run CoreCivic Florence facility where Ms.
9 Montes-Martinez is detained:
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11 Immigration detention facilities are enclosed environments, much like the
12 cruise ships that were the site of the largest concentrated outbreaks of COVID-
13 19. Immigration detention facilities have even greater risk of infectious spread
14 because of conditions of crowding, the proportion of vulnerable people
15 detained, and often scant medical care resources. People live in close quarters
16 and cannot achieve the “social distancing” needed to effectively prevent the
17 spread of COVID-19. Toilets, sinks, and showers are shared, without
18 disinfection between use. Food preparation and food service is communal, with
19 little opportunity for surface disinfection. Staff arrive and leave on a shift basis;
20 there is little to no ability to adequately screen staff for new, asymptomatic
21 infection.¹²
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23 ¹⁰ Jennifer Gonnerman, *How Prisons and Jails can Respond to the Coronavirus*, The New
24 Yorker, (March 14, 2020), [https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-
25 can-respond-to-the-coronavirus](https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus) (“it’s going to be very, very difficult to deliver a standard of care
26 either in the detection or the treatment of people who are behind bars. I just have really grave
27 concerns”); see also Dr. Lipi Roy, *Infections and Incarceration: Why Jails and Prisons Need to
28 Prepare For COVID-19 Now*, Forbes, (March 11, 2020),
[https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-
prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3](https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#1fa6b08e49f3) (“Hand sanitizers, for instance, are
often considered contraband Other harsh realities of jail life that prevent proper application
of CDC recommendations include limited access to toilet paper and paper towels; and handcuffs
prohibit the use of hands to cover one’s mouth.”).

¹¹ Ex. 2, Decl. of Robert Greifinger, *Dawson v. Asher*, 2:20-cv-00409-JLR-MAT (W.D. Wash.,
March 16, 2020), ECF No. 4.

¹² *Id.*

1 Dr. Greifinger concluded that in light of the deadly nature of the novel virus, the
2 “only viable public health strategy available is risk mitigation. Even with the best-laid plans
3 to address the spread of COVID-19 in detention facilities, the release of high-risk
4 individuals is a key part of a risk mitigation strategy.”¹³ The conditions he describe are
5 true for CoreCivic facility in Florence as well, which has not implemented testing and
6 despite being a high-risk institution.
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9 **3. The CoreCivic Facility is Particularly High Risk as it Regularly Struggles to**
10 **Control Outbreaks of Antiquated Diseases like Tuberculosis and Measles and**
11 **is Not Conducting Testing to Prevent Asymptomatic COVID-19 Spread**

12 The CoreCivic Central Arizona Florence Correctional Complex in Florence is a
13 high-risk setting for infectious diseases even when there is no worldwide pandemic. The
14 CoreCivic detention center in Florence has, for over a year, regularly maintained an
15 ongoing quarantine list and in the past year has had to work to contain outbreaks of diseases
16 that are widely unseen and eradicated in the community, such as MMR and tuberculosis.
17 As discussed below, the CoreCivic facility has done no testing for COVID-19, and their
18 hypothetical testing protocol is only for symptomatic detainees, meaning there is no way
19 to monitor asymptomatic spread at the facility. It nearly impossible that the facility will
20 address the COVID-19 pandemic in competent fashion.
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23 Counsel contacted Nathan Alexander of the U.S. Marshal Service by email on
24 March 18, 2020, and asked if any testing had been done for COVID-19, and he replied:
25 “No, there has been no need [for testing] yet. Screenings are in effect both at the facility
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¹³ Ex. 2, Greifinger Decl. ¶ 13.

1 and at the courthouse prior to inmates entering the building.” See Ex. 1, Email of Nathan
2 Alexander (March 18, 2020). When Counsel contacted him on March 13, 2020, he stated
3 that “‘Testing’ [at CoreCivic] only occurs if someone presented the associated symptoms,
4 but that has not occurred to date. A screening protocol devised jointly by Core Civic and
5 the Pinal County health Department is in place to separate, quarantine and test any
6 suspected inmates.” *Id.* at 2. When Counsel asked Mr. Alexander if inmates had access to
7 hand sanitizer or if additional sanitation measures were in place at the CoreCivic facility,
8 he responded only that “[i]ncreased sanitation measures which have been deemed
9 necessary are in effect.” *Id.* It was not clear from this response what those measures were.

12 Limited sanitation increases and only screening for suspected cases alone is **not**
13 **good enough** in a high-risk prison setting: due to the long phase of silent viral shedding
14 before COVID-19 symptoms actually develop, “stealth” transmission by infected persons
15 with low symptoms or no symptoms has played a “major role” in the pandemic, and
16 asymptomatic carriers pose incredibly high risks.¹⁴ Given that CoreCivic is only screening
17 for symptomatic/suspected cases and has conducted no testing to date, it is only a matter
18 of time before a new arrestee or guard introduces it into the facility. Given the increasing
19 community spread in Pinal County, it could already be there. Such an easily transmitted
20 virus poses a grave risk to inmates in CCA, particularly those with underlying conditions.

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25 ¹⁴ Melissa Healy, *How ‘silent spreaders’ are fueling the coronavirus pandemic*, L.A. Times
26 (March 17, 2020), <https://www.latimes.com/science/story/2020-03-17/how-silent-spreaders-are-fueling-the-coronavirus-pandemic>; CDC Emerging Infectious Diseases, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, (March 12, 2020),
27 https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (“persons with asymptomatic COVID-19
28 can spread the virus”).

1 **4. Ms. Montes-Martinez has preexisting conditions resulting in a high-risk**
2 **pregnancy and is at increased risk of harm from COVID-19**

3 Ms. Montes-Martinez is more than 7 months pregnant, with a due date in May. Ms.
4 Montes-Martinez was in a serious car accident in 2010, and she fractured her pelvis in the
5 accident and was hospitalized with critical injuries, including broken bones in her shoulder,
6 ribs, spine, and pelvis, on top of multiple other injuries as well as a collapsed lung and
7 ruptured bladder and wounds in her pelvic area. She spent two months bed-bound, and her
8 prior pelvic injuries alone put her at risk for birth complications.
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10 If Ms. Montes-Martinez contracts the virus, she will face not only a difficult
11 pregnancy with high-risk difficulties, but also a virus that preys on those with underlying
12 conditions. Dr. Jonathan Golob, who also authored a declaration in the Washington suit,
13 explained that there are “many reasons to conclude that vulnerable people . . . people of
14 any age with lung disease, heart disease . . . or pregnancy living in an institutional setting,
15 such as an immigration detention center, with limited access to adequate hygiene facilities
16 and exposure to potentially infected individuals from the community are at grave risk of
17 severe illness and death from COVID-19.”¹⁵ Experts predict that U.S. hospitals will be
18 overwhelmed by the pandemic, forcing doctors to choose which patients receive attention
19 and “prioritizing treatment for the young and others with the best chance of survival.”¹⁶
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25 ¹⁵ Ex. 3, Decl. of Dr. Jonathan Louis Golob, *Dawson v. Asher*, 2:20-cv-00409-JLR-MAT (W.D.
26 Wash., March 16, 2020), ECF No. 5.

27 ¹⁶ Ariana Eunjung, Spiking U.S. coronavirus cases could force rationing decisions similar to
28 those made in Italy, China, Wash. Post, (March 15, 2020),
<https://www.washingtonpost.com/health/2020/03/15/coronavirus-rationing-us/>.

1 Although the novel nature of the virus means that few studies have been completed
2 yet, pregnant women are considered a risk group for COVID-19 complications. This is
3 because in “general, pregnant women are at increased risk for infection and serious illness
4 due to physiological and immunologic changes in their bodies. While data collection on
5 COVID-19 is still in its infancy, Denise Jamieson, M.D., M.P.H., chair of the Department
6 of Gynecology and Obstetrics at Emory University School of Medicine, said pregnant
7 women should be considered an at-risk group.”¹⁷ The CDC has stated that pregnant women
8 need to take additional precautions, because for “viruses from the same family as COVID-
9 19 . . . women have had a higher risk of developing severe illness. It is always important
10 for pregnant women to protect themselves from illnesses.”¹⁸ The CDC also notes that there
11 have been “reported problems with pregnancy or delivery (e.g. preterm birth) in babies
12 born to mothers who tested positive for COVID-19 during their pregnancy.” *Id.* In
13 addition, at least one newborn baby was found to be positive for the virus in London,
14 showing that it can be transmitted from mother to child.¹⁹

19 **III. LEGAL FRAMEWORK**

20 **1. The Fifth Amendment Protects the Right of Pretrial Detainees to be Receive** 21 **Adequate Medical Care and to be free from Pre-Conviction Punishment**

24 ¹⁷ Am. Academy of Pediatrics, Experts discuss COVID-19 impact on children, pregnant women,
25 (Mar. 12, 2020), <https://www.aappublications.org/news/2020/03/12/coronavirus031220>.

26 ¹⁸ CDC, Questions about Pregnancy and Coronavirus Disease 2019,
<https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/pregnancy-faq.html>.

27 ¹⁹ Simon Murphy, Newborn baby tests positive for coronavirus in London, *The Guardian* (March
28 14, 2020), <https://www.theguardian.com/world/2020/mar/14/newborn-baby-tests-positive-for-coronavirus-in-london>.

1 A pretrial detainee’s freedom from pretrial confinement is a fundamental right
2 protected by the Due Process Clause; any government action infringing on this right must
3 be narrowly tailored to achieve a compelling government interest. *United States v. Salerno*,
4 481 U.S. 739, 755 (1987). The constitutional protections of pretrial detainees arise under
5 the Fifth Amendment Due Process Clause, which provides protection even greater than the
6 Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Eighth Amendment,
7 which applies to persons convicted of criminal offenses, allows punishment as long as it is
8 not cruel and unusual, but the Fifth Amendment’s due process protections do not allow
9 pretrial punishment at all. *Id.* Although the Government has an interest in detaining a
10 defendant to secure their appearance at trial, Government may only subject a detainee “to
11 the restrictions and conditions of the detention facility so long as those conditions and
12 restrictions do not amount to punishment, or otherwise violate the Constitution.” *Id.* at
13 536–37. In *Kingsley v. Hendrickson*, the Supreme Court affirmed the Due Process
14 Clause’s prohibition on pretrial punishment, and elaborated that “if the condition of
15 confinement being challenged ‘is not reasonably related to a legitimate goal—if it is
16 arbitrary or purposeless—a court permissibly may infer that the purpose of the
17 governmental action is punishment.’” 135 S. Ct. 2466, 2470 (2015); *see also Unknown*
18 *Parties v. Johnson*, No. CV-15-00250-TUC-DCB, 2016 WL 8188563, at *5 (D. Ariz. Nov.
19 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (“a particular
20 restriction or condition is punishment if the restriction or condition is not reasonably related
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1 to a legitimate governmental objective or is excessive in relation to the legitimate
2 governmental objective”).

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4 In addition, pretrial detainees have a substantive due process interest in freedom
5 from deliberate indifference to their medical needs. *Miranda v. Cty. of Lake*, 900 F.3d 335,
6 352 (7th Cir. 2018). Furthermore, in *Brown v. Plata*, Supreme Court explained that a
7 prisoner “may suffer or die if not provided adequate medical care. A prison that deprives
8 prisoners of basic sustenance, including adequate medical care, is incompatible with the
9 concept of human dignity and has no place in civilized society.” 563 U.S. 493, 510–11
10 (2011). While prisoner claims in *Brown v. Plata* arose under the Eighth Amendment,
11 pretrial detainees likewise have the legal right to adequate medical care, given that their
12 rights are at least as great as those of convicted persons being punished by imprisonment.
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15 **2. The Bail Reform Act Legal Framework**

16 The Bail Reform Act does not contemplate a pandemic, but a statutory presumption
17 of detention does arise in this case. 18 U.S.C. § 3142(e). Ms. Montes-Martinez only has to
18 present “some credible evidence contrary to the statutory presumption.” *United States v.*
19 *Hunt*, 240 F. Supp. 128, 131 (D.D.C. 2017). The Pretrial Services report itself may serve
20 this purpose. *See United States v. Hare*, 873 F.2d 796, 799 (5th Cir. 1989). “Although the
21 presumption shifts a burden of production to the defendant, the burden of persuasion
22 remains with the government.” *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008).
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25 If the judicial officer determines that the release on personal recognizance will not
26 reasonably assure the appearance of the person as required or will endanger the safety of
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1 any other person or the community, such judicial officer shall order the pretrial release of
2 the person” subject to certain conditions. In naming conditions, the court must consider:
3 (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3)
4 the history and characteristics of the accused, including character, community and family
5 ties, financial resources and employment; and (4) the nature and seriousness of the danger
6 to any person or the community that would be posed by a release. § 3142(g).
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9 The Ninth Circuit has held that weight of the evidence is the least important factor
10 and cautioned that Courts cannot make a pretrial determination of guilt. *United States v.*
11 *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). “Although the statute permits the court
12 to consider the nature of the offense and the evidence of guilt, the statute neither requires
13 nor permits a pretrial determination that the person is guilty.” *Id.* Furthermore, “[o]nly in
14 rare cases should release be denied, and doubts regarding the propriety of release should
15 be resolved in the defendant’s favor.” *U.S. v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).
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17 **IV. ARGUMENT**

18 **1. The Due Process Clause Mandates Release because the Pandemic Presents a** 19 **Grave Harm Outweighing the Government’s Interest in Confinement**

20 Ms. Montes-Martinez ongoing detention in the CoreCivic facility during the
21 COVID-19 pandemic poses a grave risk to her safety, in violation of her liberty interest in
22 avoiding pretrial punishment as well as her due process right to adequate medical care, and
23 this Court should release her immediately, subject to certain conditions. Confinement of a
24 high-risk pregnant woman in a high-risk setting like the CoreCivic facility during a
25 pandemic amounts to impermissible pretrial punishment, as it is not reasonably related to
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1 the Government's interest in confinement. For example, in non-pandemic conditions, the
2 Supreme Court has held that the fact that a person is detained does not inexorably lead to
3 the conclusion that the government has imposed punishment, holding that the Bail Reform
4 Act's conditions of confinement were narrowly drawn to effectuate the Government's
5 regulatory interest in community safety. *United States v. Salerno*, 481 U.S. 739, 740
6 (1987). At the March 16, 2020, hearing, the Government argued that Ms. Montes-Martinez
7 was a flight risk. But continuing to hold a high-risk detainee in unsanitary conditions
8 during a pandemic bears no reasonable relation to ensuring her appearance at trial, given
9 that she is at risk of death or serious complications, especially because if she dies there will
10 be no trial. Given the pandemic and acute danger to Ms. Montes-Martinez, her continued
11 detention amounts to impermissible pretrial punishment. The Government's interest
12 ensuring her appearance at trial does not outweigh her liberty interest in remaining alive
13 and free from harm. The Government wants to detain her at the cost of her safety and as
14 well as the safety of her unborn child, and this position boils down to "we want her in
15 custody, dead or alive." This Court should not condone such a due process violation.

20 Federal courts have long recognized that there is no greater necessity than keeping
21 a defendant alive, no matter the charge. *See United States v. Scarpa*, 815 F.Supp.88
22 (E.D.N.Y. 1993) (pretrial defendant with AIDS facing murder charges released on bail
23 because of the "unacceptably high risk of infection and death on a daily basis inside the
24 MCC"); *United States v. Adams*, No. 6:19-mj-00087-MK, 2019 WL 3037042 (D. Or. July
25 10, 2019) (defendant charged with violation of the Mann Act and possession of child
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1 pornography and suffering from diabetes, heart conditions and open sores released on home
2 detention because of his medical conditions); *United States v. Johnston*, No. 17-00046
3 (RMM) 2017 WL 4277140 (D.D.C. Sept. 27, 2017) (defendant charged with violation of
4 the Mann Act and in need of colon surgery released to custody of his wife for 21 days);
5 *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D.P.R. 2002) (badly wounded
6 defendant released to custody of his relatives).
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9 Furthermore, her continued detention is a violation of her due process right to be
10 free of deliberate indifference to her medical needs. CoreCivic is conducting no testing to
11 prevent asymptomatic spread, and the nature of confinement limits her access to prevention
12 measures available in the community, such as maintaining a distance of six feet from other
13 persons, personal sanitation, and frequent disinfection. The fatality rate for people infected
14 with COVID-19 is about ten times higher than a severe seasonal influenza, even in
15 advanced countries with highly effective health care systems. Ex. 3, Golob Decl. ¶ 4.
16 Patients in high-risk categories face a 15% fatality rate, and those who do not die from
17 COVID-19 should expect a prolonged recovery, including the need for extensive
18 rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss
19 of respiratory capacity. *Id.* For those reasons, public health experts have concluded that
20 high risk individuals in institutional settings “are at grave risk of severe illness and death.”
21 *Id.* ¶ 14. As Dr. Greifinger noted, even “with the best-laid plans to address the spread of
22 COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk
23 mitigation strategy.” Ex. 2, Greifinger Decl. ¶ 13.
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1 Magistrate Judge Ferraro erred in denying release on the grounds that CoreCivic
2 had no confirmed COVID-19 cases yet, given that there has been no testing, we have no
3 way of knowing that for certain. Furthermore, it is well-established that conditions in the
4 CoreCivic facility that pose an unreasonable risk of future harm from the pandemic violate
5 the Eighth Amendment’s prohibition against cruel and unusual punishment, even if that
6 harm has not yet come to pass. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). (The
7 Amendment, as we have said, requires that inmates be furnished with the basic human
8 needs, one of which is “reasonable safety.” It would be odd to deny an injunction to
9 inmates who plainly proved an unsafe, life-threatening condition in their prison on the
10 ground that nothing yet had happened to them.). Ms. Montes-Martinez’ due process rights
11 as a pretrial detainee are at least as great as those of convicted persons, whose rights are
12 governed by the Eighth Amendment. Given her underlying health problems and
13 pregnancy, Ms. Montes-Martinez’s ongoing detention during the current pandemic creates
14 a threat “so grave that it violates contemporary standards of decency to expose anyone
15 unwillingly to such a risk.” *Helling*, 509 U.S. at 36. The release of Ms. Montes-Martinez
16 is the only way to ensure her safety and that of her unborn child. Ex. 2, Greifinger Decl. ¶
17 13 (“the release of high-risk individuals is a key part of a risk mitigation strategy”).
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23 **2. She is an Appropriate Candidate for Release Under the Bail Reform Act**

24 In addition to the Constitutional concerns raised above, an analysis under the Bail
25 Reform Act shows that Ms. Montes-Martinez is neither a serious flight risk nor a danger
26 to the community, and this Court should grant temporary release until the pandemic ends.
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1 **a. Conditions of Release Can Ensure Her Appearance in Court**

2 The Government cannot show by a preponderance of the evidence that she is a
3 serious flight risk. *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). Her
4 pregnancy, the pandemic, and conditions of release ameliorate any flight concerns. Ms.
5 Montes-Martinez is over 7 months pregnant. She is a United States citizen who has lived
6 in Southern Arizona for her entire life. (Doc. No. 5.) Ms. Montes-Martinez has a high-
7 risk pregnancy in the middle of a pandemic and already has little to no incentive to flee to
8 Mexico, a country that is even less prepared to address COVID-19 than the United States.
9 Her mother Ester Martinez and sister Veronica Navarro live in Tucson; both are willing to
10 act as third party custodian. She can live with her mother. She has limited ties to Mexico
11 including extended family and friends, but her immediate family lives in this country. (*Id.*)
12 She understands that she would not be allowed to travel to Mexico pending resolution of
13 the case, and she has no desire to do so. Furthermore, it is likely that the United States
14 could very well close the border to prevent any nonessential travel to Mexico soon. Today
15 the United States closed the northern border with Canada and “the administration is also
16 weighing a similar closing of the southern border with Mexico, White House officials told
17 the PBS NewsHour.”²⁰ She does have a pending supervised release violation based on the
18 present charged offense, but the pretrial report does not indicate any failures to appear for
19 hearings in her past. Ms. Montes-Martinez is also willing to participate in outpatient drug
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27 ²⁰ Yaminche Alcindor, After closures at U.S.-Canada border, Trump says he’ll halt nonessential
28 travel at southern border, *PBS News Hour* (March 18, 2020),
<https://www.pbs.org/newshour/politics/after-closures-at-u-s-canada-border-trump-may-halt-nonessential-travel-at-southern-border>.

1 treatment. She also understands that regardless of whether she participates in inpatient
2 treatment, abstaining from drug and alcohol usage would be a condition of release. Ms.
3 Montes-Martinez is more than willing to remain in home confinement given that she wants
4 to avoid getting the virus. For these reasons, she does not present a serious flight risk.

6 **b. She is Not a Danger to the Community**

7 The Government has not shown by clear and convincing evidence that she is a
8 danger to the community. The Magistrate Judge did not detain her based on a finding of
9 dangerousness, nor did the government request a dangerousness hearing. (Doc. No. 4.) In
10 addition, Ms. Montes-Martinez is willing to attend treatment if deemed necessary, and she
11 will cooperate with drug testing or substance abuse assessments or outpatient classes.
12

13 **V. CONCLUSION**

14 Therefore, Ms. Montes-Martinez requests that this Court to release her subject to
15 certain conditions as soon as possible. This release can be temporary until the pandemic
16 ends. Counsel has conferred with Assistant United States Attorney Robert Fellrath, who
17 objects to release, but has no objection to this Court hearing this motion as soon as possible.
18 Given the pandemic, Counsel and her client and both are amenable to proceed by telephone
19 or video, at a hearing at this Court's earliest convenience.
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24 RESPECTFULLY SUBMITTED this 18th day of March, 2020.

25 JON M. SANDS
26 Federal Public Defender

27 *s/ Christina M. Woehr*
28 CHRISTINA M. WOEHR
Assistant Federal Public Defender

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Certificate of Service

I hereby certify that on the date stated above I electronically transmitted this Motion to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

Robert Fellrath
Assistant United States Attorney's Office