**XX Court**

**XX :**

**: Criminal Case No. XX**

**v. :**

**:**

**: Judge XX**

**XX :**

**:**

**EMERGENCY MOTION FOR PRETRIAL RELEASE DUE TO PUBLIC HEALTH**

**AND SAFETY THREAT POSED BY COVID-19 PANDEMIC**

NAME moves this Court for immediate release from pretrial detention. NAME requests that the Court grant the motion, or, alternatively, hold an emergency hearing on this motion and allow the parties to appear by phone.

As the novel coronavirus that causes COVID-19 has spread across the globe, hundreds of thousands of people have been infected and thousands of people have died.[[1]](#footnote-1) There is no known cure. Development of a vaccine is likely at least 12 months away.[[2]](#footnote-2) The county jail has never confronted a global health pandemic like this one.[[3]](#footnote-3) The facility is unequipped either to prevent transmission of COVID-19 among detainees and staff or to isolate and treat individuals who become infected. For the reasons set forth below, NAME’s ongoing pretrial detention poses an imminent threat to NAME’s life and to the health and safety of the community from a deadly infectious disease.

Under these unique circumstances, the Court must release NAME on appropriate conditions, at least until the resolution of this outbreak.

1. **BACKGROUND**
2. Procedural History
3. NAME was arrested on XX and charged with XX.
4. NAME has been detained prior to trial [because XX cannot afford to pay the XX financial condition required for pretrial release]. If NAME could pay $XX, NAME would be immediately released.
5. At no point since NAME’s arrest has a judicial officer concluded that NAME’s pretrial detention is necessary to serve the government’s compelling interests in preventing flight or reasonably assuring public safety, as the federal Constitution requires. *United States v. Salerno*, 481 U.S. 739, 751 (1987); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).
6. The Public Health Crisis
7. On March 11, 2020, the World Health Organization declared a global pandemic.[[4]](#footnote-4) Citing “deep[] concern[] both by the alarming levels of spread and severity, and by the alarming levels of inaction,” it called for countries to take “urgent and aggressive action.”[[5]](#footnote-5)
8. The Governor has declared a Public Health Emergency identifying COVID-19 as an imminent threat to the health and safety of the community, requiring emergency protective actions. Since then, normal life has ceased. Businesses, restaurants, schools, government offices, and churches are closed. People who have control over their bodies are self-isolating to prevent contracting or spreading this deadly disease.
9. [List major specific local developments—closing of local schools, universities, etc…]
10. As of XX, XX people have been diagnosed with COVID-19 in the United States, with XX deaths confirmed.[[6]](#footnote-6)
11. The number of people infected is growing exponentially. The death toll in Italy, which began experiencing this epidemic about a week earlier than the first diagnosed American case, saw a rise of 30% overnight in the 24 hours between March 5, 2020, and March 6, 2020 and a rise of 25% on March 15 alone—a day that killed 368 people in Italy.[[7]](#footnote-7) Experts predict similar rapid growth in the United States.
12. The numbers of people diagnosed reflect only a portion of those infected;[[8]](#footnote-8) very few people have been tested, and many are asymptomatic transmitters.[[9]](#footnote-9) Thousands of people are carrying a potentially fatal disease that is easily transmitted—and few are aware of it.
13. The current estimated incubation period is between 2 and 14 days.[[10]](#footnote-10) Approximately 20% of people infected experience life-threatening complications, and between 1% and 3.4% die.[[11]](#footnote-11)
14. The virus is thought to spread through respiratory droplets or by touching a surface or object that has the virus on it.[[12]](#footnote-12) Thus, infected people—who may be asymptomatic and not even know they are infected—can spread the disease even through indirect contact with others.
15. According, officials and experts urge “social distancing”—isolating oneself from other people as much as possible.[[13]](#footnote-13) Social distancing is virtually impossible inside the County jail.
16. Other federally recommended precautions include frequent hand-washing, alcohol-based hand sanitizers, and frequent cleaning *and* disinfecting of any surfaces touched by any person.[[14]](#footnote-14)
17. It is virtually impossible to engage in these basic preventive measures in the County jail.
18. During pandemics, jail facilities become “ticking time bombs” as “[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases.”[[15]](#footnote-15) As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” *See* Exhibit 1, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7 (Mar. 15, 2020). This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19.[[16]](#footnote-16)
19. When coronavirus suddenly exploded in China’s prisons, there were reports of more than 500 cases quickly spreading across five facilities in three provinces.[[17]](#footnote-17) In Iran, 54,000 prisoners were temporarily released to protect them and to protect the community from propagation of an outbreak.[[18]](#footnote-18)
20. People incarcerated at the jail:
    1. Are typically housed in close proximity to others and unable to distance themselves;
    2. Spend significant time in communal spaces, such as eating areas, recreation rooms, bathrooms, and cells or holding areas, and they are unable to choose to do otherwise;
    3. Live in spaces with open toilets within a few feet of their beds, and unable to access a closed toilet that would not aerosolize bodily fluids into their living spaces;
    4. Are constantly within six feet of other people, likely none of whom have been tested for COVID-19, and they are unable to choose to do otherwise;
    5. Must physically touch others or be touched by others, such as correctional officers and medical staff, many of whom have not been tested for COVID-19, and they are unable to opt out of this contact;
    6. Are frequently subjected to intimate contact by correctional staff, many of whom have not been tested for COVID-19, during searches of their person, including having those staff place their hands inside of people’s mouths and other body cavities;
    7. Lack recommended access to soap, water, tissues, and paper towels;
    8. Lack access to hand sanitizer that complies with CDC guidelines.
21. People in the jail also lack access to quality, efficient medical care. Although an incarcerated person can request to see a member of the medical staff, those requests take significant time to process. [Add any other local recent medical care problems from jail.]
22. This combination of lack of adequate sanitation, close quarters, and limited medical capacity create an intolerably dangerous situation, putting detainees, jail staff, and the communities they belong to at greater risk of illness and death—without any compelling need. The constant cycling of people in and out of the jail[[19]](#footnote-19) makes containment impossible, even if visitations are stopped.[[20]](#footnote-20)
23. Science shows that, within jails and prisons, isolation, segregation, and lockdown are ineffective against COVID-19, Meyer Decl. ¶ 10, and regardless, the jail does not have the physical space to accomplish these efforts for the current jail population. COVID-19 can survive in the air, so separation in a facility where there is still other movement of people, and occasional interaction, will not contain it. Surfaces are still touched–inside cells, in bathrooms, and in transport, at the very least. Further, the reality is that some contact with others, whether through close proximity or actual contact, is inevitable. Kitchen staff, intake staff, officers and medical staff all interact with incarcerated people as a matter of course, even on lockdown.
24. Release Serves Public Health and Community Safety
25. [CLIENT-DEPENDENT SECTION ABOUT PARTICULAR VULNERABILITY, IF ANY—If especially compelling add to front page of motion].
26. [PARAGRAPH ABOUT RELEASE PLAN – WHERE WILL CLIENT GO, ANY RELEVANT CONDITIONS, ETC—AS MUCH DETAIL AS POSSIBLE].
27. In Dr. Meyer’s words, “[r]educing the size of the population in jails and prisons is crucially important to reducing the level of risk both for those within those facilities and for the community at large.” Meyer Decl. ¶ 37. In this unique moment, release *enhances* the safety of other people and the community—and is necessary to protect NAME’s own health and safety. NAME must be able to exercise self-protective measures in a sanitary, disinfected space, and to maintain social distance from other community members to flatten the curve of the virus’s spread.
28. When NAME was initially detained, circumstances were different; this Court must consider the stark change in circumstances.
29. **ARGUMENT**

COVID-19 is causing an unprecedented public health crisis that underscores the constitutional requirement that pretrial detention be a last resort. In this case, NAME has been ordered released, but because his/her release is contingent on him/her making an upfront monetary payment, NAME is still in jail. NAME’s ongoing detention is both dangerous and unconstitutional.

1. Requiring Money Bond in this Case Means NAME Will Be Detained

An order requiring an unattainable financial condition of release is a de facto order of pretrial detention. “[T]he setting of bond unreachable because of its amount [is] tantamount to setting no conditions at all.” *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam) (“[O]nce a court finds itself in this situation—insisting on terms in a “release” order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order . . . .”). Every appellate court to address the question has agreed. *See ODonnell v. Harris County*, 892 F.3d 147, 162 (5th Cir. 2018) (holding that Defendants’ practices result in the “absolute deprivation of [indigent misdemeanor arrestees’] most basic liberty interests—freedom from incarceration”); *United States v. Leisure*, 710 F.2d 422, 415 (8th Cir. 1983) (“[T]he amount of bail should not be used as an indirect, but effective, method of ensuring continued custody.”);; *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014 (“Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”).

1. The U.S. Constitution Prohibits Pretrial Detention Unless It Is *Necessary* to Achieve Public Safety or Prevent Flight.

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987); *id.* at 750 (holding that the “individual’s strong interest in [pretrial] liberty is “fundamental.”). This norm reflects the longstanding principle that “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

In *Salerno*, the Supreme Court upheld a law that authorized pretrial detention when necessary to protect public safety in serious federal felony offenses. *See* 481 U.S. at 742; 18 U.S.C. §3142(e)-(f), (i). Specifically, *Salerno* held that pretrial detention is constitutional only if a judicial officer considers alternatives to detention and “‘finds that no [release] condition or combination of conditions’” can satisfy the government’s interests. *Id.* at 742 (quoting 18 U.S.C. § 3142(e)). The judge’s finding of necessity must be based on “clear and convincing” evidence. *See Caliste v. Cantrell*, 329 F. Supp. 3d 296, 315 (E.D. La. 2018), *aff’d*, 937 F.3d 525 (5th Cir. 2019); *Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 535 (Ct. App. 2018); *see also* *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (holding the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance).

Absent such a “sharply focused scheme,” the government may not detain a presumptively innocent person. *Foucha*, 504 U.S. at 81; *see* *id.* at 83 (holding that Louisiana’s statutory scheme authorizing the detention of insanity acquittees who were no longer mentally ill was unconstitutional because it did not provide the safeguards set forth in the Bail Reform Act such as a “clear and convincing” evidence requirement); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (*Salerno* is part of the Court’s “line of cases” prohibiting infringement of “‘fundamental’ liberty interests” except where “narrowly tailored to serve a compelling state interest.”).[[21]](#footnote-21)

These principles come into stark relief when pretrial detention affects a person solely because the person is poor. The situation our society faces today, in which NAME continues to be detained in the face of a public health crisis only because s/he cannot make a payment, exacerbates the already devastating consequences of NAME’s unconstitutional pretrial incarceration.

The Supreme Court has long recognized that a person may not be “subjected to imprisonment solely because of his indigency.” *Tate v. Short*, 401 U.S. 395, 398 (1971); *see also, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”). The right against imprisonment based solely on wealth applies to individuals being detained pretrial. *See, e.g.*, *ODonnell*, 892 F.3d at 161; *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (“The incarceration of those who cannot [afford to pay monetary bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.”); *Caliste*, 329 F. Supp. 3d at 311 n.5; *Humphrey*, 228 Cal. Rptr. 3d at 528 (Ct. App. 2018).[[22]](#footnote-22) The Fourteenth Amendment requires that, before detaining someone pretrial through an unaffordable financial condition, the Court must consider alternatives to detention and make a finding that less restrictive alternatives are insufficient to serve the government’s interests. *Pugh*, 572 F.2dat 1057.

In this case, there has been no finding that NAME’s ongoing detention is necessary to serve any compelling government interest. Even if there had been, that decision must be revisited because of changed circumstances: the government’s interest in ongoing incarceration cannot be justified where incarceration itself exacerbates an ongoing and devastating public health crisis and brings a heightened risk of illness and death to people inside and outside the jail. This Court should identify conditions of release that better protect public health and safety, and it must do so urgently.

1. The Conditions In the Jail Amid An Unprecedented Epidemic Temporarily Violate NAME’s Due Process Rights

The Due Process Clause imposes obligations on the government to meet the basic needs of the people it jails, who rely on the government for food, clothing, and necessary medical care. A failure to provide sustenance for inmates “may [] produce physical ‘torture or a lingering death.’” *Estelle v. Gamble,* 429 U.S. 97, 103 (1976) (internal quotation omitted).

The due process rights of a pretrial detainee “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp*., 463 U.S. 239, 244 (1983). Those rights are violated if he is “incarcerated under conditions posing a substantial risk of serious harm,” and the “state of mind is one of ‘deliberate indifference’ to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal citation omitted); *see, e.g.*, *Hardy v. District of Columbia*, 601 F.Supp.2d 182, 190 (D.D.C. 2009) (violation of constitutional rights of pretrial detainee if the officials “knowingly disregarded a substantial risk of serious harm of which they were aware”). Continuing to detain NAME if alternatives exist to protect the community and prevent flight while placing NAME in mortal danger of contracting and spreading an infectious disease constitute deliberate indifference to NAME’s health and safety. NAME’s incarceration, under these new circumstances, constitutes an independent due process violation that the Court must remedy.

1. **Conclusion**

WHEREFORE, for the reasons stated above, as well as any other reasons that become apparent to the Court, the defense respectfully requests that the Court grant this Emergency Motion and order that NAME be released on appropriate conditions prior to trial.

Respectfully submitted,

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1. The World Health Organization has officially classified the spread of Covid-19 as a global pandemic. *See* World Health Organization, Director-General Opening Remarks (March 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020. [↑](#footnote-ref-1)
2. Saralyn Cruickshank, “Experts Discuss Covid-19 and Ways to Prevent Spread of Disease,” John Hopkins Mag. (Mar. 17, 2020), https://hub.jhu.edu/2020/03/17/coronavirus-virology-vaccine-social-distancing-update [↑](#footnote-ref-2)
3. Given COVID-19’s contagiousness and relatively high death rate, particularly in vulnerable populations, the President ordered a 15-day directive to avoid gatherings in groups of more than 10 people. The President’s Coronavirus Guidelines for America, Whitehouse.gov (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\_coronavirus-guidance\_8.5x11\_315PM.pdf. [↑](#footnote-ref-3)
4. *See supra* note 1. [↑](#footnote-ref-4)
5. *Id.*; *see also* “Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says,” NPR (March 11, 2020), https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says. [↑](#footnote-ref-5)
6. Centers for Disease Control, Coronavirus 2019, https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html [↑](#footnote-ref-6)
7. “Italy coronavirus deaths near 200 after biggest daily jump,” Crispian Balmer & Angelo Amante, Reuters (Mar. 6, 2020), https://www.reuters.com/article/us-health-coronavirus-italy/italy-coronavirus-deaths-near-200-after-biggest-daily-jump-idUSKBN20T2ML. [↑](#footnote-ref-7)
8. Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” L.A. Times(Mar. 10, 2020), https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA. [↑](#footnote-ref-8)
9. Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed Signs,” N.Y. Times (Feb. 26, 2020, updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,”, Bus. Insider (Feb. 24, 2020), https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms. [↑](#footnote-ref-9)
10. “Coronavirus Disease COVID-19 Symptoms,” Centers for Disease Control (updated: Feb. 29 2020), https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html. [↑](#footnote-ref-10)
11. Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>. [↑](#footnote-ref-11)
12. Centers for Disease Control, Coronavirus Factsheet (Mar. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf. [↑](#footnote-ref-12)
13. *See supra* notes 2 & 3. [↑](#footnote-ref-13)
14. Centers for Disease Control, Steps to Prevent Illness: https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html?CDC\_AA\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention-treatment.html; *see also supra* notes 2 & 3. [↑](#footnote-ref-14)
15. *See* Saint Louis University, “Ticking Time Bomb,” *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>. [↑](#footnote-ref-15)
16. “The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside.” *Pandemic Influenza and Jail Facilities and Populations,* American Journal of Public Health, October, 2009; *See also* Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID\_for\_CF\_Administrators\_3.9.2020.pdf [↑](#footnote-ref-16)
17. Claudia Lauer & Colleen Long, “US prisons, jails on alert for spread of coronavirus,” AP News (Mar. 7, 2020), https://apnews.com/af98b0a38aaabedbcb059092db356697. [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. *See Peter Wagner & Emily Widra*, “No need to wait for pandemics: The public health case for criminal justice reform,” Prison Policy Initiative (Mar. 6, 2020), https://www.prisonpolicy.org/blog/2020/03/06/pandemic. [↑](#footnote-ref-19)
20. Premal Dharia, “The Coronavirus Could Spark a Humanitarian Disaster in Jails and Prisons,” Slate (Mar. 11, 2020), https://slate.com/news-and-politics/2020/03/coronavirus-civil-rights-jails-and-prisons.html [↑](#footnote-ref-20)
21. *See, e.g.*, *Simpson v. Miller*, 387 P.3d 1270, 1276-1277 (Ariz. 2017) (finding that “heightened scrutiny” applies where, as in *Salerno*, the “fundamental” “right to be free from bodily restraint” is implicated), *cert. denied sub nom. Arizona v. Martinez*, 138 S. Ct. 146 (2017); *Brangan v. Commonwealth*, 80 N.E. 3d 949, 964-65 (Mass. 2017) (finding that, when financial conditions of release will likely result in an individual’s pretrial detention, the judge must provide “findings of fact and a statement of reasons for the bail decision,” including consideration of the individual’s financial resources, “explain how the bail amount was calculated,” and state why “the defendant’s risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice to assure his or her presence at future court proceedings”). [↑](#footnote-ref-21)
22. *See also, e.g.*, *Schultz v. Alabama*, 330 F. Supp. 3d 1344 (N.D. Ala. 2018), *appeal filed sub. nom. Hester v. Gentry*, No. 18-13894 (11th Cir. Sept. 13, 2018); *Daves v. Dallas Cty.*, No. 3:18-CV-0154-N, 2018 U.S. Dist. LEXIS 160741, at \*12-13 (N.D. Tex. Sep. 20, 2018), *appeal filed,* No. 18-11368 (5th Cir. Oct 23, 2018); *ODonnell v. Harris Cty.* (*ODonnell I*), 251 F. Supp 3d 1052 (S.D. Tex. Apr. 28, 2017), *aff’d as modified*, 892 F.3d 147 (5th Cir. 2018); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 768-69 (M.D. Tenn. 2015). [↑](#footnote-ref-22)