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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 IN THE MATTER OF THE EXTRADITION  
15 OF ALEJANDRO TOLEDO MANRIQUE.

Case No. 19-mj-71055 MAG (TSH)

**ALEJANDRO TOLEDO’S SECOND  
MOTION FOR RECONSIDERATION OF  
DETENTION ORDER**

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19 **INTRODUCTION**

20 Dr. Toledo’s continued detention puts him at an unacceptable risk for death or serious harm due  
21 to the likelihood that he will catch the COVID-19 coronavirus. Because of his advanced age and  
22 current health problems, Dr. Toledo is more susceptible to catching the virus and more likely to die  
23 because of it. For those reasons, undersigned counsel implores the Court to release Dr. Toledo and  
24 avoid what could be both a human rights tragedy and an international diplomatic disaster.

25 San Mateo County – where Dr. Toledo has now begun his ninth month in custody – is one of  
26 the epicenters of the COVID-19 pandemic. Dr. Toledo is among the people that the Centers for  
27 Disease Control and Prevention (CDC) has categorized as most at-risk, not only for contracting  
28 COVID-19 but for dying from this highly contagious virus if he does contract it. Conditions of

1 pretrial confinement create the ideal environment for the transmission of COVID-19, particularly for  
 2 someone like Dr. Toledo, who is housed in the sheltered living/medical unit. Because he is housed in  
 3 the medical unit, he interacts with the same guards and medical personnel, shares the same day room  
 4 and even breathes the same unfiltered air as the other inmates with medical issues. This  
 5 extraordinary situation is the very definition of a “special circumstance.”

6 While Dr. Toledo is aware that Pretrial has recently amended its recommendation, he  
 7 respectfully submits that this change was made based on incomplete information. Once the Court  
 8 considers the most accurate and current information, including the attached declaration from counsel  
 9 for Eliane Karp-Toledo, Dr. Toledo believes that the Court will agree that it is essential that Dr.  
 10 Toledo be ordered released on appropriate conditions as soon as possible so that the Court can avoid  
 11 the tragic and very real possibility that Dr. Toledo will die in pretrial detention.

## 12 **FACTUAL BACKGROUND**

### 13 **I. Changed Circumstances: the COVID-19 Pandemic**

14 As of March 16, 2020, the new strain of coronavirus which causes COVID-19 has infected  
 15 more than 173,800 people, resulting in at least 7,281 deaths worldwide. *See Coronavirus Map:*  
 16 *Tracking the Spread of the Outbreak*, The New York Times (Mar. 16, 2020), *available at*  
 17 <https://nyti.ms/2UK4mud>. As the Court is no doubt aware, the Silicon Valley is “one of the hardest-  
 18 hit areas in the nation.” Tim Arango, et al., “To Battle Virus, 6 California Counties Order Everyone  
 19 to Stay Home,” The New York Times (Mar. 16, 2020).<sup>1</sup> Six Bay Area counties, including San  
 20 Mateo, where Dr. Toledo is in custody, have announced a “virtual public lockdown,” ordering  
 21 residents to “shelter in place.” John Woolfolk, “Coronavirus: Six Bay Area counties to ‘shelter in  
 22 place,’” The Mercury News (Mar. 16, 2020); *see also* San Mateo County Health Officer Statement  
 23 (Mar. 16, 2020), *available at* <https://www.smchealth.org/coronavirus> (directing residents to “shelter  
 24 in place”).

25 As the CDC has made clear, the risk posed by COVID-19 is not the same for everyone. Certain

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 27 <sup>1</sup> There have been at least 458 reported cases in California, but that number is estimated to reflect  
 28 only a fraction of the number of people actually infected. *See generally* Tomas Pueyo, “Coronavirus:  
 Why You Must Act Now – Politicians, Community Leaders and Business Leaders: What Should You  
 Do and When?, [https://medium.com/@tomaspueyo/coronavirus-act-today-or-people-will-die-  
 f4d3d9cd99ca](https://medium.com/@tomaspueyo/coronavirus-act-today-or-people-will-die-f4d3d9cd99ca).

1 factors, such as age and underlying medical conditions, place some people at significantly higher risk  
 2 of severe illness and death. *See CDC, Interim Clinical Guidance for Management of Patients with*  
 3 *Confirmed Coronavirus Disease (COVID-19)* (updated March 7, 2020) (hereinafter “Interim  
 4 Guidance”).<sup>2</sup> Dr. Toledo is 74 years old and suffers from hypertension. He will be 75 at the end of  
 5 this month. The CDC’s guidelines call for people over the age of 60, and people with chronic health  
 6 conditions including hypertension, to take immediate preventative action. *See CDC, People at Risk*  
 7 *for Serious Illness from COVID-19* (Mar. 12, 2020), available at <https://bit.ly/2vgUt1P>. According  
 8 to CDC statistics, the fatality rate for people in their 70s who contract COVID-19 is 8%. *See Interim*  
 9 *Guidance, supra*.<sup>3</sup> The fatality rate for people who, like Dr. Toledo, suffer from hypertension, is 6%.  
 10 *Id.* The combination of Dr. Toledo’s age and his poor health put him at grave risk of death if he is  
 11 exposed to the virus.

## 12 **II. Conditions of Confinement and the Spread of COVID-19**

13 This afternoon Magistrate Judge Cousins issued a new Criminal Case Standing Order Re:  
 14 Procedure for Review of Detention Orders in Light of Coronavirus Pandemic, a copy of which is  
 15 attached hereto as Exhibit A. In his Order, Judge Cousins recognized that “[t]his public health crisis  
 16 is serious and urgent,” and urged counsel not to delay in determining whether defendants should have  
 17 their detention hearings reopened based on their physical or mental health. *See id.*

18 Conditions of pretrial confinement create the ideal environment for the transmission of  
 19 contagious disease. *See Joseph A. Bick, “Infection Control in Jails and Prisons,” Clinical Infectious*  
 20 *Diseases* 45(8):1047-1055 (2007), available at <https://doi.org/10.1086/521910>. Inmates cycle in and  
 21 out of detention facilities, and the people who work in those facilities, including correctional officers  
 22 and care and service providers, leave and return daily, without screening. Incarcerated people as a  
 23 whole have poorer health than the general population and, even in the best of times, medical care is  
 24 limited. *See generally* Laura M. Maruschak, et al., US DOJ, Bureau of Justice Statistics, “Medical  
 25 Problems of State and Federal Prisoners and Jail Inmates,” available at

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 28 <sup>2</sup> available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients-html>.

<sup>3</sup> For people who are over 80 years old, the fatality rate jumps to nearly 15%. *See id.*

1 <https://www.bjs.gov/content/pub/pdf/mpsfppi1112.pdf>.

2 Outbreaks of the flu regularly occur in jails – indeed, Santa Rita has recently had a significant  
 3 portion of its population quarantined because of a flu outbreak – and during the H1N1 epidemic in  
 4 2009, many jails and prisons dealt with high numbers of cases.<sup>4</sup> In China, officials have confirmed  
 5 the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.<sup>5</sup> Secretary of State  
 6 Mike Pompeo has called for Iran to release Americans detained there because of the “deeply  
 7 troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention  
 8 amid increasingly deteriorating conditions defies basic human decency.”<sup>6</sup> Courts across Iran have  
 9 granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.<sup>7</sup>  
 10 In the U.S. steps are already being taken in some jurisdictions to facilitate the release of elderly and  
 11 sick prisoners and to reduce jail populations by discouraging the refusing the admission of  
 12 individuals arrested on non-violent misdemeanor charges.<sup>8</sup> For example, in Santa Clara County, the  
 13 Sheriff has already begun affirmatively working to find ways to reduce the risk that the virus poses to  
 14 inmates in county jails. In particular, she is looking for ways to “curb pretrial incarceration,” and  
 15 encouraging probation officers to “‘limit the number of probation violations’ they cite, with the  
 16 implication that nonviolent offenders shouldn’t be summarily sent to jail.” Robert Salonga, “Bay  
 17 Area courts, jails try to minimize coronavirus impact,” *San Jose Mercury News*, Mar. 12, 2020. As

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 19 <sup>4</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at  
 20 <https://bit.ly/2TNcNZY>.

21 <sup>5</sup> Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases  
 22 Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at  
 23 <https://bit.ly/2vSzSRT>.

24 <sup>6</sup> Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained  
 25 Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

26 <sup>7</sup> Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The  
 27 Associated Press (Mar. 7, 2020) at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

28 <sup>8</sup> In New York Brooklyn District Attorney Eric Gonzalez, joined by public health experts, has asked  
 Governor Cuomo to grant emergency clemencies to elderly and sick prisoners (Sarah Lustbader,  
*Coronavirus: Sentenced to COVID-19*, The Daily Appeal (Mar. 12, 2020) at  
<https://theappeal.org/sentenced-to-covid-19/>); Cuyahoga County (Ohio) is holding mass pleas and bail  
 hearings to reduce the current jail population (<https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>); Mahoning County (Ohio) jail is refusing all non-violent misdemeanor  
 arrestees (<https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>); see also Collin County (TX)  
 (<https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>);

1 Sheriff Smith explained to the Santa Clara County Board of Supervisors: ““This is a vulnerable  
 2 population,”” and we ““want to decrease the population’ in the county jail.” *Id.* Despite these efforts,  
 3 however, the sheriff has recently been forced to quarantine inmates after they were exposed to the  
 4 virus. Robert Salonga, “Coronavirus: Inmates quarantined at Santa Clara County jail after defense  
 5 attorney tests positive,” *San Jose Mercury News*, Mar. 15, 2020.

## 6 ARGUMENT

### 7 **I. The Extraordinary Risk to Dr. Toledo Posed by COVID-19 Is a Special Circumstance**

8 There is no greater necessity than keeping a defendant alive, no matter the accusation. As  
 9 Judge Jack B. Weinstein wrote, explaining his decision to release a defendant with AIDS who had  
 10 been charged with murder: “We do not punish those who have not been proven guilty. When we do  
 11 punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both  
 12 of these fundamental characteristics of our democracy.” *United States v. Scarpa*, 815 F. Supp. 88  
 13 (E.D.N.Y. 1993). In *Scarpa*, the defendant faced the most serious charges possible. Yet the court  
 14 concluded that release on bail was required because of the “unacceptably high risk of infection and  
 15 death” if he remained in custody. *Id.*

16 As in that case, the risk of infection and death is real. Although Dr. Toledo is separated from  
 17 the general population, that is not enough to keep him safe. On the contrary, because the sheltered  
 18 living unit contains the medical unit, Dr. Toledo will actually be in close physical proximity to any  
 19 inmate who exhibits symptoms of the virus. And while he does have his own cell and immediate  
 20 living area, he shares his guards with the medical unit. He also shares the same day room, and the  
 21 same unfiltered air. By contrast, hospitals like UCSF that are designed to attend to individuals with  
 22 infectious diseases use precautions such as specialized air pressure technology and air filtration units  
 23 to prevent the spread of COVID-19.<sup>9</sup> Dr. Toledo is interacting every day and night with the same  
 24 guards who interact with the very inmates most likely to be infected with the virus.

25 This Court possesses broad discretion to determine what constitutes a “special circumstance.”  
 26 *See In re Extradition of Gonzalez*, 52 F. Supp. 2d 725, 736 (W.D. La. 1999). The list of “potential  
 27 ‘special circumstances’ is not limited to those previously recognized in published decisions,” *id.*, and

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28 <sup>9</sup> *See* <https://www.ucsf.edu.news.2020/03/416866/ucsf-health-responds-covid-19-needs>.

1 the fact that one judge has declined to consider a circumstance in one case does not preclude another  
 2 judge (or even the same judge) from considering that same circumstance in a different case. A  
 3 special circumstance can be virtually anything that is “not faced by all individuals facing extradition.”  
 4 *Wroclawski v. United States*, 634 F. Supp. 2d 1003, 1008 (D. Ariz. 2009).

5 In *United States v. Taitz*, 130 F.R.D. 442, 446 (S.D. Cal. 1990), the court concluded that it was  
 6 a special circumstance where the extraditee was allergic to the detention center’s laundry detergent.  
 7 Here, it is not merely a question of whether laundry soap makes Dr. Toledo’s skin itch. The United  
 8 States government’s refusal to release him creates an unconscionable risk that Dr. Toledo will die as  
 9 a direct result of being detained. It is impossible to imagine a more special, or potentially tragic,  
 10 circumstance.

## 11 **II. Dr. Toledo Poses No Serious Risk of Flight, And Any Risk Can Be Easily Mitigated**

### 12 **A. Dr. Toledo Does Not Have Access to Un-located Funds, Because Those Funds** 13 **Were Located – in Josef Maiman’s Bank Accounts – Shortly After the Extradition** 14 **Package Was Submitted to the United States**

15 At the outset of this case, the government argued that Dr. Toledo was a flight risk because of  
 16 the allegation by the Peruvian government that a large amount of money (\$25 million or more) was  
 17 missing, and that it could be accessed by Dr. Toledo to flee. The government did not identify where  
 18 the money was, nor provide any evidence that Dr. Toledo would have access to it. As we have  
 19 learned since then, doing so would have been impossible, because the allegation turned out to be  
 20 untrue. While the government’s allegation was based on information provided by the Peruvian  
 21 government, it cannot continue to assert something which the Peruvian government has known is  
 22 untrue since March of 2018. In March of 2018, Peruvian prosecutors received banking records that  
 23 revealed that the money paid by Odebrecht to Josef Maiman, claimed by Maiman to be meant as  
 24 bribes for Dr. Toledo, was located in the accounts of Maiman and Maiman’s family. The defense has  
 25 attached a summary chart of the timeline of the transfer of money to Josef Maiman, as well as the  
 26 known location of those funds as Exhibit B. This information was known to the Peruvian  
 27 government as soon as it received the Swiss bank records in March of 2018, shortly after it submitted  
 28 the extradition package to the United States. That the money remains in Maiman’s accounts more  
 than 10 years after it was paid to Maiman should be proof enough that Dr. Toledo has no access to it.

1           **B.     The Government Has Had the Physical and Digital Contents of Dr. Toledo’s Life**  
2           **Since July 16, 2019 and Has Found Nothing Suggesting Access to Illicit Funds or**  
3           **an Interest in Fleeing from Prosecution**

4           The government’s own Search Warrant Affidavit, signed and sworn by FBI Special Agent Jeff  
5           Graham on July 15, 2019, indicated that only between \$1.3 million and \$6.3 million was unaccounted  
6           for as of that date. (Docket No. 19-mj-71070 - Search Warrant Affidavit, ¶ 48)<sup>10</sup> While the defense  
7           believes that those numbers are incorrect based on the information received from the Peruvian  
8           investigation, there is no evidence that a single dollar of that is currently available to Dr. Toledo or  
9           his wife. Absent actual evidence of access to ill-gotten funds, Dr. Toledo cannot be detained based  
10          on speculation that is contradicted by the Peruvian investigation.

11           **C.     This Court Has Far More Information About Dr. Toledo than Any Ordinary**  
12           **Defendant, and that Information Universally Supports Release**

13          The government’s now exhaustive search of Dr. Toledo’s life and financial records  
14          demonstrates that he is an excellent candidate for release. As the Court is aware, the government has  
15          been monitoring the bank accounts of Dr. Toledo and his wife in seeming real-time since the search  
16          of their home in July of 2019. The extraordinary intrusion into their lives has yielded information far  
17          beyond what would ordinarily be available to the Court in making a bail decision. None of it  
18          suggests that Dr. Toledo has the present ability or willingness to flee. The searches of their lives  
19          have uncovered no secret accounts, no tickets to Israel, no false travel documents (and indeed no  
20          currently valid travel documents for Dr. Toledo), and no evidence of access to illicit funds. What the  
21          ongoing litigation has revealed is that Dr. Toledo is an esteemed scholar and longtime member of this  
22          community who has significant personal support, including a \$1 million bond package offered by  
23          friends who have known him for decades.

24          Dr. Toledo still has no passport, still has an Interpol Red Notice, is still internationally well  
25          known, and still has nowhere to which he can flee even should he so wish.

26           **D.     Pretrial’s Amended Recommendation Relies on Incorrect and Incomplete**  
27           **Information**

28          Having recommended Dr. Toledo’s release, albeit subject to bizarrely restrictive conditions for

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<sup>10</sup> The Court, having signed the Search Warrant, has a copy of the referenced affidavit. The defense received a copy in discovery on 2/28/20, and will file a copy under seal shortly for this record.

1 a 74 year old former president and professor, for most of this case’s duration, Pretrial Services  
2 amended their report to recommend his detention based on incorrect and incomplete information. As  
3 described in the Declaration of Ethan Balogh, attached as Exhibit C to this motion, the information in  
4 Pretrial Services’ Amended Report does not correctly reflect the information available to Pretrial at  
5 the time of the initial interview in July, nor at the present time. In his conversation with Mr. Balogh,  
6 the drafting Pretrial Services Officer acknowledged that he was not accusing Dr. Toledo’s wife of  
7 lying, that he had not discussed Dr. Toledo’s wife’s personal assets during the surety interview, but  
8 that he was “bothered” that she had not volunteered that information during their discussion. Exhibit  
9 B.

10 Pretrial Services changed their recommendation purportedly because they, incorrectly, felt that  
11 Ms. Karp-Toledo would no longer be an appropriate “custodian” for Dr. Toledo. As this Court is aware  
12 from its criminal duty dockets, a third-party custodian is sometimes required for cases where the Court  
13 is concerned that the defendant will have personal difficulty following the conditions of release; in  
14 particular in cases where a defendant has shown immaturity, substance abuse, or other signs of  
15 instability or inability to comply. In this case the Court is considering a 74 year old ex-president,  
16 author, and university professor with no criminal convictions and no substance abuse problems, not a  
17 19 year-old with a drug problem. Requiring a third-party custodian makes no sense, so the absence of  
18 what Pretrial views as an appropriate custodian should have no bearing on Dr. Toledo’s release.

## 20 CONCLUSION

21 While the witnesses against him change their stories on a near-monthly basis, and the stale  
22 information presented to this Court at the outset of this extradition is further undermined, Dr. Toledo  
23 remains un-charged with a crime in Peru – his arrest ordered based only on Preventative Detention  
24 while the government there continues their preliminary investigation. Here, Dr. Toledo faces the real  
25 possibility of dying in the Maguire Correctional Facility in Redwood City as a result of the COVID-  
26 19 virus. At the beginning of this case this Court indicated that it was detaining Dr. Toledo in part  
27 because of the potential for diplomatic embarrassment should he flee the jurisdiction. Now, I ask not  
28 only the Court, but all parties involved in this case to consider the human rights implications of



1 detaining Dr. Toledo in the face of the current global pandemic. The ephemeral risk of flight is  
2 vastly outweighed by the rapidly growing reality that Dr. Toledo may die in the custody of the United  
3 States Government in circumstances that are completely avoidable.

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6 Dated: March 16, 2020

Respectfully submitted,

7 STEVEN G. KALAR  
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9 Northern District of California

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