TRINA A. HIGGINS, United States Attorney (#7349)
TODD C. BOUTON, Assistant United States Attorney (#17800)
SACHIKO JEPSON, Special Assistant United States Attorney (#17077)
JACOB J. STRAIN, Assistant United States Attorney (#12680)
Attorneys for the United States of America
111 South Main Street, Ste. 1800, Salt Lake City, Utah 84111
Telephone: (801) 524-5682

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. PLASTIC SURGERY INSTITUTE OF UTAH, INC.; MICHAEL KIRK MOORE JR.; KARI DEE BURGOYNE; KRISTIN JACKSON ANDERSEN; and SANDRA FLORES, Defendants.	CASE NO: 2:23-cr-00010-HCN UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO VACATE THE PRETRIAL DETENTION ORDER OF NOVEMBER 12, 2024 ENTERED BY MAGISTRATE JUDGE JARED C. BENNETT, AND FOR A CONTINUANCE OF THE TRIAL DATE Judge Howard C. Nielson Jr.

1. INTRODUCTION

Dr. Moore wants everything both ways. He did everything in the indictment, but he is innocent. Sure, he communicated with his codefendants, but he did not violate his pretrial release conditions prohibiting communication with his codefendants. He exercises his right to a speedy trial, but also, he does not. He contends that the Court cannot constitutionally order him not to communicate with his codefendants about this case, but he claims it was an error for the Court not to impose "a more readily-understandable condition of no communication at all between codefendants." His personal motto (he has had t-shirts made) is "Do Not Comply," but he will, of course, comply with Court orders if released again, even though he has demonstrated over time

that he will not do so. He wants a trial in January, but he also wants trial in July. His counsel cannot effectively represent him at trial by January and one of them is too unhealthy to do so, but now that he is detained—again—they actually can effectively represent him at trial in January—except they cannot if their inability to do so would influence the Court to release Dr. Moore.

Dr. Moore has demonstrated that he cannot be pinned down to a consistent legal or factual position. He will simply change positions as it suits him. But most important, he has demonstrated that he cannot be trusted, and that he is unlikely to abide by the conditions of his release. Judge Bennett was right to detain him. And under the law, Dr. Moore should remain detained pending his trial. Whatever hardships this might cause him are of his own making. He had multiple chances to demonstrate he would comply with his conditions, and he repeatedly undermined them.

2. RELEVANT FACTS TO SUPPORT DR. MOORE'S PRETRIAL DETENTION

Initial Appearance: On January 11, 2023, the grand jury returned a three-count felony indictment against Dr. Moore and his codefendants. (ECF 1). The indictment alleged that the defendants engaged in deception, theft of government property, and purposeful efforts to defraud and obstruct a lawful government function involving the controlled distribution of COVID-19 vaccines and vaccination record cards to only vaccinated persons.

Release Conditions: On January 26, 2023, pursuant to a summons, Dr. Moore appeared at his initial appearance. (ECF 20). At that time, the United States was not seeking detention. The Court released Dr. Moore pending trial (ECF 20) and imposed on him the following release conditions (ECF 26):

- "Additional Conditions of Release; The defendant must: avoid all contact, directly or indirectly, with any person who is or may be an alleged victim, potential witness and/or codefendant in the investigation or prosecution. . . . **Defendants will not talk about this case amongst themselves**." (ECF 26 at ⁋ 6(c)) (emphasis in the original)).

- "[R]eport on a regular basis to the pretrial officer as directed" and be fully processed by the United States Marshals. (ECF 26 at ⁋ 6(d) and p. 5)
- "[S]urrender any passport to the United States Clerk of the Court" (ECF 26 at ⁋ 6(l)).
- "[M]aintain or actively seek verifiable employment and/or maintain or commence an educational program as approved by the pretrial officer." (ECF 26 at ⁋ 6(a)).

First Pretrial Release Violation Petition: On May 11, 2023, the United States Probation Office petitioned the Court to revoke the pretrial release of Dr. Moore (ECF 72). He had refused to be processed by the U.S. Marshals Service as directed and had refused to submit documentation of employment. Dr. Moore also had refused to surrender his passport for approximately four months. A pretrial release violation hearing was scheduled for May 26, 2023.

Sovereign Citizen Filings: On May 18, 2023, Dr. Moore lodged a motion to dismiss for lack of subject matter jurisdiction styled as a "Notice of Special Appearance in Propria Persona." (ECF 75). In that filing, he "affirm[ed]" and "declare[d]," in a written submission to the Court, that "this Court lacks jurisdiction, and that it has committed fraud upon the court, fraud upon We the People and fraud ab initio" by attempting to exercise jurisdiction over him. (Id. at 4; see also, e.g., id. at 5 (making similar assertions that the Court lacks jurisdiction over him)). In the same "motion," Dr. Moore further moved to dismiss the criminal complaint against him based on an asserted lack of jurisdiction over him. (Id. at 4). He likened being forced to appear before this Court to being "kidnapped, which [he asserted would be] a crime in and of itself." (*Id.* at 6). He further declared that "[he would] not be appearing in person on May 26, 2023," and moved the Court to vacate the hearing for lack of jurisdiction over him. (*Id.* at 6).

May 26, 2023 Pretrial Release Violation Hearing: Despite Dr. Moore's stated refusal to appear at the May 26, 2023 hearing, he did appear in Court. (ECF 83). But any apparent compliance on Dr. Moore's part ended there. Throughout the hearing, Dr. Moore maintained

repeatedly that he was "specially appearing in propria persona," and attempted to deny the Court's jurisdiction over him based on his asserted status as a "sovereign citizen," residing in a "foreign government," outside the jurisdiction of the United States of America.

The United States called Dr. Moore's pretrial services officer to the stand and proved by clear and convincing evidence that Dr. Moore had committed at least two violations of his release conditions. For over four months, Dr. Moore failed to complete processing by the U.S. Marshal's Service as instructed by the U.S. Pretrial Services Office and failed to surrender his passport. (ECF 89 at 2). When the United States recommended that Dr. Moore be detained, Dr. Moore continued to maintain that the Court lacked jurisdiction over him. At that point, the Court ordered him detained. In its detention order the Court wrote the following:

> Defendant has failed to turn in his passport and has failed to be processed by the United States Marshal's Service as required by this court's order and by the law. Although resolved shortly before the hearing, defendant also failed for four months to provide financial and employment documentation that the court had ordered in January. Defendant's otherwise technical violations transcended the threshold of being minor when, after a full *Faretta* hearing, defendant asked that his voluminous objection to this court's jurisdiction be filed, which is a compilation of legal gibberish associated with the sovereign citizen movement. To be clear, the court is not revoking pre-trial release because defendant holds these beliefs commonly associated with sovereign citizens**. Instead, his filing overtly demonstrates that he will not abide by conditions of release because he does not believe he must comply with them given his counterfactual view that this court lacks jurisdiction over him and over the subject matter of this case**. Defendant then reaffirmed his nonsensical legal views repeatedly in both his *Faretta* and pre-trial release violation hearings today despite the court's warnings that those arguments had no legal effect whatsoever. **Defendant was undeterred and further demonstrated his likelihood of continuing to ignore orders of the court.** Consequently, under 18 U.S.C. §3148, the defendant is detained pending trial because he is unlikely to abide by the court's conditions. (ECF 89) (emphasis added).

Dr. Moore's Motion for Review of Detention: After a short time in jail, Dr. Moore indicated that he wanted to abandon his sovereign citizen views, hired Nathan Evershed, and sought review of his detention, presumably as a changed man. (ECF 97, 100, 102). The United States opposed

Dr. Moore's release, arguing that he remained unlikely to comply with the Court's release conditions. At that hearing, Dr. Moore's then-counsel, Nathan Evershed, claimed that Dr. Moore no longer espoused his previously declared sovereign-citizen beliefs and would now comply with *all* the Court's orders.

Dr. Moore's Release and Additional Release Conditions: On June 6, 2023, over the United States' objections, Judge Bennett granted Dr. Moore's release, with additional release conditions, including home detention, curfew, monitoring of his computers, emails, and texts, and GPS monitoring (an ankle monitor). (ECF 104). Two months later, on August 16, 2023, the Court removed the GPS monitoring condition, mistakenly convinced that Dr. Moore would comply with his other conditions. (ECF 119). Nathan Evershed withdrew as counsel on April 5, 2024. (ECF 138).

Dr. Moore has again recently been violating his pretrial release condition 6(c), which requires that "Defendants will not talk about this case amongst themselves."

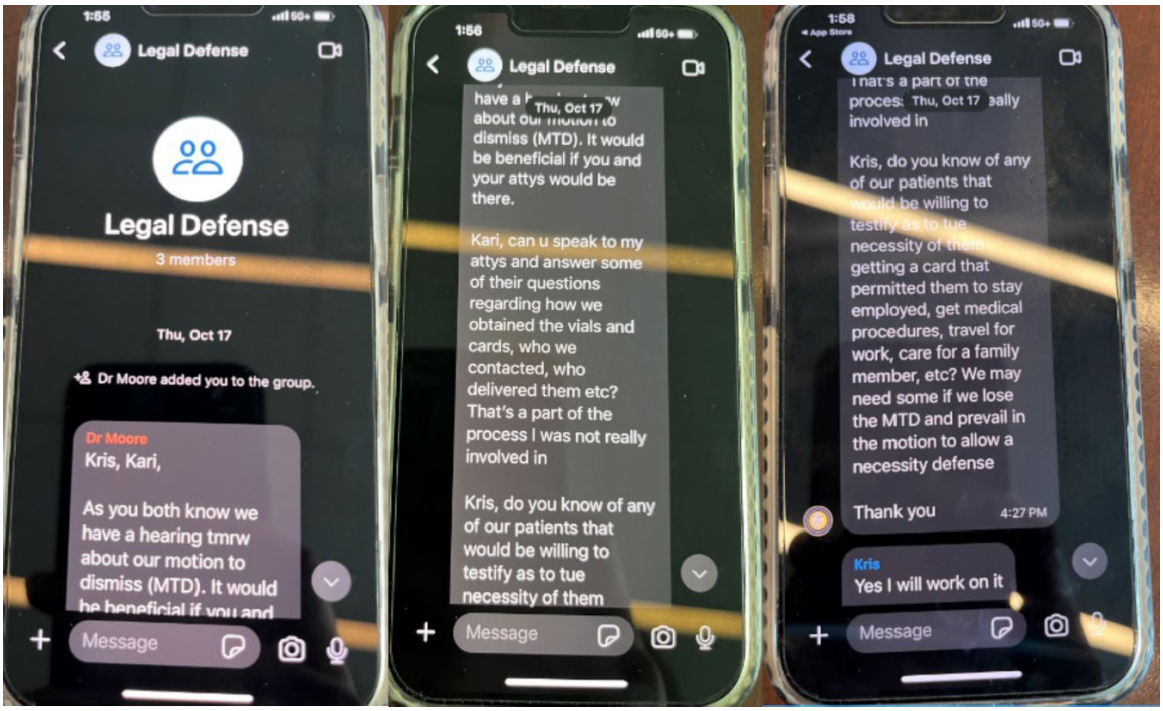
In-person meetings: Kari Burgoyne met with the prosecution on October 31, 2024 and indicated that Dr. Moore had been violating the pretrial release condition of not discussing the case. She explained that after indictment, Dr. Moore, Ms. Andersen, and Ms. Burgoyne held weekly meetings on the third floor of the Plastic Surgery Institute ("PSI") to discuss the charges and how to "get out" of them. Ms. Burgoyne confirmed that there was at least one meeting like this after Dr. Moore was released from jail. She recalled specifically that Dr. Moore wrapped his GPS ankle monitor with a towel because he feared that probation could be listening to his conversations.

Signal Communications: After his release, Dr. Moore was on a text- and computer-monitoring condition. Thus, according to Ms. Burgoyne, Dr. Moore insisted that the codefendants

set up the Signal Messaging app so that they could continue to communicate covertly. Burgoyne permitted agents to review her phone regarding these communications. Agents captured these messages that confirm that Dr. Moore, Ms. Andersen, and Ms. Burgoyne were members of a Signal Messaging group called "Legal Defense"—with Dr. Moore adding Ms. Burgoyne to the group. The identified messages from Dr. Moore regarding their "Legal Defense" substantively discuss the case in direct violation of his pretrial release conditions. For example, on October 17, 2024, Dr. Moore sent the following message to Ms. Andersen and Ms. Burgoyne:

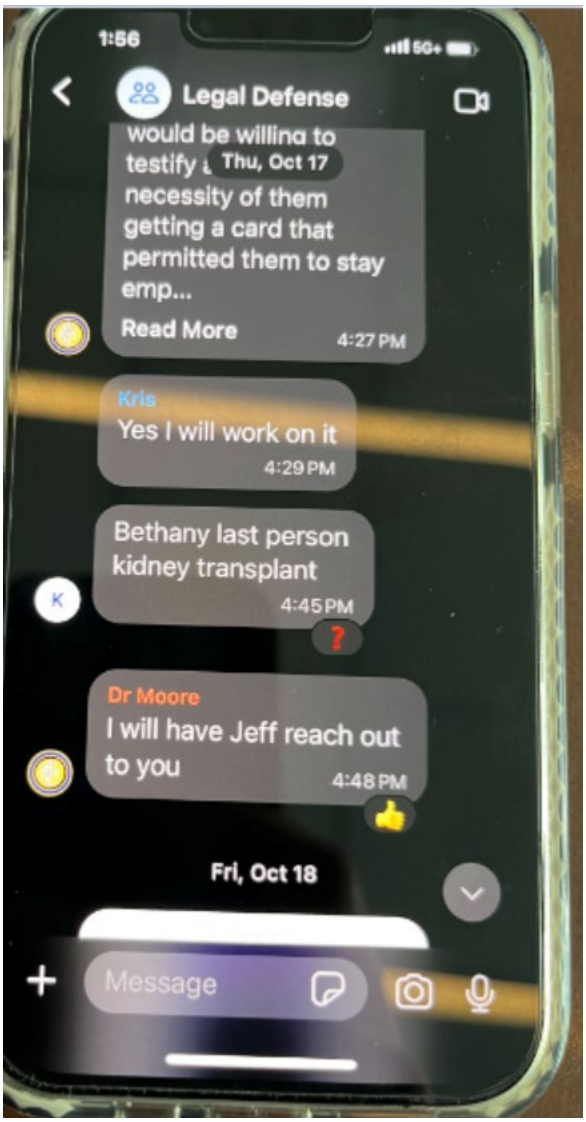
> Kris, Kari, As you both know we have a hearing tmrw about our motion to dismiss (MTD). It would be beneficial if you and your attys would be there. Kari, can you speak to my attys and answer some of their questions regarding how we obtained the vials and cards, who we contacted, who delivered them etc? That's a part of the process I was not really involved in Kris, do you know of any of our patients that would be willing to testify as to tue necessity of them getting a card that permitted them to stay employed, get medical procedures, travel for work, care for a family member, etc? We may need some if we lose the MTD and prevail in the motion to allow a necessity defense Thank you[1]

[1] Notably, contrary to suggestions by Dr. Moore's counsel, Kris Andersen's attorney has confirmed to the United States that Andersen does not have a "joint defense" agreement with Dr. Moore's counsel.



Government's Exhibit 1.

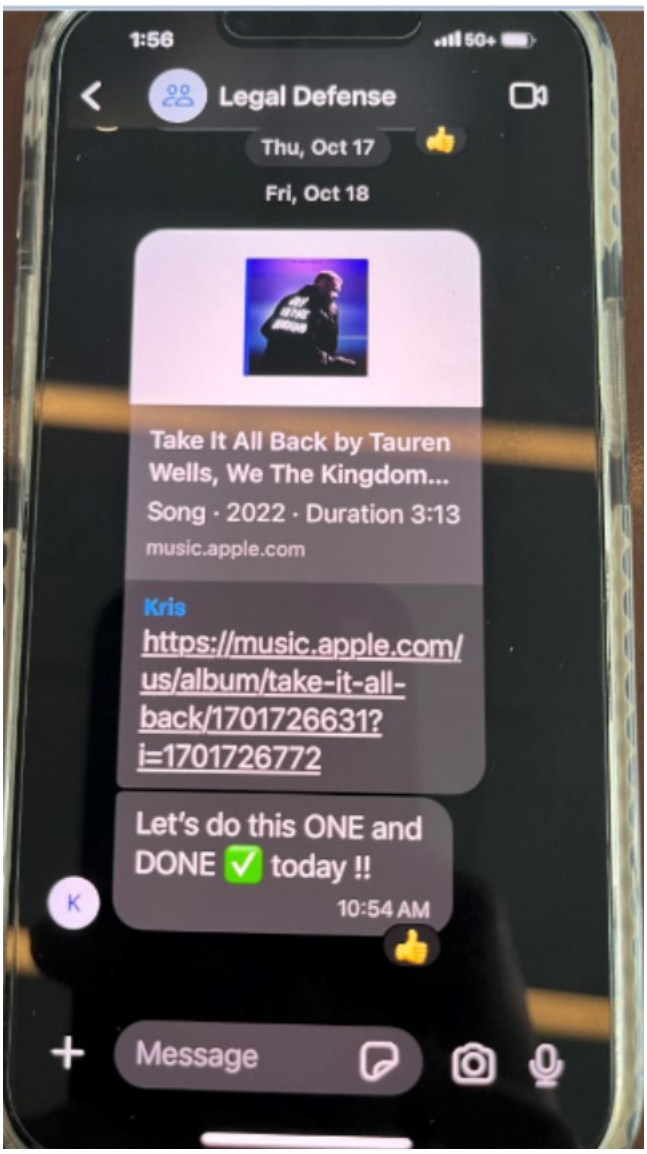
On October 17, 2024, co-defendant Andersen responded "Yes I will work on it." Ms. Burgoyne then messaged, "Bethany last person kidney transplant."



Government's Exhibit 02

On October 18, 2024 (the same day as a motion hearing before Judge Nielsen (ECF 174)), Dr. Moore messaged his codefendants sending a link to a song entitled "Take it All Back" with the comment "Let's do this ONE and DONE today !!"[2]

[2] This message indicates that, contrary to his pretrial release condition 6(c), Dr. Moore had been communicating with his codefendants about the case.



Government's Exhibit 3

3. LEGAL STANDARD

When a defendant appeals the pretrial detention ordered by a magistrate judge, the district judge presiding over the criminal case performs a *de novo* review of the detention. *See United States v. Kelsey*, 82 Fed. Appx. 652, 653 (10th Cir. 2003)(unpublished). *See also* Dist. Utah Crim. R. 57-16(a)(1); *United States v. Cisneros,* 328 F.3d 610, 616 n.1 (10th Cir. 2002) ("The standard of review for the district court's review of a magistrate judge's detention or release order under §

3145(a) is de novo."). In conducting its *de novo* review, the district judge may incorporate the record of the proceedings conducted by the Magistrate Judge, including any exhibits. *See United States v. Lutz*, 207 F. Supp. 2d 1247, 1251 (D. Kan. 2002)(unpublished).

Where, as here, a violation of a release condition is alleged, 18 U.S.C. § 3148(b) governs the revocation of release and standard for detention. This statute provides that the court "*shall* enter an order of revocation and detention if, after a hearing," the Court:

> (1) finds that there is—
>
> (A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or
>
> (B) clear and convincing evidence that the person has violated any other condition of release; and
>
> (2) finds that—
>
> (A) based on the factors set forth in [18 U.S.C. §3142(g)], there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or
>
> (B) the person is unlikely to abide by any condition or combination of conditions of release.

18 U.S.C. § 3148(b).

Therefore, to revoke a defendant's release and order his detention, a court must make the following two findings: (1) either that there is probable cause that the defendant committed a crime while on release, **or** that there is clear and convincing evidence that the defendant violated any other condition of release; and (2) either that no condition or combination of conditions will assure that the defendant will not flee or pose a danger to any other person or the community, **or** that defendant is unlikely to abide by any condition or combination of conditions or release.

The term "danger" in 18 U.S.C. § 3148(b)(2) refers to unlawful conduct, whether economic or physical in nature; it is not limited to violence or physical danger. *See, e.g., United States v.*

Erickson, 506 F. Supp. 83, 88 (W.D. Okla. 1980)(unpublished) ("Generally speaking, the term "danger," as used in 18 U.S.C. § 3148, has been deemed to refer to some imminent threat of unlawful conduct . . . , and is not to be restrictively applied only to those situations involving physical violence") (internal and external citations omitted); *United States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992) (holding that "danger" may encompass pecuniary or economic harm); *United States v. Provenzano*, 605 F.2d 85, 95 (3d. Cir. 1979) (danger not limited to physical harm; the concept includes the opportunity to exercise a substantial and corrupting influence within a labor union).

In addition, a finding that the defendant will flee or pose a danger to the community is not required for detention under section 3148. The statute plainly states that a finding that the defendant is unlikely to abide by any condition or combination of conditions of release is sufficient to justify revocation and detention. *See* 18 U.S.C. § 3148(b)(2) (setting out the required findings in the disjunctive).

A finding of probable cause that the defendant committed a Federal, State, or local crime while on release also triggers a rebuttable presumption that no condition or combination of conditions will assure that the defendant will not pose a danger to the safety of any other person or the community. 18 U.S.C. § 3148(b)(2)(B).

4. ARGUMENT

a) Despite Dr. Moore's attempt to circumvent it, Section 3148(b) continues to govern detention here.

Dr. Moore argues that the "Bail Reform Act does not allow a judicial officer to order pretrial detention on the basis of a violation of his conditions of release unless that violation, and the potential for a repeat of that violation, would make the defendant a risk of flight or would endanger another person or the community." (ECF 202 at 16). This is not the law. The United

States adopts Judge Bennett's order of detention pending trial, which explains, "This reading violates at least two canons of statutory construction" and that "reading section 3148(b) as defendant urges would render the entire provision in section 3148(b)(2)(B) superfluous."

The case Dr. Moore points to is *United States v. Davis*, 845 F.2d 412, 414 (2d Cir. 1988). *Davis* was concerned with the type of hearing that was required for a revocation under § 3148, as opposed to § 3142, and whether the United States could proceed by proffer. The Second Circuit held that the United States could proceed by proffer and also stated, "We recognize that § 3142 and § 3148 provide quite different avenues to detention before trial, and consequently, that Congress may not have intended the hearings required under § 3148 and § 3142 to be identical." The *Davis* case in no way supports the defendant's sweeping proposition. Likewise, *United States v. Brannon*, 2000 U.S. App. LEXIS 3234 (10th Cir. 2000) (unpublished) is inapposite to this case.

Dr. Moore's counsel fails to cite a single instance where any court has ever been overturned for ordering or enforcing such a basic "no-contact with codefendant" condition of pretrial release. In fact, the opposite appears to be the standard. *See e.g.*, *United States v. Aron*, 904 F.2d 221, 224 (5th Cir. 1990) (upholding detention where defendant was attempting to intimidate a witness but "the district court had relied on a finding that the defendant was unlikely to abide by conditions of release, 'rather than upon the presumption that' he would pose a danger to the community"); *see also United States v. Pickel*, 500 F. App'x 771, 772 (10th Cir. 2012) (unpublished) (Circuit judges Briscoe, Murphy, and Hartz upholding district court's ruling holding that "the no-contact order [with a claimed common law spouse] was necessary to assure the safety of the community because the *potential intimidation of, and collusion with, witnesses, would subvert the judicial process*." (emphasis added)); *United States v. Jeffs*, No. 2:16-CR-82 TS, 2016 WL 4444753, at *2 (D. Utah Aug. 23, 2016) (unpublished) (Judge Stewart, revoking defendant's bond after failing to abide by

his conditions of release after meeting with codefendants, even when allegedly discussing collateral matters); *United States v. Minor*, 204 F. App'x 453, 454 (5th Cir. 2006) (unpublished) ("The [§ 3148] statute clearly provides that these findings [of clear and convincing violations and unlikelihood that defendant will abide] alone are sufficient to justify revocation and detention; a court need not also find that the defendant will flee or pose a danger to the community." Noting also that § 3148(b) is set out in the disjunctive.); *United States v. Lester*, 2018 WL 1404284, at *2 (S.D.W. Va. Mar. 20, 2018) (unpublished) (revoking defendant based on unlikelihood of compliance for contacting codefendant via email which stated, "My probation officer even made it abundantly clear I was not to contact a codefendant at all ... I personally don't see why it would matter as long as we don't talk about the case, but my probation officer is strictly by the book."); *United States v. Suazo*, No. 20-MJ-37-DL-1, 2020 WL 3956264, at *2 (D.N.H. July 10, 2020) (unpublished) (district court upholding magistrate's finding that because of no-contact order violation, the defendant was "unlikely to abide by any conditions or combination of conditions of release," and holding "the no-contact violation stands as strong evidence that Suazo presents a danger to potential witnesses in the current case and that conditions of release cannot sufficiently manage this danger."); *United States v. Shaver*, 2021 WL 5173853, at *3 (N.D. Ohio Nov. 4, 2021) (unpublished) (upholding detention where defendant contacted and threatened codefendant, holding that "The United States rightly fears that Mr. Shaver will not abide by any conditions the Court imposes and expresses grave concern for the public safety from even Mr. Shaver's temporary release.")

An unpublished opinion authored by District Court Judge Sam Lindsay in the Northern District of Texas is also instructive.[3] In *United States v. Baltazar Novoa*, 2019 WL 1040722, at *2

[3] Undersigned counsel has had the privilege of practicing before Judge Lindsay and can attest to his legal prowess.

(N.D. Tex. Mar. 5, 2019) (unpublished), Judge Lindsay reviewed the magistrate judge's decision to revoke the defendant who violated the "no-contact with codefendants" provision. In that case, the government obtained toll records showing that the codefendants had sent approximately 100 text messages back and forth but had no substantive content. The defendant appealed his detention contending (as Dr. Moore contends here) that his communications did not pertain to the substance of the case and therefore did not violate the "purpose of the condition—to avoid any possibility that an investigation or prosecution could be compromised." In upholding the revocation by the magistrate Judge Lindsay held:

> After reviewing the record, transcript from the revocation hearing, and applicable authority, the court determines that the magistrate judge properly revoked Novoa's order of pretrial release pursuant to 18 U.S.C. § 3148. First, the court finds that clear and convincing evidence exists that ***Novoa violated conditions … set forth in the Order Setting Conditions of Release …, which prohibited him from all contact, direct or indirect, with any person who is or may be a victim or witness in the investigation or prosecution, including codefendants.***
> . . . .
> "The statute clearly provides that these findings alone are sufficient to justify revocation and detention; a court need not also find that the defendant will flee or pose a danger to the community." … ***The court, therefore, limits its inquiry to whether the magistrate judge correctly concluded that Novoa is "unlikely to abide by any condition or combination of conditions of release."*** It need not address whether Novoa poses a flight risk or danger to the community, contrary to Novoa's assertion that the magistrate judge failed to make this additional finding. (internal citations omitted) (emphasis added).

Judge Lindsay noted that the texts messages constituted "extensive, repeated, and deceptive contact." Based on the extensive and deceptive nature of the contact, Judge Lindsay determined that the defendant was unlikely to abide by any condition or combination of conditions of release pursuant to 18 U.S.C. § 3148(b)(2)(B) and denied the defendant's release.

The same reasoning applies here. Dr. Moore knew that his text messages were being monitored so, he used an encrypted Signal app to communicate with his codefendants about the case. He also organized weekly meetings to discuss the case with his codefendants. How many total times these communications occurred is unknown. But it is certain that it was extensive, repeated, and deceptive. Dr. Moore knowingly violated of his pretrial release conditions. For all his professed reform to escape pretrial detention the first time, Dr. Moore was not a changed man. He just reverted to more deceptive practices to avoid detection. Accordingly, because he has violated his conditions and is unlikely to abide by them in the future, § 3148 requires the Court to detain.

b) There is clear and convincing evidence that Dr. Moore again blatantly violated his conditions of release, and that if released, he would likely do so again.

The past is the best predictor of the future—and Dr. Moore's past strongly suggests that if the Court were to release Dr. Moore again, over the United States' objection (again), Dr. Moore would likely violate his release conditions, again. Since he was first released on pretrial conditions, Dr. Moore has blatantly, repeatedly, and purposefully violated his conditions and taken measures to prevent detection. His pretrial release was previously revoked in May 2023 for failure to comply with processing instructions, failure to surrender his passport, and claiming the Court did not have jurisdiction over him. (ECF 83, 89).

Because the Court reviews detention issues *de novo*, the United States anticipates presenting at the Tuesday evidentiary hearing, exhibits including the text messages, and a recording of Dr. Moore discussing his personal motto. And even though the United States could proceed by proffer alone, it will also call Kari Burgoyne as a witness.

At the hearing, it is anticipated that Ms. Burgoyne will testify regarding:

- weekly in-person meetings Dr. Moore held with codefendants to substantively discuss the case, which took place after the Court's pretrial release orders;

- who "pressured" who to pursue the sovereign citizen "gibberish;"

- the meeting that happened after Dr. Moore was released from custody for his first series of pretrial release violations, wherein Dr. Moore wrapped his GPS ankle monitor with a towel before his conversation with Ms. Burgoyne because he feared probation was listening to his conversations;

- Dr. Moore's set up and coordination of Signal app communications with codefendants to avoid detection by pretrial services; and

- the fact that *after the indictment*, Dr. Moore instructed Ms. Burgoyne to destroy the remaining COVID-19 Vaccines that were stored and refrigerated on the third floor at PSI. (This egregious conduct and continuation of the conspiracy post-indictment is violative of 18 U.S.C. § 1512(b)(2)(B), and the Government will be superseding the indictment soon to add this charge as to Dr. Moore.)

Defense counsel has already tried to disparage, and may continue to try to disparage, Ms. Burgoyne based on current disputes between them. But the cruel reality is that Dr. Moore's criminal activity has destroyed Ms. Burgoyne's life. She was his assistant, and he dominated that relationship with endless demands that flouted ethical and criminal lines. The Court will see for itself that Kari Burgoyne is a sincere, earnest, and sympathetic figure in this case. Her biggest mistake was working with, listening to, and being influenced by Dr. Moore.

Dr. Moore points out that "the Government took no action whatsoever against Burgoyne, despite her admission to participating in the very same acts being alleged against Dr. Moore." (ECF 202 at 5). First, it was Probation that sought to revoke Dr. Moore and Ms. Andersen, after the United States provided Probation with the information. Second, Ms. Burgoyne is the one who first revealed evidence of the violation. Without her coming forward, these violations would have remained undetected by pretrial—a further indication that Dr. Moore is unable to be adequately monitored by pretrial. And third, Dr. Moore is a powerful, highly educated, and influential figure

who clearly acted as the ringleader for his codefendants' criminal conduct. He should bear the brunt of the responsibility for the conspiracies and crimes he pressured and roped them into.

The above information establishes by clear and convincing evidence that Dr. Moore has violated at least one condition of release 18 U.S.C. § 3148(b)(1)(B) and that he is "unlikely to abide by any condition or combination of conditions of release." *Id.* at § 3148(b)(2)(B).

c) In addition to violating conditions, there is probable cause that Dr. Moore committed a federal, state, or local crime while on release.

Defendant indicates that "[w]hen the Court has a reasonable basis to believe that such a conspiracy will occur, the codefendant communication prohibition may be a reasonable prophylactic measure. However, there has *never* been any evidence presented of such a danger in this case." (ECF 202 at 28) (emphasis added). At the hearing, the government will, however, present this evidence to the contrary. The Court has made great efforts to release and monitor the defendants with the least restrictive conditions. Even after Dr. Moore flouted the Court's jurisdiction over him the first time (violating his pretrial release conditions for several months), the Court gave him further opportunities to demonstrate compliance with his release conditions. Nevertheless, after Dr. Moore was indicted, Dr. Moore continued to further his criminal conspiracy. He committed the additional crimes of obstruction and contempt. He coordinated efforts to disobey the release conditions. He undermined the integrity of the judicial process. And he tried to drag his codefendants along to do the same.

Dr. Moore claims that even though he has been communicating with his codefendants, the communications were "trivial" and that they all related to their legal defense. This is unpersuasive.

In *United States v. Perez*, 989 F.2d 1574 (10th Cir. 1993), the Tenth Circuit provided examples of the types of statements that can further conspiratorial purposes:

> Statements made to include enlistment or further participation in the group's activities; statements made to prompt further action on the part of the conspirators; statements made to reassure members of a conspiracy's continued existence; statements made to allay a coconspirator's fears; and statements made to keep coconspirators abreast of an ongoing conspiracy's activities. *Id*. at 1578 (citations omitted).

Dr. Moore's statements to his codefendants were calculated to reassure, encourage, allay fears, and improperly further his interests in this litigation. For example, he states, "Let's do this ONE and DONE today !!" Another example: in discussing how PSI obtained the vaccine and the vaccine cards, he claims to his codefendants, "That's a part of the process I was not really involved in."

Dr. Moore engaged his codefendants *substantively* about the criminal case via Signal to avoid detection. He knew it violated the Court's order. He did it anyway. He did it repeatedly. Calling it trivial ignores the reality of how we got here in the first place: Dr. Moore engaged in a conspiracy with his codefendants to defraud and obstruct a lawful government program. And when they were caught, Dr. Moore instructed a codefendant to destroy evidence. Therefore, there is probable cause to find that Dr. Moore has committed at least one federal, state, or local crime while on release and that, given his pattern of violating his release conditions and his demonstrated contempt for the Court, the legal system, and the law itself, he is "unlikely to abide by any condition or combination of conditions of release." *Id.* at § 3148(b)(2)(B).

d) The Court should maintain the no-contact with codefendants condition.

Understandably, Dr. Moore desperately wants to be in § 3142 territory. But that provision does not help him either because he is a danger to the community. Any defendant who refuses to comply with pretrial supervision presents a danger. Section 3142(c)(1)(B) provides a non-

exhaustive list of conditions considered to be the least restrictive means to reasonably assure the appearance of the person as required and the safety of any other person and the community. This list includes to "(ii) maintain employment, or, if unemployed, actively seek employment"; "(iv) abide by specified restrictions on personal associations…"; and "(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense." In conjunction, these non-exhaustive, statutorily enumerated, available conditions of release suggest that a "no-contact with codefendants" condition may be appropriate in a case like this where there is a concern that the co-employed codefendants might secretly meet (as they did here) to collude to undermine justice in their case and the prosecution of their case. Thus, the § 3142 statute, by its own terms, establishes that danger and risk are broad concepts that can be implicated by seemingly mundane pretrial conditions—like maintaining employment.

Dr. Moore also seems to make much of the fact that his violation involves a "codefendant" as opposed to a "potential witness," as specifically listed in the statute. He is splitting hairs. Today's codefendant is tomorrow's cooperating witness (*see* Flores and Burgoyne). Moreover, pursuant to the Court's order to provide a do-not-contact list, the government designated "codefendants" on the do-not-contact list emailed to the defendant's counsel at the time, Kathy Nestor and Wendy Lewis, as well as Kirsten Mumford, Ed Brass, and Kris Angelos on January 27, 2023. In that list, it was clarified again that the defendants were not to talk to "[t]heir codefendants regarding this case or the allegations of the case.") (United States' Am. List of Persons Not to Be Contacted by Defendants [Filed Under Seal] at II.6.).

Dr. Moore now asks to be released from the no-contact condition—after he has spent a significant portion of his pretrial release term purposefully violating it. Counsel asserts that, "there are numerous other alternatives" to Dr. Moore's pretrial detention, though does not list any. In the

face of reasonable restrictions that Dr. Moore violated with impunity, the Court should not reward Dr. Moore's contemptuous behavior by loosening those restrictions. After Dr. Moore's first round of violations, Judge Bennett already tried to adequately supervise Dr. Moore by increasing Dr. Moore's pretrial release conditions. In response, Dr. Moore only doubled down on his violative behavior.

Nonetheless, defense counsel asserts that "It is inconceivable that the Government could have any legitimate interest in preventing [defendants in communicating to plan their defense], at least in the absence of any evidence that codefendants are colluding to tamper with a witness." To quote Inigo Montoya from *The Princess Bride*, "You keep using that word. I do not think it means what you think it means." Far from inconceivable, in conspiracy cases like this, the United States has a substantial and legitimate interest in disrupting the criminal conspiracy; in preventing further crimes; in reducing the threat of intimidation; in preventing coordinated efforts to disobey pretrial release conditions; and in preventing the subversion of the integrity of the judicial process. The United States always has a legitimate interest in preventing defendants form colluding to plan their defense and from potentially coordinating testimony outside the presence of counsel. All these interests serve legitimate purposes designed to protect the safety of individuals and the community.

e) Under the Bail Reform Act, Hardship is not a factor.

Dr. Moore claims he should be released *again* because his ability to prepare for trial has been impaired; his ex-wife committed suicide some years ago; his 17-year-old son and elder mother need him; and that Kari Burgoyne prompted his sovereign citizen beliefs that are making the Court treat him unfairly. (ECF 202). The United States expresses sympathy for these difficulties. However, none of them are valid bases for the Court's consideration under The Bail

Reform Act to determine whether the defendant should be detained. Dr. Moore violated his conditions multiple times, and he is unlikely to abide by them in the future.

Dr. Moore has been posting to X during the pendency of this case under the handle @Moore22K, "Dr. Kirk Moore, AWAKE!" with this profile picture:

In an August 13, 2024 audio recorded interview posted to his X account, Dr. Moore stated the following:

> My motto, I had some t-shirts made that say *Noli Parere* on it, which means do not comply. Um, and, and, and that's that's kind of where I'm at, I'm just, you know, I'm, I'm not gonna let people tell me what I need to do or not do, um, I'm gonna rely on my ethics and morals and my own values, um, and I'm not gonna let anybody tell me what I can or can't say and I'm gonna live with the consequences of me saying that.

Dr. Moore has broadcast to the world that his motto is literally "do not comply." He has announced he is going to do what he wants, say what he wants, and live with the consequences. The Court should believe him.

Moreover, Dr. Moore is right to suggest that he should "live with the consequences" of his actions. Any hardship that he faces in relation to his pretrial detention is his own making. He alone is responsible for it. Not the Court. Not Judge Bennett. Not the United States. And not anyone else. Dr. Moore was already given multiple chances to demonstrate that he would comply with his pretrial conditions. He was already released from pretrial detention once—after spending some time incarcerated. He knew what the consequences of his detention would be: for himself; for his son; for his mother; and for his business. Knowing the consequences of noncompliance, he chose not to comply. Any hardship resulting from his noncompliance falls on him, and him alone.

f) Under any scenario, the Court should not grant another trial continuance.

It appears that defense counsel may be attempting to use the threat of a trial to leverage the release of the defendant. (ECF 202 at 21-22, "if this motion is denied[, trial] will be taking place in two months"). If that truly is what they are doing, it would be textbook abuse of process. Whatever defense counsel's intentions, the "threat" of a January trial has no effect on the prosecution. The United States is ready to try this case.

Regardless, the United States has now filed its own motion for a speedy trial and is asserting the public's rights under the Speedy Trial Act. Dr. Moore claims that delay of the trial is what "the prosecutors so clearly want." (ECF 200). He is projecting. As soon as the Court issued its abrupt trial order last Friday (November 15) setting deadlines for the United States to prepare most trial documents within just two weeks (and over the Thanksgiving holiday), the United States sprang into action—calling in favors, clocking significant overtime, rearranging personnel, canceling annual leave, incurring expenses related to expedited requests. It did all of this in order to meet the Court's deadlines.

As always, the United States takes the Court's orders seriously, and it takes its trial responsibilities seriously. It does not shift its positions on trial readiness for tactical advantage. The Court signaled a desire to "avoid a needless expenditure of resources to prepare for trial in January 2025 given Defendant's request that the trial be continued until July 2025 if the court grants his motion." (ECF 209). At this point, the "expenditure of resources" ship has sailed. The United States will meet the Court's deadlines and will be ready to proceed to trial in January as ordered by the Court.

Additionally, at this point, counsel for Dr. Moore has meticulously eviscerated every justification that would have provided a basis to continue the trial until July under *United States v.*

Toombs, 574 F.3d 1262 (10th Cir. 2009) and the Speedy Trial Act. All the justifications previously provided at the October hearing to toll the clock until July were discounted and undermined by defendant's filing wherein Mr. Bronster asserted to the Court, among other things, that he "is fully prepared to try the case [in January] alone should that be necessary." (ECF 200). Turns out, it is necessary.

Dr. Moore's counsel cannot credibly shift back and forth between their positions on trial readiness. They cannot credibly say at the October 18, 2024 hearing that they cannot effectively prepare to represent Dr. Moore at trial by January, only to turn around and say they can now do so, and then qualify that same position by saying, but not if he is released. Defense counsel's ability to effectively and adequately prepare for trial is not contingent on whether Dr. Moore is in custody. If Mr. Bronster says he can be fully prepared to try this case in January, while Dr. Moore is detained before trial, the Court should take Mr. Bronster at his word.

Indeed, in his latest filing, the only justification Dr. Moore's counsel provides for another trial continuance (again, only should Dr. Moore's counsel's demands be met, that Dr. Moore be released) is that a continuance "would assist Dr. Moore and his counsel in being *better prepared* for the trial." (ECF 202 at 30) (emphasis added). There is no provision under the Speedy Trial Act that tolls the time to allow for defense counsel to be "better prepared" as opposed to "fully prepared." Nor is a party constitutionally entitled to a maximally prepared defense. The Court should not allow Dr. Moore's counsel to extort his undeserved release from detention by otherwise threatening to insist on a January trial date. This would subvert justice.

Dr. Moore's counsel has now done a thorough job, on the record, of demolishing and completely undermining any rationale or potential justification for continuing the trial. At this point it would be inviting error under the Speedy Trial Act to continue the trial. It would be a

recipe for trying this case twice. Whatever the Court decides regarding Dr. Moore's now twice-self-inflicted pretrial detention, the January trial date should be maintained.

5. CONCLUSION

For the foregoing reasons, and any other reasons that may be elicited at a hearing on this matter, the United States respectfully requests that this Court (1) deny the Defendant's Motion to Vacate the Pretrial Detention Order, (2) maintain the no-contact with codefendants condition, and (3) hold firm the January 13, 2025 trial date that Dr. Moore demanded. Dr. Moore should not be rewarded for continuing to violate his conditions of release and for shifting his position on trial readiness. We have been down this road before with Dr. Moore. If he is released, he will violate again.

Respectfully submitted,

TRINA A. HIGGINS
United States Attorney

/s/ Jacob J. Strain
JACOB J. STRAIN
Assistant United States Attorney