

No. 19-1283

Supreme Court, U.S.  
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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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JAMES TOLLE,

*Petitioner,*

vs.

GOVERNOR RALPH NORTHAM  
AND THE COMMONWEALTH OF VIRGINIA,

*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Defendant Northam's Executive Order 55 (2020) institutes quarantine restrictions on all Virginians without invoking Va. Code § 32.1-48.08 and without explicitly providing any due process to citizens challenging their quarantine. Subsequently, the District Court's Order denies Petitioner any timely procedural due process during a quarantine. The questions related to these facts are as follows:

a) Can the Governor legally deprive citizens of liberty and property rights and circumvent the statutory protections for quarantined individuals by establishing a quarantine under emergency powers without invoking the quarantine statutes called for under those emergency powers?

b) Can the State deprive citizens of liberty and property for quarantine reasons without the due process required by *O'Connor v. Donaldson*, and universally treat all citizens as infected subject to quarantine without offering individual assessments as required by *Demore v. Kim*?

c) Does the District Court's denial of Petitioner's request for a hearing during the period of the quarantine and the Appellate Court's denial of Petitioner's request for an emergency injunction or stay without an expedited hearing violate the Fifth or Fourteenth Amendments by extinguishing citizens' rights to due process when there is no other avenue for due process provided by the State to redress ongoing injury to Petitioner's rights?

d) Does the quarantine imposed by Defendant Northam's Executive Orders which applies universally to all citizens violate the requirement for the restriction of liberty to be the least restrictive means possible as called for under *Shelton v. Tucker*?

2. If Defendant Northam's actions and orders under Executive Order 55 (2020) (hereinafter, "EO-55") are not considered a quarantine, Defendant Northam's Executive Orders issued under Va. Code § 44.146-17 are the most extensive use of executive powers by a Governor of Virginia at least since the Civil War and for the first time in history, apply emergency powers which restrict all citizens liberty and property rights under criminal penalty universally on all people throughout the extent of Virginia, without any limitation or mitigation. Also, Defendant Northam's Executive Orders and the statute cited do not explicitly provide due process to citizens injured by the order and are in effect until June 10, 2020, at which time Defendant Northam can summarily extend them for another year. The questions related to these facts are as follows:

a) Can the Governor use emergency powers under a statute (which was not intended by the legislature to be used without a quarantine order during a public health threat) to deprive the entire citizenry of the state of their constitutional right to travel, assemble, worship and use their property, without legislative action for an extended period of time?

b) Does the District Court's denial of Petitioner's request for a hearing during the period of a State of Emergency and the Appellate Court's denial of Petitioner's request for an emergency injunction or stay without an expedited hearing violate the Fifth or Fourteenth Amendments by extinguishing citizens' rights to due process when there is no other avenue for due process provided by the State to redress ongoing injury to Petitioner's rights?

c) Can Defendant Northam use his emergency powers to deprive all citizens of Virginia their liberty and property rights without due process as required by *Joint Anti-Fascist Refugees Committee v. McGrath*?

d) Is the principal under *Korematsu v. United States* which allows the State to deprive individuals of their liberty and property rights during national emergencies when the

Emergency precludes in-person hearings violate the rights to due process under the Fifth or Fourteenth Amendments?

b) Was the District Court's use of EDVA G. O. 2020-7 to deny Petitioner's request for preliminary relief clearly wrong based on the errors in fact?

## **CORPORATE DISCLOSURE STATEMENT**

6. Pursuant to Rule 29.6 of this Court's Rules, Petitioner Tolle states that he has no parent corporation in this action and no publicly held corporation has an interest with Petitioner Tolle in this action.

## **LIST OF PARTIES**

7. All parties appear in the caption of the case on the cover page.

**LIST OF ALL DIRECTLY RELATED PROCEEDINGS**

8. *James Tolle v. Governor Northam, et al.*, Number 1:20cv363, U. S. District Court for the Eastern District of Virginia. Order denying preliminary relief entered April 8, 2020.
9. *James Tolle v. Governor Northam, et al.*, Number 20-1419, U. S. Court of Appeals for the Fourth Circuit. Order denying stay pending appeal entered April 28, 2020.

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and orders below.

**OPINIONS BELOW**

**(CITATIONS OF ORDERS ENTERED IN THE CASE)**

10. The District Court's Order of April 1, 2020 denied Petitioner's emergency request for Temporary Restraining Order, Preliminary Injunction or preliminary-injunction hearing based on the emergency of the Coronavirus and the prohibition against in-person hearings under EDVA G.O. 2020-7. This Order is included in Appendix C.

11. The District Court's Order of April 8, 2020, which ruled on Petitioner's request for reconsideration by denying Petitioner's request for preliminary relief or a preliminary-injunction hearing is provided in the Appendix. The District Court's Order addressed some of Petitioner's arguments concerning *Winter* but did not address other arguments under *Winter*. This Order is included in Appendix B.

12. Petitioner appealed the District Court's Order on April 13, 2020, as an interlocutory order with a motion for emergency preliminary relief and preliminary-injunction hearing. The Fourth Circuit Court of Appeals ruled against Petitioner's motion for emergency preliminary relief and preliminary-injunction hearing. This Fourth Circuit Court of Appeals' Order was entered on April 28, 2020 and is included in Appendix A.

## **JURISDICTION**

12. The District Court entered a Final Order denying Petitioner's emergency request for preliminary relief or expedited hearing on April 8, 2020. Petitioner appealed to the Fourth Circuit Court of Appeals on April 13, 2020, requesting an emergency preliminary injunction or stay pending appeal at the time of the appeal. Petitioner's motion requested an expedited preliminary-injunction hearing if a stay was not granted. The Fourth Circuit Court of Appeals filed an Order on April 28, 2020, which denied Petitioner's request for emergency injunction or stay pending appeal and did not offer Petitioner an expedited hearing. Petitioner is seeking a Writ of Certiorari to a United States Court of Appeals before judgment pursuant to 28 USC § 2101(e) and Rule 11 of this Court's Rules because of the public importance related to the suspension of the constitutional rights of millions of citizens like Petitioner during the COVID-19 pandemic and due to the need for immediate redress of Defendants' injuries to Petitioner's constitutional rights which are continuing due to inaction on Petitioner's emergency requests in the District and Appellate Courts.

**CONSTITUTIONAL PROVISIONS AND  
STATUTES INVOLVED IN THE CASE**

14. The constitutional and statutes relied on in this Petition are as follows:

a) The First, Fourth, Fifth and Fourteenth Amendments to the United States

Constitution. These Amendments are provided in Appendix J.

b) Virginia Code § 44-146.17. This statute is in Appendix K, page K-2.

c) Virginia Code § 32.1-48.05. This statute is in Appendix K, page K-4.

d) Virginia Code § 32.1-48.08. This statute is in Appendix K, page K-5.

e) Virginia Code § 32.1-48.010. This statute is in Appendix K, page K-6.

## STATEMENT

15. Defendant Governor Northam signed and issued EO-55 dated March 30, 2020 [Appendix D], citing Va. Code § 44.146-17 and instituting a stay at home order on the entire State and its population, such order restricting all citizens' right to travel, assemble, worship and use of their private property under criminal penalty, with exceptions only granted by the authority of the governor. Despite the Governor claiming that he was using his emergency powers due to a public health threat, neither Defendant Northam nor the State Health Commissioner invoked Va. Code § 32.1-48.05 as called for during public health threat to officially declare a quarantine, such action depriving all healthy citizens the due process rights guaranteed under Va. Code § 32.1-48.010 during a quarantine. Petitioner, a resident of Virginia, is subject to Defendant Northam's order and filed a complaint [relevant excerpts in Appendix E] alleging injury due to violation of Petitioner's and other citizen's rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution.

16. Petitioner sought emergency preliminary relief of the injuries by Defendant's orders to his constitutional rights with a Motion for Preliminary Injunction and Expedited Hearing [relevant excerpts in Appendix F]. The District Court entered a final Order denying his request for preliminary relief or preliminary-injunction hearing on April 8, 2020 [Appendix B]. Petitioner appealed the District Court's ruling as an interlocutory order on April 13, 2020 in the Fourth Circuit Court of Appeals, filing an emergency motion seeking preliminary relief or stay pending a hearing [relevant excerpts in Appendix H]. The Fourth Circuit Court of Appeals Order of April 28, 2020 denied Petitioner's request for emergency preliminary relief and granting of a preliminary-injunction hearing [Appendix C]. This Petition is filed under this Court's Rule 11, seeking Writ of Certiorari to review a case pending in the Fourth Circuit Court of Appeals. This Court has jurisdiction to hear this Petition under 28 USC § 2101(e).

17. This case raises issues concerning whether an Executive can use emergency powers to enforce a quarantine when no protections required under the law for quarantined or isolated individuals are in place. A large body of law has been developed which gives immense power to the Executive to quarantine and isolate persons suspected of an infectious disease, but requires that this power be used in the least restrictive way and with due process available to those who are not infected. This case involves a Governor declaring a state of emergency due to a public health threat without invoking the required quarantine laws, effectively denying all citizens a right to due process.

18. The question of whether an Executive's emergency powers alone can deprive a state's population of their constitutional rights without due process for an extended period of time arises if the Defendants' orders are not a quarantine. This case does not involve the use of emergency powers when there is an immediate threat to all or most of the population, such as when an entire community was issued stay at home orders because the Boston bombers were fleeing and presented an immediate threat to any individual in the area in April, 2013. It is noteworthy in the Petitioner's case that the threat raised in the Defendants' orders is not a direct threat to life as the Boston bombers who were exchanging gunfire and bombs with the police in the streets of Boston at that time. It is also noteworthy that the threat in the case of the Boston bombers only lasted until the bombers were apprehended, with the stay at home order lasting no longer than 24 hours.

19. The use of emergency powers in Petitioner's case is more like the use of emergency powers during World War II when an exclusion order was used by the authorities to detain and intern Japanese-Americans in order to deal with the threat of saboteurs among the Japanese-American population, which led to this Court upholding the Exclusion Order in the case of *Korematsu v. United States*. As in the *Korematsu* case where the military authorities



determined it was proper to treat all Japanese-Americans as dangerous because it was too difficult to separate the dangerous citizens from the innocent citizens, Petitioner's case involves a Governor who has declared that all healthy-appearing persons may be carrying the infection, stating "Whereas, COVID-19...can be spread from an infected person who does not have symptoms to another person" [Appendix I], making it too difficult to determine who is actually infected and who is healthy. Just as in the case of *Korematsu* the military authorities used fear and panic to allow their emotional reaction to the Japanese race to determine the risk to the public rather than facts or science, Petitioner has provided evidence from leading scientists and the public statements of the Administration's own infectious disease experts to show that there is no consensus in science which supports Defendant Northam's determination and that Defendant Northam's Executive Orders are based on the fear and panic-fed belief that healthy persons can carry and transmit the disease prior to the appearance of symptoms (Appendix E, paragraphs 14 through 18; Appendix H, paragraphs 11 to 13 and footnotes.). This case gives this Court the opportunity to depart from the precedent in *Korematsu* and to make it clear that just as quarantine restrictions of constitutional rights must be limited to the least restrictive means possible, restrictions imposed under emergency powers during a state of emergency cannot be justified to apply to all persons, the guilty and the innocent, just because it is easier for the Executive to deprive everyone of their rights.

20. Even if this Court fails to depart from *Korematsu* and supports the universal use of emergency powers to deprive all citizens of their rights based on determinations not supported by a consensus of science, the question arises as to how long can an Executive impose such questionable restrictions. Can an executive operating on emergency powers alone, outside of quarantine laws, deprive all citizens of their rights for as long as the Executive believes the unproven danger of pandemic endures?

21. The due process questions of this case do not end with the Executive Orders. If Executive Orders can restrict the rights of the citizens and deny them access to the Courts because of shutdown orders, does that effectively suspend the Constitution? This case raises the question as to whether the Federal Courts have a duty under the Constitution to ensure there is due process for the hearing of emergency requests for relief even during a state of emergency when the Executive's orders have led to the prohibition of in-person hearings. Do the District Courts have to ensure that there is at least one process for emergency requests to be heard if the Constitution is not truly suspended during the duration of a state of emergency? It is noteworthy that the Defendants' orders in Petitioner's case actually explicitly deprive Defendant Northam's political opponents of the right to assemble and to build popular support against Defendant Northam's orders. If the Executive does not provide any due process and the Courts are allowed to deny the citizens a hearing during the duration of the Executive Orders, the citizens will not even have an unencumbered avenue to effect change through the political process. If the Constitution can be suspended during a state of emergency by a single elected official without judicial review or the threat of change through the electoral process, Petitioner's case provides the most perfect case for this Court to determine when the emergency power of the Executive can abrogate the founding principles of our Republic.

## REASONS FOR GRANTING THE PETITION

22. Petitioner believes that there are four main reasons for the Court to grant his request. Anyone of these have a compelling public interest and substantial precedential value which calls for review by this Court. The circumvention of quarantine law during a public health emergency which denies all citizens due process is such a paramount precedent that will serve to disenfranchise many millions of Americans in the future if it is not dealt with now. Similarly, whether the precedent from *Korematsu* will continue to be the law of the land and justify the blanket confinement of millions of Americans who are innocent of any offense at the whim of an un-indictable Executive determination is another issue ripe for review in this case. The failure of the Courts to respond to Executive Orders without due process by denying a hearing to emergency requests for relief on the sole basis of the determination of the Executive is a critical issue of the proper role of the Courts during a state of emergency. Finally, the errors in law to emergency requests for preliminary relief since this Court's guidance in *Winter* are ripe for review by this Court.

### Circumvention of Quarantine Law

23. To the extent that Defendant Northam's EO-55 is a quarantine of individuals like Petitioner and orders all (who do not meet the exceptions for essential business) to home confinement, Defendant Northam has acted to circumvent quarantine protections and deny all Virginians due process. EO-55 provides no due process to individuals affected by the order and the Courts to-date have denied Petitioner any timely hearing for procedural due process during a quarantine, which is an error in law and violates Petitioner's rights under the Fifth and Fourteenth Amendments. ("The Constitution requires some kind of hearing before the State deprives a person of liberty or property.", *Zinerman v. Burch*, 494 U.S. 113, 127 (1990); see

*O'Connor v. Donaldson*, 422 U.S. 563 (1975) for discussion of due process for involuntary confinement for any reason.) Most states, including Virginia provide due process under statutes authorizing confinement due to isolation or quarantine. In Virginia, Va. Code § 32.1-48.010 provides for petition to Virginia Circuit Courts for redress of the abuse of quarantine powers:

“A. Any person or persons subject to an order of quarantine or a court-ordered extension of any such order pursuant to this article may file an appeal of the order of quarantine as such order applies to such person or persons in the circuit court for the city or county in which the subject or subjects of the order reside or are located or the circuit court for the jurisdiction or jurisdictions for any affected area.”

24. However in this case, Defendant Northam’s orders under EO-55 do not avail those citizens quarantined under the stay-at-home order any due process opportunity provided under Va. Code § 32.1-48.010, as the statute normally would for all proper quarantine actions. In fact, EO-55 does not provide any citizen due process to avoid unnecessary quarantine restrictions. Specifically, Va. Code § 44.146-17, which Defendant Northam’s Executive Order cites for his authority, makes no mention of the use of a state of emergency during a public health threat except for the following:

“A state of emergency may address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1.”

25. It is noteworthy that as of the time of this Petition, no such order has been issued by Defendants. If Defendant Northam purposely circumvented a declaration of a quarantine under Va. Code § 32.1-48.05 during a public health threat as the legislature intended, the Court should inquire whether this was for a corrupt purpose which has denied all citizens the due process provided by Virginia quarantine laws, as seems to be the case.

26. For many years, the States had unhindered power to quarantine: "They form a portion of that immense mass of legislation which embraces everything within the territory of a

State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description...." [*Gibbons v. Ogden*, 22 U.S. 1, 203 (1824)] However, since the later nineteenth century, this body of law has grown at the Federal level to limit the abuse of quarantine power by the States. With "an evil eye and an unequal hand...the denial of equal justice is still within the prohibitions of the constitution." [*Jew Ho v. Williamson*, 103 F.10 (C.C.N.D. Cal., 1900).] "Even [when] the governmental purpose [is] legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [*Shelton v. Tucker*, 364 U.S. 479, 488 (1960).] Does the state-wide, universal restrictions in Defendant Northam's order satisfy *Shelton* in any way? If Defendant Northam's justification is that all citizens are infected because healthy people can somehow transmit the virus, Petitioner has provided evidence that the consensus of science does not support this theory. (Appendix E, paragraphs 14 through 18; Appendix H, paragraphs 11 to 13 and footnotes.) The Court has a important role to ensure that the State's interest in protecting the lives of citizens is not used to justify the most extreme measures which deprive individual citizens of their fundamental Constitutional rights.

#### Abuse of Emergency Powers

27. In the infamous decision of *Korematsu v. United States*, the Supreme Court dealt with the denial of a U. S. citizen's rights to liberty and property under emergency orders of government authorities. As in this case, where every healthy person is assumed to be guilty of being a possible transmitter of COVID-19 and must give up their rights to liberty and property to protect the interests of the State, the Exclusion Order in *Koramatsu* was based on the belief that all Japanese-American citizens were assumed to be guilty of being a collaborator with the

Japanese empire and deprived these citizens their liberty and property under the guise of a State interest. The injustice of that decision is embodied in the following, which reminds the Petitioner of how Defendant Northam's orders is being applied to every person within the entire population, which makes it easy for Virginia to circumvent due process and avoid having to worry about segregating the sick from the healthy in today's environment:

“Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.” (*Korematsu v. United States*, 323 U.S. 214, 219 (1944))

28. The dissenting opinion of Justice Jackson provided an echo of the traditions of our Republic at the time when the war panic of World War II (not too unlike the virus panic of today) was depriving vast numbers of U. S. citizens their Constitutional rights to property and liberty unjustly:

“Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity, and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that, apart from the matter involved here, he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.” (Justice Jackson dissent, *Korematsu v. United States*, 323 U.S. 214, 243 (1944))

29. The *Korematsu* decision is a perfect example of a Court willing to sacrifice the fundamental rights of the Constitution for the expediency of a National Emergency. This infamous approach to the government's use of emergency powers is roundly considered bad law: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and to be clear has no place in law under the Constitution.” [*Trump v. Hawaii*, 585 U.S. \_\_\_\_ (2018), Record No. 17-965] Petitioner's Motion to Reconsider (paragraph b) draws the analogy

between the panic of war which allowed the Courts to rubber stamp the abuse of power by the authorities in *Korematsu* with the panic of the pandemic today, which so far has caused the District Court to abdicate its duty in limiting unprecedented State power and seemingly has deterred the Appellate Court from weighing in. Unlike *Korematsu*, we are seeing the emergency powers today under Defendant Northam deprive millions more citizens of their liberty than what the Exclusion Order in *Korematsu* ever did. Inaction by this Court will serve to perpetuate the bad precedent of *Korematsu* by allowing Defendant Northam's orders to stand, "where every healthy person is assumed to be guilty of being a possible transmitter of COVID-19 and must give up their rights to liberty and property to protect the interests of the State...." [Appendix G, page 4.] The opportunity for this Court to take Petitioner's case and clarify when Executives have authority under *Korematsu* to suspend the Constitution is of substantial precedential value when many states are currently depriving their citizens of their fundamental rights based on the theory that innocent healthy people are guilty of being infected.

#### Denial of Due Process in the Courts during the State of Emergency

30. The District Court's denial of Petitioner's request for emergency preliminary relief, including denial of a preliminary-injunction hearing due to the State of Emergency, extinguishes Tolle's opportunity for any timely due process for preliminary relief in light of protracted injury and the most unprecedented and draconian measures under emergency powers probably since the Civil War is an error in law. The Appellate Court's summary dismissal of Petitioner's request for emergency preliminary relief and preliminary-injunction hearing perpetuated the District Court's denial of Petitioner's right to a hearing under the Fifth Amendment. Due process is an essential safeguard established over the course of centuries used by society to obtain fair judgment. ("This Court is not alone in recognizing that the right to be

heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society” *Joint Anti-Fascist Refugees Committee v. McGrath*, 341 U.S. 123, 168 (1951).) Even when the government authority is acting to deprive a citizen of property or liberty rights through its executive power, due process calls for procedural protections. (“Such a hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his own arguments and evidence orally before the decisionmaker.” *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970); “It has been said so often by this Court and others as not to require citation of authority that due process is flexible, and calls for such procedural protections as the particular situation demands....Its flexibility is its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) Even if the scope or form of due process varies depending on the situation, it is clear that denial of fundamental property and liberty freedoms by the Defendants must include due process. By failing to offer Petitioner even a preliminary-injunction hearing due to the restrictions of the virus, the Courts are denying Petitioner the basic due process of preliminary relief for reasons which should be reviewed by this Court. The District Court’s fear of offering Petitioner any type of hearing seems to apply universally and makes this a compelling issue of such impact to the public that this Court should review it.

30. By denying Petitioner’s request for a stay or expedited hearing on the District Court’s injury to his due process in the Fourth Circuit, the Appellate Court has added to the injury to Petitioner’s Fifth and Fourteenth Amendment rights. This Court can restore the rule of law by ensuring that the lower Courts allow for due process under emergency circumstances



even if traditional hearings cannot be held. Due process is important enough during times of emergencies in order to ensure the Constitution is still enforced at these times. It is critical to our Republic that the Courts do not shut down like a non-essential business and that the District Courts and Appellate Courts find some way to use alternate means to afford hearings when in-person hearings are not possible.

Misapplication of Law under *Winter v. Natural Resource Def. Council*

32. Petitioner's pleadings (Appendix F, paragraphs 2 through 8) argued for emergency relief based on the Supreme Court's guidance for preliminary relief in *Winter v. Natural Res. Def. Council, Inc.*, 555 U. S. 7 (2008) (hereinafter, "*Winter*"), including: a) his complaint against the Defendants is likely to succeed on the merits; b) he will continue to suffer irreparable harm in the absence of preliminary relief; c) the balance of equities tips in his favor; and d) an injunction is in the public interest. Petitioner believes that review by this Court is warranted because the District Court's application of the guidance from *Winter* was fatally flawed. If the Court considers how seriously defective the District Court's application of *Winter* was, it should be clear that more action by this Court is needed in order to prevent the lower courts from distorting the precedent established in *Winter*.

33. Petitioner believes that the arguments in his pleadings involving the first two criteria in *Winter* (sometimes called the gateway criteria) are persuasive. The record shows that the District Court did not contest Petitioner's showing of satisfaction of the gateway criteria, even acknowledging in its ruling that the last two criteria are crux of the issue: "Even if plaintiff were likely to succeed on the merits and to suffer irreparable harm in the absence of preliminary relief, his motion for injunctive relief fails because he has not established that the balance of equities tip in his favor or...the public interest." (Appendix B, p. 2.) Therefore, Petitioner believes

that the issues on review in this Petition and the granting of Appellant's request for immediate relief turns on how the District Court's analysis satisfied the equitable criteria in *Winter*. Petitioner's pleadings argued that the District Court did not give serious consideration to the balancing of equities and the public interest in this case. Nor did the Court address all of Petitioner's arguments which tried to do this. After a review of how the District Court analyzed the equitable criteria under *Winter*, it should be clear that the lower Court's application of *Winter* is fatally flawed according to the guidance of this Court.

34. When considering cases under *Winter*, determining whether the justification used for the government's action is critical to completing the full analysis. No court of equity would accept at face value the justifications for a Respondent's actions, especially when a Plaintiff who is claiming injury is providing evidence which calls into question those reasons and this should be true in analysis under *Winter* too. In this case, the District Court did not make any consideration of the reason for Defendant Northam's actions, even when Petitioner was providing evidence which indicted the government's justification. Petitioner has argued that the consensus of science does not support Defendant Northam's theory that healthy individuals, or people without symptoms, can transmit the virus. Petitioner's complaint and his pleadings in the lower Courts have provided evidence rebutting Defendant Northam's theory about the danger of healthy people, showing that the consensus of science does not prove that persons without symptoms can transmit the virus (Appendix E, paragraphs 14 through 18; Appendix H, paragraphs 11 to 13 and footnotes). Petitioner provided evidence from statements by leading epidemiologists and doctors, including the Trump Administration's leading infectious disease authorities (*ibid*). Furthermore, Petitioner argues that Defendant Northam's own actions show that he does not believe that healthy people are a danger for spread of the disease because the Defendant's executive orders do not restrict dozens of persons working within the same building

as part of what Defendant Northam calls "essential" businesses (Appendix H, para. 13).

*Balancing of Equities under Winter*

35. The District Court is wrong in its application of *Winter* because the consideration of equities of both parties and the public interest requires a balancing of the concerns and needs of all parties. This is shown in *Winters*: "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' [*Winters*, Section B, quoting *Amoco Production Co.*, 480 U. S., at 542.] For Constitutional injuries, this "balancing" must consider if the un-enjoined actions of the government are based on the minimum injury to citizen rights as the situation allows. Blind acceptance of the executive's un-amended action as the only way to achieve the needs of the government and interest of the public is not a proper application of the balancing required by the law in *Winters*.

36. The District Court's analysis erred because it did not make any attempt to determine what government action could achieve the same goals with lesser impact to the Constitutional rights of Virginia's citizens. In Appellant's Motion for Reconsideration, Appellant even offered the District Court an alternative way that the Executive Order could be modified in order to accomplish the same things with less impact to citizen rights, similar to what is being done in other states:

"Plaintiff respectfully requests the Court to grant a TRO or Preliminary Injunction which at least stays the section stating: 'Violation of paragraphs 2, 3, 4 and 5 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17 of the Code of Virginia'....this action would make Defendant Northam's Executive Orders commensurate with what many other States are implementing under their stay-at-home orders...and would represent a reasonable balance between the urgent need for preliminary relief and the needs of public health." (Appendix G, p. 9)

37. *Winters* clearly shows that the balancing done during the tipping analysis should

include an effort by the Court to understand how the Defendant's actions can be mitigated in the interest of minimizing injury. In *Winters*, the Court only reached its conclusion in favor of the government after considering how the government had modified their actions to achieve less injury: Evidence "presented to the Court reflects that the Navy has employed mitigation measures in the past, without sacrificing training objectives." [*Winters*, Section C.4, quoting 527 F. Supp. 2d, at 1238.] It is noteworthy that even though Petitioner's pleadings have discussed how his requests for relief can be attenuated, neither Defendants nor the District Court have yet considered any ways to mitigate the impact of Defendant Northam's orders. The District Court ruled out any change in the Defendants' actions out-of-hand as if any mitigation would kill people, but this is neither supported by the consensus of science nor in keeping with the proper balancing under *Winters*.<sup>1</sup>

38. The tipping analysis for *Winter* properly considers the injuries to the citizens, including the injury to due process. Petitioner's pleadings clearly raises the unprecedented impacts to the First, Fourth and Fourteenth Amendment rights of the citizens of Virginia (Appendix E, pages 7-21) and due process rights for those affected (Appendix G, para. b and c). Furthermore, the Fourteenth Amendment protections for equal treatment have been entrenched in the body of law related to quarantines. Allowing quarantine decisions to be made based on subjective biases about a disease is contrary to law. "The evidence here is clear that this is made to operate against the Chinese population only, and the reason given for it is that the Chinese may communicate the disease from one to the other. That explanation, in the judgment of the court, is not sufficient." [*Jew Ho*] The hasty assumption by the Commonwealth of Virginia that all healthy people can be infected, without proof, is an example of a bias not supported by a

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1 *Winters* makes it clear that the Court should consider changes to the Defendant's actions, even if there is no firm evidence about the probable outcome ("But this is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct." [*Winters*, Section C.2.]

consensus in science, but is influencing the State's action to abuse its quarantine power.

Petitioner notes a violation of the Fourteenth Amendment here:

"Defendant Northam is unfairly treating healthy people the same as sick people and using his quarantine and emergency powers against all in an unprecedented and extreme way. This is akin to using the criminal powers of the Commonwealth's government against innocent people." (Appendix E, para. 64.)

39. By not applying the balancing test properly under *Winter*, the District Court did not complete a full analysis as required by the law. In the Third Circuit, the Appeals Court has found District Court analysis fatally defective when balancing is not done as required by this Court. (see *Reilly v. City of Harrisburg*, No. 16-3722, p. 5 (3d Cir. 2017).) This Court has a compelling interest to ensure that the balancing in *Winter* is neither summarily dismissed by blind acceptance of the validity of the government's action nor distorted into a practice that automatically gives undue weight to the statements of the government. There is also substantial precedential value in clarifying the proper balancing of interests under *Winter*. For these reasons, the errors arising from the District Court's misapplication of the balancing required by *Winter* give reason for this Court to grant Petitioner's request for review by this Court.

#### *Consideration of the Public Interest*

40. The *Winters* criteria also calls for consideration of the public interest. The public interest considerations in this case do not only involve the interest in keeping people at home. The very definition of essential business which is found in Defendant Northam's orders also shows that there is a fundamental public interest in many healthy people not staying at home [Appendix H, para. 20]. By requiring some businesses to remain open during the State of Emergency, the Defendants are acknowledging that it is in the public interest for healthy people to have the freedom to travel and to work in order to conduct the essential business of the public.

41. Petitioner's pleadings include the example of the abuse of government's emergency powers under the Supreme Court's decision in *Korematsu v. United States*, 323 U.S. 214 (Appendix G, para. c).<sup>2</sup> As in this case, the Court in *Korematsu* relied on the determinations of the authorities that it was easier to strip a vast number of innocent Americans their rights under the Constitution because it was difficult to find those actually guilty of disloyalty, *supra*. Petitioner believes that this Court will perpetuate the bad precedent of *Korematsu* if it does not grant Petitioner a review in this case and decides to allow Defendant Northam's orders to stand. The public interest in ensuring that emergency powers are limited when fear and panic are calling for excess should be considered as part of the *Winters* analysis.

42. As noted in Petitioner's pleadings (Appendix E, para. 43 and 45; Appendix F, para. 6), Defendant Northam's orders are also perfectly designed to suppress or disenfranchise any political opposition to his actions. Defendant Northam's orders explicitly make it illegal for any political opponent to rally opposition against the government's action because it directly attacks the fundamental right of Americans to assemble for political dissent in order to have their voices heard and forbids any more than 10 people in one place.

43. Under these circumstances, inaction by the Courts effectively colludes with the Executive to deny citizens all avenues of redress of an abuse of power: administrative, judicial and electoral avenues have been eliminated by the actions of a single man. Under *Winter*, it is in the public interest that government actions should provide due process and some avenue of redress.

44. In the case of quarantine restrictions, Petitioner has also cited law which requires citizens under a quarantine be given rights and due process and that the restrictions related to

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<sup>2</sup> The District Court mentions Appellant's reference to *Korematsu* without specifically rebutting it. [Appendix B, page 2] Indeed, the unquestioning belief that the District Court expresses in the inerrancy of the Governor [*ibid.*, pages 2-3] sounds very reminiscent of the reliance that the Supreme Court in *Korematsu* put into the inerrancy of the authorities then.

quarantine to be as limited as possible, *supra*. Blanket executive orders like Defendant Northam's orders do not protect the rights of the innocent and are clearly not as limited as possible. These excesses are not in the public interest, as reflected under current quarantine law.

45. All of these reasons raise interests of the public which should be properly considered under analysis of the *Winter* for the public interest. By failing to consider any of these reasons for the public interest, the District Court erred in law by not properly applying the guidance in *Winter*.

#### *Life and Death Considerations*

46. The analysis for *Winter* in the District Court's Order seems to rely almost entirely on the fact that the public health mission of the Commonwealth involves life and death: "...the stakes...are life-or-death" [Appendix B, p. 3].<sup>3</sup> However, the large body of quarantine law which can be applied to this case also clearly involves the concern for life and death of the citizens. Petitioner has shown that this body of law calls for limitations and restrictions on the abuse of the state's power to quarantine, even when life and death is concerned, *supra*. By summarily accepting the Defendants' justifications as the overriding public interest without any consideration of the other public interests shown above, the District Court has erred in its application of *Winter*. Consideration of the public interest under *Winter* should not be a cursory analysis based on one factor. By failing to apply the "serious consideration to the public interest factor" required by this court [*Winter*, Section C.1, quoting the Ninth Circuit Court of Appeals at 502 F. 3d], the District Court's application of *Winter* was incomplete and calls for further review.

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<sup>3</sup> The District Court's Order also makes the erroneous statement that the Coronavirus emergency is "unprecedented". Petitioner's pleadings provide ample evidence that any basic understanding of history shows that the current pandemic is not the worst contagion faced by this nation, failing to compare to the worst outbreak by far, and not even much worse than annual influenza outbreaks [Appendix H, para. 29]. Even if this Court believes that the *Winter* analysis is complete, basing it on facts which are clearly wrong should raise concern and warrant further review of this case.

*Misapplication of Winter Analysis is Fatal*

47. Petitioner's appeal raises errors in law and in fact in how the District Court applied the criteria under *Winter*. There is no evidence that the Petitioner's satisfaction of the first two criteria of *Winter* (the gateway criteria) is in dispute. However, the District Court's analysis of the equitable criteria under *Winter* was so cursory or flawed that it calls into question whether the full analysis of *Winter* was actually completed by the lower court. If this Court relies on an Abuse of Discretion standard to review this case, the Court should consider the discretion which was exercised by the lower court in light of the incomplete analysis and flaws in the District Court's ruling. In *Winter*, this Court noted that Appellate review is proper and consideration of a lower Court's discretion alone is not appropriate when the lower Court's analysis for *Winter* is cursory: "The subsequent Ninth Circuit Court panel framed its opinion as reviewing the District Court's exercise of discretion...but that discretion was barely exercised here." [*Winter*, Section C.1] For these reasons, Petitioner believes that the serious flaws shown above in the District Court's analysis of the balancing of equities and public interest in this case should warrant review by this Court and granting of Petitioner's request for Writ of Certiorari even if an Abuse of Discretion standard is employed because the failure of the lower court to apply *Winter* properly in this case is an abuse of discretion and there is a substantial precedential value for this Court to address this abuse of discretion.

48. Petitioner believes that the misapplication of *Winter* in a lower court's analysis is more properly an error in law. Since this Court's guidance from *Winter* calls for the proper application of all four criteria in order to ensure an individual's constitutional rights are protected under the law in the face of government restrictions, failure of the District Court to properly apply all of the criteria in *Winter* in this case is an error in law. If this Court accepts Petitioner's



theory that the standard of review in this case is Legal Error, Petitioner has shown multiple failures to apply the law under *Winter* during the District Court's analysis. This includes the errors in applying the balancing of equities to properly determine the impact to the rights of both parties and failure to determine the least restrictive form of the government action as part of the balancing test, as shown above. It also includes the failure of the Court to perform a serious consideration of the public interests and failure to properly consider all of the public interest issues raised by Petitioner. Based on these errors in law, there is a compelling legal interest for this Court to review this case. There is also substantial precedential value in the Court correcting the errors in law undercutting the *Winter* analysis. For these reasons, this Court should grant Petitioner's request for Writ of Certiorari because of the errors in law.

## CONCLUSION

49. The present Petition puts issues which are compelling in light of the public interest throughout the nation during the Coronavirus pandemic and have substantial precedential value concerning emergency powers, due process, and the proper application of this Court's guidance in *Winter* to decide on requests for emergency preliminary relief. This Court should grant Petitioner a Writ of Certiorari for one or more of the following reasons explained in the foregoing:

a) The circumvention of quarantine law during a public health emergency which denies all citizens due process is such a paramount precedent that will serve to disenfranchise many millions of Americans in the future if it is not dealt with now;

b) The precedent from *Korematsu* will continue to be the law of the land and justify the blanket confinement of millions of Americans who are innocent of no crime at the whim of an un-indictable Executive determination if no action is taken in this case;

c) The failure of the Courts to provide access to preliminary relief and emergency hearings to injured citizens when an Executive's orders subject them to confinement without due process;

d) The errors in the application of this Court's guidance in *Winter* by Courts in the Fourth Circuit and denial of access to emergency relief call for review by this Court.

50. Petitioner's believes that his case is more compelling and deals with substantial precedential issues unlike any other case involving Stay at Home orders during the pandemic which are currently before the Appellate courts:

a) *Binford v. Sununu*: A decision in State Superior Court used a two-pronged test from *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) in lieu of the *Winter* criteria;<sup>4</sup>

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<sup>4</sup> Petitioner's complaint should pass *Avino* test, claiming both bad faith (by a Governor circumventing established quarantine law to inflict his will on the citizenry) and insufficiency of the factual basis in the

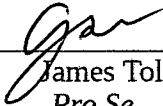
b) *Friends of DeVito v. Wolf*: Pennsylvania Supreme Court challenge of state Executive Order restricting business and political offices; unlike Appellant's case, the state order has no criminal penalties and Court found that the state afforded due process;

c) *Nigen v. New York*: New York Executive Orders 202.8 and 202.10, which do not require criminal penalties as in Appellant's case; order only denied ex-parte TRO without *Winter* and did not deny Plaintiff due process by granting a preliminary-injunction hearing.

51. None of these other cases present the compelling issues of the abuse of emergency powers, denial of due process and misapplication of this Court's *Winter* guidance as are found in this case. For these reasons and the foregoing reasons found in the specifics of the Petitioner's case, as described above, this Court should find reason to grant Petitioner his request for a Writ of Certiorari. Petitioner respectfully requests that this Court grant a Writ of Certiorari to hear Petitioner's case.

Dated: May 1, 2020

Respectfully submitted,

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consensus of science for the excessive restrictions in Defendant Northam's orders.