

No. 19-1283

**IN THE
SUPREME COURT OF THE UNITED STATES**

JAMES TOLLE,

Petitioner,

vs.

GOVERNOR RALPH NORTHAM
AND THE COMMONWEALTH OF VIRGINIA,

Respondents.

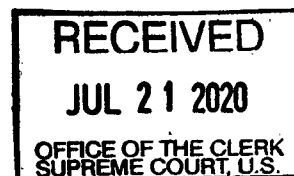
*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

Petitioner's Supplemental Brief

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Petitioner's Supplemental Brief

Petitioner's Supplemental Brief is submitted pursuant to Rule 15.8. Petitioner has been seeking expedited review of his Petition since its initial filing due to the serious and ongoing injury of Petitioner's constitutional rights by Respondent which are ongoing and continuing to evolve as Respondent Northam changes his Executive Orders at his whim. The intent of the original Petition in this case was to seek emergency relief from the Court to correct the error in the lower Courts' refusal to provide emergency relief to Petitioner or for the Court to stay Respondent Northam's Executive Orders which are continuing, even now, to deny Petitioner's fundamental Constitutional rights. The Court has recently granted an extension until July 27, 2020, for Respondents to address Petitioner's complaints, delaying the Court's hearing of Petitioner's request for at least one more month, such approval by the Court being done in an expedited manner for the benefit of the Respondents without even considering Petitioner's opposition to such extension of the ongoing injuries. Petitioner has since submitted an application for emergency stay under Rule 23 and his most recent letter request for expediting the briefing of his case, but the Clerk's office refused to docket the substance of either filing, seriously prejudicing Petitioner's access to the Court and denying Petitioner timely due process during the present session of the Court. Failure of the Clerk to docket the present Supplemental Brief will further prejudice Petitioner's case for emergency relief from injury by Respondents and serve to unfairly infringe his constitutional right to due process under the Fifth Amendment through a Clerk's process which seems to favor government Respondents in positions of power over the access and opportunity for expedited relief provided to *pro se* Petitioners.

New Cases and Other Intervening Matter

1. It is noteworthy that new cases and other intervening matter have occurred since the original Petition was filed on May 1, 2020, including the following.

a) The entry of this Court's decision in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), which is a new case which calls for the following supplement to Petitioner's brief based on the new case.

i. To the extent that the Court relies on the new case *South Bay United*, the original Petition involves violations of the Fourth and Fourteenth Amendments in addition to violations of the First Amendment. Even for the First Amendment violations, Petitioner's case also involves violations of the Petitioner's right to assemble and protest as well as the right to freely practice his religion.

ii. Petitioner does recognize that the following finding in the new case *South Bay United* has broader applications beyond the First Amendment practice of religion:

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect'....Where those broad limits are not exceeded, they should not be subject to second-guessing....", *South Bay United*, Chief Justice Roberts concurring, quoting *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Applying this principle from the new case in the context of the First and Fourteenth Amendments in Petitioner's case and others is problematic. Reliance on political accountability is only possible when the executive power being used by those who are supposed to be accountable is not used in a way which corruptly influences the political process. In Virginia and other states, the extreme limitations on public gatherings have created an effective way to shut down political opposition against the officials who are imposing such orders (see Petition, ¶ 42). Those opposing the orders cannot rely on the electoral safeguards envisioned by our founders because the right to assemble has been purposely denied to citizens and the media has almost universally

censored the opinions of those who have questioned the authorities. Where the limits to executive power may effectively be realized through the political process in the case of a vaccination program as in *Jacobson*, Executive Orders which intentionally and unfairly strike at the fundamental right of the citizens to exercise the Constitutional freedoms which are required for political accountability are another case altogether.

iii. Furthermore, this principle from then new case *South Bay United* does not apply directly to the specific facts in Petitioner's case. The original Petition includes arguments showing that Respondent Northam's orders do not fall within the "broad limits" mentioned by Chief Justice Roberts, including: I) Respondent Northam has purposely circumvented the intent of the legislature by failing to invoke quarantine orders under statutes which would provide due process to affected healthy persons and by not providing any other due process; II) by enforcing an order on all citizens of Virginia without due process, Respondent Northam has abused his emergency powers just as the Executive authorities exceeded their emergency powers without due process during the Exclusion Order reviewed in *Korematsu v. United States*; III) Respondent Northam's orders exceed the limits of state power to interfere with the fundamental right to be secure in person, houses, papers and effects under *Jones v. United States* and *Camara v. Municipal Court*. It is hard to believe that the Court would find orders which are intended to affect every person alive without due process, have no expiration date, and which have not been enforced equally against all persons are within the "broad limits" of the new case *South Bay United*. The Court will be fundamentally re-defining the breadth of Executive power if it finds all of Respondents' actions to be within those limits in this new case.

iv. The application of *Jacobson v. Massachusetts* as in the new case *South Bay United* is also inapposite to Petitioner's case for several other reasons. *Jacobson* involved

the police powers of the state established by the legislature of Massachusetts. If this Court does not see a difference between the power of the state established by law through the elected members of a state's legislature and the limited power of the Executive of a state operating within the boundaries of those laws, the Court will be fundamentally altering our Republic by granting the power to legislate to the Executive at any time. Furthermore, Petitioner's case is actually presenting facts showing that the Respondents have operated contrary to what occurred in *Jacobson's* case cited by the new case *South Bay United*. The original Petition (see "Circumvention of Quarantine Law" at ¶¶ 23-26) shows how Respondent Northam has imposed a quarantine without actually invoking a quarantine order as intended by the legislature. The failure of Respondent Northam to invoke a quarantine order with due process procedures as required by the legislature or to provide other means for due process under his quarantine restrictions are shown to be clearly contrary to the quarantine laws of Virginia. Whereas in *Jacobson* cited in the new case *South Bay United*, the police powers of the state carrying out the clear intentions of the legislature were found to be proper, Respondent Northam's actions in Petitioner's case are actually contrary to the intentions of the legislature and should not be provided the same legitimacy under the color of *Jacobson*. Additionally, *Jacobson* did not eliminate the shield to the police powers of the state within the security of one's person, houses, papers and effects. Even if the Court finds that the new case *South Bay United* and *Jacobson* allow Respondent Northam's orders under the First and Fourteenth Amendments, *Jacobson* did not involve protections under the Fourth Amendment and consideration of Petitioner's request

for limits to the police power of the state under the Fourth Amendment should not be based on *Jacobson* without re-writing that opinion.

v. Even the Respondents' restrictions on religious services is not directly related to the findings in the new case *South Bay United*. The Chief Justice's concurring opinion in the new case *South Bay United* gives the following argument for finding the California Order to be consistent with the Free Exercise Clause:

“...the Order exempts or treats more leniently only dissimilar activities...in which people neither congregate in large groups no remain in close proximity for extended periods.”

This citation shows that the new case *South Bay United* decision primarily considered the limitations in the size of gatherings under the California Order. However, Respondent Northam's orders since the original Petition have not only limited the size of services, but they have also over time established an unprecedented interference in how religious services should be conducted, including what to wear over religious vestments, prohibitions affecting the distribution of Sacraments, and prohibition which prevents the distribution of Communion.¹ It is noteworthy that the new facts since the original Petition show that many of these restrictions were enforced by criminal penalty and some were not required for the “dissimilar activities”.

¹ New intervening matter from the Executive Order Second Amended Order Number Sixty-One (2020) dated May 28, 2020, required “Persons attending religious services must strongly consider wearing face coverings over their nose and mouth at all times” (§ B.2.a.iv) and “No items can be passed to or between attendees, who are not family members” (§ B.2.a.v). This latter requirement prohibited Ministers from distributing Sacraments. The current Executive Order Number Sixty-Seven (2020) continues to prohibit Holy Communion by requiring under criminal penalties: “Any items used to distribute food or beverages must be disposable, used only once and discarded.” (§ B.1.c). This latter requirement is not levied against restaurant businesses which distribute food.

b) Other new intervening matter since the original Petition is Respondent Northam's new Executive Order, which has replaced his original Executive Order that was the subject of Petitioner's original complaint, such latest Executive Order of Respondent Northam effective July 1, 2020, Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven (hereinafter, "EO-67"), continuing to enforce an overreach of the Governor's executive powers which are still denying Petitioner's fundamental Constitutional rights and even adding more restrictions to Petitioner's freedoms beyond the previous orders for the following reasons:

i. Respondent Northam's new orders violate the First and Fourteenth Amendments by continuing to enforce an illegal quarantine without invoking an order of quarantine as required by the Virginia legislature under Va. Code § 44.146-17 and § 32.1-48.05 and restrict the free assembly of citizens with unwarranted restrictions on the gathering of healthy individuals. These restrictions on the free assembly of American citizens have been shown to be unwarranted because of recent guidance from medical authorities which have supported Petitioner's arguments that the consensus of science does not warrant restrictions on healthy persons. Furthermore, these restrictions have been shown to be unwarranted and also underscored the unequal treatment of citizens in violation of the Fourteenth Amendment when Respondent Northam failed to enforce his orders on his political allies who were violating the restrictions on outdoor gatherings during the recent protests in Richmond, Virginia Beach and in Petitioner's own county of Prince William County.

ii. Respondent Northam's new orders continue to violate Petitioner's rights under the Fourth Amendment by perpetuating the Governor's improper extension of the State's authority to how persons exercise their constitutional rights on their private property which does not comply with this Court's restrictions on State police power on private property for law

enforcement (see *Jones v. United States* 357 U.S. 493 (1958); *United States v. Rabinowitz* 339 U.S. 56 (1950)) or when the legislature has determined that there is a direct and immediate threat to public safety (see *Camara v. Municipal Court*, 387 U.S. 523 (1967)).

iii. Respondent Northam's new orders continue to violate Petitioner's rights under the Fourth Amendment because this Court has restricted the police power of the State found in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where the interest of public health does not empower a violation of the rights of citizens on private property under the Fourth Amendment because: I) the facts in *Jacobson* involved State action against citizens outside of their private property and was based on the Fourteenth Amendment, not the Fourth Amendment; II) even in *Jacobson*, the Court found that "the mode or manner of exercising its [the State's] police power is wholly within the discretion of the State so long as...any right granted or secured thereby [the Constitution and Fourth Amendment] is not infringed" *Id.*, 11; III) the *Jacobson* Court was not dealing with Executive power as in this case, but with the State power enacted by the legislature, stating: "[i]t is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine", *Id.*, 11; IV) even if this Court finds the police power of the Executive for public health reasons supported by *Jacobson*, such powers are not proper when the Executive circumvents and/or purposely violates the requirements and intentions of the legislature for use of that power to enforce a quarantine during a public health emergency, as in Petitioner's case. For these reasons, Respondent Northam's orders against healthy persons for which there is no consensus of science or good reason to believe that they threaten other members of the public during a public health emergency still violate the Fourth Amendment.

iv. Respondent Northam's new orders are continuing to violate Petitioner's rights under the Fourteenth Amendment by subjecting healthy persons to restrictions under a quarantine

without due process and without invoking the quarantine laws, which would statutorily provide due process, as required by the Virginia legislature. Furthermore, Respondent Northam's current orders during the virus panic continue to enforce an improper use of emergency powers against innocent citizens without due process in violation of the Fourteenth Amendment, similar to how the Exclusion Orders in the *Korematsu v. United States* violated the Constitutional rights of innocent citizens without due process because of the panic of war.

v. Despite the fact that Respondent Northam's new orders allow religious services to begin, Respondent Northam's orders continue to infringe on Petitioner's First Amendment rights by adding restrictions on how religious services are practiced. Specifically, the restrictions in paragraph B.1.c are so invasive to the free practice of religion that Petitioner, who is a Catholic, cannot receive Holy Communion without violating these rules and being subject to criminal penalties.

c) Other new intervening matter since the original Petition is the fact that Respondent Northam's actions to issue several new Executive Orders since Petitioner's original filing have shown that Petitioner's case is not moot. Even if Respondent Northam's new orders are found to not injure Petitioner's constitutional rights, this new intervening matter based on the recent behavior of Respondents show that without action by this Court or the lower Courts to grant Petitioner's request for injunctive relief, Respondent Northam is unconstrained at any time to re-institute harsher restrictions which injure Petitioner's constitutional rights later.

d) Other new intervening matter since the original Petition is the recent actions by world health experts and other recent scientific information and data which demonstrates that Respondent Northam's extreme actions against healthy persons like Petitioner denying them due process and their Constitutional rights are not justified by the consensus of science concerning

how healthy persons without symptoms do not transmit the virus. New data since Petitioner's original filing have shown that it is true that more people have tragically died from COVID-19, but more information has also come out since then which supports Petitioner's argument that the consensus of science does not justify the extreme actions of Respondent Northam. On June 8, 2020, the World Health Organization's leading epidemiologist reported at a press briefing that asymptomatic transmission of COVID-19 is "very rare" based on the data to date. Subsequent comments by Dr. Van Kerkhove stated that there is no clear answer on whether COVID-19 is spread by asymptomatic persons.² Even though the large number of deaths reported to date due to COVID-19 in the United States is dramatic, the COVID-19 pandemic is still not as horrific as the 1918 pandemic which, as noted in Petitioner's filings, is estimated by the CDC to have killed 675,000 Americans. But even the data used to determine the scope of the COVID-19 is not supported by solid science. First, no one has adequately explained how the data reported for the United States is radically higher than all other countries.³ However, one possible reason is that in the United States, the methods for reporting deaths have been changed under Centers for Disease Control guidelines to report cause of death as COVID-19 without a definitive diagnosis and when a COVID-19 cause is only "suspected" or "presumed".⁴ Based on this, Petitioner believes that the new intervening matter shows that current official statistics being quoted in the media are probably inaccurate and likely inflated due to including conditions which are not confirmed to be actual COVID-19 cases.

2 See Time article at <https://www.time.com/5850256/who-asymptomatic-spread/>

3 As of June 16, 2020, Johns Hopkins University reports deaths for the United States 119,719, while deaths reported for other large countries are significantly lower, even when accounting for population differences: German (8,466 deaths), Canada (7,992 deaths), Japan (837 deaths), South Korea (260 deaths).

4 "How COVID-19 Deaths are Counted", S. Pappas, *Scientific American*, May 19, 2020

e) Other new intervening matter since the original Petition involves the recent protests and large gatherings related to the death of George Floyd at the beginning of June, 2020, in Richmond, Virginia Beach and Prince William County. This new intervening matter shows that the Respondents' failure to enforce their orders against public gatherings during the public protests related to the death of George Floyd was the correct response. If the Court is concerned with the liberal interpretation of the Constitution's protection of civil liberties and the right to protest, the Court should find that Respondents' failure to enforce criminal penalties against protesters based on this new intervening matter is cause for the Court to find in favor of Petitioner's arguments, which oppose Respondent Northam's criminal penalties against citizens practicing their fundamental right to gather and protest. Furthermore, this new intervening matter shows that Respondents' orders are designed to interfere with the right to protest on the one hand and are also applied selectively to different types of protests, such new intervening matter raising serious questions about the equal application of the law under the Fourteenth Amendment and also how the political accountability discussed in the new case of *South Bay United* can be relied upon in the face of such orders.

CONCLUSION

2. Petitioner respectfully requests that the Court grant Peitioner leave to submit the foregoing Petitioner's Supplemental Brief for the Court's consideration at the earliest time possible. Petitioner believes that the Court may admit and consider the substance of this


Supplemental Brief in the interests of justice since the circumstances of the case are continuing to evolve rapidly during the time of extension granted for Respondents' response which Petitioner had no opportunity to oppose and because of the need to avoid further delay of Petitioner's urgent requests for relief of ongoing injury. Such consideration will not prejudice Respondents since service on Respondents early in the extension period, well before the due date for their Response, allows Respondents sufficient time for notice and ample opportunity to respond before July 29, 2020.

3. The Petition before the Court has provided evidence of the serious injury to Petitioner's Constitutional rights by Respondents and the errors in the lower Courts which have denied Petitioner a preliminary injunction, stay or any mitigation of Respondents' actions through mis-application of the balancing test of *Winter v. Natural Resources Defense Council*, 555 U. S. 7 (2008) have perpetuated this injury. Petitioner respectfully requests that the Court expedite the hearing of his case after the July 27, 2020, deadline for Respondent action, including consideration of this Supplemental Brief and grant Petitioner emergency relief from Respondent Northam's orders. Should the Court not expedite the hearing of Petitioner's case after July 27, 2020, Petitioner respectfully requests that the Court grant a full or partial stay of Respondent Northam's orders while Petitioner's request for Writ of Certiorari is pending before the Court. A stay during consideration of Petitioner's case would serve the interests of justice by restoring the status quo and allowing healthy persons to exercise their constitutional freedoms. If the Court considers only a partial injunction or stay, Petitioner respectfully requests that the Court at least stays enforcement of the criminal penalties against Petitioner when exercising any of his rights under the First, Fourth, and Fourteenth Amendments while Petitioner's case is pending. Alternatively, if the Court leaves the questions raised by Petitioner unanswered but remands the case to the lower Courts for decision, Petitioner respectfully requests that the Court

still grant Petitioner a full or partial stay of Respondent Northam's orders during the time that the case will be considered by the lower Courts in order to mitigate the irreparable harm being done to Petitioner by Respondents currently and to restore the status quo, allowing Petitioner and other healthy citizens to be free to exercise their Constitutional rights again while the case is pending.

Dated: July 16, 2020

Respectfully submitted,

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