

No. 19-1283

IN THE SUPREME COURT OF THE UNITED
STATES

JAMES TOLLE, PETITIONER

v.

RALPH NORTHAM, GOVERNOR OF VIRGINIA, ET AL.

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

BRIEF IN OPPOSITION

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ARGUMENT

Petitioner seeks review of an unpublished, one-sentence order of the court of appeals (Pet. App. A1) denying his motion for an injunction pending his still-ongoing interlocutory appeal from a district court order denying petitioner's motion for a preliminary injunction (Pet. App. C1–C2) against an Executive Order that expired in full in June. That claim does not warrant this Court's review.

1. Petitioner does not allege—much less establish—that the court of appeals' unpublished order denying his request for an injunction pending appeal conflicts with “the decision of another United States court of appeals” or “state court of last resort.” Sup. Ct. R. 10(a) & (b). And petitioner's claim that the district court misapplied *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), in denying his motion for a preliminary injunction, see Pet. 14–24, is both a plea for factbound error correction and a matter for the Fourth Circuit in petitioner's still-ongoing appeal from that order.

2. Certiorari is also unwarranted because the Executive Order that petitioner challenges is no longer in effect and Virginia's current COVID-19 restrictions are substantially different than the ones set out in that order. As his filings repeatedly confirm, petitioner is challenging Executive Order 55, which was issued by the Governor of Virginia on March 30, 2020. See Pet. ii, 4, 8–9; Pet. App. C1 (describing petitioner as challenging “Executive Order 55”); *id.* at D1–D3

(reproducing Executive Order 55). But the text of that order shows that it expired in its entirety no later than June 10, see *id.* at D3, and many of its provisions—including the stay-at-home order—were abrogated before then.¹ Since July 1, 2020, all of Virginia has been in Phase Three of the Governor’s reopening plan, which does not include a stay-at-home order, permits in-person gatherings of up to 250 people, and permits in-person religious services of any size.² As a result, all of the restrictions that petitioner challenged in the underlying litigation have either been substantially modified (for example, the temporary restrictions on gatherings) or are no longer in effect at all (the stay-at-home order).

¹ See, e.g., Executive Order Number Sixty-One and Order of Public Health Emergency Three, *Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)* (issued May 8, 2020; effective May 15, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf).

² Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven, *Phase Three Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19)* (issued June 30, 2020; effective July 1, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

3. This Court's review would be inappropriate at this time because respondents had not yet been properly served at the time of either the district court's order denying the preliminary injunction or the court of appeals' order denying an injunction pending appeal. See Order of July 7, 2020 (ECF No. 35), *Tolle v. Governor Ralph Northam*, No. 1:20-cv-363 (LMB/MSN) (E.D. Va. July 7, 2020) (noting that "it is unlikely that service was proper"). For that reason, respondents did not participate in the preliminary injunction proceedings before the district court and likewise did not file anything in connection with petitioner's request to the court of appeals for an injunction pending appeal. Although respondents were eventually served on July 16, the lack of a properly served respondent during the proceedings from which petitioner seeks review further cuts against this Court's intervention at his point.

4. Review is unwarranted at this stage for the additional reason that proceedings in the court of appeals are still ongoing. See Case No. 20-1419 (4th Cir.). The court of appeals has yet to address petitioner's claims on the merits, much less issue any final decision or mandate. The interlocutory nature of the current petition for a writ of certiorari further weighs against granting review now.

5. Petitioner's claims are also barred by sovereign immunity. The only defendants identified in the caption are the Commonwealth of Virginia and Governor Ralph Northam. Petitioner identifies no law

abrogating the Commonwealth's sovereign immunity. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (holding that 42 U.S.C. § 1983 does not abrogate a State's sovereign immunity). Moreover, "a suit against a state official in his or her official capacity"—as Governor Northam is sued here—"is no different from a suit against the State itself," unless it falls within the exception recognized in *Ex Parte Young*, 209 U.S. 123 (1908). See *Will*, 494 U.S. at 71 & n.10. And the federal court of appeals whose jurisdiction includes Virginia has repeatedly found that actions against a State's Governor fail to satisfy the *Young* prerequisites. See, e.g., *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 332 (4th Cir. 2001) (so holding with respect to the Governor of Virginia).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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July 27, 2020