

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*

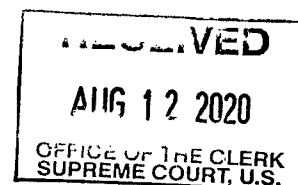
Petitioner's Reply Brief

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Petitioner's Reply Brief

This case arises from Petitioner's request for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit after appeal of an Interlocutory Order by the United States District Court for the Eastern District of Virginia in Petitioner's case *Tolle v. Governor Ralph Northam*, No. 1:20-cv-363 (hereinafter "*Tolle v. Northam*"). Petitioner respectfully requests the Court consider this present Reply Brief which is submitted under Rule 15.6 in response to Respondents' Brief in Opposition of July 27, 2020 (hereinafter "OPPOSITION"). The Respondents' OPPOSITION and arguments are fatally flawed and should not be relied upon when considering Petitioner's request for Writ of Certiorari for the following reasons.

Court Action is Proper under Rule 11

1. Respondents claim that Petitioner's request is improper under Rule 10. However, Petitioner's present request has been submitted under Rule 11 for Writ of Certiorari to request the Court to review Petitioner's issues from the Appeals Court before judgment in accordance with the Rule. This Court's consideration of Petitioner's request under Rule 11 is proper because Petitioner's case involves unprecedented suspension of fundamental Constitutional rights of vast numbers of Americans due to an abuse of Respondent Northam's emergency powers during a virus panic. The basic Constitutional rights which this nation was founded on have never been suspended for so many, for so long as at this time in our Republic. Petitioner's case is of such imperative public importance for these reasons "to justify deviation from normal appellate practice and to require immediate determination of this Court" as allowed under Rule 11. Respondents' arguments under Rule 10 and the pendency of Petitioner's appeal for preliminary relief under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) in the lower

Courts do not apply to actions under Rule 11 since Rule 11 allows this Court to review issues still pending in the Courts of Appeal when a case involves the urgent, existential issues and very operation of our Constitution in our land as in Petitioner's case.

Petitioner's Request is not Moot

2. Respondents argue that Certiorari is "unwarranted because the Executive Order that petitioner challenges is no longer in effect" [OPPOSITION, ¶ 2]. Although Respondent Northam's original Executive Order has been replaced by similar Executive Orders, Respondents' arguments should not be relied upon because they are incomplete and deceptive. Petitioner's pleadings have established that "Petitioner's case is not moot due to the ongoing actions by Respondents which cause continuing injury to Petitioner's rights" [Petitioner's Motion for Expedited Hearing, hereinafter "MOTION", ¶ 5] because "the latest Executive Orders of Respondent Northam continue 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" [MOTION, ¶ 1]. The Court should not allow an extra-constitutional Governor avoid Judicial scrutiny simply by instituting a shell game of superseding Executive Orders which implement similar Constitutional restrictions. The Respondents' arguments that Executive Order Fifty-Five has been replaced should not persuade the Court to dismiss Petitioner's request.

3. Petitioner's filings have also argued that "[e]ven if Respondent Northam's new orders are found to not injure Petitioner's constitutional rights...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" [Petitioner's Supplemental Brief,

¶ 1(c)]. It is noteworthy that, just as Petitioner's pleadings had predicted, Respondent Northam issued a new Executive Order with harsher restrictions on many Virginians within hours of Respondents' filing of its OPPOSITION.¹ At the same time that Respondents were submitting arguments to this Court stating "Since July 1...all of Virginia has been in Phase Three...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" [OPPOSITION, ¶ 2], Respondent Northam was planning to re-introduce much more severe restrictions on the Constitutional rights of half of Virginia. It is not likely that the delay of Respondent Northam's orders until the day after Respondents' OPPOSITION was a coincidence.

4. Petitioner believes that the timing was designed by Respondents to allow Respondents to make the opportunistic arguments before this Court which claim "all of the restrictions that petitioner challenged...have either been substantially modified ...or are no longer in effect...." [*Id.*, ¶ 2]. But Respondents' arguments are deceptive in light of the fact that Respondent Northam was planning to re-institute harsher restrictions on many Virginians at the same time that his Counsel was arguing to this Court that all of the restrictions have eased. With this track record, the Court should not rely on Respondents' arguments to dismiss Petitioner's requests as moot.

Arguments Concerning Service of Respondents are in Error

5. Respondents' claim that Certiorari should be denied because they "had not yet been properly served" at the time of the lower court decisions [*Id.*, ¶ 3]. This claim is an error in

1 Executive Order Sixty-Eight (2020) signed July 28, 2020, taking effect on July 31, 2020, increased restrictions on citizens' Constitutional rights to assemble and to be secure in their homes and on private property, applicable to the "Eastern Region" of Virginia. Specifically, more harsher restrictions included: "All public and private in-person gatherings of more than 50 individuals are prohibited." [¶ 2].

fact and in law. It is an error in fact because when Respondents were served in April at the height of Respondent Northam's lockdown, Respondent Northam ordered that his office be closed to the public, making traditional process service much more difficult. The District Court summarily dismissed Petitioner's request for service by United States Marshals, which Petitioner requested due to the extraordinary conditions of Respondent Northam's Executive Order [District Court Order, ECF No. 5, *Tolle v. Northam*]. Petitioner's pleadings detail his actions to serve process after this:

"[Petitioner] engaged Process Server Kenneth Condrey to serve process on Defendants at Governor Northam's place of business located at 1111 E. Broad Street, Richmond, Virginia. Prior to serving Defendants, Plaintiff contacted Defendant Northam's staff in the Governor's Office....On April 8, 2020, Defendant Northam's representative in the Governor's Office, Ms. Taylor O'Sullivan, responded...stating: 'The courier can leave it with the guard and we can take it from there'....On April 9, 2020, Mr. Condrey served a copy of said Complaint and Summons in a Civil Action upon Security Officer Kathy Jackson, at Governor Northam's place of business located at 1111 E. Broad Street, Richmond, Virginia pursuant to the instructions of Defendant Northam's agent O'Sullivan." [Plaintiff's Response, ECF No. 34, *Tolle v. Northam*, ¶¶ 4-5; Condrey Affidavit, ECF Nos. 16-17].

If Respondent Northam had problems receiving service of Petitioner's case, it was wholly due to the obstacles that Respondent Northam put in place which complicated service by any citizen opposing his extreme orders and through the fault of his own staff who did not deliver the process to him as they had promised. This Court should not allow a Governor to escape judicial review when their own actions helped deny their citizens due process and served to obstruct the administration of justice.

6. But Respondents' arguments are also an error in law. Petitioner's present request of this Court arises upon an Interlocutory Order of the District Court concerning his motion for a Temporary Restraining Order under Fed. R. Civ. P. 65 [Plaintiff's Motion, *Tolle v. Northam*, ECF Nos. 2-3, p. 1] which "argues that Defendant Northam's actions are actually causing irreparable harm which increases for every day" under Respondent Northam's orders [*Id.*, ¶ 6]. This Court

has made it clear that *Ex Parte* Orders under Rule 65 are appropriate without notice (*Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 439 (1974), “*Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, cf. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.”) Furthermore, actions by Respondents’ own orders and the District Court’s denial of Petitioner’s request for service by U. S. Marshals made service of process extremely difficult, but Petitioner still attempted to notify Respondents of his civil action by proper service. The Court has said “[t]here is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration” under such circumstances (*Carroll* at 180). On appeal of such Interlocutory Orders under Rule 65, it is preferred if notice can be provided to the opposing party if time permits, but it makes no sense for the Court to make notice of an appeal a bar to expedited hearing by this Court at this stage when no notice was permitted under the law in the lower Courts during the extraordinary circumstances which existed at the time.

7. Additionally, Respondents’ objections of having no notice of Petitioner’s appeal in the lower Court are moot because even if original service of Respondents was precluded by Respondents’ own actions (or for any other reason) in April, Respondents have been fully informed of Petitioner’s actions to appeal the Interlocutory Order since at least Respondents’ filing of their Waiver of Right of Respondents in this Court on May 14, 2020. It is noteworthy that even after acknowledging this notice of Petitioner’s actions, Respondents still chose not to file any pleading until ordered to by this Court on May 27, 2020, and ordered to respond in the District Court [District Court Order, ECF No. 29, *Tolle v. Northam*]. Petitioner’s filings have alleged that Respondent Northam’s Executive Orders were designed to deprive opponents of his

orders the ability to use the political process to effect change [Petition, ¶ 42] and that the impact of Respondents' orders on the Courts have effectively denied "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" [*Id.*, ¶ 43]. In light of this, Respondents are now arguing that impacts of Respondent Northam's orders on service of process in Petitioner's case should also preclude access to this Court. The Court should not aid in any effort of the Respondents to deny citizens who are opposing Respondent Northam's orders due process and access to the Courts, especially when it is based on allegations of injuries to Respondents which are likely due to their own fault.

Sovereign Immunity Argument is in Error

8. Respondents also argue that Certiorari is unwarranted because of Sovereign Immunity. These arguments are fatally flawed in regards to Respondent Northam. The underlying cause of action in the present Petition is a complaint under 42 U.S.C. § 1983 for injury caused to Petitioner "and other United States citizens due to violation of their civil rights and rights of American citizens guaranteed by the First, Fourth and Fourteenth Amendments of the United States Constitution" [Petitioner's Complaint, ECF No. 1, *Tolle v. Northam*, ¶ 1]. Furthermore, Petitioner's Complaint is alleging violations by Respondent Northam "acting in his official capacity and not acting as a private person" [*Id.*, ¶ 6], where Petitioner is seeking "Permanent Injunctive relief which prevents the execution of the provisions of Defendants' orders..." [*Id.*, p. 21, ¶. B]. It is settled law since *Ex Parte Young*, 209 U.S. 123 (1908), that "[i]n an injunctive...action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants. See *Pennhurst State School & Hospital v. Halderman*, 465 U. S. 89 (1984); see also *Ex parte Young, supra.*" (*Kentucky v. Graham*, 473 U.S. 159 (1985), n. 18). Even footnote 10 of the opinion cited by Respondents in *Will v. Michigan Dept. of State*

Police, 491 U.S. 58 (1989), affirms that Sovereign Immunity does not bar Petitioner's request after *Ex Parte Young*, stating: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' *Kentucky v. Graham*, 473 U.S. at 473 U. S. 167, n. 14; *Ex parte Young*, 209 U. S. 123, 209 U. S. 159-160 (1908)."

9. Furthermore, Respondents attack the long precedent of application of *Ex Parte Young* to Petitioner's case by citing the Fourth Circuit: "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)" [OPPOSITION, ¶ 5]. To the extent that Respondents' reference to *Waste Mgmt. Holdings* is based on the theory that this precedent precludes action for prospective injunctive relief against a State official, Respondents are in error because *Waste Mgmt. Holdings* clearly affirms the application of *Ex Parte Young* in cases like Petitioners, stating:

"The theory of *Ex parte Young* is that because an unconstitutional statute is void, it cannot cloak an official in the state's sovereign immunity. Although the reasoning of *Ex parte Young* has never been extended to claims for retrospective relief, federal courts may grant prospective injunctive relief against state officials to prevent ongoing violations of federal law." (*Waste Mgmt. Holdings*, 329-330, quoting *CSX Transp. Inc. v. Board of Public Works*, 138 F.3d 537, 540 (4th Cir. 1998))

10. For these reasons, Respondents' attempts to persuade the Court that Petitioner's Complaint seeking prospective injunctive relief against Respondent Northam's actions in his official capacity as Governor should not fall under "*Young* prerequisites" should be viewed as specious and be rejected. To the extent that this Court may be persuaded that Petitioner's action against the Commonwealth of Virginia is not warranted after Respondents' arguments, the Court should not bar review of Petitioner's action against Respondent Northam and should still grant Petitioner's request for Writ of Certiorari based on Respondent Northam only.

CONCLUSION


11. For the foregoing reasons, Petitioner urges the Court to reject all of Respondents' arguments against Petitioner's request for Writ of Certiorari. Petitioner believes that the errors in fact and law comprising Respondents' OPPOSITION should convince the Court that Respondents' arguments against Certiorari fall flat. Furthermore, the actions of Respondent Northam in waiting for Respondents' filings before posting harsher restrictions by Executive Order on half of Virginia (on the very next day) should raise questions about the motives of the Respondents. If this is evidence of bad faith, the Court should consider this when weighing the arguments of the Respondents which are tainted by these actions.

12. Petitioner's filings before the Court have provided evidence of the serious, ongoing 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), which have perpetuated this injury. Petitioner respectfully requests that the Court expedite the hearing of his case after Respondents' OPPOSITION and decide on the merits of Petitioner's case as soon as possible. Should the Court not expedite the hearing of Petitioner's case, 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: August 8, 2020

Respectfully submitted,

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