

No. \_\_\_\_\_

IN THE

**SUPREME COURT OF THE UNITED STATES**

JAMES TOLLE,

*Petitioner,*

v.

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***

---

**APPENDIX**

James Tolle

*pro se*

11171 Soldiers Ct

Manassas, VA 20109

(703) 232-9970

April 18, 2022

[jtmail0000@yahoo.com](mailto:jtmail0000@yahoo.com)

---

**App-i**

**INDEX TO APPENDICES**

<b>Appendix A [District Court's Order and Judgment of July 29, 2021].....</b>	<b>App-1</b>
<b>Appendix B [District Court's Memorandum Opinion of July 29, 2021].....</b>	<b>App-6</b>
<b>Appendix C [District Court's Final Order of September 16, 2021].....</b>	<b>App-40</b>
<b>Appendix D [U. S. Court of Appeals for the Fourth Circuit's Opinion and Judgment of January 20, 2022].....</b>	<b>App-51</b>
<b>Appendix E [U. S. Court of Appeals for the Fourth Circuit's Temporary Stay and Order Related to Petition for Rehearing (February 2022)].....</b>	<b>App-58</b>
<b>Appendix F [Excerpts from the Record in the Lower Courts].....</b>	<b>App-63</b>

App-1

**APPENDIX A**

**District Court's Order and Judgment of July**

**29, 2021**

App-2

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

James Tolle        )  
Plaintiff,        )  
                      )  
v.                ) Civil Action No. 1:20-cv-00363  
                      )  
Northam et al     )  
Defendant.        )

ORDER

For the reasons stated in the accompanying Memorandum Opinion, defendants' Motion to Dismiss [Dkt. No. 46] is GRANTED, plaintiff's Motion for Preliminary Relief [Dkt. No. 55] is DENIED AS MOOT, and it is hereby

ORDERED that this civil action be and is DISMISSED.

App-3

To appeal this decision, plaintiff must file a written Notice of Appeal with the Clerk of the Court within thirty (30) days of the date this Order is entered. A Notice of Appeal is a short statement indicating a desire to appeal, including the date of the order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court of appeals. Failure to file a timely Notice of Appeal waives plaintiff's right to appeal this decision.

The Clerk is directed to forward copies of this Order and the accompanying Memorandum Opinion to plaintiff, pro se, and counsel of record, to enter judgment in defendants' favor pursuant to Fed. R. Civ. P. 58, and to close this civil action.

Entered this 29<sup>th</sup> day of July, 2021.

Alexandria, Virginia

\_\_\_\_\_  
/s/\_\_\_\_\_

Leonie M. Brinkema  
United States District Judge

App-4

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

James Tolle        )  
Plaintiff,        )  
                      )  
v.                ) Civil Action No. 1:20-cv-00363  
                      )  
Northam et al     )  
Defendant.        )

JUDGMENT

Pursuant to the order of this Court entered on July 29, 2021 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the defendants' and against the plaintiff.

App-5

**FERNANDO GALINDO, CLERK OF  
COURT**

By: /s/  
**K.Galluzzo**  
**Deputy Clerk**

**Dated: July 29, 2021**  
**Alexandria, Virginia**

**App-6**

**APPENDIX B**

**District Court's Memorandum Opinion of July  
29, 2021**

IN THE UNITED STATES DISTRICT COURT FOR  
THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

JAMES TOLLE, )  
Plaintiff )  
v. ) 1:20-cv-363 (LMB/MSN)  
GOVERNOR )  
RALPH NORTHAM, )  
et al., )  
Defendants. )

MEMORANDUM OPINION

Before the Court is a Motion to Dismiss filed by defendants Governor Ralph Northam and the Commonwealth of Virginia ("defendants"). [Dkt. No. 46]. Defendants' motion seeks dismissal for lack of Jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because plaintiff James Tolle ("plaintiff" or "Tolle") is proceeding pro se,

defendants' motion was accompanied by a notice consistent with Local Rule 7(K) and Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). Plaintiff has responded to defendants' motion, and both sides have filed supplemental briefs. Also pending is plaintiff's Motion for Preliminary Relief. [Dkt. No. 55].

The Court has considered all of the parties' submissions, including plaintiff's sur-reply [Dkt. No. 52] and the supplemental briefing filed by both parties. [Dkt. Nos. 71 and 72] and finds that oral argument will not assist the decisional process. For the reasons stated below, defendants' Motion to Dismiss will be granted and plaintiff's Motion for Preliminary Relief will be denied as moot.

## I. BACKGROUND

### A. Plaintiff's Complaint

In response to the Covid-19 pandemic, defendant Governor Ralph Northam issued Executive Order Number Fifty-Five ("EO-55") on March 30, 2020, requiring individuals within the Commonwealth to stay at home, except as permitted by the order, and

App-9

restricting the size of public and private in-person gatherings, including religious services. Temporary Stay at Home Order Due to Novel Coronavirus (Covid- 19), Executive Order 55 (March 30, 2020) ("EO-55"). On April 1, 2020, plaintiff filed his civil action against the Commonwealth of Virginia and Governor Ralph Northam under 42 U.S.C. 1983 alleging that EO-55 violated his rights, as well as the rights of all "U.S. citizens within the Commonwealth of Virginia"<sup>1</sup> under the First, Fourth, and Fourteenth Amendments of the United States Constitution. [Dkt. No. 1] at ¶ 1.

Tolle alleges that he was a resident of the Commonwealth of Virginia at all material times and that he "was a practicing member in lay ministry at his Church in Gainesville[,] Virginia until Defendant

---

<sup>1</sup> As a pro se litigant, plaintiff cannot represent the interests of anyone except himself. Therefore, to the extent his claims reference other individuals, these claims must be dismissed except with regard to Tolle.

## App-10

Northam's social distancing orders caused Tolle's Church to stop offering public services." [Dkt. No. 1] at ¶ 4-5. EO-55 required "all individuals in Virginia to remain in their place of residence and only allow[ed] individuals to leave their residences for the purpose of: obtaining essential services, seeking medical or other essential services... traveling to place[s] of worship, work or school...." EO-55 also imposed a distancing requirement: "[t]o the extent individuals use shared or outdoor spaces... they must at all times maintain social distancing of at least six feet from any other person...." Id. at ¶ 21 -22. EO-55 further prohibited "[a]ll public and private in-person gatherings of more than ten individuals" including "parties, celebrations, religious or other social events, whether they occur indoor or outdoor." Id. at ¶ 23. Violation of these restrictions was punishable as a "Class 1 misdemeanor pursuant to §44-146.17 of the Code of Virginia." Id. at ¶ 25. Plaintiff alleges that EO-55 was "not based on a consensus of medical science about the modes of transmission of COVID-19," and that there was no

App-11

scientific consensus regarding the ability of asymptomatic people to spread Covid-19, making the restrictions unwarranted. Id. at ¶¶ 14-18.

The complaint alleges four causes of action. First, it alleges that EO\_55 violated the free exercise clause of the First Amendment by prohibiting gatherings of ten or more people "explicitly including 'religious or other social events, whether they occur indoor or outdoor'" and by making "it a crime to exercise one's religion in violation of [the EO'-s] prohibitions." Id. at ¶ 30. According to the complaint, EO-55 violated Tolle's free exercise rights because "Tolle's Church has already stopped offering public services because of Defendant Northam's orders." Id. at ¶ 31.

In his second cause of action, plaintiff alleges that EO-55 violated his First Amendment right to assemble by prohibiting gatherings of ten or more people and by requiring individuals who used shared or outdoor spaces to maintain social distancing of at least six feet from any other person. According to the complaint, EO-55 "restrict[ed] the Constitutional

App-12

rights of Tolle and other Virginians because his orders make it a crime for persons who express political opposition to Defendant Northam's actions to gather more than 10 persons in any place throughout the entire Commonwealth of Virginia to publicly express their political opposition." Id. at ¶ 43.

The third cause of action alleges that EO-55 violated the Fourth Amendment by restricting the number of unrelated people homeowners could host within their private homes [id. at ¶¶ 53-55], thereby "intend[ing] to intrude into the personal property and homes of United States citizens." Id. at ¶ 53,

Finally, the complaint alleges that EO-55 violated the Fourteenth Amendment by "depriving Tolle and other citizens of the liberty to travel to and conduct their religion, [and]...the liberty to travel outside their residences and to gather and assemble as they choose on their own property and... the right to have the liberty to do what they choose on their own property and...the free use of their own homes."

Id. at ¶ 63. In each count Tolle alleges that EO-55

App-13

had a disproportionate and/or unnecessary impact on healthy or asymptomatic people. Id. at ¶ 32, 44, 55, and 64.

Plaintiff's complaint seeks the following declaratory, injunctive, and monetary relief:

A. A declaration delimiting the proper use of emergency powers which protect citizens' Constitutional rights and define the balance of protection of public health and safety and protection of individual rights;

B. Permanent InJunctive relief which prevents the execution of the provisions of Defendants' orders under EO-55 which violate the United States Constitution;

C. An order requiring Defendants' compliance with the Constitution of the United States, including requiring accommodation of the free exercise of religion in places of worship to the maximum extent possible.<sup>2</sup>

---

<sup>2</sup> Defendant Northam already is required to comply with the United States Constitution. Before taking

D. An order requiring the Commonwealth of Virginia's and any other State's<sup>3</sup> emergency orders related to COVID-19 to comply with the Constitution of the United States, including requiring accommodation of the free exercise of religion in places of worship to the maximum extent possible;

E. Award of compensatory, general and special damages for Plaintiff's according to proof at trial;

F. Costs of suit, inclusive of reasonable

---

office, the Governor of Virginia is required to "take or subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia...." VA Const., art. 11, § 7.

<sup>3</sup> Plaintiff named Governor Northam and the Commonwealth of Virginia as defendants in this civil action. [Dkt. No. 1]. No other states are named as parties, and this Court does not have the power to enjoin other, non-party states.

attorney's fees,<sup>4</sup> expert witness fees, and other litigation expenses pursuant to 42 U.S.C. § 1988;

G. Appropriate interest, costs and disbursements, and such other and further relief as the Court may deem proper.

[Dkt. No. 1] at 22-23.

On December 14, 2020, in response to the changing nature of the Covid-19 pandemic, Governor Northam issued Executive Order Number Seventy-Two (2020) and Order of Public Health Emergency Nine, Commonsense Surge Restrictions, Certain Temporary Restrictions Due to Novel Coronavirus (Covid-19) (December 10, 2020) ("EO-72"). In

---

<sup>4</sup> As a pro se litigant, plaintiff has no basis for requesting attorneys' fees. See, e.g., Munvive v. Fairfax Courtty Sch. Bd., 2019 WL 2374869 (E.D. Va. 2019)(holding that plaintiff is not entitled to recover attorneys' fees because pro se parties are not entitle to such expenses).

App-16

response to that new order, plaintiff submitted a proposed amended complaint as an attachment to his opposition to defendants' Motion to Dismiss [Dkt. No. 49-1].<sup>5</sup> The amended complaint updated plaintiff's original allegations by adding new paragraphs 26-1 to 26-9, which incorporate reference to EO-72. Paragraphs 26-1 26-4 f the amended complaint quote extensively from EO-72, while Paragraphs 26-5 to 26-9 contain legal assertions regarding the effect of the executive order See, e.g., [Dkt. No. 49-1] at ¶ 26-6 ("Defendant Northam's orders under EO-72 which restrict the free practice of religion and are universally applied to all persons in Virginia are not serving a compelling government interest or are not narrowly tailored to serve any compelling government interest") and ¶ 26-8 ("Defendant

---

5 Although plaintiff did not obtain permission to amend his complaint, the Court will treat the proposed amended complaint as if it were the operative complaint in deference to plaintiff's pro se status.

Northam's orders was/is a regulation, custom or usage which causes Tolle and every United States citizen in Virginia to be deprived of his or her right to be secure in their persons, houses, papers and effects and violates the Fourth Amendment of the United States Constitution"). The proposed amended complaint amended the Prayer for Relief by inserting "EO-72 or any other similar Executive Order" after "EO-55" in Paragraph B of the Prayer for Relief. [Dkt. No. 49-1] at 27.

**B. Procedural History**

When he filed his original complaint, plaintiff also filed a Motion for Preliminary Injunction and Expedited Hearing [Dkt. No. 3J, in which he asked the Court to grant a "Preliminary Injunction to stay the execution of all or parts of Defendant Northam's orders under Executive Order 55...and interim injunction or temporary restraining order...requiring Defendants to publicly stay, the execution of Defendant Northam's EO-55 and stop all enforcement of such EO-55" [Dkt. No. 3] at 1. Plaintiff also moved the Court for an order directing

App-18

the U.S. Marshals Service to serve the complaint. [Dkt. No. 2]. The motions were promptly denied. Citing General Order 2020-07, which postponed all in-person proceedings in this district due to the novel coronavirus, the Court denied plaintiff's request for expedited hearing, and denied plaintiff's Motion for Preliminary Injunction, finding that "the only current emergency is the one caused by the Coronavirus." Finally, plaintiff's request that the U. S. Marshals Service effect service on the defendants was denied on the ground that "[i]n these exigent and extraordinary circumstances, putting members of United States Marshals Service at risk to serve this complaint would be inappropriate." [Dkt. No. 5].

On April 13, 2020, plaintiff appealed the denial of his motions. [Dkt. No. 11]. As a result, all further action on plaintiff's complaint was stayed pending resolution of his appeal. [Dkt. No. 24J. On October 26, 2020, the Fourth Circuit dismissed plaintiff's appeal, finding that the order he appealed was "neither a final order nor an appealable interlocutory or collateral order." [Dkt. No. 38]

App-19

(footnote omitted). After the Fourth Circuit issued its mandate, the stay was lifted on November 17, 2020. Defendants then filed the pending Motion to Dismiss.

In response to defendants' motion, plaintiff filed an opposition brief, to which he attached his proposed amended complaint containing allegations regarding Executive Order 72, which by then had replaced E0-55. [Dkt. No. 49-1]. After defendants filed a reply brief, plaintiff filed a Request to File Sur-reply [Dkt. No. 52] and noticed a hearing date to address his request to file a sur-reply [Dkt. No. 53J]. The Court granted plaintiff's motion to file a sur-reply without holding a hearing and determined that defendant's Motion to Dismiss would be decided on the pleadings. [Dkt. No. 54].

Plaintiff next filed the pending Motion for Preliminary Relief [Dkt. No. 55], asking the Court to enter a preliminary injunction "which enjoins Defendant Northam's Executive Orders from abridging Plaintiff's rights under the First Amendment...and Plaintiff's rights under the Fourth and Fourteenth Amendments," [Dkt. No. 55] at 3,

and attaching multi-paged Proposed Preliminary Injunction Order describing seven broad injunctions. [Dkt. No. 55-1]. Plaintiff again noticed a hearing. [Dkt. No. 58].

Having determined that argument would not aid the decisional process and that both parties' motions would be decided on the papers, an order was issued canceling the hearing that plaintiff noticed. [Dkt. No. 59]. Plaintiff responded by filing another Notice of Appeal with regard to the cancellation of the hearing on his Motion for Preliminary Relief, [Dkt. No. 60], which resulted in this civil action again being stayed until plaintiff's appeal was resolved. The appeal was dismissed and the mandate issued on May 19, 2021, [Dkt. Nos. 65 and 69].

During the pendency of plaintiff's second appeal, defendant Governor Northam issued Executive Order 79,<sup>6</sup> which terminated Executive Order 72 and thereby ended all prior Covid-19

---

<sup>6</sup> Executive Order Seventy-Nine (2021) and Order of

## App-21

mitigation measures, including restrictions on in-person gatherings, effective May 28, 2021.

Upon receiving the mandate from the Fourth Circuit, the defendants were ordered to submit an updated brief in support of their Motion to Dismiss to explain the impact of EO-79 on the pending motions and plaintiff was allowed an opportunity to respond. [Dkt. No. 70]. The parties have completed their supplemental brieflng and the Court has again determined that oral argument will not aid the decisional process. Accordingly, defendants' motion is now ripe for decision.

### **C. The Executive Orders**

On March 30, 2020, the Governor issued EO-55, the Temporary Stay at Home Order Due to Novel Coronavirus (Covid-19) about which plaintiff originally complained. EO-55 stated that it would

---

Public Health Emergency Ten, Ending of Commonsense Public Health Restrictions Due to Novel Coronavirus (Covid-19)(May 14, 2021)(“EO-79”).

App-22

remain in effect until June 10, 2020. Id. at 20. In fact, the stay at home order, the prohibition on gatherings of 10 or more, and many other provisions of EO-55 were revoked before the order expired, when Virginia began Phase One of its reopening plan and the Governor issued Executive Order 61 on May 8, 2020, allowing religious services to take place at "50% of the lowest occupancy load on the certificate of occupancy of the room or facility in which the religious services are conducted"<sup>7</sup> and creating physical distancing, signage and sanitation requirements for religious services. As conditions improved and Virginia "move[d] forward into Phase Three," Governor Northam issued Executive Order 67, which went into effect on July 1, 2020, and eliminated all numerical or percentage-based

---

<sup>7</sup> Executive Order Number Sixty-One (2020) and Order of Public Health Emergency Three, Phase One Easing of Certain Temporary Restriction Due to Novel Coronavirus (Covid-19), (May 8, 2020)(“EO-62”).

capacity restrictions for religious services but maintained physical distancing, signage, and sanitation requirements for religious services.<sup>8</sup> When Covid-19 case numbers began to increase again, Governor Northam issued EO-72 on December 14, 2020, which imposed a "modified stay at home order" and other restrictions and continued the physical distancing, signage, and sanitation requirements with minor modifications, but did not impose any new numerical or percentage-based capacity restrictions on religious services.

As vaccinations against Covid-19 increased and infection rates declined in the Commonwealth, EO-79 was issued on May 14, 2021. EO-79 explains that "with vaccines now widely available--over three million Virginians are fully vaccinated and safe from

---

<sup>8</sup> Executive Order Number Sixty-Seven (2020) and Order of Public Health Emergency Seven, Phase Three Easing of Certain Temporary Restrictions Due to Novel Coronavirus (Covid-19)(July 1, 2020)(“EO-67”).

serious illness or death caused by COVID-19—it is time to begin our new normal.” EO-79 provided that “[a]ll individuals in the Commonwealth aged five and older should cover their mouth and nose with a mask in accordance with the Centers for Disease Control and Prevention guidance” and, as of May 28, 2021, effectively terminated all other Covid-19 mitigations measures that had been imposed by prior executive orders, including physical distancing requirements.

## II. Analysis

Defendants have moved to dismiss the complaint under Fed R. Civ. P. 12(b)(1) and 12(b)(6). The Court applies similar standards of review for such motions. A Rule 12(b)(1) motion tests whether “a complaint simply fails to allege facts upon which subject matter jurisdiction can be based.” Adams v. Bain 697 F.2d 1213, 1219 (4<sup>th</sup> Cir. 1982). When determining whether a complaint will survive a motion under Rule 12(b)(1), “all facts alleged...are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would

receive under a Rule 12(b)(6) consideration." Id.

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a complaint when a "plaintiff's allegations fail to state a claim upon which relief can be granted." Adams v. NaphCare, Inc., 244 F. Supp. 3D 546, 548 (E.D. Va. 2017). As defendants properly argue, a complaint must be more than speculative, and must "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555., 570 (2007). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal quotation marks and citations omitted). When considering a motion to dismiss, a court must assume that the facts alleged in the complaint are true and resolve factual disputes in the plaintiff's favor, Robinson v. Am. Honda Motor Co., 551 F.3d 218, 222 (4th Cir. 2009); however, a court "is not bound by the complaint's legal conclusions," conclusory allegations, or unwarranted inferences. Id. Courts must "construe allegations in a

pro se complaint liberally." Thomas v Salvat'on Army So. Territory, 841 F.3d 632, 637 (4<sup>th</sup> Cir. 2016).

Without considering whether the complaint would have survived a motion to dismiss when it was filed, the court concludes that it lacks subject-matter jurisdiction over this civil action because plaintiff's complaint has become moot. As the Fourth Circuit has explained:

"[T]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction," Simmons v. United Mortg. & Loan Inv.. LLC, 634 F.3d 154, 763 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted)(quoting Unile States v. Hardy, 545 F.3d 280, 283 (4th Cir. 2008)), which extends only to actual cases or controversies, U.S. Const. art. III, § 2. When a case or controversy ceases to exist-- either due to a change in the facts or the law -- "the litigation is

moot, and the court's subject matter jurisdiction ceases to exist also." S.C. Coastal Conservation League, 789 F.3d at 482. Put differently, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCourmack, 395 U.S. 486, 496, 89 S.Ct, 1944, 23 L.Ed.2d 491 (1969).

Porter v. Clarke, 852 F.3d 358, 363 (4<sup>th</sup> Cir. 2017).

As described above, plaintiff alleges that by enacting EO-5S (and EO-72, as reflected in his proposed amended complaint), defendants violated his rights under the United States Constitution by limiting the size of public and private in-person gatherings in general and by limiting the number of people permitted to gather for religious services, among other restrictions. The record shows that Virginia removed the numerical and percentage-based capacity restrictions for religious services in

July 2020, when EO-67 became effective, and at no time since July 2020 have the defendants reimposed any numerical or percentage-based capacity limitations on religious services, other than requiring "proper physical distancing." EO-72 at ¶ II(B)(1)(b)(i). Indeed, even during the rise in Covid-19 cases in December 2020, when the Governor issued a Modified Stay at Home Order in EO-72 and imposed limits on the size of other public gatherings, there were no numerical capacity limits imposed on religious services. Moreover, as vaccines became increasingly available and the spread of Covid-19 in Virginia slowed, defendants loosened and eventually removed all Covid-19 mitigation measures required by previous executive orders.

In response to defendants' assertion that this civil action is moot, plaintiff argues that the defendants have failed to satisfy their burden under Supreme court precedent of showing that the challenged conduct cannot reasonably be expected to recur." [Dkt. No. 72I at 8, (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs. Inc., 528 U.S. 167,

189 (2000). According to the plaintiff, "[e]very if the court accepts Defendants' arguments concerning the likelihood of new capacity restrictions on religious services, Defendants provide no reason for the Court to believe that the multiple other constitutional violations of Defendants' COVID orders will not be re-instituted in the future due to a resurgence of COVID-19 or during a pandemic caused by another novel virus." Id. at 5. Plaintiff relies heavily on the Supreme Court's decision in Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) to support his argument that this civil action is not moot.

In the Dioceses of Brooklyn case, the Supreme Court considered an application for a temporary restraining order enjoining enforcement of the governor of the New York's Executive Orders that

impose[d] very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons [could] attend each religious

service and in orange zones, attendance [was] capped at 25....In a red zone, while a synagogue or church [could] not admit more than 10 persons, businesses categorized as "essential" [could] admit as many people as they wish[ed] And the list of "essential" businesses include[d] things such as acupuncture facilities, camp grounds, garages....The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

Id. at 66. Because the New York Executive Order was "not neutral and of general applicability," the Supreme Court applied the strict scrutiny standard, which requires that the restrictions be narrowly

App-31

tailored to serve a compelling state interest. Id. at 67. Stating that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," the Supreme Court held that the New York restrictions were not narrowly tailored because, among other reasons, the restrictions were "far more restrictive than any COVID-related regulations that have previously come before the court." Id.

By the time the case was before the Supreme court, the State of New York had reclassified the zones in which the plaintiffs' houses of worship were located from orange to yellow, which allowed the plaintiffs to hold worship services at 50% of their maximum capacity. Id. at 68. The Supreme Court held that the reclassification of plaintiffs' zones did not eliminate the need for an injunction because

the applicants remain under a constant threat that the area in question will be reclassified as red or orange ... the Governor regularly changes the classification of particular areas

without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected areas from attending services before judicial relief can be obtained.

*Id.* at 69 (noting that plaintiff's hold daily worship services).

Defendants argue that this civil action is easily distinguishable from *Diocese of Brooklyn* and is more aligned with the Supreme Court's decision denying an application for a preliminary injunction against enforcement of an executive order that was about to expire in *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020). In *Danville Christian Academy*, the Supreme Court declined to intervene in the Governor of Kentucky's order that K-12 schools in that state remain closed from November 18 , 2020 to January 4, 2021. The Supreme court issued its opinion on December 17, 2020, stating; "Under all the circumstances, especially the timing and the impending expiration

of the Order, we deny the application without prejudice to the applicants or other parties seeking a new preliminary injunction if the Governor issues a school-closing order that applies in the new year." Id. at S28. Plaintiff attempts to distinguish Danville Christian Academy from this civil action by arguing that the Governor of Kentucky had made public statements indicating "his intention to re-open schools just days before the Supreme Court's review of the case," [Dkt. No. 72] at 9, but such statements were not relied on by the Supreme Court in reaching its decision. This court agrees with the defendants that this civil action is more like Danville Christian Academy than Diocese of Brooklyn.

Unlike the restrictions at issue in Diocese of Brooklyn, which were still in place when the Supreme Court considered the plaintiffs' application, the Executive Orders about which Tolle complains have been rescinded and there is no indication that the defendants will adopt new restrictions. Moreover, the Supreme Court issued its decision in Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63

(2020), in November 2020, at a time when Covid-19 was rampant in the United States and the U.S. Food and Drug Administration had not yet approved a vaccine for Emergency Use Authorization.<sup>9</sup> Because the Roman Catholic Diocese of Brooklyn case was decided within a very different public health context than currently exists in Virginia, in addition to the fact that the New York order was still in effect while the Virginia order has been rescinded, the Supreme Court's holding that the case was not moot because "the applicants remain under a constant threat that the area in question will be reclassified as red or orange." id. at 68, has no bearing on this civil action. Unlike the plaintiffs in Roman Catholic Diocese of Brooklyn, Tolle does not remain under a threat that the defendants will reinstate the restrictions about

---

9 The Pfizer-Biontech vaccine was granted Emergency Use Authorization on December 11, 2020. <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/pfizer-biontech-covid-19-vaccine>

which he complained.

A recent opinion by the Fourth Circuit further supports defendants' argument that plaintiffs complaint is moot. In American Federation of Government Employees v. Office of Special Counsel, 1 F.4th 180 (4th Cir. 2021), the Fourth Circuit considered a challenge to an Office of Special Counsel ("OSC") advisory opinion regarding the application of the Hatch Act to certain conduct during the 2020 election. After the district court ruled and before the case reached the Fourth Circuit, the Office of Special Counsel withdrew the challenged opinion because the 2020 election had already occurred. Explaining that because the OSC guidance was no longer in effect it "can no longer govern the appellants' conduct or in any way chill their proposed speech. Such would seem to present a classic case of mootness." Id. at 187. Moreover, the Fourth Circuit rejected the argument that the case was not moot because the alleged violation might be repeated, explaining that it was not reasonable to expect that the "same complaining party will be subjected to the same

action again" because "there is no whiff of any of the opportunism, on the part of the defendant, that typically supports invocations of mootness exceptions where voluntary cessation of the challenged conduct is at issue," noting that the defendant withdrew its guidance because of changed circumstances (the election had occurred), "not with the aim of avoiding judgment in court." Id. at 187-88.

Like the Office of Special Counsel, the defendants in this civil action ended all Covid-related restrictions in response to changed circumstances. In announcing the end of Virginia's Covid-19 mitigation measures, Governor Northam stated "Virginians have been working hard, and we are seeing the results in our strong vaccine numbers and dramatically lowered case counts.... That's why we can safely move up the timeline for lifting mitigation measures in Virginia." Press Release dated May 14, 2021, <https://www.govemor.virginia.gov/newsroom/all-releases/2021/may/headline-895235-en.html>. Moreover, on June 21, 2021, Governor Northam announced that 70% of adults in

Virginia had received at least one Covid-19 vaccine dose. See Press Release dated June 21, 2021, <https://www.governor.virginia.gov/newsroom/all-releases/2021/june/headline-897920-en.html>. New daily cases averaged above 5,900 in early January 2021, and were under 250 by June 1. Id. This dramatic change in circumstances reflects the significant efforts by defendants and others to prevent a resurgence of Covid-19, making the need to re-impose the capacity restrictions unlikely and supporting defendant's argument that this civil action is moot. There is simply neither the "whiff of any opportunism"<sup>10</sup> by Governor Northam to suggest that he rescinded the Covid restrictions in response to this civil action nor "the constant threat"<sup>11</sup> that defendants will reimpose the complained of restrictions.

---

10 Am. Fed'n of Gov't Emp., 1 F.4th at 188.

11 Roman Catholic Diocese of Brooklyn, 141 S. Ct. at 68.

Having found that this civil action is moot, the Court therefore lacks subject matter jurisdiction and need not address the sovereign immunity arguments raised by the defendants; however in civil actions asserting claims similar to Tolle's, other Judges in this district have held that the doctrine of sovereign immunity bars such claims. See Lighthouse Fellowship Church v. Northam, 2021 WL 302446, – F.Supp.3d – (E.D. Va. 2021)(dismissing church's challenge to executive orders imposing Covid-19 mitigation measures because Governor Northam is immune from suit); Tigges v. Northam, 473 F.Supp. 3d 559 (E.D. Va. 2020) (denying business owner's request for preliminary injunction enjoining enforcement of Covid-19 related executive orders because state officers have sovereign immunity).

### III. Conclusion

For the reasons stated above, defendants' Motion to Dismiss [Dkt. No. 46J will be GRANTED and plaintiffs Motion for Preliminary Relief [Dkt. No. 55] will be DENIED by an order that will accompany

App-39

this Memorandum Opinion.

Entered this 29<sup>th</sup> day of July, 2021.

Alexandria Virginia

\_\_\_\_\_/s/\_\_\_\_\_

Leonie M, Brinkema

United States District Judge

App-40

**Appendix C**

**District Court's Final Order of September 16,  
2021**

IN THE UNITED STATES DISTRICT COURT FOR  
THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

JAMES TOLLE, )  
Plaintiff )  
v. ) 1:20-cv-363 (LMB/MSN)  
GOVERNOR )  
RALPH NORTHAM, )  
et al., )  
Defendants. )

ORDER

Before the Court is a Motion for Reconsideration [Dkt. No. 76], in which plaintiff James Tolle (“plaintiff” or “Tolle”) seeks to reverse the July 29, 2021 Order dismissing this civil action as moot. [Dkt. No. 74]. For the reasons explained below, plaintiff’s motion will be denied.

Plaintiff, who is proceeding pro se, filed this

App-42

civil action on April 1, 2020, against the Commonwealth of Virginia and Governor Ralph Northam under 42 U.S.C. I983 alleging that the Governor's Executive Orders imposing restrictions designed to mitigate the spread of Covid-19 violated his rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution by violating his free exercise of religion, infringing on his right to gather with others to express his political views, "intrud[ing] into the personal property and homes of United States Citizens," and depriving him of the "liberty to travel to and conduct [his] religion.. and the liberty to do what [he] choose[s] on [his] own property." [Dkt. No. 1] at ¶¶ 1, 43, 53, 63.<sup>1</sup> After a complicated and drawn out procedural history,<sup>2</sup> this

---

1 An amended complaint submitted by the plaintiff in response to the defendants' motion to dismiss was accepted by the Court but did not alter plaintiff's original claims no add new ones. [Dkt. No. 73] at n. 5.

2 The procedural history is detailed in the July 29,

App-43

Court dismissed the complaint as moot because Governor Northam's Executive Order 79, which was issued on May 14, 2021 and became effective on May 28, 2021, rescinded all Covid-19 related restrictions about which the plaintiff had complained. Judgment was entered in defendants' favor on July 29, 2021.

On August 10, 2021, plaintiff sent a letter to the Court asking for reconsideration of the order which dismissed his complaint. Plaintiff also requested an extension of time in which to file a notice of appeal should his motion be denied. [Dkt. No. 76] at 3. In consideration of plaintiffs pro se status, the Court accepted the letter as a motion for reconsideration, stayed plaintiff's time for filing a notice of appeal, and ordered the defendants to respond within 14 days. [Dkt. No. 77J. Defendants filed their response [Dkt, No. 78] to which plaintiff has filed a reply [Dkt, No. 81]. The motion is now fully briefed and, finding that argument will not aid the decisional process, the motion will be resolved on

---

2021 Memorandum Opinion [Dkt. No. 73] at 6-8.

the papers.

Plaintiff's motion for reconsideration seeks to have the final judgment entered on July 29, 2020, vacated. Because plaintiff filed his motion within 28 days of the date upon which the judgment was entered, the motion will be considered as brought pursuant to Fed. R. Civ. P. 59(e).<sup>3</sup> Rule 59(e) permits a court to alter or amend a final judgment only under "extraordinary" circumstances. Carter v. United States, 3:19-cv-164, 2020 WL 3883253, at \*2 (E.D. Va. July 9, 2020) (internal citations and quotation marks omitted). The Fourth Circuit has held that "[a] Rule 59(e) motion is discretionary. It need not be granted unless the district court finds that there has been an intervening change of controlling law, that

---

<sup>3</sup> The Fourth Circuit has "squarely" held that a motion for reconsideration should be analyzed under Fed. R. Civ. P. 59(e) alone, and not under Fed. R. Civ. P. 60(b), if it was filed within the time period required by Rule 59(e). Robinson v. Wix Filtration Corp., 599 F.3d 403, 412 (4<sup>th</sup> Cir. 2010).

new evidence has become available, or that there is a need to correct a clear error or prevent manifest injustice." Robinson v. Wix Filtration Corp., 599 F.3d 403, 411 (4<sup>th</sup> Cir. 2010). see also Hutchinson v. Staton, 994 F.2d 1078, 1081 (4<sup>th</sup> Cir. 1993). A Rule S9(e) motion "cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court has already thought through —rightly or wrongly.'" United States v. Dickerson, 971 F. Supp. 1023, 1024 (E.D. Va. 1997) (quoting Above the Belt. Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)).

In his motion, plaintiff asserts that new facts support reversal of the Judgment and argues that the Court was mistaken in its application of the case law regarding mootness. First, plaintiff explains that he filed his motion "to inform the Court of events and actions by Defendants arising around the time and after your dismissal of [the] complaint." [Dkt. No. 76] at 1. Plaintiff claims that "the prediction in my arguments that a resurgence of a strain of the current virus or a new virus would

likely lead to Defendant Northam considering re-institution of similar restrictions has been proven true by the events and actions of the Defendants' [sic] since the time of the Order." Id. at 2. In support of this assertion, plaintiff describes the July 27, 2021 announcement by the Centers for Disease Control and Prevention ("CDC") in which the CDC changed its guidance regarding the use of masks in response to the Delta variant of the novel coronavirus. He then explains that defendant Northam "was reported to have publicly stated that the Commonwealth reported 1,101 new COVID-19 cases on July 29<sup>th</sup>, which is up significantly from the less than 200 daily cases recorded just a month before," [Dkt. No. 76] at 2.<sup>4</sup> Plaintiff then states that "Defendant Northam was quoted as stating following the CDC's report of a resurgence: 'We'll offer guidelines in the

---

4 The source of this statement was a tweet sent from defendant Northam's official Twitter account. Governor Ralph Northam (@GovernorVA), Twitter (July 29, 2021, 12:46 pm),

next couple of days...."" [Dkt. No. 76J at 2. Plaintiff mischaracterizes Governor Northam's statement regarding new guidelines, claiming that the "Govemor admits they are still considering more quarantine restrictions on healthy persons at this time and are promising some imminent action which is still not defined," *id.* at 3; however, according to the website referenced in footnotes 3 and 4 of

---

<https://twitter.com/GovernorVA/status/1420787904520019976>. Plaintiff fails to mention the tweet that started the thread, which made clear that the Governor shared the rising case numbers to support the following recommendation: "All Virginians should consider wearing a mask in public indoor settings where there is increase risk of #COVID19 transmission, as the new @CDCgov guidance recommends. This is not a requirement, but a recommendation." Governor Ralph Northam (@GovernorVA), Twitter (July 29, 2021, 12:46 pm), <https://twitter.com/GovernorVA/status/1420787902196371460>.

place before this civil action was dismissed.

Second, plaintiff relies on his faulty understanding of Governor Northam's statements to critique the Court's legal analysis. Plaintiff argues that the Court "misinterpreted the Supreme Court's doctrine of mootness," [Dkt. No. 76] at 2, stating that "[e]ven if this precedent was not clear to the Court at the time of its Order, it should be plainly clear following the actions by the CDC and statements by Defendant Northam." Id. at 3. Plaintiff also asserts that "the Court's reliance on *American Federation of Government Employees v. Office of Special Counsel*, 1 F.4th 180 (4th Cir. 2021), hereinafter "AFGE", is even more dubious in light of the recent events than it was before the Order" of July 29, 2021. Id. at 3. In other words, plaintiff's motion presents misperceived facts as the basis for inappropriately asking the Court "to rethink what the Court ha[s] already thought through." Dickerson, 971 F. Supp. at 1024. This, the Court will not do.

Accordingly, it is hereby

ORDERED that plaintiff's Motion for

plaintiff's motion, the Governor's statement was in the context of the CDC's recommendation that everyone in K-12 schools be required to wear a mask. Because any requirement concerning masking by K-12 students is unrelated to the claims in plaintiffs complaint, the Governor's statement does not provide "new evidence that would warrant reconsideration of the July 29, 2021 Order.

In his reply memorandum, plaintiff points to an interview of Governor Northam on August 6, 2021, which plaintiff argues demonstrate the likelihood that defendants will re-impose restrictions about which plaintiff did complain. [Dkt. No. 81] at 4. Although the Court acknowledges that the plaintiff is genuinely concerned about the possibility that new restrictions will be imposed, plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot by the defendants' revocation of the Covid-19 related restrictions about which plaintiff complained. Moreover, as of September 15, 2021, the Governor has not, in fact, reimposed the restrictions that were in

App-50

Reconsideration [Dkt. No. 76] be and is DENIED.

To appeal either this decision and/or the dismissal decision, plaintiff must file a written notice of appeal with the Clerk of court within thirty (30) days of the date of entry of this Order. A notice of appeal is a short statement indicating a desire to appeal, including the date of the order(s) plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court of appeals. Failure to file a timely notice of appeal waives plaintiff's right to appeal this decision.

The Clerk is directed to forward copies of this Order to counsel of record and to plaintiff, James Tolle, pro se.

Entered this 16<sup>th</sup> day of September, 2021

Alexandria, Virginia

\_\_\_\_\_/s/\_\_\_\_\_

Leonie M. Brinkema

United States District Judge

App-51

**APPENDIX D**

**U. S. Court of Appeals for the Fourth Circuit's  
Opinion and Judgment of January 20, 2022**

App-52

UNPUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 21-2106

---

JAMES TOLLE,  
Plaintiff - Appellant,

v.

GOVERNOR RALPH NORTHAM;  
COMMONWEALTH OF VIRGINIA,  
Defendants - Appellees.

---

Appeal from the United States District Court for the  
Eastern District of Virginia, at  
Alexandria. Leonie M. Brinkema, District Judge.  
(1:20-cv-00363-LMB-MSN)

---

App-53

Submitted: January 11, 2022 Decided: January 20,  
2022

---

Before THACKER and HARRIS, Circuit Judges, and  
SHEDD, Senior Circuit Judge.

---

Affirmed as modified and affirmed by unpublished  
per curiam opinion.

---

James Tolle, Appellant Pro Se. Calvin Cameron  
Brown, Assistant Attorney General,  
OFFICE OF THE ATTORNEY GENERAL OF  
VIRGIRiNIAchmond,, Virginia, for  
Appellees.

---

Unpublished opinions are not binding precedent  
in this circuit.

**PER CURIAM:**

James Tolle appeals from the district court's orders granting Defendants' motion to dismiss and dismissing his civil action for lack of subject matter jurisdiction and denying his Fed. R. Civ. P. 59(e) motion to alter or amend judgment. We have reviewed the record and find no reversible error in the district court's determinations that Tolle's complaint was moot and that it lacked subject matter jurisdiction over the complaint as a res ult and its denial of the Rule 59(e) motion. The dismissal of Tolle's complaint, however, should have been without prejudice. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013). We therefore modify the district court's dismissal order to reflect that the dismissal of Tolle's complaint is without prejudice, affirm the dismissal as modified, see 28 U.S.C. § 2106, and affirm the district court's order denying Tolle's Rule 59(e) motion. *Tolle v. Northam*, No. 1:20-003-63cv-LMB-MSN (E.D. Va. July 29 & Sept. 16, 2021).

App-55

We deny Tolle's motion requesting oral arguments and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

***AFFIRMED AS MODIFIED;***  
***AFFIRMED***

App-56

FILED: January 20, 2022

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 21-2106  
(1:20-cv-00363-LMB-MSN)

---

JAMES TOLLE

Plaintiff - Appellant

v.

GOVERNOR                    RALPH                    NORTHAM;  
COMMONWEALTH OF VIRGINIA  
Defendants - Appellees

---

JUDGMENT

---

In accordance with the decision of this court, the judgment of the district court is affirmed as modified and affirmed.

App-57

This judgment shall take effect upon issuance  
of this court's mandate in accordance with Fed. R.  
App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

App-58

**APPENDIX E**

**U. S. Court of Appeals for the Fourth Circuit's  
Temporary Stay and Order Related to Petition  
for Rehearing**

**(February 2022)**

App-59

FILED: February 1, 2022

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 21-2106

(1:20-cv-00363-LMB-MSN)

---

JAMES TOLLE

Plaintiff - Appellant

v.

GOVERNOR RALPH NORTHAM;  
COMMONWEALTH OF VIRGINIA

Defendants - Appellees

---

TEMPORARY STAY OF MANDATE

---

Under Fed. R. App. P. 41(b), the filing of a  
timely petition for rehearing or rehearing en banc

App-60

stays the mandate until the court has ruled on the petition. In accordance with Rule 41(b), the mandate is stayed pending further order of this court.

/s/Patricia S. Connor, Clerk

App-61

FILED: February 18, 2022  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

No. 21-2106  
(1:20-cv-00363-LMB-MSN)

---

JAMES TOLLE  
Plaintiff - Appellant

v.

GOVERNOR RALPH NORTHAM;  
COMMONWEALTH OF VIRGINIA  
Defendants - Appellees

---

O R D E R

---

The court denies the petition for rehearing and  
rehearing en banc. No judge requested a poll under  
Fed. R. App. P. 35 on the petition for rehearing en

App-62

banc. Entered at the direction of the panel: Judge  
Thacker, Judge Harris, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

App-63

**Appendix F**  
**Excerpts from the Record in the Lower Courts**

**Excerpts from the District Court Record  
Plaintiff's Reply to Defendants' Opposition to  
Motion for Reconsideration**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

---

JAMES TOLLE, Civil Action No. 1:20-cv-00363

Plaintiff,

v.

GOVERNOR RALPH NORTHAM and the  
COMMONWEALTH OF VIRGINIA

Defendants.

---

PLAINTIFF'S REPLY TO DEFENDANTS'  
OPPOSITION TO MOTION FOR  
RECONSIDERATION

The Court dismissed Plaintiff's Complaint in this matter by Order entered July 29, 2021 (hereinafter, "ECF<sup>1</sup> 74"). Plaintiff filed a letter

---

1 Electronic Case File

2. Additionally, since Plaintiff's letter request for reconsideration, several events have come to pass which has bearing on Plaintiff's Complaint and the Court's dismissal of the Complaint due to mootness under ECF 74. These events include the coming to light of more evidence of Defendant Northam's commitment to returning to at least some of the unconstitutional restrictions used under Defendants' previous Executive Orders, which were at the heart of Plaintiff's Complaint. This additional evidence adds more reason for the Court to consider Plaintiff's arguments against the mootness of his Complaint and reversal of the Court's dismissal under ECF 74 and Plaintiff respectfully requests the Court to consider this evidence in addition to what was provided previously with Plaintiff's arguments against mootness.

3. Specifically, Governor Northam recently reiterated his confidence in and commitment to the use of quarantine restrictions universally on all Virginians in the future by stating "masks, social

distancing, those modifications work”<sup>3</sup> in statements made to a public podcast on August 6, 2021. He also stated during that interview that he would need to institute another State of Emergency with quarantine restrictions “if our hospitals become overburdened, which we’re seeing in some other states”<sup>4</sup> and that Virginia has, at the time of his comments, “individuals that are in the hospitals on ventilators”<sup>5</sup>. These recent statements add to the actions included in my arguments against mootness (ECF 76, pp. 2-3), which more and more show that Defendants are not willing to make it absolutely clear that they will not return to an illegal quarantine in violation of Virginia law and the Federal constitution under a future emergency order,

---

<sup>3</sup> Interview by Major Garrett on CBS’s podcast “The Takeout”, recorded 8/6/2021, see <https://www.cbsnews.com/video/virginia-governor-ralph-northam-on-the-takeout-862021/#x>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

implementing the same or similar unconstitutional restrictions, without due process, on healthy persons who do not spread the virus, an action which is becoming more and more likely as the Fall approaches and cases rise due to COVID variants. Plaintiff believes that these statements and Defendant Northam's firm, public commitment to re-implementing the same restrictions which were complained of should give pause to the Court's finding that Defendants have met the stringent standard under the U. S. Supreme Court's guidance for mootness according to *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, hereinafter "Friends". With the likelihood of higher COVID-19 incidence in the Fall and Defendant Northam's stated intent to re-institute universal restrictions, even on healthy persons, if hospitalizations "become overburdened", Plaintiff believes that it is not "absolutely clear" that the allegedly wrongful behavior could not reasonably be

expected to recur"<sup>6</sup> and Defendants have provided no reason in its Opposition to reconsideration which shows this is absolutely clear enough to meet the Supreme Court standard for mootness.

4. Moreover, Plaintiff recently provided Defendants' counsel an offer of settlement which includes the Proposed Settlement Order in Attachment A, which gives the Defendants an opportunity to provide written evidence to the Court that Defendant Northam will not reinstitute the complained-of restrictions on Virginians during future actions against COVID or other pandemics. Other more reasonable governors have entered into settlement agreements since the Supreme Court's recent decisions on overreaching Executive Orders like Governor Northam and Plaintiff used the order which was agreed to by written settlement similar to what is contained in

---

<sup>6</sup> *Friends* at 170, citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203.

App-70

**Excerpts from the U. S. Court of Appeals for  
the Fourth Circuit's Record  
Petition for Rehearing and Rehearing *En Banc***

App-71

**No. 21-2106**

---

**IN THE UNITED STATES COURT OF  
APPEALS  
FOR THE FOURTH CIRCUIT**

JAMES TOLLE,  
Plaintiff/Appellant/Petitioner,  
v.  
GOVERNOR RALPH NORTHAM  
and the  
COMMONWEALTH OF  
VIRGINIA  
Defendants/Appellees.

---

On Appeal from the United States District Court  
for the Eastern District of Virginia

---

**APPELLANT'S PETITION FOR REHEARING  
AND REHEARING *EN BANC***

---

James Tolle  
*pro se*

Calvin C. Brown  
*Assistant Attorney  
General*

The Court Failed to Consider New Material Facts  
and Conflicts with Supreme Court Guidance without  
Considering these Facts

2. The Court's denial of Tolle's request for oral arguments "because the facts and legal contentions are adequately presented in the materials before us"<sup>2</sup> is patently false. To begin with, the Court did not receive briefings from both parties as the Appellees failed to respond to the appeal. Furthermore, the Court's opinion fails to address the changing conditions of the pandemic during the appeal, including the following facts which are material to Petitioner's arguments that Plaintiff's Complaint is not moot.

a) The District Court's Opinion which dismissed Plaintiff's Complaint made it clear that Plaintiff's Complaint was moot in light of the precedent in *Diocese of Brooklyn* because the threat of the pandemic was over, stating: "...the Supreme Court issued its decision...at a time when Covid-19

was rampant in the United States and the U.S. Food and Drug Administration had not yet approved a vaccine for Emergency Use Authorization.” (ECF 73, p. 14) Since then the Omicron variant of the Covid-19 virus has become a rampant threat which the vaccines have failed to abate and the latest evidence shows that the pandemic is not over.

b) The District Court’s Opinion states that “there is no indication that the defendants will adopt new restrictions” (ECF 73, p. 14) when finding mootness and when the District Court denied Petitioner’s request for reconsideration, the District Court argued that “as of September 15, 2021, the Governor has not, in fact, reimposed the restrictions that were in place before this civil action was dismissed.” (ECF 82, p. 5). However, Governor Northam did re-impose a State of Emergency following rising hospitalizations due to Omicron in January, 2022.<sup>3</sup>

---

<sup>3</sup> Governor Northam’s Executive Order Number

c) The actions of multiple Governors, including Governor Northam, in the face of the increase of Omicron infections puts Petitioner under the threat of restrictions being imposed on the exercise of his constitutional rights and he will "remain under a constant threat" (*Diocese of Brooklyn, per curiam*, p. 6) of new restrictions as long as the Governor of Virginia continues to rule by decree in the face of the pandemic.

3. Petitioner's appeal was based on the likelihood that the Governor of Virginia would carry

---

Eighty-Four (2022) imposed a State of Emergency on January 10, 2022. which stated that the Governor was using his emergency powers under Virginia Code §44-146.17 to declare "a limited state of emergency...due to COVID-19, a communicable disease of public health threat" for the purpose of responding to "a significant increase in hospitalizations" following the Omicron variant of the virus. (see Executive Order Number Eighty-Four (2022), pp. 1-2)