

Supreme Court, U.S.
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No. 21-1413

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES TOLLE,

Petitioner / Plaintiff,

v.

GOVERNOR RALPH NORTHAM
AND THE COMMONWEALTH OF VIRGINIA,
Respondents / Defendants.

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

PETITION FOR A WRIT OF CERTIORARI

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April 18, 2022

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QUESTIONS PRESENTED

I. Does the Supreme Court's Mootness Doctrine found in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167 (2000), hereinafter "Friends", and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), hereinafter "Diocese of Brooklyn", have any consistent precedential value? The Circuit Courts seem to apply mootness liberally in contradiction to *Friends* and *Diocese of Brooklyn* whenever they feel like it.

II. Is it an error under the Court's Mootness Doctrine if a court finds mootness after ignoring evidence of a Governor's promise to return to complained of restrictions in the future under conditions which are possible in the future?

III. Can it be absolutely clear that complained of restrictions will not recur for mootness when a chief executive makes public statements promising such restrictions and it is reasonable to believe that the conditions for triggering the

promised restrictions will occur?

IV. Does arbitrarily denying persons without counsel oral arguments shortly after allowing oral arguments to represented parties in almost identical cases show an abuse of discretion?

V. Can an Appellate Court capriciously treat unrepresented parties substantially different in application of its discretion than it treats represented parties without violating the Fifth Amendment's due process clause?

CORPORATE DISCLOSURE STATEMENT

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

LIST OF PARTIES

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

**LIST OF ALL DIRECTLY RELATED
PROCEEDINGS**

A) On March 30, 2020, the Governor of Virginia¹ declared a State of Emergency due to COVID-19 under Executive Order, placing

1 Plaintiff's Complaint named Governor Ralph Northam as Defendant for violations of Tolle's constitutional rights in his official capacity. Although Ralph Northam left office on January 15, 2022, this Petition still seeks redress of these violations by the courts and relief against the current Governor of Virginia who continued to oppose Plaintiff's appeal in the Court of Appeals for the Fourth Circuit and issued a limited State of Emergency under Executive Order Number Sixteen (2022) on February 20, 2022, due to the Omicron virus bringing "the total number of hospitalizations...among their highest points since the pandemic began", such actions providing no statement or other indication which makes it absolutely clear that the current Governor will not cause the complained of actions to recur if COVID-19 cases increase further or during the next pandemic. Petitioner believes that the errors from the District Court in applying the Court's Mootness Doctrine need to be addressed for the important reasons presented below and that the issues which bar mootness in Plaintiff's case remain because the current Governor of Virginia will not be restrained

restrictions on all Virginia citizens, including healthy persons and persons in parts of Virginia having no cases at the time. Plaintiff's Complaint (*Tolle v. Northam*, 1:20-cv-00363, E.D.Va.) was filed on April 1, 2020, alleging that the restrictions ordered by Defendant Northam's violated Plaintiff's constitutional rights under the First Amendment to freely practice his religion and to freely travel and assemble, violated Plaintiff's right to be secure in his home and be protected from unwarranted government intrusion into his home under the Constitution, that Defendant Northam's restrictions implemented an illegal quarantine which violated Plaintiff's due process and equal protection rights under the Fourteenth Amendment, and that Defendant Northam did not have a compelling interest based on the consensus of science to implement restrictions which violated Plaintiff's constitutional rights. These restrictions (hereinafter

from re-instituting the complained of restrictions when acting in his official capacity without further action to correct the errors in the lower courts.

referred to as the “complained of restrictions” or “complained of actions”) remained in place and continued to violate Plaintiff’s constitutional rights under Defendant Northam’s subsequent Executive Orders in varying forms until the State of Emergency expired on July 1, 2021.

B) The District Court dismissed Plaintiff’s Complaint as moot on July 29, 2021 (see Order and Judgment in Appendix A). The District Court based its entire finding on the fact that “the Executive Orders about which Tolle complains have been rescinded and there is no indication that the defendants will adopt new restrictions” (Appendix B, Memorandum Opinion at App-33). The record shows that at the time of the District Court’s Dismissal, it was known to the District Court that the track record of Defendants included past actions which re-instituted harsher restrictions on Plaintiff when virus cases were increasing and the record also shows that new cases due to the Delta variant of the virus were a serious concern at the time of the District Court’s decision to dismiss. Based on the

record, there was ample reason for the District Court to find some indication that Defendants would adopt new restrictions at the time of its decision to dismiss Plaintiff's case as moot.

C) Plaintiff submitted a Request for Reconsideration based on the likelihood of a return to the complained of restrictions due to the Centers for Disease Control's change in recommendations for mitigations during an increase in Delta variant cases, which argued for the proper application of the standard for mootness from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000)², based on this new evidence.

D) Plaintiff's Reply to Defendants' Opposition to Motion for Reconsideration included new evidence provided in Defendant Northam's statements to the public which promised re-imposition of restrictions under a State of Emergency if "our hospitals become overburdened" (Appendix F, Plaintiff's Reply at App-67) and arguing for reconsideration under the Supreme Court's

² Hereinafter "*Friends*".

precedent in *Friends* based on this new evidence from Defendant Northam's own statements.

E) The District Court's Order (Appendix C) denied Plaintiff's Request for Reconsideration without addressing the contents of the new statements by Defendant Northam and provided no discussion of the bearing of this evidence on the Supreme Court's standard for mootness under *Friends* and the District Court's Order erred in law by not applying the Court's standard properly and not considering whether Defendant Northam's public statements made it likely that the complained of restrictions will recur. Despite the fact that Plaintiff's Reply provided Defendant Northam's own statements to the District Court with Plaintiff's arguments and that this evidence should be reviewed according to the standard for mootness under the *Friends* precedent, the District Court improperly applied this Court's precedent based on errors in fact which claimed that Plaintiff had "not presented evidence demonstrating that the Court erred in finding that this civil action was made moot"

(Appendix C at App-48) and also committed an error in fact by claiming that the evidence from Defendant Northam's own statements were "misperceived facts" (Appendix C at App-49) rather than evidence of likely future restrictions.

F) Plaintiff properly filed a timely Notice of Appeal, entered on October 5, 2021, to appeal the District Court's decision in the U. S. Court of Appeals for the Fourth Circuit, which was within the time for appeal allowed under the District Court's Denial of Reconsideration Order. Appellant's Brief was filed in the Appellate Court on October 20, 2021 and Appellant's Motion Requesting Oral Arguments and Statement Explaining Reason for Oral Arguments sought leave to make oral arguments on the latest conditions of the pandemic and State of Emergency which ensued following the date of the Motion on November 16, 2021.

G) The panel for the U. S. Court of Appeals for the Fourth Circuit denied Appellant's request for oral arguments and modified the District Court's Order to dismiss Plaintiff's Complaint without

prejudice on January 20, 2022. (See Appendix D.)

H) Petitioner filed a request for rehearing by the U. S. Court of Appeals for the Fourth Circuit on January 27, 2022 and the Court of Appeals issued a Temporary Stay of Mandate on February 1, 2022, which stayed the Appellate Court's mandate until disposition of Plaintiff's request for rehearing. The Appellate Court denied Petitioner's request for Rehearing *En Banc* or Panel Rehearing on February 18, 2022. (See Appendix E.)

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

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and orders below.

OPINIONS BELOW
(CITATIONS OF ORDERS ENTERED IN THE
CASE)

The District Court's Judgment and Order of July 29, 2021 (Appendix A), dismissed Plaintiff's case with prejudice, with an Opinion finding that "there is no indication that the defendants will adopt new restrictions" and "Tolle does not remain under a threat that the defendants will reinstate the restrictions about which he complained." (Appendix B at App-33 to App-35)

The District Court's Final Order of September 16, 2021 (Appendix C), erred in law by denying

Plaintiff's Request for Reconsideration of the lower court's dismissal without addressing the contents of the new statements by Defendant Northam and containing no discussion of the bearing of this evidence on the Court's standard for mootness under *Friends*. Despite the fact that Plaintiff's Reply provided Defendant Northam's own statements to the District Court with Plaintiff's arguments and that this evidence should be reviewed according to the standard for mootness under the *Friends* precedent, the District Court's Final Order included errors in fact which claimed that Plaintiff had "not presented evidence demonstrating that the Court erred in finding that this civil action was made moot" (Appendix C at App-48) and also wrongly claimed that the evidence from Defendant Northam's own statements were "misperceived facts" (Appendix C at App-49) rather than evidence of likely future restrictions.

The panel for the U. S. Court of Appeals for the Fourth Circuit denied Appellant's request for oral arguments and modified the District Court's

Order to dismiss Plaintiff's Complaint without prejudice on January 20, 2022 (Appendix D).

Petitioner filed a request for reconsideration to the U. S. Court of Appeals for the Fourth Circuit on January 27, 2022 based on the recent institution of a State of Emergency as promised previously by the Virginia Governor and based on an abuse of discretion by the Appellate Court which treated an unrepresented party differently than represented parties under almost identical circumstances and denied Tolle due process, but the Appellate Court denied Petitioner's request for Rehearing *En Banc* or Panel Rehearing on February 18, 2022, without comment on Petitioner's arguments (see Appendix E).

JURISDICTION

The District Court entered a Judgment against Plaintiff on July 29, 2021, and a Final Order denying Plaintiff's Request for Reconsideration and affirming its dismissal of Petitioner's Complaint on

September 16, 2021. Petitioner appealed to the U. S. Court of Appeals for the Fourth Circuit on October 5, 2021. The Appellate Court issued a Panel Opinion on January 20, 2021, which affirmed the lower court's dismissal with modification to dismiss without prejudice. The Appellate Court stayed its mandate until Petitioner's request for rehearing was denied on February 18, 2022. Petitioner is seeking a Writ of Certiorari to a United States Court of Appeals pursuant to 28 USC § 1254(1) and Supreme Court Rule 10 because the District Court's Opinion supporting the Final Order contains reversible error which has not been corrected or addressed by the Appellate Court's affirmation and modification for dismissal without prejudice.

Per Supreme Court Rule 13.1, a Petition for Writ of Certiorari is timely filed within 90 days after the entry of judgment by the lower court. According to Supreme Court Rule 13.3, the time to file the Petition runs from the date of a denial of a timely filed request for rehearing. The instant Petition is timely filed under these rules because the Petition is

filed less than 90 days from the denial of Petitioner's request for rehearing in the Court of Appeals on February 18, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

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

a) The Fifth Amendment to the United States Constitution, which includes protections for due process in the Federal Courts, provides as follows:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation." (emphasis added)

STATEMENT

By affirming the District Court's misapplication of this Court's Mootness Doctrine, the District Court has been able to re-define the precedents from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), hereinafter "Friends" and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020), hereinafter "Diocese of Brooklyn", to distort the application of mootness markedly from how courts in other circuits have applied these precedents during the pandemic. If this Court fails to grant a Writ of Certiorari to review this substantial split in the

Circuits concerning mootness, the Roberts Court will allow the circuit courts to dismantle the long history of jurisprudence which has developed the Court's consistent Mootness Doctrine and establish a precedent where mootness can be applied in any way that a lower court sees fit, without any evidence that defendants will cease unconstitutional behavior in the future.

This case also involves action by the Appellate Court which abused its discretion and denied Petitioner due process under the Fifth Amendment by arbitrarily and capriciously treating Appellant's request for oral arguments as an unrepresented party differently than how the Appellate Court treated requests for oral arguments by represented parties in other very similar cases during the pandemic. It was an abuse of discretion which caused prejudice to Petitioner's case because it prevented the Appellate Court from properly considering the latest facts and circumstances of the pandemic, including the recent institution of a new State of Emergency, before deciding to affirm the

District Court's dismissal.

Petitioner's present request is seeking relief from the errors in the District Court's dismissal under this Court's standard for mootness and relief of due process violations and abuse of discretion by the Appellate Court, under 28 USC § 1254(1) and Supreme Court Rule 10.

REASONS FOR GRANTING THE PETITION

The Court should grant Certiorari and review Petitioner's case because the application of the Court's precedents on mootness by the lower courts in the Fourth Circuit differs markedly from what the Court has required and what is found outside the Fourth Circuit. This includes errors in law and fact in the District Court's decision and the fact that material facts of the changing pandemic having a bearing on the State of Emergency promised by the Virginia Governor were not allowed to be presented and are not contained in the Appellate Court's opinion. Furthermore, the courts in the Fourth Circuit are in conflict with the U. S. Supreme Court's

precedents in *Friends and Diocese of Brooklyn* based on the material facts and create a split in how this Court's precedents are applied uniformly throughout the nation, creating clear and obvious inequities between how complaints are considered moot in different parts of the nation. Petitioner's case also involves exceptional questions of importance including how an unprecedented and illegal quarantine affects constitutional freedoms and how Petitioner's due process and right to be heard without bias was abridged by a capricious and arbitrary denial of oral argument, questions which warrant review by this Court in order to decide how to preserve constitutional freedoms and due process before the next national emergency.

The Fourth Circuit's Application of the Court's
Standard for Mootness is an Error in Law and
Markedly Differs from Application of this Court's
Precedents in Similar Cases

Petitioner's appeal raised errors in law and fact concerning the District Court's application of

this Court's precedents for mootness from *Friends* and *Diocese of Brooklyn*. Specifically, the District Court erred in law by failing to reconsider its dismissal in light of new evidence that Governor Northam was promising another State of Emergency when cases worsened in the future. On the public broadcast of a CBS news podcast with Major Garrett following the court's dismissal of Plaintiff's Complaint on July 29, 2021, the complete recording of Defendant Northam statements on August 6, 2021, concerning a return to a State of Emergency were as follows:

"[Major Garrett Question:] Is there any likelihood, Governor Northam, that you will need to impose a State of Emergency because of the Delta variant?

[Governor Northam Response:] I don't anticipate that and one of the reasons that I don't is because Virginians have been very good following the guidelines and overall Virginians have been doing well with the vaccinations, we're going to

continue to push that, but I don't expect to get to a point; **the main reason Major that we would need to do something like that is if our hospitals become overburdened** which we're seeing in some other states, but right now we're in a good position. We do have individuals that are in the hospitals on ventilators. Again the message is that people need to get vaccinated."³ (emphasis added).

Excerpts of this evidence were provided in Plaintiff's Reply to Defendants' Opposition to Motion for Reconsideration (Appendix F, Plaintiff's Reply at App-66 to App-68). It is clear from these statements that Defendant Northam planned on re-imposing a State of Emergency and restrictions on Plaintiff and other healthy persons if hospitalizations increased and "hospitals become overburdened". Failure of the

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

District Court to properly consider this new evidence of future promised restrictions under the criteria for mootness established in this Court's precedents in *Friends and Diocese of Brooklyn* is an error in law and Petitioner's appeal was based on this.⁴

Petitioner believes that the proper application of this Court's precedents in *Friends and Diocese of Brooklyn* requires the lower courts in the Fourth Circuit to consider how Governor Northam's statements affect the ability for Defendants to meet

⁴ Petitioner's appeal was also based on error in fact. In light of the new evidence presented, the District Court erred in fact by finding "plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot" (Appendix C at App-48) and by erroneously characterizing the evidence on Governor Northam's statements as "misperceived facts" (Appendix C at App-49). These errors in fact were not only clear error in light of the governor's statements submitted as evidence, but the District Court's factual errors were not harmless because the District Court based its denial of Plaintiff's reconsideration request on this error.

this Court's "stringent"⁵ standard for mootness to "make it absolutely clear that the allegedly wrongful behavior [of the past Executive Orders] could not reasonably be expected to recur" (*Friends* at 170). The failure of the Appellate Court to clearly consider this evidence or Petitioner's argument before affirming the lower court's finding of mootness perpetuates this error and establishes an interpretation of this Court's precedent from *Friends* which is markedly different than how the Court's standard for mootness were recently applied in the First, Third, Fifth and Eighth Circuits, concerning other expired COVID-19 Executive Orders.⁶ All of

5 *Friends* at 189, "...the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is **stringent**: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (emphasis added; quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)).

6 *Bos. Bit Labs v. Baker*, 11 F.4th 3 at 11 (1st Cir. 2021); *Cnty of Butler v. Governor of Pa.*, 8 F.4th 226 (3d Cir. 2021); *Hawse v. Page*, 20-1960 (8th Cir. Jul. 30, 2021) (where the Court found

these other decisions more diligently applied this Court's "stringent" standard for mootness and are distinguished from the Fourth Circuit decisions in Petitioner's case because all of the other decisions were able to cite speculation or clear and convincing evidence that the governor or legislature had taken action which positively precluded future recurrence of complained of restrictions and, notably, none of those other decisions involve a Governor who publicly and explicitly promised new restrictions almost immediately after obtaining a dismissal from a District Court, as in Appellant's case.

Petitioner believes that recent decisions in the First Circuit Court of Appeals provide a good

absolutely clear likelihood after determining that the complaint applied only to "religious activities...at their respective churches" (at 8), and that the actions of the County, with no evidence of promising future restrictions, had not reimposed restrictions "[f]or more than a year" (at 13); *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020) (where it was found "speculative" (at 180) that the expired restrictions would recur based on the actions of Governor Edwards, without any evidence of a Governor's promise to reimpose the same restrictions found).

example of how courts outside of the Fourth Circuit have more faithfully applied the guidance from this Court's precedent in *Friends* during the pandemic. When explaining their reasoning behind an earlier case against Maine's Governor where that Appellate Court did not find mootness, the U. S. Court of Appeals for the First Circuit stated: "The key to our not-moot ruling was how 'the [g]overnor ha[d] not denied that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as' the rescinded one." *Bos. Bit Labs v. Baker*, 11 F.4th 3 at 11 (1st Cir. 2021), hereinafter "Bit Labs", quoting *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157 (1st Cir. 2021). The First Circuit continued: "So on the record there the governor could not 'show[] that it is absolutely clear' that the supposedly 'wrongful behavior could not reasonably be expected to recur' if circumstances became dire enough." *Id.* (quoting *Friends*). This makes the standard for mootness in the First Circuit clear. The failure of the Maine Governor to deny that she would re-impose

restrictions if conditions got worse did not rise to the stringent standard of this Court's Mootness Doctrine and was enough to bar mootness. However in Appellant's case, Governor Northam does not just fail to deny the likelihood of new restrictions on Plaintiff, he actually promises to re-impose restrictions during a spike in the spread of the virus which leads to higher hospitalizations. The First Circuit's interpretation of the Court's standard for mootness from this example is much closer to what this Court has established where the "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness" *Friends* at 189 (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)). If the Court agrees that the failure of a governor to take any action to show that he/she will not re-institute challenged restrictions in the future (as in the First Circuit's example) does not meet the "burden" of the Court's stringent standard for mootness, how much more so should have the Fourth Circuit determined

that a governor's promises to re-instate the challenged restrictions does not meet this test. The finding of mootness in Petitioner's case is contrary to how this Court's precedent from *Friends* should be applied and the First Circuit's explanation from this example precedent should make it clear that the Fourth Circuit is out of step with what other circuits do to properly enforce this Court's standard.

Similarly, the Third Circuit's application of this Court's standard for mootness has required clear evidence that a governor will not cause complained of restrictions to recur before finding mootness. In *Cnty of Butler v. Governor of Pa.*, 8 F.4th 226 (3d Cir. 2021), hereinafter "*Cnty of Butler*", the Third Circuit found "An amendment to the Pennsylvania Constitution and a concurrent resolution of the Commonwealth's General Assembly now restricts the Governor's authority to enter the same orders." (*Cnty of Butler* at 230) and "The parties agree that the Governor's orders are no longer in effect and that he has been stripped of his power to unilaterally act in connection with this pandemic." (*Id.*). Whereas in

the Fourth Circuit expiration of the orders alone is found to be sufficient to dismiss Petitioner's case, the Defendants in the Third Circuit have to show that it is absolutely clear that their challenged behavior will not recur, beyond the simple fact that a State of Emergency has expired, as demonstrated in *Cnty of Butler*. This is another example of how out of step the Fourth Circuit is in its interpretation and application of the Court's precedents on mootness.

Additionally, the Court itself explicitly addressed mootness for COVID-19 Executive Orders which have been constantly changing throughout the pandemic in *Diocese of Brooklyn*, which stated: "It is clear that this matter is not moot", citing *Friends*, "And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." *Diocese of Brooklyn, per curiam*, at 68. When Defendant Northam had promised to re-impose the complained of restrictions, the Supreme Court's precedent citing *Friends* in *Diocese of Brooklyn* seems appropriate since Tolle was under the threat

that he would lose his constitutional rights if virus cases increased some time after his complaint was dismissed. It is noteworthy that no other Supreme Court decision on the COVID-19 Executive Orders since *Diocese of Brooklyn* has found mootness when a Governor is promising future restrictions.⁷

⁷ Defendant Northam's post-dismissal statements which promised to re-impose restrictions also contradicted the District Court's findings on other recent Supreme Court and Appellate Court precedents. At the time of Tolle's appeal, the Governor's statements made recurrence of the restrictions on Plaintiff much more likely and imminent than the re-election of President Trump, which directly contradicts the District Court's reliance on *American Federation of Government Employees v. Office of Special Counsel*, 1 F.4th 180 (4th Cir. 2021) (hereinafter "AFGE", see Appendix B at App-35 to App-36), where the Appellate Court did not explicitly address the likelihood of President Trump ever being a candidate again but simply rested its decision on the fact that President Trump was no longer a candidate after the election and "[u]nder these conditions, the unreasonableness of expecting the challenged conduct to recur is 'absolutely clear'" (AFGE at 188, quoting *Friends*). The District Court's finding concerning *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), where

The Appellate Court abused its Discretion and
Denied Petitioner Due Process

By denying Petitioner's request for oral arguments, the Appellate Court was breaking from its typical practice to allow an Appellant to be heard and to bring new material facts and evidence to the Court prior to a decision on the merits. This was especially injurious to the Appellate Court's proper consideration of a case involving a rapidly changing pandemic which did see the promised State of Emergency re-instituted at the time that the Court denied Petitioner's oral arguments request. Tolle's appeal was based on the lower court's failure to take

the Supreme Court found mootness based on an order "that was about to expire" (Appendix B at App-32), is more inapposite where the Kentucky Governor expressed no interest in renewing the restrictions while Defendant Northam was promising to re-institute the complained of restrictions on Plaintiff to mitigate a COVID variant already identified by the CDC and which Governor Northam himself noted as "much more contagious" (from Governor Northam's Annual Revenue Speech, August 18, 2021).

into account the governor's promise of a new State of Emergency, *supra*, and failure of the Appellate Court to allow Tolle to brief the latest conditions to the Appellate Court was prejudicial to his case. It is noteworthy that the Court did not deny Appellants' request for oral arguments in *Lighthouse Fellowship Church v. Ralph Northam*, 20 F. 4th 157 (4th Cir. 2021), hereinafter *Lighthouse*, which was also an appeal concerning subject matter jurisdiction and dismissal of a complaint against Governor Northam's Covid-19 orders. However, with the same constitutional rights at stake (and more – to include rights under the Fourth and Fourteenth Amendments) in this case, the Court denied the oral argument request of Tolle, a *pro se* party, Failure of this Court to correct this disparate treatment in the Appellate Court will deny a *pro se* party rights to due process while others who are represented are afforded every right to present their case with oral argument in the Federal Courts. A practice of denying *pro se* parties the same rights that the Court grants to represented parties is a double tier form of

justice which not only abridges the *pro se* party's due process rights but also raises the specter of unequal application of justice for appellants in different parts of the nation. The Court should grant Certiorari in order to ensure that the Appellate Court did not abuse its discretion by treating the oral argument requests of an unrepresented party differently than represented parties for similar cases before their panels.

Even if the Court fails to see a double tiered system of justice in favor of represented parties in the Fourth Circuit, the process that is due Tolle in this case should have been judged by what the Appellate Court typically allows in similar subject matter jurisdiction cases. The Appellate Court's denial of oral arguments in this case injured due process by preventing Tolle from having his day in court when there are worthy facts and circumstances which are not in the briefs and the issues at stake are at least as important as in other subject matter jurisdiction cases, like *Lighthouse*, where the parties were allowed oral argument. The Court should grant

Certiorari in order to ensure the due process standard in all subject matter jurisdiction cases is uniformly applied, especially in the light of a court's past actions concerning other Covid appeals.

Failure of the Appellate Court to allow Petitioner to present oral argument prior to its decision also had a direct impact on the ability of the Petitioner to bring material facts of the case to the attention of the court prior to the court making a decision, *supra*. By preventing Tolle the opportunity to bring these material facts before the lower court when its finding that "the facts...are adequately presented in the materials before this court" (Appendix D at App-55) was plainly wrong, the court denied Tolle a most basic right to due process (see for example, *Goldberg v. Kelly*, 397 U.S. 254(1970)).

By denying Tolle the opportunity to bring up the material facts of the changes in the pandemic before the Appellate Court during oral argument, the lower court prejudiced its findings without these facts that have a bearing on the case. Tolle's appeal was based on the promise of a new State of

Emergency at the time that the District Court found Plaintiff's Complaint moot. Petitioner believes that the proper application of this Court's precedents for mootness should have taken into account the promised restriction which the Governor of Virginia made in anticipation of a new State of Emergency if hospitalizations increased. Even if one argues that the restrictions imposed under the new State of Emergency did not directly affect Petitioner, the fact that the Appellate Court's Opinion and Order do not provide any evidence that it even considered this material fact prior to its decision to affirm the finding of mootness should make it clear that its consideration of mootness was prejudiced against properly applying this Court's standard for mootness, especially when the likelihood of the promised State of Emergency was not previously evaluated in light of the evidence for it. In order to ensure that all parties are given due process and the opportunity to present oral arguments and new material evidence when requested, the Court should grant Certiorari and this is even more pressing when a question of

disparate treatment of unrepresented parties is found in the record of an appeal.

Certiorari is Appropriate in Cases of Important Federal Question and for Exercise of the Court's Supervisory Power

The Rules call for granting of Certiorari when "a United States court of appeals...has decided an important question of federal law that has not been, but should be, settled by this Court" (Rule 10(c)). Tolle's case involves not only the worst pandemic in one hundred years but also raises issues concerning our fundamental freedoms in the face of the most sweeping and universal pandemic restrictions in our nation's history dictated by a single official without action by the legislature. Failure of this Court to review the dismissal which bars Tolle's complaint of an illegal universal quarantine and violations of the First, Fourth and Fourteenth Amendments from being heard at trial in the Federal Courts will allow the abuse of power which allegedly occurred to go unchallenged and to become the norm for public

health emergencies in the future. Furthermore, inaction by this Court to review the improper application of mootness to these challenges will set the stage for a repeat of the suspension of the constitutional rights of millions of citizens during the next national emergency without any precedent from the current litigation. Without Certiorari in this or similar cases, the only precedent that the Roberts Court will offer is that universal and severe restrictions on liberty by the Executive can be effected under the guise of a national emergency without restraint provided that the emergency is called off before its challengers get to trial. Without this Court's action, mootness will become the tactic of choice for despotic governors to avoid court review of their emergency actions.

Rule 10 also calls for Certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter". The lower courts in the Fourth Circuit have applied this Court's precedents for mootness markedly and

substantially differently than how mootness has been applied by the other circuit courts of appeal concerning the same constitutional matters during the pandemic, *supra*. Even if the Court does not believe that the mooting of Tolle's and similar cases should warrant Certiorari as an important matter which should be decided by this Court, the split between the Circuits created by the marked departure which the Fourth Circuit has taken when applying the precedents for mootness in Tolle's case compared to the action in similar cases in other Circuits should call for granting of Certiorari by this Court.

Furthermore, Rule 10 also calls for Certiorari when "a United States court of appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." The failure of the Appellate Court in the Fourth Circuit to enforce the stringent standard for mootness in Tolle's case has departed so far from the reasonable application of

this precedent that comparison to all of the other similar cases finding mootness in other Circuit Courts clearly show that the Fourth Circuit has strayed from the accepted practice for applying the precedents, *supra*. Additionally, the abuse of discretion in the U. S. Court of Appeals for the Fourth Circuit based on giving due process through oral argument to represented parties while denying an unrepresented party the same due process for similar cases, *supra*, is a substantial departure from the accepted and usual course of judicial proceedings in the Federal Courts which calls for granting of Certiorari in this case.

CONCLUSION

The foregoing arguments of Petitioner's have shown how Certiorari is appropriate in cases of important Federal question or split between the Circuits and for exercise of the Court's supervisory powers when a lower court has so far departed from the accepted and usual practice in application of this Court's precedents of law and application of due

process, *supra*. Furthermore, Petitioner's arguments have shown how a substantial split in how the Fourth Circuit applies this Court's precedents on mootness will be perpetuated if the Court does not grant Certiorari and take action to resolve the marked differences in the lower courts' interpretation of the precedent. Failure to address the abandonment of this Court's stringent standard for mootness in the Fourth Circuit will make it common for lower courts to find mootness in any case where an order or restriction expires, even when it is not absolutely clear that the restrictions or orders will not return in the future. Certiorari is warranted to protect this Court's Mootness Doctrine and ensure that it is being used properly in the Fourth Circuit and throughout all the courts of the land.

Furthermore, Petitioner has shown how out of step it was for the Fourth Circuit to deny Tolle due process and abuse its discretion by treating Tolle's request for oral argument differently than how represented parties in similar appeals were treated and by denying Tolle the opportunity to use oral

arguments to brief the Appellate Court on the latest material facts of the rapidly changing conditions of the pandemic and a new State of Emergency prior to their decision. Failing to grant oral argument also prejudiced the Appellate Court's opinion, which did not consider the new material facts which have a bearing on the case because the Court did not give Tolle the opportunity to bring the material facts to the Court's attention. No opinion provided with the Appellate Court's affirmation of the lower court's dismissal considered the new material facts or evidence which Tolle intended for oral argument and no explanation was given by the Appellate Court in response to Tolle's challenge that the Appellate Court's basis for denial of oral argument erred in fact.⁸ Granting of Certiorari is warranted in order

⁸ Tolle's Petition for Rehearing and Rehearing *En Banc* explicitly challenged the Appellate Court's failure to address the new facts and evidence which he would have raised at oral argument as having a bearing on the mootness of Plaintiff's Complaint (see Appendix F, Petition for Rehearing and Rehearing *En Banc* at App-72 to App-74), but the Appellate Court failed to comment on these arguments when denying the

for the Court to ensure that the Appellate Court did not abuse its discretion and/or deny Tolle due process for these reasons.

For all of the above reasons, I respectfully request and urge the Court to grant this request for a Writ of Certiorari, or to take other action as it may deem fit to provide relief or which effects correction of the errors in the lower courts as explained heretofore in the instant Petition.

Respectfully submitted,

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Petition.