No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES TOLLE,

Applicant/Plaintiff,

vs.

GOVERNOR RALPH NORTHAM
AND THE COMMONWEALTH OF VIRGINIA,

Respondents/Defendants.

TO THE HONORABLE JOHN ROBERTS, JR
CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

EMERGENCY APPLICATION FOR RELIEF OR INJUNCTION PENDING APPEAL

Relief Requested as Expeditiously as Allowed by the Court

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QUESTIONS PRESENTED

1. Should the lower courts in the Fourth Circuit be able to ignore Supreme Court precedent for mootness after *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167 (2000)[1] and *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. Nov. 25, 2020)[2] to dismiss Applicant's Complaint when Defendants are promising to return to the complained of restrictions and it is likely that this will occur at some point in the future?

2. Is the District Court's denial of reconsideration of the dismissal of Applicant's Complaint proper if it did not even mention the contents of the new evidence showing that Defendant Northam promised to return to the complained of restrictions and failed to address this Court's precedent under *Friends* in any way after the briefing on Plaintiff's Request for Reconsideration explicitly raised this precedent in light of the new evidence?

3. Should the Chief Justice of the Supreme Court allow the complete disregard for the proper application of this Court's doctrine on mootness in the Fourth Circuit without comment?

4. The District Court held that this Court's precedent in *Diocese of Brooklyn*, citing *Friends*, does not apply after voluntary cessation of pandemic restrictions because the removal of restrictions even before the pandemic is over magically removes the threat of new restrictions on the Plaintiff. Does the voluntary cessation of pandemic restrictions automatically bar the application of this Court's precedent in *Diocese of Brooklyn*?

5. Defendants argue that this Court's guidance in *Diocese of Brooklyn* only applies to unique restrictions placed on the practice of religion which are related to the size of the

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1 Hereinafter "*Friends*".
2 Hereinafter "*Diocese of Brooklyn*".

gathering and that any other restriction which obstructs or interferes with Plaintiff's practice of religion, such as preventing a priest from distributing Holy Communion, is not touched by the Supreme Court's precedent. Does this Court's precedent in *Diocese of Brooklyn* apply to all constitutional rights infringed under emergency powers during a pandemic or just on the capacity limits on religious services? To the extent that this Court's precedent applies to First Amendment rights for the free practice of religion, is a Governor unencumbered by *Diocese of Brooklyn* when imposing any other restriction which is unique to religious services and obstructs or interferes with Plaintiff's practice of religion, as long as he does not impose capacity restrictions that are unique to places of worship?

6. The District Court summarily dismissed Plaintiff's motion for stay or injunction under Fed. R. App. P. 8(a)(1)(C) based on Plaintiff's request containing arguments and evidence presented before, without the District Court considering Plaintiff's arguments.. Is it a due process violation when a District Court refuses to consider the merits of a Plaintiff's motion under Fed. R. App. P. 8(a)(1)? If this does not violate a Plaintiff's due process, how does a Plaintiff obtain his right for consideration under Fed. R. App. P. 8(a)(1)?

7. If the Chief Justice of the Supreme Court is not concerned with taking action to protect this Court's precedents on mootness from *Friends* and *Diocese of Brooklyn* at this time, is it proper for an extraordinary writ of injunction (which maintains the status quo where a State of Emergency with restrictions on Applicant's constitutional rights is barred until Defendants can show a compelling interest from the consensus of science which overcomes Plaintiff's evidence to the contrary) be granted pending appeal under 28 U.S.C. §1651(a) in order to aid in the jurisdiction of this Court by protecting the constitutioanl rights of Applicant from injuries arising due to the errors of the lower courts which defy this Court's precedents on mootness?

8. Other governors outside the Fourth Circuit facing judicial review of their

Executive Orders have taken steps to make it absolutely clear that constitutional violations like those contained in Applicant's complained of restrictions will not recur. Is it proper for the lower courts in the Fourth Circuit to deny a stay of future Executive Orders in Virginia which re-impose such restrictions if Defendants have not taken any similar steps to make it absolutely clear that constitutional violations will not occur under any re-imposed restrictions? Does the lower court's dismissal of Applicant's case prevent the people in the Fourth Circuit from receiving the same protections as governors in other Circuits have agreed to and does this create an equal protection violation when the errors in the Fourth Circuit preclude judicial action that citizens in other Circuits have obtained during the ongoing pandemic?

CORPORATE DISCLOSURE STATEMENT

9. Pursuant to Rule 29.6 of this Court's Rules, Applicant Tolle states that he has no parent corporation in this action and no publicly held corporation has an interest with Applicant Tolle in this action.

LIST OF PARTIES

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

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

11. *James Tolle v. Governor Northam, et al.*, Number 1:20cv363, U. S. District Court for the Eastern District of Virginia. Order denying preliminary relief entered April 8, 2020.

12. *James Tolle v. Governor Northam, et al.*, Number 20-1419, U. S. Court of Appeals for the Fourth Circuit. Order denying stay pending appeal entered April 28, 2020. Dismissal of appeal entered October 26, 2020.

13. *James Tolle v. Ralph Northam, Governor of Virginia, et al.*, Number 19-1283, U. S. Supreme Court, Petition for Writ of Certiorari. The Supreme Court denied Petitioner's request without comment on October 5, 2020.

14. In *James Tolle v. Governor Northam, et al.*, Number 1:20cv363, Applicant's renewed Motion for Preliminary Relief was filed February 8, 2021 in light of the U. S. Supreme Court's ruling in *Diocese of Brooklyn.* The U. S. District Court for the Eastern District of Virginia canceled Plaintiff's scheduled hearing on the motion by Order entered February 17, 2021.

15. *James Tolle v. Governor Northam, et al.*, Number 21-1225, U. S. Court of Appeals for the Fourth Circuit. Applicant's appeal of District Court's denial of application for preliminary injunction as an interlocutory order according to *Cedar Coal Co. v. United Mine Workers,* 560 F.2d 1153 (4th Cir.1977). The Court of Appeals ignored its own precedent in *Cedar Coal* in order to deny Applicant emergency relief under *Diocese of Brooklyn* and dismiss the appeal due to a lack of jurisdiction.

16. *James Tolle v. Ralph Northam, Governor of Virginia, et al.*, Emergency Application for relief, Number 20A157, The Supreme Court denied Applicant's request without comment on May 24, 2021.

17. In *James Tolle v. Governor Northam, et al.*, Number 1:20cv363, The District

Court dismissed Plaintiff's Complaint on July 29, 2021. The District Court denied Plaintiff's Request for Reconsideration on September 16, 2021. Plaintiff applied to the District Court for a stay pending appeal as required by Fed. R. App. P. 8(a)(1)(c), but the District Court denied Plaintiff due process by refusing to consider Plaintiff's arguments and evidence, stating: "..the Court will not again consider these arguments" and summarily dismissing Plaintiff's request for a stay.

18. *James Tolle v. Governor Northam, et al.*, Number 21-2106, U. S. Court of Appeals for the Fourth Circuit. Applicant appealed the District Court's dismissal based on errors in law and fact and submitted a motion to the Appellate Court for a stay pending appeal under Fed. R. App. P. 8(a)(2). The Appellate Court denied Applicant's request for stay pending appeal on October 28, 2021, without comment.

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(CITATIONS OF ORDERS ENTERED AND RELEVANT IN THE CASE)

19. The District Court's Order of July 29, 2021, dismissed Plaintiff's Complaint as moot. The District Court's Order and Memorandum Opinion supporting its decision are included in Applicant's Appendix, Section A.[3]

20. Plaintiff filed a request for reconsideration of the District Court's Dimissal, which was docketed as a Motion for Reconsideration on August 10, 2021, hereinafter Plaintiff's "Request for Reconsideration". During the briefing of this motion, Plaintiff filed a reply to Defendants' opposition, hereinafter "Plaintiff's Reply". Following the Plaintiff's Request for Reconsideration and Plaintiff's Reply which provided new evidence of Defendants' statements promising new restrictions on Plaintiff in the future, the District Court's Order of September 16, 2021, denied Plaintiff's Request for Reconsideration.[4] The District Court's Order provided 30 days for Plaintiff to file an appeal. This Order is included in App. Section B.

21. Applicant applied to the District Court for a stay or injunction pending appeal as required by Fed. R. App. P. 8(a)(1)(C), but the District Court summarily dismissed Plaintiff's request for stay by stating: "...the Court will not again consider these arguments." (See App. Section C.)

22. Applicant appealed the District Court's Order on October 5, 2021, based on errors in law and fact in the District Court's Orders of July 29, 2021 (Dismissal) and September 16, 2021 (Denial of Reconsideration).

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3 The District Court's dismissal order in Applicant's Appendix, Section A, is hereinafter referred to as "Dismissal", "Dismissal Order" or "App. Section A". References to the relevant record in the Appendix are referred to as "App. Section" with the corresponding Section number of the appendix and with page or paragraph number given as reflected in that section of the record. The District Court's opinion which accompanied its Dismissal is hereinafter referred to as "Memorandum Opinion" or "App. Section A".

4 The District Court order which denied Plaintiff's request for reconsideration in App. Section B is hereinafter referred to as "Denial of Reconsideration".

23. Applicant moved for a stay or injunction pending appeal in the Appellate Court under Fed. R. App. P. 8(a)(2), but the Appellate Court's Order of October 28, 2021, denied Applicant a stay without comment, which is in App. Section D.

JURISDICTION

24. Plaintiff's Complaint is within the jurisdiction of the District Court, pursuant to 28 U.S.C. § 1331 for actions violating the Constitution of the United States and arising under the laws of the United States

25. Plaintiff's Complaint is proper in judicial district of the District Court pursuant to 28 U.S.C. § 1391(b)(2), insofar as Plaintiff was/is a resident of this judicial district and the substantial part of the Defendants' denial of Plaintiff's rights giving rise to Plaintiff's claims occur in the District Court's judicial district.

26. Appeal to the U. S. Court of Appeals for the Fourth Circuit is proper under 28 U.S.C. § 1291 for the following reasons:

a) The District Court's Order of July 29, 2021, is a final order which dismisses Plaintiff's Complaint.

b) Plaintiff filed a timely Notice of Appeal, docketed on October 4, 2021, according to the time allowed by the District Court's Order of September 16, 2021, under Fed. R. App. P. 4(a)(5)(A).

27. Applicant properly moved for a stay or injunction pending appeal in the District Court as required by Fed. R. App. P. 8(a)(1) and subsequently in the Appellate Court according to Fed. R. App. P. 8(a)(2).

28. Applicant's present Emergency Application is proper after the Appellate Court's Order denying relief, according to Supreme Court Rule 22 and under 28 USC §1651(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

29. The constitutional provisions and statutes relied on in Applicant's case are the First, Fourth, and Fourteenth Amendments to the United States Constitution. These Amendments are provided in App. Section E.

To the Honorable John Roberts, Jr.
Chief Justice of the Supreme Court of the United States
and Circuit Justice for the Fourth Circuit

30. Applicant's present application is made under this Court's Rule 22, seeking relief from the misapplication of this Court's standard of mootness, and under 28 U.S.C. §1651(a) for an extraordinary writ of injunction should relief under Rule 22 not be granted. Applicant seeks an emergency injunction during the pendancy of Applicant's appeal which prevents Defendants from issuing new Emergency or Executive Orders related to COVID-19 or any related virus without explicit provisions for due process and without first making a showing to the Court how the consensus of science demonstrates that healthy persons without symptoms can meaningfully transmit the virus in light of the evidence which Plaintiff can show to the contrary.

31. Applicant's request for relief follows the District Court's dismissal of Plaintiff's Complaint due to mootness without considering the new evidence provided with Applicant's Request for Reconsideration in which Defendants promised to re-impose the complained of restrictions on Plaintiff's constitutional rights if hospitalizations and without weighing the likelihood of whether the complained of restrictions will recur according to this Court's strict standard for mootness from *Diocese of Brooklyn* and *Friends*. If the Court considers the errors in law comprising the District Court's finding of mootness contrary to the precedents of this Court or the errors in fact supporting this, Applicant respectfully requests that the Court award Applicant relief by reversing or remanding the District Court's dismissal based on these errors. This application allows the Supreme Court to address how the lower courts in the Fourth Circuit can ignore its precedents on mootness. Without any action by the Supreme Court, the courts in the Fourth Circuit will be allowed to distort the doctrine of mootness to apply it whenever restrictions on constitutional rights are voluntarily ceased without any concern for the likelihood that the complained restrictions will recur as required by this Court.

STATEMENT

32. Defendant Northam ordered a State of Emergency in response to the COVID-19 pandemic beginning on March 30, 2020 under the emergency powers provided under Va. Code § 44.146-17, with the initial and subsequent Executive Orders establishing a quarantine on the entire State and its population and such orders restricting all citizens' right to travel, assemble, worship and use of their private property under criminal penalty. Despite the Governor claiming that he was using his emergency powers due to a public health threat, neither Defendant Northam nor the State Health Commissioner invoked Va. Code § 32.1-48.05 as called for during public health threat to officially declare a quarantine, such action depriving all healthy citizens the due process rights guaranteed under Va. Code § 32.1-48.010 during a quarantine. Applicant, a resident of Virginia, was subject to Defendant Northam's orders and filed a complaint alleging injury due to violation of Applicant's and other citizens' rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution.

33. After Applicant appeals of Interlocutory Orders of the District Court were dismissed, the District Court lifted its stay on proceedings on Plaintiff's Complaint. Defendants filed a renewed Motion to Dismiss on June 16, 2021. During the briefings on the motion, Defendant Northam allowed the State of Emergency to expire on July 1, 2021. Following the removal of all previous restrictions on Plaintiff under the State of Emergency, the District Court dismissed Plaintiff's Complaint as moot on July 29, 2021. It is noteworthy that at the time of the District Court's dismissal, case counts and hospitalizations were increasing in Virginia due to the Delta variant of COVID-19 and the Centers for Disease Control reversed its guidance and recommended renewed public health restrictions due to the increasing cases around the time of the District Court's Order.

34. Applicant requested the District Court reconsider its dismissal of his Complaint in

light of this Court's precedents in *Diocese of Brooklyn* and *Friends* on August 9, 2021, which was docketed as a motion for reconsideration. Applicant's Request for Reconsideration argued that the District Court should reconsider its dismissal which was based on the voluntary cessation of the Defendants' State of Emergency according to the precedents of this Court by considering the likelihood that the complained of restrictions on Plaintiff's constitutional rights would recur due to the new CDC guidance and concern over the increase in the Delta variant. During the briefing of the motion, Plaintiff's Reply on August 23, 2021, provided new evidence from statements made by Defendant Northam to the media on August 5, 2021, which promised a State of Emergency with renewed restrictions if hospitalizations continued to increase (see App. Section F at 3). It is noteworthy that at the time of Plaintiff's Reply, hospitalizations reported by the Virginia Department of Health had increased by more than 145% since Defendant Northam had made his statements which promised new restrictions based on hospitalizations. The District Court denied Plaintiff's Request for Reconsideration by Order on September 16, 2021, without explicitly addressing this Court's precedent in *Friends* or considering the contents of the statements provided as new evidence which showed that it was reasonable that the complained of restrictions would recur.

35. Applicant requested a stay pending appeal in the District Court as required under Fed. R. App. P. 8(a)(1)(C), which was summarily dismissed by the District Court on September 29, 2021, stating: "„the Court will not again consider these arguments". It is noteworthy that the District Court's Order of September 29, 2021, refused to address Plaintiff's arguments concerning the errors in law and in fact in the District Court's failure to reconsider its finding of mootness in light of the evidence in Defendant Northam's recent statements under this Court's standard for mootness established in *Diocese of Brooklyn* and *Friends*.

36. Applicant appealed the District Court's Orders of July 29, 2021 (Dismissal) and

September 29, 2021 (Denial of Reconsideration) on October 4, 2021, to the U. S. Court of Appeals for the Fourth Circuit, within the 30 days allowed for appeal by the District Court's Order in App. Section B. On October 12, 2021, Applicant submitted a motion to the Appellate Court requesting a stay or injunction pending appeal or, if a stay was not granted, hearing of Applicant's appeal as an emergency appeal on an expedited basis.

37. Rather than correct the errors in law of the lower court's decision in light of this Court's precedents in *Diocese of Brooklyn* and *Friends*, the Appellate Court ordered briefing of Applicant's appeal on its normal schedule and denied Applicant's request for a stay pending appeal without comment.

38. Having failed to get any court within the Fourth Circuit to follow or address this Court's guidance in *Diocese of Brooklyn* and *Friends* yet, Applicant is now asking that the Court enforce the strict standard it has established for mootness when a controversy is still ongoing or, if the Court is not persuaded to correct the errors in the lower courts before the Appellate Court's judgment, grant of an injunction which protects Applicant's constitutional rights from restrictions which are likely to recur if COVID cases and hospitalizations follow a typical increasing trend in the Fall, during the time that Applicant's appeal is being heard by the Appellate Court.

39. As noted in the District Court, governors in other states have taken reasonable steps to prevent future pandemic restrictions from unduly abridging constitutional rights of citizens in those states. If the Court accepts Applicant's emergency request, not only can the Court enforce its strict standard of mootness and correct the errors in the lower courts in light of this standard, but it can also ensure that the protection of constitutional rights from abuse of emergency powers is uniform so that the people of California and Virginia are not receiving different rights because of a patchwork of executive actions across the nation. Failure of the courts to enforce this Court's guidance on mootness from *Diocese of Brooklyn* in the Fourth

Circuit will deprive citizens in one Circuit from benefiting under the law where other citizens have already benefited because the lesson of this Court in *Diocese of Brooklyn* makes a strong case that mootness should not apply when a pandemic is still ongoing even though restrictions may have been changed voluntarily.

40. Failure of this Court to take action to correct the errors in the lower courts is likely to weaken this Court's precedents on mootness. No action by the Court will encourage all lower courts to re-define mootness based on voluntary cessation of activity. This Court's standard which previously required that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (Friends at 170, citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968)) will be turned on its head and lower courts will require that Defendants will have to make it "absolutely clear" that they will re-implement past restrictions in order to overcome mootness, just like the Defendants and the District Court in Applicant's case has used this Court's refusal to review the *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), hereinafter *Danville*, to overturn the *Diocese of Brooklyn's* teaching on mootness. If the Court follows suit as in *Danville*, Applicant believes that it will be likely that the standard of mootness established by this Court over many years will become less and less revered, leading to a day when Defendants are able to avoid judicial scruitny simply by changing their actions when a controversy is still alive.

REASONS FOR GRANTING APPLICANT'S REQUEST FOR RELIEF

41. Applicant's appeal is based on the error in law found in the District Court's finding that Plaintiff's Complaint is moot in its Order of Dismissal and accompanying Memorandum Opinion dated July 29, 2021, hereinafter "Dismissal" or "Dismissal Order". Following the District Court's Dimissal Order, Plaintiff requested the District Court to reconsider its finding of mootness based on this Court's standard for mootness from *Diocese of Brooklyn* and *Friends.* Plaintiff's arguments for reconsideration of this Court's precedent based on new evidence were included in Plaintiff's request letter of August 9, 2021, docketed as a motion by the District Court, hereinafter "Request for Reconsideration". Plaintiff provided the latest evidence of Defendant Northam's promise to return to the complained of restrictions during the District Court's hearing of Plaintiff's Request for Reconsideration as part of Plaintiff's Reply dated August 23, 2021, hereinafter "Plaintiff's Reply" or "App. Section F". The District Court sustained its error in law by denying Plaintiff's Request for Reconsideration despite the new evidence provided in Plaintiff's Reply showing that Defendants had failed to make it absolutely clear that the complained of restrictions would not recurred as required by this Court's strict standard for mootness. The District Court's denial of Plaintiff's Request for Reconsideration, hereinafter "Denial of Reconsideration", failed to consider the new evidence provided in Plaintiff's Reply with any analysis of the Supreme Court's precedent in *Friends.*

42. The District Court's findings accompanying its Orders (Dismissal and Denial of Reconsideration) erred in fact and were clearly wrong on several facts, such errors serving as the basis of its orders and causing prejudice to Plaintiff's case. Specifically, the District Court's findings erred in fact as follows.

a) The District Court's Opinion supporting its Dismissal Order bases its decision on the expiration of the Defendants' State of Emergency and a finding that "there is no indication

that the defendants will adopt new restrictions" (App. Section A, Memorandum Opinion, at 14), which ignored the indications which were available based on the obvious and contemporaneous worsening of hospitalizations due to the Delta variant at the time and the track record of Defendants' behavior during the State of Emergency when cases and hospitalizations had worsened in the past. This error was clearly wrong in light of the current and past evidence and was not merely harmless because the District Court could not have properly applied the precedent from *Friends* without recognizing the indications that should have been obvious were it not for this error.

b) The District Court's Denial of Reconsideration Order failed to consider the contents of the statements of Defendant Northam, which clearly promise to re-institute a State of Emergency and provide an indication that defendants will adopt new restrictions, and then the District Court's Order errs in fact by stating that "plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot" (App. Section B at 4-5). Rather than considering the new evidence provided by what Defendant Northam's statements promised, the District Court presented a conclusory statement without analysis to make a finding that sustained its dismissal. The District Court's erroneous contention that no evidence having bearing on the District Court's mootness decision was provided by Plaintiff was clear error and was not merely harmless because if the District Court had properly considered the new evidence which it summarily dismissed, the District Court's finding of mootness could not have survived scrutiny in light of this evidence.

c) The District Court's Denial of Reconsideration erred in fact by either not considering the new evidence provided in Defendant Northam's statements or, alternatively, by wrongly characterizing this evidence as "misperceived facts" (App. Section B at 5). To the extent that the District Court Order found that Plaintiff misperceived the facts of Defendant

Northam's public statements which promised to re-institute the State of Emergency based on rising hospitalizations, the District Court was clearly wrong because the plain language reading of the statements by Defendant Northam to the media on August 6, 2021, show that Defendant Northam did promise to re-institute a State of Emergency under these conditions, as argued by Plaintiff. The error based on this mischaracterization of the evidence by the District Court was not mere harmless error because the District Court prejudiced Plaintiff's case by refusing to reconsider the dismissal based on this erroneous mischaracterizion of the facts of the evidence presented. This is explained in the facts and arguments presented concerning AOE 1, *infra.* The District Court's findings upon which it bases its Dismissal of Plaintiff's Complaint and its Denial of Reconsideration comprise errors in fact which include facts that are clearly wrong and not merely harmless because they prejudice Plaintiff's case by providing the basis for the District Court's actions against Plaintiff. This is explained in the facts and arguments concerning AOE 2, *infra.* The errors in law and fact in the District Court's Dismissal and Denial of Reconsideration provide reason for the Court to reverse the District Court's Dismissal or to remand Applicant's case to the lower court for proper consideration of the evidence showing that the complained of actions are likely to recur in light of the Supreme Court's guidance.

Defendant Northam Statements Promise Future Restrictions on Plaintiff

43. Following the District Court's finding of mootness, Plaintiff provided evidence of Defendant Northam's subsequent statements which promised a new State of Emergency with restrictions on Plaintiff's rights if hospitalizations continue to increase during the pandemic. 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."[5] (emphasis added).

Excerpts of this evidence was provided in Plaintiff's Reply (App. Section F) supporting Plaintiff's Request for Reconsideration. It is clear from these statements that Defendant Northam plans on re-imposing a State of Emergency and restrictions on Plaintiff and other healthy persons if hospitalizations increase and "hospitals become overburdened".

44. It is noteworthy that by the date when the District Court Denial of Reconsideration, hospitalizations in Virginia had increased by over 320% since Defendant Northam public statements to Major Garrett and hospitalizations had increased over 145% just in the time since Plaintiff's Reply which presented those statements as evidence.[6] Unless the COVID-19 virus bucks past trends, it is only likely to get worse as Fall approaches. If hospitalizations reach the point where Defendant Northam promised to re-institute a State of Emergency (which is the current trajectory based on the evidence presented in the record and likely based on seasonal increases in the Fall), it is reasonable to believe that Defendant Northam

5 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.

6 According to the hospitalization data provided by the Virginia Department of Health web page at https://www.vdh.virginia.gov/coronavirus/covid-19-in-virginia/vhha-hospitalizations/, confirmed hospitalizations when Defendant Northam made his comments about hospitalizations triggering a new State of Emergency on August 6, 2021, were 615; confirmed hospitalizations on August 24, 2021, when Plaintiff filed his Reply grew to 1,343; and confirmed hospitalizations on the date of the District Court's Denial of Reconsideration Order of September 16, 2021, were reported as 1,994. Based on this data, hospitalizations grew by 1,994/615 = 324.2% between Defendant Northam's statements on August 6, 2021 and the date of the District Court's Denial of Reconsideration Order on September 16, 2021.

will be allowed to return to restrictions on Plaintiff's constitutional rights after the Court has said Plaintiff's Complaint is moot. Based on the trends in this evidence, it is also possible that the District Court's dismissal will be vitiated during the present appeal if increasing hospitalizations trigger action by Defendant Northam as promised, leading to a reversal of the District Court's finding of mootness on appeal. But Applicant respectfully urges the Court not to wait for such circumstances because a cause for mootness under the law and Supreme Court precedents does not exist unless it is absolutely clear that the complained of restrictions will not recur, *infra.*

45. Plaintiff believes that the District Court erred in fact when reviewing the new evidence in Defendant Northam's statements. The District Court's Denial of Reconsideration states that "plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot by defendants' revocation of the Covid-19 related restrictions" (App. Section B at 4-5) and "plaintiff's motion presents misperceived facts as the basis for inappropriately" seeking reconsideration (App. Section B at 5). A plain reading of the quotation of Defendant Northam's public statements to the media shows that the Appellate Court should not accept the District Court's findings as fact nor the District Court's contention that the new evidence in Defendant Northam's statements does not indict the District Court's Dismissal. The statements clearly rebut the District Court's previous findings that "there is no indication that the defendants will adopt new restrictions" (App. Section A, Memorandum Opinion at 14), which is the basis of its Dismissal. The District Court erred in fact and was clearly wrong when refusing to recognize that the facts of Defendant Northam's statements following its finding of mootness had a bearing on the dismissal decision, facts which did actually provide some indication that Defendant Northam would re-institute new restrictions with rising hospitalizations.

46. To the extent to which the District Court found that Defendant Northam's statements to Major Garrett were "misperceived facts" (Denial of Reconsideration, App. Section

B at 5), the District Court erred and it is clearly wrong that the statements made by Defendant Northam were "misperceived" by Plaintiff in any way. Major Garrett's question was clearly involving re-imposition of restrictions under a State of Emergency in the future due to a variant of the COVID-19 virus, *supra*. Defendant Northam's response was directly addressing the conditions which he thought would require him to re-impose restrictions similar to those complained of by Plaintiff, when hospitalizations increased to the point where "our hospitals become overburdened". There is simply no other way to read, or "misperceive", such a clear statement of Defendant Northam's intent.

47. The foregoing demonstrate the errors in fact in the District Court's action. These errors were not harmless errors because the District Court's Denial of Reconsideration Order prejudiced Plaintiff's case by relying on these errors.

48. For the above reasons, it would be a mistake for the Appellate Court to rely on the District Court's findings concerning the evidence in Defendant Northam's public statements to the media on August 6, 2021 and Plaintiff respectfully requests the Court to consider this evidence without being prejudiced by the errors in fact in the District Court's findings regarding such statements.

Consensus of Science Supports No Compelling Interest for Quarantine Actions on All Healthy Persons

49. Plaintiff's Complaint, hereinafter "Complaint" or "App. Section G" has challenged the compelling interest of Defendant Northam's Order from the beginning by alleging facts which show that there is no consensus in science for restrictions on all healthy persons (App. Section G, ¶¶12, 14-18, 44) and that there are alternative means of protecting the healthy population (App. Section G, ¶44).

50. Since Plaintiff's Complaint, Plaintiff has submitted further evidence

substantiating the argument that the consensus of science does not support the restrictions on asymptomatic, healthy persons as imposed under Defendants' past Executive Orders during the pandemic. Statements from the World Health Organization (WHO) last year reported that transmission of COVID-19 by asymptomatic persons is "very rare" (documented in App. Section H, Exhibit F) and these have not been modified by any WHO experts since. The scientific studies provided by Plaintiff also show no meaningful transmission of COVID-19 by the asymptomatic patients studied.[7] To date, Defendants have failed to rebut the scientific evidence provided by Plaintiff showing no meaningful asymptomatic transmission and the District Court has held no trial to weigh the evidence nor made any findings of fact to the contrary.

51. Even if the Court does not find the recent scientific evidence as definitive, it should be clear that the consensus of science is on the side of Plaintiff's arguments and there is no compelling justification for Defendant Northam's restrictions on persons without symptoms, and even less for healthy persons who have not been exposed but still faced quarantine restrictions which abridged their constitutional rights under the past Executive Orders.

The District Court is Contrary to Law after Defying this Court's Precedents for Mootness

52. This Court should not let the lower counts continue to defy its standards of mootness and should grant Applicant immediate relief by enforcing its precedents and sending this Applicant's case back to the lower courts for proper consideration. According to *Friends*, "A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice". *Friends* at 169-170, citing *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982). This principle was recognized as an

7 See App. Section I Specifically: "There were no positive tests amongst 1,174 close contacts of asymptomatic cases." (App. Section I, Attachment A, Shiyi Cao, *et al.* study, p. 1). Also, "The lack of substantial transmission from observed asymptomatic index cases is notable." (App. Section I, Attachment B, Zachary Madewell, *et al.* study, p. 10).

essential element of judicial review when courts consider restrictions by governors during the current pandemic by the Supreme Court (see *Diocese of Brooklyn, per curiam,* which cited *Friends* at 6 and noted that "The Governor regularly changes the classification of particular areas without prior notice.") As has been seen in Virginia during the course of Plaintiff's case, Defendants have no hesitation to change restrictions on healthy individuals to impose harsher restrictions even while their counsel is promising no more increasing restrictions.[8] This is exactly why the District Court's finding of mootness during a pandemic, which by all accounts is still ongoing, is in defiance of Supreme Court precedents in *Diocese of Brooklyn* and *Friends.*

53. The Court's Memorandum Opinion which accompanied its Dismissal tries to draw a distinction between Plaintiff's case and the precedent in *Diocese of Brooklyn* by stating "the Executive Orders about which Tolle complains have been rescinded and there is no indication that the defendants will adopt new restrictions" (App. Section A, Memorandum Opinion at 14). But the District Court's finding of "no indication that the defendants will adopt new restrictions" is perplexing for several reasons. First, the track record of Defendants clearly showed a propensity to re-institute restrictions on Plaintiff's rights when they saw increasing cases due to the virus and increasing hospitalizations. On December 10, 2021, Defendant Northam's Executive Order re-instituted harsher restrictions on Plaintiff and all healthy persons, including harsher restrictions on Plaintiff's rights to assemble and to conduct his personal affairs in his home without unauthorized surveillance by banning all gatherings larger than 10 persons, based on increases in cases and hospitalizations as stated by the Defendants:

"All five health regions are experiencing increases in new COVID-19 cases, positive

8 Plaintiff's Opposition (App. Section H) to Defendants' Motion to Dismiss (MTD) included facts showing that Defendants have re-imposed harsher restrictions during the pandemic without any warning to the public or the courts: "Defendant Northam issued a new Executive Order with harsher restrictions within hours of Defendants' filing a MTD which included the statement: [Plaintiff]...cannot show any real or immediate threat that [he] will be wronged again", App. Section H, ¶2, inner quotes removed.

tests, and hospitalizations....Hospitalizations have increased by approximately 83 percent in the last four weeks. COVID-19 ICU hospitalizations have been increasing for 33 days and the statewide rate...has exceeded the threshold of concern...for the rate of confirmed COVID-19 hospitalizations....Therefore, additional measures are necessary to protect public health and stem the spread of COVID-19." (Executive Order Number Seventy-Two (2020) and Order of Public Health Emergency Nine, December 10, 2020, App. Section J, p. 1).

54. Furthermore, at the time of the District Court's Memorandum Opinion in App. Section A (dated July 29, 2021) concerns over the Delta variant were increasing. As noted by Plaintiff's filing following the District Court's Dismissal, the worry over the Delta variant was so great at the time of the District Court's Dismissal that the "Director of the CDC reversed its guidance for public COVID-19 mitigations due to a resurgence of the virus based on new 'data from recent outbreak investigations showing that Delta variant behaves uniquely differently from past strains'" (App. Section K at 2[9]). These concerns were reported in the media before and after the CDC's action, all of which preceded the District Court's Order to dismiss Plaintiff's Complaint. Based on the Defendants' past practice of re-instituting restrictions when virus cases were increasing, the District Court should have recognized that there were several (or at least some) indications that the complained of restrictions were likely to recur rather than "no indication that the defendants will adopt new restrictions" at this time when everyone else was worried about the Delta variant.

55. The District Court's Memorandum Opinion also finds that "Unlike the plaintiffs in...Diocese of Brooklyn, Tolle does not remain under a threat that the defendants will reinstate the restrictions about which he complained" (App. Section A, Memorandum Opinion at 15). But this finding is also based solely on the cessation of Defendant Northam's Executive Orders without considering the Defendants' past actions (when they re-imposed harsher restrictions

9 Quoting "CDC changes mask guidance in response to threat of Delta variant of Covid-19", K. Collins, et al. Updated July 27, 2021, https://www.cnn.eom/2021/07/27/politics/cdc-mask-guidance/index.htinl.

during increasing COVID cases), without considering the contemporaneous increase in the Delta variant, and without any consideration of the likelihood that Defendants would re-institute the restrictions if conditions changed during the pandemic that was still ongoing at the time. The majority of the Court in *Diocese of Brooklyn* has already addressed the District Court's argument that a change in the circumstances during a pandemic can make a case moot, stating:

> "The dissenting opinions argue that we should withhold relief because the relevant circumstance have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed [which is very similar to the way that the District Court dismissed Tolle's Complaint as moot without prejudice so he can apply again during the pandemic if the complained of restrictions recur].
>
> There is no justification fo rhat proposed course of action. It is clear that this matter is not moot. *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.* 551 U.S. 449, 462 (2007); *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). 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....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 area from attending services before judicial relief can be obtained....there may not be time for applicants to seek and obtain relief from this Court....The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification." *Diocese of Brooklyn, per curiam,* at 6-7.

56. It seems clear from this precedent that the Court intended for a controversy during a pandemic which was still ongoing at the time of the District Court's dismissal should not be moot based on Defendants' voluntary cessation of restrictions alone. The District Court attempts to waive this Court's precedent in *Diocese of Brooklyn* based on the difference between the New York Governor's cessation of red zone restrictions and the Virginia Governor's voluntary cessation of hist State of Emergency restrictions, but this distinction is not substantive. Under Virginia law, there is no obstacle to Defendant Northam re-imposing the same type of restrictions as the pandemic continues and even immediately if he so chooses. He

does not have to seek legislative or action from an administrative agency. There is no delay required under Virginia law for warning the public or seeking public comment. Just as in the case of the New York Governor's red/orange zone restrictions, he Virginia Governor only has to issue an Executive Order out of his own office to return to the complained of restrictions. There is no meaningful reason for the District Court to draw a distinction between these two cases.

57. To the extent that the District Court rules out the application of *Diocese of Brooklyn* to Applicant's case solely on the fact that Executive Orders enforcing the State of Emergency have expired, this distinction is not anywhere to be found in *Diocese of Brooklyn*. If the majority of the Court in *Diocese of Brooklyn*, intended for the Court's standard of mootness to only apply during the time that Governor Cuomo's Executive Orders were in force, the Court did not make this clear. Applicant believes that the Court's citations in *Diocese of Brooklyn*, including citation to the standard of mootness in *Friends*, shows that this Court's precedent continues to teach that the standards for mootness apply whether an Executive Order is active or not. The precedent for the Court's teaching from *Friends* involved a "National Pollution Discharge Elimination System (NPDES) permit" (*Friends* at 167) and not an Executive Order. The prinicple established by this Court in *Friends* and relied upon in *Diocese of Brooklyn* requires that a court consider the likelihood that the complained of restrictions will recur in the future. Whether such restrictions arise from an Executive Order or an agency permit is immaterial to the Court's precedent and the fact that Virginia voluntary ceased the restrictions on Plaintiff after Defendant Northam's Executive Order expired does not relieve the District Court from applying this Court's standard of mootness considering likely future restrictions. Any finding in the District Court which distinguishes Applicant's case from *Diocese of Brooklyn* based on what type of executive action is involved (red/orange zone classification vs. issuance of a State of Emergency) or based on whether an Executive Order is currently

enforcing such restrictions or has expired are obviously flawed and should not be trusted in this Court.[10]

58. For these reasons, the Court should not treat the District Court's finding that "Tolle does not remain under a threat" of new restrictions (App. Section A, Memorandum Opinion at 15) as a finding of fact which dismisses the Supreme Court's precedent in *Diocese of Brooklyn* without first thoroughly evaluating all of the evidence now before the Court, evidence which rebuts the District Court's finding and actually shows that it is likely that Tolle is still under the threat that the complained of restrictions will recur. This includes the new evidence provided by Plaintiff's which shows that Defendant Northam has promised in his statements to the public that he will re-institute the complained of restrictions under a State of Emergency if hospitalizations increase, *supra.*

59. If the Court considers no other evidence concerning the likelihood of future restrictions, the simple facts that the pandemic which led to the complained of restrictions is still ongoing and that Defendants are likely to return to the complained of actions if the impact of the COVID-19 variants gets worse should satisfy the Supreme Court's precedents. Without the Federal Courts addressing how governors within the Fourth Circuit are constrained by the Supreme Court's precedent from *Diocese of Brooklyn,* Defendants will be undeterred from violating Plaintiff's and other healthy person's constitutional rights through actions similar to the complained of restrictions during future pandemics. It is a fact that pandemic restrictions will occur again at some point in the future. This Court should not now "deprive a federal court of its power to determine the legality of the practice" by affirming the District Court's finding of

10 To the extent that the District Court tries to dismiss the application of *Diocese of Brooklyn* to Applicant's case based on the Executive Orders being rescinded and that "there is no indication that defendants will adopt new restrictions" (App. Section A, Memorandum Opinion at 14) is an error in fact and plainly wrong because there was evidence for an indication that the complained of restrictions will recur at least by the time of the District Court's consideration of Plaintiff's Request for Reconsideration, *supra.*

mootness in this case.

60. Even if the Court finds that it was proper for the District Court to ignore the widespread concerns over the growing Delta variant infections and hospitalizations at the time of its dismissal decision, Plaintiff provided the District Court new evidence following the Dismissal showing that Defendant Northam was committed to re-instituting a State of Emergency with restrictions on Plaintiff and other healthy persons if hospitalizations increased, *supra*. The proper application of the Supreme Court's precedent in *Friends* demands that the District Court should have used the new evidence in Defendant Northam's public statements which promise re-imposition of a State of Emergency to determine if it is reasonable that Defendants will return to the complained of restrictions when ruling on Plaintiff's request for reconsideration. The District Court's failure to properly consider the likelihood of a return to the complained of restrictions based on the new evidence provided when denying Plaintiff's request for reconsideration in the Order of App. Section B is an error in law.

61. According to the Supreme Court precedent in *Friends*, "the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (*Friends* at 170, citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, hereinafter "*Concentrated*"). Defendant Northam made statements following the District Court's dismissal which promise to re-impose a State of Emergency with the complained of restrictions based on increased hospitalizations, *supra*. These statements are in stark contrast to the long standing precedent of the Supreme Court which describes a mootness standard's "heavy burden of persuasion which we have held rests upon those in appellees' shoes" (*Concentrated* at 203) and make it impossible for the Court to ignore the error in the District Court's failure to properly

consider them. Furthermore, up until the date of the District Court's Denial of Reconsideration Order, the trend in hospitalizations reported by the Virginia Department of Health were consistently increasing after Defendant Northam's public statements concerning hospitalizations, *supra.* Defendants have provided nothing to rebut the evidence provided by Plaintiff which shows that it is likely for the complained of restrictions to recur with increasing hospitalizations. For these reasons, Applicant believes that the District Court's Denial of Reconsideration in light of the new evidence does not meet the "stringent" standard for mootness required by the Supreme Court. It is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" as required by the precedent in *Friends* in light of the evidence in Defendant Northam's statements which were presented to the District Court following the Dismissal.

62. After being presented with the new evidence in Defendant Northam's public statements, the District Court denied Plaintiff's request for reconsideration based on the reason that "plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot by defendants' revocation of the Covid-19 related restrictions" (App. Section B at 4-5). But the District Court's Denial of Reconsideration Order in App. Section B failed to provide any explicit consideration of the evidence in light of the Supreme Court's standard from *Friends* to accompany this reason. It is an error in law for the District Court to deny Plaintiff's Request for Reconsideration in light of this new evidence without considering the Supreme Court precedent for mootness. By not explicitly addressing the new evidence concerning re-imposition of the complained of actions in the future and Plaintiff's arguments under the precedent in *Friends*, the District Court's Denial of Reconsideration Order wrongly based its action on the voluntary cessation of the Defendants' Executive Orders and erred in law by ignoring the Supreme Court's guidance to the contrary.

63. The District Court also relied on this Court's action in *Danville* to dismiss the precedent from *Diocese of Brooklyn.* However, the *Danville* case is markedly inapposite to Applicant's case. In *Danville,* it is noteworthy that this Court found that "there is no indication that it [Governor Beshear's school-closing Order] will be renewed." *Danville* at 527. Even if this Court is not persauded that there was enough concern over the growing Delta variant at the time of the District Court's dismissal for the lower court to find some indication that the complained of restrictions may recur, the new evidence from Defendant Northam's statements which promise to re-institute a new State of Emergency based on the rising hospitalizations due to the Delta variant after the District Court's dismissal should convince the Court that there is at least some indication that the restrictions in Virginia will be renewed, at least at the time of the District Court's review of the new evidence with Applicant's Request for Reconsideration. This substantive differences between Applicant's case and *Danville* should convince the Court that the District Court's reliance on *Danville* in this case was flawed and that *Diocese of Brooklyn's* precedent should not be dismissed based on *Danville.*

64. Based on the foregoing reasons, the Court should find that the District Court erred in law when dismissing Plaintiff's Complaint and by denying Plaintiff's Request for Reconsideration. The Court should see that these actions in the District Court wrongly defy the Court's precedent in *Diocese of Brooklyn* and *Friends* and take action to correct this error in the lower courts if the Appellate Court has not done so yet. The plain reading of Defendant Northam's public statements promise to re-impose the complained of restrictions if hospitalizations increase and it is likely that hospitalizations will trigger this sometime in the Fall. Defendant Northam has not only failed to do anything which makes it "absolutely clear" that the complained of restrictions on Plaintiff's rights will not recur, his statements actually make it more reasonable for the Court to believe that he will re-institute a State of Emergency

with new restrictions. There is no other fair reading of the facts and evidence under the strict standard for mootness according to the Supreme Court's guidance in *Friends* and the Court should not let the District Court's finding of mootness stand if it does not meet this standard. For these reasons, the Court should reverse the District Court's dismissal and prevent the District Court's error in law from depriving the Federal courts the power to determine the legality of Defendant Northam's practice of universally quarantining healthy persons when a compelling interest has not yet been established by the consensus of science.

District Court's Errors in Fact call for Remand

65. The District Court Orders in App. Section A (Dismissal) and App. Section B (Denial of Reconsideration) are based on errors in fact which are clearly wrong, are not merely harmless error and prejudice Plaintiff by causing the District Court to dismiss his case and deny reconsideration.

66. The District Court's Memorandum Opinion, which supports its Dismissal Order, bases the District Court's decision on the expiration of the Defendants' State of Emergency and a finding that "there is no indication that the defendants will adopt new restrictions" (App. Section A, Memorandum Opinion at 14). This finding of "no indication" was clearly wrong because it was completely blind to the proven practice of Defendants' which had already re-imposed restrictions on Plaintiff when COVID-19 cases and hospitalizations were increasing, *supra.* It should have also been obvious to the District Court that the conditions for such action by Defendants due to the spread of the Delta variant were contemporaneous to the District Court's consideration of its dismissal. Just prior to the District Court's finding, the CDC had taken a dramatic step to change its guidance concerning COVID-19 precautions because of the spread of the Delta variant, *supra.* It is plainly wrong for the District Court to find that there were "no

indications" whatsoever that would lead a reasonable person to expect new restrictions. If the District Court had found that there were at least some indications that new restrictions may be implemented in response to the Delta variant but still ordered a dismissal after considering those indications as not being compelling, it would be arguable that the District Court did not err in fact. But for the District Court to ignore the track record of the Defendants and the increasing conditions at the time of its consideration to find that there were NO indications for the imposition of new restrictions is clearly wrong based on the facts. This error was clearly wrong in light of the current and past evidence and was not merely harmless because the District Court could not have met the standard for mootness under the precedent from *Friends* without ignoring these facts and erroneously finding the self-serving conclusion that there was no indication of new restrictions.

67. The District Court's Denial of Reconsideration mentions the "interview of Governor Northam on August 6, 2021" (App. Section B at 4), but provides no explicit discussion of its contents or its bearing on the case within App. Section B. The District Court's Denial of Reconsideration then erroneously states that "plaintiff has not presented evidence demonstrating that the Court erred in finding that this civil action was made moot" (App. Section B at 4-5). Rather than considering the new evidence provided by what Defendant Northam's statements promised, the District Court presented a conclusory statement without analysis which provided a formula to dismiss this new evidence and maintain its dismissal decision without justification. The evidence in the statements by Defendant Northam have direct bearing on the District Court's application of the standard for mootness under the Supreme Court precedent in *Friends* because these statements made it reasonable that the complained of restrictions would recur upon increasing hospitalizations, *supra*. The District Court's erroneous contention from App. Section B that no evidence having bearing on the District Court's mootness decision was provided by

Plaintiff was clear error and was not merely harmless because if the District Court had properly considered the new evidence which it summarily dismissed, the District Court's finding of mootness could not have survived scrutiny in light of this evidence.

68. The District Court's Denial of Reconsideration erred in fact by either not considering the new evidence provided in Defendant Northam's statements or, alternatively, by wrongly characterizing this evidence as "misperceived facts" (App. Section B at 5). To the extent that the District Court Order found that Plaintiff misperceived the facts of Defendant Northam's public statements which promised to re-institute the State of Emergency based on rising hospitalizations, the District Court was clearly wrong because the plan language reading of the statements by Defendant Northam to the media on August 6, 2021, show that Defendant Northam did promise to re-institute a State of Emergency under these conditions, *supra*, conditions which he himself said were happening in Virginia at the time of his statements. The error based on this mischaracterization of the evidence by the District Court was not mere harmless error because the District Court prejudiced Plaintiff's case by refusing to reconsider the dismissal based on wrongly characterizing the statements of Defendant Northam as misperceived facts and relying on *United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997) to ignore Plaintiff's evidence (App. Section B at 5).

69. Based on the foregoing, the District Court's Orders in App. Section A (Dismissal) and App. Section B (Denial of Reconsideration) were based on findings that erred in fact, were clearly wrong and were not merely harmless error because these findings were used by the District Court to dismiss Plaintiff's Complaint and to deny his reconsideration request. The Court should remand Plaintiff's case to the District Court to correct these errors and to properly consider the mootness of Plaintiff's case based on the track record of Defendants, the conditions concerning the virus in Virginia at the time of the District Court's dismissal, and the new

evidence presented as part of Defendant Northam's statements to the public according to the standard for mootness in the Supreme Court precedent from *Friends.*

Request for Emergency Injunction Pending Appeal

70. If the Court is not persuaded to take immediate action to enforce its standards for mootness in the lower courts and grant Applicant relief, Applicant is requesting that the Court grant an injunction on any future Emergency or Executive Orders of Defendants' during the pendancy of Applicant's appeal which re-impose restrictions related to COVID-19 that are similar to those complained of in Plaintiff's Complaint. This injunction is "necessary or appropriate in aid of [the Court's] jurisdictio[n]"[11] because it will prevent any errors in the lower courts from ignoring this Court's jurisdiction and dismissing the Court's precedents from *Diocese of Brooklyn* and *Friends* while the propriety of the District Court's actions in light of these precedents is determined on appeal. The practice of the Court requires that emergency injunctions only be granted when the applicant's right to relief is "indisputably clear".[12] Applicant believes that the right to a reasonable injunction as requested in the present application is indisputably clear if the Court considers the potential impact of new restrictions on Applicant and millions of other healthy Virginians under a new State of Emergency if Defendant Northam is allowed to carry out his promise due to the errors in the District Court. The refusal of the District Court to even consider Applicant's arguments when Applicant requested a stay pending appeal similar to the injunction in this application, *supra,* and the Appellate Court's subsequent refusal to grant a reasonable injunction make it "most critical and exigent"[13] that this Court grant an emergency injunction in order to stay the impact of the District Court's errors and prevent the

11 *Ohio Citizens for Responsible Energy, Inc. v. NRC,* 479 U.S. 1312, 1313 (1986).
12 *Communist Party of Indiana v. Whitcomb,* 409 U.S. 1235, 93 S.Ct. 16, 34 L.Ed.2d 64 (1972) (Rehnquist, J., in chambers).
13 *Fishman v. Schaffer,* 429 U.S. 1325, 1326, 97 S. Ct. 14, 15, 50 L.Ed.2d 56 (1976), quoting *Williams v. Rhodes,* 89 S. Ct 1., 2, 21 L.Ed.2d 69, 70 (1968).

irreparable harm to the constitutional rights of Applicant and all Virginians if the promised new State of Emergency is re-instituted soon, before Applicant's appeal is decided. When protection of constitutional rights is called for, action by a Justice of the Court has been found to be proper under 28 U.S.C. 1651(a), finding that it was most critical and exigent to augment normal appellate procedure in order to avoid "acceptance of the conclusion that violation of the applicant's constitutional rights msut go unremedied" (*McCarthy v. Briscoe*, 429 U.S. 1317, 1322 (1976)). The reasons for the Court to grant an emergency injunction as requested are as follows.

71. The Court can better appreciate the impact of the District Court's errors on Applicant and the entire healthy population of Virginia and reason for granting emergency relief in the form of a reasonable injunction which stays a future State of Emergency without proper showing by considering this request under the criteria for a preliminary injunction. The criteria for granting an injunction under *Winter v. Natural Res. Def. Council, Inc.* 555 U.S. 7, 20, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008), hereinafter "*Winter*", are: (1) whether the applicant is likely to succeed on the merits; (2) whether the applicant will suffer irreparable harm; (3) the balance of equities between the interested parties; and (4) if the injunction is in the public interest.[14] Although these criteria are not required for granting of an emergency injunction under 28 U.S.C. §1651, it would be worthy of the Court to consider the merit of Applicant's request based on this criteria as reasons why Applicant's right to relief is indisputably clear and how the irreperable harm of a new State of Emergency makes the granting of an emergency injunction critical and exigent for the entire healthy population of Virginia.

72. Plaintiff's arguments herein show that it is likely that Plaintiff's appeal will either give grounds for reversal or remand without any future action by Defendants based on errors in

14 *Winter* at 20.

law and fact, *supra*. Alternatively, the District Court's finding of mootness will be vitiated because of future action by Defendants, leading to reversal on appeal. Either of these circumstances makes Plaintiff's appeal likely to succeed on the merits under *Winter's* first criterion. Plaintiff's Complaint and subsequent filings have further demonstrated satisfaction of the first two criteria by showing that Plaintiff's Complaint: 1) is likely to succeed on the merits due to Plaintiff's Complaint not being moot (App. Section I, ¶¶11-17); and 2) due to restrictions on healthy persons which violate Plaintiff's constitutional rights and cause irreparable injury under the First Amendment protections for religion (App. Section I, ¶22) and free speech (App. Section I, ¶23), violations of Plaintiff's right to be secure in one's home and protected against unwarranted surveillance which cause irreparable injury under the Fourth or First Amendments (App. Section I, ¶¶24-31), and due to the fact that Defendant Northam's orders violate Plaintiff's rights and cause injury by imposing an illegal quarantine without due process under Virginia law and the Fourteenth Amendment (App. Section I, ¶¶32-34). Defendant Northam's past restrictions offered healthy persons no protection through due process (App. Section I, ¶32) and failure of the Court to grant an injunction and deter Defendants from returning to such restrictions without due process will continue these past irreparable injuries.

73. Evidence provided with Plaintiff's filings has shown that there is no consensus of science to establish a compelling interest in restricting healthy persons without symptoms because the overwhelming evidence and the most recent studies demonstrate that healthy persons do not transmit the COVID-19 virus, *supra*. Even if it is considered inconvenient for Defendants to grant constitutional rights to healthy persons during an increase of COVID-19 infections in the future, issuance of an injunction on restrictions against healthy persons will not injure Defendants or the public if the consensus of science shows that healthy asymptomatic persons do not spread the virus and Defendants cannot rebut this at the time of renewed restrictions. The

requested injunction should not harm the government's public health efforts based on the science. For this reason and the following, *Winter's* last two criteria can be satisfied.

a) The Court should also consider the third factor from *Winter* for harm to the government in comparison to the fourth factor, where the public interest lies. Renewed restrictions on healthy, asymptomatic persons from Emergency or Executive Orders by Defendant Northam will cause irreparable injury to Plaintiff and all other healthy persons of the public, including similar injury to Plaintiff's constitutional rights as what Plaintiff complained of under the First, Fourth and Fourteenth Amendments, *supra*. Scientific evidence from Plaintiff's filings has shown that the consensus of science does not offer any compelling interest for restrictions on healthy, asymptomatic persons, *supra*. Without Defendants providing any scientific evidence to rebut Plaintiff's scientific evidence and demonstrate a compelling interest for renewed restrictions on healthy, asymptomatic persons, an injunction will serve the public's interest by doing away with the unnecessary injury to the constitutional rights of citizens caused by these restrictions which are not based on solid science.

b) Furthermore, Plaintiff's filings have shown that reasonable injunctions on emergency powers of Defendant Northam are not expected to cause harm to the public based on standards accepted generally outside of Virginia. The evidence from the international scientific community provided by Plaintiff shows that restrictions on healthy, asymptomatic persons are not required to protect the public since the consensus of science is that they do not spread the virus, *supra*. Furthermore, Plaintiff has provided evidence of how other governors have accepted reasonable injunctions on their emergency powers related to COVID-19 (App. Section I, Attachment C). Plaintiff provided a proposed injunction based on the orders agreed to by other governors (App. Section F, Attachment A). If other governors and courts have found injunctions on Executive Orders which place conditions on future COVID-19 restrictions reasonable and

causing no harm to the public in their states, this demonstrates that reasonable injunctions on emergency powers like that proposed in Plaintiff's filings or as requested in the instant application should not be expected to cause harm to the public by this Court when considering the fourth criterion in *Winter.*

c) Plaintiff has shown that the impact on the government will be minimal if the Court enjoins Defendant Northam's future Emergency or Executive Orders related to restrictions on healthy persons, *supra.* On the other hand, the interest to the public in the Court preventing injury to a vast number of citizens' constitutional rights and protecting those rights in the future should be clear from Plaintiff's arguments, *supra.* Furthermore, the injunction on future Emergency or Executive Orders which Plaintiff is requesting is based on Defendants providing a showing of a compelling interest based on scientific studies of the transmission by asymptomatic persons before renewed restrictions on healthy persons are allowed. If Defendants can rebut the evidence for the consensus of science which Plaintiff has provided concerning asymptomatic transmission and demonstrate a compelling interest, the injunction requested by Plaintiff will allow for renewed restrictions on healthy persons. The impact of the injunction requested by Plaintiff gives no reason to limit the ability of Defendant Northam to issue new restrictions in the future if the most recent science at that time shows that healthy, asymptomatic persons can meaningfully contribute to the transmission of the virus and, therefore, the proposed injunction causes no impact to the government or harm to the public if the government can make the showing to overcome the Plaintiff's arguments and evidence to the contrary. For these reasons, the balancing of the injury to the government and the benefit to the public under the injunction requested by Plaintiff should make it clear that the benefits of an injunction far outweigh the impact to the government.

d) The courts have justified injunctions before when there are competing interests for the government and the rights of the public. In *Roe v. U.S. Dep't of Def.*, 947 F.3d 207 (4th Cir. 2020), hereinafter "*Roe*", the courts found a risk of infection posed by the *Roe* Plaintiffs to other members of the Air Force to be "negligible" (*Roe* at 213). The Appellate Court in that case determined that the proper way to evaluate criteria 3 and 4 from *Winter* was by landing on the side of protecting the rights of the impacted individuals during the appeal when there was only a "miniscule" (*Roe* at 230) impact to the government ("any harm resulting from the retention of this small number of servicemembers is outweighed by the 'potentially immense' harm to HIV-positive servicemembers." *Roe* at 230, quoting the *Roe* District Court). An injunction was affirmed by the Appellate Court based on the potentially immense harm to the individuals impacted by the government's action, determining that "the balance of equities and the public interest favored a preliminary injunction to maintain the status quo during litigation" (*Roe* at 231) and ensuring that the rights of the impacted individuals would remain in place. In Plaintiff's case, the impact of a reasonable injunction to the government's public health program is similarly negligible where the consensus of science shows that the transmission by asymptomatic persons is "very rare", while the impact to the rights of all healthy persons impacted by the complained of COVID-19 restrictions will be many more times greater than that of the small number of impacted individuals in *Roe*. An injunction against renewed restrictions during Plaintiff's appeal will also represent the proper balancing of the equities under *Winter's* criteria 3 and 4 because it will maintain the status quo which protects the rights of all healthy persons just as was done in *Roe*. Without a showing by Defendants that the latest science demonstrates that healthy, asymptomatic persons can meaningfully contribute to the spread of the virus to overcome the evidence and arguments which Plaintiff has provided to the contrary, whatever impact an injunction would have on Defendants' public health program is far

outweighed by the importance of protecting universal constitutional rights to freedom of worship, travel, assembly, the right to equal protection under law and the due process rights of healthy persons.

74. For the foregoing reasons, granting an injunction which prevents Defendants from issuing new Emergency or Executive Orders related to COVID-19 or any related virus without explicit provisions for due process and without first making a showing to the Court how the consensus of science demonstrates that healthy persons without symptoms can meaningfully transmit the virus in light of the evidence which Plaintiff can show to the contrary satisfies the requirements under the law by balancing the interests between the public and government and tipping toward the greater interest in the protection of the constitutional rights of millions of Virginians according to the criteria from *Winter*.

Defendants' Arguments against an Injunction do not retract Defendant Northam's Promise to Return to Past Restrictions nor Make it Absolutely Clear in any way that the Complained of Restrictions will not Recur

75. Since the District Court's denial of Plaintiff's Request for Reconsideration, Defendants have opposed Plaintiff's request for a stay, but it is noteworthy that they have not yet taken the opportunity in any of its opposition to modify Defendant Northam's promise to re-institute the restrictions on Plaintiff based on increasing hospitalizations nor rebut Plaintiff's arguments that such statements by Defendant Northam make it reasonable to believe that the complained of restrictions will recur in the Fall. If this Court properly applies the stringent standard for mootness from the Supreme Court precedent in *Friends*, it should expect that Defendants' actions or statements make it "absolutely clear" that they will not return to the complained of restrictions. However, Defendants opposition since the District Court's denial of Plaintiff's request for reconsideration does not include any statements or evidence which make it

absolutely clear that Defendants will not re-impose new restrictions on Plaintiff.

76. Plaintiff's arguments before the District Court have provided an example of how governors from other States have taken action to make it absolutely clear that they will not return to unconstitutional restrictions during the pandemic by agreeing to reasonable settlements (see App. Section I, Attachment C). Plaintiff even proposed an agreement, to Defendants and the District Court, which is based on the reasonable actions by other governors in order to allow Defendants to make it absolutely clear that they will not return to the complained of restrictions (see App. Section F at 4-5 and App. Section F, Attachment A). Defendants' opposition since the District Court's dismissal has not shown any evidence of action by Defendants which would be similar to the reasonable actions to meet the standard for mootness taken by other governors, nor have Defendants responded to Plaintiff's proposed settlement which would do this. Unless Defendants can make it absolutely clear to the Court that the complained of restrictions will not recur by agreeing to something like the Plaintiff's proposed settlement agreement or taking other appropriate action before the Court, the Court should not affirm the District Court's dismissal under the Supreme Court's precedent in *Friends*, which requires that Defendants make this absolutely clear.

77. Failure of this Court to correct any of the errors in the lower courts of the Fourth Circuit which, if left in place, will serve to preclude judicial review of Defendants' use of emergency powers to restrict Applicant's constitutional rights will create a split based on the Fourth Circuit's denial of judicial review to its citizens and how other Circuits have allowed judicial review leading to reasonable limitations on the governors in states outside the Fourth Circuit to protect citizens' rights. Action by this Court which allows Applicant's case to proceed in the lower court will set up the conditions where the use of emergency powers by the Governor of Virginia will receive judicial review as in the courts of the other Circuits and will allow the

Defendants to take the steps which are proper to show that it is absolutely clear that the complained of violations of Applicant's constitutional rights will not recur under any State of Emergency in the future. Alternatively, if the Court grants Applicant a stay pending appeal which reasonably restricts Defendants from re-imposing new restrictions on Applicant's constitutional rights without first showing a compelling interest based on the consensus of science which overcomes the Applicant's arguments and evidence to the contrary, the Court will protect this split between the Circuits from denying citizens in Virginia the protections which citizens in other Circuits enjoy during the ongoing pandemic until Defendants can show cause for treating the citizens in Virginia differently.

78. Lastly, Defendants have argued against an injunction based on sovereign immunity. However, the District Court did not make any finding concerning sovereign immunity in this case. Applicant's appeal and the instant application is wholly based on the errors related to the misapplication of this Court's precedents on mootness. Consideration of this Court of any arguments concerning standing based on sovereign immunity will traverse issues which the District Court has not properly considered, have not been tested against Plaintiff's arguments to the contrary and do not fall within the standard of review in this case. The Court's plenary review of sovereign immunity at this time will be premature and tend to injure Applicant's due process rights, effectively denying him the opportunity to have his arguments against these claims heard in the trial court. Furthermore, Defendants' arguments for sovereign immunity protections against injunctions related to Executive Orders during the ongoing pandemic have always been contrary to the precedent of this Court in *Diocese of Brooklyn*, where no sovereign immunity protections prohibited the Court from reviewing and acting to curb the executive powers of the governor in that case. Finding a sovereign immunity bar in this case would set up a split between how this Court's review of emergency powers during the ongoing pandemic

applies and would serve to create an equal protection issue between Circuits where emergency orders are justiciable and others where they are not. Applicant believes that the power of the Federal courts to review restrictions on constitutional restrictions imposed by emergency powers of governors during pandemics is the same throughout the nation and this Court is not prevented from ensuring that citizens in all Circuits receive the same protections of their constitutional rights as the Court found in *Diocese of Brooklyn.* The Defendants' arguments for sovereign immunity in this case would serve to wholly immunize them from the Court's guidance in *Diocese of Brooklyn,* which is an absurd interpretation of *Diocese of Brooklyn* precedent and this Court should not consider any such arguments.

CONCLUSION

79. Applicant has shown that the District Court has erred in law by not properly applying the precedent from the Supreme Court's guidance in *Diocese of Boorklyn* or *Friends* to its finding of mootness in App. Section A (Dismissal) and its Denial of Reconsideration in App. Section B in light of the proven track record of the Defendants, the likelihood of increasing cases and hospitalizations for COVID-related variants this Fall and the new evidence in Defendant Northam's statements which promise to re-institute restrictions on Applicant under a new State of Emergency based on hospitalizations. Applicant's arguments demonstrate how taking action to grant Applicant relief which corrects these errors will aid in this Court's jurisdiction and ensure that the lower courts properly address the critical and exigent issues involving the constitutional rights of millions of citizens in the Fourth Circuit during a pandemic which is still ongoing. Applicant respectfully requests that the Court correct the errors in law by ensuring that the proper standard for mootness under the Supreme Court's precedents is enforced in the Fourth Circuit. Applicant respectfully requests that the Court do not delay to provide Applicant relief by

reversing the District Court's decision before Applicant's appeal is final or by remanding Applicant's case to the lower courts with guidance that enforces the Court's precedents.

80. Applicant has shown how the requested emergency injunction of Defendant Northam's Emergency or Executive Orders is proper under the law according to the practice of the Court under 28 U.S.C. 1651(a) and how a reasonable injunction complies with the criteria in *Winter* for such Court action. If the Court is not persuaded to take action which corrects the errors in the lower courts which bars Applicant's Complaint from being heard, the Court should grant Applicant's request for an injunction pending Applicant's appeal which prevents Defendants from issuing new Emergency or Executive Orders related to COVID-19 or any related virus without explicit provisions for due process and without first making a showing to the Trial Court that the consensus of science demonstrates that healthy persons without symptoms can meaningfully transmit the virus in light of the evidence which Plaintiff can show to the contrary. Applicant respectfully requests that the Court grant an injunction as requested by the instant emergency application based on the foregoing, if no other relief is granted.

Dated: November 1, 2021

Respectfully submitted,

By: _____

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APPLICANT'S APPENDIX

CONTAINING

RELEVANT PARTS OF THE RECORD

FROM THE LOWER COURTS

SECTION A

District Court's Order (ECF 74)

and

Memorandum Opinion (ECF 73)

for Dismissal

(Dismissal)

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.	)	

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.

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 29th day of July, 2021.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

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 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 this 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,"[1] 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 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

[1] 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.

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 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 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 . . . their 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 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;[2]

[2] Defendant Northam already is required to comply with the United States Constitution. Before taking 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. II, §7.

D. An order requiring the Commonwealth of Virginia's and any other State's[3] 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 according to proof at trial;

F. Costs of suit, inclusive of reasonable attorneys' fees,[4] 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 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].[5] The amended complaint updated plaintiff's original allegations by adding new paragraphs 26-1 to 26-9, which incorporate references to EO-72. Paragraphs 26-1 to 26-4 of 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,

[3] 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.

[4] As a pro se litigant, plaintiff has no basis for requesting attorneys' fees. See, e.g., Munvive v. Fairfax County 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 entitled to such expenses).

[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.

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 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. 3], 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 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 an 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 the 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. 24]. 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] (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 EO-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. 53]. The Court granted plaintiff's motion to file a sur-reply without holding a hearing and determined that defendants' 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 a 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 cancelling the hearing that

plaintiff had 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,[6] which terminated Executive Order 72 and thereby ended all prior Covid-19 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 briefing 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 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

[6] Executive Order Seventy-Nine (2021) and Order of Public Health Emergency Ten, Ending of Commonsense Public Health Restrictions Due to Novel Coronavirus (Covid-19) (May 14, 2021) ("EO-79").

the lowest occupancy load on the certificate of occupancy of the room or facility in which the religious services are conducted"[7] 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 capacity restrictions for religious services but maintained physical distancing, signage, and sanitation requirements for religious services.[8] 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 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

[7] Executive Order Number Sixty-One (2020) and Order of Public Health Emergency Three, Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (Covid-19), (May 8, 2020) ("EO-62").

[8] 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").

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 (4th 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. Salvation Army So. Territory, 841 F.3d 632, 637 (4th 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 754, 763 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted) (*quoting United 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. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

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

As described above, plaintiff alleges that by enacting EO-55 (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. 72] 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]ven 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 New York's Executive Order 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 wishe[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 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 plaintiffs 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 528. 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.[9] 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.

[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

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 which he complained.

A recent opinion by the Fourth Circuit further supports defendants' argument that plaintiff's 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.governor.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"[10] by Governor Northam to suggest that he rescinded the Covid restrictions in response to this civil action nor "the constant threat"[11] that defendants will reimpose the complained of restrictions.

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)

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

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

(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. 46] will be GRANTED and plaintiff's Motion for Preliminary Relief [Dkt. No. 55] will be DENIED by an order that will accompany this Memorandum Opinion.

Entered this 29th day of July, 2021.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

SECTION B

District Court's Order (ECF 82)

denying Request for Reconsideration

(Denial of Reconsideration)

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 civil action on April 1, 2020, against the Commonwealth of Virginia and Governor Ralph Northam under 42 U.S.C. §1983 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.[1] After

[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 nor add new ones. [Dkt. No. 73] at n.5.

a complicated and drawn out procedural history,[2] this 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 plaintiff's 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. 77]. 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 the papers.

Plaintiff's motion for reconsideration seeks to have the final judgment entered on July 29, 2021, 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).[3] 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]

[2] The procedural history is detailed in the July 29, 2021 Memorandum Opinion [Dkt. No. 73] at 6-8.

[3] 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 (4th Cir. 2010).

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 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 (4th Cir. 2010); see also, Hutchinson v. Staton, 994 F.2d 1078, 1081 (4th Cir. 1993). A Rule 59(e) motion "cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court ha[s] 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 29th, which is up significantly

from the less than 200 daily cases recorded just a month before." [Dkt. No. 76] at 2.[4] Plaintiff then states that "Defendant Northam was quoted as stating following the CDC's report of a resurgence: 'We'll offer guidelines in the next couple of days . . . .'" [Dkt. No. 76] at 2. Plaintiff mischaracterizes Governor Northam's statement regarding new guidelines, claiming that the "Governor 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 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 plaintiff's 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 the 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

[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), 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 increased 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.

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 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 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 16th day of September, 2021

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

SECTION C

District Court's Order (ECF 85)

denying Stay Pending Appeal

dated September 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.	)	

ORDER

Before the Court is a motion filed by pro se plaintiff James Tolle ("Tolle" or "plaintiff") entitled Motion for Stay of Judgment and Future Restrictions on Healthy Persons Under Emergency Orders Related to Covid-19 ("Motion"). Plaintiff seeks two forms of relief: a stay of this Court's judgment pending appeal and an injunction against the future actions by the defendants.

Plaintiff filed this civil action challenging the defendants' various measures designed to mitigate the spread of Covid-19 and seeking declaratory and injunctive relief against enforcement of an Executive Order that was previously in effect as well as against future actions by the defendants. This Court granted the defendants' motion to dismiss and entered judgment in favor of the defendants on July 29, 2021. Plaintiff filed a motion for reconsideration on August 10, 2021, and the Court denied that motion on September 16, 2021. Plaintiff's pending Motion repeats claims that plaintiff has made—and the Court has rejected—several times in the past, and the Court will not again consider these arguments. Accordingly, it is hereby

ORDERED that plaintiff's Motion [Dkt. No. 83] be and is DENIED.

Plaintiff is cautioned that if he does not file a Notice of Appeal within the time provided in the September 16, 2021 Order, he will lose his ability to appeal the July 29, 2021 and September 16, 2021 Orders.

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

Entered this 29th day of September, 2021.

Alexandria, Virginia.

/s/
Leonie M. Brinkema
United States District Judge

SECTION D

U. S. Court of Appeals for the Fourth Circuit

Appeal No. 21-2106

Order

(Circuit Court Docket No. 12)

denying Stay Pending Appeal

dated October 28, 2021

FILED: October 28, 2021

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.

ORDER

Upon considerations of Appellant's motion for stay pending appeal, the court denies the motion.

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

For the Court

/s/ Patricia S. Connor, Clerk

SECTION E

Relevant Constitutional References

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV
Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION F

Plaintiff's Reply to Defendants' Opposition to Motion for Reconsideration

(District Court, ECF 81)

dated August 23, 2021

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[1] 74"). Plaintiff filed a letter request for reconsideration of the Court's Order (hereinafter, "Motion for Reconsideration", or "ECF 76"). The Court's Order of August 18, 2021 (ECF 77), accepted Plaintiff's letter request as a Motion for Reconsideration and requested a response from Defendants. Defendants' opposed the Motion for Reconsideration in their Response on August 18, 2021, hereinafter "Opposition" or "ECF 78". This filing provides Plaintiff's Reply to Defendants' Opposition to the Motion for Reconsideration in accordance with Fed. R. Civ. P. 5 and Local Rule 7(F) and Plaintiff respectfully requests that the Court admit it to the record for consideration with the Motion for Reconsideration. Arguments and reasons for the Court to ignore Defendants' opposition and to grant Plaintiff's request for reconsideration and reversal of ECF 74 and its accompanying judgment are included in this Reply, incorporating by reference Plaintiff's arguments from ECF 76.

1 Electronic Case File

Arguments and Recent Events Call for Reversal of the Court's Dismissal Order

1. Defendants' opposition is flawed due to their inability to see that Plaintiff's request for reconsideration leading to the Motion for Reconsideration properly falls under Fed. R. Civ. P. 59 for a motion requesting altering or amending of the Court's previous judgment, which was timely received by the Court within 28 days of said judgment. Plaintiff's request clearly contains new evidence concerning Defendant Northam's statements related to the change in Centers for Disease Control (CDC) guidance on the Delta variant of COVID-19 (ECF 76, p. 2) as well as argues for reversal of ECF 74 based on errors in law and fact in the Court's finding of mootness in Plaintiff's Complaint, such reversal serving to properly correct "clear error or prevent manifest injustice", as required by Defendants (ECF 78, p.1[2]). The only thing missing from Plaintiff's request for reconsideration was a title as "Motion for Reconsideration", which would not be a material error even if Defendants raised it. Even if Defendants' counsel does not understand requests under Rule 59, the Court's Order at ECF 77 has already properly recognized Plaintiff's request as a "Motion for Reconsideration" (ECF 77, p. 1) and allowed it to proceed. All of Defendants' arguments against the Court's action to consider Plaintiff's request fall short based on the Court's judgment and on the fact that Plaintiff's request contained the elements required to satisfy the intent of Rule 59, including new evidence of actions by the CDC and Defendants, which may not have been previously considered by the Court, and arguments made in order to correct errors in law and fact and prevent the manifest injustice of such.

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

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2 Quoting *Grenadier v. BWW L. Grp.*, No. 1:14CV827-LMB-TCB, 2015 WL 11111068, at *1 (E.D. Va. Feb. 19, 2015) and citing *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 411 (4th Cir. 2010).

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"[3] 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"[4] and that Virginia has, at the time of his comments, "individuals that are in the hospitals on ventilators"[5]. 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, 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*

3 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.
4 *Id.*
5 *Id.*

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"[6] 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 re-institute 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 over-reaching Executive Orders like Governor Northam and Plaintiff used the order which was agreed to by Governor Newsom in California as a basis for the language proposed in Attachment A for settlement of Plaintiff's Complaint. Plaintiff believes that until Defendants consider agreeing to a written settlement similar to what is contained in Attachment A, it will be difficult to show that Defendants have met the Supreme Court's standard for mootness and that it will not be absolutely clear that Defendant Northam will not return to the unconstitutional practices of the past during a future flare up of COVID or another public health emergency. Defendant Northam has already said that universal restrictions and modifications imposed on the liberties of all Virginians are effective and "those modifications work"[7]. Based on Defendant Northam's own words, it is more likely than not that Defendant

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

7 Statements during interview on "*The Takeout*" on 8/6/2021.

Northam will use these practices again, including the limits on liberties of healthy persons without a compelling interest (based on the consensus of science) or due process, which are at the heart of Plaintiff's Complaint about the constitutionality of universal restrictions. Without any agreement on something like Attachment A, the Court's Order will be ignoring a Governor whose public statements have promised to re-institute the universal restrictions on Plaintiff's constitutional liberties as soon as the Delta or other variant exhausts the hospital capacity. If Defendants reverse course and provide the Court something in writing similar to Attachment A or like what other reasonable governors have done, the Court would have more reason not to reverse its dismissal. Without this, the mounting and overwhelming evidence that Governor Northam intends to return to at least some of the complained-of restrictions directly contradict this Court's principal findings which support its dismissal Order: a) that "there is no indication that the defendants will adopt new restrictions" (Memorandum Opinion of July 29, 2021, hereinafter "ECF 73", p. 14); and b) that "Tolle does not remain under a threat that the defendants will reinstate the restrictions about which he complained" (ECF 73, p. 15; a similar finding on p. 16 is also contradicted by the facts and evidence).[8] If the Court does not reverse its dismissal or require Defendants to provide more evidence of Defendant Northam's intentions through Attachment A or otherwise, Plaintiff believes that the District Court's finding on mootness cannot be sustained under the stringent standard required by the Supreme Court in light of all of the recent evidence and actions by Defendants.

8 Defendant Northam's recent statements also contradict the Court's other findings in favor of Defendants. The Governor's statements make recurrence of the restrictions on Plaintiff much more likely and imminent than the re-election of President Trump, which directly contradicts the Court's reliance on *American Federation of Government Employees v. Office of Special Counsel*, 1 F.4th 180 (4th Cir. 2021) (ECF 73, p. 15). The Court's finding concerning *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), where the Supreme Court found mootness based on an order "that was about to expire" (ECF 73, p. 13), is more inapposite when Defendant Northam is promising to re-institute the complained-of restrictions on Plaintiff to mitigate a COVID variant already identified by the CDC and Governor Northam as "much more contagious" (from Governor Norham's Annual Revenue Speech, August 18, 2021).

IV. Conclusion

5. For the foregoing reasons, the Court should ignore Defendants' flawed arguments against reconsideration of its dismissal of Plaintiff's Complaint based on mootness and allow the Motion to Reconsider to proceed. The evidence provided with Plaintiff's request for reconsideration shows that the Court's Order will err in law and in fact because of recent actions by the CDC and Defendants. Recent action by the CDC has shown that the concern for the pandemic and threat from COVID variants has not been eliminated by Virginia's vaccination efforts and the CDC has changed its guidance due to a belief that the threat from COVID variants is substantially higher despite the vaccines. Furthermore, recent statements made by Defendant Northam himself make it clear that he is ready to return to at least some of the complained-of restrictions from the past if vaccinations continue to fail to address the concern over the variants and hospitalizations should rise. Defendants have also failed to respond to Plaintiff's Proposed Settlement Order which, if agreed to, would make it absolutely clear that Defendant Northam has no plans to use any of the complained-of restrictions as part of Viriginia's mitigation efforts in the future.

6. Without any other statements or actions by Defendant Northam which contradict what his most recent statements and actions are promising, the Court should find that Defendants have not satisfied the Supreme Court standard that it is absolutely clear that Defendants will not return to the complained-of restrictions in the future and the Court should reverse its dismissal of Plaintiff's Complaint for the reasons given above.

Dated: August 23, 2021

Respectfully submitted,

By: _____

James Tolle, *Pro Se*
11171 Soldiers Court
Manassas, VA 20109
703-232-9970, jtmail0000@yahoo.com

Supporting Documentation

Attachment A

Proposed Settlement Order

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.

PROPOSED ORDER FOR FINAL JUDGMENT ENTERING PERMANENT INJUNCTION, AWARDING COSTS, AND DISMISSING ACTION

It is hereby ORDERED that Defendant, Ralph Northam, in his official capacity as Governor of the Commonwealth of Virginia, all Commonwealth and State officers, agents, employees, and all other persons in active concert or participation with him, are hereby permanently enjoined state-wide from issuing or enforcing regulations issued in connection with any COVID-19 State of Emergency or other State of Emergency related to a public health emergency that impose:

(1) any capacity or numerical restrictions on religious worship services and gatherings at places of worship, provided that if

(a) hospital admissions for individuals aged 1-17 who were admitted after showing worsening COVID-19 symptoms rise at least 100% statewide, or at least 200% in a county with at least 10 hospitalizations in the prior week, in each of two consecutive weeks; or

(b) statewide daily case rates for COVID-19 rise above 25 cases per hundred thousand persons, and the statewide four week total projected available adult intensive care unit bed capacity falls below 20% of normal plus surge capacity,

the Commonwealth may impose capacity or numerical restrictions on religious worship services and gatherings at places of worship that are either identical to, or at least as favorable as, the

restrictions imposed on other similar gatherings of similar risk, as identified by the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020);

(2) any new public health precautions on religious worship services and gatherings at places of worship not in the current guidance, unless those precautions are either identical to, or at least as favorable as, the precautions imposed on other similar gatherings of similar risk, as identified by the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); and

(3) any restrictions or prohibitions on the practice of religious rites, including the distribution of communion, and the religious exercise of singing and chanting during religious worship services and gatherings at places of worship besides generally applicable restrictions or prohibitions included in the guidance for all secular business and other non-religious activities, including live events and performances.

(4) any restriction on person or persons not known to be infected by a contagious public health threat without an order of quarantine or isolation in accordance with Virginia law under Virginia Code 32.1-48.05, *et seq.*, or other law which is enacted to replace Virginia Code 32.1-48.05, *et seq.*

(5) any restriction on person or persons not known to be infected by a contagious public health threat without appropriate due process procedures which are substantially similar to an appeal of an order of quarantine under Virginia Code 32.1-48.010.

(6) This Order does not prohibit the State from issuing recommendations, best practices, precautions, or other measures, as long as such promulgations make clear to the public that they

are voluntary and not enforceable.

It is further ORDERED that Plaintiff should be and hereby are declared the prevailing party for purposes of 42 U.S.C. § 1983; Defendant shall pay Plaintiff a flat sum of $4,500 for Plaintiffs' costs related to this case, which is an amount that all parties have agreed to as reasonable costs necessarily incurred in this case and to be awarded to Plaintiff without court review.

It is further ORDERED that this action is dismissed with prejudice; and

It is further ORDERED that this Court shall retain jurisdiction over this action for purposes of implementing and enforcing the final judgment.

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

It is so ORDERED.

Entered this ____ day of _____, 2021.

Alexandria, Virginia

_____
Leonie M. Brinkema
United States District Judge

SECTION G

Excerpts from Plainitff's Complaint

(District Court, ECF 1)

dated April 1, 2020

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

JAMES TOLLE,

Plaintiff,

v.

GOVERNOR RALPH NORTHAM and the COMMONWEALTH OF VIRGINIA

Defendants.

Civil Action No.

COMPLAINT

1:20CV363 LMB/MSN

Plaintiff James Tolle (hereinafter "Tolle" or "Plaintiff"), *pro se* for his Complaint against Defendants Governor Ralph Northam and the Commonwealth of Virginia (hereinafter "Defendants", individually and/or together), alleges as follows:

NATURE OF CLAIMS

1. This is an action for damages brought pursuant to 42 U.S.C § 1983 for injury and damages caused Tolle and other United States citizens due to violation of their civil rights and rights of American citizens guaranteed by the First, Fourth and Fourteenth Amendments of the United States Constitution. The claims related to the causes of action are as follows:

a) Defendant Governor Northam signed and issued Executive Order Number Fifty-Five (2020) which seeks to explicitly prohibit the execution of several Constitutional rights of all United States citizens within the Commonwealth of Virginia, an order which makes Tolle's exercise of such rights a criminal offense;

b) Defendant Governor Northam's executive order exceeds the authority under Virginia's constitution and the statutes of the Constitution of Virginia, such abuse of his authority causing direct harm to Tolle's exercise of his rights and freedoms under the United States Constitution.

9. Tolle respectfully requests leave of the Court to cure any error or defect in service related to this complaint prior to final consideration of Plaintiff's complaint, which is requested in order to serve the interests of justice and to avoid injury to Plaintiff's due process rights.

10. Tolle respectfully requests leave of the Court to correct any other errors found in the present complaint and cure any other defects or omissions by amendment prior to final consideration of Plaintiff's complaint by the Court, which is requested in order to serve the interests of justice and to avoid injury to Plaintiff's due process rights.

FACTUAL ALLEGATIONS

Declaration of National Emergency due to Corona Virus

11. On or around March 13, 2020, President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (hereinafter, the "Declaration of National Emergency"). Upon information and belief, this declaration does/did not authorize Defendants' actions which have violated Tolle's Constitutional rights. Specifically, the Declaration of National Emergency stated: "This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations."

12. On or around March 16, 2020, the Whitehouse and Centers for Disease Control issued the "President's Coronavirus Guidelines for America 15 Days to Control the Spread" (hereinafter, the "President's Guidelines). Upon information and belief, the President's Guidelines are non-binding rules recommended for voluntary action by States and the American people. Upon information and belief, the President's Guidelines did not/do not require any specific action by Defendant Governor Northam or any other Virginia official. Upon information and belief, the President's Guidelines do not contain any medical recommendations which would apply to healthy people or people infected by the COVID-19 virus. Upon information and belief,

the President's Guidelines do not make any actions by the American people a criminal offense

13. On or around March 17, 2020, over 1 million people gathered together in groups often greater than 10 people to conduct the Democratic primary elections in Florida, Arizona and Illinois. Upon information and belief, the President's Guidelines did not see a significant threat from COVID-19 such that the President's Guidelines were used to prevent these people from carrying out their Constitutional right to travel assemble and vote. Upon information and belief, Defendant Northam never made any public statement expressing concern for the citizens of these other states so flagrantly exceeding the restrictions suggested by the President's guidelines.

14. Upon information and belief, there is no consensus of medical science that shows that healthy people or people who appear healthy and do not have symptoms can communicate the virus to others in close contact less than six feet apart. Upon information and belief, Defendant Northam's orders and actions are not based on a consensus of medical science about the modes of transmission of COVID-19.

15. On or around February 7, 2020, the Director of the National of Allergy and Infectious Disease, Dr. Anthony Fauci stated that the basis of his belief that a person appearing healthy may transmit the COVID-19 virus was from anecdotal reports from the Chinese, stating: "I made a call to a person who I know very well who is a highly respected scientist and publich health official in China, and I said, it's important for us to get the answer...can an asymptomatic person transmit it? [they said] Absolutely, we've seen it...it's not driving the outbreak, but it occurs."

16. According to the public information at the Centers for Disease Control (hereinafter, "CDC"), the consensus of current medical science believes that the main mode of transmission of the COVID-19 virus is through contact with persons who have symptoms, which is stated on the CDC's "How Coronavirus Spreads" website as follows:

> "The virus is thought to spread mainly from person-to-person.
> - Between people who are in close contact with one another (within about 6 feet).
> - Through respiratory droplets produced when an infected person coughs or sneezes."

17. According to the public information at the CDC, the consensus of medical science has not shown that the transmission of COVID-19 from a healthy person or an asymptomatic person who may have the virus is a definite mode or threat of transmission, with the "How Coronavirus Spreads" website stating:

> "People are thought to be most contagious when they are most symptomatic (the sickest)
> Some spread might be possible before people show symptoms...but this is not thought to be the main way the virus spreads."

18. On or around March 20, 2020, Dr. Fauci stated "It's still not quite clear...." when asked about the CDC's science behind his belief that COVID-19 can be transmitted by asymptomatic individuals.

Governor's Executive Order Number Fifty-Five (2020)

19. Defendant Northam signed and issued Executive Order Number Fifty-Five (2020) (hereinafter, "EO-55") on or around March 30, 2020.

20. EO-55 states it "shall be effective March 30, 2020...and shall remain in full force and in effect until June 10, 2020...."

21. Upon information and belief, EO-55 requires all individuals in Virginia to remain in their place of residence and only allows individuals to leave their residences for the purpose of: obtaining essential services, seeking medical or other essential services, taking care of individuals or animals, court ordered travel, outdoor activity while staying at least six feet from any other person, traveling to place of worship, work or school, volunteering to help charitable services, or due to fear of health or safety or upon direction by a government representative.

22. EO-55 states: "To 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...."

from any other person...." This is substantiated by facts in paragraph 22.

42. Defendant Northam's order under EO-55 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 freely gather or assemble, even in settings where all individuals appear healthy or individuals are observing a safe distance of 6 feet separation, such right, privilege or immunity being explicitly guaranteed by the First Amendment of the United States Constitution. Furthermore, Defendant Northam's order under EO-55 was/is an action under the color of statute or ordinance which violates Tolle's Constitutional rights because Defendant Northam's order makes it a crime under § 44-146.17 for an individual to violate his order. This is substantiated by facts in paragraph 23 and 25.

43. Defendant Northam's actions and orders under EO-55 directly and unreasonably restrict the Constitutional 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. This is supported by the facts in paragraphs 23 and 25.

44. Defendants' orders under EO-55 which abridges the rights of citizens in Virginia to gather and come within 6 feet of each other under the United States Constitution disproportionately deprive healthy people of their rights and are an unreasonable restriction on the right of citizens to assemble because there is no consensus in medical science that persons not showing symptoms can endanger others or transmit the COVID-19 virus. Furthermore, defendant Northam's orders under EO-55 which prohibit the gathering of more than 10 people, even outside, are unnecessary since citizens can reasonably ensure that people without symptoms or those who are most vulnerable to the COVID-19 virus are not present in any gathering and it is possible for the government to find other means to protect the health and safety of citizens

without depriving them of their Constitutional rights. Defendant Northam's orders under EO-55 are also an unnecessary intrusion on the rights of citizens because by prohibiting all gatherings inside and outside, it ignores the fact that many locations inside and outside provide the space for gatherings to allow a safe separation of over 6 feet between citizens and thereby abide by the President's Guidelines. This is substantiated by facts in paragraphs 12, 13, 14, 15, 16, 17, and 18.

45. Defendant Northam's orders under EO-55 are arbitrary and unprecedented because they ignore the fact that the President's guidelines did not restrict people's right to travel and assemble during the Democratic primaries in three states after the President's Guidelines were released and Defendant Northam's support of allowing persons to exercise their right to travel and assemble for his Democratic party events while restricting the right of healthy virginians to travel and assemble for rights guaranteed under the United States Constitution which are just as sacred as Democratic party primary voting is to our nation is hypocritical, arbitrary and shows how unnecessary Defendant Northam's orders under EO-55 are, based on actions by Defendant Northam which favor his political party while restricting the political activities of his opponents. Furthermore, Defendant Northam's orders under EO-55 are arbitrary and subjectively punish a vast number of citizens because Defendant Northam's orders impose moral values on the subjects of his order based on Defendant Northam subjective moral judgment, such as making exceptions for some activities on public beaches while prohibiting others; such as making a moral evaluation that religious gatherings are not as essential as voting in primaries. This is supported by the facts in paragraph 13, 14, 23, 24, 25and 26.

Claim related to Second Cause of Action

46. **For these reasons, Defendant Northam's actions and the Commonwealth's actions which issued Defendant Northam's EO-55 orders were actions under color of**

SECTION H

Excerpts from

Plaintiff's Response Brief, Opposition and Arguments

against Defendants' Motion to Dismiss

(District Court, ECF 49)

(includes Plaintiff's Exhibit F submitted with briefings against the original Motion to Dismiss)

filed December 22, 2020

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

JAMES TOLLE,

Plaintiff,

v.

GOVERNOR RALPH NORTHAM and the COMMONWEALTH OF VIRGINIA

Defendants.

Civil Action No. 1:20-cv-00363

PLAINTIFF'S RESPONSE BRIEF, OPPOSITION AND ARGUMENTS AGAINST DEFENDANTS' MOTION TO DISMISS

This filing provides Plaintiff's Response Brief and Opposition to Defendants' Motion to Dismiss (hereinafter, "MTD") and Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss (hereinafter, "MEMO"). Arguments and reasons for the Court to deny Defendants' MTD are included in this Response Brief and Opposition. Plaintiff opposes Defendants' MTD and respectfully requests that it be denied based on this brief.

Defendants advance preposterous arguments that the constitutional violations under Executive Order (EO) 55 are "moot as the restriction is no longer in effect" and "Plaintiff's claim fails as a matter of law because he cannot show any likelihood that the alleged harm will recur." (MTD, p. 14) Defendants argue that "the text of...[EO 55] shows that it expired in its entirety no later than June 10" and the law requires a "showing of any real or immediate threat" (MEMO, p. 15). All of these arguments are proven to be fallacious by Defendant Northam's own actions, who issued a new Executive Order two days after filing its MTD which re-instituted the harshest restrictions on citizens since March. Indeed, the "hypothetical" (MEMO, p. 16) threat which the Defendants opine about became a real and present danger to Plaintiff and the citizens of Virginia two days after Defendants filed their MTD.

2. Even if Defendant Northam's latest Order is amended or revoked such that any or all of the presently ongoing violations of Plaintiff's Constitutional rights become moot, Defendant Northam will not be prevented from re-invoking similar orders in the future without further action by the Court. It is noteworthy that Defendant Northam issued a new Executive Order with harsher restrictions within hours of Defendants' filing a MTD which included the statement: "[Plaintiff]...cannot show any 'real or immediate threat that [he] will be wronged again'"[3] Defendant Northam was planning to re-introduce much more severe restrictions on the Constitutional rights of Plaintiff and other citizens at the same time that he argued to this Court that the re-imposition of harsh restrictions by Defendant Northam was only a "hypothetical possibility" and not a "cognizable danger" to Plaintiff. (MEMO, p. 16) It is not likely that the delay of Defendant Northam's orders until two days after Defendants' filing in this Court was completely coincidental. With this track record, the Court should not rely on Defendants' arguments that Plaintiff is not under threat of a cognizable danger. For these reasons, Plaintiff's Complaint which seeks a permanent injunction against Defendant Northam in order to prevent current or similar future Executive Orders of the Governor causing ongoing injury to Plaintiff's Constitutional rights is still not moot and Plaintiff seeks such action by the Court.

3. Furthermore, the availability of a vaccine or vaccines for use against the COVID-19 virus does not make Plaintiff's case moot. Even if a vaccine is being made available to the public when Plaintiff's case comes before the Court, it is likely that not all citizens will be vaccinated sufficiently to cause Defendant Northam to revoke his restrictions on the constitutional rights of Plaintiff and other citizens. Even if Defendant Northam revokes all or most of his restrictions because of availability of a vaccine, Defendant Northam will not be

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B.1.b while exempting violators at Institutions of Higher Learning in section B.2. (Exhibit G, p. 14)

3 MEMO, p. 10, quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Attachment - Exhibit F

Recent Evidence that the Consensus of Science does not Support Quarantine of the Healthy

Defendants' restrictions on Plaintiff's Constitutional rights are still not supported by the consensus of medical science. Although it is true that more people have tragically died from COVID-19 since Plaintiff's original filing, the Court's review of recent medical developments would not find a consensus of science different than that noted in Plaintiff's Complaint.

According to the CDC, "the main mode of transmission of the COVID-19 virus is through contact with persons who have symptoms...as follows:...'Through respiratory droplets produced when an infected person coughs or sneezes'". (COMPLAINT, ¶ 16, quoting the CDC's website) Furthermore, "the consensus of medical science has not shown that the transmission of COVID-19 from a healthy person or an asymptomatic person who may have the virus is a definite mode or threat of transmission." (COMPLAINT, ¶ 17) These facts have not changed and Defendants have not provided any argument to rebut them. Restrictions and lockdowns on the healthy are not warranted by this mode of transmission because healthy persons do not produce infectious respiratory droplets. Whether this mode of transmisison applies to infected persons without symptoms (either asymptomatic or presymptomatic) has not been conclusively demonstrated by the data or the studies relied upon.

On June 8, 2020, the World Health Organization's leading epidemiologist reported at a press briefing that transmission of COVID-19 by asymptomatic persons is "very rare" based on the data to date. Subsequent comments by Dr. Van Kerkhove underscored that there is no consensus of science concerning asymptomatic transmission, stating that there is no clear answer on whether COVID-19 is spread by asymptomatic persons.[1] Furthermore, as noted in the study referenced by the American Medical Association: "The most accurate and robust quantification of the relative frequency of routes of transmission [including asymptomatic and presymptomatic transmission] would be a well-designed prospective cohort study with detailed journal and

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

phylogenetic investigations."[2] No such study which would scientifically demonstrate asymptomatic or presymptomatic transmission has been accomplished to date. As noted in Ferretti's study, the studies relied upon during the current global emergency requires the use of studies "using imperfect data".[3] All epidemeological studies to date are limited by error from the "imperfect data" which is inherent in non-clinical studies. It is noteworthy that in its brief referencing the latest medical science, the AMA[4] references the epidemiological study Xi He *et al., Temporal dynamics in viral shedding and transmissibility of COVID-19,* 26 Nature Medicine 672 (2020), but Xi He's study documents the typical limitations of these non-clinical studies, stating:

> "...symptom onset relies on patient recall after confirmation of COVID-19. The potential recall bias would probably have tended toward the direction of under-ascertainment, that is, delay in recognizing first syptoms....However, the incubation period would have been overestimated and thus the proportion of presymptomatic transmission artifactually inflated." [Xi He, p. 674]

The negative serial interval used to estimate presymptomatic infections in *He's* study is directly affected by any of this error in the estimated incubation period.

Even though the large number of deaths reported to date due to COVID-19 in the United States is dramatic, the COVID-19 pandemic is still not as horrific as the 1918 pandemic which is estimated by the CDC to have killed 50 Million worldwide, including 675,000 Americans.[5] But even the data used to determine the scope of the COVID-19 is not supported by solid science. First, no one has adequately explained how the data reported for the United States is radically

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2 Ferretti, L., *et al."*Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing", *Science,* May 8, 2020, 368:6491, p. 2., referenced in Brief of the American Medical Association and the Medical Society of the State of New York as *AMICI CURIAE* in Support of Respondent, Diocese of Brooklyn v. Governor Cumo, 592 U. S. ____ (2020), fn 5.

3 Ferretti, L., p. 2.

4 Brief of the American Medical Association and the Medical Society of the State of New York as *AMICI CURIAE* in Support of Respondent, Diocese of Brooklyn v. Governor Cumo, 592 U. S. ____ (2020), fn 5.

5 See https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html

higher than all other countries.[6] However, one possible reason is that in the United States, the methods for reporting deaths have been changed under Centers for Disease Control guidelines to report cause of death as COVID-19 without a definitive diagnosis and when a COVID-19 cause is only "suspected" or "presumed".[7] According to the New York Times, hospitals were reporting 40 to 60 percent less admissions for heart attacks during one month of the COVID-19 pandemic.[8] According to Michigan state mortality statistics (Exhibit I), deaths attributed to non-COVID causes including heart attacks, influenza and COPD were reported from May 2020 through October 2020, with an average of 198 deaths per month less than the 2019 average for these diseases. During the same time since May, Michigan reported an average of 399 deaths per month. Unless the Court believes that heart attacks and other diseases have magically disappeared in our time, it should be clear that the way statistics are being reported for COVID-19 is having an impact on the health data and death statistics reported for other diseases. Based on this, Plaintiff believes that the current official statistics being quoted in the media are probably innacurate and likely inflated due to including conditions which are not confirmed to be actually due to COVID-19 as the primary cause of death.

Based on the foregoing reasons, the available data and medical studies do not show a clear consensus of science which can justify the extreme actions of Defendants against all healthy persons in Virginia. Furthermore, Defendants' own actions which allowed healthy persons without symptoms (that is, asymptomatic) to work by the thousands at essential businesses even during the height of the pandemic clearly show that even Defendants do not

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6 As of June 16, 2020, Johns Hopkins University reports deaths for the United States 119,719, while deaths reported for other large countries are significantly lower, even when accounting for population differences: German (8,466 deaths), Canada (7,992 deaths), Japan (837 deaths), South Korea (260 deaths). Note: Numbers for all have been updated since, but U. S. is still substantially higher.

7 See "Guidance for Certifying Deaths Due to Coronavirus Disease 2019 (COVID-19)", Vital Statistics Reporting Guidance, Report No. 3, National Center for Health Statistics, April 2020

8 "Where Have All the Heart Attacks Gone?", Harian Krumholtz, April 6, 2020, New York Times (Updated May 14, 2020)

really believe that there is medical consensus showing that people without symptoms who are working at essential businesses are an immediate threat to public health.

SECTION I

Excerpts from

Plaintiff's Response. Opposition and Arguments

against Defendants' Renewed Motion to Dismiss

(District Court, ECF 72)

docketed June 21, 2021

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

JAMES TOLLE,

Plaintiff,

v.

GOVERNOR RALPH NORTHAM and the COMMONWEALTH OF VIRGINIA

Defendants.

Civil Action No. 1:20-cv-00363

PLAINTIFF'S RESPONSE, OPPOSITION AND ARGUMENTS AGAINST DEFENDANTS' RENEWED MOTION TO DISMISS

This filing provides Plaintiff's Response Brief and Opposition to Defendants' Renewed Motion to Dismiss[1] (hereinafter, "ECF[2] 71" or "renewed MTD") in accordance with the Court's Order of June 2, 2021 (ECF 70). Arguments and reasons for the Court to deny Defendants' renewed MTD are included in this Response and Opposition, incorporating by reference Plaintiff's arguments from ECF 49 and ECF 52. Plaintiff opposes a dismissal and requests that it not be granted due to the errors in Defendants' latest arguments, which are explained below.

Part I-A. Background Showing How Defendants' Actions Confirm Violations of the Constitution

1. Defendants' own actions have shown that Defendant Northam's past orders have included unconstitutional restrictions which infringed the constitutional rights of all Virginians, including Plaintiff. It is noteworthy that after Plaintiff claimed that Defendant Northam's restrictions on religious practices were unconstitutional, Defendant Northam eliminated the size restrictions on religious services as part of Executive Order Sixth Amended Number Sixty-Seven

1 Supplemental Memorandum of Law in Support of Defendants' Motion to Dismiss dated June 16, 2021 (Electronic Case File 71)
2 Electronic Case File

that asymptomatic transmission is rare and recent epidemiological studies documenting that, according to statement by the American Medical Assocaition, there had been no adequate "study which would scientifically demonstrate asymptomatic or presymptomatic transmission... accomplished to date" (ECF 49, Exhibit F). Furthermore, Defendants' arguments that there was some compelling interest from the consensus of science which supported the suspension of First Amendment and due process rights of healthy persons is rebutted by even the most recent reports since the last briefing of the Court. A study by Shiyi Cao, et al., in Nature Communications (Fall, 2020) found that there were "no positive tests" out of 1,174 "close contacts" of 300 asymptomatic cases (Attachment A, p. 1). A study by Zachary Madewell, et al., in JAMA Network Open (December, 2020) reported "The lack of substantial transmission from observed asymptomatic index cases is notable" (Attachment B, p. 10) with the transmission rate from asymptomatic or presymptomatic persons reported as more than 18 times lower than that from symptomatic persons (Attachment B, p. 5). More recently, the New York Times reported on May 11, 2021, that the share of "transmission that has occurred outdoors...may be below 0.1 percent" and that "[t]here is not a single documented Covid infection anywhere in the world from casual outdoor interactions, such as walking past someone on a street or eating at a nearby table."[3]

Part I-C. Defendants' Actions have shown that it is Likely that they will Violate the Constitution in the Future

6. Defendants argue that there is no evidence that they will violate the Constitution again in the future, but they limit this argument solely to violations of the size limit restrictions on Churches ("But Plaintiff has offered no reason to believe that churches will be again be subject to the temporary gathering restriction", ECF 71, p. 4; "Plaintiff cannot show any 'reasonable expectation' that the temporary gathering restriction will apply to in-person religious services at

3 See https://www.nytimes.com/2021/05/11/briefing/outdoor-covid-transmission-cdc-number.html, downloaded May 13, 2021.

Defendant Northam has taken no such action and Defendants' renewed MTD indicates that they are unwilling to do so. With the Defendants' past actions showing disregard of the constitutional rights of every citizen, no evidence provided with Defendants' arguments to actually demonstrate that they will not violate Plaintiff's rights again, and no indication that Defendant Northam is willing to take the steps taken by other governors to codify their intentions, the Court should find it likely that Defendants will violate Plaintiff's constitutional rights in the same manner again during another health emergency.

Part I-D. Plaintiff's Complaint is not Moot

11. Defendant Northam issued Executive Order Seventy-Nine (hereinafter, "EO-79") to replace all previous COVID restrictions, effective May 28, 2021. Although Defendants' renewed MTD argues that this moots Plaintiff's Complaint (ECF 71, pp. 5-6), Plaintiff's Complaint is not moot as noted in *Diocese of Brooklyn* for similar emergency orders ("It is clear that this matter is not moot. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U. S. 449, 462 (2007); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000)", *Diocese of Brooklyn, per curiam*, at 6).

12. The Supreme Court's citation to *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, hereinafter "*Friends*", is particularly apt for Plaintiff's case. In *Friends*, the Supreme Court stated:

> "A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289. If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. *Ibid.*" *Friends at* 169-70.

Defendants' own actions show future injury is likely and, with the possible exception of capacity restrictions on Churches, Defendants have failed to provide a showing that it is "absolutely clear" (*Id.*) that injuries to other constitutional rights will not recur, *supra*.

13. Defendants attempt to differentiate Plaintiff's Complaint against COVID restrictions from what was reviewed in *Diocese of Brooklyn*, stating: "These circumstances are a far cry from the earlier COVID cases where the Supreme Court rejected mootness arguments" (ECF 71, p. 6). But their argument that the fact that a COVID order is to expire as in *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527–28 (2020) (hereinafter, "*Danville*") overturns the precedent from *Diocese of Brooklyn* is weak. Defendants summarily dismiss the entire precedent in *Diocese of Brooklyn* based on the comment in *Danville* that the Supreme Court had "no indication that it will be renewed" (ECF 71, p. 6). However, this is an error in law because the Supreme Court's decision in *Danville* came after the public statements by Governor Beshear clearly indicating that the Kentucky schools would reopen in January, which is what the Plaintiffs in *Danville* were seeking. The experience in *Danville* is that the Supreme Court had concrete indication from those Defendants that made it "absolutely clear" they would not re-institute an order in the future, with Governor Beshear stating his intention to re-open the schools just days before the Supreme Court's review of the case[5]. Defendant Northam has made no similar statement which would provide an indication that restrictions like those under COVID-19 will not be re-instituted at some time in the future.[6] In fact, the history shows the contrary, with the past actions of

5 Governor Beshear's public statements committed to re-opening schools in Kentucky in January, 2021, reported by WDRB on December 14, 2020 (see https://www.wdrb.com/in-depth/aggressive-steps-needed-to-reopen-schools-in-counties-hit-hardest-by-covid-19-gov-beshear/article_25a8e4ec-3e49-11eb-afd6-e7771615e03e.html).

6 The Court should not rely on statements in Defendants' briefs indicating that Defendant Northam plans no restrictions on civil liberties or emergency orders in the future. Defendants' counsel has made arguments to this Court before indicating harsher restrictions were unlikely in the future while at the same time, Defendant Northam was planning to impose even harsher restrictions ("Defendant Northam issued a new Executive Order with harsher restrictions within hours of Defendants' filing a MTD which included the statement: '[Plaintiff]...cannot show any

Defendants showing that there is no reason for the Court to believe that Defendants will not resort to the same type of universal, unconstitutional restrictions during the next health emergency, *supra*. Is there any reasonable person who believes Defendant Northam will not use the same mitigation measures which they themselves still praise as public health restrictions that "have kept many Virginians safe during the last year" (Executive Order Number Seventy-Nine of May 14, 2021)? For these reasons, Defendants' arguments against the precedent in *Diocese of Brooklyn* based on *Danville* should not be given weight.[7]

14. Defendants' own actions have demonstrated that they believed that some of Defendant Northam's restrictions from past orders were unconstitutional, *supra*. Even if the Court is not persuaded by Plaintiff's constitutional arguments, the evidence from Defendants own actions give the Court reason to believe that Defendants have a track record of instituting unconstitutional quarantines and pandemic restrictions. Furthermore, with the possible exception of capacity limits on Church services, Defendants' actions during the pandemic have shown that it is likely that they will impose similar unconstitutional restrictions during the next health emergency, *supra*. Based on this, there is no reason for the Court to believe that Defendants will not respond to the next variant of the COVID-19 virus or the next novel infectious disease in the same unconstitutional manner. Furthermore, with the possible exception of Church capacity restrictions, Defendants have presented no arguments to convince this Court why it won't "return to its old ways" concerning their violations of Plaintiff's rights under the First, Fourth and Fourteenth Amendments and have completely failed to satisfy the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur" as required of the party asserting mootness according to *Friends* at 169-170.

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real or immediate threat that [he] will be wronged again'", ECF 49, ¶2, inner quotes removed).

7 *Incumaa v. Ozmint*, 507 F.3d 281 (4th Cir. 2007) is also inapposite here because the continuing controversy of Incumaa's constitutional issues were resolved when the "Supreme Court decided *Banks*" (*Incumaa* at 285) prior to finding mootness. Tolle's constitutional issues are unresolved.

15. Plaintiff's Complaint against Defendant Northam's unprecedented restrictions on all healthy persons during a quarantine or under emergency orders is also not moot because such matters are of substantial public interest. It is inarguable that a Governor's extension of limited emergency powers over the entire population of a State for more than a year is not a matter of substantial public interest. The Fourth Circuit has found that for a suit where there is substantial public interest, "[t]he general rule that denies judicial review when the principal cause of action becomes moot, therefore, does not apply", *Harris v. Bailey*, 675 F.2d 614, 616 (4th Cir. 1982), when a government action is "capable of repetition, yet evading review." *Id.*, quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911)[8]. Plaintiff believes that the likelihood of a COVID resurgence or other health emergency and Defendants' past actions make it likely and probable that Defendants will resort to similar restrictions in the future, *supra*[9], making it clear that Defendant Northam's Executive Orders are "capable of repetition" in the future. Also, future action by Defendants like this are likely to be difficult for the Courts to review, if the past year of litigation has been any indicator. Action by the Court which does not moot Plaintiff's Complaint is warranted because of the substantial public interest in restraining an Executive from unconstitutional action which may be difficult for the Courts to review if they are imposed again in a similar manner.

16. Recent actions in other courts should also inform the Court's consideration of mootness in Plaintiff's case. Other Court decisions have found similar Executive Orders to those of Defendant Northam's unconstitutional since *Diocese of Brooklyn*[10]. None of these were found to

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8 *So. Pac. Terminal Co. v. Int. Comm. Comm*, 219 U.S. 498, 498 (1911) states: "The case is not moot where interests of a public character are asserted by the Government under conditions that may be immediately repeated, merely because the particular order involved has expired. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 308."

9 The "probability" satisfying "*Brooks*" and "*Fleet Feet*" (ECF 71, p. 6) that Defendants will reenact similar, unconstitutional restrictions in the next emergency is based on the reasonable expectation that it is more likely they will use the same mitigation measures as before, *supra*.

10 See *High Plains Harvest Church, et al.,v. Polis, et al.* 592 U.S. ___ (2020); *Harvest Rock*

be moot under the guidance of the Supreme Court, even during lessening of COVID restrictions. It is noteworthy that some of these cases have already led to preliminary and permanent injunctions since the *Diocese of Brooklyn* guidance. In the D. C. District, a preliminary injunction was granted to the Roman Catholic Diocese of Washington under strict scrutiny after citing the *Diocese of Brooklyn* precedent (*Roman Catholic Archbishop v. Bowser*, Case No. 20-cv-03625 (TNM), 13 (D.D.C. Mar. 25, 2021); Footnote 5 discusses the precedential value found in *Diocese of Brooklyn*). The Governor of California has recently agreed to a permanent injunction which prevents further violations of the U. S. Constitution under Executive Orders, *supra*. Even if the Court finds that Defendant Northam's most recent Executive Order has cured all constitutional violations in Plaintiff's Complaint, Defendants have failed to take action similar to other Governors who provide concrete evidence which makes it "absolutely clear" (*Friends* at 170) that they will not violate the U. S. Constitution in the future. Without any agreement like Attachment C in place with Governor Northam and without further Court action which places reasonable limits on his executive emergency powers through injunction (as seen in the other courts), the excesses in the Defendant Northam's use of emergency powers may readily occur again later when Defendants believe that the courts are not watching. The *Diocese of Brooklyn* opinion applied the *Friends* precedent of no mootness after a Defendant comes into compliance with Federal regulations, which it found very similar to the pandemic-related Executive Orders that were changing over time and the Supreme Court clearly stated that mootness does not apply in these cases, *supra*. For these reasons, the Court should find that it is plausible that Plaintiff's request for injunctive relief will be granted in light of *Diocese of Brooklyn* and it is an error to moot Plaintiff's Complaint without any evidence to the contrary.

Church, Inc., et al. v. Newsom, No. 20A94, 592 U.S. ___ (Dec. 3, 2020); *South Bay United Pentecostal Church v. Newsom*, No. 20A136, 592 U.S. ___ (Feb. 5, 2021); *Harvest Rock Church, et al. v. Newsom*, No. 20A137, 592 U.S. ___ (Feb. 5, 2021).

17. It would be an error in law for the Court to find Plaintiff's Complaint moot because of the guidance from the Supreme Court in *Diocese of Brooklyn*, because of the Constitutional violations in Defendants' past orders as shown by the higher Court's decisions and the Defendants' own actions, and because of rulings since *Diocese of Brooklyn*, including at least one Governor agreeing to a permanent injunction against orders similar to Defendant Northam's past orders. If the Court finds mootness in Plaintiff's case, Plaintiff is confident that a finding of mootness can be reversed on appeal based on these reasons and because of the serious and obvious split it will create between the Fourth Circuit and the other Circuit Courts which have not found mootness.

Part II. Defendants' Equitable Relief Arguments Fail

18. If the Court does not find mootness in Plaintiff's Complaint, it should not accept Defendants' flawed arguments on equitable relief. Defendants wrongly state "the Complaint challenges only Executive Order 55; specifically, the 'temporary gathering restriction,' (Compl. ¶ 30) and 'social distancing orders' (Compl. ¶ 5), and requests an injunction blocking their enforcement." (ECF 71, p. 3) This is false and misleading since Plaintiff's Complaint claimed multiple constitutional violations under Defendant Northam's orders including violations of the First, Fourth and Fourteenth Amendment, *infra*. Defendants also argue "Plaintiff has never amended the Complaint to explain how more recent policies have interfered with the free exercise of religion or caused any kind of constitutional injury" (ECF 71, p. 3). This again misleads the Court since Plaintiff's last opposition (ECF 49) contains an Amended Complaint which amends the requested relief for subsequent orders and alleges detailed injuries including:

a) Violations of the free exercise of religion under the First Amendment including "orders under EO-72 [Executive Order Number Seventy-Two (2020)] which restrict the free practice of religion...including infringing on how religious services are practiced, preventing

Amendment claims. In fact, Plaintiff's Complaint and arguments show the irreparable injury under the First, Fourth and Fourteenth Amendment. This is explained in the following and should convince the Court that Plaintiff has made the "showing of irreparable injury" required by *Lyons*, at 111 for "[t]he equitable remedy [of an injunction]", *Id.*

21. Plaintiff's past arguments have also shown how Plaintiff's Complaint survives any challenge under Rule 12(b)(6) by alleging sufficient facts to show it is plausible that Defendant Northam's orders have violated Plaintiff's rights under the First Amendment (ECF 49, ¶¶ 28-38), under the Fourth Amendment (ECF 49, ¶¶ 39-41,44)[11], and under the Fourteenth Amendment (ECF 49, ¶¶ 42-44). The irreparable injury required for equitable relief should be satisfied by Plaintiff's Complaint or Amended Complaint if reviewed under Rule 12(b)(6).

Irreparable Injury from First Amendment Violations

22. Plaintiff's Complaint alleges facts which, if taken as true, shows that Defendant Northam's orders violated the free exercise of religion under the First Amendment according to strict scrutiny (ECF 1, ¶¶ 30-33). Since Plaintiff's Complaint, Plaintiff's arguments have shown how Defendant Northam's orders have violated the First Amendment following the Supreme Court precedent in *Diocese of Brooklyn* (ECF 49, ¶¶ 28-31). As noted in *Diocese of Brooklyn, per curiam*, at 5, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (quoting *Elrod v. Burns*, 427 U. S. 347, 373 (1976) (plurality opinion), hereinafter, *"Elrod"*). The violations of the First Amendment alleged in Plaitniff's Complaint or shown in his arguments lead to irreparable injury according to *Elrod.*

11 Alternatively, these factual allegations can allow the Court to infer that there were plausible violations of the First Amendment for unwarranted government supervision or intrusion onto private property which satisfy Rule 12(b)(6).

23. Plaintiff's Complaint also alleges violations of Plaintiff's First Amendment rights to travel and assemble (ECF 1, ¶¶ 40-41, 43-45; ECF 49, ¶¶ 32-38). Since Plaintiff's Complaint, Plaintiff's arguments have shown how the time, place and manner restrictions of Defendants' orders violate the Plaintiff's First Amendment right to travel and asemble[12] This shows that Plaintiff suffered irreparable injury because, according to *Elrod*, even minimal loss of First Amendment rights are irreparable injury.

Irreparable Injury under the Fourth Amendment

24. Until May 28, 2021, Defendant Northam's orders violated Plaintiff's constitutional rights under the First or Fourth Amendment through the Governor's improper extension of the State's authority to interfere with constitutional rights on private property (See ECF 1, ¶¶52-54, ECF 49, ¶¶ 1(d)-(e),40-41). The only justification for the extension of State powers against private actions on private property which are not subject to business licensing are for law enforcement purposes during the commission of a crime (see *Jones v. United States* 357 U.S. 493 (1958); *United States v. Rabinowitz* 339 U.S. 56 (1950)) or when the legislature has determined that there is a direct and immediate threat to public safety (see *Camara v. Municipal Court*, 387 U.S. 523 (1967)). Defendant Northam's orders can only be accomplished if every home in Virginia is surveilled by government authorities to determine if citizens meeting in Bible Studies, charity events, wedding receptions, funeral memorials, etc. are meeting in secret to defy the Governor's gathering limits. No probable cause is required of an individual to be charged. If a healthy person chooses to assemble with other healthy individuals on private property, with no reason to believe any of them have been exposed or are subject to a legal quarantine order, the mere act of

12 Plaintiff's past Opposition (ECF 49, ¶¶36-38) shows how Defendant Northam's orders were time, place and manner restrictions which, based on evidence of Defendants' arbitrary application, were not content-neutral and violated Plaintiff's constitutional rights to travel and assemble under the First Amendment.

their behavior on private property was a crime under Defendant Northam's dictate. Defendant Northam had no such warrant to extend police powers onto Plaintiff's property. For these reasons, Defendant Northam's orders from Executive Order Number Fifty-Five through the subsequent orders until May 28, 2021, exceeded the limits to the authority of the State and infringed on the right of citizens to be secure in their person, houses, papers, and effects under *Jones, Rabinowitz* and *Camara.* But Defendant Northam's orders are also a violation of the right to be secure in one's own home as a basic right of the privacies of life on one's own property, a principal extending back into English law which formed the basis of the Fourth Amendment, recognized by this Court in its reference to its famous defense by Lord Cameron in Colonial times:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." (*Boyd v. United States*, 116 U.S. 616, 630 (1886), hereinafter "*Boyd*")

25. The necessary surveillance of all citizens in their homes which Defendant Northam's orders require is odious to the rights which *Boyd* enumerates as forming the foundation of the Fourth Amendment: "indefeasible right of personal security, personal liberty and private property" (*Id.*). This is particularly true when Plaintiff and all other healthy citizens have never forfeited these indefeasible rights by "conviction of some public offense" (*Id.*) other than the ludicrous proposition by Respondents that not having one's home at an essential business provides such probable cause. Over the years, this Court has referred to the invasion of privacy under the Fourth Amendment:

"Then, in the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court referred to

> 'the right to privacy,' 'no less important than any other right carefully and particularly reserved to the people,' as 'basic to a free society.' *Id.*, at 656. MR. JUSTICE CLARK, speaking for the Court, referred to 'the freedom from unconscionable invasions of privacy' as intimately related to the freedom from convictions based upon coerced confessions. He said that both served the cause of perpetuating 'principles of humanity and civil liberty [secured] . . . only after years of struggle.' Id., at 657, quoting from *Bram v. United States*, 168 U.S. 532, 544 (1897). He said that they express 'supplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy.' *Ibid.*, quoting from *Feldman v. United States*, 322 U.S. 487, 489-490 (1944)." (*Time, Inc. v. Hill*, 385 U.S. 374, 413-14 (1967), hereinafter "*Time*")

26. In *Mapp v. Ohio*, 367 U.S. 643 (1961), hereinafter, "*Mapp*", the Court extended the protections of the Fourth Amendment against unreasonable search to State prosecutions because "right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment]" (*Mapp* at 655). These concerns for protections of the right of privacy in one's home should protect Plaintiff from unwarranted surveillance of his and others behavior on his private property, which is the natural extension of Defendant Northam's gathering limits on private property. Plaintiff believes that such concerns should call for the Court to review the constitutionality of Defendant Northam's orders under the Fourth Amendment just as *Mapp*'s counsel asked the Court to determine "once and for all that the [Ohio] Statute is unconstitutional"[13] in her case. Can the Court allow an Executive Order which is designed to cause government surveillance of every citizen in their homes without a warrant and authorizes law enforcement to charge gatherings with criminal penalties based on that surveillance withstand constitutional review? Plaintiff believes the Court cannot and based on the Supreme Court's recognition of the right to be free from the "invasions of privacy" (*Time* at 414) in one's own home, it should find Fourth Amendment reasons to enjoin Defendant Northam's restrictions on private property. But even if the Court does not find reason for a violation under the Fourth Amendment because there was no evidence of a search of Plaintiff's home during the time of the orders, the Court can still find that the extension of Defendant

13 *Mapp*, Justices Harlan, Frankfurter and Whittaker Dissenting, Footnote 4 at 674.

Northam's restrictions to gatherings on private property (for Bible Studies, wedding receptions, book clubs, picture shows, private political activities, or any other use of his property) are a violation of Plaintiff's right to be free from government supervision on private property for other constitutional reasons:

> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." (*Stanley v. Georgia*, 394 U.S. 557, 565 (1969), hereinafter, "*Stanley*")

27. If the Court considers Defendant Northam's past violations of these First and Fourth Amendment rights in light of a compelling interest during the pandemic, Plaintiff's Complaint and past arguments have shown that there is no consensus in science which justifies a compelling interest (ECF 1, ¶¶ 12, 14-18, 44; ECF 49, ¶¶ 1(c), 24, 38, Exhibit F). For a Rule 12(b)(6) consideration of these factual allegations,taken as true, the Court should find no compelling interest to abridge the constitutional protections against unwarranted surveillance of healthy persons where there is no quarantine order. If the Court considers more recent scientific evidence as shown in Attachments A and B, it should allow the Court to make a finding of fact that there is no consensus in science that healthy persons can spread the COVID-19 virus and no compelling interest for quarantine restrictions on all healthy persons.

28. Furthermore, the police power of the State found in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in the interest of public health does not empower a violation of the rights of citizens on private property under the Fourth or First Amendment because: i) the facts in *Jacobson*

involved State action against citizens outside of their private property and was based on the Fourteenth Amendment, not the Fourth or First Amendment; ii) even in *Jacobson*, the Court found that "the mode or manner of exercising its [the State's] police power is wholly within the discretion of the State so long as...any right granted or secured thereby [the Constitution] is not infringed", *Jacobson*, at 11; iii) the *Jacobson* Court was not dealing with a Governor's Executive power as in this case, but with the State power enacted by the legislature, stating: "[i]t is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine", *Id.*, at 11; iv) even if this Court finds the police power of the Executive for public health reasons supported by *Jacobson*, such powers are not proper when the Executive circumvents and/or purposely violates the requirements and intentions of the legislature for use of that power in order to enforce an illegal quarantine during a public health emergency, as in Plaintiff's case, *infra*. The foundational principal for our Republic is that a single branch of government is restrained from having the power to legislate and to administer law. Even *Jacobson* preserves this by recognizing the difference between the legislative and judicial branches. Applying *Jacobson* to Executive Orders will destroy this principal and makes it possible to merge legislative power with executive power in a single person who can rule without check.

29. In *Diocese of Brooklyn*, Justice Gorsuch noted that *Jacobson* was decided concerning a Fourteenth Amendment question and that constitutional questions about rights under other Amendments besides the Fourteenth should not rely on *Jacobson* because it "involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." (Justice Gorsuch concurring, *Diocese of Brooklyn* at 10) Justice Gorsuch's opinion explicitly applies to First Amendment complaints like Plaintiff's. But they also should apply to Plaintiff's complaints under the Fourth Amendment for protected actions on private property. As

noted in Justice Gorsuch's opinion concerning *Jacobson's* substantive due process right to bodily integrity: "what does that have to do with our circumstances?". (*Id.* at 11) *Jacobson* should not allow the State to violate the protections of the First or Fourth Amendments to be free from unwarranted government surveillance or supervision in one's own home.

30. Based on the factual allegations in Plaintiff's Complaint and the illegal extension of the State's power to private property found in those allegations, when taken as true, the Court should be able to infer that Defendant Northam's past orders violated Plaintiff's right to be free from unwarranted government surveillance or intrusion under the Fourth or First Amendments. On private property which is not used for commerce, the State's power to intrude into how a person chooses to conduct his private affairs is limited, a principle that reaches back to the founding of the nation. The State has no authority under *Jacobson* for public health reasons, *supra*, regardless of what the size limits for gatherings Defendants should dictate. The Supreme Court's precedents under the First, Fourth and Fourteenth Amendments have also protected citizens from unwarranted surveillance and "invasions of privacy" (*Time* at 414) without probable cause. The gathering restrictions for private property in Defendant Northam's past orders (which were specifically designed to interfere with private behavior and not behavior at essential businesses) violate these precedents. It is an unprecedented assault on the foundational constitutional rights to " personal liberty and private property" (*Boyd* at 630) if the Court should not enjoin Defendants from dictating behavior on private property when there is no probable cause of a crime and when the public health powers of *Jacobson* do not justify it.

31. In addition to the factual allegations showing emergency orders which authorize sweeping, illegal surveillance of every citizen's home without a warrant or probable cause (ECF 1, ¶¶ 52-57), which should be taken as true under Rule 12(b)(6), Plaintiff has provided rebuttal evidence to Defendants' Motion to Dismiss which shows how Defendant Northam's past orders

imposed gathering restrictions which did actually prevent Plaintiff from exercising his constitutional rights with small groups on his private property, even if Plaintiff had taken other steps to ensure the groups safety, like essential businesses of the same size.[14]. Even if the factual allegations taken as true from Plaintiff's Complaint are not enough for the Court to infer that a violation of Plaintiff's constitutional rights is likely to be found under Rule 12(b)(6), the evidence provided as part of Plaintiff's rebuttal which shows actual injury to Plaintiff's rights on his private property should convince the Court that Defendants violated Plaintiff's constitutional rights. The Court should be able to find a sweeping, illegal surveillance regime without probable cause or warrant in Defendant Northam's orders which deprived Plaintiff of his right to be secure in his person, houses, papers and effects and free from government supervision on his private property under the Fourth Amendment. Alternatively, the Court should be able to find an invasion of Plaintiff's right to be free from unchecked government power which reaches "into the privacy of one's own home" under the First and Fourteenth Amendment according to *Stanley*. Any one of these injuries caused irreparable harm to Plaintiff's rights. Furthermore, none of these injuries to Plaintiff's rights can be justified as a proper use of police powers under *Jacobson, supra*. In the case of probable cause cases like *Jones* and *Rabinowitz*, even a single deprivation of a citizen's rights under the Fourth Amendment causes irreparable harm requiring injunction. Violation of Plaintiff's Fourth or First Amendment rights for use of his property without unwarranted government surveillance or supervision under Defendant Northam's orders should be the same. But even if the "minimal" loss of Plaintiff's rights under these Amendments are not like in *Elrod*, the fact of the matter is that Defendant Northam's orders have already unconstitutionally deprived Plaintiff of his property rights repeatedly for many months and

14 See Plaintiff's Sworn Statement, Exhibit H from Plaintiff's Response Brief, Opposition and Arguments (ECF 49). Until Defendant Northam's amendment to EO-72 on March 23, 2021, Plaintiff could not conduct a Bible Study of more than 10 persons in his home or attend the same Bible Study on private property anywhere else in Virginia.

promise to continue to cause similar injury to Plaintiff's rights in the future during any new resurgence of COVID-19 or similar pandemic if the Court does not take action.

Irreparable Injury under the Fourteenth Amendment

32. Furthermore, Defendant Northam's orders until May 28, 2021, violated Plaintiff's due process and equal protection rights under the Fourteenth Amendment (ECF 1, ¶¶ 26, 64, 67, 70; ECF 49, ¶¶ 1(a)-(c),1(f), 42-44). Defendant Northam's orders violated the First and Fourteenth Amendments by continuing to enforce an illegal quarantine without an order of quarantine as required by the Virginia legislature under Va. Code § 44.146-17 and § 32.1-48.05:

> "...a state of emergency may address exceptional circumstances that exist relating to an order of quarantine or an order of isolation **concerning a communicable disease of public health threat that is issued by the State Health Commissioner** for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1." (Va. Code § 44-146.17, emphasis added)[15]

33. Defendant Northam's orders continue to violate the First and Fourteenth Amendments through an illegal quarantine which restricts the free travel and assembly of citizens with unwarranted restrictions on the gathering of healthy individuals while providing no due process to persons who are not sick as required under Va. Code § 32.1-48.05 and § 32.1-48.010:

> "A. Any person or persons subject to an order of quarantine...may file an appeal of the order of quarantine as such order applies to such person or persons...." (Va. Code § 32.1-48.010)

34. These restrictions on the free assembly of American citizens have been shown to be unwarranted because of recent guidance from medical authorities which have supported Plaintiff's arguments that the consensus of science does not warrant restrictions on healthy

15 The Virginia Health Commissioner has issued no order of quarantine yet which either cites Va. Code § 32.1-48.05 or has determined "that exceptional circumstances exist relating to one or more persons...who are known to have been exposed to or infected with...a communicable disease of public health threat and that such...circumstances render the procedures of Article 3.01 (§ 32.1-48.01 et seq.)...to be insufficient control measures" as required by Va. Code § 32.1-48.05.

persons (ECF 49, Exhibit F; Attachments A and B). Furthermore, these restrictions fail to provide due process and violates equal protection under the Fourteenth Amendment when Defendant Northam failed to enforce his orders on his political allies who were violating the restrictions on outdoor gatherings during past protests in Richmond, Virginia Beach and in Plaintiff's own county of Prince William County (ECF 49, Footnote 6)[16]. Defendants' renewed MTD fails to rebut these violations. If the Court takes the factual allegations of Plaintiff's Complaint as true according to proper Rule 12(b)(6) review, it should find that it is plausible that Defendant Northam's orders violated Plaintiff's rights to equal justice under the law and due process through an illegal quarantine. The Court should not tolerate the trampling of due process rights and equal protection under the Fourteenth Amendment any more than minimal loss to First Amendment freedoms under *Elrod* because due process and equal protection are fundamental to the protection of all other civil rights provided by the Constitution. The irreparable injury which Defendant Northam's orders caused to Plaintiff's rights should justify preliminary relief.

Plaintiff's Relief Satisfies *Lyons* and *Grant*

35. Defendants argue that Defendant Northam's "orders no longer apply—and there is no indication they will ever be reinstated" (ECF 71, p. 4) and "Plaintiff cannot show any risk of irreparable harm" in the future (*Id.*). There is more evidence for the Virginia Governor to respond to the next health emergency with similar orders than there is that the Governor would do something different, including the past action of Defendant Northam which showed no hesitation by Defendants in issuing a new order with harsher restrictions as COVID case counts

16 There is widespread public reporting on protests throughout Virginia following the death of George Floyd, violating social distancing, with Defendant Northam's support (see Virginia Mercury article "Protest over George Floyd's death spread to Virginia", May 30, 2020, by R. Zullo and K. Masters, which quotes Defendant Northam: "People are crying out for justice and healing...and we have a lot of work to do...." without any report of comments on or enforcement against the gathering and social distance violations during the protests).

Attachment A

Shiyi Cao, et al., "Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China", Nature Communications (2020) 11:5917

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Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China

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Stringent COVID-19 control measures were imposed in Wuhan between January 23 and April 8, 2020. Estimates of the prevalence of infection following the release of restrictions could inform post-lockdown pandemic management. Here, we describe a city-wide SARS-CoV-2 nucleic acid screening programme between May 14 and June 1, 2020 in Wuhan. All city residents aged six years or older were eligible and 9,899,828 (92.9%) participated. No new symptomatic cases and 300 asymptomatic cases (detection rate 0.303/10,000, 95% CI 0.270–0.339/10,000) were identified. There were no positive tests amongst 1,174 close contacts of asymptomatic cases. 107 of 34,424 previously recovered COVID-19 patients tested positive again (re-positive rate 0.31%, 95% CI 0.423–0.574%). The prevalence of SARS-CoV-2 infection in Wuhan was therefore very low five to eight weeks after the end of lockdown.

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The Coronavirus Disease 2019 (COVID-19) was first reported in December 2019, and was classified as a pandemic by the World Health Organization on March 11, 2020[1]. Following strict lockdown measures, the COVID-19 epidemic was generally under control in China, and the whole country has progressed into a post-lockdown phase. In this phase, countries face new problems and challenges, including how to accurately assess the post-lockdown risk of the COVID-19 epidemic, how to avoid new waves of COVID-19 outbreaks, and how to facilitate the resumption of economy and normal social life. As the city most severely affected by COVID-19 in China, Wuhan had been under lockdown measures from January 23 until April 8, 2020. During the first 2 months after city's reopening, there were only a few sporadic COVID-19 cases in Wuhan (six newly confirmed cases from April 8 to May 10, 2020[2]). However, there was still concern about the risk of COVID-19 in Wuhan, which seriously affected the resumption of industrial production and social services, and hampered the normal lives of residents. In order to ascertain the current status of the COVID-19 epidemic, the city government of Wuhan carried out a comprehensive citywide nucleic acid screening of SARS-CoV-2 infection from May 14, 2020 to June 1, 2020.

The citywide screening of SARS-CoV-2 infection in Wuhan is a mass screening programme in post-lockdown settings, and provided invaluable experiences or lessons with international relevance as more countries and cities around the world entering the post-lockdown phase. In this study, we report the organisation process, detailed technical methods used, and results of this citywide nucleic acid screening.

Results

There were 10,652,513 eligible people aged ≥6 years in Wuhan (94.1% of the total population). The nucleic acid screening was completed in 19 days (from May 14, 2020 to Jun 1, 2020), and tested a total of 9,899,828 persons from the 10,652,513 eligible people (participation rate, 92.9%). Of the 9899,828 participants, 9,865,404 had no previous diagnosis of COVID-19, and 34,424 were recovered COVID-19 patients.

The screening of the 9,865,404 participants without a history of COVID-19 found no newly confirmed COVID-19 cases, and identified 300 asymptomatic positive cases with a detection rate of 0.303 (95% CI 0.270–0.339)/10,000. The median age-stratified Ct-values of the asymptomatic cases were shown in Supplementary Table 1. Of the 300 asymptomatic positive cases, two cases came from one family and another two were from another family. There were no previously confirmed COVID-19 patients in these two families. A total of 1174 close contacts of the asymptomatic positive cases were traced, and they all tested negative for the COVID-19. There were 34,424 previously recovered COVID-19 cases who participated in the screening. Of the 34,424 participants with a history of COVID-19, 107 tested positive again, giving a repositive rate of 0.310% (95% CI 0.423–0.574%).

Virus cultures were negative for all asymptomatic positive and repositive cases, indicating no "viable virus" in positive cases detected in this study.

All asymptomatic positive cases, repositive cases and their close contacts were isolated for at least 2 weeks until the results of nucleic acid testing were negative. None of detected positive cases or their close contacts became symptomatic or newly confirmed with COVID-19 during the isolation period. In this screening programme, single and mixed testing was performed, respectively, for 76.7% and 23.3% of the collected samples. The asymptomatic positive rates were 0.321 (95% CI 0.282–0.364)/10,000 and 0.243 (95% CI 0.183–0.315)/10,000, respectively.

The 300 asymptomatic positive persons aged from 10 to 89 years, included 132 males (0.256/10,000) and 168 females (0.355/10,000). The asymptomatic positive rate was the lowest in children or adolescents aged 17 and below (0.124/10,000), and the highest among the elderly aged 60 years and above (0.442/10,000) (Table 1). The asymptomatic positive rate in females (0.355/10,000) was higher than that in males (0.256/10,000).

The asymptomatic positive cases were mainly domestic and unemployed residents (24.3%), retired older adults (21.3%), and public service workers (11.7%) (Fig. 1).

The asymptomatic positive rate in urban districts was on average 0.456/10,000, ranging from 0.317/10,000 in Hongshan to 0.807/10,000 in Wuchang district. A lower rate of asymptomatic positive cases was found in suburban districts (0.132/10,000), ranging from 0.047/10,000 in Xinzhou to 0.237/10,000 in Jiangan district (Fig. 2).

Among the 7280 residential communities in Wuhan, asymptomatic positive cases were identified in 265 (3.6%) communities (only one case detected in 246 communities), while no asymptomatic positive cases were found in other 96.4% communities.

Testing of antibody against SARS-CoV-2 virus was positive IgG (+) in 190 of the 300 asymptomatic cases, indicating that 63.3% (95% CI 57.6–68.8%) of asymptomatic positive cases were actually infected. The proportion of asymptomatic positive cases with both IgM (−) and IgG (−) was 36.7% (95% CI: 31.2–42.4%; $n = 110$), indicating the possibility of infection window or false positive results of the nucleic acid testing (Table 2).

Higher detection rates of asymptomatic infected persons were in Wuchang, Qingshan and Qiaokou districts, and the prevalence of previously confirmed COVID-19 cases were 68.243/10,000, 53.767/10,000, and 100.047/10,000, respectively, in the three districts. Figure 3 shows that districts with a high detection rate of asymptomatic positive persons generally had a high prevalence of confirmed COVID-19 cases ($r_s = 0.729$, $P = 0.002$).

Discussion

The citywide nucleic acid screening of SARS-CoV-2 infection in Wuhan recruited nearly 10 million people, and found no newly confirmed cases with COVID-19. The detection rate of asymptomatic positive cases was very low, and there was no evidence of transmission from asymptomatic positive persons to traced close contacts. There were no asymptomatic positive cases in 96.4% of the residential communities.

Previous studies have shown that asymptomatic individuals infected with SARS-CoV-2 virus were infectious[3], and might subsequently become symptomatic[4]. Compared with symptomatic patients, asymptomatic infected persons generally have low quantity of viral loads and a short duration of viral shedding, which decrease the transmission risk of SARS-CoV-2[5]. In the present study, virus culture was carried out on samples from asymptomatic positive cases, and found no viable SARS-CoV-2 virus. All close contacts of the asymptomatic positive cases tested negative, indicating that the asymptomatic positive cases detected in this study were unlikely to be infectious.

There was a low repositive rate in recovered COVID-19 patients in Wuhan. Results of virus culturing and contract tracing found no evidence that repositive cases in recovered COVID-19 patients were infectious, which is consistent with evidence from other sources. A study in Korea found no confirmed COVID-19 cases by monitoring 790 contacts of 285 repositive cases[6]. The official surveillance of recovered COVID-19 patients in China also revealed no evidence on the infectiousness of repositive cases[7]. Considering the strong force of infection of COVID-19[8–10], it is expected that the number of confirmed cases is associated with the risk of being infected in communities. We

Table 1 Characteristics of asymptomatic positive individuals.

	Total (%)	Asymptomatic positive persons (%)	Detection rate per 10,000 (95% CI)	P value
Total	9,899,828 (100.0)	300 (100.0)	0.303 (0.270-0.339)	
Sex				
Male	5,162,960 (52.2)	132 (44.0)	0.256 (0.214-0.303)	0.005
Female	4,736,868 (47.8)	168 (56.0)	0.355 (0.303-0.413	
Age (years old)				
≤17	969,014 (9.8)	12 (4.0)	0.124 (0.064-0.216)	<0.001
18-44	4,448,230 (44.9)	104 (34.7)	0.234 (0.191-0.283)	
45-59	2,492,943 (25.2)	96 (32.0)	0.385 (0.312-0.470)	
≥60	1,989,641 (20.1)	88 (29.3)	0.442 (0.355-0.545)	
Administrative Districts in Wuhan				
Wuchang	904,636 (9.1)	73 (24.3)	0.807 (0.633-1.015)	<0.001
Qingshan	414,312 (4.2)	23 (7.7)	0.555 (0.352-0.833)	
Qiaokou	583,440 (5.9)	32 (10.7)	0.548 (0.375-0.774)	
Hanyang	717,429 (7.2)	29 (9.7)	0.404 (0.271-0.581)	
Jianghan	524,224 (5.3)	19 (6.3)	0.362 (0.218-0.566)	
Hongshan	1,103,079 (11.1)	35 (11.7)	0.317 (0.221-0.441)	
East Lake High-tech Development Area	782,987 (7.9)	19 (6.3)	0.243 (0.146-0.379)	
Jiangan	800,440 (8.1)	19 (6.3)	0.237 (0.143-0.371)	
Caidian	503,595 (5.1)	11 (3.7)	0.218 (0.109-0.391)	
Jiangxia	671,248 (6.8)	14 (4.7)	0.209 (0.114-0.350)	
Huangpi	979,920 (9.9)	14 (4.7)	0.143 (0.078-0.240)	
Hannan	417,022 (4.2)	4 (1.3)	0.096 (0.026-0.246)	
Dongxihu	777,204 (7.9)	5 (1.7)	0.064 (0.021-0.150)	
Xinzhou	634,408 (6.4)	3 (1.0)	0.047 (0.010-0.138)	
East Lake Scenic Area of Wuhan	85,884 (0.9)	0 (0.0)	0.000 (0.000-0.430)	

χ^2 test was used to assess the association between the detection rate of asymptomatic cases increased and sex and age. Urban districts of Wuhan includes Wuchang, Qingshan, Qiaokou, Hanyang, Jiangan, Jianghan, and Hongshan; Suburban districts of Wuhan includes Hannan, Caidian, Dongxihu, Xinzhou, Jiangxia, Huangpi, East Lake High-tech Development Area, and East Lake Scenic Area of Wuhan.

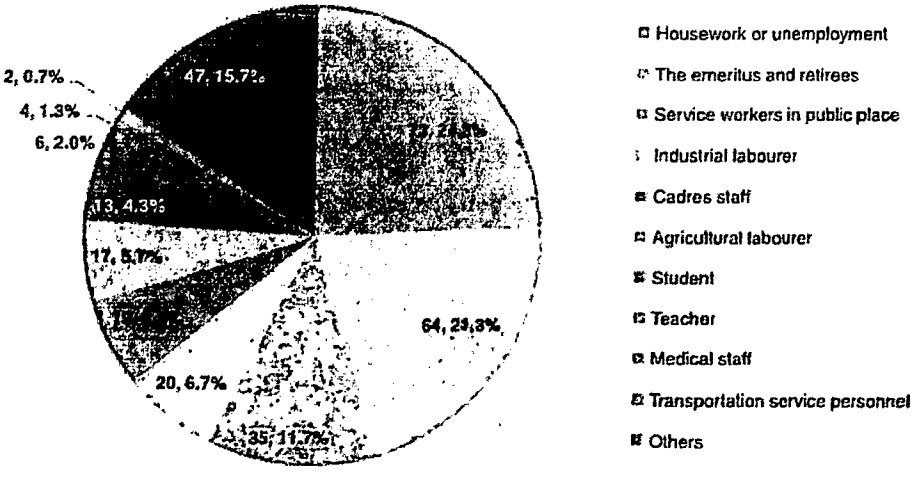

Fig. 1 The occupation distribution of asymptomatic positive cases (%). Note: Others included the self-employed, military personnel, and so on. (Source data are provided as s Source Data file.).

found that asymptomatic positive rates in different districts of Wuhan were correlated with the prevalence of previously confirmed cases. This is in line with the temporal and spatial evolution (especially the long-tailed characteristic) of infectious diseases[11].

Existing laboratory virus culture and genetic studies[9,10] showed that the virulence of SARS-CoV-2 virus may be weakening over time, and the newly infected persons were more likely to be asymptomatic and with a lower viral load than earlier infected cases. With the centralized isolation and treatment of all COVID-19 cases during the lockdown period in Wuhan, the risk of residents being infected in the community has been greatly reduced. When susceptible residents are exposed to a low dose of virus, they may tend to be asymptomatic as a result of their own immunity. Serological antibody testing in the current study found that at least 63% of asymptomatic positive cases were actually infected with SARS-CoV-2 virus. Nonetheless, it is too early to be complacent, because of the existence of asymptomatic positive cases and high level of susceptibility in residents in Wuhan. Public health measures for the prevention and control of COVID-19 epidemic, including wearing masks, keeping safe social distancing in Wuhan should be sustained. Especially, vulnerable populations with weakened immunity or co-morbidities, or both, should continue to be appropriately shielded.

Findings from this study show that COVID-19 was well controlled in Wuhan at the time of the screening programme. After two months since the screening programme (by August 9, 2020), there were no newly confirmed COVID-19 cases in Wuhan.

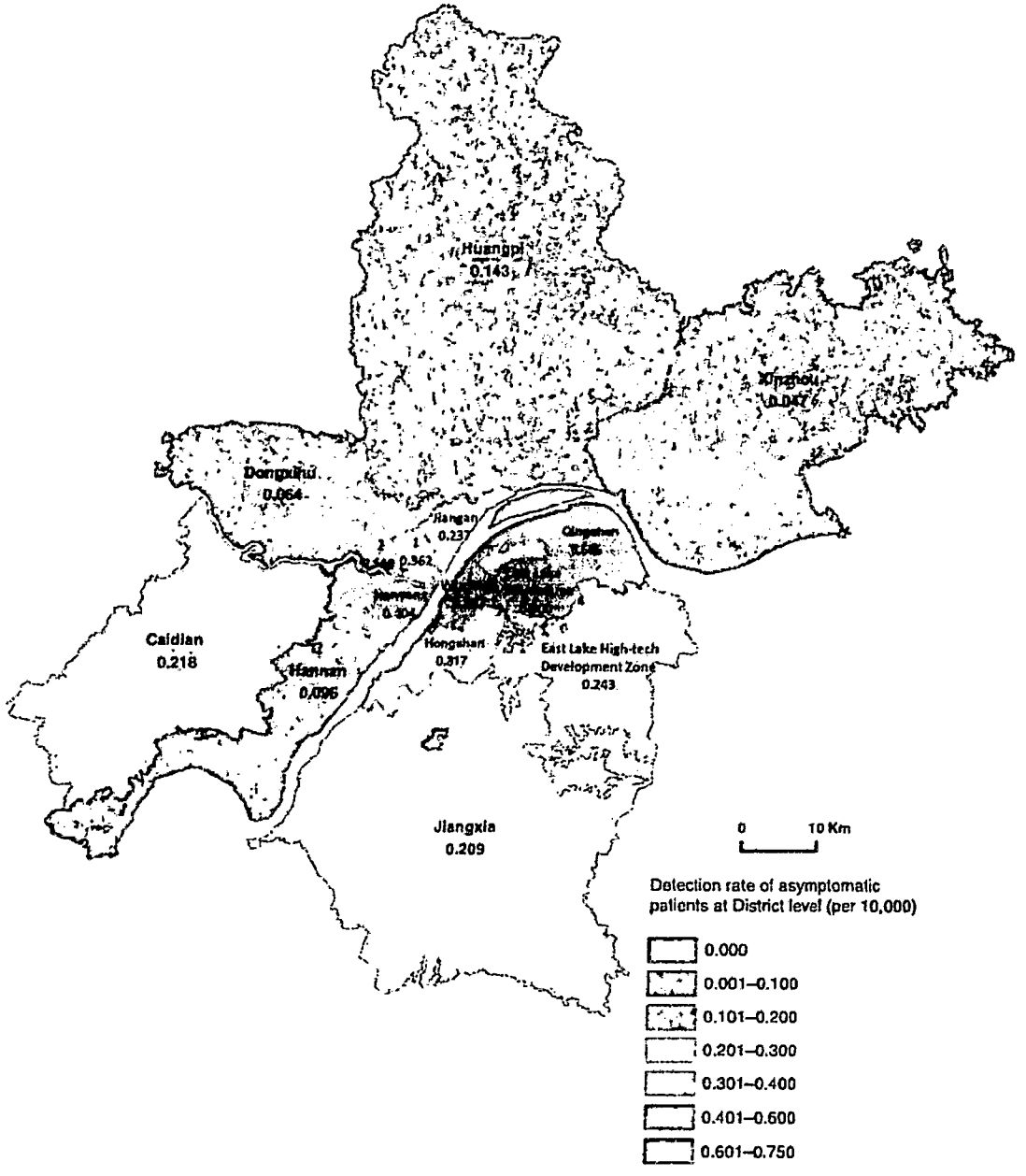

Fig. 2 The geographic distribution of the detection rate of asymptomatic positive cases. Note: 1 represents Jianghan district; 2 represents Qiaokou district. (Source data are provided as s Source Data file.).

Table 2 Results of the detection of antibody in 300 asymptomatic positive persons.

IgM Results	IgG	Asymptomatic positive persons	% (95% CI)
−	+	161	53.7 (47.8-59.4)
−	−	110	36.7 (31.2-42.4)
+	+	29	9.7 (6.6-13.6)
+	−	0	0.0 (0.0-1.2)

"−" indicates negative; "+" indicates positive.

Further testing of SARS-CoV-2 in samples collected from market environment settings in Wuhan were conducted, and found no positive results after checking a total of 52,312 samples from 1795 market setting during June 13 to July 2, 2020[12].

This study has several limitations that need to be discussed. First, this was a cross-sectional screening programme, and we are unable to assess the changes over time in asymptomatic positive and reoperative results. Second, although a positive result of nucleic acid testing reveals the existence of the viral RNAs, some false negative results were likely to have occurred, in particular due to the relatively low level of virus loads in asymptomatic infected individuals, inadequate collection of samples, and limited accuracy of the testing technology[13]. Although the screening programme provided no direct evidence on the sensitivity and specificity of the testing method used, a meta-analysis reported a

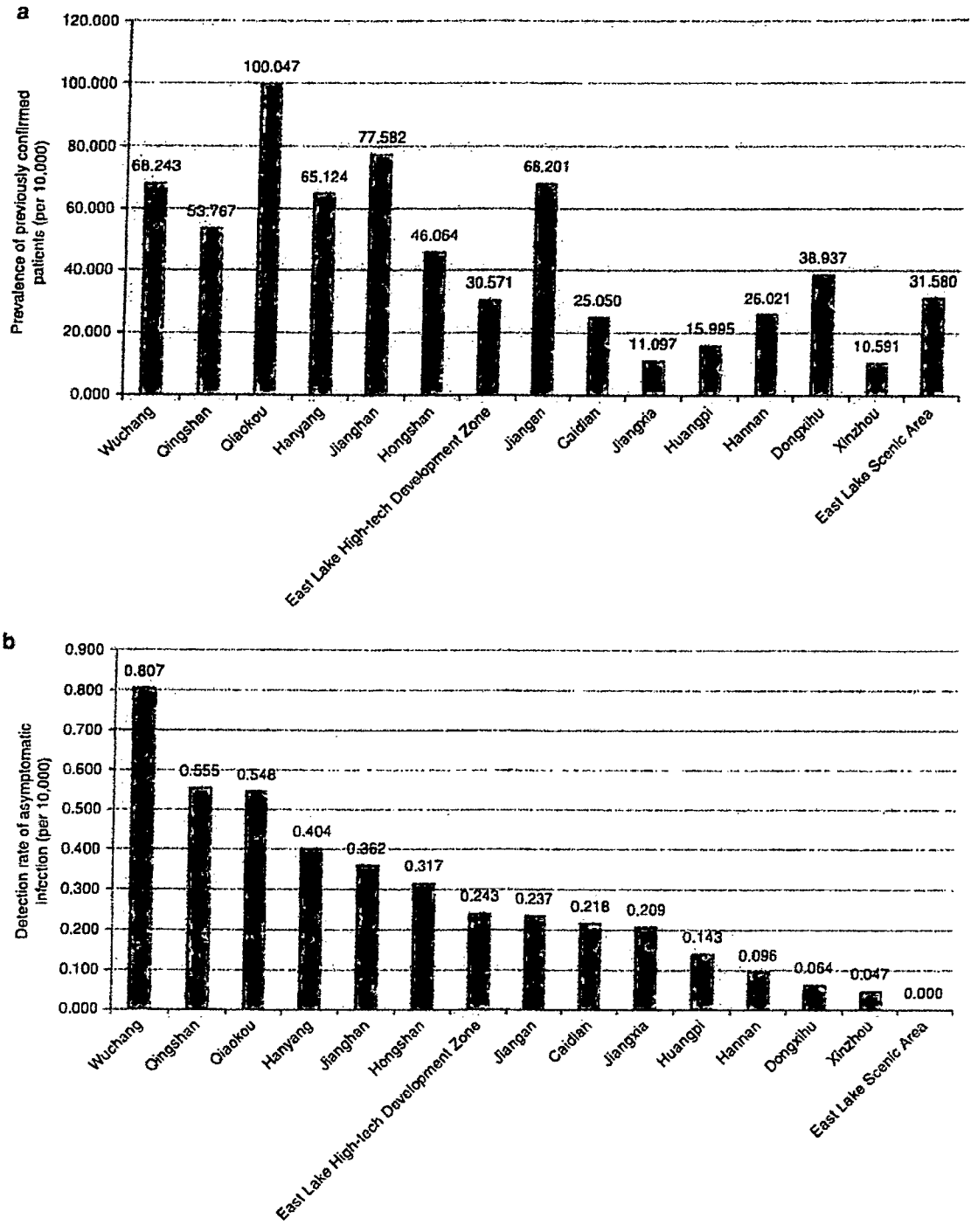

Fig. 3 The prevalence of previously confirmed patients and the detection rate of asymptomatic positive cases of COVID-19 in each district in Wuhan. **a** The prevalence of previously confirmed patients of COVID-19 in each district in Wuhan. **b** The detection rate of asymptomatic positive cases of COVID-19 in each district in Wuhan. (Source data are provided as s Source Data file.).

pooled sensitivity of 73% (95% CI 68–78%) for nasopharayngeal and throat swab testing of COVID-19[14]. Testing kits used in the screening programme were publicly purchased by the government and these kits have been widely used in China and other countries. Multiple measures were taken to possibly minimise false negative results in the screening programme. For example, standard training was provided to health works for sample collection to ensure the sample quality. The experiment procedures, including specimen collection, extraction, PCR, were according to official guidelines (Supplementary Note 1). For the real-time RT-PCR assay, two target genes were simultaneously tested. Even so, false negative results remained possible, particularly in any mass screening programmes. However, even if test sensitivity was as low as 50%, then the actual prevalence would be twice as high as reported in this study, but would still be very low. Around 7.1% of eligible residents did not participate in the citywide nucleic acid screening and the screening programme did not collect detailed data on reasons for nonparticipation, which is a limitation of this

study. Although there were no official statistics, a large number of migrant workers and university students left Wuhan before the lockdown, joining their families in other cities or provinces for traditional Chinese New Year. Therefore, it is likely that most nonparticipants were not in Wuhan at the time of the screening. The main objective of the screening programme was to assess the risk of COVID-19 epidemic in residents who were actually living in the post-lockdown Wuhan. Therefore, the estimated positive rates are unlikely to be materially influenced by nonparticipation of residents who were not in Wuhan or some residents who did not participate in the screening for other reasons. Moreover, people who left Wuhan were the target population for monitoring in other provinces and cities and were required to take nucleic acid testing. Although there was no official statistics showing the positive rate of nucleic acid testing in this population, there was no report that shown a higher positive rate of nucleic acid testing than our findings.

In summary, the detection rate of asymptomatic positive cases in the post-lockdown Wuhan was very low (0.303/10,000), and there was no evidence that the identified asymptomatic positive cases were infectious. These findings enabled decision makers to adjust prevention and control strategies in the post-lockdown period. Further studies are required to fully evaluate the impacts and cost-effectiveness of the citywide screening of SARS-CoV-2 infections on population's health, health behaviours, economy, and society.

Methods

Study population and ethical approvals. Wuhan has about 11 million residents in total, with seven urban and eight suburban districts. Residents are living in 7280 residential communities (or residential enclosures, "xiao-qu" in Chinese), and each residential community could be physically isolated from other communities for preventing transmission of COVID-19.

The screening programme recruited residents (including recovered COVID-19 patients) currently living in Wuhan who were aged ≥6 years (5,162,960 males, 52.2%). All participants provided written or verbal informed consent after reading a statement that explained the purpose of the testing. For participants who aged 6–17 years old, consent was obtained from their parents or guardians. The study protocol for an evaluation of the programme based on anonymized screening data was approved by the Ethics Committee of the Tongji Medical College Institutional Review Board, Huazhong University of Science and Technology, Wuhan, China (No. IROG0003571).

Organizational guarantee and community mobilization. A citywide nucleic acid screening group was formed, with specialized task teams contributing to comprehensive coordination, technical guidance, quality control, participation invitation, information management, communication, and supervision of the screening. The city government invested 900 million yuan (RMB) in the testing programme. From 14 May to 1 June 2020, in the peak time, up to 2907 sample collection sites were functioning at the same time in Wuhan. Each sample collection site had an assigned sample collection group, including several health professionals (staffed according to the number of communities' residents), 2–4 community managers, 1–2 police officers, and 1–2 inspectors. The sampling sites were set up based on the number and accessibility of local residents. Local community workers were responsible for a safe and orderly sampling process to minimise the waiting time. In addition, mobile sampling teams were formed by primary health care professionals and volunteers to conduct door-to-door sampling for residents who had physical difficulties or were unable to walk.

About 50,000 health professionals (mainly doctors and nurses from community health centers) and more than 280,000 person-times of community workers and volunteers contributed to sample collection, transport of equipment and samples collected, arrangement of participation process, and maintaining order of sampling sites. Public information communication and participant invitation were implemented through mass media, mobile messages, WeChat groups, and residential community broadcasts, so as to increase residents' awareness and the participation.

Acquisition, preservation, and transport of samples. All sampling personnel received standard training for the collection of oropharyngeal swab samples. To minimise the risk of cross-infection, the sampling process strictly followed a disinfection process and environmental ventilation were ensured. The collected samples were stored in a virus preservation solution or immersed in isotonic saline, tissue culture solution, or phosphate buffer (Supplementary note 1). Then, all samples were sent to testing institutions within 4 h using delivery boxes for biological samples refrigerated with dry ice to guarantee the stability of nucleic acid samples.

Technical methods for laboratory testing of collected samples. A total of 63 nucleic acid testing laboratories, 1451 laboratory workers and 701 testing equipment were involved in the nucleic acid testing. Received samples were stored at 4 °C and tested within 24 h of collection. Any samples that could not be tested within 24 h were stored at −70 °C or below (Supplementary note 1). In addition to "single testing" (i.e., separate testing of a single sample), "mixed testing" was also performed for 23% of the collected samples to increase efficiency, in which five samples were mixed in equal amounts, and tested in the same test tube. If a mixed testing was positive for COVID-19, all individual samples were separately retested within 24 h[15].

Details regarding technical methods for sequencing and virus culture were provided in Supplementary note 1. Real-time reverse transcriptase-polymerase chain reaction (RT-PCR) assay method was used for the nucleic acid testing. We simultaneously amplified and tested the two target genes: open reading frame 1ab (ORF1ab) and nucleocapsid protein (N) (Supplementary Note 1). A cycle threshold value (Ct-value) less than 37 was defined as a positive result, and no Ct-value or a Ct-value of 40 or more was defined as a negative result. For Ct-values ranging from 37 to 40, the sample was retested. If the retest result remained less than 40 and the amplification curve had obvious peak, the sample was classified as positive; otherwise, it was reported as being negative. These diagnostic criteria were based on China's official recommendations[16].

For asymptomatic positive cases, virus culture was carried out in biosafety level-3 laboratories. The colloidal gold antibody test was also performed for asymptomatic positive cases (Supplementary note 1). All testing results were double entered into a specifically designed database, and managed by the Big Data and Investigation Group of the COVID-19 Prevention and Control Centre in Wuhan, which was established to collect and manage data relevant to the COVID-19 epidemic.

Participant data collection and management. Before sample collection, residents electronically (using a specifically designed smartphone application) self-uploaded their personal information, including ID number, name, sex, age, and place of residence. Then, the electronic machine system generated a unique personal barcode and stuck it on the sample tube to ensure the match between the sample and the participant. Then trained staff interviewed each individual regarding the history of COVID-19 and previous nucleic acid testing. There was a database of confirmed COVID-19 cases in Wuhan, which can be used to validate the self-reported previous COVID-19 infection. All information was entered into a central database. The testing results were continually uploaded to the central database by testing institutions. Contact tracing investigations were conducted on participants who tested positive for SARS-CoV-2, to track and manage their close contacts. The pre-existing unique identification code for each resident was used as the programme's identification number, to ensure information accuracy during the whole process of screening, from sampling, nucleic acid testing, result reporting, the isolation of detected positive cases, and tracing of close contacts of positive cases. All screening information was kept strictly confidential and was not allowed to be disclosed or used for other purposes other than clinical and public health management. Personal information of asymptomatic positive cases was only disclosed to designated medical institutions and community health centres for the purpose of medical isolation and identification of close contacts. Researcher was blind to the study hypothesis during data collection.

Biological security guarantee. Nucleic acid testing was performed in biosafety level-2 (BSL-2) laboratories, and virus culture was conducted in biosafety level-3 laboratories. Sampling and testing personnel adopted the personal protective measures according to the standard of biosafety level-3 laboratories. Participating laboratories implemented control measures to guarantee biological safety in accordance with relevant regulations[17].

Result query and feedback. Two to three days after sample collection, participants could inquire about their test results using WeChat or Alipay application by their unique ID numbers. The results included text descriptions of nucleic acid testing and coloured health codes. A green coloured health code refers to a negative result, and a red coloured health code indicates a positive result.

Definition and management of identified confirmed cases and close contacts. In this study, all confirmed COVID-19 cases were diagnosed by designated medical institutions according to National Guidelines for the Prevention and Control of COVID-19 (Supplementary Note 2). Asymptomatic positive cases referred to individuals who had a positive result during screening, and they had neither a history of COVID-19 diagnosis, nor any clinical symptoms at the time of the nucleic acid testing. Close contacts were individuals who closely contacted with an asymptomatic positive person since 2 days before the nucleic acid sampling[16]. Repositive cases refer to individuals who recovered from previously confirmed COVID-19 disease and had a positive testing again in the screening programme. All repositive cases, asymptomatic positive persons, and their close contacts were

isolated for at least 2 weeks in designated hotels managed by primary health care professionals, and they were released from isolation only if two consecutive nucleic acid tests were negative.

Statistical analysis. Detection rate of asymptomatic positive or repositive cases was calculated by dividing the number of individuals with a positive result of nucleic acid testing by the number of participants tested. Because of extremely low detection rates, we calculated 95% confidence intervals of estimated proportions using Pearson–Klopper exact method, implemented through R package "binom" version 1.1-1[18]. SPSS version 22.0 was used for other statistical analyses. We analyzed the distribution of asymptomatic positive cases and assessed the Spearman correlation between the asymptomatic positive rate and the prevalence of previously confirmed COVID-19 cases in different districts of Wuhan. Differences in asymptomatic positive rates by sex and age groups were assessed using the χ^2 test. ArcGIS 10.0 was used to draw a geographic distribution map of asymptomatic positive cases. A value of $P < 0.05$ (two-tailed) was considered statistically significant.

Reporting summary. Further information on research design is available in the Nature Research Reporting Summary linked to this article.

Data availability

Detailed data directly used to generate each figure or table of this study are available within the article, Supplementary Information and source data are provided with this paper.

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Author contributions

S.Y.C., C.W., X.X.Y., and Z.X.L. conceived the study. C.W., Y.C.H., T.T.W., K.L., H.B.X., and X.S. participated in the acquisition of data. S.B.W. and J.G. were responsible for the on-site specimen collection, laboratory testing quality evaluation, and control. Y.C.H., T.T.W., and L.Q.L. analyzed the data. H.J., Y.H.G., and F.J.S. gave advice on methodology. Q.F.T. and C.Z.L. investigated the responses to the citywide nucleic acid testing among residents lived in outside of Wuhan city. S.Y.C., Y.G., C.W., and X.X.Y. drafted the manuscript. Y.G., M.B., and F.J.S. revised the manuscript, and M.B., C.Z.L., and F.J.S. critically commented and edited the manuscript. All authors read and approved the final manuscript. Z.X.L. is the guarantor of this study.

Competing interests

The authors declare no competing interests.

Additional information

Supplementary information is available for this paper at https://doi.org/10.1038/s41467-020-19802-w.

Correspondence and requests for materials should be addressed to C.L., F.S., X.Y. or Z.L.

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Attachment B

Zachary Madewell, et al., "Household Transmission of SARS-CoV-2", JAMA Network Open. (2020) 3:12

JAMA Network | Open.

Original Investigation | Global Health

Household Transmission of SARS-CoV-2
A Systematic Review and Meta-analysis

Zachary J. Madewell, PhD; Yang Yang, PhD; Ira M. Longini Jr, PhD; M. Elizabeth Halloran, MD, DSc; Natalie E. Dean, PhD

Abstract

IMPORTANCE Crowded indoor environments, such as households, are high-risk settings for the transmission of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

OBJECTIVES To examine evidence for household transmission of SARS-CoV-2, disaggregated by several covariates, and to compare it with other coronaviruses.

DATA SOURCE PubMed, searched through October 19, 2020. Search terms included *SARS-CoV-2* or *COVID-19* with *secondary attack rate*, *household*, *close contacts*, *contact transmission*, *contact attack rate*, or *family transmission*.

STUDY SELECTION All articles with original data for estimating household secondary attack rate were included. Case reports focusing on individual households and studies of close contacts that did not report secondary attack rates for household members were excluded.

DATA EXTRACTION AND SYNTHESIS Meta-analyses were done using a restricted maximum-likelihood estimator model to yield a point estimate and 95% CI for secondary attack rate for each subgroup analyzed, with a random effect for each study. To make comparisons across exposure types, study was treated as a random effect, and exposure type was a fixed moderator. The Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) reporting guideline was followed.

MAIN OUTCOMES AND MEASURES Secondary attack rate for SARS-CoV-2, disaggregated by covariates (ie, household or family contact, index case symptom status, adult or child contacts, contact sex, relationship to index case, adult or child index cases, index case sex, number of contacts in household) and for other coronaviruses.

RESULTS A total of 54 relevant studies with 77 758 participants reporting household secondary transmission were identified. Estimated household secondary attack rate was 16.6% (95% CI, 14.0%-19.3%), higher than secondary attack rates for SARS-CoV (7.5%; 95% CI, 4.8%-10.7%) and MERS-CoV (4.7%; 95% CI, 0.9%-10.7%). Household secondary attack rates were increased from symptomatic index cases (18.0%; 95% CI, 14.2%-22.1%) than from asymptomatic index cases (0.7%; 95% CI, 0%-4.9%), to adult contacts (28.3%; 95% CI, 20.2%-37.1%) than to child contacts (16.8%; 95% CI, 12.3%-21.7%), to spouses (37.8%; 95% CI, 25.8%-50.5%) than to other family contacts (17.8%; 95% CI, 11.7%-24.8%), and in households with 1 contact (41.5%; 95% CI, 31.7%-51.7%) than in households with 3 or more contacts (22.8%; 95% CI, 13.6%-33.5%).

(continued)

Key Points

Question What is the household secondary attack rate for severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)?

Findings In this meta-analysis of 54 studies with 77 758 participants, the estimated overall household secondary attack rate was 16.6%, higher than observed secondary attack rates for SARS-CoV and Middle East respiratory syndrome coronavirus. Controlling for differences across studies, secondary attack rates were higher in households from symptomatic index cases than asymptomatic index cases, to adult contacts than to child contacts, to spouses than to other family contacts, and in households with 1 contact than households with 3 or more contacts.

Meaning These findings suggest that households are and will continue to be important venues for transmission, even in areas where community transmission is reduced.

+ Supplemental content

Author affiliations and article information are listed at the end of this article.

Abstract (continued)

CONCLUSIONS AND RELEVANCE The findings of this study suggest that given that individuals with suspected or confirmed infections are being referred to isolate at home, households will continue to be a significant venue for transmission of SARS-CoV-2.

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Introduction

The coronavirus disease 2019 (COVID-19) pandemic is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which is spread via direct or indirect contact with infected people via infected respiratory droplets or saliva, fomites, or aerosols.[1,2] Crowded indoor environments with sustained close contact and conversations, such as households, are a particularly high-risk setting.[3]

The World Health Organization China Joint Mission reported human-to-human transmission in China largely occurred within families, accounting for 78% to 85% of clusters in Guangdong and Sichuan provinces.[4] Stay-at-home orders reduced human mobility by 35% to 63% in the United States,[5] 63% in the United Kingdom,[6] and 54% in Wuhan,[7] relative to normal conditions, which concomitantly increased time at home. Modeling studies demonstrated that household transmission had a greater relative contribution to the basic reproductive number after social distancing (30%-55%) than before social distancing (5%-35%).[8] While current US Centers for Disease Control and Prevention recommendations are to maintain 6 feet of distance from a sick household member, this may be difficult to achieve in practice and not be fully effective.[9]

The household secondary attack rate characterizes virus transmissibility. Studies can collect detailed data on type, timing, and duration of contacts and identify risk factors associated with infectiousness of index cases and susceptibility of contacts. Our objective was to estimate the secondary attack rate of SARS-CoV-2 in households and determine factors that modify this parameter. We also estimated the proportion of households with index cases that had any secondary transmission. Furthermore, we compared the SARS-CoV-2 household secondary attack rate with that of other severe viruses and with that to close contacts for studies that reported the secondary attack rate for both close and household contacts.

Methods

Definitions

We estimated the transmissibility of SARS-CoV-2 within the household or family by the empirical secondary attack rate by dividing the number of new infections among contacts by the total number of contacts. Household contacts include anyone living in the same residence as the index case. Family contacts include the family members of index cases, including individuals who live outside the index case's household. Close contact definitions varied by study and included physical proximity to an index case, exceeding a minimum contact time, and/or not wearing effective protection around index cases before the index case was tested.

Search Strategy

Following Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) reporting guideline, we searched PubMed using terms including *SARS-CoV-2* or *COVID-19* with *secondary attack rate*, *household*, *close contacts*, *contact transmission*, *contact attack rate*, or *family transmission* (eTable 1 in the Supplement) with no restrictions on language, study design, time, or place of publication. The last search was conducted October 19, 2020.

Eligibility Criteria

Eligibility criteria are described in eAppendix 1 in the Supplement. All articles with original data for estimating household secondary attack rate were included. Case reports focusing on individual households and studies of close contacts that did not report secondary attack rates for household members were excluded.

Data Extraction

One of us (Z.J.M.) extracted data from each study. Details appear in eAppendix 2 in the Supplement.

Evaluation of Study Quality and Risk of Bias

To assess the methodological quality and risk of bias of included studies of SARS-CoV-2, we used the same modified version of the Newcastle-Ottawa quality assessment scale for observational studies used by Fung et al.[10,11] Studies received as many as 9 points based on participant selection (4 points), study comparability (1 point), and outcome of interest (4 points). Studies were classified as having high (≤3 points), moderate (4-6 points), and low (≥7 points) risk of bias. One of us (Z.J.M.) evaluated the study quality and assigned the quality grades.

Statistical Analysis

Meta-analyses were done using a restricted maximum-likelihood estimator model to yield Freeman-Tukey double arcsine–transformed point estimates and 95% CI for secondary attack rate for each subgroup analyzed, with a random effect for each study.[12] For comparisons across covariates (ie, household or family, index case symptom status, adult or child contacts, contact sex, relationship to index case, adult or child index cases, index case sex, number of household contacts, study location, universal or symptomatic testing, dates of study) and comparisons with close contacts and other viruses, study was treated as a random effect, and the covariate was a fixed moderator. Variables had to have been collected in at least 3 studies to be included in meta-analyses. The Cochran Q test and I^2 statistic are reported as measures of heterogeneity. I^2 values of 25%, 50%, and 75% indicated low, moderate, and high heterogeneity, respectively.[13] Stastistical significance was set at a 2-tailed $\alpha = .05$. All analyses were done in R version 4.0.2 using the package metafor (R Project for Statistical Computing).[14,15]

When at least 10 studies were available, we used funnel plots, Begg correlation, and Egger test to evaluate publication bias, with significance set at $P < .10$.[16,17] If we detected publication bias, we used the Duval and Tweedie trim-and-fill approach for adjustment.[18]

Results

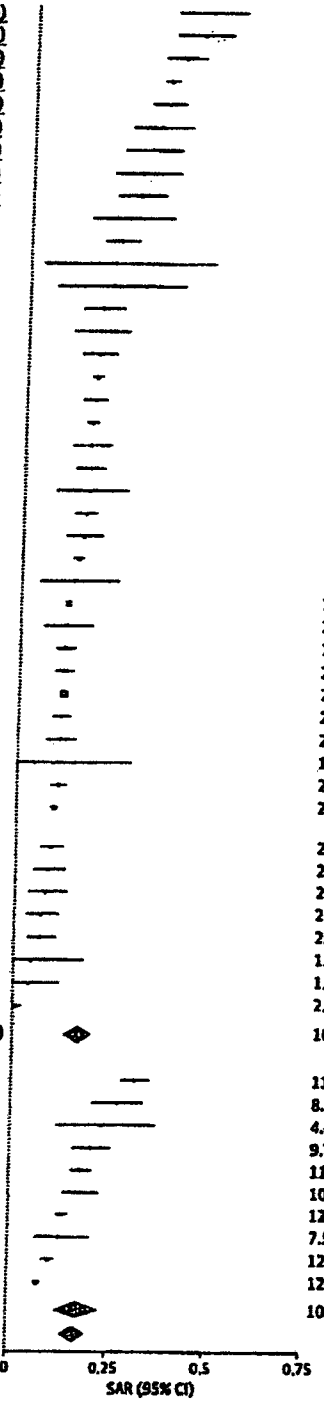
We identified 54 relevant published studies that reported household secondary transmission, with 77 758 participants (eTable 1 in the Supplement).[19-72] A total of 16 of 54 studies (29.6%) were at high risk of bias, 27 (50.0%) were moderate, and 11 (20.4%) were low (eTable 2 in the Supplement). Lower quality was attributed to studies with 1 or fewer test per contact (35 studies [64.8%]), small sample sizes (31 [57.4%]), and secondary attack rate not disaggregated by covariates (28 [51.9%]).

A description of index case identification period and methods and symptom status is provided in eTable 3 in the Supplement. Most studies did not describe how co-primary index cases were handled or whether secondary infections could have been acquired from outside the household, both of which can inflate the empirical secondary attack rate. Testing and monitoring strategies varied between studies, often reflecting variations in local testing guidelines implemented as part of contact tracing (eTable 4 and eAppendix 3 in the Supplement).

Figure 1 summarizes secondary attack rates for 44 studies[19-26,28-30,32-36,38-45,47-57,59,61-63,65-67,69,70] of household contacts and 10 of family contacts.[26,31,37,45,58,60,65,68,71,72] Estimated mean secondary attack rate for household contacts was 16.4% (95% CI, 13.4%-19.6%) and family contacts was 17.4% (95% CI, 12.7%-22.5%). One study[40]

Figure 1. Secondary Attack Rates (SAR) of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) for Household Contacts and Family Contacts

Source	Location	Participants, No.	Participants with SARS-CoV-2 Infection, No.	SAR (95% CI)	Weight, %
Household contacts					
Boscolo-Rizzo et al,[24] 2020	Treviso Province, Italy	121	54	0.45 (0.36-0.54)	1.93
Patel et al,[53] 2020	London, UK	185	79	0.43 (0.36-0.50)	2.17
Rosenberg et al,[55] 2020	New York, US	343	131	0.38 (0.33-0.43)	2.43
Dattner et al,[29] 2020	Bnei Brak, Israel	2824	981	0.35 (0.33-0.37)	2.77
Lopez Bernal et al,[47] 2020	UK	472	161	0.34 (0.30-0.38)	2.54
Wu et al,[65] 2020	Zhuhai, China	148	48	0.32 (0.25-0.40)	2.08
Wang et al,[61] 2020	Wuhan, China	155	47	0.30 (0.23-0.38)	2.12
Teherani et al,[59] 2020	Atlanta, US	108	31	0.29 (0.21-0.38)	1.92
Lewis et al,[44] 2020	Utah and Wisconsin, US	188	52	0.28 (0.21-0.34)	2.23
Dawson et al,[30] 2020	Wisconsin, US	64	16	0.25 (0.15-0.36)	1.61
Wang et al,[60] 2020	Beijing, China	335	77	0.23 (0.19-0.28)	2.47
Han,[35] 2020	South Korea	14	3	0.21 (0.03-0.47)	0.66
Böhmer et al,[23] 2020	Bavaria, Germany	24	5	0.21 (0.07-0.40)	0.97
Bae et al,[21] 2020	Cheonan, South Korea	200	37	0.18 (0.13-0.24)	2.32
Xin et al,[67] 2020	Qingdao Municipal, China	106	19	0.18 (0.11-0.26)	2.01
Wu et al,[66] 2020	Hangzhou, China	280	50	0.18 (0.14-0.23)	2.45
Hu et al,[36] 2020	Hunan, China	2771	491	0.18 (0.16-0.19)	2.78
Jing et al,[39] 2020	Guangzhou, China	542	93	0.17 (0.14-0.20)	2.62
Lyngse et al,[48] 2020	Denmark	2226	371	0.17 (0.15-0.18)	2.77
Ooting-ngern et al,[32] 2020	Thailand	230	38	0.17 (0.12-0.22)	2.39
Li et al,[45] 2020	Wuhan, China	392	64	0.16 (0.13-0.20)	2.55
Zhang et al,[70] 2020	China	62	10	0.16 (0.08-0.26)	1.70
Wang et al,[62] 2020	Beijing, China	714	111	0.16 (0.13-0.18)	2.67
Park et al,[52] 2020	Seoul, South Korea	225	34	0.15 (0.11-0.20)	2.39
Fateh-Moghadam et al,[34] 2020	Trento, Italy	3546	500	0.14 (0.13-0.15)	2.79
Islam and Noman,[38] 2020	Chattogram, Bangladesh	46	6	0.13 (0.05-0.25)	1.55
Park et al,[51] 2020	South Korea	10 592	1248	0.12 (0.11-0.12)	2.81
Phiriyasart et al,[54] 2020	Pattani Province, Thailand	106	12	0.11 (0.06-0.18)	2.11
Bi et al,[22] 2020	Shenzhen, China	686	77	0.11 (0.09-0.14)	2.68
Arnedo-Pena et al,[20] 2020	Castellon, Spain	745	83	0.11 (0.09-0.14)	2.69
Adamik et al,[19] 2020	Poland	32 023	3553	0.11 (0.11-0.11)	2.82
Malheiro et al,[50] 2020	Eastern Porto, Portugal	780	83	0.11 (0.09-0.13)	2.70
Chaw et al,[26] 2020	Brunei	264	28	0.11 (0.07-0.15)	2.49
Burke,[25] 2020	US	19	2	0.11 (0.00-0.29)	1.00
Luo et al,[49] 2020	Guangzhou, China	1015	105	0.10 (0.09-0.12)	2.73
Laxminarayan et al,[42] 2020	Tamil Nadu and Andhra Pradesh, India	4065	380	0.09 (0.08-0.10)	2.80
Shah et al,[56] 2020	Gujarat, India	386	34	0.09 (0.06-0.12)	2.61
Son et al,[57] 2020	Busan, South Korea	196	16	0.08 (0.05-0.12)	2.44
Korea CDC,[41] 2020	South Korea	119	9	0.08 (0.03-0.13)	2.26
Cheng et al,[28] 2020	Taiwan	151	10	0.07 (0.03-0.11)	2.38
Yung et al,[69] 2020	Singapore	200	13	0.06 (0.03-0.10)	2.48
Lee et al,[43] 2020	Busan, South Korea	23	1	0.04 (0.00-0.18)	1.42
Draper et al,[33] 2020	Northern Territory, Australia	51	2	0.04 (0.00-0.11)	1.98
Kim et al,[40] 2020	South Korea	208	1	0.00 (0.00-0.02)	2.72
Subgroup estimate				0.164 (0.134-0.196)	100
Family contacts					
Sun et al,[58] 2020	Zhejiang Province, China	598	189	0.32 (0.28-0.35)	11.05
van der Hoek et al,[60] 2020	Netherlands	174	47	0.27 (0.21-0.34)	8.54
Wang et al,[64] 2020	Wuhan, China	43	10	0.23 (0.12-0.37)	4.42
Dong et al,[31] 2020	Tianjin, China	259	53	0.20 (0.16-0.26)	9.78
Hua et al,[37] 2020	Zhejiang Province, China	835	151	0.18 (0.16-0.21)	11.66
Chen et al,[27] 2020	Ningbo, China	272	49	0.18 (0.14-0.23)	10.00
Liu et al,[46] 2020	Guangdong Province, China	2441	330	0.14 (0.12-0.15)	12.35
Zhang et al,[71] 2020	Liaocheng, China	93	12	0.13 (0.07-0.21)	7.53
Yu et al,[68] 2020	Wuhan, China	1396	143	0.10 (0.09-0.12)	12.17
Zhuang et al,[72] 2020	Guangdong Province, China	3697	276	0.07 (0.07-0.08)	12.51
Subgroup estimate				0.174 (0.127-0.225)	100
Combined estimate[a]				0.166 (0.140-0.193)	



Point sizes are an inverse function of the precision of the estimates, and bars correspond to 95% CIs. CDC indicates Centers for Disease Control and Prevention.

[a] Weights for the combined estimate are available in eTable 8 in the Supplement.

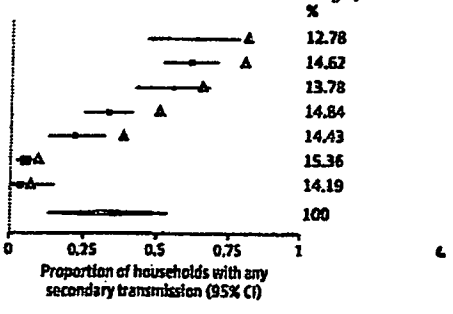
restricted index cases to children (age <18 years), resulting in a substantially lower secondary attack rate of 0.5%. Excluding this outlier, the combined secondary attack rate for household and family contacts was 17.1% (95%, 14.6%-19.7%). Secondary attack rates for household and family contacts were more than 3 times higher than for close contacts (4.8%; 95% CI, 3.4%-6.5%; $P < .001$) (eFigure 2 in the Supplement). Significant heterogeneity was found among studies of household ($I^2 = 96.9\%$; $P < .001$), family ($I^2 = 93.0\%$; $P < .001$), and close ($I^2 = 97.0\%$; $P < .001$) contacts. No significant publication bias was observed for studies of household, family, or close contacts (eFigure 3 in the Supplement). Secondary attack rates were not significantly different when restricting to 38 studies[19,20,22,23,26-31,34-40,42,44-51,54-57,60,62,63,65,67-69,72] with low or moderate risk of bias (15.6%; 95%, 12.8%-18.5%) (eFigure 4 in the Supplement). There were no significant differences in secondary attack rates between 21 studies in China[22,27,31,36,37,39,45,46,48,58,61-68,70-72] and 33 studies from other countries[19-21,23-26,28-30,32-35,38,40-44,47,49-57,59,60,69] (eFigure 5 in the Supplement), 18 studies that tested symptomatic contacts[19-21,24,25,28,29,33,34,41,47,50,53,56,58,59,61,64] and 33 studies that reported testing all contacts[22,23,26,27,30,31,35-40,42-46,48,49,51,52,54,55,57,60,63,65-67,69-72] (eFigure 6 in the Supplement), and 16 early studies[22,23,25,31,37,39,43,58,61,63-66,68,71,72] (January-February) and 20 later studies[19,24,26,29,30,32-35,38,42,44,50,53-56,59,60,69] (March-July) (eFigure 7 in the Supplement).

To study the transmissibility of asymptomatic SARS-CoV-2 index cases, eFigure 8 in the Supplement summarizes 27 studies[19-21,23-26,30,32-34,44,45,47,50,52-54,56,59-61,63,64,68,69,72] reporting household secondary attack rates from symptomatic index cases and 4 studies[26,43,44,52] from asymptomatic or presymptomatic index cases. Estimated mean household secondary attack rate from symptomatic index cases (18.0%; 95% CI, 14.2%-22.1%) was significantly higher than from asymptomatic or presymptomatic index cases (0.7%; 95% CI, 0%-4.9%; $P < .001$), although there were few studies in the latter group. These findings are consistent with other household studies[28,70] reporting asymptomatic index cases as having limited role in household transmission.

There is evidence for clustering of SARS-CoV-2 infections within households, with some households having many secondary infections while many others have none.[73-75] For example, 1 study[55] reported that 26 of 103 (25.2%) households had all members test positive. This is consistent with observation of overdispersion in the number of secondary cases per index case across a range of settings.[3] While most studies reported only the average number of secondary infections per index case, some also reported transmission by household.[44,55,56,63,65,69] Figure 2 summarizes the proportion of households with any secondary transmission. Using an empirical analysis based on secondary attack rates and mean number of contacts per household, we found the proportion of

Figure 2. Mean Number of Contacts per Household, Secondary Attack Rate (SAR) of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), and Proportion of Households Reporting Any Secondary Transmission From Index Cases

Source	Location	Mean contacts	Contacts Total	Contacts Infected	Households Total	Households Infected	Proportion of households with any secondary transmission (95% CI)	Weight, %
Wu et al,[65] 2020	Zhuhai, China	4.229	148	48	35	22	0.63 (0.46-0.78)	12.78
Rosenberg et al,[55] 2020	New York, US	3.330	343	131	103	63	0.61 (0.52-0.70)	14.62
Lewis et al,[44] 2020	Utah and Wisconsin, US	3.241	188	52	58	32	0.55 (0.42-0.68)	13.78
Wang et al,[63] 2020	Beijing, China	2.702	335	77	124	41	0.33 (0.25-0.42)	14.84
Shah et al,[56] 2020	Gujarat, India	5.216	386	34	74	16	0.22 (0.13-0.32)	14.43
Yung et al,[69] 2020	Singapore	1.493	200	13	134	7	0.05 (0.02-0.10)	15.36
Draper et al,[33] 2020	Northern Territory, Australia	1.821	51	2	28	1	0.04 (0.00-0.15)	14.19
Model estimate							0.317 (0.134-0.534)	100



The expected proportion of households with any secondary transmission (represented by the triangles) was calculated as proportion with at least 1 secondary infection in a household = $1 - (1 - SAR)^n$, where n is the mean number of contacts for that study (eTable 5 in the Supplement). Point sizes are an inverse function of the precision of the estimates, and bars correspond to 95% CIs.

households with any secondary transmission was lower than expected in a setting with no clustering (eg, most transmission is not characterized by a minority of infected individuals) (eTable 5 in the Supplement). Ideally, future studies will assess this formally by fitting a β binomial to quantify overdispersion in the full data.

A number of studies examined factors associated with susceptibility of household contacts to infection (eTable 6 in the Supplement). Age was the most examined covariate, with most studies[20,29,36-39,45,46,48,49,55,63,65,68] reporting lower secondary transmission of SARS-CoV-2 to child contacts than adult contacts. In 5 studies,[20,36,39,48,49] individuals older than 60 years were most susceptible to SARS-CoV-2 infection. Contact age was not associated with susceptibility in 9 studies,[26,28,32,44,47,58,66,67,70] although these were typically less powered to detect a difference. Figure 3 summarizes 15 studies[22,26,29,37,39,42,44,45,47,49,55,59,60,63,65] reporting separate secondary attack rates to children and adult contacts. The estimated mean household secondary attack rate was significantly higher to adult contacts (28.3%; 95% CI, 20.2%-37.1%) than to child contacts (16.8%; 95% CI, 12.3%-21.7%; $P < .001$). Significant heterogeneity was found among studies of adult ($I^2 = 96.8\%$; $P < .001$) and child contacts ($I^2 = 78.9\%$; $P < .001$). Begg ($P = .03$) and Egger ($P = .03$) tests were statistically significant for studies of adult but not child contacts (eFigure 9 in the Supplement). One study of adults[63] had a high secondary attack rate in the forest plot. Excluding this study improved the funnel plot symmetry and resulted in a secondary attack rate to adult contacts of 26.3% (95% CI, 19.3%-33.2%).

The second most examined factor was sex of exposed contacts, which was not associated with susceptibility for most studies[20,22,26,32,36,39,44,45,47-49,58,65-67,70] except 3.[38,46,68] eFigure 10 in the Supplement summarizes results from 11 studies[20,39,42,44,45,47,49,58,65,67,69] reporting household secondary attack rates by contact sex. Estimated mean household secondary attack rate to female contacts (20.7%; 95% CI, 15.0%-26.9%) was not significantly different than to male contacts (17.7%; 95% CI, 12.4%-23.8%). Significant heterogeneity was found among studies of female contacts ($I^2 = 87.4\%$; $P < .001$) and male contacts ($I^2 = 87.7\%$; $P < .001$). Moderate asymmetry was observed in the funnel plots, which was significant for studies of female contacts from Egger test ($P = .07$) but not male contacts (eFigure 11 in the Supplement). However, imputation of an adjusted effect size using the trim-and-fill method did not significantly change the secondary attack rate to female contacts (19.7%; 95% CI, 13.9%-25.6%).

Spouse relationship to index case was associated with secondary infection in 4 studies[26,45,46,58] of 6 in which this was examined.[65,67] Infection risk was highest for spouses, followed by nonspouse family members and other relatives, which were all higher than other contacts.[46] Figure 4 summarizes results from 7 studies[26,44-46,58,65,67] reporting household secondary attack rates by relationship. Estimated mean household secondary attack rate to spouses (37.8%; 95% CI, 25.8%-50.5%) was significantly higher than to other contacts (17.8%; 95% CI, 11.7%-24.8%). Significant heterogeneity was found among studies of spouses ($I^2 = 78.6\%$; $P < .001$) and other relationships ($I^2 = 83.5\%$; $P < .001$).

Several studies examined factors associated with infectiousness of index cases. Older index case age was associated with increased secondary infections in 3 studies[20,47,67] of 9 in which this was examined.[22,36,39,44,63,65] eFigure 12 in the Supplement summarizes results from 3 studies[42,44,51] reporting household secondary attack rates by index case age. Estimated mean household secondary attack rate from adults (15.2%; 95% CI, 6.2%-27.4%) was not significantly different than that from children (7.9%; 95% CI, 1.7%-16.8%). Index case sex was associated with transmission in 3 studies[42,44,67] of 9 in which this was examined.[20,36,45,47,63,65] eFigure 13 in the Supplement summarizes results from 7 studies[20,42,44,45,65,67,69] reporting household secondary attack rates by index case sex. Estimated mean household secondary attack rate from female contacts (16.6%; 95% CI, 11.2%-22.8%) was not significantly different than from male contacts (16.4%; 95% CI, 9.0%-25.5%).

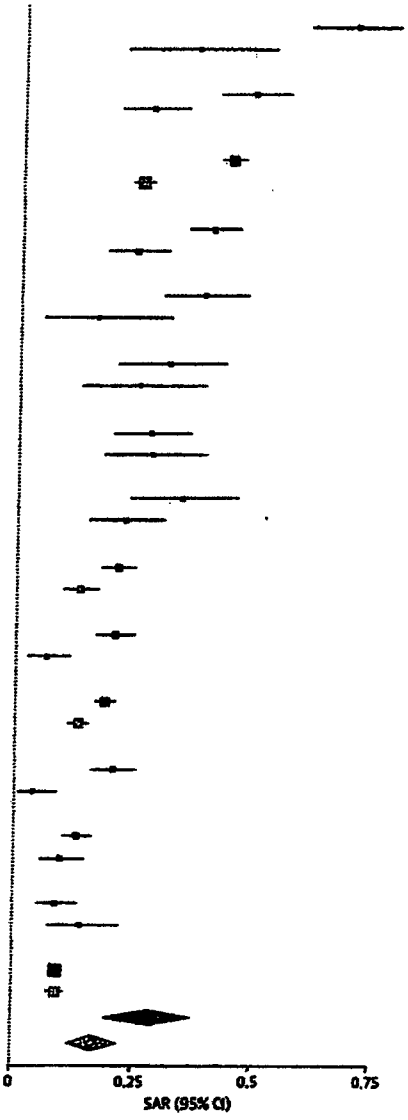
Critically severe index case symptoms was associated with higher infectiousness in 6 studies[20,38,46-48,67] of 9 in which this was examined.[44,63,70] Index case cough was associated with

infectivity in 2 studies[20,65] of 8 in which this was examined[45-48,63,67] (eAppendix 4 in the Supplement).

Contact frequency with the index case was associated with higher odds of infection, specifically at least 5 contacts during 2 days before the index case was confirmed,[70] at least 4 contacts and 1 to 3 contacts,[53] or frequent contact within 1 meter.[22,67,68] Smaller households were associated with transmission in 4 studies[20,39,47,49] of 7 in which this was examined.[55,63,65] Figure 5 summarizes results from 6 studies[20,47,49,55,61,65] reporting household secondary attack rates by number of

Figure 3. Secondary Attack Rates (SAR) of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) for Adult (≥18 Years) and Child (<18 Years) Household and Family Contacts

Source	Location	Participants, No.	Participants with SARS-CoV-2 Infection, No.	SAR (95% CI)	Weight, %
Wang et al,[63] 2020	Beijing, China				
Adults		92	64	0.70 (0.60-0.79)	6.07
Children		36	13	0.36 (0.21-0.53)	2.81
Rosenberg et al,[55] 2020	New York, US				
Adults		182	88	0.48 (0.41-0.56)	6.57
Children		156	42	0.27 (0.20-0.34)	6.65
Dattner et al,[39] 2020	Bnei Brak, Israel				
Adults		1448	637	0.44 (0.41-0.47)	7.21
Children		1376	344	0.25 (0.23-0.27)	9.92
Lopez Bernal et al,[47] 2020	UK				
Adults		297	119	0.40 (0.35-0.46)	6.85
Children		175	42	0.24 (0.18-0.31)	7.01
Wu et al,[65] 2020	Zhuhai, China				
Adults		112	43	0.38 (0.30-0.48)	6.20
Children		31	5	0.16 (0.05-0.31)	3.05
Taherani et al,[59] 2020	Atlanta, US				
Adults		64	20	0.31 (0.20-0.43)	5.64
Children		44	11	0.25 (0.13-0.39)	3.48
Lewis et al,[44] 2020	Utah and Wisconsin, US				
Adults		120	33	0.28 (0.20-0.36)	6.34
Children		68	19	0.28 (0.18-0.39)	4.46
van der Hoek et al,[60] 2020[a]	Netherlands				
Adults		67	23	0.34 (0.23-0.46)	5.66
Children		107	24	0.22 (0.15-0.31)	5.84
Hua et al,[37] 2020[a]	Zhejiang Province, China				
Adults		510	108	0.21 (0.18-0.25)	7.08
Children		325	43	0.13 (0.10-0.17)	8.69
Jing et al,[39] 2020	Guangzhou, China				
Adults		412	85	0.21 (0.17-0.25)	7.03
Children		125	8	0.06 (0.03-0.11)	7.51
Lyngse et al,[49] 2020	Denmark				
Adults		1367	257	0.19 (0.17-0.21)	7.22
Children		859	114	0.13 (0.11-0.16)	9.76
Li et al,[45] 2020	Wuhan, China				
Adults		292	60	0.21 (0.16-0.25)	6.92
Children		100	4	0.04 (0.01-0.09)	7.51
Bi et al,[22] 2020	Shenzhen, China				
Adults		462	61	0.13 (0.10-0.16)	7.09
Children		163	16	0.10 (0.06-0.15)	7.66
Chaw et al,[26] 2020	Brunei				
Adults		179	16	0.09 (0.05-0.14)	6.86
Children		85	12	0.14 (0.07-0.22)	5.71
Laxminarayan et al,[42] 2020	Tamil Nadu and Andhra Pradesh, India				
Adults		2671	245	0.09 (0.08-0.10)	7.28
Children		941	85	0.09 (0.07-0.11)	9.93
Adults estimate				0.283 (0.202-0.371)	100
Children estimate				0.168 (0.123-0.217)	100



Point sizes are an inverse function of the precision of the estimates and bars correspond to 95% CIs.

[a] Study of family contacts.

contacts in the household. Estimated mean household secondary attack rate for households with 1 contact (41.5%; 95% CI, 31.7%-51.7%) was significantly higher than households with at least 3 contacts (22.8%; 95% CI, 13.6%-33.5%; $P < .001$) but not different than households with 2 contacts (38.6%; 95% CI, 17.9%-61.6%). There was significant heterogeneity in secondary attack rates between studies with 1 contact ($I^2 = 52.9\%$; $P = .049$), 2 contacts ($I^2 = 93.6\%$; $P < .001$), or 3 or more contacts ($I^2 = 91.6\%$; $P < .001$). Information was not available on household crowding (eg, number of people per room).

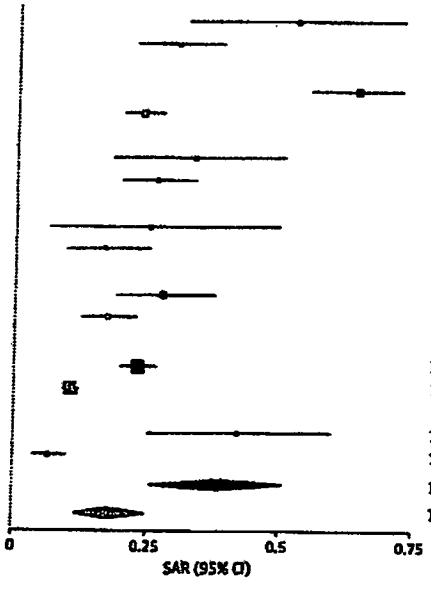
eFigure 14 in the Supplement summarizes 7 studies[76-82] reporting household secondary attack rates for SARS-CoV, and 7 studies[83-89] for Middle East respiratory syndrome coronavirus (MERS-CoV). Estimated mean household secondary attack rate was 7.5% (95% CI, 4.8%-10.7%) for SARS-CoV and 4.7% (95% CI, 0.9%-10.7%) for MERS-CoV (eTable 7 in the Supplement), both lower than the household secondary attack rate of 16.6% for SARS-CoV-2 in this study ($P < .001$). The SARS-CoV-2 secondary attack rate was also higher than secondary attack rates reported for HCoV-NL63 (0-12.6%), HCoV-OC43 (10.6-13.2%), HCoV-229E (7.2-14.9%), and HCoV-HKU1 (8.6%).[90-92] Household secondary attack rates for SARS-CoV-2 were within the mid-range of household secondary attack rates reported for influenza, which ranged from 1% to 38% based on polymerase chain reaction–confirmed infection.[93]

Discussion

We synthesized the available evidence on household studies of SARS-CoV-2. The combined household and family secondary attack rate was 16.6% (95% CI, 14.0%-19.3%), although with significant heterogeneity between studies. This point estimate is higher than previously observed

Figure 4. Secondary Attack Rates (SAR) of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) for Household and Family Contacts by Relationship to Index Case

Source	Location	Participants, No.	Participants with SARS-CoV-2 infection, No.	SAR (95% CI)	Weight, %
Wu et al,[65] 2020	Zhuhai, China				
Spouse		23	12	0.52 (0.32-0.72)	10.44
Other		120	36	0.30 (0.22-0.39)	11.32
Sun et al,[58] 2020[a]	Zhejiang Province, China				
Spouse		119	76	0.64 (0.55-0.72)	17.83
Other		479	113	0.24 (0.20-0.28)	16.41
Lewis et al,[44] 2020	Utah and Wisconsin, US				
Spouse		33	11	0.33 (0.18-0.50)	12.65
Other		155	41	0.26 (0.20-0.34)	12.62
Xin et al,[67] 2020	Qingdao Municipal, China				
Spouse		16	4	0.25 (0.06-0.50)	9.28
Other		90	15	0.17 (0.10-0.25)	10.94
Li et al,[45] 2020	Wuhan, China				
Spouse		90	25	0.28 (0.19-0.38)	17.18
Other		202	35	0.17 (0.12-0.23)	14.25
Liu et al,[46] 2020	Guangdong Province, China				
Spouse		563	131	0.23 (0.20-0.27)	20.53
Other		1878	199	0.11 (0.09-0.12)	18.46
Chaw et al,[26] 2020	Brunei				
Spouse		31	13	0.42 (0.25-0.60)	12.09
Other		233	15	0.06 (0.04-0.10)	16.00
Spouse estimate				0.378 (0.258-0.505)	100
Other estimate				0.178 (0.117-0.248)	100



Point sizes are an inverse function of the precision of the estimates and bars correspond to 95% CIs.

[a] Study of family contacts.

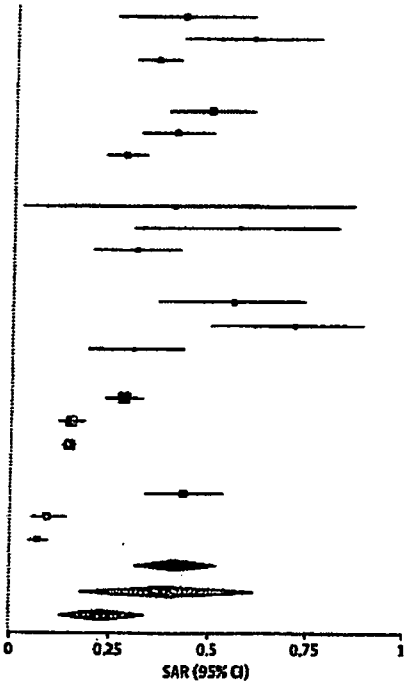
secondary attack rates for SARS-CoV and MERS-CoV. Households are favorable environments for transmission. They are what are known as 3Cs environments, as they are closed spaces, where family members may crowd and be in close contact with conversation.[94] There may be reduced use of personal protective equipment relative to other settings.

That secondary attack rates were not significantly different between household and family contacts may indicate that most family contacts are in the same household as index cases. Household and family contacts are at higher risk than other types of close contacts, and risks are not equal within households. Spouses were at higher risk than other family contacts, which may explain why the secondary attack rate was higher in households with 1 vs 3 or greater contacts. Spouse relationship to the index case was also a significant risk factor observed in studies of SARS-CoV and H1N1.[82,95] This may reflect intimacy, sleeping in the same room, or longer or more direct exposure to index cases. Further investigation is required to determine whether sexual contact is a transmission route. Although not directly assessed, household crowding (eg, number of people per room) may be more important for SARS-CoV-2 transmission than the total number of people per household, as has been demonstrated for influenza.[96-98]

The finding that secondary attack rates were higher to adult contacts than to child contacts is consistent with empirical and modeling studies.[99,100] Lower infection rates in children may be

Figure 5. Secondary Attack Rates (SAR) of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) by the Number of People Living in the Same Household as the Index Case

Source	Location	Participants, No.	Participants with SARS-CoV-2 Infection, No.	SAR (95% CI)	Weight, %
Rosenberg et al,[55] 2020	New York, US				
1 Contact		31	13	0.42 (0.25-0.60)	12.20
2 Contacts		30	18	0.60 (0.42-0.77)	15.53
≥3 Contacts		282	100	0.35 (0.30-0.41)	17.35
Lopez Bernal et al,[47] 2020	UK				
1 Contact		77	38	0.49 (0.38-0.61)	20.20
2 Contacts		106	43	0.41 (0.31-0.50)	18.49
≥3 Contacts		289	80	0.28 (0.23-0.33)	17.54
Wu et al,[65] 2020	Zhuhai, China				
1 Contact		5	2	0.40 (0.02-0.86)	2.74
2 Contacts		14	8	0.57 (0.30-0.82)	12.32
≥3 Contacts		124	38	0.31 (0.23-0.39)	15.12
Wang et al,[61] 2020	Wuhan, China				
1 Contact		27	15	0.56 (0.36-0.74)	11.05
2 Contacts		21	15	0.71 (0.50-0.89)	14.50
≥3 Contacts		56	17	0.30 (0.19-0.43)	11.75
Lyngse et al,[49] 2020	Denmark				
1 Contact		368	103	0.28 (0.24-0.33)	31.92
2 Contacts		432	64	0.15 (0.12-0.18)	19.72
≥3 Contacts		1426	204	0.14 (0.13-0.16)	19.42
Amedo-Pena et al,[20] 2020	Castellon, Spain				
1 Contact		92	40	0.43 (0.33-0.54)	21.89
2 Contacts		173	16	0.09 (0.05-0.14)	19.43
≥3 Contacts		397	27	0.07 (0.05-0.10)	18.82
1 Contact estimate				0.415 (0.317-0.517)	100
2 Contacts estimate				0.386 (0.179-0.616)	100
≥3 Contacts estimate				0.228 (0.136-0.335)	100



Point sizes are an inverse function of the precision of the estimates, and bars correspond to 95% CIs.

attributed to asymptomatic or mild disease, reduced susceptibility from cross-immunity from other coronaviruses,[101] and low case ascertainment,[102] but the difference persisted in studies in which all contacts were tested regardless of symptoms. Higher transmission rates to adults may be influenced by spousal transmission. Given the increased risk to spousal contacts, future studies might compare child contacts and nonspouse adult contacts to ascertain whether this difference persists. Limited data suggest children have not played a substantive role in household transmission of SARS-CoV-2.[40,103-105] However, a study in South Korea of 10 592 household contacts noted relatively high transmission from index cases who were aged 10 to 19 years.[51] Although children seem to be at reduced risk for symptomatic disease, it is still unclear whether they shed virus similarly to adults.[106]

We did not find associations between household contact or index case sex and secondary transmission. The World Health Organization reports roughly even distribution of SARS-CoV-2 infections between women and men worldwide, with higher mortality in men.[107]

We found significantly higher secondary attack rates from symptomatic index cases than asymptomatic or presymptomatic index cases, although less data were available on the latter. The lack of substantial transmission from observed asymptomatic index cases is notable. However, presymptomatic transmission does occur, with some studies reporting the timing of peak infectiousness at approximately the period of symptom onset.[108,109] In countries where infected individuals were isolated outside the home, this could further alter the timing of secondary infections by limiting contacts after illness onset.[110]

Household secondary attack rates were higher for SARS-CoV-2 than SARS-CoV and MERS-CoV, which may be attributed to structural differences in spike proteins,[111] higher basic reproductive rates,[112] and higher viral loads in the nose and throat at the time of symptom onset.[113] Symptoms associated with MERS-CoV and SARS-CoV often require hospitalization, which increases nosocomial transmission, whereas less severe symptoms of SARS-CoV-2 facilitate community transmission.[113] Similarly, presymptomatic transmission was not observed for MERS-CoV or SARS-CoV.[114,115]

Limitations

Our study had several limitations. The most notable is the large amount of unexplained heterogeneity across studies. This is likely attributable to variability in study definitions of index cases and household contacts, frequency and type of testing, sociodemographic factors, household characteristics (eg, density, air ventilation), and local policies (eg, centralized isolation). Rates of community transmission also varied across locations. Given that studies cannot always rule out infections from outside of the home (eg, nonhousehold contacts), household transmission may be overestimated. For this reason, we excluded studies that used antibody tests to diagnose household contacts. Furthermore, many analyses ignored tertiary transmission within the household, classifying all subsequent cases as secondary to the index case. Eighteen studies[19-21,24,25,28,29,33,34,41,47,50,53,56,58,59,61,64] involved testing only symptomatic household contacts, which would miss asymptomatic or subclinical infections, although secondary attack rate estimates were similar across studies testing all vs only symptomatic contacts.

Important questions remain regarding household spread of SARS-CoV-2. Chief among them is the infectiousness of children to their household contacts and the infectiousness of asymptomatic, mildly ill, and severely ill index cases. This study did not provide additional elucidation of factors influencing intergenerational spread. People unable to work at home may have greater risk of SARS-CoV-2 exposure, which may increase transmission risk to other household members. There may be overdispersion in the number of secondary infections per index case, which could be caused by variations in viral shedding, household ventilation, or other factors.

Conclusions

The findings of this study suggest that households are and will continue to be important venues for transmission, even where community transmission is reduced. Prevention strategies, such as

increased mask-wearing at home, improved ventilation, voluntary isolation at external facilities, and targeted antiviral prophylaxis, should be further explored.

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SUPPLEMENT.

eFigure 1. PRISMA Flow Diagram for Review of Household Secondary Attack of SARS-CoV-2, MERS-CoV, SARS-CoV, and Other Coronaviruses

eFigure 2. Secondary Attack Rates of SARS-CoV-2 for Studies of Close Contacts

eFigure 3. Funnel Plots of Studies Reporting Secondary Attack Rates of SARS-CoV-2 for Household, Family, and Close Contacts

eFigure 4. Household Secondary Attack Rates of SARS-CoV-2, Restricted to Studies With Low or Moderate Risk of Bias as Determined by the Modified Newcastle-Ottawa Scale

eFigure 5. Household Secondary Attack Rates of SARS-CoV-2, Grouped by Studies in China vs Other Locations

eFigure 6. Secondary Attack Rates of SARS-CoV-2, Grouped by Studies That Tested Only Symptomatic Household Contacts and Studies That Tested All Household Contacts Irrespective of Symptoms

eFigure 7. Household Secondary Attack Rates of SARS-CoV-2, Grouped by Studies Early (January-February) and Later (March-July) in the Pandemic

Attachment C

Permanent Injunction of California Governor

JS-6

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HARVEST ROCK CHURCH, INC., and HARVEST INTERNATIONAL MINISTRY, INC., itself and on behalf of its member churches in California, Plaintiffs, v. **GAVIN NEWSOM, in his official capacity as Governor of the State of California,** Defendant.	2:20-cv-06414JGB(KKx) **FINAL JUDGMENT ENTERING PERMANENT INJUNCTION, AWARDING ATTORNEY'S FEES AND COSTS, AND DISMISSING ACTION** Judge: The Honorable Jesus G. Bernal Action Filed: 7/17/2020

It is hereby **ORDERED** that Defendant, Gavin Newsom, in his official capacity as Governor of the State of California, all State officers, agents, employees, and all other persons in active concert or participation with him, are hereby permanently enjoined state-wide from issuing or enforcing regulations issued in connection with the COVID-19 State of Emergency declared on March 4, 2020 that impose:

(1) any capacity or numerical restrictions on religious worship services and gatherings at places of worship, provided that if

(a) hospital admissions for individuals aged 1-17 suffering from COVID-19 rise at least 100% statewide, or at least 200% in a county with at least 10 hospitalizations in the prior week, in each of two consecutive weeks; or

(b) statewide daily case rates for COVID-19 rise above 25 cases per hundred thousand persons, and the statewide four week total projected available adult intensive care unit bed capacity falls below 20%,

the State may impose capacity or numerical restrictions on religious worship services and gatherings at places of worship that are either identical to, or at least as favorable as, the restrictions imposed on other similar gatherings of similar risk, as identified by the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020);

(2) any new public health precautions on religious worship services and gatherings at places of worship not in the current guidance, unless those precautions are either identical to, or at least as favorable as, the precautions imposed on other similar gatherings of similar risk, as identified by the Supreme Court in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); and

(3) any restrictions or prohibitions on the religious exercise of singing and chanting during religious worship services and gatherings at places of worship besides generally applicable restrictions or prohibitions included in the guidance for live events and performances.

This Order does not prohibit the State from issuing recommendations, best practices, precautions, or other measures, as long as such promulgations make clear to the public that they are voluntary and not enforceable.

It is further **ORDERED** that Plaintiffs should be and hereby are declared prevailing parties for purposes of 42 U.S.C. § 1988; Defendant shall pay Plaintiffs the sum of $1,350,000 for Plaintiffs' reasonable attorney's fees and costs necessarily incurred in this case. Pursuant to 28 U.S.C. § 1961, post-judgment interest shall begin to accrue 60 days from the date this Court signs this Order;

It is further **ORDERED** that this action is dismissed with prejudice; and

It is further **ORDERED** that this Court shall retain jurisdiction over this action for purposes of implementing and enforcing the final judgment.

It is so **ORDERED**.

Dated: May 14, 2021

Hon. Jesus G. Bernal
United States District Judge

SECTION J

Excerpts from

Executive Order Number Seventy-Two (2020)

and Order of Public Health Emergency Nine

December 10, 2020

Commonwealth of Virginia
Office of the Governor

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)

Importance of the Issue

In November, as case counts and positivity rates began to rise, we took additional measures to stem the spread of the virus throughout the Commonwealth. In general, Virginians cooperated with those measures. Unfortunately, the surge that began many weeks ago is continuing across the Commonwealth. All five health regions are experiencing increases in new COVID-19 cases, positive tests, and hospitalizations. Virginia is averaging more than 4,000 new COVID-19 cases per day, up from a statewide peak of approximately 1,200 in May. Virginia's PCR percent test positivity rate is at 11.1 percent, an increase from 6.5 percent approximately one month ago. As of December 10, 2020, all but one health region reported a PCR test positivity rate at or above ten percent. Hospitalizations have increased by approximately 83 percent in the last four weeks. COVID-19 ICU hospitalizations have been increasing for 33 days and the statewide rate (4.4 per 100,000 persons) has exceeded the threshold of concern (3.5 per 100,000 persons) for the rate of confirmed COVID-19 hospitalizations. Since this pandemic began in March, we have learned that socialization with persons outside of your household and sustained activities in indoor settings contribute significantly to the transmission of the virus. Virginians must continue to practice the measures that we know work to stem the spread of the virus: wash your hands, avoid touching your face, avoid gatherings, and wear face coverings both indoors and outdoors. Therefore, additional measures are necessary to protect public health and stem the spread of COVID-19.

Directive

Therefore, by virtue of the authority vested in me by Article V of the Constitution of Virginia, by § 44-146.17 of the *Code of Virginia*, by any other applicable law, and in furtherance

c. Conduct screening of coaches, officials, staff, and players for COVID-19 symptoms prior to admission to the venue/facility.

d. Employees must wear face coverings while working in their place of employment.

e. Spectators must wear face coverings over their nose and mouth at all times.

For more information on how to reduce the risk of COVID-19 exposure and spread associated with indoor and outdoor recreational sports activities, consult the Virginia Department of Health's "Considerations for Recreational Sports" webpage, which can be found here.

14. Enforcement - Business Restrictions

a. Guidelines for All Business Sectors and the sector-specific guidelines appear here.

b. The Virginia Department of Health and the Virginia Alcoholic Beverage Control Authority shall have authority to enforce section II, subsection A of this Order. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the *Code of Virginia*, is punishable as a Class 1 misdemeanor pursuant to § 32.1-27 of the *Code of Virginia*. The State Health Commissioner may also seek injunctive relief in circuit court for violation of this Order, pursuant to § 32.1-27 of the *Code of Virginia*.

c. In addition, any agency with regulatory authority over a business listed in section II, subsection A, including but not limited to the Virginia Department of Labor and Industry, pursuant to § 40.1-51.1 of the *Code of Virginia*, the Department of Professional and Occupational Regulation, pursuant to 18 Va. Admin Code § 41-20-280, and the Virginia Department of Agriculture and Consumer Services, pursuant to § 3.2-5106 of the *Code of Virginia,* or any other law applicable to these agencies, may enforce this Order as to that business.

B. OTHER RESTRICTIONS

1. **All Public and Private In-Person Gatherings**

All public and private in-person gatherings of more than 10 individuals who do not live in the same residence are prohibited. A "gathering" includes, but is not limited to, parties, celebrations, or other social events, whether they occur indoors or outdoors. The presence of more than 10 individuals performing functions of their employment or assembled in an educational instructional setting is not a "gathering." The presence of more than 10 individuals in a particular location, such as a park, or retail business is not a "gathering" as long as individuals do not congregate. This restriction does not apply to the gathering of Family members, as defined in section II, subsection D, paragraph 2 living in the same residence.

Subject to the following requirements, this restriction shall not bar individuals from attending religious services or assembling for educational instruction with more than 10 people provided:

a. Individuals assembled for educational instruction adhere to the applicable physical distancing and sanitization plan and guidelines of the relevant governing body or educational institution;

b. Individuals attending religious services:

   i. Practice proper physical distancing at all times.

   ii. Mark seating and common areas where attendees may congregate in six-foot increments to maintain physical distancing.

   iii. Ensure that any items used to distribute food or beverages either should be disposable or washed or cleaned between uses between individuals who are not Family members.

   iv. Conduct routine cleaning and disinfection of frequently-contacted surfaces prior to and following any religious service.

   v. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19 is permitted to participate in the religious service.

   vi. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick.

   vii. Individuals attending religious services must wear face coverings in accordance with Section III below.

   viii. If religious services cannot be conducted in compliance with the above requirements, they must not be held in-person.

   Further, any social gathering held in connection with a religious service is subject to the public and private in-person gatherings restriction in Section II, subsection B, paragraph 1. Additional suggested guidance can be found here.

2. **Institutions of Higher Education**

Institutions of higher education shall comply with all applicable requirements under the Phased Guidance of Virginia Forward and the "Guidelines for All Business Sectors." Any postsecondary provider offering vocational training in a profession regulated by a Virginia state agency/board must also comply with any sector-specific guidelines relevant to that profession to the extent possible under the regulatory training requirements. Such

Effective Date of this Executive Order

This Order is in furtherance of Amended Executive Order 51 (2020). Further, this Order shall be effective 12:01 a.m., Monday, December 14, 2020, and shall remain in full force and effect until 11:59 p.m., January 31, 2021.

Given under my hand and under the Seal of the Commonwealth of Virginia and the Seal of the Office of the State Health Commissioner of the Commonwealth of Virginia, this 10th day of December, 2020.

Ralph S. Northam, Governor

M. Norman Oliver, MD, MA
State Health Commissioner

Attest:

Kelly Thomasson, Secretary of the Commonwealth

SECTION K

Plaintiff's

Request for Reconsideration of Order

in

James Tolle v. Governor Ralph Northam, et al

Case No. l:20-cv-00363

(District Court, ECF 76)

dated August 9, 2021

August 9, 2021

Hon. Judge Leonie Brinkema
United States District Court
Eastern District of Virginia
401 Courthouse Square
Alexandria, VA 22314

Re: Request for Reconsideration of Order in
James Tolle v. Governor Ralph Northam, et al., Case No. 1:20-cv-00363

Dear Judge Brinkema:

As you know, I am the Plaintiff in re case, representing myself *pro se*. I am writing to inform the Court of events and actions by Defendants arising around the time and after your dismissal of my complaint and to respectfully request reconsideration of your Order entered July 29, 2021 (Electronic Case File 74), hereinafter "Order".

In your Opinion issued with the Order (Electronic Case File 73, hereinafter "Opinion"), you stated that "the Executive Orders about which Tolle complains have been rescinded and there is no indication that the defendants will adopt new restrictions" (at 14). You also find that the U. S. Supreme Court decision in *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63 (2020) (hereafter, *Diocese of Brooklyn*), "has no bearing on this civil action", *Id.*, because that "case was decided within a very different public health context than currently exists in Virginia", *Id.*, finding that "70% of adults in Virginia had received at least one Covid-19 vaccine dose" (Opinion at 16) and quoting Defendant Northam stating "we are seeing the results in our strong vaccine numbers and dramatically lowered case counts....", *Id.* Despite my arguments that my Complaint is not moot because "Defendants provide no reason for the Court to believe that the multiple other constitutional violations [unrelated to religious capacity restrictions]...will not be re-instituted...due to a resurgence of COVID-19 or during a pandemic caused by another novel virus"[1], the Court found that "this civil action is moot" (Opinion at 16).

[1] Electronic Case File 72, ¶6. It is noteworthy that despite the fact that the Opinion discusses the reasons why the Court believes that Plaintiff's arguments concerning the *Diocese of Brooklyn* precedent are not compelling, the Court's Opinion does not offer any discernible rebuttal to Plaintiff's argument that "Defendants provide no reason for the Court to believe that the multiple other constitutional violations...will not be re-instituted...due to a resurgence". Plaintiff's Complaint claims violations of First Amendment rights to free practice of religion based on restrictions on religious services other than capacity restrictions; violations of First Amendment rights to freely travel and assemble based on gathering limits and social distancing requirements which do not pass strict scrutiny; violations of First or Fourth Amendment rights to pursue practices in his home without government supervision or unwarranted surveillance; and violations of the Fourteenth Amendment due to illegal quarantine restrictions on healthy persons without due process when the consensus of science shows that transmission by asymptomatic persons is non-existent or is very rare. Except for the capacity restrictions on religious services, nothing is found in the Opinion which explains why it is not reasonable to believe that Defendants will return to the mitigation practices which caused these constitutional violations

At the time that your Order was entered, actions by the Centers for Disease Control (CDC) and Defendants came to light which demonstrate the validity of my arguments against mootness and calls into question the basis of the Order. On July 27, 2021, the Director of the CDC reversed its guidance for public COVID-19 mitigations due to a resurgence of the virus based on new "data from recent outbreak investigations showing that Delta variant behaves uniquely differently from past strains".[2] Subsequently, Defendant Northam was reported to have publicly stated that the Commonwealth reported 1,101 new COVID-19 cases on July 29th, which is up significantly from the less than 200 daily cases recorded just a month before.[3] Defendant Northam was quoted as stating following the CDC's report of a resurgence: "We'll offer guidelines in the next couple of days...."[4] To the extent that the Court used the past improvements in public health indicators to assess the likelihood of future quarantine restrictions, the new data reported by Defendant Northam at the time of the Order should give pause to any findings based on belief that the pandemic restrictions are over. With the metrics used by the Governor to manage public health seeing such a sharp rise as reported by Defendants, it is hard to believe that Defendant Northam will not re-impose some quarantine restrictions on healthy persons again, which will directly or indirectly affect at least some of the constitutional rights raised in Plaintiff's claims. Furthermore, the specific reversal of the CDC's guidelines toward healthy persons who have been vaccinated should make it clear that action against healthy persons is being considered and will likely be done without regard to the quarantine laws or due process, just as before.

Although the Court's Opinion was correct that all COVID-related restrictions related to my Complaint of the other constitutional violations not involving religious capacity restrictions were rescinded with EO-79, 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' since the time of the Order. Not only is it still true that "Defendants provide no reason for the Court to believe that the multiple other constitutional violations...will not be re-instituted...due to a resurgence"[5], but the CDC's guidance and Defendants' actions since the time of the Order have shown strong evidence of "indication that the defendants will adopt new restrictions" after EO-79 as required by the Court's Opinion.

Furthermore, the Court's Opinion misinterpreted the Supreme Court's doctrine of mootness when applying it to Plaintiff's Complaint and the recent actions of Defendants have made it more clear that Plaintiff's Complaint is not moot according to the proper application of Supreme Court precedent. Although the Court's Opinion responded to Plaintiff's arguments based on *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, hereinafter *"Friends"*, and *Diocese of Brooklyn* by discussing the *Diocese of Brooklyn* precedent at length, the Court failed to address the Supreme Court standard for mootness

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during future resurgneces or new virus outbreaks.

[2] See multiple public reports of CDC Director's announcement, including "CDC changes mask guidance in response to threat of Delta variant of Covid-19", K. Collins, *et al.*, Updated July 27, 2021, https://www.cnn.com/2021/07/27/politics/cdc-mask-guidance/index.html.

[3] Reported by Channel 6 News, Richmond, on July 29, 2021, see https://www.wtvr.com/news/coronavirus/ northam- virginia-mask-guidance-july-2021-delta-variant.

[4] *Id.*

[5] Electronic Case File 72, ¶6

established in *Friends*: "the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (*Friends* at 170, citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203). Even 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 that Plaintiff's Complaint does not meet the Supreme Court standard for mootness. These recent events have now made it anything but "absolutely clear" that restrictions used in the past before the Court's Order will not be re-instituted during the resurgence of COVID-19 due to the Delta or other variants. How can anything be "absolutely clear" when the Governor 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.

Additionally, 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. The *AFGE* decision is inapposite to Plaintiff's Complaint in the first place because the advisory opinion of the Office of Special Counsel (OSC) which was withdrawn had only a remote possibility of ever being re-instated again, as noted by the Court of Appeals: "Once Donald Trump was no longer a candidate for public office, it made no sense for OSC to maintain guidance that hinged on the fact that he was." (*AFGE* at 13) The remote possibility that the OSC's advisory opinion would ever be needed again when Donald Trump was President is so far removed from the possibility that a resurgence of the COVID-19 virus or a new virus would lead to Defendant Northam re-instituting quarantine restrictions on healthy persons that it should have been obvious that this precedent does not apply to Plaintiff's case. However if the stark difference in likelihood of repetition between the cases was not clear at the time of the Order, it should be clear by now after a resurgence of the COVID-19 virus due to the Delta variant has led to Defendant Northam publicly considering re-imposition of restrictions on healthy persons. The recent events and actions demonstrate further how inapposite *AFGE* is to Plaintiff's Complaint.

For the above reasons, I respectfully request that the Court reconsider its Order and reverse its dismissal of my Complaint in light of the events and statements by Defendants since the time of the Order. If the Court fails to reconsider or reverse its Order, I intend to appeal the Court's dismissal of Plaintiff's Complaint based on the above issues as well as other errors. For this reason, I respectfully request that the Court grant an extension of the time to file a Notice of Appeal for that Order in accordance with Fed. R. App. P. 4(a)(5) for the length of time that the Court reconsiders its Order.

I thank you for your consideration in this matter.

Very truly yours,

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES TOLLE,

Applicant,

vs.

GOVERNOR RALPH NORTHAM
AND THE COMMONWEALTH OF VIRGINIA,

Respondents.

I, James Tolle, do swear or declare that on this date, November 1, 2021, as required by Supreme Court Rule 29 I have served the enclosed EMERGENCY APPLICATION FOR RELIEF OR INJUNCTION PENDING APPEAL on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

Governor Northam and Commonwealth of Virginia
c/o AG Mark Herring, SG Toby Heytens and AAG Calvin Brown
Office of the Attorney General
202 N. Ninth Street
Richmond, Virginia 23219

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2021

By: _____
James Tolle
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11171 Soldiers Court
Manassas, VA 20109
703-232-9970
jtmail0000@yahoo.com