

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 20-3745-GW-ASx

Date May 28, 2020

Title *Samuel Armstrong v. Gavin Newsom, et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Terri A. Hourigan

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Rami M. Kayyali

Matthew C. Heyn, CAAG

**PROCEEDINGS: TELEPHONIC HEARING RE: PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION**

Court hears oral argument. The tentative circulated and attached hereto, is adopted as the Court's final ruling. The Court DENIES Plaintiff's Motion.

A scheduling conference is set for June 15, 2020 at 8:30 a.m., with a joint Rule 26(f) report to be filed by June 8, 2020.

Defendant is ordered to respond to the Complaint forthwith.

Initials of Preparer JG : 25

Samuel Armstrong v. Gavin Newsom et al.; Case No. 2:20-cv-03745-GW-(ASx)
Tentative Ruling on Plaintiff’s Motion for a Preliminary Injunction

I. Background¹

This case is one of several challenging the constitutionality of California’s statewide stay-at-home order issued in response to the ongoing COVID-19 pandemic. *See* Docket No. 22. Plaintiff Samuel Armstrong (“Plaintiff”) brought this putative class action against defendant Gavin Newsom (the “Governor”), the governor of the state of California, alleging that the order violates the Due Process Clause of the Fourteenth Amendment.

On March 4, 2020, the Governor issued a Proclamation of a State of Emergency (“Proclamation”) based upon, *inter alia*, (1) the initial outbreak in December 2019 of a respiratory illness (now known as COVID-19) in Wuhan City, China, which quickly spread world-wide; (2) the United States Center for Disease Control and Prevention’s (“CDC”) activation on January 23, 2020, of its Emergency Response System in regards to COVID-19; (3) the California Department of Public Health’s activation on January 24, 2020 of its Medical Health Coordination Center to, *inter alia*, communicate with hospitals, clinics and other health providers regarding COVID-19 and to monitor its impact on the public health and health services; (4) as of March 4, 2020, there were 129 confirmed cases of COVID-19 in the United States with 53 being in California; (5) for more than a decade, California has had a “robust” pandemic influenza plan which had effectively responded to the H1N1 influenza virus in 2009; (6) if the COVID-19 virus were to spread in California at a rate comparable to the rate it had spread in other countries, the number of persons requiring medical care may exceed locally available resources, and controlling outbreaks minimizes the risk to the public and limits the spread of infection; and (7) his finding that the conditions of Government Code § 8558(b) relating to the declaration of a State of Emergency had been met. *See* Exhibit E to Defendant’s Request for Judicial Notice, Docket No. 18-5.² The Proclamation contained 14 orders but did not contain any limitations on individual citizens. *Id.*

¹ The following abbreviations are used for the filings: (1) Complaint (“Cmpl.”), Docket No. 1; (2) Executive Order N-33-20 (the “Order,” Docket No. 1-1; (3) Application for a Temporary Restraining Order or Preliminary Injunction (“Mot.”), Docket No. 8; (4) Defendant’s Opposition to Preliminary Injunction (“Opp.”), Docket No. 15; (5) Plaintiff’s Reply in Support of its Motion for a Preliminary Injunction (“Reply”), Docket No. 19.

² Pursuant to Federal Rules of Evidence 201, a court can take judicial notice of actions/orders of the California Governor. *See, e.g., Silver v. Jordan*, 274 F. Supp. 882, 883 (C.D. Cal. 1967) (taking judicial notice of the Governor’s calling a special session of the state legislature).

On March 19, 2020, the Governor issued Executive Order N-33-20 (“Order N-33-20”), which is attached as Exhibit 2 to Plaintiff’s Application for Temporary Restraining Order and Preliminary Injunction. Order N-33-20 noted that since the issuance of the Proclamation, “COVID-19 has rapidly spread throughout California, necessitating updated and more stringent guidance from federal, state, and local public health officials.” *Id.* Relying on the authority vested in him by the State Constitution and statutes of the State of California, in particular Government Codes sections 8567, 8627 and 8665,³ the Governor ordered:

To preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability, all residents are directed to immediately heed the current State public health directives, which I ordered the Department of Public Health to develop for the current statewide status of COVID-19. Those directives are consistent with the March 19, 2020, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, found at: <https://covid19.ca.gov/>.

Those directives follow:

ORDER OF THE STATE PUBLIC HEALTH OFFICER
March 19, 2020

To protect public health, I as State Public Health Officer and Director of the California Department of Public Health order all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at <https://www.cisa.gov/critical-infrastructure-sectors>. In addition, and in consultation with the Director of the Governor's Office of Emergency Services, I may designate additional sectors as critical in order to protect the health and well-being of all Californians.

Pursuant to the authority under the Health and Safety Code 120125, 120140, 131080, 120130(c), 120135, 120145, 120175 and 120150, this order is to go into effect immediately and shall stay in effect until further notice.

The federal government has identified 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof. I order that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these

³ Government Code § 8665 provides that: “Any person who violates any of the provisions of this chapter or who refuses or willfully neglects to obey any lawful order or regulation promulgated or issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed one thousand dollars (\$1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment.”

sectors to Californians' health and well-being.

This Order is being issued to protect the public health of Californians. The California Department of Public Health looks to establish consistency across the state in order to ensure that we mitigate the impact of COVID-19. Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.

The supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care. When people need to leave their homes or places of residence, whether to obtain or perform the functions above, or to otherwise facilitate authorized necessary activities, they should at all times practice social distancing.

On April 23, 2020, Plaintiff filed his Complaint for Violation of Civil Rights Pursuant to the Fourteenth Amendment to the United States Constitution Prohibiting Detention Without Due Process. *See* Docket No. 1. The Complaint was filed as a class action and contained only one cause of action for violation of the Fourteenth Amendment prohibiting detention without due process. Plaintiff alleged that: (1) Order N-33-20 confines him and other California residents who do not clearly fall within one of the exempt sectors to their homes, which constitutes detention without due process in violation of the Fourteenth Amendment; and (2) the Order is impermissibly vague. *See* Cmpl. ¶ 1.

On May 12, 2020, Plaintiff filed an Application for a Temporary Restraining Order (“TRO”) and for an Order to Show Cause re preliminary injunction. *See* Docket No. 8. In the Application, Plaintiff averred, *inter alia*, that: (1) “Compared to other viruses, which inspired US Constitutional litigation, corona is relatively benign;” and (2) “Governor Newsom's order appears to be a political power grab, devoid of rationality.” *See* Mot. at 9. Plaintiff raised the following arguments to support his application: (1) Order N-33-20 constitutes detention without due process in violation of the Fourteenth Amendment; (2) Order N-33-20 violates California’s quarantine procedures and constitutional safeguards embedded within said quarantine procedures; (3) the legal authorities and facts which the Governor invokes to justify his residential confinement order are misleading; (4) Order N-33-20 is unconstitutionally vague; (5) Order N-33-20 cannot withstand strict scrutiny; and (6) “the public suffers irreparable harm as a matter of law.” *See generally* Mot.

On May 12, 2020, this Court denied Plaintiff’s request for a TRO and set the present hearing on his request for a preliminary injunction. *See* Docket No. 12.

II. Legal Standard

To succeed on a motion for preliminary injunction, a party must show that: (1) he/she is

likely to succeed on the merits of her claim; (2) he/she will suffer irreparable harm in the absence of relief; (3) the balance of hardships tips in his/her favor; and (4) a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party must present evidence sufficient to clearly carry his/her burden of persuasion on each requirement. *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (citations omitted); *Winter*, 555 U.S. at 22 (explaining that a preliminary injunction can issue only on “a clear showing that the plaintiff is entitled to such relief”).

III. Discussion

Plaintiff has not shown that he is likely to succeed on the merits, or that a preliminary injunction is in the public interest. Either of these standing alone is a sufficient ground for denying Plaintiff’s motion.

A. Likelihood of success on the merits

Plaintiff repeats his two constitutional challenges to Order N-33-20 that the Court rejected in denying the TRO: (1) that Order N-33-20 detains California residents without adequate due process in violation of the Fourteenth Amendment, Reply at 5-9; and (2) the Order is impermissibly vague. Reply at 9-12.

a. *Whether the Order detains Californians without adequate due process*

Plaintiff’s first argument runs into the principle that “under the pressure of great dangers,” individual constitutional rights may be reasonably restricted “as the safety of the general public may demand.” *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). Contrary to Plaintiff’s argument, “great dangers” are not limited to wartime, Mot. at 11-12, but may include (and have included) situations such as now where society is faced with a pandemic. *Id.* (observing that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members”).

Plaintiff states that he “is not challenging the Governor’s prerogative (and medically sound decision) to prevent mass gatherings,” but rather is challengingly Order N-33-20’s requirement – which goes beyond that – that Californians stay at home. TRO App. at 14, 28. However, as another court has observed, the “settled” rule of *Jacobson* “allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and *even to leave one’s home.*” *In re Abbot*, 954 F.3d 772, 778 (5th Cir. 2020) (emphasis added).

Put simply, Plaintiff has not demonstrated an adequate likelihood of success on the merits

in showing that there has been, “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31. Plaintiff’s citation to California court decisions requiring probable cause that a person was infected with a communicable infectious disease before that person could be detained do not conclusively establish his position. *See* Reply at 6 (citing *In re King*, 128 Cal.App. 27, 28 (1932)). Those cases concerned detention at government facility. Plaintiff has not made an adequate showing that the Order, which requires Californians to stay at home except for certain essential activities, presents the same constitutional problem.

b. *Whether the Order should be declared void for vagueness*

Plaintiff argues that Order N-33-20 “is open-ended and entirely subjective, as to time and geography.” Mot. at 33. He provides several examples of conduct where he claims Order N-33-20 is ambiguous. For example, Plaintiff asks whether a person violates the Order when that person leaves his home to buy groceries before he has completely run out of food. Reply at 12.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019) (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). However, recognizing the limitations of language, courts have observed that “perfect clarity and precise guidance have never been required.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The void-for-vagueness doctrine considers two related requirements. First, “laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned*, 408 U.S. at 108. Second, the statute must avoid “arbitrary and discriminatory enforcement” and “provide explicit standards for those who apply them.” *Id.*

The Court agrees that the Order N-33-20 is not a model of clarity, but finds that it is not so unclear that a preliminary injunction is warranted. As described earlier, Order N-33-20 incorporates two other documents, so that the cumulative result is that Californians must stay home “except as needed to maintain continuity of operations” in certain areas of critical federal infrastructure. It is also, however, accompanied by other explanatory documents that set forth in additional detail the terms of Order N-33-20. This includes a set of frequently asked questions and their answers. *See* Docket No. 18-8. While Plaintiff may point to some boundary cases where it is unclear whether the act would be prohibited, “we can never expect mathematical certainty from our language.” *Grayned*, 408 U.S. at 110. The Court is not persuaded that a person of ordinary

intelligence has not, through Order N-33-20 and California's supplementary guidance, been given "a reasonable opportunity to know what is prohibited." Though Plaintiff cites to some instances of *non-enforcement* by local entities that are opposed to Order N-33-20, he has not shown that Order N-33-20 itself is susceptible to "arbitrary and discriminatory enforcement." Accordingly, the Court finds that Plaintiff has not shown a likelihood of success on the merits.

c. *Plaintiff's other arguments*

As to Plaintiff's contention that Order N-33-20 violates California's quarantine procedures, his only citation to such procedures is "page [sic] 39-40, of the 'HEALTH OFFICER PRACTICE GUIDE FOR COMMUNICABLE DISEASE CONTROL IN CALIFORNIA'." *See* Mot. at 17. However, there is no indication that such practice guide limits the authority of, or is otherwise binding on, the Governor. As noted on page 1 of that document:

This practice guide was created to provide guidance to local Health Officers in California when responding to bioterrorism as well as to actual or suspected cases of naturally-occurring communicable disease. It discusses mechanisms that are available or not available *prior to the calling of a local or statewide emergency*.

See Docket No. 8-17 at 13 of 74 (emphasis added). Here, the Governor relied, *inter alia*, on Government Codes §§ 8567, 8627 and 8665 in issuing Order N-33-20, and he did so after he declared a statewide emergency. There does not appear to be any basis to conclude that the referenced practice guide trumps enabling statutes.

As to Plaintiff's assertion that the legal authorities and facts which the Governor invokes to justify his residential confinement order are misleading, simply stated, the Plaintiff has failed to establish that Order N-33-20 is not based on a real and substantial relation to public health. It would be readily admitted that, while there is a vast amount of information and data in regards to the COVID-19 virus, there is a high degree of uncertainty and debate in regards to the exact scope of its contagion, its morbidity rate, the effectiveness of "shelter-in-place" strategies versus merely requiring social distancing versus "herd immunity," etc. However, there was no uncertainty at the time Order N-33-20 was promulgated that COVID-19 was spreading exponentially and the deaths attributed to it were also rapidly increasing. In the face of an infectious pandemic with a concomitant swamping body-count, the Governor did sufficiently cite the legal authorities for his order and the facts which substantiated its issuance.

B. The public interest

In rejecting Plaintiff's motion for a temporary restraining order, the Court found that

Plaintiff had not, beyond stating that “an injunction is in the public interest,” Mot. at 41, addressed what the consequences would be from lifting Order N-33-20, such as any increase in infections and fatalities.⁴ The Governor cites to a declaration from a California public health officer, stating his belief that lifting Order N-33-20 prematurely “would increase infections and deaths from COVID-19, thereby undoing much of the progress California has made in suppressing COVID-19.” Docket No. 16 ¶ 19. Plaintiff has not addressed this factor in his additional briefing, beyond claiming that the Governor “has many options short of [Order N-33-20]” for dealing with COVID-19. Reply at 5. This is not, as Plaintiff claims, bolstered by the fact that the Governor has since provided for a gradual re-opening plan. In fact, the much more likely explanation is that the Governor considers gradual re-opening possible because of the original issuance of Order N-33-20. Accordingly, the Court finds that Plaintiff has not demonstrated that a preliminary injunction would be in the public interest.

Additionally, the Court takes judicial notice that the circumstances involved in this lawsuit are not static. As noted by Judge Collins in his dissent in *So. Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 WL 2687079, at *5 (9th Cir. May 22, 2020):

On April 28, the Governor announced a four-stage “Reopening Plan” or “Resilience Roadmap,” under which the State would initially relax the stay-at-home order for some organizations but not others. At Stage 1, only “critical infrastructure” was exempted. At Stage 2, curbside retail and additional factories making previously non-essential “things like toys, clothing, . . . [and] furniture” would be permitted to reopen. Stage 2 entities also included ones that would reopen at a later date within that stage, such as schools (in an adapted form), childcare, dine-in restaurants, outdoor museums, “destination retail, including shopping malls and swap meets,” and office-based businesses where telework is not possible. At Stage 3, “higher risk workplaces” like churches could reopen, along with bars, movie theaters, hair salons, and “more personal & hospitality services.” And at Stage 4, concerts, conventions, and spectator sports could reopen. The Governor predicted that while Phase 2 would begin in “weeks, not months,” Phase 3 would begin in “months, not weeks.”

On May 14, 2020, it was reported that the Governor modified the stay-at-home order as provided in Stage 2 such that “in addition to essential activity, curbside retail is allowed, along with the infrastructure to support it . . . [O]ffices, limited services, and outdoor museums are also permitted to open.” See Ex. H to Request for Judicial Notice in Opposition to Preliminary Injunction, Docket

⁴ The Court takes judicial notice that the CDC reports that as of May 26, 2020, the number of reported COVID-19 cases in the state of California is 94,558 and the number of deaths is 3,795. See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

No. 18-8. The Court also takes judicial notice that on the COVID19.CA.GOV website,⁵ there is a FAQ section which indicates, *inter alia*, (1) “You can walk your dog. You can go to the vet or pet hospital if your pet is sick.” (2) “You can walk, run, hike and bike in your local neighborhoods as long as they continue to practice social distancing of 6 feet.” (3) You “can . . . leave home to care to . . . elderly parents or friends who require assistance . . .” (4) You can, with modifications for safety, go to places of worship, child care facilities, etc. As to his request for preliminary injunctive relief, Plaintiff must base his case on the current situation. At this point in time, it is unclear what Plaintiff seeks to do that he is not permitted to do under Order N-33-20.

While not in any way controlling, this Court would note it has not located any federal court decision in California where a litigant raising similar challenges to Order N-33-20 has met with any success. *See, e.g., Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022 (E.D. Cal. May 22, 2020) (gym owner’s TRO application to permit reopening on numerous grounds including due process – denied); *Six v. Newsom*, No. 8:20-cv-00877-JLL-DFM (C.D. Cal. May 22, 2020) (plaintiffs’ TRO application seeking to permit “Six to get married on her rescheduled date, the Medlins to freely visit their son, Batten to study with her teachers and/or fellow students to prepare for college, and Ball to practice and perform with his fellow concert band musicians – denied); *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *3 (E.D. Cal. May 8, 2020) (TRO applications challenging denial of permits to conduct a protest and a political rally – denied); *Cross Culture Christian Center. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *4 (E.D. Cal. May 5, 2020) (TRO application brought by church and its pastor challenging the application of Order N-33-20 to in person church services – denied); *Gish v. Newsom*, No. 5:20-cv-00755-JGB(KKx), 2020 WL 1979970 (C.D. Cal. April 23, 2020) (TRO application challenging application of Order N-33-20 to church services – denied).

IV. Conclusion

Based on the foregoing discussion, the Court **DENIES** Plaintiff’s motion for a preliminary injunction.

⁵ See <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (last visited May 27, 2020).