

No.

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL ARMSTRONG,

Petitioner,

v.

GAVIN NEWSOM; DOES, 1 through 50,
in their individual capacities, Inclusive,

Respondent.

**APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

To the Honorable Elena Kagan as Circuit Justice for the Ninth

Circuit:

1. Pursuant to Rule 13.5 of the Rules of this Court, Petitioner Samuel Armstrong requests a 60-day extension of time within which to file his Petition for Writ of Certiorari up to and including Friday, May 20, 2022.

2. The Ninth Circuit issued its Opinion for which review is sought on December 21, 2021 (decision attached).

3. This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254.

4. The Petition for Writ of Certiorari is currently due March 21, 2022. This application for extension is being filed 10 days prior to the March 21 due date.

5. This case raises important questions of the limits of state power as constrained by the Due Process Clause of the Fourteenth Amendment, as well as

the scope of qualified immunity for actions taken by state governors. Petitioner seeks review by this Court of the Ninth Circuit’s decision that Governor Newsom’s “stay home” orders did not violate the due process rights of petitioner and the thousands of other similarly-situated residents of California. This case raises the question of the reach of the Court’s more-recent decisions such as Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020), in which the Court granted applications for injunctive relief from an Executive Order issued by the Governor of New York that imposed “very severe restrictions on attendance at religious services in areas classified as ‘red’ or ‘orange’ zones.”

6. An extension of time is needed because undersigned counsel was not involved in the litigation below (in either the district or circuit courts) and was retained today (March 7, 2022) to prepare the Petition for Writ of Certiorari on petitioner’s behalf. The 60-day extension of time will provide me with adequate time to review and assess this matter, research applicable law, and draft the Petition for Writ of Certiorari for filing with the Court.

7. For the foregoing reasons, Petitioner Samuel Armstrong requests a 60-day extension of time within which to file his Petition for Writ of Certiorari up to and including Friday, May 20, 2022.

Respectfully submitted,

/s/ Michael Confusione
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Dated: March 7, 2022

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 21 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMUEL ARMSTRONG,

Plaintiff-Appellant,

v.

GAVIN NEWSOM; DOES, 1 through 50, in
their individual capacities, Inclusive,

Defendants-Appellees.

No. 21-55060

D.C. No.
2:20-cv-03745-GW-AS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted December 10, 2021**
Pasadena, California

Before: M. SMITH, LEE, and FORREST, Circuit Judges.

At issue in this appeal is California Governor Gavin Newsom's Executive Order N-33-20, issued on March 19, 2020, which ordered Californians to "stay home" to prevent the spread of COVID-19. Californian Samuel Armstrong seeks

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

monetary damages from the Governor for alleged violations of the Due Process Clause of the Fourteenth Amendment pursuant to 42 U.S.C § 1983. Armstrong's claims are barred by qualified immunity because the Governor did not violate clearly established law. We affirm the district court's dismissal of all claims.

Qualified immunity protects the Governor from suit for monetary damages when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Nicholson v. City of Los Angeles*, 935 F.3d 685, 690 (9th Cir. 2019) (quotation and citation omitted). When an official raises qualified immunity, we ask: "(1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the [official]'s alleged misconduct." *Jessop v. City of Fresno*, 936 F.3d 937, 940 (9th Cir. 2019) (quoting *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014)). We can decide which prong to consider first, and here we begin on the second prong of the analysis. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The stay-at-home order did not violate clearly established law. Armstrong does not cite a single case that supports that the March 2020 order violated his due process rights (or that it violated any Constitutional provision or statute) and, at the time, there was no Ninth Circuit or Supreme Court precedent instructing the Governor that he could not issue the order. In March 2020, *Jacobson v. Massachusetts* was the law on the authority of governments in public health

emergencies, and the order meets the requirements of that case. 197 U.S. 11, 31 (1905). The order had a real or substantial relation to protecting public health and was not “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Id.* at 31. Requiring Californians to stay at home was clearly related to the order’s stated purpose of “bend[ing] the curve, and disrupt[ing] the spread of the virus.” Later cases that call into question some aspects of *Jacobson* were not decided when the Governor issued the March 2020 order. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). The Governor had no reason to believe his actions were unconstitutional and, therefore, he is immune from personal liability.

Armstrong also does not plead a valid vagueness claim. Newsom’s order gave a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Edge v. City of Everett*, 929 F.3d 657, 664–65 (9th Cir. 2019) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

We do not address the question of mootness because Armstrong abandoned his claims for equitable relief. Mootness, therefore, is not at issue in this appeal.

Armstrong also challenges the district court’s consideration of facts outside of those alleged in the complaint. The Governor submitted a request for judicial notice to the district court with his motion to dismiss the Third Amended Complaint. A court is permitted to take judicial notice of matters of public record

if they are generally known within the jurisdiction or can be accurately and readily determined from a source whose accuracy cannot be questioned. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); Fed. R. Evid. 201(b). The information at issue was subject to judicial notice.

AFFIRMED.