IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

J.P. Bryan, Mary Jon Bryan,	§	
Gage Properties, Inc.,	§	
And Gage Hotel L.P.,	§	
Plaintiffs,	§	
	§	
v.	§	**CASE NO. 4:20-cv-00025-DC-DF**
	§	
County Judge Eleazar R. Cano,	§	
Defendant.	§	

DEFENDANT'S MOTION TO DISMISS
AND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THIS COURT:

Defendant Brewster County Judge Eleazar R. Cano files this Motion for Summary Judgment. Defendant moves for summary judgment on all claims against him. *See* Fed. R. Civ. P. 56. As Plaintiffs cannot create a fact issue on the elements of their causes of action, there is no genuine issue of material fact for trial, and Defendant Cano is entitled to judgment as a matter of law. Defendant Cano would show the Court the following:

I. INTRODUCTION

"As all are painfully aware, in early 2020 our nation was gripped with an unprecedented public health emergency caused by COVID-19. On March 11, 2020, the World Health Organization ("WHO") declared a global pandemic in response to the spread of COVID-19." *Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021). Texas, like the rest of the United States, was no exception. Prior to any action by Brewster County Judge Cano, Federal and State officials had already determined the existence of the public health emergency – (1) the U.S. Department of Health and Human Services declared that due to COVID-19 "a **public health emergency exists and has existed since January 27, 2020, nationwide;** (2)

President Donald J. Trump determined that the "COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020"; (3) and Governor Abbott entered a Proclamation that "COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster **for all counties in Texas.**" Exhibits 2, 3 and 4. Tragically, Texas has had over 2,697,312 confirmed cases of COVID-19 and the disease has claimed 52,297 lives.[1]

II. MOTION TO DISMISS

On July 2, 2021, Defendant Cano filed his Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Specifically, Defendant argued that the Court lacks jurisdiction based on the political question doctrine. Here, Defendant reasserts his entitlement to dismissal as Plaintiffs are prohibited from attempting to have the district court impose its own judgment on how best to handle the COVID-19 pandemic in Brewster County; thus, usurping the authority granted by the Texas Legislature with the passage of Chapter 418 of the Texas Government Code, the Texas Disaster Act of 1975.

Defendant incorporates all arguments asserted in his Motion to Dismiss and Reply to Plaintiffs' Response to the Motion to Dismiss. Dkt. Nos. 50 & 52. Based on those arguments, Defendant asserts that this matter should be dismissed in its entirety.

III. STATEMENT OF THE CASE

Plaintiff J.P. Bryan ("Plaintiff") filed his Complaint for Declaratory Judgment on April 10, 2020, which did not include any claim for damages. *See* Dkt. No. 1. On May 1, 2020, Plaintiff filed his First Amended Complaint for Declaratory Relief and Damages. *See* Dkt. No. 6. On March 2, 2021, the Court granted Plaintiffs J.P. Bryan, Mary Jon Bryan, Gage Properties, Inc. and Gage Hotel L.P.'s ("Plaintiffs") Motion to File a Second Amended Complaint. *See* Text Order dated

[1] https://txdshs.maps.arcgis.com/apps/dashboards/ed483ecd702b4298ab01e8b9cafc8b83.

March 2, 2021 and Dkt No. 38. Plaintiffs filed a Third Amended Complaint. Dkt. No. 48.

Plaintiffs allege six (6) causes of action pursuant to 42 U.S.C. §1983:

(1) Violation of Due Process under the Fourteenth Amendment to the United States Constitution based on Defendant's Declarations of Disaster – "Defendant's decision to sign the Declarations of March 17, 2020 and March 25, 2020 were unconstitutional inasmuch as they had no rational relationship to a legitimate government purpose because no disaster, as that term is defined in *Texas Government Code* §418.004(1), existed on either March 17, 2020 or March 25, 2020 date through April 30, 2020…." Dkt No. 48 at ¶¶35-40;

(2) Violation of Due Process under the Fourteenth Amendment to the United States Constitution based on Defendant's Orders Closing Hotels – "Defendant's orders closing hotels, motels and short-term rentals to close and vacate their guests who did not fall within an exception were unconstitutional because they had no rational relationship to a legitimate government purpose." *Id.* at ¶¶41-43;

(3) Violation of Due Process under the Fourteenth Amendment to the United States Constitution based on Conflict between Defendant's Orders Closing Hotels and Governor Abbott's Executive Orders – Plaintiffs allege that Governor Abbott's Executive Orders GA-14 and GA-18 superseded any conflicting order issued by local officials, but only to the extent that such a local order restricts essential services. *Id.* at ¶¶44-46;

(4) Violation of Due Process under the Fourteenth Amendment to the United States Constitution based on Interference with Ownership Rights – Plaintiffs allege that Defendant's Executive Orders deprived Plaintiffs of their right to own and operate a hotel in Marathon, Texas. *Id*. at ¶¶47-51;

(5) Violation of Equal Protection under the Fourteenth Amendment to the United States Constitution – Plaintiffs allege that Defendant's Executive Orders target visitors from outside Brewster County and tramples on Plaintiffs' constitutional rights." *Id*. at ¶¶52-53; and

(6) Unreasonable Seizure in Violation of the Fourth and Fourteenth Amendments to the United States Constitution – Plaintiffs allege that Defendant's Executive Order interfered with "Plaintiffs' possessory interest in the Gage Hotel by prohibiting them from renting rooms except to person who were in certain employment classifications" and "Plaintiff Bryan's possessory interest in the historic Gage Hotel by prohibiting him from staying in this part of the Gage Hotel unless it was his primary resident." *Id*. at ¶¶54-59.

Further, Plaintiffs seek declaratory relief concerning "the original and new Declarations of Local State of Disaster and the various Orders closing hotels, motels and short-term rentals" alleging that these Declarations and Orders related to the global pandemic of a novel coronavirus,

designated SARS-CoV2 which causes the disease COVID-19, "deprived Plaintiffs of their rights under the Fourth and Fourteenth Amendments to the United States Constitution, and the Commerce Clause of Article I, Section 8, of the United States Constitution, and proximately cause them to suffer damages." *Id*. at ¶ 61. Further, Plaintiffs allege that they suffered "damages in excess of $75,000.00 exclusive of costs and attorneys' fees." *Id*. at ¶ 64.

IV. ISSUES FOR CONSIDERATION

1. Whether Judge Cano is entitled to qualified immunity.
2. Whether Plaintiffs have stated valid constitutional claims.
3. Whether Plaintiffs have created a fact question regarding their constitutional claims, if any, for Fourth and Fourteenth Amendment violations.

V. ARGUMENT

A. Summary Judgment Standard

Pursuant to Fed. R. Civ. P. 56(c), summary judgment should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Speaks v. Trikora Lloyd P.T.*, 838 F.2d 1436, 1438-39 (5th Cir. 1988). In order to be entitled to summary judgment, the moving party must establish the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Fed. R. Civ. P. 56(e) provides in part:

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e)(2).

Summary judgment is precluded under Fed. R. Civ. P. 56(c) only when the dispute is genuine and the disputed facts might affect the outcome of the suit. *Id.*; *Speaks*, 838 F.2d at 1438-

39. To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. *See Celotex Corp.*, 477 U.S. at 325; *Stults v. Conoco, Inc.*, 76 F.3d 651, 656 (5th Cir. 1996). A summary judgment movant who will not bear the burden of proof at trial may meet its initial burden of establishing that there is no genuine issue of material fact merely by pointing out the absence of evidence supporting the nonmoving party's case. *See Stults*, 76 F.3d at 656; *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-719 (5th Cir. 1995).

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. *See Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 853 (5th Cir. 1996); *Stults*, 76 F.3d at 656. The party opposing summary judgment cannot establish a genuine issue of material fact by resting on the allegations made in his pleadings without setting forth specific facts establishing a genuine issue worthy of trial. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992) (internal citations omitted), *rehearing denied* 961 F.2d 215 (5th Cir. 1992), *cert. denied* 506 U.S. 825, 113 S. Ct. 82 (1992). "Once defendant[s] have made…sworn denials, summary judgment is appropriate unless plaintiff can produce significant evidence demonstrating the existence of a genuine fact issue." *Russell v. Harrison*, 736 F.2d 283, 287 (5th Cir. 1984); Fed. R. Civ. P. 56(e). "Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian*, 954 F.2d at 1131.

B. Qualified Immunity Standard

Qualified immunity shields from liability officials who perform their duties reasonably and "applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Lopera v. Town of Coventry*, 652 F. Supp. 2d 203, 211, *aff'd,* 640 F.3d 388 (1st Cir. 2011) (quoting *Groh v. Ramirez,* 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). It is generally true that public officials acting within the scope of their authority are shielded from civil liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 815-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Officials sued in their individual capacities are protected by qualified immunity unless the alleged act violates a constitutional right that was clearly established at the time. *Sanchez v. Swyden*, 139 F.3d 464, 466 (5th Cir. 1998). The test for qualified immunity has two parts that a plaintiff must prove in order to prevail. First, the Plaintiff must establish that a public official's conduct deprived the Plaintiff of a "clearly established" constitutional right. *Id.* at 466-7. "Clearly established" means sufficiently clear to put a reasonable officer on notice that his conduct may violate a person's rights. *See id; see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir.1989); *Melear v. Spears*, 862 F.2d 1177, 1187 (5th Cir.1989). "A constitutional violation does not occur every time someone feels that they have been wronged or treated unfairly. There is no constitutional right to be free from emotional distress." *Shinn on Behalf of Shinn v. Coll. Station Indep. Sch. Dist.*, 96 F.3d 783, 786 (5th Cir. 1996).

The second question for the defense of qualified immunity is whether the official's conduct was objectively reasonable. *See Sanchez v. Swyden*, 139 F.3d at 467. Even if an official violates a person's civil rights, the official may still be entitled to qualified immunity if the conduct was objectively reasonable. *Id.*, citing *Mouille v. City of Live Oak,* 918 F.2d 548, 551 (5th Cir.1990); *Pfannstiel v. City of Marion,* 918 F.2d 1178, 1183 (5th Cir.1990). "Objectively reasonable" means,

given the totality of the circumstances confronting the official, viewed objectively, was the action justified. *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011).

In *Pearson v. Callahan*, the United States Supreme Court held that lower courts are free to answer these two questions in any order they choose. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id*.

As the Fifth Circuit recently determined in July 2021:

> We are bound by the restrictive analysis of "clearly established" set forth in numerous Supreme Court precedents. A right is "clearly established" if it is "one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam) (internal quotation marks and citation omitted). Courts must not "define clearly established law at a high level of generality"; instead, their "inquiry must be undertaken in light of the specific context of the case." *Id.* at 12, 136 S.Ct. 305 (internal quotation marks and citations omitted). Therefore, unless existing precedent "squarely governs" the conduct at issue, an official will be entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 201, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam); *Mullenix*, 577 U.S. at 12, 136 S.Ct. 305 (emphasizing that "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established" (internal quotation marks and citation omitted)).
>
> Generally, to satisfy this standard, the plaintiff must "identify[ ] a case in which an officer acting under similar circumstances was held to have violated the [Constitution], and ... explain[ ] why the case clearly proscribed the conduct of that individual officer." *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020) (concluding the defendants were entitled to qualified immunity because the plaintiffs failed to identify an analogous case). While an exact case on point is not required, the confines of the officers' violation must be "beyond debate." *Baldwin v. Dorsey*, 964 F.3d 320, 326 (5th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied*, —— U.S. ——, 141 S. Ct. 1379, 209 L.Ed.2d 123 (2021) (mem.). Broad general propositions are not enough to overcome qualified immunity. *Id.*
>
> Supreme Court cases have been repeated and consistent on this high standard at the second prong.

Cope v. Cogdill, 3 F.4th 198, 204-5 (5th Cir. 2021).

Once a defendant asserts his/her entitlement to qualified immunity, "the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir.2010).

1. Due Process

In Counts 1 through 4, Plaintiffs allege violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. "No State shall…deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has deemed this clause to have a "substantive" component, which "forbids the government to infringe certain 'fundamental' liberty interests ... unless the infringement is narrowly tailored to serve a compelling state interest." *New Orleans Catering, Inc. v. Cantrell*, No. CV 20-3020, 2021 WL 795979, at *6 (E.D. La. Mar. 2, 2021), *reconsideration denied*, No. CV 20-3020, 2021 WL 1401757 (E.D. La. Apr. 14, 2021 (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

> The "established method of substantive-due-process analysis has two primary features." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). "The first is that the Due Process Clause protects only 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *4 Aces Enters., LLC v. Edwards*, 479 F. Supp. 3d 311, 325 (E.D. La. 2020) (quoting *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. 2258) (internal quotation marks omitted), *aff'd sub nom.*, *Big Tyme*, 985 F.3d 456. "The second is that 'the Supreme Court requires a careful description of the asserted fundamental liberty interest.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2258) (internal quotation marks omitted).

Here, Plaintiffs assert that: (1) the Disaster Declarations did not meet the definition of a disaster pursuant to Chapter 418 of the Texas Government Code; (2) Orders closing hotels were "at the request of an unqualified physician in Alpine, Texas and were not supported by any medical

or epidemiological based opinion that the closure of hotels would reasonably prevent COVID-19 from becoming a threat to Brewster County; (3) the Orders conflicted with Governor Abbott's Orders and (4) they could not rent rooms to guests who did not use the hotel as a primary residence or who did not fall into a specific employment classification. Plaintiffs have failed to meet the necessary standards to assert that their "liberty interests" are "deeply rooted in the Nation's history and tradition nor have they carefully described that these interests are "fundamental." "The mere novelty of such ~~a~~ claim[s] is reason enough to doubt that "substantive due process" sustains it; the alleged "right[s]" certainly cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno*, 507 U.S. at 303 (internal quotations and citations omitted).

Plaintiffs cannot and have not cited to any case precedent establishing that these alleged due process violations rise to the level of actual constitutional violations. However, if Plaintiffs attempt to allege that various Counts have infringed upon some undefined right to operate a hotel, "the Fifth Circuit has explicitly rejected any "notion" of a fundamental "right to pursue a legitimate business." *New Orleans Catering*, 2021 WL 795979, at *7 (citing *Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978).

It is clear that Plaintiffs seek to have the Court impart its judgment on the need for the Brewster County Judge's Disaster Declarations and the subsequent Executive Orders concerning hotels, motels and short-term rentals. The Supreme Court has made it clear that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020)(Chief Justice Roberts, concurring in denial of application

for injunctive relief)(citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905)). This matter can only be viewed in the context of the circumstances rapidly evolving in February, March and April 2020. As noted by Chief Justice Roberts, "there ~~is~~ [was] no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." *Id*. Therefore, "[w]hen those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Id*. (quoting *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974)". Further, Chief Justice Roberts states that those officials, as Judge Cano, "should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id*. (See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)).

a. <u>The Disaster Declarations and Texas Government Code §418.004(1)</u>

Plaintiffs' assertion that Brewster County's Disaster Declarations concerning COVID-19 did not meet the definition of a disaster pursuant to Texas Government Code, Chapter 418 in Brewster County is absurd. In Texas, counties regularly declare disasters concerning potential hurricanes or fires as the threat is imminent. Often times, those decisions by county judges concerning closures, evacuations, etc… due to potential hurricanes or fires were ultimately unnecessary as the potential hurricane or fire shifted direction sparing the county. However, local officials would be derelict in their duty if they waited until the storm or fire was raging. Unfortunately, the COVID-19 disaster was imminent and according to the Texas Department of

State Health Services, Brewster County has had 842 confirmed cases, 116 probable cases, 17 fatalities and currently has 11 active cases.[2]

Texas Government Code, section 418.108 provides, in part, that "the presiding officer of the governing body of a political subdivision may declare a local state of disaster." TEX. GOV'T CODE §418.108(a). As defined in Chapter 418, "disaster means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause including. . . epidemic…." Tex. Gov't Code Ann. §418.004(1). Here, Plaintiffs attempt to engraft additional requirements onto Chapter 418 by stating that "no cases of COVID-19 cases had occurred in Brewster County" and that Judge Cano acted at the request of "an unqualified physician and without any qualified medical opinions that COVID-19 had either occurred in Brester County or was an imminent threat of widespread or servere injury or loss of life to residents of Brewster County." Dkt 48, ¶¶37-38. However, there is no such requirement that the "disaster" (whether epidemic, hurricane or fire) actually cross the county line before action can be taken. Further, there are no requirements providing any requirement for a county judge to discuss the Disaster Declaration with a physician or obtain medical opinions. *See* Tex. Gov't Code, Ch. 418.

Before issuing the Disaster Declaration, Judge Cano testified that he had spoken with both Dr. Escovar and Dr. Rachel Sonne, Regional Health Authority, concerning COVID-19. Exhibit 26 at pg. 34 L6 – 35 L24. Specifically, Judge Cano stated that at the very onset of the pandemic he had discussions with Dr. Sonne "[a]nd the directives and the feedback and the recommendations that were coming from Dr. Escovar seemed to be in line with what Dr. Sonne, who is another medical doctor, for guidance – I mean, they seemed to be in unison, and therefore, the medical

[2] https://txdshs.maps.arcgis.com/apps/dashboards/ed483ecd702b4298ab01e8b9cafc8b83

doctors, they were the authorities of folks that I was listening to the directives from." *Id*. Further, Judge Cano states that Dr. Sonne's "guidance was, that if we didn't take proactive steps to prevent this from entering, or from becoming part of our community, that we were gonna be in a real pickle because of the lack of medical facilities here in Brewster County." *Id*. at pg. 35 L 6-13. Further, Judge Cano believed that Dr. Sonne "was relating information to me based on my knowledge of local resources, medical resources, what are going to affect our ability to deal with COVID folks if and when it were to happen. But by mitigating some of those variables, that was basically her take on this, is 'The more you-all can keep this – keep a handle on this before it occurs, it'll keep Brewster County in a position that we can respond to the crisis.'" *Id*. at pg. 35 L 16-24.

Additionally, Judge Cano testified that he was in communication with the Coronavirus (CV) Management Team which consists of local leadership – law enforcement, our EMC [Emergency Management Coordinator], the hospital CEO [Rick Flores], Dr. Escovar, the City Manager [Erik Zimmer], representatives from the university and school district and the tourism director, Robert Alvarez. *Id*. at pgs. 20-21. Further, Judge Cano's email communications demonstrate information related to a potential COVID-19 patient in Alpine on March 3, 2020 and another Covid-19 case in El Paso. Exhibit 1a and 1g. Additionally, Judge Cano was receiving information and attending meetings with the CV Management Team. Exhibits 1b, 1c, 1e, and 1h.

Before Judge Cano entered his Disaster Declaration, the U.S. Department of Health and Human Services, the World Health Organization, President Trump and Governor Abbott had all proclaimed COVID-19 as a health disaster. Exhibits 2, 3, and 4. Further, Governor Abbott's Proclamation provides that "COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas." Exhibit 4. Governor Abbott's Proclamation stated, in part, that "it is critical to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans." *Id.* Finally, President Trump

also issued Coronavirus Guidelines which encouraged working from home, limiting social gathers to no more than 10 people and avoiding eating at restaurants. Exhibit 1f and Exhibit 5.

As part of Dr. Escovar's involvement with COVID-19 and advising the Big Bend Regional Medical Center (BBRMC) and the CV Management Team, she testified that "on February 14, 2020 we had a – we had somebody present that was a contact of a contact who was exposed to COVID-19." Exhibit 27 pgs. 123 L19-124, L15. The hospital realized that they did not have good protocols or procedures in place which led them "to develop this Task Force to make sure that we start working on implementing evidence-based policies and procedures." *Id.* Dr. Escovar testified that

> the CEO had asked me to be the medical director after that patient presented and we realized we needed to have some policies and procedures in place to really help handle COVID, as it continued to spread. I had been -- personally, on my own time, been delving into the research that was starting to come out, primarily out of China at this point, since it had been -- since they had been combating COVID the longest. So when I was speaking about COVID and the areas that we needed to work on first it sounded like I was the one in the hospital that had done the most investigations. And so -- and this was a conversation that was had amongst all the physicians. And so he had asked for me to head the Task Force, and the other physicians agreed that I was the best choice.

Id at pgs. 124 L20- 125 L10. With regards to the data Dr. Escovar was reviewing in February and March 2020, she stated that

> So there was actually quite a lot that was starting to come out. It was starting to come out from Italy at that point. They were starting to get hit pretty hard, China, and then some from the Middle East. There was data coming out. Not all of the data was necessarily completely relevant to being in a rural community. Some of it was recommendations for orthopedic surgeons, to how to handle COVID-positive patients, and some of it was very specific. But in order for you to know what was pertinent for you or not, you still had to go through all of it and then determine what's relevant to you. And so the data that was getting published was all getting compiled onto specific websites and LISTSERVs. And so every day I would go through -- I was spending a minimum of about four hours every day, seven days a week, going through the data that's been published that day and then taking the salient points out of that that may be pertinent to our community that we need to know about.

Id at pgs. 125 L25 – 126 L19.

> So the biggest thing initially was, how is COVID spread? And is there a pattern in the spread? Because we needed to know which populations were really vulnerable to getting COVID first so we could monitor them closely. And then the other part was, what symptoms do they present with? So that if patients do present to the clinics or the hospital we have a high index of suspicion for wanting to test them. And testing was not very easily available. And so we really needed to know who we would save those tests for and utilize them in an efficient way.

Id at pgs. 126 L23 – 127 L9. Dr. Escovar testified that essentially the same data from the US, the CDC, the United States Government, and the Texas Department State Health Services.

Id at pg. 127. When asked about the resources of the Big Bend Medical Center Dr. Escovar testified as follows:

> Q. So back in February, March, April, the time frame we're talking about, Brewster County had no ability, and did not even have the medical equipment, in order to perform any testing to determine whether COVID was prevalent or not. Is that correct?
>
> **A.** Correct.
>
> Q. And so was that one of the factors that went into your decision back in mid-March when you started discussing tourism and the imminent threat of COVID coming into the County?
>
> **A.** Yes. So the fear was that we may not know that we have COVID in the community until people start presenting to the hospital very sick, requiring ventilators and a lot of support. And by that time, with how infectious COVID is, that would just be the tip of the iceberg. And we would have known too little too late and we would have missed the window to mitigate.
>
> So what we knew about what was required was we were seeing a large hospital in China go up within ten days. They had a huge hospital that was specific for COVID-19 patients that was built and erected within ten days that was full of ventilators and oxygen and all of this respiratory support.
>
> We knew that Italy was starting to get -- was running low on similar things. You know, ICU beds and things like that. So we had an idea of the equipment that other countries were using at a really rapid rate and then looking at our hospital. So we -- it's only a 25-bed hospital. We only have two ICU beds. And we have one ventilator for each ICU, so only two ventilators in our ICU. And we don't have any ICU-trained doctors in the hospital, or actually in the whole region. The closest would be in Midland/Odessa or El Paso.
>
> So there's, like I had said before, a group of family physicians, a pediatrician, myself, OB/GYN and a general surgeon. And so with no trained ICU doctors and a likelihood that we're going to require ICU-level care and a ventilator for these

> patients who may come in really ill and we're very far away from our next higher level of support, that was -- that was quite concerning. I remember there were a lot of discussions about what we could do to increase the support at the hospital if COVID hit.

Id at pgs. 130 L22 – 132 L23.

Therefore, it is clear that Judge Cano exercised the authority granted to him by the Texas Legislature pursuant to Section 418.108 of the Texas Government Code when enacting his initial Disaster Declarations and the subsequent March 25, 2020 order. Exhibit 6, Exhibit 1n, Exhibit 1s, Exhibit 15.

b. <u>Executive Orders concerning Hotels, Motels and Short-term Rentals</u>

The Texas Legislature has given a county judge broad authority to fulfill his responsibilities concerning the declaration of a local disaster. As other courts have noted, "[t]his crisis is fluid and the rapidity of its changes require quick action at every level of the government. Each level must weigh the needs of the many against individual needs". *Mega Vape, LLC, v. The City of San Antonio*, 2020 WL 1933938 *3 (WD Tex.- San Antonio, 2020). Specifically, Texas Government Code, section 418.108(g) provides that "[t]he county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy in that area." TEX. GOV'T CODE §418.108(g). Based on his statutory authority, Judge Cano issued various Executive Orders necessary to prevent the imminent threat to the health and safety of the citizens of Brewster County from COVID-19. Exhibits 1n, 1r, 12, 1u, 1v, 18, 1y, 20, and 21. As demonstrated above, Judge Cano sought guidance from a variety of sources when contemplating how best to navigate the rapidly evolving circumstances of COVID-19 and how best to protect the health, safety and welfare of the Brewster County citizens. Exhibits 1e, 1h, 1i, 1j, 18, 1m, 1l, 1o, 1p, 1t, 1w, 1z, 1cc.

c. The Executive Orders do not conflict with Governor Abbott's Executive Order

Plaintiffs' allege that Governor Abbott's Executive Order GA-14 supersedes Judge Cano's Executive Orders concerning hotels, motels and short-term rentals. Executive Order GA-14 provides that "this executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, **but only to the extent that such a local order restricts essential services allowed by this executive order or allows gatherings prohibited by this executive order.** Exhibit 17. Further, GA-14 describes "essential services" as consisting of those listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0. *Id.*

First, GA-14 makes no reference to hotels, motels and short-term rentals as essential services. Further, the U.S. Department of Homeland Security document entitled Guidance on the Essential Infrastructure Workforce, dated March 19, 2020 (The Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response) does not provide that hotels and/or hotel workers are considered essential critical infrastructure workers or that the hotels may fully operate; instead, the Memorandum only provides for "Hotel Workers where hotels are used for COIVD-19 mitigation and containment measures." Exhibit 13 at Exhibit B. This does not include recreational travelers or other guests where the hotel is not utilized for mitigation and containment measures. *Id*. The current version dated December 16, 2020 of the Essential Critical Infrastructure Workers contains similar language – "Management and staff at hotels and other temporary lodging facilities that provide for COVID-19 mitigation, containment, and treatment measures or provide accommodations for essential workers" were identified as essential critical infrastructure workers. Exhibit 23.

Contrary to Plaintiffs' allegations, Judge Cano's Executive Orders are not in conflict with GA-14 as they specifically meet the Guidance on the Essential Infrastructure Workforce provided in March and April 2020. Specifically, the Executive Orders provide that:

A. Hotels, motels and short-term rentals can be utilized ONLY for customers that are active military, law enforcement, and national reserve and "emergency service personnel to support city, county, state, SRSU and school district operations and healthcare professionals and employee housing during this time period.
B. Hotels, motels and short-term rentals to close and vacate all non-essential/recreational travelers.

Exhibit 12, 15, 18, 20, 21. For these reasons, Plaintiffs cause of action is frivolous and unsupported by any case precedent and evidence.

d. <u>Interference with Ownership Rights</u>

Plaintiffs allege that Defendant's Executive Orders deprived Plaintiffs of their right to own and operate a hotel in Marathon, Texas. However, these Executive Orders did not cause the loss of business at the hotel. Instead, the General Manager of the Gage Hotel, Carol Peterson made it clear in March 2020 that President Trump's March 16, 2020, announcement that citizens should stay home and Governor Abbott's Executive Order GA-08 on March 19, 2020 prohibiting Texans from going to bars, restaurants, food courts, gyms and [~~message~~ massage] parlors caused cancellations in the near term to near zero and into future months in single digits with on-going cancellations still occurring. Exhibit 13 at Exhibit K. Both of those actions were prior to any Executive Order of Judge Cano taking effect.

Plaintiffs fail to present any legal analysis or factual allegations in support of this contention, and merely state it in a conclusory fashion.

2. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021)(quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "To establish their equal protection claim, Plaintiffs must show that "two or more classifications of similarly situated persons were treated differently" under the Bar Closure Order. *Id.* (*see Gallegos–Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012)(citing *Stefanoff v. Hays Cty.*, 154 F.3d 523, 525–26 (5th Cir. 1998))). "Once that threshold showing is made, the court determines the appropriate level of scrutiny for our review. "If neither a suspect class nor a fundamental right is implicated, the classification need only bear a rational relationship to a legitimate governmental purpose." *Id.* (citing *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)).

Here, the individuals allowed to stay in hotels, motels and short-term rentals as the classification survives rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 469 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Moreover, we have held that "[a]s long as there is a conceivable rational basis for the official action, it is immaterial that it was not the or a primary factor in reaching a decision or that it was not actually relied upon by the decisionmakers or that some other nonsuspect irrational factors may have been considered." *Id.* (quoting *Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 754 (5th Cir. 1988) (emphasis omitted)). As outlined above, Judge Cano has a very rational basis for his Executive Orders – the prevention and spread of COVID-19 in Brewster County.

3. Unreasonable Seizure

Plaintiffs allege that Executive Orders of Judge Cano interfered their possessory interest in the Gage hotel as they were only allowed to rent guest rooms to certain employment classifications and that J.P. Bryan could not stay in historic portion of the Gage Hotel as it was not his primary residence in violation of the Fourth and Fourteenth Amendments. Dkt. 48 ¶¶ 54-59. It appears that Plaintiffs are attempting to allege that the Defendant's regulations constitute an unreasonable seizure of their property, and therefore violate the Fourth Amendment. However, Plaintiffs fail to present any legal analysis or factual allegations in support of this contention, and merely state it in a conclusory fashion.

Here, Defendant's Executive Orders were reasonable as demonstrated supra. Further, the General Manager of the Gage Hotel testified in her Declaration that "**[e]ver since President Donald Trump made his announcement on March 16, 2020 that citizens should stay home and Governor Abbott issued his Executive Order GA-08 on March 19, 2020 prohibiting Texans from going to bars, restaurants, food courts, gyms and [~~message~~ massage] parlors, the Gage Hotel has experienced cancellations in the near term to near zero and into future months in single digits with on-going cancellations still occurring.** Governor Abbott's Executive Order standing alone has drastically reduced the number of visitors who would normally be expected to be guests at the Gage Hotel." Exhibit 13 at K.

4. Damages

As Carol Peterson, Manager of the Gage Hotel, attributes the cancellations of reservations to near zero due to President Donald Trump's announcement related to COVID-19 and Governor Abbott's Executive Order GA-08, Plaintiffs fail to evidence of a material factual issue on any damages associated with Judge Cano's Executive Orders. Plaintiffs must present some legal analysis to support a claim for damages and cannot merely allege that "Defendant's deprivation of

Plaintiffs' constitutional rights' caused the damages in a conclusory fashion. Additionally, Plaintiffs cannot support a claim for damages as the Gage Hotel, Inc. received Coronavirus-related Paycheck Protection Program loan from the Small Business Administration for $608,417.00 for the period of April 6, 2020 to September 21, 2020. Exhibit 19.

VI. CONCLUSION

Plaintiffs fail to state any cognizable constitutional violation against Defendant for which relief can be granted, and their claims must be dismissed as a matter of law. As in *In re Abbott*, Plaintiffs are requesting that the Court second-guess the basic mitigation strategy underlying Judge Cano's Executive Orders. "The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *In re Abbott,* 954 F.3d 772, 784 (5th Cir. 2020)(The Supreme Court vacated the Fifth Circuit's decision in that case, *Planned Parenthood Center for Choice v. Abbott*, ––– U.S. ––––, 141 S.Ct. 1261, 209 L.Ed.2d 5 (Mem) (2021), leaving *Jacobson* as the lodestar by which this Court navigates). Thus, "the district court overstepped its proper role and imposed its own judgment about how the COVID-19 pandemic should be handled with respect to abortion" and that "[t]his was a usurpation of the state's power." *Id*. at 793.

Further, the Supreme Court in *Jacobson* determined that a person:

> may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger.

Jacobson, 197 at 29-30. "**[L]iberty secured by the Constitution ... does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint**." *Id.* at 26 (emphasis added). "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

The Supreme Court "established the principle that the matters of public health and safety are functions of another branch of government and it would be impermissible judicial overreach and a violation of the separation of powers if the Court were to second-guess the modes used by the legislative and executive branches to protect the people at large so long as they are not arbitrary or unreasonable. *Underwood v. City of Starkville, Mississippi*, No. 20CV00085GHDDAS, 2021 WL 1894900, at *4 (N.D. Miss. May 11, 2021)(citing *Jacobson*, 197 at 27-28) "Even in instances of competing theories regarding public safety, it is the legislature's prerogative and responsibility to decide on the appropriate course of action." *Id.* "As such, the judiciary has no place in adjudicating or relitigating such decisions." *Id.*

IV. PRAYER

Defendant Brewster County Judge Eleazar R. Cano prays that the Court grant his Motion for Summary, denying Plaintiffs all relief requested, dismissing Plaintiffs' claims in their entirety, and for such other relief as the court deems just and proper.

Respectfully submitted,

/s/J. Eric Magee
J. Eric Magee
SBN: 24007585
e.magee@allison-bass.com
ALLISON, BASS & MAGEE, L.L.P.
A.O. Watson House
402 W. 12th Street
Austin, Texas 78701

(512) 482-0701 telephone
(512) 480-0902 facsimile

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August 2021, I electronically filed the foregoing with the Clerk of Court and will send notification of such filing to the following via electronically:

Francis S. Ainsa, Jr.
3801 N. Capital of Texas Hwy Suite E240, PMB
653 Austin, Texas 78746
Tel: (915) 726- 3681
Fax: (512) 532-6614
fain@ainsalaw.com

Carlos E. Cardenas
717 E. San Antonio, 3rd
Floor El Paso, Texas 79901
(915) 544-7860
(915) 532-4768 Fax
cecardenaslaw@gmail.com

/s/J. Eric Magee
J. Eric Magee