No.

IN THE

Supreme Court of the United States

J. P. BRYAN; MARY JON BRYAN; GAGE PROPERTIES, INC.; AND GAGE HOTEL, L.P., PETITIONERS

v.

COUNTY JUDGE ELEAZAR R. CANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Is the rational basis test used by the Panel to ratify respondent's COVID-19 orders closing petitioners' hotel and removing its guests overly deferential, abrogating the Judiciary's role in protecting citizens' rights in a public health emergency by failing to provide them with a remedy for the constitutional injury they sustained?

2. Should the rational basis test be a blunt instrument which ratifies every government action, however unjust or unfounded, or should it be an active, probing investigation into the actual realities of the subject addressed by the regulation, regardless of the government's proffered reasons?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

CORPORATE DISCLOSURE STATEMENT.

Petitioner Gage Properties, Inc. ("Gage") is a Texas corporation. It has no parent company and no publicly held company owns 10% or more of its stock.

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The unpublished *per curiam* Opinion of the United States Court of Appeals for the Fifth Circuit in *J. P. Bryan et al. v. County Judge Eleazar R. Cano*, C.A. Docket No. 22-50035, decided and filed November 8, 2022, and reported at 2022 WL 16756388 (5th Cir. 11/8/2022), affirming the district court's entry of summary judgment in favor of respondent, is set forth in the Appendix hereto (App. 1-13).

The unpublished Order of the United States District Court for the Western District of Texas, Pecos Division, in *J. P. Bryan et al. v. County Judge Eleazar R. Cano*, Civil Action No. PE: 20-CV-025-DC, decided and filed December 15, 2021, and unreported by either Westlaw or LEXIS, granting respondent's motion for summary judgment, is set forth in the Appendix hereto (App. 14-57).

The unpublished Report and Recommendation of the United States Magistrate Judge in *J. P. Bryan et al. v. County Judge Eleazar R. Cano*, Civil Action No. PE: 20-CV-025-DC-DF, decided and filed November 1, 2021, and reported at 2021 WL 7184244 (W.D. Texas 2021), recommending that respondent's Second Motion to Dismiss be granted, is set forth in the Appendix hereto (App. 58-79).

The unpublished Order of the United States Court of Appeals for the Fifth Circuit in *J. P. Bryan et al. v. County Judge Eleazar R. Cano*, C.A. Docket No. 22-50035, decided and filed December 2, 2022, denying petitioners' timely filed petition for Panel rehearing, is set forth in the Appendix hereto (App. 80).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit affirming the district court's entry of summary judgment in favor of respondent, was entered on November 8, 2022; and its Order denying petitioners' timely filed petition for Panel rehearing was decided and filed on December 2, 2022 (App. 1-13;80).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioners' timely filed petition for Panel rehearing. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> ...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.

Texas Gov't Code § 418.004(1):

> **Definitions**
> In this chapter:

(1) "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 fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, other public calamity requiring emergency action, or energy emergency.

Texas Gov't Code § 418.014:

Declaration of State of Disaster

(a) The governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.

(b) Except as provided by Subsection (c), the state of disaster continues until the governor:

(1) finds that:

(A) the threat or danger has passed; or

(B) the disaster has been dealt with to the extent that emergency conditions no longer exist; and

(2) terminates the state of disaster by executive order.

(c) A state of disaster may not continue for more than 30 days unless renewed by the governor. The legislature by law may terminate a state of disaster at any time. On termination by the legislature, the governor shall issue an executive order ending the state of disaster.

(d) An executive order or proclamation issued under this section must include:
(1) a description of the nature of the disaster;
(2) a designation of the area threatened; and
(3) a description of the conditions that have brought the state of disaster about or made possible the termination of the state of disaster.
(e) An executive order or proclamation shall be disseminated promptly by means intended to bring its contents to the attention of the general public. An order or proclamation shall be filed promptly with the division, the secretary of state, and the county clerk or city secretary in each area to which it applies unless the circumstances attendant on the disaster prevent or impede the filing.

Texas Gov't Code § 418.015:

Effect of Disaster Declaration
(a) An executive order or proclamation declaring a state of disaster:
(1) activates the disaster recovery and rehabilitation aspects of the state emergency management plan applicable to the area subject to the declaration; and
(2) authorizes the deployment and use of any forces to which the plan applies and the use or distribution of any supplies, equipment, and materials or facilities assembled, stockpiled, or arranged to be made available under this chapter or other law relating to disasters.
(b) The preparedness and response aspects of the state emergency management plan are activated as provided by that plan.

(c) During a state of disaster and the following recovery period, the governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities. To the greatest extent possible, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or plans, but this chapter does not restrict the governor's authority to do so by orders issued at the time of the disaster.

Texas Gov't Code 418.018:

Movement of People

(a) The governor may recommend the evacuation of all or part of the population from a stricken or threatened area in the state if the governor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(b) The governor may prescribe routes, modes of transportation, and destinations in connection with an evacuation.

(c) The governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.

Texas Gov't Code § 418.108:

Declaration of Local Disaster

(a) Except as provided by Subsection (e), the presiding officer of the governing body of a political subdivision may declare a local state of disaster.

(b) A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable.

(c) An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary, the county clerk, or the joint board's official records, as applicable.

....

(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) The 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 of premises in that area.

(h) For purposes of Subsections (f) and (g):

(1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and (2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

....

Texas Gov't Code § 418.1015:

Emergency Management Directors

(a) The presiding officer of the governing body of an incorporated city or a county or the chief administrative officer of a joint board is designated as the emergency management director for the officer's political subdivision.

(b) An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

(c) An emergency management director may designate a person to serve as emergency management coordinator. The emergency management coordinator shall serve as an assistant to the emergency management director for emergency management purposes.

(d) A person, other than an emergency management director exercising under Subsection (b) a power granted to the governor, may not seize state or federal resources without prior authorization from the division or the state or federal agency having responsibility for those resources.

STATEMENT

Petitioners J. P. Bryan, Mary Jon Bryan, Gage Properties, Inc. and Gage Hotel, L.P. ("petitioners") own and operate The Gage Hotel in the small west Texas town of Marathon. The original Gage Hotel is

listed on the National Register of Historic Places. Originally built in 1890 and restored by cattle rancher Alfred Gage in 1927, the Hotel hosts guests traveling to the scenic Big Bend region of southwest Texas. It has a highly rated restaurant and provides facilities for weddings and other special functions. It is a principal source of income for Marathon and its 500 residents.

Marathon is located in Brewster County, an expansive, underpopulated state subdivision. It covers 6,192 square miles with only 10,000 residents. Respondent Eleazar R. Cano ("respondent" or "Judge Cano") is the County Judge of Brewster County, the presiding officer of the County Commissioners Court and the County's highest executive officer.

On March 13, 2020, Greg Abbott ("Abbott"), Governor of Texas, issued a proclamation "certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas" (App. 17;59). His proclamation invoked those parts of the Texas Disaster Act of 1975, Texas Gov't Code §§ 418.001 *et seq*. ("the Act"), which empowered him to suspend certain laws and direct the allocation of state resources as needed (§§ 418.016 & 418.017). However, Abbott did *not* invoke the power given him by§ 418.018 of the Act to control the movement of persons within any area of the State or to control the occupancy of any premises. Nor did he declare a local state of disaster in any particular county; and he did not direct or even suggest in his proclamation that any private businesses, including hotels, be closed.

Under § 418.1015 of the Act, once Abbott issued his proclamation, Judge Cano as the highest executive officer in Brewster County became the emergency management director serving as Abbott's designated agent in implementing his proclamation at the local level. Under §§ 418.108(a) & (g) of the Act, Judge Cano could declare a local state of disaster as well as "control the movement of persons and the occupancy of premises in that [local disaster] area."

On March 17, 2020, he declared a Local State of Disaster for Brewster County based on COVID-19 (App. 17;59). While his declaration did not order any hotels closed or require hotel guests to vacate, it provided that the County was empowered to take any action necessary to suppress the virus, which includes regulating the ingress and egress of occupied structures. Under § 418.004(1) of the Act, a "disaster"is defined as the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property...." Judge Cano later acknowledged that when he declared this local state of disaster for Brewster County on March 17, 2020, there were *no* reported cases of COVID-19 in the County itself or in the four adjacent counties.

On March 19, 2020, Abbott issued Executive Order No. GA-08 "which directed Texans to avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors" (*Id.*). It did *not* direct that any hotels be closed. Yet the next day, March 20, 2020, Judge Cano amended his March 17th Declaration to order the closure of all hotels/motels and short-term rentals in Brewster County (App. 17;59-60). He further ordered that all guests of these businesses

vacate their rooms beginning March 23, 2020, through April 2, 2020, with the limited exception of guests renting rooms/units as their primary residence (App. 17;59-60). Even petitioner J. P. Bryan, one of the Hotel's co-owners, was prohibited from using his secondary residence in the Hotel while other persons could occupy their secondary residences as long as those residences were not in a hotel.

On March 23, 2020, Judge Cano further modified his March 17th Declaration by allowing not only permanent residents but also other persons to access hotels, motels and short-term rentals *but only if* these other persons were: (1) active military, law enforcement, or national guard reserve; (2) emergency services personnel who support certain local and state governmental entities; and (3) healthcare professionals and employees (App. 17-18;60). He then issued on March 25, 2020, a new Declaration of Local State of Disaster for Brewster County, again invoking § 418.108(a) of the Act but without receiving any qualified expert medical opinions about whether a "disaster," as defined by the Act, actually existed in Brewster County(*Id.*).

His Orders targeted *only* hotels for closure in this expansive, underpopulated area. Other businesses whose customers were subject to the same risks of COVID-19 infection as hotel guests were *not* closed. Gas stations, grocery stores and convenience stores—all catering to the same tourists—remained open, presenting the same or even more risk of infection from human interaction as hotels. Nor was any resident of the County prohibited from having out-of-town friends

or family, even strangers, stay with them; those visitors just could not check into a hotel.

In singling out hotels for closure, Judge Cano relied upon the advice of Dr. Ekta Escovar, a pediatrician with *no* specialized training in infectious diseases or epidemiology. She told him that tourists were straining the local infrastructure and lacked "the same humanity" as local residents. She presented *no* medical data to support her view that tourists were more contagious or had more capacity to spread the virus than local residents. Instead, her advice exhibited an irrational fear of tourists. Thus Judge Cano had before him *no* medical or scientific facts from which he could reliably infer a relationship between closing hotels and the spread of COVID-19 in the County.

On March 31, 2020, Abbott issued Executive Order GA-14which encouraged non-essential workers to work remotely where possible; and it allowed all persons to access "essential services" as long as they took necessary precautions to reduce transmission of the virus. This Order contained *no* directive closing any hotel and expressly superceded any conflicting orders issued by local officials such as Judge Cano that restricted access to such "essential services" like hotels which Abbott's Executive Order allowed. This Executive Order also suspended the authority of local officials like Judge Cano under §§ 418.1015 & 418.108 to impose restrictions which were inconsistent with the Governor's Order.

Despite the Governor's Executive Order which voided Judge Cano's March 20th amendment ordering the closure of all hotels, motels and short-term rentals

in Brewster County inasmuch as they were "essential services" under this Executive Order, Judge Cano did not rescind his Order. Instead, he issued another Order on April 1, 2020,one identical to his March 23rd Order except that it extended the hotel closures through April 9, 2020, except for the same favored groups; and he then signed another Order on April 7, 2020, that again extended the hotel, motel and short-term rental closures until April 30, 2020, except for the same favored groups. While Judge Cano was issuing these Orders in late March and early April of 2020, there were *no* reported cases of COVID-19 in Brewster County. In fact, the first such case was reported in Brewster County on April 25, 2020 (App. 19;61).

On April 10, 2020, petitioner J. P. Bryan, one of the co-owners of the Gage Hotel, began this civil action against Judge Cano in the federal district court for the Western District of Texas (Pecos Division) (App. 18-19;61). Invoking jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1343(a)(3) & (4) (civil rights) , he sought damages and declaratory relief under 42 U.S.C. § 1983, for the violation of his substantive due process and equal protection rights under the Fourteenth Amendment caused by Judge Cano's Orders closing the Hotel (*Id.*).

After the other co-owners of the Gage Hotel (petitioners Mary Jon Bryan, Gage Properties, Inc. and Gage Hotel, L.P.) were added as plaintiffs, their Third Amended Complaint alleged *inter alia* that respondent's Orders interfered with their property rights by treating their hotel differently from other businesses in Brewster County for no rational reason; they contained arbitrary, unjust rules about who could

stay at the Hotel unrelated to the spread of the virus; the Orders were issued without declaring a "disaster" as defined by § 418.004(1) of the Act; and they were in open conflict with Governor Abbott's own Executive Orders which treated hotels in Brewster County as "essential services" which anyone could access if necessary precautions were taken to reduce transmission of the virus (App. 19-20;37;44;46-47;61-62).

In the meantime, on April 27, 2020, Abbott issued Executive Order GA-18 which began the reopening of certain businesses on a restricted basis (App. 19;61). Like his prior Executive Order, it superceded any conflicting local order touching upon"essential services" such as hotels; it continued to suspend the authority of local officials like Judge Cano under §§ 418.1015 & 418.108 to impose restrictions which were inconsistent with his Order; and it contained *no* directive closing any hotel. Three days later, on April 30, 2020, Judge Cano acknowledged that Abbott's Executive Order superceded his local Orders closing hotels and announced they would expire (App. 19;61).

On July 2, 2021, Judge Cano moved to dismiss petitioners' Third Amended Complaint on jurisdictional grounds claiming that the propriety of his Orders was either a non-justiciable "political question" or they were emergency measures related to an ongoing public health crisis making them immune from judicial review under *Jacobson v. Commonwealth*, 197 U.S. 11, 31 (1905) (App. 16;64). On November 1, 2021, the Magistrate Judge recommended that the district court grant respondent's motion to dismiss on both grounds (App. 58-79).

On December 8, 2021, the district court, Counts, J., rejected this recommendation because the "political question" doctrine was not a jurisdictional bar to petitioners' suit (App. 16). On December 15, 2021, however, the district court issued an Order granting Judge Cano's motion for summary judgment (App. 14-57). It first ruled that Judge Cano in his official capacity was immune from suit under the Eleventh Amendment for monetary damages or declaratory relief (App. 32-34). As for liability as a state actor under 42 U.S.C. § 1983, for his alleged *ultra vires* acts in issuing these Orders, it determined that all of Judge Cano's actions were specifically authorized by statute and discretionary in nature, providing no basis for liability (App. 37-39).

The district judge also rejected petitioners' substantive due process claim under § 1983, i.e., that Judge Cano's closure Orders (1) were unsupported by any medical or epidemiological proof that such closures would reasonably deter the spread of COVID-19, especially when the Orders themselves contained arbitrary, irrational rules about which persons could rent hotel rooms, rules which were unrelated to a spread of the virus; (2) were issued without a "disaster" declaration, as defined by § 418.004(1) of the Act; and (3) were in plain conflict with Governor Abbott's Executive Orders (App. 43-44). Applying *Jacobson's* two-prong test, Judge Counts concluded that the Orders had a "real or substantial relation" to protecting public health and were not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law" (App. 42-43 quoting *Jacobson*, 197 U.S. at 31).

In so deciding, the district judge saw no fundamental rights in play and applied a rational basis

review (App. 44). He ruled that given the Governor's own proclamation on March 13, 2020, and President Trump's declaration of a national emergency due to COVID-19, there was no genuine issue of material fact as to whether Judge Cano's subsequent Orders beginning on March 17, 2020, were irrational or arbitrary (App. 45). He was not required to consult medical professionals in making his decisions but did so in any event; and he therefore did not act alone (*Id.*).

As for petitioners' other constitutional claim under § 1983 that the Orders denied them the equal protection of the laws because they treated hotels differently from other businesses in Brewster County that were allowed to remain open to visitors from outside the County, e.g., convenience stores, gas stations, restaurants, etc., the motion judge again applied a rational basis review, imposing on petitioners the burden to negative every reasonably conceivable basis for the Orders (App. 46-47). Conceding that the Orders arguably treated hotels differently from other businesses in the County and that they treated their recreational guests differently from others who were allowed to stay there, the district judge nonetheless ruled that Judge Cano "had a rational basis for his orders and declarations— namely, the prevention and spread of COVID-19 in Brewster County in a business such as a hotel that attracts travelers from out of town" (*Id.*). Supported by consultation with a medical professional, "the differential treatment is at least rationally related to reducing the spread of COVID-19 [and therefore] sufficiently plausible and not irrational" (App. 48).

Petitioners appealed and on November 8, 2022, the court of appeals unanimously affirmed the grant of summary judgment in respondent's favor (App. 1-13). The Panel agreed with the district court that Judge Cano's Orders survive a rational basis test and did not deny petitioners the equal protection of the laws (App. 4-7). It reasoned that closing hotels to recreational guests while permitting other businesses in the County to serve the same clientele was not arbitrary or irrational; it kept down the concentration of recreational guests and visitors in the County while giving emergency service personnel a place to stay and avoiding eviction of persons claiming a hotel room as their permanent residence (App. 6). None of this, the Panel concluded, was so attenuated from the asserted goal of public health as to render the classification irrational (*Id.*). Even prohibiting petitioner J. P. Bryan, a co-owner of the Hotel, from staying as a guest in his own hotel, while "overinclusive," was not so imperfect as to render the Orders arbitrary or irrational (App. 6-7).

The Panel next determined that the substantive due process claim fared no better under rational basis review (App. 7-9). First, that the Orders deprived petitioners of their liberty interests in operating their hotel at full capacity by declaring a "disaster" where none existed under the Act or when those Orders were in open conflict with the Governor's Executive Orders—both violations of state law—were alone insufficient to state a constitutional claim under the Fourteenth Amendment (App. 7-8). Second, that the Orders allowed healthcare workers and active-duty military members—but *not* recreational guests—to stay at hotels even when no cases of COVID-19 were

reported in Brewster County or any adjoining county was not actionable different treatment because they "bore a rational relationship to slowing the spread of COVID-19 at the pandemic's outset" (App. 8-9).

On December 2, 2022, the Panel denied petitioners' timely filed petition for rehearing (App. 80).

REASONS FOR GRANTING THE PETITION

The Panel's Rational Basis Test Used To Assess Respondent's COVID-19 Orders Closing Petitioners' Hotel and Removing Its Guests Was Overly Deferential, Abrogating The Judiciary's Role In Protecting Citizens' Rights In A Public Health Emergency By Failing To Provide Them With A Remedy For The Constitutional Injury They Sustained.

Judge Cano's Orders closing petitioners' hotel and evacuating its guests on the cusp of this pandemic was an overly blunt instrument which failed to address the real risk factors which COVID-19 presented in this open, underpopulated area. Even though hotels in the rest of Texas remained open, providing its patrons with essential services and a safe harbor to socially distance, respondent—relying upon a pediatrician with no training in infectious diseases or epidemiology but with an irrational fear of tourists— singled out hotels to bear the brunt of his unfounded belief that closing them would discourage the travel of tourists to the County and inhibit spread of the virus. At the same time, however, respondent allowed *other* businesses in the County providing essential services to those same tourists as well as to other persons traveling to the

County to remain open, a decision at cross purposes with discouraging tourism or slowing a spread of the virus.

Furthermore, the exceptions carved out for those persons who were allowed to stay at hotels in the County, e.g., active military members, law enforcement and healthcare workers, were arbitrary and made no sense. The military and emergency personnel from outside the County allowed to rent rooms at the Hotel were just as likely to be infected by— and spread—the virus as the recreational tourists ousted from their hotel rooms or any other person traveling to the County.

Simply put, *Judge Cano had before him no medical or scientific facts from which he could reliably infer that closing hotels would slow a spread of the virus in the County.* There was *no* evidence justifying a belief that travel-related cases of COVID-19 would be mitigated by closing hotels and forcing tourists to seek housing with friends or relatives in the area instead of being allowed to socially distance safely in hotels. By inciting visitors to seek other housing in the County or elsewhere, the Orders had the more likely effect of *increasing* the number of travel-related cases of COVID-19 in the area, again a result at cross purposes with inhibiting a spread of the virus.

Finally, the Orders were unlawful under Texas law because there was no statutory basis for declaring a local state of disaster as defined by § 418.004(1) of the Act. The Governor never issued a "disaster" declaration for the County; no expert ever advised respondent that a "disaster" existed; and the first case of COVID-19 in the County was reported on April 25, 2020 (App. 19;61).

Thus when respondent made his local "disaster" declarations, no such "disaster" existed and he lacked authority under §§ 418.108(a) & (g) of the Act then to order hotels closed or guests evacuated. The Orders were also in clear conflict with Governor Abbott's own Executive Orders which sensibly treated hotels in the County as "essential services" which should remain open so that anyone could access them if precautions were taken to reduce transmission of the virus.

It deserves emphasis that there were *no* scientific or medical facts before Judge Cano from which he could reasonably infer a relationship between closing hotels and slowing a spread of the virus in the County. The patent irrationality of the Orders—this lack of connection between means and ends fueled by a fear of tourists, *not* facts—when coupled with their illegality under state law makes them unable to pass muster under an ordinary rational basis test, i.e., they failed to possess a coherent connection to the legitimate goal of inhibiting a spread of the virus. With no data showing that hotel closures were rationally connected to accomplishing this goal, the unlawful closures were so arbitrary in their creation, scope and administration as to fail this basic constitutional scrutiny.

The ensuing constitutional harm to petitioners' equal protection and substantive due process rights was severe and immediate. They lost business good will as well as substantial income over the course of the closure. Exacerbating the closure's arbitrary nature was respondent's decision to allow *other* businesses in the County providing essential services to these same tourists as well as to other persons traveling in or to the County to remain open; and those who were

allowed to be guests at hotels were just as likely to be infected by—and spread—the virus as the recreational tourists ousted from their hotel rooms.

The Panel, however, employing an overly deferential rational basis test first used in *Jacobson v. Commonwealth*, 197 U.S. 11, 31 (1905), were able to conceive of two explanations to support the Orders' rationality: (1) as for closing hotels while keeping open other businesses, it surmised that this kept down the concentration of recreational guests and visitors in the County; (2) as for allowing healthcare workers and active-duty military members to stay at hotels even though were these just as likely to be infected by— and spread—the virus as the recreational tourists ousted from their hotel rooms, it excused the due process violation because it "bore a rational relationship to slowing the spread of COVID-19 at the pandemic's outset" (App.6; 8-9).

However, *neither of these rationales offered by the Panel is true*. To repeat: there were *no* scientific or medical facts before respondent for him to infer a relationship between closing hotels to recreational guests and slowing a spread of the virus in the County. Closing hotels while keeping open other businesses which provide essential services to those same tourists as well as to other persons traveling about the County does *not* reduce the concentration of recreational guests in the County and thereby inhibit a spread of the virus. Nor does providing hotel rooms to emergency personnel slow the virus' spread where they were just as likely to be infected by— and spread—the virus as the recreational tourists ousted from their hotel rooms or as any other person traveling to and about the

County. In fact, by forcing visitors to the County to seek out other housing and by denying them the safe harbor of a hotel room to socially distance, the Orders had the more likely effect of *increasing* the number of travel-related cases of COVID-19 in the area.

The Panel's rational basis test which nonetheless approved of these Orders is "toothless." It lacks the analytical horsepower necessary to conclude that the Orders rest on fantasy, not fact, about the factors attendant to the spread of COVID-19 in this open, underpopulated area. As such, the Orders are too arbitrary in their creation, scope and administration to survive scrutiny under even an ordinary rational basis test, one which simply asks whether the Orders bear a rational relationship to the legitimate goal of slowing a spread of the virus in the County. Petitioners submit that these Orders bear no such relationship to this legitimate government goal and fail the rational basis test.

This Court has written that "even in a pandemic, the Constitution cannot be put away and forgotten," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, ___; 141 S.Ct. 63, 68 (2020)(*per curiam*); and that "a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists." *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ___, ___; 140 S.Ct. 2603, 2605 (2020) (Alito, J., dissenting from the denial of injunctive relief). Ordinary constitutional scrutiny bespeaks an independent judiciary willing to serve as an active, *not* passive, guarantor of individual liberties, even in an emergency. It cannot abrogate its own constitutional

role in actively applying the rational basis test by instead implementing an overly deferential standard which simply rubber stamps constitutional injury because it takes place in the midst of a public health crisis. See *Calvary Chapel*, *supra*, 591 U.S. at ___; 140 S.Ct. at 2615 (Kavanaugh, J., dissenting from the denial of injunctive relief). Petitioner submits that this is what the Panel has done here.

The question of how robust the rational basis test should be in determining constitutional injury when government actors respond to a public health emergency is a vitally important one of constitutional law warranting the Court's attention. If the Panel's decision is allowed to stand, its overly deferential, watered down version of the rational basis test becomes the law of the Circuit, imposing on plaintiffs the near impossible burden to negative every conceivable basis for the challenged action, however remote or attenuated. This Court should determine whether the rational basis test should be a blunt instrument which ratifies every government action, however unjust, or whether it should be an active, discerning investigation into the actual realities of the subject addressed by the regulation, assessing and weighing the purpose and circumstances of the government's action, regardless of its proffered reasons.

The issue comes within Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with

relevant decisions of th[e] Court." The Court should grant certiorari, identify the Panel's error, restate the true dimensions of the rational basis test, and remand the matter back to the district court for further discovery and trial.

As an initial matter, *Jacobson's* rational basis test—expressly relied upon by the district court and carried forward *sub silentio* by the Panel's decision—is an overly deferential test first used in 1905 to uphold a state statute requiring smallpox vaccination. *Jacobson v. Commonwealth*, *supra*, 197 U.S. at 25;31. Under its test, governmental action can only be actionable under the Fourteenth Amendment if the statute affecting public health or safety has no real or substantial relation to those objects or is, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law...." *Id.* at 31.

Three members of the Court, however, have written that "it is a mistake to take the language of *Jacobson* as the last word of what the Constitution allows public officials to do during the COVID-19 pandemic." *Calvary Chapel*, *supra*, 591 U.S. at ___; 140 S.Ct. at 2608 (Alito, J., dissenting, joined by Thomas and Kavanaugh, JJ.). See also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. at ___; 141 S.Ct. at 70-71 (Gorsuch, J., concurring in the grant of injunctive relief) (questioning *Jacobson's* relevance). Contrast *South Bay United Pentecostal Church v. Newsom*, 591 U.S.___, ___; 140 S.Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in the denial of injunctive relief) (citing *Jacobson's* overly deferential rational basis test).

In addition, some courts and commentators have concluded that *Jacobson's* test has withered over the years in the face of emergent individual liberties and that its overly deferential approach has been superceded by an "ordinary" rational basis test even in emergent situations. This test employs an active investigation of the subject addressed by the regulation, the purpose of the government's action, regardless of its proffered reasons, and full recognition of the need for an independent judiciary to serve as a check on the exercise of emergency government power. See *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897-902 (W.D. Pa. 2020) citing L.F. Wiley & S. I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: the Case Against "Suspending" Judicial Review*, 133 Harv. L. Rev. F. 179, 182-183 (2020); *Bayley's Campground, Inc. v. Mills*, 463 F. Supp.3d 22, 31-32 (D. Me. 2020).

Petitioners submit that *Jacobson's* overly deferential rational basis test is no longer a workable framework for assessing whether government conduct against individuals during a public health emergency is actionable. During an emergent public health crisis like COVID-19, petitioners' right to equal treatment of the laws and to be free from arbitrary government action under the Fourteenth Amendment invokes an ordinary but active rational basis test which would have identified constitutional injury on this record. "Emergency does not create power....[and e]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building Loan Assn. v. Blaisdell*, 290 U.S. 398, 425-426 (1934). *Tex. League of United Am. Citizens v. Hughs*, 978 F.3d 136, 145 n.2 (5th Cir. 2020) ("Neither the United States nor Texas Constitution includes a pandemic exception.").

See also *Tex. Democratic Party I v. Abbott*, 961 F.3d 389, 413 (5th Cir. 2020) (Ho, J., concurring) ("We do not suspend the Constitution during a pandemic.").

Petitioners' equal protection claim that they were singled out by Judge Cano as hotel owners for different treatment than other similarly situated businesses in the County obligated them to show that "there [was] no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Their substantive due process liberty interest to run their hotel business free of arbitrary government action has been long recognized, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Truax v. Raich*, 239 U.S. 33, 41 (1915); and it too obligated petitioners to show that the Orders bore no rational relationship to the legitimate goal of slowing spread of the virus. *Romer v. Evans*, 517 U.S. 620, 631 (1996). See *Simi Investment Co. v. Harris County Texas*, 236 F.3d 240,254 (5th Cir. 2000).

While the rational basis test may be the lowest standard for assessing government acts, "it is not a toothless one...." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). It demands that judges ask certain basic questions such as: what public purpose is being served by the Orders?; who is being harmed by the regulation?; and what is the characteristic of the harmed person which justifies the disparate treatment? See *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 453 (1985). Its rationality "must find some footing in the realities of the subject addressed by the" regulation, *Heller v. Doe*, 509 U.S. 312, 321 (1993); and there must a plausible policy reason for the

classification so that the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

Conversely, if the classification is irrelevant to the achievement of the goal, *Heller*, 509 U.S. at 324; or if the government's explanation for the different treatment is nonsensical or a "fantasy" devoid of facts, *Big Tyme Invs,, L.L.C. v. Edwards*, 985 F.3d 456, 469 (5th Cir. 2021); *Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), the challenged government action is arbitrary, capricious and irrational.

On this summary judgment record, there were absolutely *no* scientific or medical facts before Judge Cano for him to infer rationally a relationship between closing hotels to recreational guests and slowing a spread of the virus in the County, only the speculations of a pediatrician with no training in infectious diseases or epidemiology but with an irrational fear of tourists. Moreover, allowing *other* businesses in the County providing essential services to those same tourists as well as to other persons traveling to the County to remain open, as respondent did, was a decision at cross purposes with the assumed goals of discouraging tourism or slowing a spread of the virus.

Nor did providing hotel rooms to emergency personnel slow the virus' spread where they were just as likely to be infected by— and spread—the virus as the recreational tourists ousted from their hotel rooms or as any other person traveling to and about the County. In fact, by forcing visitors to the County to seek out other housing and by denying them the safe

harbor of a hotel room to socially distance, the Orders had the more likely effect of *increasing* the number of travel-related cases of COVID-19 in the area.

Judge Cano's Orders operated as a sledgehammer on hotels in the County when at best a scalpel was needed, a government overreach which caused petitioners constitutional injury. An active, probing investigation into the actual realities of the real risk factors which COVID-19 presented in this open, underpopulated area, regardless of respondent's proffered reasons, would have exposed his explanation for the Orders as nonsensical, devoid of facts, and irrational. Yet this is precisely what an ordinary rational basis test demands of judges and this is what the Panel and the district court failed to provide petitioners.

Other courts have seen fit to eschew *Jacobson's* overly deferential approach and apply a robust but still ordinary rational basis test to find COVID-19 restrictions violative of both equal protection and due process rights. See, e.g., *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d at 923-928 (limitation on size of gatherings for certain "non-life-sustaining" businesses; due process and equal protection claims upheld); *Paradise Concepts, Inc. v. Wolf*, 482 F. Supp.3d 365, 372 (E.D. Pa. 2020) (equal protection claim justified where different treatment of businesses not justified); *DiMartile v. Cuomo*, 478 F.3d 372, 386-388 (N.D.N.Y. 2020) (50-person limit on non-essential gatherings, including weddings, while capping ordinary use dining at 50% of a venue's maximum capacity violates equal protection); *League of Indep. Fitness Facilities and Trainers Inc. v. Whitmer*, 468 F. Supp.3d 940, 947-951 (W.D. Mich. 2020)

(*Jacobson* test still invalidates restrictions on indoor gyms as a denial of equal protection); *Wis. Legislature v. Palm*, 942 N.W.2d 900, 917-918;923-924 (Wis. 2020) (emergency stay-at-home order closing all non-essential businesses exceeded executive's rulemaking authority, is illegal and unenforceable).

Finally, Chief Justice Roberts' concurring opinion in *South Bay United Pentecostal Church v. Newsom*, 592 U.S.___, ___; 141 S.Ct. 716, 716-717 (2021) (concurring in partial grant of injunctive relief), makes clear that he disagrees with the notion that State officials are entitled to broad judicial deference in the face of irrational government regulation during a public health emergency. *Id.* He wrote that California's determination that the maximum number of adherents who can safely worship in a cavernous cathedral is zero "appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake." *Id.* at 717. He concluded:

> I adhere to the view that the Constitution principally entrusts the health of the people to the politically accountable officials of the States. But the Constitution also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by tenure...but because they are. *Deference, though broad, has its limits.*

Id. (emphasis supplied). See also *Calvary Chapel, supra*, 591 U.S. at ___; 140 S.Ct. at 2615 (Kavanaugh, J., dissenting from denial of injunctive relief) (cautioning against an unduly deferential approach to government's exercise of emergency powers).

Petitioners submit that even in a pandemic, the ordinary rational basis test should consist of an active, probing investigation of the subject addressed by the regulation, the purpose of the government's action, regardless of its proffered reasons, and full recognition of the need for an independent judiciary in order to serve as a check on the exercise of the government's emergency power. The Panel's failure to afford petitioners this kind of ordinary rational basis test warrants the grant of certiorari so that the Court can redefine the dimensions of the rational basis test before remanding the matter back to the district court for further discovery and trial.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter back to the district court for the Western District of Texas, Pecos Division, for further discovery and a trial on the merits of the petitioners' claims; or provide petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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United States Court of Appeals, Fifth Circuit.

J. P. BRYAN; Mary Jon Bryan; Gage Properties, Inc.; Gage Hotel, L.P., Plaintiffs—Appellants,
v.
County Judge Eleazar R. CANO, Defendant—Appellee.

No. 22-50035

FILED November 8, 2022

Appeal from the United States District Court for the Western District of Texas, USDC No. 4:20-CV-25, Walter David Counts, III, U.S. District Judge

Attorneys and Law Firms

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Before Jones, Southwick, and Ho, Circuit Judges.

Opinion

Per Curiam:[*]

Appellants, owners of the Gage Hotel in Marathon, Texas, sued County Judge Eleazar Cano in

his official capacity for shutting down their hotel for over a month during the Covid-19 pandemic. The district court granted summary judgment in favor of Judge Cano. We affirm.

I. BACKGROUND

Appellants own and operate the historic Gage Hotel in Brewster County, Texas, home of Big Bend National Park. Eleazar Cano is the county judge of Brewster County, and, as such, serves as the presiding officer of the county's governing body. *See* Tex. Loc. Gov't Code § 81.001.

By March 2020, Covid-19 had spread to Texas. In response, Governor Greg Abbott declared "a state of disaster for all counties" on March 13. Four days later, Judge Cano declared a local state of disaster for Brewster County, although no Covid-19 cases had been reported in the county or in any adjacent county. Both Governor Abbott and Judge Cano acted pursuant to their respective powers under the Texas Disaster Act of 1975. *See* Tex. Gov't Code Ann. §§ 418.014, 418.108.

On March 20, 2020, Judge Cano amended his declaration to order all hotels, motels, short-term rentals, RV parks, and campgrounds to vacate any guest not using the room or site as a primary residence. He soon amended his declaration again to allow active-duty military, law enforcement, national guard, emergency service personnel, and healthcare professionals to use county hotels, motels, and short-term rentals. Lodging businesses remained closed to all "recreational travelers." On March 25, Judge Cano declared another local state of disaster and maintained the restrictions on hotels, motels, and the like. On March 31, Governor Abbott issued an executive order

prohibiting, in relevant part, local officials from restricting essential services as defined by the Department of Homeland Security. The order did not mention hotels or similar businesses. By a series of supplemental orders beginning April 1, Judge Cano extended the hotel restrictions through April 30, 2020. Brewster County's first confirmed Covid-19 case appeared on April 25.

On April 10, 2020, J.P. Bryan, an owner of the Gage Hotel, brought suit under 42 U.S.C. § 1983 seeking declaratory relief against Judge Cano for allegedly violating his constitutional rights. Bryan then amended his complaint twice to add the remaining owners of the Gage Hotel as plaintiffs, specify that Judge Cano was sued in his official capacity as county judge, request money damages in addition to declaratory relief, and refine his claims.

The district court granted summary judgment for Judge Cano on all counts. The Gage Hotel owners appeal the judgment and the court's exclusion of their expert witness's affidavit.

II. DISCUSSION

"This court reviews the district court's grant of summary judgment de novo, applying the same standards as the district court." *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009). A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). We review the exclusion of expert testimony for abuse of

discretion. *Sims v. Kia Motors of Am., Inc.*, 839 F.3d 393, 400 (5th Cir. 2016).

Appellants raise six arguments on appeal. The first three relate to Appellants' equal protection, due process, and unreasonable seizure claims. Appellants' fourth argument is presented on appeal as an *ultra vires* claim, that is, that Judge Cano's orders exceeded his statutory authority, but below it was framed as another due process violation. Appellants' fifth argument contests the district court's judgment to the extent it dismissed any of their claims on sovereign immunity grounds. We assume *arguendo* that Judge Cano acted as county official and, as such, does not enjoy the state's immunity. *See Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011) (assuming that defendants were not immune from suit and proceeding to rule for the defendants on the merits). Finally, appellants challenge the expert witness affidavit's exclusion.

A. Equal Protection & Due Process

Appellants contend that Judge Cano violated their rights to equal protection and due process by arbitrarily and irrationally ordering the near closure of all hotels in Brewster County. The district court held that Appellants failed to refute Judge Cano's proffered reasons for his orders, supported by evidence, which bore a rational relationship to a legitimate governmental purpose.

1. Equal Protection

To establish their equal protection claim, Appellants must first show that "two or more classifications of similarly situated persons were

treated differently" under Judge Cano's orders. *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 468 (5th Cir. 2021) (internal quotation omitted). The district court found that the orders arguably treated similar categories of guests, businesses, and employment classifications differently. Appellants concede that their equal protection challenge, implicating neither a suspect class nor a fundamental right, is reviewed according to the rational basis test.[1] Under this standard, a governmental classification "will be upheld 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' " *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 239 (5th Cir. 2011) (quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642 (1993)). But a "necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational." *Id.* (internal quotation omitted). For example, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 3258 (1985).

Appellants do not dispute that Judge Cano's stated purpose for his orders—the public health of Brewster County—is legitimate. Rather, Appellants argue that closing hotels to recreational guests but permitting other businesses to serve the same clientele was arbitrary and irrational. Further, Appellants criticize as particularly arbitrary the distinction drawn between J.P. Bryan and other property owners, whereby Bryan was prohibited from using his secondary residence in the Gage Hotel, but others could

occupy secondary residences, so long as they were not in a hotel.[2]

One rationale for treating hotels differently from other businesses was to limit the concentrated presence of visitors and tourists in the county. Judge Cano and his advisers considered that an important means to the end of public health for several reasons: March and April are popular months for tourism in Brewster County; visitors were retreating to Texas's rural areas to escape big city quarantines; the county had limited means to test residents or visitors for Covid-19; and the county's regional medical center did not have the capacity to care for the anticipated numbers of critically ill patients. Further, a rationale for restricting the class of guests permitted to stay at hotels was to keep recreational guests away while giving emergency service personnel a place to stay. And presumably, the exception for guests whose hotel room was their primary residence existed to avoid evicting people from their homes.

Limiting restrictions to hotels and similar businesses, where guests are more likely to stay for a period of days, during the first weeks of a global pandemic, is not so attenuated from the asserted goal of public health as to render the classification irrational. *See City of Cleburne*, 473 U.S. at 446, 105 S. Ct. at 3258. To be sure, these restrictions were overinclusive in some ways and underinclusive in others. Not every guest turned away from a hotel was a tourist or big city refugee. Nor were visitors prohibited entirely from staying in the county. And prohibiting owners from staying as guests in their own hotel, if that is what happened, may have been a bit overinclusive. But these imperfections do not render Judge Cano's orders arbitrary and irrational. *See Vance v. Bradley*, 440 U.S.

93, 108, 99 S. Ct. 939, 948 (1979) (noting "perfection is by no means required" and that over and underinclusive classifications are permissible).

The Appellants' equal protection claim fails as a matter of law.

2. Due Process

Appellants' due process claim fares no better under rational basis review.[3] To show that they were arbitrarily deprived of their liberty interests in operating their hotel at full capacity, Appellants must "negative every conceivable basis which might support" Judge Cano's orders. *F.C.C. v. Beach Comm's, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993) (internal quotation omitted).

As an initial matter, counts I and III of Appellants' third amended complaint allege that Judge Cano acted *ultra vires* and thus trampled on Appellants' due process rights. On appeal, Appellants insist that Judge Cano's orders were arbitrary, capricious, and unlawful because no disaster, as defined by the Texas Disaster Act, existed at the time. In other words, declaring a local state of disaster where none existed was "per se arbitrary and irrational, and, as such, a violation of substantive due process." *Smith v. City of Picayune*, 795 F.2d 482, 488 (5th Cir. 1986). In the same vein, they label Judge Cano's April declarations as irrational on the ground that they contradicted Governor Abbott's March 31 executive order, which prohibited local authorities from restricting access to essential services.

These arguments fail as a matter of law. Allegations that Judge Cano violated state law are "alone insufficient to state a constitutional claim under

the Fourteenth Amendment." *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996). To hold otherwise would "improperly bootstrap state law into the Constitution." *Stern v. Tarrant Cnty. Hosp. Dist.*, 778 F.2d 1052, 1056 (5th Cir. 1985) (en banc); *see also Lindquist v. City of Pasadena*, 669 F.3d 225, 235 (5th Cir. 2012) (same).[4]

Appellants also attempt to demonstrate irrationality and arbitrariness by submitting evidence that no cases of Covid-19 were reported in Brewster County or in any adjacent county at the time of Judge Cano's orders. They posit that there can be no reason for imposing restrictions on local businesses without scientific data proving that the virus was on the county's doorstep. Appellants contend further that permitting healthcare workers and active-duty military members to stay at hotels but not recreational guests was arbitrary.[5]

At its heart, Appellants' argument is that Judge Cano's declarations "were based on fear, not facts." True, Judge Cano's declarations would not survive rational basis review if propped up by fantastic or nonsensical rationales or "betrayed by the undisputed facts." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013); *see also Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 253 (5th Cir. 2000) ("a nonexistent park used by County officials to interfere with private property interests is clearly arbitrary"). But Judge Cano's declarations are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Comm's, Inc.*, 508 U.S. at 315, 133 S. Ct. at 2102. As discussed above, restricting the operations of key players in the travel industry like hotels in order to limit the presence of out-of-county visitors bore a

rational relationship to slowing the spread of Covid-19 at the pandemic's outset. Appellants have not negated this conceivable basis for the order.

B. Fourth & Fourteenth Amendment Seizure

The district court reasoned that Appellants failed "to present any legal analysis or factual allegations in support" of their Fourth and Fourteenth Amendment claims. Appellants respond that summary judgment may not be granted by default based only on a deficient response, and in any event, their response was not deficient.

Certain principles are settled. A "motion for summary judgment cannot be granted simply because there is no opposition." *Hibernia Nat. Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). But "a court may grant an unopposed summary judgment motion if the undisputed facts show that the movant is entitled to judgment as a matter of law." *Day v. Wells Fargo Bank Nat. Ass'n*, 768 F.3d 435, 435 (5th Cir. 2014). Also, the party opposing summary judgment "cannot discharge its burden by alleging legal conclusions." 10A CHARLES ALAN WRIGHT & ALAN R. MILLER, FED. PRAC. & PROC. § 2727.2 (4th ed. Apr. 2022 update). Indeed, "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985) (quoting WRIGHT & MILLER, § 2738).

In this case, the district court did not grant summary judgment by default, because it reasonably concluded that the movant Cano carried his burden

while the nonmovants failed to demonstrate a material fact dispute.

Under the Fourth Amendment, "[a] seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009) (internal quotation omitted). And "by its express text, the amendment prohibits only those searches and seizures that are unreasonable in the particular circumstances in which they are performed." *United States v. York*, 895 F.2d 1026, 1028 (5th Cir. 1990).

Even assuming a seizure occurred, the same summary judgment evidence submitted by Judge Cano to show that his restrictions on hotel use bore a rational relationship to public health also shows that the restrictions were reasonable given the circumstances. The only additional evidence Appellants submit in opposition is the declaration of J.P. Bryan, which asserts that Judge Cano's "arbitrary orders" "constituted an unreasonable interference with and deprivation of" his property. These conclusory statements are insufficient to create a material fact dispute.

C. Expert Witness Exclusion

The district court held that Appellants' expert Dr. Alozie opined about a pure question of law: whether a statutory disaster existed in Brewster County. Indeed, Federal Rule of Evidence 704 is not "intended to allow a witness to give *legal* conclusions." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); *see also Snap-Drape, Inc. v. C.I.R.*, 98 F.3d 194, 198 (5th Cir. 1996); *Alldread v. City of Grenada*, 988 F.2d 1425,

1436–37 (5th Cir. 1993). Although he has excellent professional credentials, Dr. Alozie stated in his two-sentence opinion only that "a statutory disaster did not exist ... because there were no reported cases of COVID-19 in Brewster County [or in any of the surrounding counties] and no imminent threat of a COVID-19 epidemic in Brewster County." This certainly reads as a legal conclusion concerning Texas law notwithstanding Appellants' effort to characterize it as a statement of fact. At the very least, the district court did not abuse its discretion in holding as much.

For the foregoing reasons, the district court's judgment is AFFIRMED.

Footnotes

*Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

1When reviewing the constitutionality of Judge Cano's orders, the district court purported to apply the *Jacobson* test, which asks whether an emergency order "has no real or substantial relation" to public health "or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 363 (1905). But when doing its work, the court properly employed the traditional rational basis standard of review. *See Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 467–68 (5th Cir. 2021) (introducing *Jacobson* and then analyzing the equal protection claim under rational basis); *see also id.* at 471 (Willett, J., concurring) (The *Jacobson* test "is just a roundabout way of conducting a conventional constitutional analysis.").

2When questioned about this restriction at oral argument, counsel for Judge Cano asserted that the orders applied only to "guests." Thus, they did not reach J.P. Bryan and other non-guest owners. Judge Cano did not render this opinion earlier in the dispute.

3Appellants allege violations of their economic liberty interests, to which rational basis review applies. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 721, 130 S. Ct. 2592, 2606 (2010).

4Contrast this case with *Stem v. Gomez*, 813 F.3d 205 (5th Cir. 2016), where this court considered the appellant's state law claim brought under the *ultra vires* exception to sovereign immunity because it was a *state law claim*, not a due process claim. Here, Appellants have not raised state law claims, as their counsel confirmed at oral argument. The separate due process claim presented in *Stem* implicated state law only to the extent it defined the appellant's constitutionally protected property interest. *Id.* at 210–11.

5Appellants cite in support two district court cases from other circuits: *League of Indep. Fitness Facilities & Trainers v. Whitmer*, 468 F. Supp. 3d 940, 950–51 (W.D. Mich. 2020), and *County of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020). These cases misplaced the burden of production. In the first, the governor's classification of gyms as dangerous failed rational basis review because she could not muster "a single supporting fact, to uphold their continued closure." *League of Indep. Fitness Facilities & Trainers*, 468 F. Supp. 3d at 950. In the second, the state's closure of "non-life-sustaining" businesses failed rational basis scrutiny because the state "pick[ed] winners" without any "objective definitions and measurable criteria."

Cnty. of Butler, 486 F. Supp. 3d at 927. During rational basis review, it is the plaintiff who has the "burden to negative every conceivable basis which might support" "the rationality of the legislative classification." *Beach Comm's, Inc.*, 508 U.S. at 315, 113 S. Ct. at 2102 (internal quotations omitted) (emphasizing that "we never require a legislature to articulate its reasons for enacting a statute"). For that reason, if for no other, these cases serve as poor legal support.

No. PE: 20-CV-025-DC
12/15/2021
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

J. P. BRYAN, MARY JON BRYAN,
GAGE PROPERTIES, INC., and
GAGE HOTEL L.P.,

Plaintiffs,

v.

COUNTY JUDGE ELEAZAR R. CANO,

Defendant.

ORDER

The Court enters this Order to address a number of pending motions in this case, including those that were referred to United States Magistrate Judge David B. Fannin for findings of fact, conclusions of law, and recommendations for disposition pursuant to 28 U.S.C. 636, as well as others on file with the Court. Before the Court are the following matters:

i. Defendant Brewster County Judge Eleazar R. Cano's ("Defendant" or "Judge Cano") Motion to Strike/Exclude the Testimony of Plaintiffs J. P. Bryan, Mary Jon Bryan, Gage Properties, Inc., and Gage Hotel, L.P.'s (collectively, "Plaintiffs") expert Ogechika Karl Alozie, M.D. (Doc. 60),

Plaintiffs' Memorandum in Response to Defendant's Motion to Exclude (Doc. 67), Defendant's Reply to Plaintiffs' Memorandum in Response to Defendant's Motion to Strike/Exclude (Doc. 74), the Order Granting Defendant's Motion to Strike/Exclude the Testimony of Plaintiffs' Expert Ogechika Karl Alozie, M.D. (Doc. 77), Plaintiffs' Appeal from Order Granting Motion to Strike/Exclude the Testimony of Plaintiffs' Expert Ogechika Karl Alozie, M.D. (Doc. 82), Defendant's Response to Plaintiffs' Appeal from Order Granting Motion to Strike/Exclude the Testimony of Plaintiffs' Expert Ogechika Karl Alozie, M.D. (Doc. 83); and Plaintiffs' Reply (Doc. 84);

ii. Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 50), Plaintiffs' Response to Defendant's Motion to Dismiss (Doc. 51), Defendant's Reply to Plaintiff's Response to the Motion to Dismiss (Doc. 52), the Report and Recommendation of the U.S. Magistrate Judge (Doc. 80) recommending Defendant's Motion to Dismiss be granted, Plaintiffs' Objections to Report and Recommendations of the U.S. Magistrate Judge (Doc. 81); Defendant's Response to Plaintiffs' Objections (Doc. 85); and Plaintiffs' Reply (Doc. 86); and

iii. Defendant's Motion to Dismiss and Motion for Summary Judgment (Doc. 54), Plaintiffs' Memorandum in Response to Defendant's Motion to Dismiss (Doc. 65), Plaintiff's Memorandum in Response to Defendant's

Motion for Summary Judgment (Doc. 66), and Defendant's Reply to Plaintiffs' Memorandum in Response to Defendant's Motion for Summary Judgment (Doc. 73).

On November 1, 2021, the U.S. Magistrate Judge issued a Report (the "R&R") recommending that Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint (Doc. 50) be granted. (Doc. 80). On December 8, 2021, the Court rejected the R&R on the basis that the political question doctrine was not a jurisdictional bar to Plaintiffs' claims. (Doc. 87). On December 10, 2021, the Court denied Defendant's Motion to Dismiss on the application of the political question doctrine for the same reasons stated in the Court's December 8, 2021 Order. The remaining jurisdictional issues shall be addressed in conjunction with Defendant's Motion for Summary Judgment, which incorporates Defendant's Motion to Dismiss.

Having assessed the Order Granting Motion to Strike/Exclude the Testimony of Plaintiffs' Expert Ogechika Karl Alozie (Doc. 83), and the parties' pending motions, the Court determines that Plaintiffs' objections to the Order Granting Motion to Strike/Exclude the Testimony of Plaintiffs' Expert Ogechika Karl Alozie should be **OVERRULED**, Defendant's Motion for Summary Judgment should be **GRANTED** (Doc. 54), and Plaintiffs' claims against Defendant should be **DISMISSED**.

I. BACKGROUND

For the past two years, the world has dealt with a public health crisis unlike any other in the past century. On January 21, 2020, the first case of COVID-

19 was confirmed in the United States.1 Since then, COVID-19 has spread throughout the country, infecting at least 49,002,475 individuals, and causing 785,655 deaths.2 The State of Texas has confirmed 4,352,098 cases of COVID-19, and 74,198 deaths.3 In the face of this pandemic, Governor Greg Abbott, using the emergency powers granted him by the state legislature, issued a series of executive orders designed to slow the spread of disease and protect the health of Texas residents, pursuant to Chapter 418 of the Texas Government Code, the Texas Disaster Act of 1975.

On March 13, 2020, Governor Abbott issued a proclamation "certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas." (Doc. 48-1 at 2). On March 17, 2020, Defendant Bryan Cano, County Judge of Brewster County, Texas, issued a Declaration of Local State of Disaster due to Public Health Emergency. (Docs. 48 at 4; 48-1 at 16). On March 19, 2020, Governor Abbott issued Executive Order No. GA-08, "which directed Texans to avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors." (Doc. 48-1 at 21).

On March 20, 2020, Judge Cano modified the March 17 Declaration by ordering "all hotels/motels and short-term rentals [to] close and vacate their guests beginning March 23, 2020 through April 2, 2020" with limited exceptions for those using a rental unit as a primary residence. (*Id.* at 23). On March 23, 2020, Judge Cano issued an Order modifying the March 17 Declaration to allow permanent residents, guests, and others to access hotels, motels, and short-term rentals if they fell in one of three categories: (a) active-duty

military, law enforcement, and national guard reserve, (b) emergency service personnel to support city, county, state, Sul Ross State University, and school district operations or customers, or (c) healthcare professionals and employees. (*Id.* at 25). Judge Cano then signed and promulgated a new Declaration of Local State of Disaster to Public Health Emergency on March 25, 2020, which was approved by the Brewster County Commissioners and followed by another Order. (*Id.* at 27, 31).

On March 31, 2020, Governor Abbott issued Executive Order GA-14, which encouraged non-essential workers to work remotely where possible and provided that individuals were not prohibited from accessing "essential services or engaging in essential daily activities . . . so long as the necessary precautions are maintained to reduce the transmission of COVID-19[.]" (*Id.* at 34, 36). Judge Cano signed an Amended Order on April 1, 2020, that was identical to the March 23 Order except that it extended hotel closures through April 9, 2020. (*Id.* at 39). Judge Cano similarly signed an Order Extending Amended Order on April 7, 2020, that extended the hotel, motel, and short-term rental closures in the March 23 Order until April 30, 2020. (*Id.* at 41). Judge Cano signed an Order Extending Supplemental Order on April 7, 2020, that banned all travel within Brewster County except for purposes of essential activities. (*Id.* at 43).

On April 10, 2020, Plaintiff J. P. Bryan brought this suit for declaratory judgment against Judge Cano for allegedly violating his constitutional rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution and the

privileges and immunities clause of the Fourteenth Amendment to the United States Constitution, following the closure of J. P. Bryan's business, the Gage Hotel, in Marathon, Brewster County, Texas. (Doc. 1). Subsequently, J. P. Bryan joined Gage Hotel co-owners Mary Jon Bryan, his wife, Gage Properties, and Gage Hotel, L.P. as Plaintiffs in this suit. (Doc. 48).

On April 27, 2020, Governor Abbott issued Executive Order GA-18, which began the reopening of certain businesses in Texas on a restricted basis. (Doc. 48-1 at 50). The first case of COVID-19 in Brewster County was reported on April 25, 2020. (*Id.* at 60). Judge Cano issued a News Release on April 30, 2020, stating that all Brewster County Executive Orders would expire on April 30, 2020, but continuing the declaration of local disaster. (*Id.* at 57).

Plaintiffs subsequently amended their claims to state 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 (Doc. 48 ¶¶ 35–40);

2. Violation of due process under the Fourteenth Amendment to the United States Constitution based on Defendant's Orders Closing Hotels (*Id.* ¶¶ 41–43);

3. Violation of due process under the Fourteenth Amendment to the United States Constitution based on the alleged conflict between

Defendant's Orders Closing Hotels and Governor Abbott's Executive Orders (*Id.* ¶¶ 44–46);

4. Violation of due process under the Fourteenth Amendment to the United States Constitution based on Interference with Ownership Rights (*Id.* ¶¶ 47–51);

5. Violation of equal protection under the Fourteenth Amendment to the United States Constitution (*Id.* ¶¶ 52–53);

6. Unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution (*Id.* ¶¶ 54–59).

Plaintiffs also seek declaratory relief concerning "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 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.* ¶ 61).

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if it might affect the outcome of the suit

under the governing law, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *United States v. Renda*, 709 F.3d 472, 478 (5th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact." *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden then shifts to the nonmoving party to point to "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *Brown v. City of Hous., Tex.*, 337 F.3d 539, 541 (5th Cir. 2003).

Additionally, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis in original) (quoting *Anderson*, 477 U.S. at 247–48). "Where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate." *Duron v. Albertson's, LLC*, 560 F.3d 288, 291 (5th Cir. 2009) (quoting *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 199 (5th Cir. 1999)).

In reviewing the record, "the court must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weigh the evidence." *Reeves Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000). However, the court may not "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

III. DISCUSSION

A. Sovereign Immunity

"Section 1983 provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by the Constitution." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120 (1992). States and "municipalities often spread policymaking authority among various officers and official bodies." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Thus, as an initial matter, the Court must determine the status of Judge Cano as Brewster County policymaker under Section 1983. In other words, does Judge Cano make policy for Brewster County, represent the State of Texas, or act in a personal capacity?

The Texas Constitution provides for county courts in its judiciary article. The Constitution vests the State's judicial power "in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justice of the Peace, and in such other courts as may be provided by law." Tex. Const.

Art. V, § 1, § 15 ("There shall be established in each county in this State a County Court."). The County Commissioners Court, an administrative body made up of Brewster County-elected commissioners and a presiding County Judge, sets the county judge's salary, fills any county court vacancy, and provides the county court's facilities, equipment, and personnel such as clerks, sheriffs, and lawyers. Tex. Govt. Code Ann. §§ 25.0005–10; Tex. Cons. Art. V, § 18(b). The presiding judge is the county judge of the constitutional county court. Tex. Cons. Art. V, §§ 15–18. The Brewster County Judge is elected by Brewster County voters. Tex. Cons. Art. V, § 15.

"The county judge of a Texas county may possess [§ 1983 municipal] policymaking authority in some matters . . . such as presiding over the county's legislative body, preparing the county budget, and conducting elections, with 'virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute' and accountability to 'no one other than the voters for his conduct therein.'" *Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)). In *Familias Unidas v. Briscoe*, the United States Court of Appeals for the Fifth Circuit examined a county judge's implementation of a state statute that required an organization to disclose its members. The court held that this decision represented the state's, not the county's, policy. 619 F.2d at 404. But the court noted that the "unique structure of county government in Texas" gives county judges "numerous executive, legislative and administrative chores in the day-to-day governance of the county." *Id.*

The Texas configuration of the county courts means that, "at least in those areas in which [a judge], alone, is the final authority or ultimate repository of county power," a county judge may be "a policymaker whose official conduct and decisions could be attributed to the county under section 1983." *Bigford*, 834 F.2d at 1222. In other words, the entity for which the County Judge acts as policymaker—Brewster County or Texas—turns on what policy is at issue and on how state or county law describes which entity or office has power or control over that issue.

Chapter 418, also known as the Texas Disaster Act of 1975 (the "Act"), "is a comprehensive, detailed continuity-of-government framework that carefully allocates powers, duties, and responsibilities across various levels of state government and multiple agencies." *State v. El Paso Cty.*, 618 S.W.3d 812, 831–32 (Tex. App.—El Paso, no pet.). The Act "clarify[ies] and strengthen[s] the roles of the governor, state agencies, the judicial branch of state government, and local government in prevention of, preparation for, response to, and recovery from disasters." Tex. Gov. Code Ann. § 418.002(4). Under the Act, the governor of Texas is permitted to declare a "state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." *Id.* § 418.014(a). The Act defines "disaster" as being an "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, [or] other public calamity requiring emergency action." *Id.* at 418.004.

In Texas, county judges are the presiding officers of the Commissioners Court, which is the governing body of a given county. Tex. Gov. Code Ann. § 81.001(b). The "presiding officer of the governing body of a political subdivision may declare a local state of disaster." *Id.* at 418.108(a). The county judge, as the presiding officer, upon such declaration may "act on [his] own," without "tether [of] this power of local officials to the [Texas] Governor." *Id.*; *El Paso Cty.*, 618 S.W.3d at 836. County judges therefore have the authority to "manage disaster areas under their jurisdiction and to declare disasters and act autonomously under certain enumerated circumstances without the need to seek preapproval from the [Texas] Governor." *Id.*

Further, Tex. Govt. Code Ann. § 418.0105(a) provides that county judges are designated as emergency management directors for their areas and may exercise the powers granted to the governor of Texas, including the authority to control the occupancy of premises under Tex. Govt. Code Ann. § 418.0105(b). When the governor of Texas issues a disaster declaration pursuant to Section 418.018 authority, county judges become emergency management directors for their jurisdiction and serve as the governor's designated agent. Tex. Govt. Code Ann § 418.1015; *Cty. of El Paso*, 618 S.W.3d at 820.

1. County Judge as Representative of Brewster County

First, the Court must determine whether Judge Cano as a governmental official is a final policymaker for the local government in a particular area or on a

particular issue. *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 (1997). If Judge Cano acted pursuant to his standalone authority under Section 418.108, Judge Cano acted as a policymaker for Brewster County relying on the grant of inherent authority in Section 418.108 to issue his declarations and orders. *El Paso Cty.*, 618 S.W.3d at 821. In declaring county-wide procedures in response to the COVID-19 pandemic, Judge Cano acted at least in part on behalf of Brewster County. Thus, to the extent Judge Cano had discretion to, and did, promulgate orders and declarations for combating COVID-19 in Brewster County, he was acting on the County's behalf and is not entitled to sovereign immunity on such claims.

"[A] municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker" for purposes of Section 1983 liability. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); *see also Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (distinguishing a county judge's "judicial duties" from his "executive, legislative and administrative chores in the day-to-day governance of the county."). Though a judge is not liable when "acting in his or her judicial capacity to enforce state law," *Moore*, 958 F.2d at 94, county judges may be liable under Section 1983 as policymakers for the municipality.

Liability under Section 1983 attaches to local government officers "whose [unlawful] decisions represent the official policy of the local governmental unit." *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Whether an officer has been given this authority is "a question of state law." *Pembaur v. City of*

Cincinnati, 475 U.S. 469, 483 (1986). Specifically, Texas Government Code Section 418.108 provides as follows:

> (a) Except as provided by Subsection (e), **the presiding officer of the governing body of a political subdivision may declare a local state of disaster.**
>
> (b) A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable.
>
> (c) An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary, the county clerk, or the joint board's official records, as applicable.
>
> (d) A declaration of local disaster activates the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. The appropriate preparedness and response aspects of the plans are activated as provided in the plans and take effect immediately after the local state of disaster is declared.
>
> (e) The chief administrative officer of a joint board has exclusive authority to declare that

a local state of disaster exists within the boundaries of an airport operated or controlled by the joint board, regardless of whether the airport is located in or outside the boundaries of a political subdivision.

(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) **The 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 of premises in that area**.

(h) For purposes of Subsections (f) and (g):

(1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and

(2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

> (i) A declaration under this section may include a restriction that exceeds a restriction authorized by Section 352.051, Local Government Code. A restriction that exceeds a restriction authorized by Section 352.051, Local Government Code, is effective only:
>
> (1) for 60 hours unless extended by the governor; and
>
> (2) if the county judge requests the governor to grant an extension of the restriction. Tex. Govt. Code Ann. § 418.108 (emphasis added).

In this case, the Court finds that Defendant was acting, at least in part, pursuant to his independent Section 418.108 authority. Defendant, as county judge of Brewster County, was given statutory authority under Section 418.108(a) to declare a local state of disaster. Tex. Govt. Code Ann. § 418.108(a). Defendant exercised this authority in issuing his March 17 Declaration, four days after Governor Abbott issued the March 13 proclamation certifying that "COVID-19 poses an imminent threat of disaster" pursuant to Section 418.014 and specifically identifying Section 418.108 as the section of the Act under which he was acting. (Doc. 48-1 at 16–17).

Through his orders and declarations, Defendant declared a local state of emergency, closed hotels and motels, and limited their re-opening to certain individuals based upon employment and permanent housing status. (*Id.* at 16–17, 22–23). Judge Cano was entitled to "reasonably rely on [the] grant of inherent

authority in § 418.108 to issue his order." *El Paso Cty.*, 618 S.W.3d at 821. To the extent Judge Cano promulgated orders and declarations pursuant to his authority under Section 418.108 that were not mandated by the State of Texas or statutes, Judge Cano acted as a final policymaker for Brewster County and is not entitled to sovereign immunity on such claims.

2. County Judge as Representative of State of Texas

Second, the Court must determine whether Judge Cano represented the State of Texas. If Judge Cano acted pursuant to Governor Abbott's proclamations and executive orders, Judge Cano acted as Governor Abbott's designated agent and is entitled to sovereign immunity protection. Further, to the extent Judge Cano implemented or enforced Governor Abbott's proclamations and executive orders, Judge Cano is not responsible for promulgating such policy on behalf of the State of Texas. In carrying out his duties under Governor Abbott's proclamations and executive orders, and directly enforcing—or allegedly contravening—Governor Abbott's proclamations and executive orders, Judge Cano acted on behalf of the State of Texas and sovereign immunity bars any related claims.

"[S]uits against States and their agencies . . . are barred regardless of the relief sought" by the Eleventh Amendment to the United States Constitution. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Ex parte Young*, 209 U.S. 123 (1908); *Cory v. White*, 457 U.S. 85 (1982)).

There is a narrow exception to Eleventh Amendment immunity for suits brought against individuals in their official capacity, as agents of the state or a state entity if the relief sought is injunctive in nature and prospective in effect. *See Aguilar v. Texas Dept. of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir.1998) (citing *Young*, 209 U.S. at 123). Plaintiffs do not seek injunctive relief in the present case.

According to Judge Cano, following Governor Abbott's proclamation of a state of disaster in March of 2020, Judge "Cano serve[d] as the governor's designated agent in the administration and supervision of duties under Chapter 418" of the Texas Code. (Doc. 50 at 18). As noted above, whenever the Governor of Texas issues a disaster declaration pursuant to the Governor's Section 418.018 authority, county judges become emergency management directors for their jurisdiction and therefore serve as the Governor's designated agent. Tex. Gov. Code Ann § 418.1015; *see also Cty. of El Paso*, 618 S.W.3d at 820. Judge Cano claims Governor Abbott did so, and therefore, Judge Cano was given sufficient authority to enact his orders and declarations. (Doc. 50 at 11).

The Court finds that Plaintiffs' claims against Judge Cano in his official capacity fall under the *ultra vires* exception and are not initially barred.[4] *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009). Despite clearing the hurdle related to sovereign immunity, Plaintiffs' claims against Judge Cano should nonetheless be dismissed for the reasons explained below.

i. Monetary Damages

Any suit against a state official in his official capacity for money damages is due to be dismissed because he is entitled to Eleventh Amendment immunity. *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002). A state is entitled to sovereign immunity and may not be sued unless it consents to suit or unless Congress abrogates sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–99 (1984). Suits brought pursuant to 42 U.S.C. § 1983, like the one here, are no exception to the rule. *Quern v. Jordan*, 440 U.S. 332, 342 (1979). This immunity extends to state officials for claims brought against them in their official capacities for monetary damages because an award of damages would be paid by the state, thus making the state a "real, substantial party in interest." *Pennhurst*, 465 U.S. at 101.

In this case, Defendant—County Judge of Brewster County, Texas—is a state official who acted with agency authority granted under Section 418.1015, which allows county judges such as Judge Cano to "reasonably rely on [the] grant of inherent authority in § 418.108 to issue his order." *El Paso Cty.*, 618 S.W.3d at 821. Plaintiffs do not challenge that Governor Abbott repeatedly viewed COVID-19 as an extant pandemic, and himself undertook measures to slow the spread of the disease. Governor Abbott continues to renew the COVID-19 disaster proclamation from March 13, 2020, for all counties in Texas.[5] Governor Abbott published two Proclamations and three Executive Orders (GA-08, GA-14 and GA-18) during the period between March 13, 2020, and April 30, 2020. Tex. Gov. Code Ann. § 418.1015(b) states that the county judges serve as the

governor's designated agent in the administration of this chapter and states that they may exercise "the powers granted to the governor under this chapter on an appropriate local scale."

Judge Cano is entitled to sovereign immunity under the Eleventh Amendment to the extent that Judge Cano was acting as an agent of the State of Texas pursuant to Tex. Govt. Code Ann. § 418.0105(a), which provides that county judges are designated as emergency management directors for their areas and may exercise the powers granted to the governor of Texas, including the authority to control the occupancy of premises under Tex. Govt. Code Ann. 418.0105(b). When the governor of Texas issues a disaster declaration pursuant to Section 418.018 authority, county judges become emergency management directors for their jurisdiction and serve as the governor's designated agent. Tex. Govt. Code Ann § 418.1015; *Cty. of El Paso*, 618 S.W.3d at 820. Because Judge Cano acted in part to enforce Governor Abbott's disaster proclamations and executive orders, Judge Cano acted on behalf of the State of Texas. Therefore, Defendant is entitled to Eleventh Amendment immunity on Plaintiffs' claims against him in his official capacity for monetary damages. Accordingly, Plaintiffs' claims for monetary damages against Defendant in his official capacity are hereby **DISMISSED WITHOUT PREJUDICE**.

ii. **Declaratory Relief**

Under *Ex parte Young*, Plaintiffs' claim for declaratory relief against a state official is permissible "provided they have sufficient 'connection' to enforcing

an allegedly unconstitutional law." *In re Abbott*, 956 F.3d 696, 708 (5th Cir. 2020). Without this connection, "the suit is effectively against the state itself and thus barred by the Eleventh Amendment and sovereign immunity." *Id.* (citing *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011)).

Plaintiffs' claims for declaratory relief based on an alleged conflict between Defendant's Orders Closing Hotels and Governor Abbott's Executive Orders (Plaintiffs claim 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) is barred by the Eleventh Amendment. (Doc. 48 ¶¶ 44–46). Plaintiffs' claim that Defendant's orders conflicted with Governor Abbott's Orders is an allegation that Defendant as a state official violated state law. (Doc. 48 at 17). However, the Supreme Court has held that the Eleventh Amendment plainly bars such a claim. *See Pennhurst*, 465 U.S. at 121 (concluding that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is [barred] by the Eleventh Amendment"). Accordingly, Plaintiffs' claims for declaratory relief are due to be dismissed on Eleventh Amendment immunity grounds.

The Court therefore finds that Plaintiffs' Section 1983 claims for monetary damages and declaratory relief against Defendant in his official capacity as an agent for the State of Texas are barred and **DISMISSED WITHOUT PREJUDICE** for want of subject matter jurisdiction.

3. Personal Capacity

Third, the Court must determine whether Judge Cano acted individually. As long as the actions upon which the Section 1983 claim is predicated were taken in the good faith performance of his official duties, Judge Cano enjoys immunity from personal liability for damages. *Familias*, 619 F.2d at 403; *Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity for judge for his judicial acts unless those acts are committed in the "clear absence of all jurisdiction"). Judge Cano is personally liable for actions taken while discharging his official responsibilities only if: (1) he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the individual affected, or (2) he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the individual. *Familias*, 619 F.2d at 403.

The Court notes that no claims are asserted against Judge Cano in his individual capacity. The Complaint is devoid of allegations that Judge Cano knew or reasonably should have known that his declarations and orders violated Plaintiffs' constitutional rights, or that Judge Cano issued his declarations and orders with the malicious intent to cause a deprivation of Plaintiffs' constitutional rights. Plaintiffs state that "Defendant is the County Judge of Brewster County, Texas and is being sued in that capacity." (Doc. 48 at 14). Accordingly, the Court interprets the Complaint as only stating claims against Judge Cano in his official capacity.

B. Qualified Immunity[6]

Because the Court has jurisdiction over Plaintiffs' Section 1983 claims that Judge Cano violated the United States Constitution in his official capacity as Brewster County Judge by exercising his authority under Tex. Govt. Code Ann. § 418.108, the Court addresses these claims below. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]

42 U.S.C. § 1983.

To state a claim under Section 1983, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013). Before considering whether Judge Cano can be held liable under Section 1983 based on the defense of qualified immunity, the Court must first determine whether Plaintiffs have raised a genuine issue of material fact as to the existence of a constitutional violation.

1. *Ultra Vires* Claims

Plaintiffs claim that Judge Cano's orders closing hotels, motels, and short-term rentals in Brewster County were *ultra vires* acts that violated (1) Plaintiffs' rights to due process under the Fourteenth Amendment to the United States Constitution for three reasons—first, they were not rationally related to any legitimate government purpose; second, they were issued arbitrarily and capriciously without any medical or epidemiological supporting evidence; and third, they were issued after Governor Abbott prohibited the issuance of orders that conflicted with his executive orders—(2) Plaintiffs' rights under the Fourth and Fourteenth Amendment to the United States Constitution to be free from unreasonable searches and seizures and unreasonable interference with their ownership interests. (Doc. 48 at 23–24). Plaintiffs also allege that Judge Cano's orders closing hotels, motels, and short-term rentals in Brewster County deprived Plaintiffs of their right to equal protection under the Fourth and Fourteenth Amendments to the United States Constitution as well as their rights under the Commerce Clause of Article I, Section 8, of the United States Constitution. (Doc. 48 at 24).

An *ultra vires* claim is a claim seeking to require state officials to comply with statutory or constitutional provisions. *See Heinrich*, 284 S.W.3d at 372. Such a claim is not barred by sovereign immunity because the claim alleges not that a governmental officer erred in exercising his or her discretion, but rather that the officer acted without legal authority or failed to perform a purely ministerial act. *See id.* Because governmental entities remain immune from

suit in declaratory actions brought to determine a plaintiff's rights under a statute, a plaintiff is limited to bringing *ultra vires* suits against government officials in their official capacity, as Plaintiffs have done in the present suit. *See id.* at 368–69, 372–73.

"Ministerial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *City of Hous. v. Hous. Mun. Employees' Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018). On the other hand, "discretionary acts are those that require the exercise of judgment and personal deliberation." *Id.* In this case, Judge Cano's actions in promulgating Declarations of a Local State of Disaster on March 17, 2020, and March 25, 2020, and orders closing hotels, motels, and short-term rentals for a period from March 23, 2020, through April 30, 2020, were discretionary.

As explained previously, Section 418.108 provides Judge Cano with the authority to "declare a local state of disaster" as well as the ability to "control ingress to and egress from a disaster area." Tex. Govt. Code Ann. § 418.108(a), (g). Judge Cano exercised discretion in declaring a local state disaster pursuant to Section 418.108, which controlled "ingress to and egress from" Brewster County by limiting the number of people able to enter certain businesses throughout the County and differentiating between professions based upon healthcare needs or emergency-related qualifications such as law enforcement and medical personnel. Because federal judges are not public health experts, the Court defers to the discretion and judgment of Defendant who is statutorily charged with

responsibility in this area. *S. Bay United Pentecostal Church v. Newsom*, — U.S. —, 140 S. Ct. 1613, 1614 (2020) (Mem.) (Roberts, C. J., concurring) ("The 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.'").

Since the act of declaring a local disaster and issuing orders concerning the movement of persons and the occupancy of premises in a disaster area is specifically authorized by statute, Judge Cano's statutorily authorized acts cannot be considered *ultra vires*, without legal authority, or failures to perform a purely ministerial act. Accordingly, Plaintiffs' *ultra vires* claims against Judge Cano shall be **DISMISSED WITH PREJUDICE**.

2. **Constitutional Violation**

COVID-19 has been labeled by both the governor of Texas and the President as a public health emergency, which Plaintiffs do not dispute. Numerous cases have applied the standard in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), when reviewing measures that curtail constitutional rights during the COVID-19 pandemic. *See, e.g., In re Abbott*, 954 F.3d 772, 784–85 (5th Cir. 2020). In *Jacobson*—the seminal Supreme Court case on a state's authority during times of contagion—the Court contemplated judicial intervention only where "a statute purporting to have been enacted to protect the

public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" 197 U.S. 11, 31 (1905).

Jacobson involved a challenge to Massachusetts's 1902 compulsory vaccination law during a smallpox epidemic. *Jacobson*, 197 U.S. at 26. In that case, the plaintiff argued that the law violated his Fourteenth Amendment right "to care for his own body and health." *Id.* The Supreme Court rejected the claim, emphasizing that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

While the *Jacobson* decision was in the context of legislation, the United States Court of Appeals for the Fifth Circuit has recently applied the same reasoning to executive action:

> 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). Thus, a state's emergency response to public health crises, including pandemics such as COVID-19, is reviewed under the framework set forth by the Supreme Court in *Jacobson*. *Id.* at 786.

In *Abbott*, the Fifth Circuit explained that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *Id.* (emphasis in original). Like *Jacobson*, *Abbott* involved a substantive due process challenge to a state's public health order. Specifically, the plaintiffs challenged the governor's March 22, 2020, executive order, GA-09, which temporarily postponed "non-essential surgeries and procedures," including abortions, to preserve hospital capacity and personal protective equipment during the COVID-19 pandemic. *Id.* at 777, 780.

The Fifth Circuit concluded that under *Jacobson*, "the district court was empowered to decide only whether GA-09 lacks a 'real or substantial relation' to the public health crisis or whether it is 'beyond all question, a plain, palpable invasion' of the right to abortion." *Id.* at 786. (quoting *Jacobson*, 197 U.S. at 31). In *Abbott*, the majority found that the answer to both was "no." *Id.* As to the first inquiry, the majority found that the order was a "valid emergency response to the COVID-19 pandemic" that was "supported by findings" related to the shortage of medical supplies and hospital capacity. *Id.* at 787. Though a "drastic measure," the majority concluded that it "cannot be maintained on the record before us that [it] bears 'no real or substantial relation' to the state's goal of protecting public health in the face of the COVID-19 pandemic." *Id.* (quoting *Jacobson*, 197 U.S. at 31).

As to the second inquiry, the majority concluded that because GA-09 only "temporar[ily] postpone[d] . . . non-essential medical procedures, including abortion, subject to facially broad exceptions," it did not

"constitute anything like an 'outright ban' on pre-viability abortion." *Id.* at 789. As a result, the majority held that the order "cannot be affirmed to be, beyond question, in palpable conflict with the Constitution." *Id.* (quoting *Jacobson*, 197 U.S. at 31). Additionally, the district court "failed to analyze GA-09 under Casey's undue-burden test." *Id.* at 790.

The Fifth Circuit's decision in *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 465–66 (5th Cir. 2021) reaffirmed *Abbott*'s two-part inquiry for reviewing executive orders in the context of a pandemic. Since the challenged orders are public health measures to address a disease outbreak, *Jacobson* provides the proper scope of review. Therefore, Plaintiffs must raise a genuine issue of material fact as to whether Judge Cano's orders and declarations have either no "real or substantial relation" to protecting public health or that they are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

i. **Real or Substantial Relation**

The orders and declarations at issue have a "real or substantial relation" to the public health crisis. The declarations and orders all aim at reducing the opportunities for the virus to spread. Declaring a local state of emergency, closing hotels and motels, and limiting their re-opening to certain individuals based upon employment and permanent housing status all have a real and substantial relation to reducing the spread of COVID-19. Plaintiffs contest the severity of the COVID-19 outbreak in Brewster County and the need for such measures at the time of Judge Cano's orders and declarations. Plaintiffs ignore the likelihood

that the restrictions that were put in place postponed any outbreak in Brewster County or at least flattened the curve by reducing the number of deaths in the short term to avoid overwhelming the hospital system. Plaintiffs also ignore that the outbreak originated in China and spread quickly across the world, primarily through travel-related cases.

The Court's role is not to "usurp the functions of another branch of government" in deciding how best to protect public health, as long as the measures are not arbitrary or unreasonable. *Jacobson*, 197 U.S. at 28. It might be, as Plaintiffs contend, that Judge Cano's declarations and orders were not necessary to ensure public health or safety or that even stricter prohibitions were warranted at the time. While there is more than one reasonable way to respond to the COVID-19 outbreak, Judge Cano's orders and declarations have at least a real and substantial relation to protecting public health.

ii. Due Process

As to whether Judge Cano's orders and declarations are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law," for the reasons stated below, the Court finds that Plaintiffs have not raised a genuine issue of material fact. In Counts One through Four, Plaintiffs allege Defendant's actions violated their substantive due process rights under 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.

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' substantive due process claim is based on the theory that Defendant's actions infringed upon their economic liberties to operate a hotel as a result of Defendant's action in closing their business. This claim is without merit. The Fifth Circuit has explicitly rejected any notion of a fundamental right to pursue a legitimate business. *Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978). The Supreme Court has held "for many years . . . that the 'liberties' protected by substantive due process do not include economic liberties." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (citing *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

Hence, Defendant's orders that closed Plaintiffs' business are subject to rational basis review. The orders and declarations pass that test: preventing the spread of COVID-19 is a legitimate government interest and the measures at issue are rationally related to serving that interest. The summary judgment

evidence demonstrates that in March and April 2020, Judge Cano and "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." (Doc. 54 at 14). Judge Cano's first action was the March 17 Declaration, which was issued several days after Governor Abbott's own proclamation on March 13 and President Trump's declaration of a national emergency due to COVID-19. Given these circumstances, Plaintiffs have failed to produce sufficient evidence to demonstrate a genuine issue of material fact as to whether Judge Cano's actions were irrational or arbitrary. Further, Plaintiffs have not cited any authority indicating a requirement that Judge Cano specifically listen to certain Texas state medical professionals in making his decision. The summary judgment evidence shows that Judge Cano consulted a medical professional, in any event, and did not act alone.

Other courts addressing similar economic substantive due process challenges to business closures during the COVID-19 pandemic have reached the same outcome. *See, e.g.*, *Savage v. Mills*, 478 F. Supp. 3d 16, 30 (D. Me. 2020) (dismissing the plaintiffs' economic substantive due process claim because "[h]arm to business interests . . . is not a 'plain, palpable invasion of rights' under the Fourteenth Amendment"); *Paradise Concepts, Inc. v. Wolf*, 482 F. Supp. 3d 365, 371–72 (E.D. Pa. 2020) (concluding that the plaintiffs' "claims concerning the right to operate a business are not actionable in a Substantive Due Process Claim"); *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-965-JAM-CKD, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020) (finding that the plaintiffs did not have a substantial likelihood of success concerning their

substantive due process claim because the right to pursue work was not fundamental and the state's orders were enacted for a legitimate reason).

Because Plaintiffs fail to raise a genuine issue of material fact as to a violation of their substantive due process rights, these claims shall be **DISMISSED WITH PREJUDICE.**

iii. 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." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To establish their equal protection claim, Plaintiffs must show that "two or more classifications of similarly situated persons were treated differently" under Defendant's hotel closure order. *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 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." *Butts v. Aultman*, 953 F.3d 353, 358 (5th Cir. 2020) (citing *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995)).

The hotel closure order arguably (i) treats similar categories of guests who were allowed to stay in

Brewster County hotels differently from other visitors who were prohibited from staying in hotels, (ii) treats similarly situated businesses in Brewster County differently with respect to selling goods and services to all customers including visitors and travelers from outside Brewster County, and (iii) treats similar employment classifications differently. However, Judge Cano's orders and declarations do not differentiate on the basis of a suspect class. Therefore, rational basis review applies.

Such a classification does not "run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Rational basis is a factual inquiry, and thus, the Court considers the summary judgment evidence in determining whether Judge Cano's hotel closure order is irrational. Based on the summary judgment evidence, Judge Cano had a rational basis for his orders and declarations—namely, the prevention and spread of COVID-19 in Brewster County in a business such as a hotel that attracts travelers from out of town.

A classification survives rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Moreover, the Fifth Circuit has 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." *Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 754 (5th Cir. 1988) (emphasis omitted). Nor is this a case where the Court is asked to "accept nonsensical explanations for" the order in question. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013). As always, any "hypothetical rationale, even post hoc, cannot be fantasy" or be "betrayed by the undisputed facts." *Id.* at 223.

In the present case, Plaintiffs do not meaningfully refute any of Defendant's theoretical or empirical rationales for the classification under Judge Cano's orders and declarations, let alone carry their burden "to negative every conceivable basis which might support it." *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 685 (2012) (internal quotation marks and citation omitted). Defendant's rationale, supported by a consultation with a medical professional, that the differential treatment is at least rationally related to reducing the spread of COVID-19, is sufficiently plausible and not irrational. *Big Tyme Invs., L.L.C.*, 985 F.3d at 469.

Judge Cano's orders and declarations are not unconstitutional merely because some businesses remained open while others closed, some employees were allowed to travel while others stayed home, and some patrons were permitted to use hotels while others were not. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Veritext Corp. v. Bonin*, 901 F.3d 287, 291 (5th Cir. 2018). Imperfect classifications that are underinclusive or overinclusive pass constitutional muster. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the

classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." (internal quotation marks and citation omitted)).

Because Plaintiffs fail to raise a genuine issue of material fact as to a violation of their equal protection rights, these claims shall be **DISMISSED WITH PREJUDICE**.

iv. Unreasonable Seizure

Plaintiffs further claim constitutional violations related to their Fourth and Fourteenth Amendment rights to be free from unreasonable seizures based on Defendant's alleged interference with Plaintiffs' ownership rights and possessory interests in a historic hotel. Plaintiffs allege that orders of Judge Cano interfered with their possessory interest in the Gage Hotel as Plaintiffs 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. (Doc. 48 ¶¶ 54-59).

Plaintiffs fail to present any legal analysis or factual allegations in support of their contention that Judge Cano violated their Fourth and Fourteenth Amendment rights, and merely state it in a conclusory fashion. Because Plaintiffs do not specifically address Defendant's orders and declarations with regard to the right to be free from unreasonable seizures, Plaintiffs

have failed to raise a genuine issue of material fact and this claim shall be **DISMISSED WITH PREJUDICE.**

v. Commerce Clause

Lastly, Plaintiffs claim that the order closing hotels violates the commerce clause because Plaintiffs were forced to close their business and were prevented from engaging in interstate commerce. The commerce clause provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states[.]" U.S. Const. art. I, § 8, cl. 3. However, Plaintiffs fail to cite any legal authority other than the constitution itself in support of this argument.

Judge Cano's orders and declarations are not facially discriminatory against interstate commerce as they only order the closure of certain Brewster County businesses and do not regulate out-of-state businesses. Nor do Plaintiffs present any evidence that the orders and declarations have a discriminatory purpose or effect. There is no indication that the purpose of the order is to advance Brewster County's own commercial interests by curtailing the movement of articles of commerce. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). There is no indication that the orders and declarations negatively impact interstate commerce to a greater degree than intrastate commerce. *Id.* If anything, the orders and declarations negatively impact intrastate commerce to a greater degree, as they only apply to Brewster County businesses.

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its

effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This is a rational basis standard of review. According to the summary judgment evidence, the putative local benefits of closing certain businesses deemed non-essential are to reduce interactions between individuals that could spread COVID-19. Plaintiffs bear the burden of showing that the burden on interstate commerce outweighs the local benefits.

While the Court sympathizes with Brewster County hotels that had to shut down, their employees, and other businesses hurting financially and facing great adversity during this time, this alone is not a burden on interstate commerce. Although the closing of certain businesses incidentally burdens interstate commerce, it is not clearly excessive in relation to local benefits. Thus, the Court will not second-guess Judge Cano's orders and declarations regarding the health and safety of Brewster County. Accordingly, Plaintiffs have failed to raise a genuine issue of material fact as to any constitutional violation under the commerce clause and this claim shall be

DISMISSED WITH PREJUDICE.

IV. MOTION TO EXCLUDE EXPERT

Plaintiffs also appeal Magistrate Judge David B. Fannin's Order granting Defendant's Motion to Strike and Exclude the Testimony of Plaintiffs' Designated Expert Ogechika Karl Alozie, M.D. (Doc. 82). The Magistrate Judge determined that "Dr. Alozie is

unqualified to provide the proffered opinion" striking the entirety of Dr. Alozie's testimony as "he lacks the appropriate expert qualifications based upon education, knowledge, skill, and experience." (Doc. 77 at 6–7). Plaintiffs filed a "written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto." *See* Appendix C of the Local Rules for the assignment of Duties to United States Magistrate Judges. The Court now considers the appeal to determine whether any portion of the Magistrate Judge's Order is clearly erroneous or contrary to law. *Id.*

The Magistrate Judge's Order provides: "Dr. Alozie's primary opinion is that 'no statutorily defined disaster existed'" at the time Judge Cano issued his declarations and orders regarding COVID-19 in Brewster County. (Doc. 77 n. 2). Further, the Magistrate Judge explains:

> Dr. Alozie was sought to opine on "whether a statutory disaster as defined [by the Texas Government Code in § 418.004] existed in Brewster County, Texas" when Defendant Cano "issued his [d]eclarations." (Doc. 67-1 at 8). Whether Plaintiffs characterize it this way or not, Dr. Alozie, an indubitably qualified physician and epidemiologist, is not qualified to discuss the existence of a disaster as defined under §418.004, a legal question.

(*Id.* at 7). The Court therefore considers whether the proposed expert witness has training or experience to offer opinions that are relevant for the expert's testimony to assist the trier of fact. *Primrose*

Operating Co. v. Nat'l Am. Ins. Co., 382 F.3d 546, 562–63 (5th Cir. 2004).

Based on Dr. Alozie's report, his engagement was "to render my opinions whether a statutory disaster as defined above, existed in Brewster County, Texas on March 17, 2020 and March 25, 2020, the dates on which County Judge Cano issued his Declarations, or on March 20, 2020, March 23, 2020, March 25, 2020, April 7, 2020, the dates of his Orders closing hotels, motels and short term rentals." (Doc. 60). Dr. Alozie's opinion was based on "whether a statutory disaster as defined [by] the Government Code . . . existed on those dates" from the "statutory definition of 'disaster' in Texas Government Code, Chapter 418, Section 418.004(1)." (*Id.*).

Dr. Alozie's opinion that "a ***statutory disaster*** did not exist in Brewster County on any of the above-mentioned dates because there were no reported cases of COVID-19 in Brewster County and no imminent threat of a COVID-19 epidemic in Brewster County," is a legal conclusion. (*Id.*) (emphasis added). Under Federal Rule of Evidence 702, expert opinion testimony is admissible if it "will help the trier of fact to understand the evidence or to determine a fact in issue." Dr. Alozie's opinions go to pure questions of law. Although Federal Rule of Evidence 704 permits opinions that "embrace[ ] an ultimate issue," the Fifth Circuit has "repeatedly held that [Rule 704] does not allow an expert to render conclusions of law." *Snap-Drape, Inc. v. Comm'r*, 98 F.3d 194, 198 (5th Cir. 1996).

Accordingly, the Magistrate Judge correctly concluded that Dr. Alozie "is not qualified to discuss the

existence of a disaster as defined under §418.004, a legal question." Dr. Alozie is not permitted to provide testimony concerning legal conclusions about statutory interpretation and/or the existence of a statutory "disaster" under the Texas Disaster Act of 1975, Texas Government Code, Chapter 418. The Court finds that a statutory disaster existed in Brewster County in March and April 2020 as declared by Governor Abbott[7] and Judge Cano. Governor Abbott has renewed the COVID-19 disaster proclamation from March 13, 2020, for all counties in Texas. *Id.* The Court will not permit Dr. Alozie to second-guess the governor's determination regarding the health and safety of the state including Governor Abbott's declaration of a statutory disaster pursuant to Chapter 418 of the Texas Government Code, for all counties in Texas, including Brewster County, which provides that "a state of disaster continues to exist in all counties due to COVID-19." *Id.*

In sum, the Magistrate Judge's evidentiary rulings are not clearly erroneous or contrary to law. The Magistrate Judge properly determined that Dr. Alozie is not qualified to discuss the existence of a disaster as defined under Section 418.004, a legal question. Accordingly, Plaintiffs' objections to the Magistrate Judge's Order are **OVERRULED**. (Doc. 82).

V. CONCLUSION

It is therefore **ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED**. (Doc. 54).

It is further **ORDERED** that Plaintiffs' claims against Defendant in his official capacity for monetary damages and declaratory relief as an agent of the State of Texas are **DISMISSED WITHOUT PREJUDICE** based on Eleventh Amendment sovereign immunity.

It is further **ORDERED** that Plaintiffs' *ultra vires* claims against Defendant are

DISMISSED WITH PREJUDICE.

It is further **ORDERED** that Plaintiffs' Section 1983 claims against Defendant are

DISMISSED WITH PREJUDICE.

It is finally **ORDERED** that Plaintiffs' Objections to Magistrate Judge David B. Fannin's Order granting in part Defendant's Motion to Strike and Exclude the Testimony of Plaintiffs' Designated Expert Ogechika Karl Alozie, M.D. are **OVERRULED.** (Doc. 82).

It is so **ORDERED.**

SIGNED this 15th day of December, 2021.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

Footnotes

1 *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, Centers for Disease Control and Prevention ("CDC"),

https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html (accessed Dec. 6, 2021). *COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (accessed Dec. 6, 2021).

2 Coronavirus Resource Center, John Hopkins University & Medicine, https://coronavirus.jhu.edu/region/us/texas (accessed Dec. 6, 2021).

4. The *ultra vires* exception to sovereign immunity was recognized by the Supreme Court of the United States as an exception to sovereign immunity. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Supreme Court in *Larson* explained that *the ultra vires* exception applies in two situations: (1) where an officer's powers are limited by statute, but his actions go beyond those limitations, or (2) if his actions are unconstitutional *Larson*, 337 U.S. at 689–90. Under these circumstances, the official's actions are considered individual and not of the sovereign. *Id.* at 689. The Texas Supreme Court has clarified the law related to claims for declaratory relief and this exception. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 375–76 (Tex. 2009). In *Heinrich*, the widow of a police officer filed suit under the Texas Uniform Declaratory Judgment Act claiming a city violated her statutory rights when it altered her pension benefits. *Id.* at 369–70. The court explained that an *ultra vires* lawsuit aimed at "requir[ing] state officials to comply with [a] statut[e] . . . [is] not prohibited by sovereign immunity." *Id.* at 372. Such lawsuits, however, must be brought against state actors in their official capacity and not the state itself, even though the claims are

effectively against the state. *Id.* at 372–73. *Ultra vires* lawsuits also must "allege, and ultimately prove, that [such state officials] acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372. The court allowed the widow to pursue her claims for prospective relief against the state officials pursuant to the *ultra vires* exception but dismissed her claims for retrospective monetary relief and her claims against the city and other governmental entities. *Id.* at 369, 379–80.

5 *Governor Abbott Renews COVID-19 Disaster Declaration in November 2021*, Office of the Texas Governor, https://gov.texas.gov/news/post/governor-abbott-renews-covid-19-disaster-declaration-in-november-2021 (accessed Dec. 10, 2021).

6.Plaintiffs object that Defendant has not filed an answer asserting qualified immunity as an affirmative defense, so Defendant's motion for summary judgment on qualified immunity is premature and unsupported by the pleadings.

However, because Plaintiffs have failed to raise a genuine issue of material fact as to whether a constitutional violation occurred, an essential element of Plaintiffs' Section 1983 claims on which Plaintiffs bear the burden of proof, the Court **OVERRULES** Plaintiffs' objection on this ground.

7 *Governor Abbott Renews COVID-19 Disaster Declaration in November 2021*, Office of the Texas Governor, https://gov.texas.gov/news/post/governor-abbott-renews-covid-19-disaster-declaration-in-november-2021 (accessed Dec. 10, 2021).

2021 WL 7184244

United States District Court, W.D. Texas, Pecos Division.

J. P. BRYAN, et al., Plaintiff,

v.

Eleazar R. CANO, County Judge, Brewster County, Texas, Defendant.

PE:20-CV-00025-DC-DF
Signed 11/01/2021

Attorneys and Law Firms

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REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

DAVID B. FANNIN, UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE DAVID COUNTS, U.S. DISTRICT JUDGE:

BEFORE THE COURT is Defendant County Judge Eleazar R. Cano's ("Defendant" or "Cano") Motion to Dismiss Plaintiffs' Third Amended Complaint (hereafter, "Second Motion to Dismiss"). (Doc. 50). This matter is before the undersigned United States Magistrate Judge through a standing order of referral

pursuant to 28 U.S.C. § 636 and Appendix C of the Local Court Rules for the Assignment of Duties to United States Magistrate Judges. After due consideration, the undersigned **RECOMMENDS** that Defendant's Second Motion to Dismiss be **GRANTED.** (Doc. 50).

I. BACKGROUND

On April 10, 2020, Plaintiff J.P. Bryan ("Bryan") brought this suit against Defendant for allegedly violating his constitutional rights following the mid-pandemic closure of Bryan's business, the Gage Hotel, located in Marathon, Brewster County, Texas. (*See* Doc. 1; Doc. 6).

As for facts, on March 13, 2020, Greg Abbott, the Governor of Texas, ("Governor Abbott") issued a proclamation "certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas." (Doc. 48-1 at 2). Defendant followed suit on March 17, 2020, and issued a Declaration of Local State of Disaster due to Public Health Emergency (hereafter, "March 17 Declaration"). (Docs. 48 at 4, 48-1 at 16). On March 19, 2020—in an effort to stymie the potential spread of COVID-19—Governor Abbott issued Executive Order No. GA-08, "which directed Texans to avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors." (Doc. 48-1 at 21).

On March 20, 2020, Defendant modified the March 17 Declaration (hereafter, "March 20 Order") by additionally ordering "all hotels/motels and short-term rentals close and vacate their guests beginning on March 23, 2020 through April 2, 2020" with limited exceptions for those using a rental unit as a primary

residence. *Id.* at 23. On March 23, 2020, Defendant issued an Order (hereafter, "March 23 Order") modifying the March 17 Declaration to allow permanent resident guests and others to access hotels, motels, and short-term rentals if they fell in one of three categories: (a) active duty military, law enforcement and national guard reserve, (b) emergency service personnel to support city, county, state, Sul Ross State University and school district operations or customers or (c) healthcare professionals and employees. *Id.* at 25. Defendant then signed and promulgated a new Declaration of Local State of Disaster to Public Health Emergency on March 25, 2020 (hereafter, "March 25 Declaration") which was approved by the County Commissioners, that was followed by another Order (hereafter, "March 25 Order"). *Id.* at 27, 31.

On March 31, 2020, Governor Abbott issued Executive Order GA-14, which encouraged non-essential workers to work remotely where possible and provided that individuals were not prohibited from accessing "essential services or engaging in essential daily activities ... so long as the necessary precautions are maintained to reduce the transmission of COVID-19[.]" *Id.* at 34, 36. Defendant signed an Amended Order on April 1, 2020 that was identical to the March 23 Order except that it extended hotel closures thru April 9, 2020. *Id.* at 39. Defendant similarly signed an Order Extending Amended Order on April 7, 2020, that extended the hotel, motel, and short-term rental closures in the March 23 Order until April 30, 2020. *Id.* at 41. Defendant additionally signed an Order Extending Supplemental Order on April 7, 2020, that banned all travel within Brewster County except for purposes of essential activities. *Id.* at 43.

On April 27, 2020, Governor Abbott issued Executive Order GA-18, which began the reopening of certain businesses in Texas on a restricted basis. *Id.* at 50. Defendant issued a News Release on April 30, 2020, stating that all Brewster County Executive Orders would expire at 11:59 p.m. on April 30, 2020, but continuing the declaration of local disaster. *Id.* at 57. The first case of COVID-19 was reported in Brewster County on April 25, 2020. *Id.* at 60.

On April 10, 2020—midway through the chronological timeline of events described above—Bryan brought this suit against Defendant for allegedly violating his constitutional rights. (*See* Doc. 1). Bryan in his First Amended Complaint sought damages and a declaration that Defendant's COVID-19 disaster orders were unconstitutional. (*See* Doc. 6). On May 7, 2020, Defendant filed his first Motion to Dismiss Plaintiff's First Amended Complaint (hereafter, "First Motion to Dismiss"). (*See* Doc. 9). On December 16, 2020, a Report and Recommendation (Doc. 26) was released addressing the then-pending First Motion to Dismiss (Doc. 9). Since then, Bryan has amended his First Amended Complaint several times upon court consent and has added as co-plaintiffs Gage Hotel co-owners Mary Jon Bryan ("Mary Jon"), Bryan's wife, Gage Properties, and Gage Hotel L.P. ("Gage Hotel") (collectively, "Plaintiffs") to the complaint. (Doc. 48). Following the release of the Report and Recommendation, consideration of which has become moot given the subsequent amended complaints, Plaintiffs removed and modified some of their claims against Defendant in the present Third Amended Complaint. *See id.*

Plaintiffs currently assert six counts pursuant to 42 U.S.C. § 1983, along with a claim for damages and declaratory relief, against Defendant: (1) violation of

Due Process under the Fourteenth Amendment to the United States Constitution based on Defendant's various declarations of disaster; (2) violation of Due Process under the Fourteenth Amendment to the United States Constitution based on Defendant's various orders closing hotels; (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"; (4) violation of Due Process under the Fourteenth Amendment to the United States Constitution based on interference with ownership rights; (5) violation of Equal Protection under the Fourteenth Amendment to the United States Constitution; and (6) unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (Doc. 48 at 14–23).

On July 2, 2021, Defendant filed a Motion to Dismiss Plaintiff's Third Amended Complaint (hereafter, "Second Motion to Dismiss"). (Doc. 50). On August 6, 2021, Defendant filed—prior to the Court ruling on the Second Motion to Dismiss and prior to Defendant filing answer—a "Motion to Dismiss and Motion for Summary Judgment." (Doc. 54). The third Motion to Dismiss (hereafter, "Third Motion to Dismiss") "reasserts [Defendant's] entitlement to dismissal" and "incorporates all arguments asserted in [Defendant's] [Second] Motion to Dismiss and Reply to Plaintiffs' Response to the Motion to Dismiss." *Id.* at 2. Plaintiffs filed responses to each of Defendant's motions. (Docs. 52, 65, 66). Defendant filed replies to the same. (Docs. 52, 72). Accordingly, this matter is now ripe for consideration.[1]

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The courts possess only that power authorized by the Constitution and statutes of the United States. *Id.* (citations omitted). Motions filed under Federal Rule 12(b)(1) allow a party to challenge the subject matter jurisdiction of the district court to hear a case. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)). "[A]ll uncontroverted allegations in the complaint must be accepted as true." *Taylor v. Dam*, 244 F. Supp. 2d 747, 752 (S.D. Tex. 2003) (citations omitted). "Thus, unlike a motion to dismiss under Rule 12(b)(6), when examining a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the district court is entitled to consider disputed facts as well as undisputed facts in the record." *Id.* (citations omitted).

The burden of proof for a Federal Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming*, 281 F.3d at 161 (citing *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995)); *Taylor*, 244 F. Supp. 2d at 752. In fact, "there is a presumption against subject matter jurisdiction that must be

rebutted by the party bringing an action to federal court." *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996).[2]

III. DISCUSSION

On July 2, 2021, Defendant filed the presently pending Second Motion to Dismiss. (Doc. 50). At base, Defendant asserts that Plaintiffs' complaint should be dismissed for three reasons based on a "lack of subject matter jurisdiction" pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.*; *see also* FED. R. CIV. P. 12(b)(1). First, Defendant advances the political question doctrine as a basis for dismissal: Defendant's decisions to declare a local state of disaster as well as to limit the visitors to hotels, motels, and short-term rentals are a protected political question, thereby making Plaintiffs' claims nonjusticiable. (Doc. 50 at 4–5). Defendant specifically claims that he acted pursuant to his statutory authority under Chapter 418 of the Texas Government Code (hereafter, "Texas Code"). *Id.* at 8–9. Second, in line with the political question doctrine argument, Defendant argues that the Supreme Court's holding in *Jacobson v. Commonwealth of Massachusetts* declared all "local orders" to be "a reasonable restriction on private rights in emergency circumstances." *Id.* at 15. Thus, Defendant claims that, given his release of local orders during the early stages of the pandemic, *Jacobson* as a matter of law finds that his actions were reasonable and therefore insulated him from judicial inquiry.[3] For the reasons described below, the undersigned **RECOMMENDS** that Defendant's Second Motion to Dismiss be **GRANTED** on his first two grounds.

1. Political Question Doctrine

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 949 (5th Cir. 2011) (citing *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986)). In *Baker v. Carr*, the Supreme Court "set forth six independent tests for the existence of a political question." *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). The six independent tests are as follows:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> (2) a lack of judicially discoverable and manageable standards for resolving it; or
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> (5) an unusual need for unquestioning adherence to a political decision already made; or
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Spectrum Stores, Inc., 632 F.3d at 949. The "inextricable presence of one or more of these factors will render the case nonjusticiable under the Article III 'case or controversy' requirement[.]" *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1203 (5th Cir. 1978). Federal courts are generally "incompetent to make final resolution of certain matters, [and therefore] these political questions are deemed 'nonjusticiable.' " *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *Baker*, 369 U.S. at 198, 82 S.Ct. 691). Therefore, as a preliminary matter, if Defendant's actions fall within any of the six *Baker* categories, the political question doctrine will foreclose this Court's review of the substance of his orders and declarations.

Defendant claims that Plaintiffs' request for the Court to evaluate his decisions to declare a local state of disaster and his order closing hotels, motels, and short-term rentals effectively "seek[s] to have this Court pass judgment on the wisdom and efficacy of Judge Cano's emergency measures due to COVID-19." (Doc. 50 at 12). This, Defendant argues, "is barred by the political question doctrine," and in particular invokes the following *Baker* factors: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; and "an unusual need for unquestioning adherence to a political decision already made." *Id.* at 12–13.

Here, Defendant's decisions in declaring a local state of disaster and ordering the closure of hotels, motels, and short-term rentals pursuant to statutory

grants of authority under Chapter 418 of the Texas Government Code (hereafter, "Texas Code") are protected by the political question doctrine. (Doc. 50 at 13). Without needing to engage in an analysis of all six aforementioned *Baker* factors, the undersigned agrees, and finds that this case as Plaintiffs have pled it does indeed present a political question.[4] Specifically, Plaintiffs' Third Amended Complaint seeks several declarations that this case falls outside the realm of the political question doctrine since Defendant took "arbitrary, capricious, and *ultra vires* actions to close hotels, motels and short-term rentals." (Doc. 48 at 8). Plaintiffs claim that "[t]here was no need for Defendant to declare a local state of disaster"; "Defendant admitted that no disaster existed in Brewster County on March 17, 2020 and that he ordered the closure of [the businesses] because he was asked to do so by [D]r. [Ekta] Escovar" and "without the advice of Rachel Sonne, M.D., the Texas Department of State Health Services ... for Brewster County"; and his reliance on "statements made to him ... by an unqualified pediatrician ... who had become consumed with her personal fears about COVID-19" was improper. *Id.* As will be discussed below, the undersigned finds that, as pleaded, Defendant was acting within his statutory authority. Additionally, there is no statutory requirement for Defendant to consult with certain medical professionals. *See generally* TEX. GOV. CODE ANN. ch. 418. Furthermore, the undersigned notes that Texas courts find county judges' exercise of this authority to be quite discretionary. *See Mr. W. Fireworks, Inc. v. Comal County*, No. 03-06-00638-CV, 2010 WL 1253931, at *2 (Tex. App. 2010) (acknowledging the authority of the county judge of Comal County to issue a declaration "proclaiming a

local state of disaster pursuant to section 418.108(a)" in response to a fire hazard posed by fireworks use).

Further, Plaintiffs' Third Amended Complaint acknowledges and does not challenge that Governor Abbott repeatedly viewed COVID-19 as an extant pandemic, and himself undertook measures to slow the spread of the disease. (Doc. 48 at 3–10). "And obviously, Plaintiffs are unsatisfied with those efforts." *Coal. v. Raffensperger*, No. 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996 at *8, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). However, "whether the [Brewster County] executive branch has done [more than] enough is a classic political question in involving policy choices." *See id.* The Fifth Circuit has affirmed state officials' ability to craft their own regulations in response to public health emergencies, as will be discussed in more detail below. *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 465–66 (5th Cir. 2021). Moreover, Texas has a "longstanding policy" of allowing county judges to respond accordingly, and the state statute's provision of express authorization to county judges for disaster proclamations forms a strong shield against judicial micromanagement. *See Lane*, 529 F.3d at 563; *see also Mr. W. Fireworks*, 2010 WL 1253931, at *2 (citing TEX. GOV. CODE ANN. § 418). There have additionally been no claims for discrimination amongst suspect protected classes or otherwise which might lift the political veil off this case. *See, e.g., Mi Familia Vota v. Abbott*, 977 F.3d 461, 466 (5th Cir. 2020) ("[R]ace discrimination and Voting Rights Act claims ... do not present political questions."). Thus, inquiring into the wisdom, viability, and trustworthiness of Defendant's orders and declarations requires the undersigned to make an "initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82

S.Ct. 691. Therefore, the undersigned believes that this case invokes the political question doctrine. The inquiry does not end here for public health emergencies, however; Defendant's actions must overcome the minimal *Jacobson* hurdle in order for the Court to lack jurisdiction over this case.

The political question doctrine argument falls in line with Defendant's second argument relating to the *Jacobson* test of private rights restrictions during a public health crisis. (Doc. 50 at 15). In *Jacobson v. Commonwealth of Massachusetts*—the seminal Supreme Court case on a state's authority during times of contagion—the Supreme Court expressly authorized judicial intervention where "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" 197 U.S. 11, 31, 25 S.Ct. 358, 49 L.Ed. 643 (1905). While the *Jacobson* decision was in the context of legislation, the Fifth Circuit in *In re Abbott* applied the same reasoning to executive action:

> When faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measure 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 (Abbott II), 954 F.3d 772, 784 (5th Cir. 2020). Since *Abbott II*, the Fifth Circuit has re-affirmed its application of *Jacobson* to judicial review of the validity of pandemic-related regulation and ordinances.

See Big Tyme, 985 F.3d at 465–66; *see also In re Abbott (Abbott III)*, 959 F.3d 696, 716 (5th Cir. 2020) ("If the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities.") (internal quotation marks and alteration omitted). Defendant views *Jacobson* as having declared all "local orders" to be "a reasonable restriction on private rights in emergency circumstances." (Doc. 50 at 15). Defendant thus claims that, given his release of local orders during the early stages of the pandemic, *Jacobson* as a matter of law finds that his actions were reasonable and therefore insulated from judicial inquiry.

The undersigned believes that, even where the political question doctrine may typically foreclose judicial second-guessing of public officials' decisions, during times of contagion, *Jacobson* nevertheless requires brief judicial review. *See Abbott III*, 956 F.3d at 716; *S. Bay United Pentecostal Church v. Newsom*, –— U.S. ——, 140 S. Ct. 1613, 1613–14, 207 L.Ed.2d 154 (2020) (Roberts, C.J., concurring) ("Where those broad limits are not exceeded, they 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.") (internal quotations omitted). Courts, while limited in their "authority to ask whether a particular method is—perhaps, or possible—not the best," are able to consider whether the official has "acted in an arbitrary, unreasonable manner." *Abbott III*, 956 F.3d at 716 (quoting *Jacobson*, 197 U.S. at 28, 25 S.Ct. 358) (quotation marks, citations, and alterations omitted). Here, COVID-19 presented itself on a pandemic scale. Defendant responded with a declaration of a local state of disaster through his March 17 Declaration and March

25 Declaration, along with his March 20, March 23, and March 25 Orders. Therefore, the undersigned finds that, even though the political question doctrine presumptively governs the situation, given the pandemic conditions in the facts presented, *Jacobson* and *Abbott III* require some judicial inquiry into the propriety of Defendant's actions.

2. Applying Jacobson

Defendant argues that he acted pursuant to Chapter 418 of the Texas Code. (Doc. 50 at 8–9). Chapter 418 of the Texas Code, also known as the Texas Disaster Act of 1975, "is a comprehensive, detailed continuity-of-government framework that carefully allocates powers, duties, and responsibilities across various levels of state government and multiple agencies." *State v. El Paso County*, 618 S.W.3d 812, 831–32 (Tex. App. 2020) (citing TEX. GOV. CODE ANN. ch. 418). The Texas Code "clarif[ies] and strengthen[s] the roles of the governor, state agencies, the judicial branch of state government, and local government in prevention of, preparation for, response to, and recovery from disasters." TEX. GOV. CODE ANN. § 418.002(4). Under the Texas Code, the Governor of Texas is permitted to declare a "state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." *Id.* § 418.014(a). The Texas Code defines "disaster" as being an "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*, [or] other public calamity requiring emergency action." *Id.* § 418.004 (emphasis added).

When the Governor of Texas does declare a state of emergency, "[t]he Governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." TEX. GOV. CODE ANN. § 418.018(c). Further, in times of emergency "[t]he presiding officer of the governing body of an incorporated city or a county ... is designated as the emergency management director for the officer's political subdivision." TEX. GOV. CODE ANN. § 418.1015(a). In Texas, county judges are the presiding officers of the Commissioners Court, which is the governing body of a given county. TEX. GOV. CODE ANN. § 81.001(b). Therefore, in a time of emergency, the county judge is designated as the emergency management director for a given county. In their capacity as an emergency management director, a county judge "may exercise the powers granted to the governor under [the Emergency Management Chapter] on an appropriate local scale." TEX. GOV. CODE ANN. § 418.1015(b); *see also El Paso County*, 618 S.W.3d at 820. Accordingly, county judges are statutorily authorized to control the ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises on an appropriate local scale for the purpose of disaster mitigation. *See* TEX. GOV. CODE ANN. § 418.1015(b).

Independently of the Texas Governor's declarations, the "presiding officer of the governing body of a political subdivision may declare a local state of disaster." *Id.* at § 418.108(a). The county judge is, as noted, the presiding officer, and upon such declaration, the county judge is able to "act on [his] own," without "tether [of] this power of local officials to the [Texas] Governor." *Id.*; *El Paso County*, 618 S.W.3d at 836. County judges are therefore inherently equipped with

the authority to "manage disaster areas under their jurisdiction and to declare disasters and act autonomously under certain enumerated circumstances without the need to seek preapproval from the [Texas] Governor." *Id.* These declarations cannot be "continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision," which as noted is the Commissioners Court. TEX. GOV. CODE ANN. §§ 418.108(b), 81.001(b). Defendant's most substantiated argument is that his authority to act was primarily under § 418.108(a) as an independent county judge, in contrast to § 418.1015(b) as Governor Abbott's designated agent. (Doc. 52 at 2, 5). Therefore, if the methods by which Defendant promulgated his orders and declarations were as statutorily prescribed under § 418.108(a), his actions may be found to be valid.

Defendant again views *Jacobson* as having declared all "local orders" to be "a reasonable restriction on private rights in emergency circumstances." (Doc. 50 at 15). Thus, Defendant claims, given his release of local orders during the early stages of the pandemic, *Jacobson* as a matter of law finds that his actions were reasonable and therefore insulated from judicial inquiry.

Here, the undersigned finds that Defendant was indeed acting pursuant to his independent § 418.108 authority, and that Defendant's orders and declarations therefore are to receive *Jacobson* treatment. *See generally Abbott III*, 956 F.3d 696; *Big Tyme*, 985 F.3d 456. However, the undersigned does not agree that *Jacobson* contemplates an all-encompassing proclamation that every action taken by a local authority in response to COVID-19 is reasonable. Under *Jacobson* and *Abbott III*, any restriction of

rights during a pandemic which may ordinarily be protected under the political question doctrine must be a "reasonable response[ ]." *Abbott III*, 956 F.3d at 715, 717. Courts do not re-weigh the relevant cost-benefit calculus, but rather "must assume that, when [Defendant's orders and declarations] [were] issued, [Defendant] was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." *Id.* (alterations omitted) (citing *Jacobson*, 197 U.S. at 30, 25 S.Ct. 358). Here, as noted above, Defendant, as county judge of Brewster County, was given statutory authority under § 418.108(a) to declare a local state of disaster. TEX. GOV. CODE ANN. § 418.108. Defendant exercised this authority in issuing his March 17 Declaration, four days after Governor Abbott issued the March 13 proclamation certifying that "COVID-19 poses an imminent threat of disaster" pursuant to § 418.014 and specifically identifying § 418.108 as the section under which he was acting. (*See* Doc. 48-1 at 16–17; *see id.* at 3).

Through these declarations and orders, Defendant declared a local state of emergency, closed hotels and motels, and limited their re-opening to certain individuals based upon employment and permanent housing status. *See id.* at 16–17, 22–23, 25 S.Ct. 358. The undersigned has found that Defendant acted *pursuant to* his statutory authority. The inquiry now becomes one of whether Defendant's declarations and orders "reasonably restricted [Plaintiffs' constitutional rights] to combat [the COVID-19] public health emergency." *Big Tyme Invs.*, 985 F.3d 456, 466 (5th Cir. 2021) (quoting *Abbott II*, 954 F.3d at 786). This inquiry is, under *Abbott III*, two-fold: (1) whether the challenged actions lack a "real or substantial relation to the COVID-19 crisis" in Texas, and (2) whether the

challenged actions are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.*

In giving "elevated deference" to Defendant for the first part of the inquiry, the undersigned finds that the various orders and declarations indeed did not lack a "real or substantial relation to the public health crisis." *Id.* This deference is broad and gives significant credence to the acting official. *See Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir. 2020) (Ho, J., concurring) (noting criticism of the Fifth Circuit "for reading *Jacobson* too broadly in favor of the government," but observing that "whatever *Jacobson*'s scope, *Abbott [II]* makes clear that pandemic regulations must govern evenhandedly") (quotation marks omitted). Defendant released his first declaration on March 17, only after Governor Abbott declared a state of disaster for all Texas counties due to COVID-19. (Doc. 48-1 at 16–17) (specifically referencing Governor Abbott's proclamation). Here, "it is undisputed that [Defendant's orders and declarations] [are] substantially related to curbing the spread of COVID-19." *Big Tyme*, 985 F.3d at 467.

For the second part of the inquiry, the Court must consider "the alleged constitutional harm, and then evaluate that harm in accordance with established principles of constitutional interpretation." *See id.* (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 70, 208 L.Ed.2d 206 (2020) (Gorsuch, J., concurring) ("*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue.")); *see also Spell*, 962 F.3d at 181 ("Nothing in *Jacobson* supports the view that an emergency displaces normal constitutional

standards." (citation and alteration omitted)). Here, Plaintiffs' asserted rights are all *non-fundamental*, non-intermediary, and non-suspect classifications. Therefore, the undersigned will apply a rational basis review. *See generally Big Tyme*, 985 F.3d 456.

Plaintiffs have asserted rights that are non-fundamental—such as the right to operate a business, *see New Orleans Catering, Inc. v. Cantrell*, 523 F. Supp. 3d 902, (E.D. La. Mar. 2, 2021) (citing *Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978)), and the right to be free from classifications based upon employment status—unlike those addressed in *Jacobson* (child vaccination) and *Abbott III* (abortion). Yet, the undersigned reaches the same analysis and conclusions regardless of the constitutional right at stake, or the specific claim to which Plaintiffs may object, for *Abbott II-III* and *Jacobson* "govern our review of emergency public health measures." *Big Tyme*, 985 F.3d at 467. Under this slight rational basis review, courts are to uphold a challenged public health emergency regulation unless the plaintiff can prove the state action in question is *not* rationally related to a legitimate government purpose. *See, e.g.*, *New Orleans Catering*, 523 F. Supp. 3d at 912.

Here, Defendant's purpose of "the prevention and spread of COVID-19 in Brewster County" is surely a legitimate purpose. (*See* Doc. 50 at 11). Further, Defendant's declarations and orders giving himself temporarily expansive authority over Brewster County to "control ingress and egress" over its citizens, particularly to stop the intake of potentially infected outsiders to certain high-volume businesses, were rationally related to achieving his goal. *See* TEX. GOV. CODE ANN. § 418.108(g). This is especially true given the tumult of the time as well as the lack of information

as to the mortality, infection rates, and deep-seeded spread of the virus that state and local officials faced in the early stages of the pandemic. *See also Calvary Chapel Dayton Valley v. Sisolak*, —— U.S. ——, 140 S. Ct. 2603, 2605, 207 L.Ed.2d 1129 (2020) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."). Therefore, the undersigned believes that Defendant's actions, even if they would ordinarily be found to be protected by the political question doctrine under *Baker*, would still survive what is effectively a sanitized rational basis review under *Abbott III*. Accordingly, the undersigned **RECOMMENDS** that Defendant's Second Motion to Dismiss on his first and second grounds be **GRANTED**.

IV. RECOMMENDATION

For the reasons stated above, the undersigned **RECOMMENDS** that Defendant's Second Motion to Dismiss be **GRANTED** on his first two grounds. (Doc. 50).

INSTRUCTIONS FOR SERVICE AND RIGHT TO APPEAL/OBJECT

In the event that a party has not been served by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is **ORDERED** to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b), any party who desires to object to this report must serve and file written objections within

fourteen (14) days after being served with a copy unless the time period is modified by the District Judge. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made; the District Judge need not consider frivolous, conclusive, or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the U.S. Magistrate Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a *de novo* determination by the District Judge. Additionally, a party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge. *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

Footnotes

1To the extent that the Third Motion to Dismiss subsumes the Second Motion to Dismiss, this Report and Recommendation will apply to both, since the Third Motion to Dismiss incorporates the arguments of the Second Motion to Dismiss. (*See* Doc. 54 at 2).

2Defendant states no Federal Rule 12(b)(6) grounds in his Second Motion to Dismiss. Rather, he requests the Court award him summary judgment on many of the same Federal Rule 12(b)(6) grounds he asserted in his First Motion to Dismiss. (*See* Doc. 54; *see also* Doc. 9).

3Defendant makes a third argument, premised upon the sovereign immunity granted by the Eleventh Amendment. (Doc. 50 at 18). However, as will be explained, the undersigned recommends granting Defendant's Motion to Dismiss on his first two intertwined grounds; therefore, consideration of his sovereign immunity arguments is unnecessary.

4The undersigned in the Report and Recommendation from December 16, 2020, found that there was no political question presented by the case before the Court in its then-pleaded form. (Doc. 26) (discussing Plaintiff Bryan's First Amended Complaint). However, since the first Report and Recommendation considered the First Motion to Dismiss against a now-outdated version of Plaintiffs' complaint, it has become moot.

12/2/22
United States Court of Appeals, Fifth Circuit.

J. P. BRYAN; Mary Jon Bryan; Gage Properties, Inc.; Gage Hotel, L.P., Plaintiffs—Appellants,
v.
County Judge Eleazar R. CANO, Defendant—Appellee.

No. 22-50035

Appeal from the United States District Court for the Western District of Texas USDC No. 4:20-CV-25

ON PETITION FOR REHEARING
Before Jones, Southwick, and Ho, Circuit Judges. Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

Certificate of Service

2/28/2023

No.

IN THE

Supreme Court of the United States

J. P. BRYAN; MARY JON BRYAN; GAGE PROPERTIES, INC.; AND GAGE HOTEL, L.P., PETITIONERS

v.

COUNTY JUDGE ELEAZAR R. CANO

PETITION FOR WRIT OF CERTIORARI

I hereby certify that I am this day serving the foregoing document upon the person(s) and in the manner indicated below. First class mail as follows:

Jason Eric Magee
Email: e.magee@allison-bass.com
Allison, Bass & Magee, L.L.P.
Suite 201
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Respectfully Submitted,

ROD CURRY
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Certification of Word Count

No.

IN THE

Supreme Court of the United States

J. P. BRYAN; MARY JON BRYAN; GAGE PROPERTIES, INC.; AND GAGE HOTEL, L.P., PETITIONERS

v.

COUNTY JUDGE ELEAZAR R. CANO

PETITION FOR WRIT OF CERTIORARI

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7242 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on 2/28/2023

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