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

J. P. BRYAN,	§	
Plaintiff,	§	
	§	
vs.	§	**PE:20-CV-00025-DC-DF**
	§	
COUNTY JUDGE ELEAZOR R. CANO,	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

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

BEFORE THE COURT is Defendant Eleazor R. Cano's ("Defendant") Motion to Dismiss Plaintiff's First Amended Complaint (hereafter, "Motion to Dismiss"). (Doc. 9). This case is before the U.S. Magistrate Judge by a standing order of referral from the District Judge pursuant to 28 U.S.C. § 636 and Appendix C of the Local Rules for the Assignment of Duties to United States Magistrate Judges. After due consideration, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**. (Doc. 9).

I. BACKGROUND

This suit stems from the closure of hotels, motels, and short-term rentals in Brewster County, Texas as a result of various Declarations of Local Disaster in response to the Covid-19 pandemic. (*See* Doc. 6). Plaintiff J.P. Bryan ("Plaintiff")—the owner of the Gage Hotel in Marathon, Texas—brought suit against Defendant—the County Judge of Brewster County, Texas—seeking damages and a declaration that Defendant's COVID-19 disaster orders were unconstitutional. *Id*. In 2019, an outbreak of a novel coronavirus—COVID-19—began in the

Central Chinese city of Wuhan.[1]. The first confirmed case in the United States was reported on January 20, 2020.[2] The first non-travel related cases of COVID-19 in the United States were documented on February 26 and 28, 2020, "suggesting that community transmission was occurring by late February."[3]

On March 4, 2020, the Texas Department of State Health Services announced the first case of COVID-19 in Texas.[4] Greg Abbott, the Governor of Texas, (hereafter, "Governor Abbott") then 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" on March 13, 2020. (Doc. 6-1 at 1). 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. 6 at 7, 6-1 at 4). On March 19, 2020—in an effort to stymy the potential spread of COVID-19—Governor Abbot 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. 6-1 at 6).

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 9. On March 23, 2020, Defendant issued an Order (hereafter, "March 23 Order") modifying the March 17 Declaration to allow guests to

[1] *About Covid-19*, CTRS. FOR DISEASE CONTROL, https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html#:~:text=On%20February%2011%2C%202020%2C%20the,%2C%20abbreviated%20as%20COVID%2D19 (last visited December 15, 2020).
[2] Holshue, Michelle L., et. al., *First Case of 2019 Novel Coronavirus in the United States*, NEW ENG. J. MED. (March 5, 2020), https://www.nejm.org/doi/full/10.1056/NEJMoa2001191.
[3] Media Statement, Centers for Disease Control, CDC Confirms Possible Instance of Community Spread of COVID-19 in U.S. (February 26, 2020), https://www.cdc.gov/media/releases/2020/s0226-Covid-19-spread.html.
[4] News Release, Texas Dep't of State Health Services, DSHS Announces First Case of COVID-19 in Texas (March 4, 2020), https://www.dshs.texas.gov/news/releases/2020/20200304.aspx.

access hotels, motels, and short-term rentals if they fell in one of three categories in addition to those using a hotel, motel, or short-term rental as a primary residence: (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 10. 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 11, 14.

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[.]" (Doc. 6-1 at 18). Defendant signed an Amended Order on April 1, 2020 (hereafter, "April 1 Order") that was identical to the Order from March 23 except that it extended hotel closures until April 9, 2020. *Id*. at 20. Defendant similarly signed an Order Extending Amended Order on April 7, 2020 (hereafter, "April 7 Order") that extended the hotel, motel, and short-term rental closures in the March 23 Order until April 30, 2020. *Id*. at 21. Defendant additionally signed an Order Extending Supplemental Order on April 7, 2020 (hereafter, "April 7 travel ban") that banned all travel within Brewster County except for purposes of essential activities. (Doc. 6-1 at 22).

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 28. Defendant issued a News Release on April 30, 2020 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 34. The first case of COVID-19 was reported in Brewster County on April 25, 2020. *Id*. at 36.

On April 10, 2020, Plaintiff brought this suit against Defendant for allegedly violating Plaintiff's constitutional rights. (*See* Doc. 1). Plaintiff asserts six counts against Defendant: (1) violation of Due Process under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (2) violation of the Equal Protection clause under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (3) violation of Due Process under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (4) unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983; (5) violation of the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; and (6) violation of the Commerce Clause of Article I, § 8 of the United States Constitution, 42 U.S.C. § 1983. (Doc. 6 at 13–24).

Defendant filed the instant Motion to Dismiss on May 7, 2020. (*See* Doc. 9). Defendant seeks dismissal of Plaintiff's complaint for lack of subject matter jurisdiction as well as for failure to state a claim upon which relief can be granted. *Id*. Defendant argues that this Court lacks jurisdiction to hear Plaintiff's case because it invokes the political question doctrine, rendering Plaintiff's claims non-justiciable. *Id*. at 2. Defendant alternatively argues that Plaintiff has failed to state a claim upon which relief can be granted because his claims fail "to provide more than speculative allegations for any cognizable cause of action." (Doc. 9 at 10). Plaintiff filed a Response to Defendant's Motion to Dismiss on May 19, 2020. (*See* Doc. 12). Defendant filed a Reply on May 26, 2020. (*See* Doc. 13). Accordingly, this matter is ready for disposition.

II. LEGAL STANDARD

1. Rule 12(b)(1)

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The courts possess only that power authorized by the Constitution and statutes of the United States. *Id.* (citations omitted). Motions filed under 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 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. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion to dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004). Further, the court does not look beyond the face of the complaint to determine whether the plaintiff states a claim under Rule 12(b)(6). *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). When the well-pleaded facts are viewed in this light, dismissal is proper only where the plaintiff can prove no set of facts entitling him to relief. *Rankin v. Wichita Falls*, 762 F.2d 444, 446 (5th Cir. 1985). However, "plaintiffs must allege facts to support the elements of the cause of action in order to make out a valid claim." *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011). The court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrar v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)); *DeMoss v. Crain*, 636 F.3d 145, 152 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plausibility requires more than "a sheer possibility that a defendant has acted unlawfully." *Id.* Likewise, threadbare recitals of a cause of action's elements supported by conclusory statements will not survive a motion to dismiss. *Id*. Factual allegations must raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

III. DISCUSSION

1. 12(b)(1) Motion

Defendant first asserts that Plaintiff's claims are barred by the political question doctrine. (Doc. 9 at 8). Motions to dismiss on political question grounds are treated as Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction because 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 (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 (2004) (citing *Baker v. Carr*, 369 U.S. 186 (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).

The case before the undersigned does not present a political question incapable of judicial resolution. In *Jacobson v. Commonwealth of Massachusetts*—the seminal Supreme Court case on a state's authority during times of contagion—the Court explicitly contemplated 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 (1905). While the *Jacobson* decision was in the context of legislation, 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 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, 954 F.3d 772, 784 (5th Cir. 2020). In establishing the constitutional parameters of public health measures adopted during crisis, the Fifth Circuit implicitly acknowledged courts' continuing responsibility to evaluate such enactments for constitutional violations. Therefore, this matter does not fall within the political question doctrine and the undersigned will proceed with evaluating this case on the merits, albeit under the auspices of *Jacobson*, *Abbott*, and their progeny.

2. 12(b)(6) Motion

Defendant alternatively seeks dismissal of Plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 9 at 10–12). To reiterate, Plaintiff asserts the following six claims against Defendant: (1) violation of Due Process under the

Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (2) violation of the Equal Protection clause under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (3) violation of Due Process under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; (4) unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983; (5) violation of the Privileges and Immunities clause of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; and (6) violation of the Commerce Clause of article I, § 8 of the United States Constitution, 42 U.S.C. § 1983. (*See* Doc. 6). The undersigned will address each claim in turn.

i. Violation of Due Process Under the Fourteenth Amendment

Plaintiff's first claim for relief contends Defendant's March 17 Declaration and March 25 Declaration, "deprived Plaintiff of his right to due process under the Fourteenth Amendment *because* they were signed and promulgated with no evidence that a local disaster had occurred in Brewster County and no evidence that a local disaster was imminently threatened." (Doc. 6 at 15) (emphasis added). Plaintiff seeks the Court "declare null and void" the aforementioned declarations. *Id*. Defendant responds by alleging that "[i]t is undisputed that there is no statutory requirement in [§] 418.108 of the Texas Government Code" requiring a county judge to find an actual disaster has occurred prior to issuing a local state of disaster. (Doc. 9 at 10). Defendant further disputes Plaintiff's argument that Defendant made the proclamations without evidence, relying in part on Texas Governor Greg Abbott's preceding, March 13, 2020 Declaration of Disaster in All Counties in Texas. *Id*. at 12 (citing (Doc. 6-1)).

Plaintiff's alleged due process violation hinges on Plaintiff's repeated assertion that Defendant lacked the ability to declare a disaster—and therefore take the actions he did—absent

evidence that an actual disaster was taking place or absent evidence of a disaster's imminence. (*See* Doc. 6). In the State of Texas, the Texas Government Code authorizes the Governor to declare a state of disaster "if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent." Tex. Gov't Code § 418.014(a). Governor Abbott did so on March 13, 2020, and Plaintiff concedes he does not challenge Governor Abbott's declaration. (*See* Abbott Declaration dated March 13, 2020; *see also* Doc. 12 at 7). Therefore, for purposes of this matter, the propriety of Governor Abbott's Disaster Declaration is not in question.

When the Governor of Texas declares 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't Code § 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't Code § 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't Code § 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't Code § 418.1015(b). 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.

Plaintiff's argument that Defendant must be able to reasonably conclude or find that a disaster existed at the time he enacted the disaster declaration is meritless. In support of this

contention, Plaintiff merely cites to the statutory definition of a disaster which tends to rebut his own argument insofar as "disasters" include not only the occurrence but the imminent threat thereof. *See* Tex. Gov't Code § 418.004(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 . . . epidemic."). The Texas Government Code requires an official declaring a disaster include the following information in their declaration: (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. Tex. Gov't Code Ann. § 418.014. Here, Defendant has complied with each of these requirements insofar as his order (1) describes the disaster as the COVID-19 pandemic; (2) designates Brewster County as the threatened area; and (3) notes the high likelihood of significant loss of life and property as a result of the pandemic. (*See generally* Doc. 6-1). Accordingly, the undersigned finds Defendant has complied with the Texas Government Code in enacting the disaster declarations.

As Plaintiff's first claim for relief is premised on Defendant's failure to adhere to the Texas Government Code and the undersigned has found that Defendant did indeed comply with the relevant statutes, the undersigned **RECOMMENDS** Defendant's Motion to Dismiss be **GRANTED** as to Plaintiff's first, due process based, claim for relief. (Doc. 9).

ii. Violation of the Equal Protection Clause under the Fourteenth Amendment

Plaintiff's second claim alleges Defendant's Orders, beginning with the March 20 Order and ending with the April 7 Order, deprived Plaintiff of his right to equal protection under the Fourteenth Amendment. (Doc. 6 at 18). Plaintiff seeks the Court declare null and void the aforementioned orders and declarations. *Id*. Defendant fails to address this argument in his

Motion to Dismiss. (*See* Doc. 9). The bar to prevail against a motion to dismiss is exceedingly low as a plaintiff's complaint must merely "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Anderson v. Valdez*, 845 F.3d 580, 589 (5th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Here, Plaintiff states a claim upon which relief can be granted. To state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment, "a plaintiff must demonstrate that she has been treated differently due to her membership in a protected class and that the unequal treatment stemmed from discriminatory intent." *Holden v. Perkins*, 398 F. Supp. 3d 16, 24–25 (E.D. La. 2019) (citing *Mills v. City of Bogalusa*, 112 F. Supp. 3d 512, 516 (E.D. La. 2015)). Plaintiff contends that as a hotelier, he was treated differently from other business owners whose businesses were not subject to the same restrictions as his, namely limiting service to the four classes of people identified in Defendant's March 23 Order. (*See* Doc. 6-1 at 10). Without addressing whether Plaintiff is truly a member of a protected class or whether Defendant enacted the declarations with discriminatory intent, the undersigned finds that Plaintiff has plausibly stated a claim upon which relief can be granted. Plaintiff has alleged he is a member of a protected class—business owners—and that as a member of that class he was treated differently due to purported discriminatory intent on Defendant's part. As noted above, Defendant makes no arguments to rebut these allegations. (*See* Doc. 9). Therefore, the undersigned **RECOMMENDS** Defendant's Motion to Dismiss be **DENIED** as to Plaintiff's claim for violation of the Equal Protection clause. (Doc. 9).

iii. Violation of Due Process Under the Fourteenth Amendment

Plaintiff's third claim asserts Defendant's Orders, beginning with the March 20 Order and ending with the April 7 Order, deprived Plaintiff's right to due process because closing

hotels except to certain classes of employed persons is unconstitutionally overbroad and overreaching. (Doc. 6 at 18–19). Defendant similarly fails to specifically address this claim. (*See* Doc. 9). "To state a claim under [§] 1983 for a violation of due process, Plaintiff must first prove that he was deprived of a constitutionally protected life, liberty, or property interest, and then identify an official action that caused the constitutional deprivation." *Miller v. Bunce*, 60 F. Supp. 2d 620, 623 (S.D. Tex. 1999) (citing *Johnson v. Houston Indep. Sch. Dist.*, 930 F.Supp. 276, 285 (S.D.Tex. 1996)). Here, Plaintiff has stated a claim for due process violation. Plaintiff asserts his constitutional right is to "own and operate a hotel in Marathon, Texas." (Doc. 6 at 18). Plaintiff further asserts that Defendant's Orders deprived him of the right to conduct business. *Id.* at 18–19. Therefore, the undersigned finds Plaintiff has stated a claim upon which relief can be granted for a due process violation and **RECOMMENDS** Defendant's Motion to Dismiss be **DENIED** as to Plaintiff's claim for due process violation. (Doc. 9).

iv. Unreasonable Search and Seizure in Violation of the Fourth and Fourteenth Amendments

Plaintiff further asserts Defendant's Orders, beginning with the March 20 Order and ending with the April 7 Order, violated the Fourth and Fifteenth Amendments. (Doc. 6 at 20). Plaintiff contends the Orders violated the Fourth and Fifteenth Amendments because "they were a meaningful interference with Plaintiff's possessory interests in his property." *Id.* Defendant similarly fails to address this argument in his Motion to Dismiss. (*See* Doc. 9).

The Fifth Circuit has recognized that a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. El-Mezain*, 664 F.3d 467, 542 (5th Cir. 2011) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Here, Plaintiff has plainly alleged that Defendant's Orders prevented him from the full use of his hotel, and therefore violated his fourth amendment rights. (Doc. 6 at 20). Plaintiff

further contends that he was deprived of the full use of his hotel because he could not stay there *himself* unless he met one of Defendant's four criteria. *Id*. at 21. Therefore, the undersigned finds Plaintiff has stated a claim upon which relief can be granted and **RECOMMENDS** Defendant's Motion to Dismiss be **DENIED** as against Plaintiff's claim for unreasonable seizure. (Doc. 9).

v. Violation of the Privileges and Immunities Clause of the Fourteenth Amendment

Plaintiff additionally asserts Defendant's April 7 travel ban, which banned all travel into and out of Brewster County, violates the Privileges and Immunities Clause of the Fourteenth Amendment. (Doc. 6 at 22). Claims under the Privileges and Immunities clause are "to be narrowly construed." *Hall v. Louisiana*, 12 F. Supp. 3d 878, 888 (M.D. La. 2014) (citing *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 760 (5th Cir. 1987)). "The clause protects only uniquely federal rights such as the right to petition Congress, the right to vote in federal election[s], the right to interstate travel, the right to enter federal lands, or the rights of a citizen in federal custody." *Id*. at 888 (citing *Deubert*, 820 F.2d at 760). "Therefore, the key inquiry is whether the privilege claimed is one that arises by virtue of national citizenship." *Id*. at 888 (citing *Mitchell v. Beaumont Indep. Sch. Dist.*, No. 1:05–CV–195, 2006 WL 2092585, at *15–16 (E.D. Tex. July 24, 2006)).

Here, it does not appear on the face of Plaintiff's complaint that he is alleging Defendant violated one of Plaintiff's rights that arises by virtue of national citizenship. (*See* Doc. 6 at 22). Rather, it appears Plaintiff is complaining about the incidental effects Defendant's Orders had on Plaintiff's *business* rather than complaining about how his own constitutional right to interstate travel was infringed. *Id*. When presented with a similar issue, a District Court in Maine found that a complaint was properly dismissed where a plaintiff complained of the incidental effects of a COVID-19 travel ban to the individual's business as opposed to the individual being prevented

from interstate travel. *See Savage v. Mills*, No. 1:20-CV-00165-LEW, 2020 WL 4572314, at *6 (D. Me. Aug. 7, 2020). The undersigned finds this reasoning persuasive and therefore **RECOMMENDS** Defendant's Motion to Dismiss be **GRANTED** as to Plaintiff's claim for violation of the Privileges and Immunities clause of the Fourteenth Amendment. (Doc. 9).

vi. Violation of the Commerce Clause of Article I, § 8 of the U.S. Constitution

Finally, Plaintiff asserts Defendant's Order, beginning with the March 20 Order and ending with the April 7 Order, constituted "an interference with Plaintiff's trade" and were an undue burden on interstate commerce. (Doc. 6 at 23). Plaintiff additionally contends, without providing any support, that he is "a member of the protected class the Commerce Clause was intended to benefit." *Id*.

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST., art. I, § 8, cl. 3. "The Supreme Court has made clear . . . that state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 WL 8773509, at *10 (W.D. Tex. Dec. 14, 2015) (citing *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). As noted by the District of New Jersey, "[s]everal cases have found that the discretionary actions of state officials can violate the dormant Commerce Clause." *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 609 (D.N.J. 2010). Therefore, the undersigned will first assess whether Plaintiff has adequately pled that Defendant's Orders had a discriminatory effect on interstate commerce.

Here, Plaintiff's claim for relief fails to elaborate on how Defendant's Orders benefit in-state economic interests over out of state economic interests. Businesses based in Brewster

County were just as likely to be affected by the order as business based outside of Brewster County and outside the State of Texas. Therefore, the undersigned finds Plaintiff has failed to state a claim for relief and **RECOMMENDS** Defendant's Motion to Dismiss be **GRANTED** as to Plaintiff's claim for violation of the Commerce Clause. (Doc. 9).

IV. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**. (Doc. 9).

SIGNED this 16th day of December, 2020.

DAVID B. FANNIN
UNITED STATES MAGISTRATE JUDGE

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).