IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TAP PILAM COAHUILTECAN NATION, SAN ANTONIO MISSIONS CEMETERY ASSOCIATION, RAYMOND HERNANDEZ,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 5:19-cv-1084 OLG**
ALAMO TRUST, INC., DOUGLASS W. MCDONALD, CEO OF THE ALAMO TRUST, TEXAS GENERAL LAND OFFICE AND GEORGE P. BUSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS AND THE TEXAS HISTORICAL COMMISSION, CITY OF SAN ANTONIO, TEXAS,	§	
Defendants.	§	

DEFENDANTS ALAMO TRUST, INC. AND DOUGLASS W. MCDONALD'S MOTION TO DISMISS, AND ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

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Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), Defendants Alamo Trust, Inc. ("Alamo Trust") and Douglass W. McDonald move to dismiss Plaintiffs' Complaint, or in the alternative, move for a more definite statement under Rule 12(e).

INTRODUCTION

The Alamo is and always will be a shrine of Texas liberty and freedom and one of the most important historical sites in the State. However, years of deferred maintenance and urban development on and around the Alamo grounds has led to significant deterioration. To protect the rich history of the Alamo and ensure that it stands for centuries to come, it is critical that steps be taken for its preservation and restoration.

To that end, in 2011, the Texas Legislature and Governor Rick Perry designated the Texas General Land Office ("GLO") the custodian of the Alamo. By statute, the Alamo is under the exclusive jurisdiction of the GLO, and all powers and duties related to it are vested solely in the GLO. Tex. Nat. Resource Code § 31.451(a). The same statute gives the GLO the right to "partner with a qualifying nonprofit organization" to, among other things, "provide services or other benefits for the preservation and maintenance of the Alamo." *Id.* Thus, in 2015, the GLO partnered with Alamo Trust, a private nonprofit Texas corporation, to manage the day-to-day operations and staff of the Alamo.

In 2015, the GLO and City of San Antonio ("COSA") also signed an agreement to create a master plan to preserve and protect the Alamo (the "Alamo Plan"). Under this agreement, a 21-member advisory committee, the Alamo Citizens Advisory Committee ("ACAC"), was established to provide citizen input on the development of the Alamo Plan.

In May 2017, the COSA and GLO officially adopted the Alamo Plan, which consists of five primary objectives: (1) preserve the Alamo Church and Long Barrack; (2) reestablish the Alamo's historic footprint; (3) recapture the historic Mission Plaza creating a sense of reverence

and respect for the historic battlefield; (4) build a world-class visitor center and museum that tells the story of the Battle of the Alamo and over 300 years of layered history; and (5) create a sense of arrival to the site and enhance connectivity between the site and other public spaces.

The Alamo Plan includes archaeological investigations of the site. Although the Alamo is not on federal land, all archaeological investigations will comply with the spirit of the Native American Graves Protection and Repatriation Act ("NAGPRA"), which requires consultation with federally recognized Native American tribes regarding the treatment of any human remains that are discovered. Consistent with the spirit of NAGPRA, the GLO and Alamo Trust created the Alamo Mission Archaeology Advisory Committee (the "AMAAC") to advise and offer insight during the archaeological investigations. The AMAAC is comprised of five members of federally recognized Native American tribes who, among other things, have developed a Human Remains Protocol that will be followed to the extent any human remains are discovered at the Alamo during the implementation of the Alamo Plan. Notably, the Human Remains Protocol established by the AMAAC provides that the committee will "engage with other interested groups and individuals, providing a forum for their involvement and understanding of the Alamo Plan."[1] Thus, the current protocol is both extensive and inclusive.

Presently, the Alamo Plan is on schedule for completion by 2024. But Plaintiffs are now asking this Court to halt this historic project in a transparent attempt to secure preferential treatment for themselves with respect to two aspects of the project. First, Plaintiffs want a seat on the AMAAC so that they can draft the human remains protocol for the Alamo Plan despite the fact that they are not a federally recognized Native American tribe, they have no legally cognizable

[1] Plaintiffs attached a copy of the Human Remains Treatment Protocol to their Complaint as Exhibit 18.

right (much less a constitutional right) to be on this advisory committee, and a human remains protocol is already in place. Second, Plaintiffs want to use the Alamo Chapel for a private, members-only religious ceremony, despite the fact that no other individuals or groups are permitted to use the Chapel for any private ceremonies, regardless of any religious affiliation.

Apparently, Plaintiffs believe (mistakenly) that the specter of federal litigation might help them secure this special treatment. So, Plaintiffs filed this lawsuit seeking extraordinary injunctive relief and asserting a host of specious constitutional and statutory claims—all of which fail on their face and should be dismissed.

First, Plaintiffs do not even have standing to assert any of their purported claims against Alamo Trust or McDonald. To establish standing, Plaintiffs must allege an actual injury that is fairly traceable to specific conduct by Alamo Trust and McDonald and that can be redressed by a favorable decision against these specific defendants. Yet, Plaintiffs do not even try to do that. Plaintiffs, for example, make no effort to establish or explain how a private nonprofit and its CEO could be liable for constitutional violations. Instead, they generically lump all of the "Defendants" together and allege collective wrongdoing. This is not sufficient to establish standing.

Second, Plaintiffs have not stated a claim for an equal protection violation under the Fourteenth Amendment. Plaintiffs' equal protection claim is rooted in the notion that by following NAGPRA's guidelines and including only federally recognized Native American tribes on the AMAAC, Defendants have somehow discriminated against them on the basis of "national origin." However, the Complaint does not set forth any facts establishing this purported "national origin," much less any discrimination based on it. The Complaint does contain several references to the Tap Pilam "Nation," but affiliation with Tap Pilam confers no unique national origin on the Plaintiffs. Tap Pilam is neither a federally recognized Native American tribe nor a "Nation."

Third, the Complaint similarly fails to allege any due process violation. Plaintiffs have not alleged any interest protected by the Due Process Clause. Plaintiffs concede that any remains that may be at the Alamo are unidentified, and this Court has previously held that a person does not have a protected interest in unidentified remains. *Patterson v. Defense POW/MIA Accounting Agency*, __ F.3d __, No. SA-17-CV-467-XR, 2019 WL 3412913, at *11 (W.D. Tex. July 29, 2019). Similarly, Plaintiffs do not have a protected interest in sitting on the AMAAC. Their only justification for this alleged interest is that they sat on a different advisory board for a different project at an entirely different site. However, past discretionary conduct on a different project does not give rise to a constitutionally protected interest in connection with the Alamo Plan. Accordingly, the due process claims fail.

Fourth, Plaintiffs fail to state a claim for relief under the First Amendment's Free Speech or Free Exercise Clauses. Plaintiffs' free speech claims stem from Plaintiffs allegedly being denied access to hold a religious ceremony in the Alamo Chapel on September 7, 2019 (a few days before filing this suit). However, the Complaint is completely silent on the circumstances surrounding this alleged incident. It does not allege whether the Alamo Chapel was open to the public, why they were allegedly denied access, or whether their purported ceremony was intended to be a private, members-only ceremony that would have interfered with the general public's access. Put simply, Plaintiffs have not alleged sufficient facts to establish a free speech claim. Plaintiffs' free exercise violations fare no better. The Complaint does not allege a sincerely held religious belief or describe how Defendants substantially burdened it—they did not.

Finally, Plaintiffs' remaining statutory claims also merit dismissal. Plaintiffs did not comply with the Texas Freedom of Religion Act's mandatory 60-day notice period; a declaratory judgment will do nothing to clarify the rights and relations among the parties and Plaintiffs have

no standing to obtain the requested declarations; Plaintiffs have not stated a claim under the Antiquities Code; and the American Indian Religious Freedom Act ("AIRFA") does not even create a private right of action.

Because Plaintiffs have not pled a valid claim against Alamo Trust or McDonald, their Complaint should be dismissed.

STANDARD OF REVIEW

Alamo Trust and Doug McDonald move to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1), (6), and (7). Rule 12(b)(1) provides for the dismissal of lawsuits where the court lacks subject-matter jurisdiction. "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Accordingly, Plaintiffs bear the burden of showing jurisdiction exists.

Rule 12(b)(6) provides for the dismissal of a lawsuit when the plaintiff fails to state a claim upon which relief can be granted. To avoid dismissal under Rule 12(b)(6), "the plaintiff must plead 'enough facts to "state a claim to relief that is plausible on its face."'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted). While courts accept the factual allegations as true, they "will not 'strain to find inferences favorable to the plaintiffs'" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)).

Federal Rule of Civil Procedure 12(b)(7) requires the dismissal of a lawsuit if the plaintiff fails to join an indispensable party under Rule 19.

ARGUMENT

I. The Complaint Should Be Dismissed Because Plaintiffs Lack Standing to Sue Alamo Trust or McDonald (All Counts).

Plaintiffs lack standing to bring their claims against Alamo Trust or McDonald because Plaintiffs' alleged injuries are neither traceable to these defendants' conduct nor likely to be redressed by a judgment against these defendants. Standing is a limitation on the court's power, and the standing inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Kowalski v. Turner*, 543 U.S. 125, 128 (2004). To establish standing, a plaintiff must show: (1) a concrete, particularized, actual or imminent injury-in-fact; (2) that is fairly traceable to the challenged action of the defendant; and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Federal courts have no jurisdiction unless a case or controversy is presented by a party with standing to litigate." *De Leon v. Perry*, 975 F. Supp. 2d 632, 645 (W.D. Tex. 2014). Plaintiffs bear the burden of establishing standing, and if they cannot, the Complaint should be dismissed. *Lujan*, 504 U.S. at 560-61; *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); Fed. R. Civ. P. 12(b)(1).

Here, Plaintiffs make no attempt to trace any of their purported injuries to any particular Defendant. Instead, Plaintiffs simply lump all of the "Defendants" together and accuse them of collective wrongdoing. But, "[l]umping defendants together is insufficient to state a claim against any of them." *Brown v. ASC Mtge.*, No. 4:15-CV-547-A, 2015 WL 5559441, *2 (N.D. Tex. Sept. 18, 2015); *Washington v. U.S. Dept. of Housing and Urban Dev.*, 953 F. Supp. 762, 770 (N.D. Tex. 1996) ("Plaintiff may not rely on such global allegations that Defendants, as a group, committed such acts or omissions."). Plaintiffs also have not shown how a favorable decision against Alamo Trust or McDonald would redress their purported injuries related to the Alamo Plan

given that all powers and duties related to the Alamo are "vested solely in the [GLO]." Tex. Nat. Res. Code 31.451(a). Because Plaintiffs have not established that they have any standing to sue Alamo Trust or McDonald, the Complaint should be dismissed.

II. Plaintiffs' Constitutional Claims Should Be Dismissed Because Plaintiffs Have Not Plead that Alamo Trust or McDonald are Persons Acting Under Color of State Law (Counts One, Two, and Four).

Plaintiffs' First, Second, and Fourth claims for relief each allege violations of constitutional rights. Plaintiffs pursue remedies for these alleged violations under 42 U.S.C. § 1983, which "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place under color of [state law]." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (internal quotations omitted). "In general, private entities are not liable to suit under § 1983." *Hebrew v. Houston Media Source*, 453 Fed. Appx. 479, 481 (5th Cir. 2011) (holding that entity operating public access television was not liable under section 1983). Instead, the defendant of a claim under § 1983 must be "a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. A person may be a state actor if "he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Id.* Thus, to avoid dismissal of their § 1983 claims, the Plaintiffs must allege that McDonald and Alamo Trust are "persons" who acted under color of state law. 28 U.S.C. § 1983; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978).

Here, the Complaint lacks any such allegations specific to Alamo Trust or McDonald. Alamo Trust is a Texas non-profit corporation, and McDonald is its CEO. (Compl. ¶¶ 10 – 11.) The Complaint does not explain how Alamo Trust could be considered a "person;" how McDonald could be considered a state actor; or how Alamo Trust or McDonald acted under color of any state law. Indeed, apart from a bald allegation that "McDonald assumed control of the Alamo Plan," McDonald is not specifically mentioned anywhere in the Complaint. (*See* Compl. ¶ 26.)

Accordingly, the Complaint should be dismissed because it fails to allege or establish that McDonald or Alamo Trust are "persons" who acted under color of state law.

III. Plaintiffs' Equal Protection Claim Should Be Dismissed (Count One).

To allege a violation of the Equal Protection Clause, Plaintiffs must allege that they "ha[ve] been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Gibson v. Tex. Dept. of Ins.—Div. of Workers' Compensation*, 700 F.3d 227, 238 (5th Cir. 2012). "[T]he first step in an equal protection analysis … is determining whether the plaintiffs have alleged facts showing that they are treated differently." *HCI Distrib., Inc. v. Peterson*, 360 F. Supp. 3d 910, 922 (D. Neb. 2018); *accord Hines v. Quillivan*, ___ F. Supp. 3d ___, No. 1:18-cv-155, 2019 WL 3815132, at *7 (S.D. Tex. June 11, 2019). If a plaintiff meets this burden, the court should proceed to determine whether there is a rational basis for the different treatment. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Plaintiffs' equal protection allegations center on their exclusion from the AMAAC and Human Remains Protocol. (Compl. ¶¶ 48, 53). Specifically, Plaintiffs contend that the Defendants' "voluntary selective application of NAGPRA" excludes them from participating in the AMAAC or Human Remains Protocol, which they would otherwise be entitled to participate in as "next of kin" either under the Texas Health and Safety Code or the National Historic Preservation Act (the "NHPA"). According to Plaintiffs, this somehow amounts to discrimination on the basis of *national origin*. (*Id.* ¶ 53.)

Plaintiffs are wrong. The reality is that Plaintiffs have been treated exactly the same as all other members of the general public who are not members of a federally recognized Native American tribe. Defendants' reliance on the guidelines set out in NAGPRA for purposes of selecting members to the AMAAC and establishing a Human Remains Protocol does not amount to discrimination against Plaintiffs based on their national origin. Moreover, Defendants' reliance

on the NAGPRA guidelines in establishing the AMAAC easily passes the rational basis test. And, even if Plaintiffs were next of kin (which they have failed to adequately plead), neither the Texas Health and Safety Code nor NHPA provide Plaintiffs with any legal right to participate in the AMAAC or Human Remains Protocol. Thus, even if Defendants elected not to consider NAGPRA's guidelines at all, Plaintiffs still would have no legally cognizable right to serve on the AMAAC or participate in the Alamo Plan's Human Remains Protocol.

A. Plaintiffs are Being Treated the Same as Those Similarly Situated.

1. Plaintiffs Have Not Been Discriminated Against on the Basis of National Origin.

Plaintiffs argue that they are being treated differently because "Defendants voluntarily adopted NAGPRA" when drafting the Human Remains Protocol for the Alamo Plan so that Defendants would only have to consult with federally recognized tribes. (Compl. ¶¶ 48, 53.) Plaintiffs allege that the adoption of NAGPRA "discriminates against them based on their national origin." (*Id.* ¶ 53.) But, Tap Pilam is not a federally recognized Indian tribe, and the Complaint contains no other allegations regarding Plaintiffs' national origin. (Compl. ¶¶ 2, 48, 67.) "An American Indian tribe does not exist as a legal entity unless the federal government decides that it exists." *Maynor v. United States*, No. Civ. 03-cv-1559, 2005 WL 1902907, at *2 (D.D.C. July 11, 2005) (quoting *Kahawaiola v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004)). Indeed, a tribe must satisfy specific criteria before it can be recognized as such. 25 C.F.R. § 83.2.

Thus, Plaintiffs are not being treated any differently than any other similarly situated member of the public (i.e., members of the general public who are not members of any federally recognized Native American tribe). Ironically, Plaintiffs argument is actually that they should get special treatment—they should be guaranteed a place on an advisory board and involved in the

Alamo Plan's Human Remains Protocol even though similarly situated individuals share no such rights.

2. Defendants' Conduct Would Survive A Rational Basis Review.

Even if Plaintiffs had been treated differently from similarly situated persons based on Defendants' consideration of NAGPRA's guidelines in connection with forming the AMAAC and formulating the Human Remains Protocol (which they were not), Defendants' consideration of NAGPRA survives a rational basis review. To start, numerous decisions recognize that laws providing for preferential treatment to federally-recognized Indian tribes are subject to rational basis review. *See Brackeen v. Bernhardt*, 937 F.3d 406, 426 (5th Cir. 2019) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.") (quoting *Morton v. Mancari*, 417 U.S. 535, 552 (1974)); *Mancari*, 417 U.S. at 551 – 55 (applying rational basis review and rejecting due process challenge to law affording applicants with one-fourth or more degree of Indian blood with membership in a federally recognized tribe a preference over non-Indians).

Under a rational basis review, "[t]he mere fact that a law impacts different individuals in different ways does not subject it to constitutional challenge unless [plaintiff] can show that [the] law is so extreme as to lack a rational basis." *Gibson v. Tex. Dept. of Ins.*, 700 F.3d 227, 239 (5th Cir. 2012). The defendant "need not articulate the purpose or rationale" for the differential treatment, "as long as there is a reasonably conceivable state of facts that could provide a rational basis for its classification." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Indeed, "[t]he actual reason for a state action is irrelevant for claims reviewed under rational-basis scrutiny." *Newman v. Marchive P'ship, Inc. v. Hightower*, 349 Fed. Appx. 963, 965 (5th Cir. 2009) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

Here, there are numerous conceivable reasons why Defendants may have chosen to consider NAGPRA when forming the AMAAC and drafting the Human Remains Protocol. The Protocol plainly states that its intent is to "comply with the spirit of [NAGPRA]." (Compl. Ex. Q at 1.) Defendants may have wanted to limit their consultation to only include federally-recognized tribes because those tribes had gone through a vetting process with the federal government. Perhaps Defendants wanted to rely upon an established framework to guide the handling of any human remains and associated funerary objects. *See* 25 U.S.C. § 3001, et. seq. Defendants may have recognized that NAGPRA has an established framework for dealing with unidentified Native American human remains, and that such a framework would be beneficial and instructive to their handling of any remains. *See* 25 U.S.C. § 3002. Any of these reasons provide a "conceivable" basis for Defendants' decision to consider NAGPRA when drafting the Human Remains Protocol. Thus, the decision to apply NAGPRA survives rational basis review.

B. Plaintiffs' Reliance on Purported "Next of Kin" Status under the Texas Health and Safety Code and the NHPA Fails to Establish an Equal Protection Violation.

Plaintiffs also contend that they are entitled to participate in the AMAAC and Human Remains Protocol because similar projects in the past "utilized human remains protocols that allowed the next of kin to participate" and because the Uniform Development Code ("UDC") requires the application of the NHPA. (Compl. ¶ 53.) But Plaintiffs have not adequately pled that they are next of kin or provided any reason that such status would entitle them to participate in the AMAAC. Similarly, the application of the NHPA does not entitle them to participate in the AMAAC or the Human Remains Protocol.

1. Plaintiffs Fail to Plead Any Non-Conclusory Facts That They Are Next of Kin to Any Identified Remains and, even if They Were, Such Status Would Not Entitle Them to Participate in the AMAAC.

Plaintiffs fail to provide any non-conclusory allegations that they are next of kin. The Texas Health and Safety Code gives specific individuals, identified in order of priority, limited rights to control the disposition of a decedent's remains. Tex. Health and Safety Code §§ 711.002, 711.004. "Next of kin" are lowest on the priority list and, even then, only have rights if they are an "adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent." *Id.* §§ 711.002(a)(7), 711.004(a). Here, the Complaint is bereft of any factual allegations that Plaintiffs are next of kin. The Complaint has no allegations that any Plaintiff has any relationship with any identifiable remains. Without any allegations tying a specific plaintiff to specific remains, Plaintiffs cannot show that they are next of kin. *See Patterson v. Defense POW/MIA Accounting Agency*, ___ F.3d ____, No. SA-17-CV-467-XR, 2019 WL 3412913, at *9 (W.D. Tex. July 29, 2019) ("No case cited by the parties or revealed in the Court's research recognizes a cognizable property interest in remains the identity of which is in doubt."). As such, there are no allegations that establish they are next of kin. *Wells v. Ali*, 304 Fed. Appx. 292, 293 (5th Cir. 2008) (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.").

But even assuming, *arguendo*, Plaintiffs adequately plead that they are next of kin, that would not entitle them to participate in the AMAAC or the Human Remains Protocol. As discussed above, the Texas Health and Safety Code merely sets forth the priority upon which individuals have the right to control the disposition of a specific decedent's remains. It does not afford Plaintiffs (or anyone else) any sort of legal right to participate on an advisory board in connection with the Alamo Plan or to participate in the Human Remains Protocol for the project. Moreover,

even if Defendants had violated some portion of Texas Health and Safety Code (which they have not), a violation of a state law is not a basis for a claim under § 1983. *Bittakis v. City of El Paso*, 480 F. Supp. 2d 895, 909 (W.D. Tex. 2007).

2. The UDC and the NHPA Do Not Bestow Any Rights on Plaintiffs.

Plaintiffs' contention that Defendants allegedly ignored the UDC, which would mandate the application of the NHPA, also fails to establish an equal protection violation. (Compl. ¶ 53.) Plaintiffs have no rights under the NHPA. The NHPA requires federal agencies "to take into account the effects of their undertakings on historical properties and afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment on such undertakings." 36 C.F.R. § 800.1(a); 54 U.S.C. §§ 300303, 304101. In connection with this responsibility, the NHPA requires consultation with certain specified parties, including federally recognized tribes. 36 C.F.R. § 800.2(c)(2)(ii); 54 U.S.C. § 300309 (defining "Indian tribe" as "an Indian tribe, band, nation, or other organized group or community … that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."). Consultation with any other party (such as Plaintiffs) is purely discretionary. *Id.* § 800.2(c)(5). Because Plaintiffs are not federally recognized tribes, any alleged failure to apply the UDC and the NHPA does not treat them any differently than any other similarly situated individual (i.e., non-federally recognized Indian tribes).

3. Alleged Violations of the Texas Health and Safety Code and the UDC Cannot Form the Basis of § 1983 Liability.

As explained above, Plaintiffs' equal protection and due process claims essentially rely on Defendants' alleged violations of the Texas Health and Safety Code and the UDC. (Compl. ¶¶ 53 – 54, 68 – 69). But even if Plaintiffs could allege that they are next of kin under the Texas Health and Safety Code or that Defendants violated the UDC (which they cannot), these alleged violations

of state laws are not actionable under § 1983. To state a § 1983 claim, Plaintiffs must allege a violation of a federal right, and "state law violations do not form the basis of § 1983 liability." *Bittakis*, 480 F. Supp. 2d at 909 (W.D. Tex. 2007) (citing *Fields v. City of South Houston*, 922 F.2d 1183, 1189–91 (5th Cir.1991)).

IV. Plaintiffs' Due Process Claim Should be Dismissed (Count Four).

A. The Complaint Does Not Identify a Protected Interest.

"In a section 1983 cause of action asserting a due process violation, a plaintiff must first identify a life, liberty, or property interest protected by the Fourteenth Amendment and then identify a state action that resulted in a deprivation of that interest." *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). Plaintiffs contend that Defendants are "exclude[ing] the Plaintiffs from participating in the human remains protocol and the project." (Compl. ¶ 68.) Plaintiffs contend that they are entitled to participate in the protocol and the project because they allegedly have an interest in the unidentified remains at the Alamo and because they allegedly participated in the Maverick Plaza Project's human remains protocol. (Compl. ¶¶ 46, 48, 68.) But neither allegation alleges a protected interest and, accordingly, the Due Process claim should be dismissed.

1. Plaintiffs Do Not Have a Protected Interest in Unidentified Remains.

There are no allegations that any remains located at the Alamo Complex are identified and relate to any specific Plaintiff. Rather, the Complaint freely concedes that "the Alamo and the grounds surrounding it contains [sic] a historically documented mission cemetery that includes the remains of many ancestors of the Tap Pilam Coahuiltecan Nation, other federally recognized tribes, Spanish soldiers, Canary Islander settlers, African settlers, Mexican soldiers, Battle of the Alamo defenders and even a former provincial Governor of Texas." (Compl. ¶ 30.) The Complaint continues that there may be over 1300 individuals buried there. (*Id.*) But Plaintiffs identify none who are their relatives. Thus, at best, Plaintiffs have alleged an interest in unidentified remains.

But this Court has held that such an interest is not a cognizable property interest under the Due Process Clause. *Patterson v. Defense POW/MIA Accounting Agency*, __ F.3d __, No. SA-17-CV-467-XR, 2019 WL 3412913, at *11 (W.D. Tex. July 29, 2019).

The Court's recent decision in *Patterson* is controlling on this point. In *Patterson,* designated primary next of kin of servicemembers who died in WWII sought to obtain the servicemembers' purported remains. *See id.* at *1. The deceased "servicemembers were buried (or, at least, are associated with remains buried) in [the Philippines]." *Id.* In their pleadings, Plaintiffs alleged that their kin's remains had been identified and located. *Id.* at *8. At the summary judgment stage, the court recognized that the allegation was not supported. *Id.* ("[T]he Court sees the remains were not identified and located then and are not now."). Accordingly, the Court then proceeded to determine if the plaintiffs had a cognizable interest in unidentified remains—and held that they did not. *Id.* at *9 ("No case cited by the parties or revealed in the Court's research recognizes a cognizable property interest in remains the identity of which is in doubt."). The court noted that the plaintiffs' purported interest in *identified* remains was "novel," and "[i]f there is a right [to identified remains], it appears to diminish over time." *Id*. at 11.

The same is true here. None of the Plaintiffs allege a relationship with identified remains at the Alamo Complex. Rather, they freely admit that the remains may be a person that belongs to another group. Such an interest in unidentified remains is not an adequate property interest on which to base an alleged due process violation.

2. Plaintiffs Do Not Have a Protected Interest in Serving on the AMAAC.

Plaintiffs also appear to assert that their past participation in the Maverick Plaza Project entitles them to serve on the AMAAC. Their purported interest in sitting on the AMAAC is not protected by the Due Process Clause.

Just because Plaintiffs may have been afforded the privilege of serving on different advisory boards in the past, does not mean they now have a constitutionally protected right to serve on the AMAAC. Past discretionary conduct does not give rise to constitutionally protected interests. *Machete Productions, LLC v. Page*, 809 F.3d 281, 290 (5th Cir. 2015) ("[D]iscretionary statutes do not give rise to constitutionally protectable interests.") (quoting *Baldwin v. Daniels*, 250 F.3d 943, 946 (5th Cir. 2001). "A constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted in the past." *Id.* Accordingly, "if government officials may grant or deny the interest in their discretion, the interest is not protected by due process." *Anderton v. Texas Parks and Wildlife Dept.*, 605 Fed. Appx. 339, 346 (5th Cir. 2015) (citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005)).

Thus, participation in the Maverick Plaza Project does not afford Plaintiffs a protected interest in sitting on the AMAAC. *See Wainwright v. County of Oxford*, 369 F. Supp. 2d 3, 8 (D. Me. 2005) (no protected right in position on advisory committee); *see also Brown v. Texas State Univ. Sys. Bd. of Regents*, No. A-13-CA-483-SS, 2013 WL 6532025, at *9 (W.D. Tex. Dec. 12, 2013) (holding that plaintiff's interest in remaining on a basketball team was not a protected interest under the Due Process Clause).[2]

[2] To the extent that Plaintiffs allege a due process violation arising out of the NHPA (Compl. ¶ 2), courts have repeatedly rejected any such contention. *Appalachian Voices v. Fed. Energy Reg. Commn.*, No. 17-1271, 2019 WL 847199, at *3 (D.D.C. Feb. 19, 2019) (dismissing due process

B. Plaintiffs' Vagueness Challenge Does Not Allege a Due Process Violation.

Plaintiffs also couch their due process challenge, confusingly, on vagueness grounds.[3] (Compl. ¶ 69.) The Complaint does not specify what regulation Plaintiffs contend is vague, but presumably Plaintiffs mean the selection of the AMAAC members.

The vagueness challenge must fail. The selection criteria for the AMAAC is quite clear. As Plaintiffs admit, the AMAAC is comprised of only members of federally recognized tribes. (Compl. ¶ 48.) This is not vague. A statute will violate due process if it is "so 'indefinite that no one could know' what is prohibited, creating an ordinance that is 'substantially incomprehensible.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008) (quoting *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981)). That is clearly not the case here.

V. Plaintiffs' First Amendment Claim Should be Dismissed (Count Two).

Plaintiffs contend that Defendants violated Plaintiffs' First Amendments right to free speech and free exercise of religion when "Plaintiffs were denied the use of the Chapel for religious ceremony." (Compl. ¶ 57.) Specifically, the Complaint alleges the following:

> TPCN, members of the Yanaguana Tap Pilam Native American Church of the Americans, Church of Oklahoma and various Christian denominations have been conducting an annual Sunrise Memorial Ceremony in the Alamo Chapel during *La Semana de Recuerdos* (Week of Remembrances) held each September.

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claim because NHPA consulting provision was discretionary rather than mandatory and holding "[t]o the extent that any of the non-Tribal Historic Preservation Officer petitioners claim FERC's refusal to grant them consulting party status violated the NHPA or due process, that claim fails because there is no indication that the NHPA regulation in question—which provides only that certain individuals or entities "may" participate in the section 106 process as consulting parties, 36 C.F.R. § 800.2(c)(5)—creates a property interest or other 'legitimate claim of entitlement.'") (quoting *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 495 (D.C. Cir. 1988)).

[3] Vagueness is usually used to challenge criminal statutes. *Miccosukee Tribe of Indians of Fla. v. United States*, 650 F. Supp. 2d 1235, 1242 (S.D. Fla. 2009) (rejecting vagueness challenge to appropriations bill), *aff'd sub nom.*, 619 F.3d 1289 (11th Cir. 2010).

> Specifically, on September 7, 2019, Plaintiffs TPCN and Raymond Hernandez were denied permission to gather inside the Alamo Chapel for a prayer service which has been a tradition allowed by the Alamo for the past 24 years, despite allowing tourists and members of the public to enter.

(Compl. ¶ 57.) The Complaint then proceeds through a laundry list of legal conclusions, such as that Defendants deprived Plaintiffs of their right to free speech (*id.* ¶ 58); that the restriction is based on Plaintiffs' content and viewpoint (*id.* ¶ 59); that the restriction is a prior restraint (*id.* ¶ 60); that the restriction is "facially, and as applied to Plaintiffs' speech, unreasonable and an effort to suppress expression" (*id.* ¶ 61); that the restriction grants public officials "unbridled discretion" (*id.* ¶ 62); and that the restriction "provides no objective guide for distinguishing between permissible and impermissible speech" (*id.* ¶ 63). None of these conclusions are supported by any factual allegations.

The reality is that Plaintiffs want to be afforded the special privilege of being the only group that is permitted to hold a private, members-only ceremony inside the Alamo Chapel. The Alamo's refusal to afford Tap Pilam these special privileges—which no other groups or members of the pubic are afforded—is not a violation of the First Amendment.

A. The Complaint Fails to State a Claim for a Violation of the Free Speech Clause.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800 (1985). "Even protected speech is not equally permissible in all places and at all times." *Id.* at 799. "[T]he government has a substantial interest in 'coordinating multiple uses of limited space.'" *Diener v.*

Reed, 77 Fed. Appx. 601, 607 (3d Cir. 2003) (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002)).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not meet Rule 8's requirement of a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 – 78 (2009); Fed. R. Civ. P. 8(a)(2). The Complaint's allegations are nothing more than a threadbare recitation of various considerations that a court will make when analyzing an alleged free speech violation. For instance, Plaintiffs contend that the "Free Speech Restriction" is "facially … content and viewpoint based" and that it is a "prior restraint" on speech. (Compl. ¶¶ 59 – 60.) The Complaint does not describe the content of the alleged Free Speech Restriction, which is necessary to determine if it is facially content and viewpoint based, and it does not describe the content or viewpoint that Plaintiffs contend Defendants wanted to suppress. The Complaint also does not identify the alleged "prior restraint." *See Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03 (1984)) (explaining a "prior restraint" is an "administrative or judicial order[] forbidding certain communications when issued in advance of the time that such communications are to occur"). Further, it provides no description of how the Free Speech Restriction grants public officials "unbridled discretion" or how it fails to "provide an objective guide" to identify permissible speech. None of these allegations satisfy Rule 8 and, accordingly, they should be dismissed. *See Diamond S.J. Enterprise, Inc. v. City of San Jose*, __ F.3d __, 2019 WL 2744700, at *13 (N.D. Cal. July 1, 2019) (dismissing free speech claims relying upon conclusory allegations).

Furthermore, the Complaint does not allege any facts that Defendants wrongfully prohibited any speech. The Supreme Court applies a different level of scrutiny depending upon

the forum of the speech. *Cornelius*, 473 U.S. at 800. Courts recognize three types of forums: "(1) traditional and designated public forums; (2) limited public forums; and (3) nonpublic forums." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 757 – 58 (5th Cir. 2010). Traditional and designated public forums are places such as sidewalks, streets, parks, and other state property that the government has designated a public forum. *Id.* at 758. "Limited public forums—as the name suggests—provide 'for public expression of particular kinds or by particular groups.'" *Id.* (quoting *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001). The government may legally regulate limited public forums under its control for the use to which it is dedicated. *Id.* Nonpublic forums consist of "property that is not by tradition or designation open for public communication." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001). "[T]he government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.*

Here, the Alamo Chapel is a nonpublic forum (or at most a limited public forum). Accordingly, Plaintiffs must allege facts showing that any speech prohibition was unreasonable or that the proposed speech was consistent with other permitted speech. Plaintiffs have not done so, and the claim should be dismissed.

B. The Complaint Fails to State a Claim for a Violation of the Free Exercise Clause.

To invoke First Amendment protections under the Free Exercise Clause, "a plaintiff must plead he has a 'sincerely held religious belief.'" *Patterson*, 2019 WL 3412913 at *12 (quoting *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989)). "After demonstrating that he possesses a 'sincerely held religious belief,' a plaintiff must prove that a government regulation substantially burdens that belief." *Id.* (quoting *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 876 (S.D. Tex. 2009), *aff'd*, 611 F.3d 248 (5th Cir. 2010). "A

'substantial burden' is one that 'truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.'" *Patterson*, 2019 WL 3412913, at *13 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)).

> The effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

Id. (quoting *Adkins*, 393 F.3d at 570). Moreover, the free exercise clause cannot be used to challenge a neutral law of general applicability. *Employment Division v. Smith*, 494 U.S. 872, 877 – 79 (1990).[4]

Plaintiffs have neither plead that they have a sincerely held religious belief nor that any Defendants substantially burdened that belief. Plaintiffs do not allege that their religious beliefs require the use of the Alamo Chapel. Plaintiffs also do not explain how Defendants have substantially burdened any sincerely-held religious beliefs. Accordingly, the Complaint fails to state a cause of action for any alleged violation of the Free Exercise Clause.

[4] After the Court's decision in *Smith*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and the Religious Freedom Restoration Act ("RFRA"), both of which require any law limiting a person's free exercise of religion to pass a higher level of judicial scrutiny. *See* 42 U.S.C. § 2000cc *et seq.*; *id.* § 2000bb *et seq.* The Supreme Court subsequently held that the RFRA did not apply to state and local governments. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The RLUIPA, by its plain terms, only applies to "land-use regulations" and "religious exercise by institutionalized persons." *See Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015). Plaintiffs' claim does not involve land-use regulations (i.e., zoning) or institutionalized persons. *See* 42 U.S.C. § 2000cc

VI. Plaintiffs' Texas Freedom of Religion Act Claims Must Be Dismissed (Count Three).

The Texas Freedom of Religion Act ("TRFA") limits the ability of a "government agency" to burden a person's free exercise of religion. Tex. Civ. Pract. & Rem. Code § 110.003. The statute defines a "government agency" as the "state or a municipality or other political subdivision of the state" and "any agency of this state or a municipality or other political subdivision of this state." *Id.* § 110.001. Plaintiffs do not allege that either Alamo Trust or McDonald are government agencies and, accordingly, this claim must be dismissed as to them.

Even if McDonald or Alamo Trust were government agencies, Plaintiffs failed to plead that they provided the requisite notice before filing suit under the TRFA. The TRFA prohibits a suit under it unless, "60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested." *Id.* § 110.006. Because Plaintiffs failed to plead (and failed to provide) written notice to Defendants, the TRFA claim must be dismissed. *See Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579, 588 (5th Cir. 2013).[5]

VII. The Complaint Fails to State a Claim under the Antiquities Code Against Alamo Trust or McDonald (Count Six).

Under the Antiquities Code, a permit from the Texas Historical Commission is required before work can begin on a historical landmark, such as the Alamo, and all work must be done in accordance with the permit.[6] Tex. Nat. Resources Code § 191.131(b). The Commission has the discretionary authority to issue a permit "for the survey and discovery, excavation, demolition, or

[5] If the Court dismisses the causes of action under federal law against Alamo Trust and McDonald, the Court should dismiss this claim because this state-law claim does not create federal subject matter jurisdiction. *See* 28 U.S.C. § 1331.

[6] Because the GLO has exclusive jurisdiction over the Alamo, the Texas Historical Commission's authority to issue permits relating to the Alamo comes from a Memorandum of Understanding signed between the GLO and the Texas Historical Commission.

restoration of … landmarks … if it is the opinion of the committee that the permit is in the best interest of the State of Texas." *Id.* § 191.054. The Code further provides:

> [A]ll operations conducted under permits or contracts set out in Section 191.054 of this code must be carried out: (1) under the general supervision of the committee; (2) in accordance with reasonable rules adopted by the committee; and (3) in such a manner that the maximum amount of historic, scientific, archeological, and educational information may be recovered and preserved in addition to the physical recovery of items.

Id. § 191.055. Section 191.173 authorizes a citizen to bring an action to enjoin a violation of the Antiquities Code.[7] *Id.* § 191.173.

In short, the Antiquities Code relates to the issuance of permits for work on historical landmarks, and it requires the recipient of the permit to abide by it. *See generally* 13 Tex. Admin. Code § 26.2 ("Section 191.054 and § 191.055 of the Texas Natural Resources Code state that the commission oversees investigations or project work through a permitting process."). Here, there are no allegations that Alamo Trust or McDonald failed to obtain any such permits or that they are violating any such permits.

Rather, Plaintiffs contend that Defendants violated the Antiquities Code by only excavating 18 inches rather than 6 feet. (Compl. ¶¶ 50, 72.) Indeed, Plaintiffs complain that Defendants are "intentionally digging *above* internments." (*Id.* ¶ 50.) Plaintiffs contend that the 18-inch excavation violates the Antiquities Code because it is not "in such a manner that the maximum amount of historic, scientific, archeological, and educations information may be recovered." (*Id.* (quoting Tex. Natural Resource Code § 191.055).) But here Plaintiffs confuse the manner of excavation with the size and scope of the excavation. The manner in which a party excavates something may affect the amount of information recovered. For instance, dynamite would be a destructive manner

[7] The Antiquities Code is Chapter 191 of the Natural Resources Code.

of excavating compared to using hand tools. But the Antiquities Code does not require any party to enlarge the scope of a project. Moreover, as the Commission notes in its Motion to Dismiss, it does not have any authority over any protocols that relate to the Alamo or the redevelopment project (including any authority to order the expansion of the scope of the project), because the Alamo is the exclusive jurisdiction of the GLO. Tex. Nat. Resource Code § 31.451(a). Likewise, here, Alamo Trust and McDonald could not order the expansion of the scope of the project.

Accordingly, Plaintiffs fail to allege a claim under the Antiquities Code against Alamo Trust or McDonald.[8]

VIII. The American Indian Religious Freedom Act Does Not Create a Private Cause of Action (Count Seven).

Plaintiffs claim for an alleged violation of the American Indian Religious Freedom Act must be dismissed because there is no private right of action under the act. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988) ("Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."); *White v. Davis*, No. A-16-CA-059, 2017 WL 3274871, at *3 (W.D. Tex. Aug. 1, 2017) ("AIRFA does not create a cause of action or any judicially enforceable rights.").

IX. Plaintiffs' Declaratory Judgment Claim Should Be Dismissed (Count Five).

Plaintiffs claim for declaration that the Alamo Complex contains a cemetery and that the Texas Health and Safety Code and the UDC apply to the project must also be dismissed. (Compl. ¶ 71.) The Declaratory Judgment Act is a procedural statute that does not create an independent basis for jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 – 72 (1950).

[8] If the Court dismisses all the causes of action under federal law against Alamo Trust and McDonald, the Court should dismiss this claim because this state-law claim does not create federal subject matter jurisdiction. *See* 28 U.S.C. § 1331.

Because all of Plaintiffs' other causes of action fail (as explained above), this Court does not have jurisdiction to give any of the Plaintiffs' requested declarations and this claim should be dismissed.

Moreover, Plaintiffs do not have standing to obtain the declarations they seek. The requested declarations appear to be part of Plaintiffs' misguided effort to establish some sort of legal right to serve on the AMAAC and participate in the Human Remains Protocol based on their purported status as "next of kin" under the Texas Health and Safety Code or under the NHPA. As discussed above, Plaintiffs cannot point to any specific remains to which they are next of kin. Moreover, the Texas Health and Safety Code affords them no rights to serve on the AMAAC or participate in the Alamo Project's Human Remains Protocol, much less to obtain a declaration that the Alamo Complex is a cemetery. And while Plaintiffs apparently want a declaration that the UDC applies because it mandates the application of the NHPA, the NHPA does not afford the Plaintiffs any rights either. As explained above, the NHPA only requires consultation with federally recognized tribes, which Plaintiffs are not. 36 C.F.R. § 800.2(c)(2)(ii); 54 U.S.C. § 300309.

Thus, Plaintiffs have not alleged any concrete, particularized, actual or imminent injury in fact under these statutes. *See Lujan*, 504 U.S. at 560 (requiring injury for standing). Plaintiffs also cannot show that the requested declaration would redress any harm they allege. *See Lujan*, 504 U.S. at 561 (requiring redressability for standing purposes). Accordingly, Plaintiffs do not have standing to pursue their declaratory judgment claims. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, No. 1:15-cv-134, 2017 WL 9481257, at *3 (W.D. Tex. May 22, 2017) (dismissing declaratory judgment act where there was no possibility plaintiff could be sued by defendant).

X. If the Court Dismisses the Claims Against the GLO, It Should Dismiss the Claims Against McDonald and Alamo Trust.

McDonald and the Alamo Trust understand that the GLO is also seeking a dismissal of the complaint and is advancing a sovereign immunity argument. If the GLO prevails on its motion, the claims against McDonald and Alamo Trust should likewise be dismissed.

Federal Rule of Civil Procedure 12(b)(7) requires the dismissal of a complaint if the plaintiff fails to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7). Federal Rule of Civil Procedure 19 "seeks to bring into a lawsuit all those persons who ought to be there by requiring joinder. In circumstances where the litigation should not proceed without absent persons, the federal suit should be dismissed." *Pulitzer-Polster v. Pulitzer,* 784 F.2d 1305, 1308 – 09 (5th Cir. 1986). As mentioned above, "[t]he Alamo complex is under the jurisdiction of the [GLO]," and all powers and duties related to the Alamo are "vested solely in the [GLO]." Tex. Nat. Res. Code § 31.451(a - b). Because each of the remedies sought by the Plaintiffs relate to and impact the Alamo, and the GLO has exclusive jurisdiction over the Alamo, no doubt exists that the GLO's absence from this litigation would impair its ability to protect its interests. Thus, the GLO is a "required party" to this litigation pursuant to Rule 19(a).

This lawsuit cannot continue in the GLO's absence. *See* Fed. R. Civ. P. 19(b). First, judgment rendered in the GLO's absence will prejudice the GLO as it has exclusive jurisdiction over the Alamo. Fed. R. Civ. P. 19(b)(1). Second, there is no mechanism by which to lessen or avoid the prejudice. Fed. R. Civ. P. 19(b)(2). Third, any judgment rendered in the GLO's absence would be futile as the GLO, with exclusive jurisdiction over the Alamo, would not be bound by the judgment. Fed. R. Civ. P. 19(b)(3). Only the fourth factor, whether the Plaintiffs would have an adequate remedy in the event of a dismissal, potentially weighs against dismissal. Fed. R. Civ. P. 19(b)(4). However, numerous courts have analyzed an identical balance of the Rule 19(b)

factors, uniformly concluding that the immunity of an indispensable party trumps the plaintiff's potential lack of a forum. "[W]hen an indispensable party is 'immune from suit, there is very little room for balancing of other factors' set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Fluent v. Salamanca Indian Lease Auth.,* 928 F.2d 542, 548 (2d Cir. 1991) (quoting *Enterprise Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989)). Indeed, "sovereign immunity may leave a party with no forum." *Id.* (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990)); *see also N. Arapaho Tribe v. Harnsberger,* 697 F.3d 1272, 1284 (10th Cir. 2012) (dismissal of lawsuit due to indispensable party's sovereign immunity left plaintiff with no remedy); *Rosales v. Dutschke,* 279 F. Supp. 3d 1084, 1094 (E.D. Cal. 2017) (dismissing litigation when sovereign immunity prevented joinder of indispensable party).

Thus, if the Court dismisses the claims against the GLO, it should also dismiss the claims against McDonald and the Alamo Trust under Rule 12(b)(7).

XI. Alternatively, if the Court Does Not Dismiss the Complaint Entirely, the Court Should Require the Plaintiffs to Replead the Remaining Claims and Provide a More Definitive Statement.

In the event that the Court finds the Complaint should not be dismissed, Alamo Trust and McDonald alternatively move for a more definitive statement pursuant to Federal Rule of Civil Procedure 12(e). Alamo Trust and McDonald request that Plaintiffs be required to distinguish among the Defendants any claims that survive dismissal. Specifically, Alamo Trust and McDonald request that Plaintiffs be required to specifically allege which acts they claim Alamo Trust and McDonald performed, the causes of action they contend they are liable for, and the facts showing how they meet every element of each cause of action asserted against Alamo Trust or McDonald.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Dated: October 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019 a true and correct copy of the foregoing document was served on all counsel of record via the Court's electronic filing system.

/s/ Manuel Mungia
Manuel Mungia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TAP PILAM COAHUILTECAN NATION, SAN ANTONIO MISSIONS CEMETARY ASSOCIATION, RAYMOND HERNANDEZ,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 5:19-cv-1084 OLG**
ALAMO TRUST, INC., DOUGLASS W. MCDONALD, CEO OF THE ALAMO TRUST, TEXAS GENERAL LAND OFFICE AND GEORGE P. BUSH, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS AND THE TEXAS HISTORICAL COMMISSION, CITY OF SAN ANTONIO, TEXAS,	§	
Defendants.	§	

[PROPOSED] ORDER ON DEFENDANTS ALAMO TRUST, INC. AND DOUGLASS W. MCDONALD'S MOTION TO DISMISS

On this day, the Court considered Defendants Alamo Trust, Inc. ("Alamo Trust") and Douglass W. McDonald's Motion to Dismiss under Rules 12(b)(1), 12(b)(6), and 12 (b)(7) (the "Motion"). The Court, having considered the pleadings and arguments of the parties, finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that Defendants Alamo Trust and McDonald's Motion to Dismiss under Rule 12(b)(1), 12(b)(6), and 12(b)(7) is GRANTED. Plaintiffs' claims are dismissed with prejudice as to Defendants Alamo Trust and McDonald.

SIGNED this ____ day _____, 2019

_____
HON. ORLANDO GARCIA