UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TAP PILAM COAHUILTECAN NATION, SAN ANTONIO MISSIONS CEMETERY ASSOCIATION, RAYMOND HERNANDEZ, *Plaintiffs,*	§	**Civil Action No. 5:19-cv-01084-OLG**
v.	§	
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 TEXAS GENERAL LAND OFFICE'S AND GEORGE P. BUSH, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE'S MOTION TO DISMISS, AND ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT

TO THE HONORABLE JUDGE OF THE COURT:

Defendants Texas General Land Office ("GLO") and George P. Bush, Commissioner of the Texas General Land Office ("Commissioner Bush") move for dismissal of all Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), and in the alternative, for a more definite statement pursuant to Rule 12(e).

INTRODUCTION

Plaintiffs ask the Court for a spectacular remedy—to "preliminarily and permanently enjoin Defendants . . . from proceeding with construction" on the Alamo renovation project "until

the Plaintiffs' [sic] are included in the project." Compl. ¶ 27.[1] One theme unifies the menagerie of constitutional and statutory violations asserted in the Complaint: all seek treatment for the Plaintiffs more favorable than the general public receives, such as a special seat on a project advisory committee, or to have the Alamo opened during non-operating hours for a private religious ceremony. Plaintiffs seek these privileges based on affiliation with the Tap Pilam "Nation," yet they admit throughout the Complaint that Tap Pilam is not a federally recognized Indian tribe—meaning it is indisputably not a nation. Compl. ¶¶ 2, 48, 67; 25 C.F.R. § 83.2. *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273 (9th Cir. 2004)("An American Indian tribe does not exist as a legal entity unless the federal government decides that it exists."). Even if the Plaintiffs could bypass the sovereign immunity of the GLO and Commissioner Bush, no legal justification exists for the preferential treatment they seek.

This litigation primarily arises from Plaintiffs' contention that their ancestors are interred on Alamo grounds, and that they therefore have the right to sit on the Alamo Mission Archaeology Advisory Committee ("AMAAC"), and draft its human remains protocols. No specific allegations connect any Plaintiff to any specific person buried at any part of the Alamo, although the Complaint does allege that members of numerous other groups entirely unrelated to the Plaintiffs are buried there, including "other federally recognized tribes, Spanish soldiers, Canary Islander settlers, African settlers, Mexican soldiers, [and] Battle of the Alamo Defenders." Compl. ¶ 48. In all, the Complaint contends that the Alamo grounds potentially contain more than 1,300 buried

[1] The Plaintiffs consist of (1) Tap Pilam Coahuiltecan Nation ("Tap Pilam"), a group claiming Indian heritage but not federally recognized as an Indian tribe, (2) Raymond Hernandez ("Hernandez"), a Tribal Council Member of Tap Pilam, and (3) the San Antonio Missions Cemetery Association ("Cemetery Association"), a nonprofit corporation of Hernandez's creation. Compl. ¶¶ 7-9.

human remains. Compl. ¶ 48. If this is true, to grant seats on the AMAAC based on "next of kin" status, as the Plaintiffs suggest, would result in an impossibly large and unworkable committee.

The Plaintiffs therefore filed suit to obtain this preferential treatment, even though Ramon Vasquez ("Vasquez"), a Tap Pilam member, already sits as "[r]epresentative for the history and archeological category" on the Alamo Citizens Advisory Committee ("ACAC"), a committee designed to "create a vision and guiding principles for the redevelopment of Alamo Plaza and the surrounding area." Compl. ¶ 21. Despite Plaintiffs' rhetoric about Defendants "purposefully making spurious claims to exclude the Plaintiffs from the process at all costs," the Complaint attaches and cites an email from Vasquez to the other ACAC members referring to himself "[a]s a representative of [Tap Pilam]," and actively engaging in consultation regarding the Alamo project. Compl. ¶ 3; Compl. Ex. B. This lengthy email addresses alleged burial grounds at the Alamo and applicable statutes, proposing "memorial walls" and "[s]tatues of prominent tribal community members" because "displays for the Battle of the Alamo will be placed throughout the compound and [Tap Pilam] should be afforded the same respect." Compl. Ex. B. The Complaint also admits that "at the request of Alamo plan consultants," Vasquez "submitted a proposal for development of the Alamo Narrative on the site, which highlights the families who descend from the Alamo Mission and are current members of the [Tap Pilam]." Compl. ¶ 32.

The human remains protocol harangued by Plaintiffs throughout the Complaint also indicates that "[t]he local indigenous perspective has been represented by Ramon Vasquez on the [ACAC]." Complaint Ex. Q at 1. According to the protocol, the AMAAC itself "maintains no formal or legal authority," and will "[e]ngage with other interested groups and individuals, providing a forum for their involvement." *Id.* at 4. The Complaint contains no allegations that the AMAAC improperly handled human remains for which Plaintiffs had a legal right to participate

in the disposition of. Instead, the Complaint goes no further than speculative claims that "the Defendants are planning to conduct their archaeological activities in a manner that violates local, state and federal laws," yet the human remains protocol attached to the Complaint indicates that "all decisions will be in compliance with applicable local, state, and federal laws and regulations." Compl. ¶ 48; Compl. Ex. Q at 5.

Despite Vasquez's seat on the ACAC, Plaintiffs contend that by including representatives of federally recognized Indian tribes—but not Tap Pilam—on the AMAAC, Defendants violated the Fourteenth Amendment. They allege that Defendants "weaponized NAGPRA" by utilizing guidelines set forth in the Native American Graves Protection and Repatriation Act in drafting the Alamo project's human remains protocol. Compl. ¶ 48. NAGPRA requires consultation with federally recognized Indian tribes, but not unrecognized groups such as the Plaintiffs, with regard to human remains. Ironically, the Plaintiffs wish to apply the Natural Historic Preservation Act ("NHPA") to the Alamo project—a statute applicable only to federal agencies—yet the NHPA also requires consultation only with federally recognized Indian tribes, and any consultation with the Plaintiffs under the NHPA would be purely discretionary. Neither statute creates any entitlement—even for federally recognized Indian tribes—to sit on an advisory committee. The Complaint never describes an actionable violation of any law, or any legal basis for the preferential treatment and extraordinary relief Plaintiffs seek. The Court should dismiss this litigation for numerous reasons.

First, as arms of the State of Texas, the GLO and Commissioner Bush are protected from suit in federal court by the Eleventh Amendment and the doctrine of sovereign immunity. *John G. and Marie Stella Kenedy Mem'l Found. v. Mauro,* 21 F.3d 667, 670–73 (5th Cir.1994) (barring § 1983 action against GLO Commissioner based on Eleventh Amendment immunity). Moreover,

dismissal of the GLO mandates dismissal of the entire litigation because the GLO possesses exclusive jurisdiction over the Alamo, making the GLO an indispensible party without which the litigation cannot continue. TEX. NAT. RES. CODE § 31.451(a), (b); Fed. R. Civ. P. 19; *Pulitzer-Polster v. Pulitzer,* 784 F.2d 1305, 1308–09 (5th Cir. 1986).

Second, with respect to the Fourteenth Amendment due process and equal protection claims, the allegation that some hypothetical Tap Pilam ancestor might be buried at the Alamo is too attenuated to establish a concrete injury and confer Article III standing, or even a claim ripe for adjudication. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). The Complaint contains no facts establishing that any Plaintiff is the correct person to control the disposition of any specific remains under the Texas Health and Safety Code, and no legally protected interest exists 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). Likewise, no legally protected interest exists in a seat on an advisory committee. *E.g. Allen v. Martel*, CIV S-10-1320 GGH P, 2010 WL 3734096, at *2 (E.D. Cal. Sept. 21, 2010). Equally problematic, the Fourteenth Amendment claims arise primarily from state law violations, yet state law violations do not form the basis of § 1983 liability.

Third, the Complaint fails to state a claim for an equal protection violation. The equal protection claim contains the self-defeating allegation that NAGPRA "discriminates against [Plaintiffs] based on their national origin." Compl. ¶ 48 (emphasis added). The Complaint contains no facts establishing the "national origin" of the Plaintiffs, or any discrimination based on it. Although the Complaint contains numerous references to the Tap Pilam "Nation," affiliation with Tap Pilam confers no unique national origin on the Plaintiffs. The Complaint also omits any facts establishing the discriminatory intent required to state an equal protection violation. In fact, it

states the opposite: "Defendants are planning to conduct their archaeological activities in a manner that violates local, state and federal laws in an attempt to reduce cost and time." Compl. ¶ 48 (emphasis added).

Fourth, the Complaint fails to state a claim for a due process violation. No protected interest exists in hypothetical unidentified remains or a seat on the AMAAC. The only justification Plaintiffs provide for this alleged interest is that they sat on a different advisory board, for a different project, at a different site, managed by different entities. Yet the Fifth Circuit rejects the proposition that the prior granting of a discretionary privilege gives rise to a constitutional entitlement. *Machete Productions, L.L.C. v. Page*, 809 F.3d 281, 290 (5th Cir. 2015).

Fifth, the Complaint fails to state a claim for "violations" of the Texas Natural Resources Code, or by seeking declarations that a cemetery exists, that the San Antonio Development Code applies, and that the Texas Health and Safety Code applies. These state law claims are subsumed within the sovereign immunity arguments raised in this Motion, and this Court lacks jurisdiction. Moreover, the declaratory judgment act is not an independent cause of action or source of jurisdiction. The latter part of this motion briefly addresses the strained reading of the Natural Resources Code adopted by the Plaintiffs in support of that claim.

Finally, the Complaint fails to state a free speech or free exercise of religion claim under the First Amendment, the Texas Religious Freedom Restoration Act ("RFRA"), or the American Indian Religious Freedom Act ("AIRFA"). These claims allege nothing more than that on September 7, 2019, Plaintiffs "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 alleges facts so sparse that they fail to preclude the possibility that the Plaintiffs showed up outside the normal

operating hours of the Alamo and could not enter because the building was closed to the public. These vague allegations, which fail to identify any specific action taken by the Defendants, fall far short of stating a claim. The RFRA claim is also jurisdictionally barred because Plaintiffs failed to comply with the pre-suit notice provision. Lastly, AIRFA merely describes congressional policy and creates no cause of action.

STANDARD OF REVIEW

The GLO and Commissioner Bush 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 state a claim "demands more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cited in *Machete Prods., LLC v. Page*, 809 F.3d 281, 287 (5th Cir. 2015)). "[A] complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* Although the Court must take all of the factual allegations in the complaint as true, it is not "bound to accept as true a legal conclusion couched as a factual allegation." *Id*. (quoting *Twombly*, 550 U.S. at 555)." 809 F.3d at 287 (internal citations omitted). Pleadings that "merely recite the Constitution" instead of providing concrete facts fall short because "[t]hey are no more than an 'unadorned, the-defendant-unlawfully-harmed-me accusation,' which cannot survive a Rule 12(b)(6) motion to dismiss." *Carley v. Tomball Indep.*

Sch. Dist., No. H-18-2521, 2018 WL 6172529, at *5 (S.D. Tex. Nov. 26, 2018) (citing *Ashcroft*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555).

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 & AUTHORITIES

I. Sovereign Immunity Bars this Litigation. (All Claims)

Sovereign immunity bars all claims against the GLO and Commissioner Bush. *Hudnall v. Panola County*, 2:06 CV 0490 RCJ LRL, 2007 WL 81928, at *5 (D. Nev. Jan. 5, 2007)("The Texas GLO is an arm of the state of Texas. . . entitled to sovereign immunity protection"); *John G. and Marie Stella Kenedy Mem'l Found. v. Mauro,* 21 F.3d 667, 670–73 (5th Cir. 1994) (barring § 1983 action against the Commissioner of the Texas GLO because of Eleventh Amendment immunity). Under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Hall v. Texas Commn. on L. Enf't,* 685 Fed. Appx. 337, 339–40 (5th Cir. 2017)(unpublished), cert. denied, 138 S. Ct. 419 (2017)(quoting *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)). "Federal courts are without jurisdiction over suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. Louisiana Bd. of Elementary and Secondary Educ.,* 743 F.3d 959, 963 (5th Cir. 2014). Because the Complaint omits any allegations of a waiver or abrogation of sovereign immunity and none exists, the Court must dismiss all claims against the GLO and Commissioner Bush.

A. The GLO and Commissioner Bush have not waived their sovereign immunity.

The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). As the Supreme Court explains:

> "Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction. Thus, **a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation**. Nor does it consent to suit in federal court . . . even by authorizing suits against it 'in any court of competent jurisdiction.'"

College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–76 (1999)(emphasis added, citations omitted). Courts require an "unequivocal" waiver with a "clear declaration" to be "certain that the State in fact consents to suit." *Hall,* 685 Fed. Appx. at 339–40 (quoting *Sossamon v. Texas*, 563 U.S. 277, 284 (2011).

Although the Complaint vaguely alleges a litany of statutory violations, none of the statutes referenced contain any indication of consent by Texas to suit in **federal** court. Nor have the GLO and Commissioner Bush "made a 'clear declaration' that they intend to submit to this Court's jurisdiction; rather, they have moved to dismiss Plaintiff's claims on grounds that they are immune." *Hampton v. Abbott,* SA-15-CA-1155-FBHJB, 2016 WL 6094375, at *3 (W.D. Tex. Mar. 11, 2016), *report and recommendation adopted,* SA-15-CA-1155-FB, 2016 WL 6078485 (W.D. Tex. May 18, 2016).

B. Congress has not abrogated sovereign immunity for Plaintiffs' claims.

Plaintiffs assert due process and equal protection claims under the Fourteenth Amendment and freedom of speech and religion claims brought under the First Amendment. To the extent the Plaintiffs assert free-standing constitutional claims outside the scope of § 1983, the Fifth Circuit

has "long harbored a great reluctance to allow the pursuit of constitutional causes of action directly." *Berger v. City of New Orleans,* 273 F.3d 1095 (5th Cir. 2001). "When a statutory mechanism is available, § 1983 being a prime example, plaintiffs must invoke its protection." *Id; Zentgraf v. Texas A & M Univ.,* 492 F.Supp. 265, 270 (S.D. Tex. 1980) ("The Equal Protection clause of the Fourteenth Amendment is not self-enforcing but requires application through some legislative act.")(citation omitted); *Roche v. Donahue,* 985 F. Supp. 14, 17 n.2 (D. Mass. 1997)(no "free-standing First Amendment cause of action" exists apart from a § 1983 action). Likewise, the Declaratory Judgment Act provides "no independent cause of action" and "is not an independent source of federal jurisdiction." *Texas v. Ysleta del Sur Pueblo*, 367 F. Supp. 3d 596, 602-03 (W.D. Tex. 2019). This dooms Plaintiffs' First and Fourteenth Amendment claims, because § 1983 itself provides no abrogation of sovereign immunity.[2] Courts routinely dismiss § 1983 claims based on the First and Fourteenth Amendments on sovereign immunity grounds.[3]

C. Plaintiffs' claims do not fit within any exception to sovereign immunity.

The sole exception to the outright bar of sovereign immunity permits prospective injunctive or declaratory relief against state officials (but not agencies such as the GLO) where the plaintiff alleges an ongoing violation of federal (but not state) law. *Hall,* 685 Fed. Appx. at 339–40;

[2] *Quern v. Jordan*, 440 U.S. 332, 345 (1979)(a "§ 1983 [claim] does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States"); *Hampton v. Abbott,* SA15CA1155FBHJB, 2016 WL 6094375, at *3 (W.D. Tex. Mar. 11, 2016), *report and recommendation adopted*, SA-15-CA-1155-FB, 2016 WL 6078485 (W.D. Tex. May 18, 2016)("Congress has not authorized suits against the state under § 1983").

[3] *Ross v. Texas Educ. Agency,* CIV.A. H-08-3049, 2009 WL 3254935, at *8 (S.D. Tex. Sept. 28, 2009), *aff'd*, 409 Fed. Appx. 765 (5th Cir. 2011)(unpublished)(claims for "violations of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. . . are barred by the State's sovereign immunity under the Eleventh Amendment"); *Sherrod v. Prairie View A & M U.,* CIV.A. H-10-1858, 2011 WL 843936, at *3 (S.D. Tex. Mar. 8, 2011)(dismissing § 1983 equal protection claims on grounds of sovereign immunity); *Shia v. Boente,* CV H-17-1255, 2017 WL 6033741, at *5 (S.D. Tex. Nov. 16, 2017), report and recommendation adopted, CV H-17-1255, 2017 WL 6025546 (S.D. Tex. Dec. 5, 2017)("Sovereign immunity bars constitutional torts in general and claims of due process violations in particular."); *Hanna v. LeBlanc,* 716 Fed. Appx. 265, 268 (5th Cir. 2017)(unpublished), *cert. denied,* 139 S. Ct. 1266 (2019)(dismissing first amendment claims).

McKinley v. Abbott, 643 F.3d 403, 405–06 (5th Cir. 2011)(dismissing state law claims on sovereign immunity grounds); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 322 n.5 (5th Cir. 2009) ("[W]e point out that state law cannot be the basis on which a federal court either enters an injunction or an award of monetary relief against a state."). Accordingly, the Court must dismiss all claims against the GLO, all state law claims, and all federal claims against Commissioner Bush other than those seeking prospective declaratory or injunctive relief based on ongoing violations of federal law. Plaintiffs assert no claims within the latter category, and sovereign immunity disposes of this entire litigation.

1. Plaintiffs' state law declaratory and injunctive relief claims should be dismissed.

The Plaintiffs seek various declarations that state laws "apply," that state laws were "violated," and that a cemetery "exists" based on an interpretation of state law, as well as injunctive relief to prevent future violations of state law.[4] Large portions of Plaintiffs' § 1983 claims also allege violations of state law.[5] These claims do not fit within any exception to sovereign immunity and must be dismissed.

2. Plaintiffs' declaratory and injunctive relief claims do not pertain to ongoing violations of federal law and should be dismissed.

Plaintiffs ask the court "to declare that Defendants violated the First and Fourteenth Amendments." Compl. at p. 27. This request, directed at past constitutional "violations," does not pertain to an **ongoing** violation of federal law. *Hall,* 685 Fed. Appx. at 339–40. Although Plaintiffs also ask the Court to enjoin Defendants from "violating Plaintiffs' free speech and free exercise of religion," the related factual allegations describe only past conduct and do not set forth any ongoing

[4] Third Claim for Relief (Texas Freedom of Religion Act), Fifth Claim for Relief (Declaratory Judgment) and Sixth Claim for Relief (Texas Natural Resources Code)

[5] First Claim for Relief (Equal Protection—Fourteenth Amendment), Second Claim for Relief (First Amendment), and Fourth Claim for Relief (Due Process—Fourteenth Amendment)

violation or potential for imminent harm. Therefore, this request also falls outside any potential exception to Commissioner Bush's sovereign immunity, and fails Article III's requirement to plead a case or controversy to establish standing. "[W]hen a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). The declarations sought in the Complaint are not about future policy but, instead, are reframed allegations of past misconduct. *Waller v. Hanlon*, 922 F.3d 590, 603-04 (5th Cir. 2019) (holding that there is "no standing to seek declaratory relief" when the focus is solely on past conduct).

The only remaining injunctive requests to be disposed of are the requests to enjoin Defendants "from excluding Plaintiffs' [sic] from the Human Remains Protocol" and "from proceeding with construction until the Plaintiffs' [sic] are included in the project." Compl. at p. 27. Although Plaintiffs do not link these requests to any specific claim, presumably they arise from the Fourteenth Amendment Claims. The first request pertains to an already-drafted document setting forth internal policies governing the Alamo renovations. Nothing in the Complaint links this request to an ongoing violation of federal law. The second request, put bluntly, is an attempt to curry leverage—no claim exists for which halting renovations on the Alamo would provide redress, nor does the Complaint link this injunctive request to an ongoing violation of federal law. No claims asserted by the Plaintiffs fall within any exception to sovereign immunity, and all must be dismissed.

D. Dismissal of the GLO mandates dismissal of the entire lawsuit because the GLO is an indispensable party.

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). By statute, "[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 relates to and impacts 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. The GLO is a "required party" to this litigation pursuant to Rule 19(a).

The factors set forth by Rule 19(b) militate against continuing the litigation in the GLO's absence. First, because this litigation pertains exclusively to subject matter within the GLO's exclusive jurisdiction, any judgment rendered in the GLO's absence will prejudice the GLO. Fed. R. Civ. P. 19(b)(1). Second, no mechanism exists by which to lessen or avoid the prejudice. Fed. R. Civ. P. 19(b)(2). Third, a judgment rendered in the GLO's absence would not be adequate because the GLO possesses exclusive jurisdiction over the Alamo, and yet would not be bound by any 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 in favor of maintaining the litigation. 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.[6] These authorities leave no doubt that the Court should entirely dismiss this litigation pursuant to Rule 12(b)(7).

II. The Fourteenth Amendment Claims Should be Dismissed. (First Claim)(Fourth Claim)

Plaintiffs' Fourteenth Amendment claims consist of alleged equal protection and due process violations arising from allegations that their ancestors are interred on Alamo grounds, and that they therefore have the right to control the Alamo renovation project and draft its human remains protocols. Both Fourteenth Amendment claims suffer from the same problem—the Plaintiffs plead no facts connecting themselves to a specific person buried at the Alamo in a way that would confer standing. Both claims also fail because they must be brought through § 1983, yet the Complaint fails to set forth a violation of a federal right, as opposed to state statutes. Plaintiffs' equal protection and due process claims also each independently fail for reasons discussed in more detail below.

A. Plaintiffs lack standing to maintain the Fourteenth Amendment claims.

To establish Article III standing, the Plaintiffs must demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[7] An "injury in fact [consists of] an invasion of a legally protected interest which is (a)

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[6] "[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, 547 (2d Cir. 1991), cert. denied 502 U.S. 818 (1991)(recognizing that "sovereign immunity may leave a party with no forum" and nonetheless dismissing claim)(punctuation omitted); *N. Arapaho Tribe v. Harnsberger,* 697 F.3d 1272, 1285 (10th Cir. 2012)(same); *Rosales v. Dutschke,* 279 F. Supp. 3d 1084, 1089 (E.D. Cal. 2017)(dismissing litigation when sovereign immunity prevented joinder of required party).

[7] With respect to standing under state law claims, state law governs. *Flores v. Koster,* 3:11-CV-0726-M-BH, 2014 WL 1243676, at *9 (N.D. Tex. Mar. 25, 2014). However, because the Texas test for standing parallels the federal test for Article III standing, Texas courts "turn for guidance to precedent from the U.S. Supreme Court." *Heckman v. Williamson County,* 369 S.W.3d 137, 154 (Tex. 2012).

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and internal quotations omitted). Plaintiffs must allege a "distinct and palpable, as opposed to merely abstract" injury. *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)(citations and quotations omitted). In addition to satisfying this "constitutional minimum of standing," Plaintiffs must also satisfy prudential standing requirements—a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004)(internal quotation marks omitted).

Plaintiffs allege that "Defendants are planning to conduct their archaeological activities in a manner that violates local, state and federal laws" without ever specifying what these violations entail. Compl. ¶ 48. Nor do the Plaintiffs ever explain anything specific wrong with the current human remains protocol (other than that they did not draft it themselves), or any way in which the AMAAC would have acted differently with a Tap Pilam member, or any actual mistreatment of human remains. The only thing the Plaintiffs seem sure about is that the possibility of disturbing hypothetical human remains has been "exclude[d]" by careful architectural planning. Compl. ¶ 50. The Plaintiffs are not "immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (citations omitted). They simply lack standing.

1. Plaintiffs do not plead a legally protected interest in any remains buried at the Alamo.

Vague allegations that the Plaintiffs are "descendants" of those buried at the Alamo fall short of establishing that the Plaintiffs are the individuals entitled to control the disposition of human remains found there. Compl. ¶ 1; *Idrogo v. U.S. Army,* 18 F. Supp. 2d 25, 27-28 (D.D.C. 1998)(plaintiff's unsubstantiated belief of "patrimonial ancestry" in Geronimo's remains insufficient to confer standing; his grievance was nothing more than a "generalized interest of all

citizens"); *Bingham v. Massachusetts,* CIVA0811770GAO, 2009 WL 1259963, at *1 (D. Mass. May 6, 2009), *aff'd,* 616 F.3d 1 (1st Cir. 2010)(Indian plaintiffs lacked Article III standing where they could not "show that they ha[d] an inherited interest traceable through the generations from the seventeenth century to the twenty-first from particular individuals").

Even assuming that the Plaintiffs are "descendants" of remains buried at the Alamo, someone else may well occupy a higher legal priority in determining their treatment. *See* e.g. *Whaley v. County of Saginaw,* 941 F. Supp. 1483, 1491 (E.D. Mich. 1996)(no standing for siblings of deceased person to sue when they were not next of kin and therefore did "not have a property right in the body"). This Court has recently held that a person does not have a legally protected interest in unidentified remains *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.").

a. The Texas Health and Safety Code establishes consent priority for control of the disposition of human remains.

The Texas Health and Safety Code sets forth the specific priority for control of the disposition of human remains under Texas law, granting the highest priority to those with a close relationship to the decedent, such as the decedent's surviving spouse, and granting the lowest priority to "any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent." TEX. HEALTH AND SAFETY CODE § 711.002. A similar priority scheme exists for consent to the removal of human remains from a cemetery. TEX. HEALTH AND SAFETY CODE § 711.004. The Texas Estates Code dictates the priority through which inheritance passes, and therefore which individual occupies the "next degree of kinship" for the purposes of the Texas Health and Safety Code. *See e.g.* TEX. ESTATES CODE CH. 201.

b. Plaintiffs do not successfully allege a right to control the disposition of any human remains at the Alamo.

Plaintiffs' conclusory statement that they "are the next of kin and the ancestors to the remains buried at the Alamo Mission" does not establish any right under the Texas Health and Safety Code or any other statute. Compl. ¶ 1. While the Court must accept facts plead in the Complaint as true, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions" are insufficient and, thus, not entitled to such deference. *Wells v. Ali*, 304 Fed. Appx. 292, 293 (5th Cir. 2008). Whether the Plaintiffs are "next of kin" is a legal conclusion that the Complaint provides no facts to support. The Complaint never identifies a specific person's remains in which the Plaintiffs assert rights, or establishes that excavations for the Alamo renovations will disturb the burial location of that person. In the absence of facts establishing a legally protected right in any human remains buried at the Alamo, no conceivable harm occurred by virtue of the Plaintiffs' lack of a seat on the AMAAC, or their inability to control the drafting of the Alamo project's human remains protocol.

2. Tap Pilam lacks standing and capacity to sue as a tribe.

Plaintiffs also proceed under the misguided notion that affiliation with the Tap Pilam "Nation" provides them with special "tribal" rights in human remains, distinct from the rights specific individuals might assert under the Texas Health and Safety Code. They are wrong, because Tap Pilam is not an Indian tribe or a sovereign nation. "An American Indian tribe does not exist as a legal entity unless the federal government decides that it exists," based on specific regulatory criteria implemented by the Department of Interior. *Maynor v. U.S.*, CIV. 03CV1559(SBC), 2005 WL 1902907, at *2 (D.D.C. July 11, 2005)(quoting *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1273 (9th Cir. 2004)); 25 C.F.R. § 83.2. Plaintiffs concede that Tap Pilam has received no such federal recognition. Compl. ¶¶ 2, 48, 67. Tap Pilam therefore lacks standing and capacity to sue as a tribe,

or to assert any "tribal" right in human remains. 2005 WL 1902907 at *2 (holding that no tribal standing exists absent federal recognition); *Neal v. Arizona,* 436 Fed. Appx. 811, 812 (9th Cir. 2011)(unpublished)(dismissal of claims proper where "the group whose purported rights plaintiffs [were] asserting [was] not an Indian tribe or band").

The *Maynor* court dismissed claims almost identical to those now at issue. There, the plaintiff sued on behalf of himself and other unspecified Indian descendants for "temporary and permanent injunctive relief prohibiting North Carolina from conducting [archeological] digs on [Indian] sites." 2005 WL 1902907 at *1. Lack of federal recognition as a tribe rendered the claimed injuries hypothetical because the plaintiff had "not alleged that he or the other unspecified plaintiffs [were] themselves recognized Indians who personally suffered any losses." *Id.* at *2.

Here, the Complaint goes no further than a generalized allegation that the Alamo contains the remains of Tap Pilam ancestors, along with numerous entirely unrelated groups:

> "[T]he Alamo . . . 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 Plaintiffs even concede that the Alamo "is not a Native American burial ground." Compl. ¶ 48. Just as in *Maynor*, the allegation that some Tap Pilam "ancestors" are buried at the Alamo fails to confer standing where no federal tribal recognition exists. The connection between Plaintiffs and the hypothetical human remains of some unspecified "ancestor" possibly buried at the Alamo—who might instead be an Alamo defender, a Canary Island settler, or anyone else by Plaintiffs' own admission—and who might be buried at some indeterminate location, sets forth an abstract, conjectural injury rather than an imminent, concrete one. *Lujan,* 504 U.S. at 560–61.

3. No legally protected right arises from the NHPA.

The Fourteenth Amendment claims contend that the Defendants "voluntarily adopted NAGPRA and ignored the City of San Antonio's Unified Development Code which mandates procedures and protocols under 36 CFR Part 800 of the [NHPA]." Compl. ¶ 53. The Plaintiffs' reliance on the City Development Code is driven by their misguided desire to apply the NHPA's consultation requirements to the Alamo project. The Plaintiffs recognize that no direct claim exists under the NHPA because the NHPA regulates only federal agencies and applies only to federal undertakings.[8]

Instead, with artful pleading they attempt to bootstrap application of the NHPA through the City of San Antonio's Unified Development Code ("City Development Code"). Yet even applying the NHPA would not confer standing, because the NHPA requires consultation only with federally recognized tribes. 36 CFR § 800.2(c)(2)(ii). Consultation with additional parties, even with a "demonstrated interest," is purely discretionary. 36 CFR § 800.2(c)(5); *Appalachian Voices v. Fed. Energy Reg. Commn.,* 17-1271, 2019 WL 847199, at *3 (D.C. Cir. Feb. 19, 2019)(NHPA consulting provision is discretionary). Absent federal tribal recognition, Tap Pilam's status under the NHPA is no different from any other parties who might claim a demonstrated interest, and the NHPA would not require consultation with Tap Pilam.

4. No legally protected right exists in a seat on the AMAAC.

Even if applicable, the NHPA's consultation provision (or the consultation and consent provisions of the other statutory frameworks mentioned in the Complaint, such as the Texas Health and Safety Code) would not bestow Plaintiffs with a legal right to sit on the AMAAC. These

[8] 36 CFR § 800.1; *Vieux Carre Prop. Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 457–58 (5th Cir. 1989)(NHPA claims barred where defendants were not federal agencies); *Kawaiisu Tribe of Tejon v. Salazar*, 1:09-CV-01977, 2011 WL 489561, at *7 (E.D. Cal. Feb. 7, 2011)(NHPA applies only to federal undertakings).

provisions simply do not provide for advisory committee positions, and no right to sit on an advisory committee otherwise exists. *Wainwright v. County of Oxford,* 369 F. Supp. 2d 3, 8 (D. Me. 2005)(dismissing § 1983 due process claim because no protected right existed in position on advisory committee); *Allen v. Martel*, CIV S-10-1320 GGH P, 2010 WL 3734096, at *2 (E.D. Cal. Sept. 21, 2010)(same). Moreover, the AMAAC itself "maintains no formal or legal authority." Compl. Ex. Q at 4; *Chapel Farm Estates, Inc. v. Moerdler*, 01 CIV. 3601(MBM), 2003 WL 21998964, at *7 (S.D.N.Y. Aug. 22, 2003)(dismissing § 1983 due process claim because "a purely advisory body . . . could neither grant nor deprive plaintiff of any property right"). The allegation that Defendants "excluded" Plaintiffs from the AMAAC fails to confer standing because no legal right to an AMAAC seat exists.

B. The Fourteenth Amendment Claims are not viable 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 v. City of El Paso,* 480 F. Supp. 2d 895, 909 (W.D. Tex. 2007)(citing *Fields v. City of South Houston*, 922 F.2d 1183, 1189–91 (5th Cir. 1991)). The equal protection claim contends that Defendants "ignored" the City Development Code and the "procedures and protocols" it mandates. Compl. ¶ 53. Likewise, the due process claim references unspecified "failure to recognize proper protocols and laws," presumably referring to the same "procedures and protocols" referenced in the equal protection claim. Compl. ¶ 68. The City Development Code cannot create a "federal right." 480 F. Supp. 2d at 909. An allegation that the Defendants "ignored" a **city** development code, or any of the other state statutes briefly referenced in the Complaint, cannot form the basis of a § 1983 claim.[9]

[9] The Plaintiffs also allege that "Defendants' absurd stance that a cemetery does not exist at the Alamo is solely an attempt to skirt the Texas Health and Safety Code, the City's Unified Development Code and federal statutes which protect cemeteries." Compl. ¶ 54. As with the City Development Code, the Texas Health and Safety Code does not create any federal right, does not contain a waiver of immunity, and the Plaintiffs do not have standing to enforce it.

C. The Complaint does not state a claim for an equal protection violation. (First Claim)

To state a claim for an equal protection violation, the Plaintiffs must plead facts establishing that they "received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent." *Taylor v. Johnson,* 257 F.3d 470, 473 (5th Cir. 2001). The nexus of the equal protection claim is the allegation that Defendants "weaponized NAGPRA" by taking its provisions into account when drafting the Human Remains Protocol for the Alamo Renovation Plan, because NAGPRA requires consultation only with federally recognized tribes. Compl. ¶¶ 48, 53-56. Plaintiffs allege that the Defendants discriminated against them based on their "national origin" by including representatives of federally recognized tribes—but not Tap Pilam—on the AMAAC. Compl. ¶¶ 48, 53.

1. The highly deferential rational basis standard applies.

As discussed previously, Tap Pilam is not a federally recognized Indian tribe, the Complaint contains no allegations regarding "national origin" other than affiliation with Tap Pilam, and affiliation with the Tap Pilam "Nation"—which is not actually a sovereign nation—does not confer a separate national origin. 25 C.F.R. § 83.2; Compl. ¶¶ 2, 48. No facts pled indicate that a standard higher than rational basis would apply. "Under rational basis review, differential treatment must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Hines v. Aldredge*, 783 F.3d 197, 202-03 (5th Cir. 2015)(internal quotation marks omitted) (quoting *Madriz–Alvarado v. Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004)). "The actual reason for a state action is irrelevant for claims reviewed under rational-basis scrutiny." *Newman Marchive P'ship, Inc. v. Hightower,* 349 F. App'x 963, 965 (5th Cir. 2009) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

2. The Plaintiffs have been treated similarly to those similarly situated.

"[T]he first step in an equal protection analysis in this matter is determining whether the plaintiffs have alleged facts showing they are treated differently." *HCI Distrib., Inc. v. Peterson,* 360 F. Supp. 3d 910, 922 (D. Neb. 2018). The Complaint never explains how Defendants treated Tap Pilam differently from others similarly situated, being non-tribal members of the general public who claim to have ancestors buried at the Alamo. Looking back to the standing analysis, no facts pled indicate that any of the Plaintiffs have any right under the Texas Health and Safety Code in any remains buried at the Alamo.

Yet the Plaintiffs ask the Court to enjoin Defendants from "excluding Plaintiffs' [sic] from the Human Remains protocol" and "from proceeding with construction until the Plaintiffs' [sic] are included in the project." Compl. ¶ 27. In other words, they contend "that they must be treated differently from all other [similarly situated non-tribal citizens]." 360 F. Supp. 3d at 922. Plaintiffs seek to leapfrog and disregard the priority list set forth in the Texas Health and Safety Code to control the treatment of unidentified human remains they possess no legal entitlement to. "As such, the plaintiffs' claim is the exact opposite of an equal protection claim." *Id.* (dismissing equal protection claim brought by Indian tribe seeking to obtain favorable treatment disparate from that received by other tobacco manufacturers).

3. No facts pled suggest Defendants' actions would not survive rational basis review.

Even if the Plaintiffs had been treated differently from others similarly situated, some "reasonably conceivable set of facts" could justify the decision to consider NAGPRA when drafting the Human Remains Protocol. The goal articulated in Protocol documents is to "comply with the spirit of [NAGPRA]" with respect to "Native American Representation and Engagement." Compl. Ex. Q at 1. Choosing advisory committee members who would be proper under NAGPRA

provides a rational justification, although the actual reasons guiding the decision are "irrelevant." 349 F. App'x at 965. As long as the Court can conceive **some** set of facts that would provide a rational basis, no equal protection claim exists. The allegation that some members of federally recognized Indian tribes hold seats on the AMAAC, whereas Tap Pilam does not, sets forth no equal protection violation. *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

4. The Complaint suggests an absence of discriminatory intent.

Finally, no facts pled supply the discriminatory intent required to state an equal protection violation. *Taylor v. Johnson,* 257 F.3d 470, 473 (5th Cir. 2001). The Plaintiffs only assert that "[t]here is no doubt that the Defendants are purposely making spurious claims to exclude the Plaintiffs from the process at all costs." Compl. ¶ 54. This threadbare assertion does nothing to push Plaintiffs' claims across the line from possible to plausible, and is equally consistent with the absence of a discriminatory motive. *Twombly*, 550 U.S. at 555. Plaintiffs even assign Defendants a motive inconsistent with discriminatory intent: "an attempt to reduce cost and time." Compl. ¶ 48. The Complaint fails to state a claim for an equal protection violation, mandating dismissal pursuant to Rule 12(b)(6).

D. The Complaint does not state a claim for a due process violation. (Fourth Claim)

Although the Due Process Claim is far from a model of clarity, based on statements elsewhere in the Complaint, Plaintiffs seem to advance the theory that as a result of their participation in the separate Maverick Plaza Project (managed by the City of San Antonio) and the development of that project's human remains protocols, they were entitled to also sit on the AMAAC for the Alamo Project in a similar role.[10] *See* Compl. ¶¶ 46, 48, 68. To state a claim for

[10] The Due Process Claim also makes a confusing reference to "denial of a cemetery," contradicted by allegations elsewhere in the Complaint. No facts are set forth to state a claim against the GLO and Commissioner Bush for this.

a due process violation, the Plaintiffs "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." *Machete Productions, L.L.C. v. Page*, 809 F.3d 281, 290 (5th Cir. 2015). Whatever Plaintiffs really intended to say when pleading this claim, they failed to allege a protected interest.

1. The due process allegations do not set forth a protected interest.

An interest protected by the Fourteenth Amendment is more than "an abstract need or desire," or a "unilateral expectation," but instead is a "legitimate claim of entitlement." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). "A constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generously in the past." *Machete Productions, L.L.C. v. Page*, 809 F.3d 281, 290 (5th Cir. 2015)(quoting *Conn. Bd. of Pardons v. Dumschat,* 452 U.S. 458, 465, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981). "[I]f 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, 346–47 (5th Cir. 2015)(citation and internal punctuation omitted). The Fifth Circuit therefore squarely rejects the proposition that participation in a prior project provides the Plaintiffs with a protected interest in the Alamo project. Plaintiffs' wish to sit on the AMAAC is the type of "unilateral expectation" **not** afforded Fourteenth Amendment protection, and as discussed previously with respect to standing, no legal right to a committee seat exists.

Just as problematic, Plaintiffs take issue with allegedly "arbitrary decisions to pick and choose which laws to apply," in apparent preference to the NHPA, which Plaintiffs argue "requires the participation of next of kin and Indian tribes regardless of federal recognition." Compl. ¶ 2. But the NHPA does not apply to entities other than federal agencies, and Plaintiffs mischaracterize

its consulting requirements.[11] Moreover, the consultation requirements under the NHPA have been firmly held not to create a protected interest under the due process clause for two independent reasons—the consultation provisions are procedural, and they are discretionary.[12]

2. The "vagueness" challenge does not plead a due process violation.

Even if the Plaintiffs could identify a protected interest, they have not described a due process violation resulting in the deprivation of that interest. Strangely, the Complaint frames the alleged due process violation as a vagueness issue:

> "It is a basic principle of due process that a regulation is void for vagueness if its prohibitions are not clearly defined. Defendants' restrictions to exclude the Plaintiffs as part of the human remains protocols in place facially and as applied to Plaintiffs offends the Fourteenth Amendment's guarantee of due process by granting a public official unbridled discretion . . ."

Compl. ¶ 69. To state a due process claim for a "vagueness" violation, a challenged statute must be "so vague and indefinite as really to be no rule or standard at all." *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981)(*quoting A.B. Small Co. v. Am. Sugar Refining Co.,* 267 U.S. 233, 239 (1925)). Mere "uncertainty . . . is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Id.* Yet based on the Complaint's allegations, the critical criteria involved in selecting AMAAC representatives—including whether a tribe is federally recognized—is the opposite of vague. Compl. ¶ 2. No exercise of discretion was involved in not

[11] Plaintiffs' statement that the NHPA requires participation of "Indian tribes regardless of federal recognition" creates the false impression that consultation is mandatory in the absence of federal recognition. Federal agencies may consult with "additional consulting parties" with a "demonstrated interest" on a discretionary basis. 36 CFR § 800.2(c)(5). Ironically, even the NHPA makes the same distinction between federally recognized Indian tribes and unrecognized groups that Plaintiffs take umbrage with throughout the Complaint.

[12] *Anderson v. City of Dallas*, 218 F.3d 743 (5th Cir. 2000)(affirming that procedural rights do not create protected interests); *Tyler v. Cisneros*, C-96-3056-VRW, 1996 WL 723083, at *11 (N.D. Cal. Dec. 2, 1996), *rev'd on other grounds*, 136 F.3d 603 (9th Cir. 1998)(dismissing due process claim because NHPA consulting provision was procedural and did not create protected interest); *Appalachian Voices v. Fed. Energy Reg. Commn*., 17-1271, 2019 WL 847199, at *3 (D.C. Cir. Feb. 19, 2019)(dismissing due process claim because NHPA consulting provision was discretionary rather than mandatory).

granting Tap Pilam its own committee seat. Tap Pilam simply is not on the list of federally recognized Indian tribes.

A vagueness challenge here is also "misplaced, for such an argument is most commonly used to challenge the fairness of criminal statutes." *Miccosukee Tribe of Indians of Fla. v. U.S.,* 650 F. Supp. 2d 1235, 1242 (S.D. Fla. 2009), *aff'd sub nom*, 619 F.3d 1289 (11th Cir. 2010). The *Miccosukee* court therefore rejected a vagueness challenge to an appropriations bill—because the bill did not proscribe any conduct, it could not provide constitutionally inadequate notice of proscribed conduct or lend itself to arbitrary enforcement. *Id.* The Fifth Circuit likewise evaluates statutes for due process violations in terms of the level of notice provided regarding "what is **prohibited**, so that [a person] may act accordingly." *Hester v. Graham, Bright & Smith, P.C.,* 289 Fed. Appx. 35, 42–43 (5th Cir. 2008)(unpublished)(citation omitted). The Complaint does not identify a statute that prohibits any conduct. Rather, the Plaintiffs contend that the failure to grant them a seat on the AMAAC caused a due process violation. This fails to state a claim for a vagueness violation, or any other due process violation.

III. The Natural Resources Code Claim Should be Dismissed. (Sixth Claim)

Plaintiffs assert a claim under "Texas Natural Resources Code § 191.173 to prevent Defendants from violating provisions of the Texas Antiquities Code that prohibit the archaeological practices being employed by Defendants." Compl. ¶ 72. Sovereign and eleventh amendment immunity indisputably bars this state law claim. *Grossman v. Wolfe*, 578 S.W.3d 250 (Tex. App.—Austin 2019, pet. denied). Even if it did not, the Complaint fails to state a claim for any violation of the Antiquities Code. There are no allegations that the GLO or Commissioner Bush failed to obtain a permit from the Texas Historical Commission, and there are no allegations

that they are violating any permits. In fact, the Complaint concedes that the other defendants are proceeding as permitted by the THC. Compl. ¶¶ 4, 55.

The only specific archaeological practice the Complaint challenges is "intentionally digging above interments," by which it means that the Alamo project "calls for 18 inches of excavation . . . when the actual sub grade is 6 feet deep." Compl. ¶ 50. Plaintiffs contend that this violates §191.055(3) of the Code, which requires certain operations to be carried out in "such a manner that the maximum amount of historic, scientific, archeological, and educational information may be recovered." Compl. ¶ 50. Plaintiffs seem to take issue with the size and scope of the excavation rather than the manner of it. They do not allege something akin to destructive digging methods—such as dynamite—causing the recovery of less information. Rather, they want more extensive digging than required by the project. The Complaint cites no provision of the Antiquities Code that would require any party to enlarge the size and scope of a project, nor does any exist. Accordingly, the Court should dismiss this claim.

IV. The Declaratory Judgment Claim Should be Dismissed. (Fifth Claim)

Plaintiffs seek declarations that the Alamo Complex contains a cemetery and that the Texas Health and Safety Code and the City Development Code apply to the Alamo project. Compl. ¶ 71. As previously discussed, sovereign immunity bars these state law claims. Moreover, the Declaratory Judgment Act provides "no independent cause of action" and "is not an independent source of federal jurisdiction." *Texas v. Ysleta del Sur Pueblo*, 367 F. Supp. 3d 596, 602-03 (W.D. Tex. 2019). Because all of the underlying causes of action fail for the reasons discussed above, this Court does not have jurisdiction to give the requested declarations. Plaintiffs also lack standing to seek these declarations for the same reasons discussed with respect to the Fourteenth Amendment Claims. Accordingly, the Court should dismiss this claim.

V. The Freedom of Speech and Religion Claims Should be Dismissed. (Second Claim)(Third Claim)(Seventh Claim)

The final group of claims focuses on events alleged to have taken place at the Alamo early on the morning of September 7, 2019. According to the Complaint:

> "Finally, on September 7, 2019, Plaintiffs were denied use of the Alamo Chapel for religious purposes, and informed by Defendants that they would be excluded from the use of the Alamo Chapel from this point forward, despite it having been used by the tribal community for religious practice in the past. . . . 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. ¶¶ 52, 57; *see also id.* ¶ 75. From these vague allegations, the Plaintiffs assert violations of the First Amendment, Texas RFRA, and AIRFA. The Complaint speaks of Plaintiffs being "denied permission" to gather inside the Alamo Chapel without specifying whether they sought access during a time of day when the facility was open to the public. The Complaint describes a "sunrise" ceremony, but does not plead whether others were permitted access at the same time.

Construction began on the Alamo renovation project in July 2019. *See* Compl. ¶ 51. The Complaint does not include any facts related to the construction status of the Alamo Chapel at the time of the September 7, 2019 visit; details about any communications any plaintiff had with any defendant prior to that date about access to the Alamo Chapel; facts related to the manner in which they learned they would be "denied access," or whether alternative arrangements were offered; or facts relating to general restrictions on the use of that property while it was undergoing renovation. The Complaint vaguely hints that communication occurred, yet describes it in ways that equally suggest proper government conduct.

A. The First Amendment allegations do not state a claim. (Second Claim)

The Plaintiffs frame their First Amendment claim primarily in terms of "free speech." A single, cursory sentence near the end mentions "free exercise." The Complaint fails to state a claim for either of these constitutional theories.

1. The "free speech" allegation fails to state a claim.

The Complaint predominantly frames its First Amendment claim in terms of "free speech" access to a location rather than religious exercise. Paragraph 57 copies-and-pastes a partial description of the September 7, 2019 events and continues:

> "By reason of the aforementioned Free Speech Restriction, … Defendants have deprived Plaintiffs of their right to engage in protected speech in a public forum in violation of the Free Speech Clause of the First Amendment as applied to the states and their political subdivisions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983."

Compl. ¶ 58. It then recites, in numbered paragraphs, the names of other principles of free-speech doctrine with no factual application to this case. *See* Compl. ¶¶ 59-63. The Complaint does not include allegations of facts that, even if ultimately shown to be true, would establish an entitlement to relief on a public-forum theory. Plaintiffs did not seek *equal* access to a space on the same terms as the general public but, instead, demanded uniquely different access for a private event at a time the Alamo facility was normally closed to the public. Rather than neutrality, they suggest the First Amendment required a special exception for them alone. The Complaint fails to state a claim for numerous reasons.

First, it contains no factual allegations that might establish the Alamo complex in general (or the "Alamo Chapel" in particular) had been established as a public forum for this type of speech. It is not enough to merely plead a legal conclusion to that effect; the complaint must contain factual allegations sufficient to make that plausible. *Twombly*, 550 U.S. at 557 (2007)

("without some further factual enhancement it stops short of the line between possibility and plausibility").

Second, the Complaint contains no factual allegations that would show that Plaintiffs being turned away from the facility, at an hour the facility was not open to the public, was based on either content or viewpoint. The Complaint is silent about the content of any communications between Plaintiffs and Defendants, and it states no facts about the circumstances in which they were allegedly denied entrance to the facility. No facts have been pled that would establish a First Amendment violation, as opposed to a group approaching a building that was closed and being denied entrance. A conclusory allegation is not enough. *Twombly*, 550 U.S. at 556-57; *see also Ream v. Garrett*, No. 3:14-CV-4338-B, 2015 WL 9703752, at *2 (N.D. Tex. Dec. 7, 2015) (dismissing under Rule 12(b)(6) where the pleading did not contain factual allegations to show viewpoint discrimination).

Third, the Complaint's elliptical construction—saying only that Plaintiffs "were denied permission"—does not allege the facts needed to show that any particular defendant was involved in this incident and, if so, how that defendant's conduct violated the Constitution. *DeMarco v. Davis*, 914 F.3d 383, 390 (5th Cir. 2019)(affirming the dismissal of a §1983 free-exercise claim because "the plaintiff must identify defendants who were . . . personally involved in the constitutional violation" and rejecting a conclusory allegation of a lack of supervision). Identifying the proper defendant is crucial not only to stating a claim, but to establishing the standing requirements of causation and redressability. *Steel Co. v. Citizens for a Better Env.,* 523 U.S. 83, 103-04 (1998)

Fourth, it contains no factual allegations that would constitute a violation of the constitutional free-exercise protection. If Plaintiffs were "denied access" at a particular time, that

is equally consistent with the neutral application of rules general to all (for example, posted business hours) rather than invidious discrimination. The government is permitted to restrict access to its own property, whether or not it is a public forum, so long as it is done on appropriately neutral terms. *E.g.*, *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001). The Complaint provides no facts that would establish that the space to which Plaintiffs sought access was a public forum, or that they were denied access on anything other than neutral terms.

This pleading fails to state a free-speech claim. *Iqbal*, 556 U.S. at 681 (holding it is not enough for the allegations to be "consistent with" the mere possibility of discrimination; "given more likely explanations, [the facts pleaded] do not plausibly establish [an improper] purpose"). The mere "formulaic recitation of the elements" of a discrimination claim is simply not enough. *Id.* at 681. Instead, the pleading must go beyond "labels and conclusions" to address the factual grounds that might, if ultimately proven, entitle a plaintiff to relief. *Twombly*, 550 U.S. at 555. This cursory and conclusory pleading falls short.

2. The "free exercise" allegation fails to state a claim.

Beyond the "free speech" allegations, the only additional allegation supporting the "free exercise" claim is that "Defendants deny to the Plaintiffs the right to the free exercise of religion without unreasonable restraints." Compl. ¶ 64. The Complaint never expands beyond the same "denied permission to gather inside the Alamo Chapel" underpinnings. Compl. ¶ 57; *see also* Compl. ¶ 5. This falls far short of the *Twombly* and *Iqbal* standard. There is no pleading of any of the facts relevant to establishing a constitutional free-exercise claim, or for distinguishing a neutral application of a government policy for rational reasons from invidious discrimination.

For the same reasons discussed above in regard to the "free speech" claim, the "free exercise" pleading does not present factual allegations that, if proven to be true, would entitle the

plaintiffs to constitutional relief. The Complaint explains elsewhere why the policy might have been different in 2019 than in previous years—the Alamo complex was under active renovation. *See* Compl. ¶ 51. There are no facts alleged to make plausible the allegation that there was a constitutionally impermissible basis for "denying" Plaintiffs use of the facility in this specific circumstance. This aspect of the First Amendment claim should also be dismissed.

B. The Texas RFRA claim should be dismissed. (Seventh Claim)

Texas has enacted a statute allowing plaintiffs to challenge a government entity's restriction on a person's free exercise of religion. *See* TEX. CIV. PRAC. & REM. CODE §110.001, *et seq.* (the Texas RFRA). This is a state-created cause of action, and the scope of this cause of action is defined by that state law.

1. The Texas RFRA claim is jurisdictionally barred because Plaintiffs did not strictly comply with the pre-suit notice provision.

The Texas RFRA contains a pre-suit notice procedure that gives the government an opportunity to accommodate the request before being dragged to court. This notice provision is jurisdictional—a failure to comply warrants dismissal under Rule 12(b)(1). *Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579, 582-83 (5th Cir. 2013). And the compliance must be strict. *Id.* In *Morgan*, the plaintiff had provided *informal* notice (rather than following the certified-mail requirement in the statute) argued it was good enough. *Id.* at 585. The Fifth Circuit rejected that argument, dismissing the case because "the demand letter did not comply with the jurisdictional pre-suit notice requirements," which under §110.006 of the RFRA require "certified mail, return receipt requested, 60 days prior to filing suit." *Id.* at 588.

This case should be dismissed for the same reason. "It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375,

377 (1994) (citations omitted). The Plaintiffs were required to provide a specific notice, given by certified mail, in the precise manner described in the statute. Despite their burden to do so, Plaintiffs have not pled facts establishing their compliance with the RFRA's notice provision. The Complaint fails on its face to establish this Court's jurisdiction. This warrants dismissal.

2. The Texas RFRA claim allegations do not state a claim.

The Complaint also does not state a claim under the RFRA against any Defendant. For cases filed in federal court, the pleading standard is defined by *Iqbal* and *Twombly*, even for claims created by state law. Here, the facts pled are insufficient to state a violation of the RFRA for the same reasons they do not state a First Amendment claim. Merely being "denied access" one specific time, without more, does not describe a RFRA claim.

C. The American Indian Religious Freedom Act creates no cause of action. (Seventh Claim)

The Complaint alleges a violation of 42 U.S.C. § 1996, known as the American Indian Religious Freedom Act ("AIRFA"). *See* Compl. ¶¶ 6, 16, 73. AIRFA merely describes a congressional policy and has been squarely held **not** to create a cause of action. *Lyng v. Nw. Indian Cemetary Protective Ass'n,* 485 U.S. 439 (1988); *see also White v. Davis*, No. A-16-CA-059-LY, 2017 WL 3274871, at *3 (W.D. Tex. Aug. 1, 2017); *Rocha v. City of San Antonio*, No. 5:14-cv-867-DAE, 2015 WL 4068615, at *6 (W.D. Tex. Jul. 2, 2015). This cause of action does not exist and should be dismissed for failure to state a claim.

VI. The Complaint's Global Allegations by Differently Situated "Plaintiffs" Against Differently Situated "Defendants" do not State any Claim. (All Claims)

Lastly, the Complaint broadly frames all claims in global terms of "Plaintiffs" and "Defendants," obscuring which claims each Defendant must defend and which Plaintiffs suffered the alleged injuries. Yet "[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)(citing *Chyba v. EMC Mtge. Corp.*, 450 Fed. Appx. 404, 406 (5th Cir. 2011)(affirming 12(b)(6) dismissal where complaint failed to distinguish between defendants). This defect is exacerbated because Plaintiffs' global allegations obscure jurisdictional hurdles that the Complaint fails to clear, including standing and sovereign immunity. The Court should dismiss the entire Complaint based on its failure to state claims by specific Plaintiffs against specific Defendants, and if it permits repleading, pursuant to Rule 12(e), order Plaintiffs to distinguish between the parties both in making factual allegations and in asserting causes of action.

PRAYER

The GLO and Commissioner Bush request dismissal of all claims against them under Rule 12(b), that they be dismissed from this suit, and that the suit be dismissed in its entirety because the GLO is an indispensable party subject to potential prejudice if the litigation continues in its absence. Repleading would be futile, but if the Court permits repleading, it should require a more definite statement pursuant to Rule 12(e).

Respectfully Submitted,
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CERTIFICATE OF SERVICE

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

/s/ James Brandon Hughes
JAMES BRANDON HUGHES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TAP PILAM COAHUILTECAN NATION, SAN ANTONIO MISSIONS CEMETERY ASSOCIATION, RAYMOND HERNANDEZ, *Plaintiffs,*	§	**Civil Action No. 5:19-cv-01084-OLG**
v.	§	
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 GRANTING DEFENDANTS TEXAS GENERAL LAND OFFICE'S AND GEORGE P. BUSH, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE'S MOTION TO DISMISS, AND ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT

Having considered the arguments presented in Defendants Texas General Land Office ("GLO") and George P. Bush, Commissioner of the Texas General Land Office's ("Commissioner Bush") Motion to Dismiss, and Alternative Motion for a More Definite Statement, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), the Court finds that the Motion should be granted.

IT IS THEREFORE ORDERED that pursuant to Rule 12(b), all of Plaintiffs' claims against the GLO and Commissioner Bush are dismissed with prejudice in their entirety, and that the GLO and Commissioner Bush are dismissed from this litigation. **IT IS FURTHER**

ORDERED that this suit is dismissed in its entirety against all other Defendants based on the inability to join the GLO as an indispensable party.

It is so **ORDERED**.

SIGNED this _____ day of _____, 2019.

_____
ORLANDO J. GARCIA
Chief United States District Judge