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.	§	

ORDER

On this day, the Court considered Defendant George P. Bush, Commissioner of the Texas General Land Office's Motion to Dismiss First Amended Complaint (docket no. 47) and Defendant Douglass W. McDonald's Motion to Dismiss Plaintiffs' First Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) (docket no. 48). After careful consideration, the Court finds that the motions should be GRANTED, and this case be DISMISSED. Because these Motions to Dismiss are granted, the remaining pending motions (docket nos. 9, 19, and 42) are DISMISSED AS MOOT.

BACKGROUND

This lawsuit centers around the human remains found at the Alamo. Plaintiffs contend that they are the descendants of those remains, and thus initiated this lawsuit seeking an injunction protecting their interests in light of the ongoing renovation at the Alamo (the "Alamo

Plan"). Plaintiff Tap Pilam Coahuiltecan Nation is a tribal community of American Indians who trace their ancestry to the Spanish Colonial Missions of Texas and Northeastern Mexico, including Mission San Antonio de Valero, or the Alamo. *See* docket no. 44 at ¶ 1. Plaintiff Raymond Hernandez is an enrolled member of the tribe who is a direct descendant of ancestors from the Alamo. *Id.* Plaintiff San Antonio Missions Cemetery Association is a nonprofit consisting of lineal descendants of those buried in the San Antonio Missions Cemeteries, including the Alamo. *Id.*

Plaintiffs originally initiated this lawsuit against the City of San Antonio, the Texas General Land Office and its Commissioner George P. Bush, the Texas Historical Commission, and Alamo Trust, Inc. and its CEO Douglass W. McDonald. *See* docket no. 1. After each Defendant moved to dismiss the case, this Court dismissed each of the state and local agencies on either sovereign immunity or standing grounds. *See* docket no. 43. The Court noted that Plaintiffs could amend their complaint for their claims against Commissioner George P. Bush (the "Commissioner") and Alamo Trust, Inc. CEO Douglass W. McDonald ("McDonald") (collectively "Defendants"). *Id.* As was made clear in the briefing, these Defendants were the officials in charge of the Alamo Plan. *Id.*; Tex. Nat. Res. Code Ann § 31.451(a)-(b) (vesting the power over the Alamo "solely in the GLO"); Tex. Nat. Res. Code Ann. § 31.451(d) (authorizing the GLO to "partner with a qualifying nonprofit organization . . . for the performance of any activity."). Plaintiffs filed their First Amended Complaint against both Defendants, and Defendants subsequently filed the present Motions to Dismiss. *See* docket nos. 44, 47, & 48.

Plaintiffs' injuries remain the same. First, Plaintiffs allege that Defendants denied them equal protection of the law as guaranteed by the Fourteenth Amendment by excluding them from the human remains protocol. *See* docket no. 44 at ¶ 52. They allege that the Commissioner

enacted a policy "to set up the structure of the Alamo Trust, Inc. and several nonprofits," which in turn "formed the archaeological committee and drafted the human remains protocol which officially excluded Plaintiffs from the project." *Id.* Plaintiffs allege that this policy was intentionally crafted to block them from participating in the project. *Id.* Likewise, Plaintiffs allege that the Commissioner selectively applied federal laws in order to permit federally recognized Indian tribes, as opposed to Plaintiffs, to participate in the human remains protocol. *Id.* at ¶¶ 53, 55. This policy, Plaintiffs allege, discriminates against them based on their race and national origin, and, accordingly, strict scrutiny should apply. *Id.* at ¶ 57. With respect to McDonald, Plaintiffs allege that, acting as a state actor, McDonald executed and implemented these policies. *Id.* at ¶¶ 59-61.

Second, Plaintiffs assert that Defendants have denied the free exercise of their religion in violation of the First Amendment in two ways. One, Plaintiffs allege that they were not permitted to conduct their Sunrise Memorial Ceremony in the Alamo Chapel in September of 2019. *Id.* at ¶ 66. Plaintiffs allege that this religious ceremony was prohibited by the Commissioner's policy and McDonald's execution of that policy. *Id.* Plaintiffs further allege that the Alamo Chapel permitted tourists to enter on the same day. *Id.* Two, Plaintiffs allege that their exclusion from the human remains protocol and the process for the reinterment of discovered remains also inhibits the free exercise of their religion. *Id.* at ¶ 65. Specifically, Plaintiffs state that their core religious beliefs require that when a body is moved, they must perform a "forgiveness ceremony," seeking the deceased ancestor's forgiveness for disturbing their final resting place. *Id.* Plaintiffs believe that these ceremonies are sacred obligations, and that when they are performed, "the spirits will guide and heal and give blessings as a result of the practice." *Id.* And, "if the ceremonies are not performed, [Plaintiffs] believe that there will be spiritual repercussions

and that evil will come their way." *Id.* In sum, Defendants' exclusion of Plaintiffs from the human remains protocol prevents them from performing these ceremonies.

Finally, Plaintiffs allege that Defendants are violating their due process rights. Plaintiffs state that because they have been involved in human remains protocols at previous construction projects, their exclusion here violates their right to due process. *Id.* at ¶ 79-80. Moreover, Plaintiffs allege that the "regulation" is void for vagueness as it granted too much discretion to the officials to selectively apply laws to avoid including them in the project. *Id.* The Court notes that this final cause of action is ambiguous and vague.

In response, both Defendants filed their Motions to Dismiss. *See* docket nos. 47 & 48. After Plaintiffs failed to timely respond, the Court granted them an additional ten days. *See* docket no. 49. Plaintiffs' counsel then requested a further extension due to health issues, prompting the Court to stay the motions pending further notice from the parties. *See* docket no. 50. Less than a month later, Defendants notified the Court that Plaintiffs' counsel had filed a separate lawsuit in state court seeking a similar injunction against the Alamo Plan. *See* docket no. 51. Accordingly, the Court ordered Plaintiffs to respond to the motions, granting them an additional 14 days. *See* docket no. 52. Plaintiffs' response appears to be largely cut and pasted from their amended complaint. *Compare* docket no. 53 *with* docket no. 44. The response also fails to cite to any case law supporting their argument that they have adequately alleged legal claims, in violation of Local Rule CV-7(e)(1). *See* Local Rule CV-7(e)(1) ("The response must contain a concise statement of the reasons for opposition to the motion and citations of the legal authorities on which the party relies."). Regardless, Defendants filed their replies, and the Court now turns to the merits of their Motions to Dismiss.

ANALYSIS

1. Rule 12(b)(1)

Both Defendants seek dismissal of Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6). Rule 12(b)(1) provides for a case's dismissal for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Because subject matter jurisdiction goes to the heart of the Court's power to hear the case, the Court should consider these arguments first. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In considering a Rule 12(b)(1) motion, the Court may consider: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint, undisputed facts, and the Court's resolution of disputed facts. *Spotts v. United States*, 613 F.3d 559, 566 (5th Cir. 2010). In other words, the Court may "weigh the evidence and satisfy itself" that subject matter jurisdiction exists. *MDPhysicians & Assocs., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir. 1992) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). Both Defendants challenge this Court's jurisdiction for the same two reasons: Eleventh Amendment sovereign immunity protects them from suit and Plaintiffs lack standing. *See* docket nos. 47 & 48.

A. Sovereign Immunity

With respect to sovereign immunity, the Eleventh Amendment generally "bars private suits against nonconsenting states in federal court." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). This protection extends to state agencies and officials acting in their official capacity. *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974)). *Ex parte Young*, however, is an exception. *See* 209 U.S. 123 (1908). This exception permits prospective "injunctive or declaratory relief against individual state officials acting in violation of federal law." *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013). In determining whether the exception applies, the

Court conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md, Inc. v. Pub. Serv. Com'n*, 535 U.S. 635, 645 (2002).

The Commissioner is undoubtedly an individual state official who is being sued in his official capacity, and thus we turn to the claims to determine if they allege an ongoing violation of federal law and seek relief properly characterized as prospective. *See id.* at 645. As noted above, Plaintiffs assert three claims. First, Plaintiffs allege that their exclusion from the Archaeological Committee and the drafting of the human remains protocol violates their Fourteenth Amendment equal protection rights by discriminating against them based on their race and national origin. *See* docket no. 44. Even though the protocol has already been drafted, the exclusion continues as the protocol is implemented during the ongoing Alamo Plan. Indeed, since the filing of this lawsuit, human remains have been found at the Alamo. *Id.* Thus, their equal protection claim alleges at least in part an ongoing violation of federal law.

The same is true for Plaintiffs' free exercise claim and their due process claim. Their exclusion from the project is ongoing, and they allege that it violates their First Amendment free exercise and Fourteenth Amendment due process rights. *Id.* at ¶¶ 65-68. Specifically, with respect to their free exercise claim, Plaintiffs allege that when remains are disturbed, they must conduct a forgiveness ceremony. *Id.* When remains are found during the excavation, Plaintiffs' exclusion from the protocol allegedly prevents them from conducting this religious ceremony. *Id.* Moreover, Plaintiffs allege that they were denied access to the Alamo Chapel in September, 2019. Though this is a prior incident, and Plaintiffs' allegations are vague as discussed below, it appears from the pleadings to be part of the ongoing exclusion noted here. Accordingly, the

Court finds that these alleged violations of federal law are sufficiently ongoing to fall under *Ex parte Young*.

Plaintiffs also seek relief "properly characterized as prospective." *See Verizon*, 535 U.S. at 645. While the amended complaint lacks clarity and includes some requests which do not appear tied to their asserted causes of action, such as enjoining Defendants from violating the Texas Antiquities Code, Plaintiffs' primary relief is an injunction against Defendants from continuing to violate their federal constitutional rights, as outlined above. *See* docket no. 44. This relief is undoubtedly prospective, and thus the Court finds Plaintiffs' claims against the Commissioner are not barred by sovereign immunity.

McDonald also argues that he is protected by sovereign immunity. The Court notes that McDonald is not a state official, but rather is the CEO of Alamo Trust, Inc., a nonprofit partner of the Texas General Land Office. *See* Tex. Nat. Res. Code Ann § 31.451(d). However, because Plaintiffs claims are brought pursuant to 28 U.S.C. § 1983, Plaintiffs allege that McDonald is a state actor acting under color of state law. *See Hebrew v. Houston Media Source*, 453 Fed. App'x 479, 481 (5th Cir. 2011) (§ 1983 claim against private entity permissible if entity was acting under color of state law). To the extent that McDonald is a state actor, he argues that sovereign immunity protects him from suit because Plaintiffs allege that he merely executed and implemented the Commissioner's policy. *See* docket no. 48 at p. 6. But, as noted above, the Court finds most of Plaintiffs' complaint to fall within the *Ex parte Young* exception to sovereign immunity, and these same findings apply to McDonald. None of the case law that McDonald cites stands for the proposition that private actors acting under color of state law are entitled to greater sovereign immunity than the state official. *See, e.g., Ackerson v. Bean Dredging LLC*,

589 F.3d 196, 207 (5th Cir. 2009). Accordingly, the Court rejects McDonald's sovereign immunity argument.

B. Standing

Both Defendants also challenge Plaintiffs' standing to bring this case. To plead Article III standing, Plaintiffs must allege (1) an "injury in fact" (2) that is "fairly traceable" to the challenged conduct and (3) redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The "injury in fact" must be "(1) potentially suffered by the plaintiff . . ., (2) concrete and particularized, not abstract, and (3) actual or imminent, not conjectural or hypothetical." *Stringer v. Whitley*, 942 F.3d 715, 720-21 (5th Cir. 2019) (quotation marks omitted).

The Court finds that Plaintiffs adequately allege a concrete and particularized injury: their exclusion from the human remains protocol. In their amended complaint, Plaintiffs allege that they are the direct descendants of the remains buried at the Alamo. *See* docket no. 44 at ¶ 1. Moreover, they share a religious requirement to perform forgiveness and remembrance ceremonies when their ancestors' remains are disturbed. *Id.* at ¶ 3. And, because Defendants exclude them from the implementation of the human remains protocol, Plaintiffs allege they are unable to perform these religious ceremonies. Regardless of whether this alleged restriction on their ability to practice their religion entitles them to legal relief, it sufficiently establishes the "injury in fact" requirement.

The Commissioner and McDonald's arguments against this injury confuse Plaintiffs' injury in fact with whether it is an injury at law. For instance, McDonald argues that Plaintiffs do not state a particularized injury based on this exclusion because, as Plaintiffs admit, many other groups are descendants of those buried at the Alamo and are also not involved in the excavation.

See docket no. 48 at p. 9. While this argument weighs considerably on whether Plaintiffs have adequately alleged constitutional violations, it does not negate that they have alleged an injury—their exclusion. *See Patterson v. Defense POW/MIA Accounting Agency*, 343 F. Supp. 3d 637, 652 (W.D. Tex. 2018) (finding plaintiffs, who were the alleged descendants of servicemembers whose remains were found overseas, had standing to bring suit based on the deprivation of proper burials according to their religious beliefs). Whether their exclusion amounts to a legal claim will be discussed below.

In addition to sufficiently alleging an injury in fact, Plaintiffs also meet the causation and redressability requirements for standing. As noted above, the Texas Natural Resources Code vests the GLO, headed by the Commissioner, with the sole authority over the Alamo. *See* Tex Nat. Res. Code Ann § 31.451(a). Plaintiffs' exclusion from the human remains protocol and the alleged violation of their religious beliefs can therefore be traced to the Commissioner. Likewise, Section 31.451(d) permits the GLO to partner with a non-profit, in this case Alamo Trust, Inc., headed by McDonald, and thus their injuries can also be traced to McDonald. Neither the Commissioner nor McDonald challenge Plaintiffs' standing on causation or redressability grounds. Thus, the Court finds Plaintiffs have standing.

2. Rule 12(b)(6)

The Court now turns to Defendants' Rule 12(b)(6) arguments. Under Rule 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In doing so, the Court must assume the complaint's factual allegations, but not its legal conclusions, are true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680-81 (2009). The Court then determines if the complaint alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility requires enough facts to

allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

A. Equal Protection

Plaintiffs allege that their exclusion from the Archaeological Committee and the drafting of the human remains protocol violates their right to equal protection under the law by discriminating against them based on their race. *See* docket no. 44 at ¶¶ 52-64. Specifically, Plaintiffs allege that Defendants' attempt to comply with NAGPRA, a federal statute which requires consultation with federally recognized tribes in gravesites, was designed to exclude them because "they are not a federally recognized Indian Tribe." *Id.* at ¶ 61; *see also* docket no. 44-1 at 9; 25 U.S.C. § 3001, *et. seq*. According to Plaintiffs, the inclusion of federally recognized Indian tribes amounts to a classification based on race, and thus strict scrutiny should apply. *Id.*

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Laws that "explicitly distinguish between individuals on racial grounds fall within the core of that prohibition," and are "subject to strict scrutiny." *Lewis v. Ascension Parish School Bd.*, 806 F.3d 344, 354 (5th Cir. 2015) (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993)). If the law is facially neutral, the challenger must show that the law has a discriminatory effect and purpose for strict scrutiny to apply. *Id.* at 358 (citing *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977)). However, absent either discriminatory purpose or discriminatory effect, facially neutral government action is "subject to rational basis review." *Id.* at 363. If the classification is political, rather than racial, then rational basis review applies. *See Morton v.* Mancari, 417 U.S. 535, 555 (1974).

As noted above, Plaintiffs allege racial discrimination on the basis that they are not a federally recognized tribe. However, courts have held that federal recognition of tribes is a political, rather than racial, classification. *See Mancari*, 417 U.S. at 543, n.24 ("[T]he preference [for federally recognized tribes rather than "racial group consisting of Indians"] is political rather than racial in nature."). Such classifications are subject to rational basis review. *Id.* at 555. Plaintiffs' fail to allege that Defendants have no rational basis for trying to comply with NAGPRA, and Defendants offer several justifications for their decision in their Motions to Dismiss, which Plaintiffs fail to counter in response. *See* docket no. 48 at 13.

More importantly, Plaintiffs' complaint admits elsewhere that they are not being classified based on race. Rather, they allege that they are among a diverse group of descendants of those buried at the Alamo. *See* docket no. 44 at ¶ 29 ("[T]he Alamo and the grounds surrounding it contain an historically documented mission cemetery that includes the remains of many ancestors of the Tap Pilam Coahuiltecan Nation, other federally recognized tribes, Spanish soldiers, Canary Island settlers, African settlers, Mexican soldiers, Battle of the Alamo Defenders and even a former provincial Governor of Texas."). Fifth Circuit precedent requires plaintiffs asserting equal protection claims based on racial discrimination to allege differing treatment from that received by similarly situated individuals. *Fennell v. Marion Independent School Dist.*, 804 F.3d 398, 412 (5th Cir. 2015) (citing *Priester v. Lowndes Cty.*, 354 F.3d 414, 424 (5th Cir. 2004)); *see also Crain v. City of Selma*, 952 F.3d 634, 642 (5th Cir. 2020). Determining whether groups or persons are "similarly situated" depends "substantially on the facts and context of the case." *Lindquist v. City of Pasadena Texas*, 669 F.3d 225, 233 (5th Cir. 2012).

Here, the similarly situated individuals are the other descendants of those buried at the Alamo. *See* docket no. 44 at ¶ 29. Plaintiffs fail to plead how they are treated differently than these other descendants. Instead, Defendants apparently treat them equally—they too were not included in the human remains protocol or the Archaeological Committee. *See* docket no. 44-17. Because Plaintiffs fail to allege differential treatment from the other descendants, the Court finds that their equal protection claim should be DISMISSED.

B. Due Process

Plaintiffs also assert a due process claim under the Fourteenth Amendment. To assert a due process claim, Plaintiffs must 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); *see also Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Plaintiffs allege that their prior involvement in other excavation projects gives them a protected interest in being involved in excavations going forward, such as the Alamo Plan. *See* docket no. 44 at ¶ 79. However, as this Court noted in its previous Order, "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." *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 (1981)).

Plaintiffs also assert that Defendants are violating their due process rights under the "void for vagueness" doctrine. *See* docket no. 44 at ¶ 80. Setting aside that Plaintiffs again fail to identify which policy is unconstitutionally vague, it appears that this doctrine would not otherwise apply to this case. A "void for vagueness" analysis typically requires determining what is prohibited by a statute, and whether the individual has adequate notice of that prohibition. *See*

Hester v. Graham, Bright & Smith, P.C., 289 Fed. App'x 35, 42-43 (5th Cir. 2008). Plaintiffs do not identify the statute or regulation in question, nor do they identify what conduct is being prohibited or how they have insufficient notice of that prohibition. Thus, Plaintiffs' due process claim must also be DISMISSED.

C. Free Exercise

Finally, Plaintiffs allege a free exercise claim under the First Amendment based on two related theories. First, they allege that Defendants prevented them from holding their remembrance ceremony at the Alamo Chapel in September, 2019, while allowing tourists and the public to enter "on that day." *See* docket no. 44 at ¶¶ 5, 66. Second, Plaintiffs allege that the free exercise of their religion is restricted by their exclusion from the human remains protocol, as their religion requires them to perform a forgiveness ceremony whenever their ancestors' remains are disturbed. *Id.* at ¶ 65.

The First Amendment, as incorporated against the states by the Fourteenth Amendment, prevents states from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. const. amend. I. "The Free Exercise Clause . . . 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status.'" *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017)). To state a claim under the Free Exercise Clause, Plaintiffs must plead they have a "sincerely held religious belief." *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989). They then must prove that the government regulation "substantially burdens that belief." *Patterson v. Defense POW/MIA Accounting Agency*, 398 F. Supp. 3d 102, 2019 WL 3412913, at *12 (W.D. Tex. July 29, 2019). To be a "substantial burden" under the Free Exercise Clause, the action or

regulation must either "(1) influence the adherent to act in a way that violates his religious beliefs, or (2) force 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 v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Importantly, the regulation does not "rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from . . . enjoying some benefit that is not otherwise generally available[.]" *Id.*

Here, the Court does not question the sincerity of Plaintiffs' religious beliefs. Plaintiffs believe in the spiritual necessity of both the forgiveness ceremony when their ancestors' remains are disturbed and the sunrise remembrance ceremony. The question before the Court is whether their exclusion from the Alamo Chapel and the human remains protocol violates the First Amendment. *See Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644, 652 (W.D. Tex. 1999).

The Court finds that both instances are not violations of the Free Exercise Clause. In particular, the Court finds that these claims are foreclosed by the Supreme Court's decision in *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). There, Native Americans challenged the state's construction of a road through sacred grounds, which the plaintiffs used for religious ceremonies that required "privacy, silence, and an undisturbed natural setting." *Id.* at 442. The Supreme Court acknowledged that the "threat to the efficacy of at least some religious practices [was] extremely grave," but held that the Free Exercise Clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)). The Supreme Court reasoned that the "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the

individual can exact from the government." *Id.* at 451 (quoting *Sherbert v Verner*, 374 U.S. 398, 412 (1963)).

Likewise, here, Plaintiffs are seeking to gain participation in the human remains protocol and permission to conduct their ceremony in the Alamo Chapel. Indeed, as Defendants point out, inclusion in the human remains protocol and permission to enter the Alamo Chapel outside of operating hours to conduct a religious ceremony are both "benefit[s] that [are] not otherwise generally available[.]" *Patterson*, 398 F. Supp. 3d at 123. Rather, they are benefits Plaintiffs seek to exact from Defendants. Such relief is unavailable under *Lyng*. 485 U.S. at 451; *Patterson*, 398 F. Supp. 3d at 123 ("To give Plaintiffs what they seek, Defendants must recover, disinter, and identify the remains at issue. These affirmative acts are not available relief under . . . the Free Exercise Clause."). Accordingly, Plaintiffs' free exercise claim is DISMISSED, and Defendants' Motions to Dismiss are GRANTED.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant George P. Bush, Commissioner of the Texas General Land Office's Motion to Dismiss First Amended Complaint (docket no. 47) and Defendant Douglass W. McDonald's Motion to Dismiss Plaintiffs' First Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7) (docket no. 48) are **GRANTED**. Plaintiffs' claims are hereby **DISMISSED**.

IT IS FURTHER ORDERED that the pending motions (docket nos. 9, 19, and 42) are **DISMISSED AS MOOT**.

SIGNED this 23 day of September, 2020.

ORLANDO L. GARCIA
Chief United States District Judge