



## **BACKGROUND**

1. On or about September 10, 2019, Plaintiffs filed this lawsuit under the First and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983, challenging Defendant's restriction on Plaintiffs' rights to participate in the human remains protocols adopted by the Defendants and more importantly to challenge Defendants exclusion from performing their religious rituals and beliefs and access to their ancestor's remains as a result of the Defendants intentionally excluding Plaintiffs and allowing only federally recognized native Americans to participate in the process. See Docket No. 1

2. On or about October 21, 2019, the GLO and Bush filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), (6), and (7). See Docket No. 22. Specifically the GLO and Bush claimed that this court lacks subject matter jurisdiction because sovereign immunity has not been waived as Plaintiffs only allege violations of state law, Plaintiffs are not a federally recognized Indian tribe and that Plaintiffs lack standing because they lack any evidence that they are related to any alleged remains located at the Alamo site. In addition, the GLO and Bush alleged that that Defendants failed to state a claim as a matter of law as the Plaintiffs were not treated different than similarly situated individuals as they are no different than the general public at large and that the human remains protocols, rules and laws that the Defendants picked to follow are not vague and provide adequate due process.

3. On or about December 23, 2019 the Court issued Order dismissing the state law claims under the Eleventh Amendment as well as their claims against the City of San Antonio, and the Texas Historical Commission for lack of standing and allowed the Plaintiffs to replead and amend their petition with regards to the remaining defendants. Docket No. 43 Specifically, the Court held that there were distinct factual allegations in the Original Complaint against ATI and

McDonald to establish standing as they drafted the human remains protocol and formed the archaeological Committee. However, the Court granted their motion to dismiss because the Plaintiffs lumped all the Defendants together. However, the Court allowed the Plaintiffs to replead specific allegations against each remaining defendant. Further, the Court held the following: (1) that the Plaintiffs failed to allege facts against ATI and McDonald to establish they are state actors; (2) Plaintiffs failed to allege facts under the First Amendment to establish a cause of action against each Defendant; (3) that that Plaintiffs failed to allege facts to support an equal protection claim against the Defendants. Specifically, the Court held that Plaintiffs failed to identify similarly situated individuals that are being treated more favorably and that they are being discriminated against based on their race or national origin; (4) that the Plaintiffs failed to allege a due process claim as they do not identify a protected interest; (5) and that the claims against the remaining Defendants, if they are state actors, must fall under the *ex parte Young* exception to seek only prospective declaratory or injunctive relief from ongoing violations of federal law properly characterized as prospective.

4. On or about January 22, 2020, Plaintiffs filed an Amended Complaint against Douglass W. McDonald, Chief Executive Officer of the Alamo Trust, Inc. and George P. Bush, Commissioner of the General Land Office in their official capacity seeking declaratory and equitable relief. See Docket No. 44. Specifically, there have been recent and multiple discoveries of remains that are ongoing and will continue in the future. The Plaintiffs are the next of kin to these remains and are entitled to participate in the disposition and/or reinterment. Further, by disallowing the Plaintiffs to participate, violates their First Amendment rights as exclusion prohibits the Plaintiffs from performing sacred religious practices and Plaintiffs will suffer severe consequences in accordance with their religious beliefs. The Defendants have

intentionally discriminated against the Plaintiffs based on their race and have admitted throughout their pleadings that the Plaintiffs are not recognized by the federal government as an Indian tribe. The fact is that federal recognition does not change whether or not they are a Native American, Indian or any nationality, the fact remains that the plaintiffs are Indians, they belong to a tribe and are being excluded as a group because they are not federally recognized. The fact of federal recognition is nothing more than a pretext to the fact that they are excluding the Plaintiffs so that they do not have to deal with their religious practices and customs which include specific ceremonies that must be performed whenever a body is found and or moved or otherwise disturbed. The fact that they are excluding the Plaintiffs in favor of another Indian tribe that does not have the same religious beliefs regarding the disposition or movement of remains only stresses the fact that such decisions and direction by Bush and implemented by McDonald is intentionally discriminatory on the face of their pleadings. In other words, the Defendants have targeted the Plaintiffs at least partially by their national origin because they are not federally recognized and are treated differently based solely on their religious beliefs regarding the disposition of human remains.

### **RELIGIOUS BACKGROUND OF THE PLAINTIFFS**

5. Plaintiff Tap Pilam Coahuiltecan Nation (hereinafter, “TPCN”) 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, which is also known as “The Alamo.” See affidavit of Alston Thoms attached hereto and incorporated by reference as Exhibit “A”. Plaintiff Raymond Hernandez is an enrolled member of the Tap Pilam Coahuiltecan Nation who is a direct descendant of ancestors from Mission San Antonio de Valero and serves on the Tribal Council of the Nation. Plaintiff San Antonio Missions Cemetery Association is a

nonprofit association of lineal descendants of those buried in the San Antonio Missions Cemeteries, including the Mission San Antonio de Valero Cemetery. Plaintiffs are the next of kin and the ancestors to the remains buried at the Alamo Mission.

**a. Forgiveness Ceremony**

6. The Tap Pilam Coahuiltecan Nation has previously conducted reinterments of ancestral remains at the Alamo and other sites in Texas. This has become a common practice since the passage of the Native American Graves Protection and Repatriation Act (“NAGPRA”), and its consequential requirement for museums, universities and archaeological investigations to reinter Native American human remains and funerary objects by transferring possession of them to their affiliated tribal community. Among the core religious beliefs of the Tap Pilam Coahuiltecan Nation surrounding reinterments is the requirement to perform a forgiveness ceremony, asking the deceased for forgiveness for disturbing their final resting place. Alongside this forgiveness ceremony, the remains are reinterred according to the associated funerary practices of the ancestor being reinterred. In the case of the Alamo, it would follow Roman Catholic practice. Non-baptized ancestors would follow traditional interment practices. However, Defendant Bush’s policy, which is implemented by McDonald, has excluded the Plaintiffs entirely from the process whenever a body is found at the site. As such, the Plaintiffs have been unable to perform their forgiveness ceremony when remains are found and thus will suffer spiritual repercussions. See affidavit of Raymond Hernandez attached hereto and incorporated by reference as Exhibit “B”.

**b. Remembrance Ceremony**

7. Additionally, when ancestral remains are reinterred, tribal elders take a solemn vow to perform a remembrance ceremony each year on the anniversary of the date of reinterment. This stems from the religious belief that those whose burials have been disturbed, are also disturbed on their spiritual journey in the afterlife. The forgiveness ceremony, reinterment and annual remembrance ceremony are conducted in order to allow the ancestor to return to their afterlife journey. Performance of the remembrance ceremony is a sacred vow to those who undertake it. Raymond Hernandez, and other members of the Tap Pilam Coahuiltecan Nation, took such a vow when he performed the reinterment of ancestral remains inside the Alamo Chapel in 1995. At that time, the Alamo was under management of the Daughters of the Republic of Texas who agreed to allow the performance of the annual remembrance ceremony. See affidavit of Raymond Hernandez attached hereto and incorporated by reference as Exhibit "B".

8. This annual remembrance ceremony at the Alamo Chapel is the highlight of a weeklong holiday each September among the tribe known as the "La Semana de Recuerdos" (The Week of Remembrance). It includes the Fiesta de Recuerdos ("Feast of Remembrance") and concludes with the El Llanto de los Muerto (known as "the wailing"). The ceremony has been performed uninterrupted since 1995, under all three management regimes of the Alamo. This religious practice is not only limited to the Alamo site but other sites where bodies have been reinterred, including the Reinterment Cemetery at Fort Hood, Texas and Mission San Juan. The Tap Pilam burial and funerary practices are unique to them, they are a syncretic fusion of Roman Catholic belief and traditional Peyotism and lies at the core of their religious beliefs. See affidavit of Raymond Hernandez attached hereto and incorporated by reference as Exhibit "B".

9. Due to the heavy burden of the solemn vows involved with each reinterment, they are performed at specific times of the year, specifically to mark the change of seasons. La Semana de Recuerdos is held in September because it marks the month of the largest number of deaths at Mission San Antonio de Valero (the Alamo) due to historic epidemics that ravaged the Indian community during that month in the 18th century. Defendants forcibly stopped the performance of the last scheduled remembrance ceremony on September 7, 2019. Plaintiffs followed the usual practice of informing and attempting to schedule their annual event. Alamo Rangers were dispatched to prohibit tribal members, including Raymond Hernandez, from entering the Alamo Chapel to perform the ceremony. Meanwhile, tourists and members of the general public, were allowed to enter on that day. It is the religious belief of the Plaintiffs that this ceremony must be performed at the burial site of the reinterred ancestors and cannot be performed elsewhere, or by proxy. Elderly, ill and disabled tribal elders go to great lengths to fulfill their sacred vows under this practice. It is the religious belief of the Tap Pilam Coahuiltecan Nation that when this sacred vow is maintained the spirits will continue to provide guidance, healing and blessings as a result of the practice. However, if the ceremonies are not performed, they believe that there will be the opposite spiritual repercussions and that evil will come their way. See affidavit of Raymond Hernandez attached hereto and incorporated by reference as Exhibit “B”.

10. Commissioner Bush is the head of policy decisions for the GLO and was in charge of implementing the policy to set up the structure of the Alamo Trust, Inc., and several nonprofits. As a result of Bush's policy to play hide-the-ball by creating various entities, which was intentionally calculated to not only pull the curtain closed and install a non-transparent policy to facilitate secret meetings and to shelter the major players involved in the project, but, more importantly, to craft a way to block the Plaintiffs from participating in the project, as he wants to

rush the project through without distractions especially from any persons who would require that their ancestors be respected. By reason of the aforementioned policy, created, adopted, and enforced under color of state law, Defendants Bush and McDonald have unconstitutionally deprived Plaintiffs of their fundamental first amendment right to conduct their religious practices and denies them equal protection of the law guaranteed under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

### **ARGUMENTS AND AUTHORITY**

#### **Douglass W. McDonald is a State Actor**

11. Texas Natural Resources Code § 31.451(a), vests the power over the Alamo “solely in the GLO.” However, the statute also authorizes the GLO to “partner with a qualifying nonprofit organization. . . for the performance of any activity.” Tex. Nat. Res. Code Ann. § 31.451(d). Pursuant to the legislature’s mandate, Commissioner Bush created the Alamo Trust, Inc. and appointed Douglass W. McDonald as the CEO. Douglass W. McDonald is the CEO of the Alamo Trust nonprofit and runs the day to day affairs of the Alamo. McDonald, actually executes and implements the Bush Policy described above, formed the Archaeological Committee and drafted the human remain protocol policy at issue in this lawsuit and discussed above.

12. McDonald is a state actor for all purposes as Bush organized and set up the nonprofit pursuant to Tex. Nat. Res. Code Ann. § 31.451(d). The Alamo Trust uses state monies and is subject to all Texas state open meetings and open records laws. In addition, a private party involved, even though not an official of the State, can be liable under § 1983. “Private persons, jointly engaged with state officials in the prohibited action, are acting “under color” of law for



purposes of the statute. To act “under color” of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . . .” *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 982-983.

13. There is no doubt McDonald participated with Bush by masterminding a campaign by creating an archaeological committee and drafting the human remains protocol policy which changed specific protocols and applied different rules and laws with the sole purpose to exclude the Plaintiffs from participating in the removal or safeguarding of the remains of their decedents that are buried at the Alamo site. Specifically, McDonald worked in concert with Bush to change the protocol that has always been in place for past projects and was calculated and designed to intentionally exclude the Plaintiffs based on the erroneous premise that they are not a federally recognized Indian Tribe. McDonald is excluding the Tap Pilam and allowing other Indian tribes that are not related at all to the Mission and are not even from the City to participate and monitor the site. There is no doubt that the Plaintiffs are being treated differently.

#### **A. FIRST AMENDMENT CLAIMS**

14. First, the 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, which is also known as “The Alamo.” Plaintiff Raymond Hernandez is an enrolled member of the Tap Pilam Coahuiltecan Nation who is a direct descendant of ancestors from Mission San Antonio de Valero and serves on the Tribal Counsel of the Nation. Plaintiff San Antonio Missions Cemetery Association is a nonprofit association of lineal descendants of those buried in the San Antonio Missions Cemeteries, including the Mission San Antonio de Valero Cemetery. There is no doubt that the Plaintiffs are

the next of kin and the ancestors to the remains. The Plaintiffs have specific religious beliefs regarding the funerary process regarding remembrance and forgiveness as it relates to discovery, burial and reinterment of human bodies.

15. Defendant's primary focus regards the remembrance ceremony discussed above wherein the Plaintiffs must perform a yearly religious ceremony. However, the fact remains that under Plaintiff's First Amended Complaint, facts are alleged that a forgiveness ceremony must be performed every time that a body is discovered and thereafter a remembrance ceremony must follow each year thereafter at the exact location where the body was found. The fact remains that Bush as policy maker and McDonald as the enforcer have intentionally excluded the Plaintiffs from performing their religious ceremony in favor of other Indian tribes with different (unrestricted) religious beliefs regarding burial practices justified solely on a pretext argument of federal recognition. As such, the Defendant Bush's policy to only allow federally recognized Indian tribes to participate which was implemented by McDonald in drafting the policy excludes the Plaintiffs religious practices based solely on discriminatory criteria (ie. whether an Indian is actually a federally recognized Indian). As such, the facts as stated in the complaint, at this early stage, give rise to a cause of action and should move forward.

**a. Strict Scrutiny**

16. Policy is subject to strict scrutiny if it is not generally applicable, not neutral, or employs a system of individualized exemptions. Here, Bush's policy, as implemented by McDonald, violates the Free Exercise Clause in multiple ways. First, the policy put in place by Bush and implemented by McDonald is not generally applicable because they create categorical exemptions for federally recognized Indian tribes. As stated above, Bush created a policy which

is implemented by McDonald, that excludes the Plaintiffs from participating in the human remains protocol which is essential to the performance of their religious practices. Specifically, Bush's policy, implemented by McDonald, allows five federally recognized Indian tribes to serve on the committee as Tribal monitors. It should be pointed out that Bush and McDonald take the position that since federally recognized Indian tribes are represented at the site there is no discrimination. However, such logic is not only flawed but is appalling because Bush wants to believe that all Indians are the same. Nothing is further from the truth. Each Indian tribe has their own customs, religious beliefs, funerary practices and speak different languages. Just because federal Indian tribes are located on the site does not make it okay to exclude the Tap Pilam and is wholly discriminatory. (See Plaintiffs religious beliefs described above). The fact that Bush and McDonald are allowing other Indian tribes with completely different religious practices when it comes to the subject of human remains, shows a preference to other religions to the exclusion of the Plaintiffs.

17. The Indian tribes that Bush and McDonald have chosen at the exclusion of the Tap Pilam are not native to the area, four have no historic connection to Mission Valero, while the fifth, the Apache, were the historical enemies of the Coahuiltecan and were responsible for the deaths of many of those buried at the site. These actions by Bush and McDonald are facially discriminatory and inflammatory. They have denied a culturally affiliated tribal community representation and engagement, yet invite unaffiliated tribes, some from out of state, with vastly different cultural and religious beliefs, differing funerary practices and no historical connection to the site to stand in their place and rely on the erroneous premise that Plaintiffs are not Indians because they are not federally recognized.

18. The reason for this is plainly obvious, a culturally affiliated tribe, such as Tap Pilam Coahuiltecan Nation will have a greater degree of oversight, concern and care for remains that are lineal ancestors than people who lack such attachment. Bush and McDonald are seeking to skirt the oversight and protections of culturally affiliated communities that Congress and the Texas Legislature have determined is necessary and in the public interest for a project such as this. Bush's policy, as implemented by McDonald, by only allowing other federal recognized Indian tribes to participate and excluding Plaintiffs is shameful as federal recognition does not determine ethnicity or race. Bush's policy as implemented by McDonald is premised on the rationale that somehow Plaintiffs are not allowed to participate because they are not in fact Indians solely based on the erroneous premise that they are not federally recognized. Such backward antiquated logic is not proper and is hurtful, and should be seen for what it actually is...discriminatory just because Plaintiffs have not been "recognized" by the federal government.

19. Further, the Defendants are publicly stating that there is no cemetery located at the Alamo. This assertion is intellectually dishonest and being used solely to skirt federal, state and local laws designed to protect historic cemeteries and to downplay the Plaintiffs' ties to the missions. It is common knowledge that every Spanish Colonial Mission established and maintained a cemetery, and there is ample evidence that a cemetery was established and continues to exist at the Alamo. There is no doubt that the Defendant Bush and McDonald are purposely making spurious claims to exclude the Plaintiffs from the process at all costs. There is no doubt that more bodies will be found, and the Plaintiffs will continue to suffer spiritual repercussions as a result of being excluded from performing the religious ceremonies as well as deciding what happens to Plaintiffs' next of kin's remains.

20. Bush is the head of policy decisions for the GLO and was in charge of implementing the policy to set up the structure of the Alamo Trust, Inc., and several nonprofits. As a result of Bush's policy to play hide-the-ball by creating various entities, which was intentionally calculated to not only pull the curtain closed and install a non-transparent policy to facilitate secret meetings and to shelter the major players involved in the project, but, more importantly, to craft a way to block the Plaintiffs from participating in the project, as he wants to rush the project through without distractions especially from any persons who would require that their ancestors be respected. By reason of the aforementioned policy, created, adopted, and enforced under color of state law, Defendants Bush and McDonald have unconstitutionally deprived Plaintiffs of their fundamental First Amendment right to conduct their religious practices.

21. Second, Bush's policy and McDonald's implementation of same are not neutral because they favor non-religious reasons over religious ones. Specifically, allowing federally recognized tribes that have different religious practices to participate to the exclusion of the Plaintiffs with known religious ties to the missions. Moreover, because Bush and McDonald have selectively enforced their discriminatory policy against the religious actor, the application of these ordinances to Plaintiffs is not neutral.

22. Third, for the same reasons, Bush's policy and McDonald's implementation constitute a system of "individualized exemptions."

23. Each of these grounds separately makes out a prima facie case that Bush and McDonald have violated Plaintiffs' free exercise rights. The burden then shifts to Bush and McDonald to prove their affirmative defense that their actions withstand strict scrutiny. This affirmative defense fails for three reasons: (1) Bush and McDonald claimed interests in preserving a

landmark for the public are not compelling, (2) the Bush policy, as applied to Plaintiffs, does not further those alleged interests, and (3) an absolute prohibition on Plaintiffs; performance of its yearly burial ceremonies is not the least restrictive means of meeting those alleged interests.

24. As stated above, McDonald as the manager of the Alamo via the nonprofit created by the Bush policy denied the Plaintiffs their exercise of religion to perform their yearly ceremony over the bodies as well as continually to disallow them to perform there forgiveness ceremony whenever a new body is discovered. Furthermore, McDonald denied the Plaintiffs' use of the Alamo Chapel for religious ceremony and continually denies them the ability to participate in the human remains protocol as the bodies are their next of kin and disallows them to perform the forgiveness ceremony whenever a new body is found. (described above).

25. As stated above, bodies were recently discovered and will continue to be discovered throughout this process and by denying Plaintiffs access to perform their forgiveness and remembrance ceremony is a flat-out denial of Plaintiffs' religious beliefs now and in the future.

26. By reason of the aforementioned denial of the Plaintiffs' religious practices, which includes Defendant Bush's policy of exclusion and McDonald's concerted management implementation of same, and described above in detail, created, adopted, and enforced under color of state law, Defendants McDonald and Bush have deprived Plaintiffs of their right to engage in freedom of religion located in 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.

27. As a direct and proximate result of Defendants' violation of the First Amendment, Plaintiffs have suffered irreparable harm, including the loss of their constitutional rights, entitling them to declaratory and injunctive relief and nominal damages.

28. There is no doubt that this case deals with intentional discrimination to exclude the Tap Pilam Coahuiltecan Nation and its members from participating in the project even though their ancestors are interred in the cemetery located at the Mission and the Mission has maintained central cultural and religious significance for over 300 years. As stated above, there is no doubt that the Plaintiffs are the next of kin and the ancestors to the remains buried at the Alamo Mission that has been in existence in the State of Texas from the beginning.

## **B. EQUAL PROTECTION**

### **Commissioner George P. Bush**

29. There is no doubt that Bush is the head of policy decisions for the GLO and was in charge of implementing the policy to set up the structure of the Alamo Trust, Inc., and several nonprofits. Further, the Bush policy was implemented by McDonald, who formed the archaeological committee and drafted the human remains protocol which officially excluded the Plaintiffs from the project. As a result of Bush's policy to play hide-the-ball by creating various entities, which was intentionally calculated to not only pull the curtain closed and install a non-transparent policy to facilitate secret meetings and to shelter the major players involved in the project, but, more importantly, to craft a way to block the Plaintiffs from participating in the project, as he wants to rush the project through without distractions especially from any persons who would require that their ancestors be respected. By reason of the aforementioned policy, created, adopted, and enforced under color of state law, Defendant Bush has unconstitutionally

deprived Plaintiffs of their fundamental First Amendment rights to conduct their religious practices and denies them equal protection of the law guaranteed under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Specifically, Defendant Bush, by adopting his policy of exclusion and lack of transparency are currently preventing Plaintiffs from participating in the excavation even though the members of the Tap Pilam Coahuiltecan Nation, San Antonio Missions Cemetery Association and Raymond Hernandez are next of kin. Further, there is no doubt that all other similar projects currently and, in the past, have utilized human remains protocols that allowed the next of kin to participate. However, in this case Defendant Bush's policy, by excluding the Plaintiffs because they are not a federally recognized tribe is no doubt a pretext argument to justify discrimination based on the Plaintiffs particular religious beliefs regarding funerary and burial practices. Discussed above.

**a. Bush's discriminatory policy to exclude Plaintiffs and include other Indians Tribes (under the guise of federal policy) is discriminatory and treats similarly situated persons differently and gives federal tribes preferential treatment to practice their religious beliefs and excludes local Indians.**

30. Most disturbing, is the fact that the Bush policy allows five federally recognized Indian tribes to serve on the committee as Tribal monitors. It should be pointed out that Bush takes the position that since federally recognized Indian tribes are represented at the site there is no discrimination. However, such logic is not only flawed but is appalling because Bush wants to believe that all Indians are the same. Nothing is further from the truth. Each Indian tribe has their own customs, religious beliefs, funerary practices and speak different languages. Just because Federal Indian tribes are located on the site does not make it okay to exclude the Tap Pilam and is wholly discriminatory. The Indian tribes that Bush and McDonald have chosen at



the exclusion of the Tap Pilam are not native to the area, four have no historic connection to Mission Valero, while the fifth, the Apache, were the historical enemies of the Coahuiltecan and were responsible for the deaths of many of those buried at the site. These actions by Bush are facially discriminatory and inflammatory. They have denied a culturally affiliated tribal community representation and engagement, yet invite unaffiliated tribes, some from out of state, with vastly different cultural and religious beliefs, differing funerary practices and no historical connection to the site to stand in their place and rely on the erroneous premise that Plaintiffs are not Indians because they are not federally recognized. As stated throughout this brief, the reason for this is plainly obvious, a culturally affiliated tribe, such as Tap Pilam Coahuiltecan Nation will have a greater degree of oversight, concern and care for remains that are lineal ancestors than people who lack such attachment. Bush and the GLO are seeking to skirt the oversight and protections of culturally affiliated communities that Congress and the Texas Legislature have determined is necessary and in the public interest for a project such as this. Bush's policy by only allowing other federally recognized Indian tribes to participate and exclude Plaintiffs is shameful as federal recognition does not dictate ethnicity or race. Bush's policy is based on the erroneous premise that somehow Plaintiffs are not Indians because they are not recognized by federal policy and therefore should not be included in the project. Such backward antiquated logic is not proper and is hurtful and should be seen for what it actually is...discriminatory, just because Plaintiffs has not been "recognized" by the federal government.

31. Therefore, the exclusion of the Tap Pilam Coahuiltecan Nation and the inclusion of the federally recognized Indian tribes is racially discriminatory and gives the federally recognized Indians preferential treatment to practice their beliefs and religion over local Indian tribes, as such, strict scrutiny applies. There is no compelling interest for Bush to exclude the Plaintiff

Indian Tribe that is done through the least restrictive means. The federally recognized Indians chosen to participate have no interest in the Alamo at all and are included only because they are a federally recognized Indian tribe. The included federally recognized Indian tribes are of differing race, have a different religion, and/or creed from the Plaintiffs. Further, as stated throughout this motion, by choosing Federal Indian tribes with no concern or respect for the Alamo project and excluding the Plaintiffs and denying that they are in fact Indians, is actually more damaging to the project since the current Indian monitors have no interest in the preservation of the Alamo or the future of the mission.

### **Claims against Douglass W. McDonald**

32. As stated above, the Texas Natural Resources Code § 31.451(a), vests the power over the Alamo “solely in the GLO.” However, the statute also authorizes the GLO to “partner with a qualifying nonprofit organization. . . for the performance of any activity.” Tex. Nat. Res. Code Ann. § 31.451(d). Pursuant to the legislature’s mandate, Bush created the Alamo Trust, Inc. and appointed Douglass W. McDonald as the CEO. Douglass McDonald is the CEO of the Alamo Trust nonprofit and runs the day to day affairs of the Alamo. McDonald, actually executes and implements the Bush Policy described above and formed the Archaeological Committee and drafted the human remain protocol policy at issue in this lawsuit as discussed above.

33. Again, McDonald is a state actor for all purposes as Bush organized and set up the nonprofit pursuant to Tex. Nat. Res. Code Ann. § 31.451(d). The Alamo Trust uses state monies and is subject to all Texas state open meetings and open records laws. In addition, a private party involved even though not an official of the State, can be liable under § 1983. “Private persons, jointly engaged with state officials in the prohibited action, are acting “under color” of

law for purposes of the statute. To act “under color” of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . . .” *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 982-983.

34. McDonald worked in concert with Bush to change the protocol that has always been in place for past projects and was calculated and designed to intentionally exclude the Plaintiffs based on the erroneous premise that they are not a federally recognized Indian Tribe. McDonald is excluding the Tap Pilam and allowing other Indian tribes that are not related at all to the Mission and are not even from the City to participate and monitor the site. There is no doubt that the Plaintiffs are being treated differently.

35. Additionally, there is no doubt that this case deals with intentional discrimination to exclude the Tap Pilam and its members from participating in the project even though their ancestors are interred in the cemetery located at the Mission. There is no question that the Plaintiffs are the next of kin and are the ancestors to the remains buried at the Alamo Mission that has been in existence in the State of Texas from the beginning. There is no question that Defendants Bush and McDonald are excluding the Plaintiffs from performing their yearly remembrance ceremony and their forgiveness ceremony. There is no doubt that Bush and McDonald are giving federally recognized Indians preferential treatment and excluding local Indians. At this stage in the litigation there are enough facts to allege a violation of federal law that is prospective as there are bodies being discovered and more bodies will most certainly be discovered in the future.

### **C. PROSPECTIVE RELIEF**

36. On August 14, 2019 and September 23, 2019 human remains were in fact found at the Alamo site and again in early December 2019, three human skeletons were found at the Alamo site. Plaintiffs have had no input or notice of the remains found which, are very likely and most probably, the next of kin of the Plaintiffs. However, the tribal monitors (federally recognized tribes) selected by Bush's policy and implemented by McDonald have been able to participate and, as stated above, are actually dismissive of any local cultural concerns. Further, as stated above, Bush's policy as implemented by McDonald of excluding the Plaintiffs, is currently denying Plaintiffs of their rights to perform the religious ceremony and to honor their kin who are no doubt buried at the Alamo site. Specifically, the Plaintiffs are not allowed to perform their forgiveness ceremony as discussed above. However, the federally recognized tribes are allowed to perform whatever religious ceremony that they choose. Such exclusion and preference to federally recognized tribes over local Indian tribes comes at a high price to the Plaintiffs as their core fundamental belief is that spiritual harm will come to them as a result of not performing the ceremonies for the newly discovered remains as well as the remains that are currently located at the site.

#### **D. DUE PROCESS**

37. By reason of the aforementioned policy created by Bush and McDonald's concerted management scheme discussed in detail above, failure to recognize proper protocols and laws that have been followed on all past projects and that are currently being followed on other projects similar to the Alamo Project, are no doubt crafted to exclude the Plaintiffs from participating in the human remains protocol and the project and to deny them their fundamental constitutional right to freedom of religion. Such actions to change procedures and decisions solely for the purpose to exclude Plaintiffs from participating is not only repulsive but amounts

to discrimination of the Tap Piliam Indian tribe. Defendant Bush's policy and McDonalds implementation of same which was created, adopted, and enforced under color of state law, Defendants Bush and McDonald have unconstitutionally deprived Plaintiffs of the due process of law guaranteed under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

38. It is a basic principle of due process that a regulation is void for vagueness if its prohibitions are not clearly defined. Defendants Bush and McDonald's implementation and management crafted 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 such that the official's decision to limit Plaintiffs' involvement in the process and to limit Plaintiffs exercise of its core fundamental religious practices is not constrained by objective criteria, but may rest on ambiguous and subjective reasons. Specifically, crafting policy to selectively pick and choose which laws apply to the project for the sole intent to allow federal recognized Indian tribes to participate at the exclusion of the Plaintiffs is not based on objective criteria and was arbitrarily applied to craft a policy of exclusion of the Plaintiffs to participate and to exercise their religious practices. Defendants Bush's and McDonald's denial of the Plaintiffs' participation in the project facially and as applied to Plaintiffs is unconstitutionally vague in violation of the Fourteenth Amendment.

39. As a direct and proximate result of Defendants Bush and McDonald's violation of the Due Process Clause of the Fourteenth Amendment, Plaintiffs have suffered irreparable harm, including the loss of their constitutional rights, entitling them to declaratory and injunctive relief and nominal damages.

**PRAYER**

WHEREFORE, the Plaintiffs request that the Defendants be cited to appear and answer, and that the Court denies their Motion to Dismiss and to award Plaintiffs their reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law; and to grant such other and further relief as this Court should find just and proper.

Respectfully submitted,

**MARTINEZ DE VARA LAW FIRM,  
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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I certify that on May 1, 2020, a complete and correct copy of the foregoing **Plaintiffs' Response to Defendants George P. Bush Commissioner of the Texas General Land Office and Douglass W. McDonald's Motion to Dismiss First Amended Complaint** was filed electronically with the United States District Court for the Western District of Texas, San Antonio Division, with notice of case activity to be generated and sent electronically by the Clerk of the Court with ECF notice being sent to the following counsel of record:

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