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

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

DEFENDANT DOUGLASS W. MCDONALD'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Douglass W. McDonald files this Reply in Support of his Motion to Dismiss (the "Motion") (Doc. 48) and respectfully shows as follows:

ARGUMENT

Plaintiffs have once again made no serious effort to address the fatal flaws with their meritless claims, and this Court should now dispose of this lawsuit once and for all. The Court previously dismissed Plaintiffs' lawsuit but permitted them to amend their pleadings with a clear admonition that "Plaintiffs must allege sufficient facts to state a claim under a cognizable" constitutional theory. Notwithstanding this directive, Plaintiffs did not come close to stating a valid claim against Mr. McDonald. They simply rehashed many of the same specious allegations and

purported "facts" from their original complaint, only this time suggesting that Mr. McDonald was acting under "color of state law," as though that is sufficient to save their lawsuit—it is not.

Facing largely the same meritless claims as the first time, Mr. McDonald moved to dismiss Plaintiffs' First Amended Complaint ("FAC"). This time, Plaintiffs did not even respond to the Motion (completely letting the response deadline pass) until the Court order them to do so. (Doc. 49.) Then, rather than take advantage of the (second) opportunity the Court gave them, Plaintiffs simply regurgitated—nearly verbatim—the FAC's allegations in their so-called response to the Motion.[1] Plaintiffs did not grapple with *any* of the legal issues identified in the Motion. In fact, they do not identify a single case supporting their position. The only case even cited in their response is the same exact cited in the FAC, and it stands for the unremarkable proposition that a non-state actor can act under color of law for § 1983 purposes. (*See* FAC ¶ 60; Resp. ¶ 12.).

Of course, even if Plaintiffs had put any real effort into responding to the Motion,[2] it would have been futile. Plaintiffs simply do not have a constitutionally protected right to hold a private religious ceremony inside the Alamo Chapel when no other member of the general public is permitted to do so. Nor do Plaintiffs have a constitutionally protected right to serve on an advisory committee for the Alamo project or to draft the human remains protocol for the project simply by

[1] While there are minor differences in some of the paragraphs, the vast majority of Plaintiffs' response is copied verbatim from the FAC. *Compare* Resp. ¶¶ 5 - 9 *with* First Amended Compl. ("FAC") ¶¶ 1 – 5; Resp. ¶ 10 *with* FAC ¶ 9; Resp. ¶¶ 11 – 13 *with* FAC ¶¶ 59 – 61; Resp. ¶ 14 *with* FAC ¶ 1; Resp. ¶¶ 16 – 27 *with* FAC ¶¶ 67 – 78; Resp. ¶ 28 with FAC ¶ 64; Resp. ¶ 29 *with* FAC ¶ 52; Resp. ¶ 30 *with* FAC ¶ 55; Resp. ¶ 31 *with* FAC ¶ 57; Resp. ¶¶ 32 – 34 *with* FAC ¶¶ 59 – 61; Resp. ¶ 35 *with* FAC ¶ 64; Resp. ¶ 36 *with* FAC ¶ 56; Resp. ¶¶ 37 – 39 *with* FAC ¶¶ 79 – 81.

[2] Rather than respond to Mr. McDonald's Motion, Plaintiffs have apparently instead focused their efforts on filing amicus briefs in support of others trying to stop the Alamo Plan (*see* Doc. 51) and refiling this lawsuit in state court. (*See* Ex. A, Pltfs' Original Pet., *Tap Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, No. D-1-GN-20-002102 (98th District Court, Travis County, Texas).

virtue of their allegation that they may be able to trace their ancestral lineage to the Alamo. As Plaintiffs concede, thousands of others can also trace their lineage to the Alamo, conclusively establishing they have not suffered a "particularized injury" distinct from numerous other members of the general public. The reality is that Plaintiffs are trying to secure preferential treatment for themselves by asserting a host of meritless claims—all of which fail for the reasons explained in Mr. McDonald's Motion.

First, sovereign immunity bars Plaintiffs' claims. As Mr. McDonald explained in his Motion, he is entitled to sovereign immunity because the FAC is replete with allegations that he is serving as an instrumentality of the state in executing the "Bush Policy." (Mot. at 6 – 7.) Plaintiffs' response concedes this point. (*See* Resp. at 8 ("Douglass W. McDonald is a State Actor.")) As the Court explained in its order dismissing Plaintiffs' initial complaint against the Commissioner, only claims brought pursuant to the *Ex Parte Young* exception to sovereign immunity were potentially viable. (Doc. 43 at 15.) However, the FAC only seeks declarations that Defendants' past conduct violated their constitutional rights. (*See* FAC ¶ 9.) These declarations are not about future policy but are reframed allegations of past misconduct. *Waller v. Hanlon*, 922 F.3d 590, 603 – 04 (5th Cir. 2019). Accordingly, the *Ex Parte Young* exception does not apply, and the FAC should be dismissed.

Second, Plaintiffs lack standing to bring their Equal Protection and Due Process claims. (Mot. at 8 – 9.) The FAC does not allege a particularized, individual harm, an injury in fact, or the other required elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 – 61 (1992). Plaintiffs' response makes no attempt to show how Plaintiffs have suffered any such harm or how any such harm would be redressable.

Third, Plaintiffs' Equal Protection claims fail. (Mot. at 9 – 15.) To adequately allege such a violation, Plaintiffs must allege that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Gibson v. Tex. Dept. of Ins.—Div. of Workers' Comp.*, 700 F.3d 227, 238 (5th Cir. 2012). As with the original complaint, the FAC does not identify any similarly situated individuals that are being treated more favorably than them. (Doc. 43 at 12.) Plaintiffs, in fact, are treated no differently than all members of the general public who are not members of federally recognized tribes.

While Plaintiffs contend that strict scrutiny applies to the Equal Protection analysis (FAC ¶ 57), they are wrong because they are not members of a suspect class. Absent discrimination based on a suspect class such as race, rational basis applies. *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 589 (5th Cir. 2016). Notably, the Supreme Court has rejected requests to treat Indian status as a racial classification because "the term 'Indian' is not race-based." *U.S. v. Keys*, 103 F.3d 758 (9th Cir. 1996) (citing *United States v. Antelope*, 430 U.S. 641, 646 (1977)); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Moreover, "tribal status" is a political classification and, as such, only subject to rational basis scrutiny. *Mancari*, 417 U.S. at 551. Additionally, as explained in the Motion (Mot. at 11 – 12), discretionary decisions regarding the composition of the Alamo Mission Archaeology Advisory Committee's ("AMAAC") are nonreviewable, and even if they were reviewable, the selection of the AMAAC members would easily survive rational basis review. (*See* Mot. at 12 – 13.)

Fourth, the FAC fails to adequately plead any violations of Due Process. The alleged Due Process violations rest upon Plaintiffs' purported exclusion from the AMAAC and an allegedly vague restriction that the FAC continues to fail to identify. (FAC ¶¶ 79 – 80.) Plaintiffs contend that their past participation in other Human Remains Protocols entitles them to a position on the

AMAAC, but as the Court previously determined, "prior involvement in excavation projects does not give Plaintiffs a protected interest." (Doc. 43 at 14.) Similarly, Plaintiffs make no attempt to identify what regulation is void for vagueness despite the Court's explicit admonition to do so. (*See* Doc. 43 at 12 ("As ATI points out, there is no mention of what regulation is void for vagueness.")) Of course, the simple fact is that they cannot do so because there is no such regulation.

Fifth, Plaintiffs' First Amendment claims fail. These allegations rest upon Plaintiffs' purported exclusion from the Alamo Chapel for an after-hours sunrise ceremony and their demand to be on the AMAAC. As with the original complaint, the FAC "fail[s] to allege enough specific facts to support the claim" that Plaintiffs' exclusion from the Alamo Chapel violated their First Amendment rights. (*Id.* at 11.) Plaintiffs have not corrected this deficiency by explaining when, how, or why they were denied access to the Alamo Chapel. They do not plead that others have been allowed to use the chapel for sunrise ceremonies or private religious ceremonies. Of course, this is because the Alamo has a religiously neutral policy precluding private ceremonies in the chapel. With respect to their demand to be on the AMAAC and control the human remains protocol, Plaintiffs offer no explanation as to why they should be allowed to do so. "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 699 – 700 (1986). The clause does not "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Bowen*, 476 U.S. at 699.)

Finally, Plaintiffs' silence concedes that Commissioner Bush is a necessary and indispensable party to their dispute with Mr. McDonald. Thus, if Commissioner Bush's motion to dismiss is granted, the claims against Mr. McDonald should likewise be dismissed.

CONCLUSION

The First Amended Complaint should be dismissed.

Dated: May 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020 a true and correct copy of the foregoing document was served on all counsel of record via the Court's electronic filing system.

/s/ Manuel Mungia
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