

No. 20-50908

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Tap Pilam Coahuiltecan Nation; San Antonio Mission Cemetery Association;
Raymond Hernandez,

Plaintiffs - Appellants

v.

Douglass W. McDonald, CEO of The Alamo Trust; George P. Bush,
Commissioner of the General Land Office of the State of Texas,

Defendants - Appellees

On Appeal from
United States District Court for the Western District of Texas
5:19-CV-1084

**BRIEF OF APPELLANT RAYMOND HERNANDEZ, SAN
ANTONIO MISSION CEMETERY ASSOCIATION, AND TAP
PILAM COAHUILTECAN NATION**

SUBMITTED BY:

Adrian Anthony Spears, II
Martinez de Vara Law Firm, PLLC
PO Box 377
Von Ormy, Texas 78073
210.462.7753 direct
210.622.0323 office
210.622.4021 fax
adrian@sierraspears.com

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	Counsel for Appellees:
George P. Bush	Donato Ramos of Law Offices of Donato D. Ramos Laredo, TX
George P. Bush	James Hughes of Law Offices of Donato D. Ramos, P.L.L.C. Laredo, TX
George P. Bush	Donato Ramos of Law Offices of Donato D. Ramos, P.L.L.C. Laredo, TX
Douglass W. McDonald	Blake Stribling of Chasnoff Mungia Valkenaar Pepping & Stribling, P.L.L.C. San Antonio, TX
Douglass W. McDonald	Matthew Pepping of Chasnoff Mungia Valkenaar Pepping & Stribling, P.L.L.C. San Antonio, TX
Douglass W. McDonald	Manuel Mungia of Chasnoff Mungia Valkenaar Pepping & Stribling, P.L.L.C. San Antonio, TX

Appellants:	Counsel for Appellants:
Raymond Hernandez	Adrian Anthony Spears, II of Martinez de Vara Law Firm, PLLC. San Antonio, TX

San Antonio Mission Cemetery Association	Adrian Anthony Spears, II of Martinez de Vara Law Firm, PLLC. San Antonio, TX
Tap Pilam Coahuiltecan Nation	Adrian Anthony Spears, II of Martinez de Vara Law Firm, PLLC. San Antonio, TX

/s/: Adrian Anthony Spears, II
Attorney of Record for Raymond
Hernandez, San Antonio Mission
Cemetery Association, Tap Pilam
Coahuiltecan Nation

STATEMENT REGARDING ORAL ARGUMENT

Appellants/Plaintiffs Tap Pilam Coahuiltecan Nation San Antonio Mission Cemetery Association, and Raymond Hernandez, requests oral argument as they believe it could significantly aid the decisional process in this case.

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JURISDICTIONAL STATEMENT

(1) This Court has appellate jurisdiction pursuant to 28 U.S.C § 1291. The order appealed from is a final decision and judgment of the United States District Court for the Western District of Texas, San Antonio Division (also referred to herein as “the Court below” or “the Trial Court”), entered on September 23, 2020 (ROA.3476-3491.).

(2) Appellants Tap Pilam Coahuiltecan Nation; San Antonio Mission Cemetery Association; Raymond Hernandez timely filed his Notice of Appeal on October 23, 2020 (ROA.3492-3495.).

STATEMENT OF THE ISSUES

(1) The Trial Court erred by holding that Defendants' prohibition of the Plaintiffs from performing the forgiveness and remembrance ceremonies at the Alamo chapel and exclusion from the human remains protocol are not violations of the Free Exercise Clause pursuant to *Lyng v. N. W. Indian Cemetery Protective Ass 'n*, 485 U.S. 439, 451(1988).

(2) The Trial Court erred by applying rational basis review to Defendants' exclusion of the Plaintiffs in the Architectural Committee. Specifically, the Trial Court erred by holding that such exclusion lacked discriminatory purpose or discriminatory effect because the classification of Federally recognized Indian tribes is political, rather than racial.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

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.

2. On or about October 21, 2019, the Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), (6), and (7). See ROA.875-911. Specifically, the Defendants claimed that the court lacked subject matter jurisdiction because sovereign immunity was not 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 General Land Office (herein after referred to as “GLO”) and George P. Bush (herein after referred to as “Bush”) alleged that that Defendants failed to state a claim as a matter of law as the Plaintiffs were not treated differently than similarly situated individuals as they are no different than the general public at large.

3. On or about December 23, 2019 the Court issued an 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. (ROA 2797-2813).

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. (ROA 2814-3126.)

5. Specifically, Defendants have denied the free exercise of Plaintiff's religion in violation of the First Amendment by prohibiting the Plaintiffs from performing there "forgiveness ceremony" as well as the "remembrance ceremony" which are sacred obligations which will result in spiritual repercussions.

6. In addition, the Defendants have denied Plaintiffs equal protection of the law as guaranteed by the Fourteenth Amendment by excluding Plaintiffs from the human remains protocol which was intentionally crafted to block them from participating in the human remains protocol but allows other similarly situated Indian tribes with the condition that they be a Federally recognized access to the remains and allows them to decide which customs and or funerary practices to apply which discriminates against Plaintiffs based on their race and national origin, and, accordingly, strict scrutiny should apply See ROA.2834. and ROA.2838.

SUMMARY OF THE ARGUMENT

7. Plaintiff Tap Pilam Coahuiltecan Nation (hereinafter, "TPCN" or "Tap Pilam") 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 ROA.3045-3126. 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 non-profit 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.

8. 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 (titled

Appropriate Treatment of Human Remains Encountered During Alamo Complex Investigations, otherwise known as and referred to herein as the “Human Remains 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 as Exhibit B to Docket No. 53 ROA.3377-3382.

9. 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 as Exhibit B to Docket No. 53 ROA.3377-3382.

10. 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 of the dead”). 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 de Capistrano. 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 as Exhibit B to Docket No. 53 ROA.3377-3382.

11. 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 as Exhibit B to Docket No. 53 ROA.3377-3382.

12. There is no doubt that the site contains remains of the Plaintiffs ancestors and next of kin. See Report from GTI Environmental, LLC dated March 31, 2019 as Exhibit “I” of Plaintiff’s First Amended Complaint Docket 44 at ROA.2938-3007. See also Affidavit of Alston Thoms as Exhibit “R” to Plaintiffs’ First Amended Complaint Docket 44 at ROA.3045-3126. There is also no doubt that the Plaintiffs are the original occupants of the site and (See Affidavit of Alston Thoms as Exhibit “R” to Plaintiffs’ First Amended Complaint Docket 44 at ROA.3045-3126.) there is also no doubt that the Plaintiffs have religious ceremonies that must be performed

for remembrance and for forgiveness when bodies are disturbed. See affidavit of Raymond Hernandez as Exhibit B to Docket No. 53 ROA.3377-3382. There is no doubt that the project will disturb human remains of Plaintiffs next of kin and ancestors See Report from GTI Environmental, LLC dated March 31, 2019 as Exhibit “T” of Plaintiff’s First Amended Complaint Docket 44 at ROA.2938-3007. See also Affidavit of Alston Thoms as Exhibit “R” to Plaintiffs’ First Amended Complaint Docket 44 at ROA.3045-3126. Further, the Defendants have ignored the clear evidence and have actually stated that no cemetery exists at the mission which is intellectually dishonest. See Letter dated January 18, 2019 from McDonald on behalf of Alamo Trust, Inc. to the Texas Historical Commission objecting to the designation of a cemetery at the Alamo Property, ROA.2937.

13. The Trial Court relied on *Lyng v. N. W. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451(1988) and held that such exclusions of the Plaintiffs’ ability to perform their religious ceremonies were not a prohibition or an incidental effect or coercion or penalty and are merely the Plaintiffs’ attempt to exact a benefit from the Defendants. Nothing is further from the truth as unlike *Lyng*, where the government was constructing a road near sacred ground, and providing several accommodations, this case deals with a direct disturbance of physical bodies that are next of kin and are ancestors of the Plaintiffs and such direct physical disturbance by the Defendants triggers a very specific religious ceremony which Defendants have prohibited the

Plaintiffs from performing. Such actions by the Defendants are not just incidental, but an outright prohibition of the Plaintiffs' constitutional right to perform their religious ceremony. Even if such actions by the Defendants are incidental, the facts remain that the Defendants, by physically moving or disturbing the graves and bodies, trigger the necessity for the Remembrance ceremony. Even more, the Defendants then prohibit the Plaintiffs from performing their ceremonies which amounts to a coercion or penalty to the Plaintiffs. In addition, the human remains protocol drafted by the Defendant expressly states that "the AMAAC (Alamo Mission Archaeology Advisory Committee herein after referred to as "AMAAC") will determine who should be invited to and participate in the reburial process." "The AMAAC will decide who will lead the reburial ceremony/customs." (See Appropriate Treatment of Human Remains Encountered During Alamo Complex Investigations otherwise known as and referred to herein as the "Human Remains Protocol" at ROA.3021-3044.) Such policy by Defendants gives unfettered discretion to the advisory committee to pick and choose who can have access to the remains and who can perform the ceremonies. In this case, the Defendants have intentionally crafted a policy that not only discriminates against the Plaintiffs but excludes the Plaintiffs from performing their religious ceremonies. As such, Defendants' actions amount to a violation of the free exercise clause of the First Amendment and is distinguishable from the facts in *Lyng*.

14. Defendant George P. Bush, created a policy, that is implemented by Defendant Douglass W. McDonald (herein after referred to “McDonald”), that excludes the Plaintiffs from participating in the human remains protocol for human remains found at the Alamo Complex during its redevelopment, thus not only denying Plaintiffs the ability to perform their essential religious practices for disturbed burials of their ancestors as described above, but denies the Tap Pilam Coahuiltecan Nation participation while allowing other similarly situated individuals to participate which is a violation of the Equal protection clause. The Trial Court erred by dismissing the Plaintiffs’ equal protection claim by focusing on Federal recognition as a policy decision as opposed to a racial decision. However, the fact that federal recognition is a policy does not change the fact that the Defendants are hiding behind such policy to discriminate against the Plaintiffs based on national origin, excluding the Tap Pilam based on the fact that they are a certain “type” of Indian or are somehow not a “race” with different beliefs and customs. Specifically, the Bush 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 assertion is not only flawed but is appalling as Bush’s policy adopts the belief that all Indians are the same. Nothing is further from the truth. Invisibility

is the modern form of racism against Native Americans. Public discourse on racial discrimination tends to focus on when groups of people are seen as different, but racial discrimination also occurs when a group of people are not seen at all. The lack of exposure to realistic, contemporary, and humanizing portrayals of Native people creates a deep and stubborn unconscious bias in the non-Native mind. Rooted in this unconscious bias is the idea that Native people are not real or even human. However, each Native American community has their own customs, religious beliefs, funerary practices and speak different languages. Just because Federally recognized Indian tribes are allowed to participate at the Alamo redevelopment, does not permit the Defendants justifying their exclusion of the indigenous Native American tribe of the Tap Pilam Coahuiltecan Nation, and is wholly discriminatory. The American 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 Tap Pilam Coahuiltecans 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, and worse, 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. 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 federally recognized Indian tribes to participate in the human remains protocol at the exclusion of the Plaintiffs is shameful as federal recognition does not dictate ethnicity or race. Bush's policy is premised on the rationale that somehow Plaintiffs are not allowed to participate because they are not in fact Indians based solely on the erroneous premise that they are not federally recognized. Bush's policy is clearly premised on country-of-origin discrimination and the false premise that federal recognition grants "Indianness". Federal Courts have ruled that federal recognition is a political act of Congress and does not grant or remove aboriginal sovereignty or identity. Such backward antiquated logic is not proper and is hurtful and should be seen for what it actually is—discriminatory.

15. there have been recent and multiple discoveries of remains that are ongoing and will continue in the future. The Plaintiffs, as lineal descendants of the Mission Indians of the Alamo, are the next of kin to these remains and are entitled to

participate in their disposition and/or reinterment. Further, by disallowing the Plaintiffs to participate in the human remains protocol, violates their First Amendment rights as exclusion prohibits the Plaintiffs from performing sacred religious practices. As such, Plaintiffs have suffered and will continue to suffer severe consequences in accordance with their religious beliefs.

16. Plaintiff Tap Pilam Coahuiltecan Nation constitutes a distinct and unique Native American tribal community. In comparison, the Mescalero Apache Tribe, who also have historical connections with the Alamo and ancestors buried in its cemetery, though to a much smaller degree, are allowed to participate in the project. In this way, Defendants are treating two groups, similarly situated, in two radically different ways.

17. The Defendants are using “federal recognition” as a dog whistle, or cover, for racial and national origin discrimination. Despite not being Federal actors, nor using Federal funding on the project, nor having Federal oversight on the project, Defendants have attempted to justify Plaintiffs’ exclusion by arguing throughout their pleadings that the Plaintiffs are not a Federally recognized Indian tribe. Federal recognition is nothing more than a pretext to the fact that they are excluding the Plaintiffs, based on their race and nation origin, because Tap Pilam has a unique interest in the Alamo. In fact, the Alamo was built specifically for the religious

practice, including Christian burial, of the ancestors of the Tap Pilam Coahuiltecan Nation. This unique racial and national origin, with its historical ties to the Alamo, are precisely why the Defendants are refusing them access to the site and not allowing them to participate on the project. Other Indians nations do not share Tap Pilam's religious practices and customs, their unique interest in the site, or their lineal descent from those buried in the Alamo cemetery. 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, Defendants have chosen the characteristic that Tap Pilam is not a federally recognized Indian tribe as a superficial reason to treat them differently based solely on their national origin and its associated religious beliefs regarding the disposition of human remains.

ARGUMENT

A. FREE EXERCISE

18. The Trial Court erred by holding that Defendants' prohibition of the Plaintiffs from performing the forgiveness and remembrance ceremonies at the Alamo chapel and exclusion from the human remains protocol are not violations of the Free

Exercise Clause pursuant to *Lyng v. N. W. Indian Cemetery Protective Ass 'n*, 485 U.S. 439, 451(1988).

19. As stated above, the Trial Court relied on *Lyng v. N. W. Indian Cemetery Protective Ass 'n*, 485 U.S. 439, 451(1988) and held that such exclusion of the Plaintiffs' ability to perform their religious ceremonies was not a prohibition or an incidental effect or coercion or penalty and was merely the Plaintiffs' attempt to exact a benefit from the Defendants. Nothing is further from the truth as unlike *Lyng*, where the government was constructing a road nearby sacred ground, and providing several accommodations, this case deals with a direct disturbance of physical bodies that are next of kin and are ancestors of the Plaintiffs and such direct physical disturbance by the Defendants triggers a very specific religious ceremony which Defendants have prohibited the Plaintiffs from performing. Such actions by the Defendants are not just incidental but an outright prohibition of the Plaintiffs' constitutional right to perform their religious ceremony. Even if such actions by the Defendants are incidental, the facts remain that the Defendants, by physically moving or disturbing the graves and bodies, trigger the necessity for the Remembrance ceremony. Even more, the Defendants then prohibit the Plaintiffs from performing their ceremonies which amounts to a coercion or penalty to the Plaintiffs. In addition, the human remains protocol drafted by the Defendants also states that "the AMAAC will determine who should be invited to and participate in

the reburial process. The AMAAC will decide who will lead the reburial ceremony/customs.” ROA.3021-3044.

B. STRICT SCRUTINY APPLIES

20. The Supreme Court has established that the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden”) (internal quotation marks and citation omitted); See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 570, 113 S. Ct. 2217, 2246, 124 L. Ed. 2d 472, 514, 1993 U.S. LEXIS 4022, *92, 61 U.S.L.W. 4587, 93 Cal. Daily Op. Service 4295, 93 Daily Journal DAR 7368, 7 Fla. L. Weekly Fed. S 393 citing *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988) (“This Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny employed in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); see also *Braunfeld v. Brown*, 366 U.S. 599, 606-607, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (1961) (plurality opinion).

21. The Trial Court held that the Plaintiffs’ inclusion in the human remains protocol and permission to enter the Alamo chapel outside operating hours are benefits that are not otherwise generally available and such relief is unavailable

under *Lyng*, 485 U.S. at 451; *Patterson*, 398 F. Supp.3d at 123. There is no doubt that prohibiting the Plaintiffs from performing their religious forgiveness ceremony when the Defendants are the party that disturbed Plaintiffs' next of kin and ancestors remains is an outright prohibition. However, assuming that such prohibition is not an outright prohibition, but incidental, the Supreme Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For 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." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-451, 108 S. Ct. 1319, 1326, 99 L. Ed. 2d 534, 547-548, 1988 U.S. LEXIS 1871, *20-21, 56 U.S.L.W. 4292, 18 ELR 21043.

22. As stated above, the trial court relied on *Lyng* for the proposition that the Plaintiffs are trying to exact something from the Defendants, however, the facts in this case are distinguishable from *Lyng*. Specifically, *Lyng* deals with a road which disturbs a religious site and the court reasoned that such a road was a government

program that made it more difficult to practice a certain religion which is far different than the case at hand. See *Lyng* at 547. Unlike *Lyng*, in this case the renovation and implementation of the Alamo plan actually disturbs the Plaintiffs' burial site directly which triggers very specific religious ceremonies known as the forgiveness ceremony described above. Unlike *Lyng* this case deals with an outright prohibition of access to human remains of their ancestors as a result of specific government action which invades the cemetery located at the mission. Such disturbance of physical bodies and removal of Plaintiffs' ancestors' remains and the Defendants by not allowing the Plaintiffs access to the bodies to perform a specific religious ceremony which is triggered by the Defendants' disturbance of the bodies is not just incidental but an outright prohibition of the Plaintiffs' ability to perform their religious ceremony. As stated above, the Plaintiffs believe that spiritual ramifications will occur. Contrary to the Trial Court's analysis, the Plaintiffs are not exacting anything from the government as Defendants are the parties that are disturbing the Plaintiffs' next of kin and ancestor remains and then turning around and prohibiting the Plaintiffs from performing their religious ceremonies.

23. Unlike in *Lyng*, this case deals with a policy created by the Defendants known as the the human remains protocol which expressly states that "the AMAAC (Alamo Mission Archaeology Advisory Committee) will determine who should be invited to and participate in the reburial process." "The AMAAC will decide who will lead

the reburial ceremony/customs.” See Human Remains Protocol at ROA.3021-3044. Such policy by Defendants gives unfettered discretion to the advisory committee to pick and choose who can have access to the remains and who can perform the ceremonies and allows the committee to decide which religions and ceremonies can be conducted when human remains are found. Unlike the *Lyng* case, the Defendants are specifically prohibiting the Plaintiffs from performing their religious ceremonies as opposed to a mere incidental disturbance like the facts in *Lyng*.

24. It is interesting to note that in *Lyng* the Court stated that The Constitution does not permit the government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding the Indian respondents in from visiting the Chimney Rock area would raise a different set of constitutional questions. In this case the Alamo plan does just that as it prevents the Plaintiffs from performing a specific religious ceremony when human remains are found but, allows inclusion of other Indian tribes who also have kin or ancestors buried at the site to monitor or have access to the remains. Further, the Alamo plan actually prohibits only the Plaintiffs’ ability to perform its religious ceremony upon the discovery and removal of human remains even though the Alamo site was the original home and burial cemetery of the Tap Pilam. See Affidavit of Alston Thoms as Exhibit “R” to Plaintiffs’ First Amended Complaint Docket 44 at ROA.3045-3126.

25. The *Lyng* Court further stated that whatever rights the Indians may have to the use of the area, those rights do not divest the Government of its right to use what is, after all, its land. *Cf. Bowen v. Roy*, 476 U. S., at 724-727 (O'CONNOR, J., concurring in part and dissenting in part) (distinguishing between the Government's use of information in its possession and the Government's requiring an individual to provide such information). *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453, 108 S. Ct. 1319, 1327-1328, 99 L. Ed. 2d 534, 549, 1988 U.S. LEXIS 1871, *25-26, 56 U.S.L.W. 4292, 18 ELR 21043. Again, the Plaintiffs are not asking that they get special exactions or to prevent the Defendants from using the Alamo or from proceeding with the Alamo plan. All the Plaintiffs allege is that when a body is disturbed, that they are not prevented from performing their religious ceremonies.

26. It should also be pointed out that in *Lyng* the government made numerous accommodations to reduce the impact the road would have on religious activities. Specifically, in *Lyng*, the Forest Service commissioned a comprehensive study of the effects that the project would have on the cultural and religious value of the Chimney Rock area. No sites where specific rituals take place were to be disturbed. In fact, a major factor in choosing among alternative routes for the road was the relation of the various routes to religious sites: the route selected by the Regional Forester is, he noted, "the farthest removed from contemporary spiritual sites; thus,

the adverse audible intrusions associated with the road would be less than all other alternatives.” App. 102. Nor were the Forest Service’s concerns limited to “audible intrusions.” As the dissenting judge below observed, ten specific steps were planned to reduce the visual impact of the road on the surrounding country. See *Lyng* 795 F. 2d, at 703 (Beezer, J., dissenting in part). *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454, 108 S. Ct. 1319, 1328, 99 L. Ed. 2d 534, 549-550, 1988 U.S. LEXIS 1871, *26, 56 U.S.L.W. 4292, 18 ELR 21043. In this case, no accommodations were even contemplated and in fact were completely ignored and even excluded the Plaintiffs from the human remains protocol and allowed their historical enemies such as the Apache to participate as stated above. Not only does the Alamo plan involve the movement of remains of the Plaintiffs’ ancestors which triggers a very specific religious ceremony, the Alamo plan and the Defendants are specifically, denying them the ability to perform a religious ceremony. As such, the facts in this case are clearly distinguishable from *Lyng*.

27. There is no doubt that such actions and policy by Defendants prohibit the Plaintiffs from performing their ceremonies. As such, Defendants’ actions amount to a violation of the free exercise clause of the First Amendment and is distinguishable from the facts in *Lyng*.

C. EQUAL PROTECTION

28. The Trial Court erred by applying rational basis review to Defendants' exclusion of the Plaintiffs in the Architectural Committee. Specifically, the Trial Court erred by holding that such exclusion lacked discriminatory purpose or discriminatory effect because the classification of federally recognized Indian tribes is political, rather than racial.

29. The Trial Court dismissed Plaintiffs' claim of equal protection and relied heavily on *Morton v. Mancari*, 417 U. S. 535, 553-554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) for the idea that Federal recognition of a tribe is a political rather than a racial classification. However, the classification as a political rather than racial analysis is misplaced. Specifically, classifications based on Indian tribal membership are not impermissible racial classifications. See *United States v. Antelope*, 430 U. S. 641, 645-647, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Morton v. Mancari*, 417 U. S. 535, 553-554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). Federally recognized Indian tribes are independent political entities. See *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 72, n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). What is important is the fact that the Plaintiffs although not a politically or Federally recognized Indian tribe is no doubt Native American and the Defendants are improperly utilizing Federal recognition as a crutch to deny Plaintiffs access to their

next of kin.

30. As stated above, the Human Remains Protocol drafted by the Defendants expressly states that “the AMAAC (Alamo Mission Archaeology Advisory Committee) will determine who should be invited to and participate in the reburial process.” “The AMAAC will decide who will lead the reburial ceremony/customs.” See the Human Remains Protocol at ROA.3021-3044. Such policy by Defendants gives unfettered discretion to the advisory committee to pick and choose who can have access to the remains and who can perform the ceremonies. In this case, the Defendants have intentionally crafted a policy that not only discriminates against the Plaintiffs but excludes the Plaintiffs from performing their religious ceremonies.

31. Most disturbing, is the fact that the Defendants’ policy allows five Federally recognized Indian tribes to serve on the committee as Tribal monitors. It should be pointed out that Defendants 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 Defendants want to believe that all Indians are the same and that by applying Federal recognition as a policy to deny the Plaintiffs from participating is not actually discriminatory . 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 Defendants 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 Mescalero Apache, were the historical enemies of the Coahuiltecans and were responsible for the deaths of many of those buried at the site. Tap Pilam and the Mescalero Apache both have historical ties to the Mission but are being treated differently solely on their differing national origins. These actions by Defendants 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 and differing funerary practices to stand in their place and rely on the erroneous premise that Plaintiffs are not Indians because they are not Federally recognized. Defendants' policy of only allowing Federally recognized Indian tribes to participate and excluding Plaintiffs is shameful as Federal recognition does not dictate ethnicity or race. Defendants' 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.

32. 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 Defendants 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 brief, 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.

33. The Trial Court also stated that similarly situated individuals are other descendants of those buried at the Alamo. See Trial Court's Order Dismissing as Moot dated September 23, 2020 ROA 3476-3491. at 3487. The Trial Court stated that Plaintiffs failed to plead how they are treated differently than those other descendants. The Trial court further stated that Defendants apparently treat them equally - they too were not included in the human remains protocol or the

Archaeology committee. See Trial Court's Order Dismissing as Moot dated September 23, 2020 ROA 3476-3491. at 3487. Such is not the case, as stated above, other Indian tribes are allowed to participate, some have no connection to the site while others do. Put simply, the Defendants are allowing other Indian tribes with next of kin and ancestors to participate so long as they are federally recognized. See Plaintiff's First Amended Complaint paragraph 29 -ROA.2814-3126 at ROA.2824-2825. ("[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."). The focus is the discrimination based on the sole classification admitted to by the Defendants is Federal recognition.

34. The pretext reason for excluding the Plaintiffs because they are not a political entity recognized by the Federal government is nothing more than discrimination and treats other Indians with next of kin buried at the site differently upon the sole basis that they are federally recognized.

CONCLUSION

35. The Trial Court relied on *Lyng v. N. W. Indian Cemetery Protective Ass 'n*,

485 U.S. 439, 451(1988) and held that such exclusions of the Plaintiffs' ability to perform their religious ceremonies were not a prohibition or an incidental effect or coercion or penalty and are merely the Plaintiffs' attempt to exact a benefit from the Defendants. Nothing is further from the truth as unlike *Lyng*, where the government was constructing a road nearby sacred ground, and providing several accommodations, this case deals with a direct disturbance of physical bodies that are next of kin and are ancestors of the Plaintiffs and such direct physical disturbance by the Defendants triggers a very specific religious ceremony which Defendants have prohibited the Plaintiffs from performing. There is no doubt that such actions and policy by Defendants prohibit the Plaintiffs from performing their ceremonies and gives them the sole discretion to decide who can participate and what religious funerary practices will apply and specifically excludes the Plaintiffs from performing their religious ceremony when a body is disturbed. As such, Defendants' actions amount to a violation of the free exercise clause of the First Amendment and is distinguishable from the facts in *Lyng*.

36. The Trial Court erred by dismissing the Plaintiffs' equal protection claim by focusing on federal recognition as a policy decision as opposed to a racial decision. The Defendants have intentionally discriminated against the Plaintiffs based on their race and have declared 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 use of federal recognition as a benchmark for participating in the Human Remains Protocol 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 other Indian tribes that do not have the same religious beliefs regarding the disposition or movement of remains only stresses the fact that such decisions and direction by Defendants 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.

37. Therefore, the Plaintiffs ask this court to reverse the decision of the Trial Court which summarily dismissed this lawsuit and remand this case for further proceedings.

SUBMITTED BY:

/s/: Adrian Anthony Spears, II
Martinez de Vara Law Firm, PLLC
PO Box 377

Von Ormy, Texas 78073
210.462.7753 direct
210.622.0323 office
210.622.4021 fax
adrian@sierraspears.com

CERTIFICATE OF SERVICE

I certify that on March 5, 2021, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

Manuel Mungia
SBN: 24060310
mmungia@chasnoffstribling.com

Matthew E. Pepping
SBN: 24065894
mpepping@chasnoffstribling.com

Blake W. Stribling
SBN: 24070691
[Email: bstribling@chasnoffstribling.com](mailto:bstribling@chasnoffstribling.com)

CHASNOFF MUNGIA VALKENAAR PEPPING & STRIBLING, LLP
1020 N.E. Loop 410, Suite 150
San Antonio, Texas 78209
Telephone: 210-469-4155
Counsel for Defendant/Appellee
Douglass W. McDonald

Donato D. Ramos, Sr.
SBN: 16508000
mrodriguez@ddrlex.com

Donato D. Ramos, Jr., *Pro Hac Pending*
SBN: 24041744
donatoramosjr@ddrlex.com

James Brandon Hughes, *Pro Hac Pending*
SBN: 24071094
bhughes@ddrlex.com

LAW OFFICES OF DONATO RAMOS, L.L.C.
Texas Community Bank Bldg., Suite 350
6721 McPherson Rd. (78041)
P.O. Box 452009
Laredo, Texas 78045
Telephone: (956) 722-9909
Facsimile: (956) 727-5884
Counsel for Defendant/Appellee,
George P. Bush

/s/: Adrian Anthony Spears, II
ADRIAN ANTHONY SPEARS, II

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 6,707 words.

/s/: Adrian Anthony Spears, II
ADRIAN ANTHONY SPEARS, II