Case 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 THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION
CIVIL ACTION NO. 5:19-CV-1084

BRIEF OF APPELLEE DOUGLASS W. MCDONALD

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The order appealed represents a proper exercise of well-recognized authority and should be affirmed. The dispositive issues have been authoritatively decided, and the pleadings and legal arguments are adequately presented in the briefs and the record, such that the decisional process would not be significantly aided by oral argument. To the extent the Court wishes to have oral argument, Appellee McDonald will gladly participate.

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STATEMENT OF THE ISSUES

1. Did the district court erroneously conclude that Appellants have standing to bring their claims where they have suffered no particularized injury and do not allege that any human remains encountered at the Alamo are identifiable?

2. Did the district court correctly conclude that the Free Exercise Clause does not require Appellees to open the Alamo for an after-hours religious ceremony or allow Appellants to draft the human remains protocol for archaeological excavations?

3. Membership in an Indian tribe is a political (rather than racial) classification subject to rational basis review. Appellants, who are not members of a federally recognized Indian tribe, contend that creating an advisory committee from members of federally recognized Indian tribes discriminated against them based on "race." Did the district court correctly apply rational basis review in dismissing their equal protection claim?

STATEMENT OF THE CASE

I. The Alamo Plan Will Restore, Repair, and Conserve the Alamo.

The Alamo is and always will be a shrine of Texas liberty and freedom, is one of the most important sites in the State, and is widely known for the historical Battle of the Alamo in 1836. ROA.1374. However, the Alamo was inhabited several hundred years before that, first by Native Americans and then by early Spanish settlers who established the Alamo as one of five San Antonio missions intended to solidify and protect the northern territories of New Spain. *Id.* This rich history has shaped the geopolitical structures of this entire region.

Following over a century of development around it, the original nature, organization, and structure of the Alamo has been obscured to the point of nonexistence. *Id.* The final two remaining structures of the Alamo—the Church and

the Long Barrack—are in dire condition and require repairs to stop their deterioration. ROA.1422, 1735. If the causes of their deterioration are not determined, managed, and monitored, these structures could be lost forever. ROA.1735.

In 2011, the Texas Legislature and Governor Rick Perry designated the Texas General Land Office ("GLO") the custodian of the Alamo. By statute, the Alamo is under the exclusive jurisdiction of the GLO, and all powers and duties related to it are vested solely in the GLO. TEX. NAT. RES. CODE § 31.451(a). The same statute gives the GLO the right to "partner with a qualifying nonprofit organization" to, among other things, "provide services or other benefits for the preservation and maintenance of the Alamo." *Id.* Thus, in 2015, the GLO partnered with Alamo Trust, Inc. ("Alamo Trust" or "ATI"), a private nonprofit Texas corporation, to manage the Alamo's day-to-day operations. ROA.1355.

In 2015, the GLO and City of San Antonio ("COSA") also signed an agreement to create a master plan to preserve and protect the Alamo (the "Alamo Plan"). *Id.* Under this agreement, a 29-member advisory committee, the Alamo Citizens Advisory Committee ("ACAC"), was established to provide citizen input on the development of the Alamo Plan. *Id.* A member of the Tap Pilam tribe sits on the ACAC "[a]s the representative of the Tap Pilam Coahuiltecan Tribal community." ROA.2857 (Exhibit B to Amended Complaint.)

II. The Alamo Plan's Human Remains Protocol.

The Alamo Plan requires an archaeological investigation of the site, which is necessary to plan, design, and perform the required conservation and preservation work for the Alamo Church and Long Barrack. ROA.1356. The excavation and construction plans for the project were carefully designed to minimize any potential impact on archeological artifacts buried at the Alamo. ROA.1356, 1705.

The GLO and Alamo Trust recognized that the archaeological and excavation work at the Alamo could result in the inadvertent discovery of artifacts and potential human remains. Thus, the project follows a comprehensive human remains treatment protocol. ROA.1705, 3026 – 44. The Native American Graves Protection and Repatriation Act ("NAGPRA") requires consultation with federally recognized Native American tribes regarding the treatment of any human remains that are inadvertently discovered on federal lands. 25 U.S.C. § 3001, *et seq*. Moreover, compliance with NAGPRA is required to the extent that any museum receives federal funds. *Id.* §§ 3005 – 07. Although the Alamo was not subject to NAGPRA at the time the lawsuit was filed, the human remains protocol incorporates NAGPRA's spirit because NAGPRA reflects the sound practices that have been used on similar archaeological investigations at other historic sites. ROA.1356. Additionally, because the Alamo Plan calls for the construction and development of a museum, complying with NAGPRA from the outset makes practical sense. *Id.*

After consulting with various federally recognized tribes, and consistent with NAGPRA, the GLO and Alamo Trust created the Alamo Mission Archeology Advisory Committee ("AMAAC") to develop and oversee the application of a human remains protocol. ROA.1357, 1705, 3022. The AMAAC consists of members of federally recognized Native American tribes with interest in and connections to Bexar County. ROA.1357, 3021. The advisory committee "maintains no formal or legal authority" with respect to the Alamo Plan. ROA.1357, 1705, 3022. Rather, it offers insight, counsel, and guidance and provides a trained Tribal Monitor to monitor the excavations. ROA.3022, 3024 – 25. Exhibit Q to Appellants' amended complaint describes the AMAAC and includes the human remains protocol. ROA.3021 – 44.

The human remains protocol established by the AMAAC is the most comprehensive human remains protocol ever utilized at the Alamo and one of the most comprehensive human remains protocols ever utilized in Texas. ROA.1705. The protocol provides detailed guidance on a myriad of potential issues, including such things as the types of tools that can be used when excavating any human remains, the storage and security protocols that must be followed for any discoveries, the types of analysis that can be conducted on any discoveries, and the reburial protocol that must be followed. ROA.3026 – 44. The human remains protocol is also purposely inclusive in recognition of the diverse cultural and ethnic heritages that

have occupied the Alamo. ROA.1705, 3038–39. Indeed, while the AMAAC is comprised solely of members of federally recognized tribes, the AMAAC is required to "[e]ngage with other interested groups and individuals, providing a forum for their involvement and understanding of the Alamo Plan." ROA.3024.

III. The District Court Dismisses Appellants' First Attempt to Stop the Alamo Plan and Obtain Preferential Treatment.

On September 10, 2019, Appellants Tap Pilam Coahuiltecan Nation, San Antonio Mission Cemetery Association, and Raymond Hernandez (collectively, "Tap Pilam" or "Appellants") filed their initial complaint attempting to stop the Alamo Plan and secure preferential treatment for themselves with respect to two aspects of the project. ROA.12 – 39. First, Appellants sought to force their way on to the AMAAC—an advisory board. ROA.16. Second, Appellants demanded the unique right to use the Alamo Chapel for a private, members-only religious ceremony at sunrise before regular business hours. ROA.15. The complaint sought extraordinary relief, including demanding the court declare a cemetery exist at the Alamo, to enjoin the entire Alamo Plan "until the Plaintiffs' are included in the project," and to excavate the entire Alamo Plaza to 6-feet because they contended that anything less than that would not obtain "the maximum amount of historic, scientific, archeological, and educational information." ROA.29, 36, 38.

Each of the six original defendants moved to dismiss Tap Pilam's original complaint.[1] *E.g.*, ROA.836 – 72. The district court granted the motions, specifically delineating Tap Pilam's pleading failures. ROA.2797 – 2813. With respect to the allegations concerning Tap Pilam's purported exclusion from the AMAAC, the district court found that Tap Pilam "fail[ed] to allege enough facts to state an equal protection claim." ROA.2808. The district court explained that Tap Pilam failed to identify the similarly situated individuals who are being treated more favorably than them and that they failed to allege that they were denied inclusion on the AMAAC because of their race or national origin. ROA.2808 – 09. Similarly, with respect to the alleged exclusion from the Alamo Chapel, the district court explained that the complaint "merely allege[s] that [Plaintiffs] were 'denied permission to gather inside the Alamo Chapel for a prayer service,' and then proceed[ed] to state legal conclusions." ROA.2807. The district court specifically faulted Tap Pilam for failing to "state which Defendant denied them use of the Alamo Chapel, the circumstances surrounding the potential altercation, or whether it was pursuant to an alleged policy." ROA.2807. While the district court granted the motions to dismiss, it allowed Tap Pilam an opportunity to replead its claims against Alamo Trust.

[1] Tap Pilam initially sued Alamo Trust, Inc.; Douglass McDonald; the Texas General Land Office; George P. Bush; the Texas Historical Commission; and the City of San Antonio.

However, the District Court explicitly warned Tap Pilam that "if amending their complaint, Plaintiffs must allege sufficient facts" to state a legally-cognizable claim. ROA.2808.

IV. The District Court Dismisses Tap Pilam's Second Attempt to Stop the Alamo Plan and Obtain Preferential Treatment.

While Tap Pilam took advantage of the opportunity to file an amended complaint, they completely disregarded the District Court's admonition that they must state sufficient facts to state a legally-cognizable claim. On January 22, 2020, Tap Pilam filed its amended complaint, this time only seeking relief against Douglass McDonald and George P. Bush for alleged violations of the Equal Protection Clause, the Free Exercise Clause, and the Due Process Clause. ROA.2814. As with the first complaint, Tap Pilam demanded the same extraordinary relief. ROA.2833, 2849.

But, once again, Tap Pilam wholly failed to plead facts that would support their claims. For instance, Tap Pilam once again failed to provide any details surrounding their alleged denial of entry into the Alamo Chapel for their Sunrise Ceremony. They did not indicate whether this occurred during normal business hours (or at sunrise when the Alamo Chapel is closed to all members of the general public), whether they were requesting to use the Chapel for a private religious ceremony in which no other members of the public would be allowed entry, or whether the denial of entry was done pursuant to any policy. Moreover, they once

again failed to allege any facts that would establish how they were being discriminated against based on race or national origin.

Both defendants moved to dismiss the amended complaint on February 19, 2020. ROA.3134 – 84. Defendants explained that Tap Pilam lacked standing for all of their claims. ROA.3170 – 71. They also explained that the Equal Protection claim should be dismissed because Tap Pilam failed to allege that they were intentionally treated differently than others similarly situated or that there was no rational basis for the different treatment. ROA.3171 – 77. Defendants further explained that Tap Pilam's Due Process claims (which they have now abandoned on appeal) failed because they had no legally protected interest in serving on the AMAAC. ROA.3178 – 79. Finally, Defendants explained that the Free Exercise claims failed because Tap Pilam was attempting to force the government to comport its conduct to further Tap Pilam's religious interests and because the amended complaint remained bereft of any allegations regarding the circumstances around their alleged inability to use the Chapel for their sunrise ceremony. ROA.3180.

Tap Pilam did not bother to respond to the motion to dismiss the amended complaint, forcing the district court to order it to do so. ROA.3185. Tap Pilam's counsel then sought a continuance because of family circumstances, and the district court held the briefing schedule in abeyance "pending further notice from the parties." ROA.10. On April 10, 2020, McDonald advised the district court that Tap

Pilam's counsel had clearly returned to work, as counsel was representing a new set of plaintiffs challenging the Alamo Plan in a separate lawsuit. ROA.3192 – 93. The district court then ordered Tap Pilam to file a response to the motion to dismiss. ROA.3271.

Again, however, Tap Pilam failed to respond to the motion to dismiss in any substantive way. Instead, Tap Pilam brazenly (and astonishingly) simply cut and pasted the amended complaint and titled the document *a response*. ROA.3272 – 94.

The district court was justifiably unimpressed with this conduct, noting that Tap Pilam's "response appears to be largely cut and pasted from their amended complaint," and it "fails to cite to any case law supporting their argument that they have adequately alleged legal claims, in violation of Local Rule CV-7(e)(1)." ROA.3479.

Nonetheless, the district court carefully considered the merits of Tap Pilam's claims and found that they failed to state a claim upon which relief could be granted. It found that Tap Pilam's Equal Protection claim failed because "Plaintiffs allege racial discrimination on the basis that they are not a federally recognized tribe. However, courts have held that federal recognition of tribes is a political, rather than racial, classification." ROA.3486. Moreover, Tap Pilam "admits elsewhere that they are not being classified based on race." *Id.* As such, Tap Pilam's Equal Protection challenges were subject to rational basis review. The district court also dismissed

the Due Process claims, and held that the Free Exercise claim necessarily failed. ROA.3487 – 90. With respect to the Free Exercise claim, the district court correctly determined that the alleged violations (exclusion from the Alamo Chapel and the human remains protocol) did not violate the Free Exercise Clause. ROA.3489. Because "inclusion in the human remains protocol and permission to enter the Alamo Chapel outside of operating hours to conduct a religious ceremony are both benefits that are not otherwise generally available," the Free Exercise claim failed. ROA.3490 (internal citations omitted).

STANDARD OF REVIEW

The district court's ruling on a motion to dismiss for failure to state a claim under Rules 12(b)(1) and 12(b)(6) is reviewed *de novo*, applying the same standard as the district court. *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 305 (5th Cir. 2020); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007); *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). A motion under Rule 12(b)(1) challenges the subject matter of the court to hear a case. *Ramming*, 281 F.3d at 161. "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.*

With respect to a 12(b)(6) challenge, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Powers*, 951 F.3d at 305 (internal quotation marks omitted). However, the plaintiff must plead

"specific facts, not mere conclusory allegations" to state a claim for relief that is facially plausible. *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations need not be detailed, but they must be enough to raise a right to relief above the speculative level, assuming all the allegations are true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's dismissal of Tap Pilam's complaint. Despite being afforded multiple opportunities, Tap Pilam did not come close to pleading facts that would state a valid claim against McDonald. Tap Pilam did not even bother to respond substantively to McDonald's motion to dismiss—opting instead to regurgitate the woefully deficient allegations from their complaint. This is not surprising, however, because there are no legitimate facts that Tap Pilam could have plead that would have supported their claims since Tap Pilam have not been discriminated against in any way. They have been treated the exact same as every other member of the general public. The reality is that Appellants 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 Appellants have a constitutionally protected right to serve on an advisory committee for the Alamo Plan or draft the human remains protocol for the project simply by virtue of their allegation that they may be able to trace their ancestral lineage to the Alamo.

Simply put, no one has the legal right to force the government to conform to his or her religious beliefs; no one has a right to hold a private "Sunrise" Ceremony at the Alamo Chapel; no one has a right to perform a religious celebration over unidentified remains; no one has a right to force himself or herself on an advisory committee; and no one has the right to assume control over the treatment and disposition of unidentified human remains.

Nevertheless, Tap Pilam have repeatedly tried to stop the Alamo Plan in a transparent attempt to secure preferential treatment for themselves with respect to use of the Alamo Chapel and exclusive control over the unidentified human remains that may be encountered at the Alamo. However, as the district court correctly concluded, Tap Pilam's legal claims are legally and factually baseless.

To start, Tap Pilam lack standing to even bring their claims. This Court has the independent responsibility to ensure that they have standing. *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005). Tap Pilam do not have a protected interest in participating in the human remains protocol or performing a religious ceremony over unidentified remains. Tap Pilam assert they have this interest because they can trace

their lineage back to the Alamo. But if every person who can potentially trace their lineage back to someone who may have lived or died at the Alamo has standing to challenge the human remains protocol on the basis that they were excluded from the AMAAC or that each should be able to perform his or her chosen religious ceremony when any human remains (the identity of which is unknown) are disturbed, it would open the floodgates to an untold number of potential claims, which defeats the purpose of standing. Similarly, neither Tap Pilam nor anyone else has the right to force their way on to an advisory committee such as the AMAAC or force their way into a closed government building to perform a religious ceremony. Accordingly, Tap Pilam do not have standing to pursue their claims.

But even if Tap Pilam could cross the standing threshold, their claims for alleged violations of the Free Exercise Clause and the Equal Protection Clause fail. With respect to Free Exercise claim, Tap Pilam seek to force the government to comport itself to further their religious beliefs, namely to allow Tap Pilam to have a private Sunrise Ceremony in the Alamo Chapel and to participate in the human remains protocol. But neither of these allegations rises to a substantial burden on religion. Rather, their inability to perform a private Sunrise Ceremony and to participate in the human remains protocol are the result of neutral and generally applicable rules. As the district court held, Tap Pilam's Free Exercise Clause challenge fails under the Supreme Court's decision in *Lyng v. Nw. Indian Cemetery*

Protective Ass'n, 485 U.S. 439 (1988). As *Lyng* holds, the Free Exercise Clause cannot be used to force the government to comport to an individual's religious beliefs, just as Tap Pilam attempts to do here.

Similarly, Tap Pilam's equal protection claim fails. Tap Pilam are not discriminated against on the basis of race. Federal recognition of an Indian tribe is a political classification—not racial. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Absent racial discrimination, Tap Pilam fail to allege that they are treated differently from others similarly situated. Simply put, no one has the right to participate in the human remains protocol or to hold a private ceremony inside the Alamo Chapel. Tap Pilam do not even try to argue that composing the AMAAC with members of federally recognized tribes in accordance with NAGPRA fails the rational basis test, and it is not difficult to surmise why as there are dozens of reasons following NAGPRA survives rational basis, including that the Alamo Plan intends to build a museum that may receive federal funds and, consequently, be subject to NAGPRA.

Finally, at the district court, Tap Pilam also alleged that their exclusion from the AMAAC and human remains protocol violated the Due Process Clause of the 14th Amendment. Tap Pilam has not pursued that claim on appeal and has therefore waived it. *McGee v. State Farm Fire & Cas. Co.*, 515 Fed. App'x. 291, 294 n.3 (2013) (citing *United States v. Thames*, 214 F.3d 608, 611 n.3 (5th Cir. 2000))

("Failure to adequately brief an issue on appeal constitutes waiver of that argument.").

ARGUMENT

I. Appellants Lack Standing to Bring Their Equal Protection and Free Exercise Claims Based on Their Exclusion from the AMAAC and the Human Remains Protocol.

Standing is a limitation on the court's power, and appellate courts have a "'continuing obligation to assure [themselves] of [their] own jurisdiction, sua sponte if necessary.'" *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020) (quoting *United States v. Pedroza-Rocha*, 933 F.3d 490, 493 (5th Cir. 2019) (per curiam)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.") (internal quotation and citations omitted); *Sample*, 406 F.3d at 312 ("Since standing and ripeness are essential components of federal-subject matter jurisdiction, the lack of either can be raised at any time by a party or by the court.") (internal citations omitted); *Johnson v. City of Dall., Tex.*, 61 F.3d 442, 443-44 (5th Cir. 1995) (same).

To establish standing, a plaintiff must show: (1) a concrete, particularized, actual or imminent injury-in-fact; (2) that is fairly traceable to the challenged action of the defendant; and (3) is likely to be redressed by a favorable decision. *Lujan v.*

Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). An "injury in fact [consists of] an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. "[A] plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)) (holding that standing as to one claim does not confer standing as to all claims).

Here, the district court erred in determining that Tap Pilam has standing to bring their Equal Protection and Free Exercise claims because of their alleged inability to participate in the human remains protocol and perform religious reinterment ceremonies. ROA.3483-84.[2] The district court erroneously failed to consider whether Tap Pilam have a protected interest in performing such ceremonies

[2] Significantly, the only concrete and particularized injury the district court found that Tap Pilam had adequately alleged was "their exclusion from the human remains protocol." The district court did not find that Appellants had adequately alleged a particularized injury with respect to their purported use of the Alamo Chapel for their Sunrise Ceremony. They did not. They do not allege that they were entirely barred from the Alamo, or that they were prevented from entering the Alamo during its normal operating hours. Nor did Appellants establish they have any legally protected interest in extending the Alamo's operating hours to conduct their ceremony. They do not, because their interest in more flexible hours of operation is the same generalized grievance shared by all members of the public who might have liked to enter the Alamo when it was closed, regardless of their reasons. Accordingly, Tap Pilam's allegations about their Sunrise Ceremony are also insufficient to confer standing. ROA.3483.

on *unidentified remains*. Tap Pilam's amended complaint repeatedly concedes that the human remains are unidentified and, consequently, they did not allege any concrete or particularized harm that is distinct from other members of the general public. Nor has Tap Pilam shown that their alleged harm involves the invasion of a legally protected interest.

a. Tap Pilam Has Not Pled a Particularized Harm that is Distinct from the General Public.

Tap Pilam has consistently failed to demonstrate how exclusion from the AMAAC and the human remains protocol constitutes a concrete and particularized injury that is distinct from the general public. No one is entitled to serve on the AMAAC or participate in the project's human remains protocol because there is no general legal right to serve on public committees. *See, e.g., Alwood v. Clark*, No. 05-CV-0580, 2005 WL 2001317, at *9 (S.D. Ill. Aug. 19, 2005) ("Public participation in the decisions of a local board is similar to a 'town hall meeting,' and no individual has the right to be named to a committee."); *Whittington v. Trustees of Purdue Univ.*, Civil No. 2:09-cv-9, 2012 WL 685502, at *9 (N.D. Ind. Mar. 2, 2012) (determining that college professor did not have the right to serve on various committees and her removal or the university's refusal to allow her to serve on select committees did not constitute a prima facie case of discrimination). Tap Pilam has been treated the same as every other member of the general public and thus has not suffered any unique, particularized harm.

The district court found that Tap Pilam's exclusion from the human remains protocol constituted a concrete and particularized injury based on Tap Pilam's allegation that they are the direct descendants of the remains buried at the Alamo and thus, they need to be able to perform certain religious ceremonies to honor those remains. ROA.3483. But a generalized assertion of ancestry and desire to perform a religious ceremony over unidentified remains is not enough to establish the particularized harm necessary to confer standing. *Idrogo v. U.S. Army*, 18 F. Supp. 2d 25, 27-28 (D.D.C. 1998) (finding that plaintiff's unsubstantiated belief of "patrimonial ancestry" in Geronimo's remains was insufficient to confer standing and that plaintiff's grievance was nothing more than a "generalized interest of all citizens").

As Tap Pilam concedes in the amended complaint, potentially thousands of individuals can trace their ancestry to the Alamo, including descendants of "federally recognized tribes, Spanish soldiers, Canary Islander settlers, African settlers, Mexican soldiers, Battle of the Alamo Defenders, and even a former provincial governor of Texas." ROA.2825. But where, as here, "the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a *large class of citizens*," an alleged harm does not warrant an exercise of jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis added). The number of people with an ancestor who potentially lived or died at the Alamo—which is hundreds of years

old—is one such large class of citizens. If this Court were to find that every person who can potentially trace their lineage back to someone who may have lived or died at the Alamo has standing to challenge the human remains protocol on the basis that they were excluded from the AMAAC or that each should be able to perform his or her chosen religious ceremony when any human remains (the identify of which is unknown) are disturbed, it would open the floodgates to an untold number of potential claims. It would also defeat the entire purpose of the standing doctrine, which is to avoid speculative judicial inquiries by the court system. *See Lujan*, 504 U.S. at 583 (Stevens, J., concurring).

b. Tap Pilam Failed to Allege an Invasion of a Legally Protected Interest.

Even if Tap Pilam established that they suffered a concrete and particularized harm based on their exclusion from the AMAAC or the human remains protocol, those harms do not involve the invasion of any "legally protected interests." Accordingly, they do not confer standing to Tap Pilam. Neither Tap Pilam nor anyone else has a legally protected right to serve on the AMAAC. *See Wainwright v. Cnty. of Oxford*, 369 F. Supp. 2d 3, 8 (D. Me. 2005) (dismissing a constitutional claim because no protected right existed in position on advisory committee); *Allen v. Martel*, No. CIV-S-10-1320, 2010 WL 3734096, at *2 (E.D. Cal. Sept. 21, 2010) (same). Indeed, Tap Pilam never even alleged such a legal right.

Nor does Tap Pilam—or anyone else—have a right to participate in the human remains protocol or perform a religious ceremony over *unidentified* human remains. The district court based its standing decision, in part, on *Patterson v. Defense POW/MIA Acct. Agency*, 343 F. Supp. 3d 637, 652 (W.D. Tex. 2018). But the district court misapplied *Patterson*. In *Patterson*, the court found that the plaintiffs, who were alleged descendants of servicemembers whose remains were found overseas, had standing to bring suit based on the deprivation of proper burials according to their religious beliefs. ROA.3484. But that opinion is inapplicable to this case because as the *Patterson* court specifically noted in a subsequent summary judgment opinion dismissing the plaintiffs' claims:

> In its prior order on the Motion for Judgment on the Pleadings, the Court allowed Plaintiffs' due process claims to proceed. It did so in part because ***Plaintiffs alleged that "the remains have been identified and located."*** The Court, accepting that allegation as true and presented with Plaintiffs' list of cases recognizing some sort of property interest in relatives' remains, denied judgment on the pleadings for the due process claims. With the benefit of the summary judgment record, however, the Court sees the remains were not identified and located then and are not now.

Patterson v. Defense POW/MIA Acct. Agency, 398 F. Supp. 3d 102, 117 (W.D. Tex. 2019) (emphasis added). Here, no one is disputing that the remains at the Alamo are unidentified. What is more, Tap Pilam did not even seek the right to identify the remains in their Amended Complaint. Without any allegation that any remains are

identified, Tap Pilam cannot show that they have any legally cognizable interest in any purported remains at the Alamo. *See Patterson*, 398 F. Supp. at 120 ("No relevant jurisdiction recognizes a property interest in unidentified remains and the remains at issue are not identified."); *see also Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (a plaintiff's standing cannot rest upon the legal rights or interests of third parties).[3]

II. Tap Pilam's Free Exercise Claim Fails.

The district court correctly found that Tap Pilam failed to allege a violation of the Free Exercise Clause. Tap Pilam alleged that McDonald and Bush denied them the free exercise of religion by not permitting Tap Pilam to conduct a Sunrise Memorial Ceremony at the Alamo Chapel and by excluding Tap Pilam from the human remains protocol. ROA.2842. The district court correctly held that these claims failed. ROA.3488 – 90.

a. The Free Exercise Claim Fails Because Tap Pilam Does Not Allege a Substantial Burden on Religion.

The Free Exercise Clause forbids laws "prohibiting the free exercise [of religion]." U.S. Const. amend. I. To state a claim for an alleged violation of the

[3] While McDonald refers to "Tap Pilam" collectively for all Appellants throughout this brief, the standing analysis requires an individual assessment. Because Tap Pilam is not a federally recognized Indian tribe, Appellants lack tribal standing to bring broad "cultural" claims. *Maynor v. U.S.* CIV. 03CV1559, 2005 WL 1902907, at *2 (D.D.C. July 11, 2005) (no tribal or individual standing for Native American plaintiff to sue for return of remains).

clause, Tap Pilam must identify and allege a government regulation that substantially burdens its sincerely held beliefs. *Patterson*, 398 F. Supp. 3d at 121. Tap Pilam does not do so here. Tap Pilam fails to allege any law prohibiting the free exercise of religion. To the contrary, Tap Pilam alleges that they are not afforded unique rights—unavailable to the general public—to conduct a private ceremony at sunrise in the Alamo Chapel and to participate in the human remains protocol through the AMAAC. The alleged prohibitions they claim are neutral and generally applicable, and therefore not a substantial burden on religion.

"[A] government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). In other words, to determine if a substantial burden on religion exists, courts look to see if "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith" or if it "denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring) (quoting *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717 – 18 (1981)).

Thus, the Free Exercise Clause cannot be used to challenge a neutral law of general applicability. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 – 79 (1990);[4] *Bowen*, 476 U.S. at 704; *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). The Free Exercise Clause has never been used to force the government to behave in ways that an individual believes will further his or her spiritual development. *U. S. v. Means*, 858 F.2d 404, 408 (8th Cir. 1998) (quoting *Bowen*, 476 U.S. at 699); *Lyng*, 485 U.S. at 451.

As the district court correctly held, the Supreme Court's decision in *Lyng* forecloses Tap Pilam's Free Exercise challenge. ROA.3489 – 90. In *Lyng*, the U.S. Forest Service sought to build a six-mile paved road through the Chimney Rock section of the Six Rivers National Forest in California. *Lyng*, 485 U.S. at 442. In

[4] After the Court's decision in *Smith*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and the Religious Freedom Restoration Act ("RFRA"), both of which require any law limiting a person's free exercise of religion to pass a higher level of scrutiny. *See* 42 U.S.C. § 2000cc *et seq.*; *id.* § 2000bb *et seq.* The Supreme Court subsequently held that the RFRA does not apply to state and local governments. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The RLUIPA only applies to land-use regulations and religious exercise by institutionalized persons, neither of which are at issue here. *Holt v. Hobbs*, 574 U.S. 352, 357-58 (2015).

preparation of building the road, the Forest Service determined that the area was historically used for religious purposes by the Yurok, Karok, and Tolowa Indians. *Id.* The study determined that the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* (quoting report). Nonetheless, the Forest Service elected to build the road through the Chimney Rock area, and the affected Indians sued to stop the construction. *Id.* at 443.

The Supreme Court correctly held that building the road was not a substantial burden on the affected Indians' religion. *Id.* at 451. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* Even though the road "could have devastating effects on traditional Indian religious practices," including activities "believed to be critical in advancing the welfare of the Tribe, and indeed, of mankind itself," the Free Exercise Clause did not provide the plaintiffs the right to prohibit the government from building the road. The Court noted that, even if it accepted the prediction that building the road "will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding

respondents' legal claims." *Lyng*, 485 U.S. at 451-52. (internal quotations and citations omitted).

Appellants and the Amicus' efforts to distinguish *Lyng* fail. Appellants contend that *Lyng* is distinguishable because the government made accommodations and did not actually disturb a burial site. (Appellant Br. ¶¶ 22, 26.) But Appellants completely ignore the Court's assumption that the road would "virtually destroy the Indians' ability to practice their religion." 485 U.S. at 451. For its part, the Amicus do not dispute the holding of *Lyng*. Rather, it simply contends that Tap Pilam are being discriminated against because they treat the Alamo as sacred and are being prohibited from visiting the site. (Amicus Br. at 5.) But this charge is belied by the Amended Complaint, which makes clear that Tap Pilam seek rights that no one else has, namely, to force their way to participate in the human remains protocol and to conduct a private Sunrise Ceremony.[5] ROA.2842. Even Tap Pilam's brief concedes as much. (Appellant Br. ¶ 21.)

[5] Tap Pilam tried to sanitize their Amended Complaint to remove references to their "Sunrise" Ceremony when describing the circumstances surrounding their alleged exclusion from the Alamo Chapel on September 9, 2019. *Compare* ROA.15 (¶ 5) *with* ROA.16 – 17 (¶ 5). Amicus seize on this to contend that Tap Pilam adequately allege that they were targeted. (Amicus Br. at 8 (citing Amended Compl. ¶ 5.)) While Tap Pilam removed the "sunrise" reference in the specific paragraph Amicus cite, the Amended Complaint makes clear that Tap Pilam contend they were excluded for their "Sunrise" Ceremony on the date in question. ROA.2846 (¶ 75).

Just as the Free Exercise Clause does not prohibit the neutral laws of general applicability, it also does not require the government to advance one party's religious goals. Similar to this case, the plaintiffs in *Patterson v. Def. POW/MIA Acct. Agency*, 398 F. Supp. 3d 102 (W.D. Tex. 2019), sought to force the government to disinter unidentified remains. The district court correctly rejected this attempt:

> Defendant correctly argues that "Plaintiffs are essentially claiming that the Government owes them affirmative actions—such as disinterring unknown buried remains and making efforts to identify them—in order to comply with RFRA and the Free Exercise Clause." To give Plaintiffs what they seek, Defendants must recover, disinter, and identify the remains at issue. These affirmative acts are not available relief under RFRA or the Free Exercise Clause.

Id. at 123 (internal citation omitted). The *Patterson* court therefore dismissed the Free Exercise claim because *not* disinterring unidentified remains and allowing the plaintiffs to perform a "proper burial" was not a substantial burden on their religion. *Id.* The same is true here.

Indeed, it is not difficult to see the wisdom in limiting the Free Exercise Clause's reach as *Lyng* and *Patterson* do. As the *Lyng* court noted, a party's claim that they have a sacred right to access and conduct rituals on a particular government site effectively provides a "veto over public programs that do not prohibit the free exercise of religion." 485 U.S. at 452. While Tap Pilam are, today, only claiming the right to conduct a Sunrise Ceremony and reinterment rituals over remains that may or may not be in any way related to them, there is no limit on the right they demand.

Tap Pilam, or another party, may someday claim the religious need to occupy the Alamo Chapel for one day (or more) and to exclude all visitors during that time. Of course, the Free Exercise Clause does not reach so far. *Id.* at 452–53 ("Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of public lands."); *see Emp. Div.*, 494 U.S. at 888 ("Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (explaining that extending Free Exercise Clause to prohibit neutral laws of general applicability "would radically restrict the operating latitude of the legislature.").

Accordingly, the district court correctly applied *Lyng* and determined that Tap Pilam failed to allege a substantial burden on the free exercise of their religion.

b. Strict Scrutiny Does Not Apply.

Appellants wrongfully contend that strict scrutiny applies to the Free Exercise inquiry. (Appellant Br. ¶¶ 20 – 27.) As discussed above, the Court need not reach this analysis because Appellants fail to identify a substantial burden on religion. The strict scrutiny analysis applies where a law is not neutral and generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeh*, 508 U.S. 520, 525–28

(1993) (law at issue directly targeted and prohibited the church's ceremonial animal sacrifices); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (law at issue specifically targeted religious conduct by limiting the number of parishioners allowed in a house of worship that was substantially less than the number of individuals allowed in other establishments, such as an acupuncture studio). That is not the case here. No one has a right to enter the Alamo Chapel for a Sunrise Ceremony or a private ceremony—and Tap Pilam does not make any such allegation in its amended complaint. Nor does anyone have a right to participate in the human rights protocol or sit on the AMAAC.

The Amicus try to conflate Tap Pilam's allegations with the Amicus' allegations in *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014), but that case plainly does not apply here. The statute at issue in *Salazar* prohibited the use of eagle feathers, and the parties agreed that the plaintiffs' religious beliefs were substantially burdened by the law. *Id.* at 472. Moreover, in *Salazar*, the Court applied the Religious Freedom Restoration Act, which specifically creates a heightened standard *even for laws of general applicability*. *Id.* at 471 ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the regulation "(1) is in furtherance of a compelling governmental interest; and (2) is the least

restrictive means") (quoting 42 U.S.C. § 2000bb-1(b)). The RFRA does not apply to any of the parties here. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).[6]

Finally—in an argument Tap Pilam have not made—Amicus contend that strict scrutiny applies because the human remains protocol and AMAAC create a system of "individualized exemptions." As the court explained in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), such individualized exemptions exist when a law "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Id.* at 209. An individualized exemption may exist and necessitate strict scrutiny *if* the law prohibits certain conduct but with substantial exemptions. *See also Lukumi*, 508 U.S. at 527 – 28 (describing substantial exemptions to the animal slaughter laws at issue). Such is not the case here—there is no law that prohibits the free exercise of religion.

[6] Similarly, the cases relied upon by Amicus that concern the Religious Land Use and Institutionalized Persons Act ("RLUIPA") are inapplicable because RLUIPA explicitly requires strict scrutiny even to generally applicable laws. *See Haight v. Thompson*, 763 F. 3d 554, 558 (6th Cir. 2014) (applying strict scrutiny as required by RLUIPA); *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (same); *Yellowbear v. Lampert*, 741 F.3d 48, 59-60 (10th Cir. 2014) (same).

c. The Amended Complaint Does Not Raise a Right to Relief Under the Free Exercise Clause Above the Speculative Level.

To survive dismissal, the factual allegations in a complaint must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555–56. Having had an opportunity to fix their pleading and being specifically admonished to do so, Tap Pilam still did not do so.

With respect to the use of the Alamo Chapel, the district court instructed Tap Pilam to identify "which Defendant denied them use of the Alamo Chapel, the circumstances surrounding the potential altercation, or whether it was pursuant to an alleged policy." ROA.2807. Tap Pilam could not do so, however, because no one is allowed in the Alamo Chapel for private events, much less private events at sunrise. Accordingly, in their amended complaint, Tap Pilam attempted to strip any mention of the "Sunrise" Ceremony, and just alleged that they were denied use of the Chapel on September 7, 2019, while "tourists and members of the general public, [sic] where [sic] allowed to enter on that day." ROA.2817 (¶ 5). However, elsewhere in their amended complaint, Tap Pilam make clear they were allegedly denied entry to the Alamo Chapel for their "Sunrise" Ceremony on September 7, 2019. ROA.2842 (¶ 66). They never allege anyone else was allowed in the Alamo Chapel at that time (because they cannot) or that anyone else is allowed to host a private ceremony in

the Alamo Chapel (no such allegation can be made).[7] In short, Tap Pilam never alleged that they cannot enter the Alamo Chapel under the same conditions as every other member of the general public, and their amended complaint contains no allegations that Tap Pilam have been prohibited from entering the Alamo Chapel under those same conditions.[8]

Similarly, with respect to the allegation that the exclusion from the human remains protocol and the AMAAC violates the Free Exercise Clause, Tap Pilam never explain how or why their exclusion prevents them from conducting a religious ceremony. To the contrary, Exhibit Q to their amended complaint makes clear that the AMAAC is required to "[e]ngage with other interested groups and individuals, providing a forum for their involvement and understanding of the Alamo Plan."

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[7] Amicus try to distort the Alamo Chapel's access by introducing into their brief websites to try and cure Tap Pilam's pleading deficiencies. As the Alamo's website makes clear, the Alamo Chapel is not available for private meetings, ceremonies, or receptions. Event Venue Rentals, http://awscf.thealamo.org/visit/events/venue-rental/index.html (last visited May 14, 2021). While Amicus cite to the availability of tours of the Alamo Church outside of regular business hours, Tap Pilam never allege they were denied a tour.

[8] Again, the silence of the amended complaint is resounding, as publicly available reports show that Tap Pilam are allowed—and did—enter the Alamo Chapel to perform their religious ceremony under the same circumstances as the general public. *See* Vincent Davis, *Tap Pilam Coahuiltecan Nation honors ancestors with sunrise ceremony at Alamo*, SAN ANTONIO EXPRESS-NEWS (Sept. 12, 2020), *available at* https://www.expressnews.com/news/local/article/Tap-Pilam-Coahuiltecan-Nation-honors-ancestors-15562808.php (last visited May 14, 2021).

ROA.3024. And, indeed, a member of Tap Pilam sits on the ACAC, which was established to provide citizen input on the development of the Alamo Plan. ROA.2857.

III. Tap Pilam's Equal Protection Claim Fails.

Tap Pilam's equal protection allegations center on its exclusion from the AMAAC and the human remains protocol. ROA.2840 – 41; (Appellant Br. ¶ 28.) Tap Pilam contend that this amounts to discrimination on the basis of race and requires strict scrutiny. (Appellant Br. ¶ 32.) Tap Pilam is wrong.

a. Rational Basis Review Applies Because Federal Recognition as an Indian Tribe is a Political Classification.

Federal recognition of an Indian tribe is a political classification—not racial. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). If classification on the basis of tribal status was racially discriminatory, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id.* at 552. "An American Indian tribe does not exist as a legal entity unless the federal government decides that it exists." *Maynor v. United States*, No. Civ. 03-cv-1559, 2005 WL 1902907, at *2 (D.D.C. July 11, 2005) (quoting *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004)); *see also United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996) ("Indian" describes a political—not racial—group). Indeed, Tap Pilam agrees, as their brief concedes that "classifications based on Indian tribal membership are not impermissible racial

classifications." (Appellant Br. ¶ 29.) Tap Pilam never identify in the amended complaint what race Appellants claim that is different than the AMAAC members.

To allege a violation of the Equal Protection Clause absent discrimination based on race or another suspect class, Tap Pilam must allege that they were "intentionally treated differently from others similarly situated" and then must also show "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).

Tap Pilam cannot even pass the first hurdle of alleging differential treatment. Tap Pilam allege that they have been treated exactly the same as all other members of the general public who are not federally recognized Indian tribes. Conclusory allegations of discrimination will not suffice. *Rountree v. Dyson*, 892 F.3d 681, 685 (5th Cir. 2018). Moreover, a demand for preferential treatment compared to other descendent groups (who Tap Pilam concede exist) "is the exact opposite of an equal protection claim." *HCI Distrib., Inc. v. Peterson*, 360 F. Supp. 3d 910, 922 (D. Neb. 2018). In short, where Tap Pilam attempt to use the Equal Protection Clause to demand unique rights from the general public, their claim must fail.

b. Appellees' Conduct Easily Survives Rational Basis Review.

The decision to only include federally recognized tribes on the committee is subject only to rational basis review, which it easily survives. Numerous decisions recognize that government action providing for preferential treatment to federally

recognized Indian tribes is subject to rational basis review. *See Brackeen v. Bernhardt*, 937 F.3d 406, 426 (5th Cir. 2019) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased.") (quoting *Mancari*, 417 U.S. at 552); *Mancari*, 417 U.S. at 551-55 (applying rational basis review and rejecting due process challenge to law affording applicants with one-fourth or more degree of Indian blood with membership in a federally recognized tribe a preference over non-Indians). In their brief, Tap Pilam does not contend that relying on NAGPRA to compose the AMAAC fails the rational basis test—rather, Tap Pilam simply contend that strict scrutiny must apply. (*See* Appellant Br. at 22 – 26.) Accordingly, Tap Pilam have waived any argument that the rational basis test is not satisfied. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[R]ational basis review places no affirmative evidentiary burden on the government.").

Even if the Court reaches the rational basis test, it is clearly satisfied here. Under a rational basis review, "[t]he mere fact that a law impacts different individuals in different ways does not subject it to constitutional challenge unless [plaintiff] can show that [the] law is so extreme as to lack a rational basis." *Gibson*, 700 F.3d at 239. The defendant "need not. . . articulate the purpose or rationale" for the differential treatment, "as long as there is a reasonably conceivable state of facts

that could provide a rational basis for its classification." *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "The actual reason for a state action is irrelevant for claims reviewed under rational-basis scrutiny." *Newman Marchive P'ship, Inc. v. Hightower*, 349 Fed. App'x 963, 965 (5th Cir. 2009) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

Here, there are numerous reasons why the AMAAC would only be comprised of federally recognized tribes. To start, the human remains protocol plainly states that its intent is to "comply with the spirit of [NAGPRA]," which requires consultation with federally recognized tribes. ROA.3021. Alamo Trust and the GLO may have wanted to limit the AMAAC to only include federally recognized tribes because those tribes have gone through a vetting process with the federal government, and (as a result of NAGPRA) have extensive experience handling and creating protocols for the reinterment of any unidentified human remains and associated funerary objects. *See* 25 U.S.C. § 3001, *et. seq*. Alamo Trust and GLO may have recognized that federally recognized tribes have extensive experience dealing with unidentified human remains and that such a framework would be beneficial and instructive to their handling of any remains at the Alamo. *See* 25 U.S.C. § 3002. Perhaps Alamo Trust and GLO recognized that there must be some parameters on how the AMAAC would be constituted to allow it to function efficiently and looked to NAGPRA for guidance. Or perhaps Alamo Trust and GLO

recognized that the Alamo Plan's intended world-class museum may want to receive federal funds someday, which would subject it to NAGPRA. 25 U.S.C. §§ 3005 – 07. Any of these reasons provides a "conceivable" basis for considering NAGPRA when forming the AMAAC and determining participation in the human remains protocol. Accordingly, the decision to consider NAGPRA and limit the AMAAC to federally recognized tribes survives rational basis review.

c. Discretionary Decisions Regarding the AMAAC's Composition are Non-Reviewable.

Absent discrimination based on a suspect class such as national origin or race, Tap Pilam's equal protection claim amounts to a "class of one" claim, which fails in the context of discretionary determinations regarding public employment and service providers, such as who to include on an advisory committee. *Integrity Collision Ctr. v. City of Fulshear,* 837 F.3d 581, 586 (5th Cir. 2016). "[A] class of one involves a discrete group of people, who do not themselves qualify as a suspect class, alleging the government has singled them out for differential treatment absent a rational basis." *Id*. at 586. Class of one equal protection claims "are inapposite in the context of discretionary public-employment decisions." *Id*. Decisions regarding public employment and service providers "by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments." *Id*. "[I]t is impractical for the court to involve itself in reviewing these countless discretionary decisions for equal-protection violations," and**.** "[t]he Equal Protection

Clause does not require this displacement of managerial discretion by judicial supervision." *Id*. at 588. Accordingly, Tap Pilam's Equal Protection claim fails.

d. The Amended Complaint suggests an absence of discriminatory intent.

The district court ruling can also be upheld on the independent basis that no allegations supply the discriminatory intent requisite for an equal protection violation. *Taylor v. Johnson,* 257 F.3d 470, 473 (5th Cir. 2001). To establish discriminatory intent, Tap Pilam must show "that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effect on an identifiable group." *Fennell v. Marion Indep. Sch. Dist.,* 804 F.3d 398, 412 (5th Cir. 2015) (internal quotations and citations omitted). "Allegations of discriminatory intent that are merely conclusory, without reference to specific facts, will not suffice." *Id.* (internal citation and punctuation omitted).

The Amended Complaint only asserts that "[t]here is no doubt that the [Defendants] are purposely making spurious claims to exclude the Plaintiffs from the process at all costs." ROA.2845. This bare assertion does nothing to push the claims across the line from possible to plausible, and is equally consistent with the absence of a discriminatory motive. *Twombly*, 550 U.S. at 555. Tap Pilam even assigns motives inconsistent with discriminatory intent: "an attempt to reduce cost

and time." ROA.2832. These allegations do not indicate any intent to target Appellants on the basis of race or any other suspect class.

CONCLUSION

Based on the foregoing, Appellee Douglass W. McDonald requests that the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 17, 2021, the foregoing document was filed using the United States Court of Appeals for the Fifth Circuit's CM/ECF filing system and all counsel of record were served via the Court's electronic Notice of Docket activity or electronic mail pursuant to Fifth Circuit Rule 25.2.5.

/s/ *Manuel Mungia, Jr.*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

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