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

JOHN A. PATTERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 5:17-CV-00467
	)	
DEFENSE POW/MIA ACCOUNTING AGENCY, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMSS PLAINTIFF'S COMPLAINT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the U.S. Department of Defense, Defense POW/MIA Accounting Agency(DPAA), American Battle Monuments Commission, and the heads of those agencies sued in their official capacities (collectively "Defendants"), move the Court to dismiss Plaintiff's Complaint. In support of this motion, Defendants show as follows:

1. On May 25, 2017, Plaintiffs filed this original complaint seeking judicial review under the Declaratory Judgment Act, 28 U.S.C. § 2201, and Mandamus Act, 28 U.S.C. § 1361, alleging improper inaction by the DPAA in accounting for certain deceased World War II era Army servicemembers.

2. The Mandamus Act grants jurisdiction only "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

3. Plaintiffs have failed to establish that they have any clear right to relief, that Defendants have failed to perform any nondiscretionary duty owed to the Plaintiffs, and that no

adequate alternative remedy is available. Accordingly, they are entitled to no relief under the Mandamus Act.

4. Plaintiffs also seek relief not permitted under the Mandamus Act, such as an injunction against future agency action.

5. The Declaratory Judgment Act provides for certain relief when another legal provision confers jurisdiction. But Plaintiffs have identified no jurisdictional basis for much of the relief it seeks under the Declaratory Judgment Act. To the extent Plaintiffs have identified a jurisdictional basis, they have failed to state a claim under such provisions.

6. For all these reasons, Defendants respectfully request that the Court grant this motion, and dismiss Plaintiffs' Complaint with prejudice. A proposed Order is attached for the Court's review and entry.

Dated: September 13, 2017

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFNDANTS' MOTION TO DISMSS PLAINTIFF'S COMPLAINT

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(in chronological order)

INTRODUCTION

Plaintiffs, the next of kin to seven deceased servicemembers lost in the Philippines during World War II, bring this mandamus action seeking orders compelling the government to take specific steps to identify and repatriate the servicemembers' remains. But Plaintiffs have failed to establish that the government has violated any mandatory duty toward them or that they are otherwise entitled to any relief. For several reasons set forth below, their claims should be dismissed for failure to state a claim and for lack of jurisdiction.

The U.S. Department of Defense (Department or DoD), Defense POW/MIA Accounting Agency (DPAA), American Battle Monuments Commission (ABMC), and the heads of those agencies sued in their official capacities (collectively "Defendants"), are granted substantial discretionary authority regarding the issues Plaintiffs raise. Accordingly, Plaintiffs' claims under the Mandamus Act are misplaced because they cannot establish that Defendants have failed to perform a ministerial, nondiscretionary duty. Moreover, Plaintiffs cannot establish their right to relief and the absence of an adequate alternative remedy. Accordingly, these claims must be dismissed for failure to state a claim.

Most of the relief Plaintiffs seek must also be dismissed for want of jurisdiction. Even if their Mandamus Act claims were meritorious—and they are not—that Act does not provide jurisdiction to enjoin future agency action. Nor can Plaintiffs rely on the Declaratory Judgment Act. It is well-established that this Act does not confer jurisdiction but simply authorizes certain forms of relief when the Court has jurisdiction through separate legal authority. Plaintiffs have failed to establish any other basis for jurisdiction. Accordingly, their injunction claims and all claims under the Declaratory Judgment Act must be dismissed.

In sum, Plaintiffs' complaint should be dismissed with prejudice on all grounds.

BACKGROUND

I. The American Battle Monuments Commission

The American Battle Monuments Commission (Commission) was created in 1923, and was initially tasked with constructing monuments honoring American forces overseas. In 1934, the Commission took over management and maintenance of the permanent military cemeteries in Europe from World War I. In 1943, the War Department re-established the Army Graves Registration Service (AGRS), which had been disbanded after World War I, to register graves in both theaters of World War II. In 1946, Congress authorized AGRS to recover, identify and repatriate World War II dead. 60 Stat. 182 (May 16, 1946). The mission of the AGRS terminated in 1951, upon expiration of a statutory time limit. 61 Stat. 779 (1947). At that time, pursuant to Executive Order, the functions of the AGRS with respect to maintenance of national cemeteries overseas were transferred to the Commission, subject to the Army's right to "re-enter any of such cemeteries subsequent to the effective date of the transfer of functions with respect thereto for the purpose of making exhumations or reinterments should any such action become necessary." Exec. Order No. 10057, 14 Fed. Reg. 2585 (May 14, 1949), *as amended* Exec. Order 10087, 14 Fed. Reg. 7287 (Dec. 3, 1949).

The operative statute governing defendant American Battle Monuments Commission is 36 U.S.C. § 2101, *et seq.*, pursuant to codification in 1998. *See* Pub. L. No. 105-225, § 1, 112 Stat. 1253 (Aug. 12, 1998). The provision for "[m]ilitary cemeteries in foreign countries" provides in relevant part:

> When, as a result of combat operations, the Armed Forces establish military cemeteries in zones of operations outside the United States . . . , the American Battle Monuments Commission and the Secretary of the Army, immediately on the cessation of hostilities, shall decide which of the cemeteries will become permanent cemeteries . . . . The Commission is solely responsible for the design and construction of the permanent cemeteries, and of all buildings, plantings, headstones, and other permanent improvements incidental to the cemeteries,

> except that— . . . (3) burials and reburials by the Armed Forces shall be carried out in accordance with plans prepared by the Commission; and (4) the Armed Forces have the right to re-enter a cemetery transferred to the Commission to exhume or re-inter a body if they decide it is necessary.

36 U.S.C. § 2104. More than 6,000 servicemembers are buried as unknowns within the foreign cemeteries the ABMC maintains pursuant to this authority. *See* ABMC, Identifying Our Missing: July 2017 (Aug. 8, 2017) (link).[1] One such cemetery is the Manila American Cemetery, where more than 3,700 servicemembers are buried as unknowns. *See* ABMC, Manila American Cemetery Visitor Brochure (Aug. 7, 2014) (link). The ABMC has only a limited role with regard to disinterment decisions at cemeteries it maintains. After DoD has granted consent to a disinterment request (as discussed *infra*, Background § III) concerning a cemetery maintained by the ABMC, the ABMC has approval authority regarding the time and manner of the disinterment. *See* DoD Directive Type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains at 8 (June 15, 2017) (attached as Ex. M).[2] This authority is focused on maintaining the integrity of the cemetery as a memorial, not the reasons for the disinterment. *See, e.g.*, 36 U.S.C. § 2104(4) (stating DoD's "right to re-enter").

II. The Missing Service Personnel Act

A. Prior Enactments

During World War II, Congress enacted the Missing Persons Act as a temporary measure to provide for the payment of benefits to the families of missing servicemen. 56 Stat. 143 (1942).

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[1] On a motion to dismiss, courts may take judicial notice of factual information and documents published on a government agency's website. *See, e.g.*, *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005); *Loyola v. Am. Homes for Rent Property II, LLC*, No. 13-752, 2015 WL 11348310, at *5 nn.2-3 (W.D. Tex. Aug. 12, 2015).

[2] For the Court's convenience, Defendants' regulations and other public records which are cited herein are attached as Exhibits. *See supra*, Index of Exhibits. Many of these documents reside on agency websites. *See, e.g.*, DoD Issuances (link). Courts may take judicial notice of such records. *See Johnson v. Sawyer*, 47 F.3d 716, 734 n.36 (5th Cir. 1995).

That statute provided for payment to continue for one year after the person became missing, or until the Service Secretary officially declared the person dead, whichever came first. As enacted, the law allowed the Secretary to base such a declaration on an official report of death or a "finding of death." The Secretary was permitted to make a finding of death when "the information received, or the lapse of time without information, establishes a reasonable presumption that a member in missing status is dead." 37 U.S.C. § 556(b) (1961) (quoted in *McDonald v. Lucas*, 371 F. Supp. 831 (S.D.N.Y. 1974)). There was no procedure for challenging the Secretary's decision.

After the Vietnam War, the process for status reviews and findings of death began to face legal scrutiny. In 1974, a three judge district court panel found the informal procedures used by the Secretaries violated the Due Process Clause because the dependents of missing servicemen had a constitutionally protected property interest in the benefits that they were receiving. *McDonald*, 371 F. Supp. at 836. Accordingly, the dependents were entitled to notice and the opportunity to be heard before termination of those benefits by a finding of death. *Id.* at 836. Accordingly, each Service established separate procedures to satisfy *McDonald*. Additional suits followed, many of which were not benefits suits, but instead brought by relatives seeking to challenge determinations of death that they believed were inaccurate, or that they believed would lead to the government's ceasing to investigate their missing loved ones. Such claims were generally unsuccessful. *See, e.g.*, *Fors v. Lehman*, 741 F.2d 1130 (9th Cir. 1984) (rejecting standing of non-dependent parents of Vietnam MIAs to challenge presumptive findings of death under Missing Persons Act); *Hart v. United States*, 894 F.2d 1539 (11th Cir. 1990) (suit by family contesting identification of missing servicemember under Federal Tort Claims Act dismissed; efforts to identify remains "discretionary function").

B. Structure & Purpose of the Act

The Missing Service Personnel Act of 1995 was designed to remedy some of the existing concerns regarding determinations of death. Pub. L. No. 104-106, Div. A § 569, 110 Stat. 186 (Feb. 10, 1996). In introducing the bill that would ultimately be adopted as part of an appropriations bill, Senator Robert Dole explained that the law "would reform [DoD's] procedures for determining whether members of the Armed Forces should be listed as missing or presumed dead." 140 Cong. Rec. S12217, S12220, 1994 WL 449837 (Aug. 19, 1994). The law was intended "to ensure that any member of the Armed Forces . . . who becomes missing or unaccounted for is ultimately accounted for by the United States, and, as a general rule, is not declared dead solely because of the passage of time." Pub. L. No. 104-106, Div. A. § 569(a).

Section 1501(a)(1) required establishment of an office "hav[ing] responsibility for Department of Defense policy relating to missing persons." 10 U.S.C. § 1501(a)(1) (1996). It also required the Secretary of Defense to prescribe uniform procedures for the entire Department. *Id.* § 1501(b). The Act was primarily focused on the procedures for determining the status of individuals who went missing post-enactment.[3] Section 1502 sets forth the requirements for the initial assessment and recommendation by a commander upon receipt of information that a person may be missing. Sections 1503-1505 provide for the three boards of inquiry: preliminary, subsequent, and further review to determine and review the status of missing persons. Section 1507 deals with requirements relating to determinations by a board appointed under §§ 1503-1505 to recommend that a person be declared dead. As originally passed, only

[3] "Missing status" is defined to include a variety categories such as "captured" or "detained," but does not include those known to be dead. *See* 10 U.S.C. § 1513(2). By contrast a "missing person" now includes "an unaccounted for person described in subsection (a) of section 1509," thus including those known to be dead from past conflicts but whose bodies have not been recovered or determined to be unrecoverable. *See* 10 U.S.C. § 1513(1)(A); *id.* § 1509(c).

§ 1509 addressed procedures for handling new information about persons unaccounted for from prior conflicts, and limited its focus to the Korean War, the Vietnam War, and the Cold War. Pub. L. No. 104-106 § 569(b).

Judicial review under the Act is limited to challenging a board finding "that a missing person is dead." 10 U.S.C. § 1508(b). Review is limited in three ways. First, suit can only be brought by the primary next of kin or previously designated person. *See id.* § 1508(a); 10 U.S.C. § 655 (providing for designated persons). Second, judicial review is available only for a finding by a board appointed under § 1504 or 1505 that a missing person is dead, or a finding by a board appointed under § 1509 that confirms a previous finding of death. *Id.* § 1508(b). Third, the only permitted basis for challenging the board finding is that "information that could affect the status of the missing person's case [] was not adequately considered during the administrative review process under this chapter." *Id.* § 1508(a).

C. Amendments Regarding Accounting for Unrecovered Remains

In subsequent enactments, Congress has increasingly focused on accounting for the remains of those missing from prior conflicts. *See, e.g.*, Pub. L. No. 106-65, Div. A, Title V § 576, 115 Stat. 1228 (1999) (directing the Secretary of Defense to "make every reasonable effort to search for, recover, and identify the remains of [World War II] United States servicemen lost in the Pacific theater . . . while engaged in flight operations"). Most significantly, in 2009, Congress rewrote § 1509 to establish a program addressing those "unaccounted for" from specified conflicts back to World War II. Pub. L. No. 111-84, § 541, 123 Stat. 2190 (2009). The section requires the Secretary to "implement a comprehensive, coordinated, integrated, and fully resourced program to account for [missing persons as defined by § 1513(1)] who are unaccounted for from" five specified conflicts, including World War II. 10 U.S.C. § 1509(a).

Congress specified how "new information" should be handled. "New information" is defined as "credible" information that "may be related to one or more unaccounted for persons" and after November 18, 1997, is either "found or received . . . , by a United States intelligence agency, by a Department of Defense agency, or by a [primary next of kin, immediate family member, or previously designated person]" or "identified . . . in records of the United States as information that could be relevant to the case of one or more unaccounted for persons." *Id.* § 1509(e)(1), (3). Upon a determination that the information meets the statutory criteria, the section specifies three steps:

1) "that information shall be provided to the Secretary of Defense," § 1509(e)(1);
2) the Secretary is to add the information to the missing servicemember's case file and notify the next of kin of the new information, § 1509(e)(2)(A); *id.* § 1505(c)(2); and
3) the Secretary "with the advice of the missing person's counsel . . . , shall determine whether the information is significant enough to require a board review under [§ 1505]." § 1505(c)(3); *id.* § 1509(e)(2)(B).

In 2014, Congress further emphasized accounting for those missing from prior conflicts by revising § 1501(a) to require the Department of Defense to "designate a single organization . . . to have responsibility for Department matters relating to missing persons from past conflicts, including accounting for missing persons and persons whose remains have not been recovered from the conflict in which they were lost." Pub. L. No. 113-291, § 916(a), 128 Stat. 3292 (Dec. 19, 2014), *as amended by* Pub. L. No. 114-328, § 953, 130 Stat. 2000 (Dec. 23, 2016) (technical amendments).

III. DoD Implementation of Act

The Department of Defense has implemented § 1509's requirement of an accounting program by establishing the DoD Past Conflict Personnel Accounting Program. *See* DoD Directive 2310.07 (Apr. 12, 2017) (attached as Ex. J). The directive declares that "[a]ccounting for DoD personnel and other covered personnel from past conflicts and other designated conflicts is

of the highest national priority." *Id.* § 1.2(a). It also declares it DoD policy that "[i]nformation pertaining to the [government's] efforts to locate, recover, and, when applicable, identify remains for unaccounted-for . . . personnel from past conflicts . . . will be provided to the primary next of kin, immediate family members, and the person designated [under 10 U.S.C. § 655]." *Id.* § 1.2(e). The directive assigns responsibilities to relevant DoD components. *Id.* § 2. And it establishes four categories of unaccounted-for personnel:

- "Active Pursuit" – "those for which there exists sufficient information to justify research, investigation, disinterment, or recovery operations in the field," *id.* § 3.3(a);
- "Deferred" – "those for which there are no new or viable leads, or access to the site is restricted," *id.* § 3.3(b);
- "Non-recoverable" – "those for which there is negligible potential for accounting . . . . based on historical research, scientific analysis, and the limits of current technology," *id.* § 3.3(c); and
- "Under Review" – "those cases that have not yet been" assigned one of the other categories. *Id.* § 3.3(d).

Active pursuit cases "are the priority." *Id.* § 3.3(a).

The Department, by creating the DPAA in January 2015, has also implemented § 1501(a)'s requirement that a single organization be designated as responsible for "matters relating to persons missing from past conflicts." *See* DoD Directive 5110.10, Defense POW/MIA Accounting Agency (DPAA) (Jan. 13, 2017) (attached as Ex. L); Execute Order: Defense Personnel Accounting Agency Continuity of Operations (Jan. 16, 2015) (attached as Ex. D). The DPAA consolidated responsibilities previously assigned to the Joint Prisoner of War / Missing In Action Accounting Command, the Defense POW / Missing Personnel Office, and the Life Science Equipment Laboratory. *See* Execute Order § 3.A & B. The DPAA has two missions—to "[l]ead the national effort to account for unaccounted for DoD personnel from past conflicts" and to "[p]rovide the primary next of kin, family members, and the previously designated person . . . the available information concerning the loss incident, past and present

search and recovery efforts of the remains, and current accounting status for unaccounted for DoD personnel." DoD Directive 5110.10 § 1.2. Among other specified responsibilities, DPAA:

- "[E]stablishes and executes the DoD Past Conflict Personnel Accounting Program," *id.* § 2(b);
- "Leads the effort to develop, standardize, maintain, and fund the past conflict personnel accounting community's electronic case files, including a single central database and case management system," *id.* § 2(o);
- "[O]versees the development, establishment, and maintenance of . . . appropriate standards, processes, and procedures for forensic disciplines used to identify remains from past conflicts," *id.* § 2(s);
- "Establishes and leads a communication and outreach program with family members of unaccounted for DoD personnel, . . . concerning the DoD's efforts to: (1) Account for DoD personnel who are unaccounted for from past conflicts . . . (2) Provide a readily available means to communicate views and recommendations . . . (3) Communicate with family members of unaccounted for DoD personnel through the appropriate Military Department Casualty Office," *id.* § 2(t);
- "Establishes procedures for providing information, to include copies of unclassified case files of unaccounted for DoD personnel to primary next of kin, members of the immediate family, and the previously designated person" from conflicts including World War II, *id.* § 2(u), and
- "Advocates within DoD the use of emerging technologies that support past conflict personnel accounting operations to locate, recover, and identify remains. *Id.* § 2(v).

The DPAA actively reviews cases from numerous conflicts and must prioritize its efforts among more than 83,000 unaccounted-for servicemembers from past conflicts. *See* DPAA, Our Missing: Past Conflicts (link); *see also* DPAA, Our Missing: Recently Accounted For (link) (accounting for 155 servicemembers this fiscal year). The Department has committed to providing resources sufficient to meet the Congressional goal of identifying at least 200 servicemembers per year. *See* DoD Directive 2310.07 § 1.2(f); Pub. L. No. 111-84, Div. A, Title V § 541(d), 123 Stat. 2298 (Oct. 28, 2009). One aspect of DPAA's responsibilities involves compiling and weighing the evidence for disinterring unknown remains for further identification. Family members or other interested parties may submit a disinterment request to a Service Casualty or Mortuary Office, which will forward the request to the DPAA. *See* DTM-16-003 at

8 (issued May 5, 2016, revised June 15, 2017). DPAA (which may also initiate requests on its own) then reviews the request and provides a recommendation along with a "packet" of documentation to the Deputy Assistant Secretary of Defense for Military Community and Family Policy within the Office of the Under Secretary of Defense for Personnel and Readiness. *Id.* at 8-9. DPAA's goal is to submit its recommendation within five months (150 days) of a request. *See* DPAA Administrative Instruction (AI) 2310.01 at 2, 12 (Feb. 10, 2017) (attached as Ex. K). It is also DPAA policy that all requests must be forwarded for a decision; "requests cannot be denied or permanently deferred by DPAA personnel." *Id.* at 2. The Deputy Assistant Secretary of Defense in turn makes a recommendation to the Assistant Secretary of Defense for Manpower and Reserve Affairs, who may consent to or decline the request. DTM-16-003 at 9. If a request is granted, DPAA will coordinate the "time, place, and manner of disinterment" with the entity responsible for the remains, such as the ABMC. *Id.* at 9-10.

The Deputy Secretary of Defense established specific thresholds that must be met for a disinterment request to be approved. *See* Memorandum, Disinterment of Unknowns from the Nat'l Memorial Cemetery of the Pacific (Apr. 14, 2015) (attached as Ex. E); *see also* DTM-16-003 at 2 (implementing Deputy Secretary of Defense's memorandum).[4] For individually buried remains, DPAA research must "indicate[] that it is more likely than not that DoD can identify the remains"; and for commingled remains of unknowns, DPAA research must "indicate[] that at least 60 percent of the Service members associated with the group can be individually

[4] The specific thresholds set by these memoranda are consistent with longstanding DoD policy to permit disinterment for identification purposes only where there is "a high probability of positive identification." *See* Undersecretary of Defense for Policy, Memorandum: Disinterment Policy for the Purpose of Identification (May 13, 1999) (attached as Ex. A) (stating that disinterment decision "must be based on sufficient circumstantial and anatomical evidence which when combined with current forensic science techniques would lead to a high probability of positive identification").

identified." DTM-16-003 at 2. This means that DPAA must have DNA family reference samples (or other means of identification) "for at least 60 percent of the potentially associated Service members (for commingled unknown remains)" or for at least 50 percent (for individual unknown remains), and "must conduct historical research to determine whether it is more likely than not that the unknown remains can be identified." *Id.* DPAA's estimate of the likelihood of identification is a "qualitative determination based on the totality of the evidence." DPAA AI 2310.01 § 7.2; *see also id.* § 7 (setting forth 27 non-exhaustive factors to consider in its "Disinterment Criteria Guide").

Pursuant to Congress' 2014 requirement that the DPAA "establish . . . a readily available means for communication of their views and recommendations to the [DPAA] Director," by family members, the public, veterans service organizations, and concerned citizens, *see* 10 U.S.C. § 1501(a)(2)(E), the DPAA has undertaken several steps. It maintains a Public Affairs Office accessible by mail and telephone; maintains contact information on its website, including a webform for electronically submitting an inquiry, *see* DPAA, Contact Us (link); hosts a series of "family update" events around the country each year at which family members can meet one-on-one with government officials about their case, and hosts an annual briefing in Washington, D.C., *see* DPAA, Events (link). In addition, it has a web-form specifically for submitting information about the "possible location of a missing American." *See* DPAA, Report a Site (link). The primary government contact for family members of an unaccounted-for servicemember, however, is the Service Casualty Office for the relevant branch of the military. *See* DPAA, SCO Contacts (link).

IV. Status of Servicemembers

A. Camp Cabanatuan-Related Cases

Plaintiffs acknowledge that their claims regarding each of the four servicemembers who was initially buried at Camp Cabanatuan involve common graves with commingled remains. *See* Compl. § IV(D)-(G). As explained above, disinterment from a common grave cannot be recommended until DNA reference samples (or other means of identification) are on hand for at least sixty percent of the individuals who may be interred in it. *See supra* Background § III; *see also* DTM-16-003 at 2.

1. Lloyd Bruntmyer, Technician 4th Grade, 7th Material Squadron, 19th Bomb Group

Plaintiffs have identified Cabanatuan Common Grave 704 as the likely original location of the remains of Technician Lloyd Bruntmyer. *See* Compl. § IV(E), ¶ 1. This grave involves eight unknowns. *Id.* ¶ 4. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave.

2. David Hansen, Private, Headquarters Squadron, 27th Bomb Group

Plaintiffs have identified Cabanatuan Common Grave 407 as the likely original location of the remains of Private David Hansen. *See* Compl. § IV(F), ¶ 2. Plaintiffs allege the grave involved 17 individuals, six of whom are unknowns. *Id.* ¶ ¶ 2-3. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave.

3. Arthur Kelder, Private, 2nd General Hospital

Plaintiffs have identified Cabanatuan Common Grave 717 as the original location of the remains of Private Arthur Kelder. *See* Compl. § IV(G), ¶ 2. This grave involved 14 individuals, ten of whom were unknowns. *See id.* ¶ 3. The ten unknowns were disinterred in 2014. *See id.*

¶ 4. Partial remains were matched to the deceased and provided to the family for burial. *See id.* ¶¶ 6-7.

4. Robert Morgan, Private, 7th Material Squadron, 19th Bomb Group

Plaintiffs have identified Cabanatuan Common Grave 822 as the likely original location of the remains of Private Robert Morgan. *See* Compl. § IV(D), ¶ 2. This grave involves four individuals, all of whom are unknowns. *See id.* ¶ 3. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave.

B. Guy Fort, Brigadier General, 81st Infantry Division, Philippine Army

General Guy Fort was executed after being captured in September 1942. *See* Compl. § IV(C), ¶ 1. Plaintiffs allege that the remains designated Leyte #1 x-618, which are currently buried as an unknown in Manila America Cemetery grave L-8-113, are the remains of General Fort. *Id.* ¶¶ 3-4. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave.

C. Alexander Nininger, First Lieutenant, 57th Infantry Regiment, Philippine Scouts

Lieutenant Alexander Nininger died on January 12, 1942. *See* Compl. § IV(A), ¶ 1. Plaintiffs allege that the remains designated Manilla #2 Cemetery x-1130, which are currently buried as an unknown in Manilla American Cemetery grave J-7-20 are the remains of Lieutenant Nininger. *Id.* ¶¶ 2, 4. DPAA received a disinterment request regarding this grave from Plaintiff John Patterson on February 3, 2015. *See* Memorandum, Disinterment Request for Unknown X-1130 Manila #2 (Dec. 11, 2015) (attached as Ex. G). DPAA recommended that the request be denied because there was less than a fifty percent chance that the Lieutenant Nininger could be identified with the remains. *See id.* On March 4, 2016, Mr. Patterson's disinterment request was

denied by the Deputy Assistant Secretary of the Army for Military Personnel (DASA(MP)).[5] *See* Memorandum, Exhumation of Unknown Remains (Mar. 4, 2016) (attached as Ex. H); *see also* Compl. § IV(A), ¶ 3 (acknowledging the denial of requests).

D. Loren Stewart, Colonel, 57th Infantry Regiment, Philippine Scouts

Colonel Loren Stewart died on January 13, 1942. *See* Compl. § IV(B), ¶ 1. Plaintiffs allege that remains designated Manila #2 x-3629, which are currently buried as an unknown in Manila American Cemetery grave N-15-19 are the remains of Colonel Stewart. *Id.* ¶¶ 2, 4. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave.

ARGUMENT

Plaintiffs are not entitled to the orders they seek compelling specific government action regarding the search for their relatives' remains. Plaintiffs' claims under the Mandamus Act and Declaratory Judgment Act must be dismissed for lack of jurisdiction and failure to state a claim.

I. Standard of Review

The Court must dismiss a cause for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *See Home Builders Assn. of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) may be decided on: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts, plus the Court's resolution of disputed facts. *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). Plaintiffs have the burden to establish

[5] This request was processed before DPAA's current formal review process was implemented. *See* DTM-16-003 (first issued May 5, 2016). Under then existing authorities, final authority to decide the request lay with the Army and was delegated to the DASA(MP). *See* Memorandum, Delegation of Authority Related to Disinterment/Exhumation and Reinterment of Remains (Jan. 14, 2013) (attached as Ex. C).

jurisdiction. *Wright-Cepeda v. United States*, No. 09-441, 2009 WL 3013935, at *2 (W.D. Tex. Sept. 17, 2009).

A claim must be dismissed under Fed. R. Civ. P. 12(b)(6) if Plaintiffs fail to "plead enough facts to state a claim to relief that is plausible on its face." *Roberts v. Ochoa*, No. 14-0080, 2014 WL 4187180, at *4 (W.D. Tex. Aug. 21, 2014) (ultimately quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *McBride v. Reynolds*, No. 17-120, 2017 WL 2817096, at *1 (W.D. Tex. June 29, 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). The Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *De Leon v. City of San Antonio*, No. 14-204, 2014 WL 3407385, at *8 (W.D. Tex. July 10, 2014) (quotation marks omitted). When reviewing a Rule 12(b)(6) motion, the Court "must consider the complaint in its entirety" along with "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quotation marks omitted); *see also id.* (upholding judicial notice of agency documents as matters of public record).

II. Plaintiffs Have Failed to State a Claim Under the Mandamus Act

The Mandamus Act provides that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. In order to grant a writ of mandamus, a court must find that three elements are satisfied:

> (1) the plaintiff has a clear right to relief,
> (2) the defendant a clear duty to act, and
> (3) no other adequate remedy exists.

Randall D. Wolcott, M.D., P.A. v. Sebellius, 635 F.3d 757, 768 (5th Cir. 2011). Plaintiff has the burden to establish each of these three elements. *See Ayyub v. Blakeway*, No. 10-149-XR, 2010

WL 3221700, at *3 (W.D. Tex. Aug. 13, 2010). Mandamus is an "extraordinary remedy which should be utilized only in the clearest and most compelling of cases." *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969); *see also Ramirez-Gomez v. Melendez*, No. 05-74, 2005 WL 3534463, at *1 (W.D. Tex. 2005) ("The writ of mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought."). Thus, even when all the elements are present, the Court has discretion to deny the writ on equitable grounds. *See Carter*, 411 F.2d at 773 (citing *Whitehorse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373 (1955)).

A. Plaintiffs Have Not Identified Any Nondiscretionary Duties

Plaintiffs assert that the DPAA has a "ministerial duty to identify and recover [the relevant] remains," Compl. § V(A), ¶¶ 7-8, and a "ministerial duty to communicate with Plaintiffs in a readily available manner." *Id.* ¶ 9. Plaintiffs have not established that the alleged duties are nondiscretionary. For this reason alone, the writ of mandamus should be denied.

In order to satisfy the duty prong of the Mandamus Act, Plaintiffs "must demonstrate that a government officer owes the [Plaintiffs] a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.2d 1283, 1288 (5th Cir. 1997). "The legal duty must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt." *Id.* at 1288 (citation omitted); *see also Randall D. Wolcott*, 635 F.3d at 768 ("[M]andamus is not available to review discretionary acts of agency officials."); *Home Health Innovations, Inc. v. Sebelius*, No. 14-124, 2014 WL 12540881, at *2 (W.D. Tex. Feb. 18, 2014) (requiring "a clear nondiscretionary duty"). The Supreme Court long ago elaborated that "[m]andamus has never been regarded as the proper writ to control the judgment and discretion

of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself." *Wilbur v. United States*, 281 U.S. 206, 219-20 (1930).

Plaintiffs appear to rely on 10 U.S.C. § 1501(a)(2) as the basis for the "ministerial duties" they allege. On its face this provision cannot support their claims. It provides that "[s]ubject to the authority, direction, and control of the Secretary of Defense, the responsibilities of the [DPAA] shall include the following [five categories of responsibilities]." 10 U.S.C. § 1501(a)(2). These responsibilities cannot be "legal dut[ies] . . . devoid of the exercise of judgment or discretion," *Dunn-McCampbell*, 112 F.2d at 1288, because they are subject to the "direction, and control" of the Secretary of Defense. The Secretary of Defense's "authority" to control how these responsibilities are performed makes abundantly clear that they are not "specific, ministerial act[s]." *Id.* Moreover, because Plaintiffs only purport to identify duties applicable to DPAA, its mandamus claims against ABMC and the Department should be dismissed—they identify no duties allegedly violated by these Defendants.

1. DPAA's Identification Responsibility Is Not a Ministerial Duty

Plaintiffs' claim regarding the DPAA's identification responsibility also fails because they are simply asking that DPAA perform its overall mission to Plaintiffs' liking. Congress gave DPAA broad "[r]esponsibility for accounting for missing persons from past conflicts, including locating, recovering, and identifying missing persons from past conflicts or their remains after hostilities have ceased." 10 U.S.C. § 1501(a)(2)(B); *see also id.* § 1509(a) (calling for "implement[ation of] a comprehensive, coordinated, integrated, and fully resourced program to account for persons . . . who are unaccounted for from . . . World War II [and four subsequent wars]"). Such general statements of agency responsibility do not give rise to ministerial duties. *See, e.g., Doe v. Kanahele*, 878 F.2d 1438, 1989 WL 74741, at *1 (9th Cir. 1989) (unpublished) (concluding that Bureau of Prison's "general duty of protection and safeguarding of prisoners"

under 18 U.S.C. § 4042, did not support a mandamus claim because "how these duties are to be executed is not specifically prescribed"); *Marinoff v. Dep't of Health, Educ. & Welfare*, 456 F. Supp. 1120, 1121 (S.D.N.Y. 1978) (rejecting mandamus based on agency's "general duty . . . to undertake cancer research" because the statute did not direct investigation of "the possible cancer curing properties of particular substances").

Here, the statute itself makes clear that the responsibility to "identify and recover [World War II servicemember] remains," Compl. § V(A), ¶¶ 7-8, is manifestly not ministerial by setting out numerous ways DPAA or DoD discretion is involved. Consider the process Congress set out for handling "new information" about unaccounted-for servicemembers. The DPAA must determine whether the new information is "credible," 10 U.S.C. § 1509(e)(3), and whether it "may be related to one or more unaccounted for persons," *id.* § 1509(e)(1), leading to a "determin[ation] whether the [new] information is significant enough to require a board review [of the prior status decision]." *Id.* § 1505(c)(3) (incorporated by § 1509(e)(2)(B)). Each of these duties involves the exercise of discretion. *Cf. Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002) (holding that "the nature and extent of an EEOC investigation into a discrimination claim" involved agency discretion even though statute stated that EEOC "shall make an investigation," because statute "does not prescribe the manner for doing so"); *Heily v. U.S. Dep't of Defense*, 896 F. Supp. 2d 25, 36 (D.D.C. 2012) ("[T]he duty to perform a 'professional and thorough' investigation cannot be described as a ministerial duty . . . since the determination that an investigation is 'professional and thorough' in itself requires the investigator to use his or her discretion."); *Hicks v. Brysch*, 989 F. Supp. 797, 817 (W.D. Tex. 1997) ("The review of proposed civil lawsuits to ascertain whether those submissions comply with the prerequisites contained in [state law] necessarily requires the exercise of discretion on the part of the

reviewing official."); *Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *3 (E.D. La. 1995), *aff'd* 114 F.3d 1181 (5th Cir. 1997) (per curiam) (denying mandamus based on statute providing that President, upon the presence of certain conditions, "shall forthwith demand the release of such citizen [from foreign custody]" because the "duty set forth by this provision is far from ministerial" but "calls for the careful exercise of diplomatic discretion").

Discretionary choices are inherent to the exercise of DPAA's mission. DPAA obviously cannot simultaneously process the cases of the more than 83,000 unaccounted-for servicemembers from past conflicts, or even the more than 3,700 buried as unknowns at Manila American Cemetery. *See* DPAA, Our Missing: Past Conflicts (link); ABMC, Manila American Cemetery Visitor Brochure (Aug. 7, 2014) (link). Thus, it must inherently exercise discretion in prioritizing cases. If DPAA were to expend all of its efforts on unaccounted-for servicemembers who are very unlikely to be identified, it would be unable to meet the goal Congress set of resolving at least 200 cases per year. *See* Pub. L. No. 111-84, Div. A, Title V § 541(d)(2); *see also* DoD Directive 2310.07 § 1.2(f). Moreover, disinterments impose burdens that must also be considered. For example, DoD considers it less respectful of the deceased for unidentified remains to reside at a laboratory for a lengthy period of time rather than appropriately buried. *See, e.g.*, DTM-16-003 at 3 (requiring that DoD have the "ability and capacity to process the unknown remains for identification within 24 months after disinterment"). Accordingly, it is appropriate for DoD to adopt prioritization policies and disinterment thresholds to assist it in performing its statutory mission as efficiently and respectfully as possible. *See supra* Background § III. The Mandamus Act does not provide a means to challenge the agency's exercise of this inherent discretion. *See Wilbur*, 281 U.S. at 219 ("[W]here the duty is not thus plainly prescribed, but depends upon a statute or statutes the . . . application of which is not free

from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.").

2. DPAA's Communication Responsibilities Are Not Ministerial Duties

Plaintiffs' claim alleging a "ministerial duty to communicate," Compl. ¶ 9, is also meritless. As discussed above, Congress' general statement of DPAA's responsibilities does not create a mandatory duty. The statute provides for:

> Establishment of a means for communication between officials of the designated Defense Agency and family members of missing persons from past conflicts, veterans service organizations, concerned citizens, and the public on the Department's efforts to account for missing persons from past conflicts, including a readily available means for communication of their views and recommendations to the designated Agency Director.

10 U.S.C. § 1501(a)(2)(E). Even if the *initial establishment* of a means of communication between DPAA officials and the public could be considered a ministerial duty—and Defendants do not concede that it is—this is not the basis of Plaintiffs challenge. DPAA has established several means of communication, including an Office of Public Affairs, an informative website, a series of meetings with families around the country, and an annual briefing in Washington, D.C. *See supra*, Background § III. Similarly, DPAA has established "a readily available means for communication of [the public's and other specified groups'] views and recommendations to the [DPAA] Director." 10 U.S.C. § 1501(a)(2)(E). In addition to the means of communication already discussed, it has a webform permitting electronic comment on any topic and a webform dedicated to providing information about potential American remains from past conflicts. *See supra*, Background § III.

Here, Plaintiffs' claim concerns *specific interactions* with DPAA, not with its initial establishment of a means to communicate. They assert, without explanation, that DPAA has "actively obstructed the Plaintiffs' attempts to exchange information with it," thus violating an

alleged "ministerial duty to communicate with Plaintiffs in a readily available manner." Compl. § V(A), ¶ 9. Such a duty cannot be based on § 1501(a)(2)(E) because Plaintiff's claim does not concern "establishment" of a "means for communication." The discretionary choices inherent in individual communication interactions make clear that the daily communications operation of an agency cannot be "specific, ministerial acts." *Dunn-McCampbell*, 112 F.2d at 1288. Thus, the Mandamus Act does not permit entry of an order requiring the DPAA to "reliably communicate with Plaintiffs." Compl., Prayer ¶ 5.[6]

B. Plaintiffs Have Not Established a Clear Right to the Relief Sought

An independent basis for denying Plaintiffs' claim is their failure to plead "a clear and indisputable right to the relief sought." *Ramirez-Gomez*, 2005 WL 3534463, at *1. For this element, a plaintiff must do more than "merely suggest[] that it is possible that a breach [of some statutory duty] may have occurred." *Randal D. Wolcott*, 635 F.3d at 772. Instead, the complaint must specifically plead that "there was a breach of the duty such that [plaintiff] is clearly entitled to relief in mandamus." *Id.* Plaintiffs have fallen far short of that standard here. Some of the relief they seek is supported by nothing more than conclusory allegations that cannot be credited, even at this stage of the litigation. *See, e.g.*, *Myart v. Warrick*, No. 17-00063, 2017 WL

[6] To the extent Plaintiffs' claim any duty grounded in the substantive due process requirements under the Fifth Amendment, *see* Compl. § V(A), ¶ 10, they have failed to establish that they have a "property interest" that could give rise to such a claim. *See Simi Inv. Co. v. Harris Cnty, Texas*, 236 F.3d 240, 249 (5th Cir. 2000); *see also Stem v. Gomez*, 813 F.3d 205, 210 (5th Cir. 2016) ("A property interest is not derived from the Constitution but from an independent source such as state law[.]"). Plaintiffs would have to establish under the laws of each relevant state that they have a property interest in the remains of deceased relatives that rises to the level of constitutional protection. *See, e.g., Albrecht v. Treon*, 617 F.3d 890, 895 (6th Cir. 2010) (concluding relatives had no property interest under Ohio law in body parts removed during an autopsy). An attenuated due process claim is an insufficient basis for exercise of mandamus authority. *See Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *2 (E.D. La. 1995), aff'd 114 F.3d 1181 (5th Cir. 1997) (per curiam) (declining to issue writ of mandamus because due process claim was too attenuated and did not give rise to a "clearly prescribed duty").

1906951, at * (W.D. Tex. May 8, 2017) (dismissing complaint because "unclear and conclusory" allegations do not suffice). And much of the relief they seek is entirely untethered to any violation of the alleged duties discussed above.

Pursuant to the Mandamus Act, Plaintiffs seek orders requiring Defendants to:

1) "consider all new credible evidence of the identity of unidentified remains," Compl., Prayer ¶ 1;

2) "promptly disinter for identification [by DNA analysis] all unidentified remains . . . upon a showing of a reasonable probability based on evidence of their identification or, provide alternative means for family members to act and identify the remains if the Defendants fail to promptly act," *id.* ¶ 2;

3) "promptly adopt and employ all reasonable forensic technologies . . . which may assist in the efficient and timely identification of previously unidentified remains," *id.* ¶ 3

4) "promptly provide for due process in consideration of new evidence as to the identity of unidentified remains," *id.* ¶ 4;

5) "reliably communicate with Plaintiffs," *id.* ¶ 5.[7]

None of this relief is supported by pleading sufficient to show that there was a breach of an alleged duty as to each Plaintiff.

For example, while the statute calls for consideration of "new credible evidence," *see* 10 U.S.C. § 1509(e)(3), none of the Plaintiffs plead that they presented evidence to the DPAA that meets the statutory threshold that it was discovered after November 18, 1997. *See generally* Compl. § IV.[8] Indeed most of the Plaintiffs do not specifically plead that they engaged in any

[7] In Prayer ¶¶ 4-5, plaintiffs also ask the Court to enjoin Defendants from certain future actions. As discussed in Section II below, the Mandamus Act does not provide jurisdiction to grant an injunction.

[8] Plaintiffs' blanket assertion that DPAA has not acted "despite compelling evidence provided by Plaintiffs," Compl. § V(A), ¶ 7, is far too conclusory to support seven different claims. *See Alexander*, 848 F.3d at 706-07 & n.10.

contact with the DPAA at all. *See* Compl. § IV(A), (G) (only relatives of First Lieutenant Nininger and Private Kelder plead facts indicating contact with DPAA or its precedessor). By contrast, DPAA's administrative process makes clear that all disinterment requests will be thoroughly considered and passed up the chain of command for a decision. *See* DPAA AI 2310.01 at 2. As for the notion that DPAA has somehow not afforded "substantive due process" in consideration of such evidence, Compl. § V(A), ¶ 10; *id.* Prayer ¶ 4, Plaintiffs have not identified what constitutional right they have allegedly been deprived of or pleaded facts showing that the government's action is irrational. *See Cripps v. Louisiana Dep't of Agriculture & Forestry*, 819 F.3d 221, 232 (5th Cir. 2016); *Lee v. Whispering Oaks Home Owners Ass'n*, 797 F. Supp. 2d 740, 752 (W.D. Tex. 2011).[9] Accordingly, Plaintiffs have not established that the DPAA breached any duty to each of them to consider such evidence.

Nor have Plaintiffs established either a duty to disinter remains on the basis of an unspecified "reasonable probability . . . of their identification," Compl., Prayer ¶ 2, or any specific breach of such an alleged duty. *See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 707 n.10 (5th Cir. 2017) (rejecting "bald assertion" at motion-to-dismiss stage because plaintiffs offered "nothing to support" it). The limited factual assertions in the Complaint certainly do not establish the probability of identification.[10] Plaintiffs ignore the fact that most of these remains came from, or currently reside in a commingled grave, which complicates the probability of

[9] This Court has explained that, at the motion-to-dismiss stage, "[t]o overcome the presumption of validity [afforded to government action], Plaintiff must first plead facts demonstrating that the [government action] was not rational." *Lee*, 797 F. Supp. 2d at 752. *See also id.* at 755 ("[B]ecause the substantive due process claim fails, then any . . . claim based on that alleged violation also fails.").

[10] Indeed, the key assertions are entirely conclusory. *See, e.g.*, Compl. § IV(A), ¶ 3 (asserting that requests were denied "due to an erroneously calculated antemortem height"); *id.* § IV(B), ¶ 3 (asserting identification as unsuccessful "due to a misspelling of Colonel Stewart's name").

identification. They seem to obliquely challenge the disinterment thresholds set by the Under Secretary of Defense in 2015, *see* Memorandum, Disinterment of Unknowns from the Nat'l Memorial Cemetery of the Pacific (Apr. 14, 2015), but they identify nothing in the statute that prohibits this regulatory approach to a complex subject.[11] Indeed, the statute on its face requires the Department to weigh whether information is "credible," 10 U.S.C. § 1509(e)(3); *see also id.* § 1505(c)(3) (providing for "determin[ation] whether the information is significant enough"), and does not constrain DoD authority regarding the handling of buried remains in military cemeteries. *Cf. Helfgott v. United States*, 891 F. Supp. 327, 331 (S.D. Miss. 1994) ("The length of time determined to be appropriate for an administrative adjudication is clearly a discretionary, not a ministerial, decision of the agency[.]").

Lastly, Plaintiffs' have identified no breach of a duty to "adopt and employ all reasonable forensic technologies." Compl., Prayer ¶ 3. The Complaint references technology only to assert that "DNA testing" is "an expedient and cost-effective means" of identifying remains. Compl. § V(A), ¶ 8. This claim is not linked to a statutory duty and Plaintiffs' assertions about DNA testing do not establish any action of DPAA that even allegedly breaches a duty as to each Plaintiff. DPAA regulations make clear that it considers DNA testing highly useful. *See, e.g.*, DPAA AI 2310.01 at 24 (including numerous questions about DNA in its Disinterment Criteria Guide). But DNA testing is of limited utility in the absence of sufficient reference samples from family members to permit comprehensive testing of the remains in commingled graves. *See id.*;

[11] Still less do Plaintiffs identify any statutory basis under which the Court could permit "family members to act and identify the remains" resting in government cemeteries and facilities. Compl., Prayer ¶ 2. While DoD "may" enter public-private partnerships to support DPAA's mission, *see* 10 U.S.C. § 1501a, Plaintiffs plead no basis on which private action can become mandatory.

see also DTM-16-003 at 2 (requiring DNA "family reference samples or other medical means of identification" for 60% of potentially associated servicemembers).

C. Plaintiffs Have Not Shown that Available Remedies are Inadequate

To the extent that—contrary to Defendants' arguments above—the Court finds a mandatory duty and a breach of that duty by the Defendants, Plaintiffs are still not entitled to mandamus because DPAA's administrative process and the Missing Service Personnel Act's judicial review procedures would provide an adequate remedy. *See Randal D. Wolcott*, 635 F.3d at 768 (holding that "[t]he third element requires that there be no other adequate remedy available," whether a judicial or administrative remedy).

Plaintiffs' core claims concern DPAA's consideration of "new credible evidence" and making disinterment decisions based on a "showing of a reasonable probability" of identification. But there is an administrative remedy that specifically addresses these very concerns. *See* DTM-16-003 at 8-10; DPAA AI 2310.01 at 12-17. A formal disinterment request provides an opportunity to present to DPAA all of the evidence Plaintiffs believe supports identification, and triggers a review process that extends far up the chain of command. *See* DPAA AI 2310.01 at 12. Plaintiffs' only effort to address alternative administrative remedies is their conclusory assertion that DPAA has "frustrate[d]" the purpose of "the procedures for seeking relief" in such a way that "no adequate legal remedy remains." Compl. § V(A), ¶ 10. But they do not plead that any Plaintiff has actually submitted a formal disinterment request under the DPAA's current procedure, or that such a request has been delayed or denied. Yet this process could provide the very relief Plaintiffs seek. Accordingly, the availability of this administrative process makes recourse to the Mandamus Act unwarranted.

In addition, Congress also provided for limited judicial review under the Missing Service Personnel Act. If DoD establishes a further review board under § 1505(c)(3) and § 1509(e)—

after determining that "new information" is credible and "significant enough to require a board review"—Congress has specifically provided for judicial review of certain of the board's potential findings on the grounds that "there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process." *See* 10 U.S.C. § 1508(a); *see also id.* § 1508(b) (providing for judicial review to challenge a "finding by a board appointed under section 1504 or 1505 of this title that a missing person is dead" or a "finding by a board appointed under section 1509 of this title that confirms that a missing person formerly declared dead is in fact dead"). Because Congress deemed this degree of review sufficient, it provides an adequate remedy and the Mandamus Act should not be construed to undermine the exclusivity of the remedy. *See, e.g.*, *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) ("[T]he fact that a remedial scheme chosen by Congress vindicates rights less efficiently than [another approach] does not render the [statutory] remedies inadequate for purposes of mandamus."); *Gross v. West*, 211 F.3d 124 (Table), 2000 WL 309777, at *1 (5th Cir. Mar. 1, 2000) (concluding that because Civil Service Reform Act "provides the exclusive remedy" this "precludes mandamus relief" (citing *Towers v. Horner*, 791 F.2d 1244 (5th Cir. 1986)) . *Cf.* Report and Recommendation of U.S. Magistrate Judge, *Eakin v. Am. Battle Monuments Comm'n*, No. 12-1002 (W.D. Tex. June 11, 2013) (concluding that § 1508 "impliedly preclude[s] review under other statutes, including the Administrative Procedure Act).

D. Mandamus Should Be Denied on Equitable Grounds

"Even when a court finds that all three elements are satisfied, the decision to grant or deny the writ remains within the court's discretion because of the extraordinary nature of the remedy." *Randall D. Wolcott*, 635 F.3d at 768; *see also Whitehorse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373 (1955) ("[M]andamus . . . is to be granted only in the exercise of sound

discretion."). A mandamus decision is "largely controlled by equitable principles and its issuance is a matter of judicial discretion." *Carter*, 411 F.2d at 773.

Here, equitable principles weigh against granting the writ, even if some nondiscretionary duty and breach were found. DoD and DPAA are vigorously pursuing their mission to account for those lost from prior conflicts. They must operate with limited resources and set priorities regarding how to implement their mission in a way that leads to the most efficient identification of the largest number of unaccounted-for servicemembers. Any action to prioritize identification of these Plaintiffs' relatives merely because they have filed a federal lawsuit, would simply displace other identification efforts that are ongoing. And most significantly, the probability of identification is a complex inquiry involving a host of factors and scientific expertise. The Court is not well positioned to weigh Plaintiffs' claims against the appropriate standards, especially in the absence of a complete record developed by DPAA through the administrative process.

Accordingly, even if the Court could grant the writ—and it cannot—it should exercise its discretion to deny it because the public interest would not ultimately be served by granting it.

III. The District Court Lacks Jurisdiction to Grant Injunctive or Declaratory Relief

In addition to Plaintiffs' failure to state a claim as described above, much of the relief they seek exceeds the Court's jurisdiction. It is Plaintiffs' burden to establish their standing and the Court's jurisdiction to grant each form of relief sought. *See Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[P]laintiff must demonstrate standing separately for each form of relief sought."); *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007) ("Each plaintiff must have standing to seek each form of relief in each claim."); *Wyble v. Gulf South Pipeline Co.*, 308 F. Supp. 2d 733, 742 (E.D. Tex. 2004) ("[E]ach plaintiff must show that he has suffered injury in fact caused by Defendants' violation of each regulation listed in each claim set forth in [the complaint].").

Plaintiffs' numerous requests for injunctive relief, *see* Compl., Prayer for Relief ¶¶ 4, 5, 8-10 (seeking order "enjoining" future actions), categorically exceed the Court's authority under the Mandamus Act. The Fifth Circuit has made clear that the Act "does not grant jurisdiction to consider actions asking for other types of relief—such as injunctive relief." *Randall D. Wolcott*, 635 F.3d at 766. The Mandamus Act only grants jurisdiction to "command[] the performance of a particular duty that rests on the defendant," *id.* (quoting 42 Am. Jur. 2d Injunctions § 7), but does not grant jurisdiction to "prohibit the defendants from acting in a certain manner in the future." *Id.* Nor have Plaintiffs identified any other appropriate basis for jurisdiction to seek such relief. Their only alternative basis is the Declaratory Judgment Act, 28 U.S.C. § 2201, which "is not an independent ground for jurisdiction." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980); *Mustafa v. Pasquerell*, No. 05-658-XR, 2006 WL 488399, at *2 (W.D. Tex. Jan. 10, 2006); *see also Ayyub*, 2010 WL 3221700, at *7 n.21 (dismissing "claim for declaratory relief [because it] is not tied to another cause of action"). Accordingly, because the Court lacks jurisdiction to grant injunctive relief, Plaintiffs lack standing to seek it.

Plaintiffs also have not established the Court's jurisdiction to grant the other relief they seek under the Declaratory Judgment Act. To invoke the remedy provided by this Act, Plaintiffs must not only tie each requested form of relief to another cause of action, but also "allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). The Court retains broad discretion to deny declaratory relief. *See Northfield Ins. Co. v. Rodriguez*, No. 16-932, 2017 WL 2999969, at *2 (W.D. Tex. June 5, 2017).

Two of Plaintiffs' requests for declaratory relief fail because they are not grounded in a specific statute. Plaintiffs' requests that the Court declare unspecified policies and procedures to

"conflict with the plain meaning and intent" of a statute, Compl., Prayer ¶ 7,[12] and declare that unspecified policies were "applied selectively and inconsistently," *id.* ¶ 8, are not rooted in any separate cause of action and thus their Declaratory Judgment Act claim must be dismissed for lack of jurisdiction. And even if they had established a separate jurisdictional basis for proceeding with these claims, Plaintiffs have also failed to state a claim because they have pled no nonconclusory facts from which their rights could plausibly be established, or established the likelihood of future injury. *See Bauer*, 341 F.3d at 358.

Plaintiffs' final four requests for declaratory relief also fail. Their request for declaratory relief pursuant to "substantive due process" *see* Compl., Prayer ¶ 6; *id.* § V(B)(7)(d), fails to state a claim for the same reasons discussed above in connection with the Mandamus Act—Plaintiffs have not identified what constitutional right they have allegedly been deprived of or pled facts from which it could be concluded that the government's action is irrational. *See, e.g., Cripps*, 819 F.3d at 232; *Lee*, 797 F. Supp. 2d at 752, 755. They also lack standing to press such a due process claim because they have not established injury traceable to any specific government conduct. *See Betancourt v. Federated Dep't Stores*, 732 F. Supp. 2d 693, 699 (W.D. Tex. 2010). And their claim that Defendants "wrongfully withheld" certain documents in violation of the Freedom of Information Act ("FOIA"), Compl., Prayer ¶ 9, does not state a claim because it is supported by no facts from which it could be concluded that a violation has occurred, let alone

[12] Plaintiffs single out three DoD policy documents— DoD Directive 1300.22, Mortuary Affairs Policy (May 25, 2011) (which has been superseded by a version dated Oct. 30, 2015) (attached as Ex. F); Chairmen of the Joint Chiefs of Staff, Joint Publication 4-06, Mortuary Affairs (Oct. 12, 2011) (attached as Ex. B); and U.S. Army Regulation 638-2, Army Mortuary Affairs Program (Nov. 28, 2016) (attached as Ex. I)—but challenges no specific aspect of these policies and identifies no way in which they conflict with the statute. *Cf. Hernandez v. Siemens Corp.*, No. 16-539, 2016 WL 6078365, at *3 (W.D. Tex. Oct. 17, 2016) (dismissing complaint that "makes only the conclusory allegation that the MRI machine was defectively designed without an explanation of the defect or how it caused his injury").

the likelihood of future injury.[13] *See Bauer*, 341 F.3d at 358. Their claim for declaratory relief regarding "readily communicat[ing]" with Plaintiffs, Compl., Prayer ¶ 10, depends on the merits of the mandamus claims discussed *supra*, and should be denied for the same reasons. *See supra*, Arg. § II(A)(2).

Lastly, Plaintiffs' request for declaratory relief regarding reimbursement of expenses "incident to the recovery, care, and disposition of the remains," Compl., Prayer ¶ 11, fails for two reasons. First, they have not established any basis for such declaratory relief because they do not show that Congress intended 10 U.S.C. § 1482(b) to create both a right and a remedy that is privately enforceable.[14] *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And second, they have not shown a substantial likelihood of future injury; they do not maintain that Defendants are withholding reimbursements owed to any Plaintiff, or that Defendants have failed to properly reimburse individuals who met the statutory criteria in the past. *See Bauer*, 341 F.3d at 358.

In sum, Plaintiffs are entitled to none of the relief they seek and their claims may be dismissed for want of jurisdiction and for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss the complaint with prejudice.

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[13] Nor have Plaintiffs pled a claim under the FOIA, which provides it own remedy. *See* 5 U.S.C. 552(a)(4)(B).

[14] The statute provides that the relevant Service Secretary "may provide" for the recovery, care, and disposition of certain remains, 10 U.S.C. § 1481, and that incident to such action "may pay [certain] necessary expenses." 10 U.S.C. § 1482(a). Plaintiffs rely on § 1482(b), which states: "If an individual pays any expense payable by the United States under this section, the Secretary concerned shall reimburse him or his representative . . . ."

Dated: September 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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