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.	)	

REPLY IN SUPPORT OF DEFNDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendants have shown that each of Plaintiffs' legal theories fails to state a claim upon which relief can be granted. Plaintiffs take refuge in the bare allegation that they have identified their relatives' remains and argue that each claim is meritorious if it is assumed Defendants are withholding identified remains without justification. This counterfactual approach fails because the very evidence on which Plaintiffs rely contradicts their certainty about which remains are those of their relatives. Moreover, there are numerous other defects with each of their claims as a matter of pleading and as a matter of law. Accordingly, Defendants are entitled to judgment now, rather than after additional discovery and renewed dispositive briefing.

ARGUMENT

I. Plaintiffs Have Not Pled Facts Plausibly Showing That They Have Identified the Remains of Their Relatives.

The approach Plaintiffs have taken in their opposition clearly demonstrates that Defendants' motion for judgment on the pleadings should be granted. The heart of their opposition is the assertion that "[t]he Families have stated sufficient facts supporting their claim that the remains have been identified and their location known." Pls.' Opp'n at 10, ECF No. 33; *See also id.* at 4, 6-7, 11, 17, 18, 19-20, 21, 24, 34, 36 (repeatedly relying on this argument). Thus they claim that Defendants' motion should be rejected because the Court must accept as true the allegation that Defendants are holding identified remains and declining to provide them to Plaintiffs. *See, e.g., id.* at 24. Plaintiffs limit all but one of their claims to this factual theory. *See, e.g., id.* at 7 (Due Process Clause claims); *id.* at 21 (Fourth Amendment claim); *id.* at 24 (First Amendment claim); *id.* at 34 (APA claim); *cf. id.* at 29 (same for Count 3 Mandamus Act claim, but not for Count 4 claim regarding duty to identify remains). But they have "fail[ed] to plead enough underlying facts to support their conclusory claims." *Wilkens v. Toyotetsu America, Inc.*, No. 09-515, 2010 WL 3342229, at *4 (W.D. Tex. Aug. 25, 2010).

Conclusory allegations such as "Plaintiffs have already identified the location of these service members' remains," Am. Compl. ¶ 2, or "[t]he unidentified remains marked as X-1130

are those of 1LT Nininger," *id.* ¶ 21, are insufficient, standing alone, to be credited at the motion to dismiss stage. *See, e.g.*, *Hernandez v. Siemens Corp.*, No. 16-539, 2016 WL 6078365, at *3 (W.D. Tex. Oct. 17, 2016) (declining to credit "conclusory allegation that the MRI machine was defectively designed without an explanation of the defect or how it caused his injury"); *Roberts v. Ochoa*, No. 14-0080, 2014 WL 4187180, at *11 (W.D. Tex. Aug. 21, 2014) (dismissing "[a]llegations of conspiracy without facts demonstrating prior agreement between defendants").

Moreover, Plaintiffs' attempts to buttress these conclusory allegations are merely "unwarranted deductions of fact," which the "the Court does not accept . . . as true." *CH2M Hill, Inc. v. Comal Cnty.*, No. 09-555, 2009 WL 3617528, at *2 (W.D. Tex. Oct. 27, 2009). Plaintiffs' assertions are expressly or implicitly based exclusively on the servicemembers' personnel files (IDPFs) and the unknown remains files (X-files), and the relevant excerpts from these files attached to Defendants' Answer contradict Plaintiffs' certainty.[1] *See Assoc. Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) (rejecting "conclusory allegations and unwarranted deductions of fact" "especially when [they] are contradicted by facts disclosed by a document appended to the complaint"); *Hollingshead v. Aetna Health, Inc.*, 589 F. App'x 732, 737 (5th Cir. 2014) (affirming dismissal of claim because "conclusory allegation . . . [was] contradicted by the documents attached to . . . [the] complaint"); *In re Enron Corp. Sec., Derivatives & "ERISA" Litig.*, 238 F. Supp. 3d 799, 816 (S.D. Tex. 2017) ("When conclusory allegations and unwarranted deductions of fact are contradicted by facts disclosed in the appended exhibit . . . the allegations are not admitted as true.").

For example, it is not the case that "U.S. Government documents show that 1LT Nininger's remains . . . . were exhumed by [AGRS] personnel and given the designation X-1130." Am. Compl. ¶ 18; Pls.' Opp'n at 5 (relying on "relevant X-file"). One cannot extrapolate from accounts that 1LT Nininger was buried in Abucay Churchyard to the conclusion that his remains *must* be X-1130, which the initial disinterment record states was exhumed from Grave

[1] These documents are treated as part of Plaintiffs' complaint. *See Red Hook Commc'ns I v. On-Site Mgr., Inc.*, 700 F. App'x 329, 332 (5th Cir. 2017); Pls.' Opp'n at 29 (accepting documents).

No. 9, Soldiers Row, "Abucay" cemetery. *See* Am. Answer ¶ 18 & Ex. 1. Even setting aside DPAA's assessment of the facts,[2] the records Plaintiffs rely upon make clear that X-1130 is at most a *possibility*, and in fact a possibility that Plaintiff John Patterson himself had concluded was unlikely.[3] *See id.* Exs. 9, 21, 22. Similarly, the facts alleged regarding BG Fort and COL Stewart create no more than a *possibility* that their remains are in the graves Plaintiffs selected. Neither Ruben Caragay's report, Am. Compl. ¶ 24, nor Ignacio Cruz's declaration, *id.* ¶ 29, both of which relay partial and second-hand information, are sufficient for a conclusive identification, *see* Defs.' Br. at 13-15, ECF No. 31; Plaintiffs' exaggeration of the documents must be rejected.

Plaintiffs' deduction that the remains of their four relatives associated with Cabanatuan common graves have been "identified" is likewise unwarranted and cannot be credited. Not only is it unknown whether each servicemember's remains are among the selected graves at Manila American Cemetery,[4] but also, even if the remains could be known to be present among those graves, they would not be "identified" for purpose of Plaintiffs' claims. For example, no one of the nine graves associated with Common Grave 407 can be said to contain PFC Hansen, nor can any specific bone be known as his. Rights or legal interests in possession of his remains cannot

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[2] While Defendants have pled facts showing that 1LT Nininger and BG Fort are *unlikely* to be in Plaintiffs' proposed graves, *see* Defs.' Br. at 13-15, the Court need not address this because Plaintiffs have clarified that their claims only concern identified remains, not likelihood of identification. *See, e.g.*, Pls.' Opp'n at 10. Accordingly, it is Plaintiffs' failure to plead facts definitive matching each servicemember to specific remains that is dispositive.

[3] Patterson himself has noted several locations where 1LT Nininger could have been buried, including south of the river. *See* Am. Answer Exs. 9, 21, 22. The only link between 1LT Nininger and a "Grave No. 9" at *any* cemetery is a letter from Colonel George Clarke, *see id.* Ex. 5 at 4, who had left the Philippines before the burial, *see id.* Ex. 9 at 1, and whom Patterson concluded "was not in a position to know any of the relevant details" yet gave "erroneous details," *id.* Ex. 21 at 10; *id.* Ex. 22 at 1 (lamenting COL Clarke's "erroneous accounts").

[4] Defendants do not "concede that the location of the remains [of the four servicemembers associated with Cabanatuan common graves] has likely been established." Pls.' Opp'n at 4. For example, the records associating PFC Hansen with Common Grave 407 are known to be incomplete and potentially inaccurate, Defs.' Br. at 10; his remains might not have been found at the original disinterment, *id.*; his remains might have been misidentified and buried as one of the seventeen identified men associated with this grave (either in Manila or sent to the United States), *id.*; *cf.* Am. Compl. ¶ 41; or his remains could have been commingled with remains from other common graves and not ultimately buried among these graves, *see* Defs.' Br. at 11.

reasonably be understood to attach in the face of such uncertainty. *See* Defs.' Br. at 20.[5]

In sum, Plaintiffs have failed to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable" for the alleged conduct. *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Defendants' Evidence Is Proper for a Rule 12(c) Motion.

A. No Factual Dispute Prevents Judgment on the Pleadings.

Plaintiffs cannot evade judgment on the basis of an alleged dispute over "the merits of the Families' factual claim that [the remains] have been identified and/or located." Pls.' Opp'n at 4; *see id.* at 29. As discussed above, Plaintiffs conclusory allegations of identification cannot be credited at this stage. *See supra*, Arg. § I. Moreover, Plaintiffs do not show that the facts included in Defendants' Answer and highlighted in the opening brief conflict with any well-pled facts in their Complaint. *See* Pls.' Opp'n at 4-6. Instead, Plaintiffs object to various facts drawn from the same IDPFs and X-files they rely upon, without giving any basis to dispute those facts. *See, e.g., id.* at 5 (asserting that Defendants "incorrectly state that a witness reported that [BG Fort's] execution occurred in the town of Dansalan"); *id.* (asserting that Defendants "misstate[] . . . where [COL Stewart's] remains were originally exhumed"). In reality, the contents of these files cannot reasonably be disputed, and Defendants have shown that the "material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002).[6]

B. The Material Introduced by Defendants Can Be Considered at This Stage.

Plaintiffs challenge consideration of "any extrinsic evidence and/or documents" that were

[5] For this reason, even though PVT Kelder has been legally identified, Plaintiffs have failed to make credible factual claims that any of the residual remains from Common Grave 717 which are still being tested have been identified as PVT Kelder's. *See* Defs.' Br. at 10-12.

[6] Plaintiffs' reference to "factual disputes regarding the reasonableness of the Government's actions and what process should be provided," Pls.' Opp'n at 4, is mistaken because those are legal, not factual, disputes. And undisputable facts here show that Defendants' actions were reasonable. *See* Defs.' Br. at 27-28.

"not attached to the pleadings," Pls.' Opp'n at 29, but fail to identify any specific document they believe should not be considered. All of the material cited by Defendants was either attached to a pleading or subject to judicial notice. *See Great Plains Trust*, 313 F.3d at 312. Agency regulations, reports and policy documents—*e.g.*, Defs.' Exs. A-H, L, N-T—are regularly subjected to judicial notice. *See Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *Johnson v. Sawyer*, 47 F.3d 716, 734 n.36 (5th Cir. 1995). And factual material published on agency websites—*e.g.*, Defs.' Exs. I-K, M—can likewise be noticed. *See 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).[7]

III. Plaintiffs Have Failed to State a Constitutional Due Process or Fourth Amendment Claim (Counts 1, 8).

Plaintiffs' due process and unreasonable seizure claims fail because they rely exclusively on the allegation that Defendants are refusing "to allow families to bury identified remains" despite "ha[ving] control of the remains of [Plaintiffs'] relatives." Pls.' Opp'n at 19-20. As discussed above, they fail to plead facts supporting the conclusion that the remains have been identified. *See supra*, Arg. § I.[8] Defendants' showing that the relevant remains are unidentified, *see* Defs.' Br. at 9-15, is not contradicted by any well-pled complaint allegations and is an appropriate basis for judgment. *See Stanton v. Larsh*, 239 F.2d 104, 106 (5th Cir. 1956).

Moreover, while Plaintiffs attempt to define the relevant interest vaguely as "the right to receive and bury their relative's remains," Pls.' Opp'n at 13, they have failed to establish that

[7] Plaintiffs, by contrast, make factual claims in their brief that are unsupported—either by their pleadings or by any evidence—and cannot be considered. *See* Pls.' Opp'n at 4 (characterizing "letter from Colonel Stewart dated November 20, 1941"); *id.* at 5 n. 4 (asserting "[o]nly two American Colonels were killed in the Philippines during January of 1942"); *id.* at 29 (asserting vaguely that each Plaintiff has made disinterment requests "multiple times over many years").

[8] In addition to Plaintiffs' failure to adequately plead that their relatives have been identified, they also fail to establish that "the Government has control of the remains of [Plaintiffs'] relatives." Pls.' Opp'n at 20. While the graves Plaintiffs have selected are in Defendants' custody, it is unknown whether the relevant remains are in those graves or instead in a location outside Defendants' custody, such as an unrecovered grave or a private cemetery in the United States where misidentified remains could have been sent. *See* Am. Answer ¶¶ 16, 41.

any relevant jurisdiction applies such a right to buried and/or unidentified remains, let alone applies it in a manner that rises to the level of a constitutionally cognizable interest.[9] For example, the Fifth Circuit cases on which Plaintiffs rely do not recognize any cognizable property interest for *disinterment* of identified or unidentified remains. *See Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989); *Travelers Ins. Co. v. Welch*, 82 F.2d 799. 801 (5th Cir. 1936).[10] Indeed, Plaintiffs make no attempt to rebut Defendants' showing that families lack a cognizable property interest in unidentified remains. *See* Defs.' Br. at 19-20; Pls.' Opp'n at 10-11 (treating argument as "irrelevant"). Similarly, Plaintiffs do not rebut Defendants' showing that any cognizable property right—including the right to receive and dispose of the remains—was extinguished at burial because the equitable discretion that a court exercises in determining whether to order disinterment is antithetical to a concrete property interest. *See* Defs.' Br. at 21-22. Instead, Plaintiffs unpersuasively argue that burial did not affect their rights because these were only "temporary burials." Pls.' Opp'n at 11. Not only are Plaintiffs wrong on the facts—burials at Manila American Cemetery became permanent at the end of 1951, *see* Defs.' Br. at 3—but also they cite nothing for the conclusion that burial for more than 50 years can be considered "temporary" or that family property interests survive such "temporary" burials.[11]

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[9] Defendants address only the property interest because Plaintiffs did not plead a "life" interest, *see* Am. Compl. ¶¶ 68, 73, and they cite no caselaw recognizing an analogous "liberty" interest, let alone how an interest in "protection . . . against unwarranted governmental interference," *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995) (en banc), can be used to force DoD to disinter dozens of graves. *See id.* (Constitution "does not confer an entitlement to *governmental aid* as may be necessary to realize the advantages of liberty guaranteed by the Clause.").

[10] *Arnaud* addressed property interest in "possess[ing] the body in the same condition in which death left it," 870 F.2d at 308; and the Circuit held that, under Louisiana statutes and caselaw, parents had a cognizable property interest where unauthorized medical experiments had been performed on the infant's body before it was returned for burial. *See id.* at 305-07; *see also id.* at 309 ("essential aspects" of property interest protected by tort action for "unauthorized tampering of a corpse"). In *Travelers*, the Circuit assumed that Louisiana law permitted a court to order disinterment as matter of judicial discretion, not family right, noting that under state law "a body once suitably buried ought to remain undisturbed except for necessary or laudable reasons" and "after burial, [a corpse] becomes part of the ground to which it is committed." 82 F.2d at 801.

[11] A burial is no less permanent where the government, with statutory disinterment authority, is now considering whether to disinter some of these remains, but has not yet decided to disinter a

Accordingly, these claims fail for lack of a deprivation of a constitutionally-cognizable interest.[12]

IV. Plaintiffs Have Failed to State a Free Exercise Claim (Count 9).

Plaintiffs' free exercise claim fails because they have not pled any substantial burden on their exercise of religion. *See* Defs.' Br. at 31. They rest on the assertion that without the remains in their possession, they cannot "bury[] their relatives in accordance with their sincere religious beliefs." Pls.' Opp'n at 23 (declining to "'name' the specific religious belief being burdened"). Unlike the case they cite in which plaintiff's complaint explained that his Orthodox Jewish beliefs were burdened by a planned autopsy as a prohibited "molestation of the body after death," *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 340 (Md. Ct. Spec. App. 1976), Plaintiffs identify no specific belief that has been substantially burdened. It is not enough to simply restate the element of a claim without factual support. *See Iqbal*, 556 U.S. at 678. Moreover, Plaintiffs are seeking to inappropriately "exact from the government" certain affirmative actions, such as disinterment of 24 sets of remains. *See* Defs.' Br. at 31 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Far from pressuring Plaintiffs to violate their religious beliefs, Defendants are accused only of not working hard enough to provide benefits to them. *See* Defs.' Br. at 32. Thus, Plaintiffs have not made out their prima facie case, and the Court need not reach the remaining issues pertinent to this claim. *See* Defs.' Br. at 32-35.[13]

V. Plaintiffs Have Failed to State a Mandamus Act Claim (Counts 3, 4).

Defendants have shown that Plaintiffs have failed to establish any element of their

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particular grave. Until DNA testing made additional identifications more plausible, DoD had no intention of disinterring any of these permanent burials. *See, e.g.*, Defs.' Ex. N.

[12] Defendants rest on their opening brief for their additional grounds for dismissal of these claims, *see* Defs.' Br. at 24-28; the Court need not reach these arguments or the parties' disagreement about the extent to which the interests recognized by various jurisdictions rise to a constitutionally cognizable property interest under other circumstances. *See id.* at 18-19, 22-24.

[13] Plaintiffs cite no authority for their claim that the compelling interest and least restrictive means inquiries are affirmative defenses to the First Amendment and RFRA claims. Regardless, such "defenses" have not been waived because Plaintiffs raised these issues in their complaint and Defendants' specifically denied them. *See* Am. Compl. ¶ 136; Am. Answer ¶ 136. Plaintiffs also can claim neither surprise nor prejudice because the Rule 12(c) motion was filed shortly thereafter. *See Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 860 (5th Cir. 2000).

mandamus claims, and that regardless, the Court should not exercise any mandamus authority as a matter of equitable discretion. *See* Defs.' Br. at 35-44. Plaintiffs' brief confirms this showing.

First, Plaintiffs offer no meaningful response to Defendants' argument that they have failed to plead facts establishing a "clear and indisputable right to the relief sought." *Ramirez-Gomez v. Melendez*, No. 05-74, 2005 WL 3534463, at *1 (W.D. Tex. 2005); *see* Defs.' Br. at 40-42. They do not dispute Defendants' assertion that no clear right can be rooted in the mere *likelihood* of identification, Defs.' Br. at 41, resting entirely on the conclusory allegations that they have identified the remains, which cannot be credited. *See supra*, Arg. §§ I, II. Moreover, they abandoned their claim about failure to use available resources in the identification effort by not responding to Defendants' motion on that ground. *See* Defs.' Br. at 41-42.

Second, Plaintiffs have failed to show that any of the regulations they cite involve a "specific, ministerial act, devoid of the exercise of judgment or discretion." *Dunn-McCampbell*, 112 F.3d at 1288.[14] They offer no response to Defendants' specific showing that DoD Directive 1300.22 § 3, Joint Publication 4-06 § 1-2(d), Army Regulation 638-2 § 8-3(c), and other provisions involve no less discretion than the statutes the Court has already found cannot support a mandamus claim. *See* Defs.' Br. at 36-40. Even for identified remains, Plaintiffs have not shown that Defendants lack discretion, such as in the timing of transfer of remains. *See, e.g.*, DoD Directive 1300.22 § 3 (balancing "expeditious[]" return with "maintaining the dignity, respect, and care of the deceased to the extent possible and protecting the safety of the living").[15]

Third, Plaintiffs have failed to establish the inadequacy of alternative remedies in the face

[14] While this Court, relying on Fifth Circuit caselaw has stated that a mandamus claim must be rooted in the Constitution or a statute, *see Patterson*, 2017 WL 5586962, at *3, Plaintiffs point to older decisions permitting mandamus claims based on regulations, *see, e.g.*, *Woodward v. Marsh*, 658 F.2d 989, 991-92 (5th Cir. 1981). This tension need not be resolved here.

[15] In objecting to Defendants' explanation that Army Regulation 638-2 and Joint Publication 4-06 are irrelevant here, *see* Defs.' Br. at 38-39, Plaintiffs disregard the scope of these documents and betray a basic misunderstanding of authority within DoD. Thus, they have not carried their burden to show that these regulations are binding on the relevant official. *See Dunn-McCampbell*, 112 F.3d at 1288. For example, Joint Publication 4-06 is limited to a "theater of operations," which does not include graves at Manila American Cemetery. *See* Defs.' Br. at 38.

of an administrative process for disinterments, and a judicial process established by Congress. *See* Defs.' Br. at 42-44. Plaintiffs cite no authority entitling them to the sort of "hearing" they desire, Pls.' Opp'n at 29, and their argument that APA review is available, *see id.* at 30-36, undermines their position that there is no other remedy. They offer no response to Defendants' citations showing that judicial review provided by Congress need not offer the relief Plaintiffs seek to be adequate. *See* Defs.' Br. at 43-44.[16]

VI. Plaintiffs Have Failed to State an APA Claim (Count 5).

First, judicial review is not available under the APA. Congress impliedly precluded judicial review by providing only narrow grounds for judicial review in the statute. *See* Defs.' Br. at 45-46. Plaintiffs' brief simply cites the presumption in favor of judicial review and caselaw requiring consideration of "the context of the entire legislative scheme" to determine Congress' intent, not the "mere fact that some acts are made reviewable." *Abbott Labs. v Gardner*, 387 U.S. 136, 141 (1967). But Defendants have shown that the legislative scheme demonstrates that Congress did not intend every aspect of the accounting mission to be subject to judicial review. *See* Defs.' Br. at 45-46. Nor can Plaintiffs evade Defendants' showing that performance of the accounting mission is committed to agency discretion. *Id.* at 46-47. While they claim Defendants have "violate[d] [their] own regulations," this merely references the conclusory, unsupported allegation of not returning "identified remains." Pls.' Opp'n at 34.

Second, six Plaintiffs fail to challenge "a specific and final agency action." *Sierra Club v. Peterson*, 228 F.3d 559, 565 (5th Cir. 2000). It has been many decades since DoD "t[ook] possession of the remains" in the graves Plaintiffs want disinterred, Pls.' Opp'n at 35, so that cannot be the basis for their claim. *See* 28 U.S.C. § 2401(a). Five Plaintiffs point to no specific decision, resting only on the vague claim that Defendants are "withholding [the remains] from the Families." Pls.' Opp'n at 35. And Plaintiff Douglas Kelder relies on the mere fact that remains associated with Cabanatuan Common Grave 717 are still being processed, *see* Am.

[16] Plaintiffs are incorrect that the judicial review provision is inapplicable. *Compare* 10 U.S.C. §§ 1509(c), 1513(1) (defining "missing person"); *with id.* § 1508 (providing judicial review).

Answer ¶ 49, which is far from a final "refusal to return the remains." Pls.' Opp'n at 35.

Third, Plaintiffs have failed to state an APA claim on the merits. They do not dispute that their "contrary to law" allegations collapse into their constitutional claims, *see* Defs.' Br. at 48; Pls.' Opp'n at 36, which fail for the reasons discussed above.[17] *See supra* Arg. §§ III, IV. And they offer no defense of their "arbitrary and capricious" allegations except to claim it would be improper to resolve those claims due to the alleged "issue of fact concerning the identity of the remains." Pls.' Opp'n at 36. As discussed above, that argument must be rejected. *See supra*, Arg. §§ I, II.A. The undisputed facts show that it is reasonable for Defendants to decline to disinter remains without adequate expectation that they can be identified and for Defendants to retain remains that are still being processed for identification. *See* Defs.' Br. at 49. Accordingly, "judgment on the merits can be rendered." *Great Plains Trust*, 313 F.3d at 312.

VII. Plaintiffs Are Entitled to No Relief (Counts 6-8).

Because each cause of action must be dismissed, Plaintiffs' Declaratory Judgment Act claims must also be dismissed. *See* Defs.' Br. at 50. Moreover, contrary to Plaintiffs' assertion, Pls.' Opp'n at 36, forms of relief are subject to dismissal through a Rule 12(c) motion. *See*, *e.g.*, *Carson v. Fed. Nat'l Mtg. Ass'n*, No. 11-925, 2012 WL 13029757, at *2 (W.D. Tex. Jan. 26, 2012) ("declaratory judgment" is "form of relief" that may be dismissed as matter of law). Accordingly, because Plaintiffs failed to respond to Defendants' arguments or show that they have standing to seek relief for third parties or reimbursement of non-litigation expenses on the basis of 10 U.S.C. § 1482(b), *see* Defs.' Br. at 49-50, Plaintiffs have abandoned these forms of relief and they are subject to dismissal even apart from the failure of Plaintiffs' causes of action. *See Chavez v. City of San Antonio*, No. 14-527, 2015 WL 5008466, at *10 (W.D. Tex. Aug. 19, 2015); *Brooks v. Firestone Polymers, LLC*, 70 F. Supp. 3d 816, 862 (E.D. Tex. 2014).

[17] Plaintiffs' reference to a claim for deprivation of a "fair and impartial hearing," Pls.' Opp'n at 36, primarily refers to their constitutional due process claim. *See* Am. Compl. ¶ 102; Defs.' Br. at 26 (showing that due process was satisfied). At any rate, for informal adjudications, the APA imposes no greater requirements. *See* 5 U.S.C. 555 (requiring agency to act "within a reasonable time" and, if making an adverse decision, to include "brief statement of the grounds for denial").

CONCLUSION

For the foregoing reasons, the Court should grant judgment to Defendants.

Dated: June 7, 2018

Respectfully submitted,

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I hereby certify that on this 7th day of June, 2018, 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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