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' RESPONSE TO PLAINTIFFS' APPENDIX

Pursuant to Federal Rule of Civil Procedure 56(c) and Local Rule CV-7(d)(1), Defendants submit this line by line response to Plaintiffs' Appendix.[1] Many of Plaintiffs' factual assertions are entirely unsupported or depend on mischaracterizations of the cited evidence.

Plaintiffs' Appendix:	**Defs.' Response:**
Introduction	
This case concerns seven service members from World War II and their families. Each service member was buried as an "unknown" following the war. After years of waiting for the Government to take action, the Families filed this lawsuit to bring these service members home for a final and proper burial. The Families simply refuse to accept the idea that any man will be left behind as an "unknown" when there is significant evidence showing that man's burial location. Originally, the Families and the Government disputed the burial location of all of the service members' remains at issue. But that has changed during this litigation.	This characterization of Plaintiffs' case requires no response.
After being presented with the Families' arguments and pleadings, the Government now agrees with	Plaintiffs mischaracterize the facts in this paragraph. The government has not

[1] Plaintiffs' appendices attached as ECF No. 64-1 and 65-1 are virtually identical. The only differences Defendants were able to identify were the insertion of an additional sentence at the end of the introduction in ECF No. 65-1 and the inclusion of brief responses to Defendants' Appendix at pages 24-29 of ECF No. 64-1. Accordingly, Defendants provide one response to both filings.

Plaintiffs' Appendix:	Defs.' Response:
many of the Families' factual claims. The Families and the Government now agree on the burial location of four out of the seven service members (Kelder, Morgan, Bruntmyer, and Hansen). ECF 61-1 at 25-27 (agreeing that alleged graves are likely location of remains). Three of these service members' remains have been disinterred (Kelder, Morgan, and Bruntmyer), and the Government has stated that it intends to disinter the fourth (Hansen). ECF 61-1 at 25-27. The Government has only officially recognized an identification of one of those service members (Kelder). ECF 26-7 at 8, 11.	agreed that Morgan, Bruntmyer, and Hansen were in fact buried in Common Graves 407, 704, or 822; nor has the government agreed that the remains of Morgan, Bruntmyer, and Hansen are among the remains associated with those common graves that were buried as unknowns at Manila American Cemetery. These facts cannot be known based on the available evidence at this point. While remains of PFC Kelder have been disinterred and identified, the disinterment of remains associated with Common Graves 704 and 822 does not mean that the remains of Morgan and Bruntmyer "have been disinterred." Similarly, Defendants' intention to disinter remains associated with Common Grave 407 does not constitute agreement to disinter the remains of Hansen.
For the other three service members in this case, there is a still a dispute about their burial location (Nininger, Stewart, and Fort). The Families' contend that the Government failed to properly consider significant evidence showing the location of these service members' remains. As of now, the Government has not disinterred these thee individual's remains. The Government either refuses to take action on these specific remains at issue or has not responded to the respective family's request. ECF 61-1 at 28 (Nininger – refusing to disinter), 31 (Stewart – have not made a decision for years), 33 (Fort – refusing to disinter). Thus, there is a material fact in dispute between the parties concerning the location and/or identification of at least three of the service members at issue. But these disputed facts do not bar the Families' motion for summary judgment because the issues to be decided do not depend on the merits of these factual claims.	For reasons discussed in Defendants' accompanying brief, the location and/or identification of these remains is not a material dispute of fact. Plaintiffs lack evidence from which their conclusion can be established.
Statement of Facts	

Plaintiffs' Appendix:	Defs.' Response:
I. Service Members' Background	
1. In December 1941, a full-scale Japanese invasion of the Philippines commenced. Alexander R. Nininger, Loren P. Stewart, Guy O. Fort, Robert R. Morgan, Lloyd Bruntmyer, David Hansen, and Arthur H. Kelder answered their country's call to duty and fought bravely for the freedoms we enjoy today. Each made the ultimate sacrifice. First Lieutenant Nininger and Colonel Stewart were killed in action. General Fort was executed by the Japanese after his capture and imprisonment. Private Morgan, Private First Class Bruntmyer, Private First Class Hansen, and Private Kelder died while being held in a prisoner of war camp.	Undisputed.
2. A more detailed description of each service member's service and death is provided below and in the attached Declarations. *See* Ex. 1 at 4-7 (discussing Cabanatuan cases), 7-17 (discussing Nininger, Stewart, and Fort); Ex. 2 (discussing Nininger and Stewart cases).	Plaintiffs may not incorporate every assertion in Mr. Eakin's Declaration into their statement of facts. Defendants respond only to the factual assertions made in Plaintiffs' Appendix, not every factual assertion made in Mr. Eakin's Declaration.
A. Private Kelder, Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen	
3. U.S. Army Private Arthur H. "Bud" Kelder - Private Kelder served in the Medical Department of the U.S. Army during World War II. Ex. 3 at 1 (DoD Case Summary for Kelder, 2014). The American forces surrendered in the spring of 1942, and Private Kelder eventually ended up in captivity at the Cabanatuan prisoner camp. *Id.* at 2. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. Id. Private Kelder was admitted to the hospital twice for treatment of malaria and diphtheria before he died of pellagra on November 19, 1942. He was buried in Grave 717. Id. ("it is clear that he . . . was buried by his fellow prisoners in grave 717 . . . ."); ECF 63-12 at 2 (DPAA identified portions of Private Kelder, which were all from grave 717). The remains associated with Grave 717 buried at the Manila American Cemetery were disinterred in 2014. ECF 61-1 at 27. In 2015, the Government recognized that the	Undisputed.

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circumstantial evidence, along with laboratory analysis, established that Private Kelder was buried in Grave 717, and some of his remains were officially identified by the DPAA. ECF 26-7 at 8, 11.	
4. Private Robert R. Morgan - Private Morgan served with the 7th Material Squadron, 5th Air Base Group in the Pacific Theater during World War II. Ex. 4 at 1 (DoD Case Summary, Nov. 2014); Ex. 5 at 1 (DoD Case Summary, 2018). Private Morgan participated in the defense of Bataan, but was forced to surrender on April 8, 1942. Ex. 4 at 1; Ex. 5 at 1. He would survive the infamous Bataan Death March, and eventually ended up in captivity at the Cabanatuan prisoner camp. Ex. 4 at 1-2; Ex. 5 at 1-2. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. Ex. 4 at 2; Ex. 5 at 2. In early July 1942, Private Morgan developed beriberi and dysentery. Ex. 6 at 3 (hospital records). Ex. 4 at 2; Ex. 5 at 2. After suffering for months, at 6:00 PM on January 1, 1943, Private Morgan succumbed to his condition in the Cabanatuan 1st Branch Station hospital. Ex. 7 at 2 (Report of Death); Ex. 8 at 3 (Daily Death Records); Ex. 9 at 3 (Certificate of Death). He was buried in Grave 822. Ex. 4 at 2; Ex. 5 at 2; ECF 61-1 ("Grave 822 is the likely original location of . . . Private Robert Morgan."); Ex. 10 at 3 (roster of burials); see also Ex. 11 (X-files related to Morgan). The remains associated with Grave 822 were disinterred by the DPAA in November 2018. ECF 63-3 at 8.	Undisputed except to clarify that the records from Camp Cabanatuan suggest that PVT Morgan was buried in Common Grave 822. Because those records are known to contain inaccuracies, this merely establishes that it is likely he was buried in that grave. In addition, not all graves associated with Common Grave 822 were disinterred in November 2018. Only the graves designated unknown were disinterred. The graves of identified servicemembers were not disinterred.
5. Technician 4th Class Lloyd Bruntmyer - Technician Fourth Class Bruntmyer served in the 7th Material Squadron, 5th Air Base Group in the Pacific Theater of Operations during World War II. Ex. 12 at 1 (DoD Case Summary, Oct. 2011); Ex. 13 at 1 (DoD Case Summary, Jan. 2018). TEC4 Bruntmyer was captured by the Japanese on April 9, 1942. Ex. 12 at 1; Ex. 13 at 1. He would survive the infamous Bataan Death March and eventually ended up in captivity at the Cabanatuan prisoner camp. Ex. 12 at 1; Ex. 13 at 1. Unfortunately, poor	Undisputed except to clarify that the records from Camp Cabanatuan suggest that TEC4 Bruntmyer was buried in Common Grave 704. Because those records are known to contain inaccuracies, this merely establishes that it is likely he was buried in that grave. In addition, not all graves associated with Common Grave 704 were disinterred in November 2018. Only the graves designated unknown were

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conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. Ex. 12 at 1; Ex. 13 at 1. TEC4 Bruntmyer died of inanition at 8:45 a.m. on November 1, 1942 while in Barrack 2, Hospital Area, at Cabanatuan POW Camp #1, Luzon Island, Philippine Islands. Ex. 14 at 1 (Daily Death Report); Ex. 15 at 3 (Report of Death). He was buried in Grave 704, which was located in Plot 7, Grave 4 of the Cabanatuan #1 Cemetery. Ex. 15 at 3 (Report of Death); 61-1 at 25 ("Grave 704 is the likely original location of the remains of . . . Technician Lloyd Bruntmyer."); see also Ex. 16 (X-Files related to Bruntmyer). The remains associated with Grave 704 were disinterred by the DPAA in November 2018. ECF 63-3 at 8.	disinterred. The graves of identified servicemembers were not disinterred.
6. Private First Class David Hansen - Private First Class Hansen was a member of Headquarters Squadron, 27th Bombardment Group, and was stationed in the Philippines at the outbreak of World War II in the Pacific. Ex. 17 at 1 (DoD Case Summary, July 2017); ECF 63-17 at 53 (DoD Case Summary, Jan. 2018). A letter that he sent home shows what these men endured and how desperately they wanted to be reunited with their family. Ex. 18 (letter home, Feb. 7, 1942). Just after sending his letter home, PFC Hansen was captured by the Japanese in the spring of 1942. Ex. 17 at 2; ECF 63-17 at 54. He would survive the infamous Bataan Death March into captivity at the Cabanatuan prisoner camp. Ex. 17 at 2; ECF 63-17 at 54. Unfortunately, poor conditions and a lack of food, water, and medical supplies caused rampant disease among the Cabanatuan prisoners. PFC Hansen became ill and was admitted to the Cabanatuan camp hospital, suffering from dysentery and malnutrition. Ex. 17 at 2-3; ECF 63-17 at 54-55. He succumbed to illness at 1730 hours on June 28, 1942. Ex. 17 at 3; ECF 63-17 at 55; Ex. 19 (IDPF for PFC Hansen). The burial records from the Camp show that he was buried in Grave 407 in the Cabanatuan camp cemetery. Ex. 17 at 1; ECF 63-17 at 53; ECF 61-1 at 26 ("Grave 407 is the likely location of the remains of . . . Private First	Undisputed except to clarify that the records from Camp Cabanatuan suggest that PFC Hansen was buried in Common Grave 407. Because those records are known to contain inaccuracies, this merely establishes that it is likely he was buried in that grave. In addition, not all graves associated with Common Grave 407 are being considered for disinterment. Only the graves designated unknown are being considered for disinterred. The graves of identified servicemembers are not being considered for disinterment at this time.

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Class David Hansen."); see also Ex. Q19(IDPF for Hansen). The DPAA is "finalizing" a recommendation to disinter the remains associated with Grave 407. ECF 63-3 at 9.	
7. In sum, these men survived the initial fighting of World War II and the infamous Bataan Death March. ECF 19 at 10-12; ECF 26 at 12-15. But each one ultimately succumbed to disease and malnutrition while confined in Cabanatuan POW camp. ECF 19 at 10-12; ECF 26 at 12-15.	Undisputed.
8. At the conclusion of hostilities, the U.S. Army Graves Registration personnel exhumed the remains from the camp cemetery and, while some service members were identified immediately, many of the remains were buried as "unknowns" at the Manila American Cemetery, including the remains of the service members in this case. ECF 61-1 at 7. Due to improper processing of the remains by military contractors, many remains were substantially commingled with other service members' remains. See ECF 26 at 16.	It is not known whether the remains of Morgan, Bruntmyer, and Hansen were buried as unknowns at Manila American Cemetery. While it is possible that they were buried as unknowns in graves associated with Common Graves 407, 704, and 822, it is also possible that they were misidentified and buried elsewhere. The American Graves Registration Service (AGRS) disinterred remains from Camp Cabanatuan, and engaged in a process for identifying remains. See App'x ¶¶ 99-103. The remains were commingled due to burial in common graves, and AGRS lacked the technology to accurately disentangle them. *Id.* Government reviews have also concluded that the early identification effort led to additional commingling. *Id.*
B. First Lieutenant Alexander R. "Sandy" Nininger	
9. First Lieutenant Nininger served in the 1st Battalion, 57th Infantry Regiment, Philippine Scouts, in the Pacific Theater during World War II. Ex. 20 at 1 (DoD Case Summary for Nininger, June 2011). After fighting began, 1LT Nininger's Battalion was positioned in an area that did not come under heavy attack. Id. So, he voluntarily attached himself to Company K, 3rd Battalion, 57th Infantry Regiment, a company that was engaged in intense fighting with the enemy and under constant attack. Id. In the ensuing hand-to-hand combat,	Undisputed.

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1LT Nininger alone forced his way deep into enemy territory. Id. Despite running out of ammunition and being injured, 1LT Nininger could not be restrained and he proceeded to use his bayonet as he charged the enemy. Id. at 2. On January 12, 1942, a wounded 1LT Nininger was finally attacked and killed by three bayonet-wielding Japanese. Id. Reports state that those three Japanese lay dead beside him. Id. He was posthumously awarded the Medal of Honor for his actions against the enemy. Id.; ECF 19 at 8; ECF 26 at 7.	
10 (Sentence 1). At the conclusion of hostilities, 1LT Nininger's remains were exhumed from a grave near where he was known to have been killed. ECF 56-1 at 10; Ex. 21 at 6-8 (IDPF).	The cited evidence is not sufficient to conclude that the remains designated X-1130 are those of 1LT Nininger. The only documentary evidence cited is the March 7, 1950 memorandum from AGRS to OQMG (Pls.' Ex. 21 at 6-8). This document relies on the "probability that the body of Lt. Nininger was buried in Grave 9 of the Abucay Cemetery from where [X-1130] was disinterred," after discounting various other pieces of evidence. Id. ¶ 1(b)(4). AGRS's earlier memoranda demonstrate that its reliance on the association between 1LT Nininger and Grave 9 depended on Col. Clarke's February 1944 letter, which Plaintiffs themselves consider unreliable. See 3d Kupsky Decl. ¶ 26.a. While it was "the opinion of this [AGRS] Headquarters that the remains of Unknown [X-1130] are in reality those of Lt. Nininger," March 7, 1950 Mem. ¶ 1(b)(6), OQMG rejected that opinion based on contrary evidence. See 3d Kupsky Decl. ¶ 26.e-g. In addition, this sentence is not supported by ¶ 19 of Mr. Eakin's March 28, 2019 declaration, which states that "remains *believed to be* those of Nininger were exhumed from a grave near where he was known to have perished." Pls.' Ex. 1, ECF No. 64-2 at

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	10 (emphasis added) (previously filed as ECF No. 56-1). This fact is not sufficient to conclude that the remains are in fact those of Nininger. While it is Mr. Eakin's ultimate opinion that the remains designated X-1130 are those of 1LT Nininger, his opinion lacks adequate basis and should be excluded for failure to satisfy F.R.E. 702. See Defs.' Daubert Motion, ECF No. 55.
10 (Sentence 2). The exhumation was directed by U.S. Army Master Sergeant Abie Abraham. ECF 56-1 at 10; ECF 61-1 at 29.	The cited evidence is not sufficient to conclude that Sgt. Abraham "directed" the exhumation of X-1130. Defendants' Appendix states only that Sgt. Abraham interviewed an Abucay resident on December 11, 1945, who stated that he dug graves for five Americans in Abucay Cemetery in January 1942. Sgt. Abraham listed identities as "Five (5) Unknown Americans." See Kupsky Decl. Ex. 6, ECF No. 63-4; Defs.' App'x ¶ 134, ECF No. 61-1. A different officer oversaw the disinterment of X-1130. See Kupsky Decl. ¶ 24.a & Ex. 12.
10 (Sentence 3). Master Sergeant Abraham was personally selected by General MacArthur to direct the retrieval of American remains from the Province of Bataan. ECF 63-3 at 5.	The cited evidence does not support the factual assertion that Sgt. Abraham was selected to "*direct* the retrieval of American remains from the Province of Bataan." The source states that Sgt. Abraham was assigned to "retrace the Death March and *help AGRS* locate and disinter isolated graves." Defs.' App'x ¶ 15 (emphasis added).
10 (Sentence 4). The remains later designated as Manila #2 X-1130 were immediately recorded by Master Sergeant Abraham as 1LT Nininger based on his interviews of the Filipino gravedigger who had prepared the graves for five Americans in the Abucay cemetery. Ex. 22 (Report of Interment); Ex. 56-1 at 10-11; ECF 61-1 at 29; Ex. 23 at 12 (X-Files for X-1130).	This sentence makes unwarranted leaps from the evidence. It is true that Sgt. Abraham interviewed a Filipino resident of Abucay on December 11, 1945 who stated that he dug graves for five Americans in the Abucay Cemetery. See 3d Kupsky Decl. ¶ 24a. But it is not known that the remains designated X-1130 were "immediately recorded" as 1LT Nininger. Instead, it appears that

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	1LT Nininger's name was added later. See 3d Kupsky Decl. ¶¶ 25.a., Exs. 12, 13. It is also not known that Sgt. Abraham played any role in the association between X-1130 and 1LT Nininger. See 4th Kupsky Decl. ¶ 21. Sgt. Abraham did not sign either disinterment/internment report to which 1LT Nininger's name was added. See Kupsky Decl. Exs. 12, 13 (signed by S/Sgt. Thomas Corbett and S/Sgt. R.C. Barrett). The interrogation report Sgt. Abraham did sign does not mention 1LT Nininger, referring only to "Five (5) Unknown Americans." See 3d Kupsky Decl. Ex. 6. And Sgt. Abraham never mentioned the potential recovery of 1LT Nininger's remains in his books. See 4th Kupsky Decl. ¶ 22. So many people died around Abucay in January 1942 that it cannot be assumed that Sgt. Abraham linked the remains from Abucay Cemetery to 1LT Nininger. See 3d Kupsky Decl. ¶¶ 24.
11 (Sentence 1). The remains were transported to a temporary cemetery.	Undisputed. See 3d Kupsky Decl. Ex. 13 (reporting internment at Manila No. 2 on January 18, 1946). The remains were then transported to the Mausoleum at Nichols Field for identification. See App'x ¶ 2.
11 (Sentence 2). During the initial identification process, a board of officers at the Philippine Command recommended identifying the X-1130 remains as those of 1LT Nininger. Ex. 1-C at 3 (recommended identification); ECF 63-6 at 11; Ex. 23 at 2-12 (X-1130 remains associated with Nininger for years).	It is undisputed that a December 8, 1948 memorandum (which the AGRS board adopted on December 17, 1948) recommended that the remains designated X-1130 be identified as 1LT Nininger. See 3d Kupsky Decl. Ex. 19 (also Pls.' Ex. 1-C at 4). This recommendation was then forwarded to OQMG by the AGRS Headquarters, Philippine Command on December 27, 1948. See Pls.' Ex. 1-C at 3. It is also undisputed that the remains designated X-1130 had been associated with 1LT Nininger for several years. See 3d

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	Kupsky Decl. ¶ 25.b (explaining that correspondence indicated that the association had been made by AGRS between February and June 1946). Someone in AGRS added notes at an unknown point to the original January 8, 1946 disinterment report and February 13, 1946 report of internment at Manila No. 2. See 3d Kupsky Decl. ¶ 25.a; id. Ex. 12 (reporting disinterment of an "Unknown American" for which the words "Possibly Nininger" appear to have been typed later); id. Ex. 13 (reporting internment of "UNKNOWN X-1130," with a parenthetical "Nininger, Alexander R." added later in a different typeface and the statement "See attached letter.").
11 (Sentence 3). The Philippine Command stated that 1LT Nininger's remains were recovered and originally believed to be known as belonging to 1LT Nininger. Ex. 1-C at 3.	This sentence mischaracterizes the evidence. The AGRS Headquarters, Philippine Command stated in its December 27, 1948 transmittal letter that X-1130 "was recovered December 11, 1945 as a BTB [believed-to-be] known." Pls.' Ex. 1-C at 3. The transmittal letter is inaccurate because X-1130 was not disinterred until January 8, 1946 and because the association with 1LT Nininger does not appear to have been made at the time of recovery. See 3d Kupsky Decl. Ex. 12; see also 3d Kupsky Decl. ¶ 25.a-b.
11 (Sentence 4). They also recognized that 1LT Nininger was the first Medal of Honor winner in World War II. Id.	Undisputed.
11 (Sentence 5). The evidence supported this recommendation, except for an estimated height (this estimate was inaccurate). Id. at 4 (dental chart compares favorably to 1LT Nininger); ECF 55-13 at 75; ECF 61-1 at 30.	The cited evidence does not support the conclusion that all the evidence supported AGRS's December 1948 recommendation "except for an estimated height." First, Plaintiffs cite Defendants' Appendix at 30, which merely states "Beginning in December 1948, AGRS repeatedly sought identification of X-1130 as 1LT

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	Nininger, relying primarily on COL Clarke's letter. Kupsky Decl. ¶ 26 & Exhibits 19, 21, 24." Defs.' App'x ¶ 144. Second, Plaintiffs cite a single page from Mr. Eakin's deposition in which he does not address any of the evidence upon which AGRS relied but asserts that "the Quartermaster General came back and disapproved the [first AGRS] recommendation based on the height." Eakin Dep. at 75:6-8 (Mr. Eakin also asserts without evidence that the first AGRS recommendation was made "prior to any input from Clarke" which is not supported by the record). Third, Plaintiffs cite the December 1948 recommendation itself. In its recommendation, AGRS relied on (1) the internment report's statement that X-1130 had been buried in Abucay Cemetery in January 1942, (2) Col. Clarke's assertion that 1LT Nininger was buried in Grave No. 9, (3) the fact that the internment reports were filled in with 1LT Nininger's information based on Col. Clarke's letter, (4) the fact that a dental chart of X-1130 "compares favorably with" 1LT Nininger's records. 3d Kupsky Decl. Ex. 19. While a January 1942 burial in Abucay and X-1130's dental chart—which had no distinct features—were not inconsistent with 1LT Nininger's circumstances, they did not link X-1130 to 1LT Nininger more than to the numerous other servicemembers who died in that area in January 1942. See 3d Kupsky Decl. ¶ 25.d.; Shiroma Decl. ¶ 14; see also 3d Kupsky Decl. Ex. 20 (February 17, 1949 response from OQMG noting that dental records were not unique enough to associate X-1130 with 1LT Nininger). Thus, the primary evidence

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	on which AGRS relied was the association between 1LT Nininger and Grave No. 9. 3d Kupsky Decl. ¶ 25. This evidence does not support AGRS's conclusion because (1) the parties agree that Col. Clarke's statements are unreliable; see App'x 141; (2) Col. Clarke referred to "grave No. 9 behind the South wall of the Abucay Church," and while X-1130 was designated Grave 9, it was recovered from Abucay Cemetery not from the churchyard, see 3d Kupsky Decl. ¶ 24; 3d Kupsky Decl. Ex. 20 (February 17, 1949 response from OQMG noting apparent discrepancy between X-1130 and the location specified by Col. Clarke); and (3) there is no evidence that AGRS possessed any information linking X-1130 to 1LT Nininger other than Col. Clarke's statement. See App'x ¶¶ 142-43. Plaintiffs cite no support for their conclusion that "this [height] estimate was inaccurate." While Mr. Eakin opines that height estimates in general are inaccurate, his testimony in this regard does not satisfy F.R.E. 702 and should be excluded. See ECF No. 55. To the contrary, Dr. Emanovksy has demonstrated that, using current methodology and the bone measurements taken by AGRS, the estimated stature of X-1130 cannot be reconciled with the recorded height of 1LT Nininger. See 2d Emanovsky Decl. ¶¶ 13-17.
11 (Sentence 6). On five different occasions, the Philippine Command recommended to the Department of the Army that it should formally identify the X-1130 remains as those of 1LT Nininger, but this was disapproved because of the inaccurate height estimates. ECF 55-13 at 76, 100-	The cited evidence does not support the conclusion that AGRS submitted five separate recommendations to identify X-1130 as 1LT Nininger. Plaintiffs cite Defendants' Appendix which pointed to two AGRS board recommendations and an AGRS reconsideration request. See

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101; ECF 61-1 at 30; ECF 63-6 at 11, 13-14; ECF 63-7 at 4-6.	Defs.' App'x ¶ 144 (citing 3d Kupsky Decl. Ex. 19 (the December 8, 1948 initial AGRS board recommendation), id. Ex. 21 (the April 26, 1949, supplemental AGRS board recommendation), id. Ex. 24 (the March 7, 1950 AGRS reconsideration request). Plaintiffs appear to also rely on AGRS letters dated December 27, 1948 and May 5, 1949 that transmitted the initial and supplemental AGRS board recommendations. See Pls.' Ex. 1-C at 3 (Dec. 27, 1948 AGRS Headquarters, Philippine Command letter transmitting initial board recommendation); Eakin Dep. at 101:2-16 (discussing May 5, 1949 AGRS letter transmitting supplemental board recommendation).
11 (Sentence 7). The remains are currently buried as "unknown" in Manila American Cemetery Grave J-7-20. ECF 19-9; ECF 26 at 9.	It is undisputed that the remains designated X-1130 are currently buried as an unknown in Manila American Cemetery Grave J-7-20.
C. Colonel Loren P. Stewart	
12 (Sentence 1). U.S. Army Colonel Loren P. Stewart entered service in 1917 and commanded the 51st Infantry Regiment of the 51st Infantry Division (Philippine Army), U.S. Army Forces in the Far East, in the Pacific during World War II. Ex. 25 at 1 (DoD Case Summary for Stewart).	Undisputed.
12 (Sentence 2). Following the Japanese invasion, Colonel Stewart helped organize an improvised counterattack. Id. at 2.	Undisputed.
12 (Sentences 3). At some point during the night of the counterattack (January 13, 1942), Col. Stewart was killed by machine-gun fire while on a reconnaissance patrol. Ex. 26 (Report of Death for Stewart).	Undisputed.
12 (Sentence 4). He was awarded the Silver Star for this action. Ex. 27 (Citation for Silver Star).	Undisputed.

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12 (Sentence 5). Fortunately, the men he fought with were able to recover his remains. Ex. 25 at 3 (case summary).	The cited evidence does not support the conclusion that the 51st Regiment was able to recover and bury his remains. There is no evidence from any member of the 51st Regiment that Col. Stewart was recovered and buried. Instead, the only evidence is from a Filipino civilian who recalled in December 1946 that Philippine Scouts told him they were burying an American colonel. See Pls.' Ex. 25 at 3 (DPAA Case Summary describing Reuben Caragay's statement); 3d Kupsky Decl. Ex. 36. Because dental evidence and stature estimation rule out identification of these remains with Col. Stewart, Mr. Caragay's recollection cannot be relied upon. See 3d Kupsky Decl. ¶ 33; 2d Emanovksy Decl. ¶¶ 18-20 ; Shiroma Decl. ¶¶ 16-18.
12 (Sentence 6). But his loss was disastrous blow and his Regiment never recovered. Id.	It is undisputed that the loss of Col. Stewart and Captain Wilbur Kreuse threw the 51st Infantry Regiment into confusion and was a disastrous blow from which it never really recovered. See Pls.' Ex. 25 at 2-3.
13 (Sentence 1). Just like with 1LT Nininger, Colonel Stewart's remains were later discovered by Master Sergeant Abie Abraham and designated as Manila #2 X-3629. Ex. 29 (Letter from Abie Abraham); ECF 63-8 at 10; Ex. U at 26 (X-files associated with Stewart/X-3629).	This sentence inaccurately assumes that Sgt. Abraham discovered the remains designated X-1130 and associated them with 1LT Nininger. See supra, Response to ¶ 10 (Sentences 2-4). This sentence also makes the unwarranted assumption that the remains designated X-3629 are those of Col. Stewart. It is undisputed that Sgt. Abraham discovered and disinterred the remains designated X-3629 and associated them with Col. Stewart. See 3d Kupsky Decl. Exs. 36, 37 (duplicated as Pls.' Ex. 29).[2]

[2] Exhibit 37 to the 3d Kupsky Declaration was inadvertently mislabeled as Exhibit 38. It is not known what Plaintiffs intended to cite by referring to "Ex. U at 26 (X-files associated with Stewart/X-3629)" because there is no Exhibit U and the excerpt from X-3629 that Plaintiffs included as Plaintiffs Exhibit 28 does not have 26 pages.

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13 (Sentence 2). Sergeant Abraham explained that he knew Colonel Stewart very well and spent a week trying to locate Colonel Stewart's grave. Ex. 29; ECF 63-8 at 10.	Undisputed.
13 (Sentence 3). Finally, an informant approached Sergeant Abraham and provided him with detailed information about the burial of an American Colonel. Ex. 29; ECF 63-8 at 10.	It is undisputed that Ruben Caragay, a Filipino civilian provided a statement to Sgt. Abraham on December 28, 1946, who recorded the statement as follows: "During the battle of Abucay, I went to the Hacienda to check on the things near my place. I saw Philippine Scouts carrying the deceased American. The Scouts did not talk much. They said the deceased is an American Colonel. I saw the Scouts bury the deceased. The Scouts were from the 57th Inf." 3d Kupsky Decl. Ex. 36.
13 (Sentences 4-6). The information provided was consistent with other known facts. For example, Colonel Stewart was the only Colonel killed in that area. Ex. 29; ECF 63-8 at 10. Additionally, no other possible candidates with the last name Stewart or Stuart died in the area. Ex. 29; ECF 63-8 at 10.	While it is undisputed that no other colonels were killed in that area, it is not accurate that all of the information provided was consistent with known facts. Mr. Caragay stated that the Philippine Scouts were from the "57th Inf," when Col. Stewart was part of the 51st Infantry. See above. It is an unwarranted assumption that Mr. Caragay reported that the deceased was named Stuart. Instead, it appears that Mr. Caragay reported only his recollection that the Philippine Scouts stated they were burying an American colonel and Sgt. Abraham supplied the name for his report. See 3d Kupsky Decl. Exs. 36, 37. In addition, as discussed below, X-3629 is inconsistent with other known facts about Col. Stewart.
13 (Sentence 7). After reviewing the information available, Sergeant Abraham concluded that the remains were those of Colonel Stewart. ECF 63-8 at 10.	It is undisputed that Sgt. Abraham believed that X-3629 was the remains of Col. Stewart. However, he lacked identification authority and he sent the remains for AGRS processing as an

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	unknown "believed-to-be" Col. Stewart. See App'x ¶¶ 161-62.
13 (Sentence 8). Unfortunately, while Sergeant Abraham properly documented the identity of the remains, he misspelled Colonel Stewart's last name as "Stuart." ECF 61-1 at 32-33; Ex. 28 at 2-8 (Dental Chart referencing "Stuart" and statement saying X-3629 is believed to be the remains of Col. "Stuart").	It is undisputed that Sgt. Abraham misspelled Col. Stewart's name as "Stuart." See 3d Kupsky Decl. Ex. 36. It is also undisputed that the association with Col. Stewart was misspelled "Stuart" throughout the X-3629 file. See 3d Kupsky Decl. ¶ 31.
13 (Sentence 9). This resulted in recovery personnel requesting the wrong dental records.	This sentence is entirely unsupported and based on unwarranted speculation. There is no indication in X-3629 that AGRS requested the wrong servicemember dental records. Dr. Shiroma has compared the dental charts for X-3629 to those from Col. Stewart's file and concluded that they cannot be reconciled. See Shiroma Decl. ¶¶ 16-18; 3d Kupsky Decl. ¶ 33.
13 (Sentence 10). Without the dental records confirming the identification, the remains were buried as "unknown" in Manila American Cemetery Grave N-15-19. ECF 19 at 9; ECF 26 at 10.	It is undisputed that the remains designated X-3629 were buried as an unknown in Grave N-15-19 at Manila American Cemetery. For the reasons stated in the response to the prior sentence, it is unwarranted speculation that the basis for the unknown determination was a lack of dental records.
D. Brigadier General Guy O. Fort	
14 (Sentence 1). U.S. Army Brigadier General Guy O. Fort enlisted in the U.S. Army in 1899. Ex. 30 at 1 (DoD Case Summary for Fort).	Undisputed.
14 (Sentence 2). He first received a commission in the Philippine Constabulary in 1904 and rose steadily through the ranks. Id.	Undisputed.
14 (Sentence 3). He was said to be a "regular Daniel Boone who spoke every native dialect of Mindanao." Id.	Undisputed.
14 (Sentence 4). Subsequently, he was promoted to command the 81st Division of the Philippine Army. Id.	Undisputed.

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14 (Sentence 5). After fighting began, Brig. Gen. Fort organized the Moro Bolo Battalion as an auxiliary of the Philippine Army, which would later become a guerrilla force. Id.	Undisputed.
14 (Sentence 6). On May 6, 1942, General Wainwright ordered the surrender of all U.S. forces in the Philippines. Id.	Undisputed.
14 (Sentence 7). While Brig. Gen. Fort eventually complied with the order on May 27, 1942, he still commanded guerrilla forces in the Philippine Islands when he was taken prisoner by enemy forces. Id. at 2; ECF 19 at 10; ECF 26 at 10.	It is undisputed that Brig. Gen. Fort surrendered on May 27, 1942. The cited evidence does not support the statement that Brig. Gen. Fort continued to command guerrilla forces after his surrender. Instead, the DPAA Case Summary and Defendants' Amended Answer state that a portion of the Moro Bolo Battalion (an auxiliary of the Philippine Army) transformed into a guerilla operation with Brig. Gen. Fort's blessing. See Am. Answer ¶ 28, ECF No. 26; Pls.' Ex. 30 at 2. Plaintiffs' complaint is not admissible evidence at the summary judgment stage.
14 (Sentence 8). The Japanese tried to force Brig. Gen. Fort to order the guerilla forces to surrender, but he refused to cooperate. Ex. 30 at 2.	Undisputed.
14 (Sentence 9). While the Japanese were torturing the General, the General shouted: "You may get me but you will never get the United States of America." ECF 63-9 at 21.	It is undisputed that Ignacio Cruz, a provincial governor, reported to AGRS that an unidentified Filipino soldier told Mr. Cruz that he saw Brig. Gen. Fort executed behind the Lourdes Academy and that he heard Brig. Gen. Fort shout "You may get me but you will never get the United States of America." 3d Kupsky Decl. Ex. 42 (duplicated as Pls.' Ex. 31 and Pls.' Ex. 32 at 3-4). However, this second-hand information from an unidentified witness is not sufficient to establish the location of Brig. Gen. Fort's execution or his words. The available evidence does not establish the reliability of the witness, or the circumstances under which he was a

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	"guard in the premises of the Lourdes Academy."
14 (Sentence 10). Subsequently, the Japanese executed him because he refused to help. Id.	It is undisputed that the Imperial Japanese executed Brig. Gen. Fort, apparently because he refused to order the guerilla forces to surrender.
14 (Sentence 11). He was the only American-born general officer executed by the Japanese. ECF 26 at 10; see also Ex. 32 at 3 (X-files for Fort/X-618).	Defendants are unaware of any other American-born general executed by the Japanese on Mindanao. See Am. Answer ¶ 28. Plaintiffs broader statement is unsupported; in addition to Defendants' Answer, they cite only Mr. Cruz's affidavit which does not address who else the Japanese may have executed. See 3d Kupsky Decl. Ex. 42 (duplicated at Pls.' Ex. 32 at 3-4).
15 (Sentence 1). The Governor of Misamis Oriental Province, Ignacio S. Cruz, provided a sworn statement recounting the execution and burial of General Fort by the Japanese as retaliation. Ex. 31; ECF 63-9 at 21-22.	It is undisputed that Ignacio Cruz, the governor of Misamis Oriental Province provided a sworn statement to AGRS on July 14, 1947 at the time that he provided the "supposed remains of Gen. Guy O. Fort" to AGRS. See 3d Kupsky Decl. Ex. 42 (duplicated as Pls.' Ex. 31). However, Mr. Cruz's statement does not definitively "recount[] the execution and burial of General Fort by the Japanese as retaliation." Instead, Mr. Cruz has compiled a variety of statements from other witnesses that primarily describe the possible death and burial of an unidentified American. See id.; 3d Kupsky Decl. Ex. 39 at 3.
15 (Sentence 2). Governor Cruz's sworn statement was supported by his conversation with Lt. Kito of the Japanese army, as well as information he received from Dr. Vicente Velez and a Filipino Cook.	It is undisputed that in his statement, Mr. Cruz reported a conversation he had with Lt. Kito of the Japanese army in late September 1942, which did not mention an American officer's name or rank. See 3d Kupsky Decl. Ex. 42. It is also undisputed that Mr. Cruz reported a conversation with Dr. Vicente Velez who stated he heard singing in the night and the sound of shovels before dawn near Lourdes Academy in Cagayan. See

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	id. It is also undisputed that Mr. Cruz reported that the Kempeitai, the Japanese military police, used the Lourdes Academy and that a Filipino cook for the Kempeitai told Mr. Cruz that he saw a "big American" loaded into a truck and brought from Lourdes Academy. See id. However, none of these statements definitively involve Brig. Gen. Fort.
15 (Sentence 3). Moreover, Governor Cruz questioned a caretaker of the grounds surrounding the house where Brig. Gen. Fort was reportedly executed, and the information he was told supported his conclusions. ECF 63-9 at 22.	It is undisputed that Mr. Cruz reported that a caretaker at the Ateneo de Cagayan told Mr. Cruz that he saw a big American being buried by Japanese soldiers on the grounds of the Ateneo de Cagayan. 3d Kupsky Decl. Ex. 42. The AGRS interviewed the same person, whose name was recorded as Felipe Mabalos, who stated that he saw Japanese soldier dig a grave on the grounds and that he suspected it was for a high-ranking American. 3d Kupsky Decl. Ex. 39 at 2-3. This information likewise does not definitively involve Brig. Gen. Fort.
15 (Sentence 4). Additionally, a Filipino soldier told Governor Cruz that he personally saw Brig. Gen. Fort bayoneted and killed. ECF 63-9 at 21.	It is undisputed that Mr. Cruz reported to AGRS that an unidentified Filipino soldier told Mr. Cruz that he saw Brig. Gen. Fort executed behind the Lourdes Academy. 3d Kupsky Decl. Ex. 42. However, this second-hand information from an unidentified witness does not establish the reliability of the witness, or identify under what circumstances he was a "guard in the premises of the Lourdes Academy," a Kempeitai location, or explain how this unidentified soldier could recognize Brig. Gen. Fort. Mr. Cruz himself did not appear to give conclusive weight to this statement because he referred to the remains only as the "supposed remains of Gen. Guy O. Fort." Id.

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15 (Sentence 5). As a result of his investigation and communications with the Philippine Army Headquarters, Governor Cruz had Brig. Gen. Fort's grave dug up and turned the remains over to the American Grave Registration Service. ECF 63-9 at 22.	It is undisputed that Mr. Cruz had the grave designated X-618 disinterred and turned over the remains to AGRS. The evidence does not support the conclusion that these remains are in fact those of Brig. Gen. Fort.
15 (Sentence 6). General Fort's remains were later designated as X-618 Leyte #1 Cemetery. ECF 63-9 at 21-22; ECF 61-1 at 33.	It is undisputed that the remains Mr. Cruz turned over to AGRS were designated as X-618 Leyte #1 Cemetery. The evidence does not support the conclusion that these remains are in fact those of Brig. Gen. Fort.
15 (Sentence 7). Charles Vanderbilt, working for the AGRS, examined the remains and concluded that the remains could be those of Brig. Gen. Fort. Ex. 32 at 8.	This sentence mischaracterizes the cited evidence. The December 1, 1947 Identification Check List completed by Charles Vanderbilt records receipt of X-618 at the AGRS Mausoleum in Manila. See Pls.' Ex. 32 at 5-8. Mr. Vanderbilt did not compare the remains to records regarding Brig. Gen. Fort. Instead, he recorded that "according to" Mr. Cruz's affidavit, "[t]hese remains could possibly be of General Guy O. Fort." Id. at 8. There is no indication that Mr. Vanderbilt compared any details of the remains to the records of Brig. Gen. Fort.
15 (Sentence 8). The identification checklist and dental records did not exclude Brig. Gen. Fort as a candidate. Id. at 10.	This sentence mischaracterizes the cited evidence. The December 3, 1947 Report of Internment reports that an "Identification Check List and Dental Chart [were] accomplished." Pls.' Ex. 32 at 10. It also reports that either unknown X-618 or X-619 "could be Gen Guy O. Fort," apparently referring to the circumstances of recovery. There is no indication that the AGRS personnel completing the internment report compared any details of the remains to the records of Brig. Gen. Fort.
15 (Sentence 9). Further, 2nd Lieutenant Charles G Waple, Jr. signed a certification accepting the	Undisputed. However, because this certification is captioned "Office of the

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remains from Ignacio S. Cruz as those of Brig. Gen. Fort. Id. at 2.	Governor, Cagayan, Misamis Oriental," it appears that it was drafted by Mr. Cruz and signed by AGRS to accept receipt of the remains. This does not constitute an AGRS finding.
15 (Sentence 10). The remains were ultimately buried in Manila American Cemetery Grave L-8-113. ECF 19 at 10; ECF 26 at 11.	Undisputed.
II. Who Has these Service Members' Remains Now? The ABMC and DPAA	
A. ABMC	
16 (Sentence 1). The ABMC is an independent agency that is responsible for maintaining and administering American military cemeteries abroad, including the Manila American Cemetery. See Exec. Order No. 10057, 14 Fed. Reg. 2585 (May 14, 1949), as amended Exec. Order 10087, 14 Fed. Reg. 7287 (Dec. 3, 1949); 36 U.S.C. § 2101, et seq..	Undisputed.
16 (Sentence 2). Today, no statute forbids the disinterment or exhumation of remains from ABMC cemeteries.	This legal assertion does not address ABMC's authority. The statute conferring authority on ABMC gives it responsibility "for the design and construction of the permanent cemeteries [outside the United States]," 36 U.S.C. § 2104; to employ sufficient personnel to "ensure adequate care and maintenance of cemeteries, monuments, and memorials," 36 U.S.C. § 2102(a); and to "maintain the cemetery [transferred to it] and all improvements in it." 36 U.S.C. § 2111(b)(2). Nowhere does Congress give ABMC authority to determine the identity of remains or approve family requests for disinterment. Instead, Congress reserved and assigned disinterment authority to DoD. See 36 U.S.C. § 2104(4) ("[T]he 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."); *see also* Exec. Order. 10057, 14 Fed. Reg. 2585 (May 14, 1949 ("The

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	Department of the Army shall have the right to re-enter any of such cemeteries . . . for the purpose of making exhumations or reinterments should any such action become necessary.").
16 (Sentences 3, 4). But, unlike other military cemeteries, the ABMC has no process for families of service members to request exhumation or disinterment of remains. See Army Regulation 290-5, ¶2-10. The ABMC simply "has no family disinterment request policy." Ex. 33 at 9, 12 (ABMC "has no policy that allows a next of kin to request disinterment or claim unidentified remains.").	It is undisputed that the U.S. Army provides a process for family members to request disinterment of identified remains from Army national cemeteries. *See* 32 C.F.R. § 553.25; Army Regulation 290-5 ¶ 2-10 (1980). It is also undisputed that the ABMC has no process for family members to request disinterment because that function is assigned to DoD.
16 (Sentences 5, 6). It also appears to have no position on whether next of kin have the right to obtain possession of the remains of their deceased relatives interred at Manila American Cemetery for purposes of providing a burial. Id. at 10-11. Instead, the ABMC states that it defers to the DoD on matters relating to disinterment of remains from the cemeteries that it administers. Id. at 7.	The ABMC has no authority to identify remains or to permit possession of unidentified remains by individuals claiming to be their next of kin. Therefore, the ABMC defers to DoD regarding on matters relating to disinterment, and possible repatriation, of unidentified remains from the cemeteries ABMC administers, including whether a next of kin has any right and/or authority to obtain possession of unidentified remains interred at Manila American Cemetery. Pls.' Ex. 33 at 7, 10-11.
16 (Sentence 7). If a family submits a disinterment request to the ABMC, the ABMC tells the family to contact the DoD service casualty office.	It is undisputed that if a family submits a disinterment request to the ABMC, the ABMC redirects the family to the appropriate DoD service casualty office. See Pls.' Ex. 33 at 9, 12.
17 (Sentence 1). A brief background of interments at ABMC cemeteries is particularly helpful for this case.	Undisputed.
17 (Sentences 2, 3). Originally, pursuant to Public Law 80-368, the next of kin of fallen service members from WW2 could choose to have remains either (1) interred in overseas military cemeteries now controlled by the ABMC or (2) returned to the United States. If the next of kin chose option	It is undisputed that Congress permitted the next of kin of "individual identified remains" to choose interment in an overseas military cemetery or interment in the United States. *See* Pub. L. No. 80-368 §§ 3, 4, 61 Stat. 779 (Aug. 5,

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number 1 and elected for burial to take place in the overseas cemetery, then the burial was generally considered permanent. See Pub. L. No. 80-368; ECF 31-1 at 222-227 (Report to Congress on Issues Related to Requests for Disinterment of Remains Buried in Overseas Military Cemeteries, Sept. 29, 2005).	1947). Congress also gave DoD authority to determine where to inter "group or mass burials, which include the remains of one or more known individuals" and authority to inter "unidentified remains" in the overseas military cemeteries. *See id.* Burials in the overseas cemeteries transferred to ABMC are generally considered permanent. *See id.* § 9 (providing for ABMC to be responsible for the "permanent design and construction of the cemeteries"); 36 U.S.C. § 2104 (providing for "permanent cemeteries"); Report to Congress on Issues Relating to Disinterment of Remains Buried in Overseas Military Cemeteries (Sept. 29, 2005) at 2 (ECF No. 33-1 at 224) ("Interments in overseas military cemeteries are permanent.").
17 (Sentences 4-6). But, if the deceased's next of kin was not given the opportunity to make a final burial decision, then interment is not considered final. See ECF 31-1 at 222-227 (Report to Congress on Issues Related to Requests for Disinterment of Remains Buried in Overseas Military Cemeteries, Sept. 29, 2005). For example, two service members buried in an ABMC cemetery were disinterred after more than 40 years because the Army did not provide the next of kin with disposition information. Years later, the Army acknowledged that it should have asked the next of kin for disposition instructions and the remains were disinterred. See ECF 31-1 at 222-227; 36 U.S.C. § 2104 (armed forces have ability to exhume or re-inter a body if it is deemed necessary).	Sentence 4 mischaracterizes the cited evidence. It is undisputed that in 2005, the Secretary of the Army (the executive agent for disposition policy related to the World War I and II reburial programs at the time) stated that it was Army policy that disinterment requests would be approved if it is determined that the Army made an error at the time of final disposition. *See* Report to Congress on Issues Relating to Disinterment of Remains Buried in Overseas Military Cemeteries (Sept. 29, 2005) at 2 (ECF No. 33-1 at 224). Under this policy, between 1952 and 2005, the Army approved three disinterments on the ground that it did not provide disposition information to any next of kin (1987, 1990) or the correct next of kin (2001) for the identified remains during the statutory disposition period. *See id.* at 2-3. These actions do not establish any policy permitting disinterment of *unidentified*

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	remains interred in overseas military cemeteries pursuant to the authority of Pub. L. No. 80-368 § 4.
18. The ABMC currently has possession of 1LT Nininger, Col. Stewart, Brig. Gen. Fort, and Private First Class Hansen's remains, which are buried at Manila American Cemetery.	This sentence is unsupported and depends on unwarranted speculation. The graves designated X-1130, X-3629, X-618, and nine graves of unknowns associated with Cabanatuan Common Grave 407 are interred at Manila American Cemetery under ABMC jurisdiction. However, it is not known that these graves contain the remains of 1LT Nininger, Col. Stewart, Brig. Gen. Fort, and PFC Hansen.
B. The DoD and DPAA	
19 (Sentence 1). Unlike the ABMC, the DPAA is an agency within the Department of Defense.	Undisputed. See DoD Directive 5110.10 § 1.3; 10 U.S.C. § 1501(a).
19 (Sentence 2). It was purportedly established pursuant to Section 1509 of Title 10, U.S.C., as the DoD's office responsible for accounting for missing personnel from past conflicts. See DoD Directive 5110.10, Defense POW/MIA Accounting Agency (Jan. 13, 2017).	It is undisputed that DPAA it the DoD component assigned to "establish[] and execute[] the DoD Past Conflict Accounting Program" pursuant to "Sections 1501 to 1513 of Title 10, U.S.C." DoD Directive 5110.10 § 2(b). It was established in 2015 pursuant to Congress's December 2014 amendment of 10 U.S.C. § 1501(a).
19 (Sentence 3). This became necessary because Congress ordered the DoD to start bringing our heroes from World War II back home for proper burial, which the DoD had refused to consistently do on its own for decades. See ECF 61-1 at 13 ("Until October 2009, DoD had no statutory obligation to account for missing personnel from World War II.").	This sentence mischaracterizes the cited evidence. It is a fact that Congress gradually expanded DoD's statutory accounting mission for past conflicts. It first assigned accounting for the Korean War, Cold War, and Vietnam War. See Pub. L. No. 104-106 § 569, 110 Stat. 186, (Feb. 10, 1996) (creating 10 U.S.C. § 1509). In 1999, Congress directed DoD to make efforts to search for World War II servicemembers "lost in the Pacific theater of operations . . . while engaged in flight operations." Pub. L. No. 106-65 § 576, 113 Stat. 512 (Oct. 5, 1999). Only in October 2009 did Congress expand DoD's statutory mission to include all losses from World

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	War II. See Pub. L. No. 111-84 § 541, 123 Stat. 2190 (Oct. 28, 2009). Plaintiffs cite no evidence for their assertion that "DoD had refused to consistently [bring World War II servicemembers back home for proper burial] on its own for decades."
19 (Sentence 4). The DoD imposes on the DPAA an exhaustive list of regulations and policies that set forth specific requirements and standards.	It is undisputed that DPAA is subject to numerous DoD regulations, including as relevant here, DoD Directive 5110.10, DoD Directive 2310.07, and DoD Directive-type Memorandum (DTM)-16-003.
19 (Sentence 5). The DPAA claims that its mission is to provide the fullest possible accounting for missing personnel and is "committed and willing to do all we can to assist each other, thereby strengthening our collective ability to partner with family organizations, veterans, public and private entities, foreign governments, and academia to achieve our mission." Defense POW/MIA Accounting Agency, Vision, Mission, Values, available at https://www.dpaa.mil/About/Vision-Mission-Values/.	By DoD regulation, DPAA's mission is to "a. Lead the national effort to account for unaccounted for DoD personnel from past conflicts and other designated conflicts. b. Provide the primary next of kin, family members, and the previously designated person, pursuant to Section 655 of Title 10, U.S.C., the available information concerning the loss incident, past and present search and recovery efforts of the remains, and current accounting status of unaccounted for DoD personnel." DoD Directive 5110.10 § 1.2.
20 (Sentence 1). Similar to the ABMC, the DPAA and DoD do not provide any type of hearing or sufficient process for a next of kin to request the disinterment or possession of a relative's remains.	This sentence is argumentative and unsupported. Congress has not provided families a right or a process to request disinterment of remains from past conflicts. See 10 U.S.C. §§ 1501-1531. DoD has establish a process for a next of kin to request disinterment of unidentified remains for identification. See DTM-16-003. Upon identification, the DoD military services have regulations establishing a process for the next of kin to dispute the identification or decide disposition of the remains. See, e.g., Army Regulation 638-2 §§ 4-4. For reasons discussed in Defendants' briefs, these constitute sufficient

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	processes to request disinterment and receive possession of identified remains. DPAA does not have authority to grant or deny a next of kin's request to disinter or possess a relative's remains. See DTM-16-003 (delegating authority for disinterment of unidentified remains to the Assistant Secretary of Defense for Manpower and Reserve Affairs). Therefore, DPAA does not have separate processes for these things, but supports other DoD components in their processes.
20 (Sentence 2). When asked to describe how a next of kin can request disinterment of remains, the Government was unable to describe any type of process. Ex. 34 at 13-14.	This sentence mischaracterizes the cited evidence. Defendants' response to Plaintiffs' Interrogatory No. 6 referred Plaintiffs to DTM-16-003 and DPAA Administrative Instruction 2310.01 pursuant to Federal Rule of Civil Procedure 33(d), which permits such a referral where the answer to the interrogatory may be determined by examining the records. These regulations set out in detail the process for a family disinterment request, both for the family making the request, and for DoD's processing of the request.
20 (Sentence 3). Additionally, if the DPAA and DoD refuse to return remains to a next of kin, there is no opportunity to appeal any decision to another federal agency or decision maker. Id. at 28-29.	This sentence mischaracterizes the cited evidence. Plaintiffs' Interrogatory No. 23 to DPAA inquired whether there was an appeal process from denial of a family request to disinter remains. See Pls.' Ex. 34 at 28. DPAA's response explained that DTM-16-003 identifies the Assistant Secretary of Defense for Manpower and Reserve Affairs as the adjudicator for such requests. This response did not address the remedies potentially available if a DoD component refused to return identified remains to a next of kin.
20 (Sentence 4). Finally, when asked to provide a list of family organizations that the DPAA	This sentence mischaracterizes the cited evidence. DPAA objected to and

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advertises that it has partnered with to achieve its above-described mission, it failed to provide the name of even one organization. Id. at 17.	declined to answer Plaintiffs' Interrogatory No. 13 because the information was not relevant to Plaintiffs' claims in this case. See Pls.' Ex. 34 at 17. Plaintiffs did not move to compel a response, and cannot seek to treat a discovery objection as a factual admission.
21. The DPAA and DoD currently have possession of Private Kelder, Private Morgan, and Tech 4 Bruntmyer's remains, but the ABMC is ultimately responsible for caring for these remains.	This sentence is unsupported and depends on unwarranted speculation. DPAA is holding additional identified portions of PVT Kelder's remains pending Plaintiff Kelder's election regarding disposition of those remains. See 2d Berg Decl. ¶¶ 3-4. DPAA has possession of remains of unknowns associated with Cabanatuan Common Graves 704, 717, and 822, and continues to conduct analysis for the purpose of identifying those remains. See App'x ¶¶ 112, 116, 125. However, it is not known that these unidentified remains include those of PVT Kelder, PVT Morgan or TEC4 Bruntmyer. While the remains are in DPAA's possession, DPAA is responsible for care of the remains.
C. Legislative Involvement	
22 (Sentences 1, 2). Despite the Government's apparent position in this lawsuit, Congress never intended for the DPAA to have a monopoly on the recovery of service members' remains from World War II. No statute provides the DoD or DPAA with such exclusive rights.	It is irrelevant whether Congress intended DoD or DPAA to have a monopoly on the *recovery* of World War II servicemember remains. The remains currently or previously interred at Manila American Cemetery which are at issue in this lawsuit were recovered by AGRS in the 1940s. See, e.g., Richardson Dep. at 98:11-14, ECF No. 55-15 ("[R]emains that are unknowns in unknown graves are remains that have been recovered. They are not yet knowns, they have not been identified but they have been recovered."). So it is irrelevant that private individuals can discover remains in the fields of World

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	War II and bring them to the government's attention. That simply is not at issue here. Congress has given DoD a monopoly on identifying servicemembers from past conflicts and formally accounting for them. That is a uniquely governmental function. *See* 10 U.S.C. § 1501(a)(1)(C)(2)(B) (stating the director of the Defense Agency shall have responsibility for accounting for missing persons from past conflicts, including locating, recovering, and identifying missing persons from past conflicts); id. § 1509(a) (requiring DoD to "implement a comprehensive, coordinated, integrated, and fully resourced program to account for persons . . . who are unaccounted for from [specified] conflicts"); *id.* § 1509(b)(2) (stating that the medical examiner assigned to DPAA shall "exercise scientific identification authority," and "identif[y] remains in support of the function of the [DPAA] Director to account for unaccounted for persons covered by subsection (a)"); *see also* 10 U.S.C. § 1471(b)(2)(E), (b)(3)(A)(ii) (giving DoD jurisdiction over investigation of the identity of an unknown servicemember's remains). DoD regulations prohibit delegation of this identification authority to a private entity. *See* DoD Directive 5110.10 § 2(w) ("The DoD's scientific identification authority under Section 1471 of Title 10, U.S.C., is not subject to public-private partnership agreements and will not be included in such agreements.").
22 (Sentences 3, 4). In fact, other statutes enacted by Congress reveal the opposite. For example, Congress has authorized the reimbursement of expenses incurred by an individual who has	It is undisputed that Congress has authorized reimbursement of various expenses related to the recovery and disposition of a servicemember. See 10 U.S.C. § 1482. It is this very statutory

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recovered, cared for, and disposed of the remains of a service member. 10 U.S.C. § 1482.	authority that permits DoD to pay for the transfer and disposition of World War II remains once they are identified. However, Section 1482 is not a grant of authority to private entities to undertake any such actions without DoD approval. Nor does this general provision applicable to all servicemember remains trump the specific and exclusive identification authority Congress adopted for remains from specified past conflicts. See Defs.' Response to previous sentence.
22 (Sentence 5). Moreover, the statute that the DPAA was purportedly established by was intended to only cover "missing persons" deprived of due process. 10 U.S.C. § 1509.	This sentence mischaracterizes 10 U.S.C. § 1509. Section 1509 calls for DoD to establish a program to account for those unaccounted for from specified past conflicts. See 10 U.S.C. § 1509(a). Neither this provision nor this program depend on whether the unaccounted-for servicemember was "deprived of due process."
22 (Sentence 6). As expressed by Senator Dole and others, the statute was meant to provide relief to individuals declared dead solely because of the passage of time. See 140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12220, S12221, 1994 WL 449837 ("This bill attempts to ensure that missing members of the Armed Services . . . are fully accounted for by the Government and that they are not declared dead solely because of the passage of time."); ("The evidence is clear that some men from WWII, the Korean War, the Cold War and the Vietnam War were declared dead when they were not dead but alive.").	The portions of legislative history cited by this sentence—an excerpt from Senator Robert Dole's statement introducing a 1994 Senate bill and an excerpt from a letter by the National Alliance for Families supporting the bill—accurately describe one of the overall purposes of the Missing Service Personnel Act as enacted in 1996. Indeed, as originally enacted, Section 1509 was focused exclusively on servicemembers from prior conflicts who could still be alive. See, e.g., Pub. L. No. 104-106 § 569(b) (captioning Section 1509 "Preenactment, special interest cases." and including from the Korean War only those servicemembers "who (a) [were] known to be or suspected to be alive at the end of that conflict, or (B) [were] classified as missing in action and whose capture was possible"). It should be noted,

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	however, that Plaintiffs cite the legislative history from Senator Dole's 1994 Senate bill, S.2411, which did not contain the text ultimately enacted as Section 1509 and received no action after it was introduced and sent to committee. See https://www.congress.gov/bill/103rd-congress/senate-bill/2411/all-actions.
23. It is obvious that Congress wanted to protect the families of service members from Government violation of Due Process when it enacted 10 U.S.C. § 1509. As stated by Sen. Dole: The legislation would establish new procedures for determining the whereabouts and status of missing persons. Additionally, the bill provides for the appointment of counsel for the missing, ensuring that the Government does not disregard their interests and affording the missing due process of law. By ensuring access to Government information and making all information available to hearing officers, while providing for protection of classified information, the proposal also attempts to remove the curtains of secrecy which often seem to surround these cases. Additionally, the missing person's complete personnel file is made available for review by the family members. Moreover, the legislation attempts to protect the interests of the missing person's immediate family, dependents, and next of kin, allowing them to be represented by counsel and to participate with the boards of inquiry. **It is our hope that by allowing more participation by the family, requiring legal representation of the missing, and permitting Federal court review of all determinations, we will establish fundamental fairness for all concerned.** 140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12220, 1994 WL 449837 (emphasis added).	It is undisputed that one of the purposes of the Missing Service Personnel Act was to ensure appropriate procedures before a servicemember was declared dead. This was informed by *McDonald v. Lucas*, 371 F. Supp. 831 (S.D.N.Y. 1974), which held that the dependents of missing servicemen had a constitutionally protected property interest in the benefits that they were receiving, and thus were entitled to notice and the opportunity to be heard before termination of those benefits by a finding of death. However, there is no evidence that Congress considered Constitutional due process to be implicated for servicemembers known to be dead but not recovered or identified. Indeed, as shown in Defendants' response to the prior sentence, Section 1509 as originally enacted was focused exclusively on missing servicemembers who could still be alive.
24 (Sentence 1). Another supporter of the statute commented that individuals were being sent into "administrative limbo" and that it was "[n]o	This sentence mischaracterizes the cited evidence. Senator Frank Lautenberg, commenting on 1994 Senate bill S.2411,

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wonder so many families think Government decisions are arbitrary and capricious." 140 Cong. Rec. S12217-05, 140 Cong. Rec. S12217-05, S12222, 1994 WL 449837.	stated that new legislation was necessary because under then-current law "missing persons lose due process after one year. They just go into administrative limbo. They stay there until someone says they're dead. No wonder so many families think Government decisions are arbitrary and capricious." 140 Cong. Rec. S12217, S12222, 1994 WL 449837. This observation, and the corresponding procedures Congress adopted in the Missing Service Personnel Act, are not relevant to this case.
24 (Sentence 2). As shown in the Families' Cross-Motion for Summary Judgment, the DPAA and DoD have failed to do what Congress demanded it do - provide families with fundamental fairness and due process - and its current policies have sent thousands of families into "administrative limbo."	This sentence is argumentative and unsupported. Defendants have not violated any statutory provision, nor do Plaintiffs in fact claim that they have. The fundamental fairness and due process with which Congress was concerned in passing the Missing Service Personnel Act is not implicated here. Congress has never indicated that next of kin have a property interest or statutory or constitutional rights in the unrecovered or unidentified remains of their servicemember relatives.
III. Families of the Service Members	
25. The Plaintiffs in this case are the next of kin of the seven service members in this case. ECF 19 at 3-5; ECF 26 at 4-6. They have struggled for years now to bring our heroes from World War II back home.	The first sentence is undisputed. The second sentence is unsupported and unfairly characterizes events for the reasons addressed in the subsequent paragraphs.
A. Private Kelder's Family	
26. Around 2009, Private Kelder family discovered documents showing where Private Kelder's remains were located. The family contacted the DoD to try to claim the remains of Private Kelder. But, the DoD and ABMC refused to consider any of the families' evidence or provide any type of hearing for the family to claim Private Kelder's remains. Ex. 35 at 3 (2014 letter to Government). Private Kelder's family had no other choice but to	This paragraph is unsupported. Plaintiffs assert various details of John Eakin's and Plaintiff Douglas Kelder's interactions with DoD without citing any evidence. Plaintiffs' Exhibit 35 is a September 14, 2014 letter written during the Eakin v. ABMC litigation after DoD disinterred remains associated with Common Grave 717. See Pls.' Ex. 35.

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file a lawsuit against the ABMC and DoD (along with the DPAA's predecessor) in 2012. See Eakin v. American Battle Monuments Commission, et al., No. SA-12-cv-1002-FB-HJB.	It does not support any of the factual assertions in this paragraph. Instead, that letter demonstrates Mr. Eakin's longstanding beliefs that one set of remains associated with Common Grave 717 were those of his relative and that it would be simple to confirm that with DNA testing. See id. To the contrary, PVT Kelder's remains were scattered across at least five sets of remains associated with that common grave, see Berg. Decl. ¶ 8, and it has been quite difficult to secure useable DNA results from the remains. See Berg Decl. ¶ 13. Because Plaintiffs have failed to carry their burden to support these factual claims with evidence at the summary judgment stage, Defendants will not undertake the burden of detailing the actual history of Mr. Eakin's prior litigation and interactions with DoD.
27 (Sentences 1-3). After several years of litigation, the DoD and ABMC finally disinterred Private Kelder's remains in 2014. ECF 61-1 at 27. The next year, the Government officially recognized that Grave 717 contained Private Kelder's remains, but his family only received a skull, three long bones, and a few other minor bones for burial. ECF No. 26 at 15. Five years have passed since the Government disinterred Private Kelder's remains.	It is undisputed that Defendants disinterred ten sets of remains associated with Common Grave 717 in 2014, and that remains of PVT Kelder were identified in 2015. *See* Berg Decl. ¶¶ 6-7 & Exs. 1, 2. DoD provided to Plaintiff Douglas Kelder in 2015 all of the remains that could be identified as PVT Kelder's at that point. *See* Berg Decl. ¶ 7. This was not only "a skull, three long bones, and a few other minor bones," but instead "calvarium, fragmentary maxilla, fragmentary mandible, left femur, left humerus, left tibia, right fibula, right humerus, and right tibia, along with loose teeth." Berg Decl. ¶ 7. Defendants have continued to conduct testing and analysis in the intervening years, including disinterment of additional remains associated with this common grave. See Berg Decl. ¶¶ 8-13. And DoD notified Plaintiff Douglas Kelder

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	on May 6, 2019 that additional remains of PVT Kelder have been identified and are available for disposition. See 2d Berg Decl. ¶ 3; 2d Gardner Decl. ¶ 54.
27 (Sentence 4). Even though the remains recovered from Grave 717 were virtually anatomically complete, the Government only provided the Kelder family partial remains. Ex. 36 (photograph showing all of the remains disinterred and associated with Grave 717).	This sentence is not supported by the cited evidence. The photograph Plaintiffs' attached does not establish that each of the ten sets of remains disinterred from Manila American Cemetery and associated with Common Grave 717 "were virtually anatomically complete." Nor does it establish that Defendants have additional remains of PVT Kelder which they have not identified and disclosed to Plaintiff Douglas Kelder. To the contrary, Defendants have provided all remains of PVT Kelder that they have been able to identify thus far. See 2d Berg. Decl. ¶¶ 6-8. And not all of the recovered bone belong to men associated with Common Grave 717—there are at least 18 sets of DNA even though Common Grave 717 was supposed to contain only 14 servicemembers. See Berg Decl. ¶ 11.
27 (Sentence 5). The DPAA should have provided the Kelder family with frequent updates, but failed to provide even that.	This sentence is entirely unsupported, and is contradicted by evidence. The Kelder family was free to participate in DPAA's regularly scheduled family updates. See Hamilton Decl. ¶¶ 20-22. Contact with families is conducted primarily through the service casualty offices. See Hamilton Decl. ¶ 28. The Army's Past Conflicts Repatriation Branch contacted Plaintiff Douglas Kelder with updates numerous times. See 2d Gardner Decl. ¶¶ 26-54.
27 (Sentence 6). Instead, the Kelder family feels left in administrative limbo waiting for the Government to return all of their loved ones' remains.	This sentence is unsupported.
28 (Sentence 1). The Government's ineffective efforts has shocked the Kelder family.	This sentence is unsupported. Defendants cannot comment on the

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	Kelder family's state of mind. Plaintiffs cite no evidence that the government's efforts have been ineffective. To the contrary, Defendants have engaged in rigorous analysis and testing, conducting hundreds of tests on more than 250 samples from remains associated with Common Grave 717, see Berg Decl. ¶ 10; 2d McMahon Decl. ¶ 41, and identified a significant portion of PVT Kelder's remains. See 2d Berg Decl. ¶ 6 & Ex. 2.
28 (Sentence 2). It has become readily apparent that the Government has failed to employ the most modern scientific techniques. Ex. 37; Ex. 38 (emails from Government).	Plaintiffs have no credible evidence that Defendants have failed to employ the most modern scientific techniques. This claim in contradicted by specific evidence in the record. Dr. McMahon has explained AFDIL's cutting edge capabilities and how those capabilities are employed for the past conflict accounting program and DNA testing for remains associated with Common Grave 717. See generally McMahon Decl. Plaintiffs decided to forego presenting a DNA scientist as an expert witness, who could have disputed anything Plaintiffs believed to be inaccurate in this declaration. See ECF No. 42. The DPAA Laboratory employs highly credentialed and experienced forensic anthropologists and forensic odontologists like Dr. Emanovsky, Dr. Berg, and Dr. Shiroma, who use contemporary methodologies. See generally Emanovksy Decl.; Berg Decl. ; Shiroma Decl. The two email excerpts Plaintiffs attach—they did not even provide a complete document for either email—do not support the alleged conclusion. Plaintiffs' Exhibit 38, an April 7, 2014 exchange of emails, says nothing about DPAA's or AFDIL's capabilities. Instead, the email points out that the

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	$12,000 cost allegedly involved in the effort to identify PFC Lawrence Gordon did not take into account the ordinary cost of DNA testing, nor did the private laboratory reveal how many samples they tested and how many gave results. Similarly, Plaintiffs' Exhibit 37, a July 2014 exchange of emails regarding private researcher Jed Henry's commentary on the PFC Lawrence Gordon case, does not establish any inadequacy in AFDIL's capabilities. The statement "Interesting reading from Jed Henry. Obviously the Bode lab is superior to AFDIL, as we should have been pursuing nuDNA all this time." is readily recognizable as a tongue-in-cheek or sarcastic comment. Dr. McMahon, who has been in leadership at or overseeing AFDIL since 2012, has explained in detail how AFDIL uses nuclear DNA. See McMahon Decl. ¶ 10-19, 35, 38, 41. An ironic email divorced from its context cannot undermine that sworn expert testimony.
28 (Sentence 3). For example, the Government released its own report stating that it should pursue a DNA lead identification process focused on expanding nuclear DNA testing. See ECF 31-6 (Report of the Defense Science Board Task Force on the Use of DNA Technology for Identification of Ancient Remains) available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a301521.pdf.	This sentence mischaracterizes the cited evidence. The 1990 Defense Science Board report does not stand for the proposition Plaintiffs assert. See Defs.' Daubert Reply at 16, ECF No. 59 (refuting Plaintiffs' claim).
28 (Sentence 4). But, despite the fact that nucDNA has become the standard for identification of remains and is used by the Armed Forces DNA Identification Laboratory ("AFDIL") for identification of current loss remains, the DoD continues to refuse to employ it for World War II era losses.	This sentence is unsupported and contradicted by evidence in this case. Dr. McMahon has explained that nuclear DNA is used for the past accounting program and has been used for remains from Common Grave 717. See McMahon Decl. ¶ 10-19, 35, 38, 41.
28 (Sentence 5). Indeed, members of the Government's accounting community have recognized that they focused on the wrong techniques and should have pursued other more	This sentence mischaracterizes the partial email upon which it relies. The July 2014 email does not "recognize[e] that Bode is far superior to [DoD's] own

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efficient and effective testing techniques all along. Ex. 37 (recognizing that Bode is far superior to own DNA testing laboratory).	DNA testing laboratory." Instead, the email provides tongue-in-cheek or sarcastic commentary on the private investigator Jed Henry's views. The only supported evidence in this record is that AFDIL is at the forefront of testing aged DNA, has developed numerous of its own techniques and maintains a substantial success rate. See generally McMahon Decl. Moreover, Dr. McMahon has explained why mitochondrial DNA is just as or more important than nuclear DNA for identifying World War II servicemembers. See id. ¶¶ 18, 35, 38. And, AFDIL has conducted and continues to conduct nuclear DNA testing for the past accounting program and, in particular, testing of remains associated with Common Grave 717. See id. ¶¶ 38, 41. If Plaintiffs wanted to attempt to show that Bode was in fact superior or that AFDIL was "focused on the wrong techniques," they should have put forward the expert they identified. Having failed to put forward any competent evidence, they cannot create an issue of act by relying on one mischaracterized excerpt from an email chain, divorced from its own context.
B. Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen's Families	
29 (Sentences 1-4). Similar to the Kelder family, the families of Private Morgan, Technician 4th Class Bruntmyer, and Private First Class Hansen discovered documents showing where their relatives' remains were located at Manila American Cemetery. Just like with the Kelder case, they were not allowed to present evidence supporting their claims at a hearing. Nor did they receive any process from the ABMC to claim their relatives'	These sentences are unsupported. Evidence shows that Mr. Eakin discovered what he believed were new connections between these servicemembers and specific common graves and brought this to the attention of each family. See Eakin Dep. at 20:24-21:9, ECF No. 55-13. These Plaintiffs have not demonstrated that Defendants were unwilling to receive and review any additional evidence

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remains. They were left with no other choice but to file this lawsuit.	these Plaintiffs sought to provide. In fact, Plaintiffs' own exhibits show that Plaintiff Raymond Bruntmyer attended a DoD Family Update in October 2011, presented evidence to DoD representatives, and discussed the case with them. See Pls.' Ex. 1-A, ECF No. 64-3. Plaintiff Bruntmyer also sent a followup letter in November 2011 asking about the status of TEC4 Bruntmyer's case. See id. At the Family Update, Plaintiff Bruntmyer provided three pages from TEC4 Bruntmyer's IDPF, which DoD later confirmed were still present in the complete IDPF. See id. By January 2012, DPAA's predecessor had confirmed that the evidence Plaintiff Bruntmyer provided was still present in TEC4 Bruntmyer's complete IDPF and considered the connection which Plaintiff Bruntmyer had proposed. See id. DoD explained why the evidence was an insufficient basis to proceed unless and until DoD was prepared to undertake large-scale disinterment of the Cabanatuan remains. See id. Defendants have explained that Plaintiff Judy Hensley's daughter requested disinterment of PFC Hansen by email dated November 24, 2017, and that Plaintiff Raymond Bruntmyer requested disinterment of remains associated with TEC4 Bruntmyer by letter dated November 24, 2017. See 2d Gardner Decl. ¶¶ 86 & 62. This occurred well after Plaintiffs filed suit in May 2017 and after the Court dismissed their first mandamus complaint without prejudice on November 20, 2017. See ECF Nos. 1, 14. There is no evidence of any disinterment request from or evidence submitted by PVT Morgan's family. 2d Gardner Decl. ¶ 72.

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29 (Sentences 5-7). Records show that the DoD has been aware about the connection between Grave 822 and Private Morgan since at least 2014. See Ex. 4. They also show that the DoD has been aware of the connection between Grave 704 and TEC4 Bruntmyer since 2011. See Ex. 12. Nonetheless, the Government refused to take action before this lawsuit was filed.	It is undisputed that DoD has long been aware about the connection between PVT Morgan and Common Grave 822, and between TEC4 Bruntmyer and Common Grave 704, along with the association of other servicemembers who died at Camp Cabanatuan to specific common graves. See Pls.' Exs. 4, 12; see also 3d Kupsky Decl. ¶¶ 20-21 & Ex. 5. As Defendants have repeatedly explained, due to the commingling of the Cabanatuan remains, this association was an insufficient basis to proceed toward identification until DoD was prepared to undertake large-scale disinterment of these common graves. See 3d Kupsky Decl. ¶¶ 21-22; Pls.' Exs. 1-C, 4, 12.
30. A year after the lawsuit was filed, the Government finally agreed to disinter Private Morgan and Technician 4th Class Bruntmyer's remains. ECF 61-1 at 25-26. Those disinterments reportedly took place in November of 2018. ECF 61-1 at 25-26. Unfortunately, the Government's actions lack transparency, which results in a shortage of information. The families have no idea when they will receive the results of the DPAA's analysis of the remains. For all they know, they may not hear anything from the Government for years. The family members grow older each year, and many do not have five years to wait for the DPAA's completion of a "historical analysis" that satisfies the DPAA's arbitrary standards for identification - especially when a simple DNA test could resolve any identification disputes between the parties.	It is undisputed that DPAA recommended disinterment of the graves of unknowns associated with Common Graves 704 and 822 on March 2, 2018 and January 23, 2018, respectively. 4th Kupsky Decl. ¶¶ 13 & 12. It is also undisputed that the Assistant Secretary of Defense for Manpower and Reserve Affairs approved these disinterments on July 6, 2018 and August 8, 2018, and the disinterments were conducted in November 2018. See 4th Kupsky Decl. ¶¶ 13 & 12; 3d Kupsky Decl. ¶ 23. Defendants have also explained that initial DNA samples from these disinterments have been submitted to AFDIL for testing. See Berg Decl. ¶ 16; McMahon Decl. ¶ 48. Plaintiffs are mistaken in believing that historical analysis is likely to delay identification of the disinterred remains. To the contrary, DPAA only recommends disinterment after the historical analysis is completed and sufficient family references samples have been obtained to permit the

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	identification effort to proceed promptly. See 3d Kupsky Decl. ¶ 9; DTM-16-003. In the case of PVT Kelder, the initial identification came within months of disinterment. See Berg Decl. ¶ 6 & Ex. 1. What takes longer for the commingled Cabanatuan remains is identifying as much of each servicemember as possible. See 2d Berg Decl. ¶ 4-5.
31 (Sentences 1-3). The Government has recently stated that it plans to disinter Private First Class Hansen's alleged remains. ECF 61-1 at 26-27. But no one outside of the Government knows when that disinterment will occur. The Government initially refused to disinter the remains associated with Private First Class Hansen's communal grave because it was unable to obtain enough family reference samples for DNA testing to meet its arbitrary standard.	These sentences mischaracterize the cited evidence. DPAA has submitted its recommendation to disinter unknowns associated with Common Grave 407 for decision pursuant to DTM-16-003, now that the Army's Past Conflicts Repatriation Branch has solicited sufficient family reference samples, and AFDIL has received sufficient samples from the families of servicemembers associated with this common grave. See 3d Kupsky Decl. ¶ 23; 4th Kupsky Decl. ¶ 11. The disinterment decision will lie with the Assistant Secretary of Defense for Manpower and Reserve Affairs, and if approved, disinterment will occur along with other approved disinterments after that point. See 4th Kupsky Decl. ¶ 11. DoD did not refuse to disinter the remains associated with Common Grave 407; instead it prepared a draft recommendation and held it pending receipt of sufficient family reference samples. See 4th Kupsky Decl. 11.
31 (Sentences 4-6). Once the Families discovered that this was the reason why the Government refused to act, the Families' consulted John Eakin, who then obtained contacts for each of the families for which a family reference sample was required to meet the arbitrary standard. ECF 56-1 at 7. The Government's own summaries show that it made no progress for months in obtaining reference samples on its own. Ex. 17 at 5 (2017); ECF 63-17	These sentences mischaracterize the cited evidence. Defendants repeatedly pointed out that Plaintiffs had failed to provide eligible family reference samples for PFC Hansen himself. *See, e.g.*, *Patterson v. DPAA*, Hr'g Tr. at 17:8-23, June 27, 2018; Am. Answer ¶ 43, Apr. 6, 2018. Only in December 2018 and January 2019 did AFDIL

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at 57 (2018). Fortunately, the Government apparently used this information that the Families provided and plan to disinter Private First Class Hansen's remains. ECF 61-1 at 27.	receive eligible family reference samples from PFC Hansen's relatives. 2d McMahon Decl. ¶ 24, ECF No. 63-15.
31 (Sentences 7-8). Still, the family has no idea when the Government will take action or provide an update on their case. The family resides in administrative limbo.	These sentences are inaccurate. As discussed above, the process for disinterment of unknowns associated with Common Grave 407 is proceeding forward; and Plaintiff Judy Hensley will be notified when the Assistant Secretary for Manpower and Reserve Affairs issues a decision on her daughter Jennifer Russell's November 2018 request.
C. 1LT Nininger's Family	
32. Again, just like the other families in this lawsuit, 1LT Nininger's family attempted to claim the remains of their loved one, but did not receive any opportunity or hearing to present their evidence to the Government. Instead, the family had to file this lawsuit. With today's technology, the Government's refusal to conduct DNA testing on the X-1130 remains makes no sense. Although the simplest (and most efficient) way to resolve the disagreement about the identity of the remains is DNA testing, the Government's decision shows that it has no intention of disinterring the X-1130 remains.	This paragraph is entirely unsupported. It is not efficient to disinter remains that are unlikely to be those of the servicemembers Plaintiffs seek and for which DPAA has not yet completed the historical analysis to identify the set of candidates that could plausibly be identified with the remains. See 3d Kupsky Decl. ¶¶ 29. Plaintiff John Patterson had numerous opportunities to present his evidence to DPAA and its predecessors. Indeed, his correspondence is included with 1LT Nininger's files. See, e.g., 2d Gardner Decl. ¶ 6-7. DoD processed his February 2015 disinterment request. See 2d Gardner Decl. ¶ 13-14. He could have submitted additional evidence with his disinterment request, but chose not to. He could have submitted a new request, supported by additional evidence under the process set forth in DTM-16-003, but chose not to. See generally 2d Gardner Decl.
33 (Sentences 1-3). Despite 1LT Nininger being the first recipient of the Medal of Honor from World War II, his family has not sought priority of his identification. Ex. 21 at 4-5 (medal of honor	DoD went to great lengths after World War II to attempt to identify 1LT Nininger. See 3d Kupsky Decl. ¶¶ 26-27. That effort has continued with

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description); Ex. 39 (email from family to Government). Instead, the family waited patiently for action and skipped no one. But now they feel deceived by the same Government that 1LT Nininger died fighting for. Ex. 39 at 1-2.	DPAA's ongoing effort to work through all of the Abucay area losses. See id. ¶ 29. Plaintiff John Patterson's March 28, 2014 email, Pls.' Ex. 39, preceded his February 3, 2015 disinterment request. See Defs.' Ex. M. DPAA processed his disinterment request, submitting its recommendation to the then-appropriate decisionmaker on December 1, 2015. See Defs.' Ex. M.
33 (Sentence 4). Records related to 1LT Nininger's identification were left hidden and classified to cover up information and other mistakes. Ex. 21 at 2-3 (Patterson asking for Cheaney file, but being falsely told there were no classified portions relating to his uncle); see ECF 56-1 at 13 (discussing concealment of Cheaney file); Ex. 24 at 6-14 (declassified Cheaney file discussing Nininger).	Defendants lack knowledge of the reasons for which the addendum to 1LT Cheaney's IDPF was classified. Mr. Eakin's March 28, 2019 declaration, without explanation or evidence, characterizes the addendum as "a deliberate cover-up by the U.S. Government and attempt to deceive the families of the military personnel involved." Eakin Decl. ¶ 26, ECF No. 56-1. While the addendum demonstrates awareness of an error in 1951, it does not establish a cover-up or attempt to deceive anyone. Plaintiffs also cite a July 1985 letter from the Army Military Records Center stating that 1LT Cheaney's IDPF contained "no classified portions relating to [1LT Nininger." Pls.' Ex. 21 at 2-3. This is not evidence of an intentionally false statement. It appears that the classified addendum to 1LT Cheaney's IDPF was stored separately from his main IDPF and thus was not retrieved from the National Records Center in 1985. Under DPAA, the declassified Cheaney file has been fully incorporated into DoD's effort to account for 1LT Nininger. See 3d Kupsky Decl. ¶ 28.
33 (Sentence 5-6). And at other times, the family has felt like the Government has actively worked against them. Ex. 39 at 2. 1LT Nininger's family simply wants to bring him home for a proper burial,	Defendants do not dispute 1LT Nininger's family's feelings or desires.

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and are willing to do what is required to climb out of the administrative limbo they are stuck in.	
D. Colonel Stewart's Family	
34 (Sentences 1-3). Colonel Stewart's family has tried to claim the remains of their loved one, but they have not had any hearing or sufficient process to present the evidence that they have. So, the filing of this lawsuit became necessary. For years now, Colonel Stewart's family has wondered when the DPAA would act and disinter remains X-3629.	These sentences are unsupported. There is no evidence of any disinterment request prior to the November 7, 2017 request submitted by Plaintiff John Boyt during the pendency of this lawsuit. Mr. Boyt attached no evidence to his request. See 2d Gardner Decl. ¶ 33. Mr. Boyt is also free to attend a family update and meet in person with DPAA officials, as he did in 2013. See 2d Gardner Decl. ¶ 31.
34 (Sentences 4-6). The DPAA disclosed on April 11, 2019, that it has drafted a recommendation in favor of disinterment of the remains designated as X-3629. ECF 61 at 28. It turns out that the DPAA has had a disinterment memorandum prepared since at least January of 2018. ECF 63-17 at 67. This disinterment memorandum has sat in agency limbo for well over a year now. ECF 63-17 at 67.	Sentence four is undisputed. Sentence five refers to a case summary drafted by DPAA historians, which noted that a response memorandum had been drafted "and is in Agency review." Defs.' Ex. O, ECF No. 63-17 at 67. While DPAA's memorandum regarding X-3629 has not been finalized, this is not evidence of "agency limbo for well over a year." Instead, DPAA has developed leads for servicemembers whose remains might be X-3629 and has submitted its disinterment recommendation to the ASD(M&RA). 3d Kupsky Decl. ¶ 33; 4th Kupsky Decl. ¶24.
E. Brig. Gen. Fort's Family	
35. General Fort's family has also tried to claim the remains of their loved one, but they have not had any hearing or sufficient process to present the evidence that they have. The filing of this lawsuit became necessary. For years now, General Fort's family has wondered when the DPAA would act and disinter remains X-618. Based on recent filings, it appears that the Government refuses to disinter the remains and is pursuing different theories.	This paragraph is entirely unsupported. There is no record that Plaintiff Janis Fort requested disinterment of X-618 at any time prior to her December 12, 2017 request. See 2d Gardner Decl. ¶ 73. Defendants promptly processed this request, with DPAA completing its recommendation against disinterment in August 2018, see 3d Kupsky Decl. ¶ 34 & Exs. 39, 40, and the Assistant Secretary denying the request on November 28, 2018. See 3d Kupsky

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	Decl. ¶ 34 & Ex. 41. In February 2019, Plaintiff Janis Fort met with DPAA officials at a Family Member Update. Hamilton Decl. ¶ 21. DPAA has explained why X-618 is unlikely to be the remains of Brig. Gen. Fort and is preparing a recommendation for disinterment of three other sets of remains for which he is a candidate. See 3d Kupsky Decl. ¶ 39.
IV. The Problems Created by the Government's Failures	
36 (Sentence 1). The families want to provide the above-named service members with a proper burial in accordance with their beliefs. See ECF 19 (explaining the relief sought).	This sentence is unsupported. Plaintiffs may not rest on bare allegations in their complaint for a key element of their Religious Freedom Restoration Act and First Amendment claims. There is no evidence in the record that Plaintiffs have any specific beliefs about burial of their relatives or what constitutes a proper burial or how those beliefs have been burdened.
36 (Sentences 2, 3). Unfortunately, the Government has failed to provide adequate relief to the families of our fallen heroes from World War II. Many cases were ignored for decades.	This sentence is unsupported. There is no evidence that families of World War II servicemembers are entitled to any relief. Defendants were not ignoring cases. For many decades, DoD lacked any tools by which to reconsider the determinations regarding unknowns from the 1940s. And Congress prioritized recoveries from the Korean War, Cold War, and Vietnam War until October 2009, when it added World War II as a subject of the DoD accounting program. See App'x ¶ 21-22.
36 (Sentences 4, 5). It was not until 2014 that the DoD started to disinter remains associated with Cabanatuan to return them to their families. See ECF 63-17 at 56 (referring to Cabanatuan Grave 717 (Private Kelder's burial location)). And that only took place after Private Kelder's family filed a lawsuit against the Government.	Undisputed.

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36 (Sentences 6-8). In other cases, the Government misidentified service members' remains and transferred them to the wrong families for burial. ECF 26-7 at 14-16; ECF 26 at 17. For example, the Government knew for more than fifty (50) years that remains buried at West Point as 1st Lt. Ira B. Cheaney were not actually those of 1st Lt. Cheaney. ECF 63-4 at 4-12; Ex. 24 at 5 (stating in 1950 that "remains presently buried in the West Point Academy Cemetery as 1/Lt Ira B. Cheaney Jr., 0-23965, are not those of Lt. Cheaney."). But it was not until just a few weeks ago that those remains were disinterred for testing. ECF 63-16 at 2-3.	It is undisputed that misidentifications occurred during DoD's identification process in the 1940s and early 1950s. See Am. Answer ¶ 53 & Ex. 53. It is also undisputed that because DoD was unable to locate 1LT Cheaney's remains in the early 1950s, it did not proceed with disinterment of the remains mistakenly buried as 1LT Cheaney. See 3d Kupksy Decl.. ¶ 28 & Ex. 33. Upon receipt of a request for disinterment from 1LT Cheaney's next of kin, the U.S. Army approved disinterment under its regulations for Army cemeteries. See Gardner Decl. ¶ 6 & Ex. 2.
36 (Sentences 9-11). And this is not the only case of misidentification. Numerous examples show that the Government has failed to effectively fulfil its mission to recover and identify service members' remains from World War II, and the DoD has faced significant criticism for its inadequate performance. See ECF 10-2; ECF 10-3 (GAO report discussing DoD's failures in effectively accounting for deceased service members). Unfortunately, the individual cases before the Court in this case are not unique.	It is undisputed that additional misidentifications occurred in the 1940s and early 1950s, but such occurrences do not reflect on Defendants' current performance of their missions. It is undisputed that DoD faced criticism from Congress in 2013. See Mismanagement of POW/MIA Accounting, Hearing before Senate Subcommittee on Financial and Contracting Oversight, Committee on Homeland Security and Governmental Affairs, S. Hrg. 113-293 (Aug. 1, 2013), ECF No. 10-2; GAO Report, GAO-13-619, DoD's POW/MIA Mission (July 2013), ECF No. 10-3. Because DoD reorganized its accounting program and created DPAA in 2015 before this lawsuit was filed, Plaintiffs have not shown that these historical criticisms are relevant to DoD's performance since the creation of DPAA. See Hamilton Decl. ¶¶ 6-22.
37 (Sentence 1). In all of the cases at issue, even the Government would admit that there exists at least some evidence supporting the Families' claims as to the identity and/or location of the remains at issue.	It is undisputed that some circumstantial evidence in each case has caused the remains to historically be associated with a particular servicemember or servicemembers. But such early associations are often incorrect. See 3d

Plaintiffs' Appendix:	Defs.' Response:
	Kupsky Decl. ¶ 22. And isolated pieces of circumstantial evidence are inadequate to determine the likelihood that remains, if disinterred, are likely to be identifiable. See id. ¶ 8; Berran Decl. ¶ 10. Rather disinterment and identification require weighing all of the available evidence. See 3d Kupsky Decl. ¶¶ 9-12.
37 (Sentence 2). But it is the Government's position that it will not return remains to a next of kin until it performs DNA testing.	This unsupported sentence does not accurately describe any government position. DoD cannot provide unidentified remains to a family based on that family's beliefs or speculation. See App'x ¶¶ 86-88. DoD's identification process considers all available evidence, including DNA, in determining whether its clear and convincing standard of proof for identification has been met. See Berran Decl. ¶ 5.
37 (Sentences 3, 4). Even though that is its position, instead of going directly to DNA testing at the outset, the Government chooses to focus on using an antiquated approach that only applies DNA testing at the end. This results in families having to wait years before receiving results. See ECF 61-1 at 17 (historical analysis, anthropologist review, and odontologist review before DNA testing); ECF 61-1 at 28-35.	Plaintiffs cite no source for their claim that DoD uses "an antiquated approach." They cite Defendants' description of DoD's disinterment decision process that precedes the identification process. See Defs.' App'x ¶¶ 46-68. This process implements the Deputy Secretary of Defense's directive that unknowns be disinterred from military cemeteries only if the remains meet thresholds for likelihood of being identified within a reasonable period of time. See id. Plaintiffs have not shown that an alternative approach is practical, let alone statutorily or constitutionally required. Once remains are disinterred, it is not the case that DNA testing occurs only "at the end" of the process. Rather, DNA testing and other forms of analysis proceed simultaneously and interactively to produce the most efficient and comprehensive result. See

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	Emanovksy Decl. ¶ 5; Berg Decl. ¶ 6; McMahon Decl. ¶¶ 32-48.
37 (Sentence 5). As admitted by the Government's Laboratory Manager, its DNA testing facility has limited capacity and has a significant backlog. ECF 63-12 at 3 ("DPAA has to wait a long time to receive results on samples submitted to AFDIL.").	This sentence mischaracterizes the cited evidence. Dr. Gregory Berg, a DPAA Laboratory Manager noted that AFDIL has a processing queue and that DNA testing takes time. See Berg Decl. ¶ 13. As Dr. McMahon has more fully explained, AFDIL has approximately 600 samples in process at any one time, and it takes approximately 85 days to complete processing of a sample. See McMahon Decl. ¶¶ 33, 36. Plaintiffs have identified no evidence that this substantial capacity is inadequate to serve DoD's past accounting mission.
37 (Sentence 6). This casts significant doubt on whether the Government has the ability to meet the Congressional mandate of 200 identifications per year.	This sentence is unsupported. The evidence shows that DoD in fact is meeting the Congressional goal of 200 accounted-for per year. See Pub. L. No. 111-84 § 541; Hamilton Decl. ¶ 17 (explaining that in FY 2018, DPAA identified 203 previously unaccounted for servicemembers, conducted 95 field operations, conducted 237 disinterments, accessioned at least 389 sets of remains into the DPAA Laboratory, and issued disinterment recommendations pertaining to remains associated with 306 individuals).
37 (Sentence 7). The Government's own staff has discussed its failure to pursue the best DNA testing technology and recognized that an outside company (Bode) is superior. Ex. 37; Ex. 38.	This sentence is unsupported because it mischaracterizes the cited evidence and is contradicted by evidence in the record. See supra Response to ¶ 28.
V. Conclusion of Facts and Questions Relevant to Case	
38. Thus, the primary problems created by the Government's actions (or inaction) can be summed up as follows:	The bulleted points will be addressed individually.
• The Kelder family has waited nearly a decade to receive all of Private Kelder's remains (their first lawsuit was filed in 2012, years after they tried to contact the DoD). ECF 19 at 2 (citing litigation).	Plaintiffs do not support their description of their own actions and the 2012 Eakin v. ABMC lawsuit. PVT Kelder was identified in January 2015,

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Private Kelder was disinterred in 2014, yet the Government is still examining the remains with no end in sight. ECF 61-1 at 27. If families were allowed to hire private contractors to conduct DNA testing, cases could be resolved in a matter of months, not years, for a fraction of the cost.	shortly after the remains associated with Common Grave 717 were disinterred. See Berg Decl. ¶ 6. Efforts to identify as much of PVT Kelder's remains and those of his fellow servicemembers from among the commingled remains have continued over the last several years. See Berg Decl. ¶ 12. Plaintiffs cite no support for the statement that private contractors could resolve this case "in a matter of months" and "for a fraction of the cost." Due to the difficulties involved in working with aged, deteriorated, and commingled remains from the Philippines, this work is far more complex than the general work of a modern crime lab. See McMahon Decl. ¶ 19.
• It has taken years for other families in this case to even receive a response from the Government. How many more years will it take for the results of any examination performed by the DPAA to be delivered to a family?	It is not clear what Plaintiffs refer to. The Plaintiffs' disinterment requests were submitted in November 2017, and only two requests remain outstanding. See 4th Kupsky Decl. ¶ 11, 24. There is no reason to expect a lengthy period of time before identifications can be made from the disinterred remains. See Berg Decl. ¶¶ 15-16.
• The families have significant evidence showing the location of their relatives' remains, including the X-files, IDPFs, historical reports, sworn statements, and witness statements, but the Government refuses to take any action or allow the families themselves to take action.	DoD has taken action in each case. It has processed and decided each Plaintiff's disinterment request, or is preparing to decide such requests. It has also continued its own analysis to identify plausible candidates for identification as the servicemembers at issue here.
• The ABMC has no process, published rules, or policies allowing families to claim a relative's remains.	Undisputed. DoD, not the ABMC, is responsible for disinterment and identification of unknown remains interred in cemeteries the ABMC manages. See Hamilton Decl. ¶¶ 8 & 25.
The DoD and DPAA have promulgated no regulations in the Federal Register or Code of	Undisputed. The APA does not require Federal Register publication for actions

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Federal Regulations allowing families to claim a relative's remains.	involving "a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). DoD's process for family disinterment requests has been repeatedly explained in this litigation and is published on a DoD website. See https://www.esd.whs.mil/DD/DoD-Issuances/DTM/.
• The DoD and DPAA's current policy (1) fails to provide families with sufficient process, (2) conceals information from families, and (3) places families in "administrative limbo."	This bullet point makes legal arguments that Defendants address in their brief. Moreover, while this is a purported summary, Plaintiffs fail to show how they believe DoD's current policy "conceals information from families."
• The Government has refused to prioritize DNA testing, which has caused significant delays for families that simply want to bring their relatives home for a proper burial in accordance with their beliefs.	Plaintiffs appear to dispute DoD's process for determining whether to conduct a disinterment of an unknown from a military cemetery.
Specific Responses to Government's Statement of Facts (ECF 61-1)	
In addition to the above Statement of Facts, the Families also specifically respond to the individually numbered paragraphs in the Government's summary of facts, ECF 61-1, as follows:	
• 1-6 – The Families do not dispute the Government's summary of the Army Graves Registration Service, except for any differences asserted in Plaintiffs' Statement of Facts.	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 7-12 – The Families do not dispute the accuracy of the statements in these paragraphs.	
• 13 – The Families disagree with the Government's legal conclusion that burials in overseas military cemeteries are permanent and that disinterments are conducted only with military approval. Pub. L. No. 80-368 was repealed by Pub. L. No. 89-554 (Sept. 6, 1966) and is no longer in effect. No statute or law prohibits disinterment from an ABMC cemetery. Additionally, the ABMC has disinterred remains in the past as a part of beautification projects.	Plaintiffs cite no support for their claim that ABMC has disinterred remains in the past as part of beautification projects, nor do they explain why such conduct, if it occurred, is contrary to Defendants' Statement of Facts.

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• 14 – The Families lack sufficient information to form an opinion on whether the ABMC began to regularly receive DoD requests for disinterment in 2015.	
• 15 -16 – The ABMC does have an agreement with the DoD to permit the DoD to perform disinterments.	Plaintiffs' statement does not dispute a material fact, but merely references another document in the record. See Defs.' Ex. J.
• 17-23 – In general, the Families do not dispute the Government's account of the history of the Missing Service Personnel Act ("MSPA"), except to the extent that it conflicts with the Families own Statement of Facts concerning the MSPA.	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 24-27 – These paragraphs simply quote the MSPA. The statute speaks for itself.	
• 28-29 – The Families disagree with the Government's limited interpretation of the judicial review available by the MSPA. This is discussed in more detail in the Families briefing. Although the MSPA allows for review of some specific decisions, this does not preclude the review of other decisions. ECF 51 at 14.	This response addresses legal arguments discussed by the parties in their briefs.
• 30-34 – The Families do not dispute the statements in these paragraphs, except to the extent that it conflicts with the Families own Statement of Facts	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 35 – The Families contend that the DoD always had the legal obligation to account for service members from World War II and bring them back home to their next of kin for a proper burial.	Plaintiffs cite no support for their contention that DoD has always had the legal obligation to account for World War II servicemembers and return them to their next of kin for burial.
• 36-38 –The Families lack sufficient information to form an opinion on the statements in these paragraphs.	
• 39 – The Families dispute the claim that enough resources have been provided to regularly meet the Congressional requirement of 200 identifications per year, as explained in more detail in their Statement of Facts.	Plaintiffs' statement of facts does not support their dispute of the fact asserted by Defendants.

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• 40-41 - The Families lack sufficient information to form an opinion on the statements in these paragraphs, but will note that the Government had previously failed to identify 200 service members in a year prior to 2018.	Plaintiffs do not support their factual assertion in this response.
• 42-45 – The Families agree that the DPAA hosts meetings several times during each year that allow families to learn more about the DPAA's operations. They also agree that next of kin are sometimes able to receive additional information about a service member.	
• 46-59 – The Families do not dispute the Government's summary of some of its regulations and policies, except to the extent that it conflicts with the Families own Statement of Facts and arguments contained in its Response to the Government's Motion for Summary Judgment.	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 60 – The Families agree that physical evidence can be helpful to exclude a candidate. But the physical evidence must be proven to be reliable.	
• 61-63 – The Families do not know what the Government means by "stature estimation." Stature estimates used by investigators following World War II were based on inaccurate measurements. See ECF 19 at 8.	Plaintiffs cannot rely on their Amended Complaint to dispute factual assertions at summary judgment.
• 64-67 – These paragraphs contain opinions, and no factual response is required.	The opinions of qualified scientific experts are facts admissible at summary judgment. Plaintiffs' failure to dispute these facts with competent evidence should lead to these facts being considered undisputed.
• 68 – This paragraph appears to add requirements not specified in DoD and DPAA's regulations.	Paragraph 68 of Defendants' Appendix factually describes DoD's implementation of DTM-16-003.
• 69-77 – The Families agree that the DPAA uses an anthropological lead identification process instead of focusing on using DNA analysis at the beginning.	
• 78-82 – These paragraphs contain opinions about the Armed Forces DNA Identification Laboratory ("AFDIL"). Nothing needs to be added for	The opinions of qualified scientific experts are facts admissible at summary judgment. Plaintiffs' failure to dispute

Plaintiffs' Appendix:	Defs.' Response:
purposes of the motions before the Court, except to add that the Government's own employees have suggested that a private company focusing on DNA testing is far superior.	these facts with competent evidence should lead to these facts being considered undisputed. Plaintiffs' reference to Pls.' Exs. 37, 38 have been addressed above.
• 83-91 – The Families do not dispute the statements in these paragraphs in general, but do disagree with (1) the Government's statement that AR 638-2 is limited or inaccurate and (2) that remains cannot be provided to next of kin until the Armed Forces Medical Examiner makes a decision.	Plaintiffs appear to dispute these statements as matter of law, which does not give rise to any dispute of fact.
• 92-95 – The Families do not dispute the statements in these paragraphs, except to the extent that they conflict with the Families' pleadings and briefing before the Court.	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 96 – The four service members that were prisoners of war and initially buried at Camp Cabanatuan were buried with other service members that died the same day they did.	This response does not dispute Defendants' statement. Defendants have shown that Plaintiffs' response overstates the evidence. See supra Response to ¶¶ 4-6.
• 97-98 – The records relied upon by the Families have proven to be accurate. For example, the Kelder case has shown that the records relied upon by the Families in this case are accurate. Therefore, most challenges raised by the Government can be overcome.	This response does not dispute Defendants' statement. A single example in which a record was accurate does not establish that a record with thousands of entries is uniformly accurate.
• 99-103 – The Families do not dispute the statements in these paragraphs.	
• 104-105 – It is believed that disinterments associated with Camp Cabanatuan did not begin until 2014.	This response does not dispute Defendants' statement.
• 106 – The Families do not dispute this statement.	
• 107 – 108 – The Families do not dispute these statements in general, except as stated in their Summary of Facts and supporting Declarations cited therein.	This response fails to provide any specificity from which it could be determined which facts Plaintiffs dispute.
• 109-112 – The Families agree that Technician Lloyd Bruntmyer was buried in Grave 704, but disagree with the assertion that the remains	This response mischaracterizes Defendants' statement; Plaintiffs' disagreement with Defendants'

Plaintiffs' Appendix:	Defs.' Response:
associated with that grave should still be considered completely unknown.	statement is unsupported and does not create a dispute of fact.
• 113-116 - The Families agree that Private Robert Morgan was buried in Grave 822, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.	This response mischaracterizes Defendants' statement; Plaintiffs' disagreement with Defendants' statement is unsupported and does not create a dispute of fact.
• 117-120 - The Families agree that Private First Class David Hansen was buried in Grave 407, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.	This response mischaracterizes Defendants' statement; Plaintiffs' disagreement with Defendants' statement is unsupported and does not create a dispute of fact.
• 121-128 - The Families agree that Private Arthur Kelder was buried in Grave 717, but disagree with the assertion that the remains associated with that grave should still be considered completely unknown.	This response mischaracterizes Defendants' statement; Plaintiffs' disagreement with Defendants' statement is unsupported and does not create a dispute of fact.
• 129-135 – The Families do not dispute the statements in these paragraphs.	
• 136-152 – The Families dispute the Government's conclusions, and refer the Court to their statements of fact concerning 1LT Nininger. The Families do not agree that the Government's refusal to disinter 1LT Nininger's remains is reasonable. The Families do agree with paragraph 144's statement that the AGRS repeatedly recommended identifying the X-1130 remains as 1LT Nininger, but disagree that they primarily relied upon Col Clarke's letter. The basis for the Families' position is detailed in their Statement of Facts. See also Ex. 1 at 10-16.; Ex. 2.	The parties' disagreement about interpretation of the records relevant to 1LT Nininger's case is addressed above.
• 153-169 – The Families dispute the Government's conclusions, and refer the Court to their statements of fact concerning Col. Stewart. The Families do not agree with the Government's decision to exclude Col. Stewart as a candidate for comparison to the X-3629 remains, which are those of Col. Stewart. The basis for the Families' position is detailed in their Statement of Facts. See also Ex. 1 at 15-16; Ex. 2.	The parties' disagreement about interpretation of the records relevant to COL Stewart's case is addressed above.
• 170-186 - The Families dispute the Government's conclusions, and refer the Court to their statements	The parties' disagreement about interpretation of the records relevant to

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of fact concerning Brig. Gen. Fort. The Families do not agree that the Government's refusal to disinter Brig. Gen. Fort's remains is reasonable. The basis for the Families' position is detailed in their Statement of Facts. See also Ex. 1 at 16-17.	Brig. Gen. Fort's case is addressed above.
• 187-195 – The Families do not dispute these statements, except to the extent that they conclude that the remains at issue have not already been located and/or identified.	Plaintiffs' claim that the remains of the servicemembers have already been located and/or identified is addressed above. It does not create a dispute of material fact for the reasons discussed in Defendants' briefing.

Dated: June 7, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2019, 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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