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' OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INDEX OF EXHIBITS

4. Disinterment Approval, Common Grave 704 (July 6, 2018)

5. Case Summary, 1LT Alexander Nininger (Dec. 2017)

Additional Documents

BB. Order, *Chamber of Commerce v. Perez*, No. 3:16-cv-1476-M (N.D. Tex. July 7, 2016)

CC. Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen* (2005) (excerpt)

INTRODUCTION

The U.S. Department of Defense (Department or DoD), Defense POW/MIA Accounting Agency (DPAA), American Battle Monuments Commission (ABMC), and the heads of those agencies sued in their official capacities (collectively "Defendants"), have shown that they are entitled to summary judgment because Plaintiffs' claims fail both in fact and in law.

As to fact, Plaintiffs' claims largely depend on the notion that the government is improperly retaining identified remains or that the location of their relatives' remains is known. This is simply not the case. Plaintiffs cannot create a material factual dispute by adopting unsupported and unwarranted extrapolations from undisputed facts. For the four servicemembers who were buried in common graves at Camp Cabanatuan, the possibility that their commingled remains are somewhere among the graves associated with that common grave is far short of identification. DPAA has disinterred the unknowns associated with three of those common graves, and its recommendation to disinter the unknowns associated with the fourth common grave is under review by DoD. The disinterred remains are being analyzed for identification at the DPAA Laboratory in Hawaii. The record is clear that once remains are identified, DoD promptly notifies the next of kin to discuss the family's disposition instructions for the remains.

For the three servicemembers for whom Plaintiffs have claimed that circumstantial evidence proves the location of the remains, the totality of available evidence strongly indicates that those graves do not contain Plaintiffs' relatives. Plaintiff John Patterson's and Plaintiff Janis Fort's disinterment requests were denied by the appropriate DoD authority on the basis of ample evidence inconsistent with the characteristics of Plaintiffs' relatives. Plaintiff John Boyt's third disinterment request was for a grave that is unlikely to contain his relative, but could plausibly contain the remains of two other unidentified servicemembers. Finalization of DPAA's

recommendation was deferred until DoD received DNA samples from the families of those servicemembers, and DPAA's recommendation is now under review by DoD. DPAA continues to seek better leads for identifying Plaintiffs' relatives. While Plaintiffs dispute the reliability of some of the evidence upon which Defendants rely, they have not supported that dispute with admissible evidence and it is sufficient that Defendants have weighed the available evidence in reaching their decisions.

As to law, Plaintiffs' Administrative Procedure Act (APA) claims fail for numerous reasons. Plaintiffs are mistaken in claiming that formal adjudication or notice and comment rulemaking are required here. Most of the challenged agency actions are committed to agency discretion and not subject to judicial review. The final agency actions Plaintiffs challenge—denial of Plaintiff Patterson's and Plaintiff Fort's disinterment requests—are reasonable and considered the relevant evidence. None of Plaintiffs' allegations about failure to act rise to the level of a final agency action because Defendants are engaged in active processes that will result in final decisions:

- DPAA is analyzing the disinterred remains associated with Cabanatuan Common Graves 704, 717, and 822, and recently identified additional portions of Private Arthur Kelder;
- DoD is reviewing DPAA's disinterment recommendations associated with Cabanatuan Common Grave 407 and X-3629 Manila #2; and
- Defendants have conveyed substantial information to the Plaintiffs and their families regarding efforts to locate and identify the servicemembers at issue here, and continue to contact them to the extent permitted by Plaintiffs' counsel.

Even if Plaintiffs could establish finality, they cannot show that Defendants have failed to take any action required by law or acted unreasonably. As the Court concluded in twice dismissing Plaintiffs' Mandamus Act claims, neither the statute nor the regulations constrain Defendants' broad discretion to determine how best to fulfill the mission to identify unaccounted-for

servicemembers from prior conflicts.

Plaintiffs' constitutional claims likewise fail. Plaintiffs are essentially asking the Court to create novel constitutional rights out of whole cloth—to overturn Congress' and DoD's discretion to decide whether and how the government should undertake the recovery and return of servicemembers from foreign conflicts and instead make that effort a constitutional right. Defendants have not violated any property rights under the Due Process Clause of the Fifth Amendment or the Seizure Clause of the Fourth Amendment because Plaintiffs have no cognizable property interest in unidentified remains, and the government has provided sufficient protections for any cognizable interest Plaintiffs may possess. Similarly, Plaintiffs have failed to establish a substantial burden on their exercise of religion, requiring dismissal of their claims under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) because Defendants' actions are reasonable.

In sum, Defendants are entitled to summary judgment and Plaintiffs' Amended Complaint should be dismissed with prejudice on all grounds.

ARGUMENT

I. Plaintiffs Have Failed to Establish the Essential Prerequisite to Most of Their Legal Theories—That The Remains of Their Relatives Have Been Identified.

The Court previously denied judgment to Defendants largely because it concluded that Plaintiffs had adequately pled that Defendants were "refus[ing] to return allegedly identified remains." *Patterson v. DPAA*, 343 F. Supp. 3d 637, 647 (W.D. Tex. 2018); *see also* Pls.' Opp'n at 9, ECF No. 64 (asserting "a primary basis for several of the Families' claims" is "whether the service members' remains have been, or can easily be, located and/or identified").[1] At summary

[1] Hereinafter, internal citations, quotations and alterations are omitted unless otherwise indicated.

judgment, Defendants have put forward comprehensive evidence that the servicemembers and remains at issue have not been identified and that the location of these servicemembers is not known. *See* Defs.' Mot. Summ. J. (Defs.' MSJ) at 13-21, ECF No. 61; App'x at 96-195, ECF No. 61-1. Plaintiffs have failed to counter Defendants' evidence with any evidence from which it can be concluded that the servicemembers have been identified or that their location is known. Accordingly, there is no dispute of fact, and Plaintiffs' cannot rely on their refuted contention.

To the extent Plaintiffs cite competent evidence, it simply establishes that their relatives have historically been associated with particular sets of remains for various circumstantial reasons. *See infra* Arg. § II.C-D. Even if that information gives rise to the *possibility* that the remains of one Plaintiffs' relative are among the grave or graves they have singled out, it is also plausible or likely that the singled out remains are those of one or more of the dozens or hundreds of servicemembers missing from the same area. *See id.* And it is also plausible that the remains of one of Plaintiffs' relatives were buried as a different unknown, were misidentified and buried under someone else's name, or were never recovered. *See* Richardson Dep. at 49:17-19, ECF No. 55-15 (Plaintiffs' own putative expert stating that "[i]t is as likely that [1LT Nininger] is not X-1130 and has already been recovered and buried as someone else as it is that this is him"). This mere possibility cannot give rise to the statutory and constitutional claims Plaintiffs allege in this lawsuit. Otherwise, the families of tens of thousands of unaccounted-for servicemembers could turn DoD's accounting mission into protracted legal battles with constitutional implications.

Plaintiffs claim that their interpretation of the historical evidence, if adopted, makes it "more likely than not" that the remains they have singled out are those of 1LT Nininger, COL Stewart, and Brig. Gen. Fort and that the locations of the remains of the four servicemembers

associated with Cabanatuan Common Graves "has likely been established." *See* Pls.' Opp'n at 6-8.[2] Even if that were the case, it would not have legal significance. A servicemember is identified only on the basis of a "clear and convincing burden of proof" that eliminates "all reasonable alternatives." App'x ¶¶ 75-76. And DoD's disinterment threshold is set by the likelihood of identifying the remains from among all plausible candidates based on historical and scientific evidence. *See* App'x ¶ 48. Plaintiffs have made no effort to show that a constitutionally cognizable liberty or property interest can be based on such a probability, let alone that free exercise rights under the First Amendment attach to remains that may or may not be those of a relative.

More importantly, Plaintiffs are wrong. For the Cabanatuan remains, even if the location of a servicemember could be isolated to a particular group of commingled remains, that does not mean that the servicemember has been identified or that any individual piece of remains can be assigned to him rather than to other servicemembers. Until the commingled remains are disentangled by rigorous scientific analysis, there is nothing that can be turned over to any particular family.[3] And for the individual remains, Plaintiffs disregard and dismiss the most

[2] As explained in Defendants' Response to Plaintiffs' App'x, Defendants do not, in fact, concede that the location of TEC4 Bruntmyer, PVT Morgan, PFC Hansen, and any additional remains of PVT Kelder are known. *See* Defs.' Resp. to Pls.' App'x ¶¶ 4-6, 26. Because of all that happened between the servicemembers' original burial in common graves at the Cabanatuan POW Camp and today, it cannot be said that a servicemember is likely to be found among the remaining unknowns associated with the particular common grave in which he was recorded as buried.

[3] For this reason, Plaintiffs statements about whether Defendants "have possession" of the remains of Plaintiffs' relatives, *see* Pls.' Opp'n at 9, 10, 19, 22, 34, are beside the point. Even if Defendants unknowingly have possession of the remains of Plaintiffs' relatives, they cannot give possession to Plaintiffs until the remains are formally identified and (in the case of Cabanatuan) disentangled from other remains. Only at that point does DoD have authority to give the remains to Plaintiffs as the next of kin / person authorized to direct disposition of remains. *See* App'x ¶¶ 86-88.

probative evidence in the files to reach their "more likely than not" assessment. *See infra* Arg. §§ C.2, C.3, D.3. In fact, as DoD has repeatedly concluded over the years as it examined these three cases, the remains Plaintiffs have singled out are very unlikely to be those of 1LT Nininger, COL Stewart, or Brig. Gen. Fort. *See id.*

Plaintiffs also claim that summary judgment is inappropriate because the parties' disagreement about the evidence amounts to a "dispute of material facts." Pls.' Opp'n at 5-10, 19-20. That is not the case. Here, the facts are almost entirely undisputed. Everyone is looking at the same historical records. And those records cannot be tested at trial any better than at summary judgment. No witness from the 1940s can be put on the stand. Instead, the dispute between the parties concerns whether the other party is making appropriate use of this undisputed evidence. The Court can resolve this dispute at this stage of the case. Because "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment," *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003), the Court can consider Defendants' arguments that Plaintiffs are relying on speculation or unwarranted inferences. In addition, although a court generally must "review the facts in the light most favorable to [the non-moving party]," a court must do so "only when both parties have submitted evidence of contradictory facts." *Shumpert v. City of Tupelo*, 905 F.3d 310, 323 (5th Cir. 2018). Here, where the facts themselves do not contradict, there is no reason to tip the balance in Plaintiffs' favor. Defendants are entitled to summary judgment in this case because at multiple points, Plaintiffs' "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *McCarty v. Hillstone Restaurant Grp., Inc.*, 864 F.3d 354, 358 (5th Cir. 2017).[4]

[4] Plaintiffs' claim that summary judgment would be premature because DNA testing is ongoing, Pls.' Opp'n at 9, mistakes the nature of their claims. Plaintiffs claim that the current state of

II. Plaintiffs' Administrative Procedure Act Claims Are Meritless.[5]

A. Defendants Have Not Violated the APA's Procedural Requirements.

For the first time, Plaintiffs assert that the DoD should have promulgated its regulations by notice and comment in the Federal Register and must use the APA's formal adjudication process to decide disinterment requests. *See* Pls.' Cross-Mot. at 22-23, ECF No. 65. Neither assertion is correct.

First, APA's notice and comment rulemaking requirements expressly do not apply "to the extent that there is involved—(1) a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The regulation of DoD agencies in their performance of a military mission is plainly a military function. *See United States v. Ventura-Melendez*, 321 F.3d 230, 232-33 (1st Cir. 2003) (rejecting argument that rule regulating civilians cannot fulfil a military function); *Indep. Guard Ass'n of Nevada, Local No. 1 v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995), amended by 69 F.3d 1038 (9th Cir. 1995) (holding that this provision "applies to predominately civilian agencies such as [the Department of Energy] when they are performing a 'military function'"). Plaintiffs' claim that no exception applies because the regulations do not involve a "wartime function" appears to be drawn from caselaw addressing a different APA provision, which states that an "agency" for purposes of the APA does not include "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 551(1)(G). Section

---

facts entitles them to relief. If that is not the case, Defendants are entitled to judgment. If DoD later identifies one of Plaintiffs' relatives, there is no reason to expect that DoD will not provide the primary next of kin the opportunity to direct disposition of the remains, and certainly no reason to hold this case open to supervise that eventuality.

[5] Again, Defendants do not dispute that it is proper for the Court to consider Plaintiffs' First, Fourth, and Fifth Amendment claims, which fail on the merits for the reasons discussed in Argument Section II, III, and IV. *See* Defs.' MSJ at 3 n. 2. Under this APA heading, Defendants address only Plaintiffs' statutory claims that do not depend on those constitutional claims.

553's exception for "military functions" has never been considered limited to wartime.

Second, the APA's requirements for formal adjudication apply only where the "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). Thus, it only applies "when the governing statute specifies that an agency must conduct a 'hearing on the record,' as opposed to a statutory requirement of a 'hearing' or a 'full hearing.'" *Arwady Hand Truck Sales, Inc. v. Vander Werf*, 507 F. Supp. 2d 754, 759 (S.D. Tex. 2007) (citing *R.R. Comm'n of Tex. v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985) and *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004)); *see also Sierra Club v. Peterson*, 185 F.3d 349, 367 n.26 (5th Cir. 1999) (explaining that "informal adjudication is by far more prevalent today"). Plaintiffs cite no statutory provision requiring a hearing in this case, let alone a "hearing on the record." Accordingly, DoD's disinterment decisions are properly considered informal adjudications, which need only satisfy the requirements of 5 U.S.C. § 555. *See Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990) (holding that for "informal adjudication, the minimal requirements . . . are set forth in the APA, 5 U.S.C. § 555, and do not include [the trial-type procedures set forth in 5 U.S.C. §§ 554, 556-557]"). Plaintiffs have alleged no failure of § 555 requirements, and Defendants have plainly satisfied those requirements. *See, e.g.*, 5 U.S.C. § 555(e) (requiring "[p]rompt notice" of a denial of a written request, and a "brief statement of the grounds for denial").

B. Certain of the Actions Plaintiffs Challenge Are Committed to Agency Discretion and Not Made Just Subject to APA Review by DoD Regulations.

Defendants have argued that certain of the agency actions Plaintiffs appear to challenge—"decisions not to disinter certain unknown remains at this time, deferral of recommendations regarding disinterment until relevant information is received, and methodical

processing of disinterred remains for identification"—are committed to the agency's discretion and not subject to challenge under the APA. Defs.' MSJ at 4-12; *see also Patterson*, 343 F. Supp. 3d at 651 (holding open the possibility that "the decision to disinter or not is left to agency discretion"). Plaintiffs do not dispute that the statutes provide no meaningful standard to apply, but insist that agency regulations provide enforceable standards that Defendants have violated. *See* Pls.' Opp'n at 38-41. To support this argument they craft novel claims that Defendants have violated their own regulations.

For an "agency's own regulations [to] provide the requisite 'law to apply,'" *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998), the regulations must meet the same standard as a statute—they must provide a "meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Each of the regulatory provisions to which Plaintiffs point (1) does not provide a meaningful standard, (2) does not stand for the proposition Plaintiffs assert, and/or (3) has readily been met by Defendants here.[6]

1. DPAA Administrative Instruction 2310.01

Plaintiffs for the first time claim that DPAA have failed to follow its administrative instruction.[7] They do not, however, dispute Defendants' showing that AI 2310.01 does not

[6] Plaintiffs offer no response to Defendants' explanation that Joint Publication 4-06, Mortuary Affairs (Oct. 12, 2011), upon which Plaintiffs relied in their complaint, has been cancelled and that its successor, Joint Publication 4-0, Joint Logistics (Feb. 4, 2019), does not apply to DPAA or the past accounting mission. *See* Defs.' MSJ at 8-9.

[7] While Plaintiffs point out that their vague pleading language is capacious enough to include a challenge to compliance with any regulatory requirement, *see* Pls.' Opp'n at 38 n. 11 ("The Amended Complaint plainly states that the DPAA has abused its discretion and acted in an arbitrary and capricious manner by failing to observe required procedures, which necessary includes the DPAA's own procedures."), Plaintiffs cannot deny that they have never previously singled out AI 2310.01 in any pleading or brief.

create judicially manageable standards for reviewing DPAA's recommendation itself or any standards for the Assistant Secretary of Defense's disinterment decision, let alone for post-disinterment processing. *See* Defs.' MSJ at 6-7. Instead, they claim that (1) DPAA has failed to give family disinterment requests "high priority when compared to requests submitted by third parties and internal disinterment proposals," that (2) DPAA has "permanently deferred" requests at issue in this case by deferring Plaintiffs' requests "for years," and that (3) DPAA researchers failed to complete a historical analysis and draft recommendation within 30 days. Pls.' Opp'n at 38-39. None of these claims are meritorious.

As to priority, AI 2310.01 states both that family requests should receive "high priority" compared to internal disinterment proposals, *id.* ¶ 3.e, and that internal disinterment proposals "are important to the fulfillment of DPAA's mission and work on these should be balanced with family requests inasmuch as complexity of cases . . . permits," *id.* ¶ 3.f. This internal agency guidance does not actually give courts a meaningful standard to apply. At any rate, DPAA does prioritize family requests. *See* 4th Kupsky Decl. ¶ 7.

DPAA has not "permanently deferred" any of Plaintiffs' requests. See AI 2310.01 § 3.g. Indeed, Plaintiff Kelder's, Patterson's, Fort's, and Bruntmyer's disinterment requests have received final action, along with DPAA's disinterment recommendation that proceeded without any action from Plaintiff Alsbury. *See* Defs.' App'x ¶¶ 110, 114, 122, 131, 172. While Plaintiff Hensley's and Boyt's disinterment requests had been held by DPAA pending receipt of adequate family reference samples, those recommendations are now proceeding forward, *see* 4th Kupsky Decl. ¶¶ 11, 24. Regardless, this provision of the regulation cannot make actionable the kind of delay Plaintiffs complain about here because a temporary deferral is not permanent.

Finally, as to the 30 day benchmark for completion of historical analysis, Plaintiffs

cannot show either that DPAA failed to meet its internal benchmarks or that the Plaintiffs have standing to challenge DPAA's timing for such internal processing benchmarks. Nothing in the record suggests that DPAA historians failed to meet that standard. Regardless, AI 2310.01 permits DPAA to grant more time for historical analysis, *see id.* § 3, Phase II, ¶ 3, making this not a manageable or enforceable standard.

2. DoD Directive 2310.07

Plaintiffs return to claims based in DoD Directive 2310.07 and DoD Directive 1300.22 without addressing this Court's conclusion that those very regulations "do not set out specific nondiscretionary duties to which Defendants must adhere; they inherently involve discretion, just as the Court found is true for the underlying statute." *Patterson*, 343 F. Supp. 3d at 653. They do not show how these regulations provide a "meaningful standard against which to judge the agency's exercise of discretion." *Lincoln*, 508 U.S. at 191.

For DoD Directive 2310.07, the only standard Plaintiffs point to is § 1.2(e), which states that "[i]nformation pertaining to the [government's] efforts to locate, recover, and, when applicable, identify remains of unaccounted-for DoD personnel . . . from past conflicts . . . will be provided to the [servicemembers' families]." This statement does not provide a standard by which to measure the adequacy of various types or frequencies of communication in specific cases. *Cf.* Pls.' Opp'n at 39 (relying on this provision to claim that "the Government has failed to always provide sufficient information"). Regardless, as discussed below, the record demonstrates that DoD, through the Army's Past Conflicts Repatriation Branch, has amply communicated with Plaintiffs regarding DoD's efforts to locate and identify Plaintiffs' relatives. *See infra* Arg. § I.D.4. This has included one-on-one meetings at family updates, forwarding documentation, responding to letters, and telephone conversations. *See generally* 2d Gardner Decl.

3. DoD Directive 1300.22

For DoD Directive 1300.22, Plaintiffs suggest that three provisions provide relevant standards. Plaintiffs point to §3(a), which declares DoD policy that "consistent with applicable laws and regulations, . . . [the remains of DoD servicemembers] will be recovered, identified, and returned to their families as expeditiously as possible while maintaining the dignity, respect, and care of the deceased to the extent possible and protecting the safety of the living." Plaintiffs do not respond to Defendants' specific showing that this language does not constrain Defendants' discretion or provide additional "law to apply" here. *See* Defs.' MSJ at 7-8. Instead, they suggest that Defendants have "ignore[d]" this provision and "failed to comply" with it because "Private Kelder's remains have been withheld for more than four years after disinterment." Pls.' Opp'n at 39. To the contrary, PVT Kelder was expeditiously identified after disinterment, the identified remains were promptly provided to the family, and Plaintiff Kelder was contacted for disposition instructions promptly after additional remains of PVT Kelder were identified in May 2019. *See* App'x ¶ 124; 2d Berg Decl. ¶¶ 3-4; 2d Gardner Decl. ¶ 54. It is not a violation of this or any other DoD regulation for the identification process for residual remains to take a substantial amount of time, even years. Cf. App'x ¶ 128 (explaining what goes into identification process).[8]

In addition, Plaintiffs point to § 3(c) of DoD Directive 1300.22, which states that "the movement of the deceased's remains will be handled with the reverence, care, priority, and

[8] For similar reasons, Plaintiffs are mistaken to claim that DTM-16-003's requirement that DoD "must have the scientific and technological ability and capability to process unknown remains for identification within 24 months after the date of disinterment" was "violated in Private Kelder's case." Pls.' Opp'n at 40. Not only did PVT Kelder's disinterment precede the implementation of that policy, but also PVT Kelder was identified within five months of the disinterment. *See* Berg Decl. ¶¶ 5-8. DTM-16-003 does not require that every last element of commingled remains be identified within two years.

dignity befitting them and the circumstances," and § 3(d), which states that the remains "will be continuously escorted . . . from the preparing mortuary to the funeral home." Even if these could provide standards for review, Plaintiffs did not plead or provide supporting evidence for any violation of these policies, but instead express concern about something different—how the remains are maintained at the DPAA Laboratory. *See* Pls.' Opp'n at 40. At any rate, remains are treated with professionalism and respect at the DPAA Laboratory. *See* 2d Berg. Decl. ¶¶ 10-13.

4. Army Regulations

Plaintiffs offer no meaningful response to Defendants showing that the provisions of Army Regulation 638-2 cited in Plaintiffs' pleading are irrelevant. *See* Defs.' MSJ at 9-11. Defendants have explained that this regulation only comes into play once a servicemember is identified because at that point the Army becomes responsible for working with the servicemember's next of kin for disposition of the remains. *See* App'x ¶¶ 85-86. Plaintiffs have identified no defects in the Army's assistance in the disposition of PVT Kelder's remains. Therefore, Army Regulation 638-2 does not provide a standard for any of Plaintiffs' claims in this case. Even more egregiously, Plaintiffs rely on Army Field Manual FM 4-20-65, *see* Pls.' Opp'n at 45, without addressing Defendants' explanation that this document was cancelled years ago. *See* Defs.' MSJ at 10 n.10.

For all of these reasons, the Court should conclude that the aspects of the past accounting mission that Plaintiffs challenge are committed to agency discretion and not subject to review under the APA.

C. Plaintiffs Cannot Show that Defendants' Final Disinterment Decisions Are Unreasonable or an Abuse of Discretion.

Defendants are entitled to summary judgment on Plaintiffs' arbitrary and capricious

challenges to four final disinterment decisions and the policy on which they are based.[9] Defendants' challenged actions are reasonable and well-founded.

As a threshold argument, Plaintiffs assert that the Court "cannot" grant judgment to the Defendants on Plaintiffs' arbitrary and capricious claims in the absence of a certified administrative record. Pls.' Opp'n at 41. Plaintiffs err in claiming that the Court must have "the whole record" before it. *Id.* (quoting 5 U.S.C. § 706). Instead, the APA provides "the court shall review the whole record *or those parts of it cited by a party*." 5 U.S.C. § 706 (emphasis added); *Budhathoki v. Nielsen*, 898 F.3d 504, 517 (5th Cir. 2018). The practice of filing a certified administrative record with the Court is required neither by Fifth Circuit caselaw nor by the Local Rules.[10] Here, the administrative record for a disinterment decision is rooted in the servicemembers' IDPFs and the X-files for the relevant unidentified remains, along with similar historical records. Thus, the parties' respective arguments are appropriately based on the record and the parties have attached those excerpts of the record they consider most relevant.[11] In the

[9] Plaintiffs have conceded that they "agree" that DoD's decisions to disinter remains associated with Cabanatuan Common Graves 704 and 822 were "reasonable." *See* Pls.' Opp'n at 42. Accordingly, for the reasons previously laid out, these decisions should be upheld. *See* Defs.' MSJ at 16. Only the two decisions Plaintiffs still dispute will be addressed below.

[10] Indeed, courts in this Circuit have sometimes followed the rule of the U.S. District Court for the District of Columbia, under which the agency files a certified list of the contents of the administrative record and the parties file a joint appendix of the excerpts of the record upon which they rely. *See* D.D.C. Local Rule 7(n) (link) ("Counsel shall not burden the appendix with excess material from the administrative record that does not relate to the issues; raised in the motion or opposition. Unless so requested by the Court, the entire administrative record shall not be filed with the Court."); Order, *Chamber of Commerce v. Perez*, No. 3:16-cv-1476-M (N.D. Tex. July 7, 2016) (attached as Exhibit BB).

[11] Plaintiffs' claim that they cannot propose additional documents for consideration until the administrative record is certified is dubious. *See* Pls.' Opp'n at 42 n.12. Plaintiffs have already cited and attached those portions of the record they consider relevant. Defendants have attached to their pleadings or produced in discovery each of the decision documents, which clearly identify the documents upon which each memorandum relies. *See, e.g.*, App'x Ex. 39-41.

service of clarity, however, Defendants are filing certified lists of the documents reviewed by the decisionmaker for each disinterment decision. *See* Exhibits W & X.[12]

In light of the portions of the administrative records cited by the parties, the reasonableness of Defendants' actions justifies summary judgment on Plaintiffs' arbitrary and capricious claims.

1. The Disinterment Thresholds Set by the Deputy Secretary of Defense in 2015 are Reasonable.

Plaintiffs obliquely challenge the Deputy Secretary of Defense's April 14, 2015, memorandum setting thresholds for disinterment of unknown remains from overseas military cemeteries, as implemented in DTM-16-003 and DPAA AI 2310.01. *See* Pls.' Opp'n at 39. They assert that "the Government's policy that at least 60% of the persons associated with a common grave can be individually identified," is an "arbitrary and capricious action," because "[t]his is an arbitrary number that prevents families from being able to receive their relative's remains despite clear evidence showing where their loved one is buried." Pls.' Opp'n at 39. Plaintiffs appear to be specifically challenging this policy's implication that DoD will disinter commingled remains only if it has DNA samples (or other medical means of identification) from 60% of the associated servicemembers' families. *See* DTM-16-003.

As an initial matter, the Court need not entertain this argument, which is not a claim in Plaintiffs' Amended Complaint and is only articulated in a section purporting to show that DoD

Plaintiffs do not need additional information to decide whether to seek supplementation of the record.

[12] Defendants had not focused on a certified administrative record in part because Plaintiffs have refused to limit either their constitutional or their APA claims to the record. *See* Suppl. Joint Rule 26(f) Report and Proposed Schedule at 11, ECF No. 22 (Plaintiffs seeking discovery over Defendants' objection on the ground that "even if the record review rule is applicable to Plaintiffs' APA cause of action, which Plaintiffs contend it is not, extra-record information is required for effective judicial review").

regulations provide "sufficient standards by which to evaluate the DPAA's action." Pls.' Opp'n at 38. Regardless, this policy cannot be held arbitrary and capricious because it is readily apparent that DoD's "reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013). It is plainly reasonable for DoD to disinter respectfully buried remains of unknown servicemembers only with a sufficient level of certainty that it will be able to identify those remains shortly after disinterment.

In general, DNA testing can only associate remains with specific individuals if DoD has reference samples for those individuals. *See* 2d McMahon Decl. ¶¶ 10-13. Thus, if DoD conducted a disinterment without reference samples already collected, even successful DNA testing would be unlikely to support identification; the disinterred, DNA-tested remains would need to await future reference sample collection or be reinterred in the meantime. Cf. DTM-16-003 (requiring that the relevant DoD components have the resources to identify the remains within two years). Plaintiffs appear to be suggesting a hypothetical where one servicemember was known to be present among the commingled remains and DNA samples had been provided for that one servicemember. *See* Pls.' Opp'n at 39. They imply it would be unfair to delay disinterment if that one servicemember could be identified, even if his comrades from the same grave could not. But even in such a case,[13] a narrow focus on one servicemember would be unreasonable in light of DoD's need to consider its own allocation of resources, respect for all of

[13] This lawsuit does not present Plaintiffs' hypothetical. Their relatives are not known to be in any of the selected graves. And DoD's 60% threshold has not prevented the disinterment of any common grave of interest to Plaintiffs. Instead, DPAA's recommendation to disinter Common Grave 407 was deferred pending collection of additional family reference samples and is now proceeding forward. *See* 4th Kupsky Decl. ¶¶ 6, 9, 11. Practically, this simply meant that DPAA proceeded forward with other recommendations and disinterments that were more ready in the meantime, which is a result that promotes the efficient performance of the agency's mission. *See id.* ¶ 7; App'x ¶ 40.

the servicemembers potentially involved in the commingled remains, and the interests of all of those servicemembers' families. To the extent Plaintiffs use "arbitrary number" to mean that these factors could have supported a threshold that was a little higher or lower, the APA does not require such precision. *See San Luis & Delta-Mendota Water Auth. v Jewell*, 747 F.3d 581, 616 (9th Cir. 2014) (explaining that while an agency's selection of "-5,000 is thus an arbitrary number because [the agency] could also have chosen -4,999 or -5,001 or some other number within the [reasonable] range," that does not "make the choice . . . arbitrary in the sense captured by the APA" because the agency "chose a reasonable figure"). While one could perhaps argue that DNA for more a few more or less than 60% of the associated servicemembers should be required, it cannot be said that it was irrational or baseless for DoD to set a threshold for commingled remains. Plaintiffs' cursory argument should be rejected.

2. Denial of Request to Disinter X-1130 for Comparison to 1LT Nininger

Plaintiffs challenge both DoD's March 2016 denial of Plaintiff John Patterson's disinterment request for the remains designated X-1130 and Defendants' inaction since that time. See Pls.' Opp'n at 43-44. Accordingly, Defendants have addressed both the adequate basis for the decision in 2016 and the additional evidence in support of that result now. Contrary to Plaintiffs' characterization, 1LT Nininger's case has received careful attention from the 1940s down to the present. The difficulties involved in the case cannot be resolved by Plaintiffs' simplistic acceptance of an early association with 1LT Nininger in the face of substantial contrary evidence.

The March 2016 decision not to disinter the remains designated X-1130 for comparison with DNA from 1LT Nininger's family was reasonable because the underlying DPAA memorandum both considered all of the evidence that was then available and relied on two key factors: (1) "too much doubt as to the location of [1LT Nininger's] burial," and (2) "[t]he historic

evidence is not strong enough to overcome the 4.5 inch discrepancy with the highest estimated stature of X-1130." *See* App'x Ex. M, ECF No. 63-17 at 49. Both of those factors are consistent with the Quartermaster General's reasons for rejecting the proposed association with 1LT Nininger. *See* 3d Kupsky Decl. ¶ 26. And those factors are also consistent with the evidence developed since 2016. *See id.* ¶¶ 24-29. Taken together, X-1130 is unlikely to be the remains of 1LT Nininger due to the large discrepancy between the estimated stature of X-1130 and 1LT Nininger and the fact that the recovery location of X-1130 does not correspond to any witnesses' testimony regarding where 1LT Nininger was buried. Indeed, Plaintiffs do not respond to Defendants' showing in this litigation that stature estimate is reliable and that, even using current methodology, the stature of X-1130 and 1LT Nininger is at least four inches apart. *See* App'x ¶¶ 49-52, 60-63.

The "inconsistencies" Plaintiffs point out in the DPAA memorandum amount to nothing more than harmless error. While it is true that the memorandum did not address the classified addendum to 1LT Cheaney's IDPF, that is because that file had not yet been rediscovered. *See* 4th Kupsky Decl. ¶¶ 19-20. And the contents of that file actually strengthen the evidence pointing away from Abucay Cemetery and closer to the Abucay churchyard. *See* 3d Kupsky Decl. ¶ 25.c. While the memorandum mistakenly states that X-1130 was disinterred from Abucay churchyard,[14] it correctly notes the distinction between Abucay Cemetery and the Abucay churchyard and testimony about various locations 1LT Nininger could have been buried. App'x Ex. M, ECF No. 63-17 at 43-49. The memorandum's concern about the location

[14] Dr. Kupsky has subsequently compared the disinterment records for many of the remains recovered from the Abucay area and demonstrated that X-1130 was one of at least ten disinterments from the Abucay Cemetery and that a separate batch of disinterments occurred at the Abucay churchyard. *See* 3d Kupsky Decl. ¶ 24.

discrepancies would only have been strengthened by the correct recovery location. *See* 3d Kupsky Decl. ¶¶ 24-25.

However, it is Plaintiffs that err in claiming that "M/Sgt. Abie Abraham . . . made the initial association [of X-1130 with 1LT Nininger] and directed the exhumation of the remains." Pls.' Opp'n at 43. As detailed in Defendants' response to ¶ 10 of Plaintiffs' Appendix, Plaintiffs make unwarranted leaps from Sgt. Abraham's interview of a gravedigger in December 1945 regarding burying unidentified Americans in Abucay Cemetery. There is no evidence that Sgt. Abraham directed the disinterment of X-1130, and more importantly no evidence that he ever associated X-1130 with 1LT Nininger. *See* 3d Kupsky Decl. ¶ 24.a-b; 4th Kupsky Decl. ¶¶ 21-22. Plaintiffs' contortions appear designed to avoid the evidence that the association between 1LT Nininger and X-1130 depends primarily (if not exclusively) on the discredited testimony of COL Clarke. *See* 3d Kupsky Decl. ¶ 25. Without the association of 1LT Nininger with a "Grave No. 9," X-1130 is no more likely than any of the other 50 unknown remains recovered from around Abucay. *See* 3d Kupsky Decl. ¶ 24.

Because Plaintiffs are asking the Court to declare DoD's decision arbitrary and capricious,[15] it is enough that Defendants did not "entirely fail to consider" these issues. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 658. To the contrary, Defendants have demonstrated both in 2016 and now that it would be unwarranted to rely exclusively on the early association because such associations are frequently mistaken, because this association appears to be based

[15] Plaintiffs also assert that the "primary problem" with DoD's denial of this disinterment request and Plaintiff Janis Fort's request is "withholding a servicemember's remains from his family" and "refus[ing] to release possession of the remains to their next of kin." Pls.' Opp'n at 44-45. For reasons discussed above, Plaintiffs cannot show that any regulation requires release of remains before identification or merely on a family's assertion. See supra, Arg. § I.B. Thus, at bottom this simply recapitulates Plaintiffs' constitutional claims, which are discussed below. See infra, Arg. §§ II, III, IV.

on a source that Plaintiffs themselves consider to be unreliable, and because reliable anthropological evidence demonstrates that these remains were of a person far too short to be 1LT Nininger. *See* App'x ¶¶ 54-59, 139-52. DPAA has also acted reasonable in exploring other possibilities for the identification of 1LT Nininger and conducting a broader project encompassing all of the remains from the Abucay area. *See* App'x ¶¶ 197-94.

3. Denial of Request to Disinter X-618 for Comparison to Brig. Gen. Fort

Plaintiffs challenge DoD's November 2018 denial of Plaintiff Janis Fort's request to disinter X-618 for comparison to Brigadier General Guy Fort ("Brig. Gen. Fort"). Defendants have explained four factors that support the conclusion that X-618 is unlikely to be the remains of Brig. Gen. Fort:

1. Historical analysis indicates that he was likely executed in Dansalan, about 65 miles away from the location where X-618 was recovered. App'x ¶¶ 173, 176-78.
2. While Brig. Gen. Fort was a Caucasian in his 60s, AGRS anthropologists in 1950 estimated that the remains were between 23 and 28 years of age with "Mongoloid (Very probably Filipino)" ancestry. App'x ¶¶ 179-82.
3. While Brig. Gen. Fort's stature was recorded as 68.5 inches, DPAA anthropologists using modern methodology estimate the remains' stature to be at best approximately two inches shorter. App'x ¶¶ 179, 183-84.
4. While Brig. Gen. Fort had a tooth extracted decades earlier, a DPAA odontologist demonstrated that the same tooth was identified as present in X-618 on three separate occasions. App'x ¶¶ 179, 185-86.

See Defs.' MSJ at 15. Plaintiffs do not even engage with factors (2) and (4), which are sufficient standing alone to support DoD's denial. *See* App'x ¶ 179-82, 185-86.

With regard to the historical evidence, they claim that DPAA "cho[se] to ignore a sworn statement" by Ignacio Cruz, the provincial governor, Pls.' Opp'n at 45, and criticize DPAA's reliance on other evidence as "unreasonable," without significant explanation. But DPAA did not ignore Mr. Cruz's statement; instead it weighed it against the other evidence. *See* 3d Kupsky

Decl. Ex. 39.[16] Nothing more is required to defeat an arbitrary and capricious challenge. Plaintiffs cannot show that DPAA's conclusion was irrational or not supported by evidence.

For the stature discrepancy, Plaintiffs simply assert that stature estimation is "not reliable," relying on (1) the assertion that it is "common for height to be exaggerated or inaccurate" as exemplified by "a college football roster," (2) a likely typographical error in one of six recorded heights for COL Stewart as discussed below, and (3) a mischaracterization of Dr. Emanovsky's explanation of how reliable stature estimation is. *See* Pls.' Opp'n at 46. These reasons are the sort of "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation [that] are not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). Such flimsy claims cannot undermine Defendants' expert testimony establishing that stature estimation is a recognized and reliable science that is reasonably applied to these cases. *See* App'x ¶¶ 60-63.[17]

In sum, Plaintiffs cannot show that DoD's denial of their disinterment request was arbitrary and capricious because DoD did not fail to consider relevant evidence, because the decision was well-supported by evidence that Plaintiffs do not even attempt to dispute, and because Plaintiffs' efforts to dispute DoD's evidence fall flat.

D. Defendants Have Not Failed to Take Any Action Required by Law.

Plaintiffs do not dispute that their remaining APA claims seek relief under 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed." Pls.' Opp'n at

[16] For example, Mr. Cruz's statement dates the Cagayan execution in September 1942, at a time when substantial evidence confirmed that Brig. Gen. Fort was in prison in Manila. See 3d Kupsky Decl. Ex. 39 at 7 & nn.22-23.

[17] Plaintiffs have no evidence from a scientific expert to dispute the reliability of stature estimation, and Mr. Eakin's opinions are unsupported and should be excluded for failure to meet the requirements of Federal Rule of Evidence 702. *See* Defs.' Daubert Mot., ECF No. 55.

34-35, 47; Pls.' Cross-Mot. at 24-25. These claims fail both because Plaintiffs have not met the finality threshold for such review and because, even if these actions could be considered final decisions, Plaintiffs cannot show that Defendants' inaction violated any legal requirement.

As this Court has noted, "in certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate." *Patterson*, 343 F. Supp. 3d at 651 (quoting *Sierra Club v. Peterson*, 228 F.3d 559, 569 (5th Cir. 2000) (en banc)). But Plaintiffs must still show that this inaction "mark[s] the consummation of the agency's decisionmaking process." *Patterson*, 343 F. Supp. 3d at 651. Moreover, the Supreme Court has explained that 5 U.S.C. § 706(1) is rooted in the historical mandamus remedy and "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Because this APA provision only encompasses "required agency action," it "rules out judicial direction of even discrete agency action that is not demanded by law." *Norton*, 542 U.S. at 65.

Accordingly, this argument fails for the same reasons that the Court has rejected Plaintiffs' mandamus claims premised on the underlying statute and various regulations. *See Patterson*, 343 F. Supp. 3d at 653. It is thus law of the case that Plaintiffs cannot show that Defendants have failed to take discrete actions they are required to take. *See id.*; *see also supra*, Arg. § I.A.2. Nevertheless, out of an abundance of caution, Defendants will address each of the non-final actions that Plaintiffs challenge here in order to demonstrate the reasonableness of their current posture.[18]

[18] Plaintiffs also generically assert that "Defendants' actions are unlawful and should be set aside because they are . . . not in accordance with law [and] fail to observe procedure required by law." Am. Compl. ¶ 103. In response to Defendants' Rule 12(c) Motion, Plaintiffs claimed only that "the Government's actions violate its own regulations." Pls.' Opp'n to Rule 12(c) Mot. at 34, ECF No. 33; *see also id.* (claiming that the "clear rule to apply" is "the Constitution and the

They have failed to show that any "agency inaction [is] sufficiently final to make judicial review appropriate." *Patterson*, 343 F. Supp. 3d at 651 (quoting *Sierra Club v. Peterson*, 228 F.3d 559, 569 (5th Cir. 2000) (en banc)).

1. Recommending Disinterment of Common Grave 407

Plaintiffs err in claiming that "the Government has refused to take any action to disinter [PFC Hansen's] remains and provide them to his family." Pls.' Cross-Mot. at 25; Pls.' Opp'n at 34. To the contrary, DPAA prepared a draft disinterment recommendation even before Plaintiffs' November 2017 request. *See* 4th Kupsky Decl. ¶ 8. But the recommendation package could not be finalized because DoD had not received DNA samples from a sufficient number of eligible DNA donors. *See id.* ¶¶ 6, 9. Indeed, until December 2018, DoD even lacked any DNA samples that could be used to identify *PFC Hansen*—the servicemember at issue in this case. *See* McMahon Decl. ¶ 24. DPAA has now finalized its disinterment recommendation and submitted it for review and final decision by DoD officials. *See* 4th Kupsky Decl. ¶ 11.

Thus, Plaintiffs cannot show that Defendants have decided not to act or that the current status "mark[s] the consummation of the agency's decisionmaking process." *Patterson*, 343 F. Supp. 3d at 651. Nor can Plaintiffs show that any Defendant has failed to take a discrete, required action with regard to this disinterment request. *See supra* Arg. § I.B. Plaintiffs make no effort to show that any regulation requires DPAA to have completed this recommendation more quickly.

Finally, DPAA's action is reasonable. For the reasons discussed above, it would not be efficient or practical to proceed with a disinterment without sufficient DNA samples to identify

---

Government's regulations," cross-referencing the regulations cited in the Mandamus Act portion of the Amended Complaint). Because Plaintiffs do not appear to be asserting a claim distinct from their 5 U.S.C. § 706(1) claim, Defendants have not addressed this language separately.

the servicemembers associated with that grave, especially given the complications involved in identifying highly commingled remains. *See supra* Arg. § I.C.1; App'x ¶¶ 127-28. It was thus appropriate to wait for confirmation that sufficient DNA samples had been received. *See* 4th Kupsky Decl. ¶¶ 6, 9, 11.

2. Processing Remains from Common Graves 704, 717, and 822

Plaintiffs argue that DoD has "refused to act and has unreasonably delayed in taking any action" by "refus[ing] to return the remaining balance of [PVT Kelder's] remains" and by "not return[ing] the remains [of PVT Morgan and TEC4 Bruntmyer]" in the six months since remains associated with Common Graves 704 and 822 were disinterred. Pls.' Cross-Mot. at 25; Pls.' Opp'n at 34. Their argument lacks any factual support. Indeed, the only evidence is that DPAA is actively analyzing the disinterred remains from Common Graves 704, 717, and 822, along with remains from 22 other Cabanatuan common graves. *See* App'x ¶¶ 106, 112, 116, 125-26; 2d Berg Decl. ¶ 3. DPAA recently identified additional portions of seven servicemembers associated with Common Grave 717. *See* 2d Berg Decl. ¶ 3. And DPAA has begun analyzing the 12 sets of remains associated with Common Graves 704 and 822 and submitting samples to AFDIL for DNA testing. *See* App'x ¶¶ 112, 116.

Plaintiffs offer no response to these facts, or to Defendants' legal arguments. *See* Defs.' MSJ at 18-19. They cannot show Defendants have reached the consummation of their decisionmaking process, that any regulation mandates discrete, required actions that Defendants failed to perform, or that Defendants' actions are unreasonable. *See id.*

3. Processing Request to Disinter X-3629 for Comparison to COL Stewart

Plaintiffs claim that DoD has "refused to answer whether it will disinter the remains

designated as X-3629." Pls.' Cross-Mot. at 25; Pls.' Opp'n at 34-35.[19] This too is not the case. DPAA recently finalized its recommendation regarding Plaintiff John Boyt's request to disinter X-3629 for comparison to COL Stewart. *See* 4th Kupsky Decl. ¶ 24; App'x ¶¶ 154-56. Thus, DoD's final determination can be anticipated in the next several months. *See* 4th Kupsky Decl. ¶ 24. And in advance of that decision, DPAA explained that it was waiting for DNA samples from the families of the two candidates most likely to be identified from X-3629. *See* App'x ¶ 156. Therefore, there is no final agency action reviewable under the APA, nor can Plaintiffs show that any regulation mandates disinterment of these particular remains. *See* Defs.' MSJ at 19-20.

But even if DPAA's action could be construed as a final denial of Plaintiff John Boyt's disinterment request, Plaintiffs cannot show that such a denial would be unreasonable.[20] Neither COL Stewart's recorded stature nor his dental records can plausibly be reconciled with the biological characteristics of X-3629. App'x ¶¶ 164-169. Plaintiffs attempt to dismiss COL Stewart's recorded stature as "not reliable," because one out of six physical examinations recorded his stature as three inches shorter than all of the other measurements. Pls.' Opp'n at 46, 48; *see* 2d Emanovsky Decl. ¶ 20. To the contrary, repeated measurements in the same range

[19] Plaintiffs also assert that DoD "received a request for disinterment from Colonel Stewart's next of kin many years ago," Pls.' Cross-Mot. at 25, but they have not supported that assertion with any evidence. Regardless, only claims after May 2011 are actionable here. *See* 28 U.S.C. § 2401(a); *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 580 (5th Cir. 2016). Thus, only Plaintiff John Boyt's November 2017 request is actionable in this case.

[20] Defendants cannot submit a certified administrative record for Plaintiff John Boyt's request because no final decision has been made; moreover, DPAA's recommendation is pre-decisional and privileged until the Assistant Secretary of Defense for Manpower and Reserve Affairs has made a final decision. *See May v. Dep't of Air Force*, 777 F.2d 1012, 1014 (5th Cir. 1985). Because Plaintiffs refused to proceed exclusively on an administrative record, however, Defendants have submitted expert testimony explaining the available evidence regarding Colonel Stewart and X-3629. *See, e.g.*, 3d Kupsky Decl. ¶¶ 30-33; Emanovsky Decl. ¶¶ 18-20; Shiroma Decl. ¶¶ 16-18. This provides a sufficient basis for summary judgement on Plaintiffs' failure to act case.

across a six year span suggests that this large anomaly was a simple typographical error. *See* 2d Emanovsky Decl. ¶ 20. Scientists can reasonably account for the possibility of typographical errors, without undermining the entire scientific endeavor. And even if this biological evidence were set aside, Plaintiffs have no response to Defendants' showing that two of COL Stewart's teeth had been extracted that X-3629 had not lost before death. See App'x ¶¶ 167-169. This alone is reasonable grounds to exclude COL Stewart as a candidate. See Shiroma Decl. ¶ 17.[21]

Nor has DPAA "ignored" the circumstantial historical evidence upon which Plaintiffs rely. *See* Pls.' Opp'n at 7-8, 48. Instead, DPAA has considered that evidence and placed it in its broader context. *See* 3d Kupsky Decl. ¶¶ 30-33. In the context of an area where more than 100 servicemembers died during a chaotic battle and few of them have been identified, *see id.*, the recollection of a Filipino civilian regarding a brief conversation years earlier about the rank of the officer being buried cannot be treated with certainty. Moreover, that recollection cannot outweigh concrete biological evidence from the remains themselves. And under arbitrary and capricious review, it is not for the Plaintiffs or the Court to reassess the evidence, but merely to review whether the agency considered the issues and reached a rational conclusion. *See 10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (holding that courts must "uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality").

4. Communicating With Plaintiffs

Plaintiffs also assert that Defendants have failed to share adequate information with Plaintiffs. *See* Pls.' Opp'n at 42 (claiming that Defendants violated "self-imposed rules" and

[21] Plaintiffs speculate that AGRS requested the wrong dental records in the 1940s. *See* Pls.' Opp'n at 8. But that does not undermine Dr. Shiroma's comparison of COL Stewart's dental records from his IDPF to the dental records for X-3629. *See* Shiroma Decl. ¶¶ 16-18 & Exs. 7-11.

were "reluctant to share information" with the families related to" PVT Morgan and TEC4 Bruntmyer, specifically not having "heard anything [after the disinterment] about any analysis being done"); *id.* at 35 (challenging "the Government not providing new information about the remains that have been disinterred and what it is doing with those remains"). This claim fails to meet the threshold for "fail[ing] to take a discrete agency action that it is required to take." *Norton*, 542 U.S. at 64.

Plaintiffs first argue that notification and providing families "with all information concerning their relative's case . . . is required by statute." Pls.' Opp'n at 35 (citing 10 U.S.C § 1509(e)(2)(A); 10 U.S.C § 1505(c)(2)). That is not, in fact what those statutes require. See App'x ¶¶ 24-25.[22] Regardless, this Court already addressed Plaintiffs' arguments about "new information" under § 1505(c) and § 1509(e) in dismissing Plaintiffs' original Complaint. *See* Order at 7 (Nov. 20, 2017), ECF No. 14. The Court concluded that these responsibilities "involve an exercise of discretion," and do not provide "a clear duty to act as required by the Mandamus Act." Id. At any rate, the primary new information that must be added to a servicemember's personnel file is the servicemember's identification. Plaintiffs do not allege that DoD has failed to adequately notify Plaintiffs and provide them with information regarding identification determinations. *See, e.g.*, 2d Gardner Decl. ¶¶ 50-51, 54. Plaintiffs have not shown that any other specific information meets the statutory standard but has not been provided

[22] Section 1509(e) is titled "Review of status requirements," which refers to the four statuses available for missing servicemembers. *See* 10 U.S.C. § 1503(i)(3) (providing that servicemembers can be declared missing, deserted, AWOL, or dead). Because these World War II servicemembers are known to be dead, no review of status is implicated by DPAA's effort to account for their remains. Accordingly, none of DPAA's efforts trigger the "new information" requirements.

to the families.[23]

Second, in referring to "self-imposed rules," Pls.' Opp'n at 42, Plaintiffs appear to be referring to DoD Directive 2310.07, § 1.2(e), which states that "[i]nformation pertaining to the [government's] efforts to locate, recover, and, when applicable, identify remains of unaccounted-for DoD personnel . . . from past conflicts . . . will be provided to the [servicemembers' families]." Plaintiffs cannot show that this mandates a "discrete agency action" that Defendants have failed to take. This regulation provides discretion regarding when and how much information to provide. It does not provide Plaintiffs with grounds to complain that they should have been notified every time DPAA sent a DNA sample from the commingled remains from the common grave to AFDIL. *Cf.* Pls.' Opp'n at 34 (complaining that Defendants have not "provided any information . . . about any [post-disinterment] testing or research"). Moreover, the record demonstrates that DoD, through the Army's Past Conflicts Repatriation Branch, has amply communicated with Plaintiffs regarding DoD's efforts to locate and identify Plaintiffs' relatives. *See generally* 2d Gardner Decl. This has included one-on-one meetings at family updates, forwarding documentation, answering questions posed in letters and emails, and telephone conversations. *See id.* For the last year, communication has been more limited because Plaintiffs' counsel asked DoD not to contact Plaintiffs and their relatives. *See* 2d

[23] Plaintiffs do assert that "the Government knew for years about the Cheaney file, but did not timely provide that information to the next of kin – Patterson. Ex. 21 at 2-3 (Patterson asking for Cheaney file, but being falsely told that there were no classified portions relating to his uncle)." Pls.' Cross-Mot. at 25; Pls.' Opp'n at 35. This does not constitute an actionable statutory violation. The inaccurate statement to which Plaintiffs refer occurred in 1985, long before the enacted of 10 U.S.C. § 1509. *See* 4th Kupsky Decl. ¶¶ 17-18. It is also unlikely that the declassified Cheaney file constitutes "new information" under § 1509 because it was not "found" or "identified" after November 18, 1997. *See* 10 U.S.C. § 1509(e)(3). Regardless, Plaintiffs received access to the file through their putative expert, John Eakin, and information from the Cheaney file was included in DPAA's case summary for 1LT Nininger that was provide to Plaintiff Patterson in January 2018. *See* 4th Kupsky Decl. ¶ 20 & Ex. 5; 2d Gardner Decl. ¶ 19.

Gardner Decl. ¶ 4 & Ex. 1. In sum, Defendants have not failed to comply with DoD Directive 2310.07 § 1.2(e).

For all of these reasons, Defendants are entitled to summary judgment on all of Plaintiffs' APA claims.

III. Plaintiffs' Constitutional Due Process Claim Fails.

Plaintiffs' Due Process Clause claims cannot proceed in the absence of a cognizable liberty or property interest. *See DePree v. Saunders*, 588 F. 3d 282, 289 (5th Cir. 2009).[24] They have established neither. Nor can Plaintiffs establish that Defendants' behavior violates substantive due process or inadequately protects any cognizable interests they could have.

A. Plaintiffs Have Not Established a Cognizable Liberty Interest

Plaintiffs now claim a liberty interest in "choos[ing] how and where the remains of their deceased relatives will be buried." Pls.' Opp'n at 21.[25] They rely on Supreme Court's explanation that "[i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality); *see also Reno v. Flores*, 507 U.S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked

[24] Plaintiffs cite caselaw pointing out that procedural due process rights do "not depend on the merits of the claimants' substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). This does not permit Plaintiffs to evade their burden to establish a cognizable liberty or property interest. For without such an interest, no constitutional process is due. Thus, Plaintiffs are not correct that it "does not matter . . . . whether the Families . . . have located the remains of their relatives." Pls.' Cross-Mot. at 6-7. Plaintiffs' alleged liberty and property interests depend on that allegation.

[25] Defendants have not "waived" the ability to dispute Plaintiffs' heretofore undeveloped liberty interest claim, *see* Pls.' Opp'n at 20, not least because Plaintiffs have cross-moved for summary judgment on the existence of this liberty interest, *see* Pls.' Cross-Mot. at 11-12, and therefore the issue is squarely before the Court.

as fundamental"). Plaintiffs claim that their alleged liberty interest is deeply rooted and traditionally protected, citing broad language in a Ninth Circuit opinion and two nineteenth century state cases. *See* Pls.' Opp'n at 21. This fails to establish the specific liberty interest Plaintiffs are alleging here.

But Plaintiffs are not asserting the ordinary right of the next of kin to dispose of their relative's remains pursuant to state law or federal regulation. Instead, they are asserting a liberty interest in access to remains of unidentified soldiers who died overseas and were buried by the government as unknowns almost 70 years ago. As Justice Scalia explained, "before conferring constitutional status upon a previously unrecognized 'liberty,' we have required 'a careful description of the asserted fundamental liberty interest.'" *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (plurality); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) (holding that this "careful description of the asserted right" is a matter of "judicial self-restraint"); *Maldonado v. Macias*, 150 F. Supp. 3d 788, 796 (W.D. Tex. 2015) (examining plaintiff's legal status and the "statutory and regulatory framework" in order "to determine Petitioner's liberty interest"). Plaintiffs rest exclusively on vague statements of societal recognition of family rights and duties regarding burial of a recently deceased relative. They have not attempted to show that any court has ever applied those notions in this context.

History shows that the practice of individual burial for soldiers who died in foreign conflicts, let alone a government responsibility to recover and return remains to families, are recent developments. *See* Exhibit CC, Michael Sledge, *Soldier Dead: How We Recover, Identify, Bury, and Honor Our Military Fallen* at 32-37 (2005). Historically, most soldiers were "buried in the field [after a battle] with few records kept about location." *Id.* at 32. As recently as the Mexican-American War of 1846-47, the U.S. Army simply buried its soldiers were they

fell and undertook no organized effort to repatriate the remains. See id. at 32-33. While the Civil War led to more efforts to identify and record the burial of dead soldiers, it was not until 1899, after the Spanish-American War that the United States undertook what was characterized as "the first attempt of a nation to disinter the remains of all its [dead] soldiers . . . and bring them . . . to their native land for return to their relatives and friends or their reinterment in the beautiful cemeteries which have been provided by our Government for its defenders." Id. at 35. After World War I, there was a substantial public debate regarding whether soldier remains should be repatriated to the United States or, as the United Kingdom chose to require, buried in foreign military cemeteries. *See* Steven Trout, Commemoration and Remembrance, Int'l Encyclopedia of the First World War (June 26, 2017) (link). These facts demonstrate that Plaintiffs cannot point to a deeply-rooted tradition of families demanding soldier remains from the government, let alone demanding the return of unidentified remains that only Plaintiffs believe are those of their relatives. Indeed, Plaintiffs cite no authority for the notion that families can demand the return of even identified remains of soldiers buried decades ago. Barring that, how can they claim the even more tenuous right to claim unidentified remains?

Moreover, the Supreme Court has stated that for a liberty interest to be recognized based on a history of societal recognition, there cannot be "a societal tradition of enacting laws denying the interest." *Michael H.*, 491 U.S. at 122, n.2. Down to the present day, laws have provided for the final disposition of unclaimed and unidentified remains after a reasonable period of time. For example, the World War II disposition statute stated that the Secretary of War was "authorized at his own discretion in the case of unidentified remains and in all cases of identified remains which are not returned to the homeland under the provisions of this Act to inter the remains in United States military cemeteries established outside the continental limits of the United States." Pub.

L. No. 80-368, § 5, 61 Stat. 779, 780 (Aug. 5, 1947).[26] In Texas, the institution holding a dead body is generally required to hold an unidentified or unclaimed body only for three days, or six months in the case of a "traveler who dies suddenly." *See* Tex. Health & Safety Code Ann. § 691.025(b), 691.026.[27] Most states have similar statutes, including California,[28] New Mexico,[29] Rhode Island,[30] and Wisconsin.[31] Thus, Plaintiffs cannot show that their notion of a perpetual

---

[26] At present, Army Regulation 638-2, provides that "[w]hen no person in the order of priority can be identified or located, disposition of the remains will be made by the administrative determination of [the Commander, Army Human Resources Command]." AR 638-2 § 4-4(c); *see also id.* § 13-4(b), provides that the Army is responsible for "arranging and contracting for funeral and interment services for group remains [and] the unclaimed remains of a person who dies on an Army installation." Thus, the Army is responsible for disposition of group remains for identifiable individuals whose "remains are not individually identifiable and are determined to be group remains." *Id.* § 10-4; *see also id.* § 8-4(b). Family members are notified of the Army's disposition decision but do not have authority to direct a different outcome. *See id.* § 10-4; *id.* § 8-10, Table 8-1.

[27] The institution is to "make due effort to find a relative of the deceased and notify the relative of the death" for "72 hours after death." Tex. Health & Safety Code Ann. § 691.025(b); *see also id.* § 691.026 (requiring the body of a traveler who dies suddenly to be "retain[ed] . . . for six months for purposes of identification"). If someone seeks to claim the body, the body shall only be released "when the [institution holding the body] is satisfied that the claimed relationship [to the deceased] exists." *Id.* § 691.024(b). If the body is "not claimed for burial or [is] required to be buried at public expense," it is then made available to an Anatomical Board for use at medical schools or similar institutions. *See* Tex. Health & Safety Code Ann. § 691.023(a). After the Anatomical Board has delivered the body to an institution, a relative has only 60 days to claim the body. *See id.* § 691.025(d).

[28] *See* Cal. Health & Safety Code §§ 7200, 7202 (providing for transfer of unclaimed remains for use for scientific or educational purposes, subject to a 30 day holding period for "claim and identification by any authenticated relative of the decedent").

[29] *See* N.M. Stat. § 24-12-1 (providing that an unclaimed body cannot be disposed of "in less than two weeks from the date of discovery of the body").

[30] *See* R.I. Gen. Laws § 23-18.1-1 (providing that if a body is not claimed in the first 54 hours after death, the director of public services will issue a public notice with a description of the body "and within a reasonable time thereafter cause the body to be decently buried").

[31] *See* Wis. Stat. § 157.02 (providing that "[i]f no relative is known, or discoverable by use of ordinary diligence, notice may be dispensed with" and if no one "arrange[s] for taking charge of the corpse within a reasonable time after death" it must be donated or buried; the medical school must retain the corpse for "3 months before [it is] used or dismembered" so that a relative may "claim[] it upon satisfactory proof of relationship").

legal interest is recognized by their own states or federal law.

Plaintiffs have no cognizable liberty interest in the unidentified remains at issue here.[32]

B. Plaintiffs Have Not Established that Defendants Deprived Them of a Cognizable Property Interest.

Despite Plaintiffs' great effort they have failed to establish deprivation of a cognizable property interest in remains that have not been identified by the appropriate authorities or remains that have been buried for decades. None of the caselaw they cite stands for those propositions. Property interests are not analyzed at the abstract level Plaintiffs propose, but through the specific legal provisions that give rise to the property interest. Nor can Plaintiffs establish that DoD regulations give rise to any rights to federal benefits associated with the disposition of remains *before* the remains are identified. Finally, because Plaintiffs have only an abstract or future interest until their relatives are identified, they are improperly seeking governmental aid in securing those interests that is not available under the Due Process Clause.

1. Plaintiffs Have Not Shown That Either Federal Common Law or State Law Creates the Sweeping Property Interest Plaintiffs Propose.

Plaintiffs ask the Court to conclude that various sources of law provide the next of kin a perpetual "property interest in their relative's remains for the limited purpose of providing a final burial." Pls.' Opp'n at 13. They ask the Court to decide the issue at the most abstract level. *See, e.g.*, Pls.' Cross-Mot. at 22 (seeking a declaration that "the Families and all other next of kin have a constitutional, statutory, and/or common law right to possess the remains of their family members for purposes of burial"). But that is not how property interests are analyzed under the

[32] Defendants do not concede that Plaintiffs have a liberty interest in access to identified remains, such as the recently identified additional portions of PVT Kelder that Defendants are holding pending Plaintiff Douglas Kelder's disposition decision. *See* 2d Berg Decl. ¶ 4. The Court need not reach that issue on the facts of this case.

Due Process Clause. Because the property interests "stem from an independent source such as state law," courts must carefully review the "existing rules or understandings" that by which "their dimensions are defined." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *see also Reno*, 507 U.S. at 302 (holding that "[s]ubstantive due process analysis must begin with a careful description of the asserted right" as a matter of "judicial self-restraint"); *Hussey v. Milwaukee County*, 740 F.3d 1139, 1143 (7th Cir. 2014) (holding that courts must "first must ascertain the exact nature of that [property] right" and determine its "contours and dimensions").

Plaintiffs have not examined the dimensions or contours of the legal interest they assert, but instead insist that all legal sources—common law, various states' laws, and federal common law—reach the same result at the highest level of abstraction. *See* Pls.' Opp'n at 12-19. It is undisputed that in *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989), the Fifth Circuit found that a "quasi-property" interest "*may* be subject to constitutional due process protections." *Patterson*, 343 F. Supp. 3d at 646-47 (emphasis added). But *Arnaud* did not establish the principle that anything termed a "quasi-property" interest rises to a constitutionally-cognizable property interest, nor did it explore the contour and boundaries of such an interest under Texas law, let alone the other states' laws upon which Plaintiffs rely. *See* Defs.' MSJ at 23. Instead, *Arnaud* examined the relevant aspects of state law and concluded that they gave rise to a cognizable property interest in the relief plaintiff was seeking. *See* 870 F.2d at 308-09. Unless Plaintiffs follow that model, they have failed to carry their burden here.

It is readily apparent that the existence of some *related* property interest may be irrelevant to the interest asserted by Plaintiffs. *See Hussey*, 740 F.3d at 1146 (retiree's property right to participate in employee health insurance without paying *premiums* did not include right

to *cost-free* medical care). Thus, for example, district courts have explained that while the Ninth Circuit narrowly held in the anatomical gift context "that California parents have a due process property interest in the corneal tissue of their deceased children," that decision did not "broadly recogniz[e] a property right in all remains." *Shelley v. County of San Joaquin*, 996 F. Supp. 2d 921, 926-27 (E.D. Cal. 2014) (discussing *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002)). Indeed, after carefully examining the relevant state laws, both Shelley and another district court concluded that there was no cognizable property interest for the human remains in the context presented. *See Shelley*, 996 F. Supp. 2d at 931 (holding, in case regarding sheriff's department's use of backhoe to exhume murdered bodies from an abandoned well, that California law granting families the "right to control the disposition of the remains" did not give rise to a cognizable property interest); *Picon v. County of San Mateo*, No. C–08–766 SC, 2008 WL 2705576, at *3 (N.D. Cal. July 10, 2008) (holding, in case where coroner's office retained decedent's heart for one month after an autopsy, that *Newman* could not be "extended to body parts other than corneas," and that the coroner acted within authority granted under California law). Similarly, the Sixth Circuit has explained the limited scope of two prior Sixth Circuit cases that held "that next of kin do have a protected property interest in the eyes of deceased relatives, removed for the purpose of donation." *Albrecht v. Treon*, 617 F.3d 890, 896 (6th Cir. 2010) (discussing *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995)). *Albrecht* explained, after the Ohio Supreme Court ruled that there was no property interest under state law in autopsy specimens retained for investigation, that the state's clarification of its own law was dispositive of the plaintiffs' due process claim. *See* 617 F.3d at 896-97 (addressing case regarding a coroner's retention and

destruction of plaintiffs' son's brain).[33] As these decisions illustrate, Plaintiffs may not rest on the sweeping language that appears in some court decisions, but instead must show that the relevant legal authority creates the specific property interest Plaintiffs seek to enforce.

Plaintiffs cannot rest on characterizations of the common law backdrop in cases like *Newman* because, as the cases just discussed illustrate, what matters are the particular legal standards of the relevant jurisdiction. Common law principles apply only to the extent adopted by that jurisdiction. Plaintiffs are simply mistaken that a federal court's discussion of the common law backdrop to state regulation gives rise to a body of "federal common law" upon which Plaintiffs can rely. *See* Pls.' Opp'n at 13, 17-19. And their suggestion that states cannot adopt laws that alter these alleged federal common law rights, *see* Pls.' Opp'n at 18; *see also* Pls.' Cross-Mot. at 18-19 (claiming that families have "an inalienable right" protected by natural law), is contradicted by the numerous state laws restricting families' rights to remains in various ways.

Even if the states in which Plaintiffs reside provide the relevant jurisdictions—which Defendants dispute, *see infra* Arg. § III.B.2—Plaintiffs have failed to carry their burden to show that each state assigns a *property* interest to the family interest that Plaintiffs seek to enforce. Plaintiffs cannot take refuge in the term "quasi-property right," because by its very nature it

[33] *Albrecht* illustrates the appropriate interaction between state law's recognition of a property interest and federal courts' responsibility to "determine[] whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005). Thus, Plaintiffs err in disregarding the Wisconsin Supreme Court's decision that the family's interest is *not* a property right but a "personal right of the family of the deceased to bury the body." *Scarpaci v. Milwaukee County*, 96 Wis.2d 663, 672-73, 292 N.W.2d 816, 820-21 (1980); *cf.* Pls.' Opp'n at 17. State courts are competent to decide whether it is a property interest in the first place. *See Albrecht*, 617 F.3d at 896-97 (holding that "[t]he Ohio Supreme Court explicitly delineated the lack of property rights in this case" which makes "moot" the question whether "that interest, if any, rises to the level of a constitutionally protected property interest").

denotes something less than a full property right, and Defendants have shown that many jurisdictions recognize it to be a legal fiction that does not involve a property right at all. *See* Defs.' MSJ at 25 & n.18. Plaintiffs have failed to analyze each state's laws that could define the scope of the alleged property interest, instead simply string-citing a handful of state laws and noting that the states adopted, in some form, the Uniform Anatomical Gift Act. *See* Pls.' Opp'n at 13. But they do not explain the relevance of any of these statutes here. *See id.* (stating only that "several courts of appeals . . . have relied on" that Act). Nor have Plaintiffs addressed what state law has to say about unidentified or buried remains. As Defendants noted, when Fifth Circuit has addressed disinterment of buried remains, it treated it as a matter of judicial discretion, not family right. *See* Defs. MSJ at 23 (discussing *Travelers Ins. Co. v. Welch*, 82 F.2d 799. 801 (5th Cir. 1936)). Moreover, because numerous courts have concluded that state property interests did not rise to the level of a constitutionally cognizable interest, *see* Defs.' MSJ at 26 & n.19 (collecting cases), Plaintiffs cannot presume that any family burial interest passes muster or write off those decisions because they did not come from a federal court of appeals. *See, e.g.*, Pls.' Opp'n at 17 n.6.

2. Federal Law Does Not Create Any Property Interests Plaintiffs Could Enforce.

Defendants have shown that, because the remains were lawfully buried in a foreign military cemetery decades ago and are not present in any of Plaintiffs' states of residence, any property interest here must arise from federal statute or regulation. *See* Defs.' MSJ at 24-25. Plaintiffs cite no authority establishing their states' extra-territorial application of burial law to remains in other states.[34] It is plain that most state laws about burial apply only to remains found

[34] Plaintiffs claim that five cases "look[] to the law of where the next of kin resides," Pls.' Opp'n at 14, but in fact, those cases simply applied state law without discussing whether it was because

in their state. *See, e.g.*, Tex. Health & Safety Code § 691.023(a) (addressing a body under the "charge or control" of "[a]n officer, employee, or representative of the state, of a political subdivision, or of an institution having charge [the body]"); *id.* § 691.028 (stating that "[a]n adult living in this state . . . may donate the adult's [own] body . . . to be used for the advancement of medical or forensic science"). Moreover, anomalous results would follow if Plaintiffs' view were adopted. The families of servicemembers would not be on the same footing with regard to remains in Manila American Cemetery, depending on their own state of residence.[35] The next of kin's legal interest could change simply by moving from one state to another, and if the current next of kin dies, a successor next of kin living in a different state could have a different legal interest in the same remains.

Defendants have shown that the relevant federal statute do not create a private property interest. *See, e.g.*, 36 U.S.C. § 2104(4) (emphasizing that it is for "the Armed Forces" to "decide [if] it is necessary" to "exhume or re-inter a body" buried in a military cemetery under ABMC's supervision); 10 U.S.C. §§ 1501-1513 (establishing responsibility for accounting program but not creating private rights in any remains); *see also* Pub. L. No. 80-368 (making overseas burial permanent after December 31, 1951). Similarly, AR 638-2 and DoD Instruction 5154.30 provide for a relative or other designated person to direct disposition of a servicemember's remains *only after* the servicemember has been identified. *See* App'x ¶¶ 86-88. Accordingly, federal law

---

of the location of the remains, the defendant, or the next of kin. *See, e.g., Arnaud*, 870 F.2d at 305 (describing autopsies in Lafayette Parish, Louisiana).

[35] For example, Plaintiff Douglas Kelder, who resides in a state whose supreme court expressly rejected a property interest, *see Scarpaci v. Milwaukee County*, 96 Wis.2d 663, 672-73, 292 N.W.2d 816, 820-21 (1980); *Olejnik v. England*, 147 F. Supp. 3d 763, 778 (W.D. Wisc. 2015), plainly has no cognizable property interest, but Plaintiff Judy Hensley resides in a state whose supreme court has been less clear on this issue. *See In re Matter of Johnson*, 612 P.2d 1302, 1305 (N.M. 2005).

applicable to Manila American Cemetery does not give Plaintiffs any of the essential aspects of a property right.

For the first time, Plaintiffs contend that DoD regulations create a property interest by regulating the "distribution of benefits." Pls.' Cross-Mot. at 23-24. This is mistaken. As discussed above, "a legitimate claim of entitlement" that gives rise to a property interest is not present "if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). "[T]he Supreme Court has explained that [courts] are to look for ' "explicitly mandatory language," i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" *Ridgely v. FEMA*, 512 F.3d 727, 735-36 (5th Cir. 2008) (quoting *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989)). Plaintiffs have identified no such language.

Plaintiffs assert that they have a property interest in a government benefit "to the extent that the Government's regulations mandate the return of a service member's remains to a next of kin that satisfactorily proves that they are eligible and have located their relative's remains." Pls.' Cross-Mot. at 24. But they identify no such regulation, nor is there any. Instead, when DoD in its discretionary performance of its accounting mission has recovered and identified a servicemember's remains, at that point—and not before—DoD regulations regarding the disposition of remains are triggered. *See* App'x ¶¶ 86-88. Thus, even if DoD regulations regarding disposition of remains could be benefits that rise to the level of a cognizable property interest—a question that Defendants do not concede and which need not be decided—those regulations are not applicable here to the unidentified remains that Plaintiffs claim they have "located." This Court has repeatedly recognized the discretionary nature of DoD's accounting mission, both as to the governing statutes and DoD's regulations. *See Patterson*, 343 F. Supp. 3d

at 653; Order, Nov. 20, 2017, ECF No. 14. As previously noted, where limited resources mean that agencies must exercise discretion in determining who receives a "benefit," there is no entitlement in such a benefit. *See* Defs.' MSJ at 34. Plaintiffs cannot turn this discretionary mission into mandatory action by pointing out specific things the government will due once the accounting mission is completed for a specific servicemember. Nor do they allege any legal violation with regard to the disposition of PVT Kelder's remains that have been identified. *See* App'x ¶¶ 124. This property theory must be rejected.

3. For Respectfully Buried Remains, Any Right is Too Contingent to be Cognizable.

Plaintiffs have identified no authority establishing that any post-burial interests a family may have are considered a property interest, let alone one cognizable under the Due Process Clause. Nor have Plaintiffs shown that their alleged "quasi property right" lasts in perpetuity. Instead, case law is clear that the family possessory interest is extinguished or greatly diminished upon burial. Defs.' MSJ at 28-29; *see, e.g.*, *Fowlkes v. Fowlkes*, 133 S.W.2d 241, 242 (Tex. Civ. App. 1939) (stating that, upon burial, "the right of custody ceases and the body is thereafter in the custody of the law, . . . subject to the control and direction of a court of equity in any case properly before it"). This makes sense. The family right was rooted in a family duty. *See, e.g.*, *Mensinger v. O'Hara*, 189 Ill. App. 48, 53-54 (Ill. App. Ct. 1914) (explaining that these legal interests "aris[e] out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial"). Once society's interest in ensuring burial has been fulfilled, there is little need for a continuing possessory interest. Instead, the primary family interest that remains is to oppose disinterment. *See* 25A C.J.S. Dead Bodies § 4 ("[The] personal right to a decedent's body . . . is extinguished upon burial, and all that remains is an interest sufficient to support a

challenge to disinterment."). Plaintiffs identify no legal authority for a family's property right to disinterment and relocation of buried remains. Instead, because the body is considered to be in the custody of the law, the family would generally need judicial approval to disinter a body. *See* Defs.' MSJ at 28-29. While the court would consider the family's interest, an interest subject to dispositive judicial authority is too contingent and uncertain to be a cognizable property interest. Defs.' MSJ at 29; c*f. Franklin v. Austin Inner City Redevelopment-Phase I, Ltd.*, No. 1:14-176, 2015 WL 1534534, at *11 (W.D. Tex. Apr. 6, 2015) ("[T]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except for cause."); *Olejnik*, 147 F. Supp. 3d at 773 (concluding that under Wisconsin law "a family's interest in the remains . . . is simply too contingent to constitute a protected property interest.").

Plaintiffs attempt to dismiss this entire line of reasoning on the ground that these well-established state and common law principles do "not discuss temporary burials." Pls.' Opp'n at 20. They maintain that, even though these unknown remains were interred in permanent military cemeteries for over 60 years they are now "temporary" because in the last few years DoD has begun disinterring the remains it believes it can identify.[36] *Id.* It is ludicrous to suggest that thousands of graves buried for decades should be considered temporary. But more importantly, Plaintiffs cannot show that the alleged property interest survived initial burial. These remains were buried under express statutory authority where no relative could be located because the remains could not be identified. *See* Pub. L. No. 80-368, § 5, 61 Stat. 779 (Aug. 5, 1947). The remains was respectfully buried in a beautiful cemetery alongside other soldiers, with an

[36] Plaintiffs also claim that the statement of DoD's accounting mission in DoD Directives 2310.07 and 1300.22, "completely contradicts" the argument that burial terminates the family's property interest. Pls.' Opp'n at 20. This is a non sequitur because DoD's accounting mission is not rooted in the notion of a property interest. Nor do Plaintiffs look to DPAA's organic statute or DoD regulations for the contours of such a property interest.

imposing Wall of Unknowns honoring the names of those who could not be associated with a particular grave. *See* App'x ¶¶ 9-11. The government, acting as it generally does when next of kin cannot be located or is unwilling to should the burial responsibility, appropriately completed the burial responsibilities that society expects. Thus, at least for remains that are still buried, Plaintiffs have failed to show that any of their legal citations give them a property right under these circumstances.

4. Plaintiffs Cannot Establish a Property Interest In Unidentified Remains.

Perhaps most importantly, Plaintiffs cannot establish that any relevant jurisdiction has given them a property interest in unidentified remains that may or may not be one's relative. *See* Defs.' MSJ at 27-28. While Plaintiffs retort that they claim the "remains have been, or can easily be, located and/or identified," Pls.' Opp'n at 9, they do not mean that the remains have been identified by a competent authority. And they cannot support this interest from state law. States require confirmation of the relative's relationship before handing over remains. *See, e.g.*, Tex. Health & Safety Code Ann. § 691.024(b) (stating that if someone seeks to claim the body, the body shall only be released "when the [institution holding the body] is satisfied that the claimed relationship [to the deceased] exists"). Until the remains are identified, the state holds any rights and duties associated with, and to, the body—there is a consistent body of state laws addressing disposition of unidentified or unclaimed remains. *See supra* Arg. § III.A. And Plaintiffs do not have a perpetual right to challenge that disposition. *See id.* nn.26-31. Similarly, the Army's disposition regulation directly addresses unclaimed and unidentified remains, and does not give families absolute rights. *See* App'x ¶ 86-88; AR 638-2 § 4-4(c); 13-4(b). Indeed, even group remains for whom the set of individuals is known will be subject to the Army's disposition decision rather than any family member's because the elements of the remains are individually unidentifiable. *Id.* § 10-4, 8-4(b), 8-10, Table 8-1.

Defendants have shown that Plaintiffs cannot have a "legitimate claim" to remains that is shared with all of the other families whose relative the remains might be. *See* Defs.' MSJ at 27. Until an identification decision is made, Plaintiffs' interest here rises no farther than the "abstract need or desire" that has long been held insufficient to constitute a legitimate claim that is constitutionally protected. *See Roth*, 408 U.S. at 577; *see also World Trade Ctr. Families for Proper Burial, Inc. v. City of New York*, 359 F. App'x 177, 179 (2d Cir. 2009) ("[U]nder New York law, plaintiffs do not have a cognizable property right in unidentifiable human remains."). It could perhaps best be characterized as a latent or future interest that would vest once remains are identified by the relevant authorities as those of Plaintiffs' relatives. *See* Defs.' MSJ at 27; *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (holding that for due process claim, plaintiff must have been denied a right "by virtue of which he was presently entitled ... to exercise ownership dominion over real or personal property"); *Soncy Road Property, Ltd. v. Chapman*, 259 F. Supp. 2d 522, 529 (N.D. Tex. 2003) ("The 14th Amendment protects only property interests a person has *already acquired* as opposed to those in which it had an *expectancy*." (emphasis added)); *Frey Corp. v. City of Peoria*, 735 F.3d 505, 509 (7th Cir. 2013) (distinguishing between "what is securely and durably yours under state (or federal) law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain").[37] Plaintiffs' interest in any specific set of remains is uncertain and transitory, and cannot be a cognizable property interest.

[37] *See also Forgue v. City of Chicago*, No. 15-8385, 2016 WL 10703737, at *4 (N.D. Ill. June 15, 2016) (holding that "implicit" in the description of a cognizable property interest "is the requirement that the entitlement actually belong to the holder before it is withheld"); *Cornelius v. LaCroix*, 838 F.2d 207, 210 (7th Cir. 1988) ("People have a legitimate claim of entitlement to keep that which presently securely belongs to them."); *Coastal Conservation Ass'n v. Locke*, No. 2:09-cv-641, 2011 WL 4530631, at *16 (M.D. Fla. Aug. 16, 2011) (same).

5. Plaintiffs Have Not Established that Defendants *Deprived Plaintiffs of Any Cognizable Interest.*

Because the remains at issue are not identified, and because no property interests or federal benefits are triggered until the remains are identified, Plaintiffs essentially seek government aid—disinterment and identification—to help secure their future interests.[38] But "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989). As Defendants have shown, these remains are unidentified due to the actions of the Imperial Japanese. *See* Defs.' MSJ at 30-31. The United States did the best it could to give its soldiers appropriate war zone burials, to keep records, and to recover and identify remains after World War II. *See* App'x ¶¶ 1-6, 97-104. Imperial Japan's occupation of the Philippines, treatment of U.S. servicemembers' graves, and handling of the Cabanatuan POW Camp, are the primary reason that Plaintiffs' relatives and many other servicemembers could not be identified. Thus the lack of identification, and with it Plaintiffs' interest in possessing particular remains, were "injuries . . . at the hand of a third party," not by Defendants. *See Gaston v. Houston County*, 196 F. Supp. 2d 445, 446-47 (E.D. Tex. 2002); *see also DeShaney*, 489 U.S. at 195 (holding that the Due Process Clause is not triggered by "invasion [of property interests] by private actors").

[38] While Plaintiffs repeatedly protest that this is not what they seek, *see, e.g.*, Pls.' Opp'n at 22-23, it would be the only appropriate way for Plaintiffs to potentially get the relief they want—possession of their own servicemembers' remains. Defendants cannot grant possession of individual or commingled remains to Plaintiffs based on speculation and the possibility that the remains might turn out to be Plaintiffs' relatives. Defendants are responsible for these unknown remains on behalf of the servicemembers and their families, and cannot turn over other servicemembers' remains to these Plaintiffs.

Plaintiffs' only response is that the "Imperial Japanese do not have possession of the service members' remains." Pls.' Opp'n at 22. But Defendants' possession of thousands of unidentified remains does not make Defendants liable for any deprivation caused by the fact that they are unidentified. The U.S. Government has no "duty required of them by the Constitution" to identify these remains. *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984). Nor do Defendants' efforts to account for these servicemembers create constitutional rights for their families. But the government "can only be held liable [for property deprivation] if . . . its officials had a duty to act." *Hale v. Bexar County*, 342 F. App'x 921, 927 (5th Cir. 2009). As Defendants' have shown, Plaintiffs' criticism of Defendants' efforts are no more actionable as a constitutional deprivation than a "failed rescue attempt." *See* Defs.' MSJ at 31-32; *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992); *Jackson*, 738 F.2d at 1446.

This is not a case of "governmental interference" with Plaintiffs' rights, but instead an improper demand for "positive assistance to secure constitutional rights." *Griffith v. Johnston*, 899 F.2d 1427, 1438 (5th Cir. 1990); *see also Westbrook v. City of Jackson*, 772 F. Supp. 932, 937-38 (S.D. Miss. 1991). Plaintiffs cannot turn the accounting mission that Congress and DoD have undertaken into a constitutionalized "affirmative obligation on the [government]." *DeShaney*, 489 U.S. at 196.

C. DoD's Processes Adequately Protect Any Cognizable Interests.

Even if Plaintiffs had some degree of a cognizable liberty or property interest, the processes that DoD has already implemented adequately protect those interests. DoD has provided "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Burgciaga v. Deutsche Bank Nat'l Trust Co.*, 871 F.3d 380, 390 (5th Cir. 2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Plaintiffs and other servicemember families have two primary opportunities to be heard:

1) the opportunity for one-on-one meetings with DoD officials at Family Member Updates, in which Plaintiffs receive written and verbal updates on the status of their servicemember's case and can present information and ask questions, *see* App'x ¶¶ 43-45;[39] and

2) DoD's disinterment request process, under which (i) Plaintiffs can initiate the process by requesting a disinterment and submitting any reasoning and supporting documentation they wish to provide, (ii) DPAA must analyze and document its review of the available historical and scientific evidence related to the servicemember's case, (iii) both Plaintiffs' and DPAA's assessment (along with the views of other relevant DoD components) are considered by the final decisionmaker, a senior staff assistant in the Office of the Secretary of Defense—the Assistant Secretary of Defense for Manpower & Reserve Affairs, and (iv) Plaintiffs are provided with a detailed explanation of the basis for DoD's decision, *see* App'x ¶¶ 47-51; App'x Exs. B.39-41, K, L, M.

These processes provides a meaningful opportunity for Plaintiffs to receive notice of the relevant status and to be heard. *Cf. FTC v. Assail, Inc.*, 410 F.3d 256, 267-68 (5th Cir. 2005) (adopting Ninth Circuit conclusion that "where a receiver and a nonparty both claim the same property, . . . summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard").

Plaintiffs object to the adequacy of these processes on three primary grounds: (1) there is no "formal hearing," with an opportunity to present witnesses and evidence and confront DoD's witnesses and evidence, Pls.' Opp'n at 23-24; Pls.' Cross-Mot. at 5; (2) there is "no right to appeal any final decision or inaction," Pls.' Opp'n at 24; and (3) this process is not a "procedure to claim the remains of their loved one." Pls.' Opp'n at 23.[40] The bulk of Plaintiffs' cross-

[39] See, e.g., Pls.' Ex. 1-A, ECF No. 64-3 (documenting that Plaintiff Bruntmyer attended a Family Member Update in 2011, presented information, and sent followup inquiries to the agency); 2d Gardner Decl. ¶¶ 11, 31, 37, 44, 45, 55-56, 83-84 (describing Family Member Updates attended by Plaintiffs and their relatives).

[40] Plaintiffs also complain that the ABMC "has not provided any procedure for next of kin to request or claim the remains of their loved ones." Pls.' Cross-Mot. at 7; Pls.' Opp'n at 23. However, the ABMC is responsible for maintaining these permanent cemeteries and memorials, not ruling on family disinterment requests or identifications. *See* App'x ¶ 7-16. ABMC's mission has never included "provid[ing] the families of . . . service members the right to choose

motion for summary judgment is dedicated convincing the Court that it should craft from whole cloth new process for "next of kin . . . [to] request . . . possession of their relative's remains." Pls.' Cross-Mot. at 16. In Plaintiffs' view, a denial or delay of such a request should be appealable to a hearing before a neutral decisionmaker, who should be able to permit the next of kin to "proceed without the Government" to disinter, take possession of, and seek to identify the remains. *Id.* Thus, Plaintiffs ask the Court to give them what Congress did not—an opportunity to take DoD's accounting mission into their own hands.

Plaintiffs have not shown that DoD's procedures are inadequate. "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Meza v. Livingston*, 607 F.3d 392, 404 (5th Cir. 2010) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). A hearing is not always required,[41] still less a formal or adversarial hearing.[42] "What is

---

how to bury and remember their loved ones." Pls.' Cross-Mot. at 2; *see* App'x ¶ 7-16. Because DoD is responsible for disinterments by statute, *see* 36 U.S.C. § 2104(4), Plaintiffs do not need a separate process from the ABMC.

[41] *See, e.g.*, *Glinsey v. United States*, 2011 WL 2963669, at *2 (N.D. Miss. July 20, 2011) (rejecting claim that there was a due process violation "because there was no hearing" on the ground that the statutory procedure was "all that due process requires"); *Fan v. Brewer*, 2009 WL 1743824, at *7 (S.D. Tex. 2009) (explaining that due process for college or graduate school discipline based on scholarly or academic criteria requires "no hearing before the academic decision maker," or "that [the student] be able to question witnesses, or that he be allowed to present his side of the story" so long as "the student is fully informed of the faculty's dissatisfaction with his progress, and the ultimate decision to dismiss him is careful and deliberate").

[42] *See, e.g.*, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 15 (1979) (holding that there was adequate due process for denial of discretionary parole where state provided "informal interview hearing" where inmate could appear before Board and "present letters and statements on his own behalf"); *Fan*, 2009 WL 1743824, at *7 (S.D. Tex. 2009) (explaining that due process "in the context of college or graduate school discipline requires only an "informal give-and-take between the student and the administrative body dismissing him that would, at a minimum, give the student the 'opportunity to characterize his conduct and put it in what he deems the proper context'" (quoting *Goss v. Lopez*, 419 U.S. 565, 584 (1975)).

required is a procedure, not necessarily a hearing." Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.8(i) (4th ed. 2008) (stating that the requirement for a "fair procedure before a fair decision-maker" does not mean "the right to a hearing before the action is taken or even to any personal hearing at any time.").

Nor is a separate appeal process necessary here. *See, e.g.*, *Schweiker v. McClure*, 456 U.S. 188 (1982) (holding that due process did not require appeal to administrative law judge). DoD could have structured its process to involve an initial decision by DPAA with an appeal to the Assistant Secretary. By placing the final decision with someone so senior in the Office of the Secretary of Defense, DoD gave families many of the same benefits that would come with an appeal—DPAA's views and handling of Plaintiffs' evidence are scrutinized at the highest levels of DoD. *See* App'x ¶¶ 50-51. Moreover, to the extent that the Court might conclude that final disinterment decisions are subject to APA review, *see supra* Arg. § II.B (explaining that they are committed to agency discretion), the availability of judicial review could resolve any concerns about appeal. *See Lujan*, 532 U.S. at 196-97 (holding that business alleging breach of contract by government received due process through the normal judicial process); *Parratt v. Taylor*, 451 U.S. 527 (1981) (holding that prisoner's loss of property due to negligence of prison officials does not violate due process where state court remedy exists)

Plaintiffs' reference to a process for claiming remains appears to go beyond the disinterment-focused proposal in their cross-motion. DoD has a process to claim identified remains—the military services' disposition regulations. *See* App'x ¶¶ 86-88; Army Reg. 638-2. What Plaintiffs appear to seek is a formal process to claim disinterred but as-yet-unidentified remains. *See, e.g.*, Pls.' Opp'n at 24 (complaining that DoD "refuses to return the balance of [PVT Kelder's] remains to the next of kin"). It is difficult to contemplate how such a process

would work because, unlike a recently deceased person who generally can be identified by his face, distinguishing body marks, or the contents of his pocket, identification of these World War II remains depends on multiple strains of scientific analysis. *See* App'x ¶¶ 69-82.[43] All of the disinterred remains relevant here are highly commingled remains from Cabanatuan, and it would be incredibly disruptive and inefficient for Plaintiffs to seek to second-guess DoD's analysis and efforts bone by bone in an attempt to "claim" their relative.

The *Mathews* factors weigh strongly against the additional processes Plaintiffs seek here. The "private interest" in possessing remains for burial is tempered by the fact that the remains are unidentified (and in some instances buried), and the family's legal interest is at best a latent or future interest. *Cf. Lujan*, 532 U.S. at 196 (addressing due process where claimant had not "been denied any present entitlement"). Moreover, there is no recent deprivation or risk of change to the status quo. The "Government's interests" include maintaining appropriate control over this military mission within the bounds set by Congress, *see* Defs.' MSJ at 33-34, 41; responsibly safeguarding the remains of servicemembers, including preventing their disposition by the wrong family; and the efficient allocation of the limited resources available to maximize the accounting mission. The current procedures do not give rise to a significant "risk of an erroneous deprivation" that would be alleviated by Plaintiffs' "additional procedural safeguards." *Mathews*, 424 U.S. at 321. Plaintiffs can already present any evidence they believe to be probative. A live hearing or witness testimony would contribute little—because the relevant information is largely contained in historical files, it can more efficiently be produced and described in writing than in person. Through case summaries provided to Plaintiffs at Family

[43] Plaintiffs' many asides about how they think DNA testing or scientific analysis could or should work, *see* Pls.' Opp'n at 9, 35, 42, 44; Pls.' Cross-Mot. at 26, are unsupported by any admissible evidence and should not be considered.

Member Updates or upon request, Plaintiffs are well aware of DoD's historical analysis and could have used the disinterment request process to dispute DoD's interpretation of the evidence as fulsomely as they have done here. And interference with the post-disinterment identification process would be unwarranted and unlikely to lead to an earlier identification of Plaintiffs' relatives. In sum, Plaintiffs have failed to show that DoD's procedures violation the Due Process Clause.

D. Plaintiffs Have Not Identified Any Egregious Conduct By Defendants to Establish a Violation of Substantive Due Process.

Defendants have established that none of the conduct Plaintiffs challenge rises to the level of the "egregious official conduct can be said to be arbitrary in the constitutional sense." *McClendon v. City of Columbia*, 305 F.3d 314, 325 (5th Cir. 2002) (en banc); *Cuellar v. Bernard*, No. 13-CV-91, 2013 WL 1290215, at *5 (W.D. Tex. 2013). *See* Defs.' MSJ at 34-35. In response, Plaintiffs dedicate only one paragraph to defend their substantive due process claim, resting on their allegation that the remains of Plaintiffs' relatives have been "located." *See* Pls.' Opp'n at 24-25 (claiming that "[w]hile the question of whether to disinter completely unknown remains may be debatable, whether to allow families to bury located remains is not").

But Plaintiffs cannot show either that Defendants' "conduct was intended to injure in some way unjustifiable by any government interest" or that "it resulted from deliberate indifference." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). To the contrary, Defendants have established legitimate governmental reasons for the denial of some Plaintiffs' disinterment requests, for the additional time required to process other requests, and the time required for post-disinterment scientific analysis of the remains. *See* Defs.' MSJ at 12-21. While Plaintiffs seek to redirect the inquiry to the simplistic demand that Defendants "allow families to bury located remains," Pls.' Opp'n at 24, Defendants have shown that "locating"

commingled remains from common graves does not provide any remains that can be turned over to families before the arduous work of identifying and disentangling the distinct servicemembers' remains. *See* App'x ¶¶ 107, 127. It is legitimate for DoD to weigh its readiness carefully before undertaking this work. And Defendants have also shown that Plaintiffs have not in fact "located" remains likely to be those of 1LT Nininger, COL Stewart, or Brig. Gen. Fort. *See supra* Arg. § II.C-D. Nothing about DoD's conduct can reasonably be interpreted as intentional injury or deliberate indifference. To the contrary, DPAA and other supporting DoD components are vigorously pursuing the accounting mission. *See* App'x ¶¶ 36-45. There is no substantive due process violation. *See Simi Inv. Co. v. Harris County, Texas*, 236 F.3d 240, 250-51 (5th Cir. 2000).

IV. Plaintiffs' Fourth Amendment Seizure Claim Fails.

Plaintiffs' Fourth Amendment claim—that Defendants "have unreasonably held the remains at issue from Plaintiffs" and thus have "unreasonably seized" Plaintiffs' "property," Am. Compl. ¶ 125—largely depends on two assertions that Plaintiffs cannot prove. First, the claim depends on a cognizable property interest, *see* Pls.' Opp'n at 26 (arguing a "meaningful interference with [Plaintiffs'] property rights"), which fails for the reasons discussed above. *See supra* Arg. § III.B.1. Second, the claim depends on "all of the remains hav[ing] been located and/or identified," Pls.' Opp'n at 26, a factual claim refuted by the evidence. *See supra* Arg. § I.

But even if Plaintiffs had some cognizable property interest, they have not shown that the government's "seizure" of the remains is unreasonable.[44] *See Freeman v. City of Dallas*, 242 F.3d 642, 652 (5th Cir. 2001) (en banc) ("[T]he fundamental Fourth Amendment question of

[44] In the context of their due process arguments, Plaintiffs acknowledge "[o]f course, it is understandable why the Government initially took possession of these remains." Pls.' Cross-Mot. at 13.

reasonableness" is "decided by balancing the public and private interests at stake."). They primarily cross-reference their due process and APA claims. *See* Pls.' Opp'n at 5, 26 (citing Pls.' App'x ¶¶ 32-35, 38).[45] For the reasons discussed above, Defendants have satisfied due process and APA requirements. *See supra* Arg. § II, II.C; *Kinnison v. City of San Antonio,* 480 F. App'x 271, 280-81 (5th Cir. 2012) (noting that the Fourth Amendment reasonableness standard "generally requires no more of government officials than that of due process of law").

Plaintiffs also allege that it is unreasonable "to seize located and/or identified remains." Pls.' Opp'n at 26. To the extent what Plaintiffs mean by "located and/or identified" for the remains associated with Cabanatuan Common Graves 407, 704, and 822, is that the remains of TEC4 Bruntmyer, PFC Hansen, and PVT Morgan are "likely" among the 21 sets of unidentified remains associated with these graves, then it is reasonable for DoD to retain the commingled remains until the individual servicemembers can be identified. The same is true for the residual remains from Common Grave 717.[46] There are no remains that DoD can simply turn over to Plaintiffs because no one can tell whose remains are whose until the scientific analysis is complete. To the extent what Plaintiffs mean by "located and/or identified" is their "more likely

[45] Plaintiffs claim that their "factual allegations . . . show that the actions are unreasonable," but that it would be "inappropriate" to resolve "the reasonableness of the Government's behavior . . . at this stage of the case because of the material facts in dispute." Pls.' Opp'n at 26. As discussed above, there are no material disputes of fact that prevent a decision regarding the reasonableness of Defendants' actions. *See supra* Arg. § I; *see also* Defs.' Resp. to Pls.' App'x ¶¶ 32-35, 38.

[46] While Plaintiffs assert that "the balance of Pvt. Kelder's remains have already been disinterred and are currently being held in a government facility," Pls.' Opp'n at 26, that cannot in fact be known. It is possible that the balance of PVT Kelder's remains were buried as PFC. Juan Gutierrez, which remains have not yet been disinterred. It is also possible that some of PVT Kelder's remains were mistakenly placed with other common graves. All that is known is that the DPAA Laboratory continues to analyze the remains associated with Common Grave 717 and has no remains in its possession which can be said to likely be the remains of PVT Kelder. *See* 2d Berg Decl. ¶ 8.

than not" assessment for 1LT Nininger, COL Stewart, and Brig. Gen. Fort that does not take into account the probative biological profile evidence (stature, age, ethnicity, and dental records), then it is reasonable for DoD to weigh all of the evidence and conclude that DoD's disinterment threshold has not been met. *See supra* Arg. §§ II.C-D.

Because Fourth Amendment reasonableness must balance the private and public interests at stake, *see Freeman*, 242 F.3d at 652, Plaintiffs' interest in a forum to "claim a relative's remains," Pls.' Opp'n at 24, must be balanced against numerous public interests: (1) ensuring that a family does not receive another servicemember's remains or commingled remains, (2) avoiding unnecessarily disturbing the Manila American Cemetery and Monument by conducting unwarranted disinterments, (3) DoD's need to efficiently allocate its limited resources to maximize the accounting mission. The disinterment request process DoD has adopted reasonably balances all of those interests, as does DoD's identification process.

V. Plaintiffs Have Failed to Carry Their Burden to Maintain a Free Exercise Claim Under the First Amendment or RFRA.

Plaintiffs' free exercise of religion claims must be rejected because Plaintiffs have entirely failed to support those claims at the summary judgment stage. Accordingly, Plaintiffs cannot show that their practice of religion was "substantially burdened" by Defendants' regulations or conduct. Accordingly, the Religious Freedom Restoration Act (RFRA) is not triggered and Defendants' actions serve legitimate governmental interests sufficient for the Free Exercise Clause.

A. Defendants Are Entitled To Judgment Because Plaintiffs Have Not Submitted Any Evidence of a Substantial Burden on Their Religious Practices.

Defendants have shown that Plaintiffs' First Amendment and RFRA claims largely turn on whether they can show that Defendants have "substantially burden[ed]" Plaintiffs' religious

practices. *See* Defs.' MSJ at 37-39. Under RFRA, Plaintiff bears the initial burden of establishing "the existence of a substantial interference with the right of free exercise." *Diaz v. Collins*, 114 F.3d 69, 72 (5th Cir. 1997). "The sincerity of a claimant's belief in a particular religious exercise is an essential and threshold element of this burden." *Louisiana College v. Sebelius*, 38 F. Supp. 3d 766, 777 (W.D. Tex. 2014) (citing *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)). It is elementary that at the summary judgment stage Plaintiffs may not rest on their pleadings but must support the elements of their claims with evidence. *See* Fed. R. Civ. P. 56(e)(2) (stating that the non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must-by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial"); *Hernandez v. Swith Transp. Co.*, No. SA-09-CV-855-XR, 2010 WL 2232837, at *2 (W.D. Tex. June 2, 2010).

Yet Plaintiffs have submitted no evidence of their religious practices or how Defendants' actions burden those practices. Instead, they rest on the generic allegations in their Amended Complaint that the Court found adequate at the "pleading . . . stage of litigation." *Patterson*, 343 F. Supp. 3d at 652. Defendants pointed out that this was inadequate to "satisfy the summary judgment standard." Defs.' MSJ at 38. And, as this Court has noted, "a 'defendant moving for summary judgment can rely on the absence of evidence' to support a summary judgment motion." *Galvan v. SBC Pension Benefit Plan*, No. SA-04-CV-333-XR, 2007 WL 2892005, at *9 (W.D. Tex. Oct. 1, 2007) (quoting *Int'l Ass'n of Machinists v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987)).

Nor is this an abstract issue. The nature of Plaintiffs' religious beliefs and practices is directly relevant to whether their free exercise of religion has, in fact, been burdened. *See Diaz*, 114 F.3d at 72 (holding that there was no substantial burden because "[n]othing in the record

suggests that Diaz's beliefs, however fervently held, compel him to wear a medicine pouch or headband at all times"). Even if "each Plaintiff has certain religious beliefs regarding what constitutes proper burial," Am. Compl. ¶ 133, the burials the unidentified servicemembers did receive might satisfy all of those beliefs. Without explanation of what constitutes "a proper burial in accordance with each respective family's religious beliefs," Am. Compl. ¶ 132, neither Defendants nor the Court can assess the alleged burden.[47] Moreover, it is unlikely that all seven Plaintiffs have the same beliefs. Thus, Defendants do dispute the sincerity of Plaintiffs' alleged beliefs because no Plaintiffs has come forward with any specific explanation of their own beliefs. Because Plaintiffs have submitted no evidence on this critical point, the Court should grant summary judgment to Defendants. *See Louisiana College*, 38 F. Supp. 3d at 777.

B. Plaintiffs Cannot Establish Substantial Burden Because, Regardless of Their Beliefs, Defendants' Actions Are Not Coercive, and Plaintiffs Are Not Entitled To Demand Affirmative Government Action.

Plaintiffs offer no response to Defendants' showing that under controlling caselaw there is no "substantial burden" without a "tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); Defs.' MSJ at 39. After all, "the frustration of not getting what one wants" is not a substantial or undue burden. *Castle Hills First Baptist Church*, 2004 WL 546792, at *11. Nor does it violate RFRA for the "incidental effects of government programs . . . [to] make it more difficult to practice certain religions." *Lyng*, 485 U.S. at 450-51; *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (defining "substantial burden" to require "truly pressur[ing] the adherent to

[47] For this reason, Plaintiffs' allegations are unlike the case they cite in which plaintiff's complaint explained that his Orthodox Jewish beliefs were burdened by a planned autopsy as a prohibited "molestation of the body after death." *Snyder v. Holy Cross Hosp.*, 352 A.2d 334, 340 (Md. Ct. Spec. App. 1976). Nor did *Snyder* address a plaintiff's burden under the summary judgment standard.

significantly modify his religious behavior and significantly violate his religious beliefs"). At most, Plaintiffs appear to allege that the incidental effects of the accounting program make it more difficult to practice their religion. Because Plaintiffs cannot identify anything coercive in the government's conduct, it becomes clear that Plaintiffs are impermissibly seeking a "benefit that is not otherwise generally available." *Adkins*, 393 F.3d at 570.; *see also Lyng*, 485 U.S. at 456; *Siff v. State Democratic Executive Comm.*, 500 F.2d 1307, 1310 (5th Cir. 1974).

Defendants have shown that Plaintiffs are essentially claiming that the Government owes them affirmative actions—such as disinterring unknown buried remains and making efforts to identify them—in order to comply with RFRA and the Free Exercise Clause. *See* Defs.' MSJ at 38-39. In response, Plaintiffs confusingly assert that "[t]he Families want to take the affirmative action necessary to bury their relatives' remains – not force the Government to do so." Pls.' Opp'n at 29. But Plaintiffs' framing of the issue only makes sense if it can be assumed that DoD could turn over remains to a family simply because the family alleged it was their relative's body.[48] Because that is not the case, disinterment and identification are necessary prerequisites to what Plaintiffs seek. Plaintiffs are thus misusing the Free Exercise Clause and RFRA, which are "written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988); *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 791 n.2 (5th Cir. 2014) (noting "that the Free Exercise Clause enshrines [plaintiff's] right to practice its religion free from interference *by the government*"). Plaintiffs cannot compel the government to direct its resources to recovering, disinterring, or identifying particular remains merely because

[48] As discussed above, Plaintiffs' assertion that "the remains have been identified and/or located," Pls.' Opp'n at 29, is inadequate at the summary judgment stage because it is an unwarranted extrapolation from the facts. *See supra* Arg. § I.

Plaintiffs' possession of their relatives remains would help them perform desired burial rites. They identify no authority that applies RFRA or the Free Exercise Clause in such a way. Thus, even apart from Plaintiffs' failure to support their claims with competent evidence, the Court must reject their claims for failure to establish a substantial burden.

C. Regardless of Substantial Burden, Plaintiffs Have Failed to Defend Their Free Exercise Clause Claim.

And even if Plaintiffs had established a substantial burden, their Free Exercise Clause claim can be quickly dispatched. Plaintiffs do not dispute Defendants' showing that the regulations and actions at issue here are neutral rules of general applicability, which pass muster under the Free Exercise Clause so long as they serve a legitimate state interest. *See* Defs.' MSJ at 37; *Castle Hills First Baptist Church v. City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *17 (W.D. Tex. Mar. 17, 2004); *Kikapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 653-54 (W.D. Tex. 1999). Defendants have shown that they have legitimate government interests (1) in safeguarding the remains of deceased service members, known or unknown, (2) in ensuring the dignity of service members buried at the Manila American Cemetery, (3) in maintaining control over the agencies' limited resources to perform accounting mission that Congress has given them as efficiently as possible. *See* Defs.' MSJ at 41. The procedures Defendants have adopted, such as DTM-16-003, serve these interests. *See id.* Plaintiffs do not seriously dispute that Defendants have satisfied rational basis review here. *See* Pls.' Opp'n at 31 (using the phrase "legitimate governmental interest" once but focusing exclusively on whether Defendants' interests are compelling).

D. Plaintiffs' RFRA Claim Also Fails Because Defendants' Procedures Serve Compelling Government Interests and Employ the Least Restrictive Means.[49]

Because Plaintiffs have not carried their burden to establish a "substantial burden," RFRA has not been triggered, and Defendants need not show a compelling government interest or the least restrictive means. *See* Defs.' MSJ at 36-37. But even if RFRA were triggered, the government's legitimate interests noted above rise to the level of compelling interests. *See id.* at 41. They are at least as compelling as other interests courts have accepted as compelling. *See id.* at 41 & n.22 (collecting cases). In response, Plaintiffs rest exclusively on their claim that "the remains [have] . . . been individually located and/or identified or traced to specific graves" and that it is "DPAA's obligation to return identified remains to their families for burial." Pls.' Opp'n at 30. Thus, because Plaintiffs do not engage with Defendants' showing of compelling interests and rest on the unsupported allegation that the relevant remains are "identified," Defendants have met that standard.

Lastly, Plaintiffs fail to address Defendants' argument that DoD's disinterment thresholds and prioritization procedures are the least restrictive means of serving the government's compelling interests. *See* Defs.' MSJ at 42; cf. Pls.' Opp'n at 31 (erroneously alleging that "[t]he Government does not even assert that it has met its burden"). Again, Plaintiffs resort to a straw man—"no reason is given as to why identified remains that have been located should not be returned to their families for proper burial." Pls.' Opp'n at 31. To the contrary, because the

[49] Plaintiffs cite no authority for their claim that the compelling interest and least restrictive means inquiries are affirmative defenses to the First Amendment and RFRA claims. *See* Pls.' Opp'n at 29-30. Regardless, such "defenses" have not been waived because Plaintiffs raised these issues in their complaint and Defendants' specifically denied them. *See* Am. Compl. ¶ 136; Am. Answer ¶ 136. Plaintiffs also can claim neither surprise nor prejudice because the Rule 12(c) motion was filed shortly thereafter. *See Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 860 (5th Cir. 2000).

remains are *not* identified Defendants must protect them until the relevant family is known. And regardless, Defendants need to employ prioritization procedures and disinterment thresholds to efficiently manage their resources and maximize the accounting mission. Thus, even under the most stringent standard, Defendants have not violated RFRA in their good faith efforts to account for unidentified service members.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and grant judgment to Defendants on all counts.[50]

Dated: June 7, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director
Civil Division, Federal Programs Branch

/s/ Galen N. Thorp
GALEN N. THORP (VA Bar # 75517)
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
950 Pennsylvania Avenue NW
Washington, D.C. 20530
Tel: (202) 514-4781 / Fax: (405) 553-8885
galen.thorp@usdoj.gov

Counsel for Defendants

[50] Plaintiffs' request for declaratory judgment that Plaintiffs "and all other next of kin have a constitutional, statutory, and/or common law right to possess the remains of their family members for purposes of burial" and that "that the Government cannot deprive a next of kin from possessing the remains of their family members for purposes of burial without providing procedural due process protection," Pls.' Cross-Mot. at 22, fail for the reasons discussed above. *See supra* Arg. § III.A-C.

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:

John T. Smithee, Jr.
Law Office of John True Smithee, Jr.
1600 McGavock St.
Suite 214
Nashville, TN 37203

Ron A. Sprague
Gendry & Sprague PC
900 Isom Road, Suite 300
San Antonio, TX 78216

/S/ Galen N. Thorp
GALEN N. THORP
Senior Counsel