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

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

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the U.S. Department of Defense, Defense POW/MIA Accounting Agency, American Battle Monuments Commission, and the heads of those agencies sued in their official capacities (collectively "Defendants"), respectfully request that the Court enter summary judgment in their favor because there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law. For the reasons that follow, Defendants respectfully request that the Court grant this motion, and that it dismiss all of Plaintiffs' claims with prejudice.

Dated: April 20, 2019

Respectfully submitted,

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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"), are performing the missions assigned to them by Congress. Locating, recovering, and identifying the remains of unknown servicemembers from past wars is a responsibility that Congress gave to DoD and DPAA, phrased in broad terms that emphasize the government's discretion in how to perform this mission. Through this lawsuit, Plaintiffs seek to have the Court intervene in this mission, second-guessing the government's approaches and demanding that the search for Plaintiffs' relatives be prioritized over other servicemembers and conducted Plaintiffs' way, without a methodical scientific approach to ensure the likelihood of successful identification.

Plaintiffs' claims fail both in fact and in law. For the three servicemembers for whom Plaintiffs have relied on circumstantial evidence to claim that the location of their remains are known, the totality of available evidence strongly indicates that those graves do not contain Plaintiffs' relatives. For the four servicemembers 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. Thus, Plaintiffs cannot show that the government is improperly retaining identified remains.

Plaintiffs' Administrative Procedure Act (APA) claim fails because the challenged agency actions are committed to agency discretion and not subject to judicial review; even if reviewable, Defendants' final actions are demonstrably reasonable and they have not failed to take any action required by law. Indeed, their APA claims fail in large part for the same reason this Court twice dismissed Plaintiffs' Mandamus Act claims—neither the statute nor the regulations constrain Defendants' broad discretion.

Plaintiffs have also failed to establish their constitutional claims. 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.

STATEMENT OF FACTS

Pursuant to Local Rule CV-7(d)(1), Defendants hereby incorporate by reference the summary of facts and the exhibits found in the attached Appendix (cited as "Defs.' Appx. ¶ _").

STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 permits judgment even if the parties disagree about the facts; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original).[1] A dispute over a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. A fact is "material" only if it "might affect the outcome of the suit under the governing law." *Id.*

To prevail on summary judgment, Defendants need only point out "that there is an absence of

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

evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If Defendant shows there is no genuine dispute as to any material fact, Plaintiff "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (citation omitted). "Unsubstantiated 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). 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). Courts "will not assume in the absence of any proof that the nonmoving party could or would prove the necessary facts." *McCarty v. Hillstone Restaurant Grp., Inc.*, 864 F.3d 354, 358 (5th Cir. 2017). Moreover, courts "will grant summary judgment in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Id.*

ARGUMENT

I. Plaintiffs' Administrative Procedure Act Claims Are Meritless (Count 5).

Plaintiffs cannot show that Defendants have violated the Administrative Procedure Act. As a threshold matter, APA review is not available because Defendants' challenged actions are committed to agency discretion by the applicable statutes and regulations.[2] And even if APA review were available, Plaintiffs cannot show either (1) that Defendants' final determinations are arbitrary and capricious or an abuse of discretion, or (2) that Defendants have violated any applicable statutory or regulatory requirements. Therefore, Defendants are entitled to judgment

[2] Defendants do not dispute that the APA waives sovereign immunity for purposes of Plaintiffs' First, Fourth, and Fifth Amendment claims. *See Patterson*, 343 F. Supp. 3d at 648, 650. Nor do Defendants argue that Congress intended to preclude review of such constitutional claims. *See id.*; *Ellison v. Connor*, 153 F.3d 247, 252 (5th Cir. 1998). However, these claims are best considered under the substantive standards of those constitutional provisions, and are not further considered under this heading.

on Plaintiffs' APA claims.[3]

A. The Decisions Plaintiffs Challenge Are Committed to Agency Discretion and Not Subject to APA Review.

While the Court rejected in part Defendants' argument that APA review is unavailable under this statutory regime,[4] the Court held open the possibility that "the decision to disinter or not is left to agency discretion." *See Patterson*, 343 F. Supp. 3d at 651. The actions Plaintiffs challenge here—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 should not be subject to challenge under the APA.

"Congress has provided that the APA—and its concomitant grant of judicial review—does not apply . . . if 'agency action is committed to agency discretion by law.'" *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 233 (5th Cir. 2015) (quoting 5 U.S.C. § 701(a)). This limitation on judicial review applies where a "court would have no 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)).[5]

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[3] Plaintiffs fail to allege, let alone establish, any specific obligation of or action by the ABMC that could give rise to liability under any of their legal theories. Accordingly, ABMC should be dismissed as a defendant.

[4] Defendants have not abandoned their argument that the MSPA "preclude[s] judicial review," 5 U.S.C. § 701(a); *see* Defs.' Rule 12(c) Mot. at 45-46, ECF No. 31, but recognize that the Court has rejected that argument. Accordingly, that issue is preserved for any necessary appeal.

[5] This Court's prior decision appeared to separate the "determination that an action was committed to agency discretion" from whether "the law does create a judicially manageable standard by which to judge an agency's action." *Patterson*, 343 F. Supp. 3d at 650. However, *Heckler* treated those as part of the same determination—*i.e.*, if the law creates a "judicially manageable standard," then the action is not committed to agency discretion. *See* 470 U.S. at 830 ("review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").

1. The statutes do not provide a meaningful standard to apply.

Plaintiffs have not disputed Defendants' showing that the applicable statutes provide no guidance as to how the DoD is to manage its accounting mission. *See* Defs.' Rule 12(c) Mot. at 46-47; Pls.' Opp'n to Rule 12(c) Mot. at 34, ECF No. 33 (claiming only that "both . . . the Constitution and the Government's regulations" provide a "clear rule to apply"). The statutes commit to agency discretion decisions regarding recovery and accounting efforts, which involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831. In sum, "the agency has been granted authority to act by a statute that does not restrict the considerations it may rely on or the procedures by which the discretion should be exercised." *Inst. of Marine Mammal Studies v. Nat'l Marine Fisheries Serv.*, 23 F. Supp. 3d 705, 716 (S.D. Miss. 2014). The Court should conclude that it lacks sufficient *statutory* standards to evaluate the lawfulness of Defendants' actions. *See FDIC v. Bank of Coushatta*, 930 F.2d 1122, 1129 (5th Cir. 1991); *Perales v. Casillas*, 903 F.2d 1043, 1047 (5th Cir. 1990); *Inclusive Communities Project, Inc. v. U.S. Dep't of Housing & Urban Development*, No. 3:07-CV-0945-O, 2009 WL 3122610, at *6-7 (N.D. Tex. Sept. 29, 2009).[6]

[6] While *Heckler* noted that one factor supporting the presumptive unreviewability of enforcement decisions was that "when an agency refuses to act, it generally does not exercise its *coercive* power over an individual's liberty or property rights," 470 U.S. at 832, that does not mean that an agency's exercise of power over property rights renders the action reviewable in the absence of judicially manageable standards. To the contrary this factor was listed "to facilitate understanding of our conclusion that an agency's decision not to take an enforcement action should be presumed immune from judicial review" and that the presumption "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. Thus, courts have not altered their analysis when property rights were at stake. *See, e.g.*, *Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) (applying *Heckler* to contract enforcement under statutory provision, even though workers' employment rights were at stake); *Gast v. Tennessee Valley Auth.*, No. 4:10-cv-45, 2011 WL 864390, at *8 (E.D. Tenn. Mar. 10, 2011) (applying *Heckler* to authority to fine plaintiff and demand removal of his boat dock).

2. Defendants' regulations do not provide a meaningful standard to apply.

Plaintiffs only argue that the Court can review whether Defendants violated their own regulations. *See Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998) ("An agency's own regulations can provide the requisite 'law to apply.'"). In its prior ruling, the Court referred to DPAA Administrative Instruction (AI) 2310.01 (attached at App'x Ex. A.4) as containing "detailed policies for how to conduct [DPAA's] accounting mission, which provide the Court sufficient standards by which to evaluate the DPAA's action." *Patterson*, 343 F. Supp. 3d at 650. However, Plaintiffs have not claimed that DPAA has failed to follow AI 2310.01. *See, e.g.*, Am. Compl. ¶¶ 91-93; Pls.' Opp'n to Rule 12(c) Mot. (never mentioning this document).

In addition, none of the regulations on which Plaintiffs have actually relied constrain Defendants' statutorily-conferred discretion in a way that makes their APA claims cognizable. Plaintiffs rely solely on the same regulations the Court found did not support their mandamus claims. The Court concluded that those 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. In light of the court's holding that "Plaintiffs fail to demonstrate that Defendants' responsibilities with respect to recovery and identification of remains are specific, ministerial acts, devoid of the exercise of judgment or discretion," *id.* at 653, Plaintiffs also cannot show that Defendants' regulations provide a "meaningful standard against which to judge the agency's exercise of discretion." *Lincoln*, 508 U.S. at 191.

i. DPAA Administrative Instruction 2310.01

Even if Plaintiffs did rely on some aspect of AI 2310.01, it would not create a basis for judicial review. At most, this instruction could constrain DPAA's process for *recommending* whether disinterment should occur now, and none of Plaintiffs' challenges turn on that

recommendation. This *DPAA instruction* cannot constrain the discretion of the DoD entity ultimately responsible for disinterment decisions—the Assistant Secretary of Defense for Manpower and Reserve Affairs. *See* App'x ¶¶ 47-51. Nor does this DPAA instruction address, let alone constrain, DPAA's discretion in post-disinterment processing of remains for identification. As for DPAA's recommendation, the instruction does not establish a "meaningful standard," *Lincoln*, 508 U.S. at 191, because it merely provides a non-exhaustive list of factors to consider. *See* App'x Ex. A.4, AI 2310.01 § 7.2 (explaining that "[f]or DPAA, the percentage of likelihood that an Unknown can be identified is a qualitative determination based on the totality of evidence"). Thus, for purposes of Plaintiffs' claims in this case, DPAA's administrative instruction cannot create a basis for judicial review.

ii. DoD Directives

Next, the language to which Plaintiffs point in the DoD Directives, merely restates general statutory responsibilities and does not refine them into nondiscretionary duties. For example, DoD's accounting directive states: "It is DoD policy that: a. Accounting for DoD personnel and other covered personnel from past conflicts and other designated conflicts is of the highest national priority." DoD Directive 2310.07 § 1.2(a) (Apr. 12, 2017) (App'x Ex. A.3).[7] This echoes Congress's call for establishment of the accounting program. *See, e.g.*, 10 U.S.C. § 1509(a) (requiring DoD Secretary to "implement a comprehensive, coordinated, integrated, and fully resourced program to account for [unaccounted for] persons"). Similarly, DPAA's statutory "[r]esponsibility for accounting for missing persons from past conflicts, including locating, recovering, and identifying missing persons from past conflicts or their remains after

[7] Plaintiffs cite similar language from DoD Directive 2310.07E § 4.1 (Nov. 10, 2003), which was cancelled and replaced by DoD Directive 2310.07. *See* Am. Compl. ¶¶ 92(b), 93(b), 112, 119.

hostilities have ceased," 10 U.S.C. § 1501(a)(2)(B), is echoed in DoD's mortuary affairs policy directive, which states:

> It is DoD policy that: a. The remains of deceased DoD-affiliated or -covered persons, consistent with applicable laws and regulations, who die in military operations . . . 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.

DoD Directive 1300.22, Mortuary Affairs Policy § 3 (Oct. 30, 2015) (App'x Ex. A.6).[8] Just as this Court concluded that the underlying statute and these regulations provided DoD with substantial discretion in how to perform these responsibilities, *see Patterson*, 343 F. Supp. 3d at 651, they likewise do not constrain Defendants' discretion or provide additional "law to apply" here. This discretion is expressly referenced by the need to balance the recovery and identification effort with "maintaining the dignity, respect and care of the deceased" and "the safety of the living." DoD Directive 1300.22 § 3; *see also id.* (stating that action must be "consistent with applicable . . . regulations," thereby incorporating DoD Directives 2310.07 and 5110.10, DTM-16-003, etc.).

iii. Joint Chiefs of Staff Publication 4-06

Plaintiffs also cite Joint Publication 4-06, Mortuary Affairs (Oct. 12, 2011). *See* Am. Compl. ¶¶ 92(c), 93(c), 112(f), 119(f). Defendants previously explained why that document did not limit DoD discretion. *See* Defs.' Rule 12(c) Mot. at 38. Moreover, that document was recently cancelled upon the publication of Joint Publication 4-0, Joint Logistics (Feb. 4, 2019). *See* Joint Pub. 4-0, Joint Logistics, Preface at ii (App'x Ex. A.14) (explaining that "this

[8] In two counts seeking relief under the Declaratory Judgment Act, Plaintiffs also cite DoD Instruction 1300.18, Personnel Casualty Matters, Policies, and Procedures (Aug. 14, 2009) (App'x Ex. A.7). *See* Am. Compl. ¶¶ 112(e), 119(e). While it is not clear what portion of this DoD Instruction Plaintiffs seek to rely on, the most relevant provision is DoD Instruction 1300.18 § 4.3, which contains the same language as DoD Directive 1300.22 § 3.

publication cancels JP 4-06" and that "[r]elevant material from JP 4-06, Mortuary Affairs, has been incorporated into the main body and an added appendix of this publication"); *see also id.* at iii, xvii, & App'x S § 3. Joint Publication 4-0 clarifies what Defendants previously explained, that this document does not apply to DPAA or the past accounting mission. DPAA is not among the entities to which this joint doctrine applies. *See* App'x ¶¶ 93-95. Instead, this document, to the extent it touches on mortuary affairs, is intended to guide mortuary planning in current and future operations. *See, e.g.*, Joint Pub. 4-0, App'x M, Mortuary Affairs Planning § 2 (explaining that "[mortuary affairs] planning should focus on wartime and major contingencies, peacetime losses are the responsibility of the Military Department Secretary"). It primarily describes the "DOD Mortuary Affairs Program" and cross-references DoD Directive 1300.22, which has already been addressed. *See* Joint Pub. 4-0, Ch. II § 5(e) Logistics Services, MA (concluding "[f]or more information, see . . . DODD 1300.22, Mortuary Affairs Policy").[9] And it constitutes "official advice" rather than a legally binding limitation. *See id.*, Preface § 3(b). For all of these reasons, this document does not constrain DPAA or DoD leadership's discretion with regard to the past conflict accounting program.

iv. Army Regulations

Army Regulation 638-2 (AR 638-2, attached at App'x Ex. A.13), upon which Plaintiffs

[9] Because Plaintiffs previously focused on the "temporary interment" language in Joint Publication 4-06, it should be noted that the new Joint Publication makes it even more clear that this language has no application to a permanent military cemetery and monument like Manila American Cemetery. Appendix M directs planning for temporary interments where there is "the potential [for] a number of fatalities which overwhelm military and civilian capabilities" and permits geographic combatant commanders to "authorize temporary interment in their [area of responsibility]." Joint Pub. 4-0, App'x M § 5(a). It is for these temporary interments for which Appendix M directs that "[d]isinterment operations should be conducted as soon as the tactical situation on the ground permits." *Id.* § 5(b).

most extensively rely, is irrelevant for several reasons.[10] Most importantly, it is binding only on the Army. *See* App'x Ex. A ¶¶ 5, 31; AR 638-2 at i (stating that the regulation "prescribes policies for the care and disposition of remains of deceased personnel for whom the Army is responsible," not listing 10 U.S.C. §§ 1501-1513 among the statutes implemented).[11] Plaintiffs do not allege that the Army has failed to comply with any of its current obligations. *See* App'x ¶¶ 83, 85; DoD Directive 2310.07 § 2.6 (discussing U.S. Army's support obligations for past conflict accounting mission). The relevant Army casualty office—the Past Conflicts Repatriation Branch of the U.S. Army Human Resources Command—is the primary DoD point of contact for families of World War II Army servicemembers. *See* App'x ¶¶ 83-84. But that does not give this office or the Army responsibility to undertake recovery or identification operations. Instead, this office facilitates communication and directs requests to the appropriate DoD component. *See* App'x Ex. A ¶ 28. And once the appropriate DoD authority identifies servicemember remains, this office coordinates with the primary next of kin regarding disposition of the remains. *See* App'x ¶¶ 85-86.

To the extent AR 638-2 addresses disinterment and identification of remains from past conflicts, it has been superseded by DoD Directives specific to the DoD's accounting mission—such as DoD Directives 2310.07 and 5110.10, the Deputy Secretary of Defense's 2015

[10] While Plaintiffs' Amended Complaint also cited Army Field Manual (FM) 4-20-65, *see* Am. Compl. ¶ 92(e), they have not relied on it since Defendants demonstrated that this manual was replaced in 2011 by ATTP 4-46.1, which in turn was cancelled in 2014. *See* Defs.' Rule 12(c) Mot. at 39 n.15; *cf.* Pls.' Opp'n to Rule 12(c) Mot. at 27-29 (not citing FM 4-20-65). The guidance was cancelled because the Armed Forces Medical Examiner—not the Army—is now responsible for identifications. *See* App'x ¶ 90; *see also* DoD Instruction 5154.30, AFMES Operations § 2.4(a) (Dec. 21, 2017) (App'x Ex. A.8).

[11] AR 638-2 neither is nor was binding on DPAA or DoD leadership offices. DPAA is located outside the Army chain of command and instead is "under the authority, direction, and control of the [Under Secretary of Defense for Policy]." DoD Directive 5110.10 § 1.3(a).

memorandum setting the disinterment standard which guides the agency action here (App'x Ex. A.9), and the Under Secretary of Defense's memorandum that implements that standard. *See* Directive-type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains (App'x Ex. A.10). Due to Congress' actions in 2015, the U.S. Army no longer is responsible for deciding whether to disinter remains from Manila American Cemetery or to make identification decisions for current or past conflict human remains. *See* App'x ¶ 91, Ex. A ¶ 33. Subsequent DoD directives make the limited role of the services clear. *See, e.g.*, DoD Directive 5110.10 § 3.7 (not giving the Army authority to task DPAA).

Finally, even if AR 638-2 were relevant, it addresses recovery and identification of remains from *current conflicts* and does not constrain Defendants' substantial discretion to conduct the past conflict accounting mission. *See, e.g.*, Army Reg. 638-2 § 1-1 (addressing "persons for whom the Army is responsible by statutes and executive orders"). Only once does AR 638-2 reference "[r]esidual remains from previous wars," *id.* § 8-3(c), and this provision is best understood to merely cross-reference DPAA's mission and authority.[12] Regardless, Section 8-3(c) inherently involves the same discretion discussed above for the overarching DoD Directives, not a "meaningful standard" by which to judge the exercise of DoD's discretion.[13]

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[12] Section 8-3(c) provides "*Residual remains from previous wars or incidents.* The commander of the Joint POW/MIA Accounting Command (JPAC) or the geographic commander will search for, recover and tentatively identify eligible deceased personnel; all resources and capabilities immediately available will be used." That this is best understood as a limited cross-reference is evident from the scope of Chapter 8, *see id.* § 8-1 (cross-referencing Joint Publication 4-06, which as discussed above, applied only to current conflicts), and because the parallel subsections exclusively address commander responsibilities for current deaths. *See id.* § 8-3(a), (b).

[13] *Compare* AR 638-2 § 8-3(c) (explaining that "JPAC . . . will search for, recover, and tentatively identify eligible deceased personnel" using the "resources and capabilities immediately available"); *with* DoD Directive 1300.22, Mortuary Affairs Policy § 3 ("The remains of deceased DoD-affiliated or -covered persons . . . who die in military operations . . . will be recovered, identified, and returned to their families as expeditiously as possible . . . .").

For the same reasons, the other provisions of AR 638-2 that Plaintiffs cite neither apply here nor constrain Defendants' discretion. *See* AR 638-2 § 2-18(a) (merely cross-referencing Section 8 as a "mortuary benefit"); *id.* § 2-18(k) (merely noting that internment in a "U.S. Government cemetery" can be a "mortuary benefit"); *id.* §§ 4-4, 4-6 (addressing disposition rights after remains have been identified); *id.* §§ 8-8, 8-10 (addressing responsibilities for processing and disposition of remains from current conflicts).[14]

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

B. Plaintiffs Cannot Show that Defendants' Actions Are Unreasonable or an Abuse of Discretion.

Even if APA review were available, Plaintiffs cannot show that Defendants have violated the APA. Their core APA claim is that Defendants have "engag[ed] in 'arbitrary and capricious' conduct that bears no rational connection to the facts and circumstances of a particular case." Am. Compl. ¶ 99; *see also id.* ¶ 103. This claim asserts that Defendants should already have disinterred and provided specified remains to Plaintiffs because of "the identification [of those remains by Plaintiffs] and overwhelming evidence showing where the remains at issue are located." Am. Compl. ¶ 100. This claim fails because Defendants' challenged actions are reasonable and well-founded.

To press an APA claim, Plaintiffs must "point to the 'final agency action' they wish to challenge 'for which there is no other adequate remedy.'" *Patterson*, 343 F. Supp. 3d at 651 (quoting 5 U.S.C. § 704); *see also Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011). The

[14] Plaintiffs also list Army Pamphlet 638-2 under their Declaratory Judgment Act counts. *See* Am. Compl. ¶¶ 112(h), 119(h). This document sets out "procedures for the Army Mortuary Affairs Program" and has no greater scope than AR 638-2.

challenged action must have "[taken] place within the six years before [Plaintiffs] filed suit." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 580 (5th Cir. 2016) (citing 28 U.S.C. § 2401(a)). Finality requires satisfaction of two conditions: "the action must mark the consummation of the agency's decisionmaking process" and it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 580-81 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Practical consequences for a plaintiff are not enough to establish finality. *Id.* at 583. Four agency decisions plainly satisfy this finality requirement, and the reasonableness of Defendants' actions can be shown on the basis of undisputable fact.

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015). Courts apply "a presumption that the agency's decision is valid," which is the plaintiff's burden to overcome. *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 558 (5th Cir. 2014). The Court must "uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013). It "need only find a rational explanation for *how* the [agency] reached its decision." *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 225 (5th Cir. 2016). By contrast, to fail this standard, an agency must have:

> relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007).

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

DoD's March 2016 decision not to disinter the remains designated X-1130 for

comparison with DNA from 1LT Nininger's family was—and remains—reasonable for numerous reasons. The historical evidence suggests that 1LT Nininger was most likely buried near the church in Abucay, not in the location from which X-1130 was recovered, the village cemetery half a mile away. *See* App'x ¶¶ 133, 137. More significantly, modern anthropological methods for estimating stature demonstrate that the remains designated X-1130 are of an individual at least four inches shorter that 1LT Nininger. *See id.* ¶¶ 150-52. For this reason, DPAA recommended against disinterment of X-1130 because the standard set forth in DTM-16-003 could not be met. *See* App'x ¶ 130. Additional research conducted by DPAA historians has merely confirmed that these remains are unlikely to be those of 1LT Nininger. *See* App'x ¶¶ 132-48; App'x Ex. B ¶¶ 24-29 & Ex. 6-35.

Plaintiffs claim that DPAA should have given greater weight to an early association between X-1130 and 1LT Nininger, to AGRS's initial recommendation based on that early association, and to AGRS Headquarters' support for that recommendation. *See* App'x Ex. U, Response to Interrog. No. 1.[15] Under arbitrary and capricious review, it is enough for Defendants to show that DPAA did not "entirely fail to consider" these issues. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 658. Here, Defendants can show more. DPAA has not only considered these factors but also demonstrated 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 on a source that Plaintiffs themselves consider to be unreliable, and because reliable anthropological evidence demonstrates that these remains were of a person

[15] Plaintiffs also claim that stature estimation, at least as conducted in the 1940s, is a discredited science. *See id.* Defendants rest on their motion to exclude the testimony of Mr. John Eakin and Ms. Renee Richardson, which demonstrates that Mr. Eakin is unqualified to testify as an expert in this case, especially in the fields of forensic pathology, anthropology, odontology, or DNA science. *See* Defs.' Mot. to Exclude Experts, ECF No. 55.

far too short to be 1LT Nininger. *See* App'x ¶¶ 54-59, 139-52. Thus, the caution demonstrated by the Office of the Quartermaster General in the late 1940s in pressing for more detail about this case was appropriate. *See* App'x ¶ 145. 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.

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

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") was reasonable. First, historical analysis indicates that Brig. Gen. Fort was likely executed in Dansalan, about 65 miles away from the location where X-618 was recovered. App'x ¶¶ 173, 176-78. Second, 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. Third, DPAA anthropologists, using bone measurements from 1950 and modern methodology, estimate the remains' stature to be between 61.2 and 66.6 inches, approximately two inches shorter than Brig. Gen. Fort's recorded stature. App'x ¶¶ 179, 183-84. Fifth, a DPAA odontologist demonstrated that an inexplicable dental discrepancy excluded Brig. Gen. Fort from identification with X-618—the general had a tooth extracted decades earlier that was identified as present in X-618 on three separate occasions. App'x ¶¶ 179, 185-86. Because Brig. Gen. Fort was not a viable candidate for identification, and DPAA had no other candidates for identification with these remains at this time, it was reasonable to deny the disinterment request. *See* DTM-16-003.

Plaintiffs claim that all of this evidence should be disregarded in favor of the statement of Ignacio Cruz, the provincial governor. *See* App'x Ex. T, Response to Interrog. No. 1. Mr. Cruz collected several second-hand accounts suggesting that Brig. Gen. Fort may have been executed in Cagayan, where X-618 was recovered. *See* App'x ¶ 175. These accounts do not outweigh

DPAA's evidence and Plaintiffs cannot show that DPAA acted arbitrarily in denying the request.

3. Grant of Recommendations to Disinter Common Graves 704 and 822

Plaintiffs do not appear to challenge DoD's decisions to disinter remains associated with Cabanatuan Common Graves 704 and 822. The decisions were made once historical information about these losses had been reviewed and adequate family reference samples had been collected. App'x ¶¶ 109-16. As DPAA has explained, it is methodically proceeding through the Cabanatuan common graves in an effort to disinter all of them as resources allow. *Id.* ¶¶ 104-08. Because the disinterments were recommended and approved once the necessary prerequisites for successful identification were collected, these decisions should be upheld as reasonable.

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

Plaintiffs also claim to seek relief under 5 U.S.C. § 706(1), which permits courts to "compel agency action unlawfully withheld or unreasonably delayed." Pls.' Opp'n to Rule 12(c) Mot. at 35. Plaintiffs propose this as a way around the finality requirement. However, Plaintiffs have not met the finality threshold for such review. And even if these decisions could be considered final, 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.[16]

1. Recommending Disinterment of Common Grave 407

As part of DPAA's overall Cabanatuan project, DPAA is finalizing its recommendation for disinterment of the nine sets of remains associated with Cabanatuan Common Grave 407 that are buried at Manila American Cemetery. *See* App'x ¶¶ 119-20. This recommendation could not proceed until sufficient family reference samples were solicited by Army's Past Conflict Repatriation Branch and received and processed by the Armed Forces DNA Identification Laboratory. *See id.* ¶¶ 82, 85. Plaintiffs cannot show that that any Defendant has 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. To the contrary, DPAA is pressing forward for a decision under the applicable DoD regulation, just not on the timetable Plaintiffs prefer. In this

[16] 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 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.

context, the Fifth Circuit has made clear that such an allegation does not establish finality. *See Peterson*, 228 F.3d at 568 (holding that the agency's "alleged failure to comply with the [statute] . . . , however, does not reflect agency inaction. . . . Instead, the [agency] has been acting, but the [plaintiffs] simply do not believe its actions have complied with the [statute]"). And even if these actions could be considered final, they are plainly reasonable.

Nor can Plaintiffs show that any Defendant has failed to take a discrete, required action with regard to this disinterment request. For the reasons discussed above and with regard to Plaintiffs' dismissed mandamus claims, the applicable regulations give the Defendants discretion in how to perform their missions. *See supra* Arg. § I.A.2. For example, none of the regulations dictate which unknown remains should be disinterred next or the timetable on which the disinterments must be completed. *See id. Cf. Norton*, 542 U.S. at 71 (explaining that even where a document uses language about what an agency "will" do, it may not be a case where "language in the [document] itself creates a commitment binding on the agency" but more like a land use plan which "is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them"). Plaintiffs are not entitled to the prioritization of this case over any of the other Cabanatuan cases DPAA has been preparing, let alone over any of the thousands of unknowns DPAA is actively seeking to recover and identify.

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

DPAA is analyzing disinterred remains associated with 25 Cabanatuan Common Graves, including three common graves at issue in this case—Common Graves 704, 717, and 822. *See* App'x ¶¶ 106, 112, 116, 125-26. DPAA received remains from 13 graves associated with Common Grave 717, and has identified ten servicemembers. *See* App'x Ex. D ¶¶ 6, 9. It has been awaiting the last set of remains from a cemetery in the United States. *See id.* ¶ 9. AFDIL has conducted extensive testing on samples submitted by DPAA, and DPAA is preparing to

identify additional portions of the previously-identified servicemembers based on the latest testing. *See* App'x ¶ 125-26. In November 2018, DPAA disinterred remains from 12 graves associated with Common Graves 704 and 822, and has begun analyzing the remains and submitting samples to AFDIL for DNA testing. *See id.* ¶ 112, 116.

Accordingly, Plaintiffs cannot establish any final agency decision not to identify remains in DPAA's possession or not to transfer identified remains to the next of kin. Defendants are acting, just not on Plaintiffs' timetable and not, as Plaintiffs appear to desire, to the disregard of every other unidentified service member's family. And as Defendants have explained, their methodical processing of remains is reasonable. Analysis and identification is far more complex than Plaintiffs assume. *See* App'x ¶¶ 127-28. And Defendants have to prioritize and distribute their resources across many identification efforts, rather than focusing exclusively on those of interest to Plaintiffs. *See* App'x ¶¶ 36-43.

Regardless, Plaintiffs cannot meet *Norton*'s threshold. No regulation dictates discrete, required actions that any Defendant has failed to perform. For example, Plaintiff Douglas Kelder is not entitled to prioritization of identification of additional portions of PVT Arthur Kelder over the initial identification of other servicemembers for whom other families have received no remains for burial. And even if Defendants could have identified additional portions of PVT Kelder sooner, it would not be "contrary to law" to prioritize other efforts while waiting for receipt of the fourteenth set of associated remains.

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

DPAA is still preparing its recommendation regarding Plaintiff John Boyt's request to disinter X-3629 for comparison to COL Stewart. *See* App'x ¶¶ 154-56. COL Stewart is an unlikely candidate for comparison because his biological characteristics differ significantly from the remains. *See id.* ¶¶ 164-69. However, when DPAA reviews a disinterment request, it does

not merely compare one servicemember to one set of remains. Instead, if possible, it uses historical analysis to develop a list of possible candidates, and then winnows that list down using biological information. *See id.* ¶¶ 54-56, 68. In this case, DPAA has identified two candidates for comparison to X-3629 and may recommend disinterment if sufficient family reference samples are received. *See id.* ¶ 156.

Plaintiffs, therefore, cannot show that Defendants have made a final decision not to disinter these remains. But even if Defendants had made such a decision, it would be reasonable because reliable evidence of biological characteristics excludes COL Stewart from being a likely candidate for identification. *See id.* ¶ 164-69. Plaintiffs rely exclusively on a local Filipino's recollection that Philippine Scouts said they were burying an American colonel. *See* App'x Ex. S, Response to Interrog. No. 1. One local civilian's recollection years after the fact of the reported rank of the servicemember is not enough to overturn biological evidence for exclusion. Many servicemembers died in this area during the chaotic battle, and the civilian could have easily been mistaken. *See* App'x ¶ 155; App'x Ex. B ¶ 33.

Moreover, Plaintiffs claim fails because, again, they cannot show that Defendants' action was "unlawfully withheld or unreasonably delayed," 5 U.S.C. S 706(1), by establishing that Defendants failed to take discrete actions required by law. No regulation requires Defendants to disinter any particular remains.

4. Locating 1LT Nininger, COL Stewart, and Brig. Gen. Fort

Finally, to the extent Plaintiffs claim that Defendants have failed to actively seek to identify 1LT Nininger, COL Stewart, and Brig. Gen. Fort, the undisputed facts show that DPAA is actively seeking remains for whom these servicemembers would be good candidates. DPAA is reviewing all of the remains from the Abucay area, which is relevant to both 1LT Nininger and COL Stewart. *See* App'x ¶¶ 187-92. DPAA compared 1LT Nininger to X-3629 while reviewing

Plaintiff John Boyt's disinterment request. *See id.* ¶ 155. DPAA is preparing a disinterment recommendation for three remains from the Dansalan area for whom Brig. Gen. Fort is a candidate. *See id.* ¶ 195. And DPAA has begun analyzing the remains identified as 1LT Cheaney, which were recovered from the Abucay churchyard and thus could be the remains of 1LT Nininger or another of his fellow officers. *See id.* ¶¶ 193-94. This cannot be characterized as a failure to act. Moreover, because Plaintiffs cannot show that any regulation requires specific disinterments to proceed on a specific timetable, let alone the prioritization of research regarding these servicemembers rather than others, they cannot make the showing required for a 5 U.S.C. § 706(1) claim. *See Norton*, 542 U.S. at 65 (explaining that 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"*)*.

For all of these reasons, Plaintiffs' APA claim must be dismissed.

II. Plaintiffs Have Failed to State a Constitutional Due Process Claim (Count 1).

Contrary to Plaintiffs' contention, this case is not about refusing to return identified remains to family members for burial. Rather, the claimed constitutional interest is a right to disinter and examine dozens of unidentified remains in the hope that Plaintiffs' relatives can be identified among them. The Constitution provides no such right.

A. Plaintiff Have Not Established that Defendants Deprived Them of a Cognizable Property Interest.

"The first inquiry in every due process challenge—whether procedural or substantive—is whether the plaintiff has been deprived of a protected interest in property or liberty." *Edionwe v. Bailey*, 860 F.3d 287, 292 (5th Cir. 2017). "Without such an interest, no right to due process accrues." *DePree v. Saunders*, 588 F. 3d 282, 289 (5th Cir. 2009). Plaintiffs' can establish neither a cognizable property interest nor a government deprivation of that interest.

1. Plaintiffs Cannot Establish a Cognizable Property Interest Here.

"Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Still, "*federal constitutional law* determines 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). To assess whether a property interest has been infringed, courts must "first must ascertain the exact nature of that right" and determine its "contours and dimensions." *Hussey v. Milwaukee County*, 740 F.3d 1139, 1143 (7th Cir. 2014); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) (holding that "[s]ubstantive due process analysis must begin with a careful description of the asserted right" as a matter of "judicial self-restraint"). 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).

Plaintiffs seek to establish "a quasi-property right to bury the remains at issue," citing a variety of state and federal cases. Am. Compl. ¶ 68. This Court concluded that "at [the pleading] stage, Plaintiffs . . . sufficiently allege a quasi-property interest in the right to burial for their family members' remains," because the Fifth Circuit has found that a "quasi-property" interest "may be subject to constitutional due process protections." *Patterson*, 343 F. Supp. 3d at 646-47 (citing *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989)). For both legal and factual reasons, any interest Plaintiffs may have does not rise to the level of a constitutionally-cognizable property interest.

While Plaintiffs take refuge behind the vague term "quasi-property right," once one conducts "a careful description of the asserted right," *Reno*, 507 U.S. at 302, the novelty and

baselessness of Plaintiffs' asserted right becomes plain. Plaintiffs essentially assert that they have a property interest that the Government is violating by not *disinterring unknown remains* buried almost 70 years ago and either (1) simply turning them over to Plaintiffs or (2) confirming whether or not the remains are Plaintiffs' relatives. *See* Am. Compl. ¶ 69 ("Defendants are required under the U.S. Constitution . . . to return the remains at issue."). That is a very different from the interest that the Fifth Circuit held rose to the level of a constitutionally-cognizable property interest. In *Arnaud v. Odom*, the Circuit addressed an asserted interest in "possess[ing] the body in the same condition in which death left it." 870 F.2d 304, 308 (5th Cir. 1989). The Circuit held that, under Louisiana statutes and caselaw, parents had a cognizable property interest where unauthorized medical experiments had been performed on the infant's body before it was returned for burial. *See id.* at 305-07; *see also id.* at 309 ("essential aspects" of property interest protected by tort action for "unauthorized tampering of a corpse"). *Arnaud* thus did not establish that anything termed a "quasi-property interest" merited constitutional protection, nor did it assess the scope of the property interest. *Arnaud* certainly did not settle the existence of any alleged rights over unidentified or buried remains. Indeed, when Fifth Circuit has addressed disinterment of buried remains, it treated it as a matter of judicial discretion, not family right. *See Travelers Ins. Co. v. Welch*, 82 F.2d 799. 801 (5th Cir. 1936) (assuming that Louisiana law permitted a court to order disinterment as matter of judicial discretion, noting that under state law "a body once suitably buried ought to remain undisturbed except for necessary or laudable reasons" and "after burial, [a corpse] becomes part of the ground to which it is committed").

And that is the crux of the matter. Because "*federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause," *Town of Castle Rock*, 545 U.S. at 757, the Court must look behind the "quasi-

property interest" label and see whether the appropriate legal source actually creates a "legitimate claim of entitlement" for the right that Plaintiffs actually assert. Because Plaintiffs have not current entitlement to unidentified remains, they lack a cognizable property interest.

i. Federal Law Must Be the Source of the Property Interest, Due to the Location of the Remains.

Plaintiffs have also failed to establish what jurisdiction's law would apply to each Plaintiff's claim under choice of law doctrine. They appear to suggest that their own states of residence would provide the relevant legal standards.[17] But the remains are not located in any of these states, and it is not apparent why a service member's last U.S. residence more than 70 years ago or his relative's current residence should be dispositive. Most courts apply a "most significant relationship" test to determine which jurisdiction's law to apply. *See, e.g.*, *Kearny v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex. 1984). In the cases of buried remains, the jurisdictions with the most significant relationship are those where the alleged "property" is currently located. *See In re Estate of Medlen*, 677 N.E.2d 33, 36 (Ill. App. Ct. 1997); *Unger v. Berger*, 76 A.3d 510, 516 (Md. Ct. Special App. 2013). Because the unidentified remains were buried pursuant to federal laws in an overseas federal cemetery, federal law applies as the law of the place, rather than any state code. While there appears to be no body of federal common law on the question of rights in buried remains, the relevant federal statutes emphasize government discretion and 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

[17] Plaintiffs cite caselaw from their own resident jurisdictions—California, New Mexico, Rhode Island, Texas, and Wisconsin—along with caselaw from Florida, Illinois, Iowa, and Maine for which Plaintiffs' basis for citation is not obvious. *See* Am. Compl. ¶ 68.

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

Moreover, even if the location of the remains could be ignored and it could be assumed that Plaintiffs' home states provided the relevant legal standards, Plaintiffs have failed to establish that each state acknowledge a *property interest* in possessing a relative's remains for burial, let alone one *cognizable* under the Due Process Clause. State caselaw, which take a variety of conflicting approaches, generally observes both that "a dead body is not considered as property, in the ordinary, technical sense," and that certain rights "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." *Mensinger v. O'Hara*, 189 Ill. App. 48, 53-54 (Ill. App. Ct. 1914). Courts differ regarding whether the "right" arising from this duty is a property interest or instead another sort of legal interest,[18] and

[18] Recent decisions have generally concluded that the right is less than a full property interest. *See, e.g.*, *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383-84 (Tex. 2012) ("[T]he notion of a quasi-property right arose to facilitate recovery for negligent mishandling of a dead body," and in Texas this right does not include "[s]ome of the key rights that make up the bundle of property rights"). Many courts have gone so far as to characterize any property interest as a fiction. *See, e.g., Lanigan v. Snowden*, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997) ("Missouri courts have abandoned the early fiction . . . of a quasi property right of the nearest kin to the body."); *see also Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994); *Strachan v. John F. Kennedy Mem'l Hosp.*, 538 A.2d 346, 350 (N.J. 1988); *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35 (Ohio App. 1986); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335

whether any such property interest is cognizable under the Due Process Clause.[19]

Here, contrary to Plaintiffs' claim, the Wisconsin Supreme Court has held that the family's right to the remains of its decedents 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); *see also Olejnik*, 147 F. Supp. 3d at 778 (concluding that "[u]nder Wisconsin law, a family's interest in the remains of its deceased loved ones is simply too contingent to constitute a protected property interest."). And federal court decisions in California have found no cognizable property interest. *See Estate of Duran*, 2015 WL 8011685, at *14; *Shelley v. County of San Joaquin*, 996 F. Supp. 2d 921, 927 (E.D. Cal. 2014); *see also Perryman*, 63 Cal. Rptr. 3d 732 (Cal. App., July 31, 2007). Even those states that have relied on the phrase "quasi-property" often describe something less than a constitutionally cognizable property interest. *See, e.g.*, *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383–84 (Tex. 2012); *State v. Dearmas*, 841 A.2d 659 (R.I. 2004); *In re Matter of Johnson*, 94 N.M. 491, 494, 612 P.2d 1302, 1305 (N.M. 1980). Accordingly, Plaintiffs have failed to carry their burden

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S.E.2d 127, 128 (Ga. 1985); *Scarpaci v. Milwaukee County*, 292 N.W.2d 816, 820-21 (Wisc. 1980); *Johnson v. New York*, 334 N.E.2d 590 (N.Y. Ct. App. 1975).

[19] *Compare Estate of Duran v. Chavez*, No. 2:14-2048, 2015 WL 8011685, at *14 (E.D. Cal. Dec. 7, 2015) ("[T]here is no cognizable property interest in the remains of one's relatives as a procedural due process claim under the Fourteenth Amendment."); *Olejnik v. England*, 147 F. Supp. 3d 763, 778 (W.D. Wisc. 2015) ("Under Wisconsin law, a family's interest in the remains of its deceased loved ones is simply too contingent to constitute a protected property interest."); *Perryman v. Cnty. of Los Angeles*, 63 Cal. Rptr. 3d 732 (Cal. Ct. App., July 31, 2007), *review dismissed*, 208 P.3d 622 (Cal. 2009) ("[W]e find that next of kin have no recognized property right to the corpses of deceased relatives" and thus "there is no basis for a section 1983 action alleging a deprivation of a constitutional right."); *Albrecht v. Treon*, 889 N.E.2d 120, 128 (Ohio S. Ct. 2008) ("[N]othing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio."); *Georgia Lions Eye Bank*, 335 S.E.2d at 128 ("[I]n Georgia, there is no constitutionally protected right in a decedent's body."); *with Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) (applying Louisiana law to conclude that the state's "'quasi-property' right of survivors in the remains of their deceased relatives" was a cognizable "property interest[]").

to establish that each applicable jurisdiction has created a bundle of interests regarding the burial of relatives that rises to the level of a cognizable property interest.

ii. No Case Found Property Interest In Unidentified Remains.

Even if Plaintiffs could establish that the relevant jurisdiction created a cognizable property interest in possessing the *identified* remains of a relative, they have no support for extending that notion to include unidentified remains that may or may not be one's relative. Indeed, it is difficult to conceive how Plaintiffs could have a "legitimate claim" to the dozens of unidentified remains they want to test in the hope of finding their relatives. All of the cases Plaintiffs cite concern situations involving no dispute over the identity of the remains. Nothing in these cases suggests such a right to possess unidentified remains or to require that destructive testing be performed on such remains. Nor would such a right make sense. If Plaintiffs could assert such a claim, then dozens or hundreds of other people would have an equal claim to the same remains—the next of kin for anyone whose remains could be in the graves for which Plaintiffs seek disinterment. To the contrary, 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.").

At most, Plaintiffs have a future interest that could vest once remains are identified by the relevant authorities as those of Plaintiffs' relatives. But such an interest is not a cognizable property interest. "The 14th Amendment protects only property interests a person has *already acquired* as opposed to those in which it had an *expectancy*." *Soncy Road Property, Ltd. v. Chapman*, 259 F. Supp. 2d 522, 529 (N.D. Tex. 2003) (emphasis added); *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). Courts have drawn a distinction 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." *Frey Corp. v. City of Peoria*, 735 F.3d 505, 509 (7th Cir. 2013). Plaintiffs' interest in any specific set of remains is uncertain and transitory, not secure and durable. This is even more clear for the families who have demanded disinterment of all remains associated with three Cabanatuan common graves, knowing the vast majority of those commingled remains cannot be those of their relatives.

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

Not least, for the remains that are still buried, Plaintiffs fail to show that whatever property interest they possess extends to disinterment and reburial of remains that have been interred with honor and respect at a military cemetery for more than 60 years. Most courts state that, upon burial, "the right of custody ceases and the body is thereafter in the custody of the law, and disturbance or removal of it is subject to the control and direction of a court of equity in any case properly before it." *Fowlkes v. Fowlkes*, 133 S.W.2d 241, 242 (Tex. Civ. App. 1939); *see also In re Estate of Kingsbury*, 2008 ME 79, ¶ 6, 946 A.2d 389, 393 (Maine S. Ct. 2008) ("[O]nce buried, a body comes within the custody of the law[.]"); 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."); 22A Am. Jur. 2d Dead Bodies §

50 ("Disinterment is not a right."). Accordingly, courts have generally concluded that the family's interests are significantly diminished or extinguished after burial, except to challenge disinterment by someone else. *See, e.g., Unger v. Berger*, 76 A.3d 510 (Md. Ct. Spec.App. 2013); *In re Estate of Thomas*, 66 A.3d 205, 214 (N.J. Super. Ct. 2013); *Atkins v. Davis*, 352 S.W.2d 801 (Tex. Civ. App. 1961). Moreover, "there is a well-established presumption against removing the remains of a deceased person" which is "found throughout disinterment jurisprudence." *Maffei v. Woodlawn Mem'l Park*, 29 Cal. Rptr. 3d 679 (Cal. Ct. App. June 10, 2005).[20]

Plaintiffs cannot have a "legitimate claim of entitlement" to disinterment of the remains for destructive testing where courts have discretionary authority to grant or deny such requests and apply a presumption against removal. *Cf. 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."). Any interest of the next of kin is too contingent and uncertain. *Cf. 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."). For example, if this Court has discretion to grant or deny a party's request, no party could claim that discretionary relief as a property right.

[20] *See also* 25A C.J.S., Dead Bodies § 20 ("Public policy frowns on the disinterment of a body and its removal to another burial place[.]"); 22A Am Jur 2d, Dead Bodies § 50 ("[C]ourts are generally reluctant to order or sanction the removal of a body after interment, and it is the policy of the law that, except in cases of necessity or for laudable purposes, the sanctity of the grave should be maintained, and a body once suitably buried should remain undisturbed").

iv. Plaintiffs Cannot Establish That Their Relatives Are In These Graves.

Finally, legal arguments aside, Plaintiffs have failed to establish that their relatives are in the graves Plaintiffs have selected. For the reasons discussed above, 1LT Nininger, COL Stewart, and Brig. Gen. Fort do not match the biological profiles of the remains Plaintiffs have singled out, nor do the historical facts support a focus on these particular graves. *See supra* Arg. ¶¶ I.B.1, I.B.2, I.C.3. For the Cabanatuan common graves, the commingling of remains both originally and in the initial identification process means that there can be no certainty whether Plaintiffs' relatives are among the dozens of graves they have singled out. Plaintiffs' evidence does not support their assertion that their relatives have been "identified" or that the "location of their remains is known." *See* App'x Exs. S-V, Pls.' Interrog. Responses.

But even if the facts were not so clearly against the Plaintiffs here, it should be noted that any family member's assertion that an individual buried as an unknown decades ago is their relative is necessarily speculative. For this reason, the Court should hesitate to extend state-law derived property interests into an area heretofore unheard of, and then find that constitutional protections attach to those novel interests. The practical difficulties could be immense. DPAA received 134 family member disinterment requests last year. App'x ¶ 41. Unlike ordinary property, dozens or hundreds of families could have similar speculative claims to each set of remains. And the speculations could only be settled by attempting to disinter and identify the remains. Thus, recognition of such a right could impose on the government extensive affirmative obligations. As discussed in the next section, there is no need to infer such a novel constitutional right where Congress has established a statutory process. *See infra* Arg. § II.B.

2. Plaintiffs Cannot Establish that Defendants Deprived Plaintiffs of Any Cognizable Interest.

"The threshold requirement of any due process claim is the *government's deprivation* of a

plaintiff's liberty or property interest." *O'Neal v. Alamo Community College Dist.*, No. 08-1031, 2010 WL 376602, at *5 (W.D. Tex. Jan. 27, 2010) (citing *Depree*, 588 F.3d at 289) (emphasis added); *see also Smith v. Acevedo*, No. 09-620, 2010 WL 11512363, at *9 (W.D. Tex. Sept. 20, 2010) ("A due process claim, whether procedural or substantive, first requires government deprivation of a protected . . . interest."). As an initial matter, Plaintiffs were deprived of any cognizable "property interest" in possession of the service members' remains for burial by the Imperial Japanese in 1942 and 1943, not by Defendants. The service members' deaths and the ambiguities surrounding their initial burials were the result of the occupation of the Philippines. For this threshold reason Plaintiffs' due process claims must be rejected.

"The United States Supreme Court has expressed an unwillingness to find state action where the injuries were at the hand of a third party." *Gaston v. Houston County*, 196 F. Supp. 2d 445, 446-47 (E.D. Tex. 2002) (citing *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989)). After all, "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*, 489 U.S. at 197; *see also id.* at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

Furthermore, the U.S. Government's current efforts to recover and identify the remains of service members who died in World War II are not driven by any "duty required of them by the Constitution." *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984). Accordingly, any perceived inadequacies in Defendants' recovery or identification efforts are no more actionable as a constitutional deprivation than a "failed rescue attempt." *See Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992) (holding that "failed rescue effort" where state "had [no] duty to act"

was not deprivation of due process); *see also Hale v. Bexar County*, 342 F. App'x 921, 927 (5th Cir. 2009) (reiterating that government "can only be held liable if . . . its officials had a duty to act"); *Jackson*, 738 F.2d at 1446 (concluding that striking fire fighters "standing under no constitutional duty to act, did not effect a [due process] deprivation" by failing to respond swiftly enough to a fire). Courts have emphasized "the distinction between governmental interference and governmental assistance as a basis for Due Process relief" because "the Due Process Clause does not demand 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).

In sum, Plaintiffs here seek to wield the Due Process Clause to do what the Supreme Court has forbidden—"impose an affirmative obligation on the [government]," *DeShaney*, 489 U.S. at 196—the Constitution does not require Defendants to remedy the private interests impaired by wartime opponents of the United States.

B. Plaintiffs Cannot Show That They Are Entitled to Any Additional Procedural Safeguards.

Even if Plaintiffs could overcome their fundamental lack of a cognizable property interest in unidentified remains and their lack of any governmental deprivation, their procedural due process claim must fail because they cannot show that they were entitled to any additional process. "The fundamental requirement of due process is 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)). DoD established a process for families to request disinterment of specific remains, along with reasonable thresholds for approval of the disinterment. *See* DTM-16-003; App'x ¶¶ 47-51. Plaintiffs thus have a forum and an opportunity to be heard. They can submit any supporting

documentation they wish, and they are provided with a detailed explanation of the basis for DoD's ultimate decision. *See, e.g.*, App'x Exs. B.39-41, K, L, M. This process provides a timely and meaningful opportunity for Plaintiffs to seek relief. *Cf. FTC v. Assail, Inc.*, 410 F.3d 256, 267-68 (5th Cir. 2005); *United States v. Melrose East Subdivision*, 357 F.3d 493, 500 (5th Cir. 2004). In addition, Plaintiffs have direct access to the relevant DoD components through the Family Update meetings DPAA hosts around the country. At these meetings, families can sit down with agency representatives, often the very researchers who have been reviewing their relative's case, and learn about the current state of DPAA's efforts, have their questions answered, and provide any information they think would be helpful. *See* App'x ¶¶ 43-45.

Moreover, in the context of military procedures, the Supreme Court has said that "in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8.'" *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)). When dealing with such procedures, "[j]udicial deference . . . is at its apogee," and the Court must ask "whether the factors militating in favor of the entitlement are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44. In the MSPA, Congress struck a balance involving information for families, an administrative board process, and limited judicial review, while giving DoD and DPAA substantial discretion in conducting the accounting effort. *See* App'x ¶¶ 22-29; *Patterson*, 2017 WL 5586962, at *3-4. It did not provide any right to demand disinterment, nor did it provide unlimited funding by which DPAA could immediately and exhaustively respond to every family's wishes. The Court should not disrupt this balance.

At bottom, what Plaintiffs seek is a judicially directed reallocation of limited resources,

not additional procedures. Plaintiffs want consideration of their cases prioritized over those of other families in disregard of Defendants' own implementation of DPAA's identification processes. But the order of government priorities "is determined by political and economic forces, not by juries implementing the due process clause." *Walker v. Rowe*, 791 F.2d 507, 512 (7th Cir. 1986). Where limited resources mean that administrators must exercise discretion in determining who receives a benefit, there is no entitlement in such a benefit, even where the plaintiff meets non-discretionary eligibility standards. *See, e.g.*, *Ridgley v. FEMA*, 512 F.3d 727, 736-40 (4th Cir. 2008); *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36-37 (D.C. Cir. 1997).

C. Plaintiffs Cannot Identify Any Egregious Conduct By Defendants to Establish a Violation of Substantive Due Process.

To establish a substantive due process violation, a plaintiff must not only prove that "he was deprived of a life, liberty, or property interest" but also show that the deprivation was "in an arbitrary and capricious manner." *Saucedo–Falls v. Kunkle*, 299 F. App'x 315, 319 (5th Cir. 2008); *see also Lewis v. Univ. of Texas Med. Branch*, 665 F.3d 625, 630-31 (5th Cir. 2011). "[O]nly the most 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). The Supreme Court recently reiterated that the "'shocks the conscience' standard is satisfied where the conduct was intended to injure in some way unjustifiable by any government interest or in some circumstances if it resulted from deliberate indifference." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018).

Plaintiffs cannot show that Defendants' actions were egregious in this way. While the Court permitted this claim to proceed on the basis of Plaintiffs' allegation that the government

was deliberately withholding identified remains from Plaintiffs, *see Patterson*, 343 F. Supp. 3d at 647, Plaintiffs cannot support that allegation with evidence. To the contrary, Defendants have shown that the remains at issue have not been identified and that Plaintiffs' circumstantial evidence is far from sufficient to make identification likely. *See supra* Arg. § I.B, I.C. More significantly, Plaintiffs cannot show deliberate indifference or intentional injury. Instead, Defendants have to allocate limited resources across thousands of recovery and identification efforts. *See* App'x ¶¶ 36-41. They have adopted reasonable disinterment thresholds that balance competing government priorities, and their laboratories are methodically processing the disinterred remains for identification. *See* App'x ¶¶ 46-82. Plaintiffs cannot prove a substantive due process violation. *See Simi Inv. Co. v. Harris County, Texas*, 236 F.3d 240, 250-51 (5th Cir. 2000) (so long as "the question is at least debatable, there is no substantive due process violation").

III. Plaintiffs Have Failed to State a Fourth Amendment Seizure Claim (Count 8).

Plaintiffs claim a Fourth Amendment violation—that Defendants "have unreasonably held the remains at issue from Plaintiffs" and thus have "unreasonably seized" Plaintiffs' "property." Am. Compl. ¶ 125. They rely on this theory for their three declaratory judgment claims, *see id.* ¶¶ 108, 111, 118, 125, 129-130, and their APA claim, *id.* ¶ 100. This claim fails for the same reasons as their due process claims.

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amd. IV. "[A] seizure deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133 (1990); *see also Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) ("A seizure of property . . . occurs when there is some meaningful interference with an individual's possessory interests in that property."). For all of the reasons discussed above, Plaintiffs lack a current possessory interest in any of the unidentified remains

they claim Defendants have "seized." *See supra* Arg. § II.A.1.

But even if Plaintiffs had a cognizable property interest, Defendants' actions must be upheld as reasonable. *See Freeman v. City of Dallas*, 242 F.3d 642, 652 (5th Cir. 2001) (en banc) ("[T]he fundamental Fourth Amendment question of reasonableness" is "decided by balancing the public and private interests at stake."). This reasonableness standard "generally requires no more of government officials than that of due process of law." *Kinnison v. City of San Antonio*, 480 F. App'x 271, 280-81 (5th Cir. 2012). Accordingly, no separate treatment of this issue is necessary. As discussed above, the process Defendants have provided is reasonable. *See supra* Arg. § II.B. It appropriately balances families' interests and the public interest in maximizing the accounting program.

IV. Plaintiffs Have Failed to State a Free Exercise Claim Under the First Amendment or RFRA (Count 9).

Plaintiffs claim that "Defendants are withholding the remains at issue from Plaintiffs" which "deprives Plaintiffs, and their deceased family members, from having a proper burial in accordance with each respective family's religious beliefs." Am. Compl. ¶ 132. This claim fails both under the Free Exercise Clause of the First Amendment and RFRA.[21]

A. Legal Standards

"Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amd. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Cornerstone Christian Schools v. Univ. Interscholastic League*, 563 F.3d 127, 135 (5th Cir. 2009). "The government does not impermissibly regulate

[21] Plaintiffs lack standing to press claims on behalf of long-deceased relatives. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 292 n.25 (5th Cir. 2001) ("To have Article III standing to pursue an alleged violation of the Free Exercise Clause, a plaintiff must allege that his or her own particular religious freedoms are infringed.").

religious belief . . . when it promulgates a neutral, generally applicable law or rule that happens to result in an incidental burden on the free exercise of a particular religious practice or belief." *Cornerstone*, 563 F.3d at 135. And the Free Exercise Clause does not "require the Government itself to behave in ways that the individual believes will further his or her spiritual development." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Instead "a neutral, generally applicable governmental regulation will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest." *Littlefield*, 268 F.3d at 292.

Congress, through RFRA, created "a statutory prohibition against government action substantially burdening the exercise of religion." *McAllen Grace Bretheren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014) (quoting S. Rep. No. 103–111, 2 (1993)). RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except that a government may burden religious exercise "if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(a)-(b).

B. Plaintiffs Have Identified No Way that Defendants' Neutral Regulations Burden, Let Alone Substantially Burden, Their Exercise of Religion.

Plaintiffs do not allege that Defendants' regulations target religion or Plaintiffs' religious practices. These regulations are instead neutral rules of general applicability, which pass muster under the Free Exercise Clause so long as they serve a legitimate state interest. *See Castle Hills First Baptist Church v. City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *17 (W.D. Tex. Mar. 17, 2004) (applying "rational basis review" to free exercise claim that did not involve a substantial burden); *Kikapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 653-54 (W.D. Tex. 1999) (holding that justice of the peace's order for disinterment and autopsy of body

pursuant to state statute was a government action neutral as to religion);. Accordingly, for either RFRA or the First Amendment's heightened standard to apply, Plaintiffs must show that Defendants' actions burden their exercise of religion. They cannot do so.

At the outset, Plaintiffs have failed to plead any specific burden on the exercise of their religious beliefs. Their conclusory allegations fall far short. *See, e.g.*, Am. Compl. ¶ 134 (stating generically that Plaintiffs have been "prohibit[ed] . . . from freely practicing their religious beliefs" and that a "proper burial is essential for many practicing Christians"). Plaintiffs have identified no specific religious practice they believe should be or should have been performed but was not. *See* Am. Compl. ¶ 133 (stating, without elaboration, that "each Plaintiff has certain religious beliefs regarding what constitutes proper burial"). Such generic statements do not "plead enough facts to state a claim to relief that is plausible on its face," *Roberts*, 2014 WL 4187180, at *4, let alone satisfy the summary judgment standard. Nor is any conflict with Plaintiffs' unspecified beliefs readily apparent—for example, the remains were buried, not cremated.

Regardless of the nature of Plaintiffs' beliefs, they seem to be claiming that Defendants owe them affirmative actions—such as disinterring unknown buried remains and making efforts to identify them—in order to comply with the Free Exercise Clause. But "[s]uch a demand for control over the government's internal affairs is not cognizable under the Free Exercise Clause." *Schipke v. Chapman*, No. 4:08-228, 2008 WL 2123749, at *3 (N.D. Tex. 2008) (addressing an "attempt[] to cause the government to cease collecting and cataloging DNA because such processes allegedly do not comport with her religious beliefs"). "[T]he Free Exercise Clause is 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*, 485 U.S. at 439; *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*").

Moreover, Plaintiffs cannot establish a "substantial burden" for purposes of RFRA based on "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng*, 485 U.S. at 450-51; *see also Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion). The Fifth Circuit has defined "substantial burden" to require "truly pressur[ing] the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (construing analogous Religious Land Use and Institutionalized Persons Act). Here, Plaintiffs cannot show that the government has "coerced," "pressured," "forced . . . to choose," or otherwise interfered with Plaintiffs' religious practices. *See id.*; *see also Williams v. Bragg*, No. 11-0475, 2012 WL 12878297, at *5 (W.D. Tex. Aug. 1, 2012). Instead, Plaintiffs merely argue that their religious practice is inhibited because the government has not worked hard enough to identify their relatives' remains. They are seeking a "benefit that is not otherwise generally available." *Adkins*, 393 F.3d at 570. The Free Exercise Clause and RFRA impose no such requirement. *See Lyng*, 485 U.S. at 456; *Siff v. State Democratic Executive Comm.*, 500 F.2d 1307, 1310 (5th Cir. 1974). "[T]he frustration of not getting what one wants" is not a substantial or undue burden. *See Castle Hills First Baptist Church*, 2004 WL 546792, at *11.

C. Defendants' Procedures Serve Legitimate and Compelling Government Interests and Employ the Least Restrictive Means.

Because Plaintiffs have not carried their burdens of pleading and persuasion to establish a "substantial burden," RFRA has not been triggered, and the government need only establish that any incidental burden on Plaintiffs' exercise of religion serves a legitimate government interest.

See Inst. for Creation Research Graduate Sch. v. Texas Higher Educ. Coordinating Bd., No. 09-382, 2010 WL 2522529, at *17 (W.D. Tex. June 18, 2010). If triggered, RFRA requires the government to employ "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. § 2000bb–1(b), while the Free Exercise Clause requires only that the regulation be reasonably related to a "legitimate state interest." *See Littlefield*, 268 F.3d at 292. Even assuming arguendo that compelling interest standard applied, it is readily apparent that the government is justified in refusing to release unidentified remains to Plaintiffs or to disinter remains without sufficient confidence that the remains can be identified.

The most comparable situation to Plaintiffs' is that of the families of September 11th victims who brought a free exercise of religion against New York City claiming that they were deprived of the opportunity for a proper burial of their relatives because the city sent to a landfill the "finely-sifted residue of the World Trade Center debris" from which no additional human remains could be identified. *World Trade Ctr. Families for Proper Burial, Inc. v. City of New York*, 359 F. App'x 177, 179 (2d Cir. 2009). The Second Circuit rejected the families' claims, agreeing with the district court that "the governmental interest in clearing the debris of the World Trade Center efficiently and economically was compelling." *Id.* at 181. The City was responding to an "unprecedented" situation and needed to "move quickly, carefully and efficiently to satisfy" competing goals—searching for survivors and remains, preserving evidence for criminal cases, and clearing debris so downtown Manhattan could begin to function. *Id.* at 180-81. The shocking nature of the scene was due to "the magnitude of the events that occurred on September 11, not because of the City's response." *Id.* at 181.

Similarly here, Plaintiffs' inability to possess their relatives' remains for burial stems from the occupation of the Philippines by the Imperial Japanese and the privations imposed on

prisoners of war there, not from Defendants' subsequent efforts. DoD went to great lengths to recover and identify service member remains after the war, and finally buried those remains that could not be identified with great respect in a beautiful monument. *See* App'x ¶¶ 1-13. And now, Defendants have compelling interests both in safeguarding the remains of deceased service members, known or unknown, and ensuring the dignity of service members buried at the Manila American Cemetery, *see id.* ¶¶ 7-13, and in maintaining control over the agencies' limited resources to perform accounting mission that Congress has given them as efficiently as possible. *See id.* ¶¶ 33-45. *Cf. McAllen Grace Brethren Church*, 764 F.3d at 473 (concluding that "protecting bald eagles" and "protecting the interests of federally recognized tribes" are compelling interests); *Kickapoo Traditional Tribe*, 46 F. Supp. 2d at 653 n.9 ("Texas's laws relating to disinterment and autopsy serve the state's compelling interest in ensuring that the particular death is not the result of foul play.").[22]

These interests are all the more compelling because Plaintiffs are seeking to upend the management of a military program. "[W]hen applying a compelling interest standard, '[c]ontext matters.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 269 (5th Cir. 2010) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)). "[I]n a military community, 'there is simply not the same [individual] autonomy as there is in the larger civilian community.'" *Betenbaugh*, 611 F.3d at 270 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). The military has significant authority over service members and their remains. *See,*

[22] *See also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 334 (5th Cir.2009) ("Texas obviously has compelling governmental interests in the security and reasonably economical operations of its prisons."); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1074 (5th Cir. 1981) (holding that "the substantial government interest in maintaining the integrity of its fiscal policies" was compelling and justified IRS subpoena regarding a church's finances); *United States v. Ramon*, 86 F. Supp. 2d 665, 677 (W.D. Tex. 2000) ("The goal of restraining the trafficking of illegal contraband on our nation's highways is certainly compelling.").

e.g., 36 U.S.C. § 2104(4). Thus, the government's interest in ensuring respectful treatment of such remains means civilian families have less authority to dictate handling of identified remains, let alone unidentified remains.

Defendants serve these compelling interests by limiting disruption of these permanent burials, by conducting disinterments only upon concluding that identifications can swiftly be made, and by exercising necessary discretion regarding how to prioritize its identification effort. *See* App'x ¶¶ 13-16, 47-48. These Defendants' disinterment thresholds and prioritization procedures are the least restrictive means of serving these compelling interest. *See A.H. ex rel. Northside Indep. Sch. Dist.*, 916 F. Supp. 2d 757, 771 (W.D. Tex. 2013); *Kickapoo Traditional Tribe*, 46 F. Supp. 2d at 653 n.9.

Thus, even under the most stringent standard, Defendants have not violated RFRA or the Free Exercise Clause 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.[23]

[23] Because Plaintiffs' Declaratory Judgment Act claims depend on the viability of their causes of action, see Patterson 343 F. Supp. 3d at 653-54, Defendants do not address these claims separately but seek their dismissal for lack of jurisdiction because each of Plaintiffs' causes of action must be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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