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 JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) 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"), move the Court to grant judgment to Defendants and dismiss Plaintiffs' First Amended Complaint.

After this Court dismissed Plaintiffs' Complaint for failure to state claims under the Mandamus Act, 28 U.S.C. § 1361, and Declaratory Judgment Act, 28 U.S.C. § 2201, *see* Order, Nov. 20, 2017 (ECF No. 14), Plaintiffs filed an amended complaint asserting revised claims under these statutes along with claims under the First Amendment Free Exercise Clause, Fourth Amendment Seizure Clause, Fifth Amendment Due Process Clause, an implied right of action pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *See* 1st Am. Compl. (ECF No. 19). For the reasons set out in the attached Memorandum, each of these claims fails as a matter of law. Defendants respectfully

request that the Court grant this motion, and dismiss Plaintiffs' First Amended Complaint with prejudice. A proposed Order is attached for the Court's review and entry.

Dated: April 20, 2018

Respectfully submitted,

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

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D. DoD Directive 1300.22, Mortuary Affairs Policy (Oct. 30, 2015)

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L. DPAA Administrative Instruction (AI) 2310.01, DPAA Disinterment Process (Feb. 10, 2017)

M. DPAA, Historical Report, U.S. Casualties and Burials at Cabanatuan POW Camp #1 (May 2017) (link)

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N. Report to Congress on Issues Related to Disinterment of Remains Buried in Overseas Military Cemeteries (Sept. 29, 2005)

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P. Commandant, U.S. Army Quartermaster School, Memorandum, Rescinding of Army Tactics, Techniques, and Procedures (ATTP) 4-46.1, Processes to Support the Identification of Deceased Personnel (Jan. 22, 2014)

Q. U.S. Army Pamphlet 638-2, Procedures for the Army Mortuary Affairs Program (June 23, 2015)

R. U.S. Army Regulation 638-2, Army Mortuary Affairs Program (Nov. 28, 2016)

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S. Defense Science Board, Use of DNA in Identification of Ancient Remains (1995) (link)

T. Chairman of the Joint Chiefs of Staff, Joint Publication 4-06, Mortuary Affairs (Oct. 12, 2011)

INTRODUCTION

The Amended Complaint is Plaintiffs' second attempt to force the government to disinter dozens of unknown remains buried honorably at the Manila American Cemetery in the hope that their seven deceased relatives can be identified. This Court previously concluded that the Missing Service Personnel Act of 1995 (MSPA), as amended, gave significant discretion in how to perform the mission to account for service members lost during prior conflicts, including World War II. *See Patterson v. DPAA*, No. 17-467, 2017 WL 5586962 (W.D. Tex. Nov. 17, 2017); ECF No. 14. Accordingly, the Court dismissed Plaintiffs' mandamus claims for failure to identify any mandatory duties that could be judicially enforced. Plaintiffs now abandon the statute that creates this accounting mission, and instead argue that the agency's implementing regulations give rise to a mandatory duty. They also attempt to assert a variety of new constitutional and statutory claims. Plaintiffs have again failed to state a claim and their Amended Complaint should be dismissed with prejudice.

The U.S. Department of Defense (Department or DoD), Defense POW/MIA Accounting Agency (DPAA), American Battle Monuments Commission (ABMC), and the heads of those agencies sued in their official capacities (collectively "Defendants"), have the responsibility to ensure that the remains of deceased service members, known or unknown, are appropriately honored and treated with respect. The accounting mission is not an inherent duty of the government, but is a responsibility that Congress gave to DoD and DPAA. The performance of that mission is not subject to Plaintiffs' control. None of the regulations to which Plaintiffs point creates a nondiscretionary duty enforceable by Plaintiffs. Moreover, Plaintiffs' claims are not cognizable under Administrative Procedure Act (APA) both because Congress has precluded such review and because Plaintiffs have failed to challenge specific final agency actions.

Plaintiffs have also failed to make out a plausible constitutional claim. 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, buried remains. And Plaintiffs cannot rely on their own speculation and conclusory allegations about having "identified" their relatives' remains to create such a property interest. Similarly, Plaintiffs have failed to plead facts sufficient 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).

Plaintiffs' claims fail for numerous additional reason discussed below. They are entitled to none of the relief they seek, both because they again seek relief beyond the Court's jurisdiction and because none of their claims are meritorious. In sum, Defendants are entitled to judgment and Plaintiffs' Amended Complaint should be dismissed with prejudice on all grounds.

BACKGROUND

I. The American Battle Monuments Commission

The ABMC was created in 1923 to construct monuments honoring American forces overseas. It later took over management and maintenance of the permanent military cemeteries in Europe from World War I. During World War II, the Army Graves Registration Service (AGRS) was responsible for tracking graves from that war, and in 1946, it became responsible for recovering, identifying and repatriating World War II dead. Pub. L. No. 79-383, 60 Stat. 182 (May 16, 1946). The mission of the AGRS terminated on December 31, 1951, upon expiration of a statutory time limit. Pub. L. No. 80-368, 61 Stat. 779 (Aug. 5, 1947). At that time, the functions of the AGRS with respect to maintenance of national cemeteries overseas were transferred to the ABMC. Exec. Order No. 10057, 14 Fed. Reg. 2585 (May 14, 1949), *as amended* Exec. Order 10087, 14 Fed. Reg. 7287 (Dec. 3, 1949).

The operative statute governing the ABMC was recodified in 1998 as 36 U.S.C. § 2101,

et seq.. *See* Pub. L. No. 105-225, § 1, 112 Stat. 1253 (Aug. 12, 1998). The provision for "[m]ilitary cemeteries in foreign countries" provides in relevant part:

> The Commission is solely responsible for the design and construction of the permanent cemeteries, and of all buildings, plantings, headstones, and other permanent improvements incidental to the cemeteries, except that— . . . (4) the Armed Forces have the right to re-enter a cemetery transferred to the Commission to exhume or re-inter a body if they decide it is necessary.

36 U.S.C. § 2104. More than 3,700 servicemembers are buried as unknowns within the Manila American Cemetery that ABMC maintains pursuant to this authority. *See* ABMC, Manila American Cemetery Visitor Brochure (Aug. 7, 2014) (link). Burials in overseas military cemeteries are permanent, and disinterments are conducted only with military approval. *See* Pub. L. No. 80-368 § 8 (provision for family decisions about burial expired at the end of 1951); Report to Congress on Issues Related to Disinterment of Remains (Sept. 29, 2005) (Defs.' Ex. N). After DoD has authorized disinterment (as discussed *infra*, Background § III) of remains buried at an ABMC cemetery, the ABMC has approval authority regarding the time and manner of the disinterment. *See* DoD Directive Type Memorandum (DTM)-16-003, Policy Guidance for the Disinterment of Unidentified Human Remains at 8 (June 15, 2017) (Defs.' Ex. G).[1] This authority is focused on maintaining the integrity of the cemetery as a memorial, not the reasons for the disinterment. *See, e.g.*, 36 U.S.C. § 2104(4) (stating DoD's "right to re-enter").

II. The Missing Service Personnel Act

The Missing Service Personnel Act of 1995 (MSPA) was designed to "reform [DoD's] procedures for determining whether members of the Armed Forces should be listed as missing or presumed dead." 140 Cong. Rec. S12217, S12220, 1994 WL 449837 (Aug. 19, 1994); *see* Pub.

[1] For the Court's convenience, Defendants' regulations and other public records which are cited herein are attached as Exhibits. *See supra*, Index of Exhibits. Many of these documents reside on agency websites. *See, e.g.*, DoD Issuances (link).

L. No. 104-106, Div. A § 569, 110 Stat. 186 (Feb. 10, 1996) (codified at 10 U.S.C. §§ 1501 *et seq.*). The law was intended "to ensure that any member of the Armed Forces . . . who becomes missing or unaccounted for is ultimately accounted for by the United States, and, as a general rule, is not declared dead solely because of the passage of time." Pub. L. No. 104-106, Div. A. § 569(a). During and after World War II, there had been no procedure for challenging the Service Secretary's "finding of death," which was relevant to certain benefits to families of missing servicemembers. *See* 56 Stat. 143 (1942); *McDonald v. Lucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (quoting 37 U.S.C. § 556(b) (1961)). The MSPA is primarily focused on the procedures for determining the status of individuals who went missing after 1995. It provided for the initial assessment and recommendation by a commander upon receipt of information that a person may be missing, 10 U.S.C. § 1502; and for a series of boards of inquiry to determine and review the status of missing persons, *id.* §§ 1503-1505. As originally passed, only § 1509 addressed procedures for persons unaccounted for from prior conflicts, and it only concerned the Korean War and subsequent conflicts. *See* Pub. L. No. 104-106 § 569(b).

In 2009, Congress rewrote § 1509 to establish a program addressing those "unaccounted for" from specified conflicts back to World War II. Pub. L. No. 111-84, § 541, 123 Stat. 2190 (Oct. 28, 2009). The section requires the Secretary to "implement a comprehensive, coordinated, integrated, and fully resourced program to account for [missing persons as defined by § 1513(1)] who are unaccounted for from" five specified conflicts, including World War II. *See* 10 U.S.C. § 1509(a). Congress specified how "new information" should be handled. "New information" is defined as "credible" information that "may be related to one or more unaccounted for persons" and after November 18, 1997, is either "found or received . . . , by a United States intelligence agency, by a Department of Defense agency, or by a [primary next of kin, immediate family

member, or previously designated person]" or "identified . . . in records of the United States as information that could be relevant to the case of one or more unaccounted for persons." *Id.* § 1509(e)(1), (3). Upon a determination that the information meets the statutory criteria, the section specifies three steps:

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

In 2014, Congress further emphasized accounting for those missing from prior conflicts by revising § 1501(a) to require DoD to "designate a single organization . . . to have responsibility for Department matters relating to missing persons from past conflicts, including accounting for missing persons and persons whose remains have not been recovered from the conflict in which they were lost." Pub. L. No. 113-291, § 916(a), 128 Stat. 3292 (Dec. 19, 2014), *as amended by* Pub. L. No. 114-328, § 953, 130 Stat. 2000 (Dec. 23, 2016) (technical amendments). Congress also provided that a medical examiner detailed from the Armed Forces Medical Examiner System would be the "scientific identification authority," and "establish identification and laboratory policy." *Id.* § 916(b)(1) (codified at 10 U.S.C. § 1509(b)(2)(C)).

Despite the 2009 and 2014 changes, Congress has retained the MSPA's very limited judicial review provision. Judicial review under the Act is only available to challenge a board finding "that a missing person is dead." 10 U.S.C. § 1508(b). Review is limited in three ways. First, suit can only be brought by the primary next of kin or previously designated person. *See id.* § 1508(a); 10 U.S.C. § 655 (providing for designated persons). Second, judicial review is available only for a finding by a board appointed under § 1504 or § 1505 that a missing person is

dead, or a finding by a board appointed under § 1509 that confirms a previous finding of death. *Id.* § 1508(b). Third, the only permitted basis for challenging the board finding is that "information that could affect the status of the missing person's case [] was not adequately considered during the administrative review process under this chapter." *Id.* § 1508(a).

III. DoD Implementation of Act

DoD has implemented § 1509 by establishing the DoD Past Conflict Personnel Accounting Program. *See* DoD Directive 2310.07 (Apr. 12, 2017) (Defs.' Ex. F). Under this directive, "[a]ccounting for DoD personnel and other covered personnel from past conflicts and other designated conflicts is of the highest national priority." *Id.* § 1.2(a). The directive assigns responsibilities to relevant DoD components, *id.* § 2, and establishes categories of unaccounted-for personnel, with priority for "those for which there exists sufficient information to justify research, investigation, disinterment, or recovery operations in the field." *Id.* § 3.3(a).

By creating the DPAA in January 2015, DoD has also implemented § 1501(a)'s requirement that a single organization be responsible for "matters relating to persons missing from past conflicts." *See* DoD Directive 5110.10, Defense POW/MIA Accounting Agency (Jan. 13, 2017) (Defs.' Ex. E); Execute Order: Defense Personnel Accounting Agency Continuity of Operations (Jan. 16, 2015) (Defs.' Ex. B). The DPAA has two missions—to "[l]ead the national effort to account for unaccounted for DoD personnel from past conflicts" and to provide family members "the available information concerning the loss incident, past and present search and recovery efforts of the remains, and current accounting status for unaccounted for DoD personnel." DoD Directive 5110.10 § 1.2. The DPAA actively reviews cases from numerous conflicts and must prioritize its efforts among more than 83,000 unaccounted-for servicemembers from past conflicts. *See* DPAA, Our Missing: Past Conflicts (link); *see also* DPAA, Our Missing: Recently Accounted For (link) (identifying 201 servicemembers last fiscal

year). The Department has committed to providing resources sufficient to meet the Congressional goal of identifying at least 200 servicemembers per year. *See* DoD Directive 2310.07 § 1.2(f); Pub. L. No. 111-84, Div. A, Title V § 541(d).

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

The Deputy Secretary of Defense established specific thresholds that must be met for a disinterment request to be approved. *See* Memorandum, Disinterment of Unknowns from the Nat'l Memorial Cemetery of the Pacific (Apr. 14, 2015) (Defs.' Ex. C); *see also* DTM-16-003 at 2 (implementing Deputy Secretary of Defense's memorandum). For individually buried

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

After disinterment, the unidentified remains receive dignified transportation to the DPAA Laboratory in Hawaii, the "largest and most diverse skeletal identification laboratory in the world." *See* DPAA Fact Sheet, DPAA Laboratory (Mar. 2, 2015) (link) (Defs.' Ex. I); *see also* DoD Instruction 1300.18, § 4.4, E2.25 (Defs.' Ex. A) (describing dignified transfer). The remains are then examined by DPAA's staff of forensic anthropologists and odontologists, along with the medical examiner detailed from the Armed Forces Medical Examiner System (AFMES). *See* Defs.' Ex. I; 10 U.S.C. § 1509(b)(2). Bone and tooth samples are submitted to the Armed Forces DNA Identification Laboratory (AFDIL) in Dover, Delaware for DNA testing. *See* Defs.' Ex. I; DPAA Fact Sheet, AFDIL (May 12, 2015) (link) (Defs.' Ex. J) (explaining that AFDIL is a division of AFMES that handles all forensic DNA testing for DoD). AFDIL employs state of the art technologies in the forensic DNA field, including "next generation sequencing" (NGS), along with older DNA testing methods, such as mitochondrial DNA

(mtDNA), Y-chromosomal Short Tandem Repeat DNA (Y-STR), and autosomal Short Tandem Repeat DNA (auSTR) testing. *See* Am. Answer ¶ 49, ECF No. 26 (hereinafter "Answer"); *see also* AFMES, DNA FAQs, Question 11: What is the future of Forensic DNA Testing? (May 12, 2015) (link) (Defs.' Ex. K); *id.*, Question 5: What DNA tests are used to identify missing service members?. Rigorous methods are required for obtaining reliable results from antiquated remains. *See* Defs.' Ex. J (describing methodology). The testing results are reported back to the DPAA Laboratory. *See id.* The DPAA Laboratory is responsible for final identifications, *see* DoD Directive 5110.10 § 2(f), and its identification reports receive peer review by independent experts before being finalized. *See* Defs.' Ex. I.

IV. Status of Servicemembers

A. Camp Cabanatuan-Related Cases

As Plaintiffs acknowledge, the four service members who were prisoners of war initially buried at Camp Cabanatuan are associated with common graves involving commingled remains. *See* Am. Compl. ¶¶ 34, 38, 42, 46. The Cabanatuan burials pose significant identification challenges. Fellow POWs buried their comrades who died during roughly the same 24 hour period in a common grave. *See* DPAA, Historical Report, U.S. Casualties and Burials at Cabanatuan POW Camp #1 at 6-9 (May 2017) (link) (Defs.' Ex. M). Efforts to document these burials were initially spotty and hindered by the Imperial Japanese. *Id.* at 7-8. After the war, in December 1945, AGRS began disinterring remains from the common graves and reinterring those that were not immediately identified at U.S. Armed Forces Manila #2 Cemetery. *Id.* at 9-10. In the fall of 1947 the remains were disinterred again and moved to an AGRS Mausoleum for examination. *Id.* at 11. Many remains deteriorated from remaining in wet ground for several years and from being repeatedly handled. *Id.* at 18. A review conducted in 1951 concluded that the various well-intentioned identification efforts had left the remains "jumbled beyond belief."

Id. at 18. In January 1952, DoD concluded that the unknown remains were unidentifiable and should be buried at Manila American Cemetery. *Id.* at 19.

DPAA has an ongoing project to account for the unidentified service members who died at Camp Cabanatuan. It began around 2004 with historical research and assessment of all available documentation. *Id.* at 19-20.[2] The project seeks to disinter at one time all unidentified remains associated with one Cabanatuan grave, analyzing each grave in turn to synchronize with analytical and DNA collection efforts. *See* Answer ¶ 35. Once the historical research is complete, and sufficient DNA reference samples have been received from the service members' relatives, DPAA submits a recommendation under the process described above. *See supra* Background § III. The remains associated with eight common graves from Cabanatuan have been disinterred since 2014, remains associated with seven more common graves have been approved for disinterment, and recommendations for the disinterment of remains associated with six additional common graves are pending with the Assistant Secretary. *See* Answer ¶ 35.

DPAA's current identification effort must contend with numerous factors inhibiting identification. Among these are:

- The primary record regarding the original burials is Captain Robert Conn's "Death Report, Cabanatuan," which, especially for burials before August 1942, is incomplete and potentially inaccurate. *See* Historical Report at 7-9 (Defs.' Ex. M).
- The initial AGRS disinterments may not have precisely conformed to the graves as they were originally dug. *See id.* at 9-10, 14.
- Early identifications by dog tags or other personal items (whether at the time of initial burial or at the initial disinterment) may have been inaccurate (e.g., because the service member was holding the item for someone else). *See id.* at 15.

[2] *See id.* at 20 (concluding that the records "point to a complex set of burials, identifications, and misidentifications that make it difficult, based upon historical documentation alone, to set boundaries for disinterment projects focused on individual cases or even upon clustered groupings of cases").

- Remains from a common grave were likely to be inherently commingled when initially recovered. *See id.*

- Repeated handling before final burial in 1952 likely led to additional commingling, and may have caused commingling of remains drawn from different common graves. *See* id. at 12-19; Answer Ex. 53 at 2-3.

- By 1952, remains had significantly deteriorated due to burial conditions and repeated handling; further deterioration over subsequent decades is expected. *See* Historical Report at 18.

- Deterioration of the remains and preservation methods used at the Mausoleum make DNA extraction significantly more difficult. *See, e.g.*, AFMES, DNA FAQs, Question 12, What effect do environmental conditions have on DNA? (May 12, 2015).

In sum, the identification process for remains originally interred at Camp Cabanatuan is lengthy and arduous. But DPAA is committed to its mission, and continues to process numerous sets of remains for identification, in close coordination with DNA collection efforts.

1. Lloyd Bruntmyer, Technician Fourth Class, 7th Material Squadron, 19th Bomb Group

According to DoD records, Cabanatuan Common Grave 704 is the likely original location of the remains of ten service members, including Technician Lloyd Bruntmyer (TEC4 Bruntmyer). *See* Am. Compl. ¶ 36; Answer ¶ 36. Eight unknowns associated with this grave are interred in Manila American Cemetery. *See* Am. Compl. ¶ 38; Answer ¶ 38. DPAA has family reference samples for more than 60% of the missing personnel associated with Common Grave 704, including Bruntmyer, and on March 2, 2018, recommended disinterment for additional identification efforts. *See* Answer ¶ 39. This recommendation remains pending with the Assistant Secretary. *See id.* Plaintiff Raymond Bruntmyer submitted a disinterment request in November 2017, while DPAA's recommendation was being prepared. *See id.*

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

According to DoD records, Cabanatuan Common Grave 407 is the likely original

location of the remains of twenty-six service members, including Private First Class David Hansen (PFC Hansen). *See* Am. Compl. ¶ 41; Answer ¶ 41. DoD records indicate that nine unknowns are associated with this grave. *See* Answer ¶ 42; *cf.* Am. Compl. ¶ 42 (claiming that six unknowns associated with this grave are interred in Manila American Cemetery). DPAA has received only one eligible family reference sample for individuals associated with this grave, and has no usable samples from Plaintiff Judy Hensley's family. *See* Answer ¶ 43. Accordingly, DPAA is holding its draft disinterment recommendation in abeyance until a sufficient number of reference samples are received. *See id.*

3. Arthur Kelder, Private, 2nd General Hospital

According to DoD records, Cabanatuan Common Grave 717 is the likely original location of the remains of fourteen individuals, including Private Arthur Kelder (PVT Kelder). *See* Am. Compl. ¶ 45; Answer ¶ 45. Ten unknowns associated with this grave were interred in Manila American Cemetery. *See* Am. Compl. ¶ 46; Answer ¶ 46. The ten unknowns were disinterred in 2014. *See* Am. Compl. ¶ 47; Answer ¶ 47. DPAA also arranged for the disinterment of the four "identified" sets of remains associated with Common Grave 717, and is awaiting receipt of the last set of those remains. *See* Answer ¶ 47. In 2015, DPAA concluded that bones from three of the ten graves disinterred from Manila American Cemetery were associated with Private Kelder by DNA testing; it provided the relevant remains to Plaintiff Douglas Kelder for burial. *See* Am. Compl. ¶ 49; Answer ¶ 49. AFDIL has conducted more than 350 tests on samples from remains associated with Common Grave 717. Answer ¶ 49. Testing remains ongoing and will be completed after the last set of remains can be analyzed. *Id.*

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

According to DoD records, Cabanatuan Common Grave 822 is the likely original location of the remains of five service members, including Private Robert Morgan (PVT

Morgan). *See* Am. Compl. ¶ 33; Answer ¶ 33. Four unknowns associated with this grave are interred in Manila American Cemetery. *See* Am. Compl. ¶ 34; Answer ¶ 34. Plaintiffs have identified no disinterment requests made regarding this servicemember or grave. DPAA has family reference samples for more than 60% of the missing personnel associated with Common Grave 822, including Morgan, and, on January 23, 2018, recommended disinterment for additional identification efforts. *See* Answer ¶ 35. This recommendation remains pending with the Assistant Secretary. *See id.*

B. Individual Cases

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

The available evidence indicates that Brigadier General Guy Fort (BG Fort) was executed by the Imperial Japanese several months after his surrender in May 1942. *See* Am. Compl. ¶¶ 28-29; Answer ¶¶ 28-29. Plaintiffs allege that the remains designated Leyte #1 X-618, which are currently buried as an unknown in Manila American Cemetery grave L-8-113, are the remains of General Fort. Am. Compl. ¶ 30. This is one of two sets of remains disinterred from the Ateneo de Cagayan school in July 1947. Answer ¶ 30 & Exs. 33, 34.

DoD records contain conflicting testimony regarding the location of BG Fort's death and burial. Several witnesses, including Japanese officers connected to the execution, stated that the execution and burial occurred in the town of Dansalan. *See* Answer ¶ 29 & Exs. 39, 42. By contrast, provincial governor Ignacio Cruz reported second hand information suggesting that the execution and burial of BG Fort occurred about 45 miles away in Cagayan. *See* Answer ¶ 29 & Ex. 40. The remains from the Ateneo de Cagayan school were accepted for review based on Mr. Cruz's testimony and that of the school caretaker. *See* Answer Exs. 40, 41. But DoD officials found the remains unidentifiable, including based on a September 1949 comparison between BG Fort's dental records and the remains. *See* Answer ¶ 30 & Exs. 32, 35, 36 (indicating that two

teeth were present in both sets of remains which BG Fort had extracted years earlier).

On December 12, 2017, the Army Casualty Office received a disinterment request from Plaintiff Janis Fort seeking comparison of X-618 to BG Fort's family's DNA. *See* Answer ¶ 31 & Ex. 46. DPAA is preparing a recommendation in response to this request. *See* Answer ¶ 31.

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

First Lieutenant Alexander Nininger (1LT Nininger) died on January 12, 1942. *See* Am. Compl. ¶ 17; Answer ¶ 17. Plaintiffs allege that the remains designated Manila #2 Cemetery X-1130, which are currently buried as an unknown in Manila American Cemetery grave J-7-20, are the remains of 1LT Nininger. Am. Compl. ¶¶ 18, 20. Several witnesses reported to DoD investigators or 1LT Nininger's family that he was buried in Abucay in the vicinity of the church. *See* Am. Compl. ¶ 18; Answer ¶ 18 & Exs. 5-9. However, the remains Plaintiffs now focus on were exhumed by AGRS from the village cemetery about half a mile away from the church. Answer ¶ 18 & Exs. 1, 19. Various efforts to locate relevant remains in and around the churchyard were unsuccessful. *See* Answer ¶ 19 & Exs. 2, 3, 17, 19. The discrepancy between the testimony about burial and the location from which X-1130 was exhumed played a key role in DoD's decisions that 1LT Nininger was nonrecoverable and X-1130 was unidentifiable. *See* Answer ¶ 19 & Exs. 11, 13, 14, 16-18.

DPAA received a disinterment request regarding this grave from Plaintiff John Patterson on February 3, 2015. *See* Answer ¶ 19 & Ex. 23. In December 2015, DPAA recommended that the request be denied because "there exists too much doubt as to the location of the burial and subsequent recovery area for these remains" and X-1130 "does not appear to be a likely candidate for identification as 1st Lt Alexander R. Nininger, Jr." *See* Answer ¶ 19 & Ex. 23 at 7. In March 2016, the final decisionmaker agreed with DPAA's recommendation and denied Mr.

Patterson's request. *See* Answer ¶ 19 & Ex. 24; *see also* Am. Compl. ¶ 19. However, DPAA is engaged in a comprehensive disinterment project, assessing all unknowns from the Abucay area for comparison against missing from that area. *See* Answer ¶ 19.

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

Colonel Loren Stewart died on January 13, 1942. *See* Am. Compl. ¶ 22; Answer ¶ 22. Plaintiffs allege that remains designated Manila #2 X-3629, which are currently buried as an unknown in Manila American Cemetery grave N-15-19, are the remains of Colonel Stewart. Am. Compl. ¶¶ 24, 26. These remains were exhumed from a grave near the house of a Filipino civilian, Ruben Caragay, based on his 1946 report that he observed Philippine Scouts burying an individual that the Scouts stated was an American colonel. *See* Answer ¶ 24 & Exs. 25, 26.

On November 7, 2017, the Army Casualty Office received a formal request from Plaintiff John Boyt for disinterment of X-3629 for comparison to Colonel Stewart. *See* Answer ¶ 27 & Exs. 30, 31. DPAA is preparing a recommendation regarding this request. *See* Answer ¶ 27. And, as noted above, DPAA is engaged in a comprehensive project for the Abucay area. *See id.*

ARGUMENT

I. Standard of Review

A motion for judgment on the pleadings under Rule 12(c) "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (quotation marks omitted).[3] A Rule 12(c) motion employs the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See* Fed. R. Civ. P. 12(h)(2)(B); *Great Plains Trust*, 313 F.3d

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

at 313 n.8. Under this standard, a claim must be dismissed if Plaintiffs fail to "plead enough facts to state a claim to relief that is plausible on its face." *Roberts v. Ochoa*, No. 14-0080, 2014 WL 4187180, at *4 (W.D. Tex. Aug. 21, 2014). The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *McBride v. Reynolds*, No. 17-120, 2017 WL 2817096, at *1 (W.D. Tex. June 29, 2017). Courts "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff," but do not "accept as true conclusory allegations or unwarranted deductions of fact." *Great Plains Trust*, 313 F.3d at 312-13.

"[A] judgment on the pleadings . . . must be based on the undisputed facts appearing in all the pleadings." *Stanton v. Larsh*, 239 F.2d 104, 106 (5th Cir. 1956). Thus, the Court must consider the pleadings and the materials attached to the pleadings. *See Collins v. Morgan Stanley*, 224 F.3d 496, 498 (5th Cir.2000) ("[i]n considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto."); *Stanton*, 239 F.2d at 106 ("[T]he fact allegations . . . of the answer are taken as true . . . where and to the extent that they have not been denied or do not conflict with those of the complaint."); *Bandspeed, Inc. v. Qualcomm Inc.*, No. 1:14-436, 2016 WL 8814350, at *1 (W.D. Tex. June 23, 2016) (same). *Cf. Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (holding that court reviewing Rule 12(b)(6) motion "must consider the complaint in its entirety" along with "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice").

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 in Unidentified Human Remains

"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. At bottom, this effort fails because the "remains at issue" here, *id.* ¶¶ 68, 69, 75, differ from those discussed in the cited caselaw in two

key ways—(1) they are unidentified and (2) they are currently buried respectfully at a military commemorative cemetery. Whatever limited "property interest" could be recognized in other contexts, no such property interest can be cognizable here.

The cases Plaintiffs cite, which take a variety of conflicting approaches, generally observe 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,[4] and whether any such property interest is cognizable under the Due Process Clause.[5] Perhaps the best case for Plaintiffs is a Florida Supreme Court decision

[4] 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 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).

[5] *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*

which found a property interest sufficient to "give rise to procedural due process protection," specifically concluding that "in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition." *Crocker v. Pleasant*, 778 So. 2d 978, 983, 988 (Fla. 2001). Assuming arguendo that *Crocker*'s analysis is correct and that all relevant jurisdictions have created similar property interests—which Defendants do not in fact concede—Plaintiffs cannot extend such a narrow "entitlement" to create a novel right to disinter unidentified remains that may or may not be their relatives.

i. Unidentified Remains

Plaintiffs cannot show that they 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 for testing, especially destructive testing such as DNA testing.[6] 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 does not rise above the "abstract need or desire" that has long been held insufficient to constitute a legitimate claim that is constitutionally

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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[]").

[6] DNA testing involves the destruction of the bone sample. *See* Defense Science Board, The Use of DNA Technology for Identification of Ancient Remains at 14 (1995) (link) (Defs.' Ex. S) ("A portion of bone (about two grams per extraction) is cleaned to prevent cross contamination and to remove any mineralization that inhibits mtDNA testing. The sample is pulverized; from the bone powder, DNA is extracted."); *cf.* U.S. Dep't of Justice, Office of Justice Programs, DNA for the Defense Bar at 36 (June 2012) (link) ("There are times when the DNA testing process will consume the entire sample.").

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, not least because they seek to test 44 sets of remains in the hopes of identifying seven relatives, guaranteeing that the vast majority of these remains are not those of their relatives.[7]

[7] Plaintiffs cannot show that any of the remains have already been identified as those of their relative. Plaintiffs' own conclusory allegations about identification, *see* Am. Compl. ¶¶ 2, 21, 27, 31, 35, 39, 43, 69, cannot be credited. *See Great Plains Trust*, 313 F.3d at 312-13; *see also Forgue*, 2016 WL 10703737, at *4 (rejecting a property interest based only on plaintiff's "*ipse dixit* belief of entitlement"). Indeed, their own allegations demonstrate that, far from certain

ii. Respectfully Buried

Nor can Plaintiffs 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*

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identifications, the graves they have selected are merely greater or lesser possibilities based on circumstantial evidence. *See, e.g.*, Am. Compl. ¶ 24 (relying on statement reporting burial of unspecified American "colonel"); ¶¶ 29-30 (relying on statement of individual without personal knowledge). And the pleadings contain many undisputable facts suggesting that some of the graves they have identified are unlikely to contain their relatives' remains, *see supra* Background § IV.B, or that the records about Cabanatuan common graves are not sufficiently reliable for conclusive identification, *see id.* Background § IV.A. Thus, Plaintiffs' assertion that their relatives' remains have been identified are "unwarranted deductions of fact" that cannot be credited. *See Great Plains Trust*, 313 F.3d at 312-13.

Park, 29 Cal. Rptr. 3d 679 (Cal. Ct. App. June 10, 2005).[8]

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.").

iii. Relevant Jurisdictions Do Not Uniformly Recognize a Cognizable Property Interest

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.[9] But the remains are not located in any of these states, and it is not apparent why a service member's last 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

[8] *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").

[9] 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.

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 would apply 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 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).

Regardless, Plaintiffs cannot establish that even the states they have singled out uniformly acknowledge a property interest, let alone one cognizable under the Due Process Clause. For example, 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 California state courts have rejected the Ninth Circuit's characterization of California law in this area, *see Perryman*, 63 Cal. Rptr. 3d 732 (Cal. App., July 31, 2007) (discussing *Newman v. Sathyavaglswaran*, 287 F.3d 786, 798 (9th Cir. 2002)), and subsequent federal court decisions have limited *Newman* to its facts and 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). And 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 establish that the relevant jurisdictions have created a cognizable property interest.

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."). 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. The U.S. Government's inability to recover and/or identify the remains after WWII were not the cause of the deprivation. For this additional 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.").

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 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 disinterring unidentified remains for destructive testing 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)). Plaintiffs have not alleged any specific procedural defect in the process Defendants have provided for family members to provide new information and request disinterment for identification. 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).

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 supra* Background § II; *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 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).

Plaintiffs cannot show that Defendants' actions were "without a rational connection between the known facts and the decision or between the found facts and the evidence." *Meditrust Fin. Servs. Corp. v. Sterling Chems., Inc.*, 168 F.3d 211, 215 (5th Cir. 1999). Defendants have to allocate limited resources across thousands of identification efforts. And Defendants have adopted reasonable disinterment thresholds that balance competing government priorities. So long as "the question is at least debatable, there is no substantive due process

violation." *Simi Inv. Co. v. Harris County, Texas*, 236 F.3d at 250-51. Accordingly, Plaintiffs have failed to establish a substantive violation of the Constitution's due process protections.

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, for their *Bivens* claim, *see id.* ¶ 79, 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, buried remains they claim Defendants have "seized." *See supra* Arg. § II.A.

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, except to note the obvious reasonableness of declining to disinter remains finally buried more than 60 years ago until Defendants are satisfied that they are likely to be able to identify the remains so exhumed. *See supra* Background § IV.

IV. Plaintiffs Have Failed to State a *Bivens* Claim (Count 2)

A *Bivens* claim "provides a cause of action only against government officers in their individual capacities" and does not "provide a valid jurisdictional predicate" for a suit against federal employees in their official capacities. *Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999). "Therefore, to the extent Plaintiff[s] sue[] these defendants in their official capacities, [their] claims are barred as a matter of law." *Shanklin v. Fenald*, 539 F. Supp. 2d 878, 887 (W.D. Tex. 2008). Here, Plaintiffs have expressly stated that "[e]ach individually named defendant is being sued only in his or her official capacity." Am. Compl. ¶ 1 n.2; *see also id.* ¶¶ 13, 79. Accordingly, Count 2 must be dismissed.

V. 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.[10]

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 religious belief . . . when it promulgates a neutral, generally applicable law or rule that happens

[10] 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.").

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. 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

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. *See supra* Background § IV. And now, Defendants have compelling interests in safeguarding the remains of deceased service members, known or unknown, *see id.* § III, in ensuring the dignity of service members buried at the Manila American Cemetery, *see id.*, and in maintaining control over the accounting mission that Congress has given them. *See id.* § II. *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.").[11]

These interests are all the more compelling because Plaintiffs are seeking to micromanage 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, e.g.*, 36 U.S.C. § 2104(4); U.S. Army, Report to Congress (2005) (Defs.' Ex. N). 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.

[11] *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 jusitifed 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.").

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 supra* Background §§ II, III. Plaintiffs cannot show that Defendants' disinterment thresholds and prioritization procedures are more restrictive than necessary to serve 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.

VI. Plaintiffs Have Failed to State a Claim Under the Mandamus Act (Counts 3-4)

Relief under the Mandamus Act, 28 U.S.C. § 1361, is "available only if a plaintiff establishes (1) a clear right to relief, (2) that the defendant has a clear duty to act, and (3) no other adequate remedy exists." *Patterson*, 2017 WL 5586962, at *3. Mandamus is an "extraordinary remedy which should be utilized only in the clearest and most compelling of cases." *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969); *see also Ramirez-Gomez v. Melendez*, No. 05-74, 2005 WL 3534463, at *1 (W.D. Tex. 2005) ("The writ of mandamus is a drastic remedy, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought.").

A. Plaintiffs Have Not Identified Any Nondiscretionary Duties

This Court rejected Plaintiffs' arguments that the relevant statute, 10 U.S.C. §§ 1501-1513, created any "ministerial duties to support [Plaintiffs'] mandamus claims." *Patterson*, 2017 WL 5586962, at *3. The Court concluded that "[b]ecause the DPAA may exercise discretion with respect to its individual responsibilities, and the DPAA's actions are themselves subject to the authority, direction, and control of the Secretary of Defense, Plaintiff fails to show that the

DPAA has a clear duty to act as required by the Mandamus Act." *Id.*

Plaintiffs now ignore the statute and claim that various DoD *regulations* implementing that statute give rise to two nondiscretionary duties: (1) "to recover and return the remains of these service members that Plaintiffs have identified," Am. Compl. ¶ 86, and alternatively (2) "to identify the remains at issue and to use all resources and capabilities immediately available in doing so," *id.* ¶ 96. Plaintiffs claim that these duties arise from isolated provisions of DoD Directive 1300.22, DoD Directive 2310.07, Joint Publication 4-06, Army Regulation 638-2, and U.S. Army Field Manual FM 4-20-65. *See id.* ¶¶ 84-85, 91-93.

This claim fails at the threshold because—as this Court has noted, *see Patterson*, 2017 WL 5586962, at *3—the Fifth Circuit requires that the nondiscretionary duty arise from the statute itself. *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) ("The legal duty must be set out in the Constitution or by statute[.]"); *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) ("Any duty owed to the plaintiff must arise from another statute . . . or from the United States Constitution."). But even if the duty could arise from an agency regulation, the provisions Plaintiffs single out do not give rise to either of the duties they claim. In order to satisfy the duty prong of the Mandamus Act, Plaintiffs "must demonstrate that a government officer owes the [Plaintiffs] a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion." *Dunn-McCampbell*, 112 F.3d at 1288; *see also id.* ("The legal duty . . . must be positively commanded and so plainly prescribed as to be free from doubt."); *Randall D. Wolcott, M.D. v. Sebellius*, 635 F.3d 757, 768 (5th Cir. 2011) ("[M]andamus is not available to review discretionary acts of agency officials.").

First, 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 that "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).[12] 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 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) (Defs.' Ex. D).[13] Just as this Court concluded that the underlying statutes provided DoD and DPAA with discretion in how to perform these responsibilities, *see Patterson*, 2017 WL 5586962, at *3-4, application of these regulatory policy statements inherently involves substantial discretion.[14] This discretion is

[12] 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, 93, 112, 119.

[13] 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) (Defs.' Ex. A). *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.

[14] *Cf. Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002); *Doe v. Kanahele*, 878 F.2d 1438, 1989 WL 74741, at *1 (9th Cir. 1989) (unpublished); *Heily v. U.S. Dep't of Defense*, 896 F. Supp. 2d 25, 36 (D.D.C. 2012); *Hicks v. Brysch*, 989 F. Supp. 797, 817 (W.D. Tex. 1997); *Duchow v. United States*, No. 95-2121, 1995 WL 425037, at *3 (E.D. La. 1995), *aff'd* 114 F.3d 1181 (5th Cir. 1997) (per curiam).

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.).

Second, Plaintiffs cite Joint Publication 4-06, which was prepared under the direction of the Chairman of the Joint Chiefs of Staff to "provide[] joint doctrine for mortuary affairs support in joint operations." Joint Pub. 4-06, Mortuary Affairs, Preface §§ 1-2 (Oct. 12, 2011) (Defs.' Ex. T). This document is intended to guide mortuary operations in ongoing and future conflicts or other operations. *See, e.g., id.* Ch. 2 ("Mortuary Affairs Support in a Theater of Operations"). This document has no application here because Manila American Cemetery is not a "theater of operations." For that reason, its statements about "tentative ID," *id.* § 2.1(a)(1), 2-1(b)(2), or "temporary internment," *id.* § 1.2(e), 2.4(a), by combatant commands are plainly irrelevant. *See* Am. Compl. ¶¶ 84, 92-93 (referencing these provisions). Manila American Cemetery is not a location for temporary internment, but instead a permanent monument honoring deceased World War II servicemembers, including the unknowns interred there. *See* 36 U.S.C. § 2104 (providing for "permanent cemeteries"); ABMC, Manila American Cemetery Visitor Brochure (Aug. 7, 2014) (link). Regardless, the publication's statement that "[e]very reasonable effort will be made to identify human remains and fully account for unrecovered human remains of US military personnel . . . who die in military operations," Joint Pub. 4-06 § 1-2(d), simply reiterates the policy statement from DoD Directive 1300.22 discussed above, which does not create a ministerial duty. *See id.* § 1-2 (expressly referencing DoD Directive 1300.22).

Third, the two Army regulations upon which Plaintiffs most extensively rely—Army Field Manual FM 4-20-65 and Army Reg. 638-2—are inapplicable for several reasons. Most

importantly, these Army regulations (one of which has now been cancelled)[15] neither are nor were 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). Moreover, in all relevant respects, the Army regulations are 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 memorandum setting the disinterment standard which guides the agency action here, and the Under Secretary of Defense's memorandum that implements that standard. *See* DTM-16-003 (requiring that disinterment requests may be acted upon "only after the Deputy Assistant Secretary of Defense . . . determines that the [specific] thresholds are met"). The "Mandamus Act is unavailable to [a plaintiff] in requesting [the court] to compel [agency action] in violation of the [agency's] established regulations." *Bian v. Clinton*, 605 F.3d 249, 255 (5th Cir. 2010), *vacated as moot*, 2010 WL 3633770 (5th Cir. Sept. 16, 2010).

Finally, to whatever extent Army Regulation 638-2 could be considered relevant, it is intended to address recovery and identification of remains from current conflicts and does not give rise to any nondiscretionary duties.[16] *See, e.g.*, Army Reg. 638-2 at i (Defs.' Ex. R) (stating

[15] Army Field Manual FM 4-20-65 was replaced by ATTP 4-46.1 in September 2011, *see* Defs.' Ex. O, which in turn was cancelled in 2015. *See* Commandant, U.S. Army Quartermaster School, Memorandum (Jan. 22, 2014) (Defs.' Ex. P). As the supporting documentation explains, the Armed Forces Medical Examiner—not the Army—is now the "DoD scientific authority for identification of remains of DoD affiliated personnel in current deaths" and follows current best practices rather than ATTP 4-46.1. *See id.*; *see also* DoD Instruction 5154.30, AFMES Operations § 2.4(a) (Dec. 21, 2017) (Defs.' Ex. H).

[16] 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 Army Regulation 638-2. Specifically, this document does not require that unrecovered or unidentified remains be provided to putative family members. *See* Army Pamphlet 638-2, § 4.4(c), (d) (Defs.' Ex. Q).

that regulation "prescribes policies for the care and disposition of remains of deceased personnel for whom the Army is responsible" and not listing 10 U.S.C. §§ 1501-1513 among the statutes implemented); *id.* § 1-1 (addressing "persons for whom the Army is responsible by statutes and executive orders"). Only once does Army Regulation 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.[17] The Army does not have authority to task DPAA, *see, e.g.*, DoD Directive 5110.10 § 3.7, and, accordingly, this provision cannot impose a nondiscretionary duty on DPAA or DoD leadership offices. Regardless, Section 8-3(c) inherently involves the same discretion discussed above for the overarching DoD Directives and the statute, not "specific, ministerial acts." *Dunn-McCampbell*, 112 F.2d at 1288.[18]

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

An independent basis for denying Plaintiffs' claim is their failure to plead "a clear and indisputable right to the relief sought." *Ramirez-Gomez*, 2005 WL 3534463, at *1. For this element, a plaintiff must do more than "merely suggest[] that it is possible that a breach [of some statutory duty] may have occurred." *Randal D. Wolcott*, 635 F.3d at 772. Instead, the complaint must specifically plead that "there was a breach of the duty such that [plaintiff] is clearly entitled

[17] 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 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, applies only to current conflicts), and from the fact that both related subsections exclusively address commander responsibilities for current deaths. *See id.* § 8-3(a), (b).

[18] For the same reasons, the other provisions of Army Reg. 638-2 that Plaintiffs cite neither apply here nor identify the ministerial acts that Plaintiffs seek. *See* Army Reg. 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 disposing of remains from current conflicts).

to relief in mandamus." *Id.* Plaintiffs have fallen far short of that standard here.

They have failed to plead facts showing that Defendants have breached either the alleged duty "to recover and return the [identified] remains of these service members," Am. Compl. ¶ 86, or the alleged duty to "to use all resources and capabilities immediately available [to identify the remains at issue]," *id.* ¶ 96. Defendants have explained that, contrary to Plaintiffs' conclusory allegations, none of the remains Plaintiffs seek to disinter have been identified. *See, e.g.*, *Myart v. Warrick*, No. 17-00063, 2017 WL 1906951, at * (W.D. Tex. May 8, 2017) (dismissing complaint because "unclear and conclusory" allegations do not suffice). There is too much uncertainty about the initial burial location and 1940s recovery efforts for the service members at issue here to conclude that any specific service member's remains are in one of the 34 graves Plaintiffs seek to disinter. *See supra* Background § IV. And no duty to return remains can be rooted in the mere *likelihood* of identification. Thus, in the absence of a determination by an appropriate DoD authority that the remains have been identified, Plaintiffs have failed to establish any breach of any alleged duty to return identified remains.

Similarly, Plaintiffs have failed to allege facts sufficient to conclude that Defendants have breached an alleged duty to effectively use the "resources and capabilities immediately available" in the identification effort for these unaccounted-for service members and unidentified remains. Aside from Plaintiffs' failure to establish such a duty, *see* Arg. § VI(A), they have also failed to set forth facts showing that Defendants have inefficiently used the available resources in the last several years. Instead, they rely exclusively on the conclusory assertion that Defendants have "refused to consider new evidence given to them" and "failed to use all available resources and capabilities." Am. Compl. ¶ 94. But Plaintiffs have identified no specific evidence they have provided to Defendants in the last several years, nor shown that Defendants have

disregarded any such evidence. Accordingly, this conclusory assertion cannot be credited. *See See Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 707 n.10 (5th Cir. 2017). Nor can Plaintiffs show that Defendants' choice to allocate resources to other identification efforts rather than those of interest to Plaintiffs clearly breached any duty Defendants may have. Defendants are engaged in a variety of extensive efforts to fulfill the accounting mission, including a long-term project to disinter all of those buried as unknowns from the Cabanatuan POW camps. *See, e.g.*, *supra* Background § IV(A). Plaintiffs are not entitled to demand priority over similarly situated families. *Cf. Helfgott v. United States*, 891 F. Supp. 327, 331 (S.D. Miss. 1994).

C. Plaintiffs Have Not Shown that Available Remedies are Inadequate

Moreover, Plaintiffs are not entitled to mandamus because DPAA's administrative process and the Missing Service Personnel Act's judicial review procedures would provide an adequate remedy. *See Randal D. Wolcott*, 635 F.3d at 768 (holding that "[t]he third element requires that there be no other adequate remedy available," whether a judicial or administrative remedy). Plaintiffs' central assertion is that they have "new evidence" that "allows Plaintiffs to identify where these seven service members are currently buried." Am. Compl. ¶ 16; *see also id.* ¶¶ 84, 94, 100. But they do not show that they presented any such evidence to DPAA or that its administrative process is inadequate, resting instead on the conclusory assertion that "[t]here is no alternative statutory or administrative process to allow Plaintiffs to retrieve the remains or challenge Defendants' action or inaction." Am. Compl. ¶¶ 86, 96. They disregard the administrative remedy specifically designed to address these very concerns. *See* DTM-16-003 at 8-10; DPAA AI 2310.01 at 12-17. A disinterment request provides an opportunity to present to DPAA all of the evidence Plaintiffs believe supports identification, and triggers a review process that extends far up the chain of command. *See* DPAA AI 2310.01 at 12. Indeed, DPAA has issued two recommendations for disinterments relevant to Plaintiffs Raymond Bruntmyer and

Ruby Alsbury, and is holding a draft recommendation for disinterments relevant to Plaintiff Judy Hensley pending receipt of sufficient family reference samples. *See supra* Background § IV(A). DPAA is also preparing recommendations in response to disinterment requests from Plaintiffs John Boyt and Janis Fort. *See id.* § IV(B). Strikingly, these Plaintiffs did not present new evidence to DPAA with their requests. *See* Answer ¶¶ 27, 31. Having failed to establish the inadequacy of this administrative process, Plaintiffs cannot make out a mandamus claim.

In addition, Congress also provided for limited judicial review under the Missing Service Personnel Act. If DoD establishes a further review board under § 1505(c)(3) and § 1509(e)—after determining that "new information" is credible and "significant enough to require a board review"—Congress has specifically provided for judicial review of certain of the board's potential findings on the grounds that "there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process." *See* 10 U.S.C. § 1508(a); *see also id.* § 1508(b) (providing for judicial review to challenge specific board findings). Because Congress deemed this degree of review sufficient, it provides an adequate remedy and the Mandamus Act should not be construed to undermine the exclusivity of the remedy. *See, e.g.*, *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) ("[T]he fact that a remedial scheme chosen by Congress vindicates rights less efficiently than [another approach] does not render the [statutory] remedies inadequate for purposes of mandamus."); *Gross v. West*, 211 F.3d 124 (Table), 2000 WL 309777, at *1 (5th Cir. Mar. 1, 2000) (concluding that because Civil Service Reform Act "provides the exclusive remedy" this "precludes mandamus relief") . *Cf.* Order at 13, *Eakin v. ABMC*, No. 12-1002 (W.D. Tex. Aug. 5, 2013) ("Congress considered the APA's provisions in drafting [10 U.S.C. § 1508's] limited right of

review and [§ 1508] provides for judicial review only for specified persons and only for specified decisions, impliedly forbidding the review plaintiff seeks under the APA.").

D. Mandamus Should Be Denied on Equitable Grounds

"Even when a court finds that all three elements are satisfied, the decision to grant or deny the writ remains within the court's discretion because of the extraordinary nature of the remedy." *Randall D. Wolcott*, 635 F.3d at 768; *see also Whitehorse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373 (1955) ("[M]andamus . . . is to be granted only in the exercise of sound discretion."). A mandamus decision is "largely controlled by equitable principles and its issuance is a matter of judicial discretion." *Carter*, 411 F.2d at 773. Here, equitable principles weigh against granting the writ. DoD and DPAA are vigorously pursuing their mission to account for those lost from prior conflicts. They must operate with limited resources and set priorities regarding how to implement their mission in a way that leads to the most efficient identification of the largest number of unaccounted-for servicemembers. Any action to prioritize identification of these Plaintiffs' relatives merely because they have filed a federal lawsuit, would simply displace other identification efforts that are ongoing. And most significantly, the probability of identification is a complex inquiry involving a host of factors and scientific expertise. The Court is not well positioned to weigh Plaintiffs' claims against the appropriate standards, especially in the absence of a complete record developed by DPAA through the administrative process. Accordingly, even if the Court could grant the writ—and it cannot—it should exercise its discretion to deny it because granting it would not serve the public interest.

VII. Plaintiffs Have Failed to State a Claim under the APA (Count 5)

Plaintiffs also fail to state any meritorious claim under the APA. Their APA claims are not cognizable for several reasons. And, regardless, they largely recapitulate the claims made under other headings and should be rejected for similar reasons.

A. APA Review is Unavailable Because the MSPA Precludes Judicial Review and the Accounting Mission is Committed to Agency Discretion by Law

"Congress has provided that the APA—and its concomitant grant of judicial review—does not apply in two circumstances: first, if the 'statute [ ] preclude[s] judicial review,' . . . and second, 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)). Both of these circumstances are present here.

The APA's waiver of sovereign immunity does not apply where some "other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." Order at 6, *Eakin v. Am. Battle Monuments Comm'n*, No. SA-12-CA-1002-FB (Aug. 5, 2013) (quoting *Rothe Development, Inc. v. U.S. Dep't of Defense*, 666 F.3d 336, 338 (5th Cir. 2011)). Preclusion of judicial review is determined not only from the statutory text "but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984).

In *Eakin*, a court in this district concluded that the MSPA "provides for judicial review only for . . . specified decisions, impliedly forbidding the review plaintiff seeks under the APA." Aug. 5, 2013 Order at 7, *Eakin*, No. 12-1002 (citing 10 U.S.C. §§ 1501(a)(1)(B), 1508). As discussed above, the MSPA explicitly provides judicial review for certain findings by a board appointed under §§ 1504, 1505, or 1509. *See* 10 U.S.C. § 1508; *see also Eakin* Order at 6. The law states that judicial review may be had only on the basis of a claim that "there is information that could affect the status of the missing person's case that was not adequately considered during the administrative review process under this chapter." 10 U.S.C. § 1508(a). Congress adopted this narrow judicial review provision with express awareness of the APA. *See Eakin* Order at 7 (noting that 5 U.S.C. § 1508(a) cites 5 U.S.C. § 706). Accordingly, the *Eakin* court

reasonably concluded that "Congress has dealt in particularity with a claim and [has] intended a specified remedy to be the exclusive remedy." *Id.* (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 n.22 (1983). Indeed, when Congress expanded DoD's accounting mission in 2009 and specified duties for DPAA in 2014, it did not expand the judicial review provisions. *See* Pub. L. No. 113-291, § 916, 128 Stat. 3292, 3476-3479 (Dec. 19, 2014); Pub. L. No. 111-84, § 541, 123 Stat 2190, 2296-2299 (Oct. 28, 2009). "[C]ongressional intent to preclude judicial review is fairly discernible in the detail of the legislative scheme," *Block*, 467 U.S. at 351, and Plaintiffs' APA claim should be dismissed.

The APA also prohibits judicial review of challenged policies or practices that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 473-74 (5th Cir. 2016). This exemption from judicial review applies, as a general matter, to situations covered by statutes that are written so broadly that "there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). Accordingly 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)). In *Lincoln*, the Supreme Court held that the allocation of funds from a lump sum appropriation was not subject to APA review because it required balancing factors within the agency's expertise. *See* 508 U.S. at 193. Here, the MSPA's broad call for DoD to implement an accounting program for past conflicts, 10 U.S.C. § 1509(a), and instruction to centralize responsibility for this program in a "single organization," *id.* § 1501(a)(1)(A), (2)(B), provides no guidance as to how the DoD is to manage its accounting mission. Standards are lacking in all areas: from which missions to prioritize, to which disinterments would be likely to result in successful identifications, to which identification

techniques to employ in a given case. Decisions regarding recovery and accounting efforts require "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831. These factors include geopolitical and/or environmental factors, fiscal considerations, and scientific analysis and experience, not to mention balancing the interests of families of the missing from many different conflicts. All of these factors are peculiarly within the agency's expertise.

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). This Court lacks sufficient 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). Because the APA prohibits the sort of judicial review that Plaintiffs seek to have this Court conduct with respect to Defendants' disinterment decisions, Plaintiffs' claims are not cognizable under the APA and should be dismissed.

B. Plaintiffs Fail to Identify the Final Agency Actions They Seek to Challenge

Review under the APA is only available for "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011). Plaintiffs must point to a final "action that took place within the six years before it 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. Where the putative final agency action is an

alleged "failure to act," Plaintiffs must still identify "specific actions" or a specific "decision." *Sierra Club v. Peterson*, 185 F.3d 349, 364, 371 (5th Cir. 1999) (finding final action where agency "affirmatively decided not to follow [certain] regulations"). Such a claim "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *MacKenzie v. Castro*, No. 15-752, 2017 WL 1021299, at *8 (N.D. Tex. Mar. 16, 2017); *Dawoud v. DHS*, No. 06-1730, 2007 WL 4547863, at *7-8 (N.D. Tex. Dec. 26, 2007).

Apart from the disposition of Plaintiff John Patterson's disinterment request, Plaintiffs identify no final agency action that they are challenging. It is certainly premature to challenge Plaintiffs' two disinterment requests that remain pending, or DPAA's disinterment recommendations that has not yet been finally decided. *See Qureshi*, 663 F.3d at 781-82; *Nat'l Pork Producer's Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011); *Aquifer Guardians in Urban Areas v. U.S. Fish & Wildlife Serv.*, 555 F. Supp. 2d 740, 744 (W.D. Tex. 2008); *Naseh v. Chertoff*, No. 3:07-1923, 2008 WL 11348018, at *4 (N.D. Tex. Apr. 18, 2008). And, for all of the reasons discussed above, neither the relevant statutes nor Defendants' regulations give rise to a mandatory duty to take action within a specific period of time. *See supra*, Arg. § VI(A).

C. Plaintiffs Cannot Show That Defendants' Actions Are Arbitrary or Contrary to Law

Plaintiffs' APA claim also fails on the merits—they have failed to allege nonconclusory facts showing that Defendants' actions are either contrary to law or arbitrary and capricious. While Plaintiffs have not specified precisely what "findings," Am. Compl. ¶ 99, or "actions," *id.* ¶ 103, they believe are contrary to law, the only legal standards they appear to be seeking to enforce under the APA are "First, Fourth, and Fifth Amendment Constitutional rights." *Id.* ¶ 100. Accordingly, their APA claim collapses into their constitutional claims, which fail for the reasons discussed above. *See supra*, Arg. §§ II-V.

Plaintiffs' "arbitrary and capricious" claim simply recapitulates their assertion that Defendants should already have disinterred the remains due to "the identification [of those remains by Plaintiffs] and overwhelming evidence showing where the remains at issue are located." Am. Compl. ¶ 100. But the isolated facts Plaintiffs include in their Amended Complaint fall far short of conclusive identification of any of the service members Plaintiffs seek. *See supra* Background § IV. It is neither arbitrary nor capricious for DPAA to refrain from recommending disinterment until it is satisfied that the Deputy Secretary of Defense's standard has been met. Similarly, it is reasonable for DPAA to retain for further testing remains associated with Cabanatuan Common Grave 717 that have not been identified as those of PVT Kelder on the basis of DNA testing. *See supra* Background § IV(A)(3). Finally, the decision not to disinter the remains identified as X-1130 for comparison with DNA from 1LT Nininger's family was—and remains—reasonable for numerous reasons, most notably because those remains were exhumed from a cemetery where no witnesses suggested 1LT Nininger had been buried, which was across town from the vicinity of the church where most testimony suggested he had been buried. *See supra* Background § IV(B)(2).

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

VIII. The District Court Lacks Jurisdiction to Grant Any Relief, Including Declaratory Relief (Counts 6-8)

It is Plaintiffs' burden to establish their standing and the Court's jurisdiction to grant each form of relief sought. *See Friends of Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Wyble v. Gulf South Pipeline Co.*, 308 F. Supp. 2d 733, 742 (E.D. Tex. 2004). Plaintiffs lack standing to press at least two aspects of their relief claims.

First, what Plaintiffs seek goes well beyond complete relief for their individual cases. *See, e.g.*, Am. Compl., Prayer ¶ (n) (seeking "relief for all families seeking to recover the

remains of service members being held by the U.S. Government"). Plaintiffs lack standing to seek relief on behalf of other persons. *See Riggins v. Wells Fargo Bank, N.A.*, No. 10-0293, 2010 WL 2991005, at *1 (W.D. Tex. July 27, 2010).

Second, Plaintiffs' request for an "order directing Defendants to reimburse Plaintiffs for all expenses incident to the recovery, care, and disposition of the remains at issue," Am. Compl., Prayer ¶ (o), fails for reasons discussed in connection with the original complaint. Plaintiffs have not established any basis for such relief because they do not show that Congress intended 10 U.S.C. § 1482(b) to create both a right and a remedy that is privately enforceable. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Patterson*, 2017 WL 5586962, at *5. Still less could Plaintiffs establish that this statute makes reimbursable their efforts to use a private laboratory to identify their remains from among dozens of graves. And Plaintiffs have failed to establish a likelihood of future injury, as required by the Declaratory Judgment Act. *See Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003).

Finally, with regard to their Declaratory Judgment Act claims, "Plaintiffs must bring a valid claim for an independent cause of action that provides the Court with subject matter jurisdiction." *Patterson*, 2017 WL 5586962, at *4. While Plaintiffs assert three counts for declaratory relief, they rely exclusively on the causes of action already addressed—*Bivens*, the Mandamus Act, and (implicitly) the APA—as they seek to enforce various statutory terms and the First, Fourth, and Fifth Amendments. *See* Am. Compl. ¶¶ 108, 118, 124-126. Because each of these causes of action must be dismissed, *see supra*, Arg. §§ II-VII, the Court lacks jurisdiction to grant any relief. *See Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980).

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

CONCLUSION

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

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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