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.	)	

SUPPLEMENTAL JOINT RULE 26(f) REPORT AND PROPOSED SCHEDULE

Pursuant to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure, and the Court's Nov. 20, 2017 Order, ECF No. 14, the parties submit this joint report and alternative scheduling recommendations.

RULE 26(f) REPORT

1. Are there any outstanding jurisdictional issues?

a. Plaintiffs' position: No.

b. Defendants' position: The jurisdictional defects of Plaintiffs' First Amended Complaint will be set out in Defendants' renewed motion to dismiss.

2. Are there any unserved parties? All parties have been served.

3. What are the causes of action, defenses, and counterclaims in this case? What are the elements of the cause(s) of action, defenses, and counterclaims pled?

a. Count 1 – Fifth Amendment Due Process

i. Plaintiffs' Statement of Elements:[1]

[1] Defendants do not accept Plaintiffs' characterization of the elements of each claim under each count of the Amended Complaint. But they will address any dispute over the elements of the claims in later filings as appropriate, rather than unnecessarily lengthening this report.

1. Substantive Due Process: This asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government's action. Whether there is such a justification depends very much on the level of scrutiny used. Nonetheless, any time the government deprives a person of life, liberty, or property, the government must provide a sufficient justification. In the present case, strict scrutiny applies. Plaintiffs must prove that a) they have cognizable, substantive life, liberty, or property interests as the next of kin of deceased service members to receive their deceased's remains, b) that the remains are in the possession of the Defendants, and c) Defendants have refused to return the remains to Plaintiffs.
2. Procedural Due Process: This refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. The Court must determine what kind of notice and what form of hearing the government must provide when it takes a particular action. Here, Plaintiffs must prove that a) they have cognizable life liberty or property interests as the next of kin of deceased service members to receive their deceased's remains, b) that the remains are in the possession of the Defendants, and c) Defendants have refused to return the remains to Plaintiffs without reasonable due process.

ii. Defendants' Statement of Defenses:[2] Plaintiffs have failed to state a claim upon which relief can be granted; Plaintiffs have failed to file within the applicable statute of limitations; and this claim otherwise lacks merit because the procedures were appropriate to the interests at stake.

b. Count 2 – *Bivens* Claim

i. Plaintiffs' Statement of Elements: Bivens actions generally refer to actions when there has been a violation of the U.S. Constitution by federal officers acting in the color of federal authority. The plaintiff in a Bivens action must demonstrate that a constitutionally protected right has been violated by the federal officers. Numerous courts have characterized constitutional claims to enjoin federal officials as Bivens claims. For their *Bivens* claims, Plaintiffs must prove that a) they have a right to the remains of their deceased military kinfolk, and b) that the Defendants, acting in their official capacities, are intentionally or with deliberate indifference, depriving them of that right.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim upon which relief can be granted; Plaintiffs have failed to file within the applicable statute of limitations; to the extent a claim is viable, Defendants are entitled to qualified immunity.

c. Count 3 – Mandamus Act Claim for Recovery of Remains

i. Plaintiffs' Statement of Elements: The Mandamus Act, 28 USC § 1361, provides for Unites States district court jurisdiction to compel an officer or employee of the Unites States or any agency thereof to perform a duty owed to the plaintiff when

[2] Defendants reserves the right to supplement these defenses at the time they file an answer to the Amended Complaint.

no other adequate legal remedy is available. Plaintiffs must prove (1) the Plaintiffs have a clear right to relief, i.e. to have the remains of their deceased military kinfolk recovered and returned to them, (2) the Defendants have a clear duty to act, i.e. to return those remains, and (3) no other adequate legal remedy exists.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; Plaintiffs have failed to file within the applicable statute of limitations; and this claim otherwise lacks merit as a matter of law.

d. Count 4 – Mandamus Act Claim for Identification of Remains and Further Efforts

i. Plaintiffs' Statement of Elements: In the event there is a finding by this Court that the subject remains have not been sufficiently identified by Plaintiffs, Defendants have a non-discretionary duty to attempt to identify the remains at issue and Plaintiffs seek to mandamus Defendants to do so. Here, Plaintiffs must prove that (1) Plaintiffs have a right to the return of their deceased military kinfolk, (2) Defendants have a clear duty to identify the remains at issue using all resources and capabilities immediately available (Army Regulation 638-2, ¶8-3), (3) Defendants have refused to use all resources and capabilities immediately available to identify remains reasonably believed to be those of missing American service members, i.e Plaintiffs' next of kin, and (3) no other adequate legal remedy exists.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; Plaintiffs have failed to file within the applicable statute of limitations; and this claim otherwise lacks merit as a matter of law.

e. Count 5 – Administrative Procedure Act ("APA")

i. Plaintiffs' Statement of Elements: In the alternative, pursuant to the APA, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. The APA confers a general cause of action upon persons adversely affected or aggrieved by an agency action within the meaning of a relevant statute. The Court must examine whether the agency's action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. The Court can also review whether an agency's factual and policy determinations are warranted in light of all the information before the agency at the time of decision. Here, Plaintiffs must show that (1) Defendants have violated 5 U.S.C. § 500 et seq, by acting in an arbitrary and capricious manner, abusing discretion, failing to observe procedure required by law, and/or by making findings that are not in accordance with law, (2) that said actions by Defendants are unlawful and should be set aside because they are arbitrary, capricious, an abuse of discretion, not in accordance with law, fail to observe procedure required by law, unwarranted by the facts, and contrary to Plaintiffs' constitutional rights, (3) Defendants' conduct has caused and will continue to cause Plaintiffs to suffer immediate and irreparable harm, and (4) there is no adequate remedy at law and Plaintiffs are entitled to injunctive relief to protect their constitutional rights

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; Plaintiffs have not identified final agency action for each Plaintiff; Plaintiffs have failed to file suit within the applicable statute of

limitations; Plaintiffs seek review of decisions committed to agency discretion by law; Plaintiffs have other adequate remedies; and this claim otherwise lacks merit because agency action was reasonable, consistent with law and not arbitrary, or capricious.

f. Count 6 - Declaratory Judgment Act Claim Regarding Right to Possess Remains

i. Plaintiffs' Statement of Elements: A declaratory judgment is proper when the judgment will (1) serve a useful purpose in clarifying and settling legal relations at issue and (2) provide relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. Plaintiffs seek a declaratory judgment that they are entitled to the remains of their deceased military kinfolk for the purpose of providing them a proper burial or other handling in accordance with the families' religious or personal beliefs. Here, Plaintiffs must show (1) the identity of the parties to the dispute, (2) the facts giving rise to jurisdiction and venue, (3) that there is an actual and substantial case or controversy entitling the Plaintiffs to declaratory relief, (4) that declaratory relief is necessary, and (5) the relief requested should be granted.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; the Court lacks jurisdiction to grant injunctive relief, to grant relief not rooted in a separate cause of action, to grant relief where Plaintiffs have no injury traceable to specific government action.

g. Count 7 – Declaratory Judgment Act Claim Regarding Returning Remains to Plaintiffs

i. Plaintiffs' Statement of Elements: Plaintiffs seek a declaratory judgment that Defendants be required to recover and return the remains of Plaintiffs' deceased military kinfolk to Plaintiffs for the purpose of providing them a proper burial or other handling in accordance with the families' religious or personal beliefs. Here, Plaintiffs must again show (1) the identity of the parties to the dispute, (2) the facts giving rise to jurisdiction and venue, (3) that there is an actual and substantial case or controversy entitling the Plaintiffs to declaratory relief, (4) that declaratory relief is necessary, and (5) the relief requested should be granted.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; the Court lacks jurisdiction to grant injunctive relief, to grant relief not rooted in a separate cause of action, to grant relief where Plaintiffs have no injury traceable to specific government action.

h. Count 8 – Declaratory Judgment Act Claim Regarding Violation of Constitutional Rights

i. Plaintiffs' Statement of Elements: Plaintiffs request that this Court declare that Defendants have violated Plaintiffs' First, Fourth, and Fifth Amendment rights under the U.S. Constitution and issue appropriate relief, including injunctive relief, to protect Plaintiffs and others affected by Defendants' actions. Here, Plaintiffs must again show (1) the identity of the parties to the dispute, (2) the facts giving rise to jurisdiction and venue, (3) that there is an actual and substantial case or controversy entitling the Plaintiffs to declaratory relief, (4) that declaratory relief is necessary, and (5) the relief requested should be granted.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim on which relief can be granted; the Court lacks jurisdiction to grant injunctive relief, to grant relief not rooted in a separate cause of action, to grant relief where Plaintiffs have no injury traceable to specific government action.

i. Count 9 – Free Exercise Clause and Religious Freedom Restoration Act

i. Plaintiffs' Statement of Elements: Plaintiffs contend that Defendants are withholding the remains at issue from Plaintiffs. This deprives Plaintiffs, and their deceased military family members, from having a proper burial, etc., in accordance with each respective families' religious or other beliefs. Here, Plaintiffs must show that he or she has a sincere belief that is being burdened by the government. Once a plaintiff makes this showing, the government must establish that the burdening activity serves a compelling government interest. Finally, if the government does have a compelling interest, the government must show that it is using the least restrictive means possible to further that compelling interest.

ii. Defendants' Statement of Defenses: Plaintiffs have failed to state a claim upon which relief can be granted; Plaintiffs have failed to file within the applicable statute of limitations; and this claim otherwise lacks merit as a matter of law.

4. Are there any agreements or stipulations that can be made about any facts in this case or any element in the cause(s) of action?

a. Hon. John A. Patterson is the Nephew of First Lieutenant Alexander R. Nininger, a recipient of the Medal of Honor. Patterson is the person designated by the Department of Defense to direct disposition of the remains of Alexander R. Nininger.

b. Mr. John Boyt is the grandson of Colonel Loren P. Stewart. Boyt is the person designated by the Department of Defense to direct disposition of the remains of Loren P. Stewart.

c. Ms. Janis Fort is the granddaughter of Brigadier General Guy O. Fort. Janis Fort is the person designated by the Department of Defense to direct disposition of the remains of Guy O. Fort.

d. Ms. Ruby Marie Alsbury is the sister of Private Robert R. Morgan. Alsbury is the person designated by the Department of Defense to direct disposition of the remains of Robert R. Morgan.

e. Mr. Raymond Bruntmyer is the brother of Technician 4th Class Lloyd Bruntmyer. Raymond Bruntmyer is the person designated by the Department of Defense to direct disposition of the remains of Lloyd Bruntmyer.

f. Ms. Judy Hansen Hensley is the niece of Private First Class David Hansen. Hensley is the person designated by the Department of Defense to direct disposition of the remains of David Hansen.

g. Mr. Douglas Arthur Kelder is the nephew of Private Arthur H. "Bud" Kelder. Kelder is the person designated by the Department of Defense to direct disposition of the remains of Arthur H. Kelder.

5. State the parties' views and proposals on all items identified in Fed. R. Civ. P. 26(f)(3):

a. **Rule 26(a) disclosures:** The parties previously stipulated to dispense with initial disclosures on October 23, 2017. *See* 1st Rule 26(f) Report at 2, ECF No. 11. The parties disagree regarding initial disclosures as discussed below but do not seek modification of the rules regarding expert disclosures or other pretrial disclosures.

i. ***Plaintiffs' position:*** Plaintiffs wish to withdraw this stipulation because the nature of the lawsuit has changed since the Court ruled on Defendants' motion to dismiss. Thus, Plaintiffs request that the Court include in its scheduling order a deadline for the parties to provide initial disclosures.

ii. ***Defendants' position:*** Defendants object to any withdrawal of the stipulation dispensing with initial disclosures. The nature of the lawsuit has not fundamentally changed. The additional claims do not alter the fact that this is still a challenge to agency action that is presumptively to be resolved on the basis of the administrative record. Initial disclosures, especially if they are ordered exchanged before the Court rules on Defendants' renewed motion to dismiss, would be inappropriate and would unduly burden Defendants.

b. Discovery:

i. ***Plaintiffs' position:*** Discovery will provide the most expedient and efficient means to resolve the claims at issue in this case. Moreover, the discovery sought will elicit the truth in the promotion of justice. Despite this, Defendants contend that all discovery should be completely barred. This contention is misplaced for several reasons, which will be briefed in more detail should Defendants file a motion to prevent future discovery. As for the discovery that will be sought in this case, Plaintiffs are seeking to recover and bury the remains of their loved ones. Consequently, discovery relating to the remains that Plaintiffs claim are their loved ones is necessary. Plaintiffs will be seeking discovery related to the burial of the remains at issue and the graves identified in the complaint, including information relating to any other remains contained in such graves that may assist

in the identification of the remains made the subject of this suit. Plaintiffs will seek discovery into what steps, procedures and efforts have been made to identify the remains made the subject of this suit. Plaintiffs will also seek documents related to the government's procedures and policies regarding disinterment and recovery of previously unidentified remains. Further, Plaintiffs will seek to examine and test certain remains at issue for identification purposes using independent experts and the latest DNA technologies. Disinterment for discovery purposes has been used in numerous cases all around the country for over a century. Discovery should be completed in a year. Additionally, for the examination and testing of the remains, this should be conducted in phases during the year of discovery. Other discovery may become necessary as the case proceeds. Finally, even if the record review rule is applicable to Plaintiffs' APA cause of action, which Plaintiffs contend it is not, extra-record information is required for effective judicial review. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Discovery is permissible for an APA cause of action in numerous scenarios. For example, discovery is proper when the administrative record is incomplete, when the agency relied on information outside the administrative record, or when extra-record information is necessary to understand the agency's decision-making process. *See, e.g.*, *Williams v. Roche*, No. 00-1288, 2002 U.S. Dist. LEXIS 24030, at *8-9 (E.D. La. Dec. 12, 2002). Additionally, when "the government is being sued for inaction . . . [t]here is less reason to presume that the record assembled by the agency is presumptively complete." *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 791 (1997); *see*

also Lands Council v. Forester of Region One of U.S. Forest Serv., 395 F.3d 1019, 1030 (9th Cir. 2005).

ii. ***Defendants' position:*** The Court should prohibit discovery in this case without subsequent leave of Court. Alternatively, the Court should stay any discovery until after the Court rules on Defendants' renewed motion to dismiss, and after the administrative record is compiled for any challenges to agency action that are not dismissed by the Court.

1. Because Plaintiffs challenge agency action, the case will presumptively be resolved on the basis of the administrative record. *See Friends of Canyon Lake v. Brownlee*, No. 03-0993, 2004 WL 2239243, at *3 (W.D. Tex. Sept. 20, 2004); *Malone Mtg. Co. Am. v. Martinez*, No. 02-1870, 2003 WL 23272381, at *2 (N.D. Tex. Jan. 6, 2003). This is fundamentally an APA claim, and the addition of constitutional claims and claims under other statutes, such as the Mandamus Act, does not alter the basis for the Court's review. *See, e.g.*, *Malone Mtg.*, 2003 WL 23272381, at *2-3 (limiting judicial review to administrative record in action alleging, inter alia, violation of Fifth Amendment due process clause). After all, it is the APA that provides the waiver of sovereign immunity for Plaintiffs' other constitutional and statutory claims to proceed against federal agencies and officers in their official capacities. *See, e.g.*, *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985); *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005); *Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981); *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982). Accordingly, review of the

challenged agency actions should be under the APA's record requirements. And it is appropriate for the Court to prohibit discovery at this point. *See, e.g.*, *Inclusive Communities Project, Inc. v. U.S. Dep't of Housing & Urban Development*, No. 07-0945, 2009 WL 3446232, at *1 (N.D. Tex. Oct. 26, 2009) (discussing scheduling order that barred discovery outside the administrative record); *Malone Mtg.*, 2003 WL 23272381, at *2-3 (denying motion to compel discovery outside administrative record); *cf. Burgess v. CIGNA Life Ins. Co. of New York*, No. 04-0841, 2006 WL 1851391, at *4 n.3 (W.D. Tex. June 23, 2006) ("Logically, no discovery whatsoever would be appropriate if the only admissible evidence in an ERISA case were the administrative record." (quotation marks omitted)). Much of the discovery Plaintiffs say they will seek would likely be included in the administrative record. It would be improper and inefficient for Plaintiffs to seek by discovery information that will be produced in a certified administrative record. And other discovery they seek may be irrelevant to the sufficiency of that record, and thus unduly burdensome to Defendants. *Cf. Woods v. Fed. Home Bank Loan Bd.*, 826 F.2d 1400, 1414-15 (5th Cir. 1987) ("Rule 56 does not permit a party to avoid confronting his opponent's summary judgment proof by seeking discovery on factual matters that would not affect the legal basis for summary judgment."); *Ramirez v. Walker*, 199 F. App'x 302, 308-09 (5th Cir. 2006) ("[D]iscovery was unnecessary prior to ruling on the Defendants' motion to dismiss and motion for summary judgment."). Accordingly, discovery should only be permitted if Plaintiffs can satisfy the

Court that it is necessary and proper in light of the administrative record produced by Defendants for any claims that are not dismissed.

2. Alternatively, if the Court decides to permit discovery to proceed, it should not begin until after the Court rules on Defendants' renewed motion to dismiss and after an administrative record is produced. Because Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted, including for reasons stated in the Court's November 20, 2017 Order dismissing the initial complaint, Defendant should not now be subjected to burdensome discovery. *See, e.g.*, *United States ex rel Gonzalez v. Fresensius Medical Care North Am.*, 571 F. Supp. 2d 766, 768 (W.D. Tex. 2008) (concluding that staying discovery "may be appropriate where the disposition of a motion to dismiss 'might preclude the need for the discovery altogether thus saving time and expense.'" (ultimately quoting *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990))). Moreover, if the Court reaches the merits, any need to supplement the record or conduct discovery on a collateral matter should be determined after the record is compiled. *See, e.g.*, *Frito-Lay, Inc. v. U.S. Dep't of Labor*, No. 12-1747, 2013 WL 12253035, at *2-3 (N.D. Tex. Sept. 11, 2013) (denying motion for leave to obtain discovery while motion to dismiss was being briefed); *Inclusive Communities Project, Inc. v. U.S. Dep't of Housing & Urban Development*, No. 07-0945, 2009 WL 3446232, at *1 (N.D. Tex. Oct. 26, 2009) (discussing scheduling order that barred discovery outside the administrative record); *Malone Mtg. Co.*, 2003 WL 23272381, at *2-3 (denying motion to compel

discovery outside administrative record); *City of Dallas v. Hall*, No. 3:07-0060, 2007 WL 3257188, at *6 (N.D. Tex. Oct. 29, 2007) ("To obtain discovery from an agency in an APA case, a party must overcome the standard presumption that the agency properly designated the Administrative Record. That is, a party must provide good reason to believe that discovery will uncover evidence relevant to the court's decision to look beyond the record." (quotation marks and citations omitted)).

3. Finally, Defendants will seek a protective order regarding any effort by Plaintiffs to "examine and test certain remains at issue for identification purposes using independent experts and the latest DNA technologies." This is not discovery under any standard of review, and constitutes an improper attempt to preemptively gain final relief. Nearly all of the remains Plaintiffs seek to test are currently interred in Manilla, many of them in common graves. Any disinterment must proceed only pursuant to government regulations and policies, especially in the absence of any finding that the government has violated Plaintiffs' statutory or constitutional rights. Plaintiffs cannot evade the government's reasonable standards in the name of discovery. And any attempt to do so would be improper and would unduly burden Defendants and frustrate governmental and public interests that the Government seeks to uphold.

c. **Electronically stored information:** If discovery were to proceed over the defendants' objection, the parties do not anticipate that electronically stored information will present any unique difficulties.

d. **Privileges:** The parties will address procedures for asserting privileges after discovery requests (if any) have been served.

e. **Discovery limitations:** Apart from Defendants' request that all discovery be barred or postponed, the parties do not seek modification of the discovery limitations imposed by rule.

f. **Any other orders:** The parties do not now seek any other orders pursuant to Rule 16 or 26. As noted, Defendants may seek a protective order from specific discovery requests depending on their content.

6. **What, if any, discovery has been completed? What discovery remains to be done? Have the parties considered conducting discovery in phases?** No discovery has been served or completed at this time. As discussed above, Plaintiffs intend to immediately proceed with discovery. Defendants oppose discovery and request that the Court consider whether discovery is appropriate only after the administrative record is produced. If discovery were to proceed, the parties see no benefit in phased discovery.

7. **What, if any, discovery disputes exist?** The parties dispute whether discovery should be barred completely in this case, whether discovery should proceed immediately or begin only if it is demonstrably necessary after the administrative record is produced, and whether disinterment and production of remains for independent DNA testing can appropriately be required as part of discovery in this case.

8. **Have the parties discussed the desirability of filing a proposed order pursuant to Federal Rule of Evidence 502?** If discovery proceeds, it is not clear whether privileged information will become at issue. The parties will further discuss this matter, if necessary, in light of whether discovery proceeds and any discovery requests that are exchanged.

9. **Have the parties discussed mediation?** The parties have discussed mediation and do not believe that it would be helpful at this point.

ALTERNATIVE SCHEDULING RECOMMENDATIONS

As noted in the parties' joint filing on January 18, 2018, the parties agree regarding the portion of the scheduling order regarding briefing of Defendants' Renewed Motion to Dismiss, but otherwise cannot reach agreement regarding the proposed schedule. *See* ECF No. 21. The agreed portion of the schedule is as follows:

Defendants' Motion to Dismiss the First Amended Complaint	March 2, 2018
Plaintiffs' Opposition to Defendants' Motion to Dismiss	March 23, 2018
Defendants' Reply in Support of its Motion to Dismiss	April 4, 2018

The parties' respective positions regarding the remainder of a proposed schedule are set forth below:

I. PLAINTIFFS' SCHEDULING RECOMMENDATIONS

Plaintiffs propose the following schedule:

A. MOTIONS FOR LEAVE TO AMEND PLEADINGS.

The deadline for Plaintiff(s) to file a motion seeking leave to amend pleadings; or to join parties is March 30, 2019.

The deadline for Defendant(s) to file a motion (1) to designate responsible third parties, pursuant to Texas Civil Practices & Remedies Code § 33.004(a); (2) seeking leave to amend pleadings; or (3) to join parties is April 16, 2019.

B. EXPERTS

All parties asserting claims for relief shall file their designation of testifying experts and serve on all parties, but not file, the materials required by Fed. R. Civ. P. 26(a)(2)(B) on or before April 30, 2019.

Parties resisting claims for relief shall file their designation of testifying experts and serve on all parties, but not file, the materials required by Fed. R. Civ. P. 26(a)(2)(B) on or before May 30, 2019.

All parties shall file all designations of rebuttal experts and serve on all parties the material required by Fed. R. of Civ. P. 26(a)(2)(B) for such rebuttal experts, to the extent not already served, within fifteen (15) days of receipt of the report of the opposing expert.

An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within eleven (11) days from the receipt of the written

report of the expert's proposed testimony, or within eleven (11) days from obtaining a copy of the expert's deposition, if a deposition is taken, whichever is later.

The deadline for filing supplemental reports required under Fed. R. Civ. P. 26(e) is June 30, 2019.

C. **WITNESS LIST, EXHIBIT LIST, AND PRETRIAL DISCLOSURES**

The deadline for filing Rule 26(a)(3) disclosures is at least 45 days before the scheduled trial date.

The deadline for filing objections under Rule (26)(a)(3) is at least 30 days before the scheduled trial date. Any objections not made will be deemed waived.

D. **COMPLETION OF DISCOVERY**

Written discovery requests are not timely if they are filed so close to this deadline that under the Federal Rules of Civil Procedure the response would not be due until after the deadline.

The deadline for the completion of all discovery is January 30, 2019.

E. **ALTERNATIVE DISPUTE RESOLUTION (ADR) REPORT**

A report on alternative dispute resolution in compliance with Local Rule CV-88 shall be filed on or before August 30, 2018.

The parties asserting claims for relief shall submit a written offer of settlement to opposing parties on or before June 30, 2018, and each opposing party shall respond, in writing on or before July 15, 2018.

All offers of settlement are to be private, not filed. The parties are ordered to retain the

written offers of settlement and response as the Court will use these in assessing attorneys' fees and costs at the conclusion of the proceedings.

If a settlement is reached, the parties should immediately notify the Court so the case may be removed from the Court's trial docket.

F. **PRETRIAL MOTIONS**

No motion (other than a motion in limine) may be filed after this date except for good cause. The deadline to file motions (including dispositive motions and Daubert motions) is no later than 90 before the case is scheduled for trial. This deadline is also applicable to the filing of any summary judgment motion under Fed. R. Civ. P. 56 and any defense of qualified immunity. Leave of court is automatically given to file motions, responses, and replies not to exceed 30 pages in length. Fed. R. Civ. P. 6(d) does not apply to the time limits set forth in Local Rule CV-7 for responses and replies to motions.

G. **JOINT PRETRIAL ORDER AND MOTION IN LIMINE**

The deadline to file a Final Joint Pretrial Order and any motion in limine is no later than 60 days before the case is scheduled for trial.

All attorneys are responsible for preparing the Final Joint Pretrial Order, which must contain the following:

(1) a short statement identifying the Court's jurisdiction. If there is an unresolved jurisdictional question, state it;

(2) a brief statement of the case, one that the judge could read to the jury panel for an introduction to the facts and parties;

(3) a summary of the remaining claims and defenses of each party; (4) a list of facts all parties have reached agreement upon; (5) a list of contested issues of fact; (6) a list of the legal propositions that are not in dispute;

(7) a list of contested issues of law;

(8) a list of all exhibits expected to be offered. Counsel will make all exhibits available for examination by opposing counsel. All documentary exhibits must be exchanged before the final pre-trial conference. The exhibit list should clearly reflect whether a particular exhibit is objected to or whether there are no objections to the exhibit;

(9) a list of the names and addresses of witnesses who may be called with a brief statement of the nature of their testimony;

(10) an estimate of the length of trial;

(11) for a jury trial, include (a) proposed questions for the voir dire examination, and (b) a proposed charge, including instructions, definitions, and special interrogatories, with authority;

(12) for a nonjury trial, include (a) proposed findings of fact and (b) proposed conclusions of law, with authority;

(13) the signatures of all attorneys; and

(14) a place for the date and the signature of the presiding judge.

H. **FINAL PRETRIAL CONFERENCE**

The Final Pretrial Conference shall be held on [THIS DATE WILL BE COMPLETED BY

THE COURT] ______________________.

Motions in limine, if any, will be heard on this date. Counsel should confer prior to this hearing on any issues raised in a motion in limine or the Joint Pretrial Order. Any party intending to use a demonstrative exhibit should provide the same to opposing counsel at least 3 days prior to the Final Pretrial conference so that if any objections or issues are raised about the demonstrative exhibit, they can be addressed at the final pretrial conference.

I. TRIAL

Plaintiffs request that the Trial Date be set no earlier than August 30, 2019.

Plaintiffs' proposal attempts to follow the general guidelines provided by the Court. Plaintiffs have requested approximately a year for discovery for several reasons. First, there are seven Plaintiffs involved in this case. Second, the remains at issue are located in the Philippines and exhumation will be required in all but perhaps one instance. Third, even when ordered to do so, delays are expected in obtaining access to the remains in question due to the number of agencies and individuals involved in the DNA testing and other medical examinations that will be used in this case, which will necessitate more time for discovery as we wait for results. Finally, Plaintiffs are attempting to give Defendants an adequate amount of time to produce the discovery that will be requested. If Defendants are agreeable to producing discovery on an expedited schedule, then a year of discovery may not be necessary. If the Court would like further briefing on why this extended discovery deadline is necessary, Plaintiffs can present further evidence.

Plaintiffs contend that Defendants' proposed scheduling recommendations are a broad and premature attempt to limit the scope of judicial review of the constitutionality and legality of

Defendants' actions and/or inaction. Defendants' scheduling recommendations are based on the resolution of their forthcoming motion to dismiss. This is improper because the Court very well may need to postpone ruling on the motion to dismiss because there are potentially fact issues intertwined with the jurisdictional issues in the case. Additionally, Defendants' incorrectly assume that the Court has already limited its review to that authorized under the APA. Their assumption is unfounded because Plaintiffs' suit is not only a challenge to an agencies' adjudication under the APA. There are multiple other claims including the constitutionality of Defendants' actions and/or inaction. A direct constitutional challenge is available independent of the APA. While Plaintiffs' APA cause of action could arguably be limited to the administrative record, none of their other causes of action are not subject to such limitations. Even if this action could only be brought under the APA, there are several recognized exceptions to the administrative record rule that are applicable in this case.

II. DEFENDANTS' SCHEDULING RECOMMENDATIONS

Defendants propose the following schedule that can be adopted now to address how the case will proceed if all claims are not dismissed:

Event	Deadline
Index and Certification of Administrative Record for challenged decisions shall be filed	30 days after disposition of Renewed Motion to Dismiss
Administrative Record for challenged decision shall be produced to Plaintiffs	30 days after disposition of Renewed Motion to Dismiss
Motion to Supplement Administrative Record or Conduct Discovery (if any)	30 days after production of Administrative Record
Plaintiffs' Motion for Summary Judgment	120 days after production of Administrative Record
Joint Appendix of Relevant Excerpts from Administrative Record	30 days after Plaintiffs' Motion for Summary Judgement
Defendants' Consolidated Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment	30 days after Plaintiffs' Motion for Summary Judgment
Plaintiffs' Consolidated Reply on Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment	21 days after Defendants' Consolidated Opposition and Cross-Motion
Defendants' Reply in Support of Cross-Motion for Summary Judgment	21 days after Plaintiffs' Consolidated Reply and Opposition

Defendants' proposal is designed to efficiently resolve any claims that remain after disposition of the renewed motion to dismiss. As discussed above, Plaintiffs' claims should be resolved on the basis of the record that was before the agency at the time of any challenged decision, and supplemented with additional information only if certain narrow criteria are met. The mere assertion of a constitutional claim or a claim under the Religious Freedom Restoration Act does not fundamentally change that basis for judicial review. By contrast, Plaintiffs' proposed schedule presumes that there are numerous necessary facts that are outside the record, and that the case is likely to be resolved at trial. But that is not in accord with applicable law on how this case should be reviewed, and also disregards the summary judgment process. Moreover, this case will almost certainly turn on disputes of law rather than disputes of fact, making summary judgment by far the likeliest means of disposition.

Defendants oppose a lengthy, unlimited discovery period which will only serve to delay resolution of the case and unduly burden Defendants. Discovery should only be permitted upon the requisite showing of necessity under the law after the administrative record is compiled. Accordingly, Defendants have included a proposed deadline for any motion to supplement the record or demand for discovery after the administrative record is produced. If the case is not dismissed, summary judgment briefing should proceed as soon as feasible after any issues about supplementing the record with specific documents or discovery are resolved.

For the Court's convenience, Defendants have proposed that, parallel to the practice in the U.S. District Court for the District of Columbia, the full administrative record be produced to the Plaintiffs and an index and certification of the administrative record be filed on the docket. This serves judicial economy by not burdening the court with the entire administrative record when the parties may later determine that only a small portion of it is relevant to the parties' dispositive briefing. The parties would file a joint appendix of relevant portions of the administrative record in conjunction with summary judgment briefing.

Finally, Defendants propose staggered summary judgment briefing that consolidates the parties' motion and cross-motion, as this provides a more practical way to engage the legal issues than simultaneous briefs, which are frequently less responsive to the other side's arguments.

CONCLUSION

The parties respectfully request entry of a scheduling order and have attached alternative orders for the Court's convenience.

Dated: February 2, 2018

/s/ John T. Smithee, Jr.
JOHN T. SMITHEE, JR. (admitted pro hac vice)
TX State Bar No. 24098449
TN State Bar No. 36211
LAW OFFICE OF JOHN TRUE SMITHEE, JR.
1600 McGavock St.
Suite 214
Nashville, TN 37203
(806) 206-6364
jts@smitheelaw.com

GENDRY & SPRAGUE, PC
/s/ Ron A. Sprague
RON A. SPRAGUE
TX State Bar No. 18962100
Gendry & Sprague, PC
900 Isom Road, Suite 300
San Antonio, TX 78216
Rsprague@gendrysprague.com
(210) 349-0511

Counsel for Plaintiffs

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JOHN F. BASH
United States Attorney

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

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 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:

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

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

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