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

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF REMAINS, OR IN THE ALTERNATIVE, FOR PHYSICAL EXAMINATION

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INTRODUCTION

The Court should reject Plaintiffs' effort to secure through discovery much of the ultimate relief they seek in this case. Plaintiffs ask the Court to compel Defendants to (1) immediately disinter at least 24 sets of remain currently buried at the Manila American Cemetery as discovery, (2) relocate these remains, along with the 13 sets of remains associated with Cabanatuan Common Grave 717 that Defendants are currently processing in Hawaii, to the San Antonio area for Plaintiffs' convenience, and (3) permit Plaintiffs' consultant to perform destructive DNA testing on the remains in the hope that Plaintiffs' deceased relatives can be identified.

The Court should not order disinterment and production for DNA testing here because Plaintiffs have not overcome the presumption against disinterment or justified disturbing dozens of graves as part of a discovery fishing expedition. Moreover, Plaintiffs' request exceeds the scope of discovery under Federal Rules of Civil Procedure 26, 34, and 35. The results of the proposed DNA testing are not relevant to Plaintiffs' claims, which instead turn on the information currently before the agency and Plaintiffs' current legal interests. Nor would forced disinterment and testing be proportional to the needs of the case at this stage of the litigation. Plaintiffs have not established that the physical condition of these remains is "in controversy" as required for a physical examination under Rule 35. And finally, due to the many considerations here, including the interests of the families of the many other service members' remains upon which Plaintiffs seek to conduct destructive testing, the Court should deny Plaintiffs' motion as a matter of discretion.

BACKGROUND[1]

I. Disinterment of Remains from Permanent Overseas Cemeteries

"Overseas military cemeteries were designed as both cemeteries and memorials to American military personnel who paid the ultimate price while serving their country. They are hallowed shrines to service and sacrifice that are a perfect pairing of powerful architecture and pristine grounds keeping, as well as symbols of American values and our willingness as a nation to come to the defense of others." Ex. H, Report to Congress on Issues Related to Disinterment of Remains Buried in Overseas Military Cemeteries at 4 (Sept. 29, 2005) (hereinafter "2005 Report"). Manila American Cemetery, one of these memorials, contains the remains of World War II service members from the Philippines, including thousands of unknown service members who were permanently interred in the early 1950s after the U.S. Department of Defense concluded that no additional identifications could be made. *See* Def.' Mot. for Judgment on Pleadings at 2-3, 9-10, ECF No. 31 (hereinafter, "Defs.' Rule 12(c) Mot.").

Only DoD has authority to order disinterment of remains from these cemeteries. *See* 36 U.S.C. § 2104(4). The limited role Congress provided for families in making determinations about disposition of the remains expired in 1951. *See, e.g.*, Pub. L. No. 80-368 § 8, 61 Stat. 779 (Aug. 5, 1947) (providing structure for family decisions about burial of World War II servicemembers that expired in December 1951). Pursuant to the accounting mission established by Congress, DoD has adopted criteria for disinterment to ensure that respectfully buried service members are not unnecessarily disturbed. Accordingly, disinterments for identification may not be authorized unless DoD concludes that it has the relevant information and "scientific and

[1] For efficiency, Defendants incorporate by reference the factual background set forth in their Motion for Judgment on the Pleadings, and include here only the limited additional elaboration that may be helpful to the Court. *See* Defs.' Rule 12(c) Mot., ECF No. 31.

technological ability and capacity to process the unknown remains for identification within 24 months after the date of disinterment." Ex. D, Directive-type Memorandum (DTM) 16-003 at 3, June 15, 2017; *see also* Ex. G, Deputy Secretary of Defense Memorandum at 2, Apr. 14, 2015 (requiring that DoD have sufficient "capacity to identify the personnel in a timely manner" before disinterring the remains).

The Defense POW/MIA Accounting Agency (DPAA) is responsible for recommending for or against each proposed disinterment, after considering a host of factors from numerous scientific disciplines to assess whether the remains could likely be identified if disinterred. *See* Ex. F, DoD Directive 5110.10, Defense POW/MIA Accounting Agency (Jan. 13, 2017); Ex. E, DPAA Administrative Instruction (AI) 2310.01 § 7. That recommendation is forwarded to the Assistant Secretary of Defense for Manpower and Reserve Affairs for the ultimate decision. *See* DTM-16-003 at 9. If disinterment is approved, the disinterment is scheduled in consultation with the American Battle Monuments Commission (ABMC), which manages Manila American Cemetery. *See* DTM-16-003 at 9-10.

II. Defendants' Identification Process

Congress has given DoD scientific identification authority for the remains of unidentified service members. *See* 10 U.S.C. § 1471(b)(2)(E). For the past conflict accounting program, Congress provided that identification authority rests with the medical examiner assigned to DPAA. *See* 10 U.S.C. 1501(a)(2)(B); *id.* § 1509(b)(2)(C). DoD regulations prohibit delegation of this identification authority to a private entity. *See* DoD Directive 5110.10 § 2(w) ("The DoD's scientific identification authority under Section 1471 of Title 10, U.S.C., is not subject to public-private partnership agreements and will not be included in such agreements.").

The identification of an unaccounted-for service member from World War II is a multi-faceted process. Disinterred remains are honorably escorted to the DPAA Laboratory in Hawaii,

the largest and most diverse skeletal identification laboratory in the world. *See* Ex. A, Declaration of John Byrd ("Byrd Decl.") ¶ 4. The DPAA Laboratory is accredited by the ANSI-ASQ National Accreditation Board's (ANAB) International Standards Program in numerous aspects of forensic science testing, including, but not limited to, the identification and profiling of human remains, the segregation of comingled remains, certain bone procedures, and numerous aspects of odontology. *See id.* ¶ 5 & Subex. 1. At the DPAA Laboratory, a team of anthropologists and odontologists examines the remains in light of the work that DPAA historians have prepared regarding the circumstances of the loss and the circumstances of the recovery of the remains. *See id.* ¶¶ 9-12. DPAA Laboratory personnel select portions of the remains for sampling based on the totality of the circumstances and their experience with which types and portions of bones are more likely to yield usable DNA. *See id.* ¶ 13.

The samples are then sent to the Armed Forces DNA Identification Laboratory (AFDIL) in Dover, Delaware, for testing. *See id.* ¶ 13. AFDIL is accredited under ASCLD-LAB's International Standards Program in DNA testing. *See* Ex. B, Declaration of Timothy McMahon (McMahon Decl.) ¶ 8 & Subex. 1. 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 Sanger sequencing for mitochondrial DNA (mtDNA), and Y-chromosomal Short Tandem Repeat DNA (Y-STR) and autosomal Short Tandem Repeat DNA (auSTR) testing. *See* McMahon Decl. ¶¶ 15-19, 37. Rigorous methods are required for obtaining reliable results from antiquated remains, including processing all specimens in duplicate. *See id.* ¶¶ 27-35. AFDIL's past accounting section has approximately 600 samples in progress at any one time, and the average turn-around-time for processing a sample in duplicate is approximately 85 days. *See id.* ¶¶ 28, 33.

The testing results are reported back to the DPAA Laboratory. *See* McMahon Decl. ¶ 34; Byrd Decl. ¶ 13. The medical examiner assigned to DPAA is responsible for final identifications. *See* DoD Directive 5110.10 § 2(f). The DPAA Laboratory's identification reports receive peer review by independent experts before being finalized. *See* Byrd Decl. ¶ 14.

III. Plaintiffs' Discovery Request

Plaintiffs' Production Request No. 22 demands that Defendants disinter and transfer to the San Antonio area the remains currently interred in 24 graves located in Manila American Cemetery:

- Three individual graves: L-8-113, N-15-19, J-7-20;
- Nine graves associated with Cabanatuan Common Grave 407: A-8-60, A-14-15, B-5-138, B-15-168, D-1-26, D-14-159, H-11-107, N-2-185, N-8-151;
- Eight graves associated with Cabanatuan Common Grave 704: H-8-146, H-10-129, H-10-130, H-11-134, H-11-144, H-11-146, H-11-147, H-12-110;
- Four graves associated with Cabanatuan Common Grave 822: C-12-83, H-7-135, N-6-187, N-13-187.

See Pls.' Mot. ¶ 4, ECF No. 28; Am. Answer ¶ 59, ECF No. 26 (listing the graves). Plaintiffs also demand that Defendants cease processing and transfer to the San Antonio area the remnants of thirteen sets of remains associated with Cabanatuan Common Grave 717 "that have not been returned to their respective next-of-kin." Pls.' Mot. ¶ 4(h); Byrd Decl. ¶ 20.

Plaintiffs ask the Court to give Defendants no more than 60 days to produce the remains, and then propose to complete DNA testing within 45 days. *See* Pls.' Mot. ¶ 33. They have retained Jon Davoren, of Bode Cellmark Forensics, to perform unspecified DNA testing on the remains. *See id.* ¶ 35; Declaration of Jon Davoren ("Davoren Decl.") ¶¶ 2, 7, ECF No. 28-4. In performing the testing, Plaintiffs' consultant would select and remove samples, including whole teeth and portions of bone, then grind them into powder and attempt to extract usable DNA from the samples. *See, e.g.*, Ex. J, Davoren, et al., Highly Effective DNA Extraction Method for Nuclear Short Tandem Repeat Testing of Skeletal Remains from Mass Graves, 48 Croat. Med. J. 478, 480 (2007) ("Davoren Article").

Defendants objected to Production Request No. 22 on numerous grounds on March 21, 2018. *See* Ex. A, Defs.' Response to Pls.' First Request for Production, Mar. 21, 2018. Defendants identified numerous grounds for declining to comply with Plaintiffs' demand, including (1) that Plaintiffs improperly seek ultimate relief as discovery, (2) that access to the remains is not relevant to Plaintiffs' legal claims, (3) that the request is unreasonable, unduly burdensome, and entirely disproportional to the needs of the case, (4) that Plaintiffs cannot be relied up to steward the remains and sensitive personal information of third parties, and (5) that the Court should not intrude on Defendants' express discretionary authority to conduct disinterments and identification of such remains. *See id.* at 46-49.

ARGUMENT

I. Standard of Review

"While the discovery rules are liberally tilted towards production," this "does not, however, permit a plaintiff to 'go fishing.'" *Kean v. Jack Henry & Assocs.*, 577 F. App'x 342, 347 (5th Cir. 2014). The Federal Rules limit discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The Court "*must* limit . . . the extent of discovery" if it determines that "the proposed discovery is outside" this scope. *Id.* 26(b)(2)(C)(iii) (emphasis added). In weighing proportionality, the Court

> consider[s] the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1); *Talley v. Spillar*, No. 16-670, 2017 WL 9288622, at *4 (W.D. Tex. Mar. 31, 2017). When reviewing agency administrative decisions, "district courts must monitor discovery closely" and must especially enforce the proportionality requirement. *Crosby v. La.*

Health Serv. & Indem. Co., 647 F.3d 258, 264 (5th Cir. 2011).

Rule 34 permits a party to request that the opposing party "produce and permit the requesting party . . . to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: . . . any designated tangible things[.]" Fed. R. Civ. P. 34(a)(1)(B). To oppose the request, the party must "state with specificity the grounds for objecting to the request, including the reasons." *Id.* 34(a)(2)(B); *Talley v. Spillar*, No. 16-670, 2017 WL 9288622, at *4 (W.D. Tex. Mar. 31, 2017). Under Rule 37, a party may "move for an order compelling an answer, designation, production, or inspection" if "a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B)(iv). "The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable." *Walters v. Sentry Link, LLC*, No. 16-383, 2018 WL 837611, at *3 (W.D. Tex. Feb. 9, 2018) (citing *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)).[2] "Trial courts are afforded substantial discretion in determining whether to grant or deny a motion to compel discovery." *Escamilla v. United States*, No. 14-246, 2015 WL 12732889, at *2 (W.D. Tex. Apr. 13, 2015).

Rule 35 applies where a person's "mental or physical condition—including blood group—is in controversy," and permits the Court to order the party "to produce for examination a person who is in its custody or under its legal control" for "a physical or mental examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). Such an order "may be made only on motion for good cause." *Id.* 35(a)(2)(A); *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009).

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

II. Plaintiffs Have Failed to Overcome the Presumption Against Disinterment

Because Plaintiffs' demanded discovery involves disinterment of long-buried remains, they must meet a heightened standard. *See, e.g.*, *Brewer v. Am. Medical Alert Corp.*, No. 1:08-0069, 2010 WL 280986, at *2 (M.D. Tenn. Jan. 20, 2010) (holding that a discovery showing "must be supplemented where the body must first be disinterred"). "Disinterment is not a right." 22A Am. Jur. 2d Dead Bodies § 50. Upon burial, "the [family's] 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). Courts, in exercising their discretion,[3] apply "a well-established presumption against removing the remains of a deceased person, *i.e.*, against disturbing 'the repose of the dead,'" which is "found throughout disinterment jurisprudence." *Maffei v. Woodlawn Mem'l Park*, 29 Cal. Rptr. 3d 679, 684 (Cal. Ct. App. June 10, 2005). "The normal treatment of a corpse, once it is decently buried is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a 'right' of the dead and charge on the [living]." *Id.* (quoting 21 A.L.R.2d 472, Removal and Reinstatement of Remains, § 2); *see also Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936) ("[A] body once suitably buried ought to remain undisturbed except for necessary or laudable reasons.").[4]

[3] The Fifth Circuit has "assume[d] that . . . for the promotion of the truth in private litigation such as this a court may lawfully order" "a disinterment for the purpose of an autopsy in the interest of public justice." *Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936). Assuming this is correct, even an inherent power of the courts "must be exercised with restraint and discretion" because such inherent power "springs from the well of necessity and sparingly so." *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406-07 (5th Cir. 1993).

[4] *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

Thus Plaintiffs must overcome this heavy presumption when seeking access to buried remains through discovery. *See, e.g., Federal Procedure, Lawyers Ed.* § 26.569 (Feb. 2018 Update) ("Under certain circumstances, even dead bodies are subject to production under Rule 34, although exhumation is not favored in the law."). Plaintiffs acknowledge that they must show that justice requires production of the remains. *See* Pls.' Mot. ¶¶ 11, 13. *See Brewer v. Am. Medical Alert Corp.*, No. 1:08-0069, 2010 WL 280986, at * (M.D. Tenn. Jan. 20, 2010) ("[T]he right to have a dead body remain unmolested is not an absolute one; it must yield . . . where the demands of justice require such subordination."); *Labiche v. Certain Ins. Cos. or Underwriters at Lloyds, London*, 196 F. Supp. 2d 102, 104-05 (E.D. La. 1961) ("Respect for the body of the dead is part of our culture which militates against granting motions of this kind . . . . [unless] the interests of justice appear to require it[.]"). And where parties, as here, seek disinterment for evidentiary purposes, judicial approval "requires a strong showing that the facts sought will be established by an exhumation or autopsy." 25A C.J.S., Dead Bodies § 29. Plaintiffs must make "a showing of . . . urgent necessity and [] a strong showing that the examination or autopsy will establish the facts sought." *Stephens v. Nat'l Gypsum Co.*, 685 F. Supp. 847, 847-48 (M.D. Ga. 1988) (cited in Pls.' Mot. ¶ 10). *See also* 22A Am. Jur. 2d, Dead Bodies § 53 ("There must be a showing based upon strong or clear and convincing evidence that the autopsy or examination requested will, in all probability, disclose the information sought."); 25A C.J.S., Dead Bodies § 29 ("The law will not reach into the grave in search of the facts except in the rarest of cases and not even then unless it is clearly necessary[.]").

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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").

A. Plaintiffs Have Not Shown Urgent Necessity or That Justice Requires Disinterment and Testing

Plaintiffs assert that DNA testing is "necessary, as there is no other way to obtain the information sought," and purportedly urgent "so that the remains can be tested in the best condition possible and do not continue to deteriorate." Pls.' Mot. ¶¶ 14, 31. But Plaintiffs cannot create necessity merely by seeking the information. Instead, they must show that the information is essential to their claims. It clearly is not because, as discussed below, the DNA testing Plaintiffs seek is not relevant to their claims because those claims turn on the currently available information, not the results of future testing. *See infra* Arg. § III.A. Nor can Plaintiffs show urgency because they do not establish that any meaningful deterioration will occur during the pendency of this lawsuit. To the contrary, it is reasonable to expect that the deterioration that occurred prior to burial of the remains at Manila American Cemetery around 1952 and any deterioration that has occurred during the more than 60 years that have elapsed since that time will account for the difficulties in securing meaningful test results.

Accordingly, Plaintiffs cannot show that justice requires disinterment as discovery here. Rather, Plaintiffs seek disinterment as a shortcut, an alternative to proving their legal claims. *See, e.g.*, Pls.' Mot. ¶ 16 (claiming that testing would allow Plaintiffs to avoid "spending even more countless hours and resources reviewing case files"). As discussed below, this demanded relief is at the very least premature, if ever justified. *See infra*, Arg. § III.B.1. To the extent Plaintiffs can show they are entitled to prevail on their legal claims, then *at that point* the Court could consider whether disinterment is the sort of relief that justice requires.

Moreover, every disinterment case cited by Plaintiffs involved remains that had been identified before burial, and Plaintiffs cite no case where a court found the necessity or interests of justice standards satisfied for the disinterment of long-buried unidentified remains. It is more

challenging to weigh the competing interests of living persons when it is unclear precisely which persons have a stake in the result. Plaintiffs, certainly, are not entitled to presume that they are next of kin to any or all of these unidentified remains. *See* Pls.' Mot. ¶¶ 29, 36.

B. Plaintiffs Have Not Made a Strong Showing that Examination Will Establish the Facts Sought

Plaintiffs pay only lip service to the requirement of a strong showing that DNA testing will result in identification of the remains. *See* Pls.' Mot. ¶ 14 (asserting without explanation that two declarations "show that the examination and testing will establish the facts sought" and that "[w]hatever the results of the examinations are, certain facts in this case will be established conclusively"). Indeed, Plaintiffs have made no showing at all. Plaintiffs' retained consultant, Jon Davoren, asserts simply that "[i]f adequate DNA samples are obtained, the [proposed] testing will likely assist in the identification of the deceased service members' remains." Davoren Decl. ¶ 7, ECF No. 28-4.[5] Plaintiffs' counsel adds in his own declaration that "I have been informed that it is likely that adequate DNA samples will be able to be extracted from the remains." Smithee Decl. ¶ 4, ECF No. 28-3. Plaintiffs' speculation falls far short of the required showing.

In *Brewer*, for example, a district court refused to permit disinterment where the movant "offer[ed] mere conjecture as to the chances that [the] body was well preserved" enough three years after the burial for "an autopsy [to] establish the facts sought." 2010 WL 280986, at *3. Only after the movant subsequently provided an expert opinion based on specific facts did the

[5] *See, e.g.*, *United States ex rel. Univ. Loft Co. v. AGS Enterprises, Inc.*, No. 14-528, 2016 WL 9462335, at *8 (W.D. Tex. June 29, 2016) (denying motion to compel where movant made only "conclusory" statement of its need for the information); *West v. Phelps Dodge Refining Corp.*, No. 07-197, 2009 WL 10699997, at *2, *17 (W.D. Tex. Jan. 27, 2009) (excluding portions of declarations in support of motion for class certification that lacked personal knowledge and were inadmissible hearsay under Federal Rules of Evidence 601 and 802).

court conclude that a strong showing had been made. *Id.* at *3-6. Here, Plaintiffs have not established that (1) each of their relatives are likely to be among the remains subject to the disinterment request, (2) adequate DNA samples are likely to be extracted from the remains, (3) Plaintiffs' consultant has the capability and experience to prepare those DNA samples in such a way that the DNA testing is likely to produce meaningful results, and (4) that the results will be sufficient to establish the identity of the relevant service members.

As discussed in Defendants' motion for judgment on the pleadings, some of the graves Plaintiffs have identified are unlikely to contain their relatives' remains. *See, e.g.*, Defs.' Rule 12(c) Mot. at 13-14 (explaining facts making it unlikely that the graves Plaintiffs selected contain either Brigadier General Guy Fort or First Lieutenant Alexander Nininger). Even for the Camp Cabanatuan common graves, for which records suggest may have contained Plaintiffs' relatives, those records have repeatedly proven insufficient to be sure that any specific set of remains will be found among those associated with that grave and buried as unknowns. *See id.* at 9-11; *see also* Am. Answer Ex. 53, Misidentification Memorandum, Jan. 17, 2017 (showing that, for example, the relevant remains could have inadvertently been sent to the United States for burial, in whole or in part based on a misidentification in the 1940s). Cf. *Harris v. Athol-Royalston Regional School Dist. Committee*, 206 F.R.D. 30, 35 (D. Mass. 2002) (declining to permit destructive DNA testing because it "is an extreme discovery tool which is very intrusive to the targets of such discovery" and the movant had established "no direct connection linking" the material to be tested to the relevant person, but relied on "pure speculation" making the discovery request "nothing more than a 'fishing expedition'.").

Moreover, extracting usable DNA from each set of such aged and degraded remains has proven challenging, and is far from certain. *See* McMahon Decl. ¶¶ 13, 36-39; Byrd Decl. ¶¶ 15-

17. Plaintiffs' consultant has not identified either the types of DNA tests that he plans to perform or the methods by which he will amplify the extracted DNA to secure better results. *See* Davoren Decl. ¶ 7 (referring generically to "postmortem DNA extraction and testing"); *see also* 1 McCormick on Evidence § 205(B) (7th ed.) (June 2016 Update) (discussing types of DNA testing and procedures used to enhance results). Nor has Plaintiffs' consultant demonstrated that he or his firm has the necessary skill and experience to quickly and reliably perform this particular work. *See* Davoren Decl. ¶¶ 4-5 (relying primarily on the firm's experience with DNA testing associated with recent remains). While the consultant states that "[i]n the past, Bode has developed DNA profiles from the unknown remains of a service member that was killed during World War II," *id.* ¶ 5, a single success story is not sufficient to make the "strong showing" required to justify forced disinterment. Nor have Plaintiffs established that DNA testing alone would be sufficient to "establish the facts sought"—namely, the identification of the remains. Defendants' identification of service members remains depends on many different strands of information, of which DNA testing provides only one piece. *See* Byrd Decl. ¶¶ 9-14. Plaintiffs' consultant, however, is accredited only in DNA testing, not anthropology or other disciplines relevant to the comprehensive identification effort. *See* Exhibit I, ASCLD-LAB International Program, Scope of Accreditation for Bode Cellmark Forensics, Inc. (Apr. 17, 2017) (link). Not least, Plaintiffs have not established that they are prepared to expend the financial resources necessary to test hundreds of bones from the 37 sets of remains. *Cf.* Am. Answer ¶ 49 (noting that AFDIL had conducted more than 350 tests on samples from 13 remains associated with a single common grave).

In sum, Plaintiffs fall far short of the strong showing that this is one of the "rarest of cases" justifying "reach[ing] into the grave in search of the facts." 25A C.J.S., Dead Bodies §

29. The Court should enforce the presumption against forced disinterment so that "bod[ies] once suitably buried [may] remain undisturbed." *Travelers Ins. Co.*, 82 F.2d at 801.

III. Plaintiffs Have Exceeded Rule 26(b)(1)'s Limitations on Discovery

A. Disinterment and Testing Would Reveal Nothing Relevant to Plaintiffs' Claims

Plaintiffs also have not established that the disinterments they seek through discovery would be relevant to their legal claims. And here, where Defendants have moved for judgment on the pleadings under Rule 12(c), the Court should not permit unnecessary and burdensome discovery for claims that are subject to dismissal. *See, e.g.*, *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (noting that Rule 12(c) applies where "a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts"); *Grost v. United States*, No. 13-158, 2014 WL 1783947, at *4 (W.D. Tex. May 5, 2014) ("Plaintiff's contention that the Court should deny the [Rule 12(c)] Motion because she is entitled to conduct discovery is without merit."); *Black v. Option One Mortgage Corp.*, No. 07-151, 2007 WL 9706419, at *5-6 (W.D. Tex. Nov. 26, 2007) (noting that a motion for judgment on the pleadings that raises "a purely legal argument" is one "for which no discovery would appear to be required and no delay would appear to be justified").

The Court must limit the scope of discovery if it seeks irrelevant documents or tangible things. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). Indeed, the Fifth Circuit has squarely held that irrelevant discovery should be rejected. *See In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) ("The district court . . . [improperly] ordered discovery as to information which was completely irrelevant to the case before it[.]"). Similarly, the Fifth Circuit upheld a district court decision declining to order discovery of agency "orders and policies" because that information "w[as] not relevant to [defendant's] motion for summary judgment or the issue of his qualified immunity."

McCreary v. Richardson, 738 F.3d 651, 654-55 (5th Cir. 2013).

As an initial matter, Plaintiffs' discovery demands are not relevant because Plaintiffs' challenge agency action or inaction should be resolved exclusively on the basis of an 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). Any discovery outside the administrative record is irrelevant and should not be permitted. *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). Plaintiffs seek to discover information that was not and is not before the agency decisionmakers, and thus cannot be relevant.

But even if one or more claims were not limited to an administrative record, the information sought is not relevant for similar reasons. Plaintiffs argue that "disinterment and testing will reveal essential facts that are in dispute," namely "whether the remains at issue are who the Families allege they are." Pls.' Mot. at 6. But the "dispute between the parties" is not about the remains' ultimate "identity," *id.* at 11, but instead whether the facts currently before the agency and the Court are sufficient to require the agency to take any specific action. *See Graber v. City & Cnty. of Denver*, No. 09-1029, 2011 WL 3157038, at *2 (D. Colo. July 27, 2011) ("The issues Plaintiff will need to prove if he is to prevail . . . frame the scope of discovery."). Each of Plaintiffs' legal claims must be decided on the basis of the information available *at the time* of the decisions they challenge and the *current* status of their legal interests. *See, e.g., Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) (Administrative Procedure Act

determination is made "solely on the basis of the agency's stated rationale at the time of its decision."); *Soncy Road Property, Ltd. v. Chapman*, 259 F. Supp. 2d 522, 529 (N.D. Tex. 2003) ("The 14th Amendment protects only property interests a person has already acquired as opposed to those in which it had an expectancy."). Because Plaintiffs cannot have a property interest in unidentified remains, *see* Defs.' Rule 12(c) Mot. at 19-20, what they are attempting to do through discovery is to alter the very legal interests upon which they base their claims. Their theory is that forced disinterment and testing could give rise to the legal interest they currently lack. But seeking to alter the facts before the agency is not a matter of relevant discovery but instead an improper fishing expedition and, as discussed below, an improper attempt to gain ultimate relief. Plaintiffs' motion to compel must be denied.

B. Disinterment and Testing of Remains is Not Proportional to the Needs of the Case

"Rule 26(b) has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." *Crosby*, 647 F.3d at 264. The 2015 amendments to the Federal Rules of Civil Procedure emphasized that discovery must not be permitted where it is not "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); *id.* (b)(2)(C)(iii); *Curtis v. Metro. Life Ins. Co.*, No. 3:15-2328, 2016 WL 687164, at *2-3 (N.D. Tex. Feb. 19, 2016). The disinterments and testing Plaintiffs seek here are not proportional for several reasons.

1. Plaintiffs Inappropriately Seek Ultimate Relief in the Guise of Discovery

First, it is "anything but appropriate" for discovery requests to seek "all the disclosure to which [plaintiffs] would be entitled in the event they prevail on the merits." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 388 (2004). In Freedom of Information Act cases, for example:

> [b]ecause . . . plaintiff's entitlement to access to documents is the ultimate issue, discovery requests in these cases threaten to "turn FOIA on its head, awarding . . .

> [plaintiff] in discovery the very remedy for which it seeks to prevail in the suit. The courts must not grant FOIA plaintiffs discovery that would be 'tantamount to granting the final relief sought.'" *Tax Analysts v. IRS*, 410 F.3d 715, 722 (D.C. Cir. 2005) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 734 (D.C. Cir. 1981)).

Freedom Watch v. Bureau of Land Mgmt., 220 F. Supp. 3d 65, 68 (D.D.C. 2016). A plaintiff "must prevail in the case before he can see that information." *Shehadeh v. FBI*, No. 10-3306, 2011 WL 2909202, at *3 (C.D. Ill. July 18, 2011) (agreeing that a plaintiff "cannot use subpoenas or other discovery to disclose the substance of the withheld documents" where "the ultimate issue in the case is whether the substance of those documents are exempt from disclosure"). Dispositive motions, not discovery motions, are the only appropriate basis for seeking ultimate relief. *See Nored v. Cuoco*, No. 17-134, 2017 WL 2537292, at *2 (S.D. Ohio June 12, 2017) ("To the extent that the motion appears to seek the ultimate relief sought by Plaintiff in the underlying complaint, such relief may not be granted by motion, other than through the filing of a dispositive motion[.]").[6]

Similarly here, Plaintiffs are seeking ultimate relief through discovery. Plaintiffs' claims boil down to whether any legal authority permits Plaintiffs to force Defendants to disinter unidentified remains on Plaintiffs' timetable and to prioritize identification of those specific remains over Defendants' other accounting efforts. While Plaintiffs attempt to shift the focus by claiming that "[t]he ultimate relief sought by the Families is to properly bury the remains of their

[6] *See also Holt v. U.S. Bank N.A.*, No. 12-463, 2012 WL 1898893, at *1 (D. Nev. May 23, 2012) (rejecting motion that "appear[red] to be nothing more than an attempt by Plaintiff to obtain the ultimate relief requested in his complaint without affording Defendant the opportunity to challenge or contest the allegations"); *Bolger v. Dist. of Columbia*, 510 F. Supp. 2d 86, 96 (D.D.C. 2007) ("Plaintiffs' desire for a full accounting of what was done with any records that actually existed does not require the Court to permit discovery that . . . approximates the ultimate relief plaintiffs seek."); *cf. Disability Law Cntr. v. Discovery Academy*, No. 07-511, 2010 WL 55989, at *6 (D. Utah Jan. 5, 2010) (noting but not reaching issue "whether [a Rule 34] request can be used to obtain through discovery the ultimate relief being sought by the Complaint").

family members," Pls.' Mot. to Compel at 9, ECF No. 28, it is undisputed that the remains at issue are formally designated "unknown" and that Defendants provide families the opportunity to dispose of *identified* remains. *See, e.g.*, Am. Answer ¶ 49 & Subexs. 50-52. Thus, it is clear that the core relief Plaintiffs seek is disinterment and DNA testing of the remains. Indeed, they ask the Court, pursuant to the Mandamus Act, to:

> e. Issue an order, pursuant to 28 U.S.C. § 1361, directing Defendants to (1) promptly disinter and recover the remains at issue and (2) return the remains at issue to each respective Plaintiff for purposes of burial.
>
> f. Alternatively, if the Court finds that the remains at issue have not already been identified, issue an order, pursuant to 28 U.S.C. § 1361, directing Defendants to promptly disinter for identification the remains at issue and to use all available resources and capabilities in doing so.

1st Am. Compl., Prayer for Relief, ECF No. 19. Likewise, disinterment and DNA testing are an inherent part of the relief they seek under other statutory and constitutional grounds. *See, e.g.*, *id.* ¶¶ 69, 75, 100, 105, 127, 130, 132, 137. The Court should not permit Plaintiffs to do an end-run around the entire litigation process through misuse of the discovery tools, especially where a dispositive motion is pending, the burden on Defendants of the discovery sought is so high, and the impact on third-parties is so significant. It would be highly prejudicial and extraordinary to permit Plaintiffs to secure through discovery the very relief which Defendants have demonstrated they are not entitled to under other statutory or constitutional standards.

2. Forced Disinterment for Private Testing Would Be an Inappropriate Intrusion on Third-Party Interests and Military Responsibility

Another deep flaw with Plaintiffs' discovery demands is that they seek a speedier resolution of their own interests at the expense of dozens of other families and the military's responsibility to ensure respect for deceased servicemembers generally. Those countervailing interests are entitled to substantial consideration, and should be dispositive here.

The DoD is charged with ensuring the respectful handling of the remains of service

members. For this reason, DoD has implemented appropriate policies to ensure only those remains that are likely to be identified are exhumed. *See, e.g.*, Deputy Secretary of Defense Memo., Apr. 14, 2015, ECF No. 31-1 (requiring that DoD have sufficient "capacity to identify the personnel in a timely manner" before disinterring the remains); *see also* 2005 Report at 4. The forced disinterment of remains that are do not meet DoD's disinterment standards—such as those from Cabanatuan Common Grave 407, for which there is only one family reference sample for nine anticipated remains, *see* Am. Answer ¶¶ 42-43, or X-1130, for which historical evidence weighs against association with Plaintiffs' relative and no other likely candidate is known, *see id.* ¶ 19—would severely undercut the military's performance of this duty.

Congress assigned the mission of accounting for unidentified service members to DoD and DPAA. *See* 10 U.S.C. §§ 1501, 1509. While Congress encouraged private partnerships to assist in that mission, *see, e.g.*, *id.* § 1501a, Congress made no provision for placing any portion of the accounting mission under private control, especially identification authority. *See* 10 U.S.C. § 1471(b)(2)(E); *id.* § 1501(a)(2)(B); *id.* § 1509(b)(2)(C); *see also* DoD Directive 5110.10 § 2(w) (prohibiting delegation of DoD's identification authority to a private entity). Allowing Plaintiffs to transfer these remains to the San Antonio area and take control of DNA testing these remains would interfere with DoD's important mission. Contrary to Plaintiffs' assumption, see Pls.' Mot. ¶ 16, Defendants may not be able to simply accept testing results procured by Plaintiffs' consultant, given DoD's identification responsibilities and its rigorous protocols. *See* McMahon Decl. ¶¶ 27-35. And it is possible that Plaintiffs' consultant would destroy portions of the remains without producing usable results or the same level of results that AFDIL could obtain. Moreover, as previously discussed, DNA testing is merely one piece of the identification effort. A reliable identification depends on the work of historians, anthropologists,

odontologists and others, which is beyond the expertise of Plaintiffs' consultant. *See* Byrd Decl. ¶¶ 9-14; *see also* Exhibit I. Displacement of the remains to the San Antonio area would make it significantly more difficult for DPAA to engage in this comprehensive effort.

Plaintiffs are also not in a position to be sufficiently protective of the interests of the other families whose relatives are among the remains at issue here. To support the DNA testing at issue here, Plaintiffs demand access to the personal information of these families. *See* Pls.' First Request for Production, Request Nos. 16, 17, ECF No. 28-1 (demanding family DNA and genealogies in Defendants' possession). But this information was provided to Defendants under the assurance that it would not be shared and is protected by the Privacy Act and HIPAA. *See* McMahon Decl. ¶ 26 & Subex. 5. Even if this information could be shared with Plaintiffs, they have not justified their need or right to access the confidential information, including genetic information, of numerous third parties. Plaintiffs also seek control over selection of which bones or teeth to sample and which tests to perform.[7] Because each sample will be ground into powder and destroyed by the testing process, *see* McMahon Decl. ¶ 29; Davoren Article at 480, Plaintiffs are requesting authority to destroy a portion of the remains of service members to whom Plaintiffs are not related. Not only would this limit DPAA's options in its own testing and examination of the remains, but also the DPAA Laboratory and its predecessors have never given private individuals the freedom to conduct destructive testing on remains in DoD custody and considers it to be a perversion of the Government's duty to the service members and their families. *See* Byrd Decl. ¶¶ 23-26. And Plaintiffs lack the incentives to ensure that this

[7] "There is no single method of DNA typing. As with conventional immunogenetic testing, the probative value of the laboratory findings depends on the procedure employed, the quality of the laboratory work, and the genetic characteristics that are discerned." 1 McCormick on Evid. § 205 (7th ed.) (June 2016 Update); *see also id.* (describing process for mitochondrial DNA testing and short tandem repeat DNA testing).

complex, expensive, and time-consuming project is conducted in the manner most protective of the interests of all families who may have a stake in the results.[8]

3. Plaintiffs' Proposal Would Impose Significant Burden and Expense That Is Not Outweighed by Litigation Benefit

Courts are also directed to consider "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Plaintiffs' demands would impose substantial and unjustified costs on the government. Not only would compliance delay and disrupt Defendants' current efforts, *see* Byrd Decl. ¶¶ 23-26, but also Defendants would immediately bear significant financial expenses: the disinterments themselves, shipment of the remains, providing an escort to ensure dignified transfer of the remains, ABMC's restoration of the dozens of plot areas, securing and equipping a facility in the San Antonio area for proper treatment of the remains, and monitoring Plaintiffs' access to the remains. *See, e.g.*, 2005 Report at 4. Moreover, it also appears that Plaintiffs hope to shift the entire cost of DNA testing by their consultant onto the Government. *See* 1st Am. Compl., Prayer for Relief ¶ o (seeking "an order directing Defendants to reimburse Plaintiffs for all expenses incident to the recovery, care, and disposition of the remains at issue as provided by 10 U.S.C. § 1482"). This would be an unwarranted interpretation of the statute, *see* Defs.' Mot. to Dismiss at 30, ECF No. 7, but to the extent this is what Plaintiffs are seeking, it must be considered as part of the prejudicial and unjustified burden on Defendants for this unnecessary "discovery."

[8] Plaintiffs err in suggesting that DPAA's recommendation for disinterring and processing of some of these remains, supports their motion. *See* Pls.' Mot. ¶ 15. That recommendation has not yet been adopted by the relevant decisionmaker. *See* Am. Answer ¶¶ 35, 39. Regardless, it is entirely different for DoD, pursuant to its Congressionally assigned mission, its rigorous protocols, and its sacred duty to conduct disinterments and DNA testing as part of a larger identification effort. Plaintiffs, with their inevitable narrower interests simply cannot appropriately balance all of the relevant considerations.

These expenses and burdens are not counterbalanced by significant litigation benefits. Plaintiffs assert blandly that "[i]nstead of spending even more countless hours and resources reviewing case files, the essential facts in dispute can be resolved in a matter of weeks with a reliable DNA test." Pls.' Mot. ¶ 16. But, as explained above, Plaintiffs' case turns on showing what the DPAA must do in light of the evidence in those case files, not on the results of future DNA tests. *See supra*, Arg. § III.B. And Plaintiffs have no basis to assume that DNA testing will in fact result in identification—samples must be selected from among hundreds of bones, the investigator must choose among several types of DNA tests based on the circumstances, with special protocols due to the degraded circumstances of the remains, and there is no guarantee that there will be reportable results. And Plaintiffs also mistakenly presume that they can get results in less than two months. *See* Pls.' Mot. ¶ 33 ("Once the Remains are produced, the postmortem examination and DNA testing will be completed within forty-five (45) days."); *see also id.* ¶ 17 (claiming that Defendants' "testing capabilities" are inferior and that "DPAA will be unable to conduct the DNA testing of the remains by the time this lawsuit is resolved"). Their expert would find testing of these sort of remains far more complex and time consuming than the modern remains they generally handle. *See* McMahon Decl. ¶¶ 10-19, 36. In short, because DNA testing is irrelevant to the legal issues, and would not provide sure results even if it were relevant, the substantial costs to the Government cannot be justified as discovery.

IV. Plaintiffs Have Failed to Meet the Additional Requirements of Rule 35

In addition to the foregoing grounds for rejecting the requested discovery, under Rule 35 of the Federal Rules of Civil Procedures, it is Plaintiffs' burden to establish both that a person's "mental or physical condition . . . is in controversy" and that there is "good cause" for the examination. Fed. R. Civ. P. 35(a)(1), (a)(2)(A); *Acosta v. Tenneco Oil Co.*, 913 F.3d 205, 208 (5th Cir. 1990). Plaintiffs must make "an affirmative showing . . . that each condition as to

which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964); *see also id.* at 121 ("[P]hysical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule.").

But viewed properly resolution of the claims in this case does not actually put the identity of the unidentified remains "in controversy." This standard requires far more than mere relevance. *See Acosta*, 913 F.2d at 209; *EEOC v. Old Western Furniture Corp.*, 173 F.R.D. 444, 446 (W.D. Tex. 1996). Here, Plaintiffs must show that the information currently before the agency and their own current legal interests entitle them to relief. *See supra*, Arg. § III.A. Accordingly, resolution of their claims do not in fact put the identity of the remains in controversy.

Similarly, the reasons discussed above demonstrating that Plaintiffs have not establihsed relevance, necessity, proportionality, and the interests of justice likewise show that Plaintiffs cannot establish good cause for the disinterment and testing they propose. *See supra*, Arg. §§ II, III. Accordingly, Defendants will not belabor the point here, except to note that Plaintiffs err in suggesting that there is good cause because "the decedent's next of kin are the ones asking for the postmortem DNA testing." Pls.' Mot. ¶ 29. Plaintiffs assume what they have not demonstrated, and even if some of their seven relatives are among the remains, most of the 37 sets of remains on which they seek to perform destructive testing cannot be their relatives.

V. In Any Event, the Court Should Exercise Its Discretion to Deny the Motion to Compel

Even if Plaintiffs could satisfy the threshold discovery standards—and for all the reasons discussed above, they plainly have not—the Court should exercise its "substantial discretion" to deny the motion to compel. *See Escamilla*, 2015 WL 12732889, at *2. Given the unique

circumstances of disinterment, the competing interests involved (including those of third parties), and the intrusion on governmental responsibilities, forced disinterment should not be permitted at this stage of the litigation.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion to compel production of remains, or alternatively for physical examination.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 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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