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' RESPONSE TO PLAINTIFFS' ADVISORY TO THE COURT CONCERNING THE PRODUCTION AND EXAMINATION OF REMAINS

Pursuant to the Court's July 18, 2018 minute order, Defendants, the Defense POW/MIA Accounting Agency (DPAA), the U.S. Department of Defense (DoD), the American Battle Monuments Commission (ABMC), and the heads of those agencies sued in their official capacity (collectively "Defendants"), respond to Plaintiffs' Advisory to the Court Concerning the Production and Examination of Remains, ECF No. 40.

Plaintiffs' proposal should be rejected for at least four reasons. First, the proposal highlights how Plaintiffs improperly seek to entirely displace government functions performed pursuant to statutory authority—decisions regarding disinterment and identification of U.S. servicemembers from prior conflicts, and the processes by which Defendants perform that mission. Defendants are entitled to perform their missions without such disruption. Second, further discovery would be a waste of judicial resources and an abuse of discretion because Defendants are entitled to dismissal of all claims on the basis of their Motion for Judgment on the Pleadings. *See* Defs.' Rule 12(c) Mot., ECF No. 31. Plaintiffs have not only failed to

establish any plausible claim that Defendants are withholding identified remains, but also failed to rebut Defendants' demonstration that each of their claims fails as a matter of law for numerous other reasons. Third, Plaintiffs have not met the standards applicable to disinterment for DNA testing in discovery. *See* Defs.' Opp'n to Mot. to Compel, ECF No. 34. And finally, even if Plaintiffs' Advisory were to be considered, it fails to address several significant concerns identified by the Court.

Accordingly, the Court should deny Plaintiffs' motion to compel disinterment and testing and instead dismiss Plaintiffs' First Amended Complaint with prejudice.

I. Plaintiffs Cannot Justify Their Effort to Displace Defendants' Performance of Government Functions and Their Statutory Responsibilities.

Plaintiffs' Advisory would entirely bypass Defendants' statutory mission and responsibilities and is flatly contrary to law, including by disregarding:

- DPAA's statutory responsibility to locate, recover, and identify missing persons from designated past conflicts, *see* 10 U.S.C. §§ 1501(a), 1509;
- DPAA's authority to select which unaccounted-for servicemembers to prioritize based on historical research, available resources, environmental concerns, and the likelihood of identification, *see* DoD Directive 2310.07; DoD Directive Type Memorandum (DTM)-16-003 (both attached in ECF No. 31-1);
- DoD's authority to determine what thresholds to set for disinterment of unidentified remains to ensure that disinterred remains are more likely than not to be identified, *see* 36 U.S.C. § 2104(4);
- DPAA's expertise in assessing the historical, anthropological, and dental records and other factors, including the availability of DNA family reference samples, in weighing whether those thresholds have been met, *see* DoD Directive 5110.10 (attached in ECF No. 31-1);
- ABMC's responsibility to manage permanent cemeteries like Manila American Cemetery, subject only to DoD's right of access, *see* 36 U.S.C. § 2104;
- The State Department's role through the U.S. Embassy in the Philippines in managing any foreign policy implications of disinterments;
- DoD's process and procedures for disinterring, transporting and safeguarding remains, *see* DoD Directive 1300.22 § 3(c) (attached in ECF No. 31-1); Byrd Decl. ¶¶ 6-8, ECF No. 34-2

- DPAA's expertise in forensic anthropology and odontology pertaining to the identification of missing DoD personnel from past conflicts, *see* Byrd Decl. ¶¶ 4-5, 9-12;
- DPAA's expertise in selection of samples for DNA testing pertaining to the identification of missing DoD personnel from past conflicts, *see id.* ¶ 13;
- The Armed Forces DNA Identification Laboratory's (AFDIL) expertise in processing those samples and extracting DNA pertaining to the identification of missing DoD personnel from past conflicts, *see* McMahon Decl. ¶¶ 5-8, 15-16, 27-30, ECF No. 34-3.
- AFDIL's expertise in analyzing the DNA once extracted pertaining to the identification of missing DoD personnel from past conflicts, *see id.* ¶¶ 10-19, 30-37;
- The Service Casualty Offices' responsibility to notify families and make disposition arrangements, *see* DoD Directive 2310.07 § 2.6.

Most notably, Plaintiffs specifically seek to bypass Defendants' statutory identification authority, 10 U.S.C. § 1471(b)(2)(E); *id.* § 1501(a)(2)(B); *id.* § 1509(b)(2)(C), suggesting that upon completing their DNA analysis they could apply to a Texas medical examiner for a death certificate. *See* Pls.' Advisory ¶ 18; *see also* Pls.' Ex. B (proposing a private "Identification Committee" to issue a "Certificate of Identification" and then "cause steps to be taken to register the death by the appropriate authorities" and "consider whether the body could be released").[1]

There is no justification under the name of "discovery" for such a wholesale effort to displace or take over an agency's performance of its statutory responsibilities, especially where that effort is based on private citizens' personal interests and speculative assumptions. What Plaintiffs seek is not discovery. Instead, it is akin to asking a court to order the outsourcing governmental functions that are established and governed by statutory law and regulatory authority. Such a course would be a plain abuse of discretion. The Court should not grant as

[1] As previously noted, 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."); *see also* Defs.' Opp'n to Mot. to Compel at 3.

"discovery" relief far beyond what the Court could order under the Mandamus Act or the APA. What Plaintiffs seek is little different than ordering the Secretary of Defense to outsource a military operation to a private company, requiring the Social Security Administration to outsource a set of claims to be processed by a private vendor of Plaintiffs' choosing, ordering the Secretary of Defense to provide certain civilians access to a military facility, requiring the FBI to divulge confidential information about a pending criminal investigation to a private investigator, or permitting a private law firm to draft and promulgate federal regulations.

Instead, Defendants should be permitted to continue to perform their mission, as they are doing,[2] subject only to judicial review appropriately based in statutory or constitutional authority.

II. Plaintiffs' Proposal Should Be Rejected Because All of Their Claims Should Be Dismissed With Prejudice.

Plaintiffs' proposed course of action is especially improper where their claims should be dismissed as a matter of law. Plaintiffs' proposal hinges on their allegations that they have identified the three sets of buried remains as those of their relatives. But those allegations must be rejected as "unwarranted deductions of fact" that are "contradicted by facts disclosed by a document appended" to a pleading. *Assoc. Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974); *see also Hollingshead v. Aetna Health, Inc.*, 589 F. App'x 732, 737 (5th Cir. 2014); *CH2M Hill, Inc. v. Comal Cnty.*, No. 09-555, 2009 WL 3617528, at *2 (W.D. Tex. Oct. 27, 2009); *In re Enron Corp. Sec., Derivatives & "ERISA" Litig.*, 238 F. Supp. 3d 799, 816 (S.D. Tex. 2017).

[2] For example, the Assistant Secretary of Defense for Manpower and Reserve Affairs recently approved disinterment of graves associated with Cabanatuan Common Graves 704 and 822 (on July 6, 2018 and August 8, 2018, respectively). These decisions include the graves of interest to Plaintiff Ruby Alsbury and Plaintiff Raymond Bruntmyer. *See* Am. Compl. ¶¶ 9-10; Am. Answer ¶¶ 34, 37. DPAA recommended disinterment of Common Grave 822 without ever receiving a disinterment request from Plaintiff Alsbury, and DPAA's recommendation process for Common Grave 704 was moving forward before Plaintiff Bruntmyer submitted his disinterment request in November 2017. *See id.* ¶¶ 35, 39.

Each of their claims, save for one otherwise meritless mandamus theory, depends entirely on the allegation that the remains of each servicemember have already being identified, not the mere possibility of matching service members to graves. *See* Defs.' Reply on Rule 12(c) Mot. at 1-4, ECF No. 36. And accordingly, each of these claims is fatally flawed in ways that no discovery can remedy.

Moreover, there are numerous other defects fatal to Plaintiffs' claims. For their due process and Fourth Amendment seizure claims, Plaintiffs cannot show that any cognizable property interest extends to disinterment of appropriately buried remains. *See* Defs.' Rule 12(c) Mot. at 21-22, 28. There can be no "legitimate claim of entitlement" where courts have discretion to grant or deny disinterment requests. *See id.* Plaintiffs cannot show that any delay in Defendants' recovery efforts are any more actionable than a "failed rescue attempt," *id.* at 24-25, nor have they pleaded any specific procedural defect in the available administrative process, id. at 25-26. Plaintiffs' Free Exercise Claims fail both because they do not plead any specific burden on the exercise of their religious beliefs, and because the First Amendment and the Religious Freedom Restoration Act are "not [written] in terms of what the individual can exact from the government." Defs.' Rule 12(c) Mot. at 31 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)). Plaintiffs' Mandamus Act claims fail for reasons similar to their initial complaint. *See* Defs.' Rule 12(c) Mot. at 35-44; *Patterson*, 2017 WL 5586962, at *3. Plaintiffs APA claims fail both because Congress has made APA review unavailable for the challenged aspects of this statutory scheme, *see* Defs.' Rule 12(c) Mot. at 45-47, and because Plaintiffs fail to identify any final agency action they are challenging, *see id.* at 47-48. Plaintiffs' *Bivens* claim fails under any set of facts. *See* Defs.' Rule 12(c) Mot. at 29. Likewise several forms of relief sought must be dismissed as a matter of law. *See id.* at 49-50.

Thus, even if the Court did not conclude that Plaintiffs' identification allegations are "unwarranted deductions of fact," each of Plaintiffs' claims can and should be dismissed as a matter of law. Because Plaintiffs' claims so clearly fail, further discovery would be inappropriate, inefficient, and an abuse of the Court's discretion.

III. Plaintiffs Have Not Met the Disinterment Standard for These Three Sets of Remains.

Even if their claims are not dismissed, Plaintiffs cannot justify disinterment of the three graves they seek as purported discovery. As an initial matter, two of the Plaintiffs seek this discovery to displace the pending administrative process that they themselves started shortly before filing their First Amended Complaint. Plaintiff John Boyt submitted a disinterment request for the grave he associates with COL Stewart on November 7, 2017. *See* Am. Answer ¶ 27 & Ex. 30, ECF No. 26. And Plaintiff Janis Fort submitted a disinterment request for the grave she associates with BG Fort on December 12, 2017. *See id.* ¶ 31. Both of these requests are actively being processed, but DoD has taken no final agency action. *See id.* ¶ 27, 31.[3] Granting as "discovery" the very same relief requested in the pending administrative process would not only violate the Administrative Procedure Act (APA), but also deprive Defendants the right to present to this Court the information and analysis likely to be included in the decisions ultimately issued by DoD.

Moreover, for the reasons stated in Defendants' opposition to Plaintiffs' motion to compel, Plaintiffs have neither overcome the presumption against disinterment nor made a

[3] The latest information available to undersigned counsel is that DPAA's recommendation regarding Plaintiff Fort's request has been submitted to the Office of the Undersecretary of Defense for Personnel and Readiness, while DPAA's recommendation regarding Plaintiff Boyt's request has not yet been completed. *Cf.* Defs.' Rule 12(c) Mot. at 7, ECF No. 31 (explaining decision process).

"strong showing that the facts sought will be established by an exhumation." *See* Defs.' Opp'n to Mot. to Compel at 9 (quoting 25A C.J.S., Dead Bodies § 29). They cannot show that justice *requires* disinterment as discovery—both because disinterment could be available as ultimate relief if Plaintiffs prevail, *id.* at 10, and because their legal claims depend on the currently available information, not the results of future testing, *id.* at 10. All but one of Plaintiffs' legal claims depends on the contention that the information *currently available* to DoD is sufficient to conclude that the remains have already been identified but are being improperly and unconstitutionally withheld. *See id.* at 15-16; *see also* Defs.' Reply on Rule 12(c) Mot. at 1-4. Put another way, if the currently available information gives rise to no more than a *possibility* that the specified remains are those of Plaintiffs' relatives, then, by Plaintiffs' own arguments, Defendants have not violated any constitutional or statutory rights. *See, e.g.*, Pls.' Opp'n at 18, ECF No. 33 ("[T]he Families' Due Process claims do not seek to impose a duty on the Government to go out and identify service members. [Defendant] ignores the Families' claim that the Remains have been identified.").

The currently available evidence, from the very documents and files upon which Plaintiffs rely, refutes Plaintiffs' claimed identifications. Accordingly, Defendants are entitled to point out the inherent failure of Plaintiffs' legal theories, which provides an appropriate basis both for granting Defendants' dispositive motion, Defs.' Reply on Rule 12(c) Mot. at 1-4, and for ruling that the requested discovery exceeds Federal Rule of Evidence 26(b)(1)'s limitations. *See* Defs.' Opp'n to Mot. to Compel at 14-22. To show this, each of the three sets of remains will be addressed in turn.

A. Grave L-8-113, Leyte #1 X-618

Plaintiffs associate this grave with BG Fort because a provincial governor reported second hand information suggesting that the execution and burial of this general occurred in

Cagayan. *See* Am. Answer ¶ 29; Defs.' Rule 12(c) Mot. at 13. But several witnesses, including Japanese officials connected to the execution of this general, stated that the execution and burial occurred 45 miles away in Dansalan. *See id.* If these officials are correct, then the grave Plaintiffs selected cannot be BG Fort's. Moreover, these officials, who faced war crimes tribunals, would have no reason to inaccurately connect themselves to an illegal execution if it actually occurred somewhere else under someone else's supervision. In addition, in 1949, DoD ruled out these remains as being BG Fort's because the remains had teeth present that BG Fort's dental records showed to have been pulled while BG Fort was alive. *See* Am. Answer ¶ 30 & Exs. 32, 35, and 36. Accordingly, the grave Plaintiffs selected is highly unlikely to contain the remains of BG Fort.

B. Grave J-7-20, Manila #2 X-1130

Plaintiffs associate this grave with 1LT Nininger because a letter from Colonel George Clarke stated that he was buried in "Grave No. 9" and these remains were listed as coming from a grave with that number at "Abucay" cemetery. *See* Am. Answer ¶ 18 & Exs. 1, 5. While several witnesses indicated that 1LT Nininger was buried somewhere in the vicinity of the Abucay Church, one cannot extrapolate from those accounts the conclusion that his remains *must* be X-1130.[4] Plaintiff John Patterson himself noted that 1LT Nininger could have been buried in several other locations, *see* Am. Answer Exs. 9, 21, 22, and that COL Clarke had provided "erroneous accounts" and was "not in a position to know any of the relevant details." *Id.* Ex. 21

[4] As previously noted, DPAA's present conclusion is that X-1130 came from a cemetery half a mile away from the Abucay Church, a location where no witnesses suggested that 1LT Nininger had been buried. *See* Am. Answer ¶ 18. Plaintiffs dispute that interpretation of the disinterment record, but the Court need not address this issue because, even if Plaintiffs were correct about the cemetery, they cannot show that 1LT Nininger must have been in grave number 9. *See* Defs.' Reply on Rule 12(c) Mot. at 2-3 & n.3.

at 10; Ex. 22 at 1. There is no more than a dim possibility that this grave is where 1LT Nininger is buried.

C. Grave N-15-19, Manila #2 X-3629

Finally, Plaintiffs associate this grave with COL Stewart because a Filipino civilian reported in 1946 that he observed Philippine Scouts burying an individual four years earlier that the Scouts stated was an American colonel. *See* Am. Answer ¶ 24 & Exs. 25, 26. This second-hand information, recalled years later is insufficient to conclude that an identification has been made.[5] It gives rise to no more than a possibility that these remains could be those of COL Stewart.

In sum, Plaintiffs cannot show that any of these three individuals have already been identified. For that reason, attempts to create an identification on the basis of new evidence is neither relevant to the claims they have presented to the Court nor proportional to the needs of this case. *See* Defs.' Opp'n to Mot. to Compel at 14-22.

IV. Plaintiffs Have Failed To Address the Court's Questions.

Notwithstanding all of the foregoing, and assuming *arguendo* that Plaintiffs' Advisory sets forth a proposal that was proper as a matter of law, it still should be rejected because it fails to address several key issues raised by the Court at the hearing on June 27, 2018. These failures underscore the impropriety of supplanting the government functions at stake and proceeding at all in this matter. At the hearing, the Court posed a number of questions and invited Plaintiffs to "propose something to [the Court] and submit what the costs are, and [answer] all the other

[5] In briefing, Plaintiffs' counsel attempted to bolster this possibility by referring to a document and factual allegation not included in their First Amended Complaint, but such unsupported claims by counsel cannot be considered. *See* Defs.' Reply on Rule 12(c) Mot. at 5 n.7.

questions I had and how that would be handled." June 27, 2018 Hr'g Tr. 59:4-6. As detailed below, Plaintiffs have failed to answer the Court's key questions.

A. DNA Sampling & Testing

First, the Court asked about the testing that would be performed and how it would be kept within reasonable limits. *See, e.g.*, June 27, 2018 Hr'g Tr. 48:21-23 ("[A]t this point I'm not sure exactly what testing your person might do, what the expense of that testing may be, and how it's going to be conducted . . . ."); *id.* at 25:8-12 ("[W]e can't give [Plaintiffs] carte blanche to do DNA testing of the whole set of remains, and so if there is like one set that could have DNA, you know, from the head or tooth but not from some bones, we're not going to let them do everything[.]"). Plaintiffs provide no meaningful detail, stating merely that "[n]ecessary DNA samples will be prepared by appropriate personnel." Pls.' Advisory ¶ 15.

Moreover, Kenyon International's statement of procedures does not provide additional necessary detail. Kenyon International appears to be a company that serves as a middle-man to connect a family or company with a contemporary overseas death to necessary mortuary services. *See* Pls.' Ex. B at 1. Their statement of procedures here appears to largely be copied and pasted from their general statement of services with little attention to the particular situation here. *See, e.g.*, *id.* at 5 (contemplating matching fingerprints to the remains, which would not be possible here); *id.* at 7-9 (contemplating collecting DNA from a service member's toothbrush or other personal objects, which would not be possible here). For DNA sampling, they state:

> The Forensic Anthropologist/Forensic Odontologist will determine, based on the elements present and their condition, the best sites for DNA samples to be taken. In short, sites with thick cortical bone yield the most successful samples (e.g. Femur shaft).

Id. at 15. They seek complete discretion for their scientists, noting that the selection of sample locations "is based on various factors and considerations." *Id.*; *see also id.* (noting that

"[d]esirable bone sample weight is 15.0-25.0" grams but that "[l]arger samples may provide a better chance for DNA success with highly degraded remains"); *id.* at 18 (acknowledging that some DNA samples may not "yield a successful profile," requiring subsequent efforts to "re-sample in line with the sampling criteria").

Nothing in the statement identifies who would serve as a forensic anthropologist or forensic odontologist or what their minimum qualifications would be, let alone demonstrates that these unspecified individuals would have the experience necessary to select useable samples for DNA extraction from long-deceased, degraded remains. Nor do they provide reason to believe that they have the experiences necessary to use appropriate sampling procedures. For example, they acknowledge the risk of contaminating a sample with the scientist's DNA, *id.* at 15, but do not address the fact that this risk is much greater for long-deceased degraded remains due to the relatively little original DNA that is present. *See, e.g.*, McMahon Decl. ¶¶ 32, 36 (explaining that this is one reason AFDIL processes all samples in duplicate). Without specific confirmation of the capabilities and procedures of the proposed contracted scientists, the Court cannot be certain that the Plaintiffs' agents will not compromise the remains to such an extent that proper identification will be impossible, let alone assess the likelihood that they could achieve successful results.

B. Disposition

Second, despite the Court's inquiry, Plaintiffs proposal is entirely silent about how they would proceed if the remains could not be matched to Plaintiffs' families. *See* June 27, 2018 Hr'g Tr. 55:23-25 ("What are we going to do with remains that probably should not be sent to your family and need to be kept by the government?"). They make no provision for returning the remains to the government or bearing the cost of doing so. Nor do Plaintiffs acknowledge several possible reasons that their effort might fail. There are numerous possibilities; for

example: 1) their contracted laboratory might be unable to extract usable DNA based on either quality or quantity of remains; 2) samples might be unable to be matched due to contamination caused by their contracted middleman; 3) their contracted laboratory might extract some DNA but find the comparison results inconclusive; or 4) their contracted laboratory might extract sufficient DNA to confirm that it does not match Plaintiffs' family.

None of these results would necessarily place Defendants further along in their efforts to identify unaccounted-for servicemembers, in fact, it would significantly disrupt ongoing identifications that meet the Defendants' established thresholds. And several of these possibilities could merely be complications created by Plaintiffs' efforts to commandeer the identification process established by Congress. For example, if bones were repeatedly sampled but the contracted laboratory was unable to extract usable DNA, this could be because that laboratory lacked the experience and techniques available to Defendants with these particular type of remains. *See* McMahon Decl. ¶¶ 13-19, 30, 37. And it could leave Defendants with fewer remains to sample and fewer remains to provide to the servicemember's family when he is ultimately identified, or worse it could result in the destruction of usable DNA making any additional identification efforts impossible. Moreover, if Plaintiffs failed to identify the remains and Defendants lacked the research to identify relevant candidates and the appropriate family reference samples, the only appropriate response might be to reinter the remains at Manila American Cemetery as unknowns at Plaintiffs' expense. *See* DTM-16-003 at 3 (requiring that DoD "have the scientific and technological ability and capacity to process the unknown remains for identification within 24 months after the date of disinterment").

C. Costs

Third, the Court wanted Plaintiffs to explain "the cost of what this is going to take, making sure that the plaintiffs can bear those costs right now, because the last thing I want to

happen is disinterment, and then all of a sudden you don't have the funds to complete the process." *Id.* 53:2-8; *see also id.* 59:5 ("submit what the costs are"). Yet Plaintiffs have not provided an estimate of the cost of *any* component of their proposal.[6] Nor have they identified how they would pay for it. Most significantly, they have not explained what they mean by stating they have "retained the services" of "Kenyon International Emergency Services, a mortuary service company, and Bode Cellmark Forensics, an accredited DNA testing laboratory." Plaintiffs' Advisory ¶ 1, ECF No. 40. Plaintiffs do not provide any service agreements, indicate whether they are prepared to pay these entities' ordinary rates, or whether they have reached some pro bono arrangement.

Nor do Plaintiffs explain whether their professed willingness to be "responsible for all expenses incurred by them," *id.* ¶ 9, would continue to apply if far more testing were required than Plaintiffs anticipate. The costs would presumably be far higher if, instead of one or two DNA tests per set of remains, dozens of samples and tests are required. More test could be required for any number of reasons, such as difficulty securing useable DNA, needing to perform other tests if nuclear DNA is unsuccessful, or discovering that these individual remains were commingled with other remains during their initial processing in the late 1940s. But the opaqueness of Plaintiffs' Advisory leave it unclear whether their proposal and unspecified agreements with these entities depend on the rosy assumptions Plaintiffs' counsel presented at the hearing about the ease of obtaining results from nuclear DNA testing. Nor does Plaintiffs' Advisory provide assurances that they have in hand the family reference samples necessary for each type of DNA testing that might become relevant.

[6] Plaintiffs presumably could have quantified the costs for funeral home services in the Philippines and Texas, *see* Plaintiffs' Advisory ¶¶ 11, 12, 14, ECF No. 40; commercial flights, *see id.* ¶ 13; shipping samples, *id.* ¶ 15, etc., but have chosen not to do so.

Nor does the mere reference to a charitable foundation ameliorate those concerns. PFC Lawrence Gordon Foundation is a startup that had no funding little more than one year ago. *See* Meg Jones, Wisconsin Nonprofit Is On a Mission to Search for MIAs, Help Families, Milwaukee Journal Sentinel, Feb. 17, 2017 (link) (explaining that Jed Henry "decided to create the foundation" but to date "has no funding"); *see also* IRS, Tax Exempt Organization Search, Pfc Lawrence Gordon Foundation, Inc. (link) (showing that the foundation's latest filing was for organizations that receive less than $50,000). In sum, Plaintiffs have done nothing to satisfy the Court that they could finish whatever the Court permitted them to start. And, it is this type of non-response that portends problems with private individuals seeking to take on complex government functions.

D. Other Matters

Plaintiffs' effort to address other matters is likewise problematic. For example, the Court also asked for detail about "how the remains are going to be handled. Where are they going to be stored? How are they going to be stored?" June 27, 2018 Hr'g Tr. 54:13-16. While Plaintiffs address this topic, their approach is inconsistent. On the one hand, they suggest using "a state licensed funeral home in San Antonio," Pls.' Advisory ¶ 14, while on the other, they suggest that the remains will be sent to a state facility. *See* Pls.' Ex. B at 13 ("Upon arrival in the US, the remains will be transported to an approved examination facility (such as Bexar County's Medical Examiner's Office: 7337 Louis Pasteur Dr, San Antonio, TX 78227, USA)."). Regardless, their approach would severely limit Defendants' ability to examine or process the remains. *See* Pls.' Advisory ¶ 11 ("[A]ccess will be permitted only when designated representatives of both parties are present."). And for remains as sensitive as these, it is not sufficient to provide merely that the "storage facility will be climate controlled and adequate for preparation of DNA samples." *Id.* ¶ 14.

In addition, the proposal's treatment of family reference samples and genealogical information is wholly inadequate. *See* Pls.' Advisory ¶ 17 (stating vaguely that family reference samples and genealogical information "will be obtained from the family of each subject"). Each type of DNA testing requires different types of family reference samples. *See* McMahon Decl. ¶¶ 24-25 & Ex. 5. And certain types of reference samples are only likely to support definitive statistical results if a sufficient number of individual relatives are involved. *See id.* ¶ 39. Without much greater specificity, it is not even clear what types of testing Plaintiffs' agents believe they could perform. Nor have Plaintiffs have explained whether they intend to narrowly compare their DNA results to their own families, or whether they intend to seek to identify other candidates for the remains and may seek access to genetic information for other candidates' families As Defendants noted at the hearing, the latter possibility raises significant privacy concerns for living members of other families who submitted their information to the government on the assurance that it would be used only for official purposes. *See* Defs.' Opp'n to Mot. to Compel at 20; McMahon Decl. ¶ 26 & Ex. 5.

Even merely consider on its own terms, Plaintiffs' Advisory does not establish a reasonable basis to order the extraordinary action of forcing DoD to disinter remains buried in an overseas military cemetery and turn those remains over to Plaintiffs for destructive testing. But more fundamentally, all of these significant and critical failures in Plaintiffs' proposal underscore why the Court should not supplant the Defendants' lawful governmental authority in this area, or proceed any further here as to claims that should be dismissed, or order disinterment of specific graves based on speculation where the evidence calls into serious question even the possibility that Plaintiffs' relatives are interred in those locations.

CONCLUSION

For all these reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to compel and instead grant Defendants' Motion for Judgment on the Pleadings.

Dated: August 15, 2018

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 15th day of August, 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