

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, JOHN BOYT, §
JANIS FORT, RUBY ALSBURY, §
RAYMOND BRUNTMYER, §
JUDY HENSLEY, and DOUGLAS KELDER, §

Plaintiffs, §

v. §

Civil Action No. SA-17-CV-467-XR

DEFENSE POW/MIA ACCOUNTING §
AGENCY; KELLY MCKEAGUE, §
in his official capacity as Director of the §
DPAA; U.S. DEPARTMENT OF DEFENSE; §
JAMES MATTIS, in his official capacity as §
Secretary of Defense; AMERICAN §
BATTLE MONUMENTS COMMISSION; §
and ROBERT DALESSANDRO, in his §
official capacity as acting Secretary of the §
American Battle Monuments Commission, §

Defendants. §

PLAINTIFFS’ FIRST AMENDED COMPLAINT

1. John A. Patterson (“Patterson”), John Boyt (“Boyt”), Janis Fort (“Fort”), Ruby Alsbury (“Alsbury”), Raymond Bruntmyer (“Bruntmyer”), Judy Hensley (“Hensley”), and Douglas Kelder (“Kelder”) (collectively “Plaintiffs”) file this First Amended Complaint and complain of Defense POW/MIA Accounting Agency (“DPAA”), Director of the DPAA Kelly McKeague¹, United States Department of Defense, Secretary of Defense James Mattis, American

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Fern Sumpter Winbush’s successor has been automatically substituted as a party. The Court is not required to issue an order substituting Mr. McKeague for Ms. Winbush, but it may do so. The absence of such an order does not affect the substitution. Later proceedings should be in the substituted party’s name.

Battle Monuments Commission (“ABMC”), and acting Secretary of the ABMC Robert Dalessandro² (collectively “Defendants”) and show:

SUMMARY OF CASE

2. Defendants have violated Plaintiffs’ constitutional rights by refusing to return the remains of United States Army service members that lost their lives during World War II. Each Plaintiff is a designated Primary Next of Kin (“PNOK”) of an Army service member that served in World War II and died while in service in the Philippines. Plaintiffs have already identified the location of these service members’ remains and simply request that Defendants return the remains to their families for the purpose of providing a proper burial. Defendants have nevertheless wrongfully denied Plaintiffs their right to bury the remains, which unlawfully deprives each Plaintiff of substantive and procedural due process under the United States Constitution. It appears that Defendants’ only argument is that because the remains could potentially belong to all families, they belong to none. This argument cannot, and should not, prevail.

RELATED LITIGATION

3. On October 18, 2012, a complaint was filed in the United States District Court for the Western District of Texas, San Antonio Division, *Eakin v. American Battle Monuments Commission, et al*, No. SA-12-CA-1002-FB, to obtain the remains of Private Arthur H. "Bud" Kelder. Kelder’s *partial* remains were recovered and successfully identified in response to this action. The results from this prior litigation verified the accuracy of the type of records relied upon in this case and the feasibility of identifying the remains at issue. U.S. District Judge Fred Biery determined that litigation to be a case of first impression. Additionally, the Court found, for purposes of leave to amend, that the plaintiff had sufficiently stated a cause of action under the

² Each individually named defendant is being sued only in his or her official capacity.

Mandamus Act by alleging that the defendants had a duty under Army Regulation 638-2 to identify the remains of unaccounted-for members of the armed forces from World War II. *Eakin v. American Battle Monuments Commission, et al.*, No. SA-12-CA-1002-FB (W.D. Tex. Aug. 5, 2013) (“Notwithstanding giving his last full measure of devotion to this country, Private Kelder’s government declines, on technical legal reasons as opposed to the spirit of the law, to give him a decent burial in a marked grave alongside others who died in service to the United States.”).

4. A complaint was previously filed in this Court, *Eakin v. U.S. Department of Defense, et al.*, No. SA-10-CV-0748-FB, seeking records under the Freedom of Information Act. Records obtained during that litigation form the basis, in part, for this complaint.

PARTIES

5. Each Plaintiff has standing and capacity to file suit and the correct defendants are being sued in their correct capacity.

6. 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. Patterson, as the PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants’ refusal to return the remains of Patterson’s deceased family member for burial. Patterson has the right and obligation as next-of-kin to bury his deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Patterson is a proper plaintiff and has standing to file this suit. Patterson resides at 721 North Quiddnessett Road, North Kingstown, RI 02852.

7. 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.

Boyt, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Boyt's deceased family member for burial. Boyt has the right and obligation as next-of-kin to bury his deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Boyt is a proper plaintiff and has standing to file this suit. Boyt resides at 7 El Portal, Palos Verdes Estates, CA 90274.

8. Ms. Janis Fort is the granddaughter of Brigadier General Guy O. Fort. Fort is the person designated by the Department of Defense to direct disposition of the remains of Guy O. Fort. Fort, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Fort's deceased family member for burial. Fort has the right and obligation as next-of-kin to bury her deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Fort is a proper plaintiff and has standing to file this suit. Fort resides at 29272 Providence Way, Hayward, CA 94544.

9. 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. Alsbury, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Alsbury's deceased family member for burial. Alsbury has the right and obligation as next-of-kin to bury her deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Alsbury is a proper plaintiff and has standing to file this suit. Alsbury resides at 7306 Wild Eagle St., San Antonio, Bexar County, TX 78255. Dave Alsbury, her son, has been designated as the holder of power of attorney for Ruby Alsbury.

10. Mr. Raymond Bruntmyer is the brother of Technician 4th Class Lloyd Bruntmyer. Bruntmyer is the person designated by the Department of Defense to direct disposition of the remains of Lloyd Bruntmyer. Bruntmyer, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Bruntmyer's deceased family member for burial. Bruntmyer has the right and obligation as next-of-kin to bury his deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Bruntmyer is a proper plaintiff and has standing to file this suit. Bruntmyer resides at 250 E. Debbie Lane, Apt 5210, Mansfield, TX 76063.

11. 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. Hensley, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Hensley's deceased family member for burial. Hensley has the right and obligation as next-of-kin to bury her deceased family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Hensley is a proper plaintiff and has standing to file this suit. Hensley resides at PO Box 174, Cedar Crest, NM 87008. Jennifer Russell, her daughter, has been designated as the holder of power of attorney for Judy Hensley.

12. 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. Kelder, as PNOK, has been harmed by improper agency action and is adversely affected or aggrieved by Defendants' refusal to return the remains of Kelder's deceased family member for burial. Kelder has the right and obligation as next-of-kin to bury his deceased

family member, which is guaranteed by the Fourth and Fifth Amendment to the United States Constitution and common law. Thus, Kelder is a proper plaintiff and has standing to file this suit. Kelder resides at N1037 Glendenning Rd., Shell Lake, WI 54871.

13. Defendants are the Defense POW/MIA Accounting Agency³ headed by defendant Kelly McKeague, U.S. Department of Defense headed by defendant Secretary of Defense James Mattis, and American Battle Monuments Commission headed by Robert Dalessandro. Each department listed above is an agency of the United States of America and their actions are subject to judicial review by the terms of the Administrative Procedure Act. Each individual named above is being sued in only their official capacity.

JURISDICTION AND VENUE

14. This Court has both subject matter jurisdiction and personal jurisdiction pursuant to the following statutes:

a. 28 U.S.C. § 1331, which give district courts original jurisdiction over civil actions arising under the constitution, laws, or treaties of the United States. Plaintiffs' right to relief necessarily depends on the resolution of a substantial question of federal law and their causes of action allege violations of the U.S. Constitution. Specifically, Defendants have violated Plaintiffs' Due Process rights under the Fifth Amendment to the U.S. Constitution and have denied Plaintiffs their fundamental right to direct the burial of their

³ The DPAA was created in January of 2015 following a merger of several other federal agencies. The reorganization was a result of poor performance and reported scandals. *See* U.S. Gen. Accounting Office, *GAO-13-810*, DOD's POW/MIA Mission: Capability and Capacity to Account for Missing Persons Undermined by Leadership Weaknesses and Fragmented Organizational Structure (2013). Recently, it has been reported in the media that the DPAA is still plagued with the same issues as its predecessors. Despite having an approximately \$112 million annual budget, the DPAA has consistently failed to achieve 200 identifications per year, which is the goal mandated by Congress. For example, in the 2016 fiscal year, the DPAA reportedly only made 164 identifications. It is a federal agency that has routinely failed to meet expectations of Congress.

family members. Plaintiffs also allege that Defendants have violated their First and Fourth Amendment rights and common law rights.

b. 28 U.S.C. § 1361, which gives district courts original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to a plaintiff. Defendants have failed to perform a non-discretionary duty owed to Plaintiffs because they have wrongfully refused to fully and correctly account for Plaintiffs' family members that lost their lives during the Second World War. Moreover, as discussed in more detail below, Plaintiffs have failed to perform several other non-discretionary duties owed to Plaintiffs.

c. Administrative Procedure Act, 5 U.S.C.A. §§ 701 to 706, this being an action brought by persons suffering legal wrongs because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute.

d. 28 U.S.C. § 2201, as there is a live controversy between the parties, and Plaintiffs seek declaration of their rights under the First, Fourth, and Fifth Amendments to the U.S. Constitution, the Administrative Procedure Act, and the common law.

e. U.S. Const. art. 3, § 2, cl. 1, which vests federal courts with exclusive jurisdiction in cases where the United States is a party.

15. Venue is appropriate in this judicial district under 28 U.S.C. § 1391(e)(1)(c) and 5 U.S.C. § 703 because Plaintiff Ruby Alsbury resides in San Antonio, Bexar County, Texas.

FACTUAL ALLEGATIONS

I. The “Unidentified Remains” Have Been and/or Can be Identified

16. Plaintiffs are the PNOK for seven brave service members that lost their lives during World War II. These seven service members were buried as “Unknowns.” In recent years,

however, information has been brought to light that allows Plaintiffs to identify where these seven service members are currently buried. Despite this new evidence, Defendants wrongfully refuse to recover, return, and/or identify the remains of these seven service members.

A. Alexander R. Nininger's Remains Have Been Located

17. U.S. Army First Lieutenant Alexander R. "Sandy" Nininger was killed in action on January 12, 1942, while serving in the province of Bataan, Philippine Islands. He was posthumously awarded the Medal of Honor for his actions against the enemy.

18. U.S. Government documents show that 1LT Nininger's remains were first buried at the Catholic Churchyard in Abucay, Bataan, Philippine Islands. At the conclusion of hostilities, these remains were exhumed by U.S. Army Graves Registration personnel and given the designation X-1130 Manila #2 Cemetery.

19. Five recommendations to identify remains X-1130 as 1LT Nininger were disapproved due to an erroneously calculated ante-mortem height which did not match 1LT Nininger's known height. The tables used in Nininger's case to convert long bone length to height were inaccurate because the anthropological tables used were created from examinations of a Nineteenth century French population.⁴

⁴ See PERSONAL IDENTIFICATION IN MASS DISASTERS, REPORT OF A SEMINAR HELD IN WASHINGTON, D.C., 9-11 DECEMBER 1968, BY ARRANGEMENT BETWEEN THE SUPPORT SERVICES OF THE DEPARTMENT OF THE ARMY AND THE SMITHSONIAN INSTITUTION, n14, 71-83 (T.D. Stewart, ed., 1970) (can be found at: <https://archive.org/details/personalidentifi00semi>) ("He noted that stature estimation from the long bones of the American war dead was still based on the 50 male, 50 female, French cadavers – many of them senile individuals, I should say – measured by Rollet in 1888.") ("There is abundant evidence to indicate that, in general, the most accurate estimations of stature are obtained when the equation applied to the unknown has been derived from a representative sample of the population of the same sex, race, age, geographic area, and time period to which the unknown is believed to belong."); Mildred Trotter and G.C. Gleser, *A Re-Evaluation of Estimation of Stature Based on Measurements of Stature Taken During Life and of Long Bones After Death*, AM. J. PHYS. ANTHROPOLOGY 16, 79-123 (March 1958); Mildred Trotter and GC

20. Remains X-1130 were ultimately buried as an Unknown in Manila American Cemetery Grave J-7-20 where they presently lie.

21. The unidentified remains marked as X-1130 are those of 1LT Nininger.

B. Loren P. Stewart's Remains Have Been Located

22. U.S. Army Colonel Loren P. Stewart was the Commanding Officer of the 51st Infantry Regiment (PA) when he was killed in action on January 13, 1942.

23. Colonel Stewart had previously served with the 45th Philippine Scouts during his first assignment to the Philippines. It is believed that Colonel Stewart's remains were originally recovered by members of the 45th and 57th Philippine Scouts after they executed a counter-attack against the invading Japanese forces. These members from the 45th and 57th Philippine Scouts had originally known Colonel Stewart as an officer with the Scouts and associated that unit with him.

24. U.S. Government documents contain a witness account from Ruben Caragay stating that Colonel Stewart was buried near Abucay Hacienda, Bataan, Philippine Islands. His statement discusses the Philippine Scouts' recovery and burial of Colonel Stewart's remains. At the conclusion of hostilities, these remains were exhumed by U.S. Army Graves Registration personnel and given the designation X-3629 Manila #2 Cemetery.

25. Efforts to positively identify the remains were unsuccessful due to a misspelling of Colonel Stewart's name as "STUART" on a request for his ante-mortem dental records.

26. Remains X-3629 were ultimately buried as an Unknown in Manila American Cemetery Grave N-15-19 where they presently lie.

27. The unidentified remains marked as X-3629 are those of Colonel Stewart.

Gleser, *Estimation of Stature From Long Bones of American Whites and Negroes*, AM. J. PHYS. ANTHROPOLOGY 10, 463-514 (Dec. 1952).

C. Guy O. Fort's Remains Have Been Located

28. U.S. Army Brigadier General Guy O. Fort commanded the 81st Division (Philippines) and later all guerrilla forces in the Philippine Islands when he was taken prisoner by enemy forces in May of 1942. General Fort is the only American-born general officer to be executed by enemy forces.

29. U.S. Government records contain a sworn witness statement by Ignacio S. Cruz, Governor of Misamis Oriental Province, which recounts the execution and burial of General Fort by enemy forces as retaliation for an attack on enemy forces.

30. At the conclusion of hostilities, Governor Cruz directed the recovery of these remains and turned them over to U.S. Army Graves Registration personnel where they were designated as X-618 Leyte #1 Cemetery. There is no record of efforts to identify these remains and they were ultimately buried as an Unknown in Manila American Cemetery Grave L-8-113.

31. The unidentified remains marked as X-618 are those of General Fort.

D. Robert R. Morgan's Remains Have Been Located

32. U.S. Army Private Robert R. Morgan survived the infamous Bataan Death March and imprisonment at Camp O'Donnell, but ultimately succumbed to disease and malnutrition on January 1, 1943, while confined in Cabanatuan POW Camp, near Cabanatuan, Nueva Ecija, Luzon, Philippine Islands.

33. Private Morgan was buried in communal grave number 822 as one of the five U.S. service members who died on that day.

34. At the conclusion of hostilities, U.S. Army Graves Registration personnel exhumed the remains in the camp cemetery. Four service members from Grave 822, including Private

Morgan, were ultimately buried as Unknowns in the Manila American Cemetery where they presently lie in Plot 2, Row 15, Manila No. 2.

35. The unidentified remains recovered from Cabanatuan Grave 822 include those of Private Morgan.

E. Lloyd Bruntmyer's Remains Have Been Located

36. U.S. Army Private First Class Lloyd Bruntmyer survived the infamous Bataan Death March and imprisonment at Camp O'Donnell, but ultimately succumbed to disease and malnutrition on November 1, 1942, while confined in Cabanatuan POW Camp, near Cabanatuan, Nueva Ecija, Luzon, Philippine Islands.

37. PFC Bruntmyer was buried in communal grave number 704 as one of the ten U.S. service members who died on that day.

38. At the conclusion of hostilities, U.S. Army Graves Registration personnel exhumed the remains in the camp cemetery. Eight service members from grave 704, including PFC Bruntmyer, were ultimately buried as Unknowns in the Manila American Cemetery where they presently lie.

39. The unidentified remains recovered from Cabanatuan Grave 704 include those of PFC Bruntmyer.

F. David Hansen's Remains Have Been Located

40. U.S. Army Private First Class David Hansen survived the infamous Bataan Death March and imprisonment at Camp O'Donnell, but ultimately succumbed to disease and malnutrition on June 28, 1942, while confined in Cabanatuan POW Camp, near Cabanatuan, Nueva Ecija, Luzon, Philippine Islands.

41. PFC Hansen was buried in communal grave number 407 as one of the approximately seventeen U.S. service members who died on that day.

42. At the conclusion of hostilities, U.S. Army Graves Registration personnel exhumed the remains in the camp cemetery. Six service members from grave 407, including PFC Hansen, were ultimately buried as Unknowns in the Manila American Cemetery where they presently lie.

43. The unidentified remains recovered from Cabanatuan Grave 407 include those of PFC Hansen.

G. Arthur H. “Bud” Kelder’s Partial Remains Are Being Withheld

44. U.S. Army Private Arthur H. “Bud” Kelder survived the infamous Bataan Death March and imprisonment at Camp O’Donnell, but ultimately succumbed to disease and malnutrition on November 19, 1942, while confined in Cabanatuan POW Camp, near Cabanatuan, Nueva Ecija, Luzon, Philippine Islands.

45. Private Kelder was buried in communal grave number 717 as one of the fourteen U.S. service members who died on that day.

46. At the conclusion of hostilities, U.S. Army Graves Registration personnel exhumed the remains in the camp cemetery. The ten from Grave 717 who could not be identified, including Private Kelder, were ultimately buried as Unknowns in the Manila American Cemetery.

47. Beginning in 2014, in response to a petition for Mandamus filed by Private Kelder’s acting next-of-kin, the graves of the ten Unknowns buried in the Manila American Cemetery and the four Knowns buried in the U.S. were exhumed for identification.

48. Each of the remains originally buried in Cabanatuan Grave 717 were virtually anatomically complete when exhumed.

49. In 2015, the Kelder family received only his skull, three long bones and a few other minor bones for burial and were informed that the Department of Defense had used only mitochondrial DNA rather than more advanced DNA identification techniques to identify and properly re-associate these remains. The balance of Private Kelder's remains are in the custody of Defendant Department of Defense. The lack of proper re-association and identification of the remains reflects the inadequacies of Defendants' identification laboratory capacity and capability.

50. To date, only partial remains of six of the ten Unknowns exhumed from the Manila American Cemetery have been returned to their families for burial.

51. Army Regulation 638-2, ¶ 8-8, states that deceased personnel must be identified as quickly as possible by employing all well-known means and scientific resources and dictates that multiple remains from a single incident will be processed for identification simultaneously.

52. The Individual Deceased Personnel Files and other government records pertaining to Cabanatuan Grave 717 were classified and restricted from public access until approximately 2009.

53. Defendants are aware that the identification of a number of WWII remains were incorrect or that they were transferred to the wrong families for burial.

54. The unidentified remains recovered from Cabanatuan Grave 717 that are being kept by Defendants include those of Private Kelder.

55. Defendants have in their possession the balance of Private Kelder's remains.

II. Defendants' Failure to Act Violates Plaintiffs' Constitutional Rights

56. Plaintiffs are the PNOK for each respective deceased service member and are authorized to direct the disposition of their remains.

57. There is a right and obligation of next-of-kin to direct the burial of family members according to the desires and religious beliefs of each respective family. These rights are guaranteed by the First, Fourth, and Fifth Amendments of the U.S. Constitution.

58. The U.S. Government's acknowledgment of these individual rights is self-evident by their actions and body of legislation on the subject. Defendants' obligation to return remains to the next-of-kin is non-discretionary. But Defendants refuse to exercise this non-discretionary duty until they subjectively and arbitrarily choose to pick a time to "identify" remains. Defendants have deprived Plaintiffs of any opportunity to assert their protected right to bury their next-of-kin by randomly selecting who gets identified and who doesn't.

59. The remains at issue are in the possession and control of the federal government. Defendants refuse to allow Plaintiffs access to the remains at issue.

60. Plaintiffs rely upon government documents that were withheld from disclosure by the Department of Defense until this Court ordered it to divulge such documents during previous litigation. *See Eakin v. U.S. Department of Defense, et al.*, No. SA-10-CV-0748-FB. These government documents serve as proof that the remains at issue can be, and have been, identified. These authentic documents accurately identify where the remains at issue are currently located. For example, as a result of a prior case filed in this Court, Defendants exhumed and correctly identified the remains of a service member based upon information found in these documents. *See Eakin v. American Battle Monuments Commission, et al.*, No. SA-12-CA-1002-FB (W.D. Tex. Aug. 5, 2013). The facts of the instant case are essentially identical, and the identification of the remains at issue has been made by Plaintiffs, relying in part on these documents.

61. All of the remains at issue were interred in the Fort McKinley Military Cemetery near Manilla. Defendant ABMC operates and manages this cemetery, but has no published rules

whereby families can claim unidentified remains or request exhumation. The Department of Defense retains the right to reenter ABMC cemeteries under Executive Order 10057 for the purpose of making exhumations or reinternments.

62. Unlike other federal agencies operating cemeteries, the Department of Defense has promulgated no regulations concerning exhumations in the Federal Register or Code of Federal Regulations. While the Department of Defense has myriad internal regulations and policy statements related to accounting for missing personnel, none have been properly issued by notice and comment rulemaking as required by the Administrative Procedure Act. Defendants' internal regulations and policy statements concerning remains recovery virtually precludes timely accounting for unknowns interred in U.S. Military Cemeteries.

63. Defendants have a non-discretionary duty to make the fullest possible accounting of personnel missing in action. Defendants' unreasonable refusal to return the remains of deceased Army service members to their families for burial as directed by next-of-kin is a violation of the First, Fourth, and Fifth Amendments to the Constitution of the United States and applicable statutory and common law of the States providing for the right to direct burial of family members by next-of-kin.

64. To the extent that Defendants contend that they have not received a request for the return of the remains at issue from one of Plaintiffs, the filing of this suit served as notice of any such request by each Plaintiff. All conditions precedent have occurred or have been performed.

65. Plaintiffs have no alternative remedy outside of this lawsuit to claim and/or receive the remains of their deceased family members for burial.

CAUSES OF ACTION

COUNT ONE - VIOLATION OF DUE PROCESS

66. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

67. The Fifth Amendment to the U.S. Constitution provides that the government shall not deprive any person “of life, liberty, or property without due process of law.” This clause imposes two separate limits on government:

- a. 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.
- b. 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.

68. In the present case, Plaintiffs have constitutional rights and privileges, as well as significant liberty and property interests that are at stake. Each State that is, or could be, at issue recognizes that Plaintiffs have a quasi-property right to bury the remains at issue.⁵ This quasi-

⁵ *Shelley v. County of San Joaquin*, 996 F. Supp. 2d 921, 927 (E.D. Cal. 2014) (“California courts recognize ‘a quasi-property right to its possession . . . for the limited purpose of determining who shall have its custody for burial.’”); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377,

property right is protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution.⁶

383–84 (Tex. 2012) (recognizing quasi-property right in remains for burial); *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001) (Florida recognizes a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition, and thus the next of kin may bring a § 1983 action arising from alleged deprivation of procedural due process.); *Matter of Johnson*, 1980-NMSC-069, ¶ 14, 94 N.M. 491, 494, 612 P.2d 1302, 1305 (“there is a quasi-property right in a dead body which vests in the nearest relative of the deceased”); *Sullivan v. Catholic Cemeteries, Inc.*, 113 R.I. 65, 68, 317 A.2d 430, 432 (1974) (“although a dead body is not classified as ‘property’ in the true legal sense of that term, it has a status of ‘quasi property,’ to which are attached certain rights.”); *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 43 (1905) (“We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency”). *See also Alcor Life Extension Found. v. Richardson*, 785 N.W.2d 717, 729 (Iowa Ct. App. 2010); *In re Estate of Kingsbury*, 2008 ME 79, ¶ 6, 946 A.2d 389, 393; *Leno v. St. Joseph Hosp.*, 55 Ill. 2d 114, 117, 302 N.E.2d 58, 59–60 (1973) (“The principle is firmly established that while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent’s remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise.”); *Mensing v. O’Hara*, 189 Ill. App. 48, 53–54 (Ill. App. Ct. 1914) (“The decided weight of authority in this country supports the proposition that while a dead body is not considered as property, in the ordinary, technical sense in which that word is usually employed, yet the law does recognize a right, somewhat akin, perhaps, to a property right, arising out of the duty of the nearest relatives of the deceased to bury their dead, which authorizes and requires them to take possession and control of the dead body for the purpose of giving it a decent burial.”).

⁶ *See Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) (the right of survivors, recognized by Louisiana, “in the remains of their deceased relatives” qualifies as a due process property interest); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 798 (9th Cir. 2002) (holding that next of kin have the right to possess the bodies of their deceased family members, which creates a property interest that must be accorded due process of law); *Whaley v. County of Tuscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (the survivors’ right, recognized by Michigan, to possess the body of the deceased for burial and prevent its mutilation qualifies as a due process property interest); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (“We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a ‘legitimate claim of entitlement’ in Steven Brotherton’s body, including his corneas, protected by the due process clause of the fourteenth amendment.”); *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (the next of kin’s “quasi-property right in a dead body,” recognized by Arkansas, qualifies as a due process property interest); *Bynum v. City of Magee, Miss.*, 507 F. Supp. 2d 627 (S.D. Miss. 2007) (“Under Mississippi law, deceased’s next of kin and relatives have a due process property interest, or quasi-property interest, to custody or possession of the body for burial.”); *Wells v. Nuwayhid*, 96 C 4456, 1996 WL 674149, at *3 (N.D. Ill. Nov. 19, 1996) (“A state quasi-property right in the disposition

69. As shown above, Plaintiffs have identified where the remains at issue are located. Additionally, the remains at issue are being wrongfully deprived from Plaintiffs by Defendants. Defendants are required under the U.S. Constitution, multiple regulations and policies (for example Army Regulation 638-2), and the common law to return the remains at issue. Defendants' refusal to return the remains at issue is a denial of Plaintiffs' constitutionally protected right to bury the remains at issue. There is no adequate reason or sufficient justification for the government's deprivation of this right and/or property.

70. Furthermore, the Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the DPAA, as an administrative agency, provide Plaintiffs with a fair and impartial adjudicatory proceeding - both in appearance and in reality - that is free of any prejudgment on the key factual and legal merits of the allegations.

71. Defendants have violated Plaintiffs' due process rights to a fair and impartial proceeding by having refused to even offer any proceedings whatsoever.

72. Defendants' actions should be reviewed by this Court using strict scrutiny because the right to bury a deceased family member according to the wishes of that family is a fundamental right. While this right is not expressly stated in the text of the U.S. Constitution, the Ninth Amendment states: "The enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by the people." Plaintiffs' right at issue is a fundamental right. As one court has explained: "We can imagine no clearer or dearer right in the gamut of civil liberty and

of a dead body by the next of kin qualifies as a property interest for procedural due process purposes.").

security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency” *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 43 (1905). This fundamental right should not be deprived. President Calvin Coolidge gave sage advice when he stated that “[t]he nation which forgets its defenders will be itself forgotten.”

73. Defendants’ actions, taken together, amount to a violation of Plaintiffs’ substantive and procedural due process rights. Defendants have intentionally, or with deliberate indifference, deprived Plaintiffs of their liberty and property without due process of law.

74. Defendants’ conduct has caused and will continue to cause Plaintiffs to suffer immediate and irreparable harm to their constitutional right to due process. No money damages can remedy this harm, and Plaintiffs have no legal avenue by which to recover any money damages against Defendants.

75. As a result, Plaintiffs are entitled to judgment and injunctive relief to protect their constitutional rights. Plaintiffs request possession of the remains at issue for purposes of providing a proper burial.

COUNT TWO – BIVENS ACTION

76. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

77. In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court recognized “an implied right of action, derived directly from the Constitution itself,” for due process violations against federal agents for duties owed to private persons. *See Stone v. Reno*, 119 F.3d 1 (table decision), No. 96-40015, 1997 WL 367680, at *1 (5th Cir. June 10, 1997) (explaining that *Bivens* permits suits for constitutional infractions against federal

officials); *Jackson v. Hernandez*, No. 12-50368, 2013 WL 3365135, at *1 (5th Cir. July 5, 2013) (explaining that complaint alleging due process violations against federal prison guards is properly brought under *Bivens*).

78. The federal defense officials named as defendants in this case are charged with administering programs for returning and identifying the remains of deceased military personnel.

79. As explained above, Plaintiffs have a right to these remains without deprivation of due process. The individually named defendants, acting in their official capacity, are intentionally, or with deliberate indifference, depriving Plaintiffs of this right. Additionally, the individually named defendants' actions violate Plaintiffs' First and Fourth Amendment rights.

80. Accordingly, Plaintiffs are entitled to all available remedies, including injunctive relief, that will cure Defendants' wrongful actions.

COUNT THREE – MANDAMUS RELIEF FOR RECOVERY OF REMAINS

81. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

82. The Mandamus Act, 28 USC § 1361, provides for United States district court jurisdiction to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff when no other adequate legal remedy is available. Mandamus relief is available only if a plaintiff establishes (1) a clear right to relief, (2) that the defendant has a clear duty to act, and (3) no other adequate remedy exists. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011). While mandamus is an "extraordinary remedy," it can be used to compel the performance of a clear nondiscretionary duty. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988).

83. Plaintiffs have a clear right to have the remains of the deceased service members returned to them for burial because they are the designated primary next of kin.

84. As the location of all the remains has been identified, Defendants have a clear duty to return the remains to Plaintiffs as soon as practically possible. *See* Department of Defense Directive Number 1300.22, Mortuary Affairs Policy (Oct. 30, 2015); Chairmen of the Joint Chiefs of Staff, Joint Publication 4-06 Mortuary Affairs (Oct. 12, 2011), ¶¶ 1-2d, 2e.

85. Army Regulation 638-2, ¶8-3, requires Army officials to search for, recover and tentatively identify eligible deceased personnel, using all resources and capabilities immediately available. *See Eakin v. American Battle Monuments Commission, et al.*, No. SA-12-CA-1002-FB (W.D. Tex. Aug. 5, 2013).⁷ Additionally, Army Regulation 638-2, ¶2-18, states that Defendants must “search for, recover, segregate, and identify” remains. Defendants have failed to comply with Army Regulation 638-2 because, by the plain terms of the regulation, there is a non-discretionary duty to search for and return/recover the remains at issue that Plaintiffs have identified.

86. Accordingly, Defendants have a non-discretionary duty to recover and return the remains of these service members that Plaintiffs have identified. Additionally, no other adequate remedy exists. There is no alternative statutory or administrative process to allow Plaintiffs to retrieve the remains or challenge Defendants’ action or inaction.

87. Therefore, Plaintiffs request mandamus relief from this Court ordering Defendants to fulfill their non-discretionary duty to use all resources and capabilities immediately available to recover and return the remains at issue that have been identified by Plaintiffs.

⁷ There, U.S. District Judge Fred Biery found that a complaint relying upon Army Regulation 638-2 as grounds for a mandamus claim in an almost identical case was sufficient. (“plaintiff’s mandamus claim as amended states ‘a new cause of action upon which he has standing to bring and upon which the Court has jurisdiction to act.’”).

**COUNT FOUR - MANDAMUS RELIEF FOR
IDENTIFICATION OF REMAINS AND FURTHER EFFORTS**

88. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

89. Additionally, and in the alternative, should there be a finding by this Court that the remains have not been identified by Plaintiffs, Defendants have a non-discretionary duty to attempt to identify the remains at issue.

90. Plaintiffs have a clear right to have the remains of the deceased service members identified and returned to them for burial because they are the designated PNOK. Plaintiffs also are entitled to have Defendants use all available resources available to identify the remains at issue.

91. Defendants have a clear duty to identify the remains at issue. Army Regulation 638-2, ¶8-3, requires Army officials to search for, recover and tentatively identify eligible deceased personnel, using all resources and capabilities immediately available.

92. Moreover, Defendants' non-discretionary duty to identify the remains of missing service members is acknowledged by the following Department of Defense regulations, *Inter alia*:

a. Department of Defense Directive Number 1300.22, Mortuary Affairs Policy (Oct. 30, 2015), which states that it is Department of Defense policy that remains "be recovered, identified, and returned to their families as expeditiously as possible"

b. Department of Defense Directive Number 2310.07E, Personnel Accounting – Losses Due to Hostile Acts (Nov. 10, 2003, certified current as of Aug. 21, 2007), ¶ 4.1.

c. Chairmen of the Joint Chiefs of Staff, Joint Publication 4-06 Mortuary Affairs (Oct. 12, 2011), ¶¶ 1-2d, 2e, which states that "[e]very reasonable effort will be made to identify human remains and fully account for unrecovered human remains of US military personnel"

Additionally, it states that “[h]uman remains will be disinterred as soon as possible based upon operational and safety requirements.”

d. U.S. Army Regulation 638-2, ¶¶ 2–18a (“The Army will search for, recover, segregate, and identify remains of eligible decedents.”), 2-18k (“Internment may be in a U.S. Government cemetery (national or post)”), 4-4 (identifying who is authorized to direct disposition of human remains), 4-6 (stating that right to direct disposition of remains is a personal right), 8–1 (“search for, recover, and tentatively identify, when possible, remains of eligible deceased personnel.”), 8–2, 8-8 (“Deceased personnel must be identified as quickly as possible by employing all well-known means and scientific resources.”), 8–10.

e. U.S. Army Field Manual FM 4-20-65 (FM 10-286), Identification of Deceased Personnel, ¶¶ 1-1 (“The process of identifying a deceased person begins when remains are recovered.”), 1-8 (“Deceased personnel must be identified as quickly as possible by employing all well-known means and scientific resources.”).

93. Defendants have refused to use all resources and capabilities immediately available to identify remains reasonably believed to be those of missing American service members despite the following regulations to the contrary:

a. DoD Directive 1300.22, Paragraph 3, "It is DoD policy that . . . [t]he remains of deceased DoD-affiliated or -covered person, consistent with applicable laws and regulations, who die in military operations . . . will be recovered, identified, and returned to their families as expeditiously as possible"

b. DoD Directive 2310.07E, paragraph 4.1, "It is DoD policy that . . . [a]ccounting for personnel lost as a result of hostile acts is of the highest national priority."

c. Joint Publication 4-06 supports and implements DoD Directive 1300.22. Chapter 1, paragraph 2d, requires, "[e]very reasonable effort will be made to identify human remains and fully account for unrecovered human remains of US military personnel . . . who die in military operations . . ." Chapter 2 of this publication is dedicated to an entire scheme to recover remains and requires throughout that the geographic combatant commanders conduct "tentative identification."

d. Army Regulation 638-2, ¶2-18a states, "*Recovery*. The Army will search for, recover, segregate, and identify remains of eligible decedents (see chap 8)."

94. Defendants have refused to consider new evidence given to them to identify the remains at issue. Additionally, Defendants have failed to use all available resources and capabilities in identifying the remains at issue.

95. Defendants have a clear non-discretionary duty to recover, identify, and return the remains at issue. Nonetheless, Defendants have refused to comply. As a direct and proximate result of Defendants' failure to consider all evidence of identity and to act accordingly, Plaintiffs and others have been irreparably harmed and continue to suffer ongoing irreparable harm.

96. Accordingly, Defendants have a non-discretionary duty to identify the remains at issue and to use all resources and capabilities immediately available in doing so. Additionally, no other adequate remedy exists. There is no alternative statutory or administrative process to allow Plaintiffs to retrieve the remains or challenge Defendants' action or inaction.

97. Therefore, Plaintiffs request mandamus relief from this Court ordering Defendants to fulfill their non-discretionary duty to identify the remains at issue and to use all available resources and capabilities.

COUNT FIVE – VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

98. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

99. Additionally, and in the alternative to the previous Counts, Plaintiffs assert claims under the Federal Administrative Procedure Act (“APA”) 5 U.S.C. § 500 et seq., which requires that Defendants refrain from engaging in "arbitrary and capricious" conduct that bears no rational connection to the facts and circumstances of a particular case. Moreover, Defendants must refrain from making findings that are not in accordance with law.

100. Defendants have violated APA, 5 U.S.C. § 500 et seq, by acting in an arbitrary and capricious manner and by making findings that are not in accordance with law. Despite the identification and overwhelming evidence showing where the remains at issue are located, Defendants have refused to return the remains in accordance with law. By doing so, Defendants have also violated Plaintiffs’ First, Fourth, and Fifth Amendment Constitutional rights. Further, Defendants’ offer no administrative proceedings for Plaintiffs to seek relief from such arbitrary and capricious conduct. Thus, immediate review by this Court for relief is proper.

101. Nothing in the APA precludes judicial review of this complaint. *See Sackett v. E.P.A.*, 566 U.S. 120, 128, 132 S. Ct. 1367, 1373, 182 L. Ed. 2d 367 (2012) (“The APA, we have said, creates a ‘presumption favoring judicial review of administrative action’”); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 233 (5th Cir. 2015) (citing *Save the Bay, Inc. v. Adm’r. of E.P.A.*, 556 F.2d 1282, 1293 (5th Cir.1977) where the Fifth Circuit stated that “[a] long-standing and strong presumption exists that action taken by a federal agency is reviewable in federal court.”); *Kirby Corp. v. Pena*, 109 F.3d 258, 263 (5th Cir. 1997) (“when Congress wishes to preclude judicial review, it usually says so in clear and unequivocal terms.”).

102. Further, Defendants' conduct has deprived Plaintiffs of a fair and impartial hearing, to which Plaintiffs are entitled in accordance with Federal APA requirements. Defendants have refused to return or identify the remains at issue for proper burial, which violates Plaintiffs' due process rights. This is because the right to bury their next-of-kin is protected by the Fifth Amendment.

103. Defendants' actions 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. 5 U.S.C. § 706(2).

104. Defendants' conduct has caused and will continue to cause Plaintiffs to suffer immediate and irreparable harm. No money damages can remedy this harm, and Plaintiffs have no legal avenue by which to recover any money damages against Defendants.

105. As a result, Plaintiffs are entitled to judgment and injunctive relief to protect their constitutional rights.

COUNT SIX – DECLARATORY JUDGMENT FINDING
PLAINTIFFS HAVE RIGHT TO POSSESS REMAINS

106. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

107. Under the Declaratory Judgment Act, the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Declaratory relief is available only when there is an actual, substantial case or controversy between parties who have adverse legal interests of sufficient immediacy and reality.

108. Although the Declaratory Judgment provides the Court with no independent basis for jurisdiction, this Complaint provides a basis for jurisdiction under *Bivens v. Six Unknown*

Federal Narcotics Agents, 403 U.S. 388 (1971) and the Mandamus Act. Jurisdiction is also present because Plaintiffs have alleged violations of their First, Fourth, and Fifth Amendment rights under the U.S. Constitution. See *Eakin v. American Battle Monuments Commission, et al.*, No. SA-12-CA-1002-FB (W.D. Tex. Aug. 5, 2013).

109. Here, the parties have an actual, substantive case or controversy. There is a dispute whether Plaintiffs have a constitutional, statutory, and/or common law right to possess their family member's remains for purposes of providing a proper burial. Both parties will be affected by the declaration because it will determine (1) whether Defendants are violating Plaintiffs' rights by refusing to return the remains at issue and (2) whether Plaintiffs may continue their pursuit to bury the remains of their family members.

110. Defendants have a non-discretionary duty to recover, identify, and return the remains of deceased World War II military personnel. Nonetheless, Defendants have failed to fulfill this duty and refuse to employ modern techniques endorsed by the Defense Science Board.

111. Defendants' refusal to return the remains at issue in this case violates the First, Fourth, and Fifth Amendment of the U.S. Constitution. It denies Plaintiffs due process - both procedurally and substantively. Moreover, it denies Plaintiffs their common law right to bury the remains at issue.

112. Additionally, the rights of family members to possess the remains of their family members for burial is acknowledged by the following federal statutes and Department of Defense regulations, *inter alia*:

- a. 10 USC § 1481.
- b. 10 USC §§ 1501-1513.

- c. Department of Defense Directive Number 1300.22, Mortuary Affairs Policy (Oct. 30, 2015).
- d. Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts.
- e. Department of Defense Instruction Number 1300.18 January 8, 2008 Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures.
- f. Chairmen of the Joint Chiefs of Staff, Joint Publication 4-06 Mortuary Affairs (Oct. 12, 2011), ¶2.
- g. U.S. Army Regulation 638-2.
- h. U.S. Army Pamphlet 638-2.

113. Declaratory relief is necessary and the Court should exercise jurisdiction over this declaratory judgment action because: (1) there is no parallel state-court proceeding currently pending; (2) it would be unfair to deprive Plaintiffs of a ruling after more than seventy (70) years have passed since the right to bury the remains arose; (3) Defendants would not be unfairly prejudiced by a declaratory judgment, as it is Defendants' purpose to work for Plaintiffs (and all other American citizens); and (4) this would be an efficient way of determining the parties' rights and the necessity for further litigation – if a next-of-kin has absolutely no right to bury a family member's remains, then no further litigation is necessary.

114. Plaintiffs are entitled to declaratory judgment finding that PNOK have a legally protected right to possess the remains of their family members for purposes of burial and that Defendants cannot wrongfully deprive them of this right.

115. Thus, Plaintiffs request that this Court declare that Plaintiffs and all other PNOK, have the legal right to possess the remains of their family members for purposes of providing a proper burial.

COUNT SEVEN – DECLARATORY JUDGMENT
RETURNING REMAINS TO PLAINTIFFS

116. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

117. Plaintiffs have identified where the remains of their family members are. Defendants have refused to return these remains for proper burial. Accordingly, there is an actual, substantive case or controversy between the parties. Both parties will be affected by the declaration because it will determine whether Defendants are required to comply with Plaintiffs' demands to return the remains for proper burial.

118. Defendants' refusal to return the remains at issue in this case violates the First, Fourth, and Fifth Amendment of the U.S. Constitution. It denies Plaintiffs due process - both procedurally and substantively. Moreover, it denies Plaintiffs their common law right to bury the remains at issue.

119. Additionally, the rights of family members to possess the remains of their family members for burial is acknowledged by the following federal statutes and Department of Defense regulations, *inter alia*:

- a. 10 USC § 1481.
- b. 10 USC §§ 1501-1513.
- c. Department of Defense Directive Number 1300.22, Mortuary Affairs Policy (Oct. 30, 2015).

d. Department of Defense Directive Number 2310.07E November 10, 2003 Subject: Personnel Accounting -- Losses Due to Hostile Acts.

e. Department of Defense Instruction Number 1300.18 January 8, 2008 Subject: Department of Defense (DoD) Personnel Casualty Matters, Policies, and Procedures.

f. Chairmen of the Joint Chiefs of Staff, Joint Publication 4-06 Mortuary Affairs (Oct. 12, 2011), ¶2.

g. U.S. Army Regulation 638-2.

h. U.S. Army Pamphlet 638-2.

120. Declaratory relief is necessary and the Court should exercise jurisdiction over this declaratory judgment action because: (1) there is no parallel state-court proceeding currently pending; (2) it would be unfair to deprive Plaintiffs of a ruling after more than seventy (70) years have passed since the right to bury these remains arose; (3) Defendants would not be unfairly prejudiced by a declaratory judgment, as it is Defendants' purpose to work for Plaintiffs (and all other American citizens); and (4) this would be an efficient way of determining the parties' rights and the necessity for further litigation.

121. Plaintiffs are entitled to declaratory judgment finding that PNOK have a legally protected right to possess the remains at issue for purposes of providing a proper burial and that Defendants have wrongfully denied them this right.

122. Thus, Plaintiffs request that this Court declare that Defendants are legally required to recover and return the remains that Plaintiffs have identified as their next-of-kin so that the remains can be properly buried.

COUNT EIGHT – DECLARATORY JUDGMENT
FINDING THAT DEFENDANTS HAVE VIOLATED PLAINTIFFS’
FIRST, FOURTH, AND FIFTH AMENDMENT RIGHTS

123. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

124. Plaintiffs’ have the right under the Free Exercise Clause of the First Amendment to the U.S. Constitution to bury the remains at issue pursuant to each individual plaintiff’s religious beliefs. Defendants’ actions deprive Plaintiffs of this right.

125. Plaintiffs’ have the right to not have their property unreasonably seized under the Fourth Amendment to the U.S. Constitution. Defendants’ actions have violated this right because they have unreasonably held the remains at issue from Plaintiffs.

126. Plaintiffs have a due process property interest, or quasi-property interest, to custody or possession of the remains at issue for purposes of providing a proper burial. Defendants have denied Plaintiffs of this due process property interest, or quasi-property interest. This shows that Defendants contend that Plaintiffs have no right to bury the remains at issue.

127. Accordingly, there is an actual, substantive case or controversy between the parties. Both parties will be affected by the declaration because it will determine whether Defendants are required to comply with Plaintiffs’ demands to return the remains at issue for proper burial.

128. Declaratory relief is necessary and the Court should exercise jurisdiction over this declaratory judgment action because: (1) there is no parallel state-court proceeding currently pending; (2) it would be unfair to deprive Plaintiffs of a ruling after more than seventy (70) years have passed since the right to bury these remains arose; (3) Defendants would not be unfairly prejudiced by a declaratory judgment, as it is Defendants’ purpose to work for Plaintiffs (and all

other American citizens); and (4) this would be an efficient way of determining the parties' rights and the necessity for further litigation.

129. Plaintiffs are entitled to declaratory judgment finding that Defendants have violated the Free Exercise Clause of the First Amendment, Fourth Amendment, and Due Process Clause of the Fifth Amendment to the U.S. Constitution.

130. Thus, 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.

COUNT NINE – VIOLATION OF FREE EXERCISE CLAUSE

131. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

132. Defendants are withholding the remains at issue from Plaintiffs. This deprives Plaintiffs, and their deceased family members, from having a proper burial in accordance with each respective families' religious beliefs.

133. Such interference violates the Free Exercise Clause of the First Amendment to the U.S. Constitution. Additionally, Defendants have placed a substantial burden on Plaintiffs' exercise of religion, which violates the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C.A. § 2000bb-1. Each Plaintiff has certain religious beliefs regarding what constitutes a proper burial. Plaintiffs seek to provide a burial for each deceased service member in accordance with their religious beliefs. But, Defendants have wrongfully refused to recover, return, and/or identify the remains at issue.

134. Defendants' actions, or inaction, prohibit Plaintiffs from freely practicing their religious beliefs and have caused Plaintiffs significant harm. For example, a proper burial is essential for many practicing Christians. The Bible states: "A man may have a hundred children and live many years; yet no matter how long he lives, if he cannot enjoy his prosperity and **does not receive proper burial**, I say that a stillborn child is better off than he." Ecclesiastes 6:3 (New International Version) (emphasis added). Additionally, Plaintiffs' request to reinter the remains at issue does not conflict with any of their religious beliefs. *See* Genesis 50:26; Exodus 13:17-19; Joshua 24:32 (Joseph's remains were reinterred over 200 years after his death when Moses took Joseph's remains with him out of Egypt to be buried in Shechem).

135. The RFRA requires courts to apply strict scrutiny for free exercise claims. 42 U.S.C.A. § 2000bb. The RFRA applies to action taken by the federal government. *See Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 1216–17, 163 L.Ed.2d 1017 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 715 n. 2, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions."); *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998) ("RFRA is constitutional as applied to federal law.").

136. Defendants cannot show that their actions further a compelling governmental interest. Further, even if there was a compelling government interest supporting their actions, Defendants cannot show that they are using the least restrictive means of furthering such interest. Moreover, Defendants have no rational reason for their actions against Plaintiffs.

137. Thus, Plaintiffs request that this Court declare that Defendants have violated the Free Exercise Clause under the First Amendment to the U.S. Constitution and issue appropriate injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in favor of Plaintiffs and against Defendants and award Plaintiffs the following relief:

a. Issue a judgment declaring that the acts of Defendants described herein violate Plaintiffs' rights under the First, Fourth, and Fifth Amendment to the United States Constitution.

b. Issue a judgment ordering Defendants to stop engaging in such unconstitutional and unlawful acts, and to return possession of the remains at issue to Plaintiffs for purposes of burial.

c. Issue a judgment declaring that the acts of Defendants described herein violate Plaintiffs' substantive and procedural due process rights protected by the Fifth Amendment to the United States Constitution.

d. Issue a judgment declaring that the individually named defendants, acting in their official capacity, have intentionally, or with deliberate indifference, deprived Plaintiffs of their rights under the First, Fourth, and Fifth Amendment to the United States Constitution.

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.

g. Issue a judgment, pursuant to the Federal Administrative Procedure Act, finding that Defendants' actions, findings, and conclusions are unlawful and should be set aside because such actions, findings, and conclusions: (1) are arbitrary, (2) are capricious, (3) are an abuse of

discretion, (4) are not in accordance with law, (5) fail to observe procedure required by law, (6) fail to provide a fair and impartial hearing, (7) are unwarranted by the facts, and (8) are contrary to Plaintiffs' constitutional rights.

h. Enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201(a) *et seq*, that Plaintiffs and all other PNOK have a legally protected right to possess the remains of their family members for purpose of burial and that Defendants have wrongfully denied them this right.

i. Enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201(a) *et seq*, that the Constitution, State law, and common law, dictates that Defendants must promptly return the remains at issue to Plaintiffs so that the remains at issue can be properly buried and issue appropriate relief.

j. Enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201(a) *et seq*, that Defendants have violated Plaintiffs' First, Fourth, and Fifth Amendment rights under the United States Constitution and issue appropriate relief.

k. Issue a judgment finding that Defendants' actions have violated the Free Exercise Clause of the First Amendment to the United States Constitution and that Defendants must return the remains at issue to Plaintiffs for purposes of burial.

l. Issue an order (1) enjoining Defendants from violating Plaintiffs' constitutionally protected rights and (2) directing Defendants to promptly provide due process to all next-of-kin that seek to properly bury remains wrongfully withheld by Defendants.

m. Grant all appropriate relief, including injunctive relief, necessary to bring Defendants into compliance with the United States Constitution and applicable State laws.

n. Issue an order directing Defendants to institute and carry out policies, practices, and programs that provide adequate relief for all families seeking to recover the remains of service members being held by the U.S. Government.

o. Issue an order directing Defendants to reimburse Plaintiffs for all expenses incident to the recovery, care, and disposition of the remains at issue as provided for by 10 U.S.C. § 1482, Army Regulation 638-2, Chapters 4 and 8, and other applicable statutes.

p. An award of Plaintiffs' costs of suit and reasonable attorneys' fees. 28 U.S.C. § 2412.

q. That the Court retain jurisdiction in this case pending a substantial showing by Defendants that all possible unidentified remains will be identified (assuming the Court finds that the remains at issue have not been identified by Plaintiffs already) in accordance with the Court's instructions.

r. An award of any further relief to Plaintiffs that this Court deems necessary, just, proper, and equitable.

Respectfully submitted,

/s/ John T. Smithee, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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