

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,

*Plaintiffs,*

v.

DEFENSE POW/MIA ACCOUNTING  
AGENCY, et al.,

*Defendants.*

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

**PLAINTIFFS’ CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the Families<sup>1</sup> respectfully request that the Court enter partial summary judgment in their favor against the Government<sup>2</sup> on their Procedural Due Process, Declaratory Judgment, and Administrative Procedure Act claims stated in their First Amended Complaint, ECF 19. In support of their motion, the Families rely on the arguments herein, the Appendix and attached Exhibits filed with this Motion, all documents previously filed with the Court, and any oral argument granted by the Court.

**Introduction**

This case presents important questions about a family’s right to bury a relative’s remains when the Government withholds the remains from the family without any type of hearing or

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<sup>1</sup> Plaintiffs John A. Patterson, John Boyt, Janis Fort, Ruby Alsbury, Raymond Bruntmyer, Judy Hensley, and Douglas Kelder (collectively the “Families”).

<sup>2</sup> Defense POW/MIA Accounting Agency (“DPAA”), Director of the DPAA Kelly McKeague, the United States Department of Defense (“DoD”), Secretary of Defense James Mattis, the American Battle Monuments Commission (“ABMC”), and Secretary of the ABMC William Matz (collectively the “Government”).

process, waits years to respond to a family's inquiry (if it responds at all), keeps disinterred remains in a government facility for years, and refuses to allow the family to inspect the remains.

Countless families of fallen World War II service members desperately want to bring home the remains of their loved ones previously deemed "unknown" so that they can provide a final and proper burial. But the ABMC has no procedure or policy that allows families to claim the remains of their loved ones. For whatever reason, the ABMC has failed to provide families with a fair opportunity to claim their remains. While the ABMC puts forth tremendous effort to maintain and care for our military cemeteries overseas, it has failed to provide the families of many service members the right to choose how to bury and remember their loved ones. No matter how commendable the ABMC's goals are, it cannot pursue them in an unconstitutional manner. Likewise, the DPAA and DoD have failed to provide any sufficient procedure for a next of kin to claim a family member's remains or request disinterment. Simply put, this case is about providing families of service members from WW2 a fair opportunity to claim the remains of their loved ones so that they can provide these fallen heroes with a proper burial in accordance with their families' beliefs.

### **Issues Presented**

The following issues in this case should be resolved because these questions do not depend on the determination of disputed facts:

- In *Mathews v. Eldridge*, the Supreme Court said that procedural due process imposes constraints on governmental decisions that implicate an individual's liberty or property interest. And in *Fuentes v. Shevin*, the Supreme Court added that the right to be heard does not depend on an advance showing that the individual will prevail once process is provided. In this case, the Families claim that they have sufficient evidence to prove the

location of their relative's remains and that the Government has possession of the remains. But the Families have not received a hearing or an opportunity to present evidence to support their claims before a neutral decision maker. Is the ABMC, DPAA, and DoD required to provide the Families with additional procedural protection?

- Do next of kin hold a protected right to possess the remains of a relative for purposes of burial?
- Did the Government violate Section 553 of the Administrative Procedure Act when it failed to promulgate its rules and/or regulations in the Federal Register or Code of Federal Regulations and those rules and/or regulations concern the identification and/or disinterment of remains from World War II?
- Did the Government violate the Administrative Procedure Act by failing to observe procedure required by law when it made formal adjudications concerning individual rights without a formal hearing?

### **Summary of Motion**

Next of kin have a constitutionally protected right to obtain and bury the remains of their family members. The Government cannot deprive next of kin of this right unless it provides due process under the United States Constitution. Here, the Government has in its possession the remains of thousands of fallen heroes from World War II. But it has not provided the next of kin of these fallen heroes any type of process or procedure to claim their remains for purposes of providing a proper and final burial. This violates the next of kin's Fifth Amendment right to procedural due process. Accordingly, the Government must provide the Families with procedural due process and a fair opportunity to claim the remains of their loved ones.

Additionally, the Court should declare that the Families hold the right to possess their relatives' remains for purposes of burial and that the Government's withholding of the remains violates the Due Process Clause. Finally, the Court should find that the Government has violated the Administrative Procedure Act by failing to comply with procedures required by law and by failing to act.

### **Statement of Facts**

Pursuant to Local Rule CV-7(d)(1), the Families hereby incorporate by reference the summary of facts and the exhibits referenced in the attached Appendix. Additionally, many documents and files necessary for the resolution of this motion are already a part of the record and on file with the Court, which are cited and relied upon by the Families.

### **Standard for Summary Judgment**

“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks omitted). Therefore, summary judgment is appropriate under Fed. R. Civ. P. 56(a) if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

### **Argument and Authorities**

#### **I. The Court Should Protect the Families and Provide them with the full Panoply of Protections Under the Due Process Clause**

The cornerstone of the American justice system, the Due Process Clause of the Fifth Amendment of the U.S. Constitution guarantees that no person will be deprived of liberty or property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive

individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”) (internal quotation marks omitted). “Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.” *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 174 (Frankfurter, J., concurring)).

If a governmental decision or action *implicates* an individual’s interest in property or liberty, then the right to some kind of hearing becomes paramount. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (an individual deprived of liberty or property must be granted procedural due process, which involves at least some type of hearing). Even government agencies must provide individuals with procedural due process when their procedures or decisions implicate property or liberty interests. *See Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) (“The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer.”). Thus, Courts decide a procedural due process claim by (1) determining whether a property or liberty interest is implicated and (2) examining whether the procedures provided are constitutionally sufficient. *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

**A. The Families’ Right to Procedural Due Process does not Depend upon the merits of their Substantive Assertions**

The Supreme Court has explained that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions . . . .” *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (recognizing the importance to organized society that procedural due process be observed) (citing *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971))

(“the right to due process reflects a fundamental value in our American constitutional system”); *Anti-Fascist Committee*, 341 U.S. at 171-72 (Frankfurter, J., concurring)). “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey*, 435 U.S. at 259. Additionally, “a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.” *Id.* at 262. Thus, because “[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing[,]” “[i]t is enough to invoke procedural safeguards of the [Fifth Amendment] that a significant property interest is at stake . . . .” *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (“we consider the interest of the *erroneously* detained individual.”) (emphasis in original); Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable*, 60 TEX. L. REV. 875, 887 (1982) (“The sense of unfair treatment felt by victims of inadequate procedure is precisely the sort of individual harm that constitutional rights and judicial review are meant to protect against.”).

In the present case, even if the Government’s refusal to return the remains to the Families was justified, and even if the Families did not suffer any other actual injury, “the fact remains that they are being deprived of their right to procedural due process.” *See Carey*, 435 U.S. at 266. Again, “[i]t is enough to invoke the procedural safeguards of the [Fifth Amendment] that a significant property interest is at stake, whatever the ultimate outcome of a hearing. . . .” *Fuentes*, 407 U.S. at 87; *see Codd v. Velger*, 429 U.S. 624, 632 (1977) (STEVENS, J., dissenting); *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424 (1915). So, it does not matter for purposes of this motion whether the Families will succeed at a hearing on the merits of their allegations - that

they have located the remains of their relatives. Instead, it matters that some type of procedural protection must be provided so that there will not be mistaken or unjustified deprivation of liberty or property. *See Carey*, 435 U.S. at 266. Thus, arbitrary and capricious rules and regulations that leave families without any avenue to challenge an agency's actions violates procedural due process clause rights guaranteed by the Fifth Amendment.

**B. The Government's Actions and Decisions Implicate the Families' Property and/or Liberty Interests at Stake**

Next of kin have a property and/or liberty interest in the remains of their relatives for purposes of providing a final burial, and the Due Process Clause protects these interests from government interference. Unfortunately, the Government's actions and decisions in this case implicate the Families' property and/or liberty interests without sufficient due process, which places the Families' interests at stake. The ABMC has not provided any procedure for next of kin to request or claim the remains of their loved ones. Plts.' Appx. at ¶16; Ex. 33 at 9, 12. Likewise, the DoD and DPAA have not provided a sufficient procedure or process for next of kin. *Id.* at ¶20; Ex. 34 at 13-14.

**1. The Families Retain a Cognizable Property Interest in the Remains of their Relatives**

The Families have a property interest implicated in this case - the right to bury the remains of their deceased relatives - that is protected by the Due Process Clause. "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. *Id.* at 572. Indeed, the

Supreme Court has explained that “property” is a “broad” and “majestic” term. *Id.* at 571. It is among the great constitutional concepts that was “purposely left to gather meaning from experience” and “relates to the whole domain of social and economic fact.” *Id.* (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

As previously briefed in this case (*see* ECF No. 33), numerous courts of appeals, including the Fifth Circuit, have considered the issue of what property interest a person has in a deceased relative. The courts have recognized that state laws have created at least some form of a property interest in the deceased person’s remains that is entitled to due process protection.<sup>3</sup> Our society has historically placed a premium value on protecting the dignity of the human body in its final disposition. *See Newman*, 287 F.3d at 798. Indeed, “the property interests of next of kin to dead bodies are firmly entrenched in the ‘background principles of property law,’ based on values and understandings contained in our legal history dating from the Roman Empire.” *Id.* at

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<sup>3</sup> *See Arnaud v. Odom*, 870 F.2d 304, 308-09 (5th Cir. 1989) (holding that “Louisiana has indeed established a ‘quasi property’ right of survivors in the remains of their deceased relatives”); *Travelers Ins. Co. v. Welch*, 82 F.2d 799, 801 (5th Cir. 1936) (next of kin has right to possess, preserve, and bury relative’s remains); *Whaley v. County of Ruscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (holding that the next of kin have a constitutionally protected property interest in the dead body of a relative, an interest that includes the right to possess the body for burial); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) (holding that the aggregate of rights granted by the state of Ohio to next of kin rises to the level of a “legitimate claim of entitlement” that is protected by the due process clause); *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796-797 (9th Cir. 2002) (holding the exclusive right of next of kin to possess bodies of deceased family members created property interest entitled to due process protection); *Bynum v. City of Magee, Miss.*, 507 F. Supp. 2d 627, 638 (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.”); *Martin v. Kim*, 2:03 CV 536, 2005 WL 2293797, at \*1 (N.D. Ind. Sept. 19, 2005); *Mansaw v. Midwest Organ Bank*, 1998 WL 386327, \*4 (W.D. Mo.1998) (holding that in Missouri next of kin have a property interest in the disposal of a deceased person’s body); *Crocker v. Pleasant*, 778 So.2d 978, 988 (Fla. 2001) (holding that “in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition”).



797. These property interests make sense because “[p]roperty rights serve human values” and “[t]hey are recognized to that end.” *Id.* at 798.

In *Arnaud v. Odom*, the Fifth Circuit found that Louisiana jurisprudence had established a “quasi-property” right of survivors in the remains of their deceased relatives. *Id.* The Fifth Circuit looked at relevant case law and statutes regarding the next of kin’s right to the remains of relatives for burial, and concluded that such a right qualified for protection under the Due Process Clause. *Id.* Other district courts within the Fifth Circuit have also found that the next of kin’s property interest in the remains of a relative are entitled to due process protection. *See Bynum v. City of Magee, Miss.*, 507 F. Supp. 2d 627, 638 (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.”).

On the other hand, in *Fuller v. Marx*, the Eighth Circuit held that the quasi property right held by a next of kin did not extend to a decedent’s body organs. 724 F.2d 717, 719 (8th Cir. 1984). There, the court still concluded that the next of kin had a quasi-property right in the remains of the deceased, but the court decided not to extend that right to all of the body’s organs. *Id.* Here, the organs are not at issue. Thus, the opinions from the Sixth and Ninth Circuit discussed below are more applicable.

In *Newman v. Sathyavaglswaran*, the Ninth Circuit considered practically the same issue before the Court: “whether the longstanding recognition in the law of California, paralleled by our national common law, that next of kin have the exclusive right to possess the bodies of their deceased family members creates a property interest, the deprivation of which must be accorded due process of law under the Fourteenth Amendment of the United States Constitution.” 287 F.3d at 788. The court held that next of kin do have a constitutionally protected property interest

entitled to due process. *Id.* The opinion provides a detailed review of the history of common law interests in remains, and concludes that the importance of providing a proper burial is “deeply rooted in our nation’s history.” *Id.* at 790. The court also found that its decision would not be affected if a state labeled the interest as “quasi property.” *Id.* at 797. The holding turned on the substance of the rights recognized, not the label given to them. *Id.* Thus, the court held that the next of kin has a constitutionally protected property interest in the remains of a relative, which could not be altered by state action without a firm basis. *Id.* at 797-98.

Similarly, in two decisions in the Sixth Circuit, it was held that a next of kin’s interest in the remains of a relative recognized in Michigan and Ohio were entitled to Due Process protection. *Whaley v. County of Ruscola*, 58 F.3d 1111, 1116 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991). The Sixth Circuit noted that each state had recognized a right of the next of kin to possess remains for burial. *Whaley*, 58 F.3d at 1116; *Brotherton*, 923 F.2d at 482. The common law rights, combined with statutory rights to control disposition of remains recognized in each state’s adoption of the Uniform Anatomical Gift Act, was held to be sufficient to create in the next of kin a property interest in the remains of their deceased relatives that could not be taken without due process of law. *Whaley*, 58 F.3d at 1116; *Brotherton*, 923 F.2d at 482.

Further, multiple independent sources recognize a next of kin’s property interest in their relatives’ remains for the limited purpose of providing a final burial. *See Travelers Ins. Co.*, 82 F.2d at 801. First, a deeply rooted common law principle, applicable in all jurisdictions, establishes the next of kin’s entitlement to possess, control, and bury the remains of their loved ones. *See Newman*, 287 F.3d at 790. Second, each Plaintiff resides in a state that recognizes and accepts this same common law principle and has accepted some form of the Uniform Anatomical

Gift Act that the Sixth and Ninth Circuits relied on. *See* ECF No. 51 at 6-7 and ECF No. 19 at 16-17 (citing case law from each state at issue); California - Cal. Health & Safety Code §§ 7102, 7150.40 *et seq.*; Rhode Island - R.I. Gen. Laws §§ 5-33.2-24, 23-18.6.1 *et seq.*; Texas - Tex. Health & Safety Code Ann. §§ 711.002, 692A.001 *et seq.*; New Mexico - N.M. Stat. Ann. §§ 24-6B-1 *et seq.*, 61-32-19; Wisconsin - Wis. Stat. Ann. §§154.30, 157.06. Third, Federal courts have also established a common law principle recognizing the next of kin's entitlement to possess, control, and bury the remains of their loved ones. *See Newman*, 287 F.3d at 795-98. It is a core common law right. The Fifth Circuit concluded long ago that "the right to possess, preserve, and bury [remains] belongs . . . to the next of kin." *Travelers Ins. Co.*, 82 F.2d at 801. Finally, multiple Courts, including those cited in the previous footnote, have concluded that this right is entitled to due process protection. *See Bynum*, 507 F. Supp. 2d at 638.

In sum, it is established as a matter of law that the Families have a legitimate due process property interest in the remains of their deceased relatives for burial.

## **2. Alternatively, the Families Hold a Cognizable Liberty Interest Implicated by the Government**

Just like "property", "liberty" must be construed broadly. *Roth*, 408 U.S. at 571. While courts have struggled to interpret exactly what a "liberty" interest includes, the Supreme Court once explained that a liberty interest exists when society has traditionally protected the asserted liberty interest, its "rooted in history," and its "tradition is evident." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). Without doubt, it denotes the freedom to enjoy privileges long recognized as essential to the orderly pursuit of happiness by free men. *Roth*, 408 U.S. at 572.

Here, next of kin also have a liberty interest implicated by the Government's actions – next of kin cannot choose how and where to bury the remains of their deceased relatives. The liberty to bury our relatives and loved ones is deeply rooted in our history. *See Newman*, 287

F.3d at 796 (duty to provide final disposition of remains is “deeply rooted in our legal history and social traditions.”). Its tradition is evident. *Id.* Furthermore, as shown in the case law cited in the above-section, it has been protected by society dating back to the Roman Empire. *See Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 235-36, 1872 WL 3575 (1872) (citations omitted) (reviewing civil law of ancient Rome); *see also Bogert v. City of Indianapolis*, 13 Ind. 134, 136, 138 (1859) (“the burial of the dead can [not] . . . be taken out of the hands of the relatives thereof . . .”). So, next of kin have a legitimate liberty interest that is entitled to procedural due process protection. *See Michael H.*, 491 U.S. at 122. Without this liberty interest, next of kin would be denied the freedom to enjoy privileges long recognized as essential to the orderly pursuit of happiness by free men. *See Roth*, 408 U.S. at 572.

### **3. The Government Has Interfered with and Implicated the Families’ Interests**

It is undisputed that the Government has possession of the remains of more than 3,700 service members buried at Manila American Cemetery that it has unilaterally determined are “unknowns.” ECF 31 at 10. Among those remains that were or are buried at Manila American Cemetery, are the remains at issue in this case (the Government reports that at least three of the remains at issue have been disinterred and moved to a laboratory in Hawaii). ECF 61-1 at 25-27.

The Government does not dispute that it has possession of the remains that the Families contend are those of their family members. But the ABMC has provided no process or procedure for next of kin to request disinterment and possession of a relative’s remains for burial. Plts.’ Appx. at ¶16; Ex. 33 at 9, 12. Likewise, the DoD and DPAA have disinterred several of the remains at issue but have not provided next of kin with any procedural rights to claim or request possession of the remains for burial. Plts.’ Appx. at ¶20; Ex. 34 at 13-14. The respective families are not even permitted to inspect the remains. Consequently, the Government is interfering with

the Families' interests and those interests are at stake in this lawsuit. By maintaining possession of these remains, the Government is depriving the Families of their right to request or claim their relative's remains for burial. Of course, it is understandable why the Government initially took possession of these remains. But there is no excuse for failing to provide next of kin with a process or procedure to request disinterment or possession of their relatives' remains for burial. At the very least, the Families' ability to exercise their right to claim their relative's remains is unjustly limited by the Government's current policies.

**C. In Light of the Families' Property and/or Liberty Interests at Stake, the Procedures Provided are Insufficient and Next of Kin must Receive Far More Process than the Government Has Provided Them**

In the present case, the Government has completely failed to provide next of kin with sufficient process. Again, the Due Process Clause of the Fifth Amendment to the U.S. Constitution requires that the ABMC and DPAA (as well as the DoD), as administrative agencies, provide next of kin 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. *See Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) ("The basic requirement of constitutional due process is a fair and impartial tribunal, whether at the hands of a court, an administrative agency or a government hearing officer."). But the ABMC, DPAA, and DoD have not provided next of kin with any type of hearing or impartial adjudicatory proceeding.

As discussed in the attached appendix, the ABMC does not have any process or procedure whatsoever for next of kin to request disinterment or possession of relative's remains for burial. Plts.' Appx. at ¶16; Ex. 33 at 9, 12. Likewise, the DPAA and DoD also lack any type of hearing or formal process that allows next of kin to receive fair adjudication. Plts.' Appx. at

¶16; Ex. 34 at 13-14. If it wishes, the DPAA can take years to respond to a next of kin's request for disinterment or it can choose to simply ignore the request without any consequences. *See* Plts.' Appx. at ¶29; Ex. 4; Ex. 12 (showing that Government had knowledge of location of remains, but did not take any action for years). While next of kin can submit a request to the DPAA for an identification to be recognized by the DPAA and DoD, a next of kin still does not have any sufficient procedure to claim the remains of their loved one. *See* Ex. 1 at 4 (Government refused to consider evidence that family tried to present, which proved to be accurate). There is no opportunity for a formal hearing, no opportunity to present witnesses and evidence in support of a case, no opportunity to confront the Government's evidence and witnesses, no written final decision by the ABMC, and no right to appeal any final decision or inaction. The Government appears to take the position that it can do whatever it likes with the remains of service members that it unilaterally declares are "unknown" without providing next of kin with any opportunity for a hearing. But the Government's position is wrong. As discussed more below, every individual adjudication by the ABMC and DPAA must be accompanied with adequate procedures.

**1. The Government Must Provide Next of Kin with a Process to Claim the Remains of their Loved Ones**

It is up to the Court, not the DPAA or DoD, to determine the exact process that is due. *Cleveland Bd. of Ed. v. Loudermill*, 470 U. S. 532, 541 (1985) (what process is due is a question of constitutional law); *Vitek v. Jones*, 445 U.S. 480, 489 (1980) (explaining that it is not for the government to decide what due process requires, it is for the courts in interpreting the Constitution). Nonetheless, the Supreme Court has explained that individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. *Londoner v. City and County of Denver*, 210 U. S. 373–386 (1908). Those procedures normally include notice

and an opportunity to present relevant proofs and arguments, before a neutral decision maker, and reasoned decision maker. *See Hamdi v. Rumsfeld*, 542 U. S. 507, 533 (2004) (plurality opinion); *see also Friendly, Some Kind of a Hearing*, 123 U. Pa. L. Rev. 1267, 1278–1281 (1975). “These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect.” *Kerry v. Din*, 135 S. Ct. 2128, 2144, 192 L. Ed. 2d 183 (2015) (Breyer, J., dissenting) (citing *Hurtado v. California*, 110 U. S. 516, 527 (1884)). An individual is entitled to understand why the government has acted as it did – that is a fundamental element of due process. *See, e.g., Goldberg*, 397 U.S. at 267-68; *Perry v. Sindermann*, 408 U. S. 593, 603 (1972); *Morrissey v. Brewer*, 408 U. S. 471, 485, 489 (1972); *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Mathews*, 424 U.S. at 346 (1976); *Cleveland Bd. of Ed.*, 470 U.S. at 546; *Hamdi*, 542 U. S. at 533 (plurality opinion).

Every individual adjudication by the ABMC and DPAA should be accompanied with Due Process Clause procedures. Each next of kin of a deceased service member being held by the ABMC or DPAA should have a fair opportunity to meet the case that has produced their serious loss – the ability to claim the remains of their loved ones to provide a burial. *See Joint Anti-Fascist Refugee Comm.*, 341 U. S. at 172 (1951) (Frankfurter, J., concurring); *see also Hamdi*, 542 U. S. at 533 (plurality opinion); *Wolff*, 418 U.S. at 563; *Friendly, Some Kind of a Hearing*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (“notice” must provide “the grounds for” the relevant action). Next of kin must be allowed to take appropriate action after the Government implicates their interests.

The Families believe that a few simple procedures and policies would largely cure the lack of procedural due process. First, next of kin should be allowed to submit a request to an officer or employee of the Government for possession of their relative's remains, who would then be required to respond within a reasonable time period. The officer or employee would either accept or deny the adequacy of the evidence showing the identity or location of the remains. If the evidence is accepted, then the Government would be required to provide a reasonable deadline for disinterment and provide a plan for any additional identification analysis or testing with an estimate of the time required to complete the additional analysis. Any failure to respond would be considered to be a denial of the informal request. If the request is denied or the timeframe for disinterment is unacceptable, next of kin should be given the opportunity to appeal the decision to a neutral decision maker – some type of hearing. If there is a finding that the Government's proposed disinterment is not timely or the proposed analysis is inadequate, then a next of kin should be allowed to proceed without the Government by using an approved civilian contractor to be reimbursed by the Government upon final burial of the identified remains. This would be a simple and straightforward process that would protect the next of kin while also limiting the burden on the Government.

**D. A Formal *Mathews* Analysis Underscores the Strength of the Families' Claims**

The Families have established why they are entitled to judgment as a matter of law on their procedural due process claims. It will nonetheless be useful to briefly progress through a formal *Mathews* analysis—which calls for balancing “(1) the private interest affected by the government action; (2) the risk of erroneous deprivation and the value of additional safeguards; and (3) the government's interest, including the fiscal and financial burdens that additional or substitute procedural requirements would entail,” *Propert v. District of Columbia*, 948 F.2d



1327, 1332 (D.C. Cir. 1991) (citing *Mathews*, 424 U.S. at 335)—in order to underscore the strength of the private interests at stake and the high risk of error absent additional safeguards, which combine to far outweigh any governmental interests.

### **1. The Private Interests at Stake are Compelling**

The Government's current policy implicates a distinct private interest: a next of kin's right to provide a service member with a proper and final burial. The next of kin's right to provide a proper burial is fundamental as a matter of history and tradition. From their beginning to their most recent page, the annals of human history reveal the transcendent importance of providing a proper burial. It is a sacred practice in many religions and offers unique fulfillment to those who find meaning in the secular realm. From the Egyptian mummification process to the Roman civil law's imposition of a duty of burial, virtually every faith and society has exhibited a reverence for the dead. *See Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 235-36, 1872 WL 3575 (1872) (reviewing ancient laws); Genesis 50:26 (describing Joseph's burial); Deuteronomy 34:6 (describing Moses' burial); W.K.C. Guthrie, *The Sophists*, at 82 (Cambridge Univ. Press 1971); W.B. Tyrrell and F.S. Brown, *Athenian Myths and Institutions*, at 81 (Oxford Univ. Press 1991). It is a "fundamental" and "self-evident right of humanity" that is "so sacred and precious" that it "ought not to need any judicial precedent" and is "entitled to legal protection, by every consideration of feeling, decency, and Christian duty." 4 Bradford's Sur. Ct. 503 (1856) (also known as the "Ruggles Report"). "Consequently the rights of burial, the discharge of which forms ones of the offices of humanity, cannot be denied even to enemies, whom a state of warfare has not deprived of the rights and nature of men." Hugo Grotius, 2 *On the Law of War and Peace*, ch 19 at 177-178 (1625) (available at <https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf>).

Further, the next of kin's right to bury the dead is protected by natural law and is an inalienable right. *See* James W. Ely, *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1048 (2000) ("Under natural law theory, certain rights were deemed so basic as to be beyond the reach of governmental authority."). Indeed, the Ninth Amendment to the U.S. Constitution presupposes a body of natural rights that existed outside of positive law. Therefore, this Court should consult the natural law that protects the Families' interest at stake and consider it when determining the importance of the interest at stake. *See* Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 Fordham L. Rev. 1541 (2011) ("At the time of the founding, both private and public law were understood to embody natural law and judges were expected to consult it in the cases before them."); *see also* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 667 (2009) (noting that "the Federalists had expressly argued that the entire Bill of Rights was redundant" because "natural and customary rights [existed] independent of any textual enumeration").

For example, in the Greek tragedy *Antigone*, Sophocles illustrates that the next of kin's right to bury the dead is protected by natural law and is an inalienable right. There, King Creon decreed that Polynices was not to be buried. The blind prophet Teiresias railed against Creon's decision:

Know, then, and know it well, that thou shalt see not many winding circuits of the sun, before thou giv'st a quittance for the dead, a corpse by thee begotten; for that thou hast trampled to the ground what stood on high, and foully placed within a charnel-house a living soul. And now thou keep'st from them, the Gods below, the corpse of one unblest, unwept, unhallowed.

8 Harvard Classics, part 6, lines 1223-1231, (P.F. Collier & Son, NY). In defiance of King Creon's arbitrary law, Antigone appeals to the natural law as having greater binding authority

than the man-made law and sets out to provide a proper burial. “As Sophocles’s play *Antigone* illustrates, when human laws do not conform to the natural law, justice loses its meaning, man presumes to be God, and tyranny in the form of ‘might is right’ or ‘raw judicial power’ violates the most natural rights of all, such as *Antigone’s* brother’s right to a burial . . . .” Mitchell Kalpakgian, *The Right to Life and the Natural Law* (available at <http://www.ufl.org/vol%209/kalpakgian9.pdf>).

In sum, the next of kin’s interest in burying their loved ones is vital to our society and the Court should give it considerable weight when determining what procedures are required.

**2. The Value of Additional Safeguards is High and The Risk of Erroneous Deprivation Will Remain High Absent Additional Procedural Safeguards**

The second *Mathews* prong requires consideration of the probable value of additional or substitute procedural safeguards and risk of erroneous deprivation in the absence of additional procedures. Here, the adverse effects of an erroneous denial of a next of kin’s request for a relative’s remains is self-evident and the next of kin’s interest in not being erroneously denied the remains of their loved one is substantial. Additionally, the risk of an erroneous action is quite high.<sup>4</sup> This is especially true in light of the fact that the ABMC provides no procedure for next of kin to claim the remains of a family member for burial. Likewise, the DoD and DPAA, using its current procedures, provide no meaningful justification for its current policies and no meaningful opportunity for next of kin to contest its decisions or inaction. *See Mathews*, 424 U.S. at 349 (holding that procedures must ensure that the deprived person is “given a meaningful opportunity to present [his] case”).

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<sup>4</sup> The Government has made numerous misidentifications over the years. For example, in this case alone there have been several mistakes made. *See* ECF 61-1 at 27 (in Private Kelder’s case, the Government has disinterred remains that were buried in the United States); ECF 61-1 at 36 (recognizing mistaken identification of 1LT Ira Cheaney).

There are many reasons why the DPAA's woefully inadequate process will often lead to unjust results. Under the Government's current policy, a next of kin is not allowed to review all of the evidence considered by the DPAA or all information presented to the Assistant Secretary of Defense for Manpower and Reserve Affairs (or any other Deputy Assistant that reviews the information), which results in next of kin being unable to correct any misinformation placed in their case file by the DPAA. By not allowing the next of kin to appear before the Assistant Secretary, the Assistant Secretary must act without mitigating or clarifying evidence from the next of kin. By not allowing the next of kin to confront opposing witnesses or evidence, the next of kin is unable to refute statements made against their interest and the Assistant Secretary is unable to fairly evaluate the credibility of the evidence before him.

Indeed, this very case is evidence of how high the risk of erroneous deprivation is under the insufficient process that the DPAA routinely provides to next of kin. Before this litigation, the Government refused to take action after the Families requested disinterment of the remains of their loved ones. Now that the Families have had a hearing, and there is a neutral decision maker looking at the facts of their case, the Government has at least agreed to disinter three of the remains at issue. Plts.' Appx. at ¶3-6. Of course, the DPAA disinterred the remains of Private Kelder more than four years ago, yet it is still conducting "testing" and "analysis." The simple addition of some type of hearing and reasonable process will likely dramatically increase the accuracy of the ABMC and DPAA's fact finding, which will help lead to a decrease of erroneous deprivation. By allowing the next of kin to present evidence and testimony supporting their claims, it will only further help bring our fallen heroes back home for a proper burial. If no additional safeguards are provided, the Government will be allowed to continue to deprive next of kin of the remains of their loved ones indefinitely without any consequences.

### 3. The Government's Interest, While Appreciable, Is Clearly Outweighed

The Government's interest, including consideration of any added financial burden of providing next of kin adequate process, cannot counterbalance the strength of the next of kin's private interests and the risk of erroneous deprivation. The Government surely has an interest in identifying and returning service members' remains to their families—but those interests are only served when decisions regarding disinterment and identification are made timely and accurately. *See Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981) (a contested hearing prior to serious deprivation serves both the government and the private party because the government “shares the [private party's] interest in an accurate and just decision”). Moreover, the addition of some type of hearing will not unjustly harm the Government's administrative efficiency. As of now, the Government has numerous employees that perform research and prepare reports concerning the location of remains buried at Manilla American Cemetery. *See* Ex. 3; Ex. 4; Ex. 12; Ex. 20. The addition of a hearing will not significantly alter that process. If anything, it will help make sure that the Government has considered all of the available evidence, which will lead to a more effective and efficient process.

Thus, weighing the factors of *Mathews v. Eldridge*, the Government's current policy does not meet the constitutional requirements for procedural due process and the Families are entitled to judgment as a matter of law on their procedural due process claim.

## II. Declaratory Judgment - The Families Have a Right to Possess the Remains of their Relatives for Burial

The Declaratory Judgment Act provides in pertinent part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, 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). Here, the parties have an actual case or controversy. There is a dispute regarding whether next of kin have a right to possess the remains of their family members for purposes of burial. For example, the Government has the remaining balance of Private Kelder's remains, but refuses to return the balance to the next of kin. Plts.' Appx. at ¶27. Private Kelder's family would like to bury all of his remains and believe they have the right to do so.

Accordingly, the Families respectfully request that this Court declare the rights of the Families and other next of kin in regards to their right to possess the remains of their family members for purposes of burial. Specifically, the Families move for judgment as a matter of law declaring that the Families and all other next of kin have a constitutional, statutory, and/or common law right to possess the remains of their family members for purposes of burial. Further, the Families move for judgment as a matter of law declaring that the Government cannot deprive a next of kin from possessing the remains of their family members for purposes of burial without providing procedural due process protection.

### **III. The Government has Violated the APA**

The Families respectfully request that the Court grant them summary judgment finding that the Government has violated the Administrative Procedure Act ("APA").

#### **A. The Government Has Failed to Comply with Section 553 of the APA**

First, the Government has failed to comply with the APA by not promulgating its regulations concerning the disinterment of remains from World War II in the Federal Register or Code of Federal Regulations. *See* ECF 26 at 18. While the DoD has numerous rules and regulations related to accounting for missing personnel (discussed more below), none have been properly issued by notice and comment rulemaking as required by Section 553 of the APA. *See* 5 U.S.C. § 553(b)-(e) (no exception applies because this is not a wartime function).

**B. The Government Has Failed to Observe Procedure Required by Law and Violated the Fifth Amendment**

Second, the Government has unlawfully refused and unreasonably delayed the return of the remains at issue to their families. Additionally, it has done so without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(D). Here, the Government has unilaterally made a formal or “on the record” adjudication concerning several of the Families’ requests for disinterment and possession of their relatives’ remains. While an agency is generally free to choose how to utilize its rulemaking policy, certain legal requirements nevertheless apply to adjudications. 5 U.S.C. §§554, 556-557. Formal adjudications require trial-like procedures and must be conducted before an administrative law judge or agency head. *Id.* For example, if an individual is denied a benefit under the Black Lung Benefits Act, that agency must provide an administrative law judge to oversee a formal hearing reviewing the case because it is a formal adjudication. In the present case, the Families are being denied the right to bury their loved ones’ remains on an individual basis. But a formal hearing or opportunity to refute the Government’s conclusions has not been provided.

This failure also relates to the Government’s failure to provide adequate procedural due process. As discussed above, the Families have a property and/or liberty interest at stake. But, even if we assume that the Government is entitled to use its discretion and there is no property interest created by state or common law, the Government must still provide sufficient due process. In determining whether a given agency rule or regime creates a property interest protected by the Due Process Clause, courts also look to the statutes and regulations governing the distribution of benefits. *See Kelly Kare, Ltd. v. O’Rourke*, 930 F.2d 170, 175 (2d. Cir. 1991). “Where those statutes or regulations ‘meaningfully channel official discretion by mandating a defined administrative outcome,’ a property interest will be found to exist.” *Kapps v. Wing*, 404

F.3d 105, 113 (2d. Cir. 2005). “[T]he focus of the federal courts is on the adequacy of the procedures used to make that determination.” *Id.* at 117.

Thus, to the extent that the Government’s regulations mandate the return of a service member’s remains to a next of kin that satisfactorily proves that they are eligible and have located their relative’s remains, the next of kin “possess a property interest, protected by the federal Due Process Clause.” *Id.* Again, the right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. *Fuentes*, 407 U.S. at 87 (“The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit. It is enough to invoke procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake . . .”). The aim of proper procedures is to decide properly whether the next of kin has a legitimate claim of entitlement.

### **C. The Government’s Failure to Act Violates the APA**

Agency action includes a failure to act. 5 U.S.C. § 551(13). Consequently, under certain circumstances, “agency inaction may be sufficiently final to make judicial review appropriate.” *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000). Those circumstances apply here.

In the present case, the Government has had possession of the remains at issue for more than 60 years. The law, as previously discussed, demands that the Government return the remains of a service member to his family for burial. But the Government has refused to act and has unreasonable delayed in taking any action in many ways, including the following:



- Despite acknowledging that Private First Class David Hansen was most likely buried in Grave 407, the Government has refused to take any action to disinter his remains and provide them to his family. ECF 61-1 at 26.
- Despite having disinterred Private Kelder's remains five years ago, the Government has refused to return the remaining balance of his remains to his family. ECF 61-1 at 27.
- Despite having disinterred Private Robert Morgan and Technician Lloyd Bruntmyer nearly six months ago, the Government has not returned the remains to the Families or provided any information to the Families about any testing or research.
- Despite having received a request for disinterment from Colonel Stewart's next of kin many years ago, the Government has refused to answer whether it will disinter the remains designated as X-3629. ECF 61 at 27 ("DPAA is still preparing its recommendation regarding Plaintiff John Boyt's request . . .").
- The Government has failed to timely notify and provide the Families with all information concerning their relative's case, which the Government claims is required by statute. *See* 10 U.S.C § 1509(e)(2)(A); 10 U.S.C § 1505(c)(2). For example, the Government knew for years about the Cheaney file, but did not timely provide that information to the next of kin – Patterson. Ex. 21 at 2-3 (Patterson asking for Cheaney file, but being falsely told that there were no classified portions relating to his uncle). Another example is the Government not providing new information about the remains that have been disinterred and what it is doing with those remains. *See* Plts.' Appx. at ¶30-31.

The Families understand that there are other families that also want their loved ones returned. But there is no explanation as to why the Government has refused to act on any of the above-described matters in a reasonable time. If the Families were allowed to conduct DNA testing on their own, any doubts as to the identity of the remains could have been resolved in a matter of months. Instead, they have spent years now waiting for the Government to complete what it told the Families it would do – bring their loved one home for a proper burial. There simply has been no explanation as to why the Government has failed to act in these cases and refuses to allow the Families to help. Further, the Government must timely provide the Families with information concerning their relative's cases that it is finally taking action on.

### **Prayer**

FOR THE REASONS STATED ABOVE, the Families respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment and issue an order (1) declaring that the ABMC, DoD, and DPAA have violated the Families' rights under the Fifth Amendment to the United States Constitution; (2) declaring that the acts and/or omissions of the ABMC, DoD, and DPAA have violated the Families' procedural due process rights protected by the Fifth Amendment to the United States Constitution; (3) directing the ABMC, DoD, and DPAA to promptly provide procedural due process to the Families and all next-of-kin that seek to direct the burial of remains withheld by those government agencies; (4) declaring that the ABMC, DoD, and DPAA cannot deprive a next of kin from possessing the remains of their family members for purposes of burial without providing procedural due process protection; (5) finding that the ABMC, DoD, and DPAA have violated the Administrative Procedure Act; (6) directing the ABMC, DoD, and DPAA to immediately provide each Plaintiff all information within its possession that is related to or concerns their individual claim; (7) granting all appropriate relief,

including injunctive relief, necessary to bring the ABMC, DoD, and DPAA into compliance with the United States Constitution, Administrative Procedure Act, and applicable State laws; and (8) awarding any further relief to the Families that this Court deems necessary, just, proper, and/or equitable.

Dated: May 10, 2019

Respectfully submitted,

/s/ John T. Smithee, Jr. \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 10th day of May 2019, a true and correct copy was delivered as follows:

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