UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:17-cv-01793-ESH-RMM**
	)	
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

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Plaintiffs, by and through their undersigned counsel, hereby file this Memorandum of Points and Authorities in Opposition to Defendants' Motion for Reconsideration (Dkt. 72) ("Motion"). For the reasons set forth below, Plaintiffs request that the Court deny the Motion.

ARGUMENT

I. Defendants Fail To Meet The Standard For Reconsideration Under Rule 54(b)

A. The Rule 54(b) Standard

Defendants' Motion does not come close to satisfying the strict reconsideration standard applicable here. As the denial of the motion to dismiss at issue is an interlocutory order, there is no dispute that Rule 54(b) applies. But Defendants are wrong to suggest that the Rule 54(b) standard is somehow so lenient and "flexible" as to permit them to obtain reconsideration on the mere assertions that they "disagree" with the Court's decision (*see* Dkt. 72 at 2-3). To the contrary, courts in this district, including this Court, have made it clear that reconsideration under Rule 54(b) is appropriate "only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Murphy v. Exec. Office for U.S. Attorneys*, 11 F. Supp. 3d 7, 8 (D.D.C. 2014) (Huvelle, J.), *aff'd sub nom. Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204 (D.C. Cir. 2015) (internal quotations and citation omitted).[1]

Moreover, this Court also has emphasized, in the Rule 54(b) reconsideration context, that "a court 'should be loath[]' to grant a motion for reconsideration 'in the absence of extraordinary

[1] *See also Zeigler v. Potter*, 555 F. Supp. 2d 126, 129 (D.D.C. 2008), *aff'd per curiam*, No. 09-5349, 2010 U.S. App. LEXIS 6904 (D.C. Cir. Apr. 1, 2010) (same standard); *In re: Vitamins Antitrust Litig.*, Misc. No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 11350, at *18 (D.D.C. July 28, 2000) (same standard); *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003) (same standard). The same standard was announced in the decision cited by Defendants. *See Ferrer v. CareFirst, Inc.*, No. 16-cv-02162 (APM), 2017 U.S. Dist. LEXIS 128618, at *2-3 (D.D.C. Aug. 14, 2017).

circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'" *Associated Mortg. Bankers Inc. v. Carson*, No. CV 17-0075 (ESH), 2017 U.S. Dist. LEXIS 189393, at *3 (D.D.C. Nov. 15, 2017) (citations omitted).[2] In all events, Defendants – as the movants – "[have] the burden of showing that reconsideration is warranted, and that some harm or injustice would result if reconsideration were to be denied." *Id.* (citations omitted).

In their Motion, Defendants only raise improper and rehashed arguments to express their disagreement with the Court's reasoning and ultimate decision. And Defendants do not even try to identify any "harm or injustice" that would result if reconsideration were to be denied. Defendants have failed to carry their burden under Rule 54(b). In any event, even if the Court were to reconsider Defendants' arguments, they have no merit and do not warrant any change in the Court's decision.

B. Defendants Fail To Identify Any Valid Basis For Reconsideration

Defendants do not contend – nor could they – that there has been an intervening change in the law or that they have discovered any new evidence. Thus, their Motion must rest on the notion that the Court's determination that the Amended Complaint states constitutional claims is somehow "clear error." But Defendants have identified no such error.

First, Defendants note that reconsideration may be appropriate where "the Court has patently misunderstood a party . . . [or] has made an *error not of reasoning* but of apprehension." Dkt. 72 at 3 (emphasis added) (quoting *Jones v. Castro*, 200 F. Supp. 3d 183, 185 (D.D.C.

[2] *See also Keystone Tobacco Co.*, 217 F.R.D. at 237 (The court's "discretion to reconsider interlocutory orders is tempered somewhat by the Supreme Court's [admonition] that 'courts should be loath[] to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'") (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 807 (1988)) (internal quotations and citation omitted).

2016)). Yet, Defendants' Motion makes clear that they are merely challenging the Court's reasoning. In fact, Defendants use those very words to suggest error: "With respect to the [due process claim], the Court's *reasoning suffers from two flaws*." Dkt. 72 at 7 (emphasis added); *see also id.* at 5 ("This Court's heavy reliance on *Wagafe* to deny Defendants' motion was misplaced."); *id.* at 10 ("[T]he Court's due process analysis did not properly address the Supreme Court's holding"). Tellingly, Defendants fail to identify any argument that this Court "appears to have overlooked or misunderstood," as Defendants contend at the opening of their Motion. *Id.* at 1.[3] The contrary is true. The Court considered, but rejected, Defendants' arguments.

Next, Defendants suggest that reconsideration is warranted because the Court committed "errors of apprehension" by "fail[ing] to consider controlling decisions or data that might reasonably be expected to alter the conclusion reached by the Court." Dkt. 72 at 3 (quoting *Jones*, 200 F. Supp. 3d at 185). But, here again, Defendants never identify a single such controlling decision that the Court failed to consider or failed to apprehend. Rather, Defendants simply disagree with the Court's assessment of the case law Defendants presented. This is not enough.

Defendants further acknowledge that the Court must consider whether relief under Rule 54(b) is "necessary under the relevant circumstances." Dkt 72. at 3 (quoting *Jones*, 200 F. Supp. 3d at 185); *see also Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2004) ("[A]s justice requires" standard amounts to determining "whether [relief upon] reconsideration is necessary under the relevant circumstances."). Yet, Defendants never explain why reconsideration is "just" in this case, let alone "necessary." Defendants make conclusory assertions instead of specific instances of error that meet the reconsideration standard. For example, in one of their Motion

[3] In fact, after invoking these words – "overlooked" and "misunderstood" – to characterize the Court's decision, Defendants never mention them again except in one argument heading. Dkt. 72 at 7.

headings, Defendants declare that "The Court's Analysis . . . Sets an Unworkable Precedent," Dkt. 72 at 7, without ever identifying the "precedent" that the Court set or why that precedent is "unworkable." That type of argument does not pass muster. As one court put it:

> In order for justice to require reconsideration, logically, it must be the case that, some sort of 'injustice' will result if reconsideration is refused. That is, the movant must demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration.

Cobell, 355 F. Supp. 2d at 540 (stating that since the movant had not shown that a failure to reconsider would result in any injustice, it followed that justice did not require reconsideration); *see also Clayton v. District of Columbia*, 931 F. Supp. 2d 192, 211 (D.D.C. 2013) ("The District has not shown that it will be harmed by having to resort to future action regarding Clayton's as-applied constitutional claim, or that some injustice will result if reconsideration is denied. Because the District has not demonstrated that reconsideration is warranted, its motion will be denied."); *Ludlam v. U.S. Peace Corps*, 970 F. Supp. 2d 19, 23 (D.D.C. 2013) ("Nor does plaintiff demonstrate that actual harm would accompany a denial of his motion for reconsideration. Because plaintiff fails to meet the standard required for reconsideration of interlocutory rulings, the Court declines to exercise its discretion to grant plaintiff's motion.").

Defendants' Motion identifies no harm or injustice that would result if the Court does not reconsider its decision. Nor can they assert any such harm. Defendants' Motion to Dismiss tested the sufficiency of the causes of action pled in the Amended Complaint. The Court held that the constitutional claims (and the APA claims) stated causes of action. Now those allegations will be litigated before the Court makes a final decision based on the law and the evidence.

C. Defendants Improperly Are Invoking Reconsideration Simply To Register Their Disagreement With The Court's Decision

Ignoring the applicable reconsideration standards, Defendants' Motion merely rehashes the same arguments – relying on the same cases – that they used in their Motion to Dismiss. This reliance on prior arguments is pervasive throughout their current Motion for reconsideration. *See e.g.* Dkt. 72 at 4 ("As Defendants argued in both their opening brief and their reply, . . ."); *id.* at 5 ("As Defendants previously explained, . . ."); *id.* at 6 ("As Defendants previously argued, . . ."); *id.* at 8 ("Yet, as Defendants previously argued, . . ."); *id.* at 5 ("Both parties here also discussed *Nemetz* in their briefs, . . ."). Perhaps most tellingly, Defendants admitted to Plaintiffs that they were seeking reconsideration because they "disagree" with the Court's decision. *See* Exhibit A (E-mail from Defendants' counsel to Plaintiffs' counsel) (Feb. 7, 2018) ("In particular, *we respectfully disagree with Judge Huvelle's analysis* of our arguments concerning Plaintiffs' Naturalization Clause and procedural due process claims.") (emphasis added).

The law is clear that one party's mere disagreement with an interlocutory order does not provide a basis for reconsideration. This Court itself has so held:

> [I]n this Circuit, it is 'well-established' that motions for reconsideration 'cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier.'

Dist. Hosp. Partners, L.P. v. Sebelius, No. CV 11-0116 (ESH), 2011 WL 13248160, at *1 (D.D.C. Sept. 1, 2011) (quoting *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 9-10 (D.D.C. 2011)); *Said v. Nat'l R.R. Passenger Corp.*, 191 F. Supp. 3d 55, 57 (D.D.C. 2016) ("And motions for reconsideration are vehicles for neither reasserting arguments previously raised and rejected by the court nor presenting arguments that should have been raised

previously with the court.") (citation omitted). Indeed, the court's "discretion to revise its decision is subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. The sure and speedy administration of justice requires no less." *Dist. Hosp. Partners, L.P.*, 2011 WL 13248160, at *1 (internal quotations and citation omitted); *see also Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101-02 (D.D.C. 2005) (same).

Under these circumstances, Defendants' reconsideration motion is improper and should be rejected. *Estate of Gaither ex rel. Gaither*, 771 F. Supp. 2d at 9-10 (denying Rule 54(b) reconsideration motion and stating that "Defendants' entire motion either raises arguments that should have been, but were not, raised in their underlying Motion for Summary Judgment, or merely recycles the same arguments already pressed and rejected. This approach is, frankly, a waste of the limited time and resources of the litigants and the judicial system. . . . filing a motion of this kind is almost never appropriate"); *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (approving the district court's denial of the motion for reconsideration and stating: "The district court understandably determined justice did not require reconsidering its order, for Capitol raised no arguments for reconsideration the court had not already rejected on the merits . . . .").

II. Defendants' Arguments Do Not Merit Upsetting The Court's Decision Denying The Motion To Dismiss The Constitutional Claims

Defendants have not met their heavy burden of demonstrating that reconsideration is warranted. Defendants simply repackage the same arguments that the Court already considered and rejected and attempt to test new arguments they could (and should) have raised before but apparently felt did not merit advancing in the first instance. Defendants' improper motion for reconsideration should be denied for this reason alone. But, even if the Court were to consider

Defendants' repackaged assertions, they have no merit and the Court's decision that the two constitutional claims – under the Uniform Rule of Naturalization clause and under the due process clause – are properly pled in the Amended Complaint should stand.

A. Defendants Fail To Demonstrate Any Valid Basis For Revisiting The Court's Decision On The Uniform Rule Of Naturalization Claim

The Court properly rejected Defendants' motion to dismiss Plaintiffs' Naturalization Clause claim. Defendants now challenge the Court's decision, but fail to point to any clear error or other valid basis warranting reconsideration.

Defendants declare that "The Court's Discussion of Plaintiffs' Naturalization Clause Claim Relies on an Unpublished, Poorly Reasoned District Court Opinion," (Dkt. 72 at 3) referring to *Wagafe v. Trump*, No. C17-0094-RAJ, 2017 U.S. Dist. LEXIS 95887 (W.D. Wash. June 21, 2017). But it is improper for Defendants to test this argument regarding the *Wagafe* case on a motion for reconsideration when they could and should have raised it before. In any event, Defendants' arguments are baseless.

1. Defendants' Attack On The *Wagafe* Case For The First Time In The Motion For Reconsideration Is Improper

Defendants evidently dislike the *Wagafe* decision, attacking it as "poorly reasoned" among other criticisms. Dkt. 72 at 5-6. As a preliminary matter, we note that Defendants' strident collateral attack on *Wagafe* is curious in the present circumstances. The United States is a party in *Wagafe* and is represented by the Justice Department in that case. And that case remains in active litigation, with the defendants there arguing strenuously about the purported discovery burdens of having to defend against the constitutional and other claims. *See Wagafe*, 2017 U.S. Dist. LEXIS 95887. If the decision is flawed as Defendants suggest, one has to wonder why the government has not moved for reconsideration of the denial of their motion to dismiss in that case, which stands in the same posture as this case. In fact, the government in

Wagafe did move to reconsider the class certification decision in that case, which was part of the very same memorandum opinion in which the court allowed the constitutional claims to go forward. If the Justice Department is unprepared and unwilling to challenge the *Wagafe* ruling directly, that should undermine their attempt to do so collaterally in this case.

Putting aside Defendants' motives and tactics in choosing to re-litigate *Wagafe* here rather than in the *Wagafe* proceeding itself, their criticisms are misplaced. Even though they did not raise any of these points in their motion to dismiss papers, Defendants now lodge multiple complaints about that decision. *See* Dkt. 72 at 5 ("[T]he court's ruling in [*Wagafe*] included just three short paragraphs about that novel claim."); *id.* ("[*Wagafe's*] standing analysis hinged on the assumption that Congress was injured by the challenged policy, which the court suggested then derivatively harmed the plaintiffs as well. But, the court provided no explanation for the assumption that Congress was harmed by the policy at issue there, or why Plaintiffs had suffered any sort of derivative injury. . . . [T]hese [were] unsupported assumptions in *Wagafe* . . . ."); *id.* ("In *Wagafe*, the court held that the plaintiffs in that case had a right of action under the Naturalization Clause to challenge a program that allegedly blocked the approval of their naturalization applications, citing *Nemetz v. INS* . . . *Nemetz* does not support plaintiffs' allegations in *Wagafe* . . . ."); *id.* ("The Court's Naturalization Clause analysis failed to address additional defects in the *Wagafe* decision."); *id.* at 6 ("[T]he terse discussion in that nonprecedential opinion is unreliable."); *id.* at 9, n. 2 ("This conclusion by the *Wagafe* court is questionable.").

Defendants were well aware of *Wagafe* when they filed their original motion papers. In fact, Defendants cited *Wagafe* in their original motion papers and, as noted above, the Justice Department is presently litigating that very case. Defendants had ample opportunity to present

their arguments regarding the *Wagafe* decision to this Court but did not do so, presumably because they realized that such arguments lacked merit. Instead, in their motion to dismiss, Defendants simply stated that "it is far from clear that Plaintiffs even have standing to assert such a claim," citing to *Wagafe* as contrary authority. Dkt. 39-1 at 34 ("*but see Wagafe v. Trump*, No. C17-0094-RAJ, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017) (denying motion to dismiss plaintiff's Rule of Naturalization claim.)"). Defendants neither tried to distinguish *Wagafe* in its motion to dismiss, nor did they address it in their reply brief, where they instead assumed that Plaintiffs had standing to bring their Naturalization Clause claim. Dkt. 50 at 20-21 ("Assuming that Plaintiffs have standing to bring their Naturalization Clause claim in the first instance, such a claim fails . . . .").

In sum, Defendants knew that the same standing argument they were advancing in their motion to dismiss had been rejected in *Wagafe*. They also knew that Plaintiffs had identified *Wagafe.* Yet, other than acknowledging that the court in *Wagafe* had rejected a similar motion to dismiss and claiming that the law was unsettled on whether private parties have standing to challenge alleged violations of Naturalization Clause, Defendants did not attempt to attack any so-called "defects" in the *Wagafe* decision that Defendants now claim warrants reconsideration of this Court's decision.

This Motion for reconsideration is not a venue for Defendants to test their newfound discontent with *Wagafe*, and their Motion should be denied for that reason alone. *Dist. Hosp. Partners, L.P.*, 2011 WL 13248160, at *1 ("[I]n this Circuit, it is 'well-established' that motions for reconsideration 'cannot be used . . . as a vehicle for presenting theories or arguments that could have been advanced earlier.'") (citation omitted); *see also id.* at *3 ("Plaintiffs have not offered any justification for failing to offer this argument previously . . . ."); *Estate of Gaither*,

771 F. Supp. 2d at 13 ("[T]he Court declines Defendants' invitation to permit them to use Rule 54(b) as a vehicle for rearguing the merits of their position where they failed to do so adequately in the first place.").

2. Defendants' Newly-Raised Arguments Regarding The *Wagafe* Case Are In Any Event Meritless And Do Not Warrant Reconsideration

Even if the Court were to consider Defendants' newly-raised arguments, Defendants' contention that this Court committed clear error by citing favorably to *Wagafe* (in which the district court likewise denied the government's motion to dismiss a Uniform Rule of Naturalization cause of action) is baseless.

Defendants complain that the Court relied on *Wagafe* decision. Dkt. 72 at 5. Yet, Defendants are compelled to acknowledge that "*Wagafe* appears to be the only case recognizing a private right of action under the Naturalization Clause along the lines Plaintiffs have alleged here." Dkt. 72 at 5. Further, far removed from their "clear error" assertion, Defendants asserted in their reply brief in support of their motion to dismiss that "it is unsettled whether private parties have standing to challenge alleged violations of this clause by the Executive Branch," and that "[n]o controlling precedent addresses this question, and courts in other jurisdiction have drawn different conclusions." Dkt. 50 at 21, n.11. Hence, Defendants claim "clear error" where (1) they admit there is no controlling precedent on point, and (2) the Court cited to a recent court decision that held – as this Court did – that similarly situated plaintiffs had properly stated a constitutional claim. Given this, Defendants' argument is hollow.

Defendants also mischaracterize the *Wagafe* decision. For example, Defendants erroneously contend that the *Wagafe* court's standing analysis hinged on the unexplained "assumption that Congress was injured by the challenged policy, which the court suggested then derivatively harmed the plaintiffs as well." Dkt. 72 at 5. In fact, it was the Justice Department

that argued in *Wagafe* that Congress was injured by the challenged policy. Defendants' Motion to Dismiss Second Amended Complaint, *Wagafe,* No. C17-0094-RAJ (W.D. Wash. April 18, 2017), Dkt. 56. What the *Wagafe* court noted was that, even assuming Congress would be injured by the challenged program, that would not preclude a claim of harm by the plaintiffs. *See Wagafe*, 2017 U.S. Dist. LEXIS 95887, at *21-22 ("Defendants' second argument – that it is Congress, and not Plaintiffs, that would be injured – also fails. Assuming Congress would be injured by CARRP's alleged addition of non-statutory and substantive requirements to naturalization, it does not follow that Plaintiffs could not also be injured. For once Congress 'establishes such uniform rule [of naturalization], those who come within its provisions are entitled to the benefit thereof as a matter of right, not as a matter of grace.'") (quoting to *Schwab v. Coleman*, 145 F.2d 672, 676 (4th Cir. 1944)).

Defendants also complain that the court in *Wagafe* supported its decision with a citation to *Nemetz v.* INS, 647 F.2d 432 (4th Cir. 1981). Dkt. 72 at 5. While Defendants now quibble with the *Wagafe* court's citation to *Nemetz*, the *Wagafe* plaintiffs cited to the *Nemetz* decision in the *Wagafe* case and the government did not raise any objection to their reliance on *Nemetz* in its briefings in the case. *See* Defendants' Motion to Dismiss Second Amended Complaint, *Wagafe*, No. C17-0094-RAJ (W.D. Wash. April 18, 2017), Dkt. 56; *see also* Reply in Support of Defendants' Motion to Dismiss Second Amended Complaint, *Wagafe,* No. C17-0094-RAJ (W.D. Wash. May 12, 2017), Dkt. 61.

Further, reconsideration arguments relating to *Nemetz* are irrationally mutually exclusive: on the one hand Defendants argue that *Nemetz* does not support Plaintiffs here, but on the other hand complain that the Court did *not* discuss the *Nemetz* case. Dkt. 72 at 5-6. We fail to see

how a party can seek reconsideration of a court decision by arguing that the court did *not* cite a case that the party claims would *not* support the result if it had been cited.

In all events, Defendants mischaracterize *Nemetz*. Defendants contend that "*Nemetz* did not involve a horizontal claim (*i.e.*, conflict between branches of the federal government) that the Executive branch somehow usurped congressional authority – the theory that both the *Wagafe* plaintiffs and the Plaintiffs here have pressed. Instead, *Nemetz* involved a vertical claim (*i.e.*, a conflict between federal and state law) concerning whether it was appropriate to look to state law to determine the issue of good moral character in naturalization matter." *Id*. Defendants' contention is wrong.

First, the *Nemetz* court never discussed or mentioned vertical or horizontal claims. *See Nemetz*, 647 F.2d 432. Second, Defendants do not explain how or why this distinction matters for purposes of determining whether the Naturalization Clause precludes a private right of action. What matters is that the plaintiff in *Nemetz*, a naturalization applicant, had a right of action to sue the Immigration and Naturalization Service on the basis that the Naturalization Clause was undermined. *See id*.[4]

In sum, the government argued in *Wagafe*, as it does here (in its motion for reconsideration), that plaintiffs lacked standing because there was no private right of action under the Naturalization Clause and, even if the questioned "extreme vetting" program violated the clause, Congress, not the plaintiff, would be the injured party. The *Wagafe* court rejected

[4] Defendants also argue – for the first time – that a plaintiff seeking to vindicate a constitutional guarantee must satisfy essentially the same zone-of-interest test that applies to statutory claims, and – for the first time – cite to *Wash. Alliance of Tech. Workers v. DHS*, 249 F. Supp. 3d 524, 550 (D.D.C. 2017) and *Coal. for Competitive Elec. v. Zibelman*, No. 16-CV-8164 (VEC), 2017 WL 3172866 (S.D.N.Y. July 25, 2017). Dkt. 72 at 4. Defendants do not attempt to explain how these cases support their motion. In any event, these cases do not help Defendants because they do not hold that the Naturalization Clause does not protect plaintiffs' interest in becoming naturalized citizens.

these arguments, finding that the plaintiffs had standing to assert a violation of the Naturalization Clause because they suffered injury from being subjected to naturalization conditions that Congress did not impose. This Court properly found that reasoning to be persuasive. Dkt. 60 at 18-19. Defendants' mere disagreement with the Court's analysis does not show clear error and cannot merit reconsideration. *Singh*, 383 F. Supp. 2d at 102, n.1 ("Even if the Court were to reconsider this matter, the School, in all its briefing, has not met the Court head on: it has not attempted to show how the Court's reading of the case law is impermissible, it only argues that its own reading must be correct.").

3. Defendants' Other Arguments Are Likewise Improper And Do Not Demonstrate Clear Error Warranting Reconsideration

Defendants admit that they are merely rearguing the same "standing" point they raised twice before. Dkt. 72 at 4 ("As Defendants argued in both their opening brief and their reply, Plaintiffs' standing to assert a violation of the Naturalization Clause is at best highly dubious.").

Defendants fault this Court's standing ruling because, according to Defendants, the Court failed to cite "any authority from within the D.C. Circuit holding that an individual plaintiff has standing to challenge Executive Branch action under the Naturalization Clause . . . ." Dkt. 72 at 4. This argument is frivolous. While a party can claim error where a Court ignores or fails to distinguish controlling precedent, a party cannot claim error on the basis that there is no controlling authority on an issue, as Defendants do here. In fact, Defendants now have had *three* opportunities – (1) the motion to dismiss, (2) the reply brief, and (3) the reconsideration motion – to point to *any* binding authority that this Court failed to follow which holds there is no individual standing or right of action in relation to the Naturalization Clause.

Indeed, while Defendants complain that the Court did not rely on "case law cited by Defendants," they do not cite to any case law from their motion to dismiss briefs (or otherwise)

that they believe the Court was compelled to rely on. To the contrary, they acknowledge that there is no controlling authority. Dkt. 72 at 4 ("[N]or are Defendants aware of any such authority"). And, they also acknowledge that the case law the Court relied on – *e.g.*, *Wagafe* – supports Plaintiffs. Defendants simply disagree with that court's reasoning and are unhappy with this Court's decision. Again, that is not enough. *Singh*, 383 F. Supp. 2d at 102-03 (holding that employer was not entitled to re-litigate issue on motion for reconsideration where employer relied only on persuasive, non-binding authority).

Defendants also complain about the Court's decision that Plaintiffs properly pled the Naturalization Clause claim, but make no new arguments, nor cite to any authority. Defendants asserts that "[e]ven if Plaintiffs theoretically could pursue a claim under the Naturalization Clause, they have not plausibly alleged that DoD's October 13, 2017 policy violated or even implicated the clause." Dkt. 72 at 6. But, this is the same argument Defendants raised previously (*see* Dkt. 39-1 at 34), and the Court considered and rejected. Further, Defendants seem to ignore the fact that the Court's decision at issue was on a motion to dismiss, where the challenge is to the allegations in the complaint. The Court properly focused on whether the allegations in the complaint plausibly alleged a cause of action for which relief could be granted. In rejecting Defendant's arguments, the Court applied the correct legal standard and noted that "the crux of plaintiffs' complaint is that 8 U.S.C. § 1440 precludes DOD from implementing the October 13th Guidance and that DOD's policies were not 'sensible' or implemented in a lawful manner." Dkt. 60 at 19-20.[5] The Court concluded that to credit Defendants' argument, "the

[5] As the Court noted in its Memorandum Opinion, under the applicable legal standard, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Dkt. 60 at 6. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Specifically, as the Court expressly noted, Plaintiffs' claim is that DoD's "October 13th Guidance unlawfully interferes with

Court would have to ignore plaintiffs' well-pled allegations and to do so would be improper on a motion to dismiss." *Id.* at 20. Defendants' rehashed arguments do not warrant reconsideration of the Court's decision.

B. Defendants Fail To Demonstrate Any Valid Basis For Revisiting The Court's Decision On The Procedural Due Process Claim

The Court also properly rejected Defendants' motion to dismiss Plaintiffs' procedural due process claim. On this question, too, Defendants fail to point to any clear error or other valid basis warranting reconsideration.

Defendants baldly declare that the "Court's Analysis of Plaintiffs' Procedural Due Process Claim Overlooks Binding Authority and Sets an Unworkable Precedent" (Dkt. 72 at 7), yet they do not (i) identify any such "binding authority," (ii) explain how such authority is "binding" in this case; (iii) explain what "precedent" the Court's analysis sets; or (iv) describe why such unexplained precedent is "unworkable." Here, too, Defendants do nothing more than repackage prior arguments and express disagreement with the Court's "reasoning." Dkt. 72 at 7 ("With respect to the latter conclusion [on procedural due process], the Court's reasoning suffers from two flaws."). That is not enough. Even if reexamination of Defendants' arguments were appropriate, the result would be the same; neither of Defendants' alleged "flaws" with the Court's "reasoning" have any merit.

1. Defendants' Repeated Arguments Regarding Plaintiffs' Protected Property Right Are Improper On A Motion For Reconsideration

Defendants argue that Plaintiffs cannot have a due process claim because – in Defendants' view – Plaintiffs lack a protected property right. Dkt. 72 at 7. Defendants made this same argument in their motion to dismiss, (*see* Dkt. 39-1 at 35-36), and the Court considered and

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Congress's authority by creating preconditions to naturalization that Congress did not authorize." *Id.* at 18-19.

rejected it. Considering the well-pled allegations in the Amended Complaint, the Court properly concluded that "Plaintiffs have sufficiently alleged that 8 U.S.C. § 1440 bestows a right to apply for expedited citizenship in exchange for lengthy military service and that defendants are depriving them of this right by failing to certify their past honorable service." Dkt. 60 at 21.[6]

It is improper for Defendants to present the same arguments again here. Defendants' Motion must be denied for that reason alone. *See Keystone Tobacco Co.*, 217 F.R.D. at 237 (stating that the court had considered the same issue in its original opinion, and the moving parties "have not offered any new compelling support for their original position and cannot demonstrate a clear error of law merely by repeating arguments they asserted in their original briefs") (citation omitted); *Elkins v. District of Columbia*, 685 F. Supp. 2d 1, 8 (D.D.C. 2010) ("Plaintiffs' reiteration of arguments already made and ruled upon does not constitute an adequate basis for reconsideration.") (citation omitted); *Singh*, 383 F. Supp. 2d at 102 (denying motion for reconsideration where defendant sought to re-litigate arguments previously raised and rejected); *Capitol Sprinkler Inspection, Inc.*, 630 F.3d at 227 (approving the district court's denial of the reconsideration motion and noting: "The district court understandably determined justice did not require reconsidering its order, for Capitol raised no arguments for reconsideration the court had not already rejected on the merits . . . .").

2. Defendants' Arguments Regarding Plaintiffs' Protected Property Right Are In Any Event Meritless And Do Not Warrant Reconsideration

Defendants lodge a number of complaints against the Court's decision that Plaintiffs have properly pled a protected property right. Dkt. 72 at 7-9. All of these complaints boil down to

[6] The Court expressly considered Defendants' arguments (*id*. at 20-21) and rejected them, pointing out that "courts have held that naturalization applicants have a property interest in seeing their applications adjudicated lawfully." *Id.* at 21. The Court also emphasized that at this stage of the motion to dismiss, "the Court need not define the exact contours of plaintiffs' protected property interest." *Id.*

Defendants' misguided attempt to distinguish between a challenge to the denial of a right to apply for citizenship and a challenge to the *process* that DoD has established to determine a MAVNI soldier's eligibility to receive certified N-426s and the time it takes for that process to be completed. Dkt. 72 at 8. Defendants are wrong to draw such a distinction.

First, contrary to Defendants' arguments, Plaintiffs are not challenging just a process. Plaintiffs allege that Defendants are interfering with Plaintiffs' right to apply for expedited citizenship in exchange for military service. *See e.g.* Dkt. 33 at ¶¶ 3, 5, 7-8, 13, 16, 37, 59-62, 75, 100, 129. Plaintiffs are challenging specific aspects of the New DoD N-426 policy that are being applied to Plaintiffs. The policy prevents Plaintiffs from obtaining the N-426 certifications they need in order to exercise their statutory right to apply for naturalization. Plaintiffs allege exactly this in their Amended Complaint. *E.g.* Dkt. 33 at ¶¶ 7-8, 59-62, 127, 129. The Court, accepting the well-pled allegations as true, properly determined that Plaintiffs had plausibly alleged a protected property right and a constitutional deprivation. Dkt. 60 at 20-22.[7]

Second, Defendants' contention that the October 13, 2017 policy "does not deny Plaintiffs this alleged property interest [right to apply for expedited citizenship]," but rather "it

[7] For the same reasons, Defendants' complaint about the Court's citation to *Wagafe* and *Brown v. Holder*, 763 F.3d 1141 (9th Cir. 2014), Dkt. 72 at 8-10, lacks merit and does not demonstrate any clear error. Defendants' attempt to distinguish these cases falls flat. Defendants contend that "[u]nlike the *Wagafe* and *Brown* plaintiffs, the Plaintiffs cannot demonstrate that they are currently or were previously eligible to naturalize." Dkt. 72 at 9. Again, Defendants seem to ignore that the Court's decision was on a motion to dismiss. The Amended Complaint plausibly alleges that Plaintiffs are entitled to obtain an N-426, and that the challenged policy prevents Plaintiffs from obtaining the N-426 certifications they need in order to exercise their statutory right to apply for naturalization. *See e.g.* Dkt. 33 at ¶¶ 3, 5, 13, 16, 37, 62, 75, 100, 129. Indeed, post-complaint events bear this out, as Defendants' bi-weekly reporting shows that hundreds of class members have now received their N-426s. *See, e.g.*, Dkt. 73. The Court properly found that Plaintiffs have made a plausible claim, and Defendants' rehashed arguments do nothing to upset this ruling.

simply requires that Plaintiffs complete certain security screening requirements, which in turn enables them [to apply for citizenship]" (Dkt. 72 at 7) is patently false. The October 13, 2017 policy requires that Plaintiffs "favorably" complete these security screening requirements. *See* October 13, 2017 Policy (Dkt. 58-1 in the related *Nio* case, *Nio et al., v. Dep't of Homeland Security*, 1:17-cv-00998 (ESH-RMM) (D.D.C)). Thus, the October 13, 2017 policy impermissibly imposes extra-statutory requirements (above and beyond even those imposed in the USCIS July 7, 2017 policy which requires only "completion" of the DoD security screening). Also, as this Court has observed, 8 U.S.C. § 1440 "specifically refers to *past service*, not to DOD's possible future suitability determinations," (Memorandum Opinion, *Nio*, 1:17-cv-00998 (ESH-RMM) (D.D.C. Oct. 25, 2017), Dkt. 29 at 20), while the October 13, 2017 policy imposes extra-statutory requirements such as a minimum period of service requirement and thus attempts to impose a future suitability determination rather than certifying past service. In sum, Plaintiffs' claims are not just about process, but rather, are about impermissible extra-statutory requirements that deprive Plaintiffs of their right to apply for naturalization. Further, Defendants' attempted comparison also falls flat because it is premised on the false contention that this "Court has already recognized that Plaintiffs and other MAVNI soldiers are not eligible to naturalize until DoD completes their background investigations," and "has ruled that USCIS is lawfully able to wait for the completion of DoD's security screening before proceeding with adjudication of a pending naturalization application." Dkt. 72 at 9 (citing to the related *Nio* action). As Defendants surely know, this Court has made no final determination on the merits of any claims or defenses in *Nio.* In any event, Defendants' reliance on USCIS policies is misplaced because those policies undercut Defendants' position on the questions at issue in this case. In particular, longstanding USCIS policy holds that members of the Selected Reserve are

eligible to receive honorable service certifications, and have a right to apply for naturalization, based on a single day of Selected Reserve service.[8]

Defendants' mischaracterization of Plaintiffs' claims and the Court's rulings do not establish clear error or any other basis warranting reconsideration of the Court's ruling.

3. Defendants' Renewed Arguments Regarding The *Bi-Metallic* Case Are Likewise Improper

Defendants contend that another "flaw" in the Court's "reasoning" is that the Court's analysis "did not properly address the Supreme Court's holding" in *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Dkt. 72 at 10. Defendants are mistaken because this Court did directly address *Bi-Metallic*.

In their motion to dismiss and reply briefs, Defendants argued with respect to *Bi-Metallic* that agency rules and policies of broad application do not give rise to individual due process rights. *See* Dkt. 39-1 at 35 ("There is no constitutional requirement that members of public receive notice and an opportunity to be heard before an agency may implement a new policy"

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[8] For the same reasons, Defendants' criticism of the Court's citation to *Greene v. Lujan*, No. C89-645Z, 1992 U.S. Dist. LEXIS 21737 (W.D. Wash. Feb. 25, 1992) is misplaced. Dkt. 72 at 10, n.3. Defendants in fact acknowledge that "the denial of prior benefits may implicate due process concerns," but contend that here, unlike in *Greene*, the New DoD N-426 Policy does not terminate an existing benefit, but rather it "simply imposes procedural requirements before an applicant may qualify for a certified N-426 in furtherance of a naturalization application." *Id*. Again, in light of Plaintiffs' allegations, Defendants' attempt to draw such a distinction is wrong. Defendants have pointed to no error in the Court's citation to *Greene*.

Defendants' complaint that the Court did not discuss "*Olim* or any of the cases in this extensive line of authority" is misguided as well. Dkt. 72 at 8. Defendants' "extensive line of authority" refers to two cases they cited in their reply brief (*Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) and *Allen v. Mecham*, No. 05-1007(GK), 2006 WL 2714926 (D.D.C. Sept. 22, 2006)) and one case they cited for the first time in their current Motion (*Roberts v. United States*, 741 F.3d 152 (D.C. Cir. 2014)). Defendants do not suggest that the Court was obligated to discuss these cases. Defendants cited to the *Olim* and *Allen* cases for the proposition that Plaintiffs cannot claim a protected interest in a procedure per se. Dkt. 50 at 22. The Court has squarely answered that argument. As the Court noted, Plaintiffs are not claiming a protected interest in a procedure per se. Dkt. 60 at 21.

(citing *Bi-Metallic*)); *see also* Dkt. 50 at 27 ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct void in its adoption") (quoting *Bi-Metallic*).

The Court considered and addressed these very arguments. Indeed, the Court agreed that "agency rules of broad applicability normally do not implicate the same due-process concerns typical of agency adjudications involving individual right." Dkt. 60 at 21. But, the Court then observed that "this case is not the normal case." *Id.* As the Court noted, here "Plaintiffs are challenging specific aspects of the October 13th Guidance as applied to them, and allege that it summarily denies them the right to receive honorable service certifications they could have received prior to the October 13th Guidance." *Id.* The Court properly concluded that "[t]hese allegations implicate due process concerns" because the allegations challenge the agency policy "as applied to them." *Id.* Defendants have not demonstrated any error – let alone clear error – in the Court's decision.

CONCLUSION

For all the foregoing reasons, Defendants' Motion should be denied.

Respectfully submitted,

/s/ Joseph J. LoBue

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Exhibit A

From: Dugan, Joseph (CIV) <Joseph.Dugan@usdoj.gov>
Sent: Wednesday, February 07, 2018 3:24 PM
To: Wollenberg, Jennifer
Cc: LoBue, Joseph; Baruch, Douglas W.; Swinton, Nathan M. (CIV)
Subject: Kirwa v. DoD - meet/confer on motion for reconsideration

Dear Jenny,

I hope you've been well. I'm writing because Defendants plan to file a motion tomorrow (Thursday 2/8) seeking reconsideration of Judge Huvelle's denial of our motion to dismiss the *Kirwa* Plaintiffs' constitutional claims (Count V of the operative complaint). In particular, we respectfully disagree with Judge Huvelle's analysis of our arguments concerning Plaintiffs' Naturalization Clause and procedural due process claims. In our motion, we will ask Judge Huvelle to reconsider that portion of her Memorandum Opinion and Order denying our motion to dismiss those claims, and we will further ask her to dismiss the claims with prejudice.

I assume that Plaintiffs will oppose our motion. It's not entirely clear to me whether a motion for reconsideration falls within the ambit of Local Civil Rule 7(m), but out of an abundance of caution, I thought I would reach out. At your convenience, please state Plaintiffs' position with respect to our planned motion, and I will be sure to accurately reflect your position in our filing.

Thanks, and best,
Joe Dugan

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHLON KIRWA, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:17-cv-01793-ESH-RMM**
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,	)	
Defendants.	)	

[PROPOSED] ORDER DENYING DEFENDANTS' RULE 54(B) MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION TO DISMISS CONSTITUTIONAL CLAIMS

THIS MATTER, having come before the Court on a motion for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure; the Court having reviewed the arguments to the motion; and good cause appearing,

IT IS HEREBY ORDERED that the Defendants' motion for reconsideration is **DENIED**.

Dated: _____

_____
U.S.D.J. Ellen Segal Huvelle

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys and parties entitled to be notified of the proposed order's entry:

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