**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| MAHLON KIRWA, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF DEFENSE and JAMES MATTIS, in his official capacity as Secretary of Defense,<br><br>Defendants. | Civil Action No. 1:17-cv-01793<br>The Honorable Ellen Segal Huvelle |

**DEFENDANTS' RULE 54(B) MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS CONSTITUTIONAL CLAIMS**

Defendants, the U.S. Department of Defense ("DoD") and Secretary of Defense James Mattis (sued in his official capacity), respectfully move this Court pursuant to Federal Rule of Civil Procedure 54(b) to reconsider that portion of its January 11, 2018, Memorandum Opinion and Order denying in part Defendants' motion to dismiss Plaintiffs' claim for "Constitutional Violations" (Count V of the Amended Complaint).

While the Court correctly dismissed Plaintiffs' claim insofar as it alleged a substantive due process violation, the Court declined to dismiss the claim insofar as it alleged a procedural due process violation or a violation of the "uniform Rule of Naturalization" clause, U.S. Const., art. I, § 8, cl. 4 ("Naturalization Clause"). In so ruling, the Court appears to have overlooked or misunderstood several of Defendants' arguments and controlling authorities. Defendants request

that the Court grant Defendants' motion for reconsideration and dismiss Plaintiffs' constitutional claims.[1]

**STANDARD OF REVIEW**

Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all . . . claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of judgment adjudicating all the claims." *See Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015) ("Rule 54(b) operates while a case is still ongoing in district court and before any appealable final judgment has been entered . . . ."); *Cobell v. Norton*, 224 F.R.D. 266, 271 (D.D.C. 2004) ("Rule 54(b) governs reconsideration of orders that do not constitute final judgments in a case."), *reconsideration deferred*, 355 F. Supp. 2d 531 (D.D.C. 2005). The rule applies where, as here, the Court has denied or denied in part a motion to dismiss. *E.g.*, *Richardson v. Bd. of Governors of Fed. Reserve Sys.*, No. 16-867 (RMC), 2018 WL 575558 (D.D.C. Jan. 26, 2018) (reviewing under Rule 54(b) defendant's motion for reconsideration after court granted in part and denied in part defendant's motion to dismiss; granting motion and dismissing remaining claims); *Ferrer v. CareFirst, Inc.*, No. 16-cv-02162 (APM), 2017 WL 3491829 (D.D.C. Aug. 14, 2017) (reviewing under Rule 54(b) defendants' motion for reconsideration after court denied their motion to dismiss; denying motion for reconsideration).

"Importantly, the standard for reconsideration of interlocutory orders under Rule 54(b) is distinct from the standard applicable to motions for reconsideration of final judgments." *Cobell*, 224 F.R.D. at 272; *see also Ofisi v. BNP Paribas, S.A.*, No. 15-2010 (JDB), 2018 WL 385408, at *2 (D.D.C. Jan. 11, 2018) ("[T]he standard for relief under Rule 54(b) is somewhat more flexible

[1] Pursuant to Local Civil Rule 7(m), Defendants contacted Plaintiffs' counsel on February 7, 2018, to confer about this motion. Plaintiffs' counsel advised that they oppose the motion.

than that of Rule 60(b)."), *appeal docketed*, No. 18-7007 (D.C. Cir. Jan. 18, 2018); *Moore v. Hartman*, 332 F. Supp. 2d 252, 256 (D.D.C. 2004) ("[A]lthough courts only reconsider under Rule 60(b)(6) in 'exceptional circumstances,' courts have more flexibility in applying Rule 54(b)."). For example, this Court "has held that Rule 54(b) reconsideration may be granted 'as justice requires.'" *Cobell*, 224 F.R.D. at 272 (citation omitted) (collecting cases).

"Under the 'as justice requires standard,' it is appropriate to grant a Rule 54(b) motion 'when the Court has patently misunderstood a party . . . [or] has made an error not of reasoning but of apprehension.'" *Jones v. Castro*, 200 F. Supp. 3d 183, 185 (D.D.C. 2016) (alteration in original) (citation omitted). "'Errors of apprehension may include the Court's failure to consider controlling decisions or data that might reasonably be expected to alter the conclusion reached by the Court.' The Court has broad discretion to consider whether relief is 'necessary under the relevant circumstances.'" *Id.* (citations omitted).

## ARGUMENT

### I. The Court's Discussion of Plaintiffs' Naturalization Clause Claim Relies on an Unpublished, Poorly Reasoned District Court Opinion.

Plaintiffs' claim for "Constitutional Violations" primarily arises under the Naturalization Clause, which confers on Congress the authority to "establish an uniform Rule of Naturalization." As the Ninth Circuit recently explained, this uniformity principle "was a response to the tensions that arose from the intersection of the Articles of Confederation's Comity Clause and the states' divergent naturalization laws, which allowed an alien ineligible for citizenship in one state to move to another state, obtain citizenship, and return to the original state as a citizen" with all appurtenant privileges and immunities. *Korab v. Fink*, 797 F.3d 572, 581 (9th Cir. 2014); *see also Gibbons v. Ogden*, 22 U.S. 1, 15 (1824) ("The true reason why the power of establishing an uniform rule of naturalization is exclusive, must be, that a person becoming a citizen in one State, would thereby

become a citizen of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the State.").

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. *See* Mem. of Points & Authorities in Supp. of Defs.' Mot. to Dismiss Am. Compl. or in the Alternative for Summ. J. at 33, ECF No. 39–1 ("MTD"); Defs.' Reply in Supp. of Their Mot. to Dismiss Am. Compl. or in the Alternative for Summ. J. at 21 n.11, ECF No. 50 ("Reply"). The Naturalization Clause concerns the proper allocation of power as between Congress and the States; it is not a rights-giving provision. Not all constitutional provisions lend themselves to a private right of action at all, and a plaintiff seeking to vindicate a constitutional guarantee must satisfy essentially the same zone-of-interests test that applies to statutory claims. *See Wash. Alliance of Tech. Workers v. DHS*, 249 F. Supp. 3d 524, 550 (D.D.C. 2017) (inquiry considers whether the plaintiff's grievance falls within the "zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit" (citations omitted)), *appeal docketed*, No. 17-5110 (D.C. Cir. May 22, 2017); *see also Coal. for Competitive Elec. v. Zibelman*, No. 16-CV-8164 (VEC), 2017 WL 3172866, at *19 (S.D.N.Y. July 25, 2017) (explaining that the zone-of-interest test, as modified by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), applies with equal force to constitutional and statutory claims), *appeal docketed*, No. 17-2654 (2d Cir. Aug. 25, 2017).

Neither Plaintiffs nor the Court identified any authority from within the D.C. Circuit holding that an individual plaintiff has standing to challenge Executive Branch action under the Naturalization Clause, nor are Defendants aware of any such authority. Instead, the Court relied exclusively on an unpublished decision from the Western District of Washington in *Wagafe v.*

*Trump*, No. C17-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017). *Wagafe* appears to be the only case recognizing a private right of action under the Naturalization Clause along the lines Plaintiffs have alleged here, yet the court's ruling in that case included just three short paragraphs about that novel claim.

This Court's heavy reliance on *Wagafe* to deny Defendants' motion was misplaced. The *Wagafe* court'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. *Id.* at *7. 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. *See id*. This Court's decision to rely exclusively on these unsupported assumptions in *Wagafe*—to the exclusion of case law cited by Defendants holding that the Naturalization Clause does not give rise to a private cause of action—was in error.

The Court's Naturalization Clause analysis failed to address additional defects in the *Wagafe* decision. 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*, 647 F.2d 432 (4th Cir. 1981). Both parties here also discussed *Nemetz* in their briefs, but this Court did not address that decision in its Memorandum Opinion. *Nemetz* does not support plaintiffs' allegations in *Wagafe*, and it likewise does not support Plaintiffs' claims here. As Defendants previously explained, *see* Reply at 21 n.11, *Nemetz* did not involve a horizontal claim (*i.e.*, a 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 matters." *Nemetz*, 647 F.2d at 435. The claim in *Nemetz* fit comfortably within the ambit of the Naturalization Clause, as the claim concerned the proper allocation of power between the federal government and the States. *Id.*; *see also Nehme v. INS*, 252 F.3d 415, 428 (5th Cir. 2001) (noting that the rule of naturalization reflects "the concerns of the Constitution's framers . . . that there should be a single, federal body of rules for naturalization"). Plaintiffs' claim here, by contrast, has nothing to do with this vertical allocation of power.

Even 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. As Defendants previously argued, *see* MTD at 34, Reply at 21, Congress delegated to the "executive department under which [a] person served" (DoD) a role in the naturalization process for noncitizen soldiers who serve during a period of hostilities. 8 U.S.C. § 1440(a). Plaintiffs contend that the October 13, 2017 policy imposes requirements above and beyond those that Congress intended. But that is a paradigmatic APA claim that Plaintiffs have already pleaded in this case—namely, that Defendants' policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *See* 5 U.S.C. § 706(2); *see also* Am. Compl. ¶¶ 112-13, ECF No. 33 (alleging APA violations). Put another way, Plaintiffs' claim takes issue with the manner in which DoD has exercised its congressionally authorized responsibility under § 1440, not the delegation of that responsibility from Congress in the first instance.

Plaintiffs' Naturalization Clause claim finds no support outside *Wagafe*, and the terse discussion in that nonprecedential opinion is unreliable. Defendants respectfully request that the Court reconsider its prior ruling and dismiss Plaintiffs' Naturalization Clause claim with prejudice.

## II. The Court's Analysis of Plaintiffs' Procedural Due Process Claim Overlooks Binding Authority and Sets an Unworkable Precedent.

In addition to its analysis of Plaintiffs' claim under the Naturalization Clause, the Court erred in not dismissing all of Plaintiffs' due process claim. Plaintiffs alleged that "Defendants' conduct . . . violates Plaintiffs' . . . right to due process under the Fifth Amendment to the U.S. Constitution because these soldiers cannot be denied immigration benefits . . . for which they are eligible and seeking." Am. Compl. ¶ 129. To the extent this allegation could be construed to assert a violation of substantive due process, the Court correctly dismissed that claim, *see* Mem. Op. at 23, ECF No. 60, but it allowed Plaintiffs' procedural due process claim to proceed, *see id.* at 21-22. With respect to the latter conclusion, the Court's reasoning suffers from two flaws.

First, the Court erred in concluding that Plaintiffs have alleged a protected property interest. To state a cause of action for a due process violation, Plaintiffs must allege "that the government deprived [them] of a 'liberty or property interest to which [they] had a legitimate claim of entitlement, and that the procedures attendant upon that deprivation were constitutionally insufficient.'" *Scahill v. Dist. of Columbia*, No. 16-2076 (JDB), 2017 WL 4280946, at *15 (D.D.C. Sept. 25, 2017) (citation omitted), *appeal docketed*, No. 17-7151 (D.C. Cir. Oct. 30, 2017). The Court characterized Plaintiffs' alleged protected property interest as "a right to apply for expedited citizenship in exchange for lengthy military service." Mem. Op. at 21. But the October 13, 2017 policy does not deny Plaintiffs this alleged property interest; it simply requires that Plaintiffs complete certain security screening requirements before Defendants certify them as having served honorably, which in turn enables them to submit a naturalization application to the U.S. Citizenship and Immigration Services ("USCIS") component of the Department of Homeland Security. Plaintiffs' due process claim is thus properly understood not as challenging the denial of any right to apply for citizenship (for no such denial has occurred) but rather as challenging 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. *See, e.g.*, First Am. Compl. ¶ 2, ECF No. 33 (claiming that Defendants' N-426 policies "unlawfully block, interfere with, and delay naturalization for these honorably serving soldiers").

Yet, as Defendants previously argued, courts have routinely held that there is no due process protection for such pure procedure. A plaintiff must show a deprivation of an underlying substantive liberty or property interest before a court will consider the constitutional adequacy of the procedural safeguards available to the plaintiff. *See* Reply at 22; *see also Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Roberts v. United States*, 741 F.3d 152, 161-62 (D.C. Cir. 2014); *Allen v. Mecham*, No. 05-1007(GK), 2006 WL 2714926, at *4 (D.D.C. Sept. 22, 2006) ("[A] number of courts have explicitly rejected [the] circular argument that procedures may constitute property subject to due process protection."). Under this case law, Plaintiffs' discontent with the manner and timing by which Defendants certify Forms N-426—*i.e.*, issues concerning the *process* Defendants use to certify Forms N-426—cannot constitute a protected property interest. *See Roberts*, 741 F.3d 152 at 161-62 (holding that the plaintiff's claim for a "fair process" for making evaluations for purposes of promotions did not implicate a protected property interest supporting a due process claim).

The Court did not discuss *Olim* or any of the cases in this extensive line of authority, relying instead on *Wagafe* and *Brown v. Holder*. But *Wagafe* is even less instructive with respect to Plaintiffs' due process claim than it is with respect to their Naturalization Clause claim. The *Wagafe* plaintiffs alleged that USCIS created a "secret and unlawful" vetting program that

indefinitely (perhaps permanently) blocked immigration benefits for otherwise eligible applicants. *Id*. at * 1. The court concluded that "naturalization applicants have a property interest in seeing their applications adjudicated lawfully" and that "Plaintiffs allege that all the statutory requirements have been complied with, and the application of . . . extra-statutory requirements deprives Plaintiffs of the right to which they are entitled." *Id.* at *8.[2] *Brown* likewise does not control the outcome here. While the Ninth Circuit in that case recognized that the plaintiff had a "protected interest in being able to apply for citizenship," the court rejected the plaintiff's argument that the government violated due process by failing to follow its own regulations, holding instead that the plaintiff could establish a due process violation if he could show that the government "arbitrarily and intentionally obstructed his application" or was "deliberatively indifferent to whether his application was processed." *Brown*, 763 F.3d at 1147-48, 1150. No such government misconduct is alleged in this case.

Unlike the *Wagafe* and *Brown* plaintiffs, the Plaintiffs here cannot demonstrate that they are currently or were previously eligible to naturalize. This Court has already recognized that Plaintiffs and other MAVNI soldiers are not eligible to naturalize until DoD completes their background investigations (the very investigations required under the October 13, 2017 policy). *See Nio v. DHS*, 270 F. Supp. 3d 49, 65 (D.D.C. 2017). Given this Court's ruling that USCIS is lawfully able to wait for the completion of DoD's security screening before proceeding with adjudication of a pending naturalization application, Defendants' policy of linking the security

[2] This conclusion by the *Wagafe* court is questionable. *See Brown*, 763 F.3d 1141, 1153 (9th Cir. 2014) (Tallman, J., concurring in part) ("The Supreme Court has merely assumed, without deciding, that the Due Process Clause of the Fifth Amendment may be implicated when procedures limit an alien's ability to apply for citizenship.").

screening to N-426 certification does not preclude the adjudication of a naturalization application and does not compare to the use of the allegedly secret criteria at issue in *Wagafe*.[3]

Second, the Court's due process analysis did not properly address the Supreme Court's holding in *Bi-Metallic Inv. Co. v. State Board of Equalization*, that "categorical agency determinations do not implicate the Due Process Clause" because "[t]here is no requirement that members of the public receive notice and an opportunity to be heard before an agency may implement a new policy." 239 U.S. 441, 445-46 (1915). Although the Court acknowledged this holding in *Bi-Metallic*, it distinguished the instant case on the grounds that "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." Mem. Op. at 21.

Defendants respectfully submit that the Court's analysis of *Bi-Metallic* appears to conflate the legal standard for standing—in which a plaintiff must allege that he or she was actually harmed by a challenged policy—with the legal standard established by the Supreme Court in *Bi-Metallic*, which requires no such harm determination. Indeed, the Court in *Bi-Metallic* presumed that individuals would be harmed by categorical agency determinations. *See Bi-Metallic*, 239 U.S. at

[3] The Court further erred in its Memorandum Opinion by relying on *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992), *aff'd sub nom. Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995), which is even farther afield from the instant case than *Wagafe*. In *Greene*, members of the Samish Indian Tribe were "denied benefits which they previously received because of a Government decision that they are not a recognized tribe." *Id.* at *8. The court concluded that the Samish "ought to have the opportunity to demonstrate in a hearing that they continue to qualify for [certain] programs" before their benefits are taken away. *Id.* But while the *denial* of prior benefits may implicate due process concerns, here, by contrast, the *Kirwa* class members have not received an immigration benefit. Rather, they have been advised that they may eventually receive such a benefit *if they are deemed eligible*. The October 13, 2017 policy does not terminate an existing benefit, as in *Greene*, or indefinitely prolong (or deny) an application, as in *Wagafe*; it simply imposes procedural requirements before an applicant may qualify for a certified N-426 in furtherance of a naturalization application.

445 ("General [policies] within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."). Even so, "[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption," meaning that agency rules and policies of broad application do not give rise to individual due process rights. *Id*. (holding that, instead, individual "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"). Whether Plaintiffs have alleged that the challenged policy affects them in any way is irrelevant to the fact of its broad applicability, which exempts it from a constitutional due process claim. Defendants respectfully request that the Court reconsider its ruling on Plaintiffs' due process claims to address this additional defect in its analysis.

**CONCLUSION**

For the foregoing reasons, the Court should grant Defendants' motion and should dismiss Plaintiffs' claims under the Uniform Rule of Naturalization and Due Process Clause with prejudice.

Dated: February 21, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

*/s/ Joseph C. Dugan*
NATHAN M. SWINTON
JOSEPH C. DUGAN
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW

Washington, DC 20530
Tel: (202) 305-7667
Fax: (202) 616-8470
Email: Nathan.M.Swinton@usdoj.gov

*Attorneys for Defendants*