UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR RULE 54(B) MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS CONSTITUTIONAL CLAIMS

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INTRODUCTION

Plaintiffs' opposition to Defendants' Rule 54(b) motion turns on the mistaken premise that Defendants seek to rehash arguments they previously raised and that the Court considered and rejected. On the contrary, Defendants seek reconsideration only of those aspects of the Court's Order denying in part Defendants' motion to dismiss in which the Court appears to have overlooked or misunderstood key legal authorities.

First, in assessing Plaintiffs' anomalous claim under the Constitution's Naturalization Clause, U.S. Const. art. I, § 8, cl. 4, the Court relied exclusively on three paragraphs from the unpublished, nonprecedential *Wagafe v. Trump* decision, No. C17-009-RAJ, 2017 WL 2671254, at *7 (W.D. Wash. June 21, 2017), while failing to address the authority Defendants cited that sharply undercuts Plaintiffs' claim. Nor did the Court address *Nemetz v. INS*, 647 F.2d 432 (4th Cir. 1981), which both parties cited and which demonstrates the implausibility of Plaintiffs' Naturalization Clause theory.

Second, the Court's analysis with respect to Plaintiffs' due process claim was similarly erroneous in its application of legal standards. Although the Court briefly acknowledged *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441 (1915) in its opinion, the Court appears to have confused the question whether a plaintiff has standing to challenge an agency action with the question whether the action is essentially adjudicative or legislative. Because only adjudicative actions give rise to individual due process rights, there is no legally cognizable due process challenge to Defendants' programmatic changes to the policies for N-426 certification. The Court also did not explain how its reasoning could be squared with the well-settled principle that due process affords no protection for pure procedure, *see Olim v. Wakinekona*, 461 U.S. 238,

250 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). The Court's reasoning was therefore irreconcilable with controlling authority.

Given these deficiencies in the Court's opinion, Defendants respectfully request that the Court grant Defendants' Rule 54(b) motion and dismiss Plaintiffs' constitutional claims with prejudice. Not only does the Government have a strong institutional interest in calling this Court's attention to legal errors in its prior decision to which other courts may look, but in this case in particular, where any further review should be limited to the record, allowing the constitutional claims to proceed could result in unnecessary and burdensome litigation.

ARGUMENT

I. A Grant of Rule 54(b) Relief Is Appropriate Where, as Here, the Court Previously Misunderstood or Overlooked Key Arguments and Authorities.

Plaintiffs' opposition focuses largely on the appropriate standard for Rule 54(b) motions for reconsideration, with Plaintiffs relying heavily on cases applying a standard that more closely resembles the more restrictive standards under Rules 59(e) and 60(b). *E.g.*, *Murphy v. Executive Office for U.S. Attorneys*, 11 F. Supp. 3d 7, 8 (D.D.C. 2014), *aff'd*, 789 F.3d 204 (D.C. Cir. 2015). But courts in this district have recited different formulations of the Rule 54(b) standard, an approach consistent with both the rule itself (which provides that interlocutory rulings may be revised "at any time" prior to entry of final judgment) as well as the principle that the "standard for relief under Rule 54(b) is somewhat more flexible than that of Rule 60(b)." *Ofisi v. BNP Paribas, S.A.*, No. 15-2010 (JDB), 2018 WL 385408, at *2 (D.D.C. Jan. 11, 2018), *appeal docketed*, No. 18-7007 (D.C. Cir. Jan. 18, 2018); *see also Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) ("The precise standard governing Rule 54(b) reconsideration is unsettled in our Circuit, but it is clear that 'courts have more flexibility in applying Rule 54(b)' than in determining whether reconsideration is appropriate under Rules 59(e) and 60(b). For example, our Court has

held that Rule 54(b) reconsideration may be granted 'as justice requires.'" (citations omitted)); *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 30 (D.D.C. 2013) ("The considerations embedded in the 'as justice requires' standard 'leave a great deal of room for the court's discretion and, accordingly, the "as justice requires" standard amounts to determining "whether [relief upon] reconsideration is necessary under the relevant circumstances."'" (citations omitted)), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014).

While Rule 54(b) motions are not granted as a matter of course, courts in this district do not hesitate to grant such motions under appropriate circumstances, and have done so on many occasions in the recent past. *E.g.*, *Bernier v. Trump*, No. 16-cv-00828 (APM), 2018 WL 1210864, at*5 (D.D.C. Mar.8, 2018); *Shapiro v. DOJ*, No.13-555 (RDM), 2016 WL 3023980, at *7 (D.D.C. May 25, 2016), *appeal dismissed*, No. 16-5226, 2017 WL 7197010 (D.C. Cir. Nov. 1, 2017) (per curiam); *Taseko Mines Ltd. v. Raging River Capital*, 185 F. Supp. 3d 87, 92 (D.D.C. 2016); *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 164 F. Supp. 3d 56, 69 (D.D.C. 2016); *United States ex rel. McBride v. Halliburton Co.*, No. 1:05-CV-828 (FJS/JMF), 2014 WL 12691854, at *3 (D.D.C. Dec. 10, 2014), *aff'd*, 848 F.3d 1027 (D.C. Cir. 2017). Appropriate circumstances are present in this case, where, as discussed below, the Court's prior decision failed to address key arguments concerning Plaintiffs' constitutional claims and overlooked or misunderstood controlling authorities that require a different outcome.

II. The Court Should Reconsider Its Decision Recognizing a Constitutional Cause of Action Unhinged from the Constitutional Text.

Defendants' motion explained the deficiencies in the Court's ruling denying dismissal of Plaintiffs' claim under the Naturalization Clause. Having concentrated the focus of their opposition brief on the standard of review, Plaintiffs have noticeably little to say about the merits of Defendants' arguments. Plaintiffs' principal argument with respect to their Naturalization

Clause claim is that if "the government" disagreed with the Western District of Washington in *Wagafe v. Trump*, "the government" should have moved for reconsideration after the district court denied in part its motion to dismiss in that case. Plaintiffs cite no authority for the notion that the Government is somehow precluded from distinguishing or calling into question a poorly reasoned district court opinion simply because it chose not to file a discretionary motion in that case. On the contrary, "a private party may not invoke non-mutual collateral estoppel against the government with respect to an issue on which a different private party prevailed in prior litigation with the government," *Freeman v. U.S. Dep't of the Interior*, 37 F. Supp. 3d 313, 346 (D.D.C. 2014) (citing *United States v. Mendoza*, 464 U.S. 154, 160 (1984)).

Plaintiffs next incorrectly assert that "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." Pls.' Mem. in Opp'n to Defs.' Mot. for Reconsideration at 8-9, ECF No. 75 (" Pls.' Opp'n"). As the Court is well aware, Defendants candidly acknowledged the *Wagafe* decision in their memorandum accompanying their motion to dismiss, *see* Mem. of P. & A. in Supp. of Defs.' Mot to Dismiss Am. Compl. or in the Alternative for Summ. J. at 34, ECF No. 39–1 ("Defs.' Mot. to Dismiss"), and again in their reply brief, *see* 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 ("Defs.' Reply"). Defendants did not elaborate on this nonbinding, unpublished district court opinion because they had no particular reason to expect that the Court would craft a new cause of action in the D.C. Circuit based *exclusively* on *Wagafe*, particularly in light of other authorities—including appellate opinions—that cast significant doubt on *Wagafe*. *See, e.g.*, *Korab v. Fink*, 797 F.3d 572, 580 (9th Cir. 2014); *Nemetz*, 647 F.2d at 435; *Flores v. City of Baldwin Park*, No. CV 14-9290-MWF (JCx), 2015 WL 756877, at *3 (C.D. Cal. Feb. 23,

2015). Plaintiffs themselves barely discussed *Wagafe*'s cursory Naturalization Clause analysis in their original brief. *See* Pls.' Mem. in Opp'n to Defs.' Mot to Dismiss Am. Compl. or in the Alternative for Summ. J. at 38-39, ECF No. 49.

Absent from Plaintiffs' most recent filing is any explanation as to why the *Wagafe* court correctly interpreted the Naturalization Clause to embrace a challenge to alleged Executive usurpation of congressional authority, which is the theory Plaintiffs also press in this case. Taking Plaintiffs' well-pleaded allegations as true, they have not shown, and cannot show, that their claim brings them within the zone of interests that the Naturalization Clause was intended to protect.

Plaintiffs then complain in a footnote that Defendants raised this zone-of-interests argument for the first time in their Rule 54(b) motion. *See* Pls.' Opp'n at 12 n.4. But Defendants have consistently argued that it is "far from clear that Plaintiffs even have standing" to assert a claim under the Naturalization Clause, as the Clause "does not on its face extend or preserve any particular rights belonging to individuals like Plaintiffs here." Defs.' Mot. to Dismiss at 33. The question whether a constitutional provision "create[s] a cause of action" subject to private enforcement, *id.* (quoting *Flores*, 2015 WL 756877, at *3), and the question whether an individual plaintiff falls within that provision's zone of interests, are two sides of the same coin, particularly in light of the Supreme Court's ruling in *Lexmark Int'l, Inc. v. State Control Components, Inc.*, 134 S. Ct. 1377 (2014). *See id.* at 1387 ("Whether a plaintiff comes within the zone of interests is an issue that requires us to determine . . . whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." (internal quotation marks and citations omitted)); *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 581 (S.D.N.Y. 2017) ("Just as 'a rose by any other name would smell as sweet,' so, too, does the zone of interests test apply whether labeled a prudential standing issue or a cause of action issue. The Supreme Court's reasoning that

the zone of interests test is more logically a cause of action question applies equally to statutory and constitutional claims . . . ." (footnote omitted)). And while many constitutional provisions (particularly those codified in the Bill of Rights and the Reconstruction Amendments) are amenable to broad enforcement by private parties, not all provisions are created equally. *See, e.g.*, *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 108 (3d Cir. 2015) (identifying a narrow scope of claims that fall within the zone of interests of the Tonnage Clause).

To be sure, courts do not always preclude private parties from pursuing challenges to structural provisions of the Constitution (such as the uniform Rule of Naturalization). *E.g.*, *Bond v. United States*, 564 U.S. 211 (2011). But in applying the zone-of-interests test—whether to structural claims or otherwise—courts must "discern the meaning and purpose" of the provision at issue "using traditional methods of interpretation and ask whether it extends to [a particular] claim." *Mayer Terminals*, 805 F.3d at 106. As Defendants previously argued, *see* Defs.' Mot. to Dismiss at 33; Defs.' Rule 54(b) Mot. for Reconsideration of Order Denying Defs.' Mot. to Dismiss Constitutional Claims at 3, ECF No. 72 ("Defs.' 54(b) Mot."), the Naturalization Clause's uniformity requirement 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." *Korab*, 797 F.3d at 581. At no point have Plaintiffs identified any authority calling the *Korab* court's historical assessment of the Naturalization Clause into question. Assuming *arguendo* that a private party could bring a claim under the Naturalization Clause, the Executive usurpation claim that Plaintiffs have asserted here falls well outside the zone of interests the clause was designed to protect (ensuring that immigration laws are consistent across the states), and the Court's refusal to dismiss that claim was "a clear error in

the first order," *In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 218, 223 (D.D.C. 2017) (citation omitted).

Nemetz v. INS, which was cited by the parties but not mentioned in the Court's prior opinion, reinforces the conclusion that Plaintiffs' Naturalization Clause claim should have been dismissed.[1] Plaintiffs read *Nemetz* for the expansive proposition that a "naturalization applicant[] had a right of action to sue the Immigration and Naturalization Service on the basis that the Naturalization Clause was undermined." Pls.' Opp'n at 12. But the claim Plaintiffs assert is nothing like the claim at issue in *Nemetz*, as Defendants have twice explained. *See* Defs.' Reply 21 n.11; Defs.' 54(b) Mot. at 5-6. In *Nemetz*, the Fourth Circuit rejected the INS's determination that a naturalization applicant lacked good moral character within the meaning of 8 U.S.C. § 1427(a) because he may have committed sodomy in violation of Virginia law. The appellate court explained that "whether a person is of good moral character for purposes of naturalization is a question of federal law," and that a federal standard was the "only certain means of creating the constitutionally required uniform rule." *Id.* at 435. The court pointed out that, as of 1981, nine states had decriminalized consensual sodomy; two statutes proscribing such behavior had been invalidated; and "but for an 'accident of geography,' [the applicant] perhaps would be a naturalized citizen today. Such a result hardly contributes to any principle of uniformity and is, in fact, incongruous with common sense." *Id.* The court's concern, in other words, was with the distribution of power between the federal government and the states and with ensuring that immigration authority remained centralized and uniform.

[1] Plaintiffs fault Defendants for arguing "that *Nemetz* does not support Plaintiffs here, but on the other hand complain[ing] that the Court did *not* discuss the *Nemetz* case." Pls.' Opp'n at 11. Plaintiffs are correct: respectfully, the Court should have considered the *Nemetz* case (which both parties cited previously) and should have dismissed Plaintiffs' Naturalization Clause claim in part because it is irreconcilable with the logic of *Nemetz*.

Though Plaintiffs disagree with Defendants' reading of *Nemetz*, they simply note that *Nemetz* does not use the terms "horizontal" and "vertical," as Defendants did in their Rule 54(b) motion. But those terms are simply shorthand (as Defendants explained) for separation of powers and federalism principles, respectively. *See* W. William Hodes, *Congressional Federalism and the Judicial Power: Horizontal and Vertical Tension Merge*, 32 Ind. L. Rev. 155, 158 (1998). Apart from disputing Defendants' nomenclature, Plaintiffs make no effort to show why a different interpretation of *Nemetz* is superior—nor can they, as the meaning of that case is beyond credible dispute. *See Nemetz*, 647 F.2d at 435-36 (to "permit[] state law to govern the creation of a relationship (citizenship) in which the state has no legitimate interest and over which Congress has exclusive authority [would be] a result that is directly contrary to the one intended by the framers of the naturalization clause" (citation omitted)). Plaintiffs' claim has nothing to do with the allocation of power between the states and the federal government, and *Nemetz* says nothing about the allocation of power between Congress and the Executive. The case, in short, offers no support for Plaintiffs' theory and casts significant doubt on the reasoning of *Wagafe*.

Having failed to explain away these serious flaws in their Naturalization Clause theory, Plaintiffs try a different tack, arguing that "a party cannot claim error on the basis that there is no controlling authority on an issue, as Defendants do here." Pls.' Opp'n at 13. Defendants acknowledge that the D.C. Circuit has not addressed the circumstances (if any) in which a private party may have a cause of action under the Naturalization Clause. But in the *absence* of controlling precedent, the Court should consider the most persuasive nonbinding authority as well as the plain meaning of the constitutional text in light of its historical context. Both *Korab* and *Nemetz* strongly indicate that Plaintiffs' understanding of the Naturalization Clause is misguided, and Defendants respectfully submit that those appellate opinions are far more reliable authority than an

unpublished district court opinion lacking in any meaningful analysis. And since Plaintiffs have never come forward with a viable alternative explanation for the historical meaning of the Naturalization Clause, the Court should reject their attempt to repurpose that provision for this litigation. Accordingly, the Court should reconsider its prior ruling and dismiss Plaintiffs' Naturalization Clause claim with prejudice.

III. The Court Should Reconsider Its Decision Importing Procedural Due Process Requirements into General Policymaking.

Plaintiffs' arguments in defense of their procedural due process claim are equally devoid of merit. As Defendants explained in their Rule 54(b) motion, while the Court acknowledged in its prior ruling that "agency rules of broad applicability normally do not implicate the same due-process concerns typical of agency adjudications involving individual rights," the Court then mistakenly distinguished this case on the ground that Plaintiffs here challenge "specific aspects of the October 13th Guidance as applied to them." Mem. Op. at 21; *see also* Defs.' Rule 54(b) Mot. at 11. The Court's reasoning in this regard is problematic because it conflates the analysis pertaining to "agency rules of broad applicability" with the threshold standing test that all litigants are required to pass. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016) (holding that a plaintiff must "allege an injury that is both 'concrete and particularized'" (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000))). The fact that Plaintiffs allege that DoD's N-426 policy harms them does not distinguish this case from the "normal case;" it simply means they have alleged that the DoD N-426 policy harms them directly so as to satisfy the standing inquiry.

The legal doctrine concerning rules of general applicability, by contrast, pertains to whether an agency's action implicates an individual's due process rights. As the Supreme Court has held, such rules of general application may "affect the person or property of individuals,

sometimes to the point of ruin, without giving them a chance to be heard. Their 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." *Bi-Metallic*, 239 U.S. at 445. Since this ruling, courts—including courts in this circuit—have recognized that *Bi-Metallic* draws a distinction between individual adjudications (e.g., benefits determinations and naturalization decisions) that implicate due process and its attendant rights, and broader rulemaking activities that do not. *See, e.g.*, *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 923 (D.C. Cir. 2013) (no notice and hearing required for pilots affected by nonretroactivity provision of statute raising maximum age for commercial pilots from 60 to 65); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007) (no notice and hearing required for liquor licensees affected by single-unit sales moratorium); *Save Our Sch.-Se. & Ne. v. Dist. of Columbia Bd. of Educ.*, No.04-01500(HHK), 2006 WL 1827654, at *14 (D.D.C. July 3, 2006) (no notice and hearing required for community members affected by school funding and resource allocation decisions). As here, in each of these cases the plaintiffs alleged a harm stemming from the agency's conduct, but courts nevertheless dismissed the procedural due process claims because they challenged general rules or policies rather than individual adjudications. Consistent with this case law, this Court should have done likewise.

Neither in their briefing at the motion to dismiss stage nor in their latest filing have Plaintiffs cited a single case in which a court has distinguished *Bi-Metallic* and extended procedural due process to a generalized policy of the type at issue here. Nor do Plaintiffs make any effort to explain why they should be entitled to pursue a procedural due process claim against the weight of *Bi-Metallic* and progeny, other than to parrot the Court's brief discussion of this issue. *See* Pls.' Opp'n at 20. Plaintiffs' best authority, the aberrational *Wagafe* decision, does not address *Bi-Metallic* or the rule/order dichotomy at all, but instead presumes that due process

applies and focuses on whether plaintiffs there alleged a cognizable property interest. But, in the context of generalized policies, it makes no difference whether the individual litigant has a property or liberty interest or what procedures may be in place to protect against the erroneous deprivation of that interest: constitutional due process simply does not apply in this context.[2]

While Plaintiffs have scant discussion of *Bi-Metallic* in their opposition brief, they do briefly discuss Defendants' alternative argument—*i.e.*, that the deprivation about which Plaintiffs complain is one of pure process, not substance, and thus falls outside the Fifth Amendment's reach. If the Court is inclined to address the argument, it should reconsider its prior ruling in this regard as well and dismiss Plaintiffs' claim. Citing *Wagafe* and *Brown v. Holder*, 763 F.3d 1141 (9th Cir. 2014), the Court previously held that "naturalization applicants have a property interest in seeing their applications adjudicated lawfully" and that Defendants are "depriving [Plaintiffs] of this right by failing to certify their past honorable service." Mem. Op. at 21. But even if the Court is correct that Plaintiffs have a "right" to apply for naturalization (a controversial premise, *see Brown*, 763 F.3d at 1153 (Tallman, J., concurring in part)), Plaintiffs have not shown that the challenged policy deprives them of that "right." At most, Plaintiffs have shown that the policy may delay their

[2] To be sure, broad policies are not necessarily immune from challenge, as private parties and individuals often are able to challenge government action under the APA, precisely as Plaintiffs have done here.

applications somewhat.[3] But even applying an expansive understanding of due process, surely the mere *timing* of an application for a benefit is not itself a protected property interest.[4]

The Court did not explain how its conception of Plaintiffs' protected property interest could be reconciled with cases that reject due process claims for pure procedure, such as *Olim* and *Allen v. Mecham*, No. 05-1007(GK), 2006 WL 2714926, at*4 (D.D.C. Sept. 22, 2006) and the cases cited therein. As the D.C. Circuit more recently explained in *Roberts v. United States*, "[a] 'cognizable liberty or property interest' . . . is essential because '[p]rocess 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.'" 741 F.3d 152, 161 (D.C. Cir. 2014) (quoting *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (per curiam); *Olim*, 461 U.S. at 250)). In *Roberts*, the plaintiff, unhappy with the results of her periodic performance evaluations, claimed that she had a protected interest in a "fair evaluation process," but the D.C. Circuit pointed out that "a 'fair evaluation process' is still a process, not a substantive interest in liberty or property." *Id.* at 162. It is difficult to square this Court's reasoning with the D.C. Circuit's reasoning in *Roberts*, or with the many other cases that have relied on *Olim* to distinguish substantive interests from pure procedure. *See,*

[3] Plaintiffs point out that the "October 13, 2017 policy requires that Plaintiffs 'favorably' complete [DoD's] security screening requirements." Pls.' Opp'n at 18. That is true: a MAVNI soldier who poses a national security threat or otherwise fails his background investigation will be discharged from the Service, and (absent the injunction) such a solider would not receive a verification that he had served honorably. But unless this Court reverses course in *Nio*, USCIS remains entitled to delay MAVNI naturalization pending the completion of the DoD background investigation. *See Nio v. DHS*, 270 F. Supp. 3d 49, 64-65 (D.D.C. 2017). It is unclear what benefit an honorable-service certification could offer a MAVNI discharged for security reasons, as under current policy USCIS could take account of the same adverse information giving rise to the discharge in making its final naturalization determination.

[4] Indeed, if due process were to extend to such technicalities, then government would be largely incapable of troubleshooting and modifying processes and procedures across a variety of fields that involve applications or inputs from members of the public—from tax to the social safety net to regulatory oversight to, as relevant here, immigration and naturalization.

e.g., *Brown v. McHugh*, 972 F. Supp. 2d 58, 67 (D.D.C. 2013) (plaintiff's complaint that Army violated its own regulations in denying his request to remove adverse report from his record did not implicate procedural due process); *Delaney v. District of Columbia*, 659 F. Supp. 2d 185, 198 (D.D.C. 2009) (plaintiff's complaint that defendants refused to grant her access to her incarcerated clients and thus deprived her of employment did not implicate procedural due process).

In light of the above, this Court's decision to allow Plaintiffs' procedural due process claim to proceed is in considerable tension with controlling case law, including *Bi-Metallic* and *Olim*. The Court should reconsider its prior decision, correct its legal error, and dismiss Plaintiffs' due process claim with prejudice.

IV. The Court's Refusal to Dismiss Plaintiffs' Constitutional Claims Harms Defendants.

As a final matter, Plaintiffs are wrong to assert that the Court's ruling is unlikely to harm Defendant. *See* Pls.' Opp'n at 4 ("Defendants' Motion identifies no harm or injustice that would result if the Court does not reconsider its decision."). The harm from permitting meritless constitutional claims to proceed is self-evident. For example, Plaintiffs' constitutional claims, which they pleaded in their ambiguous fifth count to their Amended Complaint only after securing preliminary injunctive relief, could potentially lead to burdensome discovery requests in a case that revolves largely around an issue of pure law regarding Defendants' authority to issue the challenged N-426 policy. There is "disagreement among district courts whether the assertion of constitutional claims takes a case outside the procedural strictures of the APA, including the record review rule," *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017), though the better authority holds that such discovery is inappropriate, *see id.* at 162 ("The information necessary for the Court to determine whether the agency's [action] was rational . . . will, presumably, be found in the administrative record."); *Harvard Pilgrim Health Care of*

New England v. Thompson, 318 F. Supp. 2d 1, 10 (D.R.I. 2004) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies was entitled to broad-ranging discovery."). Because Plaintiffs' constitutional claims are meritless, Defendants should not be put to the task of litigating whether discovery is available or conducting discovery where, in the ordinary APA posture, litigation would proceed on the basis of the certified administrative record.

In addition, the Government has a strong institutional interest in calling this Court's attention to legal errors in its prior decision, as that decision stands as non-binding authority in a district where the bulk of agency-related litigation takes place and could open the door to similar erroneous rulings and further ill-founded, resource-intensive lawsuits. As discussed above (and in prior filings), the Court's ruling purports to create a new constitutional cause of action in the D.C. Circuit pursuant to the Naturalization Clause but unmoored from the text of that clause; the contours of this new cause of action, as well as the facts needed to prove a violation, are ill-defined at best. The Court also has placed its imprimatur on a procedural due process claim involving a policy of general application, suggesting that DoD may need to provide soldiers with notice and a hearing (or whatever process the Court concludes is due) before revising such policies—an obviously unworkable proposition, as the *Bi-Metallic* Court recognized more than a century ago. The Court's ruling thus potentially imposes new burdens on Defendants with respect to future programmatic changes to their MAVNI policies and potentially opens the door to a new cause of action that can be brought against all government agencies in the administration of their programs. These considerations constitute further reasons for the Court to reconsider its prior ruling.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Defendants' opening brief, the Court should grant Defendants' Rule 54(b) motion.

Dated: March 14, 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