No. 99-1162

In the Supreme Court of the United States

SYED ABDULLAH, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether aliens applying for lawful temporary residence under the special agricultural worker legalization provisions of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1160 (1994 & Supp. IV 1998), were entitled under the Due Process Clause of the Fifth Amendment to interpreters at government expense when they were interviewed by Immigration and Naturalization Service legalization officers concerning their legalization applications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 184 F.3d 158. The opinion of the district court (Pet. App. A19-A56) is reported at 921 F. Supp. 1080.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1999. A petition for rehearing was denied on October 12, 1999 (Pet. App. A18). The petition for a writ of certiorari was filed on January 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are aliens unlawfully present in the United States who unsuccessfully applied for lawful temporary resident status under the legalization program for special agricultural workers (SAWs) established by Congress in the Immigration Reform and Control Act of 1986 (IRCA). See 8 U.S.C. 1160 (1994 & Supp. IV 1998). Under the SAW program, an alien was eligible for lawful temporary resident status if the alien established that he was admissible as an immigrant, and that he had resided in the United States and performed seasonal agricultural services in the United States for at least 90 man-days during the 12-month period ending on May 1, 1986. 8 U.S.C. 1160(a)(1)(B) and (C). An alien provided lawful temporary resident status could eventually be granted lawful permanent resident status, subject to certain numerical and timing restrictions. 8 U.S.C. 1160(a)(2).

Under Immigration and Naturalization Service (INS) regulations, the SAW application process was commenced by the filing of an application for lawful temporary resident status by the alien. Applications for legalization under the SAW program were required to be made between June 1, 1987, and November 30, 1988. See 8 U.S.C. 1160(a)(1)(A); 8 C.F.R. 210.2; Pet. App. A3. Aliens who applied for legalization in the United States were required to be interviewed at an INS office by an INS legalization officer (LO). 8 C.F.R. 210.2(c)(2)(iv). Based on a review of the alien's application, including the interview, the LO would then recommend approval or denial of the application to the INS Regional Processing Facility (RPF). If the LO recommended denial and the RPF concurred, the RPF would issue a notice of intent to deny the application. The notice of

intent to deny informed the applicant of the grounds supporting the denial and of the applicant's right to submit rebuttal evidence. The RPF would then consider any additional evidence that might be brought to its attention by the applicant and render a decision on the application. An RPF denial of a SAW legalization application could be appealed to the INS Legalization Appeals Unit (LAU). The applicant was permitted to submit any newly discovered evidence not available at the time of the RPF's decision to the LAU. The LAU then rendered a decision on the appeal. See Pet. App. A4-A5.

2. Petitioners are aliens, mostly from the Indian subcontinent, whose applications for legalization under the SAW program were denied by the LAU. Petitioners filed suit in the United States District Court for the Southern District of New York, alleging that practices followed by the INS LOs in processing their SAW applications violated federal law and the Constitution. Pet. App. A5. In particular, petitioners contended that the INS applied an improper irrebuttable presumption of fraud to some of their applications based on claimed employment for particular employers who had been convicted of fraud by supplying false immigration documents in other instances (*id.* at A31-A32); that the INS improperly denied some of their applications based on a "fraud profile" generalization that aliens from Indian and Pakistani communities had engaged in widespread immigration fraud (*id.* at A42-A43); and that the INS violated due process by not providing competent interpreters at government expense during the LO interviews to those applicants without an adequate command of the English language (*id.* at A49-A50). The district court granted summary judgment for petitioners on all three claims. *Id.* at A31-A53. As

pertinent here, the district court held that the INS violated due process by failing to provide competent interpreters at the personal interviews conducted by the LOs. *Id.* at A49-A53.[1]

3. The court of appeals vacated the order granting summary judgment, reversed in part, and remanded the case in part for further proceedings. Pet. App. A1-A17. Regarding petitioners' claim that due process was violated by the INS's failure to provide interpreters during the LO interviews, the court of appeals reversed the district court and directed that summary judgment be entered in favor of the INS. *Id.* at A14.

Applying the balancing test for procedural due process claims set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976),[2] the court held that, in the context of a legalization application—in which individuals are not

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[1] In addition to arguing that applicants for SAW benefits have no due process right to language interpretation at government expense, the INS had submitted an affidavit to the effect that the New York District Legalization Office did in fact provide competent interpreters to applicants who were determined to be not capable of speaking English. The district court disregarded that affidavit, however, on the ground that the affiant, an INS supervisory LO, did not state that he was personally present at the petitioners' legalization interviews, whereas petitioners had personal knowledge of what took place at their own interviews. Pet. App. A50.

[2] The court of appeals assumed, without deciding, that petitioners were entitled to due process in the adjudication of their legalization applications, Pet. App. A10, but it also observed that petitioners "face the government in a posture more similar to that of immigrants requesting admission at the border than that of aliens defending the legality of their presence in the country at a deportation hearing." *Ibid.* (also citing *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (for the proposition that due process "protects the latter and not the former")).

faced with the necessity of defending against adverse governmental action, like criminal prosecution or deportation, but are affirmatively petitioning the government for a status enhancement and bear the burden of establishing the validity of that status—"it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens." Pet. App. A11. The individual's interest in being furnished with an interpreter, the court stated, is much diminished in the situation where the individual "affirmatively initiates a proceeding seeking the benefits of a generous statutory exemption." *Id.* at A12 (internal quotation marks omitted). Further, the court concluded that the expense and difficulty to the government of supplying interpreters would be considerable, and that the INS had a significant interest in avoiding those burdens, given that the INS received more than 1.3 million applications for legalization under the SAW program. *Id.* at A12-A13. The court observed that "[u]pholding the right [petitioners] claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great." *Id.* at A13.

The court of appeals also vacated the district court's order granting summary judgment to petitioners on their two other claims, and remanded for further proceedings on those claims. With respect to petitioners' claim that LOs had relied improperly on a "nationality-based profile" to make findings of fraud and deny applications, the court stated that, "while the INS would be constitutionally forbidden to assume that persons of one nationality are more inclined than others to fraud," the INS "would not be barred from observing repeated indicia of similar fraud from persons of one

community, and consequently from looking more carefully at applications from others of the same community bearing similar indicia of fraud." Pet. App. A15. The court found the evidence insufficient to permit a determination on summary judgment whether the INS was relying on a pure nationality-based profile, and remanded for a trial on that issue. *Id.* at A16. On petitioners' claim that the INS had relied on an irrebuttable presumption that all applications claiming agricultural employment with certain employers were fraudulent, the court found the record inadequate to justify the conclusion that the INS had relied on such a conclusive presumption, as opposed to a "reasonable inference" of fraud in the case of employers convicted "of precisely the type of fraud in question." *Ibid.* Moreover, the court observed, even if the INS had relied on such a conclusive presumption in some cases, that would not necessarily warrant vacating its determinations in all cases involving such employers, and the district court should not have ordered the INS on that basis to readjudicate the applications of all petitioners. *Id.* at A16-A17. The court therefore remanded that claim as well for trial. *Id.* at A17.

ARGUMENT

Petitioners renew their contention that due process requires the INS to provide, at government expense, an interpreter at the legalization officer's personal interview of an applicant for lawful temporary resident status under the Special Agricultural Worker program. That contention does not warrant this Court's review.

1. Review of petitioners' contentions is not warranted at this time because the decision of the court of appeals is interlocutory. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327,

328 (1967). Although the court rejected on the merits petitioners' due process claim based on the INS's failure to provide interpreters, the court did not reverse outright the district court's ruling in favor of petitioners on their two other claims, but rather remanded for a trial on those claims. Depending on how the district court resolves those claims at trial, either petitioners or the government may appeal again to the court of appeals, which would then issue a final judgment disposing of all of petitioners' claims. If the decision of the court of appeals at that time is adverse to petitioners, petitioners may then file another certiorari petition raising any claims they may have, including the due process claim based on the lack of interpreters.

2. Petitioners contend (Pet. 5-11) that the decision below conflicts with *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991) (*HRC*). Specifically, petitioners state that, "[w]hile the Eleventh Circuit did not consider whether the failure to provide competent interpreters was a due process violation under the standards set forth in *Mathews* v. *Eldridge*, [424 U.S. 319 (1976)] (because the INS's 'Examination Handbook' had already directed the interviewer to 'make certain whether the services of an interpreter [were] required' if the person being questioned did not speak English)," the Eleventh Circuit observed that the LO could not make a valid recommendation or set forth an accurate factual basis for his decision if he could not understand what the interviewee was trying to communicate. See Pet. 6 (quoting *HRC*, 872 F.2d at 1562). Petitioners' assertion of a circuit conflict with *HRC* is mistaken.

As petitioners recognize, the Eleventh Circuit's decision in *HRC* arose in the markedly different context of

an appeal from a grant of a preliminary injunction. See 872 F.2d at 1557, 1563. The court of appeals emphasized that "[a]ppellate review of the district court's decision [to grant a preliminary injunction] is very narrow," and it therefore applied a "clear abuse of discretion" standard of review, *id.* at 1561. Moreover, applying the well-settled preliminary injunction standard, the court considered only whether the plaintiffs had a "substantial likelihood" of success on the merits, *ibid.*, and not whether plaintiffs had actually established a meritorious case. And with the case in that posture, the Eleventh Circuit ultimately sustained the provisions of the preliminary injunction concerning interpreters without considering the third *Mathews* factor, on the ground that the INS Manual already provided for interpreters. See *id.* at 1562.

The decision of the court of appeals in this case, by contrast, decided the merits of the due process claim *de novo* and did evaluate the third *Mathews* factor. See Pet. App. A10-A14. Because the decision below and *HRC* addressed the issue of interpreters under different standards and on a different rationale, the two decisions do not present a circuit conflict warranting this Court's review—especially at the interlocutory stage of this case. See *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 316 (1999) (quoting *University of Tex.* v. *Camenisch*, 451 U.S. 390, 393 (1981) ("The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors * * * while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.")); *Camenisch*, 451 U.S. at 394 (observing that "likelihood of success" is not

properly equated with "success"); see also *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 716 (1981).

3. Petitioners also argue (Pet. 11-12) that the decision below conflicts with *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991), where this Court affirmed that part of the Eleventh Circuit's decision in *HRC* upholding the district court's exercise of subject matter jurisdiction. Petitioners rely on this Court's "repeat-[ing of] the finding of the district court" that the INS failed to provide competent interpreters. Pet. 12. Petitioners also note that this Court observed "that the INS was not seeking review of the district court's ruling on the merits of this issue," and that there was no "dispute that the INS 'routinely and persistently violated the Constitution and statutes in processing SAW applications.'" *Ibid.* (quoting *McNary*, 498 U.S. at 491).

As petitioners acknowledge, however, this Court in *McNary* "was presented with one question for review: Whether the SAW statute 'precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the * * * INS * * * in the administration of the SAW program.'" Pet. 11 (quoting *McNary*, 498 U.S. at 483); see also 498 U.S. at 490 ("Our grant of certiorari is therefore limited to the jurisdictional question."). This Court's actual decision in *McNary* was therefore limited to the question of subject matter jurisdiction. The Court's observation that there was no "dispute that the INS routinely and persistently violated the Constitution and statutes in processing SAW applications," *id.* at 491, merely described the INS's decision not to seek review of the district court's holding on the merits in that particular case at that interlocutory stage of the case.

That the Court prefaced its observation with the language "at this stage of the litigation," *ibid.*, confirms that point. The portion of the Court's decision describing the merits of the claims is not part of *McNary*'s holding, nor was it necessary to the Court's decision.

4. The court of appeals correctly ruled that due process did not require the INS to furnish interpreters at LOs' interviews of SAW applicants. The court of appeals properly applied the three-factor test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to evaluate the constitutional sufficiency of procedures afforded applicants for lawful temporary residence under the SAW legalization program.

Concerning the first *Mathews* factor, "the private interest that will be affected by the official action," 424 U.S. at 335, the court of appeals correctly observed that SAW applicants for legalization "have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish." Pet. App. A11; compare *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60-61 (1999) (an employee has no property interest protected by the Due Process Clause in state workers' compensation medical benefits he is not already receiving, until the employee establishes that particular medical treatment at issue satisfies the statutory standard of being reasonable and necessary).[3] SAW applicants are therefore not like individuals who are already receiving a benefit that the government is seeking to terminate, as in *Mathews* v. *Eldridge*, or who

[3] Thus, as the court of appeals observed (Pet. App. A11), applicants for adjustment of status, such as petitioners, are similar to aliens who are seeking admission into the United States for the first time. See *Choe* v. *INS*, 11 F.3d 925, 928 (9th Cir. 1993); *Castano* v. *INS*, 956 F.2d 236, 237 n.1 (11th Cir. 1992); *Campos* v. *INS*, 402 F.2d 758, 760 (9th Cir. 1968).

are subject to government-initiated enforcement proceedings seeking to affect adversely a person's status, such as criminal prosecution or removal hearings. Pet. App. A11.[4] Unlike, for example, lawful permanent resident aliens who are placed in removal proceedings, petitioners do not, if their bid for legalization is unsuccessful, thereby stand to lose any right to stay in this country—especially given the statutory confidentiality provisions in 8 U.S.C. 1160(b)(6)(A) (1994 & Supp. IV 1998), which generally preclude the INS from using information furnished by a SAW applicant for any purpose other than adjudication of the application. The court of appeals therefore correctly concluded that "it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens." Pet. App. A11.[5]

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[4] The Eleventh Circuit's decision in *HRC*, which concluded that aliens who were applying for (but had not yet been found eligible for) SAW status had a property interest in that status, see 872 F.2d at 1562, was rendered before this Court's decision in *American Manufacturers Mutual Insurance Co.*, *supra*.

[5] Petitioners argue that, while they may have affirmatively petitioned the government for a status enhancement, they were encouraged to do so by Congress, which directed the Attorney General "to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process." Pet. 8 (quoting *McNary*, 498 U.S. at 484). Nonetheless, it remains true that petitioners, in applying for legalization, are seeking a benefit under the generous provisions of IRCA, and are not faced with the government's imposition of a sanction, as in a criminal trial or a removal proceeding. For a similar reason, petitioners err in arguing that, even if SAW applicants are properly made responsible for securing interpreters for their interviews, the INS should be required at least to afford them notice of that fact, as it provides advance notice in cases involving interviews of asylum applicants. Pet. 9. Unsuccessful asylum applicants, unlike unsuccessful SAW

The court of appeals also correctly concluded that the third *Mathews* factor, the government's interest in avoiding the fiscal and administrative burdens associated with additional procedures (see 424 U.S. at 335), weighs heavily in favor of the government in this case. Pet. App. A12-A13. As the court observed, given that the INS received more than 1.3 million legalization applications under the SAW program, "[u]pholding the right [petitioners] claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great." *Ibid.*[6]

That conclusion also comports with this Court's observation that "[t]he Government's interest in efficient administration of the immigration laws at the border * * * is weighty," and that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and Legislature." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). Furthermore, a judicially imposed requirement of interpreters at gov-

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applicants, are subject to immediate referral by the INS for commencement of proceedings to remove them from the United States after their application is denied. See 8 C.F.R. 208.14(a) and (b)(2) (asylum application is decided either by immigration judge in removal proceedings or by asylum officer who, if he does not grant asylum and the alien appears to be removable, refers application to immigration judge for adjudication in removal proceedings).

[6] The district court, like the Eleventh Circuit in *HRC*, found it unnecessary to consider the third *Mathews* factor, because INS procedures at the time contemplated the furnishing of interpreters where they were required. See Pet. App. A51. The court of appeals in this case correctly rejected that approach, noting that "the government's prior voluntary assumption of the burden [of providing interpreters] does not render the burden nonexistent. Rule or no rule, the burden remains." *Id.* at A13.

ernment expense would impermissibly "displace congressional choices of policy." *Id.* at 35. Congress did not by statute require the INS to hire, train, and provide translators for legalization interviews; rather Congress's evident assumptions were that applicants would prove their case principally with documentary evidence, and that aliens who had worked on farms in this country either were capable of speaking sufficient English or could find a bilingual person to accompany them to an INS interview. Indeed, Congress specifically "directed the Attorney General to enlist a variety of nonfederal organizations," called qualified designated entities (QDEs), "to encourage aliens to apply and to provide them with counsel and assistance during the application process." See *McNary*, 498 U.S. at 484; 8 U.S.C. 1160(b)(2) and (b)(4). Congress's expectation that aliens applying for legalization would speak, or find assistance to speak, in English was reasonable, considering that temporary lawful resident status made available under the legalization program may be the first step towards United States citizenship. See 8 U.S.C. 1160(a)(2) (alien granted temporary resident status under SAW program may obtain permanent resident status without need for separate application); 8 U.S.C. 1423(a)(1) (aliens without understanding of English language ineligible for naturalization).

Concerning the second *Mathews* factor, the risk of error in the absence of the additional procedural safeguards (see 424 U.S. at 335), it is pertinent to observe that any failure by the INS to afford certain of the petitioners with competent interpreters—an allegation that the government in any event disputed below (see

p.4 n.1, *supra*)[7]—did not preclude petitioners from presenting their cases at their SAW application interviews. Nothing prevented petitioners from bringing their own interpreters to those interviews, a responsibility the court of appeals found "reasonable" to impose. Pet. App. A11. In addition, Congress expected SAW legalization applicants to establish their eligibility through documentary evidence, see 8 U.S.C. 1160(b)(3), and INS regulations required rejection of an applicant's personal testimony uncorroborated by credible evidence, see 8 C.F.R. 210.3(b)(3).

Furthermore, even after the conclusion of their interviews with the LOs, petitioners were afforded ample opportunity to rebut adverse evidence—in response to the RPF's notices of intent to deny their applications, and on appeal from the RPF to the LAU (Pet. App. A4-A5)—with any documentary evidence they wished to provide, including affidavits, which "[t]he INS considers * * * no different than * * * testimony." *Haitian Refugee Ctr., Inc.* v. *Nelson*, 694 F. Supp. 864, 868 n.6 (S.D. Fla. 1988), aff'd, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991); see also *Rahim* v. *McNary*, 24 F.3d 440, 441-442 (2d Cir. 1994) (permitting applicant to submit affidavits in response to RPF's notice of intent to deny application); 8 U.S.C. 1160(e)(2)(B) (permitting applicant to include new evidence as part of appeal to LAU); 8 C.F.R. 103.2(b)(16)(i) (mandating opportunity for applicant to rebut derogatory information of which applicant was unaware); 8 C.F.R. 103.3(a)(3)(i) (same).

In this case, the INS's denials of petitioners' applications were based in large part on the INS's reason-

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[7] Petitioners appear to concede that interpreters were made available in a number of cases. See Pet. 2-3.

able inferences that petitioners' applications were supported by fraudulent documents. See Pet. App. A16. Given the absence of credible corroborative evidence, it is unlikely that petitioners' oral testimony would have materially changed the INS's decisions on their applications. Hence, petitioners have not shown that their opportunity to apply for SAW status was hindered by any lack of competent interpreters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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