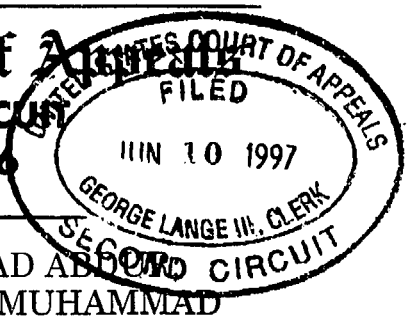
Appellant's Reply Brief

96-6206

To be Argued by:
DIOGENES P. KEKATOS



United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 96-6206

SYED ABDULLAH; MOHAMMAD ABDUL; MOHAMMAD TAHSEEN AFZAL; MUHAMMAD ZAHID AFZAL; CHOUDHURY MOHAMMAD AFFZAL; MOHAMMAD KAMAL AHMED;

(For Continuation of Caption, See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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CHAUDARY ANSER; MOHAMMAD NAZIR ARAIN; MOHAMMAD ARSHAD; SRINIVASAN ARUMUGAM; MOHAMMED ASHRAF; MOHAMMAD HASSAN ASHRAFUL; MOHAMMED AWAL; MALIK KHALID AWAN; MOHAMMAD ARSHAD AWAN; MOHAMMAD RAFIQ AWAN; ABUL KALAM AZAD; ABDUL MARUF AZAD; MOHAMMED ABDUL AZIZ; ORACK UDDIN BABU; HAFIZUR RAHMAN BABUL; MOHAMMED BABUL; MOHAMMED BADAL; HARBANS SINGH BADHAN; MA RAZZAK BADRUDDIN; MOHAMMAD AFZAL BAIG; ZAKA ULLAH BAJWA; SYED A. BAKAR; CHOWDHURY GOLAM BASET; ABUL BASHAR; RAJA FARAKH BASHIR; ABDUL BAYS; MOSTOFA BHUIYA; MD. ANISUL HOQUE BHUIYAN; MD. MIR HOSSAIN BHUIYAN; RASHEED AHMAD BHUTTA; SHAKEELA BIBI; MOHAMMAD IRSHAD BUTT; MUHAMMED SADIQ BUTT; ALI AZAM BUYA; PARMINDER K. CHAHAL; GHOOLAM RASOOL CHAUDARY; ABDUL SATTAR MUZAFAR CHAUDHARY; AHMAD CHAUDHRY; ZIAUDDIN CHAUDHRY; MASUD KHALID CHAUDRY; NISAR CHEEMA; MOHAMMAD BASHIR CHOUDHARY; RIAZ CHOUDHARY; MOHAMMAD ASIF CHOUDHRY; AKHTARUN NABI CHOUDHURY; MOHAMMED ZAHUR CHOUDHURY; MD. ABDUL CHOWDHURY; MD. ABDUL CHOWDHURY; NURUL ALAM CHOWDHURY; ABDUL MUKTADIR CHOWDHURY; AHAD CHOWDHURY; AHMED CHOWDHURY; JEWEL CHOWDHURY; RONJU CHOWDHURY; QADAR DAD; SUJAN DAS; ASHIT KUMAR DEY; ROBINSON UMER DIN; PINTU DUTTA; SANDO EDASSERY; OUSMANE FALL; NIGHAT FARIDI; GHAZIABDUL GHUFRAN; ABDUL HADI; MOHAMMAD ALI HAIDAR; BITAN HAIDAR; MOHAMMED HAIDER; MOHAMMED RAZIBUL HAQ; HASINA HAQUE; MOHAMMED HAQUE; MOHAMMAD BARUL HAQUE; MUHAMMAD EMDADUL HAQUE; ABDUL HAMEED HAREY;

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Plaintiffs-Appellees,

– v. –

IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellant.

MD. JAINAL ABEDIN; ZAINAL ABDIN; ARSHAD MUSTAFA ABID; ESSAM ABOUZEID; MIR NURUL AFSAR; ABDUL AHAD; MOHAMMAD IJAZ AHMAD; AKRAM AHMED; AM SHAMEEM AHMED; ANIS AHMED; FARID AHMED; FAROOQUE AHMED; FIROZ AHMED; MD. MOSTAQUE AHMED; MISHU AHMED; MOHAMMED BENJIR AHMED; MOHAMMED JAMAL AHMED; MOHAMMED S. AHMED; MOHAMMED SHUHEL AHMED; MOHAMMED TUFAQUE AHMED; MOHBUB UDDIN AHMED; MOINUDDIN AHMED; MOSTAQUE AHMED; MUYEEN UDDIN AHMED; QUAZI RANA AHMED; QUDDUS AHMED; RASHID AHMED; ROUF AHMED; SHEIKH AHMED; SIMLA AHMED; SYED MINHAZ AHMED; HAMEED AKHTAR; JANAS AKHUNZADA; BODRUL ALAM; MD. JANE ALAM; MD. ZAHUIRUL ALAM; MOHAMED ALAM; MOHAMMAD M. ALAM; NURUL ALAM; ARSHAD ALI; ARSHAD ALI; IMTIAZ ALI; TAYBE ALI; MOHAMMAD ALI; SHAUKAT ALI; MUHAMMAD AL-MAMOON; MOHAMMED NURUL AMIN;

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DALVIR SINGH; GURDIP SINGH; HARDAMAN SINGH; HARJINDER SINGH; JAGTAR SINGH; PAL SINGH; RANVINDER SINGH; RAWAL SINGH; SAMPURAN SINGH; SHERJANG SINGH; SUCHA SINGH; SURJIT SINGH; SURJIT SINGH; RAHMAN SIPRA; MOHAMED SOLAIMAN; RAHMATULLAH TAHER; SHAIFUL A. TALUKDAR; PRABESH TALUKDER; AYAZ TAREEN; BAHAR UDDIN; JALAL UDDIN; JAMAL UDDIN; JAMAL MOHAMMED UDDIN; KOMOR UDDIN; MAHBUB UDDIN; RAFIQUE UDDIN; SAFAR UDDIN; MOHAMMED HAMID ULLAH; S.M. WALI ULLAH; KHALIL UR-REHMAN; SM. ABDUL WAHED; RIZWAN A. WARRIACH; MOHAMMAD YAQOOB; RAJA M. YAQUB; MOHAMMED YUNUS; KAMRUL ZAMAN; GUL ZAMIR; JAHAN ZEB,

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FOR THE SECOND CIRCUIT

Docket No. 96-6206

SYED ABDULLAH, *et al.*,

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IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

Defendant-Appellant INS submits this reply brief in response to the Brief for Plaintiffs-Appellees ("Pl. Br."). For the reasons set forth below and in the Brief for Defendant-Appellant ("Gov't Br."), the judgment of the district court should be reversed.

Plaintiffs' contention that their claims should not have been dismissed for lack of subject matter jurisdiction is meritless. *See* Pl. Br. at 17-25. Plaintiffs fail to acknowledge that in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) ("*CSS*"), the Supreme Court limited its decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) ("*McNary*"), and held that the IRCA divests district courts of subject

matter jurisdiction over any substantive challenge to the denial of a SAW or legalization application, and over any collateral procedural challenge that may be adequately reviewed on the administrative record by a court of appeals upon petition for review of a final deportation order.

Plaintiffs also fail to address the INS's argument that the administrative records relating to their SAW applications permit adequate judicial review of plaintiffs' claims by a court of appeals upon review of a final deportation order. Pl. Br. at 17-26. Plaintiffs do not dispute that they took no discovery below. Thus, plaintiffs concede that district court discovery was unnecessary for their case. *Id.* at 22-23, 27. By failing to demonstrate any need for district court jurisdiction -- as opposed to circuit court jurisdiction, exercised upon petition for review -- plaintiffs fail to establish that the district court had subject matter jurisdiction over their claims. This action is, in short, an impermissible attempt to bypass deportation proceedings and to evade the statutory bar to district court review.

Plaintiffs unpersuasively attempt to distinguish *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality), whose reasoning was adopted in *Catlin v. Sobol*, 93 F.3d 1112, 1118 (2d Cir. 1996). Reading *Michael H.* unduly narrowly, plaintiffs argue that irrebuttable presumptions are substantive rules of law only where, as in *Michael H.*, those rules arise from statutory classifications, as opposed to practices or rules of a federal agency. Pl. Br. at 19-21. As discussed below, this is a distinction without a difference.

Plaintiffs' arguments on the merits are equally unavailing. Plaintiffs' chief contention, that the INS's use of similar or identical language in its decisions denying their SAW applications evidences use of an irrebuttable presumption, Pl. Br. at 28-30, 33-34, is based on reasoning that has been rejected by this Court, *see* Gov't Br. at 35. Plaintiffs further ask this Court to uphold the district court's improper substitution of its own judgment for that of the INS on matters of credibility. Pl. Br. at 29-35. In any event, plaintiffs have shown no basis for the district court's conclusion that the INS irrebuttably presumed plaintiffs' evidence fraudulent. Plaintiffs do not even address the INS's contention that the denials of plaintiffs' SAW applications were based on a full consideration of the evidence and rested in part on evidence wholly independent of the convictions of plaintiffs' purported employers for providing fraudulent SAW documents. *See id.* at 28-35.

Plaintiffs similarly fail to address the INS's contention that the LOs' recommendations to deny plaintiffs' SAW applications did not unconstitutionally rely on plaintiffs' nationalities or ethnicities. *See id.* at 35-38. As previously explained, in some instances the LOs recommended denial of plaintiffs' SAW applications because those applications presented eligibility information that was identical to information in demonstrably fraudulent applications submitted by plaintiffs' fellow nationals. Gov't Br. at 37-40. The record plainly shows that the LOs' mention of an alien's nationality or ethnicity in a recommended denial did not demonstrate improper discrimination but rather constituted one of several factors indicating a likelihood of fraud. *Id.* Even assuming *arguendo* that the LOs improperly relied on nationality or ethnicity, plaintiffs fail to provide any

evidence whatever that the INS's *final* decisions -- issued by the LAU -- rested on such a factor. Gov't Br. at 40-42.

Finally, plaintiffs fail to show that they have a due process or statutory right to qualified interpreters, or that the INS violated any such right. Plaintiffs failed *inter alia* to address the INS's argument that there is no risk of an erroneous deprivation of plaintiffs' rights under existing procedures. *Id.* at 43-44; Pl. Br. at 38-40. In addition, plaintiffs fail to support their claim that any lack of qualified interpreters prejudiced their cases. Nowhere do plaintiffs argue that the presence of such interpreters would have changed the outcome of their SAW applications, or that the INS's procedures did not afford them an adequate opportunity to establish their eligibility. *See* Pl. Br. at 39-40. Accordingly, plaintiffs' claim to qualified interpreters must fail.

For all the reasons presented in the INS's briefs on this appeal, the judgment of the district court should be reversed.

ARGUMENT

POINT I

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

Plaintiffs contend that the district court properly asserted subject matter jurisdiction under *McNary*. Pl. Br. at 17-25. Plaintiffs argue that their case presents "general collateral challenges to unconstitutional practices," Pl. Br. at 18; *see id.* at 23, and thus, under *McNary*, falls outside the IRCA's bar to district court review. This argument is unavailing.

Plaintiffs fail to acknowledge that *CSS* limited *McNary*. *See* Gov't Br. at 18-21. Indeed, plaintiffs misleadingly assert that *CSS* "upheld" *McNary*. Pl. Br. at 22. However, the two circuit decisions that have addressed the issue, neither of which plaintiffs mention, have noted that a court "must consider *McNary*'s significance in light of" *CSS*. *See Naranjo-Aguilar v. U.S. INS*, 30 F.3d 1106, 1109 (9th Cir. 1994); *see also Ayuda, Inc. v. Reno*, 7 F.3d 246, 248-49 (D.C. Cir. 1993) (noting that *CSS* "elaborated and extended the general ripeness doctrine . . . so as to severely limit *McNary*"), *cert. denied*, 513 U.S. 815 (1994). These courts recognize that *McNary* and *CSS*, read together, bar district court review of substantive challenges under the IRCA as well as collateral procedural challenges that can receive practical judicial review by a court of appeals examining the administrative record. *See Naranjo-Aguilar*, 30 F.3d at 1112-14; *Ayuda*, 7 F.3d at 249. This Court, too, has recognized the limiting effect of *CSS*. *See Perales v. Reno*, 48 F.3d 1305, 1311 (2d Cir. 1995) (noting *CSS* holding that "[p]laintiffs who could demonstrate that their applications were denied because of the rule would then be subject to IRCA's exclusive review provisions"), *cert. denied*, 116 S. Ct. 699 (1996).

Plaintiffs' failure to heed the impact of *CSS* is reflected by their reliance on *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992). *See* Pl. Br. at 23-24. Although that decision relied on *McNary* to support a finding of district court jurisdiction over a substantive challenge to IRCA-related regulations, *see* 967 F.2d at 806-07, the Supreme Court vacated *Perales*

and "remanded [the case] for further consideration in light of" *CSS. Reno v. Perales*, 509 U.S. 917 (1993).*

Plaintiffs further argue that *McNary* broadly covers "procedural and collateral questions concerning the implementation of the SAW program." Pl. Br. at 19; *see id.* at 23. In so arguing, plaintiffs blithely omit a crucial prerequisite for district court jurisdiction over collateral procedural claims -- that such claims not be adequately reviewable on the administrative record. Govt. Br. at 20-21. Plaintiffs thus mischaracterize the INS as "contend[ing] that *CSS* divests the district court of jurisdiction unless the SAW applicant has been 'front-desked.'" Pl. Br. at 21. *CSS* permits

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* Plaintiffs unsuccessfully attempt to analogize their claims to those of the *McNary* plaintiffs. *See* Pl. Br. at 18-19. Indeed, plaintiffs here do not challenge the INS's arguments that the INS apprised them of, and allowed them an opportunity to rebut, the INS's adverse evidence. *See* Gov't Br. at 8, 11, 27-28, 47; Pl. Br. at 6; JA 1904-05 & n.13. Furthermore, this case presents a developed administrative record that would afford a sufficient basis for a court of appeals to determine whether a plaintiff's application would be materially assisted by additional, translated testimony. *See* Gov't Br. at 27-29. In any event, *McNary* is not quite the authority plaintiffs suggest. In that case, the INS did not appeal the district court's improper-burden-of-proof ruling. *See Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1557 (11th Cir. 1989), *aff'd*, 498 U.S. 479 (1991). Thus, the *McNary* Court never considered whether district court jurisdiction exists over challenges to the INS's standards of proof under the IRCA, an issue the Court subsequently resolved in *CSS*. *See* Gov't Br. at 18-25.

district court jurisdiction where "front-desking" occurs *or* where the alien otherwise advances a collateral procedural claim that cannot be reviewed by a court of appeals on the administrative record. *See* Gov't Br. at 18-21.

Equally without merit is plaintiffs' argument that their claims of irrebuttable presumption and ethnic profiling are not attacks on substantive rules of law and hence are not barred by *CSS*. *See* Pl. Br. at 19-21; *see also* Gov't Br. at 20-23, 25-26.* According to plaintiffs, *Michael H. v. Gerald D.*, 491 U.S. 110,

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* Plaintiffs' charge of ethnic profiling, like their fraud presumption claim, is analogous to that rejected in *Naranjo-Aguilera*, 30 F.3d 1106. There, the plaintiffs challenged an INS regulation and policy that denied SAW status to aliens convicted of one felony or three misdemeanors (the "one/three rule"). *Id.* at 1109. The plaintiffs argued that the INS "has an unlawful policy of treating the one/three rule as a *per se* ground for denial . . . rather than as one factor to be weighed . . . on a case-by-case basis, along with other positive and negative factors." *Id.* The Ninth Circuit held that the plaintiffs' claim was a challenge to an INS interpretation of the IRCA's substantive eligibility requirements and hence not reviewable in district court. *Id.* at 1113. Here, plaintiffs similarly contend that the INS, in "summarily den[ying]" their applications, failed to treat their employers' fraud as one of several factors to consider, JA 47, and that many of the INS's denials rested on ethnic profiles without "'individual[ized] consideration,'" Pl. Br. at 36 (quoting JA 1898). Such challenges bear on plaintiffs' eligibility for SAW status and thus are not genuine collateral challenges.

120-21 (1989) (plurality), which ruled that an irrebuttable presumption is a substantive rule of law, and *Catlin v. Sobol*, 93 F.3d 1112, 1118 (2d Cir. 1996), which adopted the reasoning of *Michael H.*, involved legislative classifications. Pl. Br. at 19-21. Thus, plaintiffs contend, irrebuttable presumptions that are not contained in a statute -- *e.g.*, irrebuttable presumptions created by agency "*practice*," *id.* at 21 -- are not substantive rules of law. *Id.* Plaintiffs' distinction, however, is illusory.

An irrebuttable presumption is "the implementation of a substantive *rule of law*," *Michael H.*, 491 U.S. at 119 (emphasis added), regardless of whether the rule is embodied in a statute, regulation, policy, or practice, *see, e.g.*, *Darks v. City of Cincinnati*, 745 F.2d 1040, 1044 (6th Cir. 1984) ("city's *practice* of denying licenses to all felons is in effect a rule of substantive law rather than an irrebuttable presumption") (emphasis added); *Doe v. Edgar*, 721 F.2d 619, 624 (7th Cir. 1983) (state official's "policy" of denying reinstatement of driver's licenses to individuals twice convicted of drunk driving is "rational substantive standard[ ] . . . not open to irrebuttable presumption challenges"); *Kirk v. Secretary of Health and Human Servs.*, 667 F.2d 524, 533-34 (6th Cir. 1981) (irrebuttable presumption challenge to agency's regulations is actually attack on substantive rule), *cert. denied*, 461 U.S. 957 (1983); *MacDonald v. Board of Comm'rs of Pilots*, 523 F. Supp. 949, 952-53 (S.D.N.Y. 1981) (claim that agency's regulation requiring revocation of pilot's license at age 65 involves irrebuttable presumption constitutes "substantive due process" claim). As plaintiffs themselves have argued throughout this action, the INS has made *legal* determinations that, notwithstanding the evidence they submitted, their SAW applications were

fraudulent solely because of their alleged employers' convictions, JA 47-48, 67-68, and their nationalities or ethnicities, JA 1896-98.* Plaintiffs' suggestion that the agency's practice is invalid, Pl. Br. at 21, is irrelevant to whether that practice embodied a substantive rule.

Notwithstanding plaintiffs' self-serving characterization of their claims, the conclusion is inescapable that plaintiffs attack the INS's credibility determinations and weighing of the evidence. Thus, plaintiffs assert a substantive, eligibility-related claim that is barred by *CSS*. *See* Gov't Br. at 24 n.*. *See also CSS*, 509 U.S. at 60 (alien seeking "to rely on the denial of his application" barred from district court review); *Naranjo-Aguilar*, 30 F.3d at 1114 (district court jurisdiction lacking where unsuccessful SAW applicants "rely primarily upon the 'denial and termination of their status as lawful resident aliens'") (citation omitted).

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* Plaintiffs quote out of context the district court's statement that the "'presumption of fraud'" is "'factual, not legal, in nature.'" Pl. Br. at 21 (quoting JA 1888-89). The district court was not describing an irrebuttable presumption but merely recognizing that a rebuttable presumption involves a factual inquiry. *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). As previously noted, an irrebuttable presumption claim is an attack on a substantive *rule of law*. *See, e.g., Alvarado v. J.C. Penney Co.*, 713 F. Supp. 1389, 1392 (D. Kan. 1989) ("A conclusive presumption is a rule of substantive law which applies *regardless of facts* and cannot be contradicted by evidence to the contrary.") (emphasis added) (citation omitted).

Plaintiffs' arguments *support* the conclusion that each administrative record in this case permits a court of appeals to review the relevant plaintiff's claims in the context of a petition for review of a final deportation order. *See* Gov't Br. at 20, 23-24, 26-28. Plaintiffs do not dispute that their claims have never required any evidence other than that already present in each administrative record. Although plaintiffs state that they "never acknowledged the adequacy (or inadequacy) of the admin[ ]istrative record," Pl. Br. at 22, and argue that the "issue is not before the Court," *id.* at 23, plaintiffs' actions speak louder than their words: by basing their case on their administrative records, plaintiffs by definition acknowledged the adequacy of those records. Indeed, plaintiffs concede that their SAW files, the contents of which the INS provided as part of its motion for summary judgment, "were adequate for purposes of these motions."* *Id.* at 22-23; *see also id.* at 27 (admitting that "[t]he essential facts of plaintiffs' claims were readily ascertainable from the record that the INS submitted in support of its own claim for dismissal or alternatively for summary judgment"). Moreover, the documentary evidence that the INS included as part of its motion for summary judgment comes solely from the administrative records of plaintiffs' respective SAW proceedings. *See* JA 140, 145-1864. All such evidence

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* The affidavits that plaintiffs submitted on summary judgment could have been submitted during the administrative process. *See* Gov't Br. at 28-29. Thus, plaintiffs cannot dispute that the administrative review scheme was "capable of generating an administrative record adequate for effective judicial review." *Naranjo-Aguilar*, 30 F.3d at 1112-13; Gov't Br. at 20-21.

would be part of the administrative record that a court of appeals would review in the context of judicial review of a final deportation order. *See* 8 U.S.C. §§ 1105a(a), 1160(e)(3). That plaintiffs concede the adequacy of the administrative records in this case for purposes of judicial review is fatal to their assertion of district court jurisdiction. *See* Gov't Br. at 20-21, 23, 26-28.

Nevertheless, plaintiffs disingenuously suggest that "discovery" was conducted in this case, Pl. Br. at 22, and thus imply incorrectly that the district court's discovery tools were necessary for resolution of their action. *See generally Naranjo-Aguilar*, 30 F.3d at 1113 (noting that "class action lawsuit with district court discovery mechanisms is . . . the most effective[ ] method of judicial review" of INS's allegedly unconstitutional procedural practices under IRCA). In particular, plaintiffs contend that "[w]hatever discovery was necessary *for purposes of these motions* was accomplished in the pre-motion stage. Plaintiffs discovered their files under the Freedom of Information Act, 5 U.S.C. § 552" ("FOIA"). Pl. Br. at 22 (emphasis in original).

Contrary to this assertion, however, and as is evident from plaintiffs' mention of their FOIA requests, no discovery was conducted in the district court during the "pre-motion stage" of this case. Rather, plaintiffs' reference to "discovery" actually concerns plaintiffs' FOIA requests, made to the INS before the commencement of this action, for copies of the INS's files concerning plaintiffs' SAW proceedings. Those files consist exclusively of the administrative records that would constitute the basis for a court of appeals' review of a final SAW denial as part of that court's consideration of the applicant's petition for review of

a final deportation order. *See, e.g.*, JA 623 (noting FOIA request for copy of "complete legalization file"), 652-53, 760, 876-84, 1142, 1260-61 (FOIA request for "copy of the entire SAW file"), 1310-17, 1435-48, 1459-61, 1519, 1651-52, 1657-65, 1747-50, 1823-28. To the extent that plaintiffs point out that "[t]he INS provided the rest of the necessary information in its exhibits in support of its motion[s]," Pl. Br. at 22, plaintiffs again rely on documents that constitute the administrative record of their SAW proceedings and not any material obtained through district court discovery.

In short, all documents upon which plaintiffs relied to make out their case come from the very same administrative record that a court of appeals examines when, in deciding a petition for review of a final deportation order, it reviews the denial of the alien's SAW application. Plaintiffs have thereby demonstrated the adequacy of the administrative record for review of their claims. Thus, under *CSS* and progeny, the district court lacked subject matter jurisdiction.

Plaintiffs contend that "the district court has simply ordered the INS to reconsider the plaintiffs' applications," and "does not require the INS to come to any particular conclusion concerning any particular plaintiff." Pl. Br. at 42. That contention is without merit. Because the district court's decision reverses the INS's credibility findings and weighing of the evidence, *see* Gov't Br. at 36, it clearly affects -- if it does not dictate a particular result in -- the INS's readjudication of plaintiffs' SAW applications. Indeed, plaintiffs do not seek a class-wide injunction against INS procedures. *See Ahmed v. Meissner*, 896 F. Supp. 138, 140 (S.D.N.Y. 1995) (district court lacks jurisdiction where "[p]laintiffs seek to reopen their

individual [SAW] applications rather than an injunction to enjoin INS procedures"); *compare Montes v. Thornburgh*, 919 F.2d 531, 536 (9th Cir. 1990) ("in this case appellees were not seeking to set aside individual [administrative] orders, but to obtain injunctive and declaratory relief to protect the rights of a class of asylum-seekers during [administrative] proceedings"); *see generally Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996) (jurisdictional inquiry depends on "whether final agency action is the target of the challenger's claim").

Finally, plaintiffs fail to address at least two of the INS's other jurisdictional arguments. Plaintiffs do not discuss the INS's contention that the opportunities afforded to them to develop the administrative record would sufficiently allow courts of appeals on petitions for review to determine whether plaintiffs, whose applications were not supported by credible documentation, were deprived of any right to qualified interpreters. *See* Gov't Br. at 27-29; *see also id.* at 44 (noting IRCA regulation requiring rejection of oral testimony uncorroborated by credible evidence); *cf. Virginia*, 74 F.3d at 523 ("There is simply no impediment to the adjudication of constitutional issues through petitions for direct review of final agency action in the circuit courts.") (citation omitted).

Moreover, plaintiffs fail to address -- and in fact lend support to -- the INS's argument that their "claims are too qualified and equivocal to constitute an attack on an across-the-board rule or practice." Gov't Br. at 29 n.**. For example, with respect to their claim that the INS violated a right to competent interpreters, plaintiffs assert that "[t]he quality and level of competence of interpreters, *when they were provided by defendant, varied from interview to*

interview." Pl. Br. at 6 (emphasis added); *see also* JA 1893-98 (relying on smattering of LO notes for conclusion that INS had policy of using ethnic profiles). Plaintiffs' assertion of a pattern and practice by the INS hardly demonstrates "a consistently-applied and rigid policy." *Campos v. Nail*, 940 F.2d 495, 497 (9th Cir. 1991).

POINT II

THE INS DID NOT EMPLOY AN IRREBUTTABLE PRESUMPTION OF FRAUD AND DID NOT IMPROPERLY RELY ON PLAINTIFFS' NATIONALITIES OR ETHNICITIES IN DENYING THEIR SAW APPLICATIONS

A. Plaintiffs Have Failed to Establish That the INS Used an Irrebuttable Presumption of Fraud

On the merits, plaintiffs chiefly contend that similar or identical language in the INS's decisions establishes that the INS used an irrebuttable fraud presumption and failed to accord "individual[ized] consideration" to their SAW applications. Pl. Br. at 28-30, 33-34. This argument, however, is directly contrary to precedent of this Court, *see* Gov't Br. at 35, which plaintiffs ignore. Indeed, plaintiffs fail to acknowledge that the INS properly considered all of their evidence in denying their applications, and that any use by the INS of similar or identical language in its decisions was eminently proper. *See id.* & n.*; *see also id.* at 32-34.

Similarly flawed is plaintiffs' attempt to find an irrebuttable presumption in the INS's denials of SAW applications alleging employment by James Bosley. *See* Pl. Br. at 29. Plaintiffs claim that all such applications, which were denied for similar reasons and in

similar language, demonstrate an improper fraud presumption. *Id.* at 29-30. This claim, like plaintiffs' claims that the INS failed to give individualized consideration to other applications, *see* Gov't Br. at 32-34, fails to recognize that the INS did not impose any fraud-based presumptions but, rather, properly denied their applications for lack of credibility. As the record shows, the INS denied the relevant plaintiffs' applications because James B. Bosley and his son James R. Bosley, who were co-owners of the farm in question, each informed the INS that (1) the alleged farm never existed, (2) they never hired farmworkers or immigrants, and (3) the signature of "James Bosley" in the affidavits submitted with the relevant applications was fraudulent. JA 1324-25 (LAU decision summarizing evidence); 1438 (letter from James B. Bosley stating, "[W]e have certainly never had any farm workers or immigrants of any kind on the property as claimed," and "I have never signed any papers [on behalf of] immigrant workers"); 1439 (memorandum of interview with James R. Bosley stating that certain persons tried to persuade him "to enter into a fraudulent scheme to falsify" employment documentation and that purported signature of James Bosley on affidavit was fraudulent); 1418 (affidavit with fraudulent signature). These facts demonstrate that plaintiffs are simply quibbling with the INS's manifestly reasonable weighing of the evidence and credibility findings. Plaintiffs' contention that the INS used an irrebuttable fraud presumption is specious.

Plaintiffs' contentions with respect to the INS's denials involving other alleged employers are similarly meritless and further demonstrate that plaintiffs succeeded in having the district court improperly substitute its own judgment for that of the INS. For

example, the plaintiffs listing Lee Artis Breedlove as their employer complain that the INS, instead of finding that they were not among the ten Breedlove employees whom payroll records showed to have performed qualifying SAW employment, should have determined whether those plaintiffs were among the 250 employees of Breedlove whom the records showed were *ineligible* for SAW status. Pl. Br. at 30; *see* Gov't Br. at 32, 34. This argument is illogical: if only ten employees were qualified, then, as plaintiffs apparently concede, the remaining 250 were necessarily unqualified; whether plaintiffs were among the 250 or were altogether absent from the payroll records, those records are evidence that plaintiffs did not perform the requisite employment. Plaintiffs who cited Breedlove and Drew Conklin as their purported employers similarly challenge the INS's ultimate decisions denying those applications. Pl. Br. at 31, 32; JA 250. These arguments, however, do not demonstrate that the INS applied any fraud presumption. On the contrary, they establish that plaintiffs impermissibly seek a reweighing of the evidence and a redetermination of the INS's reasonable credibility findings. *See* Gov't Br. at 36-37.*

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* The record shows that the INS denied applications listing Conklin as the alleged employer because Conklin admitted under oath that none of the individuals for whom he signed affidavits ever worked for him, that he had signed fraudulent documentation on behalf of approximately 50 individuals, and that from 1980 to 1990 he had primarily engaged in the raising of livestock, not SAW-qualifying agricultural work. JA 251. Moreover, plaintiffs' reliance on recommended denials involving Wayne Bright is unavailing because, *inter alia*, the individual who had used

Without basis, plaintiffs fault the INS for noting in its main brief that Larry Marval was responsible for the production of over 1,000 sets of fraudulent SAW documents. Pl. Br. at 32-33; *see* Gov't Br. at 33 & n.*; JA 146-48. Plaintiffs assert that the INS relies on "an (undated) indictment," which "is an accusatory instrument, not evidence." Pl. Br. at 32-33. That argument, however, ignores the record. As Marval's judgment of conviction shows, JA 754, Marval pled guilty to the first count of his superseding indictment, which states that Marval's offense resulted in the production of "over one thousand sets of fraudulent documents on behalf of alien applicants," JA 753. A record of conviction includes the indictment. *See Glaros v. INS*, 416 F.2d 441, 443 (5th Cir. 1969); *Hirsch v. INS*, 308 F.2d 562, 564-65 (9th Cir. 1962) (citing cases).

Plaintiffs also fail to grasp the INS's observation that Marval's *admitted* involvement in the production of over 1,000 sets of fraudulent SAW documents makes it "'quite possible that all plaintiffs who claim to have worked for Marval submitted such documents.'" Pl. Br. at 33 (emphasis deleted) (quoting Gov't Br. at 33 n.*). Plaintiffs contend that "[i]t is this reasoning that supports the district court's conclusion that the INS created a presumption of fraud which

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"Wayne Bright" as an alias, Rembert Ross Murphy, had not only pleaded guilty to conspiracy to supply fraudulent SAW documentation but also admitted under oath that he had never been a farmer or farm labor contractor and that he had never employed anyone on any farm between May 1, 1983 and May 1, 1986. JA 284. Thus, neither set of denials demonstrates use of any fraud presumption.

was virtually irrebuttable." *Id.* The INS, however, drew attention to the 1,000 sets of fraudulent documents not as proof in its own right but as a means of disproving the district court's premise that Marval's conviction related to only one SAW application. *See* Gov't Br. at 32, 33 n.*; JA 1884-85, 1887. In any event, as the INS noted, the district court failed to comprehend that the INS never based its denials solely on the fact of Marval's conviction and thus that the INS never used an irrebuttable presumption. *See* Gov't Br. at 33 & n.*.

B. Plaintiffs Have Failed to Show That the INS Improperly Relied on Nationality or Ethnicity

Plaintiffs fail to address the INS's argument that LOs recommended denial of plaintiffs' applications "not because of nationality or ethnicity but because of the application[s'] suspicious resemblance to demonstrably fraudulent applications submitted by fellow nationals." Gov't Br. at 37. Instead, plaintiffs selectively cite a number of recommended denials mentioning the alien's nationality or ethnicity, *see* Pl. Br. at 9-10, and selectively quote other recommended denials, *see id.* at 10-11. Plaintiffs, however, nowhere rebut the INS's contention that an applicant's nationality or ethnicity was "not the only, or even the main, factor prompting the recommendation to deny." Gov't Br. at 39.*

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* The district court's broad-brush finding of improper profiling was erroneous. In a number of cases, the LO's notes, as the district court acknowledged, JA 1896-97, did not even mention the alleged profile. Moreover, in at least one such case the plaintiff -- Gidon Saido, whose language is *Hebrew* -- could not

Nor could plaintiffs have soundly challenged the LOs' mention of their nationalities or ethnicities in the recommended denials. *See* Gov't Br. at 37-40. That an LO's recommendation mentioned an applicant's nationality was due to that LO's belief that the SAW application followed a pattern of fraud, not to any intention to engage in invidious discrimination. *Id.* Contrary to the district court's erroneous assumption, the INS is not barred from taking note of an alien's ethnicity under all circumstances. *Id.* at 39-40. As this Court has observed in an analogous context:

> It is entirely reasonable that statistics on persons arriving in the United States be maintained, at least in part, on the basis of national origin. Far from necessarily suggesting impropriety or unlawfulness, the compilation and use of information on groups which have moved *en masse* to our shores -- data on persons of common background and experience -- is an integral part of any reasonable system for the control of our borders.

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have been rejected on the basis of the alleged profile because he evidently did not come from the nations included in that profile: India, Pakistan, Sri Lanka, and Bangladesh. *See* JA 1891-98; Record on Appeal, Exhibit 2 (vol. 4) to Plaintiffs' August 15, 1994 Notice of Cross-Motion (hand-numbered page 1311) (Saido's affidavit seeking Hebrew interpreter); Record on Appeal, Exhibit B (vol. 1) to Declaration of James A. O'Brien III, dated April 12, 1994 (Bates-stamped page 522) (LO's notes, which do not mention Saido's nationality or ethnicity).

Bertrand v. Sava, 684 F.2d 204, 215 n.14 (1982).

Even assuming *arguendo* that plaintiffs established any impropriety in an LO's mention of an applicant's nationality or ethnicity, plaintiffs failed to show a violation of their constitutional rights where the LAU's denials did not rest on such a factor. *See* Gov't Br. at 40-42. Plaintiffs merely surmise that the absence of any objection by the LAU -- the INS's final decision-maker -- "lead[s] to the conclusion that the practice of ethnic profiling is institutional and condoned at all levels." Pl. Br. at 37. Such a conclusory allegation, however, is wholly insufficient to deny the INS summary judgment on this issue or to support a grant of summary judgment in plaintiffs' favor. *See* Gov't Br. at 41-42.* Plaintiffs contend that to accept the INS's argument the Court "must accept the proposition" that LOs acted outside the scope of their delegated authority and were responsible for creating the system of ethnic profiling and "the one-through-five, level-of-suspicion-of-fraud scale." Pl. Br. at 37. The fact remains, however, that the absence of any

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* Plaintiffs insinuate that because an LO's recommendation to deny an application accompanies the record of administrative proceedings to the LAU, the recommendation and its reasoning is considered and even carries weight when the LAU renders a final decision on the application. Pl. Br. at 37-38. Whether the LAU considers or agrees with an LO's recommendation to deny, however, is irrelevant to the question of whether the LAU has adopted the LO's rationale. As previously explained, that question is answered by examining the LAU's reasoning, which in this case reveals that the INS's final decisions did not rest on nationality or ethnicity. *See* Gov't Br. at 40-42.

reliance by the LAU on nationality or ethnicity shows that the agency ultimately did not *rely* on such a factor.* Plaintiffs' assertion of irremediable, agency-wide taint is simply unsupported by the record.

POINT III

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS HAVE A RIGHT TO QUALIFIED INTERPRETERS AND THAT THE INS VIOLATED ANY SUCH RIGHT

The INS contends that plaintiffs' interest in the presence of qualified interpreters at their SAW interviews is not "'weighty.'" Gov't Br. at 42-43. In response, plaintiffs cite *McNary*'s recognition that denial of SAW status deprives an alien of an ability to "'work legally'" in this country and an opportunity to "'live openly without fear of deportation or arrest.'" Pl. Br. at 38 (quoting *McNary*, 498 U.S. at 491). Inasmuch as the Supreme Court noted that these matters were "not in issue," 498 U.S. at 490, the Court's language is entirely dictum. In any event, the Supreme Court's discussion upon which plaintiffs rely concerns whether an alien's interest in SAW status mandates "constitutionally fair procedures," *see* 498 U.S. at 491, not whether any particular procedure is constitutionally fair under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *See* Gov't Br. at 42.

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* Moreover, the level-of-fraud scale utilized by LOs was created by the agency, not the LOs. *See* JA 155-56 (LO recommendation/interview sheet containing scale for judging level of fraud is INS Form I-696).

Plaintiffs further fail to address the "weighty" interest of the INS in this case, the INS's contention that there existed no risk of an erroneous deprivation of their rights under existing procedures, and the INS's interest in avoiding the burdensome requirement of ensuring that qualified interpreters for every conceivable language and dialect are made available to SAW applicants. *See* Gov't Br. at 43-44. Indeed, requiring the INS to re-conduct LO interviews with interpreters satisfactory to plaintiffs would constitute a futile and burdensome measure, given the INS's finding that plaintiffs' applications are incredible and given the IRCA regulation requiring rejection of oral testimony uncorroborated by credible evidence. Gov't Br. at 44. Nor do plaintiffs mention that they seek translators fluent in twelve languages.* *See id.* at 44 n.*. Moreover, because plaintiffs were afforded several opportunities to supplement the administrative record with affidavits and any other documentary evidence, *see id.* at 27-28, 47, no risk of an erroneous deprivation of their rights existed here. *See Mathews*, 424 U.S. at 349 (giving "substantial weight" to administrative judgments concerning what procedures to provide).

Plaintiffs have also failed to show that any lack of qualified interpreters in their cases resulted in

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* Plaintiffs demand that the INS provide interpreters for the following languages: Bengali, Urdu, Pushto, Arabic, Tamil, French, Guyanese, Farsi, Gujarati, Hindi, Punjabi, and Hebrew. *See, e.g.*, Record on Appeal, Exhibit 2 (vols. 1, 2, and 4) to Plaintiffs' August 15, 1994 Notice of Cross-Motion (hand-numbered pages 570, 579, 643A, 660, 692, 834, 902, 1144, 1150, 1214, 1241, 1311).

prejudice. Plaintiffs merely argue that the lack of such interpreters affected their ability to present their cases. Pl. Br. at 39-40. The test for prejudice in the procedural due process context, however, focuses not on whether the lack of such process somehow affected an individual's ability to present his case but rather on whether the process would have materially changed the outcome of the case. *See* Gov't Br. at 45-46. Here, plaintiffs have not mentioned one shred of evidence that they would have presented had they been afforded the interpreters they seek. *Id.* at 46-47; Pl. Br. at 39-40. Plaintiffs argue that prejudice is shown where, for example, a hypothetical plaintiff's testimony that he picked "prunes" could be misinterpreted by an incompetent interpreter because, "to an Indian, a prune is a plum that is picked from a tree." Pl. Br. at 40. Plaintiffs, however, nowhere indicate that such alleged testimony properly interpreted would have materially affected the outcome of any of their SAW applications.* Nor do plaintiffs address the INS's argument that the availability of numerous opportunities to rebut the INS's adverse evidence with any documentary evidence plaintiffs desired to

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* In any event, to establish prejudice, plaintiffs rely entirely on an affirmation of plaintiffs' counsel that is conclusory and not based on any evidence, *see* JA 557, and is thus not entitled to any weight. *See Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir. 1994); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983) (plaintiff "cannot rely simply on conclusory statements," and "[a]n affidavit of the opposing party's attorney which does not contain specific facts or is not based on first-hand knowledge is not entitled to any weight") (citing cases).

submit militated against a finding of prejudice. *See* Gov't Br. at 47-48.

Finally, plaintiffs challenge the INS's contention that the Cappiello declaration -- which attested that plaintiffs were afforded competent interpreters at their SAW interviews -- was sufficient to preclude summary judgment in plaintiffs' favor. Pl. Br. at 41-42; Gov't Br. at 48 n.*. Plaintiffs argue that they were not required to move to strike the declaration for lack of personal knowledge, and that the district court "merely weighed whatever evidence was presented to it, including the Cappiello declaration." *Id.*

This argument is unavailing for two reasons. First, the district court rejected Cappiello's declaration on the foundational basis of lack of personal knowledge. *See* Gov't Br. at 48 n.*. Because plaintiffs failed to move to strike the declaration on this basis, the district court improperly disregarded it. *Id.* Second, to the extent the district court "weighed" the declaration, it clearly erred. "On a summary judgment motion, the court *is not to weigh the evidence*, or assess the credibility of witnesses, or resolve issues of fact." *Rodriguez v. City of New York*, 72 F.3d 1051, 1061 (2d Cir. 1995) (emphasis added). Thus, the Cappiello declaration was sufficient to defeat summary judgment in favor of those plaintiffs who claimed to have lacked competent interpreters. *See* Gov't Br. at 48 n.*. Moreover, plaintiffs fail to address the INS's contention that the Cappiello declaration warranted a grant of summary judgment in the INS's favor with respect to those plaintiffs who submitted no evidence on the interpreter issue. *Id.*

CONCLUSION

The judgment of the district court should be reversed and the case remanded to the district court with instructions to dismiss the consolidated complaints or to grant summary judgment in favor of the INS. In the alternative, the judgment should be reversed and the case remanded with instructions to deny plaintiffs' cross-motion for summary judgment.

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June 10, 1997

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