No. _____

In The
Supreme Court of the United States

RAQUEL HINOJOSA, also known as Raquel Flores Venegas, and DENISSE VILLAFRANCA,

Petitioners,

v.

PETRA HORN, Port Director, United States Customs and Border Protection; MIKE POMPEO, Secretary, U.S. Department of State; KIRSTJEN M. NIELSEN, Secretary, U.S. Department of Homeland Security; JONATHAN M. ROLBIN, Director, Legal Affairs and Law Enforcement Liaison, of the United States Department of State; UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners were born, and their births were timely registered, in Brownsville, Texas. Ms. Hinojosa, who had been residing in Mexico, applied for, and was denied, a United States passport. By contrast, Ms. Villafranca, who was residing with her family in Texas, had a U.S. passport, but the State Department revoked it. When she sought re-entry the following day, her passport was confiscated, and she was returned to Mexico. Both women are now stranded in Mexico. They sought judicial review of the denial/revocation of their passports, under the Administrative Procedure Act, as authorized by *Rusk v. Cort*, 369 U.S. 367, 375-379 (1962).[1] The district court dismissed their actions for lack of jurisdiction, holding that they were required to exhaust the procedures of 8 U.S.C. §§1503(b)-(c). Over a strong dissent, the Fifth Circuit affirmed. *Hinojosa et al. v. Horn et al.*, 896 F.3d 305 (5th Cir. 2018).

The questions presented are therefore as follows:

- Whether 8 U.S.C. §§1503(b)-(c) preempts judicial review under the Administrative Procedure Act of the denial or revocation of a passport for a United States citizenship claimant abroad, notwithstanding that this construction was explicitly rejected by *Rusk v. Cort*, 369 U.S. at 379.

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[1] Abrogated by *Califano v. Sanders*, 430 U.S. 99 (1977), on the grounds that the Administrative Procedure Act does not provide jurisdiction.

QUESTIONS PRESENTED – Continued

- Whether the majority opinion erred in characterizing this Court's analysis of §§1503(b)-(c) in *Rusk v. Cort* as a "case-specific application of the adequacy requirement to §1503" that had "no bearing" on Petitioners' cases.
- Whether 8 U.S.C. §§1503(b)-(c) provides an adequate remedy within the meaning of 5 U.S.C. §704, even though, as the dissenting Judge noted, citing *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807,1815 (2016), it would entail an "arduous, expensive, and long" process, because under §1503(c), Petitioners would be treated as "aliens seeking admission," thus triggering lengthy administrative detention and other harsh consequences imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), on such persons.
- Whether §1503(c)'s requirement that Petitioners be treated as "aliens seeking admission" is inconsistent with the fact that both have facially valid Texas birth certificates, but the conditions imposed by IIRIRA on "aliens seeking admission" eliminate the Due Process protections at the border to which this documentation would entitle them under *Kent v. Dulles*,

QUESTIONS PRESENTED – Continued

357 U.S. 116, 129-130 (1958), and *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990).

- Whether, as suggested in *Rusk v. Cort*, and reiterated in *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012), a remedy which may be sought from a different agency than the one whose action is challenged is not an adequate alternative to APA review for purposes of 5 U.S.C. §704, such that the procedures imposed by 8 U.S.C. §1503(c), which are conducted by the Department of Justice, do not provide an adequate remedy for the actions of the Department of State, denying and revoking Petitioners' U.S. passports.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners Raquel Hinojosa and Denisse Villafranca were the Appellants before the Fifth Circuit. Respondents were Appellees in the lower courts.

Refugio del Rio Grande, Inc., which, through Attorney Elisabeth Brodyaga, and together with Attorneys Jaime Diez and Cathy Potter, is filing the instant petition on behalf of Petitioners, is a not for profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Raquel Hinojosa and Denisse Villafranca respectfully petition this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Hinojosa et al. v. Horn et al.*, 896 F.3d 305 (5th Cir. 2018), App. 1. The majority opinion concluded that the district court correctly found that it lacked jurisdiction under 28 U.S.C. §1331 to conduct judicial review under the Administrative Procedure Act of the denial and revocation of Petitioners' United States passports, on the grounds that they were required to exhaust the procedures of 8 U.S.C. §§1503(b)-(c) [sections 360(b)-(c) of the Immigration and Nationality Act]. In reaching this conclusion, the majority declined to follow *Rusk v. Cort*, 369 U.S. 367, 379 (1962), which concluded that:

> [W]e hold that a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by §360(b) and (c), and that the remedy pursued in the present case was an appropriate one.

The majority opinion also conflicts with such cases as *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016), holding that a "arduous, expensive, and long" procedure is not an adequate alternative to APA judicial review, and *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012), which, as was also suggested in *Rusk v. Cort*, 369 U.S. at 375, noted that:

> The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency.

Other precedent affirming the fundamental right of U.S. citizens to return to the U.S. is also implicated. Action by this Court is required to ensure that its precedent is followed by the lower courts, and the rights of U.S. citizens abroad are protected.

II. OPINIONS BELOW

The district court dismissed Petitioners' actions under Fed. R. Civ. P. Rule 12(b)(1) and (6). Neither opinion was published. App. 31, 70. On May 8, 2018, the Fifth Circuit issued an unpublished decision, dismissing both Petitioners' appeals. App. 1. On July 11, 2018, the court published its opinion. *Hinojosa et al. v. Horn et al., supra*.

III. JURISDICTION

On May 8, 2018, the Fifth Circuit entered a single Judgment in the two cases. App. 1. Petitions for En Banc Rehearing filed by both Petitioners were denied July 11, 2018. App. 81, 83. This Court has jurisdiction under 28 U.S.C. §1254(1). Both Petitioners asserted jurisdiction in the district court under 28 U.S.C. §§1331 and 2241.

IV. STATUTORY AND REGULATORY PROVISIONS INVOLVED

5 U.S.C. §702. Right of Review (excerpt)

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .

5 U.S.C. §704. Actions Reviewable (excerpt)

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

8 U.S.C. §1252(e)(2)(A)

(e) Judicial review of orders under section 1225(b)(1)

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

8 C.F.R. §235.3(b)(1)(i)

(b) Expedited removal—

(1) Applicability. The expedited removal provisions shall apply to the following classes of aliens who are determined to be inadmissible

under section 212(a)(6)(C) or (7) of the Act [8 U.S.C. §1182(a)(6)(C) or (7)]:

(i) Arriving aliens, as defined in 8 CFR 1.2;

8 C.F.R. §235.3(b)(5)(i)
(emphasis added)

(5) Claim to lawful permanent resident, refugee, or asylee status or U.S. citizenship—

(i) Verification of status. *If an applicant for admission who is subject to expedited removal* pursuant to section 235(b)(1) of the Act claims to have been lawfully admitted for permanent residence, admitted as a refugee under section 207 of the Act, granted asylum under section 208 of the Act, or *claims to be a U.S. citizen*, the immigration officer shall attempt to verify the alien's claim. Such verification shall include a check of all available Service data systems and any other means available to the officer. An alien whose claim to lawful permanent resident, refugee, asylee status, or *U.S. citizen status cannot be verified* will be advised of the penalties for perjury, and will be placed under oath or allowed to make a declaration as permitted under 28 U.S.C. 1746, concerning his or her lawful admission for permanent residence, admission as a refugee under section 207 of the Act, grant of asylum status under section 208 of the Act, or claim to U.S. citizenship. A written statement shall be taken from the alien in the alien's own language and handwriting, stating that he or she declares, certifies, verifies, or states that the claim is true and correct. *The immigration*

officer shall issue an expedited order of removal under section 235(b)(1)(A)(i) of the Act and refer the alien to the immigration judge for review of the order in accordance with paragraph (b)(5)(iv) of this section and §235.6(a)(2)(ii). The person shall be detained pending review of the expedited removal order under this section. *Parole of such person, in accordance with section 212(d)(5) of the Act, may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective*.

8 C.F.R. § 235.3(b)(5)(iv)
(emphasis added)

(iv) Review of order for claimed lawful permanent residents, refugees, asylees, or U.S. citizens. A person whose claim to U.S. citizenship has been verified may not be ordered removed. When an alien whose status has not been verified but who is claiming under oath or under penalty of perjury to be a lawful permanent resident, refugee, asylee, or U.S. citizen is ordered removed pursuant to section 235(b)(1) of the Act, the case will be referred to an immigration judge for review of the expedited removal order under section 235(b)(1)(C) of the Act and §235.6(a)(2)(ii). *If the immigration judge determines that the alien* has never been admitted as a lawful permanent resident or as a refugee, granted asylum status, or *is not a U.S. citizen, the order issued by the immigration officer will be*

> *affirmed and the Service will remove the alien. There is no appeal from the decision of the immigration judge.* If the immigration judge determines that the alien was once so admitted as a lawful permanent resident or as a refugee, or was granted asylum status, or is a U.S. citizen, and such status has not been terminated by final administrative action, the immigration judge will terminate proceedings and vacate the expedited removal order. The Service may initiate removal proceedings against such an alien, but not against a person determined to be a U.S. citizen, in proceedings under section 240 of the Act. During removal proceedings, the immigration judge may consider any waivers, exceptions, or requests for relief for which the alien is eligible.

V. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

RAQUEL HINOJOSA

Raquel Hinojosa was born in Brownsville, Texas, in June 1973, with the aid of a midwife. Five days later, her birth certificate was properly filed with the State of Texas. It shows her name as Raquel Hinojosa, and her father as Mario Hinojosa Delgado. Shortly thereafter, her parents separated, and her mother took her to Mexico, where she re-registered her as Raquel Flores Venegas, born in Matamoros, Mexico, the daughter of her mother's new companion, Higinio Flores. App. 32.

Much later, Ms. Hinojosa learned the truth. She sought out her biological father, Mario Hinojosa, and obtained a DNA report confirming the relationship, affidavits from her father and an older half-sister, attesting to her birth in Texas, and her parents' 1968 marriage certificate. Armed with this and other evidence, which was more than sufficient to prove U.S. citizenship by the required preponderance of the evidence, Ms. Hinojosa applied for a U.S. passport. However, citing the clearly fraudulent, later filed, Mexican birth certificate, Department of State ("DOS") denied her application. App. 33.

DENISSE VILLAFRANCA

Denisse Villafranca also was born in Brownsville, Texas, with the aid of a midwife. Her birth occurred in November 1977, and was registered three days later. As was customary, in August 1978, her parents re-registered her in Mexico, as born there, "in order to enroll her in school and ensure her status as their heir." Three weeks later, she was baptized in Mexico, also reflecting birth in Brownsville, Texas. App. 71.

In 2005, Ms. Villafranca received a U.S. passport, valid for ten years. In 2010, her Mexican birth certificate was judicially corrected to accurately reflect birth in Brownsville, Texas. On November 6, 2014, the State Department issued a letter revoking her passport, because an investigation had revealed that her Mexican birth certificate had initially showed birth in Mexico. The revocation letter noted that she was not entitled

to a hearing, as seemingly required by 8 U.S.C. §1504, because it was based on a finding of non-nationality. *See* 22 C.F.R. §51.70(b)(1). The next day, following a brief trip to Mexico, Ms. Villafranca sought to re-enter the U.S. She presented her facially valid U.S. passport, which was confiscated, and she was returned to Mexico. App. 72.

B. PROCEDURAL HISTORY

While standing on U.S. soil outside a port of entry, but without requesting entry, Petitioners filed separate actions, seeking, *inter alia,* writs of habeas corpus, and in accordance with *Rusk v. Cort, supra,* judicial review of the denial/revocation of their passports through the APA, with jurisdiction laid in habeas corpus, and under 28 U.S.C. §1331. The cases were assigned to the same district judge, who dismissed them under Fed. R. Civ. P. Rule 12(b)(1) and (b)(6),[2] holding that Petitioners were not in custody for habeas purposes and that notwithstanding *Rusk v. Cort*, they were not entitled to APA judicial review because they had not exhausted the procedures of 8 U.S.C. §§1503(b)-(c).[3] App. 37-43, 45, 79.

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[2] This disposition meant that Petitioners' claims of birth in Texas were necessarily taken as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

[3] Notably, §1503(b) provides, *inter alia*:

> . . . The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under

Separate appeals were taken to the Fifth Circuit. On May 8, 2018, that court issued a single decision, affirming the district court. The majority held, App. 14, that:

> . . . *Rusk's* holding is inapplicable to the present cases. Both the *Rusk* plaintiff and his claim for relief differ substantially from the Plaintiffs and their claims here. Accordingly, the Court's case-specific application of the adequacy requirement to §1503 has no bearing on our current review.

In dissent, Judge Dennis disagreed, noting, App. 24 (footnote omitted), that citizenship claimants who follow the procedures of §§1503(b)-(c):

> . . . face the risk of burdensome proceedings under the Immigration and Nationality Act (INA), including detention during the pendency of their applications and, if their applications for admission are ultimately denied, removal. . . .

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sixteen years of age who was born abroad of a United States citizen parent.

Because §1503(b) *excludes* anyone over the age of 16 who acquired U.S. citizenship through a U.S. citizen parent, but has never been in the U.S., virtually by definition, such a person would have no lawful remedy other than through the APA. There is no indication that Congress intended such persons to have access to the APA, but that those, like Petitioner Villafranca, who was accidentally stranded abroad even though her residence and family were in Texas, would be required to undergo the harsh procedures of §§1503(b)-(c).

Judge Dennis also noted, App. 28-29 (footnote omitted), that:

> I also write separately to note that, in my view, *Rusk v. Cort*, 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed.2d 809 (1962), remains good law with respect to its interpretation of §1503(b)-(c). Nothing in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), or any subsequent Supreme Court case, suggests otherwise.
>
> . . . .
>
> Because *Califano's* reference to *Rusk* was confined to the issue of whether the APA confers subject matter jurisdiction, *Rusk's* construction of §1503 remains good law.

Both women filed petitions for en banc rehearing, which were treated as petitions for panel rehearing, and denied on July 11, 2018. App. 82, 84.

VI. ARGUMENT

A. *RUSK v. CORT* CONTROLS THE CASE AT BAR

The question presented is whether this Court's holding in *Rusk v. Cort* remains good law, and if so, whether the Fifth Circuit utilized the term "case-specific" as meaning "fact-specific,"[4] and erroneously

[4] The difference between *case-specific* and *fact-specific* is seen in *Riley v. California*, 134 S.Ct. 2473, 2494 (2014), involving a search incident to an arrest. This Court noted that *case-specific* exceptions to the warrant requirement included exigent

concluded that it was a "case-specific application of the adequacy requirement to §1503" that had "no bearing" on their review. App. 14.

In Ms. Hinojosa's case, the district court rejected *Rusk v. Cort* outright, holding that it had been "overruled" by *Califano v. Sanders*, and that one could not simply rest jurisdiction on 28 U.S.C. §1331 and invoke *Rusk v. Cort* as the basis of an APA cause of action, App. 43. In Ms. Villafranca's case, the court never addressed *Rusk v. Cort,* holding simply that §§1503(b)-(c) provided an "adequate" remedy, App. 79.

The Fifth Circuit took a more nuanced approach. On the basis of the fact that the *Rusk* petitioner would have had to travel a great distance to apply for admission at a U.S. port of entry, where he faced criminal charges and resulting pretrial detention for draft evasion, the majority concluded that *Rusk v. Cort* involved a "case-specific application of the adequacy requirement to §1503" that had "no bearing" on Petitioners' cases. *Rusk v. Cort*, and cases such as *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988), show that in the context of a given legal regime (here, 8 U.S.C. §1503), the APA's adequacy requirement is determined through a *case-specific*, but not *fact-specific* analysis, limited to

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circumstances, and that a *fact-specific* analysis was required to determine whether such circumstances existed. As in the Fifth Circuit's analysis of *Rusk v. Cort*, the term *case-specific* is often used interchangeably with *fact-specific.* But the opinion in *Rusk v. Cort* is clear that its analysis was *case-specific* to 8 U.S.C. §§1503(b)-(c), not *fact-specific*, based on the hardship it imposed on that petitioner.

the facts of the plaintiff in the case at bar. As this Court initially framed the issue in *Rusk v. Cort*, 359 U.S. at 375 (emphasis added):

> *[T]he question posed is whether the procedures specified in §360(b) and (c) provide the only method of reviewing the Secretary of State's determination that Cort has forfeited his citizenship.* More precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States. *We find nothing in the statutory language, in the legislative history, or in our prior decisions which leads us to believe that Congress had any such purpose.*

Relying on the plain language of the pertinent statutes, reinforced by their purpose and legislative history, and informed by, but not dependent on, the particular facts, this Court concluded, 359 U.S. at 378-380 (emphasis added):

> In describing the purpose of the legislation which became §360 of the 1952 Act the Senate Judiciary Committee, stating that '(t)he bill modifies section 503 of the Nationality Act of 1940,' explained that it provides:
>
> > 'that any person who has previously been physically present in the United States but who is not within the United States

> who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. The net effect of this provision is to require that the determination of the nationality of such person shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated.' S.Rep.No.1137, 82d Cong., 2d Sess., p. 50.

As a matter simply of grammatical construction, it seems obvious that the 'such person' referred to in the Committee Report is a person who has chosen to obtain a certificate of identity and to seek admission to the United States in order to prosecute his claim. The appellee in the present case is, of course, not such a person.

This legislative history is sufficient, we think, to show that the purpose of §360(b) and (c) was to cut off the opportunity which aliens had abused under §503 of the 1940 Act to gain fraudulent entry to the United States by prosecuting spurious citizenship claims. *We are satisfied that Congress did not intend to foreclose lawsuits by claimants, such as Cort, who do not try to gain entry to the United States before prevailing in their claims to citizenship.*

> *For these reasons, we hold that a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by §360(b) and (c), and that the remedy pursued in the present case was an appropriate one.* This view is in accord with previous decisions of this Court concerning the relationship of §§10 and 12 of the Administrative Procedure Act to the subsequently enacted Immigration and Nationality Act of 1952. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868; *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225. *The teaching of those cases is that the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 Act in the absence of clear and convincing evidence that Congress so intended.*

The holding of *Rusk v. Cort* was phrased in general terms: "we hold that *a person* outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by §§360(b) and (c). . . ." Had this Court intended a "fact-specific" holding, it would more likely have used language along the lines of: "we hold that *Dr. Cort*, who was denied a right of citizenship while outside the United States, was not confined to the procedures prescribed by §360(b) and (c). . . ."

Until recently, *Rusk v. Cort* was generally understood in this manner. As noted by the Foreign Affairs Manual ("FAM"), 7 FAM 1110, App. H (2015), the

provision of Certificates of Identity under §1503(b) had "fallen into disuse," App. 93. No Certificate of Identity had been issued since 1987, App. 85-86. The first case known to Petitioners which litigated the question of whether §§1503(b)-(c) was mandatory occurred in 2015,[5] *Villarreal et al. v. Horn et al.,* 203 F.Supp.3d 765 (S.D.Tex. 2016). It is now before the Fifth Circuit, No. 18-40688,[6] and has been stayed pending resolution of the instant petition.

In *Hinojosa,* the majority opinion also implied that Petitioners either had entered, or were trying to enter, the U.S. when their actions were filed, App. 15 (emphasis added):

> [I]n stark contrast to the plaintiff in *Rusk*, both Villafranca and Hinojosa were at the United States border at the time of this suit. They seek entry into the country on the basis of a claim of U.S. citizenship. *In other words, they are precisely the sort of persons that Congress, according to Rusk, was concerned to regulate under §§1503(b)-(c). These cases present the exact facts that the Rusk Court held would implicate the jurisdictional restrictions.*

This is incorrect. They stood on the publicly accessible U.S. side of the international boundary in the middle of the bridge over the Rio Grande until their

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[5] The issue was raised, but not pursued, in a motion to reconsider at about the same time in *Meza v. Kerry*, No. 1:14-cv-60 (S.D.Tex. 2015).

[6] A similar case also arose almost simultaneously in Florida, *Hogan v. Kerry,* 208 F.Supp.3d 1288, 1291 (S.D.Fla. 2016).

cases had been filed, and then retreated. They made no contact with U.S. officials, and neither requested entry nor attempted to enter illegally. As Judge Dennis correctly noted in his dissent, App. 28, "[b]oth Hinojosa and Villafranca seek a determination of their citizenship before entering the United States." Both are still in Mexico. This is particularly hard on Ms. Villafranca, who was residing with her family in Texas until she was stranded abroad.

Consistent with its *fact-specific* approach, the majority also opined, App. 15, that in contrast to the petitioner in *Rusk v. Cort*:

> [T]he path to judicial review for the Plaintiffs is far less treacherous because neither has been criminally indicted and thus does not risk incarceration upon arrival. Instead, §§1503(b)-(c) provide a clear path to judicial review.

According to the majority, §§1503(b)-(c) "provides a direct and guaranteed path to judicial review," App. 12. This, too, is incorrect. As Judge Dennis noted in dissent, it is neither guaranteed, nor direct. App. 25-26. Rather, it passes through lengthy and burdensome administrative proceedings conducted by the Department of Justice, which culminate in a determination of *admissibility*, not *citizenship*. Only at the conclusion of these proceedings could Petitioners initiate federal court proceedings to determine their claims of U.S. citizenship.

B. UNDER *U.S. ARMY CORPS OF ENGINEERS v. HAWKES CO.*, THE "ARDUOUS, EXPENSIVE, AND LONG" PROCEDURES REQUIRED BY §§1503(b)-(c) ARE NOT AN ADEQUATE ALTERNATIVE TO APA REVIEW

The hardship faced by the petitioner in *Rusk v. Cort*, on which the Fifth Circuit based its opinion that it was "case-specific" (fact-specific), was that he would have had to travel a great distance to apply for admission at a U.S. port of entry, where he faced criminal charges for draft evasion, and resulting pretrial detention. 369 U.S. at 375. Regardless of whether they have easy access to a port of entry, the hardships Petitioners (and all other U.S. citizenship claimants abroad) would endure if they proceeded under 8 U.S.C. §§1503(b)-(c) would be equally, if not more, severe.

These hardships arise primarily from the fact that under 8 U.S.C. §1503(c), they would be treated as "aliens seeking admission," subject to the provisions imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. §1225(b), and 8 C.F.R. Part 235. This status would deprive them of fundamental rights at the border, with no process, let alone Due Process. As noted in *Worthy v. U.S.,* 328 F.2d 386,394 (5th Cir. 1964):

> We think it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil. It is not to be wondered that the occasions for

> declaring this principle have been few. In *United States v. Ju Toy*, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040, it was assumed that to deny entrance of a citizen into the United States was a deprivation of a liberty secured by the Fifth Amendment. In the dissenting opinion in that case it was said that it is no crime for a citizen to come back to his native land. 198 U.S. 253, 269, 25 S.Ct. 644, 49 L.Ed. 1040. In another case the Supreme Court gave recognition to the principle, saying:
>
> > 'In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the States to forbid and punish violations of this fundamental right.' *United States v. Wheeler*, 254 U.S. 281, 293, 41 S.Ct. 133, 134, 65 L.Ed. 270. *Cf. Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394.

In recognition of this fundamental right, before IIRIRA, it was acknowledged that applicants for entry to the U.S. with "facially adequate documentation of United States citizenship" (which would include Petitioners' Texas birth certificates), were entitled to Due Process at the border. *See Hernandez v. Cremer,* 913 F.2d 230, 237 (5th Cir. 1990), *citing Kent v. Dulles*, 357

U.S. 116, 129 (1958). The district court injunction in *Hernandez v. Cremer* provided detailed procedures to be followed when such a person sought entry at a port of entry under the control of the San Antonio, Texas, district, including the following, 913 F.2d at 239 (emphasis added):

> f) *If the applicant is not admitted into the United States, he shall be advised of the procedure to obtain parole pending a hearing on his case.*
>
> g) If the applicant is not admitted into the United States or granted parole by the Port Director, he shall be given a notice briefly explaining the hearing procedure before the Immigration Judge. If no hearing date is set, the applicant shall be notified of the date of his hearing by mail, or if he has no mailing address, advised how often he must return to the port of entry to receive further information about his hearing date.

The Fifth Circuit modified this provision as follows, *id.* at 240:

> . . . Because existing regulations charge the Office of the Immigration Judge with the responsibility of mailing notice to the applicants, we relieve the INS of this duty. However, where an applicant has no Mexican mailing address, the INS must inform the applicant in writing how frequently he should check with the office to ascertain the date for which his hearing has been set.

That court then concluded, 913 F.2d at 240:

> The focus and purpose of the injunction is to provide United States citizens with procedural due process when they attempt to re-enter the country. In order to grant this protection to those applicants most likely to fall within the protected class, the injunction applies only to those applicants who support their claim of citizenship with "documentary evidence which by itself would establish citizenship if taken as true." Both voter registration cards and expired passports, if taken as true, do establish citizenship. We find that the injunction is not overbroad in this respect.

Thus, before IIRIRA, Due Process was understood to require that persons such as Petitioners, on presenting facially valid Texas birth certificates at, *e.g.*, Del Rio, Texas, would either have been allowed to enter, or would have been placed in exclusion proceedings under prior 8 U.S.C. §1226 (1996). If denied entry, as explained in *Hernandez v. Cremer*, they either would have been paroled into the U.S. or returned to Mexico, pending a hearing before an immigration judge, ("IJ").

Under 8 U.S.C. §1503(c), Petitioners would be required to accept being treated as arriving aliens, on whom IIRIRA now imposes harsh conditions. Arriving aliens lack the Due Process rights guaranteed by *Hernandez v. Cremer*. Not having proper entry documents, they would be inadmissible under 8 U.S.C. §1182(a)(7), and would be subjected to expedited removal orders, and detained, under 8 U.S.C. §1225(b)(1)(A)(i), 8 C.F.R.

§235.3(b)(1)(i), and §235.3(b)(5)(i). If local detention facilities were full (as they often are), or space was needed for new arrivals, they could be sent anywhere in the U.S. for detention and hearing, even if they had local counsel. Detention could last for many months before a merits hearing on their citizenship was held. Under 8 C.F.R. §235.3(b)(5)(i) and (b)(5)(iv), they would be ineligible for parole, except as "required to meet a medical emergency or is necessary for a legitimate law enforcement objective." If the IJ's decision was negative, and the person qualified for no other form of relief, the removal order would be executed, and a habeas petition could be filed from abroad, where only the citizenship claim could be raised, 8 U.S.C. §1252(e)(2)(A). This is neither a "direct" nor a "clear" path to judicial review. As Judge Dennis noted in dissent, App. 25-26 (footnote omitted).

> These additional burdens would be imposed on all persons located outside of the United States, regardless of whether they wished to enter the United States prior to seeking a determination of citizenship, or at all. Worse still, it is not apparent that this process ultimately aids in a determination of citizenship. If persons are approved at each step, seeking relief through §1503(b)-(c) ultimately results in their admission into the United States, where they can then bring an action for declaratory judgment under §1503(a). Thus, the process that §1503(b)-(c) imposes leads only to a determination of admissibility. Under §1503, the courts still make the ultimate determination of citizenship, but only after an

> "arduous, expensive, and long" process, *Hawkes*, 136 S.Ct. at 1815, that does not necessarily address the underlying legal question of citizenship. *See* §1503(b) (an applicant is entitled to a certificate of identity "[u]pon proof to the satisfaction of [a] diplomatic or consular officer that [her] application is made in good faith and has a substantial basis"); §1503(c) (the Attorney General makes a final determination of whether a person is "entitled to admission"); *see also Bensky v. Powell*, 391 F.3d 894, 896 (7th Cir. 2004) (persons traveling to the United States to comply with §1503(c) may be entitled to remain in the United States on a basis other than citizenship). Accordingly, persons located outside of the United States who seek a citizenship determination before entering the country would risk "serious criminal and civil penalties" if required to comply with §1503(b)-(c), and would be forced to undertake a process that is "arduous, expensive, and long" and that does not necessarily aid in the determination of their citizenship. *See Hawkes*, 136 S.Ct. at 1815-16.

Thus, under either a fact-specific, or case-specific, analysis, and particularly now, under the legal regime created by IIRIRA, the path offered by §§1503(b)-(c) is at least as treacherous as that which the *Rusk* petitioner faced. It therefore is urged that, even if this Court's analysis in *Rusk v. Cort* were correctly characterized as "case-specific" (in the sense of fact-specific), a similar fact-specific analysis in the instant cases would lead to the same result.

C. AS SUGGESTED IN *RUSK v. CORT* AND *SACKETT v. E.P.A.*, A REMEDY WHICH MIGHT BE GRANTED BY AN AGENCY OTHER THAN THE ONE WHOSE ACTION IS CONTESTED IS NOT AN ADEQUATE REMEDY UNDER 5 U.S.C. §704

Further, as noted in *Rusk v. Cort,* 369 U.S. at 375:

> The procedures of §360(b) and (c) would culminate in litigation not against the Secretary of State whose determination is here being attacked, but against the Attorney General. Whether such litigation could properly be considered review of the Secretary of State's determination presents a not insubstantial question.

In *Rusk*, this Court "put[] to one side this conceptual difficulty," concluding that "by their very terms," §1503(b) and (c) simply provide that such a person "'may' apply for a certificate of identity" and "'may' apply for admission to the United States" and that this permissive language neither showed an "intention to provide an exclusive remedy," nor indicated that "such persons are to be denied existing remedies." *Id.*

However, this Court has addressed that "conceptual difficulty" in other contexts. As the majority noted below, 896 F.3d at 311, App. 8-9 (emphasis and footnote added):

> *[J]udicial review must come via the petitioner's direct appeal*. In *Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 182 L.Ed.2d 367

> (2012), for example, the Supreme Court rejected the government's argument that the plaintiffs, who challenged the EPA's determination that their property violated the Clean Water Act, had adequate alternative remedies. The Court concluded that the first proposed alternative, challenging an EPA enforcement action, was inadequate because petitioners "cannot initiate that process" and risked onerous liability. *Id.* The other alternative—applying to a separate agency for an unrelated permit and then raising a claim under the APA if the application was denied—was too indirect. *Id.* ("*The remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency.*").

In dissent, Judge Dennis reiterated this principle, 896 F.3d 317, n.3, App. 24, n.3:

> Although persons may initiate habeas corpus proceedings under §1503(c) upon a final determination of inadmissibility by the Attorney General, this option is not an adequate remedy in a court to challenge the State Department's denial of a passport. *See Sackett v. EPA*, 566 U.S. 120, 127, 132 S.Ct. 1367, 182 L.Ed.2d 367 (2012) (applying for a permit with one agency and seeking judicial review if that permit is denied is not an "adequate remedy" that precludes APA review of an already-existing action from another agency).

But the majority opinion did not address this *conceptual difficulty*, which was identified in *Rusk v. Cort*, and found unacceptable in *Sackett*.

VII. REASONS FOR GRANTING THE WRIT

A. THE DECISION AT ISSUE HEREIN CONFLICTS WITH THIS COURT'S PRECEDENT

As shown above, the United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, within the meaning of this Court's Rule 10(c). Most crucially, the Fifth Circuit decision directly conflicts with *Rusk v. Cort*, 369 U.S. 367, 379 (1962), holding that:

> [W]e hold that a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by §360(b) and (c), and that the remedy pursued in the present case was an appropriate one.

The decision is also inconsistent with *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016), holding that a procedure which is "arduous, expensive, and long," is not an adequate alternative to APA judicial review, and *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012), noting that "[t]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency." The fundamental

right of a U.S. citizen to have "free ingress" into her native land is also undermined. *See United States v. Wheeler*, 254 U.S. 281, 293 (1920):

> In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right.

Accord Kent v. Dulles, 357 U.S. 116, 125-126 (1958) (footnote omitted):

> The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or

> reads. Freedom of movement is basic in our scheme of values.

The essential holding of *Rusk v. Cort* is that Congress did not intend for §1503 to supplant the APA. As a published decision, *Hinojosa* now binds even district court judges within the Fifth Circuit who consider that *Rusk v. Cort* is still valid. *See Guajardo-Garcia v. Sessions*, 2017 WL 5633326, at *6-7 (S.D.Tex. 2017), allowing both a §1503(a) action and APA judicial review of the denial of an application for a Certificate of Citizenship. The Fifth Circuit also now uses *Hinojosa* to bar APA review if a §1503(a) action would lie. *See De La Garza Gutierrez v. Pompeo*, 2018 WL 3454835 (5th Cir. 2018), where APA review would be far more just than an action under §1503(a), due to extenuating circumstances, including the fact that DOS had issued passports to the plaintiffs for decades, and they no longer have living witnesses or other evidence needed for *de novo* review, in which they bear the burden of proof. But based on *Hinojosa's* rejection of *Rusk v. Cort,* the Fifth Circuit held, *id*. at *4, "that §1503 provides an adequate alternative remedy to APA review."

B. THE FIFTH CIRCUIT'S HOLDING THAT §§1503(b)-(c) PREEMPTS APA REVIEW IS CAUSING NUMEROUS U.S. CITIZENS TO BE EFFECTIVELY EXILED

The question presented is crucial because it unnecessarily harms numerous U.S. citizens. Other cases where plaintiffs are stranded in Mexico include *Garcia*

v. Pompeo et al., 1:16-cv-293 (S.D.Tex. pending). Ms. Garcia was offered a Certificate of Identity under 8 U.S.C. §1503(b), but given the harsh consequences imposed by §1503(c) and IIRIRA, she declined to accept it. She is awaiting the anticipated dismissal of her case, under *Hinojosa*.

The hardships of 8 U.S.C. §§1503(b)-(c), and the inability to obtain APA judicial review of DOS' actions, are magnified by the fact that DOS appears to apply a much higher standard than the required "preponderance of the evidence" in adjudicating passport applications, and affords itself a much lower standard for proving non-citizenship in passport revocations, where DOS bears the burden of proof. This is seen in DOS' actions in the cases at bar. It is further illustrated by *Villarreal et al. v. Horn et al.*, *supra,* which involves two siblings, Ana and her younger sister, Maria, who acquired U.S. citizenship through their U.S. citizen father. Ana had a U.S. passport, but Maria's application, which fell under the same statute, and was supported by the same evidence that Ana had submitted, was denied.

Maria, who was in Mexico, brought an APA action asserting that if Ana was a U.S. citizen, by definition, she was too. DOS responded by revoking Ana's passport while she was vacationing in Mexico, claiming that they had "erred" in calculating the U.S. citizen father's presence in the U.S. before her birth. The district court dismissed the APA actions, brought under *Rusk v. Cort*, for lack of jurisdiction. Ana was eventually paroled into the U.S. to testify at the §1503(a) action of

her son, who had been delivered by a midwife, and whose passport application had been denied. (He won). Once back in the U.S., Ana requested, and received, a Certificate of Citizenship from U.S.C.I.S., but DOS has refused to either re-issue her passport, or assure her that a new application would be granted. Meanwhile, Maria remains stuck in Mexico.

Petitioners' cases, and others, clearly show the need to ensure APA judicial review, as allowed by *Rusk v. Cort,* for U.S. citizenship claimants abroad whose passport applications have been denied, or whose passports have been revoked, without subjecting them to the extreme hardships imposed by §§1503(b)-(c). Reaffirming *Rusk v. Cort* would also benefit citizenship claimants within the U.S. Where appropriate, as in *De La Garza Gutierrez, supra*, they will be able to avoid the limitations of a *de novo* proceeding under §1503(a), and obtain actual *judicial review* of the denial or revocation of their U.S. passports.

C. THE QUESTIONS PRESENTED WILL NOT BENEFIT FROM FURTHER CONSIDERATION IN THE COURTS OF APPEALS

Nor is the question presented likely to benefit from further consideration in the courts of appeals. First, the issue is relatively straightforward. This is not a case involving technical regulations, complicated patents, or conflicting Constitutional provisions. Rather, it is a question of reaffirming this Court's existing

precedent, under the new circumstances created by IIRIRA. Second, it is unlikely that in the foreseeable future the issue will be raised in other courts of appeals.[7] The majority of these cases involve midwife births, which are common in the Rio Grande Valley, Texas, where they long have been a central part of the culture, reinforced by financial considerations. Mexican parents crossing into the U.S. to give birth, or going into labor unexpectedly while on this side of the border, are less common elsewhere.

Similarly, there are far fewer "dual registration" cases in other jurisdictions. It was less common elsewhere for Mexican parents of U.S. born children who intended to raise them in Mexico to register their children both in the U.S. and in Mexico, as an (improper) means of exercising their right to dual U.S.-Mexican citizenship under Mexican law.

VIII. CONCLUSION

In conclusion, Petitioners urge this Honorable Court to grant their petition for a writ of certiorari, to resolve the question of whether 8 U.S.C. §§1503(b)-(c) preempts judicial review under the Administrative Procedure Act of the denial or revocation of a passport for United States citizenship claimants abroad,

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[7] After *Villarreal* and *Hogan*, all the cases known to Petitioners where U.S. citizenship claimants sought APA review under *Rusk v. Cort* of the denial or revocation of passports arose in the Southern District of Texas, and either were dismissed for lack of jurisdiction, or anticipate dismissal, under *Hinojosa*.

notwithstanding that *Rusk v. Cort*, *supra*, explicitly rejected that construction.

Respectfully submitted,

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