IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 17-40077 & 17-40134

RAQUEL HINOJOSA, also known as Raquel Flores Venegas,

Plaintiff-Appellant

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; UNITED STATES OF AMERICA,

Defendants-Appellees

and

DENISSE VILLAFRANCA,

Plaintiff-Appellant

v.

MIKE POMPEO, SECRETARY, U.S. DEPARTMENT OF STATE; UNITED STATES OF AMERICA; PETRA HORN, Customs and Border Protection Port Director, Brownsville, Texas; JONATHAN M. ROLBIN, Director, Legal Affairs and Law Enforcement Liaison, of the United States Department of State,

Defendants-Appellees

App. 2

Appeals from the United States District Court
for the Southern District of Texas

(Filed May 8, 2018)

Before: DENNIS, CLEMENT, and GRAVES, Circuit Judges.

PER CURIAM.

Due to the similarity in the factual background and legal issues in these two cases, we resolve both in a single opinion.

Raquel Hinojosa and Denisse Villafranca (collectively, the "Plaintiffs") were denied passports by the Department of State ("DOS") because they were deemed not to be United States citizens. They separately challenged this determination by filing complaints in the United States District Court for the Southern District of Texas, raising similar claims under the habeas corpus statute, 28 U.S.C. § 2241, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq*. Rejecting the Plaintiffs' various arguments, the district court granted the Government's motion to dismiss in each case. We AFFIRM both dismissals.

I.

Both Hinojosa and Villafranca claim they were born in Brownsville, Texas, and they have United

States birth certificates supporting their claims. Both also have birth certificates issued by the Mexican government, which indicate they were born in Mexico—though Villafranca modified her Mexican birth certificate in 2010 to list Brownsville as her birthplace. Both were raised and spent much of their lives in Mexico, but are now seeking entry into the United States.

Hinojosa applied for a U.S. passport in July 2015. Her application included documents tending to prove that the Mexican birth certificate was false. DOS was unpersuaded and denied her application in November 2015, finding that she had presented insufficient evidence to establish that she was born in the United States.

Hinojosa sought immediate judicial review of this determination before the district court. In 2016, she traveled to a port of entry in Brownsville and filed a petition for a writ of habeas corpus, as well as a complaint for declaratory and injunctive relief under the APA. The district court, adopting the report and recommendations of the magistrate judge, ultimately granted the Government's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), finding that it lacked jurisdiction to provide habeas relief or to proceed under the APA. It also considered an as-applied constitutional challenge to the statute that denies entry to U.S. citizens without passports, 8 U.S.C. § 1185(b), but found she lacked standing to assert it. Hinojosa timely appealed.

Unlike Hinojosa, Villafranca applied for and was issued a U.S. passport in August 2005. But in November 2014, DOS revoked Villafranca's passport, finding that, based on the information contained in her Mexican birth certificate before she had modified it, she had misrepresented her U.S. citizenship in her 2005 application. In its letter notifying Villafranca of the revocation, DOS stated that she was not entitled to a hearing under 22 C.F.R. §§ 51.70–51.74 because her passport had been revoked on the grounds of non-nationality. But the letter informed her that she could still contest the decision by "pursu[ing] an action in U.S. district court under 8 U.S.C. Section 1503." She was ordered to surrender her passport immediately.

Before receiving notification that her passport had been revoked, Villafranca had traveled to Mexico. When she attempted to reenter the United States at the port of entry in Brownsville, Texas, she was denied entry and her passport was seized.

Villafranca filed a petition in the district court in June 2016. She asserted similar claims for habeas relief under 28 U.S.C. § 2241 and declaratory and injunctive relief under the APA. She also argued that she could bring a declaratory judgment action under 8 U.S.C. § 1503(a). The petition was heard by the same judge that heard Hinojosa's petition. The judge again granted the Government's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), finding that it lacked jurisdiction to hear Villafranca's APA and habeas claims. It rejected her argument that she could pursue a declaratory judgment action under 8 U.S.C.

§ 1503(a) because she was not "within the United States" as required by the statute. Villafranca timely appealed.

II.

The first issue is whether the Plaintiffs may seek relief under the APA. This court reviews a district court's dismissal for lack of subject matter jurisdiction de novo. *Ctr. for Biological Diversity v. BP Am. Prod. Co.*, 704 F.3d 413, 421 (5th Cir. 2013); *Musslewhite v. State Bar of Tex.*, 32 F.3d 942, 945 (5th Cir. 1994).

The Plaintiffs sought similar relief under the APA: Hinojosa challenged the denial of her application for a U.S. passport because she was a non-citizen. Villafranca challenged the revocation of her passport because its issuance was based on the misrepresentation that she was a U.S. citizen. The district court rejected Villafranca's petition because it concluded she was not appealing a final agency action. By contrast, it rejected Hinojosa's petition because it concluded there was an adequate alternative means of receiving judicial review under 8 U.S.C. § 1503. Both grounds provide independent bases to reject an APA claim. *See Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999) (finality requirement); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (no other adequate remedy requirement).

Section 1503 outlines the process by which individuals can receive judicial review of the denial of "a right or privilege as a national of the United States" by

a government official, department or independent agency "upon the ground that he is not a national of the United States." 8 U.S.C. §§ 1503(a), (b). On appeal, both Villafranca and Hinojosa challenge the dismissal of their APA claims by arguing that the procedures under 8 U.S.C. § 1503 are inadequate.[1] We disagree. After reviewing the adequacy requirement under the APA and the procedures afforded under § 1503, we conclude that the district court's denial on this basis was proper.[2]

A. The Adequate Alternative Remedy Requirement

The APA provides judicial review for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Notwithstanding this broad definition, the APA limits the sort of "agency action[s]" to which it applies. Specifically, the statute requires that the challenged act be an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate

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[1] In so arguing, both concede that § 1503 procedures apply to them. We note that the decision-making process of a passport revocation is separately defined at 8 U.S.C. § 1504. Although the statute also provides for a "prompt post-cancellation hearing" to contest the decision, *id.*, that procedure is expressly denied when the revocation is on the basis of "non-nationality," 22 C.F.R. § 51.70. Accordingly, the procedures are unavailable to Villafranca.

[2] Since we affirm on this basis, we need not consider the court's alternative ruling on finality.

remedy in a court." *Id.* § 704. Section 704 imposes both finality and exhaustion requirements on the agency action appealed, *see* 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE §§ 15.3, 15.11 (5th ed. 2010), but it also limits the APA to the review of those agency actions which otherwise lack an "adequate remedy in a court." *Bowen*, 487 U.S. at 903 ("[T]he provision as enacted also makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). It is this latter requirement that is before us.

At a minimum, the alternative remedy must provide the petitioner "specific procedures" by which the agency action can receive judicial review or some equivalent. *Id.* The adequacy of the relief available need not provide an identical review that the APA would provide, so long as the alternative remedy offers the "same genre" of relief. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) (quoting *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1272 (D.C. Cir. 2005)); *see also Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012); *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) ("The relevant question under the APA . . . is not whether [the alternatives to APA relief] are as effective as an APA lawsuit against the regulating agency, but whether the private suit remedy provided by Congress is adequate.").

This requirement entails a case-specific evaluation. For example, the Supreme Court in *Bowen v.*

Massachusetts analyzed whether review by the Claims Court was an adequate alternative remedy, when the petitioner, the Commonwealth of Massachusetts, sought review of an agency determination denying Medicaid expense reimbursement. 487 U.S. at 904–08. Finding this review inadequate, the Supreme Court noted that the Claims Court could not grant equitable relief, which might be necessary to remedy the state's alleged harm, and that the Claims Court might not have jurisdiction for similar claims brought by other states. *Id.* The Court's conclusion regarding adequacy, in other words, was based on the facts of the case—looking specifically at the party seeking relief and its particular claim. *See Consol. Edison Co. of N.Y., Inc. v. U.S. Dep't of Energy*, 247 F.3d 1378, 1384 (Fed. Cir. 2001) ("In *Bowen*, the Supreme Court linked its judgment to a specific set of circumstances that are not present in this case.").

Moreover, judicial review must come via the petitioner's direct appeal. In *Sackett v. EPA*, 566 U.S. 120, 127 (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."). On the other hand, the fact that judicial review is delayed by multiple steps of intermediary administrative review does not render the procedure inadequate so long as the agency review is not discretionary. *Dresser v. Meba Med. & Benefits Plan*, 628 F.3d 705, 710–11 (5th Cir. 2010).

Last, the existence of an adequate alternative remedy also requires the discernment of a legislative intent to create such a remedy. *Garcia*, 563 F.3d at 523. The D.C. Circuit has articulated a helpful rule of thumb for this task—namely, that strong evidence of such intention exists when Congress provides for "[t]he creation of both agency obligations and a mechanism for judicial enforcement in the same legislation." *Citizens for Responsibility*, 846 F.3d at 1245.

B. Section 1503 Procedures

With these principles in mind, we now turn to the procedures set forth in the statute in question. 8 U.S.C. § 1503 outlines specific procedures to appeal the denial of "a right or privilege as a national of the United States" by a government official, department or independent agency "upon the ground that he is not a national of the United States." 8 U.S.C. §§ 1503(a), (b). The statute provides two separate procedures for individuals to vindicate such claims, depending on whether they are within the United States.

When the individuals are already within the United States, judicial review is immediately available: They are authorized to "institute an action under [the Declaratory Judgment Act] against the head of such department or independent agency for a judgment declaring him to be a national of the United States." *Id.* § 1503(a).

When they are not already within the United States, however, the path to judicial review is longer because such individuals must first gain admission into the country by the procedures set forth in §§ 1503(b)–(c). These provisions first require an application to "a diplomatic or consular officer of the United States" for a certificate of identity, which allows petitioners to "travel[] to a port of entry in the United States and apply[] for admission." *Id.* § 1503(b). To receive the certificate, petitioners must demonstrate good faith and a "substantial basis" for the claim that they are, in fact, American citizens. *Id.* If their applications are denied, petitioners are "entitled to an appeal to the Secretary of State, who, if he approves the denial, must provide a written statement of reasons." *Id.* The statute does not itself provide a means of reviewing the Secretary of State's decision if he confirms the denial.

If the certificate of identity is issued—either by the diplomatic or consular officer or by the Secretary of State—the individual may apply for admission to the United States at a port of entry, subject "to all the provisions . . . relating to the conduct of proceedings involving aliens seeking admission to the United States."

Id. § 1503(c). If admission is denied, petitioners are entitled to "[a] final determination by the Attorney General" that is "subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." *Id.* Conversely, if admission is granted, thereby permitting them to travel within the United States, they can file a declaratory judgment action under § 1503(a).

C. The Plaintiffs' Remedy Under § 1503 is an Adequate Alternative to APA Relief.

We now apply this procedural framework to the present cases, looking specifically to the wrong the Plaintiffs assert as well as the procedures currently available to remedy that wrong. First, the wrong to be remedied is the deprivation of U.S. passports on the allegedly erroneous conclusion that they are not citizens. They have, in other words, been denied "a right or privilege . . . upon the ground that [they are] not . . . national[s] of the United States." As noted, § 1503 is specifically designed to review such denials.

Second, we look to the procedures currently available to these Plaintiffs, who have not taken any of the procedural steps required by § 1503. As noted, the statute articulates two bases for reaching the courts to remedy their claims: They are permitted to file a habeas petition if denied admission at the port of entry, or, if granted admission, they are permitted to file a declaratory judgment action. Notably, both forums permit the Plaintiffs to prove their citizenship. If their

petition is successful, the hearings will overturn the basis for the deprivation of their U.S. passports.

The only instance in which the Plaintiffs might not receive judicial review under the statute is if their petitions for certificates of identity are denied by the Secretary [of] State. At that moment, they would be entitled to relief under the APA—a point which the Government concedes. But the mere chance that the Plaintiffs might be left without a remedy in court does not mean that the § 1503 is inadequate as a whole. In other words, the Plaintiffs are not entitled to relief under the APA on the basis that a certificate of identity *might* be denied. Otherwise, all persons living abroad claiming United States citizenship would be able to skip §§ 1503(b)–(c) procedures by initiating a suit under the APA.

In light of the foregoing, we are satisfied that 8 U.S.C. § 1503 establishes an adequate alternative remedy in court for these Plaintiffs. As noted, the statute provides a direct and guaranteed path to judicial review. Moreover, the provision comprises "both agency obligations and a mechanism for judicial enforcement." *Citizens for Responsibility*, 846 F.3d at 1245. In sum, § 1503 expresses a clear congressional intent to provide a specific procedure to review the Plaintiffs' claims. Permitting a cause of action under the APA would provide a duplicative remedy, authorizing an end-run around that process. We therefore affirm the district court's determination that it lacked jurisdiction.

The Plaintiffs rely on *Rusk v. Cort*, 369 U.S. 367 (1962), *abrogated in part by Califano v. Sanders*, 430 U.S. 99 (1977), to contest the adequacy of § 1503's procedures. In *Rusk*, the plaintiff's application to renew his U.S. passport, which he made while living abroad, was denied on the grounds that he had lost his citizenship. *Id.* at 369. The Supreme Court permitted the plaintiff to jettison the procedures of § 1503 and bring an APA claim to challenge the denial. *Id.* at 379–80. Though the Plaintiffs here attempt to analogize their present position with the *Rusk* plaintiff, the analogy fails.

Two preliminary points are worth noting at the outset. First, it is unclear to what degree that *Rusk* remains good law in light of *Califano*. *Rusk* construed the APA as a jurisdiction-conferring statute, 369 U.S. at 370–72, an assertion that was expressly rejected in *Califano*, 430 U.S. at 105. It is unclear whether this fundamental transformation of APA's purpose would alter *Rusk*'s analysis.

Second, the *Rusk* Court never explicitly discusses the adequacy requirement of the APA, and *Rusk* has rarely been relied on by either the Supreme Court or this Court when discussing it. When *Rusk* has been cited, it is usually for the basic proposition that Congress must clearly express an intent to "preclude the citizen's right to seek judicial redress for violations of his rights" by agency action under the APA. *E.g.*, *Heckler v. Ringer*, 466 U.S. 602, 644–45 (1984) (Stevens, J., concurring); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993). As noted, the Supreme Court

significantly developed and expanded the adequacy requirement since *Bowen*. It is thus unclear whether and to what extent *Rusk* is or remains an instructive account of the adequacy requirement.

We need not resolve these issues, however, because *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.

Unlike the Plaintiffs here, the plaintiff in *Rusk*, who lived in Prague at the time, was denied an application for a new passport on grounds that his citizenship had been revoked. 369 U.S. at 369. He had allegedly moved to Europe to dodge the draft. *Id.* As a result of his actions, he had not only lost his citizenship, but had also been criminally indicted for draft evasion. *Id.*

When considering whether the plaintiff's sole remedy was through the procedures set forth in § 1503(b) and (c), the Court was motivated by the particular hardship the plaintiff faced. Reviewing the statute's language and legislative history, the Court concluded that Congress could not have "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." *Id.* at 375 (emphasis added). Instead, the Court was persuaded that the procedures

were intended to check the entry of illegal aliens, who try "to gain fraudulent entry to the United States by prosecuting spurious citizenship claims." *Id.* at 376–79. In light of the extreme burden the § 1503 procedures would have placed on the plaintiff, whose claim and circumstance § 1503 was not specifically intended to address, the plaintiff could proceed under the APA. *Id.* at 379.

Here, as outlined above, the 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. Moreover, in 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.

III.

We next consider Plaintiffs' claims that they should have been allowed to pursue their habeas petitions. "In an appeal from the denial of habeas relief, this court reviews a district court's findings of fact for clear error and issues of law *de novo*." *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001) (per curiam). A

district court's dismissal of a habeas corpus claim for failure to exhaust administrative remedies is reviewed for abuse of discretion. *Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012).

A person seeking habeas relief must first exhaust available administrative remedies. *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992) (per curiam). Exhaustion has long been a prerequisite for habeas relief, even where petitioners claim to be United States citizens. *See United States v. Low Hong*, 261 F. 73, 74 (5th Cir. 1919) ("A mere claim of citizenship, made in a petition for the writ of habeas corpus by one held under such process, cannot be given the effect of arresting the progress of the administrative proceeding provided for."). "The exhaustion of administrative remedies doctrine requires not that only administrative remedies selected by the complainant be first exhausted, but instead that all those prescribed administrative remedies which might provide appropriate relief be pursued prior to seeking relief in the federal courts." *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985), *abrogated on other grounds by McCarthy v. Madigan*, 503 U.S. 140 (1992), *superseded by statute on other grounds, Woodford v. Ngo*, 548 U.S. 81 (2006); *see also Lee v. Gonzales*, 410 F.3d 778, 786 (5th Cir. 2005) ("[A] petitioner must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exists.").

Conversely, "[e]xceptions to the exhaustion requirement are appropriate where the available administrative remedies either are unavailable or wholly

inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action." *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994) (per curiam) (quoting *Hessbrook*, 777 F.2d at 1003). The petitioner bears the burden to demonstrate an exception is warranted. *Id.* (citing *DCP Farms v. Yeutter*, 957 F.2d 1183, 1189 (5th Cir. 1992); *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 112 (5th Cir. 1992)).

This court has already applied these principles to §§ 1503(b)–(c), finding the procedures they outline must be exhausted before receiving habeas relief. Specifically, in *Samaniego v. Brownell*, 212 F.2d 891, 894 (5th Cir. 1954), this court noted that,

> [w]here, as here, Congress has provided a method, administrative or judicial, by which appellant may challenge the legality of his detention, or exclusion, and such method or procedure is not tantamount to a suspension of the writ of habeas corpus, this remedy must be exhausted before resort may be had to the extraordinary writ.

Like the petitioner in *Samaniego*, Villafranca and Hinojosa have not pursued the remedies available to them under §1503(b)–(c). Nor have they demonstrated that such pursuit would be futile. They argue that they are not provided an effective remedy because the procedures do not specifically address the deprivation of their passports. But the denials were based on a finding that they were not citizens, which—as noted—is precisely the sort of claim that § 1503 is designed to

address. In other words, these procedures provide a basis for the Plaintiffs to rectify the wrongful determination that they are not citizens, which, if they are successful, will afford the Plaintiffs an effective remedy to the wrong they suffered.

We also reject the Plaintiffs' assertions that the position of a § 1503(b) petitioner who appears at a port of authority with a certificate of identity is the same as any other alien seeking admission to the United States. To the contrary, the very fact that the petitioner has that certificate puts her in a different position. Section 1503(b) calls on the U.S. diplomatic or consular officer of the United States to issue the certificate of identity "upon proof . . . that the application is made in good faith and has a substantial basis." Thus, when individuals are issued a certificate of identity for purposes of applying for admission to the United States, a U.S. official has found some merit in their claims. Obtaining a certificate of identity signals to U.S. officials charged with evaluating applications for admission to the United States at a port of entry that an individual's claim may be legitimate. Accordingly, persons who have gone through the process set forth in § 1503(b) assume a legal posture that is distinct from persons who merely proceed to the inspection station and request entry.

Thus, the Plaintiffs have not demonstrated that they are entitled to an exception to the exhaustion requirement.[3]

IV.

Last, we consider two arguments raised by Hinojosa and Villafranca individually, both of which we reject.

A. Whether Villafranca may file a claim under 8 U.S.C. § 1503(a)

We first address Villafranca's claim that she could file a declaratory judgment action under § 1503(a). The district court concluded that the claim relied on an interpretation of § 1503(a) that contravened its plain language. We review the district court's interpretation of the statute de novo, *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997), and affirm.

As already noted, the procedures set forth at § 1503(a) and §§ 1503(b)–(c) apply to distinct circumstances. Section 1503(a) applies only to "person[s] . . . within the United States," 8 U.S.C. § 1503(a), while §§ 1503(b)–(c) refers to "person[s] . . . not within the United States," *id.* at § 1503(b). And, as discussed, §§ 1503(b)–(c) provide additional procedures for those

[3] In light of this conclusion, we need not consider whether the Plaintiffs have satisfied the requirement that they be "in custody" to file a habeas claim. *See Zolifcoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (per curiam).

"not within the country" to gain admission to the United States and thereby become "persons . . . within the United States" under § 1503(a). As the Supreme Court in *Rusk* observed, this additional procedure served Congress's legislative purpose: to provide extra vetting procedures for those coming into the country claiming citizenship. 369 U.S. at 376–79.

It is undisputed that Villafranca was at a port of entry to the country at the time the lawsuit was filed. She was not, in other words, "within the United States." *Cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40 (1985) (noting constitutional implications of the distinction between being "at the border" and being "in the interior"). Accordingly, the trial court properly dismissed her claim under § 1503(a).

B. Hinojosa's As-Applied Constitutional Challenge

Hinojosa brings an as-applied constitutional challenge to 8 U.S.C. § 1185(b),[4] which states, "it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States

[4] We note that Hinojosa's discussion of this point in her brief on appeal is unclear. At points, it seems to assert a facial constitutional challenge. She argues, for example, that 8 U.S.C. § 1185(b) is "unconstitutional[ ] to the extent it precludes the return to the United States of a U.S. citizen, simply because she lacks a U.S. passport." To the extent she asserts a facial challenge, however, we decline to consider it for the first time here. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

passport." We reject her argument, affirming the district court's ruling that Hinojosa lacked the requisite standing to assert it.

To argue that a statute is unconstitutional as applied, one must demonstrate that the statute actually does apply to him or her. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 n.4 (2014) ("[A] plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him."). Hinojosa never asserts that § 1185(b) was applied to her. She never, for example, asserts that she was denied entry to the United States as a U.S. citizen lacking a passport. Nor could she make such an assertion: DOS concluded Hinojosa was *not* a citizen. Indeed, the propriety of this legal determination is the dispute around which this entire appeal turns. Whatever the constitutional ramifications of § 1185(b), they should not be reviewed here.

V.

The district court's orders in both cases are AFFIRMED.

JAMES L. DENNIS, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority opinion's decision to affirm the district court's dismissal of

Hinojosa and Villafranca's APA claims. In my view, 8 U.S.C. § 1503(b)–(c) is not an adequate remedy for persons outside of the United States who do not seek admission to the country prior to a determination of citizenship. Hinojosa and Villafranca fall into that category of persons and should be entitled to APA review.

Individuals seeking APA review must establish that there is "no other adequate remedy in a court."[1] 5 U.S.C. § 704. In evaluating the adequacy of an alternative remedy, courts must give the APA's "generous review provisions . . . a 'hospitable' interpretation." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967)). "A restrictive interpretation of § 704 would unquestionably . . . run counter to" the APA's purpose of "remov[ing] obstacles to judicial review of agency action." *Id.* at 904 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). An alternative that "carr[ies] the risk of 'serious criminal and civil penalties,'" or that imposes a process that is "arduous, expensive, and long" and does not aid in the determination of the underlying legal question, is inadequate. *U.S. Army Corps of*

[1] The APA provides that judicial review is available for "final agency action[s] for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Although the majority opinion declines to consider whether § 704's finality requirement is met in the instant cases, *Rusk v. Cort*, 369 U.S. 367, 372 (1962) *abrogated in part by Califano v. Sanders*, 430 U.S. 99, 105 (1977), expressly found that the denial of a passport application in that case was a "final administrative determination by the Secretary of State." As discussed below, *Rusk*'s conclusions with respect to this issue remain good law.

Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815–16 (2016) (quoting *Abbott Labs.*, 387 U.S. at 153).

In *Hawkes*, three companies sought APA review to challenge a determination by the Army Corps of Engineers that their land contained "waters of the United States," such that the Clean Water Act prohibited discharging pollutants onto the land without a permit. 136 S. Ct. at 1811–12. The Corps proposed two alternatives to seeking APA review: the first, to discharge material without a permit and risk an enforcement action; the second, to apply for a permit to discharge and seek judicial review in the event a permit was denied. *Id.* at 1815–16. The Supreme Court held that these alternatives were inadequate, focusing on the significant costs each imposed on the companies. *Id.* The Court held that risking an enforcement action was not an adequate remedy because of the "serious criminal and civil penalties" the companies could incur. *Id.* at 1815. The Court also held that the permitting process was not an adequate remedy because it imposed an "arduous, expensive, and long" process that required the companies to complete expensive land assessments that did not necessarily aid in the determination of whether their land contained "waters of the United States." *Id.* at 1815–16.

Analogous to the proposed alternatives in *Hawkes*, § 1503(b)–(c) would impose onerous requirements at a significant cost if required of individuals seeking a declaration of citizenship from outside of the United States. *See id.* Section 1503(c) requires that persons who obtain a certificate of identity under § 1503(b)

travel to a United States port of entry and apply for admission within two months.[2] And, as Hinojosa and Villafranca argue and the Government does not dispute, persons who comply with this requirement and travel to a port of entry still 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.[3] *See* 8 U.S.C. 1503(c) ("Any person described in this section who is finally denied admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States"); 8 U.S.C. § 1225 (providing for the inspection, detention, and removal of persons applying for admission).

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[2] *See* 22 C.F.R. § 50.11 ("A person applying abroad for a certificate of identity under section 360(b) of the Immigration and Nationality Act shall complete the application form prescribed by the Department."); U.S. DEP'T OF STATE, FS-343, APPLICATION FOR CERTIFICATE OF IDENTITY (2006) (requiring travel to a port of entry in the United States "within two months" of the issuance of a certificate of identity).

[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 (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).

These additional burdens would be imposed on all persons located outside of the United States,[4] regardless of whether they wished to enter the United States prior to seeking a determination of citizenship, or at

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[4] Justice Brennan's concurrence in *Rusk* further highlights the substantial burdens § 1503 imposes on persons located outside of the United States:

> If [§ 1503(b)–(c)] provided the sole avenue to judicial review for one who while abroad is denied a right of citizenship, the following consequences would result: He would have to apply for a certificate of identity, which would be granted only if an administrative official was satisfied that the application was made in good faith and had a substantial basis. If the certificate were initially denied, an administrative appeal would have to be taken. If that failed, an attempt might be made to secure judicial review. A holding that no such review is available would mean that one who admittedly had been a citizen would have been conclusively converted into an alien without ever having gained access to any court. On the other hand, if review were forthcoming at this stage, and if issuance of a certificate were ordered, the individual would have gained only the right to travel to a United States port of entry—if he could afford the passage—there to be "subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States." He would, in other words, have to submit to detention as an alien although it is assumed that he was once a citizen and no court had ever determined that he had been expatriated. Should he still encounter an administrative denial of the right to enter, he would finally get into court, but "in habeas corpus proceedings and not otherwise," with whatever limitations upon the scope of review such language may imply.

369 U.S. at 381–82 (Brennan, J., concurring).

all.[5] 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

[5] As Hinojosa notes, a United States passport entitles the holder to benefits beyond entry into the United States, including international travel benefits. *See, e.g.*, U.S. DEP'T OF STATE, *Smart Traveler Enrollment Program (STEP)*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/before-you-go/step.html (last visited Apr. 10, 2018) (discussing safety information and assistance available to United States citizens while traveling abroad); U.S. DEP'T OF STATE, *Country Information*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages.html (last visited Apr. 10, 2018) (discussing visa requirements for holders of United States passports in foreign countries).

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.

Section 1503(b)-(c) therefore appears to present precisely the sort of "obstacles to judicial review" that the APA's "generous review provisions" were enacted to remove. *See Bowen*, 487 U.S. at 904. I therefore conclude that § 1503 does not provide an adequate remedy in a court whenever a person outside the United States seeks a determination of citizenship before, or without, seeking admission. *See Hawkes*, 136 S. Ct. at 1815–16; *Bowen*, 487 U.S. at 904. Both Hinojosa and Villafranca seek a determination of their citizenship before entering the United States. Section 1503(b)–(c) is therefore not an adequate remedy and thus does not preclude them from seeking APA review.[6]

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[6] The majority opinion appears to suggest that § 1503(b)–(c) would provide an adequate remedy for any person whose path to judicial review is "less treacherous" than that of the plaintiff in *Rusk*, who risked incarceration upon arrival to the United States. In my view, the threat of incarceration, or a burden of similar magnitude, is not necessary for § 1503(b)–(c) to be deemed inadequate. *See, e.g.*, *Hawkes*, 136 S. Ct. at 1815. But, in any event, Hinojosa and Villafranca have demonstrated that the path to judicial review under § 1503(b)–(c) is as "treacherous" as that of the plaintiff in *Rusk* in every meaningful respect.

I also write separately to note that, in my view, *Rusk v. Cort*, 369 U.S. 367 (1962), remains good law with respect to its interpretation of § 1503(b)–(c). Nothing in *Califano v. Sanders*, 430 U.S. 99 (1977), or any subsequent Supreme Court case, suggests otherwise. In *Califano*, the Supreme Court considered whether the courts had jurisdiction under the APA to review a social security benefits decision by the Secretary of Health, Education, and Welfare. *Id.* at 100–01. The *Califano* Court held that, following Congress's decision to amend 28 U.S.C. § 1331 and eliminate its amount-in-controversy requirement in certain cases, the APA could no longer be interpreted as an independent grant of subject matter jurisdiction. *Id.* at 105.

Hinojosa and Villafranca do not argue that the APA independently confers subject matter jurisdiction. Instead, they assert jurisdiction under § 1331 and look to the APA to provide a cause of action and waiver of sovereign immunity. *See Bowen*, 487 U.S. at 891 (considering whether review was proper under the APA with jurisdiction asserted under § 1331). Because *Califano*'s reference to *Rusk* was confined to the issue of whether the APA confers subject matter jurisdiction,[7]

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[7] The Court referenced *Rusk* within the following context:

> Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter jurisdiction. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Rusk v. Cort*, 369 U.S. 367, 372 (1962). . . . The obvious effect of [Congress's] modification [of § 1331], subject only to preclusion-of-review statutes created or

Rusk's construction of § 1503 remains good law. Accordingly, § 1503 does not create an exclusive remedy for persons outside the United States who do not seek to enter the country prior to obtaining a declaration of citizenship.[8]

Hinojosa and Villafranca have demonstrated that § 1503(b)–(c) does not provide them an adequate remedy in a court for purposes of precluding APA review.

> retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate. We conclude that this amendment now largely undercuts the rationale for interpreting the APA as an independent jurisdictional provision.

Id. at 105.

[8] The majority opinion misapprehends the significance of *Rusk*'s discussion of the legislative history of § 1503. In the portion of *Rusk* that the majority opinion cites, the *Rusk* Court found that Congress enacted § 1503 to prevent non-citizens from "gain[ing] fraudulent entry to the United States by prosecuting spurious citizenship claims." 369 U.S. at 379. However, the Supreme Court further explained that Congress enacted § 1503 as a replacement for § 503 of the Nationality Act of 1940. *Id.* Under this predecessor statute, individuals were permitted physical entry into the United States to prosecute their citizenship claims, and many non-citizens entered the country and disappeared into the general population. *Id.* at 375–79. In the instant cases, Hinojosa and Villafranca seek a declaration of citizenship before attempting to gain admission to the United States. They therefore do not fall into the category of persons that Congress sought to prevent from "gain[ing] fraudulent entry to the United States." *See id.* at 379.

For these reasons, I respectfully dissent from the majority's opinion with regard to their APA claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RAQUEL HINOJOSA, Plaintiff, v. PETRA HORN, Port Director, U.S. Customs and Border Protection; Hon. JOHN KERRY, Secretary of the Department of State; Hon. JEH JOHNSON, Secretary, Department of Homeland Security; and UNITED STATES OF AMERICA, Defendants.	§ § § § § § § § § § § § § §	Civil Action No. 1:16-cv-00010

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed Jan. 20, 2017)

This case arises from the government's denial of Raquel Hinojosa's passport application and her subsequent inability to enter the United States. Hinojosa (hereafter "Plaintiff") requests that the Court grant her habeas corpus and Administrative Procedure Act (hereafter "APA") relief, and thereafter issue a declaratory judgment granting her U.S. citizenship.

Before the Court is the "Report and Recommendation of the Magistrate Judge" (Docket No. 19) in the

above-referenced case. The Magistrate Report and Recommendation (hereafter "R&R") recommends that Defendants' motion to dismiss be granted. For the reasons stated below, the "Report and Recommendation of the Magistrate Judge" (Docket No. 19) is **ADOPTED**.

I. FACTUAL BACKGROUND

Plaintiff claims she was born in Brownsville, Texas, through the assistance of a midwife, sometime in June 1973. Docket No. 21 at 1. Five days after Plaintiff's birth, her birth was registered with the State of Texas; the Plaintiff's name on said document is listed as Raquel Hinojosa. Docket No. 2 Ex. 1. Plaintiff also has a Mexican birth certificate, stating that she was born in Matamoros, Mexico; the Mexican birth certificate lists Plaintiff's name as Raquel Flores Venegas. Docket No. 21 at 1.

Besides the different last names, there is one glaring difference between the two birth certificates—each certificate lists a different father. *Id.* The Texas birth certificate lists Mario Hinojosa Delgado as the father; the Mexican birth certificate lists Higinio Flores as the father. Docket No. 2 Ex. 2. Plaintiff attributes this inconsistency to the fact that her mother and biological father, Mario Hinojosa Delgado, ended their relationship shortly after she was born. Docket No. 21 at 1. Thereafter, Plaintiff's mother returned to Mexico and registered her as the child of Higinio Flores. *Id.* Plaintiff grew up believing Flores was her father. *Id.* At some point in Plaintiff's life, she discovered that Flores

was not her biological father. *Id.* She subsequently procured a DNA test showing Mario Hinojosa Delgado as her biological father. *Id.*

In July of 2014, Plaintiff filed a passport application, supported by her Texas birth certificate, her DNA test, and affidavits from Mario Hinojosa Delgado and Plaintiff's older half-sister, confirming the Texas birth, with the United States Department of State (hereafter "DOS"). *Id.* On September 10, 2015, DOS requested that Plaintiff provide additional evidence, including information on why she grew up believing Flores was her father. *Id.* She responded on October 9, 2015. *Id.* at 2. On November 13, 2015, DOS denied her application, citing the Mexican birth certificate as evidence that her Texas birth certificate, filed by the midwife, was fraudulent. *Id.* Thus, Plaintiff claims she is currently unable to enter the United States. Docket No. 1 at 1.

II. **PROCEDURAL HISTORY**

On January 15, 2016, Plaintiff filed a "Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief" (Docket No. 1), seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, and a declaratory judgment that she is a U.S. citizen. Docket No. 1 at 3. She also asserts federal subject-matter jurisdiction exists under the APA. *Id.*

On March 28, 2016, Defendants timely filed "Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)" (Docket No. 7). First, Defendants' claim that Plaintiff's request for a writ of habeas

corpus fails because she is not "in custody" and she has not exhausted her administrative remedies. Docket No. 7 at 4. Second, Defendants' claim that Plaintiff cannot assert jurisdiction under 8 U.S.C. § 1503(a) because she is not "within the United States," as required by the statute; instead, Defendants' argue, she must proceed through § 1503(b) and (c). *Id.* at 4–5. Lastly, Defendants' claim that the APA does not provide the Court with jurisdiction over Plaintiff's case. *Id.* at 12.

On April 9, 2016, Plaintiff timely filed "Petitioner's Opposition to Respondents' Motion to Dismiss Petitioner's Petition/Complaint Pursuant to Fed. R. Civ. P. 12(b) (1)" (Docket No. 9). Plaintiff argues that she is "in custody" because she is a U.S. citizen who is unable to return to her home country and that she is not required to follow § 1503(b) and (c) because these provisions do not provide an adequate remedy at law. Docket No. 9 at 13, 21. She also asserts that the APA, pursuant to *Rusk v. Cart*, 369 U.S. 367 (1962), grants the Court subject-matter jurisdiction over her claims. *Id.* at 10.

On April 19, 2016, Defendants timely filed "Defendants' Reply in Support of Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1)" (Docket No. 12). Defendants reiterate that Plaintiff is not "in custody" and that the APA does not grant this Court subject-matter jurisdiction over this case. Docket No. 12 at 3–4.

On September 9, 2016, the Magistrate Judge filed the "Report and Recommendation of the Magistrate Judge" (Docket No. 19). First, the Magistrate held that

Plaintiff's request for habeas corpus fails for two reasons: (1) Plaintiff is not "in custody," because she "is not being subjected to restraints that are not shared by all U.S. citizens," and (2) Plaintiff has not exhausted all her administrative remedies. Docket No. 19 at 8–9. Second, the Magistrate held that the APA does not grant the Court subject-matter jurisdiction because the denial of Plaintiff's application does not constitute "final agency action." *Id.* at 10. Lastly, the Magistrate held that § 1503(b) and (c), not § 1503(a), are the correct avenues for Plaintiff to seek redress for the denial of her passport. *Id.* at 10, 11–14.

On September 23, 2016, Plaintiff filed "Petitioner's Objections to the Magistrate's Report and Recommendation" (Docket No. 21). Plaintiff re-argues that she is "in custody," that she is not required to exhaust her administrative remedies, and that the APA grants the Court subject-matter jurisdiction. Docket No. 21. Plaintiff also abandons her § 1503(a) claim. *Id.* at 11 n.5.

On October 6, 2016, Defendants filed "Defendants' Response to Petitioner's Objections to Magistrate Judge's Report and Recommendation" (Docket No. 24). On October 17, 2016, Plaintiff filed "Plaintiff's Reply in Support of Her Objections to the U.S. Magistrates Report and Recommendation" (Docket No. 28). The next day Plaintiff filed "Plaintiff's Amended Reply in Support of Her Objections to the U.S. Magistrates Report and Recommendation" (Docket No. 29). The arguments raised in these documents reiterated points in earlier briefs.

On November 17, 2016, this Court issued an "Order" (Docket No. 34), ordering the parties to brief Plaintiff's claim that "8 U.S.C. § 1185(b) is unconstitutional as applied because it infringes on the fundamental right of United States citizens to return to the United States." On November 28, 2016, Plaintiff filed "Plaintiff's Response to Court Order [34] to Brief Whether U.S.C. § 1185(b) is unconstitutional as applied to her" (Docket No. 35); in summary, Plaintiff argues that although the Government has a compelling interest to keep non-nationals from entering the United States as U.S. citizens, 8 U.S.C. § 1503(b) and (c) are not sufficiently narrowly tailored to meet that compelling interest. On December 21, 2016, one day after the filing deadline, Defendants filed "Defendants' Reply to Plaintiff's Supplemental Briefing Relating to 8 U.S.C. § 1185(b)" (Docket No. 36), arguing that Plaintiff does not have standing to bring an as-applied challenge because § 1185(b) was never applied to Plaintiff. Docket No. 36 at 3–5. Defendants also raised constitutional avoidance and Procedural Due Process arguments. *Id.* at 2, 5. Defendants also filed "Defendants' Motion for Leave to File Reply Out of Time" (Docket No. 37). On January 3, 2017, the Court entered an "Order" (Docket No. 38), granting Defendants' motion for leave to file said reply.

III. **DISCUSSION**

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A party may challenge a district

court's subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The party asserting jurisdiction bears the burden to prove the district court has jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In ruling on a Rule 12(b)(1) motion to dismiss, courts must "accept all factual allegations in the plaintiff's complaint as true." *Den Norske Stats Oljeselkap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001).

A. The Court lacks jurisdiction to provide habeas relief.

The federal habeas corpus statute, 28 U.S.C. § 2241 et seq., allows an individual who is "in custody" due to a violation of federal law or under authority of the federal government to challenge his or her "custody." *Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 735 (5th Cir. 2005). In order [to] seek habeas review, the plaintiff must first exhaust administrative remedies. *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992).

A person may challenge an agency's denial of a claimed right or privilege as a U.S. citizen under 8 U.S.C. § 1503. The administrative remedies at issue are described in § 1503(b) and (c).

In relevant parts, § 1503(b) states as follows:

> [i]f any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right

> or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision.

In relevant parts, § 1503(c) states as follows:

> [a] person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise.

Exhaustion requires that "all those prescribed administrative remedies which might provide appropriate relief be pursued prior to seeking relief in the federal courts." *Cleto*, 956 F.2d at 84 (quoting *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985)). "Exceptions to the exhaustion requirement are appropriate where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action." *Fuller v. Rich*, 11 F.3d 61, 62 (quoting *Hessbrook*, 777 F.2d at 1003)).

Plaintiff objects to the Magistrate Judge's finding that the Court lacks jurisdiction to provide habeas corpus relief. Docket No. 21 at 2. Plaintiff is incorrect because, even if the Court assumes *arguendo* that she is "in custody," it is undisputed that she has not exhausted the administrative remedies available to her.

Plaintiff's exhaustion argument is threefold. First, Plaintiff argues that there are no administrative remedies to exhaust when a passport application is denied for non-nationality. Docket No. 21 at 4. She is incorrect because the statute specifically provides Plaintiff with the administrative remedy to seek redress for the denial of her application. As § 1503(b) expressly states, a person denied a right on the ground that she is "not a national of the United States" may apply for a certificate of identity at her local embassy or consulate.

Next, Plaintiff argues that she does not have to follow the procedures prescribe[d] by § 1503(b) and (c) because these procedures are "barely available, if [they are] available at all." Docket No. 21 at 5. She is incorrect because Plaintiff cannot escape the exhaustion requirement by arguing that it is "barely available." *See Lee v. Gonzales*, 410 F.3d 778, 786 (5th Cir. 2005) (a plaintiff "must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exists"). The likelihood of success is not the measure of whether or not a remedy must be pursued. Instead, the law dictates that available remedies must be pursued prior to a habeas claim. Here, a remedy is available, pursuant to § 1503(b) and (c). It is important to note that at the conclusion of § 1503(c) the statute expressly provides for habeas review.

Lastly, Plaintiff argues that the DOS Manual (hereafter "Manual") supports her positions because it specially states that a person whose application for a passport has been denied has three possible options: he or she may (1) reapply; (2) "file a legal action in Federal court in the United States"; or (3) "apply to the U.S. embassy or consulate for 'Documentation of Identity for Travel to The United States to Apply for Admission' pursuant to 8 U.S.C. 1503(b)." Docket No. 21 at 7. She is incorrect in her interpretation of the scope of said Manual.

The Manual does not state that all of the listed options are available for a person "not within the United States." It merely provides avenues for possible challenges, which are consistent with 8 U.S.C. § 1503. The

second option—file a claim in federal court—is consistent with § 1503(a), but applicable in scope only to a person within the United States. The third option—apply at the U.S. embassy—is consistent with § 1503(b) and (c), and applicable in scope to a person "not within the United States." Furthermore, even if the Court assumes *arguendo* that the Manual provided that all listed options were available to a person "not within the United States," such provision cannot override a federal statute. The Manual, unlike § 1503(b) and (c), is not a federal statute; it is merely a manual.

B. The Court lacks jurisdiction under the APA.

The APA provides judicial review of a "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. 704. Without a "final agency action," federal courts lack subject-matter jurisdiction. *Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). To be a "final agency action," the action must (1) "mark the consummation of the agency's decision making process" and (2) be an action where "rights and obligations have been determined, or from which legal consequences will flow." *Bennett v. Spears*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted). An intermediate step in an administrative process "cannot be viewed as a 'consummation' of agency decision making." *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011).

Plaintiff objects to the Magistrate Judge's finding that the Court lacks jurisdiction under the APA Docket No. 21 at 19. Plaintiff argues that, under *Rusk v. Cort*, 369 U.S. 367 (1962), the APA provides the Court subject-matter jurisdiction over her citizenship claim. Plaintiff is incorrect.

First, the denial of Plaintiff's passport application is not a final agency action. The initial denial is simply the first step in the process, not the final determination by the applicable agency. *See Qureshi*, 663 F.3d at 781. Second, Plaintiff has not exhausted her administrative remedies. *See supra* III(A). Subsequent to said denial, the Plaintiff has existing recourse in 8 U.S.C. § 1503(b) and (c).

Plaintiff argues that no final agency action or exhaustion is required for APA standing. Docket No. 21 at 19–20. Plaintiff argues that *Rusk* held that the procedures laid out in 8 U.S.C. § 1503(b) and (c) do not need to be followed before bringing a suit under the APA. *Id.* She is incorrect because *Rusk's* holding that the APA, without a final agency action, grants federal courts subject-matter jurisdiction has been overruled. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) ("the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions"); *see also Oryszak v. Sullivan*, 576 F.3d 522, 524 (D.C. Cir. 2009); *Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 183–84 (D.C. Cir. 2006); *City of Miami v. I.C.C.*, 669 F.2d 219, 222 n. 12 (5th Cir. 1982).

Plaintiff attempts to circumvent the overruling of *Rusk* by arguing that "while the APA is no longer . . . considered jurisdictional, there is no reason that jurisdiction cannot be laid, as Plaintiff did here, under 28 U.S.C. § 1331." Docket No. 21 at 19. Plaintiff misinterprets the federal-question statute. To invoke federal question jurisdiction, "a plaintiff's claim must be based on some federal law independent of that statute." *U.S. on Behalf of F.T.C. v. Larkin, Hoffman, Daly & Lindgren, Ltd*, 841 F. Supp. 899, 903 (D. Minn. 1993) (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986)). Without a final agency action, jurisdiction does not vest under the APA nor § 1331.

C. The Court lacks jurisdiction to decide Plaintiff's as-applied challenge.

Under 8 U.S.C. § 1185(b), "it is unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport." Any plaintiff may present a facial or as-applied challenge to the constitutionality of a statute. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). A facial challenge is "a claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally." *Facial Challenge*, Black's Law Dictionary (10th ed. 2014). An as-applied challenge is "a claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied" to an individual. *As-Applied Challenge*,

Black's Law Dictionary (10th ed. 2014). Here, Plaintiff brings an as-applied challenge.

A Plaintiff "generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him." *McCullen v. Coakley*, 134 S.Ct. 2518, 2534 n. 4 (2014). "When [a federal court] is presented with an as-applied challenge, [it] examine[s] only the facts of the case before [it] and not any set of hypothetical facts under which the statute might be unconstitutional." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011).

In Plaintiff's objection to the Magistrate Judge's R&R, she raises a new issue. Plaintiff now argues that 8 U.S.C. § 1185(b) is unconstitutional as-applied to her. Plaintiff is incorrect.

Plaintiff has failed to plead sufficient facts to show that § 1185(b) has been, or is sufficiently likely to be, unconstitutionally applied to her. First, it is undisputed that § 1185(b) has not been applied to Plaintiff. At no point does Plaintiff argue that § 1185(b) was applied to her. *See generally* Docket Nos. 21, 29, 35. Second, Plaintiff admits to entering the United States without a passport. Plaintiff states, "when I found out that I was born in Texas[,] I began to cross into the U.S. with my birth certificate." Docket No. 2 Ex. 4(c).

In the supplemental briefing ordered by the Court, Plaintiff failed to plead sufficient facts to support her § 1185(b) challenge. Instead, Plaintiff argued that the procedures spelled out in § 1503(b) and (c) are not the

least restrictive means necessary to support the Government's "compelling interest in not admitting, as U.S. citizens, individuals who are not, in fact, U.S. citizens." Docket No. 35 at 7–8. Plaintiff's argument is incorrect; § 1503(b) and (c) are not relevant to her as-applied challenge to § 1185(b)—these are two different statutes.

IV. **CONCLUSION**

Although Plaintiff currently does not have standing to sue in federal court, she is not without recourse. Plaintiff can seek redress through § 1503(b) and (c). Plaintiff may apply to "a diplomatic or consular officer . . . for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission." 8 U.S.C. § 1503(b). If the diplomatic or consular officer is satisfied that the "application is made in good faith and has a substantial basis, he shall issue . . . a certificate of identity." *Id.* If the application for the certificate of identity is denied, Plaintiff is entitled to appeal the decision to the Secretary of State. *Id.* If the Secretary of State denies the appeal, the Court will then have jurisdiction to hear Plaintiff's APA claim.

Alternatively, if Plaintiff is issued a certificate of identity, she "may apply for admission to the United States at any port of entry." 8 U.S.C. § 1503(c). "A final determination by the Attorney General that [Plaintiff] is not entitled to admission to the United States shall be subject to review by any court of competent

jurisdiction in habeas corpus proceedings and not otherwise." *Id.* If the Attorney General denies Plaintiff admission, the Court will then have jurisdiction to hear Plaintiff's habeas corpus claim.

For the foregoing reasons, the "Report and Recommendation of the Magistrate Judge" (Docket No. 19) is **ADOPTED**. The Clerk's Office is hereby **ORDERED** to close this case.

Signed on this 20th day of January , 2017.

/s/ Rolando Olvera
Rolando Olvera
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

RAQUEL HINOJOSA, Plaintiffs [sic]**,**	§	
	§	
	§	**Civil Action No.**
v.	§	**B-16-10**
	§	
PETRA HORN, ET AL., Defendant [sic]**.**	§	
	§	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

(Filed Sep. 9, 2016)

On January 15, 2016, Plaintiff Raquel Hinojosa ("Hinojosa") filed a complaint against Defendants: Petra Horne, in her official capacity as Port Director of the Brownsville Port of Entry; John F. Kerry, in his official capacity as Secretary of State; Jeh Johnson, in his official capacity as Secretary of the Department of Homeland Security; and the United States of America (collectively "Defendants").[1] Dkt. No. 1.

In that complaint, Hinojosa alleged that her U.S. passport application was arbitrarily and capriciously denied. *Id*. According to Hinojosa, this denial prevented her from lawfully re-entering the United States. *Id*. Hinojosa's complaint sought a writ of

[1] The Court notes that any claims against Horne, Kerry and Johnson in their official capacities constitute a suit against the agencies that they lead. *Culbertson v. Lykos*, 790 F.3d 608, 623 (5th Cir. 2015).

habeas corpus, as well as relief under the Administrative Procedures Act ("APA"). *Id*.

On March 28, 2016, Defendants filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1), asserting that the Court lacked jurisdiction to consider Hinojosa's claims. Dkt. No. 7. Hinojosa filed a response and Defendants filed a reply. Dkt. Nos. 9, 12.

After reviewing the record and the relevant case law, the Court recommends that the motion to dismiss be granted. Hinojosa has failed to follow the procedures established by law for those in her position, which precludes jurisdiction in this Court to consider her claims.

I. Background

A. Factual Background

According to the complaint, Hinojosa was born in June 1973 in Brownsville, Texas, which would make her a natural-born American citizen. Dkt. No. 1, p. 3. "Her birth was assisted by Guadalupe Gonzalez, a midwife." *Id*. An American birth certificate – signed by Gonzalez – was issued on June 25, 1973. *Id*; Dkt. No. 2-1, pp. 3-4. It listed Mario Hinojosa as her father. Dkt. No. 2-1, pp. 2-3. According to the complaint, Mario Hinojosa "split from" Hinojosa's mother shortly after Hinojosa's birth. Dkt. No. 1, p. 4.

On August 24, 1973, a Mexican birth certificate was issued for Hinojosa, which indicated that she had been born in Matamoros, Mexico. Dkt. No. 2-1, p. 38.

This birth certificate listed Higinio Flores as Hinojosa's father. *Id*.[2]

In July 2014, Hinojosa filed for a United States passport. Dkt. No. 1, p. 4. On September 10, 2015, the State Department requested additional evidence of Hinojosa's citizenship. *Id*. Hinojosa sent additional evidence, including affidavits from Mario Hinojosa and Hinojosa's older half-sister. *Id*, pp. 4-6.

On November 13, 2015, the State Department denied Hinojosa's passport application, informing Hinojosa that "there is a reason to believe that the birth attendant who filed your birth certificate did so fraudulently and you have not submitted any early public records to support your birth in the United States. You have also indicated that you can not submit any evidence that supports your birth in Texas." Dkt. No. 1, pp. 6-7.

According to Hinojosa, she "is currently stranded in Mexico" and is "unable to return to the U.S., engage in other international travel, or engage in any of the common occupations in the U.S." Dkt. No. 1, p. 7.

B. Procedural Background

On January 15, 2016, Hinojosa filed a complaint against the Defendants. Dkt. No. 1. In her complaint, Hinojosa seeks a writ of *habeas corpus*, pursuant to 28 U.S.C. § 2241, and a declaratory judgment that she is

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[2] DNA testing, performed in May 2015, established that Mario Hinojosa is Hinojosa's biological father. Dkt. No. 2-1, p. 25.

a U.S. citizen, pursuant to 8 U.S.C. § 1503. *Id*. She also asserts that jurisdiction exists in this Court, pursuant to the APA. *Id*.

On March 28, 2016, Defendants timely filed a motion to dismiss, pursuant to FED. R. CIV. P. 12(b)(1). Dkt. No. 7. In that motion, Defendants asserted that Hinojosa is not in custody for *habeas* purposes and that she failed to exhaust her remedies prior to filing the *habeas* petition. They also asserted that Hinojosa cannot receive relief under 8 U.S.C. § 1503(a), because she is not physically present in the United States. *Id*. Lastly, they argue that the APA does not grant an independent basis for jurisdiction in this case. *Id*.

On April 9, 2016, Hinojosa timely filed her response brief. Dkt. No. 9. Hinojosa argued that she is in custody for habeas purposes because she is a U.S. citizen who is unable to return to this country. *Id*. She also asserted that jurisdiction exists under the APA because 8 U.S.C. § 1503(b)&(c) do not provide an adequate remedy at law. *Id*. Hinojosa argues that she is permitted to pursue an APA claim under *Rusk v. Cort*, 369 U.S. 367 (1962). *Id*.

On April 19, 2016, Defendants timely filed a reply brief. Dkt. No. 12. In that reply, Defendants reiterated that Hinojosa is not in custody because she is not "subject to significant restraints on her liberty [that are] not shared by the public generally." *Id*, p. 3. Defendants also assert that jurisdiction does not exist under the APA. *Id*.

On August 9, 2016, Defendants filed a motion for leave to file notice of supplemental authority, asking the Court to consider the opinion in *Villarreal v. Horn*, No. 1:15-cv-00111, ___ F.Supp.3d ___, 2016 WL 4094708 (S.D. Tex. July 29, 2016), which was issued after briefing was concluded in this case. Dkt. No. 16. On that same day, Hinojosa asked the Court to also consider the motion for reconsideration filed in *Villarreal*. Dkt. No. 17.

On August 11, 2016, the Court granted the motion for leave to file notice of supplemental authority, stating that it would consider the *Villarreal* opinion and the arguments made in the motion for reconsideration "for whatever persuasive value they may provide." Dkt. No. 18.

II. Applicable Law

A. Jurisdiction

The threshold question, before considering the substance of any claim, is whether the court possesses jurisdiction over the claim. This is the case, because federal courts are courts of limited jurisdiction, whose authority exists only within the boundaries established by Congress and the United States Constitution. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). The plaintiff bears the burden of proving jurisdiction. *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 714 (5th Cir. 2012).

A motion filed under "Rule 12(b)(1) of the FEDERAL RULES OF CIVIL PROCEDURE allows a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). A court may properly dismiss a claim for lack of jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi, Inc. V. City of Madison, Miss.*, 143 F.3d 1006, at 1010 (5th Cir. 1998).

"The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming*, 281 F.3d at 161. The Court may look to the following to find a lack of jurisdiction: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id*. (citing *Barrera-Montenegro v. U.S.*, 74 F.3d 657, 659 (5th Cir. 1996).

B. Habeas Corpus

In order for a court to have *habeas* jurisdiction under 28 U.S.C. § 2241, the petitioner must be "in custody" when he or she files the petition. *Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003). Physical detention is not required to meet this requirement. *Rosales v. Bureau of Immigration & Customs Enf't*, 426 F.3d 733, 735 (5th Cir. 2005). "History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, *restraints not shared by the public generally*,

which have been thought sufficient in the English-speaking world to support the issuance of *habeas corpus*." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (emphasis added).

A *habeas* petitioner is required to exhaust all available administrative remedies prior to filing a *habeas* petition. *Smith v. Thompson*, 937 F.2d 217, 219 (5th Cir. 1991) (citing *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985)). "The exhaustion of administrative remedies doctrine requires not [only that] administrative remedies selected by the complainant be first exhausted, but instead that all those prescribed administrative remedies which might provide appropriate relief be pursued prior to seeking relief in the federal courts." *Hessbrook*, 777 F.2d at 1003. Thus, it is the possibility of relief – not the likelihood of success or how long the prescribed remedy make take – that dictates which remedies must be pursued to satisfy the requirement for exhaustion.

C. Administrative Procedures Act

The Administrative Procedures Act provides for judicial review of agency actions. 5 U.S.C. § 706(1). As relevant here, the Court only has jurisdiction to review agency actions that constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If there is "a statutory and regulatory scheme that specifically provides for judicial review," the APA does not apply. *Dresser v. Meba Med. & Benefits Plan*, 628 F.3d 705, 711 (5th Cir. 2010).

In order for an agency action to be considered final, it must (1) mark the "consummation" of the agency's decision making process and (2) it must be a decision by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

D. Citizenship Determinations

If a United States citizen or national is denied a [sic] "a right or privilege as a national of the United States," there is a statutory vehicle for a declaratory judgment that the person is a citizen. 8 U.S.C. § 1503.

If the plaintiff is "within the United States," she may file a complaint, *i.e.* a law suit, in a Federal District Court against the head of the department or agency seeking a declaratory judgment that the petitioner is a United States citizen. 8 U.S.C. § 1503(a).

On the other hand, if the plaintiff is "not within the United States," she must follow the procedures found in §§ 1503(b) & (c). Pursuant to § 1503(b), the petitioner must "make application to a diplomatic or consular officer of the United States in the foreign country in which [s]he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission." 8 U.S.C. § 1503(b). A certificate of identity is given if there is a substantial basis to conclude that the person may be a U.S. citizen. *Id*. The consular or diplomatic

officer's denial of the issuance of a certificate of identity can be appealed only to the Secretary of State. *Id*.[3]

After making the application, if a certificate of identity is issued, then the petitioner "may apply for admission to the United States at any port of entry" and would be subject to the immigration proceedings that apply to "aliens seeking admission to the United States." 8 U.S.C. § 1503(c). If, at the conclusion of immigration proceedings, the Attorney General determines that the petitioner is not entitled to admission, it is then that judicial review is available in the form of *habeas corpus*. *Id*.

Thus, section 1503 creates a binary distinction. If the alien is "within the United States," then she utilizes the procedure found at § 1503(a). If the alien is "not within the United States," then she is required to utilize the procedures found at §§ 1503(b) & 1503(c).

III. Analysis

The Fifth Circuit has observed that "the immigration law of the United States is inexcusably complicated and in need of immediate revision." *Villa v. Holder*, 464 Fed. App'x. 270, 272 (5th Cir. 2012). This case may be one more example of the accuracy of that appraisal.

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[3] As discussed later in this report and recommendation, if the Secretary of State denies the issuance of a certificate of identity, a petitioner would have a valid APA claim. See *Infra*. section III (B).

It is undisputed that Hinojosa has two birth certificates: an American one that indicates birth in the United States and a Mexican one that indicates birth in Mexico. There is an obvious and irreconcilable conflict between these birth certificates. This case is about what procedures Hinojosa must follow in order to adjudicate her claim that her American birth certificate is the accurate one. Until she follows these procedures, there is no jurisdiction in this Court to adjudicate her claim.

As to Hinojosa's *habeas* claim, the Court must first determine whether Hinojosa is "in custody" for *habeas* purposes and, then, whether she has exhausted all of her remedies prior to filing a *habeas* petition. As to the APA claim, the Court must resolve whether an APA claim is available to correct Hinojosa's claimed denial. Lastly, the Court must sort out whether Hinojosa can seek a declaration of citizenship under 8 U.S.C. § 1503(a). The Court will address each of these issues in turn.

A. *Habeas Corpus*

Hinojosa has asserted that she has a valid *habeas corpus* claim. However, she has failed to meet two prerequisites: (1) being in custody; and (2) exhausting her administrative remedies.

1. In Custody

Hinojosa asserts that she satisfies the "in custody" requirement for *habeas* relief because she is a United States citizen, who is not permitted to enter this country and not permitted to travel internationally. Despite her claim, any limitations on her actions do not amount to "in custody" for *habeas* purposes.

As discussed earlier, "in custody" does not require physical custody – such as imprisonment – but it must involve "restraints not shared by the public generally." *Jones v. Cunningham*, 371 U.S. at 240. For example, persons on parole or probation are "in custody," because their freedom is curtailed in ways not shared by the general public. *Jones v. Cunningham*, 371 U.S. at 240. The same holds true for individuals on supervised release. *U.S. v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997). Indeed, even a person who was ordered by a court to attend alcohol rehabilitation classes was found to be "in custody." *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993).

The deportation of a non-citizen does not place that person "in custody," even though they are unable to lawfully re-enter the United States. *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001); *Chavez-Coronado v. Cockrell*, 2003 WL 21505417, at *4 (N.D. Tex. Apr. 4, 2003). A parent whose parental rights have been terminated is also not in custody. *Salinas v. Texas Dep't of Family & Protective Servs.*, 2012 WL 13685, at *1 (W.D. Tex. Jan. 4, 2012). Thus, the custody

requirement requires that the person's movements and freedom be significantly curtailed.

Hinojosa, however, is not being subjected to restraints that are not shared by all U.S. citizens. It is illegal for a United States citizen "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport." 8 U.S.C. § 1185(b). All U.S. citizens are required to prove their citizenship prior to receiving a passport. 22 U.S.C. §§ 212, 213.

Every United States citizen who does not possess a valid passport – a group which constitutes a majority of Americans[4] – are similarly unable to travel internationally or to legally re-enter the United States after traveling. It cannot fairly be said that these millions of people are in custody for *habeas* purposes. *See Villarreal*, 2016 WL 4094708, *4 (stating that a U.S. citizen who is physically in Mexico, but lacks a valid U.S. passport, is not in custody for *habeas* purposes).

Similarly, Hinojosa is not in custody for *habeas* purposes. Because custody is a condition precedent to

[4] In fiscal year 2015, the State Department reported that there were just over 125 million valid U.S. passports in circulation. Passport Statistics, U.S. Department of State (https://travel.state.gov/content/passports/en/passports/statistics.html). For the sake of comparison, the U.S. population is estimated to be around 321 million people as of July 1, 2015. The United States, CIA World Fact Book (https://www.cia.gov/library/publications/the-world-factbook/geos/us.html).

habeas jurisdiction, this claim should be dismissed without prejudice for lack of jurisdiction.

2. Exhaustion of Remedies

Even if the Court considered Hinojosa to be in custody for *habeas* purposes, she has not exhausted her administrative remedies, which produces the same result – that her case should be dismissed for lack of jurisdiction.

As previously noted, Hinojosa must exhaust all administrative remedies which could potentially provide her relief, not just the ones she believes are convenient or advantageous. *Hessbrook*, 777 F.2d at 1003. The relevant statute in this case – 8 U.S.C. § 1503(c) – provides a method by which *habeas* claims can be adjudicated in federal court. If a person, who is outside of the United States, receives a certificate of identity from the State Department, they may apply for admission into the United States at a port of entry. 8 U.S.C. § 1503(c). This application for admission would require the petitioner to utilize the immigration court system. *Id*. If the Attorney General ultimately denies the petitioner admission to the United States, then the petitioner may file a *habeas corpus* petition.[5]

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[5] As previously noted, if the issuance of a certificate of identity is denied by the State Department, the statute does not explicitly grant a right of judicial review of the denial. 8 U.S.C. § 1503(b). As discussed in the next section, under § 1503(b) a petitioner located outside of the United States may have a valid APA claim if there has been a denial of a certificate of citizenship by

The Court understands that this route has the potential to be circuitous, expensive, and time-consuming. It is, however, the route that Congress has established for people, who are not physically present in the United States, to utilize before receiving judicial review of their claims to citizenship. Most importantly, for present purposes, this route might provide Hinojosa with the relief that she seeks: a finding that she is a United States citizen. Her failure to utilize this route means that she has not exhausted her administrative remedies. *Hessbrook*, 777 F.2d at 1003.

Accordingly, this claim should be dismissed without prejudice for lack of jurisdiction.

B. APA Claim

1. No final agency action

Hinojosa asserts that the APA also grants this Court jurisdiction to consider her claim. This argument is not presently supported by the law.

As previously noted, jurisdiction does not exist under the APA unless the petitioner is challenging a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. If there is "a statutory and regulatory scheme that specifically provides

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the final authority within the State Department. Thus, there are different requirements for the exhaustion of administrative remedies, different agencies involved, and different theories for federal court jurisdiction related to §§ 1503(a) and 1503(b)-(c).

for judicial review," then the APA is inapplicable. *Dresser*, 628 F.3d at 711.

In this case, there is a statutory scheme that specifically provides for judicial review. If Hinojosa receives a certificate of identity – from a consular or other diplomatic office outside of the United States – she can present herself at a port of entry and seek admission to the United States. 8 U.S.C. § 1503(c). If she is denied admission, then her claims can be judicially reviewed in a *habeas* proceeding. *Id*. Thus, there is a specific statutory scheme that provides judicial review, making the APA inapplicable in this case. *Dresser*, 628 F.3d at 71; *see also Villarreal*, 2016 WL 4094708, *6 (stating that an APA claim was foreclosed when relief is available under § 1503).

Furthermore, the denial of the passport application does not constitute final agency action. If there are further administrative or statutory remedies available to the petitioner, then the agency action is not final for APA purposes. *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011). The denial of the passport application is an intermediate step in a lengthy regulatory and statutory process that culminates at the process outlined in 8 U.S.C. § 1503. *See Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999) (noting that intermediate agency action is not a final agency action if there [sic] other procedural remedies available).

The Court notes that if Hinojosa were to apply for a certificate of identity; have her application denied; appeal to the Secretary of State and have the Secretary

of State affirm that denial; then she may have a claim under the APA. At that point, the Secretary of State's decision would constitute final agency action – because it would be the consummation of the State Department's decision-making process – and the decision would determine Hinojosa's legal right to a passport. *Bennett*, 520 U.S. at 178. Furthermore, the statute does not explicitly provide – or prohibit – judicial review, so she would have no other adequate remedy in court. 5 U.S.C. § 704. Under those specific circumstances, Hinojosa would have a valid APA claim; but those are not the circumstances currently presented in this case.

2. *Rusk* does not dictate a different result

Hinojosa cites *Rusk v. Cort*, 369 U.S. 367 (1962) for the proposition that she may pursue remedies under either 8 U.S.C. § 1503 or the APA. In *Rusk*, the Supreme Court opined that the APA provided an independent basis for jurisdiction to consider the plaintiff's citizenship claim. *Rusk*, 369 U.S. at 372.

What Hinojosa fails to take into account is that the Supreme Court later expressly reversed its holding that the APA provided an independent basis for jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The Supreme Court specifically cited *Rusk* as one of the cases that was abrogated by its ruling in *Califano*.

> Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter

> jurisdiction. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967); *Rusk v. Cort*, 369 U.S. 367, 372, 82 S.Ct. 787, 790, 7 L.Ed.2d 809 (1962). However, an Act of Congress enacted since our grant of *certiorari* in this case now persuades us that the better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions.

Califano, 430 U.S. at 105. Thus, Hinojosa's argument is contrary to the law as it currently stands.

Accordingly, the Court lacks jurisdiction to consider Hinojosa's APA claim and it should be dismissed without prejudice for lack of jurisdiction.

C. Declaration of Citizenship

Hinojosa seeks a judicial declaration, pursuant to 8 U.S.C. § 1503(a), that she is a United States citizen. This statutory vehicle is unavailable to her under the facts of this case.

As previously mentioned, U.S.C. § 1503 creates a binary procedure, depending upon the petitioner's location. If the petitioner is within the United States, she can sue in federal court for a declaration of citizenship under § 1503(a); if the petitioner is not within the United States, she must apply for a certificate of

identity and follow the procedures set out in §§ 1503(b) & (c).

It is clear from the plain text of the statute that if a person who is "within the United States" is denied a passport, then he or she may sue the Government for a judicial declaration of their citizenship. 8 U.S.C. § 1503(a).The key question to be resolved is whether Hinojosa must be legally and physically present in the United States in order to pursue this remedy.

As an initial matter, the Court notes that it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations omitted). The Court must read this statute accordingly.

If persons who are not physically and legally present in the United States are permitted to pursue their claims under § 1503(a), then the word "not" in § 1503(b) is superfluous. If anyone who is claiming to be a citizen – no matter where they are currently living – can simply sue the Government under § 1503(a), then the phrase "not within the United States" in § 1503(b) is of no effect. The only logical way to read this statute and to give effect to *all* of its words is to conclude that Congress intended two different procedures; one that applies to individuals physically present in the United States and a different procedure for those individuals who are not physically present in the

United States. There seems to be nothing novel in such an approach.

This conclusion is consistent with the decisions of several federal courts, who have concluded that § 1503(a) only applies to those individuals who are physically present in the United States. *Okere v. United States of Am. Am. Citizens Servs.*, No. 14 C 4851, 2015 WL 3504536, at *3 (N.D. Ill. June 2, 2015); *Bensky v. Powell*, 391 F.3d 894, 896 (7th Cir. 2004) (section 1503(a) "is inapplicable to someone who is not in the United States when he sues"); *Said v. Eddy*, 87 F. Supp. 2d 937, 940 (D. Alaska 2000).

On the other hand, at least three courts, albeit in dicta, seem to have stated that, in *Rusk*, the Supreme Court permitted a § 1503(a) claim to be filed by a petitioner living abroad. *Parham v. Clinton*, 374 F. App'x 503, 505 n. 2 (5th Cir. 2010) (unpubl.)[6]; *Kahane v. Sec'y of State*, 700 F.Supp. 1162, 1165 n. 3 (D.D.C. 1988); *Icaza v. Shultz*, 656 F.Supp. 819, 822 n. 5 (D.D.C. 1987). A close reading of *Rusk*, however, does not support Hinojosa's assertion of authority.

The petitioner in *Rusk* was a doctor named Joseph Cort, who fled the United States to avoid being drafted. *Rusk*, 369 U.S. at 369. The State Department revoked Cort's citizenship under a law that stripped citizenship from those who evaded the draft. *Id*.

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[6] "Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of *res judicata*, collateral estoppel or law of the case." 5TH CIR. R. 47.5.4.

Cort, who was living in Czechoslovakia at the time, sued the Secretary of State in federal court seeking a declaration that he retained his citizenship. *Id*. The Supreme Court specifically identified: "the question posed is whether the procedures specified in § 360(b) and (c)[7] provide the only method of reviewing the Secretary of State's determination that Cort has forfeited his citizenship." *Rusk*, 369 U.S. at 375 (footnote added). The Supreme Court held that the APA provided an independent jurisdictional basis to review the Secretary of State's determination. *Rusk*, 369 U.S. at 379-380. That specific holding regarding the APA, as discussed earlier, was later expressly abrogated by the Supreme Court in *Califano*. 430 U.S. at 105.

The Seventh Circuit has observed that *Rusk* did not hold that § 1503(a) was available to persons outside of the United States. *Bensky*, 391 F.3d at 896. Indeed, there is little basis for concluding that *Rusk* currently permits a petitioner, who is outside of the United States, to pursue a claim under § 1503(a).

For example, in an unpublished case – *Parham* – the Fifth Circuit addressed the applicability of *Rusk* in a footnote. The plaintiffs in *Parham* – who claimed to be children of American Servicemen – were in the Philippines when they filed their complaint. At the time they filed suit, they had yet to receive a final agency

[7] The references to § 360 are references to section 360 of the Immigration and Nationality Act; that section was codified at 8 U.S.C. § 1503.

decision on their citizenship petitions. *Parham*, 374 F. App'x at 505 n. 2.

At the outset, the Fifth Circuit noted that the "plain language" of § 1503(a) limited its application to those who were within the U.S. *Parham*, 374 F. App'x at 505 n. 2. The Court also noted that *Rusk* and *Kahane* may permit those outside of the United States to utilize the procedures set forth in § 1503(a). *Id.* The Court then considered whether the plaintiffs should be required to proceed under § 1503(a) or § 1503(b), but decided "we need not decide which of these two provisions is appropriate." *Id*.

The Fifth Circuit arrived at its conclusion because – whether the plaintiffs were permitted to proceed under § 1503(a) or § 1503(b) – there was no final agency action, so judicial review was "currently inappropriate." *Id*. Thus, the Fifth Circuit did not decide the availability of § 1503(a) for persons who are not within the United States. Indeed, given the posture of [that] case, that issue was not ripe for decision.

As previously noted, unpublished opinions from the Fifth Circuit are not definitive resolution of contested issues, but may be persuasive. *Ballard v. Burton*, 444 F.3d 391, 401 n. 7 (5th Cir. 2006). Moreover, given the absence of specific direction and the express failure to decide the applicability of § 1503(a) to individuals located outside of the United States, the weight to be accorded to *Parham* in the current situation is limited. In short, given that the Fifth Circuit addressed the § 1503(a) issue in a single footnote; in an

unpublished decision; and did not conclusively resolve the question, *Parham* provides little guidance in resolving the matter. Accordingly, the Court believes that the plain language of the statute should control. *See In re Universal Seismic Associates, Inc.*, 288 F.3d 205, 207 (5th Cir. 2002) ("as in any case of statutory interpretation, we look to the plain language of the statute, reading it as a whole and mindful of the linguistic choices made by Congress.").

This does not mean that Hinojosa is left without a vehicle through which to pursue her citizenship claim. She may still follow the procedures set forth in § 1503(b) and § 1503(c). What she cannot do, given that she is not present in the United States, is pursue relief under § 1503(a). Accordingly, this claim should be dismissed.

IV. Recommendation

It is recommended that the motion to dismiss filed by Defendants Petra Horn, John F. Kerry, Jeh Johnson and the United States of America be granted. Dkt. No. 7. It is further recommended that the complaint filed by Raquel Hinojosa be dismissed without prejudice for lack of jurisdiction.

The parties have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Andrew S. Hanen, United

States District Judge. 28 U.S.C. § 636(b)(1). Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *See* § 636(b)(1); *Thomas v Arn*, 474 U.S. 140, 149 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

DONE at Brownsville, Texas, on September 9, 2016.

/s/ Ronald G. Morgan
Ronald G. Morgan
United States
Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DENISSE VILLAFRANCA, Plaintiff,	§	
v.	§	Civil Action No. 1:16-cv-155
JOHN F. KERRY, U.S. Secretary of State; UNITED STATES OF AMERICA; PETRA HORN, Port Director, Customs and Border Protection; and JONATHAN M. ROLBIN, Director, Legal Affairs and Law Enforcement Liaison, U.S. Department of State, Defendants.	§	

ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS

(Filed Jan. 9, 2017)

This case arises from the revocation of Denisse Villafranca's passport and Villafranca's subsequent inability to enter the United States through the U.S. port of entry in Brownsville, Texas. Villafranca (hereafter "Plaintiff') requests that this Court grant her habeas relief and issue her a declaratory judgment of U.S. citizenship. She also requests review of the denial of her passport under the Administrative Procedures Act (hereafter "APA"). Currently before the Court is "Defendants' Motion to Dismiss" (Docket No. 26). For the reasons set forth below, this Court lacks jurisdiction to

hear Plaintiff's case. Accordingly, "Defendants' Motion to Dismiss" (Docket No. 26) is **GRANTED**.

I. FACTUAL BACKGROUND

Plaintiff alleges she was born in Brownsville, Texas in November 1977 with the assistance of a midwife. Am. Compl., Docket No. 3 at 3. Three days after her birth, her birth was registered with the Texas Department of Health–Bureau of Vital Statistics, showing her date of birth as November 1977 and her place of birth as Brownsville, Texas. *Id.* (citing Sealed Exhibits, Docket No. 4 at 4). Plaintiff's parents were Mexican nationals with border crossing cards, which they used to enter the United States prior to the birth of their daughter. Docket No. 3 at 3. Plaintiff and her parents returned to Mexico shortly thereafter. *Id.*

In August 1978, Plaintiff's parents registered her birth in Mexico in order to enroll her in school and ensure her status as their heir. *Id.* Plaintiff alleges, however, that the Mexican civil registry contains two errors: (1) that her birth was registered in August 1977, and (2) that she was born in Madero, Tamaulipas, Mexico in June 1977. *See id.* (citing Docket No. 4 at 21).

Plaintiff was baptized in Tampico, Tamaulipas, Mexico three weeks after her birth was registered in Mexico. Docket No. 3 at 4. Her baptismal certificate reflects that she was born in November 1977 in Brownsville, Texas. *Id.* (citing Docket No. 4 at 27).

On August 17, 2005, Plaintiff applied for and was issued a U.S. passport, valid for ten years. *Id.* at 4. In 2010, Plaintiff filed suit against the Mexican Civil Registry and had her Mexican birth certificate corrected to show she was born in November 1977 in Brownsville, Texas. *Id.* (citing Docket No. 4 at 22).

On November 6, 2014, the Department of State issued a correspondence which revoked Plaintiff's passport via a determination that the Plaintiff was not a U.S. national. Docket No. 3 at 4–5 (citing Docket No. 4 at 110). The Department of State correspondence referenced the results of an investigation which revealed Plaintiff had a Mexican birth certificate stating she was born in June 1977 in Madero, Tamaulipas, Mexico. Docket No. 3 at 5. The corrections to Plaintiff's Mexican birth certificate in 2010 were not addressed in said correspondence. *Id.* The Department of State further concluded that Plaintiff was not entitled to a hearing under 22 C.F.R. §§ 51.70–51.74 because her passport was revoked on grounds of "non-nationality." Pl.'s Resp. to Mot. to Dismiss, Docket No. 25 at 5 (citing 22 C.F.R. § 51.70(b)(1)). Plaintiff was ordered to surrender her passport immediately. *Id.*

Sometime before receipt of the above referenced November 6, 2014 correspondence, Plaintiff had traveled to Mexico. *See* Docket No. 25 at 5. On November 7, 2014, Plaintiff attempted to reenter the United States through the port of entry in Brownsville, Texas. Plaintiff's passport was taken from her, and she was denied entry into the United States. *Id.*

II. PROCEDURAL HISTORY

Plaintiff filed her original petition on June 29, 2016, which she amended on July 13, 2016. Docket No. 3. Plaintiff seeks a declaratory judgment that she is a U.S. citizen, under 8 U.S.C. § 1503. *Id.* at 7. Plaintiff also seeks habeas relief on the ground that her exclusion from the United States serves as a restraint on her liberty not shared by similarly situated individuals, and therefore renders her "in custody" for purposes of 28 U.S.C. § 2241. *Id.* at 5–6. Finally, Plaintiff seeks review of an adverse agency action under the Administrative Procedures Act (hereafter "APA") for the revocation of her passport without hearing or sufficient cause. *Id.* at 7.

Defendants filed the instant motion to dismiss for lack of jurisdiction on October 19, 2016, which was amended on November 28, 2016 to conform to this Court's local rules. Docket Nos. 17 and 26. Plaintiff filed a response to the motion to dismiss on November 25, 2016. Docket No. 25.

III. DISCUSSION

A claim must be dismissed pursuant to FED. R. CIV. P. 12(b)(1) if the court lacks subject matter jurisdiction to hear it. The party asserting jurisdiction—in this case the Plaintiff—has the burden to prove by a preponderance of the evidence that the court has jurisdiction. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001).

A. <u>The Court lacks jurisdiction to provide declaratory relief under 8 U.S.C. § 1503(a)</u>

Pursuant to 8 U.S.C. § 1503(a),

> [i]f any person who is *within the United States* claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States. . . .

8 U.S.C. § 1503(a) (emphasis added). Defendants first argue that this Court lacks jurisdiction to provide Plaintiff with the declaratory relief she seeks because she is not "within the United States" as required under 8 U.S.C. § 1503(a). Docket No. 26 at 6. Defendants contend that standing on U.S. soil at an international border is insufficient to be "within the United States," and Plaintiff's own admission that she is unable to enter the United States demonstrates she is not currently within the United States for purposes of § 1503(a). *Id.* at 14. Defendants also argue that allowing individuals who appear at a U.S. port of entry to proceed under § 1503(a) undermines the dual scheme Congress created for individuals within the United States versus those abroad. *Id.* at 15.

In contrast, Plaintiff argues that § 1503(a) does not require an individual to "enter" the United States;

instead, the plain language of § 1503(a) requires only that an individual be "within the United States" without regard to how that individual came to be there. Docket No. 25 at 16.

The Court agrees with Defendants that standing on U.S. soil at a U.S. port of entry is insufficient to be "within the United States" for purposes of § 1503(a). "Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result." *United States v. Female Juvenile,* 103 F.3d 14, 16–17 (5th Cir. 1996) (internal citations omitted). To construe § 1503(a)'s "within the United States" as including ports of entry conflicts with § 1503(b)'s instruction that persons not within the United States must apply for a certificate of identity "for the purpose of traveling to a port of entry in the United States and applying for admission." If a port of entry is "within the United States," then applying for a certificate of identity would be unnecessary; persons not within the United States could simply present themselves at a port of entry in order to fall under the Plaintiff's erroneous proposed scope of § 1503(a). Surely, Congress did not intend for a result which rendered § 1503(b) meaningless. The Court finds that it lacks jurisdiction under § 1503(a) because Plaintiff is not within the United States.

B. <u>The Court lacks jurisdiction to provide habeas relief.</u>

To establish jurisdiction under 28 U.S.C. § 2241, a plaintiff must be "in custody" at the time she files her petition and she must identify a custodian. *See Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003). Although physical detention is not necessary to establish "custody," a plaintiff must be subject to significant restraints on her liberty not shared by the general public. *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S. Ct. 373, 376, 9 L. Ed. 2d 285 (1963). Additionally, a plaintiff seeking habeas relief under § 2241 must exhaust all administrative remedies which might provide relief prior to filing suit in federal court. *Smith v. Thompson*, 937 F.2d 217, 219 (5th Cir. 1991).

The administrative remedies at issue are described in 8 U.S.C. § 1503(b)–(c). Under § 1503(b),

> [i]f any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity.

Under § 1503(c),

> [a] person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in *habeas corpus proceedings* and not otherwise.

8 U.S.C. § 1503(b)–(c) (emphasis added). Although administrative remedies generally must be exhausted, "[e]xceptions to the exhaustion requirement are appropriate where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action." *Hessbrook v. Lennon,* 777 F.2d 999 (5th Cir. 1985).

Defendants argue that Plaintiff is not "in custody" and that her failure to exhaust the remedies set forth under 8 U.S.C. § 1503(b)–(c) preclude her from seeking habeas relief. Docket No. 26 at 10–11, 15. In contrast, Plaintiff argues that she is "in custody" and that the remedies described in § 1503(b)–(c) are "options that may be pursued, not procedures requiring exhaustion" as evidenced by the use of the permissive "may" throughout the statute. Docket No. 25 at 9–13, 17–19.

Plaintiff also argues that the remedies outlined in§ 1503(b)–(c) are no longer in use, thus negating any need to exhaust said remedies. *Id.* at 19.

Without deciding the issue of "custody," the Court finds that § 1503(b)–(c) set forth administrative remedies that must be exhausted, the failure of which divests this Court of jurisdiction. The Court does not interpret the term "may" to mean that the procedures described in § 1503(b)–(c) are permissive. Rather, the use of "may" leaves open to those individuals who have been denied passports on the basis of non-nationality the option of first reapplying for a U.S. passport by submitting new evidence not previously considered, if available.

The Court also finds that Plaintiff has not demonstrated that exhaustion is not required on the basis that available administrative remedies are wholly inappropriate. Although Plaintiff argues that certificates of identity have rarely been issued over the last 30 years, Plaintiff also states that only three inquires [sic] have been made for certificates of identity over the last three years. Docket No. 25 at 19. The fact that few people have applied for certificates of identity does not render said option wholly inappropriate. Thus, the Court finds that it lacks jurisdiction to provide habeas relief because Plaintiff has not exhausted her administrative remedies.

C. The Court lacks jurisdiction under the APA.

The APA only permits judicial review of an adverse agency decision where no other adequate remedy is available. *Bowen v. Massachusetts,* 487 U.S. 879, 903, 108 S. Ct. 2722, 2736, 101 L. Ed. 2d 749 (1988). Defendants argue that § 1503(b)–(c) lay out adequate procedures by which an individual who is abroad may make a claim of citizenship. Docket No. 26 at 16. In contrast, Plaintiff argues that § 1503(b)–(c) are not "adequate remedies" because § 1503(b) does not provide for judicial review of a decision by the Secretary of State to deny a certificate of identity. Docket No. 25 at 21.

Assuming Plaintiff is correct, the Secretary of State has yet to deny any application for a certificate of identity submitted by Plaintiff, and there is no evidence to suggest that the Secretary of State will deny her application. Accordingly, Plaintiff's concerns are speculative and do not upset a finding that § 1503(b)–(c) lay out adequate procedures by which an individual who is abroad may make a claim of citizenship. The Court finds that it lacks jurisdiction under the APA because Plaintiff has adequate remedy available.

ORDER

For the foregoing reasons, "Defendants' Motion to Dismiss" (Docket No. 26) is **GRANTED**. The Clerk's Office is hereby **ORDERED** to close this case.

Signed on this 9th day of January, 2017.

/s/ [Illegible]
Rolando Olvera
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40077

RAQUEL HINOJOSA, also known as
Raquel Flores Venegas,

Plaintiff-Appellant

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; UNITED STATES OF AMERICA,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 11, 2018)

(Opinion May 8, 2018, 5 Cir., ___, ___ F.3d ___)

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E B Clement
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40134

DENISSE VILLAFRANCA,

Plaintiff-Appellant

v.

MIKE POMPEO, SECRETARY, U.S. DEPARTMENT OF STATE; UNITED STATES OF AMERICA; PETRA HORN, Customs and Border Protection Port Director, Brownsville, Texas; JONATHAN M. ROLBIN, Director, Legal Affairs and Law Enforcement Liaison, of the United States Department of State,

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Filed Jul. 11, 2018)

(Opinion May 08, 2018, 5 Cir., ___, ___ F.3d ___)

Before DENNIS, CLEMENT, and GRAVES, Circuit Judges.

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ENTERED FOR THE COURT:

/s/ E B Clement
UNITED STATES CIRCUIT JUDGE

DECLARATION OF KAREN L. CHRISTENSEN

1. I am the Deputy Assistant Secretary for Overseas Citizens Services (OCS) in the Bureau of Consular Affairs at the Department of State (DOS).

2. This affidavit is based on personal knowledge, information provided by employees of DOS, and DOS records.

3. Pursuant to authority in 8 U.S.C § 1503(b) and 22 C.F.R. § 50.11, DOS is capable of issuing a Certificate of Identity to eligible applicants. DOS currently makes available a form that an applicant may use to apply for a Certificate of Identity (FS-0343), and a form that constitutes the Certificate of Identity itself (FS-0343-A), to use in the event an individual applies and is found eligible for the Certificate. This application form was recently revised and may be revised further. It will also undergo OMB review as necessary.

4. OCS estimates that no Certificates of Identity have been issued in, at a minimum, 25 years. OCS is, for example, aware of an instance in which Department records indicate a Certificate of Identity was issued in 1987.

5. On October 3, 2016, DOS received an application for a Certificate of Identity at one of its consulates. Prior to that date, OCS is aware of only three inquiries regarding Certificates of Identity in the last three years at Embassies and Consulates, including the aforementioned case as well as Plaintiff Villafranca's. OCS is not aware of any other applications being made or processed at Consulate Monterrey in the last twelve (12) months.

6. The FAM currently available on the Department website discusses Certificates of Identity. *See* generally 7 FAM 1150 Appendix H. Generally speaking, the FAM is intended as guidance to consular officers who would adjudicate applications for Certificates of Identity, rather than instructions for the public. The FAM provisions related to Certificates of Identity are currently under internal review.

7. While this particular FAM provision is under review, the Department does not intend to hold applications for adjudication in abeyance.

8. Consulate Monterrey bas advised potential applicants and their counsel that they may submit an application form, two photographs, and evidence to support their application. When Plaintiff Villafranca advised post that he could not open the form, a PDF version was provided to him, a copy of which is attached hereto as Exhibit 1. To date, Plaintiff Villafranca has not submitted the application, according to Consulate Monterrey. Should any potential applicants have questions regarding the application form, they may contact the nearest U.S. Embassy or Consulate.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 6, 2016.

/s/ Karen L. Christensen
Karen L. Christensen

[LOGO] U.S. Department of State **APPLICATION FOR CERTIFICATE OF IDENTIFY** *(Under Section 360(b) of the Immigration and Nationality Act)*	Post Application Number
If more space is needed for any item or comments, use back of form.	

(Please print name in full) *(Last, First, MI)*
I, _____ _____
_____, hereby apply for a Certificate of Identify under Section 360(b) of the Immigration and Nationality Act.

Date of Birth *(mm-dd-yyyy)*	Height __ Feet __ Inches	Eyes	Hair

Visible Distinguishing Marks

Now Residing At

Permanent Residence	Has Been Since

RESIDENCES SINCE BIRTH

Address	From *(mm-dd-yyyy)*	To *(mm-dd-yyyy)*

OCCUPATIONS PURSUED		
Occupation	From *(mm-dd-yyyy)*	To *(mm-dd-yyyy)*

ENTERED THE UNITED STATES AS FOLLOWS:		
Place		Date *(mm-dd-yyyy)*
Name Used on Entering	Port of Entry	Name of Vessel or Aircraft *(if any)*

I claim to be a national of the United States:
☐ By Birth ☐ By Naturalization

(State the date when United States nationality is claimed to have been acquired, the facts and grounds in support of the claim, and the evidence submitted herewith. The statement should conform, so far as practicable, to the statements required in applications for passports.)

I have not committed any act which, to my knowledge, might have implied allegiance to, or a claim of nationality of, a foreign state, or committed any act or fulfilled any condition which would have caused my expatriation under the provisions of any law of the United States, except as follows: *(If any such act has been committed by the applicant, he shall specify in the following space the precise nature of the act, the place where and time when it was committed, and explain how, notwithstanding such act, his claim of United States nationality is made in good faith.)*

I claim a right or privilege as a national of the United States *(State specifically the nature of such claim.)*

Such right or privilege has been denied me by a department, independent agency, or executive official of the United States on the ground that I am not a national of the United States.*(State by what department, agency, or executive official of the United States the right or privilege was so denied, and the date and place of such denial.)*

I: ☐ Have ☐ Have Not filed a previous application for a certificate of Identity under Section 360(b) of the Immigration and Nationality Act. That application was filed on: *(Give date and place of filing. State whether granted or denied and if denied, give reason thereof, if known.)*

Since acquiring United States nationality, I: ☐ Have ☐ Have Not applied for passports of the following governments:

Government	Place	Date *(mm-dd-yyyy)*	Name Under which Applied For	Granted		Date *(mm-dd-yyyy)*
				Yes	No	

I: ☐ Have ☐ Have Not applied for United States immigration visas and United States visas on passport as follows:

Office	Place	Date *(mm-dd-yyyy)*	Name Under which Applied For	Granted Yes	Granted No	Date *(mm-dd-yyyy)*

Name of Mother	Address
Name of Father	Address
Name of Nearest Relative in the United States	Address

Place of Mother's Birth	Date *(mm-dd-yyyy)*	**STAPLE ONE PHOTO HERE DO NOT MAR FACE**

She Resided in the U.S.		At	The two photographs required must be 2 by 2 inches In size, unmounted, printed on thin paper, have a light background, and clearly show a full front view of applicant (with bare head, unless the applicant is a member of a
From *(mm-dd-yyyy)*	To *(mm-dd-yyyy)*		
Place of Father's Birth			
He Resided in the U.S.		At	
From *(mm-dd-yyyy)*	To *(mm-dd-yyyy)*		

			religious order wearing a headdress), with the distance from the top of head to point of chin approximately 1 1/4 inches. Snapshot group, or full-length photos will not be accepted. Photos submitted must have been taken within 30 days of date submitted.

I desire to proceed to the United States for the purpose of applying for admission thereto.

If granted a certificate of identity, I propose to travel to a port of entry in the United States and to apply for admission thereto within two months from the date of the Issuance of such certificate.

I understand that I may apply for admission into the United States at any port of entry and that I shall be subject to all the provisions of the Immigration and Nationality Act relating to the conduct of proceedings involving aliens seeking admission into the United States.

I solemnly swear (or affirm) that the statements made on all the pages of this application are true and that the photograph attached is a likeness of me.

_____

(Signature of Applicant)

Subscribed and sworn to before me this ____ day of ____, ____.
[SEAL] _____

Consul _____ of the United States at _____

☐ Issuance of Certificate of Identity Approved
(Date (mm-dd-yyyy)) _____

☐ Issuance of Certificate of Identity Denied
(Date (mm-dd-yyyy)) _____ For the following reasons:

(Use the reverse side of this page if additional space is needed)

7 FAM 1110 App. H

Foreign Affairs Manual
Chapter 7 Consular Affairs
7 FAM 1100 Acquisition and Retention
of U.S. Citizenship and Nationality
7 FAM 1100 Appendix H Miscellaneous
Citizenship and Nationality-Related
Certificates and Other Documents
(CT:CON-577; 05-27-2015)
(Office of Origin: CA/OCS/L)

7 FAM 1110 APPENDIX H SUMMARY

(CT:CON-577; 05-27-2015)

7 FAM 1160 THROUGH 1190 APPENDIX H UNASSIGNED

a. At one time the Bureau of Consular Affairs (CA) and U.S. embassies and consulates abroad issued certain citizenship related documents in addition to passports and Consular Reports of Birth Abroad of a Citizen of the United States of America. Issuance of these documents was covered by prior existing statutes and regulations. Most have fallen into disuse with the passage of time and changes in regulations. However, they still may be encountered in adjudicative situations. This replaces old *7 FAM 1400 Appendix F* (TL:CON-50; 09-07-1990).

b. The documents include:

(1) Certificates and Cards of Identity and Registration;

(2) Certificates of Non-Citizen National Status;

(3) Certificates of Nationality; and

(4) Certificates of Identity for Travel to the United States to Apply for Admission.

c. None of these U.S. Department of State documents is equivalent to Certificates of Citizenship issued by the Attorney General or by a court having naturalization jurisdiction and Certificates of Naturalization issued by the U.S. Immigration and Citizenship Service (USCIS). They do not constitute proof of U.S. citizenship under 22 U.S.C. 2705.

d. The U.S. Immigration and Naturalization Service (INS) issued Form I-197, United States Citizen Identification Cards and Form I-179, Identification Card for Use of Resident Citizen in the United States until the early 1980's. USCIS no longer issues the cards, and any person seeking such documentation should be advised that he or she may apply for a U.S. passport instead through normal passport issuing procedures. Although these cards are no longer issued, those that were issued are still recognized by USCIS and U.S. Customs and Border Protection (CBP) as evidence of citizenship under 8 CFR 235.10 for limited purposes. Possession of either document does not constitute proof of U.S. citizenship under 22 U.S.C. 2705, and they are not acceptable as proof of U.S. citizenship. It is secondary evidence. A person applying for a passport presenting such a document should be advised to present the primary evidence of citizenship set forth in *7 FAM 1100 Appendix B* (under development).

NOTE: Exemplars for the Form I-197 and Form I-179 are available in the USCIS publication M-274 Handbook for Employers.

e. Questions:

(1) If posts abroad receive such a document and have any question about it, you should immediately contact *the Office of Legal Affairs, Overseas Citizens Services, Bureau of Consular Affairs* (CA/OCS/L) at Ask-OCS-L @state.gov.

(2) Passport agencies and centers should contact *Passport Services' Adjudication Policy Division (CA/PPT/S/A/AP*) at AskPPTAdjudication@state.gov.
