No. 18-461

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ELISABETH (LISA) S BRODYAGA
Counsel of Record
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226
LisaBrodyaga@aol.com

CATHY J. POTTER
LAW FIRM OF
CATHY J. POTTER, PLLC
409 East Jackson Avenue
Harlingen, Texas 78550
(956) 622-3011
cpotter@cathypotterlaw.com

JAIME M. DIEZ
JONES AND CRANE
P.O. Box 3070
Brownsville, Texas 78523
(956) 544-3565
JaimeMDiez@aol.com

Attorneys for Petitioners

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

Respondents' claim that further review is unwarranted rests largely on two contentions: 1) that *Hinojosa et al. v. Horn et al.*, 896 F.3d 305 (5th Cir. 2018) does not conflict with *Rusk v. Cort*, 369 U.S. 367 (1962), or any other decision of this Court, and 2) that 8 U.S.C. §1503(b)-(c), provides an "adequate remedy in a court" within the meaning of 5 U.S.C. §704 for U.S. citizens[1] abroad whose passport applications were denied, or whose passports were revoked.

Petitioners disagree. *Hinojosa* conflicts with *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1815-16 (2016); *Sackett v. EPA*, 566 U.S. 120, 127 (2012), and most fundamentally, with *Rusk v. Cort*. As Circuit Judge James L. Dennis concluded in his dissent, *Cort* "remains good law" [APP:28]. *Cort* was *case specific*, holding that §1503(b)-(c) does not preempt review under the Administrative Procedure Act ("APA"), but not *fact specific*, in that it was not limited to its facts.[2] *See Riley v. California*, 134 S.Ct. 2473, 2494 (2014).

Alternatively, as Judge Dennis also concluded in his dissent [APP:21-27], the procedures of §1503(b)-(c) are so onerous that under *Hawkes*, they cannot

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[1] Because their cases were dismissed under Fed. R. Civ. P. 12(b)(1), F. R. Civ. P., Petitioners' claims of birth in Brownsville, Texas, are presumed true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

[2] *See Chacoty v. Tillerson*, 285 F.Supp.3d 293, 302-03 (D.D.C. 2018), rejecting DOS' contention that *Cort* was "limited to the facts of the case."

constitute an "adequate remedy," and, as suggested by *Cort* and held in *Sackett*, a possible remedy through one agency is an inadequate remedy for actions of another. Petitioners challenged actions of the Department of State ("DOS"), but under §1503(b)-(c), their citizenship claims would be reviewed by an Immigration Judge ("IJ"), under the Department of Justice, ("DOJ").

COUNTER STATEMENT

A. Ms. Hinojosa

As the Government explains DOS' denial of Ms. Hinojosa's passport [GOV:3]:

> In support of her application, Hinojosa provided her Texas birth certificate, a DNA test indicating that Mario Hinojosa Delgado is her father, and an affidavit from family members attesting to her birth in Texas. . . .
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> . . . Citing Hinojosa's Mexican birth certificate, the Department stated that "there is a reason to believe that the birth attendant who filed" Hinojosa's Texas "birth certificate did so fraudulently. . . ." The Department further stated that Hinojosa "ha[d] not submitted any early public records to support [her] birth in the United States. . . ."

However, as the District Court found [APP:33], the DNA test *showed* that Mario Hinojosa was Ms.

Hinojosa's father.[3] Her Texas birth certificate was filed five days after her birth,[4] and the "family members" who provided affidavits included Mario Hinojosa, who affirmed that he was present at her birth.[5] Her Mexican birth certificate, showing Higinio Flores as her father, was filed two months later [APP:32]. She grew up believing that she was born in Mexico and Higinio Flores was her father [APP:32]. Only as a teenager did she learn the truth. So her Texas birth certificate is her only early public record showing birth in Texas.

Under these circumstances, her Mexican birth certificate does not provide "'a reason to believe the birth attendant who filed' Hinojosa's Texas 'birth certificate did so fraudulently'" [GOV:3]. To the contrary, the Texas certificate, DNA test, and affidavit of her biological father demonstrate all but conclusively that it was the later-filed Mexican birth certificate that was fraudulent.

B. Ms. Villafranca

Similarly, Ms. Villafranca's Texas birth certificate was filed three days after her birth, while her (now judicially corrected) Mexican birth certificate was filed nine months later [APP:71]. As the Government concedes [GOV:4] (emphasis added):

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[3] The DNA test showed a 99.99997% probability that he is her biological father. *Hinojosa v. Horn et al.*, 1:16-cv-10 (S.D. Tex. 2017) (sealed) Dkt. No.2, at p.25.

[4] *Id.* at pp.3-4.

[5] *Id.* at p.16.

> In 2014, while Villafranca was traveling in Mexico, the Department of State revoked her passport, *based on a determination that she was not a U.S. national*. *Ibid.* The Department cited the results of an investigation that revealed her Mexican birth certificate indicating (before it was modified at Villafranca's request) that she was born in Mexico.

There are "early public records" showing Ms. Villafranca's birth in Texas, including her baptismal record, created when she was three weeks old [APP:71]. But DOS revoked her passport without prior notice, any opportunity to present these documents, or even a post-revocation hearing. And the Mexican birth certificate alone could not satisfy DOS' burden when revoking a passport of proving, by a preponderance of the evidence, that she is not a U.S. citizen.

Ms. Villafranca also had a SENTRI pass. She became so desperate to return to her family in Texas that she overcame her fear of trying to use it after her passport had been revoked. Fortunately, she was admitted, and promptly filed an action under 8 U.S.C. §1503(a) and the APA. *Villafranca v. Rolbin et al.*, 1:18-cv-178 (S.D. Tex.) (pending).

Rather than allow Petitioners to pursue APA actions from abroad, the Government insists that they submit to the procedures of 8 U.S.C. §1503(b)-(c), which characterize them as "aliens seeking admission," subjecting them to orders of expedited removal, months-long detention without access to bond or parole, and hearings before an IJ, which, as Judge Dennis

explained [APP:26-27], would not necessarily reach the issue of their citizenship.

Neither the District Court nor the Fifth Circuit addressed these factors. The District Court assumed that if Ms. Hinojosa presented a certificate of identity issued under §1503(b) at the port of entry, and was denied admission, she could immediately file a habeas petition. *See* [GOV:5] (emphasis added):

> The court further explained that, if the certificate of identity is granted, Hinojosa then "may apply for admission to the United States at any port of entry," and if denied admission she may *at that point* obtain judicial review through habeas corpus.

The Fifth Circuit adopted this erroneous assumption. *See* [GOV:6-7]:

> The court of appeals reasoned that the procedures prescribed in 8 U.S.C. 1503 provide a "direct and guaranteed path to judicial review. . . ." As the court explained, if petitioners seek and obtain certificates of identity, they may then seek admission at any point of entry under Section 1503(c). . . . If granted admission, the court explained, petitioners may seek a declaratory judgment that they are U.S. citizens under Section 1503(a); if denied admission, they may seek review through habeas corpus under Section 1503(c).

The determination of whether to admit someone presenting a certificate of identity is made, not by DHS at the port of entry, but by an IJ, many months later.

Thus, as Judge Dennis explained [APP:22-27], the procedures of §1503(b)-(c) provide neither a direct nor a guaranteed path to judicial review. *See* [APP: 23-24] (emphasis added):

> 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. . . . *[A]s 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*. FN3
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> FN3 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).

REPLY ARGUMENT

A. *Sackett*

The Government claims that Petitioners misread *Sackett*, because of the complicated procedures it involved, and assert [GOV:20-21], that:

> [T]here is no indication that, if petitioners sought and obtained certificates of identity from the Department of State, they would not be admitted to the United States by the agency charged with making that determination (the U.S. Department of Homeland Security) . . . [DHS] would not be precluded from permitting petitioners to enter if the available information warranted, merely because petitioners lack current passports.

However, DHS cannot lawfully admit persons presenting certificates of identity as U.S. citizens, since §1503(c) *requires* DHS to treat them as "aliens seeking admission." Lacking proper entry documents, 8 U.S.C. §1225(b)(1)(A)(i), and 8 C.F.R. §235.3(b)(1)(i), §235.3(b)(5)(i), §235.3(b)(5)(iv) and §235.6(a)(2)(ii) would mandate that DHS issue removal orders, detain them without the possibility of parole, except for medical emergencies or a "legitimate law enforcement objective," and refer them to an IJ to review their citizenship claims. Even if they had the legal authority to do so, the chances that DHS would admit as a U.S. citizen someone whose passport application had been denied, or whose passport had been revoked, are virtually nil.

The State Department denied Ms. Hinojosa's passport application and revoked Ms. Villafranca's U.S. passport. Immigration Judges fall under the Justice Department, 8 U.S.C. §1103(g). Therefore, Petitioners' facts fall squarely within *Sackett*'s principle, foreshadowed in *Cort*,[6] that a remedy available from one agency is not an "adequate remedy" for adverse actions of another.

B. *Hawkes*

As to *Hawkes*, the Government asserts [GOV:17-18]:

> [T]he mere fact that an alternative remedy prescribed by Congress involves administrative steps or may be less convenient than an APA suit for that or other reasons does not render them inadequate.

In urging that *Hawkes* is inapposite, the Government cites *Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009), noting that:

> 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

[6] *See* 369 U.S. at 375:

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

> the [alternative] remedy provided by Congress is adequate.

Petitioners are not claiming that §1503(b)-(c) is simply less *convenient* or *effective* than APA actions. Rather than providing a federal court remedy, §1503(b)-(c) sets the citizen on a tortured path to an IJ hearing. If unsuccessful before the IJ, removal follows, allowing for a habeas action. In Dr. Cort's case, the sole hardship *caused by* §1503(b)-(c) would have been the trip to a port of entry. His arrest would have resulted from the indictment for draft evasion, not §1503(b)-(c), and bond during the criminal proceedings would not have been legally barred.

By contrast, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Petitioners would face months-long detention, without access to bond or parole. With local detention facilities full, mostly with Central American asylum seekers, they probably would be transferred to another detention center, away from counsel, family, and witnesses. If they then failed to convince the IJ that they were born in Brownsville, and no other relief was available, the expedited removal orders issued at the port of entry would be executed, sending them to Mexico. Only then could they test their citizenship in habeas proceedings. If unsuccessful, the removal orders would stand, greatly complicating later attempts to immigrate through family members.

Thus, as concluded by Judge Dennis, and not meaningfully contested by the Government, the

§1503(b)-(c) procedures would impose onerous requirements, at a significant cost.[7] They also carry a risk of serious civil penalties.[8] Under *Hawkes*, they are not an *adequate* remedy for purposes of 5 U.S.C. §704.

C. *Rusk v. Cort*

Last, but certainly not least, *Rusk v. Cort* was *informed by*, but not *limited to*, the facts in Dr. Cort's case, and controls Petitioners' cases. As concluded therein, 369 U.S. at 379:

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

Not only was *Cort*'s holding categorical, but its reasoning relied more on the statute's plain language than individual facts. *See* 369 U.S. at 375:

> [S]ubsections (b) and (c) by their very terms simply provide that a person outside of the United States who wishes to assert his citizenship "may" apply for a certificate of identity and that a holder of a certificate of identity "may" apply for admission to the

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[7] Ironically, aside from any legal fees Petitioners would incur, the primary expense would be borne by tax-payers, since detaining Petitioners pending IJ hearings would cost thousands, if not tens of thousands, of dollars.

[8] "[D]eportation is a particularly severe 'penalty,' " *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

> United States. As the District Court said, "The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies."

And *id*. at 379:

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

This was also the conclusion reached in *Chacoty*, 285 F.Supp.3d at 303:

> *Cort's* holding—that "a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by [§1503](b) and (c)]"—rested on the text and legislative history of §1503. . . . It was not confined to the particular facts of the case.

Construing *Cort* in this manner would not, as the Government contends [GOV:16], "disregard the statutory structure and effectively nullify Congress's decision in Section 1503 to establish two distinct paths

depending on whether a person is within or outside the United States."

However, the two paths are not "distinct." A person born and living abroad who acquired U.S. citizenship through a citizen parent, has never been in the U.S. and is now over the age of sixteen cannot utilize §1503(b)-(c). Her only remedy is under the APA.[9]

The Government also urges [GOV:18-19], that (emphasis added):

> [P]etitioners' argument is *premised on a series of conjectures* about how the administrative process might unfold in *particular hypothetical claims* seeking review of the Department of State's determinations concerning their passports would necessarily be more efficient than the Section 1503(b) and (c) procedures or would result in equally adequate relief. In such an APA suit, if the district court found on the merits that the Department failed sufficiently to consider specific evidence or articulate the reasons for its decision, and if that decision were sustained on appeal, *the appropriate remedy would be to remand the matter for the Department to reconsider its determinations, not to direct the Department to reach a specific determination on the ultimate issue whether petitioners are entitled to passports.*

No certificate of identity has been issued since 1987 [APP:85], and DOS characterizes them as having

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[9] *See, e.g., West v. Pompeo*, 1:18-cv-00160 (S.D. Tex. 2018), where such a person successfully sued under the APA.

"fallen into disuse with the passage of time and changes in regulations" [APP:93]. The onerous procedures imposed by IIRIRA on "aliens seeking admission," as Petitioners would be classified under §1503(c), are not "hypothetical." Petitioners, and others similarly situated,[10] are unwilling to act as guinea pigs in testing whether DHS would follow the law.

Finally, contrary to the Government's claim [GOV:19], APA review *could* reach the ultimate issue of Petitioners' citizenship, because DOS' factfinding procedures are woefully inadequate. Passport applications are adjudicated without live testimony. As with Ms. Villafranca and Ana Villarreal, passports may be revoked without notice or opportunity to be heard while the bearer is traveling abroad. And notwithstanding 8 U.S.C. §1504, administrative appeals are precluded where passport applications are denied or passports are revoked for "non-nationality," 22 C.F.R. §51.70(b)(1). Therefore, 5 U.S.C. §706(2)(F) would allow *de novo* review of their citizenship claims. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) ("*de novo* review is authorized when the action

[10] Ana Villarreal's passport also was revoked while she was vacationing abroad, and her APA action was dismissed for lack of jurisdiction, *Villarreal et al. v. Horn et al.*, 203 F.Supp.3d 765 (S.D. Tex. 2016). Her Fifth Circuit appeal, No.18-40688, is stayed, pending resolution of the instant petition. Daniela Garcia, the plaintiff in *Garcia v. Pompeo et al.*, 1:16-cv-293 (S.D. Tex.) (pending), was offered, and declined, a certificate of identity. Both Ms. Hinojosa and Ms. Garcia are still in Mexico.

is adjudicatory in nature and the agency factfinding procedures are inadequate").

CONCLUSION

It therefore is respectfully urged that the instant petition for a Writ of Certiorari be granted.

Respectfully submitted,

ELISABETH (LISA) S BRODYAGA
Counsel of Record
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226
LisaBrodyaga@aol.com

JAIME M. DIEZ
JONES AND CRANE
P.O. Box 3070
Brownsville, Texas 78523
(956) 544-3565
JaimeMDiez@aol.com

CATHY J. POTTER
LAW FIRM OF CATHY J. POTTER, PLLC
409 East Jackson Avenue
Harlingen, Texas 78550
(956) 622-3011
cpotter@cathypotterlaw.com

Attorneys for Petitioners

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