Case No. 17-40134

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DENISSE VILLAFRANCA,
Plaintiff-Appellant,

v.

REX W. TILLERSON, 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.

On Appeal from Grant of Motion to Dismiss for Lack of Subject Matter Jurisdiction by the United States District Court for the Southern District of Texas

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APPELLEES' RESPONSE BRIEF

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

KATHERINE E.M. GOETTEL
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation

GENEVIEVE M. KELLY
Trial Attorney
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4705
Va. Bar No. 86183
genevieve.m.kelly@usdoj.gov

Attorneys for Appellees

VILLAFRANCA v. TILLERSON
Case No. 17-40134

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff Denisse Villafranca; Plaintiff's Attorney Cathy J. Potter; Plaintiff Attorney's Law Office − Law Office of Cathy J. Potter PLLC, 203 South Commerce Street, Harlingen, Texas, 78550

s/ Genevieve Kelly
Attorney of record for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees Petra Horn, Port Director, United States Customs and Border Protection et al. ("Defendants"), request oral argument in this case. This appeal raises significant issues of statutory interpretation and proper application of case law, and Defendants believe that adjudication of those issues would be aided by oral argument.

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STATEMENT OF JURISDICTION

Ms. Denisse Villafranca brings this appeal of the district court's decision granting the Government's motion to dismiss for lack of jurisdiction. Accordingly, this Court's appellate jurisdiction to review the district court's final order arises from 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

STATEMENT OF ISSUES

I. Did the district court properly determine that it lacks jurisdiction over Villafranca's claim for declaratory judgment under 8 U.S.C. § 1503(a) because she was not "within the United States" when she filed her lawsuit?

II. Did the district court properly find that it lacks jurisdiction over Villafranca's habeas corpus claim because 8 U.S.C. § 1503(b)-(c) provides her an alternative avenue to possible relief?

III. Did the district court properly find that it lacks subject matter jurisdiction to review Villafranca's passport revocation under the Administrative Procedure Act because Congress has provided her an adequate remedy under 8 U.S.C. § 1503(b)-(c)?

STATEMENT OF THE CASE

Villafranca alleges that she was born in Brownsville, Texas, in November 1977 and that a midwife attended her birth. ROA.8. She alleges that her birth was

registered with the state of Texas three days after she was born. ROA.8. She also alleges that the day after she was born, her parents − who lived in Mexico and were Mexican citizens − took her back to Mexico, where she was raised. ROA.8. She states that her parents registered her birth in Mexico when she nine months old and that "errors were made by the civil registry in the original Mexican birth certificate that were later corrected." ROA.8.

In 2005, Ms. Villafranca applied for and received a United States passport. ROA.9. Ms. Villafranca subsequently sought to have Mexican birth certificate amended to indicate that she was born in the United States. ROA.9. She successfully amended her Mexican birth certificate 2012. ROA.9. That same year, she petitioned United States Citizenship and Immigration Services to sponsor her parents for immigrant visas. ROA.9.

On November 6, 2014, while she was in Mexico, the United States Department of State sent a letter to her Brownsville, Texas, address, informing her that her U.S. passport had been revoked and ordering her to surrender it. ROA.9-10. The Department's revocation letter noted that an investigation revealed she had a Mexican birth certificate listing Mexico as her birthplace, which was registered three months before her alleged birthdate in Texas. ROA.9-10. The revocation letter informed her that she could challenge this decision in federal

court by filing an action under 8 U.S.C. §1503. ROA.10. Title 8 section 1503 of the United State Code states, in its entirety:

> **(a) Proceedings for declaration of United States nationality**
> If 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, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.
>
> **(b) Application for certificate of identity; appeal**
>
> If 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. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been

> physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.
>
> **(c) Application for admission to United States under certificate of identity; revision of determination**
>
> A person who has been issued a certificate of identity under the provisions of subsection (b), 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. 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. § 1503.

On June 29, 2016, Ms. Villafranca filed suit against the Department of State in the United States District Court for the Southern District of Texas. ROA.6. She alleged in her complaint that at the time her attorney filed the lawsuit, she was "at the Gateway Bridge," which connects Brownsville, Texas, to Matamoros, Mexico, having approached the bridge from the Mexican side. ROA.7.

She brought three claims. ROA.20-22. First, she alleged that she was being unlawfully detained in government custody because her inability to travel without a U.S. passport was tantamount to being in physical custody. ROA.20-21. Second, she requested de novo judicial review of the revocation of her passport under the procedures outlined in 8 U.S.C. § 1503(a). ROA.22. Third, she sought,

as an alternative to § 1503(a) review, a review of her passport revocation under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. *Id.*

Defendants moved to dismiss Ms. Villafranca's complaint on October 19, 2016. First, Defendants argued that the Court lacked jurisdiction over Ms. Villafranca's habeas corpus claim because she was not in custody. ROA.63-66. Second, Defendants argued that Ms. Villafranca could not obtain review of her passport revocation under § 1503(a) because that provision applies only to persons "within the United States," and Ms. Villafranca filed suit while standing at the port of entry to the United States. ROA.67-68. Third, Defendants argued that Ms. Villafranca could not bring either a habeas action or an APA claim because the procedures provided in § 1503(b)-(c) permitting aliens to apply for a certificate of identity from the U.S. Consulate in order to seek admission to the United States constituted adequate alternative paths for obtaining relief. ROA.68-69.

In her response to Defendants' Motion to Dismiss, Ms. Villafranca argued that she was "within the United States" when she filed her lawsuit because she was standing "at the point of entry at the Gateway Bridge in Brownsville, Texas." ROA.80, 87-88. She also argued that she was in custody for purposes of habeas review because her exclusion from a country where she claims citizenship constitutes a significant restraint on her liberty and that Defendant Petra Horn, Customs and Border Protection Port Director in Brownsville, Texas, was her

proper custodian. ROA.85-86. Finally, she argued that she need not exhaust the procedures outlined in 8 U.S.C. § 1503(b)-(c) because those procedures have not "been in use for at least twenty-five years" and therefore cannot provide an adequate remedy. ROA.89-90.

On January 10, 2017, the district court granted Defendants' Motion to Dismiss. ROA.175. The court found that it lacked jurisdiction over all three of Ms. Villafranca's claims. ROA.177-81. First, the court determined that it lacked jurisdiction to provide Ms. Villafranca declaratory relief under 8 U.S.C. § 1503(a). ROA.177-79. The court determined that § 1503(a), which applies only to plaintiffs who are "within the United States," does not include Ms. Villafranca. ROA.177-79. The court reasoned that Ms. Villafranca's interpretation of "within the United States" conflicts with the language of § 1503(b), which instructs persons not within the United States to apply for a certificate of identity "for the purpose of traveling to a port of entry in the United States and applying for admission." ROA.178-79.

Second, the district court determined that it lacked jurisdiction over Ms. Villafranca's habeas claim. ROA.179. Without reaching the issue of whether Ms. Villafranca was in custody, the district court determined that she had failed to exhaust the other remedies available to her under § 1503(b) and (c), as required before pursuing habeas relief. ROA.179 (citing *Smith v. Thompson*, 937 F.2d 217, 219 (5th Cir. 1991)). In response to Ms. Villafranca's claim that § 1503(b)-(c) do

not provide an appropriate remedy to her habeas action because the certificate of identity procedures had not been used over the past thirty years, the district court found that Ms. Villafranca failed to meet her burden. ROA.180. The district court stated that the small number of requests made for a certificate of identity over the past thirty years did not render the procedures inappropriate. ROA.180.

Finally, the district court determined that it lacked jurisdiction over Ms. Villafranca's APA claim. ROA.181. The court found that the procedures outlined in § 1503(b)-(c) provided an adequate alternative remedy to the APA. ROA.181. The court noted Ms. Villafranca's claim that § 1503(b) did not provide for judicial review of the Secretary of State's final denial of a certificate of identity. ROA.181. However, the district court stated that even if judicial review of the Secretary of State's denial was unavailable, Ms. Villafranca had yet to be denied a certificate of identity and there was no evidence to suggest that she would be denied if she applied. ROA.181. Accordingly, the district court determined that Ms. Villafranca's claim regarding the inadequacy of § 1503(b)-(c) should be dismissed as purely speculative. ROA.181.

Ms. Villafranca filed her Notice of Appeal on February 6, 2017. ROA.182.

SUMMARY OF THE ARGUMENT

The district court properly granted Defendants' Motion to Dismiss for lack of subject matter jurisdiction because Ms. Villafranca cannot pick and choose her

own remedies to challenge her passport revocation when Congress has already outlined her appropriate remedy. The district court correctly dismissed her claim for relief under 8 U.S.C. § 1503(a) because that provision is only available to persons bringing suit from within the United States. It correctly dismissed her habeas claim because it is possible for her to obtain relief from § 1503(b)-(c). It also correctly dismissed her APA claim because § 1503(b)-(c) provides her an adequate alternative to APA review of her passport revocation. Accordingly, the Court should affirm the district court's decision to dismiss Ms. Villafranca's complaint.

ARGUMENT

I. Standard of Review

This Court reviews a district court's dismissal for lack of subject-matter jurisdiction de novo. *Musslewhite v. State Bar of Texas*, 32 F.3d 942, 945 (5th Cir.1994). However, 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). Under that deferential standard, reversal is appropriate only when a district court "dismisses a petition on an erroneous legal conclusion or clearly erroneous finding of fact." *Rodriguez v. Johnson*, 104 F.3d 694, 696 (5th Cir.1997).

II. Federal Rule of Civil Procedure 12(b)(1) Standard

"'A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.'" *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005) (citation omitted). In evaluating whether subject matter jurisdiction exists, the court accepts all uncontroverted, well-pleaded factual allegations in the complaint as true. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011). Still, the plaintiff bears the burden of establishing subject matter jurisdiction. *See Willoughby v. United States ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). The court may find that subject matter jurisdiction is lacking based on "'(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.* (citation omitted).

III. The District Court Correctly Dismissed Ms. Villafranca's Complaint for Lack of Subject Matter Jurisdiction.

A. The district court correctly determined that it lacked jurisdiction to review Ms. Villafranca's passport revocation under § 1503(a) because she is not "within the United States."

The district court correctly determined that it lacked jurisdiction over Ms. Villafranca's § 1503 claim because § 1503(a)'s procedures apply only to persons bringing their claims from "within the United States."[1]

Ms. Villafranca claims that at the time her attorney filed her lawsuit, she was "at the point of entry at the Gateway Bridge in Brownsville, Texas on United States soil . . . well within the boundaries of the United States." App.'s Br. at 3. However, she fails to explain how she could be both at the entrance of Gateway Bridge (having approached the bridge from the Mexican side) *and* within the United States. *See id.* As the Fifth Circuit has repeatedly recognized, there is an "actual border," the *crossing* of which − not the approaching of which − subjects a person to the rights and responsibilities of a person within the United States. *See*, *e.g., United States v. Stone*, 659 F.2d 569, 572 (5th Cir. 1981).

Ms. Villafranca asserts that "entering" the United States under the Immigration and Nationality Act is not a necessary condition for being "within the

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[1] In the alternative, the district court could have dismissed Ms. Villafranca's § 1503 claim under Federal Rule of Civil Procedure 12(b)(6) for failure to allege sufficient facts upon which to state a claim.

United States." App.'s Br. at 13. That is true for the many people born in the United States who have never left the country and have therefore never entered it from abroad. But Ms. Villafranca's insistence that a person abroad can get "within the United States" by standing near the border at an inspection station "on United States soil" is nonsensical. Not only would such an interpretation of "within the United States" render § 1503(b) meaningless, as the district court observed, but it would also render the entire inspection station meaningless. The purpose of the station is to inspect people *before* they get within the United States. *See e.g.*, *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (noting the longstanding distinction in immigration law between persons "com[ing] to our shores seeking admission" and "those who are within the United States after an entry").

Ms. Villafranca seems to argue in the alternative that the § 1503(a) procedures are not limited to persons "within the United States" but are also available to persons outside of the United States who prefer to file a lawsuit under § 1503(a) rather than to apply for a certificate of identity under § 1503(b)-(c). To support that reading of the statute, she argues that § 1503(b)-(c) states that persons abroad whose passports have been denied or revoked *may* apply for a certificate of identity. She argues that unlike *shall*, the permissive *may* indicates that the § 1503(b)-(c) procedures are options and not requirements, and that she may choose to proceed under § 1503(a) or (b)-(c). App.'s Br. at 15-16.

Ms. Villafranca is correct that § 1503(b)-(c)'s "may" indicates that a person located abroad whose passport has been denied or revoked is not required to seek a certificate of identity. Such a person may also reapply for a passport or may simply choose not to challenge the denial or revocation and to remain abroad. However, § 1503(b)-(c)'s permissive "may" does not entitle persons abroad to bring suit under § 1503(a). Section 1503(a) clearly and unambiguously applies only to persons bringing suit from "within the United States." 8 U.S.C. § 1503(a).

Ms. Villafranca urges the Court to expand § 1503(a) to aliens abroad on the basis that the Department of State itself once instructed people that they could bring § 1503(a) suits from abroad in a Foreign Affairs Manual. App.'s Br. at 16-17 (citing 7 FAM 1150 app. H (c)-(d) at ROA.101). However, that manual does not actually state that § 1503(a) suits can be brought from abroad. *See* ROA.101. And even if it did, a manual can never supersede the plain language of a statute. *Hinojosa v. Horn*, No. 1:16-CV-00010, 2017 WL 281753, at *4 (S.D. Tex. Jan. 20, 2017), *appeal filed*, 17-40077 (5th Cir. Jan. 24, 2017) (finding that the same Foreign Service Manual failed to support Hinojosa's contention that § 1503(a) applies to persons outside of the United States).

Ms. Villafranca also claims that unless § 1503(a) procedures are made available to persons outside of the United States, she would be forced to violate 8 U.S.C. § 1185(b), which requires U.S. citizens to bear a valid passport when they

enter the United States. App.'s Br. at 7-8; *see* 8 U.S.C. § 1185(b) ("Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, 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 passport."). This argument is unavailing. Congress created very specific procedures in § 1503(c) that instruct Ms. Villafranca – who has presented questionable claims of U.S. citizenship by birth – on how to seek admission to the United States with a certificate of identity. There is no reason for Ms. Villafranca to think that following those specific procedures would subject her to liability under § 1185(b)'s much more general rule requiring U.S. citizens to carry their United States passports when entering the United States. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Once again. § 1503(c) expressly provides that individuals with a certificate of identity may seek admission to the United States with that document.

None of Ms. Villafranca's arguments for why § 1503(a) applies to her is availing. Accordingly, the district court properly dismissed her claim for § 1503(a) review for lack of jurisdiction.

B. The district court correctly dismissed Ms. Villafranca's habeas claim for lack of jurisdiction.

The district court did not abuse its discretion by concluding that it lacked jurisdiction over Ms. Villafranca's habeas claim because habeas relief is only available to petitioners who are in custody and who have exhausted all "administrative remedies which might provide appropriate relief . . . prior to seeking relief in the federal courts." *Smith v. Thompson*, 937 F.2d 217, 219 (5th Cir. 1991) (quoting *Hessbrook v. Lennon,* 777 F.2d 999, 1003 (5th Cir. 1985)); *see* ROA.179.

1. The district court correctly determined that Ms. Villafranca failed to exhaust the remedies outlined in § 1503(b)-(c) that might provide her appropriate relief.

The relief Ms. Villafranca seeks in habeas is to reenter the United States and to travel abroad. ROA.20-21. Even assuming arguendo that this constitutes a valid habeas claim, the district court properly dismissed the claim on the ground that § 1503(b)-(c) procedures might provide her appropriate relief. To survive a motion to dismiss her habeas claims, Ms. Villafranca bore the burden of proving that the procedures in § 1503(b)-(c) cannot provide her appropriate relief.[2] *Smith*, 937 F.2d at 219; *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)

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[2] As discussed above in section A of this brief, the district court properly found that the word "may" in 1503(b) does not render the exhaustion requirements in habeas law (or in the APA) permissive.

("[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."). Before this Court, she bears the burden of showing that the district court abused its discretion by dismissing her habeas claim. *Gallegos-Hernandez*, 688 F.3d at 194. She cannot make that showing.

Section 1503(b) provides that upon proof to the satisfaction of the consular officer that an application is made "in good faith and has a substantial basis," the officer "shall issue to such person a certificate of identity." 8 U.S.C. § 1503(b). Once she receives the certificate, she may use it to travel to a port of entry and apply for admission. *Id.* If she is denied a Certificate of Identity, she may appeal this decision to the Secretary of State. *Id.* If she is not admitted, but treated as an arriving alien at the border, she can bring a habeas corpus claim at that time in which she could present evidence of citizenship. 8 U.S.C. § 1503(c). Because these procedures might provide Ms. Villafranca the relief she seeks, she is foreclosed from bringing a habeas claim until she has exhausted these other remedies.

Ms. Villafranca claims that the § 1503(b)-(c) procedures cannot provide her relief because certificates of identity have fallen into disuse and have rarely been utilized over the past thirty years. App.'s Br. at 17. However, as the district court properly observed, while Ms. Villafranca claimed only a small number of people had applied for a certificate of identity in the past thirty years, the mere fact that

few people have applied for certificates of identity does not render the certificate "wholly inappropriate." ROA.180.

Ms. Villafranca also argues that § 1503(b)-(c) "does not provide a means whereby the Department of State can reconsider its decision, correct any errors, or re-issue the U.S. passport." App.'s Br. at 20. This is wrong. If she is denied admission at the border, she can then seek habeas proceedings in which she could present evidence of citizenship. 8 U.S.C. § 1503(c). If she is admitted, she will then be "within the United States" for purposes of 1503(a). Either way, § 1503(b)-(c) offers her a mechanism for seeking relief.

Finally, Ms. Villafranca argues that a certificate of identity would give her no advantage in being admitted to the United States over an alien applying for admission without any documentation. App.'s Br. at 20-21. However, that purely speculative claim has no basis in law or fact. Ms. Villafranca apparently cites *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (BIA 2011),[3] for the proposition that had she arrived at the border with a certificate of identity, "the Customs and Border Protection agents would have had two options: to put her in removal proceedings under 8 U.S.C. § 1229 or [to] order expedited removal." App.'s Br. at 20. That case is entirely inapposite. In that case, the Board of Immigration

[3] Ms. Villafranca actually cites *Matter of E-R- & L-R-*, 20 I. & N. Dec. 520 (BIA 2011), but Defendants could not locate a Board of Immigration Appeals case with that name and citation.

Appeals decided that when an alien arrives in the United States without valid documentation, DHS possesses the prosecutorial discretion to place the alien in regular removal proceedings in lieu of expedited removal proceedings. *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. at 520. The case makes no reference to certificates of identity, much less indicates that an individual who arrives with one must be placed immediately in removal proceedings; in fact, the statute makes clear the purpose of this document is to allow the bearer to seek admission. *Id.* In any case, the argument that she can seek admission and habeas review without first obtaining a certificate of identity under § 1503(b) only confirms that she has failed to exhaust her available administrative remedies.

As the district court correctly determined, Ms. Villafranca has failed to meet her burden of showing that the § 1503(b)-(c) procedures are wholly inappropriate to the relief she seeks. Accordingly, the Court should affirm the district court's dismissal of her habeas claim.

2. Although the district court declined to reach the issue, habeas relief is also foreclosed to Ms. Villafranca because she is not in custody.

The district court declined to reach the issue of whether Ms. Villafranca was even in custody for purposes of filing a habeas petition. ROA.180. Should this Court reach the issue, it should determine that she is not in custody. *See, e.g.*,

Davis v. Scott, 157 F.3d 1003, 1005 (5th Cir. 1998) ("[T]his court may affirm a judgment upon any basis supported by the record.").

Ms. Villafranca has not presented any arguments to this Court in support of her assertion that she is "in custody." *See generally* App.'s Br. In the district court, she argued that the revocation of her passport places her in custody because it imposes significant restraints on her liberty that are not shared by the populace at large. ROA.80-82 (citing *Jones v. Cunningham*, 371 U.S. 236 (1963)). That argument must fail. *Jones* had nothing to do with international travel but held only that a U.S. citizen who is on parole, but not incarcerated, was "in custody" for purposes of habeas jurisdiction. *See Jones,* 371 U.S. at 236. In addition, various circuit courts and district court have explained that mere exclusion from the United States does not constitute "custody, "without subjecting the individual to detention or imposing other restrictions on her movement. *See, e.g.*, *Samirah v. O'Connell*, 335 F.3d 545, 551 (7th Cir. 2003); *Patel v. U.S. Att'y Gen.*, 334 F.3d 1259, 1263 & n.4 (11th Cir. 2003) ("While [Petitioner's] removal from the United States may limit his opportunities to re-enter this country, this does not constitute a severe restraint on his individual liberty."); *Chavez-Coronado v. Cockrell*, No. Civ. A. 3:02-cv-797-L, 2003 WL 21505417, at *6 (N.D. Tex. Apr. 4, 2003) ("When the quote in *Jones* … is put into the proper context, the passage does not support the

premise that an alien satisfies the 'in custody' requirement simply by being excluded from the United States and thus having his movements restrained.").

In addition, the district courts in this Circuit have repeatedly, uniformly, and correctly held that the "inability to travel internationally is a restraint generally shared by the populace of United States who do not have a passport," and that the self-professed U.S. citizen's lack of a passport does not constitute "custody." *Garza v. Clinton*, No. H-10-0049, 2010 WL 5464263, at *3 (S.D. Tex. Dec. 29, 2010); *see also*, *e.g.*, *Villarreal v. Horn*, 203 F. Supp. 3d 765, 771 (S.D. Tex. 2016); *Villegas v. Clinton*, H-10-029, 2010 WL 5387553 at *5 (S.D. Tex. Dec. 20, 2010) (noting that even "United States citizens have been required to present a passport to enter the United States following a trip abroad," including trips to "Canada, Mexico, the Caribbean, and Bermuda").

To the extent she claims that she is in custody because she cannot re-enter the United States following her passport revocation, this argument is also incompatible with Fifth Circuit precedent. That analysis, if accepted, would be applicable to non-citizens removed from the United States, rendering them all in custody, a claim the Fifth Circuit has rejected. *See Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011) (holding petitioner was not in custody because he "failed to show that his deportation was the result of any extreme circumstances or that he is subject to any restraints in Mexico not experienced by other non-citizens who

lack the documentation to enter the United States"). As with the plaintiff in *Merlan*, Villafranca has not shown here that she is subject to any restraints not shared by other individuals abroad who lack a valid U.S. passport. *See id*. She, therefore, is not in custody and cannot establish a valid habeas claim.

C. The district court correctly determined that it lacked jurisdiction over Ms. Villafranca's APA claim.

The district court correctly dismissed Ms. Villafranca's APA claim. Just as Ms. Villafranca's habeas claim is foreclosed by her failure to exhaust the remedies in § 1503(b)-(c), Villafranca's APA claim is also foreclosed by the adequate alternative remedy made available in § 1503(b)-(c). 8 U.S.C. § 704; *see Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) ("§ 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.") (internal quotations omitted).

To determine whether there is an "other adequate remedy," courts consider the nature of the plaintiff's injury and whether the other remedies available to the plaintiff are "adequate" to redress the injury. *Garcia v. Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009). Whether other judicial remedies are available "hinges on whether the alternative remedies are 'adequate' to redress the injury alleged, although the alternative need not be 'more effective' than APA review." *S.T. ex rel. Trivedi v. Napolitano*, No. H-12-285, 2012 WL 6048222, at *4 (S.D. Tex. Dec.

5, 2012) (quoting *Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1532-33 (D.C. Cir. 1983)).

The § 1503(b)-(c) procedures provide Ms. Villafranca an adequate remedy by which she can not only seek admission into the United States but by which she can ultimately obtain judicial review. If she obtains a certificate of identity and is not admitted into the United States, she can present evidence of citizenship in habeas proceedings. 8 U.S.C. § 1503(c). If she applies for a certificate of identity and is refused, she can appeal the decision to the Secretary of State. 8 U.S.C. § 1503(b). If the Secretary of State affirms the denial and no other remedy is available to her, she can seek review of the Secretary's determination in district court under the APA. 5 U.S.C. § 701 *et seq*. Alternatively, if she obtains a certificate of identity and is admitted, she is then "within the United States" for purposes of 1503(a).

Ms. Villafranca argues that § 1503(b)-(c) procedures do not provide an "other adequate remedy" because § 1503 offers no review of the Secretary of State's denial of a certificate of identity. App.'s Br. at 23. But as the district court determined, Ms. Villafranca is merely speculating that the Secretary of State will deny her application, and speculation is insufficient to demonstrate that the § 1503(b)-(c) procedures are inadequate. *See* ROA.181. In addition, Ms. Villafranca offers no explanation for why she believes that judicial review of the

Secretary of State's denial is unavailable. *See* App.'s Br. at 23. If she applies for a certificate of identity and is denied, and the denial is affirmed by the Secretary of State, that denial would presumably constitute a "final agencv action for which there is no other adequate remedy," and would be reviewable under the APA. 5 U.S.C. § 704. Ms. Villafranca has presented no facts or legal authority suggesting otherwise. *See* App.'s Br. at 23.

Ms. Villafranca also relies on *Rusk v. Cort*, 369 U.S. 367 (1962), to argue that the § 1503(b)-(c) procedures are not an adequate remedy under the APA. App.'s Br. at 12, 23-24. But her reliance on *Cort* is misplaced for at least two reasons. First, litigants can no longer cite the APA as an independent source of subject matter jurisdiction, as Cort did. *Califano v. Sanders*, 430 U.S. 99, 106-07 (1977). Rather, the APA is now construed solely as a limited waiver of sovereign immunity applying only where there is a "final agency action for which there is no other adequate remedy in a court." *Id.*; 5 U.S.C. § 704; *Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 488 (5th Cir. 2014). As such, the Court strictly construes the scope of § 704 in favor of the sovereign.[4] *Id.*; *Dep't of Army*

[4] This standard differs from the "clear and convincing evidence" standard applied to other statutes outside of the APA that the government may argue preclude judicial review under the APA entirely. *See, e.g.*, *Texas v. United States*, 787 F.3d 733, 755 (5th Cir. 2015).

v. Blue Fox, Inc., 525 U.S. 255, 261 (1999). With that understanding in mind, *Cort* does not control the outcome of this case.

Second, *Cort* is nevertheless distinguishable from this case because none of the facts that rendered the § 1503(b)-(c) procedures inadequate for Cort are present here. The State Department never doubted that Cort, who was born in Massachusetts in 1927, was a U.S. citizen at birth. *Cort*, 369 U.S. at 369. Cort registered for the Selective Service in 1951 shortly before traveling to Europe. *Id.* While in Europe, he failed to report for the draft board's required physical examinations and for induction into the Armed Forces in Massachusetts. *Id.* In 1954, while Cort was still in Europe, he was charged in federal criminal court with draft evasion. *Id.* He later applied from Europe to renew his expired passport and was denied under then § 349(a)(10) of the Immigration and Nationality Act, which stated that U.S. citizens who stayed outside of the country for the purpose of avoiding the draft would lose their citizenship. *Id.*

Cort sought review of his passport denial from abroad under the APA. In particular, he sought to challenge the constitutionality of the statute that stripped native-born U.S. citizens of their citizenship for draft evasion. *Cort*, 369 U.S. at 370. The Government moved to dismiss the action on the grounds that § 1503(b)-(c) provided the exclusive procedure under which Cort could attack the administrative determination that he was not a citizen. *Id.* The district court

denied the Government's motion, finding that § 1503(b)-(c) did not provide Cort an "other adequate remedy" under the APA. *Id.* The district court later found that the statute upon which the State Department stripped Cort of his citizenship was unconstitutional. *Id.*

The Supreme Court upheld the district court's determination that § 1503(b)-(c) did not provide Cort an adequate alternative remedy. *Cort*, 369 U.S. at 375. In doing so, the Supreme Court observed that because Cort had been criminally charged with draft evasion, seeking admission into the United States under § 1503(b)-(c) would subject him to criminal detention and prosecution, even if his challenge to the loss of his citizenship were successful. *Id.* The Supreme Court concluded that Congress did not "intend[ ] 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." *Cort*, 369 U.S. at 375 (emphasis added).[5]

The Court should decline to erroneously broaden the holding in *Cort* to the very different circumstances here. First, not only were Cort's identity and U.S.

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[5] The concurrence was also concerned with the possibility that there would be no judicial review of the Secretary of State's final decision to deny a certificate of identity under § 1503(b). *Cort*, 369 U.S. at 381 (Brennan, J., concurring). However, it provided no rationale for that concern. *Id.*

birth never in question, but Cort was not seeking entry into the United States. Accordingly, it is not surprising that the procedures in § 1503(b)-(c) were deemed inadequate for Cort when those procedures were designed to prevent people from bringing frivolous claims of U.S. citizenship in order to gain admission into the United States. *See Cort*, 369 U.S. at 391-96 (Harlan, J., dissenting) (explaining the legislative history of § 1503(b)-(c)). Second, Cort would have faced criminal detention and prosecution had he sought admission at the border, even if he had prevailed in his separate citizenship claim. Ms. Villafranca has not alleged any similar concerns. The nature of her alleged injury – being unable to enter the United States and travel abroad − is entirely different. *See Garcia*, 563 F.3d at 525. Third − and perhaps most significantly − the crux of Cort's claim was a constitutional challenge to the statute under which the State Department revoked his citizenship for draft evasion.[6] The administrative process outlined in § 1503(b)-(c) to help establish a potential litigant's identity could not have helped resolve his constitutional claim. *See, e.g., Califano*, 430 U.S. at 109 (declining to require exhaustion under the APA where constitutional questions are "unsuited to resolution in administrative hearing procedures"). The heart of Ms. Villafranca's

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[6] Notably, the Supreme Court postponed consideration of the jurisdictional question until after the lower court held that the statute upon which the State Department relied to strip Cort of his citizenship was unconstitutional. *Cort*, 369 U.S. at 370 n.4.

claim, by contrast, is that she was born in the United States. This is precisely the type of factual dispute that the administrative procedures in § 1503(b)-(c) were designed to address. *See* 8 U.S.C. § 1503(b)-(c); *Cort*, 369 U.S. at 391-96 (Harlan, J., dissenting) (explaining the legislative history of § 1503(b)-(c)). Accordingly, Ms. Villafranca's reliance on *Cort* is misplaced, and the Court should affirm the district court's determination that § 1503(b)-(c) provides Ms. Villafranca an adequate remedy under the APA. *See Ferretti v. Dulles*, 246 F.2d 544, 547 (2d Cir. 1957) (holding that the plaintiff's attempt to seek judicial review of agency action was "premature," as she had not exhausted the administrative remedies provided in § 1503(b)-(c)).

Ms. Villafranca cannot rely on the APA to circumvent the statutory procedures proscribed for challenging the revocation of her passport from abroad. Therefore, the Court should affirm the district court's dismissal of her APA claim for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision to dismiss Ms. Villafranca's complaint for lack of subject matter jurisdiction.

Dated: May 16, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

KATHERINE E.M. GOETTEL
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation

s/ Genevieve M. Kelly
GENEVIEVE M. KELLY
Trial Attorney
District Court Section
Office of Immigration Litigation
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4705
Va. Bar No. 86183
genevieve.m.kelly@usdoj.gov

Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I, Genevieve Kelly, certify that today, the 16th day of May, 2017, a copy of Appellees' foregoing Response Brief was served on the Appellant, Ms. Villfranca, via the electronic filing system of the U.S. Court of Appeals for the Fifth Circuit.

Dated: May 16, 2017

s/ Genevieve Kelly
Trial Attorney
U.S. Department of Justice

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6409 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font size and Times New Roman font style.

s/ Genevieve Kelly
Trial Attorney
U.S. Department of Justice