Case No. 17-40077

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAQUEL HINOJOSA, also known as Raquel Flores Venegas,

Plaintiff-Appellant,

v.

PETRA HORN, Port Director, United States Customs and Border Protection;
REX W. TILLERSON, Secretary, U.S. Department of State;
JOHN F. KELLY, Secretary, U.S. Department of Homeland Security;
UNITED STATES OF AMERICA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas,
the Honorable Rolando Olvera, Presiding
No. 1:16-cv-00010

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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-Appellant Raquel Hinojosa, represented by Lisa S. Brodyaga, Esq., of Refugio Del Rio Grande, and Jaime M. Diez, Esq., of Jones & Crane.

There are no other private (non-governmental) parties. Defendants-Appellees Petra Horn, Port Director, United States Customs and Border Protection; Rex W. Tillerson, Secretary, U.S. Department of State; John F. Kelly, Secretary, U.S. Department of Homeland Security; and the United States of America are represented by the U.S. Department of Justice, Civil Division, Office of Immigration Litigation, District Court Section, Hans H. Chen, lead counsel.

Dated: April 18, 2017

/s/ Hans H. Chen

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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, proper application of case law, and the operation of executive agencies. Adjudication of those issues would be aided by oral argument.

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STATEMENT OF JURISDICTION

On January 1, 2016, Plaintiff-Appellant Raquel Hinojosa, also known as Raquel Flores Venegas ("Hinojosa"), filed a Complaint that seeks, as its primary relief, district court review of the U.S. Department of State's denial of Hinojosa's passport application. ROA.7-16. Hinojosa initially claimed that the District Court had subject matter jurisdiction to hear such claims under the statute relating to the alleged denial of a right or privilege of U.S. citizenship, 8 U.S.C. § 1503(a), and under 28 U.S.C. § 1331, the federal question statute. Hinojosa also claimed that the Court possessed jurisdiction under the habeas statute, 28 U.S.C. § 2241, and that the Court could consider her claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq*.

On January 20, 2017, the District Court entered a final order adopting the report and recommendation of Magistrate Judge Ronald G. Morgan, granting Defendants' motion to dismiss, and dismissing the Complaint. ROA.390-400. On January 24, 2017, Hinojosa filed a timely notice of appeal of the District Court's order. ROA.401.

This Court's appellate jurisdiction to review the District Court's final order arises from 28 U.S.C. § 1291 ("courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

STATEMENT OF ISSUES

Did the District Court properly find that it lacks habeas jurisdiction to review Hinojosa's claims because she is not "in custody" and has not exhausted the administrative remedy available to her?

Did the District Court properly find that it lacks subject matter jurisdiction to review Hinojosa's passport denial under the APA where she has an adequate remedy available to her under 8 U.S.C. § 1503(b)-(c)?

FACTUAL BACKGROUND

Hinojosa alleges that she was born in Brownsville, Texas, in June 1973 and that a midwife attended her birth. ROA.9 (Compl. ¶ 7). She alleges that her birth was registered with the state of Texas five days after she was born, under the name Raquel Hinojosa. ROA.9 (Compl. ¶ 7). She admits, however, that two months after her birth, her mother – who is now deceased – registered Hinojosa's birth in Mexico, on a birth certificate stating that Hinojosa's name was Raquel Flores Venegas, that the child was born in Matamoros, Tamaulipas, Mexico, and that the child's biological father was Higinio Flores. ROA.10 (Compl. ¶¶ 7a, 9).[1] Hinojosa's certificate of baptism, dated November 11, 1973, similarly states that

[1] The Complaint assigns the same number to two consecutive paragraphs. Defendants' citation to paragraph 7a refers to the second of these.

her name is Raquel Flores Venegas, that she was born in Mexico, and that her father is Higinio Flores. ROA.11 (Compl. ¶ 9).

Hinojosa claims that when she was fourteen years old, her mother told Hinojosa that Hinojosa's "true name" was Raquel Hinojosa, that Hinojosa was born in Brownsville, Texas, and that her biological father was not Flores but Mario Hinojosa. ROA.10 (Compl. ¶ 7a).

Twenty-seven years later, in July 2015, Hinojosa filed an application for a U.S. passport. ROA.432-93 (Compl. Ex. 2). With that application, she submitted an affidavit from Mario Hinojosa and a report of DNA testing results that she claims shows that Mr. Hinojosa is her biological father. ROA.442; ROA.451-53. On September 10, 2015, the State Department requested additional evidence from Hinojosa. ROA.10 (Compl. ¶ 8). Hinojosa responded with a letter on October 4, 2015, in which she referred to her previous submission but did not provide any further evidence. ROA.10 (Compl. ¶ 8); ROA.495-97. On November 13, 2015, the State Department denied Hinojosa's passport application on the grounds that she had provided insufficient documentation to establish that she had been born in the United States, stating, in relevant part:

> The documentation you provided to support your claim of birth in the United States is not sufficient to establish by a preponderance of the evidence that you were born in the United States. There exists a foreign birth record indicating that your birth occurred in Mexico. 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 indicated that you cannot submit any evidence that supports your birth in Texas. Also, all of the supporting evidence that was submitted and/or found shows your place of birth as Mexico. Therefore, we are unable to determine that you are entitled to a passport and your application is denied.

ROA.12-13 (Compl. ¶ 10). Hinojosa responded to the denial by filing her Complaint in this action on January 15, 2016, ROA.7-16, allegedly while standing "at a port of entry" in Brownville, Texas, "unable to enter the United States. . . ." ROA.9 (Compl. ¶ 4).

Hinojosa's Complaint originally included three causes of action. The first sought issuance of a writ of habeas corpus finding that Hinojosa's inability to enter the United States constituted "custody" in violation of the laws and Constitution of the United States. ROA.13 (Compl. ¶ 12). The second sought review under the APA of the State Department's denial of her passport application. ROA.13 (Compl. ¶ 14). The third, which she subsequently voluntarily dismissed, sought a declaration of citizenship under 8 U.S.C. § 1503(a). ROA.14 (Compl. ¶ 16).

On March 28, 2016, Defendants filed a Motion to Dismiss the Complaint. ROA.26-48. In her opposition to Defendants' Motion to Dismiss, Hinojosa consented to dismissal of her third cause of action under 8 U.S.C. § 1503(a), conceding that she lacked the residence within in the United States required to bring a claim under that section. ROA.63 n.3. The District Court noted Hinojosa's

abandonment of her Section 1503(a) claim in its decision dismissing her other claims, ROA.393. Hinojosa reaffirms her voluntary dismissal of that claim on appeal. Appellant's Br. 3 n.4.

On August 9, 2016, Magistrate Judge Morgan issued a Report and Recommendation for dismissal of Hinojosa's claims for lack of subject matter jurisdiction. ROA.146-160. On January 20, 2017, the District Court issued an opinion adopting the Report and Recommendation, granting Defendants' Motion to Dismiss, and dismissing the Complaint for lack of subject matter jurisdiction. ROA.390-400.

The Magistrate Judge recommended in his report that Hinojosa had failed to satisfy the "in custody" requirement for habeas jurisdiction. ROA.152-53 (concluding that Hinojosa is not in custody because she "is not being subjected to restraints that are not shared by all U.S. citizens," all of whom are also "unable to travel internationally or legally re-enter the United States" unless they bear a U.S. passport). The District Court adopted the Magistrate Judge's report, ROA.394-96, but also held that, even assuming *arguendo* that Hinojosa was "in custody," she was still not entitled to habeas relief because she had not exhausted the administrative remedies available to her – specifically the remedies provided for an individual outside the United States who is denied a right or privilege on the basis of non-nationality by8 U.S.C. § 1503(b) and (c). ROA.395-96. The District Court

rejected Hinojosa's argument that she need not follow what she characterized as the "barely available" administrative procedures at Section 1503(b)-(c), holding that exhaustion requires her to pursue available administrative remedies regardless of the likelihood of success. ROA.396. The District Court also rejected Hinojosa's argument that the State Department's Foreign Affairs Manual ("FAM") excused her from any obligation to exhaust that remedy at Section 1503(b)-(c). The District Court held that the FAM contained no such provision, and that, even if it did, the manual could not supersede the statute. ROA.396. Because Hinojosa had not exhausted her available administrative remedies, the District Court concluded that habeas relief was unavailable. ROA.396.

The District Court next rejected Hinojosa's argument that the APA provides the District Court with jurisdiction over her claims. ROA.397. The District Court found that the denial of Hinojosa's passport was not a final agency action as required for relief through the APA and 28 U.S.C. § 1331, the statute relating to federal question jurisdiction. ROA.397-98. The District Court concluded that without final agency action, it lacked subject matter jurisdiction to consider Hinojosa's APA claim. ROA.397. The District Court also found that it could not award Hinojosa relief under the APA because she had not exhausted the adequate alternative remedies provided by 8 U.S.C. § 1503(b)-(c). ROA.397.

Finally, the District Court rejected Hinojosa's argument, raised for the first time in her objections to the Report and Recommendation, that it should infer a habeas or APA remedy under the doctrine of constitutional avoidance because failing to do so would render 8 U.S.C. § 1185(b), the statute that requires U.S. citizens to possess a passport in order to enter or depart the United States, unconstitutional as applied to her. The District Court held that Hinojosa had failed to establish standing to bring an as-applied challenge to Section 1185 because that statute had never been applied to her. The District Court accordingly dismissed that claim for lack of subject matter jurisdiction. ROA.399.

The District Court concluded by pointing out that Hinojosa was not without recourse. She could seek redress, as Defendants have argued, through Section 1503(b)-(c) by seeking a certificate of identity, traveling to a U.S. port of entry, and applying for admission. If she were denied a certificate of identity, she could pursue a remedy under the APA. If she were granted a certificate but denied admission, Hinojosa could then seek habeas relief from the Courts. ROA.399-40.

On January 24, 2017, Hinojosa filed her notice of appeal. ROA.401-02.

SUMMARY OF THE ARGUMENT

Congress has provided a remedy for an individual, like Hinojosa, who is denied a right or privilege on the ground that she is not a U.S. citizen. For an individual who is outside the United States or who does not reside in the United

States, that remedy is set forth at 8 U.S.C. § 1503(b)-(c): she may seek a certificate of identity from a U.S. consulate that she can then use to seek entry to the United States, and, if she is denied entry, may then seek review of that denial in habeas. Hinojosa would rather bypass the procedures set forth at Section 1503(b)-(c) and seek immediate habeas relief or a review of the State Department's action under the APA. But neither the habeas statute nor the APA grants courts jurisdiction over her efforts to evade the statutory scheme. This Court should affirm the District Court's dismissal of her claims.

First, the District Court lacked subject matter jurisdiction over Hinojosa's habeas claim at this point because Hinojosa is not "in custody" as required to establish jurisdiction under the habeas statute. As the Magistrate Judge and the District Court correctly concluded, Hinojosa "is not being subjected to restraints that are not shared by all U.S. citizens," who must bear a U.S. passport to lawfully re-enter the United States, and "are required to prove their citizenship prior to receiving a passport." ROA.153. Her location outside of the United States does not convert the denial of a passport application into "custody." If Hinojosa were correct, analogous government actions that remove individuals from the United States would result in those individuals' continuing (and arguably indefinite) "custody." The Fifth Circuit, however, has rejected that theory and held that such

aliens cannot be considered "in custody" for purposes of the habeas statute. *See Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011).

Second, the District Court also properly dismissed Hinojosa's habeas claim for failure to exhaust her administrative remedies, a precondition to seeking habeas relief in federal court. The Court correctly found no exceptions excusing Hinojosa from that exhaustion requirement. This Court should affirm the District Court's dismissal of Hinojosa's habeas claims on both grounds.

The District Court also properly dismissed Hinojosa's APA claim. The APA's waiver of sovereign immunity applies only where there is no alternative statutorily provided remedy or where the alternative remedy is inadequate. Here, however, Section 1503(b) and (c) provide an adequate remedy for Hinojosa to seek admission and, ultimately, judicial review of her claim of citizenship. Where such an adequate, alternative remedy exists, the APA does not permit Hinojosa to bypass that remedy.

Rusk v. Cort, 369 U.S. 367 (1962), a case in which Hinojosa places extensive but misplaced reliance, does not permit a different conclusion. That case held that the APA provided jurisdiction for an individual to challenge, while still abroad, the involuntary forfeiture of his citizenship, and did not require him, as Section 1503 would have, to travel to the United States to face criminal charges and incarceration related to the reasons the Government believed he had forfeited

his citizenship. *Rusk* fails to support Hinojosa's argument, for two reasons. First, as the District Court correctly held, *Rusk* had assumed that the APA was an independent grant of subject-matter jurisdiction, a position the Supreme Court expressly abrogated in *Califano v. Sanders*, 430 U.S. 99, 105 (1977). And second, nothing in *Rusk* suggests that its holding – that an undisputed U.S. citizen at birth should not have to travel to the United States and face criminal penalties to seek relief for an allegedly unconstitutional revocation and deprivation of his citizenship – should extend to an individual who has never been adjudicated to be a U.S. citizen and challenges only the factual finding that she was not. The District Court properly found, instead, that in view of the remedy available to Hinojosa at Section 1503(b)-(c), there is no "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and therefore the APA's waiver of sovereign immunity does not apply. This Court should affirm that decision.

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).

"'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 properly dismissed Hinojosa's habeas claim.

The District Court correctly found that the denial of Hinojosa's passport application does not place her in "custody," as required for the court to exercise jurisdiction over her habeas claims. District courts in this circuit have uniformly

held that denial of a passport to an alleged U.S. citizen located outside of the country does not constitute "custody," and doing so now would contravene Circuit law. None of the arguments that Hinojosa has raised establishes that she is "in custody." Even if they did, her failure to exhaust available, administrative remedies under 8 U.S.C. 1503(b)-(c) precludes her from seeking habeas relief in federal court. The Court should, therefore, affirm the dismissal of Hinojosa's habeas claim.

A. The Court lacks habeas jurisdiction because Hinojosa is not "in custody."

This Court lacks the requisite jurisdiction to review Hinojosa's habeas claim because, as the Magistrate Judge properly found and as the District Court properly adopted, she is not in custody. "For a court to have habeas jurisdiction under section 2241, the petitioner must be 'in custody' at the time he files his petition for the conviction or sentence he wishes to challenge." *Zolicoffer v. U.S. Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003); *see also* 28 U.S.C. § 2241(c). Although physical detention is not necessary to be "in custody," the petitioner must be subject to significant restraints on her liberty not shared by the public generally. *See Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

Hinojosa's inability to cross the U.S.-Mexican border without a valid passport is not a significant governmental restraint on her liberty that is unique to her situation. On the contrary, such a "restraint" is shared by every U.S. citizen

who does not bear a valid U.S. passport, *see* 8 U.S.C. § 1185(b) ("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"), as well as every alien who lacks the documentation to enter the United States. *Merlan*, 667 F.3d at 539; *see* 8 U.S.C. § 1185(a)(1) ("[I]t shall be unlawful for any alien to … enter the United States except under such reasonable rules, regulations and orders, and subject to such limitations and exceptions, as the President may prescribe[.]"); *see, e.g.*, 8 C.F.R. §§ 211.1 & 212.1 (arriving aliens must present "a valid, unexpired [immigrant or nonimmigrant] visa" to be admitted). Hinojosa alleges that she is "currently stranded in Mexico" and "unable to return to the U.S., engage in other international travel, or engage in any of the common occupations in the U.S." ROA.13 (Compl. ¶ 12). But 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 [the] United States who do not have a passport," and that the denial of a passport to a self-professed U.S. citizen does not constitute "custody." *Garza v. Clinton*, No. H-10-0049, 2010 WL 5464263, at *3 (S.D. Tex. Dec. 29, 2010); *see also Villarreal v. Horn*, 203 F.Supp.3d 765, 771 (S.D. Tex. 2016); *Villegas v. Clinton*, No. H-10-0029, 2010 WL 5387553, at *5 (S.D. Tex. Dec. 20, 2010) ("for decades United States citizens have been required to present a passport to enter the United States

following a trip abroad," a requirement that now includes trips to "Canada, Mexico, the Caribbean, and Bermuda"). ROA.153.

Hinojosa's claim that she is in custody because she cannot re-enter the country after the State Department denied her passport application is also incompatible with Fifth Circuit precedent. Appellant's Br. 35 ("Here, the *custody* alleged is Ms. Hinojosa's inability to exercise her fundamental right to enter and dwell peacefully within the U.S."). That custody analysis, if accepted, would be applicable to non-citizens removed from the United States, rendering them all in custody and making the legal validity of their removal the test of whether their custody is lawful. The Fifth Circuit, however, has held that a person who is removed from the United States is not ordinarily in custody for habeas purposes. *Merlan*, 667 F.3d at 539 (holding petitioner was not in custody because he failed to show "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*, Hinojosa has not shown that she is subject to any restraints not shared by citizens abroad who lack a valid U.S. passport. *See id*. She, therefore, is likewise not "in custody."

In her Complaint and her briefs below, Hinojosa relied heavily on a dictum from *Jones v. Cunningham* that "habeas corpus is available to an alien seeking entry into the United States." 371 U.S. 236, 239 (1963). ROA.9 (Compl. ¶ 4).

Jones, however, 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* 371 U.S. at 236. In addition, various Courts of Appeal and District Courts have analyzed *Jones*' dictum and explained that the mere exclusion of an alien from the United States, without subjecting him to detention or imposing other restrictions on his movement, does not constitute "custody." *See Samirah v. O'Connell*, 335 F.3d 545, 551 (7th Cir. 2003); *Patel v. U.S. Attn'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."); *Villegas*, 2010 WL 5387553, at *5 (no custody where "federal officials have not imposed restrictions on [Plaintiff's] freedom of movement").

As the Seventh Circuit explained in *Samirah*, none of the four cases that *Jones* cited in support of its dictum found habeas jurisdiction on the basis of "mere exclusion":

> In *Brownell*, the alien brought a declaratory action under the Administrative Procedure Act in order to challenge an

> order of deportation; he did not bring a habeas action. *Brownell* [*v. We Shung*, 352 U.S. 180, 182-86 (1956)]. In *Mezei*, the alien was detained by the government, and effectively imprisoned on Ellis Island, because the United States had permanently excluded him on security grounds and no other country was willing to accept him. [*Shaughnessy v. United States ex rel*] *Mezei*, [345 U.S. 206, 207 (1953),]. In *Knauff*, a case in which the Court did not discuss jurisdiction, the alien was likewise "detained at Ellis Island." [*United States ex rel.*] *Knauff* [*v. Shaughnessy*, 338 U.S. 537, 539 (1950)]. In *Jung Ah Lung*, a steamship master had detained an alien under color of federal law, the Chinese Restriction Act, and so the Court held the detention constituted federal custody for purposes of habeas jurisdiction. [*United States v.*] *Jung Ah Lung*, [124 U.S. 621, 626 (1888)]. . . .

Samirah, 335 F.3d at 551. Apart from *Brownell*, which was not a habeas action, each of the cases cited by *Jones* involved the plaintiff's detention by federal immigration officials. Hinojosa does not claim that any federal official, let alone the Secretary of State, has detained her or restricted her movement. In short, Hinojosa claims "mere exclusion," and so cannot be said to be "in custody" and cannot establish a basis for jurisdiction over her habeas claim.

B. Hinojosa cannot dispense with the requirement of "custody" by arguing that her exclusion from the United States denied her the ability to exercise a fundamental right.

Hinojosa next argues that her claim that the denial of her passport satisfies the custody requirement because "such denials deprive [U.S. citizens whose passport applications were denied while they were abroad] of their fundamental right to return, 'peacefully to dwell within' the country of which they are citizens."

Appellant's Br. 33. She suggests that such deprivation satisfies the custody requirement for habeas jurisdiction. *Id.* at 35-36. Appellant's Br. 33 ("If she is a U.S. citizen, as she was presumed to be for purposes of the Rule 12(b)(1) motion to dismiss, denial of her passport deprived her of her fundamental rights, and was therefore in violation of the United States Constitution.").

Even if Hinojosa were correct that the denial of her passport application was unlawful in preventing her from "returning" to the United States – which she is not, *see infra* Part V – she still must satisfy the requirement that she be "in custody" to bring a habeas challenge. *Zolicoffer*, 315 F.3d at 540. As this Court has explained, habeas "is not a generally available federal remedy for every violation of federal rights, nor can it be utilized to review a refusal to grant collateral administrative relief, unrelated to the legality of custody." *Zalawadia v. Ashcroft*, 371 F.3d 292, 299-300 (5th Cir. 2004) (cited at Appellant's Br. 35) (internal quotations and citations omitted); *see also U.S. ex rel. Kling v. LaVallee*, 306 F.2d 199, 203 (2d Cir. 1962) (Friendly, J., concurring) ("Federal habeas corpus is not the remedy for every ill to which flesh is heir."). Because merely being denied a passport is not "custody," *see, e.g.*, *Garza*, 2010 WL 5464263, at *3; *Villegas*, 2010 WL 5387553, at *5, the Court should affirm.

Finally, Hinojosa argues that the Court should manufacture habeas jurisdiction as a matter of constitutional avoidance. Appellant's Br. 38. She

argues that denying habeas jurisdiction and requiring her to utilize the remedy prescribed by Congress would render 8 U.S.C. § 1185(b) – the statute that requires U.S. citizens re-entering the United States to bear a valid passport – unconstitutional as applied to her. Appellant's Br. 37-38 ("is therefore urged that, if only for reasons of Constitutional avoidance, the Court should hold that Ms. Hinojosa is in custody for habeas purposes, since a contrary finding would render 8 U.S.C. § 1185(b) unconstitutional"). Even if Hinojosa's constitutional argument had any merit – and as the District Court found, it does not, *see infra* Section V – the doctrine of constitutional avoidance does not accomplish what Hinojosa wishes. Rather, the doctrine "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*." *Clark v. Martinez*, 543 U.S. 371, 385 (2005). As a mere tool of statutory interpretation, the constitutional avoidance doctrine cannot create subject-matter jurisdiction where none exists. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 265 (2011) ("The canon of constitutional avoidance directs courts to prefer the interpretation of a statute that preserves its validity, but the specter of a statute's unconstitutionality cannot be permitted to distort the antecedent question of jurisdiction. Courts interpret and evaluate a statute only after confirming their authority to adjudicate the case before them.") (Kennedy, J., concurring). Hinojosa

does not argue that Section 1185(b) is ambiguous. Nor does she advocate an interpretation of Section 1185(b) that diverges from the Government's. Indeed, nothing in her Complaint – which asks the Court to declare her a U.S. citizen and order the Defendants to issue her a passport – turns on the interpretation, application, or validity of Section 1185(b).

Rather, Hinojosa merely argues that it would be easier for her to challenge her passport denial if the Court found the subject matter jurisdiction to review that denial under habeas at this stage, rather than requiring her to follow the procedures set forth in 8 U.S.C. § 1503(b)-(c). Appellant's Br. 37. Because Hinojosa raises no statutory ambiguity in Section 1185(b), there is no reason to apply the doctrine of constitutional avoidance, and the Court should reject her suggestion that her novel claim concerning Section 1185(b) requires the Court to manufacture subject matter jurisdiction where none exists.

C. Habeas jurisdiction is also unavailable because Hinojosa has not exhausted her administrative remedies under 8 U.S.C. § 1503.

In addition to Hinojosa's failure to satisfy the custody requirement, the Court has a second basis to affirm the District Court's finding that it lacks jurisdiction over her habeas claims: her failure to exhaust her administrative remedies. The Supreme Court has cautioned that habeas is an "extraordinary remedy" that "has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe

nor immediate." *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). Habeas jurisdiction, therefore, is unavailable where the petitioner has an unexhausted administrative remedy. *See United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992).

The administrative remedy in this case is set forth in 8 U.S.C. § 1503(b)-(c). After the State Department denies the passport of an individual located outside the United States, Section 1503(b) and (c) create an administrative procedure that potentially allows that person to seek lawful entry into the United States. Section 1503(b) directs that person to first apply at a U.S. diplomatic or consular office for a certificate of identity for the purpose of travelling to a U.S. port of entry and applying for admission. Under 8 U.S.C. § 1503(c), a determination at the port of entry that the person is not entitled to admission to the United States is subject to judicial review in habeas corpus.

In her Appellant's Brief, Hinojosa acknowledges the procedure at Section 1503(b)-(c), which she refers to as an "optional means of challenging the denial of a passport application by a citizenship claimant abroad." Appellant's Br. 28; *see also id.* at 6 n.5, 10, 39. Hinojosa concedes that she has not pursued those measures, *id.* at 11, and she so cannot seek relief from this court. *See Ferretti v. Dulles*, 246 F.2d 544, 547 (2d Cir. 1957) (plaintiff's attempt to seek judicial review of agency action "premature" where she had not exhausted "the administrative remedies provided in" § 1503(b)-(c)). She has speculated that she might be

detained if she were to attempt to do so at some unspecified point in the future, *see* Appellant's Br. at 21, but Hinojosa does not claim that such speculative future detention suffices to establish habeas jurisdiction *at this stage*. Nor could she. *See Phifer v. Clark*, 115 F.3d 496, 500 (7th Cir. 1997) ("A habeas petition ought not to be predicated on future events unless and until those events actually occur."); *Toolasprashad v. Grondolsky*, 570 F. Supp. 2d 610, 635 (D.N.J. 2008) (speculative allegations regarding future parole hearing did not warrant habeas relief because "the language of § 2241 is set forth in present rather than in future terms").

No exception justifies Hinojosa's failure to exhaust the administrative remedy set forth at Section 1503(b)-(c), as the District Court correctly found. "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 (5th Cir. 1994). Having admitted that Section 1503(b)-(c) creates a "means of challenging the denial of a passport application by a citizenship claimant abroad," Appellant's Br. 28, Hinojosa cannot credibly claim that the administrative remedy laid out at Section 1503(b)-(c) is "unavailable."

Hinojosa does appear to claim that Section 1503(b)-(c) is an inadequate remedy because it does not provide the remedy that Hinojosa would prefer: "a

pathway through which DOS can reconsider" the denial of Hinojosa's passport application based on the State Department's finding of non-citizenship. Appellant's Br. 17-18. But an administrative remedy exists so long as "'a plaintiff's *injury* may be remedied in another action, even if that remedy would have no effect upon the challenged agency action.'" *Wash. Legal Found. v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993) (quoting *Coker v. Sullivan*, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990)). "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 v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985).

Hinojosa also denigrates the administrative remedy at Section 1503(b)-(c) because, she claims, it would provide her with little additional relief beyond what she could obtain by traveling to a U.S. port of entry and seeking admission without first applying for a certificate of identity pursuant to Section 1503(b). Appellant's Br. 25 n.14. That argument does not establish the unavailability of the administrative remedy set forth at Section 1503(b)-(c); to the contrary, it confirms that remedy's availability. Hinojosa cites neither authority nor logic to support her claim that she is excused from pursuing the administrative remedy available to her

at Section 1503(b)-(c) merely because there may be yet more procedural routes for seeking relief that she also has not exhausted.

Hinojosa provides no other argument why she should be excused from the exhaustion requirement for habeas. She has, therefore, provided no basis for this Court to find that the District Court abused its discretion by dismissing Hinojosa's habeas claim for failure to exhaust her administrative remedies. The Court should, as a result, affirm the District Court's finding that it lacked jurisdiction over Hinojosa's habeas claim.

IV. The District Court properly dismissed Hinojosa's APA claims for lack of subject matter jurisdiction.

The District Court properly dismissed for lack of subject matter jurisdiction the other remaining cause of action in Hinojosa's Petition, her claim arising from the APA. 5 U.S.C. § 701 *et seq*. Although Hinojosa emphasizes repeatedly throughout her Brief that subject matter jurisdiction exists for this claim not under the APA but under Section 1331, Appellant's Br. 16, 21, her failure to satisfy the APA's requirements for a waiver of sovereign immunity led the District Court to correctly conclude that it cannot rely on Section 1331 as a source of jurisdiction. The District Court also properly distinguished *Rusk*, the case that Hinojosa relies on almost exclusively to assert, incorrectly, that her APA claim can proceed even in light of the alternative remedy established at Section 1503(b) and (c).

A. Hinojosa cannot sue under the APA because an adequate alternative remedy exists: Section 1503(b)-(c).

Hinojosa cannot bring a claim under the APA because the APA in this case does not provide the requisite waiver of sovereign immunity required for federal question jurisdiction. Section 1331, it is true, confers federal question jurisdiction over civil actions where the matter in controversy arises under the Constitution, laws, or treaties of the United States, including U.S. laws concerning passport issuance. 28 U.S.C. § 1331. But Section 1331 does not permit jurisdiction to be exercised over a claim against the United States unless there is a separate, statutory waiver of sovereign immunity. *See Koehler v. United States*, 153 F.3d 263, 265-66 & n.2 (5th Cir. 1998) ("It is well settled . . . that sovereign immunity is not waived by a general jurisdictional statute such as 28 U.S.C. § 1331.").

Hinojosa claims, incorrectly, that the APA provides the requisite waiver of immunity in this case. Section 702 of the APA provides that a person suffering legal harm because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review. 5 U.S.C. § 702. But the APA's waiver of sovereign immunity applies only to agency actions for which there is "no other adequate remedy in a court." 5 U.S.C § 704. Section 704 "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." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

Thus, the APA's waiver of sovereign immunity applies only where there is no alternative, statutorily provided remedy or where the statutory remedy is inadequate. *Council of & for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521, (D.C. Cir. 1983). As noted above, a statutory procedure may provide an adequate remedy even if it does not result in direct review of the complained-of agency decision, as APA record review would. *Wash. Legal Found. v. Alexander*, 984 F.2d at 486 ("'a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action.'") (quoting *Coker*, 902 F.2d at 90 n.5); *see also Mitchell v. United States*, 930 F.2d 893, 897 (Fed. Cir. 1991) (Section 704 precludes APA review when "there is an adequate remedy," even if remedy is "in another court"); *Ballin v. Kerry*, No. 1:12-121, 2013 U.S. Dist. LEXIS 196346, at *4 (S.D. Tex. Mar. 29, 2013) ("Numerous federal courts have held that [8 U.S.C.] § 1503(a) provides an adequate remedy for the denial of an application for a passport based on the applicant's failure to establish citizenship") (collecting cases); *Hassan v. Holder*, 793 F. Supp. 2d 440, 446 (D.D.C. 2011); *Raya v. Clinton*, 703 F. Supp. 2d 569, 575 (W.D. Va. 2010).

In this case, the District Court correctly found that Section 1503(b)-(c) also provides an adequate statutory remedy following the denial of Hinojosa's passport application. ROA.397; *see also Hogan v. Kerry*, --- F. Supp. 3d ----, 2016 WL 5415769, at *3 (S.D. Fla. Sep. 20, 2016) (same); *Meza v. Kerry*, No. 1:14-CV-60,

2015 U.S. Dist. LEXIS 180474, at *7-8 (S.D. Tex. Aug. 11, 2015) (same). As such, the APA's waiver of sovereign immunity does not apply in this case, and Hinojosa cannot proceed with her claim under Section 1331.

The statutory design of the APA bars Hinojosa from using it to piece together a remedy different than what Congress has authorized. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204–05 (2012). As the District Court found, ROA.396, Congress authorized a remedy for individuals such as Hinojosa and codified it at Section 1503(b)-(c). The fact that Hinojosa views that remedy as "optional" actually affirms, rather than negates, its existence as an adequate alternative remedy. Appellant's Br. 6 n.5, 10, 28, 39. After Defendants denied Hinojosa's passport application, nothing obligated her, of course, to seek further redress under the procedures that Congress established at Section 1503(b)-(c). But whether she chooses to avail herself of that remedy or not, the APA does not permit her to bypass it for another remedy she perceives as more favorable. *See* 5 U.S.C. § 704; *Koehler*, 153 F.3d at 265-66 & n.2; *Bowen*, 487 U.S. at 903.

Hinojosa argues that Section 1503(b) and (c) cannot serve as an adequate alternative remedy that precludes an APA waiver of sovereign immunity because Section 1503(b) does not permit every person overseas who claims a right to citizenship to seek a certificate of identity. Appellant's Br. 30 (noting that Section

1503(b) is not applicable to a person "who was born and raised abroad, and attained the age of sixteen years" prior to applying for a certificate of identity). But even if the remedy prescribed by Section 1503(b)-(c) would not be available to all potential applicants, Hinojosa does not, and cannot, dispute that it is available *to her*. S*ee* 8 U.S.C. § 1503(b) (subsection is applicable "to a person who at some time prior to his application for the certificate of identity has been physically present in the United States"); ROA.63 n.3 (claiming that Hinojosa once resided in Brownsville). Accordingly she is precluded from seeking relief under the APA.

B. *Rusk v. Cort* does not permit Hinojosa to proceed under Section 1331 and the APA.

The Supreme Court's decision in *Rusk v. Cort*, cited extensively by Hinojosa, does not authorize her to bypass Section 1503(b)-(c) and pursue an APA claim, for at least two reasons. First, as the District Court explained, the Supreme Court in *Rusk* found jurisdiction to review Dr. Cort's APA claim on what it understood to be an implied grant of subject-matter jurisdiction in the APA. But that understanding was expressly overruled in *Califano v. Sanders*, 430 U.S. 99, 105 (1977). *See* ROA.397. In *Califano*, the Supreme Court held the APA did not confer jurisdiction on the federal courts to review administrative decisions, but merely to prescribe how that jurisdiction, if conferred by some other statute, is to be exercised. *Califano*, 430 U.S. at 105. Here, Hinojosa asserts that subject matter jurisdiction arises under Section 1331. As noted above, however, Section 1331

does not waive the government's sovereign immunity from suit, and the APA waives that immunity only where there is a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *Koehler*, 153 F.3d at 265-66 & n.2. Because Section 1503(b)-(c) does provide an adequate remedy here, *see supra* Section I.A, the APA does not provide a basis for jurisdiction.

Second, the basis for Hinojosa's claim has nothing in common with the facts that gave rise to the decision in *Rusk*. The claimant in that case, Dr. Cort, was not asserting that the government had erroneously failed to recognize that he was a U.S. citizen. Rather, Dr. Cort, who was undisputedly a U.S. citizen at birth, had been found, in an administrative proceeding conducted without notice to him and while he was living abroad, to have "forfeited" his citizenship by remaining outside the United State to avoid military service. *Id.* at 375. Dr. Cort sought to challenge the constitutionality of the statute the permitted the government to strip him involuntarily of his U.S. citizenship.[2] *Id.* at 369. Dr. Cort, who had also been criminally indicted in Massachusetts for draft evasion, faced arrest and criminal pretrial confinement if he used the Section 1503(b)-(c) mechanism to return to the United States. *Id.* at 369, 375. On those facts, *Rusk* held that "Congress had no

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[2] Indeed, the Supreme Court later agreed that the statute was unconstitutional. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (finding INA 349(a)(10) unconstitutional).

intent "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 (emphases added).

Hinojosa's situation is almost entirely unlike Dr. Cort's. Hinojosa is not challenging a decision stripping her of her undisputed birth citizenship, but rather a factual finding that she was not born in the United States. She is not, to the best of Defendants' knowledge, under indictment for any crime, and she does not face certain arrest and imprisonment if she were to travel to a U.S. port of entry with a certificate of identity issued under Section 1503(b). Rather, the facts of this case fall squarely within the category of cases – claims to derivative citizenship by persons born and living abroad – that Congress intended to subject to the provisions of 8 U.S.C. § 1503(b) and (c).

In proceedings below, Hinojosa argued that "nothing in *Rusk* indicates that the Court intended to limit it to its facts." ROA.191-92. But there is likewise nothing to support an assertion that the narrow holding of *Rusk*, which dealt with a constitutional challenge to the involuntary forfeiture of U.S. citizenship, should be extended to cover the very different, and far more common, facts of this case, in which the plaintiff has never been found to be a U.S. citizen. *See Hogan,* --- F. Supp. 3d ----, 2016 WL 5415769, at *3. *Hogan* agreed with the Government that "Plaintiff is not in the class of people similarly situated to Dr. Cort, because

Plaintiff has never been recognized as a U.S. citizen and is not under a real threat of criminal prosecution and arrest, if she were to follow the procedures set forth in subsections (b) and (c) of § 1503," and concluded that "the Court lacks jurisdiction over Plaintiff's claim under the APA". *Id.* *Rusk* does not control here, and it does not permit Hinojosa to pursue an APA claim in place of the remedies specified at Section 1503(b)-(c).

V. The District Court properly found that Hinojosa lacked standing to challenge the requirement that a U.S. citizen bear a passport to enter the United States.

Finally, the District Court correctly dismissed, for lack of standing, Hinojosa's claim that by denying APA or habeas review at this stage, the Court renders Section 1185(b) unconstitutional as applied to her, holding that she had not alleged that Section 1185(b) had ever been applied to her at all. Hinojosa does not allege that she was denied entry under Section 1185(b) as a U.S. citizen not in possession of a passport.[3] Rather, she was determined to be a non-citizen, and is unable to enter the United States because she does not meet the criteria for the admission of *aliens*. 8 U.S.C. § 1185(a)(1); *see, e.g.*, 8 C.F.R. §§ 211.1 & 212.1 (arriving aliens must present "a valid, unexpired [immigrant or nonimmigrant]

[3] Indeed, in her Complaint, Hinojosa does not claim she has attempted to enter the United States at all. ROA.7 (Compl. at 1 (asserting consequences "*if* she attempts to make that claim [of citizenship] at the port of entry") (emphasis added)).

visa" to be admitted). An as-applied challenge to a statute must fail for lack of standing if the statute was never applied to the plaintiff at all. *See Green v. City of Raleigh*, 523 F.3d 293, 298 (4th Cir. 2008). As Hinojosa has been adjudicated a non-citizen, Section 1185(b), which applies only to citizens has, and can have, no effect on her whatsoever. Accordingly, Hinojosa lacks standing to raise an as-applied challenge to that statute.

The cases that Hinojosa cites for the principle that U.S. citizens have a fundamental right to return to the United States are therefore inapplicable to her, because each of them involved undisputed U.S. citizens whose passports were confiscated or refused for reasons unrelated to their citizenship. *See Haig v. Agee*, 453 U.S. 280, 283-86 (1981) (permitting passport revocation of "an American citizen" living abroad in response to his exposure of CIA officers and agents); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (restricting ability to deny passports based on applicant's communist party membership where "[t]he grounds for refusal asserted here do not relate to citizenship"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 502, 504 (1964) (statute criminalizing application for, or use of, passports by members of Communist organizations held unconstitutional); *Worthy v. United States*, 328 F.2d 386, 394 (5th Cir. 1964) ("We do not think that a *citizen*, absent from his country, can have his fundamental right to have free ingress thereto subject to a criminal penalty if he does not have a passport.") (emphasis added). Because

Hinojosa's citizenship is the precise issue in dispute, cases discussing the constitutional right of unquestioned U.S. citizens to return home are not apposite.

Hinojosa nonetheless argues that for purposes of this motion, the Court must presume the truth of her allegation that she is a U.S. citizen. Appellant's. Br. at 33 ("If she is a U.S. citizen, as she was presumed to be for purposes of the Rule 12(b)(1) motion to dismiss, denial of her passport deprived her of her fundamental rights, and was therefore in violation of the United States Constitution."). As an initial matter, Hinojosa is incorrect. On a motion to dismiss for lack of subject-matter jurisdiction, the Court of Appeals "must take all of the factual allegations in the complaint as true, but we are not bound to accept as true a legal conclusion couched as a factual allegation." *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 287 (5th Cir. 2015). Hinojosa's assertion that she is a U.S. citizen is not only a legal conclusion that the Court is under no obligation to credit, but the ultimate issue she seeks to have resolved by the Court.

Moreover, even if the Court were to accept that allegation, it would not create standing, because she still cannot show that Section 1185(b) was ever applied to her. By her own allegations, if Hinojosa were to be denied entry to the United States, it would be because the Government *did not* accept her claim of U.S. citizenship, ROA.7 (Compl. at 1) (Hinojosa "cannot return to the United States because Respondents … deny that she is a U.S. citizen"), and not because

she failed to comply with the requirement of 8 U.S.C. § 1185(b) that a U.S. citizen seeking entry must bear a passport. The uncontested fact that Hinojosa was never denied admission as a U.S. citizen under Section 1185(b) for failure to bear a U.S. passport deprives her of standing to challenge that requirement. The Court should affirm.

CONCLUSION

The Court should affirm the District Court's denial of Hinojosa's claims that she brought under the habeas statute and the APA and affirm the District Court's dismissal of the Complaint in this action.

Dated: April 18, 2017

Respectfully submitted

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. Dated: April 18, 2017

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I hereby certify that the foregoing document was filed on April 18, 2017, through the ECF system, and that it will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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