No. 18-461

In the Supreme Court of the United States

RAQUEL HINOJOSA, ET AL., PETITIONERS

v.

PETRA HORN, PORT DIRECTOR, UNITED STATES CUSTOMS AND BORDER PROTECTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether individuals abroad who were determined by the U.S. Department of State not to have established U.S. citizenship through birth in the United States, and as a result were found not entitled to U.S. passports, may obtain immediate judicial review of those determinations under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, forgoing the procedures established by Congress in 8 U.S.C. 1503 for persons abroad who claim they have denied a right or privilege as a national of the United States to request a certificate of identity from the Secretary of State and to seek admission to the United States.

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OPINIONS BELOW

The consolidated opinion of the court of appeals (Pet. App. 1-30) is reported at 896 F.3d 305. The orders of the district court (Pet. App. 31-46, 70-80) are not published in the Federal Supplement but are available at 2017 WL 281753 and 2017 WL 9249483, respectively. The report and recommendation of the magistrate judge in petitioner Hinojosa's case (Pet. App. 47-69) is not published in the Federal Supplement but is available at 2016 WL 7912013.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2018. Petitions for rehearing were denied on July 11, 2018 (Pet. App. 81-82, 83-84). The petition for a writ of certiorari was filed on October 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are individuals who were issued Mexican birth certificates shortly after their births, were raised in Mexico, and spent much of their lives in Mexico. Pet. App. 3. Although both petitioners have alleged that they are natural-born U.S. citizens, the U.S. Department of State determined that petitioners had presented insufficient evidence to establish that they were born in the United States. *Id.* at 3-4. On the basis of those determinations, the Department of State denied petitioner Hinojosa's application for a U.S. passport, and it revoked petitioner Villafranca's previously issued passport, while each was in Mexico. *Id.* at 3-4, 49. Petitioners filed separate suits asserting (as relevant) claims under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging the Department of State's actions. Pet. App. 3-4. The district court in each case dismissed those claims. *Id.* at 31-46, 70-80. The court of appeals affirmed, *id.* at 1-30, concluding that petitioners could not seek review under the APA because they had an "adequate remedy," 5 U.S.C. 704, under another statute, 8 U.S.C. 1503, and petitioners had failed to pursue that adequate alternative remedy. Pet. App. 5-15.

1. a. Petitioner Hinojosa has a Mexican birth certificate, issued in August 1973, stating that she was born in Matamoros, Mexico. Pet. App. 32, 48. That document lists petitioner's name as Raquel Flores Venegas and identifies Higinio Flores as her father. *Id.* at 32. Hinojosa grew up in Mexico. 17-40077 Pet. C.A. Br. ii, 1; see Pet. App. 3.

Hinojosa alleges, however, that she was in fact born in Brownsville, Texas, with the assistance of a midwife. Pet. App. 32. She possesses a second birth certificate, issued in Texas in June 1973 and signed by the midwife,

that lists Hinojosa as having been born in Texas. *Id.* at 32, 48. That birth certificate lists petitioner's name differently (as Raquel Hinojosa) and identifies a different man (Mario Hinojosa Delgado) as her father. *Ibid.*

In July 2015, while residing in Mexico, Pet. i, Hinojosa submitted an application to the Department of State for a U.S. passport, Pet. App. 3. In support of her application, Hinojosa provided her Texas birth certificate, a DNA test indicating that Mario Hinojosa Delgado is her father, and an affidavit from family members attesting to her birth in Texas. *Id.* at 33.

In November 2015, after requesting and receiving additional information from Hinojosa, the Department of State denied her passport application. Pet. App. 33. Citing Hinojosa's Mexican birth certificate, the Department stated that "there is a reason to believe that the birth attendant who filed" Hinojosa's Texas "birth certificate did so fraudulently." *Id.* at 49 (citation omitted); see *id.* at 33. The Department further stated that Hinojosa "ha[d] not submitted any early public records to support [her] birth in the United States" and that she "ha[d] also indicated that [she] c[ould] not submit any evidence that supports [her] birth in Texas." *Id.* at 49 (citation omitted).

b. In 1978, petitioner Villafranca was registered in Mexico as having been born in Madero, Tamaulipas, Mexico, in 1977. Pet. App. 71. Like Hinojosa, however, Villafranca alleges that she was in fact born in Texas, with the assistance of a midwife. *Ibid.* Villafranca alleges that her birth was registered with the State of Texas as having occurred in Brownsville, Texas, in 1977. *Ibid.* Villafranca further alleges that the Mexican birth certificate indicating that she was born in Mexico is erroneous and that it has since been corrected at her request to state that she was born in Texas. *Id.* at 71-72.

In 2005, Villafranca, who resided in Texas, applied for and received a U.S. passport, on the basis of her alleged birth in November 1977 in Texas. Pet. App. 72. In 2014, while Villafranca was traveling in Mexico, the Department of State revoked her passport, based on a determination that she was not a U.S. national. *Ibid.* The Department cited the results of an investigation that revealed her Mexican birth certificate indicating (before it was modified at Villafranca's request) that she was born in Mexico. *Ibid.* When Villafranca attempted to reenter the United States through the port of entry in Brownsville, Texas, she was denied entry, and her passport was taken from her. *Ibid.*

2. Hinojosa and Villafranca each traveled to the port of entry at Brownsville, Texas, and filed separate actions in the United States District Court for the Southern District of Texas challenging the Department of State's actions. Pet. App. 3-4; 17-40134 Pet. C.A. Br. 3. As relevant here, both asserted claims under the APA challenging the Department's actions denying or revoking their passports. Pet. App. 3-4.[1]

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[1] In addition to their APA claims, both petitioners asserted other claims for relief that the lower courts rejected and that are not at issue in this Court. Both petitioners sought writs of habeas corpus under 28 U.S.C. 2241, which the district court in each case rejected on the ground that petitioners were required, but had failed, to exhaust available administrative remedies. Pet. App. 37-41, 76-78. Villafranca also sought a declaratory judgment under 8 U.S.C. 1503(a) that she is a U.S. citizen; the court dismissed that claim on the ground that relief under Section 1503(a) is available only to persons who are "within the United States." Pet. App. 74 (quoting 8 U.S.C. 1503(a)) (emphasis omitted); see also *id.* at 35 (Hinojosa asserted but abandoned a similar claim). Hinojosa additionally asserted a constitutional challenge to 8 U.S.C. 1185(b)—which prohibits a U.S. citizen from entering or leaving the United States without a passport—which the court rejected. Pet. App. 43-45. Petitioners do not seek review of any of those determinations in this Court.

a. In Hinojosa's case, a magistrate judge recommended dismissing her APA claim, and the district court adopted that recommendation. Pet. App. 41-43, 60-68. The court concluded that APA review was unavailable on two grounds. First, it determined that the denial of Hinojosa's passport application was "not a final agency action" made reviewable under 5 U.S.C. 704 because "[t]he initial denial is simply the first step in the process, not the final determination by" the Department. Pet. App. 42.

Second, the district court held that review was unavailable in any event because Hinojosa had an alternative remedy under another statute, 8 U.S.C. 1503(b) and (c). Pet. App. 42. As the court explained, under Section 1503(b), Hinojosa may apply to a U.S. diplomatic or consular officer in Mexico for a "certificate of identity" indicating that she is a U.S. national, which the officer must issue if he determines that Hinojosa's "application is made in good faith and has a substantial basis." *Id.* at 45 (quoting 8 U.S.C. 1503(b)). The court further explained that, if the certificate of identity is granted, Hinojosa then "may apply for admission to the United States at any port of entry," and if denied admission she may at that point obtain judicial review through habeas corpus. *Ibid.* (quoting 8 U.S.C. 1503(c)); see *id.* at 45-46. The court additionally observed that, if instead the certificate of identity is denied, Hinojosa could appeal that denial to the Secretary of State. *Id.* at 45. The court stated that, if that appeal to the Secretary were rejected, Hinojosa could then seek APA review. *Ibid.* The court determined that petitioner was required, but had failed, to exhaust those alternative remedies and thus could not seek APA review. *Id.* at 42; see *id.* at 37-41.

b. In Villafranca's case, the district court similarly concluded that APA review was unavailable in light of the procedures established by 8 U.S.C. 1503(b) and (c). Pet. App. 79. The court reasoned that "[t]he APA only permits judicial review of an adverse agency decision where no other adequate remedy is available," and Villafranca had not shown that Section 1503(b) and (c) were inadequate. *Ibid.* Villafranca argued that Section 1503(b) did not provide an adequate remedy because, if she were denied a certificate of identity by a consular officer and the Secretary of State affirmed that denial, Section 1503(b) would not provide for judicial review of the Secretary's decision. *Ibid.* The court assumed arguendo that Section 1503(b) would not provide an adequate remedy in that scenario, but it concluded that Villafranca's "concerns [we]re speculative" because the Secretary of State had not yet "den[ied] any application for a certificate of identity" she had submitted, and there was no indication the Secretary would do so. *Ibid.*

3. The court of appeals affirmed the district court's judgments in both of petitioners' cases in a consolidated decision. Pet. App. 1-21.

a. The court of appeals agreed with the district court in each case that APA review is unavailable because petitioners have another "adequate remedy in a court." 5 U.S.C. 704; see Pet. App. 5-15. The court of appeals reasoned that the procedures prescribed in 8 U.S.C. 1503 provide a "direct and guaranteed path to judicial review." Pet. App. 12. As the court explained, if petitioners seek and obtain certificates of identity, they may then seek admission at any point of entry under Section 1503(c). *Id.* at 10-11. If granted admission, the court explained, petitioners may seek a declaratory judgment that they are U.S. citizens under Section 1503(a); if

denied admission, they may seek review through habeas corpus under Section 1503(c). *Id.* at 11.

The court of appeals observed that "[t]he only instance in which [petitioners] might not receive judicial review under the statute is if their petitions for certificates of identity are denied by the Secretary." Pet. App. 12. The court determined, and the government agreed, that "[a]t that moment" petitioners would then be able to seek APA review of the Secretary's decision. *Ibid.* Also, the court reasoned that "the mere chance that [petitioners] might be left without a remedy in court" in that scenario "does not mean that the § 1503 [remedy] is inadequate as a whole." *Ibid.* Otherwise, the court observed, "all persons living abroad claiming United States citizenship would be able to skip §§ 1503(b)-(c) procedures by initiating a suit under the APA." *Ibid.* The court concluded that "§ 1503 expresses a clear congressional intent to provide a specific procedure to review [petitioners'] claims," and "[p]ermitting a cause of action under the APA would provide a duplicative remedy, authorizing an end-run around that process." *Ibid.*

The court of appeals rejected petitioners' contention that *Rusk* v. *Cort*, 369 U.S. 367 (1962), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977), excused them from complying with Section 1503(b) and (c). Pet. App. 13-15. In *Cort*, this Court held that a plaintiff—formerly a natural-born U.S. citizen—living abroad could seek review under the APA of the denial of his passport application without exhausting the procedures set forth in Section 1503(b) and (c). See 369 U.S. at 369-380. The court of appeals concluded that *Cort* did not support petitioners' position that they may bypass Section 1503(b) and (c). Pet. App. 13-14.

After expressing uncertainty about whether *Cort* "remains an instructive account of the [APA's] adequacy requirement" in light of subsequent decisions of this Court, the court of appeals determined that *Cort*'s "holding is inapplicable" here in any event because the "plaintiff and his claim for relief" in that case "differ substantially from [petitioners] and their claims here." Pet. App. 14. The plaintiff in *Cort*, it explained, "was denied an application for a new passport on grounds that his citizenship had been revoked" because he had "allegedly moved to Europe to dodge the draft," and he "had also been criminally indicted for draft evasion." *Ibid.* As the court observed, "th[is] Court concluded that Congress could not have 'intended that a native of this country living abroad must travel thousands of miles, *be arrested, and go to jail* in order to attack an administrative finding that he is not a citizen of the United States.'" *Ibid.* (quoting *Cort*, 369 U.S. at 375). Instead, the court of appeals noted, this Court determined that Section 1503's "procedures were intended to check the entry of illegal aliens, who try 'to gain fraudulent entry to the United States by prosecuting spurious citizenship claims.'" *Id.* at 14-15 (citation omitted). The court of appeals reasoned that it was "[i]n light of the extreme burden the § 1503 procedures would have placed on the plaintiff, whose claim and circumstance § 1503 was not specifically intended to address," that this Court held "the plaintiff could proceed under the APA." *Id.* at 15.

The court of appeals determined that in this case, by contrast, Section 1503(b) and (c) "provide a clear path to judicial review," and that path "is far less treacherous because neither [petitioner] has been criminally indicted and thus does not risk incarceration upon arrival." Pet. App. 15. In addition, the court observed that, "in stark

contrast to the plaintiff in [*Cort*], both Villafranca and Hinojosa were at the United States border at the time of this suit" and "seek entry into the country on the basis of a claim of U.S. citizenship," and are therefore "precisely the sort of persons that Congress, according to [*Cort*], was concerned to regulate under §§ 1503(b)-(c)." *Ibid.*[2]

b. Judge Dennis concurred in part and dissented in part. Pet. App. 21-30. As relevant here, Judge Dennis expressed the view that Section 1503(b) and (c) do not provide "an adequate remedy for persons outside of the United States who do not seek admission to the country prior to a determination of citizenship." *Id.* at 22. In his view, Section 1503(b) and (c) "would impose onerous requirements at a significant cost if required of individuals seeking a declaration of citizenship from outside of the United States," and "it is not apparent that this process ultimately aids in a determination of citizenship" because a court determines that issue after a person is admitted to the United States. *Id.* at 23, 26.

4. On November 2, 2018, subsequent to the filing of the petition for a writ of certiorari, Villafranca filed a separate suit in the Southern District of Texas, alleging that she "was allowed to enter the United States on October 30, 2018, despite her lack of a current U.S. passport," and seeking a declaratory judgment under 8 U.S.C. 1503(a) that she is a U.S. citizen. Compl. ¶ 2, *Villafranca* v. *Rolbin*, No. 18-cv-178; see *id.* ¶ 19. On January 2, 2019, the district court in that case granted the government's unopposed motion to stay proceedings pending the lapse of appropriations. 1/2/19 Order, *Villafranca*, *supra* (No. 18-cv-178).

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[2] Because the court of appeals affirmed on the ground that petitioners had an adequate remedy, it did not consider the district court's "alternative ruling" that no final agency action exists. Pet. App. 6 n.2.

ARGUMENT

Petitioners contend (Pet. 10-27) that the district court erred by dismissing their APA claims seeking review of the Department of State's action regarding their passports on the ground that 8 U.S.C. 1503 provides an adequate alternative remedy that petitioners have not exhausted. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. 704. As this Court has observed, "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). The court of appeals correctly determined that Section 704 does not authorize judicial review in the circumstances of petitioners' cases because another statute affords them an "adequate remedy" of which petitioners have not availed themselves. 5 U.S.C. 704; Pet. App. 11-15.

a. Petitioners' APA claims seek review of the Department of State's action denying or revoking their passports based on the Department's determinations that petitioners had not adequately established that they are natural-born U.S. citizens. Pet. App. 2-5. Petitioners contend (Pet. i) that those determinations of noncitizenship were erroneous because each petitioner was born in Texas rather than in Mexico.

Section 1503 of Title 8, United States Code, entitled "Denial or rights and privileges as national," establishes a detailed procedure for individuals who claim they have been denied a right or privilege as a U.S. national to obtain review of that alleged denial. 8 U.S.C. 1503. The process differs depending on whether such an individual is present in the United States or is abroad. For a "person who is within the United States" who "claims a right or privilege as a national of the United States," and who "is denied such right or privilege by any" federal agency or official "upon the ground that he is not a national of the United States," Section 1503(a) provides that the person may seek judicial review by filing an action under the Declaratory Judgment Act, 28 U.S.C. 2201, against the agency or official for a judgment "declaring him to be a national of the United States." 8 U.S.C. 1503(a). Such an action must be brought "within five years after the final administrative denial of such right or privilege." *Ibid.* Section 1503(a) contains an exception prohibiting such declaratory relief where the question of a person's status as a U.S. national "arose by reason of, or in connection with," or is "in issue in," a removal proceeding. *Ibid.*

For a "person who is not within the United States" but was "physically present in the United States" at some previous point in time (or is under the age of 16 and was born abroad to U.S.-citizen parents), and who claims the denial of "a right or privilege as a national of the United States," Section 1503(b) and (c) prescribe a different mechanism for challenging that denial. 8 U.S.C. 1503(b). Section 1503(b) provides that such a 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." *Ibid.* If the person presents "proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis," the officer "shall issue to such person a certificate of identity." *Ibid.* If the certificate of identity is granted, Section 1503(c) provides that the person may then "apply for admission to the United States at any port of entry." 8 U.S.C. 1503(c). Upon admission to the United States, the person would then be eligible to seek a declaratory judgment under 8 U.S.C. 1503(a) that he is a citizen.

As the court of appeals observed, if a person outside the United States is unsuccessful at either administrative phase of the process prescribed by Section 1503(b) and (c), judicial review is available at that time. Pet. App. 10-12. The government acknowledged below, and the court of appeals determined, that if the Secretary of State approves the denial of a certificate of identity, a person may then seek review under the APA because no other adequate remedy would exist at that time. *Id.* at 12; see 17-40077 Gov't C.A. Br. 7-8; 17-40134 Gov't C.A. Br. 22. In addition, if the person obtains a certificate of identity and then applies for but is denied admission to the United States at a port of entry, Section 1503(c) expressly provides for judicial review of that final determination of inadmissibility "in habeas corpus proceedings." 8 U.S.C. 1503(c). As the court of appeals concluded, although "the path to judicial review is longer" for persons who "are not already within the United States," Section 1503 (coupled with the APA in a case in which the Secretary affirms the denial of a certificate of identity) "provide[s] a * * * path to judicial review" that is "clear," "direct," and "guaranteed." Pet. App. 10, 12, 15.

Petitioners each "concede[d] that [the] § 1503 procedures apply to them." Pet. App. 6 n.1. And they do not appear to dispute that, if they had pursued those procedures, whatever the outcome at the various stages of the administrative process, judicial review would be available. Yet neither petitioner alleges that she began, let alone exhausted, the statutorily prescribed process in Section 1503(b) and (c) before bringing her APA suit. The court of appeals therefore correctly determined that the APA does not authorize judicial review in these cases because petitioners have, but declined to pursue, an alternative "adequate remedy." 5 U.S.C. 704.

b. Petitioners principally contend (Pet. 10-16, 25, 27) that this Court's decision in *Rusk* v. *Cort*, 369 U.S. 367 (1962), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977), compels a contrary conclusion. The court of appeals correctly rejected that contention. Pet. App. 13-15. As the court explained, the question this Court addressed in *Cort* must be understood in the context of the circumstances of that case. See *id.* at 14-15.

Cort involved a person who was a natural-born U.S. citizen at birth, but whose citizenship was revoked on the ground that he had evaded the draft and whose passport application from abroad was denied on that basis. Pet. App. 14. The plaintiff, Joseph Cort, had been born in Massachusetts in 1927 and registered for the Selective Service in 1951, shortly before traveling to Europe. *Cort*, 369 U.S. at 369. While in Europe, Cort failed to report for the draft board's required physical examinations and for induction into the Armed Forces in Massachusetts. *Ibid.* In 1954, while Cort was still in Europe, he was charged in federal court with draft evasion. *Ibid.* Cort subsequently applied at the U.S. embassy in Prague to renew his expired passport, and his application

was denied "on the ground that he had lost his citizenship * * * by remaining outside the United States for the purpose of avoiding military service," under Section 349(a)(10) of the Immigration and Nationality Act (INA), 8 U.S.C. 1481(a)(10) (1958). Section 349(a)(10) provided that U.S. citizens who stayed outside the country to avoid the draft would lose their citizenship. *Cort*, 369 U.S. at 369.

Cort sought judicial review of his passport denial from abroad under the APA. *Cort*, 369 U.S. at 369-370. In particular, he sought to challenge the constitutionality of the INA provision that stripped native-born U.S. citizens of their citizenship for draft evasion, *id.* at 370—a provision that the Court later held was unconstitutional, see *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 163-184 (1963). The district court denied the government's motion to dismiss Cort's APA claim on the ground that Section 1503(b) and (c) provided the exclusive means for challenging the Department of State's citizenship determination, *Cort*, 369 U.S. at 369-370, and this Court affirmed over a dissent, see *id.* at 371-380; see also *id.* at 383-399 (Harlan, J., joined by Frankfurter and Clark, JJ., dissenting).

In reaching that decision, the Court framed the question presented narrowly and consistent with the specific circumstances of the case, explaining that,

> precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States.

Cort, 369 U.S. at 375. The Court answered that case-specific question in the negative. See *id.* at 375-380. In doing so, the Court reasoned that "the purpose of [Section 1503(b) and (c)] was to cut off the opportunity which aliens had abused under" prior law "to gain fraudulent entry to the United States by prosecuting spurious citizenship claims." *Id.* at 379. The Court concluded that the circumstances of Cort's case—in which Cort sought to challenge the constitutionality of the statutory provision by which his natural-born citizenship had been revoked, and where returning to the United States to do so would subject him to arrest and likely criminal penalties in light of pending charges—did not implicate that congressional purpose. See *ibid.* As the court of appeals here explained, the Court held that, "[i]n light of the extreme burden the § 1503 procedures would have placed on [Cort], whose claim and circumstance § 1503 was not specifically intended to address, the plaintiff could proceed under the APA." Pet. App. 15.

The court of appeals correctly determined that *Cort*'s reasoning and result do not compel a similar conclusion here in light of the significant differences in the circumstances between that case and this one. Pet. App. 14-15. Unlike Cort, petitioners have a "clear path to judicial review," *id.* at 15, and pursuing that path would not require them to be subject to inevitable arrest and criminal prosecution on already-pending criminal charges, *id.* at 14. In addition, whereas Cort's original entitlement to U.S. citizenship was never questioned, and his suit sought to challenge the revocation of his birthright citizenship on the ground that the applicable statute was unconstitutional, here it is precisely the factual determinations by the Department of State concerning petitioners' claimed citizenship of

which they seek review. In contrast to Cort, petitioners thus "are precisely the sort of persons that Congress, according to [*Cort*], was concerned to regulate under §§ 1503(b)-(c)," and "[t]hese cases present the exact facts that [*Cort*] held would implicate the jurisdictional restrictions." *Id.* at 15 (emphasis omitted).

Petitioners contend (Pet. 10-16, 25) that the Court's decision in *Cort* should be understood more broadly, as concluding categorically that the procedures established by Section 1503(b) and (c) are never an "adequate remedy" under 5 U.S.C. 704 for any persons not present in the United States. That contention lacks merit. As the court of appeals observed, the Court's opinion in *Cort* "never explicitly discusse[d] the adequacy requirement of the APA" in Section 704, Pet. App. 13, let alone rendered any across-the-board determination about whether the procedures set forth in Section 1503(b) and (c) satisfy that requirement. Although petitioners point (Pet. 12-14, 25) to certain language in the opinion describing its conclusion more broadly, the Court's own "[m]ore precise[]" statement of the question it decided, *Cort*, 369 U.S. at 375, indicates that the Court did not view its decision in such sweeping terms.

Moreover, construing the Court's decision in *Cort* as determining that Section 1503(b) and (c) never provide an adequate remedy for the only persons to whom they apply —individuals not present in the United States—would disregard the statutory structure and effectively nullify Congress's decision in Section 1503 to establish two distinct paths depending on whether a person is within or outside the United States. Section 1503(a) provides for immediate judicial review, in the form a declaratory-judgment action, of a claimed denial of a right or privilege of status as a U.S. national, but *only* for persons "within

the United States." 8 U.S.C. 1503(a). Section 1503(b) and (c) establish a separate and distinct process for persons asserting such claims but who are "not within the United States." 8 U.S.C. 1503(b). If Congress had intended that such persons outside the United States could always seek review under the APA—and that the Section 1503(b) and (c) procedures would always be optional—the limitations Congress imposed in Section 1503(a) confining its declaratory-judgment remedy to persons within the United States would lack practical significance. The Court's decision in *Cort* should not be read as eviscerating the structure Congress created in Section 1503 and rendering the restrictions Congress placed on declaratory-judgment relief surplusage.

Even if passages of the Court's opinion might be read as broadly as petitioners suggest, they would not necessarily be controlling here. The Court has often "recall[ed] Chief Justice Marshall's sage observation that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used,'" and "'[i]f they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). That same observation counsels against overreading *Cort*'s holding here.

c. Petitioners' remaining contentions lack merit. They argue (Pet. 17-22) that the remedy afforded under Section 1503(b) and (c) is not "adequate" because the process is "'arduous, expensive, and long.'" Pet. 25 (quoting *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016)). But the mere

fact that an alternative remedy prescribed by Congress involves administrative steps or may be less convenient than an APA suit for that or other reasons does not render them inadequate. See *Garcia* v. *Vilsack*, 563 F.3d 519, 525 (D.C. Cir. 2009) ("The relevant question under the APA * * * is not whether [the alternatives to APA relief] are as effective as an APA lawsuit against the regulating agency, but whether the [alternative] remedy provided by Congress is adequate."), cert. denied, 558 U.S. 1158 (2010).

This Court's decision in *Hawkes* addressed decisions by the U.S. Army Corps of Engineers that had the effect of regulating private parties' primary conduct, by determining that particular property contained waters of the United States subject to federal environmental regulations; violating the restrictions that were thereby imposed would potentially subject the private parties to substantial civil and criminal liability. See 136 S. Ct. at 1811-1812, 1815. The Court concluded that neither violating the restrictions and challenging their applicability in an enforcement action—risking civil penalties of up to $37,500 per day, "to say nothing of potential criminal liability"—nor commencing a permit-application process that would be very costly and would "add[] nothing to the" relevant agency determination was an adequate remedy. *Id.* at 1815-1816. The Court's decision in that case does not establish that any administrative process that is more costly or time-consuming than an immediate APA suit will always be an inadequate remedy.

In any event, petitioners' argument is premised on a series of conjectures about how the administrative process might unfold in particular hypothetical scenarios. It is far from clear that litigating petitioners' APA

claims seeking review of the Department of State's determinations concerning their passports would necessarily be more efficient than the Section 1503(b) and (c) procedures or would result in equally adequate relief. In such an APA suit, if the district court found on the merits that the Department failed sufficiently to consider specific evidence or articulate the reasons for its decision, and if that decision were sustained on appeal, the appropriate remedy would be to remand the matter for the Department to reconsider its determinations, not to direct the Department to reach a specific determination on the ultimate issue whether petitioners are entitled to passports. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Petitioners speculate (Pet. 20-21) that, if they were to seek admission, they might be found inadmissible and thereafter might be "detained" for "many months" and held "anywhere in the U.S." But as the district court observed in Villafranca's case, such "concerns" about how the process might play out "are speculative" because she had not in fact undertaken the required steps. Pet. App. 79. And Villafranca's account of her own subsequent experience casts significant doubt on petitioners' dire predictions about the burdens they would encounter. She has alleged in a separate suit she commenced after the petition for a writ of certiorari was filed that she "was allowed to enter the United States on October 30, 2018, despite her lack of a current U.S. passport," and is now seeking a declaratory judgment under 8 U.S.C. 1503(a) that she is a U.S. citizen. Compl. ¶ 2, *Villafranca* v. *Rolbin*, No. 18-cv-178 (S.D. Tex. Nov. 2, 2018); see *id.* ¶ 19.

Petitioners additionally contend (Pet. 23-25) that the Section 1503(b) and (c) remedy is inadequate because, if

they obtain certificates of identity from the Department of State, they still must be found to be admissible at a port of entry by an official of a different agency. They point to language in this Court's decision in *Sackett* v. *EPA*, 566 U.S. 120 (2012), in which the Court stated that "[t]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency." *Id.* at 127. Petitioners misread that decision.

In *Sackett*, the plaintiffs—a couple who had begun constructing a house on a plot of land that the U.S. Environmental Protection Agency (EPA) believed contained navigable waters subject to federal regulation—were issued a compliance order by the EPA to restore a wetland area on their property that they had filled in. See 566 U.S. at 122, 124-127. Although judicial review of that determination would ultimately be available if the EPA commenced an enforcement action, the plaintiffs could not "initiate that process," and if they violated the order in the meantime they would face "an additional $75,000 in potential liability" per day. *Id.* at 127. The Court observed that, although the plaintiffs conceivably could have subsequently applied to the Army Corps of Engineers for a permit to fill the site, their ability to do so was "severely limit[ed]" because the Corps' regulations prohibited it from issuing such a permit to individuals who had received compliance orders from the EPA unless doing so was "'clearly appropriate.'" *Id.* at 126 (quoting 33 C.F.R. 326.3(e)(1)(iv) (2011)).

Here, in contrast, there is no indication that, if petitioners sought and obtained certificates of identity from the Department of State, they would not be admitted to the United States by the agency charged with making that determination (the U.S. Department of Homeland

Security) and thus be unable to pursue claims under Section 1503(a). Unlike the Corps in *Sackett*, which was significantly restricted in its ability to issue a permit to the plaintiffs in light of the EPA's earlier compliance order, the Department of Homeland Security would not be precluded from permitting petitioners to enter if the available information warranted, merely because petitioners lack current passports. Cf. 8 U.S.C. 1504(a) ("The cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued."). Once again, Villafranca's account of her own experience, in which she successfully gained entry into the United States despite the revocation of her passport and has now commenced a declaratory-judgment suit under Section 1503(a), undermines petitioners' predictions that the involvement of another agency renders the process Congress prescribed inherently inadequate.

2. Petitioners do not contend that this Court's review is necessary to resolve a circuit conflict, and they do not identify any court of appeals that would hold that petitioners may seek APA review and bypass the procedures set forth in Section 1503(b) and (c). Petitioners suggest (Pet. 30) that cases presenting the issue are unlikely to arise outside the Fifth Circuit, where they contend the particular fact pattern presented here most commonly arises. But the legal issue whether Section 1503 can provide an adequate alternative remedy for persons outside the United States has in fact arisen elsewhere. See, *e.g.*, *Chacoty* v. *Tillerson*, 285 F. Supp. 3d 293, 296-297 (D.D.C. 2018) (suit by Israeli and Canadian citizens challenging Department of State's denial

of applications for proof of citizenship in the form of Consular Reports of Birth Abroad); *Hogan* v. *Kerry*, 208 F. Supp. 3d 1288, 1289 (S.D. Fla. 2016) (suit by person born and present in Ireland challenging denial of passport). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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