No. _____

In The
Supreme Court of the United States

JESSICA GARCIA,

Petitioner,

v.

MICHAEL T. FREEMAN; JOHN KERRY, SECRETARY OF STATE; JEH JOHNSON, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; THE UNITED STATES OF AMERICA; and ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

and

VERONICA MARTINEZ DE ESPARZA,

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE, and THE UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Moreno*, 727 F.3d 255, 260 (3d Cir.2013), petition for certiorari pending, No. 13-457, the United States argued, and the Third Circuit held, that having a valid United States passport was not a defense to charges under 18 U.S.C. §911, for falsely claiming United States citizenship, concluding that under 22 U.S.C. §2705(1) ("2705(1)"), a passport constitutes conclusive proof of United States citizenship *only if* "its holder was actually a citizen of the United States when the passport was issued."

Here, the United States argued, and the Fifth Circuit held, that giving Petitioners passports mooted their actions under 28 U.S.C. §2201 seeking declarations that they are United States citizens, because a United States passport "may be used as evidence of [ ] citizenship during its period of validity. *See* 22 U.S.C. §2705(1)." Appendix ("App."), at 4, 8.

Petitioner Jessica Garcia ("Ms. Garcia"), was denied the rights to enter the country as a United States citizen and to possess such personal documents as her Texas birth certificate. She joined Nancy Castro and other United States citizens in a class action challenging such procedures, with a count under 8 U.S.C. §1503(a), instituting an action under

QUESTION PRESENTED – Continued

28 U.S.C. §2201 for a declaration that she is a United States citizen.[1] App. 85-100. Petitioner Veronica Martinez de Esparza ("Ms. Martinez"), requested, and was denied, a United States passport. She also sought a declaration that she is a United States citizen. App. at 24. Both received passports, which the Department of State ("DOS"), may revoke for non-nationality, without notice, opportunity to be heard, or even a post-revocation hearing. *See* 8 U.S.C. §1504, 22 C.F.R. §51.62(a)(1) and §51.70(a). The district courts held that in light of 22 U.S.C. §2705(1), issuance of the passports mooted their declaratory judgment actions. Both women appealed.

The Fifth Circuit dismissed Ms. Garcia's appeal, her Petition for En Banc Rehearing, and Ms. Martinez' appeal, holding that because they had received United States passports, their actions for declarations that they are, in fact, United States citizens were moot, and that to issue such declarations would be to render advisory opinions. App. 1-9.

Not only does the Third Circuit's construction of 2705(1) leave the citizenship of passport holders vulnerable to challenge – and the record shows that such challenges are common – but the manner in which DOS exercises its discretion to cancel passports

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[1] *Castro, et al. v. Freeman, et al.*, 1:09-cv-208 (Southern District of Texas, pending).

QUESTION PRESENTED – Continued

has generated numerous individual cases and a class action, *Castro*, *supra*. The sole remedy, a §1503 action, becomes more difficult over time, as memories fade and evidence is lost. By contrast, a declaratory judgment, which may be rescinded only in accordance with Rule 60, F.R.Civ.P., becomes less vulnerable to challenge as time passes.

The following question therefore is presented: Does issuing a United States passport render moot a declaratory judgment action, under 28 U.S.C. §2201, instituted pursuant to 8 U.S.C. §1503(a), seeking a declaration of United States citizenship?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

In *Garcia v. Freeman, et al.*, Petitioner Jessica Garcia appeared as Plaintiff before the United States District Court for the Southern District of Texas, Brownsville Division, and as Petitioner before the Fifth Circuit Court of Appeals. Michael T. Freeman, Port Director, United States Customs and Border Protection, Brownsville, Texas; Hillary Clinton, later substituted by John Kerry, United States Secretaries of State; Janet Napolitano, recently substituted by Jeh Johnson, Secretaries of the Department of Homeland Security; the United States of America, and the United States Attorney General, were the Defendants before the District Court and Appellees before the Fifth Circuit Court of Appeals.

In *Martinez de Esparza v. Kerry, et al.*, Petitioner Veronica Martinez was Plaintiff before the United States District Court for the Southern District of Texas, McAllen Division, and Appellant before the Fifth Circuit Court of Appeals. Hillary Clinton, and then John Kerry, United States Secretaries of State; and the United States of America, were Defendants in the District Court, and Appellees at the Fifth Circuit.

Refugio del Rio Grande, Inc., which, with Attorney Jaime Diez, is filing the instant petition on behalf of Petitioners Jessica Garcia and Veronica Martinez, is a not for profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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PETITION FOR WRIT OF CERTIORARI

Jessica Garcia and Veronica Martinez de Esparza respectfully petition this Honorable Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their cases. The United States urged, and the Fifth Circuit agreed, that issuing passports rendered moot Petitioners' declaratory judgment actions, seeking declarations that they are United States citizens. This conflicts with numerous decisions from this Court. *See*, *e.g.*, *Knox v. Service Employees Intern. Union*, 132 S.Ct. 2277, 2287 (2012) ("mootness argument fails because there is still a live controversy as to the adequacy of the [relief provided]"); *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013) (case is not moot if plaintiff still has a personal stake in the outcome and the court can grant effectual relief); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (case is not moot unless intervening events "'irrevocably eradicated the effects of the alleged violation.' *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983), *quoting County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)"); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937) (courts find facts and determine their legal consequences), and *Rusk v. Cort*, 369 U.S. 367, 372 (1962) ("a declaratory judgment is available as a remedy to secure a determination of citizenship"). *See also Reyes v. Neelly*, 264 F.2d 673, 676 (5th Cir.1959) (Judge Rives, dissenting) (Such a declaratory judgment is a declaration of status that binds not only governmental authorities but, also, the whole world).

It is also in tension with the position the United States took before the Third Circuit, which was adopted in *United States v. Moreno*, 727 F.3d 255 (3d Cir.2013).[2]

Petitioners' actions were instituted under 8 U.S.C. §1503(a), which provides, in relevant part (emphasis added):

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

In *Garcia v. Freeman, et al.*, No. 12-41458 (5th Cir.2013), the Fifth Circuit reasoned, App. at 2:[3]

> DOS issued Garcia a passport card as a result of its final determination that Garcia met her burden of proof establishing her United

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[2] In both *Garcia* and *Martinez v. Kerry, et al.,* No. 13-40166 (5th Cir.2013), the Fifth Circuit was provided with copies of *Moreno* in 28(j) letters, filed September 12, 2013, but neither opinion mentioned that case.

[3] *See Rios-Valenzuela v. DHS*, 506 F.3d 393, 397 (5th Cir.2007) ("we read 'institute' in [the context of §1503] to mean '[t]o initiate; begin.' ").

> States citizenship. Thereafter, Garcia did not have a concrete interest in this action because she did not suffer any harm. In other words, there is no showing that she has been denied any right or privilege as a United States national as a result of DOS' decision to issue her a passport card. This card may be used as evidence of Garcia's citizenship during its period of validity. See 22 U.S.C. § 2705(1). . . . Garcia's contention that she still has a concrete interest in obtaining a declaration of citizenship is unavailing; essentially, she seeks an advisory opinion that could be used in the event an official challenges her citizenship in the future. As stated, because DOS issued Garcia a United States passport card, she has not been denied any right or privilege of a United States national.

In *Martinez de Esparza v. Kerry*, *supra*, quoting its decision in *Garcia*, the court held, App. at 23:

> Martinez has not shown she was denied a right or privilege as a United States national as a result of DOS' decision to issue her a passport because it may be used as evidence of her citizenship during its period of validity. *Id.* (citations omitted). Martinez' contention that she still has a concrete interest in obtaining a declaration of citizenship fails for the same reason the plaintiff's contention in *Garcia* failed. "[E]ssentially, she seeks an advisory opinion that could be used in the event an official challenges her citizenship in the future". *Id.* DOS issued Martinez a

> United States passport, and, therefore, she has not been denied a right or privilege of a United States national.

Several conceptual errors are imbedded in these holdings. First, 8 U.S.C. §1503(a) only provides jurisdiction to *institute* a declaratory judgment action under 28 U.S.C. §2201. Once *instituted*, mootness is determined as in any other declaratory judgment action. *See*, *e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (emphasis added):

> In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 . . . (1941), we summarized as follows: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." FN7
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> FN7. *The dissent asserts, post, at 777, that "the declaratory judgment procedure cannot be used to obtain advanced rulings on matters that would be addressed in a future case of actual controversy." As our preceding discussion shows, that is not so.* If the dissent's point is simply that a defense cannot be raised by means of a declaratory judgment action where there is no "actual controversy" or where it would be "premature," phrasing that argument as the dissent has done begs the question: whether this is an actual, ripe controversy.

> . . . The other case the dissent cites for the point, *Calderon v. Ashmus*, 523 U.S. 740, 749 . . . (1998), simply holds that a litigant may not use a declaratory-judgment action to obtain piecemeal adjudication of defenses that would not finally and conclusively resolve the underlying controversy. That is, of course, not the case here.

Here, there is a substantial, actual, and ripe controversy. As held in *Knox v. Service Employees Intern. Union*, 132 S.Ct. 2277, 2287 (2012) (internal citations omitted) (emphasis added):

> The union argues that concerns about voluntary cessation are inapplicable in this case because petitioners do not seek any prospective relief. . . . But even if that is so, the union's *mootness argument fails because there is still a live controversy as to the adequacy of the SEIU's refund notice*.

A United States passport is not an "adequate" substitute for a declaration of United States citizenship. Petitioners' interest in having such declarations is both concrete, and substantial. DOS has unreviewable discretion to revoke their passports,[4] forcing them to file new declaratory judgment actions to reprove their United States citizenship, *de novo* – assuming that the relevant evidence is still available.

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[4] Under 8 U.S.C. §1504, DOS "is authorized to cancel any United States passport . . . if it appears that such document was illegally, fraudulently, or erroneously obtained. . . ."

By contrast, declarations that Petitioners are United States citizens could only be vacated in accordance with the substantive and procedural safeguards of Rule 60, F.R.Civ.P.

Effectual relief is also possible: declaratory judgments that Petitioners are, in fact, United States citizens: the very relief they sought. *See Rusk v. Cort*, *supra*.[5]

The "immediacy and reality" prong is satisfied by the fact that DOS often arbitrarily exercises its discretion to revoke passports. They sometimes discover a "new" seemingly adverse, fact, and revoke the passport, without giving the citizen notice or an opportunity to

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[5] The plaintiff in *Rusk* had been denied a passport at an embassy abroad on the grounds that he had lost his citizenship. He sought a declaration of United States citizenship, from outside the country. This Court held that the Administrative Procedure Act ("APA"), provided jurisdiction for an action under the Declaratory Judgment Act, just as 8 U.S.C. §1503 did here. 369 U.S. at 375:

> [T]he 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. We find nothing in the statutory language, in the legislative history, or in our prior decisions which leads us to believe that Congress had any such purpose.

The holding that the APA was jurisdictional was abrogated by *Califano v. Sanders*, 430 U.S. 99 (1977). But the availability of a declaratory judgment to determine citizenship status remains intact.

dispute its relevance.[6] Moreover, agents of Customs and Border Protection ("CBP"), sometimes confiscate valid passports from United States citizens seeking to enter the United States.[7] This happened to Nancy Castro, the lead Plaintiff in *Castro, et al. v Freeman, et al.*, 1:09-cv-208 (Southern District of Texas, pending),[8] and to Ricardo Martinez, who was born in a hospital in McAllen, Texas, but was forced to "admit" birth in Mexico.[9] In Veronica Martinez' case, the immediacy

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[6] *See, e.g.*, *Gutierrez v. Kerry, et al.*, 1:12-cv-155 (Southern District of Texas, pending). Mr. Gutierrez' passport was revoked *solely* because his Mexican birth certificate had originally reflected birth in Mexico. DOS took this as conclusive of Mexican birth, Dkt. 15, p.41 ("[t]herefore, you did not acquire U.S. citizenship by virtue of birth in the United States"), and revoked his passport, even though his Mexican birth certificate had been judicially corrected to show his true place of birth, in Texas. *Id.* at pp.32-37.

[7] For documents not included in the Appendix, the record in Ms. Garcia's case is cited by docket number and page, *e.g.* [66.1:440-41] references docket No. 66-1, pages 440-41. To avoid confusion, in Ms. Martinez' case, citations are by page, *e.g.* [R:153] is an order resetting a status conference, at page 153. Sealed exhibits are cited by docket number and document page.

[8] The same CBP agent who confiscated Nancy Castro's passport confiscated Jessica Garcia's birth certificate and other documents, and returned her to Mexico. App. 89-91, 94-96.

[9] *Martinez v. Jimenez, et al.*, 7:08-cv-087 (Southern District of Texas, 2008), discussed at [102:4, n.3]. Ricardo Martinez was returning from a visit with his grandmother, in Mexico, when he was stopped at a port of entry in Laredo, Texas. Even though he had a valid passport, he was handcuffed to a chair and forced to "confess" Mexican birth. Unfortunately, his county issued birth registration card indicated that he was registered before he was born. He was stripped of all his documents and returned to

(Continued on following page)

and reality of this threat are underscored by the outstanding, indefinite DOS "Lookout" for her, asserting that she is *not* a United States citizen. App. 41, 116.[10]

Although necessary for jurisdiction under 8 U.S.C. §1503 to *institute* the declaratory judgment action, the deprivation of a right or privilege claimed as a United States national need not continue throughout the case, as the Fifth Circuit held, so long as the case has not become moot. In this sense, §1503 is similar to habeas corpus, under 28 U.S.C. §2241. A habeas petition is only appropriate if the petitioner is "in custody" when it is filed, much as a §1503 complaint can only be filed if the plaintiff "is denied" a right or privilege claimed as a U.S. national. But jurisdiction is not lost if the habeas petitioner is released from custody during the action, unless the case has become moot, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Similarly, jurisdiction in a declaratory judgment action *instituted* under §1503 is not destroyed, unless the action has become moot, simply because the right or privilege, the denial of which provided jurisdiction to *institute* the action, has been cured.

Mexico, where he spent almost two years before his parents located counsel who arranged his return.

[10] The district court opined that this was "[l]ike when somebody goes to the airport and they're on the 'watch list,' " but that this did not mean "that there's anything that can be done about that in this lawsuit." App. 41. Respondents' counsel declined the opportunity to comment. App. 50.

Issuing passports did not render Petitioners' cases moot. A passport does not "determine" United States citizenship, as *Rusk* allows. It is not irrevocable, as *Golden State* requires. It does not even guarantee entry into the United States, as the cases of Nancy Castro and Ricardo Martinez demonstrate. And, as necessary to overcome a claim of mootness, Petitioners still had legally cognizable interests in the outcome of the litigation, namely, in obtaining declarations that they are United States citizens. This is what they sought, and is the effectual relief the district courts could provide.

Nor would ascertaining the necessary facts to determine that Petitioners are United States citizens constitute an advisory opinion, as the Fifth Circuit also held. *See Aetna Life Ins., supra*, 300 U.S. at 242:

> That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences.

Aetna also defines an advisory opinion as "an opinion advising what the law would be upon a hypothetical state of facts." *Id*. at 241. Ascertaining the facts and determining whether Petitioners have the legal status of United States citizens does not entail drawing legal conclusions from a hypothetical state of facts.

OPINIONS BELOW

The Fifth Circuit issued unpublished, *per curiam* opinions in both cases. App. 1, 6. Similarly, the district court opinions were unpublished. App. 10, 36, 38.

JURISDICTION

Judgment in Ms. Garcia's case was entered October 18, 2013. App. 1. Her Petition for En Banc Rehearing was denied December 6, 2013. App. 51. Ms. Martinez' appeal was denied December 9, 2013. App. 6. No Petition for En Banc Rehearing was filed in Ms. Martinez' case. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1503(a) Denial of rights and privileges as national

(a) Proceedings for declaration of United States nationality. If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or

independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

8 U.S.C. §1504
Cancellation of United States passports and Consular Reports of Birth

(a) The Secretary of State is authorized to cancel any United States passport or Consular Report of Birth, or certified copy thereof, if it appears that such document was illegally, fraudulently, or erroneously obtained from, or was created through illegality or fraud practiced upon, the Secretary. The person for or to whom such document has been issued or made shall be given, at such person's last known address, written notice of the cancellation of such document, together with the procedures for seeking a prompt post-cancellation hearing. 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.

22 U.S.C. §2705(1)
Documentation of citizenship

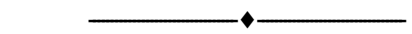
The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

(1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.

28 U.S.C. §2201 Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the

> filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.



STATEMENT OF THE CASE

I. JESSICA GARCIA

Jessica Garcia was born in Brownsville, Texas, in January, 1987. She was delivered by a midwife, Trinidad Saldivar. DHS suspected Ms. Saldivar of having filed false birth records, but she was never charged with any offense. App. 89, 94.

In 2009, Ms. Garcia was working in Brownsville, and living across the river, in Matamoros, Mexico, with her Mexican national husband, and their two minor U.S. citizen children. She applied for a passport just before June 1, 2009, when the passport requirement of the Western Hemisphere Travel Initiative ("WHTI"), was extended to citizens returning from regions that historically had been exempt, including Mexico. *See* 8 U.S.C. §1185(b), 22 C.F.R. §59.2. At that time, CBP had adopted and publicized a policy whereby those who had applied for, but not yet received, United States passports could still enter as citizens, by presenting a United States birth certificate, photo identification, and the receipt for their passport application. [102:817]. Between June 1,

2009, and October 31, 2009, Ms. Garcia entered in this manner at least 100 times. But that day she was stopped. Her birth in Texas was questioned, because it had also been registered in Mexico (*after* it was registered in Texas). Her mother was summoned to the port of entry, and both women steadfastly maintained, in vain, that Ms. Garcia was born in Brownsville. After hours of interrogation, all the documents Ms. Garcia carried were confiscated, a Notice to Appear ("NTA"), before an Immigration Judge was issued,[11] and she was summarily returned to Mexico. App. at 19.

Ms. Garcia then joined Nancy Castro in the class action challenging such procedures, *Castro*, *supra*.[12] Ms. Castro had undergone an almost identical encounter, except that she already had a valid passport.

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[11] The NTA was never filed with the Immigration Court, App. 96, so no administrative procedures existed by which Ms. Garcia could challenge the denial of entry, or confiscation of her personal documents. Those administrative actions were therefore final for purposes of 8 U.S.C. §1503(a). *See Linzalone v. Dulles*, 120 F.Supp. 107, 109 (D.C.N.Y. 1954) ("where no administrative proceeding is available, the administrative denial complained of is final.").

[12] Ms. Garcia filed suit November 20, 2009 [47:366], while her passport application was still pending, App. 13 [184:1392], based on the denial of her application for entry, and confiscation of her documents [47:377-79,390-91]. The Fifth Circuit erroneously stated that §1503 jurisdiction was based on the denial of her passport. App. 2. This false symmetry made it appear that issuing a passport "cured" the denial of a right or privilege as a U.S. citizen that had provided jurisdiction, thus obscuring the fact that the passport was not "adequate" relief under *Knox*.

App. 89-94. The amended complaint included a count under 8 U.S.C. §1503(a), with 28 U.S.C. §2201, where both women sought declarations of United States citizenship. App. 100. Ms. Garcia spent seven months exiled to Mexico. App. 72-81.

The district court severed the §1503 counts from the rest of the action. On July 5, 2012, DOS issued Ms. Garcia a passport, and then filed a motion to dismiss the case as moot, App. 13-14. Ms. Garcia countered by requesting summary judgment, App. 29. The court ordered DOS to answer certain questions about their procedures for adjudicating and revoking passports. App. 31-35. Amidst a controversy as to the accuracy of DOS' response [178-182:1379-1390], the court dismissed the case as moot. App. 10-30. The court found jurisdiction under 8 U.S.C. §1503(a), based on the fact that Ms. Garcia was denied entry as a United States citizen, and that her passport application had been denied (although the latter occurred long after the action was instituted). App. 19. In dismissing the case as moot, the court reasoned that the case was moot because Ms. Garcia no longer suffered the specific problems that prompted the suit, and did not show "a reasonable expectation" that the *same ones* would recur. App. 20-21. However, the court added a significant caveat. App. 26, 27 (emphasis added):

> Although the Court finds that Defendants' issuance of Plaintiff's passport moots the instant case, this should not be taken to suggest that late issuance of a passport will

> always have this effect. *See Guerrero v. Clinton, et al.*, No. 1:11-cv-16, Dkt. No. 38. The instant case is factually dissimilar to *Guerrero*. There the Plaintiff's passport had been revoked and reissued on the eve of trial; here, Plaintiff was denied a passport and, near the end of litigation, DOS issued a passport card to her. The distinction between a revocation and a denial and subsequent issuance should not be overlooked. . . .
>
> . . .
>
> *[O]nce DOS issues a passport, the decision to so issue the passport is left semi-open, subject to DOS revoking the passport in the future on the basis of new evidence controverting the holder's citizenship.* However, in cases in which an individual's passport application is denied, such decision is final unless the applicant re-engages DOS and provides new evidence in support of her citizenship.

In other words, consistent with 8 U.S.C. §1504, the court acknowledged that a passport may be revoked *at any time*, based on "new evidence controverting the holder's citizenship."[13] This is true regardless

[13] As in *Gutierrez v. Kerry, et al.*, *supra*, the "new evidence" may be extremely flimsy. But it forces the citizen to file a §1503 action, where s/he again bears the burden of proof, whether or not the necessary evidence still exists, and regardless of the hardship caused thereby. Loss of his passport has been devastating for Mr. Gutierrez. He needed it for his job in the international division of an oil company, and consequently lost his job. It also caused his Texas drivers license to be revoked.

of whether the passport was issued after an initial denial, or after a prior revocation. The district court found revocation more likely if the passport had been revoked previously, thus precluding mootness, than if it was issued after an initial denial, where the court found that it mooted the case.

Regardless of its merits, that calculus goes to the voluntary compliance exception, where mootness is determined by the likelihood that the challenged conduct will be resumed. *See*, *e.g.*, *Already, LLC v. Nike, Inc*., 133 S.Ct. 721, 726-27 (2013). But it effectively concedes the point, decisive under *Knox*, that issuing a passport is *not adequate* relief in an action seeking "to secure a determination of citizenship," as contemplated by *Rusk*, because the passport is forever subject to revocation.

In rejecting Ms. Garcia's argument that, based on the inadequacy of the relief provided by a passport, she continued to have a personal stake in the litigation, the district court reasoned, App. 28-29 (footnotes added):

> As the Court said in *Lopez-Diaz v. Freeman, et al.*, No. 1:12-cv-102, Dkt. No. 30 at 14-15, "Plaintiff essentially seeks through a judicial declaration under 8 U.S.C. § 1503(a) to shift the burden to Defendants in the event that there is some reason to question the validity of DOS's issuance of [her] passport card or the legitimacy of [her] citizenship in the future." As the Court held in *Lopez-Diaz*, it is not clear that 22 C.F.R. § 51.62 allows DOS

> to revoke a passport under any lesser standard than Federal Rule of Civil Procedure 60 allows a judgment to be disturbed. *Id.*, at 14.[14] As in *Lopez-Diaz*, the Court finds that Plaintiffs desire to shift the burden to Defendants through a judicial declaration of Plaintiffs citizenship under 8 U.S.C. § 1503(a) in this case is "a preemptive declaration[,] is inconsistent with the language of 8 U.S.C. § 1503, and does no more than invite the Court to issue an advisory opinion for use under speculative future circumstances." *Id.*, at 15.[15] Again, the Court relies on the reasoning in *Manning [v. Rice*, 4:06-cv-464, 2008 WL 20088712 (Eastern District of Texas, 2008)]

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[14] In fact, DOS can, and does, revoke passports on very flimsy "new" evidence. *See Gutierrez*, *supra*. But regardless of its accuracy as a statement of law, there is no mechanism to enforce such a requirement. Under current regulations, DOS provides no notice, or opportunity to be heard, prior to revocation, such as would be available in a Rule 60 proceeding. The sole recourse is a new §1503 action, leaving the citizen without a passport for months, or even years, until the case is resolved.

[15] It is unclear how such a declaration could be an advisory opinion when DOS issues a passport before trial, and not when a trial is conducted which results in a declaration of citizenship. For example, two co-plaintiffs in *Castro*, Alicia Ruiz and Maria Reyes, had very similar facts. App. 97-99. Their declaratory judgment claims were also severed into individual actions. In Ms. Reyes' case, Respondents gave her a passport before trial, and the case was dismissed, with no declaration of citizenship. *Reyes v. Freeman, et al.*, 1:11-cv-85 (Southern District of Texas, 2012), Dkt. 167. However, Ms. Ruiz' case went to trial. She won, and received a declaration of United States citizenship. *Ruiz v. Freeman, et al.*, 1:11-cv-84 (Southern District of Texas, 2012), Dkt. 188.

> and refuses to issue a declaration of Plaintiff's citizenship in this case based on speculation of future events.

Ms. Garcia appealed to the Fifth Circuit, which adopted this reasoning, and denied both her appeal, and her petition for *en banc* rehearing. App. 1-5, 51-52.

II. VERONICA MARTINEZ

Ms. Martinez is the oldest child of her now-deceased United States citizen father. All his children were born in Mexico. Ms. Martinez' next younger sibling, Monica, is only ten months younger than she. The family immigrated to the U.S. many years ago, but Ms. Martinez was already married, and remained in Mexico. Her siblings all filed for Certificates of Citizenship, under 8 U.S.C. §1401. After interviewing their father, under oath, their applications were granted. App. 106 [R:146, 171].

Later, Ms. Martinez moved to Texas. She applied for a passport, presenting the same evidence, including her father's affidavit, that her siblings had used. This evidence established her citizenship as well. She also provided his death certificate, and showed that her siblings had been acknowledged as United States citizens. But DOS made nonsensical demands, including that her (deceased) father file a new affidavit, detailing his presence in the United States. Ms. Martinez replied that no new affidavit was possible, but that the evidence already presented established

her citizenship. Nonetheless, DOS issued a boilerplate denial of her application. App. 105-09. There being no administrative appeal, Ms. Martinez filed suit, under §1503(a), seeking a declaratory judgment that she is a United States citizen.

The district court recognized the absurdity of the denial, and spent much of the first status conference, in June, 2012, trying to "talk some sense" into Respondents' counsel, App. 62, who eventually asserted that even though DOS had issued a passport to Monica, DOS believed that her Certificate of Citizenship had been granted in error. App. 60-67. In August, 2012, after the witnesses had been deposed, Ms. Martinez filed for summary judgment. [R:124-30]. Even after finding the witnesses' testimony consistent with the affidavits, DOS still refused to concede that Ms. Martinez had shown, by a preponderance of the evidence, that she had acquired U.S. citizenship. Instead, they tracked down a former girlfriend of an uncle, who further corroborated the original affidavit of the United States citizen father, and the witnesses' testimony. Only then did DOS relent, and in November, 2012, they issued the passport, App. 113-15, and sought to dismiss the action, as moot. [R:156-167]. However, like an unexploded land-mine, there is an outstanding DOS "Lookout" for her, asserting that she did not acquire United States citizenship. App. 41, 116.

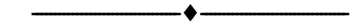
At the next hearing, the court considered DOS' motion to dismiss. The court first agreed that issuing a passport did *not* moot Ms. Martinez' action for a

declaration of United States citizenship, but then equivocated as to whether a judgment should be entered, or only an order of dismissal. App. 54-56. (emphasis added):

> MS BRODYAGA: . . . And we asked for summary judgment on that months ago, Judge. And that motion is also still pending, and we believe that we're entitled to summary judgment, namely a declaration that she is a U.S. citizen.
>
> Now, if they are conceding she is a U.S. citizen, they should have no opposition to entry of a judgment – declaration stating that she is a U.S. citizen.
>
> THE COURT: Well, did you have any opposition to that?
>
> MS WESTWATER: Yes, your Honor.
>
> THE COURT: Why?
>
> MS WESTWATER: I – if the State Department –
>
> THE COURT: Well, then we do have something – then I can't dismiss it.
>
> MS WESTWATER: I'm sorry, sir?
>
> THE COURT: *I mean, she wants to be declared a citizen. That's her cause of action here. And giving her a passport with your refusing to say that she's an American citizen just leaves something here as a cause of action.*

> MS WESTWATER: Your Honor, the United States has said that she is a citizen by giving her the passport.
>
> . . .
>
> THE COURT: Okay. And if you all can agree on an order that I sign granting your dismissal that basically says that, then I'll dismiss it.

Anticipating that the parties would not be able to agree on an order, the judge set a date for a hearing on Ms. Martinez' summary judgment motion. App. 58. No agreement was reached, so on that date, the parties returned for a hearing on Ms. Martinez' summary judgment motion. Instead, the Court dismissed the case as moot. App. 36-50. Ms. Martinez appealed. But the Fifth Circuit dismissed her appeal, relying on the reasoning in Ms. Garcia's case. App. 6-9.



ARGUMENT

I. THE INSTANT CASES WERE NOT MOOT.

The seminal case involving mootness in the context of declaratory judgment actions was *Aetna*, *supra*, 300 U.S. at 240-41 (internal citations omitted):

> A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy

> must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

The instant controversy is "definite and concrete." Petitioners sought declarations of United States citizenship. They received only passports, which may be revoked for non-nationality, based on flimsy "new" evidence, without notice, opportunity to be heard, or even a post-revocation hearing. 8 U.S.C. §1504, 22 C.F.R. §51.62(a)(1) and §51.70(a), *Gutierrez v. Kerry, et al.*, *supra*. The case therefore "touch[es] the legal relations of parties having adverse legal interests." The Department of State has an interest in preserving its unreviewable discretion to revoke Petitioners' passports, whereas Petitioners have an adverse interest, that of securing a "determination of [their] citizenship," under *Rusk*, *supra*, with the procedural protections provided by Rule 60, F.R.Civ.P.

The instant controversy is both real and substantial. Petitioners' passports are subject to revocation, and they face possible exile, should the passports be confiscated while they are abroad, *e.g.*, at a U.S.

Consulate, as happened to Reyes Torres [66.1:440-41],[16] or when seeking to enter the United States, as with co-Plaintiff Nancy Castro, in *Castro*, *supra*, App. 89-94, and Ricardo Martinez.[17] Because revocation and confiscation occur without notice or opportunity to be heard, disastrous consequences may result, such as presently are being incurred by Humberto Gutierrez.[18]

Particularly for citizens such as Jessica Garcia, who was born with a midwife, and contrary to *Matter of Villanueva*, 19 I&N Dec. 101, 102-03 (BIA 1984), DHS often conducts its own investigation when adjudicating visa petitions, or naturalization applications by permanent residents who gained their status through United States citizens, even if the citizen has a valid passport. App. 101-102.[19] This delays

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[16] Docket No. 66-1 was a proposed amended complaint, adding new plaintiffs, including Reyes Torres. The district court disallowed the amendment, but Mr. Torres filed an individual action, resulting in the return of his passport. *Torres, et al. v. Freeman, et al.*, 1:10-cv-071 (Southern District of Texas, 2010).

[17] *Martinez v. Jimenez, et al*., *supra*.

[18] *Gutierrez v. Kerry, et al.*, 1:12-cv-155 (Southern District of Texas, pending). Mr. Gutierrez went from being head of the international division of Helmerich & Payne International Drilling Co., where he had worked for sixteen years without missing a single day of work, to being jobless, because his passport was revoked, and shortly thereafter, his drivers license as well, making it next to impossible for him even to get to his stateside jobsite. He has now been let go by his employer. *Id.*, Dkt. 35.

[19] *See*, *e.g.*, *Rosales, et al. v. Lopez, et al.*, 1:13-cv-622 (Southern District of Texas, pending). From 1970, when Isaias

(Continued on following page)

processing of the immigrant petitions and naturalization applications. It also causes unjustified passport revocations, and fear and uncertainty in passport holders.

Finally, the action admits of "specific relief through a decree of a conclusive character," declaratory judgments: the very relief Petitioners sought.

The Fifth Circuit's reasoning, that Petitioners are seeking advisory opinions, *i.e.*, opinions "advising what the law would be upon a hypothetical state of facts," *Aetna*, at 241, is incorrect. To the contrary, they urged the district courts to ascertain the facts, and the legal status flowing therefrom, as this Court determined to be the courts' province in *Aetna*, *supra*, at 242.

Thus Petitioners meet both the criteria set forth in *Aetna*, and of cases demonstrating that the requirements of a continued personal stake in the litigation and the court's ability to fashion a remedy apply equally in declaratory judgment actions. *See*, *e.g.*, *Los Angeles v. Lyons*, *supra* at 123.

Rosales entered with his father, who was interrogated under oath at the port of entry, to 2009, when he received his United States passport, his citizenship was challenged at least five times, and always resolved in his favor. One such occasion was in 1994, when he immigrated his wife and children, including his daughter Flor Esthela Rosales. But in 2013, when Flor applied for naturalization, DHS challenged her lawful permanent resident status, demanding that she again prove her father's citizenship, even though he has a valid United States passport.

Nor must the personal stake required to avoid mootness be identical to that which provided initial standing. *See*, *e.g.*, *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12-13 (1992):

> While a court may not be able to return the parties to the *status quo ante* . . . a court can fashion some form of meaningful relief in circumstances such as these.

Finding, as here, that mootness occurred late in the litigation has other adverse consequences. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 191-92 (2000) ("To abandon the case at an advanced stage may prove more wasteful than frugal" given the "sunk costs."). Here, both sides have continuing interests, and the "sunk costs" are substantial. *See* the declaration of Jessica Garcia, detailing the hardships she suffered during her seven month exile from the United States, including loss of her job, default on her student loan and a court arranged payment plan for a traffic ticket, having to sell her personal possessions, including her laptop computer, strained relations with her husband, children and parents, loss of health care, depression, weight gain, and more. App. 72-81. It should therefore not be surprising that she seeks the relative security of a declaration of United States citizenship, so that she does not suffer the fate of co-Plaintiff Nancy Castro, or Ricardo Martinez, and find herself again exiled to Mexico.

Even after issuing a U.S. passport, DOS refuses to formally "admit" that the person is a United States citizen. For example, DOS eventually returned to Nancy Castro the passport CBP had confiscated, and issued one to her sister, Yuliana. [110:909]. Yet they refused to "admit" that the sisters were born in Texas. *See* Respondents' Responses to Petitioners' First Set of Requests for Admission [115:926]:

> REQUEST FOR ADMISSION NO. 1:
>
> Admit that Laura Castro was born in the State of Texas.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 1:
>
> Defendants deny the request for admission, but Defendant Clinton avers that Laura Castro was issued a United States passport.
>
> REQUEST FOR ADMISSION NO. 2:
>
> Admit that Yuliana Castro was born in the State of Texas.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 2:
>
> Defendants deny the request for admission, but Defendant Clinton avers that Yuliana Castro was issued a United States passport.

These responses were later amended as follows [122:1000]:

REQUEST FOR ADMISSION NO. 1:

Admit that Laura Castro was born in the State of Texas.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Defendants admit that Laura Castro provided enough evidence showing that she was born in Texas to meet her burden of proving that she is a United States citizen in support of her U.S. passport application.

REQUEST FOR ADMISSION NO. 2:

Admit that Yuliana Castro was born in the State of Texas.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Defendants admit that Yuliana Castro provided enough evidence showing that she was born in Texas to meet her burden of proving that she is a United States citizen in support of her U.S. passport application.

Clearly, DOS carefully guards its right under 8 U.S.C. §1504 to revoke any passport, leaving the person with no remedy except a federal court action under 8 U.S.C. §1503, with 28 U.S.C. §2201, where s/he must prove citizenship again, *de novo*, by a preponderance of the evidence. That may occur years later, when the relevant evidence has been lost, and memories have faded. By contrast, under Rule 60(c)(1), after a year, a declaration of U.S. citizenship

can no longer be vacated solely "on the basis of new evidence controverting the holder's citizenship."

II. RESPONDENTS' ARGUMENTS LACK MERIT

As Respondents summarized their position to the Fifth Circuit in Petitioner Martinez' case, Brief for Respondents, at page 9 (emphasis added):

> First, State may only issue a passport to an individual *it believes* is a U.S. citizen. 22 U.S.C. § 212 (State may only issue passports to citizens and non-citizen nationals of the United States); 22 C.F.R. § 51.2 (same). Therefore, issuance of a U.S. passport is evidence that State believes an individual is a U.S. citizen. *Second, a judicial declaration is not better than a passport since its only utility is to induce State to issue a passport* – something State has already done. Third, no exception to mootness applies because Ms. Martinez has not shown a likelihood of *future wrongful revocation* by State or that she would be unable to raise the matter to a court if it should happen. *As the district court stated, State may revoke the passport of any U.S. citizen based upon adverse information received after passport issuance. USCA5 345. Ms. Martinez fails to articulate why she should be exempt from this rule.* Finally, Ms. Martinez's requested relief is nothing more than an advisory opinion, an opinion offered on the record as it now stands that is meant to dictate how the parties should act in

> the unlikely event new adverse facts come to light. Such declarations are prohibited under the Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

These contentions fail. First, the fact that "State believes an individual is a U.S. citizen" when they issue a passport is of little worth. DOS has unreviewable discretion to revoke it the next day, and under *Moreno*, even if it has not been revoked, criminal charges can be brought against the holder for allegedly having made a false claim to U.S. citizenship. Second, the "utility" of a judicial declaration extends far beyond "induc[ing] State to issue a passport." In addition imposing to time restrictions, such a declaration would force the United States to test any allegedly adverse evidence in federal court before revoking a passport, with all the disruption that can cause. *See Gutierrez*, *supra*.

Third, the issue is not whether Petitioners showed an *exception* to mootness, but whether mootness ever occurred. Particularly since problems relating to citizenship can and do arise with various state and federal agencies, the issue is whether providing a passport is adequate relief, under *Knox*, rather than one of voluntary cessation. For example, in Ms. Garcia's case, the denial of entry and confiscation of documents by CBP provided jurisdiction under §1503, so when DOS gave her a passport, it was not voluntary cessation. Similarly, in Ms. Martinez' case, DOS' denial of her passport application provided jurisdiction, but, particularly given the indefinite "Lookout"

for her, she could have problems in the future with CBP, at the border, or DHS, in attempting to immigrate a relative. Such problems can only be prevented through a declaration of U.S. citizenship. As the dissenting opinion recognized in *Reyes v. Neelly*, *supra*:

> The issue of citizenship has been so jealously protected that some federal courts have allowed the dual remedy of habeas corpus and declaratory judgment to an alleged citizen. Such a declaratory judgment is a declaration of status which is binding not only on governmental authorities but, also, upon the whole world, it being equivalent to a certificate of naturalization.

Therefore, Petitioners urge that they retained a legally cognizable interest in the outcome of the litigation, in accordance with *Knox*, *supra*, since a passport does not provide adequate relief.

Respondents' fourth argument is particularly revealing. They claim (emphasis added):

> As the district court stated, State may revoke the passport of any U.S. citizen based upon adverse information received after passport issuance. USCA5 345. *Ms. Martinez fails to articulate why she should be exempt from this rule*.

When such a case goes to trial, and the plaintiff wins, s/he receives a declaration of citizenship, which can only be vacated in accordance with Rule 60. *See*, *e.g.*, *Ruiz v. Freeman, et al.*, *supra*. But *Respondents*

"fail[ ] to articulate why [they] should be exempt from *this rule*," *i.e.*, from Rule 60, in Petitioners' cases, simply because they issued the passports *prior to trial*.

Granting a declaratory judgment where DOS issued a passport before trial would no more be an "advisory opinion" than one granted after trial. In both cases, it could still be challenged, but only under the strictures of Rule 60. Under *Aetna*, "[t]he legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences."

REASONS FOR GRANTING THE WRIT

Supreme Court Rules 10(a) and 10(c) are both implicated here. As Respondents acknowledged in their Request for Publication to the Fifth Circuit in Ms. Garcia's case, App. 68-70, the question presented is important. The United States took inconsistent positions before the Fifth and Third Circuits, and prevailed in both. As contemplated by Rule 10(a), the Fifth Circuit opinions in Petitioners' cases conflict with that of the Third Circuit in *U.S. v. Moreno*, *supra*. Similarly, as discussed above, the Fifth Circuit decided Petitioners' cases in a way that "conflicts with numerous decisions from this Court," within the meaning of Rule 10(c).

I. THE NEED FOR THE COURT TO IMPOSE UNIFORMITY.

Before the enactment of 8 U.S.C. §1504 in 1994, the Ninth Circuit had held that DOS had only limited power, if any, to revoke passports. *See Magnuson v. Baker*, 911 F.2d 330, 334 (9th Cir.1990):

> [A]ssuming the Secretary can revoke a passport, he can do so only if he (a) gives the passport holder an opportunity to be heard prior to revocation, and (b) seeks revocation on the basis of fraud, misrepresentation, or some other exceptional ground.

As a practical matter, the enactment of §1504 dispensed with any Due Process protections, by giving DOS statutorily authorized discretion to revoke passports, made immune from judicial review by 8 U.S.C. §1252(a)(2)(B)(ii).

However, the final sentence of §1504 makes it clear that DOS is not empowered to make conclusive determinations of citizenship, or lack thereof:

> 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.

In *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir.2011), much as the Third Circuit held in *Moreno*, the Eighth Circuit indicated that a passport would offer no protection against criminal charges of falsely

claiming United States citizenship, but opined that, under *Matter of Villanueva*, it is "conclusive proof of citizenship in administrative immigration proceedings." However, *Villanueva* is honored primarily in the breach. App. 101-02. The closest there is to meaningful authority that a passport is conclusive of United States citizenship is *Magnuson*, which held that, under 22 U.S.C. §2705(1), it is conclusive unless and until revoked in accordance with Due Process.

The United States has taken contradictory positions about the meaning of 2705(1), and the extent to which a valid passport constitutes "evidence" of United States citizenship. In Petitioners' cases, the United States argued, and the Fifth Circuit agreed, that the actions for declaratory judgments that Petitioners are, in fact, United States citizens, were rendered moot by the issuance of passports, because under 2705(1), a passport "may be used as evidence of [Petitioner's] citizenship during its period of validity." App. 4. But in *Moreno*, the United States argued, and the Third Circuit held, under 2705(1), a passport is conclusive of U.S. citizenship only if the holder was, in fact, a United States citizen when it was issued. Without a declaration of United States citizenship, which could be nullified only by the district court, in accordance with Rule 60, F.R.Civ.Proc., and particularly given that under current regulations, it can be revoked without notice, an opportunity to be heard, or a post-revocation hearing, a passport is of little value as evidence of citizenship. As noted in *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir.2002):

> As Alexander Hamilton wrote, the power over naturalization must "necessarily be exclusive; because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule." The Federalist No. 32 (Alexander Hamilton). Indeed, the policy favoring uniformity in the immigration context is rooted in the Constitution. *See* U.S. Const. art. I, § 8 ("The Congress shall have the Power To . . . establish a uniform Rule of Naturalization.")

Therefore, this Court should grant certiorari, to establish uniformity among the circuit courts of appeals on the question of the reach of 2705(1), and consequently, whether by issuing passports to Petitioners, Respondents rendered moot their actions seeking declaratory judgments that they are, in fact, United States citizens.

II. THE LACK OF CLARITY IS BURDENING THE DISTRICT COURTS.

After the Fifth Circuit dismissed Ms. Garcia's appeal, in an unpublished, *per curiam* opinion, Respondents filed a Request for Publication. They argued that, App. 69:

> Cases under 8 U.S.C. § 1503(a) are common within the Fifth Circuit. Moreover, as occurred here, these cases are frequently resolved before trial . . . by the issuance of a passport to the plaintiff by DOS. As the Court held, this passport issuance resolves the case and the district court may then dismiss the action as

> moot. However, in multiple cases, dismissing these cases after a passport is issued has been a difficult process because the litigants have not been able to agree on dismissal of the case, and have continued to argue, both in district court and before this Court, over whether the case is moot.
>
> . . .
>
> Publication of the Court's decision in this case therefore is necessary to preserve judicial resources, and encourage the dismissal of cases that are resolved through the discovery process. Because publication would provide significant and clear guidance to future litigants and district courts on this important and recurring issue, Appellees-Defendants respectfully ask the Court to reconsider its decision not to publish.

There is a chicken/egg dimension to Respondents' claim that publication of the Fifth Circuit opinion would "preserve judicial resources." The burden of proof to obtain a passport is the same as for a declaratory judgment: preponderance of the evidence. Thus, holding that issuing a passport does *not* render moot an action for a declaration of U.S. citizenship would be at least as efficacious as publishing the opinion in *Garcia*, since conceding that a plaintiff was entitled to a passport would constitute an admission that s/he was also entitled to a declaration of United States citizenship.

III. HOLDING THAT ISSUING A PASSPORT MOOTS AN ACTION FOR A DECLARATION OF UNITED STATES CITIZENSHIP NOT ONLY LEAVES PETITIONERS' CITIZENSHIP OPEN TO CHALLENGE, BUT CREATES A FINANCIAL BARRIER TO THE ABILITY OF MANY CITIZENS TO CHALLENGE THE DENIAL OR REVOCATION OF PASSPORTS.

The record below clearly shows Petitioners' need for declaratory judgments, to "determine" their status as United States citizens, in accordance with *Rusk*, *supra*. In Ms. Martinez' case, there is an outstanding "Lookout" for her, inhibiting her ability to exercise her constitutional right of international travel. *See Regan v. Wald*, 468 U.S. 222, 240-42 (1984). In *Castro*, where Jessica Garcia's action was commenced, co-plaintiff Nancy Castro already had a valid U.S. passport. This did not prevent CBP from detaining her, with her mother, sister, Yuliana, and infant niece, when they sought entry. After nearly ten hours of interrogation, Ms. Castro's mother signed a false confession, "admitting" that Nancy and Yuliana were born in Mexico. Ms. Castro's passport was confiscated, and she was returned to Mexico.[20] At the time,

[20] Ms. Castro's mother was served with an order of expedited removal, under 8 U.S.C. §1225(b)(1)(A)(i), because she supposedly falsely registered her daughters as born in Texas. Respondents have refused to vacate the mother's removal order, or return her non-immigrant visa. So she remains excludable, under 8 U.S.C. §1182(a)(6)(C)(i), and can no longer visit her

(Continued on following page)

Ms. Castro was in the early stages of a high risk pregnancy, and needed immediate access to her doctor in Brownsville. She filed an emergency motion [15:110], which was granted. *See* Minute Entry, September 8, 2009, 1:09-cv-208. Under the circumstances, Ms. Garcia cannot be faulted for wanting a declaration of her citizenship, so that she need not fear being subjected to the same treatment as her co-Plaintiff, Nancy Castro.

Claims of United States citizenship made by applicants for entry usually are heard by issuing an expedited removal order, and referring it to an Immigration Judge. 8 C.F.R. §1235.3(b)(5)(iv). Detention of the citizenship claimant is mandatory, and parole under 8 U.S.C. §1225(d)(5) is forbidden, absent a "medical emergency, or . . . legitimate law enforcement objective," 8 C.F.R. §1235.3(b)(5)(i). Thus, without declarations that they are United States citizens, like Nancy Castro, Ricardo Martinez, and others, Petitioners could experience such problems in the future, and be subjected to lengthy administrative detention, before they could (again) litigate their U.S. citizenship, *de novo*, in district court. Or, like Reyes Torres, their passports could be confiscated at the U.S. Consulate, if they try to immigrate family members. This could also leave them stranded in Mexico.

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daughters, or grandchildren, in Brownsville. App. 89-94 [102:802].

There are other, less obvious, problems. As urged in Respondents' Request for Publication, "these cases are frequently resolved before trial . . . by the issuance of a passport to the plaintiff by DOS." If they then are dismissed as moot, attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA"), are unavailable. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). Where a passport denial borders on frivolous, as in Petitioners' cases, it is virtually certain that a passport will be issued before trial, and EAJA fees would be unavailable. In closer cases, such as that of Alicia Ruiz, won after trial, the initial denial probably would be considered "substantially justified," also making EAJA fees unavailable. Thus, EAJA fees rarely, if ever, would be available. Given the extensive discovery, motions, etc., that characterize these cases, most private attorneys would be deterred from undertaking them without a substantial fee. And whether most people in this position have the resources to pay such fees is highly questionable. The district court docket sheet, *Garcia v. Freeman, et al.*, 1:11-cv-83 (Southern District of Texas, 2012), shows an increasing number of "related cases" filed from 2009 to 2011. But an unknown, and unknowable, additional number of aggrieved citizens who were denied passports, or whose passports were revoked, have been unable to seek redress, due to this conundrum.

IV. THE QUESTION PRESENTED WILL NOT BENEFIT FROM FURTHER CONSIDERATION IN THE COURTS OF APPEALS.

There are three reasons that the question presented would not benefit from further consideration in the courts of appeals. First, the issue is relatively straightforward. This is not a case involving technical regulations, complicated patents, or conflicting Constitutional provisions. Rather, it is a question of applying settled law under new circumstances. Second, it is unlikely that, at least in the foreseeable future, the issue will be raised in other courts of appeals. As noted in Respondents' Request for Publication, "[c]ases under 8 U.S.C. § 1503(a) are common within the Fifth Circuit." They usually involve midwife births which occurred near the Mexican border, to Mexican parents. App. 87. Midwife births that occurred in the heartland, or near the Canadian border, do not appear to elicit the same degree of scrutiny.

And finally, the fact that there is a petition for certiorari pending in *Moreno*, *supra*,[21] where Respondents took a position inconsistent with that advanced in and adopted by the Fifth Circuit, presents this

[21] As a courtesy, on December 19, 2013, an email was sent to counsel for Respondents, Donald B. Verrilli, Jr., Solicitor General, advising that the instant petition was forthcoming, and that every effort would be made to file it before January 10, 2014, the current response date in *Moreno*. Copies of the Fifth Circuit decisions in Petitioners' cases were attached.

Court with a unique opportunity to consider the question presented from differing perspectives.

CONCLUSION

In conclusion, Petitioners urge this Honorable Court to grant their petition for a writ of certiorari, to resolve the question of whether issuing a United States passport renders moot a declaratory judgment action seeking a declaration of United States citizenship, under 28 U.S.C. §2201, instituted pursuant to 8 U.S.C. §1503(a).

Respectfully submitted,

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APPENDIX

APPENDIX – Continued

APPENDIX – Continued

APPENDIX – Continued

Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-41458
Summary Calendar

JESSICA GARCIA,

Petitioner-Appellant

v.

PORT DIRECTOR MICHAEL T. FREEMAN; JOHN KERRY; JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondents-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:11-CV-83

(Filed: Oct. 18, 2013)

Before: JONES, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM.*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

(Continued on following page)

Jessica Garcia applied for a United States passport in May 2009. The Department of State (DOS) denied her application and Garcia filed this action under 8 U.S.C. § 1503(a), which provides for declaratory relief from a final agency determination denying any right or privilege as a national of the United States upon grounds of citizenship. Shortly after discovery closed in May 2012, however, DOS determined Garcia met her burden of proof to establish her United States citizenship and issued her a passport card. As a result, DOS moved to dismiss this action on the grounds that the issuance of the passport card mooted Garcia's claim for a declaration of citizenship under § 1503(a). Garcia challenges the district court's granting the motion to dismiss.

Garcia contends the court erred in concluding her action was moot simply because DOS issued her a passport card. She maintains she still has a concrete interest in the outcome of the litigation in that she seeks to obtain a declaration of United States citizenship that will not expire and can only be rescinded or modified pursuant to Federal Rule of Civil Procedure 60. Finally, she maintains such a declaration of citizenship would be meaningful relief if granted by the district court.

We review *de novo* the district court's grant of a Federal Rule of Civil Procedure 12(b)(1) motion to

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except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

dismiss for lack of subject matter jurisdiction. *Zephyr Aviation, LLC v. Dailey*, 247 F.3d 565, 570 (5th Cir. 2001). Garcia bears the burden of proof to show jurisdiction exists. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

An individual who claims a denial of a right or privilege as a national by any department or independent agency may seek a declaration of citizenship under § 1503(a). 8 U.S.C. 1503(a); *see Nelson v. Clinton*, 2010 WL 5342822, *3 (S.D. Tex. 2010) (explaining § 1503(a) authorized an action by a person within the United States "who claims a denial of a right or privilege as a national, such as the issuance of a passport"). An action under § 1503(a) "may be instituted only within five years *after the final administrative denial* of such right or privilege". 8 U.S.C. § 1503(a)(2) (emphasis added); *see Parham v. Clinton*, 374 F. App'x 503, 504 (5th Cir. 2010) (noting there was no denial of a right or privilege pursuant to § 1503 when a final administrative decision had not been issued). "The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) (citation omitted). "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Id*. (internal quotation marks and citation omitted).

A district court does not have jurisdiction to review claims under § 1503(a) where plaintiff has not

been denied a right or privilege as a national of the United States pursuant to a final administrative determination. *See* § 1503(a); *Parham*, 374 F. App'x at 504. DOS issued Garcia a passport card as a result of its final determination that Garcia met her burden of proof establishing her United States citizenship. Thereafter, Garcia did not have a concrete interest in this action because she did not suffer any harm. In other words, there is no showing that she has been denied any right or privilege as a United States national as a result of DOS' decision to issue her a passport card. This card may be used as evidence of Garcia's citizenship during its period of validity. *See* 22 U.S.C. § 2705(1); *see also Manning v. Rice*, 2008 WL 2008712, *3 (E.D. Tex. May 8, 2008) (explaining that plaintiff suffered no injury under § 1503(a) because she was issued a passport, which serves as evidence of citizenship). Garcia's contention that she still has a concrete interest in obtaining a declaration of citizenship is unavailing; essentially, she seeks an advisory opinion that could be used in the event an official challenges her citizenship in the future. As stated, because DOS issued Garcia a United States passport card, she has not been denied any right or privilege of a United States national. Accordingly, the district court did not err in dismissing this action as moot.

In her reply brief, Garcia concedes she is not asserting that an exception to the mootness doctrine applies. She has abandoned any challenge to the district court's holding on these exceptions by failing

to brief the issue on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (citing FED. R. APP. P. 28(a)(4)).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-40166
Summary Calendar

VERONICA MARTINEZ DE ESPARZA,

Petitioner-Appellant

v.

JOHN KERRY, Secretary of State;
UNITED STATES OF AMERICA,

Respondents-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:12-CV-24

(Filed: Dec. 9, 2013)

Before: KING, BARKSDALE, and HIGGINSON, Circuit Judges.

PER CURIAM.*

Veronica Martinez de Esparza applied for a United States passport in June 2008. After the Department

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of State (DOS) denied her application, in 2009 Martinez filed this action under 8 U.S.C. § 1503(a), which provides for declaratory relief from a final agency determination denying any right or privilege as a national of the United States, upon grounds of citizenship. In November 2012, DOS determined Martinez met her burden of proof to establish her United States citizenship and issued her a passport. As a result, DOS moved to dismiss this action on the grounds that the issuance of the passport mooted Martinez' claim for a declaration of citizenship under § 1503(a). Martinez challenges the district court's granting the dismissal motion.

Martinez contends the district court erred in concluding her action was moot because DOS issued her a passport. She contends that DOS and Border Patrol Agents have the authority to revoke or confiscate a passport without prior notice or hearing. For that reason, she maintains she has a concrete interest in obtaining a declaration of citizenship under § 1503(a), which will not expire and can only be rescinded or modified pursuant to Federal Rule of Civil Procedure 60.

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is reviewed *de novo*. *E.g., Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Martinez bears the burden of proof to show jurisdiction exists. *Id*.

"An individual who claims a denial of a right or privilege as a national by any department or independent agency may seek a declaration of citizenship under § 1503(a)." *Garcia v. Freeman*, No. 12-41458, 2013 WL 5670856, at *1 (5th Cir. 18 Oct. 2013) (citation omitted); 8 U.S.C. § 1503(a). Actions under § 1503(a) "may be instituted only within five years *after the final administrative denial* of such right or privilege". *Garcia*, 2013 WL 5670856, at *1 (quoting 8 U.S.C. § 1503(a)(2) (emphasis added)) (citation omitted). "The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Id*. (quoting *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009)). "Generally, any set of circumstances that eliminates [the] actual controversy after the commencement of a lawsuit renders that action moot." *Id*. (In her reply brief, Martinez concedes she is not asserting that an exception to the mootness doctrine applies.)

"A district court does not have jurisdiction to review claims under § 1503(a) where plaintiff has not been denied a right or privilege as a national of the United States pursuant to a final administrative determination." *Id*. (citations omitted). Martinez has not shown she was denied a right or privilege as a United States national as a result of DOS' decision to issue her a passport because it may be used as evidence of her citizenship during its period of validity. *Id*. (citations omitted). Martinez' contention that she still has a concrete interest in obtaining a declaration

of citizenship fails for the same reason the plaintiff's contention in Garcia failed. "[E]ssentially, she seeks an advisory opinion that could be used in the event an official challenges her citizenship in the future". *Id*. DOS issued Martinez a United States passport, and, therefore, she has not been denied a right or privilege of a United States national.

AFFIRMED.

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

JESSICA GARCIA,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. 1:11-CV-83**
MICHAEL T. FREEMAN, ET AL.,	§	
	§	
Defendants.	§	

ORDER *NUNC PRO TUNC*

Inadvertent scrivner's errors in the order signed and entered in this case on October 10, 2012, Dkt. No. 187, are hereby corrected by substituting the following order as of November 7, 2012, *Nunc pro Tunc*.

BE IT REMEMBERED, that on October 10, 2012, the Court considered Defendants' Motion to Dismiss as Moot under Federal Rule of Civil Procedure 12(b)(1), Dkt. No. 164, Plaintiff's Opposition to Motion to Dismiss, Dkt. No. 166, Plaintiff's Supplemental Points and Authorities in Support of Plaintiff's Opposition to Motion to Dismiss, Dkt. No. 170, Defendant's Reply in Support of Motion to Dismiss, Dkt. No. 171, Plaintiff's Motion for Summary Judgment on Her Complaint for Declaratory Relief, Dkt. No. 169, Defendants' Opposition to Motion for Summary Judgment, Dkt. No. 172, Plaintiff's Reply to Defendants' Opposition to Her Motion for Summary Judgment, Dkt. No. 173, Defendants' Declaration of Jonathan M.

Rolbin, Dkt. No. 178, Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt. No. 179, (Sealed) Exhibits in Support of Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt. No. 180, Supplement to Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1,] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt No. 181, and Defendants' Reply to Plaintiff's "Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012 [174]," Dkt. No. 182. For the reasons discussed below, the Court **GRANTS** Defendants' Motion to Dismiss as Moot under Federal Rule of Civil Procedure 12(b)(1) and **DENIES** Plaintiff's Motion for Summary Judgment on Her Complaint for Declaratory Relief as moot.

As a preliminary matter, the Court notes that the deadline for dispositive motions in the present case was May 31, 2012. Dkt. No. 161. However, Defendants' Motion to Dismiss as Moot Under Federal Rule of Civil Procedure 12(b)(1) challenges the Court's subject matter jurisdiction, an issue that may be raised at any time. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). Thus, the instant motion is not untimely.

I. Background

The present case is an individual action for a declaration of United States citizenship under 8 U.S.C. § 1503(a), and was originally one cause of action among many in *Castro et al. v. Freeman et al.*, No. 1:09-cv-208. On April 26, 2011, the Court severed the present case from *Castro*. *Id.*, Dkt. No. 158 at 16-17. Plaintiff has not filed a separate complaint under this case number, however, her individual action under 8 U.S.C. § 1503(a) is raised in Plaintiffs' Third Amended Petition for Writ of Habeas Corpus, F.T.C.A. and Bivens Action for Damages, and Class Action Complaint for Declaratory and Injunctive Relief. *Castro*, Dkt. No. 102 at 39. There, Plaintiff and six other Plaintiff's claim that they "were denied their right of entry to the U.S., and the right to possess their documents demonstrating U.S. citizenship, on the grounds that they were allegedly not United States citizens. . . . Plaintiffs . . . therefore further request that this Court issue declaratory judgments, under 8 U.S.C. § 1503(a), declaring that they are United States citizens." *Id.* (footnote omitted).

Similarly, the facts relating to Plaintiff's cause of action under 8 U.S.C. § 1503(a) are alleged in Plaintiffs' Third Amended Petition for Writ of Habeas Corpus, F.T.C.A. and Bivens Action for Damages, and Class Action Complaint for Declaratory and Injunctive Relief. *Id.*, Dkt. No. 102 at 14-16. There, Plaintiff stated that she was born in Brownsville, Texas in 1987, and her birth was attended by a midwife. *Id.*, at 14. Plaintiff's mother registered her birth in

Matamoros, Mexico, reflecting birth there, "in order to obtain vaccinations for her in Mexico." *Id.* In May, 2009, Plaintiff applied for a United States passport. *Id.*

On October 31, 2009, Plaintiff attempted to cross into the United States at a port of entry in Brownsville, Texas. *Id.*, Dkt. No. 102 at 14. She showed Officer Eliseo Cabrera her Texas ID, her Texas birth certificate, and her receipt for her passport application. *Id.* Officer Cabrera asked if Plaintiff had a Mexican birth certificate. *Id.* Plaintiff answered that she did not, and Officer Cabrera sent her into secondary inspection. *Id.* Ultimately, Plaintiff was denied entry into the United States, her documents were confiscated, and Officer Cabrera issued a Notice to Appear to her for a hearing on her citizenship before an immigration judge. *Id.*

On June 24, 2010, Defendant Department of State, ("DOS") denied Plaintiff's May 2009 application for a United States passport. Dkt. Nos. 184, 185, and 186.

Following severance of Plaintiff's individual action under 8 U.S.C. § 1503(a) from the other causes of action in *Castro* and until the present motions, the parties remained relatively inactive before the Court. On July 25, 2012, DOS issued Plaintiff a passport card. Dkt. No. 164 at 2. Regarding the basis for its decision, DOS stated that "[a]fter reviewing all of the evidence submitted by [Plaintiff] Jessica Garcia, as well as additional evidence obtained by DOS during

the course of discovery, DOS determined that [Plaintiff] Jessica Garcia had satisfied her burden of establishing that she was born in the United States." *Id.*

II. Defendants' Motion to Dismiss as Moot

A. Parties' arguments

Two days after issuing Plaintiff's passport card, Defendants filed Defendants' Motion to Dismiss as Moot under Federal Rule of Civil Procedure 12(b)(1). Dkt. No. 164.. In their motion, Defendants argue that Plaintiff's action for a declaration of United States citizenship under 8 U.S.C. § 1503(a) is moot by virtue of DOS's issuance of Plaintiff's passport card. On July 27, 2012, Defendants filed their Motion to Dismiss as Moot under Federal Rule of Civil Procedure 12(b)(1). Dkt. No. 164. In this motion, Defendants argue that Defendant Department of State's ("DOS") issuance of a passport card to Plaintiff "means that no case or controversy exists, and this case is therefore moot." *Id.*, at 1. Further, Defendants argue that "the narrow exception to the mootness rule is those situations that are 'capable of repetition yet evading review,'" and that the present case does not fall within that exception. *Id.*, at 5-6 (internal citation omitted).

On August 17, 2012, Plaintiff filed Plaintiff's Opposition to Motion to Dismiss. Dkt. No. 166. In her response, Plaintiff argues that the instant case is not moot. *Id.*, at 4-9. Specifically, Plaintiff argues that a different exception to the mootness doctrine based upon voluntary acts undertaken by a defendant

applies in this case. *Id.*, at 4-5. Plaintiff argues that application of this exception prevents the present case from being moot because Defendants have not met the "heavy burden" that the test requires. *Id.*, at 5-7 (internal citation omitted). Plaintiff continues, arguing that the true purpose behind Defendants' motion is an attempt to evade the imposition of attorneys fees under the Equal Access to Justice Act. *Id.*, at 8-9. On September 3, 2012, Plaintiff filed Supplemental Points and Authorities in Support of Plaintiff's Opposition to Motion to Dismiss. Dkt. No. 170. Plaintiff did not seek leave to file her supplemental response, as required by Judge Tagle's Civil Procedures, Rule 5(E). In this supplemental filing, Plaintiff argues that the issuance of her passport "is irrelevant to her right to a Declaration of U.S. Citizenship," because the broader scope of a Declaration of U.S. Citizenship under 8 U.S.C. § 1503(a) by a Federal Court than the issuance of a passport by the DOS prevents the DOS's decision from mooting her claim. *Id.*, at 1.

On September 6, 2012, Defendants filed Defendants' Reply in Support of Motion to Dismiss. Dkt. No. 171 at 4-6. In their reply, Defendants argue that the voluntary cessation and the "capable of repetition, yet evading review" exceptions to the mootness doctrine do not apply in the instant case. Specifically, Defendants argue that DOS's decision to issue Plaintiff's passport card "[was] not a cessation of an ongoing activity, but a single evaluation of evidence that has now been completed to the benefit of Ms. Garcia

based on the evidence gathered during the discovery period." *Id.*, at 4. Further, Defendants rearticulate their argument that Plaintiff has failed to establish the required elements of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Id.*, at 5-6.

On September 19, 2012 the Court ordered Defendants to answer three questions regarding the criteria for reevaluation of a decision to issue a United States passport, what constitutes new evidence of an individual's citizenship sufficient for DOS to reevaluate the individual's application for a United States passport, and what constitutes new evidence of an individual's citizenship sufficient for DOS to reevaluate the individual's citizenship when DOS seeks to revoke an individual's passport. Dkt. No. 177. On September 26, 2012, Defendants submitted the Declaration of Jonathan M. Rolbin, responding to the Court's questions, Dkt. No. 178. On September 27, 2012, Plaintiff filed Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt. No. 179, (Sealed) Exhibits in Support of Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt. No. 180, and Supplement to Plaintiff's Response to Declaration of Jonathan M. Rolbin, [178.1,] Filed Pursuant to This Court's Order of September 12, 2012, [174], Dkt No. 181. In these documents, Plaintiff argues that Defendants' response through the Declaration of Jonathan M. Rolbin ("Rolbin") is

inaccurate, in that the "new evidence" upon which Rolbin says DOS relied in issuing Plaintiff's passport was not "new." Dkt. Nos. 179, 180, 181. On September 28, 2012 Defendants filed Defendants' Reply to Plaintiff's "Response to Declaration of Jonathan M. Rolbin, [178.1] Filed Pursuant to This Court's Order of September 12, 2012 [174]," Dkt. No. 182. In their Reply, Defendants argue that there is no basis for Plaintiff to have filed a response to Rolbin's declaration, and that his statements are "correct and accurate." *Id.*

On October 2, 2012, the Court ordered the parties to respond to and provide any documentation in support of the Court's question asking whether Plaintiff's May 2009 passport application was finally adjudicated prior to DOS's issuance of Plaintiff's passport card on July 25, 2012. Dkt. No. 183. The parties both informed the Court that Defendant DOS denied Plaintiff's May 2009 application on June 24, 2010. Dkt. Nos. 183, 184, and 185.

B. Standard of Review

Rule 12(b)(1) allows a court to dismiss a lawsuit where the pleader proves that the court "lacks jurisdiction over the subject matter." FED. R. CIV. P. 12(b)(1). The Plaintiff bears the burden of establishing that this Court has subject matter jurisdiction over the claims she raises. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). "Ultimately, a motion to dismiss for lack of subject matter

jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of [her] claim that would entitle plaintiff to relief." *Id.* (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc.*, 143 F.3d at 1010 (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)).

In determining whether a federal court has subject matter jurisdiction, a court may consider "(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." *Ramming*, 281 F.3d at 161 (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

C. Legal Analysis

The jurisdiction of federal courts is limited by the Constitution's "case or controversy" requirement. U.S. CONST. art. III, § 2, cl. 1. The doctrines of mootness, ripeness, standing, and political question reflect this requirement. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Some have described the doctrine of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation

(standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (citing Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)). To have standing, a plaintiff must have suffered an injury in fact, the injury must be fairly traceable to the defendant's conduct and it must be likely that the injury will be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Should an event transpire during the course of the case that prevents a plaintiff from having standing, the case is rendered moot, and the federal court must dismiss the case for want of jurisdiction.

To bring an action seeking a declaration of citizenship under 8 U.S.C. § 1503(a), an individual must have suffered the denial of a "right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States." 8 U.S.C. § 1503(a). Plaintiff suffered the exclusion from the United States following her attempt to enter the United States on October 31, 2009 and also the denial of her passport application on June 24, 2010. Accordingly, Plaintiff has met the prerequisites to filing suit under 8 U.S.C. § 1503(a).

Defendants have challenged this Court's subject matter jurisdiction over the instant action. Dkt. No. 164. Defendants' challenge is a factual attack. *See Menchaca*, 613 F.2d at 511. The Court finds the following facts to be uncontested: Plaintiff submitted an application for a United States passport in May

2009, Plaintiff's passport application was denied on June 24, 2010, and Plaintiff was issued a passport card on July 25, 2012. Dkt. Nos. 183, 184, and 185; Dkt. No. 164 at 1, 167.

Defendants argue that their *ultra vires* issuance of Plaintiff's passport card on July 25, 2012 moots the instant action. As stated above, events that occur during the course of litigation may end the live controversy between the parties and render an action moot. However, there are exceptions to the mootness doctrine. Most relevant to this case are the exceptions for events that are "capable of repetition, yet evading review," and for defendants' voluntary acts.

The exception for acts that are "capable of repetition, yet evading review" applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This exception is inapplicable to the instant case. Plaintiff has not demonstrated that either of the two bases for her action, denial of entry into the United States or denial of her passport application, are in themselves too short to be subject to review. In fact, the entire purpose of 8 U.S.C. § 1503(a) is to provide such review. Additionally, the Court finds that Plaintiff has not demonstrated a reasonable expectation that she will be subject to either or both denial of entry into the United States or denial of any future passport applications. Although

Plaintiff does articulate concerns about future treatment at the border and in future adjudications of passport applications or revocations, the Court adopts the reasoning of another district court in *Manning v. Rice*:

> The Court cannot and will not issue such speculative and advisory relief. If Plaintiff's passport is not renewed, and if she has exhausted her administrative remedies as to the denial of that renewal, then she – at that time – will have been denied a right or privilege to which she believes she is entitled and a district court should – at that time – have jurisdiction over her claims. Now is simply not that time.

4:06-CV-464, 2008 WL 2008712, at *3 (E.D. Tex. 2008).

The second relevant exception to the mootness doctrine limits the ability of voluntary actions by defendants from eliminating federal court jurisdiction. As the Fifth Circuit has stated,

> . . . the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case: If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.

Sossamon v. Lone Star State of Texas, 560 F.3d 316, 324 (5th Cir. 2009); *Friends of the Earth, Inc. v.*

Laidlaw Environmental Services, Inc., 528 U.S. 167, 189 (2000). In a case in which a defendant's voluntary act threatens to moot the case, the applicable standard for determining whether the case has been mooted provides "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Sossamon*, 560 F.3d at 325 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189). The party asserting mootness, here the Defendants, bears the "heavy burden" of establishing that the case has become moot. *Id.* However, when the defendant is a government actor, "courts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity." *Id.* This slight deference is provided to "government actors in their sovereign capacity and in the exercise of their official duties" because of a "presumption of good faith because they are public servants, not self-interested private parties." *Id.* Thus, without contrary evidence, a court may assume that formal policy changes or similar voluntary acts by defendants who are governmental actors within their official capacities "are not mere litigation posturing." *Id.*

The instant case presents a situation in which the Defendants' voluntary act threatens to moot the case. Defendants issued Plaintiff's passport card on July 25, 2012 on their own, without an open application from the Plaintiff, and outside of any settlement

agreement. Dkt. Nos. 164 at 1, 167. It is unclear under what authority DOS may issue United States passports without an open application from an applicant or pursuant to a settlement agreement. Notwithstanding the fact that the basis for DOS's action is unknown, the Court finds DOS's issuance of Plaintiff's passport card to be a "voluntary act." Unless an exception applies, this action moots both grounds for Plaintiff's action under 8 U.S.C. § 1503(a): Plaintiff has a passport card, and may use her passport card to enter the United States.

Turning to the exception for a defendant's voluntary act, Plaintiff has argued that Defendants' actions were, in fact, litigation posturing, undertaken so as to avoid an award of attorneys' fees.[1] Dkt. No. 166 at 8-9. Even if the Court were to find this suggestion to be evidence to that effect, thereby depriving Defendants of the presumption of good faith, Defendants' mootness argument still prevails. Accordingly, the Court will evaluate Defendants' actions without the presumption of good faith, without making any finding as to the good or bad faith underlying their decision to issue Plaintiff's passport card.

As stated above, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Sossamon*, 560 F.3d at 325

[1] The Court states no position on the merits of Plaintiff's arguments regarding any potential award of attorneys' fees.

(quoting *Friends of the Earth, Inc.*, 528 U.S. at 189). Defendants bear the "heavy burden" of establishing that their "allegedly wrongful behavior could not reasonably be expected to recur." *Id.* The Court finds that Defendants have met this burden. The wrongful behavior alleged in this case involved Plaintiff's denial of entry into the United States and the denial of her passport application. The Court finds that Defendants' issuance of Plaintiff's passport card makes it "absolutely clear" that Plaintiff will not be excluded from the United States in the future, during the period of the passport's validity. The Western Hemisphere Travel Initiative, the Department of Homeland Security's implementation of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. No. 108-458, § 7209, 118 Stat. 3638, 3823-24 (2004), requires citizens to present a U.S. passport, U.S. passport card, Enhanced Driver's License, or Trusted Traveler Program Card as of June 1, 2009 to gain entry into the United States. Further, when seeking entry into the United States, an individual must prove to the Customs and Border Patrol officer that he or she is a citizen and present a United States passport if not excused from that requirement. *See* 8 C.F.R. § 235.1(b). Because Plaintiff now has a United States passport, unlike on October 31, 2009, the Court finds it is "absolutely clear" that Defendant's allegedly wrongful behavior of denying her entry into the United States cannot reasonably be expected to recur.

As to the denial of Plaintiff's passport application, the Court finds that Defendant has demonstrated

with absolute clarity that, notwithstanding the discovery of new evidence that she is not a citizen, Defendant's allegedly wrongful behavior of denying Plaintiff a United States passport on application cannot reasonably be expected to recur. In Defendants' Declaration of Jonathan M. Rolbin, Defendant DOS states that "[a]ny application, even one previously denied, is always readjudicated in full based on the evidence presented and available at the time of that application." Dkt. No. 178, Declaration of Jonathan M. Rolbin at 2, p. 4. Further, Rolbin states that DOS bases its decisions to issue passports "on the evidence presented and available at the time of that application." *Id.* Assuming no new evidence, defined by Rolbin as "evidence which was not before DOS at the time of the denial,"[2] *Id.*, at 2, p. 3, regarding Plaintiff's citizenship is discovered, DOS's future decisions on passport applications submitted by Plaintiff should be the same as its current decision to issue Plaintiff's passport card. Should new evidence come to light in

[2] Plaintiff's argument that Defendants' Declaration of Jonathan A. Rolbin is inaccurate fails. As Plaintiff acknowledges, there was new evidence before DOS at the time it decided to issue Plaintiff's passport: the deposition testimony of affiants. The Court notes the difference between affidavits and depositions, including the availability of cross examination, and notes that "new" evidence need not mean "different" evidence. There is no reason to believe that "new" evidence cannot be corroborative of other evidence; the only requirement to be new is that it not previously have been before DOS. That the substance was substantially similar, or even identical, does not eliminate the difference between depositions and affidavits.

the future that controverts Plaintiff's citizenship, that evidence might be a basis for denying a future passport application. However, should this happen, Defendants would not be returning to allegedly wrongful behavior; instead, they would be engaging in new behavior based on a new evaluation of different evidence. Accordingly, the Court finds it is absolutely clear that Defendants' allegedly wrongful conduct, denying Plaintiff a United States passport, cannot reasonably be expected to recur. Because neither exception to the mootness doctrine applies, the Court finds that Plaintiff's claim for a judicial declaration of United States citizenship under 8 U.S.C. § 1503(a) is moot.

Although the Court finds that Defendants' issuance of Plaintiff's passport moots the instant case, this should not be taken to suggest that late issuance of a passport will always have this effect. *See Guerrero v. Clinton, et al.*, No. 1:11-cv-16, Dkt No. 38. The instant case is factually dissimilar to *Guerrero*. There the Plaintiff's passport had been revoked and reissued on the eve of trial; here, Plaintiff was denied a passport and, near the end of litigation, DOS issued a passport card to her. The distinction between a revocation and a denial and subsequent issuance should not be overlooked. The critical difference rests on the Court's finding that in cases involving revocations of passports, there appears to be ongoing review of the evidence of a holder's status.

In the Court's order of September 12, 2012, the Court ordered Defendants to answer three questions.

Dkt. No. 174 at 2-3. The first of these questions asked "[w]hat are the criteria for determining whether DOS will reevaluate a decision to issue a passport made on the grounds that the individual has met his burden of proof of United States citizenship under 22 C.F.R. § 51.40?" *Id.*, at 2. In response, Rolbin stated, "DOS reevaluates the decision to issue a passport when it subsequently learns of new evidence that was not before it at the time of passport issuance and sufficiently contradicts the individual's claim to U.S. citizenship, or that presents another ground to reevaluate the decision to issue a passport." Dkt. No. 178, Declaration of Jonathan M. Rolbin at 2, p. 2. The Court reads this statement to say that, once DOS issues a passport, the decision to so issue the passport is left semi-open, subject to DOS revoking the passport in the future on the basis of new evidence controverting the holder's citizenship. However, in cases in which an individual's passport application is denied, such decision is final unless the applicant re-engages DOS and provides new evidence in support of her citizenship. *Id.*, at 2, p. 4 ("In addition to reevaluations that occur in the context of litigation, DOS also reevaluates an individual's application in other situations. For example, at any time following a denial, an applicant may always submit a new application, and may include any evidence not previously provided. Any application, even one previously denied, is always re-adjudicated in full based on the evidence presented and available at the time of that application."). Thus, the distinction between a revocation of an existing passport and an issuance on a previously denied passport application

is the scope of DOS's ability to continue to evaluate evidence of an applicant's or holder's citizenship; in the former DOS retains plenary authority to conduct almost rolling review of the evidence of a holder's citizenship (as appeared in *Guerrero*), whereas in the latter, DOS engages in episodic review of evidence of an applicant's citizenship. This distinction is crucial to the voluntary act exception analysis in that episodic review does not permit DOS to return to previous conduct; there is no ongoing evaluation. However, in the cases involving revocation, once a revocation has occurred, as in *Guerrero*, the issuance of passport following revocation is a return to the semi-open status in which a holder's status is constantly under review. At that point, DOS's conduct in its evaluation is being "returned to" and, unless the Defendant can demonstrate with absolute clarity that a return to any allegedly wrongful analysis of the evidence of a holder's citizenship cannot reasonably be expected to recur, such voluntary act of issuing a passport to an individual whose passport was previously revoked does not moot a case.

As a final point, the Court turns to Plaintiff's argument that the scope of a judicial declaration under 8 U.S.C. § 1503(a) is broader than the issuance of a passport, and that this fact prevents the instant case from becoming moot. Dkt. No. 166 at 5-7. As the Court said in *Lopez-Diaz v. Freeman, et al.*, No. 1:12-cv-102, Dkt. No. 30 at 14-15, "Plaintiff essentially seeks through a judicial declaration under 8 U.S.C. § 1503(a) to shift the burden to Defendants in the

event that there is some reason to question the validity of DOS's issuance of [her] passport card or the legitimacy of [her] citizenship in the future." As the Court held in *Lopez-Diaz*, it is not clear that 22 C.F.R. § 51.62 allows DOS to revoke a passport under any lesser standard than Federal Rule of Civil Procedure 60 allows a judgment to be disturbed. *Id.*, at 14. As in *Lopez-Diaz*, the Court finds that Plaintiff's desire to shift the burden to Defendants through a judicial declaration of Plaintiff's citizenship under 8 U.S.C. § 1503(a) in this case is "a preemptive declaration[,] is inconsistent with the language of 8 U.S.C. § 1503, and does no more than invite the Court to issue an advisory opinion for use under speculative future circumstances." *Id.*, at 15. Again, the Court relies on the reasoning in *Manning* and refuses to issue a declaration of Plaintiff's citizenship in this case based on speculation of future events.

III. Plaintiff's Motion for Summary Judgment

Because Plaintiff's claim under 8 U.S.C. § 1503(a) has become moot, Plaintiff's Motion for Summary Judgment on Her Complaint for Declaratory Relief, Dkt. No. 169, is **DENIED** as moot.

IV. Conclusion

Based on the foregoing, the Court **GRANTS** Defendants' Motion to Dismiss as Moot Under Federal

Rule of Civil Procedure 12(b)(1), and **ORDERS** as follows:

1. Defendants' Motion to Dismiss as Moot Under Federal Rule of Civil Procedure 12(b)(1) is **GRANTED** because Defendant DOS issued Plaintiff's passport card on July 25, 2012.

2. Plaintiff's Motion for Summary Judgment on Her Complaint for Declaratory Relief, Dkt. No. 169, is **DENIED** as moot.

3. The Clerk is hereby **ORDERED** to close this case.

DONE at Brownsville, Texas, on November 7, 2012, *Nunc pro Tunc* to October 10, 2012.

/s/ Hilda G. Tagle
Hilda G. Tagle
United States District Judge

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

JESSICA GARCIA,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. 1:11-CV-83**
MICHAEL T. FREEMAN, ET AL.,	§	
	§	
Defendants.	§	

ORDER

BE IT REMEMBERED, that on September 12, 2012, the Court **ORDERED** Defendant Department of State ("DOS") to answer the questions below in an affidavit of an individual with sufficient institutional knowledge and binding authority to adequately and accurately represent DOS's policies and practices by September 26, 2012.

Presently before the Court are Defendant's Motion to Dismiss as Moot Under Federal Rule of Civil Procedure 12(b)(1) and Plaintiff's Motion for Summary Judgment on Her Complaint for Declaratory Relief, along with each party's responses and replies to these motions. Dkt. Nos. 164, 169, 166, 170, 171, 172, and 173. In evaluating Defendants' argument that this case has become moot because DOS has issued Plaintiff a passport card, the nature of DOS's policies and procedures used in evaluating and deciding upon applications for U.S. passports is inextricably

intertwined with this Court's jurisdiction. The parties have each presented facts and arguments to the Court alleging divergent views on DOS's practices in its evaluation and deciding upon applications for U.S. passports. These statements have all been submitted to this Court under the standard provided by Federal Rule of Civil Procedure 11, which provides in relevant part:

> By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . .
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b)(3), (4).

It is well-established that "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. Mine Workers*, 330 U.S. 258, 291 (1947). In cases in which "the question of jurisdiction

depends upon the same facts that are involved in the disposition of the merits, the Court will retain the case and determine the issue, as it always has jurisdiction to determine its jurisdiction." *ECEE, Inc. v. Federal Energy Regulatory Comm'n.*, 611 F.2d 554, 555 fn.4 (5th Cir. 1980) (citing *Means v. Wilson*, 383 F.Supp. 378, 381 (modified on other grounds). Thus, to determine whether the present case has been mooted by DOS's issuance of a passport card to Plaintiff, the Court needs to find jurisdictional facts relating to DOS's policies and procedures in evaluating the citizenship of applicants and holders of U.S. passports.

To determine mootness the Court must make a finding of fact regarding the timing of the evaluation of the evidence of citizenship, and the circumstances triggering any new evaluation of the evidence and determination of citizenship. To support this finding of fact the Court **ORDERS** DOS to answer the following questions.[1]

1. What are the criteria for determining whether DOS will reevaluate a decision to issue a U.S. passport made on the grounds that the individual has met his burden of proof of United States citizenship under 22 C.F.R. § 51.40?

2. What constitutes "new evidence" of an individual's citizenship sufficient for DOS to reevaluate

[1] The application of the preponderance of the evidence standard is outside the scope of this Order.

the individual's application for a U.S. passport after DOS has previously denied the individual a U.S. passport on the grounds that the individual has not met his burden of proof of United States citizenship under 22. C.F.R. § 51.40? See e.g. Dkt. No. 164 at 2 ("After reviewing all of the evidence submitted by Jessica Garcia, as well as additional evidence obtained by DOS during the course of discovery, DOS determined that Jessica Garcia had satisfied her burden of establishing that she was born in the United States.").

3. What constitutes "new evidence" of an individual's citizenship sufficient for DOS to reevaluate the individual's citizenship in those cases in which DOS revokes an existing U.S. passport on the grounds that the individual is not a U.S. citizen. See Dkt. No. 164 at 5 ("There is no reason to expect that DOS will later question Ms. Garcia's U.S. citizenship unless new evidence is discovered which would disprove her birth in the U.S.").

Defendant DOS is **ORDERED** to submit answers to the above questions to the Court in an affidavit of an individual with sufficient institutional knowledge and binding authority to adequately and accurately represent DOS's policies by September 26, 2012. The Court **ORDERS** the **VACATURE** of the Scheduling Order, and resets this case for Final Pretrial Conference on October 30, 2012 at 1:30 p.m..

DONE at Brownsville, Texas, on September 12, 2012.

/s/ Hilda G. Tagle
Hilda G. Tagle
United States District Judge

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

VERONICA LORENA MARTINEZ DE ESPARZA, Plaintiff,	)	
v.	)	CIVIL ACTION NUMBER
HON. HILLARY CLINTON, SECRETARY OF STATE, and UNITED STATES OF AMERICA, Defendants.	)	M-12-024

ORDER OF DISMISSAL

Came on to be considered the Defendants' Motion to Dismiss (Docket Entry Number 35), and the Court, after having considered same, the pleadings on file, and statements of counsel, including the Defendants' concession that Plaintiff is a citizen through the issuance of a United States Passport, granted said motion for the reasons stated on the record. It is, therefore,

ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is hereby GRANTED, and Plaintiff's claim is hereby DISMISSED as moot.

DONE this 30th day of January, 2013, at McAllen, Texas.

/s/ Ricardo H. Hinojosa
Ricardo H. Hinojosa
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

VERONICA MARTINEZ DE ESPARZA, Plaintiff, vs. HILLARY R. CLINTON, ET AL., Defendants.	CASE NO: 7:12-CV-024 CIVIL McAllen, Texas Wednesday, January 30, 2013 (4:13 p.m. to 4:24 p.m.)

HEARING ON MOTION FOR SUMMARY JUDGMENT

BEFORE THE
HONORABLE RICARDO H. HINOJOSA,
CHIEF UNITED STATES DISTRICT JUDGE

Appearances: See Next Page

Court Recorder: Antonio Tijerina

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
(361) 949-2988

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[3] **McAllen, Texas; Wednesday, January 30, 2013; 4:13 p.m.**

(Call to Order)

THE COURT: Next case is a Civil Action. It is M12-24, *Veronica Martinez de Esparza versus the Honorable Hillary Clinton, Secretary of State of the United States of America*.

Can I have announcements for the parties as to who's here?

MS WESTWATER: Your Honor, Gisela Westwater, here for the Defendant, your Honor.

MS. BRODYAGA: Lisa Brodyaga for the Plaintiff.

THE COURT: Okay. We're here on the Government's motion to dismiss. This is a case where we've already – Plaintiff has received a passport; is that right?

MS WESTWATER: Yes, your Honor.

MS. BRODYAGA: That's correct.

THE COURT: And you're opposing the motion to dismiss?

MS. BRODYAGA: Yes, sir.

THE COURT: And the reason for that is what?

MS. BRODYAGA: The grounds for that is that the case is not moot because the relief we requested –

THE COURT: The relief we requested was the passport.

MS. BRODYAGA: – was – no, sir. The relief we requested was a declaration of United States citizenship. The [4] passport – the denial of the passport was only the jurisdictional basis for bringing us into court.

THE COURT: Okay. But then if we don't have the jurisdictional basis any more, wouldn't that be moot to begin with? In addition to the fact that basically by issuing the passport, they're conceding that she's an American citizen.

MS. BRODYAGA: They are not conceding that she is an American citizen, your Honor. They are conceding that on the evidence before the Court at present she has shown by a preponderance of the evidence. They are retaining the right under the law to revoke the passport at any time –

THE COURT: Yeah, but that's true of anybody in the United States that has a passport. They retain the right to yank the passport from any of us.

MS. BRODYAGA: That's correct, your Honor.

THE COURT: And so therefore, she's not –

MS. BRODYAGA: That's correct.

THE COURT: – in any different situation. Right now she is declared an American citizen by the issuance of the passport, and frankly, I think this case is moot.

MS. BRODYAGA: Well, I believe it's not, Judge. There's a lookout for who that is of indefinite validity. They have –

THE COURT: Well, a lookout for her just like there is for a lot of other people I suspect.

[5] MS. BRODYAGA: Well –

THE COURT: Like when somebody goes to the airport and they're on the "watch list."

MS. BRODYAGA: – the –

THE COURT: That doesn't mean, that there's anything that can be done about that in this lawsuit. And I will say that the reason I should grant this dismissal here is because after having considered the motion to dismiss, the pleadings that are on file here, your statements today, unless you have something else.

MS. BRODYAGA: Well –

THE COURT: Basically, considering all that, including the Defendant's confession, as far as I'm concerned the Plaintiff is a citizen through the issuance of the passport, the Court thinks that this motion should be granted and this case be dismissed as moot.

MS. BRODYAGA: Well, your Honor, I believe that that's incorrect because the Government can yank the passport, and by yanking the passport –

THE COURT: Can yank the passport of every single American citizen.

MS. BRODYAGA: – they have yanked – that's true.

THE COURT: They don't grant a passport. The Honorable Hillary Clinton, through her offices, would not have granted a passport unless somebody was a citizen of the United [6] States, and that they were convinced that that person was a citizen of the United States.

MS. BRODYAGA: But –

THE COURT: She, like everybody else in the United States, runs the risk that at some day the Government may just decide to yank the passport. They're going to have to have a valid reason to yank the passport, and in order to do that, they would have to prove that she is either not an American citizen or has violated the law in any other way that our passports can be yanked, if they can be yanked.

MS. BRODYAGA: Not necessarily, your Honor. They do not have to prove anything –

THE COURT: Yes, necessarily. They have to –

MS. BRODYAGA: They don't have to prove anything to yank their passport. They have absolute

discretion to do it at any time without prior notice; without a hearing –

THE COURT: But they – they –

MS. BRODYAGA: – before or afterwards, and that would leave her with no proof of her U.S. citizenship. You and I have our birth certificates. Her only proof of her citizenship is her passport.

THE COURT: As you well know, there are many people with birth certificates that can't get a passport because the Government refuses to give them one.

MS. BRODYAGA: Well, that – that's also true.

[7] THE COURT: So that isn't such a gold standard with regard with regards to citizenship either. As you yourself know based on the other cases we've had here.

MS. BRODYAGA: But a declaration of United States citizenship, your Honor –

THE COURT: I don't even understand –

MS. BRODYAGA: – she can still be –

THE COURT: – how you have a declaration of United States citizenship.

MS. BRODYAGA: That's the –

THE COURT: Other than for people that get naturalized and have a naturalization certificate,

none of us have a declaration of American citizenship that we can hang on our walls.

I can hang on my commission to be a United States District Judge. I have a lot of other type papers I could hang up, but I don't have a declaration of citizenship that I put up on the wall and say the Government has declared me a United States citizen.

MS. BRODYAGA: That's because you didn't have a –

THE COURT: So I don't know of anybody that's been issued one. Do you? Other than a naturalized citizen?

MS. BRODYAGA: Yes, sir, I do. People where we have had cases that were litigated and we have gone to trial on them, and a person has been found to be a U.S. citizen, the [8] Court has issued a declaratory judgment –

THE COURT: Right, but nobody is claiming right now that she isn't other than you.

MS. BRODYAGA: Well, they are claiming –

THE COURT: The Government is not claiming that she's not a citizen. They have conceded that she's a citizen. So who's going to argue the contrary if we have a trial here?

MS. BRODYAGA: They –

THE COURT: The Government is going to argue that she's a citizen. We don't have a defense here or there's nothing we can say here.

MS. BRODYAGA: They have not conceded she's a citizen. They have only conceded that on the evidence before the Court to date, she has shown by a preponderance of the available evidence.

THE COURT: Okay, but nobody at this point has told her that she's not, and that's how you would have jurisdiction in this Court. If there was some governmental agency that has either detained her or refused to grant her some form of citizenship document, then we'd have a case here.

That is the only way you come here. People don't come here and say, oh, by the way, nobody has declared that I'm not a citizen, but you do it. The only way they come here, and the only way we have jurisdiction here, is if some governmental agency or something else of value from this Government of the [9] United States has declared them not to be a citizen and is putting them in harm's way from that standpoint.

MS. BRODYAGA: And –

THE COURT: In this case, we do not have that. All we have is a woman who is a Plaintiff here with an American passport which basically means, as far as the Government goes, they're not claiming anything other than she's an American citizen. So, what am I going to litigate? The Government isn't

claiming – they're not proceeding with evidence that she's not an American citizen. Unless you think it's in doubt, and you should present evidence in case –

MS. BRODYAGA: We have –

THE COURT: – which at that point I'm not here in the business of having a case which is moot because there is no governmental agency that is denying her citizenship. We don't have anybody denying her citizenship right now. That's when we have jurisdiction here, when there is some governmental action that denies the citizenship of an individual. We don't have that now. So what are we fighting about?

MS. BRODYAGA: We are fighting about her right to have a certain degree of peace that if the Government –

THE COURT: She has a degree of peace as much as the rest of us have with our birth certificates and/or our – in this case, higher than the birth certificate because shes got a passport from the Federal Government. The birth certificate [10] comes from the State of Texas or whatever state it is.

She has a gold standard with regards to your proof of citizenship at the present time, which is your passport. Other than a person who is naturalized and has a naturalization certificate, she's got the gold standard of citizenship.

And so if she wants to continue arguing that, well, I can't help it. This isn't the forum to do that.

She can go on some other place and argue it, but here, we don't tie up the Courts in something that's already, you know, somebody already has what they want.

MS. BRODYAGA: Well, all we're asking is that the Judge – that your – the Court issue a declaratory judgment under the *Declaratory Judgment Act* –

THE COURT: I'm not in that – no. Because nobody is declaring that she's not. What I – what this judgment will say is basically what I just told you; that we did consider the motion to dismiss as moot today, that I have considered the pleadings on file, the statements that have been made today including your strong statements right now, and having considered that, that I am including in the things that I'm considering the Defendant's concession that she's a citizen through the issuance of a U.S. passport. And that therefore this case is moot at the present time.

MS. BRODYAGA: Okay. It's our position that issuance of a passport is not a concession of citizenship, Judge.

[11] THE COURT: Well, that –

MS. BRODYAGA: Particularly when they qualify it.

THE COURT: – when would the United States Government issue a passport without conceding that the person is an American citizen? Can you give me an example of an American passport granted

by the State Department to an individual whom they have not conceded as an American citizen?

Under what circumstances would they issue an American passport to somebody that they do not concede as an American citizen?

MS. BRODYAGA: That they only are conceding that the evidence presented to date, and they are reserving the right at any time, for any reason –

THE COURT: It doesn't say that on her passport.

MS. BRODYAGA: It doesn't say that, but it does in the regulations. It –

THE COURT: But that's true – but that's true of every person walking around with a passport. And that is their proof of citizenship. That is true of every single one of us who may have a passport.

MS. BRODYAGA: But not every single one of us has been denied a passport and had to come to Court to litigate it and spent months and months and months litigating it –

THE COURT: And yes, and once she gets it –

MS. BRODYAGA: – and then the Government says it's [12] moot.

THE COURT: – and once she gets it, her lawyer is upset about it.

MS. BRODYAGA: No, I'm not upset about it; I just want the –

THE COURT: Yes, you are very upset about it, and you want to have a continuation of a fight that you've already won here.

MS. BRODYAGA: No, I just want a declaration saying that we have won.

THE COURT: And you've got what you wanted. You wanted a passport issued. That's how we have jurisdiction here; the failure for them to issue the passport. Once we had that jurisdiction and they've issued it, and basically conceded that she's an American citizen, just like they do to everybody else who gets a passport, we're done at least for now.

MS. BRODYAGA: At least for now, Judge.

THE COURT: And I – she, like everybody else, is done in this case at least for now as anybody else who has a passport that has it yanked at some point for whatever reason. But it's going to have to be a legal reason.

And so therefore, the motion to dismiss is granted. And as always, it's nice to see both of you-all, but –

MS. BRODYAGA: As always, it will be nice to see you, Judge. And please enter a judgment so our time for appeal will [13] start running.

THE COURT: Yes. In fact I'll sign it right now.

MS. BRODYAGA: Thank you.

MS WESTWATER: Thank you, your Honor.

THE COURT: Did you want to say anything?

MS WESTWATER: No, your Honor.

THE COURT: Well, that's a smart move for somebody who just won their motion.

If you-all don't have anything else, you-all can be excused. Thank you.

MS. BRODYAGA: Thank you.

MS WESTWATER: Thank you, your Honor.

(This proceeding was adjourned at 4:24 p.m.)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 12-41458

JESSICA GARCIA,

Petitioner-Appellant

v.

PORT DIRECTOR MICHAEL T. FREEMAN; JOHN KERRY; JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondents-Appellees

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

ON PETITION FOR REHEARING EN BANC

(Filed Dec. 6, 2013)

(Opinion 10/18/13, 5 Cir., ___, ___, F.3d ___)

Before JONES, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

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

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

VERONICA MARTINEZ DE ESPARZA, Plaintiff, vs. HILLARY R. CLINTON, ET AL., Defendants.	CASE NO: 7:12-CV-024 CIVIL McAllen, Texas Friday, December 14, 2012 (2:53 p.m. to 2:59 p.m.)

STATUS CONFERENCE

BEFORE THE
HONORABLE RICARDO H. HINOJOSA,
CHIEF UNITED STATES DISTRICT JUDGE

Appearances: See Next Page

Court Recorder: Antonio Tijerina

Transcribed by: Exceptional Reporting Services, Inc.
P.O. Box 18668
Corpus Christi, TX 78480-8668
(361) 949-2988

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[3] **McAllen, Texas; Friday, December 14, 2012; 2:53 p.m.**

(Call to Order)

THE COURT: Next is Civil Action Number M12-24, *Veronica Martinez de Esparza versus Hillary Clinton, Secretary of State of the United States of America.*

MS WESTWATER: Your Honor.

MS. BRODYAGA: Lisa Brodyaga for the Plaintiff, Judge.

MS WESTWATER: Gisela Westwater for the United States.

THE COURT: Okay. There's a recent motion to dismiss here indicating that there's been a passport issued to the Plaintiff. It isn't ripe yet. Are you in agreement with it?

MS. BRODYAGA: I just filed an opposition to that, Judge, about an hour before –

* * *

[7] MS. BRODYAGA: If the Government would concur. All we are asking is that the Government concur and the entry of a declaration that she is a U.S. citizen, which would give her the procedural protections –

THE COURT: Well, I –

MS. BRODYAGA: – just in the event that she needs them. And we asked for summary judgment

on that months ago, Judge. And that motion is also still pending, and we believe that we're entitled to summary judgment, namely a declaration that she is a U.S. citizen.

Now, if they are conceding she is a U.S. citizen, they should have no opposition to entry of a judgment – declaration stating that she is a U.S. citizen.

THE COURT: Well, did you have any opposition to that?

MS WESTWATER: Yes, your Honor.

THE COURT: Why?

MS WESTWATER: I – if the State Department –

THE COURT: Well, then we do have something – then I can't dismiss it.

MS WESTWATER: I'm sorry, sir?

THE COURT: I mean, she wants to be declared a [8] citizen. That's her cause of action here. And giving her a passport with your refusing to say that she's an American citizen just leaves something here as a cause of action.

MS WESTWATER: Your Honor, the United States has said that she is a citizen by giving her the passport.

THE COURT: Well, then why can't you say it in a – as our dismissal here?

MS WESTWATER: I'm sorry, sir. I'm not sure I understand what you're getting at.

THE COURT: Well, I'm not quite sure I understand what you're saying.

The United States has said that she's a United States citizen, but were unwilling to say she's a United States citizen for purposes of dismissing this case.

MS WESTWATER: Your Honor, we believe that once the United States has granted a passport, that that –

THE COURT: Okay. Well, then why can't you say that we've granted her a passport because we believe she's an American citizen?

MS WESTWATER: Yes, your Honor, that is what the -that is what – yes. The United States –

THE COURT: Okay. And if you all can agree on an order that I sign granting your dismissal that basically says that, then I'll dismiss it.

MS. BRODYAGA: That includes a declaration that she [9] is a United States citizen, Judge.

THE COURT: Yes.

MS. BRODYAGA: Yes, sir.

THE COURT: That they have found that she's an American citizen so they have issued the passport.

MS. BRODYAGA: Well, they agree to entry of a judgment declaring her to be a U.S. citizen is what we're requesting. That is –

THE COURT: That they have found that she's an American citizen, and they're issuing her a passport. That's what we need to do here.

MS. BRODYAGA: Well, I mean, but that's still –

THE COURT: Work on the order is what I'm doing here.

MS. BRODYAGA: Okay. We'll work on the order, Judge. We'll work on the order.

THE COURT: I mean, we're just not going to spend like –

MS. BRODYAGA: Okay. We'll work on the order. And if – if we're unable to come to –

THE COURT: If you're unable to come to some agreement on the order, I'm giving you all a date to be here.

MS. BRODYAGA: Okay. That's fine. We can say submit competing orders if we can't agree on one?

THE COURT: No.

MS. BRODYAGA: Okay.

[10] THE COURT: Because we need to have a hearing on your motion for summary judgment.

MS. BRODYAGA: Okay.

THE COURT: That'll be January the 30th at 4:00 o'clock. Okay?

MS. BRODYAGA: Thank you, your Honor.

THE COURT: Thank you all.

(This proceeding was adjourned at 2:59 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MC ALLEN DIVISION

VERONICA MARTINEZ DE ESPARZA, Petitioner, vs. HILLARY R. CLINTON, ET AL., Respondents.	CASE NO: 7:12-CV-0024 CIVIL McAllen, Texas Thursday, June 28, 2012 (4:13 p.m. to 4:27 p.m.)

HEARING ON MOTION TO DISMISS

BEFORE THE
HONORABLE RICARDO H. HINOJOSA,
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Petitioner: ELISABETH LISA S. BRODYAGA, ESQ.
Attorney at Law
17891 Landrum Park Road
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For Respondents: GISELA A. WESTWATER, ESQ.
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[2] **McAllen, Texas; Thursday, June 28, 2012; 4:13 p.m.**

(Call to Order)

THE COURT: The next case is criminal [sic] number M-12-24: *Veronica Martinez de Esparza versus Hillary Rodham Clinton and others.*

* * *

MS. BRODYAGA: Okay.

THE COURT: Okay. So what do we need here? We need a hearing?

MS. WESTWATER: Your Honor, I believe we set out in our earlier 26-F – joint 26-F report various timelines for discovery. So I believe we seek an order setting out the scheduling orders that the parties can begin that.

THE COURT: And this is a weird one because all her siblings got citizenship except her?

MS. WESTWATER: Your Honor, all of her siblings were born later, after the father had clearly been in the United States, been paying taxes, and we

have tax records for all those years. We do not have – we have very limited records for earlier years.

THE COURT: Just listen to yourself.

MS. BRODYAGA: Judge, it's –

THE COURT: Just listen to yourself on that subject.

MS. BRODYAGA: It's ten months difference between her and the next younger one, Judge.

THE COURT: Right.

MS. BRODYAGA: That's why I'm saying –

THE COURT: I mean it's just so silly but –

MS. BRODYAGA: – the same evidence that was used in her younger sister's case shows that she's a citizen too and that's why I'm saying this is abusive on the government's part, [7] to make us go through all these depositions, all this expense.

THE COURT: But you've – I mean it's already been done.

MS. WESTWATER: Yes.

MS. BRODYAGA: No, the depositions have not been done. They were granted without going through the – this process and that's why we wanted to bring this under the *APA* for them to –

THE COURT: I know you want to bring it under that but you can't.

MS. BRODYAGA: Okay. Well –

THE COURT: And so, I'm just trying to talk some sense into her from the standpoint of the government's side here as they've already admitted everybody else in the family as a citizen except her.

MS. BRODYAGA: Yes, sir.

THE COURT: With a ten month difference here –

MS. BRODYAGA: Yes, sir, yes.

THE COURT: – because that was – somebody didn't bring them a tag of some something.

* * *

[11] THE COURT: Okay. We'll go ahead and have a status conference on this case on August the 30th at 4:00 o'clock in the afternoon. That will give you time to conduct this discovery and you-all can still look for it at that point as to where you are with regards to trying to resolve this matter, or do we just need a hearing date?

MS. BRODYAGA: Okay. So this initial discovery will be limited to that issue?

THE COURT: To the issue that she's trying to –

MS. BRODYAGA: Okay, that's fine.

THE COURT: – find out more information on.

MS. BRODYAGA: Okay.

THE COURT: Whatever issue that is.

MS. WESTWATER: Yes, and also regarding the employment history or the presence in the United States, your Honor, of the father.

MS. BRODYAGA: The presence in the United States, [12] Judge, the same evidence we used in all the other cases would make her a citizen too. There's no difference in terms –

THE COURT: Well, you have all of that. I mean you've already declared all the rest of them citizens so you know how long he's been here.

MS. WESTWATER: But, your Honor, here it's de nova review and in the –

THE COURT: So are you – did you mess up on the rest of them and they're not citizens and the government gave all that citizenship to them and all of a sudden you decided to rein it in?

MS. WESTWATER: Your Honor?

THE COURT: I mean just – maybe you should mention this to somebody in administration higher up who thinks that they're out there doing all sorts of things and maybe they would like to know what's being done for them here.

MS. WESTWATER: Yes, your Honor.

THE COURT: Okay. I mean that's what you're telling me now that somebody made a mistake now on all these others and they're not citizens?

MS. WESTWATER: Your Honor, as we said, all the other children are born later and when –

THE COURT: Well, then you still have the information already as to what it is that he's – how long he's been here.

MS. WESTWATER: Your Honor – for the other children, [13] your Honor, there was more periods of time that the father could establish that he had been here. The statements that we have right now are very generic and in that sense you can only –

THE COURT: Okay. There's a ten month difference here.

MS. WESTWATER: But, your Honor, you can only obtain citizenship, derivative citizenship, under the conditions that Congress set out. Congress set out five months or excuse me, five years. A ten month difference can make a difference, your Honor, between derivative citizenship or not.

THE COURT: Okay. Well, she's saying "I'm standing on the information they have as to how long the father was here." You already know. You have a timeline with regards to the ones that have been declared citizens.

And how long ago were they declared citizens?

MS. BRODYAGA: I'd have to pull the other file but the most recent one obtained her passport, I think it was like two years ago. We filed simultaneously for passports for her and for this client but because the other one had a certificate of citizenship she was granted – the one who is ten months younger – was given her passport but this one was told that she had to have a new affidavit from her deceased father.

The first – you know, I included in the packet the fact that he was deceased and his death certificate and they [14] sent me back this form saying "We need you to fill out this form."

THE COURT: All right. Are you now telling me then that somebody was wrong in the information that they used to declare the other ones, the one that's ten months younger, a citizen?

MS. WESTWATER: No, your Honor, but this case could still turn on the extra ten months of whether or not they can establish presence.

THE COURT: Okay. But we're at the point where by now somebody should have already looked at this. I don't have this kind of time to sit around here with some pettiness like "Well, maybe."

You know what the timeline was for the other ones so how hard is it to figure out with the ten months here?

MS. WESTWATER: But like –

THE COURT: I mean that's in the hands of the government. The government's already decided this at some point.

MS. WESTWATER: Yes, your Honor.

THE COURT: I don't have that and I don't think I should be called upon to go through something when you have the information yourself and can tell her "The reason it doesn't fall is because of some – the ten month period does here make – does make a difference here."

[15] MS. WESTWATER: Yes, your Honor, and that's the government's belief. We simply sought discovery in order to be certain there was not more information in plaintiff's hands that we could look at –

THE COURT: Okay. But how far off is this?

MS. WESTWATER: – but that's not our burden.

THE COURT: How far off is this from the sister who is ten months younger to her? How far off does the government say they are with regards to the proof from the father or are you now telling me, which you refused to answer, that there was a mistake with regards to the younger one?

MS. WESTWATER: Under the current calculations of what we have, we would believe perhaps

there was a mistake with the younger one, that we're looking at least at a year, your Honor.

THE COURT: And there's nothing you can do about it now I guess?

MS. WESTWATER: There's nothing that we're going to do as far as I know, your Honor, regarding the sibling.

THE COURT: Other than make sure this one doesn't get it?

MS. WESTWATER: Yes, your Honor.

MS. BRODYAGA: And the father is deceased now. He was alive at the time most of these went through.

No. 12-41458

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JESSICA GARCIA
Appellant-Plaintiff,

v.

MICHAEL FREEMAN, et al.
Appellees-Defendants.

APPELLEES-DEFENDANTS' REQUEST FOR PUBLICATION

Appellees-Defendants, through undersigned counsel, respectfully request that the Court reconsider its decision not to publish the Court's October 18, 2013 order in this case. In its decision, the Court held that in an action under 8 U.S.C. § 1503(a), premised on the U.S. Department of State's ("DOS") denial of an individual's application for a U.S. passport, the issuance of a passport to the individual by DOS moots the action. *Garcia v. Freeman, et al.*, ___ Fed. App'x ___, 2013 WL 5670856 (5th Cir. Oct. 18, 2013). Appellees-Defendants request publication of the decision in this case under Fifth Circuit Rule 47.5, as the decision "calls attention to an existing rule of law that appears to have been generally overlooked," by providing guidance regarding a situation that occurs

frequently, but has not consistently been addressed and understood by litigants. Appellees-Defendants request publication so that the Court's guidance will be available as a precedential opinion for future litigants.

Cases under 8 U.S.C. § 1503(a) are common within the Fifth Circuit. Moreover, as occurred here, these cases are frequently resolved before trial – after additional evidence regarding the location of a plaintiff's birth is gathered in the course of discovery – by the issuance of a passport to the plaintiff by DOS. As the Court held, this passport issuance resolves the case and the district court may then dismiss the action as moot. However, in multiple cases, dismissing these cases after a passport is issued has been a difficult process because the litigants have not been able to agree on dismissal of the case, and have continued to argue, both in district court and before this Court, over whether the case is moot. *See, e.g., Martinez de Esparza v. Clinton*, Case No. 12-cv-0024 (S.D. Tex.), currently pending on appeal in Case No. 13-40166 (5th Cir.); *Martinez, et al. v. Clinton*, Case No. 12-cv-89, ECF Nos. 17-23, 27-30 (S.D. Tex.) (Plaintiffs are opposing dismissal as moot even after passports are issued to both individuals).

Moreover, in another recent section 1503(a) case, *Martinez v. Kerry*, Case No. 13-cv-00101 (S.D. Tex.), DOS moved to dismiss the case as moot after a passport was issued to the plaintiff. (ECF No. 11.) The plaintiff (whose counsel is also counsel of record for Plaintiff-Appellant in this case) has opposed dismissal

and cross-moved for summary judgment. (ECF No. 13.) In support of this opposition and cross-motion, the plaintiff has refused to acknowledge that the decision in this case is applicable there, arguing that the decision in this case is unpublished, and so the Fifth Circuit may yet decline to adopt its reasoning. *See Martinez v. Kerry*, Case 1:13-cv-00101, ECF No. 14 at 3-4 (S.D. Tex. Nov. 3, 2013).

Publication of the Court's decision in this case therefore is necessary to preserve judicial resources, and encourage the dismissal of cases that are resolved through the discovery process. Because publication would provide significant and clear guidance to future litigants and district courts on this important and recurring issue, Appellees-Defendants respectfully ask the Court to reconsider its decision not to publish.

CONCLUSION

For the foregoing reasons, the Court should order publication of its October 18, 2013 decision in this case.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General
Civil Division

ELIZABETH STEVENS
Assistant Director, District Court Section
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/s/ *Sarah B. Fabian*
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Attorneys for Appellees-Defendants

Date: November 5, 2013

AFFIDAVIT

State of Tamaulipas, Mexico

City of Matamoros

I, Jessica Garcia, born in Brownsville, Texas, U.S.A., I hereby swear or declare under penalty of perjury of the laws of the United States as follows:

My name is Jessica Garcia. On October 31, 2009, I was stopped at the border between Mexico and the United States and not allowed to enter the United States. At that time, Officer Cabrera took away my documents to enter the United States. Since that time, I have been unable to enter the United States. This has created great hardship for me and my family. The following is what I have suffered:

First, because I am unable to enter the United States, I am unable to get to my job. I am having serious economic problems. Before I was detained, I was working as a phlebotomist for Grifols Biomat, a plasma laboratory in Brownsville, Texas. I had been working there for almost a year. This was a very good job with good opportunities for me. I was being paid $9.00 per hour, and I was working more than forty hours a week. In addition, my employer was pleased with my work and told me that in a year they would raise my salary. I was taking home approximately $650.00 every other week, after taxes. My family depended on my wages.

Before I started to work for Grifols Biomat, I worked at fast food restaurants: El Pollo Loco, What-A-Burger, and McDonalds. These were the only jobs I could find. I was paid minimum wage at each of these places. I worked these jobs because I needed the money, but I always wanted to be a nurse, or something in the health field.

In order to qualify to work as a phlebotomist, I had to work very hard, since I did not have the necessary education. I did not finish high school, so I first had to get my G.E.D. I finished my G.E.D. and enrolled at a technical school in Brownsville, "Career Center of Texas," in a medical assistant course. On February 2008, I finished school and qualified as a medical assistant. Now I have my license. In order to go to school, however, I had to apply for and obtain a student loan with the United States Federal Government. When I finished my course, I owed the government $7,617.19, plus interest. The agreement I signed with the government was that I would begin repaying my loan November 2009, one year after I had started working. Right before I would have started re-paying, I lost my job because I was denied entry to the United States, and Officer Cabrera took away my documents. I have no money to begin repaying the loan. As of this date, I am already seven months behind in my payments and I am very concerned about this. The interest is growing and I contacted my lender (Citibank) to explain my situation and seek help via letter and I have not heard back from them. I have not been able to do so by

phone because the only way to contact them is by calling an "800" number. In Mexico, you cannot dial this number. I worry about this constantly, and it is a source of great stress. If the loan goes into default, it will affect my credit rating for years to come.

In addition, my license as a medical assistant is only good in the United States. I do not have a license as a medical assistant in Mexico. Therefore, even if there were positions available in Mexico, I could not qualify. I have also lost a good job that I worked hard to obtain in the United States. I worked for more than four months to get the job I had in the United States. When I was applying for the job, I had a license, but no experience, and the employer wanted to hire someone with experience. I had worked hard in school, however, and was a very good student and that was why my school wrote a letter to the lab, told them about me, and asked the lab to give me an opportunity. I was very lucky when the lab agreed to hire me, and I loved the job. Then after ten months of work, with the promise of a raise in salary in a few months, it all was taken from me when Officer Cabrera refused to let me enter the United States and took my Texas Birth Certificate.

The day that I was detained by Officer Cabrera, I told him that I was on my way to work. I told Officer Cabrera that I was worried about my job and that I wanted to talk to my boss to let him know that I was detained and not able to get to work. Officer Cabrera asked me for the name of my boss. I told him it was Mr. Oscar Beasley. Officer Cabrera did not allow me

to call him. Instead, Officer Cabrera told me that he was going to call Mr. Beasley and tell them that I would not be coming back to work there because I had lied to them, I was not a United States citizen, I was Mexican.

I was detained on a Saturday. On the Monday after this incident, I called Mr. Beasley to let him know what had happened to me. When I spoke to Mr. Beasley he told me that he already knew that I had been sent in for questioning at the bridge. He told me that one of our regular donors, who comes over to donate plasma, had told him that he saw that I had been sent inside.

Mr. Beasley told me not to worry. He told me that when I solved my problem, I could come back and he would see how he could help me get my job back. But it has now been more than seven months since I have not been able to go to work. He told me that if I was able to return, he would see what he could do. He did not promise me that he would give me my job back.

I am terribly worried about this. Seven months have passed and even though Mr. Beasley knows that I am a good worker, I am afraid that I have already lost my job – a job that I loved. I worked hard to qualify for that job and I worked hard to get that job. I was making a good wage that my family needs, and I also had medical insurance and discount card through my employer. Now, I have lost everything. I do not have a job; my family's financial situation is desperate; and we have no medical insurance. With two young children,

I suffer from constant worry that they will become ill and we have no medical insurance.

I am depressed because of my inability to work. When I see people with whom I used to work and people that used to go to the lab to donate plasma, I don't want to talk to them. I don't want to have to explain to each person what has happened to me. I fear that some of them are thinking that I don't work there any more because I did something wrong. So when I see a former coworker or client on the street in Matamoros, I go the other way so I don't have to talk to them.

Because of the stress and anxiety caused by this problem, I have gained a great deal of weight. I worry all the time and I eat to try to make myself feel better and to make the worry go away. My mood has changed. Before this incident I was a happy and active person; I was always looking for things to do with my family. Now, I am depressed and it is difficult for me to find the energy to do the things I used to do. I cannot sleep at night because of the worry, and I wake up in the morning with swollen eyes. Because I cannot sleep, I am tired the next day.

The stress over this situation has also caused my relationship with my husband to deteriorate. I have lost any desire to be with him as husband and wife, and I know that this is not good for us. None of this happened because of him. I also get mad at him for not making enough money, because the loss of my wages is causing us severe financial problems. But I know that he works very hard and is earning as much

as he is able. It is not his fault that he does not get paid enough. On just his salary there are many things we cannot afford, and I worry that we will never be able to have a better life, and even more important, we cannot even pay our bills. Our credit is being ruined and I worry about the future of our children. And now the situation is even worst since three weeks ago, around the middle of May, my husband lost his job. He was fired because there is no more work. Company began laying people and he was laid off. Now, neither one of us is working and our economic situation is critical. We are now economically dependant on our parents. However, neither one of our parents are rich and they can not support us. We had sold our old cars and we bought a small car. However, we are running out of things we can sell. I even had to sell my compute lab top. At this time my husband and I all we have is $2000,00 pesos to our name, which is approximately $150 dollars.

My constant worry and depression are also affecting my relationship with my children. I am very concerned about this, because they are very young. Even though they are young, I am sure they know that something is wrong. The pressure on them is affecting their health and this adds to my worry. This winter the children have been sick a number of times. Since I no longer have health insurance, I took them to a very inexpensive place to see a doctor. They only charged me $20.00 pesos, approximately $2 dollars, to look at the children, but they are not pediatricians and do not have the knowledge and skills that would

allow them to know if there were anything really serious wrong. I could not take them to their regular pediatrician in Brownsville who has been caring for them since they were born. I could not get there because of this whole situation and I do not have medical insurance to pay for such a visit, even if I were to try to have someone else take the children over. I feel guilty and worry that this is all of my fault: I should have been able to defend myself better before Officer Cabrera and convinced him that I was not born in Mexico as he insisted.

I also feel guilty because this situation is placing a great burden on my mother. I know she worries constantly about my problems. This is very bad for her. She just went through chemotherapy and radiation treatment after having surgery because she had cancer of the womb. It is important for my mother's health that she relax and not worry about me. When I was working I was able to help my family pay for the medications she requires; now my family and I need my parents' financial help just to survive.

Also, the incident has also affected my relationship with my parents. When I was detained, Officer Cabrera harassed me, and told me that my parents did not love me. I never knew that I had a second, Mexican Birth Certificate. Officer Cabrera told me that he had in front of him a Texas Birth Certificate and my Mexican Birth Certificate; it was clear to him that I was not born in Texas. He insisted that if my parents had not told me this, I should still understand it was a fact. He told me that my parents did

not love me because they had not kept records of when I was born to show that I was born in the United States. He told me that his parents did love him, because he too had been born with the help of a midwife, but the difference was that his mother loved him, and she kept records of his birth – therefore, in a month and a half after he filed for a passport, he got one without any problems. Officer Cabrera also told me that if my father loved me, he would have come to the bridge to talk to him immediately when he was called. I told Officer Cabrera that my father could not come because he was at work. Officer Cabrera said that he had a baby child and if his son was in trouble he would come even if that meant losing his job.

After this incident and its terrible effect, I could not help but think about what Officer Cabrera had said. I knew what he said was not true, but I could not help but think that maybe he was right – why didn't my parents keep records? Maybe they didn't love me. I know this is not true; my parents love me and they show it every day in the help and support they provide. But I can not help the doubts from entering my mind, and I feel guilty. It makes me even more depressed.

To add to everything, I learned I have a warrant out for my arrest in Brownsville, Texas. I had received a traffic ticket because my car insurance had expired, before the incident at the bridge. I went before the judge, and assumed responsibility for the oversight. The judge kindly allowed me to pay my fine in payments. Since I have been unable to work, I have been

unable to make the payments. My mother went to the City of Brownsville office to explain to them that I had not made the payments because of the problems arising out of my being refused entry to the United States. The city officer told my mother that in order to provide more information, I needed to come to the office (of course, I cannot do that). He did tell her that there is now a warrant out for my arrest, owing to my failure to make the payments. Now I am afraid that when I am permitted to return to the United States, I will be arrested.

I need to return to the United States so that I can get my job and my life back. My need to return to the U.S. so I can find a job is even greater now that my husband had lost his job since at this time we have no money. I know that this is going to be difficult for me since during this time I will not be able to see my husband since he has no visa to enter the U.S. However, our situation is desperate right now. That is why in addition to allowing me to return to the U.S. I ask the Court to give my parents permission to cross into the United States during the time that this case is being resolved, so that they can bring my children into the United States. My children are United States citizen and my parents have visa's to enter the U.S. but I want to make sure that my parents do not have any problems with immigration when they bring my children to see me. At this time my children are going to stay with my parents until I am able to settle back in the U.S. That is why I want to make sure that my children can go back and forth between the United

States and Mexico so that they can spend time with their father and with me.

Pursuant to 28 U.S.C. Sec. 1746, I, Jessica Garcia, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed on June 7, 2010 by /s/ Jessica Garcia
Jessica Garcia

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

CYNTHIA TREVINO
PETITIONER/PLAINTIFF

v. **CA B-07-218**

HILLARY CLINTON, SECRETARY OF STATE, TIMOTHY M. WEISNET, REGIONAL DIRECTOR, DEPT. OF STATE, HOUSTON PASSPORT AGENCY,
and
UNITED STATES OF AMERICA
RESPONDENTS/DEFENDANTS

WRITTEN REPORT BY EXPERT WITNESS

My name is Joe Rivera, and for the past 30 years I have been the County Clerk of Cameron County. In this position, among other duties, I have been responsible for the administration of the County Official Records, vital statistics, records and filing, beer and wine license, birth records, death records and marriage information.

In this regard, I will testify that, in connection with this employment, I have become aware that it has long been common in this area for people to arrange for a midwife ("*partera*"), to help with the birth of their children. People from Mexico and the U.S. alike frequently use the services of midwives to attend the births of their children in Texas. Also, I am aware that there was a time when it was not uncommon

to learn that a local midwife had fraudulently registered a child or children as having been born in the United States when in fact they were born in Mexico.

I have also become aware that it is a common practice in Cameron County and other border counties that the parents of children born in Texas also register their children in Mexico as having been born in Mexico. This is particularly true where the parents are living in Mexico, and intend to raise the child in Mexico. There are many reasons that this occurs. Some parents do it for purely cultural reasons, Others do so in order that their children may have the benefit of Mexican Citizenship, such as attending public school, or obtaining medical services, in Mexico. I have seen many cases where parents registered their children as having been born in Mexico, when in fact they were born in the United States, regardless of whether they were born with a midwife or in a hospital. I also know that many Texas birth certificates have been flagged by the State because a birth registration was also found in Mexico. My experience is that most parents who fraudulently registered their children as having been born in the U.S. did so after they registered their child in Mexico, and that it is not uncommon in such cases that different birthdates are used in the Texas and Mexican registrations. In other words, in most cases where there is a fraudulent Texas birth record, you will find that the child was registered first in Mexico and then in Texas, often with a different birth date. On occasion, a child born in Texas may have been registered in

Mexico before being registered in Texas, because the midwife did not promptly file the Texas registration, but this is not common.

In this regard, I would like to further state that for my opinion I have not reviewed any specific documents. That my opinion is based on my years of living and working as a County Clerk for Cameron County where among some of my responsibilities are to the administer the birth records. In addition, I attest that I have not received any compensation for this testimony and that I have not testified as an expert or by deposition within the preceding four years.

Respectfully submitted,

/s/ Joe Rivera

Joe Rivera
County Clerk

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

LAURA NANCY CASTRO, YULIANA TRINIDAD CASTRO, In her own name, and on behalf of her Infant daughter, "C.A.G.", TRINIDAD MURAIRA DE CASTRO, RODRIGO SAMPAYO, JESSICA GARCIA, ANA ALANIS, ALICIA RUIZ, MARIA REYES, JENIFER ITZEL GONZALEZ, and PETITIONERS/ PLAINTIFFS, In Their Own Name and On Behalf of All Others Similarly Situated,	)	
v.	)	**CIVIL ACTION CA B-09-208**
MICHAEL T. FREEMAN, PORT DIRECTOR, U.S. CUSTOMS AND BORDER PROTECTION, ELISEO CABRERA, HILLARY CLINTON, U.S. SECRETARY OF STATE,	)	**JURY DEMANDED ON F.T.C.A AND BIVENS CLAIMS**

JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,	)
ERIC HOLDER, Jr., UNITED STATES ATTORNEY GENERAL, and	)
THE UNITED STATES OF AMERICA.	)

THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS, F.T.C.A. AND BIVENS ACTION FOR DAMAGES, AND CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Laura Nancy Castro ("Laura"), Yuliana Trinidad Castro ("Yuliana"), in her own name and on behalf of her infant daughter, C.A.G. ("C.A.G."), Trinidad Muraira de Castro ("Trinidad"), Rodrigo Sampayo ("Sampayo"), Jessica Garcia, ("Garcia"), her mother, Ana Alanis ("Alanis), Alicia Ruiz ("Ruiz"), Maria Reyes ("Reyes"), and Jenifer Itzel Gonzalez, ("Gonzalez"), through the undersigned counsel, file their Third Amended Petition for Writ of Habeas Corpus, damages under the Federal Tort Claims Act, Bivens action against Customs and Border Protection Officer Eliseo Cabrera, and Class Action Complaint for Declaratory and Injunctive relief.

I. INTRODUCTION

The case at bar challenges Defendants' tactics and procedures at ports of entry in encounters between agents of the Department of Homeland Security, ("DHS"), and U.S. citizenship claimants, and, in some cases, their parents. It also challenges the lack of due process by the Department of State, ("DOS"), in adjudicating and revoking passports, and by CBP officers at ports of entry, in confiscating facially valid documents evidencing U.S. citizenship.

The instant case is not "related to" the prior class action in *Castelano et al v. Clinton et al,* CA M-08-057 (S.D.Tx). However, that case does provide context. It was hoped that the settlement obtained therein would solve the Due Process issues raised herein, at least with respect to passports for individuals born with the aid of Texas midwives. Sadly, this was a false hope, as shown, *inter alia*, by the cases of the named Plaintiffs herein. It is therefore necessary to address the fundamental issue that was skirted in *Castelano*: the existence and scope of Due Process rights in the issuance (and revocation) of United States passports.

Plaintiffs challenge: 1) the use of inappropriate standards of proof and lack of due process in adjudicating applications for U.S. passports, in revoking such passports, and in confiscating facially valid documents such as U.S. passports, laser visas, "green

cards," birth certificates, etc.[1] 2) the procedures and legal standards used by Customs and Border Protection, ("CBP"), in encounters with persons with facially valid documents showing U.S. citizenship, including denial of counsel, lengthy detention and extremely harsh interrogation of them and/or their parents, and lack of any Due Process remedy if the CBP officer is not "satisfied" of their U.S. citizenship;[2] 3) inadequate

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[1] *See, e.g., Hernandez v. Cremer,* 913 F.2d 230 (5th Cir. 1990) (applicant for admission with facially valid documents showing U.S. citizenship is entitled to "fair procedures" in determining whether he will be allowed to enter or placed in proceedings); *Atem v. Ashcroft,* 312 F.Supp.2d 792 (E.D.Va. 2004) (finding due process applicable since cancellation of passport implicates a specific liberty interest, to wit, the right to international travel).

[2] The lack of Due Process rights by those with facially valid documents showing U.S. citizenship in encounters at the ports of entry is crucial. In Yuliana Castro's case, the immigration judge held that a CBP denial of entry as a U.S. citizen can be challenged only by a process which requires (lengthy) administrative detention of most applicants, before they can seek a judicial determination of their U.S. citizenship, [99:18-19]. This enables Defendants to coerce such persons into "withdrawing" their requests for entry, and return them to Mexico, leaving them with no recourse other than the unorthodox procedure used herein, of filing habeas action while they are physically within the U.S., at a port of entry.

The most recent escalation of "the passport wars" is seen in *U.S. v. Benavides,* 7:10-cr-954, and *Benavides v. Napolitano et al,* 1:10-cv-223. Mr. Benavides is a UTB student who alleges birth in 1989, in Laguna Heights, TX, with the aid of a midwife. In 2008, he had an encounter similar to the Castros, Sampayo, and Garcia, and was forced to "withdraw" his application for admission. He then applied for a U.S. passport, and submitted substantial documentation. Over a year later, and without

(Continued on following page)

training of DOS agents on the standard of proof for adjudicating applications for United States passports, and revoking previously issued passports, 4) inadequate training of and restraints on CBP agents who inspect applicants for entry as U.S. citizens, and their supervisors; and 5) whether Defendant Cabrera should be allowed to conduct inspection at ports of entry.

* * *

III. THE FACTS

A. THE CASTRO FAMILY

5. Laura Nancy Castro and Yuliana Trinidad Castro are natives and citizens of the United States, born in Brownsville, Texas in 1980 and 1984, respectively. Their births were attended by midwife Trinidad Saldivar, who, shortly thereafter, timely registered them in Brownsville, Texas.[6] Their mother, Trinidad

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adjudicating the application, Defendants indicted him for false statements on a passport application, and arrested him. The AUSA has moved to dismiss the criminal charges, but Mr. Benavides remains in detention, and is under an ICE hold. If not released soon, he may lose an entire semester at UTB.

[6] The midwife who delivered Petitioners Laura and Yuliana, Trinidad Saldivar, is on Defendants' list of suspicious midwives. Defendant Cabrera represented to Trinidad Castro that Ms. Saldivar had spent five years in prison for filing false birth certificates, but a PACER search of her name turned up no entries. Ms. Saldivar has received anonymous threats of unspecified harm if she fails to "admit" that she falsely registered births in the U.S.

Muraira de Castro, is a Mexican citizen, who at all relevant times had documents with which to lawfully enter the United States. Docs [110,112].

6. Shortly after the births of Laura and Yuliana, their mother, Trinidad, returned with them to her home in Matamoros, Mexico, where she has resided at all pertinent times. *Id.*

7. When Laura was about four years old, Trinidad registered her birth in Mexico, as born in Matamoros, so that she could attend school there. The same day, and for the same reason, Trinidad also registered the birth of Yuliana, (who was then four and a half months old), in Matamoros, Mexico, showing birth in Matamoros. *Id.*

8. Laura Castro applied for, and on January 30, 2008, received, a U.S. passport. Yuliana Castro applied for a U.S. passport in January, 2009. DOS requested additional evidence of her birth in Texas, to which Yuliana responded on or about July 30, 2009.

9. On August 24, 2009, at about 9:40 a.m., Laura, Yuliana, and Trinidad Castro, with Yuliana's infant daughter, Plaintiff C.A.G., applied for admission/ entry at the Old Bridge in Brownsville, Texas. Laura presented her U.S. passport. Yuliana presented her birth certificate, Texas ID, and the receipt for her U.S. passport, along with the Texas birth certificate of C.A.G. Trinidad presented her laser visa. The agent on duty, CBP Officer Eliseo Cabrera, noted that Yuliana's birth certificate reflected a midwife birth, and took them to secondary inspection, where he

detained, interrogated, threatened, and otherwise treated all four Plaintiffs inhumanely for about ten hours. *Id.*

10. At the time of the events in question, all four were in a delicate medical state. Trinidad suffers from high blood pressure. Laura was in the early months of pregnancy, and was experiencing symptoms demonstrating that it was a high-risk pregnancy. Yuliana was recovering from complications of child-birth. C.A.G., who was only a few weeks old, was deprived of the care and environmental conditions any newborn requires, and cried uncontrollably. *Id.*

11. Based on threats, fear, hunger, exhaustion, and her inability to continue listening to the cries of her infant granddaughter, C.A.G., complicated by her own the delicate medical condition, and awareness of the medical vulnerability of the others, Trinidad succumbed to the efforts of Officer Cabrera to extract a false "confession" from her, stating that Yuliana and Laura had in fact been born in Mexico, and signed the document he had prepared. *Id.*

12. The Castros' family was so concerned by their detention that they sent an attorney to the port of entry, but he was not allowed to represent, or even communicate with Plaintiffs. The family also called the police, who came to the bridge, and made a report. *Id.*

13. After forcing Trinidad Castro to sign a false "confession," Defendants confiscated the documents of Laura, Yuliana, and Trinidad, and returned them to

Mexico, without giving them any opportunity to contest his actions. Laura and Yuliana were treated as having "withdrawn" their applications for entry. Trinidad was found to be inadmissible for fraud, under 8 U.S.C. §1182(a) (6) (C)(i), and subjected to "expedited removal." *Id.*[7]

14. Other than by requesting additional documentation in support of their passport applications, at no time prior to August 24, 2009, did any Defendant attempt to inform anyone in the Castro family that there were questions as to whether Laura and Yuliana had in fact been born in Texas. Prior to that date, all three: Laura, Yuliana, and their mother, Trinidad Castro, crossed into the U.S. frequently, without problems or complications.

15. When the instant action was filed, Laura, Yuliana and Trinidad Castro were at the Old Brownsville Bridge, but were unable to enter the U.S., and

[7] By treating them as having "withdrawn" applications for admission, rather than putting them in proceedings, or issuing orders of expedited removal, Defendants deprived Laura and Yuliana Castro of all statutory means of asserting U.S. citizenship. Similarly, by forcing Trinidad Castro to sign a "confession" of fraud, Defendants deprived her of the ability to have a hearing before the Immigration Judge with respect to the bona fides of her visa, and her request for admission, under 8 U.S.C. §1229a, or to contest the cancellation of her laser visa. *See,* 8 U.S.C. §1252(e)(1). Therefore, Trinidad Castro challenges the means by which the false confession was extracted, and seeks a declaration that it is, indeed, false, and that she committed no fraud.

Trinidad was not allowed to retract her "confession." At the time of filing, Plaintiffs were therefore within the United States, in Brownsville, Texas, within the jurisdiction of this Court, and were in custody within the meaning of 28 U.S.C. §2241.

16. Neither Laura nor Yuliana can freely exercise her right to international travel. Laura's passport was recently returned to her, and Yuliana also received a United States passport. Removal proceedings against Yuliana have been terminated. However, notwithstanding their decision to give Yuliana a passport, Defendants reserved the right to reinstitute proceedings against her, and the Immigration Judge held that the citizenship of persons such as the Castro sisters can only be determined following an order of expedited removal, which would, in most cases, involve lengthy administrative detention, with no possibility of parole. Laura continues to have problems when she crosses the border with her passport, which causes her to be fearful and suffer emotional distress each time she crosses. Both Laura and Yuliana fear that they could experience similar problems in the future, and only be able to assert their citizenship by being physically detained. This adversely affects both of them emotionally and physically.

17. Trinidad Muraira de Castro is still in custody because the finding that she had committed fraud, derived from the false "confession" that Laura and Yuliana were actually born in Mexico, permanently bars her from the United States. Since she is not the

spouse, son, or daughter or a U.S. citizen or lawful permanent resident, she is ineligible for a waiver under 8 U.S.C. §1182(1). She has close relatives born in Texas, and will be deprived of the opportunity to participate fully in the lives of her U.S. citizen children and grandchildren, or to immigrate to the United States.

18. Trinidad Castro can no longer visit her daughters Laura and Yuliana, or her grandchildren, in Texas, and their fear of crossing the border causes them to limit their visits with her in Mexico.

* * *

C. JESSICA GARCIA AND ANA ALANIS

29. Jessica Garcia was born in Brownsville, Texas in 1987. Her birth was also attended by midwife Trinidad Saldivar, who registered it in Brownsville two and a half weeks later. Shortly after her birth, her mother took Jessica to her home in Matamoros, Mexico. When Jessica was about seven weeks old, her mother registered her birth in Matamoros, as having been born there, in order to obtain vaccinations for her in Mexico. [190,191].

30. In May, 2009, Ms. Garcia applied for a U.S. passport. Said application is still pending.

31. On October 31, 2009, at about 9:30 a.m., Ms. Garcia sought entry at the new bridge, in Brownsville, Texas. Officer Cabrera was working primary. She showed him her Texas ID, Texas birth certificate, and the receipt for her passport application. He asked

if she also had a Mexican birth certificate. She was unaware of the existence of such a document, and replied that she did not. Officer Cabrera then sent her in to secondary inspection. *Id.*

32. Ms. Garcia waited a while, and when nothing happened, asked another CBP officer what was going on, because she was due at work in Brownsville at 10:00 a.m. That officer locked her in a small room, to await Officer Cabrera, who arrived about 30 minutes later. He eventually produced her Mexican birth certificate, which had been filed a month after her Texas birth certificate. He claimed that the Texas birth certificate was fraudulent, and began to hurl threats and insults at her, and make false representations, in a vain attempt to force Ms. Garcia to sign the papers he had prepared apparently to "withdraw" her application for admission. *Id.*

33. Eventually, Ms. Garcia's mother, Ana Alanis, also came to the port of entry. She explained why Jessica Garcia had two birth certificates, and insisted that she had been born in Brownsville. Nonetheless, she was also treated with threats, insults, and false statements by Officer Cabrera, in a vain attempt to get her to falsely "confess" that Jessica had been born in Matamoros. *Id.*

34. When neither woman would "confess" to the untruth sought by Officer Cabrera, he was forced

(apparently by his Supervisor), to issue an NTA.[12] He confiscated all the documents Jessica and her mother had with them, and sent them back to Mexico. *Id.* Among the documents confiscated was the request of the Department of State seeking additional evidence of her birth in the United States, and papers relating to her outstanding student loan.

35. The NTA against Ms. Garcia was never filed with the EOIR, so no hearing was ever scheduled. Nor was she afforded a hearing by which to challenge the confiscation of her documents.[13]

37. As a result, Jessica Garcia lost her employment, and the income on which she and her family depended. In order to settle her motion for preliminary injunction, Defendants agreed to allow her to enter as a U.S. citizen until her citizenship claim is finally determined. However, she is still sent into secondary inspection, interrogated, and often delayed for extended periods when she enters. Among other

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[12] Plaintiffs' counsel was recently informed that the Office of ICE Chief Counsel declined to file the NTA. This left Ms. Garcia completely in the air. But for invocation of the instant tactic of filing a writ of habeas corpus, while she was at the port of entry, there would have been no means of challenging CBP's action.

[13] On information and belief, Plaintiffs allege that the NTA was rejected for filing by the Harlingen, Texas, DHS Office of Chief Counsel. However, no attempt was made thereafter to contact her, or allow her to re-enter to the United States. But for the instant litigation, she would therefore have remained indefinitely in Mexico, with no means of asserting her U.S. citizenship.

hardships, she lost her employment, health insurance, and defaulted on other financial obligations, including a payment schedule for a traffic ticket in Brownsville, Texas. Her health has suffered, and she gained a lot of weight. Her relationships with her husband and children have also deteriorated. Her old job is no longer available, and she has been unable to find new employment. As a direct result of Defendants' actions, Ms. Garcia continues to suffer both economic and emotional crises.

D. ALICIA RUIZ

38. Alicia Ruiz was born in 1933, in Mercedes, Texas, where her family had been living for some time, and where her older brother had been born and baptized. As was common at that time, her birth was not timely registered. At the age of nine months, she was baptized in Mercedes, Texas. Her baptismal certificate shows birth in "Relampago Ranch," Texas. Ms. Ruiz' parents moved to Mexico, and when she was ten, registered her birth in Mexico, as having been born there. When she married in Mexico, in 1951, she was required to present a birth certificate, but the only one she possessed showed birth in Mexico, so her marriage certificate also shows birth in Mexico. However, the birth certificates of two of her three children reflect that she was born in Texas. [241].

39. Ms. Ruiz has applied three times for a U.S. passport. Each time, her application has been rejected.

The most recent denial, in 2009, from which there is no administrative appeal, notes only that she was registered in Mexico before her delayed Texas birth certificate was filed. The denial recites as follows, [241:36]:

> A check with the Mexican vital records office revealed that there was a birth certificate recorded for you on 9/22/1943 Reynosa, Tamaulipas, Mexico. This record was filed before the Texas birth certificate. As a result of this finding, a US passport cannot be issued to you at this time.

40. This denial simply ignores all other evidence, including her contemporaneous baptismal certificate, and denies her Due Process.

E. MARIA REYES

41. Maria Reyes was born in Creedmore, Travis County, Texas, in 1931. Her brother, Hermenegildo Reyes, was born in Lockhart, Texas, in 1928. In October, 1931, the family was repatriated to Mexico. The repatriation document states that her parents, Abraham Reyes and Carmen Lucio de Reyes, were accompanied by Hermendegido Reyes, age 3, and Maria Reyes, age five months, and that they were coming from "Greehmore, Texas." On April 21, 1932, Maria Reyes was baptized in Lampazos, N.L., Mexico. Her baptismal certificate reflects birth in "Cremord, Tex." The following day, her parents registered her birth in Lampazos, N.L., showing the same date of

birth, but reflecting her place of birth as Anahuac, N.L., Mexico.

42. In 1975, Ms. Reyes obtained a delayed Texas birth certificate, using her baptismal certificate, and repatriation record. In 2006, she attempted to obtain a U.S. passport. The application was denied, based solely on the fact that the Mexican birth record predated the delayed Texas birth certificate.

43. In 2007, Ms. Reyes' application for a copy of her Texas birth certificate was denied, since the U.S. Consulate had advised the State of Texas of the Mexican birth certificate. She requested a hearing in Austin, Texas, where the ALJ found that she had, indeed, been in born in Texas, and a new birth certificate was issued.

44. In 2008, Ms. Reyes again applied for a U.S. passport, including the evidence on which the ALJ had found that she was born in Texas. On May 9, 2008, that application was also denied, [242:3]:

> A check with the Mexican vital records office revealed that there was a birth certificate recorded for you on 04/22/1932. This record was filed before the Texas birth certificate. As a result of this finding, a U.S. passport cannot be issued to you at this time.

45. This denial, from which no administrative appeal exists, ignores all the other relevant evidence and denies her Due Process.

* * *

C. LAURA AND YULIANA CASTRO, RODRIGO SAMPAYO, JESSICA GARCIA, ALICIA RUIZ, MARIA REYES, AND JENIFER GONZALEZ

DECLARATORY RELIEF UNDER 8 U.S.C. §1503(a)

124. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 123.

125. Laura and Yuliana Castro, Sampayo, and Garcia, were denied the right of entry to the U.S., and the right to possess their documents demonstrating U.S. citizenship, on the grounds that they were allegedly not United States citizens.[32] The passport applications of Sampayo, Ruiz, and Reyes have all been denied, also on the grounds that they are allegedly not United States citizens.

126. Plaintiffs Laura and Yuliana Castro, Sampayo, Garcia, Ruiz, Reyes, and Gonzalez therefore further request that this Court issue declaratory judgments, under 8 U.S.C. §1503(a), declaring that they are United States citizens.

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[32] Although Laura and Yuliana Castro have since received their U.S. passports, and the documents that were confiscated have been returned, Laura continues to have problems when crossing and there is a real danger that, absent a judicial declaration that they are United States Citizens, they could suffer problems in the future.

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

LAURA NANCY CASTRO, ET AL, IN THEIR OWN NAMES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
v.	)	
MICHAEL T. FREEMAN, PORT DIRECTOR, U.S. CUSTOMS AND BORDER PROTECTION, BROWNSVILLE, TEXAS PORT OF ENTRY; ET AL.	)	**CA B-09-208**

PETITIONERS/PLAINTIFFS' EXHIBIT "V"

Exhibit "V" is the Declaration of Jodi Goodwin, a local immigration attorney, attesting that, notwithstanding that the issue has been brought formally to their attention, the Department of Homeland Security routinely violates *Matter of Villanueva,* 19 I&N Dec. 101 (BIA 1984) (Unless void on its face, a valid U.S. passport issued to an individual as a U.S. citizen is not subject to collateral attack in administrative immigration proceedings, but constitutes conclusive proof of such person's United States citizenship).

Ms. Goodwin's declaration further demonstrates collusion between DHS and DOS in such cases, as the U.S. citizen's valid U.S. passport was revoked following,

and as a result of, DHS' improper actions. *See, Galvan et al v. Lopez et al,* CA B-11-025.

Respectfully Submitted,
s/

Lisa S. Brodyaga, Attorney
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, TX 78586
(956) 421-3226
Federal ID: 1178,
Texas Bar 03052800

Jaime M. Diez,
Attorney
JONES & CRANE
P.O. Box 3070
Brownsville, TX 78523
(956) 544-3565

[Certificate Of Service Omitted]

COUNTY OF CAMERON

STATE OF TEXAS

DECLARATION OF JODI GOODWIN

I, Jodi Goodwin, am an attorney in the State of Texas since 1995 with Bar number 00793835. I am Board Certified in immigration and Nationality Law and have my office in Harlingen, Texas. I make the following statements under the penalty of perjury:

I attended an AILA (American Immigration Lawyers Association) Liaison meeting at the USCIS (United States Citizenship and Immigration Services) office at 1717 Zoy Street, Harlingen, Texas at which various representative of the Department of Homeland Security were present including attorneys representing ICE (Immigration and Customs Enforcement. In particular, I recall Greg Ball having been present at

the liaison meeting and responding to AILA members as to various questions.

One of the questions brought up during the meeting was whether or not CIS and ICE were following the Board of Immigration Appeals precedent decision in Matter of Villanueva with respect to the validity of U.S. passports. It was noted during the meeting that CIS regularly disregarded the decision and would request additional documentation or even deny cases where a U.S. passport was already issued. I recall Mr. Ball advising the AILA members present that he would look into the matter and get back with us.

The issue of USCIS regularly disregarding BIA precedent with respect to US passports is still a problem to this date. USCIS continues to request additional evidence of US citizenship when a US passport is presented in cases. I have had at least one client who presented a valid passport to CIS in relation to immigrating his family and subsequently applying for a certificate of citizenship for one of his minor sons have his passport revoked by the Department of State. The timing of the revocation was just after the Administrative Appeals Unit had sustained my appeal of the denial of the citizenship application for the son of my client based on CIS' disregard of Matter of Villanueva. It is clear to me that DHS and the Department of State were in communication with respect to the passport being revoked.

All of the above is true and correct. If you should have further questions please do not hesitate to contact me at 956-428-7212.

SIGNED UNDER THE PENALTY OF PERJURY ON THIS THE 7th DAY of FEBRUARY, 2011

/s/ Jodi Goodwin
Jodi Goodwin

LAW OFFICES OF LISA S. BRODYAGA
17891 Landrum Park Rd.
San Benito, Texas 78586
(956) 421-3226
FAX: 421-3423

January 28, 2009

U.S. Department of State
National Passport Center
31 Rochester Avenue
Portsmouth, NH 03801-2900

Re: Passport application of Veronica Lorena Martinez De Esparza Born June 21, 1973 in Sabinas Coah. Mexico

Gentlepersons:

We have received your letter of January 12, 2009, (copy enclosed). Please be advised that the requests you make are nonsensical. Your letter gives the impression that you have not reviewed any of the documents previously submitted, or even read the cover letter. Nor do you explain why the evidence presented is insufficient.

For example, you request a notarized affidavit from Ms. Martinez' U.S. citizen father, detailing his physical presence in the U.S. and abroad, prior to her birth. However, we have already given you his death certificate, demonstrating that such an affidavit is no longer possible. You also request evidence of his physical presence in the U.S. for ten years prior to the applicant's birth, of which at least five were after his fourteenth birthday. We have already provided that evidence, as well as copies of the Certificates of

Citizenship issued to the applicant's siblings, on the basis thereof. As explained in the cover letter, dated June 6, 2008:

> Enclosed please find passport applications for two sisters, Veronica Lorena Martinez de Esparza, and Monica Adriana Martinez-Alvarado. Both applicants acquired U.S. citizenship through their father, Moises Martinez-Terrazas, born April XX, 1930, in Granger, Texas, and deceased February XX, 2008. As you will see, we obtained a Certificate of Citizenship for Monica in 1997. Veronica was living in Mexico at that time, and did not seek a Certificate.
>
> Several other siblings applied simultaneously, (and also received certificates). They included Juan Carlos Martinez, who was at that time ten years old. His application was therefore signed by his father. A copy is enclosed for your reference. The original is in his A-file, probably in Central Records.
>
> The N-600 applications of Juan Carlos and Monica, (copy also enclosed), show that their father was physically present in the United States as follows:
>
> 1930 – approximately 1939 or 1940
> 1964 – 1982[1]
> 1992 and

[1] As shown by his affidavit, enclosed, he spent 8-10 months per year in the U.S. during that period.

1995 to present, (i.e., 1997, when application was filed).

As documentation for the N-600s, we presented the following:

The birth certificates of the applicants, of their father, Moises Martinez, and three of their uncles, to wit:

Ricardo Martinez, born March XX, 1936, Granger, Texas Luciano Martinez, born April XX, 1937, Granger, Texas, and Antonio Martinez, born February XX, 1939, Granger, Texas.

The marriage certificate of the applicants' parents;[2] A 1972 wage and tax statement of the applicants' father; The Social Security printout of the applicants' father; The Selective Service and Social Security cards of the applicants' father, and Affidavits from the source parent, Moises Martinez, and his older sister, Ercilia Martinez Terrazas (also now deceased).

These documents are all enclosed. Together, they show that Moises Martinez spent more than five years in the United States as a child, (from 1930 to approximately 1939 or 1940), and at least six years after the age of

[2] Translations of the Mexican documents have been provided for your convenience. They were not submitted in 1997, as INS did not then require translations of Spanish language documents.

> fourteen, (eight to ten months per year, from 1964 to 1973, when Veronica was born).
>
> Also enclosed for your information are the death certificate of the applicants' father, and a copy of the birth certificate of the aunt, Ercilia Martinez, born May XX, 1923, in Granger, Texas.

Similarly, your request for an "original physical presence statement from the Citizenship and Immigration Services on N600 Form" makes no sense. Form N-600 is not a "physical presence statement" of her father, and we have already provided copies of N-600 forms filed by two siblings. The information thereon relating to her father would be identical. If you want her to file an N-600 form with you, please make your request more explicit.

Otherwise, it is respectfully urged that Ms. Martinez' passport application be adjudicated on the basis of the information, and documents, provided. You are also urged to apply the appropriate standard, of whether she has shown that she acquired U.S. citizenship at birth by a preponderance of the evidence. *See,* 8 U.S.C. §150.[3] If the application is denied, we

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[3] Specifically, the question is whether it is "more likely than not" that Ms. Martinez is a U.S. citizen. As explained in *Tellabs, Inc. v. Makor Issues & Rights,* Ltd. 127 S.Ct. 2499, 2513 (2007):

> At trial, she must then prove her case by a "preponderance of the evidence." Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter.

would request an explanation of your reasons for that denial, which addresses the evidence presented. Your prompt response will be greatly appreciated. The deadline of June 1, 2009, is rapidly approaching.

Sincerely,

/s/
Lisa S. Brodyaga,
Attorney at Law

I, Veronica Martinez de Esparza, concur in the above request.

/s/
Veronica Martinez de Esparza

[SEAL]

United States Department of State
National Passport Center
31 Rochester Avenue
Portsmouth, NH 03801-2900
1-877-487-2778

February 24, 2009

Veronica Lorena Martinez De Esparza
1795 W Trevino St Apt 3
Rio Grande City, TX 78582

Dear Ms. Martinez De Esparza:

This letter is in reference to your request for a U.S. passport

A review of your application and accompanying documents shows that you were born in Mexico on June XX, 1973, to one United States citizen parent Moises Martinez Terrazas, and a Mexican national mother.

Section 309(a) of the Immigration and Nationality Act provides, in part, that a person born outside of the United States of an alien mother and a United States citizen father (who were not married at the time of the birth) acquires United States citizenship at birth if the following conditions are met:

1. The child is legitimated under the law of the child's residence or domicile while the child is under the age of twenty-one years (this requirement was changed in 1986 but the changes only applied to children who had not reached the age of eighteen prior to the date of enactment of the law).

2. The citizen father was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen, prior to the birth of the child. (The law was amended in 1986 to reduce the amount of physical presence required to transmit U.S. citizenship from ten years to five years, at least two of which were after attaining the age of fourteen. However, this amendment was not retroactive.)

In view of the above, it does not appear that you have a claim to U.S. citizenship because your father was not able to prove ten years physical presence in the United States before your birth, five years after the age of fourteen. Therefore, we are unable to issue a passport at this time and your application is denied.

We suggest that you contact the U.S. Citizenship and Immigration Services (formerly known as the Immigration and Naturalization Service) for information regarding other travel documents and possible naturalization as a United States citizen. Any special return postage fees will be refunded. By law, the passport execution and application fees are nonrefundable.

Sincerely,

/s/ Paige Button
Paige Button
Acting Director

Enclosure(s):
Father's Death Certificate
Father's Birth Certificate (2)
Applicant's Birth Certificate with Translation
Applicant's Baptismal Certificate
Parent's Marriage Certificate with Translation
Affidavits (2)
Father's SS Card
Father's Selective Service Card
Birth Certificates for Siblings (Luciano, Ricardo, and Antonio)
Father's W-2 (1972)

[SEAL]

United States Department of State

Washington, D.C. 20520

November 8, 2012

TO: CA/PPT/NPC – Ms. Karen Pizza

FROM: CA/PPT/L – Christine McLean, Acting [cm]

SUBJECT: Passport issuance to Veronica Lorena Martinez de Esparza, dpob 6-XX-1973, Mexico.

Managing Director Florence Fultz has approved passport issuance to the above named individual. Ms. Martinez applied for a passport on June 8, 2008. In support of her application, she presented her birth certificate, her parent's marriage certificate, two versions of her father's Texas birth certificate, as well as her father's affidavit of physical presence, affidavits from two aunts, an uncle and her mother. The application was denied in 2009 because Ms. Martinez provided only affidavits and limited documentary evidence (a SS earnings printout and a selective service registration card) to support her father's presence in the U.S for the requisite 10 years, 5 after age 14. The final computation of physical presence was 49 months, 4 years and one month – 11 months short of the required 5 years over age 14.

She subsequently sued the Department. In the course of the suit, the applicant, her mother, two uncles and an uncle's wife were deposed. The father could not be deposed because he is deceased. The depositions confirmed the contents of all the affidavits

and provided details that were not available with the application. The brothers – including plaintiff's deceased father – lived and worked together in Texas. We now know where they worked, where they lived, how much they got paid and how much rent they paid. The brothers and widow all stated that whatever documentation the family may have had about anything was destroyed in a fire at a sister's house.

In addition, the AUSA independently located the former girlfriend of an uncle who knew the brothers when they lived in Hereford, Texas. She indicated that she had met Ms. Martinez's father in Hereford in 1968, while she was pregnant with her first child by the brother. She thought that the brothers lived and worked at a nearby farm. This places the father in the U.S. in 1968 as claimed.

We also learned that the father had a car in Texas. All the witnesses agreed that he had it in 1969/1970/1971 when he was courting his future wife.

In view of the information obtained in the depositions and developed by the AUSA, we have concluded, and MD Fultz concurs, that the information provided by the former girlfriend places him in the U.S. in 1968 for at least the 10 months he claimed in his affidavit. The additional evidence about the car places him in the US in 1971 – also for the 10 months he claimed in the affidavit. Those 20 months give him sufficient time to transmit. Therefore, Ms. Martinez may be issued a passport.

We understand that you have Ms. Martinez's previous application. Attached is a recent photograph and copy of her identification. Please treat this application as a refile and include a copy of this memo to the application. The application should be sent by overnight mail to:

Ms. Veronica Lorena Martinez de Esparza
c/o Ms. Lisa Brodyaga
17891 Landrum Park Rd.
San Benito, TX 78586

Contact Consuelo Pachon if you have any questions. Please copy the biopage and e-mail it to her as soon as the passport is issued.

LOOKOUT **LOOKOUT**

NAME (Last)	(First)	(Middle)
Martinez de Esparza	Veronica	Lorena

BIRTH DATE	BIRTHPLACE (City)	(State)	(Country)
06-XX-1973	Sabinas	Coahuila	Mexico

REASON CODE	SOURCE CODE	EXPIRATION DATE
N	E	Indefinite

REASON SUB-CODE (MODIFIER)

N/A

SOURCE DOCUMENT (Name or Subjective Code) Used when document is filed under name not appearing on top line, e.g. cross reference. Also identifies information used to create lookout.

N/A

OFFICER REQUESTING LOOKOUT (Name, Signature & Organizational Symbol)

Sherry Jones CA/PPT/NPC /s/ Sherry Jones

PLACE OF RESIDENCE (City) (State)

N/A

LAST PASSPORT (Number) (Date) (Place Issued)

N/A

REASON FOR LOOKOUT (State briefly, indicate person or agency to be notified, including phone number and address)

Applicant claimed derivative citizenship through citizen father. U.S. citizen parent must be physically present in the U.S. prior to the child's birth, for 10 years, 5 years after the age of 14. No acquisition under section 309A of the INA.

IMPORTANT: This Lookout Form is not to be construed as denial or limitation of passport facilities.

CROSS REFERENCE: (Prepare set for each name. Fill in Source Department line on all sets if source document is to be filed under subjective code. If source document is to be filed under a name, fill in Source Document line with file name on all cross references.

PREPARED AND FORWARDED TO TWX/CLEARANCE BY:	**OFFICER AUTHORIZING REMOVAL**
Richard Stover /s/ Richard R. Stover Adjudication Manager CA/PPT/NPC	NAME ORGANIZATIONAL SYMBOL
	DATE(MM-DD-YYYY) REASON
RECEIVED AND FILED TO TWX/CLEARANCE BY:	
NAME DATE	REMOVED DATE NAME & SIGNATURE

LOOKOUT FORM 1-87 DS-1589 **U.S. DEPARTMENT OF STATE** **LOOKOUT**