
RECENT DEVELOPMENT

UNDOCUMENTED CITIZENS OF THE UNITED STATES: THE REPERCUSSIONS OF DENYING BIRTH CERTIFICATES

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I. INTRODUCTION

Texas's recent actions have encouraged the legislature to propose an amendment to one of the most fundamental rights in the United States Constitution—birthright citizenship.¹ The Texas Department of State Health Services has implemented a policy denying children born in the United States to immigrant mothers access to birth certificates.² Although the agency argued its decision to change the policy was rooted in its desire to protect the children's information,³ the ramifications of denying birth certificates are extensive and could affect the child for many years to come.⁴

It has been argued that even at times when immigration regulations seemed lax, immigrants, and even their U.S.-born children, have been and will always be “marked” as foreigners that carry a social stigma.⁵ As

1. See Birthright Citizenship Act of 2015, S. 45, 114th Cong. (2015) (amending the concept of birthright citizenship to include only those individuals who have at least one parent that is lawfully in the United States or a citizen); see also Amicus Curiae Brief of National Immigration Law Center in Support of Plaintiffs' Emergency Application for Preliminary Injunction at 9, *Serna v. Tex. Dep't of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 7894768 (W.D. Tex. Oct. 16, 2015) [hereinafter NILC's Amicus Curiae] (“[N]ot only does the Texas Policy result in unequal treatment, but there is ample evidence of societal hostility against the U.S.-born children of undocumented immigrants. One of Texas[s] U.S. senators has advocated amending the U.S. Constitution to end birthright citizenship[.]”); Clare Foran, *Ted Cruz Supports Amending the Constitution to End Birthright Citizenship*, NAT'L J. (Aug. 19, 2015), *republished by* ATLANTIC (Aug. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/08/ted-cruz-supports-amending-the-constitution-to-end-birthright-citizenship/443943/> [<https://perma.cc/6KWG-4ZT3>] (reporting on Ted Cruz's proposal to end birthright citizenship).

2. See Melissa del Bosque, *Children of Immigrants Denied Citizenship*, TEX. OBSERVER (July 13, 2015, 2:08 PM), <http://www.texasobserver.org/children-of-immigrants-denied-citizenship> [<https://perma.cc/7LUK-ZEAX>] (communicating the recent denials of birth certificates to U.S.-born children of immigrant mothers).

3. See Juan Escalante, *Texas Continues to Deny Birth Certificates to U.S. Citizen Children Born to Undocumented Parents*, HUFFPOST (Sept. 21, 2015, 10:55 AM), http://www.huffingtonpost.com/juan-escalante/texas-continues-to-deny-b_b_8160298.html [<https://perma.cc/LR48-DTJH>] (conveying the agency's interest in protecting the child's confidential information).

4. See NILC's Amicus Curiae, *supra* note 1, at 13 (“Plaintiffs have repeatedly demonstrated the link between obtaining a certified copy of a birth certificate and the ability to exercise the privileges and rights of citizenship.”).

5. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1397 (1997) (“Indeed, to be an immigrant is to be marked by the border. This is not to say that all immigrants are marked in the same way. Some immigrants are able to ‘pass’ while others (and sometimes even their U.S.-born descendants) remain perpetual foreigners.”); see also Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1162 (2009) (asserting immigrants

immigration is a hot-button issue in political platforms, the amount of leeway immigrants and their descendants have been given through legislation and regulations, particularly affecting those who have come to the United States undocumented, has ebbed and flowed over the years.⁶ Racial profiling laws, such as the one in Arizona,⁷ are examples of ways in which governmental agencies have implemented immigration policies in hopes of deterring the amount of immigrants coming to the United States.⁸ Aside from the number of immigrants crossing the border, another concern among the states has been dealing with the number of children of these immigrants who are born in the United States.⁹ Identification of such children, through the use of birth certificates, has been an ongoing issue.¹⁰ This Recent Development will explain Texas's

born in the United States are categorized as outsiders based on physical features “because they carry a ‘figurative border’ on their bodies”).

6. See del Bosque, *supra* note 2 (“Even in the darkest hours of Texas’ history of discrimination, officials never denied birth certificates to Hispanic children of immigrants[.]”); Steven Mintz, *Mexican Americans and the Great Depression*, GILDER LEHRMAN INST. AM. HIST., <http://www.gilderlehrman.org/history-by-era/great-depression/resources/mexican-americans-and-great-depression> [<https://perma.cc/P7PK-TWQW>] (highlighting callous treatment of Mexican Americans during the Great Depression and Japanese Americans during World War II).

7. See ARIZ. REV. STAT. ANN. § 11-1051 (2010) (allowing an officer to inquire about an individual’s immigration status during a traffic stop if he or she has reasonable suspicion the individual is unauthorized to be in the United States); see also *Arizona’s SB 1070*, AM. C.L. UNION, <https://www.aclu.org/feature/arizonas-sb-1070> [<https://perma.cc/J7NE-W9EU>] (claiming “[j]aws inspired by Arizona’s SB 1070 invite rampant racial profiling against Latinos, Asian-Americans and others presumed to be ‘foreign’ based on how they look or sound” and at least “two dozen copycat bills were introduced in state legislatures across the country,” such as “Alabama, Georgia, Indiana, South Carolina and Utah”).

8. See Pham, *supra* note 5, at 1160 (noting “those who have a foreign accent or appearance or who were born in another country can expect to be asked to show documents when others are not, be asked to show more documents, or be denied restricted benefits altogether”).

9. See Fiona Ortiz, *Texas Won’t Stop Denying Immigrants’ Children Birth Certificates—For Now*, HUFFPOST (Oct. 18, 2015, 3:16 PM), http://www.huffingtonpost.com/entry/texas-wont-stop-denying-immigrants-children-birth-certificates-for-now_5623ebcbe4b08589ef47d633 [<https://perma.cc/4VPL-UGSD>] (asserting the policies surrounding U.S.-born children of immigrants became a hot topic issue “in the November 2016 presidential campaign with Republican candidate Donald Trump questioning the automatic granting of citizenship and Jeb Bush drawing fire for his comments on the issue”).

10. See generally *In re Corr. of the Birth Record of Lopez*, No. 2004-AP-06 0046, 2004 WL 3563007 (Ohio Ct. App. Dec. 30, 2004) (resolving the issue of one Guatemalan mother’s difficulty in amending her U.S.-born child’s birth certificate for lack of acceptable identification); see also *Decamps ex rel. Cedenov v. N.Y.C. Dep’t of Health*, 841 N.Y.S.2d 819, 2007 WL 725710, slip op. at *1 (App. Div. Mar. 9, 2007) (hearing an immigrant mother’s request to amend her child’s birth certificate).

recent practice of denying birth certificates to these children and analyze its consequences.

A. *Recent Denial of Birth Certificates*

Problems arising from the lack of a valid form of identification become more prominent due to the increased implementation of regulations requiring proof of citizenship or status, and have had a negative impact on the lives of many, especially those coming from low-income or mixed-status families.¹¹ The issuance of a birth certificate by proper administrative agencies is normally not a problem when a child is born to U.S.-citizen parents or parents who have permission, either through a green card or visa, to be in the United States.¹² However, in Texas, a child whose parent was unauthorized to be in the United States and did not have a proper form of identification was denied access to a birth certificate.¹³ Prior to this change, states attempted, albeit unsuccessfully, to impose a screening process to obtain a mother's status—reporting to the proper authorities those who are unauthorized.¹⁴ Some have speculated the change in practice was in response to President Obama's executive actions regarding immigration policies (specifically the Deferred

11. See Gabriela M. Bogin-Farber, Note, *Birth Certificate Challenges for Children of Immigrants: Unintended Consequences of Anti-Immigrant Restrictionism*, 16 HARV. LATINO L. REV. 169, 176 (2013) (“Thus, while laws requiring proof of status are problematic for multiple populations in different ways and for different reasons, their impact on mixed status families may be particularly devastating.”).

12. See TEX. ADMIN. CODE ANN. § 181.28(i)(10) (West 2015) (specifying documentation issued by the federal or state government, such as a driver's license or passport, as primary identification documents are acceptable to obtain a certified birth certificate). *But see* Serna v. Tex. Dep't of State Health Servs., No. 1-15-CV-446 RP, 2015 WL 10818655, at *2 (W.D. Tex. Oct. 16, 2015) (alleging undocumented immigrants “almost universally lack any primary identification documents” and acknowledging Plaintiffs' argument that many of whom also lack “foreign identity documents which would qualify as secondary identification”).

13. See *Serna*, 2015 WL 10818655, at *11 (recognizing children born to immigrant parents without a proper form of identification, as provided by the Texas Administrative Code, are being denied the issuance of their birth certificates); del Bosque, *supra* note 2 (“According to the lawsuit, the women who requested birth certificates for their children in Cameron and Hidalgo counties were turned away because of insufficient proof of their identities.”).

14. See, e.g., S.B. 1405, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (requiring staff and personnel to screen the statuses of individuals going into the hospital and to contact the local federal immigration department if a patient is unauthorized to be in the United States). *But see* Press Release, N.Y. Immigration Coal., Public Hospitals Renew Commitment to Keep Patient Immigrant Status Private: “Open Letter” in 12 Languages Promises Confidentiality (May 18, 2011), <http://www.thenyic.org/PR-HHC-16-05-11> [https://perma.cc/3HKA-J3XR] (announcing New York's plans to keep patients' immigration statuses confidential).

Action for Child Arrivals and Deferred Action for Parental Accountability policies), the influx of immigrants coming into the United States during the summer of 2015, and/or the broadcasted issue of “anchor babies.”¹⁵

According to Pew Research, about 295,000 children were born to “unauthorized parents” in the United States, accounting for approximately 8% of births in 2013.¹⁶ With immigration being a major issue on the priority lists of both the Republican and Democratic parties, at least one state government has decided to alter its regulations to reflect what it believes to be the best response to immigration issues.¹⁷

An immigrant mother’s *matricula*—a Mexican consular identification card¹⁸—which was once generally accepted in obtaining her child’s birth certificate, was deemed to be insufficient proof of identity.¹⁹

15. See Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, N.Y. TIMES (Jan. 4, 2011), http://www.nytimes.com/2011/01/05/us/politics/05babies.html?_r=0 [https://perma.cc/S442-ZAHM] (touching upon the concept of “anchor babies” as a way to prevent deportation); Melissa del Bosque, *Legislator ‘Alarmed’ by State’s Refusing Birth Certificates for Children of Undocumented Parents*, TEX. OBSERVER (July 16, 2015, 2:45 PM), <http://www.texasobserver.org/legislators-alarmed-texas-refusing-birth-certificates-children-undocumented-immigrants/> [https://perma.cc/JXA2-YY2W] (asserting the state’s refusal to issue birth certificates began shortly after the Obama Administration pushed to executive change immigration policies and hypothesizing it may “have something to do with the influx of Central American families that peaked last summer”); Manny Fernandez, *Immigrants Fight Texas’ Birth Certificate Rules*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html?_r=0 [https://perma.cc/2PZ2-Y35F] (“The refusal to accept the consular IDs coincided with . . . the influx of Central American immigrants at the border last summer and the state’s opposition to President Obama’s executive actions on immigration . . .”).

16. Jeffrey S. Passel & D’Vera Cohn, *Number of Babies Born in the U.S. to Unauthorized Immigrants Declines*, PEW RES. CTR. (Sept. 11, 2015), <http://www.pewresearch.org/fact-tank/2015/09/11/number-of-babies-born-in-u-s-to-unauthorized-immigrants-declines/> [https://perma.cc/R2J2-S432].

17. See Lacey, *supra* note 15 (discussing legislation that would “create two kinds of birth certificates . . . one for the children of citizens and another for the children of illegal immigrants”). Some scholars disagreed with the planned legislation, characterizing it as “patently unconstitutional.” *Id.*

18. See Kevin O’Neil, *Consular ID Cards: Mexico and Beyond*, MIGRATION POL’Y INST. (Apr. 1, 2003), <http://www.migrationpolicy.org/article/consular-id-cards-mexico-and-beyond> [https://perma.cc/Y28Z-9E5T] (stating the Mexican consulates issued the *matricula* ID as “a way for the Mexican government to keep track of its citizens for consular and tax purposes, collect data on them, and provide them with what the government considers to be a basic human right: the ability to identify oneself”).

19. See Suzanne Gamboa, *U.S. Citizen Kids’ Benefits at Risk by Birth Certificate Denials in Texas*, NBC NEWS (Aug. 24, 2015, 6:18 PM), <http://www.nbcnews.com/news/latino/u-s-citizen-kids-benefits-risk-birth-certificate-denials-n415126> [https://perma.cc/C9NK-7JY6] (noting the change from Texas’s prior regulation of allowing foreign identification, such as a *matricula*, as an acceptable form of identification in obtaining a birth certificate).

Furthermore, what was once merely a fear among immigrants—having their lack of legal status exposed by simply seeking medical attention—came into fruition and has made this population more vulnerable to deportation.²⁰

Individuals who do not have legal status in the United States cannot obtain most, if any, primary forms of identification needed to retrieve these records.²¹ Although there are secondary and supporting documents that can also be used if a primary form of identification is unavailable, it is also challenging for an individual in the United States illegally to present these types of documents to the Department of State Health Services.²²

Critics of this practice, specifically the families directly affected by this regulation, have expressed concern that such practice will substantially hinder children's ability to benefit from and take responsibility for their status as United States citizens.²³ Many argue that denying birth certificates to these children is state infringement on constitutional rights of U.S. citizens by birth (known as birthright citizenship) which are protected under the Fourteenth Amendment of the United States Constitution.²⁴ Outraged by the recent change in policy and the

20. See Bogin-Farber, *supra* note 11, at 180 (stating it is not unreasonable for immigrants to fear exposure or “believe that [they] will be challenged when [they] go . . . to a hospital to give birth and cannot show ‘American identification’” due to the increase in number and stringency of state and federal regulations requiring identification).

21. See *List of Acceptable Forms of Identification*, DALLAS COUNTY, http://www.dallascounty.org/departments/countyclerk/documents/AustinID_FORMS_2014_000.pdf [<https://perma.cc/5GWU-F9S9>] (listing forms of primary identification, such as a driver's license, federal or state identification card, United States passport, etc.); see also Fernandez, *supra* note 15 (“Most Texans pick up a birth certificate by showing a driver's license. But illegal immigrants lack many of the approved forms of identification, such as a license or foreign passport with a United States visa.”). It is important to note identification requirements for acquiring other forms of identification, such as those in Dallas, are compulsory pursuant to federal legislation. See REAL ID Act of 2005, 49 U.S.C. § 30301 note (implementing federally mandated minimum standards for obtaining a state driver's license or identification card).

22. See, e.g., *List of Acceptable Forms of Identification*, *supra* note 21 (indicating even if an individual is using a foreign passport as a secondary acceptable identification it must be accompanied by a “Visa issued by the United States Department of State”).

23. See, e.g., Gamboa, *supra* note 19 (highlighting the impact of the difficulties in enrolling children into a school without a birth certificate).

24. See U.S. CONST. amend. XIV, § 1 (“All persons *born* . . . in the United States . . . are citizens of the United States and of the State wherein they reside.” (emphasis added)); see also *Serna v. Tex. Dep't of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 10818655, at *4 (W.D. Tex. Oct. 16, 2015) (“Plaintiffs argue the conduct of [the Texas Department of State Health Services] has interfered with the fundamental rights of citizenship, to travel and to familial integrity, as well as education and public benefits.”); Gamboa, *supra* note 19 (arguing the denial of birth certificates is an

repercussions such a policy will have on their children, many immigrant families brought suit against the state, claiming a violation of their children's constitutional rights.²⁵ Proponents of this policy, as well as the state agency, argued enforcement of this rule has nothing to do with the status of a child's parent(s); rather, it has to do with protecting a child's "information by ensuring they only release records to people who are qualified to obtain them."²⁶ According to various news sources, the Texas Department of Health and Safety and the families of these children reached a settlement.²⁷ However, there is limited information as to what

infringement on the rights of children—rights that are bestowed upon fellow citizens born in the United States).

25. Sam Hart, *The Battle for Birth Certificates: Is Denying Them to Children of Undocumented Immigrants Constitutional?*, TEX. MONTHLY (July 23, 2015), <http://www.texasmonthly.com/the-daily-post/the-battle-for-birth-certificates-is-denying-them-to-children-of-undocumented-immigrants-constitutional/> [<https://perma.cc/N8GR-PPR5>] (reporting on a lawsuit commenced by immigrant families impacted by the new policy against the Texas Department of State Health Services); see also Eyder Peralta, *Texas Fights Suit After Denying Birth Certificates To Children of Illegal Immigrants*, NPR (July 23, 2015, 10:38 PM), <http://www.npr.org/sections/thetwo-way/2015/07/23/425568894/texas-fights-suit-after-denying-birth-certificates-to-children-of-illegal-immigr> [<https://perma.cc/B3PJ-MJ7S>] (emphasizing the immigrant's constitutional claims against the government for the implementation of this policy); Seth Robbins, *Lawyers: US-born Kids Harmed by Denial of Birth Certificates*, FREE REPUBLIC (Aug. 21, 2015, 10:47 PM), <http://www.freerepublic.com/focus/chat/3327793/posts> [<https://perma.cc/8SDD-RC4R>] (discussing the lawsuit filed by immigrant families against the government for denying them the ability to obtain their children's birth certificates).

26. Escalante, *supra* note 3 (quoting Fernandez, *supra* note 15); see also TEX. PENAL CODE ANN. § 32.51(b)(3) (West 2015) (making it a felony offense to fraudulently use or possess "identifying information of a child younger than 18 years of age"); *Serna*, 2015 WL 10818655, at *9 ("Defendants contend the current requirements were adopted due to concerns regarding identity theft and the reliability of identification documents."). It is important to note, however, there are a number of states that still accept a *matricula* as an acceptable form of identification, as Texas has in the past. See *Acceptable Identification List to Obtain Vital Records*, UTAH DEP'T HEALTH OFF. VITAL RECS. AND STATS., <https://vitalrecords.utah.gov/wp-content/uploads/List-of-Acceptable-Identification.pdf> [<https://perma.cc/S67S-MU7V>] (listing a *matricula* consular card, even presented alone, as a sufficient primary form of identification when attempting to obtain a birth certificate); see also *Identification is Required*, IDAHO DEP'T HEALTH AND WELFARE, <http://healthandwelfare.idaho.gov/Portals/0/Health/Vital%20Records/AcceptIdE.pdf> [<https://perma.cc/A9BB-C9D5>] (confirming a *matricula*, if signed and used in conjunction with another form of acceptable identification, is sufficient proof of identification for an authorized individual to obtain a birth certificate). But see *Application for Certified Copy of Kansas Birth Certificate*, KAN. DEP'T HEALTH AND ENV'T, http://www.kdheks.gov/vital/download/birth_fillable.pdf [<https://perma.cc/T3RY-58KH>] (indicating "matriculas are not an acceptable form of" identification when applying to receive a certified copy of a birth certificate in Kansas).

27. See, e.g., Alexa Ura, *Texas Agrees to Resolve Birth Certificate Case with Undocumented Families*, TEX. TRIBUNE (July 25, 2016, 12:00 PM), <https://www.texastribune.org/2016/07/25/texas-agrees->

this settlement entails.²⁸ Although the state was given nine months in which to comply, there is at least one county website still stating the *matricula* is not a valid form of identification.²⁹

B. *The Importance of Birth Certificates and Their Purposes*

The importance of having a birth certificate is far greater than simply having a document stating when the child was born and who the child's parents are.³⁰

Most importantly, a birth certificate gives a child an identity; it not only documents who he or she is, but also gives the individual a legal identity, establishing his or her residency and citizenship.³¹ The birth certificate is "the most important documentary evidence of a child's nationality."³² Birth certificates are a sort of "membership card," providing proof of legal status to reap benefits allotted to citizens of the United States, including, but not limited to, a social security card, Medicaid eligibility, and a state driver's license.³³

II. COMPLICATIONS WITH PROOF OF CITIZENSHIP

The state's denial of birth certificates to these children does not constitute a per se deprivation of citizenship. But, because of the societal importance placed on proper birth registration and the possession of a

to-resolve-birth-certificate-case/ [https://perma.cc/4HVG-7GDQ] (discussing the settlement reached in the birth-certificate case).

28. Memorandum from the Texas Rio Grande Legal Aid to the Staff (Sept. 9, 2016) (on file with author).

29. See *New Laws Effecting the Purchase of Birth Records*, DALL. COUNTY, <http://www.dallascounty.org/department/countyclerk/birthcertificates.php> [https://perma.cc/XU4S-UW6H] (stating, as of June 1, 2015, the *matricula* consular card is no longer an acceptable form of identification "for purchase of birth certificates or for obtaining confidential records").

30. See Bogin-Farber, *supra* note 11, at 170 (asserting "birth registration is crucial for a variety of reasons including, but not limited to, access to basic services, prevention of child labor and child marriage, and decreasing trafficking").

31. See *The Importance of the Birth Certificate – Birth Registrar Certification*, TEX. DEPT ST. HEALTH SERVICES, <https://www.dshs.state.tx.us/vs/field/brc/importanceofBC.shtm> [https://perma.cc/TNY4-PD7H] ("[A birth certificate] establishes Texas residency and US citizenship. It provides legal identity."); see also Innocenti Research Center, *Birth Registration: Right from the Start*, 9 INNOCENTI DIGEST, at 1 (Mar. 2002) (asserting registration of birth give the individual "an official identity, a recognized name and a nationality").

32. Innocenti Research Center, *supra* note 31, at 2.

33. See *id.* at 1 ("These children have no birth certificate, the 'membership card' for society that should open the door to the enjoyment of a whole range of other rights including education and health care, participation and protection.").

birth certificate, there are similar, if not identical, sociological effects— analogous to having illegal status—felt by children who are otherwise legal citizens.³⁴ Lacking valid proof of status—a birth certificate—and confronted with instances of prior, and perhaps continual, racial profiling, it is not unreasonable for a child born to immigrant parents to feel they will not be believed to be a U.S. citizen.³⁵ As such, refusing to issue a birth certificate infringes upon the legal effects of said certificate.³⁶

Individuals who lack a birth certificate have greater difficulties obtaining benefits and other forms of identification or proof of citizenship that are awarded to all citizens of the United States.³⁷ These benefits include, but are not limited to, access to a social security card/number, a driver's license, a voter identification card, a passport, health care services, and school enrollment.³⁸ Although some of these benefits may be obtained by providing secondary forms of citizenship, stated *supra*, it is not always feasible for immigrant families to obtain such identification for two reasons: (1) the amount of income brought in by an immigrant or mixed status family may not be sufficient to obtain these types of documents;³⁹

34. *Cf.* *Serna v. Tex. Dep't of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 10818655, at *7 (W.D. Tex. Oct. 16, 2015) (“Insofar as a birth certificate is the primary means of documenting citizenship, it follows that a citizen’s right to obtain it is as fundamental as the rights and privileges that flow from the status it documents.”); *see also* *Fernandez*, *supra* note 15 (“Texas has not directly challenged the citizenship of the children, which is granted by the 14th Amendment to anyone born in the United States. Many of them have birth certificates in the state’s database. It is just a matter of adequate identification, the state says.”).

35. *See* *Bogin-Farber*, *supra* note 11, at 180 n.55 (“Without a birth certificate or Social Security number, the chances are low that a U.S. citizen child of undocumented parents will be believed to be a citizen.”).

36. *Juan Castillo*, *Lawsuit: U.S. Citizen Children Denied Birth Certificates in Texas*, NBC NEWS (May 28, 2015, 3:04 PM), <http://www.nbcnews.com/news/latino/suit-alleges-undocumented-parents-denied-birth-certificates-citizen-children-n366111> [<https://perma.cc/CF6Y-5WLA>] (claiming, without birth certificates, parents will “face considerable difficulties or barriers to enroll [children] in school, give consent for their medical care or receive other services U.S. citizens are eligible to receive”).

37. *See* Brief of the United Mexican States (“Mexico”) as Amicus Curiae in Support of Plaintiffs’ Emergency Application for Preliminary Injunction at 5, *Serna*, 2015 WL 10818655 (No. 1-15-CV-446 RP) [hereinafter Mexico’s Amicus Curiae] (emphasizing the difficulties in obtaining other forms of government-issued identification without a birth certificate).

38. *See* *Gamboa*, *supra* note 19 (“[A]n unknown number of children in Texas whose parents are potentially illegally in the country, are unable to get state and federal services given to U.S. citizens, face the threat of being unable to go to school and are unable to travel . . .”).

39. *See* *Passel & Cohn*, *supra* note 16 (reporting unauthorized individuals are “likely to hold low-skilled jobs” and their average median household income in 2007 was “\$36,000, well below the \$50,000 median household income for U.S.-born residents”). *Compare* *Bogin-Farber*, *supra* note 11,

and (2) many families are unlikely to reach out to authorities to obtain the necessary documentation for fear of being caught.⁴⁰

A. *Secondary Proof of Citizenship and Its Purpose*

Nevertheless, when a birth certificate is not available, other documentation may be used as a secondary form of identification, including: early public records, delayed birth certificates, “Letters of No Record,” and birth affidavits.⁴¹ However, even when an individual—particularly a parent with no legal status—has secondary evidence, it may still not be enough to establish proof of identification to obtain either a birth certificate or a secondary form of identification.⁴²

A social security card may also be considered a secondary form of identification when the individual cannot provide a birth certificate because proof of citizenship and identity are required to acquire a social security card.⁴³ A social security card and number gives the citizen an

at 181 (indicating the immigrant mother was subject to DNA testing to prove maternity in order to amend her son’s birth certificate and was only able to do so because her “attorney found a low-cost DNA testing company”), *with id.* at 182 (emphasizing another case study where a mother’s inability to pay a \$500 fee for a DNA test to prove maternity prevented her from amending her child’s birth certificate).

40. *See Serna*, 2015 WL 10818655, at *4 (emphasizing the requirement for a mother to provide an explanation as to why a certified copy of the child’s birth certificate was not produced, causing the mother to “admit [her] status and thus expose [her] to potential criminal liability and removal from the United States”); *see also* Bogin-Farber, *supra* note 11, at 185 (“Undocumented immigrants have been described as *living in the shadows*: the tenuous position of the undocumented in U.S. society is often accompanied by a fear of deportation, familial separation, or mistreatment.” (emphasis added)).

41. *See U.S. Passports & International Travel: Citizenship Evidence*, U.S. DEP’T ST., <https://travel.state.gov/content/passports/en/passports/information/citizenship-evidence.html> [<https://perma.cc/88HS-UJ68>] (listing early public records, delayed birth certificates, “Letters of No Record” and birth affidavits as valid forms of secondary evidence).

42. *See In re Corr. of the Birth Record of Lopez*, No. 2004-AP-06 0046, 2004 WL 3563007, at *4 (Ohio Ct. App. Dec. 30, 2004) (indicating the trial court’s unwillingness to recognize an affidavit signed five years after the birth of the child as proof of maternity, resulting in denial of petition to amend the birth record).

43. *See Learn What Documents You Need to Get a Social Security Card*, SOC. SEC. ADMIN., <https://www.socialsecurity.gov/ssnumber/ss5doc.htm> [<https://perma.cc/ED4A-R54M>] [hereinafter *Documents to Get a Social Security Card*] (providing the individual applicant must present proof of citizenship when applying for a social security card, and only accepting U.S. birth certificates or passports as proof). Although it is possible for noncitizens to obtain a social security number for employment purposes, documentations proving the individual’s age and identity are still required. *See Social Security Numbers for Noncitizens*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10096.pdf> [<https://perma.cc/X8WZ-7E3L>] (indicating an applicant must provide proof of his or her age by presenting a foreign birth certificate or, in the alternative, a passport or document issued by

opportunity to be employed.⁴⁴ The employer is required to verify that the applicant has a social security card before employment commences; even if the applicant is able to obtain employment without a social security card, that job will likely offer less pay and fewer—if any—benefits compared to a job requiring verification of a social security number before hire.⁴⁵ For a U.S. citizen to receive a social security card, however, the government has explicitly listed two forms of proof of citizenship: (1) a U.S. birth certificate, or (2) a U.S.-issued passport.⁴⁶ Lacking the first form of proof, an individual is left only one option—a U.S.-issued passport.

A driver's license is also evidence of citizenship, yet states require proof of citizenship—such as a birth certificate—when applying for a license.⁴⁷ According to state administrative entities in charge of distributing driver's licenses, one must satisfy four requirements to obtain a driver's license: (1) establish identity, (2) provide a social security number, (3) establish citizenship or lawful presence, and (4) establish residency.⁴⁸

the Department of Homeland Security). However, this avenue is not accessible to children born of immigrant mothers as they are U.S. citizens, and not citizens of another country.

44. See Carolyn Puckett, *The Story of the Social Security Number*, 69 SOC. SEC. BULL. 55, 70 (2009) (stating a “[social security number] is needed for work”).

45. See Erika J. Nava, *Federal Immigration Reform Would Help New Jersey's Striving Immigrants and Boost the State's Economy*, N.J. POL'Y PERSP. (Jan. 2014), <http://www.njpp.org/assets/reports/NJPPImmigrationReformJanuary2014.pdf> [<https://perma.cc/P9EG-ZBED>] (finding non-citizens with median household incomes and median annual wages significantly lower, with a significantly higher share below the federal poverty level, compared to natives and naturalized citizens).

46. *Documents to Get a Social Security Card*, *supra* note 43 (navigating the system by selecting “A Child” as the recipient; then selecting “Original” as the type of card; and, finally, selecting “U.S. Born Citizen” as the recipient's citizenship status).

47. See, e.g., *Drivers License Identification Requirements*, FLA. DEP'T MOTOR VEHICLES, <http://www.dmvflorida.org/drivers-license-identification.shtml#immigrant> [<https://perma.cc/QGE3-3MC3>] (“Florida law requires identification, proof of date of birth, proof of residential address and proof of social security number . . .”); *Proof of Citizenship, Identity, and Residence: EDL/EID*, WASH. ST. DEP'T LICENSING, <http://www.dol.wa.gov/driverslicense/edlproof.html> [<https://perma.cc/639L-PK4H>] (stating one must provide proof of citizenship when acquiring a driver's license in Washington).

48. See *Apply for a Texas Driver License*, TEX. DEP'T PUB. SAFETY, <https://www.dps.texas.gov/DriverLicense/ApplyforLicense.htm> [<https://perma.cc/X2R7-YASB>] (listing documentation required to apply for a Texas driver's license); *Real ID Document Checklist for Identity Verification*, CONN. DEP'T MOTOR VEHICLES, http://www.ct.gov/dmv/lib/dmv/selectct/selectid_accpt_docs3.pdf [<https://perma.cc/6JNG-YXN6>] (providing a checklist and examples of requirements necessary to obtain a driver's license in Connecticut).

When one does not have a birth certificate, the first issue arises in providing sufficient evidence of identity.⁴⁹ This is because a primary form of proving identity in some states is by providing a birth certificate.⁵⁰ Furthermore, states often require more than one form of proof of identity; other forms of documentation include U.S. passports, foreign passports, permanent resident cards, military IDs, and state and federal employee identification.⁵¹ Given that individuals who are denied a copy of their birth certificates are, in fact, born in the United States and are thus U.S. citizens, they are not eligible to receive foreign forms of identification and legal status.⁵²

49. See *Proof Requirements for a Permit, License or Non-Driver ID*, N.Y. DEP'T MOTOR VEHICLES, <http://dmv.ny.gov/driver-license/prove-identity-age-permitlicense> [https://perma.cc/2AZY-LNST] (stating that one must provide proof of date of birth and name using a social security card or other documentation, such as a birth certificate, passport, military photo, certificate of citizenship, or residency card when obtaining a license).

50. See *Checklist of All Accepted Documents*, GA. DEP'T DRIVER SERVICES, <http://online.dds.ga.gov/SecureID/accepteddocs.aspx> [https://perma.cc/U9ZL-2HUG] (listing a birth certificate, among other types of documentation, as a primary identification document when there is a request to change a name on a driver's license); *Obtaining a Virginia Driver's License or Identification (ID) Card*, VA. DEP'T MOTOR VEHICLES (July 1, 2017), <https://www.dmv.virginia.gov/webdoc/pdf/dmv141.pdf> [https://perma.cc/N826-7KGQ] (indicating an "official birth document issued by a U.S. state, jurisdiction or territory"—not including birth documentation provided by a hospital or foreign birth certificates—is a primary document for establishing proof of identity when applying for a driver's license in Virginia); *Primary Proof of Identification for a United States Citizen*, OKLA. DEP'T PUB. SAFETY, <https://www.ok.gov/dps/documents/US%20Citizen%20Primary%20Proof%20of%20Identification.pdf> [https://perma.cc/GF4S-8XB3] (asserting "[a] certified birth certificate, as issued by the appropriate state agency from the state of birth" is a primary proof of identification when obtaining a driver's license in Oklahoma); CONN. DEP'T MOTOR VEHICLES, *supra* note 48 (showing a U.S. birth certificate or Registration of Birth as part of the *primary* document list in proving identity when acquiring a driver's license).

51. See, e.g., CONN. DEP'T MOTOR VEHICLES, *supra* note 48 (presenting acceptable forms of proof of identity and requiring two forms of identification, one of which must be a "primary document"—U.S. birth certificate or U.S. passport).

52. See Mexico's Amicus Curiae, *supra* note 37, at 8 ("Without a birth certificate, a child cannot acquire or assert U.S. or Mexican nationality or citizenship."); see also David Agren, *Mexico's National Voter IDs Part of Culture*, USA TODAY, <http://usatoday30.usatoday.com/news/world/story/2012-01-22/mexico-national-voter-ID-cards/52779410/1> [https://perma.cc/X9TX-7LD6] (indicating Mexican voter cards have "become the accepted way to prove one's identity" and documents to obtain a voter card include "a birth certificate, another form of photo identification and a recent utility bill" (emphasis added)); *Preparing for Immigration Relief: How to Get a Passport for Mexican Nationals*, IMMIGRANT LEGAL RESOURCE CTR. (July 2014), <http://listonm.org/wp-content/uploads/2015/07/Obtaining-Passport-for-Mexican-Nationals-Final-English.pdf> [https://perma.cc/F8TW-VEBL] (declaring a Mexican birth certificate or expired Mexican passport is necessary to prove Mexican nationality when seeking to obtain a Mexican passport).

The second issue in applying for a driver's license, assuming the individual can provide proof of identity, is the requirement of a social security number.⁵³ As previously stated, it is extremely difficult for citizens to obtain a social security number without a U.S. birth certificate because the agency requires the document as proof of citizenship.⁵⁴

A third potential form of secondary proof of citizenship is a voter-registration identification card.⁵⁵ For obvious reasons, a voter-registration ID is not only important to prove citizenship, but it also gives an individual the ability to exercise the most highly ranked privilege available only to citizens—the right to vote.⁵⁶ In many cases, to obtain a voter-registration card, an individual must present a primary form of identification, usually a driver's license or passport.⁵⁷ Not surprisingly, although struck down by the Supreme Court, there were a number of states that passed laws requiring an individual voter to provide a form of identification at the polls on voting day.

Furthermore, there is a fear—and an all too real possibility—of deportation due to lack of proper identification and citizenship status.⁵⁸

53. See, e.g., TEX. DEP'T PUB. SAFETY, *supra* note 48 (listing documentation required to apply for a Texas driver's license).

54. See *Documents to Get a Social Security Card*, *supra* note 43 (stating the only acceptable forms of documentation to prove citizenship for obtaining a social security number are a birth certificate or a U.S.-issued passport).

55. See *Proof of Citizenship to Register to Vote*, AM. C.L. UNION VA., <https://acluva.org/3838/proof-of-citizenship-to-register-to-vote/> [<https://perma.cc/B8G6-FXCL>] (“Under current law, applicants to vote must state that they are U.S. citizens. HB 341 and HB 497 make it more difficult to register to vote by requiring ‘proof of citizenship’ (e.g., a copy of a passport, birth certificate or naturalization documents) to register to vote.”).

56. See Katherine Culliton-Gonzalez, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 HARV. HUM. RTS. J. 127, 158 (2012) (“[B]y far the greatest number of persons in the United States who would no longer enjoy birthright citizenship and its attendant rights, including voting rights, would be Latino.”); see also Ben Brewster, *The Importance of Voting to Democracy*, VT. SEC’Y ST., https://www.sec.state.vt.us/kids/contest/2005/9_12_winner_2005.htm [<https://perma.cc/2FWB-RMTX>] (claiming voting is one of the most important fundamental rights because a democratic system would not run effectively without it).

57. See *Required Identification for Voting in Person*, VOTETEXAS.GOV, <https://www.votetexas.gov/register-to-vote/need-id.html> [<https://perma.cc/FJX8-L9DN>] (requiring Texas voters to present an acceptable form of photo identification, such as a driver's license or U.S. passport, or a supporting form of identification with a Reasonable Impediment Declaration describing the voter's reasonable impediment to obtaining an acceptable photo identification).

58. See Tim Henderson, *Deportations Down, but Fear Persists Among Undocumented Immigrants*, HUFFPOST (Oct. 23, 2015, 5:02 PM), http://www.huffingtonpost.com/entry/deportation-fears_562a694ce4b0ec0a38945002 [<https://perma.cc/88BA-7H2R>] (“Cities like Baltimore and states

Even if there are possibilities for obtaining secondary forms of identification without a birth certificate, fear of deportation if caught, may keep families from going to other governmental agencies to obtain such identification.⁵⁹ It is reasonable for these individuals to want to remain unseen as deportation may create a difficulty—sometimes insurmountable—for that child to prove his or her citizenship and come back into the United States in the future.⁶⁰

B. *Challenges of Not Having a Birth Certificate*

Immigrant families faced with this issue must likely overcome similar challenges, as they have in the past, in amending their children's birth certificates.⁶¹ In one particular case, the court was leery of accepting other forms of identification to prove the maternity of a child whose birth certificate needed amendment.⁶² Many of these women who sought to amend their children's birth certificates did not provide a proper form of identification, or provided false or stolen identification, to avoid deportation.⁶³ The courts' rulings against these immigrant mothers' requests to amend their children's birth certificates demonstrates the

like California and Nevada that want to provide more services to unauthorized immigrants are finding that it takes a lot of reassurance to get such people out of the shadows.”).

59. See *Serna v. Tex. Dep't of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 10818655, at *4 (W.D. Tex. Oct. 16, 2015) (recounting how a plaintiff “was unable to bring her [U.S.-born] son back into the United States after traveling to Mexico” because he could not offer proof of citizenship after his birth certificate could not be obtained); see also Henderson, *supra* note 59 (“Advocates say immigrants’ fear can prevent them from cooperating with police and derail attempts to ensure that all drivers are licensed.”).

60. See Bogin-Farber, *supra* note 11, at 180 (arguing an individual without a proper form of identification, if deported, is “effectively stripped of her U.S. citizenship, with few means of proving it in the future”).

61. See *Serna*, 2015 WL 10818655, at *12 (concluding the children plaintiffs, although compelling and persuasive, did not have enough “substantiating evidence to carry the burden necessary to grant” a preliminary injunction against the Texas Department of State Health Services).

62. See *In re Corr. of the Birth Record of Lopez*, No. 2004-AP-06 0046, 2004 WL 3563007 at *4–5 (Ohio Ct. App. Dec. 30, 2004) (determining the problem with amending the child's birth certificate was a lack of valid identification to prove maternity of the child).

63. See Bogin-Farber, *supra* note 11, at 179 (“[T]he issue in this case was not that [the mother] did not have any authentic identification but that she was afraid to present her non-U.S. identification due to her lack of lawful status.”). But see *Serna*, 2015 WL 10818655, at *2 (noting with regard to obtaining a birth certificate that “[a]bsent primary identification, to satisfy the identification requirement, an applicant must submit two forms of secondary identification of different types, or one form of secondary identification and two forms of acceptable supporting identification of different types” (citing 25 TEX. ADMIN. CODE § 181.28(i)(11)(B) (West 2013))).

judiciary's lack of understanding as to the reasons why these mothers do not provide documentation of their true identity.⁶⁴

As previous cases illustrate, presenting to the court multiple forms of proof of identity when trying to acquire a birth certificate still may not be enough.⁶⁵ Requiring other forms of identification is also problematic, as these individuals often come to the United States with few, if any, documents proving citizenship or forms of identification from their home country, and with limited documentation it is unlikely they will be able to obtain other forms of identification once in the United States.⁶⁶

From the time a child is born until the mother is able, if ever, to obtain her child's birth certificate, that child will not be able to benefit from services awarded to other citizens, including those that play a vital role in the child's ability to live.⁶⁷ This also may make the family "slip into poverty, leading to family budget trade-offs that negatively impact children's health."⁶⁸ Children who are not able to obtain a birth certificate, unlike other U.S. citizens, will not be able to acquire benefits, such as school enrollment, Medicaid or other forms of medical insurance, and social services.⁶⁹

Without being issued a birth certificate it will be difficult to obtain these benefits because an individual applicant must present a valid form of identification (in most cases a social security number) to gain access to

64. See Bogin-Farber, *supra* note 11, at 179 ("The court's rejection of the request to amend the birth certificate . . . appears to reveal a lack of understanding about the fears facing undocumented immigrants and the reasons some may choose to provide aliases to hospitals and other institutions.").

65. *E.g.*, Decamps *ex rel.* Cedeno v. N.Y.C. Dep't of Health, 841 N.Y.S.2d 819, 2007 WL 725710, slip op. at *1–2 (App. Div. Mar. 9, 2007) (holding copies of the child's birth certificate pending amendment, an order and results of a paternity test, and the mother's foreign passport were insufficient proof of maternity and denying petition to amend the birth certificate).

66. See Serna, 2015 WL 10818655, at *2 ("[M]any [immigrants] left their native country as minors, and thus never obtained a drivers' license or electoral identity card. They further allege many such persons were stripped of, or have lost, identification cards during their journey to the United States.").

67. See Peralta, *supra* note 25 (pointing to the plaintiff mother's hardships "in enrolling her daughter in day care, traveling with her child, obtaining necessary medical care and other health, education and welfare services requiring parental consent and/or proof of . . . Texas birth").

68. Bogin-Farber, *supra* note 11, at 186.

69. See Serna, 2015 WL 10818655, at *5 ("Plaintiffs provide evidence that one or more of them has been informed by workers at the pertinent offices that . . . a birth certificate is required to obtain WIC benefits . . ."); see also Escalante, *supra* note 3 ("Without a birth certificate, undocumented parents in Texas will continue to face a multitude of challenges—their newborns will not be able to be enrolled in preschool, and they will not be able to enroll in Medicaid.").

health insurance such as Medicaid.⁷⁰ Thus, these children will likely be subjected to low-cost providers of medical treatments for various ailments, ranging from a simple cold or flu-like symptom, to more onerous illnesses, such as cancer, due to a lack of financial resources and ineligibility for Medicaid.⁷¹

Although only a state statutory entitlement,⁷² school enrollment may now be more convenient for citizens of the United States. Prior to state denial of birth certificates to children born in the United States to immigrant mothers, grade schools would not have to inquire into a child's familial immigration status because parents were better able to provide identification and proof of citizenship for their children. In 2008, a study showed 6.8% of children in grades K-12 had "at least one parent who was undocumented" and "[m]ost of these children, having been born in the United States, [were] U.S. citizens."⁷³ Many schools around the country are now requiring that parents provide a child's birth certificate upon application for enrollment in school.⁷⁴ This change in policy not only

70. See *Serna*, 2015 WL 10818655, at *4 (acknowledging Plaintiffs' claim they "ha[d] difficulties retaining Medicaid assistance for [their] children [who] fac[ed] serious health issues" because they lacked a birth certificate when applying for coverage); see also *Immigrants and the Affordable Care Act (ACA)*, NAT'L IMMIGR. L. CTR., [http://www.nilc.org/issues/health-care/immigrants/](http://www.nilc.org/issues/health-care/immigrants/health-care-immigrants/) [<https://perma.cc/ER5X-RLF9>] (disclosing the requirement of presenting a social security number to apply for medical insurance under the Affordable Care Act). But see Phil Galewitz & Kraiser Health News, *How Undocumented Immigrants Sometimes Receive Medicaid Treatment*, PBS NEWS HOUR, (Feb. 13, 2013, 11:00 AM), <http://www.pbs.org/newshour/rundown/how-undocumented-immigrants-sometimes-receive-medicaid-treatment/> [<https://perma.cc/U6D9-MDQU>] (reporting immigrants can sometimes seek medical treatment through government-provided emergency funding).

71. See Mexico's Amicus Curiae, *supra* note 37, at 5 (asserting children who are denied a birth certificate will be placed in a "high vulnerability situation" because of their lack of access to health care).

72. See *Goss v. Lopez*, 419 U.S. 565, 573 (1975) ("Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. [State laws] direct local authorities to provide a free education to all residents between five and 21 years of age[.]") (citations omitted) (citing OHIO REV. CODE ANN. §§ 3313.48, 3313.64, 3321.04 (1972)).

73. Passel & Cohn, *supra* note 16.

74. See *Serna*, 2015 WL 10818655, at *4 ("[F]or a student under eleven years of age being enrolled in a school or the first time, the person enrolling a child born in the United States must provide[] a certified copy of the child's birth certificate within thirty days."); see also *Frequently Required Documents to Enroll Your Child at a New School*, VITALCHEK (July 16, 2015), <http://blog.vitalchek.com/birth-certificates/frequently-required-documents-to-enroll-your-child-at-a-new-school/> [<https://perma.cc/NU28-XBAA>]. (including a birth certificate among the most common documents needed when a parent is enrolling his or her child in school). But see TEX. HEALTH & SAFETY CODE ANN. § 191.0046(a) (West 2015) ("On the request of a child's parent or guardian, the state registrar shall issue without fee a certificate necessary for admission to school or

negatively impacts children who will be born in the United States, but it also adversely affects children already in the school system, who have not yet provided a birth certificate to school administrations.⁷⁵

Denying these children a birth certificate will also have a negative impact on their future endeavors, which includes the ability to enter into higher education programs.⁷⁶ As with grade schools, higher-education institutions require documentation upon application, including photo identification—such as a driver’s license—and an immunization record along with a copy of the applicant’s social security card.⁷⁷ For the aforementioned reasons, this type of documentation may be unattainable to individuals who were initially denied copies of their birth certificates. The effect of such a practice is detrimental to these individuals’ overall ability to provide for themselves as well as their families, and to raise their socio-economic status.⁷⁸ This lack of education may inhibit an individual’s ability to contribute to society at his or her fullest potential.⁷⁹

to secure employment. The certificate shall be *limited to a statement of the child’s date of birth.*” (emphasis added)).

75. See *Serna*, 2015 WL 10818655, at *4 (mentioning “enrollment in school or day care may be terminated or refused” when parents attempt to enroll their child without providing a birth certificate); see also *Gamboa*, *supra* note 19 (“One mother’s U.S. citizen children were denied entry to Head Start. Another U.S.-born child was kicked out of school.”).

76. Cf. Mexico’s Amicus Curiae, *supra* note 37, at 7 (indicating these children “will likely experience the harsh effects of being unable to prove their true status for many years to come”).

77. See *Required Documents for College Enrollment & Registration*, VITALCHEK (Aug. 6, 2015), <http://blog.vitalchek.com/birth-certificates/required-documents-for-college-enrollment-registration/> [<https://perma.cc/NJZ2-XDFA>] (indicating a photo identification, social security card, and immunization records are among the necessary documentation required to apply for college).

78. See *Unemployment Rates and Earnings by Educational Attainment*, BUREAU LAB. STATS., https://www.bls.gov/emp/ep_table_001.htm [<https://perma.cc/5JZ4-MMG2>] (illustrating the positive impact education level has on weekly earnings); see also John Immerwahr & Tony Foleno, *Great Expectations: How the Public and Parents—White, African American and Hispanic—View Higher Education*, NAT’L CTR. FOR PUB. POLY AND HIGHER EDUC., PUB. AGENDA, CONSORTIUM FOR POLY RES. IN EDUC., NAT’L CTR. FOR POSTSECONDARY IMPROVEMENT, at 4 (May 2000), <http://www.highereducation.org/reports/expectations/expectations.pdf> [<https://perma.cc/E5EC-AL8T>] (“Parents’ preference for a college education for their children, rather than trade school, complements their view of college not just as a ticket to good income but also as an entry to higher standing and social status.”).

79. See *Education Indicators in Focus*, ORG. FOR ECON. COOPERATION AND DEV. (Jan. 2013), [http://www.oecd.org/education/skills-beyond-school/EDIF%202013—N%C2%B010%20\(eng\)—v9%20FINAL%20bis.pdf](http://www.oecd.org/education/skills-beyond-school/EDIF%202013—N%C2%B010%20(eng)—v9%20FINAL%20bis.pdf) [<https://perma.cc/9NFX-4QHQ>] (“Data show that adults who have attained higher levels of education are generally more likely than those with lower levels of educational attainment to report stronger civic engagement, in terms of voting, volunteering, political interest, and interpersonal trust.”).

III. VIOLATION OF CONSTITUTIONAL RIGHTS

According to the Fourteenth Amendment of the United States, all individuals born in the United States are granted citizenship and “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁸⁰ This section of the U.S. Constitution accounts for what the Supreme Court, in *United States v. Wong Kim Ark*⁸¹ and courts thereafter, have recognized as birthright citizenship.⁸² It also establishes a U.S.-citizen child’s right to due process and equal protection of their rights.⁸³ A child’s right to U.S. citizenship should not be affected by the citizenship of his or her parents.⁸⁴ Opponents of the new policy argue that denying these children their birth certificates is a state denial of rights that all Americans enjoy.⁸⁵

Without the proper form of identification, children being denied birth certificates will also be denied the right to vote because they will be unable

80. U.S. CONST. amend. XIV, § 1; see 8 U.S.C. § 1401 (2012) (declaring “a person born in the United States” is a national and a citizen).

81. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

82. *E.g.*, *United States v. Leung Sam*, 114 F. 702, 703 (W.D.N.Y. 1902) (acknowledging the Supreme Court’s ruling that all individuals born in the United States are citizens thereof).

83. See U.S. CONST. amend. XIV, § 1 (restricting a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (holding fundamental liberties protected by the Equal Protection and Due Process clauses also extend to include personal choices, such as those that “define personal identity and beliefs”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1989) (stating the Equal Protection Clause commands all similarly situated citizens be treated alike); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“The Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’” (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920))); *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 n.15 (5th Cir. 2001) (“The equal protection clause requires that all persons similarly situated be treated alike.” (citing *City of Cleburne*, 473 U.S. at 439)); *Simi Inv. Co. v. Harris Cty.*, 236 F.3d 240, 249 (5th Cir. 2000) (acknowledging a substantive due process violation occurs “when the government works a deprivation of a constitutionally protected interest” (quoting *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988))); see also *Gamboa*, *supra* note 19 (stating “children being denied birth certificates are U.S. citizens, entitled to all rights of their fellow citizens with parents born here or who have become citizens”).

84. *Cf. Wong Kim Ark*, 169 U.S. at 696 (holding children born in the United States to parents domiciled in the United States but citizens of another nation are nonetheless subject to U.S. jurisdiction).

85. See *Serna v. Tex. Dep’t of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 10818655, at *5 (W.D. Tex. Oct. 16, 2015) (concluding “at a minimum, that deprivation of a birth certificate to the Plaintiff children results in deprivations of the rights and benefits which inure to them as citizens, as well as deprivations of their right to free exercise of religion by way of baptism, and their right to travel”); see also *De Leon v. Perry* 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014) (“Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law.”), *aff’d sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

to obtain a voter identification card, which is necessary to enter the polls.⁸⁶ For reasons previously stated, the ability to obtain secondary proof of identification or citizenship is difficult, if not impossible, when the applicant cannot present a valid birth certificate.⁸⁷

The denial of one of the most fundamental rights of a citizen—the right to vote—poses a constitutional issue. Under the Fifteenth Amendment of the U.S. Constitution, citizens, even those established by birth, are not to be denied the right to vote based on their race.⁸⁸ Although different from Jim Crow laws, literacy test requirements, poll taxes, etc.—which directly affect voting—denying birth certificates indirectly inhibits an individual’s ability to vote.⁸⁹ By not distributing their birth certificates, the state is essentially stripping these predominantly Latino children of their future right to vote; they will not be able to get a voter identification card without proper proof of citizenship, thus inhibiting their ability to participate at the polls.⁹⁰ One might argue that the reason behind preventing these children from future participation in the most important and protected process awarded to U.S. citizens is directly related to their race; specifically, because he or she is a U.S.-born Mexican-American.⁹¹

Two prerequisites must be met in determining whether there has been an infringement on a citizen’s right to vote based on “race, color, or previous condition of servitude” as established by the Fifteenth Amendment.⁹² First, the government’s action must have resulted in the

86. See, e.g., *Proof of Citizenship to Register to Vote*, *supra* note 55 (noting proof of citizenship—usually presentation of a passport or certified birth certificate—is required to register to vote in the United States).

87. See Mexico’s Amicus Curiae, *supra* note 37, at 5 (contending it would be extraordinarily difficult to obtain other forms of government-issued identification, such as a driver’s license or passport, if the individual is not able to obtain a birth certificate).

88. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

89. See NILC’s Amicus Curiae, *supra* note 1, at 8 (emphasizing the denial of a birth certificate has a negative effect on an individual’s ability to vote, and has a “direct impact on the ability of individuals to exercise their fundamental right to citizenship in a manner equal to other citizens”).

90. See Culliton-Gonzalez, *supra* note 56, at 158 (“[I]he greatest number of persons in the United States who would no longer enjoy birthright citizenship and its attendant rights, including voting rights, would be Latino”).

91. See Mexico’s Amicus Curiae, *supra* note 37, at 3 (arguing the Texas Department of State Health Services is denying birth certificates in an attempt “to punish immigrants whom it believes have violated federal immigration laws”).

92. U.S. CONST. amend. XV, § 1.

“denial or abridgment of the right” to vote.⁹³ Given that individuals who are denied birth certificates do not have a proper form of proving identification and are unable to provide a valid form of identification by obtaining a voter ID, these individuals are not allotted the same opportunity to vote for elected representatives as other fellow citizens.⁹⁴ The second requirement states that an individual must prove, in considering the infraction under the “totality of the circumstances,” that “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected.”⁹⁵ In essence, this group must establish they did not have an equal opportunity to participate in the political process, and did not have their voices heard by voting for the politician they wanted.⁹⁶ In this situation the class of protected citizens referenced in the provision are U.S. citizens born to undocumented mothers—individuals, no matter their ancestry, whose citizenship was established and should be recognized at birth.⁹⁷ These members have not been, and will continue to

93. 52 U.S.C. § 10301(a) (2015).

94. *See Who Votes, Who Doesn't, and Why*, PEW RES. CTR. (Oct. 18, 2006), <http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/> [<https://perma.cc/2NRW-JQ55>] (“Not only do the rich seem to get richer, on Election Day next month they will probably get a disproportionately large say about who gets elected to Congress.”).

95. 52 U.S.C. § 10301(b) (2015).

96. *See id.* (indicating a violation occurs if voting processes related to nomination or election of representatives “are not equally open to participation by members of a class of citizens”); *see also* Brewster, *supra* note 56 (noting the right to vote allows individuals an opportunity to voice their concerns and opinions of not only current and future legislation, but also the government itself, to bring about change); Hattie Lindell, *The Importance of Voting*, MOODY C. COMM., U. TEX. AUSTIN, <http://moody.utexas.edu/strauss/texelects/importance-voting-hattie-lindell> [<https://perma.cc/TN69-G55C>] (emphasizing voters “have the power to make decisions that can affect the country” by voting and “mak[ing] [their] opinions heard”); Natalie E. Tennant, *We Are All West Virginia: A Civics Education Program*, W. VA. SEC’Y ST., <http://www.sos.wv.gov/elections/civics/Documents/Why%20is%20Voting%20important.pdf> [<https://perma.cc/DAS5-KHDM>] (“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.” (quoting Lyndon B. Johnson)); *Politician: What They Do*, CFNC.ORG, https://www1.cfnc.org/Plan/For_A_Career/Career_Profile/Career_Profile.aspx?id=06qI27IPVFIJDPPdJIDuHwXAP3DPAXXAP3DPAX [<https://perma.cc/4KXC-LB5R>] (“Politicians are elected to represent the people who vote for them. So they must be aware of the needs of the people they represent.”).

97. *See United States v. Wong Kim Ark*, 169 U.S. 649, 696 (1898) (recognizing all individuals born in the United States are subject to its jurisdiction regardless of parental citizenship).

not be, awarded the same ability to elect representatives of their choice so long as states continue to deny them birth certificates.⁹⁸

Without the ability to participate in the voting process, this group of individuals will have their opinions and needs suppressed.⁹⁹ They will be unable to elect representatives to office to act as proxies and voice these individuals' concerns, or attempt to amend or repeal laws which directly impact their daily lives, such as immigration reform and other state policies. Instead, laws and regulations, which these individuals will have had no opportunity to challenge, will govern everyone, including this particular group of citizens.¹⁰⁰

Furthermore, some argue that a state agency's refusal to issue birth certificates constitutes a deprivation of parents' "fundamental right to raise and protect their children."¹⁰¹ Classified as "family integrity," many courts have recognized this as a right protected by the Constitution.¹⁰² Others argue, and at least one circuit court has repeatedly said, that the concept of family integrity is ill defined and is thus, at most, a weak argument.¹⁰³ The United States District Court for the Western District of

98. See, e.g., *Proof of Citizenship to Register to Vote*, *supra* note 55 (mandating all applicants provide proof of citizenship by presenting documents such as a birth certificate, passport, or naturalization document).

99. Cf. *Reasons Why You Should Vote*, CIVICS-ONLINE.ORG, <http://www.civics-online.org/voting-rights/reasons-why-you-should-vote/> [<https://perma.cc/C29R-XKDS>] (indicating when one does not vote to shape society in accordance with his or her needs, others who do vote will have an advantage in having their voices heard by public representatives).

100. See Tennant, *supra* note 97 (stressing the importance of voting as one's way to elect politicians that represent an individual's needs into office as opposed to "let[ting] other people decide what is best for [oneself]").

101. *Serna v. Tex. Dep't of State Health Servs.*, No. 1-15-CV-446 RP, 2015 WL 10818655, at *5 (W.D. Tex. Oct. 16, 2015).

102. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–05 (1977) (emphasizing the right to family integrity is a right clearly protected by the U.S. Constitution); see also *Kipps v. Caillier*, 205 F.3d 203, 206 (5th Cir. 2000) (acknowledging a "parent-child relationship lies at the heart of protected familial associations" (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (finding the right to family integrity is held by both child and parent); *Morris v. Dearborne*, 181 F.3d 657, 671 (5th Cir. 1999) (noting the constitutionally protected right to family integrity was well established since at least 1992).

103. See *Serna*, 2015 WL 10818655, at *5 ("[A]s Defendants point out, the Fifth Circuit has repeatedly characterized the right as ill-defined." (citing *Doop v. Chapman*, 211 F. App'x 246, 248 (5th Cir. 2006))); see also *Doop*, 211 F. App'x at 248 (contending the parameters of the right to family integrity are not clearly defined (citing *Kiser v. Garrett*, 67 F.3d 1166, 1173 (5th Cir. 1995))); *Rolen v. City of Brownfield*, 182 F. App'x 362, 364 (5th Cir. 2006) (characterizing the right to family integrity protected by the Due Process Clause of the Constitution as "nebulous and undefined"); *Peters v. Lowrey*, 114 F.3d 1184, 1997 WL 255628, at *4 (5th Cir. May 6, 1997) (acknowledging the right to

Texas, however, has stated that although the parameters of this right may not be clearly defined, the right does include “food, shelter, medical care and religious participation by a parent on behalf of his or her child.”¹⁰⁴ The court further acknowledged that denial of a birth certificate would frustrate the parents’ ability to obtain public assistance for their child’s needs, including medical care, food, and shelter.¹⁰⁵ Thus, Texas has likely violated—at a minimum—the parents’ and children’s right of family integrity.¹⁰⁶

Denial of birth certificates invokes more than one constitutional issue; therefore, a governmental agency must pass the test of strict scrutiny, proving they employ the least restrictive means in achieving a compelling governmental interest.¹⁰⁷ In applying this test, the United States District Court for the Western District of Texas has concluded that the Texas

family integrity as constitutionally protected while also recognizing “the contours of the right are nebulous and not clearly established” (citing *Kiser*, 67 F.3d at 1173); *Kiser*, 67 F.3d at 1173 (characterizing the right of family integrity as nebulous); *Doe v. Louisiana*, 2 F.3d 1412, 1418, (5th Cir. 1993) (discussing the right to family integrity in the context of qualified immunity and “[p]ointing out that courts have emphasized the *nebulous* nature of a liberty interest in familial relationships” (emphasis added)); *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988) (“[W]e do not think that appellants in this case should have known that their conduct in removing the Hodorowski children from the home violated the nebulous right of family integrity.”).

104. *Serna*, 2015 WL 10818655, at *6.

105. *See id.* (“In this case, Plaintiffs have presented evidence that the lack of a birth certificate for a Texas-born child presents grave difficulties to a parent seeking to obtain public assistance in providing that child food, shelter and medical care.”).

106. *See id.* (concluding the plaintiffs satisfied the first element required to get a preliminary injunction by sufficiently proving the Texas governmental agency threatened “irreparable injury” by violating their rights).

107. *See id.* at *7 (concluding “a heightened level of scrutiny is appropriate in analyzing the constitutional claims” brought by parents of children who are being denied birth certificates); *cf.* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (determining whether the governmental action was narrowly tailored to achieve a compelling interest in the context of the First Amendment); *see also* *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983) (“Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right[.]” (citing *Harris v. McRae*, 448 U.S. 297, 322 (1980))); *Serv. Emps. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010) (holding a policy “will not satisfy strict scrutiny if there is a less restrictive means that ‘would be at least as effective in achieving the legitimate purpose’ that is being served.” (quoting *Reno v. ACLU*, 521 U.S. 844, 874, (1997))); *Merced v. Kasson*, 577 F.3d 578, 587 n.12 (5th Cir. 2009) (proclaiming strict scrutiny applies when more than one constitutional right is violated even if only generally applicable (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972))); *cf.* *Nguyen v. INS*, 208 F.3d 528, 534–35 (5th Cir. 2000) (applying a heightened level of scrutiny to a statute challenged on grounds of gender discrimination because it required more difficult procedures for a male parent to confer citizenship to offspring than a female parent), *aff’d*, 533 U.S. 53 (2001).

Department of State Health Services may have implemented a policy that is under-inclusive—permitting other forms of foreign identification as acceptable means, such as a student identification or insurance card with photo identification, while disallowing a *matricula*—and thus, may not pass the strict-scrutiny test.¹⁰⁸

From the creation of this democratic nation, birthright citizenship, which includes *all* individuals born in the United States regardless of the nationality of one's parents, has been recognized and protected by the U.S. Constitution.¹⁰⁹ Nonetheless, the legislature has recently proposed legislation that would alter the concept of birthright citizenship completely.¹¹⁰ One proposed piece of legislation will only grant birthright citizenship if at least one parent of the child is a U.S. citizen lawfully permitted to remain in the United States, or is an undocumented individual serving in one of the branches of the U.S. Armed Forces.¹¹¹

IV. CONCLUSION

Due to the importance of obtaining and possessing a birth certificate, Texas's policy severely burdens children who are denied this form of documentation.¹¹² The fact that a birth certificate is required for most, if not all, applications for additional proof of identification and benefits leaves these children with a never-ending cycle of trying to procure secondary forms of identification which will, more likely than not, also

108. *See Serna*, 2015 WL 10818655, at *10 (“The singling out of the Mexican *matricula* may suggest it is being subjected to a different, and more exacting, standard than other forms of identification. Such treatment could lead to the conclusion that [the state agency is] implementing an underinclusive policy which would violate strict scrutiny.”).

109. *See* U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”); *see also* 8 U.S.C. § 1401 (2012) (listing situations that qualify for citizenship by birth).

110. *Compare* 8 U.S.C. § 1401 (including any and all individuals born in the United States as citizens thereof), *with* Birthright Citizenship Act of 2015, S.45, 114th Cong. (2015) (proposing amendment to birthright citizenship eligibility criteria).

111. *See* S.45 (listing individuals with at least one parent who is “(1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States whose residence is in the United States; or (3) an alien performing active service in the [U.S. Armed Forces]” as the only individuals eligible for birthright citizenship). *But see* *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) (maintaining relinquishment of U.S. citizenship requires “an expatriating act and an *intent* to relinquish citizenship . . . proved by a preponderance of the evidence” (emphasis added)).

112. *See* NILC's Amicus Curiae, *supra* note 1, at 6 (“The ability to receive a United States birth certificate is imbricated with the fundamental right to citizenship because birth certificates serve as the foundational evidence of national citizenship for individuals born in this country.”).

require a birth certificate to obtain.¹¹³ This will leave the child and his or her parents with no other choice but to abstain from going any further.¹¹⁴ They will have to overcome artificial barriers to benefit from rights to which they are entitled as citizens of the United States.¹¹⁵ These benefits include, but are not limited to, the right to vote, and obtaining other proofs of identification such as a driver's license, social security card and passport.¹¹⁶ These children are essentially deprived of all benefits and rights, in addition to having an increased risk of deportation with the possibility of never being able to return to the United States.¹¹⁷ Inquiring about a mother's immigration status when she is attempting to obtain a birth certificate will also make her vulnerable to deportation.¹¹⁸ Thus, denying a U.S.-citizen child the opportunity to obtain his or her birth certificate increases the likelihood of disbanding his or her family, which is not in the best interest of the child.¹¹⁹

Additionally, by refusing to give parents of these children a certified copy of their birth certificate, the state is making these children more vulnerable to abuse and neglect, as well as increasing their risk of

113. See Mexico's Amicus Curiae, *supra* note 37, at 5 ("Without a birth certificate from the jurisdiction in which a person is born, it is exceedingly difficult for a person to obtain any other government-issued identification: passport, driver's license, state, or student identifications."); see also *Documents to Get a Social Security Card*, *supra* note 43 (requiring proof of citizenship by providing government issued identification such as a birth certificate or U.S. passport when seeking to obtain a social security card).

114. *Cf. Serna*, 2015 WL 10818655, at *12 ("Plaintiffs contend that, by curtailing access to birth certificates, Defendants render life in the United States so intolerable that Plaintiffs are pushed to 'self deport.'").

115. See *id.* at *5 (including a list of services that were either difficult to procure or outright unobtainable because the child did not and could not obtain a birth certificate); see also *Gamboa*, *supra* note 19 (contending U.S.-born children are not eligible to receive state and federal services allotted to all U.S. citizens because they are denied birth certificates).

116. See *Proof of Citizenship to Register to Vote*, *supra* note 55 (indicating a copy of one's birth certificate is a common form of identification to satisfy the proof of citizenship requirement when registering to vote); WASH. ST. DEPT LICENSING, *supra* note 47 (asserting proof of citizenship, normally satisfied by providing a copy of a birth certificate, is required when applying for a driver's license).

117. See, e.g., *Peralta*, *supra* note 25 (noting one mother's fear of deportation when traveling with her child because a lack of identification decreases the child's ability to re-enter the United States). The reality is that "U.S. citizenship—without the documentation to prove it—is empty." Mexico's Amicus Curiae, *supra* note 37, at 7.

118. See *Bogin-Farber*, *supra* note 11, at 180 (contending immigrant mothers fear disclosing their immigration status when seeking medical treatment due to increased risk of deportation).

119. See *id.* at 185 (confirming immigrant families' fear of separation due to a lack of U.S. identification).

becoming or remaining impoverished.¹²⁰ By not possessing the ability to obtain public assistance, such as medical insurance and food programs, these children and their families may be stripped of the means necessary to create a better lifestyle and make a contribution to society.¹²¹ Lack of a birth certificate will also frustrate these children's efforts in attending public schools and obtaining a higher education.¹²² Therefore, the denial of a birth certificate decreases the chances of providing a better future for themselves.¹²³

Although the legislature is in the process of attempting to alter the parameters of how citizenship is obtained by limiting the individuals who qualify for birthright citizenship, the law of the United States still remains unaltered from when it was incorporated many years ago—an individual is a citizen of the United States if he or she is born in the country.¹²⁴ As such, these children should have the same constitutional protections afforded to other citizens of this great nation; the Due Process Clause and Equal Protection Clause ensure this.¹²⁵

120. See Innocenti Research Center, *supra* note 31, at 1 (arguing a lack of identity will leave these children vulnerable to abuse and exploitation).

121. See Bogin-Farber, *supra* note 11, at 186 (“The longer the amendment efforts take, the further the family may slip into poverty, leading to family budget trade-offs that negatively impact children’s health.”).

122. See *Frequently Required Documents to Enroll Your Child at a New School*, *supra* note 75 (noting a birth certificate is commonly required to enroll a child into school); see also *Required Documents for College Enrollment & Registration*, *supra* note 78 (listing a photo identification, social security card, and immunization records as required documentation for applying to colleges).

123. See *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/> [<https://perma.cc/VW2T-3VFW>] (“College-educated Millennials also are more likely to be employed full time than their less-educated counterparts (89% vs. 82%) and significantly less likely to be unemployed (3.8% vs. 12.2%).”).

124. See 8 U.S.C. § 1401 (2012) (claiming any “person born in the United States” is a citizen thereof). *But see* Birthright Citizenship Act of 2015, S. 45, 114th Cong. (2015) (seeking an amendment to birthright citizenship to include only individuals born in the United States to at least one parent that is a U.S. citizen, lawful permanent resident, or serving in the military).

125. See U.S. CONST. amend. XIV, § 1 (“[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)).

