# MADE IN AMERICA: HOW BIRTH CERTIFICATE APPLICATIONS INFRINGE ON THE RIGHT TO CITIZENSHIP

ELISA CARIÑO[∞]

ABSTRACT

Serna v. Texas Department of State Health Services *is a pioneering lawsuit which championed children born in the United States to undocumented parents. This lawsuit challenged a Texas policy that made it impossible for undocumented immigrant parents to obtain certified copies of birth certificates for their Texas-born children. This article argues that, by requiring forms of identification out of reach for most undocumented immigrants to apply for a certified copy of a birth certificate in Texas, the State deprived the U.S. citizen children of their rights. The case focuses on Texas, but the issue transcends state lines, and this article looks at the requirements for applying for a certified copy a birth certificate throughout the United States and the implications of these policies for U.S.-born children of undocumented parents. Using* Serna *as a backdrop, this article considers how unreasonably denying citizens access to their birth certificates interferes with the full rights of their citizenship. To do so, this article explores the arguments made by both parties in* Serna *to recommend strategies for advocates and sympathetic policy-makers to remove barriers preventing undocumented immigrants from obtaining their children's birth certificates.*



[∞] Elisa Cariño, New York University School of Law, 2017; B.A. University of Chicago, 2013. Thank you to all the editors at the *N.Y.U. Review of Law & Social Change*, especially Mae C. Bowen, Madeleine Choné, Lucy Gray-Stack, Molly Griffard, Intisarul Islam, Maggie Lamb, Kevin J. Reilly, Maria Romero, Kevin Siegel, Matthew Stolz, and Margaret Suh. This article is dedicated to all the parents who selflessly moved oceans and mountains for their families, including my own.

When he was six-years-old, B. Rodriguez Padilla ("B.R.") saw three men murder his father on his family's front lawn. Cartel crossfire had killed his kindergarten schoolmate only a month prior. B.R. was an American citizen, originally born in McAllen, Texas. However, he was trapped at the time in Reynosa, Mexico, where his parents had returned a few weeks after his birth. Narcoviolence worsened over the years, and, after his father's murder, B.R.'s desperate mother crossed the border back into the United States. To provide B.R. safe passage across the border, B.R.'s mother needed a certified copy of his birth certificate. However, the Texas Department of State Health Services Vital Statistics Unit ("DSHS") rejected her applications to obtain it. As an undocumented parent, she had failed to prove her identity using adequate documentation as defined by DSHS, whose policies were written and interpreted in a way that made her compliance impossible. It took months and legal intervention for B.R. to reenter his own birth country.[1]

B.R.'s story only scratches the surface of the harm he would face if he were unable to access to his own birth certificate. Without a birth certificate, B.R. could not secure proper identification to apply for public benefits,[2] get married, or exercise his right to vote. He would not be able to apply for a driver's license or Social Security card without an original or notarized copy of his birth certificate.[3] He would not then be able to enter the legitimate workforce because of his

1. Affidavit of Estrella de Jesus Cedillo Nito, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 25-1).

2. Affidavit of Cynthia Ibarra ¶ 8, *Serna*, 2015 U.S. Dist. LEXIS 140919 ("The social worker at our clinic (Su clinica Familiar) has been working to keep the Medicaid renewed for us, but she is telling us that we have to present the birth certificate soon or we will have problems with our coverage. I have been told we may lose our coverage at the end of this month."). *See also* Affidavit of Maria Isabel Perales Serna ¶ 11, *Serna*, 2015 U.S. Dist. LEXIS 140919 ("There is a big problem with mi Medicaid because the card has my daughter's name spelled wrong. Since it does not match the name on social security card, they have not paid the hospital. Since she has been sick with some lung problems a few times, I have terrible debts now with the hospital. Also, some specialists have refused to see her. Without the birth certificate it is really hard to correct the Medicaid card."); Affidavit of Violeta Vega ¶¶ 3–5, *Serna*, 2015 U.S. Dist. LEXIS 140919 (Vega lost her Section 8 voucher after her failure to produce a copy of her son's birth certificate, which caused her rent to triple).

3. *See Identification Requirements*, TEX. DEP'T OF PUBLIC SAFETY, https://www.dps.texas.gov/DriverLicense/identificationrequirements.htm [https://perma.cc/N9AP-BUFY]; *see also*

inability to complete an employer's federally-required I-9 paperwork.[4] B.R. also could not establish credit to apply for loans, educational or otherwise. The legal ramifications could further intensify. For example, B.R. would be hard-pressed to prove his age in a legal proceeding in which he sought, for example, to raise a defense of mistaken identity or to transfer a case from criminal court to juvenile court. These problems would not disappear if B.R. tried to request a certified copy of his birth certificate as the registrant named on his birth certificate, as such a request would be rejected until he was an adult. At that point, B.R. would not have documents to establish that he was, in fact, who he was claiming to be: the registrant himself.

Faced with these consequences, B.R.'s mother sued to gain access to her son's birth certificate. The ensuing lawsuit, *Serna v. Tex. Dep't of State Health Servs.* offers an example of the complex and troubling interaction among institutional racism, legitimate public policy concerns, fundamental liberties jurisprudence, and the changing demographics of the United States.[5] Using this lawsuit and the legal landscape it challenged in Texas as a case study, this article shows how unreasonably denying citizens access to their birth certificates interferes with their fundamental rights. All children born in the United States are entitled to reasonably available proof of their citizenship. This right is a logical extension of the Fourteenth Amendment's protection of fundamental rights. Citizenship "without the documentation to prove it—is empty"[6] and therefore unconstitutional.

First, this article will evaluate the application procedures to obtain a certified copy of a birth certificate in Texas. It will describe *Serna*'s factual background, pleadings, motions, and settlement agreement. The *Serna* case study relates most immediately to the story of Mexican and Central American immigration, but the problems faced by the *Serna* plaintiffs transcend nationality. Part I also discusses the policies for applying for a certified copy of a birth certificate in various states across the United States. A corresponding table details each U.S. state's policies and requirements for obtaining a certified copy of a birth certificate.[7] Part II of this article explores and analyzes the arguments

*Learn What Documents You Need to Get a Social Security Card*, SOC. SEC. ADMIN., https://www.socialsecurity.gov/ssnumber/ss5doc.htm [https://perma.cc/86Q6-GWVS].

4. *Form I-9 Instructions for Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., https://www.uscis.gov/system/files_force/files/form/i-9instr.pdf [https://perma.cc/2UJ4-LEAN].

5. *Serna*, 2015 U.S. Dist. LEXIS 140919.

6. Brief for the United Mexican States ("Mexico") as Amicus Curiae Supporting Plaintiffs' Emergency Application for Preliminary Injunction at 7, *Serna*, 2015 U.S. Dist. LEXIS 140919 [hereinafter Amicus Brief for Mexico Supporting Plaintiffs' Emergency Application for Preliminary Injunction].

7. See Appendix, Elisa Cariño, *Nationwide Survey of Acceptable Identification to Submit with an Application for a Certified Copy of a Birth Certificate* (Mar. 2019), available at

made by both parties in Serna to illuminate the constitutional arguments that a lawyer can use in her advocacy to mitigate the negative consequences associated with inequitable access to birth certificates in the United States. This Part demonstrates how current policies infringe on the Fourteenth Amendment right to citizenship, which snowballs into further infringement on other major constitutional rights. Thus, a lack of access to a birth certificate relegates an individual to "second-class citizens[hip]."[8] Lastly, in Part III, this article recommends strategies for advocates and sympathetic policy-makers to remove barriers preventing undocumented immigrants from obtaining their U.S.-born children's birth certificates.

## I.
## BACKGROUND

### *A.* Serna v. Texas*: Acquiring a Birth Certificate in Texas*

In 2015, La Union del Pueblo Entero, Inc. ("LUPE"),[9] a nonprofit organization, assisted Maria Isabel Perales Serna in bringing a class-action lawsuit in federal court.[10] The case had two interrelated plaintiff classes: (1) undocumented parents like Maria, and (2) their minor children born in the United States. Defendants were the Texas Department of State Health Services Vital Statistics Unit (hereinafter "DSHS"), DSHS Commissioner Kirk Cole, and then-DSHS State Registrar and Director Geraldine Harris.[11] The lawsuit argued that DSHS policy made it unduly burdensome for undocumented parents of Texan-born children to access a certified copy of those children's birth certificates.[12] This, they alleged, left undocumented parents and their children without official proof of their familial and legal relationships to one another. The lawsuit was ultimately dismissed when the parties reached a settlement agreement.[13]

Through a network of state registrar offices, the Texas DSHS registers, collects, compiles, and preserves all state birth and adoption records.[14] A child's birth is recorded with the county clerk's office in the county of her birth. The county office then sends the birth record to DSHS.[15] These local officials must

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https://socialchangenyu.com/wp-content/uploads/2019/03/CarinoAppendix.pdf [https://perma.cc/Z958-UKS8] [hereinafter Appendix].

8. Third Amended Complaint, *Serna*, 2015 U.S. Dist. LEXIS 140919, at ¶ 87.

9. Order Denying Application for Preliminary Injunction, *Serna*, 2015 U.S. Dist. LEXIS 140919, at *4 (LUPE describes "itself as a non-profit organization dedicated to promoting the health, education, labor, and civil rights of indigent farmworkers and other low-wage workers in the Rio Grande Valley").

10. Third Amended Complaint, *supra* note 8.

11. *Id.* ¶¶ 7–34.

12. *Id.* ¶¶ 210–13.

13. Settlement Agreement, *Serna*, 2015 U.S. Dist. LEXIS 140919 (No. 187-1).

14. TEX. HEALTH & SAFETY CODE ANN. §§ 191.002(a), (b) (West 2002 & Supp. 2017).

15. *Id.* §§ 191.022(b), 191.029.

supply a "properly qualified applicant" with a certified copy of a birth certificate.[16] An applicant can be a minor registrant's guardian, legal representative, or immediate family member (through blood, marriage, or adoption).[17] To be properly qualified, these applicants "must present proof of identity acceptable to the State Registrar."[18] Forty-two forms of acceptable identification were divided into three categories: primary, secondary, and supporting.[19]

An applicant can request a birth certificate by presenting one primary document to the state registrar's office. Primary documents must be unexpired and issued by a federal, state, or tribal government. Primary documents include passports, drivers' licenses, military identification cards, or United States Citizenship and Immigration Services (USCIS) green cards.[20] An applicant without primary identification documents has two options. She can either submit two forms of secondary identification or one secondary document with two "supporting documents."[21] A secondary document is defined as any document that "contains the applicant's name, signature, or identifiable photo of the applicant."[22] Supporting documents are "other records or documents that verify the applicant's identity," and state registrar personnel have discretion to determine whether the document successfully establishes the applicant's identity.[23]

These requirements disparately harm undocumented parents. Acceptable primary documents are generally not available to undocumented immigrants in Texas and in many other states. It is unreasonable for state governments to expect an undocumented applicant to possess two different forms of acceptable secondary identification.[24] First, concerning those undocumented parents who have entered the United States via the southern border, it is common for identity documents to be lost or stolen during the arduous journey through Latin Ameri-

16. *Id.* § 191.051(a); *Cf.* 25 TEX. ADMIN. CODE § 181.21(b) (2013) (stating that a properly qualified applicant may not be issued a birth certificate if the application information contradicts that of the state registrar's record).

17. ADMIN. § 181.1(21).

18. *Id.* § 181.28(i)(2).

19. Declaration of Victor Farinelli ¶ 5, Serna v. Texas Dep't of State Health Servs. No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015).

20. ADMIN. § 181.28(i)(10).

21. *Id.* § 181.28(i)(11).

22. *Id.*

23. *Id.* § 181.28(i)(12).

24. This list included: (i) Current student identification; (ii) Any Primary Identification that is expired; (iii) Signed Social Security card, or Numident; (iv) DD Form 214 Certificate of Release; (v) Medicaid card; (vi) Medicare card; (vii) Veterans Affairs card; (viii) Medical insurance card; (ix) Foreign Passport accompanied by a Visa issued by the United States Department of State; (x) Foreign Passport in accordance with the United States Department of State, Visa Waiver Program; (xi) Certified birth certificate from the Department of State (FS-240, DS-1350 or FS-545); (xii) Private Company Employment Identification card; (xiii) Form I-94 accompanied by the applicant's Visa or Passport; (xiv) Mexican voter registration card; or (xv) Foreign Identification with identifiable photo of applicant. *Id.* § 181.28(i)(11).

ca—aptly nicknamed "La Bestia" ("The Beast").[25] Additionally, many undocumented immigrants leave their native countries as minors, before they would have secured a drivers' license or electoral identity card.[26] Further, many forms of alternate identification "cannot be obtained or renewed" at consulates within the United States.[27] This leaves undocumented parents with few or no options for obtaining their U.S.-born child's birth certificate.

*1. Foreign Passports and Matrículas at Issue in* Serna

Most undocumented immigrants can obtain a foreign passport or a foreign consular photo identification card. Specifically, Mexican nationals can obtain a photo identification known as a "matrícula." Matrículas are issued by Mexican consulates throughout the United States. Prior to 2013, Section 181 of Texas' administrative code permitted an applicant to submit a foreign passport to DSHS as proof of identity when applying for a birth certificate. However, in 2013, Section 181 was "amended to require that all proffered foreign passports bear a current United States visa in order to be accepted."[28] DSHS created additional barriers for undocumented parents when the agency changed its interpretation of Section 181's "foreign government photo identification card"[29] language to exclude the matrícula and all other consular identification.[30] These two changes "in effect preclude[d] undocumented parents from obtaining birth certificates for their U.S. born children."[31]

The *Serna* plaintiffs argued that DSHS's policies disproportionately affect undocumented immigrants and their U.S.-born children.[32] They alleged that defendants knowingly intended for a large percentage of undocumented persons to be "without any form of identification acceptable under Texas' policy, and with-

25. *See* Third Amended Complaint, *supra* note 8, ¶¶ 50–53. These immigrants from Latin America face extreme weather, dehydration, hostile ranchers, venomous reptiles and spiders, unreliable "coyotes"—paid human smugglers—cartel conflict, sexual assault, and various other dangers of a transnational narco-economy. In the 2017 fiscal year alone, the United States Border Patrol reported 294 deaths along the Texas-Mexico border. *Sector Profile – Fiscal Year 2017 (Oct. 1st Through Sept. 30th)*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/USBP%20Stats%20FY2017%20sector%20profile.pdf [https://perma.cc/UJ65-SQE9].

26. Third Amended Complaint *supra* note 8, ¶¶ 50–53; *see also* Affidavit of Diana Hernandez, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) ("Because of our ages, we never had a Mexican drivers' license or electoral card. We cannot get those documents here in Texas."); Affidavit of Brizeida Sanchez, *Serna*, 2015 U.S. Dist. LEXIS 140919.

27. Third Amended Complaint, *supra* note 8, ¶ 52.

28. *Id.* ¶ 56.

29. ADMIN. §18l.28 (i)(11)(xiv)–(xv).

30. Third Amended Complaint, *supra* note 8, ¶ 60.

31. *Id.* ¶ 103.

32. *Id.* ¶ 102–05.

out any possibility of obtaining such identification."[33] Because foreign passports and consular matrículas were the two most common forms of identification available to Texas's undocumented people, the *Serna* plaintiffs argued that the related change in statutory interpretation coincided "with growing political opposition to attempts to develop immigration relief for many undocumented families, especially those with United States born children."[34] Plaintiffs accused DSHS of not providing a reasonable alternative to obtain birth certificates, and they further alleged that they were "summarily told that their identification [was] unacceptable, and they [were] either not permitted a chance to present any supporting materials, or [had] their supporting materials ignored."[35]

DSHS cited various security concerns for its policy change. In 2008, the agency conducted research on the "reliability of the matrícula."[36] In defense of its policy change, DSHS explained that the Federal Bureau of Investigation ("FBI"), the Department of Justice ("DOJ"), and the Immigration and Custom Enforcement ("ICE") do not recognize the matrícula as proper identification.[37] According to the congressional testimony of the FBI's then-Assistant Director of Intelligence, federal agencies were concerned about the "non-existence of any means of verifying the true identity of the card holder."[38] Similarly, DSHS explained that the Mexican Consulates responsible for issuing matrículas did "not maintain a centralized database that keeps track of persons who have been issued a matrícula and which consular office issued the person a matrícula."[39] DSHS also maintained that Mexican Consulates do not verify the authenticity of the documents submitted with matrícula applications, citing instances where the same photo had been used in several matrículas with different names.[40] The FBI has also found "numerous instances of Matrícula cards being issued under the same name, the same address, or with the same photograph, or to a single person with multiple names."[41] DSHS argued that these instances of fraud and their concerns about the Mexican Consulates' process for issuing matrículas justified their policy change.

The *Serna* plaintiffs pushed back against the state's justification, arguing that the extensive security measures taken by the Consul General of Mexico

33. *Id.* ¶ 65.
34. *Id*. ¶ 62.
35. *Id.* ¶ 71.
36. Declaration of Geraldine R. Harris ¶ 3, Sept. 4, 2015, *Serna*, 2015 U.S. Dist. LEXIS 140919.
37. Declaration of Marc Allen Connelly ¶ 4, Sept. 4, 2015, *Serna*, 2015 U.S. Dist. LEXIS 140919.
38. *Id.* ¶¶ 4–6.
39. Declaration of Geraldine R. Harris, *supra* note 36.
40. *Id*.
41. Declaration of Marc Allen Connelly, *supra* note 37, ¶¶ 4–6.

were adequate to prevent the unlikely issuance of duplicate or improper cards.[42] Matrículas issued from 2006 to 2014 had visual and hidden security features like holograms, multiple colors of ink, and high-quality photographs.[43] Moreover, a "centralized system supported the previous Consular ID in order to confirm authenticity of documents and personal information, prevent duplicates, and link the information to Mexican security databases."[44] In 2014, the fifty Mexican Consulates in the United States issued a new version of the matrícula with additional security measures like encrypted personal information of the applicant's biometrics, invisible markings, micro text frames, a background design ("Guilloche"), and a laser engraved unique card number.[45]

Some states have approached these concerns about the matrícula's reliability in other, pragmatic ways. For example, the Illinois Department of Health policy reads in relevant part: "[a] Matrícula Consular card issued after October 2006 and not currently expired is acceptable on its own. However, if issued prior to October 2006, you will need to submit one additional documentation showing current address as noted above."[46] Illinois' ability to fashion a workable system that allows for the use of matrículas weakens any potential arguments that government agencies must only accept primary documents.

*2.* Serna *Settlement Agreement*

On July 11–12, 2016, the parties in *Serna* reached a settlement agreement. Pursuant to the settlement agreement, DSHS must now implement the following series of changes surrounding the issuance of birth certificates by April 25, 2017.[47] First, and of note: the Mexican Voter ID card, which may be applied for from within the United States, shall be acceptable as a 'Secondary Identification,' pursuant to 25 TAC 181.28(i)(11)(D)(xiv). Additionally the El Salvadoran and Honduran consular certification and Guatemalan consular identification cards—subject to Defendants receiving and reviewing independent verification regarding the process to issue such certification directly from the Honduran and Guatemalan consular authorities—also shall be acceptable as 'Secondary Identification' pursuant to 25 TAC 181.28(i)(11)(D)(xv).[48]

Second, and of equal note, DSHS agreed to designate a Vital Statistics Unit supervisor for the specific purpose of resolving disputes over "denials of written

42. Affidavit of Carlos Gonzalez Gutierrez ¶ 13, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446 (RP), 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015).

43. *Id.* ¶¶ 14–16.

44. *Id.* ¶ 20.

45. *Id.* ¶¶ 20–27.

46. *Birth, Death and Other Records: Valid Government Issued Photo Identification*, ILL. DEP'T OF PUB. HEALTH, http://www.idph.state.il.us/vitalrecords/Pages/vgipi.htm [https://perma.cc/HKM8-T2BW]. *See also* Appendix, *supra* note 7.

47. Order Granting Motion to Stay, *Serna*, 2015 U.S. Dist. LEXIS 140919 (No. 183).

48. Settlement Agreement, *supra* note 13, ¶ 1.

applications for birth certificates by local registration districts due to the adequacy of foreign identification presented."[49] This reviewing officer, within ten days, must inform the applicant seeking review "of the basis for the denial [of her application to receive a certified copy of a birth certificate issued by the state of Texas], or [] inform the local registrar of any error in denial and issue the birth certificate."[50]

DSHS also agreed to modify its regional and statewide trainings by creating new videos and by updating existing training documents and handbooks to include samples of the identity documents at issue in *Serna*.[51] DSHS agreed to mail every local registrar office an update that clarifies the list of acceptable documents for a birth certificate application.[52] DSHS also agreed to create and distribute bilingual English-Spanish posters and pamphlets that educate applicants on the documents now acceptable for a proper birth certificate request.[53] At the time of publication, *Serna's* docket has remained inactive since the case was settled.[54] Despite the genuine progress that the *Serna* settlement agreement represents, it is, unfortunately, a small victory for the reasons discussed below.

### *B. Parallel Problems: Securing a Birth Certificate in Other States*

While all U.S. states maintain and distribute birth records, each state does so according to its own laws and administrative policies.[55] Some states have policies similar to Texas' policies at issue in *Serna*. Several states—including Alaska, Arkansas, Delaware, Florida, Mississippi, Nebraska, and South Carolina—have vital records request policies that disproportionately burden undocumented parents.[56] These states require U.S.-issued government identification that is often impossible for undocumented people to obtain. Such rigid requirements are both under-inclusive, as many types of foreign-issued identification suffice in many other contexts, and they are unnecessary to advance privacy and anti-fraud safeguards as discussed *supra* Part I.A.

Some states, like California[57] and Missouri,[58] allow self-attestation to obtain a certified birth certificate. Individuals seeking a birth certificate can prove

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49. *Id.* ¶ 6.

50. *Id.*

51. *Id.* ¶¶ 3–4.

52. *Id.* ¶ 2.

53. *Id.* ¶ 4.

54. Order Dismissing Case, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446 (RP), 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 195).

55. *See* Appendix, *supra* note 7, for a fifty-state survey of required documents to obtain a certified copy of a birth certificate.

56. *Id.*

57. An applicant can submit a notarized paper application that includes the following sworn statement: "I, [Applicant's Printed Name], declare under penalty of perjury under the laws of the State of California, that I am an authorized person, as defined in California Health and Safety Code Section 103526 (c), and am eligible to receive a certified copy of the birth, death, or marriage cer-

their identity by making a sworn declaration under penalty of perjury that attests both to their relationship with the individual named on the birth certificate and to the fact that they are signing under their own legal name.

The vast majority of states across the country accept a combination of primary and secondary forms of identification from applicants requesting a certified copy of a birth certificate.[59] However, states create substantial obstacles for undocumented parents when they do not accept documents that these parents may already have or that they can reasonably obtain.[60] As a result, many U.S.-born children of undocumented immigrants—American citizens by birth—are unable to prove their identity, placing their citizenship and enjoyment of many constitutionally-guaranteed rights in jeopardy. The serious constitutional implications arising from this issue are discussed below.

## II.
## CONSTITUTIONAL IMPLICATIONS

*Serna v. Texas* demonstrates how inequitable access to birth certificates infringes on the Fourteenth Amendment's right to citizenship.[61] This constitutional infringement negates the citizenship of certain individuals by preventing them from enjoying the constitutional rights rooted in their status as citizens.[62] A meaningful right to citizenship presumably implies a right to access proof of that citizenship in order to effectuate its benefits and privileges. This Part will address the various constitutional arguments that citizen children of undocumented parents can use in court to challenge such an infringement by the state of their right to citizenship.[63] To preface, these types of lawsuits foreground issues that

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tificate of the following individual(s):" Or, an applicant can verbally make this oath to a state official when filing an in-person application. *Application for Certified Copy of Birth Record*, CAL. DEP'T OF PUB. HEALTH (Jan. 1, 2018), https://www.cdph.ca.gov/pubsforms/forms/CtrldForms/VS111.pdf [https://perma.cc/FZS2-Y6D3].

58. Missouri's application states: "Mail-in requests must be notarized. All applications must be signed. I_____, subject to the penalty of perjury, do solemnly declare and affirm that I am eligible to receive a certified copy of the vital record(s) requested above and that the information contained in this application is true and correct to the best of my knowledge." *Application for a Vital Record*, MO. DEP'T HEALTH & SENIOR SERVS., http://health.mo.gov/data/vitalrecords/pdf/birthdeath.pdf [https://perma.cc/CX6Z-L7P5]; *see also Obtaining Certified Copies of Vital Records*, MO. DEP'T HEALTH & SENIOR SERVS., http://health.mo.gov/data/vitalrecords/applications.php [https://perma.cc/C7UX-JVUX].

59. *See* Appendix, *supra* note 7.

60. *Id*.

61. Order Denying Application for Preliminary Injunction, *supra* note 9.

62. Brief for Texas Appleseed Foundation as Amicus Curiae Supporting Plaintiffs' Application for Preliminary Injunction at 6, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 63) [hereinafter Amicus Brief for Texas Appleseed Foundation Supporting Plaintiffs' Application for Preliminary Injunction].

63. As discussed *infra* in Part II.D, undocumented parents could bring their own constitutional claims in theory. In practice, the likelihood of success requires further exploration. An advocate would need to find a brave plaintiff and navigate complex constitutional jurisprudence.

arise out of the United States' federalist system of government. The right to citizenship is federal, as are many of the rights derived from citizenship. Yet, the Tenth Amendment, by implication, reserves to the states the responsibility of maintaining and distributing the vital records of those born within their respective borders.[64] The states naturally vary in their requirements to establish proof of the applicant's identity and proof of the applicant's relationship to the registrant of the vital record. State requirements that create insurmountable barriers for citizens to access their birth certificates are likely unconstitutional.

Before delving into specific constitutional claims, it is also critical to highlight the complex place that children occupy in constitutional jurisprudence. Some case law restricts children's constitutional rights,[65] but the text of the Fourteenth Amendment should not be read to give children any less of a claim to citizenship than adults. The right to citizenship itself has no age component. But, like many constitutional protections, the liberty interest arising from citizenship may potentially be stronger for adults than for children. There is no uniform standard on how judges should evaluate age when adjudicating constitutional disputes. Historically, children were understood to possess only the constitutional rights of their parents. Though this has changed in recent decades, courts still employ this approach in some contexts.[66] Two seminal decisions in the late 1960s, *In re Gault* and *Tinker v. Des Moines*, can be read together to stand for the proposition that due process requires courts to protect the constitutional rights of children.[67] In *Serna*, the presiding judge understood the children's rights to be separate and distinct from their parents. He wrote, "the Court concludes Plaintiffs have established, 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[.]"[68] In sum, it is clear that the Fourteenth Amendment protects a child's right to citizenship and that the U.S.-born children of undocumented immigrants may seek to vindicate their constitutional rights in court.

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64. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

65. *See*, *e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (lowering the level of suspicion required to search the persons of students in a school setting).

66. *See*, *e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) ("Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-à-vis Gerald, she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.").

67. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (upholding First Amendment rights of schoolchildren); In Re Gault, 387 U.S. 1 (1967) (extending the protections of the Fourteenth Amendment's Due Process Clause to juveniles).

68. Order Denying Application for Preliminary Injunction, *supra* note 9.

### *A. Jus Soli Citizenship & the Right to Nationality*

A child born in the United States has a fundamental right to American citizenship under domestic and international law. The Fourteenth Amendment states that "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."[69] The Immigration and Nationality Act similarly codifies the legal fact that an individual is a citizen of the United States if she is "born in the United States."[70] Commonly referred to as 'jus soli' or 'birthright citizenship,' this right is granted to a child irrespective of her parent's immigration status. Courts have followed this interpretation of the Fourteenth Amendment's Citizenship Clause since 1898.[71]

Sources of international law, which the Supreme Court has found useful in adjudicating issues of juvenile justice, reinforce the notion that children enjoy this right.[72] For example, the International Covenant on Civil and Political Rights, which the United States ratified in 1992, protects a child's right "to acquire a nationality"[73] and requires that "every child shall be registered immediately after birth and shall have a name."[74] The Universal Declaration of Human Rights, also ratified by the United States, states that "[e]veryone has a right to recognition everywhere as a person before the law."[75] Similarly, the Convention of the Rights of the Child—to which the United States is a signatory, but which it has not ratified—requires states to "ensure the implementation of [children's] rights in accordance with their national law" and "without unlawful interference."[76] Article 8 reinforces these rights by requiring that "[w]here a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to reestablishing speedily his or her identity."[77] Human rights treaties such as these may inspire and anchor domestic debates over constitutional rights.

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69. U.S. CONST. amend. XIV, §1.

70. *See* 8 U.S.C. § 1401(a) (2012) (outlining who "shall be nationals and citizens of the United States at birth").

71. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).

72. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (prohibiting the death penalty for juveniles and considering "laws of other countries and to international authorities as instructive" for interpreting the Constitution).

73. International Covenant on Civil and Political Rights art. 24, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 *U.N.T.S.* 171.

74. Convention on the Rights of the Child art. 7, Nov. 29, 1989, 1577 U.N.T.S. 3.

75. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 6 (Dec. 10, 1948).

76. Convention on the Rights of the Child, *supra* note 74, at art. 7–8.

77. *Id.* at art. 7. The Rights of All Migrant Workers and Members of Their Families, a multilateral United Nations treaty, also secures similar rights for children in Article 29. It reads in relevant part that *"Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality."* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 29, Dec. 18, 1990, 2220 *U.N.T.S.* 3. The United

Because it is "a most precious right" in American jurisprudence,[78] the right to citizenship is "not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."[79] In *Afroyim v. Rusk*, when deciding whether a section of the Immigration and Nationality Act was constitutional, the Supreme Court held "the [Fourteenth] Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it."[80] Citizens cannot fully vindicate this right if they lack access to documentary proof of their status as citizens; they "may not simply assert [their] identity in order to be recognized."[81] The federal government similarly describes a birth certificate as "the most important document you'll need to prove your legal identity and age."[82] However, in the *Serna* case, Texas disregarded the spirit of Afroyim and diluted American citizenship by denying access to proof of citizenship and, in doing so, preventing citizens from having their identity recognized. The presiding judge in *Serna* agreed with this characterization.[83] As was argued in *Serna*, infants and children must acquire identity documents through the adult figures in their lives. Children cannot wait until adulthood to obtain their own birth certificate and establish their identity because they would be "deprived of their ability to prove the most basic element from which so many of their other critical rights flow."[84] American children should not "begin their lives without 'the right to have rights."[85]

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States has neither signed nor ratified the Rights of All Migrant Workers and Members of Their Families.

78. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963) (citing United States v. Wong Kim Ark, 169 U.S. 649 (1898)).

79. Afroyim v. Rusk, 387 U.S. 253, 262 (1967).

80. *Id.* (discussing Section 401(e) of the Immigration and Nationality Act).

81. Amicus Brief for Mexico Supporting Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 6, at 4.

82. *Replace Your Vital Records*, U.S. GOV'T (Sept. 24, 2018), https://www.usa.gov/replace-vital-documents [https://perma.cc/CY4W-NQGN].

83. Order Denying Application for Preliminary Injunction, *supra* note 9, at 9 ("Finally, it simply begs credulity for Defendants to argue a birth certificate is not a vitally important document.").

84. Brief for the American Civil Liberties Union Foundation and the American Civil Liberties Union of Texas as Amicus Curiae Supporting Plaintiff's Motion for a Preliminary Injunction at 10, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446 (RP), 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 66-1) ("[A deprivation of citizenship] is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men." (quoting Schneiderman v. United States, 320 U.S. 118, 122 (1943))) [hereinafter Amicus Brief for the ACLU Supporting Plaintiff's Motion for a Preliminary Injunction].

85. Amicus Brief for Mexico Supporting Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 6, at 7.

*B. The Property Right to a Birth Certificate: Procedural Due Process*

In most states, those denied access to a birth certificate can argue that they have been denied procedural due process, as the plaintiffs in *Serna* argued. Only by denying the validity of jus soli citizenship could states dispute that children born within their boundaries are entitled to birth certificates. As the ACLU stated in its brief in *Serna*, "the only point of dispute is whether defendants' process for verifying plaintiffs' identities, which prevents all children whose parents lack lawful status from availing themselves of that right, is constitutionally adequate."[86]

The Fourteenth Amendment mandates that no "State [shall] deprive any person of life, liberty, or property, without due process of law." Whenever Due Process applies, "the question remains what process is due."[87] To answer this question, courts use a test that balances "the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected."[88] Here, the weight of the private interest in obtaining a withheld birth certificate cannot be overstated. Without a birth certificate, a citizen may be deprived of fundamental rights like citizenship, voting, the free exercise of religion, and the integrity of familial relationships. These interests are further discussed in Parts II.C.1 through II.C.3 below. The risk that U.S.-born children of undocumented parents will be erroneously deprived of birth certificates is very high since their parents cannot reasonably possess the documents required to obtain a birth certificate. For example, prior to the settlement agreement in *Serna*, DSHS had refused to provide plaintiffs other ways to demonstrate their identity. Plaintiffs therefore had no meaningful opportunity to challenge DSHS' authentication of their documents. Further, there was no mechanism to allow the *Serna* plaintiffs to appeal a DSHS decision and make a case for obtaining their birth certificates. States, however, are prohibited from denying individuals the opportunity to present the proof essential to a determination of their protected rights.[89] Thus, if the state procedure makes it impossible to overcome evidentiary burdens to vindicate an

86. Amicus Brief for the ACLU Supporting Plaintiff's Motion for a Preliminary Injunction, *supra* note 84, at 2. The ACLU amicus brief explains that Texas has created a property right to birth certificates because the state registrar must provide a copy of the birth certificate to a properly qualified applicant. *Id.* at 3; *see also* Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 784 (Tex. 2005) (interpreting "shall" to indicate a mandatory duty); LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986) (finding that use of the word "shall" indicates that the direction is "mandatory").

87. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

88. Little v. Streater, 452 U.S. 1, 2 (1981); *see also* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

89. *Little*, 452 U.S. at 17.

individual's important interests, the state has deprived the individual of "a meaningful opportunity to be heard."[90]

The only potential justification for such a deprivation under the procedural Due Process Framework is "a countervailing state interest of overriding significance."[91] A state might defend its restrictive policy by arguing that the government has an interest in preventing identity fraud, which allegedly increases when "self-identification requirements are loosened."[92] To show this, defendants have the burden of establishing that accepting matrículas and foreign passports as part of applications for vital records would lead to an increase in fraud. However, it is unreasonable to expect that foreign documents will somehow fall through the cracks of agency scrutiny and authentication. Defendant states might also argue that the government has an interest in minimizing additional costs from the verification of these allegedly more readily forged documents. However, the administrative burdens of verifying alternative forms of identification are, according to the Supreme Court, "hardly significant enough to overcome" fundamental private interests as important as familial bonds.[93] A state agency, like a Department of Health or Office of Vital Records, still retains the authority and discretion to authenticate any document presented by any applicant. This was the case for the analogous Texas agency in *Serna*. Presumably, this is also true for currently acceptable forms of identification like drivers' licenses and American passports. Even if the process to authenticate foreign documents is lengthier or more expensive, it does not outweigh the harm that plaintiffs would suffer when denied access to their birth certificates. Defendants' proffered justifications should therefore be found insufficient to allow the current regime to survive challenge.

In sum, the private interest at stake—the right to a birth certificate—is a critical right from which the protections and rights of citizenship follow, the risk of erroneous deprivation is high, and the government's interests in identity fraud and privacy are insufficient to justify the burden on potential plaintiffs. Advocates should emphasize how a birth certificate applicant has little to no recourse to challenge an agency denial of her application on the basis of insufficient or inadequate documentation. The court should not ask these individuals "to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[94]

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90. *Id.* at 16. (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

91. *Boddie*, 401 U.S. at 377.

92. Defendants' Response to Plaintiffs' Emergency Application for Preliminary Injunction at 33, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 41).

93. *See*, *e.g.*, *Little*, 452 U.S. at 15–16 (finding that the "[s]tate's monetary interest is hardly significant enough to overcome private interests as important as [inter alia, familial bonds]") (citation omitted).

94. Santosky v. Kramer, 455 U.S. 745, 768 (1982) (citation omitted).

### *C. The Fundamental Right to One's Birth Certificate: Substantive Due Process*

In addition to these arguments related to procedural due process, U.S.-born children of undocumented parents can also show a violation of substantive due process when denied a birth certificate. They can argue, for example, that the state's denial of their birth certificate application threatens their right to citizenship and at least three other fundamental rights. Specifically, plaintiff children would suffer burdens on their fundamental rights to familial integrity,[95] to vote, and to marry.

Once the plaintiff has established that a fundamental right has been violated, the defendant state would need to justify such an interference. A state government can interfere with the free exercise of fundamental rights only if the government proves that its policies are necessary to achieve a compelling government interest. Without such a showing, the state's actions will be prohibited as a substantive due process violation.[96]

In claims akin to *Serna*, the court would review the factual record to determine whether the relevant policies are narrowly tailored and appropriate. The court would focus on the list of acceptable forms of identification that a state requires for obtaining a certified copy of their birth certificate and would inquire into the state's justification, determining whether consular identifications have been or are being used to "fraudulently identify one's self to obtain a certified copy of a birth record."[97]

The state must also show that the governmental interest in preventing fraud is significant enough to justify the infringement of fundamental rights.[98] This is a high bar. The state cannot simply "urge a highly speculative risk that a small number of birth certificates could somehow fall into the wrong hands" without providing specifics.[99] Without presenting evidence beyond conjecture, a defendant state would fail to establish that its policy is necessary and that it serves a compelling government interest.

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95. Third Amended Complaint, *supra* note 8, at ¶ 91; Plaintiffs' Emergency Application for Preliminary Injunction at 13, 2015 U.S. Dist. LEXIS 140919; Amicus Brief for Mexico Supporting Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 6, at 8.

96. *See* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) ("'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling'. . . . 'The law must be shown necessary, and not merely rationally related to, the accomplishment of a permissible state policy.'") (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)); McLaughlin v. State of Florida, 379 U.S. 184, 196 (1964). *See also* United States v. Carolene Products Co., 304 U.S. 144, 152–53, n.4 (1938) (differentiating between levels of judicial scrutiny).

97. Defendants' Response to Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 92, at 1.

98. *See*, *e.g.*, United States v. Salerno, 481 U.S. 739, 750 (1987) (upholding a provision after substantive due process litigation because it was narrowly tailored enough and addressed an acute problem).

99. Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 95, at 6.

Although defendants might argue that the repercussions of living without a birth certificate vary over time, it would be incorrect for them to suggest that a policy only sufficiently impinges on a fundamental right if it becomes indefinitely impossible to exercise the right.[100] "[E]ven temporary deprivations of very important benefits and rights can" require strict scrutiny.[101] The Supreme Court has found that state laws clearly "interfere directly and substantially with the [fundamental] right" when a statute's requirements makes it "practically impossible" for a group of people to meet the statute's requirements.[102]

A state law can be burdensome even if it does not have "a primary objective" of impeding fundamental rights.[103] It is "irrelevant" whether the exercise of a fundamental right is "absolutely denied" or "merely penalized" because "[c]onstitutional rights would be of little value if they could be . . . indirectly denied."[104] Similarly, plaintiff children should not be burdened to wait until they come of age to access certified copies of their birth certificates.

Potential defendants would argue that denial of birth certificates does not entail the kind of fundamental rights violation that triggers strict scrutiny. This was what DSHS argued in *Serna* when it suggested that denying birth certificates had at most an "incidental effect" on plaintiffs' fundamental rights.[105] This type of minimizing argument claims that lack of access to a birth certificate does not compromise the right to citizenship. A presiding judge would likely take the position of Judge Pitman in *Serna*, who concluded that plaintiffs' evidence showed that a lack of a birth certificate affects the fundamental rights of the citizen children.[106]

If strict scrutiny applies to the fundamental right to proof of citizenship, then state defendants will be forced to show that their birth certificate identification policies are narrowly tailored to advance the legitimate goal of preventing the issuance of fraudulent birth certificates. Under strict scrutiny, a state cannot simply prefer to verify an applicant's identity in a certain way; a defendant's policies need to be the necessary way to authenticate the identity of a birth certificate applicant and her relationship to the registrant of record.[107] Advocates can

100. Third Amended Complaint, *supra* note 8, at ¶ 91.

101. Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 907 (1986).

102. Zablocki v. Redhail, 434 U.S. 374, 378, 387 n.12 (1978).

103. *Soto-Lopez*, 476 U.S. at 903.

104. Dunn v. Blumstein, 405 U.S. 330, 341 (1972) (internal citation omitted).

105. Defendants' Response to Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 92, at 19.

106. Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919, at *6 (W.D. Tex. Oct. 16, 2015); *see also* Order Denying Application for Preliminary Injunction, *supra* note 9, at 17.

107. *See supra* note 100 and accompanying text.

highlight less restrictive policies from other states to serve as the baseline for defining what is "necessary" under substantive due process analysis.[108]

Nevertheless, if a different court were to disagree with Judge Pitman's finding that a fundamental right was at issue, the presiding judge would employ rational basis review to determine if the policy is rationally related to a legitimate government interest, whether actual or hypothetical. Under deferential rational basis review, U.S.-born children of undocumented immigrants could still prevail if they can show that animus was a motivating factor in enacting the policy. As stated above, defendant governments would assert their rational interest in "protecting the issuance of birth certificates" from identity fraud and theft.[109] In response, plaintiffs could cite evidence that the relevant state policies were enacted out of the distaste for, fear of, or animus against an unpopular group.[110] Ample evidence exists on political hostility against the citizen children of undocumented immigrants, a trend on the rise around the same time as the implementation of new vital records request policies.[111] Therefore, even under rational basis review, plaintiffs could prevail when citing to a legislative record indicating animus motivated the passage of the birth certificate request policy.

The following sections discuss the ways in which specific fundamental rights are affected by the infringement on one's citizenship. A judge would likely apply strict scrutiny in her fundamental rights analysis of the plaintiffs' claims because discriminatory vital records request policies significantly burden children's lives and their fundamental rights.[112] The presiding judge in the frontier litigation on these issues has already characterized the facts as such.[113]

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108. *See* Appendix, *supra* note 7.

109. Order Denying Application for Preliminary Injunction, *supra* note 9, at 14 ("A certified copy of a birth record can be used to obtain numerous identification documents, such as a passport or driver's license, as well as to commit identity theft. Accordingly, in Texas, birth certificates are not treated as open records.") (internal citations omitted).

110. The Supreme Court has held that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)); Romer v. Evans, 517 U.S. 620 (1996); *see also* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that a purpose to discriminate against an unpopular group is not a legitimate government interest).

111. According to a former Lieutenant Governor of Texas, "Congress must make states and local communities partners in securing the border, allowing them the tools necessary to enforce the laws of our Nation. Any legislation that provides a pathway to citizenship must be dead on arrival, and we must look at all the tools in our arsenal to address the influx of illegal immigrants." Plaintiffs' Response to Defendants' Motion to Dismiss, Attachment B at 2, *Serna*, 2015 U.S. Dist. LEXIS 140919. *See also* Clare Foran, *Ted Cruz Supports Amending the Constitution to End Birthright Citizenship*, NAT'L J. (Aug. 19, 2015), http://www.nationaljournal.com/twentysixteen/2015/08/19/tedcruz-supports-amending-constitution-end-birthright-citizenship [https://perma.cc/7VW2-4WGB].

112. *Serna*, 2015 U.S. Dist. LEXIS 140919, at *6; *see also* Third Amended Complaint, *supra* note 8, ¶¶ 80-94 ("Harms to Plaintiffs"); Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 95, at 6–7.

113. Order Denying Application for Preliminary Injunction, *supra* note 9, at 9 ("Based on the evidence presented by Plaintiffs, the Court concludes Plaintiffs have established, at a mini-

*1. Fundamental Right to Vote*

Both the Supreme Court and Congress consider voting to be a fundamental right.[114] However, without a birth certificate, plaintiff children will face serious hurdles when they seek to vote in the upcoming decades, particularly in states like Texas, which requires proof of citizenship for voter registration.[115] Texas also requires in-person voters to present photo identification. Voters can bring one of the following: 1) Texas driver license issued by the Texas Department of Public Safety (DPS); 2) Texas Election Identification Certificate issued by DPS; 3) Texas personal identification card issued by DPS; 4) Texas license to carry a handgun issued by DPS; 5) United States military identification card containing the person's photograph; 6) United States citizenship certificate containing the person's photograph; or 7) United States passport.[116] Such requirements are not uncommon. Texas is one of seventeen states with similar voter identification requirements.[117] Citizen children of undocumented immigrants would face extreme difficulty or outright denial when seeking to acquire these documents without a birth certificate and therefore may not be able to vote for failure to produce the required photo identification. In *Reynolds v. Sims*, the Court stated that the "free and unimpaired" right to vote "is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[118] It follows that, since states' birth certificate identification requirements interfere with plaintiffs' right to vote, such infringement must be "meticulously scrutinized" as well.

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mum, 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 the free exercise of religion by way of baptism, and their right to travel.").

114. *See* National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (2012) ("The Congress finds that (1) the right of citizens of the United States to vote is a fundamental right."); *see also* Evans v. Cornman, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.") (citation omitted).

115. *See Register to Vote*, TEX. SEC'Y OF STATE, http://www.votetexas.gov/register-to-vote/ [https://perma.cc/F3PV-C3E6]; *Filling out the Application*, TEX. SEC'Y OF STATE, http://www.votetexas.gov/register-to-vote/filling-out-the-application.html [https://perma.cc/5WUG-3S7H].

116. *Required Identification for Voting in Person*, TEX. SEC'Y OF STATE, http://www.votetexas.gov/register-to-vote/need-id.html [https://perma.cc/89QB-QHQU]; *see also* TEX. ELEC. CODE. ANN. § 63.0101 (West 2018).

117. *See* Wendy Underhill, *Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 15, 2018), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/8VEM-T8TU].

118. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

*2. Fundamental Right to Familial Integrity*

Fit parents have the right to "the care, custody, and control of" their children because our society recognizes it as one of the oldest unenumerated rights.[119] When denied the ability to acquire a birth certificate, a child does not fully enjoy her right to be free from arbitrary interference with her family life. The "custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[120] A parent's care, custody, and control of her child may be jeopardized if she cannot establish legal proof of their familial relationship. For example, a parent may not make medical decisions for her child or prove parentage in a custody dispute.[121] Family rights also attach to the instruments of international law, discussed *supra*.[122] The Supreme Court has consistently held that children have the right to the protection of their parents' parental rights.[123] Consequently, children also have a right to non-interference in matters regarding their custody and care. In *Serna*, plaintiff parents could not establish proof of a legal relationship to their biological offspring because of DSHS policies from 2013-15. This impeded their ability to make important childrearing decisions related to education, medical care, and religious practice.[124] As such, the state also infringed the fundamental rights of their children.

*3. Fundamental Right to Marriage*

Lastly, vital records request policies similar to those in *Serna* could infringe a child's right to marriage when she comes of age. Since 1888, the Supreme Court has fiercely protected the "most important relation in life" and "the foun-

119. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing parents' strong interest in controlling their child's education).

120. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

121. Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 95, at 13; Third Amended Complaint, *supra* note 8, at ¶¶ 79-94.

122. For example, Advocates could advance the ideals protected by Article 12 of The Universal Declaration of Human Rights, which states that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence." Even more explicitly, it states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." G.A. Res. 217, *supra* note 75, at art. 12.

123. *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) ("Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-a-vis Gerald, she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.").

124. Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 95, at 13; Third Amended Complaint, *supra* note 8, at ¶¶ 79–94.

dation of the family and society."[125] The right to marriage has, moreover, been expanded over time.[126]

Currently, an individual must submit proof of age and identity to apply for a marriage license, regardless of the state.[127] Unsurprisingly, the state lists primarily include documents that are almost impossible to acquire without an original or certified copy of a birth certificate. Thus, state governments risk preventing American citizens from successfully effectuating their fundamental right to marriage by denying them access to their birth certificates.[128]

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125. Maynard v. Hill, 125 U.S. 190, 205, 211 (1888).

126. For more on the fundamental right to marriage, *see generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015) ("[S]ame-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."); Lawrence v. Texas, 539 U.S. 558, 573–574 (2003) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U. S. 833, 851 (1992)); Boddie v. Connecticut, 401 U.S. 377 (1971) (collecting cases); Loving v. Virginia, 388 U.S. 1,12 (1967) (holding that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that marriage is "one of the basic civil rights of man" and "fundamental to the very existence and survival of the race"). Moreover, Texas is obligated to protect this right under international law. Article 23 of the International Covenant on Civil and Political Rights, a binding multilateral international treaty, parallels The Universal Declaration of Human Rights: "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution[.]" G.A. Res. 217, *supra* note 75, at art. 16; *see also* International Covenant on Civil and Political Rights, *supra* note 73, at art. 23 ("The right of men and women of marriageable age to marry and to found a family shall be recognized.").

127. In Texas, the "[p]roof of identity and age" of a marriage license applicant "must be established by: (1) a driver's license or identification card issued by this state, another state, or a Canadian province that is current or has expired not more than two years preceding the date the identification is submitted to the county clerk in connection with an application for a license; (2) a United States passport; (3) a current passport issued by a foreign country or a consular document issued by a state or national government; (4) an unexpired Certificate of United States Citizenship, Certificate of Naturalization, United States Citizen Identification Card, Permanent Resident Card, Temporary Resident Card, Employment Authorization Card, or other document issued by the federal Department of Homeland Security or the United States Department of State including an identification photograph; (5) an unexpired military identification card for active duty, reserve, or retired personnel with an identification photograph; (6) an original or certified copy of a birth certificate issued by a bureau of vital statistics for a state or a foreign government; (7) an original or certified copy of a Consular Report of Birth Abroad or Certificate of Birth Abroad issued by the United States Department of State; (8) an original or certified copy of a court order relating to the applicant's name change or sex change; (9) school records from a secondary school or institution of higher education; (10) an insurance policy continuously valid for the two years preceding the date of the application for a license; (11) a motor vehicle certificate of title; (12) military records, including documentation of release or discharge from active duty or a draft record; (13) an unexpired military dependent identification card; (14) an original or certified copy of the applicant's marriage license or divorce decree; (15) a voter registration certificate; (16) a pilot's license issued by the Federal Aviation Administration or another authorized agency of the United States; (17) a license to carry a handgun under Subchapter H, Chapter 411, Government Code; (18) a temporary driving permit or a temporary identification card issued by the Department of Public Safety; or (19) an offender identification card issued by the Texas Department of Criminal Justice." TEX. FAM. CODE § 2.005(b) (West 2017).

128. Third Amended Complaint, *supra* note 8, at ¶ 79.

### *D. Equal Protection*

In addition, plaintiffs may also argue that the denial of birth certificates is a violation of Equal Protection, which interacts synergistically with claims based on Due Process.[129] The plaintiffs in *Serna* succinctly summarized the salient points of such an argument:

> [T]he Department is condemning these citizens to second-rate status until they turn eighteen, at which time—if the documentation exists and the Department complies—they may be able to obtain a birth certificate and start enjoying the full benefits of citizenship that every other U.S.-born citizen takes for granted, from birth.[130]

Both citizen children born to undocumented parents and the undocumented parents themselves can advance Equal Protection arguments in court. Although it would be possible to frame the Equal Protection claim solely in terms of discrimination against the parents,[131] it would be more practical to tie arguments to the unequal treatment of children born in the United States who are owed the full privileges of their citizenship.[132]

The crux of any Equal Protection argument is that the "state [is] treat[ing] two similarly situated groups of persons differently without adequate justification."[133] Amendment XIV, Section 1 of the United States Constitution, prohibits

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129. The Supreme Court has noted: "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. . . . This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become." Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) (citations omitted).

130. Amicus Brief for Texas Appleseed Foundation Supporting Plaintiffs' Application for Preliminary Injunction, *supra* note 62, at 6.

131. *Nguyen v. INS.*, 533 U.S. 53 (2001). Plaintiffs in *Nguyen* brought an equal protection claim because 8 U.S.C.S. § 1409 provided different ways for a child to acquire U.S. citizenship through their parents. If the American-citizen parent was the father, a child's application had to demonstrate an established parental relationship. This requirement was not necessary if the mother was the American-citizen parent. The Court's analyzed Equal Protection in terms of the treatment of the applicant's parents of the applicants. It cited the real differences between men and women as parents. Oddly, the Supreme Court did not focus on the inequality's effects on the applicants, the children themselves. *Id.*

132. The undocumented plaintiffs can sue for equal protection claims because the Fourteenth Amendment is not confined to citizens. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("These provisions [the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

133. Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 95, at 7 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[134] A reviewing court may either apply strict scrutiny or rational basis review depending on the characterization of the class and the extent of the state's deprivation of their rights.[135] To survive strict scrutiny, the policies at issue must have been narrowly tailored to further a compelling government interest. Under rational basis review, defendants merely prove their policy is rationally related to a legitimate government interest, whether real or hypothetical. Their proffered justification cannot be a pretext for distaste or animus towards socially or politically unpopular groups.[136] Certain groups, particularly those who have been historically marginalized on the basis of race and ethnicity, are classified as a suspect classes and afforded "a correspondingly more searching judicial inquiry".[137]

For strict scrutiny to apply, plaintiffs would need to allege both the discriminatory intent and discriminatory impact of the vital records request policies on immigrant communities.[138] The Latino community suffered particularly from the effects of DSHS policy in Texas and was therefore prominently discussed in *Serna*. A future lawsuit could focus on undocumented parents from African, Asian, Eastern European, or other backgrounds, depending on the particular community and its demographics.

The Supreme Court has articulated that plaintiffs have multiple ways to show discriminatory intent.[139] These include the history and historical background of the birth certificate requirement and whether a state adopted a list of acceptable identification for a birth certificate request because of, not in spite of,

134. U.S. CONST. amend. XIV, §1.

135. The level of scrutiny of an Equal Protection claim "is not solely a question of law, but rather a mixed question of law and fact." Order Denying Application for Preliminary Injunction, *supra* note 9, at 26.

136. The Supreme Court has held "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Cleburne*, 473 U.S. at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)); *see also* Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick* because "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"); Romer v. Evans, 517 U.S. 620 (1996); United States v. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that a purpose to discriminate against an unpopular group is not a legitimate government interest).

137. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

138. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact - in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires - may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.").

139. *See Davis*, 426 U.S. 229 (articulating what allegations would warrant a heightened scrutiny analysis).

an adverse impact on a minority group.[140] Plaintiffs must show that discriminatory intent was at least one of the state's motivations in enacting this policy.[141] However, plaintiffs must also rebut any argument that defendants would have created the same vital records request policy absent the alleged impermissible intent.

Given these stringent requirements, advocacy lawyers may seek to advance an Equal Protection argument based on discriminatory administration of facially neutral policies in the style of *Yick Wo v. Hopkins*.[142] Birth certificate application policies are facially race-neutral policies that are administrated in an impermissibly prejudicial manner. These lawyers would have the high burden of showing that the state's policies are on the basis of race and alienage, and not an innocuous coincidence.

Because a *Yick Wo* argument is difficult to advance, plaintiffs would more realistically use legislative history to show discriminatory animus as a motivating factor for enacting the law. For example, they could show that a legislature drafted a bill with "almost surgical precision" to target undocumented immigrants.[143] Plaintiffs could also point to discriminatory statements made by politicians prior to the law's passage.

Advocates can strengthen their race and alienage discrimination arguments by submitting information on the highly technical nature of immigration and identification documents in the countries of origin of the plaintiff class (such as visa applications and consular identification technology). If such evidence shows a foreign government issues and authenticates foreign identification documents with care, this undermines a potential defendant's compelling interest in preventing identity fraud. Rather, it shows that plaintiffs are more than perfectly amenable to proving their identity, which is their very objective and the crux of the case. This type of information also supports a stronger inference of pretext on the part of the potential defendant state agency.

In sum, a presiding judge would most likely apply heightened scrutiny to any of the aforementioned types of Equal Protection arguments because the relevant issues pertain to both race and fundamental liberties.[144] The success of the Equal Protection challenge, thus, would likely depend on whether a state narrowly tailored its policies. To win, potential plaintiffs should submit evidence that a

140. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

141. Village of Arlington Heights, 429 U.S. at 265.

142. Yick Wo v. Hopkins, 118 U.S. 356, 362–63 (1886).

143. NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (holding that a voter ID law violated the Equal Protection Clause because intent could be inferred from "the surgical precision" in which the law was crafted to target Black voters).

144. *See supra* Part II.B–C. *See also* Order Denying Application for Preliminary Injunction, *supra* note 9, at 22–23 ("Although Defendants maintain there is no fundamental right at issue, the Court has concluded the Plaintiffs have presented evidence showing that a lack of a birth certificate affects the fundamental rights of the citizen Plaintiff children.").

state is implementing under-inclusive policies that violate strict scrutiny in its administration of birth certificates. To do so, plaintiffs need to demonstrate a "singling out" of foreign identification to subject it to a "different, and more exacting, standard than other forms of identification."[145] Advocacy lawyers can make this point by citing other states, like California and Missouri, that rely on sworn affidavits under penalty of perjury as examples of less restrictive means of achieving the state's interest in minimizing fraud.

### *E. First Amendment*

As was argued in *Serna*, advocates can make First Amendment arguments because vital records application policies can also infringe on the protections afforded by the Free Exercise Clause, which states that the government "shall make no law . . . prohibiting the free exercise of religion." For example, undocumented Catholic parents may be unable to have their U.S.-born children baptized because some churches require the parents to present a birth certificate for a priest to perform a baptism.[146] The Supreme Court grants children First Amendment protection of the free exercise of religion, even not as absolutely as adults. Courts apply heightened scrutiny to infringements on the right to the free exercise of religion.[147] Religious freedom protections are also grounded in statute. Federally, the Religious Freedom Restoration Act prohibits substantial burdens on a person's exercise of religion, except when the Government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest."[148] At the state level, numerous states, including Texas, have passed their own Religious Freedom of Religion Act that track the federal standard.[149] Because of these strong constitutional and statutory protections of religious freedom, children denied birth certificates who are therefore unable to participate in religious life would have strong claims that they have been denied their right to free exercise.

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145. Order Denying Application for Preliminary Injunction, *supra* note 9, at 36.

146. *See*, *e.g.*, Translation of Affidavit of Juana Gomez Ybarra, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 25-1); Affidavit of Nancy Garcia, 2015 U.S. Dist. LEXIS 140919 (No. 25-1); Affidavit of Juanita Valdex-Cox, 2015 U.S. Dist. LEXIS 140919 (No. 25-1).

147. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (finding that courts must apply heightened scrutiny in religious freedom cases because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Prince v. Massachusetts, 321 U.S. 158, 167 (1943) (finding "when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary").

148. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1; *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

149. Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a)–(b) (West 2011).

## III.
## RECOMMENDED STRATEGIES

*Serna* demonstrates that citizenship connotes a right to reasonable access to a certified copy of a birth certificate. As discussed above, American citizens cannot enjoy their fundamental rights, nor can they fully participate in society, without a birth certificate. States therefore must explore realistic alternatives to forms of identification that they currently accept for vital records request applications. Many current state practices are not necessary to protect the integrity of birth certificates.

Activists, advocates, and policymakers should follow three practical strategies to remove barriers to obtaining birth certificates for U.S.-born children of undocumented immigrants. These can and should be implemented in states other than Texas where undocumented parents face similar obstacles when seeking birth certificates for their U.S.-born children.

First, advocates should push for states to implement alternative safeguards against identity theft, such as those discussed in *Serna's* settlement agreement. These might include procedures to challenge a state agency's denial of a birth certificate request due to the applicant's insufficient or inadequate identification, as discussed *infra* Part II.B. Birth certificates are "the most important proof" of identity and age,[150] so applicants and registrants should be provided desperately-needed recourse to ensure that their loved ones are not relegated to empty, second-class American citizenship.[151]

Second, and where applicable, advocacy lawyers can use canons of statutory interpretation to seek favorable constructions within the parameters of preexisting vital records policies. Advocates could use such statutory interpretation arguments when seeking a court or state agency interpretation of the list of acceptable documents for a birth certificate request to include foreign identification documents. This approach could be used in states with ambiguous or vague policies. For example, many states, like Massachusetts and Minnesota, simply require "proof of your identification" and "valid identification."[152] The judge or administrative agency would only need to employ common, straightforward statutory interpretation canons like plain meaning, constitutional avoidance, and *ejusdem generis*.[153]

In addition to statutory interpretation arguments, advocacy lawyers should stress that state agencies cannot justify their restrictive policies. Advocacy lawyers should, for example, note other states with less restrictive birth certificate

150. *See Replace Your Vital Records*, *supra* note 82.

151. Amicus Brief for Mexico Supporting Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 6, at 7.

152. *See* Appendix, *supra* note 7.

153. For more information on canons of statutory interpretation, *see* ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: INTERPRETATION OF LEGAL TEXTS (2012).

policies are not experiencing any problems related to the use of sworn affidavits or foreign documents for purposes of obtaining a birth certificate. In fact, several states with large immigrant populations already allow applicants to use consular identification, like matrículas, when requesting important identification documents and other benefits.[154] To respond to defendants' public policy concerns about identity fraud, plaintiff lawyers should stress that some of the solutions they are advocating, such as expanding the list of acceptable identification to include consular identification, are not tantamount to "loosened" self-identification requirements.[155] Defendants do not need to automatically accept the authenticity of every foreign identification documented that is submitted by an applicant. A state can authenticate them just as the state presumably authenticates domestic documents that appear questionable upon submission. The potential administrative burdens created are miniscule in comparison to the infringement of the fundamental liberties and constitutional rights at stake.

Third, advocates should try to widen the list of acceptable documents that can be submitted with birth certificate applications through legislative and administrative advocacy. By educating lawmakers and agency decision-makers about the harms caused by their vital records policies, advocates may be able to reform policies without the need to litigate. However, advocates in more hostile legislative or administrative environments might be better served by filing a lawsuit to capture the attention of the relevant officials. Undocumented parents rarely have the types of identification that many states currently require—and that DSHS had previously required—when submitting an application for a certified copy of a vital record. This reality experienced by too many undocumented parents provides advocates with a compelling and urgent narrative and room to negotiate for workable solutions with legislators and administrative agency decisionmakers. As Jennifer Harbury, a prominent social justice lawyer and attorney for the *Serna* plaintiffs, explained: "Our argument isn't 'yes matrícula, no matrícula'...[t]he argument is 'what will you take that people can actually get?'

154. Brief for the National Immigration Law Center as Amicus Curiae in Support of Plaintiffs' Emergency Application for Preliminary Injunction at 10 n.11, Serna v. Texas Dep't of State Health Servs., No. 1-15-CV-446, 2015 U.S. Dist. LEXIS 140919 (W.D. Tex. Oct. 16, 2015) (No. 65) ("*See*, *e.g.*, Valid Government Issued Photo Identification, Ill. Dep't of Pub. Health (listing a consular identification card as a proper form of identification), http://www.idph.state.il.us/vitalrecords/Pages/vgipi.htm [https://perma.cc/PAS2-9N27]; Identification Requirements, N.Y.C. Dep't of Health & Mental Hygiene (listing the IDNYC Municipal ID, which can be obtained by presenting a consular identification card, as an acceptable form of identification for birth certificate requests), https://www1.nyc.gov/site/doh/services/birth-certificates.page [https://perma.cc/CW7G-E5VR]; THE PEW CHARITABLE TRUSTS, DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER'S LICENSES 16–19 (Aug. 2015), http://www.pewtrusts.org/~/media/assets/2015/08/deciding-who-drives.pdf [https://perma.cc/E8EL-Y7WM] ("Consular identification cards … are a common substitute [for proof of identity], accepted by all 11 jurisdictions issuing licenses to unauthorized immigrants.").

155. Defendants' Response to Plaintiffs' Emergency Application for Preliminary Injunction, *supra* note 92.

They have to take something. [The children] were born here. They are U.S. citizens."[156]

Advocacy lawyers should look to the more inclusive vital records policies in states like California, and even in more conservative Missouri. California borders Mexico, and it contains a large undocumented population. Yet California does not require a lawfully eligible applicant, like a parent or a legal guardian, to submit any form of government-issued identification when trying to obtain a certified birth certificate on behalf of its registrant.[157] Similarly, Missouri also allows self-attestation under penalty of perjury in place of other documents to prove one's identity when requesting a certified copy of a birth certificate.[158] Alternatively, several states, including Idaho and Utah, allow the use of foreign and consular identification, a step between the overly restrictive policies of Texas prior to the *Serna* settlement and California and Missouri's more permissive self-attestation standard.[159]

## IV.
## CONCLUSION

This article highlights the frontier lawsuit, *Serna v. Tex. Dep't of State Health Servs.*, which challenged the acceptable forms of identification that Texas required to issue to a certified copy of a birth certificate. The issues raised in *Serna* are not unique to Texas, however, as there are similar policies leading to inequitable and inconsistent access to vital records throughout the country. In most states, these policies jeopardize several constitutional rights of citizen children born to undocumented parents because state agencies have prevented this class of children from accessing government-issued proof of their identity. In order to prevent the deprivation of full citizenship rights to these children, advocates have many tools and strategies at their disposal to reform overly burdensome and discriminatory birth certificate application policies. Through thoughtful litigation and advocacy on behalf of these children and their parents,

156. Julián Aguilar, *Mexican Government: Denial of Birth Certificates Harms Children*, TEX. TRIB., (Aug. 25, 2015), http://www.texastribune.org/2015/08/25/mexican-government-denial-birth-certificates-could/ [https://perma.cc/7AYZ-EX65].

157. CAL. HEALTH & SAFETY CODE § 103526(a)(1) (West 2017) ("If a request for a certified copy of a birth … record is made in person, the official shall take a statement sworn under penalty of perjury that the requester is signing his or her own legal name and is an authorized person, and that official may then furnish a certified copy to the applicant.").

158. *See Application for a Vital Record*, Mo. Dep't Health & Senior Servs., http://health.mo.gov/data/vitalrecords/pdf/birthdeath.pdf [https://perma.cc/CX6Z-L7P5]; *see also Obtaining Certified Copies of Vital Records*, Mo. Dep't Health & Senior Servs., http://health.mo.gov/data/vitalrecords/applications.php [https://perma.cc/C7UX-JVUX]; *see also Obtaining Copies of Certified Vital Records*, Bureau of Vital Records, Mo. Dep't of Health & Senior Servs., http://health.mo.gov/data/vitalrecords/applications.php [https://perma.cc/3CVB-PJRH].

159. *See* Appendix, *supra* note 7.

advocates can work to ensure that children of immigrants have full access to their birthright and are not second-tier citizens.