

# **An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the *Matrícula Consular* in Texas's Birth Certificate Application Policy**

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*Recent changes in Texas's birth certificate application policy have made it nearly impossible for hundreds — and perhaps thousand — of undocumented immigrants to obtain birth certificates for their U.S.-born children. The Texas Department of State Health Services (DSHS) has implemented a policy banning state registrars from accepting the matrícula consular (matrícula) as an identifying document applicants may present as part of the state's birth certificate application process. Matrículas are consular identification cards issued by Mexican consulates to citizens of Mexico living outside of the country. They are widely-accepted as a reliable form of identification and are often the only identification available to undocumented immigrants. Without alternative forms of ID, undocumented parents cannot satisfy the policy's identification verification procedure and consequently cannot obtain birth certificates for their children.*

*Undocumented parents lacking birth certificates for their children cannot fully access their fundamental right to parenthood, which includes the right to make decisions on how best to raise and care for their children. Enrolling a child in schools and daycare and obtaining public benefits like Medicaid and Section 8 housing assistance all require presentation of that child's birth certificate. In addition, although the children affected by the*

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*changes are citizens by virtue of being born in the U.S., they cannot fully exercise their rights as citizens, including the right to travel interstate, to receive a public education as well as the right to work. Furthermore, the policy may, in some instances, have the effect of denaturalizing U.S.-born children, thereby depriving them of their statuses as U.S.-citizens.*

*This Note provides an Equal Protection analysis of Section 181, the provision of the Texas Administrative Code that codifies this new policy. Part I explains the recent changes in Texas' birth certificate application procedures. Part II provides an overview of the Equal Protection Clause. Parts III through V argue that the new Texas policy violates the Equal Protection Clause. This Note first argues that strict scrutiny is the appropriate standard of review in analyzing the constitutionality of the policy. It then argues that the policy fails to survive strict scrutiny review because it fails to further a compelling state interest, is underinclusive in its attempt to prevent fraud, and because less discriminatory alternatives can as effectively deter identity crimes and fraud.*

## I. RECENT CHANGES IN TEXAS'S BIRTH CERTIFICATE APPLICATION PROCEDURE

### A. SECTION 181 AND RECENT CHANGES IN POLICY

Under Texas law, parents seeking to obtain birth certificates for their newborns must comply with the rules and procedures established by the DSHS, the state agency statutorily empowered to “administer the registration of vital statistics.”<sup>1</sup> One crucial DSHS rule that applicants must comply with is 25 Texas Administrative Code § 181.28 (Section 181).<sup>2</sup> Section 181 mandates that in order for applicants to be “properly qualified” to receive birth certificates for their children, they “must present proof of identity acceptable to the State Registrar.”<sup>3</sup>

Section 181 sets forth an extensive list of acceptable forms of identification, divided into three categories — primary, secondary, and supporting.<sup>4</sup> Applicants become “properly qualified” by presenting the state registrar with (1) one form of primary identification,<sup>5</sup> (2) two forms of secondary identification,<sup>6</sup> or (3) one

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1. TEX. HEALTH & SAFETY CODE ANN. § 191.002 (West 2015).  
2. 25 TEX. ADMIN. CODE § 181.28 (2013).  
3. *Id.* § 181.28(i)(2).  
4. *Id.* § 181.28(i)(9).  
5. *Id.* § 181.28(i)(10)(A).  
6. *Id.* § 181.28(i)(11)(B)(i).

form of secondary identification, plus two forms of supporting identification.<sup>7</sup>

Acceptable forms of primary identification are current and valid documents issued by the federal or state governments, such as a driver's license or a United States Passport.<sup>8</sup> Some acceptable forms of secondary identification include signed Social Security cards, Medicaid and Medicare cards, and foreign passports accompanied by a visa issued by the Department of State.<sup>9</sup> Finally, supporting identification is described as “[o]ther records or documents that verify the applicant’s identity.”<sup>10</sup> DSHS has ultimate discretion in determining whether a supporting identification is acceptable or not.<sup>11</sup> Examples of acceptable supporting documents include “among other things, a recent utility bill, a current pay stub, a bank account statement, a public assistance letter, an official school transcript, a voter registration card, an automobile insurance card or title, and a social security letter.”<sup>12</sup> In total, there are forty-two forms of acceptable identification listed in Section 181.<sup>13</sup>

One form of identification not included on this list is the *matrícula consular*, photo identification cards issued by Mexican consulates to citizens of Mexico residing in the United States and other countries.<sup>14</sup> Prior to the enactment of Section 181 in 2013, DSHS accepted *matrículas* as sufficient identification for obtaining a birth certificate.<sup>15</sup> Beginning in 2013, however, the state reversed course and through “an aggressive campaign of audits, monitoring visits, and other communications with local birth certificate offices,” DSHS officials gave strict orders to registrars to

7. *Id.* § 181.28(i)(11)(B)(ii).

8. *Id.* § 181.28(i)(10)(D) (2013).

9. *Id.* § 181.28(i)(11)(D).

10. *Id.* § 181.28(i)(12).

11. *Id.* (“The examining or supervisory personnel may determine that a supporting identification document may meet the department’s requirements in establishing identity.”).

12. Decl. of Victor Farinelli, Def.’s Resp. to Pl.’s Emergency Appl. for Prelim. Inj. at \*2–3, *Serna v. Tex. Dep’t of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623 (W.D. Tex. Oct. 16, 2015) [hereinafter Farinelli Decl.].

13. *Id.* at 2.

14. See ANDORRA BRUNO & K. LARRY STORRS, CONG. RESEARCH SERV., RL32094, CONSULAR IDENTIFICATION CARDS: DOMESTIC AND FOREIGN POLICY IMPLICATIONS, THE MEXICAN CASE, AND RELATED LEGISLATION 2 (2005) [hereinafter CRS Report].

15. See Jonathan Blitzer, *The Front Line Against Birthright Citizenship*, THE NEW YORKER (Sept. 18, 2015), <http://www.newyorker.com/news/news-desk/the-rule-of-law-in-texas> [https://perma.cc/XZC6-LL94].

reject all consular identifications.<sup>16</sup> Later that year, without complying with normal rule-making procedure, DSHS codified the changes as Section 181, which effectively implemented a universal ban on the use of *matrículas* in the birth certificate application procedure.<sup>17</sup> In addition to the refusal to accept *matrículas*, the new policy also rejected foreign passports without visas, another ID form that is commonly accessible to undocumented immigrants.<sup>18</sup>

## B. POSSIBLE EXPLANATIONS FOR THE CHANGES IN POLICY

The proponents and opponents of Section 181 have put forward different explanations as to why *matrículas* have been excluded as an acceptable ID form. In justifying the promulgation of Section 181, DSHS officials relied heavily on the McCraw Report, an analysis of the reliability of *matrículas* presented by Steve McCraw, the then-Assistant Director of the FBI, before Congress in 2003.<sup>19</sup> These officials argue that *matrículas* are unsecure and that the tightening of birth certificate identification requirements since 2013 was motivated by concerns about the authenticity and reliability of source identifications used to obtain birth certificates.<sup>20</sup> Marc Connelly, the then-Deputy General Counsel of DSHS, explained that in promulgating the new policy, DSHS was simply mirroring the approaches some federal agencies and states have taken in resolving the uncertainty over the

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16. See Fourth Am. Compl. at ¶¶ 62, 66, 74–75, *Serna*, 2015 WL 6118623; see also Blitzer, *supra* note 15.

17. See Fourth Am. Compl. at ¶¶ 62 n.2, 67.

18. First Compl. at ¶¶ 43–50, *Serna*, 2015 WL 6118623 (“Defendants have provided no reasonable alternative means for the Plaintiffs to obtain the birth certificates, such as presentation of a parental passport without a U.S. visa . . .”).

19. See *Consular ID Cards in a Post 9/11 World: Hearing Before the House Judiciary Subcomm. on Immigration, Border Security, and Claims on Consular ID Cards*, 108th Cong. (2003) [hereinafter McCraw Report] (statement of Steve McCraw, Assistant Director of the Office of Intelligence, FBI), available at <https://www2.fbi.gov/congress/congress03/mccraw062603.htm> [<https://perma.cc/472X-AP72>]

20. See Decl. of Geraldine R. Harris, Def.’s Resp. to Pl.’s Emergency Appl. for Prelim. Inj. at 1–3, *Serna v. Tex. Dep’t of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623, (W.D. Tex. Oct. 16, 2015) [hereinafter Harris Decl.] (Harris explained that the *matrícula consular* is not a reliable form of identification. Ms. Harris discussed the McCraw Report’s findings that Mexican consulates in the United States do not maintain a centralized database that keeps track of persons who have been issued *matrículas*, resulting in incidences where one person has been found with several *matrículas*, all in different names, but with photos of the same person. Further, she stated that the McCraw Report revealed that Mexican consulates did not verify the authenticity of the source documents presented by persons seeking *matrículas*.)

*matriculas*' reliability.<sup>21</sup> Specifically, Mr. Connelly stated that various federal agencies and states have studied the reliability of the card and their findings of unreliability have led them to reject it as an ID form.<sup>22</sup>

In addition, Victor Farinelli, the then-Field Services Communications Manager for DSHS, explained that the ban was implemented solely for security purposes and in response to a Rider 72 Workgroup recommendation.<sup>23</sup> According to Mr. Farinelli, the Rider 72 Workgroup was commissioned by the 2011 State Legislature to develop recommendations for improving the security of the state's birth registration system.<sup>24</sup> Members of the workgroup included staff members of various local, state, and federal agencies including the U.S. Department of Homeland Security, the U.S. Department of State, and the local registrars.<sup>25</sup> Allegedly, Rider 72 Workgroup recommended the strengthening of the security of the birth certificate application process by reducing the number of acceptable ID forms.<sup>26</sup> Accordingly, DSHS promulgated Section 181 to implement this objective.<sup>27</sup>

Lawyers representing immigrants affected by Section 181 claim that the new policy is rooted in anti-immigrant sentiments and represents opposition to attempts by the Obama Administration to provide immigration relief for undocumented families, especially those with U.S.-born children.<sup>28</sup> Specifically, they claim that Section 181 is an effort to oppose two of President Obama's policies. The first is the July 2014 infusion of federal funding to support unaccompanied children from Central America crossing the border into Texas.<sup>29</sup> The second is President Obama's executive order on immigration announced on November 2014, which implemented Deferred Action for Parents of Americans (DAPA), a program aimed at protecting law-abiding immigrant parents of

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21. See Decl. of Marc Allen Connelly, Def.'s Resp. to Pl.'s Emergency Appl. for Prelim. Inj., *Serna*, 2015 WL 6118623 [hereinafter Connelly Decl.].

22. *Id.*

23. See Farinelli Decl., *supra* note 12.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See Fourth Am. Compl., *supra* note 16, at 13.

29. See Michael D. Shear & Jeremy W. Peters, *Obama Asks for \$3.7 Billion to Aid Border*, N.Y. TIMES (July 8, 2014), <http://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html> [https://perma.cc/3WD2-HMM3].

American children from prosecution and deportation.<sup>30</sup> To become eligible for relief under DAPA, a parent must prove that her child is a citizen, which requires her to possess the child's birth certificate.<sup>31</sup>

These lawyers emphasize that the state's refusal to accept *matrículas* coincides with Texan leaders' other tough-on-immigration positions. For instance, they note that in 2014, Texas led twenty-five other states in a lawsuit against the federal government in an attempt to dismantle DAPA.<sup>32</sup> Similarly, earlier that year, in response to the increased number of unaccompanied minors crossing into the state, Texas legislators and Governor Perry launched "Operation Strong Safety," a \$1.3 million-per-week effort to strengthen patrol of the Texas-Mexico border.<sup>33</sup> As a result of the suggestive timing, the lawyers suspect that Section 181, like these other contemporaneous anti-immigrant efforts, is a political backlash to Obama's policies. Thus, plaintiffs claim that the policy is not actually aimed at preventing fraud or making the birth certificate application process more secure, but rather at making it harder for undocumented immigrants to live in Texas. Furthermore, immigrant plaintiffs believe that the policy is promulgated with the intent of preventing undocumented immigrants from obtaining their children's birth certificates and acquiring citizenship through their children.<sup>34</sup> Allegedly, registrar employees<sup>35</sup> and DSHS officials have admitted to this purpose.<sup>36</sup>

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30. Memorandum of Jeh Charles Johnson, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/BJ33-Y4LG>]).

31. Blitzer, *supra* note 15.

32. *Id.*

33. See Julián Aguilar, *DPS Addresses New Border Operation*, TEX. TRIB. (June 19, 2014), <https://www.texastribune.org/2014/06/19/states-leadership-instructs-dps-increase-patrols-b/> [<https://perma.cc/ZM4X-8WZX>]. (The Texas Department of Public Safety justified the policy as a tool to "combat the ruthless Mexican cartels who are preying upon our communities and who continue to commit heinous and unimaginable crimes. . .").

34. See Fourth Am. Compl., *supra* note 16, at 16.

35. See 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> [<https://perma.cc/69WG-8JDC>], ("One couple who were [sic] denied a birth certificate for their 6-month-old daughter say in court documents that they were told by a McAllen official that the requirements became more strict [sic] to prevent illegal immigrants from obtaining legal status through their American-born children.").

36. Blitzer, *supra* note 15.

### C. IMPACT OF SECTION 181 ON UNDOCUMENTED PARENTS AND THEIR CHILDREN

Despite the controversy surrounding Section 181's underlying motivation, both sides acknowledge that the policy has erected significant barriers for undocumented immigrants seeking to obtain birth certificates for their newborns.<sup>37</sup> The acceptable primary identification documents enumerated in Section 181 will almost never be available to undocumented persons because proof of legal status is universally required for obtaining federal- and state-issued identification.<sup>38</sup> Furthermore, undocumented immigrants generally also do not have access to secondary documents, like national or electoral identification cards.<sup>39</sup> Many immigrants leave Mexico or Central America as minors before they ever obtain these forms of identification.<sup>40</sup> In addition, many lose their possessions en route to the U.S. or face problems of expiration and theft upon arrival.<sup>41</sup> Thus for many years, *matrículas* were the only ID option available to undocumented immigrants seeking to satisfy the identification requirement and obtain birth certificates for their children.<sup>42</sup> However, with the prohibition of *matrículas* as acceptable ID, scores of parents from Mexico and Central America have been denied birth certificates for their Texas-born children.<sup>43</sup>

The denial of birth certificates has resulted in serious consequences for undocumented parents and their citizen children. Without their children's birth certificate, many parents have faced difficulty caring for their children because they cannot access public benefits, such as Medicaid and Section 8 welfare, a federal program that provides rental assistance to low-income

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37. See Def.'s Resp. to Pl.'s Emergency Appl. for Prelim. Inj. at 2–3, *Serna v. Tex. Dep't of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623 (W.D. Tex. Oct. 16, 2015) (“The state does not challenge the impact the policy has had on undocumented parents’ access to their children’s birth certificates.”).

38. See Dean W. Davis, *The Best of Both Worlds: Finding Middle Ground in the Heated Debate Concerning Issuing Driver’s Licenses to Undocumented Immigrants in Illinois*, 38 S. ILL. U. L.J. 93, 102 (2013) (explaining that in 2013, only New Mexico and Washington State issued drivers’ licenses to undocumented immigrants that may be used for identification purposes).

39. See Pl.’s Emergency Appl. for Prelim. Inj. at 2–3, *Serna*, 2015 WL 6118623.

40. *Id.*

41. *Id.* at 3.

42. *Id.*

43. First Compl., *supra* note 18, ¶ 27.

families.<sup>44</sup> In addition, parents are often required to present their children's birth certificates before their newborns can be baptized and as a condition for enrolling them in daycare and schools.<sup>45</sup> Furthermore, families have been torn apart when children who have traveled out of the country without a birth certificate cannot return to the United States.<sup>46</sup> With no proof of parent-child relationship or their children's citizenship, some parents are deterred from domestic travels because of the prospect of being separated from their children with no certainty of ever reuniting with them.<sup>47</sup> Others fear the possibility that if their children are deported with them, the children will face severe difficulties proving and preserving their citizenship status.<sup>48</sup>

#### D. THE LITIGATION

In May 2015, in response to the promulgation of Section 181, over two dozen affected parents brought suit in federal court seeking declaratory and injunctive relief.<sup>49</sup> The plaintiffs sued DSHS under 28 U.S.C. § 1983, claiming that the policy was unconstitutional under the Equal Protection and Supremacy Clauses.<sup>50</sup>

In August 2015, plaintiffs moved for a preliminary injunction to enjoin the enforcement of the policy, in an attempt to prevent ongoing irreparable harm from occurring before the court ruled

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44. See Blitzer, *supra* note 15; see also First Compl., *supra* note 18, at ¶¶ 55, 74, 78, 118; Fernandez, *supra* note 35.

45. *Id.*

46. See Pl.'s Emergency Appl. for Prelim. Inj., *supra* note 39, at 4 (“[A plaintiff parent’s son] is currently with his father in a very dangerous part of Mexico, where the drug war is ongoing. A child was recently killed near the school there. Because [the child] has no birth certificate, [plaintiff parent] has no way to bring him safely to his own country, the United States.”).

47. *Id.* at 4 (“Given the heightened security and militarization efforts in the Rio Grande Valley, the Plaintiffs may be stopped at any time by U.S. Border Patrol, ICE, and/or police officers who can and have challenged the Plaintiff parents about their relationship to their children. This could result in the wrongful and highly traumatic separation of the child from his or her parents. . . . The Plaintiff children cannot travel safely because of their lack of a birth certificate. They have no evidence of the parent-child relationship or their citizenship.”).

48. *Id.* at 9 (“Defendants have denied U.S. citizen children the single most important state document [with] which they may prove their place of birth. This obstructs their right to citizenship . . . Plaintiff children, if removed with their parents, will face serious problems in preserving their right to citizenship.”).

49. See First Compl., *supra* note 18, at ¶ 3.

50. See First Compl., *supra* note 18, at ¶¶ 3, 110, 126, 139.



on the merits of the case.<sup>51</sup> In October of that year, U.S. District Judge Robert Pitman denied plaintiff's preliminary injunction motion after finding that the plaintiffs failed to meet the high evidentiary burden of establishing a substantial likelihood of success on the merits.<sup>52</sup> The court noted that the determination of likelihood of success in this case was not solely a question of law, but rather a mixed question of law and fact.<sup>53</sup> Accordingly, Judge Pitman concluded that while the legal landscape favored the plaintiffs and strict scrutiny was the appropriate standard for reviewing the policy's constitutionality, the court did not have sufficient factual development at such an early stage of litigation to conclude that there was a substantial likelihood that the policy would fail to survive strict scrutiny review.<sup>54</sup>

In July 2016, DSHS and the plaintiffs entered a settlement agreement.<sup>55</sup> Pursuant to the agreement, Texas agreed to clarify and expand the types of acceptable secondary forms of identification so as to enable undocumented immigrants to prove their identity and secure birth certificates for their children.<sup>56</sup> Judge Pitman agreed to a monitoring period of nine months to ensure the state's compliance.<sup>57</sup> If the parties fail to abide by the terms of the settlement agreement, litigation on Section 181's constitutionality will likely resume.

#### E. PURPOSE AND OVERVIEW OF NOTE

DSHS's policy of banning *matrículas* has resulted in extreme hardships for undocumented parents and their children. If Texas fails to change its policy and litigation resumes, this Note argues that the policy violates the Equal Protection Clause and should therefore be struck down.

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51. See Pl.'s Emergency Appl. for Prelim. Inj., *supra* note 39 (Plaintiffs sought an injunction requiring the state to "determine at least two forms of identification [that are] reasonably and actually accessible to undocumented immigrant parents of Texas-born children.").

52. *Serna v. Tex. Dep't of State Health Servs.*, Vital Statistics Unit, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*12 (W.D. Tex. Oct. 16, 2015).

53. *Id.* at \*8.

54. *Id.* at \*12.

55. See Julia Preston, *Lawsuit Forces Texas to Make it Easier for Immigrants to Get Birth Certificates for Children*, N.Y. TIMES (July 24, 2016), <http://www.nytimes.com/2016/07/25/us/lawsuit-texas-immigrants-birth-certificates.html> [https://perma.cc/25HJ-ZETG].

56. *Id.*

57. *Id.*

Part II provides a brief explanation of how the Equal Protection Clause is used to challenge government policies. Parts III through V argue that the DSHS's birth certificate ID policy violates the Equal Protection Clause. These parts explain that strict scrutiny is the appropriate standard for reviewing the constitutionality of Section 181, and that the policy is unconstitutional because it cannot survive strict scrutiny review; Section 181 fails to further a compelling state interest, is underinclusive in its attempt to regulate fraud, and less discriminatory alternatives exist that can as effectively ensure a secure birth certificate application process.

## II. OVERVIEW OF THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>58</sup> Litigants can use the Equal Protection Clause to challenge state and local government actions and policies in two main ways. First, under classification analysis, litigants can challenge a law or policy that discriminates against individuals because of their membership in a “suspect” or “quasi-suspect” class.<sup>59</sup> Second, under fundamental rights analysis, individuals can challenge government actions that unequally burden a group’s exercise of a fundamental right.<sup>60</sup>

Under the classification analysis, determining whether a law violates the Equal Protection Clause requires determining the appropriate level of scrutiny, a factor that is contingent on how the government draws its classifications.<sup>61</sup> Classifications based on a “suspect class,” such as race or national origin, are subject to strict scrutiny.<sup>62</sup> Under strict scrutiny, a discriminatory classifi-

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58. U.S. CONST. amend. XIV, § 1.

59. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 691 (4th ed. 2011) (“Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics, such as race, gender, age, disability or other traits. Sometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right.”).

60. *Id.*

61. *Id.* at 687 (“The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.”).

62. *Id.* at 688 (“The Court has emphasized that immutable characteristics such as race, national origin, gender, and the marital status of one’s parents warrant heightened

cation must be narrowly tailored to serve a compelling state interest.<sup>63</sup> Alternatively, for classifications based on “quasi-suspect” classes, such as gender, intermediate scrutiny is used.<sup>64</sup> To survive intermediate scrutiny, a court must find the government objective important, and the policy must have a “substantial relationship” to the end being sought.<sup>65</sup> For both strict and intermediate scrutiny, the burden of proof is on the government to justify its classification.<sup>66</sup> Lastly, classifications that do not trigger strict or intermediary scrutiny, such as economic classifications, are analyzed under rational basis review.<sup>67</sup> Under this level of scrutiny, a law is upheld so long as the policy is rationally related to a legitimate government purpose, and the burden of proof is on the challenger.<sup>68</sup>

Under the fundamental right analysis,<sup>69</sup> whether a law violates the Equal Protection Clause also depends upon the level of scrutiny, which is contingent upon the nature of the right infringed.<sup>70</sup> If the right infringed is a fundamental right, then strict scrutiny applies.<sup>71</sup> However, if a burdened right is not a fundamental right, then the court will use rational basis review.<sup>72</sup>

The Supreme Court held in *Plyler v. Doe* that undocumented immigrants are protected under the Equal Protection Clause, stating:

Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have

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scrutiny. The notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.”).

63. *Id.* at 690.

64. *Id.* at 687.

65. *See id.* at 688.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 691–92. (“The use of equal protection to safeguard these fundamental rights was, in part, based on the Supreme Court’s desire to avoid substantive due process, which had all of the negative connotations of the *Lochner* era. However, the effect is the same whether the right is deemed fundamental under the equal protection clause or under the due process clause: Government infringements are subjected to strict scrutiny. Correspondingly, if a right is not fundamental, then only rational basis review is used for claims concerning it under both equal protection and due process.”).

70. *Id.*

71. *Id.* at 691–92.

72. *Id.*

long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.<sup>73</sup>

Accordingly, both undocumented parents and their citizen children are protected by the Equal Protection Clause from unconstitutional state actions. Thus, they may use the Clause as a sword to challenge state laws that either draw discriminatory classifications or infringe upon their fundamental rights.

### III. STRICT SCRUTINY AS THE APPROPRIATE STANDARD OF REVIEW

As discussed in Part II, determining the level of scrutiny is the crucial first step in Equal Protection analysis. Part III argues that strict scrutiny is the appropriate standard of review. Section A examines the standard of review through the classification analysis. Section B then discusses the standard of review using the fundamental rights analysis. Under the classification analysis, Section A argues that if plaintiffs can meet the challenging burden of establishing discriminatory intent, a court should find that intermediate scrutiny applies. Under the fundamental rights analysis, Section B argues because the policy infringes upon plaintiff parents’ fundamental right to parenthood as well as the children’s fundamental right to travel interstate, strict scrutiny applies. Ultimately, because plaintiffs only need to prevail on a single theory to trigger strict scrutiny, this part concludes that strict scrutiny is the appropriate standard of review.

#### A. CLASSIFICATION ANALYSIS

The classification analysis begins by identifying how the government draws its classifications among similarly-situated individuals.<sup>74</sup> Here, DSHS’s policy has drawn classifications among individuals in two ways. One, DSHS’s policy has classified birth certificate applicants by their immigration status by creating a

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73. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citations omitted).

74. See Adam Bryan Wall, Note, *Justice For All? The Equal Protection Clause And Its Not-So-Equal Application to Legal Aliens*, 84 TUL. L. REV. 759, 762 (2010) (“When examining a law to determine if it violates the Equal Protection Clause, a court must make the following three determinations: (1) what the classification is, (2) the level of scrutiny to be applied, and (3) whether the government action meets the level of scrutiny.”) (footnotes omitted).

disparity between those who are legal residents and those who are undocumented.<sup>75</sup> The state has created this disparity by refusing to accept *matrículas* and foreign passports without visas, the only two forms of IDs that undocumented immigrants generally have access to.<sup>76</sup> Meanwhile, it accepts other types of identification that are arguably less secure than *matrículas*, but are generally inaccessible to undocumented immigrants, such as student identification cards and private employment IDs.<sup>77</sup> Thus, the policy has the discriminatory effect of disadvantaging undocumented immigrants as a class. Second, the policy classifies American children based on the documentation status of their parents. For the reasons explained above, the policy makes it significantly more difficult, if not impossible, for children born to undocumented parents to obtain birth certificates, as compared to children born to parents with legal status. Accordingly, the policy also has the effect of disadvantaging the children of undocumented immigrants as a class.

Even after classification has been identified, the Equal Protection Clause does not automatically apply. Instead, under classification analysis, the Equal Protection Clause applies only to situations of facial classification or intentional discrimination.<sup>78</sup> Because the policy does not classify facially, plaintiffs here would need to prove that the state promulgated the policy with the intent of burdening undocumented immigrants and their children, and DSHS's mere knowledge that Section 181 would have a discriminatory impact is insufficient to establish intent.<sup>79</sup> Usually, it is exceedingly difficult for plaintiffs to establish discriminatory intent for a facially-neutral law.<sup>80</sup> Plaintiffs can prove animus by

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75. Although an argument can be advanced that individuals with legal status are not "similarly-situated" to undocumented immigrants and therefore the Equal Protection Clause would not apply to classification based on documentation status, in *Plyler*, the Supreme Court implicitly rejected this argument by recognizing that government classification based on documentation status is cognizable under the Equal Protection Clause. *Plyler*, 407 U.S. 202 at 216–217. In *Plyler*, the Court invalidated a Texas statute which facially classified students based on their undocumented immigration status. *Id.* at 230. The statute withheld state funding from school districts for the education of children who were not "legally admitted" into the United States and authorized these districts to deny enrollment to these children. *Id.* at 206 n.2.

76. First Compl., *supra* note 18, ¶ 24–27.

77. See 25 TEX. ADMIN. CODE § 181.28 (2013).

78. See LEONORA LAPIDUS, EMILY J. MARTIN, & NAMITA LUTHRA, *THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN'S RIGHTS* 13 (4th ed. 2009).

79. *Id.* at 3.

80. *Id.*

demonstrating that the law's effect is so discriminatory so as to allow no other explanation other than that the law was adopted for impermissible purposes,<sup>81</sup> through a history of discriminatory government action,<sup>82</sup> through the sequences of events leading up to the state action,<sup>83</sup> or through legislative history.<sup>84</sup>

Admittedly, it will be difficult for the *Serna* plaintiffs to establish the requisite discriminatory intent. Aside from the Rider 72 Workgroup Recommendation described in Mr. Farinelli's Declaration, Section 181's regulatory history is sparse.<sup>85</sup> Further, Texas has put forth some evidence demonstrating that the policy was enacted to ensure the reliability and authenticity of the source identifications used to obtain birth certificates.<sup>86</sup> While plaintiffs point to the state's other anti-immigration policies during the period of Section 181's promulgation as circumstantial evidence of Texas's discriminatory intent,<sup>87</sup> without more, it may not be sufficient to prove that DSHS acted with animus.<sup>88</sup>

If, however, plaintiffs can muster the evidence needed to meet this high hurdle, then plaintiffs can proceed to the second step of the classification analysis, which is determining the level of scrutiny to be applied.<sup>89</sup> Assuming plaintiffs succeed in establishing discriminatory intent, they have a viable argument that intermediate scrutiny applies.

Under the classification analysis, heightened scrutiny is reserved for distinction on the basis of a "suspect" class.<sup>90</sup> "Suspect" classifications are typically classifications based upon immutable characteristics over which a person has no control over and cannot change, such as one's race, ethnicity, skin color, or national origin.<sup>91</sup> In *Plyler v. Doe*, the Supreme Court concluded that un-

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81. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

82. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

83. *Id.*

84. *Id.* at 268.

85. See *supra* notes 23–27 and accompanying text.

86. See *supra* notes 20–27 and accompanying text.

87. See *supra* notes 31–36 and accompanying text.

88. *But see supra* notes 82–83 and accompanying text.

89. See Wall, *supra* note 74, at 762.

90. See *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982).

91. *Id.* at 216 n.14 ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggest the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."). However, immutability is not dispositive in the Court's finding of "suspect" classification and the Court has designated features "suspect" even when the classified traits may ultimately change. See, e.g.,

documented alien status is not an “absolutely immutable characteristic,” but instead “the product of conscious, indeed, unlawful, action.”<sup>92</sup> Thus, the Court acknowledged that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”<sup>93</sup> As a result, lower courts have interpreted *Plyler* to stand for the proposition that classifications based on undocumented status only warrant rational basis review.<sup>94</sup> For instance, courts have only applied rational basis review when reviewing the constitutionality of state statutes that either prohibited undocumented immigrants from obtaining drivers’ licenses or issued a distinctive license reserved only for undocumented applicants.<sup>95</sup> Despite courts’ traditional reliance on rational basis review in assessing the constitutionality of government classification on the basis of documentation status, the Supreme Court departed from this tradition in *Plyler v. Doe* by applying intermediate scrutiny to invalidate a Texas law that provided free public education for children with legal status, but required undocumented children to pay “full tuition fee” to receive the same schooling.<sup>96</sup>

The *Plyler* Court announced two central reasons for departing from rational basis review. First, the Court was troubled by the injustice of punishing blameless children for their parents’ ac-

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Ingrid M. Löfgren, *The Role of Courts vis-à-vis Legislatures in the Same-Sex Marriage Context: Sexual Orientation as a Suspect Classification*, 9 U. MD. L.J. RACE, RELIG. GEND. & CLASS 213, 223–25 (2009) (Löfgren explains that the Court held that alienage and status as an illegitimate child are “suspect” classifications, despite the fact that attaining citizenship and the child’s parents marrying, respectively, would make these traits non-immutable. Löfgren also acknowledges that the Court has consistently prioritized two inquiries for establishing “suspect” status: “(1) whether the group singled out for unequal treatment has been subjected to long-standing and invidious discrimination; and (2) whether the group’s distinguishing characteristic bears any relation to the group members’ ability to perform or function in society.”).

92. *Plyler*, 457 U.S. at 220.

93. *Id.* at 223.

94. See Jason H. Lee, *Unlawful Status as a “Constitutional Irrelevancy”?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 9 (2008).

95. See, e.g., *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 544 (6th Cir. 2007) (explaining that *Plyler* held “that illegal aliens are not members of a suspect class and that state classifications against them are accordingly subject to the far-more-forgiving rational-basis standard of review”); *John Doe No. 1 v. Ga. Dep’t of Pub. Safety*, 147 F. Supp. 2d 1369, 1373 (N.D. Ga. 2001) (“Following *Plyler*, it is clear that illegal aliens are not a ‘suspect class’ that would subject the Georgia statute to strict scrutiny.”).

96. *Plyler*, 457 U.S. at 223–24 (1982) (“In determining the rationality of [the statute at issue], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute at issue] can hardly be considered rational unless it furthers some substantial goal of the State.”).

tions.<sup>97</sup> In employing a more exacting standard, the Supreme Court relied upon the rationale presented in illegitimacy cases like *Trimble v. Gordon* and *Weber v. Aetna Casualty & Surety*.<sup>98</sup> Government classifications in these cases, where state laws discriminate against non-marital children, trigger intermediate scrutiny because the Court acknowledges that holding children accountable for their parents' mistakes is contrary to the basic concepts of justice, where legal burdens bear a relationship to individual responsibility.<sup>99</sup> Thus, in finding support from the illegitimacy cases, the *Plyler* Court adopted intermediate scrutiny to compensate for the injustice of punishing children for their parents' choices.

Second, the *Plyler* Court's decision to adopt intermediate scrutiny was motivated by its concerns about the "countervailing costs" of denying children of undocumented immigrants basic education, including the social costs of creating "a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime."<sup>100</sup> Accordingly, in considering the troubling social ills that stem from the state law, the Court applied heightened scrutiny to offset these externalities.<sup>101</sup>

The two rationales articulated by the *Plyler* Court apply to the case at hand. Consequently, intermediate scrutiny applies. First, like the law in *Plyler*, DSHS's policy has the same effect of punishing innocent children for their parents' actions; the policy

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97. *Id.* at 226.

98. *Id.* at 219–20 (citing *Trimble v. Gordon*, 430 U.S. 762 (1977) (applying intermediate scrutiny in invalidating a state law discriminating against children born out-of-wedlock); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (same)).

99. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) ("Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother . . . [I]t is invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." (footnotes omitted)).

100. *Plyler*, 457 U.S. at 230; *See id.* at 223–224 ("[The statute in question] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

101. *Id.* at 223–224 ("In determining the rationality of [the state statute at issue], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the state statute] can hardly be considered rational unless it furthers some substantial goal of the State.").



denies children their birth certificates and, by extension, access to the many rights and benefits that flow from their citizenship, including education, public assistance, other forms of ID, the right to work, and the right to participate in religious activities.<sup>102</sup> Similar to *Plyler*, the affected children here are penalized and excluded from important opportunities “only because of a status resulting from the violation by parents or guardians of our immigration laws,” despite the fact that they can “affect neither their parents’ conduct nor their own status.”<sup>103</sup> The injustice is even greater in the case at hand than in *Plyler* because the children affected here are American-born citizens with even less of a connection to their parents’ actions than the undocumented students in *Plyler* who accompanied their parents to the United States.

Second, the countervailing social costs articulated in *Plyler* are also present in this case. Indeed, the social externalities presented in this case are even greater than those announced in *Plyler*. The state’s policy burdens our country with significant costs, including the potential deaths of citizen children who cannot travel back to the U.S. to escape dangerous environments,<sup>104</sup> the breaking up of families,<sup>105</sup> sick children with no access to healthcare,<sup>106</sup> increased crime,<sup>107</sup> and increased identity theft and fraud.<sup>108</sup> Furthermore, the policy has the potential to tarnish the relationship the United States possesses with some of its international allies. Specifically, Mexico will likely be offended by Texas’s treatment of its citizens and DSHS’s lack of reciprocity in respecting foreign identification.<sup>109</sup> Additionally, unlike the undocu-

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102. See *supra* notes 44–48.

103. *Plyler*, 457 U.S. at 238 (1982) (Powell, J., concurring) (internal quotation marks & citation omitted).

104. See *supra* note 46.

105. *Id.*

106. See *supra* notes 44.

107. *Plyler*, 457 U.S. at 241 (Powell, J., concurring) (noting that an uneducated “subclass of illiterate persons” adds to “problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime”).

108. Without accessible forms of documentation that can be used to obtain birth certificates, undocumented applicants may be forced to rely upon forged or fraudulently-obtained photo identification. See, e.g., Ian Long, “Have You Been Un-American?: Personal Identification and Americanizing the Noncitizen Self-Concept,” 81 TEMP. L. REV. 571, 585–86 (“Unfortunately, some undocumented immigrants are forced to obtain personal identification through less legitimate channels” due to the “lack of other more legitimate means of obtaining identification.”).

109. See Br. of the United Mexican States (“Mexico”) as Amicus Curiae in Supp. of Pls.’ Emergency Appl. for Prelim. Inj., 14–15, *Serna v. Tex. Dep’t of State Health Servs.*, Vital

mented immigrants in *Plyler*, the children affected in this case are American citizens. The state's policy is less justifiable when it has the effect of denying U.S. citizens the education and opportunities needed to become contributive members of our country.

*Plyler* was an exceptional departure from the Supreme Court's typical use of rational basis review in cases challenging state policies that classify on the basis of documentation status.<sup>110</sup> *Plyler*'s application of intermediate scrutiny has not yet been followed by the Supreme Court in subsequent cases.<sup>111</sup> Nevertheless, assuming plaintiffs can meet their heavy burden of establishing discriminatory intent, the factual similarities between this case and *Plyler*, the parallels in policy concerns raised by Section 181 and the law in *Plyler*, as well as the additional injustice Section 181 imposes upon American-born citizens are reasons justifying the application of *Plyler*'s intermediate scrutiny to this case.

## B. FUNDAMENTAL RIGHTS ANALYSIS

Section B examines three constitutional rights and Section 181's impact on these rights. Subsection 1 examines the fundamental right to parent one's child. Subsection 2 discusses the fundamental right to travel interstate. Subsection 3 explains the right to citizenship. Section B concludes that the new policy infringes upon plaintiff parents' fundamental right to parenthood and the children's fundamental right to travel interstate. It further notes that while the right to citizenship is not yet a well-defined fundamental right, a court that chooses to adopt Judge Pitman's preliminary injunction ruling as persuasive authority would also find that Section 181 infringes upon the children's fundamental right to citizenship. Ultimately, because a court only needs to find a single infringement of a fundamental right to

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Statistics Unit, No. 1-15-CV-446 RP, 2015 WL 6118623 (W.D. Tex. Oct. 16, 2015) ("Mexico and the United States have a unique, complex but fruitful bilateral relation . . . Mexico believes that the strong, vital relation with Texas and the unique-no other relation with the United States warrant respect for Mexican citizens and also for Mexico's official documents, issued with the highest standards of security.").

110. See Lee, *supra* note 94, at 8-9 (noting that *Plyler*'s holding that intermediate scrutiny applies "has been both criticized by scholars and interpreted narrowly by subsequent courts as limited to its specific facts (a state classification affecting illegal immigrant children and their access to public education). Indeed, no court has applied intermediate review to a classification of illegal immigrants except in *Plyler*." (footnotes omitted)).

111. *Id.*

trigger strict scrutiny review, Section B argues that strict scrutiny should apply.

### 1. *Fundamental Right to Parenthood*

Parents' rights to care for their children have been repeatedly recognized as a fundamental right by the Supreme Court. For instance, in 1923, in *Meyer v. Nebraska*, the Court declared a state law that prohibited teaching in any language other than English in public schools unconstitutional, after finding that parents possessed a fundamental liberty interest, protected by the Fourteenth Amendment's Due Process Clause, to "bring up [their] children," and to "control the education of their own [children]."<sup>112</sup> In more recent years, the Court held in *Wisconsin v. Yoder* that Amish parents had a constitutional right to exempt their children from a state law that mandated compulsory school attendance.<sup>113</sup> Additionally, in *Troxel*, the Court struck down a state law that allowed any person to petition for visitation rights and empowered state courts to grant visitation rights without parental approval.<sup>114</sup> Though the decision was a plurality, all members of the *Troxel* Court agreed that the right to parenthood is fundamental.<sup>115</sup>

As gleaned from precedent, the right to parenthood seeks to preserve the important and intimate relationship between parent and child.<sup>116</sup> The right to parenthood has been described as encompassing the right to direct the education and upbringing of children,<sup>117</sup> the right to impress upon those children religious beliefs and moral standards,<sup>118</sup> and the right to make decisions concerning the "care, custody, and control of the children."<sup>119</sup> Judge Pitman explained that the right to parenthood extends "to issues of food, shelter, medical care and religious participation by a parent on behalf of his or her child."<sup>120</sup>

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112. *Meyer v. Nebraska*, 262 U.S. 390 at 403.

113. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

114. *Troxel v. Granville*, 530 U.S. 57, 60–63 (2000).

115. *Id.*, *passim*.

116. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

117. *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

118. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

119. *Troxel*, 530 U.S. at 65–66.

120. *Serna v. Tex. Dep't of State Health Servs.*, 2015 WL 6118623, at \*6.

DSHS's policy has substantially infringed upon plaintiff parents' fundamental right to parenthood. Section 181 effectively strips away plaintiff parents' ability to make crucial decisions with respect to the upbringing and care of their children. For one, without birth certificates for their children, parents cannot provide their kids with the education they desire for them, since birth certificates are frequently required for daycare and school enrollment.<sup>121</sup> Second, without their children's birth certificates, many plaintiff parents cannot provide their children with basic necessities like food, shelter, and medical care because access to food stamps, Medicaid and Section 8 housing vouchers are foreclosed without their children's birth certificates.<sup>122</sup> Third, many parents cannot fully impress upon their children their desired religion or moral values; some plaintiff parents have been unable to baptize their children without their children's birth certificates, and consequently cannot introduce their children into their religion in their preferred way.<sup>123</sup> For many of these reasons, Judge Pitman held in the preliminary injunction opinion that Section 181's burden on plaintiff parents' right to parenthood triggers strict scrutiny review.<sup>124</sup>

Section 181 frustrates parental decision-making incidentally, and can therefore be distinguished from the state laws at issue in *Meyer*, *Yoder*, and *Troxel*, in which the challenged laws prohibited parental decision-making directly. The policies in these cases imposed express mandates on children and parents by requiring children to attend school, learn in English, and accept court-ordered visitation, while providing parents with no opportunity to depart from these requirements or effectuate their opposing will. Despite this distinction, the Supreme Court has held that heightened scrutiny is appropriate not only when a state law directly infringes upon fundamental rights, but also when a state law imposes a substantial indirect burden upon the exercise of a funda-

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121. See *supra* note 45.

122. See *supra* note 44; *Serna v. Tex. Dep't of State Health Servs.*, 2015 WL 6118623, at \*6

123. See *supra* note 45.

124. *Serna*, 2015 WL 6118623, at \*6-7 ("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. In addition, Plaintiffs have presented evidence that the lack of a birth certificate makes it impossible for at least some parents to have a child baptized . . . the Court has concluded the Plaintiffs have presented evidence showing that a lack of a birth certificate affects . . . the fundamental right of family integrity.").

mental right.<sup>125</sup> While the Court has not yet reviewed a case challenging state or local action that imposes indirect burdens on the right to parenthood, it has applied heightened scrutiny to laws that impose substantial indirect burdens on the exercise of other fundamental rights including the right to interstate travel,<sup>126</sup> the right to free exercise of religion,<sup>127</sup> the right to vote,<sup>128</sup> and the right to have an abortion.<sup>129</sup>

Preserving parents' ability to make educational and religious decisions on behalf of their children and their ability to make choices on how best to raise and care for their children is at the

125. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1232–33 (explaining that the Supreme Court has recognized, particularly in the areas of free speech, free exercise of religion, and privacy, that an incidental burden on a fundamental right “triggers some form of heightened scrutiny, if and only if, the burden is substantial”); see also *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (“It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence.” (internal quotation marks & citations omitted)).

126. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (The Supreme Court applied strict scrutiny in invalidating a state law that imposed a residency requirement as a prerequisite to welfare. The Court held that the law was unconstitutional because it deterred interstate travel even though the statute did not directly regulate interstate travel.), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); see also *Saenz v. Roe*, 526 U.S. 489 (1999) (same).

127. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (The Supreme Court applied strict scrutiny in holding that a South Carolina law impermissibly infringed upon petitioner’s free exercise of religion by conditioning her eligibility for unemployment benefits on her willingness to work on her Sabbath. The Court recognized that the denial of benefits constituted an indirect burden on her free exercise rights, because the policy had the incidental effect of pressuring her to abandon her religious practices. The Court explained “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” (internal quotation marks & citation omitted)); see also *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988) (“[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.”).

128. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 168 (noting that the Supreme Court applied strict scrutiny in reviewing laws that only indirectly burdened effect on the right to vote in *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989) and *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979)).

129. See Dorf, *supra* 125, at 1219–20 (“According to the pivotal three-Justice opinion in [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)], a law that has ‘the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus’ constitutes an undue (and therefore unconstitutional) burden on a woman’s right to decide whether to have an abortion. . . . [T]he *Casey* test states that the substantiality threshold applies to laws with the *purpose or effect* of burdening a right; Justices O’Connor, Kennedy, and Souter do not distinguish between direct and incidental burdens.” (emphases added) (footnote omitted)).

core of the fundamental right to parenthood.<sup>130</sup> Albeit indirect, Section 181's burden on plaintiff parents' ability to make these decisions for their children by foreclosing education, welfare, and religious opportunities is perceptible and substantial, as the discussion above and Judge Pitman's opinion make clear. Strict scrutiny should therefore apply.

## 2. *Fundamental Right to Interstate Travel*

Similar to the fundamental right to parenthood, Supreme Court jurisprudence has recognized the right to travel interstate as a fundamental right.<sup>131</sup> For instance, in *Shapiro*, the Court invalidated a state law aimed at deterring indigent out-of-staters from traveling into and residing in the state by denying welfare assistance to state residents who did not reside within the state for at least one year preceding their application for assistance.<sup>132</sup> Post-*Shapiro*, the Court has consistently applied strict scrutiny review to invalidate state laws on the grounds that the policies burdened the right to interstate travel.<sup>133</sup>

The Supreme Court has described the scope of this right as a broad privilege to enter and exit states at the individual's will. In modern jurisprudence, the Court explained that the right protects against three forms of policies: "[state law that] actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."<sup>134</sup> Importantly, the Court has stressed that the right even protects against state laws that indirectly burden the right to interstate travel.<sup>135</sup> Thus, regardless of whether a legislature intends to deter or penalize the right to interstate

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130. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923).

131. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

132. *Id.* at 631.

133. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Saenz v. Roe*, 526 U.S. 489 (1999). Although the Supreme Court's modern right to interstate travel jurisprudence mostly involves invalidating durational residency requirements, the right to travel has prevailed against state and federal laws that restrict freedom of interstate movement in other ways. For example, in *Crandall v. Nevada*, 73 U.S. 35 (1867), the Court held that a state may not impose a tax on residents who desire to leave the state or on nonresidents merely passing through. In *Edwards v. California*, 314 U.S. 160 (1941), the Court held that a state may not make it a crime to bring a nonresident indigent person into the state. See also *Kent v. Dulles*, 357 U.S. 116 (1958).

134. *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (internal quotation marks & citations omitted).

135. See *supra* note 126.

movement, strict scrutiny applies if the state law has such an effect.

DSHS's new policy infringes upon plaintiff children's fundamental right to interstate travel. Section 181 has the effect of both deterring and penalizing the children's exercise of their right to travel out of Texas. First, without a birth certificate and other forms of ID documenting the parent-child relationship, parents are deterred from traveling with their children outside of the state because of the prospect of being separated from their children.<sup>136</sup> These parents explain that there are various inland border patrol checkpoints surrounding Texas and express fear at the potential of losing their children when they are stopped by patrol officers and unable to produce proof of their parent-child relationship.<sup>137</sup> Second, even when children assume the risk of separation and choose to travel to another state, the policy burdens their ability to do so by foreclosing their ability to travel by airplanes and buses; birth certificates and other forms of identification that can only be obtained with a birth certificate (such as passports), are required for children to board domestic airlines.<sup>138</sup> Furthermore, major interstate bus transportation companies require a birth certificate or other proof of the parent-child relationship in order for a parent to pick up an unaccompanied child from a bus trip.<sup>139</sup>

Without providing a detailed analysis on the issue, Judge Pitman held that plaintiffs adequately established that the denial of birth certificates deprived citizen children of their fundamental right to travel interstate.<sup>140</sup> In light of the analysis above, Judge Pitman's ruling arrived at the right outcome and should therefore be adopted in subsequent litigation on this issue.

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136. See *supra* note 48.

137. See Pls.' Emergency Appl. for Prelim. Inj., *supra* note 39 at 4.

138. *Id.* at 10–11.

139. *Id.* at 10–11.

140. *Serna v. Tex. Dep't of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*5 (W.D. Tex. Oct. 16, 2015) (“[T]he 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, as well as deprivations of their right to free exercise of religion by way of baptism, and their right to travel.”).

### 3. *Right to Citizenship*

Unlike the rights to parenthood or interstate travel, the Supreme Court has yet to define the right to citizenship as a fundamental right. However, in a line of cases where the Court reviewed the constitutionality of federal denaturalization statutes, the Court declared the right to citizenship as constitutionally-rooted and one that the government has no power to strip away, absent the citizen's voluntary assent.<sup>141</sup>

Throughout this line of denaturalization cases, the Court continuously described a person's right to his or her U.S. citizenship status as among the most sacrosanct of rights. The Court portrayed it in such language as "a most precious of right"<sup>142</sup> and as "one of the most valuable rights in the world today."<sup>143</sup> Furthermore, in *Trop v. Dulles*, the Court described this right as fundamental.<sup>144</sup> This rhetoric demonstrates the Court's inclination to safeguard this right against governmental intrusion, and has led some scholars to conclude that it is sufficiently essential to be classified as fundamental.<sup>145</sup>

Because the Supreme Court has not elevated the right to citizenship as a fundamental right, it has not had opportunity to clarify what components of this right are fundamental. The right

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141. See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967). In *Afroyim*, the Supreme Court reviewed the constitutionality of a statute that denaturalized individuals for voting in foreign elections and for leaving the United States to avoid military service. The question at issue in the case was whether or not Congress can strip away a citizen's citizenship, absent his or her voluntary renouncement. In holding in the negative and consequently invalidating the statute at issue, the Court first acknowledged the right to citizenship as constitutionally-rooted in the Fourteenth Amendment. The Court further explained that the congressional authority to denaturalize a U.S. citizen absent his or her assent contravenes both the text and history of the Fourteenth Amendment. Accordingly, the Court concluded, citizens may not be stripped of their citizenship, without their voluntary assent. The one exception to the holdings announced in *Afroyim* is if a person engages in fraud or misrepresentation in the naturalization process. Later discovery of the fraud is grounds for nullification of the individual's grant of citizenship. See, e.g., *Fedorenko v. U.S.*, 449 U.S. 490 (U.S., 1981).

142. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963).

143. *Id.* at 160 (internal quotation marks & citation omitted).

144. See *Trop v. Dulles*, 356 U.S. 86, 92 (1958) ("[T]he deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however, reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship . . . I believe his fundamental right of citizenship is secure.").

145. See, e.g., T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1485 (1986) (suggesting that the right of citizenship could be a fundamental right protected by the Fifth Amendment Due Process Clause or implicit in the structure of the constitutional system) (footnotes omitted).



to citizenship is seemingly vast and amorphous, including not only one's citizenship status, but also the privileges and benefits that flow from it.<sup>146</sup> While the Court has yet to articulate the precise boundaries of this right,<sup>147</sup> the privileges encompassed within the right to citizenship are commonly understood by U.S. citizens to include the right to vote, the right to freedom of expression and worship, to run for elected office, to public education, to travel interstate, to work, among others.<sup>148</sup> Some of these rights have been recognized as fundamental,<sup>149</sup> while the Supreme Court has declared that other privileges, such as the right to education and the right to work, are not fundamental rights.<sup>150</sup> Accordingly, should the Supreme Court recognize the right to citizenship as fundamental, it would need to articulate, in addition to citizenship status, which benefits (if any) among the many that attend one's status, are protected from government intrusion, absent survival of strict scrutiny review.

Plaintiffs asserted that strict scrutiny is the appropriate standard of review because Section 181 infringes upon the children's right to citizenship in two main ways. First, they argued that the policy deprives them of their right to their citizenship status by effectively denaturalizing them. They explained that without birth certificates, the children are denied the most im-

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146. See Catherine Yonsoo Kim, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1466–67 (noting that the right to citizenship “provides the foundation from which other rights arises.”).

147. See generally Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 738–42 (2003) (Positing that the framers “viewed the meaning of federal citizenship very broadly” and explaining that there is considerable evidence that constitutional architects intended this right to encompass a “natural rights” conception of the right to citizenship, which includes, among other privileges, “the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil.”) (footnote omitted).

148. See, e.g., *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> [<https://perma.cc/PJ5J-QPB8>] (last visited: May 26, 2017).

149. See, e.g., *supra* note 127–128 (the right to vote and the right to free exercise of religion are fundamental rights).

150. See Michael Salerno, *Reading is Fundamental: Why The No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 510. (“There is no fundamental right to education explicitly guaranteed by the United States Constitution. Neither has the Supreme Court recognized an implied fundamental right to education in the Constitution.”); *Graham v. American Golf Corp.*, 418 Fed.Appx. 634, 635 at \*1 (C.A.9 (Cal.),2011) (finding that there is no fundamental right to work or to pursue a calling for purposes of the Equal Protection Clause) (internal quotes and citation omitted).

portant document by which they may prove their place of birth.<sup>151</sup> Accordingly, in the event they are deported or choose to travel abroad, they will face serious difficulties proving their citizenship status.<sup>152</sup> If they cannot prove their status, with no additional proof of citizenship in possession, the children will effectively be stripped of their U.S. citizenship. Second, plaintiffs explain that without birth certificates, the children cannot access many of the benefits that accompany their citizenship, including the rights to enroll in schools, to work, and to receive eligible government assistance.<sup>153</sup>

In light of the foregoing discussion, for plaintiffs to prevail on these two claims, a court must find that there is indeed a fundamental right to citizenship, and that this fundamental right encompasses both citizenship status as well as its accompanying privileges. In his preliminary injunction order, Judge Pitman ruled in plaintiffs' favor on both of these unresolved issues.<sup>154</sup> Further, he held that the deprivation of a birth certificate is a *per se* infringement of the fundamental right to citizenship, sufficient to trigger strict scrutiny, explaining that "[i]nsofar 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. Accordingly, a heightened level of scrutiny is appropriate. . . ."<sup>155</sup> Should a reviewing court adopt Judge Pitman's ruling on this issue, strict scrutiny would apply.

#### IV. COMPELLING STATE INTEREST

Part III of this Note presents a few reasons why strict scrutiny is the appropriate standard for reviewing Section 181's constitutionality. When a state law is reviewed under strict scrutiny, it will almost certainly be declared unconstitutional.<sup>156</sup> To survive strict scrutiny, the law must overcome two hurdles: first, it must

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151. See Pls.' Emergency Appl. for Prelim. Inj., *supra* note 40.

152. *Id.*

153. *Serna v. Tex. Dep't of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*1 (W.D. Tex. Oct. 16, 2015).

154. *Id.* at \*5.

155. *Id.* at \*7.

156. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) ("This exacting scrutiny 'has proven automatically fatal' in most cases." (citation omitted)).

further a compelling state interest and, second, it must be narrowly tailored in furthering that interest.<sup>157</sup> When strict scrutiny applies, the burden of proof is on the government.<sup>158</sup> The remaining parts of this Note analyze the constitutionality of Section 181 under these two components of strict scrutiny review.

Part IV discusses the likelihood that Section 181 can survive the compelling state interest test, which has two main parts. First, the court must find as a matter of law that the state's articulated interest is a compelling state interest.<sup>159</sup> Second, evidence must establish that the policy actually furthers this interest.<sup>160</sup> The state's failure to establish either component renders the policy unconstitutional.<sup>161</sup>

Section A discusses the first inquiry of the compelling state interest test and explores whether DSHS's stated rationale of preventing fraud is a compelling state interest. Section B then examines whether refusing to accept *matrículas* actually furthers DSHS's articulated goals. Part IV concludes that although a court will likely find fraud prevention to be a compelling state interest, it will nevertheless likely find that Section 181 cannot further this interest because it is wholly unclear that *matrículas* are linked to fraud or that the rejection of *matrículas* can effectively ensure a more secure birth certificate application process.

#### A. PREVENTING FRAUD AND IDENTITY CRIMES AS A COMPELLING STATE INTEREST

The determination of what is a compelling state interest is a question of law.<sup>162</sup> Though no test yet exists for determining when a legitimate state interest rises to the level of compelling,

157. See *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny — that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." (citation omitted)).

158. See CHEMERINSKY, *supra* note 59, at 688 and accompanying text.

159. *Brown*, 564 U.S. at 803 ("Filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." (footnote omitted)).

160. *Id.* at 799 ("The State must specifically identify an 'actual problem' in need of solving . . . and the [infringement of fundamental rights] must be actually necessary to the solution. . . . California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent games and harms to minors. . . . [A]mbiguous proof will not suffice.").

161. See generally *id.*

162. See generally David Charles Sobelsohn, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462 (1977).

the Supreme Court has provided some guidance. For instance, the Court has used a variety of formulations to describe compelling state interests, such as “interests of the highest order,”<sup>163</sup> an “overriding state interest,”<sup>164</sup> and “unusually important interest.”<sup>165</sup> The Court has also consistently recognized a few broad categories of goals as compelling,<sup>166</sup> including crime and fraud prevention.<sup>167</sup> For instance, in *Schall v. Martin*, the Court stated that “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted. We have stressed before that crime prevention is a ‘weighty social objective’ . . .”<sup>168</sup> This articulation was reaffirmed in *United States v. Salerno*.<sup>169</sup>

Against this backdrop, a court will likely find DSHS’s stated goal of preventing identity crimes and fraud a compelling state interest. Indeed, Judge Pitman explained in his injunction order that “a birth certificate is a vital and important document. As such, Texas has a clear interest in protecting access to that document.”<sup>170</sup>

#### B. THE TENUOUS RELATIONSHIP BETWEEN *MATRÍCULAS* AND FRAUD

In the second step of the compelling state interest test, the state must establish that the policy actually furthers its stated goal.<sup>171</sup> Accordingly, to prevail on this second step, the state will

163. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotation marks & citation omitted).

164. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (citation omitted).

165. *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O’Connor, J., dissenting).

166. *See Sobelsohn, supra* note 162, at 479–86.

167. *See, e.g., De Veau v. Braisted*, 363 U.S. 144, 155 (1960) (holding that a state law that banned the collection of union dues, if any officer for such union had been convicted of a felony, furthered the compelling state interest of “combatting local crime”).

168. *Schall v. Martin*, 467 U.S. 253, 264 (1984) (citations omitted).

169. *See United States v. Salerno*, 481 U.S. 739, 749 (reaffirming that crime prevention is a compelling state interest, stating “[i]n *Schall* . . . we recognized the strength of the State’s interest in preventing juvenile crime. This general concern with the crime prevention is no less compelling when the suspects are adults.”).

170. *Serna v. Tex. Dep’t of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*11 (W.D. Tex. Oct. 16, 2015).

171. In *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, (2011), the Supreme Court held that a California law that prohibited the sale or rental of violent video games to minors failed to further a compelling state interest because the state failed to sufficiently prove that there was a causal link between children’s exposure to violent video games and harm to minors, or a link between the law’s restrictions and a benefit to parents who wished to restrict their children’s access to violent games, since there were other age-specific rating programs available to warn parents.

either need to prove that *matrículas* are linked to fraud or that the rejection of *matrículas* as part of the ID verification process can effectively ensure a safer application process.<sup>172</sup> This section argues that because DSHS is unlikely to meet its burden in proving either, Texas will be unable to prove that the policy furthers a compelling state interest.

Subsection 1 explains why the McCraw Report, DSHS's primary evidence on this issue, fails to establish that *matrículas* are linked to fraud. Subsection 2 then provides a case study of the acceptance of *matrículas* in the financial sector to further illustrate that the relationship between *matrículas* and fraud is tenuous at best. Subsection 3 argues why refusing to accept *matrículas*, the only ID form available to most undocumented immigrants, cannot effectively reduce fraud because of the important role it plays in fraud prevention.

#### 1. *The McCraw Report Cannot Establish a Link Between Matrículas and Fraud*

DSHS's primary evidence in support of their position that *matrículas* are linked to fraud is the McCraw Report.<sup>173</sup> Specifically, DSHS officials relied on the Report's articulation of the two principle ways in which *matrículas* perpetuate fraud.<sup>174</sup> First, the Report found that individuals were able to obtain *matrículas* from Mexican consulates using fake source documents, such as a fake Mexican birth certificate or Mexican ID card.<sup>175</sup> Second, it explained that *matrículas* card were easy to forge due to their

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172. *Id.* This Note assumes that the *matrículas* in circulation and used by undocumented immigrants today are those issued after the 2004 security upgrades discussed in *infra* Part VI.B.1. See, CRS Report, *supra* note 14, at 5 (Noting that *matrículas* are only valid for a five-year period and that as of the late-2000s, all old *matrículas* have been replaced by high-security cards.)

173. See Def.'s Resp. to Pls.' Emergency Appl. for Prelim. Inj., *supra* note 37, at 7, 9–10; Connelly Decl., *supra* note 21, at 2; Harris Decl., *supra* note 20, at 2.

174. *Id.*

175. See McCraw Report, *supra* note 19 (“Mexico issues the card to anyone who can produce a Mexican birth certificate and one other form of identity, including documents of very low reliability. . . . [I]n some locations, when an individual seeking a *Matrícula Consular* is unable to produce any documents whatsoever, he will still be issued a *Matrícula Consular* by the Mexican consular official if he fills out a questionnaire and satisfies the official [sic] that he is who he purports to be.”); see also Powerpoint on Consular ID Card presented by the Secretaria de Relaciones Exteriores, Consulate of Mexico at 5 [hereinafter Consulate Powerpoint] (Applicants applying for a *matrícula* must present a Mexican Birth Certificate, An official Mexican ID, Proof of address within the consular district, and a fee).

inadequate security features<sup>176</sup> and the large quantity of excess cards in circulation, attributable to the absence of a centralized database for tracking duplicate issuances.<sup>177</sup> With excess *matrículas* in circulation, more opportunities were available for tampering and forgeries.<sup>178</sup>

Almost a decade and half has passed since McCraw's statements were made, and if the findings contained in the report still held true today, then DSHS could prevail in establishing the *matrículas*' connection to fraud. However, since 2004, there have been significant security upgrades implemented to the card as well as its distribution procedures.<sup>179</sup> In taking into account these new features, potential risks of fraud posed by *matrícula* have been drastically minimized.<sup>180</sup>

An analysis of these new security features reveals that the *matrícula* is fully equipped to safeguard against the two forms of fraud risks identified in the McCraw Report. For one, it is now unlikely that individuals can obtain *matrículas* using fake or unreliable breeder documents. As of 2004, Mexican consulates gained access to centralized databases, which contain records of all Mexican passport holders and registered voters, and enable the consulates to scrutinize applicants' source documents against database information.<sup>181</sup> Moreover, the consulates have since adopted a robust policy of verifying applicants' identities and their source documents.<sup>182</sup> Indeed, these reforms were imple-

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176. See McCraw Report, *supra* note 19 ("In addition to being vulnerable to fraud, the *Matrícula Consular* is also vulnerable to forgery. . . . It is our estimate that more than 90 percent of *Matrícula Consular* cards now in circulation are earlier versions of the card, which are little more than simple laminated cards without any security features.").

177. *Id.* ("[The] Government of Mexico has no centralized database to coordinate the issuance of consular ID cards. This allows multiple cards to be issued under the same name, the same address, or with the same photograph.").

178. *Id.*

179. See John Coyle, *The Legality of Banking the Undocumented*, 22 GEO. IMMIGR. L.J. 21, 51 ("[A]s of January 2004, each *matrícula consular* issued by any Mexican consulate was enhanced with a number of new security features. . . . This means that a substantial proportion of cards now in circulation . . . contain security features significantly more robust than those described by McCraw in his testimony. The efforts by Mexico to create a more reliable and secure [consular identity card] for use by its nationals living in the United States call into question the continuing accuracy . . . [of the security concerns] articulated by McCraw, namely that the cards lack the necessary security features to be reliable forms of identification." (footnote omitted)).

180. See *id.*

181. *Id.*

182. Aff. of Carlos Gonzales Gutierrez, *Serna*, 2015 WL 6118623, at 3 [hereinafter Gutierrez Aff.] ("Mexican consulates issue the Consular ID after a rigorous process to confirm the identity and residence of the bearer."); see also SRE MATRÍCULA FACT SHEET

mented directly in response to the concerns articulated in the McCraw Report.<sup>183</sup> Similarly, since 2004, the cards have been made more forgery resistant.<sup>184</sup> They have become enhanced with a number of new features that make them difficult to forge,<sup>185</sup> and strict procedures have now been implemented to prevent duplicate issuances.<sup>186</sup> Additionally, commercially available document authentication systems are now available to verify a card's authenticity, which has the potential to deter the manufacture and use of forged *matrículas*.<sup>187</sup>

In sum, security enhancements adopted since 2004 impact the relevancy of the McCraw Report in two main ways: “first, [ ] a significant number of the concerns about the reliability of [*matrículas*] articulated by McCraw in June 2003 have been addressed, and, second, that those who continue[ ] to invoke McCraw’s testimony as proof of the unreliability of [*matrículas*] are relying on information that is largely outdated.”<sup>188</sup> Thus, unless DSHS can provide additional evidence establishing the card’s unreliability in spite of these new reforms, a court will likely find that DSHS cannot satisfy its burden of proving that its rejection of *matrículas* furthers the Department’s stated goals.<sup>189</sup>

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1–2 [hereinafter, SRE Fact Sheet], available at [http://agendaquick.hhoh.org/docs/2014/PS/20140505\\_842/2359\\_Matricula%20Consular%20Information.pdf](http://agendaquick.hhoh.org/docs/2014/PS/20140505_842/2359_Matricula%20Consular%20Information.pdf) [<https://perma.cc/8L7S-ZYAY>] (describing how the Mexican consulates employ a five-step process for verifying applicants’ identities before issuing *matrículas*).

183. Coyle, *supra* note 179, at 51.

184. See Consulate Powerpoint, *supra* note 175 (indicating that a consular ID is “extremely difficult to forge, due to its highly sophisticated security measures.”).

185. See Coyle, *supra* note 179, at 51; see also Gutierrez Aff., *supra* note 182, at 4 (describing new card features, including high quality print and micro text frames, text with different colors of ink, embedded identity data on a cryptographic chip, and laser engraved unique card number).

186. See BASIC FACTS ABOUT THE MATRÍCULA CONSULAR 2–3 (Dec. 2015) [hereinafter NILC Report], available at <https://www.nilc.org/wp-content/uploads/2015/11/Basic-Facts-about-the-Matricula-Consular.pdf> [<https://perma.cc/5WWV-MDX8>] (indicating that procedures now require information on newly issued *matrículas* to be entered into a database, enabling consulate staff to track whether a *matrícula* has already been issued to an applicant); see also SRE Fact Sheet, *supra* note 182, at 1–2 (“The system will let us know [if the applicant] has already been issued a *Matricula*, and if so, the previously captured photograph will appear, which avoids duplicity. The *Matricula* System has the capacity to keep a record of documents issued to each individual.”).

187. See NILC Report, *supra* note 186, at 2.

188. Coyle, *supra* note 179 at 53.

189. This author has diligently searched for modern reports and studies on the reliability of *matrículas*. She was unable to find a single meaningful report because most reports found were based on the McCraw Report and generated in the early- to mid-2000s.

## 2. *The Acceptance of Matrículas in the Banking Sector*

The use of *matrículas* in commercial banking since 2003 and the lack of an identifiable, corresponding increase in fraud indicate that the security upgrades are effective, further confirming that the link between *matrículas* and fraud is wholly speculative.

Commercial banks began accepting *matrículas* as acceptable identification with the passage of Section 326 of the USA PATRIOT Act, which directed the Treasury Department to promulgate regulations on acceptable identification that may be used to open bank accounts.<sup>190</sup> The Treasury Department's regulations became effective in June 2003 and it expressly included *matrículas* as an acceptable ID form.<sup>191</sup> In 2004, after some Members of Congress argued that the Department's regulations were effective and therefore amendments were unnecessary, Congress rejected an amendment aimed at discouraging the Department from its continued acceptance of *matrículas*.<sup>192</sup> Consequently, *matrículas* are accepted today by hundreds of financial institutions nationwide and banks have opened hundreds of thousands of accounts to individuals who have established their identities using *matrículas*.<sup>193</sup> Since the regulation's enactment over ten years ago, there has been no evidence establishing the link between the ubiquitous acceptance of *matrículas* in the banking sector and fraud, while commentators have suggested that this policy actually safeguards against crime.<sup>194</sup>

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190. CRS Report, *supra* note 14, at 3.

191. *Id.* at 3 (The Treasury Department wrote to Congress saying "the proposed regulations do not discourage bank acceptance of the 'matricula consular' identity card that is being issued by the Mexican government to immigrants." (internal quotation marks & footnote omitted)).

192. See CRS Report, *supra* note 14, at 12–13.

193. See Coyle, *supra* note 179, at 32–33 ("As of July 2004, the *matricula consular* was accepted as valid proof of identity for opening bank accounts by 178 financial institutions in the United States. By late 2006, this number had almost doubled to 350. The list of U.S. financial institutions that currently accept the card as a proof of identity includes Bank of America, Citibank, JPMorgan Chase, SunTrust, and Wells Fargo. As of June 2005, Wells Fargo opened 525,000 accounts to persons who proved their identity, at least in part, by means of a *matricula consular*." (footnotes omitted)).

194. See *id.* at 53 ("[A] compelling argument can be made that bringing undocumented immigrants into the mainstream actually operates to *enhance* national security. . . . [A]t least one official at the Treasury Department stated that, for purposes of fraud or money-laundering detection, the federal government would prefer to have as many people as possible active in the U.S. banking system, because this would allow their financial activities to be more closely monitored." (footnote omitted)); see also, CRS Report, *supra* note 14, at 6 (noting that "individuals who are able to deposit their money in banks do not have to carry around large amounts of cash or keep large sums in their homes and, thus, are less



The banking sector is not an exceptional case.<sup>195</sup> The *matrículas*' widespread, continued acceptance by sophisticated institutions with strong security interests is strong testament to the card's reliability, further revealing the difficulty DSHS will face in proving its connection to fraud.

### 3. *The Important Role Matrículas Play in Preventing Fraud*

In addition to establishing *matrículas* link to fraud, to survive the compelling state interest test, DSHS must also prove that Section 181 can effectively reduce fraud.<sup>196</sup> It is unlikely that the state can meet its burden of proof for this issue because *matrículas* play an important role in fraud prevention.

Studies have shown that when it comes to opportunities essential for life in America, such as driving and working, restrictive ID requirements that undocumented immigrants cannot satisfy through legitimate means counterproductively encourage these immigrants to access these opportunities through illegitimate methods, such as through the use of fake IDs. For instance, while federal immigration laws require those seeking employment to first establish work eligibility, many undocumented immigrants who do not have legitimate ID forms are not deterred from working, but instead rely on counterfeit IDs.<sup>197</sup> Similarly, in most states, undocumented immigrants do not possess valid ID

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likely to become crime victims"); see also Kevin R. Johnson, *Driver's License and Undocumented Immigrants: the Future of Civil Rights Law?*, 5 NEV. L. J. 213, 224 (noting that "[t]he lack of an identification makes criminal law enforcement, including that in connection with the 'war on terror', more, not less, difficult because millions of undocumented immigrants are unaccounted for in any official governmental record-keeping system" (footnote omitted)).

195. See CRS Report, *supra* note 14, at 2 (In 2004, "the *matrícula consular* [was] accepted as valid identification in 377 cities, 163 counties, and 33 states, as well as 178 financial institutions and 1,180 police departments in the United States. . . . It [was] also accepted by numerous telephone and utility companies, hospitals, and video stores, among other establishments."); see also NILC Report, *supra* note 186, at 2 (reporting that as of December 2015, *matrículas* may be used to obtain an Individual Taxpayer Identification Number to pay federal income taxes and that many state and local governments specifically accept *matrículas* for purposes such as obtaining a driver's license or interacting with law enforcement. As of August 2013, the Mexican Embassy has reported that more than 371 counties, 356 financial institutions, and 1,036 police departments accepted *matrículas* as a valid form of ID.).

196. See *supra* note 157.

197. See Long, *supra* note 108, at 585 (reporting that a twenty month INS study revealed that approximately 50,000 undocumented immigrants used as many as 78,000 fraudulent documents while attempting to acquire employment, including fake Social Security cards.).

with which to obtain drivers' licenses.<sup>198</sup> However, this has not prevented undocumented immigrants from driving; some individuals have obtained licenses using fake IDs, while others drive without a license at all.<sup>199</sup>

In light of these studies, the acceptance of *matrículas*, one of the only ID forms available to most undocumented immigrants, safeguards against the use of fake IDs. Accordingly, a rejection of *matrículas* will likely exacerbate the issues of fraud in the birth certificate application process and undermine DSHS's security goals. In considering this unintended consequence, it will be difficult for the state to prove that Section 181 can effectively further its articulated objective of controlling fraud .

## V. NARROWLY TAILORED

Even if a court finds that Section 181 survives the compelling state interest test, the policy must further be narrowly tailored to survive strict scrutiny.<sup>200</sup> The narrowly tailored test ensures that the government's infringement of fundamental right is necessary for the furtherance of a compelling state interest, and that its articulated compelling state interest is not a pretext for an impermissible purpose.<sup>201</sup> To survive the narrowly tailored test, Section 181 must satisfy two conditions. First, it cannot be underinclusive, that is, too narrow in scope to reasonably fulfill the government's purported interest.<sup>202</sup> Second, it cannot be overinclusive, which requires a finding that less discriminatory alternatives cannot as effectively advance the states' articulated goals.<sup>203</sup>

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198. See Davis, *supra* note 38.

199. See Alexander L. Mounts, *A Safer Nation?: How Driver's License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists*, 37 IND. L. REV. 247, 271 (2003).

200. *Serna v. Tex. Dep't of State Health Servs., Vital Statistics Unit*, No. 1-15-CV-446 RP, 2015 WL 6118623, at \*7 (W.D. Tex. Oct. 16, 2015) ("Under strict scrutiny, the challenged law must be narrowly tailored to be the least restrictive means of achieving a compelling government interest. A law is narrowly tailored if it actually advances the state's interest, does not sweep too broadly, does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of a constitutional right is the least-restrictive alternative." (internal quotation marks, alterations, and citations omitted)).

201. *Id.*

202. *Id.* at 7 ("Such a policy fails strict scrutiny because its under-inclusiveness raises the possibility that the government's stated interest is pretextual and that the policy is actually intended to serve another end." (citation omitted)).

203. CHEMERINSKY, *supra* note 59, at 687 ("Under strict scrutiny, a law is upheld if it is proved necessary to achieve a compelling government purpose. The government must

## A. UNDERINCLUSIVE

The starting point for the inquiry into Section 181's underinclusiveness is whether the forty-two identification forms accepted under the policy pose risks of fraud, but remain unregulated. If so, the state's policy fails strict scrutiny review, because its underinclusiveness raises the possibility that the government's stated goal is pretextual. In other words, if the state were truly concerned about the reliability of source IDs used to obtain birth certificates, it would have banned any and all forms of IDs that are linked to risks of fraud. Failing to regulate all unreliable identification would raise "serious doubts about whether the State is pursuing the interest it invokes,"<sup>204</sup> thereby establishing the inference that the policy is actually rooted in an improper motive, such as animus towards undocumented parents and their children.<sup>205</sup>

Section A argues that Texas's policy is underinclusive for failing to regulate the risks of identity crimes created by some of the other forms of ID accepted under Section 181. Subsection 1 analyzes the risks of fraud created by the global fake identification business. Subsection 2 examines the risks of fraud posed by certain out-of-state drivers' licenses.

1. *Risks of Fraud Posed by the Global Fake ID Business*

DSHS faces the risk that birth certificate applicants may present fake versions of the forty-two forms of identifications listed in Section 181. Because of the global fake ID business, fake versions of commonly-used ID forms such as passports, Social Security cards, and drivers' licenses are more attainable than ever before.<sup>206</sup> Hundreds of thousands of fake identification are circulated in the U.S.<sup>207</sup> and it is easy and relatively inexpensive to obtain a fake IDs.<sup>208</sup> Further, those who possess fake IDs are

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have a truly significant reason for discrimination, and that it cannot achieve its objective through any less discriminatory alternative.”)

204. See *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011).

205. See *supra* note 34.

206. See *Identity Crisis*, THE ECONOMIST (Aug. 11, 2012), <http://www.economist.com/node/21560244> [<https://perma.cc/BJ5H-YABQ>].

207. *Id.*

208. See *generally* DOCUMENT SECURITY ALLIANCE, IDENTITY DOCUMENT: THE CONTINUED AVAILABILITY OF FOREIGN SOURCED COUNTERFEIT IDENTITY DOCUMENTS ARE A THREAT TO OUR NATIONAL SECURITY.

able to use them to commit fraud and crimes in a number of ways, including to commit financial scams, to open up bank accounts under fake names, to board airplanes and access secure areas, as well as to obtain IDs like drivers' licenses.<sup>209</sup> Today, it is becoming increasingly difficult to prevent and control the issuance and use of fake IDs.<sup>210</sup>

While it is uncertain whether or not DSHS has implemented policies to detect counterfeit IDs, the general trend among states is that not enough is being done. Studies have found that many states provide little to no forensics document training to officials and that state officials are not equipped with card scanning technology.<sup>211</sup> Consequently, state officials are generally deficient at detecting fake IDs.<sup>212</sup> GAO investigators were able to use counterfeit out-of-state drivers' licenses and birth certificates to fraudulently obtain licenses in three states.<sup>213</sup>

Accordingly, the risks of fraud posed by the global fake ID industry are real and substantial. If DSHS's purported goal was truly to prevent those with counterfeit IDs from obtaining birth certificates, it should have taken further measures to regulate this risk. If DSHS cannot show that it has taken precautionary measures such as providing scanning technology and document forensics trainings to registrar officials, then a court should hold that Section 181 is underinclusive in its purported attempt to regulate fraud.

## 2. *Risks of Fraud Posed by Certain Out-of-State Drivers' Licenses*

In Washington and until recently in New Mexico, undocumented immigrants are able to legally obtain drivers' licenses using *matrículas*.<sup>214</sup> These licenses not only give holders driving privileges but they may also be used for identification purposes.

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209. *See id.* at 1–2.

210. *Fake Passports, Drivers Licenses, and Police Badges a Click Away*, KESSLER (Sept. 16, 2015), <https://investigation.com/2015/09/16/fake-passports-drivers-licenses-and-police-badges-a-click-away/> [<https://perma.cc/B8YA-DQB9>] (explaining that, despite attempts to make federal and state IDs more forgery-resistant, fake ID manufacturers have found ways to mimic security features)

211. *See supra* note 208 at 4.

212. *See id.*

213. *See id.*

214. *See* THE PEW CHARITABLE TRUSTS, DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER'S LICENSES 10 (2015) [hereinafter PEW STUDY].

es.<sup>215</sup> Furthermore, the licenses issued to undocumented immigrants in these states are indistinguishable from those issued to legal residents.<sup>216</sup> Accordingly, DSHS's failure to prohibit Washington and New Mexico drivers' licenses renders Section 181 underinclusive. If *matrículas* are unreliable, then the New Mexico and Washington drivers' licenses obtained using them are also unreliable. In other words, the license becomes tainted with the purported unreliability of its source ID.

From 2002 until recently, undocumented immigrants living in New Mexico were able to obtain drivers' licenses using *matrículas* and proof of in-state residency.<sup>217</sup> In March 2016, New Mexico enacted a new law prohibiting the issuance of drivers' licenses to undocumented immigrants.<sup>218</sup> Although the new law went into effect in November 2016, licenses issued prior to the new law's enactment were not immediately nullified, and residents have until 2020 to comply.<sup>219</sup> Thus, if an undocumented immigrant obtained a New Mexico driver's license with a *matrícula* not long before this new policy went into effect, the license could validly be used as an ID until 2020.<sup>220</sup> Similarly, in Washington undocumented immigrants can conveniently obtain licenses by satisfying the ID requirement with their *matrículas* and by verifying in-state residency.<sup>221</sup>

Today, there are perhaps thousands of undocumented immigrants who have obtained New Mexico or Washington drivers' licenses by using their *matrículas*.<sup>222</sup> The immigrant-friendly application processes have resulted in a surge in the number of out-of-state residents crossing into these states to obtain licens-

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215. See Davis, *supra* note 38.

216. *Id.*

217. *Id.* at 103–04.

218. See Jesse Moya & Deming Headlight, *Real ID requirements from DMV, USA TODAY* (Dec. 23, 2016), <http://www.demingheadlight.com/story/news/2016/12/23/real-id-requirements-dmv/95801912> [<https://perma.cc/7Z5L-9QVX>].

219. *Id.*

220. *Id.*

221. *Steps to getting your first driver license: Proof of identity*, WA. STATE DEPT OF LICENSING, <http://www.dol.wa.gov/driverslicense/idproof.html> [<https://perma.cc/P6XF-JF9C>] (last visited May 26, 2017) (explaining that applicants can satisfy the residency requirement without a Social Security Number by signing a declaration and providing documents showing their Washington addresses).

222. See PEW STUDY, *supra* note 214, at 5 (estimating that 70,000 undocumented immigrants possess New Mexico drivers' licenses and 230,000 possess Washington licenses).

es.<sup>223</sup> Thus, there is a real possibility undocumented individuals living in Texas possess these licenses and use them as Section 181 source documents. Accordingly, DSHS's failure to restrict these licenses render the policy underinclusive in its alleged attempt to regulate fraud.

## B. OVERINCLUSIVE

The second part of the narrowly tailored test is analyzing whether the law is overinclusive, which requires an inquiry into whether alternative policies exist that impose less harm on undocumented parents and their children, but are as effective at ensuring a secure birth certificate application procedure.

An observation of the birth certificate application ID verification procedures adopted by other states reveals that effective, realistic, and less discriminatory alternatives exist. As demonstrated by the security features implicit in these alternative policies, these other states share Texas's concerns in preventing fraud. Nevertheless, these alternative policies strike a better balance; they minimize the risk of fraud while simultaneously providing opportunities for individuals who do not possess conventional forms of ID to obtain birth certificates for their children. Accordingly, Section A concludes that Section 181 is overinclusive.

Subsection 1 provides an overview of the birth certificate application ID procedures adopted by nine other states with sizeable undocumented immigrant populations. Subsection 2 examines the alternative of limiting the acceptance of *matrículas* to those issued after 2004. Subsection 3 discusses the option of accepting *matrículas* when accompanied by a birth verification letter. Subsection 4 explores the policy of accepting *matrículas* when accompanied by the applicant's notarized sworn statement.

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223. See Lornet Turbull, *DOL Tightens Rules for New Driver's Licenses to Stop Fraud*, SEATTLE TIMES (Nov. 5, 2010), <http://www.seattletimes.com/seattle-news/dol-tightens-rules-for-new-drivers-licenses-to-stop-fraud/> [<https://perma.cc/A4MM-Z7ZP>](reporting that "officials say an alarming number of out-of-state residents without Social Security numbers have been obtaining licenses [in Washington] in recent years.").

### 1. *Birth Application Procedures Employed by Other States*

An examination of the birth certificate policies adopted the ten states with the largest undocumented immigrant populations, Section 181 has the most discriminatory impact on immigrants with limited access to IDs.<sup>224</sup> This study reveals that Texas is the only state that neither accepts *matrículas* nor foreign passports without visas — the only two forms of ID that are accessible for most undocumented individuals, and provides no alternative mechanism for individuals without IDs to verify their identities.

In the remaining nine states, many accept at least one form of ID that is available to undocumented individuals in its birth certificate application process. For instance, Florida,<sup>225</sup> New York,<sup>226</sup> New Jersey,<sup>227</sup> and North Carolina<sup>228</sup> accept foreign passports without visas. Georgia accepts both foreign passports without visas and consular IDs, including *matrículas*.<sup>229</sup> Illinois accepts *matrículas* and other consular IDs.<sup>230</sup> Furthermore, New Jer-

224. See Jeffrey S. Passel & D'Vera Cohn, *State Unauthorized Immigrant Populations*, PEW RESEARCH CTR. (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations> [https://perma.cc/C5NK-XCNT].

225. *Birth*, FLORIDAHEALTH, <http://www.floridahealth.gov/certificates/certificates/birth/> [https://perma.cc/Z84E-TH7M] (last visited May 27, 2017) (listing passports as acceptable ID without indicating a visa requirement).

226. *Order a Birth Certificate*, N.Y.C. DEP'T OF HEALTH, <http://www1.nyc.gov/site/doh/services/birth-certificates.page> [https://perma.cc/H95V-KDES] (last visited May 27, 2017) (describes listing foreign passports as acceptable ID (without indicating a visa requirement)); *Mail-in Application for Copy of Birth Certificate*, NEW YORK STATE DEP'T OF HEALTH, <http://www.ny.gov/sites/ny.gov/files/atoms/files/doh-4380.pdf> [https://perma.cc/AB8H-ZZ9T] (last visited May 27, 2017) (describes the instructions for obtaining birth certificates outside of the five boroughs, and lists foreign passports (with no visa requirement) and "other government issued photo-ID" as acceptable ID; alternatively, the applicant can satisfy the ID requirement by providing a copy of a utility bill and a letter from a government agency dated within the last 6 months, showing the applicant's name and address.).

227. *Getting Copies of Genealogical Records*, STATE OF N.J. DEP'T OF HEALTH, <http://www.state.nj.us/health/vital/order-vital/genealogical-records/> [https://perma.cc/C7GB-ZCCW] (last visited May 27, 2017) (undocumented immigrants can satisfy ID requirement by presenting two of the following: foreign passport, municipal ID, utility bill, and bank statements).

228. *FAQs: What is a certified copy of a certificate?*, N.C. DEP'T OF HEALTH & HUMAN SERVS., <http://vitalrecords.nc.gov/faqs.htm#idforms> [https://perma.cc/U9EH-AVZS] (last visited May 27, 2017) (listing passports or visas as acceptable IDs (emphasis added)).

229. *ROVER FAQs*, GA. TECH. AUTH., <http://gta.georgia.gov/rover-faqs#q6> (listing passports and consular IDs as acceptable IDs without indicating a visa requirement) [https://perma.cc/BBD2-3ZXL] (last visited May 27, 2017).

230. *Valid Government Issued Photo Identification*, ILL. DEP'T OF PUB. HEALTH, <http://www.idph.state.il.us/vitalrecords/Pages/vgipi.htm> [https://perma.cc/EHE6-5JBW] (last visited May 27, 2017). Illinois accepts *matrículas* issued after October 2006.

sey<sup>231</sup> and New York<sup>232</sup> accept municipal IDs, an ID form that certain towns and cities issue to their residents, including to undocumented individuals.<sup>233</sup> In addition, undocumented immigrants in North Carolina,<sup>234</sup> Illinois,<sup>235</sup> New Jersey,<sup>236</sup> and New York<sup>237</sup> can satisfy the ID requirements by presenting bank statements and utility bills, documents that are accessible for many undocumented immigrants.<sup>238</sup>

In some of these states, IDs are not required for applicants to obtain birth certificates because alternative identity verification procedures are available to individuals who do not possess IDs. For instance, in California<sup>239</sup> and Arizona,<sup>240</sup> applicants have the option of verifying identities with a notarized sworn statement. Additionally, Virginia accepts birth verification letters from the hospital in which the child was born as an alternative to its normal ID requirement.<sup>241</sup> To date, there have been no well-known reported instances of birth certificate fraud in these states,<sup>242</sup> indicating that less discriminatory policies exist.

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*Matriculas* issued before October 2006 are accepted only if accompanied with an additional form of ID, such as a utility bill.

231. See *supra* note 227.

232. See *supra* note 226.

233. See Silvia Mathema, *Providing Identification to Unauthorized Immigrants: The State and Local Landscape of Identification for Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Nov. 24, 2015), <https://www.americanprogress.org/issues/immigration/reports/2015/11/24/126082/providing-identification-to-unauthorized-immigrants/> [<https://perma.cc/9MXV-GYPY>].

234. *Supra* note 228.

235. *Supra* note 230.

236. *Supra* note 227.

237. *Supra* note 226.

238. See CRS Report, *supra* note 14.

239. See CAL. DEP'T OF PUB. HEALTH, HOW TO OBTAIN CERTIFIED COPIES OF BIRTH RECORDS 1 (2015).

240. See ARIZ. DEP'T OF HEALTH SERVS., BUREAU OF VITAL RECORDS REQUEST FOR COPY OF BIRTH CERTIFICATE 1 (2016), <http://www.azdhs.gov/documents/licensing/vital-records/application-certificate-birth.pdf> [<https://perma.cc/N373-RK9U>].

241. *ID Requirements*, VA. DEP'T OF HEALTH, <http://www.vdh.virginia.gov/vital-records/id-requirements> [<https://perma.cc/ZUE4-N9SU>] (last visited: May 26, 2017) (The website reads: "If you have none of the above identification and are requesting a birth certificate for your child, please provide a letter from the hospital (their letterhead) where the child was born along with a letter (their letterhead) from the health care provider who provided the mother prenatal care. The letter from the health care provider shall include the dates prenatal care began and ceased, name of the mother and the name, signature and title of the person preparing the letter.")

242. After a diligent search, the author could not find any reporting on this issue.



## 2. *Limiting Acceptance of Matrículas to Those Issued After the 2004 Upgrade*

As discussed in Part IV, DSHS's concerns about the reliability of *matrículas* are almost exclusively based on the analysis of the card's reliability described in the McCraw Report.<sup>243</sup> The McCraw Report was issued in 2003 and therefore cannot be relied on as an accurate representation of the security of *matrículas* issued after 2004.<sup>244</sup> Many of new features of the card were added directly in response to McCraw's concerns.<sup>245</sup> Accordingly, a less discriminatory alternative to a categorical refusal to accept all *matrículas* would be to reject only the *matrículas* issued prior to the 2004 security upgrades.<sup>246</sup>

Illinois has taken this approach and currently accepts *matrículas* issued after October 2006 as satisfactory proofs of identity.<sup>247</sup> Applicants may also use *matrículas* issued before October 2006, so long as they are submitted with an additional form of ID which may include credit card statements, bank statements, and utility bills<sup>248</sup> — documents that are generally available to undocumented immigrants. This policy enables undocumented parents to satisfy the identification requirement and obtain birth certificates for their children, while closely targeting the security risks identified in the McCraw Report.

## 3. *The Acceptance of Matrículas Paired with Birth Verification Letters*

In Virginia, one can use a *matrícula* to satisfy the birth certificate ID requirement as long as the *matrícula* is supplemented with a birth verification letter from the hospital in which the child was born.<sup>249</sup> If adopted in Texas, this alternative procedure would reduce the risk of fraud by ensuring that the applicant is the mother or father of the newborn child and therefore a

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243. See *supra* Part IV.B.2.

244. Coyle, *supra* note 179 at 53.

245. See *supra* Part IV.B.2.

246. *Id.*

247. See *supra* note 230.

248. See *id.*

249. See *supra* note 241.

“properly qualified candidate” entitled to receive a birth certificate for his or her child.<sup>250</sup>

Other states have stringent birth verification letter policies in place, which enhances the reliability of the letters.<sup>251</sup> These policies should also be implemented in Texas. Birth verification letters should be on official hospital letterhead and provide information from the hospital’s records collected immediately after birth, such as the name of the child, the date and place of birth, the names of the parents, and the child’s address. These letters should only be issued to the child’s parents at the hospital soon after the child is born, and hospitals should implement record-keeping systems for documenting issued letters. To make the policy even more secure, hospitals should only issue one birth verification letter per child and should disallow replacements.

This policy ensures a secure birth certificate application process in a number of ways. First, because the letter is only issued to the child’s parents at the hospital soon after the baby is born, this policy prevents those who are not the child’s parents from obtaining letters. Accordingly, the letter is proof of parenthood and registrar employees can be confident that the *matrícula* holder is indeed the newborn’s mother or father, and therefore a “properly qualified applicant.” Second, concerns about using forged letters are relieved because when hospitals implement a recordkeeping system, registrar employees can call the hospital to verify their authenticity. This policy is reliable, easy-to-implement, and less discriminatory towards individuals without IDs than Section 181.

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250. 25 TEX. ADMIN. CODE § 181.1 (2013) (defining “properly qualified applicant” as a “registrant, or immediate family member either by blood, marriage or adoption, his or her guardian, or his or her legal agent or representative”).

251. See, e.g., UNIV. OF WASH. MED. CTR., BEFORE YOU LEAVE THE HOSPITAL 2–3, <http://www.uwmedicine.org/services/obstetrics/documents/Before-You-Leave-Hospital.pdf> [<https://perma.cc/7UNR-QARJ>] (last visited: May 26, 2017) (explaining the procedure for obtaining a birth verification letter: “You will be given a Birth Verification Letter as temporary proof of your baby’s birth. It can be used in place of a birth certificate for up to 60 days after the birth. For example, the Department of Social and Health Services . . . accepts an original Birth Verification Letter as proof of birth. *If you get DSHS assistance, you need to let them know about your baby’s birth.* . . . Birth Verification Letters are available from the time of your baby’s birth until 2 months of age. University of Washington Medical Center can give only one Birth Verification Letter to each family for their baby’s birth and *cannot* replace a lost letter.”).

#### 4. *The Acceptance of Matrículas Paired with Notarized Sworn Statements*

Another alternative policy that is currently employed in California and Arizona is permitting the use of *matrículas* when submitted with a notarized sworn statement of identity.<sup>252</sup> A notarized statement is an effective method of preventing fraud because there are laws ensuring that notaries diligently verify the identities of those who come before them. This is especially true in Texas where notary laws are more stringent than those of other states.

Under Texas's notary laws, a parent must personally appear before the notary public and present satisfactory evidence proving that he or she is the person who signed the sworn statement. The officer may verify the identity of an applicant in three ways: (1) the applicant is personally known to the officer, (2) on the basis of a government-issued ID — a method generally foreclosed to undocumented parents, or (3) on the basis of a credible witness, who must be personally known to the notary and must personally know the applicant.<sup>253</sup>

The verification methods in Texas are more stringent than those in California because both verification methods available to undocumented applicant require the applicant to directly or indirectly know the notary officer. In California, applicants can verify their identities with the oaths of two credible witnesses, regardless of direct or indirect knowledge.<sup>254</sup> Thus, the officer may establish the identities of the two witnesses with photo IDs, which allows applicants to rely on their relatives and friends as witnesses.<sup>255</sup> While it may be more difficult for undocumented immigrants in Texas to verify their identification, there are still realistic and accessible ways for them to meet the direct or indirect knowledge requirement. For instance, they may “personally know” or be connected to a “credible witness” who has a relation-

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252. See *supra* notes 239–240.

253. TEX. CIV. PRAC. & REM. CODE ANN. § 121.005(a) (West 2017).

254. CAL. CIV. CODE § 1185 (West 2017).

255. A significant percentage of undocumented immigrants living in the U.S. have relatives who are documented and are therefore eligible to serve as credible witnesses in California. See *The Facts on Immigration Today*, CTR. FOR AM. PROGRESS (Oct. 23, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/> [<https://perma.cc/M9YK-MY7A>] (“Undocumented immigrants are often part of the same family as documented immigrants.”).

ship with a notary from organizations that they belong to, such as labor unions, churches, and schools. Furthermore, they may become acquainted with a “credible witness” through their lawyers and social workers.

Notarization is a reliable process for verifying a person’s identity.<sup>256</sup> First, notaries owe the public a fiduciary duty of care, which legally obligates them to diligently verify the identities of all who come before them.<sup>257</sup> If they breach this duty, they incur liability to all who suffer injury as a proximate result of their negligence.<sup>258</sup> Second, notaries may face civil and criminal liability for their failure to thoroughly verify a signer’s identity,<sup>259</sup> with penalties ranging from a \$10,000 fine to jail sentences.<sup>260</sup> Third, notaries may face administrative fines and/or penalties, including the revocation, suspension, or denial of a current or future notary commission, which also threatens their access to current and future licenses of all kinds, including law, real estate, and insurance.<sup>261</sup> Lastly, notaries face reputational costs and scrutiny from their communities for poor performance or misconduct. This policy furthers the state’s interest in minimizing fraud, while providing undocumented parents and others without adequate ID with an accessible method for obtaining birth certificates for their children.

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256. See Peter J. Van Alstyne, *The Notary’s Duty of Care for Identifying Document Signers*, 32 J. MARSHALL L. REV. 1003, 1010 (1999) (“[N]otarizations are scarcely the perfect device to combat document and signature fraud. However, if performed properly, the notarial act is extraordinarily effective.” (footnote omitted)).

257. *Id.* at 1013–14 (stating that to satisfy this duty of care, the notary must perform with integrity and diligence, and merely conforming to the customs of the workplace or community does not satisfy the standards of reasonable care).

258. *Id.* at 1014 (further explaining that if material questions arise over the notary’s proper verification of a signer’s identity, the burden of proof shifts to the notary to establish by a preponderance that reasonable care was exercised).

259. See *Texas State Notary Handbook*, TEX. STATE NOTARY BUREAU, [hereinafter *Texas Notary Handbook*] <http://notarypublics.com/education-center/education-center-registration-form/education-center-files/texas-state-notary-handbook/#tag9> [<https://perma.cc/W2KN-TXV5>] (last visited: May 26, 2017).

260. See *id.* Crimes include tampering with government records, official misconduct, perjury, and aggravated perjury. Notaries public may also be charged with participating in a criminal conspiracy to defraud the public.

261. See Charles N. Faerber, *Being There: The Importance of Physical Presence to the Notary*, 31 J. MARSHALL L. REV. 749, 751 (1997).

## VI. CONCLUSION

Of the ten states with the largest undocumented immigrant populations, only Texas has adopted a birth certificate application policy that makes it nearly impossible for undocumented parents to obtain birth certificates for their U.S.-born children. While DSHS argues that the policy is necessary to prevent fraud and ensure a secure birth certificate application process, a careful review of the *matrículas*' current features reveal that the card is a secure form of identification; thousands of domestic institutions with similar interests in fraud prevention accept it today for a broad range of uses.

This policy not offends undocumented parents' rights to care for and educate their children, but it also compromises the right of citizen children to travel interstate as well as the validity of their U.S. citizenship. Thus, as correctly held by Judge Pitman, strict scrutiny is the appropriate standard of review.

Section 181 violates the Equal Protection Clause because it cannot survive strict scrutiny. The policy fails to further a compelling state interest, is underinclusive in its attempt to provide a safer birth certificate application process, and less discriminatory alternatives exist that can as effectively further the state's goals. Accordingly, the policy must be struck down as unconstitutional.