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INTRODUCTION

This case concerns the state of Texas's refusal to issue certified copies of birth certificates to United States-citizen children whose parents lack a lawful immigration status. There is no dispute—nor could there be—that the Plaintiff children, having been born in the state of Texas, are citizens of this country. Indeed, their right to citizenship by virtue of their birth in the United States is enshrined in the Fourteenth Amendment and cannot be abridged even by Congress, let alone the states. The only question is whether the Constitution permits a state to single out citizens whose parents lack immigration status, and deny birth certificates to these citizen children and their parents.

Amici American Civil Liberties Union of Texas and American Civil Liberties Union respectfully submit this brief to make two key points in support of the conclusion that Texas' denial of birth certificates violates the Constitution, and that Plaintiffs are therefore entitled to a preliminary injunction. First, Amici write to elaborate on Plaintiffs' procedural due process claim. As Amici will explain in Part I below, Defendant's policy violates procedural due process because Plaintiffs have a state-created right to receive their birth certificates, but Defendants' procedures fail to provide them with a meaningful opportunity to prove their entitlement. Second, with respect to Plaintiffs' substantive due process and equal protection claims, Amici write briefly to respond to Defendants' erroneous contention that the state's denial of birth certificates does not infringe upon Plaintiffs' fundamental rights. As Amici explain in Part II, Defendants' policy is subject to strict judicial scrutiny because it impermissibly interferes with Plaintiffs' exercise of fundamental constitutional rights.

INTERESTS OF AMICI

Amici, the American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Texas, have a longstanding interest in litigating cases to promote the equal treatment and civic integration of immigrants and challenge unconstitutional state and local laws targeting immigrant communities. *See* Mot. for Leave to File Br. of Amici Curiae at 1–2 (detailing interests of amici).

ARGUMENT

I. Defendants’ Policy Violates Procedural Due Process.

Plaintiffs are likely to succeed on the merits of their procedural due process claims because they are statutorily entitled to copies of the Plaintiff children’s birth certificates, and Defendants’ procedures guarantee that they will never be able to avail themselves of that right. *See* Pls.’ Reply in Supp. of Mot. for Prelim. Inj. at 11; Pls.’ Mot. for Prelim. Inj. at 2–4, 6, 15, 21; Second Am. Compl. ¶¶ 114, 147, 150, 152, 178. Defendants have never disputed that Plaintiffs are entitled to birth certificates. Thus, the only point of dispute is whether Defendants’ process for verifying Plaintiffs’ identities, which prevents all children whose parents lack lawful status from availing themselves of that right, is constitutionally adequate. Decades of precedent makes clear that it is not.

It is well established that “the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). “[O]nce it is determined that the Due Process Clause applies, ‘the question remains what process is due.’” *Id.* at 541 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

A. Plaintiffs Have a Property Right to Birth Certificates Under Texas Law.

The “property” protected by the Fourteenth Amendment’s due process clause includes not only individual interests in real and personal property, but also an individual’s interest in entitlements created by state (or federal) law. The Supreme Court has instructed that property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Loudermill*, 470 U.S. at 538. As the Fifth Circuit has explained, “[i]n a nutshell . . . when a person has a legitimate claim of entitlement to a benefit, he has a protected property interest sufficient to entitle him to due process.” *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 930 (5th Cir. 1988). See also, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (recognizing that statutory entitlement to welfare payments constitutes property protected by due process). Thus, property rights may arise when an individual has “a legitimate claim of entitlement” to a benefit “grounded in the statute defining eligibility for [that benefit]” even if the applicant “has not yet shown that they were, in fact, within the statutory terms of eligibility.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (discussing *Goldberg*, 397 U.S. 261–62).¹

Under the Vital Statistics Act, Texas has created a statutory right entitling a “properly qualified applicant” to obtain a certified copy of a birth certificate. Tex. Health & Safety Code Ann. § 191.051(a); Defs.’ Br. in Opp’n to Pls.’ Mot. for Prelim. Inj. (“Defs.’ Opp’n”) Ex. 2 at 2. Specifically, the Act mandates that “the state registrar *shall* supply to a properly qualified applicant, on request, a certified copy of a record . . . of a birth.” (emphasis added). A “properly qualified applicant” is defined under state law as “[t]he registrant, or immediate family member .

¹ See also *Bell v. Burson*, 402 U.S. 535, 541–42 (1971) (recognizing state-created property right in drivers’ licenses); *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220 (5th Cir. 2012) (“Privileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process.”) (citation omitted).

. . . , his or her guardian, or his or her legal agent or representative.” 25 Tex. Admin. Code § 181.1(21). The state legislature’s use of the word “shall” makes clear that this is a nondiscretionary duty: the registrar *must* provide a copy of the birth certificate to a properly qualified applicant.² *See LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) (finding that use of the word “shall” indicates that the direction is “mandatory”); *see also Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784 (Tex. 2005) (interpreting “shall” to indicate mandatory duty).

Accordingly, Texas law entitles immediate family members, guardians, and other “properly qualified applicants” to obtain a copy of the requested birth certificate. The mandatory language grants a protectable property right to those persons. *See, e.g., Swindle v. Livingston Parish Sch. Bd.*, 655 F.3d 386, 395 (5th Cir. 2011) (finding that directive that student “shall” remain under the supervision of the school system created an entitlement protected by procedural due process).

Here, Defendants do not dispute—nor could they—that Plaintiff parents are “properly qualified applicants” as defined by Texas law. 25 Tex. Admin. Code § 181.1(21). Thus, the only question is whether Defendants’ procedures for providing birth certificates to properly qualified applicants are adequate under the circumstances.

B. Texas’s Procedures for Determining Whether to Issue Birth Certificates to Properly Qualified Applicants Are Plainly Inadequate.

As it is clear that the right to Texas birth certificates warrants procedural due process protections, the only remaining questions are “what process the State provided, and whether it was constitutionally adequate.” *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Even when, as

² The Vital Statistics Unit may refuse to issue a birth certificate to a properly qualified applicant for one reason: if the information in the application contradicts the information in the state registrar’s record. 25 Tex. Admin. Code § 181.21(2).

here, the property right has been created by the state, “[t]he answer to th[e latter] question is not to be found in the [state] statute,” but is instead analyzed under the federal Due Process Clause. *Loudermill*, 470 U.S. at 541–42. In determining what process is constitutionally due, courts must balance: “the private interests at stake; the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and the governmental interests affected.” *Little v. Streater*, 452 U.S. 1, 13 (1981); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Amici address first Defendants’ current procedures and the erroneous results, and then the private and governmental interests at stake.

1. Defendants’ Procedures Guarantee Erroneous Results for All Children Whose Parents Lack Lawful Status.

The Texas Administrative Code sets forth the regulatory process through which properly qualified applicants may obtain birth certificates. 25 Tex. Admin. Code § 181.28. The applicant must, *inter alia*, submit an application on the proper form, sign the application, and present identification documents to prove his or her identity. § 181.28(i).³ Specifically, the regulation requires “qualified applicant[s]” to prove their identity by showing either one “primary” document or two “secondary” documents or one “secondary” document and two “supporting” documents. § 181.28(i)(11). Primary documents include, *inter alia*, drivers’ licenses issued in the United States, an offender identification card issued by a Texas correctional facility, and visas and “green cards” issued by the Department of Homeland Security. § 181.28(i)(10)(d). Secondary documents include, *inter alia*, any expired primary identification document; foreign passports from countries in the Visa Waiver Program; foreign

³ Notably, these procedures set forth the process to determine if applicants are who they say they are, but do not affect the scope of the entitlement. *See Loudermill*, 470 U.S. at 539–41 (rejecting the argument that a “property right is defined by, and conditioned on, the legislature’s choice of procedures for its deprivation,” and explaining that “[p]roperty’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty”).

passports with valid visas; “Foreign Identification with identifiable photo of applicant”; and Mexican voter registration cards. § 181.28(i)(11). The regulation also provides that applicants may provide “[o]ther records or documents that verify the applicant’s identity.” § 181.28(i)(12).

In addition, Defendants have recently developed an internal practice and policy of refusing to accept certain identification notwithstanding the regulatory language permitting applicants to prove their identity through some type of “Foreign Identification with identifiable photo of applicant.” § 181.28(i)(11)(xv). Pursuant to Defendants’ rule, the Vital Statistics Unit refuses to accept consular identification cards, foreign passports that lack valid visas, or other supporting identification that would be available to an individual who lacks lawful immigration status. *See* Defs.’ Opp’n at 1, 4–5, 7; *id.*, Ex. 1 at 2; *id.*, Ex. 3 at 3.

If properly qualified applicants like Plaintiff parents cannot produce two of the enumerated secondary identity documents, the Vital Statistics Unit will refuse to issue them birth certificates. *See, e.g.*, Pls.’ Reply in Supp. of Mot. for Prelim. Inj., Ex. 1 at 9, 16, 19–20, 28, 31, 34; *id.*, Ex. 2 at 16, 26; Pls.’ Mot. for Prelim. Inj. at 2–4, 6, 15; Second Am. Compl. ¶¶ 100(f)–(i), 101(f), 103(d); *see also* Defs.’ Opp’n, Ex. 2 at 2–3. Defendants provide no procedures to challenge this denial. *Compare* 25 Tex. Admin. Code § 181.21 (providing applicants with a right to a hearing when the state identifies a factual conflict between the application and the state birth registration database, and proposes to refuse to issue a copy of a birth certificate on that basis).

Texas’s procedures not only risk but effectively *guarantee* that properly qualified applicants will be erroneously deprived of their right to a birth certificate if the registrant has undocumented parents. As detailed in Plaintiffs’ submissions, Plaintiff parents do not have access to any set of identity documents that would allow them to satisfy Defendants’ procedural

requirement, and Defendants refuse to provide a way for them to demonstrate their identity. Pls.’ Reply in Support of Mot. for Prelim. Inj., Ex. 1 at 9, 16, 19–20, 28, 31, 34; Pls.’ Mot. for Prelim. Inj. at 2–4, 6, 15; Second Am. Compl. ¶¶ 100(f)–(i), 101(f), 103(d). As a result, although no party disputes that Plaintiff parents are properly qualified applicants, they will always be prevented from proving it, and will always be denied their right to obtain a copy of their child’s birth certificate. In other words, they will be denied a meaningful opportunity to make out their claims for birth certificates.

It is well established that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 333. *See also, e.g., Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (recognizing that “a meaningful opportunity to be heard” is a fundamental “promise of the Due Process Clause”). As the Supreme Court has “repeatedly emphasized,” “the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.” *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)); *see also Roth*, 408 U.S. at 577 (“It is a purpose of the constitutional right to [adequate procedures] to provide an opportunity for a person to vindicate those claims.”). Thus, in *Little*, the Supreme Court held that the state’s procedures “violated the due process guarantee of the Fourteenth Amendment” because they prevented the individual from presenting proof essential to a determination of his protected rights. 452 U.S. at 17. *Little* considered a state law denying fathers the ability to present evidence that would have been critical to make an accurate paternity determination. Because the procedures made it impossible to “overcome the evidentiary burden” that the state required, the Supreme Court explained that the procedures would deprive the litigant of “a meaningful opportunity to be heard.” *Id.* at 16. Similarly, in a

case in which a litigant challenged the deprivation of his driver's license on procedural due process grounds, the Supreme Court emphasized that “[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.” *Bell v. Burson*, 402 U.S. 535, 541–42 (1971). *See also Haitian Refugee Ctr.*, 676 F.2d at 1040 (holding that procedural due process was violated where “the government created conditions which negated the possibility that [the plaintiffs’] hearing would be meaningful in either its timing or nature”); *cf. Boddie*, 401 U.S. at 379 (explaining that a procedural “requirement, valid on its face, may offend due process because it operates to foreclose a particular party’s opportunity to be heard”). Accordingly, because Defendants’ procedures deny Plaintiffs a meaningful opportunity to prove their claim, they violate one of the most basic requirements of due process.

The relief requested by Plaintiffs—an injunction that would restore Defendants’ previous policy that did accept certain documents that would allow undocumented parents to obtain birth certificates for their citizen children—would correct the erroneous denials of birth certificates at issue in this case. Defendants have never questioned the identity of Plaintiff parents, they only prevented the parents from proving it; changing their policy to accept identity documents available to parents without lawful status would allow Plaintiffs to show that they are who they say they are—and get birth certificates for their children.

2. The Private Interests at Stake Are Significant.

The magnitude of the private interests at stake here—implicating fundamental rights including citizenship, familial relations and child rearing, and freedom to travel— are undeniable, and further reinforce that the State’s procedures violate due process. *See, e.g., Pls.’*

Reply in Support of Mot. for Prelim. Injunction at 2, 6–8, 15–18; *id.*, Ex. 1 at 9, 16, 28; *id.*, Ex. 2 at 26; Pls.’ Mot. for Prelim. Injunction at 4–5, 8–11, 14–15. And, even while arguing that certain entities like public schools and public benefits offices should not technically require Plaintiff children to provide birth certificates, Defs.’ Opp’n at 12–14, Defendants do not dispute the fundamental importance of a birth certificate in a citizen’s everyday life.

Numerous decisions recognize the critical nature of private rights even in cases where the stakes were far lower. It is clear that, for example, drivers’ licenses, occupational licenses, permits to operate businesses, and parental rights to custody and care of children are “important interest[s]” that warrant strong procedural protections. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *see also id.* (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society’”) (quotation marks omitted); *Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 27 (1981) (explaining that parental rights to custody and care of children “warrant deference, and absent a powerful countervailing interest, protection”); *Little*, 452 U.S. at 13 (1981) (“[T]his Court frequently has stressed the importance of familial bonds. . . .”); *Bell*, 402 U.S. at 539 (“Suspension of issued licenses involves state action that adjudicates important interests of the licensees.”); *Bowlby v. City of Aberdeen*, 681 F.3d 215, 221 (5th Cir. 2012) (explaining that the plaintiff’s “ability to operate her business . . . is recognized by courts as an important right”).

Moreover, the importance of Plaintiff children’s interest in their United States citizenship—and their ability to prove that citizenship—cannot be overstated. As the Supreme Court has emphasized, “citizenship has been described as ‘man’s basic right for it is nothing less than the right to have rights[.]’” *Fedorenko v. United States*, 449 U.S. 490, 522–23 (1981) (citation and quotation marks omitted); *see also, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159

(1963) (equating citizenship with “all that makes life worth living”) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922)); *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (“[A deprivation of citizenship] is more serious than a taking of one’s property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men.”); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality op.) (“When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.”).

Without their birth certificates, Plaintiff children will be deprived of their ability to prove the most basic element from which so many of their other critical rights flow. As Plaintiffs have shown, without birth certificates for the Plaintiff children, the fulfillment of everyday needs such as obtaining child care, enrolling in school, travelling across borders, and proving a parental relationship become difficult if not impossible. *See, e.g.*, Pls.’ Reply in Support of Mot. for Prelim. Inj. at 2, 6–8, 15–18; *id.*, Ex. 1 at 9, 16, 28; *id.*, Ex. 2 at 26; Pls.’ Mot. for Prelim. Inj. at 4–5, 8–11, 14–15. Furthermore, this deprivation is potentially endless as there is no indication that Plaintiff children will *ever* be able to obtain the identity documents required under Texas Administrative Code § 181.28(i)(10)–(11) without their birth certificates. *See Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (“The possible length of wrongful deprivation of [a property interest] is an important factor in assessing the impact of official action on the private interests.”).

3. Defendants Have Not Demonstrated That Any Interest Weighs Against Affording Plaintiffs a Meaningful Opportunity to Be Heard.

Plaintiffs must be provided a “meaningful opportunity to be heard” unless Defendants can show “a countervailing state interest of overriding significance.” *Boddie*, 401 U.S. at 377. Defendants have not shown any such interest here, nor could they. Defendants acknowledge that granting Plaintiffs’ motion would not create harm to them “per se,” but argue that it could result in harm to Texas citizens because of “the risks of identity theft that increase as self-identification requirements are loosened.” Defs.’ Opp’n at 33. But Defendants cannot demonstrate their interest simply by raising the specter of identity theft, particularly since Plaintiffs are perfectly amenable to proving their identity. Defendants’ concern is, at bottom, a desire to avoid spending resources on additional verification procedures, which does not come close to outweighing Plaintiffs’ interest in—and acute need for—birth certificates as proof of citizenship. *See* Section II.B.2., *supra*.

As an initial matter, Defendants’ justification for their hard and fast rule is suspect at best. *Compare e.g.*, Defs.’ Opp’n at 6, 8 (describing concerns with Mexico’s consular identification issuance procedures), *with* Br. of Amicus Curiae United Mexican States, App. A (Carlos Gonzales Gutierrez Aff.) ¶¶ 11–21, 30 (explaining that the Mexican government revamped its consular identification issuance procedures). Indeed, Defendants’ policy contradicts the very expert recommendations on which they rely. *Compare* Defs.’ Opp’n at 5–6, *with* Vital Statistics Unit, Tex. Dep’t of State Health Servs., *Strengthening the Texas Birth Record Information System* at 48 (2012) (noting that noncitizens with children born in the United States who lack access to specific form of identification will “need to be accommodated in the process”). Where, as here, the state’s policy is unnecessary to achieve the state’s asserted

interest, the Supreme Court has given short shrift to the government’s justification. *See, e.g., Bell*, 402 U.S. at 540.

In any event, requiring Defendants to implement constitutionally adequate procedures does not mean “loosen[ing]” self-identification requirements. Defs.’ Opp’n at 33. Defendants would not necessarily have to accept at face value each and every passport or consular ID presented by a parent seeking a birth certificate for their child; if Defendants have concerns about a particular document presented by a particular individual, they can subject the document to further examination and authentication, as they presumably do when other documents, such as drivers’ licenses, appear questionable. Ultimately, whichever documents Defendants choose to accept or not accept must provide some means by which Plaintiffs can demonstrate their entitlement. Even if foreign documents sometimes require additional inspection and verification, the marginal administrative burden would be far outweighed by the harm that the Plaintiffs will otherwise suffer. *See Little*, 452 U.S. at 15–16 (finding that the “[s]tate’s monetary interest is hardly significant enough to overcome private interests as important as [*inter alia*, familial bonds]”) (quotation marks omitted); *Bowlby*, 681 F.3d at 221 (finding administrative burdens imposed by providing procedural protection not significant enough to overcome harm from the erroneous loss of an occupational license); *see also Santosky v. Kramer*, 455 U.S. 745, 768 (1982) (“The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”).⁴

⁴ Given that Texas affords full-blown hearings when the Vital Statistics Unit finds factual conflicts between the database and the application, taking additional steps to verify the identity of parents where there is no question about the veracity of the application should not be unduly burdensome. *Cf. Haitian Refugee Ctr.*, 676 F.2d at 1023 (“[T]hat requiring additional procedural

Further, requiring meaningful procedures will also advance the government’s interest in protecting Texas citizens “to whom Defendants owe a duty” of protection, Defs.’ Opp’n at 33, because all of the children injured by this policy are citizens of Texas. These Texas-born United States citizen children will be protected from risks like family separation, denial of their right to travel, erroneous arrest by immigration authorities, and frustration in enrolling in public schools and benefits programs. Furthermore, the State’s interest in protecting the Texas citizenry against identity fraud is served when Texas-born children can prove their identity. *See Santosky*, 455 U.S. at 767 (explaining that the government’s “goal is served by procedures that promote an accurate determination”); *Haitian Refugee Ctr.*, 676 F.2d at 1040 (“Although the government does have an interest in acting with dispatch, it is also in the government's interest to make informed determinations.”).

In sum, Defendants have erroneously deprived Plaintiffs of their statutory right to a birth certificate by implementing procedures that effectively guarantee deprivation of that right whenever the registrant’s parents lack lawful immigration status in the United States. This is the very essence of a procedural due process violation.

II. Defendants’ Policy Impermissibly Infringes Upon Plaintiffs’ Fundamental Rights.

In support of their substantive due process and equal protection claims, Plaintiffs have explained that Defendants’ policy is subject to strict judicial scrutiny because it implicates fundamental rights, and the policy is unable to satisfy that stringent test. *See* Pls.’ Mot. for Prelim. Inj., at 6–7, 8–15; Pls.’ Reply at 6–8, 10, 12–13; *see also, e.g., Shapiro v. Thompson*, 394 U.S. 619, 642–44 (1969). Defendants do not contest that birthright citizenship or other basic rights asserted by Plaintiffs are fundamental rights. Instead, Defendants dispute that the State’s

safeguards would be valuable and not unduly burdensome, are evidenced by the regulations and procedures normally applicable to asylum proceedings, but largely ignored in this case.”).

denial of birth certificates sufficiently impinges on those fundamental rights to trigger strict scrutiny. Defendants assert that only “laws that directly impact [fundamental] rights” are subject to strict scrutiny, and appear to suggest that the challenged policy must directly prohibit or render impossible the exercise of the fundamental right for strict scrutiny to be triggered. Defs.’ Opp’n at 18–19. Amici write briefly to address Defendants’ erroneous argument.

The Supreme Court has repeatedly rejected the contention that burdens on fundamental rights must be “direct” in order to trigger strict scrutiny. For example, in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Supreme Court summarized its precedents concerning the fundamental right to travel and emphasized that “[o]ur right-to-migrate cases have principally involved [an] . . . *indirect* manner of burdening the right.” *Id.* at 903 (emphasis added). Similarly, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), a case concerning both the right to vote and the right to travel, the Supreme Court emphasized that it is “irrelevant” whether the exercise of a fundamental right is “merely penalized” or “absolutely denied.” *Id.* at 341. The Court explained, “[i]t 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.” *Id.* at 338–41 (internal quotation marks and citations omitted) (second omission in the original); *see also, e.g., Riddell v. Nat’l Democratic Party*, 508 F.2d 770, 776 (5th Cir. 1975) (“While the burden . . . is not so great as total exclusion from the ballot, we do not understand this to be the sole litmus test for evaluating a constitutional challenge to restraints on the ability to organize as a political party.”).

The Supreme Court’s precedents make clear that to trigger strict scrutiny, the state law need not “actually deter” the exercise of a fundamental right, nor must the state law have a “primary objective” of impeding a fundamental right. *Soto-Lopez*, 476 U.S. at 903. Rather,

strict scrutiny is applicable whenever a state law “uses ‘any classification which *serves to* penalize the exercise of that right.’” *Id.* (quoting *Dunn*, 405 U.S. at 340) (emphasis added); accord *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257–58 (1974) (explaining that “a classification which ‘operates to Penalize’” the exercise of a fundamental right “must be justified by a compelling state interest,” even if the state law does not “actually deter[.]” the exercise of the right) (citations omitted). The Supreme Court’s fundamental rights cases have simply asked whether the state policy “burdens the right” and where it has found, such a burden, “required the State to come forward with a compelling justification.” *Soto-Lopez*, 476 U.S. at 904.

Numerous other cases illustrate that state policies that fall far short of wholly precluding the exercise of a fundamental right have nonetheless been reviewed under exacting scrutiny. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court concluded that the state law “clearly does interfere directly and substantially with the right to marry” even though the state law did not involve an absolute ban on marriage for the affected class, but simply required that certain individuals first obtain a court order. In finding a direct and substantial interference with a fundamental right, the Supreme Court relied in part on the burden on those who are ultimately able to meet the state law’s requirements:

Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

434 U.S. at 387. Notably, the policy was found to interfere with fundamental rights because—as a *practical* matter—some people would be unable to meet the statute’s requirements; for others, interference was found merely because the policy conditioned the exercise of the right, even if it

did not wholly preclude it. *See also, e.g., Soto-Lopez*, 476 U.S. at 907 (noting that “even temporary deprivations of very important benefits and rights can” garner strict scrutiny); *Whatley v. Clark*, 482 F.2d 1230, 1233 (5th Cir. 1973) (applying strict scrutiny to review state law creating a presumption that, for voting purposes, “students are not domiciliaries of the places they live while attending school,” even though students could exercise their right to vote as long as they were able to rebut the presumption).

Here, there is no question that Plaintiffs have shown that Defendants’ policy significantly interferes with their fundamental rights concerning travel, family relationships and the upbringing of children, and birthright citizenship itself. In particular, with respect to citizenship, while Defendants concede (as they must) that the Plaintiff children are United States citizens, they nonetheless have crafted a state policy that denies to those citizen children the most basic, commonplace proof of their citizenship. *Compare, e.g., Tex. Health & Safety Code § 191.052* (providing that a certified copy of a birth certificate “is prima facie evidence of the facts stated in the record”), *with United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013) (holding that a United States passport does not by itself constitute proof of citizenship, and noting that passports may be issued to persons who are nationals but not citizens of the U.S.). Without proof of their citizenship, how are these children ever to access and exercise the many rights that come with citizenship? And even if the Plaintiff children, through the Herculean efforts of their parents, are ultimately able to obtain many of the benefits of citizenship, the cases discussed above demonstrate that the very fact that strenuous efforts are required to overcome the state policy should trigger the application of strict scrutiny here.

Further, the nature of the interests at stake here reinforces that close judicial scrutiny of Defendants’ policy is required. “Citizenship is a most precious right.” *Kennedy*, 372 U.S. at

159. *See also supra* at Section I.B.2. Indeed, by the “unequivocal terms of the Amendment itself,” “[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.” *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967); *see also id.* (stating that the Amendment “provides its own constitutional rule in language calculated completely to control the status of citizenship” and “[t]here is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time”). The State’s policy operates to “dilute” the Plaintiff children’s birthright citizenship by denying them the very proof of that citizenship— and must be subjected to strict judicial scrutiny.

In sum, Defendants’ assertion that the State’s denial of birth certificates does not infringe on Plaintiffs’ fundamental rights must be rejected.

CONCLUSION

For the reasons given, the Court should grant Plaintiffs’ request for a preliminary injunction enjoining Defendants’ policy of denying the issuance of certified copies of birth certificates to Plaintiffs.

_____/S/_____
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