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April 27, 2015

The Honorable Harold W. "Trey" Gowdy, III
Chairman
Subcommittee on Immigration and Border Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Zoe Lofgren
Ranking Member
Subcommittee on Immigration and Border Security
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

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RE: House Committee on the Judiciary's Subcommittee on Immigration and Border Security Hearing on "Birthright Citizenship: Is It the Right Policy for America?"

Dear Chairman Gowdy and Ranking Member Lofgren:

On behalf of the American Civil Liberties Union ("ACLU"), we submit this letter to the House of Representatives Committee on the Judiciary Subcommittee on Immigration and Border Security hearing on April 29, 2015: "Birthright Citizenship: Is It the Right Policy for America?" To answer the question posed by this hearing, we emphatically answer a resounding, unequivocal YES. Constitutional citizenship was the right decision back in 1868 when the 14th Amendment was ratified, and it has proven to be the right course for the U.S. for the past 147 years.

For nearly a century the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

One of the Constitution's essential engines to ensure equality and fairness under the law has been the guarantee of citizenship to those born on U.S. soil, regardless of who their parents are, as embodied in the American Citizenship Clause of the 14th Amendment:

"*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside*."[1]

This unequivocal text has protected all children born in the U.S. – regardless of their race or ethnicity or the status of their parents – for nearly 150 years. Now some Members of the House of Representatives, including five Members of the Judiciary Committee, seek to rewrite the 14th Amendment's constitutional guarantee of birth citizenship. Rep. Steve King (R-IA) has introduced the Birthright Citizenship Act of 2015 (H.R. 140) that seeks to gut the constitutional guarantee of citizenship enshrined in the 14th Amendment, by limiting constitutional citizenship to three categories of people only: children of U.S. citizens or nationals, children of permanent residents, and children of non-citizens in active-duty military service. The ACLU strongly opposes the Birthright Citizenship Act of 2015 and any proposals to subvert birth citizenship for the following reasons:

(1) *The Birthright Citizenship Act of 2015 violates the Constitution and radically seeks to overturn nearly 150 years of constitutional tradition and civil rights history*.

The Birthright Citizenship Act of 2015 directly violates the 14th Amendment guarantee that all people born in the U.S. and under its jurisdiction are citizens of the U.S. and of the state in which they reside, and are subject to equal protection under the law. The drafters of the 14th Amendment codified the principle of citizenship at birth and ensured that race, ethnicity, and ancestry could never again be used by politicians to decide who among those born in our country are worth of citizenship. With very limited exceptions,[2] all children born in the U.S. are automatically U.S. citizens.

The 14th Amendment conferred the rights of citizenship on all who were born in the U.S., including freed slaves. Ratified in the aftermath of the Civil War, the 14th Amendment was intended to negate the Supreme Court's infamous ruling in *Dred Scott* (1857), denying citizenship to freed slaves and their descendants. The Amendment was ratified in response to discriminatory laws passed by former Confederate states that prevented African Americans from voting, entering professions, owning or leasing land, accessing public accommodations, and serving on juries. The 14th Amendment was an affirmation that in the U.S., all children are born as equals, — no matter what their race, ethnicity, bloodline, or lineage may be.

The history of the congressional debates leading up to the 14th Amendment makes clear that the principle of constitutional citizenship has always been intended to protect *all* minority groups from invidious discrimination. Debates in the post-bellum period reveal that the members of Congress actively debated and deliberated over the treatment of U.S.-born children of "gypsies," who were considered unlawfully present, and decided that birth citizenship must be conferred to them. When asked whether the 1866 Civil Rights Act, which preceded the 14th Amendment, would "have the effect of naturalizing the children of Chinese and Gypsies born in this country," Sen. Lyman Trumbull, the bill's drafter replied: "Undoubtedly….[T]he child of an Asiatic is just as much a citizen as the child of a European."[3]

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1 U.S. CONST., amend. XIV, § 1.

2 Over 100 years ago the Supreme Court explained that this phrase simply meant that the children born to foreign diplomats or hostile forces are not automatically U.S. citizens. See *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898). The Court found that these few discrete exceptions to citizenship at birth were rooted in the Common Law dating back centuries, which provided that all children born in the territory of the sovereign were citizenships except for those born to foreign diplomats or hostile occupying forces.

3 CONG. GLOBE, 39th Cong., 1st Sess. 498 (1865).

The federal courts have long held that the 14th Amendment dictates that children born on U.S. soil are citizens *without regard to their parents' status*. When the Chinese Exclusion Act of 1882 denied citizenship through naturalization to Chinese laborers who were lawfully present, the Supreme Court ruled in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), that children born to these workers on U.S. soil were citizens at birth under the 14th Amendment. As the Supreme Court emphasized, the "Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory…including all children here born of resident aliens." *Id.*[4] The Court elaborated, "To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage who have always been considered and treated as citizens of the United States."[5]

This principle of citizenship at birth has been the settled law of the land for over a century and was confirmed most recently in the 1982 Supreme Court decision, *Plyler v. Doe*, 457 U.S. 202 (1982), which affirmed that non-citizens, including undocumented immigrants, are subject to U.S. jurisdiction under the 14th Amendment.[6]

(2) *The Birthright Citizenship Act of 2015 seeks to erect a racial caste system that dates back to the pre-Civil War era.*

The Birthright Citizenship Act of 2015 would effectively create a racially identifiable subclass of predominantly minority children born in the U.S. yet denied their constitutional right to American citizenship. Race-based classifications are deeply repugnant to American values of fairness and equality, and are completely at odds with our country's history of inclusion and of expansion of civil and human rights.

While the co-sponsors of the Birthright Citizenship Act seek to rewind the clock to the pre-Civil War era, several state legislatures as recently as in 2011 have blocked attempts to amend birth citizenship. Recognizing these measures as radical and xenophobic, the legislatures of South Dakota,[7] Montana,[8] and Arizona[9] shot down these measures. These state legislatures, like the vast majority of Americans, believe in a land of equal opportunity where every child – regardless of race, ethnicity, or ancestry – is born with the same rights as every other U.S. citizens.

(3) *The Birthright Citizenship Act of 2015 is unconstitutional because the right to citizenship at birth cannot be repealed by legislation.*

The right to citizenship at birth is enshrined in the 14th Amendment and cannot be repealed without a constitutional amendment. Article V of the Constitution provides two ways to propose constitutional amendments: (1) amendments may be proposed either by the Congress, by two thirds votes of the House and the Senate; or (2) by a convention called by Congress in response to

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4 In *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)**,** the Supreme Court held that a baby born in California to Chinese parents -- subjects of China prohibited by law from becoming U.S. citizens -- was a citizen at birth under the 14th Amendment,.

5 *Id.* at 694.

6 *Plyler v. Doe*, 457 U.S. 202, 243 (1982).

7 South Dakota: House Bill 1199 (H.B. 1199, 86th Leg. Assem., Reg. Sess. (S.D. 2011)) failed in committee.

8 Montana: House Bill 392 (H.B. 392, 62nd Leg., Reg. Sess. (Mont. 2011)) failed in the state legislature, and then Governor Brian Schweitzer said that he would veto any unconstitutional bills, such as H.B. 392 (*See* Matt Gouras, *Gov. Schweitzer: Unconstitutional bills face veto*, ASSOCIATED PRESS, Feb. 3, 2011, *available at* http://www.businessweek.com/ap/financialnews/D9L8NTI00.htm.

9 Arizona: Senate Bill ("SB") 1308 (S.B. 1308, 50th Leg., 1st Sess. (Ariz. 2011)) and SB 1309 (S.B. 1309, 50th Leg., 1st Sess. (Ariz. 2011)) both were blocked by a strong showing of state legislators.

applications of two-thirds or more of states. Amendments must be ratified by three-quarters or more of the states. The Congress can choose to refer proposed amendments either to state legislatures or to special conventions called in the states to consider ratification.

No court has ever endorsed the notion that constitutional citizenship can be repealed or amended by legislation. The Birthright Citizenship Act of 2015 lacks legal foundation and is unconstitutional.

In conclusion, the ACLU will continue to challenge any proposal that erodes the constitutional guarantee of citizenship at birth. The 14th Amendment is sacrosanct and too important to be defined by the political and discriminatory prejudices of any Member of Congress. The ACLU urges the House Judiciary Committee to uphold the long-established constitutional guarantees of citizenship at birth and to reject any attempts to subvert such constitutionally protected rights.

For more information, please contact ACLU legislative counsel Joanne Lin (202/675-2317; jlin@aclu.org).

Sincerely,

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