

Shut Up. You Don't Even Go Here.* An Examination of First Amendment Rights for Noncitizens

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**SHUT UP.
YOU DON'T EVEN GO HERE.*
*AN EXAMINATION OF FIRST AMENDMENT
RIGHTS FOR NONCITIZENS***

BY: SAMANTHA CHASWORTH†

INTRODUCTION

Imagine you are living in an impoverished country, looking to escape political turbulence, violence, or general mistreatment. You come to the United States with your children to seek asylum status and are stopped just moments after crossing the border and placed in the custody of a United States detention center. Throughout your unreasonably long time in the detention center awaiting your immigration hearing, you are not treated as a human being. You are overworked, underpaid, and forced into solitary confinement for hours. To protest your treatment, you and your fellow inmates decide to stop working, stop sending your children to the detention center's school, and hunger strike. As a result, the detention center officials retaliate against you in order to discourage further protesting. When the retaliatory treatment becomes unbearable, you form a class action lawsuit against the detention center and allege violations of, among other things, your First Amendment rights.

The government and the detention center later respond to the lawsuit by informing you that you do not have a claim; they urge you to dismiss your action. As far as they are concerned, noncitizens like yourself do not have First Amendment rights because you lack a substantial connection to the United States. Without First Amendment protections, you have no right to protest or speak out against your treatment in the detention center, as well as no right to express your individual views. So what do you do? Your voice is chilled. You cannot speak out about the horrible conditions you are experiencing in the detention center. Once you are finally released you cannot protest for immigration reform until you are a citizen out of fear that your green card will be taken away and officials will be after your family to look into their status and deport them. Your speech is chilled out of fear. You must shut up.

*MEAN GIRLS (Paramount Pictures 2004).

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Recently, in *Pineda Cruz et al v. Thompson et al*, a group of women in Karnes County Civil Detention Center, most applying for asylum,¹ protested the harsh conditions they faced in the detention center.² These conditions were “intolerable and unduly harsh, especially for their young children.”³ After these protests, the detention center immediately retaliated and punished the protesting women by placing them in isolation and firing them from their detention center jobs.⁴

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Plaintiffs filed a class action lawsuit, representing the women detained at Karnes peacefully protesting their treatment, seeking injunctive relief to stop the retaliatory acts of the detention center.⁵ The Plaintiffs argued that under the First Amendment, they are entitled to the right to peacefully protest treatment and that the detention center, acting under the direct authority of the government, violated that right when it retaliated against their expressive conduct.⁶ However, in their motion to dismiss the complaint, the Department of Justice and the Karnes County Civil Detention Center stated that (1) the Plaintiffs failed to establish jurisdiction due to their failure to plead waiver of sovereign immunity as the United States cannot be sued, (2) the case was moot because all named Plaintiffs had been released from ICE custody, (3) the Plaintiffs did not exhaust their administrative remedies, and (4) the Plaintiffs did not state a claim under the First Amendment.⁷ The most alarming assertion is the Defendants’ final argument stating that the Plaintiffs did not establish a First Amendment claim. They explained that because

¹ Class Action Complaint at 2, *Pineda Cruz v. Thompson*, No. 5:15-cv-00326-XR (W.D. Tex. dismissed Apr. 23, 2015) (explaining that many of the women in Karnes County Detention Center were eligible for asylum). Asylum is a form of immigration status that is based upon the applicant’s past or future fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Refugees & Asylum*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum> (last updated Nov. 12, 2015).

² Class Action Complaint, *supra* note 1, at 6-8.

³ *Id.* at 7.

⁴ *Id.* at 9-20.

⁵ *Id.* at 20-23 (explaining that the plaintiffs seek to represent the women both present and future detained at Karnes).

⁶ *Id.* at 24.

⁷ Federal Defendants’ Motion to Dismiss Complaint at 6-16, *Pineda Cruz v. Thompson*, No. 5:15-cv-00326-XR (W.D. Tex. dismissed June 19, 2015).

the Plaintiffs have not been admitted to the United States, they therefore have not established sufficient connections to the country and thus are not entitled to litigate a claim of First Amendment violation.⁸

The argument used by the government in *Pineda Cruz* was that noncitizens, like the detainees, lacked a substantial enough connection to the United States.⁹ However, what is a “substantial connection?” What if a person came to the United States in search of the “American Dream,” has been here for twenty years, participates in the economy, owns his home, sends his children to school, hopes to serve in the military, but is a noncitizen? Is that still not a substantial enough connection? What about a person who is a citizen but does not have a job, does not own a home, and hates the government? Here, the noncitizen loves America and contributes to its economic growth whereas the citizen constantly plots against the United States and is nothing more than a drain on the economy. How is it that the citizen is considered to have *enough* of a connection to the United States constitution but the noncitizen is not?

Although the Plaintiffs in *Pineda Cruz* voluntarily dismissed their complaint,¹⁰ the discrimination experienced by the Plaintiffs in *Pineda Cruz* has the potential to be the reality for many across the United States if First Amendment protections are not recognized for noncitizens. First, the First Amendment is not speaker-based.¹¹ As long as a person is within the jurisdictional boundaries of the United States, they are entitled to the First Amendment.¹² This is affirmed through both the text of the First Amendment and the ability of both legal and illegal noncitizens to challenge the constitutionality of state actions.¹³

⁸ *Id.* at 16.

⁹ *Id.* at 12.

¹⁰ Notice of Voluntary Dismissal, *Pineda Cruz*, No. 5:15-cv-00326-XR.

¹¹ *See infra* Part III(A)(a).

¹² U.S. CONST. amend. XIV, § 1.

¹³ *See infra* Part III(A)(a).

Next, under the current United States Constitution, noncitizens are entitled to equal protection,¹⁴ due process,¹⁵ basic rights in a criminal prosecution,¹⁶ and freedom from slavery and involuntary servitude.¹⁷ Because noncitizens are clearly entitled to fundamental rights,¹⁸ they should be entitled to the protections of the First Amendment as well, another fundamental right.¹⁹ The ability to freely express oneself is crucial to the cornerstone of American societal values. Therefore, the government should not be able to arbitrarily choose which fundamental rights apply to noncitizens and which do not.

Lastly, without this freedom, noncitizens live in fear of unfair treatment or have their voices chilled altogether.²⁰ Many noncitizens fear repercussions from reporting employment discrimination, domestic violence, or police brutality claims.²¹ In addition, most immigration reform is achieved through

¹⁴ See U.S. CONST. amend. XIV, § 1; see also Plaintiffs' Opposition to Federal Defendants' Motions to Dismiss the Complaint at 17-18, *Pineda Cruz*, No. 5:15-cv-00326-XR (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886)).

¹⁵ See U.S. CONST. amend. V; see also Plaintiffs' Opposition to Federal Defendants' Motions to Dismiss the Complaint, *supra* note 14, at 17-18 (citing *Yick Wo*, 118 U.S. at 369; *Yamataya v. Fisher*, 189 U.S. 86, 99-100 (1903); *Wong Wing v. United States*, 163 U.S. 228, 242 (1896)); *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2012) (citing *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Zadyvas v. Davis*, 533 U.S. 678, 693 (2001)).

¹⁶ See U.S. CONST. amends. V, VI, XIV. See generally *Wong Wing*, 163 U.S. at 228; *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893), cited in David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 n.16 (2003).

¹⁷ See U.S. CONST. amend. XIII; see also *Wong Wing*, 163 U.S. at 237-38.

¹⁸ Plaintiffs' Opposition to Federal Defendants' Motions to Dismiss the Complaint, *supra* note 14, at 17-18 (explaining the fundamental rights that noncitizens are currently entitled to under the United States Constitution).

¹⁹ See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (stating "freedom of association receives protection as a fundamental element of personal liberty").

²⁰ See *First Amendment Violations*, HOLD CBP ACCOUNTABLE, <http://holdcbpaccountable.org/first-amendment-violations/> (last visited Mar. 17, 2018) (explaining the lack of First Amendment rights for noncitizens and stating that "[w]idespread abuses by Customs and Border Protection officials without repercussions or accountability have led many to refer to the border zone area as a constitution-free zone"). See generally Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

²¹ See Wishnie, *supra* note 20, at 667-69 (explaining that many immigrants fear reporting crimes because it will bring attention to their immigration status); see also Candice S. Thomas, "Immigration" Law: *The Determination of Remedial Measures for Undocumented Workers in the Workplace*, 83 U. CIN. L. REV. 1009, 1009 (2015) (identifying the various discriminatory challenges faced by noncitizens in the workplace and stating that "studies reveal that recent immigrants are more likely to experience discrimination than U.S. citizens or immigrants who have resided longer in the United States").

protesting,²² yet without First Amendment protection, noncitizens may fear participation because they may worry about being detained thereafter. Political speech is highly regarded under the First Amendment²³ and should be maintained for noncitizens as well.²⁴ Thus, the First Amendment must be recognized for noncitizens.

This Note considers the government's argument in *Pineda Cruz* that noncitizens are not entitled to the protections of the First Amendment and challenges that argument. Although *Pineda Cruz* was dismissed, the issue is still largely important for many noncitizens, and a decision about First Amendment protections should be made. The women in the Karnes Civil Detention Center are just a small sample of noncitizens in the United States, especially in detention centers, in desperate need of First Amendment rights.²⁵ Noncitizens are entitled to First Amendment protections because (1) the First Amendment is not speaker-based, (2) First Amendment rights are among the list of fundamental rights protected by the Constitution that noncitizens are already entitled to, and (3) without protection their speech is chilled, resulting in undue harm and unfair treatment.

Section I of this Note provides background information about *Pineda Cruz et al v. Thompson et al* and explains the government's argument in its Motion to Dismiss. Section II explains the First Amendment, demonstrating what it is and explaining its fundamental nature. Section III argues that noncitizens are entitled to First Amendment rights, presenting the non-speaker-based composition and character of the First Amendment. Next, this section demonstrates the many fundamental rights that noncitizens currently have in an effort to show the hole left open for the First Amendment. Next, this section describes the

²² See, e.g., *Nationwide Protest Planned for Immigrant Rights*, MSNBC (May 19, 2015, 12:54 PM), <http://www.msnbc.com/msnbc/nationwide-protests-planned-immigrant-rights#57336> (explaining that due to a lack of progress in immigration rights and DAPA in particular, activists staged an "Immigration Action Day" to protest and rally across the country and remind people there is a human face to the movement).

²³ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁴ See generally Wishnie, *supra* note 20.

²⁵ *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUD., <http://cmsny.org/immigration-detention-behind-the-record-numbers/> (last visited Mar. 17, 2018) (explaining that in 2012, the United States had detained 477,523 noncitizens, a nearly 25 percent increase since 2009).

enormous consequences of not providing First Amendment protections to noncitizens, like the government in *Pineda Cruz* had suggested. Lastly, this section discusses the benefits of allowing noncitizens protection under the First Amendment and both addresses and dismisses the counterarguments that may arise.

PINEDA CRUZ ET AL V. THOMPSON ET AL

Pineda Cruz et al v. Thompson et al was a class action suit filed in the U.S. District Court for the Western District of Texas. There, a group of women, while spending time in the Karnes County Civil Detention Center, protested the treatment they were receiving.²⁶ Then, the guards and the government exposed them to harsh and intolerable conditions.²⁷ This led to the women filing a class action lawsuit, a lawsuit relying on a principle that noncitizens are entitled to First Amendment rights.²⁸ However, in September 2015, the Plaintiffs voluntarily dismissed the case.²⁹ Although the case was voluntarily dismissed, it had lasting impacts because the government, in its Motion to Dismiss, argued that noncitizens are not entitled to First Amendment rights, a contention that shocked the Plaintiffs and the immigration community.³⁰

What happened?

At Karnes County Civil Detention Center, nearly every mother and child detained was applying for asylum or withholding of removal after fleeing their home countries of Honduras, El Salvador, and Guatemala due to both life threatening and sexual violence.³¹ Although these women may have brought their children to the United States to escape persecution, the women

²⁶ See *infra* Part I(A).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *infra* Part I(C).

³⁰ *Id.*

³¹ See Class Action Complaint, *supra* note 1, at 6 (explaining that although ICE has the authority to release these women and their children at any time, they have chosen to detain them while their asylum applications and applications for withholding are adjudicated); see also Kevin Penton, *Center Threatened Detainees Over Hunger Strike, Suit Says*, LAW360 (Apr. 24, 2015, 7:06 PM), <http://www.law360.com/articles/647432> (stating that the women were “held on bonds of \$2,500 to \$10,000 as they await determination of whether they can seek asylum in the U.S. out of fear that they would face persecution in their home countries”).

described the conditions in the detention center as “intolerable and unduly harsh;”³² a description that speaks volumes. The treatment was so abhorrent that guards told the women “they should agree to be deported if they want to leave the detention center so badly.”³³ Further, the women were detained for an unreasonably long period of time.³⁴ In response, a group of approximately eighty mothers decided to protest their treatment by circulating a petition and announcing a five-day peaceful hunger strike during Holy Week in which they consumed only liquids.³⁵

This angered Immigration and Customs Enforcement (ICE) officials and employees at the detention center (GEO Group Employees), who, upon demanding to know why the mothers were protesting and who the leaders were, accused them of being bad mothers for not feeding their children, an accusation that was entirely unfounded because the mothers fed their children breakfast, lunch, and dinner.³⁶ ICE officials even went so far as to say that the protesting mothers were not “mentally fit to care for their children” and as a response, many women dropped out of the protest.³⁷

Scare tactics were not the only method used by ICE and GEO employees to attempt to coerce cooperation among detainees. Ms. Pineda Cruz, Ms. Yakeline Galeano, and Ms. Soares de Oliviera dos Santos were placed in isolation, some with their children as young as two years old, overnight without being told why.³⁸ These isolation rooms, intended to isolate sick children or to punish women, were very small, dark, and locked and had an unpleasant

³² See Class Action Complaint, *supra* note 1, at 7-8 (explaining the harsh conditions at Karnes, such as improperly cooked food, very low paying “work assignments,” inadequate medical care, and improper punishments).

³³ *Id.* at 8.

³⁴ Many of the women came to the United States because they were fleeing widespread life threatening danger in their home countries and were detained while they awaited the completion of their asylum cases. *Id.* at 1-2.

³⁵ *Id.* at 8-9 (explaining that the hunger strike was peaceful because “the participating mothers did not pose a threat to anyone”).

³⁶ *Id.* at 9-10.

³⁷ *Id.* at 10.

³⁸ See *id.* at 10-14; see also *id.* at 15 (stating that the effects of isolation were apparent because Ms. Pineda Cruz’s son had not been well and had been crying constantly after the time he spent locked in isolation).

odor.³⁹ The rooms instilled a great deal of fear among the women and their children.⁴⁰ The women were later informed that they were placed in isolation because they were seen participating in the hunger strike.⁴¹ To make matters worse, GEO then fired all of the women from their jobs; a consequence that negatively impacted their ability to provide for their children as the mothers frequently purchased commissary food to supplement their children's meals.⁴²

The detainees were told many things by the guards in attempts to stop their hunger strike. They were told that if they continued to protest, they could not send emails, they could not work, and their immigration cases would suffer.⁴³ In addition, the GEO guards told women lies that things were out of order or closed to deprive them of certain rights they were entitled to, such as the right to a phone call or to purchase things from the commissary.⁴⁴ Further, the guards never restored their jobs, despite their continued protesting, and continued to threaten to take their children away.⁴⁵

The detention center, under orders of Warden Rose Thompson, was "acting under color of federal law" in a way that chilled the Plaintiffs' rights under the First Amendment to protest their confinement and treatment.⁴⁶ Therefore, the Plaintiffs' counsel argued that "[r]emedies available at law [were] not sufficient to compensate Plaintiffs for the chilling effects on their expressive conduct."⁴⁷ Thus, in April 2015, the women joined together to form a class action lawsuit against ICE and GEO wherein they sought an injunction and an issuance that the Defendants' actions

³⁹ *Id.* at 10-14.

⁴⁰ *Id.*

⁴¹ *Id.* at 11.

⁴² *Id.* at 14-15.

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 17 (stating that one woman attempted to call her family, but guards told her the phone was broken, and then when she tried to purchase goods from the commissary, the guard claimed it was closed).

⁴⁵ *Id.* at 19.

⁴⁶ *See id.* at 20; *see also id.* at 24 (explaining that it is a violation of the First Amendment for a government actor to retaliate against a person for engaging in expressive conduct and the "[p]etition, protests, and hunger strike at Karnes are expressive activity at the heart of what the First Amendment is intended to protect, because they are intended to call attention to and protest government actions").

⁴⁷ *Id.* at 20.

violated the Plaintiffs' rights under the First Amendment of the United States Constitution.⁴⁸

In response, the government filed a Motion to Dismiss the action on four grounds.⁴⁹ The most surprising ground was the argument that the Plaintiffs did not have First Amendment rights: "As non-resident aliens who have not gained admission or entry to the United States – and who have not established any lawful presence in, or connections to, the United States – Plaintiffs are not entitled to prevail in a lawsuit seeking relief for alleged violations of the First Amendment."⁵⁰

How could the government argue that the Plaintiffs were not entitled to First Amendment rights?

As one commentator described, the Department of Justice, in its Motion to Dismiss, went for the "nuclear option" in stating that undocumented immigrants in detention have no First Amendment rights.⁵¹ In its brief, the government argued that it is constitutional to suppress speech based upon immigration status because each individual must have a sufficient connection to the United States to have First Amendment rights under the Constitution.⁵² For this argument, the government relied on *Johnson v. Eisentrager*, a 1950 case that concerned the rights of

⁴⁸ *Id.* at 24-25.

⁴⁹ See generally Federal Defendants' Motion to Dismiss Complaint, *supra* note 7, at 6-16 (arguing that (1) there was no waiver of sovereign immunity, (2) the issue was moot because the named Plaintiffs were released, (3) Plaintiffs did not exhaust their administrative remedies, and (4) Plaintiffs failed to state a First Amendment claim).

⁵⁰ *Id.* at 2; see Matthew Bultman, *Immigrant Women Fight Feds' Bid to Dismiss 1st Amend. Suit*, LAW360 (Sept. 1, 2015, 3:46 PM), <http://www.law360.com/articles/697784> (stating that the plaintiffs have contended that the substantial connections test is not reasonable because it is impossible for a noncitizen to determine in advance whether they established the adequate connections to receive constitutional protections).

⁵¹ Robert Schoon, *Immigration Reform News: Detained Immigrants 'Not Entitled' To First Amendment Protections, Argue Obama Justice Department Lawyers in Little-known Court Case*, LATIN POST (May 17, 2015, 5:00 PM), <http://www.latinpost.com/articles/53858/20150517/immigration-reform-news-detained-immigrants-not-entitled-to-first-amendment-protections-argue-obama-justice-department-lawyers-in-lesser-known-court-case.htm> (explaining that the Obama Administration would disapprove of the treatment given to the Plaintiffs in *Cruz*, stating: "Before you tell any court that free speech . . . somehow does not apply to a group of people in the United States, please check with your boss").

⁵² See Federal Defendants' Motion to Dismiss Complaint, *supra* note 7, at 12-13.

Nazi spies serving sentences in Germany.⁵³ *Eisentrager* applied to a narrow category of people, those who are enemy aliens outside the United States and who therefore had minimal Constitutional rights within the United States.⁵⁴ However, as the Plaintiffs' argued, because the women in *Karnes* were within the United States seeking First Amendment protection and further were not "enemy aliens," *Eisentrager* does not apply.⁵⁵

Also, the government argued that the First Amendment was speaker-based and the free speech rights of noncitizens within the United States hinged on their *individual* connection to the United States.⁵⁶ This, as the Plaintiffs argued, is impermissible.⁵⁷ Plaintiffs alleged that the government's argument (1) dismantles the First Amendment's application to all persons within the United States and therefore is prohibited by the Supreme Court, and (2) would have severe negative effects on the noncitizen community, including the chilling effects of inhibiting the ability to speak and express themselves freely.⁵⁸

Another argument the government made was that immigrants were not "people" under the text of the Constitution.⁵⁹ For support, the government relied heavily on *United States v. Verdugo-Urquidez*, incorrectly arguing that the case stood for the proposition that "the people" in the First, Second, Fourth, Ninth, and Tenth Amendments only protects those with sufficient connections to the United States, such that they are part of the

⁵³ *Id.*; see *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950); see also Plaintiffs' Opposition to Private Defendants' Motions to Dismiss the Complaint at 22-23, *Pineda Cruz v. Thompson*, No. 5:15-cv-00326-XR (W.D. Tex. dismissed Sept. 1, 2015) (explaining that this is of no consequence to the Plaintiffs' free speech claim because "[t]he Free Speech Clause does not confer an affirmative right; it restricts the government from interference with protected speech").

⁵⁴ *Eisentrager*, 339 U.S. at 796.

⁵⁵ Plaintiffs' Opposition to Private Defendants' Motions to Dismiss the Complaint, *supra* note 53, at 21-22.

⁵⁶ Federal Defendants' Motion to Dismiss Complaint, *supra* note 7, at 14.

⁵⁷ See Plaintiffs' Opposition to Private Defendants' Motions to Dismiss the Complaint, *supra* note 53, at 15-19 ("[S]peech restrictions based on the identity of the speaker are all too often simply a means to control content . . . [T]he purpose and effect [of a speaker-based distinction] are to silence entities whose voices the Government deems to be suspect." (quoting *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010))).

⁵⁸ *Id.*; see also *infra* Part III(A)(c)(1) (explaining the chilling effects that noncitizens face as a result of a lack of free speech).

⁵⁹ See Federal Defendants' Motion to Dismiss Complaint, *supra* note 7, at 13 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

national community.⁶⁰ However, as the Plaintiffs stated, “the people” was not at issue; moreover, with the prohibition of a speaker based analysis, *Verdugo* was inapplicable.⁶¹

Lastly, the government relied on *Turner v. Williams*, involving the government’s plenary power to exclude anarchist noncitizens, wherein the petitioner lacked free speech rights and was excluded at Ellis Island.⁶² However, as the Plaintiff’s argue, *Turner v. Williams* does not permit limitless governmental interference with undocumented immigrants.⁶³ The Plaintiffs argued that even if this case permitted limitless governmental interference, it is nonetheless inapplicable because the detained women at Karnes and their children were not anarchists; in addition, the women were not seeking judicial review or a review of the government’s plenary power.⁶⁴

Overall, the government relied on irrelevant and unsound reasons in arguing that the Plaintiffs did not state a First Amendment claim. Additionally, some of the cases relied on were dated.⁶⁵ Further, the cases relied on were factually distinct from the case at hand.⁶⁶ Thus, the government’s argument that the Plaintiffs did not state a valid First Amendment claim was entirely unsupported, and should have been denied.

The Plaintiffs won, right?

Despite insufficiencies in its argument, the government was successful in preventing the Plaintiffs from pursuing their claim.⁶⁷

⁶⁰ *Id.*

⁶¹ Plaintiffs’ Opposition to Private Defendants’ Motions to Dismiss the Complaint, *supra* note 53, at 22-23.

⁶² See Federal Defendants’ Motion to Dismiss Complaint, *supra* note 7, at 13-14 (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)).

⁶³ See Plaintiffs’ Opposition to Private Defendants’ Motions to Dismiss the Complaint, *supra* note 53, at 24-25 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (quoting *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (explaining that freedom of speech and press is accorded to aliens residing within the United States))).

⁶⁴ Plaintiffs’ Opposition to Private Defendants’ Motions to Dismiss the Complaint, *supra* note 53, at 23-24.

⁶⁵ See, e.g., Federal Defendants’ Motion to Dismiss Complaint, *supra* note 7, at 13-14 (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)).

⁶⁶ *Id.*

⁶⁷ Notice of Voluntary Dismissal, *supra* note 10.

On September 9, 2015, the Plaintiffs filed a motion to voluntarily dismiss the action.⁶⁸ This may seem shocking, given the irrational arguments posed by the Defendants. However, as explained by counsel for the Plaintiffs, Trisha Trigilio, “[b]y mid-September, none of the striking mothers was left in Karnes, and mothers who were detained months after the strike didn’t have a live controversy with the Defendants.”⁶⁹ One of the named plaintiffs was granted legal status, while the other two have been released on bond during their immigration proceedings.⁷⁰ Additionally, the remainder of the protesting detainees have either been released or transferred to another detention center.⁷¹ As Trigilio said,

I am disappointed that our clients didn’t have the chance to hold the Obama administration accountable – both for the inhumane threats to separate children from their mothers, and for the claim that undocumented immigrants don’t have free speech rights. Free speech is a matter of human dignity, and our Constitution protects that right for all persons within the United States. It is outrageous for our government to imprison mothers and children in the United States, then claim that those same mothers and children are too far removed from U.S. affairs to speak out about the government’s actions.⁷²

Although these individual women were released from Karnes County Civil Detention Center, the status of First Amendment rights for noncitizens throughout the country is still uncertain.

⁶⁸ *Id.*

⁶⁹ E-mail from Trisha Trigilio, Counsel for Plaintiffs, Univ. of Tex. Sch. of Law, Civil Rights Clinic, to author (Oct. 3, 2015, 12:25 PM EST) (on file with author) (explaining why the Plaintiffs filed a motion to voluntarily dismiss their complaint).

⁷⁰ Jason Buch, *Detainees Drop Retaliation Lawsuit*, SAN ANTONIO EXPRESS-NEWS (Sept. 9, 2015), <http://www.expressnews.com/news/local/article/Detainees-drop-retaliation-lawsuit-6494015.php>.

⁷¹ *Id.*

⁷² E-mail from Trisha Trigilio, *supra* note 69.

THE FIRST AMENDMENT⁷³

The First Amendment is a necessary right that protects all those within the United States. Arguably, the First Amendment is a fundamental constitutional right⁷⁴ that has been argued to extend not only to legal United States citizens but also to non-citizens within the borders of the United States. These arguments are based in both the text of the Constitution and a person's ability to challenge the constitutionality of state and federal actions.⁷⁵ In determining whether the speech is protected, it does not matter who the speaker is, as long as the speaker is within the United States, they are entitled to the rights, privileges, and protections of the First Amendment.⁷⁶

The First Amendment is Fundamental

A Constitutional right is a right guaranteed by the United States Constitution.⁷⁷ A fundamental Constitutional right is a right specifically identified by the Constitution or found to be protected under the Due Process or Equal Protection Clause of the Fourteenth Amendment.⁷⁸ Identification of fundamental rights “has not been reduced to any formula.”⁷⁹ Instead, the Court must use “reasoned judgment in identifying interests of the person so fundamental” and deserving of the State's respect.⁸⁰ Further, in the Court's evaluation of fundamental rights, it seeks to protect those “fundamental rights and liberties, which are, objectively, deeply rooted in this Nation's history and tradition.”⁸¹ The First Amendment and the freedoms that it aims to protect are a key example of a fundamental right.

⁷³ This Note focuses exclusively on speech law within the First Amendment; other rights afforded under the First Amendment are outside of the scope of this Note.

⁷⁴ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷⁵ See *infra* Part III(A)(a).

⁷⁶ See *infra* Part III(A)(a).

⁷⁷ *Constitutional Right*, BLACK'S LAW DICTIONARY (10th. ed. 2014).

⁷⁸ *Fundamental Constitutional Right*, BLACK'S LAW DICTIONARY (10th. ed. 2014).

⁷⁹ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

⁸¹ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted) (internal quotation marks omitted); see also *Obergefell*, 135 S. Ct. at 2598 (explaining that the process in evaluating is broad and stating that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries”).

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁸² Freedom of speech, one of the rights protected by the First Amendment, is a fundamental right and liberty free from impairment by the State through the due process clause of the Fourteenth Amendment.⁸³ Notably, characterizing the First Amendment as fundamental is “not lightly used.”⁸⁴ A characterization of fundamental nature requires that a right be objectively deeply rooted in this Nation’s history and tradition.⁸⁵ Here, the First Amendment “reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men.”⁸⁶ Additionally, the First Amendment allows for an open marketplace of ideas without government interference.⁸⁷ It is fair to say that the First Amendment plays a strong role in the Nation’s history. It is therefore clear that the First Amendment and the freedom of speech is a fundamental right, but who is entitled to its protections?

NONCITIZENS ARE ENTITLED TO FIRST AMENDMENT RIGHTS

Noncitizens must be provided with the guarantees of the First Amendment. First, it is not speaker-based.⁸⁸ Second, the First Amendment is fundamental, and noncitizens are currently entitled to other fundamental rights, such as equal protection, due process of law, rights in a criminal prosecution, and freedom from

⁸² U.S. CONST. amend. I.

⁸³ See *Gitlow v. New York*, 268 U.S. 642, 666 (1925); see also *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (explaining that the fundamental character of freedom of speech is also extended to the right of peaceable assembly and free press); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (stating that the right to petition for a redress of grievances is fundamental in nature as well).

⁸⁴ *Hill v. Colorado*, 530 U.S. 703, 782-83 (2000) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939)) (demonstrating the importance of the word “fundamental”).

⁸⁵ *Glucksberg*, 521 U.S. at 720-21.

⁸⁶ *Hill*, 530 U.S. at 782-83 (quoting *Schneider*, 308 U.S. at 161).

⁸⁷ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

⁸⁸ See *infra* Part III(A)(a).

slavery and involuntary servitude.⁸⁹ The government and the Court cannot arbitrarily determine which rights noncitizens have and which they do not, especially those rights that are fundamental. Third, without access to the privileges of the First Amendment, noncitizens live in a country where their voices are chilled from speaking out against the many injustices to which they fall victim.⁹⁰

In recognizing that noncitizens have First Amendment rights, both noncitizens and society will benefit. This recognition would allow for a true marketplace of ideas, thereby embracing the principles of the First Amendment.⁹¹ However, many critics have argued that because noncitizens are not parties to the social contract of the United States Constitution, they do not deserve the same rights.⁹² Additionally, critics have argued that because noncitizens cannot vote, they should not be able to participate in the marketplace of ideas; therefore they are not entitled to the First Amendment's freedom of expression.⁹³ Nevertheless, noncitizens should be entitled to First Amendment protections and the ability to speak freely.

ARGUMENT

Noncitizens should be given First Amendment rights because (1) the First Amendment is not speaker-based, (2) noncitizens are afforded other fundamental rights such as equal protection under the law, due process of law before deprivation of life, liberty or property, basic rights in a criminal prosecution, and freedom from slavery and involuntary servitude, and (3) without First Amendment rights, the negative consequences create a chilling effect across the noncitizen community.

⁸⁹ See *infra* Part III(A)(b).

⁹⁰ See *infra* Part III(A)(c).

⁹¹ See *infra* note 145.

⁹² See *infra* Part III(C)(a).

⁹³ See *infra* Part III(C)(b).

Identity is Irrelevant: The First Amendment is Not Speaker-Based

The First Amendment right is not speaker-based. At the heart of free speech protection is the assertion that the government cannot deprive the public of the right to determine for itself what speakers are worthy of consideration.⁹⁴ “The protection for any given act of expression cannot vary based on the speaker’s identity.”⁹⁵ As long as the speaker, regardless of citizenship, is within the United States, the First Amendment provides protection. This non-speaker-based approach is due to both the text of the United States Constitution and the ability for everyone within the United States to challenge the constitutionality of state and federal actions.

First, the text of the First Amendment facilitates a non-speaker-based approach. For example, the word “freedom” from the phrase “freedom of expression” stated within the text of the First Amendment means nothing if the government can restrict who can express views and where.⁹⁶ Additionally, in containing the phrase “the people,” the First Amendment allows for a non-speaker based approach.⁹⁷ This phrase has historically led to a lot of debate about who exactly is entitled to these rights.⁹⁸ Some commentators have wondered whether this reference to “the people” in various constitutional amendments is referring to particular individuals or if it is merely rhetorical and “the people” can mean different things in different Constitutional amendments.⁹⁹ However,

⁹⁴ Plaintiffs’ Opposition to Private Defendants’ Motions to Dismiss the Complaint, *supra* note 53, at 17 (citing *Citizens United v. FEC*, 558 U.S. 310, 342 (2010)).

⁹⁵ Restrictions on speech cannot be imposed simply because the claimant is a citizen or a noncitizen. *Id.* at 17 (citing *Citizens United*, 558 U.S. at 342; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

⁹⁶ *Id.*

⁹⁷ U.S. CONST. amend. I.

⁹⁸ Some critics of extending First Amendment rights to noncitizens have argued that the phrase “the people” in the First Amendment only refers to United States citizens, while many proponents for immigration reform have argued that this phrase refers to all those within the jurisdiction of the United States, taking a very literal reading of the amendment. *See The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1078 (2013) (explaining that the touchstone is not necessarily citizenship; instead, it is connection to the country).

⁹⁹ *Id.* (detailing the different meanings that “the people” has within the various amendments of the Constitution and explaining that the tension arises not from citizenship, but from a substantial connection with the United States); *see, e.g.*, Wishnie, *supra* note 20, at 680 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66

because only a portion of the First Amendment refers to “the right of the people,” a portion that does not discuss speech protections, it has been argued that there is no express limitation as to whom the right to free speech applies.¹⁰⁰

The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all “persons” and guard against any encroachment on those rights by federal or state authority.¹⁰¹

Therefore, because “the people” within the text of the First Amendment is not precise and does not distinguish between citizen and noncitizen, noncitizens are entitled to the protections and privileges of the First Amendment. The textual language and construction of the First Amendment is not the only mechanism for enabling noncitizens the right to First Amendment protections.

Next, it is a well-established principle that noncitizens legally within the United States are entitled to challenge the constitutionality of federal and state actions.¹⁰² Even those noncitizens *illegally* within the United States are permitted to

(1990)) (explaining that within the Fourth Amendment “the people” has been called a term of art).

¹⁰⁰ In the text of the First Amendment, the portion that refers to “the people” is only in one clause. Thus, within the construction of the First Amendment itself, it is unclear exactly who is being addressed specifically by “the people” thereby implying that it does not have strict limitations. See Plaintiffs’ Opposition to Federal Defendants’ Motions to Dismiss the Complaint, *supra* note 14, at 19-20 (quoting *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995) (explaining that there are no limitations expressly limiting to whom the First Amendment applies as there are for the Fourth Amendment, another amendment that states “the people” and excludes its rights to those who belong to a community of persons with a sufficient connection to this country)).

¹⁰¹ See *id.* (citing *Underwager*, 69 F.3d at 365 (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (explaining that these rights are extended to all persons and do not distinguish between citizen and noncitizen))).

¹⁰² *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 994 (9th Cir. 2012) (citing *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 580 (1976); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-03 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419-20 (1948)).

bring constitutional claims.¹⁰³ Noncitizens and citizens alike are permitted to challenge the constitutionality of federal and state actions so long as they are within the United States. In *Ibrahim v. Dep't of Homeland Security*, one issue was whether the Plaintiff had standing to challenge her name on a terrorist watch list by arguing a First Amendment violation.¹⁰⁴ There, the court held that she had standing because she was within the United States.¹⁰⁵ This speaks to the non-speaker-based characteristic of the First Amendment. If the First Amendment were speaker-based, only specific individuals would be entitled to bring First Amendment claims challenging state and federal actions. Once a person is within the territorial United States, they have the ability to challenge the constitutionality of state and federal actions, regardless of citizenship.¹⁰⁶

The effects of a speech restriction based on the identity of the speaker, or a speaker-based approach, are immense because it is merely a means to control content and silence those whom the government deems suspect, resulting in an oppressive government.¹⁰⁷ However, because of the text and construction of the First Amendment acting in concert with the ability of noncitizens to challenge the constitutionality of federal and state actions, the First Amendment itself is not speaker-based. Because the First Amendment is not speaker-based, or does not specify who is entitled to its protections, citizens as well as noncitizens are entitled to its protections and benefits.

What Rights Do Noncitizens Have?

Although a court has yet to determine the scope of First Amendment rights of noncitizens within the United States, noncitizens are currently entitled to certain other fundamental rights and protections under the United States Constitution. Noncitizens are entitled to certain fundamental rights: (1) equal protection under the law, (2) due process of law before deprivation

¹⁰³ *Ibrahim*, 669 F.3d at 994 (citing *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)).

¹⁰⁴ *Ibrahim*, 669 F.3d at 992.

¹⁰⁵ *Id.* at 993-94.

¹⁰⁶ *Id.* at 994-95.

¹⁰⁷ Plaintiffs' Opposition to Federal Defendants' Motions to Dismiss the Complaint, *supra* note 14, at 15 (quoting *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010)).

of life, liberty or property, (3) basic rights in a criminal prosecution, and (4) freedom from slavery and involuntary servitude.¹⁰⁸

Equal Protection

The Fourteenth Amendment provides that a state cannot “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁹ The Fourteenth Amendment is not confined to the protection of citizens and includes all people in the jurisdiction, regardless of race, color, and nationality.¹¹⁰ Thus, those within the territorial United States, even noncitizens, are entitled to equal protection under the law¹¹¹ because they are within its jurisdiction. Furthermore, the equal protection clause protects fundamental rights with strict scrutiny, and therefore the protection of these rights through the equal protection clause is fundamental.¹¹² Carving distinctions solely on the basis of ancestry has been deemed by the Supreme Court as “odious to a free people whose institutions are founded upon the doctrine of equality.”¹¹³ A racial classification, or ancestry classification,¹¹⁴ is subject to the most rigid scrutiny, or “strict scrutiny.”¹¹⁵ If the classification is upheld, it must be shown to be necessary to the

¹⁰⁸ *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (“[S]o rooted in the traditions and conscience of our people as to be ranked as fundamental.”); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937); *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *Grosejean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936); *The Civil Rights Cases*, 109 U.S. 3, 22-23 (1883).

¹⁰⁹ U.S. CONST. amend. XIV, § 1.

¹¹⁰ See *Plaintiffs’ Opposition to Federal Defendants’ Motions to Dismiss the Complaint*, *supra* note 14, at 17 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886) (noting that a treaty between the United States and China provided that the United States government must exercise all powers to protect and secure the same rights, privileges, immunities, and exemptions that may be enjoyed by citizens for Chinese laborers who permanently or temporarily reside within the United States)).

¹¹¹ *Id.*

¹¹² *Loving*, 388 U.S. at 11.

¹¹³ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (explaining that the restrictions afforded to people of Japanese extraction residing in the United States have been sources of problems and isolated from the white population within the United States).

¹¹⁴ An ancestry classification would encompass noncitizens from other countries that are discriminated against based upon their ancestral background.

¹¹⁵ See *Loving*, 388 U.S. at 11.

accomplishment of some permissible state objective, independent of the discrimination, what the Fourteenth Amendment aimed to eliminate.¹¹⁶ Thus, noncitizens are entitled to equal protection under the law, a fundamental right.

Due Process of Law Before Deprivation of Life, Liberty, or
Property

The Fourteenth Amendment not only guarantees equal protection under the law but also guarantees due process of law before deprivation of life, liberty, or property; a right also guaranteed to noncitizens.¹¹⁷ Additionally, the Fifth Amendment guarantees due process, stating “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”¹¹⁸ The term “person” used in the Fifth Amendment encompasses every human within the United States.¹¹⁹ Regardless of citizenship, every “person” is entitled to due process such as indictment of a grand jury or presentment.¹²⁰ The Due Process Clause protects fundamental rights and liberties objectively that are first, deeply rooted in this Nation’s history and tradition¹²¹ and second, “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.”¹²² If a fundamental liberty interest is involved, the government is prohibited from infringing on that interest unless the infringement is narrowly

¹¹⁶ *Id.*

¹¹⁷ See U.S. CONST. amend. XIV, § 1 (stating “nor shall any state deprive any person of life, liberty, or property without due process of law”); see also Plaintiffs’ Opposition to Federal Defendants’ Motions to Dismiss the Complaint, *supra* note 14, at 17 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the Fourteenth Amendment is not confined to only the protection of citizens)).

¹¹⁸ See U.S. CONST. amend. V; see also *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2012) (citing *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Reno v. Flores*, 507 U.S. 292, 306 (1993)) (stating “[i]t is well established that the Fifth Amendment guarantees non-citizens due process in removal proceedings. Therefore, every individual in removal proceedings is entitled to a full and fair hearing” (citations omitted)).

¹¹⁹ See *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) (“A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to.”).

¹²⁰ See *id.*

¹²¹ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (stating that the Due Process Clause is “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

¹²² *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted) (citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

tailored to serve a compelling state interest.¹²³ Therefore, the right to due process is fundamental.

Further, “it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States.”¹²⁴ Also, deporting a noncitizen without providing him an opportunity to present evidence is inconsistent with the requirements of the Fifth Amendment and a court has never allowed an administrative officer to disregard the fundamental principles of due process.¹²⁵ In fact, under the Fifth Amendment, even a noncitizen that has entered the country illegally has the right to be heard before being deported.¹²⁶ “No such arbitrary power [to deport without a hearing exists] where the principles involved in due process of law are recognized.”¹²⁷ Therefore, noncitizens are entitled to due process of law.

Basic Rights in a Criminal Prosecution

The protections of the Fifth and Fourteenth Amendments are afforded to noncitizens and, thus, noncitizens are entitled to basic rights in a criminal prosecution. Additionally, noncitizens are protected in criminal proceedings under the Sixth Amendment.¹²⁸ Rights, including those to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to “the accused.”¹²⁹ The right to counsel in criminal

¹²³ *Id.* (citing *Reno*, 507 U.S. at 302).

¹²⁴ *Cole*, *supra* note 16, at 382 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

¹²⁵ *Yamataya v. Fisher*, 189 U.S. 86, 99-100 (1903) (explaining that the court refuses to disregard the fundamental principles of due process of law and allow administrative officials to act arbitrarily).

¹²⁶ *Id.* at 101.

¹²⁷ *Id.*

¹²⁸ *See* U.S. CONST. amend. VI (stating “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence”); *Cole*, *supra* note 16, at 369; *see also* *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth, Sixth, and Fourteenth Amendments protect noncitizens charged with crimes).

¹²⁹ *Cole*, *supra* note 16, at 370.

prosecutions, provided by the Sixth Amendment,¹³⁰ is a fundamental right.¹³¹ “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides [are] lost, justice will not still be done.”¹³² Further, without taking into consideration citizenship status, all people within the United States are tried for their crimes and are entitled to the same rights in criminal prosecutions.¹³³ Noncitizens are entitled to the safeguards of the United States Constitution, to protection under the laws, and to both civil and criminal accountability.¹³⁴ Therefore, noncitizens are provided basic rights during a criminal prosecution.

Freedom From Involuntary Servitude

Lastly, noncitizens have the right to be free from involuntary servitude. Under the Thirteenth Amendment, “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹³⁵ Further, Congress has the ability to determine the extent of the badges and incidents of slavery.¹³⁶ The Supreme Court has established that the badges and incidents of slavery include restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.”¹³⁷ Thus, the Thirteenth Amendment, the right to freedom against involuntary solitude, is a fundamental amendment because it protects against infringement of

¹³⁰ *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

¹³¹ *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963); *Grosejean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936) (stating that “certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by . . . the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution”).

¹³² *Zerbst*, 304 U.S. at 462 (internal quotation marks omitted).

¹³³ U.S. CONST. amend. VI; see *Cole*, *supra* note 16, at 370-71.

¹³⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (explaining that so long as a noncitizen has taken the steps towards becoming a citizen, the government cannot remove the safeguards of the United States Constitution), *cited with approval in Cole*, *supra* note 16, at 371 n.16.

¹³⁵ U.S. CONST. amend. XIII, § 1.

¹³⁶ *The Civil Rights Cases*, 109 U.S. 3, 35 (1883).

¹³⁷ *Id.*

fundamental rights. Therefore, because noncitizens are within the jurisdiction of the United States, because they are on United States soil, they are entitled to the benefits of the Thirteenth Amendment to be free from involuntary servitude.¹³⁸

Why Do Noncitizens Need First Amendment Rights?

Additionally, the cost of not granting noncitizens First Amendment rights is immense. A denial of these rights silences an entire group of people within the jurisdiction of the United States, exactly what the First Amendment is meant to protect against. Without First Amendment rights, noncitizens experience a chilling effect, causing them to fear ever speaking or expressing themselves. It can occur in a variety of forms such as through (1) political speech, (2) the criminal justice system, and (3) reporting labor and employment misconduct.

Chilling effects on political speech

The type of speech restricted in *Pineda Cruz* and in the lives of many noncitizens is political speech. Political speech, granted the highest level of protection,¹³⁹ is a valuable tool for noncitizens to work to pass reform. Through protests and petitions, noncitizens and their supporters push for immigration reform on numerous platforms.¹⁴⁰ Petitioning involves presenting a communication, either orally or in writing, to the legislative, executive, and judicial branches of government to seek redress of a grievance.¹⁴¹ Petitioning has proved to be a valuable tool for the noncitizen community. For example, petitioning helped to implement whistleblower policies for certain classes of immigrants and restrict the use of immigration status in law enforcement efforts immediately after the terrorist attacks on September 11, 2001.¹⁴²

¹³⁸ See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (holding that the lower court erred in not discharging petitioners from imprisonment as they were entitled to be free from involuntary servitude).

¹³⁹ See *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

¹⁴⁰ See *Wishnie*, *supra* note 20, at 680-81 (explaining the need for petitioning throughout the noncitizen community and the success of petitioning in both the areas of law enforcement and labor and employment).

¹⁴¹ *Id.* at 668.

¹⁴² *Id.* at 670-71.

Without First Amendment protections, noncitizens would be silenced; they would be unable to voice their concerns without being oppressed by the government.¹⁴³ An oppressive government, one that fails to see where change must exist for those in need, would lead to a loss of hope among the noncitizen community. No reforms would be passed because of ancient, arbitrary, immigration law, and a willfully blind government.

Chilling effects within the criminal justice system

Further, if noncitizens do not have First Amendment protections, they will be deterred from reporting crimes. Many noncitizens, after falling victim to criminal activity, do not report their abuses to law enforcement.¹⁴⁴ They are afraid that by reporting an abuse, it will cause law enforcement officials to unreasonably revoke their green card or possibly attract the attention of immigration officials to family members that may be undocumented, an unintended effect of reporting a crime done because the officer is overstepping his authority.¹⁴⁵ Additionally, if a noncitizen witnesses or is victim to a crime and calls the police to report that crime, this will eventually lead to questioning and a noncitizen may have the same fear.¹⁴⁶ For example, victims of domestic violence fear law enforcement abuses and therefore may not report attacks, leaving their attackers on the street ready to harm others and feeling immune to the police.¹⁴⁷ The First Amendment is thus a necessary tool for noncitizens that feel too afraid to report crimes.¹⁴⁸ A noncitizen's speech is effectively chilled within the criminal justice system without First Amendment protections.

¹⁴³ *Id.* at 670.

¹⁴⁴ *Id.* at 673.

¹⁴⁵ *Id.* at 669, 674-75.

¹⁴⁶ Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 119 (2011) ("Calling the police to report [a] crime will likely lead to questions that reveal a witness's immigration status, resulting in detention and deportation for the undocumented immigrant witness.").

¹⁴⁷ Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 839, 841 (2012).

¹⁴⁸ *See id.* at 841.

Chilling effects of employment misconduct

Another area where noncitizens are in desperate need of First Amendment protections is reporting employment misconduct. Without First Amendment protections, noncitizens would worry about reporting misconduct by their employers, fearing that if they report harsh working conditions the employer would find an excuse to report them to immigration authorities, which may result in revocation of a green card or looking into the status of a family member, a complete invasion of privacy.¹⁴⁹ Additionally, employers have an upper hand and may use it to their advantage to put noncitizen employees in harsh working conditions. Employers know that employees will not report these conditions to authorities, thus their voice is chilled. The employer may have the noncitizen work long hours for extremely low pay in conditions that are unsafe, all the while knowing that he will never report this to the Department of Labor.¹⁵⁰ Therefore, allowing noncitizens protection under the First Amendment is crucial within the workplace because it allows noncitizens to freely air complaints within a company, without fear of immigration involvement.

PROTECTING NONCITIZENS UNDER THE FIRST AMENDMENT BENEFITS CITIZENS

Additionally, noncitizens are not the only ones to benefit from recognition that they have First Amendment rights. One of foundations of the First Amendment is to allow for and to maintain a safe marketplace of ideas, and the free and open debate necessary to self-government.¹⁵¹ For the marketplace of ideas to work effectively, these ideas need to come from a variety of

¹⁴⁹ See Wishnie, *supra* note 20, at 669-70.

¹⁵⁰ See Eunice Hyunhye Cho, *Exploiting Immigrants: Labor Laws Need to Protect Undocumented Workers, Too* (Apr. 24, 2013), http://www.mercurynews.com/ci_23091307/exploiting-immigrants-labor-laws-need-protect-undocumented-workers (stating that many undocumented workers do not stand up for their rights to a fair day's pay out of fear that their employers will retaliate).

¹⁵¹ See *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (stating that the First Amendment's purpose is to allow for a marketplace of ideas in which "truth will ultimately prevail" (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)) (internal quotation marks omitted)).

sources, including noncitizens because noncitizens contribute a fresh perspective to discussions within the United States, politically and otherwise.¹⁵² Because they come from outside the United States, noncitizens know what it is like to be an outsider both politically and socially, and can effectively contribute to the marketplace of ideas created by the First Amendment. This contribution benefits citizens looking to get a fresh perspective on a political or social problem because noncitizens, because of their multitude of cultural backgrounds, bring to the table a rare perspective on both social and political issues.

COUNTERARGUMENTS

Social-Contract theory

One argument against granting illegal noncitizens First Amendment protection is that illegal noncitizens, unlike citizens and resident aliens or lawful permanent residents, are not parties to the social contract embodied within the Constitution.¹⁵³ The social-contract theory states that because they were not parties to the Constitution and do not belong to the United States, they therefore they may not invoke its protections.¹⁵⁴ However, this is incorrect to assume.¹⁵⁵ Because noncitizens must conform to the Constitution and owe a temporary obedience to it, they are entitled to its protections and advantages.¹⁵⁶

Another concern is that the United States, while engaging in foreign activities, may plausibly abridge the freedom of expression or another constitutional right of a citizen of another country.¹⁵⁷ Then, that foreign citizen would try to bring their claim in a

¹⁵² See Steven J. Burr, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1916 (1985) (explaining that there are benefits to having a multitude of ideas in a society, including those obtained from noncitizens); see also Corydon Ireland, *The Gifts of Immigration*, HARV. GAZETTE (Apr. 21, 2011), <http://news.harvard.edu/gazette/story/2011/04/the-gifts-of-immigration> (explaining that noncitizen children often arrive as “instant adults” with much more than just a suitcase; they arrive with language, culture, a need for education and psychological toughness as a result of the hardship they faced from their homeland).

¹⁵³ Burr, *supra* note 152, at 1913.

¹⁵⁴ *Id.* at 1913-14.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* at 1913 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 749 (1893) (Field, J., dissenting)).

¹⁵⁷ *Id.* at 1914-15.

United States federal court and challenge the constitutionality of United States foreign policy, a claim that may, for example, take the form of a First Amendment claim.¹⁵⁸ However, in foreign policy issues, the Supreme Court could hold that the claim is nonjusticiable under the political question doctrine.¹⁵⁹ Thus, the Court may not wish to grant First Amendment rights for noncitizens in an effort to not interfere with the justiciability of foreign policy.¹⁶⁰ However, this issue is not about foreign policy. These noncitizens are within the jurisdiction of the United States and therefore the issue should be treated as such. The Court should be able to adjudicate decisions regarding the First Amendment and noncitizens, without issue of justiciability.

Right to vote

There are those that view the First Amendment solely as a means to achieve the ends of self-government.¹⁶¹ They argue that because noncitizens do not have a right to vote or participate directly in self-government, it is not as important to protect their right to free expression.¹⁶² However, the right to vote is only one of the many things encompassed by the First Amendment.¹⁶³ The First Amendment “furthers autonomy, critical thinking, self-expression, the search for truth, and the checking of government abuse, all interests that noncitizens share equally with citizens.”¹⁶⁴ Even though corporations cannot vote, they are still entitled to the same right as citizens to freely express themselves.¹⁶⁵ Those who can vote need to hear from those who cannot in order to take their interests into account, demonstrating that their inability to vote increases a noncitizen’s importance within the political community.¹⁶⁶

¹⁵⁸ *Id.* at 1915.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Cole, *supra* note 16, at 377.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that corporations have First Amendment rights).

¹⁶⁶ See Cole, *supra* note 16, at 377-78.

CONCLUSION

The First Amendment protections must be guaranteed to everyone on United States soil. Because noncitizens are currently within the jurisdiction of the United States, they deserve the protections guaranteed by the First Amendment. Further, noncitizens are entitled to many fundamental rights. The First Amendment must be included within that bundle of rights. Without the ability to advocate for their rights, and report crimes and employment misconduct, noncitizens are left with nowhere to turn; their speech is chilled.