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THE HISTORY AND FUTURE OF ITINs AND TAXIGRATION
POLICY FOR UNDOCUMENTED TAXPAYERS IN THE
UNITED STATES

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THE HISTORY AND FUTURE OF ITINs AND TAXIGRATION
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*Jackie Vimo**

I. INTRODUCTION

Undocumented¹ immigrants exist at the border of U.S. tax systems and principles of democratic justice. Undocumented taxpayers pay billions of dollars to federal, state, and local governments every year in income, excise, consumption, and payroll taxes.² Yet they are ineligible to vote or qualify for most benefits that these payments support, including Social Security retirement benefits, Medicare, Medicaid, Supplemental Security Income, the Supplemental Nutrition Assistance Program, and federal tax benefits such as the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC). The fact that immigrants have no say in how their tax dollars are spent raises serious democratic concerns. The U.S. origin story is often recounted as an epic battle against the tyranny of “taxation without representation,” yet millions of undocumented taxpayers lack a voice in the rules that govern them. As Francine Lipman describes, undocumented taxpayers are “separate, unequal, and without representation.”³

At the same time as they are excluded from critical public benefits and tax credits, undocumented taxpayers increasingly face needless and

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¹ Undocumented immigrants are foreign-born people who do not have legal authorization to be or remain in the United States. The term “undocumented” is technically a misnomer, as many in this category possess some form of documentation. Nonetheless, this Essay adopts this vocabulary, as it is the term most commonly used by undocumented immigrants themselves.

² In the introduction to this issue, Francine Lipman notes that undocumented immigrants “pay about \$12 billion a year in state and local taxes, \$16 billion in federal payroll taxes, and tens of billions in federal income and other taxes annually.” Francine J. Lipman, *Taxing Undocumented Immigrants Redux*, 21 PITT. TAX REV. 153, 161–62 (2024).

³ See generally Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006).

burdensome administrative barriers to applying for taxpayer identification numbers (TINs) used to file and pay their federal and state income taxes. This Essay provides an overview of the exclusions and hurdles undocumented immigrants have faced in the nearly three decades since the inception of the Individual Taxpayer Identification Number (ITIN), a specific TIN used by undocumented immigrants in lieu of a Social Security number (SSN). This Essay begins with a short introduction to ITINs and then offers a brief history of ITIN policy development, ending with an overview of efforts to include ITIN taxpayers and their families in COVID-19 relief payments. The Essay concludes with a list of administrative and legislative policy recommendations that could create a fairer, more just tax system for undocumented taxpayers and the nation as a whole.

II. TAXING UNDOCUMENTED IMMIGRANTS

A. *ITIN History*

The ITIN is a relatively recent addition by the U.S. Treasury as a TIN. The Internal Revenue Service (IRS) started using SSNs for tax reporting in 1962.⁴ At that time, the Social Security Administration (SSA) did not require that SSN applicants show evidence of citizenship status, work authorization, or benefit eligibility; these requirements were implemented in the 1970s.⁵ In the following decades, SSA issued “nonwork” SSNs to most immigrants with U.S. tax obligations.⁶ Then, in 1996, responding to a study finding tax compliance issues with nonresident immigrant investment income,⁷ the IRS promulgated regulations creating the ITIN, a nine-digit tax processing number to enable taxpayers ineligible for SSNs to meet their federal tax obligations.⁸ All immigrants (including undocumented immigrants) who

⁴ Carolyn Puckett, *The Story of the Social Security Number*, 69 SOC. SEC. BULL. 55, 67 (2009), <https://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html>.

⁵ Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1430–31 (2004).

⁶ ERIKA K. LUNDER & MARGOT L. CRANDALL-HOLLICK, CONG. RSCH SERV., R43840, FEDERAL INCOME TAXES AND NONCITIZENS: FREQUENTLY ASKED QUESTIONS 4 (2014).

⁷ NAT’L TAXPAYER ADVOC., 2003 ANNUAL REPORT TO CONGRESS 60 (2003), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/nta_2003_annual_update_mcw_1-15-042.pdf.

⁸ T.D. 8671, 1996-1 C.B. 314; Treas. Reg. § 301.6109-1(d)(3) (1996).

reside in the United States and meet the “substantial presence” test⁹ are required to comply with the same tax laws governing citizens and are taxed on their worldwide income, subject to treaty provisions.¹⁰ With rare exceptions, all taxpayers must file taxes with a TIN assigned by the IRS.¹¹ Although ITINs are issued to various categories of immigrants,¹² ITINs are an especially important tool for undocumented immigrants.

ITINs enable immigrants to comply with federal tax laws and contribute to the economy, but they also offer other substantive benefits. If an undocumented immigrant has an opportunity to legalize their immigration status, filing taxes with an ITIN can serve as a positive factor in proving “good moral character” and establishing work history as well as physical presence in the United States.¹³ Although ITINs were created to serve tax purposes, they are increasingly used to access a number of social goods. An ITIN can be used to open a bank account, access a line of credit, apply for a mortgage or an auto loan, or apply for a driver’s license in states without immigration status restrictions for licenses.¹⁴ Roberto Suro and Hannah Findling contend that “[t]he ITIN creates a category of membership in American society that is predicated not on the circumstances of an individual’s arrival but on their conduct as income earners and taxpayers once here.”¹⁵

⁹ I.R.C. § 7701(b)(3); Treas. Reg. § 301.7701(b)-1(c) (1992).

¹⁰ NAT’L TAXPAYER ADVOC., *supra* note 7, at 61.

¹¹ I.R.C. § 6109(a)(1).

¹² ITIN filers include dependents or spouses of U.S. citizens and nonresident immigrants as well as immigrants claiming tax treaty benefits. See *Individual Taxpayer Identification Number*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/individual-taxpayer-identification-number> (last updated Jan. 4, 2024).

¹³ SARAH LORA ET AL., *TAX ISSUES FOR IMMIGRANTS: A PRACTICAL GUIDE TO UNDERSTANDING TAX LAW FOR IMMIGRANT TAXPAYERS* 69–74 (2022).

¹⁴ For a current list of states without immigration status restrictions on driver’s licenses, see *State Laws Providing Access to Driver’s Licenses or Cards, Regardless of Immigration Status*, NAT’L IMMIGR. L. CTR. (July 2023), <https://www.nilc.org/issues/drivers-licenses/state-laws-providing-dl-access/>.

¹⁵ Roberto Suro & Hannah Findling, *Tax Equality for Immigrants: The Indispensable Ingredient for Remedying Child Poverty in the United States*, 9 J. ON MIGRATION & HUM. SEC. 251, 255 (2021), <https://doi.org/10.1177/23315024211034836>.

ITINs may function to facilitate avenues to greater inclusion for immigrant taxpayers, but using an ITIN is not without risks. By applying for ITINs, immigrants make themselves visible to the state and subject to government surveillance. Sarah Horton describes state-issued identity documents, including passports and driver's licenses, as a form of "bureaucratic inscription."¹⁶ ITINs fall in the category of this type of document, which mediates contact between migrants and the state. Horton explains that "[i]n rendering migrants not only known to the state but *legible*—that is, locatable through the information tied to migrants' identities—documents also make migrants more vulnerable."¹⁷ Although U.S. law provides strong confidentiality provisions for taxpayer data,¹⁸ there is no guarantee that Congress will not rescind these protections or that this data will not be shared with immigration enforcement agencies, pursuant to a court order or via other channels. Questions about whether to share IRS data with the Immigration and Naturalization Service (INS) and the Department of Homeland Security (DHS) have persisted since the ITIN's inception.¹⁹

B. Policy Developments

The birth of the ITIN in 1996 coincided with a watershed year for both immigration and welfare reform legislation in Washington, D.C. The IRS published the regulations that created the ITIN in May, and President Bill Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in August of that year.²⁰ PRWORA radically restricted immigrant access to public benefits, including Medicaid, cash

¹⁶ Sarah B. Horton, *Introduction* to PAPER TRAILS: MIGRANTS, DOCUMENTS, AND LEGAL INSECURITY 3 (Sarah B. Horton & Josiah Heyman eds., 2020).

¹⁷ *Id.* at 6.

¹⁸ I.R.C. § 6103.

¹⁹ See, e.g., Joshua Rodriguez, *How Does Information Sharing Between DHS and Other Non-Enforcement Executive Agencies Work?*, BIPARTISAN POL'Y CTR. (Apr. 17, 2018), <https://bipartisanpolicy.org/blog/how-does-information-sharing-between-dhs-and-other-non-enforcement-executive-agencies-work/#>.

²⁰ T.D. 8671, 1996-1 C.B. 314; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

assistance, unemployment, and retirement benefits.²¹ Further, PRWORA required work-authorized SSNs for the taxpayers, spouses, and any qualifying children to receive the EITC.²² ITIN filers were thus excluded from the EITC. The following year, Congress passed the Taxpayer Relief Act of 1997, which established the CTC, including a refundable Additional Child Tax Credit (ACTC).²³ The law required taxpayers claiming the CTC to provide a TIN for any qualifying child; however, because the law did not specify the type of TIN required, acceptable TINs included SSNs and ITINs.²⁴ Accordingly, the EITC was the primary federal tax credit Congress denied ITIN filers.

In 2003, the IRS announced new measures intended to discourage “unauthorized use” of ITINs—namely, the use of ITINs for nontax purposes.²⁵ According to an IRS press release, the procedural changes would “help ensure that ITINs are issued for their intended tax administration purpose for administering the tax code and not for other reasons, such as providing personal identification.”²⁶ To begin with, the 2003 changes required immigrants to attach a tax return along with the Form W-7 used to apply for an ITIN.²⁷ The Taxpayer Advocate Service (TAS), an independent watchdog office within the IRS, had opposed the proposal, arguing that the tax return requirement would “place unnecessary administrative hurdles” on taxpayers seeking to comply with tax laws and lacked any underlying tax or business justification.²⁸ In addition, the 2003 revisions to the ITIN process included reducing the number of documents accepted as proof of identity from forty to thirteen and issuing ITINs via a letter instead of a card to avoid

²¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 401.

²² *Id.* § 451.

²³ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 101, 111 Stat. 788, 796–99.

²⁴ *Id.*; MARGOT L. CRANDALL-HOLLIK & ERIKA K. LUNDER, CONG. RSCH. SERV., IN11830, THE CHILD TAX CREDIT AND INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS (ITINs) 1, 2 (2021).

²⁵ I.R.S. News Release IR-2003-140 (Dec. 17, 2003).

²⁶ *Id.*

²⁷ *Id.*

²⁸ NAT’L TAXPAYER ADVOC., *supra* note 7, at 72–73.

confusing the ITIN with an SSN.²⁹ These procedures remain in place to this day.

ITIN administration processes remained largely unchanged until a July 2011 Treasury Inspector General for Tax Administration (TIGTA) report entitled “Individuals Who Are Not Authorized to Work in the United States Were Paid \$4.2 Billion in Refundable Credits.”³⁰ The report emphasized that ITIN filers had received billions in ACTCs, refundable credits that can result in refunds even without any withholding or payment of income tax.³¹ Ranking member of the Senate Finance Committee Orrin Hatch demanded action from Congress and the Obama administration in response to the report’s findings.³² Nonetheless, the findings were consistent with the tax statutes passed into law by Congress, including the Senate, which mandated this treatment.

In 2012, TIGTA published a new report finding that the IRS’s process for reviewing and verifying ITINs was “so deficient that there is no assurance that ITINs are not being assigned to individuals submitting questionable applications.”³³ However, the report did not uncover any evidence of fraud. In June 2012, the IRS announced interim modifications to its ITIN procedures, which it made permanent the following November.³⁴ To begin with, ITINs would expire after five years.³⁵ The IRS also formalized its earlier practice of rejecting notarized copies of original documents, which

²⁹ I.R.S. News Release IR-2003-140, *supra* note 25.

³⁰ TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2011-41-061, INDIVIDUALS WHO ARE NOT AUTHORIZED TO WORK IN THE UNITED STATES WERE PAID \$4.2 BILLION IN REFUNDABLE CREDITS (2011).

³¹ *Id.*

³² Lisa Rein, *Undocumented Workers Got Billions from IRS in Tax Credits, Audit Finds*, WASH. POST (Sept. 2, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/undocumented-workers-got-billions-from-irs-in-tax-credits-audit-finds/2011/03/23/gIQAhtaKvJ_blog.html.

³³ TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2012-42-081, SUBSTANTIAL CHANGES ARE NEEDED TO THE INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER PROGRAM TO DETECT FRAUDULENT APPLICATIONS (2012).

³⁴ I.R.S. News Release IR-2012-98 (Nov. 29, 2012).

³⁵ The expiration policy was amended in 2014, but it was rendered obsolete by the passage of the PATH Act of 2015, Pub. L. No. 114-113, div. Q, 129 Stat. 2242, 3040-128 (2016). *See* I.R.S. News Release IR-2014-76 (June 30, 2014).

had previously been accepted.³⁶ Certifying Acceptance Agents (CAAs) would be authorized to review original documents or copies certified by the issuing agency for primary and secondary applicants.³⁷ Meanwhile, dependents would be required to mail original documents or certified copies to the IRS unless the dependent visited a Taxpayer Assistance Center (TAC) or a U.S. tax attaché's office.³⁸ In its 2012 report to Congress, TAS contended that the new procedures placed an “unprecedented burden on ITIN applicants, imperiling their future tax compliance as well as their personal welfare and safety in the United States and abroad.”³⁹

In June 2012—the same month that the IRS implemented its interim ITIN program changes—President Barack Obama announced the Deferred Action for Childhood Arrivals (DACA), which provided work authorization and protection from deportation for children who arrived in the United States at a young age.⁴⁰ In November 2014, the Obama administration announced a second initiative, Deferred Action for Parents of Americans (DAPA), which would have granted a similar reprieve to parents of U.S. citizens or lawful permanent residents.⁴¹ While the DAPA policy was blocked by the courts and never went into effect, the creation of DACA and DAPA raised concerns that the programs would result in “amnesty bonuses” in the form of tax credits.⁴² Beneficiaries of these deferred action statuses would be issued a

³⁶ *ITIN Documentation Frequently Asked Questions (FAQs)*, INTERNAL REVENUE SERV. (Jan. 4, 2024), <https://www.irs.gov/individuals/international-taxpayers/itin-documentation-frequently-asked-questions-faqs>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 1 NAT'L TAXPAYER ADVOC., 2012 ANNUAL REPORT TO CONGRESS 154 (2012), <https://www.taxpayeradvocate.irs.gov/reports/2012-annual-report-to-congress>.

⁴⁰ Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. DEP'T OF HOMELAND SEC. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴¹ Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, U.S. DEP'T OF HOMELAND SEC. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

⁴² Marisa Shultz, *Immigrants Granted Amnesty Now Eligible for Tax Benefits*, N.Y. POST (Feb. 3, 2015), <https://nypost.com/2015/02/03/immigrants-granted-amnesty-now-eligible-for-tax-benefits>; Max

work-authorized SSN and, therefore, be eligible for the EITC and the CTC.⁴³ Consequently, Republican Senator Chuck Grassley introduced legislation that sought to block deferred action recipients from retroactively claiming the EITC in early 2015.⁴⁴

Although Grassley's bill did not advance, these measures were rolled into the Protecting Americans from Tax Hike (PATH) Act of 2015, which Congress passed as part of a broader appropriations bill.⁴⁵ The PATH Act made expansions of the EITC and CTC permanent while codifying the 2012 ITIN application rules and imposing a slew of new barriers for ITIN taxpayers.⁴⁶ The ITIN provisions were inspired both by opposition to the DACA and DAPA programs and mounting concerns about improper payments of tax credits reported in IRS audits.⁴⁷ The PATH Act denied taxpayers the ability to receive the EITC, CTC or ACTC, and the American Opportunity Tax Credit (AOTC) retroactively if they did not have a valid TIN issued on or prior to the date of the filed return.⁴⁸ In addition, the PATH Act set all ITINs issued before 2013 to expire on a staggered basis and included a provision for all ITINs to expire if an individual did not file a tax return for three consecutive years.⁴⁹

The new barriers created by PATH Act requirements caused ITIN returns to plummet. In 2015, the year the PATH Act was enacted, 4.4 million

Ehrenfreund, *What the Debate over "Amnesty Bonuses" Reveals About the GOP's Immigration Problem*, WASH. POST (Mar. 3, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/03/what-the-debate-over-amnesty-bonuses-reveals-about-the-gops-immigration-problem/>.

⁴³ *Who Qualifies for the Earned Income Tax Credit (EITC)*, INTERNAL REVENUE SERV. (Mar. 1, 2024), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc>.

⁴⁴ A Bill to Amend the Internal Revenue Code of 1986 to Provide a Limitation on Certain Aliens from Claiming the Earned Income Tax Credit, S. 686, 114th Cong. (2015).

⁴⁵ Pub. L. No. 114-113, Div. Q, 129 Stat. 2242, 3040–128 (2016).

⁴⁶ *Id.* §§ 101, 103, 203.

⁴⁷ Josh Hicks, *Watchdog: Improper IRS Payments of Tax Credit Increased Last Year*, WASH. POST (May 13, 2014), <https://www.washingtonpost.com/news/federal-eye/wp/2014/05/13/watchdog-irss-improper-payments-of-tax-credit-increased-last-year/>.

⁴⁸ PATH Act §§ 204–206.

⁴⁹ I.R.C. § 6109(i)(3).

ITIN returns were filed.⁵⁰ By 2019, the number of ITIN returns had been cut nearly in half, with only 2.5 million ITIN taxpayers filing returns.⁵¹

The next attack on the rights of ITIN tax filers came in the form of the Tax Cuts and Jobs Act (TCJA) of 2017.⁵² President Donald Trump's signature tax reform bill imposed a new SSN requirement for qualifying children for the CTC, which stripped the CTC from an estimated one million immigrant children.⁵³ Early bill drafts would have also required at least one of the taxpayers claiming the dependent and the child dependents themselves to have a valid, work-authorized SSN and imposed a new SSN requirement for the AOTC.⁵⁴ Advocates battled fiercely against these provisions and were successful in blocking the SSN requirement for the AOTC as well as the SSN requirement for parents or other taxpayers claiming qualifying children for the CTC.⁵⁵ Given that 4.4 million U.S.-citizen children under the age of eighteen lived with at least one undocumented parent as of 2018, requiring parents also to have an SSN to claim the CTC would have had a much greater impact.⁵⁶ Republican Senator Mitt Romney revived the effort to require an SSN of CTC claimant parents in his 2022 Family Security 2.0 proposal.⁵⁷ The TCJA's CTC SSN requirement sunsets in 2025. In the meantime, one

⁵⁰ 1 NAT'L TAXPAYER ADVOC., 2015 ANNUAL REPORT TO CONGRESS 199 (2015), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_MSP_18_ITIN.pdf.

⁵¹ *Most Taxpayers Needing a New ITIN Are Prohibited from Filing Electronically, Causing Unnecessary Refund Delays*, TAXPAYER ADVOC. SERV.: NTA BLOG (Feb. 8, 2024), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-most-taxpayers-needing-a-new-itin-are-prohibited-from-filing-electronically-causing-unnecessary-refund-delays/>.

⁵² Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

⁵³ Jacob Leibenluft, *Tax Bill Ends Child Tax Credit for About 1 Million Children*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 18, 2017, 4:45 PM), <https://www.cbpp.org/blog/tax-bill-ends-child-tax-credit-for-about-1-million-children>.

⁵⁴ *Id.*; H.R. 1, 115th Cong. § 1103 (as introduced in the House, Nov. 2, 2017).

⁵⁵ Leibenluft, *supra* note 53; *see* I.R.C. §§ 24(h), 25A.

⁵⁶ AM. IMMIGR. COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 1 (2021), <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

⁵⁷ Senator Mitt Romney et al., *A New National Commitment to Working American Families*, ROMNEY.SENATE.GOV, https://www.romney.senate.gov/wp-content/uploads/2022/06/family-security-act-2.0_one-pager_appendix.pdf (last visited Feb. 14, 2024).

million children have been denied access to a tax credit with a proven track record of lifting children out of poverty.⁵⁸

C. Failure of Global Pandemic Relief for Undocumented Households

The most recent policy exclusions for ITIN filers were imposed through the three rounds of stimulus payments at the peak of the COVID-19 pandemic. Through dogged advocacy, immigrant activists were able to incrementally remove barriers to the stimulus checks for SSN holders in mixed-status families that included ITIN filers; however, ITIN filers themselves were completely cut out of all three relief payments.⁵⁹ In the end, every taxpayer with a valid SSN was able to access all three stimulus payments, regardless of whether they were married to an undocumented spouse who filed with an ITIN.⁶⁰ Dependent children with SSNs whose parents or guardians filed exclusively with ITINs only received the final payment.⁶¹

The denial of COVID-19 relief for undocumented immigrants who suffered disproportionately from infection, sickness, and death as vulnerable essential workers—often without access to healthcare—exposed glaring economic and social injustices. The first round of Economic Impact Payments (EIPs) was authorized in March 2020 by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act barred ITIN filers from receiving stimulus payments and imposed a “marriage

⁵⁸ Kalee Burns & Liana Fox, *The Impact of the 2021 Expanded Child Tax Credit on Child Poverty*, CENSUS.GOV (Nov. 22, 2022), <https://www.census.gov/library/working-papers/2022/demo/SEHSD-wp2022-24.html>; Bradley L. Hardy et al., *The Antipoverty Effects of the Expanded Child Tax Credit Across States: Where Were the Historic Reductions Felt?*, BROOKINGS: THE HAMILTON PROJECT 1 (Mar. 1, 2023), <https://www.brookings.edu/articles/the-antipoverty-effects-of-the-expanded-child-tax-credit-across-states-where-were-the-historic-reductions-felt/>.

⁵⁹ *Mixed-Status Families Ineligible for CARES Act Federal Pandemic Stimulus Checks*, MIGRATION POL’Y INST. (May 2020), <https://www.migrationpolicy.org/content/mixed-status-families-ineligible-pandemic-stimulus-checks>.

⁶⁰ I.R.S. Fact Sheet FS-2022-26 (Apr. 2022), <https://www.irs.gov/pub/taxpros/fs-2022-26.pdf> (explaining that spouses with SSNs married to ITIN filers and filing jointly were initially ineligible for the first stimulus check, unless at least one of the spouses was a member of the U.S. armed forces at any time during the 2020 taxable year, but legislation enacted by Congress in December 2022 made spouses of ITIN filers with SSNs retroactively eligible for the first stimulus payment).

⁶¹ I.R.S. Fact Sheet FS-2022-27 (Apr. 2022), <https://www.irs.gov/pub/taxpros/fs-2022-27.pdf>.

penalty” for citizens and lawfully present immigrants married to ITIN filers, unless at least one of the spouses was a member of the U.S. armed forces at any time during the 2020 taxable year.⁶² Under the CARES Act, a U.S. citizen who filed taxes jointly with a spouse who filed taxes with an ITIN was denied the first EIP.⁶³ The CARES Act excluded 5.1 million adults and children with SSNs living in mixed-status families from COVID-19 relief payments as well as 9.3 million taxpayers with ITINs.⁶⁴

For the second round of EIPs, Republican Senator Marco Rubio successfully pushed to eliminate the CARES Act marriage penalty. “No American should be denied a federal stimulus check because they are married to a foreign national who is not a U.S. citizen,” said Senator Rubio, who introduced legislation with Republican Senator Thom Tillis to remove the marriage penalty.⁶⁵ Thanks to persistent efforts by advocates and Senator Rubio, H.R. 133, enacted in December 2020, authorized a second round of EIPs that added three million U.S. citizens and lawfully present immigrants with SSNs married to immigrants who had been shut out of CARES Act relief. Under H.R. 133, SSN-holding spouses of ITIN filers were also retroactively eligible for the first CARES Act payment.⁶⁶ However, round two of the stimulus checks still excluded 2.2 million U.S. citizen children and other kids with SSNs as well as 9.3 million ITIN filers.⁶⁷

The contentious debate over immigrant eligibility continued for the third round of relief checks under the American Rescue Plan Act (ARPA) of 2021. Republican Senators Todd Young and Ted Cruz introduced amendments

⁶² *SOI Tax Stats—Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Statistics*, INTERNAL REVENUE SERV. (Feb. 7, 2024), <https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics>.

⁶³ *See id.*

⁶⁴ Julia Gelatt et al., *Nearly 3 Million U.S. Citizens and Legal Immigrants Initially Excluded Under the CARES Act Are Covered Under the December 2020 COVID-19 Stimulus*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/news/cares-act-excluded-citizens-immigrants-now-covered> (last visited Mar. 3, 2024).

⁶⁵ Press Release, U.S. Sen. Thom Tillis, Tillis & Rubio Introduce Bill to Allow Stimulus Money for U.S. Citizens Married to Non-Citizens (June 25, 2020), <https://www.tillis.senate.gov/2020/6/tillis-rubio-introduce-bill-to-allow-stimulus-money-for-u-s-citizens-married-to-non-citizens>.

⁶⁶ *Id.*

⁶⁷ *Id.*

during the bill negotiations that would again deny stimulus payments to citizens and lawfully present immigrants with SSNs married to ITIN filers.⁶⁸ Eight Democratic senators voted for the Young amendment.⁶⁹ Nonetheless, following pushback from advocates, the Cruz amendment was defeated along party lines, with no Democrats voting in favor.⁷⁰ The final ARPA bill ultimately extended stimulus payments to *all* taxpayers with SSNs, including children whose parents or guardians were both ITIN filers.⁷¹

Given that immigrants were disproportionately concentrated in essential jobs during the COVID-19 pandemic,⁷² the exclusion of ITIN filers from pandemic relief was particularly inequitable and egregious. Millions of undocumented immigrants worked long hours while others sheltered in place, yet they were not eligible for a single penny of federal economic relief in the form of direct payments as stimulus checks. In addition to being a matter of basic equity, including ITIN relief would have helped grow the U.S. economy. According to an August 2020 report, extending just the first round of EIPs to undocumented taxpayers and their families would have added over \$10 billion to the U.S. economy, generating enough economic activity to support over 82,000 jobs nationwide.⁷³

Beyond being excluded from COVID-19 relief, undocumented tax filers also faced unprecedented barriers to applying for ITINs and paying their taxes during the height of the pandemic. Generally, ITIN applicants can avoid mailing their original documents by using CAAs and Taxpayer Assistance

⁶⁸ Alexander Bolton, *Senate Rejects Cruz Effort to Block Stimulus Checks for Undocumented Immigrants*, THE HILL (Mar. 6, 2021, 10:59 AM), <https://thehill.com/homenews/senate/541945-senate-rejects-cruz-effort-to-block-stimulus-checks-for-undocumented/> (explaining the introduced amendments by Senator Cruz and Senator Young).

⁶⁹ *Id.*; S. Con. Res. 5, 117th Cong. (2021), amended by S. amend. 54.

⁷⁰ S. amend. 968 to S. amend. 891, H.R. 1319, 117th Cong. (2021) (amendment failed).

⁷¹ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 139 (codified at I.R.C. § 6428B).

⁷² Julia Gelatt & Muzaffar Chisti, *COVID-19's Effects on U.S. Immigration and Immigrant Communities, Two Years On*, MIGRATION POL'Y INST. 1 (2022), <https://www.migrationpolicy.org/research/covid19-effects-us-immigration>; RAÚL HINOJOSA OJEDA ET AL., UCLA LATINO POL'Y & POL. INITIATIVE, UNDOCUMENTED DURING COVID-19: ESSENTIAL FOR THE ECONOMY BUT EXCLUDED FROM RELIEF 4 (2020), <https://escholarship.org/uc/item/2k40c22z>.

⁷³ HINOJOSA OJEDA ET AL., *supra* note 72, at 5.

Centers (TACs), which are authorized to conduct in-person document verification.⁷⁴ However, most offices were closed, leaving taxpayers no other choice but to send in their original documents through the U.S. Postal Service (USPS). Both the USPS⁷⁵ and the IRS⁷⁶ experienced historic delays and backlogs. Some individuals reported waiting over a year to have their ITIN applications processed, and many others lost their identification documents and tax records in the mail.⁷⁷

Due to the barriers ITIN taxpayers faced during the pandemic, many were unable to claim the expanded CTC. The expansion of the CTC through pandemic relief legislation has been demonstrated to be an exceptionally effective tool for reducing child poverty.⁷⁸ However, millions of immigrant families were denied the expanded CTC because their children lacked SSNs or because they missed the filing deadline due to the pandemic and were unable to claim the credit retroactively due to the PATH Act's provisions. Democratic Senator Robert Menendez issued a call to extend the tax deadline so that immigrant families could claim the CTC, but the request was met with silence from the IRS.⁷⁹

Since undocumented workers are ineligible for Unemployment Insurance (UI) and were excluded from stimulus relief, some states stepped

⁷⁴ *ITIN Documentation Frequently Asked Questions (FAQs)*, INTERNAL REVENUE SERV. (Jan. 4, 2024), <https://www.irs.gov/individuals/international-taxpayers/itin-documentation-frequently-asked-questions-faqs>.

⁷⁵ Quinn Klinefelter, "There's No End in Sight": Mail Delivery Delays Continue Across the Country, NPR (Jan. 22, 2021, 7:01 PM), <https://www.npr.org/2021/01/22/959273022/theres-no-end-in-sight-mail-delivery-delays-continue-across-the-country>.

⁷⁶ Greg Iacurci, *IRS Had a Backlog of Nearly 8 Million Paper Business Tax Returns in 2020 Due to Pandemic*, CNBC (Sept. 7, 2021, 5:03 PM), <https://www.cnbc.com/2021/09/07/pandemic-led-to-irs-backlog-of-8-million-paper-business-tax-returns.html>.

⁷⁷ *Most Taxpayers Needing a New ITIN Are Prohibited from Filing Electronically, Causing Unnecessary Refund Delays*, TAXPAYER ADVOC. SERV.: NTA BLOG (Feb. 8, 2024), <https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-most-taxpayers-needing-a-new-itin-are-prohibited-from-filing-electronically-causing-unnecessary-refund-delays/2021/04/>.

⁷⁸ Burns & Fox, *supra* note 58; Hardy et al., *supra* note 58.

⁷⁹ Press Release, Sen. Bob Menendez, Menendez, Colleagues Urge IRS to Extend Filing Deadline for ITIN Filers Affected by Processing Delays (July 14, 2022), <https://www.menendez.senate.gov/newsroom/press/menendez-colleagues-urge-irs-to-extend-filing-deadline-for-itin-filers-affected-by-processing-delays>.

in to create “excluded worker” funds. The largest fund was established in New York, where \$2.1 billion was set aside to provide support to undocumented workers left out of the mainstream UI system.⁸⁰ Senate Majority Leader Chuck Schumer sent a letter to IRS Commissioner Charles Rettig to address the IRS backlog so that workers could access the fund, which required workers to furnish an ITIN to claim benefits.⁸¹ “I secured \$1.5 billion for the IRS in the last COVID relief bill so the IRS can provide taxpayer assistance and do administrative work just like this,” noted Schumer, “and now they have to get to work to clear the individual taxpayer ID backlog.”⁸² In response, the IRS established an innovative pop-up process through which taxpayers who had previously submitted an ITIN application but not yet received their ITIN could schedule an appointment to bring a copy of their application to a TAC.⁸³ IRS staff then stamped their copy as received, and workers could provide this stamped copy to apply for New York’s Excluded Worker Fund (EWF).⁸⁴

This example of the IRS response to workers needing ITINs for New York’s state-level EWF benefits demonstrates that, when there is political will, the IRS can implement effective measures to remove barriers for ITIN filers. The IRS should therefore implement policies to remove the hurdles that have been imposed since the ITIN’s inception in 1996. Further, Congress should introduce legislation to eliminate the statutory barriers that have been enacted in recent decades. The next Part of this Essay contains a list of recommendations that the U.S. Department of Treasury and Congress should implement to ensure the full inclusion of ITIN taxpayers in the nation’s tax systems.

⁸⁰ Annie Correal & Luis Ferré-Sadurní, *New York Set Aside \$2.1 Billion for Undocumented Workers. It Isn’t Enough.*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/nyregion/new-york-excluded-workers-fund.html>.

⁸¹ Chris Sommerfeldt, *N.Y. Lawmakers Say Thousands of Undocumented Residents Unable to Access COVID Aid Because of IRS Backlogs*, N.Y. DAILY NEWS (Apr. 30, 2021), <https://www.nydailynews.com/2021/04/30/ny-lawmakers-say-thousands-of-undocumented-residents-unable-to-access-covid-aid-because-of-irs-backlogs/>.

⁸² *Id.*

⁸³ *New York State Residents: Excluded Workers Fund Payments*, INTERNAL REVENUE SERV. (Jan. 4, 2024), <https://www.irs.gov/individuals/new-york-state-residents-excluded-workers-fund-payments>.

⁸⁴ *Id.*

III. RECOMMENDATIONS FOR A MORE EQUITABLE TAX CODE

Eliminate SSN Requirements for the CTC and EITC: Congress should pass legislation to allow taxpayers and their dependents to claim the EITC and the CTC using a TIN—whether an SSN or an ITIN. Although the CTC SSN requirement is slated to expire in 2025, broad TIN eligibility should be codified permanently into law.

Allow All Taxpayers to Claim the EITC, CTC, and AOTC Retroactively: Congress should strike the prohibition on retroactive claims for the EITC, CTC, and AOTC under the PATH Act. Like all other taxpayers subject to statutes of limitations on refund claims, immigrants should have up to three years to claim any tax refunds including tax credits.

Eliminate the Tax Return Requirement for ITIN Applicants: ITIN applications should not require a tax return as a condition precedent to issuance of the number. Rather, ITIN applications, including a Form W-7 and identifying documents or certification of the same, should be processed as properly filed and received throughout the year.

Issue ITINs to Taxpayers Eligible for State Tax Credits: Although most ITIN filers are excluded from the EITC and CTC, states have filled the gap by enacting state-level EITCs and CTCs that are available to all state residents, including ITIN filers. There are currently ten states with ITIN-inclusive state EITCs⁸⁵ and eleven states with ITIN-inclusive CTCs.⁸⁶ Unfortunately, many individuals and families are unable to take advantage of these state tax credits because the IRS will not issue ITINs to individuals who do not have a federal tax filing requirement.⁸⁷ The IRS should revise its procedures so applicants who require ITINs for state-level tax credits are eligible to be issued ITINs. The IRS has a record of implementing special procedures to help ITIN applicants meet state-level TIN requirements. For

⁸⁵ *Map of States That Offer Earned Income Tax Credits (EITCs) to ITIN Filers*, NAT'L IMMIGR. L. CTR. (July 2023), <https://www.nilc.org/issues/taxes/tax-credit-itin-filers/>.

⁸⁶ Aidan Davis & Neva Butkus, *States Are Boosting Economic Security with Child Tax Credits in 2023*, INST. ON TAX'N & ECON. POL'Y (Sept. 12, 2023), <https://itep.org/states-are-boosting-economic-security-with-child-tax-credits-in-2023/>.

⁸⁷ *How Do I Apply for an ITIN?*, INTERNAL REVENUE SERV. (Jan. 4, 2024), <https://www.irs.gov/individuals/how-do-i-apply-for-an-itin>.

example, the pop-up TACs for EWF benefits is a precedent for innovative procedures to ensure that tax filers can access state-level benefits.⁸⁸

Allow Electronic Processing: The IRS should allow for the electronic processing of ITIN applications. In addition, the IRS should allow CAAs to upload copies of documents they have authenticated. Any future IRS nonfiler portals or IRS direct e-file programs should be mobile-friendly, multilingual, accessible, and contain clear instructions.

Make the ITIN Permanent: Imposing renewal requirements on the ITIN is an unnecessary barrier that has not been demonstrated to address concerns about ITIN integrity. Like SSNs, ITINs should be made permanent and not subject to renewal.

Expand Programs to Assist ITIN Filers: Currently, ITIN filers can only have their original documents authenticated by CAAs and limited TACs. The IRS should expedite the approval of applications by organizations seeking to become CAAs and take measures to improve access to the CAA program. Beyond CAAs and TACs, the TAS has recommended expanding the officials who can review and certify documentation, including state agencies and county clerks. Further, the IRS should explore innovative solutions to address ITIN filer barriers, including partnerships of CAAs with organizations trusted by immigrant communities and with Volunteer Income Tax Assistance (VITA) programs. The IRS should consider providing tax education, outreach, and hands-on assistance services in rural immigrant communities through a “tax mobile” that travels to taxpayers. In addition, the IRS should conduct a nationwide outreach and education campaign to educate immigrants about their tax filing obligations and the resources available to assist them.

IV. CONCLUSION

The COVID-19 pandemic brought into sharp focus the vast disparities faced by undocumented workers and taxpayers, a disproportionate number of whom were essential workers. Undocumented workers denied unemployment insurance benefits and stimulus checks had no safety net to enable them to stay at home to protect the health of their families while the pandemic ravaged the nation. The exclusion of ITIN taxpayers from stimulus

⁸⁸ See *supra* notes 83–84.

relief was a senseless injustice with negative implications for public health, safety, and the economy.

Although the injustices faced by ITIN filers would be best addressed by creating a pathway to legal status and citizenship for the eleven million undocumented residents living in the United States,⁸⁹ Congress and the U.S. Department of Treasury can take steps to advance the inclusion of all residents in the nation's financial and taxation systems. Adopting the recommendations above would be a small but important step towards a fairer, more equitable tax system for all.

⁸⁹ *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST. (2019), <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>.

