The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 13 | Number 4 Article 5

3-1-2011

Closing the Courthouse Doors: The Implications of the Discovery of Immigration Related Facts and the Effects of Sec. 30.014 of the Texas Civil Practice & Remedies Code.

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CLOSING THE COURTHOUSE DOORS: THE IMPLICATIONS OF THE DISCOVERY OF IMMIGRATION RELATED FACTS AND THE EFFECTS OF § 30.014 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE

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* St. Mary's University School of Law, Doctor of Jurisprudence, May 2011; McMurry University, B.A. English and History, December 2007. I would like to thank my family and friends for their constant love, support, and encouragement. Thank you to Bill Beardall and all of the staff at the Equal Justice Center for their guidance and advice during my experience working with the organization. I would especially like to thank all of the staff writers and editorial board of *The Scholar: St. Mary's Law Review on Minority Issues*, for all your hard work on this piece.

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I. INTRODUCTION

Maria's[1] story, like that of many other undocumented immigrants, begins in a camper in the bed of a truck, under a tarp. Scrunched into this tight space with four other people, a "coyote" smuggled her across the Texas-Mexico border.[2] Maria was drawn to make the dangerous trip across the border by the promise of a better life, money, and freedom from oppression.[3] She planned to send any money she earned back

1. Maria is a pseudonym used to protect the identity of the parties on which this story is based. As an intern at the Equal Justice Center, I helped low-income workers recover unpaid wages, regardless of their immigration status. For many of the clients I have come in contact with, their immigration status is a very sensitive subject. Maria's story is based on a combination of the stories of two different individuals who sought the help of the Equal Justice Center. Their struggles present a realistic and wholly encompassing example of the dangers and problems that undocumented immigrants face in the United States.

2. *See* Karen Lee Ziner, *The Immigration Debate: A Desperate Journey*, PROVIDENCE J. (May 7, 2007, 11:31 AM), http://www.projo.com/news/content/Guatemala_Journey_05-07-07_615FCAA.2b9f751.html (illustrating the journey that undocumented immigrants experience crossing the border); *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html (last visited Mar. 14, 2011) (describing the role of a "coyote" in crossing the border, who is paid money and in return offers "insider knowledge about crossing the border"). The term "coyote" is the vernacular term for the individual who accepts payment. *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html (last visited Mar. 14, 2011). Due to the increased security along the border, the demand for "coyotes" has surged. *Id.*

3. *See* Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 97 (2004) (identifying the various problems that undocumented immigrants are trying to leave behind, which may include "war, oppression, corruption, and starvation"); JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 4 (2009) (surveying the demographics of undocumented immigrants present in the United States as of March 2008); Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 184 (2005) (recognizing that although the United States holds opportunities for those seeking a new life, additional safeguards and screenings are necessary to maintain border security); Paul R. Penny, III, Comment, *Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration's "Mismatch Letters?"*, 5 SCHOLAR 355, 360 (2003) (indicating how the expanding amount of immigrants entering the United States are

to her family in Mexico to provide for her children and her elderly father.[4]

Cecilia[5] paid to smuggle Maria into the country to work as a domestic housemaid.[6] Cecilia promised to pay Maria $200.00 a week to clean her house.[7] As a live-in housemaid,[8] Maria had a warm bed, a roof over her head, and a steady income, which was more than Maria expected when she embarked on her journey to the United States.

If Maria's story had ended here, then her voyage across the border would have been well worth it.[9] However, within a week of settling in at

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likely to "seek out employment in order to sustain themselves in a capitalistic society"); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegalimmigrants.html (last visited Mar. 14, 2011) (discussing how the United States "has become a nation of immigrants" who come "with hopes and dreams of a better life and a fresh start"); *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html (last visited Mar. 14, 2011) (examining the influx of immigrants from Mexico and the reasons for crossing the United States-Mexico border).

4. *See* Karen Lee Ziner, *The Immigration Debate: A Desperate Journey*, PROVIDENCE J. (May 7, 2007, 11:31 AM), http://www.projo.com/news/content/Guatemala_Journey_05-07-07_615FCAA.2b9f751.html (showing the common practice of immigrants sending money back to their families in their home countries). The individual in this story managed to find a job "packing fish into boxes, for $7.10 an hour." *Id.*

5. Cecilia is also a pseudonym, however, her character is also based on a real defendant in a case filed by the Equal Justice Center.

6. Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author). While the facts in Maria's cased are based on true stories, these plaintiffs' cases are still involved in litigation. The immigration status of these individuals is still very sensitive, and revealing the true identity of the plaintiffs in their pleadings would undermine the use of a pseudonym, and potentially expose the immigration status of these individuals. Therefore, Maria's story will cite to a redacted version of the Complaint and Affidavit of the plaintiffs, which will be kept on file with the author.

7. *Id.*; Complaint at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

8. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006) (providing that Congress intended for the Fair Labor Relations Act to include household workers, such as maids). *See generally* TEX. RIO GRANDE LEGAL AID, LABOR RIGHTS OF DOMESTIC WORKERS IN TEXAS (2010), *available at* http://www.texascbar.org/content/legal_library/pubs/downloads/DomesticWorkersRightsTexas2010.pdf (listing the various kinds of rights domestic workers are entitled to under federal law).

9. *Cf.* Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 99 (2004) (discussing the dangers of crossing the border); Karen Lee Ziner, *The Immigration Debate: A Desperate Journey*, PROVIDENCE J. (May 7, 2007, 11:31 AM), http://www.projo.com/news/content/Guatemala_Journey_05-07-07_615FCAA.2b9f751.html (referring to the deaths of immigrants attempting to enter the United States); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal immigrants.html (last visited Apr. 6, 2011) (explaining many of the risks taken by those who attempt to immigrate into the United States); Kat Sanchez, *Problems Faced by Illegal*

Cecilia's house in San Antonio, Maria's workload became significantly greater than promised.[10] Maria was cleaning, cooking, doing laundry, taking children to school, and watching them after school.[11] In the next few weeks, Maria had taken on several additional tasks, including helping Cecilia run her bookkeeping business and caring for Cecilia's elderly mother-in-law.[12] Maria worked at least twelve hours a day, seven days a week, for a grand total of eighty-four hours a week.[13] At the rate of $200.00 a week, Maria averaged $2.38 per hour of work. Cecilia, however, did not pay Maria the promised salary of $200.00 a week.[14] From the beginning, Cecilia deducted $50.00 a week for the cost of the "Coyote" bringing Maria across the border.[15] Maria did not complain, and accepted the $150.00 a week—working at a rate of $1.78 per hour. If this had been the end of Maria's story, some still might consider it a success compared to the thousands of immigrants who cross the border to work, but are cheated out of their pay entirely by sleazy employers.[16]

Immigrants, ASSOCIATED CONTENT (Nov. 1, 2007), http://www.associatedcontent.com/pop_print.html?content_type=article&content_type_id=430210 (revealing the grave dangers undocumented immigrants face, which include "heat exhaustion, dehydration, starvation, or murder").

10. Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

11. *Id.*; Complaint at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

12. Complaint at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author); Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

13. Complaint at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author). The complaint states 100 hours were worked a week, however, the estimations are more conservative for the purposes of this Comment. Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author). These calculations are based on a conservative estimate of 12 actual working hours a day. While there are actually 17 hours between 6:00 a.m. and 11:00 p.m., after deducting time for breakfast, lunch, dinner, and other possible break times, which are all very unlikely to have been taken, 12 hours a day still illustrates to idea of Maria being overworked for the amount of compensation she was receiving.

14. Complaint at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author); Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

15. Affidavit of Plaintiff at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

16. *See* Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 243–44 (2008) (discussing the exploitation of day laborers); *see also About Us: Mission*, EQUAL JUSTICE CTR., http://equaljusticecenter.org/staff/mission/ (last visited Mar. 14, 2010) (presenting the mission of the Equal Justice Center in fighting wage theft).

Treatment of Maria had changed for the worse, as well. Cecilia would verbally abuse Maria, calling her "fat," "ugly," and lazy.[17] Cecilia would often hit Maria in the stomach and push her around the house. At one point, Maria recalls Cecilia shoving her face into dog fecal matter because the new puppy had an accident in the house.[18] If this was not bad enough, Cecilia's husband began to sexually assault Maria. He would often pass by her and touch her in inappropriate places. He would corner her in a room, and threaten to tell Cecilia, or call "immigration" if Maria said anything.

Maria continued to work for Cecilia three years, and anytime she asked about payment, Cecilia would threaten to report her to "immigration."[19] Cecilia would tell Maria that she was lucky to have a place to live in the United States. After enduring so much at Cecilia's home, Maria finally decided to stand up for herself. Maria demanded payment for her work, and when it was denied as usual, she informed Cecilia that she would be leaving. Upon hearing this, Cecilia grabbed her by the hair, cursed at her, dragged her across the house, threw Maria out of the door, pushed her face into the concrete sidewalk, and told Maria to leave. Cecilia made it clear that if Maria ever reported her to some kind of authorities she would have Maria killed.

Maria found refuge at a local women's shelter. There she learned about a non-profit organization, Texas Advocacy Project, which helps victims of sexual harassment, sexual assault, and domestic violence to assert their rights against the offenders.[20] In collaboration with the Equal Justice Center,[21] a non-profit organization that helps low-income workers recover wages—regardless of immigration status—Maria was able to file a lawsuit against Cecilia.[22] However, early on in the discovery phase, the

17. Affidavit of Plaintiff at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

18. Complaint at 3, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

19. *Id.* at 2; Affidavit of Plaintiff at 2, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

20. Brief of Amicus Curiae, Texas Advocacy Project, in Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 1, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Apr. 6, 2010); *Our Mission*, TEX. ADVOCACY PROJECT, http://www.texasadvocacyproject.org/# (last visited Mar. 14, 2011).

21. Brief of Amicus Curiae, Texas Advocacy Project, in Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 1, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010, no pet.); *About Us: Mission*, EQUAL JUSTICE CTR., http://equaljusticecenter.org/staff/mission/ (last visited Mar. 14, 2011).

22. Complaint at 1, —— v. ——, No. ——ca—— (W.D. Tex. ——) (on file with author).

defendants filed a motion to compel discovery of Maria's social security number and driver's license number, arguing the information was necessary for identification and credibility purposes, and was also required, at least partially, in accordance with the Texas Civil Practice and Remedies Code (TCPRC) § 30.014 (hereinafter § 30.014).[23] This poses a serious problem because Maria is undocumented and cannot provide the information. The defendant filed this motion intending to use the discovery process and § 30.014 as a means of preventing litigation initiated by an individual with an illegal or uncertain immigration status.

The discovery of immigration related facts,[24] and the statutory requirements set forth in § 30.014 result in discovery of information that is of little to no relevance in many civil claims that plaintiffs may assert—regardless of immigration status.[25] Allowing discovery of this information

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23. *See In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846, at *1 (Tex. App.—San Antonio Dec. 10, 2010) (discussing defendant's filing of motion to compel); TEX. CIV. PRAC. & REM. CODE ANN. § 30.014(a) (West 2008) (stating that a party shall include in his or her initial pleading: "the last three numbers of the party's driver's license number, if the party has been issued a driver's license" and "the last three numbers of the party's social security number, if the party has been issued a social security number"). The court required Ms. Viveros to authenticate her social security number in order for her criminal background to be adequately investigated. *In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *3. The court granted mandamus relief in order to allow the relators an opportunity to investigate the true identity of Ms. Viveros. *Id.* at *3; *see also* Plaintiff's Motion for Protective Order Precluding Inquiries with *In Terrorem* Effect and Memorandum in Support at 1, Ayala v. Genter's Detailing, Inc., No. 09-CV553-G (N.D. Tex. July 13, 2010) (moving the Court for protection status of immigration related facts); Plaintiff's Reply in Support of Motion for Protective Order Precluding Inquiries with an *In Terrorem* Effect at 2, Ayala v. Genter's Detailing, Inc., No. 09-CV-553-G (N.D. Tex. July 13, 2010) (responding to a motion to compel); Brief of Amici Curiae in Support of Plaintiffs' Objections to Magistrate Order at 5, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553 (N.D. Tex. July 13, 2010) (referring to the discovery information sought by the defendants).

24. *See* Brief of Amici Curiae in Support of Plaintiffs' Objections to Magistrate Order at 5, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553 (N.D. Tex. July 13, 2010) (referring to facts that either directly or indirectly have the potential to expose the immigration status of a litigant). Examples of "immigration related facts" include the discovery of questions about alienage, place of birth, immigration status, Social Security Number, and driver's license. *See id.*

25. *See In re* Reyes, 814 F.2d 168, 171 (5th Cir. 1987) (holding that discovery into immigration status in an FLSA case is improper); Barrera v. Boughton, No. 3:07cv1436, 2010 U.S. Dist. LEXIS 26081, at *14–17 (D. Conn. Mar. 19, 2010) (discussing the inadmissibility of discovery inquiries of immigration status even if potentially relevant); David v. Signal Int'l, LLC, 257 F.R.D. 114, 126 (E.D. La. 2009) (finding immigration status to be irrelevant as applied to defendant's in *pari delicto* argument); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 749–50 (D. Md. 2008) (discussing and agreeing with other courts on the irrelevance of immigration status in cases disputing wages and hours); Rengifo v. Erevos Enters., Inc., No. 06-4266, 2007 U.S. Dist. LEXIS 19928, at *7–9 (S.D.N.Y. Mar. 20, 2007) (suggesting that defendants' discovery request for tax identification numbers is a "back door attempt" to gain impermissible information of plaintiff's im-

negatively impacts many individuals, whether documented or not, and intimidates them into not asserting their rights, or seeking any kind of relief for fear that: (1) their immigration status will be discovered by authorities who will initiate deportation; (2) there will be some kind of retaliation against them; or (3) they will never even get a chance to assert their rights because their cause will not be heard in court anyway.[26]

Section II of this Comment will examine the discoverability of immigration related facts in the civil justice system. Section III of this Comment will explore § 30.014, beginning with the legislative history of this provision, and discuss whether it is meeting the purported legislative objective of efficiency in judgment collections. Section IV of this Comment will examine the consequences of § 30.014, and the discovery of immigration related facts, on undocumented individuals attempting to assert their rights. Section V will propose legislative alternatives to the statute that would achieve the same goal of efficiency on the judicial docket, without unduly prejudicing undocumented immigrants. Finally, Section VI will present tools for fighting a motion to compel the discovery of immigration related facts.

II. Discovery of Immigration Related Facts in Civil Litigation

A. *Discovery Procedures*

The scope of what parties may discover during the course of litigation is outlined in Rule 192 of the Texas Rules of Civil Procedure (TRCP).[27] Generally, parties may discover information that is (1) "not privileged,"

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migration status); EEOC v. First Wireless Grp., Inc., No. 03-cv-4990, 2007 U.S. Dist. LEXIS 11893, at *12–13 (E.D.N.Y. Feb. 20, 2007) (balancing plaintiffs' potential harm against defendant's interest in discovery of immigration status); Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (conceding possible relevance of immigration status for damages and credibility, but upholding court-imposed discovery limitations on the subject); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (finding immigration status irrelevant to both claims and defenses); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) ("[T]he prejudice to plaintiff outweighs any potential relevance this information [concerning immigration status] may have to the defense.").

26. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004); *Barrera* 2010 U.S. Dist. LEXIS 26081, at *16; David, 257 F.R.D. at 122; *Rengifo* 2007 U.S. Dist. LEXIS 19928, at *5 (quoting Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002)); *Bice of Chi.*, 229 F.R.D. at 583; Bernal v. A.D. Willis Co., No. 03-CA-196 (W.D. Tex. Apr. 1, 2004) (order denying defendant's motion to compel discovery answers); *Flores*, 233 F. Supp. 2d at 465 n.2 (citing Flores v. Albertson, Inc., 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002)); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (quoting Ansoumana v. Gristedes Operating Corp., No. 00-0253 (S.D.N.Y. Nov. 8, 2000)).

27. *See generally* Tex. R. Civ. P. 192 (outlining the scope of discovery).

and (2) "relevant to the subject matter of the pending action."[28] Information is properly discoverable when it "appears reasonably calculated to lead to the discovery of admissible evidence."[29] The trial court is given the discretion to compel, limit, or prohibit the discovery of information requested.[30] A trial judge may grant an order protecting a litigant from having to produce certain discovery citing "undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights."[31] The court may also consider the "interest of justice," when determining whether to allow the discovery of information.[32]

B. *The Types of Claims Discovery of Immigration Related Facts Effect*

1. Labor and Employment Claims

It is estimated that approximately twelve million undocumented immigrants live in the United States.[33] Undocumented immigrants are among the most vulnerable members of society.[34] Many people immigrate to the United States to pursue a better life for themselves and their families.[35]

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28. *Id.* at 192.3(a). It is important to note the remainder of 192.3(a) which states that a party may discover information "whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." *Id.*

29. *See id.*; *see also In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846, at *4–5 (Tex. App.—San Antonio Dec. 10, 2010).

30. TEX. R. CIV. P. 192.3(a); *see also In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *4–5.

31. TEX. R. CIV. P. 192.6(b).

32. *Id.*

33. JEFFERY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES 1 (2009); Bill Piatt, *Immigration Reform from the Outside In*, 10 SCHOLAR 269, 278–79 (2008); Paul R. Penny, III, Comment, *Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration's "Mismatch Letters"?*, 5 SCHOLAR 355, 359 (2003).

34. *See* LEGAL MOMENTUM, IMMIGRANT WOMEN IN A BROKEN IMMIGRATION SYSTEM: AN AGENDA FOR CHANGE 1 (2010), *available at* http://www.legalmomentum.org/assets/pdfs/immigrant-women-in-a-broken.pdf (explaining how immigrant women generally suffer a broader range of harm compounded by the fear of possible retaliation if they report the employer's illegal mistreatment); Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 185 (2005) (illustrating the treatment that undocumented laborers receive); Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 243 (2008) (attributing the vulnerability to the undocumented immigration status of the workers); Kat Sanchez, *Problems Faced by Illegal Immigrants*, ASSOCIATED CONTENT (Nov. 1, 2007), http://www.associatedcontent.com/article/430210/problems_faced_by_illegal_immigrants.html (asserting that undocumented immigrants' inability to report is the cause of their vulnerability).

35. *See* Paul R. Penny, III, Comment, *Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration's "Mismatch Letters?"*, 5 SCHOLAR 355, 360 (2003) (commenting on the economic elements that bring immigrants to the United States,

For most of these people, the journey is long and dangerous, and for some it results in death.[36] Unfortunately, the reality many undocumented immigrants face when they arrive in the states is that they become victims of abuse and exploitation.[37]

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such as higher pay and better benefits); Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 97 (2004) (comparing the motivations for coming to the United States of immigrants today to those of the European settlers); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegalimmigrants.html (last visited Jan. 2, 2011) (stating that undocumented immigrants come to the United States with hopes of freedom and starting a new life); *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html (last visited Mar. 14, 2011).

36. Kat Sanchez, *Problems Faced by Illegal Immigrants*, ASSOCIATED CONTENT (Nov. 1, 2007), http://www.associatedcontent.com/pop_print.html?content_type=article&content_type_id=430210. "[D]ozens or even hundreds [of undocumented immigrants] die each year crossing the border, whether of heat exhaustion, dehydration, starvation, or murder." *Id.*; *accord* Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 98 (2004) (discussing the danger posed by vigilante Texas landowners for immigrants crossing the U.S. border); Karen Lee Ziner, *The Immigration Debate: A Desperate Journey*, PROVIDENCE J. (May 7, 2007, 11:31 AM), http://www.projo.com/news/content/Guatemala_Journey_05-07-07_615FCAA.2b9f751.html (recounting the story of a young man's dangerous journey to the United States); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegalimmigrants.html (last visited Mar. 14, 2011) (citing to the death of individuals who attempt to make the journey over to the United States).

37. Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 185 (2005) (addressing the negative treatment undocumented immigrants receive from employers); *see* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES iii (2009), *available at* http://pewhispanic.org/files/reports/107.pdf (reporting on the significant number of undocumented immigrants working low-skilled jobs); Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 243–44, 267 (2008) (discussing the poor working conditions and other dangers faced by undocumented day laborers); Elizabeth Kaigh, Comment, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 141 (2009) (discussing the problem of women who are brought into the United States to become sex slaves); Enrique A. Maciel-Matos, Comment, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327, 328–29 (2010) (discussing the individuals who end up in the trafficking system, 50,000 of whom arrive in the United States every year); Paul R. Penny, III, Comment, *Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration's "Mismatch Letters?"*, 5 SCHOLAR 355, 360–61 (2003) (discussing the negative stigma placed on undocumented immigrant workers during a poor economy, which leads to unfair labor practices by U.S. employers); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegalimmigrants.html (last visited Jan. 2, 2011) (discussing the troubles faced by undocumented immigrants upon arrival in the

Exploitation is especially prevalent in the workplace.[38] Undocumented immigrants make up about 5.4% of the labor force in the United States.[39] These individuals often become the target of workplace discrimination, harassment, wage and hour violations, harsh working conditions, and mistreatment.[40] Undocumented workers are often paid below federally mandated minimum wage and overtime rates, if paid at all.[41] Undocumented workers often experience poor treatment solely because they are undocumented.[42] They believe that they are powerless, especially when faced with the threat of being reported to immigration authorities.[43]

United States, such as a higher cost of living, finding employment, and dealing with the language barrier).

38. *See* Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 185 (2005) (discussing the disconnect between the nation's need for immigrant labor and the critical attitude toward the immigrant workers); Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 244 (2008) (pointing out the failure of immigrant workers to report mistreatment or poor working conditions because of their need for employment and a paycheck).

39. JEFFERY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES iii (2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

40. *See* Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 185 (2005) (discussing the discrimination undocumented immigrants experience in the labor force); Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 244 (2008) (discussing the harsh working conditions experienced by immigrant day laborers); Michael King, *From Low Wage to No Wage*, AUSTIN CHRON., Dec. 3, 2010, http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A1121866.

41. Michael King, *From Low Wage to No Wage*, AUSTIN CHRON., Dec. 3, 2010, http://www.austinchronicle.com/gyrobase/Issue/story?oid=oid%3A1121866 (reporting on a national study by the Workers Defense Project, which found that 26% of low-wage workers earn less than minimum wage); *Projects: Overview*, EQUAL JUSTICE CTR., http://equaljusticecenter.org/overview/ (last visited Mar. 14, 2011); *see also* Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 199 (2005) (discussing ways to remedy the problem of undocumented immigrants whose employers who do not follow the labor laws); Analiz Deleon-Vargas, Comment, *The Plight of Immigrant Day Laborers: Why They Deserve Protection Under the Law*, 10 SCHOLAR 241, 245 (2008) (reporting on a lawsuit involving a company that failed to pay its workers the minimum wage).

42. *See* Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 185 (2005) (commenting on the negative feelings people hold about undocumented immigrant-workers who are necessary for the economy).

43. *See* Mary Reinholz, *Immigrants Find the Island a Mixed Blessing; A Life Looking Over Shoulders in a Land of Freedom*, N.Y. TIMES, Dec. 27, 1998, at 14LI, *available at* 1998 WLNR 2971139 (illustrating the fear that undocumented individuals experience); Karen Lee Ziner, *The Immigration Debate: A Desperate Journey*, PROVIDENCE J. (May 7, 2007,

Labor laws in the United States provide remedies for all individuals being treated in contravention of the law.[44] However, all of these remedies involve filing some type of formal charge or complaint either with a federal agency or filing a lawsuit asserting rights under state and/or federal law. Very few organizations exist that will help undocumented immigrants assert their employment rights; unfortunately, individuals that do decide to get help in these situations represent a small portion of the immigrant population being exploited in the workplace.[45]

2. Violence, Abuse, Sexual Harassment, and Trafficking Laws

Abuse also commonly occurs during the transportation of immigrants across the border.[46] Approximately 700,000 individuals are trafficked across international borders annually, the majority of whom are women

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11:31 AM), http://www.projo.com/news/content/Guatemala_Journey_05-07-07_615FCAA.2b9f751.html (showing an example of immigrants being found by immigration services); *Illegal Immigrants*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegalimmigrants.html (last visited Mar. 14, 2011) (detailing the raids that immigration authorities perform).

44. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 152(3) (2006) (protecting the right of employees to engage in protected concerted activity, not excluding undocumented immigrants); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203(e), 206(a) (2006) (providing wage and hour protection to "any individual employed by an employer," with no relevant exceptions); Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(2) (2006) (extending protections of the act to any eligible employees, not explicitly excluding undocumented immigrants); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2006) (including any "individual employed by an employer" in the definition of employee, not excluding undocumented immigrants); *see also* TEX. LAB. CODE ANN. § 21.001 (West 2006) (aiming to eliminate discrimination against all people in the State of Texas, not specifically excluding undocumented immigrants); LAB. § 62.002(5) (West 2006) (extending the definition of "employee" to any individual employed by an employer); LAB. § 61.011 (West 2006) (failing to exclude undocumented employees from those who shall be paid under the statute).

45. *Cf. About Us: Mission*, EQUAL JUSTICE CTR., http://equaljusticecenter.org/staff/mission/ (last visited Mar. 14, 2011) (presenting the mission of the Equal Justice Center, one of the few organizations that is able to provide free legal services to low-income workers regardless of their immigration status).

46. *See* Enrique A. Maciel-Matos, Comment, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327, 332–33 (2010) (discussing how human traffickers obtain their victims); *Human Trafficking Fuels Violence Against Women*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/frontpage/2009/November/human-trafficking-fuels-violence-against-women.html (last visited Mar. 14, 2011) (defining human trafficking in the context of the Violence Against Women Act (VAWA)); *Violence Against Women*, WOMEN'S HEALTH, http://www.womenshealth.gov/violence/types/ht.cfm (last updated Sept. 1, 2007) (identifying human trafficking as an act of violence against women).

and children.[47] About 50,000 of these women and children are trafficked into the United States.[48] Frequently, the abused are undocumented women, arguably the most vulnerable people in this situation because of cultural views that women are not as valuable as men.[49] Coyotes transport immigrants across the border for significant sums of money.[50] Women are often violated and abused during these trafficking schemes; some end up in the sex slave trade and never get a chance at a better life in the United States.[51]

The vulnerability of undocumented women also extends to instances of domestic abuse.[52] Recently, Congress enacted laws to prevent trafficking and abuse of women such as the Violence Against Women Act (VAWA).[53] The VAWA provides more funding and protection for women who are victims of violence.[54] Congress has provided additional immigration relief for individuals who are victims of human trafficking and domestic abuse in the form of U-visas and T-visas.[55] However, these in-

47. Enrique A. Maciel-Matos, Comment, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327, 328 (2010).

48. *Id.*

49. *Id.* at 330–31; LEGAL MOMENTUM, IMMIGRANT WOMEN IN A BROKEN IMMIGRATION SYSTEM: AN AGENDA FOR CHANGE 1 (2010), *available at* http://www.legalmomentum.org/assets/pdfs/immigrant-women-in-a-broken.pdf.

50. *Illegal Immigration from Mexico*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/illegal-immigration-from-mexico.html (last visited Mar. 14, 2011).

51. *See* Elizabeth Kaigh, Comment, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 140 n.5 (2009).

52. *See* LEGAL MOMENTUM, IMMIGRANT WOMEN IN A BROKEN IMMIGRATION SYSTEM: AN AGENDA FOR CHANGE 1 (2010), *available at* http://www.legalmomentum.org/assets/pdfs/immigrant-women-in-a-broken.pdf (discussing the vulnerability of immigrant women); *Violence Against Women*, WOMEN'S HEALTH, http://www.womenshealth.gov/violence/index.cfm (last updated Jan. 15, 2009) (outlining what constitutes an act of violence against women).

53. Violence Against Women Act, 42 U.S.C. § 13981 (2006).

54. *See id.* Congress initially included a private cause of action for women to pursue their offenders civilly, however, the civil remedy provision of the statute was ruled unconstitutional by the Supreme Court. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000). This means that women who want to pursue relief against these offenders civilly will have to do so by other means such as common law torts, and other abuse and assault laws.

55. *U Visa for Immigrants Who Are Victims of Certain Crimes*, U.S. IMMIGRATION SUPPORT, http://www.usimmigrationsupport.org/visa-u.html (last visited Mar. 14, 2010) (providing information on the availability of a U Visa). A U Visa is extraordinary immigration relief available to victims who:

> [H]ave suffered substantial physical or mental abuse due to a criminal activity in at least one of the following categories: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage situations, peonage, false imprisonment, involuntary servi-

dividuals are often hesitant to come forward and assert their rights against their offenders because of the fear of deportation surrounding the discovery of immigration status.

C. *State of Law Regarding the Discoverability of Immigration Related Facts*

Courts have recognized the sensitivity surrounding the discovery of a plaintiff's immigration status.[56] Courts have additionally acknowledged the need for protection to extend to inquiries related to the discovery of immigration status, such as social security numbers and tax documents.[57] A discovery request is improper when it has a high probability of exposing an individual's immigration status and is irrelevant to any claims or defenses asserted in the cause.[58] Furthermore, Courts have found discov-

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tude, slave trade, kidnapping, abduction, unlawful criminal restraint, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

Id.; *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/ (scroll down, click "Humanitarian," on the left side, click "Victims of Human Trafficking & Other Crimes," click "Victims of Human Trafficking: T Nonimmigrant Status") (last updated April 4, 2011) (providing information for relief via a trafficking visa).

56. *See* EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893, at *8–11 (E.D.N.Y. Feb. 20, 2007) (stating that undocumented immigrants fear deportation resulting from civil legal entanglements); Sandoval v. Am. Bldg. Maint. Indus., 267 F.R.D. 257, 276–77 (D. Minn. 2007) (determining that questions concerning the credibility should not place an undue burden on a claimant due to fear of immigration issues); Rengifo v. Erevos Enters., Inc., No. 06 Civ. 4266, 2007 U.S. Dist. LEXIS 19928, at *7–9 (S.D.N.Y. Mar. 20, 2007) (commenting that unlimited discovery into a party-opponent's immigration status may overly burden a party alleging harm under federal employment regulations); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (noting that fear of deportation might prohibit the intended application of the Fair Labor Standards Act to undocumented immigrants).

57. *See Sandoval*, 267 F.R.D. at 276–77 (D. Minn. 2007) (finding that employer-defendants may not enquire into an undocumented worker-plaintiff's use of false social security numbers to attack credibility of testimony); *Rengifo* 2007 U.S. Dist. LEXIS 19928, at *7–9 (commenting that courts should not allow discovery requests for information into an immigrant's status to be used as a weapon by employers against litigious undocumented employees); *First Wireless Group, Inc.*, 2007 U.S. Dist. LEXIS 11893, at *8–11 (holding that attacks on credibility are limited so as to not implicate undocumented immigrant status); *Flores*, 233 F. Supp. 2d at 465 n.2 (prohibiting inquiries into immigration as being overly prejudicial when compared to relevance).

58. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (expressing concern that discovery into immigration status precludes undocumented immigrants from asserting rights afforded them by the federal legislature); Barrera v. Boughton, No. 3:07-cv-1436, 2010 U.S. Dist. LEXIS 26081, at *7 (D. Conn. Mar. 19, 2010) (acknowledging the negative impact of immigration status queries on civil litigation by undocumented immi-

ery that would implicate the immigration status of a plaintiff is improper when it is remote to the actual subject matter of the litigation, and the potential harm that the plaintiff would realize outweighs any relevancy of the information.[59] Texas decisions in the area of employment law, domestic violence, torts, personal injury, and workers' compensation have held that immigration status is not relevant to such claims brought in these areas of the law.[60]

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grants); David v. Signal Int'l, L.L.C., 257 F.R.D. 114, 122 (E.D. La. 2009) (questioning the relevance of immigration status for workers filing suit under federal laws); *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5 (questioning relevance of immigration status for claimants suing under federal and New York state employment laws); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (stating that immigration status is irrelevant when trying to assert the mendacity of undocumented party-opponents in federal employment law trials); Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG (W.D. Tex. Apr. 1, 2004) (order denying defendant's motion to compel discovery answers); *Flores*, 233 F. Supp. 2d at 465 n.2; Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (denying confidential discovery for an employer seeking the immigration status of an employee suing for unpaid wages).

59. *See Rivera*, 364 F.3d at 1066; *Barrera*, 2010 U.S. Dist. LEXIS 26081, at *7; *David*, LLC, 257 F.R.D. at 122; *Rengifo* 2007 U.S. Dist. LEXIS 19928, at *5; *Bernal*, No. SA-03-CA-196-OG (W.D. Tex. Apr. 1, 2004) (order denying defendant's motion to compel discovery answers); *Bice of Chi.*, 229 F.R.D. at 583; *Flores*, 233 F. Supp.2d at 465 n.2 (E.D.N.Y. 2002); *Zeng Liu*, 207 F. Supp. 2d at 192–93.

60. *See David*, 257 F.R.D. at 122; *Rivera*, 364 F.3d at 1064–65 (9th Cir. 2004); *Barrera*, 2010 U.S. Dist. LEXIS 26081, at *7; *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007); Carmen Contreras v. KV Trucking, Inc., No. 4:04-CV-398, 2007 U.S. Dist. LEXIS 70129, at *5 (E.D. Tex. Sept. 21, 2007) (holding that Texas does not consider the citizenship of claimants in suits for unpaid wages); *Bernal*, No. SA-03-CA-196-OG (W.D. Tex. Apr. 01, 2004) (order denying defendant's motion to compel discovery answers); *Bice of Chicago*, 229 F.R.D. at 583; *Flores*, 233 F. Supp. 2d at 465 n.2; *Zeng Liu*, 207 F. Supp.2d at 192–93; Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.) (recognizing that citizenship is not required to recoup lost earnings); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 637 (Tex. Civ. App.—El Paso 1972, writ ref'd, n.r.e.) (holding that immigration status is irrelevant to a person's eligibility for worker's compensation). The Court cited to 42 U.S.C. § 1981, which provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Galindo, 484 S.W.2d at 637 (quoting 42 U.S.C. § 1981); *see also In re* Core Constr. Servs. of Tex., Inc., No. 05-09-00665-CV, 2009 Tex. App. LEXIS 4807, at *1 (Tex. App.—Dallas June 24, 2009, no pet.) (denying rather emphatically an assertion that immigration status is relevant in suits for unpaid wages in Texas). The Texas Fifth Court of Appeals in Dallas found mandamus improper in a case where the trial judge had granted a protective order barring discovery of immigration status. *In re* Core Constr. Servs. of Tex., Inc., 2009 Tex. App. LEXIS 4807, at *1.

In the case *TXI Transportation Company v. Hughes*,[61] the Texas Supreme Court rejected the argument that a witness's immigration status is relevant to the witness's credibility.[62] In this case, the plaintiff's attorney was allowed to introduce evidence at trial of false statements by an undocumented commercial driver to his employer involving his immigration status.[63] The Court held that immigration status was clearly a "collateral matter," or a matter that was "not relevant to proving a material issue in the case."[64] In holding that alleged false statements regarding immigration status were not admissible for impeachment purposes, the Court in *Hughes* noted that there is a general distain towards the use of "specific instances of conduct for impeachment" and determined that such statements were "not admissible to impugn the witness's character for truthfulness."[65] The Court noted several federal and state decisions that have also held that alleged false statements about immigration status are not admissible for impeachment purposes.[66]

Aside from *Hughes*, other federal opinions have held that parties cannot seek to discover irrelevant information regarding immigration status—or statements about immigration status—through the "back-door"

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61. 306 S.W.3d 230 (Tex. 2010). It is important to note that the Court in this case decided on the admissibility of immigration status, and not discoverability. *Id.* at 240. However, when read in conjunction with other decisions regarding discoverability of immigration related facts, the Court determined that immigration status is not admissible to determine credibility, and therefore when defendants propose discovery based on credibility, allowing this discovery would not lead to admissible evidence, and should therefore be prohibited. *Id.* at 241–42.

62. *Id.* at 245 (ascribing undertones of racism to references of a party-opponent's immigration status as a means of impeachment).

63. *Id.* at 234 (stating that since citizenship was not an element of the claim sought by the plaintiff, evidence of the same was neither required nor desired).

64. *Id.* 241 (explaining a collateral matter to be one that is not germane to the case at bar).

65. *Id.* 242 (explaining the significance of immigration status in light of Rule 608 of the Texas Rules of Evidence).

66. *Hughes*, 306 S.W.3d at 242 n.7; *see* First Am. Bank v. W. DuPage Landscaping, Inc., No. 00-C-4026, 2005 U.S. Dist. LEXIS 20729, at *2–3 (N.D. Ill. Sept. 19, 2005) (explaining that impeachment based on the undocumented status of a witness is not allowed); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996) (finding that without specific evidence a witness made misrepresentations about his or her immigration status, the fact that the witness is undocumented is not grounds for impeachment); Castro-Carvache v. INS, 911 F. Supp. 843, 852 (E.D. Pa. 1995) (holding that "an individual's status as an alien, legal or otherwise . . . does not entitle the Board to brand him a liar"); Hernandez v. Paicius, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003) (holding that the California Evidence Code bars the use of immigration status and evidence of other "bad acts" when being introduced to undermine the credibility of a witness).

credibility argument.[67] The "back-door" is a defensive tactic of attempting to discover the immigration status of a plaintiff without direct questioning.[68] Because courts are likely to deny discovery directly into a plaintiff's immigration status when it is irrelevant to the subject matter of the litigation, defendants attempt to discover this information through other means, and often times this "back door" is the need to determine the credibility of the plaintiff.[69] There is no Texas case law opposing these federal opinions, and the Texas Supreme Court established in *Hughes* that it would follow federal precedent on the issue of using immigration status to determine credibility.[70] The Texas rules governing a court's discretion to grant a protective order in these matters are similar to those under the federal rules.[71] These rules provide broad trial court discretion to protect litigants from harassment, especially where the evi-

67. *See* Sandoval v. Am. Bldg. Maint. Indus. Inc., 267 F.R.D. 257, 276–77 (D. Minn. 2007) (stating that although defendants may not inquire into the immigration status or social security numbers of a plaintiff, they can inquire about whether or not they have used aliases or false names as long as they do not ask why they engaged in such behavior); Rengifo v. Erevos Enters., Inc., No. 06 Civ. 4266, 2007 U.S. Dist. LEXIS 19928, at *7–9 (S.D.N.Y. Mar. 20, 2007) (granting plaintiff's petition for a protective order enjoining his employers from learning his immigration status and social security number, because his immigration status was not material to the case); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893, at *8–11 (E.D.N.Y. Feb. 20, 2007) (discarding an attempt to determine an individual's immigration status by making irrelevant inquiries into whether a false social security number was provided as unnecessary); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (explaining that because many undocumented immigrants will not file claims if they are required to divulge their immigration status, they must be protected from irrelevant inquiries).

68. *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *8; *Sandoval*, 267 F.R.D. at 276–77; *see First Wireless Group, Inc.*, 2007 U.S. Dist. LEXIS 11893, at *8–10 (rejecting defendant's argument that inquiring about the submission of false information on the plaintiff's employment application is not relevant to their immigration status); *Flores*, 233 F. Supp. 2d at 464–65 (finding that the possibility of prejudice related to the defendant's immigration status inquiry "far outweighs whatever minimal probative value such information would have"); Brief of Amici Curiae in Support of Plaintiffs' Objections to Magistrate Order at 5–6, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553 (N.D. Tex. July 13, 2010) (explaining that the defendants want to focus on the plaintiff's social security numbers to inquire about the reasons and circumstances surrounding their use of the numbers, not because the numbers themselves are relevant).

69. *See* Brief for Texas Advocacy Project of Amicus Curiae, Texas Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 8, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010, no pet.) (acknowledging defendant's requests, but explaining in detail why such a request is immaterial to any aspect of the litigation). Other "back-door" arguments that defendants often propose are the need to determine the identification of the party, the need of a social security number, the need for tax information and employment records, and the requirements of § 30.014. *Id.* at 3, 4 n.17.

70. *Id.* at 11 (citing TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 242 (Tex. 2010)).

71. *Compare* TEX. R. CIV. P. 192.6, *with* FED. R. CIV. P. 26(c)(1).

dence itself is essentially irrelevant and not calculated to lead to relevant evidence.[72]

The Fourth Court of Appeals in San Antonio recently issued a mandamus opinion, *In re K.L. & J. Limited Partnership* (*K.L. & J.*),[73] addressing the discovery of immigration related facts in the civil arena.[74] This is significant because it marks the first time an appellate court in Texas has directly addressed the issue. In *K.L. & J.*, the plaintiff filed a suit against her former employer asserting causes for "sexual harassment, discrimination, retaliation, unlawful employment practices, sexual assault, intentional infliction of emotional distress, negligent training, and negligent supervision."[75] The defendant filed a motion to compel the plaintiff to (1) authenticate the social security number she provided, (2) answer questions regarding her citizenship and alienage status, (3) and to amend her petition to include the information required in § 30.014.[76]

The Court decided that the inquiry as to the authenticity of the social security number previously provided by the plaintiff was proper.[77] Citing to the Texas Supreme Court in *In re Colonial*,[78] the court noted "the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed."[79] However, the court was careful to narrowly address only the issue of the discovery request to allow discovery solely for purposes of "authenticity."[80] As for questions regarding plaintiff's citizenship and alienage, the court concluded that mandamus relief was not proper because the defendants failed to show they lacked adequate remedy on appeal.[81] The court noted that the defendants failed to show that without the answers to these immigration related questions, their defense would be "severely compromised or vitiated."[82] The court similarly held that the trial court did not abuse its discretion in denying defendants' motion to compel the plaintiff to modify her initial pleading pursuant to § 30.014.[83] The court

72. TEX. R. CIV. P. 192.4(b).

73. No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010, no pet.).

74. *Id.* at *1.

75. *Id.*

76. *Id.*

77. *Id.* at *3.

78. 968 S.W.2d 938 (Tex. 1998).

79. *In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *3 (quoting *In re* Colonial, 968 S.W.2d 938 (Tex. 1998)).

80. *See id.* (allowing the discovery of the social security number provided, but only to determine the true identity and investigate the background of Bella Viveros).

81. *Id.*

82. *Id.*

83. *Id.* at *7.

concluded that the trial court properly applied the statute by rejecting Defendant's argument that § 30.014 mandated the trial court to order the plaintiff to amend her petition.[84]

III. Texas Civil Practice & Remedies Code § 30.014—Pleadings Must Contain Partial Identification Information[85]

A. *Legislative History*

Section 30.014 of the TCPRC reads:

> (a) In a civil action filed in a district court, county court, or statutory county court, each party or the party's attorney shall include in its initial pleading:
>
> (1) the last three numbers of the party's driver's license number, if the party has been issued a driver's license; and
>
> (2) the last three numbers of the party's social security number, if the party has been issued a social security number.
>
> (b) A court may, on its own motion or the motion of a party, order that an initial pleading be amended to contain the information listed under Subsection (a) if the court determines that the pleading does not contain that information. A court may find a party in contempt if the party does not amend the pleading as ordered by the court under this subsection.[86]

This section of the code was added to promote judicial efficiency by identifying parties to a civil proceeding.[87] Prior to the enactment of this section, civil pleadings were governed by § 30.015 of the TCPRC, which required a party to provide the court with its name as well as current residence or business address to the clerk of the court.[88] Additionally, § 52.003(a) of the Texas Property Code (TPC) required the abstract of judgment to contain the same identifying information as well as the de-

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84. *In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *7. The court also noted that the defendants failed to meet their burden of showing no adequate remedy on appeal regarding the court's denial to order the plaintiff to comply with the requirements of § 30.014. *Id.* at 8.

85. Tex. Civ. Prac. & Rem. Code § 30.014 (West 2008).

86. *Id.* The original version proposed made these requirements mandatory, and left it to the court's discretion to hold any party who did not provide this information in contempt. S.J. of Tex., 80th Leg., R.S. 1675 (2007).

87. *See* Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007) (stating that, previously, the information the parties were required to provide to the court was often insufficient to identify them for judgment purposes).

88. *See* Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007).

fendant's birth date.[89] The problem with these previous requirements was that the information was often insufficient to identify the person subject to the judgment.[90] Section 30.014 was passed to facilitate the identification of parties in a proceeding, enforce judgments, and collect amounts owed under abstracts of judgments.[91]

IV. The Consequences of the Discovery of Immigration Related Facts

A. *The Unanticipated Impact of § 30.014*

While this statute serves a valid purpose, it also created a situation that was perhaps unanticipated. According to the Texas Legislature Records, there was no talk about how this might affect the ability of anyone to assert their rights civilly.[92] Ultimately, this provision of the code unduly prejudices undocumented immigrants by requiring the discovery of immigration related facts, which, in most civil proceedings, have no relevance to an individual's claim.[93]

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89. *Id.*

90. *Id.*

91. *See id.* (requiring each party to include the last four digits of their social security number as well as the last two digits of their driver's license number in its initial pleadings).

92. *See* Tex. S.B. 699, 80th Leg., R.S. (2007) (failing to outline procedures for civil redress); Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007) (same); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007) (same).

93. *See In re* Reyes, 814 F.2d 168, 171 (5th Cir. 1987) (holding that discovery into immigration status in an FLSA case is improper); *see also* Barrera v. Boughton, No. 3:07cv1436, 2010 U.S. Dist. LEXIS 26081, at *19 (D. Conn. Mar. 19, 2010) (barring defendants from obtaining information related to immigration status in a civil rights lawsuit); David v. Signal Int'l, LLC, 257 F.R.D. 114, 126 (E.D. La. 2009) (preventing defendants from inquiring into plaintiff's immigration status, employment history, and current address); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750, 751 (D. Md. 2008) (holding that immigration status of a plaintiff is irrelevant in a wage case and denying defendant's motion to compel plaintiff to disclose such information); Rengifo v. Erevos Enters., Inc., No. 06 Civ. 4266, 2007 U.S. Dist. LEXIS 19928, *9–10 (S.D.N.Y. Mar. 20, 2007) (barring defendants from obtaining plaintiff's immigration status information, social security number, tax identification number, and employment authorization information); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893 *13–14 (E.D.N.Y. Feb. 20, 2007) (denying defendant's motion to set aside a previous order barring defendants from inquiring into claimant's immigration status); Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (precluding defendants from inquiring into plaintiff's immigration status in an employment discrimination suit); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (denying defendant's motion to compel parties to reveal their citizenship, place of birth, employment history, and use of aliases); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (concluding that effect of providing information related to plaintiff's immigration status outweighs any need for such information by defendants).

As noted above, prior to the enactment of § 30.014 of the TCPRC in 2007, the information required of claimants filing a civil suit was codified in § 30.015 of the TCPRC, and § 52.003(a) of the TPC.[94] According to the Senate Judiciary Committee, these previous requirements on pleadings were "often insufficient to identify the person against whom the judgment is entered."[95] These sparse requirements made it difficult to enforce judgments based on the abstracts alone.[96] Thus, the purpose of enacting § 30.014 was to make it easier to identify litigants who have judgments against them, and promote efficiency in judgment collection.[97]

While the additional requirements contained in § 30.014 increase the efficiency in identifying litigants in judgment situations, it also, albeit unintentionally, has the effect of providing the free discovery of immigration related information in situations where these facts are not relevant to the litigation.[98] By its nature, § 30.014 results in the discovery of immigration related facts because an undocumented individual filing a civil action will never be able to provide the information required in this statute.[99] Undocumented individuals do not have a valid social security number or a valid Texas driver's license. Every time an undocumented individual tries to assert a right in the Texas state civil court system, § 30.014 will require these individuals to expose their immigration status, or lack thereof.[100]

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94. Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007).

95. Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007).

96. Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007).

97. *See* Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007) (expanding personal identification requirement disclosures in civil lawsuits); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007) (same).

98. *See* Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007); Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007). The situations referred to are claims in which immigration status is irrelevant, such as FLSA claims, Title VII discrimination claims, sexual harassment claims, domestic abuse claims, and VAWA claims.

99. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.014 (West 2008) (establishing procedural requirements for litigants involving indentifying information).

100. The language in the statute "if available" is of no consequence as applied to undocumented immigrants, because the information required by the statute would never be available in the case of an undocumented individual.

B. *The Use of § 30.014 as a Defensive Intimidation Tactic*

Unfortunately, litigants are not using § 30.014 for its intended purpose.[101] Defendants have turned the requirements of this provision into an intimidation tool with the intent of preventing undocumented immigrants from asserting their rights.[102] Defendants often argue that the courts favor "broad discovery," and the discoverability of an undocumented immigration status reveals that a plaintiff is not credible.[103] However, these arguments have proven unsuccessful when weighed against the privacy rights, and prejudicial effect that the discovery of these facts will have on undocumented plaintiffs.[104] Section 30.014 has essentially become a way for defendants to discover immigration related facts, which otherwise would never have been at issue.

C. *Discoverability*

As previously discussed, the TRCP provide a broad scope of discovery.[105] The trial court is given broad discretion under the TRCP and the Texas Rules of Evidence as to what information is discoverable and what

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101. *See* Brief of Amicus Curiae, Texas Advocacy Project, in Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 4 n.17, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010, no pet.) (speculating why the trial judge denied the motion to compel).

102. *See id.* at 5–6 (predicting a chilling effect if the immigration status of potential female plaintiffs is scrutinized as a perquisite to relief).

103. *See In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846, at *4 (Tex. App.—San Antonio Dec. 10, 2010, no pet.); Brief of Amicus Curiae, Texas Advocacy Project, in Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 4 n.17, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010, no pet.) (suggesting the trial court may have denied the order because it did not believe the defendant's claim that the reason the social security number was false, while relevant to the fact that there was dishonest conduct, needed to be introduced). The credibility argument that defendants typically present turns on the fact that the plaintiff is in the United States illegally, which, according to them, makes the plaintiff dishonest and not credible. Additionally, Defendants will often elaborate further that in situations where an individual had previously provided false identifying information, they lack credibility.

104. *See, e.g.*, First Am. Bank v. W. DuPage Landscaping, No. 00-C-4026, 2005 U.S. Dist. LEXIS 20729, at *2–3 (N.D. Ill Sept. 19, 2005) (immigration status available to be used for impeachment purposes only); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996) (stating that being an undocumented immigrant does not impugn one's character, according to the Eastern District of New York); Castro-Carvache v. INS, 911 F. Supp. 843, 852 (E.D. Pa. 1995) (being an undocumented immigrant does not make that individual a liar); Hernandez v. Paicius, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003) (rejecting alienage as a viable avenue for attacking the party's credibility); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 245 (Tex. 2010) (finding harmful error and reversing when immigration status of a party was allowed in by the trial court).

105. TEX. R. CIV. P. 192 cmt. 1 (West 1999); *see In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *3.

is relevant.[106] However, discovery should be limited only to information that is reasonably calculated to lead to admissible evidence.[107]

Section 30.014 leads to the discovery of immigration related facts, which results in increased litigation expenses, harassment and annoyance to the plaintiff, and the invasion of personal rights. Section 30.014 also gives the trial court the authority to order a party to amend its initial pleading to contain the last three digits of the party's driver's license and social security numbers, if they are not contained in the original pleading.[108] The trial court is given the authority to find a party in contempt if they fail to amend their pleading as ordered by the court.[109] When determining whether the immigration status of litigants is discoverable, courts have developed a test for discoverability similar to the balancing test found in Rule 403 of the Texas Rules of Evidence.[110] If the discovery of plaintiff's immigration status poses a serious risk of injury to the plaintiff and outweighs the need for disclosure, then the information is not discoverable.[111] Leaving these issues to the discretion of the trial court causes uncertainty, which is enough to intimidate litigants into backing out of a lawsuit for fear that their immigration status may ultimately be discovered.[112] This is commonly known as the *in terrorem* effect.[113]

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106. TEX. R. CIV. P. 192; TEX. R. EVID. 401; *see In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *3 (citing TEX. R. CIV. P. 192); TEX. R. EVID. 402).

107. TEX. R. CIV. P. 192.3(a); *see In re* K.L. & J. Ltd. P'ship, 2010 WL 5176846, at *3–5 (discussing the relevant scope of discovery); Oral Argument at 21:38, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV (Tex. App.—San Antonio Dec. 10, 2010, no pet.) (on file with court).

108. TEX. CIV. PRAC. & REM. CODE ANN. § 30.014(b) (West 2008).

109. *Id.*

110. *Compare* Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG, slip op. at 3 (W.D. Tex. Apr. 01, 2004) (citing Liu v. Donna Karan Inter., Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002)) (balancing the proposition of serious risk of injury against the need for disclosure), *with* FED. R. EVID. 609 (relating to evidence of prior convictions), *and* TEX. R. EVID. 403 (balancing test to determine if relevant evidence is sufficiently prejudicial that it should be excluded despite its relevance).

111. Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG, slip op. at 3 (citing Liu v. Donna Karan Inter., Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002)); *see also* FED. R. EVID. 609 (relating to evidence of prior convictions); TEX. R. EVID. 403.

112. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063–65 (9th Cir. 2004) (discussing the harm of disclosure).

113. *See* Barrera v. Boughton, No. 3:07cv1436(RNC), 2010 WL 1240904, at *2 (D. Conn. Mar. 19, 2010); David v. Signal Int'l, LLC, 257 F.R.D. 114, 122 (E.D. La. 2009); Rengifo v. Erevos Enter., Inc., No. 06 Civ. 4266, 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007).

D. *The Chilling Effect*

The "chilling effect," also referred to by courts as the *in terrorem* effect, has been defined as striking "paralyzing fear in the plaintiffs sufficient to chill any inclination they may have had to prosecute their pending claims."[114] Some courts have determined that in cases where immigration status is not relevant to the claims being asserted, the discovery of these immigration related facts has an *in terrorem* effect on the litigants.[115] The concern is that discovery of immigration facts, when they are not relevant to the claims in contention, pose "'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights."[116]

Because § 30.014 results in the discovery of immigration related facts, claimants are likely to become intimidated, and shy away from their ability to assert their rights.[117] More courts have now begun to prohibit "discovery of a plaintiff[ ]'s immigration status where such discovery is either not relevant at all to the essential elements of the underlying claim, or where the relevance is so slight or tangential that it is outweighed by the potential prejudice and chilling effect of allowing the discovery."[118]

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114. *David*, LLC, 257 F.R.D. at 126.

115. *See Barrera*, 2010 WL 1240904, at *2; *David*, 257 F.R.D. at 122; *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5.

116. Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (quoting Transcript of Hearing at 12, Ansoumana v. Gristede's Oper. Corp., No. 00 Civ. 0253 (S.D.N.Y. Nov., 8 2000)).

117. *See Rivera*, 364 F.3d 1057, 1064–65 (9th Cir. 2004) (discussing the harm of disclosure); *Barrera*, 2010 WL 1240904, at *2; *David*, 257 F.R.D. at 122; *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5; EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005); *Liu*, 207 F. Supp. 2d at 192–93.

118. BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS 17 (2010) *available at* www.utcle.org (citation omitted); *see also In re* Reyes, 814 F.2d 168, 171 (5th Cir. 1987) (issuing order for trial court to withdraw part of discovery relating to citizenship status); *Barrera*, 2010 U.S. Dist. LEXIS 26081, at *14–19 (discussing cases supporting the proposition that immigration status should not be revealed in discovery); *Bice of Chi.*, 229 F.R.D. at 583 (same); *David*, 257 F.R.D. at 125–26 (identifying harms associated with allowing discovery of immigration status); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750–51 (D. Md. 2008) (citing other courts denying such discovery requests and agreeing); *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *7–9 (addressing concerns about possible negative consequences in allowing immigration status to be discovered); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893, at *13–14 (E.D.N.Y. Feb. 20, 2007) (affirming the trial court's order denying discovery of a party's immigration status); Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (denying defendants motion to vacate trial court's order barring discovery of immigration status); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (explaining that while the policy supports broad discovery, the *in terrorem* effect outweighs any policy gains in allowing discovery of an individual's immigration status).

E. *The Recognized Rights of Immigrants Trump Discoverability*

There are various areas of the law in which undocumented workers have the ability to assert certain civil rights.[119] While the following is not an exhaustive analysis of the areas of law in which undocumented immigrants have been extended coverage, it provides a look into the most common areas of the law in which the discoverability of immigration related facts arise.[120]

1. Labor Laws

Courts have increasingly used their discretion to prohibit the discovery of immigration related facts in wage and hour litigation where the plaintiffs are covered by the Fair Labor Standards Act (FLSA).[121] In these types of cases, immigration status is not relevant to whether an employer failed to pay their employee for work performed.[122] This logic can be applied to causes brought in Texas state court under labor laws such as the Texas Minimum Wage Act (TMWA) and the Texas Payday Law

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119. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2006); Family Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006); *see also* Texas Commission on Human Rights Act (TCHRA), TEX. LAB. CODE ANN. §§ 21.001–.556 (West 2006); Texas Payday Law, TEX. LAB. CODE ANN. § 61.011–.020 (West 2006); Texas Minimum Wage Act, TEX. LAB. CODE ANN. § 62.001–.205 (West 2006).

120. *See* BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS, LABOR AND EMPLOYMENT LAW CONFERENCE 1–3 (2010), *available at* www.utcle.org (explaining that with important exceptions, labor laws of the United States and of the State of Texas largely cover all employees).

121. *See, e.g.*, *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (recognizing that the FLSA protects documented and undocumented persons the same); Flores v. Albertsons, Inc., No. CV-01-00515, 2002 U.S. Dist. LEXIS 6171, at *20–21 (C.D. Cal. Apr. 9, 2002); *David*, 257 F.R.D. at 125–26 (holding that the plaintiffs were protected from questions referencing immigration status); *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *7–9; *Flores*, 233 F. Supp. 2d at 465 n.2; *see also* Brief of *Amici Curiae*: Mex.-Am. Bar Ass'n of Tex. et al. in Support of Plaintiffs' Objections to Magistrate Order at 8, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553-G (N.D. Tex. Sept. 2, 2010), 2010 WL 4786730 (noting a trend in decisions supporting protection for immigrants); BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS, LABOR AND EMPLOYMENT LAW CONFERENCE 18 (2010).

122. *See, e.g.*, *In re* Reyes, 814 F.2d at 170; *Flores*, 2002 U.S. Dist. LEXIS 6171, at *21; *David*, 257 F.R.D. at 125–26; *Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *7–9; *Flores*, 233 F. Supp. 2d at 465 n.2; *see also* Brief of *Amici Curiae*: Mex.-Am. Bar Ass'n of Tex. et al. in Support of Plaintiffs' Objections to Magistrate Order at 8, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553-G (N.D. Tex. Sept. 2, 2010), 2010 WL 4786730 (pointing out that the protection is in place because the discovery is unnecessary); BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS, LABOR AND EMPLOYMENT LAW CONFERENCE 17 (2010).

(TPL).[123] Seeking immigration related discovery in wage and hour cases has the *in terrorem* effect discussed above.[124] This type of intimidation discovery has the effect of creating a second class of workers accustomed to substandard wages, or no wages at all, and no kind of redress due to the fear that their immigration status would be discovered.[125]

Undocumented workers are also protected from employment discrimination by the National Labor and Relations Act (NLRA), and Title VII of the Civil Rights Act of 1964 (Title VII).[126] The same *in terrorem* concern exists in discovery for cases involving these claims.[127] One difference that exists between claims brought under the NLRA or Title VII and wage and hour cases under the FLSA is that NLRA and Title VII claims have the available remedies of unearned back pay and reinstate-

123. *See* Texas Minimum Wage Act, TEX. LAB. CODE ANN. § 62.001 (West 2006); Texas Payday Law, TEX. LAB. CODE ANN. § 61.011 (West 2006).

124. *See Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5; *Flores*, 233 F. Supp. 2d at 465 n.2 (granting protective order in wage and hour overtime case); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (defendant employer barred from discovery in a wage and hour FLSA case); *see also* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (granting plaintiffs motion for a protective order, ensuring they will not be forced to reveal their immigration status, in a Title VII action); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (barring defendant employer from discovering immigration status of employees EEOC sued on behalf of for violation of anti-discrimination laws); Barrera v. Boughton, No. 3:07cv1436, 2010 U.S. Dist. LEXIS 26081, at *3 (D. Conn. Mar. 19, 2010) (agreeing with cited precedent that the chilling effect of discovery outweighs possible benefits of discovering immigration status in a case concerning alleged violations of the Federal Constitution); *David*, 257 F.R.D. at 122 (ordering immigration status excluded from eligible discovery in a case involving workers being shipped to Louisiana after Hurricane Katrina in an action under the Trafficking Victims Protection Act); Order Denying Defendant A.D. Willis Company's Motion to Compel Discovery Answers, Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG, at 1–2 (W.D. Tex. Apr. 1, 2004).

125. *See In re* Reyes, 814 F.2d at 170 (noting that petitioners in case might be persuaded to forgo their rights because of the tangential consequences of immigration inquiries irrelevant to the issue); *Rivera*, 364 F.3d at 1064 (noting that workers will have an incentive to not report discrimination in its various forms, contrary to the public policy of both the United States and the State of Texas); *David*, 257 F.R.D. at 122 (intimidating effect if discovery allowed too great); *Liu*, 207 F. Supp. 2d at 193 (discussing the *in terrorem* effect of allowing such discovery); BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS, LABOR AND EMPLOYMENT LAW CONFERENCE 17 (2010) (chilling effect is unacceptable).

126. National Labor Relations Act, 29 U.S.C. § 152(3) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2006). The NLRA protects workers who engage in protected concerted activity in relation to labor law violation in the workplace. 29 U.S.C. § 152 (2006). Title VII protects workers from discrimination on the basis of race, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2006).

127. *See Rivera*, 364 F.3d at 1064 (following the trend of prohibition of immigration status in a Title VII action); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (same); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893, at *9–11 (E.D.N.Y. Feb. 20, 2007) (same).

ment.[128] This difference in available remedies is significant because the United States Supreme Court in *Hoffman Plastics v. NLRB*,[129] established that undocumented workers are not eligible for the remedies of unearned back pay and reinstatement because awarding these remedies to undocumented workers would contravene the Immigration Reform and Control Act (IRCA) of 1986.[130] Although it is disconcerting that undocumented workers lose these powerful remedies when bringing a claim under the NLRA, the matter pertinent to the discussion of § 30.014 is that the opinion seems to discount the *in terrorem* effect and put immigration status and related information directly in question (thus making it relevant and discoverable).[131] Importantly, however, the Court in *Hoffman* did not explicitly state that its reasoning extended to claims brought under Title VII.[132]

From this inconclusive portion of *Hoffman*, a significant body of case law has grown to establish that information regarding immigration status, authorization to work, and social security numbers are not relevant and not discoverable in the Title VII context.[133] The theme drawn from these decisions is that even if *Hoffman* does bar undocumented workers from the remedies of back pay or reinstatement under Title VII claims,[134] in-

128. *Compare* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1) (2006) (prohibiting discrimination and offering back pay, reinstatement, and other possible remedies), *with* Fair Labor Standards Act, 29 U.S.C. §§ 206–07, 216(b) (2006) (setting minimum standards for working individuals and offering lost wages, unpaid wages, promotions, and other equitable relief). Back pay is not an available remedy under FLSA because a worker pursuing a FLSA claim is trying to recover unpaid wages, lost wages for work actually performed, while a worker pursuing a claim under the NLRA is seeking relief after having been terminated from employment. While a NLRA claim can incorporate a claim for unpaid wages, the remedy of unearned back pay is an award of wages for work not actually performed, but for work that would have been performed had it not been for a wrongful termination. *See generally* Fair Labor Standards Act, 29 U.S.C. §§ 206 (2006); National Labor Relations Act, 29 U.S.C. § 152 (2006).

129. 535 U.S. 137 (2002).

130. *Id.* at 151.

131. *See id.* at 149–50.

132. *See generally id.*

133. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1061, 1064 (9th Cir. 2004) (Title VII action where discovery of the plaintiff's immigration status was barred); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893, at *8–9 (E.D.N.Y. Feb. 20, 2007) (same); EEOC v. Restaurant Co., 448 F. Supp. 2d 1085, 1087–88 (D. Minn. 2006) (same); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (same); EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 590 (E.D. Cal. 1991) (same).

134. At least one court has not only concluded that immigration related information was irrelevant, but went further to question whether the prohibition of remedies such as back pay or reinstatement under NLRA claims extends to Title VII claims at all. *Rivera*, 364 F.3d at 1067–69. The Ninth Circuit Court of Appeals discussed three poignant differences distinguishing the statutes and supporting the conclusion that remedies of back pay

quiring into the plaintiff's immigration status, at least during the initial stages of litigation is "oppressive, [ ] constitute[s] a substantial burden on the parties and on the public interest and [ ] would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims."[135] This reasoning that immigration related information is generally not discoverable in Title VII claims lends support to the argument that immigration related information should not be required in the analogous context of § 30.014.

The Texas Supreme Court instructed Texas courts interpreting the Texas Commission on Human Rights Act to follow this federal precedent interpreting Title VII of the Civil Rights Act of 1964.[136] This federal precedent holds that in a claim for employment discrimination, at least when no back or front pay is being requested, immigration related information is not relevant and not discoverable.[137] Courts have even extended this protection to situations when a plaintiff had previously provided a false social security number, or used an alias.[138]

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and reinstatement under Title VII are not prohibited by *Hoffman*; which bolsters the irrelevance of immigration related information. *Id.* First, claims under the NLRA are enforced primarily through prosecution by the a government agency, the NLRB, while claims under Title VII are enforced principally through private causes of action. *Id.* at 1067. If private individuals were prevented from obtaining certain remedies under Title VII, it would undermine the legislative intent that private individuals serve as private attorneys-general to enforce the statute. *Id.* "Second, Congress has armed Title VII plaintiffs with remedies designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers." *Id.* Any limitation on these remedies would impinge upon the congressional intent to send strong messages of deterrence through the use of weighty and abundant remedies. *See id.* Third, in NLRA claims remedies like back pay and reinstatement are granted by a federal agency with a limited scope of delegated authority. *Id.* at 1068. Conversely, under Title VII these remedies are awarded by federal courts that do not have the same limits on their remedial authority as do federal agencies. *Id.*

135. *Bice of Chi.*, 229 F.R.D. at 583 (citing *Rivera*, 364 F.3d at 1065 (9th Cir. 2004).

136. *In re* United Servs. Auto. Ass'n, 307 S.W. 3d 299, 308 (Tex. 2008) (explaining the TCHRA was created, in part, to harmonize state law with federal law regarding employment discrimination and as a result, analogous federal statutes and cases constructing the employment discrimination laws should be similar at the state level).

137. *Rivera*, 364 F.3d at 1069; *Bice of Chi.*, 229 F.R.D. at 583; *Restaurant Co.*, 448 F. Supp. 2d at 1087.

138. *See Bice of Chi.*, 229 F.R.D. at 583 (conceding parties can be impeached if they lied about a Social Security number or alias they provided, but not allowing any questioning into the circumstances of the falsity); EEOC v. First Wireless Group, Inc., No. 03-CV-4990, 2007 U.S. Dist. LEXIS 11893 *9–11 (E.D.N.Y. Feb. 20, 2007) (finding more narrow means to accomplish the same goal—without revealing immigration status information); Brief of *Amici Curiae*: Mex.-Am. Bar Ass'n of Tex. et al. in Support of Plaintiffs' Objections to Magistrate Order at 9, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553-G (N.D. Tex. Sept. 2, 2010), 2010 WL 4786730 (arguing that courts have recognized the need to bar

Specifically in the realm of employment law, there is an increasing concern that preventing workers from asserting their rights in violation of federal and state mandated laws would essentially create a second class of workers.[139] Because § 30.014 creates an *in terrorem* effect intimidating claimants from asserting their rights, this statute can be linked to the problem of creating this lower class.[140] Inquiries into social security numbers and other immigration related facts have a chilling effect on a claimant's rightful exercise of their legal rights, particularly due to the inherent threat of deportation.[141] An employment system that allows employers to operate entirely in violation of labor laws contributes to the creation of this second class of workers.[142] Such a system would allow employers to hire undocumented individuals and pay them substandard wages, or no wages at all under the ever-present threat of exposing the employees to immigration authorities.[143] This completely undermines the purpose of

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the use of questioning circumstances of an alias or false Social Security card, if used, because it could *lead to* disclosure).

139. *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (the FLSA does not distinguish between undocumented immigrants and citizens in its coverage of employees); Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004) (identifying an additional chilling effect on undocumented immigrants—the threat of deportation—if a discrimination claim is brought by an undocumented immigrant, thus the policy behind prohibiting discovery of immigration status); David v. Signal Int'l, LLC, 257 F.R.D. 114, 122 (E.D. La. 2009) (same as *Rivera*); *see* Liu v. Donna Karan Intern., Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (allowing discovery of immigration status "would inhibit plaintiffs in pursuing their rights"); BILL BEARDALL, EMPLOYMENT LAW PRINCIPLES APPLICABLE TO CLAIMS BY LOW-WAGE IMMIGRANT WORKERS, LABOR AND EMPLOYMENT LAW CONFERENCE 17–18 (2010) (agreeing that a trend of denying discovery of immigration status in these kinds of cases is beginning to coalesce).

140. TEX. CIV. PRAC. & REM. CODE ANN. § 30.014 (West 2006); *see* Rengifo v. Erevos Enters., Inc., No. 06-4266, 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007) (agreeing there is a clear *in terrorem* effect). The problem is that undocumented workers face not only concerns retaliatory action, in the form of discharge or some other action—the same problem documented workers encounter—but also the threat of being removed from the country. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004).

141. *See Rengifo*, 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007) (asserting that often without protective orders prohibiting discovery ultimately calculated to discover a party's immigration status, discrimination actions would never been able to be completed); *see also* Topo v. Dhir, 210 F.R.D. 76, 79 (S.D.N.Y. 2002).

142. *See Rivera*, 364 F.3d at 1064 (upholding protective order because of "the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights"). The Ninth Circuit's decision describes the harsh reality that undocumented workers face dual consequences for an assertion of labor and civil rights. *Id.* These consequences include the possibility of a retaliatory discharge from employment and notification to INS, thus subjecting the undocumented worker to deportation or criminal proceedings. *Id.*

143. *See Rivera*, 364 F.3d at 1064–65 (citing cases in which undocumented workers were reported to immigration after filing claims for unpaid wages).

labor law regulation by allowing companies who violate these laws to profit from free or very cheap labor, and unethically compete with companies who comply with federal and state labor laws.[144]

Additionally, the use of the discovery process by employers in this manner fosters extraneous litigation and negatively effects judicial economy.[145] This process involves discovery into: (1) immigration related facts regarding the plaintiff which are not likely to be admissible evidence; (2) the defendants' hiring practices; and (3) the credibility of the defendant.[146] This back-and-forth process evolves into an expensive discovery battle over information that is collateral and tangential to the actual subject matter of the dispute.[147] Ultimately, time and resources of the litigants and the judicial system are wasted on the discovery of irrelevant information, which undermines the purpose of the discovery procedures set out in the TRCP.[148]

2. Violence, Abuse, Sexual Harassment, and Trafficking Laws

Individuals should be encouraged to seek judicial protection from abuse, sexual harassment, and domestic violence. Claimants often fear discovery of these matters would have negative implications far more serious than the relief they may get by filing a case.[149] Requiring a party to divulge immigration related facts, and the identifying information required in § 30.014 would create a chilling effect on parties seeking judicial protection from domestic abuse, sexual assault, sexual harassment, trafficking, and other serious forms of violence.[150]

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144. Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750 (D. Md. 2008).

145. Brief of *Amici Curiae*: Mex.-Am. Bar Ass'n of Tex. et al. in Support of Plaintiffs' Objections to Magistrate Order at 15, Ayala v. Genter's Detailing Inc., No. 3:09-cv-553-G (N.D. Tex. filed Sept. 2, 2010), 2010 WL 4786730.

146. *See id.* (detailing the expansive effect on the discovery process if discovery about use of incorrect social security numbers and thus immigration status is permitted).

147. *Id.*

148. *See* TEX. R. CIV. P. 192 (defining the scope and purpose of the discovery process).

149. *See* Brief of *Amicus Curiae*, Tex. Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 4–5, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070 (Tex. App.—San Antonio Dec. 10, 2010), 2010 WL 5176846 (arguing that delving into an individual's immigration status would have a chilling effect on undocumented immigrants who are victims of abuse and "turn to the courts for their only protection against sexual harassment, sexual assault, stalking, and domestic violence").

150. *See id.*

This effect is of even greater concern when considering immigrant women.[151] Immigrant women are often vulnerable to acts of violence and discrimination due to "social isolation, language barriers, lack of familiarity with U.S. law and availab[ility] of remedies, cultural attitudes [towards] speaking out about unwanted sexual attention, and precarious economic condition[s]."[152]

All women are protected from violence under the Violence Against Women Act of 1994 (VAWA).[153] The purpose of VAWA is to protect women and children from violent crimes motivated by gender.[154] Through its enactment VAWA provided increased resources and services to aide in preventing violent acts against women and children, which included funding for programs and educational services aimed at fulfilling these purposes, and training programs for members of judiciary, law enforcement, government agencies, and other community groups to assist in recognizing, addressing, investigating and prosecuting these specific crimes of violence outlines in the statute.[155] The VAWA additionally calls for collaboration between government agencies, law enforcement branches, and other community organizations to focus on education, training, prevention, intervention, and enforcement against these violent crimes.[156] At the time it was passed it contained a provision allowing civil redress for victims of violent crimes motivated by gender.[157] Unfortunately, the United States Supreme Court found this civil rights provision unconstitutional.[158] However, women and children are still protected and benefit from other provisions of VAWA, and the ability to obtain civil relief is still possible under other domestic violence and common law ac-

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151. *See* LEGAL MOMENTUM: WOMEN'S LEGAL DEF. & EDUC. FUND, IMMIGRANT WOMEN IN A BROKEN IMMIGRATION SYSTEM: AN AGENDA FOR CHANGE 1 (2010), *available at* http://www.legalmomentum.org/assets/pdfs/immigrant-women-in-a-broken.pdf.

152. Brief of *Amicus Curiae*, Tex. Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 4–5, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070 (Tex. App.—San Antonio Dec. 10, 2010), 2010 WL 5176846; *see* Enrique A. Maciel-Matos, Comment, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327, 330–31 (2010) (referring to the causes of susceptibility of immigrant women).

153. Violence Against Women Act, 42 U.S.C. § 13981 (2000) (stating "all persons" should be free from gender-motivated crime), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

154. *Id.* §§ 13941, 14001(a), 14016(c), 14036, 14041a(1), 14042, 14043d-1(1).

155. *Id.*

156. *Id.* §§ 14042, 14043d-1(6), 14016 (2006).

157. *Id.* § 13981(c) (2000), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

158. United States v. Morrison, 529 U.S. 598, 601–02, 627 (2000).

tions.[159] Community organizations that help women who are victims of violent crimes by filing suits for civil relief against their offenders may receive funding or grants under VAWA; but, if undocumented women do not assert their rights out of fear their status might be discovered the purpose of VAWA is undermined, and the act becomes useless as applied to undocumented women.[160]

V. THE POSSIBLE ALTERNATIVES TO § 30.014

As previously discussed, § 30.014 poses the problem of requiring sensitive information in a litigants initial pleading, which leads to the discovery of immigration related facts. Undocumented individuals, by nature of their legal status, will never have the identifying information required by § 30.014. Essentially, the TCPRC provides for the initial step in the discovery of immigration related facts, and the litigation battle that ensues.[161]

A possible solution to the problems associated with § 30.014 would be to repeal the statute completely. This would put the Texas Judicial System back in the same position it was before the statute's institution on September 1, 2007.[162] Doing away with the requirement of including a plaintiff's immigration status in the initial pleadings would eliminate the *in terrorem* effect that prevents many litigants from initiating a cause of action. While this fix would be beneficial to undocumented individuals, repealing the statute would also undermine the legislative intent of identifying individuals who have a judgment against them.[163]

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159. *See, e.g.*, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846 at *1 (Tex. App.—San Antonio Dec. 10, 2010) (illustrating a female plaintiff seeking civil relief for sexual abuse).

160. *See* Violence Against Women Act, 42 U.S.C. § 13981(a) (2006) (addressing violence against women and children at the federal level), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000); *see also* LEGAL MOMENTUM: WOMEN'S LEGAL DEF. AND EDUC. FUND, IMMIGRANT WOMEN IN A BROKEN IMMIGRATION SYSTEM: AN AGENDA FOR CHANGE 1, 2 (2010), *available at* http://www.legalmomentum.org/assets/pdfs/immigrant-women-in-a-broken.pdf (asserting that immigrant women are denied legal status and the rights associated with such status).

161. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.014 (West 2008) (requiring the last three numbers of the party's social security number be included in the initial pleading).

162. *See* Tex. S.B. 669, 80th Leg., R.S. (2007) (enacting a requirement for party's identifying information, including the last three digits of the social security number, in initial filings).

163. *See* Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007) (stating that social security and driver's license numbers make collecting monies owed under judgments less difficult); *see also* Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007).

Another possible solution would be to do away with the requirement of providing the requisite information in the litigant's initial pleadings, and only require the litigant to provide the indentifying information, if available, *to the clerk* upon filing the lawsuit.[164] This would allow the court to obtain the same identifying information and achieve the same purpose as intended by the legislature when enacting § 30.014.[165] This solution would also eliminate the chilling effect that § 30.014 has on litigants who are hesitant to seek civil redress for the fear of having their immigration status discovered.[166]

The downside to this approach is that it has the potential of burdening the court with more work and cutting down on judicial efficiency. As § 30.014 currently stands, the identifying information is conveniently located in the initial pleadings and is a public record.[167] This makes the information more easily accessible when trying to find out if a litigant is subject to a judgment.[168] Limiting the disclosure of indentifying informa-

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164. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.015 (West 2008) (describing a party notifying the court of any address changes).

165. *See* Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007) (warning that failure to comply would result in a contempt finding); Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007) (pointing out that S.B. 699 would require the identifying information to be in the abstract of judgment).

166. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (indicating the effect on the millions of undocumented workers who hold many of the undesirable jobs in the U.S. economy); Barrera v. Boughton, No. 3:07CV1436(RNC), 2010 U.S. Dist. LEXIS 26081, at *3–4, 6–7, 19 (D. Conn. Mar. 19, 2010) (granting plaintiffs' request for a protective order barring discovery of immigration related facts after plaintiffs were lured into a police sting operation by the offer of jobs); David v. Signal Int'l, LLC, 257 F.R.D. 114, 122 (E.D. La. 2009) (agreeing with plaintiffs' argument that an inquiry into their immigration status exceeded its probative value); Rengifo v. Erevos Enters., No. 06 Civ 4266, 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007) (emphasizing that Rengifo's immigration background is a separate issue from unpaid overtime); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (finding that immigration status was not pertinent to the issues in the case); Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG (W.D. Tex. filed Apr. 1, 2004) (denying defendant's motion to obtain discovery information pertaining to plaintiffs' immigration status); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (asserting that the *in terrorem* impact of an inquiry for immigration status leaned toward permitting a protective order); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (finding that even if the discovery of immigration status was relevant, "the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure"). *Contra* Catalan v. Vermillion Ranch Ltd. P'ship, No. 06-cv-01043-WYD-MJW, 2007 WL 951781, at *2 (D. Colo. Mar. 28, 2007) (distinguishing the "chilling effect" in *Rivera* because "defendants, as H-2A employers . . . have an affirmative legal duty to report workers who abscond to Immigration Customs Enforcement . . . within twenty-four (24) hours of discovery") (citation omitted).

167. TEX. CIV. PRAC. & REM. CODE ANN. § 30.014 (West 2008).

168. *See* Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 699, 80th Leg., R.S. (2007; Senate Comm. on Jurisprudence, Comm. Rep., Tex. S.B. 699, 80th Leg., R.S. (2007)

tion only to the clerk of the court takes away from the efficiency the legislature aimed for, and adds more work for the clerk of the court. This additional work for the clerk, and lost efficiency, would likely add to the costs of litigation, which would likely be passed on to the litigants, potentially making litigation too expensive for low-income litigants.

However, the disadvantages to this solution are not certain. When considering the possible rise of costs in litigation against the chilling effects § 30.014 currently has on litigants, it is likely that undocumented individuals will opt for an increase in the cost of litigation as opposed to the possible discovery of their immigration status.

VI. Fighting Against the Discovery of Immigration Related Facts

A. *The Defendant's Strategy*

Defendants have begun to realize that § 30.014 inherently provides for the discovery of immigration related facts without having to implement the mechanism of a discovery request.[169] When a defendant is involved in litigation with an individual it suspects or knows to be undocumented, a defendant will typically adhere to the requirements of § 30.014.[170] The Defendant can then move the court to order the plaintiff to provide the required identifying information, citing the statute if the plaintiff fails to do so in his or her initial pleadings.[171] The next step in the defendant's strategy is to make a discovery request for immigration related facts arguing that a social security number and other identifying information are required to ensure a party is credible or has the standing to sue.[172]

Once a defendant makes a discovery request, a plaintiff, in opposition, should object to the request and ask the court to prohibit the discovery of

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(commenting on difficulty associated with locating a particular person with insufficient information).

169. *See* Tex. Civ. Prac. & Rem. Code Ann. § 30.014 (West 2008) (requiring a party to disclose a portion of his or her driver's license and social security numbers); Tex. R. Civ. P. 192.1–192.4 (stating that discovery is permissible regarding any information that is pertinent and not protected by privilege).

170. *See, e.g.*, Defendant's Original Answer and Request for Disclosure at 1, Cruz v. Webb, No. C2010-0551D (433rd Dist. Ct., Comal Cnty., filed July 16, 2010) (providing the information required under § 30.014 and explicitly pointing out compliance with the statute).

171. Tex. Civ. Prac. & Rem. Code Ann. § 30.014 (West 2008).

172. *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070-CV, 2010 WL 5176846, at *1, *2, *4 (Tex. App.—San Antonio Dec. 10, 2010, no pet. h.); *see* Brief of *Amicus Curiae*, Tex. Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 11–14, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070, 2010 WL 5176846 (Tex. App.—San Antonio Dec. 10, 2010) (arguing the Texas Supreme Court previously decided that immigration status does not play a role in credibility).

immigration related evidence.[173] Objections must be specific and give the factual or legal basis for the objection, as well as "the extent to which the [objecting] party is refusing to comply."[174] A plaintiff objecting to the discovery of immigration related facts should assert that such requests violate discovery relevance standards.[175] The defendant will likely respond with a motion to compel the discovery of these facts.[176] The court will then have to intervene in the discovery process to determine whether discovery is properly warranted.[177] This defensive strategy quickly turns the litigation into a heated dispute over issues that have very little, if any, relevance to the claims asserted by the plaintiff.[178] This battle also takes a toll on the efficient prosecution of a case, as well as the judicial economy of litigating a case.[179]

B. *Responding to the Defendant's Strategy*[180]

Once the defendant files a motion to compel discovery of immigration related facts, the plaintiff must then develop a strategy to resist discov-

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173. TEX. R. CIV. P. 192.6(a); Plaintiffs' Motion for Protective Order Precluding Inquiries with an *In Terrorem* Effect and Memorandum in Support at 1, Ayala v. Genter's Detailing, Inc. , No. 3:09-CV-553-G (N.D. Tex. filed May 25, 2010).

174. TEX. R. CIV. P. 193.2(a).

175. 6 William V. Dorsaneo III, *Texas Litigation Guide* § 97.50 (2010).

176. *See* 31 TEX. JUR. 3D DISCOVERY AND DEPOSITIONS § 140 (West 2005 & Supp. 2010–2011) (explaining how a discovering party may obtain an order to compel such discovery, even for answers that are provided, but determined to be "incomplete"). *Cf.* 6 William V. Dorsaneo III, *Texas Litigation Guide* § 97.50 (2010) (outlining techniques for resisting discovery).

177. *See In re* CSX Corp., 124 S.W.3d 149, 152 (Tex. 2003) (holding certain interrogatories to be overbroad and lacking reasonable limitations). The Texas Supreme Court has repeatedly struck down trial courts' discovery orders found to be overbroad. *Id.* at 152–53. "A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *Id.* at 153 (citation omitted); *see also* TEX. R. CIV. P. 193.4 (following an objection to discovery, either party may request a hearing, but the objecting party is required to provide evidence supporting the objection).

178. *See* Brief of *Amici Curiae*: Mex.-Am. Bar Ass'n of Tex. et al. in Support of Plaintiffs' Objections to Magistrate Order at 15, Ayala v. Genter's Detailing, Inc., No. 3:09-cv-553-G (N.D. Tex. Sept. 2, 2010), 2010 WL 4786730 (advocating for limited discovery to avoid encouraging extraneous discovery that has little or no relevance to primary issues).

179. *Id.*

180. This section is intended to help practitioners build a strategy to effectively oppose a motion to compel. While the statute at issue is Texas-specific, the same analysis can be applied to other similar statutes in other jurisdictions. In addition to Texas state cases, there is also a significant body of federal case law that speaks to the subject of discoverability of immigration related facts that has been discussed throughout this Comment.

ery.[181] In a motion to compel, defendants commonly assert that: (1) plaintiff did not comply with § 30.014's requirement that litigants place identifying information in their pleadings;[182] (2) the information requested bears on the plaintiff's credibility; (3) broad discovery is favored; and (4) they are entitled to know the plaintiff's true identity.[183]

Generally, in response to a motion to compel, a plaintiff can assert a privilege, move for a protected order, or move to limit discovery.[184] If a plaintiff's original objection to discovery is not sustained, the most appropriate course of action is for the plaintiff to file a motion for a protective order.[185]

Discovery is improper when it seeks material that is: (1) outside the scope of discovery; (2) privileged; (3) invades personal, constitutional, or property rights; or (4) would impose undue burden or cause unnecessary expense, harassment, or annoyance.[186] In situations where the discoverability of immigration related facts has little or no relevance to the civil claims being asserted, a plaintiff should argue that the discovery being sought is outside the scope of discovery, invades personal rights, and would cause unnecessary expense, harassment, and annoyance.[187] As a result of these dueling motions, the trial court has the discretion to order:

> (1) the requested discovery not be sought in whole or in part; (2) the extent or subject matter of the discovery be limited; (3) the discovery not be undertaken at the time or place specified; (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court; [and] (5) the results of discovery be sealed or otherwise protected . . . .[188]

In response to defendant's assertion that plaintiff did not comply with § 30.014, a plaintiff should assert that the requirements of § 30.014 were not intended to provide discovery, but to regulate judicial efficiency. The

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181. 6 William V. Dorsaneo III, *Texas Litigation Guide* § 97.10 (2010) (detailing methods and requirements for objecting to discovery).

182. *See* Brief of *Amicus Curiae*, Tex. Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 4 n.17, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070, 2010 WL 5176846 (Tex. App.—San Antonio Apr. 6, 2010) (summarizing various reasons given during attempts to compel discovery of plaintiff's identity).

183. Brief of *Amicus Curiae*, Tex. Advocacy Project, In Support of Plaintiff-Respondent, Suggesting Denial of Mandamus at 3, *In re* K.L. & J. Ltd. P'ship, No. 04-10-00070, 2010 WL 5176846 (Tex. App.—San Antonio Apr. 6, 2010).

184. TEX. R. CIV. P. 176.6(c); TEX. R. CIV. P. 192.4; TEX. R. CIV. P. 192.6.

185. TEX. R. CIV. P. 192.6(a).

186. *See* 6 William V. Dorsaneo III, *Texas Litigation Guide* § 97.10[1][a][ii] (2010); *see also* TEX. R. CIV. P. 192.3.

187. *See* 6 William V. Dorsaneo III, *Texas Litigation Guide* § 97.10[1][a][ii] (2010); *see also* TEX. R. CIV. P. 192.3.

188. TEX. R. CIV. P. 192.6(b).

statute plainly reads, "*if*" a driver's license and social security number has been issued.[189] While there may be a number of reasons why an individual has not been issued a driver's license, the non-issuance of a social security number carries a strong assumption that an individual is an undocumented immigrant. In situations where a plaintiff has failed to comply with the provisions of § 30.014 because none of the requested forms of identification have been issued, a defendant is likely to press the discovery of immigration related facts, especially in the case where a defendant knows or suspects a plaintiff is undocumented.

In response to the assertion that immigration related facts bear weight on the credibility of the plaintiff, courts have generally found that the opportunity to test the credibility of plaintiffs does not outweigh the public interest in allowing them to enforce their rights.[190] When immigration status is a collateral matter—"not relevant to proving a material issue"—examination into these facts is not admissible for impeachment purposes.[191] As discussed above, courts have generally rejected the notion that the undocumented status of an individual automatically impugns his or her credibility.[192]

The scope of discovery includes "any non-privileged matter that is relevant to any party's claim or defense."[193] Trial courts play an active role in regulating the breadth of sweeping or contentious discovery.[194] When a court denies a motion to compel, it may also issue a protective order to

189. TEX. CIV. PRAC. & REM. CODE § 30.014(a) (West 2008).

190. *See* First Am. Bank v. Western DuPage Landscaping, Inc., No. 00 C 4026, 2005 U.S. Dist. LEXIS 20729, at *2 (N.D. Ill. Sept. 19, 2005); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996); Castro-Carvache v. Immigration & Naturalization Serv., 911 F. Supp. 843, 852 (E.D. Pa. 1995); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010) (holding that even in limited cases where immigration status may speak to credibility, it should be excluded because it causes undue prejudice under evidence Rule 403, especially in civil trials); Hernandez v. Paicius, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003).

191. Poole v. State, 974 S.W.2d 892, 905 (Tex. App.—Austin 1998, pet. ref'd); *see also* First Am. Bank v. Western DuPage Landscaping, Inc., No. 00 C 4026, 2005 U.S. Dist. LEXIS 20729, at *2 (N.D. Ill. Sept. 19, 2005); *Mischalski*, 935 F. Supp. at 207–08; Castro-Carvache, 911 F. Supp. at 852; *Hughes*, 306 S.W.3d at 241 (explaining that the immigration status was irrelevant to the case because it was not an element the plaintiff had to prove in order to prevail); *Hernandez*, 134 Cal. Rptr. 2d at 761–62.

192. *See First Am. Bank*, 2005 U.S. Dist. LEXIS 20729, at *2; *Mischalski*, 935 F. Supp. at 207–08; *Castro-Carvache*, 911 F. Supp. 843, 852; *Hughes*, 306 S.W.3d at 245; *Hernandez*, 134 Cal. Rptr. 2d at 761–62.

193. FED. R. CIV. P. 26(b)(1); TEX. R. CIV. P. 192.3(a).

194. FED. R. CIV. P. 26(b)(2)(C); *see also* FED. R. CIV. P. 26(c)(1) (discussing when a trial court may grant a protective order limiting discovery); TEX. R. CIV. P. 192.6(b) (illustrating when a Texas trial court may limit discovery by issuing a protective order).

protect a litigant who shows good cause for such protection.[195] A plaintiff seeking a protective order must show that she is entitled to a protective order by presenting evidence that her immigration related facts are not relevant to the claims or defenses asserted in the case, or that any relevance of these facts is outweighed by the oppressive and chilling effects of the discovery.[196]

In a motion for a protective order, the plaintiff should assert facts and put forth evidence that the plaintiff is covered by the law under which he or she is asserting a claim, and illustrate how the discovery of immigration related facts would have an *in terrorem* effect on his or her ability to assert that claim.[197] In a civil matter, discovery should not be allowed when the discovery of immigration related facts outweighs the public interest in allowing an individual to assert her rights.[198] It is important that plaintiff(s) prove they are asserting a claim in which the law has recognized coverage of undocumented individuals.[199] For example, "it is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."[200] Once a plaintiff has proven he or she is asserting a claim in which the discovery of immigration related facts are irrelevant, or that the prejudice of the discovery outweighs the relevance of the discovery, the trial court should grant a protective order.

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195. FED. R. CIV. P. 26(c)(1); TEX. R. CIV. P. 192.6(b).

196. TEX. R. CIV. P. 192.4, 192.6; FED. R. CIV. P. 26(b)(2)(c), 26(c)(1)(D); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987); Ayala v. Genter's Detailing, Inc., No. 09-cv-553-G-BF (N.D. Tex. July 13, 2010) (order granting defendant's motion to compel, and granting in part and denying in part plaintiffs' motion for protective order); Bernal v. A.D. Willis Co., No. 03-196 (W.D. Tex. Apr. 01, 2004) (order denying defendant's motion to compel discovery answers).

197. *See generally* Plaintiffs' Motion for Protective Order Precluding Inquiries with an *In Terrorem* Effect and Memorandum in Support, Ayala v. Genter's Detailing, Inc., No. 3:09-CV-553-G (N.D. Tex. filed May 25, 2010), 2010 WL 2844507 (providing an example of a plaintiff's motion for a protective order prohibiting discovery of immigration status).

198. *See* TEX. R. CIV. P. 192.4(b) (providing that discovery *should* be limited when the "burden . . . of the proposed discovery outweighs its likely benefit, taking into account the needs of the case . . . [and] the importance of the issues at stake in the litigation"); *see also* FED. R. CIV. P. 26(b)(2)(c)(iii).

199. *See, e.g., In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (illustrating how the FLSA applies to citizens and non-citizens alike); *see also* Fair Labor Standards Act, 29 U.S.C. § 203(e)(1), (g) (2006) (defining "employee" as in "individual" who holds employment); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2006); National Labor Relations Act, 29 U.S.C. § 152(3) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2006); Texas Minimum Wage Act, TEX. LAB. CODE ANN. § 62.002(5) (West 2006); Texas Payday Law, TEX. LAB. CODE ANN. § 60.011 (West 2006); Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001 (West 2006).

200. *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987).

VII. CONCLUSION

"All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[201]
Texas Constitution, Article I, §13

The courthouse doors should remain open to every person, and no one should be prohibited from bringing a cause of action because of their race, ethnicity, nationality, alienage, economic status, or gender. Discovery into the immigration status of plaintiffs has the effect of closing the doors to the courthouse for undocumented individuals, and denies them "remedy by due course of law."[202] Undocumented individuals will never have the "last three digits" of a valid social security number or a driver's license required by § 30.014.

A social security number is a very unique form of identification that warrants privacy and protection. Most Americans are concerned with protecting their identities, which is evident from the number of identity theft services available to those who want top-flight protection for their personal information, such as "Watchdog," and "Identity Lock."[203] Why make this sensitive information a requirement for a pleading that is public record?

A social security number is inextricably intertwined with immigration status and citizenship. Parents of an individual born in the United States usually fill out documents in the hospital, and within days a social security number is issued for that newborn. Every United States citizen has a social security number. Every undocumented individual does not have a social security number and, therefore, no undocumented individual will ever be able to comply with the provisions of § 30.014.

A driver's license number is also an important piece of identification, which an undocumented individual will never be able to obtain legitimately.[204] Additionally, the requirement that a litigant provide this number affects not only undocumented individuals, but also citizens who do not have a driver's license or cannot afford one.

By providing for the discovery of the fact that a plaintiff lacks a social security number, the legislature has made it easier for defendants to com-

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201. TEX. CONST. art. I, § 13.

202. *See id.*

203. *True Identity Protection*, IDWATCHDOG.COM, http://www.idwatchdog.com/ (last visited Mar. 27, 2011); LIFELOCK.COM, http://www.lifelock.com/329763 (last visited Mar. 27, 2011).

204. *See Identification Requirements for a Texas Driver License or Identification Card*, TEX. DEP'T OF PUB. SAFETY, http://www.txdps.state.tx.us/driverlicense/identificationrequirements.htm (last visited Mar. 27, 2011).

pel the discovery of immigration status. This process also results in the *in terrorem* effects that prevent many individuals from asserting themselves in the civil court system.[205] This chilling effect extends to documented immigrants who are fearful of exposing their immigration history, and United States citizens that have family members that might have recently immigrated. The United States is, after all, a land of immigrants.

The Texas Rules of Civil Procedure provide for the discovery of information that is relevant, reasonably calculated to lead to admissible evidence, and is not overly-broad.[206] Immigration related facts are not relevant in most civil causes of action, particularly in the case of labor and employment litigation, domestic abuse, and sexual harassment. Immigration status is not admissible in civil cases, not even for credibility issues.[207] Since immigration status is never admissible, it should never be discoverable.

It is in the best interests of society to keep the courthouse doors open for individuals who have been exploited or harassed. Allowing civil redress keeps businesses honest, and protects basic human rights.[208] Section 30.014 essentially closes the doors for undocumented individuals trying to obtain civil relief. This provision puts a defendant on notice that a litigant is not documented. Defendants then use discovery as a tool to intimidate litigants from pursuing a cause of action.

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205. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064–65 (9th Cir. 2004) (discussing the negative impact of immigration related discovery on millions of undocumented workers); Barrera v. Boughton, No. 3:07CV1436(RNC), 2010 U.S. Dist. LEXIS 26081, at *3–4, *6–7, 19 (D. Conn. Mar. 19, 2010) (granting plaintiffs' protective order request which barred discovery of immigration related facts); David v. Signal Int'l, LLC, 257 F.R.D. 114, 122 (E.D. La. 2009) (finding that inquiry into plaintiffs' immigration status exceeds its probative value); Rengifo v. Erevos Enters., No. 06 Civ 4266(SHS)(RLE), 2007 U.S. Dist. LEXIS 19928, at *5 (S.D.N.Y. Mar. 20, 2007) (stating that plaintiff's immigration status is not relevant to his unpaid overtime claim); EEOC v. Bice of Chi., 229 F.R.D. 581, 583 (N.D. Ill. 2005) (finding that immigration status is not pertinent to the issues in the case); Bernal v. A.D. Willis Co., No. SA-03-CA-196-OG (W.D. Tex. filed Apr. 1, 2004) (denying defendant's motion to obtain discovery information pertaining to plaintiffs' immigration status); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (recognizing that the *in terrorem* impact of a potential investigation into plaintiffs' immigration status supports granting plaintiffs' protective order request); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (holding that immigration status is irrelevant and the risk posed to the plaintiffs outweighs the need to disclose immigration related facts).

206. TEX. R. CIV. P. 192.3(a).

207. *See* First Am. Bank v. W. DuPage Landscaping, Inc., No. 00 C 4026, 2005 U.S. Dist. LEXIS 20729, at *2 (N.D. Ill. Sept. 19, 2005); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996); Castro-Carvache v. Immigration & Naturalization Serv., 911 F. Supp. 843, 852 (E.D. Pa. 1995); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010); Hernandez v. Paicius, 134 Cal. Rptr. 2d 756, 761–62 (Cal. Ct. App. 2003).

208. *See* Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001 (West 2006).

Many undocumented litigants will stay away from the courthouse based on the provisions of § 30.014 and the potential of exposing their immigration status. Even more individuals will stay away when they realize a defendant has the ability to compel information regarding immigration status, and almost none of these individuals would come forward if they knew their immigration status would be found relevant and ultimately subject to discovery. It is important to find an alternative to § 30.014, and to keep the discoverability of immigration related facts in a cause where they have no relevance from being at issue.