

WHO NEEDS DACA OR THE DREAM ACT? HOW THE ORDINARY
USE OF EXECUTIVE DISCRETION CAN HELP (SOME)
CHILDHOOD ARRIVALS BECOME CITIZENS

by
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Over two million immigrants without legal status entered the country as children. These childhood arrivals have the constitutional right to attend public schools without charge, and billions of taxpayer dollars have been invested in their education. Offering these young people the opportunity to remain in the United States, use their education to contribute to the communities in which they have been raised, and become citizens would let the country realize its return on this investment. Yet thus far Congress, which has the exclusive power to create new paths to citizenship, has failed repeatedly to pass legislation that would enable childhood arrivals to earn some form of legal immigration status and eventually naturalize.

The Deferred Action for Childhood Arrivals program (DACA), which the Obama Administration launched in August 2012, partially addressed this issue by letting eligible childhood arrivals stay and work in the country for two-year renewable increments. In September 2017, the Trump Administration rescinded DACA, citing the Attorney General's conclusion that it was an unconstitutional exercise of authority by the Executive Branch. Less than eight hours later, Trump stated that if Congress failed to legalize DACA within six months he would reconsider the issue.

If Congress fails to codify DACA or enact some form of the DREAM Act (which would let childhood arrivals earn permanent residence and eventually citizenship), it seems highly unlikely that the Trump Administration could, or would, reinstate DACA, given that its attorney general has declared the program unconstitutional. But there are other steps the Executive Branch could take to make it easier for childhood arrivals to legalize. Moreover, neither DACA nor the DREAM Act offers a complete solution: codifying DACA gives its recipients no legal status, and every iteration of the DREAM Act Congress has considered imposes require-

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ments that disqualify many childhood arrivals. Therefore, regardless of what Congress may do, it is worth examining the unilateral and uncontroversial steps that the current administration (or a subsequent one) could take to help childhood arrivals become citizens. This Article identifies the discretion that the Executive Branch has with the military, cancellation of removal, parole, admissibility waivers, deferred action, and surplus immigration application fees. The Article then assesses the various ways the Executive Branch could employ that discretion to improve childhood arrivals' access to the paths to permanent residence and citizenship created by Congress.

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I. INTRODUCTION

*At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. . . . Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.*¹

It was no coincidence that President Obama announced the creation of the Deferred Action for Childhood Arrivals program (DACA)—which gives young immigrants who arrived or stayed in the U.S. without legal permission temporary protection from deportation and the ability to qualify for work authorization—on the 30th anniversary of the Supreme Court's decision in *Plyler v. Doe*.² In that landmark case, the Court held by the narrowest possible majority that children lacking legal immigration status have the constitutional right to the same free education that states provide their citizens.³ Three decades before Obama cited childhood arrivals' lack of culpability for their status as justification for creating DACA, Justice Brennan, who wrote the majority opinion in *Plyler*, also highlighted the innocence of young unauthorized immigrants.⁴ Justice Brennan's focus on the lack of culpability, coupled with his emphasis on the importance of education, enabled Brennan to achieve a majority by obtaining Justice Powell's swing vote.⁵

If *Plyler* opined that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice[,]"⁶ then why was DACA even necessary? Why do over

¹ *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

² The decision was announced on June 15, 1982. *Id.* at 202. DACA was announced thirty years later on June 15, 2012. *Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T OF HOMELAND SEC. (Jan. 29, 2018), <https://www.dhs.gov/topic/deferred-action-childhood-arrivals-daca>.

³ *Plyler*, 457 U.S. at 230.

⁴ This Article uses the term "childhood arrival" to refer to a person living in the U.S. without legal immigration status who entered the country as a minor. That entrance may have been unlawful, or may have been lawful pursuant to an immigration status (such as a tourist visa) that has since expired.

⁵ *Plyler*, 457 U.S. at 223–24 ("In determining the rationality of [the statute at issue], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims."); *id.* at 226 (explaining these children "are present in this country through no fault of their own"); *id.* at 230 ("[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders . . .").

⁶ HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 5–6 (2014).

⁷ *Plyler*, 457 U.S. at 220.

two million noncitizens⁸ living in the United States have no lawful immigration status even though they entered the country as children,⁹ and thus bear no culpability for their situation?

The answer, as *Plyler* itself acknowledged, is that the United States Constitution grants Congress the power to establish “an uniform Rule of Naturalization[,]” and therefore only Congress can create paths to permanent legal status and citizenship.¹⁰ *Plyler*’s holding restricted only the states’ ability to penalize young immigrants for their unlawful status, not Congress’s decision to refrain from providing a status for them in the first place. Thus, even after *Plyler*, unless Congress changes the law to provide a way for young unauthorized immigrants to obtain legal status, or the immigrants’ personal circumstances change so as to allow them to qualify for an existing path to legal status that Congress has already provided, they remain unauthorized and subject to deportation.

Less than five years after *Plyler* was decided, Congress did change the law, at least temporarily: starting in 1986, unauthorized immigrants who had been in the United States since January 1, 1982 could legalize their status by paying a fine and meeting other requirements.¹¹ Congress’s action validated a third point upon which *Plyler* relied: the mutable nature of unlawful status, meaning that, at some point in the future, through a change in law, or personal circumstances, or both, an unauthorized immigrant could become a lawful resident and eventually a citizen.¹²

A decade after, however, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹³ which not only ended several paths to obtaining legal status but also imposed new barriers to the paths that remained.¹⁴ IIRIRA’s changes made it significantly

⁸ This Article uses the term “noncitizen” to refer to any person who is not a U.S. citizen or national. The term “alien” is used in U.S. immigration statutes to convey the same meaning but has pejorative connotations.

⁹ Donald Kerwin & Robert Warren, *National Interests and Common Ground in the US Immigration Debate: How to Legalize the US Immigration System and Permanently Reduce Its Undocumented Population*, 5 J. ON MIGRATION & HUM. SECURITY 297, 321 (2017) (reporting that in 2015 the undocumented population was estimated to include 2.5 million undocumented residents brought to the U.S. at age 15 or younger).

¹⁰ *Plyler*, 457 U.S. at 225.

¹¹ Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, sec. 201, § 245A, 100 Stat. 3359, 3394–98; see also Kris W. Kobach, Remark, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1330 (2008) (discussing IRCA’s effects).

¹² Or, as the lower court in *Plyler* wrote, “[T]he illegal alien of today may well be the legal alien of tomorrow.” *Plyler*, 457 U.S. at 207.

¹³ Pub. L. No. 104-208, div. C, 110 Stat. 3009-546.

¹⁴ See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2089 (2008); Kari Hong, *The Ten Parts of “Illegal” in “Illegal Immigration” That I Do Not Understand*, 50 U.C. DAVIS L. REV. ONLINE 43, 45–46 (2017), <https://lawreview.law.ucdavis.edu/online/vol50/50-online-Hong.pdf>; Dara Lind, *The Disastrous, Forgotten*

harder for unauthorized immigrants to find a way to remain in the country legally.¹⁵ As a result, unauthorized immigrant parents could not acquire a lawful status to pass on to their minor children, and after those children became adults they could not access any path to legal status on their own.¹⁶

Starting in 2001, Congress has considered numerous bills that would give unauthorized childhood arrivals the ability to earn provisional lawful status and eventually permanent residency and citizenship, based on fulfilling various criteria such as minimum education requirements, length of time in the United States, and good moral character.¹⁷ Many of these bills have been entitled “The Development, Relief, and Education for Alien Minors Act” (DREAM Act), and the general population to whom they are directed is often called DREAMers.¹⁸

In 2011, when yet another version of the DREAM Act failed to attract sufficient support to pass both chambers of Congress, immigration advocates urged the Obama Administration to independently implement measures to protect childhood arrivals.¹⁹ A year later, in the middle of a reelection campaign during which crucial support from Hispanic voters appeared jeopardized by the record number of deportations that had occurred during Obama’s first term,²⁰ Department of Homeland Security Secretary Janet Napolitano issued a policy memo entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children.”²¹ Citing the Executive Branch’s authority to determine which immigration cases to prosecute, the memo identified criteria that immigration officials should use to determine whether to temporarily shield from deportation (a process called deferred action) “certain young people who were brought to this country as children and know only this country as home.”²² That same day, in a speech in the White House Rose Garden, President Obama explained the reasoning

1996 Law that Created Today’s Immigration Problem, VOX (Apr. 28, 2016), <http://www.vox.com/2016/4/28/11515132/iirira-clintonimmigration>.

¹⁵ See Lind, *supra* note 14.

¹⁶ See *id.*

¹⁷ *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGRATION COUNCIL (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers>.

¹⁸ *Id.*

¹⁹ See Julia Preston, *Young Immigrants Say It’s Obama’s Time to Act*, N.Y. TIMES (Nov. 30, 2012), <https://nyti.ms/TxH6P6>.

²⁰ See Rebekah Metzler, *Obama Offers Two Years of ‘Deferred Action’ to Illegal Immigrants*, U.S. NEWS & WORLD REP. (June 15, 2012), <https://www.usnews.com/news/articles/2012/06/15/obama-offers-two-years-of-deferred-action-to-illegal-immigrants>.

²¹ Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012) [hereinafter Memorandum from Janet Napolitano].

²² *Id.*

behind the program that would come to be known as Deferred Action for Childhood Arrivals, or DACA:

[W]e are a better nation than one that expels innocent young kids. . . . [T]hese young people are going to make extraordinary contributions and are already making contributions to our society. . . . The notion that in some ways we would treat them as expendable makes no sense.²³

Two months later, eligible immigrants who submitted the mandatory application, supporting documentation, and non-waivable \$465 fee could receive deferred action and a work permit for two years.²⁴

Although immigrant rights advocates greeted DACA's creation with praise, their enthusiasm was dampened by DACA's failure to create a way for childhood arrivals to earn permanent legal status and citizenship.²⁵ President Obama's announcement of the program acknowledged this shortcoming:

This is not a path to citizenship. It's not a permanent fix. This is a temporary, stopgap measure. . . . Precisely because this is temporary, Congress needs to act. There's still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments.²⁶

Similarly, Secretary Napolitano's memo implementing DACA expressly identified DACA's limits: "This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights."²⁷

While supporters of DACA faulted the program for not going far enough, opponents criticized it for going too far, calling DACA a "politi-

²³ *Transcript of Obama's Speech on Immigration Policy*, N.Y. TIMES (June 15, 2012), <https://nyti.ms/LsjqnD>.

²⁴ Requirements included having entered the U.S. before turning 16 and having lived in the U.S. continuously since June 15, 2007, with some exceptions; having been under the age of 31, without lawful status, and physically present in the U.S. on June 15, 2012; having been in school at the time, or having graduated from high school (or having met other educational requirements); and not having a serious criminal record. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>. The fee was increased from \$465 to \$495 effective December 23, 2016. *Our Fees*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/forms/our-fees> (last updated Jan. 5, 2017).

²⁵ See, e.g., *AILA Praises Deferred Action Announcement*, AM. IMMIGRATION LAWYERS ASS'N (June 15, 2012), <http://www.aila.org/advo-media/press-releases/2012/aila-praises-deferred-action-announcement> ("[DACA] does not offer a permanent fix for these young people. This announcement creates space for Congress to truly take on this issue and find the desperately needed solutions to our broken immigration system.").

²⁶ *Transcript of Obama's Speech on Immigration Policy*, *supra* note 23.

²⁷ Memorandum from Janet Napolitano, *supra* note 21, at 3.

cally-motivated power grab”²⁸ that unconstitutionally usurped Congress’s exclusive authority to formulate immigration policy.²⁹ During the 2016 campaign, the Republican presidential nominee vowed to repeal DACA on his first day in office, calling it an illegal executive amnesty,³⁰ but the numerous executive orders on immigration that President Trump issued during his first six months in office left DACA intact.³¹ Then, in the summer of 2017, Idaho’s governor and the attorneys general of ten states sent a letter to U.S. Attorney General Jeff Sessions stating that they would sue the Trump Administration if it did not rescind DACA by September 5, 2017.³²

On September 1, 2017 President Trump expressed sympathy toward childhood arrivals, telling reporters, “We love the Dreamers. We love everybody We think the Dreamers are terrific.”³³ Four days later, the

²⁸ Elise Foley, *Obama Administration to Stop Deporting Younger Undocumented Immigrants and Grant Work Permits*, HUFFINGTON POST (June 15, 2012), http://www.huffingtonpost.com/2012/06/15/obama-immigration-order-deportation-dream-act_n_1599658.html.

²⁹ See, e.g., Michael W. Cutler, *Obama Invokes Prosecutorial Discretion to Circumvent Constitution and Congress*, FOX NEWS (June 17, 2012), <http://www.foxnews.com/politics/2012/06/17/obama-invokes-prosecutorial-discretion-to-circumvent-constitution-and-congress.html>; Jan Ting, *President Obama’s “Deferred Action” Program for Illegal Immigrants Is Plainly Unconstitutional*, CTR. FOR IMMIGRATION STUDIES (Dec. 2, 2014), <http://cis.org/Obama-Deferred-Action-Amnest-Executive-Action-Unconstitutional>. The State of Mississippi and ten Immigration and Customs Enforcement officers filed a federal lawsuit challenging DACA’s constitutionality, but the case was dismissed on jurisdictional grounds, and the Fifth Circuit affirmed. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 730–31, 746 (N.D. Tex. 2013), *aff’d sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). The Fifth Circuit upheld a challenge to subsequent executive action that attempted to expand DACA and create a similar deferred action program for undocumented parents of U.S. citizen and permanent resident children. *Texas v. United States*, 787 F.3d 733, 743–44 (5th Cir. 2015). The proposed expansion of DACA removed the age cap of 31 as of June 15, 2012, extended the period of deferred action to three years instead of two, and adjusted the date from which the applicant must be continuously residing in the United States from June 15, 2007 to January 1, 2010. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs. et al. 3–4 (Nov. 20, 2014) [hereinafter Memorandum from Jeh Charles Johnson].

³⁰ *Transcript: Donald Trump’s Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmstory.html>.

³¹ See, e.g., Exec. Order No. 13802, 82 Fed. Reg. 28,747 (June 26, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017); Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

³² Suzanne Gamboa, *Texas AG, Others Demand Trump Stop New DACA Permits, End Renewals*, NBC NEWS (June 29, 2017), <https://www.nbcnews.com/news/latino/texas-ag-others-demand-trump-stop-new-daca-permits-end-n778371>.

³³ Joanna Walters & Sabrina Siddiqui, *‘We Love the Dreamers’: Trump Close to Decision on Future of Obama Program*, THE GUARDIAN (Sept. 1, 2017), <https://www>.

Trump Administration announced its plan to rescind DACA over a six-month period, citing the Attorney General's conclusion that the program was "an open-ended circumvention of immigration laws [and] was an unconstitutional exercise of authority by the Executive Branch."³⁴ Less than eight hours after that announcement, Trump tweeted: "Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!"³⁵

Although the general consensus is that any comprehensive immigration solution for childhood arrivals needs to come from Congress,³⁶ and there appears to be at least some bipartisan support for such a solution, the likelihood of Congress codifying DACA or enacting some form of the DREAM Act is uncertain.³⁷ If Congress fails to act, it seems highly unlikely

theguardian.com/us-news/2017/sep/01/trump-daca-dreamers-immigration-facebook-letter.

³⁴ Attorney General Jeff Sessions, Remarks on DACA (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

³⁵ Glenn Thrush & Maggie Haberman, *To Allies' Chagrin, Trump Swerves Left*, N.Y. TIMES (Sept. 6, 2017), <https://nyti.ms/2xPIqoH>. As of the date this article was written, the Trump Administration had not reconsidered its decision to rescind DACA, but various plaintiffs had sued to enjoin DACA's rescission, and seven states had sued challenging the DACA program itself. For an overview of the DACA-related litigation pending at the time this article was written, see, e.g., National Immigration Law Center, Status of Current DACA Litigation (last updated May 16, 2018), <https://www.nilc.org/issues/daca/status-current-daca-litigation/>.

³⁶ See, e.g., Meet the Press with Chuck Todd, *Full Kelly Interview: Visa Overstays Are a "Big Problem"*, NBC NEWS (Apr. 15, 2017), <https://www.nbcnews.com/meet-the-press/video/full-kelly-interview-visa-overstays-are-a-big-problem-for-immigration-enforcement-922041923875> (then-Department of Homeland Security Secretary John F. Kelly said, "I would argue, Chuck, that we have to straighten this out. And I place that squarely on the United States Congress. It's a hugely complex series of laws, and I engage the Hill quite a bit and get an earful about what I should do and what I shouldn't do. But it all comes down to the law, doesn't it? And we are a nation of laws, and I would hope that the Congress fixes a lot of these problems."); Devlin Barrett, *DHS Secretary Kelly Says Congressional Critics Should 'Shut Up' or Change Laws*, WASH. POST. (Apr. 18, 2017), https://www.washingtonpost.com/world/national-security/dhs-secretary-kelly-says-congressional-critics-should-shut-up-or-change-laws/2017/04/18/8a2a92b6-2454-11e7-b503-9d616bd5a305_story.html?utm_term=.b01dc505a5ed (Kelly said, "If lawmakers do not like the laws they've passed and we [the Department of Homeland Security] are charged to enforce, then they should have the courage and skill to change the laws.").

³⁷ Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize Dreamers*, N.Y. TIMES (Sept. 5, 2017), <https://nyti.ms/2x8tnt1>; see also, e.g., Eric Bradner, *Paul Ryan Tells Undocumented Immigrant He Doesn't Want to Deport Her*, CNN (Jan. 13, 2017), <http://www.cnn.com/2017/01/12/politics/paul-ryan-town-hall-undocumented-immigrant/index.html>; Madeline Conway, *George W. Bush Makes Case for Foreign Aid and Immigration Reform*, POLITICO (Apr. 13, 2017), <http://www.politico.com/story/2017/04/george-w-bush-foreign-aid-immigration-237197> ("There needs to be a way for somebody to be able to get in line to become a citizen so long as they met [sic] certain criteria.").

that the Trump Administration could, or would, reinstate DACA, given that its attorney general has declared the program unconstitutional. There are, however, other steps the Executive Branch could take to make it easier for childhood arrivals to legalize. And even if Congress does enact some form of DACA or the DREAM Act, neither law will offer a complete solution: codifying DACA offers its recipients no legal status, and every iteration of the DREAM Act Congress has considered imposes requirements that disqualify many childhood arrivals. Therefore, regardless of what Congress may do, it is worth examining the unilateral and uncontroversial steps that the current administration (or a subsequent one) could take to help childhood arrivals become citizens.

This Article first provides a context for that analysis by exploring the forces that led to the existence of approximately 2.5 million young immigrants in the U.S. without legal status. After providing an overview of the relevant aspects of the U.S. immigration legal system, it then analyzes the factors that make it so difficult for childhood arrivals to obtain legal immigration status under the current system, and the forces that cause so many childhood arrivals to come to the U.S. despite their inability to obtain legal immigration status.

Next, this Article identifies two direct paths to citizenship or permanent residence—through military service and cancellation of removal—over which the Executive Branch has significant discretion. It then assesses how the Executive Branch could make these two paths more accessible to childhood arrivals through the ordinary exercise of that discretion. In addition, six immigration-related policies or procedures that the Executive Branch administers are identified: parole-in-place, advance parole, inadmissibility waivers, deferred action, outreach programs, and application fees. For each one, changes are proposed that the Executive Branch could make to improve childhood arrivals' access to the paths to permanent residence and citizenship created by Congress.

The Article concludes by acknowledging that, even if the Executive Branch implemented every one of the proposals identified, it would only help a relatively small number of childhood arrivals obtain citizenship. While that could certainly be meaningful for those impacted, the majority of childhood arrivals would remain without legal status and subject to deportation absent comprehensive Congressional action.

II. WHY ARE THERE OVER TWO MILLION CHILDHOOD ARRIVALS IN THE U.S.?

To understand why there are over two million childhood arrivals in the United States, it is necessary to examine the legal framework that currently governs immigration in this country; how that system prevents most childhood arrivals from obtaining legal immigration status; and why

so many childhood arrivals come to this country and make it their home anyway.

A. *Overview of the Current U.S. Immigration Legal System*

The current U.S. immigration legal system divides people into two categories: citizens and noncitizens. Generally, only citizens have the unconditional right to enter and live in the U.S. Noncitizens usually must receive advance permission to enter the U.S., typically in the form of a visa.³⁸ To obtain a visa, noncitizens must meet the requirements for the specific visa for which they are applying; that visa must be available; and the noncitizen must not be subject to any grounds of inadmissibility. Each of these three elements is discussed further below.

1. *Specific Visa Requirements*

There are two main types of visas: nonimmigrant visas and immigrant visas.³⁹ A nonimmigrant visa lets its recipients (also known as visitors) stay in the United States temporarily for certain approved purposes such as tourism, education, business, or employment.⁴⁰ Nonimmigrant visas also are granted for humanitarian reasons.⁴¹ An immigrant visa, also known as a “green card,” lets its recipients remain in the country indefinitely.⁴² Unlike visitors with nonimmigrant visas, immigrant visa holders (who are also called green card holders, lawful permanent residents, “LPRs,” or permanent residents) can live and work anywhere in the United States.⁴³ They can also sponsor certain family members for permanent residence, qualify for various government benefits after a years-long waiting period, and eventually may be eligible to apply for citizenship through a process called naturalization.⁴⁴

³⁸ See *U.S. Visas*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en.html>.

³⁹ *What is a U.S. Visa?*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html>.

⁴⁰ *U.S. Visas*, *supra* note 38. Applicants for nonimmigrant visas may be required to submit evidence supporting the stated purpose of their trip, their intent to depart the United States after their trip, and their ability to pay all costs of the trip. See *Visitor Visa*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/visit/visitor.html>.

⁴¹ See *Humanitarian*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian>.

⁴² *USCIS Immigrant Fee*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/file-online/uscis-immigrant-fee> (last updated Oct. 2, 2017).

⁴³ *Green Card*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard> (last updated Sept. 9, 2017).

⁴⁴ *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization> (last updated Jan. 22, 2013); *Government Benefits*, U.S. CITIZENSHIP & IMMIGRATION SERVS.,

Under the current immigration legal system, noncitizens who wish to make the U.S. their home and eventually become citizens generally must first qualify for permanent residence by obtaining an immigrant visa, or green card.⁴⁵ Current U.S. immigration law offers five paths to permanent residence: through (a) family sponsorship; (b) employment; (c) the diversity lottery; (d) certain nonimmigrant humanitarian statuses; and (e) cancellation of removal.⁴⁶ The requirements for each path are summarized below:

Family Sponsorship. The majority of permanent residents receive their green cards through family sponsorship.⁴⁷ U.S. citizens can sponsor spouses, parents, children, and siblings.⁴⁸ Permanent residents can sponsor spouses and unmarried children.⁴⁹ Sponsoring relatives generally must submit proof that they have adequate means of financially supporting the applicant, and must contractually agree that they will do so if necessary to prevent the applicant from relying on the U.S. government for financial support.⁵⁰

Employment. The next most common path to a green card is through employment.⁵¹ Immigrant visas are available for five categories of

<https://www.uscis.gov/tools/settling-us/government-benefits> (last updated June 28, 2016); *Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/eligibility-categories> (last updated Sept. 12, 2017). Generally, anyone seeking to naturalize must first be a permanent resident for at least five years. *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization> (last updated Jan. 22, 2013). In other words, noncitizens who wish to become U.S. citizens must first become permanent residents, unless they qualify for expedited citizenship due to their military service, or are under the age of 18 and qualify for derivative citizenship through their parents. *Id.*; see also *Naturalization Through Military Service: Fact Sheet*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet> (last updated June 12, 2017); *Citizenship Through Parents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-parents> (last updated Nov. 10, 2015).

⁴⁵ *Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship> (last updated Jan. 22, 2013). As previously noted, one exception is noncitizens who qualify for expedited citizenship based on their service in the U.S. military. *Naturalization Through Military Service*, *supra* note 44. This path to citizenship is discussed below. See *infra* Section III.A.

⁴⁶ *Green Card Eligibility Categories*, *supra* note 44.

⁴⁷ RYAN BAUGH & KATHERINE WITSMAN, U.S. DEP'T OF HOMELAND SEC., U.S. LAWFUL PERMANENT RESIDENTS: 2015, ANNUAL FLOW REPORT 3 (2017).

⁴⁸ INA § 201(b)(2), 8 U.S.C. § 1151(b)(2); INA § 203(a), 8 U.S.C. § 1153(a).

⁴⁹ *Id.*

⁵⁰ U.S. CITIZENSHIP & IMMIGRATION SERVS., HOW DO I FINANCIALLY SPONSOR SOMEONE WHO WANTS TO IMMIGRATE? 1 (2003).

⁵¹ BAUGH & WITSMAN, *supra* note 47, at 4 (from October 1, 2014 to September 30, 2015, 14.9% of the immigrant visas awarded were through employment categories).

workers (and their spouses and children).⁵² Two categories—for applicants with exceptional ability or advanced professional degrees; and for skilled workers, professionals without advanced degrees, and needed unskilled workers—generally require a U.S. employer’s sponsorship and certification from the U.S. Secretary of Labor that there are not sufficient workers who are able, willing, qualified, and available at the destination and that the applicant’s employment does not adversely affect the wages and working conditions of similarly employed workers in the U.S.⁵³ The other categories—outstanding professors and researchers; special immigrants (such as ministers, religious workers, and employees of the U.S. government abroad); and employment-creation immigrants (investors)—do not require employer sponsorship and are not subject to the labor certification process.⁵⁴

The Diversity Lottery. Congress established the Diversity Immigrant Visa Program in 1990 to diversify the immigrant population in the United States.⁵⁵ The program makes immigrant visas available to applicants from countries with historically low rates of immigration.⁵⁶ Eligible applicants must also meet education or work experience requirements.⁵⁷

Nonimmigrant Humanitarian Statuses. Noncitizens who obtain any one of six nonimmigrant humanitarian statuses usually can qualify for permanent residence after a certain time period. Refugees and asylees may apply for a green card (and in fact, refugees are required to) one year after being granted refugee or asylee status.⁵⁸ Recipients of so-called

⁵² INA § 203(b), 8 U.S.C. § 1153(b).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Immigration Act of 1990, Pub. L. No. 101-649, sec. 131, § 203(c), 104 Stat. 4978, 4997-99 (codified at 8 U.S.C. § 1153(c)); *see also Diversity Visa Program - Entry*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/immigrate/diversity-visa/entry.html>; *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/diversity-visa> (last updated Jan. 11, 2018).

⁵⁶ *Diversity Visa Program - Entry*, *supra* note 55; *Green Card Through the Diversity Immigrant Visa Program*, *supra* note 55.

⁵⁷ *See* U.S. DEP’T OF STATE, INSTRUCTIONS FOR THE 2018 DIVERSITY IMMIGRANT VISA PROGRAM (DV-2018) 2, <https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2018-Instructions-Translations/DV-2018%20Instructions%20English.pdf>.

⁵⁸ Immigration and Nationality Act (INA) § 208(a), 8 U.S.C. § 1158(a); *see Green Card for Asylees*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/asylees> (last updated July 10, 2017); *Green Card for Refugees*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/refugees> (last updated June 26, 2017). Refugee and asylee status is available to noncitizens who have fled from their home country and cannot return because they have a well-founded fear of persecution based on religion, race, nationality, political opinion, or membership in a particular social group. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). Applicants for refugee status or asylum must also prove that they

“U” and “T” visas (for qualifying victims of serious crimes and human trafficking) are eligible for permanent residence three years after being granted their respective nonimmigrant statuses.⁵⁹ Young immigrants who are granted special immigrant juvenile status may obtain an immigrant visa as soon as one is available, as may applicants who successfully self-petition under the Violence Against Women Act.⁶⁰

Cancellation of Removal. The only path to permanent residence specifically designed for immigrants who are unlawfully present in the U.S. is cancellation of removal. To access it, applicants must be in remov-

cannot relocate safely to another area of their home country, and asylees generally must seek asylum within one year after entering the U.S. INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). Noncitizens are only eligible for refugee status if they are located outside the U.S. and receive a referral to the U.S. Refugee Admissions Program, whereas applicants for asylum must be present in the U.S. or at a U.S. border. INA § 208(a), 8 U.S.C. § 1158(a); *see also Refugee Admissions*, U.S. DEP'T OF STATE, <https://www.state.gov/j/prm/ra/index.htm>.

⁵⁹ *Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-victim-crime-u-nonimmigrant> (last updated Mar. 23, 2011); *Green Card for a Victim of Trafficking (T Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/trafficking-victim-t-nonimmigrant> (last updated Nov. 12, 2015). The U visa is for victims of serious crimes who cooperate with law enforcement and suffer substantial physical or mental harm as a result of the crime. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last updated Aug. 25, 2017). The T visa is for victims of serious trafficking within the U.S. *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last updated Oct. 3, 2011).

⁶⁰ *See Green Card Based on SIJ Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/special-immigrant-juveniles/green-card-based-sij-status> (last updated July 12, 2011); *Employment-Based Immigration: Fourth Preference EB-4*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4> (last updated Dec. 1, 2017) (special immigrant juvenile status recipients may apply for a green card through the employment-based fourth preference, which is numerically limited and may have a waitlist based on country of origin); *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/battered-spouse-children-parents> (last updated Feb. 16, 2016); *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/green-card-vawa-self-petitioner> (last updated Jan. 11, 2018). Special immigrant juvenile status is for foreign children in the United States who have been abused, abandoned, or neglected and cannot be reunited with a parent. INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J). The Violence Against Women Act allows certain spouses, children, and parents of U.S. citizens and certain spouses and children of permanent residents to file a green card petition for themselves, without the abuser's knowledge or sponsorship. INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B); INA § 245(a), 8 U.S.C. § 1255(a).

al proceedings in a U.S. immigration court.⁶¹ If their application fails, they are subject to deportation.⁶² Applicants must prove to the immigration judge presiding over their case that for at least the prior ten years they have resided continuously in the U.S. and have had good moral character.⁶³ Applicants also must prove that they have a U.S. citizen or permanent resident spouse, parent, or child under age 21 who would suffer “exceptional” and “extremely unusual” hardship if the applicant were removed.⁶⁴ This hardship must be substantially worse than what a family member would normally suffer if a loved one were deported.⁶⁵ Successful applicants avoid deportation and receive a green card.⁶⁶

2. *Visa Availability*

In addition to establishing that they qualify for the specific visa they seek, applicants must also show that the visa is available. Immigrant visas are numerically limited: 675,000 can be granted per year, with some exceptions.⁶⁷ The biggest exception involves family-sponsored immigrant visas for a U.S. citizen’s immediate relatives (parents, spouses, and unmarried children under 21 years old): visas for U.S. citizens’ immediate relatives are not numerically limited, and thus are always available.⁶⁸ All other family-sponsored immigrant visas, and all employment-based immigrant visas, are numerically limited based on type and on the applicant’s country of origin (current immigration law provides that no more than 7% of the total immigrants each year may come from one country).⁶⁹ Applicants for oversubscribed family-sponsored and employer-

⁶¹ See INA § 240A(b), 8 U.S.C. § 1229b (2012); see also U.S. DEP’T OF JUSTICE, APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS, <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf>.

⁶² See U.S. DEP’T OF JUSTICE, *supra* note 61.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ INA § 203, 8 U.S.C. § 1153; see generally BAUGH & WITSMAN, *supra* note 47, at 2 (listing numerical limits for different immigrant visas).

⁶⁸ INA § 201(b)(2), 8 U.S.C. § 1151(b)(2); see generally BAUGH & WITSMAN, *supra* note 47, at 1.

⁶⁹ INA § 201(b)(2), 8 U.S.C. § 1151(b)(2); see generally BAUGH & WITSMAN, *supra* note 47, at 6–7. The preference system for family-based immigrant visas depends on the beneficiary’s country of origin, the beneficiary’s relationship with the sponsor (spouse, child, or sibling), the beneficiary’s age and marital status (if the beneficiary is the sponsor’s child), and the sponsor’s status (U.S. citizen or permanent resident). *Id.*; see also *Visa Bulletin - Immigrant Numbers for April 2018*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS (Mar. 9, 2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-april-2018.html>. The preference system for employer-sponsored immigrant visas depends on the type of visa and the beneficiary’s country of origin. *Id.*

based immigrant visas are placed on a waitlist prioritized by date of application.⁷⁰

Immigrant visas available through the Diversity Immigration Visa Program are also capped: currently, 50,000 per year are available.⁷¹ No wait list is maintained; instead, unsuccessful applicants are rejected and must reapply the next year to be considered again.⁷²

Immigrant visas for some humanitarian statuses are also capped. Specifically, immigrant visas for holders of special immigrant juvenile status are limited to 10,000 per year,⁷³ and immigrant visas for self-petitioners under the Violence Against Women Act are subject to any cap that would apply if the applicants were being sponsored by their abuser.⁷⁴ Immigrant visas for admitted refugees and asylees, and for U and T visa recipients, are not capped.⁷⁵ However, refugee admissions are capped annually based on what the Executive Branch decides in consultation with Congress; for fiscal year 2018, the Trump Administration has proposed a cap of 45,000.⁷⁶ U visas are capped at 10,000 per year, and T visas are capped at 5,000 per year; waitlists based on application date are maintained when those limits are reached.⁷⁷

⁷⁰ *Id.*

⁷¹ INA § 203, 8 U.S.C. § 1153; see generally BAUGH & WITSMAN, *supra* note 47, at 7.

⁷² *Diversity Visa: Submit an Entry*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-submit-entry.html>; *Green Card Through the Diversity Immigrant Visa Program*, *supra* note 55.

⁷³ Special immigrant juveniles obtain green cards through the EB-4 employment preference for "special immigrants," which has a 10,000 annual immigrant visa cap, and which allocates visas based on nationality. See *Green Card Based on Special Immigrant Juvenile Classification*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/green-card/sij> (last updated Nov. 30, 2017); *Employment-Based Immigration*, *supra* note 60; *Victims of Criminal Activity*, *supra* note 59. The category is oversubscribed with respect to applications from Guatemala, Honduras, and El Salvador, resulting in a waitlist of about eight years for applicants from those countries with special juvenile status who wish to obtain permanent residence. See *Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants from El Salvador, Guatemala and Honduras*, U.S. CITIZENSHIP & IMMIGRATION SERVS. [hereinafter *Employment-Based Fourth Preference*], <https://www.uscis.gov/news/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras> (last updated June 20, 2016); *Visa Bulletin: Immigrant Numbers for April 2018*, *supra* note 69.

⁷⁴ *Green Card for VAWA Self-Petitioner*, *supra* note 60.

⁷⁵ INA § 245, 8 U.S.C. § 1255.

⁷⁶ Christopher Ingraham, *The Incredible Shrinking Refugee Cap, in One Chart*, WASH. POST (Sept. 26, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/26/the-incredible-shrinking-refugee-cap-in-one-chart/?utm_term=.5ff454c0fa0f. Asylee admissions are not capped. See also BAUGH & WITSMAN, *supra* note 47, at 2.

⁷⁷ *Victims of Criminal Activity*, *supra* note 59; *Victims of Human Trafficking*, *supra* note 59; *Questions and Answers: Victims of Human Trafficking*, *supra* note 59.

3. Admissibility

Applicants who qualify for a visa that is available must also show that they are admissible. Admissibility is a legal term defined largely by conduct that will make a person ineligible for admission to the United States, regardless of what type of visa they seek. Section 212(a) of the Immigration and Nationality Act (INA) lists ten general categories of inadmissibility grounds, including health-related grounds (having a communicable disease, or physical or mental disorder, or lacking certain vaccinations); certain criminal convictions; certain prior immigration violations; security-related grounds (spies, terrorists, and Nazis); being a public charge; lacking required documents (such as an unexpired passport); being a polygamist; and having renounced U.S. citizenship to avoid taxation.⁷⁸ Many grounds of inadmissibility can be waived depending on the type of immigration status for which the applicant qualifies and different waivers require different types of supporting evidence.⁷⁹

B. Why Are So Few Childhood Arrivals Able to Obtain Legal Immigration Status?

Current U.S. immigration law offers childhood arrivals no way to earn a green card based on their own merit, such as by showing that the contributions they make to their communities outweigh any harm they may cause. Instead, they must qualify through one of the five existing paths Congress has established for acquiring permanent residence. Studies suggest that no more than 15% of childhood arrivals can obtain a green card through one of these paths.⁸⁰ This is because few childhood arrivals are able to qualify for an immigrant visa, and when they are, it is often not available or they are barred from obtaining it by one or more grounds of inadmissibility.

⁷⁸ INA § 212(a), 8 U.S.C. § 1182(a).

⁷⁹ See generally *USCIS Policy Manual: Volume 9: Waivers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9.html> (last updated Aug. 23, 2017).

⁸⁰ See DONALD KERWIN ET AL., CTR. FOR MIGRATION STUDIES OF N.Y., *THE DACA ERA AND THE CONTINUOUS LEGALIZATION WORK OF THE US IMMIGRANT-SERVING COMMUNITY 2* (2017), <http://cmsny.org/wp-content/uploads/2017/02/CMS-Legalization-Report-FINAL.pdf> (“[T]here is already widespread engagement by the immigrant-serving sector with the large share of US undocumented residents (likely in the 15-20 percent range) who are eligible to pursue a permanent immigration benefit or relief.”); Kirk Sample, *Young Immigrants, Seeking Deferred Action Help, Find Unexpected Path*, N.Y. TIMES (Mar. 22, 2013), <http://nyti.ms/WJBUJ8> (reporting that many individuals seeking legal advice to request DACA discovered that they were eligible for other relief). *But see* Tom K. Wong et al., *Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey*, 2 J. ON MIGRATION & HUM. SECURITY 287, 294 (2014) (“[W]e caution that a wholesale generalization of this 14.3 percent figure to the entire DACA-eligible population, or even to the broader unauthorized population, would be unwise.”).

1. Few Childhood Arrivals Qualify for One of the Five Paths to Permanent Residence

As discussed above, currently there are only five paths to permanent residence: through family sponsorship, employment, the diversity lottery, certain humanitarian statuses, or cancellation of removal. Few childhood arrivals can qualify for one of these paths.

With respect to family sponsorship, one study suggests that only about 3.6–6.6% of childhood arrivals could qualify for permanent residence through this path.⁸¹ This is mainly because most childhood arrivals have no family member eligible to sponsor them: a U.S. citizen parent, spouse, child, or sibling (the sponsoring child or sibling must be at least 21 years old); or a parent or spouse who is a lawful permanent resident.⁸² Moreover, even if childhood arrivals have a family member with the immigration status needed to sponsor them, that family member may not be able to meet the financial requirements for sponsorship,⁸³ or the childhood arrival may not be able to afford the required application fees, which typically total \$1,980 and for which no fee waiver or reduction is usually available.⁸⁴

Similarly, many childhood arrivals are not eligible for permanent residence through employment because they cannot qualify for one of the five categories of workers for which green cards are available. The few that can may not have an employer who is willing to expend the time and money necessary to sponsor them, or who is able to obtain the required labor certification.⁸⁵

⁸¹ Wong et al., *supra* note 80, at 292–93.

⁸² Note that if a parent becomes a U.S. citizen while his or her child is under the age of 18, the child generally will automatically acquire U.S. citizenship at the same time. See *Citizenship Through Parents*, *supra* note 44. By definition, such children are not unauthorized immigrants, and thus are not considered childhood arrivals for purposes of this Article.

⁸³ Generally, the sponsoring family member must meet minimum income requirements and sign an affidavit of support, agreeing to make reimbursement should the green card recipient they sponsor receive any means-tested public-benefits before having worked for ten years as a lawful permanent resident. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 50, at 1.

⁸⁴ See *I-912, Request for Fee Waiver*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-912> (last updated May 3, 2016); *Our Fees*, *supra* note 24. Applicants for an immigrant visa typically need to file, at a minimum, a Petition for Alien Relative form and an Application to Register Permanent Residence or Adjust Status form, with respective fees of \$535 and \$1140. They also need to pay a \$220 USCIS Immigrant Fee. In addition, most applications to USCIS for immigration-related benefits require applicants to get their picture and fingerprints taken (“biometrics”), for which the current fee is \$85. The fees stated in this Article include the \$85 biometrics fee in the total given.

⁸⁵ See BAUGH & WITSMAN, *supra* note 47, at 2.

Few childhood arrivals qualify for a diversity visa because most do not come from a country with a historically low rate of immigration to the U.S. Studies indicate that 75–80% of childhood arrivals are from Mexico.⁸⁶ After Mexico, the most-represented countries of origin for childhood arrivals are (in alphabetical order) Argentina, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, India, Peru, Philippines, and South Korea.⁸⁷ Applicants from eight of those 11 countries (Brazil, Colombia, El Salvador, India, Mexico, Peru, Philippines, and South Korea) are not eligible for the 2018 diversity immigrant visa lottery.⁸⁸ Childhood arrivals who are from an eligible country still may not qualify for the diversity lottery due to its education or work experience requirements.⁸⁹ They also may be deterred by the fees they would need to pay if their application proved successful.⁹⁰

Only a small minority of childhood arrivals are able to qualify for a green card through certain nonimmigrant humanitarian statuses, because few childhood arrivals can satisfy all of the requirements for one of those statuses. Childhood arrivals by definition are ineligible for refugee status, because that status is only available to people who are outside the U.S.⁹¹ Most childhood arrivals cannot establish a claim for asylum, because they cannot prove that they are unable to return to their country of origin due to a well-founded fear of persecution by the government (or others whom the government cannot or will not control) based on religion, race, nationality, political opinion, or membership in a particular social group.⁹² Few childhood arrivals have been victims of serious crime

⁸⁶ Audrey Singer & Nicol Prchal Svajlenka, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS (Aug. 14, 2013), https://www.brookings.edu/wp-content/uploads/2016/06/DACA_singer_svajlenka_FINAL.pdf; *Approximate Active DACA Recipients: Country of Birth as of September 4, 2017*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

⁸⁷ *Id.*

⁸⁸ U.S. DEP'T OF STATE, *supra* note 57, at 1. The other countries whose natives are ineligible for the 2018 lottery are Bangladesh, Canada, China (mainland-born), Dominican Republic, Haiti, Jamaica, Nigeria, Pakistan, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. *Id.*

⁸⁹ *Id.* at 2 (stating diversity immigrant visa lottery applicants must have at least a high school education or its equivalent, or two years of work experience within the past five years in an occupation that requires at least two years of training or experience to perform).

⁹⁰ There is no fee to enter the lottery, but if an applicant is successful, they must pay the standard fees for obtaining a green card, which typically total \$1,980. *See supra* note 84 and cites therein.

⁹¹ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *see also Refugee Admissions, supra* note 58.

⁹² INA § 208(a), 8 U.S.C. § 1158(a); *see also* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). They may also have difficulty proving that they cannot relocate

or human trafficking in the U.S., and thus few qualify for U or T nonimmigrant status.⁹³ Similarly, not many childhood arrivals can prove that they have been abused, abandoned, or neglected by a parent with whom they cannot be reunited, or that they have been abused by a U.S. citizen spouse, child, or parent (or permanent resident spouse or parent); thus, few qualify for special immigrant juvenile status or as self-petitioners under the Violence Against Women Act.⁹⁴

Most childhood arrivals cannot qualify for permanent residence through cancellation of removal for reasons that otherwise are viewed as fortunate. Historically, childhood arrivals have been unlikely to be placed in removal proceedings, due either to a combination of their age and length of residence in the U.S. (few people under the age of 18 have been put in removal proceedings unless they were recent arrivals) or to their lack of negative interaction with law enforcement (most unauthorized immigrants have ended up in removal proceedings after a criminal stop, arrest, or conviction).⁹⁵ The small number who do end up in removal proceedings are unlikely to qualify for cancellation of removal because they cannot prove that they have a U.S. citizen or permanent resident spouse, parent, or child under age 21 who would suffer exceptional and extremely unusual hardship if they (the childhood arrival) were removed.⁹⁶

2. Many Immigrant Visas Are Unavailable for Years

Childhood arrivals who qualify for an immigrant visa through one of the five paths that already exist face a second hurdle: the visa for which they qualify must be available. As noted above, visas for immediate rela-

safely to another area of their home country, or may have failed to seek asylum within 1 year of entering the U.S. INA § 208(a)(2)(A)–(B), 8 U.S.C. § 1158(a)(2)(A)–(B).

⁹³ See *Victims of Criminal Activity*, *supra* note 59 (explaining U visas are for victims of serious crimes who cooperate with law enforcement and suffer substantial physical or mental harm as a result of the crime); *Victims of Human Trafficking*, *supra* note 59 (explaining T visa is for victims of serious human trafficking within the U.S.). One study suggests that only about 3.4% of childhood arrivals could qualify for U nonimmigrant status. Wong et al., *supra* note 80, at 289.

⁹⁴ INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (special immigrant juvenile status is for foreign children in the United States who have been abused, abandoned, or neglected and cannot be reunited with a parent); INA § 204(a)(1)(A)–(B), 8 U.S.C. § 1154(a)(1)(A)–(B); INA § 245(a), 8 U.S.C. § 1255(a) (the Violence Against Women Act allows certain spouses, children, and parents of U.S. citizens and certain spouses and children of permanent residents to file a green card petition for themselves, without the abuser's knowledge or sponsorship). One study suggests that only about 2% of childhood arrivals could qualify for special immigrant juvenile status or as a self-petitioner under the Violence Against Women Act. Wong et al., *supra* note 80, at 292–93.

⁹⁵ See *FY 2016 ICE Immigration Removals*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/removal-statistics/2016> (last updated Dec. 5, 2017).

⁹⁶ INA § 240A(b), 8 U.S.C. § 1229b(b); see U.S. DEP'T OF JUSTICE, *supra* note 61.

tives of U.S. citizens are always available because they are not numerically limited; therefore, childhood arrivals applying for an immigrant visa as a U.S. citizen's parent, spouse, or unmarried child under 21 years old will face no wait.⁹⁷ However, every other type of family-based visa, and all employment-related visas, are numerically limited based on the preference category into which the visa falls.⁹⁸ All preference categories for family-sponsored visas face waitlists of over two years, with longer waits for applicants from seven specific countries, six of which are the countries of origin of approximately 89% of childhood arrivals.⁹⁹ Applicants facing the longest wait times include those who are Filipino siblings of U.S. citizens (23.5 years); Filipino married adult sons and daughters of U.S. citizens (23 years); Mexican married adult sons and daughters of U.S. citizens (22.5 years); Mexican unmarried adult sons and daughters of U.S. citizens and permanent residents (21.5 years); and Mexican siblings of U.S. citizens (20.5 years).¹⁰⁰ The most oversubscribed employment-related preference categories are for Indian skilled workers, professionals and other workers (11-year wait), and Indian members of professions holding advanced degrees or persons of exceptional ability (9-year wait).¹⁰¹

Immigrant visas through the diversity lottery also are numerically limited, but there is no waitlist; instead, unsuccessful applicants are rejected and must reapply in subsequent years if they wish to be considered.¹⁰² In 2015, over nine million people applied for the 50,000 visas available.¹⁰³ Thus, the few childhood arrivals who are eligible to enter the diversity immigrant visa lottery have only a 0.55% chance of obtaining a visa.

Childhood arrivals applying for green cards through humanitarian statuses can also face lengthy wait times. For example, green card applicants with special immigrant juvenile status from El Salvador, Guatemala, or Honduras currently face a backlog of about eight years.¹⁰⁴ Violence

⁹⁷ INA § 201(b)(2), 8 U.S.C. § 1151(b)(2); *see generally* BAUGH & WITSMAN, *supra* note 47, at 1.

⁹⁸ *See Visa Bulletin – Immigrant Numbers for April 2018, supra* note 69.

⁹⁹ Specifically El Salvador, Guatemala, Honduras, India, Mexico, and Philippines. *See Approximate Active DACA Recipients: Country of Birth as of September 4, 2017, supra* note 86; *Visa Bulletin – Immigrant Numbers for April 2018, supra* note 69.

¹⁰⁰ *Visa Bulletin – Immigrant Numbers for April 2018, supra* note 69.

¹⁰¹ *Id.*

¹⁰² *See* U.S. DEP'T OF STATE, *supra* note 57, at 14.

¹⁰³ *DV 2015 - Selected Entrants*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/dv-2015-selected-entrants.html>.

¹⁰⁴ *See Employment-Based Fourth Preference, supra* note 73. This is because these green cards are subject to the EB-4 employment preference for "special immigrants," which has a 10,000 annual immigrant visa cap and allocates visas based on nationality. *See Green Card Based on SIJ Status, supra* note 60; *Victims of Criminal Activity, supra* note 59.

Against Women Act (VAWA) self-petitioners applying for green cards face the same wait they would have if their abuser were petitioning for them under the family-based preference system.¹⁰⁵

Childhood arrivals who might be eligible to receive a green card through cancellation of removal might also face a wait of several years, because immigration judges can approve a maximum of 4,000 applications for cancellation of removal each year.¹⁰⁶ Once that number is reached, a decision on an application is deferred until a visa becomes available under the numerical cap in a future year.¹⁰⁷

3. Most Childhood Arrivals Are Inadmissible Due to Prior Immigration Violations

The few childhood arrivals who qualify for an available immigrant visa through one of the five paths to permanent residence statutorily created by Congress face yet another hurdle: avoiding the numerous grounds of inadmissibility. This is particularly difficult for childhood arrivals because, as discussed above, the ten general categories of inadmissibility include certain prior immigration violations, and by definition all childhood arrivals are subject to one such ground: being present in the U.S. without legal immigration status.¹⁰⁸ Most are also subject to a second ground: being in the U.S. due to an unlawful entrance.¹⁰⁹

These two inadmissibility bars (hereinafter the unlawful presence bar and the unlawful entrance bar) only apply when visa applicants are physically in the U.S. Thus, the bars can be avoided by consular processing, which is when visa applicants leave the U.S. and apply for a visa at the American embassy or consulate in their country of origin.¹¹⁰

Consular processing usually is not a viable solution for childhood arrivals, however, because it can trigger two other grounds of inadmissibility: the three- and ten-year unlawful presence reentry bars.¹¹¹ The three-

¹⁰⁵ Individuals with refugee status, asylum, U nonimmigrant status, and T nonimmigrant status face no backlog when applying for a green card.

¹⁰⁶ INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1); 8 C.F.R. § 1240.21 (2017).

¹⁰⁷ *Id.*

¹⁰⁸ INA § 212(a)(6)–(7), 8 U.S.C. § 1182(a)(6)–(7).

¹⁰⁹ INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A). One study suggests that 61–89% of childhood arrivals are in the U.S. due to an unlawful entrance, because they entered the U.S. without a valid visa. Singer & Svajlenka, *supra* note 86.

¹¹⁰ INA § 212(a)(6)–(7), 8 U.S.C. § 1182(a)(6)–(7); *Consular Processing*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/consular-processing> (last updated Mar. 8, 2018).

¹¹¹ INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). Unlawful presence refers to any period of time in which a noncitizen over the age of 18 is present in the U.S. without authorization. Childhood arrivals begin to accrue unlawful presence the day after turning 18, regardless of whether they entered the country illegally or with a visa that has since expired, unless they obtained DACA on or before their 18th birthday; DACA recipients do not accrue unlawful presence during the time period that their

year unlawful presence reentry bar states that noncitizens who accrue between 180 and 365 days of unlawful presence in the U.S., leave the U.S., and then seek readmission are inadmissible for three years.¹¹² The ten-year unlawful presence reentry bar provides that noncitizens who accrue 365 days or more of unlawful presence in the U.S., leave the U.S., and then seek readmission are inadmissible for ten years.¹¹³ The bars are triggered by any departure from the U.S., and there is no special consideration or exemption for childhood arrivals or for departures prompted by the requirement to consular process.¹¹⁴ This prospect of having to spend a decade waiting outside the country they consider home prevents many childhood arrivals (and other unauthorized immigrants) from applying for a green card through family sponsorship, employment, or the diversity lottery, even when they are otherwise eligible for one.

There are a few limited situations when a visa applicant who has accrued six months or more of unlawful presence can avoid the unlawful presence reentry bars: if they are the immediate relative of a U.S. citizen and are present in the country due to a lawful entrance;¹¹⁵ if they have a U.S. citizen or permanent resident spouse or parent who would suffer extreme hardship unless the applicable reentry bar is waived;¹¹⁶ or if they

DACA is valid. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/frequently-asked-questions#education> (last updated Jan. 26, 2018).

¹¹² INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B).

¹¹³ *Id.* The bars were enacted in 1996 as part of IIRIRA; their intent is to discourage people from entering the country illegally or from staying in the country after their legal status expires. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, sec. 301, § 212(a), 110 Stat. 3009-546, 3009-576. Before IIRIRA, if noncitizens present in the U.S. without authorization became eligible for some kind of lawful status (for example, they married a permanent resident, or got a job that qualified for a work-related visa), they could apply for that new lawful status from within the U.S. by paying a \$1,000 fine. *See* INA § 245(a)(i), 8 U.S.C. § 1255(a)(i). Now that option is available only to noncitizens who were physically present in the U.S. in 2000 and for whom a qualifying petition was filed before April 2001. *Id.*

¹¹⁴ INA § 212(a)(9)(B)(iii), 8 U.S.C. § 1182(a)(9)(B)(iii).

¹¹⁵ INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (defining immediate relative); INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) (immediate relative may adjust status to permanent resident, even if not in lawful status, so long as present in U.S. due to lawful entry). Note that U.S. citizen immediate relative applicants are still subject to the unlawful entrance bar; if their presence in the U.S. is due to an illegal entry, they are not eligible to adjust status in the U.S., and instead must apply for a visa through consular processing, which will trigger the three- or ten-year unlawful presence reentry bars if they have accrued six months or more of unlawful presence. *See* INA § 245(c)(2), 8 U.S.C. § 1255(c)(2); *see also* INA § 212(a)(9)(B)(iii), 8 U.S.C. § 1182(a)(9)(B)(iii).

¹¹⁶ INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The grant of a waiver does not obviate the requirement to consular process, it just prevents the unlawful presence reentry bars from being applied. Thus, childhood arrivals whose qualifying

qualify for a green card through either a nonimmigrant humanitarian status or cancellation of removal.¹¹⁷

Unless they fall within one of these limited exceptions, all childhood arrivals who qualify for an available immigrant visa must consular process. Thus, all other childhood arrivals will be subject to either the three- or ten-year unlawful presence reentry bar (depending on the amount of unlawful presence they have accrued), unless they have not accrued six months or more of unlawful status, such as by having acquired and maintained DACA since before turning 18 ½ years old.

C. What Causes So Many Childhood Arrivals to Come to the U.S. Despite Their Inability to Obtain Legal Immigration Status?

Childhood arrivals “face the threat of deportation to a country that [they may] know nothing about, with a language that [they] may not even speak.”¹¹⁸ They cannot receive any public welfare benefits, work legally, or (except in a few states) get a driver’s license. Given this seemingly challenging future, why do they come to the U.S.?

The vast majority of childhood arrivals are brought to the U.S. from Mexico with their families.¹¹⁹ The search for better economic opportunities has been the major driver for unauthorized immigration from Mexico to the U.S. since at least the 1920s, when large-scale agriculture started expanding in the southwestern part of the U.S. at the same time that new immigration laws essentially cut off prior sources of cheap labor: workers

relative would suffer extreme hardship if they were subject to the unlawful presence reentry bars will still need to return to their country of origin to consular process, but will not need to spend three or ten years there waiting for the unlawful presence reentry bars to expire.

¹¹⁷ Noncitizens who qualify for a green card through a humanitarian status or cancellation of removal typically also qualify for a waiver of the unlawful presence bar, and thus can adjust status to permanent resident from within the U.S. See INA § 245(a), 8 U.S.C. § 1255(a); INA § 240A(b), 8 U.S.C. § 1229b; see also U.S. DEP’T OF JUSTICE, *supra* note 61.

¹¹⁸ *Transcript of Obama’s Speech on Immigration Policy*, *supra* note 23.

¹¹⁹ The best way to determine childhood arrivals’ country of origin is to extrapolate from data that is available regarding DACA recipients. A large majority of DACA recipients (about 75%) are from Mexico. *Approximate Active DACA Recipients: Country of Birth as of September 4, 2017*, *supra* note 86; Singer & Svajlenka, *supra* note 86. The next largest group (about 10%) comes from Central America. Singer & Svajlenka, *supra* note 86. By definition, all DACA recipients have been living in the U.S. since at least June 15, 2007. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 24. The largest inflow of minors since 2007 has been from the Northern Triangle region. See *Southwest Border Unaccompanied Alien Children Statistics FY 2016*, U.S. CUSTOMS & BORDER PROT. (Jan. 20, 2017), <https://www.cbp.gov/site-page/southwest-border-unaccompanied-alien-children-statistics-fy-2016>.

from Asia and Africa.¹²⁰ By 1980 there were about 1.5 million noncitizens living in the U.S. without legal immigration status.¹²¹ Shortly thereafter, a Mexican economic crisis that coincided with a U.S. economic boom caused the unauthorized population to more than double, reaching 3.2 million people in 1986.¹²² Legislation enacted that year granted about half of that population the ability to legalize, but the half it excluded (those who had arrived within the prior five years) continued to live and work in the U.S. due to ineffective enforcement against the Americans who employed them.¹²³ The U.S. economic expansion through much of the 1990s attracted more unauthorized workers from Mexico.¹²⁴ At the same time, U.S. policies regarding trade and drug enforcement displaced numerous workers in Mexico and elsewhere in Latin America, forcing them to cross international borders to survive.¹²⁵ As border enforcement increased and it became increasingly difficult and dangerous for mi-

¹²⁰ MOTOMURA, *supra* note 6, at 31–45; *All Things Considered: How Did We Get to 11 Million Unauthorized Immigrants?*, NATIONAL PUBLIC RADIO (Mar. 7, 2017), <http://www.npr.org/2017/03/07/518201210/how-did-we-get-to-11-million-unauthorized-immigrants>. Although some Mexican agricultural workers eventually were able to obtain temporary legal status through the Bracero program (which was started during World War II), lax border controls and minimal interior enforcement created an informal system that made it easy for Mexicans to establish a circular pattern of coming to work in the U.S. and then returning to their families in Mexico, regardless of whether they had the required papers for doing so. Then, in the mid 1960s, the U.S. legal immigration system changed significantly: the Bracero program ended, country-specific immigration limits were imposed (making it take much longer for Mexicans to obtain legal status), caps were instituted for family-based immigrant visas, and employment-based visas were restricted so much that it essentially became impossible to get one without a college degree. As a result, many of the Mexicans who could have lawfully come to the U.S. to live and work before the 1960s no longer could—they either had a long line to wait in, or no line at all. Lax border controls and minimal interior enforcement continued, however, and thus, so did the inflow of unauthorized Mexican workers. *Id.*

¹²¹ *All Things Considered: How Did We Get to 11 Million Unauthorized Immigrants?*, *supra* note 120.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See, e.g.*, DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 23–24 (2008); Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 *ANNALS AM. ACAD. POL. & SOC. SCI.* 98, 108 (2007); Kerwin & Warren, *supra* note 9, at 308 (“The North American Free Trade Agreement, which took effect in 1994, vastly disrupted the Mexican agricultural sector and prompted large-scale migration, but did not provide sufficient legal avenues of migration for displaced workers.”); Motomura, *supra* note 14, at 2094.

grants to travel back and forth between work in the U.S. and home in Mexico, more chose to stay in the U.S., and their families joined them.¹²⁶

After children from Mexico who come to the U.S. with their families, the next largest group of childhood arrivals are from what is known as the Northern Triangle region of Central America (the countries of El Salvador, Guatemala, and Honduras).¹²⁷ Most of these childhood arrivals are young people under the age of 18 who make the perilous journey from their home country to the U.S. without any parent or guardian, and are formally known as unaccompanied alien children, or UACs.¹²⁸ Historically less than 10,000 UACs from the Northern Triangle region came to the U.S. each year; in 2013 that number increased to almost 21,000; then to 52,000 in 2014, down to 28,000 in 2015, and back up to an estimated 40,000 for 2016.¹²⁹ Most UACs are fleeing crime, gang threats, violence, and extreme poverty, and are hoping to unite with an adult family member or friend already settled in the U.S.¹³⁰

In summary, childhood arrivals come to the U.S. for various reasons, all of which can essentially be condensed down into one: they, or their

¹²⁶ See Dara Lind, *9 Facts that Explain DACA, the Immigration Program Trump Is Ending*, VOX (Jan. 30, 2017), <https://www.vox.com/policy-and-politics/2017/8/31/16226934/daca-trump-dreamers-immigration>. As discussed in Section II.B, *supra*, new penalties enacted in the mid-1990s (including IIRIRA's unlawful entrance and unlawful presence bars, and the three- and ten-year unlawful presence reentry bars) make it virtually impossible for noncitizens to legalize through family sponsorship or employment once they enter the U.S. without authorization. *Id.*; see also INA § 212(a)(6)–(7), 8 U.S.C. § 1182(a)(6)–(7).

¹²⁷ See *supra* note 119 and accompanying text.

¹²⁸ *Southwest Border Unaccompanied Alien Children Statistics FY 2016*, *supra* note 119.

¹²⁹ *Id.*; see also *Southwest Border Inadmissibles by Field Office FY2017*, *supra* note 119. All years go from October 1 to September 30. For example, the 2016 numbers are for October 1, 2015 through September 30, 2016.

¹³⁰ *No Childhood Here: Why Central American Children Are Fleeing Their Homes*, AM. IMMIGRATION COUNCIL (July 1, 2014), <https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes>. One study found that the boys coming to the U.S. from the Northern Triangle region “most feared assault or death for not joining gangs or interacting with corrupt government officials, [while the girls] most feared rape or disappearance at the hands of the same groups.” *Id.* Some U.S. policymakers have expressed an interest in addressing the root causes of this migration. See, e.g., *Home and Away: DHS and the Threats to America, Remarks Delivered by Secretary Kelly at George Washington University Center for Cyber and Homeland Security, U.S. DEP’T OF HOMELAND SEC.* (Apr. 18, 2017), <https://www.dhs.gov/news/2017/04/18/home-and-away-dhs-and-threats-america> (“We know people are leaving Central America because they lack economic opportunity and experience high levels of violence in their communities. In June, the State Department, along with Treasury, Commerce and DHS and our co-host Mexico, will host a conference focused on the economic and security needs of El Salvador, Honduras, and Guatemala.”).

parents, believe that regardless of how difficult life may be for them here, it would be even more difficult in the country they are leaving behind.¹³¹

Childhood arrivals also come with varying degrees of culpability. Some childhood arrivals, and the parents who bring them to the U.S., may not know that they are violating U.S. immigration law, which is notoriously complex and nuanced, in part due to its frequent changes.¹³² They may have obtained false papers that they believed were genuine. They may be relying on outdated or incorrect information about the possibility of qualifying for legal status after entering the U.S. and finding a job.¹³³ Those accustomed to corrupt government officials may have avoided authorized entry points to protect themselves from extortion, perhaps with the plan of pursuing legal status after getting settled in the U.S., working, and saving up enough to access professional assistance. Others may have understood that their entry was unauthorized but mistakenly believed (or optimistically hoped) that they would eventually qualify to legalize through a family sponsor, employment, a widespread amnesty program like the one implemented in 1986, a new program like DACA, or some other kind of immigration reform, like the DREAM Act. Still others may have realized their entrance was unlawful and that they had little chance of ever legalizing their status, but chose to come anyway because they thought their stay would only be temporary, or that they had no better choice. And of course, many childhood arrivals entered the U.S. at such a young age that they had no idea they were doing anything unlawful. Similarly, many childhood arrivals have no idea they are anything other than American: thanks to *Plyler*, they grow up attending public schools, and may not even learn about their lack of lawful immigration status until they turn 16 and find out they cannot legally work, drive, or qualify for a student loan or in-state college tuition.¹³⁴

¹³¹ See Christina Nuñez, *Why People Migrate: 11 Surprising Reasons*, GLOBAL CITIZEN (Dec. 4, 2014), <https://www.globalcitizen.org/en/content/why-people-migrate-11-surprising-reasons/>.

¹³² The changes are both in substance (due to statutory revisions Congress enacts) and implementation (due to shifting executive approaches to administration and enforcement).

¹³³ For example, for several decades prior to 1996, visa applicants could overcome certain bars to adjustment of status simply by paying a \$1,000 fine, and for several years under the Obama Administration, removal actions generally were not pursued against unauthorized immigrants unless they were public safety threats. See INA § 245(a)(i), 8 U.S.C. § 1255(a)(i); Memorandum from Jeh Charles Johnson, *supra* note 29, at 3.

¹³⁴ The most common age at arrival for DACA recipients was eight; 31% were five or younger, and 69% were ten or younger, when they arrived. Singer & Svajlenka, *supra* note 86.

III. HOW ORDINARY USES OF EXECUTIVE AUTHORITY CAN HELP SOME CHILDHOOD ARRIVALS BECOME CITIZENS

Current U.S. immigration law enables childhood arrivals to obtain permanent residence and eventually naturalize only if they qualify for a green card through one of the five existing pathways that Congress has created: family sponsorship, employment, the diversity lottery, a qualifying nonimmigrant humanitarian status, or cancellation of removal. DACA did not change this—it offered only limited benefits (temporary protection from deportation and a work permit) for which fewer than half of childhood arrivals qualified.¹³⁵

Congress has the exclusive authority to create new paths to citizenship. Thus only Congress—not the Executive Branch or the judiciary—can create a way for childhood arrivals to earn citizenship based on their unique situation, such as through requirements similar to DACA's. There are, however, unilateral and uncontroversial steps the Executive Branch can take to make it easier for childhood arrivals to access the five existing paths to permanent residence and citizenship that Congress has created. Specifically, the Executive Branch has discretion and authority regarding the military, cancellation of removal, parole, admissibility waivers, deferred action, and surplus immigration application fees. The current administration (or a subsequent one) could employ that discretion and authority to improve childhood arrivals' access to the five existing paths to permanent residence and citizenship created by Congress.

A. *Expedited Citizenship Through Military Service*

Congress has given the Executive Branch the discretion to allow noncitizens to join the U.S. military and subsequently earn expedited citizenship through their service. The Executive Branch could use this discretion to allow qualifying childhood arrivals to join the military and access this path to citizenship.

Section 10 of the U.S. Code allows noncitizens, including those present in the U.S. without legal immigration status, to join the military if the armed services determine that “such enlistment is vital to the national interest.”¹³⁶ Separately, § 328 of the Immigration and Nationality Act provides that noncitizens who serve in the military honorably during certain

¹³⁵ Since the program was created in 2012, approximately 800,000 childhood arrivals have obtained DACA. Dara Lind, *Trump Just Turned DACA into a Ticking Time Bomb for 800,000 Immigrants*, VOX (Sept. 5, 2017), <https://www.vox.com/2017/9/5/16252648/trump-daca-end-deadline>. In 2015, the undocumented population was estimated to include 2.5 million undocumented residents brought to the U.S. at age 15 or younger. Kerwin & Warren, *supra* note 9, at 321. The requirements for obtaining DACA are set forth in note 24 above.

¹³⁶ 10 U.S.C. § 504(b)(2).

time periods, including any “period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force” are eligible to naturalize, regardless of their immigration status.¹³⁷ On July 3, 2002, President Bush signed an executive order designating September 11, 2001 as the beginning of “a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force” solely to “provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status” in the U.S. Armed Forces.¹³⁸ That authorization remains in effect until a future presidential executive order rescinds it.¹³⁹ In April 2017, a Department of Defense official announced that the Trump Administration had no plans to discontinue or modify the policy first implemented by President Bush’s 2002 executive order, and as of the date this Article was written, the July 2002 executive order was still in effect.¹⁴⁰

Currently, the only way that noncitizens may join the military is through the Military Accessions Vital to National Interest program (MAVNI), which the Department of Defense authorized as a pilot program in 2009.¹⁴¹ MAVNI recruits are allowed to naturalize after completing at least 180 days of active duty service or at least one year of satisfactory service in the reserves.¹⁴² To be eligible for MAVNI, recruits must be lawful permanent residents or possess one of certain specified nonimmigrant visas.¹⁴³ They also must be fully licensed healthcare professionals in critically short specialties, or be native speakers of one of 44 strategic lan-

¹³⁷ INA § 328(a), 8 U.S.C. § 1439(a) (2012). Applicants must meet the standard requirements for naturalization, including demonstration of good moral character; knowledge of the English language; knowledge of U.S. government and history (civics); and attachment to the principles of the Constitution. *Naturalization Through Military Service*, *supra* note 44.

¹³⁸ Exec. Order No. 13269, 3 C.F.R. 241 (2003), *reprinted in* 8 U.S.C. § 1440 (designating the period beginning September 11, 2001 as a period of hostilities for the purposes of expedited naturalization under INA § 329).

¹³⁹ *Naturalization Through Military Service*, *supra* note 44.

¹⁴⁰ Joseph J. Kolb, *Trump Will Allow Immigrants to Obtain Citizenship Through Military Service*, FOX NEWS (Apr. 3, 2017), <http://www.foxnews.com/us/2017/04/03/trump-will-allow-immigrants-to-obtain-citizenship-through-military-service.html>.

¹⁴¹ *Id.*; MSG Washington, *The 2016 MAVNI Information Paper*, JOIN THE MILITARY (Apr. 26, 2016), <http://jointhemilitary.org/mavni-information-paper/>.

¹⁴² Press Release, U.S. Dep’t of Def., DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program (Oct. 13, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc/>.

¹⁴³ MSG Washington, *Everything You Need to Know About the 2016 Army MAVNI Program*, JOIN THE MILITARY (Apr. 25, 2016), <https://3a7.d5c.godaddywp.com//qualify-army-mavni-program/>.

guages.¹⁴⁴ Approximately 10,400 noncitizens have joined the military since MAVNI's creation, and the Army's 2012 soldier of the year was a MAVNI recruit.¹⁴⁵

In 2014, MAVNI was expanded to allow noncitizens with DACA to enlist, and was also modified to remove certain requirements that would have made it difficult for them to do so, such as the need to have resided in the United States legally for a minimum of two years.¹⁴⁶ At the same time, the program was renewed for two years, and subsequently the maximum number of spaces available in the program was increased from 1,200 to 5,200.¹⁴⁷

MAVNI offers DACA recipients numerous advantages. First, it allows them to access the professional, monetary, educational, and other benefits that all members of the armed forces receive in exchange for their service. It also permits them to earn citizenship through an expedited process that bypasses the requirement to first acquire lawful permanent resident status.¹⁴⁸ Finally, it lets them sponsor their undocumented immediate family members to adjust status to permanent resident, even if those family members would otherwise be barred due to their unlawful entrance.¹⁴⁹ Three hundred fifty-nine DACA recipients joined the Army

¹⁴⁴ *Id.* Eligible languages include Arabic, Cantonese, Mandarin, French, Korean, Persian, Dari, Persian Farsi, Portuguese, Russian, Swahili, and Turkish, but not Spanish. *Id.* Other requirements include having a high school diploma and a high enough score on the Armed Forces Qualification Test; being between the ages of 17–34 years old; and being under age 35 at the time of leaving for Basic Combat Training. *Id.*

¹⁴⁵ Alex Horton, *The Military Looked to 'Dreamers' to Use Their Vital Skills. Now the U.S. Might Deport Them*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/09/07/the-military-looked-to-dreamers-to-use-their-vital-skills-now-the-u-s-might-deport-them/?utm_term=.7a3267a0e6c6; *Naturalized Citizen SGT Saral K. Shrestha Earns Soldier of the Year Honors*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Dec. 7, 2012), <https://www.uscis.gov/archive/blog/2012/12/naturalized-citizen-sgt-saral-k>.

¹⁴⁶ *USCIS Policy Manual: Volume 12 - Citizenship & Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Aug. 23, 2017), <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume12-PartI.html>; *Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot Program*, U.S. DEP'T OF DEF., <https://www.defense.gov/news/mavni-fact-sheet.pdf>; Julia Preston, *Military Path Opened for Young Immigrants*, N.Y. TIMES (Sept. 25, 2014), <https://nyti.ms/1CqyEFB>.

¹⁴⁷ *Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot Program*, *supra* note 146.

¹⁴⁸ INA § 328(a), 8 U.S.C. § 1439(a); *see Naturalization Through Military Service*, *supra* note 44. Recruits with lawful permanent residence also benefit from this streamlined path because it eliminates the requirement that they hold that status for five years before being eligible for citizenship. INA § 328(a), 8 U.S.C. § 1439(a); *see Naturalization Through Military Service*, *supra* note 44.

¹⁴⁹ This process, which is called "parole-in-place," is discussed in Section III.C below.

through MAVNI during the 2016 federal fiscal year,¹⁵⁰ and as of September 2017, when the Trump Administration announced DACA's rescission, approximately 900 DACA recipients were either serving or had signed contracts to serve through MAVNI.¹⁵¹

The Executive Branch's decision to extend MAVNI eligibility to DACA recipients has generally met with bipartisan support. In June 2016 the Republican-led U.S. House of Representatives rejected a measure that would have barred DACA recipients and other unauthorized immigrants from military service.¹⁵² During the 2016 campaign, then-candidate Trump expressed his support for continuing to allow childhood arrivals with DACA an expedited path to citizenship through military service, stating: "I think when you serve in the armed forces, that's a very special situation and I could see myself working that out, absolutely."¹⁵³

The Trump Administration's September 2017 announcement that it was terminating the DACA program has brought renewed attention to the participation of DACA recipients in MAVNI.¹⁵⁴ It is unclear whether, and how, those who lose their DACA protection would be allowed to continue to serve; a Pentagon spokesman stated that "the Pentagon is coordinating with the departments of justice and homeland security 'regarding any impact' the change will have on military DACA recipients."¹⁵⁵

Even before DACA's cancellation, however, its recipients' continued participation in MAVNI was uncertain, due to a memo the Department of Defense issued on September 30, 2016 titled "Military Accessions Vital to the National Interest Pilot Program Extension."¹⁵⁶ Although the memo

¹⁵⁰ Kolb, *supra* note 140. The 2016 federal fiscal year runs from October 1, 2015 through September 30, 2016. *Glossary Term – Fiscal Year*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/fiscal_year.htm.

¹⁵¹ Horton, *supra* note 145.

¹⁵² Cristina Marcos, *House Rejects Effort to Ban Illegal Immigrants from Military Service*, THE HILL (June 16, 2016), <http://thehill.com/policy/finance/283762-house-rejects-effort-to-ban-illegal-immigrants-from-enlisting-in-military>.

¹⁵³ Kolb, *supra* note 140.

¹⁵⁴ See, e.g., Horton, *supra* note 145; Gregory Korte et al., *Trump Administration Struggles with the Fate of 900 DREAMers Serving in the Military*, USA TODAY (Sept. 7, 2017), <https://www.usatoday.com/story/news/politics/2017/09/07/trump-administration-struggles-fate-900-dreamers-serving-military/640637001/>; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 14, 2017), <https://twitter.com/realdonaldtrump/status/908276308265795585?lang=en> ("Does anybody really want to throw out good, educated and accomplished young people who have jobs, some serving in the military? Really! . . .").

¹⁵⁵ Associated Press, *Pentagon: Trump Order to End DACA Raises Issues for Military*, MILITARY.COM (Sept. 8, 2017), <http://www.military.com/daily-news/2017/09/08/pentagon-trump-order-end-daca-raises-issues-military.html>.

¹⁵⁶ Memorandum from Peter Levine, Under Sec'y, U.S. Dep't of Def., to Sec'y of the U.S. Army et al. (Sept. 30, 2016), <https://mavnicenter.com/uploads/files/1480542487209-mavni-memo-30-sep-16.pdf>.

extended the MAVNI program through September 30, 2017, it required each MAVNI applicant to satisfactorily complete all security screening requirements “[p]rior to shipping to basic training or serving for any period of time on active duty in the Armed Forces” and stated that MAVNI enlistees are not eligible for an interim security clearance until the completion of a positive national security eligibility determination is made.¹⁵⁷ These revised eligibility and screening protocols essentially put the entire program on hold, and virtually no DACA recipients have been able to ship to basic training (and thus become eligible for expedited citizenship) since then.¹⁵⁸

Looking forward, the same reasoning that led the Department of Defense to allow DACA recipients to participate in MAVNI could justify making the program available to all childhood arrivals. MAVNI was expanded to DACA recipients in part to help the Department of Defense achieve its recruiting objectives; its 2010–2012 Strategic Plan specifically identified childhood arrivals who would qualify for the DREAM Act as desirable recruits offering a “smart” way “to sustain quality assurance even as we expand markets to fill manning at controlled costs.”¹⁵⁹ The same reason could support expanding MAVNI further, regardless of what happens with DACA. For example, the limit on the number of recruits allowed to enroll per year could be expanded, eliminated, or not applied to qualifying childhood arrivals. In addition, the process deficiencies that have delayed security clearances for DACA recipients could be resolved, and deferred action could be granted to MAVNI recruits so they are protected from deportation while waiting for the clearances to conclude. Finally, childhood arrivals could be considered for enrollment in MAVNI on a case-by-case basis (regardless of their participation in DACA) so long as they meet all of the program’s numerous stringent qualifications.

In addition to changing the way it administers MAVNI, the Department of Defense could allow childhood arrivals to join the military outside of that program. The statute that grants the Executive Branch the discretion to allow unauthorized immigrants to serve in the armed forces requires only that the services determine that “such enlistment is vital to

¹⁵⁷ *Id.*

¹⁵⁸ JULIE KIRCHNER, CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, ANNUAL REPORT 2017, at vi-vii and 17-18, https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf; see also *Pentagon Considers Cancelling Program that Recruits Immigrant Soldiers*, NATIONAL PUBLIC RADIO (July 3, 2017), <http://www.npr.org/2017/07/03/535342867/pentagon-considers-canceling-program-that-recruits-immigrant-soldiers>.

¹⁵⁹ Andrea Nill Sanchez, *What the DREAM Act Has to Do with U.S. Defense and National Security*, THINKPROGRESS (Sept. 15, 2010), <https://thinkprogress.org/what-the-dream-act-has-to-do-with-u-s-defense-and-national-security-25820da65bd0/> (quoting from the FY 2010-2012 Strategic Plan for the U.S. Department of Defense’s Office of the Undersecretary of Defense for Personnel and Readiness).

the national interest.”¹⁶⁰ Neither Congress nor the courts has ever interpreted or restricted the meaning of “vital to the national interest” to include only service members with the foreign language or professional health care specialties that MAVNI requires.¹⁶¹ Allowing childhood arrivals with other needed qualifications to join the military outside of MAVNI could help the services meet the qualitative and quantitative recruiting goals implemented to ensure that they have a mission-ready all-volunteer force, especially since a strong economy and smaller recruiting budget is expected to continue to cause the services’ talent pool to shrink faster than the military is downsizing.¹⁶² As the White House said in a statement released after the U.S. House of Representatives rejected a measure that would have barred DACA recipients and other unauthorized immigrants from military service, “Allowing [childhood arrivals] to serve represents an opportunity to expand the recruiting pool, to the advantage of military recruitment and readiness.”¹⁶³

It is difficult to estimate how many childhood arrivals would be able to qualify for citizenship by joining the military if any of the various scenarios identified above were implemented, particularly since the number eligible would vary greatly depending on what changes were made. Re-

¹⁶⁰ 10 U.S.C. § 504(b)(2).

¹⁶¹ See Bryant Jordan, *Lawyer Says Immigration Military Recruitment Legislation Unnecessary*, MILITARY.COM (May 20, 2015), <http://www.military.com/daily-news/2015/05/20/lawyer-says-immigration-military-recruitment-legislation-unneeded.html>.

¹⁶² ALINE QUESTER & ROBERT SHUFORD, POPULATION REPRESENTATION IN THE MILITARY SERVICES: FISCAL YEAR 2015 SUMMARY REPORT 3–4 (2017), https://www.cna.org/CNA_files/PDF/DRP-2017-U-015567-Final.pdf.

¹⁶³ Jordan, *supra* note 161. Similarly, former Reagan Administration Assistant Secretary of Defense for Manpower, Reserve Affairs and Installations Larry Korb, who is now a Senior Fellow at the Center for American Progress in Washington, D.C., has said that there is no reason to bar childhood arrivals from military service and citizenship. “If they meet all the standards for education and score well on the [military entrance exam] and they’re physically fit, why not let them in? . . . We’ve done it before. What better way to prove your loyalty to the country than fight and die for it?” *Id.* Margaret Stock, the now-retired Lieutenant Colonel in the U.S. Army Reserve who helped create the MAVNI program, says that childhood arrivals who qualify for DACA or the DREAM Act are “likely to be a military recruiter’s dream candidates for enlistment. . . . In a time when qualified recruits—particularly ones with foreign language skills and foreign cultural awareness—are in short supply, enforcing deportation laws against these young people makes no sense.” Sanchez, *supra* note 159; see also Rod Powers, *Immigrants in the US Armed Forces*, THE BALANCE (Sept. 8, 2016), <https://www.thebalance.com/immigrants-in-the-us-armed-forces-3353965> (“The military benefits greatly from the service of its foreign-born. Non-citizen recruits offer greater racial, ethnic, linguistic, and cultural diversity than citizen recruits. This diversity is particularly valuable given the military’s increasingly global agenda. Additionally, statistics show that: Asian/Pacific Islander and Hispanic non-citizens who have served for at least 3 months are nearly 10 percent less likely to leave the service than white citizens. Non-citizens who have served for at least 36 months are 9 to 20 percent less likely to leave the service than white citizens.”).

ardless, any changes the Executive Branch did choose to pursue should be relatively straightforward to implement, and could be effected by using the same procedure that was used to initially create MAVNI and then expand it to DACA recipients: through a Department of Defense policy memo and subsequent implementing procedures. Notably, there is no fee for eligible recruits to join MAVNI, and those who subsequently qualify for expedited citizenship are exempt from paying the corresponding application fee.¹⁶⁴

B. *Permanent Residence Through Cancellation of Removal*

Congress has given the Executive Branch the discretion to grant lawful permanent resident status to noncitizens in removal proceedings who meet certain requirements. The Executive Branch could use this discretion to change the way it administers that process (called “cancellation of removal”)¹⁶⁵ to make it more accessible to childhood arrivals.

Pursuant to § 240A(b) of the INA, immigration judges may grant lawful permanent resident status to noncitizens in removal proceedings who are present in the U.S. without authorization.¹⁶⁶ Applicants must prove that for at least the ten years prior to their removal hearing they have resided continuously in the U.S. and have had good moral character.¹⁶⁷ They must also prove that they have a U.S. citizen or permanent resident spouse, parent, or child younger than 21 who would suffer “exceptional” and “extremely unusual” hardship if the applicant were removed.¹⁶⁸ This hardship must be substantially worse than what a family member would normally suffer if a loved one were deported.¹⁶⁹ Factors

¹⁶⁴ MSG Washington, *supra* note 141. Typically the fees to apply for naturalization total \$725, though this fee is waived with a showing of economic necessity. See *Our Fees*, *supra* note 84; *I-912, Request for Fee Waiver*, *supra* note 84. Naturalization applicants whose household income is at or below 200% of the federal poverty guideline qualify for a reduced fee of \$405. *Our Fees*, *supra* note 84.

¹⁶⁵ Confusingly, a similar process that allows noncitizens who already have permanent resident status to avoid removal once they are in removal proceedings imposes slightly different requirements and is also called cancellation of removal. See INA § 240A(a), (b); 8 U.S.C. § 1229b(a), (b); see also U.S. DEP’T OF JUSTICE, *supra* note 61. This Article uses the term “cancellation of removal” to refer only to the process available to nonpermanent residents under INA § 240A(b), and not the process available to permanent residents under INA § 240A(a).

¹⁶⁶ INA § 240A(b), 8 U.S.C. § 1229b; see also U.S. DEP’T OF JUSTICE, *supra* note 61. Immigration courts are part of the Department of Justice’s Executive Office for Immigration Review, and thus fall under the Executive Branch. See *Fact Sheet: EOIR at a Glance*, U.S. DEP’T OF JUSTICE (Sept. 9, 2010), <https://www.justice.gov/eoir/eoir-at-a-glance>.

¹⁶⁷ INA § 240A(b)(1)(A), (B), 8 U.S.C. § 1229b(b)(1)(A), (B).

¹⁶⁸ INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

¹⁶⁹ *Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (B.I.A. 2001).

that an immigration judge will consider when determining what constitutes exceptional and extremely unusual hardship include:

[T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. . . . [A]ll hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.¹⁷⁰

Hardship that the applicant would endure if deported is not a relevant factor.¹⁷¹

In addition to offering a path to permanent residency, cancellation of removal offers other benefits. Immigrant visas available through cancellation of removal are not subject to the preference system that can result in years-long waits for applicants falling within an oversubscribed category. Moreover, applicants who are granted cancellation of removal may complete the relatively straightforward process of obtaining a green card from within the United States; they are not required to return to their home country for consular processing, and thus are able to avoid triggering one of the reentry bars if they have accrued six months or more of unlawful presence.

Cancellation of removal also has several drawbacks. The biggest one is apparent from its name: by definition, cancellation of removal is available only to noncitizens who are in removal proceedings. Noncitizens cannot initiate removal proceedings themselves; they can only pursue cancellation of removal as an affirmative defense to removal proceedings initiated by the government, and if their request for cancellation of removal fails, they are subject to deportation. In addition, cancellation of removal grants are limited by statute to 4,000 per year.¹⁷² After that number is reached, immigration judges defer decisions on cancellation of removal requests until more visas are available under the numerical cap in a future year.¹⁷³

There are several ways the Executive Branch could change how it administers cancellation of removal to make that path to permanent residence more accessible to childhood arrivals. The Executive Branch

¹⁷⁰ *Id.* at 63–64.

¹⁷¹ *Id.* at 64.

¹⁷² INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1); 8 C.F.R. § 1240.21 (2017).

¹⁷³ *See* 8 C.F.R. § 1240.21.

could allow childhood arrivals to initiate removal proceedings themselves for the sole purpose of seeking cancellation of removal, and guarantee that a rejection would not result in removal proceedings continuing. Alternatively, the Executive Branch could allow childhood arrivals who make a *prima facie* showing that they meet the statutory criteria for cancellation of removal (ten years of continuous residence, ten years of good moral character, and a U.S. citizen or permanent resident spouse, parent or child who would suffer exceptional and extremely unusual hardship if the childhood arrival were removed) to obtain a preliminary ruling on their eligibility for cancellation of removal without entering removal proceedings.¹⁷⁴ As a corollary to that, the Executive Branch could guarantee that it would subsequently initiate removal proceedings to grant permanent resident status to childhood arrivals who obtained a favorable preliminary ruling, and that it would not initiate removal proceedings against childhood arrivals whose applications were judged unlikely to succeed.

In addition, the Executive Branch could refine the definition of exceptional and extremely unusual hardship so that it takes into account childhood arrivals' unique circumstances. Because the statute does not define exceptional and extremely unusual hardship, the Executive Branch has the discretion to employ any definition that is based on a permissible construction of the statute.¹⁷⁵ This is true even if the Executive Branch's interpretation significantly affects the implementation of immigration law.¹⁷⁶ In the context of cancellation of removal, the Executive Branch could specify that exceptional and extremely unusual hardship includes situations in which a childhood arrival plays a meaningful role in the qualifying relative's life in the U.S. Exceptional and extremely unusual hardship could also include situations in which the conditions in

¹⁷⁴ This advance adjudication process would be similar to the advance waiver process created for visa applicants who are exempt from the unlawful presence bars if their U.S. citizen spouse or parent would suffer extreme hardship. *See* Section III.E, *infra*.

¹⁷⁵ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

¹⁷⁶ For example, the INA authorizes the Executive Branch to grant parole to noncitizens for “urgent humanitarian reasons or significant public benefit.” INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). Before DACA was rescinded, the Executive Branch expanded the definition of “urgent humanitarian reasons or significant public benefit” to include travel that DACA recipients undertook for educational purposes. *Frequently Asked Questions*, *supra* note 111 (“Generally, USCIS will only grant advance parole if your travel abroad will be in furtherance of: humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative; educational purposes, such as semester-abroad programs and academic research, or; employment purposes such as overseas assignments, interviews, conferences or, [sic] training, or meetings with clients overseas. Travel for vacation is not a valid basis for advance parole.”).

the childhood arrival's country of origin are such that the qualifying relative might need to support the childhood arrival financially, or would suffer mental distress worrying about the childhood arrival's safety or well-being. If the childhood arrival's qualifying family member were a son or daughter, exceptional and extremely unusual hardship could also include the hardship the child would face if he or she relocated to the childhood arrival's country of origin, or if he or she were forced to live in a different country from the childhood arrival parent. These interpretations of the term exceptional and extremely unusual hardship would comport with the authority Congress has granted the Executive Branch to grant permanent resident status to unauthorized immigrants in removal proceedings while also taking into account the unique circumstances of childhood arrivals, many of whom have deep ties to their families and community in the U.S. and face limited opportunities in their country of origin.

Finally, childhood arrivals who are granted cancellation of removal but cannot immediately obtain an immigrant visa due to the 4,000 cap could automatically be granted deferred action and the right to apply for work authorization pending the availability of an immigrant visa.

It is difficult to predict how many childhood arrivals could qualify for cancellation of removal under one or more of the possible changes identified above. Many should be able to establish that they have been in the U.S. and have had good moral character for more than ten years.¹⁷⁷ Few are likely to have U.S. citizen or permanent resident parents, but many may have U.S. citizen or permanent resident spouses, and an estimated 25% of DACA recipients have at least one U.S. citizen child.¹⁷⁸ Whether any of those childhood arrivals are able to establish that their removal would cause exceptional and extremely unusual hardship to that child, or any other qualifying relative they may have, would obviously depend on each family's individual circumstances and the definition of that term that the Executive Branch chooses to apply to childhood arrivals.

Making some or all of the above changes to the cancellation of removal process would allow more childhood arrivals to obtain an immigrant visa and eventual citizenship. This need not be viewed as an amnesty or end run around Congress's failure to provide childhood arrivals seeking cancellation of removal with some other way of obtaining permanent residence.¹⁷⁹ Childhood arrivals would still need to satisfy the

¹⁷⁷ Nearly three-quarters of DACA applicants have lived in the U.S. for at least ten years. Singer & Svajlenka, *supra* note 86.

¹⁷⁸ Lind, *supra* note 126 (citing an August 2017 survey of 3,063 DACA recipients conducted by Tom Wong of UC San Diego for the liberal think tank at the Center for American Progress and other immigrant advocacy groups).

¹⁷⁹ See generally Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 49 (2017) (discussing why relying on existing laws to move unauthorized immigrants to legal status should not be viewed as an unlawful

substantive statutory requirements to be eligible for the relief cancellation of removal provides. The changes proposed above would simply make the process more accessible to childhood arrivals, a goal which comports with the legislative intent behind cancellation of removal: that immigration judges should have the authority to prevent the removal of unauthorized immigrants and adjust their status to permanent resident when a compelling case for doing so is established. Given that childhood arrivals' unlawful presence in the U.S. is due to no fault of their own, they seem particularly well-suited for this form of relief.¹⁸⁰

The complexity of refining the cancellation of removal process to take into account childhood arrivals' unique situation would vary depending on which proposed changes were implemented. Revising the process to allow childhood arrivals to initiate removal proceedings themselves, obtain preliminary rulings regarding their eligibility for cancellation of removal, and be guaranteed that the process would not result in removal proceedings being pursued against them should they fail to qualify for permanent residence, would require substantial revisions to immigration court policies, procedures, and application forms.¹⁸¹ Refining the applicable definition of exceptional and extremely unusual hardship would require a simple revision to the Immigration Judge Benchbook, and possibly to the Immigration Court Practice Manual.¹⁸² Granting deferred action and the right to apply for work authorization to childhood arrivals whose grant of cancellation of removal is delayed due to the 4,000 annual cap would require revisions to policies, procedures, and application forms used by the immigration courts and U.S. Citizenship and Immigration Services.¹⁸³

Childhood arrivals applying for cancellation of removal could complete the same form that all noncitizens currently submit when pursuing that relief, though the form would need to be revised depending on the

executive grant of amnesty). For an example of the type of criticism directed at DACA based on the contention that it is an unlawful executive grant of amnesty, see Aaron Klein, *How the Obama Administration Bypassed Congress to Grant De Facto Amnesty to Young Illegal Aliens*, BREITBART (Sept. 3, 2017), <http://www.breitbart.com/big-government/2017/09/03/obama-administration-usurped-constitution-bypassed-congress-grant-de-facto-amnesty-dreamers/>.

¹⁸⁰ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (recognizing the innocence of undocumented persons brought to the United States as children).

¹⁸¹ See U.S. DEP'T OF JUSTICE, *supra* note 61.

¹⁸² See U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK, <https://www.justice.gov/eoir/immigration-judge-benchbook-generic-template>; U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2016), <https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf>.

¹⁸³ Presumably the court would issue an order stating that the childhood arrival qualified for deferred action, and then the childhood arrival would need to submit the order to U.S. Citizenship & Immigration Services in support of an application for deferred action and work authorization.

childhood arrival-specific changes made to the process. Childhood arrival applicants could be required to pay the same fee that other applicants pay (currently \$100) or possibly a different fee based on the complexities that their circumstances are likely to entail.¹⁸⁴

C. Elimination of the Unlawful Entrance Admissibility Bar, and Possible Avoidance of the Unlawful Presence Reentry Bars, Through Parole-in-Place

The Executive Branch has the statutory authority to let noncitizens without legal status remain in the United States, and to retroactively convert their most recent entrance into a lawful one, even if they are inadmissible. This discretion, which is called parole-in-place, could be exercised to help childhood arrivals who meet all the criteria for an immigrant visa but for the inadmissibility bars that parole-in-place eliminates or avoids.

“Parole” is the discretion that § 212(d)(5)(A) of the INA gives the Secretary of Homeland Security to permit noncitizens, on a case-by-case basis, to temporarily enter the United States for “urgent humanitarian reasons or significant public benefit,” even if they lack a valid visa or are otherwise inadmissible.¹⁸⁵ Because recipients of parole enter the U.S. lawfully, they avoid two common grounds of inadmissibility: arriving in the country through a non-designated port of entry, and being present in the country due to an unlawful entrance.¹⁸⁶ Recipients of parole may apply for employment authorization and are allowed to remain in the United States lawfully during the duration of their parole; thus, they do not accrue unlawful presence for purposes of the three- and ten-year unlawful presence reentry bars during that time.¹⁸⁷

“Parole-in-place” refers to situations when the Department of Homeland Security (DHS) uses this statutory authority to grant parole to a noncitizen who is already physically present in the United States.¹⁸⁸ Pa-

¹⁸⁴ See U.S. DEP’T OF JUSTICE, *supra* note 61 at 4.

¹⁸⁵ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

¹⁸⁶ See INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (stating noncitizen “who arrives in the United States at any time or place other than as designated by the [Secretary of Homeland Security]” or who is “present in the United States without being admitted or paroled” is inadmissible).

¹⁸⁷ See 8 C.F.R. § 274a.12 (2017); see also INA § 274A, 8 U.S.C. § 1324a; Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092 (Dec. 4, 1987); *Employment Authorization*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/information-employers-employees/employer-information/employment-authorization> (last updated Oct. 24, 2017) (employment authorization for parole recipients available under category c(11)).

¹⁸⁸ See INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); INA § 235(a)(1), 8 U.S.C. § 1225(a)(1). The legal authority for granting parole-in-place was formally recognized by the then-Immigration and Naturalization Service (INS) General Counsel in a 1998 opinion. See Memorandum from Paul W. Virtue for Bo Cooper,

role-in-place retroactively paroles noncitizens into the United States as of the date of their most recent entrance.¹⁸⁹ This converts that entrance into a lawful one, removing two grounds of inadmissibility: arriving in the country through a non-designated port of entry, and being present in the country due to an unlawful entrance.¹⁹⁰ Parole-in-place also converts its recipients' ongoing presence in the United States from unlawful to lawful (again, dating back to their most recent entrance). As a result, parole-in-place recipients do not accrue unlawful presence dating forward from their most recent entrance, and that period of presence will not trigger the three- or ten-year unlawful presence reentry bars if the recipient departs the country for some reason, such as to obtain an immigrant visa that requires consular processing.

Parole-in-place does not remove any other grounds of inadmissibility, nor does it preclude the triggering of any other reentry bars (including reentry bars based on periods of unlawful presence preceding the date of a recipient's retroactive parole into the U.S.). Parole-in-place also does not provide any kind of legal status or path to citizenship for its recipients; they still must qualify for an immigrant visa through a path statutorily created by Congress. Parole-in-place simply removes a few of the most common barriers for people who might otherwise qualify for an immigrant visa: entering without inspection and admission or parole; and having accrued sufficient unlawful presence after their most recent entrance such that the three- or ten-year unlawful presence reentry bars will be triggered if the immigrant visa for which they qualify requires consular processing.

In the past, the Executive Branch has granted parole-in-place to various groups of people, including the parents, spouses, and children of members of the U.S. military.¹⁹¹ Since at least 2013, DHS has had a formal, publicly announced initiative, created in partnership with the De-

Gen. Counsel, Immigration & Naturalization Serv., Exec. Assoc. Comm'r for Policy & Planning et al. 1 (Aug. 21, 1998). That opinion was endorsed the following year in a memorandum by the then-Immigration and Naturalization Service Commissioner. Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Reg'l Dirs. et al. (Apr. 19, 1999), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-31937.html>. (The INS was the predecessor to the Department of Homeland Security.) In 2007, the Department of Homeland Security General Counsel concurred with the 1998 INS General Counsel's opinion in relevant part. *Parole in Place Memorandum*, U.S. CITIZENSHIP & IMMIGRATION SERVS. 2 n.4 (Nov. 15, 2013), <https://www.uscis.gov/executive-actions-immigration/parole-place-memorandum> (citing Memorandum from Gus P. Coldebella, Dep't of Homeland Sec. Gen. Counsel, to Dep't of Homeland Sec. officials, "Clarification of the Relation Between Release under Section 236 and Parole under Section 212(d)(5) of the Immigration and Nationality Act" (Sept. 28, 2007)).

¹⁸⁹ See *Parole in Place Memorandum*, *supra* note 188.

¹⁹⁰ See INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).

¹⁹¹ *Parole in Place Memorandum*, *supra* note 188.

partment of Defense, which allows immediate family members of veterans and those currently serving in the U.S. military to apply for parole-in-place.¹⁹² That initiative later expanded parole-in-place to the immediate family members of lawful permanent residents and of people whose enlistment in the military was pending.¹⁹³ The main urgent humanitarian reasons or significant public benefit the policy cites is reducing the stress and anxiety that veterans and those in the military face “because of the immigration status of their family members in the United States.”¹⁹⁴

Urgent humanitarian reasons and significant public benefit would also support offering parole-in-place to childhood arrivals who could obtain an immigrant visa but for the inadmissibility bars that parole-in-place eliminates or avoids. Parole-in-place could serve an urgent humanitarian purpose by reducing the stress and anxiety experienced by young people who live under the constant threat of deportation, who came here through no fault of their own, and who may know only this country as their home.¹⁹⁵ Allowing childhood arrivals to remain in the United States could provide significant public benefit by enabling the country to reap the returns on its investment in their education and upbringing.¹⁹⁶

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ An extensive body of research documents both quantitatively and qualitatively the toll that the threat of deportation takes on the lives of childhood arrivals and their families. *See, e.g.*, ROBERTO G. GONZALES, *LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA* (2016); Luz M. Garcini et al., *DREAMers and Their Double Standard of Living in the United States: A Contextual Perspective and Clinical Implications*, 174 *AM. J. PSYCHIATRY* 623 (2017); Elizabeth Aranda & Elizabeth Vaquera, *How DACA Affected the Mental Health of Undocumented Young Adults*, *THE CONVERSATION* (Sept. 5, 2017), <https://theconversation.com/how-daca-affected-the-mental-health-of-undocumented-young-adults-83341>; Lorna Collier, *DREAMers in Limbo*, 46 *MONITOR ON PSYCHOLOGY* 56 (2015), <http://www.apa.org/monitor/2015/01/dreamers.aspx>; Jens Hainmueller et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children's Mental Health*, *SCIENCE* (Aug. 31, 2017), <http://science.sciencemag.org/content/early/2017/08/30/science.aan5893.full>; Video, *Undocumented Americans: What Is It Like to Grow Up as an Undocumented Youth in America?*, *AM. PSYCHOLOGICAL ASS'N*, <http://www.apa.org/topics/immigration/undocumented-video.aspx>.

¹⁹⁶ The economic contributions of childhood arrivals have been quantified in various contexts, as have the costs of deporting them. *See, e.g.*, David Bier, *Ending DACA Will Impose Billions in Employer Compliance Costs*, *CATO INST.* (Sept. 1, 2017), <https://www.cato.org/blog/ending-daca-will-impose-billions-employer-compliance-costs>; Walter Ewing, *America Benefits from Growing Economic Clout of DACA Recipients*, *IMMIGRATION IMPACT* (June 15, 2017), <http://immigrationimpact.com/2017/06/15/america-benefits-daca-recipients/>; Walter Ewing, *The Economic Costs of Ending DACA*, *IMMIGRATION IMPACT* (Feb. 14, 2017), <http://immigrationimpact.com/2017/02/14/economic-costs-ending-daca/>; MISHA E. HILL & MEG WIEHE, *INST. ON TAXATION & ECON. POLICY, STATE & LOCAL TAX CONTRIBUTIONS OF YOUNG UNDOCUMENTED IMMIGRANTS 1–2* (2017), <https://itep.org/wp-content/uploads/2017DACA.pdf>; John Hudak & Elaine Kamarck, *The Mind-Boggling Cost of DACA*

Parole-in-place could be made available to childhood arrivals pursuant to criteria similar to those used for the family of armed forces service members: on a case-by-case basis for applicants who, but for their presence in the U.S. due to an unlawful entry, could adjust status to permanent resident through sponsorship by a qualifying U.S. citizen or permanent resident family member.¹⁹⁷ Parole-in-place for childhood arrivals also could be expanded to include childhood arrivals who, but for their accrual of unlawful presence after their most recent entry, could obtain an immigrant visa that is not immediately available because it is in an oversubscribed category; this would allow eligible childhood arrivals to remain in the U.S. and work lawfully until their visa became available. Finally, parole-in-place for childhood arrivals could be expanded to include childhood arrivals who, but for their accrual of unlawful presence after their most recent entry, qualify for an available immigrant visa that requires consular processing; although they would still be required to travel to their country of origin to consular process, the parole-in-place grant would allow them to avoid triggering the three- or ten-year unlawful presence reentry bars.

Expanding parole-in-place to childhood arrivals pursuant to one or more of the possibilities identified above would allow more of them to obtain an immigrant visa and eventual citizenship. As with the possible revisions to cancellation of removal discussed above, this should not be viewed as an amnesty or end run around Congress.¹⁹⁸ Childhood arrivals would still need to qualify for one of the legislatively-created paths to permanent residence and citizenship. Parole-in-place would only remove

Repeal, BROOKINGS INST. (Sept. 7, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/07/the-mind-boggling-cost-of-daca-repeal/>; THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 8–9, 14 (Francine D. Blau & Christopher Mackie eds., 2017), <https://www.nap.edu/read/23550/chapter/2>; Tom K. Wong et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CTR. FOR AM. PROGRESS (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>; see also MOTOMURA, *supra* note 6, at 198 (legalizing immigrants with strong work histories may be more “accurate” and “efficient” than trying to identify ex ante who the best economic contributors will be); *Remarks by the President in an “Open for Questions” Roundtable*, WHITE HOUSE (Sept. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/28/remarks-president-open-questions-roundtable> (“[F]or those who have an ambition to start a business, entrepreneurs, young people who have gotten college degrees or advanced degrees—for us to train them here in the United States and then send them back to start businesses elsewhere makes absolutely no sense.”).

¹⁹⁷ *Accord* MARSHALL FITZ, CTR. FOR AM. PROGRESS, WHAT THE PRESIDENT CAN DO ON IMMIGRATION IF CONGRESS FAILS TO ACT 21 (2014); KATE M. MANUAL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43782, EXECUTIVE DISCRETION AS TO IMMIGRATION: LEGAL OVERVIEW 12 (2014), <https://fas.org/sgp/crs/homsec/R43782.pdf>.

¹⁹⁸ See *supra* note 179.

or avoid a few of the most common barriers for those who would otherwise qualify for an immigrant visa. Because those barriers were enacted to deter noncitizens from intentionally entering and remaining in the U.S. unlawfully, using parole-in-place to allow childhood arrivals to overcome or avoid them would not undermine their purpose.

It is difficult to predict how many childhood arrivals could benefit from the various expansions of parole-in-place identified above, because it is difficult to estimate how many have a family member or employer eligible to sponsor them. Given the low percentage of DACA recipients who report entering the country with a valid visa, however, it seems likely that few would be able to obtain an immigrant visa without the benefit of parole-in-place or advance parole (discussed in Section III.D below).¹⁹⁹

Expanding parole-in-place to childhood arrivals under one or more of the scenarios described above could be implemented through procedures similar to those currently in place for noncitizens who apply for parole-in-place based on their relationship with an armed forces member, veteran, or person seeking to enlist in the military.²⁰⁰ U.S. Citizenship and Immigration Services (USCIS) could issue a memorandum updating its policy manual. Childhood arrivals could submit an Application for Travel Document (Form I-131) to USCIS, along with proof of eligibility, evidence of any discretionary factors that they would like considered, and payment of the fee USCIS establishes as sufficient to cover the costs of evaluating parole-in-place applications from childhood arrivals who would otherwise qualify for an immigrant visa.²⁰¹

D. Elimination of the Unlawful Entrance Admissibility Bar, and Possible Avoidance of the Unlawful Presence Reentry Bars, Through Advance Parole

The Executive Branch has a longstanding practice, which has been incorporated into regulation and recognized by federal courts, of using its statutory parole authority to grant advance parole to noncitizens in the U.S. seeking pre-authorization to reenter the country if they travel

¹⁹⁹ As explained more fully in Section II.B.3, *supra*, childhood arrivals who are present in the country due to a lawful entrance (meaning they entered with a nonimmigrant visa that has since expired) can adjust status to permanent resident if they are sponsored by an immediate family member who is a U.S. citizen; they do not need to make use of some form of parole to avoid the unlawful entrance bar. Nationally, 61% of DACA applicants reported they entered without inspection and admission or parole, 11% entered with a valid visa, and 28% reported their status as unknown. Singer & Svajlenka, *supra* note 86.

²⁰⁰ See *Parole in Place Memorandum*, *supra* note 188.

²⁰¹ Currently the fee that U.S. Citizenship & Immigration Services charges for considering Applications for Travel Documents ranges from \$0–\$660 based on the grounds for the request. *I-131, Application for Travel Document, Special Instructions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-131> (last updated Nov. 21, 2017).

abroad for a qualifying reason.²⁰² The Executive Branch could expand this practice to grant advance parole to childhood arrivals wishing to travel abroad to foster ties with their country of origin, and to childhood arrivals who meet all the criteria for an immigrant visa but for the inadmissibility bars that travel on advance parole would allow them to eliminate or avoid.

As discussed in Section III.C above, parole is the discretion that § 212(d)(5)(A) of the INA gives the Secretary of Homeland Security to permit noncitizens, on a case-by-case basis, to temporarily enter the United States for urgent humanitarian reasons or significant public benefit, even if they lack a valid visa or are otherwise inadmissible.²⁰³ Because recipients of parole enter the U.S. lawfully, they avoid two common grounds of inadmissibility: arriving in the country through a non-designated port of entry, and being present in the country due to an unlawful entrance.²⁰⁴ Recipients of parole may apply for employment authorization and are allowed to remain in the United States lawfully during the duration of their parole; thus, they do not accrue unlawful presence for purposes of the three- and ten-year unlawful presence reentry bars during that time.²⁰⁵

Advance parole is an outgrowth of the Executive Branch's general parole authority.²⁰⁶ Advance parole is permission granted to a qualifying noncitizen *inside* the U.S. to reenter the U.S. (be "paroled") after temporarily traveling abroad.²⁰⁷ Citizens, green card holders, and noncitizens with valid multi-entry visas do not need advance parole to leave and return.²⁰⁸ Noncitizens with single-entry visas, temporary humanitarian sta-

²⁰² See U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS ADVANCE PAROLE DOCUMENTS 2 (2017), <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20USCIS%20Advance%20Parole%20Documents.pdf>; see also Ramirez v. Brown, 852 F.3d 954, 956–63 (9th Cir. 2017); *Adjudicator's Field Manual, Advance Parole Documents and Boarding Letters*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-20442/0-0-0-20456.html> (last revised June 28, 2005).

²⁰³ See INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

²⁰⁴ See INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (noncitizen "who arrives in the United States at any time or place other than as designated by the [Secretary of Homeland Security]" or who is "present in the United States without being admitted or paroled" is inadmissible).

²⁰⁵ See generally INA § 274A, 8 U.S.C. § 1324a; 8 C.F.R. § 274a.12; *Employment Authorization*, *supra* note 187 (employment authorization for parole recipients available under category c(11)).

²⁰⁶ See *supra* note 202.

²⁰⁷ See 8 C.F.R. § 212.5(f) (2017); see also Arrabelly, 25 I. & N. Dec. at 777; *Ombudsman Update: Advance Parole Tips*, U.S. DEP'T OF HOMELAND SEC. (Apr. 13, 2016), <https://www.dhs.gov/ombudsman-update-advance-parole-tips>.

²⁰⁸ Arrabelly, 25 I. & N. Dec. at 777; *Ombudsman Update: Advance Parole Tips*, *supra* note 207.

tuses, deferred action, or no lawful immigration status do require advance parole to leave the country and return; otherwise, they have no lawful way to reenter.²⁰⁹ The grant of advance parole is not a guarantee of re-admission, because advance parole recipients are still subject to being inspected at ports of entry by Customs and Border Protection officials.²¹⁰ Advance parole does, however, provide a reasonable assurance that reentry will be allowed.²¹¹

In addition to permitting travel outside the country with the reasonable assurance of being allowed to return, the benefit of advance parole is that upon return, its recipients enter the U.S. with permission and are considered lawfully present. As a result, they will not be subject to the unlawful entrance admissibility bar, and during the length of their parole period they do not accrue unlawful presence for purposes of the three- and ten-year unlawful presence reentry bars. Thus, advance parole has the same impact on its recipients' ability to obtain an immigrant visa as parole-in-place does: if advance parole recipients qualify for an immigrant visa as the immediate relative of a U.S. citizen, they can adjust status from within the U.S. to permanent resident, and if they qualify for an immigrant visa that requires consular processing, their departure will not trigger the three- or ten-year unlawful presence reentry bars.²¹² The main difference between parole-in-place and advance parole is that parole-in-place does not require, or allow, its recipients to leave the U.S. In contrast, advance parole recipients must establish a qualifying reason for travel, expend the time and money required for the travel (without being guaranteed that they will be permitted to return), and then successfully reenter the U.S. before being able to take advantage of the benefits advance parole provides in terms of eliminating or avoiding the unlawful

²⁰⁹ Moreover, noncitizens without valid immigrant visas who have pending applications for certain immigration benefits must request and receive advance parole prior to leaving the United States in order to avoid termination of their pending applications. *Ombudsman Update: Advance Parole Tips*, *supra* note 207.

²¹⁰ *Id.*; see also Roque Planas, *DACA Recipient Deported After Visiting Mexico*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/entry/daca-recipient-deported-after-visiting-mexico_us_56b13943e4b08069c7a56417 (advance parole recipient denied reentry by Customs and Border Protection due to prior removal order).

²¹¹ See *Ombudsman Update: Advance Parole Tips*, *supra* note 207.

²¹² See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (defining immediate relative); INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) (immediate relative may adjust status to permanent resident, even if not in lawful status, so long as present in U.S. due to lawful entry). Note that although parolees have lawful presence in the U.S., they have no lawful status. Therefore, they can only adjust status in the U.S. if they qualify for an immediate relative visa; if they qualify for any other immigrant visa they will need to obtain it through consular processing in their country of origin. This departure will trigger the three- or ten-year unlawful presence reentry bars only if they have been present in the U.S. unlawfully for a period of six months or more at any time *prior* to the date they entered the U.S. as a parolee.

entrance admissibility bar and the accrual of unlawful presence for purposes of the three- and ten-year unlawful presence reentry bars.

Over the years, the Executive Branch has expanded the availability of advance parole: the benefit now has its own application and filing fee, and entire categories of applicants are eligible for the benefit, with each category having distinct requirements.²¹³ For example, noncitizens with a pending application for Temporary Protected Status, or with current Temporary Protected Status, current U nonimmigrant status, or current T nonimmigrant status, all are eligible for advance parole regardless of their reason for travel.²¹⁴ Noncitizens with pending applications for adjustment of status to permanent resident may apply for advance parole if they are seeking to “travel abroad temporarily for ‘urgent humanitarian reasons’ or in furtherance of a ‘significant public benefit,’ which may include a personal or family emergency or bona fide business reasons.”²¹⁵ DACA recipients used to be able to receive advance parole to travel for employment, educational, or humanitarian purposes, but not for vacation; that policy changed on September 5, 2017 when the Trump Administration announced DACA’s rescission, and now advance parole is no longer available to DACA recipients regardless of the reason for travel.²¹⁶

Advance parole through DACA offered childhood arrivals several benefits. It let them participate in study abroad programs, visit ailing family members they may not have seen for years, establish or maintain connections with their country of origin, and pursue employment or other professional opportunities involving international travel. Advance parole also eliminated two grounds of inadmissibility that many childhood arrivals face: having arrived in the country through a non-designated port of entry, and being present in the country due to an unlawful entrance.²¹⁷

²¹³ *I-131 Application for Travel Document*, *supra* note 201 (listing fees ranging from \$0–660 depending on applicant’s age and current immigration status).

²¹⁴ U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR APPLICATION FOR TRAVEL DOCUMENT, FORM I-131, at 4, <https://www.uscis.gov/i-131> (last updated Dec. 23, 2016).

²¹⁵ *Id.* The most common status of an advance parole applicant is someone with a nonimmigrant visa whose application for adjustment of status to permanent resident is pending. U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 202, at 6–9.

²¹⁶ *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions*, Question 57 U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Sept. 2017), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#travel>; Memorandum from Elaine Duke, Acting Sec’y, U.S. Dep’t of Homeland Sec., to James W. McCamet, Acting Director, U.S. Citizenship & Immigration Services (Sept. 5, 2017) [hereinafter Memorandum from Elaine Duke], available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

²¹⁷ *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (noncitizen “who arrives in the United States at any time or place other than as designated by the [Secretary of Homeland Security]” or who is “present in the United States without being admitted or paroled” is inadmissible).

Thus, childhood arrivals who received advance parole through DACA and were the immediate relative of a U.S. citizen were able to adjust status from within the U.S. to permanent resident.²¹⁸

Advance parole does not remove any other grounds of inadmissibility or preclude the triggering of any other reentry bars (including reentry bars based on periods of unlawful presence predating the date of a recipient's parole into the U.S.). Advance parole also does not provide any kind of legal status or path to citizenship for its recipients; they still must qualify for an immigrant visa through a path statutorily created by Congress. Advance parole simply removes or avoids a few of the most common barriers for people who might otherwise qualify for an immigrant visa: entering without inspection, being present due to an unlawful entrance, and having accrued sufficient unlawful presence after their most recent entrance such that the three- or ten-year unlawful presence reentry bars will be triggered if the immigrant visa for which they qualify requires consular processing.

There are several changes the Executive Branch could make to the way it administers advance parole so that childhood arrivals can access its benefits.²¹⁹ For example, childhood arrivals could be eligible for advance parole for any reason, so long as they were using it to visit their country of origin. This would foster their ties to that country, making it easier in the event they ended up wanting, or needing, to relocate there.²²⁰ Alter-

²¹⁸ See *supra* note 212 and accompanying text.

²¹⁹ As previously noted, as of September 5, 2017 even childhood arrivals with DACA could not receive advance parole. Memorandum from Elaine Duke, *supra* note 216.

²²⁰ This could complement policies facilitating repatriation, especially policies encouraging childhood arrivals to repatriate when they turn 18 years old—the age when many begin to experience the full limitations of their unauthorized status (their inability to work lawfully or access most forms of funding for higher education), and the age when they start to accrue unlawful presence for purposes of the three- and ten-year unlawful presence reentry bars. Other complementary policies include encouraging communities of people who live outside their shared country of origin to maintain connections with it. See, e.g., *About, INT'L DIASPORA ENGAGEMENT ALL.*, <http://www.diasporaalliance.org/about-us/> (describing program supported by U.S. Department of State and U.S. Agency for International Development that helps diaspora communities give back to their country of origin). Receiving countries can also be supported in implementing policies to facilitate the integration of repatriating migrants, including childhood arrivals. See, e.g., Antonio Olivo, *After Decades in America, the Newly Deported Return to a Mexico They Barely Recognize*, WASH. POST (Mar. 3, 2017), https://www.washingtonpost.com/world/the_americas/mexico-prepares-to-absorb-a-wave-of-deportees-in-the-trump-era/2017/03/03/a7bd624a-f86c-11e6-aa1e-5f735ee31334_story.html?utm_term=.526ceb11d2b3&wpisrc=nl_rainbow-fbia&wpmm=1; see also Motomura, *supra* note 14, at 2075, 2096 (explaining the U.S. can “tr[y] to make migration more circular through incentive, especially through attractive conditions in countries of origin that entice migrants to return,” and noting

natively (or in addition), advance parole could be made available to childhood arrivals pursuant to criteria similar to those initially used for making parole-in-place available to the family of armed forces service members: on a case-by-case basis for applicants who, but for their presence in the U.S. due to an unlawful entry, would qualify to adjust status to lawful permanent resident immediately based on sponsorship by a U.S. citizen parent, spouse, or child over the age of 21.

More broadly, advance parole could be made available to childhood arrivals who have not yet accrued sufficient unlawful presence to trigger the three- or ten-year unlawful presence reentry bars, and who qualify for an immigrant visa that requires consular processing but is not yet available because it is subject to the preference system and is in an oversubscribed category. This latter expansion of advance parole would allow eligible childhood arrivals to remain in the U.S. and work lawfully until their visa becomes available, and then to depart the country for the required consular processing without having accrued sufficient unlawful presence to trigger the three- or ten-year unlawful presence reentry bars.²²¹ Finally, regardless of the conditions under which advance parole is made available to childhood arrivals, the Executive Branch could guarantee that they would be permitted to reenter, or could limit denial of reentry to certain specified reasons, which could be subject to some form of appeal.

It is difficult to predict how many childhood arrivals would benefit from these proposed expansions of advance parole. By the end of the 2015 fiscal year, 19,943 DACA recipients had been granted advance parole out of 699,832 total DACA recipients, and 4883 applicants for adjustment of status to permanent resident were DACA recipients who had previously been granted advance parole.²²² As of September 2017, approximately 6% of DACA recipients had been granted advance parole and about 5% of DACA recipients had adjusted to permanent resident status (but data does not indicate what percentage of DACA recipients who adjusted status had previously been granted advance parole).²²³

that permanent return migration from the U.S. to South Korea, Ireland, and Poland has increased in the last 15 years).

²²¹ Childhood arrivals with prior periods of unlawful presence (meaning those who lacked both DACA and parole for six months or longer after turning 18 ½) would still be subject to the three- and ten-year unlawful presence reentry bars if they departed the U.S. for consular processing or any other reason.

²²² U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 202, at 6; *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2015*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 30, 2015), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821_daca_performancedata_fy2015_qtr4.pdf.

²²³ Glenn Kessler, *Did Obama Allow a 'Back Door' to Citizenship Through DACA?*, WASH. POST. (Sept. 7, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/>

There are approximately 2.5 million childhood arrivals; therefore, one estimate is that 75,000–150,000 childhood arrivals might be able to take advantage of advance parole if offered under the circumstances identified above.²²⁴

Although expanding advance parole to childhood arrivals would allow more of them to obtain an immigrant visa and eventual citizenship, as with the proposed revisions to cancellation of removal and parole-in-place discussed above, doing so need not be viewed as an amnesty or end run around Congress. Childhood arrivals would still need to qualify for one of the paths to permanent residence and citizenship statutorily created by Congress. Advance parole would only remove a few of the most common barriers for those who would otherwise qualify for an immigrant visa. Because those barriers were enacted to deter noncitizens from intentionally entering and remaining in the U.S. unlawfully, using advance parole to allow childhood arrivals to overcome them would not undermine their purpose.

Expanding advance parole to childhood arrivals under one or more of the scenarios described above could be implemented through the same procedures previously used to allow DACA recipients to travel with advance parole: childhood arrivals would submit an Application for Travel Document (Form I-131) to USCIS, along with proof of eligibility, evidence of any discretionary factors that they would like considered, and payment of the fee USCIS establishes as sufficient to cover the costs of evaluating the application's sufficiency.²²⁵

E. Elimination of the Unlawful Presence and Other Admissibility Bars Through Provisional Waivers

Congress has given the Executive Branch the authority to waive certain grounds of inadmissibility for qualifying applicants through the grant of inadmissibility waivers. The Executive Branch could make inadmissibility waivers more accessible to childhood arrivals by refining the criteria for granting provisional unlawful presence waivers, and by expanding the availability of provisional waivers to other grounds of inadmissibility. This would allow qualifying childhood arrivals who would otherwise be eligible for an immigrant visa to access one of the paths to permanent residence and citizenship statutorily created by Congress.

2017/09/07/did-obama-allow-a-backdoor-to-citizenship-through-daca/?noredirect=on&utm_term=.e71f7f30c893.

²²⁴ Kerwin & Warren, *supra* note 9, at 321.

²²⁵ Currently the fee USCIS charges for considering Applications for Travel Documents ranges from \$0–\$660 based on the grounds for the request. *I-131 Application for Travel Document*, *supra* note 201 (listing fees ranging from \$0–\$660 depending on applicant's age and current immigration status).

By definition, all childhood arrivals lack lawful immigration status. Thus, the most common ground of inadmissibility that childhood arrivals face is being present in the U.S. without lawful immigration status. Childhood arrivals who would otherwise qualify for an immigrant visa can avoid this ground of inadmissibility by leaving the U.S. and returning to their home country to obtain the visa through consular processing. The problem with this approach is that childhood arrivals who have accrued six months or more of unlawful presence will be subject to a new ground of inadmissibility: the three- and ten-year reentry bars for unlawful presence.

Section 212(a)(9)(B)(v) of the INA gives the Secretary of Homeland Security the discretion to waive the three- and ten-year unlawful presence reentry bars for a noncitizen if refusing admission to the noncitizen “would result in extreme hardship” to a qualifying relative (a spouse or parent who is a U.S. citizen or permanent resident).²²⁶ Before 2013, immigrant visa applicants could apply for an unlawful presence waiver only after they had departed the U.S. and appeared for an immigrant visa interview at an American consulate in their country of origin.²²⁷ This required applicants to leave the U.S. (and also leave their qualifying relative, unless their qualifying relative could travel with them) with little assurance of when or even if they would be allowed to return. Starting in 2013, USCIS began allowing applicants to apply for provisional unlawful presence waivers *before* departing the U.S. for their immigrant visa interview.²²⁸ “This new process was developed to shorten the time that U.S. citizens and lawful permanent resident family members are separated from their relatives while those relatives are obtaining immigrant visas [through consular processing].”²²⁹

Initially, only certain immigrant visa applicants (those who were sponsored by a U.S. citizen immediate family member) were eligible to participate in the provisional unlawful presence waiver process; applicants who qualified for a visa on some other basis still had to apply for an unlawful presence waiver after appearing for their interview abroad.²³⁰ In

²²⁶ INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). Note that this is a different standard from that used for cancellation of removal, which is available to applicants who have a U.S. citizen or permanent resident spouse, parent, *or child younger than 21* who would suffer “exceptional” and “extremely unusual” hardship if the applicant were removed. INA § 240A(b), 8 U.S.C. § 1229b(b). Extreme hardship to a U.S. citizen or permanent resident child younger than 21 is not a ground for seeking a provisional unlawful presence waiver. *See* INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

²²⁷ *See Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> (last updated Jan. 5, 2018).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

2016, however, USCIS expanded the provisional unlawful presence waiver process to include qualifying applicants for any type of immigrant visa.²³¹

Going forward, USCIS could further revise the way it administers unlawful presence waivers, this time by refining the definition of extreme hardship that it employs.²³² For example, extreme hardship could be presumed when a childhood arrival plays a meaningful role in the qualifying relative's life in the U.S. Extreme hardship could also be presumed when conditions in the childhood arrival's country of origin are such that the qualifying relative might need to support the childhood arrival financially, or would suffer mental distress worrying about the childhood arrival's safety or wellbeing. These definitions of the term extreme hardship would comport with the authority Congress has granted the Executive Branch to waive the unlawful presence bars while also taking into account the unique circumstances of childhood arrivals, many of whom have deep ties to their families and community in the U.S. and face limited opportunities and challenging circumstances in their country of origin.²³³

In addition to refining the definition of extreme hardship used when childhood arrivals apply for provisional unlawful presence waivers, the Executive Branch could also revise the way it processes admissibility waivers by expanding the availability of provisional waivers to grounds of inadmissibility other than unlawful presence.²³⁴ Doing so would appropriately take into account childhood arrivals' unique situation: they may be present in this country through no fault of their own, and many have stronger ties here than to their country of origin, which would make it particularly hard if they had to spend extended periods of time in their country of origin waiting for a decision on their waiver request.

Of course, changing the admissibility waiver process to take into account childhood arrivals' unique circumstances by refining the definition of extreme hardship and expanding the provisional process to all admis-

²³¹ *Id.* The applicant still must establish eligibility for the unlawful presence waiver, e.g., that refusing his or her admission would result in extreme hardship to a qualifying relative. *Id.*

²³² Because the statute does not define extreme hardship, the Executive Branch has the discretion to employ any definition that is based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

²³³ This would be similar to the approach the Executive Branch has taken with parole-in-place: it has a published policy defining “urgent humanitarian reasons or significant public benefit” to include situations when the applicant is the immediate family member of someone serving in the military. *See infra* Section III.C.

²³⁴ Other grounds of inadmissibility that can be waived include health-related grounds; certain criminal grounds; membership in a totalitarian party; immigration fraud or misrepresentation (excluding false claims to U.S. citizenship); smuggling; and being the subject of a civil penalty. INA § 212(a), 8 U.S.C. § 1182(a).

sibility waivers would allow more of them to obtain an immigrant visa and eventual citizenship. This need not, however, be viewed as an amnesty or end run around Congress. Childhood arrivals would still need to qualify for one of the paths to permanent residence and citizenship statutorily created by Congress. Those applying for a provisional unlawful presence waiver would also need to prove that they have a U.S. citizen or permanent resident spouse or parent who would suffer extreme hardship if the childhood arrival were subject to the three- or ten-year unlawful presence reentry bars. Those bars were enacted to deter noncitizens from intentionally entering the U.S. unlawfully; refining the definition of extreme hardship to allow childhood arrivals with a qualifying relative to avoid their application should not undermine their purpose. Similarly, those applying for a provisional waiver of another ground of inadmissibility would still need to establish their eligibility for a waiver of that ground of inadmissibility; expanding the provisional process to any inadmissibility waiver for which childhood arrivals apply would simply allow them to remain in the country they view as home until their waiver request is decided, rather than being required to spend an extended period of time in a country to which they may have few if any ties, waiting for the waiver to be processed.²³⁵

It is difficult to predict how many childhood arrivals would benefit from these proposed changes to the admissibility waiver process. In 2015, USCIS received about 23,000 regular inadmissibility waiver applications, and 47,888 provisional unlawful presence waiver applications.²³⁶ In 2016, 57,150 applications for provisional unlawful presence waivers were filed, representing a 19% increase from 2015 and a 35% increase from 2014.²³⁷ Historically, about 70% of waiver applications are approved.²³⁸ Childhood

²³⁵ In February 2018, the average processing time for an inadmissibility waiver application was 15 months. *USCIS Processing Time for the Nebraska Service Center*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (last updated Feb. 1, 2018) (in February 2018 USCIS was processing applications filed on November 2, 2016). The average processing time for a provisional unlawful presence waiver application was almost seven months. *USCIS Processing Time for the National Benefits Center*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://egov.uscis.gov/cris/processingTimesDisplay.do> (last updated Jan. 28, 2018) (in January 2018 USCIS was processing applications filed on July 28, 2017). Recall that applicants for provisional unlawful presence waivers can remain in the U.S. while their application is pending, whereas applicants for all other inadmissibility waivers must file their application in their country of origin, and then remain in their country of origin until their application is granted.

²³⁶ *Domestically Filed Application for Waiver of Grounds of Inadmissibility (I-601) Receipts, Approvals, Denials, Approval Rate, Denial Rate, Request for Evidence (RFE) Rate*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Apr. 29, 2015), <http://www.cayerdysonlaw.com/newsandlinks/images/043015%20I-601%20and%20I-601A%20Statistics%20FY2010%20to%202015.pdf>; KIRCHNER, *supra* note 158, at 20.

²³⁷ KIRCHNER, *supra* note 158, at 20.

²³⁸ *Id.*; see also *supra* note 236.

arrivals comprise about 22% of the undocumented population.²³⁹ Therefore, one estimate would be that about 12,573 childhood arrivals might apply for a provisional unlawful presence waiver each year, of which about 8,800 would be granted, and about 5,000 childhood arrivals might apply for other provisional waivers each year, of which about 3,500 would be granted.²⁴⁰

Refining the provisional unlawful presence process as proposed above so that it recognizes childhood arrivals' unique situation should be straightforward to implement. USCIS could follow the same procedure it used when it first expanded the provisional unlawful waiver process to all immigrant visas: it would publish a proposed rule in the Federal Register, take comments, and then publish the final rule.²⁴¹ If the provisional waiver process were expanded beyond unlawful presence waivers to other grounds of inadmissibility for childhood arrivals, USCIS would also need to create a new application form, just as it created a new application form for provisional unlawful presence waivers. Childhood arrivals would then complete the appropriate form and submit it to USCIS with payment of the applicable fee.²⁴²

F. *Deferred Action on a Case-by-Case Basis in Limited Situations*

Noncitizens subject to removal can receive deferred action from the Executive Branch on a case-by-case basis for humanitarian reasons, administrative convenience, or if doing so is in the interest of the Executive Branch's overall immigration enforcement mission.²⁴³ The Executive

²³⁹ *Profile of the Unauthorized Population: United States*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>.

²⁴⁰ These numbers are approximations derived from the data provided in *Profile of the Unauthorized Population*, *supra* note 239 and KIRCHNER, *supra* note 158, at 20.

²⁴¹ See, e.g., Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50,244, 50,246–47 (July 29, 2016).

²⁴² The current fees for a provisional unlawful presence waiver request total \$715, and the current fees for a ground of inadmissibility waiver request total \$1,015. See *I-601A, Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-601a> (last updated Jan. 3, 2018); *I-601, Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/i-601> (last updated Nov. 7, 2017).

²⁴³ This authority is not expressly conferred by statute, but rather is implied both by the U.S. Constitution and by its reference, and thus endorsement by implication, in several federal statutes. See U.S. CONST. art. II, § 3, cl. 5; 6 U.S.C. § 202(5) (2012); INA § 103(a)(3); 8 U.S.C. § 1103(a)(3); INA § 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (Violence Against Women Act self-petitioners not in removal proceedings are “eligible for deferred action [and] employment authorization”); INA § 237(d)(2), 8 U.S.C. § 1227(d)(2) (DHS may grant stay of removal to applicants for T or U visas but the denial of a stay request “shall not preclude the alien from applying for . . . deferred action”); REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 312, 313 (codified at 42 U.S.C.

Branch could employ this practice on a case-by-case basis for childhood arrivals who present uniquely deserving situations.

Deferred action is a longstanding administrative mechanism by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.²⁴⁴ Deferred action does not confer any form of legal status; it simply means that, for a specified period of time, an individual is permitted to be in the United States. Deferred action recipients are also permitted to apply for work authorization, which may be granted upon a showing of economic necessity.²⁴⁵

The Executive Branch could use this authority to grant deferred action to childhood arrivals on a case-by-case basis in limited situations.²⁴⁶ For example, deferred action could be granted to childhood arrivals who already qualify for an immigrant visa and are simply waiting for one to become available. In the past, deferred action has been granted with little controversy in similar situations: the Reagan and Bush Administrations both granted deferred action to people who qualified for a visa through sponsorship by family members who had recently acquired legal status due to a legalization program enacted in 1982 (which granted legal status to an estimated one-to-two million people, but not to their family members); the deferred action allowed them to remain in the country with their family members until the visas for which they qualified (which were in oversubscribed preference categories) became available.²⁴⁷ Similarly, since 2010 deferred action has been granted to applicants who qualify for U nonimmigrant status for victims of serious crimes but are subject to a waiting list because all 10,000 visas statutorily allocated to that status have already been allocated for the fiscal year.²⁴⁸ Applicants who would receive

§ 30301) (requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status"); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-36, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (codified at 8 U.S.C. § 1151) (spouse, parent, or child of certain U.S. citizens who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").

²⁴⁴ "Deferred action" *per se* dates back at least as far as 1975. See Memorandum from Janet Napolitano, *supra* note 21, at 2 n.1, citing *Operation Instructions* § 103.1 (a) (1) (ii), U.S. CITIZENSHIP & IMMIGRATION SERVS. (1975).

²⁴⁵ See INA § 274A(h) (3), 8 U.S.C. § 1324a(h) (3); 8 C.F.R. § 274a.12(c) (14).

²⁴⁶ This is in contrast to DACA, which granted deferred action to childhood arrivals on a widespread basis pursuant to broad-based criteria.

²⁴⁷ See *Executive Grants of Temporary Immigration Relief, 1956-Present*, AM. IMMIGRATION COUNCIL (Oct. 2, 2014), <https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present>.

²⁴⁸ See *USCIS Approves 10,000 U Visas for 7th Straight Fiscal Year*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/news/uscis-approves-10000-u-visas-7th-straight-fiscal-year> (last updated Dec. 29, 2015); *Victims of Criminal Activity*, *supra* note 59. At the end of June 2017, over 100,000 applicants had been granted deferred action pending availability of a U visa. *Number of Form I-918, Petition for U Nonimmigrant*

a U visa but for the backlog are granted deferred action, including a work permit, until the visa becomes available.²⁴⁹

Looking forward, childhood arrivals who qualify for an immigrant visa that is in an oversubscribed preference category could be granted deferred action and a work permit until their visa becomes available. In addition, if Congress passes some form of DACA or the DREAM Act, the Executive Branch could exercise its discretion to grant deferred action to childhood arrivals who just miss qualifying for its benefits, but who present compelling circumstances. The Executive Branch could consider their situations on a case-by-case basis and give them the opportunity to prove that the equities favor an exercise of discretion. For example, an applicant who barely misses any age or date cut-off Congress imposes could submit evidence of her outstanding academic accomplishments; an applicant who falls just short of meeting any educational requirements could submit evidence of his extensive professional achievements; and an applicant with a disqualifying criminal record could submit evidence of her rehabilitation and exemplary community service.²⁵⁰

Granting childhood arrivals deferred action under one of the scenarios described above should not be viewed as an end run around Congress, because deferred action's benefits are much more limited than the benefits of either an immigrant visa or the DREAM Act. Deferred action offers no pathway to legal status or citizenship; it simply allows recipients to remain in the U.S. until they are able to access one of the existing paths statutorily created by Congress.

The Executive Branch could administer this limited form of deferred action for childhood arrivals the same way it granted deferred action before the DACA program was created: on an *ad hoc* basis, without any application system or way for childhood arrivals to affirmatively request the benefit, and without any clear policy or guidelines.²⁵¹ Of course, such an approach would be open to the same criticism that was directed at the administration of deferred action before DACA: namely, that it violated the rule of law principles of consistency, predictability, transparency, re-

Status, by Fiscal Year, Quarter, and Case Status 2009-2017, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Sept. 21, 2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2017_qtr3.pdf. Given the 10,000 annual statutory cap, this means some applicants will be in deferred action status for ten years.

²⁴⁹ *Victims of Criminal Activity*, *supra* note 59.

²⁵⁰ Case-by-case exceptions for childhood arrivals with disqualifying criminal records seem particularly appropriate, given the extensive research establishing that their age makes them part of the demographic most likely to have temporary lapses in judgment that can lead to profound legal consequences. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

²⁵¹ *See, e.g.*, Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 22–28 (2015).

viewability, and nondiscrimination.²⁵² Alternatively, the Executive Branch could administer this limited form of deferred action for childhood arrivals through a process similar to that which it used for DACA, though with modifications designed to avoid the most common criticisms challenging DACA's legality. For example, prior to implementing the program the Executive Branch could follow the Administrative Procedure Act's notice-and-comment procedures.²⁵³ Deferred action grants could be limited to unique and compelling situations, and administered with true discretion, resulting in denials even to applicants who fall within the stated guidelines, and grants to applicants who do not.²⁵⁴ The program could also be designed to address some of the criticisms that DACA supporters levelled at that process: applicants could be guaranteed that the confidential information they supply would not be used for immigration enforcement; grants could be given for open-ended periods of time, or periods longer than two years where appropriate; the application fee could be eliminated entirely, as it is for asylum applicants, or it could be waived or reduced for applicants who have not yet had the benefit of a work permit, and for those with limited financial resources.²⁵⁵

It is difficult to predict how many childhood arrivals would qualify for deferred action under the scenarios identified above.²⁵⁶ Of course, much would depend on which scenario is implemented, and how. Regardless, childhood arrivals who qualify for deferred action would be more likely to avoid accruing unlawful presence, and would have more time to try to qualify for one of the paths to legal status and citizenship statutorily created by Congress: as time passes, they would be more likely to meet and marry spouses eligible to sponsor them for permanent resident status, or those with younger U.S. citizen siblings will reach the point where the sibling turns 21 and becomes eligible to sponsor them for permanent resident status.

²⁵² *Id.*

²⁵³ See 5 U.S.C. § 553(b); see, e.g., *Texas v. United States*, 787 F.3d 733, 746 (5th Cir. 2015).

²⁵⁴ See *Texas*, 787 F.3d at 764.

²⁵⁵ CHARLES GORDEN ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03(2)(h) (2009) (noting that non-DACA grants of deferred action typically are open-ended and then periodically reviewed to determine whether deferred action is still warranted).

²⁵⁶ For an example of how changes in DACA criteria could affect the number of people eligible, see Randy Capps & Marc R. Rosenblum, *Executive Action for Unauthorized Immigrants: Estimates of the Populations that Could Receive Relief*, MIGRATION POLICY INST. (Sept. 2014), <http://www.migrationpolicy.org/research/executive-action-unauthorized-immigrants-estimates-populations-could-receive-relief>.

G. Greater Access to Justice Through Outreach and Fee Changes

The Executive Branch has the discretion to implement outreach initiatives that educate and assist noncitizens who may be eligible for immigration benefits; and to waive, reduce, or eliminate the fees it charges applicants for immigration benefits. By reallocating surplus funds to outreach programs and application fee changes for childhood arrivals, the Executive Branch could use this discretion to improve childhood arrivals' access both to existing paths to permanent residence and citizenship, and to any of the immigration-related benefits made more accessible to childhood arrivals through the policy and procedure changes identified above.

USCIS (the agency within the Department of Homeland Security that processes immigration applications filed within the U.S.) is essentially self-funded; virtually its entire budget for case processing and services comes from application fees, rather than Congressional appropriations.²⁵⁷ Since at least 2009, USCIS has employed an application fee structure that generates a surplus of \$73 million (or possibly more), which it has used to award grants exclusively for helping lawful permanent residents apply for citizenship.²⁵⁸ By definition, the beneficiaries of these grants have already enjoyed permanent resident status, including the legal right to work in the U.S., for three years or longer, and are at least 18 years old.²⁵⁹ The majority also have sponsors who are U.S. citizen or permanent resident family members, or employers.²⁶⁰ In contrast, childhood arrivals have no legal immigration status, may never have had the right to work legally in the U.S., may be younger than 18, and the vast majority have no family members with any legal immigration status. Given these differences, reallocating funding from helping permanent residents naturalize to helping childhood arrivals legalize could be a more appropriate and impactful use of USCIS's surplus.

²⁵⁷ See *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/aboutus> (last updated Jan. 17, 2018); KIRCHNER, *supra* note 158, at viii; *Our Fees*, *supra* note 24.

²⁵⁸ *Citizenship and Assimilation Grant Program*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/about-us/citizenship-and-integration-grant-program> (last updated Sept. 28, 2017). Of that surplus, \$10 million was awarded for the two-year period beginning on October 1, 2017, with a goal of helping 25,000 permanent residents apply for citizenship, the cost of which works out to be \$400 per applicant. *Id.*

²⁵⁹ INA § 316(a), 8 U.S.C. § 1426(a); INA §§ 318-19, 8 U.S.C. §§ 1428-29; INA § 334(b), 8 U.S.C. § 1445; 8 C.F.R. § 274a.12 (2017).

²⁶⁰ See U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2016 YEARBOOK OF IMMIGRATION STATISTICS 18 (2017), <https://www.dhs.gov/immigration-statistics/yearbook>; *Legal Immigration and Adjustment of Status Report Fiscal Year 2017, Quarter 3*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration> (last updated Oct. 25, 2017) (numbers listed in Excel spreadsheet link at the bottom of the webpage).

It is difficult to predict how many childhood arrivals could benefit from a USCIS-funded initiative to help them legalize. Some studies estimate that 15% or more of childhood arrivals could be eligible for some form of legal immigration status, even if the Executive Branch implements none of the policy and procedure changes this Article identifies.²⁶¹ One study concluded:

[W]hile it is often framed in political terms, our research suggests that the legalization of unauthorized immigrants can also be framed as an access to justice issue, particularly for those who may be eligible for lawful permanent residency, but do not know it or are unable to access legal services or assistance. For these unauthorized immigrants, legalization need not wait for executive actions such as DACA or DAPA, or even comprehensive immigration reform legislation.²⁶²

In addition to implementing outreach and education initiatives directed at childhood arrivals, USCIS could reallocate at least some of its surplus funds to waive, reduce, or eliminate the fees it charges childhood arrivals who apply for one of the existing paths to permanent residence and citizenship statutorily created by Congress, or who seek one of the immigration-related benefits identified above (parole-in-place, advance parole, provisional admissibility waivers, or deferred action) that the Executive Branch makes more accessible to childhood arrivals.

Some USCIS applications, such as those for asylum, do not require any fee payment, and many of those that do allow for fee waivers based on a showing of economic need.²⁶³ Notably, the entire \$725 application fee for naturalization can be waived with a showing of economic necessity, and starting in October 2016 USCIS also began offering a reduced fee of \$405 for naturalization applicants whose household income is at or below 200% of the federal poverty guidelines.²⁶⁴ In contrast, with the exception of naturalization applications filed by MAVNI participants, all of the

²⁶¹ KERWIN ET AL., *supra* note 80, at 2 (the undocumented population currently includes a high percentage—perhaps 15%—who may be eligible for an immigration benefit or relief, but do not know it or cannot afford to pursue it); Semple, *supra* note 80 (numerous attorneys across the country have reported that many individuals seeking legal advice to request DACA discovered that they were eligible for other relief). *But see* Wong et al., *supra* note 80, at 294 (“[W]e caution that a wholesale generalization of this 14.3 percent figure to the entire DACA-eligible population, or even to the broader unauthorized population, would be unwise.”).

²⁶² Wong et al., *supra* note 80, at 301–02.

²⁶³ *Asylum*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last updated Jan. 31, 2018) (“There is no fee to apply for asylum.”). Fee waivers are requested by submitting Form I-912 along with proof that the applicant receives a means-tested benefit, has a household income at or below 150% of the federal poverty guidelines, or has a financial hardship. *See I-912, Request for Fee Waiver*, *supra* note 84.

²⁶⁴ *See Our Fees*, *supra* note 24; *I-912, Request for Fee Waiver*, *supra* note 84.

applications required to pursue the immigration-related benefits this Article discusses have corresponding fees, only some of which can be waived based on a showing of economic need. For example, the application fees for an immigrant visa based on family sponsorship typically total \$1,980, and generally no fee waiver or reduction is available.²⁶⁵ The \$660 cost for a travel document and biometrics (required for parole, including advance parole and parole-in-place) can only be waived if the travel is for humanitarian reasons.²⁶⁶ No fee waiver is available for applications for provisional unlawful presence waivers or waivers of other grounds of inadmissibility, which cost \$715 and \$1,115, respectively.²⁶⁷

It is difficult to predict how many childhood arrivals would benefit from any change in application fees. Approximately half of the childhood arrivals eligible for DACA never applied for it.²⁶⁸ It seems likely that at least some of them determined that its mandatory application fee of almost \$500 outweighed the two years of limited benefits it provided.²⁶⁹ Thus, it seems likely that reallocating at least some of USCIS's surplus to reduce or eliminate the fees imposed when childhood arrivals pursue immigration relief could prompt more of them who qualify for some form of legal status to pursue it.²⁷⁰

Reallocating at least some of USCIS's approximately \$8 million annual surplus to help childhood arrivals should be straightforward to implement. Instead of only awarding grants to immigrant-serving organizations that help permanent residents naturalize, grants could be made to organizations that help childhood arrivals qualify for and pursue paths to permanent residence and citizenship. With respect to application fees, at least some of the surplus could be used to eliminate the filing fee for any immigration application submitted by a childhood arrival. Alternatively, the filing fees charged to childhood arrivals could be waived or at least reduced based on a showing of financial hardship. This could be implemented by revising Form I-912 (Request for Fee Waiver) and Form I-942 (Request for Reduced Fee), and their respective instructions, to provide that those forms may be filed by childhood arrivals submitting certain immigration applications.

²⁶⁵ See *supra* note 84 and cites therein. Similarly, no fee waiver was available for initial DACA applications or renewals, the fees for which totaled \$495 at the time the Trump Administration rescinded the program. *Supra* note 84.

²⁶⁶ See *Our Fees*, *supra* note 24; *Request for Fee Waiver*, *supra* note 84.

²⁶⁷ *Id.*

²⁶⁸ Lind, *supra* note 135.

²⁶⁹ See, e.g., Wong et al., *supra* note 80, and *Fee Increases for the DACA Program Could Put Relief Out of Reach for Immigrant Youth* (Oct. 27, 2017), <https://unitedwedream.org/2016/10/fee-increases-for-the-daca-program-could-put-relief-out-of-reach-for-immigrant-youth/>. The fee was \$465 when DACA was first announced, and increased to \$495 effective December 23, 2016. *Our Fees*, *supra* note 24.

²⁷⁰ See, e.g., Wong et al., *supra* note 196.

IV. CONCLUSION

Suggesting ways that the Executive Branch could exercise its discretion in the context of immigration may seem foolish or naive, given the numerous political and legal challenges that have nullified the Obama and Trump Administrations' recent forays into that realm. When Congress expressly delegates discretion to the Executive Branch, however, exercising that discretion within the clear parameters of that grant not only comports with, but bolsters, the separation of powers principle.

Congress has expressly granted the Executive Branch substantial discretion with respect to two paths to citizenship: through military service, and through permanent residence based on cancellation of removal. Congress has also granted the Executive Branch discretion when administering six immigration-related policies or procedures: parole-in-place, advance parole, inadmissibility waivers, deferred action, outreach programs, and application fees. The Executive Branch has uncontroversially exerted this authority on repeated occasions in the past, such as through the launch of the MAVNI program and its subsequent expansion to DACA recipients; the establishment of a parole-in-place policy for relatives of current, former, and pending members of the military; the extension of advance parole for any reason to recipients of Temporary Protected Status, U nonimmigrant status, and T nonimmigrant status; the creation of a provisional adjudication process for unlawful presence waivers; the ongoing funding of grants to immigrant-serving organizations that help lawful permanent residents become citizens; and the recent implementation of a reduced fee for naturalization applications.

Should the Executive Branch pursue any of the proposals identified in this Article, it would not only be acting well within its statutorily granted authority, it would also be furthering the policies underlying that legislative scheme: enhancing the economy, fostering family unity, and providing humanitarian relief. Making it easier for childhood arrivals to access the paths to citizenship statutorily created by Congress also supports Congress's goal of decreasing the number of unauthorized immigrants in the country without incenting additional unauthorized immigration, and comports with general principles of equity and justice.

Of course, even if the Executive Branch implemented every one of the proposals identified, it would only help a relatively small number of childhood arrivals obtain citizenship. While that could certainly be meaningful for those impacted, the majority of childhood arrivals would remain without legal status and subject to deportation absent comprehensive Congressional action.