

**DISCRETION IN IMMIGRATION LAW: A PARTIAL REMEDY FOR
STATELESS PEOPLE IN THE UNITED STATES**

*By Betsy L. Fisher**

* Betsy L. Fisher is a practicing immigration attorney, a lecturer in international refugee law at the University of Michigan Law School, and an advocate and ally with United Stateless. Thanks to Northeastern Law Review staff, especially Marissa Mooney, for helpful edits; Joanne Kelsey, Jaelyn Kelley-Widmer, David Baluarte, and Christiana Martenson for their comments on earlier drafts; and to Michigan Law faculty, including Julian Mortenson and Karima Bennoune, for their input. Special thanks and gratitude to Karina, Miliyon, and the United Stateless community.

TABLE OF CONTENTS

INTRODUCTION	365
I. STATELESS PEOPLE AND LEGAL PROTECTIONS IN THE UNITED STATES	369
A. <i>Statelessness: The Basics</i>	369
B. <i>Experiences of Stateless People in the United States</i>	371
C. <i>Legal Protections for Stateless Individuals in the United States</i>	373
D. <i>Importance of U.S. Government Action on Statelessness</i>	376
II. DISCRETION IN IMMIGRATION BENEFITS AND CIVIL IMMIGRATION ENFORCEMENT	378
A. <i>Discretion in Immigration Law</i>	378
B. <i>Immigration Benefits and Discretionary Requirements</i>	383
C. <i>Prosecutorial Discretion in Civil Immigration Enforcement</i>	384
D. <i>Legal Challenges to Exercises of Prosecutorial Discretion</i>	386
III. THE PROPOSAL: STATELESSNESS AS A SIGNIFICANT POSITIVE FACTOR IN DISCRETIONARY ANALYSIS	391
A. <i>Identifying Stateless Individuals</i>	392
1. Definition of Statelessness	392
2. Standard of Proof	393
3. Burden of Proof	394
B. <i>Considering Statelessness in Discretionary Analysis for Immigration Benefits</i>	395
C. <i>Considering Statelessness in Prosecutorial Discretion</i>	398
1. Deferred Action	399
2. Parole in Place	401
3. Stays of Removal	402
4. Limiting Detention	402
5. Employment Authorization	404

D. <i>Case Studies</i>	404
IV. EVALUATING THE PROPOSAL	407
A. <i>Legal Defensibility</i>	407
B. <i>Challenges in Implementation</i>	410
C. <i>Addressing the Impact of Immigration Enforcement on Stateless People</i>	413
1. Legal Status	413
2. Financial Hardship	415
3. Immigration Detention	415
4. Separation from Relatives	416
CONCLUSION	417

ABSTRACT

Although thousands of stateless people live in the United States, no law or policy provides lawful immigration status or relief to stateless people based on their statelessness. This Article argues that the U.S. executive branch should consider a noncitizen's statelessness as a positive factor in discretionary adjudications of immigration benefits and in the exercise of prosecutorial discretion when granting temporary reprieves from enforcement, evaluating detention, and providing work authorization. This proposal falls squarely within existing legal authority and would address many of the humanitarian needs of stateless people. However, its discretionary nature would lead to inconsistent implementation. Only legislation will provide stateless people a pathway to lawful permanent residence and citizenship.

INTRODUCTION

International law defines a stateless person as someone who is “not considered as a national by any State under the operation of its law”¹ Henry is a stateless person who survived the Holocaust and, now in his 80s, lives in Maryland.² As a young child at the conclusion of World War II, Henry moved with his family to the United States under a humanitarian immigration program, but Henry lost his legal status due to a conviction in 1967 for which he was pardoned in 2022.³ The conviction led Henry to experience decades of uncertain immigration status in the United States.⁴ Miliyon is another undocumented stateless person in the United States whose lack of legal status causes constant anxiety. Despite having a driver’s license, he makes sure not to drive fast or at night, lest he be apprehended and sent to immigration detention.⁵ Henry and Miliyon’s experiences of uncertainty and economic hardship are shared by tens of thousands of stateless people in the United States.⁶

This Article argues that positive exercises of discretion in U.S. immigration processes can partially address the humanitarian needs of stateless people in the United States. In December 2021, Secretary Alejandro Mayorkas announced that the Department of Homeland Security (“DHS”) would adopt a definition of statelessness for immigration purposes and take measures to improve the status of stateless people in the United States.⁷ As an announcement from an

1 Convention Relating to the Status of Stateless Persons art. 1, ¶ 1, Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter 1954 Convention art. 1, ¶ 1].

2 Lou Chibbaro Jr., *California Gov Pardons Md. Man for 1967 Gay Sex Conviction*, WASHINGTON BLADE (July 14, 2022), <https://www.washingtonblade.com/2022/07/14/california-guv-pardons-md-man-for-1967-gay-sex-conviction/>; Libor Jany, *Newsom Pardons Sara Kruzan, Imprisoned as a Teen for Killing Man who Trafficked Her*, YAHOO NEWS (July 2, 2022), <https://www.yahoo.com/video/newsom-pardons-sara-kruzan-imprisoned-030302533.html>.

3 Chibbaro Jr., *supra* note 2.

4 *Id.*

5 Stephanie Sy & Lena I. Jackson, *Hundreds of Thousands of Stateless People are Living in Legal Limbo in the U.S.*, PBS NEWSHOUR (Apr. 5, 2022), <https://www.pbs.org/newshour/show/hundreds-of-thousands-of-stateless-people-are-living-in-legal-limbo-in-the-u-s>.

6 CTR. FOR MIGRATION STUD., STATELESSNESS IN THE UNITED STATES: A STUDY TO ESTIMATE AND PROFILE THE US STATELESS POPULATION 2, 4, 70–74 (2020) (noting that an estimated 218,000 people in the United States are stateless or at risk of statelessness, and often experience economic and psychological hardship).

7 *DHS Announces Commitment to Enhance Protections for Stateless Individuals in the United States*, DEP’T OF HOMELAND SEC. (Dec. 15, 2021), <https://www.dhs.gov/news/2021/12/15/dhs-announces-commitment-enhance-protections-stateless>

administrative agency, this commitment must come through executive action using existing authorities rather than new legislation.

This Article proposes that the U.S. executive branch should consider statelessness as a significant, positive factor in discretionary analysis.⁸ This Article discusses two forms of discretion: (1) discretion in immigration benefits adjudications and (2) exercises of prosecutorial discretion in civil immigration enforcement.⁹ It argues that this comparatively minor, legally defensible change in administrative immigration policy can provide meaningful relief in addressing the legal uncertainty, financial hardships, lengthy immigration detention, and separation from family that many stateless people in the United States experience.¹⁰ Only legislation can provide stateless people with access to lawful permanent residence and naturalization based on a person's statelessness.¹¹ Even so, this proposal can provide some humanitarian relief immediately, which is critical given the small odds of legislation in the near future.¹²

In addition, this Article has two broader applications. First, it provides a blueprint for other jurisdictions that, like the United States, lack specialized legislation that addresses stateless people and thus rely on existing authorities to ameliorate the harms that stateless people experience. Second, current litigation threatens to sharply limit executive discretion in immigration enforcement. This Article demonstrates that, even if litigation succeeds in curbing the use of categorical programs like the Deferred Action for Childhood Arrivals ("DACA"), the executive branch can still address hardships created by U.S. immigration enforcement by examining humanitarian factors like a person's statelessness.¹³

This Article draws from three strands of literature. First, a growing body of academic work analyzes the international law of

individuals-united-states.

8 See *infra* Part III.

9 There are many other forms of discretion that are exercised in immigration law, including procedural discretion, such as whether to delay proceedings or grant a change in venue. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 761–63 (1997).

10 See *infra* Part IV.C.

11 See *Our Mission*, UNITED STATELESS, <https://www.unitedstateless.org/purpose> (noting that the organization's mission includes "changes to domestic laws to introduce a path to citizenship for the stateless in the U.S.") (last visited May 12, 2022).

12 See *infra* Part I.C.

13 See *infra* Part IV.A.

statelessness, including interpretations of the definition of statelessness from the 1954 Convention relating to the Status of Stateless Persons and applications of international human rights law to stateless people.¹⁴ Second, academic and advocacy publications describe the situations of stateless people and possible legislative solutions in the United States.¹⁵

- 14 See, e.g., Laura van Waas, *Nationality Matters*, SCH. OF HUM. RTS. RSCH. SERIES, VOL. 29 (2008); Alice Edwards & Laura van Waas, *Nationality and Statelessness under International Law*, AMERICAN J. OF INT'L L. (2014); Betsy L. Fisher, "The Operation of Law" in *Statelessness Determinations under the 1954 Statelessness Convention*, 33 WIS. INT'L L.J. 254, 268–70 (2015) [hereinafter Fisher, *Operation of Law*]; Carol Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232 (1995). Other studies address the intersection of statelessness with international refugee law, assessing the ways that an asylum seeker's statelessness can impact their asylum claim. MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS (2019); Alfred M. Boll, *Nationality and Statelessness in the International Law of Refugee Status*, 31 INT'L J. REFUGEE L. 169 (2019) (reviewing ERIC FRIPP, NATIONALITY AND STATELESSNESS IN THE INTERNATIONAL LAW OF REFUGEE STATUS (2016)). Finally, others focus on the implementation of statelessness determinations within specific jurisdictions or analyze states' nationality laws to identify gaps that can lead to statelessness. See, e.g., KATIA BIANCHINI, PROTECTING STATELESS PERSONS: THE IMPLEMENTATION OF THE CONVENTION RELATING TO THE STATUS ON STATELESS PERSONS ACROSS EU STATES (2018); Inst. on Statelessness and Inclusion & Glob. Citizenship Observatory, *Instrumentalising Citizenship in the Fight Against Terrorism*, INST. ON STATELESSNESS & INCLUSION (Mar. 2022), https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf; Betsy L. Fisher, *Gender Discrimination and Statelessness in the Gulf Cooperation Council States*, 23 MICH. J. GENDER & L. 269 (2016) [hereinafter Fisher, *Gender Discrimination*].
- 15 See CTR. FOR MIGRATION STUD., *supra* note 6; U.N. High Comm'r for Refugees [hereinafter UNHCR] & Open Soc'y Just. Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, JUST. INITIATIVE (2012), <https://www.justiceinitiative.org/uploads/26d69dde-2d4d-4617-9da9-e57b8cf30af7/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf> [hereinafter *Citizens of Nowhere*]; UNHCR, *Representing Stateless Persons Before U.S. Immigration Authorities*, UNHCR (2017), <https://www.refworld.org/pdfid/59a5898c4.pdf> [hereinafter *Representing Stateless Persons*]. Other articles address how statelessness impacts claims in the U.S. asylum system. See Maryellen Fullerton, *The Intersection of Statelessness and Refugee Protection in U.S. Asylum Policy*, 2 J. ON MIGRATION & HUM. SEC. 144 (2014); Stewart E. Forbes, "Imagine There's No Country": *Statelessness as Persecution in Light of Haile II*, 61 BUFF. L. REV. 699 (2013); Eileen Kaufman, *Shelter from the Storm: An Analysis of U.S. Refugee Law as Applied to Tibetans Formerly Residing in India*, 23 GEO. IMMIGR. L.J. 497 (2008–2009). Finally, a handful of articles propose and evaluate legislative solutions for stateless people in the United States. David Baluarte, *Life after Limbo: Stateless Persons in the United States and the Role of International Protection in Achieving a Legal Solution*, 29 GEO. IMMIGR. L.J. 351 (2015); Asako Ejima, *Ghosts in America: Working Towards Building a Legal Framework for Stateless Individuals in the United States*, 53 CASE W. RES. J. INT'L L. 357 (2021); Polly J. Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443

Finally, a substantial literature theorizes the role of discretion in U.S. administrative and immigration law¹⁶ and analyzes its application in practice.¹⁷ This Article builds on each of these strands to analyze the potential of executive, rather than legislative, action to improve the situation of stateless people in the United States.

This Article contains four Parts and a Conclusion. Part I describes the international law of statelessness, the human rights challenges that stateless people in the United States often face, the minimal legal protections afforded to stateless people in the United States, and the reasons that the U.S. government should take executive action to address statelessness. Part II outlines the considerable role of discretion in U.S. immigration adjudications. Many immigration benefits require a noncitizen to show that they meet eligibility requirements and that the noncitizen merits a favorable exercise of discretion.¹⁸ Government agencies also exercise prosecutorial discretion in civil immigration enforcement when they grant temporary reprieves, such as deferred action and parole, from immigration enforcement.¹⁹

Part III presents the Article's proposal. After addressing preliminary considerations in identifying stateless individuals, it argues that adjudicators should consider statelessness as a positive factor in discretionary analysis for immigration benefits and in the exercise of prosecutorial discretion. Part IV evaluates the potential of this proposal to address the challenges that stateless people face. It concludes that considering statelessness as a discretionary factor in immigration adjudications and enforcement would address some of the humanitarian challenges that stateless individuals in the United States face. Ultimately,

(2013).

16 Several works provide constitutional and legal theories of the role of discretion in administrative and immigration law. *See generally* Kanstroom, *supra* note 9; Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 36 IMMIGR. & NAT'Y L. REV. 143, 166 (2015) [hereinafter Motomura, *President's Dilemma*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

17 Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020) [hereinafter Wadhia, *Darkside Discretion*]; Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016) [hereinafter Wadia, *Demystifying Employment*]; Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765 (2021); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 36 IMMIGR. & NAT'Y L. REV. 1259, 1265–75 (2015).

18 *See infra* Part II.A., pp. 17–18.

19 *See infra* Part II.C.

considering statelessness as a discretionary factor is a crucial step—in the absence of legislation—that would provide a durable legal status.

I. STATELESS PEOPLE AND LEGAL PROTECTIONS IN THE UNITED STATES

This Part provides background on statelessness and the experiences of stateless people in the United States. Part I.A provides the definition of statelessness from the 1954 Convention and common causes of statelessness globally. Part I.B describes hardships that stateless people in the United States often face. Part I.C explains that the United States does not provide immigration relief to stateless people by virtue of their statelessness, leaving stateless people to rely on general constitutional or statutory provisions and leaving many with no access to immigration relief.

A. *Statelessness: The Basics*

The 1954 Convention relating to the Status of Stateless Persons defines a stateless person as someone “who is not considered as a national by any State under the operation of its law.”²⁰ Governments commonly do not apply their nationality laws as written. Further, it is common that additional laws, regulations, or practice “under the operation of its law” mean that a person who is covered by a nationality law in principle is still not recognized as a national.²¹ Under the 1954 Convention definition, it is the potential state of nationality’s determination that is definitive.²²

²⁰ 1954 Convention art. 1, ¶ 1, *supra* note 1.

²¹ *Id.* art. 1(1); UNHCR, HANDBOOK ON PROTECTION OF STATELESS PERSONS 12 ¶ 22 (2014), https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf (“The reference to ‘law’ in [the definition of statelessness] should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.”); Fisher, *Operation of Law*, *supra* note 14, at 274, 278–87 (describing ways in which state practice may vary from nationality laws as written); Fisher, *Gender Discrimination*, *supra* note 14, at 311 (discussing how gender discrimination in nationality law as well as in family, civil registration, and criminal law, creates a risk of statelessness).

²² One of the drafters of the Convention, Mr. Voigt of the Federal Republic of Germany, noted that “[n]o country of residence could dispute the declaration a country of origin that it had deprived a person of his nationality. The status of such a person was clear.” THE *TRAVAUX PRÉPARATOIRES* OF THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESSNESS PERSONS 104, 107–10 (Betsy L. Fisher, ed.,

This interpretation also makes good policy sense. Only the state can extend the benefits of nationality to an individual, and it is the state's determination that should carry the day.²³

The United Nations High Commissioner for Refugees ("UNHCR") estimates that there are ten million stateless people globally who become stateless for a variety of reasons.²⁴ For example, a child may be born stateless if their parents are stateless and the child is born in a country that does not grant nationality by birth in territory.²⁵ Examples of groups that are largely stateless include Palestinians, the Bidoon in Kuwait, and Rohingya in Burma.²⁶ A child whose birth is not registered may technically receive nationality at birth but become unable to prove their nationality through birth in territory or parentage later in life.²⁷ States may revoke nationality for political dissidents or members of minority groups. As an example, Ethiopia stripped nationality from individuals of Eritrean origin after Eritrean independence.²⁸ A territory may change hands, and individuals may not be recognized as nationals by the new state. For instance, many individuals in Soviet republics found themselves stateless after the dissolution of the Soviet Union.²⁹

Stateless individuals globally experience many human rights violations; many stateless people lack legal status in their country

2022); see also Fisher, *Operation of Law*, *supra* note 14, at 267–68, 288–89 (“When an applicant can present evidence that the state in question has disclaimed her as its citizen, the applicant need not point to a principle of law—whether in the nationality law or otherwise—in order to establish her statelessness.”).

23 As a British appellate court stated: “The ultimate decision about grant or refusal of citizenship to any person is entirely within the remit of the administrative and judicial authorities of the Republic of Ukraine. For me to make any determination of citizenship would be an unauthori[z]ed trespass upon the . . . sovereignty of the Republic of Ukraine.” Fedorovski, *Re Judicial Review* [2007] NIQB I19 [16] (UK).

24 UNHCR, *Special Report: Ending Statelessness within 10 Years*, UNHCR 16 (Nov. 2010), <https://www.unhcr.org/ibelong/special-report-ending-statelessness-within-10-years/>.

25 van Waas, *supra* note 14, at 52 (noting that states that do not convey nationality through birth in territory may result in the children of stateless parents inheriting their parents' statelessness).

26 ROSA LUXEMBURG STIFTUNG, *ATLAS OF THE STATELESS* 20–21, 26–27, 30–31 (2020).

27 Fisher, *Gender Discrimination*, *supra* note 14, at 285 (noting a birth registration is essential to demonstrating nationality, whether proving parentage in a state with nationality law following *jus sanguinis* or proving birth in territory in a state with nationality law following *jus soli* principles).

28 See, e.g., *Haile v. Holder (Haile II)*, 591 F.3d 572 (7th Cir. 2010) (describing an asylum applicant who was stripped of Ethiopian nationality due to his Eritrean origin).

29 *Sterba v. Holder*, 646 F.3d 964 (6th Cir. 2011) (describing an asylum claim for an individual of Russian descent in Estonia who was not recognized as Estonian after Estonia's independence from the Soviet Union).

of residence, leaving them vulnerable to immigration enforcement and indefinite detention.³⁰ They often lack access to employment authorization and public services like education and health care.³¹ Stateless individuals are often unable to obtain travel documents to travel internationally, which may lead to lifelong separation from relatives.³²

B. Experiences of Stateless People in the United States

A civil society survey estimated that 218,000 people in the United States are stateless or at risk of statelessness.³³ Stateless individuals in the United States report four challenges that largely mirror those reported by stateless people globally:³⁴ (1) lack of legal status, (2) financial hardship resulting from lack of long-term work authorization, (3) vulnerability to detention, and (4) separation from family members.³⁵

Some stateless people in the United States have a legal status that gives them access to permanent residence and citizenship, including as refugees and recognized asylum seekers.³⁶ For stateless people like Henry and Miliyon who have lost legal status in the United States or who never had it, they face a situation like other undocumented individuals, with at least one notable distinction: they have no other country where they are authorized to return.³⁷

Stateless people in the United States also commonly experience financial hardship.³⁸ For example, Karina is a stateless woman in the United States who, as a child, received a final order of removal.³⁹ Due

30 van Waas, *supra* note 14, at 249, 266; David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 266 (2006).

31 van Waas, *supra* note 14, at 340–41, 353 (noting that stateless people face obstacles accessing education, and healthcare).

32 van Waas, *supra* note 14, at 12–13 (noting that stateless people face obstacles accessing travel documents).

33 CTR. FOR MIGRATION STUD., *supra* note 6, at 2.

34 This Article will reference these challenges facing stateless people as they are common experiences, although not all challenges apply to all stateless people.

35 CTR. FOR MIGRATION STUD., *supra* note 6, at 68–73; *Citizens of Nowhere*, *supra* note 15, at 24–27; *Representing Stateless Persons*, *supra* note 15, at 3–4.

36 See CTR. FOR MIGRATION STUD., *supra* note 6, at 68–69 (discussing that, based on a 48-person study, many stateless individuals arrived in the United States with lawful status and noting that some stateless individuals have lawful permanent residence or other lawful status in the United States).

37 Baluarte, *supra* note 15, at 361.

38 CTR. FOR MIGRATION STUD., *supra* note 6, at 71.

39 John Washington, *‘It’s Like Living in Solitary Confinement, but Out in the World,’* THE NATION (Jan. 23, 2020), <https://www.thenation.com/article/society/immigration-stateless-deportation/>.

to a government mistake processing her paperwork, Karina was not required to report to immigration authorities as an adult.⁴⁰ But this also left her without work authorization.⁴¹ Without any form of lawful status, she was unable to receive financial aid and had to drop out of college.⁴² Even after she married a U.S. citizen, she could not obtain lawful status because she entered the country without inspection as a child.⁴³ Eventually, an immigration lawyer helped her to apply for DACA, which gives her access to work authorization.⁴⁴

Many stateless individuals also experience lengthy immigration detention after a final order of removal because they are rarely able to obtain travel documents to other states, meaning that they cannot be removed.⁴⁵ Professor David Baluarte describes the situation of Artour, a noncitizen of Armenian heritage who was born in the Republic of Georgia.⁴⁶ Artour's asylum claim in the United States was denied, he was ordered removed, and he was detained pursuant to removal.⁴⁷ Though Artour is stateless,

[a]fter two months in detention, Artour was asked to reach out to Armenia for travel documents, but was denied. Nevertheless, after six months, he received a letter [from U.S. immigration authorities] stating that his removal to the Republic of Georgia was foreseeable and that his detention would continue. After nine months, a Georgian consular official indicated that travel documents would not likely be issued. Nevertheless, he received another notice [from U.S. immigration authorities] after eleven months that his removal was foreseeable and his detention would therefore be continued. Artour continued in detention until a *pro bono* lawyer filed a petition for *habeas corpus* on his behalf, and he was released a week later, after 14 months, without the petition even being adjudicated.⁴⁸

As Artour's experience illustrates, even safeguards against indefinite detention are easily circumvented by overzealous immigration

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*; see *infra* Part III.B.

44 Washington, *supra* note 39.

45 *Representing Stateless Persons*, *supra* note 15, at 34; Baluarte, *supra* note 15, at 361–62.

46 Baluarte, *supra* note 15, at 364.

47 *Id.*; see *infra* Part III.B.

48 Baluarte, *supra* note 15, at 364 (emphasis in original).

enforcement officers.⁴⁹

Finally, without access to travel documents, stateless individuals often face long periods of separation from their family members outside the United States.⁵⁰ Tatianna is a stateless woman from the former Soviet Union whose oldest son was detained in the Soviet Union because he opposed the government.⁵¹ Afraid that her younger son would also be detained, Tatianna fled with him to the United States in search of protection and hoping to reunite with her older son later.⁵² During this time, the USSR dissolved and Tatianna's country of citizenship ceased to exist.⁵³ After their asylum claims were denied, both Tatianna and her younger son were detained, and then released when they could not be removed.⁵⁴ Tatianna lacked legal status in the United States that would allow Tatianna to apply for her older son to join her.⁵⁵ She also did not have nationality in any other country that would allow them to travel, leaving the family separated for decades.⁵⁶ Other stateless people with family members in the United States may experience long separations during detention because they are prevented from traveling domestically as a condition of their release from immigration detention.⁵⁷

C. *Legal Protections for Stateless Individuals in the United States*

While the international definition of a stateless person can “no doubt be considered as having acquired a customary nature,”⁵⁸ there is no corresponding customary international obligation that requires states to offer legal status or other form of protection to stateless people.⁵⁹ The 1954 Convention defines rights that signatory states must offer stateless

49 See CTR. FOR MIGRATION STUD., *supra* note 6, at 69.

50 *Id.* at 69–71.

51 Shaminder Dulai & Moises Mendoza, *Stateless: The Ultimate Legal Limbo*, NEWSWEEK (Apr. 10, 2015), <https://www.newsweek.com/stateless-ultimate-legal-limbo-319461>.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 CTR. FOR MIGRATION STUD., *supra* note 6, at 71.

58 Int'l L. Comm'n, Rep. on the Work of its Fifty-Eighth Session, at 49, U.N. Doc. A/61/10 (2006).

59 BIANCHINI, *supra* note 14, at 67 (noting that even the 1954 Convention does not require state signatories to provide a particular form of legal status or to exempt stateless people from domestic immigration laws).

people, but the United States has not acceded to the 1954 Convention.⁶⁰ As a result, the United States has neither a customary nor treaty obligation to identify or offer protection to stateless people by virtue of their statelessness. As of April 2023, the United States still had not done so.⁶¹ Where states lack legislative or regulatory provisions addressing stateless people as such, stateless people are left to rely on general legal norms such as limitations on immigration detention or temporary periods of tolerated stay for individuals who cannot be deported.⁶² Katia Bianchini's comparative study of European Union ("EU") states demonstrates that states that did not adopt specific schemes to address statelessness offered less generous forms of protection to stateless people.⁶³ Use of general legal norms often failed to meaningfully address the humanitarian challenges that stateless people face.⁶⁴

This pattern holds true in the United States. Instead of requesting legal status by virtue of a person's statelessness, as individuals in twenty-one countries can do,⁶⁵ stateless people in the United States can only claim immigration benefits and relief established for other purposes.⁶⁶ Some stateless people in the United States have a legal status and a pathway to permanent residence and citizenship through, for example, status as a resettled refugee.⁶⁷ Stateless people seeking immigration

60 1954 Convention art. 1, ¶ 1, *supra* note 1.

61 Note, however, that adjudicators in the United States do have to determine individual's nationality in a variety of situations. Fisher, *Operation of Law*, *supra* note 14, at 268–70 (noting that U.S law requires determinations of nationality in asylum, in designating a country of removal, and for purposes of federal court jurisdiction based on diversity).

62 See generally BIANCHINI, *supra* note 14, at 177–206 (discussing the application of general immigration protections to stateless people in the Czech Republic, Germany, Greece, the Netherlands, and Sweden, none of which had specific legislation or regulation to identify and protect stateless people as such).

63 *Id.* at 5 (“States with specific statelessness determination procedures tend to ensure more protection than other States . . .”).

64 *Id.* at 177–80 (describing protections in EU Member States that do not have specific protections for stateless individuals and provide other forms of protection such as tolerated stay or subsidiary protection).

65 UNHCR, *Good Practice Papers, Action 6: Establishing Statelessness Determination Procedures for the Protection of Stateless Persons*, UNHCR (July 2020), <https://www.refworld.org/pdfile/5f203d0e4.pdf>.

66 See generally *Representing Stateless Persons*, *supra* note 15 (providing information to immigration lawyers about representing stateless people in procedures such as asylum and deferred action).

67 CTR. FOR MIGRATION STUD., *supra* note 6, at 61–66 (listing individuals who are likely stateless and who were resettled or received asylum in the United States).

relief from deportation may claim asylum.⁶⁸ Stateless people subject to lengthy immigration detention may rely on habeas protections to secure release under the Supreme Court precedent *Zadvydas v. Davis*.⁶⁹ But in many situations, no immigration benefit is available to a stateless person.⁷⁰ The lack of such a system exposes stateless people in the United States to significant uncertainty.⁷¹

Legislation that would establish a mechanism to identify and provide lawful status to stateless people has been introduced in four sessions of Congress via the Refugee Protection Act (“RPA”), a bill that addresses asylum, refugee resettlement, and other humanitarian immigration measures.⁷² The RPA establishes a specific pathway to lawful permanent resident status for noncitizens who are determined to be stateless, providing access to work authorization and travel documents.⁷³ This provision was included in the comprehensive immigration reform bill that passed the Senate in 2013.⁷⁴ Similarly, in 2022, the Stateless Protection Act would have extended status and protections from deportation to stateless individuals.⁷⁵ Regrettably, neither bill passed,

68 *Representing Stateless Persons*, *supra* note 15, at 11, 20.

69 *Zadvydas v. Davis*, 533 U.S. 678 (2001). In fact, *Zadvydas* was a stateless person, though the Court declined to use this word to describe his situation. *Id.* at 684 (observing that “*Zadvydas* . . . was born, apparently of Lithuanian parents, in a displaced persons camp in Germany in 1948. . . . In 1994, Germany told the INS that it would not accept *Zadvydas* because he was not a German citizen. Shortly thereafter, Lithuania refused to accept *Zadvydas* because he was neither a Lithuanian citizen nor a permanent resident. . . . In 1998, Lithuania rejected, as inadequately documented, *Zadvydas*’ effort to obtain Lithuanian citizenship based on his parents’ citizenship; *Zadvydas*’ reapplication is apparently still pending.”).

70 Baluarte, *supra* note 15, at 360–61 (noting that stateless individuals are presumed to be removable, leaving them subject to immigration detention, though they cannot generally be removed, and that “there is no legal framework for the recognition or protection of stateless persons” in the United States).

71 *See supra* Part I.B.

72 *See* Refugee Protection Act of 2019, H.R. 5210, 116th Cong. § 122 (2019); Refugee Protection Act of 2016, H.R. 5851, 114th Cong. § 17 (2016); Refugee Protection Act of 2013, H.R. 1365, 113th Cong. § 17 (2013); Refugee Protection Act of 2011, H.R. 2185, 112th Cong. § 17 (2011).

73 *See* Refugee Protection Act of 2019, H.R. 5210, 116th Cong. § 122 (2019). For an academic analysis of the impact of the provision for stateless people, *see* Baluarte, *supra* note 15, at 372–89.

74 Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. § 3405 (2013). The House never held a vote on S. 744. CONGRESS.GOV, S.744 – BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT (last visited May 5, 2022) (noting that this measure passed the Senate in 2013).

75 *See* Stateless Protection Act, S. 5330, 117th Cong. (2022).

and prospects for significant immigration reform legislation appear slim at this time.⁷⁶ Accordingly, to improve the status and situation of stateless people in the United States, the executive branch must rely on existing authority within the U.S. immigration system.

Fortunately, government agencies do not need new legislation to proactively identify stateless individuals and consider their statelessness in evaluations for existing immigration benefits or exercises of discretion in immigration enforcement. As such, this Article proposes that favorable exercises of discretion are available to stateless people and other groups facing humanitarian challenges in the United States, even if legal challenges succeed in sharply restraining prosecutorial discretion in immigration enforcement.⁷⁷ Further, this approach of identifying existing executive authorities can be employed in other jurisdictions that lack legislation providing legal status for stateless individuals.

D. Importance of U.S. Government Action on Statelessness

Addressing statelessness is a matter of importance to the U.S. government for three reasons. First, addressing statelessness ensures efficient use of limited government resources. Stateless people generally cannot be removed from the United States because, by definition, no other state is obliged to accept their return.⁷⁸ A report from the Inspector General of DHS reported that the inability of noncitizens (including stateless people) to secure travel documents was a significant factor limiting DHS' ability to implement orders of removal.⁷⁹ Pending removal, average daily costs to detain a noncitizen were \$143.92 in fiscal year 2020.⁸⁰ From the perspective of the U.S. government, use of limited

76 See *id.*; Elaine Kamarck, *Can Biden Pass Immigration Reform? History Says it will be Tough*, BROOKINGS INST. (June 22, 2021), <https://www.brookings.edu/blog/fixgov/2021/06/22/can-biden-pass-immigration-reform-history-says-it-will-be-tough/> (“Immigration reform may be as difficult in the third decade of the 21st century as it was in the first and second.”).

77 In fact, ICE adopted a similar approach in a 2022 policy requiring ICE officers to consider U.S. military service by a person or immediate family member “when making civil immigration enforcement decisions involving the noncitizen.” U.S. IMMIGR. & CUSTOMS ENF’T, ICE DIRECTIVE 10039.2, CONSIDERATION OF U.S. MILITARY SERVICE WHEN MAKING DISCRETIONARY DETERMINATIONS WITH REGARD TO ENFORCEMENT ACTIONS AGAINST NONCITIZENS (2022).

78 *Representing Stateless Persons*, *supra* note 15, at 34; Baluarte, *supra* note 15, at 361.

79 DEP’T OF HOMELAND SEC., OIG-19-28, ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS I, 7 (2019).

80 DEP’T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET

resources to pursue removal of noncitizens should focus on priority cases, such as noncitizens who pose a serious concern to public safety or national security.⁸¹

Second, the U.S. government has an interest in advancing human and constitutional rights of stateless people in the United States. While statelessness affects a relatively small number of people, the estimated 200,000 people who are stateless or at risk of statelessness in the United States face disproportionate hardships.⁸² Stateless people are at particular risk of extended periods of immigration detention,⁸³ and—because detention will not lead to removal—is often arbitrary and in violation of international law.⁸⁴ Where immigration detention does not advance the purpose of securing a noncitizen’s removal, it may also violate the individual’s constitutional rights.⁸⁵

Third, addressing statelessness in the United States would align domestic policy with foreign policy objectives. The U.S. government encourages other governments to address the rights of stateless people in its territory and to prevent future cases of statelessness.⁸⁶ It also provides significant funding to UNHCR to advance UNHCR’s mandate to identify and protect stateless people.⁸⁷ These activities clash with the reality that U.S. immigration law and policy provides no immigration

OVERVIEW FISCAL YEAR 2022 CONGRESSIONAL JUSTIFICATION 4 (2021).

81 DEP’T OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW 2 (2021) (“By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America’s well-being. We do not lessen our commitment to enforce immigration law to the best of our ability. This is how we use the resources we have in a way that accomplishes our enforcement mission most effectively and justly.”). Part II.D addresses that these priorities are currently being challenged in litigation.

82 See *supra* Part I.B.

83 CTR. FOR MIGRATION STUD., *supra* note 6, at 70–73.

84 U.N. Human Rights Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, at 5, U.N. Doc. CCPR/C/GC/35, (Dec. 16, 2014) (explaining that Article 9 of the International Covenant on Civil and Political Rights, governing liberty and security of person, means that detention “for the control of immigration is not per se arbitrary, but . . . must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. . . . The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.”).

85 *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (observing that “the statute’s basic purpose [is] assuring the alien’s presence at the moment of removal”).

86 *Statelessness*, U.S. DEP’T OF STATE, (last visited Oct. 3, 2022), <https://www.state.gov/other-policy-issues/statelessness/> (describing diplomatic activities and funding to address statelessness globally).

87 *Id.*

benefits or relief to stateless people as such. As reflected by the December 2021 commitment by the DHS, the Biden Administration has adopted a policy to advance the rights of stateless people in the United States.⁸⁸

This Article proposes considering statelessness in discretionary analysis to address these human rights concerns for stateless people in the United States.⁸⁹ It will evaluate the extent to which this solution can address these four challenges for stateless people: (1) lack of legal status, (2) financial hardship, (3) immigration detention, and (4) separation from family members.⁹⁰

II. DISCRETION IN IMMIGRATION BENEFITS AND CIVIL IMMIGRATION ENFORCEMENT

This Part describes existing legal authority by analyzing the role of discretion in U.S. immigration law. Part II.A provides an overview of the role of discretion and the distinction between lawful status, a substantive benefit outlined in immigration statute and regulation, and lawful presence, which is granted via a temporary reprieve from immigration enforcement that may also provide employment authorization. Part II.B describes the role of discretion in some immigration benefits, in which individuals who meet eligibility criteria for an immigration benefit must also demonstrate that the U.S. government adjudicator should favorably exercise discretion. Part II.C describes exercise of prosecutorial discretion, including temporary reprieves from immigration enforcement such as deferred action or parole.

A. *Discretion in Immigration Law*

Discretion plays a central role in U.S. immigration law. “U.S. immigration law in practice may be best described as a fabric of discretion and judicial deference.”⁹¹ Several government agencies exercise discretion in immigration processes. DHS is a cabinet-level government agency with numerous subagencies, many of which have immigration-

88 *DHS Announces Commitment to Enhance Protections for Stateless Individuals in the United States*, DEP’T OF HOMELAND SEC. (Dec. 15, 2021), <https://www.dhs.gov/news/2021/12/15/dhs-announces-commitment-enhance-protections-stateless-individuals-united-states>.

89 *See infra* Part III.

90 *See infra* Part IV.C.

91 Kanstroom, *supra* note 9, at 709.

related missions.⁹² These include U.S. Citizenship and Immigration Services (“USCIS”); U.S. Immigration and Customs Enforcement (“ICE”); and U.S. Customs and Border Protection (“CBP”).⁹³ The Department of Justice houses the Executive Office of Immigration Review (“EOIR”), which includes trial-level administrative courts staffed by immigration judges and the administrative appellate body, the Board of Immigration Appeal (“BIA”).⁹⁴ Immigration judges and the BIA adjudicate requests for several forms of discretionary immigration benefits, including asylum asserted as a defense to removal.⁹⁵ The Department of State also has discretion in immigration benefits,⁹⁶ stemming from its role in consular processing of visa applications from outside the United States.⁹⁷ Discretion is often assigned by statute to the Attorney General or Secretary of Homeland Security,⁹⁸ but is in practice exercised by low-level officials, including immigration benefits adjudicators in USCIS, immigration judges (who are administrative, Article I officials), and

92 See Homeland Security Act of 2002, 6 U.S.C. § III (2002) (establishing the Department of Homeland Security in Section 101); *id.* at §§ 252, 271, and 381 (creating or transferring U.S. Citizenship and Immigration Services, Secret Service and others established or transferred into the Department in sections 442, 451, and 821, respectively).

93 *Operational and Support Components*, DEP’T OF HOMELAND SEC. (Dec. 13, 2021), <https://www.dhs.gov/operational-and-support-components>. This Article focuses on individuals who are in the United States and does not propose remedies for individuals seeking to enter the United States. This means that CBP is of less relevance than USCIS and ICE, which are the focus of this Article’s policy suggestions.

94 *About the Office*, DEP’T OF JUST., (Feb. 3, 2021), <https://www.justice.gov/eoir/about-office>; Wadhia, *Darkside Discretion*, *supra* note 17, at 375.

95 Wadhia, *Darkside Discretion*, *supra* note 17, at 375 (describing government agencies with discretionary immigration authority).

96 See, e.g., U.S. DEP’T OF STATE, 9 FOREIGN AFFS. MANUAL 305.4-3(c)(a), FACTORS TO CONSIDER WHEN RECOMMENDING A WAIVER (2021) (instructing consular officers: “[y]ou may, in your discretion, recommend an INA 212(d)(3)(A) waiver . . .”).

97 U.S. DEP’T OF STATE, 9 FOREIGN AFFS. MANUAL 102.2-2, ROLE OF DEPARTMENT OF STATE (2022) (“The Department of State oversees the visa process abroad through its consular officers who determine visa eligibility, and works closely with interagency partners, especially the Department of Homeland Security (DHS), in this process. We are often the first U.S. Government agency to have contact with foreign nationals wishing to visit the United States.”). Because this Article focuses on stateless individuals in the United States, this Article will not address the Department of State further.

98 See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1182(h) (2008) (authorizing the Attorney General to waive several grounds of inadmissibility to noncitizens); Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(v) (2008) (granting discretion to the Attorney General to determine whether the noncitizen is “a danger to the security of the United States.”).

officers within ICE.⁹⁹

Two forms of discretion are important for the purposes of this Article: discretion in adjudicating requests for immigration benefits and prosecutorial discretion in civil immigration enforcement.¹⁰⁰ First, many immigration benefits, such as asylum or temporary protected status, have eligibility criteria outlined in the Immigration and Nationality Act (“INA”).¹⁰¹ Even when an applicant meets all eligibility criteria, though, the applicant must also demonstrate that they merit an exercise of positive discretion to receive the benefit.¹⁰² Professor Shoba Sivaprasad Wadhia calls the discretion invoked in denying benefits to an otherwise eligible noncitizen “Darkside Discretion.”¹⁰³ Both DHS and EOIR adjudicate discretionary immigration benefits.¹⁰⁴ Second, prosecutorial discretion describes any instance in which DHS declines to fully enforce immigration laws against a noncitizen.¹⁰⁵

99 Wadhia, *Darkside Discretion*, *supra* note 17, at 375 (“Immigration judges in EOIR have jurisdiction to make many discretionary decisions when deciding whether a person qualifies for relief from removal.”); Regulations permit the powers assigned by statute to these department heads to be delegated to lower-level authorities. 8 C.F.R. § 2.1, Authority of the Secretary of Homeland Security (2003); 8 C.F.R. § 1003.0(b)(2) (2003) (both authorizing delegations of authority to officials within DHS and EOIR, respectively).

100 There are many other forms of discretion that are exercised in immigration law, including procedural discretion, such as whether to delay proceedings or grant a change in venue. Kanstroom, *supra* note 9, at 761–63.

101 See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1158 (outlining eligibility criteria for asylum); Immigration and Nationality Act, 8 U.S.C. § 1254a (outlining eligibility criteria for temporary protected status).

102 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, VOLUME I - GENERAL POLICIES AND PROCEDURES, PART E – ADJUDICATIONS, CHAPTER 8 - DISCRETIONARY ANALYSIS (current as of Apr. 7, 2022), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (listing immigration benefits for which adjudication includes discretion, including extending or changing nonimmigrant status, humanitarian parole, temporary protected status, refugee status and asylum, among others).

103 Wadhia, *Darkside Discretion*, *supra* note 17, at 367.

104 *Id.* at 375.

105 Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 6 (2012) [hereinafter Wadhia, *Sharing Secrets*] (noting that DHS has “authority to not assert the full scope of the agency’s enforcement authority in each and every case” (citation omitted)). Discussions as to whether DHS’s enforcement of civil violations can be properly understood as “law enforcement,” and whether DHS’s exercises of discretion are properly understood as “prosecutorial discretion” are beyond the scope of this Article. See KATE M. MANUEL & TODD GARVEY, CONG. RSCH. SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES, I (2013), <https://sgp.fas.org/crs/misc/R42924.pdf> (noting that some commentators prefer to use the term “enforcement discretion.”). Moreover, they do not change the analysis in

The key difference between these two forms of discretion is that, in the first, a positive exercise of discretion in adjudicating immigration benefits leads to an individual receiving a substantive right with a legal basis for residence.¹⁰⁶ Lawful status is a substantive legal right and “a term of art that refers to being in the United States in a specific immigrant or non-immigrant visa classification and complying with its terms.”¹⁰⁷ Confusingly, forms of prosecutorial discretion including parole and deferred action provide lawful *presence*, but not lawful *status*.¹⁰⁸ A positive exercise of prosecutorial discretion offers a noncitizen only temporary reprieve from civil immigration enforcement, which conveys lawful presence but not lawful status.¹⁰⁹

Immigration law stipulates that a person who is “unlawfully present” in the United States for at least 180 days is inadmissible for a period of time, meaning that they are ineligible for immigration benefits unless a waiver applies.¹¹⁰ A noncitizen is considered unlawfully present if they are “in the United States after the expiration of the period of stay authorized . . . or is present in the United States without being admitted or paroled.”¹¹¹ However,

this Article that DHS does have clear legal authority based on statute, regulation, longstanding practice, and jurisprudence to exercise discretion (whatever form we call the form of discretion) to decline to enforce immigration law to the fullest extent. *See infra* Part IV.A; Wadhia, *Darkside Discretion*, *supra* note 17, at 3–4 (noting that “[d]eferred action has been part of the immigration system for more than fifty years, and is featured in the immigration statute, federal court decisions, regulations, and agency memoranda.”).

106 Wadhia, *Darkside Discretion*, *supra* note 17, at 7.

107 Beth Werlin, *Digesting the Argument in U.S. v. Texas: What is Lawful Presence and Why Does It Not Mean What It Sounds Like*, IMMIGR. IMPACT (Apr. 19, 2016), <https://immigrationimpact.com/2016/04/19/united-states-v-texas-lawful-presence>.

108 *Texas v. United States*, 809 F.3d 134, 147–48 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (noting that deferred action provides lawful presence for a defined period but does not provide lawful status).

109 BEN HARRINGTON, CONG. RSCH SERV., R45158, AN OVERVIEW OF DISCRETIONARY REPRIEVES FROM REMOVAL: DEFERRED ACTION, DACA, TPS, AND OTHERS, (Apr. 10, 2018) (“immigration authorities in the United States have sometimes exercised their discretion to grant temporary reprieves from removal to non-U.S. nationals (aliens) present in the United States in violation of the Immigration and Nationality Act (INA). . . . The primary benefit that a reprieve offers to an unlawfully present alien is an assurance that he or she does not face imminent removal.”)

110 Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(i) (2013). The INA stipulates that a person with at least 180 days but less than one year of unlawful presence is subject to a three-year inadmissibility bar. A person with more than one year of unlawful presence faces a ten-year inadmissibility bar. *Id.*

111 *Id.* § 1182(a)(9)(B)(ii) (2013).

[a]s a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful (emphasis in original).¹¹²

Lawful presence can provide an individual with work authorization and means that a person can depart the country without being inadmissible for unlawful presence in the future, though previous periods of unlawful presence still apply.¹¹³ To emphasize that prosecutorial discretion does not convey lawful status or any substantive right, agency policies about prosecutorial discretion routinely contain disclaimers like the following:

[This memorandum] is not intended to, does not, and may not be relied upon to create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party, including in removal proceedings or other litigation involving DHS, ICE, or the United States, or in any other form or manner whatsoever.¹¹⁴

There are few fixed distinctions between immigration benefits and forms of prosecutorial discretion apart from this distinction between lawful status and lawful presence. Immigration benefits carrying lawful status are established in legislation and regulation, while forms of prosecutorial discretion are often (but not always¹¹⁵) defined in agency policy.¹¹⁶ Individuals apply for immigration benefits using designated

112 U.S. CITIZENSHIP & IMMIG. SERV., ADJUDICATOR'S FIELD MANUAL, DISTINCTION BETWEEN "UNLAWFUL STATUS" AND "UNLAWFUL PRESENCE," 40.9.2(a)(2), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm40-external.pdf>.

113 See Wadhia, *Darkside Discretion*, *supra* note 17, at 6–7 (describing how deferred action provides access to employment authorization and lawful presence).

114 KERRY E. DOYLE, OFF. PRINCIPAL LEGAL ADVISOR, U.S. IMMIGR. & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., GUIDANCE TO OPLA ATTORNEYS REGARDING THE ENFORCEMENT OF CIVIL IMMIGRATION LAWS AND THE EXERCISE OF PROSECUTORIAL DISCRETION 17 (2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

115 *But see* Deferred Action for Childhood Arrivals, 8 C.F.R. §§ 236.21–25 (2022) (codifying Deferred Action for Childhood Arrivals, a form of prosecutorial discretion); 8 U.S.C. § 1182(d)(5)(A) (2013) (authorizing parole on a case-by-case basis).

116 Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN.

forms and formal processes for adjudication,¹¹⁷ while requests for prosecutorial discretion frequently (but not always¹¹⁸) have no form or formal process.¹¹⁹

B. Immigration Benefits and Discretionary Requirements

Numerous immigration benefits require an applicant to demonstrate both that they meet the threshold eligibility criteria outlined in legislation or regulation and that they merit a positive exercise of discretion.¹²⁰ When adjudicating these benefits, adjudicators first gather facts about the applicant, then determine whether the applicant is eligible for the benefit according to statutory or regulatory criteria.¹²¹ Where the applicant is eligible, the adjudicator weighs all relevant positive and negative factors and decides whether to exercise favorable discretion and approve the benefit.¹²² USCIS guidance as of July 2022 provides a general list of twenty-two factors that should be considered in discretionary consideration of immigration benefits where relevant, though the guidance notes that this list is “a non-exhaustive list of factors; the officer may consider any relevant fact in the discretionary analysis.”¹²³

PUB. INT. L.J. 243, 246 (2010) [hereinafter Wadhia, *Prosecutorial Discretion*].

117 For example, applications for asylum follow the procedures defined in the Immigration and National Act and accompany regulations. Immigration and Nationality Act, 8 U.S.C. § 1158(d)(1), (5)(A) (2008); 8 C.F.R. §§ 208.1-24 (2020). Noncitizens apply for asylum using Form I-589. U.S. CITIZENSHIP & IMMIGR. SERVS., *Form I-589, Application for Asylum and for Withholding of Removal* (updated Aug. 02, 2023), <https://www.uscis.gov/i-589>.

118 Form I-131 is used to request parole and Form I-821D is used to request Deferred Action for Childhood Arrivals. U.S. CITIZENSHIP & IMMIGR. SERVS., *Form I-131, Application for Travel Document* (updated June 12, 2023), <https://www.uscis.gov/i-131>; U.S. CITIZENSHIP & IMMIGR. SERVS., *Form I-821D, Consideration of Deferred Action for Childhood Arrivals* (updated May 30, 2023), <https://www.uscis.gov/i-821D>.

119 Wadhia, *Prosecutorial Discretion*, *supra* note 116, at 246.

120 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, *supra* note 102, at 1–3 (listing immigration benefits for which adjudication includes discretion, including extending or changing nonimmigrant status, humanitarian parole, temporary protected status, refugee status and asylum, among others).

121 *Id.* at 6–7.

122 *Id.* at 9.

123 *Id.* at 7–8.

C. Prosecutorial Discretion in Civil Immigration Enforcement

Unlike discretionary consideration in adjudications for immigration benefits, positive exercises of prosecutorial discretion do not provide an individual with a lawful immigration status.¹²⁴ Rather, prosecutorial discretion means that a government agency with civil immigration enforcement power chooses not to enforce that power to the maximum extent.¹²⁵ The Supreme Court has affirmed that, as in the criminal justice system, a “principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”¹²⁶

Prosecutorial discretion can be exercised by DHS subagencies USCIS, CBP, and ICE.¹²⁷ Prosecutorial discretion can apply at all stages of immigration enforcement, from individual decisions whether to apprehend or seek removal to decisions to grant temporary reprieves from enforcement such as stays of removal or deferred action.¹²⁸ DHS agencies can also offer work authorization resulting from discretionary, temporary reprieves from immigration enforcement.¹²⁹ Importantly, beneficiaries of deferred action and parole do not accrue periods of “unlawful status” while they benefit from temporary reprieves from prosecutorial discretion.¹³⁰

The factors and process for many forms of prosecutorial discretion are outlined only in agency policy documents.¹³¹ For example,

124 Wadhia, *Demystifying Employment*, *supra* note 17, at 3.

125 Hallett, *supra* note 17, at 1773–74. (“Although there are differences between these types of prosecutorial discretion, in terms of both scope and effect, they share a common feature—they all involve a decision by an executive branch official not to fully enforce the law in a particular case.”).

126 *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (“At each stage the Executive has discretion to abandon the endeavor . . .”).

127 Wadhia, *Darkside Discretion*, *supra* note 17, at 375.

128 Hallett, *supra* note 17, at 1773–74; MANUEL & GARVEY, *supra* note 105, at 11–12 (describing various forms of prosecutorial discretion within DHS’s authority).

129 8 C.F.R. § 274a.12(c)(II), (14), (18) (2022) (setting forth that individuals who are granted deferred action or parole or released on orders of supervision, respectively, are eligible for work authorization).

130 U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 112, at 40.9.2(b)(3)(J) (noting that deferred action does not constitute unlawful presence); *Id.* at 40.9.2(b)(1)(G) (noting that parole does not constitute unlawful presence).

131 Notably, however, no public guidance or agency policy describes the criteria for individual grants of deferred action. While providing guidance on numerous forms of discretion and adjudications, the USCIS Policy Manual does not provide

a 2011 ICE policy provided an extensive list of factors to consider when exercising prosecutorial discretion in civil immigration enforcement, including the length of residence in the United States, criminal and immigration history, family ties, and other factors related to hardship.¹³² A 2021 DHS policy directs officials to “prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security.”¹³³

The factors considered in prosecutorial discretion vary widely by the form of temporary reprieve offered, including weighing the financial costs to government and public safety and national security.¹³⁴ Discretionary analysis can also include weighing the hardship faced by a noncitizen or their family members.¹³⁵ General guidelines on exercising discretion have listed factors or reasons for consideration when exercising prosecutorial discretion, often seeking to focus immigration enforcement efforts on people who pose a danger to public safety or national security rather than others, such as families with a long presence in the United States.¹³⁶ Notably, Obama-era guidance directed ICE

any guidance on individual forms of deferred action. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, VOL. 3, PT. G, <https://www.uscis.gov/policy-manual/volume-3-part-g>, (last visited May 5, 2022) (containing no guidance on USCIS’s provision of deferred action); *see also* Wadhia, *Sharing Secrets*, *supra* note 105, at 8–9 (noting that any forms or agency memorandum governing deferred action is not publicly available). USCIS has published guidance on DACA and another group-based form of deferred action for special immigrant juveniles. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106.2, 236.21, 236.22, 236.23, 236.24, 236.25); U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, VOL. 6, PT. J, CH. 4, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4> (last visited May 6, 2022).

132 Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf’t, to All Field Off. Dir.s., Special Agents in Charge & Chief Couns. 4, U.S. IMMIGR. & CUSTOMS ENF’T (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

133 Memorandum from Alejandro N. Mayorkas, Secretary, DHS, to Tae D. Johnson, Acting Dir., U.S. IMMIGR. & CUSTOMS ENF’T 3–4 (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

134 *See, e.g., id.*; TAE D. JOHNSON, ACTING DIR., U.S. IMMIGR. & CUSTOMS ENF’T, DIRECTIVE H1005.3: USING A VICTIM-CENTERED APPROACH WITH NONCITIZEN CRIME VICTIMS (Aug. 10, 2021), <https://www.ice.gov/doclib/news/releases/2021/H1005.3.pdf>; Morton, *supra* note 132 (each listing factors and considerations to immigration enforcement officers about the exercise of prosecutorial discretion).

135 *Arizona v. United States*, 567 U.S. 387, 396 (2012) (noting that exercises of discretion may consider “immediate human concerns” and the “equities of . . . individual case[s].”).

136 *See* U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, VOL. 1, PT. E, <https://www.uscis.gov/policy-manual/volume-1-part-e>, (last visited Aug. 12, 2023).

officials to consider “whether the person’s nationality renders removal unlikely,” a factor that should lead ICE agents to consider statelessness when exercising prosecutorial discretion.¹³⁷

Parole, which provides lawful presence in the United States but not lawful status, is broadly outlined in the INA and may be granted “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.”¹³⁸ Parole is not intended to circumvent refugee processing.¹³⁹ Eligibility criteria for several specific applications of parole are outlined in regulations.¹⁴⁰ Proposed regulations will codify eligibility criteria for DACA, which offers deferred action to individuals who came to the United States while under the age of sixteen and meet other requirements, such as residency.¹⁴¹ The remainder of this Article focuses on prosecutorial discretion in the forms of deferred action, parole in place, stays of removal, releases from immigration detention, and employment authorization.

D. *Legal Challenges to Exercises of Prosecutorial Discretion*

While exercises of prosecutorial discretion can benefit noncitizens and the U.S. government, policies extending prosecutorial discretion also pose risks of litigation. Executive branch officials who are crafting new policies relating to the exercise of prosecutorial discretion, including for stateless people, must respond to three realities. First, legal challenges against prosecutorial discretion policies are likely. Second, categorical forms of prosecutorial discretion face increased risk of judicial review on the merits. Finally, the Supreme Court’s willingness to uphold categorical forms of prosecutorial discretion on the merits is, at best, questionable.

First, any prosecutorial discretion policy (whether in the form of enforcement guidelines or categorical, temporary reprieves from enforcement) is likely to face legal challenges—particularly as a result of aggressive litigation by the state of Texas against the Biden Administration’s immigration policies.¹⁴² As a result, executive branch

137 Morton, *supra* note 132, at 4.

138 Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (2013).

139 *Id.*

140 *See, e.g.*, 8 C.F.R. § 212.5 (2019) (parole for individuals in immigration detention); 8 C.F.R. § 212.19 (2021) (parole for entrepreneurs); 8 C.F.R. § 212.14 (2011) (parole for witnesses or informants in criminal or counterterrorism matters).

141 8 C.F.R. §§ 236.21.25 (2022); Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (2013) (authorizing parole on a case-by-case basis).

142 *See* Uriel J. García, *Trump Appointees are Helping Texas Derail Biden’s Immigration*

policymakers ought not to draft policies seeking to avoid litigation itself, since litigation may be unavoidable. Rather, policymakers should carefully craft policies to ensure that they are defensible if they are challenged.¹⁴³

One extreme example of a state's attempts to challenge prosecutorial discretion of immigration laws involves legal challenges to the Biden Administration's civil immigration enforcement guidelines. Dating back several decades, immigration agencies have established general guidelines on how immigration enforcement agencies should prioritize their resources when deciding whether to apprehend noncitizens or seek their removal.¹⁴⁴ During the Obama Administration, while DACA and other categorical programs faced significant litigation challenges, general immigration enforcement guidelines about "priorities for deportation were not challenged and were considered to be squarely within the government's discretionary powers."¹⁴⁵

Despite this longstanding precedent, the State of Texas challenged the Biden Administration's enforcement guidelines in 2021, and the federal district court in Texas issued a nationwide injunction.¹⁴⁶ The district court held that the Biden Administration's guidelines "prioritiz[e] the detention of some aliens over others," contravening the INA's categories of mandatory detention.¹⁴⁷ Thus, the district court found that "the Government has effectively conferred upon itself

Agenda, TEX. TRIB. (Mar. 15, 2022), <https://www.texastribune.org/2022/03/15/texas-paxton-immigration-biden-trump/> (noting more than twenty lawsuits were filed by Texas against Biden administration, often where one judge heard more than 75% of cases, allowing the State of Texas as plaintiff to choose their judge).

143 This strategy was adopted by the Trump Administration in the third iteration of its Muslim ban, which curbed the aspects of the first two versions of the Muslim Ban that were enjoined after legal challenges. See Avidan Y. Cover, *Quieting the Court: Lessons from The Muslim Ban Case*, 23 J. GENDER, RACE & JUST. 1, 24–25 (2020) ("As a result of the government's changes, the third version of the Muslim ban was still a ban, but different in form and asserted rationale, which enabled the Court to uphold its validity."). Thanks to Prof. Jaclyn Kelley-Widmer for this insight.

144 See, e.g., MEMORANDUM FROM DORIS MEISSNER, COMM'R, IMMIGR. & NATURALIZATION SERV., TO REG'L DIRS., DIST. DIRS., CHIEF PATROL AGENTS, & REG'L & DIST. COUNSEL OF THE U.S. DEP'T OF JUST. IMMIGR. & NATURALIZATION SERV. (Nov. 17, 2000), <https://www.aila.org/infonet/ins-memo-on-prosecutorial-discretion> ("This memorandum describes the principles with which the INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions."); Morton, *supra* note 132 (setting out factors for prioritizing immigration enforcement efforts).

145 Hallett, *supra* note 17, at 1772–73 (citation omitted).

146 Texas v. United States, 555 F. Supp. 3d 351 (S.D. Tex. 2021).

147 *Id.* at 404.

discretion as to the timing of detention—discretion it does not have.”¹⁴⁸ On appeal, a three-judge panel of the Fifth Circuit quickly stayed the injunction as it related to immigration enforcement guidelines,¹⁴⁹ noting that “while the district court’s interpretation of these statutes is novel, executive branch memos listing immigration enforcement priorities are not.”¹⁵⁰ After further proceedings, however, the district court vacated the memorandum.¹⁵¹ As a result, ICE attorneys do not apply guidelines on civil enforcement and instead decide whether to exercise discretion on a case-by-case basis.¹⁵² In an environment where general guidelines on prioritization are subject to litigation and nationwide injunctions, policymakers should assume that any other policy about prosecutorial discretion will also be challenged.

Second, litigation challenges face closer judicial scrutiny where they announce eligibility criteria on a categorical basis rather than a case-by-case basis.¹⁵³ As an initial matter, it is an appropriate and lawful exercise of the executive’s authority to establish categorical forms of prosecutorial discretion such as DACA. Appropriate, because clear criteria carry the benefit of making exercises of discretion “uniform, consistent, and nondiscriminatory.”¹⁵⁴ Lawful, because considering even categorical forms of prosecutorial discretion, “the legal authority to exercise prosecutorial discretion comes with the authority—indeed, the obligation—to adopt a system that is consistent with the rule of law.”¹⁵⁵

148 *Id.*

149 The Fifth Circuit left the injunction in place to the extent that it required compliance with the mandatory detention provisions. *Texas v. United States*, No. 21-40618, slip op. at 7–8 (5th Cir. Feb. 11, 2022).

150 *Id.* slip op. at 10. (citation omitted).

151 The full Fifth Circuit vacated the prior stay issued by a Fifth Circuit panel, and the District Court’s injunction was reinstated. *Texas v. United States*, 24 F.4th 407, 408–09 (5th Cir. 2021). The District Court then held a bench trial and vacated the memorandum as arbitrary, capricious, and contrary to procedure. *Texas v. United States*, 6:21-CV-00016, slip op. at 4, (S.D. Tex. June 10, 2022).

152 *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF’T, (updated July 27, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

153 But note that USCIS rejected some applications from individuals who met DACA eligibility criteria, making it a case-by-case basis adjudication. ANDORRA BRUNO, CONG. RSCH. SERV., R46764, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): BY THE NUMBERS 7–8 (2021), <https://sgp.fas.org/crs/homsec/R46764.pdf> (showing that, from 2012 to 2020, more than 82,000 initial applications for DACA were denied).

154 Motomura, *President’s Dilemma*, *supra* note 16, at 166.

155 Hiroshi Motomura, *The President’s Discretion, Immigration Enforcement, and the Rule of Law*, AM. IMMIGR. COUNCIL (2014), <https://www.americanimmigrationcouncil>.

Nonetheless, policies that provide categorical, temporary reprieves from immigration enforcement have faced significant challenges.¹⁵⁶ The most significant judicial decision regarding categorical forms of prosecutorial discretion is the Supreme Court decision in *Department of Homeland Security v. Regents of University of California*.¹⁵⁷ The Court found that, while exercises of prosecutorial discretion are generally beyond judicial review, DACA could be scrutinized because it “does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an ‘action [that] provides a focus for judicial review.’”¹⁵⁸ The opinion demonstrates the policymaker’s Catch-22: a program that provides clear criteria and processes for exercises of prosecutorial discretion will be subject to greater judicial scrutiny than one that relies on a list of factors or that lacks stated criteria altogether.

Finally, the Supreme Court’s willingness to uphold categorical reprieves from enforcement is not assured. Chief Justice Roberts’ majority opinion in *Regents* declined to rule on DACA’s legality.¹⁵⁹ Instead, the Court held that DHS’ decision under the Trump Administration to rescind DACA was invalid because DHS failed to analyze whether either part of DACA—providing lawful presence or employment authorization—was lawful on its own.¹⁶⁰ Longstanding regulation states that a noncitizen with deferred action may receive employment authorization if the

org/sites/default/files/research/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf [hereinafter Motomura, *President’s Discretion*].

156 See, e.g., Complaint, *Texas v. Biden*, No. 2:22-cv-00014-M (N.D. Tex., Jan. 28, 2022) (challenging the Central American Minors parole program as unlawful). Note that, as of this writing, a categorical parole program announced for refugees fleeing from Ukraine had not been challenged in litigation.

157 *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020). This lawsuit was not a challenge to the legality of DACA, but a challenge of the legality of the *rescission* of DACA, though both issues were raised in the lawsuit. *Id.* at 11, 18–19.

158 *Id.* at 11 (2020) (citing *Heckler v. Chaney*, 470 U. S. 821, 832 (1985)).

159 *Id.* at 18–19 (declining to determine whether DACA was lawful, instead focusing on the process to rescind DACA).

160 *Id.* at 21–24. The Court reasoned that “[e]ven if it is illegal for DHS to extend work authorization and other benefits to DACA recipients, that conclusion supported only disallow[ing] benefits But nothing about that determination foreclosed or even addressed the options of retaining forbearance or accommodating particular reliance interests.” *Id.* at 22, 26 (internal quotations and citations omitted).

noncitizen “establishes an economic necessity for employment.”¹⁶¹ Chief Justice Roberts may believe that DACA exceeded regulatory authority because DACA recipients automatically also received employment authorization without a separate adjudication or individualized consideration of the economic necessity for employment.¹⁶² In proposed regulations, DHS proposed unbundling DACA from employment authorization.¹⁶³ But in its final rule, DHS returned to a bundled approach to “best ensure efficient processing and minimize processing delays or other bureaucratic drawbacks.”¹⁶⁴ DHS also rejected suggestions that its unbundled approach was designed to insulate DACA from litigation.¹⁶⁵

As of this writing, numerous pending legal challenges, including Texas’ challenge to the Biden Administration’s civil immigration enforcement guidelines, may disrupt longstanding principles of prosecutorial discretion. If categorical forms of temporary reprieves like DACA and immigration enforcement guidelines were to be held unlawful, the consequences would be devastating for millions of noncitizens and their families. This would lead to needless expenditure of government resources. If U.S. courts affirm DACA’s legality on the merits, immigration enforcement authorities should move swiftly to provide categorical forms of protection to stateless individuals, and to codify those protections through regulation. But if courts hold—

161 8 C.F.R. § 274a.12(c)(14) (2022); *see also* Wadhia, *Demystifying Employment*, *supra* note 17, at 15 (“the statutory and regulatory basis for providing work authorization to qualifying individuals spans more than three decades and pre-dates the deferred action programs announced by President Obama”).

162 Hallett, *supra* note 17, at 1810 (observing that Chief Justice Roberts vacated the memo rescinding DACA not because he believes that DACA is lawful, but because DHS did not consider whether the different parts of DACA could be disentangled, implying that he may believe that employment authorization is not lawful).

163 Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53739 (proposed Sept. 28, 2021) (to be codified at 8 C.F.R. §§ 106.2, 236.21, 236.22, 236.23, 236.24, 236.25) (“The proposed rule would modify the existing filing process and fees for DACA by making the request for employment authorization on Form I-765, Application for Employment Authorization, optional”).

164 Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53206 (2022). *See generally id.* at 53198–53206.

165 *Id.* at 53201 (“DHS therefore disagrees with commenters to the extent they characterize DHS’s rationale for proposing the unbundled process as a necessary means to insulate the policy from litigation. Rather, DHS’s primary reason for proposing the unbundled approach was to provide applicants with greater flexibility and to reduce cost barriers to eligible noncitizens who sought forbearance but did not want, prioritize, or have economic need for employment authorization. . . . DHS strongly believes it is legally authorized to implement the DACA policy, including to grant recipients discretionary work authorization.”).

against the weight of significant precedent—that DACA is not lawful, such a holding would not undermine case-by-case exercises of favorable discretion in adjudicating immigration benefits and requests for temporary reprieves from enforcement.

III. THE PROPOSAL: STATELESSNESS AS A SIGNIFICANT POSITIVE FACTOR IN DISCRETIONARY ANALYSIS

Part III presents this Article's key argument: absent legislation or assurances of the long-term viability of categorical forms of prosecutorial discretion, immigration officers should consider statelessness as a significant, positive factor in discretionary considerations in immigration adjudications and when exercising prosecutorial discretion. Instructing immigration enforcement officers to consider a factor follows policies like those providing discretionary forms of relief for noncitizens who have served in the military (or their relatives) or for victims of crime.¹⁶⁶ DHS and EOIR must use existing authorities to implement DHS's 2021 commitment to offer immigration relief to stateless individuals in the United States.

Part III.A outlines key considerations—such as the definition of statelessness and the standard and burden of proof—when identifying stateless individuals. Part III.B argues that adjudicators should consider statelessness as a strong positive factor when considering discretionary benefits such as asylum that require the applicant to demonstrate eligibility under statutory and regulatory requirements and that the applicant merits a positive exercise of discretion. Part III.C argues that DHS should also consider statelessness in exercising prosecutorial discretion for undocumented stateless individuals. DHS should consider deferred action, parole in place, stays of removal, limits on detention, and employment authorization as relevant forms of prosecutorial discretion. Part III.D demonstrates how the proposal would operate in practice using five brief vignettes.

166 See, e.g., U.S. IMMIGR. & CUSTOMS ENF'T, ICE DIRECTIVE H005.3, USING A VICTIM-CENTERED APPROACH WITH NONCITIZEN CRIME VICTIMS (2021) (requiring ICE officers to consider U.S. military service by a person or immediate family member “when making civil immigration enforcement decisions involving the noncitizen”); U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 134 (requiring ICE officers to consider noncitizens' experience as victims of crime when making decisions in civil immigration enforcement).

A. *Identifying Stateless Individuals*

Granting benefits to stateless people would require USCIS to establish a process to identify stateless people.¹⁶⁷ The process would not grant any legal status but would allow individuals to receive recognition of their statelessness for consideration in other underlying requests. International experience in statelessness determination procedures shows that three essential considerations must be built into any process seeking to identify and protect stateless people: (1) a correct interpretation of the international definition, (2) a flexible standard of proof, and (3) a shared burden of proof.¹⁶⁸

I. Definition of Statelessness

First, to offer protection to stateless individuals, government agencies must have a correct understanding of statelessness.¹⁶⁹ This starts with adopting the definition of statelessness from the 1954 Convention relating to the Status of Stateless Persons, which states that a stateless person is someone who “is not considered as a national by any State under the operation of its law,”¹⁷⁰ a definition which carries the weight of customary international law.¹⁷¹ Adopting the existing international definition improves the likelihood of consistency across jurisdictions and means that adjudicators can reference interpretive guidance from UNHCR.¹⁷² Beyond just adopting the international definition, the

167 For a brief discussion on why USCIS rather than other agencies should adjudicate statelessness, *see infra* note 216.

168 BIANCHINI, *supra* note 14, at 304–05 (arguing that any efforts to identify stateless individuals must adopt an appropriate burden of proof to address the difficulties that stateless people will face obtaining evidence); Baluarte, *supra* note 15, at 389 (“The most effective way to identify stateless persons in the United States and provide them with protection is to implement a mechanism in harmony with the guidance from the international community, developed in response to the global statelessness crisis.”).

169 *See* Fisher, *Operation of Law*, *supra* note 14, at 262 (“The 1954 Statelessness Convention, when properly interpreted, requires adjudicators to consider state practice in addition to nationality law.”).

170 1954 Convention art. I, ¶ 1, *supra* note 1, at 5158.

171 Int’l L. Comm’n, *supra* note 58, at 36.

172 UNHCR’s Handbook provides substantive guidance on the definition of statelessness as well as procedures and evidentiary standards in assessing statelessness. UNHCR, *supra* note 21, at 9–23. UNHCR’s guidance is of particular relevance given that the UN General Assembly mandated UNHCR to identify and protect stateless people and reduce and prevent cases of statelessness. G.A. Res. 50/152, ¶¶ 14–15 (Dec. 21, 1995); G.A. Res. 16/137 ¶¶ 2, 4 (Dec. 19, 2006).

U.S. government must also adopt a correct interpretation, including situations where a person may appear to be a national under a state's nationality law but is not considered as a national by the state.¹⁷³ Adopting a more stringent interpretation would mean misinterpreting the 1954 Convention. Critically, excluding these individuals from protection leaves them in limbo and expends government resources enforcing immigration law against people who lack state protection.

2. Standard of Proof

USCIS must adopt a flexible standard of proof in applying the definition of a stateless person. The definition of a stateless person “requires proof of a negative,” which presents “significant challenges to applicants and informs how evidentiary rules in statelessness determination procedures are to be applied.”¹⁷⁴ UNHCR guidance recommends that a person be recognized as stateless “where it is established to a ‘reasonable degree’ that an individual is not considered as a national by any State under the operation of its law.”¹⁷⁵ Because of the inherent challenges in demonstrating statelessness, the lifelong humanitarian hardships that stateless people face, and the government resources expended in enforcement against nonremovable people, USCIS should ensure that the standard of proof is not set unreasonably high.

The process ought not to require particular forms of evidence or documentation. UNHCR guidance lists many forms of evidence

173 See *supra* Part I.A (discussing the correct interpretation of the 1954 Convention definition to include situations when a government does not consider a person to be its national).

174 UNHCR, *supra* note 21, para. 88, at 34.

175 *Id.* para. 91, at 35. A recent publication demonstrates the benefits of a modified the standard and burden of proof, arguing that once the applicant has cooperated with the adjudicator to provide all reasonably available evidence, and has made a prima facie showing of statelessness, the burden of persuasion should shift to the government. The government should be required to establish that the applicant does, in fact, currently possess the nationality of another state by a standard of “clear and convincing” evidence. The applicant should have the opportunity to respond to the government’s assertions. MAI KANEKO-IWASE, NATIONALITY OF FOUNDLINGS: AVOIDING STATELESSNESS AMONG CHILDREN OF UNKNOWN PARENTS UNDER INTERNATIONAL NATIONALITY LAW 186–87, 229–30 (2021). I find Kaweko-Iwase’s arguments persuasive, but I also find it unlikely that USCIS will adopt a discretionary process that, against general administrative principles, shifts the burden to itself. See 8 C.F.R. § 103.2(b)(1) (2022) (“An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request . . .”).

that may be relevant to an applicant’s claim of being stateless—but also notes that “applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.”¹⁷⁶

3. Burden of Proof

General principles of U.S. administrative immigration law indicate that the applicant carries the burden to establish eligibility for a benefit.¹⁷⁷ But in this proposal, a person’s statelessness does not establish eligibility for any form of benefit—it only provides a factor that must be considered among all other relevant factors.¹⁷⁸ UNHCR guidance states that the applicant carries a duty to be truthful and to submit “all evidence reasonably available.”¹⁷⁹ USCIS should share the burden to produce evidence in two ways. First, DHS agencies often have significant evidence related to the applicant’s status and immigration history in the applicant’s government file, or A-file.¹⁸⁰ Rather than requiring individuals to wait through extensive delays for Freedom of Information Act requests,¹⁸¹ U.S. government agencies should provide the A-file and other relevant information to applicants and adjudicators. Second, in some cases assessing an applicant’s statelessness will require contacting the embassy or consulate of possible nationality.¹⁸² USCIS may be able to secure a response more easily than an individual and should bear responsibility to do so, while ensuring that contacting an

176 UNHCR, *supra* note 21, para. 90, at 34.

177 8 C.F.R. § 103.2(b)(1) (2022) (“An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request . . .”).

178 *See infra* Part III.B.

179 UNHCR, *supra* note 21, para. 89, at 34.

180 *A Step-By-Step Guide to Completing FOIA Requests with DHS*, IMMIGRANT LEGAL RES. CTR. (Sept. 2020), https://www.ilrc.org/sites/default/files/resources/new_foia_dhs_practice_advisory_-_2021_0.pdf (noting that DHS agencies keep records on individuals it interacts with in an A-file, which individuals can request through FOIA).

181 *Lawsuit Challenges Systemic USCIS and ICE FOIA Delays*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/lawsuit-challenges-systemic-uscis-and-ice-foia-delays> (last visited May 3, 2022) (describing a lawsuit challenging significant delays in FOIA requests for A-files).

182 UNHCR, *supra* note 21, para. 41, at 17–18.

embassy or consulate does not place an applicant at risk.¹⁸³

B. Considering Statelessness in Discretionary Analysis for Immigration Benefits

USCIS and EOIR should ensure that statelessness is considered as a strong positive factor in discretionary analysis, thereby limiting discretionary denials for stateless individuals who are eligible for immigration benefits.¹⁸⁴ The USCIS Policy Manual lists many factors to consider when adjudicating discretionary benefits.¹⁸⁵ A person's status as a stateless person is not among the factors that are listed, but may be relevant to several factors that are listed. One factor is "[h]ardship due to an adverse decision."¹⁸⁶ A stateless person is likely to experience hardship because, in most circumstances, a stateless person lacks permission to enter any other country. If denied the benefit, the stateless person may find themselves in legal limbo, unable to depart from the United States even through the removal process and unable to obtain legal status in the United States.¹⁸⁷ This prong should weigh in favor of a stateless person.

Another factor, the "length of . . . lawful residence in the United

183 *Id.* para. 79, at 31.

184 The best way to prevent discretionary denials would be for Congress to remove discretion to deny benefits for individuals who meet extensive legislative and regulatory requirements. Kanstroom, *supra* note 9, at 804 ("Delegated discretion, as defined in this Article, should be legislatively removed from U.S. immigration law as much as possible. Relief from deportation should be available if specific standards are met, such as a specified period of residence, extreme hardship, and good moral character, among others."); Wadhia, *Darksided Discretion*, *supra* note 17, at 413 (recommending that Congress eliminate discretion where immigration benefits have delineated eligibility criteria). This Article, however, proposes action that can be taken *without* legislative changes. Prof. Wadhia also suggests that DHS, the Department of Justice, and the Department of State could adopt a regulation that creates a rebuttable presumption that an individual who meets eligibility criteria will receive a favorable exercise of discretion. *Id.* at 414. This could be accomplished through regulatory action as well as legislation.

185 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, DISCRETIONARY ANALYSIS, *supra* note 102 (citation omitted).

186 *Id.* (citation omitted).

187 Baluarte, *supra* note 15, at 360–61 ("[T]he U.S. system of immigration enforcement rests on some fundamental assumptions, one of which is that someone who does not have authorization to reside in the United States may be sent to another country. This assumption does not bear out in reality in the case of stateless persons, who are not nationals of any country, and no country in the world is obliged to issue them documents to facilitate their return.").

States,”¹⁸⁸ benefits only those stateless individuals who already have lawful residence in the United States on another basis, for example if they entered as refugees or have received asylum. Many stateless people have been in the United States for decades¹⁸⁹—but the Policy Manual only requires consideration of periods of residence where an individual was in lawful status.¹⁹⁰ This means that current guidance does not direct adjudicators to consider periods of residence in the United States without lawful status, even where the individual could neither obtain lawful status nor depart from the United States due to their statelessness.

At least three discretionary factors relate to compliance with immigration law and may apply negatively to stateless people because they are generally unable to depart from the United States after their period of authorized stay. First, the Policy Manual directs adjudicators to consider the “[n]ature and underlying circumstances of any inadmissibility grounds at issue, the seriousness of the violations, and whether the applicant or beneficiary is eligible for a waiver of inadmissibility or other form of relief.”¹⁹¹ Stateless people who enter the United States on valid visas or with failed asylum claims may lose lawful status¹⁹² and face inadmissibility due to “unlawful presence” in the United States.¹⁹³ While an inadmissibility ground would be “at issue,” the person’s statelessness may explain the “nature and underlying circumstances” of the ground of inadmissibility.¹⁹⁴

The second factor relevant to a stateless person’s compliance with immigration law asks “[w]hether the person is under an unexecuted administratively final removal, deportation, or exclusion order.”¹⁹⁵ This is likely to be a negative factor for stateless individuals, many of whom have final orders of removal—which remain unexecuted because they

188 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, DISCRETIONARY ANALYSIS, *supra* note 102.

189 CTR. FOR MIGRATION STUD., *supra* note 6, at 55 (estimating that more than 18% of stateless people in the United States have been in the United States for twenty years or more).

190 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, DISCRETIONARY ANALYSIS, *supra* note 102.

191 *Id.* (citation omitted).

192 The broadest study of stateless individuals in the United States found that “[m]ost of the undocumented stateless persons arrived legally in the United States.” CTR. FOR MIGRATION STUD., *supra* note 6, at 69.

193 Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) (2013).

194 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, DISCRETIONARY ANALYSIS, *supra* note 102.

195 *Id.* (citation omitted).

cannot depart from the country.¹⁹⁶ Finally, the Policy Manual directs consideration generally of “[c]ompliance with immigration laws.”¹⁹⁷ Stateless individuals frequently face obstacles to compliance, for instance, because their nonimmigrant visa status expired and they were unable to depart from the United States. Individuals may not realize that they are stateless until they are denied a travel document while attempting to return to their country of origin.¹⁹⁸

While statelessness may be relevant to support positive and negative factors in discretionary analysis, current USCIS guidance fails to suggest or require consideration of statelessness as a factor when adjudicating discretionary immigration benefits. Data is not available to show how common denials of immigration benefits are based on discretion, let alone how often a stateless person is denied an immigration benefit based on discretion.¹⁹⁹ But where a stateless person is denied an immigration benefit for which they are eligible, they probably lack other options to obtain lawful status and may face significant humanitarian hardship based on the discretionary denials.²⁰⁰ When adjudicating discretionary benefits, USCIS and EOIR adjudicators should consider a person’s statelessness to be a significant positive factor that would outweigh negative factors in all but the most serious situations. Because a stateless person will generally not be removable, denying them an immigration benefit only leaves them in limbo and risks U.S. government resources on immigration enforcement. Only serious criminal records, such as convictions for murder or other serious violent crimes, should be held to outweigh a finding of statelessness. Negative factors should

196 Baluarte, *supra* note 15, at 359–72 (outlining the legal limbo that stateless individuals find themselves in, unremovable because of their status as stateless individuals); CTR. FOR MIGRATION STUD., *supra* note 6, at 69 (“Some received orders of removal, but could not be deported. Instead, they experienced long periods of detention. Several had been released under orders of supervision . . .”).

197 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, DISCRETIONARY ANALYSIS, *supra* note 102 (citation omitted).

198 For example, a stateless person born in the former Soviet Union who now lives in the United States learned “years later that Uzbekistan never officially recognized me as a citizen because I didn’t register with Uzbekistan after it had become independent, which I was supposed to apparently. I didn’t know that.” CTR. FOR MIGRATION STUD., *supra* note 6, at 9–10.

199 See Wadhia, *Darkside Discretion*, *supra* note 17, at 398 (noting that data on adjudications of discretionary adjustments does not explain the reasons for denial); *id.* at 402 (noting that data on adjudications of discretionary waivers does not explain the reasons for denial).

200 See Wadhia, *Darkside Discretion*, *supra* note 17, at 387 (describing hardships faced by individuals who met eligibility criteria but who were denied based on discretionary criteria).

also be understood in light of a person's statelessness—for example, assessing whether a person's noncompliance with immigration law is due to the individual's inability to depart from the United States because of their statelessness.

C. *Considering Statelessness in Prosecutorial Discretion*

A person's statelessness should also be considered a significant positive factor for exercises of prosecutorial discretion for various forms of relief, much as a noncitizen's connection to military service or experience as a victim of a crime is already considered.²⁰¹ In the absence of legislation, immigration enforcement authorities could consider statelessness as a categorical basis for relief. This would carry immense benefits of reliable and broad-reaching relief, but poses two challenges. First, categorical programs carry litigation risks unless programs like DACA are affirmed on the merits. Second, the diversity of legal situations of stateless people means that a one-size-fits-all categorical approach would still leave some individuals in need of case-by-case relief. Even if legal challenges that are ongoing at the time of this writing mean that categorical forms of prosecutorial discretion are no longer viable, civil immigration enforcement authorities can exercise prosecutorial discretion on a case-by-case basis, considering statelessness as a significant factor while also weighing all other relevant positive and negative factors.

Given the unlikelihood that stateless people will be removed to any other country, it is particularly appropriate for enforcement authorities to exercise favorable discretion for stateless people in immigration detention and removal proceedings, both to conserve government resources and for humanitarian reasons. Government resources spent detaining and attempting to remove stateless noncitizens are wasted.²⁰² The average daily cost to detain a noncitizen increased from \$119.06 in fiscal year 2019 to \$143.92 in fiscal year 2020.²⁰³ Likewise, the average time of noncitizens' detention prior to removal has increased from 43.9 days in fiscal year 2016 to 53.4 days in fiscal

201 See U.S. CITIZENSHIP & IMMIGR. SERVS., CHAPTER 8 – DISCRETIONARY ANALYSIS, *supra* note 102.

202 Baluarte, *supra* note 15, at 354 (“[D]etaining stateless persons as if they were removable, and conducting futile efforts to deport them squanders the resources of an overburdened system of immigration regulation.”)

203 DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW FISCAL YEAR 2022 CONGRESSIONAL JUSTIFICATION, 4 (2021), <https://www.dhs.gov/publication/congressional-budget-justification-fy-2022>.

year 2020.²⁰⁴ This means that overall expenses to secure the removal of a noncitizen with final orders of removal have increased significantly, though stateless individuals cannot be removed.²⁰⁵ From the perspective of immigration enforcement, exercises of prosecutorial discretion can improve efficiency in removal efforts and focus resources on individuals who threaten public safety.²⁰⁶

Exercises of prosecutorial discretion can also address the human rights concerns described above in Part I.B. Stateless individuals may come to the attention of immigration enforcement officials after lengthy periods without documentation, after their asylum claims are denied, or due to criminal activity.²⁰⁷ When encountered, these individuals are likely to receive final orders of removal, experience lengthy detention, and eventually secure release.²⁰⁸ When ICE releases individuals from detention because they cannot be removed, ICE issues orders of supervision, which may limit domestic travel and impose extensive reporting requirements.²⁰⁹ Because a stateless person cannot be removed, these conditions may last for the rest of a person's life.²¹⁰

Due to these significant humanitarian hardships, USCIS should provide (1) deferred action and (2) parole in place for stateless individuals. ICE should (3) provide stays of removal, (4) limit detention of stateless individuals. Where individuals have received any of these forms of relief, USCIS should provide employment authorization. Where a stateless person receives deferred action, parole in place, or an order of supervision, USCIS should also consider statelessness as a strong discretionary factor weighing in favor of authorizing employment.

1. Deferred Action

USCIS should consider granting deferred action as the default method of granting temporary reprieve to stateless people. USCIS and

204 *Id.* at 2.

205 DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS, OIG-19-28 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf>.

206 DEP'T OF HOMELAND SEC., *supra* note 81, at 2 (“By exercising our discretionary authority in a targeted way, we . . . use the resources we have in a way that accomplishes our enforcement mission most effectively and justly.”)

207 CTR. FOR MIGRATION STUD., *supra* note 6, at 60.

208 Baluarte, *supra* note 15, at 362–63.

209 Wadhia, *Demystifying Employment*, *supra* note 17, at 8–9.

210 Baluarte, *supra* note 15, at 365 (noting “the challenges faced by stateless persons condemned to a life of supervised release.” (citation omitted)).

ICE both have authorization to provide deferred action.²¹¹ USCIS is the more appropriate entity to have responsibility for deferred action for stateless people, for two reasons. First, statelessness is a complex factual inquiry, and concentrating responsibility for adjudications in one agency can improve the quality of decision-making.²¹² Second, this follows the precedent set in DACA, which shifted discretion to USCIS “away from rank-and-file immigration officers who were perhaps disinclined to exercise it.”²¹³

Deferred action is a longstanding tool of prosecutorial discretion that provides lawful presence, a temporary reprieve from immigration enforcement for a defined period that can be renewed.²¹⁴ An individual with or without a final order of removal can receive deferred action.²¹⁵ During the period of deferred action, the person may also receive employment authorization if the applicant “establishes an economic necessity for employment.”²¹⁶ USCIS should exercise its discretion to grant deferred action to stateless individuals for a period of five years, considering statelessness as—at minimum—a significant positive factor in a case-by-case, holistic discretionary analysis.

211 Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 347 (2013).

212 BIANCHINI, *supra* note 14, at 109–10 (discussing the importance of competent adjudicators with expertise in statelessness); UNHCR, *supra* note 21, para. 63, at 27 (2014), <https://www.unhcr.org/en-us/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html> (“Centralized procedures are preferable as they are more likely to develop the necessary expertise among the officials undertaking status determination.”).

213 Hallett, *supra* note 17, at 1785.

214 U.S. CITIZENSHIP & IMMIGR. SERVS., ADJUDICATOR’S FIELD MANUAL, *supra* note 112, at 40.9.2(b)(3)(J)–(I) (“Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.”); Wadhia, *Demystifying Employment*, *supra* note 17, at 3–4. While USCIS is retiring the Adjudicator’s Field Manual in favor of a new compilation, the Policy Manual, this Article references the Adjudicator’s Field Manual because public USCIS guidance continues to do so. See USCIS, UNLAWFUL PRESENCE AND INADMISSIBILITY (updated June 24, 2022), <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-bars-to-admissibility>.

215 *Deferred Action for Childhood Arrivals (DACA)*, U.S. IMMIG. & CUSTOMS ENF’T (updated Oct. 27, 2022), <https://www.ice.gov/daca> (noting that DACA “is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who are in removal proceedings, with a final order, or with a voluntary departure order. All deferred action decisions will be made by [USCIS].”).

216 8 C.F.R. § 274a.12(c)(14) (2022).

2. Parole in Place

USCIS should also extend parole in place to stateless individuals where appropriate. Parole is authorized by the INA,²¹⁷ and it takes many forms.²¹⁸ Parole in place is important for a noncitizen who entered the United States without admission and who has a means to adjust status to lawful permanent residence, such as through marriage to a U.S. citizen.²¹⁹ Adjustment of status requires that a noncitizen have been “admitted or paroled into the United States.”²²⁰ Noncitizens who have another citizenship elsewhere can request advance parole, which allows them to depart and reenter the United States.²²¹ After being paroled back into the United States, they can apply to adjust status.²²²

A stateless person cannot leave the United States because they generally cannot secure travel documents to enter any other country,²²³ so parole in place allows a person in this situation to adjust status. Parole provides lawful presence,²²⁴ and a person who receives parole can also receive employment authorization.²²⁵ Current USCIS policy specifies that parole in place is an appropriate remedy for relatives of members of

217 Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (2013). This section of this Article does not address parole of noncitizens after apprehension under Immigration and Nationality Act section 1226.

218 *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGR. SERV. (updated May 2, 2023), https://www.uscis.gov/humanitarian/humanitarian_parole (listing numerous forms of parole, including humanitarian parole or significant public benefit parole, advance parole, parole in place, and many forms of categorical parole).

219 VOLUME 7 - ADJUSTMENT OF STATUS, PART B - 245(A) ADJUSTMENT, CHAPTER 2 - ELIGIBILITY REQUIREMENTS, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2> (noting that parole in place is a means to request a waiver facilitating a noncitizen to adjust status) (last visited May 9, 2022).

220 Immigration and Nationality Act, 8 U.S.C. § 1255(a) (2022).

221 See Jennifer Riddle, *When is Advance Parole an Option*, CLINIC (July 28, 2021), <https://cliniclegal.org/resources/parole/advance-parole/when-advance-parole-option>.

222 *Id.*

223 CTR. FOR MIGRATION STUD., *supra* note 6, at 71.

224 Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(ii) (2013) (“[A]n alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”)

225 8 C.F.R. § 274a.12(c)(11) (2022). Unlike individuals who receive deferred action and orders of supervision, the regulations do not require an individual who receives parole to demonstrate economic necessity to obtain employment authorization. *Id.* at § 274a.12(c)(14), (18).

the U.S. armed forces.²²⁶ USCIS should extend this guidance to include stateless people. This form of positive exercise of discretion would provide not just a temporary reprieve from immigration enforcement but also a means to obtain lawful, permanent status in the United States.

3. Stays of Removal

ICE should also exercise its discretion to grant stays of removal to stateless individuals. A stay of removal is another form of temporary reprieve, delaying implementation of a final order of removal, and the duration of the stay of removal is considered lawful presence.²²⁷ ICE should grant stays to applicants with final orders of removal who are seeking deferred action or parole in place while their applications are pending with USCIS. Stays of removal should also be used for individuals who are stateless but for whom USCIS does not exercise its discretion to grant deferred action.

4. Limiting Detention

ICE should adopt a presumption of non-detention for stateless persons in all situations where the INA does not require detention.²²⁸ Detention is mandatory in the ninety days following a final order of removal and for noncitizens who are inadmissible or deportable under several specified provisions of the INA.²²⁹ After the ninety-day removal period, if removal has not occurred, ICE can release the noncitizen under an order of supervision, which would impose conditions of release and reporting requirements.²³⁰ Stateless people are generally not entitled to

²²⁶ *Immigration Options for Family of Certain Military Members and Veterans*, U.S. CITIZENSHIP & IMMIGR. SERV. (2016), https://www.uscis.gov/sites/default/files/document/brochures/Brochure-Immigration_Options_for_Family_of_Certain_Military_Members_and_Veterans.pdf.

²²⁷ U.S. CITIZENSHIP & IMMIGR. SERV., ADJUDICATOR'S FIELD MANUAL, 40.9.2(b)(3) (I), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm40-external.pdf> (“During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.”)

²²⁸ *See generally* Immigration and Nationality Act, 8 U.S.C. § 1231(a)(2)–(3) (2006); 8 U.S.C. § 1226(c)(1) (1996).

²²⁹ Immigration and Nationality Act, 8 U.S.C. § 1231(a)(1) (2006); 8 U.S.C. § 1226(c)(1) (1996).

²³⁰ Immigration and Nationality Act, 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.4(e) (2011).

travel documents in any country and cannot be deported. As a result, their ongoing detention is not in the public interest absent other circumstances. This is not just a policy choice that ICE ought to make; it is a constitutional obligation.²³¹ The purpose of immigration detention is to ensure that the U.S. government can remove the noncitizen with a final order of removal.²³² The constitutionality of detention depends on “whether the detention in question exceeds a period reasonably necessary to secure removal Thus, if removal is not reasonably foreseeable, the . . . continued detention [is] unreasonable and no longer authorized by statute.”²³³ After the removal period, ICE officers review the situations of noncitizens for release from detention.²³⁴ When a noncitizen is released from detention, the individual receives an order of supervision, which places conditions on the noncitizen’s release. An order also requires periodic reporting to an immigration officer, may require the noncitizen to receive approval before traveling outside a specified geographic area or for a specified period, and may place other restrictions on conduct as well.²³⁵

To comply with constitutional limitations on indefinite detention and to preserve government resources, ICE should develop systems to identify stateless people proactively and ensure that stateless

231 *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (“We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”). A Supreme Court ruling in 2022 held that immigration statutes do not require bond hearings after six months of detention, but the decision left open whether the U.S. Constitution would require bond hearings. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). International human rights obligations also apply to situations of immigration detention. *See, e.g.*, G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, Art. 9, (Dec. 16, 1966); Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (“The notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”).

232 *Zadvydas*, 533 U.S. at 699 (observing that “the statute’s basic purpose [is] assuring the alien’s presence at the moment of removal.”).

233 *Id.* at 699–700.

234 8 C.F.R. § 241.4(e) (2011) (listing criteria to release individuals from detention after the removal period, including that “[t]ravel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest”).

235 8 C.F.R. § 241.13(h) (2005).

individuals are not detained longer than statute, regulation, or public safety requires. Where a stateless person is released from detention pursuant to an order of supervision, ICE should impose the least possible restrictions on orders of supervision—such as an annual telephonic check-in, without any restrictions on domestic travel.

5. Employment Authorization

An individual who is granted deferred action and shows economic necessity, receives parole in place, or is released from detention on an order of supervision, is eligible to receive employment authorization.²³⁶ When assessing whether to grant employment authorization, USCIS should consider a person’s statelessness and the exercise of prosecutorial discretion as positive factors. Where a stateless person meets regulatory requirements, USCIS should exercise its discretion to authorize employment. Given that stateless people with deferred action or an order of supervision do not have another pathway to legal status and cannot depart from the United States, USCIS should provide employment authorization for the full period of prosecutorial discretion, using “its discretion [to] determine the validity period” for employment authorization documents.²³⁷

D. Case Studies

To illustrate how these exercises of prosecutorial discretion may benefit stateless people, this Article will present five composite and hypothetical profiles of common situations for stateless people in the United States and explain the outcome for each if the proposal outlined above were implemented fully.

Ahmed is a stateless person who claimed asylum in the United States but whose asylum claim was rejected. Ahmed then received a final order of removal and was detained pending removal.²³⁸ ICE would be responsible for considering Ahmed’s statelessness when evaluating whether to continue to detain him.²³⁹ In most situations, stateless

²³⁶ 8 C.F.R. § 274a.12(c)(11), (14), (18) (2022) (providing that individuals who are granted deferred action and have an economic necessity, who receive parole, or who are released on orders of supervision, respectively, are eligible for work authorization).

²³⁷ *Id.* § 274a.12(a).

²³⁸ Immigration and Nationality Act, 8 U.S.C. § 1231(a)(2) (2006); *see also supra* Part I.B for the discussion of Tatianna, whose situation mirrors this factual pattern.

²³⁹ 8 C.F.R. § 241.13(f) (2005).

people have no means of obtaining any travel document to any country, making him unremovable.²⁴⁰ Since the purpose of detention is to secure removal and Ahmed cannot be removed, Ahmed's ongoing detention after the removal period would be unreasonable, and Ahmed should be released from detention.²⁴¹ Ahmed could also request deferred action as a stateless person and apply for employment authorization based on economic necessity.²⁴² While waiting for a decision on the request for deferred action, ICE should grant Ahmed a stay of removal. After assessing all relevant factors, assuming no significant negative equities, USCIS should grant Ahmed deferred action and, with a showing of economic necessity, employment authorization.

Bohdana is a stateless person who entered the United States as a refugee,²⁴³ but she was convicted of a crime. Bohdana is now inadmissible and cannot adjust status to lawful permanent residence.²⁴⁴ Depending on the nature of the crime, Bohdana can request a waiver of inadmissibility that would allow her to adjust status to lawful permanent residence.²⁴⁵ In that application for a discretionary waiver, USCIS would consider her statelessness—and her well-founded fear of persecution if returned to her country²⁴⁶—as positive factors. If her crime is serious, USCIS may find that the negative factors outweigh the positive factors and deny her waiver of inadmissibility.²⁴⁷ If she is detained, ICE may provide a stay of removal. ICE would consider Bohdana's statelessness and set only the conditions and reporting requirements in her order of supervision needed to promote public safety.

Chedline is a stateless person who entered the United States

240 8 C.F.R. § 241.4(e)(1) (2011) (including as one criterion for release from immigration detention that “[t]ravel documents are not available”).

241 *Zadydas v. Davis*, 533 U.S. 678, 699–700 (2001).

242 8 C.F.R. § 274a.12(c)(11) (2022).

243 Immigration and Nationality Act, 8 U.S.C. § 1157 (2005).

244 Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2) (2013).

245 Immigration and Nationality Act, 8 U.S.C. §§1157(c)(3) (2005) (allowing waivers for numerous grounds of inadmissibility), 1182(a)(2) (2013); U.S. CITIZENSHIP & IMMIGR. SERV., FORM I-602, APPLICATION BY REFUGEE FOR WAIVER OF INADMISSIBILITY GROUNDS (updated Aug. 8, 2022), <https://www.uscis.gov/i-602>.

246 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2021) (defining a refugee as someone who has, *inter alia*, “well-founded fear of persecution”); 8 U.S.C. § 1182(a)(2) (2013).

247 U.S. CITIZENSHIP & IMMIGR. SERVS., INSTRUCTIONS FOR FORM I-602, APPLICATION BY REFUGEE FOR WAIVER OF INADMISSIBILITY GROUNDS 7 (asking an applicant to “[e]xplain[] why you believe your application should be approved as a matter of discretion, if applicable, and why the favorable factors in your case should outweigh the unfavorable factors”).

as a student, was unable to return to her country of origin, and has now lived as an undocumented person in the United States for several years.²⁴⁸ Chedeline does not have a final order of removal. If there are no significant negative factors, Chedeline would apply for and receive deferred action and, if she can demonstrate economic necessity, would be authorized for employment.²⁴⁹ In the event that Chedeline were apprehended while USCIS considered the request for deferred action, ICE would grant a stay of removal pending USCIS's decision.

Destá is an undocumented stateless person in the United States who does not have a final order of removal, and who is married to a U.S. citizen.²⁵⁰ Destá has a pathway to lawful permanent residence status and naturalization,²⁵¹ but because he entered the United States without admission or parole, he cannot adjust status.²⁵² Destá, having no country to go to, cannot use advance parole to gain the admission or parole needed to adjust status.²⁵³ Instead, he requests parole in place, which would allow him to adjust status.²⁵⁴ In adjudicating his request for parole in place, USCIS would consider his statelessness as a strong positive factor, mindful that denying his request will cause hardship to him and his U.S. citizen spouse.

Fazal entered the United States without inspection and is facing removal proceedings under EOIR jurisdiction. He claimed asylum,²⁵⁵ and he meets all requirements for asylum in the United States.²⁵⁶ Unless

248 See *supra* note 198 (describing a stateless person in the United States in this situation).

249 8 C.F.R. § 274a.12(c)(14) (2022).

250 See *supra* Section I.B (describing the situation of Karina, in a similar factual situation).

251 Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2009) (defining “immediate relatives” to include spouses of U.S. citizens); U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-130, PETITION FOR ALIEN RELATIVE (updated May 18, 2023), <https://www.uscis.gov/i-130>.

252 Immigration and Nationality Act, 8 U.S.C. § 1255(a) (2022).

253 See Riddle, *supra* note 221.

254 U.S. CITIZENSHIP & IMMIGR. SERVS., CHAPTER 2-ELIGIBILITY REQUIREMENTS, *supra* note 219, <https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2> (noting that parole in place can provide a means for noncitizens without admission or parole to adjust status).

255 Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1) (2008) (noting that a non-citizen if they are “who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum.”).

256 Requirements for asylum are set out in the Immigration and Nationality Act and accompanying regulations. Immigration and Nationality Act, 8 U.S.C. § 1158 (2008); 8 C.F.R. §§ 208.1–.24 (2020).

Fazal presents significant negative factors, the immigration judge should consider his statelessness and fear of persecution as a significant positive factor and grant asylum.

For any of these individuals who are granted deferred action, parole in place, or a stay of removal, USCIS or ICE would be able to revoke any form of prosecutorial discretion and enforce civil immigration law as to that individual.²⁵⁷

IV. EVALUATING THE PROPOSAL

This Part evaluates Part III's proposal to consider a person's statelessness as a significant positive factor in discretionary analysis. Part IV.A argues that this proposal is legally defensible and can avoid some of the judicial scrutiny facing other (lawful) exercises of prosecutorial discretion. Part IV.B evaluates implementation concerns. It argues that prosecutorial discretion is a far-from-perfect remedy, including vulnerability to bias, inconsistent implementation from enforcement officials who resist using prosecutorial discretion, and vulnerability to being abandoned altogether by a future administration. Part IV.C establishes that these administrative remedies address some of the biggest challenges facing stateless people. These remedies can provide a temporary reprieve from deportation, address indefinite detention, and authorize a stateless person to work. But, in lacking certainty and without legislation, the proposal does not offer assurance of a durable status.

A. *Legal Defensibility*

Considering statelessness as a factor in discretionary adjudications carries the enormous benefit that it does not require legislation. It is important to identify and advocate for legislative solutions that would best protect stateless individuals, but, at the time of this writing, there is little reason to think that Congress will enact these

257 HARRINGTON, *supra* note 109, at 8 (“The nature of the Executive’s ability to retract this assurance [that the Executive branch will not seek the noncitizen’s removal]—and the resulting reliability of the assurance to the alien—varies by reprieve type. . . . In contrast, DHS asserts that it may terminate a grant of deferred action or DACA at its discretion, although the Administrative Procedure Act and constitutional principles may require DHS to have an adequate justification for doing so.” (citations omitted); Hallett, *supra* note 17, at 1806 (“Non-citizens who receive . . . [deferred action] must live a kind of temporary existence, knowing that at any point, for any reason, that discretion can be revoked.”))

solutions. This section argues that individual discretionary consideration of statelessness rests on longstanding authority, whose application to stateless individuals on a case-by-case basis is defensible. This approach would also avoid some of the legal scrutiny that other policies providing guidelines for prosecutorial discretion have faced.

This Article's proposal to require DHS and EOIR officers to consider statelessness in discretionary analysis is lawful and would survive judicial scrutiny for three reasons: (1) it relies on case-by-case analysis, (2) it clarifies existing but *ad hoc* precedent of considering statelessness in discretionary decisions, and (3) it mirrors treatment already given to factors like medical needs and U.S. military service.

First, this proposal suggests a case-by-case analysis rather than categorical exercises of discretion—which the Supreme Court determined meant that DACA was subject to judicial scrutiny.²⁵⁸ Nor does the policy direct immigration officers to deprioritize any group of individuals for immigration enforcement. It simply requires officers to consider an additional factor when determining whether to exercise favorable discretion on behalf of an individual identified as stateless. Despite many appellate challenges to individual applications of discretionary analysis,²⁵⁹ there have not been challenges seeking to limit consideration of a factor in discretionary analysis.

Second, it builds on and clarifies existing but *ad hoc* precedent. While decisions to grant or deny prosecutorial discretion rarely result in written notices outlining reasons for the outcome, several appellate decisions mention statelessness in considering discretionary immigration benefits such as asylum and waivers of inadmissibility.²⁶⁰ Likewise, at least one previous agency policy on prosecutorial discretion directed officers to consider an applicant's nationality and likelihood of

258 *Dep't of Homeland Security v. Regents of Univ. of Cal.*, No. 18-587, slip op. at 11 (U.S. June 18, 2020).

259 *See, e.g.*, *Pula*, 19 I. & N. Dec. 467 (BIA 1987); *Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (both reviewing discretionary denials of immigration benefits).

260 *See, e.g.*, *Jourbina v. Holder*, 532 F. App'x. 1 (2d Cir. 2013) (holding that failure to consider denationalization in a motion to reopen based on changed country circumstances constituted abuse of discretion); *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011) (requiring the BIA to consider whether denationalization based on ethnicity constituted past persecution, which generally warrants a favorable exercise of discretion in asylum); *Application for Waiver of Grounds of Inadmissibility* (U.S. Citizenship & Immigr. Servs. Admin. Appeals Off. July 2, 2009) (dismissing admin. appeal), [https://www.uscis.gov/sites/default/files/err/H2%20-%20Waiver%20of%20Inadmissibility%20-%20Criminal%20-%20212%20\(h\)/Decisions_Issued_in_2009/Jul022009_03H2212.pdf](https://www.uscis.gov/sites/default/files/err/H2%20-%20Waiver%20of%20Inadmissibility%20-%20Criminal%20-%20212%20(h)/Decisions_Issued_in_2009/Jul022009_03H2212.pdf) (considering applicant's statelessness, but denying discretionary waiver).

removability.²⁶¹ Even where agency policy does not name statelessness as a relevant factor, USCIS guidance about discretionary analysis is clear that its list of factors is not comprehensive, and the guidance instructs adjudicators to consider *all* relevant factors.²⁶² This proposal would direct officers to consider a factor in its comprehensive discretionary analysis. Incorporating this change into publicly available agency guidance would ensure that information is transparently available to immigration lawyers and potential beneficiaries of the policy.

Third, considering statelessness as a positive factor is analogous to current treatment of acute medical conditions or military service. While USCIS has not published guidance on deferred action outside of DACA, a common use of deferred action is to grant reprieves to individuals with acute medical needs, allowing them to remain in the United States.²⁶³ Medical conditions are also relevant to requests for humanitarian parole²⁶⁴ and discretionary analysis for immigration benefits.²⁶⁵ Likewise, a noncitizen's service in the U.S. armed forces—or close relationship to a current or former member of the U.S. armed forces—is a relevant factor in discretionary analysis, including in requesting parole in place or deferred action.²⁶⁶ Similarly, ICE instructs its officers to consider a noncitizen's experience as a victim of serious

²⁶¹ Morton, *supra* note 132, at 4.

²⁶² U.S. CITIZENSHIP & IMMIGR. SERVS., CHAPTER 8 – DISCRETIONARY ANALYSIS, *supra* note 102 (“Any facts related to the person’s conduct, character, family ties, other lawful ties to the United States, immigration status, or any other humanitarian concerns may be appropriate factors to consider in the exercise of discretion. . . . Factors may include, but are not limited to:”); DEP’T OF HOMELAND SEC., *supra* note 81, at 3–4 (“It instead requires an assessment of the individual and the totality of the facts and circumstances. . . . Such factors can include, for example: . . . The above examples of aggravating and mitigating factors are not exhaustive.”).

²⁶³ See Shannon Dooling, *‘It’s Scarier than Having a Surgery’: A Year Later, Uncertainty Around Medical Deferrals Remains*, WBUR (Sept. 24, 2020), <https://www.wbur.org/news/2020/09/24/medical-deferrals-immigrants-uscis-uncertainty>.

²⁶⁴ U.S. CITIZENSHIP & IMMIGR. SERVS., GUIDANCE ON EVIDENCE FOR CERTAIN TYPES OF HUMANITARIAN OR SIGNIFICANT PUBLIC BENEFIT PAROLE REQUESTS (updated June 23, 2022) <https://www.uscis.gov/humanitarian-or-significant-public-benefit-parole-requests> (listing documents to submit to support requests for parole on various grounds, including receiving medical treatment).

²⁶⁵ U.S. CITIZENSHIP & IMMIGR. SERVS., CHAPTER 8 – DISCRETIONARY ANALYSIS, *supra* note 102 (noting that at the factfinding stage, the adjudicator should gather evidence relating to “serious medical conditions,” among other considerations).

²⁶⁶ *Discretionary Options for Military Members, Enlistees and Their Families*, U.S. CITIZENSHIP & IMMIGR. SERVS. (updated Apr. 25, 2022), <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families>; U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 77.

crime.²⁶⁷ None of these situations automatically warrant an exercise of discretion or generates access to a form of lawful status that did not otherwise exist. It simply adds a positive factor that an adjudicator must consider as a significant factor in discretionary analysis.

No policy bars a DHS or EOIR official from considering statelessness as a factor relevant to discretionary benefits or prosecutorial discretion. Nor does any policy prohibit DHS or EOIR from expanding the list of factors relevant to discretionary analysis. Given the executive branch's inherent authority to decide when and to what extent it will enforce immigration law, DHS and EOIR can also update the factors to be considered in prosecutorial discretion to include statelessness. Importantly, this policy option remains available to address statelessness or other groups who present humanitarian needs—the precise discretionary remedies that are appropriate will vary by the individual or group. This Article's proposal remains viable even if courts ultimately constrain executive use of discretion in civil immigration enforcement in contravention of well-established precedent.

B. Challenges in Implementation

The second criterion for assessing this proposal is whether and how it would be implemented in practice. The proposal faces at least three major challenges in implementation: (1) potential for arbitrary or inconsistent decisions, including from enforcement agencies; (2) lack of judicial review of individual decisions; and (3) susceptibility to rescission or cancellation in the future.

First, the proposal to consider statelessness as a discretionary factor is vulnerable to arbitrary or inconsistent decision-making. As only one factor in a series of considerations, stateless individuals would be treated differently by different adjudicators, some of whom would give it significant weight and others who may be impacted by negative bias or consideration of illegitimate criteria.²⁶⁸ In this context, inconsistency and bias would mean that some stateless individuals do not receive a discretionary benefit or form of prosecutorial discretion that agency policy indicates they should receive.²⁶⁹ The most efficient way to address this is to establish clear categories of possible eligibility for forms of

²⁶⁷ U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 134.

²⁶⁸ Hallett, *supra* note 17, at 1780–89.

²⁶⁹ See Wadhia, *Darksided Discretion*, *supra* note 17, at 395 (“In a meaningful number of cases, it is a single negative factor or mark that results in a denial in the exercise of discretion.” (citation omitted)).

prosecutorial discretion and to adjudicate applications on a case-by-case basis.²⁷⁰ But clear categories leave a program vulnerable to litigation.²⁷¹ The lack of clear criteria in prosecutorial discretion is the issue that DACA sought to address²⁷²—and its clear eligibility criteria is what made DACA vulnerable to judicial scrutiny.²⁷³ Instead, EOIR, USCIS, and ICE leadership must seek to increase consistency and appropriate adjudications by issuing guidance to staff and requiring training for all staff on the significance of a finding of statelessness in a discretionary determination and by closely monitoring implementation. They should also designate specialized officers who would assess requests for exercises of discretion based on statelessness.²⁷⁴

Experience shows that ICE officers often resist efforts to expand access to temporary reprieves from immigration enforcement.²⁷⁵ This resistance can be partially addressed by allocating responsibility for adjudicating requests to USCIS, following the precedent to assign DACA applications to USCIS instead of ICE.²⁷⁶ However, extended immigration detention is among the most acute hardships experienced by stateless people in the United States,²⁷⁷ and addressing this would require ICE's

270 Motomura, *President's Dilemma*, *supra* note 16, at 170 (“Part of taking care faithfully to execute the immigration laws is adopting an enforcement system that maximizes predictability and uniformity and minimizes discrimination.”)

271 *See supra* Section IV.A.1.

272 *See* Motomura, *President's Dilemma*, *supra* note 16, at 166 (describing DACA as an “attempt to regularize and systematize immigration enforcement, and to make immigration enforcement uniform, consistent, and non-discriminatory.” (citation omitted)).

273 *See supra* Section IV.A.2.

274 BIANCHINI, *supra* note 14, at 280–83 (discussing the importance of competent adjudicators with expertise in statelessness); UNHCR, *supra* note 21, para. 63, at 27 (“Centralized procedures are preferable as they are more likely to develop the necessary expertise among the officials undertaking status determination.”).

275 *See* Motomura, *President's Dilemma*, *supra* note 16, at 166–68 (describing opposition within ICE to implementing DACA, including a lawsuit by the ICE union challenging the implementation of DACA); Hallett, *supra* note 17, at 1808 (noting that the Obama administration allocated adjudicatory responsibility for DACA applications to USCIS to address “institutional resistance . . . from frontline ICE enforcement”); KATIE MCCOY, THE HUMAN COSTS OF ICE'S ENFORCEMENT FRAMEWORK, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD (June 2021), https://nipnl.org/PDFs/2021_28June_enforcement-report.pdf (describing examples in which ICE officers refused to exercise prosecutorial discretion for individuals who should have benefitted from discretion under ICE guidance).

276 *See* Hallett, *supra* note 17, at 1796–97 (noting that ICE officers tend to experience a bias toward enforcement, and that DACA adjudications were assigned to USCIS as a result).

277 CTR FOR MIGRATION STUD., *supra* note 6, at 68–69 (describing the risk of detention

cooperation.²⁷⁸ Again, ICE should issue policy guidance and mandate training for its officers, and DHS leadership should exercise regular oversight of ICE actions to implement exercises of discretion for stateless individuals.

Second, there is extremely limited administrative or judicial review of exercises of discretion.²⁷⁹ At a policy level, deferential judicial review means greater certainty that the policy will remain in place. But at the individual level, the absence of judicial review means that individuals whose requests are denied have no legal recourse. Courts may review denials of discretionary immigration benefits in limited circumstances.²⁸⁰ Individual decisions whether to exercise prosecutorial discretion, though, are insulated from judicial review.²⁸¹ Considering the inevitable influence of bias or inconsistent decision-making, and resistance from at least some ICE officers to exercising discretion, the absence of judicial review is significant for stateless individuals who receive denials to their requests for reprieves from immigration enforcement. This would require DHS leadership to engage in regular review of actions and discretionary decisions to address and preempt arbitrary outcomes.

Third, administrative guidance to adjudicators can change with a new administration.²⁸² Courts can review whether an agency

that stateless people in the United States face).

278 Motomura, *President's Dilemma*, *supra* note 16, at 166–67 (describing how opposition within ICE to guidelines for prosecutorial discretion under the Obama administration undermined its implementation).

279 If denied discretionary immigration benefits, for example, applicants can file a motion to reopen. On appeal, motions to reopen are reviewed for abuse of discretion, which is a deferential standard. *See, e.g., Inestroza-Antonelli v. Barr*, 954 F.3d 813, 815 (5th Cir. 2020) (applying the abuse of discretion standard in a motion to reopen).

280 *See, e.g., Kucana v. Holder*, 558 U.S. 233 (2010) (holding that motions to reopen are subject to judicial review); Pula, *supra* note 259; *In Re Kasinga*, 21 I. & N. Dec. 467 (BIA 1996) (both reviewing discretionary denials of immigration benefits).

281 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–91 (1999) (holding that considerable judicial deference is appropriate in civil immigration enforcement, even more than in criminal prosecution, because delays in removal proceedings from judicial review can “permit and prolong a continuing violation of United States law,” often involve foreign policy concerns, and deportation is not considered to be punishment); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (“[A]n agency’s decision not to institute enforcement proceedings [is] presumptively unreviewable under [5 U.S.C.] § 701(a)(2).”).

282 Hallett, *supra* note 17, at 1810 (discussing DACA, and noting that “as the Supreme Court made clear, a future administration may decide to end such programs at any time as long as they abide by the requirements of the Administrative Procedure

has properly changed guidance or terminated or rescinded a form of prosecutorial discretion.²⁸³ But the Supreme Court in *Regents* was unambiguous about the authority to end a form of prosecutorial discretion altogether, stating that “[t]he dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.”²⁸⁴ While not required to implement the solution,²⁸⁵ DHS and EOIR could address this uncertainty by promulgating a regulation that would require consideration of statelessness in discretionary assessments of immigration benefits and exercises of prosecutorial discretion.

C. Addressing the Impact of Immigration Enforcement on Stateless People

Stateless individuals in the United States report four common experiences: (1) lack of legal status, (2) financial hardship resulting from lack of work authorization, (3) vulnerability to detention, and (4) separation from family members.²⁸⁶ This section evaluates the extent to which this Article’s proposal would address these humanitarian challenges experienced by many stateless people.

1. Legal Status

The proposal only partially addresses the need for stateless people to have assurance of their ability to live in the United States without fear of immigration enforcement. If implemented, this proposal would reduce discretionary denials for stateless individuals who are

Act”).

283 *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, No. 18-587, slip op. at 3 (U.S. June 18, 2020).

284 *Id.* slip op. at 9.

285 Factors to be considered in discretionary analysis have generally not been codified. For example, ICE policy mandating consideration of military service is an agency policy rather than a regulation. U.S. IMMIGR. & CUSTOMS ENFT, ICE DIRECTIVE 10039.2(2), CONSIDERATION OF U.S. MILITARY SERVICE WHEN MAKING DISCRETIONARY DETERMINATIONS WITH REGARD TO ENFORCEMENT ACTIONS AGAINST NONCITIZENS (2022). USCIS’s list of discretionary factors cites to administrative case precedent rather than to regulation. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 102. Determining which factors to weigh, and how to weigh them, is not something that agencies have felt that they need to codify and falls within the exception to notice and comment requirements as an interpretive rule or a general statement of policy. 5 U.S.C. § 553(b)(3)(A) (1966).

286 *CTR FOR MIGRATION STUD.*, *supra* note 6, at 68–73; *Citizens of Nowhere*, *supra* note 15, at 24–27; *Representing Stateless Persons*, *supra* note 15, at 3–4.

applying for immigration benefits.²⁸⁷ This would provide them access to lawful status—substantive legal rights and associated benefits, often with the ability to seek lawful permanent residence and naturalization. This proposal would also provide parole in place, a bridge to lawful permanent residence for stateless individuals who were not paroled or admitted but who have a basis to adjust status.

This proposal would benefit many, but not all, undocumented stateless people who lack eligibility for any immigration benefit. First, discretionary analysis is vulnerable to arbitrary outcomes, including for reasons of bias, meaning that some stateless individuals who should receive positive exercises of discretion do not.²⁸⁸ Discretionary analysis also means that some individuals with strong negative factors, such as serious criminal histories, would not receive a favorable exercise of discretion and would not benefit from this policy.²⁸⁹

Second, those who do receive temporary reprieves through an exercise of prosecutorial discretion would benefit from lawful presence in the form of deferred action, parole, and stays of removal, but they would not receive lawful status.²⁹⁰ This lawful presence would be subject to revocation at any time.²⁹¹ Finally, by definition, none of the forms of prosecutorial discretion offer access to *durable* status that would allow them to adjust status to lawful permanent residence and eventual naturalization.²⁹² Only legislation can offer that.²⁹³

287 Such denials may already be uncommon, though government agencies do not provide sufficient data to establish this. See Wadhia, *Darkside Discretion*, *supra* note 17.

288 See *supra* Part IV.B.

289 See, e.g., *Matter of Mendez-Morales*, 21 I. & N. Dec. 296 (B.I.A. 1996) (denying a discretionary waiver of inadmissibility based on extreme hardship was not required where an applicant had a U.S. citizen wife and children and a regular history of employment but had a serious criminal record).

290 HARRINGTON, *supra* note 109, at 9 (noting that time on “deferred action, TPS, and most other types of reprieves does not count toward the accumulation of unlawful presence”).

291 Hallett, *supra* note 17, at 1806 (noting that “discretion is always revocable”).

292 See *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, (updated May 30, 2023), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> (answering the question “[d]oes deferred action provide me with a path to permanent resident status or citizenship?” with the following response: “No. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”)

293 Legislation to provide a pathway to citizenship for undocumented individuals would include some stateless individuals but, depending on the scope of

2. Financial Hardship

This proposal would also mitigate some of the financial hardships that stateless people in the United States face. Individuals who receive lawful status would generally receive employment authorization incident to their immigration benefits.²⁹⁴ Many individuals who receive temporary reprieves from immigration enforcement would also be able to apply for employment authorization. Deferred action recipients can apply for employment authorization if they can “establish[] an economic necessity for employment.”²⁹⁵ Individuals released from detention on orders of supervision may receive work authorization based on factors which include economic necessity, dependent family members, and the length of time before a noncitizen can be removed.²⁹⁶ Parole recipients must apply for work authorization, and are not required by regulation to show an economic necessity.²⁹⁷

This is not a perfect solution. Any of these options require individuals to renew their work permits regularly, leaving “otherwise productive individuals in a constant state of instability and economic precariousness.”²⁹⁸ Long delays in USCIS processing mean that individuals who do have these temporary forms of work authorization can face extended gaps in authorization.²⁹⁹

3. Immigration Detention

This proposal would also address risks of extended detention. It

legislation, would likely not cover all stateless people, much as DACA includes many but not all stateless individuals. *See id.* *See also* USA FOR UNHCR, *How One Harvard Student is Using her Story to Advocate for Statelessness Issues in the US* (May 27, 2021), <https://www.unrefugees.org/news/how-one-harvard-student-is-using-her-story-to-advocate-for-statelessness-issues-in-the-us/>.

294 8 C.F.R. § 274a.12(a) (2022) (listing groups of noncitizens who are authorized for employment by virtue of their immigration status in the United States).

295 *Id.* § 274a.12(c)(14).

296 *Id.* § 274a.12(c)(18).

297 *Id.* § 274a.12(c)(11) (describing categories of noncitizens who must apply for employment authorization to include “an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act”).

298 Baluarte, *supra* note 15, at 366.

299 CTR FOR MIGRATION STUD., *supra* note 6, at 71 (“Some stateless persons, namely those under orders of supervision, receive employment authorization, which they must renew annually. Many have reported difficulties caused by delays in issuing work re-authorization. Lapses in work authorization make it difficult for stateless persons to advance in the workplace or even retain their positions.”)

would require ICE agents to consider a person's statelessness in assessing detention and to consider statelessness when setting conditions for orders of supervision when the INA does not mandate detention. This would not mitigate all situations of detention, because detention would continue to be mandatory during the removal period and for individuals with certain criminal convictions.³⁰⁰ An additional challenge is the extent to which ICE staff are willing to implement these policies.³⁰¹ To address this, DHS must ensure widespread training and engage ICE leadership to ensure that ICE develops and implements systems to affirmatively identify stateless individuals. Widespread training for the immigration bar is also essential to ensure that individuals are aware of opportunities to request release from immigration detention.

4. Separation from Relatives

This proposal partially addresses the separation from family members that stateless people often face. Stateless people in the United States often face separation from relatives who are outside the country, because they are not entitled to travel documents from any other country.³⁰² Stateless people also face separation from family members in the United States during prolonged periods of detention or when subject to travel restrictions to orders of supervision.³⁰³

This proposal would facilitate some people gaining lawful permanent residence status or naturalization on a basis other than their status as stateless, which would facilitate international travel. But it only removes obstacles to that status rather than creating a basis for legal status for undocumented stateless individuals. For those individuals, this proposal offers some relief, as it would require ICE to lessen conditions in orders of supervision that can limit the individual's ability to travel domestically. It would not address the situation of undocumented stateless individuals who are separated from relatives outside the United States.

300 Detention is mandatory during the removal period. Immigration and Nationality Act, 8 U.S.C. § 1231(a)(1)(A)–(2) (2006) (requiring detention during the 90-day removal period); 8 U.S.C. § 1226(c)(1) (1996) (mandating detention for noncitizens who are inadmissible or deportable under several specified provisions of the INA).

301 See *supra* Section IV.B.

302 CTR FOR MIGRATION STUD., *supra* note 6, at 68–71.

303 *Id.* at 69–70.

CONCLUSION

This Article argues that discretionary remedies can go a considerable distance to address the humanitarian issues that stateless people in the United States commonly face. To preserve limited government resources in immigration enforcement and to address the hardships that stateless people face, DHS and EOIR should require adjudicators to consider statelessness as a positive factor when adjudicating discretionary immigration benefits. DHS should also consider statelessness as a factor to consider in exercises of prosecutorial discretion, which would give many undocumented stateless people a temporary reprieve from immigration enforcement and the opportunity to receive work authorization. Additionally, DHS should prevent and limit extended immigration detention of stateless individuals. While not required to give immediate effect to this proposal, a regulation codifying this treatment of this factor would provide assurance about the long-term stability of this policy.

This Article also illustrates how states without a dedicated mechanism to offer immigration status to stateless people can improve the rights of stateless individuals. States should pursue legislation providing durable legal status, but as this Article demonstrates, states can proactively take steps to identify stateless people and employ existing legal remedies to address the needs of stateless people where legislation and a pathway to permanent residence is unobtainable.

Furthermore, this Article demonstrates the limited—but important—role that discretion can continue to play, even if judicial interventions sharply limit the role of executive discretion in contravention of longstanding precedent. Though only legislation can provide a pathway to citizenship, case-by-case consideration of statelessness offers the remarkable benefit of being implementable immediately. While awaiting legislation, the executive branch can and should act to address the many hardships that stateless people in the United States face.

