

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA and JANET NAPOLITANO)
in her official capacity as)
President of the University of)
California,)

Plaintiffs,)

VS.)

NO. C 17-05211 WHA)

U.S. DEPARTMENT OF HOMELAND)
SECURITY and ELAINE DUKE in her)
official capacity as Acting)
Secretary of the Department of)
Homeland Security,)

Defendants.)

STATE OF CALIFORNIA, STATE OF)
MAINE, STATE OF MARYLAND, and)
STATE OF MINNESOTA,)

Plaintiffs,)

VS.)

NO. C 17-05235 WHA)

U.S. DEPARTMENT OF HOMELAND)
SECURITY, ELAINE C. DUKE in her)
official capacity as Acting)
Secretary of the Department of)
Homeland Security; and UNITED)
STATES OF AMERICA,)

Defendants.)

San Francisco, California)
Tuesday, October 3, 2017)

TRANSCRIPT OF PROCEEDINGS

Reported By: BELLE BALL, CSR 8785, CRR, RDR
Official Reporter, U.S. District Court

(Case captions and appearances continued, next page)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

CITY OF SAN JOSE, a municipal)
corporation,)
)
Plaintiff,)

VS.)

NO. C 17-05329 WHA)

DONALD J. TRUMP, President of)
the United States in his)
official capacity; ELAINE C.)
DUKE in her official capacity;)
and the UNITED STATES OF)
AMERICA,)
)
Defendants.)

DULCE GARCIA, MIRIAM GONZALEZ)
AVILA, SAUL JIMENEZ SUAREZ,)
VIRIDIANA CHABOLLA MENDOZA,)
NORMA RAMIREZ and JIRAYUT)
LATTHIVONGSKORN,)
)
Plaintiffs,)

VS.)

NO. C 17-05380 WHA)

UNITED STATES OF AMERICA;)
DONALD J. TRUMP in his official)
capacity as PRESIDENT of the)
United States; and ELAINE C.)
DUKE in her official capacity)
as Acting Secretary of the)
Department of Homeland)
Security,)
)
Defendants.)

(Appearances, next page)

APPEARANCES:

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MARK H. LYNCH, ESQ.

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(Appearances continued, next page)

APPEARANCES, Continued:

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UNITED STATES DEPARTMENT OF JUSTICE
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BY: JEFFREY S. ROBINS, ESQ.
ASSISTANT DIRECTOR

Also Present: CHRISTINE WOOD, Paralegal

Also Present via Videoconference:
MAGISTRATE JUDGE JAMES ORENSTEIN

1 Tuesday - October 3, 2017

7:56 a.m.

2 P R O C E E D I N G S

3 **THE COURT:** Welcome, good morning. So help me first
4 with your appearances, and then we'll explain the setup.

5 So please call the case, Angie.

6 **THE CLERK:** Calling Civil Action 17-5211, related to
7 17-5235, 17-5329 and 17-5380, Regents of the University of
8 California, et al. versus United States Department of Homeland
9 Security, et al.

10 Counsel, please approach the podium and state your
11 appearances for the record.

12 **MS. ALMADANI:** Good morning, Your Honor. Mónica
13 Ramírez Almadani with Covington & Burling on behalf of the
14 University of California.

15 **MR. CORTES:** Good morning, Your Honor. Luis Cortes
16 from Barrera Legal, on behalf of the Garcia plaintiffs.

17 **THE COURT:** Welcome to you.

18 **MR. ZAHRADKA:** Good morning, Your Honor. James
19 Zahradka from the California Attorney General's office on
20 behalf of the states of California, Maryland, Maine and
21 Minnesota. I won't be part of the initial presentation today,
22 but I'm appearing on behalf of those states.

23 **THE COURT:** Great.

24 **MR. DETTMER:** Good morning, Your Honor. Ethan Dettmer
25 from Gibson Dunn on behalf of the Garcia plaintiffs

1 **THE COURT:** Great.

2 **MS. FINEMAN:** Good morning, Your Honor. Nancy
3 Fineman, Cotchett, Pitre & McCarthy, for plaintiff City of
4 San Jose.

5 **THE COURT:** Okay.

6 **MR. DAVIDSON:** Good morning, Your Honor. Jeffrey
7 Davidson, Covington & Burling, on behalf of the Regents of the
8 University of California.

9 **THE COURT:** All right.

10 **MR. LEE:** Good morning, Your Honor. Ronald Lee with
11 the California Department of Justice for the State of
12 California.

13 **MR. LYNCH:** Good morning, Your Honor. Mark Lynch with
14 Covington & Burling on behalf of the Regents of the University
15 of California.

16 **THE COURT:** Okay.

17 **MR. ROSENBAUM:** And good morning, Your Honor. Mark
18 Rosenbaum from Public Counsel on behalf of the Garcia
19 plaintiffs.

20 **THE COURT:** Welcome to you. All right, so that is the
21 plaintiff side. How about the government side?

22 **MR. ROSENBERG:** Good morning, Your Honor. Brad
23 Rosenberg from the Department of Justice, Civil Division,
24 Federal Programs Branch.

25 With me at counsel's table is Jeffrey Robins, who's an

1 Assistant Director in the Civil Divisions Office of Immigration
2 Litigation. And he will be taking the lead on the presentation
3 today.

4 And I also have a colleague, a paralegal from our office,
5 Christine Wood.

6 **THE COURT:** Christine Wood.

7 **MS. WOOD:** Yes.

8 **THE COURT:** Great. Welcome to all of you.

9 All right. So we're here on a tutorial. And just to help
10 with the logistics for a moment, help me understand, first of
11 all, where the camera is.

12 Is there a camera in here?

13 **THE CLERK:** (Indicating)

14 **THE COURT:** It's up there, all right. So it will be
15 pointing at the counsel, correct?

16 **THE CLERK:** Yes.

17 **THE COURT:** Okay. And is this being -- I know it is
18 being sent to the Eastern District of New York, correct?

19 **THE CLERK:** Correct.

20 **THE COURT:** All right, does everybody understand that?
21 So that the Judge and the Magistrate Judge back there can tune
22 in, eventually.

23 And then, is this also being made available to the public?
24 I think it is, but I'm not sure. Is that --

25 **THE CLERK:** (Inaudible)

1 **THE COURT:** Not made available to the public. Okay.
2 All right. I have no objection to it being made available to
3 the public, but -- all right, I'm just curious to know.

4 So, in -- in -- I want to say greetings and compliments to
5 Judge Garaufis and James Orenstein, Judge Orenstein, there in
6 the Eastern District in Brooklyn. I think I see you there.

7 Good morning.

8 **JUDGE ORENSTEIN:** Yes, that's me. Good morning.

9 **THE COURT:** All right. And I want to invite you to
10 ask questions, do anything you want to do, interrupt as you
11 would like during the proceedings. So, you are most welcome to
12 do that.

13 And also in the courtroom, Judge Sallie Kim, who is our --
14 in charge of the discovery in this case. And then my law clerk
15 and extern are here as well. So, we're all anxious to start
16 learning something about the subjects.

17 Let me get guidance from you on the time. I was thinking
18 something along the lines of a total of 45 minutes per side,
19 which would be about an hour and a half.

20 Give me a rough idea, is that what you were thinking?
21 What -- what's your thought?

22 **MS. ALMADANI:** Your Honor, we were thinking about an
23 hour for our side. We can always condense it if that's --

24 **THE COURT:** Well, let's see how it goes. I do have --
25 I do have a hearing at 11:00, but I've got a conference

1 beforehand. We might be able to get an hour per side. But
2 let's see how that goes.

3 How about on the government's side?

4 **MR. ROSENBERG:** I think -- Your Honor, we're happy to
5 work within whatever parameters the Court would like. And we
6 just want the presentation to be --

7 **THE COURT:** Let's say 45 minutes to an hour per side,
8 and see how that goes. And we'll start with the plaintiffs,
9 and then go to the government.

10 You can save a little bit of your time for rebuttal. But
11 you don't get more than the government. You just get the same
12 amount of time as the government.

13 Now, I hope you can avoid argument. Some of the things --
14 some -- some background facts will inevitably have an
15 argumentative aspect to them. I understand that. But it's --
16 the time for real argument is going to be later. I think,
17 today, it will be most beneficial to learn the ins and outs of
18 how the things that we sent out to you in the order, how that
19 works.

20 So now, I'll turn the floor over to the plaintiffs. And
21 you may begin with your presentation, please. Go ahead. And
22 again, start with your name, if you would.

23 **MR. CORTES:** Good morning, Your Honor.

24 **THE COURT:** Good morning.

25 **MR. CORTES:** My name is Luis Cortes from Barrera

1 Legal, on behalf of the Garcia plaintiffs. So myself and
2 Ms. Almadani will be presenting today.

3 **THE COURT:** Okay. That's great. I have a feeling
4 they can't hear you very well in New York because your voice is
5 soft. So I want you to use the microphone a little bit more,
6 and you can turn it up there. Yeah. Aim it towards your
7 voice.

8 So, you two proceed.

9 **MR. CORTES:** Thank you, Your Honor.

10 So, we want to provide a roadmap as to what we're going to
11 be covering today because immigration is so vast it covers so
12 much and it covers so much that we want to narrow it down to
13 what we think is the most relevant and important parts as is
14 applicable to this case.

15 So the three principal things that we're going to be
16 covering is the overview of the immigration procedure -- I know
17 that covers a great aspect of it. That includes removal, the
18 potential bars when someone is returned, and what that looks
19 like. Not just in the legal aspect, but also in the practical
20 aspect of what the mechanics of that looks like.

21 We'll also be covering the history of deferred action, and
22 what it looks like within the context of its history.

23 And then we will finish off with focusing on the DACA
24 program, the Deferred Action for Childhood Arrivals, and what
25 it looks like now, and kind of how that works, as well. So

1 those are, in broad strokes, what we are going to be covering.

2 Of course, if there is any point that Your Honor or any
3 other -- anyone else has any questions, we can cover other
4 parts of that maybe that we haven't -- we are prepared for that
5 as well.

6 I do want to mention that I practice exclusively
7 immigration law, so that is -- a significant amount of my
8 knowledge basically comes from there, and working with DACA
9 recipients as well. So if you have any questions about how it
10 works in practice as well, I'm able to provide some of that
11 context.

12 (Off-the-Record discussion between counsel)

13 **MR. CORTES:** As well, Your Honor, I know that this
14 case is particularly focused on the DACA program, itself, and
15 there might be some questions about the real practical
16 mechanics of it, in terms of its procedure or timelines or
17 anything like that.

18 I, myself, went through the DACA program as well, so I'm
19 happy to answer any questions, because I have some intimate
20 knowledge based on that.

21 I'll let my colleague --

22 **MS. ALMADANI:** And Your Honor, just very briefly, I've
23 handled immigration-related cases my entire career, both as a
24 staff attorney with the ACLU Immigrants Rights Project and as
25 an Assistant U.S. Attorney in the Central District of

1 California. I have also been an immigration adviser to both
2 federal government officials and state officials.

3 And so that's why I'm here today. And I'll be discussing
4 mostly the history of deferred action.

5 **THE COURT:** Great.

6 **MR. CORTES:** So, looking at what -- kind of what all
7 the moving parts are, in the immigration context, there's the
8 enforcement arm of immigration, which is Immigration and
9 Customs Enforcement, or ICE, and Customs and Border Control,
10 which is generally the border, or at the airports. So they are
11 the enforcement agency of the Department of Homeland Security.

12 The benefits agency of the Department of Homeland Security
13 that provides immigration benefits from a work permit to legal
14 permanent residency is the U.S. Citizenship and Immigration
15 Services, or USCIS --

16 **THE COURT:** Say that again, U.S. --

17 **MR. CORTES:** Citizenship and Immigration Services, or
18 USCIS.

19 **THE COURT:** All right, I got it.

20 **MR. CORTES:** So they are the benefits agency.

21 **THE COURT:** That's the group that swears people in as
22 citizens, right?

23 **MR. CORTES:** Yes, they can. Yeah.

24 **THE COURT:** All right.

25 **MR. CORTES:** And there's also the Immigration Court,

1 or the Executive Office for Immigration Review. And that
2 includes the Board of Immigration Appeals as well. So those
3 are the general framework of what the moving parts and all of
4 the government agency looks like.

5 In terms of what the population looks like as it pertains
6 to this case, the Department of Homeland Security in 2012
7 estimated that there's about 11.4 million undocumented
8 individuals in the United States. Of course, that -- that
9 number might fluctuate because it's difficult to ascertain how
10 many people are really here. But that's the last snapshot that
11 the Department of Homeland Security provided.

12 But within that, in terms of the DACA recipients, there
13 have been approximately about 800,000 total DACA recipients.
14 In terms of the active DACA recipients, there's about 690,000
15 that have -- now have DACA. That decrease in number could be
16 because they got status somewhere else, or sometimes DACA was
17 removed, so there's a variety of reasons why an individual
18 might not have DACA anymore.

19 Now, to provide a quick snapshot as to what the,
20 quote-unquote, average DACA beneficiary looks like -- and these
21 are from the statistics that U.S. Citizenship and Immigration
22 Services provided. A vast majority of the DACA recipients are
23 from Mexico. About 79.4 percent. And the one next to that, so
24 the right below that, is El Salvador, from -- 3.7 percent of
25 the DACA beneficiaries are from there.

1 And I believe the next two are from Central America, from
2 Guatemala and Honduras, covering from 2.66 percent to
3 3.2 percent. So if we're looking at who the DACA beneficiary
4 is, on average, it's people from Mexico, by and large, and then
5 individuals from Central America is what we're looking at.

6 Within that, 82 percent of them are single. And that will
7 become important as we move forward with the presentation,
8 because --

9 **THE COURT:** Single now? Or single at the time they
10 applied?

11 **MR. CORTES:** I believe it's single now.

12 **THE COURT:** Okay.

13 **MR. CORTES:** Single now. And that marital status
14 sometimes has something to do with the way that the immigration
15 procedure works. So that is important to keep in mind.

16 And also, the current average age of the DACA recipient is
17 in their twenties and early thirties.

18 So that is the snapshot of the average DACA, individual
19 DACA recipient that --

20 **THE COURT:** Is there a way to tell from the data what
21 the -- what the age is -- distribution of ages was at the time
22 they came in to the USA?

23 **THE WITNESS:** The USCIS hasn't provided that
24 information. I'm sure there is a way to find it, though we
25 don't have those numbers, quite, offhand, of when they actually

1 came in. Though, at least in terms of in practice, we see a
2 lot of individuals who are coming in at a very early age. Even
3 before they can speak.

4 I do want to note that in order to qualify for DACA, you
5 have to have entered before you are 16. So at the very
6 minimum, it's then. Right before you are 16.

7 **THE COURT:** Right. But if we were trying to figure
8 out how many were 15, 14, 13, all the way down to one month,
9 would those forms that you fill out to apply, could we tabulate
10 that information from the forms?

11 **MR. CORTES:** Yeah. The DACA form -- it's the I-821D,
12 that's the form that we apply for DACA or that a person uses to
13 apply for DACA -- it asks the time of entry, the time of
14 initial entry, and also accounts for any exit.

15 So if -- that information could be compiled if --

16 **THE COURT:** Is it tabulated on the computer,
17 somewhere? Or is that something that would have to be done
18 manually?

19 **MR. CORTES:** As far as I researched, that information
20 hasn't been provided, or hasn't been tabulated yet. But I'm
21 sure that it could be put together.

22 **THE COURT:** Okay. Maybe the government side will have
23 more info on that, whenever they get up.

24 **MR. CORTES:** So, so that's kind of what the population
25 looks like that we are talking about, within the context of

1 undocumented individuals. So it's a very small subsection of
2 individuals.

3 Now, we'll move into what that looks like a little bit
4 more in detail towards the end, when we are talking about DACA.
5 But now, I really want to focus on what the removal process
6 looks like, and what it is, and the different types of removal,
7 as we're talking about leaving the United States.

8 **THE COURT:** I'm glad you're going to that, but before
9 you even start, what is the difference between removal and
10 deportation?

11 **MR. CORTES:** So deportation, the term of art of
12 "deportation" was mostly used before 1996, where there was a
13 sweep over -- I don't want to call it reform, but there was a
14 significant amount of immigration law that's changed at that
15 time. And there was "exclusion" and "deportation," and then it
16 just got merged together to "removal." So they are synonymous
17 when we're talking about proceedings now.

18 "Deportation proceedings," as it's colloquially known, is
19 now called "removal proceedings." But it's effectively the
20 same thing, as we're talking about the process in this context.

21 **THE COURT:** Okay.

22 **MR. CORTES:** Now, when we're talking about removal,
23 there's a few ways that an individual can be removed. The
24 first way is going through removal proceedings. So you would
25 go through the administrative proceedings with an immigration

1 judge, and the opposing counsel would be the Department of
2 Homeland Security representing ICE or Immigration and Customs
3 Enforcement. And you would figure out if a person is
4 deportable. So if -- they wanted to make sure that person
5 isn't a citizen of here, of the United States, before they
6 initiate removal proceedings, and also what forms of relief, if
7 any, they may have.

8 Now, I do want to note that because it's civil
9 proceedings, there is no right to government-appointed counsel,
10 no matter what age. So, between one and 99, it's the
11 individual's responsibility to hire an attorney.

12 There is an exception to that. If the individual has
13 diminished mental capacity, then there's a way to establish
14 whether that is a significant diminished capacity to be able to
15 get an appointed counsel. But that's really the only exception
16 that there is in terms of having appointed counsel in these
17 proceedings.

18 Now, the removal proceedings can vary in the timeline.
19 The average timeline for someone who is not detained is
20 approximately 600 -- 676 days. So, and that's how long
21 individuals have been waiting. At least as of right now, it's
22 676 days for someone who is not detained.

23 **THE COURT:** Say that again. So, somebody who is --
24 they initiate removal, and it doesn't end until 676 days?

25 **MR. CORTES:** On average.

1 **THE COURT:** These are for people who are out of
2 custody.

3 **MR. CORTES:** Correct. Correct.

4 **THE COURT:** And what is it for people who are in
5 custody?

6 **MR. CORTES:** That, that varies. For example, I work
7 in the Seattle area. And Tacoma Immigration Court is the court
8 that deals with the detain docket.

9 Now, according to Syracuse University -- they have a
10 system that they can track a lot of this data. And the average
11 wait time is about 82 days to 90 days for someone who is in
12 custody. But we're talking about the first level of its
13 procedure, through the Immigration Court.

14 Of course, there's an appeal process to the Board of
15 Immigration Appeals. And then if the Board of Immigration
16 Appeals has an unfavorable decision, then there is potentially
17 a petition for review in the circuit court. In this case, it
18 would be in the Ninth Circuit. So that would be an additional
19 time to whatever wait time that there is.

20 So, and again, the Board of Immigration Appeals will move
21 a case along faster if someone is detained for, I guess --

22 **THE COURT:** That number you gave me, 676, does that
23 include appeals?

24 **MR. CORTES:** It does not.

25 **THE COURT:** That's just a decision by the immigration

1 judge?

2 **MR. CORTES:** Correct.

3 **THE COURT:** Okay.

4 **MR. CORTES:** And that's how long individuals have been
5 waiting, at least as of right now. So that might fluctuate.

6 So that's what removal proceedings looks like, generally.
7 Now, of course, there's much more mechanics that go into that.

8 **THE COURT:** Do we know how many -- what the -- what
9 the ratio is of -- let's say out of 1,000 cases, how many of
10 them wind up with removal orders, and how many do not? What is
11 the percentage?

12 **MR. CORTES:** It depends on the forms of relief. That
13 data is available. The majority of individuals end up with a
14 deportation order.

15 I want to provide a quick snapshot as to what that looks
16 like. In terms of the -- we'll take it maybe within the asylum
17 context, and we'll see that in a moment.

18 But the top five countries that are represented in
19 Immigration Court are Mexico and individuals from Central
20 America. So those are the top five countries that are
21 represented in the Immigration Court system.

22 And if we're looking at just asylum, someone who applies
23 for asylum and protection for that, the top five -- at leave
24 the top five -- excuse me, the top four countries that has a
25 denial rate is Mexico, and individuals from Central America.

1 So, for instance, Mexico has close to a 90 percent denial
2 rate for asylum. El Salvador has 80 percent. A little more
3 than 80 percent. Honduras has -- reaching 80 percent. And
4 Guatemala has just below 80 percent of a denial rate when it
5 comes to their asylum applications.

6 And this is coming from the data put together from
7 Syracuse University. They have a system to track that.

8 **THE COURT:** Isn't there something else, though? In
9 addition to asylum, something that I see in the 1326 cases,
10 it's a relief road, some kind of relief road from deportation
11 that's not asylum. It's a different kind. What is that?

12 **MR. CORTES:** Yeah. I believe your Honor might be
13 referring to cancellation of removal.

14 **THE COURT:** I think that's it, yes.

15 **MR. CORTES:** Yeah. And if I may, we will cover
16 immigration and removal in the next slide.

17 **THE COURT:** Okay.

18 **MR. CORTES:** I wanted to just make sure to go through
19 the rest of the types of the removals. And it would make the
20 rest of the forms of relief a little bit better to understand
21 within that context. But you can apply for, for instance,
22 that, in the removal proceeding stage.

23 There are two other parts to how someone can be removed.
24 And the other one is through an expedited removal. And what
25 that looks like is that if someone already has a removal order,

1 then they don't go through the removal proceedings. Because
2 the removal proceedings is to see if you get a deportation
3 order or a removal order. So if you already have one, then
4 Immigration and Customs Enforcement can just say: Here's the
5 deportation order, or the removal order, and then they can be
6 removed.

7 And the length of time it takes to be removed can vary,
8 depending on how long it takes to get travel documents from the
9 consulate, like a passport, so they can go. And then, also,
10 the resources. They have to procedurally gather them and
11 (Inaudible) them.

12 At least in Washington, it could take somewhere --
13 sometimes as little as five days from being picked up to being
14 removed, if someone already has a deportation order.

15 Now, within the DACA beneficiary context, we do see some
16 DACA beneficiaries who already have deportation orders. The
17 most common thing that I see with that is one of two things --
18 or, excuse me -- one of three things.

19 One is that their parents have gone through the
20 immigration system, and the child was a beneficiary, or was at
21 least a derivative of the application. And then the
22 application was denied, and it eventually came with a
23 deportation order, so now the child has a deportation order.

24 And so those individuals then would not go through the
25 removal proceedings.

1 **THE COURT:** So take that case. The child is subject
2 to a deportation, but they're in the DACA program.

3 **MR. CORTES:** Uh-huh.

4 **THE COURT:** Is that -- so what happens in that
5 situation?

6 **MR. CORTES:** If they have a removal order and they're
7 in the DACA program?

8 **THE COURT:** Right.

9 **MR. CORTES:** So having a prior removal order doesn't
10 prevent an individual from getting DACA. The reason for it is
11 because DACA doesn't -- it isn't technically a status under the
12 Immigration Nationality Act, so it is not subject to
13 inadmissibility grounds. So it's not subject to what it would
14 normally take for someone to get legal permanent residency or
15 citizenship.

16 **THE COURT:** But if you are in the DACA program and you
17 get subject to a deportation order on account of your parents.

18 **MR. CORTES:** Uh-huh.

19 **THE COURT:** Is it a defense? I mean, can you raise
20 it, say? Wait, no, I'm in the DACA program, I don't get to...
21 How does that part work?

22 **MR. CORTES:** Yeah. So, it could work in two different
23 parts. In two different scenarios. One of them is: So,
24 someone doesn't have DACA yet. Well, someone can't apply, but
25 before this. So someone didn't have DACA, but they're

1 DACA-eligible, they'll meet all the requirements which we'll
2 get to close to the end. And they get picked up in removal
3 proceedings. Then, yes, someone could say: Hey, I'm DACA
4 eligible, I want to apply. And then the Court will generally
5 provide them some time to apply with USICS and see if it's
6 granted. And if it is, then the case just might be
7 administratively closed. So it can be brought up as a defense
8 by that.

9 If someone already has DACA, then they wouldn't be placed
10 in removal proceedings unless something happened. Generally,
11 if there's an arrest or a conviction, that might disqualify
12 them from DACA or cause further DACA to be taken away.

13 It doesn't always have to be an arrest. If they are
14 deemed to be a threat to national security, for instance, if
15 they think that the individuals are a gang member or something
16 of that, even if there's no conviction, then the Department of
17 Homeland Security can rescind DACA, and then put in a removal
18 proceedings. At that point, saying "I'm DACA-eligible" won't
19 help as a defense, because it was already taken away. So then,
20 then that would be -- then that would be that.

21 I don't know if I answered the Court's question.

22 **THE COURT:** Yeah, you did. All right.

23 **MR. CORTES:** And the last part, before I move on, is
24 just a voluntary departure. And a voluntary departure
25 effectively is the same thing. You have got to go. But the

1 way that it works is that it doesn't -- it's not seen as -- it
2 is not a removal order. So that will create implications later
3 on in terms of wanting to come back, whether you have a removal
4 order or not, on a voluntary departure.

5 Now, the other thing I want to mention that we've seen
6 within the DACA beneficiaries is that the parents would have
7 gone through the immigration system and were granted voluntary
8 departure, saying: Okay, we are not going to issue a removal
9 order, but we will give you X amount of days to leave under a
10 voluntary departure. That way you don't have a deportation
11 order or a removal order when you leave. But then they don't
12 leave within the allotted time.

13 And so under that situation, the voluntary departure turns
14 automatically into a removal order by operation of law. So now
15 that DACA beneficiary now also has a removal order. So we've
16 seen some of that happen, too, within this context.

17 Now, I did want to move to the forms of relief, so, some
18 of the defenses that you may have in the event that you are
19 placed in removal proceedings. And really, there are -- see if
20 there's -- okay.

21 So, if we're looking at the forms of relief, there's a
22 variety. But in terms of the DACA beneficiaries, there's -- a
23 lot of them won't be applicable to them.

24 So for instance, if we're looking at asylum -- we went
25 through it a little bit as to what a DACA beneficiary might

1 face in terms of the denial rates with their asylum, given the
2 demographics and the denial rates.

3 With the cancellation and removal, putting it in broad
4 strokes, there's five things that you need show in order to be
5 granted cancellation of removal. And the full name of it is
6 Cancellation of Removal for Certain Non-permanent Residents and
7 Adjustment of Status. That will mean that if you get your case
8 granted that you would get a green card. That's essentially
9 what it would mean.

10 So the five general requirements to be able to just
11 qualify is that you've been in the United States for a period
12 of ten years from the -- from the moment that you entered, from
13 when the removal proceedings were initiated. So, ten years
14 from that.

15 So even if it takes, for instance, the 600 and something
16 days for the Court to move forward, those don't count towards
17 the ten years. So if you -- nine, nine years and six months,
18 then, out of luck. So you have to be here for ten years.

19 The second one is that you have to have what's called a
20 qualifying relative. So part of the relief is contingent on
21 having a qualifying relative, so that you can show hardship if
22 you -- to that relative if you were removed. And the
23 individuals who qualify are legal permanent resident or U.S.
24 citizen parents, spouses, or children. So long as they are
25 under 21. So, then, that's the other requirement.

1 You have to show that you are of good moral character.

2 And that you haven't been convicted of certain crimes,
3 like drug offenses. There's an enumerated amount of crimes.

4 And this is where, really, the meat of the case is, in a
5 more practical sense. You have to show that if you are
6 removed, that the qualifying relative will suffer exceptional
7 and extremely unusual hardship. So that's the term. So
8 regular hardship or even regular extreme hardship isn't
9 sufficient. It has to be exceptional and extremely unusual
10 hardship.

11 And that's -- the BIA has recognized that that's a high
12 standard, and has provided some factors to take a look at. For
13 instance, the child's health, or the qualifying relative's
14 health; the conditions in their home country.

15 And really, what the Board of Immigration Appeals
16 generally looks at and subsequently the immigration boards, is
17 that if that individual, the qualifying relative, will suffer a
18 different type of hardship that anybody else in that position
19 would suffer.

20 So, for instance, saying: "Oh, my, you know, my spouse is
21 going to be removed and I won't have a spouse," or, you know:
22 "We are going to be separated," because all of the spouses
23 would have the same hardship, that wouldn't rise to that level,
24 necessarily.

25 Generally, as a matter of practice, one of the first

1 things that we look at is any kind of health complications or
2 school complications. And it provides this weird issue where
3 the worse the condition someone's in, the better the case looks
4 like.

5 And so for a -- for instance, a DACA beneficiary who maybe
6 has a child who is a U.S. citizen, if the child is healthy,
7 everything is going well, then it would be difficult to -- to
8 be successful on a cancellation of removal case, if we're
9 trying to provide exceptionally treating -- a real hardship on
10 the cancellation or removal.

11 And I had mentioned before that 82 percent of the DACA
12 beneficiaries now are single, so, as in not married. And
13 therefore, at least one of the qualifying things is not there
14 in terms of to be able to qualify for cancellation of removal.

15 The rest of them won't apply for DACA beneficiaries, by
16 and large. For instance, there's a diversity lottery visa.
17 But Mexico and Central America are -- can't -- don't allow for
18 that for diversity (Inaudible) --

19 **THE COURT:** Say that last sentence again. It went by
20 me too fast. Say it again, please, that last point.

21 **MR. CORTES:** Sure. So, for instance, other forms of
22 relief, like the diversity lottery visa.

23 **THE COURT:** Diversity what?

24 **MR. CORTES:** Lottery visa.

25 **THE COURT:** Okay.

1 **MR. CORTES:** So it's where individuals from certain
2 countries can apply for essentially a lottery, and then you get
3 picked, and you can have a legal permanent residence. And so
4 Mexico and Central America are excluded from the diversity
5 lottery visa program.

6 There's temporary protected status. Again, that was set
7 by Congress. And only certain individuals from certain
8 countries apply. And it's generally if there was some sort of
9 humanitarian issue going on in the home country, like the
10 earthquake in Haiti, for instance. So they would permit them
11 to stay here for a small period of time.

12 But in terms of the DACA beneficiary folks we're talking
13 about, that wouldn't apply for them, either, because you have
14 to have applied at the time that the program was started, so
15 you can't apply now.

16 So, really, that just leaves us with family-based
17 petitions. And I'll just briefly touch on that to provide a
18 practical explanation of what that looks like, and then I'll
19 move forward from there.

20 **THE COURT:** Now, you've used about 25 minutes of your
21 time. So be -- be mindful of the clock.

22 **MR. CORTES:** Yes. In terms of family-based petitions,
23 it's essentially -- we can look at it as a two-step process.
24 The first step is just applying for a family-based petition.
25 So you will need someone to apply for you.

1 The individuals who are able to apply are legal permanent
2 resident or U.S. citizen parents; spouses, of course; and
3 children, if the children are U.S. citizens and over 21. They
4 can petition for their parents. And siblings, if the siblings
5 are U.S. citizens.

6 But in a practical way, sometimes family-based petitions
7 are really not an option. So I'll provide an example. There
8 are -- some family-based petitions are subject to a cap on a
9 visa, meaning that they will only -- the United States will
10 only allow certain individuals from that category to immigrate
11 into the United States on that category.

12 So let's say I have a U.S. citizen brother -- this is the
13 most common example -- and he files a petition for me now.
14 Well, the petition will generally take maybe a few months to a
15 year, maybe a little bit, more or less, to get approved. But
16 to use it, I would have to wait until the -- what is called the
17 "priority date" becomes current. And the priority date is
18 essentially the date that the application gets assigned. And
19 that essentially becomes your time waiting in line.

20 And so, for instance, individuals from Mexico right now,
21 they are filing -- or they are adjudicating sibling-based
22 petitions from U.S. citizens that were filed or have a priority
23 date of -- I believe it is July of 1997. So if I -- and my
24 sibling in this example would file a petition for me now, I
25 would have to wait for that 1997 date to reach up to 2007,

1 October 3, 2007 (sic) for me to use.

2 **THE COURT:** Okay. This suggests a question to me.
3 Let's say we did not have the DACA program at all.

4 **MR. CORTES:** Uh-huh.

5 **THE COURT:** Or even with the DACA program, I guess
6 this question might apply. So, take the case of someone in the
7 DACA group. What would be the pathway to even legal residency?

8 Now, not even thinking yet about citizenship, but what --
9 is there a way? Or is that prohibited in some way? What's the
10 rule on that?

11 **MR. CORTES:** In order -- generally, you would need
12 something or someone else. An employer or a family member or
13 something to hold onto to be able to get legal status. To be
14 able to do it on your own, there is very limited exceptions to
15 be able to do that. Generally, what is called a self-petition,
16 a petition for myself.

17 And the most common self-petition are victim-based
18 petitions. If you have been a victim of a crime, and the crime
19 has been reported, and you were helpful with the prosecution or
20 the investigation. Or if you are a victim of domestic violence
21 at the hands of someone, a family member with legal status.
22 Those are the most common self-petitions that we see. So
23 that's what it would take for someone to do it on their own.

24 But other than that --

25 **THE COURT:** How about if -- let's say somebody's got a

1 job with -- a long-time job with a long-time employer. Could
2 the employer help the person out, and somehow get legal status
3 for them? How does that work?

4 **MR. CORTES:** The employment visas or the
5 employment-based petitions have a lot of inadmissibility
6 grounds. So, although the employer might -- can file the
7 petition, to actually get it adjudicated will be difficult
8 because there's a lot of the inadmissibility statutes that will
9 prevent him from actually getting the status.

10 For instance, not being in current legal status will not
11 allow you to get status in the United States. You would have
12 to travel abroad and finish the process at the consulate, and
13 then come back. And as we will look at --

14 **THE COURT:** So you're saying that -- a DACA persons
15 stays in California; the employer applies for a visa. But the
16 fact that the DACA recipient is in California precludes them
17 from getting the visa.

18 **MR. CORTES:** Here. So --

19 **THE COURT:** What do you mean, "Here"?

20 **MR. CORTES:** In terms of being able to get it in the
21 United States. What it will look like practically is that you
22 would have to go back to your country of origin, and then
23 finish the process with an interview at the U.S. Consulate.

24 **THE COURT:** Does --

25 **MR. CORTES:** At the country of origin.

1 **THE COURT:** Does that ever happen? I mean, has that
2 ever -- in your experience, does anyone ever go through all
3 that?

4 **MR. CORTES:** No. And the reason for it is, if we're
5 looking at the next slide, when we're looking at the ten-year
6 bar, this is the reason. Because practically, it doesn't work.

7 So the way that the bars work -- and the most common one
8 is a ten-year bar -- is that if someone has more than one year
9 of unlawful presence in the United States, and then leaves,
10 then that automatically triggers the ten-year bar, meaning you
11 can't come in for ten years.

12 There's a few exceptions and waivers for that, and we'll
13 get to that in one second. But that's the first rule.

14 So if you have an employer who want to petition for you,
15 and then you're saying: "Okay, well, I'll go to the consulate
16 and then finish my process there," then the first thing, one of
17 the first things you might be looking at is this ten-year bar,
18 and seeing if there is a way to get over that.

19 And there -- a lot of the DACA beneficiaries that we see,
20 at least with the snapshot of the population that we have now,
21 will be subject to the ten-year bar if they receive DACA in
22 their mid to late thirties.

23 **THE COURT:** What does the three-year bar mean?

24 **MR. CORTES:** The three-year bar is for individuals who
25 have been unlawfully present in the United States between 180

1 days -- more than 180 days, but less than a year.

2 **THE COURT:** And what does the three-year -- three
3 years means that they -- this is if they go back to their home
4 country, then there's a three-year bar.

5 Does that apply -- let's say somebody overstays their
6 visa. Let's say they come in with a visa, but then they
7 overstay it by 181 days. Then they go back. So you're saying
8 they can't come back for three years? Is that it?

9 **MR. CORTES:** Correct.

10 **THE COURT:** Okay.

11 **MR. CORTES:** Correct. And so, as a practical matter,
12 an employer would have a lot of difficulty finalizing the
13 petition, an employment petition, because of the ten-year bar.

14 **THE COURT:** Uh-huh.

15 **MR. CORTES:** And so, as a practical matter, that would
16 be really difficult.

17 Now, there is a waiver if the employment visa is
18 temporary. And so we're talking non-immigrant visas or
19 temporary visas; there may be a waiver for that.

20 **THE COURT:** What kind of visas?

21 **MR. CORTES:** They're called non-immigrant visas. And
22 those are just -- that just means that is a temporary visa,
23 where you have to leave at the end of the term of your visa.

24 (Reporter interruption)

25 **MR. CORTES:** I will, sorry.

1 So, as a practical matter, it would be difficult to get
2 that approved -- a waiver of that approved, for two reasons.

3 One is that you would have to show that you will actually
4 come back to your country of origin after you're done with your
5 visa. Which might be difficult if you've already lived in the
6 United States for a really long time, or essentially, all your
7 life, to prove to the consulate: Yes, I'll come back, I won't
8 just overstay.

9 **THE COURT:** Is the ten-year and the three-year, is
10 that statutory, or by regulation?

11 **MR. CORTES:** Yes.

12 **THE COURT:** Statutory?

13 **MR. CORTES:** It -- yes. And it's in -- I have the
14 statute. Are you looking for actual statute?

15 **THE COURT:** No, no, I just wondered if that's
16 something that Congress did, or is that something, a regulation
17 that the agency did.

18 **MR. CORTES:** It's in the Immigration and Nationality
19 Act. I believe it was an act of Congress. When it changed in
20 1997, when all of the major shifts in the immigration laws
21 happened.

22 **THE COURT:** Okay.

23 **MR. CORTES:** So I don't want to spend too much time on
24 it, unless the Court has any other questions.

25 **THE COURT:** No. In fact, wasn't your colleagues going

1 to address the Court?

2 **MR. CORTES:** Yes.

3 **THE COURT:** I think you've used up more than 30
4 minutes.

5 So, your turn.

6 **MR. CORTES:** Thank Your Honor.

7 **THE COURT:** Tell us your name again, please.

8 **MS. ALMADANI:** Mónica Ramírez Almadani. In the
9 interest of time, Your Honor, I'll try to be brief.

10 Mr. Cortes has addressed the immigration procedures that
11 apply when an individual lacks immigration status, may be
12 removable from this country, and is seeking relief from
13 removal. Mr. Cortes will also address DACA specifically, so
14 I'll try to be very brief here.

15 We wanted to explain the history of deferred action in
16 similar programs. And in particular, explain how deferred
17 action operates within the broader immigration scene.

18 And so the Secretary of Homeland Security -- we'll start
19 there -- has broad statutory authority to establish national
20 immigration enforcement policies and priorities.

21 And as Mr. Cortes explained, DHS has the power to remove
22 individuals. However, it has limited resources. It has -- in
23 the past, it has removed, I believe, at most, 400,000
24 individuals. Back in 2013, I believe. And that was only five
25 percent of the undocumented population in the United States.

1 And so as a result, the Department of Homeland Security
2 must prioritize its targets. It must decide who it's going to
3 investigate; who it's going to arrest, detain; who it's going
4 to place in removal proceedings; who is going to qualify for
5 bond; who is going to ultimately be removed as part of the
6 immigration removal system.

7 And for this reason, historically, the former Immigration
8 and Naturalization Service and now the Department of Homeland
9 Security have prioritized for removal serious criminals,
10 terrorists, immigrants who are apprehended or have recently
11 crossed the border and have no significant ties to the United
12 States, and immigrants who have significantly abused the
13 system. For example, through fraud.

14 Now, again, if you look at all of the INS and ICE
15 memoranda on enforcement priorities, they all focus on public
16 safety, national security, border security. Those are the
17 quintessential and consistent priorities of the federal
18 government.

19 As a corollary, the government has historically
20 complemented those enforcement priorities by correlating what
21 is called "deferred action" to some non-priority immigrants.
22 Deferred action is a well-established way in which DHS
23 de-prioritizes certain immigrants. So it prioritizes certain
24 immigrants, and it also de-prioritizes certain immigrants. For
25 humanitarian reasons, for practical reasons, and also for

1 consistency.

2 Through this exercise of discretion, a removable alien may
3 remain in the United States for a specific period of time. And
4 that's where DACA fits into this larger scheme.

5 And again, my colleague will address that, briefly, in a
6 second.

7 **THE COURT:** You are going to -- what was the origin,
8 the first time that deferred action was used -- I know it
9 predates DACA. So, what's the history of deferred action?

10 **MS. ALMADANI:** Your Honor, there have been many
11 different programs that are very similar to deferred action.
12 And so as far back as the early 1950s, there have been various
13 programs in place that have allowed certain individuals who
14 would otherwise be inadmissible or removable to be in the
15 United States.

16 Based on my research, I found a memo from 1976 in which
17 the INS described this term "deferred action" as a non-priority
18 category. And so the term has been in use for quite some time.
19 It is not necessarily based in statute. But it's clear, if you
20 look at the history of immigration enforcement, that it has
21 been used throughout history.

22 A very well-known case and perhaps the first well known
23 case of deferred action would involve John Lennon from the
24 Beatles. He was offered deferred action, I believe, in 1972.

25 And it's always been a procedure that's been in place.

1 It's not the type of procedure that has been, necessarily,
2 publicized. But the government, again through its enforcement
3 discretion, has the ability to choose not to take enforcement
4 action against a particular individual or groups of
5 individuals.

6 And so starting in 1997, that's where you see programs or
7 policies that are defined more explicitly as "deferred action."

8 And, I believe the government is also planning to address
9 this.

10 Back in 1997, under President Bill Clinton, there was a
11 policy to protect the battered spouse -- battered spouses of
12 legal permanent residents and U.S. citizens. So individuals
13 who were in a situation where they were petitioning through
14 their spouse or their spouse was petitioning for them to obtain
15 legal status, but they were in these violent relationships,
16 they could obtain deferred action while their visas were
17 pending.

18 And so that was -- that's one program. And we have a
19 slide that identifies various --

20 **THE COURT:** What was that? Go through that one again.

21 **MS. ALMADANI:** Sure. So that was a class-based
22 deferred action for battered aliens under the Violence Against
23 Women Act, that was in 1997. And again, that authorized
24 deferred action for immigrants who were eligible for permanent
25 relief under the Violence Against Women Act.

1 And so while their cases were pending, while their
2 petitions were pending, the Department of Homeland Security --
3 or, then, INS -- chose not to remove them. So there was a
4 process to defer any enforcement action against them, because
5 they were eligible for this permanent relief down the road.

6 **THE COURT:** So the -- so the act, the statute,
7 authorized the ultimate down-the-road relief. What was that
8 called, again?

9 **MS. ALMADANI:** This was under VAWA, Violence Against
10 Women Act.

11 **THE COURT:** No, no, but the type of relief was a visa,
12 or what -- was it asylum?

13 **MS. ALMADANI:** Yes, it was a visa.

14 **THE COURT:** So down the road there would be a visa --

15 **MS. ALMADANI:** Potentially Your Honor. Potentially.
16 So these are all pending petitions.

17 **THE COURT:** Now, did the statute also authorize
18 deferred action? Or was that done administratively?

19 **MS. ALMADANI:** That was done administratively,
20 Your Honor.

21 **THE COURT:** All right. And what was that program
22 called?

23 **MS. ALMADANI:** That was the battered aliens under the
24 Violence Against Women Act memoranda.

25 **THE COURT:** Does that program still exist?

1 **MS. ALMADANI:** I believe it -- I don't know,
2 Your Honor.

3 **MR. CORTES:** (Nods head)

4 **THE COURT:** We'll find out, I guess. But, all right.

5 **MS. ALMADANI:** And there have been additional programs
6 since then.

7 **THE COURT:** Is that -- I want to hear about those
8 programs, but was that a -- the battered women program, was
9 that done by -- what was the form? Was it done the same way
10 DACA was done? Or what was the form of the implementation?

11 **MS. ALMADANI:** Your Honor, it was a memorandum issued
12 by INS.

13 **THE COURT:** So that, in that sense, it's just like
14 DACA.

15 **MS. ALMADANI:** Yes, Your Honor.

16 **THE COURT:** Okay. Give me another example.

17 **MS. ALMADANI:** Sure. In 2001, under President George
18 W. Bush, there was a similar deferred action for applicants for
19 nonimmigrant status or visas made available under the Victims
20 of Trafficking and Violence Protection Act. So, individuals
21 who were crime victims or victims of human trafficking could
22 apply and can apply for certain types of visas.

23 And so, similar to the -- the VAWA program, these
24 individuals were action -- deferred -- they were the subject of
25 a deferred action, or qualified for deferred action, I should

1 say, while their applications were pending.

2 **THE COURT:** So did they -- so, earlier, I heard you
3 had to go back to the home country in order to go to the -- do
4 you still have to -- under these two programs, do you have to
5 go back to the home country to apply for the visa?

6 Or can you stay in the country, apply for the visa -- see
7 what we're getting at?

8 **MS. ALMADANI:** The latter, Your Honor.

9 **THE COURT:** And you get deferred action in the
10 meantime.

11 **MS. ALMADANI:** Correct, Your Honor.

12 **THE COURT:** Okay.

13 **MS. ALMADANI:** In 2005, the government provided
14 deferred action for foreign students affected by Hurricane
15 Katrina who were unable to fulfill their F1 visa full-time
16 student requirement. So there were students, foreign students
17 that need visas to live here, but a requirement of the visa is
18 that you go to school. And so because of the hurricane, they
19 were unable to fulfill the requirements of the visa.

20 And so instead of deporting them, the government deferred
21 action to protect them and allow them to stay here for a
22 limited period of time.

23 Your Honor, even though "deferred action" is not a term
24 that was necessarily used prior to 1997, in the eighties, there
25 were meaningful exercises of discretion to protect certain

1 immigrants. And I just want to make sure to highlight one, and
2 then I'm happy to sit down.

3 In 1996 -- the Court may be familiar with the Immigration
4 Reform and Control Act. This was essentially the pathway to
5 lawful status for certain aliens who were in the U.S. without
6 authorization during that time. And many immigrants qualified
7 for IRCA, and were able to legalize their status.

8 However, IRCA also created an issue of split-eligibility
9 families, where one individual was eligible for IRCA, but his
10 or her spouse or children were not necessarily eligible for
11 IRCA.

12 So in 1987, the government created the Family Fairness
13 Program. And this was also an act of administrative procedure
14 where the -- the government, exercising its discretion, allowed
15 for individuals' children to not be removed. So it was a
16 deferred-action type program for the children of those
17 individuals who were eligible or qualified for IRCA.

18 In 1990, it expanded that Family Fairness Program to grant
19 extended voluntary departure and eligibility for work
20 authorization to the spouses of those individuals, in addition
21 to the unmarried children. And what's important here is that
22 as many as 1.5 million individuals were expected to be eligible
23 under the expanded Family Fairness Program.

24 At the time, the estimated undocumented population in 1990
25 was 3.5 million. And 1.5 million of those individuals were

1 expected to be eligible for that particular program. And so,
2 even though it was not called "deferred action," it was a form
3 of deferred action. These individuals were de-prioritized for
4 removal, and allowed to stay in the country and to qualify for
5 this form of deferred action.

6 **THE COURT:** So let's just take that one, again. Same
7 questions. Was that -- part of that was due to a statute, I
8 guess. But you are saying that the deferred action part was
9 administrative, only.

10 **MS. ALMADANI:** That's correct. So the statute applied
11 only to certain individuals who qualified for legalization.
12 Their children and spouses did not necessarily qualify. And so
13 deferred action was created to protect those individuals.
14 Initially the children, then the program was expanded to allow
15 the spouses to also stay in the country and to actually work.

16 **THE COURT:** So when somebody applied under that
17 program, did they fill out a form kind of like the one we're
18 dealing with in DACA? Or was it just automatic? Or how did
19 that part work?

20 **MS. ALMADANI:** Your Honor, because they were also
21 eligible for work authorization, it is my understanding that
22 they did submit information to the government and had to
23 affirmatively apply for that deferred action.

24 Then again, that wasn't the term that was used. It was
25 called "extended voluntary departure." But it was effectively

1 the same type of de-prioritization by the government, and
2 again, allowed for work authorization.

3 **THE COURT:** More slowly by me. That name again,
4 "deferred" what?

5 **MS. ALMADANI:** This was "extended voluntary
6 departure." At the time that was --

7 **THE COURT:** Extended voluntary departure. All right,
8 but you are saying that that is the same as deferred action?

9 **MS. ALMADANI:** And in fact, Your Honor, yes, because
10 it allowed them to stay, and it also granted them the ability
11 to work.

12 **THE COURT:** Okay.

13 **MS. ALMADANI:** Your Honor, unless the Court has more
14 specific questions about past programs, I would like Mr. Cortes
15 to address DACA more specifically.

16 **THE COURT:** Let's go to that. But before you do, you
17 said a moment ago it was your, quote, "understanding." Now, I
18 gave each side some discovery in this case. These things could
19 become important. And I wouldn't want you guessing at whether
20 or not there's a form that you fill out.

21 It would be good to know for sure whether there's a form
22 -- how that program works. So maybe some of your discovery
23 ought to be directed to being crystal clear on what the
24 analogies were or were not.

25 Okay.

1 **MS. ALMADANI:** Absolutely, Your Honor. Thank you.

2 **THE COURT:** Okay. Who's going to address DACA --
3 okay. You're returning.

4 Now, you've already used 48 minutes of your time, and just
5 now getting to the centerpiece. Now, remember, I wanted you to
6 save a little bit for your rebuttal.

7 But let's hear about DACA.

8 **MR. CORTES:** Sure. And I'll highlight what I believe
9 are the most important points with the deferred action program,
10 or the DACA program.

11 The eligibility for it, as Your Honor might be aware, has
12 specific age and date requirements. You have to have entered
13 the United States before you were 16. You have to have been in
14 the United States from June 15, 2007, until the time of
15 applying so you have to show that you have all that continuous
16 presence.

17 You have to do -- there is an academic or military
18 requirement where you have to be in school or have graduated
19 from high school, or have a GED or something equivalent. Or
20 have been a veteran of the armed forces. There's a criminal
21 history requirement where you can't have a felony or what's
22 called a significant misdemeanor, or three or more
23 misdemeanors. And you can't be detained at the time of
24 applying.

25 So if a DACA -- a potential DACA beneficiary is detained,

1 we would have to work or the individual would have to work with
2 ICE to get them out of detention, so that they could apply.

3 The procedure is getting all of the evidence to prove all
4 of these requirements, and filling out the forms, paying \$495.
5 And you have to pay each time that you apply or renew. And get
6 your fingerprints taken, where they also take your photo. And
7 they do a background check, including the --

8 **THE COURT:** Is it a photo and fingerprints?

9 **MR. CORTES:** Yes. As I came to find out, the photo,
10 whatever you look like that day, that would be on your work
11 permit. So if it's not a good day, then it's not a good day
12 for your work permit, either. And it's given to you for two
13 years. And then you can renew every two years.

14 Now, the benefits both come directly and indirectly. The
15 direct benefit from USCIS is the work permit, itself. And a
16 letter that says you have deferred action for this amount of
17 time. But the work permit becomes really significant because
18 then that allows you or allows a person to get a Social
19 Security number. And then, having a Social Security number
20 just opens up so many doors. From applying for a credit card
21 to, in some states, applying for a driver's license or
22 professional licenses. Sometimes financial aid, under state
23 law. So it has a lot of secondary benefits that --

24 **THE COURT:** Work card. A green card is not the same
25 as a work card. Those are two different things.

1 **MR. CORTES:** Correct. A green card is when someone's
2 a legal permanent resident, you have that. A work permit is
3 just the work authorization that's issued for a certain period
4 of time.

5 **THE COURT:** Uh-huh.

6 **MR. CORTES:** Yeah. And the three things I want to
7 note before I provide the rest of the time to the government is
8 the eligibility requirements really creates a cohort of
9 individuals who can apply. The -- the amount of individuals is
10 finite. It's not that this program, if it was never ended,
11 would go on forever. Because you have to have entered from
12 June 15th, 2007, so people who enter subsequently won't apply.

13 **THE COURT:** Why was it extended -- originally it was
14 2012, right? It was June 15, 2012, was the first program.
15 Right?

16 **MR. CORTES:** No, it's the other way. So this is the
17 first program (Indicating), and then there was an attempt to
18 expand it so that it would -- that the date would be further
19 out so someone who would have entered prior -- or --

20 **THE COURT:** Okay. So the very first program, which
21 was initiated June, 2012, --

22 **MR. CORTES:** Right.

23 **THE COURT:** -- had a 2015 entry date, deadline. Is
24 that what you are saying?

25 **MR. CORTES:** No. So it was implemented in June 15,

1 2012, but you have to prove that you've been here from June 15,
2 2007. So anybody who entered after that can't apply. So it
3 does create a --

4 **THE COURT:** So if somebody had entered in 2010, would
5 they be eligible under the original program?

6 **MR. CORTES:** No.

7 **THE COURT:** So they had to be 2007 or -- or earlier?

8 **MR. CORTES:** Correct.

9 **THE COURT:** And then when the program was amended,
10 what was -- how was it changed?

11 **MR. CORTES:** It was changed so that the dates would go
12 up to 2010. So -- but it was never effectuated. So that
13 someone would have to be here before -- it was before 2010. So
14 it would provide for a greater amount of individuals to apply.
15 Because anybody who entered in 2008, -9, so on, would --

16 **THE COURT:** So anyone who entered -- let's say right
17 now, anyone who entered in 2009, is eligible? Or not eligible?

18 **MR. CORTES:** No.

19 **THE COURT:** Not eligible.

20 **MR. CORTES:** Right. As the program stands right now,
21 it's June 15, 2007 and earlier, you have to have been -- if you
22 came June 16th, 2007, then you are not --

23 **THE COURT:** When you do the math, when would it be
24 impossible for anyone to apply for DACA? Because -- you have
25 to be 31 or younger, right?

1 **MR. CORTES:** You have to have been 31 or younger at
2 the time of the announcement. So June 15, 2012, they look at
3 your age at that time.

4 **THE COURT:** Right. Okay. Is there some date in the
5 future where it will be impossible for someone to qualify?

6 **MR. CORTES:** Yes. I would have to do some arithmetic
7 to try to do the math, but there is a point where eventually
8 there's -- no one is going to be eligible.

9 **THE COURT:** But still, at the present, people are
10 still eligible. Is that true? Or --

11 **MR. CORTES:** Well, the program was rescinded, so no
12 one can apply now.

13 **THE COURT:** No, no. If it hadn't been rescinded,
14 people would still be eligible to apply?

15 **MR. CORTES:** Yes.

16 **THE COURT:** Okay.

17 **MR. CORTES:** Yes. And sometimes it's, like, the
18 educational requirement that they're missing. So they might
19 fit everything else, but they didn't finish high school, and
20 they might now be going back to get a GED program. And so now
21 they become eligible.

22 Two final points, and I will then sit down, is I want to
23 answer the Court's question. According to the Brookings
24 Institute, one third of the DACA applicants were at the age of
25 five or younger at the time of arrival. And the most common

1 age of arrival was eight years old, and this comes from the
2 Brookings Institute. So I wanted to correct that.

3 **THE COURT:** Great. Thank you.

4 Let's take a short break for not long, not 20 minutes; how
5 about a ten-minute break. Take a ten-minute break, and then we
6 will resume. Thank you.

7 (Recess taken from 8:57 a.m. to 9:05 p.m.)

8 **THE COURT:** So now we will hear the tutorial by the
9 government. Please proceed. And you are Mister --

10 **MR. ROBINS:** Mr. Robins, Your Honor.

11 **THE COURT:** Oh, yes, there it is, over there. All
12 right, Robins. Got it.

13 **MR. ROBINS:** Thank Your Honor. Thank you for the
14 opportunity to give this tutorial.

15 **THE COURT:** Of course.

16 **MR. ROBINS:** Again, Jeffrey Robins from the Office of
17 Immigration Litigation within the Department of Justice. And
18 the government's presentation today is primarily focused on the
19 removal proceedings, themselves, and the aftereffects of those
20 proceedings.

21 If we could just go to the next slide please.

22 And Your Honor asked how removal proceedings work. Before
23 I get to that, however, I just want to cover and rehash -- and
24 throughout this presentation, Your Honor, I will do my best not
25 to duplicate efforts to the extent, that there's some sense of

1 agreement -- which is, rehash the notion of the difference
2 between what it takes to come to the United States, what it
3 takes to stay in the United States. And then, really, what the
4 focus of this presentation is, for purposes of deferred action
5 and other forms of prosecutorial discretion, what happens when
6 someone is facing potential removal from the United States.

7 So until the Immigration and Nationality Act was
8 promulgated in 1952, anyone who wanted to get a green card to
9 become a lawful permanent resident had to go outside of the
10 country, and go to a consular officer, and apply for an
11 immigrant visa to come to the United States.

12 So the Immigration and Nationality Act changed that, and
13 allowed people to become permanent residents from within the
14 United States. And as opposing counsel addressed, the key --
15 the first step in that process is the need of a petition.

16 And so in talking about all of these terms and how one can
17 come or stay in the United States, a petition is different than
18 a visa. It's -- an immigrant visa petition is filed on form
19 I-130 or I-140, which, as already addressed, allows a
20 qualifying family member, or a qualifying employee in the case
21 of an employer-employee relationship, to establish that
22 relationship. And once that relationship is established to the
23 satisfaction of the Immigration Service, then the individual,
24 the beneficiary of the visa petition can apply to adjust their
25 status as lawful permanent resident.

1 **THE COURT:** Let me cover that ground again, see if I
2 got it right. Before 1952, to get a green card, you had to be
3 overseas. Is that true?

4 **MR. ROBINS:** Yes.

5 **THE COURT:** Is that what you said? And you would
6 apply through the consular office? Is that the way it worked?

7 **MR. ROBINS:** Yes. And really, it's the equivalent of
8 a green card. You get the status of a lawful permanent
9 resident. So someone coming into the United States is coming
10 in on an immigrant visa.

11 **THE COURT:** Is it still true, even today, that in
12 order to get a visa, you have to apply through a consular
13 office overseas?

14 **MR. ROBINS:** Not necessarily.

15 **THE COURT:** That's changed too, then. So how does
16 that part work?

17 **MR. ROBINS:** So it works in two ways. And it's
18 different for someone seeking more permanent status, that of a
19 permanent resident, an immigrant visa. They can do that, in
20 some cases, subject to the restrictions laid out in the
21 Immigration and Nationality Act that we'll discuss. They can
22 do that from within the United States. And that processes is
23 called adjustment of status.

24 They can also do that from outside of the United States,
25 seeking an immigrant visa. And that is called consular

1 processing. Individuals can also seek non-immigrant visas.
2 And that's what counsel -- not -- recognized as temporary,
3 permission to come to the United States for a specific purpose
4 that's identified in that visa. And so these are certain
5 employment visas, visitors' visas, right? It's what someone
6 coming in the United States would need if they are going to
7 come visit Disney World or something like that, B-1 or a B-2,
8 in certain circumstances, or an H-1B visa for certain
9 specialized applications.

10 And so those also can be sought overseas from their home
11 country by going to a United States consulate. Or, for people
12 in the majority of cases, in the United States -- or in some
13 cases, in the United States, if they already have another valid
14 status, they can apply to change their status within the United
15 States. And so, someone who is here as a student might be able
16 to have an employer petition for them on a nonimmigrant visa,
17 to remain in the United States.

18 The difficulty with that change of status happens when
19 someone is not in the United States with any status. And there
20 are certain limitations --

21 **THE COURT:** Wait. That was too many double-negatives.
22 Say that last sentence again.

23 **MR. ROBINS:** Individuals in the United States without
24 status are generally prevented from changing their status to
25 another nonimmigrant, or to a nonimmigrant status, or to a

1 lawful immigrant status. There are limitations. And I'll
2 discuss those in detail in the government's presentation.

3 **THE COURT:** I thought you said earlier that somebody
4 could apply from within the United States for a visa. But I
5 think now what you're saying is that that's -- you have to be
6 lawfully here to begin with, to do that.

7 Is that what you are saying?

8 **MR. ROBINS:** Yes, but there are exceptions that allow
9 people to apply for an immigrant visa to get lawful permanent
10 resident status from within the United States.

11 **THE COURT:** Even without proper documentation to begin
12 with.

13 **MR. ROBINS:** In some circumstances.

14 **THE COURT:** All right. Just so it'll be clear, give
15 me one example of such a situation.

16 **MR. ROBINS:** One example is someone entering a
17 proceedings who is eligible for cancellation of removal.
18 Which, which plaintiffs' counsel discussed.

19 **THE COURT:** All right. Okay.

20 **MR. ROBINS:** Another example is special adjustment
21 provisions. And so, the T and U victims of trafficking and
22 crime visas that plaintiffs' counsel talked about also have
23 provisions that allow people who are eligible for those
24 nonimmigrant visas, once they have had them for a certain
25 period of time, to adjust their status and become a lawful

1 permanent resident within the United States. And that would be
2 for some of them where they had no status in the first place,
3 when they sought the T or the U nonimmigrant visa.

4 **THE COURT:** Okay.

5 **MR. ROBINS:** And so, that's kind of the real
6 breakdown. And essentially --

7 **THE COURT:** Give me -- the real breakdown is what,
8 again?

9 **MR. ROBINS:** Oh, the difference between immigrant
10 visas and nonimmigrant visas. And the petitioning process
11 which establishes the relationship for an immigrant visa. Be
12 it family-based, be it employment-based, be it a
13 self-petitioner in the case of the Violence Against Women Act
14 or certain national interest waivers, people who have work that
15 is deemed to be in the national interest, or the diversity visa
16 program, which is a lottery that allows individuals primarily
17 outside of the United States to enter into a lottery system.
18 And from certain countries. Plaintiffs' counsel is correct in
19 noting that Mexico isn't part of that program, I believe.

20 But upon winning the lottery, that individual doesn't need
21 a family member or an employer to petition them for an
22 immigrant visa in the United States.

23 And so that's the first step. And then the second step,
24 after a petition is approved, is to determine eligibility to
25 apply for adjustment of status, or to apply for an immigrant

1 visa, and then to determine whether the individual is
2 admissible or not. And I'll go through those provisions as
3 well.

4 But what we're dealing with primarily when individuals are
5 in removal proceedings is they've either come to the United
6 States in a valid status, and overstayed, or they came to the
7 United States by entering the United States without inspection,
8 they were smuggled into the United States, and so they don't
9 have a valid status. And those individuals are subject to
10 removal proceedings.

11 And so how those removal proceedings work, Your Honor,
12 that authority is provided by Congress to the Department of
13 Homeland Security. Now, and they are charged with the
14 enforcement of the immigration laws.

15 We have already addressed the difference or similarity, as
16 the case may be, between inadmissibility and deportability that
17 Your Honor asked about, which now have been merged into the
18 same term called "removability," with the --

19 **THE COURT:** Tell us how it used to be, inadmissibility
20 versus deportability, then how it got merged together. Go
21 through that historical step.

22 **MR. ROBINS:** So those are still two separate statutory
23 provisions that have slightly different bars to admission for
24 individuals who either have not effectuated an entry into the
25 United States, or not become a lawful permanent resident.

1 Certain individuals with status are subject to arguably
2 less stringent terms that would result in their removability
3 and deportability. Those are the same. But what -- all that
4 changed in the law is how everything is referred to. And
5 instead of being two separate names for those proceedings,
6 they're all called "removal proceedings" now. And I believe,
7 Your Honor, that's the only effect of those changes. It's the
8 name, for practical purposes.

9 Those removal proceedings take place in Immigration
10 Courts, an administrative type inquiry, a civil inquiry, as we
11 discussed, that are administered by the Executive Office for
12 Immigration Review. That's a branch of the Department of
13 Justice. And so the Immigration Courts are administered by the
14 Department of Justice. But it is the Department of Homeland
15 Security who brings the civil charges in immigration
16 enforcement proceedings.

17 Those proceedings begin by the filing of a notice to
18 appear. And so the immigration enforcement components of the
19 Department of Justice, be it Customs and Border Protection or
20 Immigration and Customs Enforcement, will serve on an
21 individual a notice to appear in removal proceedings that
22 identifies the statutory grounds that they are asserting that
23 the person is not lawfully present or is inadmissible,
24 deportable, otherwise removable from the United States. And
25 then by serving that, filing it with the Immigration Court,

1 that's what commences removal proceedings.

2 That is the standard, most normal process that allows for
3 robust opportunities to seek relief from removal. And we will
4 discuss that in greater detail as well.

5 There are different procedures that can result in a
6 removal order as well. One of those that counsel has discussed
7 is expedited removal. And the government's understanding of
8 that process is a little different. But, expedited removal is
9 a statutory form of removal for individuals who are recent
10 entrants or recently arriving to the United States.

11 The provisions that plaintiffs' counsel talked about, I
12 wouldn't categorize and I don't believe the statute would
13 categorize as expedited removal, but that's a reinstatement of
14 removal.

15 So somebody who already has a removal order and is then
16 later encountered by the immigration enforcement authorities
17 could have their prior removal order reinstated against them.

18 And there is, I would acknowledge, a limited process to
19 seek review of that. The Ninth Circuit recognizes, not very
20 much, as a matter of fact.

21 But there remains discretion to either -- as there does
22 with expedited removal proceedings, to choose to use one of
23 those administrative removal functions, or to place the
24 individual into full removal proceedings before an immigration
25 judge.

1 So in terms of examples of prosecutorial discretion, and
2 kind of from the bottom up, so we're here today with the
3 question of the DACA policy. The DACA policy is an example of
4 deferred action. And deferred action is an example of a form
5 of prosecutorial discretion. And so, examples of prosecutorial
6 discretion all go to, really, the question of whether the
7 government in its discretion intends to pursue removal against
8 an individual.

9 And the exercise of that discretion can happen at numerous
10 times. It can happen before an individual is encountered by
11 immigration enforcement officers or agents. It can happen once
12 they are placed into removal proceedings, during the course of
13 those proceedings. And it can also happen once an individual
14 has a removal order. And, addressing what the government
15 intends to do with the actual removal of that individual from
16 the United States.

17 So starting at the top from the decision to either issue
18 or cancel a detainer, that is the request that an individual be
19 --

20 **THE COURT:** Remind me what a detainer is.

21 **MR. ROBINS:** It's a request, Your Honor, that an
22 individual who is in state or local custody be transferred to
23 Immigration custody so that the government can pursue a removal
24 proceedings against them.

25 **THE COURT:** I mean, just curious about that, because

1 it comes up in different contexts. Is a detainer required by
2 law, like a statute, to -- that the local sheriff has got to
3 honor it? Or is it a cooperative thing between the agencies to
4 -- to honor? How does that part work?

5 **MR. ROBINS:** It's subject to -- at this time, that
6 question is subject to various rounds of litigation,
7 Your Honor.

8 **THE COURT:** What is your position?

9 **MR. ROBINS:** Your Honor, I honestly don't --

10 **THE COURT:** All right.

11 **MR. ROBINS:** I don't want to misspeak.

12 **THE COURT:** I don't want to get you in trouble with
13 some other case. So -- but that's -- is there a statute that
14 calls out the term "detainer"? Do you know that?

15 **MR. ROBINS:** Your Honor, I'm not sure about that.

16 **THE COURT:** All right. So, anyway, your point is that
17 prosecutorial discretion could be exercised even with respect
18 to that step.

19 **MR. ROBINS:** Yes. And, and to the extent there is a
20 statutory or regulatory basis, the discretion lies in whether
21 to make -- take that action or not.

22 Similarly, the very decision what to do with the notice to
23 appear, to pursue a notice to appear against an individual.
24 Even if they otherwise have what would be a ground of
25 removability, there's discretion, like a prosecutor has

1 discretion to pursue criminal charges or not, to pursue the
2 case against an individual who would otherwise be chargeable as
3 being removable from the United States.

4 The same goes for when a notice to appear is filed, the
5 government has the discretion to cancel that notice to appear.

6 As, as has been discussed in a variety of memoranda over
7 the years, the determination of what are enforcement priorities
8 or what are not enforcement priorities --

9 **THE COURT:** Go through some of the programs that were
10 mentioned by Ms. Al- -- just a second, don't tell me, Ms. --
11 Almadani?

12 **MS. ALMADANI:** Yes, Your Honor.

13 **THE COURT:** Okay.

14 I think she mentioned several programs that -- one was
15 battered women, one was Family Fairness, and so forth. Go
16 through that history.

17 I'm particularly interested in: Were the APA proceedings
18 used in connection with any of those? Either to initiate them;
19 to modify them? What's the history there?

20 **MR. ROBINS:** Your Honor, I'm fairly certain, to
21 initiate, the examples that have been discussed, that there --
22 I don't believe there were APA proceedings in any of them.

23 If we go back one slide --

24 **THE COURT:** Oh, this, you got -- you got several of
25 them -- oops -- it went away.

1 **MR. ROBINS:** Yeah. And Your Honor, with your
2 indulgence, I'm just going to back up to the beginning of
3 "deferred action."

4 **THE COURT:** All right, go ahead.

5 **MR. ROBINS:** And this is a little repetitive, but it
6 really was in the 1970s that the government had a policy called
7 the "non-priority policy" that really set those priorities in
8 terms of who it would be pursuing removal proceedings against.

9 And those were enshrined in the Immigration and
10 Naturalization Services. And that's the precursor to the
11 Department of Homeland Security and its immigration
12 subcomponents. But, those operating instructions.

13 And there's been discussion --

14 **THE COURT:** Was it called "Deferred Action" then?

15 **MR. ROBINS:** It was not, at that time, Your Honor. It
16 was called "Non-priority Status."

17 **THE COURT:** Non-priority status. But there was an
18 internal memo? Or how was that recognized?

19 **MR. ROBINS:** There were a series of memoranda, and
20 then these operating instructions that are discussed in
21 numerous cases in terms of whether they have a binding effect
22 or not.

23 And so that's kind of the predicate for the deferred
24 action as we know it today. So that's throughout the 1960s and
25 '70s. And those --

1 **THE COURT:** Earlier you said seventies, but now you're
2 saying sixties. So let's -- I am curious. Just be as precise
3 as you can.

4 **MR. ROBINS:** Sure. My understanding, that the first
5 mention in operating instructions, I think, is in 1973. And
6 our research is the same, that all of this came to light in
7 FOIA litigation involving John Lennon's removal proceedings.
8 And there's a number of memoranda that are discussed that I
9 think talk about the use of something like this in the late
10 sixties. But the term "non-priority" and the discussion of
11 this non-priority status, my understanding is, was first
12 mentioned in an official document in about 1973.

13 Then -- so as we go through time, plaintiffs also talked
14 about the -- the family programs in furtherance of the 1986
15 immigration reforms, and what's known as "legalization" or
16 "amnesty." And those provisions that allowed individuals to --
17 or first, I believe spouses, and then later children, who were
18 not protected by the statutory provisions to remain in United
19 States and to work.

20 I do believe there is some difference or distinction there
21 to the extent that my understanding is that those provisions
22 arise out of -- and plaintiffs' counsel referred to this -- a
23 statutory provision known as "voluntary departure," that
24 plaintiffs discussed.

25 That voluntary departure allows individuals who would

1 otherwise have removal orders to not get a removal order, and
2 gives them a period of time to depart from the United States.
3 I believe that that policy is based on the voluntary departure
4 statute. And what they called it was "extended voluntary
5 departure," to give individuals an extended period of time.

6 And the result, what happened there is subsequent
7 legislation addressed the presence of those individuals in the
8 United States, and gave them similar benefits.

9 **THE COURT:** Well, but you're saying that was
10 legislation, but Ms. Almadani said it was by administrative
11 action.

12 **MR. ROBINS:** So there's -- through the passage of
13 time, it starts with legislation that provided for the
14 legalization program. That left certain individuals outside of
15 its reach.

16 **THE COURT:** Right.

17 **MR. ROBINS:** There was administrative action to afford
18 some protections to those individuals. But my understanding is
19 that was still based in statutory provisions, known as
20 "voluntary departure." So, extending what they called
21 "extended voluntary departure" was, I believe, based in
22 statutory predicate.

23 **THE COURT:** Well, all right. Let me tell you the way
24 I see the issue, and you help me with it.

25 Extended voluntary departure was awarded by statute to,

1 let's say, the husband. But then that left the spouse and/or
2 children unprotected. And the agency, on its own, said: We
3 will give deferred action to those spouse and children.
4 Without any specific statutory authority.

5 **MR. ROBINS:** I don't agree with that, Your Honor.

6 **THE COURT:** Okay. Where do you disagree?

7 **MR. ROBINS:** So where the parties agree, for certain,
8 is that Congress, in session, provided the avenue to
9 legalization for individuals that were not lawfully present in
10 the United States. And that didn't address certain spouses and
11 children. So that was not based on extended voluntary
12 departure. That was the legalization, or what's often referred
13 to as "the amnesty program."

14 Where we differ -- and the parties can address this in
15 greater detail to the extent it's needed in later briefing --
16 is the question of what the predicate for the administrative
17 protections to fill those --

18 **THE COURT:** What do you say it was?

19 **MR. ROBINS:** My understanding, Your Honor, is that it
20 arose from statute. And so the statute that provides for
21 voluntary departure doesn't say that children and spouses of
22 these people get -- Congress didn't say: Also you get the
23 protection of extended voluntary departure.

24 But my understanding is that the government, in its
25 discretion, said: We have this statutory authority to extend

1 voluntary departure.

2 And that is the tool that they used to then
3 administratively allow individuals to remain in the United
4 States, pending the subsequent statutory --

5 **THE COURT:** But that would be a very long extension,
6 wouldn't it? If it's extended voluntary -- they are going to
7 be here indefinitely. Right?

8 **MR. ROBINS:** But they were not, Your Honor. Congress
9 acted to protect those individuals.

10 **THE COURT:** Later.

11 **MR. ROBINS:** Later. Yes.

12 **THE COURT:** Oh, okay. All right. Keep going.

13 **MR. ROBINS:** Thank you, Your Honor.

14 So that's what happened throughout the eighties, and there
15 were, to my understanding -- then we get into the late
16 nineties. And that's where -- just go back real fast -- thank
17 you.

18 So in the nineties is where we get the deferred action for
19 battered aliens under the Violence Against Women Act. But in
20 terms of general policy memorandum and guidance, so not
21 specific applications of how deferred action, how certain
22 groups of individuals might be able to seek -- or guidance,
23 that policy guidance, that identifies a group's eligibility to
24 seek deferred action.

25 Prior to that, both prior to and after that, there were

1 general statements within policy statements. The 2000 Meissner
2 memo by Doris Meissner, Commissioner of the INS at the time;
3 2006 ICE operating guidance. And then later, that talks about
4 generally the notion of deferred action --

5 **THE COURT:** All these documents are going to be made
6 available to me, somehow?

7 **MR. ROBINS:** Absolutely.

8 **THE COURT:** Okay. Do you all have those, too? Do you
9 know what he's talking about?

10 **MS. ALMADANI:** I'm familiar with -- yes, I'm familiar
11 with those.

12 **THE COURT:** Okay. So I would want everybody to have
13 the same deck of cards.

14 So, okay. Go ahead.

15 **MR. ROBINS:** And those lay out generally the same
16 thing that the operating instructions did in the early to mid
17 seventies, that deferred action, which is an exercise of
18 prosecutorial discretion that isn't -- doesn't arise from
19 statute or regulation, but arises from the general enforcement
20 power and authority of the Immigration Service, that that
21 recognized that as it's applied on a case-by-case basis.

22 And so then, we've got this group of applications that
23 apply to groups of individuals, starting with the 1997 VAWA
24 protections, and then the T and U protections in 2001 and 2003,
25 and then students affected by Hurricane Katrina in 2005, and

1 widows in 2009. And --

2 **THE COURT:** Sorry, widows?

3 **MR. ROBINS:** Widows. So these are individuals who had
4 a U.S. citizen or had a petitioner petitioning for their
5 immigration status, that immigration visa petition, who --
6 where the spouse passes away I believe before they've been
7 married for two years.

8 And so the -- the effect at the time was that that
9 immigration visa petition went away. And so you had
10 individuals who were married to United States citizens who
11 might have otherwise been entitled to adjust their status who
12 were suddenly without the ability to address status, because
13 the petition was automatically revoked by the death of their
14 spouse.

15 And so at the time, in that case, via policy memorandum
16 identifying that on a case-by-case basis, individuals in that
17 circumstance could seek the administrative grace of deferred
18 action.

19 And that was later fixed by subsequent Congressional
20 action that did away with the automatic termination --

21 **THE COURT:** So on these deferred action programs, was
22 there an application form that -- not exactly the same wording,
23 but an application form analogous to the one that's used in
24 DACA, so the people would apply, maybe it gets approved, and
25 then they're in the program.

1 So is that the way it worked for those earlier deferred
2 action programs?

3 **MR. ROBINS:** Your Honor, I'll have to get back to you
4 on the specific process, or throughout the conduct of the
5 litigation.

6 My sense is I don't think there were specific forms that
7 were created for the -- for applications based on these
8 memorandum.

9 **THE COURT:** It would be good to know the answer to
10 that.

11 Listen, without getting into argument, I don't want to get
12 into argument, but was there ever any litigation over these
13 earlier deferred action programs about -- for example, to the
14 extent to which APA proceedings had to be used to amend the
15 programs?

16 **MR. ROBINS:** I'm not positive, but I don't -- to that
17 specific question, I don't believe so.

18 **THE COURT:** Okay.

19 **MR. ROBINS:** I'm not immediately familiar with any.
20 The other distinguishing factor, Your Honor, about these
21 group-based extensions of deferred action, I believe the only
22 one still applicable is the second one. The deferred action
23 for victims of trafficking and victims of crime that has now
24 been imported into regulations.

25 And so otherwise, the circumstances for which there were

1 group-based provisions of deferred action have been overcome by
2 events and they no longer need them, or there have been
3 statutory or legislative provisions that have addressed what --

4 **THE COURT:** Well, go through -- you mentioned there's
5 some regulations afoot on -- on which one of these groups?

6 **MR. ROBINS:** So, on the second group. So for victims
7 of trafficking and certain crime victims, so those are persons
8 who are eligible for T and U nonimmigrant visas. Regulations
9 there provide that there are statutory caps on those visas.
10 And there's a large number of applicants for those visas. So
11 there's a waiting line, each year, to be able to get an actual
12 nonimmigrant visa issued to you.

13 And so what initially began as a policy that said if an
14 individual is prima facie eligible for the visa, they were
15 eligible to seek on a case-by-case basis a grant of deferred
16 action, that policy is now enshrined in regulation.

17 **THE COURT:** Was that by APA rulemaking? Or just, how
18 did that part work?

19 **MR. ROBINS:** Yes, I believe it was, Your Honor.

20 **THE COURT:** So, when -- and is that rulemaking
21 completed? Or is it still underway?

22 **MR. ROBINS:** I believe that is a final rule.

23 **THE COURT:** What year was that, roughly?

24 I don't want you to guess, so --

25 **MR. ROBINS:** Maybe 2008 or 2009. Your Honor, it's --

1 one of the first cases I had in this district was seeking to
2 expedite the promulgation of those regulations. And so, I
3 think around 2008.

4 **THE COURT:** I wasn't the judge, was I? I don't think
5 so.

6 **MR. ROBINS:** I don't think so, Your Honor.

7 **THE COURT:** Okay. All right.

8 **MR. ROBINS:** So that's kind of the background on
9 examples and extensions of deferred action. I think some of
10 the key take-aways in the majority of these examples is kind of
11 the subsequent action that's been taken to address the policies
12 that arose. But also, the explicit expression in each of these
13 cases where even where the government acknowledged that
14 individuals may seek prosecutorial discretion in the form of
15 deferred action, that their cases were to be adjudicated on a
16 case-by-case basis.

17 And I would note even with regard to DACA, plaintiffs'
18 counsel talked about the notice that individuals receive with
19 regard to the receipt of their DACA. Those notices and
20 supporting guidance in the standard operating procedures and
21 frequently asked questions and other documents that are issued
22 in support of the DACA policy talk about the fact the DACA can
23 be terminated at any time.

24 **THE COURT:** So if someone is -- their application had
25 been approved -- let's go back a year, say, and the DACA

1 application was approved. They get a work permit, and also
2 some document saying they are -- what? That they are in the
3 United States lawfully?

4 What kind of document do they get?

5 **MR. ROBINS:** They get a work permit and a document --
6 it's, I believe, a notice of action -- that indicates that
7 their DACA has been approved. And not that they are not in the
8 United States lawfully. Because DACA is not a form of lawful
9 immigration status. It simply renders them lawfully present in
10 the United States. And so that's different.

11 **THE COURT:** Lawfully present. Okay. So is that what
12 it says, is that the phrase that's used in the document that is
13 issued? "Lawfully present"?

14 **MR. ROBINS:** I'm not sure what the specific language
15 is.

16 **THE COURT:** Does anyone over there know what the -- is
17 it a card? Is it a letter? What is the form of this action?

18 **MS. ALMADANI:** Your Honor, it is a notice of action.
19 And so it's a one-page document (Indicating). I'm not sure if
20 it says "You are lawfully present," but it does explain that
21 USCIS has approved the DACA application or renewal application,
22 and that the individual is a recipient of DACA, and is
23 authorized to be in the United States.

24 So it's a one-page document that also includes the
25 expiration date. And the individual's alien registration

1 number.

2 **THE COURT:** Is the -- oh, the Social Security number
3 wouldn't necessarily be on there. That's a separate process.

4 **MS. ALMADANI:** That's correct.

5 **THE COURT:** Okay. Well, when you do your motions
6 later on, please include these -- this would be -- I would like
7 to see that document, for example.

8 **MS. ALMADANI:** (Nods head)

9 **THE COURT:** And also, an example of a work permit. So
10 when you do your motions later, please, please include examples
11 of that.

12 **MS. ALMADANI:** (Nods head)

13 **THE COURT:** Okay. Thank you.

14 What more do you have? Keep going. You haven't used up
15 -- you have used about 40, almost 40 minutes. So you have got
16 20 minutes to go.

17 **MR. ROBINS:** And we are on the home stretch,
18 Your Honor.

19 And so, the government did just want to touch briefly upon
20 how courts have looked at prosecutorial discretion, itself, and
21 the non-reviewability of that. And so we identify --

22 **THE COURT:** I'm pretty aware of that process. Go
23 ahead. Give me the essence of it.

24 **MR. ROBINS:** But essentially where prosecutorial
25 discretion is inherently a discretionary exercise of the

1 government, that isn't something that is subject to review.
2 That's been recognized by the Supreme Court and Congress in
3 implementing provisions of the INA that strip certain forms of
4 judicial review from any court.

5 And so that's at 8 U.S.C. 1252(g), and interpreted both in
6 the language of that statute and by the Supreme Court to take
7 any decision or action to adjudicate, to commence to
8 adjudicate, or enforce removal proceedings against an
9 individual. And so that deals generally, and applies to
10 general applications of prosecutorial discretion.

11 An important point --

12 **THE COURT:** But have there been cases where that issue
13 has come up in the context of there is a program, people can
14 apply for it, they get a letter -- what did you call it, a
15 letter of acceptance? A letter of action?

16 **MR. ROBINS:** Notice of action.

17 **THE COURT:** Notice of action. They get a notice of
18 action that says: You have been accepted into the DACA
19 program. So, even issuing a work permit.

20 So have there been cases that have dealt with that
21 scenario where it's not just prosecutorial discretion, it's a
22 program about prosecutorial discretion where you get to enroll
23 and get an official letter?

24 **MR. ROBINS:** Your Honor, I'm not positive. I believe
25 some of the case law does get into that. And obviously, that's

1 going to be a key issue for the Court.

2 **THE COURT:** Okay. But if you knew of some sizzling
3 decision that had that scenario, that would be pretty close on
4 point, so we would need to look at that. Okay.

5 **MR. ROBINS:** So if we can go to the next slide.

6 (Off-the-Record discussion between counsel)

7 **MR. ROBINS:** Your Honor, right now I'm reviewing the
8 form I-797C that an individual who received DACA would
9 receive.

10 **THE COURT:** Is that it right there?

11 **MR. ROBINS:** Yes.

12 **THE COURT:** Can you hand it up?

13 **MR. ROSENBERG:** This was a document that was entered
14 as an exhibit in one of the filings in New York.

15 **THE COURT:** Okay.

16 **MR. ROSENBERG:** Happy to have --

17 **THE COURT:** May I just take a look at it so I can get
18 an idea of what you are talking about?

19 (Document handed up to the Court)

20 **THE COURT:** All right. Oh, it's tiny print. All
21 right.

22 (The Court examines document)

23 **THE COURT:** Okay. It says in the tiny print (As
24 read):

25 "Our records indicate that U.S. Citizenship and Immigration

1 Services, USCIS, granted DACA in your case, and that your
2 current period of deferred action will expire in less than 180
3 days. If you wish to avoid a lapse..."

4 Okay, this must be something that they sent send out at
5 the one-and-a-half-year mark. Is that right?

6 **MR. ROBINS:** Yeah, Your Honor, that's correct. So
7 this is identifying to an individual that they would need to
8 renew their application. So it likely doesn't contain the
9 precise language of someone who is granted DACA in the first
10 instance or upon renewal.

11 **THE COURT:** So that would be different language. Now,
12 up at the top, in fairness to the government, it says in bold
13 letters:

14 "This notice does not grant any immigration status or benefit."

15 **MR. ROBINS:** We will make sure to get that before --

16 **THE COURT:** I would like to see what happens at the
17 outset. But I'm going to hand this back to you so that you --
18 you get to make your record later on.

19 (Document handed down)

20 **THE COURT:** Okay.

21 **MR. ROBINS:** Thank Your Honor.

22 So, our next slide, the Court asks whether there are any
23 regulations, at the last hearing, with regard to deferred
24 action. And we also addressed regulations that might address
25 other forms of prosecutorial discretion.

1 And in the case of deferred action, in terms of
2 determinations or eligibility or grants of deferred action,
3 itself, there are no regulations.

4 There is a regulation that defines "deferred action," and
5 that is the regulation that extends employment authorization to
6 individuals who are entitled to or receive -- I'm sorry, or
7 receive a grant of deferred action.

8 **THE COURT:** Okay. Go through -- so what's the history
9 of that regulation?

10 **MR. ROBINS:** So the Immigration Service has
11 regulations that lay out a number of categories of individuals
12 who may seek employment authorization. One group of those, of
13 that category, is individuals whose employment authorization is
14 incident to their status. And so a lawful permanent resident,
15 a green card holder, or other visa holders don't need a
16 separate document that identifies their ability to work.

17 Another category is individuals who, upon either receiving
18 a benefit or receiving something else from the Immigration
19 Service, like deferred action -- which the government argues is
20 not a benefit, but that those individuals have to -- are
21 eligible to apply for employment authorization. And so
22 deferred action is listed as one of the categories of people
23 who, upon getting a grant of deferred action, may seek
24 employment authorization.

25 **THE COURT:** Okay. Wait a second. What's the code

1 section, the C.F.R. for that regular --

2 **MR. ROBINS:** So it's 8 C.F.R. 274a.12(c)(14).

3 And that's cited in our slide, Your Honor.

4 **THE COURT:** So that says that if you are the
5 beneficiary of deferred action -- maybe "beneficiary" is a term
6 you wouldn't want to use. But if you get some kind of a notice
7 saying your deferred action has been approved, then you are
8 eligible to apply for a work authorization under 8 C.F.R.?

9 **MR. ROBINS:** Yes. And that those regulations also
10 provide that grants of employment authorization are
11 discretionary.

12 **THE COURT:** So is that the regulation under which DACA
13 provides work authorization for recipients?

14 **MR. ROBINS:** Yes.

15 **THE COURT:** All right. Okay. All right.

16 **MR. ROBINS:** There are also regulations and policy
17 memorandum that address whether an individual with deferred
18 action accrues lawful presence during their time in the United
19 States. And so this is the discussion that plaintiffs' counsel
20 had at the beginning of their presentation, and relates to
21 Your Honor's questions about the bars to someone being able to
22 return to the United States.

23 So someone in the United States for a period of time
24 without any lawful status may accrue a period of unlawful
25 presence. But, based on certain regulations and certain policy

1 guidance, depending on the situation, Your Honor, certain
2 individuals, including individuals granted deferred action,
3 don't accrue unlawful presence while they have deferred action.

4 **THE COURT:** So if you are a DACA-approved recipient,
5 then no additional accrual? Is that right?

6 **MR. ROBINS:** Yes.

7 **THE COURT:** But if you were here more than -- what was
8 it, more than 180 days, then the three-year bar would apply.
9 Is that true?

10 So tell me how it would benefit a DACA recipient to --
11 that regulation would benefit with respect to unlawful presence
12 accrual.

13 **MR. ROBINS:** So it may benefit certain DACA recipients
14 if they had a prior -- if they had status, right, if they're in
15 the United States with some unlawful presence before they got
16 DACA. Or, the period they were that status was not long, less
17 than 180 days that would accrue an unlawful-presence bar. Or,
18 even if they were in the United States for that period, for a
19 period of time, that would -- for which there would be the
20 accrual of unlawful presence, if that period was before they
21 were 18 years old. Because minors don't accrue unlawful
22 presence.

23 **THE COURT:** Okay, that's important to know. So let's
24 take the case of a child who comes in with let's say the mom,
25 at age five. Then, are they accruing -- when they're young

1 like that, are they accruing unlawful presence? Or does it
2 start at age 18?

3 **MR. ROBINS:** It starts at age 18.

4 **THE COURT:** Okay. So how would DACA then help that
5 person? Give me an example of how -- how it would help
6 anybody. How would DACA help somebody on the unlawful-presence
7 situation?

8 **MR. ROBINS:** I think, Your Honor, an individual who
9 received DACA before they turned 18 wouldn't necessarily have
10 an unlawful presence bar, were they to depart the United
11 States.

12 **THE COURT:** I'm having trouble imagining this
13 scenario. But I do remember that discussion last time. All
14 right.

15 **MR. ROBINS:** And --

16 **THE COURT:** Go ahead.

17 **MR. ROBINS:** It's hard to say, you know, of the DACA
18 population, who would necessarily fit within that subsection of
19 all of it. But because of all the --

20 **THE COURT:** Let me give you a scenario. You tell me
21 if this would work. Let's say somebody comes here on a visa to
22 study. And they're 16 years -- no. Let's say they are 14
23 years old. And then the visa runs out. They apply for DACA.
24 They get DACA. Then when they turn 18, they don't accrue time?
25 Is that it? Is that the way it would work?

1 **MR. ROBINS:** Yes.

2 **THE COURT:** All right. Seems like last time there was
3 a much more important point made on this, on the plaintiffs'
4 side, that I cannot now reconstruct. But when you get your
5 rebuttal, which will come up in a minute, you can try to
6 explain it to me again.

7 **MR. CORTES:** (Nods head)

8 **THE COURT:** All right. Keep going.

9 **MR. ROBINS:** And I'll just advance through the next
10 two slides, Your Honor, that really talk about the two
11 questions the Court added on for the parties about folks who
12 were here, undocumented, their path to lawful immigration
13 status. And they are limited. I'll acknowledge that.

14 Individuals who are seeking, first of all, to be eligible
15 for adjustment of status, an individual has to be inspected.
16 Inspected, and admitted or paroled into the United States. So
17 individuals who enter without inspection generally aren't
18 eligible for adjustment of status.

19 That is not the case where an individual -- where a person
20 petitioning for them is an immediate relative. And so that --
21 I'm sorry. That bar doesn't go away. But that's the first
22 element of eligibility for adjustment of status.

23 The second element of eligibility is identified in the
24 Immigration and Nationality Act at 8 U.S.C. 1255(c) that talks
25 about the need to be in lawful status, and also not have

1 engaged in unlawful employment. And so if you have an
2 immediate relative -- and we talked about -- plaintiffs'
3 counsel talked about having a spouse or parent petitioning for
4 you -- then those bars don't apply. But you still need that
5 initial to have been inspected or admitted to a just status.

6 There are exceptions.

7 And the two primary exceptions -- and I discussed this at
8 the beginning -- are cancellation of removal is one. That
9 allows individuals to adjust status, even if they don't have
10 those initial elements. And plaintiffs' counsel discussed the
11 elements for that.

12 Another is a special provision known as 1255(i)
13 adjustment. That's for individuals who had an immigration visa
14 petition filed on their behalf before April 30th, 2001. And so
15 that's some time back, but in the case especially of preference
16 aliens, siblings or individuals who have to wait a longer
17 period of time for a visa number to become available to them,
18 in those cases, they maintain some eligibility possibly for
19 adjustment of status.

20 Then there's also the special forms of adjustment of
21 status. And there's a number of varieties that Congress has
22 provided, such as for victims of trafficking, or certain crime
23 victims, once they get a nonimmigrant visa in T or U category,
24 they also would be eligible to apply for adjustment of status
25 in their removal proceedings.

1 So it really depends on a case-by-case basis, who may be
2 eligible to seek these paths to adjustment of status. But they
3 do -- they would happen through the course of removal
4 proceedings.

5 Additionally, the ability for an individual to apply for
6 asylum or relief under the convention against torture based on
7 alleged persecution or other problems related to their return
8 to their home country is something that is and may be raised in
9 removal proceedings.

10 And in addition, certain members of the armed forces,
11 pursuant to statute, may be eligible to directly naturalize and
12 become citizens, based on their service in the armed forces.
13 And so --

14 **THE COURT:** Say that last point again. So let's say
15 somebody was a DACA recipient, and they were in the armed
16 forces. Is that a pathway to citizenship?

17 **MR. ROBINS:** Yes, I believe it is. If they are in
18 service during a time of armed conflict, which is -- currently
19 defined as that, he would statutorily be eligible, if they meet
20 all of the other -- good moral character and statutory
21 qualifications to naturalize.

22 **THE COURT:** As a general matter, is this a true
23 statement that in order to become a naturalized citizen, you
24 have to be in this country with a green card? Is that true?
25 Generally true?

1 **MR. ROBINS:** Generally, yes. Military naturalization
2 provides some exceptions to that.

3 **THE COURT:** All right. Okay. Have a seat. Let me --
4 we've just -- you used up all your time, but I'll give you five
5 minutes for rebuttal. So let's hear your rebuttal, so to
6 speak.

7 **MS. ALMADANI:** Thank Your Honor, I'll try to be brief.
8 I just want to address several points.

9 On this question of the history of deferred action, we
10 talked about the Family Fairness Program in the 1980s, and
11 subsequent deferred action programs. However, there were
12 several other programs that preceded the Family Fairness
13 Program.

14 So if you go all the way back to the 1950s, under the
15 government's parole authority, the Eisenhower administration,
16 for example, paroled about 1,000 foreign-born children adopted
17 by American citizens overseas who were precluded from entering
18 the U.S. because of statutory quotas. That same administration
19 admitted 38,000 Hungarian refugees after the unsuccessful
20 Hungarian revolution.

21 And again, these were individuals who did not have a basis
22 for entering the country legally or staying in the country
23 legally. However, the government used its discretion to allow
24 them to be in this country.

25 **THE COURT:** Wait, how --

1 **MS. ALMADANI:** And that was not the subject of --

2 **THE COURT:** How did that work in the Hungarian deal?

3 I actually remember in my fifth grade we had a kid show up
4 one day, he was from Hungary, did not speak a single word of
5 English. And -- but right there, he was in our class. So
6 maybe he was in this program.

7 So how did that program work?

8 **MS. ALMADANI:** He might have been, Your Honor. There
9 were about 38,000 Hungarian refugees, but there were only 6,130
10 visas available. And so the remainder of those individuals,
11 about 32,000 individuals, were allowed to come in, they were
12 paroled in. And like DACA recipients, allowed to be in this
13 country. They were authorized to be in the United States --

14 **THE COURT:** But, parole is a statutory creature, isn't
15 it? Or am I wrong about that?

16 **MS. ALMADANI:** It is, Your Honor, it is. But it is a
17 form of prosecutorial discretion. When they entered the
18 country they did not have green cards, for example. And it
19 wasn't until 1958 that there was legislation that permitted the
20 parolees to adjust to LPR status. It's merely an example of
21 another program or policy where the government exercised its
22 discretion in favor of a particular group.

23 And I think that's one of the main points we want to
24 emphasize, is that historically there have been these groups of
25 individuals, like DACA recipients, who have been essentially

1 protected from removal. And so there's a long history of the
2 government exercising its discretion in that way.

3 And even though the term "deferred action" has not been
4 used throughout history, there have been various similar
5 analogs and programs that had the same effect.

6 **THE COURT:** And, and one of the things, when we get to
7 our briefing on this, one of great interest to me is the
8 history -- these are programs, I understand what you're saying.
9 But to what extent were they set up under the Administrative
10 Procedure Act? Or if they were modified, that the
11 modifications were adjusted through the APA?

12 Or if they were not -- maybe they were different in the
13 sense that there was not -- there was not an application and a
14 notice-of-action type of document. I would be curious to know
15 how they worked from the point of view of the recipient. And,
16 whether or not they ever got tested in court, whether or not
17 someone ever brought a claim that they should have gone through
18 the APA or they didn't go through the APA, so forth.

19 So, anyway, there is plenty of time to brief all that in
20 the future. But I am interested in that whole history of
21 deferred action, and its formalization, and whether or not APA
22 should apply or not.

23 **MS. ALMADANI:** Yes, Your Honor.

24 **THE COURT:** All right.

25 **MS. ALMADANI:** And all the programs that I have

1 identified today and the government has identified were not the
2 subject of APA rulemaking. But we will continue to do research
3 and --

4 **THE COURT:** Well, all right. Well, were they ever
5 rescinded? Were any of those programs rescinded, and was that
6 the subject of APA?

7 **MS. ALMADANI:** As far as I know, Your Honor, no
8 program has been rescinded in the way that DACA has been
9 rescinded. Based on our research, it appears that many of
10 these programs were ultimately phased out due to legislation
11 that provided a more permanent solution to the problem. But we
12 are not aware of any situations like the one we're facing
13 today.

14 **THE COURT:** If that's true, this is a very important
15 historical point for me to -- I don't know what the legal
16 significance of it is, but let me repeat what you just said.
17 Make sure that both sides see what I'm getting out of this.

18 So we've had a number -- over the decades, a number of
19 deferred action, quote, "programs." I'm going to say all of
20 them, it sounds like, have been eventually folded into
21 legislation which obviated the issue we have here, where this
22 has not been folded into legislation, but has been
23 administratively terminated. After -- after a large number of
24 people have applied and been accepted.

25 Then, the question then becoming: Should the rescission

1 be under the APA, or not?

2 So I would be very interested to know if that issue came
3 up in -- in prior programs. And so, there. Is that --

4 **MS. ALMADANI:** We will address that, Your Honor, in
5 the future.

6 **THE COURT:** Did I say that correctly?

7 **MS. ALMADANI:** Yes, Your Honor.

8 **THE COURT:** Did I say the history correctly?

9 **MS. ALMADANI:** Yes.

10 **THE COURT:** Okay.

11 **MS. ALMADANI:** Just very briefly, on the Family
12 Fairness Program, you asked about extended voluntary departure.
13 As a historical point, I think it's important to clarify that
14 in 1996 when there was essentially an immigration overhaul,
15 many immigration laws were reformed at that time. There was
16 lots of different legislation. The voluntary departure statute
17 was actually modified to limit the amount of time that someone
18 could be in the country pending their voluntary departure. So
19 it was limited to 120 days.

20 So prior to that, during the Family Fairness Program,
21 those individuals who benefited from that benefited from an
22 indefinite voluntary departure. And so subsequent to that,
23 when there was legislation that modified the voluntary
24 departure statute, that's when the government, based on our
25 research, started to use deferred action more commonly.

1 Because the voluntary departure statute now limited the amount
2 of time that someone could actually stay here.

3 And so that's when you see a shift in the -- in the
4 program name or the type of discretion that's being used,
5 starting in 1997, with the VAWA program that we discussed that
6 involved battered spouses. And so on.

7 And so for those programs, those are defined as "deferred
8 action." And I guess prior to that, you see "extended
9 voluntary departure," and "parole," and those terms used more
10 commonly.

11 **THE COURT:** Have both sides given me your slides?

12 **MS. ALMADANI:** I believe so, Your Honor.

13 **THE COURT:** Let me ask my law clerk, did -- did we get
14 those slides?

15 **THE LAW CLERK:** As far as I know, if you got them it
16 would have been this morning. So --

17 **THE COURT:** All right. Well, hand up -- each side
18 hand up the paper slides, so we'll at least have one set per
19 side.

20 (Documents handed up to the Court)

21 **THE COURT:** Now --

22 **MS. ALMADANI:** Your Honor, we also have additional
23 statistics, two other handouts that are not in our slides that
24 we have shared with the government that we would like to share
25 with the Court. DACA statistics (Indicating), and then we have

1 statistics on the country of birth.

2 **THE COURT:** Sure. Have you shown the government?

3 **MS. ALMADANI:** Yes, Your Honor.

4 **THE COURT:** Do you have any issue with me seeing
5 these?

6 **MR. ROSENBERG:** We do not, Your Honor.

7 **THE COURT:** All right. Great. Hand those up, please.

8 (Documents handed up to the Court)

9 **THE COURT:** And make sure you give those to Judge
10 Orenstein, too.

11 **MS. ALMADANI:** We will.

12 **THE COURT:** Judge Orenstein, do you have any questions
13 before we wrap up? I want to leave time for you to ask
14 questions.

15 **JUDGE ORENSTEIN:** Thank you very much for including
16 me. And counsel, thank you, on both sides, for the
17 presentations.

18 **THE COURT:** Thank you for attending.

19 Okay, I think we are done for today. Is there anything
20 more?

21 **MS. ALMADANI:** Your Honor, you had asked a question
22 about DACA and unlawful presence. And I just wanted to make
23 sure we addressed that issue.

24 **THE COURT:** Go ahead, address that issue.

25 **MS. ALMADANI:** Thank you.

1 **MR. CORTES:** I will make it very quick, Your Honor.

2 So, the way that it would work --

3 **THE COURT:** Use the microphone now.

4 **MR. CORTES:** The way that it would work practically is
5 there wouldn't be, really, a situation where a DACA recipient
6 would not accrue unlawful presence, because part of the
7 eligibility requirement is to have been unlawfully in the
8 United States on June 15, 2012. So we couldn't have a
9 situation where someone entered on a student visa, is here
10 legally, and then transferred over to DACA. So that wouldn't
11 work.

12 Most of the DACA beneficiaries, from what we see at the
13 USCIS statistics, are in their mid to late thirties. So they
14 have already accrued the unlawful presence necessary after the
15 age of 18. So tolling the unlawful presence doesn't help them
16 at this point.

17 I want to also put a little asterisk in the 18-year mark.
18 There is one exception to that, which is in the permanent bar,
19 when we're talking about the permanent bar to the United
20 States, unlawful presence starts accruing at any time. And the
21 permanent bar happens when you have one year of unlawful
22 presence, you exit, and then you return unlawfully. That's one
23 way to trigger the permanent bar.

24 And so, for instance, if there's a five-year-old, stays
25 here until they're ten years old, their parent takes them to

1 see a sick family member then returns a day later, let's say,
2 then they are subject to the permanent bar because that
3 18-year-old -- having to be 18 years old to start unlawful
4 presence doesn't apply to the permanent bar.

5 And that's under --

6 **THE COURT:** So even an infant could be subject to a
7 permanent bar?

8 **MR. CORTES:** Yes. Yes. The -- only the ten- and
9 three-year bars is where the unlawful presence starts at 18.

10 **THE COURT:** Which statute imposed that?

11 **MR. CORTES:** The permanent bar?

12 **THE COURT:** Yeah.

13 **MR. CORTES:** It's under INA Section 212(a)(9)(C).

14 **THE COURT:** Is that the -- which, the '96 act? '86
15 act?

16 **MR. CORTES:** '96 act.

17 **THE COURT:** '96? So a child who's one year old comes
18 in, stays a year?

19 **MR. CORTES:** Over a year. So a year and a day.

20 **THE COURT:** All right. A year and a day. Leaves,
21 comes back a week later -- or what, a year and a day? Or just
22 comes back at all?

23 **MR. CORTES:** Just comes back. Oh, so -- sorry,
24 Your Honor. Go ahead.

25 **THE COURT:** So a year and day, leaves, comes back for

1 one day. At that point they are ineligible permanently for --
2 for what?

3 **MR. CORTES:** For immigration status.

4 **THE COURT:** Of any type. Even --

5 **MR. CORTES:** (Nods head)

6 **THE COURT:** Even a work visa.

7 **MR. CORTES:** Yes.

8 **THE COURT:** Wow, that's pretty -- that's -- does that
9 ever happen?

10 **MR. CORTES:** Yes.

11 **THE COURT:** Does it?

12 **MR. CORTES:** Yes. And you can ask for it to be
13 waived, but it's a mandatory minimum of ten years. Unlike the
14 ten-year bar where that's the ceiling, the permanent bar,
15 they've got a minimum of ten years outside of the United
16 States. And then you can see if it gets waived.

17 **THE COURT:** What was the rationale -- maybe the
18 government knows.

19 What was the rationale for that provision, if you don't
20 mind saying? If you don't know, don't guess at it. But what
21 was the rationale for that?

22 **MR. ROBINS:** Your Honor, I unfortunately can't speak
23 to that.

24 **THE COURT:** Okay. Do you agree that that comes up,
25 and that's applied? That, that mandatory forever bar is

1 applied?

2 **MR. ROBINS:** Your Honor, that is what the statute
3 states, and I believe it is applied.

4 **THE COURT:** Okay.

5 **MR. ROBINS:** And the government also does have the
6 citations for the consent to reapply, that ten-year --
7 Your Honor, I think we just lost New York.

8 **THE COURT:** Yeah, we're about done. So we will bring
9 it to a close.

10 **MR. ROBINS:** But for an individual in that situation,
11 we concur with that ten-year period before they can seek
12 authority to reapply for admission into the United States.

13 And that's laid out in our final slide. I didn't have the
14 opportunity to address those citations, Your Honor.

15 **THE COURT:** All right. We've got to bring it to a
16 close. I want to thank you both. You did great jobs. This
17 has been most informative. And we're done, right, for today?

18 Good. Have a great day. Thank you.

19 **THE CLERK:** Court's in recess.

20 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Belle Ball

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Thursday, October 5, 2017