

The Honorable Richard A. Jones

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of
himself and other similarly situated,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United
States, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAJ

**DEFENDANTS' REPLY TO
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
EXCLUDE TESTIMONY OF
SEAN M. KRUSKOL**

INTRODUCTION

1
2 Plaintiffs' retained CPA, Mr. Kruskol, admittedly lacks expertise in statistical analysis and
3 thus is not qualified to offer expert statistical testimony. Because he cannot show that his findings
4 are statistically significant, they are not probative and should be excluded. Mr. Kruskol's opinions
5 and testimony also lack a sound methodology, reliability and relevance.

ARGUMENT

7 **I. Mr. Kruskol lacks the ability to assist the Court in understanding the CARRP 8 data, and whether any of his data points are meaningful.**

9 After incorrectly stating that Defendants' motion addresses only four of Mr. Kruskol's
10 opinions, Plaintiffs claim he is somehow "plainly qualified" to provide all of his opinions. Dkt #493
11 at 1. But his admitted lack of qualifications to determine "statistical significance," or conduct trend
12 or regression analyses renders all his statistical testimony non-probative and unhelpful to the trier of
13 fact. Dkt #471 at 3-4, citing Kruskol dep. (Ex. D to Dkt #476, sealed Murphy Dec.) at 34:9 – 35:8.
14 As he cannot attest that his findings are statistically significant, they are not competent proof.

15 After misstating that Defendants do not assert that any of Mr. Kruskol's conclusions are
16 incorrect, Plaintiffs incorrectly claim that Dr. Siskin conceded that Mr. Kruskol's "calculations" and
17 "conclusions are correct." Dkt #493 at 1, 6. Dr. Siskin pointed out that while Mr. Kruskol's
18 arithmetic is correct, the conclusions he derives are statistically incorrect and misleading. Dkt #471
19 at 5-6, citing Siskin report (Ex. F to Dkt #476, sealed Murphy Dec.) at pp. 2, 7-12, 14-21, and 32.

20 Mr. Kruskol's observations are "descriptive" and mathematically correct, but do not address
21 whether any data "anomalies" he describes are meaningful, or if any differences in data outcomes
22 are relevant to Plaintiffs' allegations. Ex. F to Dkt #476 at 5-12. While Plaintiffs tout his experience
23 in "large-scale data analytics" (Dkt #493 at 3), it is the lawyers, not Mr. Kruskol, who draw
24 conclusions from the differences and his claimed "anomalies." That is the problem. Even if he can
25 crunch numbers, that expertise equips him only to describe the data, not to explain it or its
26 significance. He is unable to interpret which number-value differences are significant, or which
27 "anomalies" are meaningful, and also lacks the qualifications to do so. Plaintiffs attempt to shield
28 Mr. Kruskol's shortcomings and audaciously attack Dr. Siskin's analyses by arguing that Mr.
Kruskol's discovery of "anomalies" in the data proves that it is Dr. Siskin's expertise that is useless

1 to the Court. See Dkt #493 at 7 (“This is just common sense; statistical analysis is only as good as
 2 the data on which it relies.”). But Mr. Kruskol’s shortcomings in statistical analysis mean he cannot
 3 provide any useful assessment of the data he considered. Anomalies exist in most datasets. Ex. F to
 4 Dkt #476 at 30. The task is to determine their impact, and to prove that they either tend to support,
 5 undermine, or say nothing about the propositions at issue – which Mr. Kruskol cannot do.

6 Plaintiffs argue that the increased referral rate to CARRP for applicants from majority-
 7 Muslim countries is central to Plaintiffs’ equal protection claim. Dkt #493 at 1. But they offer no
 8 evidence that applicants from majority-Muslim countries (“Muslim countries”) whose applications
 9 present potential national security (“NS”) concerns are referred to CARRP at a significantly higher
 10 rate (or any higher rate) than applicants from majority non-Muslim countries whose applications also
 11 present potential NS concerns. Without such evidence, Mr. Kruskol’s statistical opinion does not
 12 support Plaintiffs’ equal protection claim, and thus is irrelevant and would not assist the Court.

13 **II. Mr. Kruskol’s reliance on a manipulated, nonsensical definition of a CARRP**
 14 **case and presumption that CARRP is *the cause* for the difference in processing**
 15 **times and adjudication outcomes for NS Concern cases cannot assist the Court.**

16 Plaintiffs incorrectly state that this Court granted Plaintiffs’ motion to compel production of
 17 the “CARRP Dataset” produced in early January 2021 “[b]ecause the USCIS Detailed Data included
 18 an overbroad definition of a ‘CARRP case.’” Dkt #493 at 4. This Court made no such finding. Dkt
 19 #445 at 5. Plaintiffs have never established that the USCIS dataset used an overbroad definition of a
 20 CARRP case. Nor does Mr. Kruskol claim he has greater expertise than USCIS in defining a
 21 CARRP case and determining if an application was subject to CARRP. Dkt #471 at 7-8, citing
 22 Kruskol dep. (Ex. D to Dkt #476) at 67:18-22, 69:22 – 70:10.

23 Plaintiffs seek to offer Mr. Kruskol’s testimony to support their claim that referring NS
 24 Concern applications to CARRP causes adjudication delays and adverse outcomes. Dkt #493 at 3-5.
 25 But they rely upon the false assumption that CARRP cases take longer to adjudicate and have lower
 26 rates for approving benefits because they are in CARRP, rather than because they involve NS
 27 concerns. The flaw is that they are not comparing comparable data sets, but rather apples to oranges.
 28 The apples are applications that do not present potential NS concerns, and thus are never referred to
 CARRP to investigate, vet and, if possible, resolve such concerns. The oranges are applications that

1 present potential NS concerns and thus are referred to CARRP to investigate, vet and possibly
 2 resolve those concerns. Plaintiffs and Mr. Kruskol presume, with no supporting evidence, that if
 3 USCIS officials were to handle all applications with potential NS concerns on the same track and in
 4 the same way as applications having no potential NS concerns, the processing times would be no
 5 longer and the adjudication outcomes no less favorable than for applications without potential NS
 6 concerns. Plaintiffs' data expert thus falls into the most basic trap of comparing the incomparable.
 7 As a high-ranking USCIS official explained, referring applications to CARRP does not delay
 8 processing and adjudication, but instead allows applications presenting NS concerns to move
 9 forward. Deposition of Daniel Renaud (Ex. 1 to sealed Taranto Dec., contemporaneously filed with
 10 this Reply) at 311:7 – 314:20. Thus, Mr. Kruskol's testimony about longer processing times for NS
 11 Concern cases referred to CARRP, and the less favorable adjudication outcomes, would not assist
 12 the Court. It is not probative of whether the longer processing times and less favorable adjudication
 13 outcomes are *caused* by CARRP, rather than by having to vet potential NS concerns in determining
 14 whether applicants qualify for the immigration benefits sought. Since Mr. Kruskol's opinion is
 15 "connected to existing data only by [his] *ipse dixit*," there is "too great an analytical gap between the
 16 data and [his] opinion" to support it. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049
 17 (9th Cir. 2014), quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (2007). *Accord, In re*
 18 *Phenylpropanolamine Prods. Liab. Litig.*, 289 F. Supp. 1230, 1237-38 (W.D. Wash. 2003).

19 Contrary to Plaintiffs' misstatement (Dkt #493 at 9), USCIS did not testify that under the
 20 FDNS-NS User Guide, NS CMEs are created also for cases that are never referred to CARRP. The
 21 cited testimony by Mr. Shinaberry of USCIS, who does not work for FDNS or in the CARRP
 22 program, was given only in his personal capacity.¹ Shinaberry dep. (Ex. 2 to Taranto Dec.) at
 23 124:16 – 126:21. Even in his personal capacity, Mr. Shinaberry did not confirm Plaintiffs'
 24 interpretation of the language in the User Guide, responding that "it doesn't state that [interpretation]
 25 explicitly." He simply acknowledged Plaintiffs' suggested possibility of creating an NS CME for a
 26

27 ¹ Because Plaintiffs' Rule 30(b)(6) notice did not designate this subject, and thus Defendants did not
 28 designate or prepare Mr. Shinaberry to testify for USCIS on this subject, the question was objected
 to as beyond the scope of the deposition. He was permitted to answer to the best of his ability in his
 personal capacity. See *Detoy v. City & Cty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000).

1 case not referred to CARRP. *Id.* Plaintiffs present no evidence that this has ever occurred.

2 Plaintiffs complain that Defendants prevented Mr. Kruskol from determining the extent of
 3 any potential overstating of CARRP referrals because Defendants did not produce, for his
 4 examination, all applications and A-files for the 28,214 CARRP-referred cases included in the
 5 USCIS dataset. Dkt #493 at 9. But Mr. Kruskol could have examined applications and A-files for
 6 the named Plaintiffs, class notice responders and others whose files Plaintiffs' counsel possess. Dkt
 7 #192 at 2. Yet he examined none of that material; and he concedes that he does not know if he could
 8 determine from a review of the files whether an application was referred to CARRP. Dkt #475 at 9-
 9 10, citing Kruskol dep. (Ex. D to Dkt #476) at 123:16 – 124:2, 124:16-25, 125:14-25, 127:10 –
 10 128:16, 140:8 – 141:9. Also, the notion that Mr. Kruskol was capable of reviewing all applications
 11 and A-files for applicants in the USCIS dataset of 10.6 million applications received during FY 2013
 12 – 2019, or even for the over 28,000 applications that were referred to CARRP, is preposterous. If
 13 each A-file averages 500 pages, compared to the 588-page average for the A-files for each of the
 14 named plaintiffs, Mr. Kruskol's review would have encompassed about 5.3 billion pages of material,
 15 far more than he could review in several lifetimes.²

16 Plaintiffs deny that Mr. Kruskol's Declaration abandons his previous claim that some cases,
 17 an unspecified number, might have been incorrectly flagged as CARRP-referred cases in the USCIS
 18 dataset. Dkt #493 at 10. Yet Mr. Kruskol's Declaration does not point to any incorrect flagging of
 19 cases as having been referred to CARRP, even though his Declaration followed Defendants'
 20 production of a very granular CARRP dataset in January 2021, with NS Concern type and substatus
 21 data for every CARRP case. Plaintiffs pressed to obtain that data to enable Mr. Kruskol to
 22 substantiate his suspicion that USCIS might have overflagged cases as CARRP-referred in its dataset
 23 produced in June 2020. Misusing the January 2021 dataset with data on NS Concern type and
 24 substatus for each CARRP case, Plaintiffs now pretend that all CARRP cases that were processed
 25 and vetted through CARRP and whose NS Concern type was changed from KST or Non-KST to

26
 27 ² $[500 \times 10.6 \text{ million} = 5.3 \text{ billion}]$ Even if Mr. Kruskol devoted 100% of his professional time in a
 28 work year (8760 hours) over a 50-year work career of 438,000 hours $[8760 \times 50 = 438,000]$, he
 could not complete the task by reviewing 10,000 pages per hour. $[10,000 \times 438,000 = 4.38 \text{ billion}]$
 Reviewing A-files only for the 28,000+ CARRP cases, many millions of pages, is also unrealistic.

1 Non-NS, or whose status became NS Concern Not Confirmed or NS Concern Resolved, were never
2 subject to CARRP. Indeed, Plaintiffs imply that USCIS incorrectly flagged such cases as CARRP
3 cases in the dataset it produced. But Mr. Kruskol never embraced that notion, either at his
4 deposition or in his recent Declaration. See Kruskol dep. (Ex. D to Dkt #476) at 75-76, 80-81, 90-
5 91; 102, 104, 122-24, 140-41, 155-57, 159, 181; Kruskol dep. (Ex. 3 to Taranto Dec.) at 95-96, 101,
6 103, 167-68; Kruskol Dec. (Ex. A to Dkt #476) at ¶¶ 8-10, 12-15, 17-20, 22, 24-25, 27, 30-32, 34,
7 36, 38, 40-41, 43-47.

8 Plaintiffs falsely claim that the USCIS summary data incorrectly states that 81.1% of
9 applications adjudicated under CARRP were approved. Dkt #493 at 10. Instead, Plaintiffs
10 challenge the fact that 81.1% were approved only by concocting their own version of what qualifies
11 as a CARRP case. With no evidence, they suggest that a CARRP case excludes any cases for which
12 the NS Concern type was changed by the end of the CARRP process from KST or Non-KST to Non-
13 NS, or for which the NS Concern substatus ultimately became NS Not Confirmed (or presumably
14 NS Concern Resolved). The 81.1% approval rate for applications adjudicated after referral to
15 CARRP is a fact that even Plaintiffs' expert Mr. Kruskol accepts, even though it negates Plaintiffs'
16 case narrative that USCIS employs CARRP as a process intended to deny immigration benefits to
17 qualified applicants. Dkt #475 at 7, citing Kruskol dep. (Ex. D to Dkt #476) at 46:18 – 47:8.
18 Plaintiffs pretend that CARRP-referred cases exclude all applications where the NS Concern type for
19 the CARRP case ultimately became Non-NS after vetting and processing through CARRP enabled
20 USCIS to successfully resolve the potential NS Concern that prompted the referral to CARRP.
21 Those cases for which the NS Concern type ultimately was changed to Non-NS comprise the vast
22 majority of CARRP cases. See Kruskol Dec. at ¶ 8a (Ex. A to Dkt #476), noting that 84% of all the
23 adjudicated applications in USCIS' CARRP dataset were ultimately identified as Non-NS. Plaintiffs
24 disingenuously attempt to misrepresent the data for all CARRP cases combined by redefining their
25 notion of what constitutes a CARRP case, for purposes of looking only at data for adjudication
26 outcomes and processing times. They imply that the only true CARRP cases are the much smaller
27 subset of cases where the NS concern type could not be changed to Non-NS and remained either as
28 KST or Non-KST. Plaintiffs try to further erode the correct 81.1% overall approval rate for CARRP

1 cases by removing from the dataset all cases where the ultimate substatus became either NS Not
2 Confirmed or NS Concern Resolved. As Mr. Kruskol notes (Ex. A to Dkt #476) at ¶ 9a, fully 76%
3 of the CARRP-referred applications that USCIS adjudicated had a final substatus of NS Concern
4 Resolved, and 86% of them were approved; 10% had a final substatus of NS Not Confirmed, and
5 73% of them were approved. In short, by misrepresenting their own experts' conclusions, Plaintiffs
6 unwittingly reflect that his testimony would not assist either them or the Court.

7 **III. Mr. Kruskol's opinions concerning data anomalies are not reliable or relevant.**

8 Plaintiffs choose to ignore Defendants' showing that Mr. Kruskol's opinions about possible
9 data anomalies are methodologically flawed, unreliable, as well as irrelevant to any issue to be
10 resolved by the Court. Dkt #475 at 7-11. Plaintiffs instead offer unsupported arguments for
11 allowing Mr. Kruskol to testify to perceived anomalies he can neither substantiate nor say would
12 significantly impact his conclusions.

13 For example, Plaintiffs point to Mr. Kruskol's suggestion that the USCIS dataset is
14 anomalous because among over 10.6 million applications for adjustment of status or naturalization
15 USCIS received during FY 2013 – 2019, less than 1% have adjudication times that Mr. Kruskol
16 believes do not appear reasonable since they were completed within 60 days of application receipt.
17 Dkt #493 at 11. He suggests that USCIS should have removed this tiny fraction of cases from its
18 reporting of data regarding application receipt to adjudication. Notably, Mr. Kruskol does not claim
19 this would have significantly lengthened the processing time calculations. More critically, he makes
20 no claim that including cases adjudicated within 60 days of application receipt shortened the
21 processing times for CARRP cases more than for non-CARRP cases, and thus that USCIS
22 understated the difference in processing times for CARRP vs. non-CARRP cases. Nor does he
23 identify any CARRP case for which he claims the processing time is unrealistically short.

24 As for Mr. Kruskol's unsupported claim that the USCIS dataset might include duplicates,
25 none of the 40 sets of possible duplicates Mr. Kruskol lists in his report are true duplicates. Each
26 involves a separate application. Ex. F to Dkt #476 at 10-11, 28-30. In sum, Mr. Kruskol's claimed
27 anomalies are speculative, unreliable, and not relevant even if they could be factually confirmed.

CONCLUSION

For the foregoing reasons, and for reasons stated in Defendants’ motion to exclude Mr. Kruskol’s testimony, the Defendants’ motion should be granted and the opinions and testimony of Mr. Kruskol should be excluded.

Dated: April 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

1
2 I hereby certify that on April 9, 2021, I electronically filed the foregoing with the Clerk of
3 the Court using the CM/ECF system, which will send notification of such filing to all counsel of
4 record.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I electronically filed the foregoing UNDER SEAL via the Court's CM/ECF system, which will send notification of such filing to all counsel of record. Additionally, I directed that an encrypted copy of the foregoing SEALED submission be served on counsel for Plaintiffs via email.

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