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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, et al., on behalf
of themselves and others similarly situated,

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00094-RAJ

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

**NOTE ON MOTION CALENDAR:
April 9, 2021**

FILED UNDER SEAL

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INTRODUCTION

1
2 Plaintiffs' expert Sean Kruskol has provided many opinions that will help the trier of
3 fact—this Court—resolve important issues raised by Plaintiffs' claims. Relying on his substantial
4 expertise in large-scale data analytics, Mr. Kruskol analyzed sizeable datasets—some containing
5 millions of records and hundreds of fields—to demonstrate that applications subjected to
6 CARRP take longer to be adjudicated and are denied at higher rates than other applications, and
7 that CARRP disproportionately targets applicants from Muslim-majority countries.

8 Defendants' motion to exclude Mr. Kruskol's opinions is illogical and unsupported.
9 Defendants seek to exclude *all* of Mr. Kruskol's opinions *in their entirety*, but they never assert
10 that *any* of his conclusions are incorrect. Nor could they, since their own expert, Bernard Siskin,
11 conceded at his deposition that Mr. Kruskol's calculations are correct. And, of the numerous
12 conclusions Mr. Kruskol provided in his reports, Defendants' motion explicitly addresses only
13 four. Because Defendants make no argument whatsoever as to why the vast majority of Mr.
14 Kruskol's opinions should be excluded—opinions he is plainly qualified to provide—the
15 sweeping relief Defendants seek must be rejected.

16 Even as to the four opinions the motion does address, Defendants' arguments are
17 meritless. Defendants argue that Mr. Kruskol's analysis showing that applicants from Muslim-
18 majority countries are subject to CARRP at over ten times the rate of those from non-Muslim-
19 majority countries is not relevant to Plaintiffs' claims. That is clearly wrong. CARRP's grossly
20 disproportionate impact on applicants from Muslim-majority countries is squarely relevant to
21 Plaintiffs' equal protection claim: courts have repeatedly held that such disparate impact on a
22 suspect class is probative of discriminatory intent. *See, e.g., Reno v. Bossier Par. Sch. Bd.*, 520
23 U.S. 471, 489 (1997); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1038 (9th Cir. 2020).
24 The three other challenged opinions relate to anomalies that Mr. Kruskol identified when
25 attempting to validate the data to verify its accuracy. Contrary to Defendants' arguments, those
26 anomalies are not based on Mr. Kruskol's "unsupported speculation," but rather his rigorous

1 review of the data, Defendants’ own documents, and the testimony of Defendants’ witnesses.
2 Defendants’ motion should be denied.

3 **BACKGROUND**

4 **A. In Discovery, Defendants Produced Very Large Datasets to Plaintiffs**

5 During discovery, Defendants produced large datasets regarding the processing of
6 immigration benefit applications, including applications subjected to CARRP. They include:

7 USCIS Summary Data: “data and related summaries for Fiscal Year 2013 through Fiscal
8 Year 2019 regarding USCIS’s receipt of immigration benefit applications for naturalization or
9 adjustment of status” which “contained information that purported to indicate whether such
10 applications were subject to CARRP.” Def. Ex. B. at 5.

11 USCIS Detailed Data: an anonymized version of the underlying dataset used to create the
12 USCIS Summary Data. The USCIS Detailed Data is “a granular dataset containing 10,621,174
13 records and 45 fields of application data.” Def. Ex. B at 7.

14 CARRP Dataset: “a granular dataset containing 28,214 records and 219 fields of
15 application and related USCIS data.” Def. Ex. A at 6. The dataset “provides the underlying
16 Concern Type and Sub-status [of applications] USCIS purportedly . . . subject to CARRP.” *Id.*

17 Class Lists: seven datasets “purport[ing] to show applications that: 1) were being or had
18 been processed pursuant to the CARRP policy; 2) had not been adjudicated as of the respective
19 class list date; and 3) were pending for 180 days or longer as of the class list date.” Ex. A at 8.
20 The Class Lists contain “11,297 unique Alien numbers.” *Id.* at 22.

21 **B. Plaintiffs Retained Expert Sean Kruskol to Analyze These Very Large Datasets**

22 Because these large datasets can only be analyzed by an expert in large-scale data
23 analytics, Plaintiffs retained Mr. Kruskol to “review, analyze, and compile summary statistics
24 related to data provided by” USCIS and “review, merge, and analyze various lists of individuals
25 subject to” CARRP. *Id.* at 1. Mr. Kruskol has extensive expertise analyzing large datasets. For
26 over 10 years, Mr. Kruskol has served as “a consultant to public and private companies and their

1 counsel in various industries, including global manufacturers, telecommunications firms, large
2 financial institutions, online and brick & mortar retailers, technology firms, and multimedia
3 companies.” *Id.* His work “focuses on matters involving large-scale data analytics,” and he has
4 “worked with a variety of large data sets, including product sales, employee time sheets, banking
5 transactions, general ledger transactions, personally identifiable information, and cost
6 information related to computer components.” *Id.* Mr. Kruskol is a recurring guest lecturer at
7 Washington University in St. Louis on the topics of data analysis and data modeling. *Id.*

8 Mr. Kruskol is a licensed Certified Public Accountant (CPA), a Certified Fraud Examiner
9 (CFE), and a Chartered Global Management Accountant (CGMA). *Id.* As a CPA, Mr. Kruskol
10 often conducts trend analyses and other statistical analyses in his work. Kruskol Decl. at 2-3; Ex.
11 B at 36 (“Data analysis involves the review of data sets to identify trends or anomalies.”); Ex. C
12 at 15 (CPA training includes “[a]pplication of statistical methods and concepts such as ... trend
13 analysis”). Mr. Kruskol has a Masters of Accounting and Bachelors of Science in Accounting,
14 with a Minor in Management Information Systems. Ex. A at 1. In this case, he has complied with
15 the American Institute of Certified Public Accountants professional standards, which require him
16 to: “1) maintain integrity and objectivity; 2) only undertake engagements that are expected to be
17 completed with professional competence; 3) exercise due professional care in performing the
18 services; 4) adequately plan and supervise the performance of the services; and 5) obtain
19 sufficient relevant data to provide a reasonable basis for the conclusions.” *Id.*

20 **C. Mr. Kruskol’s Reports Contain Opinions Highly Relevant to Plaintiffs’ Claims**

21 Mr. Kruskol has produced four expert reports providing opinions showing that CARRP
22 results in delays and denials of immigration benefit applications and disproportionately targets
23 individuals from Muslim-majority countries. On February 28, 2020, Mr. Kruskol issued a 34-
24 page report with 23 exhibits analyzing the USCIS Summary Data and the Class Lists. Mr.
25 Kruskol’s conclusions included that the adjustment class spent an average of 1,014 days awaiting
26 adjudication, while the naturalization class spent an average of 727 days. *Id.* at 9.

1 Because of an error in the USCIS Summary Data, Defendants produced an updated
2 version of that data and the USCIS Detailed Data in June 2020. In response, Mr. Kruskol issued
3 a 24-page supplemental report with 34 exhibits on July 17, 2020. Contrary to Defendants’
4 assertion, Mr. Kruskol’s supplemental report did not “replace” his February 2020 report, Mot. at
5 1, but rather modified and added opinions based on the corrected data. Mr. Kruskol concluded
6 that applications subject to CARRP take 2.5 times longer to adjudicate than other applications.
7 Def. Ex. B at 4. He also concluded that naturalization applicants from Muslim-majority countries
8 are subjected to CARRP at 12 times the rate of applicants from non-Muslim majority countries,
9 and adjustment applicants at over 10 times the rate. *Id.*

10 In August 2020, Plaintiffs conducted a Rule 30(b)(6) deposition of USCIS focusing on
11 “[h]ow USCIS defines and measures categories of information in the new tables and underlying
12 dataset.” Dkt. 445 at 2-3. Following receipt of this testimony, Mr. Kruskol issued a 12-page
13 second supplemental report with four exhibits on September 21, 2020. He opined that the USCIS
14 Detailed Data “appears to overstate the number of applications subject to CARRP,” and he
15 identified potential data anomalies, including duplicate records and “application processing times
16 that are inconsistent with the duration of USCIS’s adjudication process.” Def. Ex. C. at 3.

17 Because the USCIS Detailed Data included an overbroad definition of a “CARRP case,”
18 the Court granted Plaintiffs’ motion to compel the production of the “CARRP Dataset.” Dkt. 445
19 at 5. On March 4, 2021, Mr. Kruskol issued a 22-page supplemental declaration with 19 exhibits
20 analyzing that dataset. He opined that USCIS denied 89% of KST, 56% of NS Confirmed, 41%
21 of Non-KST, 40% of NS Concern Unresolved, 27% of NS Not Confirmed, and 14% of Non-NS
22 applications received between October 1, 2012 and September 30, 2019. Def. Ex. A at 3-4.

23 ARGUMENT

24 A. Legal Standard

25 Federal Rule of Evidence 702 permits expert testimony if it will “help the trier of fact to
26 understand the evidence or to determine a fact in issue,” so long as the “testimony is based on

1 sufficient facts or data” and “is the product of reliable principles and methods.” “The district
 2 court is not tasked with deciding whether the expert is right or wrong, just whether his testimony
 3 has substance such that it would be helpful to a [trier of fact].” *Alaska Rent-A-Car, Inc. v. Avis*
 4 *Budget Grp., Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013). An expert “need not be officially
 5 credentialed in the specific matter under dispute” as long as his “specialized knowledge is
 6 sufficiently related to ... the proposed testimony.” *Thompson v. Whirlpool Corp.*, 2008 WL
 7 2063549, at *4 (W.D. Wash. May 13, 2008). Because “*Daubert* is meant to protect juries from
 8 being swayed by dubious scientific testimony,” where, as here, “the district court sits as the
 9 finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is
 10 keeping the gate only for himself.” *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018).

11 **B. Defendants Do Not Challenge Any of Mr. Kruskol’s Opinions That Demonstrate the**
 12 **Significant Delays and Denials of Applications Subjected to CARRP**

13 Defendants ask the Court to exclude Mr. Kruskol from testifying at all, but they challenge
 14 almost none of his opinions. Those opinions will assist this Court in resolving a critical issue in
 15 this case: the extent of the harms CARRP causes. Mr. Kruskol’s data analysis demonstrates that
 16 CARRP results in significant delays and denials of adjustment of status and naturalization
 17 applications, as here summarized:

Category of NS concern	Routine	CARRP			
	Not CARRP	Non-NS (“resolved” concern)	Non-KST		KST
			Not Confirmed	Confirmed	
Approval Rates	92.5%	86%	73%	44%	11%
Denial Rates	7.5%	14%	27%	56%	89%
Delay Rates for Adjudicated Cases	244 days	646.5 days	601.5 days	762 days	769 days
Delay Rates for Pending Cases	371 days	750 days	631 days	848 days	902 days

18 Pls.’ Mot. for Summ. J. at 17 (citing Def. Ex. B at Exs. Z, AC, AV; Def. Ex. A ¶¶8-9, 32, 34, 46
 19 & Exs. BM, BN, BO, BP, BQ, BR.). Defendants challenge *none* of these conclusions. Nor could
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1 they: Defendants’ own expert, Dr. Siskin, conceded that Mr. Kruskol’s conclusions are correct.¹
2 Ex. D at 30:20-21 (“I agreed with his arithmetic in all cases.”); *id.* at 34:8-35:17 (Applications
3 “processed through CARRP” “will take longer” and are “more likely to be denied” at
4 “significantly” higher rates than non-CARRP applications).

5 Defendants attempt to dismiss Mr. Kruskol’s analysis as “rudimentary calculations ...
6 that require no expert presentation.” Mot. at 12. But to reach his conclusions, Mr. Kruskol had to
7 analyze spreadsheets containing millions of records and hundreds of data fields—something that
8 required expertise in analyzing large datasets. *See supra* p. 2 (the USCIS Detailed Data contains
9 10,621,174 records and 45 fields and the CARRP Dataset contains 28,214 records and 219
10 fields). There was nothing “rudimentary” about that process, which would have been impossible
11 for someone lacking Mr. Kruskol’s qualifications. *See* Ex. E at 226:16-227:2 (because the data
12 “is too large to be analyzed via a program such as Microsoft Excel,” Mr. Kruskol “needed to
13 load [the] data into [his] data analytics tool and write ... a program in SQL”).

14 **C. Mr. Kruskol Does Not Require Expertise on Issues Irrelevant to His Opinions**

15 Defendants argue that Mr. Kruskol’s reports “should be excluded because he lacks
16 expertise to make statistical analyses” including “regression analyses, tests for p-values and
17 determining statistical significance, and trends analyses.” Mot. at 3. That is wrong as both a legal
18 and factual matter. As a legal matter, Mr. Kruskol only requires expertise on issues relevant to
19 his opinions. *See United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)
20 (expert’s knowledge only requires a “valid ... connection to the pertinent inquiry”). Mr. Kruskol
21 has not opined on regression analyses or tests for p-values and statistical significance, and
22 therefore requires no expertise on those issues. Defendants are wrong that Mr. Kruskol “seeks to
23 testify to his criticisms of regression analyses and tests of statistical significance and for p-values
24 conducted by Defendants’ statistical expert, Dr. Bernard Siskin.” Mot. at 4. Mr. Kruskol simply
25

26 ¹ Defendants are precluded from trying to challenge Mr. Kruskol’s analysis in their reply brief.
Eberle v. City of Anaheim, 901 F.2d 814, 818 (9th Cir. 1990).

1 explained that Dr. Siskin’s analyses failed to address anomalies in the data. Def. Ex. C at 9 n.36.
 2 This is just common sense; statistical analysis is only as good as the data on which it relies.

3 As a factual matter, Defendants are incorrect that Mr. Kruskol cannot “perform” “trends
 4 analyses,” and he *never* admitted “lack of competence to conduct trend analyses.”² Mot. at 3-4.
 5 To the contrary, Mr. Kruskol has expertise in trend analyses and has performed them many
 6 times. Kruskol Decl. at 2-3; Ex. B at 36 (CPAs conduct “[d]ata analysis involv[ing] the review of
 7 data sets to identify trends”); Ex. C at 15 (CPAs have knowledge in “trend analysis”). He plainly
 8 has expertise to include opinions with “fiscal year trend analyses” and cite “trends in
 9 naturalization rates.” Mot. at 4. Defendants have identified no flaw in Mr. Kruskol’s analyses,
 10 and the mere fact that he has not previously “presented testimony,” *id.* at 5, does not disqualify
 11 him from doing so here. *United States v. Smith*, 520 F.3d 1097, 1105 (9th Cir. 2008); *see Tuf*
 12 *Racing Products, Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (holding
 13 CPA qualified as expert because “calculation [was] well within the competence of a C.P.A.”).

14 Defendants also are incorrect that Mr. Kruskol requires expertise in “the substantive
 15 issues concerning the data’s subject matter,” including “USCIS’ processing of immigration
 16 benefit applications” or “programs involving vetting or national security concerns.” Mot. at 4.³ If
 17 that proposition were correct, then it would apply also to Defendants’ expert Dr. Siskin, who
 18 acknowledged that he has no expertise on those “substantive issues.” *See* Pls.’ Mot. to Exclude
 19 Siskin (Dkt. 460) at 3. But, unlike Dr. Siskin, Mr. Kruskol never opines on the “substantive
 20 issues.” *Id.* at 3-5 (collecting Dr. Siskin’s unqualified opinions on CARRP’s overall value and
 21 USCIS’s use of third-party information for CARRP referrals).

22
 23 ² Defendants mischaracterize Mr. Kruskol’s testimony. Mr. Kruskol stated that he does not “do
 24 tests to determine statistical significance of trend analyses.” Def. Ex. D at 35:5-8. That is not the
 same thing as performing trend analyses, which Mr. Kruskol clearly can do.

25 ³ Defendants again mischaracterize Mr. Kruskol’s testimony. He never “concedes that an expert
 26 analyzing statistical data needs to understand the substantive issues concerning the data’s subject
 matter,” Mot. at 4, but instead stated that “anyone analyzing data should have an understanding
 of how that data was created.” Def. Ex. D. at 35:18-20.

1 **D. Mr. Kruskol’s Analysis Demonstrating CARRP’s Disparate Impact on Applicants**
 2 **from Muslim-Majority Countries Is Highly Relevant to Plaintiffs’ Claims**

3 Defendants argue that the Court should exclude Mr. Kruskol’s analysis of CARRP’s
 4 disparate impact on applicants from Muslim-majority countries. The existence of this impact is
 5 undisputed; nevertheless, Defendants assert that it should be excluded because it is not “relevant
 6 to ... Plaintiffs’ claims that CARRP operates with an anti Muslim animus or effect.” Mot. at 6.
 7 That is wrong. Courts routinely consider such statistical evidence in cases involving
 8 discrimination claims, and a facially neutral policy’s disparate impact on a suspect class is
 9 probative of discriminatory intent. *Reno*, 520 U.S. at 489; *Democratic Nat’l Comm.*, 948 F.3d at
 10 1038. Indeed, a statistical disparity can be so great—like in this case—that it is sufficient by
 11 itself to establish discriminatory animus. *See The Comm. Concerning Cmty. Improvement v. City*
 12 *of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (evidence of “gross statistical disparities” can
 13 satisfy intent requirement). Mr. Kruskol’s analysis that naturalization applicants from Muslim-
 14 majority countries are subjected to CARRP at *12 times* the rate of applicants from non-Muslim
 15 majority countries, and adjustment applicants at *over 10 times* the rate is clearly relevant to
 16 Plaintiffs’ equal protection claim. Def. Ex. B at 4.⁴ Again, Defendants have identified no flaw in
 17 Mr. Kruskol’s disparate impact analysis; on the contrary, Dr. Siskin conceded his calculations
 18 are correct. *See Ex. D* at 38:9–40:9.

19 **E. Mr. Kruskol’s Opinions Identifying Data Anomalies Should Not Be Excluded**

20 As an expert in analyzing large-scale datasets, Mr. Kruskol performed “high-level data
 21 validation procedures” to ensure the accuracy of the USCIS data. Def. Ex. C at 9. Because of
 22 those validation procedures, Mr. Kruskol’s reports described certain data anomalies to help the
 23 Court better understand the data’s limitations. Defendants’ request that the Court exclude Mr.

24 _____
 25 ⁴ Defendants are incorrect that “Mr. Kruskol also suggests in his reports that CARRP has a
 26 discriminatory effect upon applicants who are Muslim or from majority-Muslim countries.” Mot.
 at 7. Mr. Kruskol *never* opines on whether CARRP was implemented with discriminatory intent.
See Ex. A at 1 (“I have not been asked to evaluate or opine on any issue of discrimination and
 offer no such opinion.”).

1 Kruskol’s opinions as to three such anomalies has no merit. While Defendants argue Mr. Kruskol
2 “provides only ‘subjective belief’ and ‘unsupported speculation’” regarding these anomalies,
3 Mot. at 12, each of Mr. Kruskol’s opinions is based on his rigorous review and analysis of
4 Defendants’ own data, documents, and witness testimony.

5 **1. USCIS Documents and Witnesses Confirm that the Data Overstates the**
6 **Number of CARRP Cases**

7 Defendants attempt to exclude Mr. Kruskol’s opinion that the USCIS Detailed Data
8 “appears to overstate the number of applications subject to CARRP.” Def. Ex. C at 3. Defendants
9 fail to recognize that, in reaching that opinion, Mr. Kruskol was relying on USCIS’s own FDNS-
10 DS User Guide and deposition testimony. For example, although the data flagged *every* case as
11 CARRP whenever a Case Management Entity (CME) was opened in the FDNS-DS database, the
12 User Guide states that an NS Concern CME “is created when an application ... *could* fall under
13 [CARRP].” *Id.* at 5. In Rule 30(b)(6) testimony, USCIS acknowledged that one could “infer” that
14 “an NS concern CME could be created even when the application does not definitely fall under
15 CARRP.” *Id.* Both the User Guide and Rule 30(b)(6) testimony also confirm that an NS Concern
16 CME can be created even when the applicant “has not been confirmed as an NS Concern.” *Id.* at
17 6. Defendants identify no flaw in Mr. Kruskol’s reliance on USCIS’s own statements.

18 Instead, Defendants criticize Mr. Kruskol for not knowing “how many cases were
19 misclassified” as CARRP and because he cannot “quantify the apparent overstatement.” Mot. at
20 7-8. However, as Mr. Kruskol explained in his reports, given the data anomalies and problems
21 with USCIS’s CARRP algorithm created only for the purpose of this litigation, the only way to
22 confirm the actual number of CARRP applications would be to “review underlying documents to
23 confirm whether a given application was processed under CARRP,” and “USCIS has not
24 provided all underlying copies of completed applications” or A-files. Def. Ex. C at 9; Def. Ex. B
25 at 8. In effect, Defendants fault Mr. Kruskol for declining to opine beyond what he deemed
26 reasonable given the data to which he had access.

1 Defendants are also wrong that, in his March 2021 declaration, Mr. Kruskol “essentially
2 abandoned the claim that any CARRP-flagged cases in the dataset were incorrectly flagged as
3 CARRP cases.” Mot. at 9. Instead, his analysis confirms that the USCIS Summary Data
4 incorrectly states “that 81.1% of applications adjudicated under CARRP were approved,” *id.* at
5 7, because when Non-NS and Not Confirmed cases are removed, the actual approval rates of
6 applications adjudicated under CARRP are only 44% for Confirmed Non-KSTs and 11% for
7 KSTs. *See supra* p. 5.

8 **2. The USCIS Detailed Data Has Potential Duplicate Records**

9 Mr. Kruskol identified 213,647 instances of potential duplicate records in the USCIS
10 Detailed Data. Def. Ex. C at 11. For example, he identified [REDACTED]
11 [REDACTED]
12 [REDACTED]. *Id.* Defendants
13 claim that Mr. Kruskol’s analysis is “speculative” because he cannot confirm whether the records
14 are in fact duplicates. Mot. at 10. However, as Mr. Kruskol explained in his report, the reason
15 why he cannot confirm the duplicates is because Defendants did not provide the “A-Number,
16 application number, or receipt number” for any of the data entries and instead “assigned each
17 unique application an anonymize[d] identifier.” Def. Ex. C at 11. Moreover, Defendants have not
18 come forward with any reliable evidence that Mr. Kruskol is wrong.

19 Without any factual support whatsoever, Defendants suggest that “a significant portion”
20 of the potential duplicates might be twins. Defendants rely solely on the CDC’s 3.3% rate for
21 twin births in the United States. Mot. at 11. But, at his deposition, Mr. Kruskol explained that it
22 does not make any sense to rely on the rate for twin births in the United States for immigration
23 benefit applicants who are not even born in the United States. Ex. E at 199:19-23. Nor can twins
24 account for any of the potential duplicate records where the record count is greater than two,
25 such as the 24 identical records mentioned above, *id.* at 213:17-23, or the 10 identical records of

1 [REDACTED]. Def. Ex. C at Ex. BH. Even if Defendants' arguments were not
2 fatally flawed, their critiques of Mr. Kruskol's analysis go only to its weight, not its
3 admissibility. *See City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

4 **3. USCIS Confirmed the Existence of Date Anomalies Mr. Kruskol Identified**

5 In its Rule 30(b)(6) deposition, USCIS confirmed that its data has date anomalies that
6 were likely created by data entry errors. Def. Ex. C at 11. In the USCIS Summary Data, USCIS
7 excluded applications from its analysis of processing times when its databases included entries
8 erroneously indicating that the application was adjudicated either before it was received or on the
9 same day that it was received. *Id.* at 11 n.49. Mr. Kruskol identified 4,723 such records. *Id.*
10 However, if the data erroneously indicated that the application was adjudicated even "two days
11 after the receipt date," the application "would be included" in USCIS's analysis. Ex. F at 208:12-
12 209:7. Mr. Kruskol identified 96,571 applications that were adjudicated in less than 61 days,
13 which is inconsistent with a reasonable expectation of time it usually takes to adjudicate
14 naturalization and adjustment of status applications. Def. Ex. C at 11-12.

15 Again, Defendants can identify no flaw in Mr. Kruskol's calculations but instead refer to
16 his opinion as "speculative," because he cannot confirm whether those applications were all data
17 entry errors or if some were actually adjudicated in less than 61 days. Mot. at 11. However,
18 Defendants fail to recognize that the only way Mr. Kruskol could confirm those errors is to
19 review the underlying A-files and applications, which Defendants have not produced. Def. Ex. C
20 at 9; Def. Ex. B at 8. Moreover, USCIS's 30(b)(6) witness confirmed that date anomalies exist,
21 but USCIS failed to take into account the full extent of such anomalies when creating the USCIS
22 Summary Data. Ex. F at 205:5-209:7. Therefore, Mr. Kruskol's analysis will clearly assist this
23 Court in understanding another limitation of the data: that the data understates the actual
24 processing times of naturalization and adjustment of status applications because it incorrectly
25 includes this anomalous data.
26

1 **F. Mr. Kruskol’s Testimony Should Not Be Excluded Under Rule 403.**

2 Defendants’ argument that Mr. Kruskol’s testimony should be excluded under Rule 403
3 is also baseless. Mot. at 12. As a preliminary matter, courts find “Rule 403 argument[s]
4 inapplicable” where, as here, the “action will be tried in a bench trial.” *United States v. De Anda*,
5 2019 WL 2863602, at *4 (N.D. Cal. July 2, 2019); see *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d
6 891, 898 (9th Cir. 1994); *Cnty. Ass’n for Restoration of the Env’t, Inc. v. Cow Palace, LLC*, 80
7 F. Supp. 3d 1180, 1216 (E.D. Wash. 2015) (“Rule 403 has a limited role, if any, in a bench
8 trial.”). Moreover, as explained above, Mr. Kruskol has presented numerous opinions that will
9 help the Court and that Defendants have provided no valid basis to exclude. Mr. Kruskol’s
10 opinions regarding the significant delays and denials of applications subjected to CARRP and the
11 grossly disparate impact that CARRP has on applicants from Muslim-majority countries have
12 high probative value and will clearly assist this Court in adjudicating Plaintiffs’ claims.
13 Defendants have failed to explain how any of those opinions “would waste time” or “cause
14 confusion.” Mot. at 12. Moreover, Mr. Kruskol’s opinions regarding the three anomalies that
15 Defendants challenge in this motion are also highly probative of the data’s limitations, including
16 how the USCIS Summary Data overstates the actual approval rate of CARRP cases and
17 understates the actual processing times of naturalization and adjustment of status applications.
18 To the extent that Defendants have identified any concerns regarding Mr. Kruskol’s opinions,
19 they go only to the weight the Court may assign his opinions and not their inadmissibility. *City of*
20 *Pomona*, 750 F.3d at 1044; *Microsoft Corp. v. Motorola, Inc.*, 904 F. Supp. 2d 1109, 1117 (W.D.
21 Wash. 2012). Defendants’ motion should be denied.

22 **CONCLUSION**

23 Plaintiffs respectfully request that the Court deny Defendants’ motion to exclude
24 testimony of Sean M. Kruskol.
25
26

DATED: April 5, 2021

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