

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

**REPLY IN SUPPORT OF PLAINTIFFS'
MOTION TO EXCLUDE OPINIONS OF
BERNARD SISKIN**

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I. INTRODUCTION

Plaintiffs have moved to exclude certain opinions of Dr. Bernard Siskin. *See* Plaintiffs’ Motion to Exclude Opinions of Dr. Bernard Siskin 1, ECF No. 463 (“Motion”). As Defendants acknowledge, Plaintiffs do not seek to exclude most of the opinions offered in the hundreds of pages of reports that Dr. Siskin has produced in this matter. *See* Defendants’ Opposition to Plaintiffs Motion to Exclude Opinions of Dr. Bernard Siskin 1, ECF No. 485 (“Opposition”). Rather, Plaintiffs identify three discrete sets of opinions that go beyond what the rules of evidence permit. Mot. 1. Defendants bear the burden of establishing that these opinions are admissible. *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). They fail to do so.

II. ARGUMENT

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A. **Plaintiffs’ Motion correctly states the legal standards governing the admissibility of expert testimony.**

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Defendants assert that Plaintiffs’ Motion misstates the legal standards governing the admission of expert testimony. Opp. 1. They are mistaken. Plaintiffs’ motion properly sets forth the standards in question, which are derived from Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Mot. 1–2. Defendants fault Plaintiffs for supposedly “ignor[ing] the Ninth Circuit’s admonition that when a district court sits as the finder of fact, ‘there is less need for the gatekeeper to keep the gate’” Opp. 1 (quoting *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018)). This argument falls flat. First, Defendants have filed two *Daubert* motions of their own in this matter, neither of which cites *Flores*. ECF No. 475; ECF No. 477. Second, Plaintiffs’ narrow motion—which, unlike Defendants’ sweeping motions, challenges the admissibility of a subset of opinions that violate the baseline requirements of Rule 702—properly accounts for the Court’s more limited gatekeeping role in the bench-trial context.

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B. **Defendants fail to establish that Dr. Siskin’s opinions on CARRP’s value and legitimacy are admissible.**

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Dr. Siskin opines on (a) CARRP’s benefits to national security, (b) the costs CARRP imposes on applicants, and (c) whether CARRP’s benefits outweigh its costs. *See* Mot. 3 (citing

1 Ex. A at 12; Ex. B at 15).¹ Defendants fail to establish that these opinions are admissible. Dr.
2 Siskin is unqualified to opine on CARRP’s costs and benefits because, as he concedes, he is not
3 an expert on CARRP, national security, terrorism, intelligence, or immigration. *See* Mot. 3 (citing
4 Ex. C at 20:8-21:11, 164:19-165:8); *Daubert*, 509 U.S. at 592 (expert’s opinion must “have a
5 reliable basis in the knowledge and experience of his discipline”); *Gable v. Nat’l Broad. Co.*, 727
6 F. Supp. 2d 815, 833 (C.D. Cal. 2010) (“[T]he court must examine whether the witness’s
7 qualifying training, experience, or specialized knowledge is sufficiently related to the subject
8 matter upon which the witness offers an opinion.”), *aff’d sub nom. Gable v. Nat’l Broad. Co.*, 438
9 F. App’x 587 (9th Cir. 2011).

10 Defendants fault Plaintiffs for purportedly “neglect[ing] to recognize” that Dr. Siskin’s
11 analysis of CARRP’s costs and benefits responds to an opinion offered by one of Plaintiffs’
12 experts, Dr. Marc Sageman. Opp. 4. That is inaccurate: Dr. Siskin opined on CARRP’s value as a
13 policy in his *first* report. *See* Ex. A at 1, 12. It is also irrelevant. Defendants do not cite, and
14 Plaintiffs are unaware of, any authority holding that an expert’s otherwise unqualified opinion is
15 admissible when offered in response to another expert.

16 Defendants suggest that Dr. Siskin’s cost-benefit opinions are admissible because experts
17 may opine on hypotheticals. *See* Opp. 4 (citing Advisory Committee Notes to Fed. R. Evid. 705);
18 *see also id.* at 2–3 (asserting that Dr. Siskin’s cost-benefit opinions are based on either his own
19 assumptions or those supplied to him). That misses the point. Framed as a hypothetical, Dr.
20 Siskin’s opinion is nothing but a truism, *viz.*: if one assumes that *not* implementing a hypothetical
21 program will result in a high net cost, then one may also assume that implementing the program is
22 sound policy. *See* Mot. 4; *see also* Ex. C at 145:7–13 (“I think given the fact that the program
23 exists and was set up that someone obviously believes there’s a high cost to it, and if there wasn’t,
24 they never would have set up this program.”). This truistic conjecture is not rooted in Dr. Siskin’s

¹ All citations to exhibits herein refer to Exhibits A through F to the Declaration of Hugh Handeyside in Support of Plaintiffs’ Motion to Exclude Opinions of Bernard Siskin, ECF No. 461. These exhibits are currently filed under seal at ECF No. 462.

1 statistical expertise; it is nothing more than a reformulation of a policy question that Dr. Siskin
2 concedes he is not qualified to answer. *See* Mot. 4 (citing Ex. C at 397:13-398:8). It will not help
3 the Court to “determine a fact in issue.” Fed. R. Evid. 702(a).

4 **C. Defendants fail to establish that Dr. Siskin’s opinions on the significance of third-**
5 **agency information are admissible.**

6 Dr. Siskin’s reports include a statistical analysis of the extent to which USCIS uses third-
7 agency information in deciding whether to refer an application to CARRP. *See* Opp. 6–7. Plaintiffs
8 do not challenge the admissibility of the data in Dr. Siskin’s reports regarding third-agency
9 information. Plaintiffs do, however, challenge the admissibility of Dr. Siskin’s opinions on the
10 significance of that data. *See* Mot. 4–6; *see also* Opp. 6. Those opinions venture well beyond Dr.
11 Siskin’s statistical expertise: at root, they are opinions about *how* and *why* USCIS uses third-
12 agency information to refer applicants to CARRP. Dr. Siskin is not qualified to opine on those
13 topics because, as Plaintiffs have explained, he knows virtually nothing about the CARRP process
14 or the nature or use of the third-agency information at issue.² *See* Mot. 5. Defendants offer no basis
15 on which to conclude that these opinions are admissible.

16 **D. Defendants fail to establish that Dr. Siskin’s regression analysis is admissible.**

17 Dr. Siskin’s regression analysis is inadmissible because it rests on deeply flawed inputs,
18 rendering unreliable both the analysis and the opinions drawn therefrom. *See* Mot. 6–12.
19 Defendants’ arguments to the contrary are meritless.

20 As an initial matter, Defendants contend that Plaintiffs have “fail[ed] to tell the Court that
21 [the] regression analysis in Dr. Siskin’s July 2020 report was expressly responsive to opinions in
22 reports of several of Plaintiffs’ experts” Opp. 8. This charge is puzzling. Plaintiffs have not
23 suggested that Dr. Siskin’s regression analysis was anything but responsive; on the contrary, the
24 fact that it was responsive is the problem. The parties agreed that their statistical experts would
25 issue supplemental reports in July 2020 to incorporate revised data provided by USCIS—not to
26 respond to other experts’ opinions. *See* ECF No. 359 at 4–5 (describing data error and providing

² Plaintiffs’ statistical expert, Sean Kruskol, is an illuminating contrast. In his reports and testimony, Mr. Kruskol scrupulously avoids offering any opinions outside his specialized expertise.

1 that supplemental reports of statistical experts were to be filed in July, while *responsive* reports of
2 statistical experts were to be filed in August). Yet in his July report, Dr. Siskin went far beyond
3 incorporating the revised USCIS data. He used Defendants’ data error to add wholly new analyses
4 and opinions that he *could* have included in his original report, but did not. *See* Mot. 2.

5 Defendants assert that “Plaintiffs’ challenge to Dr. Siskin’s regression analysis boils down
6 to a classic debate between experts,” Opp. 12, but that description is misleading. Any “debate”
7 relates not to the outcome of the regression analysis but to the data and assumptions underlying it.
8 And in that arena, the two experts—Dr. Siskin and Dr. Sageman—are not equally qualified. As
9 Plaintiffs have explained, Dr. Sageman is a scholar and political sociologist with decades of
10 experience in counterterrorism and terrorism research, including extensive experience examining
11 and parsing the data in the Global Terrorism Database (“GTD”). Mot. 7 (citing Ex. D ¶¶ 15–30;
12 Ex. F ¶¶ 1–9). Dr. Siskin has no expertise in terrorism, Ex. C at 20:12–14, and no prior experience
13 with the GTD, *id.* at 291:15-19. Thus, Dr. Sageman is uniquely qualified to opine on whether the
14 data and assumptions Dr. Siskin fed into his regression analysis are “of a type reasonably relied
15 upon by experts in the particular field.” Fed. R. Evid. 703. Dr. Siskin is not.

16 Dr. Sageman describes at length why the data and assumptions that Dr. Siskin incorporated
17 into his regression analysis are not reliable. *See* Mot. 7–12. In particular, Dr. Sageman explains
18 that the GTD “is not a reliable source of information,” Mot. 7 (quoting Ex. D ¶ 12), for quantifying
19 “the extent of terrorist events in a country,” *id.* (quoting Ex. B at 114). This flaw in the GTD fatally
20 undermines Dr. Siskin’s regression analysis, which relies on the GTD to assess the correlation
21 between referral to CARRP and the purported extent of terrorist events in a country. *See* Mot. 6–
22 7; *see also* Opp. 10. Since the GTD is a fundamentally unreliable measure of terrorist events in a
23 country, the results of Dr. Siskin’s regression analysis and the opinions derived therefrom are also
24 unreliable. *See* Mot. 7–9.

25 Defendants respond to Dr. Sageman’s explanation of the GTD’s flaws by conflating him
26 with a lay witness. They repeatedly attempt to dismiss as “unsupported” or “unsubstantiated” Dr.
27 Sageman’s opinions regarding the GTD and the professional standards adopted by researchers of

1 terrorism. *See* Opp. 8–11. Defendants are wrong. Dr. Sageman’s opinions are substantiated by his
2 specialized expertise in counterterrorism and terrorism research, including the years of field
3 research during which he has attempted to validate the GTD’s records.³ *See supra* 4. Far from
4 being “unsupported,” such opinions are the essence of expert testimony. *See, e.g., Kumho Tire Co.*
5 *v. Carmichael*, 526 U.S. 137, 148 (1999) (“Experts of all kinds tie observations to conclusions
6 through the use of what Judge Learned Hand called ‘general truths derived from . . . specialized
7 experience.’” (alteration in source; citation omitted)).

8 Defendants note that other federal agencies, and Dr. Sageman himself, have used the data
9 in the GTD in some contexts. Opp. 9. That is insignificant. Dr. Sageman does not opine that the
10 data in the GTD is unusable in every circumstance. Rather, he opines that the GTD is
11 fundamentally unreliable when used *in the way Dr. Siskin used it*: to quantify terrorist events by
12 country. *See* Mot. 7; *see also* Ex. D ¶ 19 n.2.

13 In addition to the GTD, Dr. Siskin used a country’s designation as a “state sponsor of
14 terrorism” as a variable in his original regression analysis. *See* Mot. 9. That was illogical for
15 multiple reasons. *Id.* As Dr. Sageman explains, sponsorship of terrorism by a state says “nothing
16 of predictive or probabilistic value” about whether nationals of that state are potentially involved
17 in terrorism. *Id.* (quoting Ex. D ¶ 36). Moreover, the State Department’s list of state sponsors of
18 terror is fundamentally political. *Id.* As such, it is not an accurate gauge of the quantity or frequency
19 of terrorist events in a country; nor can it factor into the adjudication of applications for
20 immigration benefits.

21 Defendants note that Dr. Siskin re-ran his regression analysis after removing any reliance
22 on whether a country has been designated a state sponsor of terrorism. Opp. 11. But Dr. Siskin has
23 not withdrawn his original regression analysis, and Defendants continue to defend its admissibility.
24 *See id.* In any case, removing reliance on one illogical variable does not change the bedrock

³ Notably, despite filing motions to exclude the testimony of several of Plaintiffs’ other expert witnesses, Defendants have never attempted to cast doubt on Dr. Sageman’s qualifications as an expert—nor could they plausibly do so.

1 problem with the analysis: in every iteration, it relies inappropriately on the GTD.

2 Defendants attempt to brush aside two other serious flaws underlying Dr. Siskin's
3 regression analysis. First, the assumption animating the analysis—that applicants from countries
4 with higher rates of terrorist incidents are more likely to have “some association with terrorist
5 actors,” Mot. 11 (quoting Ex. B at 24)—is nothing but Dr. Siskin's speculation. *See id.* Dr.
6 Sageman, an expert in the relevant field, has explained that this assumption is invalid. *See* Ex. D
7 ¶ 30. Defendants retort that Dr. Siskin's assumption is “obvious,” Opp. 12, but Defendants' bare
8 assertion hardly establishes that Dr. Siskin has employed “the same level of intellectual rigor that
9 characterizes the practice of an expert in the relevant field,” *Kumho Tire*, 526 U.S. at 152.

10 Second, Dr. Siskin acknowledged that his analysis would have been “more informative” if
11 he had been able to consider the data that does, in fact, drive referrals to CARRP—such as
12 “indicators.” *See* Mot. 11. But he was not able to consider that data because, he was told, it was
13 “not readily available.” *Id.* Defendants' silence on this point underscores that Dr. Siskin's theories
14 underlying his regression analysis are unconnected to reality.

15 **E. The flaws in the challenged opinions render them inadmissible.**

16 Defendants repeatedly assert, without citation, that any flaws in Dr. Siskin's opinions go
17 to their weight, not to their admissibility. *See* Opp. 3, 5, 8, 9, 12. Not so. Expert opinions that do
18 not meet the requirements of Rule 702 are inadmissible. This is no less true of opinions offered by
19 statistical experts. *See, e.g., In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1273 (S.D. Cal.
20 2010) (“[W]here significant variables that are quantifiable are omitted from a regression analysis,
21 the study may become so incomplete that it is inadmissible as irrelevant and unreliable.”). Because
22 Defendants have not established that the opinions challenged here satisfy Rule 702's requirements,
23 *Lust*, 89 F.3d at 598, the opinions should be excluded.

24 **III. CONCLUSION**

25 Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Exclude, ECF No.
26 463, in full.

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