The Honorable Richard A. Jones

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' OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE OPINIONS OF DR. BERNARD SISKIN

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

INTRODUCTION

Defendants oppose Plaintiffs' motion to exclude certain opinions from Bernard Siskin, Ph.D., an expert in statistical analysis. Plaintiffs do not challenge Dr. Siskin's expertise as a statistician or in statistical analysis, or the admissibility of the vast majority of his opinions (presented in his expert reports and deposition testimony). Plaintiffs target only two discrete points not central to Dr. Siskin's reports, and his regression analysis establishing that most (two-thirds) of the statistical correlation of CARRP referrals with the Muslim population percentage of an applicant's country of birth disappears when considering and controlling for the reported level of terrorism in the applicant's native country, and that CARRP referrals are not significantly correlated with a country's Muslim population percentage. Plaintiffs have failed to demonstrate that any of his opinions must be excluded as unreliable under either Fed. R. Evid. 702 or *Daubert* principles.

ARGUMENT

I. Plaintiffs misstate the standard for admission of expert testimony.

Plaintiffs' *Daubert* challenge to Dr. Siskin's testimony ignores 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 when … keeping the gate for himself." *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (*internal quotes omitted*). The gatekeeper doctrine "designed to protect juries is largely irrelevant in the context of a bench trial" since "there is less danger that a trial court will be unduly impressed by the expert's testimony or opinion" than a jury. *Flores*, 901 F.3d at 1165 (*internal quotes omitted*). Here, there is no danger that the Court, as factfinder, would be unduly influenced at trial were it to consider expert opinions it might have pre-screened more rigorously under *Daubert* for a jury trial. Since Plaintiffs have not established that any of Dr. Siskin's opinions are inherently unreliable, whether based on methodology or otherwise, there is no basis for their exclusion, even if there were to be a jury trial – as Defendants address below.

Even for jury trials, where there is a more compelling need for the Court to exercise its gatekeeping function, the Ninth Circuit cautions that judges "should not exclude expert testimony simply because they disagree with the conclusions of the expert." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998). "Disputes as to the strength of an expert's credentials, faults in

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

his use of a particular methodology or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *Id*. (*brackets omitted*). A trial court addressing a *Daubert* motion must not be concerned with the "correctness of the expert's conclusions," as with Plaintiffs' challenge here, "but [rather] the soundness of his methodology," which they do not contest. *Estate of Barabin v. AstenJohnson, Inc*., 740 F.3d 457, 463 (9th Cir. 2014).

Under Rule 702, this Court may exercise discretion to allow expert testimony where it will assist the trier of fact to understand the evidence or determine a fact at issue, it is based upon sufficient facts or data, and it is the product of reliable principles and methods that the expert has applied reliably to the facts of the case. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013); *Avila v. Willits Envtl. Remediation Tr.*, 633 F.3d 828, 836 (9th Cir. 2011); *In re Phenylpropanolamine Prods. Liab. Litig.*, 289 F. Supp. 2d 1230, 1236-37 (W.D. Wash. 2003). Since Plaintiffs cannot show that Dr. Siskin's opinions are the product of insufficient facts or data, or principles and methods that are unreliable or were applied unreliably, their *Daubert* challenge fails.

II. Dr. Siskin's analyses weighing costs to applicants from CARRP referral against costs of failing to address national security concerns should not be excluded.

Plaintiffs reveal the weakness of their primary *Daubert* argument by purporting to find advantage in Dr. Siskin's "disavow[al]" of any knowledge of a key assumption underlying his analysis; namely, that the cost of delays in CARRP vetting is outweighed by the very serious cost of failing to detect a threat to national security. Dkt. 460 at 3. As if hoisting the expert by his own petard, Plaintiffs declare that Dr. Siskin disqualifies himself by admitting he cannot "opine on CARRP's overall value or legitimacy." *Id*. at 1. The tactic backfires. It is plain that Dr. Siskin's concession enhances rather than detracts from his assistance to the trier of fact because, as expected of an expert, he stays in his lane by explaining what is out of his lane. In carefully distinguishing between the mode of analysis (statistics) and the subject being analyzed (national security vetting), Dr. Siskin freely admits that the key balancing assumption is supplied by others. *See* Siskin July 17, 2020 report (Ex. B at 12, referenced in attorney Handeyside's March 25, 2021, Declaration (Dkt #461), and submitted with Plaintiffs' motion to seal motion to exclude Dr. Siskin's opinions (Dkt #459)); *see e.g.,* Daniel Renaud deposition (Ex. 1 referenced in Taranto Declaration and submitted

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

with contemporaneously filed Motion to Seal) at 46:18 – 47:1, 47:16 – 48:12, 93:20 – 96:2, 81:8-17, 109:1-16, 227:13 – 228:16, 313:4 – 314:20; Matthew Emrich dep. (Ex. 2 to Taranto Dec.) at 44:14 – 49:1, 51:1-9; Kevin Quinn 30(b)(6) USCIS dep. (redacted Ex. 3 to Taranto Dec., unredacted exhibit to Motion to Seal) at 31:2 – 32:8. Dr. Siskin's concession only undermines Plaintiffs' chief argument, not his qualifications to assist the Court. Plaintiffs ultimately concede that Dr. Siskin is not opining as to CARRP's value or legitimacy but simply "assum[ing]" that the program would not have been developed if there was no benefit of referring applicants who pose potential national security concerns for vetting under CARRP. Dkt #460 at 3, citing Siskin dep. (Plaintiffs' Ex. C) at 144:21-24.

Since Dr. Siskin is not opining as to CARRP's value or legitimacy, but offering a statistical analysis related to the cost of failing to refer applicants who are national security concerns, versus the cost of delay to applicants, Plaintiffs' argument that Dr. Siskin is not qualified to present opinions as to CARRP's value or legitimacy simply misses the mark. His opinions are rooted in statistical analyses, for which he is clearly qualified as Plaintiffs do not contest. Plaintiffs argue that Dr. Siskin's opinion must be excluded also because he has not considered what Plaintiffs conjure up as non-delay costs, specifically a wrongful denial allegedly resulting from a referral to CARRP. But Plaintiffs present no evidence that such costs exist or, if they do, whether they are significant. Nor do Plaintiffs show that considering them would materially affect Dr. Siskin's analysis. For example, Plaintiffs identify no instances, among the over 28,000 CARRP cases in the dataset for I-485 and N-400 applications filed during FY 2013 through FY 2019, of applications wrongfully denied because of referral to CARRP. More critically, they present no evidence that referring an application to CARRP increases the prospects for a wrongful denial. Even if Plaintiffs could substantiate their arguments, they go only to the weight of Dr. Siskin's opinions – not their admissibility.

Plaintiffs argue for excluding Dr. Siskin's opinion as to the statistical validity of CARRP also because it derives in part from the reasonable assumption that the probability of being a national security threat is higher among applicants referred to CARRP than among applicants not referred. Dkt #460 at 4, citing Plaintiffs' Ex. E (Siskin report dated October 13, 2020), at 45. USCIS officials associated with the CARRP program, identified in Defendants' disclosures, can address the factual

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

underpinnings for Dr. Siskin's assumption. Alternatively, Fed. R. Evid. 705, as the Advisory Committee Notes explain, allows experts to testify based on hypotheticals. In any event, because Plaintiffs fail to show as an undisputed fact that Dr. Siskin's assumption is invalid, they cannot establish that his opinion must be excluded as methodologically flawed. Finally, Plaintiffs' attack on Dr. Siskin's assumption does not challenge his methodology, but the correctness of his opinion. This is not sustainable as a *Daubert* challenge since it goes only to the weight of his testimony.

While criticizing Dr. Siskin's analysis comparing delay costs to CARRP-referred applicants to costs of failing to refer applicants who are national security concerns, Plaintiffs neglect to recognize that Dr. Siskin was addressing Plaintiffs' assertion that a high false positive rate (*i.e.,* referring to CARRP an applicant who is not a national security concern or "threat," to use their expert Dr. Sageman's verbiage), renders CARRP invalid. Dr. Siskin was illustrating what one must consider before concluding that a high false positive rate renders a process is invalid. Ex. B at 15 ("The question in the hypothetical above is whether our applicant should have been referred to CARRP because the decision resulted in a false positive.") Dr. Siskin then provided a statistician's understanding concerning decision theory, *i.e.*, what can be and cannot be concluded simply from a high false positive rate. He explains that "a high false positive rate would be an indication that identifying which applications are actually national security concerns cannot be achieved with great accuracy under routine vetting." Ex. B at 15. His responsive report clarifies that he is not opining to the actual cost and benefit of the CARRP screening process, but only that the process having a high false positive rate does not mean it is an inappropriate screening device, and whether statistically it is an appropriate screening device. Ex. E at 38-45.

Plaintiffs close with the argument that "Dr. Siskin's opinions on CARRP's costs and overall value" are not useful to the Court because they "reduce to a truism" that "if the upsides of a program outweigh its downsides, it is worthwhile." Plaintiffs fail to understand that Dr. Siskin was pointing out that the statistical finding of what Plaintiffs portray as a high false positive rate (referring to CARRP persons who turn out not to be a national security concern) and a very low incidence of persons who are national security threats does not mean that the CARRP program is inappropriate. The Court is not obliged to accept Plaintiffs' view that a high false positive rate for CARRP referrals

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

coupled with a low incidence for applicants ultimately confirmed as national security threats somehow renders the CARRP program inappropriate. See Ex. E at 38-45. Also, a high false positive rate when protecting against terrorism must be balanced against the risk to the entire country posed by terrorism. *See Elhady v. Kable*, __ F.3d __, 2021 WL 1181270 at *14 (4th Cir., March 30, 2021) ("Congress made a policy choice, balancing the burdens imposed on the victims of false positives with the costs imposed on the entire country when a terrorist attack occurs.") More critically, their argument provides no basis for excluding Dr. Siskin's opinion. Further, the mere fact that CARRP vetting could resolve a national security concern shows no failure in having referred an application to CARRP.

III. Dr. Siskin's opinions as to Third Agency Information should not be excluded.

Plaintiffs offer no evidence to support their argument that Dr. Siskin's opinions concerning Third Agency Information must be excluded as unreliable. As Plaintiffs note, Dr. Siskin points to data establishing that Third Agency Information is the principal driver for CARRP referrals, with over 95% of referrals to CARRP based at least in part on Third Agency Information. Dkt #460 at 4-5, citing Ex. B (Siskin report dated July 17, 2020) at 3, 93-94. As Dr. Siskin explains, the statistical data directly contradicts Plaintiffs' averment that referrals to CARRP are driven by an anti-Muslim bias of USCIS and its personnel. *Id*. Plaintiffs claim that Dr. Siskin's data-based opinion and related statistical analysis must be excluded as "unhelpful." What Plaintiffs really mean is that this data is unhelpful to their claims and should be excluded since they cannot controvert it. The fact that Third Party Information (overwhelmingly from the law enforcement and intelligence communities) drives referrals to CARRP, as Dr. Siskin underscores, provides powerful evidence against Plaintiffs' claim that an anti-Muslim bias by USCIS and its personnel is what prompts referrals to CARRP. *See also* Kevin Quinn personal dep. (Ex. 4 referenced in Taranto Dec., submitted with Motion to Seal) at 178:5-15 (90% of non-KST national security concerns come to USCIS from law enforcement or intelligence agency information). Plaintiffs' argument that such evidence is not factually based and must be excluded because it cannot assist the Court is therefore specious.

Bereft of supporting evidence, Plaintiffs argue that USCIS is obliged to assess and evaluate information relating to I-485 and N-400 applications, and thus not absolved of responsibility for

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

anti-Muslim bias rooted in use of Third Agency Information. Dkt #460 at 5-6. But Plaintiffs offer no evidence of anti-Muslim bias in the Third Agency Information. Moreover, USCIS' authority concerning the naturalization process and vetting does not negate the fact that USCIS' referral of most applicants to CARRP is prompted by national security-related information received from Third Agencies, including from security checks conducted on all applicants. *See* Renaud dep. (Ex. 1) at 211:11 – 212:13 and 222:12-17 (same security checks are run on all N-400 and I-485 applicants), and at 83:9-22 and 85:7-13 (information USCIS receives from background checks indicates whether an applicant is on the terrorist watchlist); Quinn 30(b)(6) dep. (Ex. 4) at 60:15 – 66:8. Contrary to Plaintiffs' suggestions, USCIS does not place applications into CARRP based upon the applicants' country of birth or citizenship, but based upon "national security information" specific to applicants. Renaud dep. (Ex. 1) at 204:1 – 206:1, 207:20 – 208:20.

Plaintiffs also argue for excluding Dr. Siskin's opinion based on their erroneous presumption that USCIS' obtaining and use of Third Agency Information is entirely discretionary. Dkt #460 at 5-6. To the contrary, USCIS conducts the same series of security checks with Third Agencies on all applicants for adjustment of benefits or for naturalization. Renaud dep. (Ex. 1) at 211:11 – 212:13 and 222:12-17. USCIS has no control over whether inquiries to Third Agencies result in positive hits, which might raise national security concerns warranting referral of applications to CARRP. And for applicants determined to be KSTs (known and suspected terrorists) based on Third Agency Information (Emrich dep., Ex. 2, at 239:5-9, 245:7-11), USCIS personnel have no discretion whether to refer their applications to CARRP; USCIS policy and practice is to refer all I-485 and N-400 applications from KSTs to CARRP. Renaud dep. (Ex. 1) at 158:15-21 (USCIS does not decide whether someone is on the terrorist watchlist), 160:2-19 (security checks returned to USCIS indicate if someone is referred to CARRP because they are on the watchlist); Quinn 30(b)(6) dep. (Ex. 3) at 35:17 – 36:20, 148:2-18, 149:9-11, 150:1-4, 151:3-7, 152:15 – 153:13, 160:16 – 161:3; Quinn personal dep. (Ex. 4) at 43:24 – 45:2, 46:11-15, 51:2-12. Notably, Plaintiffs present no evidence that USCIS' practice of referring all KSTs to CARRP constitutes an anti-Muslim practice.

As his July 17, 2020 report details, Dr. Siskin designed a valid statistical study to estimate sources and first source of data used in referring applicants to CARRP, and the extent to which that

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

source is Third Agency information or USCIS information. Plaintiffs do not dispute the validity of his statistical methodology, but only his conclusion and data analyses, which refute their claims. Plaintiffs seek to prevent the Court from considering Dr. Siskin's well-founded conclusion that the data contradicts their allegation that the disparity in the referral rate of applicants from majority-Muslim countries is due to "USCIS developing information for referring them to CARRP or because of anti-Muslim bias on the part of USCIS." Ex. B at 3. The unassailable fact that Third Agencies were in all but a small fraction of cases the data source for CARRP referrals contradicts Plaintiffs' claim that extreme vetting by USCIS targeting Muslims drives referrals to CARRP.

Plaintiffs seem to argue that USCIS' development of information concerning applicants necessarily includes its use of information from Third Agencies. They imply, with no evidence, that USCIS engages in anti-Muslim practices in referring cases to CARRP based on Third Agency Information, and thus that opinions from Dr. Siskin that do not comport with their theory must be excluded as inherently unreliable. But nothing Plaintiffs offer refutes Dr. Siskin's study showing that USCIS was rarely the source of information prompting the referral of cases to CARRP. Plaintiffs' challenges to Dr. Siskin's data analysis of Third Agency Information as the source for CARRP referrals and Plaintiffs' averment of USCIS bias plainly involve no challenge to his methodology, and thus go only to the weight of his opinion.

IV. Dr. Siskin's Regression Analysis and related opinions should not be excluded

Plaintiffs' argue for excluding Dr. Siskin's regression analysis and related opinions because they challenge the reliability of his conclusions and the open source, university-based Global Terrorism Database (GTD) he uses. The Department of Defense, its military departments, and other federal agencies have commonly used GTD as a source for data on the global incidence of terrorism. Ex. B (Siskin July 17, 2020 report) at 115-16. Since Plaintiffs' challenge is to Dr. Siskin's conclusions, not his methodology, it fails under *Daubert*.

Though not part of their argument to exclude Dr. Siskin's regression analysis (which correlates higher rates of referrals to CARRP of applications from persons born in Muslim-majority countries with the higher rates of terrorist incidents GTD reports for those countries), Plaintiffs suggest that Dr. Siskin should have included this analysis in his February 2020 report. Dkt #460 at

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

2. Plaintiffs fail to tell the Court that this regression analysis in Dr. Siskin's July 2020 report was expressly responsive to opinions in reports of several of Plaintiffs' experts on USCIS' referral of applicants to CARRP having an anti-Muslim animus and effect, served upon Defendants only after Dr. Siskin submitted his February 2020 report. See Ex. B (Siskin July 17, 2020 report) at 2 ("[N]o valid statistical evidence" supports the "allegation of anti-Muslim bias, as developed in reports by Plaintiffs' designated 'expert[s],'" which "is founded on the premise that applications from applicants born in countries with a majority Muslim population have been more likely to be referred to CARRP than applications from applicants born in countries with a non-majority Muslim population."); 3 ([T]he "statistical evidence" is "that there is no causal relationship between a country being majority Muslim and the number of CARRP referrals of … applicants born in that country"; "the level of terrorist activity in a country, and other factors, such as the volume of applications from a country and whether that country is a state sponsor of terrorism, explain a significant amount (2/3) of the variance among countries in CARRP referrals. After controlling for these factors, the percentage of a country's population that is Muslim has only a small and statistically non-significant correlation with the number of CARRP referrals from a country."), 7 (After Dr. Siskin finalized his initial report, several of Plaintiffs' designated experts – Ragland, Johansen-Mendez, Arastu, Kruskol, and Bajoghli – submitted reports opining that "USCIS operates CARRP with an anti-Muslim animus and effect, simply based on the observed correlation between the number of referral[s] to CARRP from a country and whether the country has a majority Muslim population."). Notably, the GTD, which Plaintiffs argue is inherently unreliable and requires exclusion of Dr. Siskin's opinions, was first discussed in the report of Plaintiffs' designated expert Marc Sageman, to support his opinion. Ex. B (Siskin July 17, 2020 report) at 114 n.63, citing Sageman February 28, 2020 report referencing GTD data on the reported incidence of terrorism).

The essence of Plaintiffs' argument to exclude Dr. Siskin's regression analysis and related opinions is that their own expert Dr. Sageman believes the GTD is not reliable. The Court is not bound by Dr. Sageman's unsupported view that he and "scholars" he fails to identify deem the GTD unreliable. Moreover, Dr. Siskin's report details the extensive bases for the reliability of the GTD and its use for his regression analysis, which Plaintiffs do not begin to address. Ex. B (Siskin July

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

17, 2020 report) at 114-120. Dr. Sageman criticizes anyone who would rely upon GTD data (Dkt #460 at 7, citing Ex. D, Sageman August 7, 2020 report), ignoring that the Department of Defense and its components, the Department of State, the Department of Homeland Security, the nation's national laboratories, and others, including NATO, have accessed and downloaded GTD data hundreds of times, as have other researchers studying terrorism. Ex. B at 115-116.

Plaintiffs posit that GTD data "appear completely arbitrary" (Dkt. #460 at 7, citing Ex. D), but offer only their expert's unsupported opinion for this claim. Plaintiffs, through Dr. Sageman, argue that one should instead turn to unidentified "information from field research," whatever that means, or "reliable datasets" they decline to identify but to say are constructed by unidentified "scholars." (Dkt #460 at 7 citing Ex. D) Even if Plaintiffs' criticisms were valid, they would go only to the weight of Dr. Siskin's opinions based on the GTD, not their admissibility. Moreover, the fact that the GTD might be less than perfect, like databases generally, does not render an expert opinion using its data inherently unreliable and thus inadmissible.

Plaintiffs tout Dr. Sageman's opinion that the GTD overstates the number of terrorist incidents, conflating acts of insurgency or civil war. Dkt #460 at 7 citing Ex. D. This is merely Dr. Sageman's unsubstantiated personal view. He does not say to what extent GTD overstates the number of incidents, either globally or for any country. More critically, he does not claim that correcting the numbers would materially affect Dr. Siskin's regression analysis or opinions. Nor do Plaintiffs or Sageman substantiate their inference that there would be no national security concerns about immigration benefit applicants associated with acts of insurgency or civil war. Whether the GTD might have included acts of insurgency or civil war raises no reliability issue as to Dr. Siskin's regression analysis using GTD data. Even if it did, this could affect only its weight, not admissibility.

Likewise, Plaintiffs' argument that Dr. Sageman believes that the GTD is plagued by characterization flaws, inclusion of incidents with insufficient information, and "significant" numbers of events of unknown attribution (Dkt #460 at 8, citing Ex. D) is again no more than Dr. Sageman's personal view, with no evidence offered. Moreover, Dr. Sageman, whose qualifications to determine statistical significance are unestablished, does not identify any of the incidents or

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

events at issue, or claim that removing them from consideration would lead to a significantly different outcome in Dr. Siskin's regression analysis.

Plaintiffs' final argument premised upon Dr. Sageman's criticism of GTD is that it is "not a neutral instrument" since it reflects the "orientation of the U.S. government as to what constitutes terrorism," which differs from other governments and shifts over time. Dkt #460 at 809, citing Ex. D. He suggests that the GTD is inherently unreliable since it is largely funded by U.S. Government grants and operates with a "systematic bias against non-US allies." Dkt #460 at 809, quoting Ex. D. Again, Plaintiffs offer no substantiation for Dr. Sageman's personal views. Nor is this Court forced to accept Plaintiffs' notion that the U.S. Government cannot appropriately determine what constitutes terrorism, or inference that the Government dictates GTD's end product. Their argument to exclude Dr. Siskin's regression analysis boils down to the notion that a database comporting with U.S. Government interests in monitoring terrorism must be rejected as inherently reliable since it does not match Dr. Sageman's personal and undisclosed view of what constitutes terrorism.

Plaintiffs take aim at Dr. Siskin for referring to a likely undercount of terrorist events in more authoritarian or less developed countries (Dkt #460 at 9), falsely suggesting that this is his contrived assessment. As Dr. Siskin's report details, the GTD's inclusion of cases turns on the availability of "high quality sources," independent of the government, political perpetrators, and corporations, which are less available in certain geographic areas and thus result in a more conservative documentation of attacks in those areas. Ex. B at 119. At the same time, Plaintiffs suggest that Dr. Siskin, despite his unassailable expertise in statistical analysis, should be foreclosed from offering his statistical analysis correlating GTD data with CARRP referral rates because he is not an expert in foreign policy or national security. Dkt #460 at 9. Plainly, such expertise is not required for Dr. Siskin to correlate data from an open source university database on terrorist incidents with USCIS data concerning referrals to CARRP to test what accounts for the increase in referrals from applicants from majority-Muslim countries.

Plaintiffs next challenge Dr. Siskin's regression analysis because he also considered whether the U.S. Department of State listed a country as a state-sponsor of terrorism, as with Iran and Syria for several decades. Dkt #460 at 9. But Plaintiffs fail to state that Dr. Siskin also conducted his

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

regression analysis without considering whether a country was a state-sponsor of terrorism, and obtained an even stronger showing that CARRP referrals are significantly related to the reported incidence of terrorism in the applicant's country of birth, and not significantly related to whether the country's population is Muslim-majority. Ex. E (Siskin October 13, 2020 report) at 48-49. Plaintiffs suggest that Dr. Siskin's opinions should be excluded because he does not know what standard the State Department uses in compiling its list of state-sponsors of terrorism, but that is not germane to his regression analysis or related opinions.

Plaintiffs next argue that using the State Department's list of state sponsors of terrorism as a variable in Dr. Siskin's regression analysis is "illogical and unhelpful" since only four countries are listed – despite Dr. Siskin's inclusion of a regression based on the GTD and global terrorism – and because of Dr. Sageman's unsubstantiated conjecture that state sponsors of terrorism generally do not use their own nationals in sponsoring or conducting terrorism. Dkt #460 at 10. Using that logic, Plaintiffs might incredulously reason that applicants participating in their native country's sponsorship of terrorism should never be referred to CARRP based on their link to terrorism.

Plaintiffs also claim that the State Department list is an unreliable indicator concerning terrorism because it focuses on countries hostile to the United States. The fact that the State Department list, over the past 40 years, might reflect the United States' views as to which countries are hostile actors does not establish that state-sponsored terrorism never gives rise to national security concerns or impacts CARRP referrals. The Court is not obliged to adhere to the view of Dr. Sageman and class counsel for KSTs and non-KST as to whether state-sponsored terrorism can give rise to national security concerns that impact CARRP referrals.

Plaintiffs also argue that Dr. Siskin offers no reason to believe that his theories related to the regression analysis correspond to reality. Dkt #460 at 11. To the contrary, his regression analysis establishes that his hypothesis not only corresponds to reality but is proven by the data. Moreover, a regression analysis is not speculative, but is a widely used and accepted methodology for measuring the correlation or predictive value of independent variables to predict a particular outcome and statistically measure the extent to which each independent variable in a model explains the variance in the dependent variables controlling for all other variables in the model. *See* Federal Judicial

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

Center's *Reference Manual on Scientific Evidence, 3d ed.* (2011), *Reference Guide on Statistics* at 213, 221, 256-57, 260-72, 279-81, 284-88, 294-99 and *Reference Guide on Multiple Regressions* at pp. 303 *et seq*. Plaintiffs' criticisms of how Dr. Siskin might have improved his regression analysis go to its weight, not admissibility.

Finally, Plaintiffs argue that Dr. Siskin's regression analysis should be excluded because it was not meant to assess "causality," but only to demonstrate a correlation between the reported incidence of terrorism in a country with the rate of referral to CARRP of applications from applicants born in that country. Dkt #460 at 12. Plaintiffs overlook the obvious logic that applicants from countries with higher rates of terrorism are more likely to have some association with that terrorism, even if very small, than applicants from countries with very low rates of terrorism.

Ultimately, Plaintiffs' challenge to Dr. Siskin's regression analysis boils down to a classic debate between experts, for the Court to resolve as trier of fact. Dr. Siskin conducted the regression study to test Plaintiffs' experts' hypothesis that the cause of the significantly higher rate of referrals to CARRP from applicants from majority-Muslim countries is anti-Muslim bias by USCIS, although the referral rate is very small, around 1%. The regression study sought to determine whether other factors are correlated with the increased referral to CARRP of applicants from majority-Muslim countries, and if the correlation of CARRP referrals with the majority-Muslim status of the applicant's birth country remains significant when the other factors are considered and controlled for. The Siskin study shows, as a factual matter, that the correlation with a country's majority-Muslim population status is no longer significant. Plaintiffs mischaracterize as an opinion the fact that "there is strong statistical evidence that the level of terrorist event[s] in a country and other factors such as the magnitude of application from a country and whether the country is a state sponsor of terrorism explain a significant amount (2/3s) of the variance in CARRP among countries in CARRP referrals." Ex. B at 130. Whether the increased terrorism rate in a country is directly causative of the higher rate of referrals to CARRP for applicants from that country is not germane since the only causation issue is whether there is statistical evidence that USCIS bias caused an increase in referring to CARRP applicants who are Muslim or from majority-Muslim countries. Plaintiffs seek to expunge the evidence that it did not.

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION
Ben Franklin Station, P.O. Box 878
Washington, D.C. 20044
(202) 616-4900

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to exclude opinions by Dr. Siskin, Defendants' designated expert in statistical analysis.

Dated: April 5, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General
Civil Division
U.S. Department of Justice

AUGUST FLENTJE
Special Counsel
Civil Division

ETHAN B. KANTER
Chief, National Security Unit
Office of Immigration Litigation
Civil Division

BRIAN T. MORAN
United States Attorney

BRIAN C. KIPNIS
Assistant United States Attorney
Western District of Washington

ANNE DONOHUE
Counsel for National Security
Office of Immigration Litigation

ANTONIA KONKOLY
Trial Attorney
Federal Programs Branch

W. MANNING EVANS
Senior Trial Counsel
Office of Immigration Litigation

/s/ *Leon B. Taranto*
LEON B. TARANTO
Trial Attorney
Torts Branch

LINDSAY M. MURPHY
Senior Counsel for National Security
Office of Immigration Litigation

BRENDAN T. MOORE
Trial Attorney
Office of Immigration Litigation

JESSE L. BUSEN
Counsel for National Security
Office of Immigration Litigation

VICTORIA M. BRAGA
Trial Attorney
Office of Immigration Litigation

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Anne P. Donohue
ANNE P. DONOHUE
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
Liberty Square Building, Room 6204
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
Anne.P.Donohue@usdoj.gov
Phone: (202) 305-4193

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 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.

/s/ Anne P. Donohue
ANNE P. DONOHUE
Counsel for National Security
United States Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
(202) 305-4193