

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF KANSAS

3 PARKER BEDNASEK,

4 Plaintiff,

5 v.

Docket No. 15-9300-JAR

6 KRIS W. KOBACH,

7 Defendant.

8 -----
9 STEVEN WAYNE FISH, et al.,

10 Plaintiffs,

11 v.

Docket No. 16-2105-JAR

12 KRIS W. KOBACH,

13 Defendant.

Kansas City, Kansas

Date: 03/06/2018

Day 1 - (P.M. Session)
Pages 130-307

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15

16 TRANSCRIPT OF BENCH TRIAL
17 BEFORE THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

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*By stipulation

1 (1:17 p.m., proceedings commenced.)

2 MR. KOBACH: Before we begin, Your Honor, if
3 I may raise a quick objection covering this testimony.
4 We are objecting to the use of demonstrative exhibits
5 found at Tabs 4 through 8 of the plaintiffs' Michael
6 McDonald folder. We did not receive them 24 hours in
7 advance. Indeed, we received them the moment
8 Mr. McDonald took the stand.

9 We confirmed this over the lunch break by
10 checking all of our e-mail accounts, and none of us
11 received these demonstrative exhibits. And in light of
12 your decision this morning and your adherence to the
13 strict rules, we'd request that these demonstrative
14 exhibits not be permitted.

15 MR. DANJUMA: So, Your Honor, we did
16 submit -- send an e-mail to all -- to Secretary Kobach
17 and his co-counsel with the demonstrative exhibits at I
18 believe 9:30 and then a corrected version at 10:35,
19 although those times might be wrong, and we copied the
20 court on each of those.

21 MS. LIU: Yesterday.

22 MR. DANJUMA: Yesterday. Sorry. This was
23 yesterday, on Monday.

24 THE COURT: A.m.?

25 MR. DANJUMA: A.m., in the morning. So it

1 was definitely 24 hours in advance. And we have
2 e-mail -- we have an e-mail record of that. I'm not
3 sure how to resolve it or why the Secretary didn't
4 receive it.

5 MR. KOBACH: We've checked all of our e-mail
6 accounts and we did not receive it.

7 MR. DANJUMA: Can I ask -- we also copied
8 the court, so the court should have a record of the
9 document that we --

10 THE COURT: Yeah. I have them right here.
11 I received them yesterday. I -- well, if they're
12 legitimate e-mail accounts, I don't know why you
13 wouldn't have received them. Why don't you confer and
14 make sure that the e-mail account was correct.

15 MR. DANJUMA: Hold on for just one moment.

16 THE COURT: I mean, I can probably find it
17 as well. It came into my chamber's e-mail box at what
18 time yesterday? About 9:30 and again at 10:30?

19 MS. SEYMOUR: Bonnie individually, not
20 chambers.

21 THE COURT: Oh, Okay. Bonnie, can you find
22 that e-mail?

23 COURTROOM DEPUTY: I have it here.

24 THE COURT: Does it show that the defendants
25 received it?

1 COURTROOM DEPUTY: I have -- I'm showing
2 garrettroe@gmail.com, but then it looks like there's not
3 a space.

4 MR. DANJUMA: There is an e-mail for
5 kriskobach@ksd. -- or -- wait. Hold on.

6 COURTROOM DEPUTY: Yes. Sue Becker also.
7 Addresses are showing kansasgov, sue --
8 sue.becker@ksd.gov.

9 THE COURT: Can you print that page right
10 here for me?

11 COURTROOM DEPUTY: Yes.

12 MR. HO: So --

13 THE COURT: It doesn't show the complete
14 e-mail address. I don't know if it will when we print
15 it out either. Click on Kris Kobach and see what --

16 MR. HO: We get KS --

17 MR. KOBACH: There's a space inserted there.

18 MR. HO: -- gov.

19 THE COURT: Where?

20 MR. KOBACH: That e-mail address is not my
21 e-mail address.

22 MR. HO: I mean, we replied --

23 MR. KOBACH: There is no ks.govkris.kobach.
24 It's not even close to that.

25 MR. HO: We replied "all".

1 THE COURT: I'm sorry.

2 MR. HO: We replied "all" to an e-mail from
3 the court.

4 THE COURT: Is this an e-mail you initiated
5 or is this a reply e-mail?

6 MR. HO: It's a reply. I'm -- and I
7 apologize for the confusion here, Your Honor, but it's a
8 long e-mail thread that was initiated here from
9 Ms. Wiest, and we've just been hitting "reply all" I
10 think to that.

11 THE COURT: All right. So the latest e-mail
12 was 9:49 a.m. I guess it's the -- this is the initial
13 e-mail. You said you sent another one later to
14 supplement. But this is 9:39. So it goes to -- and
15 it's a reply. It goes to garrett.robert.roe@gmail.com.
16 It goes to Kansas -- ks.govkris.kobach. That's not a
17 correct address. But it does go to Mr. Roe. It goes
18 to sue.becker@kansas.gov. Is that not correct?

19 MS. BECKER: KS, Your Honor?

20 MR. KOBACH: Should be ks.gov.

21 THE COURT: It says ks.gov, but then it says
22 Sue. There's no --

23 COURTROOM DEPUTY: I think it's running
24 together looks like. Maybe the addresses are running
25 together.

1 MS. BECKER: Invalid.

2 THE COURT: I'm not sure. But it looks like
3 Mr. Roe got it --

4 MR. KOBACH: That's --

5 THE COURT: -- at a Gmail account.

6 MR. KOBACH: That's his personal e-mail
7 account, which he doesn't use for this litigation.

8 THE COURT: Yes, he does. You all have been
9 using Gmail accounts for this litigation. You have.

10 MR. KOBACH: Where -- we'll have to check
11 with Mr. Roe to be sure. Because we had everybody check
12 over lunch to see if anybody received it, and none of us
13 could find it.

14 THE COURT: All right. Well, looks like
15 there was the attempt made. I'm still not convinced
16 Mr. Roe didn't receive it because it looks like this is
17 a legitimate one for him. I'm confused by this stream
18 because it shows Kris.Kobach@, but then there's nothing
19 behind it. And then there's another -- an ampersand and
20 then there's another one that does look like it's the
21 wrong address. And the same with Ms. Becker. But for
22 Mr. Roe, unless this isn't a right Gmail address, he
23 received it. I'm not sure.

24 Well, let's proceed.

25 MR. DANJUMA: Your Honor, I just would want

1 to make clear that these are just a summary of the
2 information in the report and a citation to each of
3 the -- to data that is in the report. So we -- I
4 actually don't know the origin of that e-mail thread but
5 this -- this is simply a way for the court to sort of
6 clarify and summarize the numbers that have already
7 been --

8 THE COURT: All right. For now, don't use
9 the demonstrative exhibit. I may let you come back
10 around to it after the other side has had a chance to
11 review it. But for now we'll just avoid using it.

12 MR. DANJUMA: Just -- Your Honor, just one
13 moment.

14 THE COURT: All right. So our system
15 bounced these back. I don't know if it's -- because you
16 are replying to an earlier e-mail. So I don't know if
17 it's a formatting issue with your system or our system,
18 but it does look like it -- it runs these addresses
19 together in a way that, you know, we -- we got bounced
20 back messages, not on this particular string, but we did
21 on another one that it did the same thing to. So I'm
22 not convinced that Ms. Becker and Mr. Kobach have
23 received notice. However, this is a correct address for
24 Mr. Roe, and he does use a Gmail account. That's the --
25 that's the address he's been using in CM/ECF, which is

1 our official e-mail for him, but I'm a little bit
2 unclear on whether it has run his letters together as
3 well.

4 So for now -- I'm sorry? They are running
5 together. So for now, it looks like they didn't receive
6 it. This is something we need to fix because you all
7 may be needing to e-mail one another during the course
8 of the trial as well, and we're going to have to figure
9 that out -- you're going to have to figure it out. But
10 for now, don't use the demonstrative exhibit. They need
11 time to review it.

12 MR. STEINER: Your Honor, just to be clear,
13 Professor -- Professor McDonald can use the exhibit --
14 or Mr. Danjuma can use the exhibit to refresh his
15 recollection should he need to to give his testimony;
16 correct?

17 THE COURT: I don't have a problem with
18 that.

19 MR. STEINER: Okay.

20 THE COURT: Yeah. I'm just saying don't
21 publish it as a demonstrative exhibit at this point.

22 MR. DANJUMA: Understood. Okay. Thank you,
23 Your Honor.

24 BY MR. DANJUMA:

25 Q. Now, before the break, I think we had just

1 referenced the exhibits that you prepared in this case
2 on February 25th, 2016, and April 11th, 2016.

3 So, Dr. McDonald, I'd like to ask, what were
4 you asked to do in this case?

5 A. I was asked to review voter registration data
6 from the Kansas Secretary of State's ELVIS system to
7 ascertain the people who were affected by the documented
8 proof of citizenship requirement and their
9 characteristics and then to opine about what the effect
10 of the law would be on their immediate participation in
11 elections and their long-term participation in
12 elections.

13 Q. And first, could you start by briefly identifying
14 the types of data sources you use to analyze voter
15 registration applicants in Kansas?

16 A. I identified -- well, I was -- I obtained through
17 the course of this litigation three voter registration
18 files. The first would be the entire voter file of
19 those active and inactive registered voters in the state
20 of Kansas. The next file would be what I'll call a
21 suspense list, which is anybody who has their voter
22 registration application in an incomplete or suspense
23 state before it can be moved on to a active or inactive
24 status. And then lastly, I have a canceled list, which
25 is individuals who -- who were on the suspense list but

1 then were not able to get onto the voter registration
2 file, instead had their registrations canceled.

3 Q. And just to clarify the record, can you explain
4 again what a suspense list is and why an applicant might
5 be on that list?

6 A. Yeah. So the Kansas Secretary of State's Office
7 has a suspense list. They -- on their website, they
8 have a description of the different reasons why someone
9 can be on the suspense list. One reason would be
10 they're underage. Another reason would be an incomplete
11 voter registration address. Third reason would be
12 overseas voter. And then the fourth reason would be
13 lack of documentary proof of citizenship.

14 Q. And does the Kansas Secretary of State's Office
15 have any system for recording voter registration
16 information?

17 A. Yes. This is called the ELVIS system in Kansas.
18 There are similar systems in other states that manage
19 individual voter records. Generally, we might call them
20 election management systems.

21 Q. And is it your understanding that the files for
22 Kansas voters that you just discussed were generated by
23 the ELVIS system?

24 A. Yes. I understand that these were extracts from
25 the ELVIS system.

1 Q. Okay. Now, did you obtain any data sources
2 about -- with information about registration applicants
3 for the period between January 1st, 2013, and September
4 24th, 2015?

5 A. Say those dates again for me. I'm sorry.

6 Q. Absolutely. Did you obtain any data sources with
7 information about applicants -- voter registration
8 applicants for the period between January 1st, 2013, to
9 September 24th, 2015?

10 A. Yes. I was provided by counsel a file that was
11 represented to me to be a suspense list as of -- from an
12 extract of the ELVIS system as of September 24th, 2015.

13 Q. And what is the significance, if any, of a
14 suspense list from late September 2015?

15 A. Well, the policy of denying individuals their
16 registration based on a lack of documentary proof of
17 citizenship began on January 1st, 2013. And in -- on
18 October 1st of 2015, the Secretary of State's Office
19 implemented a policy where if individuals had been on
20 the suspense list for more than 90 days, they may have
21 their registrations canceled. So September 24th would
22 be an important date because it's immediately prior to
23 when this new policy of cancellations would have been
24 initiated.

25 Q. And is it correct to say that it would have the

1 number -- some estimate of the number of individuals who
2 had been suspended for lack of documentary proof of
3 citizenship before their applications were canceled?

4 A. Yeah. So at this point, no one had been removed,
5 to my knowledge, for failure -- for failure to provide
6 documentary proof of citizenship. And so the suspense
7 list as of that September 24th date would have been the
8 cumulative number of people who had found their way on
9 to the suspense list for failing to provide documentary
10 proof of citizenship and the other reasons that I
11 mentioned.

12 Q. Okay. Did you obtain any data sources from on or
13 around the date December 11th, 2015, in reaching the
14 conclusions in your report?

15 A. Yes, I did. I requested from the Secretary of
16 State's Office the voter registration file for the
17 entire state and a suspense list. That suspense list
18 had no confidential information in it, so it did not
19 include the reasons why individuals were not -- were on
20 the suspense list, the various -- the four reasons why
21 they were on the suspense list, and did not -- also did
22 not include the registration source. But these were two
23 files that were extracted by the Secretary of State's
24 Office and delivered to me on December 11th, 2015.

25 Q. And I think you said it didn't have the method of

1 registration; is that right?

2 A. That's correct.

3 Q. So did you evaluate the total number of suspended
4 applicants regardless of how they applied --

5 A. Yes.

6 Q. -- on that date -- as of that date?

7 A. Yes, I was able to do that. Yes.

8 Q. And you mentioned that it didn't have information
9 about the reason why someone had been suspended. Were
10 you able to make any conclusions about why individuals
11 were suspended on the list as of December 11th, 2015?

12 A. Lacking the confidential information, I was able
13 to develop a methodology of estimating the numbers of
14 people in the different types of categories.

15 So, for example, if someone had a birth date
16 less than 18 years prior to December 11th, 2015, that
17 would be somebody who would be underage. And if someone
18 had -- there was a flag in the suspense list that
19 identified if someone was an overseas voter, so I
20 assumed that all of those individuals were overseas
21 voters and in suspense state for that reason.

22 Then lastly, what I did was I geocoded the
23 voter registration file. And geocoding is much like
24 what you do with the cell phones we were just seeing on
25 the overhead projector where if you look up an address,

1 you'll get a data point of where that address is
2 located. I did that for the -- the entire suspense
3 list. And then any address that failed to geocode, I
4 assumed was on the suspense list for failure of having a
5 completed address.

6 That identified the three methods of --
7 those three methods of finding yourself on a -- the
8 suspense list. So the residual last would be
9 individuals who hadn't provided their documentary proof
10 of citizenship.

11 Q. And so just to clarify the record, is it accurate
12 to say that you were able to create an estimate of
13 individuals who were on the suspense list for failing to
14 provide documentary proof of citizenship by eliminating
15 other reasons why they might be suspended?

16 A. Yes, I was.

17 Q. All right. Were you able to obtain any
18 information, any voter registration information from
19 March 31st, 2016?

20 A. Yeah. I -- there was a protective order. And
21 under that protective order, I was given a suspense list
22 of --

23 Q. And -- sorry, just to clarify, there was a
24 protective order. What was the protective order?

25 A. It regarded the confidential data that would have

1 been found on the suspense list or the canceled list,
2 because I was also provided that information.

3 Q. And the protective order allowed you to obtain
4 information that you had previously been denied when you
5 sought information as of December 11th?

6 A. Correct. So that would include the reason why
7 the -- a person was on the suspense list and the
8 registration source.

9 Q. So what data did you receive as of March 31st,
10 2016?

11 A. I received a suspense list dated March 31st,
12 2015, and a -- a 90-day rule or a canceled list as of
13 March 31st, 2015.

14 THE COURT: I'm sorry. Did you say '16 or
15 '15? March 31st --

16 THE WITNESS: Oh, 2015. Thank you.

17 BY MR. DANJUMA:

18 Q. Okay. Now I'd like to ask you a question about
19 your initial report. Do you recall how many individuals
20 you determined -- did you reach any conclusions about
21 the total number of individuals who had been suspended
22 or had their applications canceled for lack of
23 documentary proof of citizenship?

24 A. Yes, I did.

25 Q. Do you -- do you recall the number of

1 individuals?

2 A. Well, I can look it up in my report.

3 Q. Would it be helpful if I used a document to
4 refresh your recollection?

5 A. Yes, it would.

6 MR. DANJUMA: Oh.

7 THE COURT: That's fine.

8 BY MR. DANJUMA:

9 Q. Dr. McDonald, I'd like to just clarify one thing
10 on the record. The -- the time period that I referred
11 to earlier where you received other additional data as
12 of March 31st, that data was obtained as of March 31st,
13 2016; is that correct?

14 A. That's correct.

15 Q. Okay. It's possible that you may have said March
16 31st, 2015 and we just wanted to clarify the record
17 since we've been going back and forth on the dates.
18 Sorry.

19 A. I think the judge --

20 THE COURT: I guess I'm a little confused.

21 THE WITNESS: She got it.

22 MR. DANJUMA: This is why the demonstrative
23 is so universal.

24 THE COURT: On March 31, 2016 is when you
25 received the suspense list? I thought I heard March --

1 THE WITNESS: March 31st, 2016 was an
2 extract of the confidential data of a suspense list and
3 a canceled list.

4 THE COURT: Which were dated March 31, 2015?

5 THE WITNESS: 2016.

6 THE COURT: Everything's March 31, 2016?

7 MR. DANJUMA: Yes.

8 THE WITNESS: March 31st, 2016 for these
9 files.

10 THE COURT: Got it. Okay. Thank you.

11 BY MR. DANJUMA:

12 Q. Any reference I think to March 2015 was -- was in
13 mistake; is that right?

14 A. That's correct.

15 Q. Okay. So then my next question was -- was
16 whether or not you reached any conclusions in your
17 initial report about the number of individuals who had
18 been suspended or -- or the total number of individuals
19 who were suspended or canceled as of December 11, 2015?

20 A. Initially, I had identified that there were
21 22,814 individuals who had been canceled or suspended by
22 December 11th, 2015 for lack of providing documentary
23 proof of citizenship.

24 Q. And a question about that analysis, Dr. McDonald.
25 Were you able to track the status of applicants from one

1 date to another using the ELVIS system?

2 A. Yes, I am. Every individual in the ELVIS system
3 is assigned a unique voter registration identification
4 number, regardless of whether or not they actually make
5 it onto the voter registration rolls, and so it's
6 possible using that information to track the status of
7 an individual from one of these files to the next file.

8 So each of these dates we can see
9 individuals with the same identification number, maybe
10 they moved from a suspense state to an active state or a
11 suspense state to a canceled state. We can track that
12 information by looking at their unique identification
13 number.

14 Q. And so -- so just to -- to -- to ensure I
15 understand, you were able to track the individuals who
16 were on the suspense list as of September 24th, 2015,
17 and determine whether or not they ultimately became
18 registered, whether they were suspended, or whether
19 their applications were canceled; is that accurate?

20 A. That is correct.

21 Q. Okay. And what conclusions did you reach about
22 the number of applicants who were canceled and suspended
23 or registered as of that date?

24 A. So comparing the September 24th suspense list
25 with the December 11th, 2015 suspense list -- so a

1 period of about -- October, November, December, a little
2 less than three months, roughly about -- a little less
3 than 71 percent, 70.9 percent of the applicants that
4 were on the September 24th, 2015 suspense list had
5 either remained on the suspense list by December 11th,
6 2015 or had been canceled from the voter registration
7 system.

8 Q. Okay. So most individuals who were suspended as
9 of September 24th, 2015 did not become registered; is
10 that accurate?

11 A. Yes, the majority. It's almost 71 percent.

12 Q. And what percent were able to become registered
13 when they had initially been suspended?

14 A. Well, conversely, we can also look at the voter
15 registration file. And I can see -- by matching the
16 voter registration file on December 11th, 2015 with the
17 suspense list of September 24th, 2015, I can see how
18 many people had managed to find their way onto the voter
19 registration file. And of those people who had
20 initially failed to provide documentary proof of
21 citizenship and were in a suspense state, roughly a
22 little bit less than 29 percent of them were able to
23 make their way onto the voter registration list.

24 Q. And do you know any reasons why an individual
25 might have been cleared off the suspense list and become

1 a registered voter?

2 A. Yes. There are two possible reasons why that
3 could have occurred. One is that the individual had
4 cured their deficiency of providing the -- by providing
5 the documentary proof of citizenship. I'm also aware,
6 upon reviewing Bryan Caskey's declaration in this
7 matter, that the Secretary of State's Office had started
8 a policy of looking up individual's voter registration
9 -- excuse me -- birth certificates if they were born in
10 the state of Kansas.

11 I don't know which method these
12 individuals -- on individual case-by-case basis were
13 cleared and put onto the voter registration record, but
14 it would be through one of those two methods that these
15 individuals were in a suspense state at one point in
16 time and then later found their way onto the voter
17 registration file.

18 Q. And what if you -- what, if anything, do you
19 infer from the fact that 29 percent of individuals
20 ultimately became cleared from the suspense list? What
21 do you infer from that fact about -- if anything, about
22 the burden the documentary proof of citizenship law
23 places on voter registration applicants?

24 A. I infer that this isn't a costless exercise, that
25 people aren't necessarily going to DMV offices or, when

1 they're registering to vote through other means, have
2 with them the documentary proof of citizenship that is
3 necessary in order to satisfy the requirements under
4 the -- on Kansas law. At some later point in time they
5 must take additional action in order to -- to clear and
6 cure the deficiency that's in their voter registration
7 application.

8 Q. So even the individuals who ultimately do become
9 registered after being suspended were -- were blocked at
10 some point from being able to register and needed to
11 take additional steps; is that correct?

12 A. That's correct.

13 Q. Now, what do you infer from the fact that
14 71 percent of individuals on the September 24th, 2015
15 suspense list were either canceled or remained suspended
16 as of December 11th, 2015?

17 A. I infer that, unlike the 29 percent that had
18 managed to find their way onto the voter registration
19 list, that these other 70.9 percent were, unfortunately,
20 unable to cure their voter registration and remained
21 either in a suspense state or had their voter
22 registration application canceled entirely and thus they
23 weren't able to -- to satisfy the costs that -- involved
24 of providing the documentary proof of citizenship in
25 order to cure the deficiency in their application.

1 Q. Dr. McDonald, did you also calculate the total
2 number of individuals who had been suspended at any
3 point for failure to provide documentary proof of
4 citizenship as of December 11th? And, if so, do you
5 recall that number?

6 A. Yes. So, again, using this technique of looking
7 at the ID numbers, I can see the number of people who
8 were either on the suspense list as of September 24th,
9 2015 and the new people who had been added to the
10 suspense list by December 11th, 2015. And if I add
11 those two numbers together, I get a total number of
12 35,314 individuals who at some point had to do some --
13 at least some extra step to either clear themselves or had
14 failed to clear themselves and remained either suspended
15 or had been -- their registrations had been canceled.

16 Q. Now, Dr. McDonald, you testified earlier that you
17 obtained data through the confidential -- the protective
18 order issued in this case. You obtained confidential
19 data about the reason why someone was suspended and the
20 method of registration as of March 31st, 2016; is that
21 correct?

22 A. That is correct.

23 Q. Were you able to reach any conclusions about the
24 number of individuals who were blocked from registering
25 to vote either because their applications were canceled

1 or suspended as of March 31st, 2016?

2 A. Yes. This information was now available to me.
3 I no longer had to do an estimate. I had the actual
4 data, the direct data from the Secretary of State's
5 Office which identified each unique individual who had
6 been affected by the documentary proof of citizenship
7 requirement. And as of March 31st, 2016, there were --
8 either in a suspense state or a canceled state, there
9 were 30,732 individuals.

10 Q. Okay. And do you know how many -- do you recall
11 how many applicants were canceled?

12 A. Yes. There were 16,749 that were canceled.

13 Q. And how many applicants remain suspended as of
14 March 31st, 2016?

15 A. 13,983.

16 Q. How do the numbers of suspended and canceled
17 applicants compare to the numbers that you evaluated
18 from December 11th, 2015?

19 A. They had increased by about 75 -- well, they had
20 increased. The earlier estimate was roughly 22,814, and
21 so that was as of December 11th, 2015. And then by
22 March 31st, 2016, the number had raised -- increased to
23 30,732.

24 Q. And do you have an estimate of the number -- the
25 percentage of applicants of -- of -- excuse me.

1 Do you have an estimate of the percentage of
2 new registrants whose applications were canceled or
3 suspended as of March 31st, 2016?

4 A. As a percentage of what?

5 Q. The percentage of new voter registrations between
6 the period of January 2013 to December 2015 when the --
7 the documentary proof of citizenship law had been
8 enforced.

9 A. So I had a voter registration file as of December
10 11th, 2015. There's a date of registration on that file
11 and so I was able to look back in time to see the number
12 of people, new registrants from January 1st through
13 December 11th, 2015 -- January 1st, 2013 and December
14 11th, 2015 who had registered and were on the voter
15 registration list as of December 11th --

16 Q. Can you tell us that number?

17 A. -- 2015.

18 Yeah. That number was two thousand --
19 247,663. If I divide the 60,000 -- excuse me, the
20 30,732 that were either suspended or canceled as of
21 March 31st due to documentary proof of -- lack of
22 providing documentary proof of citizenship, then roughly
23 about 12 percent of all new registrants between -- over
24 this time period of when the law was in effect had had
25 their voter registration either in a suspended state or

1 canceled due to the failure to cure the -- the issues
2 with their voter registration application.

3 Q. And so just to be clear, you were able to
4 estimate that 12 -- excuse me.

5 You were able to estimate that 12.4 percent
6 of new registrant -- new registrations between January
7 2013 and December 2015 approximately were canceled or
8 suspended?

9 A. It's 12.4 percent if I just use those numbers.
10 There would have been some additional registration
11 activity between December 11th, 2015 and March 31st,
12 2016, roughly, again, about three months. And so it's
13 12.4 percent. It's probably slightly less if you factor
14 in that unknown number.

15 Unfortunately, in the confidential data that
16 I was provided by the Secretary of State's Office, I
17 wasn't given a voter registration file, which would have
18 enabled me to do more precise calculations on the
19 percentage.

20 Q. Okay. Do the number of suspended and canceled
21 applicants that you evaluated as of March 31st, 2016
22 suggest that the difficulty of complying with the -- the
23 documentary proof law is isolated or widespread?

24 A. Yes, this looks to be widespread, that there
25 aren't just a small scattering of individuals across the

1 state who are being affected.

2 As of March 31st, there were 30,732
3 individuals who had been affected by the law. So that
4 strikes me as not being isolated incidents. And this
5 was roughly 12 percent of all new voter registrations as
6 well. So, again, this seems to be something that was
7 affecting a large number of people within the state of
8 Kansas.

9 Q. As an expert in voter registration and voter
10 behavior, would you expect the numbers of canceled or
11 suspended applicants to increase or decrease after March
12 31st, 2016?

13 A. Right. So people will register to vote when they
14 intend to vote. And as an election nears, you typically
15 see voter registration activity start picking up,
16 especially in a presidential election year like 2016.
17 So I would have expected between March 31st and November
18 of 2016 that additional people would be -- find their
19 way onto the suspense list or have their registrations
20 canceled within that period pursuant to the 90-day rule.
21 And this -- we had already seen activity increase
22 between December 11th, 2015 and March 31st, 2016 of
23 roughly 8,000 more individuals. So I can only imagine
24 that that number would continue to increase and escalate
25 as November approached.

1 Q. Okay. Now, you testified earlier about the
2 percentage of -- of new voter registrations that became
3 canceled or suspended for lack of documentary proof of
4 citizenship. I wanted to ask, did you evaluate the
5 impact of this law on registered voters in the state of
6 Kansas?

7 A. I did not.

8 Q. And why not?

9 A. Well, because they had successfully registered
10 for one. But in -- the law as it was applied only
11 applied to new registrants; it didn't apply to existing
12 registrants. And so if you were currently on the voter
13 registration file, you did not need to provide
14 documentary proof of citizenship.

15 Q. So are new voters the relevant population to
16 examine when determining whether there's an impact of
17 the law on voter registration applications?

18 A. Yes. I would also look at the individuals
19 themselves because we have those individual records, and
20 I -- they're the people who are being affected by the
21 law.

22 Q. Now, Dr. McDonald, you also testified that as of
23 March 31st, 2016 you had access to the method of
24 registration for individuals on the -- on the voter --
25 on the suspense and cancellation list; is that correct?

1 A. That's correct.

2 Q. So did you now have information about the number
3 of voter -- motor-voter applicants who were either in a
4 suspense or canceled state as of March 31st, 2016?

5 A. Yes, that confidential information was available
6 to me.

7 Q. Were you able to reach any conclusions about the
8 total number of motor-voter applicants who were blocked
9 by the law as of March 31st, 2016?

10 A. Yes. There were 22,888 who were either canceled
11 or on a suspense list for reason of documentary --
12 failure to provide documentary proof of citizenship as
13 of March 31st, 2016. That's roughly 75 percent of all
14 individuals who had -- were either on a suspense state
15 or in canceled due to failure to provide documentary
16 proof of citizenship.

17 Q. And, Dr. McDonald, can you explain how you
18 determined from the data file you had which individuals
19 were -- the method of registration that an individual
20 who was on the suspense list had used?

21 A. The Secretary of State's Office had a code or
22 really three codes that identified motor vehicle
23 registrations. And there was an MV code, if I recall
24 them correctly. They're in my reports. There's an MV0
25 code for on-line voter registration. And then there was

1 an MV -- some other registered -- for like a change of
2 registration or update registration from a Motor
3 Vehicles office.

4 Q. Was that code an MVC code, just to clarify?

5 A. MVC, change, yes, yes.

6 Q. So just to clarify the record, your analysis
7 included both in-person and on-line motor-voter -- motor
8 vehicle transactions; is that correct?

9 A. That is correct.

10 Q. Okay. And you also testified that approximately
11 75 percent of the total number of individuals who had
12 been blocked by the documentary proof of citizenship law
13 as of March 31st had applied through a motor-voter -- a
14 motor-voter application --

15 A. Yes.

16 Q. -- is that correct?

17 A. Yes.

18 Q. So would you conclude that motor vehicle
19 transactions are the most frequent method of
20 registration for people who end up suspended or canceled
21 for lack of documentary proof of citizenship?

22 A. Yes.

23 Q. Okay. Dr. McDonald, were you also able to
24 evaluate the characteristics of individuals, the
25 demographic characteristics of individuals on the

1 suspense and canceled list?

2 A. Yes, I was.

3 Q. And how did you perform that analysis?

4 A. The voter registration data in the ELVIS system
5 includes lots of information. And in addition to the
6 information that we'd been discussing so far, there's
7 also a date of birth and a -- a party affiliation and
8 gender that are coded into the voter registration file.

9 Q. And did you evaluate whether or not the law had
10 any disproportionate impact on young voters -- on young
11 voter registration applicants? Excuse me.

12 A. Yes, I did.

13 Q. And did you reach any conclusions about what the
14 disproportionate impact might be on young voter
15 registration applicants?

16 A. Yes, I did. So the best comparison I can make is
17 to compare the voter registration file on December 11th,
18 2015 and look at the characteristics of those
19 individuals as of that date because that's the voter
20 registration file that I have. And I can compare that
21 with the confidential data that was provided to me on
22 March 31st, 2016. It's not exactly the same date, so
23 that's unfortunate, but likely there would not be big
24 changes in the voter registration demographics between
25 December 11th, 2015 and March 31st, 2016.

1 So making this comparison then of the
2 December 11th, 2015 voter registration file,
3 14.9 percent of all individuals on the voter
4 registration file were between the ages of 18 and 29.

5 Compare that with the -- either individuals
6 who were in a suspended state or canceled for failure to
7 provide documentary proof of citizenship and were
8 motor-voter applicants, 18- to 29-year-olds were
9 43.2 percent. So it's a comparison of 14.9 percent on
10 the overall registration file, and then nearly a three
11 times greater frequency of 43.2 percent on that canceled
12 and suspense list as of March 31st, 2016.

13 So it's a much greater frequency of seeing
14 young people either having their registration being
15 suspended or canceled for failure to provide documentary
16 proof of citizenship.

17 In terms of party registration, again, using
18 the same approach, from that December 11th, 2015 voter
19 file, 31 percent of the individuals on that file were
20 recorded as having no party affiliation. Compare that
21 with this March 31st, 2016 suspense and canceled lists,
22 again from motor-voter applicants who failed to provide
23 documentary proof of citizenship, unaffiliated voters
24 constituted 53.4 percent, or nearly twice the number
25 that were on the voter file.

1 So, again, this law seems to
2 disproportionately effect not only younger people age 18
3 to 29 but also people who less frequently affiliate with
4 a political party.

5 Q. As an expert in voter registration and voter
6 behavior, what conclusions, if any, do you draw
7 regarding the immediate and long-term burden the
8 documentary proof of citizenship law places on voter
9 registration applicants?

10 A. Well, obviously immediately these are individuals
11 who can't vote in election. So they are unable to
12 participate in the most immediate election in which they
13 are in a suspense or canceled state.

14 In the long-term though, there's a large
15 body of literature out there, scholarship, that finds
16 that if an individual votes once, then they're more
17 likely to vote again. So the habit -- voting is
18 habit-forming in a way. And if you miss your first
19 opportunity to participate in election, you're going to
20 start that habit of being a good citizen later in your
21 life and you -- compared to peers who were able to
22 complete the registration process and vote in an
23 election. These individuals will always be a step
24 behind those individuals because they -- they will not
25 have learned all of the things that you need to do in

1 order to vote.

2 You -- beyond just registering to vote,
3 you -- if you're traveling, you may need to provide an
4 absentee ballot application. You may need to fill that
5 out. You may need to go to a polling location and
6 figure out where that is, and you may want to learn
7 about the candidates and educate yourself on politics.

8 And so all of these things are wrapped
9 together into a learning process. And that learning
10 process is retarded if an individual is unable to
11 fulfill their civic duty and vote.

12 Q. And is that true for all applicants who are
13 blocked by a voter registration barrier?

14 A. Generally, when we look at the literature on
15 burdens, we find that burdens do tend to lower turnout.
16 I -- myself, I have written on this and -- in peer
17 reviewed journals. Many other people have found that
18 various barriers beyond just this documentary proof of
19 citizenship do result in lowered voter participation
20 rates.

21 Q. Is --

22 A. And it's particularly important to look at these
23 young and unaffiliated voters because they're the most
24 vulnerable to these sorts of effects. One author said
25 that, you know, if there is even a slight burden,

1 voters -- young voters won't show up to vote at all.

2 And so there's -- there are scholar --
3 there's scholarly findings that find that the -- these
4 sort of -- these are the most vulnerable populations.
5 These are the people on the periphery who are the least
6 socialized into voting. And they could -- they're the
7 most sensitive to changes in costs of voting, which the
8 documentary proof of citizenship is such a cost.

9 Q. Dr. McDonald, I just wanted to ask on the record,
10 is there any typos in your supplemental report that you
11 would like to correct?

12 A. Yes. I'm aware of three.

13 Q. And would it help for me to -- do you know --
14 what are those typos?

15 A. Well --

16 Q. Okay. Would it refresh your recollection if I
17 directed you to page -- to the sentence from page 9 into
18 page 10 of Plaintiffs' Exhibit 73, your supplemental
19 report?

20 A. Yes. So in this sentence that cuts over these
21 page -- from page 9 to page 10, there is a number of --
22 saying that there are -- there -- the number of DMV
23 registrants there -- excuse me. Let me say --

24 "Recalling previous statistics, there 10,717
25 DMV registrants who are on the March 31st, 2016 suspense

1 list and 10,117 DMV registrants on the March 31st, 2016,
2 90-day list, for a total of 22,888." That actually
3 doesn't add up if you do the math. And the reason for
4 that is because the number is actually 12,717 DMV
5 registrants who were on the March 31st, 2016 suspense
6 list.

7 Q. So just to clarify the record, the sentence that
8 you just read from 9 to 10 of your -- of Plaintiffs'
9 Exhibit 73 should read, Recalling previous statistics,
10 there are 12,717 DMV registrants who were on the March
11 31st, 2016 suspense list and 10,171 DMV registrants on
12 the March 31st, 2016, 90-day list, for a total of
13 22,888; is that correct?

14 A. That is correct.

15 Q. Okay.

16 A. All right. And the other one -- or the other two
17 come together, and they are -- I just had them before we
18 were having this discussion.

19 Q. Would it refresh your recollection --

20 A. Yes.

21 Q. -- if I directed you to the sentence flowing from
22 page 10 to 11 that begins "Notably"?

23 A. Yes. Yes. So notably -- on the bottom of
24 page 10, first fragment of a sentence, "Notably
25 45.5 percent of these registrants are age 18 to 29,

1 compared to only 14.9 percent among active and inactive
2 registrants." If you look at the table, you'll see that
3 this information does not match the table on -- Table 4
4 on page 10. The reason is is because these were not
5 actually the DMV registrants, these are all registrants
6 who have been in -- and so if you -- the Table 4 is
7 actually correct. Those are the correct percentages
8 there. So in that case, it should be 43.2 percent of
9 these registrants are age 18 through 29.

10 Q. And -- and just to clarify the record, did you
11 review the raw data that you received on March 31st,
12 2016 before testifying today to verify these numbers?

13 A. Yes, in both cases.

14 Q. Okay.

15 A. I -- and we didn't finish with the other ones.
16 So the next one is the 50.9 percent number that starts
17 on the first full sentence on page 11. That is, again,
18 the wrong number. The Table 4 is correct. It says
19 40.9 -- "50.9 percent of these registrants are
20 unaffiliated." It should read, if you look at Table 4,
21 53.4 of these registrants are unaffiliated.

22 Q. Okay. So just finally to clarify the record,
23 these two sentences that we've been discussing, it
24 should read, Notably, 43.2 percent of these registrants
25 are age 18 to 29, compared to only 14.9 percent among

1 active and inactive registrants.

2 And the next sentence should read
3 53.4 percent of these registrants are unaffiliated with
4 a political party, compared to 31.1 percent among active
5 and inactive registrants.

6 Are those two sentences correct?

7 A. Yes, those are correct.

8 Q. Okay. And is there any reason why those typos
9 may have emerged when you prepared your supplemental
10 report?

11 A. This came under a very tight deadline to prepare
12 this report, as I recall.

13 Q. Did you -- did you receive the codes for the --
14 the -- how far in advance of your expert report did you
15 receive the codes, if you recall, for -- to perform the
16 analysis in your supplemental report?

17 A. I can't recall the exact number of days, but it
18 was certainly less than a week. It might have been one
19 or two days.

20 Q. Okay. Thank you.

21 Dr. McDonald, I'd like you to flip to Tab 9
22 of your binder. And for the record, I'm going to note
23 that Tab 9 has been marked by defendant as Defendant's
24 Exhibit 1140, the Camarota expert report.

25 MR. DANJUMA: And, Your Honor, I am

1 referring this -- I am referencing this -- I'm going to
2 ask Dr. McDonald questions about this document. We are
3 not seeking to have it admitted. We've waived hearsay
4 objections, but I'm not planning to publish this
5 information but just to ask him about the content of it.

6 THE COURT: Well, I mean, if you're going to
7 have him testify to the content, it needs to be
8 admitted.

9 MR. DANJUMA: Does it? Okay. Is there a
10 way to ask him about it if he reviewed it or...

11 THE COURT: Yeah. I mean, if he can testify
12 about it without testifying to its contents and just his
13 impressions and -- I mean, yeah, that's fine. I just --
14 in order for him to testify from the content of it
15 itself and to make that part of the evidentiary record,
16 it needs to be in the record.

17 BY MR. DANJUMA:

18 Q. Okay. I'm going to ask -- just one moment.

19 Dr. McDonald, do you recognize the document
20 in Tab 9 of your binder?

21 A. Yes, I do.

22 Q. What is it?

23 A. It is an expert report, really a rebuttal report
24 by Dr. Camarota.

25 Q. Did you review the document?

1 A. Yes, I did.

2 Q. And did you consider Camarota's critiques or
3 responses to the opinion you offered in this case?

4 A. Yes, I did.

5 Q. Did Dr. Camarota's report change any of the
6 conclusions you reached as an expert in this case?

7 A. No, it does not.

8 Q. I'd like to ask you specifically about some of
9 the critiques Dr. Camarota raises in his report.

10 First, could I ask you to look at the
11 sentence in the first paragraph on page 2 of the report
12 that --

13 MR. KOBACH: Objection. He's now going to
14 the content of the report without admitting it into
15 evidence.

16 MR. DANJUMA: I'm just --

17 THE COURT: He's pointing him to it. You're
18 not asking him to read it aloud?

19 MR. DANJUMA: No.

20 THE COURT: All right. Go ahead.

21 BY MR. DANJUMA:

22 Q. Do you see the -- and I'm just going to read the
23 beginning of the sentence so that -- without reading the
24 content.

25 Do you see the sentence that begins, In the

1 case of Michael McDonald's report? Do you see that
2 sentence on page 2 of Dr. Camarota's report?

3 A. Yes, I do.

4 Q. Could you -- could you read that sentence to
5 yourself and summarize the point that you understand
6 Dr. Camarota to be making.

7 A. My understanding of Dr. Camarota's criticism of
8 my report is that he says essentially that I am not
9 looking -- making the correct comparison when I look at
10 the entire voter registration file when I am talking
11 about disproportionate effects of the documentary proof
12 of citizenship law. Instead, I should be looking at
13 only new registrants rather than those that -- rather
14 than all registrants.

15 Q. So is it fair to say that Dr. Camarota believes
16 that you need to see the -- the -- or your understanding
17 of his critique of your report is that you should have
18 evaluated the rate of individuals on the -- of young
19 people on the documentary proof of citizenship -- who
20 were suspended between the ages of 18 to 29, you should
21 have compared that to new registrants rather than to
22 their occurrence on the full voter registration file?

23 MR. KOBACH: Your Honor, objection. We've
24 had two people place in their own words, just like you
25 might copy a report and rephrase it in your own words,

1 the content of Mr. Camarota's report, and we have him
2 leading the witness to restate a different phrasing of
3 the report.

4 This is so obviously a way to get around not
5 having this report introduced into evidence. I would
6 simply ask that they either refrain from doing this or
7 introduce it into evidence.

8 THE COURT: Well, I don't think this witness
9 can lay the foundation for it. But it -- so essentially
10 you're wanting to ask him what his response is to
11 Dr. Camarota's critiques of his opinion?

12 MR. DANJUMA: Exactly, Your Honor. What
13 we -- obviously, Dr. McDonald cannot admit
14 Dr. Camarota's report into evidence. He didn't create
15 it. But he should -- he -- any expert witness should be
16 able to respond to criticism that is made of their
17 expert report. So that's all that I'm trying to ask.

18 THE COURT: All right. Reframe the
19 question.

20 MR. DANJUMA: Okay.

21 THE COURT: I was confused by the question.

22 MR. DANJUMA: Okay. Yes.

23 BY MR. DANJUMA:

24 Q. Now, you testified what your understanding of
25 Dr. Camarota's critique was at -- in that sentence of

1 his report and other portions of his report.

2 How do you respond to that critique?

3 A. Well, he and I agree that young people are
4 disproportionately on the suspense list and canceled
5 list as a reason for failing to provide documentary --
6 documentary proof of citizenship.

7 What he would have me do, though, is only
8 look at the -- the sort of intermediate stage of once
9 people are on the list, are they more or less likely to
10 get off the list. And the reason why I don't think
11 that's very informative has a lot to do with the way in
12 which the law is implemented in Kansas.

13 So in Kansas, if you are already on the
14 voter registration list, you are essentially
15 grandfathered in and you don't have to provide
16 documentary proof of citizenship. Documentary proof of
17 citizenship only applies to new registrants. And we
18 know that, yes, new registrants tend to be younger.

19 So a good analogy here is with -- comes from
20 the phrase itself grandfather clause. Back during the
21 Jim Crow era of the south, there were -- southern states
22 adopted literacy tests, but they exempted certain
23 individuals from literacy tests, those for people who
24 had been -- their grandfathers had been able to vote in
25 elections, and, thus, that's where the word grandfather

1 clause comes from.

2 If I were to look at the racial effect of a
3 literacy test with a grandfather clause, I wouldn't want
4 to look just at the -- the African-Americans and poor
5 whites and their relative ability to satisfy a literacy
6 test in the south. I'd want to consider that there are
7 a lot of African-Americans and poor whites in the south
8 that were being targeted by the law in the south. And
9 so whether or not they get -- whether or not they're
10 successful or not of passing a literacy test is not so
11 relevant as it is to understanding the affected
12 populations.

13 And so it's a very similar situation here.
14 We have a grandfather clause. We've grandfathered in
15 everyone who's currently a voter registrant on the voter
16 registration list in Kansas. And, in addition, the
17 Secretary of State's Office is clearing some individuals
18 themselves. So some people are passively being cleared.

19 And so if you are a new registrant from out
20 of state, you're not being treated the same way as other
21 people in the state of Kansas when it comes to your
22 ability to participate in -- in Kansas elections. And
23 so my report is looking at the effect of that. Who are
24 the affected people, and how are they different from the
25 overall population of people who are registered to vote

1 in Kansas.

2 And I think that's the -- the -- the most --
3 the best way to do this analysis and it's direct
4 evidence. This is individual level data of individuals
5 who are being affected by the law and their relative
6 frequency relative to the overall population.

7 Q. So is it fair to say that you and Dr. Camarota
8 agree that the disproportionate impact of the law comes
9 in part from the fact that young voters and unaffiliated
10 voters are disproportionately a part of new voter
11 registration applications?

12 A. Yes.

13 Q. Given that fact, can you still draw conclusions
14 from the social science literature about the impact of a
15 law like this on low propensity or otherwise vulnerable
16 populations of voter registration applicants?

17 A. Yes. I just previously opined about that, that
18 these are particularly vulnerable populations when
19 there's an additional burden that's placed upon them
20 widely, just generally, but more specifically we can see
21 the effect of this in the -- in the law as it's being
22 implemented in Kansas because those people who are
23 either being canceled or on the suspense list for
24 failure to provide documentary proof of citizenship tend
25 to be younger, and they also tend to be people who

1 aren't -- don't have firm partisan attachments yet,
2 which is -- makes sense that these are the people on the
3 periphery who are not fully engaged into politics. They
4 want to be. They want to get there, but they just
5 haven't gotten there yet.

6 And -- and so seeing those individuals on
7 the suspense list would seem very consistent with the
8 literature that we know that says that these costs would
9 be borne in -- disproportionately by this particular
10 vulnerable group.

11 Q. Dr. McDonald, I'd also like to ask you about a
12 sentence that Dr. Camarota writes on page 6 of his
13 report. Can I direct you to the -- the first full
14 sentence on page 6 of the report that reads, "A second
15 problem with McDonald's report." Could you read that
16 sentence to yourself and explain what you understand to
17 be Dr. Camarota's critique of your opinion?

18 A. Well, I read the reports. I don't need to really
19 review it again in that respect.

20 I mean, he -- so here, he's complaining that
21 I didn't try to estimate the number of non-citizens that
22 are on either the suspense list or the canceled list,
23 and, therefore, my analysis is incomplete because I have
24 not done that additional analysis of -- to try to
25 identify the non-citizens on the suspense list or the

1 canceled list.

2 Q. And just as a preliminary question, were you
3 asked to evaluate the number of non-citizens on the
4 suspense list?

5 A. No, I was not.

6 Q. As an expert in voter registration and voting
7 behavior, do you have any opinions about the likelihood
8 that individuals on the suspense list are non-citizens?

9 A. It's very possible that there are non-citizens on
10 the suspense list and the canceled list, without a
11 doubt. We know of handfuls of cases across the country
12 of individuals who have been discovered to be
13 non-citizens and prosecuted and, in some cases, even
14 deported.

15 So the penalties are quite high if an
16 individual who is not a citizen either registers or
17 actually votes in an election, but these are very small
18 numbers. And so from what I know from many, many
19 reports over time that there are a small number of
20 individuals who are not citizens of the United States
21 who are either registered or voting. That's one piece
22 of evidence.

23 The other piece of evidence comes from the
24 Secretary of State's Office policy of clearing
25 individuals passively by looking up their birth

1 certificate records in -- if they were a voter in
2 Kansas -- if they were born in Kansas. And the
3 Secretary's -- Bryan Caskey says that his office is
4 clearing roughly 50 percent of the individuals who
5 failed to provide documentary proof of citizenship. And
6 that's only for the individuals who were born in Kansas.

7 There are other individuals from the other
8 49 states, DC, Puerto Rico, any other location in the
9 U.S. or abroad where you are a citizen. And if they
10 move into Kansas, we would assume those individuals
11 don't get that same generosity that the Secretary of
12 State's Office is applying to people who are born in
13 Kansas.

14 And since there are a lot of people who move
15 between states, I would expect then that a large number
16 of the people on -- if not nearly all of them are not
17 non-citizens, to use a double negative unfortunately,
18 but, rather, they are people who, for whatever reason,
19 were unable to -- who are citizens and were unable to
20 provide their documentary proof of citizenship.

21 Q. Does -- do you recall whether Camarota's report
22 criticized you for failing to make comparisons between
23 Kansas and -- the voter registration rate in Kansas
24 versus neighboring states, like Oklahoma and Nebraska?

25 A. Yes. He calls this direct and indirect evidence.

1 And he claims that by looking at Kansas registration
2 rates and comparing it to either a previous point in
3 time in Kansas or comparing Kansas to another state that
4 that's -- somehow that's direct evidence of the effect
5 of documentary proof of citizenship law. I disagree
6 with that very strongly.

7 We have the direct evidence. We have the
8 individual records from the Secretary of State's Office
9 of the individuals who are being affected by this
10 policy. There's no -- I don't need to look indirectly
11 at what I would consider to be indirect evidence by
12 making comparisons across time or between states.

13 And the reason why I call that indirect
14 evidence is because in order to make a valid comparison
15 of that nature, I have to assume that the only thing
16 that has changed, say, from the 2010 election to the
17 2014 election in Kansas, is the documentary proof of
18 citizenship law. That is just not true. There are
19 other election effects that are going on.

20 The 2010 gubernatorial and senate elections
21 weren't particularly competitive. The senate and
22 gubernatorial elections in 2014 were particularly
23 competitive. I've published in peer reviewed articles
24 about the effect of competition on turnout. I know that
25 when elections are competitive, turnout goes up. And so

1 we would have expected more registration activity, more
2 turnout in a 2014 election compared to 2010, and that's
3 just one of the factors.

4 I mean, we're looking at the nature of the
5 competition, how much money are the campaigns spending,
6 how much media attention is being paid to the campaigns,
7 how much are third-party organizations coming in and
8 doing voter mobilization drives, how much -- what
9 changes -- other changes besides the documentary proof
10 of citizenship are being made by election officials
11 within the state of Kansas.

12 We have to hold all of these things constant
13 just to do the comparison within Kansas from one
14 election to the next. We also have to do -- make all
15 these assumptions that Nebraska, for example, is the
16 same as Kansas except for the documentary proof of
17 citizenship law. And, again, all the election effects,
18 all of the media effects, all of the money effects, all
19 of the election -- ways in which elections are
20 administered differently, we have to assume that those
21 things are held constant and the only change that you're
22 making is the documentary proof of citizenship. And,
23 again, that's just strange credibility that that is
24 somehow direct evidence. That is very indirect
25 evidence.

1 We only have one data point in time here,
2 the 2014 election, to make inferences from if we were
3 going to do the sort of analysis that Dr. Camarota would
4 like to do. That is just insufficient. You need a
5 larger number of observations and you need to look
6 across more elections. You need to have other states
7 perhaps that have adopted laws so we can actually start
8 to tease out in looking at this aggregate indirect data,
9 that evidence that might provide some evidence of the
10 effect of the law on -- on voters.

11 But we don't need to do that. We've got the
12 individual level data. We can see the -- directly the
13 individuals who are being affected by this law. So
14 there was -- from my perspective, there was no reason to
15 ever go do this analysis, which was fraught with many
16 assumptions to it, when we actually had the individual
17 level data that is -- are the direct people who are
18 being affected by the law.

19 Q. In reviewing Dr. Camarota's report, did you
20 also -- did you note whether Dr. Camarota incorporated
21 any survey data into his analysis?

22 A. Yes, he did. And that yet raises another level
23 of uncertainty because now you have to assume that the
24 survey itself has been administered in the same way
25 across states and across time.

1 We're very familiar with random sampling
2 error. It's the margin of error of polls. Right away
3 we have these differences where there's, just by pure
4 random chance that the -- the population that you're
5 sampling from, you're going to get an imprecise estimate
6 of the true population valued because of sampling. So
7 right away, you've added -- on top of all the other
8 uncertainties that I've been talking about, you now have
9 additional uncertainties with the survey.

10 Now, the survey that Dr. Camarota uses is a
11 survey that's conducted by the Census Bureau called the
12 Current Population Survey. Its primary purpose is to
13 construct a monthly unemployment rate that we have in
14 the country. And in November of an election year, they
15 ask a small battery of questions on voting and
16 registration. It's a -- it's a supplemental. And I
17 have been working with the Current Population Survey for
18 quite a while. They do some very odd things in survey
19 methodology and the way in which they present their
20 data.

21 To their credit, they have made changes
22 based on some of my criticisms. For example, they used
23 to report voting age population turnout rates. Now they
24 report citizen voting age population turnout rates. But
25 that's not the only issues that I have with the Current

1 Population Survey.

2 And without going into all of the technical
3 details that are involved with this, I just don't have a
4 lot of confidence that -- in the Current Population
5 Survey as a -- a source of data that would tease out
6 these effects.

7 Again, this is the most indirect data that
8 you could have. It's survey data, on top of all the
9 variations that we have of surveys. And then we have
10 the variations of elections and how they are
11 administered and what the campaigns are doing. We
12 somehow have to tease out this effect of this law from
13 all of this very noisy data, when we don't really need
14 to do that. We've got the individual level data.

15 Q. And so do you see a difference in the value of
16 the Kansas registration data you examined versus the
17 survey data that Dr. Camarota relies upon?

18 A. Yeah. The individual level data is the gold
19 standard here of the data that we could look at. It
20 is -- these are the individuals who are being affected.
21 We don't have to infer and make a lot of inferences and
22 assumptions about this other sorts of data to try and
23 tease out what the effect may be. We can look at the --
24 directly at the individuals.

25 Q. And do you believe that Dr. Camarota's estimates

1 regarding the Current Population Survey are reliable
2 evidence?

3 A. I do not.

4 MR. DANJUMA: Okay. No further questions at
5 this time.

6 THE COURT: Mr. Johnson.

7 MR. JOHNSON: I have no questions. Thank
8 you.

9 THE COURT: All right. Ms. Becker or
10 Mr. Kobach?

11 CROSS EXAMINATION

12 BY MR. KOBACH:

13 Q. Hi, Mr. McDonald. Good to see you again. I'll
14 just go straight to some of the points you made in your
15 testimony. You said that you at one time consulted with
16 the Election Assistance Commission, or EAC, regarding
17 some voting research; is that correct?

18 A. That is correct.

19 Q. You haven't done any work with the EAC since
20 2015, have you?

21 A. That's correct.

22 Q. The EAC has stopped using you for voting
23 research; is that correct?

24 A. They have invited me to talk to the EAC, so I --
25 I have participated with the EAC. But that particular

1 survey was moved to other consulting organizations.
2 And, quite frankly, I didn't want to be involved in it
3 anymore because the data were so shoddy that we were
4 getting from states that it was mainly a waste of my
5 time to try to rectify the data that was found in the
6 EAC reports. So I had no interest in working with the
7 EAC after the 2006 report.

8 One of the other organizations that I worked
9 with, which is the Federal Voting Assistance Program, I
10 did an analysis of the -- what's known as the UOCAVA
11 data, the Uniformed and Overseas Civilian data for them
12 to see -- to look at the reliability of the Election
13 Administration Survey from the EAC. And, unfortunately,
14 we found it severely wanting in terms of its accuracy.

15 And so, again, I just -- part of it was a
16 parting of ways because the EAC had moved to another
17 organization. I'd actually talked to the Research
18 Triangle Institute, which had taken over in 2008, if I
19 recalled, about participating, but I declined to do so
20 because I just wasn't interested in working with the --
21 the EAC further on that particular report.

22 Q. Are you aware of the reasons the EAC wasn't
23 interested in working with you any longer?

24 A. I am unaware, but I -- I continued to have good
25 relations with their -- their staff. And so, again,

1 they invited me to talk at their -- their meetings.

2 Q. Are you aware of any problems they had or
3 disagreements they had with you over your work?

4 A. No, I -- no, I'm not.

5 Q. You were asked earlier about your academic
6 publishing. Have you ever published any articles on the
7 subject of non-citizens registering to vote?

8 A. I have not.

9 Q. Have you ever done any primary research on
10 non-citizens registering to vote?

11 A. I have not.

12 Q. Has a court ever found your expert testimony to
13 be incomplete or unconvincing?

14 A. Yes, it has.

15 Q. I'm going to show you a public record to --

16 MR. KOBACH: Your Honor, may the court take
17 judicial notice of a court case? I'm just trying to
18 think how we can do this.

19 THE COURT: Yes.

20 MR. KOBACH: I'd ask the court to take
21 judicial notice of *Backus versus South Carolina* in the
22 District of South Carolina, 857 F.Supp.2d 553.

23 THE COURT: F.Supp.2d --

24 MR. KOBACH: 553.

25 THE COURT: So noted.

1 MR. KOBACH: And this is in the Defendant's
2 exhibit list as Defendant's Exhibit 898.

3 THE COURT: Exhibit 898?

4 MR. KOBACH: 898.

5 BY MR. KOBACH:

6 Q. Mr. McDonald, could you -- I'm going to walk over
7 here. Could you take a look at page -- using the
8 numbers on the bottom of the page, page 9. Pull it up
9 here.

10 THE COURT: Are you admitting -- are you
11 seeking to admit 898? Judicially noticing it is not the
12 same thing as admitting it into the record. But if
13 you're going to ask him about specifics, I think we
14 ought to admit it in the record. Is there any
15 objection?

16 MR. KOBACH: Your Honor, I would move the
17 admission of this case into the record.

18 MR. DANJUMA: Your Honor, we don't think
19 this is evidence. We don't have any problem with --
20 with the Secretary asking Dr. McDonald about this, the
21 case, just as I asked him about Dr. Camarota's report.
22 But I'm not sure why we need to get it into evidence.
23 He just asked him about the case.

24 THE COURT: All right. All right. For now,
25 it's judicially noticed. It is Exhibit 898. At least

1 we have it in the record for appellate purposes. Go
2 ahead and ask him about it.

3 BY MR. KOBACH:

4 Q. Mr. McDonald, do you see the portion that's
5 highlighted on the Elmo screen? If you're looking at
6 your unhighlighted copy, it's beginning of the -- or
7 middle of the last paragraph, "The court is of the
8 opinion that Dr. McDonald relied on incomplete
9 information." Do you see that?

10 A. Yes, I do.

11 Q. Do you see where it continues, "Relied on
12 incomplete information when reaching his determination
13 that traditional race neutral principles were
14 subordinated. He neglected to consider important
15 sources of information in reaching his conclusion. More
16 problematic, however, is that he failed to consider all
17 the traditional race neutral principles that guide
18 redistricting in South Carolina."

19 Do you see that?

20 A. Yes, I do.

21 Q. And then I want to go to the next page, page --
22 well, sorry. Then on the top of the first full
23 paragraph in the second column. "Particularly troubling
24 is his admission that he failed to consider the
25 guidelines and criteria that the general assembly

1 devised for the redistricting process, which, as we
2 explained, contained guiding race neutral principles."

3 Do you see that?

4 A. Yes.

5 Q. And then, finally, on the -- page 10, at the end
6 of the first full paragraph. "By so narrowly limiting
7 the source of information that he examined and failed --
8 and failing to consider all the traditional race neutral
9 principles that guide redistricting in South Carolina,
10 Dr. McDonald was unable to provide the court a reliable
11 opinion that the general assembly subordinated
12 traditional race neutral principles to race."

13 Do you see that?

14 A. Yes, I do.

15 Q. Is the court correct in stating that you did not
16 consider the principles or the factors that the court
17 says you did not consider?

18 A. Yes, it was. It was impossible for me to -- to
19 evaluate all of the race neutral principles that the
20 legislature had considered.

21 Q. So it's your belief that the court criticized you
22 for doing -- for not doing the impossible?

23 A. Correct.

24 Q. Are you familiar with the case of *Backus versus*
25 *South Carolina*? I'm sorry, we just did that one.

1 Are you familiar with the case of Page -- in
2 fact, I know you're familiar with that because you just
3 talked about it in your -- we're going to talk about it
4 again, *Page versus Virginia State Board of Elections*?

5 A. Yes, I am. That's the case that we won on a
6 majority decision and overturned the congressional
7 districts in Virginia as a racial gerrymander.

8 MR. KOBACH: With this case as well, Your
9 Honor, I'm just going to ask the court take judicial
10 notice of the *Page versus Virginia State Board of*
11 *Elections*. I have the Westlaw cite as 2015 WL 3604029,
12 and it's Defense Exhibit 899.

13 THE COURT: Exhibit 899 judicially noticed.

14 MR. KOBACH: I apologize, I didn't bring up
15 extra copies. Oh, we did -- I did.

16 BY MR. KOBACH:

17 Q. Now, here, Mr. McDonald, I direct you to page 16,
18 and this is in the portion of the dissent, and the
19 dissenting judge there -- do you see I'm looking at the
20 first full paragraph right before the subsection B. Do
21 you have it?

22 A. I'm on the wrong page. What page is this again?

23 Q. Page 16.

24 A. 16. Sorry. Yes, I'm there. Yes.

25 Q. Okay. Do you see where it says, "Having

1 previously taken the view in a scholarly publication
2 that the 2012 redistricting was driven by the desire to
3 protect incumbents, it lies not in the mouth of McDonald
4 now to say that race, not protection of incumbents, was
5 the predominant reason for the 2012 redistricting. I
6 simply cannot countenance as a finder of fact such a
7 180-degree reversal on a key issue. I conclude that
8 McDonald's views, in whole and in constituent parts, are
9 not entitled to any credibility."

10 Do you see that?

11 A. Yes, I do.

12 Q. Was there a reversal on a key -- key issue
13 between your prior writings and your testimony in this
14 case?

15 A. No, there was not.

16 Q. Why is that? Or can you explain how the judge
17 came to that conclusion that -- and gave --

18 A. So I analyzed the redistricting competition that
19 we had held in Virginia with that reform group that was
20 supported by a -- predominantly Republican backers in
21 the state of Virginia. And we had analyzed the
22 different plans that had been produced by that
23 redistricting plan. I wrote a 54-page or so law review
24 article analyzing the effects of that, the different
25 types of plans that were generated and the differences

1 between those -- those plans. There were one or two
2 sentences in that entire 54-page manuscript where I had
3 said that incumbency was primarily involved with the
4 redistricting in the state of Virginia. That guided it.

5 I had not done an analysis of incumbency at
6 that point, and I made that clear to the court because
7 this is an issue that came up in that court. The *Backus*
8 issue that you just referenced as well came up because
9 good lawyers are going to look back and find any
10 evidence of -- that you can impeach a witness with.

11 So that issue had come up as well. And the
12 thing was is that I didn't -- I didn't even know where
13 the incumbents lived, so I couldn't do an incumbency
14 analysis. What I was trying to do was characterize what
15 the media had said about the -- the redistricting plan.
16 And it was one small portion of the entire 54-page
17 article.

18 What I was asked to do in that case was a
19 different task entirely, which was to evaluate whether
20 or not Virginia had conducted a constitutionally
21 impermissible racial gerrymander. I had not reviewed,
22 at the stage of where I had written the law review
23 article, any analysis of the racial effects and whether
24 or not the plan was constitutionally firm due to racial
25 issues.

1 And so as -- as I learned more about the
2 evidence and I did the analysis, I was -- I came to a
3 conclusion that race had predominated in that case. It
4 was not inconsistent with the prior analysis because I
5 simply hadn't done the analysis. I hadn't done an
6 analysis of where the incumbents lived in Virginia. And
7 I hadn't done a racial analysis in that law review. We
8 were just, again, comparing the different plans that
9 were produced on characteristics like compactness and
10 respect for local political boundaries and other things
11 of that nature. We weren't looking at these
12 constitutional questions that came up in the *Page* case.

13 And so I disagreed with Judge Payne's
14 opinion. The majority also found my testimony credible.
15 This -- both of these cases also arose in the *Vesilind*
16 case, which the state Supreme Court of Virginia just
17 heard last week. And in that case, the district court
18 judge, faced again with this same evidence, had found
19 that my testimony was credible. He said that the new
20 methodology that withstood a *Daubert*-like challenge
21 within Virginia, he found it very persuasive, but he had
22 to rule in favor of the legislature because the
23 legislature's given wide deference over their decisions
24 on redistricting.

25 The state Supreme Court has agreed to hear

1 that appeal last week. We'll see what happens with that
2 particular case, but I'm hopeful that we will also get
3 new state legislative districts in Virginia as a
4 consequence of that.

5 So there have been two cases where this
6 issue has come up -- well, two cases where *Backus* has
7 come up, one where the *Page* dissent has come up. And so
8 far, the majority in *Page* and the district court judge
9 in the *Vesilind* case have both discounted these findings
10 by the courts.

11 Q. Are you familiar with Twitter?

12 A. Yes, I am.

13 Q. Do you have a Twitter handle?

14 A. Yes, I do.

15 Q. Can you confirm that it is @electproject?

16 A. That is correct.

17 Q. Are you aware that tweets or Twitter, small
18 publications as it were, are publicly available?

19 A. Yes, I am.

20 Q. Do you have any personal bias against me?

21 A. No, I don't. I -- we had a very nice
22 conversation during the deposition. I -- I would
23 imagine we could actually find some common agreement on
24 some things. But do I disagree with you on some
25 policies? Absolutely. Particularly like with the Trump

1 Voter Integrity Commission.

2 Q. Well, I thought we had a pleasant discussion too,
3 but then I read some tweets.

4 On September 12th, 2017, did you tweet,
5 "Threat on lack of integrity of Kris Kobach making him
6 unfit to chair Voter Integrity Commission"?

7 A. I don't recall that particular tweet.

8 Q. Just to refresh your recollection, if you --
9 you'll see that they're arranged by date and in reverse
10 date order. So if you go to --

11 A. Oh, yeah.

12 Q. -- September 12th, 2017. Do you see it now?

13 A. Can you point to which page number it's on?

14 Q. No, I can't. I think if you just keep going down
15 through the dates to September 12th, you should find it.

16 A. I just passed September 12th and I didn't it.
17 So which year is it?

18 Q. 2017.

19 A. 2017.

20 Q. The top of my page again says page 11 of 12.

21 A. What was it again?

22 Yeah. Okay. All right. So which -- I'm
23 on --

24 Q. The one that says --

25 A. -- some -- I'm on one that says September 24th,

1 but it's not --

2 Q. Here, I'll show you mine that's highlighted, then
3 maybe you can -- just to refresh your memory. Look --

4 A. It's on the 12th. Oh, I just seem -- I seem just
5 to be missing these pages because -- I can't find that.

6 Q. Here. You want to hold --

7 A. I'm not trying to stonewall you on this.

8 Q. You can hold mine if you want.

9 A. Sorry. I apologize for that.

10 Q. Do you see that there, the yellow highlighted
11 one?

12 A. Yes.

13 Q. And it says, "Threat on lack of integrity of Kris
14 Kobach making him unfit to chair Voter Integrity
15 Commission."

16 Did you tweet that?

17 A. Yes, I did.

18 Q. On November 10th, 2017, did you tweet, "Kobach
19 hired a child pornographer to work for Trump's Voter
20 Fraud Commission, so should we really be all that
21 surprised by who he hangs around with"?

22 A. Yes, I did.

23 Q. On January 11th, did you tweet -- and I apologize
24 to the court for the profanity in this next one -- "A
25 staffer in Pence's office was quoted as saying 'working

1 with Kobach was a S-H-I-T sandwich.' Maybe that quote
2 wasn't from a staffer."

3 Did you tweet that one?

4 A. Yes, I did.

5 Q. On January 5th, 2018, did you tweet, "And don't
6 forget VP Pence's office opinion, working with Kobach
7 was a S-H-I-T sandwich"?

8 A. Yes. I see that one, yes.

9 Q. And on the same date, January 5th, 2018, did you
10 tweet, "The *Kansas City Star* is blistering in their
11 opinion of Kobach"?

12 A. Which date is -- yes, I see that one. Yes.

13 Q. So do you still maintain that you do not have any
14 personal bias against me?

15 A. Not against you personally, no.

16 Q. Do you have a bias against me in my capacity as
17 Secretary of State?

18 A. No, I do not.

19 Q. Do you have a bias against the -- the actions of
20 the Kansas Secretary of State?

21 A. No, I do not.

22 Q. These are just friendly tweets?

23 A. They're tough, but they're tweets.

24 Q. Did you work on a political party's campaign in
25 2004?

1 A. In 2004? Yes, I did.

2 Q. For whom?

3 A. I believe at that point in time, I was working
4 for -- I was actually an elected official in the Fairfax
5 County Democratic Committee, and I was head of -- in
6 charge of voter registration.

7 Q. So --

8 A. I wasn't working for a campaign. I was working
9 for a --

10 Q. For the party?

11 A. For the party, yeah.

12 Q. So did you -- did the Fairfax Virginia Democratic
13 party pay you, or was it a volunteer position?

14 A. No. This was an elected position, unpaid elected
15 position.

16 Q. When you say "elected," do you mean elected by
17 the party --

18 A. Yeah.

19 Q. -- people in the party?

20 A. There was a vote, and I was elected, yes.

21 Q. But did you work for a political party's campaign
22 in the 1998 election?

23 A. 1998? Yes, I did.

24 Q. For whom?

25 A. This would be state legislative campaigns in

1 California for the -- that are Democratic.

2 Q. Did you work for the California Democratic party
3 in 1998?

4 A. Yes.

5 Q. And what did you do for the California Democratic
6 party?

7 A. Can you say that again? I missed the first part.

8 Q. What did you do for the California Democratic
9 party in 1998 in your work for them?

10 A. Yeah. I devised one of the first microtargeting
11 programs in the country. So these are -- using the
12 voter registration files to identify individuals that
13 you want to target for your campaign for voter contacts,
14 persuasion, and voter mobilization.

15 Q. Were you paid by the California Democratic party
16 for that work?

17 A. Yes, I was.

18 Q. Did you -- and I think you just mentioned you
19 worked also for some California political campaigns.
20 Was it in '98 or '96?

21 A. Yes. I worked for two legislative campaigns in
22 1996.

23 Q. And do you recall the candidates for whom you
24 worked?

25 A. Yes. They were two state legislative candidates;

1 Susan Davis, who later became a member of Congress, and
2 Howard Wayne. I never knew whatever happened to him.
3 But they were both Democrats as well.

4 Q. Were you paid by those Democrat campaigns?

5 A. Yes, I was.

6 Q. What year was the NVRA passed, the National Voter
7 Registration Act?

8 A. 1993.

9 Q. And when was it implemented by the states?

10 A. Well, it --

11 Q. Roughly speaking?

12 A. Boy, that's a loaded question.

13 Q. It was -- well, what range --

14 A. -- because I've actually sued --

15 Q. What was --

16 THE COURT: Wait, wait, wait. Don't talk
17 over each other, please. She can only take down one
18 voice at a time.

19 THE WITNESS: That's a loaded question
20 because I was involved in a lawsuit in Massachusetts to
21 -- that alleged that the state had not actually
22 implemented NVRA as -- I believe that was 2013 or 2012
23 when that lawsuit was filed. And Massachusetts
24 capitulated in that suit and agreed that they had not
25 actually been implementing NVRA.

1 So there's some debate as to whether or not
2 states are actually fully compliant, particularly with
3 providing assistance, registration at public assistance
4 offices.

5 BY MR. KOBACH:

6 Q. Well, let me rephrase it. Would you agree that
7 between 1994 and 1996, most states complied with the
8 central provision, which was allowing registration to
9 vote at DMVs?

10 A. Yes. I just want to be a little cautious in
11 answering it because I may be involved in litigation in
12 the future about other NVRA...

13 Q. Okay. Well, let me just get to the point. What
14 effect did the motor-voter provisions of the NVRA have
15 nationally on participation rates of registered voters?

16 A. It's been a while since I reviewed that
17 literature so -- but there was -- there were some people
18 who looked at this. There were some states that had
19 actually implemented NVRA-like procedures before 1993.
20 And so there's some variation here about the effect of
21 NVRA on turnout, which is the primary thing that people
22 are interested in in the sort of scholarly literature.
23 A modest effect. May -- either negligible, zero, to a
24 slight 1 or 2 percentage point increase in voter
25 participation.

1 Q. Didn't, in many states, voter participation rates
2 as a percentage of registered voters drop significantly
3 after the NVRA?

4 A. Right. Well, that goes back to this issue about
5 how you have to control for all the different campaign
6 effects. And so the 1996 presidential election was one
7 of the least competitive presidential elections in
8 modern history. We generally knew that Clinton was
9 going to win reelection. The preelection polling
10 pointed in that direction. And so it was no surprise
11 that, unfortunately, the man who is named -- this
12 building is named after was soundly defeated. And when
13 there's a lack of competition, you generally see turnout
14 decline.

15 So I wouldn't -- the studies that I was
16 talking about are doing -- making like comparisons
17 between the states as they were implementing NVRA-like
18 provisions. And you could see that there was a slight
19 -- slightly higher turnout in the states that had NVRA
20 provisions versus states that didn't.

21 Q. And when you say "turnout," are you talking about
22 turnout of eligible population or turnout of registered
23 voters?

24 A. That's a great question. It -- those studies, as
25 I recall, were usually only looking at voting age

1 population. So that's -- could be a valid critique of
2 those studies as well.

3 Q. What I'm getting at is something that I think
4 we'll agree on. And that is, if you look just at the
5 percentage of registered population that turns out, do
6 you -- would you agree it's fair to say that after the
7 NVRA was implemented, most states saw a sustained
8 decrease because a smaller percentage of the registered
9 population were turning out?

10 A. Right. This is one plausible explanation of NVRA
11 is that NVRA increased the voter registration rolls but
12 didn't actually motivate those individuals to vote. And
13 so a plausible scenario as to why registration rates
14 were -- declining turnout rates based on registration is
15 that the voter registration rolls had been inflating as
16 a consequence of NVRA and the provisions, as you well
17 know, regarding the purging or cancellation of voter
18 registrations and all of the activity that must happen
19 around that.

20 Q. Would you agree that it's plausible that many
21 people who registered at the DMV when asked were trying
22 to be polite to the person who offered them the
23 opportunity but had no intention of voting?

24 A. It's possible. The -- more recently, we had
25 Oregon adopt this automatic voter registration. And,

1 again, Oregon's a complicated state because they do all
2 mail balloting, but they claim that roughly about
3 70,000 -- I've seen the studies that claim roughly
4 70,000 people were -- voted in addition to what would
5 have otherwise occurred if they hadn't been registered
6 to vote.

7 So, yeah -- yes, there are some people who
8 are not going to vote. There's other evidence to
9 suggest like with Oregon's experience with automatic
10 voter registration and the studies with NVRA
11 implementation that it -- there are -- among the people
12 who are registering to vote, there are some who don't
13 vote, but there are also some people who do vote.

14 Q. You offer several conclusions in your expert
15 report and in your testimony about the Kansas proof of
16 citizenship law and its effect on voter registration,
17 don't you?

18 A. Yes, I do.

19 Q. And you also -- well, in my next question I'm
20 going to use the term rate of registration, which -- and
21 by that I mean the registered population compared to the
22 total population. Is that a term you would use?

23 A. Can you say that again just so I make sure I
24 understand what you're doing?

25 Q. Maybe you can give me a better term. But the

1 rate of registration or the registration rate, the rate
2 of registration compared to the total eligible
3 population?

4 A. Okay. Yes.

5 Q. Now, in reaching your conclusions in your report,
6 you didn't make any effort to compare the registration
7 rate before the law went into effect to the registration
8 rate after the law went into effect, did you?

9 A. No, I did not.

10 Q. Why not?

11 A. As I was mentioning in direct, I thought that the
12 best, most direct evidence that we would have would be
13 the individual records -- individual records that your
14 office had provided to me in that protective order, that
15 confidential data that identified the individuals who
16 had failed to provide documentary proof of citizenship
17 and their registration source.

18 Q. But if as you suggest that the -- the proof of
19 citizenship law had a depressant effect on registration
20 of certain sections of the population, wouldn't we
21 expect to see a decrease in the rate of registration
22 after the law goes into effect?

23 A. As I explained before, not necessarily because
24 the assumption that we have to make in the sort of
25 analysis that you're saying is I have to say that the

1 only change that occurred was the documentary proof of
2 citizenship law. And that's a very dicey thing to do in
3 these sorts of studies.

4 The studies that I referenced earlier,
5 researchers were looking at a number of states over a
6 period of elections to try to tease out the effect of
7 motor-voter so that they -- they could try to control
8 for these other confounds that might be occurring with
9 the competitiveness of the campaigns, the way in which
10 elections are administered beyond NVRA, or the
11 documentary proof of citizenship in this case, et
12 cetera.

13 So with only one election to make a
14 comparison of, there's just not enough information there
15 yet to make a solid judgment. And so what I would want
16 to do is I would want to look over time. I'd want to
17 see what was happening in Kansas and -- and -- and other
18 states, if other states adopted similar laws and enacted
19 them. That would -- that would give me a way to do this
20 aggregate analysis.

21 But, again, I didn't need to do this because
22 we have the individual records and we can see the
23 individuals who are being affected by the law itself.

24 Q. But when you're looking at the individual
25 records, you're making all kinds of assumptions, aren't

1 you, about why the person didn't -- didn't complete his
2 registration, aren't you?

3 Isn't it true that you're assuming the
4 person couldn't and you are neglecting -- or you're
5 discounting the possibility that he moved out of the
6 state or simply didn't want to because he was being
7 polite to the person at the DMV and didn't really have
8 an interest in voting?

9 A. Yes, there could be other plausible explanations
10 as to why someone did not seek to complete their
11 documentary proof of citizenship.

12 Q. Could it be that the person was a non-citizen?

13 A. Yes, it is. I conceded that earlier.

14 Q. Now, in criticizing Camarota's rebuttal report in
15 the direct testimony you gave, you say that you can't
16 compare the rates in three states, you know, in the 2010
17 election compared to the 2015 election, Kansas being one
18 of those states, and draw any conclusions about the
19 effect of the law; right?

20 A. (Witness nods head.)

21 Q. Are you familiar with the Government
22 Accountability Office?

23 A. Yes, I am.

24 Q. Are you familiar with their report that they did
25 in 2015, I believe, on the effect of photo ID laws on

1 participation rates?

2 A. Yes, I am. They used my data for that report.

3 Q. Isn't that exactly what the GAO did? They
4 compared participation rates in a handful of states
5 before the laws went into effect and after the laws went
6 into effect, the same thing you just said you cannot do?

7 A. Well, first of all, they did more than one
8 pairing. So that's one important thing of distinction.

9 But I -- I think that report's interesting
10 and some evidence of the effect of a voter
11 identification law. I would still want more data
12 because we've only done a limited number of pairings.
13 And so I find that report interesting, but otherwise
14 than that, I would like to have more data from an
15 aggregate data perspective. Whenever you do these sort
16 of aggregate data analyses, I would want more data
17 besides just making one or two comparisons of one state
18 versus other states. We need more data.

19 Q. But -- so can we draw --

20 A. Yeah, but it's -- what you're talking about is
21 the case study method of doing research. And it is a
22 valid method. But, again, you have to -- you have to
23 make the assumption that the only change that you're
24 observing -- the only thing that's different between the
25 two states is the -- whatever it is that you want to

1 study. And that's a dicey proposition in most cases.

2 And so -- but if you can establish that,
3 then that gives you some credibility that the analysis
4 is -- is not contaminated as much. But, again, we -- we
5 only have one election to go with here, and so I -- I
6 would want a lot more information before I would do an
7 aggregate analysis.

8 Q. Isn't -- isn't that exactly what the GAO did,
9 they took one election, they looked at the election
10 before the change of the photo ID and the elections
11 after, just like the Camarota study looks at the
12 election before proof of citizenship and the election
13 after?

14 A. Again, that's a -- and you -- and they looked at
15 more than one state as well so -- as I recall the
16 report, so --

17 Q. Six states, wasn't that right?

18 A. As I recall the report. So, again, having more
19 states looking across time gives us a little bit more
20 confidence on the effect of a law. Also, as I recall --
21 because I'm -- it's -- my memory's hazy on this
22 particular report, so I'm trying to respond to you as
23 best as I can -- they had done some matching of trying
24 to look at comparable states as well. And I -- again, I
25 can't recall the complete methodology that they used for

1 their report. But, again, these are the sort of
2 techniques that you would do in order to try to tease
3 out the effect of an aggregate effect like this.

4 Q. So is it fair to say, if I summarize what you've
5 just said, that the -- you see some limitations in the
6 state-by-state comparison method that the GAO used, but
7 there are still some conclusions that you can draw from
8 it?

9 A. They're suggestive is what I would say. And,
10 again, in -- the best analysis you could do was -- would
11 be to look at the individual level data. The GAO can't
12 get that individual level data from the states, as you
13 well know the difficulties of the federal government to
14 obtain voter registration data of that character. And I
15 encountered it myself in doing work with the Federal
16 Voting Assistance Program. And actually -- well, no.

17 So the GAO had some data. They were tasked
18 to do -- usually what the GAO is tasked to do is an
19 analysis by Congress. I imagine that's what happened
20 here. And they did the best report that they could
21 given the data that they had available to them. Would
22 there be better data sources that could be available
23 like the individual level data? Absolutely.

24 Q. Would you make the same assessment then of the
25 similar methodology -- methodology used by Camarota,

1 that it's suggestive, as you've put it?

2 A. Well, I'm not convinced by having only one data
3 point and the assumptions that are behind his report in
4 my comparing 2010 to 2014, which is what you were
5 opening with earlier, saying that registration goes up.
6 Well, there are lots of other -- lots of other effects
7 that are going on that would explain why registration or
8 turnout was going up between 2010 and 2014.

9 So in those aspects of his report, I -- I
10 have serious reservations about it and -- on top of the
11 reservations that I had about using the current
12 population survey to do his analysis.

13 Q. So there are lots of other effects, as you just
14 said. Aren't there lots of other reasons a person might
15 not complete his registration, looking at the individual
16 data, as you have done?

17 A. I answered that previously, and the answer was
18 yes.

19 Q. Did you look at the number and composition of
20 registered voters nationally before and after the Kansas
21 proof of citizenship went into effect?

22 A. I did not have that, no.

23 Q. Would that inquiry have been useful to see if
24 Kansas participation rates or registration rates
25 changed, either better or worse than the national change

1 in participation rates and registration rates?

2 A. Right. So registration is a really messy number,
3 as you probably well know. So it's -- different states
4 have different practices. And in some states, it's
5 really the localities who are responsible for managing
6 voter registrations. So different localities have
7 different practices about how they manage their voter
8 registration files, the timing of the cancellations or
9 the purgings that they are doing, the activity that's
10 happening with -- like different practices, like we just
11 discussed Oregon with their automatic voter
12 registration. And other states are coming on-line with
13 that innovation.

14 So you could do an analysis. I mean, it's
15 always possible to do an analysis. I just don't think
16 that such an analysis would be particularly informative
17 just because there's just such wide variation between
18 the states and how they administer voter registration
19 and how the -- the -- the political environment, the --
20 and now we have to start thinking about other factors
21 like demography and other things that we know are
22 associated with participation that will vary across the
23 states as well.

24 So I -- I don't -- didn't think to do that
25 sort of analysis because I had the individual level

1 data, and so I could look directly at the individual
2 level data rather than doing some aggregate analysis
3 that would compare states.

4 Q. But if you did the aggregate analysis, you could
5 corroborate or contradict, or at least you could see if
6 the two analyses point in the same direction, could you
7 not?

8 A. You can always -- that's true. You could do an
9 analysis and you could see if it corroborates the -- the
10 individual level analysis. But, again, I just don't
11 think it would be -- whatever noisy signal it would give
12 you wouldn't be very informative whatsoever. It might
13 corroborate something, but it may not. And it's just
14 sort of a crapshoot as to whether or not a study like
15 that would corroborate or would not corroborate the
16 individual level data that I was able to look at.

17 Q. Would you agree that national registration rates
18 went down from 2014 to -- sorry, from 2010 to 2014,
19 looking at the October, which is, of course, where you
20 sort of measure registration?

21 A. I haven't looked at that. Are you referencing
22 the Current Population Survey to do that or --

23 Q. Yeah.

24 A. -- national aggregate?

25 Well, you're -- I don't want to go into the

1 nerdy parts of the Current Population Survey. But there
2 are some flaws with the way in which the Current
3 Population Survey is implemented. And what the Census
4 Bureau does is that they -- they identify anyone who was
5 never administered that supplement questionnaire I just
6 described earlier, this voting registration supplement.
7 So if you -- if the interviewer never asked you the
8 questions, if you refused to respond to the question, or
9 if you didn't know the answer to the question, the
10 Census Bureau has a very unusual practice that's not
11 consistent with what much of survey methodologists do,
12 or public opinion firms do, which is they code all of
13 those people as did not vote and did not register.

14 What's been happening over time is that the
15 percentage of people who have this missing data are
16 increasing. And this is the sort of discussions I'm
17 having with the Current Population Survey, the people
18 who run that survey and analyze it, as to why that's
19 happening and what adjustments we might be able to make
20 to the aggregate statistics that are being put out by
21 the Current Population Survey.

22 And so I don't know Kansas versus the other
23 states. This is -- there's randomness that's going on
24 with the administration of it. But nationally
25 there's -- that decline that you're seeing is at least

1 in part an artifact of the fact that there's more
2 missing data over time in the Current Population Survey
3 and the unusual way in which the Current Population
4 Survey treats the missing data.

5 So I -- if you're looking at the Current
6 Population Survey and you're telling me that the
7 registration rates went down or turnout went down,
8 according to CPS, from one election to the next, I would
9 need to look at the missing data, and I would want to
10 look at some other -- there's -- other researchers have
11 proposed some solutions, reweighting schemes to the CPS
12 to deal with this particular problem. I might want to
13 look at those and -- and apply them and see what the
14 data would tell me about the Current Population Survey.

15 An it's for these reasons that I really
16 wouldn't use the Current Population Survey for this --
17 this sort of analysis because it just has some of these
18 really deep methodological issues that would make it
19 suspect, especially if you're trying to tease out the
20 effect from one state.

21 Q. So let me interrupt. So you're saying the
22 Current Population Survey doesn't give an accurate
23 estimate of the state -- of any state's population?

24 A. The population -- they weight the Current
25 Population Survey to the Census Bureau population

1 estimates. So it gives -- by definition of what the
2 population estimates are, it provides an accurate
3 snapshot of the population. What it doesn't do is
4 provide an accurate read on the voter registration or
5 the turnout within a state.

6 Q. But if we have the voter registration from the
7 state itself, then we have the accurate number for voter
8 registration, and we have a pretty good number for the
9 population. Would you agree?

10 A. Well, you were raising this issue earlier, right?
11 Because we have people who move outside the state. And
12 they persist on the voter registration rolls because of
13 this deadwood issue and NVRA compliance.

14 And so when I talk to people about this
15 issue, I tell them we don't know the number of people
16 who are registered to vote in the United States, as
17 crazy as that sounds, because we don't have a good
18 measure of the number of people who are registered.
19 There are different data sources that we have, but they
20 don't tell us a true picture of that one absolute number
21 that we would like to have.

22 Q. So if we don't know the number of people
23 registered, we don't have a good grasp on the number of
24 people who live in a state, and there are all these
25 vagaries about the registration numbers that we do have

1 because some people may have moved away, some people may
2 have died, some people may be registered in three
3 states, whatever, would you agree that you can't draw
4 any firm conclusions then about effect on -- of anything
5 on registration since the foundation numbers are so --
6 are so bad?

7 A. Well, again, this is for these aggregate
8 analyses, and so I would just caution about the
9 usefulness of those. You would want more data. You
10 would want to be able to not just look at a
11 cross-section but across time. These are the sorts of
12 techniques that we would do to try and tease out these
13 effects. I've seen these effects on estimating voter ID
14 laws, for example. And, again, you're trying to get
15 more data. You've got variation across the state.
16 You're trying to control for all these other effects,
17 election administration and campaign effects, and
18 demography matters as well I should mention. So you can
19 try to do it that way. And certainly, in my own
20 published research, I -- that's the tact that I've taken
21 on these sorts of analyses.

22 But trying to isolate one state of an
23 innovative -- a new policy innovation in one state using
24 aggregate data seems to me to be very dicey, and I would
25 -- would really revert again back to that individual

1 level data because I think that -- that's your gold
2 standard here in trying to assess effects.

3 Q. If -- if as you, I think, mentioned that the
4 registration rate went down nationally, assuming the
5 CPS -- Current Population Survey data is reliable, if it
6 went down from 2010 to 2014 but the registration rate in
7 Kansas went up from 2010 to 2014, wouldn't that at some
8 level undercut your conclusion that the DPOC law
9 depresses registration?

10 A. So you've asked me a hypothetical that I can't
11 fully answer without looking at the Current Population
12 Survey data to do an analysis of it.

13 Q. Assuming the conditions are true.

14 A. So in the hypothetical that the national voter
15 registration rate went down by the CPS and Kansas went
16 up, and it has to be outside the margin of error, and
17 it -- I can -- I have confidence that these other issues
18 Current Population Survey aren't contaminating the data,
19 it would be evidence to me that, well, there was more
20 competitive election in 2014 in Kansas, and I would have
21 expected that turnout to go up and registration activity
22 to go up.

23 And I don't know if I could tease out the
24 effect of the documentary proof of citizenship law from
25 just the overall general environment, electoral

1 environment that was happening in 2014 versus 2010 in
2 Kansas in particular.

3 Q. In your expert report, you state something that I
4 think you restated in your testimony a moment ago. You
5 opined that a total of 22,814 registrants have been
6 purged or remain suspended and thereby prevented from
7 voting.

8 When you say purged, you're referring to
9 canceled; correct?

10 A. Yes.

11 Q. And when you say prevented from voting, what do
12 you mean?

13 A. Meaning that these individuals didn't have a
14 chance to participate in the election.

15 Q. But do you know that they didn't go on to
16 complete their registration?

17 A. It's possible that some of them went on to
18 complete the registration. We know from the -- the
19 later data from the suspense and -- the canceled list,
20 we know the canceled individuals did not cure their --
21 their registration because they were canceled.

22 The -- it is possible that some of the
23 individuals on the suspense list went on to cure their
24 suspended state somehow, either through actions of their
25 own or actions by your office.

1 Q. If I told you -- let's assume -- and it will be
2 presented later in evidence, but just assume for now
3 that 90 -- over 90 percent of the people on the suspense
4 list eventually do get their citizenship confirmed,
5 either by the state passively or by the individual
6 actively. Would you agree that those 90 percent plus
7 are not prevented from voting?

8 A. Right. Those individuals that find their way
9 onto the voter registration list, yes, they have the --
10 the ability to vote then.

11 Q. And so what about the remaining less than
12 10 percent? Are you making an assumption in your
13 analysis that they were actually U.S. citizens and that
14 they do actually still reside in Kansas and that they
15 are -- and they don't meet any other reasons why they
16 would be unqualified to vote?

17 A. Yes, I am.

18 Q. That's a pretty big assumption, isn't it?

19 A. I don't think so.

20 Q. We live in a very mobile society, don't we?

21 A. That is correct.

22 Q. Would you agree that a very substantial number of
23 people who are registered voters move from state to
24 state in any -- in any period, every 5-year period or
25 10-year period?

1 A. Yes, there are people who move from state to
2 state. I don't know exactly the numbers. I know the
3 American Community Survey finds roughly 40 percent,
4 about 44 percent of the population moves every four
5 years, because I'm interested in that in terms of
6 presidential elections. So I know that sort of
7 statistic off the top of my head. But I don't know --
8 the ACS, the American Community Survey, doesn't really
9 report that information in terms of interstate moves or
10 moves of that character. So I can't tell you from that
11 data how many people are moving outside of Kansas and
12 how many people are just moving across town or something
13 of that nature.

14 So it's probably less. And -- and this is
15 only in a four-year period. So it's possible that --
16 you know, if I were to make a guess -- and I would love
17 to look at the data more directly -- maybe 10 percent of
18 those people are moving outside the state, might even be
19 less. But I'm just hazarding a guess on that based on
20 my knowledge.

21 Q. So it's possible you could get to 10 percent of
22 people moving?

23 A. Well, again, you're -- yes, it's possible that
24 there's 10 percent moving. You're conflating some
25 numbers here though, however, because you're -- we're

1 talking about the new registrations. I had said that it
2 was 12 percent in my report. You're saying that it's
3 10 percent of all the new registrations eventually are
4 cleared of their suspense state.

5 Q. Oh, no, I'm saying 10 percent -- let me rephrase.
6 I'm saying 90 percent plus are cleared and go on to
7 become fully registered voters. And --

8 A. Right.

9 Q. And I'm asking you, the remaining -- whatever
10 the -- some percent less than 10 could be accounted for
11 by people moving, could it not?

12 A. And I'm disagreeing with that because what I'm
13 saying is that I would apply that 10 percent to the
14 people who were on the suspense list, not to the --
15 everyone on the suspense list is that 10 percent.
16 Because we've already -- we've already seen testimony
17 today of individuals who are on the suspense list and
18 are Kansas residents so -- and we know that your office
19 itself is clearing individuals passively. So -- and we
20 can see individuals who are voting, I imagine, if we
21 were to look at that additional information now that
22 it's available to us.

23 And, you know, so I -- yes, there's some
24 individuals who are on the suspense list who are
25 probably moving outside the state and decided not to

1 cure their -- their -- their documentary proof of
2 citizenship. I don't know when they did that. I don't
3 know if there was an intervening election. I don't know
4 what the rate of those individuals are. I would guess
5 that it's -- again, because I -- we would have to do
6 more studying. And you're asking me some -- to come up
7 with some numbers on the cuff -- you know, on the fly.

8 But I wouldn't think that it's the entire
9 suspense list or canceled list. I would say that it's
10 some proportion of that and it's probably somewhere
11 around 10 percent or so of those individuals. Again,
12 with more work, I might be able to get a more precise
13 number. But it might be something like that that are
14 actually -- find their way on the suspense list and then
15 move outside the state.

16 And, again, we have to know about the
17 intervening election. So did they have an opportunity
18 at an intervening election as well. And so the number
19 may actually be less than 10 percent, but I'm just --

20 Q. Let me give you another set of numbers, and that
21 is -- and these are also numbers that -- they were
22 earlier introduced through declarations and now they'll
23 be introduced through evidence later.

24 But suffice it to say, if you look at the
25 total population of people who registered to vote since

1 the law went into effect -- or who started the
2 registration process since January 1st, 2013 --

3 A. Yes.

4 Q. -- and the total number of people who completed
5 the process, 95.4 percent completed the process. So we
6 know that 4.6 percent didn't, for one reason or another.
7 Could the movement of people from state to state and the
8 fact that some of those people are non-citizens, could
9 that account for the 4.6 percent?

10 A. As I said, I think it could account for a portion
11 of it, but I don't think it would account for all of the
12 4.6.

13 Q. Based on what? Why would it not -- why would it
14 not add up to the 4.6 percent?

15 A. Well, again, you're -- there's no 4.6 percent
16 that I've seen up to this point. So I -- I have to take
17 this that that's a true number. And, again, I would
18 want to look at -- at these numbers more generally to --
19 to actually do the analysis.

20 It's -- it's not everybody who's on the
21 suspense list is moving outside the state. It's that
22 there's some rate of people who are on the suspense list
23 that are moving outside the state.

24 Q. Right.

25 A. And my assumption would be that that rate would

1 be consistent with -- with the general population. That
2 would be my initial way of coming up with an estimate
3 here. And so I would apply whatever the overall
4 estimate for the population is to the suspense list.
5 And so if it was 10 percent, for example, then I would
6 say 10 percent of the suspense list are individuals who
7 are moving outside of the state. I wouldn't say
8 everyone on the suspense list is -- makes up the people
9 who are moving outside the state.

10 Q. Okay. And I think I know the answer to this, but
11 I just want to make sure it's clear. You never made any
12 effort to analyze what percentage of people on the
13 suspense list are non-citizens, did you?

14 A. Correct. We've answered that a few -- multiple
15 times now, yes.

16 Q. And you never made any effort to analyze what
17 percentage of -- or what number or percent of the people
18 on the suspense list moved away, did you?

19 A. No, I did not.

20 Q. So for the purposes of your report, is it fair to
21 say you just assumed everyone on the suspense list is a
22 citizen who still resides in Kansas?

23 A. Yes, that is true.

24 Q. You referred earlier to 22,000 who were on the
25 suspense list, approximately 22,000 who were on the

1 suspense list in the period of September 2015 to
2 December 2015. Do you recall that?

3 A. Yes, I do.

4 Q. September to December 2015, would you consider
5 that a high -- a period of high voter registration
6 activity?

7 A. 2015?

8 Q. In a state like Kansas where there are no --

9 A. Yeah, yeah.

10 Q. -- fall elections in odd numbered years --

11 A. Right.

12 Q. -- or at least there weren't at that time?

13 A. I can't recall if there was a special election or
14 anything of that nature in that time period. But, no,
15 it would not be a time of high volume.

16 Q. Did -- why did you select September to December
17 of 2015 to look at, or was that the only thing available
18 to you?

19 A. That was the only data that were available to me.

20 Q. Would you agree that if you had looked at the --
21 taken a three-month period -- three-month period in the
22 advent of a major fall election and an even numbered
23 year, you might have seen a very different picture --

24 A. Right.

25 Q. -- of registration activity?

1 A. Yeah. And as I mentioned in my report, I need to
2 clarify this, is that there's another important
3 milestone that's happening between September 24th and
4 December 11th, which is the implementation of the 90-day
5 rule. And so part of what I was interested in, when I
6 was comparing September 24th to December 11th, wasn't so
7 much about the activity. It was to try and figure out,
8 you know, increased activity of suspense, people in the
9 suspense state. It was more to look at the number of
10 people who were being canceled pursuant to the 90-day
11 rule.

12 Q. In this same period, when you're looking at those
13 numbers, your numbers include -- well, the numbers you
14 received from the state included people who were on the
15 suspense list for reasons other than lacking proof of
16 citizenship; correct?

17 A. The confidential data that I received on March
18 31st had that information, yes.

19 Q. But I'm talking about the three-month -- the
20 three-month period from September to December 2015
21 where -- where you used the 22,000 number, there you
22 were using data that didn't have the reason for the --

23 A. Correct.

24 Q. -- for being on --

25 A. Yes, I had to estimate the reasons why

1 individuals were on the suspense list -- on those two
2 suspense lists.

3 Q. Okay. So you're -- it is an estimate. You
4 don't -- you didn't actually know the reason why they
5 were on the suspense list in comparing September 2015 to
6 December 2015 numbers?

7 A. Right. I had to estimate that, yes.

8 Q. And so you were guessing at the number that were
9 on the suspense list for other reasons, like incomplete
10 registration forms, et cetera?

11 A. Yes, it was. And I have some confidence that
12 those estimates were correct because I can look at the
13 suspense list and the canceled list that was provided to
14 me on March 31st, and I can look at the relative sizes
15 of the numbers and distribution frequency of the age and
16 the gender and party registration and see that they're
17 very comparable from September 24th and December 11th
18 when I had to do an estimation procedure rather than
19 when I had the actual individual level data available on
20 March 31st, 2016.

21 Q. So would it also be more meaningful to look at
22 the entire period the proof of citizenship law has been
23 in effect rather than just looking at a snapshot of
24 three months in 2015?

25 A. I'm not sure I understand the question.

1 Q. Well, if you're looking at the -- if you're
2 attempting to ascertain whether people are successful in
3 getting off the suspense list, wouldn't it be more
4 meaningful to look at the entire period the law has been
5 in effect rather than pick one period of low voter
6 activity in an odd numbered year?

7 A. Well, in a way, the September 24th suspense list
8 is -- has some of that data in it because it is the --
9 anyone from January 1st, 2013 through September 24th,
10 2015 who had failed to cure their deficiency in the
11 registration record.

12 So that's why that September 24th file is
13 informative for that reason. It's sort of important to
14 have it into the analysis.

15 Q. And then when you came up with the number of
16 71 percent approximately, that included people who were
17 merely on suspense and still could have completed their
18 registration; correct?

19 A. The 71 percent, which is the estimate on December
20 11th of people who had -- were on the September 24th,
21 2015 suspense list and their change in their status
22 included both individuals who remained on the suspense
23 list and people who neither appeared on the suspense
24 list or the voter registration file, and, thus, I
25 inferred that their registrations had been canceled

1 pursuant to the 90-day rule that had taken -- been put
2 into effect on October 1st.

3 Q. Okay. So you said you inferred that.

4 A. Correct.

5 Q. You didn't know that. Is it correct you didn't
6 know that?

7 A. Correct.

8 Q. And this gets to your 12.4 percent number that
9 you were talking about earlier. And this, of course, is
10 a number looking at -- I think the numerator of your
11 fraction looks at people who were canceled, I believe,
12 or the denominator?

13 A. Canceled or suspended.

14 Q. Yeah. Is it possible that there were additional
15 persons who registered to vote during this period of
16 time and subsequently canceled their registration by the
17 time you ran the analysis?

18 A. So there were -- there was someone who registered
19 in that three-month period, is -- is that what you're
20 saying, and they then --

21 Q. Canceled for one reason or another --

22 A. -- proactively canceled, like --

23 Q. -- moved away?

24 A. -- they informed election officials that they had
25 moved? I suppose that's possible.

1 Q. Is it possible that there were individuals --
2 when you looked at that -- that universe -- or when you
3 looked at those numbers between September and December
4 of 2014, were you looking at total numbers of
5 cancellations in the state, or were you looking at the
6 specific people who were on the suspense list in 2014?

7 A. Well, we were looking 2015.

8 Q. I'm sorry. 2015.

9 A. I know these dates are easy to mess up.

10 Q. Yes.

11 A. So, yes, I was -- I was only looking at the
12 suspense list because I -- the only voter registration
13 file I ever had for my analysis was extracted from the
14 ELVIS system on December 11th, 2016 -- now I'm making
15 the mistake -- 2015. So I -- I could only look at
16 changes to the suspense list from September 24th because
17 I only had the suspense list as of September 24th.

18 Q. Okay. And remind me what the 12.4 percent
19 fraction represented.

20 A. Right. So I have a voter registration file from
21 December 11th, 2015. And I looked at the registration
22 date in twenty -- registration rate -- the registration
23 date as of -- individuals who were either active or
24 inactive in the voter registration file as of December
25 11th, 2015, going back to any new applicant that had

1 completed their registration from January 1st, 2013
2 through December 11th, 2015.

3 Q. Okay. So this -- that is, then, a much larger
4 time frame. You're looking at all people canceled or
5 suspended between January 2013 and December 2015;
6 correct?

7 A. Correct.

8 Q. And is it possible that there could be thousands
9 of people who were canceled for other reasons, such as
10 moving out of the state, normal NVRA --

11 A. Right.

12 Q. -- activity, keeping up -- the voter rolls clean
13 and all that?

14 A. Yeah, absolutely. That's why in my direct
15 testimony I said it was roughly 12 percent rather than
16 this firm 12.4 percent number because it's -- there's
17 likely I'm -- that's the high estimate of the -- of the
18 number of people who were new registrants who failed to
19 get onto the voter registration list.

20 Again, that was using the confidential data
21 on March 31st, so there's -- just to add to the more
22 complications, there were new registrants between
23 December 11th and -- 2015 and March 31st, 2016. I don't
24 have a voter file from March 31st, 2016, so I can't -- I
25 can't look at those numbers either.

1 Q. Is it -- is it possible that there could be tens
2 of thousands of people who were canceled during that
3 almost three-year period for reasons having nothing to
4 do with proof of citizenship?

5 A. It's possible. And if I recall the number
6 correctly for the denominator, the -- it was roughly --
7 I think it was 233,000. So if I added tens of
8 thousands, it -- yes, it would reduce the overall
9 percentage, but it would be still above 10 percent
10 roughly.

11 So that's why I tried to characterize the
12 number as an estimate of 12 percent. It's -- there's
13 some imprecision to it because I don't have all of the
14 transactions that have been made into the voter
15 registration file, and I don't have those new
16 registrations from December 11th, 2015 to March 31st,
17 2016.

18 THE COURT: All right. Let's take a break.
19 We need to take an afternoon break. Let's take a break
20 for 15 minutes.

21 (Recess.)

22 THE COURT: Mr. Kobach.

23 BY MR. KOBACH:

24 Q. Continuing roughly from where we left off. I
25 want to change topics just a little.

1 Do you know whether the Kansas Secretary of
2 State's Office has added any additional measures to
3 assist people passively getting their proof of
4 citizenship confirmed since your March -- since your
5 March 2016 numbers?

6 A. I've only reviewed the declaration by Bryan
7 Caskey. And I don't recall the date of that
8 declaration, so I don't know if that was before or after
9 March 31st.

10 Q. Are you aware of what the Secretary of State's
11 Office did in 2016?

12 A. Again, I don't know what the date of Bryan
13 Caskey's declaration is. I mean, if you're talking
14 about the characterization of his declaration, I am
15 aware that you look up birth certificates of individuals
16 who were born in Kansas. I don't know if there are any
17 additional steps that your office is taking.

18 Q. I'm referring to an additional step that started
19 in May 2016 -- and just for your information, then I'll
20 ask you a question about it -- where the state also
21 checks DMV records on behalf of the individual to see if
22 there's any citizenship document in those DMV records.
23 It's a web portal that was set up.

24 Now, if that change occurred in May 2016,
25 which I'll represent to you that did, and so that the

1 state is able to passively confirm the citizenship of
2 more people, wouldn't that mean that March 2016 numbers
3 about the percentage of people who remain in suspense
4 are somewhat stale because a greater percentage come off
5 suspense later?

6 A. Right. I have no data in my report about any
7 activity after March 31st, 2016.

8 Q. Well, would you agree with me if a higher
9 percentage are coming off suspense because the state is
10 able to passively verify the citizenship of a greater
11 percentage of people, that those March numbers would no
12 longer be relevant?

13 A. No, I don't agree with you on that because I am
14 not able to look at the numbers and the relative number
15 of new registrations versus the ones that you are
16 clearing. And I don't know what the distribution is on
17 the -- of the -- those individuals as well. So I -- I
18 can't say anything about who may or may not be affected
19 and the relative sizes of the populations that are
20 affected.

21 Q. Well, let me offer a less strong assertion then.
22 Would you agree that it would make sense to look at the
23 numbers after that change to get a picture of how many
24 people are coming off of suspense?

25 A. More data is usually better. So, yes, I agree

1 that we would want to look at any additional data that
2 may be available to look at the effect of the law and
3 the policies that your office has on -- on the
4 documentary proof of citizenship requirement.

5 Q. I want to turn now to the subject of younger
6 voters. And you referred to, you know, these younger
7 voters as people who -- who were vulnerable or -- I
8 guess is the term you used. Are you aware that Kansas
9 is a state where new driver's license applicants who are
10 U.S. citizens must provide documentary proof of
11 citizenship to get their driver's license?

12 A. You're a real ID state --

13 Q. Yes.

14 A. -- essentially?

15 Q. Well, we're a half real ID state.

16 A. A half real ID. So I'm aware that -- that states
17 are -- there are real ID states, and I take it that your
18 representation is correct of -- of Kansas.

19 Q. So given that fact, would you agree that it
20 should be pretty easy for most young applicants to prove
21 citizenship for voting if they were already required to
22 prove citizenship to get their driver's license?

23 A. I'm trying to understand the nature of the
24 question.

25 Q. Let me rephrase it.

1 A. Yeah.

2 Q. Since the state already -- since Kansas is one of
3 those states that requires proof of citizenship for
4 first time driver's license applicants, and since the
5 state already has the document in its hands, shouldn't
6 it be fairly easy for young people in Kansas to have
7 their proof of citizenship confirmed since the state
8 already has that document?

9 A. For the individuals that the state already has
10 the information available to them, and assuming that
11 your office can accurately look up their information
12 into the other system, then it would -- you could
13 passively verify those individuals through the system
14 you are describing.

15 Q. And for those other -- for those young people who
16 register and who for some reason hadn't gotten a Kansas
17 driver's license yet, so we didn't -- we couldn't
18 passively register them, let's look at their situation.
19 Are you aware that according to a recent Pew study
20 94 percent of people in that age group 18 to 29 have a
21 smart phone?

22 A. Sounds about right to me, but I don't know the
23 exact number from that particular Pew study. I do
24 occasionally look at Pew studies so --

25 Q. So assuming --

1 A. -- it sounds --

2 Q. Let's just assume -- assuming that number's
3 correct, would you agree that it is relatively easy for
4 people -- or easier for people who have a smart phone
5 and are adept with it to e-mail a document over to the
6 county election officer than someone who is older and
7 doesn't have a smart phone?

8 A. Not necessarily. They would have to know the
9 e-mail or phone number that they're texting to. So they
10 would have to gather that information. They would have
11 to gather the information of the document itself. And
12 so, again, these are -- when you say "relatively easy,"
13 these are still actions that need to be taken.

14 And the -- social science literature finds
15 that even rain can reduce turnout so -- although they
16 seem relatively innocuous and insurmountable from our
17 perspective being in the courtroom, but in real life
18 these barriers can pose real costs to individuals that
19 they are unable to overcome. And we can actually see
20 that on even trivial things like rain.

21 Q. So rain would be a cost that a would-be voter
22 might not be able to overcome?

23 A. Getting wet is a cost, right. And so actual
24 studies have found that when it rains, voter turnout
25 goes down.

1 Q. Is cold weather a cost that some voters might not
2 be able to overcome?

3 A. Right. Absolutely. The weather, I mean, in
4 general, yes.

5 Q. Is the fact that nearly all of the states have a
6 registration requirement, in other words, that you
7 had -- you have to be registered before you can vote, is
8 that a cost that must be overcome?

9 A. Absolutely. My work and other individuals' work
10 finds that states that have election-day registration
11 generally have five to seven percentage points high
12 turnout rates. And then there are these other
13 innovations, like automatic registration, that are now
14 being implemented in several states across the country
15 that may further lower the barrier of registration.

16 So, yes, there's a large body of evidence
17 that suggests that voter registration is an impediment
18 to and a cost of -- for voting.

19 Q. So if rain is a cost, cold weather is a cost,
20 even having a registration system is a cost, can we use
21 the word burden? Are -- would that be roughly
22 entertained?

23 A. Burden, yeah, if we want to use that as well,
24 yeah.

25 Q. So if these are all burdens that all add up --

1 and there's probably half a dozen other things would you
2 say as well, in addition to rain, cold weather and
3 registering?

4 A. I didn't quite understand --

5 Q. I'm sorry. Yeah. It was a --

6 A. -- the question.

7 Q. -- rambling -- rambling question.

8 Would you agree there are many other things
9 that constitute potential burdens the way you define it?
10 So, for example, length of the drive to the polling
11 place, being employed or not employed, et cetera?

12 A. Yes.

13 Q. So if there are all of these burdens, would you
14 agree that there's a large number of them in the way
15 you're defining them?

16 A. A large number of burdens?

17 Q. Yeah. That you would -- that you would --

18 A. Yeah.

19 Q. For each voter's matrix of decision?

20 A. Yes, potentially there are a large number of
21 burdens that potential voters and registrants are facing
22 when they go through the process of attempting to vote.

23 Q. So if there are a large number of burdens, is it
24 difficult to identify the effect of one additional
25 burden, mainly that you would have to provide proof of

1 citizenship?

2 A. Well, that was our prior discussion about using
3 aggregate data versus the individual level data. And
4 I -- with the numbers that I'm seeing with the
5 individual data, we can determine directly what's
6 happening with these individuals and the cost that's
7 being imposed -- or the burden that's being imposed upon
8 them. You know, these are 30,000, you know, according
9 to my report that -- overall that were affected by the
10 documentary proof of citizenship as of March 31st, 2016.
11 If I recall my report numbers correctly, it's roughly
12 30,000. That is, you know, a small number relative to
13 the overall number of registrants in Kansas.

14 And so it would be difficult to tease out
15 with an aggregate analysis what the effect of a law like
16 that is affecting 30,000 people. But by using the other
17 data source, which is the individual records, we can
18 ascertain what the size of the effect is.

19 Q. But to tease it out on an individual level or on
20 an individual analytical approach isn't it equally
21 difficult, because you already acknowledged you don't
22 know whether the person actually is a citizen, you don't
23 know whether he still lives in Kansas, and you don't
24 know all kinds of other factors; correct?

25 A. Right. I have conceded that it's possible that

1 some individuals on the suspense list that were canceled
2 were either non-citizens, which I think is a very small
3 number, or the more likely larger number would be had
4 moved. How many? Again, trying to get an estimate of
5 that if -- I guess -- again, the American Community
6 Survey says 44 percent or so of the population moves
7 every four years. So let's take it down to one year.
8 And so maybe 11 percent's moving every year.

9 I have no idea how many of those individuals
10 are moving in state versus across state or within -- you
11 know, within the locality. My guess is that it's a, you
12 know, smaller number. And if we applied that proportion
13 to the number of people that are on the suspense list,
14 yes, I can't discount that there are some people who
15 applied for voter registration and then moved outside
16 the state and didn't provide documentary proof of
17 citizenship. But it's probably only like 5 or 6 or 7
18 percent.

19 I -- again, this is all off the cuff
20 analyses that you're forcing me to do here. That
21 doesn't negate that that plus this very small number of
22 non-citizens gets you still a relatively, you know,
23 large number of 25,000 or so, maybe more that's --
24 that's probably even more like 29 or 28,000, if I apply
25 the percentages correctly.

1 So does it modulate -- you know, does it
2 attenuate my analysis? Yes, it does. But does -- do I
3 change my overall conclusions and opinion? No. I don't
4 think that even -- I think the valid points that you've
5 made -- and considering those valid points, I don't
6 think that it -- it changes my conclusions or opinion
7 about the effect of the law on an individual's ability
8 to register.

9 Q. So we talked about -- you just summarized what we
10 talked about as far as people who moved away and that's
11 why they remained on suspense or are non-citizens and
12 that's why they remained on suspense and eventually were
13 canceled. And then we also mentioned earlier this
14 possibility that with the motor-voter law and the -- the
15 people that sometimes are just polite when they're at
16 the DMV, and they say, yeah, sure, register me, but then
17 they never plan to vote.

18 Is it possible that some -- the significant
19 percentage of the people who stay in suspense are just
20 people who never intended to vote in the first place,
21 they said, yeah, go ahead, I'll get registered, and then
22 didn't have any intention of voting?

23 A. I don't want to get into people's minds about
24 their intentions of whether or not they want to vote.
25 But is it possible that there's some individuals who

1 registered without the intent to vote? It's possible.
2 And it's possible that there were people that wanted to
3 be registered and were blocked from registering because
4 they weren't able to provide the documentary proof of
5 citizenship. And it's really up to the individual to
6 make that determination for themselves.

7 In my opinion, it's not really the role of
8 the state to intervene and make that decision for them.

9 Q. You claim that -- I believe it's fair to say that
10 you claim that the number of 18- to 29-year-olds on the
11 suspense list is disproportional when you compare it to
12 the number of 18- and 29-year-olds looking at the
13 entirety of the 1.8 million registered voters in Kansas;
14 right?

15 A. Yes.

16 Q. But would you also agree that new registrants are
17 significantly younger on average than the body of the
18 1.8 million much older registrants because new
19 registrants tend to be people turning -- there's a large
20 chunk of new registrants who are turning 18 and voting
21 for the first time?

22 A. Yes. I -- in my direct, I agreed with
23 Dr. Camarota to say that, yes, the new registrants tend
24 to be younger. And, thus, that if you were to devise a
25 law that were to target younger voters, you would only

1 apply it to new registrants. And although I can't speak
2 for the intentions of the government of Kansas in -- in
3 passing this law, the effect is pretty clear that it is
4 affecting younger people and people who are less likely
5 to affiliate with a political party.

6 Q. So really then -- correct me if I'm wrong -- what
7 you're saying it affects new registrants more than it
8 affects people who were grandfathered in?

9 A. Correct.

10 Q. Okay.

11 A. Because they're not affected at all.

12 Q. So just to understand your use of the term
13 disproportionally then. If you're asked -- if you're
14 looking at the likelihood of getting on suspense list as
15 a measure of disproportionality, wouldn't it be better
16 to compare the number of voters on the suspense list who
17 are 18 to 29 and compare it to the number of all people
18 who registered in that period of whatever it is, a year
19 or three years or two years, who are 18 to 29 so that
20 you're comparing apples to apples?

21 You're looking at the people of those recent
22 registrants who ended up on suspense versus looking at
23 this body of 1.8 million who have been registered for 40
24 or 50 years?

25 A. Right. And I -- the false approach. Why I think

1 that's a false approach is it goes back to the
2 explanation I was saying about literacy tests.

3 So if I were to look at literacy tests that
4 had been grandfathered in and it was disproportion -- it
5 was affecting African-Americans and poor whites and then
6 I did -- in your analysis all I can look at is the
7 differential rates of African-Americans and poor whites
8 who are on -- who have been administered a literacy test
9 and determine if that has a racial effect, are
10 African-Americans less likely to be able to pass the
11 literacy test, even though these are the -- because of
12 the grandfather clause that was implemented with the
13 literacy test, the larger population of people are not
14 being affected by it. It's only being targeted to
15 certain segments of the population, namely,
16 African-Americans and poor whites.

17 And so you want to look at both stages of
18 the process, both how you get onto the voter -- your
19 attempt to -- the pool of people who are attempting to
20 get on the list and their success at overcoming whatever
21 that burden is. And I -- I don't think it's proper just
22 to look at that one slice of it, which is are they able
23 to successfully do -- you know, complete a literacy
24 test, or are they successfully able to provide the
25 documentary proof of citizenship requirements. You have

1 to look at both parts of the process to understand who's
2 being affected by the -- the particular law.

3 Q. Okay. Well, setting aside the fact that you
4 believe -- and I think it's fair to say that a -- any
5 law that has a grandfather clause that people who are
6 already registered in this case aren't affected and new
7 registrants are affected by the requirement -- setting
8 aside the fact that that has some immediate disparity in
9 the treatment, the people who are already registered
10 versus new registrants, looking only at the new
11 registrants, do you recall me telling you in your
12 deposition that between January 1, 2013 and -- and May
13 2016, just prior to your deposition, that there were a
14 total of 331,199 people registered to vote in Kansas?

15 A. I do not recall that number, no.

16 Q. Well, let me get to the point. Do you recall me
17 telling you that of those 33,100, 41.3 percent were 18
18 to 29 years of age; in other words, of all the people
19 who had registered for the first time under the new law,
20 41.3 percent were 18- to 29-year-olds?

21 A. I don't recall that, but it strikes me as a
22 plausible number.

23 Q. So if that number is accurate -- you had said,
24 after you corrected your typo in direct examination,
25 that 43.2 percent of the people on the suspense list

1 were 18- to 29-year-olds on March 31st, 2016; right?

2 A. Yes. I think that's Table 4 is where that number
3 comes from --

4 Q. Okay.

5 A. -- and that's in the report.

6 Q. So if 43 percent of the people on the suspense
7 list, using that period of time roughly, to early
8 2016 -- from the beginning of the law until March or May
9 of 2016, if 43.2 percent of the people on the suspense
10 list were 18- to 29-year-olds and 41.3 percent of all
11 new applicants were 18- to 29-year-olds, wouldn't you
12 say that it's pretty proportionate between the number of
13 people who get on the suspense list and the number --
14 total number of 18- to 29-year-olds in that pool?

15 A. Yes. I agree that the 18- to 29-year-olds are
16 the ones who are being affected by the law. So it's
17 because it's only new registrants that are being -- that
18 have to provide the documentary proof of citizenship is
19 causing that phenomenon, yes.

20 Q. Okay. So you would agree that looking only at
21 new registrants, there is no disproportional effect on
22 18- to 29-year-olds among new registrants?

23 A. Among, yes. Conditional on the fact that you are
24 a new registrant, then, yes, the rates are relatively
25 the same for 18- to 29-year-olds relative to -- well,

1 I'd have to see all the data to say that with any --

2 Q. Okay.

3 A. But I get what you're trying to get at. So
4 reserving that I haven't looked at all the data and all
5 of those sort of issues, I get that the rate for young
6 people is about the same relative to their proportion in
7 the population and so that -- yes.

8 Q. Okay. And then going through the same line of
9 questions regarding unaffiliated voters. I think you
10 said in your supplemental report -- I don't remember if
11 you changed this number or not, but I think you said
12 45.6 percent of DMV registrants in suspense were
13 unaffiliated; correct?

14 A. Again, that's at Table 4 on --

15 Q. Table 2. Table 2 of your supplemental report.

16 A. Oh, say the number again.

17 Q. I think you said that of DMV registrants
18 specifically, 46 -- sorry, 45.6 percent of the suspense
19 category were unaffiliated voters?

20 A. Sorry. I'm just trying to look up the number
21 again. So please give me the number one more time and
22 then I can -- I can --

23 Q. I believe your number was 45.6 percent
24 unaffiliated on Table 2.

25 A. On Table 2. So this --

1 Q. Supplemental report I think.

2 A. On the supplemental report, that is -- these
3 are -- yes, these are the individuals on the suspense
4 list.

5 Q. Right.

6 A. So it's not the canceled plus the suspense list,
7 yes.

8 Q. Okay.

9 A. And that number is in Table 2 on page 7 of my
10 supplemental report. The percentage of unaffiliated on
11 the suspense list for reason of proof of citizenship not
12 submitted is 45.6 percent. I'm just trying to get that
13 into the record appropriately.

14 Q. Okay. So I'll represent to you -- and it will be
15 established later -- that looking at the same time
16 period, the total number of DMV applicants -- the total
17 number who applied, not just the ones on the suspense
18 list, who are unaffiliated was 46.6 percent. So would
19 you agree that if the total number was 46.6 percent,
20 then that 45.6 percent figure would not be
21 disproportionate, would it?

22 A. It's -- again, it's only disproportionate because
23 you're conditional on the fact that these are
24 individuals who have attempted to register. You're not
25 looking at the individuals who were being affected by

1 the law itself. So you're only looking at one stage of
2 this process, not both stages together to arrive at that
3 disproportionate.

4 Q. And I think --

5 A. And I'm looking at both of the processes together
6 when I say disproportionate.

7 Q. Okay.

8 A. So we're -- we're using -- we're applying this
9 term to different populations of individuals. And so I
10 just want to make clear I agree with you, but I don't
11 agree with you that it's not disproportionate --

12 Q. Okay.

13 A. -- when we look at the way I look at it.

14 Q. I think you said disproportionate when you meant
15 to say not disproportionate at the very -- initial
16 answer. It's hard to keep our terms straight here --

17 A. I know.

18 Q. -- but just to clarify.

19 So looking only at the people who registered
20 to vote after the -- the proof of citizenship law went
21 into effect, you would agree -- and not looking at
22 people who registered prior, you would agree that it is
23 -- there is no disproportionality in the unaffiliated
24 voters who end up on the suspense list versus the total
25 number of people who registered in that time?

1 A. Right. In mathematical terms, I would say
2 conditional on the fact that you attempted to register,
3 there is no disproportionate effect. But it's important
4 to understand that there's the other process that's
5 involved here that would lead to disproportionalities
6 when you look at both stages of the process.

7 Q. And I think we're actually getting close to the
8 end here. I just want to ask you one last series of
9 questions.

10 We talked earlier about comparing the
11 nationwide rate of voter registration and how it
12 dropped. And you -- I won't reiterate the entire
13 conversation before. But now I want to look at the
14 nationwide drop in participation.

15 Would you agree that nationwide there was a
16 drop in participation between the 2010 November election
17 and the 2014 November election?

18 A. You know, I should know that number off the top
19 of my head, quite frankly, because I produced those
20 statistics, but I can't tell you what the national
21 number was between 2010 and 2014.

22 Q. Well, I have some numbers in my notes and you can
23 tell me if these sound correct. I have 45.5 percent in
24 2010 and 41.9 percent in 2014 nationally. Does that
25 sound right?

1 A. That sounds like it's coming from the Current
2 Population Survey and I -- when I calculate these
3 turnout rates, I use the actual administrative data and
4 do it as a percentage of those who are eligible to vote,
5 and I can't recall off the top of my head what the
6 numbers that -- that I would say are -- they are.

7 Q. Does that sound roughly like the -- roughly --

8 A. It's not --

9 Q. -- roughly a drop of almost 4 percent?

10 A. It sounds too high to me, those numbers. I --
11 the numbers that -- as I recall that I compute are more
12 about 40 -- you know, 41 percent or so. So that's why I
13 thought that those were from the Current Population
14 Survey.

15 Q. I see. But would you agree using the numbers you
16 computed, there was a similar drop in turnout from 2010
17 to 2014?

18 A. I can't recall off -- and, again, I should know
19 these sorts of things off the top of my head, but I -- I
20 can't recall one way or another whether, the way I
21 compute it, if turnout had dropped between 2010 and
22 2014.

23 Q. Okay. If it dropped in between 2010 and 2014
24 nationally but in Kansas the participation rates went
25 from 47.3 percent to 48.3 percent, would that undercut

1 an assertion that the change in the law hurt
2 participation?

3 A. No, it wouldn't. And now that I'm thinking about
4 this more, although I can't give you the exact numbers,
5 yes, 2014, by the way I calculate turnout rates, was one
6 of the lowest turnout rates I think since 1942 for
7 midterm election. And -- but what I note is that that
8 was really centered in the largest states. So states
9 like California, Texas and New York didn't have
10 competitive elections. In some cases, there were states
11 that because of the timing of the calendar didn't -- and
12 some of these were the larger states -- didn't have a
13 statewide office on the ballot, so they didn't have a
14 U.S. senate election or a gubernatorial election.

15 And so what really happened in 2014 wasn't
16 so much that nationally turnout declined so much, it's
17 just that there were certain states that had -- that
18 were the larger states that tended to have the
19 uncompetitive elections. And that the states that were
20 competitive, like a Kansas -- and I can't recall Kansas'
21 numbers offhand, but they -- they were very comparable
22 to the 2010 numbers were -- were increasing, again,
23 because those elections were more competitive. It's
24 just that the competitive 2014 elections were centered
25 in mid-sized to smaller states than in the larger states

1 that happened in 2010.

2 Q. Well, you would concede that the official numbers
3 show that Kansas voter participation increased from 2010
4 to 2014, would you not?

5 A. I think they do. From what I was saying earlier,
6 I know 2010 was an uncompetitive year, both for governor
7 and U.S. senate in Kansas, and so -- and 2014 was highly
8 competitive. So I believe it is true that the turnout
9 rates increased, but I don't have the numbers directly
10 in front of me so I can't be 100 percent certain if that
11 assertion is correct.

12 Q. So back to the -- and this -- this will be
13 wrapping it up. Backing up to the -- the issue of
14 burdens of voting and all of the things that affect a
15 person's decision to vote or to complete his
16 registration. If -- if the voter registration rates are
17 increasing in Kansas over this period before the law and
18 after the law and the turnout rates are increasing over
19 this period, does that suggest that the incremental
20 increase in burden of any statutory requirement to
21 register is -- was more than accounted for or outweighed
22 by the simple desire to vote?

23 A. It's complicated. The answer to that's
24 complicated so I have to go into the whole calculus of
25 voting and do the sort of analysis. So I'll just revert

1 back to what I said before, which is that we know that
2 there were 30,000 individuals who were -- who were
3 affected. Yes, there were other things that were going
4 on that might have increased turnout. But I don't know
5 what would have happened in 2010 if the law had been in
6 place. So that's why I'm a little hesitant to answer
7 the question the way in which you posed it.

8 So -- so we know the effect. Is it -- are
9 elections noisy? Absolutely. Do I think that the
10 noisiness of the elections probably swamps over that
11 effect that I'm seeing from looking at the individual
12 data? It's possible that that's -- that's true. And
13 that's why I would have reservation about using the
14 aggregate analysis because I don't think it's going to
15 be a good methodology at this point unless we get more
16 elections to -- to study to actually be able to tease
17 out the effects of the law versus all the other things
18 that are going on in elections and -- and election
19 administration and other things of that nature.

20 Q. And, hopefully, one last question, and that is
21 that you've been pointing out that the Kansas election
22 of 2014 was a high interest election and therefore that
23 might account for the bump in numbers in 2014. But are
24 you aware of what was going on in the Kansas ballot in
25 2010?

1 A. It's in my expert report, so I do mention what
2 the -- the governor and senate margins of victory were.
3 They were much larger in 2010 compared to 2014.

4 Q. Would you -- sorry. Go ahead.

5 A. Yeah. So I -- yeah.

6 Q. Would you agree that the -- with an open governor
7 seat, an open U.S. senate seat, and three of the four
8 house seats being open that that would be -- 2010 would
9 have been an exceptionally high interest year as well?

10 A. It really depends. Again, it -- open seats are
11 a -- one of the indicators that leads to a competitive
12 election, but it's not the only indicator that leads to
13 a competitive election. So I couldn't say that in -- in
14 and of itself would be enough information.

15 What -- we could look at the -- sort of the
16 post election numbers, which is the margin of victory.
17 And I can see that the 2014 elections were more
18 competitive than the 2010 elections were, at least at
19 the top of the ticket, the senate and gubernatorial
20 election.

21 MR. KOBACH: Okay. No further questions.
22 Thank you.

23 THE COURT: Redirect.

24 REDIRECT EXAMINATION

25 BY MR. DANJUMA:

1 Q. Thank you, Dr. McDonald. And I'll try to be as
2 brief as possible. I'd just like to ask something to
3 try to clarify the record here. Secretary Kobach asked
4 you a series of questions about whether or not
5 applicants may have been canceled for a variety of
6 reasons besides documentary proof of citizenship. Do
7 you recall that series of questions?

8 A. Yes, I do.

9 Q. I just want to clarify. Your analysis -- the
10 conclusions you reached in your analysis were predicated
11 on the fact that you had either direct evidence that
12 individuals were canceled for lack of documentary proof
13 of citizenship or you had made a reliable estimate of
14 individuals who had been canceled for that specific
15 reason; is that right?

16 A. Yes, it is.

17 Q. And Secretary Kobach asked a series of
18 questions -- a series of hypotheticals regarding
19 90 percent or 94 percent of individuals who start the
20 registration process ending up registered to vote. I
21 just want to verify and clarify for the record, your
22 analysis in your initial report found something that's
23 contradictory to that; is that correct?

24 A. That's correct.

25 Q. And you -- can you restate the number of

1 individual -- do you recall the percentage of
2 individuals at that time frame between January 21st,
3 2013 to the time you prepared your expert report using
4 the December 11th data who were either canceled or
5 suspended as of that date?

6 A. It's roughly 12 percent.

7 Q. I'm sorry. I meant the proportion of individuals
8 who were on the suspense or canceled list who were able
9 later to become registered?

10 A. Oh, yes. So this was comparing the September
11 24th, 2015 suspense list to the December 11th, 2015
12 suspense list. And I could see that 29 percent of the
13 individuals on the suspense list as of September 24th,
14 2015 had managed to find their way onto the voter
15 registration rolls as either active or inactive voters.

16 Q. And 71 percent either remained canceled or
17 suspended; is that right?

18 A. That's correct.

19 Q. Then one additional question. There was a lot of
20 discussion about changes in the overall registration
21 rate and whether or not you should have canceled --
22 calculated that. We've discussed that a bit already in
23 your direct examination. I just have another question
24 to ask. You testified that you did not evaluate the
25 impact of this law on voters who were already

1 registered; is that right?

2 A. That is correct.

3 Q. And the reason why you didn't do that is because
4 there wouldn't be an impact on voters who were already
5 registered because they were grandfathered in?

6 A. That's correct.

7 Q. One final question. Secretary Kobach asked you a
8 series of questions about *Page v. Virginia State Board*
9 *of Elections*. Do you recall the -- the questions he
10 asked you about the dissenting judge's evaluation of
11 your expert opinion?

12 A. Yes, the aptly named Judge Payne.

13 Q. I'd just like to -- to ask you to read into the
14 record a footnote from the majority opinion in that
15 decision. I'll -- I'll put this on the -- on the --

16 Can you read the highlighted text in that
17 Footnote 16 from the majority opinion of that decision?

18 A. Yes, I can, and I will proceed to do so.

19 "Perhaps this is also the appropriate
20 juncture at which to address the dissent's rejection of
21 the credibility of plaintiffs' expert, Dr. McDonald, and
22 endorsement of defendant's expert, Mr. Morgan, which we
23 find somewhat puzzling. We find it no more damning that
24 Dr. McDonald has testified differently in different
25 contexts than that Mr. Morgan has testified consistently

1 on the same side. Nor is it the exploration of issues
2 in an academic piece, written before Dr. McDonald was
3 retained by plaintiffs and before he fully evaluated the
4 evidence here, of particular relevance. We do, however,
5 find the significant -- we do find, however, significant
6 the following facts: That Mr. Morgan proffers no
7 academic work, that he does not have an advanced degree,
8 that his undergraduate degree was in history, that he
9 has never taken a course in statistics, that he has not
10 performed -- that he has not performed a racial bloc
11 voting analysis, that he had not worked with or talked
12 to any members of the Virginia legislature, and that he
13 miscoded the entire city of Petersburg's VTDs." Do you
14 want me to do the "See trial..."

15 Q. No. Thank you, Dr. McDonald. Just one moment.

16 Do you understand that the majority in the
17 *Page v. Virginia* case credited your expert opinion?

18 A. I was the only expert witness for the plaintiffs,
19 so, yes, they credited my opinion.

20 MR. DANJUMA: Thank you. Nothing further at
21 this time.

22 THE COURT: All right. Anything more?

23 MR. KOBACH: (Shakes head.)

24 THE COURT: All right. May Dr. McDonald be
25 excused?

1 You're excused. Thank you.

2 MR. DANJUMA: Yes, Your Honor.

3 THE COURT: Can you get started on your next
4 witness?

5 MS. HA: Your Honor, plaintiffs would like
6 to call plaintiff, T.J. Boynton.

7 COURTROOM DEPUTY: If you could stand and
8 raise your right hand for me, please.

9 THOMAS J. BOYNTON,
10 called as a witness on behalf of the Plaintiffs, having
11 first been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. HA:

14 Q. Good afternoon. Can you, please, state and spell
15 your full name for the record.

16 A. Thomas Jason Boynton, T-H-O-M-A-S, J-A-S-O-N,
17 B-O-Y-N-T-O-N.

18 Q. How old are you?

19 A. Thirty-seven years old.

20 Q. And where were you born?

21 A. In Aurora, Illinois.

22 Q. Are you a United States citizen?

23 A. I am.

24 Q. Where do you currently live?

25 A. Wichita, Kansas.

1 Q. And how long have you lived in Kansas?

2 A. Just over three and a half years.

3 Q. Are you currently employed?

4 A. I am.

5 Q. Where?

6 A. Wichita State University.

7 Q. And what's your occupation there?

8 A. I am an English professor.

9 Q. How long have you been a professor there?

10 A. The same amount of time as I've lived in Kansas,
11 just over three and a half years.

12 Q. Are you on tenure track?

13 A. I am.

14 Q. Are you taking time off from work to be here
15 today?

16 A. I am.

17 Q. Did there come a time when you decided you wanted
18 to vote in Kansas?

19 A. There did.

20 Q. When was that?

21 A. Upon my relocation to Kansas and establishment of
22 residency there.

23 Q. In 2014?

24 A. In August -- well, the summer of 2014.

25 Q. And did you understand that you had to register

1 to vote before you could vote?

2 A. Yes.

3 Q. Did you, in fact, register to vote?

4 A. I learned that an attempt that I made to register
5 to vote was unsuccessful.

6 Q. When and where was that attempt?

7 A. That was at the Wichita DMV in August of 2014.

8 Q. Tell us what happened when you tried to register
9 to vote at that time.

10 A. I went through the steps as prompted by the --
11 the clerk at the DMV to complete the process of getting
12 my driver's license. I don't remember anything
13 regarding the voter registration process other than she
14 asked me if I wanted to register to vote and I replied
15 in the affirmative.

16 Q. Do you remember anything else about the
17 conversation you had with the person at the DMV?

18 A. Not -- not particularly. I remember that I
19 brought a number of documents that I thought might be
20 needed to acquire my driver's license. And there was a
21 moment at which she additionally asked me if I wanted to
22 register to vote and I -- I said yes.

23 Q. What documents did you bring with you?

24 A. I had my birth certificate. I had my current
25 Illinois driver's license, some utility bills and Social

1 Security card.

2 Q. Does your birth certificate show that you were
3 born in Illinois?

4 A. Yes.

5 Q. Do you recall which documents you presented to
6 the person at the DMV?

7 A. I don't recall what documents she asked for
8 specifically. I would have asked -- I would have
9 produced any of the documents she asked for among those
10 I had with me.

11 Q. Did she or anyone else at the DMV tell you that
12 you lacked appropriate documentation to become a
13 registered voter?

14 A. No.

15 Q. Did she or anyone tell you that you would not be
16 registered to vote?

17 A. No.

18 Q. And when you left the DMV that day, did you
19 believe that you had successfully registered to vote?

20 A. Yes, I did.

21 Q. When you left the DMV that day, did you think you
22 had to provide any additional documentation to complete
23 your voter registration?

24 A. No, I did not.

25 Q. Was there a point in time you came to learn that

1 you were, in fact, not registered to vote?

2 A. Yes, there was.

3 Q. When was that?

4 A. That was during November of 2014 when I attempted
5 to vote.

6 Q. Tell us what happened.

7 A. I showed up at the polling place that -- I think
8 I used the State of Kansas website to determine based on
9 my place of residence what my polling place was. I
10 showed up. They said my name was not on the rolls and
11 that this -- this sometimes happens, that their
12 records -- the print records they work from at each
13 polling place are incomplete. So I would have to fill
14 out a provisional ballot, and it would be determined
15 later on if it was a mistake in the print record of the
16 roll or something more, such as not having been
17 successfully registered.

18 Q. And was this the first time you heard you may not
19 have been registered to vote in Kansas?

20 A. Yes.

21 Q. Were you surprised by the fact that you may not
22 have been registered?

23 A. I was.

24 Q. Did you have any idea why your registration at
25 the DMV was not completed?

1 A. I did not.

2 Q. And did you have any doubts as to whether you
3 told the DMV employee you wanted to register to vote?

4 A. No, I had no doubts about that.

5 Q. Why not?

6 A. Well, I remembered it specifically because I
7 was -- I was excited to be presented with the
8 opportunity to register and the convenience of that
9 along with getting my driver's license. And I also had
10 someone with me that, once the -- the process was
11 complete to submit my paperwork for the license, I told
12 on the way out that they had offered me to -- the chance
13 to register to vote too and that I thought that was --
14 that was convenient.

15 Q. In turning back to election day in 2014, when you
16 left the polling site, did you think your provisional
17 ballot would be counted?

18 A. I -- I was unsure. I hoped it would, but --
19 yeah, I guess I didn't really put together that the
20 registration had been unsuccessful at that point. So, I
21 don't know, maybe 60/40 I thought probably it was just a
22 mistake on the rolls that they had.

23 Q. And did there come a time when you were asked to
24 provide documentary proof of your citizenship status in
25 order to complete your voter registration?

1 A. There did.

2 Q. And when was that?

3 A. I don't remember the exact month, but it was
4 subsequent to filling out the provisional ballot. And I
5 received notification in the mail from -- from the state
6 that documentary proof of citizenship would need to be
7 submitted to complete the process of registration.

8 Q. What was --

9 A. And I think it was around December or January of
10 2014-'15.

11 Q. What was your reaction when you received that
12 notice?

13 A. I was annoyed. I had attempted to vote. I had
14 told the people at the DMV that I wanted to be
15 registered to vote and I was enthused to vote. And the
16 notification I took as also notifying me that the vote
17 had not been successful.

18 Q. Did the notice you receive mention any alternate
19 way of completing your voter registration without
20 submitting documentary proof of citizenship?

21 A. I don't think so.

22 Q. Did you ever receive information from any source
23 about an alternative method of completing your voter
24 registration without submitting documentary proof of
25 citizenship?

1 A. Not that I recall.

2 Q. Did you come to understand that your registration
3 application was subsequently canceled for failure to
4 provide documentary proof of citizenship?

5 A. I did.

6 Q. And did you come to understand that you were not
7 registered to vote in Kansas after your registration
8 attempt at the DMV?

9 A. I did.

10 Q. Have you been back to the DMV after your visit in
11 August 2014?

12 A. I have.

13 Q. When?

14 A. Two instances in 2015; one of which involved
15 misplacing my license on a trip to Illinois where my
16 family still resides, another of which involved being
17 robbed in Washington, D.C., in December of 2015, and I
18 lost my license through those things being stolen from
19 my pocket. So those -- yes, I needed to go back to get
20 replacement driver's license cards each time.

21 Q. Let's start with the first time you went back.
22 Were you asked if you wanted to register to vote when
23 you returned to the DMV?

24 A. Yes.

25 Q. And what did you say?

1 A. I said no.

2 Q. Why was that?

3 A. At that time I remember thinking to myself that
4 the previous time when I had replied in the affirmative
5 to that same question, it didn't seem to bear fruit.
6 And I wasn't registered to vote through the process that
7 they were then asking me to go through again. So I
8 thought to myself, this doesn't seem to be the kind of
9 process that leads to me being successfully registered,
10 so I might as well just save myself the effort and say
11 no this time, so --

12 And it was also a thought that I had that
13 the next elections that would be ones in which I wanted
14 to vote would not be until 2016, so I had time to
15 complete that if I wanted to. But it was mainly the
16 thought that I thought it was futile to try to attempt
17 to register to vote at the DMV because that's what I had
18 attempted to do before and it didn't work.

19 Q. And let's talk about the second time you went
20 back after the incident in D.C.. Were you asked if you
21 wanted to register to vote at that time?

22 A. Yes.

23 Q. And what did you say?

24 A. I also said no.

25 Q. And why was that?

1 A. The same line of -- line of thought, as well as I
2 had become a plaintiff in -- in this case at that point.
3 And I remember additionally thinking I didn't know
4 whether registering to vote during the process of this
5 case would -- would affect my standing in it.

6 Q. And how did it make you feel when you learned
7 that your voter registration had been canceled and you
8 would not be able to cast your vote?

9 A. I was irritated and disappointed.

10 Q. Is voting important to you?

11 A. It is.

12 Q. Why is that?

13 A. I -- it's -- I like to have my voice heard in
14 the -- the running and election of people to the running
15 of the structures that govern me and are in charge of my
16 life and my society.

17 Q. And had you voted before the November 2014
18 elections?

19 A. Yes.

20 Q. When?

21 A. Upon when I was first eligible. I think 1998 was
22 the first election. 2000 would have been my first
23 presidential election. Midterm and presidential
24 elections, pretty much all of them with the exception of
25 maybe one or two midterm elections since I became

1 eligible to vote.

2 Q. And after the preliminary injunction was issued
3 in this case in 2016, did you vote in the presidential
4 election in November 2016?

5 A. I did.

6 Q. Do you intend to vote in future elections?

7 A. Yes, I do.

8 MS. HA: No further questions at this time.

9 THE COURT: Mr. Johnson.

10 MR. JOHNSON: I have no questions. Thank
11 you.

12 THE COURT: All right. Mr. Roe.

13 CROSS EXAMINATION

14 BY MR. ROE:

15 Q. Mr. Boynton, it's your testimony you registered
16 to vote at the DMV, is that correct, or applied to
17 register to vote at the DMV?

18 A. I replied in the affirmative to a -- to a
19 question of whether I wanted to register to vote at the
20 DMV.

21 Q. Okay. I have here Joint Exhibit 829.
22 Exhibit 829.

23 MS. HA: Do you have a copy?

24 MR. ROE: Can I show this -- can I
25 publish -- well --

1 THE COURT: Exhibit 829 is admitted by
2 stipulation?

3 MR. ROE: Yes.

4 THE COURT: You can publish it.

5 MR. ROE: Well, Your Honor, actually, we
6 have some -- huh?

7 THE COURT: I know there's probably
8 confidential information --

9 MR. ROE: Right, that's the issue.

10 THE COURT: -- that's subject to redaction.
11 I guess consistent with the way it was handled last
12 time, there's -- I don't know. There may be certain
13 pages that you could publish without that concern.

14 MR. ROE: I'm going to ask some questions
15 that I think will be okay under the protective order.
16 Okay.

17 THE COURT: I mean, our national rules
18 require that -- because everything's public that such
19 identifiers as date of birth and Social Security number
20 except for the last four digits --

21 MR. ROE: Right. And those would all --
22 yes. Those would all be showing if I published it. I
23 just --

24 THE COURT: -- home addresses.

25 MR. ROE: Yes. I can ask some questions --

1 THE COURT: Okay.

2 MR. ROE: -- but I don't want it published
3 in court. Is that all right?

4 THE COURT: Okay. Understood.

5 MR. ROE: Okay.

6 BY MR. ROE:

7 Q. Have you seen something that looks like this
8 before?

9 A. I have -- I am holding a number of things. I've
10 seen things that look vaguely like these things.

11 Q. Okay. Do you remember seeing something like this
12 in your deposition?

13 A. Yes --

14 Q. Okay.

15 A. -- I think so.

16 Q. I'm going to represent to you that this is --
17 this has been jointly admitted. This is a copy of
18 what's called your ELVIS file. This is the voter
19 registration file in our database.

20 A. Okay.

21 Q. Is that your name on the top?

22 A. Yes.

23 Q. And is that your address? And don't say your
24 address, but is that your address?

25 A. Yes.

1 Q. And is that your last four Social and your
2 driver's license number, if you know?

3 A. I can't find them.

4 Q. Oh, sorry. Underneath registrant data, the -- on
5 the left side, the third box down.

6 A. Last four of the Social is correct. And it's
7 just occurring to me right now that the driver's license
8 number I have memorized is from when I lived in
9 Illinois, so I need to re-memorize this. But everything
10 else looks right.

11 Q. Okay. Date of birth is the same as well?

12 A. Yes.

13 Q. Okay. Can you look over at the right side of
14 that box where it says federal data?

15 A. Okay.

16 Q. Where it says source, there is not something that
17 says anything about motor-voter or DMV; is that correct?

18 A. Not that I can see.

19 Q. Okay. And the -- that status has an A; is that
20 correct?

21 A. Yes.

22 Q. Okay. And can you go to the eighth page of that
23 document, please. It should say voter check on it.

24 A. Yes.

25 Q. Is that your -- at the bottom, is that your last

1 name?

2 A. Yes, it is.

3 Q. Does that driver's license number match the first
4 page?

5 A. Yes, it does.

6 Q. Does it say proof of citizenship document found?
7 Is there a yes after that?

8 A. Yes.

9 Q. And does it state what the document is?

10 A. Certified U.S. birth certificate.

11 Q. Okay. And can you go to the 13th page of that
12 document?

13 A. I think I have it.

14 Q. Does it say Kansas voter registration
15 application?

16 A. Yes.

17 Q. Is that your name, address and date of birth and
18 other identifiers?

19 A. Everything looks correct.

20 Q. Okay. Do you recall approximately the date of
21 November 2016 election?

22 A. The specific date? No, I do not. It's just
23 November two thousand --

24 Q. I'm sorry, the 2014 election? I'm sorry.

25 A. November 2014 is --

1 Q. On that -- sorry. On that same voter
2 registration application, do you see a number -- a date
3 on the bottom right-hand side?

4 A. Yes. It says November 4th.

5 Q. 2014?

6 A. Yes.

7 Q. Do you recall if that's approximately the date of
8 the -- that election that year?

9 A. It seems right to me.

10 Q. Okay. Last question. This is Joint Exhibit 825,
11 which has been already shown.

12 THE COURT: 825 is already admitted, yes.

13 BY MR. ROE:

14 Q. This is a voter registration receipt that the
15 Division of Vehicles -- that the Division of Vehicles
16 would -- the procedure is that they hand to people who
17 have applied to register to vote after the -- you know,
18 the law went into effect. Do you recall getting one of
19 those?

20 A. Not specifically.

21 Q. Okay.

22 A. Are we talking about the 2014 instance?

23 Q. I'm sorry. The first time you went to the
24 driver's license and you claimed that you registered to
25 vote.

1 A. Right. Yeah, I don't recall that.

2 Q. Okay.

3 A. It's got a 2016 date at the bottom is --

4 Q. Well, and do you recall getting that same -- a
5 notice like that either of the other two times?

6 A. No, I don't.

7 MR. ROE: Thank you. No further questions.

8 REDIRECT EXAMINATION

9 BY MS. HA:

10 Q. Very briefly. So on page -- on Exhibit 829 -- do
11 you still have that in front of you?

12 A. I sure don't.

13 Q. Okay.

14 MR. ROE: I can give it back.

15 BY MS. HA:

16 Q. If you can go back --

17 A. The voter check?

18 Q. If you can go back to page 8 --

19 A. Right.

20 Q. -- the voter check page.

21 A. Yes.

22 Q. And do you see on the bottom, it says description
23 of document found, certified U.S. birth certificate?

24 A. I do see that.

25 Q. What's the date added under that line?

1 A. 8/4/2014.

2 Q. And if you can go to the last page of the
3 exhibit.

4 A. Okay.

5 Q. Do you see in the bottom box it's says that
6 your -- what does it say on the very last line?

7 A. 11/5/2015 canceled per K.A.R. 7-23-15.

8 Q. Do you understand that to mean that your
9 registration information -- your voter registration was
10 canceled in November 2015 even though the voter check
11 page suggests that your U.S. birth certificate was added
12 to the system in August of 2014?

13 A. That seems to be what it means.

14 MS. HA: Thank you.

15 THE COURT: All right. Anything more?

16 All right. May Mr. Boynton be excused so
17 that he can stay in the courtroom if he chooses to? Not
18 going to be recalled?

19 All right. Mr. Boynton, you're excused.

20 THE WITNESS: Okay. Thank you.

21 THE COURT: All right. This is probably a
22 good time to close the evidence for today. I do want to
23 take up some legal rulings that I promised you at the
24 beginning of the day, so we'll do that before we leave;
25 but, otherwise, we'll reconvene at nine o'clock tomorrow

1 with the plaintiffs' next witness.

2 All right. So I'd like to turn back to some
3 of the legal rulings you may need before you call your
4 witnesses tomorrow morning. And you all have briefed
5 all of these extensively, so I'm not seeking argument.
6 I've spent time reviewing them and I'll just proceed to
7 rule.

8 First, on the *limine* motions -- and there
9 are two *limine* motions pending in the *Fish* case; there
10 are none pending in the *Bednasek* case. The plaintiffs
11 move in Document 459 -- it's actually a motion *in limine*
12 to admit -- actually to take judicial notice of
13 adjudicative facts. And the defendant has responded in
14 opposition to this and the defendant has responded in
15 opposition to this.

16 Specifically, plaintiffs move for me to
17 judicially notice two sets of adjudicative facts. The
18 first being the total number of votes cast for the
19 highest statewide office on the ballot in election years
20 going back to 2000 based on information that was taken
21 from the Secretary of State's Office website; and then,
22 secondly, the fact that the Kansas Department of Revenue
23 requires applicants for a driver's license renewal to
24 provide proof of identity, Social Security number, proof
25 of Kansas residency and principal residence. Again,

1 this is based on information on the KDOR website.

2 Defendant objects that these are not
3 adjudicative facts. I think they are. They're the type
4 of fact pursuant to Federal Rule 201 that must not be
5 one subject to reasonable dispute in that it is either
6 generally known within the territorial jurisdiction of
7 the court or (2) capable of accurate and ready
8 determination by resources whose accuracy cannot
9 reasonably be questioned. And, in fact, the court must
10 take judicial notice if requested by a party and
11 supplied with the necessary information under Rule of
12 Evidence 201(c)(2).

13 So this type of information -- in fact, I
14 think I've already heard evidence that either alluded to
15 this or spoke to numbers of votes cast in a --
16 particular years. That data, those statistics are
17 readily available in the Secretary of State's Office
18 website. I have no reason to question the legitimacy of
19 those numbers.

20 And, similarly, I have no reason to question
21 the legitimacy of the information on the KDOR website
22 that advises all of us what we must have if we want to
23 renew our driver's license: Proof of identity, Social
24 Security number, proof of Kansas residence and principal
25 residence.

1 And, again, I think I've heard this from the
2 two plaintiff witnesses who have testified, that they
3 understood they had to provide certain things. And they
4 even spoke to some of these identifying documents as
5 ones they took with them.

6 So I will take judicial notice of these two
7 what I consider to be adjudicative facts that come from
8 reliable sources, the websites of the Secretary of State
9 and the Kansas Department of Revenue.

10 The second motion *in limine* is Defendant
11 Kobach's motion *in limine* to exclude evidence regarding
12 alleged efforts to amend the NVRA. That's Document 463.
13 Plaintiffs have responded. Defendant Kobach has
14 replied.

15 And my -- my ruling is as follows: The
16 background of this is that on November 22nd, 2016,
17 plaintiffs served their sixth request for production of
18 documents. And this request, which was modified during
19 counsel's meet and confer discussion, sought "all
20 documents and communications regarding potential
21 amendments or changes to the National Voter Registration
22 Act affecting how officials may assess the eligibility
23 of a voter registration applicant."

24 And plaintiffs actually moved to compel
25 production of two documents that they argued were

1 responsive to this request. One was a draft of a
2 possible future amendment to the DVRA that was created
3 by Defendant Kobach and shared only with counsel in his
4 office and with Bryan Caskey, who is the head of the
5 Elections Division of the Secretary of State's Office.
6 This document is known as the "draft amendment".

7 And then, secondly, plaintiffs sought to
8 compel a document that Defendant Kobach created
9 referencing a possible amendment to the NVRA, which was
10 photographed by the Associated Press in late November
11 2016 as Mr. Kobach was walking into a meeting with then
12 President-elect Donald Trump. We've been referring to
13 this as the "photograph document".

14 Defendant refused to produce those documents
15 asserting they were beyond the scope of discovery, not
16 relevant and were protected by attorney-client,
17 deliberative process and executive privileges, arguments
18 that Magistrate Judge James O'Hara rejected in -- on
19 April 5th of 2017 ruling that the sixth request was
20 within the scope of discovery, and he ordered the
21 documents to be produced for his in camera review.

22 After Judge O'Hara reviewed these two
23 documents in camera, he issued a second order on April
24 17 of 2017 ruling that the documents in redacted form
25 were relevant to the issues for which discovery was

1 reopened. And all, I guess, content of those documents
2 that didn't relate to the NVRA, proposed amendment or
3 discussions about amending the NVRA were redacted
4 because there were other matters on those documents.
5 But they were redacted under Judge O'Hara's ruling. He
6 stated that both documents contain exactly the type of
7 information contemplated by the court in a previous
8 order as relevant.

9 He also noted that neither document
10 conclusively showed that Mr. Kobach sought to amend the
11 NVRA in order to avoid the Tenth Circuit's
12 interpretation of Section 5 of that statute, but
13 Judge O'Hara found that they -- the documents bore on
14 that question or could reasonably lead to other
15 information bearing on that question, which, of course,
16 is the standard at the stage of discovery. And that was
17 the stage the case was at at that point.

18 Defendant asked this court to review
19 Judge O'Hara's decision under Rule 72(a). This court
20 did not overturn and denied that request to review and
21 modify or overturn that decision.

22 Then on summary judgment, plaintiff attached
23 the draft amendment and photograph document as sealed
24 exhibits to their motion. And also, in the response to
25 opposition to the defendant's motion for summary

1 judgment, these -- plaintiff agreed to file under seal
2 and to redact references to them in the briefs until the
3 court could determine whether they should be unsealed.
4 The court considered the parties' submissions and then
5 unsealed the two exhibits.

6 And so that's just the procedural background
7 of how we come to today when Defendant Kobach moved to
8 exclude this evidence, which would include his
9 deposition testimony, because Judge O'Hara allowed a
10 limited deposition of Mr. Kobach specifically on these
11 documents. So Mr. Kobach moves to exclude that
12 deposition testimony, which plaintiffs have designated
13 for purposes of this trial.

14 And, Mr. Kobach, our use of the evidence has
15 no bearing on the two-part test that was set forth by
16 the Tenth Circuit in ruling on my order of preliminary
17 injunction.

18 Plaintiff responds that Judge O'Hara
19 determined the evidence relevant. I found it relevant
20 by implication when I unsealed the documents at the
21 summary judgment stage. And, further, plaintiff argues
22 the evidence tends to support their claim in this case
23 that the DPOC law violates Section 5 by showing that
24 Defendant Kobach understands that it violates the
25 section as interpreted by the Tenth Circuit. Plaintiff

1 argues otherwise there would be no need for lobbying
2 efforts to amend the NVRA, particularly during the first
3 year of President Trump's term in office.

4 Defendant replies that his testimony
5 demonstrated that the draft amendment was merely a
6 contingency plan and nothing more. Plaintiffs argue
7 this is inconsistent with the documents that show a
8 concerted push immediately after the election to
9 persuade the new administration to amend the NVRA.

10 Plaintiffs also argue that given the
11 defendant's unique access to voter registration
12 information, the evidence tends to show that he was
13 aware that he could not prove that a substantial number
14 of citizens were able to successfully register to vote
15 under the attestation regime.

16 Defendant replies that plaintiffs did not
17 refer to this evidence in the pretrial order and they
18 have waived their ability to rely on it at trial. He
19 also argues that because it is his burden to fulfill the
20 Tenth Circuit's two-part test, plaintiffs' evidence
21 could not be relevant.

22 My ruling is as follows: I deny the motion
23 *in limine*. Under Rule 401(a), evidence is relevant at
24 the stage that we're at now, at trial, if it has any
25 tendency to make a fact more or less probable than it

1 would be without the evidence.

2 The documents about Mr. Kobach's attempt to
3 amend the NVRA and lobby President Trump's transition
4 team to push for such an amendment in his first year
5 agenda show, or tend to show, or make it more probable
6 than not that he understood he could not fulfill the
7 Tenth Circuit's requirements. So on that basis, a fact
8 more or less probable than it would be without the
9 evidence, it's relevant.

10 Mr. Kobach's argument that the proposed
11 draft amendment was a contingency plan is one that goes
12 to the weight and not the admissibility of the evidence.
13 At this point, obviously, I'm not ruling about what
14 weight I'll give this evidence. I'm merely saying that
15 it satisfies the relevant standard for admissibility.

16 Second, the fact that Mr. Kobach has the
17 burden of proof on this issue does not impact the
18 court's relevancy determination because any party may
19 use evidence to impeach other evidence of the opposing
20 party, and that is considered relevant.

21 So relevant evidence is not confined to
22 evidence that supports the position of the party who
23 bears the burden of proof. Relevant evidence can also
24 include evidence that negates the position of the party
25 who bears the burden of proof. The evidence need only

1 have a tendency to make that fact more or less probable.

2 And, finally, defendant's pretrial order
3 argument is rejected. There is no requirement that an
4 exhaustive list of the parties' evidence be included in
5 the pretrial order or be waived.

6 So that's my rulings on the two motions
7 *in limine*.

8 I will turn now to -- there's *Daubert*
9 motions the pending. I don't know that it's necessary
10 to decide all of those now. There's also deposition
11 designations pending and opposition about that. But I
12 think I'd like to take those up at the time that you're
13 ready to get to those deposition designations.

14 I indicated this morning some things though
15 to think about. I needed a merged transcript for Brad
16 Bryant. The question about live witnesses is moot now
17 because you all agree that live witnesses aren't going
18 to be offered through deposition.

19 And then with respect to a category of
20 witnesses, such as Kansas Department of Revenue
21 employees, I do want a showing of unavailability and --
22 so I can make a ruling as to whether those deposition
23 designations are appropriate. But those, I believe, are
24 depositions offered by the defendant. So we can wait
25 until the defendant's case to do that.

1 All right. And then, finally, there's
2 pending *Daubert* motions. And there are no *Daubert*
3 motions pending in Bednasek, but the following experts
4 are subject to pending *Daubert* motions: Fish
5 Plaintiffs' expert Lorraine Minnite, Bednasek expert
6 Professor Michael Smith, defendant expert Steven
7 Camarota, which I think defendant offers in both cases,
8 defendant expert Hans von Spakovsky, and then -- which
9 again is in both cases; and then defendant expert
10 Jesse -- Dr. Jesse Richman, which I think is offered
11 only in Fish.

12 So does anyone -- I'll turn to you, Mr. Ho.
13 Are you planning to call Dr. Minnite or Dr. Smith
14 tomorrow?

15 MR. HO: We are planning on calling
16 Dr. Minnite tomorrow. And Dr. Smith is the Bednasek
17 plaintiffs' witness.

18 MR. JOHNSON: Dr. Minnite won't be until
19 Thursday or possibly Friday.

20 THE COURT: All right. Well, then let's
21 talk about Dr. Minnite then.

22 MR. ROE: Your Honor --

23 THE COURT: Yes.

24 MR. ROE: -- there is a pending motion --
25 *Daubert* motion on Smith, on Professor Smith in the

1 Bednasek --

2 THE COURT: Yes, that's correct.

3 MR. ROE: Oh, okay.

4 THE COURT: Yeah.

5 MR. ROE: I'm sorry. I thought you said
6 there was not.

7 THE COURT: The ones I show as pending are
8 Minnite, Smith, Camarota, von Spakovsky and Richman.

9 MR. ROE: I'm sorry. I thought you said it
10 was not. I apologize.

11 THE COURT: Okay. All right. So --

12 MR. JOHNSON: Your Honor, with the speed at
13 which the trial is going, I doubt Professor Smith will
14 be reached until Friday.

15 THE COURT: Okay. Well, for now, let's take
16 up Professor Minnite. I'll rule on that tonight. And,
17 you know, just give me a heads up, and I'll make a
18 record on the other -- others as we need to.

19 So Dr. Minnite is designated by Fish
20 plaintiffs. The defendant moves to exclude her
21 testimony in Document 431 and plaintiffs have responded
22 in Document 453. As I understand it, the scope of her
23 testimony was she's prepared reports and will testify
24 concerning the incidence of voter fraud and non-citizen
25 registration and voting in Kansas. And, of course, you

1 know, *Daubert* motion is challenging whether this expert
2 testimony should be admitted.

3 The court has broad discretion in making
4 this determination. The proponent of expert testimony
5 must show a grounding in the methods and procedures of
6 science which must be based on actual knowledge and not
7 on subjective belief or unaccepted speculation. The
8 court must determine whether the expert is duly
9 qualified by knowledge, skill, experience, training or
10 education to render the proposed opinion.

11 And this is really a gatekeeping function of
12 the trial court and so the court has to determine
13 qualifications, reliability, relevance, and whether this
14 testimony will, in fact, assist the trier of fact,
15 something that the court considers several factors;
16 whether the testimony is within its common knowledge and
17 experience is -- is a important factor.

18 So with respect to Professor Minnite, I note
19 that she holds a bachelor's in history, a master's in
20 political science, a master's in philosophy -- or a
21 Ph.D. -- or, I'm sorry, a master's in philosophy and
22 political science and a Ph.D. in political science.
23 She's an associate professor at Rutgers University. Her
24 research focuses on American politics and elections.
25 She has authored two full-length peer reviewed books and

1 numerous articles in peer-reviewed academic journals and
2 over a dozen chapters in edited research volumes, most
3 of these writings on voter fraud. She has been awarded
4 research grants and honors by Carnegie, Ford, Russell
5 Sage, New York Foundation, Columbia University,
6 Institute of Social and Economic Research and Policy,
7 among others.

8 Defendant challenges her qualifications
9 claiming her experience as an assistant professor in a
10 classroom does not qualify her to address this topic.
11 And defendant claims that her voter fraud research
12 occurred between 2007 and 2010, which he characterizes
13 as post litigation. I reject that particular argument.
14 It's not post this litigation, which is the relevant --
15 the relevant comparison or the relevant time frame.

16 Defendant also contends that neither her
17 expert reports nor three previous publications have been
18 subject to peer review and that she's not qualified to
19 reference Kansas law or to rebut Dr. Jesse Richman's
20 survey evidence or comment on the psychology behind why
21 non-citizens would or would not register to vote.

22 I find that there's clear evidence that her
23 book, *The Myth of Voter Fraud*, which was published in
24 2010, was peer reviewed before it was even awarded a
25 book contract by the publisher, Cornell University

1 Press. The document that the defendant relied on
2 discussed the copy editing process which happened after
3 the review process had been completed and after the peer
4 review process had been completed.

5 And plaintiffs argue they are not offering
6 Dr. Minnite as an expert on election law or the Kansas
7 procedure on obtaining a driver's license. So those
8 concerns or challenges by the defendant are of no
9 consequence.

10 Defendant argues that Dr. Minnite relies too
11 heavily on media reports in rendering her opinion making
12 it unreliable. But the court finds that she uses a
13 mixed methods methodology utilizing qualitative,
14 quantitative and archival research. And this is a
15 common and a proper methodology that many courts have
16 accepted. Her research is replicable. Her sources have
17 been documented. So I reject that challenge.

18 Finally, defendant argues that Dr. Minnite
19 should not be able to testify about whether non-citizen
20 voter registration is a problem or is significant or is
21 substantial. In line with the court's rulings as to
22 defendant's experts, "substantial" is a legal question.
23 I think somebody said that in their opening statement.
24 It's my call to make. So I caution that Dr. Minnite
25 should not be testifying and giving her opinion as to

1 what is substantial for the same reason none of the
2 other experts should testify to that. Frankly, if they
3 do, I'll ignore them because it's the ultimate -- one of
4 the ultimate questions I'll be deciding, irrespective of
5 what any expert may opine about that.

6 So I do find that the scope of her proper
7 testimony is relevant. And so I find that Dr. Minnite
8 is a proper expert witness under the factors set forth
9 in Rule 702 and in *Daubert*, and she should be allowed to
10 testify. So that's my ruling on Dr. Minnite.

11 Let me know when I need to reach another
12 expert.

13 All right. Is there anything that we need
14 to talk about? I do want you all to figure out this
15 e-mail situation, because as we go through trial if you
16 all want to trade documents or have communications, and,
17 frankly, we're trying to figure out what happened. The
18 e-mail string -- it started, the addresses were correct
19 for everybody on the defense side. And then somewhere
20 in the process of replying, some formatting or something
21 went bad. And we're going to try to figure out if it
22 was a problem on our end. It could very well have been.

23 But I just caution stay away from the
24 replies to the e-mail strings and make sure the
25 addresses are correct. And Mr. Roe has a Gmail account.

1 That's his CM/ECF. I assume that's the proper address.
2 That's the one we've been sending it to but we did
3 change it to your Secretary of State e-mail.

4 MR. ROE: Well, we looked at that in the --
5 I didn't get it in the Gmail account either. Apparently
6 Gmail was somehow spelled incorrectly too, so I don't --

7 THE COURT: Well, yeah, that's true.

8 MR. ROE: Yeah, yeah, yeah.

9 THE COURT: I'm just saying originally you
10 had -- that was part of the problem.

11 MR. ROE: Yeah, correct, right.

12 THE COURT: But originally that Gmail
13 account was the one that you were using. So that's why
14 I think everyone was using that. But, anyway, just make
15 sure you get that worked out. We don't want to have
16 that problem arise again.

17 All right. Anything else we need to talk
18 about this evening? Mr. Kobach?

19 MR. KOBACH: Yeah, Your Honor, if it's -- if
20 it doesn't test the patience too much of the court or
21 the opposing attorneys, we would be interested in
22 knowing the *Daubert* rulings on the other experts just
23 because people are -- a lot of people are flying in from
24 around the country. And if this affects anybody's
25 travel plans, it might be convenient for them to know

1 about it.

2 THE COURT: All right. You're talking about
3 your witnesses as well?

4 MR. KOBACH: Yes, please.

5 THE COURT: Okay. So we've talked about
6 Dr. Minnite. Do you want me to rule on Dr. Smith
7 tonight? I'm perfectly --

8 MR. JOHNSON: That's fine, Your Honor.

9 THE COURT: All right. Let's go to
10 Dr. Smith, and then we'll turn to defendant's three
11 experts.

12 All right. Dr. Smith. All right.
13 Dr. Smith is designated by Plaintiff Bednasek only.
14 Defendant moves to exclude this testimony in
15 Document 171. Plaintiffs respond in Document 178.

16 Dr. Smith's report, his expert report can be
17 divided into two parts. First, he sets forth the
18 research dispute between Dr. Jesse Richman and his
19 co-authors and Dr. Ansolabehere and his co-authors. And
20 those are two -- that's Richman being defendant's
21 expert, Ansolabehere being a rebuttal expert of the
22 plaintiffs.

23 And Dr. Smith sets forth the results of his
24 own Kansas study comparing individuals on the suspense
25 list in the fall of 2014 to the registered voter list

1 from the spring of 2015. He also points to the
2 demographics of individuals on the suspense list in
3 order to opine about the DPOC law's burden.

4 Dr. Smith is a professor of political
5 science and chair of social sciences at Emporia State.
6 He's authored two books on voting laws. He's written
7 several scholarly journal articles and book chapters on
8 other political science topics, several of which have
9 been peer reviewed. Several of these articles were
10 published on the website of the Midwest Political
11 Science Association.

12 Defendant challenges the specificity of
13 Smith's qualifications to opine about non-citizen voter
14 fraud.

15 I find that Dr. Smith is sufficiently
16 qualified and that any deficiency in his specific
17 knowledge can be explored on cross-examination.

18 Defendant challenges Dr. Smith's choice to
19 compare the suspense list to the registration list as a
20 whole, and this is a reliability challenge under
21 *Daubert*. Defendant argues that the proper comparison
22 would be to the registration list since January 2013
23 when the DPOC law was passed.

24 Plaintiff responds that this argument goes
25 to the weight and not the admissibility of the evidence.

1 I agree. I don't think this is a barred admissibility.
2 It does go to the weight of the evidence.

3 Finally, defendant challenges Dr. Smith's
4 testimony about the Richman/Ansolabehere studies arguing
5 that Dr. Smith is not adding anything to their opinions.
6 The opinions should speak for themselves. And,
7 therefore, this is not helpful to the trier of fact.

8 Plaintiff responds that Dr. Smith does not
9 merely parrot Dr. Ansolabehere's opinion but adds to his
10 own by putting the two studies into context and
11 explaining the limited data available on the issue. And
12 that further, the second part of Dr. Smith's opinion is
13 entirely based on his own study.

14 I agree that Dr. Smith's testimony does --
15 is relevant. He is going to testify about his own
16 study. It's not just redundant of -- of the other two
17 witnesses.

18 Defendant also challenges as conclusory
19 Dr. Smith's opinion that DPOC laws have a substantial
20 cost to voters. Defendant argues the only basis for
21 this opinion is that a number of individuals are on the
22 suspense list and, therefore, there must be a
23 substantial cost.

24 Defendant also points to an admission by
25 Dr. -- by plaintiff that Dr. Smith did not undertake to

1 quantify the cost of voting and the impact of the DPOC
2 law.

3 I think these challenges again go to the
4 weight, not the admissibility of Dr. Smith's testimony.
5 So I deny the *Daubert* motion on Dr. Smith.

6 Next, there's a *Daubert* motion on Hans
7 von Spakovsky, who was designated by the defendant to
8 testify in both cases. Plaintiff Fish moved to exclude
9 his testimony in Document 428. Defendants respond and
10 plaintiffs reply.

11 Plaintiffs ask the court to exclude -- or
12 rather to extend to its trial rulings the court's
13 summary judgment rulings that excluded von Spakovsky's
14 testimony about the McFerron survey as well as to
15 exclude legal opinions on the ultimate issue. I've made
16 clear with respect to all of these experts they're not
17 to testify to legal opinions.

18 The court otherwise denied the earlier
19 *Daubert* motion and plaintiffs asked if their objections
20 that were previously denied be preserved for the record.
21 I do intend to extend my summary judgment rulings on
22 von Spakovsky's testimony for purposes of trial. I'm
23 not convinced based on the record I have before me that
24 the ruling should be any different. So plaintiffs'
25 objections that I overruled and denied before are, in

1 fact, preserved for the record. And I do, in fact,
2 exclude von Spakovsky's testimony about the McFerron
3 survey.

4 To the extent von Spakovsky offers a legal
5 opinion about the meaning of the survey results or any
6 other matter, it's inadmissible under Federal Rule of
7 Evidence 704(a). So I'm just -- for all the reasons I
8 gave before on this particular piece of von Spakovsky's
9 testimony, I adopt and reaffirm that ruling.

10 The remainder of plaintiffs' arguments go to
11 weight and not admissibility.

12 With respect to Jesse Richman, who's been
13 designated by defendants in the Fish case only,
14 plaintiffs move to exclude the testimony of Jesse
15 Richman in Document 427. Defendants have responded in
16 Document 451, and plaintiffs reply in Document 471.

17 Again, plaintiffs ask me to extend my
18 summary judgment ruling that excludes Richman's
19 testimony about ultimate legal issues, such as whether
20 numbers are substantial. As I've said before, I do
21 exclude legal opinions by Dr. Richman or anyone else
22 about that.

23 Additionally, plaintiffs asked me to exclude
24 an exhibit about the response rates that was attached to
25 defendant's response to the original *Daubert* motion last

1 September. Plaintiffs argue that Richman did not
2 include this report with either his initial or his
3 rebuttal report and that he was unable to provide the
4 response rates when his deposition was taken in April
5 2017.

6 I held that the response rate issue, along
7 with plaintiffs' other reliability challenges, goes to
8 the weight and not the admissibility of the evidence.
9 And I reaffirm and adopt that same decision again. So
10 it's not -- it's weight, not admissibility. Richman
11 will be able to testify about that.

12 The exhibit -- the spreadsheet, I'm going to
13 allow that to be admitted. Although all parties agree
14 it was not disclosed until September and it was
15 disclosed late, plaintiffs have had plenty of time to
16 review it with their rebuttal expert. They did, in
17 fact, explore this topic with Richman at his deposition.
18 And plaintiffs are armed with sufficient information
19 upon which to challenge the response rates to the survey
20 during their cross-examination. Otherwise, my summary
21 judgment rulings on Richman are applied at trial.
22 Plaintiffs' challenges to reliability go to weight and
23 not admissibility of the evidence.

24 Dr. Camarota, I believe, is the last one to
25 take up. And I'm going to take it under advisement,

1 which means I'm going to allow Dr. Camarota to testify,
2 and then I'm going to decide -- after I hear him
3 testify, I'm going to decide the *Daubert* motion, because
4 this is the type of *Daubert* motion with respect to him
5 that I think I need to hear evidence, and I need to hear
6 a lot of evidence that he would otherwise testify to if
7 I allowed him to testify.

8 So in the -- in the -- I guess in the
9 interest of efficiency, he will testify. It will be in
10 the form essentially of a proffer if I ultimately rule
11 in plaintiffs' favor. If I don't rule in plaintiffs'
12 favor, I will have heard the testimony. So it will help
13 me decide the *Daubert* motion, and it will make a record.
14 And then, ultimately, if I agree with the defendant, it
15 will, in fact, be his testimony at trial.

16 So plaintiffs' motion to exclude his
17 testimony is Document 429. Defendant's response is 454.
18 Plaintiffs reply in Document 472. Again, I'm taking
19 this under advisement.

20 I think there are challenges to his
21 qualifications and there are reliability challenges and
22 relevance challenges, all of which I'll take under
23 advisement at this point. So plan on having him here.

24 All right. Is there anything else we need
25 to talk about? Mr. Johnson?

1 MR. JOHNSON: Thank you, Your Honor. There
2 are two witnesses who are going to be testifying
3 tomorrow and -- well, into Thursday, Bryan Caskey and
4 Tabatha Lehman. There has been discussion among the
5 parties about the order of examination of the witnesses.
6 But the -- I have proposed that since they will be
7 called by Mr. Ho, or someone on behalf of the Fish
8 plaintiffs, that they conduct their direct examination,
9 I follow with my direct examination, and then the
10 defendants follow with a comprehensive
11 cross-examination.

12 The defendant's proposal, as I understand
13 it, is that direct, cross and redirect be conducted by
14 the Fish plaintiffs, that be over, then I do the same
15 thing in my case.

16 I believe for streamlining the process, my
17 proposal makes more sense and, second, it prevents -- it
18 avoids the possibility that a witnesses will, in
19 essence, have to testify twice to the same thing because
20 of the -- you know, the separate records in the cases.
21 I just think that having Fish plaintiffs conduct their
22 examination, then I follow, then the defendants have the
23 opportunity for a comprehensive cross makes more sense
24 in terms of making sure a good flow of presentation of
25 the evidence. And it -- it also minimizes the time that

1 Mr. Caskey and Ms. Lehman, who have other jobs that
2 quite candidly may be more important than this -- than
3 this trial, that they can devote to their -- they can
4 devote more time to their jobs and less sitting for a
5 shorter time on the stand.

6 THE COURT: All right. Is there an
7 objection to that?

8 MR. KOBACH: Your Honor, there's no
9 objection to that structure or order of the examination
10 and crosses. However, we would remind the court that
11 Mr. Caskey is unavailable tomorrow. He is available
12 Thursday and Friday. So I don't know if that --

13 THE COURT: All right.

14 MR. JOHNSON: We understand that.

15 THE COURT: So Ms. Lehman's going to be
16 called tomorrow, but Mr. Caskey not until Thursday or
17 Friday; correct?

18 MR. HO: That's right, Your Honor. We plan
19 on calling Mr. Caskey -- I mean, Ms. Lehman tomorrow and
20 Mr. Caskey Friday.

21 THE COURT: I think it's more efficient to
22 do it this way. I mean, the only other way would be to
23 do it separately, but I would still, I think, allow
24 Bednasek to go out of order because it doesn't make
25 sense to have these two state officials have to come

1 twice to the courthouse so --

2 But let's do it that way. And then
3 you'll -- and then that way, if we structure it the two
4 directs, cross, two redirects, cross -- I mean, recross,
5 I mean, you know, it makes sense I think.

6 MR. JOHNSON: And just to remind Your Honor
7 and the parties, Mr. Bednasek -- he's here tomorrow
8 because Wednesday's the only day he doesn't have class.

9 THE COURT: Understood. All right.

10 MR. HO: And just one point of clarification
11 on the testimony of Mr. Caskey and Ms. Lehman, because
12 this was an issue in dispute with the defendants,
13 that -- their testimony will be admissible in both
14 cases, that is, Mr. Johnson and -- and a member of our
15 team don't have to ask the same questions of those
16 witnesses to adduce an answer in our case, and then
17 Mr. Johnson ask the exact same question to adduce the
18 same information for admission in the *Bednasek* case. I
19 just want to make sure --

20 THE COURT: Correct, that's correct. That's
21 why we -- I don't know if consolidated is the right
22 word, but that's what -- as you will recall, and we had
23 a pretrial conference about this I think with Ms. Becker
24 and several of you, we decided it was more efficient to
25 do it this way and to do evidence in common to both

1 cases at the outset. And then if there's separate
2 evidence, to take that up secondly. So Fish separate
3 evidence -- evidence separately, Bednasek -- Bednasek,
4 and then finally defendant's case. So that's what we
5 decided.

6 So, yeah, I mean, any questions that you --
7 the record is the record. So any questions that the --
8 that are drawn out by the Fish plaintiffs equally apply
9 to the Bednasek -- Bednasek case. I'll try to remember
10 his name when he's here, not call him by the wrong name.

11 But -- and, I mean, frankly, at trial, any
12 evidence that's drawn out by any examiner applies to
13 everyone. So, I mean, if Mr. Kobach -- Mr. Kobach's
14 cross-examining one of these witnesses, it may have
15 relevance both to Mr. Fish and to Mr. Bednasek's case,
16 et cetera and vice versa as well. So, anyway, that's
17 the way we'll proceed. Everybody clear on that?

18 MR. JOHNSON: And rather than have to send
19 an e-mail to the parties by 6:00 p.m., I just want to
20 announce to the court that Parker Bednasek will be here
21 tomorrow to testify.

22 MR. ROE: I'm sorry, is it just Parker
23 tomorrow? Anybody else?

24 MR. JOHNSON: Well, I mean, he's the only
25 one taken out of order.

1 THE COURT: Yeah. We're still in the Fish
2 case, but we --

3 MR. ROE: Okay, okay, okay.

4 THE COURT: -- agreed that Mr. Bednasek, so
5 that he can get hopefully all straight As in his senior
6 year at KU, will testify so not -- not -- it's a busy
7 time right before spring break. So he gets to testify
8 tomorrow out of order. Everybody had agreed to that
9 ahead of time.

10 All right. All right. Have a pleasant
11 evening. We'll see you at nine o'clock tomorrow.

12 (Proceedings adjourned until the following
13 day, March 7, 2018, at 9:00 a.m..)

14 CERTIFICATE

15 I certify that the foregoing is a correct
16 transcript from the record of proceedings in the
17 above-entitled matter.

18 DATE: March 13, 2018

19
20 /s/Kimberly R. Greiner
21 KIMBERLY R. GREINER, RMR, CRR, CRC, RDR
22 United States Court Reporter
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