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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PARKER BEDNASEK,
Plaintiff,

v.

Docket No. 15-9300-JAR

KRIS W. KOBACH,
Defendant.

STEVEN WAYNE FISH, et al.,
Plaintiffs,

v.

Docket No. 16-2105-JAR

KRIS W. KOBACH,
Defendant.

Kansas City, Kansas
Date: 03/09/2018

Day 4 (P.M. Session)
Pages 1039-1212
.....

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

APPEARANCES:

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(Appearances continued on next page)

1 APPEARANCES:

2 (Continued)

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I N D E X

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E X H I B I T S

<u>Fish Plaintiffs'</u> <u>Exhibits</u>	<u>Offered</u>	<u>Received</u>
67	1201	1201
68	1201	1201
69	1201	1201
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864	1056	1056
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1 (1:18 p.m., proceedings commenced).

2 THE COURT: All right. You can be seated.

3 LORRAINE MINNITE,

4 called as a witness on behalf of the Fish Plaintiffs,

5 having first been duly sworn, testified as follows:

6 CROSS EXAMINATION

7 BY MR. ROE:

8 (Continued)

9 Q. Doctor Minnite, I just have a few more questions.
10 Do you remember we were talking about voter fraud
11 earlier?

12 A. Yes.

13 Q. Okay. So if thousands of non-citizens all voted
14 in an election by accident, no willful violation, you
15 would say there was no voter fraud?

16 A. Say that again.

17 Q. If a thousand non-citizens all voted in an
18 election, it was all totally by accident, none of them
19 had any willful behavior, you would look at that and you
20 would say there was no voter fraud by those people?

21 A. Well, I-- I don't know how you'd know that it was
22 all by accident, but we could take it as a hypothetical.
23 I would say that that was a very flawed election and
24 that people voted illegally in it.

25 Q. So-- I'm sorry. Your-- your position now is

1 that-- are you saying it might be voter fraud even if
2 they do it without any willful or by accident?

3 A. Well, if you want to--

4 MS. LAKIN: Objection to the extent it
5 mischaracterizes Doctor Minnite's testimony.

6 THE COURT: Sustained.

7 Q. (BY MR. ROE) Okay. So you're just saying it's a
8 problem that we should look into, but you're not stating
9 that it's voter fraud?

10 A. I'm-- I'm stating what I just said, which is that
11 it was a flawed election, there were illegal votes
12 apparently cast in that election. And it-- it's a
13 serious issue.

14 Q. But it's not voter fraud?

15 A. Well, I don't know.

16 Q. I'm giving you a hypothetical under your
17 definition. It's all by accident, they didn't know they
18 weren't supposed to do it. That's all-- that's the
19 information. That's it.

20 A. Well, you're representing that as the truth.
21 Right?

22 Q. Yes, for the purposes of this hypothetical.

23 A. It may not be fraud but it's still illegal.

24 Q. So it's--

25 A. I don't-- I keep the two things very close

1 together.

2 Q. I agree with you on that, it's definitely
3 illegal. I just want to make sure it's not voter fraud
4 under your definition.

5 A. If it's not the intentional corruption of the
6 electoral process by voters, then I don't technically
7 call it voter fraud for purposes of measurement.

8 Q. Okay. And if--

9 A. But that doesn't that--

10 Q. I know--

11 A. -- I don't take into account the context. That's
12 the whole point.

13 Q. Okay.

14 A. And that I ignore illegality.

15 Q. Okay. So you-- okay. So you admit it's illegal,
16 it's just not voter fraud. Right? That's your
17 testimony?

18 A. If that's what you're representing to me, that
19 there's an election and there are a thousand
20 non-citizens who voted and none of them did it
21 intentionally, then it wouldn't be fraud by my
22 definition, that's correct.

23 Q. Okay. Do you recall talking about the-- do you
24 recall the chart of the DOJ indictments that you have in
25 your expert report?

1 A. Where?

2 Q. In your first expert report.

3 A. Can you show me where that is?

4 Q. I think it's Page 12.

5 A. Yes.

6 Q. Okay. On the chart there is various different
7 crimes there, right, there's voter fraud, there's-- I'm
8 sorry, is it voter fraud, there's-- I'm sorry, it's
9 election fraud. Correct?

10 A. It says election fraud violations.

11 Q. Okay. And there's-- there's other ones, there's
12 tax evasion?

13 A. Yes.

14 Q. Okay. That chart, you understand it to be
15 indictments of all-- to be all the-- the indictments in
16 2005 by the Bush Administration; is that correct?

17 A. This is data taken from a database that is not
18 produced by the Bush Administration, it was produced by
19 the Administrative Office of U.S. Courts.

20 Q. I'm not asking if the Bush Administration
21 produced the data, I'm asking if that's what the data
22 represents is the number-- the indictments for those
23 sets of crimes in 2005.

24 A. It's for fiscal year 2005.

25 Q. Okay. And you'd agree that a prosecutor-- so

1 these are indictments, correct, do you know what an
2 indictment is?

3 A. Yes.

4 Q. Okay. So you agree, though, that even if a
5 prosecutor has some kind of evidence for an indictment,
6 he may not file an indictment?

7 A. Yes.

8 Q. Okay. So you're not-- you're not representing
9 that that chart is all of those crimes that were known
10 in 2005?

11 A. That's correct.

12 Q. Okay. In the Washington case you mention, the--
13 the governor's race, do you remember that in your
14 report?

15 A. You'd have to show it to me. I write it-- I
16 write about it in my book as well.

17 Q. Okay. Do you recall-- here we go. Page 12 and
18 13.

19 A. Okay.

20 Q. Do you recall this, the-- the election-- the
21 governor's race in Washington in 2004?

22 A. Yes.

23 Q. Okay. You state that, correct me if I'm wrong,
24 that-- that some 25 ballots or .009 percent of the
25 total-- of the total 2.8 million cast were invalid

1 because they were cast in the names of deceased voters
2 or double votes. Right?

3 A. Where are you there?

4 Q. On Page 13.

5 A. Okay. Yes.

6 Q. Okay. You know the range-- the margin of victory
7 in this case was 129 votes. Right? You don't include
8 that in your-- in your report, do you?

9 A. I don't know. I-- I include-- I'm looking. But
10 I certainly include it in my book, which I cite as the
11 information for this case.

12 Q. This is the court case you cite, correct, the
13 court opinion from the--

14 A. It looks like it.

15 Q. It's the report of the proceedings? Okay.

16 A. Yeah, which I cite in the-- in the-- in my
17 report.

18 Q. Okay.

19 A. Footnote 38.

20 Q. Turn to Page 18 and 19, please. Can you read
21 that that's highlighted?

22 A. Where do you want me to start?

23 Q. So-- so you're saying you don't recall if the
24 margin of victory in this case was 129 votes; is that
25 what you're saying?

1 A. I'm not-- I know it was very small. I don't
2 remember.

3 Q. Okay. Well, I'm going to represent to you--

4 A. Well, actually I do remember.

5 Q. Okay.

6 A. There was a certified number.

7 Q. Uh-huh.

8 A. And it ended up having to be changed because of--
9 I think this is the case that there were-- there had to
10 be a few ballots deducted at the end of it.

11 Q. Yes, yes.

12 A. So the number changed a little bit, that's why
13 I'm having trouble remembering.

14 Q. You would agree it was approximately 129, right,
15 that was the approximate margin of victory? I'm going
16 to represent to you that was the approximate margin of
17 victory, okay, just for time sake. All right?

18 Now, in this case in which the margin of victory
19 was approximately 129 votes, the court found that 1,401
20 votes were cast by convicted felons.

21 A. Where are you reading?

22 Q. In these highlighted areas.

23 A. Right. But where?

24 Q. Should I read it into the record?

25 A. I'm just not following you.

1 Q. Okay. Okay. "Here, petitioners have established
2 by clear and convincing evidence that 754 felons
3 voted--"

4 THE COURT: Wait a minute.

5 MS. LARKIN: Objection.

6 MR. ROE: I'm sorry. I'm trying to help
7 her, Your Honor. So I cannot-- I cannot read it in the
8 record?

9 THE COURT: Point her to the page and
10 paragraph without reading it, but--

11 MR. ROE: Okay.

12 A. You had me on the wrong page. That's why.

13 Q. (BY MR. ROE) Page 18.

14 A. I know. Yeah, but I was looking here.

15 Q. Oh, okay, I'm sorry.

16 A. Yeah. Okay.

17 Q. Okay.

18 A. All right.

19 Q. So--

20 THE COURT: Counsel, I feel like we're
21 really getting into the weeds on--

22 MR. ROE: Your Honor, I will direct her to
23 the question--

24 THE COURT: No, no, no, just let me finish.
25 I feel like we're getting in the weeds. I know she

1 testified about voting, but I just want to remind
2 everybody that the standard is successful registrations,
3 it's not even attempted registrations. It's-- it's--
4 ultimately it's a matter of successful registrations and
5 whether that's substantial.

6 I understand-- I've heard of evidence beyond
7 that by both sides, but I just feel compelled to point
8 that out because we are getting in the weeds on other
9 cases that had to do with actual numbers of votes cast,
10 et cetera.

11 MR. ROE: Well, I'm just-- she brings it up
12 in her expert report.

13 THE COURT: I agree, I agree.

14 MR. ROE: I mean, it's the majority of her
15 expert report is talking about, you know, other cases of
16 voter fraud like this. I mean, I just want to point it
17 out. Anyway.

18 THE COURT: Okay. Go ahead.

19 Q. (BY MR. ROE) So again, 1,401 votes were cast by
20 convicted felons in that case, was found by that court?

21 A. "Here, petitioners have established by clear and
22 convincing evidence that 754 felons voted at the general
23 election in 2004."

24 Q. Yes. And then the next one.

25 A. "Intervenors have established that 647 felons

1 voted at the same election."

2 Q. All right. I will represent to you that if you
3 add those numbers together they equal 1,401. Okay?

4 A. Okay.

5 MS. LAKIN: Objection, Your Honor. It's not
6 entirely clear from this what the-- Mr. Roe has stated
7 here from this information that that-- those aren't
8 duplicate votes, for instance.

9 MR. ROE: Okay. Fine, Your Honor.

10 THE COURT: Why don't you-- well, you can--
11 you can clear that up on redirect.

12 Q. (BY MR. ROE) Okay. So assuming it's 1,401,
13 that's approximately seven times the number of that
14 margin of victory. Right?

15 A. If you say so.

16 Q. And you don't think this is-- you don't think
17 that's a problem?

18 A. No, you're-- you're really distorting my views.

19 Q. Okay. Sorry, let me rephrase. You don't think
20 that's substantiated evidence of voter fraud?

21 A. That's not what the judge found.

22 Q. Okay.

23 A. The-- what the judge found in this case was that
24 many of these people had been mailed ballots by the
25 election board, which was a mistake. And when you get a

1 ballot in the mail and you don't understand if you're on
2 parole maybe you're not allowed to vote, and you send it
3 back in, then that vote--

4 MR. ROE: Your Honor--

5 A. -- gets counted.

6 MR. ROE: If Ms. Lakin would like to cross
7 her or redirect on the explanation, I just want to make
8 sure we're clear. You know, it's fine.

9 THE COURT: I think the answer was no, she
10 doesn't-- she doesn't agree with the premise of your
11 question.

12 MR. ROE: Okay.

13 Q. (BY MR. ROE) All right. Last set of questions.
14 *The Sanchez versus Dornan* case--

15 A. Yes.

16 Q. -- which you mentioned and you're familiar with
17 that?

18 A. Yes.

19 Q. Okay. I believe in your report that they
20 ultimately found no evidence of fraud, right, on Page 13
21 of your report.

22 A. The initial report?

23 Q. Yes.

24 A. Because I--

25 Q. Yes, it is. Yes.

1 A. -- speak about that a couple times, so-- yes.

2 Q. Okay. You're not disputing that the House
3 Administrative Committee which investigated that
4 election contest filed by the Dornan against-- the
5 Dornan campaign against Loretta Sanchez in the contest
6 where she won by less than 1,000 votes, that the
7 committee in its official report on its investigation
8 found that more than 600 votes were cast by
9 non-citizens? You're not disputing that?

10 A. No.

11 Q. Okay.

12 MR. ROE: Thank you. That's all.

13 MS. LAKIN: No further questions, Your
14 Honor.

15 THE COURT: Mr. Johnson.

16 MR. JOHNSON: I have nothing. Thank you,
17 Your Honor.

18 THE COURT: May Doctor Minnite be excused?

19 MS. LAKIN: Yes.

20 THE COURT: All right. Thank you. You may
21 call your next witness.

22 MR. HO: Your Honor, at this time the only
23 witness that the plaintiffs would call is Secretary
24 Kobach via video deposition. But we've discussed this
25 with Secretary Kobach and there's been a request that

1 the defense has made to allow them to put on some of
2 their witnesses in the hopes that they can get back to--
3 they've come in from out of town, in the hopes that they
4 can get back. And the concern that Secretary Kobach has
5 is that if we play the deposition, we may not have
6 enough time to get his witnesses on and off the stand so
7 that they can go home.

8 We don't have an objection to it. But, you
9 know, we would put on Secretary Kobach's deposition if
10 it were our choice. But out of courtesy to the defense,
11 if the Court is fine with it when he makes this request
12 to put on some of his witnesses out of order, we don't
13 object to that.

14 THE COURT: Okay. Okay. So let me--
15 because there's some work to be done with respect to
16 some of your witnesses, Mr. Kobach. So which witnesses
17 are you wanting to call this afternoon?

18 MR. KOBACH: We were wanting to call Mr. von
19 Spakovsky and Mr. Camarota, both of whom are hoping to
20 fly back to Washington, D.C., this evening.

21 THE COURT: Oh, these are your two experts
22 and you're planning to call them live?

23 MR. KOBACH: Yes.

24 THE COURT: Okay.

25 MR. JOHNSON: Your Honor, I don't have any

1 objection to this also.

2 THE COURT: Okay. Let's proceed.

3 MR. HO: I guess what I would just say
4 briefly, though, Your Honor, is that we would like to
5 make a decision after Mr. von Spakovsky testifies
6 whether to go forward with the video deposition or with
7 Mr.-- or with Doctor Camarota, depending on how much
8 time there is left.

9 THE COURT: Okay. I understand. All right.
10 Let's proceed. You're going to call Doctor von
11 Spakovsky. I'm sure I'm butchering your name, I'm
12 sorry.

13 HANS von SPAKOVSKY,
14 called as a witness on behalf of the Defendant, having
15 first been duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KOBACH:

18 Q. Mr. von Spakovsky, could you spell your name for
19 the Court?

20 A. Sure. It's Hans, H-A-N-S. von, v, and that's a
21 small v, O-N. Spakovsky, S-P-A-K-O-V-S-K-Y.

22 Q. Mr. von Spakovsky, is this your-- does this
23 appear to be your resume that I just handed to you?

24 A. Yes, it is.

25 MR. KOBACH: Your Honor, I'd like to

1 introduce Mr. von Spakovsky's resume into evidence.

2 THE COURT: The exhibit number, please.

3 MR. KOBACH: Exhibit No. 864.

4 THE COURT: Any objection?

5 MR. HO: No objection, Your Honor.

6 MR. JOHNSON: No objection, Your Honor.

7 THE COURT: Exhibit 864 admitted.

8 Q. (BY MR. KOBACH) Mr. von Spakovsky, what is your
9 occupation?

10 A. I'm an attorney and currently a senior legal
11 fellow at The Heritage Foundation and manager of their
12 election Law Reform Initiative.

13 Q. And do you teach any classes on the side?

14 A. I'm an adjunct at the Scalia Law School where I
15 teach a class on election law.

16 Q. And the Scalia Law School is affiliated with
17 which university?

18 A. George Mason University.

19 Q. And again, which class do you teach?

20 A. Election law.

21 Q. Please tell us about your own educational
22 background.

23 A. I have a undergraduate degree from the
24 Massachusetts Institute of Technology and a law degree
25 from Vanderbilt University.

1 Q. And what is your work history I guess beginning
2 with your legal work?

3 A. I was in private practice for two years. When I
4 got out, then I was an in-house corporate counsel in
5 Atlanta. I moved to Washington in 2001 to take a job in
6 the U.S. Department of Justice, the civil rights
7 division. I started off as a trial attorney in the
8 voting section, which is responsible for enforcement of
9 all federal voting rights laws, the Voting Rights Act,
10 the Help America Vote Act, the National Voter
11 Registration Act and the UOCAVA, the Uniformed and
12 Overseas Citizens Absentee Voting Act.

13 I was then promoted to counsel to the Assistant
14 Attorney General for civil rights. I was in that
15 position for three years providing advice to the
16 Assistant Attorney General and helping coordinate
17 enforcement of federal voting rights laws. I then spent
18 two years on the federal--

19 Q. Well, let's-- before we get there, I just want to
20 talk more about your Department of Justice.

21 A. Sure.

22 Q. So what were the years that you were at the
23 Department of Justice?

24 A. I was there from 2001 to 2005. And while I was
25 there, I'm sorry, I should've mentioned that I was the

1 Department of Justice representative on the first Board
2 of Advisors to the U.S. Election Assistance Commission.
3 I also served on two different committees, one a-- a
4 committee for IEEE, that's the Institute of Electronics
5 and Electrical Engineers. They had a committee that was
6 working on trying to establish standards for voting
7 equipment.

8 I also served on another committee for OASIS.
9 You know, Washington is full of acronyms. OASIS is the
10 Organization for the Advancement of Structured
11 Information Systems. And they were also trying to work
12 on standards for the software and other such devices
13 used in the-- in the voting field.

14 Q. And is it correct that you were the Department of
15 Justice's representative on those committees?

16 A. Yes.

17 Q. And, I'm sorry, I interrupted you. Then after
18 you left the Justice Department in 2005, what did you
19 do?

20 A. I spent two years at the Federal Election
21 Commission as a commissioner. Our responsibility was to
22 enforce the Federal Election Campaign Act which governs
23 campaign financing for anyone running for Congress for
24 the presidency.

25 Q. How many commissioners are there on the Federal

1 Election Commission?

2 A. There are six commissioners.

3 Q. What do the commissioners do?

4 A. We formulated and issued regulations to enforce
5 the Federal Election Campaign Act. We also did audits
6 of federal campaigns as well as enforcement matters. So
7 if-- if someone had a complaint that a congressional
8 candidate or a presidential campaign had violated the
9 law, we would investigate that and make a decision as to
10 whether they had violated the law and whether or not
11 some kind of a fine or penalty was appropriate for that.

12 Q. Is it correct that prior to becoming a federal
13 election commissioner you served as a local election
14 board member; is that correct?

15 A. Yes. When I was a practicing lawyer in Atlanta,
16 I spent five years on the Fulton County Registration
17 Election Board. This was-- the election board was
18 responsible for all processing of voter registrations
19 and the running of elections in Fulton County, which is
20 the metropolitan-- metropolitan Atlanta area and was the
21 largest county in Georgia.

22 I also spent three years as the vice chairman of
23 the Fairfax County Electoral Board. That's in Virginia.
24 Fairfax County also is the largest county in the state
25 of Virginia and had the same responsibilities;

1 processing all voter registrations, administering the
2 voter registration system, and also running the polling
3 places on election day. And then, of course, you know,
4 counting ballots and also making decisions on things
5 like provisional ballots that had been filed on election
6 day.

7 Q. Would the Fairfax County Election Board have a
8 staff that works under it?

9 A. Yes. There were three members of the electoral
10 board. We had a general registrar who was a full-time
11 employee of the county and took direction from us on the
12 running of elections and the processing, administering
13 of the voter administration system.

14 Q. So would the election board in Fairfax County be
15 roughly analogous to the election commissioner in-- like
16 of Sedgwick County in Kansas or of Johnson County?
17 Would that be a rough analogy?

18 A. Well, we're the board that's running-- I mean,
19 the general registrar worked for the Board. So we would
20 set policy and also make all decisions on-- on whatever
21 issues came up, including, you know, final issues on the
22 hiring of personnel, how much equipment-- how much
23 voting equipment should be at various precincts, any
24 issues arising over voter registration, things like
25 that.

1 Q. And where were you working when you served on the
2 Fairfax County Election Board?

3 A. I was working at The Heritage Foundation.

4 Q. Okay. So let's go back to your career timeline.
5 After leaving the Federal Election Commission, what did
6 you do?

7 A. That's when I went to The Heritage Foundation and
8 went to work in their legal center.

9 Q. And have you been there ever since?

10 A. I have, yes.

11 Q. And that was in what year?

12 A. 2008.

13 Q. Your CV also mentions the Public Interest Legal
14 Foundation. What work have you done there?

15 A. I'm on the Board of the Public Interest Legal
16 Foundation. It's a non-profit group whose mission is
17 improving election integrity across the country.

18 Q. Have you published any books on voter fraud?

19 A. Yes. I've published-- I co-authored a book
20 called "Who's Counting? How Fraudsters and Bureaucrats
21 Put Your Vote At Risk." I also contributed a chapter to
22 a book put out by the American Bar Association. They
23 asked me to do a history summary and the effects of the
24 National Voter Registration Act. "America Votes," the
25 name of the book. I've also-- I also did a chapter on

1 election issues for another book published recently
2 called Liberty's-- "Liberty's Nemesis."

3 Q. So in addition to the book you co-authored, the
4 two chapters that you just described, have you written
5 any articles or other publications on voter fraud?

6 A. Yes. I-- I've published an extensive list of
7 studies and reports for The Heritage Foundation. I've
8 also done other reports. For example, I recently
9 co-authored a-- a manual on-- with Don Palmer, who's the
10 former chief election official for the state of Virginia
11 and the state of Florida, on best practices for election
12 officials to improve the integrity of the voter
13 registration system.

14 Q. And is that a book that is intended to advise
15 election administrators nationally or is that just
16 limited to Virginia?

17 A. Well, it's not a book, it's like a-- I don't
18 know, it's like a 20-page manual that goes through all
19 the different ways that election-- local election
20 officials can improve the integrity of the voter
21 registration process and voter lists. And it was
22 distributed to election officials all over the country.

23 Q. Have you been asked to serve on any boards or
24 committees dealing with elections other than the ones
25 you've already mentioned?

1 A. Yes. Last year I was appointed by President
2 Donald Trump to his Advisory Commission on Election
3 Integrity.

4 Q. Have you been appointed to serve on any ABA
5 committees or boards?

6 A. Well, I-- I haven't been-- I haven't been
7 appointed to a ABA committee, but it was the ABA
8 committee, I think it was on state and local government,
9 that contacted me. Ben Ginsberg I think was the
10 chairman and he asked me to contribute a chapter to the
11 book that the ABA was putting out on the American
12 election process.

13 Q. Have you done any studies of election turnout?

14 A. I have. I've done a series of reports for The
15 Heritage Foundation where I would take a look at states
16 like Georgia, Kansas, Texas, and some others where I
17 would get the official and other turnout data from those
18 states and look at what the turnout was both before and
19 after they passed, for example, a-- a voter ID law to
20 see what effect it-- it might have.

21 Q. Have you ever been invited to testify before
22 Congress?

23 A. Yes, in the last ten years numerous times.

24 Q. Roughly how many times?

25 A. Well, I-- I've kind of lost count, at least a

1 dozen times, probably-- maybe a dozen-and-a-half or
2 more.

3 Q. And was your testimony about elections?

4 A. Most of it-- most of the time, but I've also been
5 asked to testify about-- about other issues, such as
6 most recently I-- I testified about federal district
7 court judges issuing injunctions with national scope.

8 MR. KOBACH: Your Honor, I offer Mr. von
9 Spakovsky as an expert witness in the subjects of
10 elections, election administration and voter fraud.

11 MR. HO: Your Honor, just to preserve the
12 record, we note our objections made in our *Daubert*
13 motion.

14 MR. JOHNSON: And, Your Honor, for the
15 record, the Plaintiff Bednasek joins in that objection.

16 THE COURT: All right. Your objections are
17 noted for the record. Consistent with my *Daubert*
18 ruling, I overrule those objections and allow-- and
19 recognize Mr. von Spakovsky as an expert in the fields
20 of elections, election administration and voter fraud.

21 Q. (BY MR. KOBACH) Mr. von Spakovsky, I'm going to
22 show you Exhibit 865. Is this your expert report that
23 you submitted for this case?

24 A. Yes, it is.

25 MR. KOBACH: Your Honor, I'd like to offer

1 into evidence Mr. von Spakovsky's expert report,
2 Exhibit 865.

3 MR. H0: Your Honor, we object. The expert
4 report in its unredacted form as it exists - and it has
5 been submitted to the Court - contains numerous passages
6 which Your Honor excluded Mr. von Spakovsky-- numerous
7 passages addressing topics which Your Honor excluded Mr.
8 von Spakovsky from testifying about, including about
9 three pages worth of text about survey research on Pages
10 15 through 17 of the report. There were also various
11 legal conclusions about the word "substantial" sort of
12 sprinkled throughout the report which Your Honor also
13 excluded.

14 MR. KOBACH: Your Honor, if you wish, I can
15 amend my motion and move the admission of his report
16 with the exception of the portion dealing with the
17 survey. And I believe that starts on Page 15 in the
18 first full paragraph and ends on Page 16 at the end of
19 the first three paragraphs.

20 MR. H0: Your Honor, we would still object.
21 Your Honor clearly found that Mr. von Spakovsky is not
22 qualified to testify on survey research. Beyond the
23 portions that Mr. Kobach identified at the bottom of
24 Page 16, Mr. von Spakovsky offers opinions based on a
25 Rasmussen poll. On Page 17, he offers opinions based on

1 a Brennan Center survey, so we would move for the
2 exclusion of those pages as well.

3 If Mr. Kobach is willing to agree to that,
4 then we're fine with him using portions of the report in
5 order to expedite the testimony of Mr. von Spakovsky.
6 But we would also ask that when it's formally moved into
7 evidence that references to "substantial" in relation to
8 the number of non-citizen registrations in Kansas also
9 be redacted from his report.

10 MR. KOBACH: Your Honor, I would agree with
11 redacting Page 15 from the word "Kansas voters" through
12 the end of the paragraph before "Conclusion" on Page 17.
13 However, I don't think redacting the word "substantial"
14 would be appropriate since many of the expert reports
15 include the word "substantial."

16 THE COURT: All right. So I will admit
17 Exhibit 865 subject to redaction of any references to
18 those matters that I excluded in the-- in the *Daubert*
19 ruling. That includes the McFerron survey, it includes
20 other surveys. It's probably not practical to exclude
21 if he mentions substantial, but I will disregard. As I
22 cautioned you with respect to every witness, I'll
23 disregard anything that I consider to be a legal
24 opinion. But subject to those redactions, 865 admitted.

25 MR. HO: Thank you, Your Honor.

1 MR. JOHNSON: And for the record, I'd join
2 in Mr. Ho's objections. And thank you, Your Honor.

3 THE COURT: So noted.

4 Q. (BY MR. KOBACH) Mr. von Spakovsky, is this your
5 expert report?

6 A. Yes, sir, it is.

7 Q. Are the sources that you used in your expert
8 report contained or noted in your expert report?

9 A. They are.

10 Q. Do you think this country has a problem with
11 non-citizens being able to easily register and vote?

12 A. Yes, I do. It's because we have mostly an honor
13 system throughout the country and there are numerous
14 examples of non-citizens registering and voting, whether
15 intentionally or-- or through accident. A few examples
16 show that, that it's an ongoing problem.

17 In the early 1980s, a federal grand jury in
18 Chicago publicly released its report, something very
19 unusual since federal grand juries normally operate
20 under a veil of secrecy. And their grand jury report
21 noted the results of their investigation of a very large
22 voter fraud case in-- in Chicago.

23 One of the-- amongst the various kinds of fraud
24 that they noted was the problem of aliens registering
25 and voting in the city for various reasons, including

1 the fact that a voter ID card can be used to obtain
2 other kinds of-- of ID. And I believe in that case the
3 Justice Department actually ended up prosecuting and
4 convicting around two dozen aliens.

5 If you move to the 1990s; this subject has
6 already been mentioned. In 1996, Bob Dornan, who was
7 the incumbent Republican congressman from a district in
8 California, filed an election contest against the winner
9 of his re-election contest, Loretta Sanchez. She won by
10 less than 1,000 votes. His contest was investigated by
11 the House Administration Committee which has
12 jurisdiction over those kind of contests.

13 One of the things they did in the case was they
14 compared the voter registration list and those who had
15 voted against INS records and their official report
16 concluded that over 600, I believe 624, individuals who
17 had voted in that election were not U.S. citizens.
18 There was circumstantial evidence they said of another
19 196.

20 So they didn't overturn the election because
21 there was still a small margin of the victory, but the
22 point was that literally hundreds of non-citizens had
23 voted in that election. And we would never have known
24 about it except for the fact an election contest was
25 filed.

1 If you move to the 2000s, in 2005, as another
2 example, the legislative auditor in the state of Utah
3 did a sampling audit of driver's licenses which had been
4 issued to illegal aliens. Utah was one of the few
5 states that did that. And the audit turned up the fact
6 that a couple of hundred illegal aliens had actually
7 registered in the state. And there was an estimate put
8 out by a state senator that if this sample audit was
9 extended to the entire population of driver's license
10 holders, that there might be 5 to 7,000 individuals--
11 aliens with licenses.

12 There are many more examples, including last year
13 when officials in Virginia admitted that they had
14 removed 5,500 non-citizens from the voter rolls but not
15 before they had cast 7,500 ballots.

16 MR. HO: Your Honor, I'm going to lodge an
17 objection. This testimony about some incident in
18 Virginia that occurred last year does not appear
19 anywhere in Mr. von Spakovsky' expert disclosures. I
20 think he just testified that it happened last year,
21 which is 2017. His disclosures were in 2016. I also
22 don't believe that the 2005 incident in Utah is in his
23 expert report, although I can't-- I'd like to
24 double-check that to be 100 percent sure about it.

25 THE COURT: All right. He is limited to

1 testify to what's in his expert report. Is the Utah in
2 your expert report?

3 THE WITNESS: Yes, ma'am, it is.

4 MR. HO: Yeah, I apologize, Your Honor, I
5 just looked at it and saw that it is.

6 THE COURT: I'll disregard the testimony
7 about Virginia.

8 Q. (BY MR. KOBACH) Mr. von Spakovsky, looking at
9 the *Dornan-Sanchez* case investigated by the
10 congressional committee, was that investigated because
11 Congressman Dornan filed a contest?

12 A. That's correct.

13 Q. In your opinion, has voting by aliens--
14 non-citizens occurred in other congressional races as
15 well?

16 A. Yeah. When we-- we have-- we have cases that
17 have been prosecuted in many different places. A couple
18 of cases, for example, that I cite in my expert report,
19 there are two opinions from the Seventh Circuit Court of
20 Appeals. And the Seventh Circuit Court of Appeals'
21 opinions detail two separate aliens who came to the
22 United States, both of them to Illinois.

23 Almost as soon as they got here, they went and
24 got driver's licenses and also registered to vote. They
25 then promptly voted, including in a federal election.

1 So they would've been voting for individuals for
2 Congress.

3 And the-- again, the only reason those cases came
4 to light-- they were not discovered by election
5 officials. According to the Seventh Circuit opinions,
6 they were discovered when these individuals-- they were
7 aliens who had come here legally, but they applied for a
8 change of status with the INS. And that's the point at
9 which it was discovered that they had, in violation of
10 federal law, illegally registered and voted. But the
11 election officials in Illinois did not discover that.

12 Q. Is it your view that election officials are
13 limited in the tools they have to discover aliens on the
14 rolls?

15 A. Yes. Yes, they are.

16 Q. In your opinion, is the signature or affirmation
17 on a voter application a sufficient way to stop a
18 non-citizen from registering either intentionally or
19 accidentally?

20 A. No, because there are numerous cases-- again, for
21 example, the two Seventh Circuit cases where the
22 individuals-- where they filled out the registration
23 forms, according to the opinions, they checked "yes"
24 that they were citizens and signed the affirmation form
25 swearing that they were citizens despite the fact that

1 they were not.

2 Q. Are you familiar with the non-citizens discovered
3 by the Sedgwick County, Kansas Election Office which you
4 describe I believe in your report?

5 A. Yes. I-- I was given that to review when I was
6 preparing my expert report.

7 Q. I'm going to ask you to take a look at
8 Exhibit 1133, the exhibit I think we have all almost
9 memorized by now.

10 Do you-- do you-- were you in the courtroom when
11 the plaintiffs' expert, Ms. Minnite, went through some
12 of those cases?

13 A. I was, yes.

14 Q. Is it your opinion as you looked at those cases
15 that the individuals in those cases did not commit
16 something that can be described as fraud?

17 A. No, I think anytime a non-citizen registers,
18 anytime a non-citizen votes, they are-- whether
19 intentionally or-- or by accident, I mean, they are
20 defrauding legitimate citizens from a fair election.

21 Q. Is it your opinion that in many of these cases
22 the fact that the non-citizen was registered would not
23 have been discovered but for the fact that the
24 non-citizen registered again at the naturalization
25 ceremony?

1 A. Yes, that's my opinion.

2 Q. Is it your expert opinion that Sedgwick County
3 has discovered a significant fraction of the
4 non-citizens on the voter rolls in Sedgwick County?

5 A. I think they've probably only--

6 MR. HO: Objection. Leading, Your Honor,
7 and also gets to the ultimate legal conclusion in the
8 case.

9 THE COURT: I'll overrule. Significant.
10 I'll hear his opinion on that but, as you know,
11 ultimately I'll decide what's substantial and what's
12 significant.

13 MR. HO: Thank you.

14 Q. (BY MR. KOBACH) You may answer.

15 A. Well, I'll answer that by saying that it's highly
16 unlikely that they have discovered whatever the number
17 is of non-citizens who have registered to vote in the
18 county. The last figures I saw, and I believe it's in
19 my expert report, is that less than half of the
20 individual aliens who are in the United States become
21 citizens.

22 So that means a large number of aliens who are
23 here, you know, legally are not going to be caught at
24 naturalization ceremonies. Certainly illegal aliens are
25 not going to be caught at naturalization ceremonies. So

1 if that's your only source of being able to determine
2 whether an alien has registered, you are not going to
3 find all of them just through naturalization ceremonies.

4 Q. Could you catalog for us the states that you
5 describe in your expert report where what you would
6 regard as conclusive evidence of registering by
7 non-citizens has occurred? I know you just mentioned
8 California, the *Dornan* case, but could you go through
9 the other states that you've talked about?

10 A. Well, I think I mentioned Utah. Illinois is
11 certainly mentioned in those Seventh Circuit decisions.
12 And in a third case, a decision from the Board of
13 Immigration Appeals at the Justice Department of a third
14 alien who also registered to vote in-- in Illinois.

15 The Justice Department while I was there,
16 although it was not my division, prosecuted aliens in
17 the state of Florida not just for registering and voting
18 but also including an alien who tried to run for the
19 state legislature, even though that, of course, was
20 illegal under the law. And there are various other
21 cases in-- in other states that are documented in a-- in
22 a database we maintain at The Heritage Foundation.

23 Q. So you've mentioned specific cases out of
24 California, Utah, Illinois, Florida. And I think you
25 also mentioned Virginia during your tenure at the Board

1 of Elections; is that right?

2 A. Yes. I should say when I-- and I mentioned this
3 in my expert report. When I was on the Fairfax County
4 Electoral Board, we discovered more than 270
5 non-citizens who were not only registered to vote but
6 over 100 of them had cast ballots in prior elections.

7 We-- after investigating the cases and
8 determining that these individuals really were
9 non-citizens, we took them off the voter rolls. We also
10 forwarded information about these individuals to both
11 the commonwealth's attorney for Fairfax County, that's
12 the equivalent of the county district attorney in other
13 states.

14 And we also forwarded it to the U.S. Justice
15 Department because for an alien to register and vote
16 was-- was not only a violation of Virginia state law, as
17 it is in all states, but it's also a violation of
18 federal law. Unfortunately, although we took them off
19 the rolls, neither the commonwealth's attorney nor the
20 Justice Department did anything about those cases.

21 Q. And how were those 270 cases discovered in
22 Fairfax County?

23 A. They were discovered by checking with the DMV.
24 And what had happened with these individuals was a
25 combination of two things. They were either

1 individuals-- well, some of them were individuals who
2 had I believe contacted the general registrar because
3 they were now trying to apply for citizenship. And
4 there is a question on the citizenship application
5 asking an alien whether they have registered or voted.

6 So these were people who wanted to-- you know, in
7 that-- in the citizen application process and wanted to
8 make sure that they were taken off the voter
9 registration lists.

10 Others were individuals who when they went to
11 renew their driver's license said that they were not
12 U.S. citizens, despite the fact that the first time they
13 went to get their driver's licenses they had asserted
14 they were U.S. citizens. So that's how we discovered
15 them. Most basically by accident.

16 Q. And you mentioned cases discovered while you were
17 at the Justice Department in the state of Florida. How
18 many such cases were there?

19 A. I think there were about a dozen prosecutions.

20 Q. All right. You also mentioned in your expert
21 report the Government Accountability Office study of
22 2005. What did the GAO study find?

23 A. Well, the GAO was looking at information that
24 might be able to be gathered that would help state
25 election officials. They took a look at I think eight

1 federal district courts, at the jury-- jury lists since
2 most federal district courts summon their juries from
3 voter registration lists.

4 And in that GAO report, I think they-- four of
5 the district courts said that they didn't have anyone
6 who was excused from jury duty for being a non-citizen,
7 but then four of the courts said they had had
8 individuals excused from jury duty for not being U.S.
9 citizens. And the numbers range-- I think the maximum
10 from one of the courts was up to 3 percent of
11 individuals who had been called for jury duty and had
12 been excused because they were not U.S. citizens.

13 Q. In the *Reyes* case in the Florida, is it correct
14 that that concerned someone who did not realize that she
15 could not register to vote?

16 A. Yeah. The Anailin Reyes case is a-- this is a
17 case and an order issued by the federal immigration
18 courts at the U.S. Justice Department. Ms. Reyes was a
19 alien who came legally to the United States from Cuba.
20 She was at the-- I think it was the Duval County
21 courthouse with her mother and another-- and I think her
22 sister. And as she came out of the courthouse,
23 according to the judge, they were stopped by a group
24 that was engaging in a voter registration drive, wanted
25 them to register to vote.

1 She told the individual that she was not a U.S.
2 citizen and, according to the judge, was told that that
3 didn't matter, that she should register to vote anyway.
4 And that case again ended up in front of the immigration
5 court, and it was clear that-- that the judge believed
6 that she had been told by this voter registration group,
7 which she-- she couldn't remember who it was or
8 identify, that it was okay for her to register to vote.

9 Q. In your experience at the Justice Department,
10 do-- does it sometimes occur that a person who
11 accidentally or believing the representation of others
12 registers to vote despite being a non-citizen sometimes
13 end up being prosecuted or deported?

14 A. Well, for example, 18 U.S.C. 611, which is the
15 federal statute that bars aliens from voting, is a
16 strict liability statute. It does not-- if you read it
17 carefully, it doesn't have any intent or knowledge of--
18 of the law, you know, knowledge that you're doing wrong
19 as-- as a part of the statute.

20 So there are certain federal laws where-- like if
21 you register or you vote as an alien, you're-- you're
22 going to be in big trouble, including the fact that it
23 may bar you from being able to apply for a
24 naturalization to become a citizen.

25 Q. So in your opinion, does the proof-of-citizenship

1 requirement serve as a safety net for those aliens to
2 help them avoid inadvertently breaking the law?

3 A. Oh, yes, I think so, particularly if they're in a
4 situation where someone such as in the Anailin Reyes
5 case mistakenly tells them, no, it's okay for you to
6 register to vote.

7 Or in another case, it was another good example
8 of this which I mentioned in my expert report; and that
9 is, in the early 2000s there was an election contest in
10 Compton, California. The mayor there lost his
11 re-election by I think about 300 votes.

12 There was testimony in that case by aliens on the
13 stand that they had registered and voted in that case.
14 And the Court eventually barred an individual who had
15 been elected to the City Council from ever holding
16 public office again in California under a-- a state
17 statute that allows that to be done because of the fact
18 that the Court found that she had solicited and
19 convinced aliens to register to vote in the election.

20 Q. In your opinion, do you believe voting by
21 non-citizens can affect the outcome of elections?

22 A. Well, what I would say about that is I-- and I
23 agree with what the-- the Supreme Court said in the
24 *Crawford* case, which was the case involving Indiana's
25 voter ID law. And, you know, the Court said - and I

1 think it's correct - is that the United States has a
2 long history of voter fraud. It's been documented by
3 journalists and historians and it can make the
4 difference in a close election. And that's the key.

5 You know, making a comparison to how many votes
6 are cast statewide is not the right comparison. What
7 you have to realize is that we have hundreds of
8 elections in this country at the state and local level.
9 And many of those elections are decided by a very small
10 number of votes. And that's why even a relatively small
11 number of non-citizens could make the difference in a
12 race that's decided by a small number of votes. And we
13 have cases like that all the time.

14 Q. And do you believe, in your opinion, that that
15 risk warrants a proof-of-citizenship requirement?

16 A. Yes, I do.

17 Q. Are you aware of any other states other than
18 Kansas that have a proof-of-citizenship requirement?

19 A. Yes. My understanding is there are three other
20 states. Alabama has put in a proof-of-citizenship
21 requirement. Also Georgia and Arizona have both-- both
22 laws of which were pre-cleared by the Justice Department
23 as non-discriminatory as part of the Section 5 process
24 when that was still in place.

25 Q. Which two were pre-cleared by the Justice

1 Department?

2 A. Arizona and Georgia.

3 Q. Do you have an opinion on the alternatives to
4 requiring proof of citizenship suggested by plaintiffs
5 in this case?

6 A. Well, the alternatives aren't very good.

7 Q. Well, let's go through them one-by-one.

8 A. Sure.

9 Q. Let's look at comparing voter rolls to TDL,
10 temporary driver's license lists, what is your problem
11 about the utility of doing so?

12 A. Well, the problem with that, as I understand it,
13 is that that list does not contain permanent resident
14 aliens, which make up a fair portion of the alien
15 population. So you're going to miss those.

16 You're also going to miss aliens who are in the
17 country perhaps legally but who do not have a driver's
18 license and don't apply for a driver's license. And
19 you're certainly not going to pick up aliens who are in
20 the country illegally.

21 Q. What about jury duty questionnaires as a
22 mechanism to prevent non-citizens from registering to
23 vote?

24 A. Well, jury questionnaires in which individuals
25 excuse themselves from jury duty because they assert

1 they're not a U.S. citizen, that might help you find a
2 small number of non-citizens who are registered to vote.
3 But the number of individuals called for jury duty is a
4 very small percentage of the number of registered voters
5 in most states.

6 And you're assuming that the non-citizen answers
7 the jury form truthfully when they say-- you know, most
8 non-citizens if they're on the voter registration list
9 may not want to admit that they're not a U.S. citizen
10 when they're called to a courtroom.

11 Q. And I'm going to ask you next about the SAVE
12 database which you talk about in your report, but I want
13 to put up on the screen for you Exhibit 882, which is
14 the letter.

15 While she's doing that, let's jump ahead. Let's
16 look at the fourth alternative, which is the EVVE
17 database. Do you have any opinion on that database's
18 effectiveness as a means of preventing non-citizens from
19 registering?

20 A. Well, EVVE is the Electronic Verification of
21 Vital Events. It's a system used by state agencies and
22 I think the federal government. But the problem with
23 that system is that in order to check an individual's
24 name on it, you have to have their mother's maiden name
25 and their state of birth. And that information is not

1 collected by any election officials anywhere in the
2 country for voter registration purposes.

3 Q. And what about the I guess fifth alternative
4 offered by plaintiffs, prosecution as a deterrent. What
5 is your opinion of that as a mechanism for preventing
6 non-citizens from registering?

7 A. Well, it's hard to do prosecutions when-- unless
8 you can find the problem. And as some of the cases I
9 cited show, since we basically have an honor system in
10 most of our voter registration process, you can't
11 prosecute cases if you can't discover them. And often
12 we only find non-citizens when there's an election
13 contest and we-- they actually do an examination of the
14 individual voters.

15 So that's just-- that's not enough of a deterrent
16 to prevent individuals from registering to vote,
17 particularly if it's people who mistakenly believe that
18 they-- they can register to vote, perhaps a permanent
19 resident alien who doesn't understand that they're not
20 allowed to register to vote.

21 And as I've said before, and I think it's very
22 important to understand, is that if a-- if an alien
23 votes, whether they do it accidentally or intentionally,
24 that negates the vote of an eligible citizen and that is
25 defrauding the American public of a fair election.

1 Q. And I'm not sure if it was mentioned while you
2 were in the courtroom, but I'll represent to you that in
3 recent years Kansas has prosecuted or in the process of
4 prosecuting two non-citizens for registering or voting.

5 Do you think that those prosecutions will be
6 sufficient to deter future non-citizens from registering
7 to vote?

8 A. I have no idea. I would hope so, but I don't
9 think there's any guarantee that they will.

10 MR. KOBACH: Do you have Exhibit 818?

11 Q. (BY MR. KOBACH) This is returning back to the
12 SAVE database subject as an alleged alternative. Okay.
13 If we could scroll down. As you'll see, this is a
14 letter-- no, I'm sorry, it's the answer to this letter.
15 Is it the same exhibit? Okay. There we go.

16 You'll see that this is an answer to-- is a
17 letter to my office from-- dated August 20th, 2012. And
18 you'll see in the second paragraph-- could you review
19 that second paragraph there?

20 A. Sure. (Reads document). I've reviewed it.
21 Thank you, yes.

22 Q. So you see-- do you see the two requirements that
23 the Department of Homeland Security imposes on an agency
24 wishing to use the SAVE database?

25 A. Yes. And I-- even without reviewing this, I'm

1 aware that the SAVE database, for example, requires
2 the-- the A number, what's known as the alien number
3 that's assigned to aliens who are legally in the United
4 States in order to search the SAVE databases.

5 Q. And is there an additional requirement in this
6 letter?

7 A. Yes. In this letter they're also saying that
8 they want a copy of the immigration document in question
9 to complete the verification process.

10 Q. And in your experience and expertise as an
11 election administrator and one who studies elections, is
12 that a practical or even possible thing for a state to
13 do in its voter registration database?

14 A. No, it's not.

15 Q. Are you aware of any other states that have
16 attempted to gain access to the SAVE database in a
17 meaningful way?

18 A. Well, I think I heard yesterday and-- a claim
19 that Virginia, for example, was using the SAVE system.
20 That's not correct. Don Palmer, the former state
21 election official, chief state election official for
22 Virginia, did sign an agreement with the Department of
23 Homeland Security to use the SAVE system, but my
24 understanding is that it's never actually been
25 implemented because of these kind of requirements making

1 it too difficult to use.

2 MR. HO: Your Honor, I'm going to object and
3 move to strike that answer. This is not in Mr. von
4 Spakovsky's report and he's contradicting the testimony
5 of Secretary Kobach's own witness. So it's not
6 impeaching any of our witness testimony.

7 THE COURT: I'll disregard this testimony.
8 It's not in the witness report.

9 Q. (BY MR. KOBACH) Mr. von Spakovsky, I'd finally
10 like to address the last section of your report
11 regarding the burden allegedly caused by the
12 proof-of-citizenship requirement.

13 Are you familiar with the Kansas law at issue in
14 this case?

15 A. Yes. I've reviewed it and I took a look at the
16 13 different ways-- 13 different types of documents that
17 can be used to satisfy the requirement, plus the fact
18 that Kansas also has basically a-- an escape clause at
19 the end that allows an individual to provide any other
20 documentation that he or she believes could prove that
21 they are a U.S. citizen.

22 Q. Is this a relatively large list of qualifying
23 documents, the 13 you just mentioned?

24 A. Yeah, it's a very broad list. In fact, it's a--
25 it's a broader list than what most states are using, for

1 example, for their-- their voter ID laws.

2 Q. And what is the importance of the-- I can't
3 remember how you described it, but the clause where a
4 person does not possess their documents but may,
5 nevertheless, request a hearing, why do you think that's
6 important?

7 A. Well, it's important because there may be other
8 documents that are not specifically listed that could be
9 used to-- to prove citizenship. And the fact that the
10 individual has the ability to submit that to the, you
11 know, Kansas Secretary of State so that there can be a
12 review of that, I think it provides all the flexibility
13 needed to ensure that people who are eligible will be
14 able to register and vote.

15 Q. Based on what you observed in other states with
16 respect to voter ID laws and the documents to satisfy
17 that, how would you compare the burden in Kansas for
18 providing proof of citizenship?

19 A. I think it's a very tangential burden, one that's
20 not any different from the other things you have to do
21 to be able to register to vote.

22 Q. How about the 90-day rule where the individual
23 has 90 days to proof of citizenship, what effect do you
24 think that has?

25 A. Well, that gives folks plenty of time to meet the

1 requirements, and particularly the fact that even if the
2 90 days expires, then you can re-register and a new
3 90-day period starts up.

4 Q. And what effect do you think the Kansas efforts
5 to obtain citizenship documents from Vital Statistics or
6 the Division of Vehicles have on the law?

7 A. Well, I mean, that's also a very good step
8 because that-- that has automated the process. My
9 understanding is that the state of Kansas checks on a
10 monthly and regular basis with both DMV and your Vital
11 Statistics agency to check for birth certificates of
12 individuals born in Kansas and with DMV to-- to see if
13 they have documents indicating your-- your citizenship.

14 So that-- that kind of automates the process and
15 takes the burden off of the individual registration
16 applicant.

17 Q. In your experience at the Department of Justice
18 and as a voter-- voting administrator in Virginia and
19 Florida and in your experience analyzing cases of voter
20 fraud, is it common for people who are found guilty of
21 willfully voting or registering illegally to claim when
22 first confronted that their behavior was just a mistake?

23 A. That seems to be a--

24 MR. HO: Objection, Your Honor. I don't
25 believe this is in Mr. von Spakovsky' expert report.

1 THE COURT: I don't know what the foundation
2 would be for him to render such an opinion, so I'll
3 sustain.

4 Q. (BY MR. KOBACH) Mr. von Spakovsky, do you have
5 direct knowledge of cases that were filed by the Justice
6 Department during your tenure?

7 A. Yes, I-- I do.

8 Q. In your experience, did individuals who were
9 charged initially respond by saying it was just a
10 mistake?

11 MR. HO: Same objection, Your Honor.

12 THE COURT: With the limited number of cases
13 that you were involved at the Justice Department, I'll
14 allow you to answer if you have independent recollection
15 of what happened in those cases.

16 A. I-- I think that's usually what defendants claim
17 in cases, including the civil rights cases that we
18 would-- we would file. The defendant always said that
19 they either hadn't done the activity or it was a
20 mistake, that it was not intentional.

21 MR. KOBACH: No further questions.

22 THE WITNESS: Thank you.

23 THE COURT: I want to ask you something just
24 for clarification because I just-- I've heard from Ms.
25 Minnite this morning and I've just heard from you, and I

1 think it's fair to say there's a pretty good distinction
2 in terms of how the two of you define voter fraud.

3 She focused on looking at the mens rea,
4 which one typically does when you use the word fraud,
5 the intent, the perhaps knowledge, but definitely
6 intent.

7 But you-- as I understand it, anytime
8 someone who's not qualified and eligible to vote or
9 register in fact does, be they a non-citizen or perhaps
10 some other reason, even if it's one person, you consider
11 that to be defrauding the American-- you consider that
12 defrauding the electoral process; would that be fair to
13 say?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Well, conversely, when there are
16 thousands of otherwise qualified United States citizens
17 over the age 18, no disqualifying status, are denied the
18 right to register, much less vote, would that not also
19 be defrauding the electoral process?

20 THE WITNESS: I would liken this to the many
21 cases and state laws, Your Honor, that have been passed
22 with voter ID laws. And the-- the view that-- that I
23 have and that I think the view of many of the courts who
24 have looked at this is that as long as you have an open
25 process that allows a potential voter to, for example,

1 obtain the ID that's needed to vote, that's neither
2 discriminatory nor unconstitutional. And the same is
3 true with proof-of-citizenship requirements. I think
4 this is something that every eligible voter can fairly
5 easily meet and, therefore, it's a tangential burden
6 that is not--

7 THE COURT: Well, that doesn't really answer
8 my question. But I take it from the way you've answered
9 my question that when you consider whether denying the
10 right to register and denying the right to vote to
11 someone that is an American citizen and meets the
12 electoral requirements, you want to consider that in the
13 context of what the burdens are.

14 But conversely, when you're talking about
15 one non-citizen voting, you don't want to consider that
16 in context whether that person made a mistake, whether a
17 DMV person convinced them they should vote. Is that
18 fair to say? We don't look at it contextually that way,
19 we only look at it contextually when we're talking about
20 citizens?

21 THE WITNESS: No, I don't think that's fair
22 to say. What I would say about a non-citizen is if-- if
23 you are-- if state or federal authorities are
24 considering whether or not to criminally prosecute a
25 non-citizen, well, then, of course, the context matters

1 and whether or not they did so accidentally or whether
2 it was a mistake by state officials.

3 The best example of that, of course, is if--
4 if a non-citizen truthfully answers the voter
5 registration form, they checked that they are not a U.S.
6 citizen, but then an election official registers them
7 anyway, obviously I don't think they should be
8 criminally prosecuted. But the question--

9 THE COURT: I'm not asking about
10 prosecution.

11 THE WITNESS: Right.

12 THE COURT: I'm asking about the way you
13 characterize what is fraud on the electoral process.

14 THE WITNESS: Yeah.

15 THE COURT: I'm asking about the differences
16 in the way you perceive that based on whether we're
17 talking about citizens who are-- should be eligible to
18 vote versus non-citizens who clearly are not eligible to
19 vote.

20 THE WITNESS: Right. Well, the second half
21 of my answer is that criminal prosecution is different
22 from the integrity of the election process. And that's
23 why if non-citizens are easily registering and voting
24 without detection, it doesn't matter whether or not
25 that's the-- each of those non-citizens is doing that

1 intentionally or because they don't realize they're not
2 supposed to be registering and voting.

3 The fact that they are registering and
4 voting means that individuals who are ineligible are
5 casting ballots. And each ballot they cast takes away
6 the vote of and dilutes the vote of actual citizens who
7 are voting. And that's--

8 THE COURT: So thousands of actual citizens
9 that should be able to vote but who are not because of
10 the system, because of the law, that's not diluting the
11 vote and that's not-- that's not impairing the integrity
12 of the electoral process, I take it?

13 THE WITNESS: No, what I-- what I'm saying
14 is that I don't believe that this requirement prevents
15 individuals who are eligible to register and vote from
16 doing so.

17 THE COURT: All right. Mr. Ho.

18 CROSS EXAMINATION

19 BY MR. HO:

20 Q. Are you ready, Mr. von Spakovsky?

21 A. I am.

22 Q. Mr. von Spakovsky, you would agree with me that
23 an expert witness should provide objective, unbiased
24 opinion testimony. Correct?

25 A. Yes.

1 Q. And you would agree that an objective opinion is
2 one that tends-- that is one that considers evidence
3 that tends to support one conclusion as well as evidence
4 that tends to detract from that conclusion. Correct?

5 A. Yes.

6 Q. And you would agree that it would be inconsistent
7 with providing an objective expert opinion to provide
8 evidence that only supports one side of an opinion-- of
9 a conclusion. Correct?

10 A. Yes.

11 Q. Okay. Now, other than in this case, you have
12 never before testified as an expert in litigation.
13 Correct?

14 A. That's correct.

15 Q. You do not have a graduate degree in political
16 science. Correct?

17 A. No, I have a-- I have a law degree.

18 Q. So that is-- it's correct that you do not have a
19 graduate degree in political science. Correct?

20 A. Not in political science.

21 Q. And you do not have a graduate degree in public
22 policy. Correct?

23 A. No.

24 Q. Now, back at MIT when you were an undergrad, you
25 minored in history. Correct?

1 A. Correct.

2 Q. You consider yourself an historian when it comes
3 to issues of voter fraud. Correct?

4 A. Based on more than two decades of work in that
5 area, yes.

6 Q. So you consider yourself an historian. Correct?

7 A. I consider myself an expert on election
8 administration and also on voter fraud in the U.S.

9 Q. Mr. von Spakovsky, I didn't ask you whether you
10 consider yourself an expert on election administration,
11 I asked whether you consider yourself an historian. You
12 consider yourself an historian. Correct?

13 A. I know the history of voter fraud.

14 Q. You--

15 MR. KOBACH: Objection, Your Honor. This is
16 argumentative.

17 THE COURT: Overruled.

18 Q. (BY MR. HO) Mr. von Spakovsky, you sat for a
19 videotaped deposition in this case. Correct?

20 A. Yes, I did.

21 Q. And you were under oath during that deposition?

22 A. Of course.

23 Q. And you answered all of your questions truthfully
24 during that deposition. Correct?

25 A. Yes.

1 Q. Okay. I'm going to hand you a copy of your
2 deposition transcript. Could you please turn to Page 26
3 in your transcript, Line 5, and we're going to play a
4 video clip from your deposition.

5 (Video began).

6 (MR. HO: You also refer to historians. Are
7 you an historian, Mr. von Spakovsky?

8 THE WITNESS: I'm an historian when it comes
9 to election fraud issues. I've done a lot of research,
10 published a lot of papers and written a book on various
11 voter fraud cases around the country.")

12 MR. KOBACH: Your Honor, I would like to
13 object to the--

14 THE COURT: Just a minute, stop it. Yes.

15 MR. KOBACH: I'd like to object. I don't
16 understand the basis for using a video as opposed to a
17 transcript to just move quickly here.

18 MR. HO: I think I'm entitled to use-- it's
19 a videotaped deposition, Your Honor. As Your Honor
20 noted with Secretary Kobach's deposition--

21 THE COURT: Yeah, but I think the proper
22 procedure is showing the transcript and-- and if he
23 admits he said that during his deposition, there's no
24 reason to play it.

25 MR. HO: Okay. I was--

1 THE COURT: Okay.

2 Q. (BY MR. HO) You consider yourself an historian
3 when it comes to election fraud issues, correct, Mr. von
4 Spakovsky?

5 A. Yes, I believe I already said that.

6 Q. Okay. You do not have a graduate degree in
7 history. Correct?

8 A. I do not.

9 Q. You have not published any peer-reviewed research
10 as an historian. Correct?

11 A. That's correct.

12 Q. Now, you would say that outside of this case
13 you've written extensively about the issue of voter
14 fraud. Correct?

15 A. Yes.

16 Q. And some of that extensive writing you've done
17 addresses the issue of non-citizen registration.
18 Correct?

19 A. Yes.

20 Q. And as an example of that, you would point to
21 your 2012 book co-written with John Fund called "Who's
22 Voting? How Fraudsters and Bureaucrats Put Your Vote At
23 Risk." Correct?

24 A. Correct.

25 Q. That book was not published by a university

1 press. Correct?

2 A. That's correct.

3 Q. It was published by a company called Encounter
4 Books. Correct?

5 A. That's correct.

6 Q. That book was not peer-reviewed. Correct?

7 A. No.

8 Q. In fact, you have published no peer-reviewed
9 research on voter fraud. Correct?

10 A. I'm not in academics so I don't use the
11 peer-review process.

12 Q. So my question was: You have published no
13 peer-reviewed research on the issue of voter fraud.
14 Correct?

15 A. Yeah, I'm not in academics so I don't use the
16 peer-review process.

17 Q. So your answer to my question is that you have
18 not published any peer-reviewed research on voter fraud?

19 MR. KOBACH: Your Honor, asked and answered.

20 THE COURT: Is your answer no?

21 THE WITNESS: The answer is no.

22 Q. (BY MR. HO) Okay. And you haven't published any
23 peer-reviewed research on voting. Correct?

24 A. No. My publications on that, The Heritage
25 Foundation go through an editing process there.

1 Q. And that editing process is not a blind
2 peer-review process. Correct?

3 A. No, it is not.

4 Q. So you have not published any research on voting
5 that has been peer-reviewed, correct, Mr. von Spakovsky?

6 A. Yes.

7 Q. Yes, you have? Or yes, you haven't?

8 A. No, I have not.

9 Q. Okay. You have not published anything that's
10 peer-reviewed. Correct?

11 A. That's correct.

12 Q. You're an adjunct professor at the Law School of
13 George Mason University?

14 A. Yes.

15 Q. You're not a tenured professor at the Law School
16 of George Mason University. Correct?

17 A. No.

18 Q. And one of the bases on which you hold yourself
19 out as an expert in this case is that you're a manager
20 of the Law Reform Initiative at The Heritage Foundation.
21 Correct?

22 A. Yes.

23 Q. And you've been there about ten years?

24 A. Yes.

25 Q. And The Heritage Foundation is a think tank whose

1 mission to his formulate and promote conservative public
2 policies. Correct?

3 A. Correct.

4 Q. You've heard of plaintiffs' expert witness in
5 this case, Doctor Michael McDonald. Correct?

6 A. I was not here when he testified.

7 Q. But you've heard of Doctor Michael McDonald.
8 Correct?

9 A. Yes.

10 Q. And you know that Doctor McDonald has a project
11 where he keeps track of turnout around the country.
12 Right?

13 A. Yes.

14 Q. And you have relied on Doctor McDonald's turnout
15 research in your own work. Correct?

16 A. I've relied on the turnout numbers that he has
17 collected.

18 Q. And to the extent that you rely on Doctor
19 McDonald's turnout data, you consider that work to be
20 reliable. Correct?

21 A. Well, he's one of the only experts that includes
22 the-- that uses turnout data that takes account of
23 citizenship and also of other individuals who may be
24 ineligible to vote.

25 Q. And you consider Doctor McDonald's turnout data

1 to be accurate and reliable. Correct? Otherwise you
2 wouldn't rely on it, right, Mr. von Spakovsky?

3 A. I have used that, amongst other turnout data
4 also.

5 Q. I don't think you answered my question about
6 whether you consider Doctor McDonald's turnout data to
7 be reliable and accurate. Do you, Mr. von Spakovsky?

8 A. When I have used it, yes.

9 Q. Okay. And you don't have any reason to believe
10 that Doctor McDonald's other work apart from his turnout
11 research is flawed in any way. Correct?

12 A. That's not correct.

13 Q. Okay. Could you turn to Page 55 in your
14 deposition and Line 19.

15 MR. HO: And in this case, Your Honor, I'm
16 not trying to refresh his recollection, I'm trying to
17 impeach him so I'd like to read directly from the
18 transcript, if I may.

19 THE COURT: All right. Proceed, you can.

20 Q. (BY MR. HO) Question: You don't have any reason
21 to think that his other work is inaccurate, do you?

22 Answer: I haven't reviewed any of it so I
23 have no idea.

24 Was that my question and was that your
25 answer?

1 A. Yes.

2 Q. Okay. You answered truthfully. Right?

3 A. As far as I recall, yes.

4 Q. Okay. Now, you submitted an expert report in
5 this case. Right?

6 A. Yes.

7 Q. Prior to submitting your expert report, you
8 reviewed the initial expert report of Doctor McDonald in
9 this case. Correct?

10 A. I believe I did.

11 Q. Your expert report contains no critique of Doctor
12 McDonald's expert reports in this case. Correct?

13 A. I was not asked to critique his report.

14 Q. And because-- leaving aside what you were asked
15 to do, your expert report in this case contains no
16 criticism of Doctor McDonald's report in this case.
17 Correct?

18 A. That's correct, because I was not asked to
19 critique his report.

20 Q. Okay. You've obviously also heard of plaintiffs'
21 other expert witness, Doctor Lorraine Minnite. Correct?

22 A. Yes.

23 Q. You don't dispute Doctor Minnite's qualifications
24 as a political scientist, do you?

25 A. I really don't have an opinion about that.

1 Q. So you don't dispute her qualifications as a
2 political scientist?

3 A. I don't have an opinion one way or the other.

4 Q. Prior to submitting your expert report in this
5 case, you reviewed the initial expert report of Doctor
6 Minnite in this case. Correct?

7 A. I did take a look at it, yes.

8 Q. Your expert report contains no criticisms of
9 Doctor Minnite's expert reports in this case. Correct?

10 A. I was not asked by the state of Kansas to review
11 or critique her report.

12 Q. But you did review her report and your report
13 contains no criticism of her report. Correct?

14 A. I was not asked to critique her report.

15 Q. So your answer to my question is no, your report
16 does not contain any criticism of Doctor Minnite's
17 reports, is that right, Mr. von Spakovsky, or am I
18 mistaken?

19 A. I was not asked to provide critiques of any of
20 the expert reports provided by the plaintiff. I was
21 simply asked to provide my opinion on the issue of
22 non-citizens registering and voting and what I thought
23 the Kansas statute did and did not do.

24 Q. Okay. So let's talk about your expert report,
25 which I believe is Defendant's Exhibit 865. Do you

1 still have it up there?

2 A. I do.

3 Q. There are a total of 59 footnotes in your report;
4 is that right?

5 A. I don't know.

6 Q. Why don't you take a look.

7 A. Yes, there are 59 footnotes.

8 Q. Okay. Now, you believe that everything in your
9 expert report in this case is true to the best of your
10 knowledge. Right?

11 A. As far as I know, yes.

12 Q. And you swear that under oath, under penalty of
13 perjury. Right?

14 A. As far as I know, yes, the citations are correct.

15 Q. And there's-- this report is a complete statement
16 of your opinions in this case. Right?

17 A. Well, it was my opinion two years ago when the
18 deposition was taken.

19 Q. Okay. There's nothing that you left out in your
20 expert report that you're relying on today. Right?

21 A. No.

22 Q. Now, you understand that you're being offered as
23 an expert on whether voter registration requirements are
24 burdensome. Right?

25 A. I'm also being asked to present my opinion on the

1 problem of non-citizens registering and voting.

2 Q. And we'll talk about that in a second, but I just
3 want to talk about your opinion about whether or not
4 voter registration requirements are burdensome. Your
5 opinion is being offered as an expert opinion. You
6 understand that. Right?

7 A. I understand that.

8 Q. Okay. After you were retained-- I'm sorry, let
9 me start that again. Before you were retained to be an
10 expert in this case, you did not have an opinion either
11 way about whether Kansas' documentary
12 proof-of-citizenship law is burdensome for voters.
13 Correct?

14 A. I-- I probably looked at the law when it was--
15 when it was first passed.

16 Q. Mr. von Spakovsky, my question was: At the time
17 that you were retained as an expert witness in this
18 case, at that time, you did not yet have an opinion as
19 to whether or not the Kansas law was burdensome for
20 voters. And by Kansas law, I mean the documentary
21 proof-of-citizenship law at issue in this case; is that
22 correct?

23 A. I-- I don't recall if I had-- how much review I
24 had done of the Kansas law before I was retained.

25 Q. Mr. von Spakovsky--

1 A. I keep track-- I keep track of new laws that are
2 passed in the election area all over the country and I
3 usually take a look at that, you know, to review what
4 they do.

5 Q. Mr. von Spakovsky, I'd like to ask you to take a
6 peek at your deposition transcript on Page 206. It's
7 the binder to your right.

8 A. I'm sorry, is it right here?

9 Q. Yes. No, it's the binder that you're holding I
10 believe. Page 206 of your deposition transcript, Line 8
11 through 17.

12 Question: Did you have a view prior to your
13 engagement as an expert in this case as to whether or
14 not the documentary proof-of-citizenship law is
15 burdensome?

16 Answer: I had not. I knew about the Kansas law,
17 but I had not reviewed it in depth and I had not yet
18 seen the survey information showing the overwhelming
19 majority of individuals already have the data that they
20 need.

21 Was that my question and was that your answer?

22 A. Yes.

23 Q. Okay. And you answered truthfully. Correct?

24 A. As far as I knew at the time, yes.

25 Q. Okay. Now, as an expert on whether voter

1 registration requirements are burdensome, your opinion
2 is that there are no current voter registration
3 requirements that are burdensome. Correct?

4 A. Are you talking about in Kansas?

5 Q. Talking about in the entire United States of
6 America. Your opinion as an expert on voter
7 registration requirements is that there are no voter
8 registration requirements in the United States of
9 America that are burdensome. Correct?

10 A. What I know about the registration requirements
11 under both federal law and state laws is that all of the
12 registration laws in the country right now have been
13 found to be legal and constitutional, therefore,
14 they're-- they're not a burden.

15 Q. I didn't ask you about the legality of voter
16 registration requirements, Mr. von Spakovsky. I asked
17 you as an expert on whether voter registration
18 requirements are burdensome for people, your opinion is
19 that no voter registration requirements currently in
20 force in the United States are burdensome. Correct?
21 That's your opinion?

22 A. I have not reviewed the registration laws of
23 every single state. If you want to ask me about a
24 particular state and what the registration requirement
25 is, I can then provide you with my opinion as to whether

1 I think it's burdensome or not. But I'm not going to
2 answer a--

3 Q. Mr. von Spakovsky--

4 A. -- a general question about the registration
5 requirements in 50 states plus the District of Columbia.

6 Q. Mr. von Spakovsky, would you turn to Page 55 in
7 your deposition, please. And specifically to Line 24
8 through Page 56, Line 6.

9 As an expert on whether voter registration
10 requirements are burdensome, can you give me an example
11 of a voter registration requirement somewhere in the
12 country today that you consider to be burdensome?

13 Answer: I don't think any of the current voter
14 registration laws are burdensome.

15 Was that my question and was that your answer?

16 A. That was my answer two years ago, but I have no
17 idea what changes, if any, have been made in voter
18 registration laws since that date that might change that
19 opinion.

20 Q. So as of today you can't think of a voter
21 registration requirement that you would consider
22 burdensome. Right?

23 A. Yes. But as I've said, I'm not-- I cannot claim
24 that I know the exact requirements of every single
25 state.

1 Q. But you can't think of any requirement that you
2 would consider a burdensome voter registration
3 requirement that's currently in force today; is that
4 right?

5 A. With the limitations I've just given you, yes.

6 Q. You understand that this case is being heard
7 under the National Voter Registration Act or NVRA.
8 Correct?

9 A. I do.

10 Q. And you consider yourself an expert on the NVRA.
11 Right?

12 A. Yes.

13 Q. And you know that the text of the NVRA includes a
14 congressional finding that states have used
15 discriminatory and unfair registration laws and
16 procedures. Right?

17 A. Yes.

18 Q. But you don't know and can't identify one example
19 of a law that Congress was referring to in the text of
20 the NVRA in 1993 when it found that states used
21 discriminatory and unfair registration laws. Correct?

22 A. You haven't asked me about what the status of the
23 law was in 1993. You've asked me about current
24 registration laws.

25 Q. That was my question a few seconds ago, Mr. von

1 Spakovsky. My question was-- as an expert here now was:
2 As an expert on the NVRA, which you hold yourself out to
3 be, you can't think of an example of what Congress was
4 referring to when in the text of the statute it found
5 that states were engaging in discriminatory and unfair
6 registration practices. Correct?

7 A. That's not correct. I mean, for example, if
8 Congress in the past and the courts have said that if
9 you have, for example, a durational requirement beyond
10 30 days, states can't put in a registration requirement
11 that says you have to register more than 30 days prior
12 to an election.

13 So if a state tried to put in a requirement that
14 you had to register six months before an election, that
15 obviously would be a burdensome requirement that would
16 not stand up.

17 Q. Your testimony is that a durational-- a
18 durational residency requirement of six months is what
19 Congress was referring to when it found that states had
20 engaged in discriminatory and unfair voting practices,
21 Mr. von Spakovsky?

22 A. I'm saying that that would be-- I don't know if
23 that's what Congress was referring to because I wasn't
24 there when they passed that statute, but that would be
25 an example of a burdensome requirement.

1 Q. Now, your opinion in this case is that the law at
2 issue in this case is not burdensome. Right?

3 A. That's correct.

4 Q. And one of the reasons that you site for this law
5 not being burdensome is the fact that there are 13
6 different documents that can be used to satisfy it.
7 Correct?

8 A. Correct.

9 Q. But you would agree with me, wouldn't you, Mr.
10 von Spakovsky, that the documentary proof-of-citizenship
11 law requires additional effort for a person who is
12 denied registration if he or she does not have a copy of
13 one of those documents?

14 A. Yes, unless the state is able to automatically
15 get their birth certificate or another document from DMV
16 under the process they've set up, in which case they're
17 not going to have to take another step.

18 Q. Okay. You understand, though, Mr. von Spakovsky,
19 that under regulations promulgated by the Secretary of
20 State if an individual's registration is suspended
21 because of failure to provide documentary proof of
22 citizenship, that if that proof of citizenship is not
23 provided or found within 90 days, that that registration
24 is cancelled. Correct?

25 A. I understand that.

1 Q. Okay. And when you opined in your report that
2 the documentary proof-of-citizenship requirement is not
3 burdensome for voters, at that time when you offered
4 that opinion you were not aware of how many Kansans had
5 been cancelled because they hadn't provided documentary
6 proof of citizenship. Correct?

7 A. I don't recall if-- if I had that information.

8 Q. Okay. Could you please turn to Page 303 in your
9 deposition, Mr. von Spakovsky, Line 24.

10 MR. HO: We don't have to bring this one up
11 on the screen, Steven. Thank you.

12 Q. (BY MR. HO) If you could just read the question
13 and answer starting at Page 303, Line 24 through 304,
14 Line 11.

15 THE COURT: Read it to yourself, not aloud.

16 A. I'm sorry, where-- where do you want me to start?

17 Q. (BY MR. HO) Page 303, Line 24.

18 A. 303, Line 24.

19 Q. Through Page 304, Line 11. Read that and see if
20 it refreshes your recollection.

21 A. "Have you determined how many--"

22 THE COURT: No, just--

23 Q. (BY MR. HO) Don't read it aloud.

24 THE COURT: Just read it to yourself.

25 Q. (BY MR. HO) Read it to yourself.

1 A. Okay. (Reads document).

2 THE COURT: The next question will be: Does
3 it refresh your recollection?

4 A. Okay. I've read it.

5 Q. (BY MR. HO) Does that refresh your recollection
6 as to whether or not at the time that you offered your
7 opinion in this case that the documentary
8 proof-of-citizenship law was not burdensome whether you
9 knew how many Kansans had their applications cancelled
10 for failure to provide documentary proof of citizenship?

11 A. I-- well, according to the deposition which
12 occurred two years ago, I believe I had read Mr.
13 Caskey's affidavit which indicated that a majority of
14 the individuals had provided the proof of citizenship
15 that they needed to register to vote.

16 Q. But that wasn't my question, Mr. von Spakovsky.

17 A. I'm sorry, what was your question?

18 Q. My question was: At the time that you offered
19 your opinion that the proof-of-citizenship law was not
20 burdensome, you were not aware of how many Kansans had
21 seen their voter registration applications cancelled for
22 failure to comply with the documentary
23 proof-of-citizenship requirement. Correct?

24 A. I-- I don't recall if I was-- had that
25 information.

1 Q. Okay. So the number of Kansans whose
2 applications were cancelled under the documentary
3 proof-of-citizenship law, that did not factor into your
4 analysis when you determined that the law was not
5 burdensome. Correct?

6 A. I don't recall having that information.

7 Q. Now, one of the other reasons that you identify
8 for opining that the law is not burdensome is because of
9 the hearing option for people who don't have one of the
10 documents. Right?

11 A. Correct.

12 Q. Okay. And when you offered your opinion about
13 the hearing option in this case, you did not know how
14 often that hearing procedure had been used in Kansas.
15 Correct?

16 A. I don't believe I had that information.

17 Q. Okay. And when you offered your opinion about
18 the hearing option in this case, you didn't know how the
19 hearing option is publicized to Kansans who might want
20 to make use of it. Correct?

21 A. I-- I don't recall.

22 Q. Okay. And when you offered your opinion in this
23 case about the hearing option, you did so without even
24 having any information about whether Kansans are ever
25 informed that the hearing option exists. Correct?

1 A. I was going off the regulations and the statute
2 which provide the option for the hearing.

3 Q. So the answer to my question is, yes, right, Mr.
4 von Spakovsky? That you offered an opinion about the
5 hearing option without any information about whether or
6 not Kansans who might want to use it actually know about
7 it. Right?

8 A. I-- I don't-- I didn't have that information at
9 the time.

10 Q. And because you didn't have information about
11 whether Kansans know about the hearing option, that--
12 the level of knowledge about the hearing option that
13 Kansans may or may not have is not something that
14 factored into your opinion about the hearing option.
15 Correct?

16 A. What factored into my opinion was the fact that
17 a-- a hearing option was offered and it was very easy to
18 comply with.

19 Q. Okay. When you offered your opinion about the
20 hearing option, you were not aware of the existence of
21 any evidence that Kansans were even aware of the
22 existence of the hearing option, correct, Mr. von
23 Spakovsky?

24 A. I don't have a way of knowing how the citizens--
25 how aware the citizens of Kansas are of laws and

1 regulations passed by the state.

2 Q. So the answer to my question is you did not know
3 anything about how much Kansans were aware of the
4 hearing option. Correct?

5 A. My answer is, there's no way I could know how
6 much every individual Kansan knows about a Kansas
7 statute or regulation.

8 Q. Now, you testified earlier that at the time that
9 you were retained as an expert in this case, you had not
10 yet formed an opinion-- actually, I'm sorry, I
11 apologize. Let me retract that question.

12 Now, at the time that you wrote your book "Who's
13 Counting" in the year 2012, you were already an advocate
14 for documentary proof-of-citizenship requirements like
15 the one at issue in this case, right, Mr. von Spakovsky?

16 A. That's correct. I've made that recommendation on
17 a number of occasions.

18 Q. And if we go back even farther to the year 2009,
19 you were already of the view that the National Voter
20 Registration Act is a failure. Correct?

21 A. You need to say that in the context of what I
22 said. What I've said is that the purpose of the law was
23 to supposedly increase turnout in elections. As I wrote
24 in the chapter of the book that I wrote for the ABA,
25 turnout numbers actually show that while registration

1 increased, it did not seem to increase turnout in
2 elections.

3 And while there are some provisions in the law
4 that I think are-- restrict the ability of election
5 officials beyond what is necessary, there are other
6 parts of the law that are good, such as the ability to
7 register to vote at-- at DMV offices, the ability to
8 register to vote at welfare offices. Those are all good
9 parts of the law.

10 Q. Okay. Mr. von Spakovsky, I'm going to hand you
11 an exhibit that we're marking as Plaintiffs'
12 Exhibit 144. This was Exhibit 4 during your deposition
13 in this case, it's your testimony before the Senate
14 Rules Committee in 2001; is that right?

15 A. Yes.

16 Q. Okay. So this is your written testimony before
17 the United States Senate Rules Committee. Correct?

18 A. Yes.

19 MR. KOBACH: Before the opposing counsel--
20 is this on the exhibit list?

21 MR. HO: No, it's not. It's an impeachment
22 exhibit.

23 A. Yes, this was my testimony 17 years ago.

24 Q. (BY MR. HO) And when you testified to Congress,
25 you offered your opinions truthfully and under oath.

1 Correct?

2 A. Yes.

3 MR. HO: Your Honor, we'd like to offer
4 Plaintiffs' 144 into evidence, please.

5 MR. KOBACH: Objection. We think it's
6 hearsay and we haven't-- it's an out-of-court statement.

7 THE COURT: Of this declarant. Overruled on
8 hearsay grounds. Exhibit 144 admitted.

9 Q. (BY MR. HO) Okay. Let's bring it up on the
10 screen. Thank you.

11 So let's take a look at the first paragraph.
12 Last sentence in the first paragraph reads,
13 "Motor-voter's attempt to make registration universal is
14 instead a universal failure because it was so flawed as
15 to actually undermine our registration system."

16 You wrote those words. Correct?

17 A. Yes. Yes.

18 Q. And the first sentence, the topic sentence of
19 this paragraph is, "One of the biggest threats to voter
20 rights and election integrity today is the condition of
21 our voter registration rules." Those are your words.
22 Right?

23 A. Correct.

24 Q. Okay. In your expert report that you submitted
25 in this case, which is being held under the NVRA, you

1 did not disclose that you had regarded the NVRA as a
2 universal failure. Correct?

3 A. I don't remember if I-- what I said about it in
4 the deposition. But as I have mentioned, I wrote an
5 entire chapter of it, which you are well aware of, in
6 the book the ABA put out. And I talked about both the
7 problems with it and the benefits of it.

8 And as I've said, the failure is the fact that
9 Congress believed when it passed it and those who were
10 pushing the law forward said that this would be the
11 answer to declining voter turnout in the United States.
12 The law was passed but the turnout after the law became
13 effective, it did not increase turnout.

14 Q. Now, in this paragraph in your testimony to the
15 United States Congress where you opine that motor-voter
16 is a universal failure, you do not say anything about
17 motor-voter-- motor-voter failing to increase turnout,
18 correct, Mr. von Spakovsky?

19 A. Not in this short testimony, but I've written
20 that on many other occasions, including the one that
21 I've just told you about.

22 Q. Okay. Let's shift gears and talk about your
23 opinion on non-citizen registration and voting. You
24 consider yourself an expert on those topics, right, Mr.
25 von Spakovsky?

1 A. Yes.

2 Q. You have not in your experience ever attempted to
3 match state voter registration records with information
4 about non-citizens in any other databases in order to
5 identify possible non-citizens on their voter rolls; is
6 that right?

7 A. I don't have access to state voter rolls.

8 Q. You were an election official in the state of
9 Georgia at one point. Right?

10 A. I was a member of a five-member board.

11 Q. And you were an election official in the state of
12 Virginia at one point. Right?

13 A. I was a member of a three-member board.

14 Q. And in your capacity on the member-- as a member
15 of those two boards of election, you never in your
16 experience ever tried to, say, match voter registration
17 records to information in other databases containing
18 information about non-citizens in an attempt to identify
19 possible non-citizens on the voter rolls; is that
20 correct?

21 A. That is not correct.

22 Q. Okay. Where did you do that?

23 A. When I was on the Board in Fairfax County, that's
24 when I urged that we check DMV lists for individuals who
25 when they got their driver's license said they were

1 non-citizens to see whether they were registered to
2 vote.

3 Q. Okay. We'll come back to that in a second, Mr.
4 von Spakovsky. Now, as an expert in non-citizen
5 registration, you cannot identify a single other expert
6 who's your peer on non-citizen registration. Correct?

7 A. I know about my expertise. I'm not going to give
8 an opinion about the expertise of others.

9 Q. So as an expert on non-citizen registration, you
10 cannot identify a single other expert on non-citizen
11 registration. Correct?

12 A. No, that's not correct. It's not up to me to
13 determine the expertise or qualifications of other
14 individuals in this area. I know what I know. I don't
15 know what others do.

16 Q. I didn't ask you to determine other people's
17 expertise or read other people's minds, Mr. von
18 Spakovsky. I just asked you as an expert on non-citizen
19 registration who else you regard as an expert on
20 non-citizen registration like yourself. And your answer
21 is there's no one. Right?

22 A. No, that is not my answer. And you are asking me
23 to determine who the other experts are, and I'm telling
24 you that it's not up to me to determine the expertise of
25 other individuals in this area.

1 Q. Mr. von Spakovsky, could you turn to Page 37 in
2 your deposition transcript, Line 24. And we're going to
3 actually play a clip from your deposition.

4 THE COURT: This is for impeachment?

5 MR. KOBACH: Objection.

6 MR. HO: Yes, Your Honor.

7 MR. KOBACH: It's unclear why the transcript
8 is not sufficient.

9 MR. HO: I don't have to use the transcript,
10 it's a videotaped deposition. I'm not trying to refresh
11 his recollection, I'm trying to impeach his testimony.

12 THE COURT: How long--

13 MR. KOBACH: You tried to impeach him
14 earlier.

15 THE COURT: How long is the excerpt? I
16 mean, you can do it either way, but I think it's more
17 efficient to read from the transcript. If you have it--

18 MR. HO: We have it.

19 THE COURT: -- cued up, how long is it?

20 MR. HO: It's 15 seconds, Your Honor.

21 MR. KOBACH: Counsel, you used the
22 transcript to try to impeach others. Why is a
23 transcript not sufficient to impeach Mr. von Spakovsky?

24 THE COURT: I think it's counsel's choice.

25 I mean, it's a matter of discretion. I-- I counseled

1 him before to use the transcript because oftentimes it
2 results in a delay when people are going to use a video,
3 but it seems like, I mean, this counsel is going to have
4 their act together and they're ready to play it right
5 away. So as long as we're not going to sit around and
6 wait for them to cue it up, I'm okay with that. So are
7 you ready?

8 MR. HO: We'll try to be judicious about it,
9 Your Honor.

10 MR. KOBACH: Can we just have the page
11 number and lines?

12 MR. HO: I announced the page number and
13 lines, but for your benefit I'll read them again. It's
14 Line 37-- Page 37, Line 24.

15 (Video was played).

16 (MR. HO: As an expert on non-citizen
17 voting, can you identify some other experts in the
18 field?)

19 THE WITNESS: I-- you know, I-- I-- no. I
20 mean, I don't know if there are other experts who
21 believe they're experts on this subject or not, I-- I
22 don't know.

23 MR. HO: So as far as you know--).

24 Q. (BY MR. HO) Mr. von Spakovsky, was that my
25 question--

1 MR. KOBACH: Objection, we need the
2 follow-up.

3 THE COURT: I'm sorry?

4 MR. KOBACH: We're deprived of context, he
5 obviously was starting to say--

6 MR. HO: That was me.

7 MR. KOBACH: Could we see the remaining
8 questions after that one?

9 MR. HO: You have the transcript. Right?
10 We gave you-- Emily, did we give him a copy?

11 THE COURT: Mr. Kobach, you can redirect him
12 if you think that question was out of context.

13 MR. KOBACH: Okay, Your Honor.

14 Q. (BY MR. HO) Was that my question and was that
15 your answer, Mr. von Spakovsky?

16 A. It was.

17 Q. Now, Mr. von Spakovsky, in your view there are no
18 mainstream Republican officials or academics that know
19 anything about voter fraud; is that correct?

20 A. If I may, I'd like to provide an answer to your
21 last question. You left out my following answer in the
22 deposition, which is the exact answer I gave today.
23 You--

24 THE WITNESS: May I read that, Your Honor,
25 to the Court?

1 THE COURT: Go ahead.

2 THE WITNESS: I think it's very relevant to
3 the question that he asked me.

4 THE COURT: All right. In the interest of
5 time, go ahead and read it. Go ahead.

6 A. Your follow-up question was: As far as you know,
7 you are the only expert in existence on non-citizen
8 registration?

9 My answer was: I did not say that. What I said
10 was that I am not going to speculate on who is or who is
11 not an expert or consider themselves to be an expert. I
12 know what my expertise is and not that of others.

13 That's the exact answer I gave you today.

14 Q. (BY MR. HO) Okay. So let's not talk about
15 speculation, Mr. von Spakovsky, let's talk about your
16 actual opinion. And one of your actual opinions is
17 there are no mainstream Republican officials or
18 academics that know anything about voter fraud.
19 Correct?

20 A. That is not correct.

21 Q. Okay. I'm going to hand you an exhibit that's
22 been marked as Plaintiffs' Exhibit 145. Please turn to
23 the second page of that exhibit, Mr. von Spakovsky.
24 This is a redacted version of an e-mail that you wrote
25 from your Heritage Foundation e-mail address dated

1 February 22nd, 2017. Correct?

2 A. That's correct.

3 Q. Okay.

4 MR. HO: Your Honor, we'd like to offer
5 Plaintiffs' Exhibit 145 into evidence, please.

6 THE COURT: Any objection?

7 MR. KOBACH: No objection.

8 MR. HO: Okay. Can we please put that up on
9 the screen, Steven?

10 THE COURT: 145 admitted.

11 Q. (BY MR. HO) And let's turn to the second page
12 and let's look at the second paragraph. About halfway
13 down you write, "If they are picking mainstream
14 Republican officials and/or academics to man this
15 commission, it will be an abject failure because there
16 aren't any that know anything about this or who have
17 paid any attention to this issue over the years." You
18 wrote that, right, Mr. von Spakovsky?

19 A. That is correct, although I was speaking about
20 voter fraud in general. The question you just asked me
21 and that was in the deposition was about non-citizen
22 voting, which is just one aspect of that.

23 Q. Mr. von Spakovsky, the question that I've just
24 asked you was not about non-citizens registration, it
25 was about voter fraud. And you wrote in reference to

1 voter fraud that there are no Republican officials
2 and/or academics that know anything about that topic.
3 Correct?

4 A. I didn't say Republican officials, I said
5 mainstream Republican officials and academics.

6 Q. Thank you for that correction. This e-mail was
7 in reference to the Presidential Commission on Elections
8 Integrity. Correct?

9 A. Yes.

10 Q. Okay. And you identified your work on the
11 Presidential Commission on Elections Integrity
12 previously as one of the bases for your qualifications
13 to offer an opinion in this case. Correct?

14 A. I didn't offer it as a basis, I was asked if I
15 had served on the Commission.

16 Q. You worked with Secretary Kobach when you were on
17 the Election Integrity Commission. Correct?

18 MR. KOBACH: Objection, relevance.

19 THE COURT: Overruled.

20 A. I worked with Commissioner Kobach and other
21 members of the Commission.

22 Q. (BY MR. HO) Okay. That Commission has been
23 disbanded. Correct?

24 A. That's correct.

25 Q. Now, after one of the meetings-- can we keep that

1 e-mail on the screen, Steven, please?

2 Now, after one of the meetings of the Commission,
3 you were asked about this e-mail in which you expressed
4 your opinion about mainstream Republican officials and
5 their knowledge of voter fraud by a reporter and you
6 denied writing this e-mail, correct, Mr. von Spakovsky?

7 A. No. What I was asked was about an e-mail that I
8 had sent to the Attorney General about the Commission.
9 I did not send an e-mail to the Attorney General. This
10 e-mail was not sent by me to the Attorney General.

11 Q. Okay. I'm going to hand out what's been marked
12 as the transcript for Plaintiffs' Exhibit 146.

13 MR. KOBACH: Your Honor, we've seen several
14 documents allegedly impeaching him which counsel has
15 misrepresented. We'd like to see this before it is
16 presented, before he asks any further questions about
17 it.

18 THE COURT: Well, all right. You've been
19 handing him copies as you've been handing the others
20 copies. This is a several-page transcript, so let's let
21 Mr. Kobach review it. In fact, it's 3:00, why don't we
22 take about a 15-minute break.

23 MR. HO: If I may just-- Your Honor.

24 THE COURT: Yes.

25 MR. HO: Mr. Kobach did say that I was

1 misrepresenting about impeachment exhibits, and I'd just
2 like to clarify the record. I don't believe I've
3 misrepresented anything. That every exhibit that I've
4 offered has been properly offered as an impeachment
5 exhibit. And as far as I know, there have been no
6 objections to those exhibits or they've been admitted--
7 maybe there have been objections but they've all been
8 admitted into evidence.

9 MR. KOBACH: Your Honor, he very
10 specifically misrepresented in the case where he tried
11 to cut the witness off from his video testimony when the
12 second question clarified and was exactly what he said
13 in this case. It was clearly misrepresenting.

14 THE COURT: All right. I understand. I
15 understand. And that was clarified with Mr. von
16 Spakovsky's additional testimony. But I mean, as far as
17 just the procedure of presenting impeachment evidence
18 against this witness, I think you're doing it properly.
19 But if it's something of any length, you need to give
20 the other side an opportunity to look at it before you
21 actually point-- and actually now that I look at it,
22 it's just two pages, maybe three. Two pages. So, you
23 know, a minute or so would be enough.

24 I just want to-- you know, as I've made
25 clear all along, when you're showing somebody something,

1 make sure the other side has it and is pointed to it and
2 has a chance to be on the same page and understand what
3 the question is going to be about. Okay? So let's
4 reconvene at 20 after.

5 (Recess).

6 THE COURT: All right. You can be seated.

7 MR. KOBACH: Your Honor, before we-- before
8 we proceed, we're going to object to the use of this
9 transcript for three reasons.

10 No. 1, it's produced by an organization that
11 identifies itself as ProPublica. That organization has
12 in the past misrepresented itself to me personally. The
13 individuals did not represent themselves to be
14 reporters-- or the individual, singular, did not
15 represent himself to be a reporter and then published
16 something that was deceptive. Secondly, this--

17 THE COURT: Now wait. Are you talking about
18 the court reporting company?

19 MR. KOBACH: No, no, no. This purports to
20 be a transcript between a ProPublica reporter and Mr.--
21 actually two reporters and Mr. von Spakovsky. No. 2, it
22 doesn't identify the unnamed person.

23 THE COURT: Wait, wait, wait. I'm sorry, I
24 thought you meant the transcript of his deposition.
25 What are you talking about?

1 MR. KOBACH: I'm sorry. No, no, no. I'm
2 objecting to this document that was just handed to us.

3 THE COURT: And on the basis of?

4 MR. KOBACH: The-- the ProPublica-- the
5 organization ProPublica has in my own personal
6 experience concealed their identity as reporters and has
7 deceptively reported on what they found, so I have grave
8 doubts as to the veracity of this. Secondly, it doesn't
9 identify--

10 THE COURT: Is this an-- what is this, an
11 audio or a video?

12 MR. KOBACH: It appears to be an audio of
13 some sort of interview or conversation between two
14 journalists, unnamed, and Mr. von Spakovsky. That's my
15 second objection. They are unnamed.

16 And third, it doesn't provide a context.
17 Just like what Mr. Ho did a moment ago, it's a-- it
18 appears to start abruptly in the middle of a
19 conversation and then ends abruptly. And just as we saw
20 with Mr. Ho a moment ago on the video clip, what was
21 excluded afterward was contradictory to the conclusion
22 Mr. Ho wished to draw. And so similarly, we don't have
23 context here.

24 THE COURT: All right. Mr. Ho, do you have
25 the complete transcript?

1 MR. HO: That is the complete transcript of
2 the audio-recording, Your Honor. The question that I
3 posed to Mr. von Spakovsky was whether or not after a
4 meeting of the Election Integrity Commission, which Mr.
5 Kobach adduced testimony about, he denied writing the
6 e-mail that we just discussed during his testimony.

7 The audio is a recording of a reporter-- of
8 two reporters asking questions of Mr. von Spakovsky
9 after that meeting about this e-mail. And as the
10 transcript shows, he denies writing the e-mail, which he
11 has now just admitted that he wrote it. And it goes to
12 the credibility of this witness, Your Honor, on the
13 issues in this case.

14 THE COURT: All right. So I think the first
15 thing you're going to have to do is play enough of this
16 and ask him if this, in fact, is him because I think
17 what Mr. Kobach is raising is an authenticity question.
18 So let's do that and then go from there.

19 MR. HO: And if I may, Your Honor, just to
20 keep the record very clear. This is now the second time
21 that Mr. Kobach has accused me of doing something
22 deceptive or misrepresenting something about Mr. von
23 Spakovsky's deposition testimony. And, you know, Mr.
24 Kobach is free to redirect Mr. von Spakovsky on
25 anything, but I 'd like to make the record very clear

1 that I take issue with these accusations of
2 misrepresentation. They're not true.

3 THE COURT: So noted.

4 MR. KOBACH: Your Honor, it's my
5 understanding that it's not my responsibility to respond
6 to deceptive tactics by redirecting but, rather, we all
7 have an obligation to try not to deceive the Court.

8 THE COURT: Well, you know what, deception
9 is not the right word. This happens all the time
10 between lawyers, they-- they play something, the other
11 side says you're not-- you're not giving us the whole
12 context of this, they object. And typically the
13 judicial response to that is clear it up when you get
14 back with this witness and examine.

15 I mean, my gosh, I have these deposition
16 transcripts that you all want to admit primarily-- do
17 you see all these orange tags? These are the disputes,
18 most of them about context. It's not deception. It's
19 just that, you know, people have different interests
20 about what they want played because of what supports
21 their case and what doesn't.

22 So I don't think Mr. Ho has acted with
23 deception, and I understand why he takes issue with
24 that. And I find that he hasn't acted in a deceiving
25 way because he hasn't perhaps offered the full context

1 of Mr. von Spakovsky's answer. I allowed Mr. von
2 Spakovsky to go ahead and read the rest of that
3 deposition and it-- it became clear to me that when he
4 did that, his testimony was largely consistent with what
5 he said today. So, you know, I understood that.

6 All right. So let's go forward. You want
7 to impeach him with this tape. And if there's an
8 authenticity question about whether it's him, let's make
9 sure it's his voice. He'll admit it or I'll figure it
10 out from listening.

11 MR. HO: Thank you, Your Honor. Steven,
12 could we maybe play just the first--

13 (Audio was played).

14 Q. (BY MR. HO) Mr. von Spakovsky, was that your
15 voice on the tape saying "I have no idea"?

16 A. Yes. But what I was asked was whether I had sent
17 an e-mail to Jeff Sessions, I did not.

18 THE COURT: That's not the question.

19 Q. (BY MR. HO) That's not the question.

20 THE COURT: That's not the question, I'm
21 just trying to determine whether that's your voice.

22 THE WITNESS: It is.

23 THE COURT: If that's your voice, then I'll
24 allow you to impeach. If you take issue with the
25 context of this, as I said before, Mr. Kobach can ask

1 you questions to clarify or to clear it up.

2 MR. HO: Thank you, Your Honor.

3 MR. KOBACH: Your Honor, can we just be
4 clear--

5 THE COURT: Yes.

6 MR. KOBACH: -- what is the specific
7 statement he's impeaching?

8 MR. HO: I asked Mr. von Spakovsky if when
9 he was asked about The Heritage Foundation e-mail in
10 which he stated that there were no mainstream Republican
11 officials who knew anything about voter fraud, if he
12 denied writing that e-mail when asked about it by a
13 reporter after a meeting of the Election Integrity
14 Commission.

15 Mr. von Spakovsky stated that he did not
16 deny writing the e-mail and offered an explanation for
17 what he had to say. I am playing a video-- an audio of
18 what he actually said in order to impeach him.

19 THE COURT: All right. I-- I think that's
20 fine. If it's inconsistent with what he said or you
21 think it is, then go ahead and play it.

22 (Audio was played).

23 Q. (BY MR. HO) Mr. von Spakovsky, that's your voice
24 on the recording throughout answering the questions of
25 those reporters. Correct?

1 A. That's correct.

2 Q. Okay. Mr. von Spakovsky, let's turn now to the
3 methodology that you use when trying to ascertain
4 whether there is a problem of non-citizen registration
5 in Kansas.

6 A. But I would like to explain. You have
7 mischaracterized the answer that I gave in that-- that
8 recording. I was--

9 Q. Mr. von Spakovsky, I haven't posed a question to
10 you and I haven't characterized it. I asked you a
11 question if that was--

12 THE COURT: All right. Mr. Kobach can clear
13 this up on redirect. That's the standard practice. You
14 can ask him about this and then he can explain.

15 MR. KOBACH: All right.

16 Q. (BY MR. HO) So let's talk about your methodology
17 for trying to ascertain whether or not there is, in
18 fact, a problem of non-citizen registration in Kansas.
19 The methodology that you employ in trying to answer that
20 question, Mr. von Spakovsky, it doesn't have any kind of
21 name, does it?

22 A. I'm not sure what you mean.

23 Q. There's no shorthand name for the methodology
24 that you employ in trying to ascertain whether or not
25 there's a problem of non-citizen registration in Kansas.

1 Correct?

2 A. I'm not aware of a short-term-- a short-term
3 name.

4 Q. You're also not aware of whether or not the
5 methodology that you employ comports with
6 generally-accepted standards in the social sciences,
7 correct, Mr. von Spakovsky?

8 A. What I do is collect information on prosecutions
9 and reports of non-citizens across the country and put
10 that information together and summarize it.

11 Q. Okay. That wasn't my question, Mr. von
12 Spakovsky.

13 MR. HO: Your Honor, I'd like if I could
14 get-- to get an answer to my question, which was whether
15 or not his method comports-- for ascertaining whether or
16 not there's a problem of non-citizen registration in
17 Kansas comports with generally-accepted standards in the
18 social sciences.

19 THE COURT: All right. That's the question.
20 You can answer that question.

21 A. I don't know what the-- I-- I have no idea
22 whether or not this would go with whatever academics do
23 in their social science research.

24 Q. (BY MR. HO) Okay. Let's talk about your
25 opinions about preventing non-citizens from registering

1 to vote. You would agree, Mr. von Spakovsky, that it is
2 impossible to have a perfect security system that
3 prevents all non-citizens from registering to vote.

4 Correct?

5 A. I'm sorry, can you repeat the question?

6 Q. Sure. You would agree with me, Mr. von
7 Spakovsky, that it's impossible to have a perfect
8 security system that prevents all non-citizens from
9 registering to vote. Correct?

10 A. Right. There's no such thing as a perfect
11 security system.

12 Q. Okay. And you would also agree with the
13 statement that state DMVs must train their employees to
14 prevent non-citizens to apply for-- excuse me. Let me
15 start that again.

16 You would also agree with the statement that
17 state DMVs must train their employees to prevent
18 non-citizens who apply for driver's licenses from
19 registering to vote. Right?

20 A. I believe they should do so.

21 Q. Now, I believe you discussed on your direct
22 examination a couple of cases from the Seventh Circuit.
23 Do you remember that?

24 A. Yes.

25 Q. Okay. And I believe you testified that the

1 individuals in those Seventh Circuit cases were
2 non-citizens who checked "yes" on their voter
3 registration forms. Do you remember that? Checked
4 "yes" in response to the citizenship question. Do you
5 remember testifying to that effect?

6 A. Yes.

7 Q. Okay. Let's talk about that and let's bring up
8 your expert report, Defendant's Exhibit 865, back up
9 onto the screen. And let's look at Page 9 of your
10 report. The last paragraph on the page.

11 Now, in this paragraph you're describing one of
12 those Seventh Circuit cases about a non-citizen who
13 ended up registered to vote. Correct?

14 A. I'm sorry. Which paragraph are you referring to?

15 Q. The last paragraph on Page 9 of your report. You
16 are describing one of those Seventh Circuit cases about
17 a non-citizen who ended up registered to vote. Correct?

18 A. Yes.

19 Q. Okay. And when we look here, this non-citizen
20 left the citizenship box unchecked on her driver's
21 license application form. Correct?

22 A. No, the second-- she says that, but then she says
23 she couldn't remember whether she checked the box or the
24 state employee did so.

25 Q. You haven't actually looked at that person's

1 voter registration form. Correct?

2 A. I was citing directly from the Seventh Circuit
3 opinion which went through the facts of the case.

4 Q. Okay. But in your description of this case,
5 you'd agree that despite knowing that this driver's
6 license applicant was a non-citizen, the DMV employee
7 still asked her if she would like to register to vote.
8 Correct?

9 A. That is what she claimed in the case.

10 Q. Okay. Mr. von Spakovsky, would you turn to
11 Page 81 in your deposition, please. Line 18 through
12 Line 22. Just let me know when you're there.

13 A. I'm sorry, what lines?

14 Q. 18 through 22.

15 A. Yes.

16 Q. Question: Despite knowing that the driver's
17 license applicant was a non-citizen, the DMV employee
18 still asked the applicant if she would like to register
19 to vote. Correct?

20 Answer: Correct.

21 Was that my question and was that your answer?

22 A. It was. And that's what it said in the Seventh
23 Circuit opinion.

24 Q. Okay. Now, you would agree that there seems to
25 be a problem that occurs in a number of cases that a DMV

1 worker, despite not knowing-- excuse me, despite knowing
2 that a driver's license applicant is a non-citizen,
3 still asks the applicant if she would like to register
4 to vote. Correct?

5 A. Yes.

6 Q. And you believe that when this happens, the
7 non-citizen is likely to believe that she is permitted
8 to register to vote and ends up registering. Correct?

9 A. Correct.

10 Q. And you would agree that when this happens, a DMV
11 employee asking someone whom the DMV employee knows is
12 not a citizen whether or not that person would like to
13 register to vote, that the non-citizen does not intend
14 to violate the law. Correct?

15 A. Well, I can't judge all of these cases, that
16 would depend on the circumstances of the case. And in
17 that kind of situation I would want to ask the
18 registrant whether or not they actually read the oath of
19 affirmation before they signed it in which they affirm
20 that they are a U.S. citizen.

21 Q. You'd agree that better training for DMV workers
22 could in some instances prevent non-citizens from
23 becoming registered to vote. Correct?

24 A. Yes. If DMV officials are willing to allow their
25 clerks to make the decision to not offer the opportunity

1 to register to vote.

2 Q. Now, I believe you testified a moment ago before
3 the break that when you were an elections official in
4 Fairfax County, you identified some non-citizens who
5 were registered to vote. Right?

6 A. Yes.

7 Q. And you did so I believe you said by looking at
8 DMV records. Correct?

9 A. I said those were some of the records we
10 identified.

11 Q. Okay. But you used some DMV records to identify
12 some non-citizens on the voter rolls. Correct?

13 A. Correct.

14 Q. Okay. I want to talk about a section in your
15 report, Page 10. Defendant's 865. Now, you have you a
16 header about halfway through this page that reads, "The
17 Alternatives to Requiring Proof of Citizenship." Let me
18 know when you're there.

19 A. I have the page, thank you.

20 Q. All right. The first bullet on this page and the
21 ensuing paragraph address the practice of comparing a
22 statewide voter registration list to the state DMV
23 files. Correct?

24 A. I-- I'm sorry. Could you say that again?

25 Q. Sure. This bullet, the first bullet under the

1 header "Alternatives to Requiring Proof of Citizenship"
2 describes the practice of comparing statewide voter
3 files to a state DMV list to try to identify
4 non-citizens on the rolls. Correct?

5 A. Right.

6 Q. And you expressed the opinion in your report that
7 this method of comparison is inadequate in Kansas
8 because, in your understanding, the DMV database in
9 Kansas does not distinguish green card holders, that is
10 lawful permanent residents who are non-citizens, from
11 citizens. Correct?

12 A. My understanding is when a data comparison is
13 done, it only turns up the temporary driver's license
14 holders--

15 Q. And the reason-- I'm sorry.

16 A. -- not the permanent resident aliens.

17 Q. Have you finished your answer?

18 A. Yes.

19 Q. Okay. And the reason why the comparison only
20 turns up temporary visa holders is because your
21 understanding is that in the DMV database there's no way
22 to distinguish legal permanent residents, that is green
23 card holders, from citizens. Correct?

24 A. Correct.

25 Q. Okay. Now, Mr. von Spakovsky, I just want to be

1 clear. Are you saying that you're not aware that
2 Secretary Kobach is relying on an expert report from
3 another expert in this case, Doctor Jesse Richman, that
4 incorporates an analysis that compares driver's license
5 records about lawful permanent residents, green card
6 holders, to the state voter file in order to identify
7 lawful permanent residents potentially in the voter
8 file? You're not aware of that?

9 A. I haven't reviewed that report.

10 Q. Okay. Because you certainly wouldn't say that
11 the DMV records don't have green card information,
12 despite knowing that that was false, right, Mr. von
13 Spakovsky?

14 A. My understanding was that if you do a data
15 comparison, it only picks up the TDLs.

16 Q. Okay. So your testimony is that Secretary
17 Kobach, who's relying on an expert report that
18 incorporates information from DMV files on green cards,
19 did not tell you when you wrote that in your expert
20 report that the DMV files do not contain green card
21 information and allowed you to submit this report with
22 that incorrect statement, right, Mr. von Spakovsky?

23 MR. KOBACH: Objection. Objection, Your
24 Honor, the counsel is providing information that is not
25 true as a condition to the question being answered to

1 the witness.

2 THE COURT: Let me review the question.
3 Just a minute. Just a minute. I think the question is
4 somewhat confusing and compound. Why don't you reframe
5 it.

6 MR. HO: I'll do my best, Your Honor.

7 Q. (BY MR. HO) So I'm going to represent to you
8 that Doctor Jesse Richman, one of the other experts for
9 Secretary Kobach in this case, has submitted an expert
10 report that contains an analysis that compares green
11 card information in DMV files to the state voter lists
12 to ascertain whether or not there are potentially some
13 legal permanent residents, green card holders, who might
14 be in the voter file. Okay? Do you understand me, Mr.
15 von Spakovsky, when I make that representation to you?

16 A. Yes.

17 Q. Okay. Now, you wrote in your report that the DMV
18 doesn't have information on green card holders, that
19 that was your understanding. Right?

20 MR. KOBACH: Your Honor, objection. Again,
21 I think he's mischaracterizing it. I believe his report
22 was referring to TDLs, not to all-- not to all driver's.

23 MR. HO: That's just wrong.

24 THE COURT: All right. I'm going to
25 overrule. There's a factual dispute between the two of

1 you as to what it says, but you can clarify and
2 redirect, Mr. Kobach.

3 A. Okay. I'm sorry, I lost the track of the
4 question in the arguments going on.

5 Q. (BY MR. HO) In your report--

6 A. Yes.

7 Q. -- your understanding was there was no
8 information on green card holders, lawful permanent
9 resident non-citizens, in the DMV files. Correct?

10 A. My understanding was that when you do a
11 comparison, that information doesn't come up.

12 Q. Okay. And Secretary Kobach reviewed your expert
13 report before you submitted it in this case. Correct?

14 A. I don't recall if I sent it to them before I
15 finalized it.

16 Q. Okay. Now, you believe that non-citizens who
17 register to vote in violation of state law should be
18 prosecuted. Correct?

19 A. No, I think I answered before that that depended
20 on the-- the facts and circumstances of each-- each
21 case.

22 Q. Okay. Could you open up your deposition
23 transcript, Mr. von Spakovsky, to Page 313. And could
24 you go to Line 7 through 10. Let me know when you're
25 there. Are you there?

1 A. Yes.

2 Q. Okay. Question: Do you believe that non-- the
3 non-citizens who register are in violation of federal
4 law - there I go - state law should be prosecuted?

5 Answer: I believe they should, yes.

6 Was that the question that was posed to you and
7 was that your answer?

8 A. Yes, it was. But I would qualify that by saying
9 that if it was intentional, yes, they should be
10 prosecuted. If it was a mistake-- accidental or a
11 mistake of DMV officials, then that's-- those are facts
12 and circumstances that any prosecutor would take into
13 account.

14 Q. (BY MR. HO) Now, but you believe that
15 prosecutions are not a solution to the problem of
16 non-citizen registration for reasons that include
17 prosecutors sometimes don't want to bring cases? That's
18 one reason why prosecutions are inadequate, right, Mr.
19 von Spakovsky, in your view?

20 A. That's correct.

21 Q. And another reason is you think that illegal
22 registrations is-- are difficult to detect, right, Mr.
23 von Spakovsky?

24 A. That's correct.

25 Q. Okay. Let's talk about those two reasons. The

1 first reason, the lack of desire of prosecutors. You're
2 aware that Secretary Kobach has criminal prosecutorial
3 authority over election crimes. Right?

4 A. Correct.

5 Q. Do you think that Secretary Kobach lacks a desire
6 to prosecute election crimes?

7 A. No. I don't know if he has the resources to do
8 it.

9 Q. Now, let's talk about the second reason, the
10 difficulty of detection. You described in your report
11 in this case 30 incidents of non-citizen registration in
12 Sedgwick County. Right?

13 A. Yes, relying on the information I received from
14 the state.

15 Q. And you're not aware of any reason why those
16 specific 30 instances of non-citizen registration that
17 the Kansas Secretary of State informed you about
18 couldn't be prosecuted by the Kansas Secretary of State.
19 Correct?

20 A. I don't know the facts and circumstances of each
21 case and whether the registration was intentional or
22 accidental or whether it was a-- an administrative
23 error.

24 Q. And at the time that you offered your opinion in
25 this case that prosecutions were at-- inadequate to

1 address the problem of non-citizen registration, you
2 were unaware of how many prosecutions of non-citizens
3 for registering or voting Secretary Kobach had brought.
4 Correct?

5 A. I was aware of prosecutions throughout the
6 country on this issue.

7 Q. That wasn't my question, Mr. von Spakovsky. I'd
8 like an answer to my question.

9 At the time that you offered the opinion that
10 prosecutions were inadequate to address the problem of
11 non-citizen registration in Kansas, you offered that
12 opinion without being aware of how many prosecutions
13 Secretary Kobach had brought against non-citizens for
14 registering to vote. Correct?

15 A. I was not aware of how many prosecutions had
16 actually been conducted.

17 Q. Now, let's talk about the evidence of non-citizen
18 registration in Kansas in your report in a little bit
19 more detail. And let's start-- well, in your report we
20 discussed earlier you mentioned 30 instances of possible
21 non-citizen registration in Sedgwick County. Right?

22 A. Yes.

23 Q. Now, you're aware that there are more than
24 1.7 million registered voters in the state of Kansas?

25 A. Yes.

1 Q. And of the more than 1.7 million registered
2 voters in the state of Kansas, at the time of your
3 report you were not aware of any other instances of
4 non-citizen registration in Kansas other than the 30 in
5 Sedgwick County that you described. Correct?

6 A. That's correct.

7 Q. Now, the factual basis for your assertion that
8 there were 30 non-citizens registered to vote in
9 Sedgwick County, you said I believe a moment ago, was
10 information that Secretary Kobach gave to you. Correct?

11 A. Correct.

12 Q. Okay. Now, you don't know the intent of any of
13 those individuals in Sedgwick County when they
14 registered to vote. Correct?

15 A. I do not because I've not examined the facts and
16 circumstances of each case.

17 Q. So you offered an opinion in this case about the
18 extent of non-citizen registration in Kansas and relied
19 exclusively on information that Secretary Kobach gave
20 you without investigating the circumstances of those
21 cases. Correct?

22 A. Well, the problem I was asked to investigate was
23 the problem of non-citizens registering and voting. And
24 as I've said this afternoon in my testimony, I believe
25 it's a problem if non-citizens register, whether they do

1 so intentionally or without realizing that they're
2 violating the law.

3 Q. Okay. I'm going to look at your report,
4 Defendant's Exhibit 865, which has been admitted into
5 evidence, and Page 3. And let's look at the first full
6 paragraph.

7 A. I have it.

8 Q. Are you there?

9 A. Yes.

10 Q. Okay. Second to last sentence you write,
11 "Clearly aliens who applied to register at the DMV were
12 not dissuaded from falsely asserting U.S. citizenship by
13 the oath requirement." Did I read that correctly?

14 A. Yes.

15 Q. Okay. Those are your words?

16 A. That's correct.

17 Q. But you have not investigated these individual
18 cases and, therefore, you don't know whether or not
19 these individuals falsely asserted U.S. citizenship,
20 correct, Mr. von Spakovsky?

21 A. No, I'm relying on the state and their indication
22 that these individuals were all non-citizens.

23 Q. That wasn't my question, Mr. von Spakovsky. It
24 was whether or not you had personal knowledge of whether
25 or not these individuals falsely asserted U.S.

1 citizenship when they became registered to vote. The
2 answer to that question is no. Right?

3 A. If they were non-citizens at the time they filled
4 out the registration application form and-- and signed
5 the oath requirement, then they falsely asserted they
6 were U.S. citizens. That is my answer.

7 MR. HO: Your Honor, I would like an answer
8 to my question, which was whether or not he knew if
9 these individuals had, in fact, falsely asserted U.S.
10 citizenship when he made that representation in his
11 report.

12 THE COURT: All right. Can you answer that
13 question, that specific question?

14 A. Well, I don't know it personally. I was relying
15 on the evidence-- the facts that I was given, that they
16 were aliens at the time they submitted the registration
17 form.

18 Q. (BY MR. HO) But you don't know if they swore
19 falsely that they were U.S. citizens, right, Mr. von
20 Spakovsky?

21 A. I did not personally examine each registration
22 form.

23 Q. Now, when you formed your opinion about
24 non-citizen registration in Kansas, other than the
25 Sedgwick County spreadsheet which was provided to you by

1 your client, you did not have any other information that
2 you independently sought about the problem of
3 non-citizen registration in Kansas. Correct?

4 A. Correct.

5 Q. And in your opinion, it is methodologically
6 appropriate to arrive at an objective expert opinion
7 about the extent of non-citizen registration in Kansas
8 by relying exclusively on a spreadsheet given to you by
9 your client, Secretary Kobach. Correct?

10 A. I relied on the information I received from
11 Secretary Kobach in Kansas and also my knowledge of
12 non-citizen registration and voting in many other cases
13 throughout the country.

14 Q. And that knowledge of non-citizen registration
15 and voting that you referred to in many other cases
16 throughout the country, there's not a single one of them
17 in the state of Kansas. Correct?

18 A. There is now I believe a conviction and
19 prosecution in Kansas.

20 Q. At the time that you offered your opinion in this
21 report, the extent of your knowledge of non-citizen
22 registration in Kansas was a single spreadsheet offered
23 to you by your client, Secretary Kobach. Correct?

24 A. As I've answered repeatedly, yes.

25 Q. Now, we established that this case is not your

1 first time collaborating with Secretary Kobach. Right?

2 A. What do you mean by collaborating?

3 Q. Well, you worked with him on the Presidential
4 Commission on Election Integrity. Right?

5 A. I was a commission member, along with a number of
6 other individuals who were on the Commission.

7 Q. And if we go back to 2010, you also worked with
8 Secretary Kobach then supporting his first campaign for
9 Secretary of State. Right?

10 A. I did send him a contribution, yes.

11 Q. And in addition to contributing to his campaign
12 for Secretary of State, you also wrote an e-mail
13 promoting a fundraiser for Secretary Kobach's first
14 campaign for Secretary of State. Correct?

15 A. I believe I did.

16 Q. Okay. You didn't mention the fact in your expert
17 report that you had contributed to Secretary Kobach's
18 campaign and that you had written fundraising e-mails
19 for him. Correct?

20 A. I did not.

21 Q. Now, let's go back to your expert report, Page 3.
22 And let's look at the second full paragraph. And I want
23 to look at that first sentence. "The number of aliens
24 discovered in just one county in Kansas may be the tip
25 of the iceberg." Did I read that right?

1 A. Yes.

2 Q. Okay. Did you write those words, Mr. von
3 Spakovsky?

4 A. I did.

5 Q. Why did you choose the phrase "the tip of the
6 iceberg"?

7 A. I've used that before in other things that I've
8 written.

9 Q. But I mean, the reason you used that phrase is
10 because, in your view, the 30 instances of non-citizen
11 registration in Sedgwick County, those could be
12 indicative of a larger problem. Right?

13 A. Correct.

14 Q. The date of your report, remind me again, it's
15 May 16th, 2016; is that right?

16 A. Correct.

17 Q. Now, you're aware, Mr. von Spakovsky, aren't you,
18 that just a few months before you used this phrase "tip
19 of the iceberg" in your report to describe the 30
20 incidents of non-citizen registration in Sedgwick
21 County, your client, Secretary Kobach, used the exact
22 same phrase in a press release, "the tip of the
23 iceberg," to describe the same 30 incidents of
24 non-citizen registration in Sedgwick County, Mr. von
25 Spakovsky?

1 MR. KOBACH: Objection.

2 A. No, I was not aware of that. "Tip of the
3 iceberg" is a phrase that's used very often.

4 Q. (BY MR. HO) This has been marked as Plaintiffs'
5 Exhibit 147.

6 MR. KOBACH: Your Honor, this is a waste of
7 the Court's time. He's already said that his answer is
8 that it's-- it's an often used phrase.

9 MR. HO: I'd like to impeach that answer,
10 Your Honor.

11 THE COURT: All right. Proceed.

12 MR. ROE: Your Honor, this is--

13 THE COURT: His answer I think was that it's
14 a commonly used phrase. All right.

15 MR. HO: Now, this is a press release from
16 the Secretary of State's Office which is dated
17 October 15th, 2015. Your Honor, we'd like to admit this
18 into evidence as a statement from Secretary Kobach,
19 who's a party opponent.

20 THE COURT: This is a press release dated
21 October 16th, 2015. Any objection?

22 MR. KOBACH: No objection.

23 THE COURT: 147 admitted.

24 Q. (BY MR. HO) Can you bring up Plaintiffs' 147 on
25 the screen. And specifically let's look at the second

1 paragraph four lines down, towards the end of the fourth
2 line, the fifth sentence.

3 "We have already identified more than 30 aliens
4 who either successfully registered before our law went
5 into effect or who attempted to register and were
6 stopped after the law went into effect. And that's just
7 the tip of the iceberg." Did you read that correctly?

8 A. Yes.

9 Q. Okay. Mr. von Spakovsky, do you believe it is
10 methodologically appropriate as an expert witness to
11 copy language used by your client in a press release?

12 MR. KOBACH: Objection, harasses the
13 witness.

14 THE COURT: Overruled. You can answer it if
15 you can.

16 A. I have never seen this press release before
17 today.

18 Q. (BY MR. HO) Okay. Just so we're clear; your
19 testimony is that when you used the phrase "tip of the
20 iceberg" to describe 30 incidents of non-citizen
21 registration in Sedgwick County in your expert report in
22 2016, it's just a coincidence that Secretary Kobach used
23 the exact same expression to describe the exact same 30
24 incidents of non-citizen registration in Sedgwick County
25 in a press release just a few months earlier?

1 A. I've already answered that question. I've never
2 seen that press release before today.

3 Q. Okay. Let's talk about the size of the iceberg.
4 You can't offer any kind of percentage about the-- you
5 can't offer any estimate about the percentage of
6 non-citizens who are registered to vote who have been
7 discovered, can you?

8 A. Are you talking about for Kansas or--

9 Q. For Kansas.

10 A. No.

11 Q. You don't have any estimate about the size of the
12 iceberg, right, Mr. von Spakovsky?

13 A. That's correct.

14 Q. Okay. Let's talk a little bit more about your
15 expert report. I believe you testified earlier today
16 describing some of the work in your expert report that
17 the outcome of a close election could be affected by
18 non-citizens voting, right, Mr. von Spakovsky?

19 A. Correct.

20 Q. You cannot identify a single federal election the
21 outcome of which was decided by non-citizen voting,
22 right, Mr. von Spakovsky?

23 A. I can't cite a single case where it changed the
24 outcome, but there was cases like the *Dornan* case where
25 it came within I think 200 votes of changing the

1 outcome.

2 Q. Okay. But you can't identify a single case where
3 the outcome was decided by non-citizen voting. Right?

4 A. No.

5 Q. Let's talk about some of the examples you do talk
6 about in your report. So let's go back to your report,
7 Defendant's Exhibit 865, Page 4. Let's look at the
8 fourth paragraph on this page.

9 Now, in this paragraph in your report you
10 describe a situation in which an NBC station in Florida
11 identified 100 individuals who were excused from jury
12 duty who were possible non-citizens on the voter rolls.
13 Right?

14 A. Yes.

15 Q. Now, you know, Mr. von Spakovsky, don't you, that
16 after this NBC report there was a follow-up by the same
17 NBC station that determined that at least 35 of those
18 100 individuals had documentation to prove that they
19 were, in fact, United States citizens. Correct?

20 A. I'm aware of it now, yes.

21 Q. Okay. In your expert report, though, you did not
22 mention the fact that at least 35 of these individuals
23 in fact had documents to demonstrate that they were
24 United States citizens. Correct?

25 A. Well, as you know from my deposition, I was not

1 aware of that at the time I wrote the expert report.

2 Q. Right. Because at the time that you wrote about
3 these 100 individuals in your expert report, you didn't
4 bother to see that there was follow-up by the same NBC
5 station determining that at least a third of these
6 people were not non-citizens, right, Mr. von Spakovsky?

7 A. I was not aware of the follow-up, although
8 apparently they-- the follow-up did find that a
9 significant number were not U.S. citizens.

10 Q. You're aware that this expert report has been
11 submitted to the Court, right, Mr. von Spakovsky?

12 A. I am.

13 Q. Okay. And you never sought to correct or
14 supplement your expert report to caveat that 100 number
15 and say that at least a third of these people were
16 actually citizens, right, Mr. von Spakovsky?

17 A. It was corrected in the deposition that you took
18 of me two years ago.

19 Q. Okay. So if I hadn't stood up and asked you
20 these questions on cross examination, that report
21 would've gone into evidence to the federal judge without
22 any correction about those 100 individuals, correct, Mr.
23 von Spakovsky?

24 A. No, because I-- if I had found out about it, I
25 would've corrected it. But I wasn't aware of it, as you

1 know, when you took my deposition. So I wasn't aware of
2 it so I couldn't correct it. If I knew of that--

3 Q. You're aware that--

4 A. -- I would.

5 Q. Are you finished with your answer?

6 A. I think so.

7 Q. Okay. You were aware of that mistake in your
8 expert-- I'm sorry, I'm not going to call it a mistake.
9 You were aware of that inaccurate representation in your
10 report at the time you gave your direct testimony,
11 right, Mr. von Spakovsky?

12 A. Yes.

13 Q. And you didn't--

14 A. That mistake had already been-- I had been made
15 aware of it in your deposition so, therefore, the Court
16 would be aware of it.

17 Q. And you didn't bother to explain to the Court
18 that that representation in your report--

19 MR. KOBACH: Objection, asked and answered
20 and harassing.

21 MR. HO: I'll move along.

22 Q. (BY MR. HO) Let's talk about the GAO report--

23 MR. KOBACH: I would also like to--

24 THE COURT: Wait a minute. Wait a minute.

25 One person at a time. Mr. Kobach.

1 MR. KOBACH: And I would also like the
2 record to reflect that Mr. Ho is pointing aggressively
3 at the witness throughout this entire interchange.

4 THE COURT: All right. So noted. Mr. Ho, I
5 think you should tone it down.

6 MR. HO: Yes, Your Honor.

7 Q. (BY MR. HO) You testified about a GAO study in
8 your report, right, Mr. von Spakovsky?

9 A. I did.

10 Q. Okay. And you mentioned in your report that
11 according to this GAO study, one federal district court
12 reported that 1 to 3 percent of the people who were
13 called for jury duty indicated that they were
14 non-citizens registered to vote. Correct?

15 A. That's correct.

16 Q. Okay. Now, in your testimony today, you
17 acknowledge that the GAO report cites statistics from
18 eight U.S. district courts. Correct?

19 A. That's correct.

20 Q. And four out of those eight U.S. district courts
21 reported that there was not a single non-citizen who had
22 been called for jury duty off of-- off of the voter
23 rolls in those districts. Correct?

24 A. Correct.

25 Q. And you did not mention in your expert report

1 that four out of the eight district courts cited by the
2 GAO found not a single non-citizen registered to vote.
3 Correct?

4 A. That's correct. But I also did not mention the
5 other three federal district courts out of the four that
6 did find. I simply cited one of the federal district
7 courts as an example and then I gave a full citation to
8 the GAO report, which is over 70 pages of data and
9 information, all of which I could not put into the
10 report.

11 Q. Okay. The three other district courts that had
12 non-citizens reported from their jury rolls-- for jury
13 duty from their voter rolls, all three of those reported
14 that fewer than 1 percent of the people called for jury
15 duty indicated that they were not U.S. citizens.
16 Correct?

17 A. I don't recall the exact details of all of the
18 district courts.

19 Q. Okay. This is Plaintiffs' Exhibit 127. This is
20 the GAO report that you relied on in your expert report
21 in this case, Mr. von Spakovsky. Does that look correct
22 to you?

23 A. This is the GAO report I cited.

24 Q. Okay. You read that report. Right?

25 A. I did, at the time I wrote the expert report.

1 Q. Okay.

2 MR. HO: I'd like to move Plaintiffs'
3 Exhibit 127 into evidence, Your Honor.

4 MR. KOBACH: No objection.

5 THE COURT: Any objection?

6 MR. KOBACH: No.

7 THE COURT: 127 admitted.

8 Q. (BY MR. HO) Okay. Let's look at Page 42 of the
9 GAO report, which is Page 47 of the pdf, Steven.

10 Okay. I see three bullets here describing the
11 percentage of people called for jury duty who reported
12 that they were-- they were not U.S. citizens. Do you
13 see that, Mr. von Spakovsky?

14 A. I do.

15 Q. Okay. The first bullet there is the one that
16 says that there's a federal district court where 1 to
17 3 percent of the people called for jury duty reported
18 that they were not U.S. citizens. Right?

19 A. Correct.

20 Q. And that is the one district court that you
21 described in your expert report when you talked about
22 the GAO study. Right?

23 A. Yes.

24 Q. Okay. Now let's talk about the other two-- the
25 other two bullets on this page. The second bullet is a

1 federal district court in which less than 1 percent of
2 the jury pool reported that they were not U.S. citizens.
3 Right?

4 A. Yes.

5 Q. Okay. You didn't mention that jury pool in your
6 expert report. Right?

7 A. That's correct.

8 Q. Okay. Third bullet here is a third U.S. District
9 Court in which 150 people out of the 95,000 stated that
10 they were not U.S. citizens. Right?

11 A. Correct.

12 Q. Okay. And you would agree with me that that's
13 less than 1 percent of the people from that jury pool.
14 Correct?

15 A. Yes.

16 Q. Okay. And you didn't mention that jury pool in
17 your expert report, right, Mr. von Spakovsky?

18 A. That's correct.

19 Q. Okay. Let's look at the next page, the top
20 bullet. A fourth U.S. District Court said that five
21 people out of 50,000 claimed that they were non-citizens
22 in response to jury questionnaires, right, Mr. von
23 Spakovsky?

24 A. That's correct.

25 Q. And you'd agree that's less than 1 percent of the

1 people in that jury pool, right, Mr. von Spakovsky?

2 A. Yes.

3 Q. Okay. You didn't mention that district court in
4 your expert report. Right?

5 A. I was giving only one example from this report.
6 I didn't mention all eight. I mentioned one and I
7 clearly said it was up to 3 percent, that court said it
8 was 1 to 3 percent. So I represented correctly that
9 they had said it could've been up to 3 percent.

10 Q. Mr. von Spakovsky, do you remember at the
11 beginning of our conversation you agreed with me that an
12 expert should present evidence that both supports and
13 detracts from a particular conclusion?

14 A. Sure.

15 Q. The one federal district court from the eight
16 cited in the U.S. GAO report that you cited in your
17 expert report was the one with the highest percentage of
18 people reporting that they were non-citizens, right, Mr.
19 von Spakovsky?

20 A. That's correct.

21 Q. Mr. von Spakovsky, in 2011 you wrote an op-ed
22 asserting that a 2010 election in Missouri that ended in
23 a one-vote margin of victory included 50 votes cast
24 illegally by the citizens of Somalia. Correct?

25 A. Correct. But it turned out apparently that was

1 incorrect, which is why I did not include it in my
2 expert report.

3 Q. Okay. Not talking about your expert report. I
4 just want to talk about that op-ed for a second.

5 You wrote that op-ed claiming that 50
6 non-citizens from Somalia voted in an election in
7 Missouri, despite the fact that a month earlier there
8 had been an election challenge-- there had been an
9 election contest in that case and a state court in
10 Missouri issued an opinion, *Royster versus Rizzo*,
11 finding that no fraud had taken place in that election.
12 Correct?

13 A. I don't know when that opinion was issued. I
14 wasn't aware of that when I wrote the piece, which was
15 based on other reports.

16 Q. You're aware of that now, right, Mr. von
17 Spakovsky?

18 A. I'm aware of that now.

19 Q. You never published a written retraction of your
20 assertion about Somalia voters illegally participating
21 in that election, right, Mr. von Spakovsky?

22 A. I don't believe so, but I don't recall when I
23 discovered that.

24 Q. Okay. Mr. von Spakovsky, you mentioned your time
25 on the FEC earlier today. Do you remember that?

1 A. Yes.

2 Q. Okay. You were never confirmed to be a
3 commissioner on the FEC by the United States Senate.
4 Right?

5 A. That's correct, I served in a recess appointment
6 for two years.

7 Q. Okay. Congressman John Lewis opposed your
8 nomination to the FEC, right, Mr. von Spakovsky?

9 A. I believe that's correct.

10 Q. You're not aware in his entire career of
11 Congressman Lewis ever opposing any other nominee to the
12 FEC, right, Mr. von Spakovsky?

13 A. I have no idea.

14 Q. Mr. von Spakovsky, you understand that under the
15 documentary proof-of-citizenship law, a birth
16 certificate is considered satisfactory evidence of
17 United States citizenship because anyone born in the
18 United States is a U.S. citizen, right, Mr. von
19 Spakovsky?

20 A. Yes.

21 Q. You do not believe, though, Mr. von Spakovsky, do
22 you, that that is a correct interpretation of the
23 Fourteenth Amendment, right, Mr. von Spakovsky?

24 A. I have written analyses of the legislative
25 history of the Fourteenth Amendment and I don't believe

1 that's a correct interpretation, but that's the
2 interpretation of the State Department and the courts.

3 Q. Right. Just so the record is clear, you do not
4 believe that under the Fourteenth Amendment everyone
5 born on United States soil is, in fact, a U.S. citizen,
6 right, Mr. von Spakovsky?

7 MR. KOBACH: Objection. It's unclear what
8 the relevance of the meaning of the Fourteenth Amendment
9 clause here on--

10 MR. HO: It goes to bias, Your Honor.

11 THE COURT: All right. I'll overrule.
12 Answer if you can.

13 A. Well, if you're saying that I have a bias towards
14 immigrants, I have no bias towards immigrants. In fact,
15 I'm a first-generation American and I'm a son of
16 immigrants, in fact refugees who came to the United
17 States. So I don't have a bias against non-citizens.

18 Q. (BY MR. HO) Wasn't my question, Mr. von
19 Spakovsky.

20 A. Well, that's my answer, sir.

21 Q. I'd like an answer to my question, Mr. von
22 Spakovsky, which was: You do not believe that everyone
23 born on United States soil is, in fact, a United States
24 citizen, right, Mr. von Spakovsky?

25 A. Well, the courts themselves have said that that's

1 correct. For example, sons and daughters of diplomats
2 and others are not considered citizens of the United
3 States.

4 I think the interpretation of that, if you look
5 at the legislative history, is that to be a U.S. citizen
6 at least one of your parents has to be a U.S. citizen.
7 But, you know, that's not what the State Department
8 believes and that's not what-- that's not the way the
9 Supreme Court has interpreted the law.

10 MR. HO: I don't have any more questions for
11 you, Mr. von Spakovsky. Thank you.

12 THE WITNESS: Thank you.

13 MR. JOHNSON: May it please the Court. Your
14 Honor, before commencing my cross examination I'd like
15 to ask the Court to take judicial notice of the official
16 citation of the *Rizzo versus Royster* [sic] case to which
17 reference has been made on a number of occasions and
18 which is referred to on Page 25 of Ms. Minnite's initial
19 report, the number of which I can't remember, but I'm
20 sure it's in the record somewhere.

21 THE COURT: And what's the citation?

22 MR. JOHNSON: The official citation of the
23 *Rizzo versus Royster* case is 326 S.W.2d [sic] 104. It's
24 a decision of the Missouri Court of Appeals in 2010.

25 THE COURT: This is something that I can

1 take judicial notice of.

2 MR. JOHNSON: Thank you.

3 THE COURT: I so notice.

4 MR. JOHNSON: Okay. I don't think anybody
5 can-- can dispute that.

6 CROSS EXAMINATION

7 BY MR. JOHNSON:

8 Q. Mr. von Spakovsky, my name is Mark Johnson. I'm
9 a partner with the Dentons law firm. It's a pleasure to
10 meet you. I was on the telephone--

11 A. Right.

12 Q. -- when your deposition was taken, so I asked
13 some of the questions and, in fact, I was honored that
14 Mr. Ho actually used some of my questions in your cross
15 examination.

16 Let me sort of complete the circle on the e-mail
17 of February the 22nd. And I don't have the exhibit
18 number because it's not on here, but 144, 145, something
19 like that. Just to make sure we're clear on the record.

20 MS. CARPENTER: 145.

21 Q. (BY MR. JOHNSON) 145, okay. It's Exhibit 145,
22 you have a copy of it in front of you.

23 A. I do.

24 Q. Thank you. And I would just like to-- in his
25 excerpt from your e-mail, Mr. Ho read a certain part of

1 it. I'd like to read another passage from it, it's in
2 the first paragraph and it's on the second page of the
3 exhibit beginning with the third full sentence. And
4 I'll just read it and ask you if you-- if you agree this
5 is what it says.

6 "We're also hearing that they are going to make
7 this bipartisan and include Democrats. There isn't a
8 single Democratic official that will do anything other
9 than obstruct any investigation of voter fraud and issue
10 constant public announcements criticizing the Commission
11 and what it is doing, making claims that it is engaged
12 in voter suppression." Is that a correct recitation of
13 what you wrote?

14 A. It is.

15 Q. Thank you. Now, let me ask you a couple of
16 questions about some of the content of your expert
17 witness report which has been admitted into evidence.
18 And I'd refer you to the second and third pages, Mr. Ho
19 already asked you some questions about that. These are
20 references to the Sedgwick County spreadsheet that about
21 which there has been an extensive amount of testimony.
22 Do you have that material in front of you?

23 A. I-- I have my expert report.

24 Q. Thank you. Would you agree with me that the
25 references to the Sedgwick County report appearing on

1 Pages 2 and 3 of your expert witness report are the only
2 Kansas-specific evidence that you recite in your expert
3 report relating to the issue of the phenomenon of
4 non-citizen registration?

5 A. Yes.

6 MR. JOHNSON: That's all I have. Thanks
7 very much.

8 THE WITNESS: All right.

9 MR. KOBACH: Your Honor, before I begin the
10 redirect, we've been researching a question at our desk
11 here about the-- whether an expert is strictly limited
12 to only the statements or opinions in his report or
13 whether the expert may stay on the same subject but
14 offer an opinion that goes beyond the four corners of
15 the report.

16 And it seems to be that there's some case
17 law in the Tenth Circuit that he can go beyond as long
18 as he's staying on the same subject matter. And so I'd
19 like to request that the Court allow me to-- you'll
20 recall I was asking about some cases that occurred after
21 his report was written about I think it was in Virginia
22 in one and might've-- the other might be in
23 Pennsylvania. I was asking about cases and you said,
24 well, stick to the ones in your report.

25 In light of that what I think appears to be

1 an open question or we're still trying to do the
2 research, would the Court permit me to ask about those
3 cases that occurred after his report was written?

4 THE COURT: And what's the context of
5 getting into-- what are you going to ask him about this
6 other one?

7 MR. KOBACH: I'm going to ask him to
8 describe about what he knows about cases of voter fraud
9 after his report was written. In other words, it's on
10 the same subject but it's continuing forward in time.
11 And so I think it is permissible to do that, but I
12 understand that Your Honor said to keep it only to what
13 was in the report. So I was wondering if I may at least
14 continue forward in time in a couple of areas and do
15 that. If not, we can just proffer it.

16 THE COURT: All right. Mr. Ho.

17 MR. HO: Your Honor, we would object to
18 that. If Secretary Kobach wanted to offer evidence on
19 those incidents that took place after Mr. von
20 Spakovsky's report, he could've requested to supplement
21 that report and asked us about it, maybe then we
22 would've asked to supplement our reports. But this is
23 trial by ambush.

24 THE COURT: All right. I'll allow you to do
25 it as a proffer because, again, as we've talked about

1 before, each side needs to have-- know the universe of
2 what the opinions are of the experts so that they will
3 have the opportunity to supplement. I mean, we had a
4 good example of that with Doctor Minnite's testimony,
5 she supplemented twice to add additional information.

6 So I'll let you go into this line of
7 questioning as a proffer only at this point.

8 MR. KOBACH: Okay. So as a proffer, I'm
9 going to ask I think three questions here.

10 REDIRECT EXAMINATION

11 BY MR. KOBACH:

12 Q. Mr. von Spakovsky, I'm going to ask you first
13 about any additional cases, in particular I think you
14 might've started to say something about Virginia when
15 opposing counsel objected, but additional cases of voter
16 fraud that have occurred in the last two years since you
17 wrote your report.

18 A. Sure. I'll talk specifically about non-citizens.
19 The Public Interest Legal Foundation used a provision of
20 the National Voter Registration Act to obtain voter
21 registration records from almost all of the counties in
22 Virginia. They had to sue a number of the counties to
23 force them to comply. But this is a provision of the
24 NVRA that gives the public, any member of the public,
25 access to voter registration records.

1 As a result of that, what they were asking for
2 was the voter registration records on all registered
3 voters who had been removed from the voter rolls by
4 election officials because they were non-citizens.

5 The result of that statewide investigation was
6 that they discovered approximately 5,500 non-citizens
7 who had been removed from the voter rolls in Virginia in
8 the last I think five years but not before they had cast
9 7,500 ballots. And I found that very significant
10 because, you know, in the last dozen years Virginia has
11 had two statewide attorney general's races decided by
12 less than 1,000 votes.

13 And in the 2017 election, there were a number of
14 state House races decided by a very small number of
15 votes, including one district, state House district, in
16 which there was a tied vote. And the winner of that
17 election was determined by drawing a name and which
18 candidate won that election determined which political
19 party would control the state legislature.

20 That particular district, the 94th District, is
21 mostly made up of Newport News. And that was one of the
22 cities that the Public Interest Legal Foundation had
23 obtained records from and they had removed more than 200
24 non-citizens from the rolls there.

25 Q. And any cases-- any other cases? I think

1 Pennsylvania may have been one, but I'm not sure.

2 A. The Public Interest Legal Foundation did a
3 similar request under the NVRA in New Jersey. In New
4 Jersey they found I think in 11 counties over 1,000
5 non-citizens who had been removed from the voter rolls,
6 about a third of whom had cast ballots.

7 And in Pennsylvania, there's been a state
8 legislative committee there investigating this issue.
9 Al Schmidt I think it is, election official from
10 Philadelphia, testified not too long ago that he
11 estimated that there were 100,000 non-citizens on the--
12 that had been on the voter rolls in Pennsylvania.
13 There's currently a lawsuit to try to get the internal
14 information from DMV and the Secretary of State turned
15 over and made public.

16 Q. The second question of my proffer. In-- we
17 talked about cases on which you had personal knowledge
18 at the DOJ in Florida where those who were charged with
19 voter fraud crimes said that it was just a mistake,
20 claimed that it was just a mistake.

21 Are there other cases beyond your personal
22 knowledge where you would claim-- you believe that
23 aliens say that it's just a mistake when they are--
24 there's alleged to be--

25 MR. HO: Objection, Your Honor. He hasn't

1 laid a foundation for it. In fact, he specified that
2 these are instances beyond Mr. von Spakovsky's
3 knowledge.

4 THE COURT: All right. So there's--

5 MR. KOBACH: That's correct.

6 THE COURT: -- a second basis to-- this is
7 just a proffer. This information is not something I'm
8 going to consider because I've said it wasn't properly
9 disclosed under the federal rules. But there is a
10 separate basis; if it's not something within his
11 personal knowledge, research study, then it's also not
12 admissible. But proceed.

13 Q. (BY MR. KOBACH) You can answer. The question
14 was beyond those cases, is it common for non-citizens to
15 claim it's just a mistake when it's discovered they have
16 registered?

17 A. Well, that's-- that's-- you can see that in many
18 of the reported cases, such as the Seventh Circuit case,
19 one of the ones that I mentioned in my expert report.

20 Q. And then the last question, and that is: Has
21 your-- have you done any research on the-- on the total
22 number of convictions for voter fraud obtained or
23 maintained a database in that regard?

24 A. About two years ago The Heritage Foundation
25 started a-- a database. Now, this is not-- this is not

1 a comprehensive review of all the records across the
2 country, court records, media records, et cetera. But--
3 but basically we have gathered up information on cases
4 as we have run across them.

5 The rules for this database are very strict.
6 There are no cases in there in which people simply
7 allege voter fraud. The only cases in the database are
8 cases in which someone has actually been convicted in a
9 court of law of engaging in election fraud or there's
10 been a judicial finding or also in some states there are
11 some state election boards that have the ability to
12 impose administrative fines like in fraud cases. We--
13 that database is now up to over 1,100 cases and we're in
14 the process of adding some more into that.

15 MR. KOBACH: That ends my proffer. So now
16 I'll continue with the redirect.

17 Q. (BY MR. KOBACH) Mr. von Spakovsky, you've
18 testified before Congress more than a dozen times you
19 said. In your experience, does-- do congressional
20 committees invite people to testify that the committee
21 does not deem to be an expert?

22 A. Well, I don't know, but I know that I was invited
23 specifically to comment on various kinds of election
24 issues, including the Voting Rights Act, because the
25 committee believed I had expertise on that issue.

1 I should mention that I've also testified in
2 front of the U.S. Commission on Civil Rights on these
3 issues, in fact just recently, about less than a month
4 ago.

5 Q. Does the ABA or American Bar Association usually
6 ask non-experts to write chapters in its books?

7 A. I don't believe so.

8 Q. Do-- do most people who study-- well, let me
9 rephrase that. Do all experts in election
10 administration publish only in peer-reviewed journals?

11 A. I don't believe so.

12 MR. HO: Objection, Your Honor. It sounds
13 like he's trying to get at the legal definition of
14 expert, which is not the proper subject testimony of--
15 not the proper subject of testimony.

16 THE COURT: I'll sustain to the form of the
17 question. I don't know how he has personal knowledge
18 of-- unless he studied every expert in the country.

19 Q. (BY MR. KOBACH) Do most people-- not looking at
20 the legal definition of a-- an expert witness but just
21 the-- your understanding of the word "expert," do most
22 experts in election administration publish in
23 peer-reviewed journals?

24 A. I don't know the answer to that. I know that
25 I've had a number of election experts that I've gotten

1 to write studies for The Heritage Foundation. Those
2 have not been peer-reviewed, they've gone through our
3 extensive editing process. And that includes, for
4 example, the former chief election official for Virginia
5 and Florida who has written for us on election
6 administration issues.

7 Q. Do you regard the members of the Federal Election
8 Commission to be experts in the common understanding of
9 the word in elections?

10 A. Well, certainly the commissioners are experts on
11 the Federal Election Campaign Act.

12 Q. And are you aware of any other federal election
13 commissioners in your experience who publish regularly
14 in peer-reviewed journals?

15 A. No.

16 Q. In the common sense of the word, do you regard
17 members of the Election Assistance Commission appointed
18 by the President and confirmed by the Senate to be
19 experts in elections?

20 A. Well, yes, in particular because one of the
21 duties given to the EAC and those commissioners by the
22 federal statute that established the EAC is to provide
23 best practices guidelines to election administrators
24 across the country. And that was one of the jobs of the
25 Board of Advisors when I served on it, to help them with

1 that.

2 Q. To your knowledge, do any of the current members
3 of the Election Assistance Commission publish in
4 peer-reviewed journals?

5 A. I'm not aware that they do.

6 Q. Are you aware of any past members of the Election
7 Assistance Commission who publish in peer-reviewed
8 journals?

9 A. No.

10 Q. Do you recall the interchange regarding the
11 recording-- recording, the audio-recording, from a
12 purported reporter from ProPublica?

13 A. Yes.

14 Q. Mr. Ho did not allow you to explain your answer,
15 you started to explain what was going on. Could you
16 please give the context in your answer?

17 A. Sure. We had just completed I think an
18 eight-hour hearing in New Hampshire of the Presidential
19 Commission-- Advisory Commission on Election Integrity.
20 During that time, you know, I had no access to e-mail or
21 anything like that, just like you do in a federal court.

22 And at the end of the hearing, a reporter came up
23 to me and asked me if someone from The Heritage
24 Foundation had sent Mr. Sessions an e-mail saying that
25 they were concerned that Democrats were being appointed

1 to this Commission, do you know who that was?

2 I said, I have no idea. And I was answering
3 truthfully. First of all, I had not seen this e-mail.
4 I was simply asked, in essence, had I sent an e-mail to
5 Jeff Sessions. The answer to that is no. It was no at
6 the time, it's no today.

7 This e-mail was sent to a private party in-- a
8 lawyer that I know in Washington, D.C., who does not
9 work for the government-- didn't work for the government
10 then, doesn't work for the government now. Apparently
11 unbeknownst to me--

12 Q. Before you-- before you go on. When you said
13 "this e-mail," could you tell me what the exhibit number
14 is?

15 A. There was not an exhibit number on it.

16 Q. What are the first words at the top of the page?

17 A. Well, the first-- it says "from" but then it's--
18 there's a-- it's blacked out and it says (b)(6),
19 Attorney General's e-mail address.

20 Q. Okay. I'm sorry. And then-- I interrupted you.
21 And you said "unbeknownst to me," you may continue.

22 A. The lawyer who I sent it to who, as I said,
23 didn't work for the federal government then, doesn't
24 work for the federal government now, unbeknownst to me
25 he apparently had forwarded it to Jeff Sessions.

1 So this was a private discussion that was not
2 sent to the Attorney General. In fact, I've never sent
3 an e-mail to the Attorney General.

4 Q. Mr. Ho asked you about DMV employees offering
5 non-citizens opportunities to vote. Do you recall that?

6 A. Yes.

7 Q. Does this happen in states all across the
8 country, in your opinion?

9 A. Yes, it does.

10 Q. In your opinion, is this the result of human
11 error?

12 A. Well, in some places I think it's the result of
13 human error. But when I was at the Justice Department,
14 I spoke to election officials and to some DMV officials,
15 and it was very clear to me that many DMV officials
16 resented the fact that the NVRA had placed on them the
17 responsibility for voter registration.

18 You know, they're-- they saw their job as taking
19 care of licensing, and they did not want their clerks
20 making decisions on whether someone should be offered
21 the right to vote or not.

22 So the people that I talked to basically told
23 their clerks, no matter what, offer the individual the
24 right to vote. We'll let the election officials decide
25 what to do about it when they get it.

1 Q. So now looking specifically at Kansas. Do you
2 have any reason to regard the training provided by the
3 Kansas Secretary of State's Office to the Kansas
4 Department of Vehicles as inadequate?

5 A. No.

6 Q. Do you agree with the plaintiffs' assertion in
7 this case that just giving more training to DMV
8 officials would be preferable to proof of citizenship to
9 stop non-citizens from registering?

10 A. No, because there are too many non-citizens that
11 you're not going to find, people who are here illegally,
12 people who don't get driver's licenses, even if you can
13 get DMV to-- to take care of this.

14 Q. You were also asked about comparisons, computer
15 comparisons of databases involving driver's licenses.
16 Do you remember that?

17 A. Yes.

18 Q. Would a database of temporary driver's licenses
19 given to non-citizens temporarily living in the country,
20 would that-- would that database include green cards
21 which are only given to lawful permanent residents?

22 A. No, because they're-- they're permanent
23 residents, they're not here temporarily.

24 Q. So if green card holders in a state-- and I'll
25 represent to you in Kansas they do. If green card

1 holders obtain normal driver's licenses along with U.S.
2 citizens, would a comparison of people who have normal
3 driver's licenses with the voter rolls reveal which
4 people are non-citizens on the voter rolls?

5 A. No, not-- no, not that I'm aware.

6 Q. Mr. Ho also asked you about prosecutions and how
7 many my office has brought. Do you remember that?

8 A. Yes.

9 Q. I don't know if you were in the courtroom when
10 the number was stated, but I'll-- I'll just represent it
11 to you; that our office has to date only been able to
12 prosecute two cases of non-citizens for voting or
13 registering, despite the fact that we know of all the
14 129 cases at issue in this litigation.

15 Given that fact, do you think prosecution is an
16 effective deterrent to preventing non-citizens from
17 voting?

18 A. No, because those kind of cases don't get a lot
19 of publicity and not everyone knows about them, so you
20 know, you would need that to deter non-citizens from
21 registering.

22 Q. In your expertise both as-- in elections and as a
23 person who formerly worked at the Department of Justice,
24 are there often barriers to prosecuting cases of
25 non-citizens registering and/or voting?

1 A. Yes, there are. I mean, for example, I know the
2 Department of Justice has never taken advantage of
3 several things. For example, they have never gone to
4 the Department of Homeland Security to ask for the files
5 of individuals applying-- aliens applying for
6 citizenship to get those files where individuals
7 answered "yes" that they had registered and voted.
8 Those are the easy files for them to obtain and
9 prosecute, yet they haven't done that.

10 Neither have the U.S. Attorney's Offices across
11 the country, and there are 93 of them. I'm not aware
12 that a single one of them has gone to the clerk of the
13 federal courts where they are located to ask for the
14 files on individuals who were excused from jury duty
15 from-- for being non-citizens so that they could easily
16 check, see whether that individual is registered to
17 vote. And that might be a very easy case to investigate
18 and potentially prosecute. But none-- none of the U.S.
19 Attorney's Offices have ever done that.

20 Q. Mr. Ho also asked you about individuals falsely
21 swearing that they are U.S. citizens. I think he was
22 principally asking about at the DMV.

23 Is it your understanding that every DMV in the
24 country, every state's Departments of Motor Vehicles in
25 the country asks voter registration applicants to either

1 swear or sign an affirmation that they are U.S.
2 citizens?

3 A. Yes, that is also a standard part, of course, of
4 the federal voter registration form.

5 Q. And is it your understanding that that happened
6 in Kansas as well?

7 A. Yes.

8 Q. Is it your understanding based on your experience
9 and expertise that some non-citizens will knowingly
10 swear that they are non-citizens?

11 A. Yes, I've seen cases-- I've seen cases like that
12 prosecuted.

13 Q. I'm sorry, I misstated it. That some
14 non-citizens will knowingly swear that they are U.S.
15 citizens.

16 A. Yes, there have been many cases like that.

17 Q. Oh, Mr. von Spakovsky, I-- I was just wondering,
18 did I teach you the English phrase "tip of the iceberg"?

19 A. No.

20 Q. Had you ever used it in writings or conversation
21 prior to meeting me?

22 A. Yes. I give many speeches on the election fraud
23 issue and I've used that term for years.

24 Q. Are all of the instances of voter fraud you know
25 of included in your expert report?

1 A. No.

2 MR. KOBACH: No further questions.

3 MR. HO: A very brief recross, Your Honor.

4 THE COURT: Yes.

5 RECCROSS EXAMINATION

6 BY MR. HO:

7 Q. Mr. von Spakovsky, do you remember just a second
8 ago Secretary Kobach asked you a question about whether
9 or not you agreed with the contention that DMV training
10 practices in Kansas are inadequate, and you said no.
11 Right?

12 A. I have not been presented with any evidence that
13 they're inadequate.

14 Q. Have you reviewed the training materials that DMV
15 workers in Kansas receive concerning voter registration,
16 Mr. von Spakovsky?

17 A. No.

18 Q. Have you reviewed the training practices of DMV
19 workers in Kansas regarding voter registration, Mr. von
20 Spakovsky?

21 A. No.

22 Q. So you don't know anything about DMV training in
23 Kansas with respect to voter registration, right, Mr.
24 von Spakovsky?

25 A. I've not been presented with any materials on

1 that.

2 MR. HO: Okay. Your Honor, the only other
3 questions that I would have at this time relate to the
4 proffer that Secretary Kobach had. Now, we-- we, you
5 know, maintain our objection and appreciate Your Honor's
6 ruling. For purposes of the record I could ask a few
7 brief questions, excuse me, related to the proffer. But
8 if Your Honor prefers that we simply move on, that's--
9 that's fine.

10 THE COURT: It's up to you.

11 MR. HO: I'll ask just a couple of quick
12 questions.

13 Q. (BY MR. HO) Mr. von Spakovsky, you testified--

14 MR. HO: And this is without waiving our
15 objection and obviously respecting Your Honor's ruling
16 that this evidence is not admitted.

17 THE COURT: I understand.

18 Q. (BY MR. HO) Mr. von Spakovsky, you testified
19 about some non-citizens who ended up on the voter rolls
20 in Pennsylvania. Do you remember that?

21 A. Yes.

22 Q. Okay. You're aware, are you not, that that issue
23 in Pennsylvania has been attributed to a glitch in the
24 Pennsylvania DMV computer system. Right?

25 A. Right.

1 Q. I'm sorry?

2 A. Yes.

3 Q. And you're aware, are you not, that the problem
4 in Pennsylvania stemmed from the fact that even when
5 non-citizens provided documentation at Pennsylvania DMV
6 offices showing that they are non-citizens, that they
7 were still as a matter of course taken into the
8 motor-voter process?

9 A. I believe that was the assertion made in the
10 legislative testimony.

11 Q. You don't have any reason to doubt that
12 assertion, do you, Mr. von Spakovsky?

13 A. No.

14 MR. HO: No further questions, Your Honor.

15 MR. JOHNSON: Nothing, Your Honor. Thank
16 you.

17 THE COURT: Anything more? All right. May
18 Mr. von Spakovsky be excused?

19 THE WITNESS: Thank you very much.

20 MR. HO: Well, Your Honor, at this time I
21 think it's highly unlikely that we would be able to
22 finish Doctor Camarota before 5:00 p.m.

23 The other option would be to play the
24 deposition transcript, which is about 45 minutes, so
25 that would take it beyond 5:00 p.m. as well. We could

1 start one or the other. We're happy to do whatever Your
2 Honor prefers at this point.

3 MR. KOBACH: Your Honor, Mr.-- Mr. Camarota
4 deduced that we would not be able to finish and so he
5 hopped on a plane to go home for the-- oh, no.

6 MR. CAMAROTA: No, no, I'm staying.

7 MR. KOBACH: Oh, you're staying. Okay. I
8 was passed a note that you hopped on a plane. Well,
9 then I guess we could do either one.

10 THE COURT: It sounds like he might take
11 longer than 45 minutes from start to finish, though, Mr.
12 Camarota?

13 MR. HO: And, I'm sorry, just so that the--
14 Your Honor knows, with the defendant's
15 counter-designations added in, it's about 49 minutes.

16 THE COURT: Okay. I mean, I'm willing to
17 stay, I just-- we need to be done by 5:30. I actually
18 have another appointment for work. My workday continues
19 after we finish this.

20 MR. KOBACH: And, Your Honor--

21 THE COURT: If you think we're going to be
22 finished by 5:30.

23 MR. KOBACH: We just have a real brief legal
24 issue we'd like to raise before we start the video, if
25 that's okay.

1 THE COURT: Okay.

2 MR. KOBACH: And I'm going to let my
3 colleague.

4 MS. BECKER: Your Honor, Sue Becker for the
5 defendant. With regard to the playing of the videotaped
6 deposition portion, we request that the video itself not
7 be made publicly available. Rule 83.2.1 prohibits the
8 videotaping of witness testimony at trial. This
9 evidence is offered in lieu of live testimony and it is
10 not an exhibit, therefore it is not a judicial record
11 that can be publicly available after the trial. To
12 allow public access to the video would circumvent
13 Rule 83.2.1.

14 The Eighth Circuit has squarely addressed
15 this question, it held, quote, "As a matter of law, the
16 deposition videotape itself is not a judicial record to
17 which the common-law right of public access attaches.
18 And even if the defendant had moved for the admission of
19 the videotape into evidence, the videotape itself would
20 not necessarily have become a judicial record subject to
21 public review."

22 THE COURT: I tend to agree because-- I tend
23 to agree because, as you know, there's a rule against
24 broadcasting and-- outside of the courthouse testimony.
25 So I agree that this particular testimony that's being

1 presented by video is-- while it should be marked as an
2 exhibit, it's not actually made a part of the-- the
3 record.

4 And it-- well, in fact, exhibits in general
5 are returned to the parties at the close of the trial,
6 so I don't know that it's an issue anyway. But I agree
7 with you, it shouldn't be a public record for purposes
8 of our docket.

9 MS. BECKER: Thank you, Your Honor. So I
10 just want to clarify, that was *U.S. versus McDougal*, 103
11 F.3d. 651.

12 THE COURT: Okay. You won, you don't need
13 to give me more argument.

14 MS. BECKER: All right. Well, so to
15 clarify, Your Honor, so the videotape itself is not
16 available to be publicly disseminated, whereas the trial
17 transcript that may contain the testimony is the
18 judicial record. Is that my understanding as well?

19 THE COURT: That's correct. And I-- well,
20 the transcript of the video-- oftentimes the court
21 reporter doesn't take down the transcript of the
22 deposition that's played, but the transcript suffices.
23 All right? So-- isn't that right, Kelli, the transcript
24 of the deposition will be incorporated into the trial
25 transcript. And if that trial transcript is ever made

1 public, then this transcript would be but not the video
2 itself.

3 Okay. Okay. So Local Rule 32.1 says that
4 if depositions, et cetera, are to be used at trial, the
5 parties seeking to use them must file the portions to be
6 used at the beginning of trial insofar as their use
7 reasonably can be anticipated, which I think has
8 happened. But the question here now is, does it
9 become-- unlike any other exhibit, does it become part
10 of the public docket? It does not.

11 MS. BECKER: Okay. Thank you, Your Honor.
12 The second issue I'd like to make a record on with--
13 still with regard to the videotaped deposition is that
14 the-- the designations provided by the plaintiff
15 contains all of the pages that are under seal currently
16 from Your Honor's order of 10-27-17 when we argued all
17 of the unsealing of the judicial record when the
18 plaintiffs attached Mr. Kobach's entire deposition to a
19 motion.

20 And then we went through-- we had a hearing
21 and we discussed the exhibits that they wanted to unseal
22 and then Your Honor agreed to unseal portions of the
23 deposition that was, you know, contextual and so forth.
24 And we've gone through and compared, and all the pages
25 that are completely under seal are in the videotape.

1 THE COURT: But they're no longer under
2 seal. I mean, that's-- my order *in limine* resolved
3 that. They're no longer under seal with respect to--

4 MS. BECKER: So, Your Honor, so you
5 released--

6 THE COURT: -- with respect to those
7 portions that plaintiff has designated and you have
8 counter-designated. I understand you have a continuing
9 objection. You object to the video at all, but you also
10 counter-designated. So those portions which I think is
11 what's going to be played are no longer under seal.

12 MS. BECKER: Well, and with regard to the
13 counter-designations, those were only if Your Honor
14 overruled our objections. And as Mr. Ho stated, I did
15 watch the video, it's-- you know, it was-- it was a
16 limited one-hour discovery deposition. And the
17 videotape is 49 minutes and defendant's designations,
18 our counter-designations, consist of about 60 lines. I
19 mean, a few-- like ten pages.

20 So the majority-- I just want to make sure
21 you know the majority are the redacted things, and it's
22 my understanding that you're now unsealing most of them?

23 THE COURT: I'm unsealing those parts that
24 I've ruled upon as designations and
25 counter-designations. And you are not waiving your

1 objection to this being played by countering-- by
2 counter-designating. I mean, you're not waiving. Your
3 objection is preserved for the record.

4 MS. BECKER: Okay. And then I would also
5 like to preserve and re-assert our motion *in limine*
6 which-- on the basis of relevance, which I would also
7 argue that nothing has changed other than we're in a
8 trial setting because earlier the redactions, the
9 redacted portions were based on relevance. So now
10 they're being unredacted and unsealed apparently.

11 The argument with regard to the motion *in*
12 *limine* is that the--

13 THE COURT: I'm not going to-- I'm not going
14 to revisit. You can make your-- I mean, you don't need
15 to make a record. Your objection, your-- your position
16 on the *limine* motion is preserved for the record. I'm
17 not going to change my ruling, so we don't need to hear
18 argument and go through that anymore.

19 So your objections to the video, your *limine*
20 positions are-- are preserved for the record. Your
21 objections to the extent you've objected in the-- at the
22 earlier stage of the litigation to the unsealing of this
23 document, those objections are preserved for the record
24 as well.

25 MS. BECKER: All right. And I have one

1 additional point with regard to that. And that is that
2 Your Honor stated earlier with regard to plaintiffs'
3 argument about something being contained in the pretrial
4 order and that was the basis for getting it in. I
5 believe it was a stipulation. But Your Honor stated
6 that it was more important that the pretrial order
7 contained the stipulations and that the pretrial order
8 controlled the evidence in this case.

9 And defendant agrees that the pretrial order
10 controls in this case, and we argued this when we filed
11 this motion *in limine* and asked the Court to follow the
12 pretrial order and exclude the evidence of these
13 allegations of lobbying efforts, which is nowhere in the
14 pretrial order. It is not in the plaintiffs'
15 contentions. At most, it was in a footnote in the
16 motion for summary judgment that they did not rely on.

17 So I would just like to point out for the
18 record that the alleged lobbying efforts to amend the
19 NVRA and the President Trump stuff and all the other
20 things and its lack of relevance to the issues-- still
21 have lack of relevance to the issues to be tried.

22 And the Court earlier said that the pretrial
23 order was not controlling when defendant's requested the
24 pretrial order to be held as the final parameters of
25 the-- of the evidence when you overruled defendant's

1 motion *in limine* to exclude that evidence.

2 So on that basis, on that new basis, I'm
3 re-asserting defendant's motion *in limine* to exclude
4 reference to efforts to amend the NVRA on the basis that
5 plaintiffs did not include this issue in their plaintiff
6 contentions in their pretrial order. I think that's it.

7 THE COURT: Okay. I overrule the objection
8 to relevance. I overrule your objection to the extent
9 you're complaining about the pretrial order not
10 addressing this because pretrial orders never contain
11 the-- an exhaustive account of all of the evidence. It
12 doesn't include all the exhaustive evidence of the
13 defendant nor of the plaintiff.

14 The pretrial order does control in terms of
15 the claims, in terms of stipulations. Although if you
16 reach additional stipulations later, that's added to the
17 record.

18 So when I was ruling about the pretrial
19 order controlling, I was talking about the stipulations
20 and deadlines or other sorts of rules in the pretrial
21 order. I was not talking about the scope of the
22 evidence mentioned in the pretrial order.

23 I've never seen a pretrial order that-- that
24 provides a recitation of all of the evidence. You can
25 imagine how long a pretrial order that did that would

1 be.

2 All right. So those are my rulings, let's
3 proceed.

4 MR. DANJUMA: Your Honor, just before we
5 proceed, just a logistical question. When we read the
6 prior deposition designations for Mr. Rucker and Mr.
7 Bryant, you asked for admission of the underlying
8 evidence, the-- the exhibits during the reading.

9 Is it all right if we do that at the close
10 of the video just to-- to move into evidence each of the
11 underlying exhibits?

12 THE COURT: Yes.

13 MR. DANJUMA: Okay.

14 THE COURT: Yes, that's probably more
15 efficient, rather than stopping the video repeatedly.

16 MR. DANJUMA: And just so you know, this
17 might take us a little bit beyond 5:30. I know you have
18 another appointment, I'm just noting that.

19 THE COURT: All right. I'm telling them
20 that right now. Go ahead.

21 MR. DANJUMA: Oh, and I'll hand a copy of
22 the transcript with the highlighted depositions [sic] to
23 opposing counsel and to the Court.

24 (The videotaped deposition of KRIS KOBACH
25 was played).

1 MR. DANJUMA: So, Your Honor, that's the
2 completion of the videotape. And at this time
3 plaintiffs would like to move for the admission of
4 Plaintiffs' Exhibit 67, the draft NVRA amendments which
5 were marked as Exhibit 1 in Defendant's Kobach's August
6 1st, 2017 deposition.

7 THE COURT: Well, I understand you have a
8 continuing objection to Exhibit 67, which I've already
9 ruled on. I'll admit it, but your objection is
10 preserved for the record.

11 MR. DANJUMA: And Plaintiffs' Exhibit 68,
12 Kobach e-mail to Hamilton, which was marked as Exhibit 4
13 in Defendant Kobach's August 1, 2017 deposition.

14 MS. BECKER: Continuing objection, Your
15 Honor.

16 THE COURT: All right. Continuing objection
17 overruled. Exhibit 68 admitted.

18 MR. DANJUMA: And Plaintiffs' Exhibit 69,
19 the Kobach memo for Trump transition meeting, which was
20 marked as Exhibit 5 in Defendant Kobach's August 1st,
21 2017 deposition.

22 THE COURT: All right. Overruling
23 defendant's continuing objection to that. I'll admit
24 Exhibit 69.

25 MR. DANJUMA: And finally, we would move to

1 admit as Plaintiff's Exhibit 148 the videotaped
2 deposition of Defendant Kobach on August 1st, 2017,
3 pursuant to the-- the Court's prior recommendation.

4 THE COURT: All right. Exhibit 148, the
5 video deposition is admitted, but it can be-- it will be
6 withdrawn at the close of the trial. And for purposes
7 of the record, the written transcript of this will be
8 part-- just like the deposition transcripts are part--
9 you know, the oral deposition transcripts are part of
10 the trial transcript but not the actual tape itself.

11 MR. DANJUMA: Understood. And just very
12 quickly for the record, Exhibit-- the Exhibit 2 that was
13 referenced is plaintiffs'-- in the deposition was
14 plaintiffs' consolidated reply memorandum in support of
15 plaintiffs' motion for preliminary injunction, which was
16 filed on April 21st, 2016, ECF No. 94.

17 And the exhibit that was marked as Exhibit 3
18 in the-- in Secretary Kobach's deposition was
19 defendant's emergency motion for a stay pending appeal
20 in the Tenth Circuit, which was filed August 2nd, 2017.

21 THE COURT: Okay. So noted.

22 MS. BECKER: And, Your Honor, I would like
23 to just note my continuing objection to the admission of
24 the videotape even as an exhibit. And I would like to
25 move to strike all of the previous testimony from the

1 record as part of my continuing objection that the Court
2 has noted.

3 THE COURT: All right. Understood. The
4 motion to strike is denied and continuing objection is
5 overruled, preserved for the record. All right.

6 MR. KOBACH: Your Honor, could I add just
7 one quick thing?

8 THE COURT: Yes.

9 MR. KOBACH: One benefit of playing that
10 video is I did discover an error in the transcript.
11 There was one word that was in the transcript that was
12 not in the video. Can I present that to your clerk?

13 THE COURT: Yes. Well, what's the page and
14 line number?

15 MR. KOBACH: Page 54, Line 19. I think the
16 word "accident" was added by the transcriber but was not
17 stated in the video.

18 THE COURT: Okay. You know, the
19 transcription is certified by another court reporter,
20 not this one, but I think we need to make a record of
21 this. So Page 54, tell me again what line.

22 MR. KOBACH: Line 19.

23 THE COURT: Line 19. And then what's--
24 what's the correction?

25 MR. KOBACH: The word-- I think the word

1 "accident" was inadvertently inserted. I didn't--

2 THE COURT: 54, Line 19. Mine says, "Do you
3 ever rely on his--"

4 MR. KOBACH: Oh, maybe I'm looking at a
5 different--

6 THE COURT: Am I not looking at the right--
7 no, I'm sorry. I'm looking at the-- I'm sorry. My
8 fault. I've got too much paper up here. Okay. 54,
9 Line 19. So what was the word that you heard?

10 MR. KOBACH: The word that was inserted I
11 believe incorrectly by the transcriber was "accident."
12 I think the correct reading is just, "It would be more,
13 you know--" and then I was cut off by the question.

14 THE COURT: Okay. We've made a record of
15 that. You can review it over the weekend. If you take
16 issue with it, Mr. Ho--

17 MR. HO: We don't take issue with that, Your
18 Honor.

19 THE COURT: Okay. So the-- I don't know how
20 you do this, Kelli, but I suppose there needs to be some
21 sort of annotation in the record that the certified
22 transcript-- there was an error determined upon playing.
23 Of course, this whole soliloquy is in the record so
24 maybe that's all we really need.

25 Okay. We're going to recess for the

1 weekend. I think this closes your case, but I'll have
2 you rest on Monday after you make sure that you've got
3 everything, whether it's stipulations or whatever.

4 And then Mr. Camarota will be here, Mr.
5 Kobach, on Monday to testify?

6 MR. KOBACH: Yes. Mr. Camarota will be back
7 and I believe Mr. McFerron will be here as well on
8 Monday. And-- oh, yes, and Doctor Richman will also be
9 here on Monday.

10 And we wanted to inquire at this point, Your
11 Honor, we-- we're only intending to bring originally the
12 witnesses we listed. However, during the testimony of
13 Marge Ahrens, the League of Women Voters witness brought
14 by plaintiffs, she testified about something that wasn't
15 in the pretrial order at some length. And we wanted to
16 ask the Court leave to bring an additional lay witness
17 to-- a fact witness to-- to rebut what Ms. Marge Ahrens
18 said.

19 She testified at great length about her view
20 that the method of verifying citizenship through the
21 hearing would be extremely inconvenient, would be
22 difficult for people to do, and-- and went on and on
23 about that. And we propose - if you-- if the Court is
24 willing to exercise its discretion - bringing one of the
25 people who have actually been through the hearing to do

1 a very brief testimony saying what happened.

2 THE COURT: All right. Mr. Ho.

3 MR. HO: Your Honor, if they would make this
4 person available for deposition prior to their
5 testimony, we'd consider that.

6 THE COURT: I don't know if there's time for
7 a deposition, but if you can let plaintiffs know who
8 this person is and how to contact them so they can at
9 least interview them over the weekend, I'll allow you
10 to. What's the name of this person?

11 MR. KOBACH: Her name is Jo French. And I
12 don't know if Jo is short for Josephine or what it's
13 short for.

14 MR. HO: I mean, Your Honor, our position
15 about the inadequacy of this hearing alternative has
16 been clear throughout this entire litigation. I mean,
17 we've submitted testimony on this, evidence on this,
18 it's in your preliminary injunction ruling.

19 I think it's a little bit disingenuous for
20 them to suggest that they had no idea that the ease of
21 the hearing process would come up during trial. And--
22 and so I-- we object to this witness.

23 THE COURT: All right. Objection is
24 overruled. Ms. Ahrens was allowed to go and-- I'm not
25 sure they objected at that point, but was allowed to go

1 into some great detail about in her view, based on her
2 conversations with people and her own observations, the
3 burden I guess of the hearing process. And I don't know
4 that that-- that that would've been evident to anyone
5 that she was going to-- that she was going to testify
6 about that.

7 So I'm going to grant leave for that limited
8 purpose for them to call somebody who's been through the
9 hearing. I think that's-- that's appropriate.

10 Mr. Johnson, you want to preserve your
11 objection for the record?

12 MR. JOHNSON: Well, I'd like to preserve my
13 objection. But perhaps as a matter of fairness, the--
14 the defendants could provide the names of all
15 individuals who have gone through this process, dates of
16 the hearings, details as to whether the hearings were
17 in-- we've heard that this can be done from somebody
18 sitting in a truck, for example. Has that, in fact,
19 happened? They talk about it in-- as some sort of
20 hypothetical possibility. Has it happened? Could they
21 provide us details of how all of these hearings have
22 occurred?

23 THE COURT: All right. I'm going to allow
24 this, but I think that's a fair request. So I'm going
25 to have the defendants disclose the names and contact

1 information for all-- is it five or six people that have
2 gone through the hearing?

3 MR. KOBACH: I think-- I believe it is six.
4 I don't know what contact information we have. We may
5 not have phone numbers, but we certainly do have names
6 and all the information that was provided at the
7 hearing. We probably have phone numbers.

8 THE COURT: You would have to have contact
9 information if they filled out a form and made--

10 MR. KOBACH: Yes. I just don't know if we
11 have phone numbers for all, because I know we were
12 trying to get some just in the last day. But we
13 certainly have names and addresses and we can give all
14 the information we have.

15 THE COURT: But each one of these people
16 filled out a form?

17 MR. KOBACH: Yes, they did.

18 THE COURT: Well, I think you need to give
19 those forms to them, the actual forms--

20 MR. KOBACH: Okay.

21 THE COURT: -- which presumably will have
22 enough so they can contact them.

23 Okay. The other big issue, and I know
24 everyone is ready to go, but you've designated a number
25 of depositions, and in particular there's a number of

1 Kansas Department of Revenue employees that plaintiff
2 has objected to on a hearsay basis I think because
3 they're, you know, your employees, they're within the
4 100 miles and they're-- you didn't-- you did not respond
5 to that objection.

6 So as I sit here now, I don't know what the
7 status of that is. Are you calling these people live or
8 are you going to be prepared to show unavailability and
9 proceed with them by deposition? And I ask because
10 there's a lot of, you know, objections - I kind of waved
11 the stack of papers around at you a little bit - that I
12 need to resolve if we're going to go by-- if we're going
13 to go by deposition and if I'm going to allow you to go
14 by deposition.

15 MS. BECKER: Your Honor, given the-- the
16 time constraints of our trial, we'd agree to withdraw
17 all the-- the designations and just bring one live
18 witness in place of the-- I think we had five or six
19 deposition designation witnesses. So we could bring one
20 from-- one or two at the most, very short, from the
21 Department of Vehicles.

22 THE COURT: Okay.

23 MS. BECKER: And we could contact them
24 tonight and try to get them here hopefully Monday or
25 Tuesday.

1 THE COURT: And who are they?

2 MS. BECKER: It would probably be Julie
3 Earnest and Michaela Butterworth.

4 THE COURT: All right.

5 MS. BECKER: And there's not a lot of
6 testimony from them, which is why perhaps, you know,
7 erroneously we didn't plan to bring them live, but we
8 will.

9 THE COURT: Okay. Mr. Ho.

10 MR. HO: Your Honor, we may be able to save
11 everyone a whole lot of time here. One thing that we
12 have proposed to the defendants on multiple occasions
13 was-- the DOV witness testimony is pretty rote stuff,
14 that if we could just get some stipulations done, we
15 might not even need to bring any of these folks in.

16 I got something mailed to me very late in
17 the day on Monday. And with the hubbub of trial, we
18 haven't had a chance to really look at it. But, you
19 know, we're willing to consider those stipulations and
20 work with the defendants over the weekend if that could
21 obviate the need to bring in the DOV witnesses to save
22 everyone a whole lot of time.

23 THE COURT: All right. Well, work together
24 and see if you can do that. If not, then we prepared--
25 so from my standpoint, I don't need to worry about any

1 more designations of depositions, you're not planning to
2 present any more depositions other than-- what about Mr.
3 Bryant?

4 MS. BECKER: I believe we've already sort of
5 taken care of him because he was already read by the
6 plaintiffs and I don't--

7 THE COURT: You had designated-- you had
8 designated other parts of his deposition.

9 MS. BECKER: Your Honor, how about we--
10 we're not going to-- we won't deal with the deposition
11 designations. If we decide to present him, we'll bring
12 him live and we'll let plaintiffs know--

13 THE COURT: Okay.

14 MS. BECKER: -- this weekend.

15 THE COURT: Okay. All right. That-- that
16 answers all my questions I believe. All right. Well,
17 everyone have a good weekend and we'll be back here
18 Monday--

19 (The Court and courtroom deputy confer).

20 THE COURT: 9:00 a.m. on Monday.

21 (5:49 p.m., proceedings recessed).
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C E R T I F I C A T E

I, Kelli Stewart, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 173 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED March 15, 2018.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR