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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: 03/19/2018
Day 7 (A.M. Session)
Pages 1879-1991
.....

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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PATRICK McFERRON

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1 (9:32 a.m., proceeding commenced).

2 THE COURT: All right. You can be seated.
3 All right. We are ready to resume evidence.

4 Mr. Kobach, are you ready with your next
5 witness?

6 One thing I did want to bring up, and I
7 mentioned this last week, about hearing the pending
8 motion for contempt while everyone is here. I think we
9 should still do that. I don't know how long evidence
10 will go on today. So if we end early enough, I suggest
11 we take it up at the end of the day. If not, I suggest
12 we take it up tomorrow morning. But I have no idea how
13 long a hearing to anticipate.

14 Mr. Kobach, I'd like to hear from you and
15 you as well, Mr. Ho, in terms of what you think you'll--
16 how much time you think you'll take.

17 MR. KOBACH: Okay. We're just estimating
18 how much time our witness, Mr. McFerron, will take.
19 We're estimating between-- about 45 minutes of direct,
20 an hour on the high end and then however long the cross
21 is.

22 MR. STEINER: Probably 30 to 45 minutes if I
23 had to guess, but depending on--

24 MR. JOHNSON: And a similar amount for me.

25 THE COURT: Okay.

1 MR. KOBACH: And then I assume they'll be
2 bringing a rebuttal expert, so it might be possible to
3 get through both of those this morning. I'd certainly
4 like to.

5 MR. STEINER: That would be my expectation.

6 THE COURT: All right. And given that, we
7 could have the hearing on the motion for contempt. And
8 how much time do you think you'll spend on your part of
9 that, Mr. Kobach?

10 MR. KOBACH: Probably 15 to 20 minutes at
11 the high end. And we're certainly willing to compress
12 any time you've allotted for closing to try to get it
13 all in today.

14 THE COURT: Okay. Well, it doesn't sound
15 like we're going to have a time issue. So don't worry
16 about compressing your closings, do however much time
17 you'd like.

18 Mr. Ho, as far as the contempt hearing?

19 MR. HO: I don't anticipate us needing a
20 tremendous amount of time for that either, Your Honor.
21 We've submitted what we think is the evidence supporting
22 a finding of contempt on the papers. We can talk about
23 that a little bit and be happy to answer whatever
24 questions Your Honor has for us on that, but I don't
25 anticipate it taking much longer than what Secretary

1 Kobach said his-- he would need, 15 minutes on our side.

2 THE COURT: Okay. All right. So it looks
3 like we're probably going to conclude everything today.
4 And I did see the stipulations you filed. Document 494
5 is a notice of joint stipulations, it's 18 stipulations
6 that I assume will-- does this completely ameliorate
7 your need to call any Department of Revenue witnesses,
8 Mr. Roe?

9 MR. ROE: Yes, Your Honor.

10 THE COURT: Okay. All right. So that's
11 filed of record. There's a second one, Document 495,
12 and I think these are numbers that perhaps plaintiff had
13 asked me originally to take judicial notice of or maybe
14 both of you did, I don't know, but I indicated I would
15 rather have it in the form of evidence or stipulations.

16 So it's a notice of joint stipulations for
17 federal election years 2000 through 2016, the total
18 number of votes reported for the highest federal or
19 state office on the ballot in Kansas. And then the same
20 for years 2004 through 2016 specific to-- oh, no, I'm
21 sorry.

22 And then for federal election years 2004
23 through 2016, the official turnout in Sedgwick County.
24 And that's the official turnout. 2016 primary election
25 data not available, but the general elections data is

1 available. All right. So I have that in the record.

2 MR. JOHNSON: Your Honor, if I might. I
3 was-- I was copied on all the stipulations, and we would
4 go along with-- I think there are two sets, and we join
5 in the--

6 THE COURT: All right. So for the record,
7 Plaintiff Bednasek joins in Documents 494 and 495. All
8 right. Mr. Kobach.

9 MS. BECKER: Your Honor, defendant calls Pat
10 McFerron.

11 PATRICK McFERRON,
12 called as a witness on behalf of the Defendant, having
13 first been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MS. BECKER:

16 Q. Good morning, Mr. McFerron.

17 A. Good morning.

18 Q. Could you please state and spell your name for
19 the record?

20 A. Pat McFerron, M-c-F-E-R-R-O-N.

21 Q. And what is your occupation?

22 A. I'm a pollster.

23 Q. And for whom do you work?

24 A. Cole, Hargrave, Snodgrass & Associates.

25 Q. Okay. Can you describe what a pollster does,

1 please?

2 A. Yes. We collect data. I mean, the polling I do,
3 I'm involved in the data collection, the modeling for
4 performing-- getting that data collection together,
5 helping collect the data, analyzing the data and
6 presenting that data.

7 Q. Okay. How long have you worked at Cole, Hargrave
8 & Snodgrass?

9 A. I joined the firm in December of 1993.

10 Q. Okay. So for the past 25 years you've just
11 exclusively worked there; is that correct?

12 A. Yeah, I have worked there during that entire
13 time, yes.

14 Q. 25 years, okay.

15 A. Yes.

16 Q. Okay. Have-- has your position changed over time
17 or is it--

18 A. Yes. I-- I originally started our own-- our call
19 center where we did the data collection. I was the
20 Director of Survey Research. And then in the-- about
21 2000-- I can't remember the exact year, 2004, I became
22 president of the company.

23 Q. Okay. Please describe what your work as a
24 pollster would entail on either a daily or a weekly
25 basis.

1 A. Well, it's quite extensive. You know, obviously
2 getting clients, designing questions, setting up the
3 structure of a study, testing that study, implementing
4 the study, monitoring the data collection, analyzing the
5 data and then presenting it.

6 Q. Okay. And as a pollster, have you been an
7 invited speaker at any education seminars or conferences
8 or any kind of training in your industry?

9 A. I have spoken to-- to numerous university classes
10 and statistics classes, methods of social science
11 research, political science classes to present my craft.

12 Q. Okay. And what are your areas of expertise as a
13 pollster?

14 A. We do primarily-- about 70 percent of our work is
15 political related, but we do a substantial amount of
16 traditional market research as well.

17 Q. And would that be like consumer research--

18 A. Yes.

19 Q. -- when you say market research? Okay. Have you
20 received any awards or recognition in your-- in your
21 field, you or your firm?

22 A. Yeah, *Campaigns and Elections* magazine has
23 recognized us before a couple of times. I've been
24 involved in receiving a Reed Award, which is an industry
25 standard award, a Telly as well for some work that we

1 had done-- it was actually a television commercial that
2 we had done the research and everything there as well.

3 Q. Okay. And so there's-- it sounds like there's a
4 whole-- like a-- a industry of the awards, kind of like
5 for excellence in polling? Is it separated by the type
6 of--

7 A. It's really for campaigns and--

8 Q. Okay.

9 A. -- and political are the ones-- the primary ones
10 I've been involved in.

11 Q. Okay. Have you ever conducted research on issues
12 relating to elections?

13 A. Yes.

14 Q. And-- I'm sorry, I think you just stated, but
15 what percentage of your work is related to political
16 polling?

17 A. Roughly 70 percent.

18 Q. All right. Have you ever conducted surveys for
19 presidential candidates?

20 A. Yes. We were-- we've done polling in various
21 states at times for a number of different presidential
22 candidates, but we were the only pollster used by Donald
23 Trump during-- before he received the nomination.

24 Q. Oh, okay. The fact that you also do market
25 research and consumer research, does that help-- do the

1 two aspects of different-- the different types of
2 polling help with the other side or--

3 A. They're substantially different. Polling for--
4 of voters versus consumers.

5 Q. Uh-huh.

6 A. And so having that experience changes how you
7 structure your data collection process.

8 Q. And how many surveys do you conduct on average
9 like every year or maybe by the month?

10 A. It ebbs and flows a little bit, but I would say
11 that we probably do 50 to 70 studies in any given year.
12 Very seldom does a week go by that we do not have
13 somebody in the field doing interviewing.

14 Q. And when you say "in the field," are you
15 referring to actual data collection in your call center?

16 A. Yes, in the fields, the data collection, yes.

17 Q. Okay. Great. With regard to the-- the
18 methodology that you use, I believe you testified in
19 your deposition that your methodology was primarily
20 based on your 25 years' worth of experience. Is that--

21 MR. STEINER: Objection. Objection, Your
22 Honor. I think that she should be asking a proposed
23 expert open questions and not leading questions about
24 what he testified to in his deposition.

25 THE COURT: I agree. Watch your leading,

1 he-- you shouldn't be leading him.

2 Q. (BY MS. BECKER) Mr. McFerron, do you have-- do
3 you have a lot of education with regard to polling or do
4 you rely on your experience?

5 A. Both. I have-- I have some education in-- in
6 social science research. My undergraduate degree is in
7 political science. I also took graduate studies in
8 statistics from the American University in Washington,
9 D.C.

10 But most of it has been practical, pragmatic
11 survey research primarily in my current position with
12 Cole, Hargrave, Snodgrass, although I have had exposure
13 in working with other pollsters prior to that time.

14 Q. Okay. During that 25-year period, can you
15 estimate how many statewide surveys you've conducted?

16 A. I would say it would have to be north of a
17 thousand statewide studies in different places.

18 Q. Okay. Are there other types of surveys besides
19 statewide surveys?

20 A. Yeah, we do-- survey everything from city council
21 races, school board races. We do lots of DMA,
22 designated market area studies for our consumers. There
23 will be congressional seats, there will be-- we do
24 national studies from time to time, regional studies as
25 well.

1 Q. Okay. And that's what I was going to ask about.
2 So are there other states besides Kansas that you have
3 done?

4 A. Yes, I believe the number is now-- we've worked
5 in 43 states, done projects in 43 states at this time.

6 Q. Okay. Can you tell us some examples of the--
7 some of the larger polls that you have conducted or been
8 involved with?

9 A. One of the ones I'll highlight is the Meinders
10 School of Business Mid-America consumer confidence
11 study. It covered 16 states. We did that for a number
12 of years. We had-- the Meinders School of Business is a
13 Oklahoma City university. One of their patrons sat on
14 the Federal Reserve Board of Governors and it was
15 modeled after the University of Michigan's consumer
16 confidence study. And it's 16 states; roughly Wisconsin
17 to New Mexico, Montana to Louisiana, to do a Mid-America
18 study. We did that on a quarterly basis for a number of
19 years.

20 Q. Okay. Do you recall offhand the sample size of--
21 of those states?

22 A. I believe they were-- they were 700. There
23 might've been a few that were at 750 that we did there.
24 The University of Michigan I believe is at 500 for their
25 nationwide study.

1 Q. Okay. Do you recall being asked about the AAPOR
2 standards in your deposition?

3 A. Yes.

4 Q. And did you know much about those when you were
5 first asked?

6 A. Not in great detail, no.

7 Q. Have you since taken a look at them?

8 A. I did review those.

9 MR. STEINER: Objection.

10 MR. JOHNSON: Your Honor, objection. The
11 witness apparently is going to testify about knowledge
12 that he has acquired since he gave his deposition.
13 We've seen no revisions to his deposition [sic].

14 MR. STEINER: Same objection.

15 MR. JOHNSON: This is unfair surprise.

16 THE COURT: Where are you going with this
17 line of questioning?

18 MS. BECKER: Your Honor, these are some
19 industry standards that he's familiar with and I was
20 just going to ask him if his survey met the industry
21 standards. And they-- they asked him in deposition
22 about these standards.

23 MR. STEINER: Correct. So, Your Honor, what
24 happened at his deposition is he testified that he
25 wasn't aware of industry standards and, therefore,

1 didn't conform his survey to the industry standards.

2 What she's now going to try to elicit from
3 him is, well, I've gone back-- even though I didn't know
4 what the standards were at the time that I did the
5 survey or at the time I testified in my deposition, I've
6 gone back and looked and what I did was good enough is
7 what we're about to hear from them.

8 THE COURT: All right. I think your
9 concerns go to the weight rather than admissibility of
10 this testimony. You can fully cross examine him on
11 this. So proceed.

12 Q. (BY MS. BECKER) So after looking at the
13 standards that plaintiffs' counsel had pointed out, do
14 you believe that your survey follows those standards?

15 A. Yes.

16 Q. Does your firm make sure to have specific goals
17 for a survey?

18 A. Yes.

19 Q. Do you consider alternative data beyond a survey?

20 A. Yes.

21 Q. Do you select samples that will represent the
22 population to be studied?

23 A. Yes.

24 MR. STEINER: Objection, Your Honor. Again,
25 she should be asking the witness what his methodology

1 was and what he did rather than leading him through it.

2 THE COURT: I agree. Sustained. Rather
3 than feed him the standards, just ask him - if that's
4 what you're asking him about - ask him to relate what
5 the standards are.

6 MR. JOHNSON: Your Honor, if she just wants
7 to ask him what's his methodology, that solves the whole
8 problem.

9 THE COURT: I agree. You shouldn't be
10 leading the expert. Sustained.

11 MS. BECKER: Thank you.

12 Q. (BY MS. BECKER) Are there other methods of data
13 collection that describe the methodology that you
14 employ?

15 A. Sorry?

16 Q. Are there other-- any other methods of data
17 collection that you would call your-- your methodology
18 without specifically referring to the standards from the
19 AAPOR?

20 A. Yes. And if I-- if it's appropriate, if I can go
21 back and just kind of take you through the whole-- the
22 entire process of what we tried to do.

23 Q. Sure.

24 MR. STEINER: Objection, Your Honor. I
25 think that she's now getting into what would be his

1 substantive testimony. He hasn't yet been tendered or
2 qualified as an expert. And if she's crossing the line
3 from what his qualifications are to-- to the substance
4 of his opinion, I'd like the opportunity to voir dire.

5 THE COURT: All right. There is still, of
6 course, an open question about his qualifications. I--
7 before trial, plaintiff had filed a motion to exclude,
8 finding that Mr. McFerron's expert testimony had not
9 been previously disclosed, and it hadn't in accordance
10 with Rule 26(a)(2).

11 But in that order, I ruled that the remedy
12 for this particular witness would be rather than present
13 his-- his testimony by deposition, which defendants
14 wanted to do, to require this witness to provide live
15 testimony since his expert testimony was not previously
16 disclosed way back when Rule 26(a)(2) required such.

17 But I left open the plaintiffs' desire to
18 move for exclusion under Rule 702 and under the *Daubert*
19 framework out of time because, again, they didn't learn
20 until fairly recently that Mr. McFerron was going to be
21 offering expert testimony. When he was deposed, he
22 indicated that he thought he was not going to be-- going
23 to be asked to provide expert testimony and that has
24 changed since his deposition.

25 So I agree that this needs to be done in a

1 staged situation so that plaintiffs have an ability to
2 voir dire or question and/or object to his expertise.
3 So I'll sustain the objection to that extent.

4 Before you get into the methodology, let's
5 start with his qualifications and allow plaintiff to
6 object to that and-- and we'll make a record of that.

7 MS. BECKER: And, Your Honor, I would like
8 to clarify with regard to the whole issue of his
9 testimony. The expert-- what we're now calling the
10 expert disclosure was, in fact, just the-- the summary
11 of the survey which plaintiffs deposed him about. So
12 there's no new summary of opinion.

13 And we have-- basically the entire time ever
14 since we hired Mr. McFerron to do a survey, we have-- it
15 is our position that he is a fact witness based on the
16 fact that he was just collecting data and he's not
17 giving opinions about the data and he's not making
18 inferences from the data, he's just reporting the
19 numbers, but--

20 THE COURT: Well, having him testify to his
21 methodology and standards is going beyond being a fact
22 witness.

23 MS. BECKER: Well, and, Your Honor, the only
24 reason that we're doing it is because you found that he
25 was an expert.

1 THE COURT: No, I did not.

2 MS. BECKER: Well, I-- okay.

3 THE COURT: No, I did not.

4 MS. BECKER: Okay.

5 THE COURT: I did not find that he was an
6 expert. I've already given the procedure here. The
7 procedure was you did not timely disclose him as an
8 expert pursuant to Rule 26(a)(2), then plaintiff took
9 his deposition. In the deposition plaintiff asked, are
10 you being offered up as an expert? And this witness
11 indicated he didn't think so.

12 Plaintiff then proceeded with the deposition
13 and inquired into some of the subject matter that one
14 would inquire into of a typical expert because it seemed
15 like even at that stage his testimony was going beyond
16 what a-- a fact witness might testify to with respect to
17 a survey. I mean, survey witnesses typically are
18 experts. But anyway, plaintiff made that record.

19 Then it comes to me because you all are
20 taking the position that you are wanting to use him as
21 an expert in the sense that you are wanting him to
22 testify to the results of the survey and his-- his
23 methodology in getting that far. Plaintiff wanted him
24 excluded altogether, not be able to testify to any of
25 those things because in plaintiffs' view that was expert

1 testimony.

2 My ruling and the ruling that still stands
3 now is I did not exclude him as long as you called him
4 live because I felt like plaintiff had received some
5 notice because they inquired into these matters on
6 deposition. But at the same time, they didn't waive
7 their objections to him being an expert.

8 So now we have him here. If you're not
9 going to seek to qualify him as an expert, that's fine,
10 that's your call to make. But I imagine what's going to
11 happen next is you start getting into some of the
12 substance of his testimony. There may very well be
13 objections by plaintiff that you're crossing the line
14 into expert testimony, so I'm going to have to resolve
15 the issue one way or another.

16 So I leave it to you whether you want to
17 qualify him as an expert or not. You've been asking him
18 about his experience, et cetera. But my-- I guess as I
19 hear how this is going back and forth even now, it
20 appears to me that there's still going to be an issue as
21 to what he can testify to, what constitutes lay
22 testimony, what-- what constitutes expert opinion. Yes.

23 MR. STEINER: And, Your Honor, I think that
24 you've addressed most of my points. The one additional
25 one which I think was also in our papers, I just want to

1 make sure it's-- for the record here. To the extent
2 that Mr. McFerron is now again trying to testify as a
3 fact witness, on top of all the reasons we said this is
4 expert testimony and not fact testimony, if it's to be
5 presented at all, I think that any effort to have him
6 say here are the results of what people told me in a
7 survey is classic hearsay. And, of course, if he's an
8 expert he can testify based on that.

9 But if he's not an expert, it's wholly
10 improper for him to come here and say, well, I
11 interviewed or people working for me interviewed 500
12 people and here's the results of what those people told
13 me out of court. And so that's an additional basis that
14 I just want the record to be clear. He can't testify as
15 a fact witness as to what he was told in a survey.

16 THE COURT: All right. Well, I have ruled
17 that to the extent plaintiffs-- or defendant is going to
18 ask him about the survey results, that is not
19 permissible lay opinion. That is expert testimony.

20 So I thought that defendant was going to be
21 offering him up as an expert today since I gave them
22 that opportunity, assessing a remedy that in response to
23 plaintiffs' motion to exclude that he had to testify
24 live so they could challenge him here live about his
25 expertise. All right.

1 MS. BECKER: Okay. Well, Your Honor,
2 defendant will just-- I was planning to offer him as an
3 expert anyway and that's why I was going through his
4 background and his methodology and so forth. So we'll
5 just continue to do that.

6 THE COURT: Okay.

7 MS. BECKER: Thank you.

8 Q. (BY MS. BECKER) Mr. McFerron, if the Court
9 accepts you as an expert we'll come back to the exact
10 methodology that you used in this survey.

11 MR. STEINER: Your Honor, just so it's clear
12 because of the purpose of my voir dire, I don't have a
13 problem with him testifying with respect to his
14 background and proposed qualifications as an expert as
15 to what methodology he followed or how he would describe
16 that methodology. I do have a problem with him
17 testifying as to the specifics of what he did applied to
18 this case.

19 So if he wants to describe-- I think what
20 Ms. Becker is getting at is that he used a quota system.
21 If that's what she's getting at, I don't have a problem
22 because I do plan to voir dire him on that. If it's
23 something else or how that worked in this particular
24 case, that I believe has to come after he is tendered as
25 an expert.

1 THE COURT: All right. It's pretty clear to
2 me that I'm going to have to draw lines here consistent
3 with my prior ruling and depending on how this-- what
4 he's asked and what he testifies to. I'm going to take
5 this particular issue under advisement. It's
6 multi-faceted. I'm going to take it under advisement
7 and sort it out in my written opinion.

8 So everyone make their appropriate record;
9 voir dire of qualifications, objections to--
10 contemporaneous objections to things that plaintiff
11 thinks are not proper within the scope of the lay
12 witness' opinion, if that's what he's being offered for,
13 I don't know. But I'm going to take it all under
14 advisement. So, Ms. Becker, proceed.

15 MS. BECKER: Thank you.

16 Q. (BY MS. BECKER) Mr. McFerron, in your opinion,
17 where does your firm rank as far as midwest firms--
18 midwest polling firms?

19 A. I believe that it depends on how you define
20 midwest, but I think we're one of the premier polling
21 firms in this region; Kansas, Oklahoma, Arkansas.

22 Q. And where-- where are the other firms that are
23 sort of well-known, where are those located?

24 A. Most of the larger firms are located on-- on one
25 of the coasts.

1 Q. Let's see, Mr. McFerron, I'm going to hand you
2 your bio.

3 MS. BECKER: May I approach the witness,
4 Your Honor?

5 THE COURT: Yes. And what's the exhibit
6 number on that?

7 MS. BECKER: It is Defendant's Exhibit 1208
8 and I'd like to offer it into-- well, first--

9 MR. STEINER: No objection, Your Honor.

10 THE COURT: All right. Exhibit 1208
11 admitted. And this is the CV or bio of this witness?

12 MS. BECKER: Yeah, it's a CV. They refer to
13 it as a bio in the industry.

14 Q. (BY MS. BECKER) Mr. McFerron, could you
15 basically sort of summarize what is on your-- on your
16 bio as far as anything that we haven't already addressed
17 with regard to your experience?

18 A. I guess we've talked about my position with the--
19 the company, so that's already-- that's there in the
20 first paragraph.

21 Been involved in a number of polling and focus
22 group research, marketing efforts from startup groups to
23 companies, charitable organizations, lobbying efforts,
24 presidential campaigns to local school boards, a
25 thousand research projects, more than 40 states.

1 And then it's got my educational background. And
2 the fact that I'm active in the day-to-day data
3 collection.

4 Q. Okay. Thank you. Mr. McFerron, when did you
5 first hear about this lawsuit?

6 A. I believe I was contacted by the Secretary of
7 State's Office in spring of 2016.

8 Q. Okay. And at that time had you routinely
9 conducted surveys in Kansas on various issues?

10 A. Yes. My-- my first survey I worked on when I
11 joined the firm was a Kansas survey in 1993.

12 Q. Okay.

13 A. We regularly do-- I will do 15 to 20 surveys a
14 year in Kansas.

15 Q. All right. Are you aware of any other polling
16 firm that has done more surveys in Kansas?

17 A. I do not believe that there's any polling firm
18 that's done more work in Kansas than we have. Over the
19 last 25 years anyway.

20 Q. And had you ever done any work for the-- the
21 Kansas Secretary of State's Office before?

22 A. No.

23 Q. Okay. Have you ever done a study or a poll on
24 the rates of possession of the documentary proof of
25 citizenship in Kansas?

1 A. This was the first one.

2 Q. Are you aware of any other survey previously on
3 this-- on this topic?

4 A. No.

5 Q. What were you hired to do in this case?

6 A. I was hired to do a-- a survey of Kansas
7 residents, to simply do fact-finding, to ask if they had
8 documents readily available to them.

9 Q. Okay. And do you recall how much the charge was
10 for this survey?

11 A. I believe it was \$9,000.

12 Q. Were you personally involved in collecting the
13 data that the survey reports?

14 A. I did not do any of the actual interviewing on
15 the phone, but I was in the-- in the data collection
16 center during part of the data collection.

17 Q. And is that also like what we'd call a call
18 center?

19 A. Yes.

20 Q. So you have a call center in your office?

21 A. It is one of the things we think that sets our
22 firm apart is that we-- we operate our own call center,
23 yes.

24 Q. Okay. Would you consider that-- yourself to have
25 personally managed this survey?

1 A. Yes, I would be the project director or manager
2 of this, yes.

3 Q. Okay. When the survey was completed, what-- what
4 was prepared for your client who I guess would be the
5 Secretary of State's Office?

6 A. We tabulated the questionnaire that had been
7 designed, we provided a-- a set of cross-tabulations and
8 then also a-- a very short executive summary analysis.

9 Q. Okay. And I believe you have in front of you
10 what has been marked as Defendant's Exhibit 863. And
11 does that appear to be the data summary in the survey
12 that you prepared?

13 A. Yes.

14 MS. BECKER: Your Honor, defendant offers
15 Defendant's Exhibit 863 into evidence.

16 MR. STEINER: Your Honor, we object. I
17 guess a couple of things. If I-- do I understand Your
18 Honor's prior instruction correctly to be that you want
19 us to hold voir dire to be part of our cross or that we
20 should voir dire him prior to his attempt to offer any
21 type of opinion?

22 I plan to do it, you know, before he offers
23 his opinion. But given that it's a bench trial, if you
24 think-- if Your Honor thinks it would be more efficient,
25 I'm happy to hold it.

1 THE COURT: I think it would be more
2 efficient for you to hold it. I'll take-- as I've said,
3 this is all under advisement. I shouldn't say all,
4 there may be some things that are not that I can rule
5 on. But Exhibit 863, the admission of that I'll take
6 under advisement.

7 MR. STEINER: Thank you, Your Honor. Your
8 Honor, I think it would be helpful, even if we're not
9 voir-diring now, for Ms. Becker to identify the proposed
10 areas of expertise that Mr. McFerron claims to have,
11 because I don't think that that's quite been
12 established.

13 THE COURT: I think we've already heard
14 testimony that he claims to be an expert in polling and
15 does 70 percent of his work with respect to election
16 polling. I don't know if she intended-- did you intend
17 to go any further than that?

18 MS. BECKER: I don't believe so. I think I
19 did ask what his areas of expertise were.

20 MR. STEINER: Thank you, Your Honor.

21 THE COURT: Okay.

22 MS. BECKER: Your Honor, may I publish this
23 or not since it's--

24 THE COURT: Yes. I mean, again, it's under
25 advisement so treat it as if it's admitted. I'll sort

1 it all out later.

2 MS. BECKER: Thank you.

3 Q. (BY MS. BECKER) Mr. McFerron, the first page of
4 the-- the document in front of you, does that appear to
5 be what you would-- you called your summary?

6 A. Yes.

7 Q. Okay. Could you just go through just the key
8 facts? I mean, we can all see it here, but I would like
9 for you just to-- well, first tell me, though, is this a
10 common document that you would create or was this
11 special for this particular survey?

12 A. No, this is a-- a common document.

13 Q. Okay. So you've prepared memos or these types of
14 things before?

15 A. Yes.

16 Q. So could you please just sort of give me a brief
17 summary of-- of the survey data?

18 A. Yes. I mean, the key facts, again, they do speak
19 for themselves there, but you could see-- well, let me
20 start at the top. You can see the dates that the survey
21 was conducted. It was 500 adults living in Kansas. You
22 can see the margin of error there.

23 The key fact is that 98 percent have either a
24 birth certificate or a U.S. passport available out of
25 the 500 we interviewed. It increases to 99 percent when

1 you look at some of the other records. We only had-- we
2 had one respondent out of the 500 who affirmatively
3 claimed to not have access to at least one of them. And
4 that-- that respondent had indicated that she was
5 already registered to vote.

6 Among those who are legal residents but not
7 registered to vote, 95 percent have a readily accessible
8 birth certificate or passport. We did have three who
9 were not registered. They all said that naturalization
10 papers were a possibility that they had.

11 And then the last point there in the-- in the key
12 facts, what I took was I took the U.S. Census data with
13 the number of people living in Kansas, took the number
14 of registered voters. And this was just a test we did
15 after the studies, not anything at the-- quota at the
16 start, and we showed that we had 83 percent of
17 registered voters, which was the same as you get when
18 you did that math.

19 Q. All right. When did you provide this summary of
20 the results?

21 A. May 12th, 2016.

22 Q. Okay. And do you recall if you were actually
23 questioned about this at your deposition?

24 A. Yes, I believe I was.

25 Q. Okay. So it is not new. Right?

1 A. Correct.

2 Q. Is there a-- a name for this type of study? How
3 would you refer to this as distinguished from other
4 types of studies that you conduct?

5 A. This was a-- really a fact-finding study. There
6 weren't messages tested, which is what most of the
7 political work I do is is message testing. This was not
8 trying to develop any messaging, it was just
9 fact-finding.

10 Q. Okay. What kind of a study is it, like something
11 with action-- action points, is that--

12 A. Yeah. Many studies we do, we say we have an
13 actionable component where we're trying to take the
14 data, to do something with that in the-- in the public
15 realm, be it with consumers or voters. This is-- this
16 is not a study that has actionable components to it.

17 Q. Okay. When-- so as an informational-type study,
18 is this common or typical? Are there distinctions
19 between this particular study that you did and another
20 type of information-gathering study?

21 A. I'm not-- not certain I'm understanding.

22 Q. I'm just-- is this-- is this study a good example
23 of-- of an information-gathering study or is it-- was it
24 different?

25 A. No, I think it's a very straightforward-- asking

1 people if they have a document, just a very simple
2 yes/no on certain type of responses. Very
3 straightforward study.

4 Q. Okay. So, Mr. McFerron, I'd like you to take us
5 through the 23 questions on your survey. And I think
6 the best way to do that is-- is just to go ahead and go
7 through each one so that you can sort of tell us what
8 the question was meant to-- what information that the
9 question was meant to obtain.

10 So can you please tell me about Question 1 and--
11 and what it was designed to collect?

12 A. Yes. Question 1 is simply asking people their
13 age. The study was done using industry standard random
14 digit dialing V, and then also doing random digits on
15 the-- on the mobile phones as well, land and mobile
16 phones. So we don't know who we're-- who we're getting
17 on the other side of the phone, so we want to make sure
18 we ask their age at the start. Because we have a model
19 created, we want to make sure that our respondents
20 reflect that model.

21 Q. Okay. And-- and can you tell me about the-- the
22 RDD, random digit dialing, is-- and if that is a
23 standard?

24 A. Yeah, it's the industry standard. And we work
25 with a firm out of California, Scientific Telephone

1 Sampling, to generate our samples there. But it's
2 essentially-- most people understand the area code being
3 the first three digits of a phone number, the prefix
4 being the next three. And then the last four digits,
5 the first two are blocked numbers. And so we know where
6 there are active blocks, and so we use those first eight
7 digits and then randomly assign two digits to the last
8 two places in the phone number and dial those numbers.

9 Q. Okay. And so on Question-- in Question 2 then,
10 tell me about Question 2 and what you intended to gather
11 from that.

12 A. This is a-- a bit of a screen question. You can
13 see how the last three responses have skipped to the
14 county question to make sure that we have the geographic
15 determination for our model as well, so we wanted to
16 collect that county because a illegal alien living in
17 the United States or an undocumented alien or someone
18 who's unable to answer that question, quite frankly, we
19 don't believe qualifies for the rest of the study. And
20 so that's really what we're looking at there.

21 Q. Okay. So that-- so which of the following best
22 describes your status? That's a question that based on
23 their answer you're saying they may skip the -- the
24 person in the call center--

25 A. Correct. Because a illegal alien living in the

1 United States or an undocumented alien did not qualify
2 for our-- our status as a legal resident of Kansas.

3 Q. Okay. How about Question 3, could you read
4 Question 3, please?

5 A. "Which of the following best describes your
6 current voter registration status?" I'm a registered
7 voter in the state of Kansas. I'm registered to vote in
8 a different state. Or I'm not registered to vote.

9 Q. Okay. And the percentages, could you read those
10 for me, please?

11 A. Yes, 83 percent registered to vote in the state
12 of Kansas. 4 percent registered to vote in a different
13 state. And 13 percent not registered to vote.

14 Q. And I have a question, was this a survey of just
15 voters or was it intended to be a survey of another
16 group?

17 A. It's really a survey of legal residents that
18 would have the potential to be a registered voter.

19 Q. Okay. So with regard to the-- the 4 percent that
20 says I'm registered to vote in another state, is there--
21 is there a contradiction-- if this is a survey of
22 residents, is there a contradiction with that answer?

23 A. No, not at all. I think it's-- people move
24 states and change their registration to the state
25 they're in on a regular basis.

1 Q. Okay. And why don't you just go ahead and-- and
2 read-- it looks like between Questions 4 and 5, so is
3 this something that is read to the person on the
4 telephone?

5 A. Yes.

6 Q. And could you-- could you go ahead and read that
7 for us into the record?

8 A. Yes. "Now I want to read you a short list of
9 documents. Only one of these documents is needed in
10 order to register to vote in Kansas. For each of these,
11 please let me know if you have that document at your
12 home, office or other location or if someone else keeps
13 the document for you and can get it to you, if
14 necessary, or if that document does not exist."

15 Q. Okay. And so am I to assume then that the
16 following questions then are a discussion of the-- the
17 short list of documents?

18 A. Yes.

19 Q. Okay. So could you read Question 5, please.

20 A. "A birth certificate showing that you were born
21 in the United States or on U.S. territory." And you see
22 92 percent indicated they have that document. 4 percent
23 said someone else keeps it for them. 3 percent
24 affirmatively said it does not exist, and 1 percent was
25 uncertain.

1 Q. Okay. And this is exactly how the questions are
2 asked; is that correct?

3 A. Yes. At times, especially starting here, the
4 agents would potentially have to read the responses
5 there: Would you say you have that document at home,
6 office or other location? Would you say-- or someone
7 else has that document? Or does it not exist? So they
8 might have to prompt them for those responses.

9 Q. Okay. All right. Let's go on to No. 6. Can you
10 please read No. 6?

11 A. Yeah. "Either a current or expired United States
12 passport." 49 percent said they had that document. 1
13 percent said someone else kept it and 49 percent said it
14 did not exist. And then 1 percent uncertain.

15 Q. Okay. And was the-- the word "expired" placed in
16 there specifically?

17 A. Yes.

18 Q. And why is that?

19 A. Well, it's my understanding that's one of the--
20 one of the documents that would suffice to become
21 registered to vote would be an expired passport.

22 Q. Okay. Are you aware of criticism by the other
23 side, by the plaintiffs in this case with regard to that
24 question?

25 A. Yes. I believe they have-- they've made the

1 claim that that 49 percent number is not reflective of
2 the data they have.

3 Q. And what-- what is your response to that?

4 A. I-- I tried to-- to look at the link they
5 provided in their deposition. The full links weren't
6 working internally there to the State Department data,
7 but I believe they said--

8 MR. STEINER: Objection, Your Honor.

9 THE COURT: Just a minute.

10 MR. STEINER: So now we're going beyond his
11 report to him responding to our rebuttal expert's
12 testimony, which ordinarily would be fine, but
13 ordinarily there would be a supplemental report that
14 discloses whatever data he, Mr. McFerron, thinks he
15 found that somehow supports half of Kansans having
16 passports contrary to what the State Department and
17 census say. That should be disclosed or should have
18 been disclosed.

19 THE COURT: All right. The objection is
20 taken under advisement for a couple of reasons: One,
21 this-- this question and answer suggests that he is here
22 to testify as an expert; two, this isn't an expert
23 opinion that has been provided to plaintiff before
24 trial. So I will take under advisement the motion to
25 exclude and disregard this testimony altogether.

1 MR. STEINER: Thank you, Your Honor.

2 Q. (BY MS. BECKER) So-- so, Mr. McFerron, let's--
3 let's move on to No. 7. Could you please read Question
4 7?

5 A. "A United States naturalization document." You
6 can see 58 percent said it does not exist and 42 percent
7 were uncertain. I would like to point out that the N
8 number there, which is the number of people asked this
9 question dropped substantially. This is down to only
10 12. The reason for that is that those who have either
11 the passport or the birth certificate, there was simply
12 no reason to take their time to ask-- ask the rest of
13 these questions because they already met the
14 qualifications for registering to vote.

15 Q. Okay. So-- so is that why some of the N numbers
16 vary up and down because of the-- not everyone is asked
17 all the exact same questions?

18 A. The study was designed that after the-- the first
19 two, the birth certificate and the passport, once they
20 affirmatively met the qualifications, we did not ask
21 them for the next document in the litany.

22 Q. Okay. Because that would basically be kind of a
23 waste of their time; is that correct?

24 A. Yes.

25 Q. Okay. All right. How about No. 8, could you

1 please read No. 8?

2 A. "A Bureau of Indian Affairs card number, tribal
3 treaty card or tribal enrollment member or an American
4 Indian card with KIC classification issued by the
5 Department of Homeland Security."

6 Q. And what was the-- the response?

7 A. We had 92 percent said it does not exist.
8 8 percent say they were uncertain, which is essentially
9 11 people said it does not exist and one was uncertain.

10 Q. Okay. And then how about Question 9?

11 A. "A U.S. military record of service showing U.S.
12 birthplace." We had again 12 responses. Eight had the
13 document at home or at office or other location.
14 Another 8 percent had someone else keeps the document.
15 The others, 75 percent does not exist and 8 percent
16 uncertain.

17 Q. Okay. And then No. 10.

18 A. "A consular report of birth abroad of a citizen
19 of the United States or a certificate of report of birth
20 issued by the United States Department of State." We
21 did not have anybody-- it's dropped to ten at this point
22 because we had-- had two people say they had the U.S.
23 military record. And you can see that 90 percent said
24 that it des not exist and then one person was uncertain.

25 Q. Okay. And 11?

1 A. "A final adoption decree showing name and U.S.
2 birthplace." Again, 90 percent said it does not exist.

3 Q. And again, not everyone was asked these?

4 A. Correct. Only ten were asked that question.

5 Q. All right. Let's take a look at No. 12. Would
6 you please read No. 12?

7 A. "Proof of citizenship issued by the federal
8 government related to the Immigration and Nationality
9 Act of 1952 or a certificate of citizenship issued by
10 the U.S. Citizenship and Immigration Services." Again
11 ten people were asked this. 90 percent said it does not
12 exist, one person was uncertain.

13 Q. Okay. And 13.

14 A. 13 again asked of ten people, "A United States
15 hospital record of birth created at the time of birth or
16 extract from such a hospital record." We did have two
17 of the ten people or 20 percent say they had that
18 document. Another person, or 10 percent, said someone
19 else keeps it. 40 does not exist and 30-- 30 percent
20 were uncertain.

21 Q. Okay. And actually, Mr. McFerron, I should've
22 asked you, do you know where this list comes from?

23 A. I believe we-- we looked and examined the list
24 from the law that's in question about what-- what
25 ability someone has to prove their identity.

1 Q. Okay. Thank you. All right. And then the next
2 question would be Question 14.

3 A. "As you may or may not know, any person born in
4 Kansas can receive a free replacement birth certificate
5 from the Kansas Department of Health and Environment
6 that can be used to register to vote. Now knowing this,
7 would you be able to get a copy of your birth
8 certificate in order to register to vote?"

9 Again, this was asked of seven people. You can
10 see 29 percent said yes, 43 percent no, and 29 percent
11 uncertain.

12 Q. Okay. And No. 15.

13 A. Okay. Because we had two affirmatively say they
14 could get the-- the copy of their birth certificate in
15 the previous question, the N drops to five.

16 "If you do not have access to any of the
17 documents we've discussed, citizens of Kansas can still
18 prove their citizenship by submitting to the State
19 Election Board other documents such as affidavits from
20 family members attesting you to being a United States
21 citizen or other evidence that you were born in the
22 United States. A hearing can be held by telephone and
23 no lawyers are required. Is this an option you would
24 consider in order to register to vote?" You can see we
25 had 60 percent say no and 40 percent uncertain.

1 Q. Okay. All right. And then so at Question 16,
2 does that kind of take us back out of the-- that takes
3 us beyond the documentation question; is that true?

4 A. Yes, this gets us back to the full N of 500.

5 Q. Okay.

6 A. So everybody is then asked the following
7 questions.

8 Q. All right. So that would be-- could you please
9 read now Question 16 that everyone is asked?

10 A. "Do you consider yourself to be of Hispanic or
11 Latino decent?" 5 percent said yes, 95 percent said no.

12 Q. All right. And then Question 17?

13 A. "What do you consider to be your race? Are you
14 white, African-American, Native American, Asian or
15 something else? 90 percent white. 5 percent
16 African-American. 2 percent Native American. 1 percent
17 Asian. 2 percent refused.

18 Q. Okay. All right. Let's move on to Question 18.
19 We only have five more. Okay. So Question 18, could
20 you go ahead and read that one and the answers as well?

21 A. Yes. "In 2011, because of evidence that aliens
22 were registering and voting in Kansas elections, the
23 Kansas Legislature passed a law requiring that people
24 who register to vote for the first time must prove that
25 they are United States citizens before they can become

1 registered. Do you support or oppose this law?"

2 77 percent support, 14 percent oppose, 9 percent no
3 opinion.

4 Q. And then number-- No. 18-- or, I'm sorry, No. 19.

5 A. "Is your household income over or under 50,000 a
6 year?" 39 percent under 50,000. 51 percent over
7 50,000. 10 percent refused.

8 Q. And, Mr. McFerron, have you ever worded your
9 income question differently for other surveys?

10 A. Yes.

11 Q. What are the options on income questions?

12 A. We could do it a number of different ways. This
13 is one. Another is to ask this question and then a
14 follow-up. If they had said less than 50,000, then ask
15 would that be less than 25 or between 25 and 50. If
16 they said over 50, you would say, would that be less
17 than or more than 100? And then we continue to ask--
18 ask that-- branch off to get that within generally a
19 \$25,000 range.

20 We've also had some clients at times that prefer
21 a method where we-- we simply read a list of under
22 20,000, 20 to 40, 40 to 60, 60 to 80,000. Different--
23 different studies have different-- often different
24 parameters on what we are looking at, depending on what
25 the consumer market or the voter market we're looking at

1 is.

2 Q. And why did you choose to-- to ask it this way in
3 this study?

4 A. One, part of it is timing. We wanted to-- to get
5 the survey done quickly given that the-- the cost
6 parameters that we had. Surveys are charged by the
7 amount of time it takes to collect the information
8 largely, and so we wanted to keep that low. It was one
9 of the-- one of the-- the reasons we wanted to do that.

10 Q. Okay. Do you think that the results could've
11 been different or-- or do you find utility had you added
12 a lot of levels of income?

13 MR. STEINER: Objection, Your Honor. I
14 think this is not what he did. He's explaining that he
15 did this to save money. Asking a question about what do
16 you think might happen if you had asked the question
17 differently and used, you know, a more stratified
18 breakdown, to the extent this witness has any expertise,
19 this is-- that type of question is far beyond anything
20 he can proffer on.

21 THE COURT: Sustained. Disregard the
22 question and answer, if any.

23 Q. (BY MS. BECKER) On Question 20, could you please
24 read that one for us?

25 A. "To be certain we have a representative sample,

1 can I get in which county in Kansas you live?" That was
2 recorded. We then used that county, then aggregated
3 those counties to make certain that we had a
4 representative sample of the state by region, which you
5 see in Questions 22 and 23. Questions 21, 22, and 23
6 were not asked of the respondents, that was data that
7 was gathered by the agents.

8 Q. Okay. And could you explain again how the-- the
9 agents-- so they didn't ask, they just--

10 A. They recorded the county. And then on the-- on
11 the data side afterwards we knew, for example, Labette
12 County is in the southeast. We have a-- have maps drawn
13 and we have the county codes and know-- know in which
14 media market and in which of our six regions that we--
15 we generally use for Kansas, which-- and which counties
16 those are.

17 Q. Okay. What-- Mr. McFerron, what is the standard
18 size for statewide surveys in your understanding?

19 A. When we do-- for our studies that we do, a
20 statewide survey will generally be between 500 and 600
21 interviews. We will do some more, we have done a few
22 less than that, but 500 to 600 is the normal standard.

23 Q. Is there a-- an industry group or anyone that--
24 that you could cite for us that follows that or
25 recommends that?

1 MR. STEINER: Objection, Your Honor, not in
2 his report.

3 THE COURT: All right. Under advisement.

4 A. Generally it's-- the standards are to do as many
5 interviews as you can as long as you don't jeopardize
6 other facets of your data collection because of the cost
7 constraints that you have.

8 Q. (BY MS. BECKER) Okay. Can you tell me who are
9 some of your other current clients that your firm works
10 for?

11 A. We work with a number of larger companies that we
12 do survey research for on a regular basis. If you want
13 to talk about Kansas, we actually lost a client last
14 week when-- when Mark Hutton decided not to run for
15 governor. He had been a client of ours. And we do work
16 with Koch Industries. The ACLU has been a client or has
17 hired us to do work in Oklahoma in the past through a
18 state question initiative there.

19 Q. Let me ask you about that. So what kind of work
20 did you do for the ACLU in Oklahoma?

21 A. Criminal justice reform efforts. Two state
22 questions. Alison Holcomb was the person who
23 interviewed and-- and selected me for that work.

24 Q. What kind of survey was in that?

25 A. It was a political survey, a voter survey. 600--

1 we actually did two studies for them, a benchmark survey
2 and then a brushfire survey during the campaign.

3 Q. Okay. And how many-- how many people in that
4 study?

5 A. There were 600 each in Oklahoma.

6 Q. Now, is there a-- a reason that Oklahoma would
7 have 600 as opposed to a different number?

8 A. That was their preference. Oklahoma does have a
9 little bit larger population than Kansas, but I
10 routinely do 500 sample surveys in Oklahoma as well.

11 Q. Okay. So based on your experience, what do you
12 consider a statewide survey range sample size to be?

13 A. You know, I've done them as low as 300. I prefer
14 500, but I've done 600 and 700 sample studies as well.

15 Q. And this study was--

16 A. And I think that's-- for live telephone
17 responses, I think that's a pretty solid industry
18 average in that 5 to 600 range for live telephones.
19 You'll see some surveys that are much higher but those
20 are-- those tend to be automated systems.

21 Q. Okay. And how many people were in this Kansas
22 survey?

23 A. 500.

24 Q. Okay. Mr. McFerron, in your experience have you
25 found pollsters to typically work for both partisan--

1 parties, both sides of the aisle or not?

2 A. There are a few that will work on both sides of
3 the aisle. But generally you work for-- if you're in
4 the political world you work for Republicans and
5 non-partisans or Democrats and non-partisans.

6 Q. Why is that?

7 A. Well, if not, you can get into conflicts when it
8 comes to developing-- polling is often used to help
9 affect turnout modeling. And so you work against-- you
10 can work against other clients if you're working across
11 the partisan landscape. And there's always a trust
12 issue as well.

13 Q. Okay. Do you consider yourself to have a broad
14 range of partisan clients or-- as far as varying
15 viewpoints in politics?

16 A. We tend to work for Republican candidates. But
17 yes, we've worked for candidates along a broad range
18 within that-- that network. And I'm actually very
19 pleased that we have such a broad base of clients. One
20 of the other clients I-- I probably should mention is
21 New American Economy. That is a pro-immigration reform
22 group that we've done a substantial amount of work for
23 as well.

24 Q. And what states have you done work for the
25 pro-immigration group?

1 A. That survey work has been in Oklahoma.

2 Q. Oklahoma. Okay. Did you use weighting when you
3 reported this data?

4 A. No. We use a-- a different approach. We use a
5 quota-based approach where we do the model on the front
6 end and do all the interviewing. Weighting is a-- is
7 something that is used throughout the industry that we
8 have seen issues with at times. And so we have-- with
9 the prevalence of cell phones, we've gone to-- we've
10 reverted back to the quota-based structure mainly
11 because so many-- because we control our own data
12 collection, we know that we can-- we can go in and find
13 people that meet the model instead of having to give a--
14 a disproportionate weight to one response over another.
15 So for our studies, each voice is one voice and weighs
16 as one voice.

17 Q. At one point in time was the quota-based method
18 frowned upon?

19 A. It's-- it's very possible. I think before
20 universal cell phone coverage I think it was much more
21 difficult to reach people. And we will use weighting at
22 times. For example, we've done survey work in Hawaii
23 where we might have difficulty getting native speakers,
24 native Hawaiian speakers or Korean speakers, to reach
25 those quotas on the phones and so we have used weighting

1 in extenuating circumstances such that.

2 Q. For this survey do you think that the quota-based
3 was the right choice?

4 A. Yeah. This is-- this is our-- this is our normal
5 standard operating procedure that we use is building the
6 model up front and then interviewing people in those for
7 that model.

8 Q. And you mentioned-- and I know we've already
9 talked about your call center, but can you tell me a
10 little bit about-- about the call center and like how
11 big it is and the number of employees that you may have
12 and who trains them?

13 A. Yes. We have a 35-station call center, more than
14 60 employees. I've got a half a dozen or more that have
15 been with me for more than ten years. Probably 20 to 25
16 that have been with me for more than five years. And
17 we-- we pride ourselves in setting we think an industry
18 standard for our retention of employees. We only do
19 data collection, there's no selling. They are trained
20 in the art of developing that rapport in those first few
21 seconds to get people to participate in the survey. And
22 we're very proud of that group.

23 Q. Nice. How often are you on the floor of your
24 call center to see the data collection?

25 A. I make it a point to be there at least one day a

1 week and try to be there at least for some sort of time
2 during every study we have. It's not always possible,
3 but that's the-- the goal, what I try to do.

4 Q. Okay. In this survey did you ask about education
5 levels of the Kansas residents who responded?

6 A. No, we did not.

7 Q. Why not?

8 MR. STEINER: Objection, Your Honor. Again,
9 it's beyond his report to explain why he didn't do so.

10 THE COURT: All right. I'll take that under
11 advisement.

12 A. You know, it's-- did not see a need for it when
13 we were designing the study. And, again, we're trying
14 to keep the-- design the study that could be done for
15 the costs that we have.

16 Q. (BY MS. BECKER) Okay. Mr. McFerron, what if you
17 had-- I don't want you to speculate, but would you say
18 that your firm is-- is usually right in the political
19 polls that you conduct as far as predictions?

20 MR. STEINER: Objection, Your Honor. Among
21 other things relevance, but--

22 THE COURT: I'll sustain.

23 Q. (BY MS. BECKER) Mr. McFerron, as a pollster, how
24 are you evaluated by the industry?

25 A. Ultimately a pollster, you know, has to be proven

1 correct on election day if you're in the political
2 world. You have to-- otherwise you don't stay in
3 business very long. And so we're-- that's how you're
4 evaluated.

5 Q. Do you feel like you've been proven correct on
6 election days?

7 MR. STEINER: Same objection, Your Honor.

8 THE COURT: All right. I'll allow him to
9 answer, but I don't think this has much weight. This is
10 not the same type of study. Go ahead and answer.

11 A. We're very pleased with our record, especially in
12 Kansas. We were one of the few, for example, last cycle
13 that had-- or, I'm sorry, in 2014 that had Sam Brownback
14 ahead toward the end of the election.

15 Q. (BY MS. BECKER) Do you recall being asked in
16 your deposition about this exact topic of predictions
17 and how accurate you were?

18 A. Yes.

19 Q. Do you recall discussing the Oklahoma primary?

20 A. Yes.

21 Q. Could you explain since-- since you were asked
22 about it in your deposition, could you explain that
23 situation with regard to the Oklahoma primary?

24 MR. STEINER: Objection, Your Honor. Again,
25 I don't think that the test for what he can testify here

1 or opine about is what he was asked in his deposition,
2 it's what he wrote in his report. And talking about,
3 you know, his hits or misses in Oklahoma on top of being
4 I think wholly irrelevant is also far beyond anything
5 that he's disclosed in his report as a basis for his
6 opinions here.

7 THE COURT: Now that I've heard a number of
8 these questions, I do think they're irrelevant. I'll
9 take under advisement that part of the objection that
10 goes to whether or not it was-- whether or not it's
11 within the scope of his expert opinion and, if so,
12 whether that opinion was dually disclosed or not.

13 MR. STEINER: Thank you.

14 MS. BECKER: And, Your Honor, I'd just like
15 to point out that plaintiffs attached this exact primary
16 news thing in their filing with the Court and I believe
17 they questioned him about it at his deposition, so
18 that's why I'm asking about it.

19 Q. (BY MS. BECKER) Mr. McFerron, do you have
20 bilingual workers in your call center?

21 A. Yes.

22 Q. How many or what percentage of them are
23 bilingual?

24 A. Generally we have at least three out of our-- if
25 we're manning 25 stations that will be bilingual. If

1 we're doing something in an area with a higher
2 Hispanic-- or Spanish language response rate, we will
3 increase that from time to time.

4 Q. Okay. And-- and tell me how that happens. So if
5 someone answers and they are speaking another language,
6 what happens at that point? Is there a signal that
7 somebody else needs to get on the phone or--

8 A. No, it is coded--

9 MR. STEINER: Objection, Your Honor. Again,
10 this is beyond anything that's disclosed in his report.
11 There's no second or third language script that's
12 disclosed in his report. You know, I understand Your
13 Honor's prior rulings, but I do think that that needs
14 just to be made for the record.

15 THE COURT: All right. If it's not in the
16 report at all and plaintiff wasn't even on notice of it
17 at the time of deposition, I sustain as to this
18 question.

19 As you'll recall, I allowed this witness to
20 testify only if he testified live because I felt like
21 plaintiff had some prior notice, again, although
22 defendants had violated the Rules of Civil Procedure,
23 had some prior notice at the time of the deposition as
24 to what they might ask him at his deposition, without
25 waiving, of course, their objection to him being offered

1 as an expert witness.

2 But if-- to the extent you ask him things
3 that are outside of the report and outside of deposition
4 testimony, I will just sustain those. I don't need to
5 take those under advisement. That would be without--
6 outside the scope of any proffered expert opinion.

7 MS. BECKER: Thank you, Your Honor. And I
8 would like to just state for the record that defendant
9 listed him as a fact witness. He did not provide an
10 expert report. And what we put on the filed disclosure
11 was, in fact, just the summary from this exact survey
12 that plaintiffs asked him about at length in his
13 deposition, so...

14 THE COURT: Well, you're being schizophrenic
15 because you say that but then, on the other hand, you
16 continue to elicit testimony that really sounds like the
17 testimony you elicit from an expert witness.

18 So I suppose I'm going to have to analyze
19 this under both tracks; whether it's permissible lay
20 opinion and, if not, is it permissible expert opinion,
21 is it within the scope of what you have disclosed to
22 plaintiff, and go from there.

23 Q. (BY MS. BECKER) Mr. McFerron, tell me a little
24 bit about subsets and specifically subsets within a
25 sample size of about 500 respondents. Can you-- can you

1 define what a subset would be?

2 A. A subset would be-- for example, out of this
3 survey 51 percent would be a-- the male subset.
4 49 percent would be in the female. So a subset is
5 exactly what that says, it's a subset of the overall
6 study.

7 Q. Okay. So how-- how do the subsets-- what is the
8 relationship between the subsets and the-- the
9 quota-based method that you use in this survey?

10 A. We set up a model that sets quotas for some of
11 those subsets. We used geography, age and gender on
12 this study.

13 Q. Okay. So once you've reached the model, what
14 happens as the calls are being made?

15 A. It will terminate that call, although I-- this
16 study I know it came together very closely. I do
17 believe that we hit the senior citizens a little bit
18 earlier than we did the others. And so then we would--
19 we would not talk to those over the age of 65 at that
20 point.

21 Q. Okay. And actually you mentioned the senior
22 citizens. Do you recall what time of day the call
23 center made these phone calls?

24 A. Generally it was 3:00-- I believe it was 3:00 to
25 9:00, afternoon to evening.

1 Q. And why is that time frame chosen?

2 A. It tends to be the greatest response rate and so
3 that's why we choose that.

4 Q. Okay. Let me just-- I may have a couple more
5 questions, if you'll just give me a moment.

6 MS. BECKER: Your Honor, I believe that's
7 all I have on direct, but I may have redirect after
8 plaintiffs are finished.

9 THE COURT: All right.

10 MR. STEINER: Your Honor, before I start my
11 cross, I would like to just make for the record an
12 objection. To the extent it's not-- there's now a
13 suggestion that Mr. McFerron is not offering fact
14 testimony because it's hearsay and not appropriate fact
15 testimony, and he's potentially not offering expert
16 testimony because he hasn't disclosed an expert opinion
17 and yet he's a pollster, not what you would typically
18 think of as an expert in surveying, but perhaps it's lay
19 opinion testimony.

20 That doesn't satisfy the requirements of
21 Rule 701 based on what Mr. McFerron's already testified
22 to this morning because what he's here testifying on--
23 701 deals with perceptions of lay witnesses, if it's
24 either helpful to clearly understanding the witness'
25 testimony, which this can't be because his only

1 testimony is on these now apparently lay perceptions, or
2 to determining a fact in issue. But it still has to be
3 based-- rationally based on the witness' perception.

4 And what Mr. McFerron has testified to is he
5 didn't do any of these calls, he didn't personally go
6 out and interview 500 people. A group of people who
7 worked for him did the calls, reported the information
8 and he reviewed those spreadsheets of information that's
9 provided.

10 Now, that's, of course, perfectly
11 appropriate for an expert to do, because under Rule 703
12 an expert can consider things that are otherwise
13 inadmissible if that's what-- the type of information
14 that experts in the field would rely on.

15 But a lay opinion testimony doesn't get
16 the-- the benefit of the Rule 703 exception to be able
17 to consider things that are otherwise inadmissible. A
18 lay witness who's offering a lay opinion has to do that
19 on his or her own individual perception, which Mr.
20 McFerron didn't do.

21 So I'd like that additional objection to his
22 testimony based on what I think is a new theory during
23 Ms. Becker's questioning that he's somehow a-- offering
24 lay opinion as opposed to either fact or expert opinion.

25 THE COURT: Ms. Becker, it would really help

1 me in analyzing this if you would tell me. Is he being
2 offered as an expert, is he offered as a-- someone
3 offering a lay opinion? What is he being offered for?

4 MS. BECKER: Well, now, Your Honor, he's
5 being offered as an expert. But it's the same-- it's
6 the same-- he's not supplemented because it's all the
7 same from when he was deposed. Exact opinions.

8 THE COURT: All right. Because you not more
9 than a few minutes ago told me the opposite, so that's
10 why-- I mean, I'm just trying to make sure the record is
11 clear.

12 Plaintiff has offered, I mean, you know,
13 objections on both theories. I need to rule. Earlier I
14 said, well, I guess I'm going to have to analyze them as
15 an either/or, but if you're electing one or the other it
16 would be helpful. So you're electing--

17 MS. BECKER: We're electing expert. I was
18 just trying to explain why he didn't have an expert
19 report is because we had originally listed him as a fact
20 witness.

21 THE COURT: Okay. I understand.

22 MR. STEINER: May I proceed?

23 THE COURT: Yes.

24 MR. STEINER: Thank you.

25 CROSS EXAMINATION

1 BY MR. STEINER:

2 Q. Good morning, Mr. McFerron.

3 A. Hello.

4 Q. Now, you agree with me, sir, that the wording of
5 a question can affect survey results. Right?

6 A. Yes.

7 Q. And your job as a surveyor is to ask impartial
8 questions. Right?

9 A. Depending on the study, yes.

10 Q. If you want to get unbiased results in your
11 survey, you have to ask impartial questions. Right?

12 A. Yes.

13 Q. Okay. And that's so that the wording of the
14 question doesn't affect the responses, right, sir?

15 A. Correct.

16 Q. Okay. And you didn't do that here, did you?

17 A. I-- I disagree with your-- your characterization
18 there.

19 Q. Well, let's look at your report, Defendant's
20 Exhibit 863, and if we can look at Question 18.

21 Okay. And it's either in the book or on the
22 scene in front of you. And this is a question I think
23 that someone from the Secretary's office asked you to
24 add. Right?

25 A. That is correct.

1 Q. Okay. And you agree with me, Mr. McFerron, that
2 this question is a biased question, right, sir?

3 A. I-- I would say that this question-- I can see
4 how someone could have concerns about this question and
5 the results to it. But I'd like to point out that it
6 does not affect-- it's asked after the other 17
7 questions. It would have no effect on the--

8 Q. So the answer to my question though is yes, this
9 question is a biased question. Right?

10 A. I don't know that I would use the term "biased."

11 Q. Well, it introduces potential bias into your
12 survey?

13 MS. BECKER: Objection, Your Honor. These
14 are asked and answered, but I-- I would like to make a
15 standing objection that these are the exact same
16 questions that I attempted to discuss with the witness
17 and then Mr. Steiner objected as far as--

18 THE COURT: It's cross examining, which is
19 his right to do to impeach the witness' testimony even
20 if he did object.

21 MR. STEINER: And for the record--

22 MS. BECKER: I'll just come back on
23 redirect.

24 MR. STEINER: -- she asked about every
25 question in the survey I think without objection or

1 almost without objection, certainly not to this one.

2 THE COURT: Well, even if-- even if somebody
3 objects to a question, that does not mean they're
4 foreclosed from asking follow-up questions, particularly
5 if the Court allowed the person to testify.

6 I don't recall that there were objections to
7 this particular question. But as you know, I've allowed
8 this witness to testify to virtually everything under an
9 under advisement basis. But in any event, it is proper
10 to ask about testimony that's already been elicited on
11 direct examination. So proceed.

12 Q. (BY MR. STEINER) Right. So I don't think we got
13 an answer to the last one, but the answer to my question
14 is yes, this introduces potential bias into your survey.
15 Right?

16 A. I think it depends a little bit-- I do not have
17 the research on why the Kansas Legislature passed this
18 law. If that first phrase is a justification for that,
19 then I would say that the bias is not there. If that's
20 not the case, then it could-- it could be.

21 Q. Okay. And you say that you might not use the
22 word "bias," but that was, in fact, your word, sir.
23 Right?

24 A. I could see how I could categorize this as bias
25 at some point, yes.

1 Q. Right. So you remember being deposed in this
2 case. Right?

3 A. I do.

4 Q. Okay. And that was back in June of 2016. Right?

5 A. I'll take your word for that.

6 Q. So shortly after you prepared your-- you did the
7 interviewing and you prepared your summary. Right?

8 A. Yes.

9 Q. And you swore to tell the truth that day, right,
10 sir?

11 A. Yes.

12 Q. Okay. Just like you swore to tell the truth this
13 morning. Right?

14 A. Yes.

15 MR. STEINER: May I approach, Your Honor?

16 THE COURT: Yes.

17 Q. (BY MR. STEINER) So why don't we look at
18 Page 58, Line 4 of your testimony.

19 Question: And the language that says, "because
20 of evidence that aliens were registering and voting in
21 Kansas elections," was that language your idea or
22 someone from Secretary Kobach's idea?

23 Answer: I don't remember.

24 Then: I couldn't hear you.

25 And you repeated: I don't remember.

1 And then on Line 12: And in your experience as a
2 pollster or surveyor, does the inclusion of language
3 like that have a tendency to affect the answers that
4 people give?

5 Answer: Yes, it can.

6 Question: How many-- how can it affect the
7 answer?

8 Answer, your answer, your words: Well, any-- any
9 information can have an effect. So-- and that is one
10 reason why this question-- it's the only place that I
11 think there is bias of any kind in the study, and that's
12 why it's asked at the end of the study.

13 That was your testimony, right, sir?

14 A. Yes.

15 Q. Okay. And your testimony was that this question
16 had the potential to introduce bias into the survey,
17 right, sir?

18 A. Yes.

19 Q. Okay. And you don't want to change that
20 testimony today, do you?

21 A. No.

22 Q. Okay. And-- and you, in fact, agreed with me
23 that you should've asked that question differently.
24 Right?

25 A. (Pause).

1 Q. Putting aside what you said before, you would
2 agree with me now that you should've asked that question
3 differently. Right?

4 A. Yes.

5 Q. And-- but you didn't even bother to tell
6 Secretary Kobach or someone from his office that this
7 question had the potential to introduce bias into your
8 survey. Right?

9 A. Can you please repeat that?

10 Q. Sure. You didn't bother to tell Secretary Kobach
11 or Mr. Roe - I don't think Ms. Becker was there yet -
12 but Secretary Kobach or anyone from his staff, you
13 didn't tell them that this question that they wanted
14 asked had the potential to introduce bias to the survey.
15 Right?

16 A. I don't recall doing so, no.

17 Q. Well, why don't you look at Page 61, Line 23 and
18 see if that refreshes your recollection.

19 A. Okay. That's correct.

20 Q. Okay. You didn't tell them?

21 A. No.

22 Q. And now let's look at your question about
23 possession of documentary proof of citizenship. Can we
24 pull up, Stephen, Question 5.

25 And this question you put all into one long

1 question. Right? So you want to know whether someone
2 has any of these documents, and we're going 5 through
3 the next dozen or so questions, whether they have the
4 document in their home, office, or other location or if
5 someone else keeps the document for them and can get it,
6 if necessary. Right?

7 A. Yes.

8 Q. Okay. And you also told them that this document
9 was needed to register to vote in Kansas, right, sir?

10 A. It says only one of these documents is needed.

11 Q. Right. But you-- you told people before you
12 asked them whether they had the document that whatever
13 list you were going to read them, they were going to
14 need at least one of those things if they wanted to
15 register to vote in Kansas. Correct?

16 A. Yes.

17 Q. Okay. And didn't consider whether that
18 introduced bias, telling them that this document was
19 needed to vote. Right?

20 A. Yeah, I do not see that it introduces bias.

21 Q. Okay. You didn't think about it one way or the
22 other, right, sir?

23 A. No, I-- I did think about it.

24 MS. BECKER: Objection, misstates his--

25 Q. (BY MR. STEINER) You put all of this into--

1 THE COURT: All right. I'll overrule the
2 objection but reframe the question.

3 Q. (BY MR. STEINER) You put all of this into one
4 long question. Right?

5 A. Yes.

6 Q. Okay. And by the way, sir, you aren't-- you--
7 you don't know about the social desirability effect.
8 Right?

9 A. No, I'm familiar with the social desirability
10 effect.

11 Q. You've learned about that since your deposition?

12 A. No. I mean, I've-- did I say something contrary
13 to that in the deposition I'm guessing?

14 Q. Well, you-- I think you testified before that
15 you-- you had heard the term but you didn't know-- you
16 didn't know that term in relation to surveying. Right?

17 MS. BECKER: Could you point out the line
18 and page, please?

19 MR. STEINER: I'm asking him a question.

20 MS. BECKER: Well, you just--

21 A. I am familiar with-- with social desirability
22 effect, yes.

23 Q. (BY MR. STEINER) Okay. But you don't know about
24 that term as it relates to surveying, right, sir?

25 A. I might need some more specificity from you.

1 Q. Sure. So why don't we look at Page 54, Line 16
2 of your transcript.

3 Question: Have you ever heard the term social
4 desirability?

5 THE COURT: All right. Let him have a
6 chance to look, make sure he's following.

7 A. Okay.

8 Q. (BY MR. STEINER) Okay? Question: Have you ever
9 heard the term social desirability?

10 Answer: My guess is yes. I don't know that I--
11 I'd probably need to know more in context.

12 Question: Are you familiar with the concept of
13 social desirability as it relates to survey research?

14 Answer: I'd probably need, again, some more
15 explanation about what you're-- what you're talking
16 about.

17 Right? That was your testimony in your
18 deposition, right, sir?

19 A. Yes.

20 Q. Okay. And you don't want to change that
21 testimony today. Right?

22 A. Correct. I would still need to know the context.

23 Q. Okay. And if we can go back, Stephen, to
24 Question 5 of the survey.

25 Now, when you asked this question, you put

1 everything in one long list. You didn't, for example,
2 first ask a person whether they had-- whoever was on the
3 phone whether they had documentary proof of citizenship
4 in their possession, right, as Question 1?

5 A. Correct.

6 Q. And you didn't then wait and see if the answer
7 was no to follow up with the subpart of the question,
8 could someone else get it for you-- get your birth
9 certificate for you, right, you asked it all together?

10 A. Correct.

11 Q. And you didn't ask someone how long it would take
12 them to get a copy of their birth certificate. Correct?

13 A. Correct.

14 Q. And you also didn't ask the person how much it
15 would cost to get a copy of their birth certificate.
16 Right?

17 A. Correct.

18 Q. And you didn't ask anyone whether the name on
19 their birth certificate matched their current name.
20 Right?

21 A. Correct.

22 Q. And the same is true as to whether the name on
23 their passport matched their current name. Right?

24 A. Correct.

25 Q. Or any of the other documents that could be used

1 for-- for proof of citizenship. Right?

2 A. Correct.

3 Q. But you understand that people sometimes change
4 names so as a result of marriage, divorce, or other
5 reasons. Right?

6 A. Yes.

7 Q. And that's not something you asked about?

8 A. Correct.

9 Q. Now, I'd like to go back to your expertise.

10 MR. STEINER: And, Your Honor, I don't know
11 what time you want for a morning break so I'm happy to
12 continue, but this is-- I'm changing gears, if this is
13 what you'd prefer.

14 THE COURT: All right. It's 11:00. It's a
15 good time if you're changing gears. So let's be in
16 recess until 11:20.

17 MR. STEINER: Thank you.

18 (Recess).

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

20 MR. STEINER: May I approach, Your Honor?

21 THE COURT: Yes.

22 MR. STEINER: Thank you.

23 Q. (BY MR. STEINER) Now, Mr. McFerron, you were
24 retained to conduct the survey in this matter in May of
25 2016. Right?

1 A. Yes.

2 Q. And you were paid \$9,000 to do the survey at that
3 time?

4 A. That is correct.

5 Q. And at that time you weren't sure whether you
6 were being paid to be a fact witness or being paid to be
7 an expert witness, right, sir?

8 A. At that time I don't believe I was-- I was being
9 paid for anything other than to do the survey.

10 Q. Okay. And you weren't sure of whether after
11 paying you to do the survey you would be called as a
12 fact witness or as an expert witness. Right?

13 A. Correct.

14 Q. And you thought you were probably an expert.
15 Right?

16 A. I believe, if I remember that deposition
17 discussion correctly, I-- I'm not a lawyer so I don't
18 have a-- a legal definition of what an expert witness
19 is, but I do believe I'm an expert in political polling.

20 Q. Right. And Mr. Roe or someone else on the
21 Secretary's behalf thought that you'd just be a fact
22 witness. Right?

23 A. To my recollection, yes.

24 Q. And you had never testified as an expert witness
25 before, right, sir?

1 A. I have-- I have never testified as an expert
2 witness before, although I was designated as an expert
3 witness but it never-- their trial-- they never called
4 me.

5 Q. But you've never testified as an expert prior to
6 today. Right?

7 A. Correct.

8 Q. And even from your deposition up until today, to
9 the extent your testimony is accepted as an expert
10 witness, this is the first time you'll ever have
11 testified as an expert, right, sir?

12 A. Yes.

13 Q. Okay. And when you did your survey, you prepared
14 a two-page summary of your results. Right?

15 A. Correct.

16 Q. Okay. And I think we can all agree that two-page
17 summary didn't meet the requirements of Rule 26 of the
18 Federal Rules of Civil Procedure for an expert witness
19 report. Right?

20 MS. BECKER: Objection, calls for a legal
21 conclusion.

22 THE COURT: I'll sustain to the form of the
23 question.

24 Q. (BY MR. STEINER) You're testifying here today as
25 a proffered expert. Correct?

1 A. My understanding is that's-- that's to be
2 determined I guess.

3 Q. But you're proposed to be an expert, right, sir?

4 A. Yes.

5 Q. Okay. And you propose that you're an expert in
6 polling. Right?

7 A. Correct.

8 Q. And not in surveying or statistics. Right?

9 A. I'm not a statistician, correct.

10 Q. And not in survey methodology or things of that
11 nature. You're an expert in polling. Right?

12 A. I think--

13 MS. BECKER: Objection, misstates the
14 evidence and his previous testimony.

15 THE COURT: Overruled. Overruled. Answer
16 it if you can.

17 A. I'd like to better understand your distinction
18 between survey research and polling.

19 Q. (BY MR. STEINER) Okay. Well, I think the
20 Secretary's counsel suggested that all you're being
21 offered for is as a-- an expert in polling. Correct?

22 A. I--

23 Q. You were here an hour or so ago when Ms. Becker
24 represented to the Court that--

25 A. Yeah, I don't recall exactly what counsel said at

1 that time, but--

2 Q. But you didn't correct that, you don't think
3 you're being offered for anything beyond what Ms. Becker
4 represented to the Court you were being offered on.
5 Correct?

6 A. I want to be clear here. I want to-- on polling
7 and survey research, correct.

8 Q. So you think it's both polling and survey
9 research?

10 A. I think those are two very close to synonymous
11 terms in my mind.

12 Q. Now, you're aware that an expert witness has to
13 make certain disclosures before they can offer their
14 opinion testimony. Correct?

15 A. No.

16 Q. You didn't know that?

17 MS. BECKER: Objection, calls for a legal
18 conclusion.

19 THE COURT: He's already answered he wasn't
20 aware, so I'll overrule.

21 Q. (BY MR. STEINER) And no one ever told you that
22 if you're an expert witness you have to prepare reports
23 and you have to disclose all of your opinions, things of
24 that nature?

25 A. No.

1 Q. Okay. So, well, let me just go through some of
2 the requirements and see if we can agree that your
3 two-page summary doesn't do that. Your two-page summary
4 isn't signed by you, correct, sir?

5 A. It indicates it is from me, but there's not a
6 signature.

7 Q. You didn't sign it. Right? You didn't sign it.
8 Right?

9 A. Not that I see, correct.

10 Q. And it doesn't contain a statement of your
11 compensation. Right?

12 A. Correct.

13 Q. And it doesn't say anything about other cases in
14 which you've testified either as an expert either at
15 trial or by deposition. Correct?

16 A. Correct.

17 Q. Okay. But we can all agree that that's none.
18 Right?

19 A. Excuse me?

20 Q. You haven't testified either in trial or at
21 deposition as an expert. Right?

22 A. Correct.

23 Q. Okay. And it doesn't contain a statement of all
24 of your qualifications, including a listing of all
25 publications that you've authored or co-authored in the

1 last ten years. Correct?

2 A. Correct.

3 Q. Okay. And I think it's the case that you haven't
4 written anything in the last ten years. Correct?

5 A. No, that's-- that's not true.

6 Q. Okay. So you've written some-- some articles or
7 other things in the last ten years?

8 A. I have written articles that we have-- we
9 self-publish that are survey analysis.

10 Q. Okay. And you've written articles about polling
11 or surveying?

12 A. No, the articles have been about the survey that
13 we've-- the surveys that we've conducted.

14 Q. So you haven't written any articles about survey
15 methodology or polling methodology--

16 A. Correct.

17 Q. -- correct? And you-- and the other articles
18 that you've written about your survey results, you don't
19 list those as part of your qualifications in your
20 expert-- sorry, in your summary report that's
21 Exhibit 863. Right?

22 A. Correct.

23 Q. And no one ever told you that you needed to
24 provide a list of everything that you've written in the
25 last ten years. Right?

1 A. Correct.

2 Q. Okay. And you haven't ever written a
3 peer-reviewed article. Right?

4 A. Correct.

5 Q. And you've never served as a peer reviewer for a
6 journal. Right?

7 A. Correct.

8 Q. Okay. And now, this one is not clear to me from
9 your report or prior testimony, so I'll ask you to
10 explain it. Does the two-page summary contain a
11 complete statement of all of your opinions and the bases
12 and reasons for them, for the work that you've performed
13 in this case?

14 A. I would say that I'd like to-- maybe I need to
15 review it all here, but I don't see opinion in the
16 two-page document.

17 Q. Well, does the two-page summary contain a
18 complete statement as to all matters that you intended
19 to offer testimony on here today?

20 A. I would say that would also include the
21 questionnaire and the cross-tabulations that have also
22 been provided.

23 Q. So Exhibit 863 as a whole contains all of your
24 opinions or other testimony and all of the bases and
25 reasons for them?

1 MS. BECKER: Objection, asked and answered.

2 THE COURT: I think it's a different
3 question. Overruled. You can answer.

4 A. Again, I-- I don't see any of this having opinion
5 in it.

6 Q. (BY MR. STEINER) Okay. And Exhibit 863 contains
7 all of the facts and data that you considered in forming
8 your views in this case?

9 A. Can you rephrase that for me?

10 Q. Well, is everything that you considered in-- as a
11 basis for your testimony here today, all of the facts,
12 all of the data, any other bases for your opinion, is
13 all of that contained and disclosed in Exhibit 863?

14 A. I would say that I also draw on my personal
15 experience and my 25 years in the-- in the field.

16 Q. Okay. Anything else?

17 A. No, I don't believe so.

18 Q. Okay. And, for example, you don't have any
19 footnotes in your executive summary, the two-page memo.
20 Right?

21 A. No.

22 Q. Okay. And you don't cite any research in either
23 the two-page summary or anywhere else in Exhibit 863.
24 Right?

25 A. I mean, it is all about the research.

1 Q. Sorry. You don't cite any academic research
2 about survey design or survey methodology anywhere in
3 Exhibit 863. Correct?

4 A. Correct.

5 Q. Okay. Your opinion-- or excuse me, your
6 testimony in this case is based entirely on the results
7 of your 500-person survey. Right?

8 A. And my experience, yes.

9 Q. And you've provided the survey questionnaire.
10 Right?

11 A. Yes.

12 Q. Okay. And a person-by-person chart of the
13 responses to the questionnaire? I don't think that's in
14 Exhibit 863--

15 A. Yes.

16 Q. -- but you produced the chart?

17 A. Yes.

18 Q. And back at the time of your deposition, you
19 weren't familiar with the American Association of Public
20 Opinion Research. Right?

21 A. No, I-- I don't think I said I wasn't familiar
22 with the organization.

23 Q. You didn't know whether you're-- at that time,
24 back at the time you did the survey in May of 2016 and
25 testified about it in June of 2016, you didn't know

1 whether the survey complied or didn't comply with the
2 Code of Ethics of the American Association of Public
3 Opinion Research. Right?

4 A. Correct.

5 Q. Okay. And, for example, you didn't report the
6 response rate in your survey. Correct?

7 A. Correct.

8 Q. Okay. And you don't know what the response rate
9 was. Right?

10 A. I-- I don't have that at my ready.

11 Q. And you think that an ideal response rate is
12 100 percent in a telephone survey?

13 A. Never attainable, but yes.

14 Q. And you understand in the real world it's
15 substantially less than that because lots of people say
16 you're interrupting my dinner, or I don't want to talk
17 to you, or for some other reason don't participate in
18 the survey. Right?

19 A. Correct.

20 Q. And you didn't-- you didn't report that and you
21 don't know today what that response rate is. Correct?

22 A. Correct.

23 Q. And now, you understand that the Court ruled
24 prior to trial that you couldn't testify as a fact
25 witness but you might be permitted to testify as an

1 expert. Right?

2 A. Yes.

3 Q. And since the time of that ruling, you didn't
4 supplement your two-page summary. Right?

5 A. Correct.

6 Q. And you didn't-- and you didn't prepare a report
7 in compliance with the expert witness disclosures of
8 Rule 26. Right?

9 MS. BECKER: Objection, calls for a legal
10 conclusion.

11 THE COURT: Overruled. Answer it if you
12 can, if you know.

13 A. Correct.

14 Q. (BY MR. STEINER) And we haven't discussed this
15 since your deposition, but now that you're here seeking
16 to testify as an expert, have you either requested or
17 been promised or been paid anything other than the
18 original \$9,000?

19 A. We have-- we have discussed an hourly
20 compensation rate, yes.

21 Q. And how much is that?

22 A. I believe \$100 an hour for research and \$150 for
23 testimony.

24 Q. And when was it that the-- and this is being paid
25 by the Secretary's office?

1 A. I believe so.

2 Q. And when was it that the Secretary's office
3 agreed to pay you additional compensation to come and
4 testify today?

5 A. Two weeks ago.

6 Q. Okay. And was that in a written exchange?

7 A. I believe there's some e-mail traffic.

8 Q. And you didn't disclose either before you took
9 the stand this morning or in your direct testimony that
10 you had been promised additional compensation beyond the
11 \$9,000 that you testified in response to Ms. Becker's
12 questions. Right?

13 A. Correct.

14 Q. Now, I want to focus on your qualifications. You
15 don't have an advanced degree, correct, sir?

16 A. Correct.

17 Q. You have a bachelor's degree in political
18 science. Right?

19 A. Yes.

20 Q. And you started a master's program at American
21 University?

22 A. Yes.

23 Q. Okay. And that was also in the political science
24 or international politics fields?

25 A. Yes.

1 Q. Okay. And you didn't finish that?

2 A. Correct.

3 Q. Okay. It's something that your wife doesn't let
4 you hear the end of. Right?

5 A. Or my children.

6 Q. And in your studies you took two statistics
7 courses. Right?

8 A. At least, yes.

9 Q. You took one statistics course as an
10 undergraduate. Right?

11 A. Yes.

12 Q. Okay. And you took one statistics course during
13 the time that you were a master's student. Right?

14 A. Yes.

15 Q. All right. And now you say "at least," but at
16 the time of your deposition those were the only two,
17 right, sir?

18 A. There were two that were exclusively on
19 statistics. There were other classes that-- that had
20 social science research in there as well.

21 Q. So you took methods of social science research as
22 an undergraduate student. Right?

23 A. Yes.

24 Q. Okay. And you can't remember the name of the
25 graduate statistics course you took. Right?

1 A. Correct.

2 Q. But it was one graduate statistics course.

3 Right?

4 A. Yes.

5 Q. Okay. And now, you mentioned that-- and you've
6 never taught at a college or graduate level program,
7 correct, sir?

8 A. Correct.

9 Q. And in response to Ms. Becker's questions, you
10 said you've been invited to speak to college classes.
11 Right?

12 A. Correct.

13 Q. Okay. And that was once a semester or so, a
14 professor would ask you to come in and talk about your
15 polling. Correct?

16 A. Correct.

17 Q. Okay. Political science classes?

18 A. Generally, yes.

19 Q. And-- and so, for example, you've heard the
20 team-- the term in statistics the T statistic, right,
21 sir?

22 A. I've heard the term, yes.

23 Q. Right. But you don't know what that common
24 statistics term means. Right?

25 A. Correct.

1 Q. Okay. And you don't know how to calculate the T
2 statistic. Right?

3 A. Correct.

4 Q. And you don't calculate or report a T statistic
5 in your surveys or polls. Correct?

6 A. Correct.

7 Q. You're also not really familiar with the American
8 Community Survey that's part of data that's put out by
9 the Census Bureau. Right?

10 A. I am familiar with Census Bureau data, yes.

11 Q. But not the American Community Survey?

12 A. Correct.

13 Q. And you understand that most professionals use
14 weighting to adjust their samples to match the
15 characteristics of a population, right, sir?

16 A. I believe many do. I'm not certain if I can
17 categorize it as most, it very well could be, but...

18 Q. That's the prevalent form of adjusting a sample--

19 A. Yes.

20 Q. -- to match the population?

21 A. Yes.

22 Q. Okay. And that's what's prevalent among
23 statisticians and people who focus on survey
24 methodology. Right?

25 A. Correct.

1 Q. Okay. And you use a different system than-- than
2 what's generally-accepted by others in the field.

3 Right?

4 A. I don't know that I'd go with your
5 "generally-accepted" but we are-- we are not the norm,
6 that's correct.

7 Q. Right. Because most people in the field use
8 weighting. Right?

9 A. Correct.

10 Q. And you use the quota system?

11 A. Yes.

12 Q. Right?

13 A. Correct.

14 Q. And again, you didn't cite any academic
15 literature to support the use of a quota system rather
16 than weighting. Right?

17 A. Correct.

18 Q. And you're not aware of academic literature that
19 rejects quota systems and-- and discredited that, you
20 know, half a decade ago-- half a century ago. Right?

21 A. Can you say that again, please?

22 Q. You're not aware of the academic literature that,
23 you know, 50 or 60 years ago discredited quota systems
24 in favor of weighting systems. Right?

25 A. I'm sorry, one more time.

1 Q. You're-- you're generally not familiar with the
2 academic literature in the field of survey methodology
3 and research. Right? You focus on the real world, not
4 on academics. Right?

5 A. Correct.

6 Q. Okay. So you're not familiar with the literature
7 that's out there that rejected quota systems. Right?

8 A. I have seen some of that. I think it depends on
9 your definition of "familiar."

10 Q. So you're familiar that there's academic
11 literature out there that rejected quota systems?

12 A. Correct. And my understanding is most of that
13 is-- is before the prevalence of land lines and
14 universal telephone coverage.

15 Q. And you're aware that most people use weighting.
16 Right?

17 A. Yes.

18 Q. And now on top of not citing any authority for
19 your work, you didn't save all of the data that you
20 considered, right, sir?

21 A. Excuse me?

22 Q. You didn't save all of the data that you
23 considered in preparing your summaries, right, sir?

24 A. I'm sure you're going somewhere here with this,
25 but I'm not certain-- I mean, I've got the-- we showed

1 you the responses here and we have--

2 Q. Okay. For example, in preparing your summary,
3 you calculated the voter registration rate in Kansas.
4 Right?

5 A. Correct.

6 Q. Okay. And you did that to compare that rate to
7 what you were told in the survey. Right?

8 A. Excuse me?

9 Q. You calculated that rate, the 83 percent rate
10 that you report in your summary, you calculated that to
11 compare the rate that people told you they were
12 registered to vote to your view of what the voter
13 registration rate in Kansas was, right, sir?

14 A. Yeah. We-- what I did as I think I explained
15 earlier is we-- we took the census data for the number
16 of people living in Kansas. I then found the number of
17 registered voters in Kansas, what that list was, and
18 then did the math. And if you took the number of
19 registered voters in Kansas and the adult population in
20 Kansas, you came to 83 percent, yes.

21 Q. Right. So you went to the Secretary's website
22 and took the number of registered voters in Kansas.
23 Right?

24 A. Right.

25 Q. At whatever time you prepared your survey--

1 A. Correct.

2 Q. -- or your summary and you divided that by the
3 adult population of Kansas that you took from the Census
4 Bureau data. Right?

5 A. Correct.

6 Q. But didn't save either of the two numbers that
7 you used to present that 83 percent calculation.
8 Correct?

9 A. I don't have it with me today, no.

10 Q. And you didn't-- you didn't have it with you at
11 your deposition and you didn't retain it from the time
12 you did the calculation until the time you-- until the
13 time you testified at your deposition or here today.
14 Right?

15 A. Correct.

16 Q. Okay. And now, you testified you used a quota
17 system to match the demographics of the survey to the
18 demographics of Kansas as a whole. Right?

19 A. Yes.

20 Q. And you tried to control for sex, age, and
21 geography. Right?

22 A. Correct.

23 Q. And you don't know how many people were-- strike
24 that.

25 With respect to age, that was the first question

1 you asked. Right?

2 A. Correct.

3 Q. And sex was something you determined by the
4 person who was asking the questions listening to the
5 voice and observing whether it was likely to be a man or
6 a woman. Right?

7 A. Correct. And in a few instances, though, they
8 have some hints to ask to verify that, yes.

9 Q. And geography, though, you don't ask-- and you
10 do-- you ask those questions at the beginning or make
11 those observations at the beginning to know whether you
12 have too many men or women or too many people of a
13 particular age group. Right?

14 A. Correct.

15 Q. And you also try to control for geography using
16 the quota system. Right?

17 A. Correct.

18 Q. Okay. But for that you didn't ask the county of
19 residence until the very end of your survey. Right?

20 A. Correct.

21 Q. Okay. Now, you don't know how many people were
22 excluded by the quota system you used. Right?

23 A. You--

24 Q. Sir, you didn't keep records when you called
25 someone up. Right? You have 500 people in your survey.

1 Right?

2 A. Correct.

3 Q. But you called many more than 500 people. Right?

4 A. Yes.

5 Q. Okay. Because some people said, I don't want to
6 participate in the survey. Right?

7 A. Correct. I-- what I would-- what I would clarify
8 here is that I-- I don't know which people were
9 excluded, I do know which phone numbers were.

10 Q. Okay. If you can stick to my questions, it will
11 go a little bit faster and Ms. Becker can ask you
12 anything she wants on redirect. But you know some
13 people refused to participate. Right?

14 A. Correct.

15 Q. And you didn't keep track of what percentage
16 refused to participate, how many numbers you called and
17 were told, sorry, we don't want to participate today or
18 we don't have time or whatever other excuse. Right?

19 A. I-- I don't have that here with me, correct.

20 Q. And then some people you called and when they
21 gave a particular age group and you listened to the
22 voice and heard that it was either a man or a woman, you
23 said, oh, we don't need another man or another woman or
24 we don't need another person in that age group, so we're
25 terminating the survey. Right?

1 A. That's not precisely how it occurs but, in
2 essence, yes.

3 Q. Okay. And so those people don't count in the 500
4 either. Right?

5 A. Correct.

6 Q. Okay. And you didn't keep track of how many
7 people were excluded and what groups they fell into.
8 Right?

9 A. I don't have that data here, correct.

10 Q. And you didn't try to have income levels be
11 representative of the population of Kansas as a whole.
12 Right?

13 A. That was not in our quota model.

14 Q. Okay. And I take it, sir, that you're not
15 familiar with the literature that says-- you know,
16 that's concluded that possession of various types of
17 documentation tends to be correlated with different
18 levels of income?

19 A. No.

20 Q. Okay. Because if you were-- if you were aware of
21 that, it's something you would've tried to control for.
22 Right?

23 A. Excuse me?

24 Q. If you were aware that lower income people tended
25 to have a lower possession of key documentation like

1 birth certificates than higher income people, that's
2 something that you would've tried to control for.
3 Right?

4 A. No. The control I have was for the response. It
5 would've been what I would've done on the response rate.
6 And with the prevalence of cell phones and others, we
7 haven't seen that disconnect with income.

8 Q. So if you could assume for me, sir, that someone
9 living in poverty is less likely to possess their birth
10 certificate than someone who makes more than \$100,000 a
11 year, can you make that assumption for me?

12 A. Again, as someone doing data, I try not to make
13 assumptions such as that.

14 Q. Okay. Well, you're here as an expert you
15 understand, and you understand that experts can testify
16 based on assumptions and give their opinions based on
17 that. Right?

18 A. As a pollster, I'm trained not to make those
19 assumptions.

20 Q. Okay. So it's something you're not comfortable
21 doing is to take that assumption and give testimony
22 based on it?

23 A. Correct. As a pollster, I would not assume that.
24 I mean, I would review data if it were available to me,
25 but I would not assume that.

1 Q. But you would agree with me that to have accurate
2 survey results, you would want income to be reflective
3 of the income stratification of the overall population
4 of Kansas. Right?

5 A. Ideally, yes.

6 Q. Okay. But you didn't ask questions to test for
7 that, right, you just asked the one under 50 or over 50
8 question. Right?

9 A. Correct.

10 Q. And you didn't do any further income breakdown?

11 A. Correct.

12 Q. And you didn't try to control for the percentage
13 of people living below the poverty line. Right?

14 A. Correct.

15 Q. Okay. And even the limited income data that you
16 did collect you didn't use to try to make sure that your
17 sample data matched the characteristics on the over 50
18 and under 50 of Kansas as a whole. Right?

19 A. No, I-- I did not try to.

20 Q. Okay. And, in fact, it doesn't. Right?

21 A. I would-- I would disagree with that I believe.

22 Q. Well, your survey showed that 39 percent of
23 people in Kansas have household incomes of less than
24 \$50,000 a year. Right?

25 And if you need help, it's exhibit-- Stephen,

1 it's Exhibit 863 on Page 7.

2 A. Yeah, what I would-- I would say that there are a
3 couple of things there. I would say that this is
4 39 percent of adults, legal Kansas residents. And that
5 would be out of that 90, so that would be-- you'd have
6 that 10 percent refused as well, so it's not an even--
7 so it would be a higher percentage out of that number.

8 Q. Yeah. The percent of refused, you don't know
9 whether they're above 90 or--

10 A. Correct. There's no way to--

11 Q. I'm sorry, above 50 or over [sic] 50. Right?

12 A. There's no reason to-- to presume them to break
13 any differently than the rest.

14 Q. Right. So you-- so your belief, having conducted
15 the survey, was that 39 percent were in households with
16 incomes under 50,000 and 51 percent were in households
17 over 50,000. Right?

18 A. With 10 percent refusing, yes.

19 Q. Right. And by the way, the numbers there only
20 add up to 493 out of your 500 even though I think-- I
21 added up the rest of your charts and I think the rest
22 all add up to 500. You can't explain why it's 493
23 rather than 500. Right?

24 Right? If you take the 192 people that were
25 under 50,000, the 251 people that are over 50,000 and

1 the 50 people who refused, you know, my math in my head
2 at least is that that's 493.

3 A. Let me-- just a moment. Let me review here.

4 Q. Sure.

5 A. No, that is 493 there it looks like.

6 Q. Right. And you don't disclose anywhere in your
7 report what happened to those other seven people.
8 Right?

9 A. Not that I see here.

10 Q. Okay. And you come up with 39 percent as being
11 under 50,000. Right?

12 A. Yes.

13 Q. Okay. And are you aware that the-- and at this
14 time in 2016 when you did your questioning, the most
15 recent census data that would be available would be for
16 the year 2014. Right?

17 A. That's my understanding, yes.

18 Q. Right. And you didn't bother to go look at the
19 census to see what percentage of people in Kansas were
20 under 50,000 versus over 50,000. Right?

21 MS. BECKER: Objection, that's just
22 argumentative language.

23 THE COURT: Overruled. Answer the question.

24 A. In this particular instance, no.

25 Q. (BY MR. STEINER) Okay. Would it surprise you to

1 know that roughly-- or I think it's slightly over
2 48 percent of Kansans for that most recent census data
3 were in households with incomes under \$50,000 a year?

4 MS. BECKER: Objection, assumes facts not in
5 evidence.

6 THE COURT: Are you relying on some census
7 data?

8 MR. STEINER: I'm first asking him and then
9 I'll present it to him if he doesn't know.

10 THE COURT: All right. Proceed.

11 A. That would not surprise me, especially if that is
12 all Kansans, not legal residents and not adults, because
13 then it would be very in line with what our study shows
14 once you factor those out.

15 Q. (BY MR. STEINER) So it's your testimony that if
16 you took out people who were surveyed by the census and
17 answered-- who were under 18 and answered that their
18 household income was under \$50,000, that that would--
19 that people-- that people under 18 misreported, is that
20 the concept?

21 A. No, no, no. I don't think it's misreported. I'm
22 just saying that if you're talking about-- you're
23 comparing a little bit of apples-to-oranges here if
24 you're talking about adults versus children. And again,
25 I haven't seen the data you're talking about.

1 MR. STEINER: May I approach, Your Honor?

2 THE COURT: Yes.

3 Q. (BY MR. STEINER) Let me give you a printout of
4 the 2010 to 2014 American Community Survey five-year
5 estimates of income for Kansas. It's been marked as
6 Defendant's 155 for identification now.

7 MS. BECKER: Plaintiffs'.

8 MR. STEINER: I'm sorry, Plaintiffs' 155.

9 Q. (BY MR. STEINER) And, sir, when you use census
10 data, you typically use the five-year estimates. Right?

11 A. Actually I-- I generally go back to the actual--
12 the last official census, because it has more data about
13 individuals, which is what I generally look for.

14 Q. So you would go all the way back to 2010?

15 A. Correct.

16 Q. All right. That's not-- you understand that most
17 people in the field would use the five-year data.
18 Right?

19 A. Yeah, I don't--

20 Q. You don't know?

21 A. I don't know that.

22 Q. Okay. And that if people didn't use the
23 five-year data, they would use the point estimates of
24 one-year data in the most recent American Community
25 Survey estimates. Right?

1 A. If it has individuals, it would be something I
2 would consider, yes.

3 Q. So would you prefer the one-year data to the
4 five-year data?

5 A. No, I would prefer data that had individuals as
6 opposed to households.

7 Q. Well, your question was household income, right,
8 sir? Can we put up Exhibit 863?

9 A. Correct.

10 Q. Right. So you would want to-- so you prefer
11 individual income and yet you asked people in your
12 survey about their household income. Right?

13 A. Yes. I'm asking about their household income,
14 which kind of household they live in. But I-- I see
15 nothing here that tells me if there's a household side
16 variance between someone that makes less than 10,000 and
17 200,000 or more.

18 Q. What was that?

19 A. I see nothing in this data you're giving me that
20 shows that-- that explains that there's a-- a household
21 size variance between lower income or upper income
22 houses.

23 Q. Okay. Well, your question, sir, if you look at
24 your survey instrument, which is in Exhibit 863 and it's
25 Question 19, is not: Is your individual income over or

1 under \$50,000 a year? It's: Is your household income
2 over or under \$50,000 a year? Right, sir?

3 A. Yes.

4 Q. Okay. And 39 percent are under 50,000. Right?

5 A. Yes. 39 percent of individual-- adult individual
6 Kansans are living in a household making less than
7 50,000 a year.

8 Q. Right. And you understand-- are you familiar
9 enough with the census data in the form of Exhibit 155
10 to be able to be comfortable using that in your
11 testimony?

12 A. Yes.

13 Q. Okay. And so you understand that the household
14 question in that data is the percentage of households.
15 Of the estimated 1.1 million households in Kansas during
16 that time period, what percentage of those households
17 had household income in the various income
18 classifications. Right?

19 A. Yes.

20 Q. Okay. And if you add up all of the ones that are
21 from less than 10,000 up to 49,999, I believe the number
22 is 48.1 percent. Right?

23 A. I will take that you've done the math.

24 Q. And if-- if your survey showed 39 percent of
25 households had household income of less than \$50,000 a

1 year but the census data showed 48 percent or
2 48.1 percent of households had income of less than
3 \$50,000 a year, your sample would not be representative
4 of Kansas as a whole. Correct?

5 A. No. Again, my survey does ask household income,
6 but it is 39 percent of the individuals living in
7 households. And those are two different numbers.

8 Q. Okay. And you didn't impose any sort of quota or
9 make any adjustments to your survey to try and account
10 for the discrepancy in income. Right?

11 A. Correct. I do not believe there's a discrepancy
12 in income.

13 Q. And with respect to educational attainment, you
14 didn't even ask the question about the respondent's
15 level of education. Right?

16 A. Correct.

17 Q. Okay. Now, sir, you would agree with me that
18 it's important when you're making calls to be able to
19 get a representative sample that you call all seven days
20 a week. Right?

21 A. I would say that there are no days that I would
22 exclude calling on, correct.

23 Q. And you would agree with me that Sunday is a
24 particularly important day to include in a survey.
25 Right?

1 A. It is a-- a very high response day, yes.

2 Q. Right. Because people are-- people who work for
3 a living tend to be home--

4 A. You're correct.

5 Q. -- right? And yet your survey that you did
6 here-- and that's particularly true with respect to
7 lower income households who-- who tend to be wage
8 earners, whether it's one parent households or whether
9 it's two incomes, you have two parents that both work.
10 Right?

11 A. I don't know that I'd make that assumption. They
12 might be more likely to work weekend jobs as far as I
13 know. So, you know, we don't make assumptions.

14 Q. But regardless, you-- you agree that to have a
15 representative sample, Sunday is a really important day.
16 Right?

17 A. I would say that I would not purposely exclude a
18 Sunday. Sunday is a high response rate day, yes.

19 Q. Okay. It's actually one of the best days to call
20 to get a representative sample. Right?

21 A. It is a very good response rate day, yes.

22 Q. Okay. And-- and that is important to have a
23 representative sample. Correct?

24 A. Having a high response rate or a cooperation
25 rate, yes, is.

1 Q. And that happens when you call on Sundays.

2 Right?

3 A. It can happen on other days as well.

4 Q. All right. And here you didn't include Sunday,
5 right, you started your survey on Monday?

6 A. Correct.

7 Q. Okay. And you sampled 500 people. Right?

8 A. Correct.

9 Q. And that's essentially the range of doing a--
10 within the range of doing a statewide survey. Right?

11 A. Correct.

12 Q. Okay. Now, you would agree with me that if what
13 you wanted to measure was whether the documentary
14 proof-of-citizenship law hampered voter registration,
15 you would-- you would want to question people who were
16 not already registered. Correct?

17 A. If the goal was to understand those who were not
18 registered to vote, yes.

19 Q. So if you-- Stephen, could we put up Exhibit 863,
20 the first page again. And if we can blow up the
21 paragraph below the line that's across the page. Right?

22 Now you say in the last sentence of this
23 paragraph, "Control for gender, age and geographic
24 region in order to replicate the U.S. Census
25 information, this study reveals requiring proof of

1 citizenship in order to register is not - underlined - a
2 concern for residents and is - again underlined - not
3 hampering voter registration." Right?

4 A. Correct.

5 Q. Okay. And if you wanted to draw that conclusion
6 about whether the law was hampering voter registration,
7 you would want to look at its effect on people who are
8 not registered as opposed to those who previously were
9 registered and aren't subject to the law. Right?

10 A. Okay.

11 Q. Okay. You agree with that. Right?

12 A. Yes.

13 Q. Okay. And you would agree that to do that you
14 would want a sample of at least 300 people. Right?

15 A. If that was the exclusive goal, yes.

16 Q. Okay. If that's-- if that's what you were trying
17 to draw the conclusion that you wrote in your report to
18 this Court, that voter registration is not hampering--
19 I'm sorry, that the documentary proof-of-citizenship law
20 is not hampering voter registration before you gave that
21 as your opinion to this Court, you would want that to
22 be-- you would want to test on people who were not
23 registered as opposed to those who were registered,
24 right, sir?

25 A. No, I actually think that that study-- that that

1 statement is really justified by the people who have
2 registered to vote already.

3 Q. Okay. Well, you understand that anyone who
4 registered before the law took effect, they were
5 grandfathered. Right?

6 A. So it's not hampering them. Correct?

7 Q. Right. So you're saying, well, people-- the law
8 is not hampering the overall population because
9 80 percent of the population is already registered
10 before the law took effect and it doesn't have any
11 effect on that 80 percent of the population. Right?
12 That's essentially what you're saying in that sentence?

13 A. I think that is a part of this, yes.

14 Q. Okay. And as to the other 20 percent or
15 25 percent or 40 percent of the population that's not
16 yet registered to vote, in order to testify to this
17 Court whether the documentary proof-of-citizenship law
18 hampers registration among that segment of the
19 population, you would want your study to look at that
20 segment of the population. Right?

21 A. We have 65 cases in that-- in that realm.

22 Q. Right. And-- but if that's what you were drawing
23 conclusions on to present to this Court, you would want
24 ideally 500 but at least 300 people, right, sir?

25 A. I'm not certain I'm following exactly what you're

1 asking here.

2 Q. Okay. If you wanted to tell the Court that
3 documentary proof of citizenship doesn't hamper
4 registration among citizens of the state who are
5 eligible citizens of the state who are not already
6 registered to vote, you would want your sample to be of
7 people who are not registered to vote and eligible to
8 vote. Right?

9 A. If that were the sole purpose, yes.

10 Q. Okay. If it were any purpose that you were going
11 to give your opinion to this Court, that's what you
12 would want it based on. Right?

13 A. No. I-- the survey I've conducted here is about
14 all Kansas residents, not just those not registered to
15 vote.

16 Q. Right. So you can't tell this Court anything
17 about the impact of the voter registration law on people
18 who are not already registered to vote in Kansas.
19 Right?

20 A. No. I mean, I have a cell size of 65 to do that.
21 It's not what I would prefer if that were my sole
22 purpose, but it's still reliable and--

23 Q. Right. You would prefer 500 but at least 300.
24 Right?

25 A. If that were the sole purpose, yes.

1 Q. And you could also do it as an oversample, right,
2 that's something that you're familiar with?

3 A. Correct.

4 Q. Okay. And you didn't do an oversample because
5 you thought it would be more than the \$9,000 budget that
6 you had. Right?

7 A. Correct.

8 Q. Okay. And-- and that's to get to a margin of
9 error down in the 3 percent range. Right?

10 A. For?

11 Q. Having a 300 or 500-person sample.

12 A. Yeah, a 500 sample would be around 4 percent,
13 yes.

14 Q. Okay. And a 65-person sample is more like a
15 little over 12 percent. Right?

16 A. On a 50/50 question proposition, yes.

17 Q. Okay. And that's what you base-- so that
18 12 percent margin of error is what you based your-- your
19 testimony on in this case?

20 A. Yeah, I-- I think the numbers are-- are
21 overwhelming. I'm not sure the margin of error on those
22 individual questions would be that high.

23 Q. Well, in your deposition you testified to
24 12 percent. Right?

25 A. For a 50/50 proposition, yes.

1 Q. And you don't want to change that?

2 A. Correct.

3 Q. And now, even though you didn't test for
4 education and you didn't use the income data that you
5 collected, you used the percent of registered voters as
6 your basis for concluding that the survey accurately
7 reflects U.S. Census data. Right?

8 A. I-- I would say that I actually used the-- the
9 gender, age and geography. And then after doing the
10 study, it was not part of the original model, the other
11 information there with the-- the data.

12 Q. All right. So let's look at your executive
13 summary, if we can go back to Page 863 and the bottom
14 bullet before the line.

15 What you wrote in the report that you've asked
16 the Court to take into evidence is that, "This survey
17 accurately reflects U.S. Census data in that 83 percent
18 are registered voters, the same percentage you achieve
19 if you take the current number of registered voters in
20 the state and the last census estimate of those living
21 in the state." That's what you wrote to the Court.
22 Right?

23 A. Correct.

24 Q. Okay. And you've asked the Court to accept that
25 as your honestly-held opinion. Correct?

1 A. Yes.

2 Q. Okay. You don't want to change that opinion--

3 A. Correct.

4 Q. -- right now. Right? Okay. Now, and-- and so
5 that's part of what you were telling the Court and
6 anyone else who read your report, that they should take
7 comfort that your sample reflected the overall
8 demographics of the state of Kansas because the same 83
9 percent of people who told you they were registered to
10 vote is the same percentage that you get by looking at
11 the percentage of registered voters as you've calculated
12 it. Right?

13 A. Yes, I would say. And this is one instance where
14 it reflects the U.S. data.

15 Q. Now, are you familiar with Doctor Steven
16 Camarota?

17 A. No.

18 Q. Okay. You don't know that he's one of
19 Secretary Kobach's other experts in the case?

20 A. No.

21 Q. Okay. So I'd like to show you one of the charts
22 that Doctor Camarota presented to the Court in his
23 testimony. If we can go to Exhibit 1140 and Page 10 is
24 Figure 1. It's on the screen in front of you. Okay?

25 And do you see that Doctor Camarota calculated

1 the voter registration rate in Kansas and presented that
2 data to the Court. Do you see that?

3 A. Yes.

4 Q. Okay. And I'll represent to you that that's data
5 that the Secretary presented to the Court as the voter
6 registration rate in Kansas. Okay? And you see that
7 Doctor Camarota found that about 68 percent of Kansans,
8 eligible Kansans, were registered to vote. Right?

9 A. Okay.

10 Q. Okay. And he did that by using the 2010 and 2014
11 Current Population Survey from the Census Bureau.
12 Right?

13 A. Okay.

14 Q. Okay. And so that rate is about 15 percent less
15 than the rate that you calculated. Right?

16 A. Correct.

17 Q. Okay. And that's 15 percentage points lower than
18 what the respondents to your survey told you about their
19 voter registration. Right?

20 A. Correct.

21 Q. Okay. And if you assume that Doctor Camarota's
22 testimony and calculations and figures are correct as to
23 the voter registration rate in Kansas, then your survey
24 is not representative of the population of Kansas as a
25 whole, correct, sir?

1 A. I-- I don't want to assume. One of the things
2 that stands out is this Figure 1, all ages. I'm not
3 certain what that definition is, because mine would not
4 include those under 18.

5 Q. Okay. Well, if you assume that Doctor Camarota,
6 who does have a Ph.D., properly calculated this figure,
7 if you assume that, then you agree that your sample is
8 not representative of the state as a whole as it comes
9 to voter registration, right, sir?

10 A. Again, I-- I get in the habit of trying not to
11 assume things--

12 MR. STEINER: No further questions.

13 A. -- but I do acknowledge a difference.

14 THE COURT: Mr. Johnson.

15 MR. JOHNSON: Your Honor, I may take more
16 than-- I'm going to take 30 minutes plus.

17 THE COURT: Okay. So this is a good time
18 for a lunch break, it's 12:15. Let's reconvene at 1:30.

19 MR. JOHNSON: And, Your Honor, if I may
20 remind the witness not to confer with counsel.

21 THE COURT: That's correct. Mr. McFerron,
22 because you're on cross examination you shouldn't talk
23 about the substance of your testimony over the lunch
24 break with-- with Mr. Kobach's team. Understood?

25 THE WITNESS: Yep.

1 THE COURT: Okay. All right. We'll be in
2 recess until 1:30.

3 (Recess).

4 (12:14 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 112 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED March 26, 2018.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR