THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY AND REPORTS OF PROFESSOR NERMEEN ARASTU, MR. JAY GAIRSON, AND MR. THOMAS RAGLAND

NOTE ON MOTION CALENDAR:
April 9, 2021

PUBLICLY FILED
REDACTED VERSION

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I. INTRODUCTION

Thomas Ragland, Jay Gairson, and Professor Nermeen Arastu are three of the nation's most experienced legal practitioners in immigration cases raising alleged national security concerns, including CARRP cases. For different reasons, they are uniquely positioned to explain how CARRP operates in practice and impacts applicants for immigration benefits, including how CARRP and non-CARRP cases are treated differently. Defendants seek to exclude their experience and opinions from this Court but offer no reason that satisfies the Daubert standard for exclusion. Indeed, all Defendants' challenges are areas for cross-examination and contrary trial evidence, not bases for exclusion. They go to the weight of the testimony, not its admissibility.

Contrary to Defendants' arguments, Mr. Ragland and Mr. Gairson are not offering conclusions based on "unsupported speculation." Nor are they offering improper legal conclusions. Their testimony provides analysis and opinions based on decades of experience working to resolve hundreds of CARRP (and non-CARRP) cases, USCIS admissions and information, and their review of CARRP policy and training documents. Defendants put forward no evidence of their own to show their analyses are wrong; they instead merely suggest they *could* be wrong. Similarly, Defendants attack Professor Arastu's testimony for not proving every possible negative while Defendants themselves offer only scant speculation that her analysis and conclusions could be incomplete. Here again, Defendants offer nothing to undermine her methodology or disprove her conclusions.

Most telling is what Defendants do not challenge: the three experts' qualifications as immigration-policy experts. All three experts fill pages in their reports with relevant experience as practitioners in national security-related immigration cases, qualified experts in other federal cases, scholarship on CARRP and related issues, and other relevant experience.

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II. ARGUMENT

A. Legal Standard

In the Ninth Circuit, Rule 702 "contemplates a *broad conception* of expert qualifications." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269 (9th Cir.1994) (emphasis added). In cases like this one where a scientific background is not necessary, courts focus on the expert's experience. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). "In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony." Fed. R. Evid. 702 advisory committee's note; *see also Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (expert testimony is reliable "if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline").

Exclusion of expert testimony is disfavored, particularly in bench trials. "When the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) ("Daubert is meant to protect *juries* from being swayed by dubious scientific testimony."); *AngioScore, Inc. v. TriReme Med., Inc.*, 87 F. Supp. 3d 986, 1016 (N.D. Cal. 2015) (collecting cases). *See also Alaska Rent–A–Car, Inc. v. Avis Budget Grp., Inc.,* 738 F.3d 960, 969–70 (9th Cir. 2013) ("Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable."). "[T]here is less danger that a trial court will be unduly impressed by the expert's testimony or opinion in a bench trial." *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) (cleaned up).

It is well-established that the Daubert analysis must not supplant the typical adversarial process. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook,* 598 F.3d 558, 564 (9th Cir.2010). *See also Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1199 (9th Cir. 2014) ("issues regarding the correctness of [an expert's] opinion, as opposed to its relevancy and reliability, are a matter

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of weight, not admissibility"); Fed. R. Evid. 702 advisory committee's note ("rejection of expert testimony is the exception rather than the rule . . . and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'") (citations omitted); *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1017 n. 14 (9th Cir. 2004) ("The factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."). Disagreements between experts are not grounds for exclusion, but for cross examination. *See, e.g.*, *In re Roundup Prod. Liab. Litig.*, 390 F. Supp. 3d 1102, 1134 (N.D. Cal. 2018).

B. Mr. Ragland and Mr. Gairson's Testimony Should not be Excluded

Mr. Ragland and Mr. Gairson have practiced immigration law for decades. They are not just accomplished immigration lawyers. They are national experts in immigration cases raising national security issues, under CARRP and the statutory Terrorism Related Inadmissibility Grounds ("TRIG"). They have both served on numerous occasions as qualified experts in federal court, published articles on CARRP and TRIG, given CLEs on the subject, and represented hundreds of applicants subject to CARRP or TRIG. Gairson Report ¶¶3-16; Ragland Report ¶¶3-31. They are qualified through their vast experience to assist the Court in understanding how applications for immigration benefits are processed, both in "routine" cases and in cases subject to CARRP. *See, e.g.*, *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1043 (9th Cir. 2010) (expert's experience in the marketing and advertising industry allowed him to opine on industry practices); *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (expert's experience working for insurance companies qualified him to opine that defendants deviated from industry standards). That the experts are lawyers who have practiced under the immigration-law regime does not mean that they are offering "legal conclusions." Motion at 3. To the contrary, they simply offer their experience on immigration-benefits processing and are thus no different from standard industry experts. *Cf. First Union Nat. Bank v. Benham*, 423 F.3d 855, 862–63 (8th Cir. 2005) (district court abused its discretion in excluding attorney's testimony on standard practices in legal profession).

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1. Defendants Mischaracterize Mr. Ragland and Mr. Gairson's Testimony as Mere Legal Conclusions

Defendants assert that the "central point" of Mr. Ragland and Mr. Gairson's opinions is to convey legal conclusions about CARRP. Motion at 3. Not so. Both Mr. Ragland and Mr. Gairson put CARRP into context, in terms of how the program fits (or doesn't fit) within the complex immigration legal framework,[1] how applications are treated differently in CARRP compared to applications not subjected to CARRP, the implications of an application subjected to CARRP, and the program's detrimental impact on individual applicants. This critical insight and expertise is "beyond the common knowledge of the average layperson and is not misleading." *Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009).

For example, in his expert report, Mr. Ragland analyzes the differences (and similarities) between adjudicating an application under TRIG, the statutory national security-related grounds of inadmissibility established by Congress in the Immigration and Nationality Act ("INA"), versus CARRP, a secret vetting program invented by USCIS that was neither endorsed by Congress nor appears in the INA. Ragland Report ¶¶53-66. Mr. Ragland explains that if an application is denied because of TRIG, USCIS must notify the applicant that the denial was because of TRIG, disclose the facts supporting the denial under TRIG, and provide the applicant an opportunity to rebut that information before USCIS makes a final decision. *Id.* [redacted] Mr. Ragland's decades of experience add significant value to his analysis. Mr. Ragland explained in his report that, in his experience, the opportunity to respond to factual information serving as the basis for alleged inadmissibility under TRIG often dispels USCIS' security concerns, [redacted] *Id.* at 58-66. Mr. Gairson likewise explains in his report how CARRP applies an often insurmountable burden of proof to applicants, and leads to pretextual

[1] The INA has been recognized as "second only to the Internal Revenue Code in complexity." *Castro-O'Ryan v. U.S. Dept. of Immigr. and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quotation omitted); Baltazar-Alcazar v. INS, 386 F.3d 940, 948 (9th Cir. 2004) (same).

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denials not grounded in the statute. Gairson Report at ¶¶37, 204-209. [redacted] Both experts also opine on the limited options that applicants unknowingly subject to CARRP have to seek adjudication when their applications have been delayed by CARRP for years. Ragland Report ¶109; Gairson Report ¶36-38.

Far from usurping the Court's role as to the ultimate question of the legality and constitutionality of CARRP, Mr. Ragland and Mr. Gairson will aid the Court in understanding how CARRP departs from the statutory scheme and routine processing, the utility of providing notice to applicants to correct false assumptions, and the impact on and harm to applicants of prolonged delays and pretextual denials.

2. The Case Studies and Stories from Experience Add Needed Context

Defendants also mischaracterize the purpose of Mr. Ragland and Mr. Gairson providing CARRP case studies. Defendants contend that this evidence should come through fact witnesses and documents rather than as expert testimony. This criticism fails to appreciate the substance of the experts' reports, as they do not simply relay events that occurred to clients and other individuals. These examples were offered in their reports for two important reasons. First, they illustrate the basis for their opinions. Indeed, had Mr. Gairson and Mr. Ragland not provided concrete examples to support their opinions, Defendants likely would have sought to disqualify them for failing to provide the factual basis for their opinions. Second, they demonstrate the difference between cases that are subjected to CARRP and those that are not and show the real-world implications of CARRP on applicants.

For example, Mr. Gairson highlights one individual [redacted]

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[redacted]

Mr. Ragland similarly describes the case of [redacted] It is precisely this type of analysis that can aid the Court, providing insight into how applicants under CARRP are treated differently from other applicants, and the direct impact of such treatment.

Defendants also err in seeking to disqualify Mr. Gairson and Mr. Ragland based upon the fact that they are (or were) advocates for their individual clients with respect to their benefit applications. This case concerns the legality of the CARRP program, not the merits of their clients' individual benefit applications, and Defendants cite no case for the proposition that experts may not opine on the effects of a government program simply because they have clients who are affected by that program. Defendants cite *Highland Capital Management, L.P. v. Schneider*, 379 F. Supp. 2d 461, 468 (S.D.N.Y. 2005), but the proffered expert in that case had no personal knowledge or expertise and only rehashed the relevant facts in the case. The

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remaining cases Defendants cite are similarly inapposite.[2] While the Court can certainly consider the professional backgrounds of Mr. Ragland and Mr. Gairson in weighing their credibility and the strength of their testimony, their work on certain immigration cases does not provide a basis to disqualify them as experts.

3. Defendants' Argument that Mr. Ragland and Mr. Gairson's Testimony is Speculative is Fundamentally Flawed

Defendants baldly assert Mr. Ragland and Mr. Gairson base their opinions on "unconfirmed speculation" as to who was subject to CARRP and have "no basis" for estimating the number of CARRP cases they have handled.[3] Defendants are simply wrong that Mr. Ragland and Mr. Gairson have "no basis" for estimating the number of CARRP cases they have handled, just because USCIS refuses to disclose which applicants are subjected to CARRP. Motion 6. Mr. Ragland and Mr. Gairson explained that USCIS often confirms directly or indirectly that their clients are subject to CARRP. Gairson Report ¶ 11; Ragland Report ¶¶ 19-24. Indeed, Plaintiff Wagafe was revealed to be subject to CARRP through a FOIA request. Gairson Report ¶ 114. But even without these confirmations, as they explain, CARRP processing is so distinct from routine processing that, as experienced immigration attorneys, it is easy for them to identify a case subject to CARRP. Prior to this litigation, Mr. Ragland and Mr. Gairson were both knowledgeable about CARRP through publicly-available policy documents and training materials. For years, they have not only been able to apply the factors that lead USCIS to put someone in CARRP in their own cases, but they are well-aware of the tell-tale signs that an applicant's case is being processed in CARRP—signs that undeniably are part and parcel of the CARRP process and for which there can be no dispute. *See* Ragland Report 6-9 (citing to combination of factors, including unusual delays ¶20, de-scheduled interviews ¶21, FBI

[2] *See In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 543 (S.D.N.Y. 2004) (excluding opinions based on nothing more than "personal, subjective" views on whether defendants' conduct was "ethical"); *Stencel v. Fairchild Corp.*, 174 F. Supp.2d 1080, 1085-86 (C.D. Cal. 2001) (describing the difference between attorneys and witnesses).

[3] Indeed, Defendants offer no real expert to opine on, or undercut Mr. Ragland and Mr. Gairson's methodology. While they cite to Dr. Siskin, he fails to even attempt to look at any of the factors they cite other than delays. Dkt. 462 Ex. E at 55-57 (Siskin Report). Indeed, Defendants rely on their own attorney argument, but the proper place for such conjecture is not in a motion to exclude but rather on cross-examination.

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interviews of clients in their homes or workplaces ¶22, unusual questioning in the actual USCIS interview ¶23, unusual Notices of Denial or Intent to Deny based on clearly insignificant factors ¶24, past travel experiences falling under Secondary Security Screening" ¶26); Gairson Report ¶11 (identifies CARRP cases through FOIA work, analysis of procedural delays, encounters with external vetting agencies, and evaluation of the interviews and request for additional information). Defendants point to no evidence that these critical factors are not indicative of a CARRP case. Moreover, in preparing their reports, Mr. Gairson and Mr. Ragland also [redacted]

Notably, Defendants do not identify a *single* case that Mr. Gairson or Mr. Ragland highlight that was not in fact subjected to CARRP. This is particularly telling as Defendants are uniquely positioned to verify whether in fact the cases Mr. Gairson and Mr. Ragland cite involve applicants referred to CARRP. Moreover, Defendants themselves prevented Mr. Gairson and Mr. Ragland from officially confirming that their clients were subject to CARRP because Defendants' counsel expressed great alarm at the prospect of Plaintiffs' counsel sharing the class lists with their expert witnesses, even though the protective order permits experts to review the lists. Decl. of Heath Hyatt ¶7. Given Defendants' concerns, Plaintiffs did not show the class lists to these experts in preparing their reports. *Id*. Defendants' attempts now to exclude this expert testimony based on the very information Defendants themselves blocked them from obtaining is neither fair nor a proper basis to exclude expert testimony.

Finally, Defendants' argument that the supposed regional scope of their law practice is a flaw in their methodology is unavailing. Motion at 6. Neither have testified that their practices are geographically limited. Indeed, Mr. Ragland, who lives in Washington, D.C., currently represents individuals he has determined were subject to CARRP who are in Indiana. Ragland Report ¶88. And both experts consult with attorneys across the country who seek out their support. *See* Ragland Report Ex. A; Gairson Report ¶¶10-14. But, in any event, any regional

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focus is immaterial—CARRP is a national program that Defendants themselves tout as having "consistent" application across the agency. **Ex. E**, USCIS 30(b)(6) Dep. 31:2-18.

4. Mr. Gairson and Mr. Ragland's Basic Calculations are Not Grounds to Exclude Their Opinions

Finally, Defendants claim that Mr. Gairson and Mr. Ragland should be excluded entirely based on three paragraphs—of more than 400—of their reports where Defendants claim they conduct statistical analysis. Motion at 4-5. Defendants' arguments are misplaced. Neither conducted complex statistical analysis. Mr. Ragland conducted no statistical analysis at all. He simply [redacted] Defendants conveniently ignore that Mr. Ragland also describes how the statistics he reviewed are consistent with the testimony of Defendants' own witness, Mr. Daniel Renaud, who testified that [redacted] They mischaracterize the testimony of Plaintiffs' other expert Mr. Sean Kruskol as disagreeing with Mr. Ragland, [redacted] Moreover, Defendants' attempt to discredit Mr. Ragland's review of their statistics with self-serving testimony from their own expert witness, Mr. Siskin, is a matter for trial, but not a basis for *Daubert* exclusion. Motion at 5; *see In re Roundup Prod. Liab. Litig.*, 390 F. Supp. 3d at 1134 (disagreement between experts not grounds for exclusion). Mr. Gairson, for his part, used basic arithmetic and a (published) federal government study on personal network sizes to support his opinion that CARRP's "articulable link" framework sweeps far too broadly. Gairson Report ¶¶94-105. Mr. Siskin's disagreement with Mr. Gairson is similarly not a basis for *Daubert* exclusion. Motion at 5.

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5. Professor Nermeen Arastu's Expert Opinions are Admissible.

Although Defendants focus on just one element of Professor Arastu's expert report, they broadly seek to exclude her as an expert witness entirely. Motion at 9-12. Defendants' motion should be denied in its entirety, but at a minimum as to the aspects of Professor Arastu's report that Defendants do not even challenge.

Professor Arastu is a clinical law professor with years of experience representing applicants for immigration benefits, especially Muslim immigrants. Arastu Report ¶¶1-17. In her report, she observed, and heard from other immigration law practitioners, that clients who were Muslim or from Muslim majority countries faced longer delays on their immigration applications, and USCIS attempted to deny only those clients' applications on the basis that they had made false statements on their applications. *Id.* ¶19; Dep. at 149; 159-60. This was resulting in devastating situations for her clients and their communities. Arastu Report ¶¶92-120. Defendants do not challenge any of these observations. Understandably, Professor Arastu wanted to explore why this was happening, prompting her to conduct a study of district court naturalization cases that she published as a law review article. *Id.* ¶20; Dep. at 149-50.

Professor Arastu provides extensive analysis in support of her opinions that CARRP results in pretextual denials and unjustified delays, and that the secrecy surrounding CARRP interferes with an applicant's ability to get redress. Arastu Report ¶¶125-126. For instance, Professor Arastu opines that it is common, if not almost inevitable, for applicants to make mistakes in completing immigration forms. *Id.* ¶47. This has been confirmed by USCIS itself, which recognizes that mistakes are not just common, but frequent. *Id.* (citing testimony of USCIS officer that ten mistakes per application is "about average"). Professor Arastu also opines that how USCIS addresses such mistakes differs between applications subject to normal processing versus those subjected to CARRP. Standard USCIS policy is to judge such mistakes against "the standards of average citizens of the community in which the applicant resides." *Id.* ¶46 (quoting USCIS Policy Manual Volume 12). [redacted]

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[redacted] Defendants do not challenge these opinions.

The only thing Defendants do challenge is Professor Arastu's conclusion that a review of 158 federal court cases confirms her and others' experience that USCIS disproportionately uses the alleged provision of false testimony to pretextually deny applications of applicants who are Muslim or from Muslim-majority countries. Professor Arastu herself recognized limitations on this analysis, but those limitations effect only how much weight should be given the conclusions drawn from the research, and do not foreclose Professor Arastu testifying to the analysis that she undertook. But more fundamentally, this research was one basis, not the sole basis, for her opinions regarding the disproportionate impact of CARRP on the Muslim community.

Defendants' main criticism of Professor Arastu's analysis of the 158 cases is that it is not necessarily representative of every case where USCIS denied an application based on false testimony. But USCIS offers no evidence (which it would be uniquely positioned to offer) that any cases not captured by the sample would not have an equal disparity between Muslim and non-Muslim applicants. And, in fact, Professor Arastu identifies reasons why applicants who are denied on this basis are reluctant to appeal their case to a federal court, Arastu Report ¶¶105-06 (describing fear of retaliation or further unwanted scrutiny), and these reasons may be most pronounced in Muslim communities, *see id.* ¶118, so if anything, the sample may underrepresent the percentage of "false testimony" denials that are Muslim or from Muslim-majority countries.

Defendants complain that Professor Arastu does not know which of the 158 cases were subjected to CARRP. [redacted] Professor Arastu devotes at least seven pages to describing CARRP materials [redacted] a fact Defendants entirely ignore, claiming she provides "no basis" for her view [redacted] Absent there being another explanation for the increase in these "false testimony" denials, and Defendants provide no such explanation, it is fair

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for Professor Arastu to opine that the increase, and the disproportionate impact on the Muslim community, are both a result of CARRP.

Finally, Defendants argue that Professor Arastu does not know how many of the "false testimony" denials were pretextual. But this is a problem of USCIS's own making, as they refuse to disclose what applications are subjected to CARRP, and thus it is impossible for Professor Arastu or any other researcher to know every time that an application is put under CARRP scrutiny and into a regime where a UCSIS officer is told to find a basis other than the national security concern to deny the application. These denials are pretextual if they would not have happened but for CARRP. To fault an expert from not being able to testify to facts that defendants hide from them is neither fair nor a basis for denying the expert the opportunity to testify to what they have discerned and the logical inferences that can be drawn from the same.

III. CONCLUSION

For the reasons set forth above, the Court should deny Defendants' Motion to Exclude Mr. Gairson, Mr. Ragland, and Professor Arastu.

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Respectfully submitted,

DATED: March 25, 2021

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