

The Honorable Richard A. Jones

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IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of  
*himself and other similarly situated,*

Plaintiffs,

v.

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

Defendants.

CASE NO. 2:17-cv-00094-RAJ

**DEFENDANTS' REPLY TO  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
EXCLUDE TESTIMONY AND  
REPORTS OF PLAINTIFFS'  
EXPERTS DR. NERMEEN  
ARASTU, MR. JAY GAIRSON, AND  
MR. THOMAS RAGLAND**

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO EXCLUDE TESTIMONY AND  
REPORTS OF PLAINTIFFS' EXPERTS DR. NERMEEN ARASTU,  
MR. JAY GAIRSON, AND MR. THOMAS RAGLAND  
(Case No. C17-00094RAJ)

UNITED STATES DEPARTMENT OF JUSTICE  
CIVIL DIVISION, OFFICE OF IMMIGRATION LITIGATION  
Ben Franklin Station, P.O. Box 878  
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1 **INTRODUCTION**

2 Plaintiffs fail to show that their experts, Dr. Nermeen Arastu, Mr. Thomas Ragland, and Mr.  
3 Jay Gairson, are qualified to offer expert testimony in this case pursuant to Federal Rule of Evidence  
4 702, and the principles of *Daubert v. Merrell Down Pharms., Inc.*, 509 U.S. 579, 597 (1993). The  
5 Court should thus grant Defendants’ motion to exclude the testimony and reports of Dr. Arastu, Mr.  
6 Ragland, and Mr. Gairson.

7 **ARGUMENT**

8 **I. The legal conclusions of Plaintiffs’ experts should be excluded**

9 The central point of the Arastu, Ragland, and Gairson reports is to opine on the legality and  
10 constitutionality of CARRP under the mantle of “expertise.” *See, e.g.*, Dkt. No. 480 Sealed Ex. A at  
11 36-37 ¶¶121-126; Sealed Ex. B at 9-13 ¶¶33-41; Sealed Ex. C at 18-23 ¶¶53-66, 48-49 ¶¶145-47.  
12 An expert witness, however, “cannot give an opinion as to a legal conclusion, *i.e.*, an opinion on an  
13 ultimate issue of law.” *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d  
14 1051, 1058 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998,  
15 1016 (9th Cir. 2004) (emphasis in original). Plaintiffs argue that their experts are merely analyzing  
16 the law and discussing the differences between CARRP and terrorism related grounds of  
17 inadmissibility under the Immigration and Nationality Act. *See* Dkt. No. 499 at 4-5. To the extent  
18 they are simply stating what the law is, however, this is not the role of an expert but the role of  
19 counsel at trial. *In re Rezulin Prod. Liab. Lit.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004). Likewise,  
20 to the extent Plaintiffs’ experts offer an opinion regarding the legality of the CARRP process, this is  
21 an ultimate issue of law left to the Court to determine. *Nationwide Transport Finance*, 523 F.3d at  
22 1058; *Sprecht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988).

23 **II. The testimony and reports of Mr. Gairson and Mr. Ragland should be excluded**  
24 **under *Daubert***

25 Both Mr. Gairson and Mr. Ragland provide “case studies” amounting to narratives of  
26 selected individuals’ experiences filing applications for adjustment of status and naturalization. *See*  
27 Dkt. No. 480 Sealed Ex. B at 33-66 ¶¶106-253; Sealed Ex. C at 26-35 ¶¶74-103. Plaintiffs’ assert that

1 these case studies “add needed context” to the opinions of Mr. Gairson and Mr. Ragland, *see* Dkt. No.  
2 499 at 5-6. But to the extent such evidence is admissible, it should be “properly presented through  
3 percipient witnesses and documentary evidence.” *In re Rezulin Prod. Liab. Lit.*, 309 F. Supp. 2d at 551;  
4 *see also Highland Capital Management, L.P. v. Schneider*, 379 F. Supp.2d 461, 468 (S.D.N.Y. 2005).  
5 Plaintiffs’ failure to provide any reason why this evidence cannot be presented separately at trial  
6 establishes that Mr. Gairson and Mr. Ragland’s statements regarding clients they have represented is  
7 improper. *See* Dkt. No. 499 at 4. Neither Mr. Gairson nor Mr. Ragland are unbiased witnesses regarding  
8 the merits of their clients’ cases and have a vested interest in claiming that their clients are eligible for  
9 the immigration benefits they seek. *See Stencel v. Fairchild Corp.*, 174 F. Supp.2d 1080, 1085-86 (C.D.  
10 Cal. 2001) (“Attorneys are advocates, charged with selflessly serving their client’s interests. Expert  
11 witnesses, on the other hand, are employed to assist the parties in their pretrial preparation, and if called  
12 to testify, to give their unbiased opinion in order to assist the trier of fact in understanding the relevant  
13 evidence.”)

14 Both Mr. Gairson and Mr. Ragland provide statistical analyses, *see* Dkt. No. 480 Sealed Ex.  
15 B at ¶104; Sealed Ex. C at ¶105, 108, but neither possesses any expertise in statistical analysis, *see* Dkt.  
16 No. 480 Sealed Ex. B at ¶¶3-16; Sealed Ex. C at ¶¶3-14. Contrary to Plaintiffs’ assertions, Mr. Gairson  
17 and Mr. Ragland are not simply “reviewing” statistical data, but analyzing that data and advancing  
18 “expert” conclusions about delays in the CARRP program. That Mr. Ragland’s conclusions regarding  
19 processing times in CARRP differs from those of both Plaintiffs’ and Defendants’ statistical experts  
20 plainly shows the impropriety of Mr. Gairson and Mr. Ragland’s data-related “analyses.” *See* Dkt. No.  
21 480 Sealed Ex. G at 54-55.

22 However they choose to characterize their opinions, neither Mr. Gairson nor Mr. Ragland  
23 provide a sound methodological basis for their conclusions. *See Daubert*, 509 U.S. at 590. They  
24 rely primarily on cases they handled to reach their conclusions regarding the CARRP process, yet  
25 admit they conducted no review of their own case files in reaching these conclusions. *See* Dkt. No.  
26 480 Sealed Ex. E at 79 line 24 to 80 line 14; Sealed Ex. F at 46 lines 11-13. Rather, they rely on other  
27 factors or “tell-tale signs” to determine if a case was subject to CARRP, despite the fact that they

1 concede that these factors may be present in non-CARRP cases. *See* Dkt. No. 480 Sealed Ex. C at 8 ¶26;  
 2 Sealed Ex. E at 133 lines 16-25, 134 lines 1-6; Sealed Ex. F at 215 line 7 to 216 line 2, 218 line 18 to 220  
 3 line 1. Plaintiffs assert that Mr. Gairson and Mr. Ragland reviewed certain documents in preparing their  
 4 reports, *see* Dkt. No. 499 at 7, but neither Mr. Gairson nor Mr. Ragland tether their conclusions directly  
 5 to those documents. Rather, they rely on their own litigation experience. *See, e.g.*, Dkt. No. 480 Sealed  
 6 Ex. B at 3; Sealed Ex. C at 5-11.

7 Plaintiffs' argument that Defendants do not identify any cases highlighted by Mr. Ragland or Mr.  
 8 Gairson as not comprising CARRP cases is inapposite. *See* Dkt. No. 499 at 8. The correctness of their  
 9 conclusions about their clients' experiences is not at issue, but rather whether the methodology used to  
 10 reach those conclusions is sound. *See Daubert*, 43 F.3d at 1319. Even assuming, without conceding,  
 11 that Mr. Gairson and Mr. Ragland were correct in identifying a small number of cases they have handled  
 12 as having been subject to CARRP, the absence of a reliable methodology for reaching this conclusion is  
 13 of no more assistance to the Court than guesswork. Mr. Gairson and Mr. Ragland's additional failure to  
 14 account for alternative explanations for the presence of their "tell-tale signs" is the antithesis of a reliable  
 15 methodology. *See Daubert*, 509 U.S. at 590; *see also Hangarter*, 373 F.3d at 1017-18. Even assuming  
 16 both to be "accomplished immigration lawyers" who have qualified as experts in other cases, *see* Dkt.  
 17 No. 499 at 3, does not show that they are qualified to be experts in this case and testify concerning  
 18 CARRP.

### 19 **III. The testimony and report of Dr. Arastu should be excluded under *Daubert***

20 The Court should exclude the opinion evidence of Dr. Arastu because it is not based on a  
 21 reliable foundation, as *Daubert* requires. Her report satisfies none of the criteria contemplated in  
 22 Rule 702. It is based heavily on her 2019 UCLA Law Review article, *Aspiring Americans Thrown*  
 23 *Out in the Cold: The Discriminatory Use of False Testimony to Deny Naturalization*.<sup>1</sup> Dr. Arastu's  
 24 conclusions based on her article are flawed: her case sampling is not representative of all  
 25 naturalization applications denied on false testimony grounds, *see* Dkt. No. 480 Sealed Ex. A at 7-8,

26 <sup>1</sup> Plaintiffs assert that Dr. Arastu reviewed additional documents in reaching the conclusions in her  
 27 report, *see* Dkt. No. 499 at 10-11, but her opinions are anchored to the conclusions reached in her  
 28 *Aspiring Americans* article, *see* Dkt. No. 480 Sealed Ex. A at 6-11 ¶¶19-34, 23-27 ¶¶77-91.

1 ¶21-25; she is not aware and makes no effort to determine whether any of the cases in her sample  
2 were processed under CARRP, *see* Dkt. No. 480 Sealed Ex. G at 70-71, 73-74; the analysis is based  
3 on circular reasoning, as she assumes at the outset that USCIS pretextually denies applications on  
4 false testimony grounds and then concludes that naturalization denials based on false testimony are  
5 therefore pretextual, *see* Dkt. No. 480 Sealed Ex. A at 8-9 ¶¶24-27; Sealed Ex. G at 70; and her own  
6 data indicates that the percentage of cases in which an applicant was from a Muslim-majority  
7 country has remained constant over those periods, *see* Sealed Ex. A at 79-81; Sealed Ex. G at 73.

8 Plaintiffs attempt to shift the burden to the Government to prove that Dr. Arastu's  
9 conclusions are wrong. Dkt. No. 499 at 11. But the question is not whether Dr. Arastu's  
10 conclusions are accurate, but whether her methodology is sound, and whether she has reliably derived  
11 her conclusions from that methodology. *See Daubert*, 43 F.3d at 1319. The mere fact that she has  
12 worked as a clinical law professor in the immigration context is insufficient to qualify Dr. Arastu as an  
13 expert in this case, especially where her conclusions are premised on incomplete information and  
14 conjecture. *Daubert*, 509 U.S. at 590 (specialized knowledge means "more than subjective belief or  
15 unsupported speculation").

**CONCLUSION**

For the foregoing reasons, and for reasons stated in Defendants’ motion to exclude, the Defendants’ motion should be granted and the testimony and reports of Mr. Gairson, Mr. Ragland, and Dr. Arastu should be excluded.

Dated: April 9, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 9, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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