The Honorable Richard A. Jones

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 OF SEAN M. KRUSKOL

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INTRODUCTION

Plaintiffs' retained CPA, Mr. Kruskol, admittedly lacks expertise in statistical analysis and thus is not qualified to offer expert statistical testimony. Because he cannot show that his findings are statistically significant, they are not probative and should be excluded. Mr. Kruskol's opinions and testimony also lack a sound methodology, reliability and relevance.

ARGUMENT

I. Mr. Kruskol lacks the ability to assist the Court in understanding the CARRP data, and whether any of his data points are meaningful.

After incorrectly stating that Defendants' motion addresses only four of Mr. Kruskol's opinions, Plaintiffs claim he is somehow "plainly qualified" to provide all of his opinions. Dkt #493 at 1. But his admitted lack of qualifications to determine "statistical significance," or conduct trend or regression analyses renders all his statistical testimony non-probative and unhelpful to the trier of fact. Dkt #471 at 3-4, citing Kruskol dep. (Ex. D to Dkt #476, sealed Murphy Dec.) at 34:9 – 35:8. As he cannot attest that his findings are statistically significant, they are not competent proof.

After misstating that Defendants do not assert that any of Mr. Kruskol's conclusions are incorrect, Plaintiffs incorrectly claim that Dr. Siskin conceded that Mr. Kruskol's "calculations" and "conclusions are correct." Dkt #493 at 1, 6. Dr. Siskin pointed out that while Mr. Kruskol's arithmetic is correct, the conclusions he derives are statistically incorrect and misleading. Dkt #471 at 5-6, citing Siskin report (Ex. F to Dkt #476, sealed Murphy Dec.) at pp. 2, 7-12, 14-21, and 32.

Mr. Kruskol's observations are "descriptive" and mathematically correct, but do not address whether any data "anomalies" he describes are meaningful, or if any differences in data outcomes are relevant to Plaintiffs' allegations. Ex. F to Dkt #476 at 5-12. While Plaintiffs tout his experience in "large-scale data analytics" (Dkt #493 at 3), it is the lawyers, not Mr. Kruskol, who draw conclusions from the differences and his claimed "anomalies." That is the problem. Even if he can crunch numbers, that expertise equips him only to describe the data, not to explain it or its significance. He is unable to interpret which number-value differences are significant, or which "anomalies" are meaningful, and also lacks the qualifications to do so. Plaintiffs attempt to shield Mr. Kruskol's shortcomings and audaciously attack Dr. Siskin's analyses by arguing that Mr. Kruskol's discovery of "anomalies" in the data proves that it is Dr. Siskin's expertise that is useless

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to the Court. See Dkt #493 at 7 ("This is just common sense; statistical analysis is only as good as the data on which it relies."). But Mr. Kruskol's shortcomings in statistical analysis mean he cannot provide any useful assessment of the data he considered. Anomalies exist in most datasets. Ex. F to Dkt #476 at 30. The task is to determine their impact, and to prove that they either tend to support, undermine, or say nothing about the propositions at issue – which Mr. Kruskol cannot do.

Plaintiffs argue that the increased referral rate to CARRP for applicants from majority-Muslim countries is central to Plaintiffs' equal protection claim. Dkt #493 at 1. But they offer no evidence that applicants from majority-Muslim countries ("Muslim countries") whose applications present potential national security ("NS") concerns are referred to CARRP at a significantly higher rate (or any higher rate) than applicants from majority non-Muslim countries whose applications also present potential NS concerns. Without such evidence, Mr. Kruskol's statistical opinion does not support Plaintiffs' equal protection claim, and thus is irrelevant and would not assist the Court.

II. Mr. Kruskol's reliance on a manipulated, nonsensical definition of a CARRP case and presumption that CARRP is *the cause* for the difference in processing times and adjudication outcomes for NS Concern cases cannot assist the Court.

Plaintiffs incorrectly state that this Court granted Plaintiffs' motion to compel production of the "CARRP Dataset" produced in early January 2021 "[b]ecause the USCIS Detailed Data included an overbroad definition of a 'CARRP case.'" Dkt #493 at 4. This Court made no such finding. Dkt #445 at 5. Plaintiffs have never established that the USCIS dataset used an overbroad definition of a CARRP case. Nor does Mr. Kruskol claim he has greater expertise than USCIS in defining a CARRP case and determining if an application was subject to CARRP. Dkt #471 at 7-8, citing Kruskol dep. (Ex. D to Dkt #476) at 67:18-22, 69:22 – 70:10.

Plaintiffs seek to offer Mr. Kruskol's testimony to support their claim that referring NS Concern applications to CARRP causes adjudication delays and adverse outcomes. Dkt #493 at 3-5. But they rely upon the false assumption that CARRP cases take longer to adjudicate and have lower rates for approving benefits because they are in CARRP, rather than because they involve NS concerns. The flaw is that they are not comparing comparable data sets, but rather apples to oranges. The apples are applications that do not present potential NS concerns, and thus are never referred to CARRP to investigate, vet and, if possible, resolve such concerns. The oranges are applications that

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present potential NS concerns and thus are referred to CARRP to investigate, vet and possibly resolve those concerns. Plaintiffs and Mr. Kruskol presume, with no supporting evidence, that if USCIS officials were to handle all applications with potential NS concerns on the same track and in the same way as applications having no potential NS concerns, the processing times would be no longer and the adjudication outcomes no less favorable than for applications without potential NS concerns. Plaintiffs' data expert thus falls into the most basic trap of comparing the incomparable. As a high-ranking USCIS official explained, referring applications to CARRP does not delay processing and adjudication, but instead allows applications presenting NS concerns to move forward. Deposition of Daniel Renaud (Ex. 1 to sealed Taranto Dec., contemporaneously filed with this Reply) at 311:7 – 314:20. Thus, Mr. Kruskol's testimony about longer processing times for NS Concern cases referred to CARRP, and the less favorable adjudication outcomes, would not assist the Court. It is not probative of whether the longer processing times and less favorable adjudication outcomes are *caused* by CARRP, rather than by having to vet potential NS concerns in determining whether applicants qualify for the immigration benefits sought. Since Mr. Kruskol's opinion is "connected to existing data only by [his] *ipse dixit*," there is "too great an analytical gap between the data and [his] opinion" to support it. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014), quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (2007). *Accord*, *In re Phenylpropanolamine Prods. Liab. Litig.*, 289 F. Supp. 1230, 1237-38 (W.D. Wash. 2003).

Contrary to Plaintiffs' misstatement (Dkt #493 at 9), USCIS did not testify that under the [redacted]. The cited testimony by Mr. Shinaberry of USCIS, who does not work for FDNS or in the CARRP program, was given only in his personal capacity.[1] Shinaberry dep. (Ex. 2 to Taranto Dec.) at 124:16 – 126:21. Even in his personal capacity, Mr. Shinaberry did not confirm Plaintiffs' interpretation of the language in the User Guide, responding that "it doesn't state that [interpretation] explicitly." He simply acknowledged Plaintiffs' suggested possibility of [redacted]

[1] Because Plaintiffs' Rule 30(b)(6) notice did not designate this subject, and thus Defendants did not designate or prepare Mr. Shinaberry to testify for USCIS on this subject, the question was objected to as beyond the scope of the deposition. He was permitted to answer to the best of his ability in his personal capacity. See *Detoy v. City & Cty. of San Francisco*, 196 F.R.D. 362, 367 (N.D. Cal. 2000).

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[redacted]. *Id*. Plaintiffs present no evidence that this has ever occurred.

Plaintiffs complain that Defendants prevented Mr. Kruskol from determining the extent of any potential overstating of CARRP referrals because Defendants did not produce, for his examination, all applications and A-files for the 28,214 CARRP-referred cases included in the USCIS dataset. Dkt #493 at 9. But Mr. Kruskol could have examined applications and A-files for the named Plaintiffs, class notice responders and others whose files Plaintiffs' counsel possess. Dkt #192 at 2. Yet he examined none of that material; and he concedes that he does not know if he could determine from a review of the files whether an application was referred to CARRP. Dkt #475 at 9-10, citing Kruskol dep. (Ex. D to Dkt #476) at 123:16 – 124:2, 124:16-25, 125:14-25, 127:10 – 128:16, 140:8 – 141:9. Also, the notion that Mr. Kruskol was capable of reviewing all applications and A-files for applicants in the USCIS dataset of 10.6 million applications received during FY 2013 – 2019, or even for the over 28,000 applications that were referred to CARRP, is preposterous. If each A-file averages 500 pages, compared to [redacted] Mr. Kruskol's review would have encompassed about 5.3 billion pages of material, far more than he could review in several lifetimes.[2]

Plaintiffs deny that Mr. Kruskol's Declaration abandons his previous claim that some cases, an unspecified number, might have been incorrectly flagged as CARRP-referred cases in the USCIS dataset. Dkt #493 at 10. Yet Mr. Kruskol's Declaration does not point to any incorrect flagging of cases as having been referred to CARRP, even though his Declaration followed Defendants' production of a very granular CARRP dataset in January 2021, with NS Concern type and substatus data for every CARRP case. Plaintiffs pressed to obtain that data to enable Mr. Kruskol to substantiate his suspicion that USCIS might have overflagged cases as CARRP-referred in its dataset produced in June 2020. Misusing the January 2021 dataset with data on NS Concern type and substatus for each CARRP case, Plaintiffs now pretend that all CARRP cases that were processed and vetted through CARRP and whose NS Concern type was [redacted]

[2] *[500 x 10.6 million = 5.3 billion]* Even if Mr. Kruskol devoted 100% of his professional time in a work year (8760 hours) over a 50-year work career of 438,000 hours *[8760 x 50 = 438,000]*, he could not complete the task by reviewing 10,000 pages per hour. *[10,000 x 438,000 = 4.38 billion]* Reviewing A-files only for the 28,000+ CARRP cases, many millions of pages, is also unrealistic.

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[redacted] or whose status [redacted] were never subject to CARRP. Indeed, Plaintiffs imply that USCIS incorrectly flagged such cases as CARRP cases in the dataset it produced. But Mr. Kruskol never embraced that notion, either at his deposition or in his recent Declaration. See Kruskol dep. (Ex. D to Dkt #476) at 75-76, 80-81, 90-91; 102, 104, 122-24, 140-41, 155-57, 159, 181; Kruskol dep. (Ex. 3 to Taranto Dec.) at 95-96, 101, 103, 167-68; Kruskol Dec. (Ex. A to Dkt #476) at ¶¶ 8-10, 12-15, 17-20, 22, 24-25, 27, 30-32, 34, 36, 38, 40-41, 43-47.

Plaintiffs falsely claim that the USCIS summary data incorrectly states that 81.1% of applications adjudicated under CARRP were approved. Dkt #493 at 10. Instead, Plaintiffs challenge the fact that 81.1% were approved only by concocting their own version of what qualifies as a CARRP case. With no evidence, they suggest that a CARRP case excludes any cases for which the NS Concern type was [redacted] or for which the NS Concern substatus [redacted]. The 81.1% approval rate for applications adjudicated after referral to CARRP is a fact that even Plaintiffs' expert Mr. Kruskol accepts, even though it negates Plaintiffs' case narrative that USCIS employs CARRP as a process intended to deny immigration benefits to qualified applicants. Dkt #475 at 7, citing Kruskol dep. (Ex. D to Dkt #476) at 46:18 – 47:8. Plaintiffs pretend that CARRP-referred cases exclude all applications where the NS Concern type for the CARRP case [redacted] after vetting and processing through CARRP enabled USCIS to [redacted] that prompted the referral to CARRP. Those cases for which the NS Concern type ultimately was [redacted] comprise the vast majority of CARRP cases. See Kruskol Dec. at ¶ 8a (Ex. A to Dkt #476), noting that [redacted] of all the adjudicated applications in USCIS' CARRP dataset were ultimately [redacted]. Plaintiffs disingenuously attempt to misrepresent the data for all CARRP cases combined by redefining their notion of what constitutes a CARRP case, for purposes of looking only at data for adjudication outcomes and processing times. They imply that the only true CARRP cases are the much smaller subset of cases where the NS concern type could not [redacted]. Plaintiffs try to further erode the correct 81.1% overall approval rate for CARRP

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cases by removing from the dataset all cases where the ultimate substatus [redacted]. As Mr. Kruskol notes (Ex. A to Dkt #476) at ¶ 9a, fully [redacted] of the CARRP-referred applications that USCIS adjudicated had a final substatus of [redacted] and [redacted] of them were approved; [redacted] had a final substatus of [redacted] and [redacted] of them were approved. In short, by misrepresenting their own experts' conclusions, Plaintiffs unwittingly reflect that his testimony would not assist either them or the Court.

III. Mr. Kruskol's opinions concerning data anomalies are not reliable or relevant.

Plaintiffs choose to ignore Defendants' showing that Mr. Kruskol's opinions about possible data anomalies are methodologically flawed, unreliable, as well as irrelevant to any issue to be resolved by the Court. Dkt #475 at 7-11. Plaintiffs instead offer unsupported arguments for allowing Mr. Kruskol to testify to perceived anomalies he can neither substantiate nor say would significantly impact his conclusions.

For example, Plaintiffs point to Mr. Kruskol's suggestion that the USCIS dataset is anomalous because among over 10.6 million applications for adjustment of status or naturalization USCIS received during FY 2013 – 2019, less than 1% have adjudication times that Mr. Kruskol believes do not appear reasonable since they were completed within 60 days of application receipt. Dkt #493 at 11. He suggests that USCIS should have removed this tiny fraction of cases from its reporting of data regarding application receipt to adjudication. Notably, Mr. Kruskol does not claim this would have significantly lengthened the processing time calculations. More critically, he makes no claim that including cases adjudicated within 60 days of application receipt shortened the processing times for CARRP cases more than for non-CARRP cases, and thus that USCIS understated the difference in processing times for CARRP vs. non-CARRP cases. Nor does he identify any CARRP case for which he claims the processing time is unrealistically short.

As for Mr. Kruskol's unsupported claim that the USCIS dataset might include duplicates, none of the 40 sets of possible duplicates Mr. Kruskol lists in his report are true duplicates. Each involves a separate application. Ex. F to Dkt #476 at 10-11, 28-30. In sum, Mr. Kruskol's claimed anomalies are speculative, unreliable, and not relevant even if they could be factually confirmed.

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CONCLUSION

For the foregoing reasons, and for reasons stated in Defendants' motion to exclude Mr. Kruskol's testimony, the Defendants' motion should be granted and the opinions and testimony of Mr. Kruskol 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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