

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.¹

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

**DEFENDANTS’ NOTICE OF
MOTION, AND MOTION TO
EXCLUDE TESTIMONY OF SEAN
M. KRUSKOL; MEMORANDUM
OF SUPPORTING POINTS AND
AUTHORITIES**

(Note On Motion Calendar for:
April 9, 2021)

Defendants, through their attorneys of record, hereby move this Court pursuant Fed. R. Evid. 104(a) and 702, and pursuant to the Court’s gatekeeping requirements to screen expert evidence for relevancy and reliability, to exclude the testimony, Declaration and reports of Sean M. Kruskol, an accountant (CPA) whom Plaintiffs designated as their expert in statistical analysis. Defendants also move for the exclusion of Mr. Kruskol’s testimony, Declaration and reports under Fed. R. Evid. 403.

This Motion is based upon the papers filed herein, including the following Memorandum, and Exhibits identified in a contemporaneously filed attorney Declaration of Lindsay M. Murphy and attached thereto, or submitted with Defendants’ Motion to file exhibits under seal. A proposed order is submitted for consideration by the Court.

¹ Plaintiffs sued all individual defendants only in their official capacities. *See* Dkt. No. 47 at 8-9. Pursuant to Fed. R. Civ. P. 24(d), the offices’ incumbents are substituted for their predecessors.

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Dated: March 25, 2021

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendants seek to exclude evidence from Plaintiffs' accounting expert Sean M. Kruskol,
4 offered as a statistical expert, because he lacks the requisite expertise in statistical analysis.
5 Additionally, Mr. Kruskol's opinions and testimony do not satisfy Fed. R. Evid. 104(a) and 702 and
6 the *Daubert* requirements for relevancy and reliability, and would not assist the Court in addressing
7 any material issue. Defendants also seek its exclusion under Fed. R. Evid. 403.

8 **BACKGROUND**

9 Mr. Kruskol, a Certified Public Accountant (CPA), claims expertise in "forensic accounting,
10 valuation, causation and economic damages issues in a wide variety of commercial disputes," but not
11 in statistical analyses, nor in processing immigration benefit applications, the issues on which
12 Plaintiffs offer his testimony as a statistical expert. *See* Kruskol Declaration executed March 4, 2021
13 (Exhibit A) at Ex. BJ (Kruskol resume appended to Declaration). In addition to a Declaration, Mr.
14 Kruskol submitted three expert reports.² His February 28, 2020, initial report was replaced by his
15 July 17, 2020, Supplemental Report (Ex. B), and supplemented by his September 21, 2020, Second
16 Supplemental Report (Ex. C). He was deposed on October 20, 2020. *See* Ex. D (Kruskol dep.).

17 **LEGAL STANDARDS**

18 The testimony and opinions of an expert witness must satisfy Fed. R. Evid. 702 requirements,
19 which govern the admissibility of expert testimony. Rule 702 provides:

20 If scientific, technical or other specialized knowledge will assist the trier of fact to
21 understand the evidence or to determine a fact in issue, a witness qualified as an expert
22 by knowledge, skill, experience, training or education, may testify thereto in the form
23 of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data,
(2) the testimony is the product of reliable principles and methods, and (3) the witness
has applied the principles and methods reliably to the facts of the case.

24 The trial court "must determine whether the expert witness is qualified and has specialized
25 knowledge that will assist a trier of fact to understand the evidence or determine a fact in issue."

26 _____
27 2 Exhibits offered in support of this Motion are identified in the contemporaneously filed
28 Declaration of Lindsay M. Murphy, and submitted with Defendants' Motion to Seal because they
include protective order information. A redacted Exhibit D is appended to the Murphy Declaration.

1 *McKendall v. Crown Control Corp.*, 122 F.3d 803, 805-06 (9th Cir. 1997) (*internal quotes and*
2 *citation omitted*). *Accord*, *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir.
3 2014). Rule 702 also requires trial judges to ensure “that an expert’s testimony both rests on a
4 reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms., Inc.*, 509
5 U.S. 579, 597 (1993). Thus, the Court must screen the proffered evidence to ensure it is not only
6 relevant but reliable, which the testimony’s proponent must establish. *Estate of Barabin v.*
7 *AstenJohnson, Inc.*, 740 F.3d 457, 463, 466 (9th Cir. 2014). The Court is required to assess, under
8 Fed. R. Evid. 104(a), whether the expert is proposing to testify to “specialized knowledge that will
9 help the factfinder understand or decide a fact in issue.” *United States v. Alatorre*, 222 F.3d 1098,
10 1102-03 (9th Cir. 2000), citing *Daubert*, 509 U.S. at 592. In exercising discretion under Rule 702 to
11 allow expert testimony to assist the trier of fact to understand the evidence or determine a fact in
12 issue, the Court is to determine whether it is based upon sufficient facts or data, is the product of
13 reliable principles and methods, and that the expert has reliably applied the principles and methods
14 to the facts of the case. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 709 F.3d 872, 882-83 (9th
15 Cir. 2013). Expert testimony is relevant only if the knowledge underlying it has a valid connection
16 to the pertinent inquiry, and is reliable only if that knowledge has a reliable basis in the knowledge
17 and experience of the relevant discipline. *City of Pomona*, 750 F.3d at 1043-44.

18 The basic purpose of a trial court’s “gatekeeping requirement” is to ensure that the expert
19 “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an
20 expert in the relevant field.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). This
21 gatekeeping requirement applies not only to scientific knowledge, but also to testimony based on
22 technical and specialized knowledge. *Id.* at 141. A proponent of expert testimony must “explain the
23 methodology the experts followed to reach their conclusions [and] point to any external source to
24 validate that methodology.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir.
25 1995). Although the inquiry is “a flexible one,” the Supreme Court suggested specific factors likely
26 to help trial courts evaluate whether expert testimony is reliable, including testing, peer review, error
27 rates, and acceptance in the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

1 The requirement of specialized knowledge means “more than subjective belief or
 2 unsupported speculation.” *Daubert*, 509 U.S. at 590. Thus, “the opinions of [expert] witnesses on
 3 the intent, motives or states of mind of corporations, regulatory agencies and others” should be
 4 excluded because these opinions “have no basis in any relevant body of knowledge or expertise.” *In*
 5 *re Rezulin Prod. Liab. Lit.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004). An expert should also not
 6 “supplant the role of counsel in making argument at trial, and the role of the [decision maker] in
 7 interpreting the evidence.” *Id.*; see also *Moses v. Payne*, 555 F.3d 742, 756 (9th Cir. 2009) (“Under
 8 Rule 702, expert testimony is helpful . . . if it concerns matters beyond the common knowledge of
 9 the average layperson and is not misleading.”); *United States v. Hanna*, 293 F.3d 1080, 1086 (9th
 10 Cir. 2002); *United States v. Morales*, 108 F.3d 1031, 1039 (9th Cir. 1997) (*en banc*). The Court
 11 “may reject expert testimony also where the ‘analytical gap’ between the data and the expert’s
 12 conclusion is too great.” *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998), citing
 13 *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 519 (2007).

14 “Even when expert testimony is otherwise admissible, the district court may exclude it under
 15 Rule 403.” *United States v. Vallejo*, No. 99-50762, 2001 U.S. App. LEXIS 7367, at *31 (9th Cir.
 16 Jan. 16, 2001). Thus, if the Court finds that the testimony would waste time, confuse, or not
 17 materially assist the trier of fact, it has discretion to exclude the expert’s testimony. *Vallejo*, 2001
 18 U.S. App. LEXIS 7367 at *12-15, citing *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir.
 19 1996), *cert. denied*, 520 U.S. 1193, 117 S. Ct. 1483 (1997).

20 ARGUMENT

21 I. Mr. Kruskol’s testimony, Declaration and reports should be excluded because he 22 lacks expertise to make statistical analyses related to the issues in this litigation.

23 Plaintiffs portray Mr. Kruskol as an expert in statistical analysis, but he falls short of the
 24 mark in fundamental respects. He readily concedes that key aspects of statistical analysis are simply
 25 beyond his expertise, including some central to this case, specifically regression analyses, tests for *p*-
 26 values and determining statistical significance, and trends analyses – none of which he can perform.
 27 Kruskol dep. (Ex. D) at 34:9 – 35:8. The Federal Judicial Center’s *Reference Manual on Scientific*
 28 *Evidence*, 3d ed. (2011) underscores the critical importance of regression analyses, *p*-values,

1 statistical significance and trends analyses in statistical analyses in its *Reference Guide on Statistics*
2 at pp. 213, 220-21, 230-31, 233, 236, 240-41, 248-58, 260-72, 279-95, 297-99. *See also Reference*
3 *Guide on Multiple Regressions* at pp. 303 *et seq.* As Mr. Kruskol is incompetent to conduct, present
4 or interpret such fundamental statistical analyses, he simply cannot qualify as an expert witness in
5 statistical analysis. Despite Mr. Kruskol's admitted lack of expertise, he seeks to testify to his
6 criticisms of regression analyses and tests of statistical significance and for *p*-values conducted by
7 Defendants' statistical expert, Dr. Bernard Siskin. Kruskol dep. (Ex. D) at 186:18 – 187:2. *See* Dr.
8 Siskin's July 17, 2020, Amended Report (Ex. E) at pp. 4-5, 10, 17-18, 21, 23-30, 34, 45-46, 50, 53-
9 54, 74, 81, 87-88, 95, 99-108, 112-30, 132-34, and October 13, 2020, Responsive Report (Ex. F) at
10 pp. 13, 20, 25, 46-51, 53-55, 71-72, addressing regression analyses, statistical significance, and trend
11 analyses, statistical analyses for which Mr. Kruskol disclaims any expertise. And though Mr.
12 Kruskol admits lack of competence to conduct trend analyses, his Supplemental Report (Ex. B)
13 includes "fiscal year trend analyses" (pp. 12-13, 15) and cites trends in naturalization rates (p. 33).

14 Notably, Mr. Kruskol concedes that an expert analyzing statistical data needs to understand
15 the substantive issues concerning the data's subject matter, including how that data was created.
16 Kruskol dep. (Ex. D) at 35:13-20. Yet he admits he has no expertise in USCIS' processing of
17 immigration benefit applications, generally or under CARRP. *Id.* at 32:10-22. He has no experience
18 conducting statistical analyses relating to immigration benefit applications, or programs involving
19 vetting or national security concerns (*Id.* at 35:13 – 36:1), or concerning bias or discrimination
20 claims (*Id.* at 36:10-15), which are central to Plaintiffs' class claims.

21 Given his extensive uncertainty about critical aspects of the data he analyzed, owing largely
22 to his lack of expertise in statistical analyses and the subject matter concerning immigration benefit
23 applications and the CARRP process, Mr. Kruskol's testimony would not assist the trier of fact in
24 resolving any fact at issue concerning any claim Plaintiffs assert. Mr. Kruskol says that to
25 understand the data he sought to analyze, he needed to understand how an application moved
26 through the adjudication process from receipt to potential additional vetting procedures, all the way
27 through adjudication. *Id.* at 26:15-22. He concedes it was important for him to have a firm

1 understanding of the CARRP policy and how it operates, particularly in the context of I-485 and N-
2 400 processing and adjudication, in order to conduct his analysis of the data. *Id.* at 27:9-18. He
3 admits, however, that he is not an expert in CARRP policy or CARRP terminology (*Id.* at 66:19-22,
4 67:12-16), despite having broad access through Plaintiffs to voluminous CARRP materials produced
5 during discovery. To prepare his reports, Mr. Kruskol needed to know the information listed on
6 blank I-485 and N-400 forms, the information processed through various USCIS databases, and how
7 an application would move through the various processes to final adjudication. *Id.* at 28:16-29:2.
8 But Mr. Kruskol was unable to obtain answers to all of his questions about USCIS' processing of
9 immigration benefit applications or about CARRP policy through his document review or
10 conversations with Plaintiffs' counsel. *Id.* at 29:3-9, 30:12-17. He was unable to resolve questions
11 regarding how an application is identified as CARRP in the USCIS database and dataset provided,
12 potential duplicates he thinks he might have found in the dataset and his lack of understanding how
13 they might exist, some adjudication times for forms I-485 and N-400, and how there could be what
14 he believes are data anomalies concerning an application's receipt date and last status date or
15 adjudication date. *Id.* at 29:11-30:10. *See also id.* at 30:19 – 31:12 (detailing other data issues he
16 says are "unclear to me" or that he is "unable to explain").

17 Plaintiffs have failed to establish that Mr. Kruskol is qualified to provide statistical analyses
18 as an expert in this case. *See Kumho Tire Co.*, 526 U.S. at 148-49 (court obliged to act as gatekeeper
19 when expert's knowledge and experience is sufficiently called into question). He has never
20 published anything concerning statistical analyses. Ex. D at 35:10-12. It should be no surprise that
21 he has never presented testimony on statistical analyses or been accepted by a court as a statistical
22 expert. *Id.* at 36:17-25. The mere fact he might have crunched numbers in a financial accounting
23 setting is of no import in this litigation in which Plaintiffs' central theme is that the CARRP process
24 for handling immigration benefit applications with potential national security concerns operates with
25 an anti-Muslim animus or discriminates against applicants who are Muslim or from majority-Muslim
26 countries. Also, what little statistical analysis Mr. Kruskol offers, going far beyond his expertise, is
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1 unsound, methodologically flawed, statistically incorrect, and subject to misuse and
2 misinterpretation. *See* Siskin Responsive Report (Ex. F) at, *e.g.*, pp. 2.n1, 7-12, 14-21, 32.

3 **II. Mr. Kruskol's testimony and opinions should be excluded because they are not**
4 **relevant to determining any fact or resolving any issue in this case, will not assist**
5 **the trier of fact, and are not based on a reliable methodology.**

6 Mr. Kruskol's evidence does not address the issues for which the statistical evidence is
7 relevant to this litigation, most specifically Plaintiffs' claims that CARRP operates with an anti-
8 Muslim animus or effect. Directed to the determination by Defendants' statistical expert, Dr. Siskin,
9 that once an application is referred to CARRP, there is no relationship between being from a
10 majority-Muslim country and how long it will take to process an application or whether it will be
11 approved or denied, Mr. Kruskol admitted he could not disagree but declined to further address the
12 issue because he had not performed the analysis and wanted to again review Dr. Siskin's statement.
13 Kruskol dep. (Ex. D) at 50:1-12. Despite his access to data for that analysis, he explained that he did
14 not address this issue as it was not part of his assignment. *Id.* at 50:18 – 51:6. Mr. Kruskol could
15 not recall doing any analyses of CARRP adjudication outcomes for applicants from majority-Muslim
16 countries compared to applicants not from majority-Muslim countries. *Id.* at 51:8-20.

17 The statistical evidence, which Mr. Kruskol's reports largely side-step or ignore, refute
18 Plaintiffs' claims that applicants who are Muslim or from majority-Muslim countries are commonly
19 referred to CARRP, where their applications are generally either not adjudicated or are denied.
20 Though his reports do not address those claims, Mr. Kruskol concedes that the USCIS data shows
21 that approximately 28,240 applications of the 10.6 million I-485 and N-400 applications USCIS
22 received (during FY 2013 – FY 2019) were referred to CARRP (about 0.3% of all applications), and
23 that 99.7% of the applications never went into CARRP. *Id.* at 37:8 – 39:4. [28,240/10,600,000 =
24 0.266%, *i.e.*, 99.734% were not referred to CARRP.] When directed to Dr. Siskin's determination
25 that about 1.27% of applications from applicants from majority-Muslim countries were processed
26 under CARRP, and thus that 98.73% never went into CARRP, Mr. Kruskol was unable to recall the
27 data, and thus to challenge Dr. Siskin's statement concerning the data. *Id.* at 41:20 – 42:6.

1 Although Mr. Kruskol was unable to recall specific numbers, he testified that the
2 determination that 81.1% of applications adjudicated under CARRP were approved, and that 18.1%
3 were denied, is “generally consistent with [his] analysis of the data.” *Id.* at 46:18 – 47:6. Asked
4 whether he noticed that the data shows that the approval rates for applicants from majority-Muslim
5 countries whose applications were adjudicated after referral to CARRP were actually higher than for
6 applicants not from majority-Muslim countries whose applications were adjudicated after referral to
7 CARRP, Mr. Kruskol was unable to deny this; he explained this was something he had “not
8 answered yet” in his review of the data. *Id.* at 48:9 – 49:24.

9 Distracting from the statistical evidence that is relevant to and which refutes Plaintiffs’
10 claims, Mr. Kruskol offers opinions and conclusions not relevant to resolving any factual issue in
11 this case, and does so without providing a sound methodological basis for his opinions and
12 conclusions. *See Daubert*, 509 U.S. at 590. He opines, for example, that the USCIS dataset *might*
13 overstate the number of cases referred to CARRP, and might include duplicate cases. But he does
14 not state the likelihood of any over-flagging of cases as CARRP or how many cases were
15 misclassified, and he does not state that there are any duplicates in the dataset, and if so, how many.
16 Nor does he say whether or how correcting for overflagging or duplication would affect his
17 conclusions concerning any issue or fact to be addressed by the Court. Mr. Kruskol also suggests in
18 his reports that CARRP has a discriminatory effect upon applicants who are Muslim or from
19 majority-Muslim countries, with no stated bases or methodology for reaching that opinion. Kruskol
20 Supplemental Report (Ex. B) at p. 4 (¶¶ 7g-h), and pp. 16-18 (¶¶’s 44-52). He points to USCIS data
21 showing a higher percentage of referrals to CARRP for applicants from majority-Muslim countries,
22 but this is an observation that the Court could make in perusing the produced USCIS data summaries
23 without expert assistance. What matters is whether the data actually evidence discrimination, given
24 other explanations to account for the higher percentage and that Dr. Siskin address; Mr. Kruskol
25 offers no assistance to the Court on that issue.

26 Mr. Kruskol concedes he is not an expert in determining whether USCIS has correctly
27 referred a case to CARRP (Ex. D at 67:18-22), yet still insists upon addressing the issue. While his
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1 report says that USCIS detailed data “appears to overstate” the number of applications subject to
 2 CARRP, he confessed at his deposition that “I do not know for sure whether or not the updated
 3 USCIS detailed data overstates the number of applications subject to CARRP.” *Id.* at 75:25 – 76:19.
 4 Mr. Kruskol notably claims no greater expertise than USCIS in determining whether any particular
 5 application in the dataset produced to Plaintiffs was referred to CARRP. *Id.* at 69:22 – 70:10. He
 6 conjectures that lacking access to applicants’ A-files and applications diminishes his ability to
 7 determine which applications were referred to or processed in CARRP. *Id.* at 70:12 – 71:1. He
 8 suggests that accessing USCIS’ FDNS-DS database, for which he disclaims any expertise, *might*
 9 enable him to determine which applications were referred to CARRP. *Id.* at 71:24 – 73:9.

10 Though Mr. Kruskol suggests that USCIS *might* have overstated the number of applications
 11 subject to CARRP in its produced dataset, he declines to say there was in fact an overstatement of
 12 CARRP cases but conjectures only that “there is a potential for overstatement of CARRP processed
 13 applications.” *Id.* at 155:18 – 156:2, 156:10-14. He has made no attempt to quantify the apparent
 14 overstatement, claiming he would need additional fields contained within the FDNS-DS database.
 15 *Id.* at 156:20 – 157:4. He admitted that he would be speculating to say that the overstatement were
 16 even more than 1%. *Id.* at 157:6-19. Thus, even if his testimony were reliable, it would not be
 17 probative or relevant to determining any fact at issue, or understanding the evidence.

18 Notably, Mr. Kruskol does not criticize the criteria USCIS used for determining whether a
 19 case is a CARRP case, saying “he has no opinion one way or another” concerning the criteria. *Id.* at
 20 159:12-23. Though seeking to raise questions concerning whether USCIS has correctly flagged
 21 applications as having been processed under CARRP, Mr. Kruskol confessed that he cannot say with

22 [REDACTED]
 23 [REDACTED] *Id.* at 181:1-23.³
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26 ³ Mr. Kruskol understands that the CME (case management entity) identifier in FDNS-DS for a
 27 national security concern case may be opened when it is necessary to perform further review on an
 28 individual’s application. Ex. D at 73:10 – 74:2. [REDACTED]

Id. at 74:4-17.

1 While Mr. Kruskol opines that the USCIS updated data “appears” to have overstated the
2 number of applications subject to CARRP, he cannot answer whether that purported overstating is of
3 the number of applications that were subject to CARRP at any time during their pendency, or rather
4 an overstating of the number that remained subject to CARRP from the time of referral up to their
5 adjudication or the end of the study period (9/30/19). Kruskol dep. (Ex. D) at 80:10 – 81:23.

6 Mr. Kruskol testified that even if he had access to all of the data from the sub-status and NS
7 concern type fields in USCIS’ FDNS-DS database, he could not know in advance of seeing that data
8 whether, based upon it, he would be able to reach any conclusions on whether any CARRP-flagged
9 cases were incorrectly flagged and never referred to CARRP. *Id.* at 140:8 – 141:9. *See also id.* at
10 90:18 – 91:7 (Kruskol “cannot conclude” whether he would change the CARRP flag for any cases
11 from *yes* to *no* if he were to review sub-status data for each CARRP-flagged case); *id.* at 104:2-12
12 (Asked if obtaining data on the NS concern type and sub-status for the CARRP-flagged applications
13 would impact his determination whether cases were in CARRP or not, Mr. Kruskol was “unable to
14 determine” how his conclusions or analyses might change.) After *all* that data was subsequently
15 produced to Plaintiffs and Mr. Kruskol in early January 2021 pursuant to the order granting
16 Plaintiffs’ motion to compel production of statistical data (Dkt #445), his Declaration essentially
17 abandoned the claim that any CARRP-flagged cases in the dataset were incorrectly flagged as
18 CARRP cases, and actually referred to CARRP, identifying no cases as incorrectly flagged.

19 Mr. Kruskol suggested in his Declaration and at his deposition that reviewing all underlying
20 applications *might* assist him in determining which applications were subject to CARRP, though he
21 never offers any basis for that conjecture. He testified that “[w]ithout reviewing any of the
22 underlying CARRP applications, [he’s] unable to confirm whether or not the data within the updated
23 detailed data is accurate” and thus to validate USCIS’ data on whether an application was subject to
24 CARRP. *Id.* at 122:24 – 123:16. He recalled that USCIS’ Rule 30(b)(6) deponent Kevin Shinaberry
25 testified that reviewing the 10.6 million applications would not be necessary to determine which
26 ones were ever referred to or processed in CARRP (*Id.* at 123:16 – 124:2), and was unable to
27 identify any basis for disagreeing; he simply stated that he did not know whether USCIS’ data

1 accurately reflects a review of the underlying applications and CARRP processing status. *Id.* at
2 124:4-14.

3 Mr. Kruskol's suggestion that reviewing 10.6 million applications would help him determine
4 which cases were referred to CARRP is not just unfeasible but entirely speculative. He could not
5 know if CARRP information is discernible from the applications since he could not even recall ever
6 having reviewed any "completed" I-485 or N-400 applications, or if Plaintiffs' attorneys had
7 provided any to him. *Id.* at 124:16-25. He did review blank application forms, which he confirmed
8 contain no field or category indicating if an application is subject to CARRP. *Id.* at 125:14-25.
9 Even if Mr. Kruskol had access to the underlying 10.6 million applications that are the source of the
10 data produced to Plaintiffs, he does not know if he would have done any different analyses. *Id.* at
11 127:10-22. Further, he has never seen an A-file (where USCIS maintains each applicant's N-400
12 and I-485 applications, and other information on the individuals' immigration history) on anyone.
13 *Id.* at 127:23 – 128:4. Even if he could access the 10.6 million applications and/or A-files at issue,
14 or some number of them, he does not know how long he would need to review even a single
15 application; nor can he provide any time range for that review. *Id.* at 128:5-16.

16 Mr. Kruskol's Declaration suggests, with no basis, that the USCIS data concerning CARRP-
17 flagged cases is anomalous because it includes cases in which the sub-status for various cases
18 change during CARRP processing, and sometimes change more than once on the same day. Yet at
19 his deposition he acknowledged that after a CARRP case goes through vetting, [REDACTED]
20 [REDACTED] *Id.* at 102:9-19.

21 Mr. Kruskol's opinions concerning potential duplicates in the USCIS dataset are not only
22 speculative, but also not relevant to resolving any fact at issue or understanding the evidence. While
23 Mr. Kruskol suggests the prospect of duplicates within the USCIS data, he is adamant that he is not
24 claiming there are any duplicates within the data, but only that "there are potential duplicates." *Id.* at
25 198:12-16. He is "unable to confirm whether or not [he] identified true duplicate records." *Id.* at
26 206:14 – 207:6. Nor does he know whether removing the potential duplicates would have a
27 statistically significant impact on his analyses and conclusions. *Id.* at 220:11 – 221:3. Notably, none
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1 of the potential duplicates listed in his report are CARRP cases. *Id.* at 224:9-14. He is not even able
2 to say that the percentage of duplicates that are CARRP cases is even closer to 1% than to 0%. *Id.* at
3 221:5 – 222:10. Also, none of the potential duplicates his report lists involve, to his knowledge,
4 applicants from majority-Muslim countries. *Id.* at 224:16 – 225:16.

5 Most critically, after Mr. Kruskol examined USCIS’ “granular dataset containing 28,214
6 records [on CARRP-flagged applications] and 219 fields of application and related USCIS data”
7 [Ex. A, Kruskol Declaration ¶ 13], he identified not even one potential duplicate among the CARRP
8 cases in the dataset. Moreover, in his listing of potential duplicates in his prior Second Supplemental
9 Report (Ex. C), based on matching information in a more limited number of fields (*e.g.*, birthdate,
10 country or birth and nationality, application form, application date), Mr. Kruskol did not consider the
11 frequency of twins or multiple births as accounting for most or even a significant portion of his
12 potential duplicates, using for example CDC’s 3.3% background rate for twin births in the United
13 States, which would include about 350,000 twins or multiple births among a population equivalent to
14 the 10.6 million applicants included in the dataset. Kruskol dep. (Ex. D) at 207:25 – 213:23. As
15 explained in Dr. Siskin’s Responsive Report (Ex. F at pp. 10-11), Mr. Kruskol’s claim that the
16 USCIS data contains duplicate applications is not supported by the data he cites. The USCIS data
17 analyst who prepared the database has confirmed that personal identification information shows that
18 the entries are not duplicates, and that the amount of duplication would not be meaningful even if
19 one incorrectly accepted as accurate Mr. Kruskol’s count of potential duplicates. *Id.*

20 Mr. Kruskol also suggested that the dataset’s inclusion of cases adjudicated within 60 days
21 might be problematic since one of Plaintiffs’ attorneys, whom Mr. Kruskol could not identify,
22 suggested that adjudication within 60 days of application receipt is inconsistent with the time it
23 *usually* takes to adjudicate an I-485 or N-400 application. Ex. D at 235:24 – 239:1. But of the 10.6
24 million applications included in the dataset, Mr. Kruskol has no guess as to the percentage that
25 should fall within the usual time for adjudication. *Id.* at 239:14-22. He conceded that over 98% of
26 the adjudications in the USCIS dataset occurred more than 60 days following application receipt. *Id.*
27 at 239:24 – 240:22. In short, he cannot establish that the data includes questionable adjudications.

1 In summary, Mr. Kruskol does not present evidence meeting Fed. R. Evid. 702 and *Daubert*
2 standards. He provides only “subjective belief” and “unsupported speculation.” *Daubert*, 509 U.S.
3 at 590. His Declaration, reports and testimony should be excluded since they are not founded on a
4 reliable methodology, and provide improper conclusions, or opinions and inferences that would not
5 assist the Court as trier of fact in understanding the evidence or resolving any issue in this case. His
6 selective citing of reported data (or simplistic calculations using that data, *e.g.*, comparing two
7 numbers to determine the mathematical difference), without any statistical analysis, constitutes
8 nothing more than statements of fact for which the Court does not need his assistance to discern.

9 **III. Mr. Kruskol’s testimony and opinions should be excluded under Rule 403**
10 **because their presentation would waste time, cause confusion and not materially**
11 **assist the Court as the trier of fact.**

12 Fed. R. Evid. 403 expressly empowers the Court to exclude evidence, even if deemed
13 competent expert testimony that meet the relevancy and reliability requirements of Rule 702 and
14 *Daubert*, “if its probative value is substantially outweighed by a danger of one or more of the
15 following: ... confusing the issues, misleading the jury [or factfinder], undue delay, wasting time, or
16 needlessly presenting cumulative evidence.” Providing minimal statistical analysis, Mr. Kruskol’s
17 reports consist mainly of data snippets he lifted from USCIS tabular summaries of data Defendants
18 produced in June 2020, selected to shore up Plaintiffs’ case narrative, or rudimentary calculations
19 using data from the tabular summaries that require no expert presentation. Where Mr. Kruskol
20 departs from presenting simple snippets of data, or rudimentary calculations made from them, he
21 refers to possible anomalies, potential duplicates, and possible overflagging of CARRP cases, never
22 attesting to the likelihood such anomalies, duplicates or overflagging are actual rather than just
23 potential or, more importantly, that they had a significant impact on the data and would lead to a
24 different resolution of any issue presented to the Court. Mr. Kruskol’s discussion of potential
25 anomalies, duplicates and overflagging would not assist the Court in understanding the evidence or
26 determining any fact at issue, but simply confuse the issues and the Court’s understanding of the
27 statistical evidence, and waste time.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant the motion to exclude the testimony, Declaration, and reports of Plaintiffs’ designated expert Mr. Kruskol.

Dated: March 25, 2021

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that counsel for both parties met and conferred on March 22, 2021, during which time counsel for Defendants notified Plaintiffs' counsel of our intention to file the foregoing motion to exclude expert testimony. Plaintiffs' counsel indicated that they did not agree with the relief sought.

Dated: March 25, 2021

/s/ Lindsay M. Murphy
LINDSAY M. MURPHY
Civil Division
U.S. Department of Justice

CERTIFICATE OF SERVICE

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I hereby certify that on March 25, 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.

/s/ Lindsay M. Murphy
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