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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 (P.M. Session)
Pages 1992-2197
.....

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Case No. 15-9300 Plaintiffs:

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(Appearances continued on next page)

1 APPEARANCES:

2 (Continued)

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E X H I B I T S

Plaintiffs Fish Exhibits

Offered

Received

313A	2185	2185
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Plaintiff Bednasek Exhibits

Offered

Received

315	1997	1997
316	2001	2002
317	2015	2015
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319	2017	2017
321	2018	2018
322	2020	
324	2027	

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E X H I B I T S
(continued)

<u>Defendant's Exhibits</u>	<u>Offered</u>	<u>Received</u>
1205	2194	2196
1209*	2035	
1210	2089	
1213	2112	
1214	2193	2193

*Judicially noticed.

1 (1:33 p.m., proceedings commenced.)

2 THE COURT: Mr. Johnson.

3 MR. JOHNSON: May it please the Court.

4 CROSS EXAMINATION

5 BY MR. JOHNSON:

6 Q. Mr. McFerron, my name is Mark Johnson. You may
7 remember me as the disembodied voice in your deposition.
8 I was calling in on the phone. The first thing you said
9 this morning, when you got on the stand, was, in
10 response to the question of what you do for a living,
11 you said, "I'm a pollster." Do you remember saying
12 that?

13 A. Yes.

14 Q. You're really much more than that, aren't you?
15 You really do much more than just conduct polls?

16 A. Yes.

17 Q. Isn't it true that you are one of the most highly
18 compensated corporate lobbyists in the state of
19 Oklahoma?

20 A. I have a -- our firm has a list of clients we're
21 very proud of.

22 Q. Okay. I'm going to hand you what has been marked
23 as -- for purposes of identification as Plaintiff's
24 Exhibit 315. I'll give two copies to the court and
25 copies to counsel. Can you tell me what this document

1 is?

2 A. It is an Oklahoma Ethics Commission filing of
3 clients and lobbyist registration.

4 Q. For you; is that correct?

5 A. Yes.

6 Q. Your name is on it?

7 A. Correct.

8 Q. Pat McFerron?

9 A. Yes.

10 Q. Dated February 1, 2018?

11 A. Yes.

12 MR. JOHNSON: Your Honor, I offer
13 Exhibit 315 into evidence.

14 THE COURT: Is there any objection
15 Exhibit 315 admitted?

16 MS. BECKER: No, Your Honor.

17 MR. JOHNSON: Your Honor, may I put this on
18 the overhead?

19 THE COURT: Yes.

20 BY MR. JOHNSON:

21 Q. Okay. So if you look at the top, this is a form
22 that's required by the Oklahoma Ethics Commission?

23 A. Yes.

24 Q. And it's required of anybody who does lobbying on
25 behalf of anybody in Oklahoma; isn't that correct?

1 A. That's my understanding, yes.

2 Q. And this form was something that you filled out?

3 A. Correct.

4 Q. And is it -- is all of the information on this
5 form current as of today?

6 A. Yes.

7 Q. And let me ask you, it indicates there are two
8 types -- pardon me -- three types of lobbyists. If you
9 look at the -- the second line, it says legislative
10 lobbyist, legislative liaison, and executive lobbyist.
11 Could you tell us what each of those is?

12 A. Yeah. I believe a legislative lobbyist is
13 someone that's involved in lobbying the legislative body
14 or the governor's office. Legislative liaison is
15 someone who works for a state entity and -- and lobbies
16 those. An executive lobbyist is someone who lobbies
17 someone in the executive branch on issues not related to
18 legislation.

19 Q. That would include the governor and the branches
20 of Oklahoma state government that are in the executive
21 branch?

22 A. Correct.

23 Q. Is it correct that you provide both legislative
24 and executive lobbying for AT&T?

25 A. Actually, I don't believe I do executive lobbying

1 there the way there -- the definitions are because --

2 Q. Well, it says agencies to be lobbied,
3 legislature/governor and staff, doesn't it?

4 A. It does and I will lobby those. But I think it's
5 -- the Oklahoma Ethics Commission defines executive
6 lobbyist in a unique fashion. So my lobbying for them
7 is only to do with legislation. So that is one area,
8 the legislative, governor and staff is one bucket
9 together.

10 Q. Okay. And doesn't this form of -- I've gone to
11 the second page. Doesn't this form indicate that you
12 are a registered lobbyist for Wal-Mart?

13 A. Yes.

14 Q. You've also already testified that you lobby for
15 Koch; is that correct?

16 A. Yes.

17 Q. And you also lobby for Tesla?

18 A. Yes.

19 Q. Okay. You also do political consulting, don't
20 you?

21 A. Yes.

22 Q. Not just polling but consulting, advising
23 candidates; is that correct?

24 A. Our firm does, yes.

25 Q. Now, you say "our firm." Now, one -- one part

1 of, I believe, your employment is something that you
2 didn't mention and that's something called CMA
3 Strategies; is that correct?

4 A. Yes.

5 Q. And that is an organization that you founded?

6 A. Correct.

7 Q. And it provides political consulting work?

8 A. Yes.

9 Q. Cole Hargrave, the entity with which you've been
10 for the last 25 years, that's a different entity?

11 A. It is.

12 Q. Are the two entities related?

13 A. I could explain this. It's probably the best way
14 to do this. Cole Hargrave Snodgrass was a much larger
15 company prior to Tom Cole being elected in 2002 to
16 Congress. When he was elected to Congress, myself and
17 the Hargraves -- and Cole Hargrave started CMA
18 Strategies and took over that book of business which Tom
19 Cole is not involved with.

20 Q. The two entities share offices, don't they?

21 A. We have -- we have separate offices for both, but
22 I have a phone -- I have dedicated landline phones in
23 the same office for -- for those two companies.

24 Q. Okay. Would I be correct in saying that you have
25 been quoted a number of times in the Oklahoma press as a

1 Republican strategist?

2 A. Yes.

3 Q. Do you do any work for Democratic candidates?

4 A. I have worked for candidates who are Democrats,
5 but those have generally been in non-partisan elections.

6 Q. So in partisan elections, you work and have
7 worked solely for Republican candidates?

8 A. Correct.

9 Q. Now, is it correct that in your firm's website,
10 in CMA Strategies' website, you describe yourself as a
11 senior political consultant and lobbyist?

12 A. Yes.

13 Q. Mr. McFerron, I'm handing you a copy of what's
14 been marked for purposes of identification as
15 Plaintiff's Exhibit 316. Two copies for the court and
16 one copy each for counsel. Would you agree with me that
17 this is a printout of CMA Strategies' website?

18 A. I believe so, yes.

19 Q. All right. And your picture appears on the
20 second page of Exhibit 316?

21 A. Correct.

22 MR. JOHNSON: Your Honor, I offer
23 Exhibit 316 into evidence.

24 THE COURT: Any objection?

25 MS. BECKER: No objection.

1 BY MR. JOHNSON:

2 Q. Mr. McFerron --

3 THE COURT: 316 admitted.

4 MR. JOHNSON: I'm sorry.

5 BY MR. JOHNSON:

6 Q. -- isn't it true that on page 2 of Exhibit 316 it
7 states that, "McFerron began his career in survey,
8 research and market analysis at Cole Hargrave Snodgrass
9 & Associates"?

10 A. Yes.

11 Q. Okay. Now, let me ask you a few questions about
12 the circumstances that gave rise to your preparing this
13 survey in question today. Now, you were asked to
14 perform that survey; is that right?

15 A. Yes.

16 Q. And you were first contacted about doing the
17 survey during the first week of May of 2016; isn't that
18 correct?

19 A. I don't know that I can be that precise. It was
20 a week or two, maybe three before the survey was filled
21 was --

22 Q. All right. Now, Mr. McFerron, you remember
23 giving your deposition, don't you?

24 A. Yes.

25 Q. And that was on June 7th, 2016; is that correct?

1 A. Yes.

2 Q. And you were sworn to tell the truth --

3 A. Correct.

4 Q. -- as you are sworn to tell the truth today?

5 Page 8, lines 7 through 19.

6 Mr. McFerron, let me show you -- oh, you
7 have your deposition right there. Let me refer you to
8 page 8, lines 7 through 19. Do you have that?

9 A. Yes.

10 Q. You were asked the question: "When did you first
11 learn about the lawsuit, either the Fish lawsuit or the
12 Keener lawsuit, against the Secretary of State over the
13 Kansas documentary proof of citizenship requirement?"

14 Answer: "It would have been -- I don't know
15 the exact date, but it would have been within a couple
16 of days of the -- the first week of May of this year."

17 Is that correct?

18 A. That was -- my recollection was probably a little
19 better then than today; but, yes.

20 Q. In fact, that was less than a month after you
21 delivered the results of the survey; is that right?

22 A. Correct.

23 Q. So you would -- you would, now having your
24 recollection helped, you would say that you'd got your
25 first call about this -- doing this survey some time

1 during the first week of May 2016?

2 A. Or within a couple of days of the first day of
3 May I think is what that says.

4 Q. Now, you were contacted by the Secretary of
5 State?

6 A. Not directly, I don't believe. I did have one
7 conversation with him is my recollection and this --
8 although my deposition might be more accurate there, but
9 I believe it was Mr. -- is it Roe?

10 Q. So what you remember is that Mr. Roe contacted
11 you first?

12 A. That -- yes.

13 Q. But you do remember having at least one
14 conversation with the Secretary himself about the
15 survey?

16 A. Correct.

17 Q. Were you told in the initial survey that it had
18 to be done quick -- pardon me.

19 Were you told in the initial contact that
20 the survey had to be done quickly?

21 A. I know they were interested in doing something
22 without -- without much of a delay, but I don't
23 remember --

24 Q. Right.

25 A. -- anything had to be done quickly.

1 Q. I think you testified on direct examination that
2 there were certain things you did, certain questions you
3 phrased, or certain questions you didn't ask because you
4 needed to fit within the agreed amount that you would be
5 paid; is that right?

6 A. Yes. Yes.

7 Q. Okay. And isn't it true that at some point you
8 were given a deadline?

9 A. I don't recall that. I will tell you it's my --
10 our standard practice not to rush any kind of survey
11 into the field.

12 Q. Okay. Well, let me -- let me -- okay. Well, let
13 me try to understand that. The first contact that you
14 received about the survey was within a couple of days of
15 the first week of May; is that right?

16 A. Correct.

17 MS. BECKER: Objection. Mischaracterizes
18 his testimony.

19 THE COURT: Overruled.

20 THE WITNESS: The first day of May anyway.

21 BY MR. JOHNSON:

22 Q. The first day of May, all right.

23 So is it correct that from the first contact
24 you had with the -- with the Secretary's Office, you
25 outlined, drafted, supervised the calling of survey

1 respondents, gathered the results, analyzed the results
2 and wrote your May 12th memo; right?

3 A. Yes.

4 Q. You did all of that in somewhat less than two
5 weeks?

6 A. Correct.

7 Q. Did you negotiate with the Secretary's Office
8 over the cost of the survey?

9 A. I don't recall that process. I don't remember if
10 I was given that this was kind of the parameters. I
11 think what it was was could you do this survey, what
12 would this cost in this range.

13 Q. Well, \$9,000 doesn't exactly sound -- sounds like
14 a figure somebody would grab out of the air. 5,000,
15 10,000 maybe. How did you get to \$9,000?

16 A. It's because it's a -- a 500 sample survey with
17 really 19 questions, some of which we knew were not
18 going to be asked of others.

19 And I'll tell you my standard price is --
20 500 sample for 20 question survey is \$10,000 depending
21 on the response -- what we expect, how difficult it is
22 to get responses. So it's generally a function of how
23 long the survey is, how long the agents are on, and how
24 many people we interview.

25 Q. All right. Now, in the -- the memo that you

1 included with your delivery of the results of the
2 survey, it indicates that it's addressed "to interested
3 parties". You didn't address it to the Secretary of
4 State. Who were the other interested parties?

5 A. I don't -- I don't know who those would be.

6 Q. Do you typically address your commissioned
7 surveys to interested parties?

8 A. I have at times if -- if -- but most of the time
9 it's addressed to whoever's funding the survey or how
10 they would like it addressed.

11 Q. Why didn't you -- why didn't you address it to
12 Secretary Kobach? You knew his office was funding the
13 survey, didn't you?

14 A. I did. And I believe I asked who to address it
15 to and, again, as you mentioned, we were under a tight
16 time frame trying to get the -- I was wanting to get the
17 analysis out to people, and so we went with "to
18 interested parties".

19 Q. So you called and you were told to address it "to
20 interested parties"; is that right?

21 A. I don't remember if it was a telephone call, but
22 most likely, yes.

23 Q. Okay. Now, you said you had at least one
24 conversation with the Secretary. Did you -- you shared
25 a copy of the draft questions with the Secretary, didn't

1 you?

2 A. With the Secretary's Office at least.

3 Q. With the Secretary's Office, okay.

4 So you -- you put together a draft and you
5 sent it up to Topeka for them to review; is that
6 correct?

7 A. That's -- I expect that to be what -- yes.

8 Q. Did you expect to get comments on the draft?

9 A. Yes. I will tell you I don't remember what those
10 -- yes, I expected --

11 Q. You did get comments, didn't you?

12 A. I remember a few discussions, yes.

13 Q. In fact, Question 18 --

14 A. That was the one.

15 Q. -- that was added at the Secretary's request,
16 wasn't it?

17 A. Yes.

18 Q. Did you take that request as an order?

19 A. No different than -- I mean, it is a -- a client
20 relationship and they were funding it, wanted that
21 question added.

22 Q. Were you concerned if you hadn't gone along with
23 including that question that you might lose the
24 assignment?

25 A. I -- I don't recall having that -- that thought

1 at the time. But because it was being included at the
2 end, I didn't -- I didn't see a statistical problem with
3 having it included there.

4 Q. Have you heard the term "push poll"?

5 A. Yes.

6 Q. Push poll -- let me ask you this: Isn't it true
7 that a push poll is a poll crafted in such a way that
8 the person taking the poll gets the answers he's looking
9 for?

10 A. That is -- that is not my definition of a push
11 poll. The -- I think a push poll is actually not even
12 trying to collect data but rather trying to disseminate
13 information.

14 Q. Did you have concerns about Question 18?

15 A. Very minor, which is why I would -- I did not
16 want to have it at the start of the study.

17 Q. You had not participated in the legislative
18 effort to enact the SAFE Act in 2011, had you?

19 A. No.

20 Q. In fact, in 2016, when you were asked to do this
21 -- this poll, you had at most a sketchy understanding of
22 the SAFE Act; is that correct?

23 A. I would say I have a -- a general public kind of
24 understanding.

25 Q. Okay. And you had, let's say, a general public

1 understanding of the documentary proof of citizenship
2 requirement?

3 A. Correct.

4 Q. But you didn't -- you certainly didn't have the
5 detailed knowledge of the SAFE Act necessary to draft
6 Question 18, did you?

7 A. I -- no, I would think I would have had the --
8 the ability to draft that question, yes.

9 Q. So you were familiar with the case that alien
10 registration in Kansas in 2011 was the basis for
11 adopting this legislation? You're telling us that right
12 now?

13 A. I knew that the political discourse around the
14 SAFE Act in 2011 included that -- that claim.

15 Q. Wouldn't you agree with me that the phrasing of
16 Question 18 could have affected the respondent's
17 answers?

18 A. To Question 18, yes.

19 Q. You believe the question was badly written, don't
20 you?

21 A. I think it could have been written in a way to
22 withstand greater scrutiny.

23 Q. Okay. But you approved it anyway and you gave it
24 to your call center to include in the --

25 A. Yes.

1 Q. -- survey calls?

2 You believed it could have been written
3 better at the time, didn't you?

4 A. I would actually say I don't know about being
5 "written better". I did have some concerns about it,
6 yes.

7 Q. Did you have concerns -- were your concerns
8 sufficient to overcome your concern that you might lose
9 the assignment if you didn't include Question 18?

10 A. No, I -- quite frankly, I would have -- no.

11 Q. You wanted to do a good job?

12 A. I have lost clients before over things. I'm not
13 afraid to do that.

14 Q. Sure. But in this case you wanted to do a good
15 job for Secretary Kobach, didn't you?

16 A. I wanted to perform my work in a quality manner.
17 I'm not sure that -- I wanted to have quality work. I
18 didn't care if it was for Secretary Kobach or a
19 different client.

20 Q. The \$9,000, was it paid before or after you
21 delivered the results of the survey?

22 A. I believe it was after.

23 Q. And the firm -- and the payment was made to Cole
24 Hargrave; is that correct?

25 A. I can't imagine it was not, but I don't -- I

1 don't get engaged on that side of the business very
2 often.

3 Q. Okay. Didn't you see the survey as an investment
4 in getting more business in Kansas?

5 A. No.

6 Q. You knew that Secretary Kobach was considering
7 running for higher office, didn't you?

8 A. His name had been rumored, yes.

9 Q. Okay. You knew he had been chair of the Kansas
10 Republican Party, didn't you?

11 A. Perhaps I have. But if you'd ask me that now, I
12 wouldn't have been able to recall that.

13 Q. And you thought if you gave him good service, he
14 might get you more work in Kansas, didn't you?

15 A. No.

16 Q. You knew why the survey was being taken, didn't
17 you?

18 A. I knew it had to do with the -- with the case.

19 Q. With the litigation?

20 A. Yes.

21 Q. And that was communicated to you by Mr. Roe in
22 the first contact?

23 A. I believe so.

24 Q. Was that reiterated to you by Secretary Kobach in
25 the telephone conversation you had with him?

1 A. I don't recall.

2 Q. Did you ask to be paid before the results of the
3 survey were communicated?

4 A. Excuse me?

5 Q. Did you ask to be paid before the survey was
6 delivered?

7 A. Well, I mean, that I would physically have the
8 payment before it was delivered?

9 Q. Yes.

10 A. No.

11 Q. Now, you've done political work in Kansas for a
12 number of years, haven't you?

13 A. Yes.

14 Q. In fact, as far back as 2003; is that right?

15 A. I actually did some prior to that, it was -- it
16 was brought to my attention; but, yes.

17 Q. Okay. Isn't it true that you worked on Governor
18 Brownback's election campaign in 2010 and re-election
19 campaign in 2014?

20 A. Yes.

21 MR. JOHNSON: I am going to mark two
22 exhibits. One will be 317, the other will be 318, for
23 purposes of identification, and I'm going to hand copies
24 of both of those exhibits to Mr. McFerron and then give
25 two each to the court.

1 Exhibit 317 purports to be excerpts from the
2 Brownback Campaign Financial Disclosure Report of
3 October 25, 2010 and Exhibit 318 purports to be an
4 excerpt from the Brownback Campaign Disclosure Report of
5 January 10, 2011. I'll give two copies of each to the
6 court.

7 BY MR. JOHNSON:

8 Q. Have you had a chance to look at these two
9 documents, Mr. McFerron?

10 A. Very briefly, yes.

11 Q. And do you recognize them as campaign disclosure
12 reports filed in Kansas that you -- that you see in the
13 normal course of business?

14 A. I don't know that I've seen these before. But,
15 no, it looks that way, yes.

16 Q. You've certainly seen forms like this?

17 A. Yes.

18 Q. Let me first refer you to Exhibit 317, which is
19 the excerpt from the Brownback Disclosure Report of
20 October 25, 2010, and ask you to look at the second and
21 third pages of this exhibit.

22 A. Okay.

23 Q. Okay. Actually, second, third and fourth because
24 there are three separate payments. Would you agree with
25 me this document reflects on August 25, 2010, Cole

1 Hargrave Snodgrass & Associates received \$5,500 from the
2 Brownback campaign?

3 A. Yes.

4 Q. And then if you look at the next page, would you
5 agree that it reflects that on October 6, 2010, Cole
6 Hargrave received a payment of \$7,400 from the campaign?

7 A. Yes.

8 Q. And then finally on the -- on the last page on
9 October 21st, 2010, it reflects that Cole Hargrave
10 received a payment of \$15,300 from the campaign?

11 A. Yes.

12 Q. Do you see that?

13 Does that jive with your recollection of
14 amounts you received from the -- from the campaign?

15 A. I have no reason to dispute these or disagree
16 with these.

17 MR. JOHNSON: Okay. I offer Exhibit 317
18 into evidence.

19 MS. BECKER: No objection.

20 THE COURT: 317 admitted.

21 BY MR. JOHNSON:

22 Q. And now let me refer you to Exhibit 318, which is
23 the campaign disclosure report dated January 10, 2011.
24 Do you have that in front of you?

25 A. Yes.

1 Q. Could you look at the second and third pages of
2 that report, and is it correct that the -- the second
3 page reflects a payment to Cole Hargrave on October
4 26th, 2010 of \$32,400?

5 A. Yes.

6 Q. And then the last page of the exhibit reflects a
7 payment to Cole Hargrave on October 30, 2010 of \$8,100?

8 A. Yes.

9 Q. And would you agree with me --

10 MR. JOHNSON: Well, offer Exhibit 318 into
11 evidence.

12 MS. BECKER: No objection.

13 THE COURT: 318 admitted.

14 BY MR. JOHNSON:

15 Q. And will you agree with me that the total paid to
16 your firm by the Brownback campaign in then Senator,
17 soon to be governor, Brownback's initial election
18 campaign totaled \$68,600?

19 A. That's what it looks like here to me, close to
20 that.

21 Q. Okay. Now, Mr. McFerron, I'm going to mark three
22 more exhibits as respectively 319, 320 and 321.

23 Exhibit 319 -- and rather than do them all
24 together, I'll hand them up serially. Exhibit 319
25 marked for purposes of identification is the Brownback

1 Campaign Disclosure Report dated July 28th, 2014. Do
2 you have that in front of you now?

3 A. Yes.

4 Q. Isn't it correct that Exhibit 319 reflects a
5 payment on May 20, 2014 of \$24,000 to Cole Hargrave?

6 A. Yes.

7 MR. JOHNSON: Offer Exhibit 319 into
8 evidence.

9 MS. BECKER: No objection.

10 THE COURT: 319 admitted.

11 BY MR. JOHNSON:

12 Q. Now, I'm going to hand you what has been marked
13 as Exhibit 320 for purposes of identification, a
14 document which purports to be an excerpt from the
15 Brownback Campaign Disclosure Report dated October 27th,
16 2014. Do you have that document in front of you?

17 A. Yes.

18 Q. Would you agree with me that this document
19 reflects a payment to Cole Hargrave on August 29, 2014
20 of \$13,200?

21 A. Yes.

22 Q. And then on September 30, which is on the last
23 page of the -- of the exhibit, a payment in the amount
24 of \$14,500 to Cole Hargrave?

25 A. Yes.

1 Q. Finally, Mr. McFerron, I'm going to hand you a
2 document that's marked for purposes of identification as
3 Exhibit 321. Hand copies to the court and to counsel.
4 This exhibit purports to be an excerpt from the
5 Brownback Campaign Disclosure Report dated January 10,
6 2015. Do you have this in front of you?

7 A. Yes.

8 Q. Will you agree with me that this document
9 reflects a payment on October 28, 2014 to Cole Hargrave
10 in the amount of \$32,000?

11 A. Yes.

12 Q. And will you agree with me that the exhibit also
13 reflects a payment to Cole Hargrave on November 3, 2014
14 in the amount of \$13,000?

15 A. Yes.

16 Q. Will you agree with me --

17 MR. JOHNSON: I offer Exhibit 321 into
18 evidence.

19 MS. BECKER: No objection.

20 THE COURT: 321 admitted.

21 BY MR. JOHNSON:

22 Q. Would you agree with me that Cole Hargrave was
23 paid a total of \$96,700 by the Brownback re-election
24 campaign in 2014?

25 A. I'll trust your math. If that's what these

1 documents add up to, yes.

2 Q. Isn't it true you also wrote strategy memos for
3 the Brownback re-election campaign in 2014?

4 A. It might depend on your definition of "strategy
5 memos". But I did write memos from the polling and
6 focus research group we did.

7 Q. Okay.

8 A. That --

9 Q. Didn't you recommend Governor Brownback's
10 campaign put out materials tying its Democratic
11 opponent, Paul Davis, to the Wichita multiple murder
12 case involving the Carr brothers?

13 A. I don't remember a document to that, but that
14 would not be incongruent with what I remember my
15 findings to be.

16 Q. Mr. McFerron, I'm going to hand you a document
17 which has been marked for purposes of identification as
18 Exhibit 322. I will tell you that this is a printout of
19 a column that ran in the *Kansas City Star* on October
20 31st, 2014. Have you -- once you've had an opportunity
21 to review this, I want to ask you a few questions about
22 it. Do you have that -- have you had an opportunity to
23 read it?

24 A. Yes.

25 Q. Now, if you'll look at the middle of the second

1 page, it appears to quote from a memo that you write.
2 Is the -- which begins with the words "our polling
3 shows". Do you see that paragraph?"

4 A. Yes.

5 Q. Is that an accurate excerpt from a memo that you
6 wrote to the Brownback campaign?

7 A. Not having the memo in front of me and it being a
8 few years, I can't say for certain. I wish you had the
9 actual memo referenced here from the *Cap Journal* there.
10 But that quote does not seem to counter what I would
11 recall.

12 Q. Okay. Well, let me read it. In fact, I'll put
13 it on the -- well, let me --

14 MR. JOHNSON: May I offer Exhibit 322.

15 MS. BECKER: Objection. Objection, Your
16 Honor. It's -- there's no website notation on it. Our
17 witness has not seen it and it's clearly hearsay. He's
18 free to question the witness about it. But as far as
19 reading a document into evidence which is some random
20 thing that I believe earlier in the trial was -- was not
21 allowed --

22 THE COURT: All right. I'll sustain the
23 objection.

24 MR. JOHNSON: I'll be happy to read an
25 excerpt and ask if the witness questions it.

1 BY MR. JOHNSON:

2 Q. "Our polling shows that, when voters are informed
3 of Davis' relationship with the Supreme Court
4 justices" --

5 MS. BECKER: I'm sorry, objection. She
6 sustained that you're not supposed to be reading it into
7 the record, I thought.

8 THE COURT: All right. You can impeach him
9 with the substance of that. So you can -- you've shown
10 it to him. I think you can ask him is that -- I think
11 he's already answered basically, but you can ask him
12 does that reflect his recollection what he put in the
13 memo.

14 MR. JOHNSON: I would like to get it into
15 the record what -- what it appears at least the story
16 indicates that he said and then ask him if he said this.

17 THE COURT: All right. Proceed.

18 MR. JOHNSON: Thank you, Your Honor.

19 BY MR. JOHNSON:

20 Q. "Our polling shows that, when voters are informed
21 of Davis' relationship with the Supreme Court justices
22 and reminded of that court's decision to overthrow the
23 conviction and sentencing of the Carr brothers, they
24 break against Davis by a better than 5 to 1 ratio."
25 Did you write that?

1 A. That would be something I can see me writing
2 coming out of -- out of that --

3 Q. So you have no reason to question that quote?

4 A. Correct.

5 Q. Okay. I want to hand you a document which I will
6 mark as Exhibit 323 which I'll indicate appears to be a
7 press release issued by the Kansas Chamber of Commerce
8 last May, May of 2017, concerning a poll -- the results
9 of a poll conducted by Mr. McFerron. Have you had a
10 chance to review this?

11 A. Okay.

12 Q. And do you remember conducting the poll for the
13 Kansas Chamber of Commerce referred to in this?

14 A. Yes.

15 Q. Did you review this press release when it was
16 issued?

17 A. No.

18 Q. You never saw this press release?

19 A. I don't believe I have. Do you have a date on it
20 which year? Because this references a study that I've
21 done every year since, I believe, 2002.

22 Q. Right, that's what I was going to get to. You
23 have written -- pardon me.

24 You have conducted a survey -- an annual
25 survey for the Kansas Chamber of Commerce since 2002?

1 A. Correct.

2 Q. But you don't remember seeing this press release?

3 A. Not as a press release, no.

4 Q. Okay. Well, let me ask you something that's in
5 it. Let me ask you about something that's in it. Is it
6 correct that you have done work for -- for all of the
7 campaigns of Congressman Mike Pompeo?

8 A. Yes.

9 Q. Is it correct you did work for the campaign of
10 Congressman Roger Marshall?

11 A. Yes.

12 Q. Is it correct that you did work for all of the
13 eight successful primary challenges to Republican
14 incumbent state senators in 2012?

15 A. Not the way -- I did not do it for them. I was
16 involved in polling each of those but not for those
17 campaigns specifically.

18 Q. Okay. And you do remember that the -- the effort
19 in 2012 was intended to sanitize the Kansas state senate
20 of moderate Republicans, don't you?

21 A. I don't know that I would agree with that -- that
22 terminology.

23 Q. Would you agree with me that there was an effort
24 to eliminate all moderate Republicans from the Kansas
25 state senate in 2012?

1 A. No. I mean, I -- I don't think your absolute
2 terms of "all" and definition of "moderate" are things
3 that are universal.

4 Q. Would you agree with me that eight incumbent
5 Republican senators were targeted by Governor Brownback
6 for primary challenges?

7 A. I believe that there were eight Republican
8 senators targeted by a variety of interests in the
9 state.

10 Q. Would you agree with me that each of those
11 senators had a primary opponent who was reputed to be a
12 more conservative Republican?

13 A. Yes.

14 Q. Would you agree with me that seven of those eight
15 were defeated?

16 A. Yes.

17 Q. Would you agree with me that you were
18 commissioned by Governor Brownback to poll in those
19 campaigns?

20 MS. BECKER: Objection. Your Honor,
21 Rule 403. I don't understand what this has to do with
22 the case.

23 MR. JOHNSON: This goes to credibility, Your
24 Honor. This goes to whether Mr. McFerron was actually
25 interested incurring favor with incumbent Republicans in

1 Kansas rather than providing a truly objective survey.

2 THE COURT: All right. I'll overrule.

3 THE WITNESS: Can you repeat the question?

4 MR. JOHNSON: Could you read it back?

5 (Requested question read back by the
6 reporter.)

7 THE WITNESS: No, it was not Governor
8 Brownback.

9 BY MR. JOHNSON:

10 Q. Who commissioned you?

11 A. I would have to look and see who that was. It
12 was -- I believe it might have been the Kansas State
13 Chamber.

14 Q. Isn't it true that the Kansas State Chamber at
15 the time was -- was -- was being run by a person named
16 Mike O'Neal?

17 A. I don't know that he was there at that point.
18 I'm not sure what his -- I had very limited
19 conversations with Mr. O'Neal.

20 Q. I'm going to hand you a document which has been
21 marked for purposes of identification as Exhibit 324.
22 I'll hand two copies for the court and copies to each of
23 counsel. I'll represent to you, Mr. McFerron, that
24 these are excerpts from FEC -- Federal Election
25 Commission reports. Have you seen Federal Election

1 Commission campaign financial disclosure reports?

2 A. Yes.

3 Q. You would agree with me that candidates for
4 federal office have to file periodic financial
5 disclosure reports with a federal agency called the
6 Federal Election Commission?

7 A. Correct.

8 Q. And those -- you know, as -- as opposed to state
9 candidates who have to file disclosure reports with the
10 State Ethics Commission, we've already gone through some
11 of those exhibits?

12 A. Yes.

13 Q. What I want to do is go through this with you in
14 relatively short order to indicate the extent to which
15 you've done work for Kansas candidates for federal
16 office. All right. Okay. Now, if you look at the
17 second page of the exhibit --

18 MS. BECKER: Your Honor, I just object again
19 to -- a continuing objection under Rule 403 that this is
20 just a waste of time and we've already established
21 through numerous brand new exhibits that he has done a
22 lot of work in Kansas and he's been hired by numerous
23 groups.

24 THE COURT: All right. Well, first of all,
25 Exhibit 324's not been offered, so I don't think you

1 should be reading it into the record in this fashion.

2 MR. JOHNSON: Your Honor, Exhibit 403 (sic)
3 is probative value of it and I believe that this exhibit
4 does have probative value. And, you know, to the extent
5 it is prejudicial, you know -- it's unduly prejudicial,
6 I'm sure that you can --

7 MS. BECKER: Rule 403 is undue waste of
8 time, immaterial and cumulative. That is what this is.

9 THE COURT: All right. Exhibit 324 I'll
10 take under advisement. Go ahead and proceed with it.
11 It really is a balancing test under 403. It probably is
12 prejudicial. I don't know how probative it is until you
13 ask questions about it.

14 BY MR. JOHNSON:

15 Q. Isn't it true --

16 MR. JOHNSON: I'm sorry, Your Honor.

17 THE COURT: Go ahead.

18 BY MR. JOHNSON:

19 Q. -- in 2014 you were paid -- your firm was paid,
20 combined by the Brownback campaigns and the Pompeo
21 campaigns, a total of \$186,800?

22 A. If that's what's reflected in these reports, I
23 have no reason to dispute that.

24 Q. And isn't it true that in the 2016 election,
25 right after you had been commissioned to prepare the

1 survey in this case, you were paid an additional \$21,300
2 by the Pompeo campaign and \$16,250 by Senator Moran's
3 re-election campaign?

4 A. If that's what this shows.

5 MR. JOHNSON: Your Honor, that's all I have.
6 Thank you. Thanks, Mr. McFerron.

7 MS. BECKER: Your Honor, I have more
8 redirect.

9 REDIRECT EXAMINATION

10 BY MS. BECKER:

11 Q. Mr. McFerron, I think it's been established that
12 you've done a lot of work, a lot of polling work in
13 Kansas and that you're very familiar with the Kansas
14 electorate; would you agree?

15 A. Yes.

16 Q. If you are assessing what percent of the adult
17 citizens of Kansas possess documents proving
18 citizenship, you need to look at the entire adult
19 citizen population; is that correct?

20 MR. STEINER: Objection. Leading, Your
21 Honor.

22 THE COURT: All right. I'll overrule with
23 respect to this question, but you need to not lead the
24 witness and suggest answers to him.

25 THE WITNESS: Yes, I mean, look at adults

1 living in Kansas, yes.

2 BY MS. BECKER:

3 Q. Does the fact that a person that might already be
4 registered to vote in Kansas, does that change the --
5 the issue or the fact of whether or not they have
6 documentary proof of citizenship available to them?

7 A. No.

8 Q. Now, Mr. McFerron, you were asked about this at
9 length with regard to the why you didn't just look at
10 the non-registered voter population -- I believe the
11 eligible non-registered voter population. But if you
12 did that, do you see any kind of a problem with just
13 looking at the non-registered voters?

14 A. Well, for one thing it would dramatically
15 increase the cost of the study because your incident
16 rate would change dramatically for doing the study, but
17 not from the result standpoint, no.

18 Q. Would it change your -- whether or not the study
19 was representative of the state?

20 A. Well, I mean, it depends. It depends on what
21 you're trying to make representative of. For this I'm
22 trying to be representative of the state. So, yes, that
23 would change representative of the state. But, I mean,
24 that would be what your -- depending on what your --
25 what your ultimate goal and model would be.

1 Q. Would --

2 A. But, no, a study just of those not registered to
3 vote would not be reflective of the state of Kansas,
4 correct. Because there's not a lot of data on that, it
5 would be tough to create the model and benchmarking for
6 that kind of a study.

7 Q. Could you speculate what age group might be
8 primarily in that -- that group?

9 MR. STEINER: Objection, Your Honor. The
10 question --

11 THE COURT: Sustained.

12 BY MS. BECKER:

13 Q. Opposing counsel suggested that you were trying
14 to get survey results that made your clients happy. And
15 I'm wondering if you want to address that.

16 A. Well, it's personally offensive. I've had many
17 clients who do not like the survey results but you don't
18 -- you don't stay in business as long as we have by
19 giving people -- telling them what they want to hear.

20 I'll use an example. The gubernatorial
21 client I talked about here, I'm sure Mark Hutton was not
22 happy with my first survey analysis of his and he has
23 since dropped out of the race. So, no, I have never had
24 any qualms giving a client data they don't -- that's not
25 what they want to hear.

1 Q. Are you doing any polling work for Secretary
2 Kobach in the 2018 gubernatorial campaign?

3 A. No.

4 Q. Did you say earlier that you were until recently
5 -- I'm sorry.

6 You just mentioned that about Mr. Hutton.
7 Do you recall if Secretary Kobach has used your polling
8 firm at all in the 2017-2018 election cycle?

9 A. No, he has not.

10 Q. In your mind, is there a difference between
11 polling and survey research?

12 A. To me they're largely synonymous terms, so, no.

13 Q. So earlier when Mr. -- when plaintiffs' counsel
14 was trying to make a distinction, do you see a
15 distinction?

16 A. I do not.

17 Q. Mr. McFerron, you've mentioned a few times that
18 the parameters of the survey -- you've mentioned a lower
19 cost and that that was a consideration; is that true?

20 A. Yes.

21 Q. Are you implying -- well, let me ask it this way:
22 Does the fact that the survey didn't cost as much make
23 the survey any less reliable?

24 MR. STEINER: Objection, Your Honor. This
25 is again leading him on. The question she -- if she

1 wanted to ask a proper question --

2 THE COURT: All right. I'll sustain to the
3 form of the question. Needs to be an open-ended
4 question, not a leading question.

5 MS. BECKER: Okay.

6 BY MS. BECKER:

7 Q. Are -- are -- does the cost of a survey affect
8 its outcome?

9 A. There -- there are diminishing returns the more
10 expensive a study becomes if that -- if that increase in
11 the expense is done by a larger sample size. I would
12 never say that I wouldn't prefer to have a 50,000-person
13 survey over something smaller, but -- but I have every
14 confidence in a 500 sample statewide survey, 95 percent
15 confidence, margin of error of 4.3 I guess.

16 Q. Right.

17 Was your firm the top polling firm in the
18 Midwest before you were ever asked to do this survey?

19 A. I believe that we had a -- a very good reputation
20 throughout this part of the country prior to this
21 survey, yes.

22 Q. Did you have any reason to try to make Secretary
23 Kobach happy and -- with the results for business
24 purposes?

25 A. No. I think we have a firm footing especially in

1 Kansas. It's our No. 2 state. For example, we
2 represented Pompeo -- or Secretary Pompeo now had hired
3 us to do survey work in his earlier elections and we
4 would have already had a commitment to do his work
5 there. The other things alluded to on cross, they were
6 already in motion and moving forward prior to this
7 survey.

8 In fact, I -- I did give a heads up to some
9 of the people involved there that I was going to be
10 testifying here, and it was the first they had heard
11 that I even participated in this survey.

12 Q. And I want to clarify, do you recall from your
13 survey how many people out of 500 reported not having
14 access to a --

15 A. We had one person.

16 Q. One out of 500?

17 A. Yes and that person was already registered to
18 vote.

19 Q. I see.

20 Now, counsel also asked if you were familiar
21 with literature with regard to the quota based, and it
22 didn't seem like you were able to complete your answer
23 with regard to whether you were aware of the -- I think
24 you referred to them as academic studies?

25 A. I think there is a continued debate over polling

1 methodology related to weighting and modeling to put
2 studies together. I do think that it's entirely
3 inappropriate to look at a world of the 1930s and '40s
4 where telephone coverage, let alone cell phone coverage,
5 were not where they are today and to use that -- that
6 time frame as a determinate for what works today.

7 You know, I think the field is littered with
8 people that do weighting wrong, that do modeling wrong,
9 that do quotas wrong. So you can find examples in any
10 of those that people miss the boat. They set up the
11 model wrong to begin with.

12 There was a study during the presidential
13 campaign that I remember that someone found -- there was
14 some number of African-American men in a certain age
15 group overwhelmingly supporting Donald Trump. And come
16 to find out only one person had been interviewed but
17 weighted an extreme weight.

18 Q. So that would be a pitfall of the weighting
19 method?

20 A. Correct.

21 Q. And last I just want to ask once again with
22 regard to the question -- I believe you testified with
23 regard to Question 18 that you could see how it could
24 introduce bias; is that -- do you recall stating that?

25 A. Correct.

1 Q. Could you explain why you don't think that it --
2 that it did introduce bias?

3 A. It doesn't introduce any bias to the --
4 especially there's -- there's no way it can introduce
5 bias to the 17 questions before it was asked. And,
6 again, it's -- it purports as fact something that --
7 that, you know, I think people can maybe debate if it's
8 fact or not is where the bias could be as far as the
9 reason that the legislature passed this legislation.

10 MS. BECKER: Okay. Thank you, Mr. McFerron.
11 I don't have anything else.

12 THE COURT: Any further cross?

13 MR. STEINER: No recross, Your Honor.

14 MR. JOHNSON: Nothing, Your Honor. Thank
15 you.

16 THE COURT: All right. May Mr. McFerron be
17 excused? You're excused.

18 MS. BECKER: Yes.

19 THE COURT: Call your next witness.

20 MR. KOBACH: We have no further witnesses,
21 Your Honor. I think at this point, before the rebuttal
22 witness comes in, it might be appropriate, there's one
23 last evidentiary item we had.

24 We wanted to move for admission either by
25 judicial notice or some other process -- we've been

1 looking at the research on this -- the admission into
2 the record of the entire legislative history. I have a
3 certified copy from the Office of the Legislative
4 Supervisor. We have copies for the court and for
5 opposing counsel. Since we are, of course, debating a
6 statute and legislative history may be -- may or may not
7 be relevant.

8 THE COURT: All right. Any objection?

9 MR. JOHNSON: Yes, Your Honor.

10 MR. HO: Yes, Your Honor. We object to
11 that. This is a -- 592 pages of documents, including
12 letters, statements, out-of-court statements. And I
13 think judicial notice of testimony and statements is for
14 the fact that some testimony has been offered and that
15 some statements have occurred in the course of adopting
16 legislation but not for the truth of the matter asserted
17 therein, which is what I believe Secretary Kobach seeks
18 to offer the evidence for. I mean, there's no issue in
19 this case about what the legislature may or may not have
20 heard, what the legislature may or may not have believed
21 in 2011 when the SAFE Act was passed.

22 The question in this case is whether or not
23 -- or one of the questions in this case is whether or
24 not, in fact, there was a substantial number of
25 non-citizens registering to vote in the state of Kansas.

1 So the only possible purpose for admitting these
2 documents is for the truth of the matter asserted.

3 They're hearsay and they should be excluded
4 from the trial record, Your Honor.

5 MR. JOHNSON: Your Honor, I join in Mr. Ho's
6 objection. Seemingly a third of this document is drafts
7 and revisions and strike-throughs and updates of the
8 bill, not legislative history.

9 MR. HO: And what I'd add also is that a lot
10 -- out of several documents in there are testimony from
11 Secretary Kobach himself. Again, if he wants to testify
12 about what he believes to be incidence of non-citizen
13 registration in the state of Kansas, he's welcome to
14 take the stand. I'd be happy to cross-examine him on
15 this.

16 MR. KOBACH: Your Honor, this is not being
17 offered for the truth of the matter asserted at all.
18 This is being offered for the evidence of what the
19 legislature saw prior to enacting the act. It's also a
20 prior record.

21 I would point out in the Supreme Court of --
22 case of *Crawford* -- *Marion County* versus *Crawford* (sic),
23 which, of course, is a central case in the Bednasek --
24 central court case in the Bednasek half of this case,
25 the Indiana -- the entire Indiana legislative history of

1 SEA 456 -- or whatever the number was of that statute --
2 was taken into the record as legislative fact is how the
3 court described it.

4 And we also have looked at the Tenth Circuit
5 case law. There is a plethora of cases in the Tenth
6 Circuit acknowledging that legislative history may be
7 either noticed or put into the record through some form
8 even on appeal as simply the legislative history of the
9 statute.

10 So we are not offering it for the truth of
11 the matter asserted. We are simply offering to show
12 what the legislature considered when it enacted the law,
13 and this is particularly relevant to the Bednasek case
14 which raises the constitutional question.

15 MR. JOHNSON: Your Honor, as I remember,
16 having taken statutory interpretation a long time ago,
17 legislative history is only relevant when the statute is
18 ambiguous. I have seen no argument, no position taken
19 that this statute is ambiguous. It may be a bad statute
20 but it's not ambiguous.

21 MR. KOBACH: As someone who taught
22 legislative history for quite a while, it's relevant for
23 determining the legislature's intention when drafting
24 the law. One of the issues in the Bednasek case, of
25 course, is the Fourteenth Amendment claim. And the

1 intention of the legislature is sometimes reflected in
2 the things the legislature looked at.

3 THE COURT: Not if the legislation is plain
4 on its face. Justice Scalia created a whole body of
5 law --

6 MR. KOBACH: Well, that would be if you're
7 looking at the meaning of the word.

8 THE COURT: -- wherein which we focus on the
9 plain meaning of the words of the statute.

10 I'm going to judicially notice that there
11 was 593 pages of the legislative history that includes
12 letters and statements and testimony, including the
13 testimony of Secretary Kobach, that includes drafts and
14 strike-throughs and redrafts and that's all I'm going to
15 notice.

16 I'm not going to read it. I'm not going to
17 read the substance of it because then I would be
18 crossing the line into, I think, giving it some weight
19 and import when it truly is hearsay.

20 But I can certainly notice that the
21 legislature went through what sounds like somewhat of a
22 relatively extensive legislative process. But I'm not
23 going to read these documents. So I can judicially
24 notice that it exists and I'll go that far.

25 MR. KOBACH: Just to clarify, Your Honor,

1 would that -- our main concern is that it would be in
2 the record of the case. Would that judicial notice
3 effectively move it into the record?

4 THE COURT: Let's mark it as an exhibit and
5 I'll say that I judicially noticed the exhibit. Again,
6 you're not offering it for truth of the matter asserted,
7 so it has no evidentiary weight in terms of the
8 substance of the documents, the substance of the
9 testimony, any of that. And I think the record needs to
10 be clear that that's not properly before the court as
11 evidence in that sense. And for the appellate record,
12 it would not be as well.

13 MR. KOBACH: It would be Exhibit 1209.

14 THE COURT: 1209. All right.

15 MR. JOHNSON: Your Honor, just for purposes
16 of clarification, does your ruling mean that this
17 document may not be cited for any purpose other than to
18 state that it exists?

19 THE COURT: That would be -- that would be
20 correct. I've told you exactly what I'm judicially
21 noticing.

22 MR. JOHNSON: Yes, you have.

23 THE COURT: I'm judicially noticing -- I'm
24 trusting what you all told me. I'm judicially noticing
25 that the legislative history of this -- of this statute

1 is 593 pages. It includes, but is not limited to,
2 letters, statements, testimony, including the testimony
3 of Secretary Kobach himself. It includes drafts of the
4 legislation, strike-throughs and redrafts. I will
5 notice that process happened and this is the type of
6 information that the legislature considered and created,
7 but I will not notice the content of any of these
8 because it is hearsay. It's not proper evidence when
9 offered for the truth of the matter asserted, meaning
10 the content of what's in the -- in the documents
11 themselves.

12 All right. Do you understand? All right.
13 It's Exhibit 1209 I'm judicially noticing with those
14 caveats.

15 MR. JOHNSON: Your Honor, I left a bunch of
16 clips and things up here. Let me get them out of the
17 way.

18 THE COURT: All right. So with that the
19 defendant rests?

20 MR. KOBACH: Yes.

21 THE COURT: All right. Anything more from
22 the defendant?

23 MS. BECKER: Actually, Your Honor, we just
24 would have some administrative things. You're not going
25 to take it up after the break, are you?

1 THE COURT: I'm sorry?

2 MS. BECKER: We just have a few things to
3 reassert at the close of evidence.

4 THE COURT: This is the close of your
5 evidence; correct?

6 MS. BECKER: Yes. So -- all right. Well,
7 we would -- we would move for -- ask for a motion for
8 summary judgment and motions to dismiss based on the
9 evidence that's been introduced at trial thus far in
10 addition to our previous briefing that I understand that
11 Your Honor has already considered and overruled, but
12 it's for purposes of the record we would move for that
13 again based on the arguments that we -- that we put in
14 the briefs as well as standing arguments for the Fish
15 Plaintiffs that had documentary proof of citizenship
16 with them and did not produce it is a self-inflicted
17 injury, and Bednasek as to standing and the fact that we
18 still believe he was a Texas resident.

19 And we would also move under Rule 52(c) for
20 a finding of partial fact with regard to an issue that
21 we would like to keep on the appellate record, which is
22 that I understand that Your Honor is bound by the Tenth
23 Circuit ruling. However, the defendant would like to
24 preserve for appeal the fact that the Tenth Circuit's
25 standard that has created the paradigm of evidence in

1 this case is -- is not in line with *Crawford v. Marion*,
2 and we do not think that the defendant should have had
3 to show a substantial burden to justify the law and it's
4 not consistent with the NVRA. So -- and we'll put that
5 in a written motion for Your Honor.

6 THE COURT: All right. That's fine. So
7 typically, when someone moves for relief at the end of
8 the case, I take the matter under advisement. But I
9 think we're not in the correct procedural posture at
10 this point, having almost concluded the trial, for me to
11 take up a motion to dismiss or motion for summary
12 judgment.

13 But to the extent you're raising
14 jurisdictional issues you've raised before and on the
15 basis of this more complete record, I overrule and deny
16 those for the reasons given in my prior orders.

17 And with respect to your motion for finding
18 of partial fact, which sounds like a motion that really
19 seeks to preserve your legal position despite the ruling
20 from the Tenth Circuit, I think your statement preserves
21 that for the appellate record. I don't need to rule on
22 that. I am bound by the Tenth Circuit's decision.

23 All right. So now plaintiff has a rebuttal
24 witness; is that correct?

25 MR. STEINER: Thank you, Your Honor. We

1 call Professor Matthew Barreto as our expert.

2 THE COURT: Okay. All right.

3 MATTHEW BARRETO, Ph.D.,

4 called as a witness on behalf of the Fish Plaintiffs,

5 having first been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. STEINER:

8 Q. Good afternoon, Professor Barreto.

9 Just before --

10 A. Good afternoon.

11 Q. -- before we get started, where were you born?

12 A. San Juan, Puerto Rico.

13 Q. Where did you grow up?

14 A. I grew up in Topeka, Kansas.

15 Q. Did you go to high school in Topeka, Kansas?

16 A. I did.

17 Q. Where did you go?

18 A. I went to Washburn Rural High School.

19 Q. Are there any well-known Kansas politicians who
20 also went to your high school?

21 A. Yes.

22 Q. Who is that?

23 A. That would be Secretary Kobach who's sitting
24 across the table here from us.

25 Q. Now --

1 A. Though he is older than me.

2 Q. After you graduated from Washburn Rural, what did
3 you do?

4 A. I went to college in Eastern New Mexico
5 University in Portales, New Mexico where I studied
6 political science.

7 Q. And --

8 MR. STEINER: May I approach the witness,
9 Your Honor?

10 THE COURT: Yes.

11 BY MR. STEINER:

12 Q. I'll hand you a binder that has your CV and your
13 expert witness report, I think --

14 A. Thank you.

15 Q. -- also Mr. McFerron's report.

16 If you look at the first tab of the binder
17 -- if you look at the first tab of the binder, is that
18 -- I believe it's the same as Plaintiffs' Exhibit 137.
19 Is that your current CV?

20 A. Yes, it looks like it is.

21 Q. And what do you -- now what did you do after you
22 graduated from Eastern New Mexico?

23 A. Then I moved to Los Angeles where I worked for a
24 year and then I started graduate school. I did a year
25 of graduate school in political science at Claremont

1 Graduate University, and then pursued my Ph.D. at the
2 University of California, Irvine also in political
3 science.

4 Q. And in your undergraduate and graduate studies,
5 did you take any courses in statistics, research
6 methodology or survey design?

7 A. Yes, I did at both levels. As an undergraduate,
8 took classes on research methodology and statistics.
9 And at the graduate level, I took numerous classes in
10 both research methodology and statistics.

11 Q. What was the area of focus and the topic of your
12 Ph.D. dissertation?

13 A. Public opinion and voting in the United States,
14 specifically looking at racial and ethnic minorities,
15 survey research, public opinion and voting patterns
16 predominantly focusing on the Latino population in the
17 United States.

18 Q. Did your dissertation win any fellowships or
19 awards?

20 A. Yes, it did.

21 Q. Can you describe some of those?

22 A. Yeah, I believe there were three awards; one was
23 from the Ford Foundation, Dissertation Fellowship Award,
24 another one was from the UC Mexus Foundation, and the
25 third from the University of California, Office of the

1 President.

2 Q. After receiving your Ph.D., what did you do?

3 A. I took a job as an assistant professor of
4 political science at the University of Washington in
5 Seattle in 2005.

6 Q. And was that a tenured or tenure track position?

7 A. Correct, that was a tenure track position.

8 Q. Did you receive tenure at the University of
9 Washington?

10 A. Yes, I did. I was at the University of
11 Washington about nine and a half years where I was
12 promoted to associate professor and then to full
13 professor.

14 Q. And associate professor is the tenured position?

15 A. Correct.

16 Q. And why did you leave the University of
17 Washington?

18 A. I received a job offer at the University of
19 California, Los Angeles where I'm currently a professor
20 of political science in Chicano studies.

21 Q. And in your teaching at the University of
22 Washington and/or at UCLA, have you taught any courses
23 in statistics, research methodology or survey design?

24 A. Yes, across all of those at both. The
25 undergraduate level I have taught classes on research

1 methodology and survey methodologies specifically. I've
2 also taught those same classes to Ph.D. students,
3 approaches to research, research design as well as
4 specific courses on regression analysis, statistical
5 analysis and advanced statistical analysis.

6 Q. In addition to your teaching, in your academic
7 work have you published any books or articles in
8 peer-reviewed publications?

9 A. Yes.

10 Q. Approximately how many books and how many
11 articles?

12 A. I think four books and about 60 articles and book
13 chapters.

14 Q. Approximately how many of those are
15 peer-reviewed?

16 A. Pretty much most of them, all of them.

17 Q. What are the areas of focus in your research and
18 publications?

19 A. Public opinion survey methodology, voting and
20 election patterns mostly focusing on the Latino
21 population in the United States.

22 Q. Did any of your books or articles win awards?

23 A. Yes.

24 Q. Could you describe some of those?

25 A. Yeah. The book that I co-authored with

1 Dr. Christopher Parker in 2013, I received the Best Book
2 Award from the American Political Science Association
3 section on racial and ethnic politics. I've also won a
4 couple of awards for the best conference paper presented
5 at a political science conference, two or three of those
6 over the years.

7 Q. In addition to publishing in peer-reviewed
8 journals and publishing peer-reviewed books, have you
9 served as a peer reviewer for any academic publications?

10 A. Yes, all the time.

11 Q. Could you describe some of those journals that
12 you've served as a peer reviewer for?

13 A. Yes. So basically, when you submitted articles
14 to these journals, then you go on their peer review
15 list. You have to return the favor.

16 So I've been invited to be a peer reviewer
17 for pretty much all of the articles -- journals in which
18 I have published an article, including journals such as
19 the *American Political Science Review*, which is our
20 flagship journal in political science, *Journal of*
21 *Sociological Methods and Research*, which is a premier
22 methods journal, *Public Opinion Quarterly*, which is the
23 official journal of the American Association of Public
24 Opinion Research and many more.

25 Q. Now, has your academic work and research led you

1 to join the board of any industry groups in the field of
2 election law or survey research?

3 A. Yes.

4 Q. Could you describe what boards -- what boards
5 you've joined in those fields?

6 A. Sure. So in 2010 I joined the board of the
7 American National Election Study. This is a group that
8 is -- oversees the survey that has been funded by the
9 National Science Foundation every year since 1948. It's
10 the oldest and perhaps the most prestigious survey of
11 American public opinion related to the elections. And
12 it's been run out of the University of Michigan since
13 1948 and continues to be run out of the University of
14 Michigan.

15 Q. And what's your understanding of why you were
16 selected to join that board?

17 A. Well, in 2008, during the 2008 presidential
18 election, I received a grant from the National Science
19 Foundation to run a companion study with the American
20 National Election Study. This added a Latino oversample
21 and a Spanish translation for the first time to the
22 American National Election Study. It was the same year
23 that a colleague of mine also added the first ever
24 African-American oversample to that study. And as a
25 result of myself and Dr. Tasha Philpot, University of

1 Texas, we were both invited to join the National
2 American Election Study Board after that in 2012 for the
3 future cycles.

4 Q. And what does serving on that board entail?

5 A. There's probably about 25 or so professors and
6 there are a couple of industry professionals as well on
7 that board. We meet quarterly. We evaluate the survey
8 instrument, evaluate the latest research on survey
9 methodology, implementation. We advise the principal
10 investigators on any of these issues, or they ask for
11 our input and assign us to committees to help them
12 oversee the implementation. It's a very, very large
13 project and so the board is quite busy.

14 Q. Now, in addition to your academic work, have you
15 had the opportunity to design and implement surveys in
16 the real world?

17 A. Yes, I have.

18 Q. Okay. And is there a company that you work with
19 in that regard?

20 A. Yes. In 2007 I co-founded the polling and
21 research firm Latino Decisions along with Dr. Gary
22 Segura.

23 Q. And what is Latino Decisions?

24 A. This is a public opinion data collection firm.
25 We mostly focus on Hispanic and Latino Americans but

1 also do surveys of the general public and focus groups
2 to understand the opinions and attitudes of this
3 community.

4 Q. Approximately how many surveys have you
5 personally designed or implemented?

6 A. I would say, between the academic work and the
7 work at Latino Decisions, well over 200 surveys that
8 I've personally designed and implemented myself.

9 Q. Can you identify some of the types of clients you
10 work with at Latino Decisions?

11 A. Well, overwhelmingly our clients are issue groups
12 or advocacy groups that are interested in the Latino
13 community. So we work for groups such as the National
14 Council of La Raza, the National Association of Latino
15 Elected Officials, the Latino Victory Project, groups
16 like that that are trying to uplift and raise awareness
17 over public opinion in the Latino community.

18 Q. Do you ever work for political candidates or
19 parties?

20 A. Yes.

21 Q. And when did that work start?

22 A. The first time we did work for candidates running
23 for office was in 2016. So for the first nine years our
24 firm did not do any partisan work. In 2016 we worked on
25 three candidate campaigns; one for president and two for

1 U.S. senate.

2 Q. Okay. And did you work on any political party
3 campaigns?

4 A. Our firm also received a contract I did not
5 personally work on. But Dr. Gabriel Sanchez, one of our
6 principals, headed up some work for the Democratic
7 Congressional Campaign Committee in 2016.

8 Q. Now, Professor Barreto, have you ever testified
9 as an expert witness before?

10 A. Yes.

11 Q. Approximately how many times?

12 A. Maybe about half a dozen, plus or minus, six or
13 seven.

14 Q. Were any of those cases in the area of survey
15 research and impact of voting laws or regulations?

16 A. Yes.

17 Q. Okay. Which ones were those?

18 A. That would have been in Wisconsin voter ID
19 case -- I don't remember the exact name. You can
20 probably refresh my memory -- Pennsylvania voter ID case
21 and the Texas voter ID case. Those all three concerned
22 voter identification laws and I offered a survey in each
23 of those.

24 Q. And has your opinion been excluded or criticized
25 in any part by any of those courts?

1 A. My recollection was in the Pennsylvania case the
2 lower court, the first decision that was offered, raised
3 some questions about the survey that we offered and that
4 in the appeal process another expert came in and
5 provided testimony about the survey and that the survey
6 was eventually accepted.

7 Q. And what's your -- do you know what ultimately
8 happened in the Pennsylvania case?

9 A. The voter ID law was struck down.

10 Q. Has your survey research and opinion been cited
11 favorably by any courts in -- in these cases?

12 A. Yes. Well, in the Pennsylvania case, it was
13 eventually cited favorably when the law was struck down
14 as well as in the court decision in Wisconsin and the
15 court decision in Texas, as well as numerous appeals,
16 appellate decisions in Texas where judges specifically
17 referenced the findings of the survey.

18 MR. STEINER: Your Honor, at this point I
19 would tender Professor Barreto as an expert on
20 statistical analysis, survey methods and voting
21 behavior.

22 MS. BECKER: Your Honor, no objection as to
23 those areas.

24 THE COURT: All right. I accept this
25 witness as an expert in the fields of statistical

1 analysis, survey methods and voting behavior.

2 BY MR. STEINER:

3 Q. Now, Professor Barreto, have you had an
4 opportunity to review the summary of results and the
5 survey instrument prepared by Mr. McFerron who testified
6 earlier this morning?

7 A. Yes, I have.

8 Q. And if you need to reference it, I believe it's
9 Tab 3 in your binder. It's been admitted as Defendant's
10 Exhibit -- or it's being considered as Defendant's
11 Exhibit 863. I think that's under advisement by the
12 court.

13 Did you prepare a report that summarized
14 your opinions and the basis therefore?

15 A. Yes, I did.

16 Q. Could you look behind Tab 2. This is Plaintiffs'
17 Exhibit 134. Is that your report in this case?

18 A. Yes, that's correct.

19 Q. Okay. And if you'd go to page 12 of the report,
20 is that your signature?

21 A. Yes.

22 Q. Did -- and does this report accurately reflect
23 and present your professional opinions that you've
24 formed in this matter?

25 A. Yes, it does.

1 MR. STEINER: Your Honor, I would offer
2 Exhibit 134.

3 MS. BECKER: No objection.

4 THE COURT: 134 -- I don't think you've
5 offered 137.

6 MR. STEINER: I apologize. I'd also offer
7 137, which is his current CV.

8 THE COURT: All right. 134 and 137
9 admitted.

10 BY MR. STEINER:

11 Q. Now, could you, please, just give an overall --
12 give your overall reaction and opinions on the survey
13 performed by Mr. McFerron at a high level?

14 A. Sure. I think paragraph 8 on page 4 probably
15 highlights the three key takeaways that raised questions
16 and criticisms from me about the data that was presented
17 in the McFerron survey.

18 The first was that the sample of 500 Kansas
19 adults was not a representative sample of the entire
20 population, and that created a lot of questions for me
21 about the interpretation then.

22 The second was that the question wording
23 throughout the survey had inconsistencies and violations
24 of what we consider social science practices or norms
25 and were designed in a way to introduce bias.

1 And the third was that the survey was not
2 implemented in a generally accepted practice when the
3 actual surveys data were being recorded. There were
4 many questions and, again, irregularities of what we
5 would normally do.

6 Q. So I'd like to talk about each of those things in
7 a little bit more detail. The first thing you mentioned
8 was the survey sample not being representative of the
9 population. Could you explain why it's important that a
10 survey sample be representative of the population as a
11 whole?

12 A. Yeah. This is the single most important
13 component of getting a survey right is that there are
14 about 2 million eligible voters here in Kansas but the
15 survey's only going to be able to interview 500 or maybe
16 a thousand, or maybe even 50,000 as just discussed, but
17 you're never going to be able to interview all 2
18 million. So you need to make sure that sample that you
19 draw, when you draw that sample, that it is reflective,
20 that it can stand in for those 2 million people.

21 And you want to make sure on a lot of
22 different demographic characteristics the sample of
23 those 500 people you match and they match perfectly to
24 the larger universe of the 2 million eligible voters.
25 It's the most important and single first principle we

1 would always evaluate.

2 Q. How do you go about doing that?

3 A. Well, some of this was discussed by Mr. McFerron
4 in that he said he looked at census data. I believe
5 that was one of the bullet points in his report. And
6 that's exactly how you would do it. You would look at
7 known census estimates.

8 The census publishes on an annual basis
9 demographic estimates and characteristics of each of the
10 states, and so you would look at things -- for example,
11 you might look at things like college education. And if
12 you knew from the census that 30 percent of Kansas
13 adults had a college degree, then you would expect to
14 get exactly 30 percent in your sample to have a college
15 degree, so on and so forth. You would go through
16 different demographic characteristics and make sure that
17 the sample you got is actually reflective of the
18 population.

19 Q. You mentioned education. What other areas would
20 you look at if you were doing the survey?

21 A. Socioeconomic status are certainly at the top of
22 that list. That includes things like education, income,
23 household income, home ownership status, and those types
24 of demographic identifiers. There would be others that
25 Mr. McFerron talked about such as gender and age and

1 those sorts of demographic characteristics.

2 Q. And is race a factor that you would look at?

3 A. Yeah, you would look at race and ethnicity. You
4 would look at geography. Those are a couple of things
5 Mr. McFerron talked about.

6 Q. Now, can you explain why it's important to look
7 at education as one of the factors in a survey of this
8 type of possession of documents?

9 A. Well, certainly there's two main reasons for
10 this. First, remember the goal is to get a
11 representative sample. We want -- we want this sample
12 of 500 people to be reflective of the 2 million Kansans
13 that it's a stand-in for.

14 First, we want to make sure we have the
15 exact right number of people who have post graduate
16 degrees and the right number of people who never even
17 finished high school in the first place.

18 There's two reasons education is important.
19 The first is that it's related to response rate. That
20 is people with higher educational attainment, they're
21 much more likely to participate and respond to surveys.
22 So if you're not paying attention to that, you will
23 easily get way too many college-educated respondents in
24 your survey.

25 The second is that that factor is correlated

1 with the possession of these underlying documents and
2 things like birth certificates, passports and things
3 like that. Not only does it create a mismatch of the
4 demographics, but, if you're not paying attention to
5 that, you're including -- increasing the number of
6 people in your sample who are likely to have that --
7 those documents.

8 Q. And what about with respect to income level, why
9 is that important to look at?

10 A. Yes and income is quite similar to education and
11 that's why we sort of often times look at those together
12 as socioeconomic status.

13 Income has been shown in numerous studies to
14 be correlated with the possession rate of what I refer
15 to in other research as underlying documents. Those are
16 things like birth certificates, passports and Social
17 Security numbers and things like that that lower income
18 individuals are statistically less likely to have those
19 documents.

20 And so we want to make sure that if the
21 survey is reflective on a topic like this, that it's
22 very important to make sure that you have the exact
23 right number of people over -- that are making over
24 \$200,000 and a number of people who are making under
25 \$20,000.

1 Q. Okay. And what types of breakdowns do you
2 typically see on income level?

3 A. Well, I think Mr. McFerron explained this as well
4 that in most surveys there are, I think he said,
5 brackets or strata in which you might ask 0 to 20,000;
6 20,000 to 40,000; 40,000 to 60. So you let people put
7 themselves in one bracket or another.

8 If you only ask one question like this, it
9 usually has a follow-up question. Then if you said, oh,
10 I make under 50, you would follow up. And he gave this
11 exact example that under 25 or between 25 and 50. The
12 more data we have there, the more we're able to assess
13 whether or not the survey is, in fact, representative of
14 the entire state.

15 Q. And what -- I think you mentioned also home
16 ownership versus renting. Why is that important?

17 A. This is another variable that is identified as
18 being correlated with non-response or response rate.
19 There's a discussion of response rate earlier and it's
20 found similar to education-income, that homeowners are
21 much more likely to -- first of all, to have access to
22 resources. Perhaps through the purchase of their home
23 they had to have tracked down some of these other
24 documents. And they have higher response rates to
25 surveys.

1 Renters, which are less likely to -- perhaps
2 have less access to these documents, move around a lot
3 more than homeowners and less stable. They have lower
4 response rate.

5 We would like to know if someone is a
6 homeowner or renter so we can match that to the census
7 to make sure we have the exact right proportion in our
8 sample here as homeowners and renters as census reports
9 for Kansas.

10 Q. You've mentioned the response rate a few times.
11 Could you explain what that is and why it's important?

12 A. Yeah. The response rate -- there are two rates
13 that were referenced earlier when Mr. McFerron was
14 giving testimony and those were the cooperation rate and
15 response rate. Those are both things that the American
16 Association of Public Opinion Research says that, when
17 you're offering these official expert reports and things
18 like this, that you need to report those. And the
19 reason is very simple, it allows us to assess the
20 reliability and the generalizability of the data that
21 was collected.

22 If you have 500 people here but you had to
23 make 1 million calls in order to get those 5 million --
24 500 people, that would have a very low response rate,
25 would indicate that the survey did not have a very good

1 cooperation rate. Whereas, if he only had to make a
2 thousand calls and he had a 50 percent response rate,
3 that would be exceptionally high. And so we want to
4 know that so we can know something about the reliability
5 of the data.

6 Q. Now, once you have collected your data and looked
7 at these different census factors, how do you ensure
8 that your survey sample matches the characteristics of
9 the population as a whole?

10 A. Well, this -- I think it's, you know, directly to
11 debate one of my strongest criticisms of the survey is
12 the quota-based sampling technique that we just had some
13 discussion over.

14 Typically what most survey researchers do,
15 in both the social sciences and also my experience in
16 which you referred to as the real world, is provide
17 weights. They weight the data after the fact to make
18 sure that it balances and matches the census. We don't
19 want to collect data and then give it to either a client
20 or a court if it doesn't actually match the population
21 that we're interested in. And so the most common
22 practice is that, once the data are collected, they
23 would be weighted to find any discrepancies and bring it
24 into alignment.

25 Q. Now, doesn't applying those weights undervalue

1 the responses of people who are easier to reach or fall
2 into categories that are more responsive and overvalue
3 individual responses of people who are in groups that
4 are harder to reach?

5 A. In a very simplistic way of thinking about it, we
6 are assigning numeric values to their responses, but
7 that's what the research has suggested for decades is
8 extremely valuable.

9 I'll give you a very quick example to think
10 about this. If we have a sense and if we know from
11 census data that the underlying population of Kansas is
12 50 percent male and 50 percent female and we get a
13 survey that is 60 percent female and 40 percent male, we
14 know that that would not be reflective. It would be
15 overrepresenting women in that study and so we would
16 assign a value of, say, something like .9, 90 percent,
17 to female respondents and 1.1 or something like that.

18 That doesn't mean those responses are better
19 or anything like that. It just means when the computer
20 tabulates the responses, the data are reflective of a
21 50/50 balance in the population.

22 If your survey is implemented up front with
23 a care and by following social science standards, the
24 weights that you will probably have to apply are usually
25 fairly small and they just help ensure that your sample

1 is reliable.

2 Q. And so, for example, the -- I think the example
3 Mr. McFerron just testified to about a single
4 African-American male in a survey being weighted and
5 suggesting that that segment of the population was
6 overwhelmingly supportive of President Trump's election,
7 what's your response to that?

8 MS. BECKER: Objection. Leading.

9 MR. STEINER: The question was what's your
10 response to that.

11 THE COURT: No, it's not leading. Go ahead.

12 THE WITNESS: This is an example from, I
13 believe, the on-line poll that the *Los Angeles Times* did
14 in conjunction, I believe, with Rand throughout the 2016
15 election where they're attempting to interview the same
16 people over and over again. And there were many
17 articles written about that poll because it did suffer
18 from small sample sizes and weighting problems.

19 That's not the common approach. Most people
20 have a very large robust sample size and they apply
21 weights after the fact just to make the sample more
22 precise and more accurate.

23 So I do agree with one thing Mr. McFerron
24 said, that if you don't know what you're doing, whether
25 you're doing quota base sampling or weighting, you're

1 going to have bad data. So we want to make sure that
2 we're implementing these things with care and according
3 to social science standards.

4 BY MR. STEINER:

5 Q. Now, Mr. McFerron testified, I believe you were
6 here for it, to using a quota system to attempt to have
7 the survey sample match the population on the factors
8 that he considered, which I think were race, sex and
9 geography. In your opinion is that an acceptable
10 methodology?

11 A. No, it is not.

12 Q. Okay. Why not?

13 A. This is something that has been around for a long
14 time. It continues to be debunked and proven
15 statistically, when compared to a universe estimates,
16 meaning the real answer, that quota-base sampling yields
17 much more bias. And there's a lot of academic research
18 and survey science research to suggest that.

19 The reason is that -- and he explained this,
20 I believe, when you were questioning him -- that at one
21 point he said the senior citizen category was full and
22 it had to get "turned off". That's how quotas work is
23 that you have an exact number that you expect to get.

24 For high response categories -- and it was
25 probably not just people over 65, it was probably in

1 particular women over 65, because they respond at higher
2 rates. Once that category is closed off, it means no
3 more people in that category can come into the survey.
4 And so that means the remaining people that come in are
5 artificially having a higher participation rate in the
6 survey and creating imbalance in the survey.

7 There's been a number of studies that show
8 when you do that, when you try to artificially force
9 people beforehand, it results in far less accurate data
10 than if you were to have implemented the study with more
11 days, with more call-backs giving everyone an equal
12 chance to participate and then applying some weights on
13 the back end is the far more accurate way to implement a
14 study.

15 Q. Okay. And looking at Mr. McFerron's survey
16 results, did you see demographic inconsistencies between
17 his survey and the Kansas adult -- or citizen voting age
18 population as a whole that, in your opinion, called into
19 question the validity of the survey results?

20 A. Yes, I did.

21 Q. Okay. And what are those areas?

22 A. Well, one that we've already been speaking about
23 is related to income. He reported in his survey that
24 39 percent of households were below \$50,000. And I
25 think we established earlier that the census reports

1 that it's 48 percent. So he was off there by about
2 9 percent.

3 As I mentioned, that should have been broken
4 down more so we could really assess the fine grain of
5 whether or not those folks were under 25,000 or between
6 25 and 50. But income appears to be off.

7 MS. BECKER: I'm sorry, objection, Your
8 Honor. This is not within his report. If you could
9 give me a citation to it, please.

10 THE WITNESS: Paragraph 14 on page 8.

11 MS. BECKER: Thank you.

12 THE COURT: It's in the first two sentences
13 of the paragraph. Proceed.

14 THE WITNESS: Okay. So the second area
15 that's also in that same paragraph is related to
16 passport acquisition, which is one of the documents that
17 is asked about in terms of access to citizenship. And
18 here the survey reported that 50 percent of Kansas
19 households had a U.S. passport.

20 When we checked those against other records
21 and documents as provided by the State Department, it
22 suggested that it was only about 30 percent of Kansas
23 households had a U.S. passport. So in that case it was
24 off by 20 percentage points.

25 BY MR. STEINER:

1 Q. Why is that 20 percent difference in reported
2 possession of passports versus what the State Department
3 says, why is that significant?

4 A. Well, there's, you know, either one of two things
5 happening. Either people are over-reporting the extent
6 to which they actually have passports, which I'll talk
7 about in just a minute when I talk about a question
8 wording. So either they're saying, yes, I have a
9 passport when they don't and they're not giving us their
10 honest answers, which is no good.

11 Q. Is there a term which refers to that?

12 A. That would be social desirability which you
13 talked about earlier. So either that's happening and
14 they don't actually have passports at 50 percent and
15 they're trying to tell the interviewer they do, or
16 50 percent of the respondents have a passport which
17 would mean that the survey is absolutely not reflective
18 of the true state of Kansas in which 30 percent of
19 Kansans have a passport. So, again, it's a demographic
20 irregularity where the weight should have been used to
21 correct for that.

22 And the third was an area that you also
23 already discussed, which was in terms of the rate of
24 voter registration. I noted in my report that,
25 according to the census, only 68 percent of Kansans were

1 registered to vote. And in this report it was indicated
2 it was 83 percent.

3 So there's three areas where I wish I would
4 have had more demographic data such as home ownership
5 status or status to evaluate it on. But in this case
6 there were three areas of significant mismatches with
7 true underlying population.

8 MR. STEINER: Stephen, if we could put up
9 Exhibit 155, the census. Is it not in there? It's
10 okay.

11 MR. NAJARIAN: First year or five year?

12 MR. STEINER: Five year.

13 BY MR. STEINER:

14 Q. Can you just identify -- I'm not sure if
15 Mr. McFerron could. So just identify what this is.

16 A. This is the American Community Survey done by the
17 U.S. Census and this particular product is called the
18 five-year estimate ending in the year 2014 here for the
19 state of Kansas and it's, I believe, reporting household
20 income.

21 MR. STEINER: Your Honor, I don't believe I
22 offered 155 during Mr. McFerron's testimony but I would
23 like to offer it now. I think it's from the census
24 data, so I think there's generally agreement on that,
25 but I'd like to make sure these numbers are included.

1 MS. BECKER: No objection. Let's try to do
2 it before you put it up on the screen. Thanks.

3 THE COURT: 155 admitted.

4 BY MR. STEINER:

5 Q. Now, Professor Barreto, in your work, how do you
6 determine what population it is that you should be
7 drawing a sample of?

8 A. Well, I think we have to ask ourselves what is
9 the most important question to be answered or what are
10 we trying to make a conclusion about, and that should
11 tell us the population that we're interested in here.

12 In some of the studies that Mr. McFerron
13 referred to, he was doing studies of voters or likely
14 voters for some of his clients. He would have
15 specifically said I want to get a sample of likely
16 voters right here before the election.

17 So the question that we have is what is the
18 -- what is the most important piece of information we
19 want to get out of this study. And I think on the very
20 first page of his summary he attempts to make a
21 conclusion that this law is not harming the registration
22 rates. And so I think if that's the question -- if
23 that's the conclusion he's attempting to make, that that
24 should help us define the population that we need to be
25 studying.

1 Q. And in that circumstance, what population is that
2 you would study?

3 A. Well, I think if you're trying to answer a
4 question of does this new law affect people who are
5 trying to register and vote, then the population you
6 want to sample are people who are currently not
7 registered but eligible. You don't want to be sampling
8 people who are already registered, perhaps been
9 registered for many years.

10 You want to be sampling the people who are
11 not registered if you're trying to draw that conclusion
12 that this new law will not impact them or will. It's a
13 question. You want to assess it. So that's the
14 population of the -- if I had been tasked with this, I
15 would have instructed my client to focus on.

16 Q. When you're constructing a sample, then what
17 sample size do you typically look for?

18 A. Well, in there I think that if he had started
19 with a sample of 500 just within that population of not
20 registered eligible, that would have been perfectly
21 fine. If he had done a statewide sample and done an
22 oversample, an additional sample essentially, 500 would
23 have been fine. But something in that range definitely
24 gives us more confidence in the results.

25 Again, I should say, you know, with the

1 footnote there the sample size alone doesn't direct
2 reliability. The survey has to be implemented
3 correctly, has to be weighted and a number of other
4 things.

5 Q. And I believe Mr. McFerron testified that in his
6 sample of 500, 65 of those people were not registered to
7 vote. I think 415 were registered and there were about
8 18 people registered in another state, not necessarily
9 Kansas, and then two people who didn't respond to that
10 question.

11 What impact does that have -- if you're
12 talking about either 65 people who aren't registered at
13 all or as many as 85 people who may not be registered in
14 Kansas, what impact does that have on the survey
15 results?

16 A. This is a issue I get directly in paragraph 15
17 where I reference that exact number because that was an
18 issue that I was concerned about that there were only 65
19 non-registered. And there's two problems. The first,
20 assuming that sample of 65 people is representative of
21 all the thousands of non-registered Kansans, it would
22 carry a margin of error of plus or minus 12.2 percent.

23 But it raises the larger question of are
24 those 65 people reflected? What are the demographics of
25 those 65 people? If we were to do a survey of

1 non-registered eligible voters, we would have started
2 with that sample frame. We would have said what are
3 their characteristics.

4 If he was doing a quota, he would have set
5 up quotas just for those 65 folks.

6 So you need to not only have a larger sample
7 but you have to have a sample that is drawn with the
8 intent to get a reliable representative sample of that
9 group, and neither of those things were done in this
10 case.

11 Q. Now, Professor Barreto, turning to the wording of
12 the survey questionnaire itself, you mentioned earlier
13 that was, I think, your second area of concern. Could
14 you explain that in more detail?

15 A. Yes. Yes, I'd be happy to. So there's a couple
16 of areas in the survey in the way that the questions are
17 worded that I believe are not consistent with best
18 practices in social science, or worst case are
19 introducing extreme bias into the way respondents would
20 be faced with that question and have to respond to it.
21 And as a result, I believe what's happening, I believe I
22 explain in paragraph 16, is over-reporting.

23 I already gave one example of this with the
24 passports. It could be that people feel that they need
25 to tell the survey taker that they have that and so

1 they're over-reporting the extent to which they do,
2 because in this case I believe it's question five
3 there's a very specific example of social desirability.

4 Q. Why don't we look at Question 5. I think it's
5 either going to be on the screen or behind Tab 3 in the
6 report. And this is Mr. McFerron's survey where the
7 lead in he says, "Now I want to read you a short list of
8 documents. Only one of these documents is needed in
9 order to register to vote in Kansas. For each of these,
10 please let me know if you have that document at your
11 home, office or other location, or if someone else keeps
12 the document for you and could get it to you if
13 necessary, or if that document does not exist."

14 So could you explain what, in your opinion,
15 is wrong with that lead into the series of questions?

16 A. Yeah, so I think that there are a couple of
17 things. The first is that it's overly long and
18 complicated. But at the starting point it primes the
19 respondent that the list of documents you're about to
20 hear are needed. It says these documents are needed.
21 And the second thing it tells them is that they're
22 needed in order to perform an act in which we have a lot
23 social desirability about, to be a registered voter.

24 There's extensive political science
25 literature of over-reporting, of finding that when

1 someone starts with that question, especially when it's
2 very near the front of the survey, you haven't had that
3 rapport -- Mr. McFerron talked about that, that usually
4 comes towards the end of the survey -- of just leading
5 off telling a stranger I want you to tell me if you have
6 one of these documents and, by the way, you need these
7 documents in order to be a registered voter.

8 It then doesn't actually give any follow-up
9 questions to assess whether the document may have been
10 lost, whether or not it has their correct name on it.
11 It compresses all of that into one single question. And
12 so I think this question, as well as the ones that
13 follow on passports and other things, have been primed
14 by that lead in.

15 Q. And as an expert in survey methodology, if you
16 were to draft this question or this lead in, how would
17 you draft it to avoid introducing that bias?

18 A. Well, we've had similar questions about birth
19 certificates on some of these other surveys that you
20 referenced in other court cases. Because it is what I
21 call an underlying document, it is an important
22 document, and so we usually -- what we want to do is we
23 want to make sure the question is neutral, that it
24 doesn't lead the respondent to think they need to give
25 one answer or the other. We want them to think no

1 matter what they say that's fine.

2 And so we followed social science practices
3 there and start out by saying now I want you to think
4 about the last time you had to use your birth
5 certificate. And I'm just paraphrasing here because I
6 don't have my old surveys in front of me. Some people
7 we've talked to may have lost or misplaced their birth
8 certificate over the years. Other people know right
9 where they are and keep them in close contact. How
10 about you, if you had to show your birth certificate, is
11 that something that you would be able to produce, or
12 like some people have you maybe lost it over the years?

13 So by giving the respondents different
14 scenarios and saying other people here also fall into
15 one of those scenarios, you haven't led them to say you
16 need these documents to be a voter. And there's very
17 extensive political science research on this -- on this
18 topic suggesting that, when you prime respondents, they
19 will over-report their participation, their access to
20 documents.

21 Q. Now, if we could look -- before we get there, I
22 think with respect to the -- to the age question, was
23 there --

24 A. Yeah, there were two other items that I had
25 identified as perhaps not following best practices in

1 social science research. The first were these
2 demographic questions that come at the beginning of the
3 survey. As Mr. McFerron explained, he's using them to
4 create his quotas.

5 Typically we like to put these demographic
6 questions at the end of the survey. These are personal,
7 sensitive pieces of information and we typically don't
8 want to lead out by those because we know people don't
9 have that rapport yet, they may not give their best
10 answer.

11 With respect to age, typically that is asked
12 what year were you born as opposed to asking someone
13 tell me what your age is.

14 Q. Why is that?

15 A. People don't like to always tell you how old they
16 are, especially as they get into middle and older years.
17 But they don't think that if I tell them the year of
18 your birth that you're going to quickly calculate their
19 age, so they usually do a good job of doing that.

20 Again, we always put that near the end of
21 the survey so that you can have had -- so that would
22 give us a more accurate read. Again, social science
23 research on that year of birth is the most accurate way
24 to capture that type of question.

25 The second question that I took issue with

1 the wording on related to demographics was income, which
2 we've already discussed.

3 Q. And then if you take a look at Question 18 -- and
4 we've had, I think, pretty extensive testimony by
5 Mr. McFerron on this -- but what's your opinion, in
6 terms as an expert on survey methodology with respect to
7 the wording of Question 18?

8 A. Well, this is certainly a leading question. We
9 would probably put this into the category of what we
10 call as message framing actually and so we're not --

11 Q. What's that?

12 A. -- really interested --

13 So I think this question would probably
14 belong much better in most of the work that Mr. McFerron
15 does for political candidates, which he did mention he
16 does messaging research.

17 Typically you would just phrase a question
18 two different ways. You would give one lead in that a
19 candidate is considering saying on the campaign trail
20 and then you might give another lead in that either the
21 opponent, and you would see how that changes people's
22 responses.

23 You're not actually interested in the
24 factual real answer to the question, and that is these
25 first two sentences. You're telling people of the

1 evidence of people registering who weren't supposed to
2 be registering in Kansas elections. That may or may not
3 be true. You're priming the respondent to think of that
4 issue. You're then saying that that's why the
5 legislature passed this law. You're talking about the
6 legislature took action in order to do this.

7 And so for a variety of reasons, I think
8 which we already discussed, this would not be considered
9 to produce factually reliable evidence, but it's not to
10 suggest that these type of questions aren't used. They
11 are, but they're used in campaign messaging research.

12 Q. And, finally, Professor Barreto, I believe the
13 third area that you mentioned where you took issue with
14 Mr. McFerron's methodology was in the implementation of
15 the survey. Can you explain what concerns you had in
16 that regard?

17 A. Yes. Well, we've already discussed that there
18 was no response rate reported, so that was something
19 that we were not able to assess in terms of the
20 accuracy.

21 But here in paragraph 19 I talk specifically
22 about the days and the times in which the survey was
23 administered. In order to get that reliable sample of
24 all adult residents in Kansas, we want to make sure that
25 we don't close off possibilities for some people to

1 participate in the study.

2 In this case this study was done in only
3 three days, which is unusually short when it comes to
4 social science surveys. As a comparison, the survey
5 that we did in the state Pennsylvania we left in the
6 field for three weeks. I believe the survey that we did
7 in the state of Texas we left in the field for four
8 weeks.

9 And the reason is we want to do multiple
10 call-backs. We want to exhaust the numbers. We want to
11 call people back and ask them a second time to
12 participate. We don't only want to call in the evening
13 on Monday, Tuesday and Wednesday. We also want to call
14 on the weekend during different hours.

15 So it's generally accepted that you will
16 call at least seven days so that you have every possible
17 different scenario and that you'll call at different
18 times. And preferably, for a social science study,
19 you'll be in the field for two or three weeks really
20 trying to do those call-backs.

21 In this case this survey was conducted in
22 just three days, which is exceptionally fast. And so if
23 you were -- I explain in here why that's a problem. For
24 anyone who was working during those hours the survey day
25 was implemented, they had a zero chance being included.

1 That's the reason we want to continue to dial numbers
2 and give people every possible opportunity to be counted
3 in a survey.

4 Q. All right. Can you just explain what -- I think
5 you used the term call-back. Can you explain what that
6 is and how that relates to the survey research?

7 A. Yeah. So we'll call a number and the person says
8 I can't talk right now, I'm busy or, no, thank you, I'm
9 not interested, or the phone just rings and it goes to
10 their voicemail. Rather than just moving on and just
11 taking the next one and only getting people who answer
12 on the first ring, what we like to do is release
13 sample -- release the phone numbers in small batches so
14 rather than just releasing all of them -- and we'll do
15 two, three, four attempts per each number and then move
16 on to another number and try to get those.

17 When you're doing a survey in only three
18 days, it's not possible to do that. You just keep
19 calling numbers and get people who are only answering on
20 the first ring. And there's a lot of, again, public
21 opinion research that's been published on what's called
22 the non-response bias that when you only get people on
23 those first ring and you're not getting people on the
24 second, the third, the fourth ring, those people are
25 demographically and socioeconomically quite different.

1 Q. And with respect to only calling on weekday
2 afternoons and evenings, do you agree that it's
3 important to include weekends in calling?

4 A. Yeah, weekends in particular are very important.
5 Everybody has a different schedule. We shouldn't assume
6 what their schedule is, and that's why we like to do as
7 many call-backs on as many different days.

8 MR. STEINER: Thank you, Professor Barreto.
9 I have no further questions.

10 THE COURT: All right. I think now would be
11 a good time to take a 15-minute break.

12 (Recess.)

13 THE COURT: I should ask Mr. Johnson, did
14 you have any questions?

15 MR. JOHNSON: No, Your Honor.

16 CROSS EXAMINATION

17 BY MS. BECKER:

18 Q. Good afternoon, Dr. Barreto.

19 A. Good afternoon.

20 Q. You did some work for the Hilary Clinton campaign
21 a couple years ago; is that correct?

22 A. Correct.

23 Q. You provided strategic advice to the campaign as
24 a consultant; isn't that correct?

25 A. We provided polling and focus groups.

1 Q. Did you independently act as a consultant to the
2 campaign separate from Latino Decisions?

3 A. I think the contract was with myself and Gary
4 Segura, my business partner, and not with our firm. But
5 I don't remember the details of the contract.

6 Q. Did you do more than polling work?

7 A. We also did focus groups.

8 Q. Could you, please, describe the extent of that
9 consulting work as far as, like, when it started, when
10 it ended?

11 A. I believe it started in the summer of '15. I
12 don't remember exactly when it started. Maybe the fall
13 of '15. I would have to go and look. And then we did
14 polling and focus groups for them during the primary
15 election and then during the general election.

16 Q. Okay.

17 A. Through the general election day.

18 Q. Through the election day?

19 A. Yeah, I think that's when contracts ended.

20 Q. Do you recall in your report, which I think you
21 still have in front of you, I believe there was a
22 criticism found on page 3, paragraph 6. You criticized
23 McFerron for being essentially a Republican firm, didn't
24 you?

25 A. That was part of it.

1 Q. And didn't you also state in the report that his
2 firm was not neutral or independent?

3 A. That was part of what I wrote there, yes.

4 Q. Your firm just hired former DNC chair, Democratic
5 National Committee Chair, Albert Morales; isn't that
6 right?

7 A. I think he would have been honored to have been
8 the chair. That wasn't his position. He was -- I
9 believe he was their Director of Hispanic Outreach for a
10 while. But, yes, he works for us now.

11 Q. Okay. So he -- do you know how long he was with
12 -- working for the DNC?

13 A. I do not. Off and on he had been there in
14 between other jobs for eight years maybe, maybe more.

15 Q. Uh-huh. Have you hired anybody from the RNC?

16 A. We have not.

17 Q. The McFerron survey doesn't specifically ask
18 respondents how old they are, does it?

19 A. I think it asks what age bucket they're in.

20 Q. Do you want to look at which one?

21 A. Yeah, let me look at the question so I can give
22 you an answer. "Which of the following age groups is
23 correct for you?"

24 Q. So by giving a broad age group category, that
25 kind of counteracts any reluctance that you were

1 describing earlier of a respondent to be shy and not
2 want to tell their exact age; isn't that true?

3 A. I think the age category would be slightly better
4 than a direct "tell me your exact age." I still
5 wouldn't have put it at the beginning. And the point I
6 was trying to make is just the traditional way of asking
7 it, which is "why don't you give me your year of birth"
8 and do at the end of the survey.

9 Q. Because that would cause people reluctance to
10 continue?

11 A. To misreport their age possibly.

12 Q. Isn't it true that respondents, if they are
13 hesitant to give you an age, wouldn't they also be
14 hesitant to give you an exact income bracket?

15 A. Some respondents do not report income, that's
16 correct.

17 Q. And what happens when they refuse to answer, does
18 that hurt response rate?

19 A. Well, the response rate is -- it would be the
20 response rate to that question. The response rate to
21 the survey is something that we talk about. In terms of
22 the overall participation in the survey, that would be
23 gleaned at Question 1 or 2.

24 But typically if someone doesn't answer
25 their income, there might be a follow-up question on

1 income. That's sometimes where you do see a bracket of
2 just higher or lower than something. But it is common
3 that some people will not tell you their income.

4 Q. So it would make sense, wouldn't it, to avoid
5 that period of time where you might -- somebody might
6 not want to tell it and then you have to come up with
7 brackets. Wouldn't it be reasonable just to go ahead
8 and give them a higher or lower than so that you don't
9 risk losing or getting a negative or zero response?

10 A. No. The traditional way of asking it is to ask
11 for more categories because it is so important.

12 If you only have a higher or lower than 50,
13 there's usually an immediate follow up that says, well,
14 is that lower than 25 or between 25 and 50 and then you
15 can place those people in more categories. This was an
16 example that Mr. McFerron said he had used in other
17 work.

18 And so that's the traditional way of doing
19 it is asking for more categories so that we can just
20 have more information about the respondents.

21 Q. Well, if they're less inclined to give you an
22 exact number, how does giving more categories help?

23 A. Well, we want to be able to assess two things.
24 One is the reliability of the sample. And so by having
25 more information about the respondents, we can get a

1 better approximation for how it matches the census.
2 And, two, is we can assess the degree to which it might
3 be correlated with the access of the documents, which is
4 another -- another area of concern.

5 Q. Dr. Barreto, this isn't the first time you
6 testified against a state law in a trial, is it?

7 A. No.

8 Q. You testified for plaintiffs in the Wisconsin
9 photo ID trial I believe; is that correct?

10 A. Yes.

11 Q. And you testified in that case that 13.2 percent
12 of African-American voters didn't have photo ID; is that
13 right?

14 A. I'd have to go and look at my report.

15 Q. You don't -- you don't recall one way or the
16 other?

17 A. I don't recall. It was a long time ago.

18 Q. Do you recall whether the trial judge ruled in
19 favor of the plaintiffs?

20 A. My recollection of Wisconsin was that the trial
21 judge ruled against the voter ID law in their first
22 decision.

23 MS. BECKER: May I approach the witness,
24 Your Honor?

25 THE COURT: Yes.

1 BY MS. BECKER:

2 Q. I'm just going to hand you an article --

3 A. Okay.

4 Q. -- for identification. Dr. Barreto, could you
5 just identify what this appears to be?

6 A. This looks like a news story from a newspaper in
7 Seattle, Washington in 2014.

8 Q. And who was the subject of the story?

9 A. It's about me.

10 Q. Okay. And that's your picture on the front page;
11 right?

12 A. That's me, yeah.

13 MS. BECKER: Your Honor, I have marked
14 Defendant's Exhibit 1209 as an article. Move into
15 evidence, please.

16 THE COURT: I think we already have a 1209,
17 if my memory is correct.

18 MS. BECKER: 1210. Sorry, 1210.

19 BY MS. BECKER:

20 Q. Dr. Barreto --

21 THE COURT: Wait a minute. Exhibit 1209.

22 MR. STEINER: I think it is -- this would be
23 1210.

24 THE COURT: This is Exhibit 1210. What is
25 it again? A news article?

1 MS. BECKER: Yeah, it's an article titled
2 The Seattle Prof Who is Changing the Conversation.

3 MR. STEINER: I object to the admission of
4 news article, Your Honor. It's hearsay. I don't think
5 it's evidence. Certainly don't have a problem with
6 Miss Becker questioning Dr. Barreto about anything
7 that's attributed to him in the article, but I don't
8 think the article itself is evidence.

9 THE COURT: I agree, consistent with the
10 other article that the plaintiffs have, I'm not going to
11 admit it as evidence, but you can certainly ask him
12 questions to impeach him with information in the
13 article.

14 BY MS. BECKER:

15 Q. Dr. Barreto, I'd like to ask you if you recall
16 giving this interview?

17 A. I -- I recall most of it, but it was three or
18 four years ago.

19 Q. Okay. And I just want it -- you referenced that
20 you were involved in the Wisconsin case and I want to
21 see if this refreshes your recollection as to where that
22 legal status is. If you'd turn to page 3 of 5.

23 A. Okay.

24 Q. And the -- if you could just read that paragraph
25 to yourself beginning with Adelman, I believe that's

1 Judge Adelman, and then doesn't it appear as if the
2 trying judge's decision was sent to the Seventh Court of
3 Appeals, and are you aware that it was reversed?

4 MR. STEINER: Objection, Your Honor. I
5 think that this is -- the Wisconsin voter ID case has
6 had a long history of going up to the Seventh Circuit,
7 that the Seventh Circuit's opinion being stayed in
8 advance of the 2014 election, going back to the Seventh
9 Circuit, going back to the trial court, going back up.

10 And so to ask this witness about where this
11 case was in 2014 when it's currently, I think, awaiting
12 opinion from the Seventh Circuit for a third time is
13 certainly unfair to anyone other than perhaps a lawyer
14 involved in the case.

15 THE COURT: Reframe the question. If you
16 know the answer, you can answer it.

17 And you can certainly redirect, Mr. Steiner.

18 BY MS. BECKER:

19 Q. Are you aware of that case being reversed or not?

20 A. I know that it has been up and down, as
21 Mr. Steiner said. I don't know the current status.

22 MS. BECKER: Your Honor, I'd like to ask
23 that the court take judicial notice of *Frank v. Walker*,
24 768, F.3rd, 744, Seventh Circuit, 2014.

25 THE COURT: Are you asking me to take

1 judicial notice of the entire procedural history and all
2 the opinions in that case?

3 MS. BECKER: No, just this one citation,
4 Your Honor.

5 THE COURT: All right. It sounds like it's
6 an incomplete picture of the case, which is still
7 pending, as I understand it, in front of the trial
8 court.

9 MR. STEINER: Correct, Your Honor. So we
10 obviously don't have a problem with Your Honor taking
11 judicial notice of any of the opinions of the case. But
12 I think for completeness, to the extent that becomes an
13 issue, we should be able to point Your Honor to any
14 other opinions in the case.

15 THE COURT: All right. I'll judicially
16 notice *Frank versus Walker* at that citation.

17 MS. BECKER: Thank you, Your Honor. This
18 particular citation has a reference to Dr. Barreto's
19 report, which is why I drew it to the court's attention.

20 BY MS. BECKER:

21 Q. One other -- I'd also like to ask you, doctor --
22 do people call you professor or doctor?

23 A. Professor usually.

24 Q. Professor. I will also.

25 A. Doctor is more for real doctors I think.

1 Q. That's kind of what I was thinking but I don't
2 want to be rude.

3 So I just want to draw your attention to a
4 comment and ask if -- if you recall this in the
5 interview. And it is on page -- page 2 beginning of the
6 paragraph ACLU Voting Rights Project. If you could just
7 read that paragraph.

8 A. Uh-huh.

9 Q. The ACLU staff attorney cited here described you
10 as critical to their success and that they expect to
11 rely on you in the future; is that true?

12 A. That's what he said.

13 Q. Okay. And that wouldn't be for Hispanic
14 community service work, would it?

15 A. In the Wisconsin case, we did a large survey and
16 then I believe we did an African-American and a Hispanic
17 oversample.

18 Q. I'm sorry, I guess these are for -- these are for
19 legal cases; right? These aren't just social research?

20 A. You would have to ask him, but that's what I did
21 in Wisconsin.

22 Q. And in the other states as well, legal
23 consulting?

24 A. In Pennsylvania I also worked with the ACLU, but
25 not in Texas.

1 Q. Professor Barreto, how much money did you make in
2 2017 for work for lawyers?

3 A. I have no idea.

4 Q. Well, is it above 50,000 or below 50,000?

5 A. 2017, is that the year that we're filing on right
6 now?

7 Q. Yes.

8 A. I have got no idea. I -- I have no idea. I'd
9 have to go and look at my taxes.

10 Q. Above 50?

11 A. Probably above 50.

12 Q. Above 100?

13 A. I don't know. I'd have to go and look.

14 Q. How about the year 2016?

15 A. I have no idea.

16 Q. You have no idea?

17 A. None. My wife has a very good idea. She handles
18 our taxes. I have almost no part in that.

19 Q. What percentage of your work -- of your income,
20 if you know, constitutes legal polling, legal work of
21 the sort?

22 A. Well, the work that I do for Latino Decisions,
23 which is the research and polling firm that I started,
24 most of that is not for legal polling work with lawyers.
25 That's mostly for issue advocacy groups, like I

1 mentioned earlier, such as the National Association of
2 Latino Elected Officials. And then sometimes in
3 combination or typically separately from that, such as
4 in these voter ID trials, I also worked as an expert
5 witness.

6 Q. So you don't know a percentage?

7 A. I don't know, sitting here, a percentage.

8 Q. You know what, you can speculate as an expert.
9 Why don't you speculate, please.

10 A. On what?

11 Q. What percentage of your work -- of your income is
12 from legal consultation in polling?

13 MR. STEINER: Objection, Your Honor. I
14 don't think an expert's allowed to speculate. An expert
15 is allowed to offer opinions based on either facts or
16 based on assumptions that are presented to him or her.
17 But an expert can't speculate any more than any other
18 witness can speculate.

19 THE COURT: All right. I think the better
20 question is if you can estimate. If you can, you can.
21 If you can't, you can't. Your wife's not on the stand.
22 If she's the only one that can answer it, so be it. But
23 can you estimate?

24 THE WITNESS: I cannot.

25 BY MS. BECKER:

1 Q. And you cannot estimate -- well, never mind.
2 I'll strike that.

3 Professor Barreto, you mentioned that you
4 started Latino Decisions; is that true?

5 A. Yes, with Professor Gary Segura in 2007 I
6 believe.

7 Q. Did you -- when did you start American Decisions?

8 A. That's a division that some of our business
9 partners have also used mostly just to run surveys of
10 the general population, but I don't know the year.

11 Q. Okay. Because I -- but you, in fact, founded it?

12 A. It's a division of Latino Decisions.

13 Q. Okay. Is Asian American Decisions also a
14 division?

15 A. Yes.

16 Q. Okay. So by my count you've got three different
17 decision companies that you run and that you do
18 consultation and polling for; is that correct?

19 A. Not really.

20 Q. More than three?

21 A. No.

22 Q. Less than three?

23 A. Well, it's not really correct, your question.
24 You want me to expand?

25 Q. Well, did you find (sic) American Divisions and

1 Latino Decisions and Asian American Decisions?

2 A. So I think your question --

3 Q. That was a yes or --

4 A. If I run them, and that's what I was saying
5 wasn't correct, because I don't --

6 Q. Right. My question was did you -- did you found
7 them?

8 A. I'd say that Professor Taeku Lee founded Asian
9 American Decisions and I'd say Andrew Rosenkranz, one of
10 my business partners, founded American Decisions. I
11 have the most involvement in Latino Decisions. These
12 are just divisions that sometimes we run other surveys
13 under.

14 Q. I'm going to hand you another thing that I'd just
15 ask for you to take a look at and identify that.
16 Professor, what does this appear to be?

17 A. I guess it's off the website Asian American
18 Decisions. It looks like it's my bio.

19 Q. So that's -- that's you right there on the -- on
20 the cover page of the American -- Asian American
21 Decisions --

22 A. Yes.

23 Q. -- true?

24 Do you do any legal -- have you been asked
25 to do any legal work for the Asian American population

1 yet?

2 A. What do you mean by "legal work"?

3 Q. Similar to what you're doing here?

4 A. Not similar to what I'm doing here, no.

5 Q. What is your current area of research that you
6 would have been working on in the last -- say, the last
7 year?

8 A. Public opinion, understanding voting and election
9 patterns in the context of American elections.

10 Q. Isn't it true that you have -- that you've
11 currently dubbed your research area -- your current
12 research as racially polarized voting precincts that
13 would also be used in gerrymandering lawsuits?

14 A. That's -- that is an area of research.

15 Q. But it's your current research; right?

16 A. It's an area of research that I've worked on
17 since graduate school on and off. But --

18 Q. Is there a reason it would be --

19 A. -- there's only one --

20 Q. Well, is there a reason it would be listed as
21 your current research on your website?

22 A. It's part of the current research I'm doing. I'm
23 not just working on one project, but I am assessing
24 voting patterns by race and ethnicity for academic and
25 for legal work.

1 Q. Have you testified in Texas with regard to voting
2 precincts and maps and whether there's voter delusion
3 based on the location of the precincts and redrawing of
4 them?

5 A. I think I understand your question. I have
6 testified in redistricting lawsuits in the state of
7 Texas, at least two I can think of, maybe three -- three
8 that I can think of.

9 Q. So is it fair to say that your expertise is very
10 broad?

11 A. It is or isn't? I didn't understand.

12 Q. Is.

13 A. My expertise I think is what I discussed at the
14 outset with Mr. Steiner, which is voting and elections,
15 public opinion survey, methodology as it relates --
16 primarily as it relates to issues of race and ethnicity
17 in America.

18 Q. Are you an expert in voter registration?

19 A. I have done research on voter registration, yes.

20 Q. But you're not an expert on voter registration,
21 are you?

22 A. You mean in, like, filling out the form?

23 Q. No. Like, I don't believe your lawyer offered
24 you as an -- a voter registration expert, someone that
25 would perhaps have worked in elections for state

1 government.

2 A. I have not done that.

3 Q. Do you teach any courses on voter registration
4 and the requirements of -- for registering to vote?

5 A. It certainly is covered in a number of classes I
6 have taught in terms of undergraduate classes on
7 American politics.

8 Q. Right. And I have a list of all those courses
9 actually. But did you -- did you teach anything
10 specifically to proof of citizenship or assessing the
11 community's awareness of laws with regard to proof of
12 citizenship?

13 A. I don't understand that question.

14 Q. I think I'll just move on.

15 Professor, you had a few criticisms of
16 Mr. McFerron's report; is that correct?

17 A. Yes.

18 Q. Okay. One of them was the passport number. Do
19 you recall that?

20 A. Yes.

21 Q. Okay. And if you look at -- take a look at your
22 report on page -- I apologize. It's Footnote 12. It's
23 on page 7. No, wrong page. Sorry. Page 8. And you
24 testified that you thought that that was a big problem
25 because it made the survey seem unreliable. Do you

1 recall that?

2 A. Yes.

3 Q. Okay. Did you actually look at what you -- what
4 you cited before you put it in your footnote as far as
5 this milecards.com website?

6 A. Yeah. My recollection is that this was a
7 compilation of State Department records looking at the
8 number of passports that had been issued by state.

9 Q. Okay. All right. I just want to hand you what
10 we're going to mark for identification Defendant's
11 Exhibit 1211.

12 THE COURT: I'm sorry, 1211?

13 MS. BECKER: 1211.

14 BY MS. BECKER:

15 Q. Professor, does this URL match the URL in your
16 report at Footnote 12 -- or, I'm sorry, 13?

17 A. Yes, this looks correct.

18 Q. This is a credit card bonus miles website; right?

19 A. I have no idea.

20 Q. Well, you can take a look.

21 A. Okay. It says milecards.com.

22 Q. And what does it say at the top?

23 A. What states have the most passport holders,
24 interactive map.

25 Q. Do you commonly rely on credit card travel bonus

1 websites for your expert reports?

2 A. Well, in this case I was looking at the
3 methodology section which indicated that it was based on
4 the State Department's annual report of passport
5 issuances. And so I was looking for data on the number
6 of -- the rate of passport issuances by state. And this
7 appeared to be based on State Department records, and so
8 I used it.

9 Q. Have you -- have you cited this website in other
10 expert reports?

11 A. If I was looking for passport numbers, I might
12 have.

13 Q. You would have gone to the bonus miles credit
14 card website?

15 A. I would have to look at other footnotes.

16 Q. Okay. Well, do you recall Mr. McFerron
17 testifying that when he tried to follow this link, it
18 was sort of a -- it was a bogus link and it actually
19 didn't go to the State Department, it said the page
20 you're looking for is gone? I don't know -- do you
21 recall him saying that?

22 A. No.

23 Q. Well, he did.

24 Professor, you're aware, aren't you, that
25 children can have passports; correct?

1 A. Yes.

2 Q. So if McFerron's survey reported a higher
3 percentage than what you found on the Visa bonus miles
4 site, would you have any reason to think that perhaps
5 your number from the Visa credit card site might be
6 inaccurate compared to his?

7 A. I don't think this is a Visa credit card site,
8 number one. But if children were reported in that
9 number, which they certainly are, it would actually make
10 the enumerator larger, okay. So rather than 30 percent,
11 it would actually be a much smaller percentage of adults
12 because we would have to exclude all the children and we
13 would be left with all the adults that have passports
14 and we would divide that by the citizen population. If
15 that's the case, then the number of passport holders is
16 less than 30.

17 Q. As you're sitting here today, you can't point to
18 a website with this passport -- these numbers that's a
19 valid website that you're using to try to discredit what
20 they found, can you?

21 A. Well, this website here has the number of
22 passports issued and the rates for each of the states.
23 And it describes that it is basing this on a State
24 Department report.

25 Q. But you're citing this?

1 A. Correct because this was where it was put into a
2 nice, neat table format.

3 Q. Okay. Where are the numbers on here? Because I
4 see 30 percent on Kansas and I don't -- I don't see the
5 underlying numbers, do you?

6 A. Well, I didn't produce this document.

7 Q. But you cited it in your expert report and you
8 brought it to the court as evidence that our expert was
9 wrong on the data. So is there another --

10 A. So what's the question?

11 Q. The question is if you have another citation for
12 the actual numbers -- you just told me that you had the
13 actual numbers and if you look at the actual numbers...

14 A. Yeah, those are in here. If you navigate
15 through, I'm confident that you can find it.

16 Q. On the Visa website?

17 A. On this website.

18 Q. Okay. Well, I'll represent to you that I did
19 that and I could not, but we're going to move on at this
20 point.

21 Professor, you're also criticized -- you
22 criticized the language of a couple of questions and you
23 referred to them as bias-inducing I believe. Do you
24 recall that?

25 A. Yes.

1 Q. I'm going to hand you a document that I'll mark
2 as Defendant's Exhibit 1212 and ask you to identify this
3 if you recognize what it is.

4 A. This is the results of a poll -- of a survey that
5 was done for the National Association of Latino Elected
6 Officials Educational Fund in September-October 2016.
7 Appears to be results across multiple states.

8 Q. Was this -- was this done by -- or, I'm sorry,
9 this was done by Latino Decisions; is that right?

10 A. Yeah. It says here on the last page, page 11,
11 "This poll was directed by Adrian Pantoja and David
12 Ayón," lists their addresses and says Latino Decisions.

13 Q. Thank you.

14 For the states that were surveyed, it was a
15 400-person sample size, correct, the last page under
16 methodologies?

17 A. Yes, under methodologies.

18 Q. Four hundred?

19 A. Says 400 Latino registered voters in each of
20 seven states.

21 Q. Thank you.

22 If you could turn to page 8. And I'm just
23 curious, because you've been very clear that -- that the
24 wording in Mr. McFerron's survey was so detrimental that
25 it was going to create bias. But you understand, of

1 course, that question, Question 18, was the last
2 question of the survey, right, of Mr. McFerron's survey?

3 A. It was close to the end, yeah.

4 Q. Okay. Could you read Question 27 in your survey,
5 please.

6 A. This is not my survey, by the way. This was done
7 by Adrian Pantoja and David Ayón. I was legally
8 prevented from working on anything outside of the
9 Clinton campaign in 2016, but I'll read it nonetheless.

10 Q. Hold on a second, professor. So you're saying
11 that some of these Latino Decision surveys you don't
12 want to have anything to do with?

13 A. I'm just -- you called it "my survey". I was
14 just correcting the record for that.

15 Q. Is it Latino Decisions' survey?

16 A. Yes.

17 Q. Did you find -- were you the founder of that
18 group?

19 A. Yes.

20 Q. Thank you. Could you read that question?

21 A. Okay. Question 27. "During the first
22 presidential debate, Donald Trump stated, 'We have a
23 situation where we have our inner cities,
24 African-Americans, Hispanics are living in hell because
25 it's so dangerous. You walk down the street, you get

1 shot.' We have gangs roaming the streets. In many
2 cases they're illegally here, illegal immigrants. They
3 have guns. They shoot people.

4 Do these statements make you more favorable
5 or less favorable towards Donald Trump?"

6 Q. That could create bias in some respondents,
7 wouldn't you agree?

8 A. Well, it depends on what you're trying to ask
9 them.

10 Q. Sure. Which --

11 A. If you're trying to ask their opinion of those
12 statements, then it's very common practice that you read
13 a public statement and ask people's response to a public
14 statement.

15 Q. So earlier, when you were testifying and agreeing
16 that I think Mr. Steiner was asking you that it was just
17 crazy that we would put so many words in front of a
18 question, you know, bias-producing words about whether
19 you have a birth certificate or you don't have this or
20 don't have that, and I believe it was a statement made
21 to the effect there was a really long sentence and that
22 itself produced bias, is that different from your
23 survey?

24 A. Completely.

25 Q. Completely different?

1 A. Yes.

2 Q. Why don't you read Question 28.

3 A. Question 28.

4 Q. Uh-huh.

5 A. "Recent news reports show that in 1998 Donald
6 Trump's hotel and casinos secretly spent \$68,000 trying
7 to do business in Cuba in violation of the U.S. trade
8 embargo against Cuba at the time. Does this make you
9 much more likely, somewhat more likely, somewhat less
10 likely, or much less likely to vote for Donald Trump?
11 Base equals Florida respondents."

12 Q. So is it your testimony today that that is also
13 not a long question that could produce bias?

14 A. That's correct. This is a message testing
15 question, as I explained when I was explaining
16 Mr. McFerron's report.

17 Q. Uh-huh. Professor, earlier I believe the other
18 criticism was of a voter registration figure that --
19 that you called into question. Do you recall that?

20 A. Yes.

21 Q. So when you said that the Census Bureau says that
22 68 percent of eligible Kansans are registered, you were
23 looking at the American Community Survey responses; is
24 that correct?

25 A. I think it's actually the Current Population

1 Survey.

2 Q. So -- and that's different than the American
3 Community Survey?

4 A. Yes.

5 Q. Do you recall what was put on the board while you
6 were --

7 A. I believe that it was a reference to
8 Dr. Camarota's report and I believe he uses the Current
9 Population Survey. It's called the November Supplement
10 and they do a special report every two years
11 specifically asking people about their voting and
12 registration status. It's still a U.S. Census document
13 but it's not part of the American Community Survey.

14 Q. Right because Dr. Camarota relied just on census
15 data and he had to also -- maybe you don't know this.
16 But would you agree that if you're going to be comparing
17 changes in census data, you have to use the same type of
18 data set for an accurate comparison? So you can't take
19 a five-year CPS and then try to compare it to a
20 different data set, would you agree?

21 A. I generally agree that if you're comparing across
22 two data sets that you would want them to be as similar
23 as possible. But, of course, you know, I'd have to look
24 and see which data sets you're talking about.

25 Q. But you -- you came up with the 68 percent figure

1 in the report; is that correct?

2 A. Yes, we cited it. I must have looked at a
3 similar website as Dr. Camarota.

4 Q. But we can actually calculate the exact
5 percentage using actual government database, can't we?

6 A. That's another means of doing it. I was using
7 census data, which is for demographic analysis,
8 typically the way that we do it.

9 Q. Did you -- did you attempt to actually take the
10 actual number of Kansas registered voters or did you
11 look at the general census data?

12 A. I was looking at the Current Population Survey.

13 Q. If you turn to page -- let's see in your report
14 where you discuss that issue. I believe it is page 7
15 and you -- this is where the Footnote 12 comes in. What
16 is that footnote to? What type of data, assuming that
17 you --

18 A. It looks like it's a link to the Current
19 Population Survey from the U.S. Census Table 1.

20 Q. Okay. You don't -- you didn't provide that --
21 that table with your report, did you?

22 A. Just the link to the Excel sheet. It looks like
23 it's a link to a .xls document on their website.

24 Q. Do you happen to know if that table was for the
25 state of Kansas or if it was for the population in

1 general?

2 A. I believe that was for the state of Kansas, yes.

3 Q. Is there a reason why you didn't go to the
4 Secretary of State actual voter registration numbers
5 that are confirmed?

6 A. Well, the numbers don't have rates of
7 registration and so I was trying to get the registration
8 rate. And as you mentioned before, perhaps similar to
9 Dr. Camarota, I was using the CPS, which is a widely
10 used census report for the registration and voting rate
11 for different states.

12 Q. I'm not -- I'm sorry, I don't understand what you
13 mean by "the numbers don't have rates." If I'm -- if
14 I'm looking at voter registration numbers for a certain
15 time period on the Secretary of State website, explain
16 why wouldn't that be a rate?

17 A. Because that's only the enumerator.

18 Q. It's the number --

19 A. To get the rate, we need the denominator as well.
20 So --

21 Q. Well, if I'm -- I'm sorry, go ahead.

22 A. The census, the CPS, provides both of those. And
23 then they provide these nice, neat tables on the rate of
24 registration and the rate of voting in every state in
25 every election. And that's why they call it the

1 November Supplement and that's why it's commonly used by
2 political scientists.

3 Q. Those are -- those are, again, estimates, is that
4 correct, self-reported census questions?

5 A. Yes. I mean, all survey data are self-reported
6 estimates and then we try to assess how reliable they
7 are.

8 Q. Right. So if the Secretary of State's Office had
9 access to the actual voter registration numbers, that
10 would not be an estimate; correct?

11 A. That would just -- that would be the enumerator,
12 yes. We still need to get some census data involved for
13 the denominator.

14 Q. Professor, I'm just handing you some documents
15 from the Fact Finder like what we were discussing and
16 I'd ask you to identify what that appears to be.

17 A. So these first two pages appear to be American
18 Community Survey one-year estimates for 2016 on the
19 population of Kansas by gender, age and citizenship
20 status.

21 MS. BECKER: Your Honor, I'd offer these
22 into evidence as Defendant's Exhibit 1213.

23 MR. STEINER: Your Honor --

24 THE COURT: What is this?

25 MS. BECKER: This is another Census Bureau

1 document as well as the voter registration, I believe
2 which has been stipulated to, both of these.

3 MR. STEINER: Your Honor --

4 THE COURT: Why is it being admitted as an
5 exhibit if it's stipulated to?

6 MS. BECKER: Well, it's got a footnote to
7 Professor Barreto's report is -- after the Census Bureau
8 and we're going to do some calculations on the
9 percentage that -- since that is an issue.

10 THE COURT: I'm sorry, I'm really lost here.
11 So I've heard -- I've heard evidence about the --
12 relying on the Census Bureau data to determine the total
13 number of adults in Kansas. I've heard evidence
14 about -- census data about the number of registered
15 voters in Kansas. I've heard evidence earlier in the
16 case about the Secretary of State's number of registered
17 voters in Kansas. These are at particular points in
18 time not necessarily always matching. But what is
19 Exhibit 1213?

20 MS. BECKER: Your Honor, Exhibit 1213 is
21 just a calculation because Professor Barreto put in his
22 report that Mr. McFerron was wrong about a statistical
23 percentage of Kansans who were registered to vote and he
24 cited --

25 THE COURT: He's relying -- he's relying on

1 Dr. Camarota's report, not his own calculation.

2 MS. BECKER: No, he was relying on -- that
3 was brought up in his direct. But in his report,
4 there's no mention of Dr. Camarota. In fact, he just
5 attaches the Census Bureau and does a citation to it and
6 that's what I have printed and I have it.

7 THE COURT: This is a document that
8 underlies his report is what you're telling me?

9 MS. BECKER: Yes.

10 THE COURT: All right. Any objection?

11 MR. STEINER: Well, in part, Your Honor,
12 there's two things. And -- and so -- and just to be
13 clear, Professor Barreto and Dr. Camarota both used the
14 same data, which I think both of them have testified
15 that's what people in the industry do and they came to
16 the same numbers.

17 With respect to the exhibit that Miss Becker
18 wants to examine on, you know, certainly as to the
19 underlying census data, the first two pages of the
20 exhibit, we don't have an objection to the underlying
21 data.

22 I do have an objection to the unidentified
23 handwriting that's on the first page of the exhibit
24 because I don't think that's Dr. Barreto's handwriting.
25 So I think that should be redacted off. I don't know

1 where that came from.

2 And then, you know, I believe Miss Becker
3 suggested that the next two sets of documents are other
4 things that have been stipulated, and that may be, in
5 which case we won't object to them. But I would like to
6 know where that's otherwise in evidence just so I can
7 confirm that in fact. Because what she's done is taken
8 three documents and put them together in one new
9 exhibit, which isn't the ordinary way of doing it. But
10 if these other parts of the exhibit are otherwise in
11 evidence, I'm not going to object to them.

12 THE COURT: All right. Can you enlighten
13 us, is this a compilation of three things either already
14 stipulated to or in evidence? And if so just identify
15 them and then we can move on.

16 MS. BECKER: I believe that the first two
17 pages are being stipulated to as a Census Bureau table
18 and that would be filed in a stipulation. And I
19 believe --

20 THE COURT: What year are we talking about,
21 just for clarity?

22 MS. BECKER: Pardon me?

23 THE COURT: What year?

24 MS. BECKER: What year? It is 2016.

25 THE COURT: And this is Kansas data?

1 MS. BECKER: It is Fact Finder data for
2 Kansas and Sedgwick County, Kansas.

3 THE COURT: Kansas -- the state of Kansas,
4 Sedgwick County, 2016 and it's registered voters.
5 That's the first two pages.

6 THE WITNESS: Population.

7 THE COURT: Total population. Yeah, it
8 would help if I could look at it. Okay. So first two
9 pages are U.S. Census Bureau Fact Finder. The
10 handwriting does need to be redacted.

11 MS. BECKER: Certainly.

12 THE COURT: The first two pages, it looks
13 like it says sex, by age, by ethnicity and citizenship
14 status. So it's broken down male, female, total Kansas
15 population, Sedgwick County. All right. So that sounds
16 like something that's been stipulated to.

17 MR. STEINER: I believe that was filed this
18 morning, Your Honor.

19 THE COURT: All right. And then the next --
20 next pages are as of August 1, 2015, there's three
21 pages, voter registration and party affiliation and it
22 goes by the counties. It's broken out by the counties
23 in Kansas. Is that all otherwise stipulated to or in
24 evidence?

25 MS. BECKER: I believe it is, Your Honor,

1 but I would -- I can check afterwards and maybe we could
2 conditionally admit it.

3 MR. JOHNSON: Your Honor, to my knowledge,
4 it's not been stipulated to. This is -- from my
5 experience, I've seen these numbers in my election work
6 and this comes from the Secretary of State --

7 MS. BECKER: Website.

8 MR. JOHNSON: -- website. That would seem
9 to be a compilation or a summary of underlying
10 registration documents.

11 THE COURT: And have you been -- does this
12 come from the Secretary of State's website, first of
13 all, the breakout by county?

14 MS. BECKER: Yes.

15 THE COURT: There are underlying documents.
16 Have those been disclosed to the other side?

17 MS. BECKER: Yes.

18 THE COURT: So they can confirm these
19 numbers are accurate?

20 MS. BECKER: Yes. They're just a public
21 document on the website and we can --

22 THE COURT: No. If the website discloses it
23 in this format, that's fine. But what they're saying is
24 they have no means to verify the accuracy of these
25 unless you all are --

1 MR. JOHNSON: On top of that, my experience,
2 Your Honor, this is a flash-cut. In other words, these
3 are numbers as of a date certain and simply we have
4 three separate documents put together here all separate
5 dates.

6 THE COURT: Okay. These three pages we're
7 talking about with a breakout of counties, I note it
8 says as of August 1, 2015. The first page is 2016. And
9 then the last part of this exhibit is -- is a table that
10 says reported voting and registration by sex and single
11 years of age from November 2014 and it breaks it out by
12 age beginning at age 18 and going up to -- I don't think
13 -- page -- going up to 85 years old. Is that something
14 that's been stipulated to or --

15 MR. JOHNSON: Judge, I've never seen a
16 document like this.

17 THE COURT: All right. So I'm not going to
18 admit this at this time. You're going to need to --
19 let's come back around. If you've received the
20 underlying documents or you're satisfied by looking at
21 the Secretary of State's site -- website these numbers
22 are, in fact, what they're represented to be, then you
23 all can craft a stipulation. So I'll take this under
24 advisement at this point --

25 MS. BECKER: Thank you, Your Honor.

1 THE COURT: -- Exhibit 1213.

2 MS. BECKER: We are going to discuss it
3 without -- because the first two pages are already
4 stipulated to and all I really wanted to do is have --
5 BY MS. BECKER:

6 Q. Professor Barreto, if you could, please, take a
7 look at what I handed you. If we take the actual number
8 of registered Kansans, which you will find on page 3,
9 summary -- I'm sorry, it's actually the bottom of page
10 5, the very end of the voter registration and party
11 affiliation document from the Office of the Kansas
12 Secretary of State, and what I'd like to do is have you
13 calculate or agree with me a math problem, which I'm not
14 good at but this is fairly simple. Do you see the
15 number 1,705,537, professor?

16 A. Yes.

17 Q. Do you understand that to be the number of actual
18 voter -- voters registered in Kansas for that document?

19 A. It appears to be the total number reported as of
20 August 1st, 2015.

21 Q. And if we take that number and we divide it by
22 the eligible population found on the first page, the
23 stipulated Census Bureau chart, eligible population of
24 2.08 million --

25 THE COURT: Okay. But wait a minute.

1 You're -- you're giving him -- you're giving a total
2 population from a different date. Aren't the first two
3 pages some time in 2016 and these other three pages are
4 dated as of August 1, 2015?

5 MS. BECKER: Yes, Your Honor.

6 THE COURT: That's not going to be a good
7 number unless the numbers match.

8 MS. BECKER: The survey -- the survey was
9 done in May of 2016. And so the best -- when you go to
10 these data sets, the Census Bureau data, the first two
11 pages are stipulated to and that's population for 2016.
12 The voter registration status is only updated once or
13 twice a year. And so the last time the voter
14 registration numbers, prior to the May 2016 survey, had
15 been calculated would have been the August 2015. So --

16 THE COURT: All right. Proceed.

17 Mr. Johnson.

18 MR. JOHNSON: Your Honor, a couple of points
19 here. First, the document that's been stipulated into
20 evidence by the parties doesn't specify the number of
21 felons who would be -- who would fall outside of the
22 voter eligible population, nor does it specify the
23 number of new residents of Kansas who have not been a
24 resident long enough to register.

25 MS. BECKER: Well, this document's in

1 evidence. I just need to ask a math question and then
2 I'm done.

3 THE COURT: All right. I think you can
4 cross-examine -- cross-examine on that.

5 BY MS. BECKER:

6 Q. So if we take that actual number of registered
7 Kansans, which is 1.75 million seeing there, and divide
8 it by the eligible population of 2.08 million, we get
9 84 percent, don't we?

10 A. Your Honor, if I may, this is the reason I think
11 that there's lots of questions about this, is that the
12 reason I use the CPS data from 2014 is both the
13 denominator and the enumerator were asked in the same
14 survey set, the Current Population Survey, which is
15 probably also why Dr. Camarota does that.

16 And it is not a traditional practice in
17 political science to take the 2015 registration numbers
18 off of one count and put them over the denominator of
19 the 2016. The 2015 one-year estimates would have at
20 least been closer to the August 2015 close of
21 registration and these others reasons. So --

22 Q. Do you --

23 A. -- math, you can do the math. But I'm not
24 comfortable defending that. That's not the way we
25 commonly calculate it.

1 Q. That's fine. I'm just asking for the math. I'm
2 asking for the math. Because we've got the latest --
3 the numbers prior to the survey from the Secretary of
4 State's are -- are the 1.75 and then the population as
5 stipulated is 2.08. So simple math, would you agree
6 that's 84 percent?

7 A. Well, if you give me a calculator, we could solve
8 it together.

9 THE COURT: I can tell you, if that's the
10 methodology, I'm giving that number absolutely no
11 weight. That's ridiculous methodology. Just is. Go
12 ahead and make your record.

13 THE WITNESS: I get 82.07.

14 BY MS. BECKER:

15 Q. Thank you.

16 Professor, would you agree that actual
17 verified numbers are more reliable than estimates?

18 A. It depends on the context.

19 Q. So you don't agree?

20 A. Depends on the context.

21 Q. If I -- if I ask you yes or no would you agree
22 that actual verified numbers are -- are more reliable
23 than an estimate, yes or no?

24 A. Well, if you're counting ballots in an election,
25 yes, you would want the actual ballots not estimates.

1 But there's lots of research to suggest that surveys
2 like the ACS are more reliable than even full census
3 counts.

4 MS. BECKER: Your Honor, move to strike. I
5 was just looking for a yes or no question -- or answer.

6 That's all I have.

7 THE COURT: I'll disregard the question and
8 answer unless you want to reframe the question.

9 MS. BECKER: Nope. That's all I have.
10 Thank you.

11 MR. STEINER: Briefly, Your Honor.

12 THE WITNESS: I have your calculator, by the
13 way.

14 MS. BECKER: You want to take it home?

15 MR. STEINER: It's a phone also, not just a
16 calculator.

17 REDIRECT EXAMINATION

18 BY MR. STEINER:

19 Q. Professor Barreto, I think at the risk of going
20 back to this, the math problem, I believe you testified
21 that both you and, to your understanding, Dr. Camarota
22 used the ACS?

23 A. CPS.

24 Q. I'm sorry, the CPS data on voter -- reported
25 voter registration in the November Supplement; is that

1 right?

2 A. Yes.

3 Q. Okay. And why is that typically used by
4 professionals in the -- in your fields?

5 A. Well, first, it has a very large sample. It has
6 a sample across all 50 states. It asks questions about
7 voter eligibility and voter registration and voter
8 turnout in the same survey. So it's all contained in
9 the same year. It's been done consistently every two
10 years. So it's done in presidential election years and
11 midterm years and it uses the same methodology, and it's
12 sponsored and implemented by the U.S. Census Bureau.

13 So because of that, it is sort of a go-to
14 data source when you're doing analysis or comparisons
15 across different states rather than trying to mix and
16 match figures.

17 Q. And Miss Becker suggested to you that, according
18 to the Secretary of State, they count approximately
19 1.7 million people registered to vote in the state of
20 Kansas as of August 1st of 2015. Do you remember that?

21 A. Yes.

22 Q. And, in your experience, is there a reason why a
23 snapshot count of the number of people listed as
24 registered voters in each county of the state and in the
25 state as a whole is not necessarily an accurate report

1 of the number of people living in the state who, in
2 fact, are registered to vote in those states?

3 A. The first issue is you would want to make sure
4 it's from the same year. Because voter registration
5 numbers fluctuate county by county and year by year
6 depending on voter registration drives, depending upon
7 how competitive elections are and depending on how often
8 the voter rolls are updated and people who move away or
9 pass away are changed. So those numbers are constantly
10 in flux and each county may have a different schedule to
11 update their numbers.

12 MR. STEINER: Thank you. No further
13 questions.

14 THE COURT: Anything else? Anything else?

15 MS. BECKER: No questions.

16 THE COURT: All right. May Professor
17 Barreto be excused?

18 THE WITNESS: Thank you.

19 MR. STEINER: Yes, Your Honor.

20 THE COURT: All right.

21 THE WITNESS: Thank you.

22 THE COURT: You may be excused. Thank you.
23 Anything more from plaintiff?

24 MR. STEINER: Your Honor, I just want to
25 return to one issue with respect to Mr. McFerron and

1 whether now is the time for it or whether Your Honor
2 wants to take it up separately before we get to
3 closings.

4 The one thing that was alarming in what
5 Mr. McFerron testified to on cross examination, or at
6 least among other things, was the concept that he had
7 not disclosed his compensation for coming and testifying
8 today; that since the time of his report, he's been
9 promised additional compensation. And, of course,
10 that's normal for an expert witness. It's why it has to
11 be disclosed.

12 I think it's particularly alarming not only
13 was that information not updated, but Miss Becker
14 elicited testimony from him on direct in which he
15 reported that he had been paid \$9,000 without also
16 testifying about the additional compensation that he was
17 being offered to come and testify today.

18 And on the question of whether he can only
19 be an expert witness or whether they're still playing
20 the schizophrenia of maybe a fact witness, may be a lay
21 opinion or may be expert testimony, it is certainly
22 improper in this court to pay someone to come and
23 testify as a fact witness or to pay someone to come and
24 testify and give lay opinion testimony.

25 I think the fact that the Secretary's Office

1 was both playing this parlay of, well, we're not sure
2 which way we'll try and put him in, maybe he's still a
3 fact witness and not disclosing the additional
4 compensation is additional grounds that should be
5 considered in assessing and we believe excluding
6 Mr. McFerron's testimony as well as any other remedies
7 that may be appropriate.

8 THE COURT: I agree that one does not pay a
9 lay witness for testimony. Only experts are
10 compensated. So it's troubling to me why I kept having
11 to ask whether he was an expert or lay opinion -- or lay
12 witness and why I got conflicting answers until the end.
13 So your concerns are duly noted and I will consider
14 that, among other things, in determining how to consider
15 Mr. McFerron's testimony, if at all.

16 MR. STEINER: Thank you, Your Honor.

17 THE COURT: All right. So plaintiff rests
18 with their rebuttal case; is that correct?

19 MR. HO: Yes, Your Honor.

20 THE COURT: Anything more from defendant?
21 All right. Closing arguments, we are 20 minutes until
22 five o'clock. Do you all want to give closing arguments
23 this evening?

24 MR. KOBACH: Yes.

25 MR. HO: We'd be willing to, Your Honor, and

1 I'd be prepared to. I do think it will take longer than
2 20 minutes for my argument alone. So we're willing to
3 stay a little late but I don't want to impose upon the
4 court's time if you do not wish to stay late. We're
5 happy to do them now. Happy to do them in the morning.
6 Whatever Your Honor prefers.

7 THE COURT: So how much time do you -- and,
8 of course, are you going to split your opening so that
9 you get the final word like plaintiffs normally do after
10 the defendant's closing?

11 MR. HO: I would like to have maybe five
12 minutes after the defendant's closing but I, as an
13 initial matter, would like about 30 minutes, Your Honor.

14 THE COURT: All right. So a total of 35.

15 MR. JOHNSON: Your Honor, I think I'll take
16 ten.

17 THE COURT: All right. Mr. Kobach, how much
18 do you anticipate?

19 MR. KOBACH: Probably 20 minutes.

20 THE COURT: So a little over an hour. Is
21 everybody prepared to proceed?

22 (All counsel nod.)

23 THE COURT: So we'll wait and have the
24 contempt hearing tomorrow. I think it would be too late
25 to try to take that up tonight.

1 Okay. All right. Let's proceed, Mr. Ho.
2 We'll go Mr. Ho, Mr. Johnson, Mr. Kobach and then back
3 to Mr. Ho. Do you think you'll have any final closing?

4 MR. JOHNSON: No, I don't -- I don't see any
5 need to reserve any.

6 THE COURT: Okay.

7 MR. HO: Your Honor, we're here because the
8 voices of thousands of Kansans have been silenced by
9 Secretary Kobach's documentary proof of citizenship
10 requirement. They include Donna Bucci. She was
11 disenfranchised because she couldn't pay for a birth
12 certificate and was forced to choose between either
13 paying for a document or paying for her share of her
14 rent.

15 It includes Wayne Fish, a military brat who
16 moved around a lot, couldn't find his birth certificate
17 in 2014 and couldn't vote in that election.

18 It includes Ted Stricker. He was
19 disenfranchised even though he did everything he was
20 supposed to do under this law. He brought his birth
21 certificate with him to the DMV when he registered to
22 vote. He left thinking he had been registered to vote.
23 He went to the polls and cast a provisional ballot that
24 he was told wouldn't be counted and didn't count.

25 TJ Boynton had the same experience. He was

1 disenfranchised too in 2014 and he testified about what
2 it was like to have his voice silenced in that election.

3 It's about the voters who the League of
4 Women Voters would normally be reaching through their
5 voter registration drives. Former President Marge
6 Ahrens testified that it was a huge dead hit, a blow to
7 the league's voter registration activity.

8 They're not alone. There were 22,000
9 motor-voter applications through March of 2016 who were
10 similarly disenfranchised.

11 Defendant's own expert testimony confirmed
12 the disenfranchising effects. Dr. Jesse Richman offered
13 an estimate that his best estimate is that there were
14 117 to 125 non-citizens on the suspense list.

15 Now, we heard testimony from
16 Dr. Ansolabehere that that estimate of 0.7 percent of
17 the suspense list being comprised of non-citizens was
18 not statistically significant, not statistically
19 distinct from zero.

20 But even if we take Dr. Richman's estimate
21 at face value, what it would mean then is that more than
22 99 percent of the people who have seen their
23 registration applications blocked by this law are United
24 States citizens whose voices deserve to be heard in our
25 elections.

1 Now, Secretary Kobach has three responses to
2 the clear evidence that this law has been extremely
3 burdensome to voters in Kansas; that everyone has these
4 documents, that people who don't could go through a
5 hearing, and that the evidence from turnout rates show
6 that this law is not burdensome. And I want to take
7 each one of these arguments in turn.

8 With respect to document possession rates,
9 we heard testimony from two witnesses, Dr. Richman,
10 Mr. McFerron, who both did surveys about document
11 possession rates. But neither of those surveys are
12 reliable and the court shouldn't credit either of those
13 surveys, Your Honor.

14 First, with respect to Dr. Richman's survey
15 about document possession rates, Dr. Richman treated
16 anyone who answered the question someone keeps your
17 documents for you as a person who has immediate access
18 to their citizenship documents and we know that that's
19 not right.

20 Dr. Richman used an inconsistent and
21 unreliable system for weighting his survey responses,
22 including weighting the results by foreign name, in
23 which he would have treated Judge Murguia as someone who
24 was foreign. And he admitted that for anyone complying
25 with a documentary proof of citizenship requirement

1 increases the costs of voting.

2 You heard a lot about Mr. McFerron's survey
3 a moment ago. I'm not going to belabor the details, but
4 just to hit the highlights of Dr. Barreto's testimony.
5 We know that Mr. McFerron's survey was not based on a
6 representative sample. The income distribution in his
7 survey was off and his survey had no information about
8 the education levels or home ownership rates of the
9 people in the survey. We know the survey had too many
10 passport holders and we know that the survey had too
11 many registered voters.

12 It relied on a discredited quota-based
13 approach. Whereas a better and more reliable system
14 would have had a survey with better written questions
15 that would have addressed these issues and weighted the
16 results appropriately.

17 We know that Mr. McFerron attempted to draw
18 estimates about the wrong target population. He focused
19 on the full universe of eligible voters in the state of
20 Kansas even though the vast majority of them already
21 registered to vote and therefore were not subject to the
22 documentary proof of citizenship requirement.

23 He testified himself that you need a sample
24 of about 500 people to draw reliable results and his
25 sample of 65 unregistered individuals was simply

1 insufficient to generate reliable results about document
2 possession rates amongst the group of people who are
3 actually affected by this law.

4 Third, we know that the survey questions in
5 his survey instrument were worded and sequenced in such
6 a way that introduced bias and produced incorrect
7 results.

8 And, fourth, we know that the survey was
9 implemented inappropriately. There's no way to
10 calculate the response rate. He was in the field for
11 only three days when several weeks would have been
12 appropriate and it was conducted during odd times of day
13 -- odd times of the day. So we know that that survey is
14 not reliable.

15 But just backing up for a moment, Your
16 Honor, even if you take their evidence about document
17 possession rates at face value, it's simply irrelevant
18 to the question of whether or not this law burdens
19 voters.

20 As the D.C. Circuit held in 2016,
21 ultimately, when you look at the fact that at least
22 17,000 or so Kansans have been prevented from
23 registering because of this law, it doesn't matter if
24 those people didn't have access to their documents or
25 they simply gave up in the face of this onerous

1 bureaucratic requirement. The result is the same, the
2 abridgement of their voting rights.

3 Let's talk about the second argument that
4 Secretary Kobach raises, the issue of the hearing
5 alternative. Now, the evidence that we heard over the
6 last two weeks demonstrated that it was -- that the
7 hearing alternative is insufficient to mitigate the
8 burdens of this law. Only five people or maybe six,
9 it's unclear based on the representations from Secretary
10 Kobach, how many people have actually taken advantage of
11 the hearing. None of the plaintiffs in this case were
12 ever informed that the hearing was an alternative way
13 for them to satisfy the proof of citizenship
14 requirement.

15 The League of Women Voters is not aware of
16 anyone using it. The form itself that one has to fill
17 out in order to initiate the process is quite
18 intimidating. A person has to swear they do not possess
19 a citizenship document or face a potential Felony 9.

20 That's not the kind of thing Wayne Fish, to
21 take an example, Your Honor, could be reasonably
22 expected to swear to. He didn't know where his
23 citizenship document was. It's a lot to ask someone in
24 his situation who thinks it might be somewhere in the
25 possession of one of his family members to swear and

1 risk a felony prosecution that he did not possess the
2 document.

3 And there's no information on what standards
4 a person has to satisfy in order to -- in order to prove
5 their -- their citizenship.

6 What we do know is that at least one person
7 has proven citizenship at one of these hearings simply
8 by swearing that he was a United States citizen, which I
9 think sort of begs the question why swearing under oath
10 is insufficient in Secretary Kobach's views.

11 Now, we did hear one -- testimony from one
12 witness who's been through this hearing process, Jo
13 French. And just as an initial matter, Your Honor, just
14 to remind the court, Miss French testified that she
15 wanted to make Secretary Kobach look good and described
16 Deputy Secretary of State, Eric Rucker, as her friend.

17 But if we look at her testimony, it simply
18 underscores how unrealistic it is for people to make use
19 of this process. Miss French had to pay \$8 at first in
20 an unsuccessful effort to obtain documents. She had
21 assistance from friends who live in other states to try
22 to gather the documents that she did have. She
23 ultimately relied on a family Bible during this hearing.
24 Which is great for her, but for folks who maybe don't
25 have a family Bible for whatever reason, maybe because

1 they're not Christians themselves, that's cold comfort.
2 She ultimately had to drive 40 minutes to Topeka to do
3 the hearing. And from start to finish the whole process
4 took five months to complete. So I think her experience
5 belies the notion that this is a simple and easy
6 process.

7 Secretary Kobach's third argument has to do
8 with turnout rates. And he relied on the testimony of
9 Dr. Steven Camarota. And just a few points about him
10 just to remind the court. He's an anti-immigration
11 advocate. He's not an expert on voting. He has no
12 peer-reviewed publications on anything related to
13 voting, no experience analyzing the effects of voting
14 laws, on registration levels, or turnout. I guess that
15 is until he offered an expert opinion in this case. And
16 he ignored the fact that the law only affects new
17 applicants.

18 When he looked at registration rates, for
19 example, Your Honor, he didn't make any effort to try to
20 assess what the success rate was for people registering
21 to vote after 2013 compared to before it. When he looks
22 at -- when he cites statistics on what the registration
23 rate was in the state of Kansas in 2014, that obviously
24 includes many people who registered to vote prior to
25 this law.

1 Dr. McDonald, who is an expert on
2 registration and turnout rates, testified that what
3 Dr. Camarota was trying to do was at best indirect
4 evidence of the effect of the law and it suffers from a
5 key fallacy, which is that it assumes that the only
6 difference between the 2010 and 2014 elections in Kansas
7 was the implementation of the documentary proof of
8 citizenship requirement, which we know is simply not
9 true. It ignores the significant differences in the
10 electoral environment in 2014 as compared to 2010 in
11 this state, which obviously had countervailing impacts
12 on the levels of registration and turnout in that
13 election.

14 But, again, even if we just credit their
15 evidence on registration and turnout, it ultimately is
16 beside the point. As the U.S. Court of Appeals for the
17 Fifth Circuit held two years ago in a case *Veasey versus*
18 *Abbott*, just looking at turnout rates from one election
19 to another doesn't tell you the effect of a law because
20 so many things affect overall turnout rates.

21 Some voters might turn out in an election
22 for some reason. Maybe it's a competitive election.
23 Maybe there's a lot of campaign spending. Maybe there's
24 a lot of interest in that election. But that doesn't
25 mean other voters weren't kept away from the polls

1 because of a law that's being challenged.

2 I just want to briefly say something about
3 defendant's proffer of evidence about the number of
4 voters whose registrations were suspended or canceled,
5 his attempt to introduce evidence that postdated the
6 2016 evidence that the parties had stipulated to. Now
7 Your Honor excluded that evidence and we think that
8 that's -- obviously we agree with that ruling as
9 something that was proper because that evidence was not
10 timely disclosed to the plaintiffs and it's also not
11 materially different than the evidence that is in the
12 record of, you know, in the -- well, over 10,000 voters
13 whose applications have been interfered with.

14 But I want to say that there's one other
15 reason why that evidence is ultimately irrelevant to
16 this case and -- and that supports Your Honor's ruling
17 excluding it and it's from the defendant's own
18 witnesses. Mr. Caskey, the Director of Elections,
19 testified that since the injunction went into effect,
20 voters who have registered at the DMV without providing
21 proof of citizenship have not seen their applications
22 canceled, that people who had been canceled previously
23 were restored to some sort of suspense status. And what
24 that means then, Your Honor, is that the numbers since
25 your injunction went into effect, they're fundamentally

1 different and not comparable to the numbers previously.

2 And Dr. Camarota testified to that effect.
3 When asked why didn't you analyze registration numbers
4 from the year 2016, for example, Dr. Camarota, he
5 responded that the preliminary injunction in this case
6 was a confounding factor that would not allow us to
7 evaluate the likely impact of the law by looking at the
8 registration numbers. So defendant's own witnesses have
9 confirmed that numbers about registration rates,
10 suspended voters, et cetera, after Your Honor's
11 preliminary injunction ruling went into effect are
12 simply not relevant in terms of trying to assess the
13 impact of this law. Now, that's one side of the ledger,
14 the voters who have been disenfranchised.

15 The other side of the ledger is whether or
16 not this law can be justified by evidence of non-citizen
17 registration. Now, Secretary Kobach has put in evidence
18 of specific incidents of purported non-citizen
19 registration and statistical estimates. Obviously
20 that's only the first part of the Tenth Circuit's
21 two-part test. He also has to demonstrate that even if
22 there are a lot of non-citizens registered to vote, that
23 nothing short of a documentary proof of citizenship
24 requirement will be adequate to the task. I'm only
25 going to address the first prong here, Your Honor, the

1 evidence of non-citizen registration and I'll start with
2 the incidence.

3 Secretary Kobach said in his opening that
4 there are 129 registrations or attempted registrations
5 by non-citizens in the state. The actual evidence
6 that's been introduced into the record, Your Honor, is a
7 little less than that. We only have evidence in these
8 three forms of specific incidence of non-citizen
9 registration. And I'll start with the Sedgwick County
10 spreadsheet. Thirty-eight incidents from Tabitha
11 Lehman, this spreadsheet, Defendant's Exhibit 1133. Of
12 those 38, only 18 people successfully registered to vote
13 since 1999. We're talking fewer than one person per
14 year.

15 Dr. Lorraine Minnite, an expert on voter
16 fraud, testified that this is largely the result of
17 errors, DMVs mistakes and applicant confusion.
18 Dr. Hersh confirmed that. When you look at the voter
19 file, there are hundreds of people who, for instance,
20 registered to vote before they were born. And everyone
21 understands that's a clerical mistake, right. No one
22 thinks that we have a crisis of unborn registrants. The
23 underlying ELVIS records confirmed this, people writing
24 in to say take me off the voter rolls. "I am not a
25 citizen. I cannot vote." This is evidence that these

1 registrations are not the product of intentionality but
2 rather mistake.

3 Now, also, if we look at those 38 cases from
4 Sedgwick County, only five of them voted prior to
5 naturalizing dating back to the year 2004, a period in
6 which more than 1.4 million ballots were cast in
7 Sedgwick County. And if we look at the spreadsheet, we
8 see people registered for 18 years not voting, 12 years
9 not voting, 12 years not voting, 8 years not voting, 8
10 years not voting, 7 years not voting. I'll come back to
11 that and why that's important evidence when we talk
12 about the temporary driver's license matches.

13 So Brian Caskey said he found 79 people both
14 on the temporary driver's license file and on the voter
15 files. Dr. Richman conceded that we don't know all of
16 those people are actually non-citizens because someone
17 can naturalize after obtaining a temporary driver's
18 license.

19 And, in fact, we know that there's evidence
20 that, in the course of applying for driver's licenses,
21 people who self-identify as non-citizens are still
22 offered voter registration by the DMV. That is
23 confirmed in the Sedgwick County spreadsheet that there
24 were mistakes by DMV employees. And even Hans
25 von Spakovsky testified that DMV employees make

1 mistakes.

2 But let's look at Dr. Hersh's analysis. Of
3 those 82 people that he found -- so he actually found a
4 few more people than Bryan Caskey did when he tried to
5 match the two files -- only 18, 14 active voters and 4
6 inactive voters successfully registered to vote. So
7 it's much smaller than the defendants believe is
8 relevant -- than the defendant believes is relevant
9 here. And the number of people who voted out of those
10 82 is 3.

11 That's evidence that this -- this is not
12 intentional. What Dr. Hersh testified was it's like
13 someone came and held up a bank without taking any
14 money. The low turnout rates here are evidence that
15 what's happening when it happens is not the product of
16 people intentionally trying to corrupt the system but
17 errors either on the part of state employs or by the
18 applicants themselves.

19 We also, however, heard testimony from Hans
20 von Spakovsky -- and I just want to say a few words
21 about Mr. Von Spakovsky if I could. He's not an
22 objective empirical expert. No advanced degree. No
23 peer-reviewed publications. Couldn't explain his
24 methodology. He performed no original research on
25 Kansas. He simply took a spreadsheet from Secretary

1 Kobach and then just opined there's a massive problem in
2 Kansas without investigating the underlying facts of
3 that spreadsheet. He overstated or exaggerated evidence
4 regularly.

5 He said that people were falsely asserting
6 United States citizenship at the DMV, but then he
7 conceded that he never actually looked at people's voter
8 files to see if they, in fact, falsely swore. And
9 you'll recall from the cross examination of Miss Lehman,
10 many voter registration forms correlated to her
11 spreadsheet don't involve people falsely swearing but
12 were actually incomplete.

13 He testified about -- and included in his --
14 included in his report an incident of a hundred
15 supposedly non-citizens registering to vote in Florida
16 but he omitted the fact that at least 35 of those people
17 were confirmed to be citizens by the time he did his
18 report.

19 He talked about a GAO study where he cited
20 one U.S. District Court where he said up to 3 percent of
21 the people on the jury -- a call list from the voter
22 rolls were non-citizens but he omitted the seven other
23 district courts mentioned in the GAO report. Four of
24 which had no non-citizens on the voter rolls and three
25 which had far fewer than 1 percent.

1 He wrote an op-ed in 2011 about supposedly
2 50 Somali voters stealing an election in Missouri even
3 though almost one year earlier a Missouri state court
4 had issued an opinion saying there was zero fraud in
5 that election, Your Honor.

6 I think it begs the question was
7 Mr. von Spakovsky just sloppy? Did he just miss all of
8 this? Now, that's one plausible inference here. And if
9 it's true, that would make him probably the world's
10 worst expert on voter fraud.

11 The other plausible inference that, as a
12 person who holds himself out to be an expert who's
13 engaged in numerous studies on voting and studied this
14 issue extensively, the other inference is that he was
15 seeking to advance an agenda in this courtroom, Your
16 Honor. He claimed that he had no preconceived opinions
17 about this law when he was retained as an expert in
18 2016, and yet in 2012 in his book he advocated for this
19 law and described it in that book. He was fundraising
20 for Secretary Kobach in 2010 when Secretary Kobach was
21 advocating for a law like this. If you go back to 2001,
22 he was testifying in Congress that the NVRA was a
23 failure. And in 2017 he infamously wrote that
24 "mainstream Republican officials and academics don't
25 know anything about voter fraud".

1 So who is Mr. Hans von Spakovsky? I would
2 submit that the court should make three findings about
3 him. That he is not an objective expert. They offered
4 incomplete and misleading testimony, which at a minimum
5 makes him not a credible witness. And, third, Your
6 Honor, I would -- and I do not say this lightly, that
7 the facts support an inference that Mr. von Spakovsky,
8 who is knowledgeable about these issues, knowingly
9 misled the court and the court should make a finding to
10 that effect. The only fraud in Mr. von Spakovsky's
11 report, Your Honor, is the report itself.

12 So that's the evidence of incidence of
13 non-citizen registration. Secretary Kobach says it's
14 just the tip of the iceberg. So let's talk about the
15 iceberg and the statistical estimates of non-citizen
16 registration which Secretary Kobach said in his opening
17 argument it could be a thousand. It could be 18,000.
18 It could be 32,000. This is based on the work of
19 Dr. Richman, who has never been qualified as an expert
20 and does survey research for a popular audience, has
21 been heavily criticized by his peers.

22 Now, Dr. Ansolabehere, whose credentials are
23 impeccable, criticized Dr. Richman. He explained
24 further, if you do a meta-analysis of Dr. Richman's work
25 and just take his data at face value, assume it's

1 correct, assume it's not bias, assume it's based on
2 representative samples, what does that tell you? It
3 tells us nothing about non-citizen registration in the
4 state for two reasons. The first his estimates are
5 entirely inconsistent with each other. Sometimes it's a
6 thousand non-citizens registered to vote in Kansas.
7 Sometimes it's 32,000. Those numbers can't both be
8 correct.

9 Second problem is that, when you aggregate
10 his data, you get an estimate that 1.3 percent of
11 non-citizens in this state are registered to vote with a
12 margin of error of plus or minus 7.6 percent. And that
13 means that his estimates, Dr. Richman's analysis and
14 data even if you take it at face value is not
15 statistically distinct from zero.

16 And the only way that Dr. Richman gets to a
17 statistically significant result is by using
18 unconventional methods for calculating confidence
19 intervals that he had never used prior to his
20 supplemental report in this case, not in his
21 peer-reviewed research, not even in his initial report
22 in this case. And Dr. Ansolabehere explained for a
23 number of reasons why those unconventional methods were
24 inappropriate and why a conventional method of
25 calculating a confidence interval is the right way to

1 go.

2 Now, I just want to say something about --
3 briefly about Dr. Richman's individual estimates of
4 non-citizen registration. They suffer from a number of
5 flaws. The sample sizes are small. They're
6 non-statistically significant. In some cases he's
7 surveying people who are not actually non-citizens. In
8 some cases some of the people who say they're registered
9 are not. The samples are not representative of the
10 state of Kansas.

11 But I want to focus on one survey in
12 particular, the survey of temporary driver's license
13 holders. Here he surveyed 37 people who are temporary
14 driver's license holders. Six said they were registered
15 or attempted to register to vote. He says that's
16 16.5 percent. So multiply that by the adult non-citizen
17 population of Kansas, that gives you 18,000 non-citizens
18 registered to vote in Kansas.

19 Now, this is the key estimate in this case.
20 Secretary Kobach said during opening that this is his
21 best estimate of the number of non-citizens on the voter
22 rolls in Kansas. And he's made the same comment in the
23 media in a number -- on a number of occasions. As an
24 initial matter, I'll note that Dr. Richman doesn't even
25 agree with that. According to Dr. Richman, the estimate

1 should be 13,000 because you should weight his survey
2 sample for the overall demographics of the Kansas
3 non-citizen population.

4 But even still this estimate's not reliable
5 for five reasons. First, sample size is 37, which is
6 far too small for a reliable estimate of the non-citizen
7 population in Kansas. You heard Mr. McFerron defend --
8 his own expert witness testify a moment ago that when he
9 makes statewide estimates, he likes to have a sample of
10 500 or so. Far larger than 37. Even Dr. Richman
11 conceded that the estimate had weak statistical power
12 and that even under -- using his unconventional methods,
13 the confidence interval was more than 20 percentage
14 points for this estimate.

15 It's a biased sample. It excludes whole
16 categories of non-citizens, including undocumented
17 immigrants, green card holders and non-drivers.

18 There's also no response rate for this
19 survey. Dr. Richman said that overall his response rate
20 was 16 percent. Dr. Ansolabehere thought it was
21 5 percent. But that's for all of the surveys that he
22 conducted in this case, Your Honor. He couldn't give
23 you a response rate for the number -- for the survey of
24 temporary driver's license holders specifically. So
25 there's no way to assess the validity of his results.

1 Fourth problem, the wording of his survey
2 asked people whether they were registered or had
3 attempted to register to vote, which means anyone who
4 said yes to that question we don't even know if that
5 person ever successfully registered.

6 But it gets worse, we don't even know if any
7 of these people ever tried to register to vote. As
8 Dr. Richman stated, his understanding is that everyone
9 who submits a voter registration form, even if it's not
10 accompanied by documentary proof of citizenship should
11 be in the Kansas voter file. Well, Dr. Hersh looked for
12 the six TDL respondents who said they were registered or
13 had attempted to register to vote. Even with a complete
14 voter file that the Secretary gave to us, none of them
15 were there. So none of these six people had actually
16 not just registered, none of them had even attempted to
17 register to vote.

18 So when you look at the TDL data --

19 And Dr. Richman didn't dispute that during
20 cross examination.

21 So when you look at the data from the TDL
22 survey, Secretary Kobach says that data shows that
23 18,000 non-citizens are registered. Dr. Richman says
24 it's 13,000. We'd submit, Your Honor, if you're going
25 to use the data from Dr. Richman's TDL survey, the

1 correct answer is zero.

2 Okay. So the iceberg on close inspection,
3 Your Honor, it's more of an ice cube. We're not saying
4 that no non-citizens have ever ended up registered to
5 vote in this state, Your Honor, but there is no evidence
6 that it is in the thousands like Secretary Kobach has
7 asserted.

8 Now, this law, Your Honor, it's based on a
9 story. And that story is that there are hoards of
10 non-citizens streaming to the polls to corrupt our
11 elections. And the most notable instance of that story,
12 Your Honor, is in a video that we played during
13 Dr. Richman's cross-examination in which Secretary
14 Kobach cited Dr. Richman's work on the CCES to cast
15 doubt on the popular vote margin in 2016. And with Your
16 Honor's permission, I'd just like to play a few seconds
17 of that video again.

18 (Video clip Plaintiffs' Exhibit 133 played.)

19 "I think the president-elect is absolutely
20 correct when he said the number of illegal votes cast
21 exceeds the popular vote margin between him and Hilary
22 Clinton at this point. In 2008 there was a massive
23 survey of bad elections in the Cooperative Congressional
24 Election Survey. And it was a survey of over 32,000
25 people. And the survey found, to the surprise of many,

1 that 11.3 percent of aliens residing in the United
2 States stated that they voted in the presidential
3 election."

4 (Video clip ends.)

5 That reference to the CCES is undoubtedly a
6 reference to Dr. Richman's published study on that
7 survey. But Dr. Richman himself testified and explained
8 that he doesn't even believe that.

9 (Video clip playing. Video sound too low to
10 hear question.)

11 "I'm not aware of any."

12 (Video clip ends.)

13 Not just his research, he's not aware of any
14 research suggesting that the popular vote margin can be
15 attributable to non-citizen voting. And to his credit,
16 Mr. von Spakovsky's testimony was to the same effect.
17 He couldn't identify a single election that he
18 believed the outcome -- of which he believed the outcome
19 was decided by non-citizen voting.

20 These stories, Your Honor, about
21 non-citizens stealing our elections, they're not real.
22 If they were real, Secretary Kobach would not have
23 needed to draft an amendment to the NVRA to change what
24 is permissible under that law and pitch that amendment
25 to the then president-elect. The story's not real.

1 Wayne Fish is real. Donna Bucci is real.
2 Tad Stricker is real. TJ Boynton is real. Their
3 disenfranchisement in 2014 was real. The damage to the
4 League of Women Voters and their voter registration
5 drives, that was real. The damage to our democracy,
6 when so many of our fellow citizens are silenced, is
7 real.

8 And our commitment, Your Honor, to the
9 dignity of each of our fellow citizens and to our
10 democracy itself respectfully, Your Honor, demand a
11 ruling from this court permanently prohibiting the
12 documentary proof of citizenship requirement, this
13 onerous and unnecessary bureaucratic hurdle from being
14 imposed on motor-voter applicants. The people of this
15 state, I submit, Your Honor, deserve no less. Thank
16 you.

17 MR. JOHNSON: May it please the court, Your
18 Honor, thank you for conducting such an exemplary
19 proceeding for the past two weeks. On behalf of the
20 team, most of them decided not to show up today, I'm
21 afraid to say, who represent Parker Bednasek, say we're
22 privileged to be involved in a proceeding of such
23 paramount importance. We were proud to present Parker
24 to you. By his testimony and demeanor, I hope you saw
25 someone in whom we adults can repose our trust for the

1 future.

2 I have the privilege to teach over a hundred
3 KU students every semester. From my experience with
4 them, I disagree with many of my contemporaries who have
5 concerns about the future. The future is in good hands.

6 But we have a case the Tenth Circuit has
7 made it clear what you -- what you're presented with.
8 First, have a substantial number of non-citizens
9 registered to vote in Kansas? Second, is the DPOC
10 requirement a burden on the right to vote. And, third,
11 is the DPOC requirement the necessary solution to the
12 problem of non-citizens registering to vote such that
13 the burden on voting is justified.

14 The evidence we have all presented to you,
15 we submit, leads to the following answers. First, a
16 substantial number of non-citizens have not registered
17 to vote. Second, DPOC is a burden on the right to vote
18 and more than a minimal burden. And, third, if there is
19 a problem with non-citizens registering to vote, the
20 drastic solution of DPOC goes far beyond what is
21 necessary to solve that problem.

22 The defendant's evidence of how many
23 non-citizens have registered to vote or actually voted
24 has fallen flat. The defendant relies on the testimony
25 of Dr. Richman. Mr. Ho addressed that in detail. I

1 think we all know what happened there and there's no
2 need to beat that dead horse anymore.

3 The defendant has not discharged the burden
4 of showing that a substantial number of non-citizens
5 have registered. Indeed the court could certainly find
6 as a matter of fact that the defendant has failed to
7 prove that any non-citizens have registered much less
8 voted. How many have registered? How many have voted?
9 At most, at most a handful. The evidence indicates that
10 fewer than 10 have voted in the past 20 years. That
11 number is hardly substantial. It hardly meets the test
12 laid out by the Tenth Circuit. We submit that the
13 defendant has failed the test to prove documentary proof
14 of an alien registration problem.

15 We also submit that the plaintiffs have
16 established that the DPOC requirement is a burden on the
17 right to vote. The defendant's case on this point turns
18 on the McFerron survey. It is evident from
19 Mr. McFerron's testimony that he does not qualify as
20 someone who can prepare and execute a reliable survey.
21 The survey his firm conducted was fatally flawed. It
22 included a question Mr. McFerron admitted introduced
23 bias into the survey and that question was provided by
24 the Secretary and had absolutely nothing to do with the
25 availability of DPOC documents, which at least I

1 understood to be the purpose of the survey in the first
2 place. Mr. McFerron was interested in currying favor
3 with Republican candidates in Kansas to continue his
4 close and lucrative relationship with that party in
5 Kansas.

6 Dr. Camarota was presented as the
7 defendant's expert on Kansas elections. He testified
8 that because the registration and voter figures between
9 the 2010 and 2014 elections were essentially unchanged
10 and the only difference between those elections was the
11 existence of the DPOC requirement, that that requirement
12 does not impose a burden on the right to vote. I guess
13 the point is to show that DPOC can't be a burden if it
14 doesn't affect registration and turnout. However, he
15 agreed that for his conclusion to be correct, the
16 elections had to be comparable, but they weren't.

17 The 2014 election was unprecedented in
18 Kansas. Close elections for governor and senator with
19 the anomalous phenomenon of no democratic candidate in
20 the senate race and concerted efforts to eject two
21 Supreme Court justices. Popular interest in the 2014
22 election was sky high and Dr. Camarota knew nothing
23 about it.

24 He did concede that high interests in
25 elections could hypothetically result in increases in

1 registration and turnout. And if that happened, the
2 registration and turnout in 2014 should have been higher
3 than in 2010. But it wasn't. Why? Because the DPOC
4 requirement depressed them showing that it is, in fact,
5 a burden on the right to vote. The sheer number of
6 potential registrants who have been placed on the
7 suspense list and then canceled as a consequence of the
8 90-day rule in 7-23-15 shows the impact of that burden.

9 Now, the entertaining testimony of Jo French
10 apparently offered to show that the hearing procedure is
11 not a burden, in fact, proved to the contrary. In a
12 process that took by my count six months, by Mr. Ho's
13 count five months, doesn't matter, the following
14 evidence occurred. And I'm going to run out of fingers
15 on this one.

- 16 1. Miss French attempted to register.
- 17 2. She was told that she needed
18 documentation to do so.
- 19 3. She contacted the Secretary's Office.
- 20 4. She spoke with a representative of that
21 office.
- 22 5. She obtained a copy of the hearing
23 request form.
- 24 6. She filled out and submitted the form.
- 25 7. She contacted her church in Arkansas to

1 obtain a baptism certificate.

2 Eight -- I'll just stop with that. I'll
3 stop with the fingers. She contacted her high school to
4 get a copy of her transcript. She sent those documents
5 to the Secretary's Office.

6 She spoke with the Secretary's Office to
7 obtain a hearing date. She drove 45 minutes to Topeka
8 for the hearing. She sat through the hearing. She
9 drove 45 minutes home after the hearing.

10 Finally, she got a copy of the election
11 board's order that she's a citizen and therefore
12 eligible to register and then she finally registered.

13 Although she was unable to get a copy of her
14 birth certificate, she had to pay Arkansas vital records
15 \$8 to check for one. Her determination was admirable.
16 But just like Parker Bednasek, her testimony proved the
17 fatal shortcomings of the DPOC requirement.

18 Finally, the DPOC requirement is not
19 necessary. There's no alien registration problem to be
20 solved. It's a solution in search of a problem. The
21 long used attestation of citizenship is more than
22 enough. And to the extent some alien potentially
23 slipped through the cracks, mostly from mistaken action,
24 better training of state employees should solve that
25 problem.

1 The consequences of this law? Tens of
2 thousands who are eligible to vote are deprived of the
3 right. Parker Bednasek showed what happens to someone
4 who can't or doesn't comply. Parker will graduate from
5 college next month and two months before he casts his
6 first vote. The Secretary says that's Parker's fault.
7 We submit the fault lies elsewhere.

8 I've spoken many times on the SAFE Act since
9 it was -- since it was adopted. I've even debated the
10 Secretary twice on it, one time at KU law school and
11 another time at the Dole Institute of Politics. Nearly
12 every time I talk about the issue, I preface my comments
13 with a quote from Voltaire, which is in the original
14 French, le mieux est l'ennemi du bien. The perfect is
15 the enemy of the good.

16 Although that quote is more often used in
17 talking about how efforts to make legislation perfect
18 often result in the defeat of legislation that is good,
19 the quote fits DPOC. This requirement tries to make
20 perfect what is a -- what is a very, very, very good
21 system. And in doing so, in trying to root out all
22 avenues for non-citizens to register to vote, it has the
23 effect of depriving many thousands -- tens of thousands
24 of their right, people like Parker Bednasek.

25 And finally now we have the admission from

1 that stand right there from the forces seeking to
2 perfect the system that, in fact, the perfection they
3 seek is impossible. On Friday, March 9, Hans
4 von Spakovsky sitting in that chair right there said the
5 following.

6 Question: "You agree with me,
7 Mr. von Spakovsky, that it's impossible to have a
8 perfect security system that prevents all non-citizens
9 from registering to vote; correct?"

10 Answer: "Right."

11 There's no such thing as a perfect security
12 system. So in seeking something they know is
13 unattainable, they have knowingly deprived thousands of
14 their fundamental right to vote.

15 Thank you, Your Honor.

16 MR. KOBACH: May it please the court, I'm
17 going to approach the closing in a slightly different
18 manner. Rather than just going through the evidence and
19 the experts, I'm going to try to put it in context of
20 legal questions for this case.

21 There are two principal legal claims that
22 we're still addressing, both in the briefing and in this
23 trial. One is whether the proof of citizenship
24 requirement is preempted by the NVRA, and that, of
25 course, is the principal claim of the Ho (sic)

1 plaintiffs. And the other is that the -- whether the
2 proof of citizenship requirement imposes an
3 unconstitutional burden on the right to vote, which is,
4 of course, the principal claim of Plaintiff Bednasek.

5 I'm going to start with the second one,
6 Plaintiff Bednasek and how the evidence comes into play
7 in his claim. Now, as we pointed out in our briefs to
8 the court, plaintiff was mistaken in his briefing claim
9 that strict scrutiny applies. The Supreme Court
10 reminded us in *Burdick versus Takushi*, that "petitioner
11 proceeds from the erroneous assumption that a law that
12 imposes any burden on the right to vote must be subject
13 to strict scrutiny." Our cases do not so hold.

14 Now, plaintiff has been somewhat unclear as
15 to whether his Fourteen Amendment claim arises under the
16 due process clause or under the equal protection clause.
17 And this is where we can start putting the facts in
18 place.

19 Let's first look at the equal protection
20 clause where I think we can dismiss it pretty quickly.
21 In order to prevail on an equal protection clause claim,
22 the plaintiffs must demonstrate that there are similarly
23 situated classes of individuals being treated
24 differently and that the discrimination is intentional.
25 And that -- those are, of course, from *Cleburne versus*

1 *Cleburne Living Center and Washington versus Davis,*
2 those two principles. If those hurdles are met, then
3 the court must determine what level of scrutiny to
4 apply. And, as the court is well aware, if there is a
5 suspect classification, then and only then would it
6 arise to strict scrutiny.

7 Well, the plaintiff has not even identified
8 a class of voters to which he is a member that suffers a
9 burden on the right to vote different than similarly
10 situated classes, nor has he pled any discriminatory
11 motive on the part of the defendant, which leads me to
12 believe that maybe they're not making the equal
13 protection claim but rather -- so at this point we can
14 say there's no *prima facie* claim.

15 But if plaintiffs try at this late date to
16 construct an equal protection claim based on the age of
17 voter registration applicants, which we did hear some
18 testimony about, I would say that they nevertheless
19 failed to do so because precisely the same percentage of
20 new applicants who have applied to register since
21 January 1, 2013 are in the 18 to 29 age group as are the
22 percentage of the people on the suspense list who are in
23 the 18 to 29 age group. In other words, if you look at
24 all new people since the law went into effect, people
25 registering, the same percentage get on the suspense

1 list in that age group as the total population
2 registering.

3 Now, the only way they could try to make a
4 claim that there's disproportionality and fashion that
5 into an equal protection claim would be if they looked
6 at the entire population, including those who are
7 grandfathered in before the law took effect. And
8 plaintiffs' expert McDonald conceded this. He said
9 there's no disproportionality if you just look at the
10 people who registered since then.

11 If they're going to try to make an equal
12 protection claim based on the entire population, well,
13 then they prove too much. Because you can only do that
14 if you are essentially going to say all grandfather
15 clauses create an equal protection problem because they
16 will tend to adversely impact younger people who weren't
17 around or weren't of age or in whatever category by the
18 time the law went into effect. So I don't think they
19 can do that and certainly the evidence in this case
20 doesn't help them.

21 So let's go to where I think the Bednasek
22 Plaintiffs have to fashion their constitutional claim
23 and that's under the due process clause. But a due
24 process challenge can only be successful where the
25 action of the state seriously undermines the fundamental

1 fairness of the electoral process. That's *Duncan versus*
2 *Polythress*.

3 But to look at the *Crawford* cases, where we
4 really need to go, that's where we're going to have the
5 balancing test that the Bednasek Plaintiffs are looking
6 for. But it must be remembered here that Plaintiff
7 Bednasek acknowledged in his testimony that he possess a
8 birth certificate. He chose not to provide it at the
9 time of registration. He disagreed with the law, and
10 that's his right to do, but he did -- he had no problem
11 providing the birth certificate to the Navy when they
12 asked for it, so he has one.

13 He cannot stand in the shoes of the rest of
14 the people out there that allegedly don't possess one.
15 In other words, he cannot -- he does not have standing
16 to bring -- he may have standing as the court has ruled
17 to bring his claim, but he doesn't have the standing to
18 bring a claim of others who don't possess a birth
19 certificate.

20 And the court may also recall the Bednasek
21 Plaintiffs sought -- at the time plaintiff -- I think
22 they had two at the time -- sought class certification
23 and the court appropriately denied class certification.
24 So he can only speak for himself, a person who does have
25 the documents and chooses not to provide them.

1 Okay. So now let's look at *Crawford* and
2 plug the facts into the *Crawford*. The controlling
3 Supreme Court precedent, that's, of course, *Crawford*
4 from 2008, that's the Indiana photo ID law. And the
5 court in *Crawford* said the court must look at the
6 alleged burden on the right to vote and the burden must
7 be justified by relevant and legitimate state interests
8 sufficiently weighed to justify the limitation.

9 And the Supreme Court in *Crawford* held that
10 quote -- and I'm not going to do a lot of quoting of the
11 cases, but this one really is important.

12 "The inconvenience of making a trip to a government
13 office, gathering the required documents and posing for
14 a photograph surely does not qualify as a substantial
15 burden on the right to vote or even represent a
16 significant increase over the usual burdens of voting."

17 Now, it's important to point out that the
18 *Crawford* case recognized that the Indiana law not only
19 required presenting a photo ID but also required
20 possessing the same citizenship documents at issue in
21 this case in order to get a photo ID. In other words,
22 just like in Kansas, if you're a United States citizen,
23 getting a driver's license after the 2005 Real ID Act in
24 Congress, you have to provide proof of citizenship
25 because that's how you show that you are lawfully -- you

1 are lawfully present in the United States if you are a
2 U.S. citizen. So the same documents were at issue in
3 *Crawford*, although indirectly. You had to have those
4 documents to get the driver's license in the first
5 place.

6 Well, Plaintiff Bednasek failed to meet the
7 standard laid out in *Marion County versus Crawford*
8 (sic). The burden here is nothing more than the
9 incidental burden there of gathering the documents and
10 getting the requisite ID, or in this case gathering the
11 documents or document and completing the proof of
12 citizenship process at the registration process.

13 So Plaintiff Bednasek can't raise the claims
14 of those who lack documents, as I mentioned earlier, and
15 the inquiry should end there. But if we go further and
16 if the alternative decides that Bednasek can raise the
17 claims of people who don't possess the documents, let's
18 look at those claims and look at the facts.

19 The only evidence indicates in this case
20 that nearly all Kansas citizens do have documents
21 available to prove their citizenship if they so choose.
22 Now, you may recall during the expert testimony of
23 Ansolabehere and -- for the plaintiffs and Richman for
24 the defendants, both of them agree that 2.2 percent of
25 the people on the suspense list lack documents. Those

1 are just the people on the suspense list. But that
2 2.2 percent includes non-citizens, whatever that number
3 of them may be, who aren't going to have the documents
4 proving their citizenship of course.

5 And as defendant's expert Richman pointed
6 out, he pointed out that 2.2 percent number cannot be
7 extrapolated to the whole citizen population of Kansas
8 because it's a subpopulation that includes non-citizens
9 on the suspense list and it's necessarily going to be
10 identifying people who don't have the documents because
11 that's why they were put on suspense in the first place.

12 So, according to Richman, the number for the
13 population as a whole is approximately .1 percent or one
14 in a thousand. And if you look at the Census Bureau
15 numbers of the population, the eligible population we
16 were just discussing with the last witness, you're
17 talking about 2,077,00 people eligible voters. So the
18 number would be about 2,077 -- 2,770,000 eligible --
19 people of eligible voting age, so that would be about
20 2,077.

21 And according to defendant's expert
22 McFerron, his May survey found a very similar number.
23 He found that the number of the people -- of the 500 who
24 were questioned only one said that they did not possess
25 the documents. That would be .2 percent, which is

1 really close to .1 percent suggested by Richman. There
2 you would be talking about 4,154 if you took that
3 .2 percent and applied to the voting age eligible
4 population.

5 And for those very rare cases, we do have
6 ready -- the ready -- the very rare cases who don't have
7 ready access to the 2013 documents, we do have the
8 evidentiary -- the informal hearing process of proving
9 citizenship. So let's talk about that and what the
10 evidence showed.

11 In the case of Miss French, she testified it
12 took 30 to 35 minutes, that it was easy to do and that
13 she had ample assistance from personnel in the Secretary
14 of State's Office who helped her gather the documents.

15 Plaintiffs' counsel's assertion it took five
16 months or six months is, I would say, somewhat
17 misleading. She said that the date -- she chose the
18 date because that was the date convenient to her that
19 she wanted to come up to Topeka to go to the office.
20 She obviously could have chosen an earlier date, but she
21 chose that one.

22 The record illustrates that there were the
23 four other citizenship hearings. That record is now
24 before the court. And one of those was done entirely by
25 telephone, that of Dale Weber. And that illustrates

1 again you don't even need to be there. You don't need
2 to be present to bring the form or you can send the form
3 into the evidence office. You can do it all by
4 telephone, including the formal hearing itself.

5 The plaintiff in the Fish case, Donna Bucci,
6 and she's the only one who says that she doesn't
7 actually possess a document, one of the relevant
8 documents, she also acknowledged she could make
9 applicable phone calls. She said possibly during lunch.
10 She was asked how long her lunch break was. But we also
11 need to remember she only worked until approximately
12 midday. Her afternoons would be free if she wanted to
13 do it by phone like the records would show -- or the
14 records do show that Dale Weber did.

15 So none of these individuals have been
16 prevented from -- they may have a process that they
17 haven't gone through yet, but no one has been prevented
18 from voting because of lack of documents.

19 Now, let's go back to the *Crawford* case. So
20 what did the Supreme Court do in *Crawford*? They looked
21 -- they balanced the interest of the state and they
22 balanced the supposed imposition upon the voters of
23 Indiana. One of the interesting things about that case
24 is the Supreme Court accepted the evidence from the
25 courts below that there were 43,000 -- an estimate of

1 43,000 Indiana residents, or citizens presumably, lacked
2 a driver's license or applicable photo ID, 43,000, and
3 the state had not provided a single evidence of the type
4 of voter fraud that a photo ID would have prevented. As
5 the Supreme Court said, "The record contains no evidence
6 of any such fraud actually occurring in Indiana at any
7 time in its history."

8 But the court nevertheless said the threat
9 to the integrity of the voter process, regardless of how
10 many past cases there may or may not be, the threat was
11 enough to justify the additional hurdle, the imposition,
12 the inconvenience, to use the court's word, on the
13 43,000 who might not yet have the relevant photo ID. So
14 43,000 inconvenienced versus zero cases of fraud.
15 That's what the Supreme Court still ruled in favor of
16 the state -- in Indiana in the *Crawford* case.

17 Here we have, just reasoning loosely from
18 the experts, we have somewhere around 4,000 -- maybe up
19 to 4,000 Kansas citizens who may not possess the
20 document and would have to go through the hearing
21 process, not 43,000. Four thousand would have to go
22 through that extra process. And we have 129 specific
23 cases that we have found. So 43,000 to zero versus
24 possibly 4,000 to 129. So the burden calculus in
25 *Crawford* was far less favorable to the state but the

1 state prevailed nonetheless.

2 The evidence shows the SAFE Act provides for
3 multiple ways to get this document in. So you can do it
4 by text. You can do it by e-mail. And there is a -- it
5 is a -- a relatively non-burdensome process to provide
6 it in. And of course there's the free birth
7 certificates if you're born in Kansas and the checking
8 with vital statistics of the State on behalf of the
9 applicant as well as the checking with the Department of
10 Motor Vehicles records on behalf of the applicant.

11 Now, the evidence shows all these mechanisms
12 that the State does to assist people through the
13 process, about 95 percent -- it's fluctuated a little
14 bit with time -- 94, 95, 96 percent who start the
15 process finish the process with their citizenship
16 proven. So what about the other 5 percent?

17 Well, we talked about this with plaintiffs'
18 expert Dr. McDonald. He confirmed that 5 percent who
19 don't complete it at the end of the day could very well
20 be accounted for by the non-citizens who are stopped by
21 the proof of citizenship requirement, which is what the
22 requirement intends to do is stop non-citizens, and by
23 people who move out of the state or to a different
24 county during the registration period. And remember we
25 heard from Commissioner Tabitha Lehman that, in her

1 analysis of people on the suspense list in Sedgwick
2 County, 30 percent had moved away, 30 percent. The
3 address -- the post office postcard bounced back because
4 of a change of address.

5 So a lot of the people who appear not to be
6 completing the process, that 5 percent are just moving
7 to a different jurisdiction. And then, of course,
8 you've got the percentage of non-citizens in there as
9 well. So the -- there is no evidence that people who
10 are U.S. citizens are prevented from registering to vote
11 by virtue of the Kansas law.

12 They continually -- Mr. Ho continually says
13 this, Well, look at the 22,000 people, look at the 20-
14 -- whatever the number is on the suspense. Of course it
15 fluctuates over time. Look at these people, they're
16 prevented. No, they're not prevented. They're
17 temporarily on the suspense list.

18 The suspense list is a continuously flowing
19 population. People come on. People get off. People
20 who have the citizenship documents and fully intend to
21 provide them will temporarily be on it for a few days or
22 a few weeks until they finally e-mail or mail the
23 document in. So the mere fact that someone is on
24 suspense list does not mean that they will remain on it.
25 Indeed the vast majority do get off of it and it does

1 not mean they're prevented from doing anything.

2 Okay. Let's look at the other half of the
3 balancing that has to be done under *Crawford*. That's
4 the interest of the state. The interest of the state
5 here are preventing non-citizen registration,
6 maintaining accurate voter rolls, only qualified U.S.
7 citizens, and maintaining confidence in the electoral
8 process. The Supreme Court in *Crawford* recognized those
9 similar -- indeed same state interests as certainly
10 legitimate interests that could balance any
11 inconvenience to the voters there.

12 So now let's go to the Fish case. The first
13 part of the Tenth Circuit test is the number of
14 non-citizens who have registered. And, of course, as
15 Your Honor knows, the key word is "substantial" that the
16 Tenth Circuit gave us.

17 I mentioned in my opening how you define
18 substantial is decisive. If you use the fractional
19 definition of substantial, it's almost certainly going
20 to weigh in favor of the plaintiffs. Because, when you
21 look at the 1.7, 1.8 million voters, every number looks
22 tiny compared to the total percentage of voters. Or if
23 you look at the alternative calculation, which the
24 plaintiffs have suggested through the evidence they have
25 put in, you look at the total number of votes cast over

1 a time period, you're going to get a number even bigger
2 than 1.7 million. So you put a number of non-citizens
3 up against 1.8 million or more, it is a fraction that's
4 going to look tiny. But that's a definition of
5 substantial that is weighted toward that conclusion.

6 Initially we offered a consequential
7 definition of substantial. And I will acknowledge that
8 the consequential definition tends to favor defendants,
9 the consequential definition is could it change the
10 consequence of an election. And one non-citizen could
11 change the consequence of an election. So I think those
12 definitions are hard for Your Honor to use or any court
13 to use because if you pick either definition you're
14 pretty much going to pick an outcome in the case.

15 I would suggest that the consequential
16 definition is the one people think of when they think
17 of, you know, is this a big enough problem for our
18 system, is it going to change election results? That's
19 one thing people naturally think of.

20 If you want to look for a third one, then
21 there is a functional failure. Are a substantial enough
22 people who are non-citizens getting through, getting
23 through the filter and wrongly getting on the rolls that
24 we can say the system is failing and so there -- it's a
25 substantial enough problem that it requires changing the

1 way the system works?

2 And I would argue that if that is the
3 definition you use, and certainly if you use the
4 consequential definition, the State has shown more than
5 enough numbers to be substantial. The problem certainly
6 is substantial.

7 So what is the number? Well, first of all,
8 we have the number of known identifiable non-citizens.
9 That's 129. And, of course, that 129 number has -- has
10 increased exponentially since the time this case was
11 filed. You've seen multiple declarations as we learned
12 about more and more. So the number keeps going up
13 because we keep discovering them through the indirect
14 methods we have.

15 But with regard to that number, there was
16 some discussion in this case of both registered and
17 attempted to register in that number. I would argue
18 that it's important to consider both. Because but for
19 the proof of citizenship requirement, almost all of the
20 attempted to register ones would have been registered.
21 In other words, since 2013 many of those individuals
22 would have gotten on the ballot. So I think you really
23 have to look at both unless you're just going to say
24 we're looking at people on the rolls before 2013.

25 There was one of the 128, that was the one

1 in Sedgwick County who didn't check either box "I'm a
2 citizen" or "I'm not a citizen." But, nevertheless, she
3 did sign under the statement "I swear I'm a citizen."
4 That one probably wouldn't have become registered, I
5 guess, because of the -- the voter application form was
6 incomplete. But still 128 of the 129 would have become
7 registered but for the proof of citizenship law. So
8 then -- so that's one number we know, and I would
9 suggest that's a big enough number.

10 But if we look at the estimates of the total
11 population of people on the voter rolls who are
12 non-citizens, I think we -- we clearly have enough to
13 say it's substantial.

14 Now, absolutely the estimates range. They
15 range a great deal. On the low end we have 1,169. On
16 the -- sorry 1,067. That was -- this was Richman's
17 estimate based on Sedgwick County. And then, in
18 prompting from Ansolabehere, he weighted the estimate,
19 revised it and looked at it. It came out to 1,067.
20 That's the low end. At the high end we have 33,014.
21 That's a big range, but I would argue that the entire
22 range still classifies as substantial. It's in the
23 thousands.

24 The low end was based on the Sedgwick County
25 naturalization data. The high end was based on an

1 estimate from CCES data at the 33,014. In the middle we
2 have the survey of the TDL holders, which when waited
3 was 13,173. We also have the unweighted estimate of
4 18,000. It is correct Richman said the weighted
5 estimate would be preferable, so 13,173 is in the
6 middle.

7 And even plaintiffs' expert
8 Dr. Ansolabehere, on this critical question, he
9 calculated a meta-analysis. You may remember that in an
10 interchange during the cross examination. And he
11 estimated in his meta-analysis that 1.3 percent of
12 non-citizens -- so that's 1.3 percent of the non-citizen
13 population, which is 115,000, 1.3 percent of them would
14 be registered. That number is 1,500 -- 1,502
15 non-citizens registered in Kansas. I would argue even
16 Dr. Ansolabehere's 1,502 still crosses that line into
17 being a substantial number.

18 These estimates indicate the system is
19 failing. And as Justice Scalia pointed out during
20 *Arizona versus ITCA* oral arguments "mere attestation
21 means nothing. It's just not enough to have someone
22 sign their name when they may not be aware of what
23 they're signing to."

24 The suspense list is a changing population.
25 I mentioned that. People go on. They come off. Just

1 looking at the suspense numbers doesn't tell you what
2 percent actually don't possess the documents.

3 So now let's finally look at the second part
4 of the Tenth Circuit test. If there is a substantial
5 number, do the other tools work to stop non-citizens
6 from registering? And the answer, based on the evidence
7 this court has heard, is resoundingly, no, they don't
8 work. Indeed the State of Kansas has tried each of the
9 other alternatives suggested by the plaintiffs and
10 they've been completely ineffective. Let's quickly go
11 through them based on what we know of the evidence.

12 Prosecution, the threat of state or federal
13 prosecution has existed for 70 years since 1948. It's
14 been completely ineffective. Indeed all of the
15 non-citizens discovered have registered even though
16 there was at least implicitly a threat of being caught
17 and getting prosecuted.

18 The SAVE System, of course SAVE was never
19 intended to measure whether someone was a citizen or
20 not. That's the Systematic Alien Verification for
21 Entitlements System maintained by Department of Homeland
22 Security. As the evidence before the court has proven,
23 the Department of Homeland Security was asked for
24 permission by Kansas to use the SAVE System to try and
25 use it for this purpose. And the response from Homeland

1 Security was you can't use it unless you've got an alien
2 number and you've got the underlying document possessed
3 by the non-citizen that has that alien number on it.

4 Well, of course, these are things that a
5 voter registration would never collect because the voter
6 registration doesn't register non-citizens. It's
7 presumed that you're registering only citizens. And so
8 no state has those -- those numbers or documents in its
9 voter registration system. And as expert von Spakovsky
10 pointed out, other states like Virginia have also tried
11 to use SAVE in his expertise and his personal
12 experience, and they ran into precisely the same
13 problem. It ended up being useless for those states.

14 Third alternative, using the Electronic
15 Verification of Vital Events or the database consortium
16 to try to do this. As Mr. Caskey pointed out, you have
17 to know the state of birth and that's not something that
18 we collect when you register to vote, so you can't use
19 the system. That's also cost prohibitive.

20 TDL, that was another one, use the TDL list.
21 Well, the State has been using the TDL list and has
22 periodically been looking at people who collect -- who
23 get temporary driver's licenses. Those people are
24 non-citizens. They're here temporarily. But it's
25 proven grossly inadequate because it excludes green card

1 holders who are here permanently and excludes unlawfully
2 present aliens and excludes that very significant number
3 of non-citizens who come to the state but do not feel
4 the need to drive or do not feel the need to get a
5 Kansas driver's license. So it does identify a small
6 percentage but it's nowhere near an adequate percentage.

7 And then the final -- sorry, second to the
8 last one they recommended was, well, maybe better
9 instruction of DOV personnel, maybe we can weed out
10 human error. Well, the evidence showed that additional
11 instruction will not suffice. All that can be achieved
12 through training has already been achieved. And many of
13 this was in the stipulations that the parties agreed
14 upon. The DOV employees receive 30 minutes of training
15 about this, you know, 30 seconds or less of interaction
16 that they have with each person. They're trained
17 exactly what to do and exactly how to do it. In
18 addition, Mr. Caskey, in his testimony, pointed out that
19 they receive on-the-job training as well.

20 Third, the Secretary of State's Office
21 provides continuous inputs and updates to this training.

22 And, fourth, as Mr. Caskey described it,
23 there's the train the trainer instruction that also
24 occurs continuously. So the trainers are given new
25 training to ensure that any human error can be

1 minimized. But there will always be human error, as
2 plaintiffs' expert Minnite herself said. You just can't
3 eliminate human error from the system.

4 And, finally, jury questionnaires, here we
5 have shown that identifying non-citizens from responses
6 on jury questionnaires is also inadequate because
7 there's such a tiny percentage of non-citizens who are
8 called for jury duty in the first -- and it certainly
9 doesn't prevent them from registering in the first
10 place.

11 So to summarize both halves of the Tenth
12 Circuit test, they both fall in the defendant's favor.
13 A number in the thousands is substantial. It shows that
14 the system is failing and it certainly shows it could
15 change the outcome of an election and none of the
16 alternatives suffice to prevent non-citizens from
17 voting.

18 Now, a few final comments in response to
19 what plaintiffs' counsel said. With respect to
20 Mr. von Spakovsky, Mr. Ho stated, in rather hash terms,
21 there was a Missouri case. It was -- Rizzo versus
22 Royster was the election and that was the one where a
23 large number of Somalian nationals were alleged to have
24 voted in that primary. And he said the court ruled
25 there was no evidence of fraud. That's a misleading

1 summary of what the court did in that case.

2 The court did not attempt to determine
3 whether these individuals were non-citizens or not. The
4 court wasn't even presented that question. The only
5 question that the court ruled on was were they
6 registered and they were all registered. Of course,
7 they were. But the court didn't look at the underlying
8 question of were the registrations registrations of
9 non-citizens. The court did not hold that they were
10 found to be U.S. citizens, which I think was the
11 implication of Mr. Ho's statement.

12 Now, consider the plaintiffs' experts. They
13 have impressive academic credentials, as I would say our
14 experts do as well. But Ansolabehere, McDonald,
15 Minnite, Barreto, they appear in case after case
16 involving any voter integrity measure, whether it be
17 photo ID, now whether it be proof of citizenship, in
18 some cases maybe even redistricting. The same cohort of
19 experts will appear and will be presented. And I would
20 suggest that they do come to these questions with an
21 answer predetermined. That's why they're hired and
22 rehired.

23 And, again, I understand that experts in all
24 fields in the law sometimes have a side that they tend
25 to fall on, but to argue that their -- their testimony

1 is somehow more credible or should be given more weight
2 I think is absolutely incorrect. We know where they
3 were coming from and we knew exactly what they were
4 going to conclude.

5 Now, plaintiffs also say that not many of
6 the 129 non-citizens actually voted, or to use the
7 colorful analogy of one of plaintiffs' experts it's like
8 robbing a bank but not taking any money. Well, sort of.
9 I'm not sure I would agree with that. Or you could
10 actually go with it and say, well, would you still allow
11 people to just walk into the bank and not close the door
12 because you had 100-and-some people walk in and appear
13 -- appear like they were going to rob the bank but then
14 they changed their minds and didn't actually take any
15 money? No, you would still say we're going to lock the
16 doors.

17 Similarly you can't say we are going to
18 trust on faith that, even though we allow these
19 non-citizens to register, they're probably not going to
20 be as interested as U.S. citizens in actually voting, so
21 let's not worry about it. So what if they're on the
22 voter rolls? Well, just assume they probably wouldn't
23 vote and everything will be okay. I would argue that's
24 not the appropriate way to look at this.

25 The legislature of Kansas has made a choice

1 and has weighed the costs, the burdens, if there are
2 any, of having a proof of citizenship requirement versus
3 the benefit of having that enhanced security knowing
4 that you are actually preventing non-citizens from
5 registering. And the legislature has made that policy
6 judgement that we believe it is more important for the
7 integrity of our election to stop the non-citizens from
8 getting on in the first place and it would be foolhardy
9 to just assume they're not going to vote, so therefore
10 we won't worry about it.

11 Now, the plaintiffs are urging you to change
12 the meaning of the NVRA with respect to this NVRA claim.
13 This is contrary to the statement of it's principal
14 sponsor, Senator Wendell Ford, that nothing in the NVRA
15 would prohibit a state from requiring proof of
16 citizenship. They are asking you to read unstated
17 content into the word "necessary" into the NVRA.

18 And they're also asking you to believe that
19 Congress created a special path for people who go to the
20 DMV. If you go to the DMV, you don't have to prove your
21 citizenship. But if you register by mail, yeah, the
22 state could ask you to provide citizenship that way. If
23 you register in person, the state could ask you to
24 provide citizenship. That doesn't even make sense. But
25 that's what they're asking you to do.

1 They're urging you to depart from the plain
2 language of the NVRA. And I would say that even if you
3 use the Tenth Circuit test, which we now have to do, you
4 still look at that and you don't have a balance in favor
5 of the plaintiffs. Both halves lean towards the
6 defendants here.

7 The legislature did the balancing. The
8 legislature spoke in 2011 by huge bipartisan majorities
9 that this was the appropriate thing the people of Kansas
10 needed to ensure that our elections were secure, to keep
11 public faith in our elections high and to ensure that no
12 election was stolen because of improper voting by a
13 non-citizen.

14 This court should respect that legislature's
15 judgment, especially since there has been no evidence
16 that the -- that the constitution has been violated
17 under the *Crawford* balancing test or that the NVRA test
18 has been satisfied. Thank you.

19 THE COURT: Mr. Ho.

20 MR. HO: Nothing in response, Your Honor.
21 One just housekeeping measure that I realized reviewing
22 the transcript. The video that was played at the end of
23 my closing statement, the interview of Secretary Kobach
24 from the *Kansas City Star* which was admitted into the
25 record as Plaintiffs' Exhibit 133, I believe Your Honor

1 said, with respect to the transcript of that video,
2 which is Plaintiffs' Exhibit 133A, that the defendants
3 would have an opportunity to review it. And I assume at
4 this point they've reviewed it over the last six days.
5 Since we used it it hadn't been formally moved into
6 evidence, so I just want to make sure the record is
7 clear and that it is -- it is formally moved into
8 evidence now that the defendants have had enough time to
9 review that transcript.

10 THE COURT: Any objection to Exhibit 133A?

11 MR. JOHNSON: No objection.

12 MR. KOBACH: No objection to the transcript.

13 THE COURT: Is transcript 133A already --
14 that's admitted. All right.

15 MR. HO: Nothing further from us, Your
16 Honor.

17 THE COURT: All right. So we will consider
18 the record closed on the trial and I will take this
19 matter under advisement and issue a written decision.

20 I can't tell you with certainty when the
21 decision will be issued. Obviously there's a lot of
22 evidence that I'll need to review and writing is a
23 process that usually takes some time. But I am mindful
24 the election season -- the primary season and general
25 election approach, and so I will try to issue a decision

1 as timely as I can understanding that the decision one
2 way or the other will have an effect on the voters, on
3 the Secretary of State's Office, on the State of Kansas
4 in its entirety as we approach this election season.

5 MR. HO: Question, Your Honor, if I may?

6 THE COURT: Yes.

7 MR. HO: Would Your Honor like proposed
8 findings of fact and conclusions of law now that the
9 evidence is in the record?

10 THE COURT: That would be helpful. That
11 would speed up my process. So, Mr. Ho, did you have an
12 idea, in terms of a deadline, for submission? We could
13 do this simultaneously.

14 MR. HO: Sure. I don't think we need an
15 opportunity to respond. We can do simultaneous briefs.
16 Is four weeks enough? Is that soon enough for Your
17 Honor? I mean, we can do it on whatever time frame
18 would be helpful to the court, but that was just an
19 opening bid.

20 THE COURT: Four weeks works for me. Does
21 it work for everyone? Mr. Johnson?

22 MR. JOHNSON: That's -- that's fine, Your
23 Honor. Thank you.

24 THE COURT: Mr. Kobach?

25 MR. KOBACH: Just to clarify, Your Honor,

1 would that be simultaneous?

2 THE COURT: Yes.

3 MR. KOBACH: Yeah, that's fine.

4 THE COURT: All right. Four weeks.

5 MR. HO: Thank you.

6 THE COURT: Especially since we're talking,
7 set an actual deadline.

8 COURTROOM DEPUTY: April 16th is four weeks.

9 THE COURT: April 16th is the deadline for
10 that. Technically this will go under advisement on
11 April 16th, and then tomorrow we're going to have the
12 hearing on the motion for contempt.

13 Bonnie, we have hearings at 9:00?

14 COURTROOM DEPUTY: We actually have one
15 status conference. We could get started at 9:15 here.

16 MR. JOHNSON: Would you mind if I be excused
17 from that?

18 THE COURT: You are, yes. I don't think
19 it's your -- you didn't join in that motion necessarily,
20 did you?

21 MR. JOHNSON: No.

22 THE COURT: So 9:15 tomorrow morning. All
23 right. All right. We will be in recess then until 9:15
24 tomorrow.

25 MR. KOBACH: Your Honor, could I, one real

1 quick housekeeping. There were two things -- I'm not
2 even quite sure where we put them. There was a dispute
3 about the contact with Miss Bucci -- I'm sorry,
4 Miss French and when that occurred. We have some
5 screenshots, to the extent that is still a live issue,
6 we can present to the court.

7 And then we also have some e-mails about --
8 remember the very first day of the trial or possibly the
9 second day the question was when were the latest
10 examples of the ELVIS database sent to the opposing
11 counsel? And there was interplay we didn't -- whether
12 they got notice in time. We have the relevant e-mails
13 in that regard too. I'm not quite sure how we want to
14 deal with those now.

15 THE COURT: All right. So two things, the
16 e-mails concerning the latest ELVIS -- oh, because there
17 was that e-mail chain and there was a bounce back
18 because something had happened to the formatting of your
19 e-mails and it looked like you did not receive a certain
20 e-mail from plaintiff?

21 MR. KOBACH: I think that was different.
22 I'll let Mr. Roe explain.

23 MR. ROE: I think what you're referring to,
24 Your Honor, was the demonstrative exhibits. I think
25 what counsel is referring to is the disclosures

1 regarding the underlying ELVIS files of the Sedgwick
2 County spreadsheet.

3 THE COURT: And this pertained to
4 demonstrative exhibits at the outset?

5 MR. ROE: No, no. This was -- this was the
6 issue the evening after Miss Lehman testified. We came
7 back the next morning, that was what that entailed. So
8 this is involving the -- at what point the -- all the
9 ELVIS files were sent to opposing counsel.

10 THE COURT: So is there an exhibit that's
11 outstanding? Is that -- I mean, I'm trying to remember.

12 MR. STEINER: I don't believe so, Your
13 Honor. I think the issue was the Secretary's -- I think
14 there was some ELVIS files that had handwritten cover
15 pages instead of other cover pages. I think what
16 they're trying to say is, well, it was included in a
17 massive exhibit that was presented earlier. And, you
18 know, when they presented their -- Miss Lehman's
19 summary, they hadn't followed up. We think we're
20 missing certain exhibits.

21 I think what they came in and tried to say,
22 well, they would have been in some much bigger
23 spreadsheet but they were separated by handwritten
24 pages. I think that issue is long resolved. I think
25 that Miss Lehman's testified. I think that Your Honor

1 allowed the testimony that they wanted to elicit from
2 Miss Lehman. So I'm not sure what the issue is there.

3 I would like to address the first issue with
4 Miss French but let's clean up --

5 THE COURT: So is there any additional
6 exhibit or testimony that this pertains to?

7 MR. KOBACH: The testimony's already in, for
8 example, in the case of Miss French. And I think this
9 was the -- with regard to Mr. Caskey, it's already in
10 evidence. But this has to do with the allegation that
11 inadequate notice was given by plaintiffs.

12 THE COURT: You need to stand up when you're
13 talking.

14 MR. KOBACH: Sorry.

15 THE COURT: All right. It sounds like it's
16 moot really.

17 MR. KOBACH: Is it possible for us to -- to
18 the extent that they continue to rely on this at any
19 stage, whether we can get this into the record, at least
20 the screenshots, of when communication occurred and the
21 e-mail?

22 MR. STEINER: Is this with respect to
23 Miss French or ELVIS?

24 MR. KOBACH: Screenshots with respect to
25 Miss French.

1 THE COURT: I hadn't heard about that issue.
2 I thought we were still on the ELVIS database underlying
3 all the records when the additional ELVIS database
4 records were provided. That's not what you're talking
5 about now?

6 MR. KOBACH: I'm sorry, I'm jumping back and
7 forth, Your Honor.

8 THE COURT: All right. What is the issue
9 from Miss French? Was she precluded from testifying or
10 an exhibit still pending I haven't fully admitted?

11 MR. STEINER: The issue with Miss French was
12 I believe in her testimony she suggested that she talked
13 to Secretary Kobach I believe on the Thursday of the
14 first week of trial after Miss Ahrens testified on
15 Wednesday. And there was questions and she was somewhat
16 confused. I think the date was either Monday or Tuesday
17 that she talked to Mr. Rucker about the possibility of
18 testifying.

19 I think that that's consistent with what she
20 had said. "Earlier in the week" or even "the prior
21 week" is consistent with what she said in the morning
22 interview prior to her coming over here and -- and with
23 respect to the representations following Miss Ahrens'
24 testimony.

25 Now, we asked last week Miss Becker to

1 produce to us not just the screenshots that we haven't
2 seen but -- that Secretary Kobach's referring to but any
3 communications between anyone in the Secretary's Office
4 and Miss French and they refused. And if that's part of
5 what we're going to hear tomorrow as part of the
6 contempt hearing with respect to those representations,
7 we think that the Secretary's Office should produce any
8 communications that they had with Miss French about the
9 possibility of her testifying, any communications that
10 Mr. Rucker had over the past month that Miss French
11 testified to, but the Secretary's Office flat out
12 refused.

13 THE COURT: All right. If this pertains to
14 issues that we're going to take up at the contempt
15 hearing tomorrow --

16 MR. KOBACH: This does not.

17 THE COURT: I'm not understanding what it
18 pertains to.

19 MR. KOBACH: You may recall they were trying
20 to impugn the credibility of Miss French by saying she
21 had been called long before, and impugning the
22 credibility of this counsel's table by saying she'd been
23 called long in advance. And the question was on what
24 day was she called. And we have screenshots of the
25 conversation within our office of what -- the call

1 occurred on Wednesday, which was the day after Ms.
2 Ahrens.

3 THE COURT: All right. The problem is
4 Miss French isn't here. She can't be cross-examined
5 further about that. But for the record, Exhibit 1214
6 we'll call it, I'll admit it. I don't think I'm going
7 to give it any weight because it can't be tested now
8 through additional questioning of her. But to the
9 extent it supports what your -- you know what you're
10 arguing about their impeachment of her, I think it's
11 fine, you can put it in the record. So we'll call that
12 Exhibit 1214.

13 MR. STEINER: Your Honor, we'd like a copy
14 of it. We haven't been given that yet. But what we'd
15 also like, not just their internal communications about
16 Miss French that we're now being handed, but
17 communications between Mr. Rucker or Secretary Kobach
18 and Miss French in the, you know, month leading up to
19 her testimony, which I think she testified to. And
20 that's what we asked them for last week in follow up to
21 those representations and we were told no.

22 THE COURT: Where -- why haven't you
23 produced those communications?

24 MR. KOBACH: We're not aware there are any.
25 We have been searching for anything other than phone

1 conversations and we're not aware of any. We didn't
2 tell them flat out, no, we're not going to do that. We
3 said we haven't found any.

4 MR. STEINER: I'd like to put Miss Becker's
5 e-mail into the record then. We can call it I think
6 156.

7 MS. BECKER: You did not ask me for the
8 screenshots. You asked me for discovery response and I
9 said that we did not have to provide a discovery
10 response because the court had already listened to her
11 testimony and she was done testifying, Mr. Steiner.

12 THE COURT: All right. Exhibit 156 admitted
13 as well. I suspect maybe this has more to do with the
14 arguments you're going to make to me tomorrow. But for
15 the record that's Miss Becker's e-mail about this issue,
16 Exhibit 156, admitted as well.

17 SMS. BECKER: Your Honor, we'll go ahead and
18 proffer Exhibit 1205. We're going to offer into
19 evidence 1205, the e-mails Secretary Kobach was just
20 discussing of the Sedgwick County data and the attached
21 ELVIS records showing defendant's discovery dates and
22 responses.

23 THE COURT: I'm not sure I understand. You
24 all keep switching topics on me here. I've admitted
25 1214 which has to do with screenshots concerning

1 Miss French. 156 an e-mail from Miss Becker. Now we're
2 back on the ELVIS database, the e-mails about that.

3 MS. BECKER: The two things that we were
4 bringing up were the screenshots from Miss French since
5 that was a topic that came up. And then the notebook of
6 the e-mails and the discovery responses that were
7 debated when Mr. Caskey -- when we broke during
8 testimony and we had to go back and look through our
9 records to see when we produced discovery to the other
10 side, and that's what this is. So I can give it
11 whatever number you'd like.

12 THE COURT: And what does this pertain to?
13 There's no outstanding exhibits; right?

14 MS. BECKER: It pertains to the ELVIS
15 records that I believe Mr. Caskey was going to be
16 testifying to and then we -- we had an evening where
17 there was an allegation about sort of like the
18 defendants weren't timely with producing these record to
19 us.

20 THE COURT: It's untimely now to put these
21 in the record. Mr. Caskey's not on the stand. The
22 evidence is closed. If you -- if you wanted to -- if
23 you wanted to prove you had disseminated them, the time
24 to have done that would have been the next morning or
25 when there was time if either side wanted to put

1 Mr. Caskey back on the stand. I mean, you can put those
2 in the record, but I'm not looking at them because I
3 don't -- I don't know how to process something like that
4 that comes to me at the end and the evidence is closed.
5 There's nobody that can be asked about it.

6 MS. BECKER: Understood.

7 THE COURT: I think it's pretty much useless
8 at this point.

9 MS. BECKER: Thank you.

10 THE COURT: That's Exhibit 1205?

11 MS. BECKER: Yes, Your Honor.

12 THE COURT: You can put it in the record.
13 Again, you're out of time on me considering it. That's
14 why I keep asking is there an exhibit that I
15 conditionally admitted that I need to consider this, is
16 there testimony that I -- the evidence is closed. So
17 trying to clean up the record now by proving that you
18 submitted something or traded something or sent
19 something doesn't do anything in terms of the trier of
20 fact because only -- it only has relevance if you give
21 me something in time for me to say, oh, you did disclose
22 that in time, okay, therefore, I will consider that
23 exhibit or I will consider that testimony. But that's
24 not the way any of this is coming to me at this point.
25 So I'm not going to consider this. That's all I'm

1 saying.

2 MR. STEINER: Your Honor, we would like a
3 copy of whatever was just handed up.

4 THE COURT: That's Exhibit 1205. Is there a
5 second copy for the plaintiff?

6 MR. STEINER: Apparently not.

7 MS. BECKER: We have copies.

8 THE COURT: Again, I don't give it any
9 evidentiary weight. The evidence is closed. Everybody
10 has rested. So. All right. Anything else? All right.
11 We'll see you back at 9:15 here.

12 (Proceedings adjourned.)

13

14

15 CERTIFICATE

16 I certify that the foregoing is a correct
17 transcript from the record of proceedings in the
18 above-entitled matter.

19 DATE: March 26, 2018

20

21 /s/Kimberly R. Greiner
22 KIMBERLY R. GREINER, RMR, CRR, CRC, RDR
23 United States Court Reporter

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