UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

v.

Case No. 3:15-CV-00421-jdp

BEVERLY R. GILL, et al.,

Defendants,

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

THE WISCONSIN ELECTIONS COMMISSION DEFENDANTS AND THE WISCONSIN STATE ASSEMBLY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO ADMIT IN EVIDENCE TESTIMONY BY DEPOSITION OF ANY PLAINTIFF WHO DOES NOT TESTIFY LIVE AT TRIAL

Plaintiffs ask the Court to admit the deposition testimony of every one of the Plaintiffs in this case—all but one of whom they concede is available for trial—without allowing the Wisconsin Elections Commission Defendants or the Wisconsin State Assembly (collectively, "Defendants") an opportunity to cross-examine them. In essence, Plaintiffs propose that the Court try this case on paper, with live testimony as the exception. Plaintiffs couch their plan as an "efficient and fair" means of "creat[ing] a complete record." Mot. at 2–3. It is neither. Plaintiffs' plan disregards the instructions the Court gave at the February 1, 2019 scheduling

conference, in which the Court stated that it would not "force anyone into using a deposition" instead of "having the opportunity for live cross-examination." Ex. 6 to Greenwood Decl. at 22:18–21, ECF 303-6. Plaintiffs' plan is also contrary to the federal rules. Federal Rule of Civil Procedure 32(a) specifies the circumstances in which a party may admit deposition testimony from its own witnesses. Plaintiffs have not established that any of those circumstances are present here. Nor do Plaintiffs offer a shred of authority for their request that the Court disregard the federal rules in service of their plan to shield their witnesses from cross-examination.

FACTUAL BACKGROUND

The specifics of Plaintiffs' proposal are as follows:

- Plaintiffs request admission of the deposition testimony of "any plaintiff who does not testify live at trial in this case." Mot. at 1.
- Plaintiffs propose this approach even though they claim only one Plaintiff is unavailable to testify live and concede the availability of all other Plaintiffs. Mot. at 2.
- Plaintiffs do not identify to the Court or Defendants which Plaintiffs will testify live at trial. Instead, they submitted designations for all 39 plaintiffs who were deposed, and (apparently) ask the Court to preadmit all of it. Mot. at 2.
- Plaintiffs reserve for themselves the flexibility to later pick "a manageable number of Plaintiffs to testify at trial." Mot. at 3.

Plaintiffs did not tell Defendants about their proposal until June 10, 2019. That was well after all of the discovery depositions of the Plaintiffs were complete, and just a few days before the parties' pretrial disclosures were due. Plaintiffs did not make any effort to engage in any meaningful dialogue with Defendants about how the parties might have agreed to streamline the presentation of the evidence at trial. Instead, Plaintiffs' counsel simply asserted that they intended to submit deposition designations from each one of the Plaintiffs and every one of their experts, regardless of their availability to attend trial. *See* Ex. 2 to Greenwood Decl. at 3 (email from J. Ackerman to R. Greenwood summarizing June 10, 2019 call). (Plaintiffs have apparently reconsidered submitting their expert testimony through designations.) Along with their pretrial disclosures, Plaintiffs submitted designations for 39 individual plaintiffs. ECF 301-1.[1]

ARGUMENT

Plaintiffs' proposal ignores the guidance this Court provided regarding the use of deposition testimony at trial. And it is blatantly inconsistent with the federal rules. Plaintiffs offer no sound legal justification for the *en masse* admission of deposition testimony from available witnesses. Instead, Plaintiffs engage in handwaving about what courts handling other gerrymandering cases have done, but even those cases do not lend support to Plaintiffs' motion.

[1] Because Plaintiffs' designations from these witnesses are improper and contrary to the rules, Defendants are not submitting counter-designations and objections. In the event that the Court grants Plaintiffs' motion in whole or in part, Defendants reserve their right to make additional objections to Plaintiffs' designated testimony and to submit counter-designations.

Importantly, this is not the sort of case where live testimony becomes less important because there are multiple plaintiffs who must establish the same claim. Here, Plaintiffs are asserting vote dilution claims with respect to 29 separate districts. *See* Am. Compl. ¶¶ 19–20, 22–23, 25–26, 28–29, 31–32, 34–35, 37–38, 40–41, 43–44, 46–47, 49–50, 52–53, 55–56, 58–59, 61–62, 64–65, 67–68, 70–71, 73–74, 76–77, 79–80, 82–83, 85–86, 88–89, 91–92, 94–95, 97–98, 100–101, 103–104, ECF 201. The lesson from *Gill* is that a Plaintiff's interest is limited to the Assembly district where that Plaintiff votes, not the state as a whole. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). And of course each Plaintiff's First Amendment claim is highly individual. Each and every Plaintiff must therefore establish her individual standing to sue and ultimately the merits of their specific claims. *See id.* at 1934. Plaintiffs' claims are independent of one another. And Plaintiffs have provided no rationale for why some may establish their independent claims without the scrutiny of cross-examination, while others might, at Plaintiffs' sole discretion, come to trial.

The Court should decline the Plaintiffs' invitation to create a partisan gerrymandering exception to the Federal Rules of Civil Procedure.

I. Plaintiffs' Proposal Contravenes the Court's Instructions.

The parties and the Court discussed the use of deposition testimony at trial during the February 1, 2019 scheduling conference. During that conference, the Court suggested that "if there are *some* witnesses who can be presented by deposition, *consider whether that might work*." Ex. 6 to Greenwood Decl. at 22:21–23, ECF 303-6 (emphasis added). However, in response to the Assembly's concern that it wanted the opportunity to cross-examine the plaintiffs at trial, the Court was

very clear that it would not force any party to using depositions in lieu of live testimony:

> ***And I'm not trying to force anyone into using a deposition*** that we—where they would feel disadvantaged by not having the opportunity for live cross-examination.

Id. at 22:18–21 (emphasis added). The Court elaborated that it did not intend to hold a trial by depositions:

> ***Like I said, I'm not trying to jam this down anybody's throat.*** I'm just suggesting that there might be some bits of evidence that might need to be made of record that needs to be done by discovery depositions. And I understand the discovery depositions aren't an ideal format for presentation at trial, but oftentimes people will make due without them if there is need for examination. ***That's why we're having a trial, otherwise we'd have you mail in your papers and we'd have a stack of depositions and affidavits, but we're not doing that.***

Id. at 22:25–23:10 (emphasis added).

In their motion, Plaintiffs mischaracterize the Court's instructions. Instead of heeding the Court's repeated statements that the Court would not force a party to accept deposition testimony instead of live testimony, Plaintiffs have moved the Court to do just that. And while Plaintiffs seem willing to rewrite the Court's remarks, Defendants have relied on them. In particular, Defendants conducted Plaintiffs' depositions as discovery depositions, with the expectation that Defendants would later be permitted to cross-examine Plaintiffs live at trial as the Rules require. The Court should reject Plaintiffs' attempt to substitute their own trial management plans for the Court's.

II. The Federal Rules of Civil Procedure and Evidence Do Not Permit Plaintiffs to Introduce Deposition Testimony from Their Own Available Witnesses.

Even if Plaintiffs' proposal was consistent with the Court's instructions—and it is not—it is flatly at odds with the federal rules, which place a heavy emphasis on the importance of live trial testimony.

Federal Rule of Civil Procedure 32 specifies the limited conditions under which depositions may be admitted at trial. Relevant here, Rule 32(a)(4) delineates the circumstances under which a party may use the deposition of its own witnesses. The first four circumstances, listed in Rule 32(a)(4)(A) through (D), permit a party to use depositions in lieu of live testimony if the witness is unavailable. None of those provisions applies here, because Plaintiffs concede that 39 of the 40 plaintiffs whose deposition testimony they seek to admit are available to testify at trial. Mot. at 2 ("One Plaintiff, Sara Ramaker, is unavailable for trial, leaving 39 Plaintiffs who could be made available to testify live if required."). As for Ms. Ramaker, who has not yet been deposed, the Plaintiffs have not carried their burden to establish that she is unavailable.[2] *See Rascon v. Hardiman*, 803 F.2d 269, 277 (7th Cir. 1986) ("The party seeking to admit the deposition, must prove that the requirements of the rule have been met.").

Unable to rely on Rule 32(a)(4)(A) through (D), Plaintiffs are left with subsection (E), which permits use of a party's deposition only if the Court finds "on

[2] Defendants cannot assess whether Ms. Ramaker is unavailable until she is deposed on July 2.

motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used." FED. R. Civ. P. 32(a)(4)(E).

The hurdle for establishing exceptional circumstances is high, and Plaintiffs do not come close to clearing it. The Seventh Circuit has explained that "[e]ven 'serious prejudice' from the exclusion of a deposition has been held not to be an exceptional circumstance in and of itself." *Griman v. Makousky*, 76 F.3d 151, 153 (7th Cir. 1996). The Court elaborated that "it is not only a party's need for the evidence in the deposition, but also the nature of the circumstances that have made the deponent unavailable to testify, that determines whether the circumstances can be thought exceptional." *Id.* Here, of course, *the witnesses are available*, and the *only* circumstance the Plaintiffs identify is the need to put on their case in the time the Court has allotted for trial. *See* Mot. at 2. That is not an exceptional circumstance: many parties are confronted with the problem of having to present multiple witnesses in a short timeframe.[3]

Other courts have similarly taken a narrow view of Rule 32's "exceptional circumstances" provision. The Eighth Circuit held that the provision applies only when "live testimony from the deponent is impossible or highly impracticable and

[3] The challenges Plaintiffs face regarding the allocation of their trial time are partly of their own making. Plaintiffs recently (and impermissibly) announced their intent to have four Democratic politicians testify about the plaintiffs' injuries instead of the plaintiffs themselves. *See* Defs.' Mot. to Strike Pls.' Suppl. Disclosures, ECF 282; Defs.' Reply in Supp. of Mot. to Strike Pls.' Suppl. Disclosures, ECF 296.

'the interest[s] of justice,' 'with due regard to the importance of live testimony in open court,' counsel in favor of admissibility." *McDowell v. Blankenship*, 759 F.3d 847, 851 (8th Cir. 2014). The Sixth Circuit, citing Rule 32(a)(4)(E)'s predecessor, reasoned that "exceptional circumstances" are those akin to the death, infirmity, or imprisonment of a witness:

> How exceptional the circumstances must be under Rule 32(a)(3)(E) is indicated by its companion provisions. These authorize use of a deposition in lieu of live testimony only when the witness is shown to be unavailable or unable to testify because he is dead; at a great distance; aged, ill, infirm, or imprisoned; or unprocurable through a subpoena.

Allgeier v. United States, 909 F.2d 869, 876 (6th Cir. 1990); *cf. G.E.J. Corp. v. Uranium Aire, Inc.*, 311 F.2d 749, 755 (9th Cir. 1962) ("We see no reason why the pre-trial deposition of a witness should be admissible when the witness is himself present."). No circumstances like that are present here. Plaintiffs concede that 39 plaintiffs are able to attend the trial and have not identified any reason it would be "impossible or highly impracticable" for them to testify live. *McDowell*, 759 F.3d at 851.

The Plaintiffs' request certainly does not show due regard for the importance of live testimony. Rule 32(a)(4)(E) reflects "the strong preference of Anglo–American courts for live testimony." *Griman*, 76 F.3d at 153. Under that tradition, "[t]he deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Hand, J.). Rule 32 is not the only Rule that codifies the common law insistence on live testimony whenever possible. Rule 43(a)—which Plaintiffs do not

even acknowledge in their motion—states: "At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise." FED. R. CIV. P. 43(a). The reason live testimony is important is because it affords the factfinder a chance to evaluate the credibility of the witnesses' testimony as tested through cross-examination—exactly what Plaintiffs are trying to avoid here. *See, e.g.*, *Griman*, 76 F.3d at 153; *Napier*, 102 F.2d at 468–69.

Against this backdrop, it is no surprise that authorities have cautioned restraint in the application of Rule 32(a)'s "exceptional circumstances" provision, lest parties attempt to try cases via deposition. *See, e.g.*, *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) ("But the right to use depositions for discovery, or for limited purposes at a trial, of course does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury."); 7 MOORE'S FED. PRACTICE - CIVIL § 32.28 (2019) ("[T]he express requirement that there be due regard for the importance of presenting oral testimony is a warning that this provision is not to be used as authority for trying cases generally on depositions."). Of course, that is exactly what Plaintiffs propose—shoehorning in their testimony through depositions as a way to prevent the Court from being able to effectively assess their credibility.[4]

[4] Among other credibility issues, the Court will have to assess whether the Plaintiffs have truly been deterred from engaging in associational activity as a result of Act 43.

Lastly, Plaintiffs' proposal is inconsistent with the Federal Rules of Evidence. Plaintiffs' own out-of-court statements, offered for the truth of what they assert, are textbook hearsay. *See* FED. R. EVID. 801(c); 802. Plaintiffs have identified no applicable hearsay exception, and there is none, because all of these witnesses are available to testify.

III. Plaintiffs Have Not Identified Any Authority That Supports Their Proposal.

Plaintiffs have not identified a single authority that supports their proposal. Their lack of any such authority—and their corresponding need to fall back on their insistence that this case is somehow "different" just because it involves partisan gerrymandering claims—highlights the fact that the rules do not permit what the Plaintiffs propose.

The authority Plaintiffs cite to support their motion falls into three categories: authority Plaintiffs mischaracterize, authority that has nothing to do with what they propose, and a handful of unreasoned orders from other partisan gerrymandering cases. None of it justifies departure from the federal rules.

First, Plaintiffs cite *Rascon v. Hardiman* in support of their claim that: "prevailing Seventh Circuit precedent is clear that the 'admission of deposition testimony is within the sound discretion of the trial Court.'" Mot. at 3 (citing *Rascon*, 803 F.2d at 277). Plaintiffs' quotation from *Rascon* is misleading. It omits the first part of the sentence, which reads in full: "*As long as the deposition testimony meets the requirements of the Federal Rules of Evidence,* admission of deposition testimony is within the sound discretion of the trial court." *Rascon*, 803

F.2d at 277 (emphasis added). The italicized portion the Plaintiffs left out concerns exactly what is at issue here: whether the Rules allow the admission of Plaintiffs' own deposition testimony. And unless Rule 32(a)'s requirements are met, they do not, because the depositions are hearsay and the witnesses are available.[5]

Second, the bulk of the Plaintiffs' authorities are simply not on point. Plaintiffs cite a number of general authorities regarding the Court's power to manage trial. *See* Mot. at 1 (citing FED. R. Civ. P. 1, 16(c)(2)(L)). Neither of these rules speaks to the problem at hand, which is the domain of Rule 32. Unsurprisingly, Plaintiffs identify no case in which a court has applied these Rules in the manner Plaintiffs propose.

Similarly, the cases Plaintiffs rely on (other than *Rascon*) concern the manner of taking testimony by deposition once the requirements of Rule 32 are met, not whether the testimony is admissible at all. For example, Plaintiffs cite *Oostendorp v. Khanna*, 937 F.2d 1177 (7th Cir. 1991), Mot. at 3, but that case concerned a party's challenge to the court's plan to admit deposition testimony via narrative summary, *not* whether the testimony was admissible at all. *Oostendorp*, 937 F.2d at 1179–80. So too with the other two cases Plaintiffs cite, which concern the introduction of deposition testimony after the requirements of Rule 32 had already been met. *See Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 844 (7th Cir. 1984) (stating that the depositions at issue were introduced "pursuant to Fed.

[5] In *Rascon*, unlike here, the deposition testimony at issue was admissible under Rule 32 because the witness was unavailable. 803 F.2d at 277.

R. Civ. P. 32"); *Holmes v. Godinez*, No. 11 C 2961, 2016 WL 4091625, at *6–7 (N.D. Ill. Aug. 2, 2016) ("Plaintiffs seek to admit depositions of IDOC employees who either reside more than 100 miles from trial or were previously designated as 30(b)(6) deponents. The use of deposition testimony in these two contexts is permitted.").[6] Similarly, Plaintiffs cite the Manual for Complex Litigation, Mot. at 3, but it concerns only the manner of receiving deposition testimony. Nothing in the manual suggests courts are free to disregard the requirements of Rule 32.[7]

Third, Plaintiffs fall back on the refrain that the Court should follow what they claim is "customary in redistricting cases (and in particular in partisan gerrymandering cases)." Ex. 2 to Greenwood Decl., ECF 303-2. Plaintiff cite three examples that supposedly authorize departure from the federal rules in gerrymandering cases. None does. The first, a pretrial order from *League of Women Voters of Michigan v. Benson*, specifically requires that the parties adhere to Rule 32(a)(4), the very Rule Plaintiffs are seeking an exception from here. It says:

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[6] The relevant portion of *Cameo Convalescent Center* cites Rule 32(a)(4) as justification for the admission of counter-designations: "Pursuant to Fed.R.Civ.P. 32(a)(4), the defendants read other portions of the deposition introduced by Cameo." 738 F.2d at 844. The Rule has since been reorganized. What was then subsection (a)(4) is now (a)(6), and it is not applicable here. *See* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2148 (3d ed. 2019). Thus, *Cameo Convalescent Center* does not address at all the modern Rule 32(a)(4), which contains the requirements Plaintiffs must meet.

[7] Plaintiffs' alternative proposal, that the Court admit summaries of Plaintiffs' depositions, Mot. at 7, suffers from the same flaw as their reliance on case law concerning the method of introducing deposition testimony. Whether presented by designation or summary, Plaintiffs' deposition testimony is inadmissible unless Plaintiffs establish that the requirements of Rule 32 or one of the exceptions to the hearsay rule have been met.

"Plaintiffs agree to produce any Voter Witness identified by the Secretary or Intervenors if they are available to travel during the time frame of the trial. Excuses to designations hereunder will be governed by the standards set forth in Fed.R.Civ.P.32(a)(4) and related principles." Ex. 3 to Greenwood Decl. at 2, ECF 303-3. The second, a pretrial order from *Ohio A. Philip Randolph Institute v. Householder*, merely states that the parties will offer certain witnesses by deposition. *See* Ex. 4 to Greenwood Decl. at 7, ECF 303-4. The pretrial order contains no indication about whether the parties agreed to this procedure or whether the witnesses were available, let alone any legal reasoning. Finally, Plaintiffs cite a transcript from *League of Women Voters of North Carolina v. Rucho*. That transcript does not help Plaintiffs, either. There, the parties *agreed* to present certain witnesses by deposition. Ex. 5 to Greenwood Decl. at 14:15–21, ECF 303-5. Defendants certainly do not agree to Plaintiffs' plan here—a plan Plaintiffs did not even attempt to negotiate.

CONCLUSION

There is no authority that supports Plaintiffs' proposed plan to try this case using the deposition testimony of available party witnesses instead of live testimony. The Court should decline the Plaintiffs' invitation to create a partisan gerrymandering exception to the federal rules and deny their motion.

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Respectfully submitted,

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