IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.,

Plaintiffs,

v. No. 15-cv-421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO ADMIT IN EVIDENCE TESTIMONY BY DEPOSITION DESIGNATIONS OF ANY PLAINTIFF WHO DOES NOT TESTIFY LIVE AT TRIAL

Trial of this action is scheduled for four days, from July 15 to 18, 2019. The parties have identified more than 50 witnesses—including 39 Plaintiffs, five experts, and seven fact witnesses—who may testify at trial. The trial cries out to be managed so that evidence is presented efficiently but fairly, and so that a complete record may be built through procedures that respect this Court's schedule and the rights of all parties. To that end, Plaintiffs have offered a number of alternatives for how testimony of some of the 40 Plaintiffs may be admitted in evidence, promoting the goal of Rule 1: "the just, speedy, and inexpensive determination" of this proceeding. Plaintiffs also have identified the relevant federal rules and precedents that permit this Court to admit Plaintiffs' testimony by deposition, in lieu of live testimony, and have highlighted three recent examples of partisan gerrymandering cases in which three-judge panels like this one admitted in evidence designations from the plaintiffs' depositions rather than requiring them to testify at trial.

By contrast, Defendants stubbornly oppose Plaintiffs' proposals without offering any alternatives for how a full record can be created in the four days the Court has assigned this remand proceeding for trial. The Court should exercise its considerable inherent powers and discretion under the Federal Rules of Civil Procedure, and issue an order either granting Plaintiffs' request to present Plaintiff testimony by deposition, or crafting an alternative procedure for the efficient presentation of evidence at trial.

FACTUAL BACKGROUND

Defendants mischaracterize Plaintiffs' various proposals regarding how the Court could grant the relief that Plaintiffs seek to admit evidence at trial. *See* Wis. Elections Commission Defs. & Wis. State Assembly's Resp. in Opp'n to Pls.' Mot. to Admit in Evidence Testimony by Dep. of Any Pl. Who Does Not Testify Live at Trial ("Defs.' Resp."), dkt. 311, at 2-3. For clarity, Plaintiffs set forth the following alternative procedures, all of which are accepted and appropriate, by which this Court could admit in evidence deposition testimony of some Plaintiffs:

1. The Court could admit deposition testimony of any Plaintiff who does not testify live at trial through designation of specific portions of the deposition transcripts by Plaintiffs and counter-designations by Defendants. Plaintiffs and Defendants could identify a limited, manageable list of Plaintiffs they each wish to call for live testimony as early as the Court orders, and any previously submitted designations of deposition testimony by Plaintiffs who are identified to testify live, by any party, would be withdrawn.
2. The Court could admit summaries prepared by Plaintiffs of the deposition testimony of any Plaintiff who does not testify live at trial, and responsive summaries prepared by Defendants. Again, Plaintiffs and Defendants could identify a limited, manageable list of

Plaintiffs they each wish to call for live testimony as early as the Court orders, and any previously submitted summaries of deposition testimony by Plaintiffs who are identified to testify live, by any party, would be withdrawn.

3. If Defendants wish to cross-examine more than a limited, manageable number of Plaintiffs at trial, the Court could admit deposition designations or summaries as set forth above from ***only*** the Plaintiffs, in lieu of live direct testimony, and then allow Defendants to conduct live cross-examination of all of the Plaintiffs at trial, with limited redirect by Plaintiffs' counsel, if necessary.[1] If Defendants are ultimately unable to conduct live-cross examination of all 39 Plaintiffs in their allotted two trial days, Plaintiffs would agree to allow counter-designations (or responsive summaries, whichever mirrors the entry of evidence by Plaintiffs) of depositions into the record for any Plaintiffs that Defendants do not have time to cross-examine.

Although Plaintiffs believe that each of these proposals will achieve the goals of Rule 1 and comply with Rule 32(a)(4)(E), they are aware that this Court has considerable experience trying complex, multi-party cases and conducting trials so that evidence is presented thoroughly but efficiently. Consequently, Plaintiffs reiterate that they are "open to any procedure the Court prefers," and are willing to discuss other options with Defendants and the Court. Pls.' Mot. to Admit in Evidence Testimony b Dep. of Any Pl. Who Does Not Testify Live at Trial ("Pls.' Mot."), dkt. 302, ¶ 7.

[1] This brief uses the term "all" for 39 Plaintiffs (those who have been deposed and can be available for trial between July 15 and 18, 2019). A separate motion for the admission of the deposition testimony of the fortieth Plaintiff, Sara Ramaker, who is out of the country and thus unavailable for trial in the week of July 15, will be made once that deposition has been conducted.

ARGUMENT

This reply brief (i) outlines how granting Plaintiffs' motion would not prejudice any party in the case, and (ii) responds to Defendants' mischaracterizations of the federal rules and binding precedents.

I. No Party Will Be Prejudiced If This Court Grants Plaintiffs' Motion.

Defendants make two claims as to how they would be prejudiced if Plaintiffs' motion is granted but neither withstands even a basic review of the facts.

First, Defendants complain that they only heard of Plaintiffs' deposition designation proposal on June 10, 2019, and that this information came well after the 39 Plaintiffs available for trial had been deposed. *See* Defs.' Mot. at 3. That representation is disingenuous. Plaintiffs foreshadowed ***exactly*** this scenario—that deposition designations would be necessary given the number of Plaintiffs and the brevity of the trial—nearly ***five months ago*** at the February 1, 2019 scheduling conference. *See* Pls.' Mot. ¶¶ 13-14. Twenty-one Plaintiff depositions occurred before February 1, 2019, and 18 occurred after that date. *See* Pls.' Dep. Designations, dkt. 301-1. Defendants did not change their deposition strategy after the discussion at the scheduling conference, though they were aware that the Court could admit testimony from those depositions even if they were not "tied up in a bow for presentation [at] trial." Dkt. 303-6, at 22:15-18; *see also* Pls.' Mot. ¶ 14. After the Court reset the trial for July 15, Defendants did not ask Plaintiffs' counsel whether any of the Plaintiffs they already had deposed would be available for the new trial date. Nor did Defendants ask to re-depose for the purpose of taking trial testimony any of the 21 Plaintiffs they deposed in January. As with their attitude toward the rest of this litigation, Defendants have made strategic choices based on the belief that this case will become moot before trial. Those strategic choices torpedo the Defendants' claims of unfair prejudice now.

Second, Defendants complain that they will be disadvantaged by not being able to cross-examine all 39 available Plaintiffs. But the premise of this argument is meritless. Defendants ***already had*** the opportunity to fully cross-examine each of those 39 Plaintiffs at their depositions, taking between two and four hours to cross-examination each. Defendants fail to identify why they must cross-examine Plaintiffs live at trial in light of the extensive cross-examination they already conducted at the Plaintiffs' depositions, or why their deposition cross-examinations are insufficient to create a complete record. Moreover, under one of the procedures that Plaintiffs propose, the Court would admit deposition designations for Plaintiffs who are not called to offer live direct testimony, and Defendants could then cross-examine as many Plaintiffs as they wish during their allotted trial time.

II. This Court Has the Power to Grant Plaintiffs' Motion Under the Federal Rules of Civil Procedure and Binding Precedent.

Defendants correctly point out that both the Federal Rules of Civil Procedure and binding precedent stress the importance of live testimony in open court. *See* Defs.' Resp. at 7-8 (citing Fed. R. Civ. P. 32(a)(4)(E) and *Griman v. Makousky*, 76 F. 3d 151, 153 (7th Cir. 1996)). However, these authorities explain that, despite the value of live testimony, trial courts have discretion as to when and how to admit deposition testimony into evidence. That is, in fact, the point of Fed. R. Civ. P. 32(a)(4)(E): to give trial courts discretion to admit depositions as evidence where "exceptional circumstances . . . permit the deposition to be used." Similarly, in *Griman*, although the Seventh Circuit upheld the trial court's decision not to allow deposition testimony into evidence, an important factor weighing in favor of the judge's sound use of discretion was that a "jury would not find it easy to determine Hunt's credibility without hearing him testify under direct and cross-examination." 76 F. 3d 153. For purposes of balancing efficiency and fairness, there is one glaringly obvious and material difference between *Griman*

and this case: *Griman* was tried to a jury but the trial in this case is to a panel of three experienced federal judges, two of whom have already presided over a four-day trial in this case; reviewed voluminous evidence, including four days of trial testimony and hundreds of exhibits, at an earlier stage of this case; and written voluminous opinions evaluating the claims, defenses, and evidence. *Griman* is thus inapposite because its predicate—a jury that might be unable to assess credibility without live testimony—is absent here.

Defendants do make one weak attempt, in a footnote, to explain why live testimony from Plaintiffs could be important here. Defendants assert that, "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." Defs.' Resp. at 9 n.4. But Defendants make no effort to enumerate, let alone describe, these "other credibility issues," nor do they develop this argument.

Furthermore, Defendants offer no reason at all to conclude that live testimony by every Plaintiff will be crucial for assessing Plaintiffs' ***vote dilution*** injuries. The explanation for the absence of any such reason is obvious: live testimony on that issue is wholly unnecessary. The primary testimony these injuries require from Plaintiffs is that they live at particular locations and are supporters of Democratic candidates and policies. This information can be admitted easily, and without any prejudice, through deposition designations.[2] Finally, if any adverse inferences about Plaintiffs' credibility are to be drawn because of their lack of live testimony, that is a consequence that Plaintiffs are prepared to accept. The fact that courts in three recent

[2] In fact, at least one set of the Defendants, the Wisconsin Election Commission, has already admitted through its Responses to Plaintiffs' Requests for Admissions that each individual Plaintiff "usually votes for Democratic candidates and generally supports policies espoused by Democratic candidates and officeholders." (this is repeated for each Plaintiff throughout the document). *See* Second Declaration of Ruth Merewyn Greenwood, dated June 25, 2019, Ex. 1, at 3.

partisan gerrymandering cases have used this procedure without any difficulty, however, suggests that no such inferences are appropriate. *See* Pls.' Mot. ¶¶ 9-12.

Defendants seek to minimize the multiple Seventh Circuit authorities Plaintiffs cite that affirm the district court's discretionary admission of deposition designations in evidence. *See* Pls.' Mot. at 5-7; Defs.' Resp. at 10-12. First, they suggest that *Rascon v. Hardiman*, 803 F.2d 269 at 277 (7th Cir. 1986), is inapplicable because it requires that deposition testimony meet the requirements of the Federal Rules of Evidence, and Defendants' claim Plaintiffs' depositions are hearsay and therefore inadmissible. On the contrary, Plaintiffs' deposition testimony meets the requirements of Federal Rule of Evidence 807 because it:(i) is trustworthy (sworn under oath); (ii) is offered as evidence of a material fact (offered for evidence as to individual Plaintiff's standing and harm); (iii) is more probative of the pertinent facts than other evidence (Plaintiffs can speak to their residential address, voting patterns, and individualized harms); and (iv) admitting the testimony will best serve purposes of the rules and the interests of justice (will allow for the just, speedy, and inexpensive determination of the issues in the case).

Next, Defendants seek to distinguish *Oostendorp v Khanna*, 937 F.2d 1177 (7th Cir. 1991), *Cameo Convalescent Ctr. Inc. v. Senn*, 738 F. 2d 836 (7th Cir. 1984), and *Holmes v. Godinez*, No. 11 C 2961, 2016 WL 4091625 (N.D. Ill. Aug. 2, 2016) because each involved the admission of deposition testimony after Fed. R. Civ. P. 32 had been satisfied. Defendants' attempts to distinguish these cases are unavailing. First, throughout their original motion and this reply brief, Plaintiffs have explained how Fed. R. Civ. P. 32 is satisfied here. Second, Plaintiffs cited these cases to identify for the Court (and Defendants) the different ways that deposition testimony has been admitted in evidence in district courts in this Circuit.

Moreover, these authorities are far from the only cases that stand for the proposition that deposition testimony may be admitted in evidence under exceptional circumstances. The Seventh Circuit has also admitted deposition testimony under Rule 32(a)(4)(E), even where the witness was available, because of the particular circumstances of the case. *See U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (finding that a district court did not commit plain error by allowing a party to admit into evidence both deposition testimony and live testimony from the same witness). Likewise, in *Shedd-Bartush Foods of Ill. v. Commodity Credit Corp,* 135 F. Supp. 78, 90 (N.D. Ill. 1955), the district court emphasized that it would admit certain deposition testimony—even though "the depositions which the plaintiff took of its own officers are largely conclusionary, self-serving and hearsay"—because "the court is hearing the case without a jury [so] their admission can do no harm." Here, not only is the trial to the Court, but Plaintiffs are seeking to offer deposition testimony from depositions taken by ***Defendants'*** counsel. Thus, ample Seventh Circuit authority supports the admission of Plaintiffs' deposition designations under Rule 32(a)(4)(E).

Defendants rely on *McDowell v. Blankenship*, 759 F.3d 847, 851 (8th Cir. 2014), for the proposition that "exceptional circumstances" includes only a narrow category of cases. *See* Defs.' Resp. at 7-8. Yet in *McDowell*, the Eighth Circuit noted that in determining whether Rule 32(a)(4)(E) applies, the court must balance "the equities at play," which in that case included "the practical need for *some* testimony in situations where live testimony is impracticable." 759 F.3d at 852. The Court also observed that the fact that the party opposing the admission of designations had counsel that "questioned [the witness] extensively during th[e] deposition" minimized prejudice to the opposing party. *Id.*

Furthermore, Defendants misread the pre-trial order in the partisan gerrymandering case from Michigan, *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019). Defendants quote from the third paragraph of the pre-trial order, which explains that the three selected Voter Witnesses, once chosen, will be subject to Rule 32(a)(4). But Defendants disregard the second paragraph, which provides for ***depositions*** of all the Voter Witnesses that are not identified in paragraph three. The depositions of the non-identified Voter Witnesses took place around the state from February 4 to 12, 2019. In other words, these witnesses were available to testify over the period of the trial, February 5-7, 2019, but were directed instead to testify via deposition at remote sites rather than live at trial. The testimony from those depositions was then admitted into evidence and formed part of the record in that case. *See id.* at 880 ("In addition to presenting witnesses at trial, the parties submitted hundreds of exhibits and deposition testimony from numerous witnesses in lieu of in-person testimony . . .").

Finally, Defendants emphasize that in the Ohio and North Carolina partisan gerrymandering cases (respectively, *Ohio A. Philip Randolph Institute v. Householder*, 1:18-cv-357 (S.D. Ohio 2019) and *League of Women Voters of North Carolina v. Rucho*, 1:16-cv-1164 (M.D.N.C. 2017)), the parties eventually agreed to enter Plaintiff testimony via deposition designations. *See* Defs.' Mot. at 13. This only highlights the uniquely unreasonable approach and disregard for Rule 1 by the Defendants here: they are the ***only*** litigants to have opposed the practical and non-prejudicial procedure of admitting designated deposition testimony in multi-plaintiff partisan gerrymandering cases in this decennial cycle. Again, if Defendants will not be as reasonable as the parties in the other cases, they are free to cross-examine as many Plaintiffs as they like in their two trial days. But however Defendants decide to proceed, it should not stop

this Court from admitting in evidence deposition designations from a majority of the Plaintiffs in lieu of direct examination at trial.

CONCLUSION

This Court has the power to manage the admission of evidence to ensure judicial efficiency and fairness to all parties. According to Rules 32(a)(4)(E) and 16(c)(2)(L), as well as binding Seventh Circuit precedent, this Court has the authority and the discretion, given the exceptional circumstances of this case, to admit Plaintiffs' deposition designations in evidence in lieu of direct testimony for any Plaintiff who does not offer live direct testimony at trial. Plaintiffs have offered to identify the names of a limited number of Plaintiffs whom they wish to call for live direct testimony, provided that the deposition designations for the other Plaintiffs are accepted into evidence. Plaintiffs are not seeking to prevent Defendants from exercising their right to cross-examine any and all Plaintiffs.

Plaintiffs respectfully request that this Court permit Plaintiffs (and Defendants if they wish) to submit designated deposition testimony by certain Plaintiffs in lieu of live direct testimony at trial (or cross-examination in the case of Defendants). Alternatively, Plaintiffs respectfully request that this Court permit Plaintiffs (and Defendants if they wish) to submit summaries of Plaintiffs' depositions, for those Plaintiffs who do not offer live direct testimony at trial (or cross-examination, in the case of Defendants).

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Respectfully submitted,

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