

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

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs,

v.

Case No. 15-CV-324-JDP

ANN S. JACOBS, Chair, Wisconsin Elections

Commission, *et al.*,

Defendants.

JUSTIN LUFT, *et al.*,

Plaintiffs,

v.

Case No. 20-cv-768-JDP

TONY EVERS, *et al.*,

Defendants.

Plaintiffs' Motion for Final Pre-Trial Conference and Trial by Zoom

Plaintiffs respectfully request that the Court enter an order that the trial in this case on February 10 and 11, 2022, be conducted remotely, with testimony and argument held via Zoom due to significant health risks arising from high-levels of COVID-19 transmission. Plaintiffs also request that the Court permit the final pre-trial conference scheduled for February 3, 2022, to be conducted remotely. Defendants have represented that they take no position on this Motion.

1. Federal Rule of Civil Procedure 43(a) provides that, “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open

court by contemporaneous transmission from a different location.” The decision to allow remote testimony is within this Court’s discretion. *See, e.g., Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005); *Thomas v. Anderson*, 912 F.2d 971, 977 (7th Cir. 2018).

2. The country remains in the midst of the COVID-19 pandemic which appears to, again, be worsening. That is certainly true for Wisconsin. On December 20, 2021, the Wisconsin Department of Health Services (“DHS”) released a Public Health Advisory which states that:

The highly contagious Omicron Variant of COVID-19 has been detected in Wisconsin and is anticipated to cause a rapid increase in disease activity in the coming weeks. Public health officials are actively researching how Omicron differs from other variants. Current data from other states and regions of the world show that it spreads more easily than previous strains, including the Delta variant. There is a serious risk that continued, increased numbers of COVID-19 cases will overwhelm an already strained health care system, leading to dangerous situations where patients experiencing medical emergencies may not be able to receive immediate, adequate, life-saving attention and care due to lack of hospital capacity.¹

3. According to the U.S. Centers for Disease Control and Prevention (“CDC”), the emerging Omicron variant is likely to spread more easily than the original COVID variant, and potentially more easily than the Delta variant. Persons without symptoms likely can spread the virus to others. Further, even fully vaccinated persons are experiencing breakthrough infections and be able to spread the virus. While the CDC believes vaccines are likely to protect against more serious illness and death, “[m]ore data are needed to know if Omicron infections, and especially reinfections and breakthrough infections in people who are fully vaccinated, cause more severe illness or death than infection with other

¹ RYAN WESTERGAARD, MD, PhD, MPH, WIS. DEP’T OF HEALTH SERVICES, PUBLIC HEALTH ADVISORY: ANTICIPATED SURGE IN COVID-19 DISEASE ACTIVITY DUE TOOMICRON VARIANT (Dec. 20, 2021), <https://www.dhs.wisconsin.gov/dph/memos/communicable-diseases/2021-12.pdf>.

variants.” It is also not yet clear whether treatments that are effective with other variants will be effective with Omicron.²

4. In recognition of the surge in COVID-19 cases, on December 28, 2021 the Seventh Circuit issued General Order 21-011, cancelling in-person oral argument until January 31, 2022 and to use telework as appropriate to minimize on-site staffing.³
5. If trial and the pre-trial conference are held in person, it will require many of Plaintiffs’ counsel to travel from multiple locations in Wisconsin and multiple states, including New York, California, Pennsylvania, and Illinois. *Cf., Singleton v. Merrill*, No. 2:21-cv-91 (N.D. Ala. Dec. 22, 2021) (three-judge court noting that counsel and witnesses would need to travel from multiple locations, in support of its decision to hold a preliminary injunction hearing remotely.) *See*, Ex. A.
6. Timing is critical to ensure that these matters are resolved prior to the 2022 elections, and thus Plaintiffs do not seek to delay the trial. *Cf., Singleton* (three judge court ordering five-or-more day long preliminary injunction hearing by Zoom “[i]n light of the serious time exigencies applicable to the request for preliminary injunctive relief in these cases, the health and safety of all persons involved in these proceedings, and the need to preserve the continuity of the proceedings”) Ex. A.
7. Since the date the Seventh Circuit issued its opinion in these cases in June 2020, the parties and this Court have successfully conducted almost all proceedings remotely. This includes various hearings and scheduling conferences with the Court, and eighteen of the 21

² *Omicron Variant: What You Need to Know*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>.

³ *General Order 21-011: Order Regarding COVID-19 – Temporary Implementation of Remote Arguments and Reduction of On-Site Staffing*, SEVENTH CIRCUIT COURT OF APPEALS (Dec. 28, 2021), https://www.ca7.uscourts.gov/general-orders/General_Order_21-011.pdf.

depositions taken by the parties in 2020 and 2021.⁴ Plaintiffs believe the pretrial conference and trial could similarly be successfully conducted remotely.

8. The Zoom.gov platform, as relevant here, “permits the instantaneous transmission of live video testimony” and “allows the parties to pose questions to witnesses and interpose objections. It also allows the Court to make rulings on objections. . . .” *Goldstine v. FedEx Freight Inc.*, No. C18-1164 MJP, 2021 WL 952354 at *11 (W.D. Wash. Mar. 11, 2021); *see also, e.g., Thoreson v. Poplin*, No. 19-CV-998-WMC, 2021 WL 848762 at *14 (W.D. Wis. Mar. 5, 2021) (“The court has held a bench trial via Zoom and other federal district courts have now successfully conducted civil jury trials using the same means in light of COVID concerns.”); *Nuance Communications, Inc. v. International Business Machines Corp.*, No. CV 16-5173, 2021 WL 2535575 at *2 (S.D.N.Y. June 21, 2021) (balance of bench trial which had begun before pandemic was conducted by Zoom, with some witnesses testifying by Zoom); *Mitsubishi Tanabe Pharma Corporation v. Sandoz, Inc.*, 533 F. Supp. 3d 170, 179 n.4 (D.N.J. 2021) (in light of pandemic, bench trial held by Zoom).

Therefore, Plaintiffs request that this Court order the final pre-trial conference and the trial in this case to be conducted by Zoom or other remote means as appropriate. Should the Court require more information to render its decision, Plaintiffs respectfully request that the Court schedule a status conference to discuss this matter.

⁴ Defendants chose to take three depositions of Plaintiffs’ witnesses in person. However, Plaintiffs believe trial testimony of those witnesses could readily be conducted remotely.

Dated December 29, 2021.

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