

UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS

MIKE THOMPSON, ET AL.,

Plaintiffs,

vs.

TY MASTERSON, ET AL.,

Defendants.

and

ETHAN CORSON, ET AL.,

Proposed  
Defendant-Intervenors.

Case No. 5:23-cv-04120-TC-GEB

**INTERVENING LEGISLATORS' OBJECTIONS TO  
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Kansas State Senators Ethan Corson, Dinah Sykes, Marci Francisco, Tom Holland, Pat Pettey, Cindy Holscher, and Mary Ware, as well as Kansas State Representatives Jerry Stogdsill, John Carmichael, and Dan Osmen (*collectively*, the “Intervening Legislators”), in their official capacities, respectfully object to the Magistrate Judge’s *Memorandum and Order Denying Motion to Intervene and Setting Phase I Scheduling Order* [Docket No. 28] (the “Recommendation”) denying the Intervening Legislators’ *Motion to Intervene as Defendants* [Docket No. 10] (the “Motion to Intervene”), pursuant to Rule 72(b)<sup>1</sup> of the Federal Rules of Civil Procedure (the “Rules”). The Intervening Legislators state the following in support of their Objection:

**SUMMARY OF ARGUMENT**

In the Recommendation, the Magistrate Judge correctly recites the Tenth Circuit’s “minimal” burden standard in determining whether to grant the Intervening Legislators’ motion,

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<sup>1</sup> Although the Recommendation is titled as a “Memorandum and Order”, the Recommendation is dispositive with respect to the Intervening Legislators, and therefore, is governed procedurally by Rule 72(b). FED. R. CIV. P. 72(b).

but when she purports to apply that standard to the motion, she states that no **compelling** evidence was presented to support the motion. In effect, in reaching her decision, the Magistrate Judge imposed an impermissibly heavy burden on the Intervening Legislators, assessing whether they had presented unquestionably persuasive evidence that the Attorney General would not provide them adequate representation. The actual Tenth Circuit test is whether the Intervening Legislators presented evidence suggestive of inadequate representation – which they did – and this Court should correct the Magistrate Judge’s legal error by granting the Motion to Intervene.

### INTRODUCTION

The Intervening Legislators seek to participate as intervening defendants in the above-captioned lawsuit. Plaintiffs’ lawsuit seeks to bypass the requirements of the Kansas Constitution – and declare as unconstitutional certain provisions of the Kansas Constitution – concerning the State Legislature’s call for a federal constitutional convention, a process left to the States by Article V of the U.S. Constitution.

The Intervening Legislators are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a). Intervention is particularly necessary here, where the named Defendants voted with the Plaintiffs in the failed vote to call for a federal constitutional convention in Kansas. The Defendants do not adequately represent the interests of the Intervening Legislators, as evidenced by the Defendants’ cooperation with the Plaintiffs in seeking a lightning-quick resolution of this case in which the Plaintiffs seek preemption of the Kansas Constitution, statements by the Attorney General (who represents the Defendants) favoring a federal constitutional convention, and the statement of one of the Defendants also favoring such a convention. Under U.S. Supreme Court and Tenth Circuit precedent, intervention is appropriate

under these circumstances. Therefore, the Intervening Legislators are entitled to intervene under Rule 24(a)(2) and the Court should not adopt the findings and conclusions of the Recommendation.

### **FACTUAL BACKGROUND**

On March 22, 2023, the Kansas Senate voted on Senate Concurrent Resolution 1607 (the “Senate Resolution”), titled: “Making application to the United States Congress to call a convention of the states for the purpose of proposing amendments<sup>2</sup> to limit the federal government.” ECF Doc. 1 at ¶¶ 21, 23. The Senate Resolution received 22 yea votes and 16 nay votes, less than a two-thirds majority as the Kansas Constitution requires. ECF Doc. 1 at ¶ 22. The Intervening Legislators who are members of the Senate—Senators Corson, Sykes, Francisco, Holland, Pettey, Holscher, and Ware—all voted against the Senate Resolution, contributing to its defeat. Defendant Senate President Masterson, however, voted in favor of the Senate Resolution, as did Plaintiff Thompson.

Likewise, on March 22, 2023, the Kansas House of Representatives voted on Concurrent Resolution 5008 (the “House Resolution”), titled: “Applying to the Congress of the United States to call for a convention of the states for the limited purpose of amending the constitution of the United States to impose fiscal restraints on the federal government.” ECF Doc. 1 at ¶¶ 16, 18. The House Resolution received 74 yea votes and 48 nay votes, less than the required two-thirds majority. The Intervening Legislators who are members of the House of Representatives—Representatives Stogsdill, Carmichael, and Osmen—all voted against the House Resolution, contributing to its defeat. Defendant Speaker Hawkins, however, voted in favor of the House Resolution, as did Plaintiff Murphy.

### **PROCEDURAL BACKGROUND**

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<sup>2</sup> Notably, under the Kansas Constitution, a two-thirds vote of elected legislators in both chambers of the legislature is required to approve a call for a convention to propose amendments to the U.S. Constitution. ECF Doc. 1 at ¶ 2.

On December 22, 2023, the Plaintiffs filed the instant case alleging that the Kansas Constitution’s “super-majority requirement violates the federal Constitution” because “Article V of the U.S. Constitution sets forth exclusive procedures for Congress and state legislatures to amend the federal Constitution.” ECF Doc. 1 at ¶ 4. According to the Plaintiffs, “States cannot, through their constitutions or state law, impose limitations or procedural requirements on state legislatures acting pursuant to this federal authority.” ECF Doc. 1 at ¶ 6. Kansas law generally requires a simple majority to pass concurrent resolutions, but the Kansas Constitution requires a two-thirds vote for the Legislature to call for Congress to convene a constitutional convention.<sup>3</sup> Thus, the Senate Resolution and the House Resolution failed. ECF Doc. 1 at ¶¶ 33–34.

On January 24, 2024, the Defendants filed their answer, raising three defenses: (1) failure to state a claim; (2) non-justiciability; and (3) any other additional defenses that may become apparent. ECF Doc. 6 at 4.

Two days later, the Court began initial discovery planning. See ECF Doc. 7. But that same day, the Plaintiffs and Defendants filed a joint motion to “order the pleadings closed and discovery stayed” and “decide this case on the parties’ respective motions for judgment on the pleadings.” ECF Doc. 8 at 1. The Plaintiffs and Defendants proposed to file these dispositive motions by February 20, 2024, ECF Doc. 8 at ¶ 4, less than two months after the Plaintiffs filed their complaint and less than a month after the Defendants filed their answer— without discovery and precluding participation by any other interested party. The Court has deferred ruling on the joint motion until after the parties file proposed dispositive motions. ECF Doc. 9.

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<sup>3</sup> Notably, Plaintiffs fail to address whether the Kansas Constitution’s provision means that an affirmative vote of two-thirds of *all* Senate and House members is necessary, including the number of members who do not actually vote on resolution. Here, two members of the Senate, Kan. S. Con. Res. 1607, *supra* note 3 and three members of the House, Kan. H.R. Con. Res. 5008, *supra* note 4, did not vote.

On February 9, 2024, the Intervening Legislators filed the Motion to Intervene and a memorandum in support of same. ECF Docs. 10, 11. The Motion to Intervene was referred to Magistrate Judge Birzer (the “Magistrate Judge”). ECF Doc. 10. On March 1, 2024, the Plaintiffs filed their response to the Motion to Intervene. ECF Doc. 17. On March 15, 2024, the Defendants filed their response to the Motion to Intervene. ECF Doc. 20. On March 22, 2024, the Intervening Legislators filed a reply memorandum in support of the Motion to Intervene. ECF Doc. 23. On July 24, 2024, the Magistrate Judge heard argument on the Motion to Intervene. ECF Doc. 27. On August 16, 2024, the Magistrate Judge issued her Recommendation that the Motion to Intervene be denied. ECF Doc. 28.

#### ARGUMENT

In reviewing a magistrate judge’s report and recommendation, the Court makes a “de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C). “De novo review is required when a party files timely written objections to the magistrate judge's recommendation.” *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583-584 (10th Cir. 1995). In the Court's review, the Court must “consider relevant evidence of record and not merely review the magistrate judge's recommendation.” *Id.* at 584. The district judge is given discretion whether to “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C).

#### **I. The Intervening Legislators are Entitled to Intervene as a Matter of Right.**

“On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P. 24(a)(2).

Consistent with Rule 24’s language, the Tenth Circuit has identified four requirements for intervention as a matter of right: “(1) the application is timely; (2) it claims an interest relating to the property or transaction which is the subject of the action; (3) the interest may as a practical matter be impaired or impeded; and (4) the interest may not be adequately represented by existing parties.”<sup>4</sup> *Kane Cnty. v. United States*, 928 F.3d 877, 890 (10th Cir. 2019). When analyzing these requirements, the Court must take a “liberal approach” that favors granting a motion to intervene—especially in a case “raising significant public interests.” *Id.* (citing *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 136 (1967)). Here, the Intervening Legislators would satisfy each requirement of the Tenth Circuit’s test even under the conventional standard – let alone under the relaxed standard applicable in light of the public interests at stake in this case.

## **II. The Defendants do not Adequately Represent the Intervening Legislators’ Interests.**

An intervenor’s burden to establish inadequate representation is “only a minimal challenge.” *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 195 (2022); *Barnes v. Sec. Life of Denver Ins. Co.*, 945 F.3d 1112, 1124 (10th Cir. 2019) (“Notably, we have also characterized this burden as ‘minimal’”). This requirement is satisfied by “the *possibility* of divergent interests” and thus the mere “*potential* for inadequate representation.” *Everest Indem. Ins. Co.*, 335 F.R.D. 330, 334 (D. Kan. 2020) (citing *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017)) (emphasis added).

In the Recommendation, the Magistrate Judge found that the interests of the Defendants and the Intervening Legislators are identical and the presumption of adequate representation applies, but in so finding, the Magistrate Judge found “no compelling evidence” to overcome the

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<sup>4</sup> Here, neither the Plaintiffs nor the Defendants dispute that the first three requirements have been met. *See* ECF Doc. 17 at 1-3; ECF Doc. 20 at 2. Likewise, the Magistrate Judge found that “there is no dispute regarding Intervenors['] meeting the first three requirements.” ECF No. 28 at 7. Given that there is no dispute regarding requirements 1-3, only the fourth requirement will be addressed herein, notwithstanding the Court’s *de novo* review.

presumption of adequate representation. ECF Doc. 28 at 17. However, the Recommendation recites the following evidence: at least one of the Defendants planned to spark the instant lawsuit and to prevail on the very issue he is now charged with defending. ECF Doc. 28 at 16. (“Defendant Masterson, as Senate President, stated he hoped to pass a similar resolution to the ones at issue here by declaring the measure passed with a simple majority vote, thus sparking a lawsuit ‘to settle the question of what’s required for Kansas to join the call.’”). The Recommendation cites additional evidence: the Attorney General himself has personally expressed support for a constitutional convention, providing support for the Intervening Legislators’ position that the Attorney General’s statements indicate that he may not even decisively agree with the Intervening Legislators on the constitutionality of a constitutional convention. ECF Doc. 23 at 7-8 (citing John Celock, *Article V Convention To Amend Constitution Pushed By Several States*, HuffPost (Mar. 26, 2013), [https://www.huffpost.com/entry/article-v-convention\\_n\\_2951027](https://www.huffpost.com/entry/article-v-convention_n_2951027)).

As explained above, the Tenth Circuit has held that the “possibility of divergent interests” and the “potential for inadequate representation” is sufficient to defeat the presumption of adequate representation. *Everest Indem. Ins. Co.*, 335 F.R.D. at 334 (citing *W. Energy All. v. Zinke*, 877 F.3d 1157, 1168 (10th Cir. 2017)). However, the Recommendation asserts that intervention is not appropriate “at this stage of the litigation” and that “if... future developments undermine the presumption of adequate representation, the Intervenors may renew their request to intervene.” ECF Doc. 28 at 17. On their face, such statements amount to tacit admissions of the “possibility of divergent interests” and the “potential for inadequate representation.” *Everest Indem. Ins. Co.*, 335 F.R.D. at 334. But the Recommendation imposes an impermissible burden, and relies on a legally undue burden, in finding that “there is no compelling evidence at this point to overcome the presumption”, ECF Doc. 28 at 17 (emphasis added). The appropriate standard does not require

that the evidence of inadequate representation be compelling, so the Recommendation’s recitation of that requirement as part of the relevant test shows that the standard applied was incorrect.

It would appear that counsel for the Defendants actually prefers a result counter to the one they are ostensibly seeking.<sup>5</sup> The Recommendation fails to apply the appropriate standard – which should be that the evidence is suggestive of inadequate representation – turning the Intervening Legislators’ “minimal challenge” into a maximal one. *Berger*, 597 U.S. 195. Based on the foregoing, the Defendants do not adequately represent the Intervening Legislators’ interests and the court should allow the Intervening Legislators to intervene as of right under Rule 24(a)(2).

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<sup>5</sup> The Defendants alternatively argue that the Attorney General is in control of the litigation, without regard to legislators’ concerns. ECF Doc. 20 at 3.

WHEREFORE, the Intervening Legislators respectfully request that the Court enter an order granting the Intervening Legislators' intervention as of right under Rule 24(a)(2) and granting such other and further relief as is just and proper.

August 29, 2024

Respectfully submitted,

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By: /s/ Mark P. Johnson

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served by electronic mail, via the Court's e-filing system, on August 29, 2024, on counsel for the Plaintiffs and Defendants.

/s/ Mark P. Johnson  
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