

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:20-cv-02992-PAB

JUDICIAL WATCH, INC., *et al.*

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, *et al.*,

Defendants.

**PROPOSED INTERVENORS' REPLY TO PLAINTIFFS' RESPONSE TO PROPOSED
INTERVENORS' OBJECTIONS TO THE MAGISTRATE JUDGE'S
RECOMMENDATION ON MOTION TO INTERVENE AS DEFENDANTS**

Proposed Intervenors submit this Reply to Plaintiffs' Response ("Response"), ECF No. 53, to their Objections to the Magistrate Judge's Recommendation on Motion to Intervene as Defendants ("Objection"), ECF No. 49.

INTRODUCTION

The Magistrate Judge's Recommendation that this Court deny Proposed Intervenors' Motion to Intervene would effectively end their participation in this case and bar them from continuing to defend their interests. Accordingly, in their Objection, ECF No. 49, Proposed Intervenors argued that the Recommendation addresses a dispositive matter and that *de novo* review is appropriate. *See* ECF No. 49, at 7. In their Response to Proposed Intervenors' Objection, ECF No. 53, Plaintiffs argue that, because the Objection does not explicitly refer to Federal Rule of Civil Procedure 72(b), Proposed Intervenors are somehow foreclosed from arguing that denial of their Motion to Intervene is dispositive, or that the Court should review the Recommendation under the *de novo* standard of review articulated in Rule 72(b)(3). *See* ECF No. 53, at 4.

But Plaintiffs' argument ignores that Proposed Intervenors explicitly made the very arguments that Plaintiffs now contend were waived. *See* ECF No. 49, at 7. To support their untenable position, Plaintiffs rely exclusively on the Objection's reference to Rule 72(a) in the first sentence of its prefatory paragraph. *See* ECF No. 49, at 1. But the reference to Rule 72(a) alone in that sentence was simply a scrivener's error. As the substantive discussion in the Objection makes clear, it was brought under Rule 72 generally and, more specifically, requested *de novo* review as authorized under Rule 72(b)(3) and, in the alternative, under Rule 72(a). *See* ECF No. 49, at 7. A single scrivener's error in the opening sentence of the Objection should not and cannot waive or foreclose an argument that the Objection clearly makes in its text.

The other arguments Plaintiffs make in their Response have already been thoroughly addressed in Proposed Intervenors' Objection, as well as the extensive briefing before the Magistrate Judge. *See generally* ECF No. 17; ECF No. 39; ECF No. 49. Proposed Intervenors—voter registration organizations that work with historically disenfranchised communities—have a right to intervene because they have unique, substantial, and legally protectable interests in this action that are not adequately represented by the State.¹ In addition, they raise common issues of law and fact and should be granted permissive intervention. This Court should grant Proposed Intervenors request to intervene.

¹ In addition to the arguments made in Proposed Intervenors' previous filings, to the extent that Plaintiffs continue to assert that the State's representation of Proposed Intervenors' interests is "presumptively adequate," Proposed Intervenors note that history serves as the clear counterpoint to that argument. As recently as 2019, the Colorado Secretary of State employed flawed and discriminatory voter-maintenance programs, including the now defunct Crosscheck system. ECF No. 17, at 10; ECF No. 49, at 6-7. Accordingly, the alignment of Proposed Intervenors' interests with those of the State simply cannot be presumed.

DISCUSSION

Relying entirely on the single reference to Rule 72(a) in the prefatory paragraph of Proposed Intervenor's Objection, Plaintiffs assert that Proposed Intervenor is foreclosed from arguing that denial of their Motion to Intervene is dispositive or that this Court should review the Magistrate Judge's Recommendation under the *de novo* standard of review articulated in Rule 72(b)(3). ECF No. 53, at 4. But as the body of the Objection makes clear, the reference to Rule 72(a) in the prefatory paragraph, rather than to Rule 72 as a whole or to both Rule 72(a) and 72(b), was a scrivener's error. As such, it should not and cannot serve as a barrier for this Court to evaluate Proposed Intervenor's Objection under the appropriate standard of review.

Specifically, in their Objection, Proposed Intervenor argued that the Magistrate Judge's Recommendation to deny intervention warranted *de novo* review because it would bar Proposed Intervenor from participating in the instant litigation, necessarily foreclosing any claim or defense Proposed Intervenor might bring and thereby making the matter dispositive. ECF No. 49, at 7. This is because in the Tenth Circuit, "the question of whether an order is dispositive is a practical one, with motions that have a dispositive effect—even if not designated specifically as such—given *de novo* review." ECF No. 49, at 7 (citing *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1461-63 (10th Cir. 1988)). And, as other courts have found, the *denial* of a motion to intervene has a *de facto* dispositive effect on potential intervenors by barring them from litigation entirely and should be evaluated as such. *See e.g., Ind. Petroleum Marketers & Convenience Store Ass'n v. Huskey*, 2014 WL 496825, *2 (S.D. Ind. 2014) (denial of motion to intervene required *de novo* review); *Wash. Mut. Bank v. Chiapetta*, 2011 WL 1743389, *1 (N.D. Ohio 2011) (denial of a motion to intervene is dispositive); *cf. Illinois v. City of Chi.*, 912 F.3d 979, 984 (7th Cir. 2019) (explaining that "[b]ecause denial of a motion to intervene essentially ends the litigation for the

movant, such orders are final and appealable”); *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 25 (2d Cir. 1993) (holding a district judge must make the final determination on a motion to intervene, absent consent to magistrate jurisdiction). This Court should do the same.

In the alternative, Proposed Intervenors asserted in that same section of their Objection that the Magistrate Judge’s Recommendation should also be rejected for clear error, the more deferential standard of review reserved for non-dispositive matters evaluated under Rule 72(a). ECF No. 49, at 7 (“Notwithstanding, even if this Court were to determine that the clear error standard applies, Proposed Intervenors would succeed under that standard *as well.*”) (emphasis added). In other words, the substantive discussion makes clear that Proposed Intervenors did not intend to limit their Objection to just Rule 72(a).²

This Court unquestionably has the discretion to consider the Objection pursuant to Rule 72(b) or any other standard it deems correct under the law. The question of which provision of Rule 72 should be applied to a Magistrate Judge’s Recommendation falls within this Court’s inherent power, and the Court is not foreclosed from applying the appropriate standard of review *even if*, as Plaintiffs assert, Proposed Intervenors had intended to limit their Objection to the Rule 72(a), which they did not. *See, e.g., U.S. ex rel. Jimenez v. Health Net, Inc.*, No. 99-CV-01259-EWN-MJW, 2005 WL 2002435, at *4 (D. Colo. Aug. 19, 2005) (applying the correct standard of review pursuant to Rule 72(a) despite defendants assuming the wrong standard of review pursuant to Rule 72(b)); *see also In re Nielsen*, No. 16-CV-00081-LTB-MJW, 2017 WL 57260, at *5 (D.

² Though Plaintiffs argue that the error confines Proposed Intervenors to a challenge under Rule 72(a) alone, the timing of Plaintiffs’ Response indicates that Plaintiffs likely understood that Proposed Intervenors intended to object under Rule 72(b) as they requested a one-week extension from the presumptive response deadline set by Rule 72(b)(2). *See* ECF No. 50, at 2. In contrast, Rule 72(a) does not explicitly allow for a response, nor does it set a 14-day response deadline.

Colo. Jan. 4, 2017) (applying the correct standard of review after all parties failed to articulate the correct standard of review).

CONCLUSION

For these reasons, as well as the reasons set out in Proposed Intervenors' Motion to Intervene, ECF No. 17, Reply in Support of the Motion to Intervene, ECF No. 39, and Objection, ECF No. 49, Proposed Intervenors respectfully request that the Court consider their Objection as filed pursuant to Rule 72(b) and apply its accompanying *de novo* standard of review or, in the alternative, under Rule 72(a), and grant Proposed Intervenors' request to intervene.

Dated this 9th of June 2021

Respectfully submitted,

s/ Amanda R. Callais

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following individuals:

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