

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KC TENANTS,)
)
Plaintiff,)
)
v.) Case No. 20-000784-CV-W-HFS
)
DAVID M. BYRN, in his official)
capacity as the Presiding Judge)
for the 16th Judicial Circuit)
Court, Jackson County, Missouri,)
)
MARY A. MARQUEZ, in her)
official capacity as the Court)
Administrator for Jackson)
County, Missouri,)
)
Defendants,)
)
and,)
)
HELLA SHRIVER; JAMES GORHAM;)
NATIONAL ASSOCIATION OF)
RESIDENTIAL PROPERTY)
MANAGERS,)
)
)
Proposed Intervenor-Defendants.)

**PROPOSED INTERVENORS' SUGGESTIONS IN REPLY TO
UNITED STATES OF AMERICA'S RESPONSE IN OPPOSITION
TO MOTION TO INTERVENE (ECF NO. 41)**

Proposed Intervenor, Hella Shriver, James Gorham, and the members of the National Association of Residential Property Managers (“NARPM®”) are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a). First, Proposed Intervenor have standing. Second, the motion is timely because it was filed within weeks of the Complaint and before the litigation had meaningfully progressed. Third, because Proposed Intervenor have standing, they have a recognized interest in the

subject matter of this case. Fourth, Proposed Intervenors' interests will not be adequately protected by the existing parties. Alternatively, they should be permitted to intervene under Rule 24(b) because their participation will provide a unique point of view that will aid the Court in the disposition of this case.

The Centers for Disease Control and Prevention's ("CDC") September 1, 2020 order, entitled "*Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19*," 85 Fed. Reg. 55292 (Sept. 4, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf> ("CDC Order"), is an unprecedented, unilateral order suspending *state* law under the unsupported premise that doing so was "necessary" to control the COVID-19 pandemic. CDC's sweeping actions are not authorized by statute or regulation. But even if they were, they comprise an historically unheard-of affront to core constitutional limits on federal power.

The United States of America ("United States") did not challenge Proposed Intervenors' standing, their recognized interest in the subject matter of this case, nor the fact that their interests will not be adequately protected by the existing parties. Instead, the United States bases its challenge on assertions that Proposed Intervenors' motion improperly enlarges the currently pending issues—it does not—and that the motion was untimely—it was not. The balance of the United States' opposition is moot.¹

Despite the United States' argument to the contrary, Proposed Intervenors do not seek to "introduce issues which are outside the scope of the issues" presented because the validity of the CDC Order is squarely in front of this Court. *See EEOC v. Woodmen of World Life Ins. Soc.*, 330 F. Supp. 2d 1049, 1054, 1055 (D. Neb. 2004) (finding that cross-claims presenting additional facts "do not

¹ Pursuant to this Court's Order, Proposed Intervenors were not permitted to participate in the November 3, 2020 preliminary injunction hearing. *See* ECF No. 45. Nor did this Court permit consideration of or argument related to the validity of the CDC Order. *See* ECF No. 42.

impermissibly expand the scope of litigation because they ... merely relate [to] an issue already squarely before the court”). While Plaintiff has not framed it as such, “step one” of any analysis of its argument on the merits requires determining whether the CDC Order is valid.

Plaintiff’s first cause of action alleges federal preemption under the Supremacy Clause. *See* ECF No. 1 at ¶¶ 74-81. The Supremacy Clause grants “supreme” status only to the “*Laws* of the United States.” U.S. Const. art. VI, cl. 2 (emphasis added). Before Plaintiff can establish a violation of the Supremacy Clause, it must establish that the CDC Order is a valid regulation, and therefore a law of the United States.

Plaintiff’s second cause of action alleges a procedural due process violation on the theory that the CDC Order creates “a state-created liberty interest in temporary immunity from any action to remove or cause the removal of a tenant from a residential property.” ECF No. 1 at ¶ 87, ¶¶ 82-88.² The alleged liberty interest Plaintiff is seeking to protect can only exist if the CDC Order is valid. If the CDC Order is invalid, the Order cannot create a “property interest in temporary immunity from evictions for nonpayment of rent.” *See* ECF No. 34 at 28.

The United States’ reliance on *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944) is misplaced. That case turned on the fact that intervention in a Commission hearing was governed by the Commission’s rules which specifically stated that, with some exceptions, “granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding.” *Id.* at 494. The Court’s determination that “an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature

² At this time, Proposed Intervenor take no position on Plaintiff’s claim that temporary immunity from evictions for nonpayment of rent is a federally created property interest.

of the proceeding” was based on the Commission’s intervention rule. *Id.* at 498. As the Court noted immediately thereafter, “[t]o this effect was the Commission’s rule on the subject.” *Id.*

Similarly, the United States’ reliance on *EEOC* for the proposition that “[a]n intervening party may join issues only on a matter that has been brought before the court by another party” is misplaced because *EEOC* relied on an out-of-circuit case that also relied on *Vinson*, as well as a local Circuit Rule limiting points raised by intervenors on appeal. *See EEOC*, 330 F. Supp. 2d at 1055 (citing *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.D.C.1990)). These cases all turn on the existence of a *rule* limiting how intervenors may participate in an action. No such rule is at issue here, and *Vinson* has never been cited, let alone adopted, by the Eighth Circuit.

For similar reasons, reliance on *Babinski v. Am. Family Ins. Grp.*, No. CV073374JMRRLE, 2008 WL 11458616 (D. Minn. Jan. 15, 2008) is also misplaced. Moreover, *Babinski* is distinguishable for another reason, the Court’s determination in that case was related to permissive intervention under Rule 24(b). *See id.* at *6 (declining to grant permissive intervention when the proposed intervenor’s “Complaint would not implicate any common questions of law or fact” and “[sought] to adjudicate the rights and obligations under a wholly separate insurance policy, and under distinctly different policy language.”). Here, Proposed Intervenors are entitled to intervene as of right under Rule 24(a) and only seek permissive intervention in the alternative. Moreover, Proposed Intervenors’ position implicates common questions of law and fact, and thus does not enlarge the pending issues.

That all the parties assume the validity of the CDC Order does not make the Order lawful. And the fact that neither party has made arguments about the validity of the CDC Order, does not mean that Proposed Intervenors’ position that the Order is unconstitutional has enlarged the pending

issues.³ The Court cannot resolve this matter on the merits without considering the validity of the CDC Order, and Proposed Intervenors' claims that the Order is unconstitutional fit squarely within that inquiry.

The United States' other argument against intervention as of right appears to be that Proposed Intervenors' motion is untimely, based on when it was filed and because Proposed Intervenors' arguments may necessitate the participation by the United States and thus cause potential delay. *See* ECF No. 41 at 1-2, 2-3. These arguments are without merit.

Proposed Intervenors' motion is timely. Timeliness "is a decision within the district court's discretion ... and is based on all of the circumstances." *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011) (internal citation omitted). In determining whether a motion is timely, a court should consider: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *Id.*

Proposed Intervenors' motion was filed 27 days after Plaintiff's Complaint and before the litigation had meaningfully progressed. Proposed Intervenors' motion has not prejudiced the existing parties, because they did not and do not seek to delay any proceedings. Indeed, Plaintiff's motion for preliminary injunction proceeding and the Defendants' pending Motion to Dismiss have proceeded during the pendency of Proposed Intervenors' motion.⁴

³ This Court has contemplated the possibility of argument regarding validity of the CDC Order. *See* ECF No. 9 ("The State Court procedure assumes the validity of the CDC moratorium and purportedly seeks to implement it, but defendants are presumably now free to question validity of the moratorium (as some landlords may have done).").

⁴ Proposed Intervenors take no position on Defendants' pending Motion to Dismiss. *See* ECF No. 30. However, if Plaintiff's claims, in whole or in part, survive the Motion to Dismiss this Court will have to consider this case on the merits which, contrary to the United States' view, requires determining

The fact that the United States may have to intervene at a future point in time or file an additional *amicus* brief at the merits stage of this litigation does not delay proceedings in a way that warrants denial of Proposed Intervenors' motion. *See United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) ("The question for determining the timeliness of the motion to intervene is whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change."). The existing parties have not been prejudiced by Proposed Intervenors' motion.

Proposed Intervenors satisfy the standards to intervene as of right under Federal Rule of Civil Procedure 24(a) or to warrant permissive intervention under Rule 24(b), and the Court should grant Proposed Intervenors' Motion to Intervene.

Dated: November 12, 2020

Respectfully Submitted,

Respectfully,

/s/ Kara Rollins

Kara Rollins

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the validity of CDC's Order. Indeed, the Court has reserved the possibility of such a consideration for future stages of this litigation. *See* ECF No. 42. As discussed, the validity of the CDC Order is not an enlargement of the issues presented to the Court, but rather a legal predicate that must be resolved *before* Plaintiff's claims can be adjudicated. In this way, the validity of the CDC Order is essential to determining the merits of this action.

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Kara Rollins

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