WHO DECIDES?: CIVIL CONSENT JURISDICTION OF U.S. MAGISTRATE JUDGES AND THIRD-PARTY INTERVENTION

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The Federal Magistrates Act permits a U.S. magistrate judge to preside over and enter final judgment in a civil case as a district judge would if all parties to the case have consented to the magistrate judge's jurisdiction. Parties must consent voluntarily and affirmatively—although consent can be implied from the circumstances—to protect the parties' constitutional right to have their case heard by an Article III judge. To vindicate this right, a body of jurisprudence has developed distinguishing dispositive matters, for which a magistrate judge requires the consent of all the parties in a case to rule on the matter, and nondispositive matters, for which a magistrate judge does not require the consent of all the parties to rule on the matter. As to third-party motions to intervene, the federal courts of appeals are split: in the Second Circuit, a magistrate judge cannot rule on a third-party's motion to intervene without its consent, while in the Seventh and Ninth Circuits, a magistrate judge can. The circuits' different treatments of a motion to intervene before a magistrate judge creates the opportunity for litigation gamesmanship and inequities across the circuits: It is possible for litigants to use this nuance in magistrate judge civil consent-based jurisdiction to slow down litigation or to unfairly obtain additional review of their motions to intervene that they would otherwise not receive if the cases had proceeded before a district judge.

This Note addresses the split between the Second Circuit and the Seventh and Ninth Circuits. It ultimately argues in favor of the Seventh and Ninth Circuits' approach—that magistrate judges should be permitted to rule on a third-party's motion to intervene without its consent in civil cases where the original parties have consented to the jurisdiction of a magistrate judge. This Note argues that doing so is within the broad statutory authorization of magistrate judge civil consent jurisdiction under the Federal Magistrates Act and that the U.S. Constitution does not bar such an interpretation. This Note also argues that the Seventh and Ninth Circuits' jurisprudence ensures that

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cases proceed expediently and fairly, while avoiding gamesmanship and disincentives to magistrate judge jurisdiction.

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INTRODUCTION

In 1968, Congress passed the Federal Magistrates Act[1] (FMA), authorizing a class of judicial adjuncts to assist the U.S. district courts in the efficient resolution of criminal and civil matters.[2] These judges—for they are judges[3]—are formally known as U.S. magistrate judges. Their integral role in disposing of the wide range of matters with which they are entrusted[4] has been recognized by the U.S. Supreme Court.[5] The district courts are authorized to delegate duties to their magistrate judges at their discretion.[6] The FMA also permits magistrate judges to rule and enter judgment in a case as a district judge would upon the consent of the original parties to the lawsuit.[7] Some circuit courts, though, prohibit magistrate judges from ruling on motions brought by litigants wishing to become parties, such as potential intervenors,[8] whereas others permit magistrate judges to rule on such motions.[9] In three such cases,[10] potential third-party intervenors zealously attempted to insert themselves in hard-fought litigations in which the original parties had consented to magistrate judge jurisdiction but they—the potential intervenors—had not. When their motions were denied, these potential intervenors challenged the magistrate judges' authority to rule on their

1. Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended in scattered sections of 18 and 28 U.S.C.).

2. *See* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 5 (2014).

3. *See* Michael E. Upchurch, *Federal Magistrate Judges: Origin, Evolution and Practice*, 80 ALA. LAW. 19, 22 (2019) ("In 1988, the Magistrate Committee of the Judicial Conference approved referring to magistrates as 'Judge' and addressing magistrates as 'Your Honor.'").

4. *See* Ruth Dapper, *A Judge by Any Other Name?: Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. 1, 3 (2015); *see also infra* Part I.A.

5. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938–39 (2015) ("And it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.").

6. *See* MCCABE, *supra* note 2, at 2; *see also infra* Part I.A.

7. *See* 28 U.S.C. § 636(c)(1); *see also* FED. R. CIV. P. 73(a); *infra* Part II.B.2. This Note uses "magistrate judge jurisdiction" and similar constructions to refer to the authority of a magistrate judge to preside over a "civil consent case." This Note uses "civil consent case" to refer to cases in which the original named parties have consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of a magistrate judge to preside over and enter judgment in their case.

8. *See infra* Part II.A. This Note uses "potential intervenors" to refer to interested third parties who have moved to intervene in a lawsuit prior to the entry of a disposition on their motion.

9. *See infra* Part II.B.

10. *See* Robert Ito Farm, Inc. v. County of Maui, 842 F.3d 681 (9th Cir. 2016); People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 171 F.3d 1083 (7th Cir. 1999); N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc. (*New York Chinese V*), 996 F.2d 21 (2d Cir. 1993).

motions to intervene without their consent[11]—perhaps to slow down or disrupt the litigation by throwing sand on the litigation tracks via procedural or jurisdictional challenges or because they thought a second look by the district judge would be to their benefit.

First, in *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*[12] (*New York Chinese V*), a bloc of former controlling shareholders sought to intervene[13] to challenge a settlement in a copyright infringement case[14] after the company settled the case against their wishes.[15] When the magistrate judge denied their motion to intervene, they appealed to the district judge claiming that a district judge, rather than a magistrate judge, had to decide their motion.[16] The Second Circuit agreed.[17] Second, in *People Who Care v. Rockford Board of Education, School District No. 205*,[18] school board members in a district that discriminated against minority students attempted to intervene in a long-running school discrimination case—their motion to intervene came after a magistrate judge ordered the board to approve a levy to fund court-ordered remedies for the past discrimination.[19] Third, in *Robert Ito Farm, Inc. v. County of Maui*,[20] two public interest citizens' groups moved to intervene to defend a county ordinance prohibiting the cultivation of genetically engineered crops in a lawsuit brought by industrial agriculture plaintiffs challenging the ordinance.[21] In both of these cases, the potential intervenors objected to a magistrate judge ruling on their motion to intervene without their consent.[22] But, the Seventh and Ninth Circuits held that a district judge was not required to rule on these motions.[23]

The circuit courts differed in their analyses and now differ on whether a magistrate judge can rule on a motion to intervene in civil consent cases[24] without the consent of a potential intervenor. The Second Circuit looked to the requirement of consent for waiver of the constitutional right to adjudication before an Article III judge in determining that a magistrate judge cannot rule on potential intervenors' motions to intervene unless and until

11. *See Robert Ito Farm*, 842 F.3d at 685; *People Who Care*, 171 F.3d at 1089; *New York Chinese V*, 996 F.2d at 23.

12. 996 F.2d 21 (2d Cir. 1993).

13. *Id.* at 23.

14. N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc. (*New York Chinese VI*), 153 F.R.D. 69, 70 (S.D.N.Y.), *aff'd*, 43 F.3d 1458 (2d Cir. 1994).

15. The settlement amount was for less than the amount of damages and attorneys' fees. *See New York Chinese V*, 996 F.2d at 22–23.

16. *Id.* at 23.

17. *Id.* at 25; *see also infra* Part II.A.

18. 171 F.3d 1083 (7th Cir. 1999).

19. *See id.* at 1089; *infra* Part II.B.1.

20. 842 F.3d 681 (9th Cir. 2016).

21. *Id.* at 684. Both of the potential intervenors were public interest citizens' groups. *Id.*

22. *See id.* at 685; People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 179 F.R.D. 551, 559 (N.D. Ill. 1998), *aff'd*, 171 F.3d 1083 (7th Cir. 1999).

23. *See Robert Ito Farm*, 842 F.3d at 685; *People Who Care*, 171 F.3d at 1089; *infra* Part II.B.

24. *See supra* note 7 and accompanying text.

they consent.[25] The Seventh and Ninth Circuits, on the other hand, looked to the broad statutory authorization of magistrate judge jurisdiction in civil consent cases in finding that it is within a magistrate judge's authority to rule on a motion to intervene without the potential intervenor's consent.[26] Among other effects, these differences in jurisprudence have created inequities both within and across circuits in the degree of appellate review available for a potential intervenor's motion to intervene in a civil consent case.[27] The circuits also now differ on when a potential intervenor's consent is required[28]: the Second Circuit requires a potential intervenor's consent to magistrate judge jurisdiction upon filing a motion seeking leave to intervene,[29] whereas the Seventh and Ninth Circuits do not require the consent of the intervenor until the motion has been granted and the intervenor has become a party to the lawsuit.[30]

This Note argues that, in civil consent cases, magistrate judges should be permitted to rule on a potential intervenor's motion to intervene without consent. This rule is consistent with the FMA's broad authorization of magistrate judge power over the original, consenting parties' case, does not run afoul of the right to adjudication before an Article III court and promotes fairness and the expedient resolution of claims while avoiding litigation gamesmanship and disincentivizing consent to magistrate judge jurisdiction. Part I reviews the role and power of magistrate judges. Part I also provides context on magistrate judges' status as Article I adjudicators acting as judicial adjuncts of Article III courts, waiver of the right to adjudication before an Article III court, and intervention under Federal Rule of Civil Procedure (FRCP) 24. Part II explores the divergent approaches to whether magistrate judges may rule on a potential intervenor's motion to intervene in cases where the original parties have consented to magistrate judge jurisdiction but where the potential intervenor has not. Part III then argues that the approach taken by the Seventh and Ninth Circuits in *People Who Care* and *Robert Ito Farm*, respectively, which permits magistrate judges to rule on a motion to intervene in civil consent cases without the consent of the potential intervenor, is the correct approach. This Note argues that ruling on a potential intervenor's motion to intervene without the intervenor's consent is within the broad statutory authorization of magistrate judge authority in civil consent cases and that this approach does not implicate the constitutional dimension identified by the Second Circuit in *New York Chinese V*.

25. *See infra* Part II.A.
26. *See infra* Part II.B.
27. *See infra* Part III.C.1.
28. These courts—and others as well—hold that a potential intervenor, as a potential late-coming party, must consent to magistrate judge jurisdiction if and after the motion to intervene is granted and the intervenor officially enters the case. *See infra* note 162 and accompanying text. If the intervenor does not consent, the case is transferred from the magistrate judge back to the district judge. *See infra* note 162.
29. *See infra* Part II.A.
30. *See infra* Part II.B.

I. U.S. MAGISTRATE JUDGES: ROLE, POWERS, AND RELEVANT STATUTES

Magistrate judges play an integral role in the federal district courts. They dispose of many pretrial civil and criminal matters, increasing access to the federal courts in the process.[31] Congress created this important position with the passage of the FMA,[32] but the role of magistrates traces its history back to shortly after the founding of the United States.[33] Since then, both Congress and the courts have entrusted magistrate judges with increasing responsibilities and powers.[34] Part I.A provides a brief overview of the role of magistrate judges, tracing the steady growth of their responsibilities and summarizing the types of matters with which they are entrusted. Part I.B summarizes the statutory framework outlining magistrate judges' jurisdiction and powers. Part I.C then provides background on intervention under FRCP.

A. The Role and Responsibilities of the U.S. Magistrate Judge

Magistrate judges have broad authority, and this authority has grown substantially since the role's creation.[35] Since the creation of the role with the passage of the FMA,[36] magistrate judges have become an integral part of the federal district courts, performing a wide variety of functions essential to the efficient disposal of cases.[37]

Congress passed the FMA in 1968 to help the district courts manage burgeoning dockets.[38] Under the FMA, magistrate judges were created as Article I judicial adjuncts of the Article III courts, who would increase the efficiency of the courts by presiding over matters better reserved to magistrate judges than to district judges.[39] Magistrate judges are subject to the complete control of the district courts.[40] Under the framework set forth in the FMA, magistrate judges are appointed by the district judges of the respective courts and exercise the jurisdiction of the district court—they are not a separate court or tribunal of their own.[41] They can be removed only by a majority of the district judges of the district court and only for cause.[42]

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31. *See infra* Part I.A.
32. *See* MCCABE, *supra* note 2, at 4.
33. *See id.* at 3.
34. *See infra* Part I.A.
35. *See infra* notes 49–53 and accompanying text.
36. *See* MCCABE, *supra* note 2, at 4–5.
37. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938–39 (2015); *infra* Part I.A.
38. *See* MCCABE, *supra* note 2, at 2.
39. *See id.* at 5.
40. *See infra* notes 41–42, 46–47 and accompanying text.
41. *See* 28 U.S.C. § 631(a); *see also* MCCABE, *supra* note 2, at 2 (stating that the appointment of magistrate judges requires public notice of vacancies and candidate screening by merit selection panels consisting of lawyers and citizens and that most magistrate judges serve full time for eight-year, renewable terms).
42. 28 U.S.C. § 631(i) ("Removal of a magistrate judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability . . . ."). Because magistrate judges are authorized by statute, Congress could, at will, deauthorize and end the role by statute. *Cf. infra* note 102.

Under the FMA, magistrate judges must be lawyers in good standing with the bar of the highest court of a U.S. state, the District of Columbia, or a U.S. territory for at least five years.[43] Magistrate judges take the judicial oath of office[44] and are subject to the same standards of discipline and disqualification as other federal judges are.[45] The district courts are authorized to determine how best to use their magistrate judges to meet the needs of the court, its judges, and its litigants.[46] Accordingly, district judges determine what duties to delegate to magistrate judges based on statutory authority, local rules, and court orders.[47]

Since the passage of the FMA, magistrate judges' responsibilities have increased substantially, and magistrate judges are universally recognized as an integral part of the judiciary.[48] In 1996, Congress amended the FMA so that appeals from the judgments of magistrate judges in civil consent cases would be treated the same as appeals from the judgments of district court judges—both are now appealable to the circuit courts.[49] In 2000, Congress gave magistrate judges limited criminal contempt authority.[50] And, the prestige of the position has increased over the intervening decades: in 1988, the Judicial Conference of the United States "approved referring to magistrates as 'Judge' and addressing magistrates as 'Your Honor'" to recognize magistrate judges' role as judges rather than as a "lesser species of judicial officer."[51] This change, effective after the passage of the Federal Courts Study Committee Implementation Act of 1990,[52] acknowledged the integral position of magistrate judges within the federal judiciary, as well as the role's ever-expanding responsibilities and duties.[53]

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43. 28 U.S.C. § 631(b)(1).

44. *Id.* § 631(g).

45. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3066 (3d ed. 2019).

46. *See* MCCABE, *supra* note 2, at 2.

47. *See id.*

48. *See supra* note 5 and accompanying text.

49. *See* MCCABE, *supra* note 2, at 13. The 1994 version of § 636 permitted the parties in a civil consent case to specifically consent to the appeal of decisions of a magistrate judge to the district court, rather than to a court of appeals. *See* 28 U.S.C. § 636(c)(4) (1994). This provision was removed by the Federal Courts Improvement Act of 1996. *See* Pub. L. No. 104-317, § 207, 110 Stat. 3847, 3850 (codified as amended at 28 U.S.C. § 636).

50. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §§ 202–203, 114 Stat. 2410, 2412–2414 (codified as amended at 18 U.S.C. § 3401, 28 U.S.C. § 636); *see also* MCCABE, *supra* note 2, at 13; *infra* note 106 and accompanying text (discussing the differences between magistrate judges' and district judges' contempt authority).

51. Upchurch, *supra* note 3, at 22.

52. Pub. L. No. 101-650, 104 Stat. 5104 (codified as amended in scattered sections of the U.S.C.).

53. *See* Douglas A. Lee & Thomas E. Davis, *"Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845, 854 (2016) ("The provision is one of nomenclature only and is designed to reflect more accurately the responsibilities and duties of the office . . . ." (quoting MAGISTRATE JUDGES DIV., OFF. OF JUDGES PROGRAMS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 90 (2009), https://www.uscourts.gov/sites/default/files/magistrate_judge_legislative_history.pdf [https://perma.cc/7R5K-VMRE])).

In their role as Article I adjudicators, magistrate judges dispose of a wide variety of both criminal and civil matters. Depending on the local rules of a district court, their duties can include: presiding over criminal misdemeanor jury trials and imposing sentences; presiding at pretrial criminal proceedings, such as initial appearances, bond hearings, and arraignments in both felony and misdemeanor cases; issuing arrest and search warrants; handling case management in complex civil cases; conducting mediations and settlement conferences in civil cases; handling and determining pretrial motions, including discovery motions, motions in limine, and motions to intervene; recommending a disposition or ruling on summary judgment and other case-dispositive motions; reviewing administrative appeals, such as Social Security determinations; and reviewing federal habeas petitions filed under 28 U.S.C. §§ 2254–2255 and recommending a disposition.[54] By permitting district courts to delegate these functions to magistrate judges, Congress intended to allow district judges to tend to more substantive matters, such as conducting trials.[55] But as the position was created under Article I of the U.S. Constitution, magistrate judges' exercise of their jurisdiction over these varied matters has not been without challenge.

B. Magistrate Judge Jurisdiction and the Article III Judicial Power

In their handling of the many matters that come before them, magistrate judges exercise the judicial power of the district courts. Their jurisdiction is governed by 28 U.S.C. § 636.[56] In civil cases, § 636(b) permits magistrate judges to rule on nondispositive pretrial motions referred to them by district judges.[57] Section 636(b) also permits magistrate judges to recommend dispositions in case-dispositive motions referred to them by district judges, with the final disposition being determined by the district judge.[58] In addition, parties may consent to have their cases decided by a magistrate judge rather than by a district judge.[59] Parts I.B.1 and I.B.2 detail the statutory authorization of magistrate judge jurisdiction in the matters that come before them both with and without the parties' consent.[60] Part I.B.3 then discusses magistrate judges' status as Article I adjudicators, rather than as Article III judges, and the source of their adjudicative power.[61]

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54. *See* 28 U.S.C. § 636(a)–(c); Dapper, *supra* note 4, at 3 (noting that magistrate judge duties range from "criminal initial appearances, detention hearings, and arraignments, to civil settlement conferences, discovery motions, and consent jury trials"); *see also* Fed. Magistrate Judges Ass'n, *United States Magistrate Judges: Their Function and Purpose in Our Federal Courts*, U.S. DIST. CT., DIST. OF CONN., http://ctd.uscourts.gov/sites/default/files/FMJA%20Brochure.pdf [https://perma.cc/CM3W-AYXX] (last visited Nov. 3, 2020).

55. *See* Scott M. Smith, *Civil Jurisdiction of Magistrates Under Federal Magistrates Act of 1968 (28 U.S.C.A. §§ 631 et seq.)*, 128 A.L.R. Fed. 115 (1995).

56. 28 U.S.C. § 636(a)–(c); *see infra* Parts I.B.1–2.

57. 28 U.S.C. § 636(b).

58. *Id.*

59. *Id.* § 636(c); *see infra* Part I.B.2.

60. *See infra* Parts I.B.1–2.

61. *See infra* Part I.B.3.

1. Jurisdiction of the Magistrate Judge in Matters Referred to Them Without the Parties' Consent

The U.S. Code permits district judges to refer both case-dispositive and nondispositive matters to magistrate judges.[62] Under 28 U.S.C. § 636(b)(1)(A), magistrate judges may rule on nondispositive pretrial matters in civil actions and proceedings referred to them by a district judge.[63] The parties to a lawsuit are not required to provide consent for a magistrate judge to rule on a nondispositive pretrial matter, and a district judge, on the objection of a party, must hear and set aside a magistrate judge's ruling if it is clearly erroneous or contrary to law.[64]

The statute explicitly prohibits magistrate judges from ruling on the following eight pretrial motions referred to them by a district judge because they are case dispositive:

> [M]otion[s] for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.[65]

Under § 636(b)(1)(B), magistrate judges may file "proposed findings of fact and recommendations for the disposition"[66] in any of the eight case-dispositive pretrial motions carved out from § 636(b)(1)(A), motions for federal post-conviction relief in criminal cases, and federal habeas petitions referred to them by a district judge.[67] For these matters, the parties have fourteen days to file written objections after the magistrate judge has submitted a report and recommendation, and the district judge must perform de novo review of the "portions of the report or specified proposed findings or recommendations to which objection is made."[68] Otherwise, the district judge may "accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge."[69] As with pretrial nondispositive matters, the parties' consent is not required for a district judge to refer a dispositive matter to a magistrate judge to recommend a disposition.[70]

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62. *See* 28 U.S.C. § 636(b)(1)(A)–(B); FED. R. CIV. P. 72(a).

63. 28 U.S.C. § 636(b)(1)(A). Magistrate judges may also preside over and make determinations in some criminal matters. *See id.* § 636(a); *see also* Dapper, *supra* note 4, at 3.

64. FED. R. CIV. P. 72(a).

65. 28 U.S.C. § 636(b)(1)(A).

66. Often called a "report and recommendation" or an "R & R."

67. 28 U.S.C. § 636(b)(1)(B).

68. *Id.* § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3).

69. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3); *see* Roell v. Withrow, 538 U.S. 580, 585 (2003) (noting that "the district court [is] free to do as it sees fit with the magistrate judge's recommendations" in "nonconsensual referrals of pretrial but case-dispositive matters under § 636(b)(1)").

70. *See Roell*, 538 U.S. at 585 (noting that § 636(b)(1) referrals are nonconsensual).

2. Consent to Magistrate Judge Jurisdiction in Civil Cases

Section 636 also permits the parties in a civil case to consent to the jurisdiction of a magistrate judge for the entry of judgment in both jury and nonjury actions[71]:

> Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . .[72]

With the consent of the parties under this framework, the power to decide the parties' case is transferred from a district judge to a magistrate judge.[73] A magistrate judge effectively stands in as a district judge in a civil consent case[74]: "[A] § 636(c)(1) referral gives the magistrate judge full authority over dispositive motions, conduct of trial, and entry of final judgment, all without district court review."[75] Further, any "judgment entered by 'a magistrate judge designated to exercise civil jurisdiction under [§ 636(c)(1)]' is to be treated as a final judgment of the district court"[76] and is appealable to the circuit courts "in the same manner as an appeal from any other judgment of a district court."[77]

Section 636 emphasizes the importance of the voluntariness of consent to this framework.[78] The acquisition of consent must abide by FRCP 73(b).[79] Notice of consent must be provided to the parties in writing, the parties must affirmatively consent in writing, and the district and magistrate judges must advise the parties that their consent may be freely withheld without repercussions for their case.[80]

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71. This is separate from the nonconsensual referral of both pretrial dispositive and nondispositive matters to magistrate judges under § 636(b)(1)(A)–(B).

72. 28 U.S.C. § 636(c)(1); *see also* FED. R. CIV. P. 73(a) ("When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial.").

73. *See supra* note 72 and accompanying text.

74. 12 WRIGHT ET AL., *supra* note 45, § 3072 ("The magistrate judge's authority when presiding by special designation and with the consent of the parties is that of the district court; he or she therefore may perform all of the functions of a district judge.").

75. *Roell*, 538 U.S. at 585.

76. *Id.* (alteration in original) (quoting 28 U.S.C. § 636(c)).

77. 28 U.S.C. § 636(c)(3); *see also* FED. R. CIV. P. 73(c).

78. 28 U.S.C. § 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.").

79. FED. R. CIV. P. 73(b).

80. 28 U.S.C. § 636(c)(2) ("[T]he district court judge or the magistrate judge . . . shall also advise the parties that they are free to withhold consent without adverse substantive consequences."). FRCP 73 prescribes the procedures for obtaining consent. It requires the clerk of the court to give parties written notice of the opportunity to consent under § 636(c) and requires the parties to jointly or separately file a written statement of consent. FED. R. CIV. P. 73(b)(1). The district judge or magistrate judge is informed of the parties' response to the clerk's notice of the opportunity to consent only if all parties have consented to the referral. *Id.* The rule permits the district judge, magistrate judge, or another court official to remind the parties of the opportunity to consent, so long as the parties are advised that they are free to withhold consent without adverse consequences to their case. *Id.* r. 73(b)(2).

In addition, the Supreme Court has also held that consent to magistrate judge jurisdiction can be implied from the conduct of the parties during litigation.[81] In *Roell v. Withrow*,[82] the Supreme Court stated that the parties "'clearly implied their consent' by their decision to appear before the Magistrate Judge, without expressing any reservation, after being notified of their right to refuse and after being told that she intended to exercise case-dispositive authority."[83] The importance of consent to jurisdiction derives, as discussed below, from magistrate judges' status as Article I rather than Article III judges. This is further implicated when a third party moves to intervene in a lawsuit, thus raising the question of whether consent is required for an Article I magistrate judge to rule on the motion to intervene.

3. Article III Judicial Power and Article I Adjudication

Despite their importance within the federal judiciary, magistrate judges are not Article III judges.[84] Article III, Section 1 of the Constitution vests "[t]he judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[85] Judges of these courts are nominated by the president with the advice and consent of the Senate.[86] Article III, Section 1 protects the judicial branch as an independent and coequal branch of government by providing the judiciary with life tenure and protection from salary reductions.[87] In doing so, it also protects the right of litigants to have their cases decided by judges free from "potential domination by other branches of government."[88]

Judges who are nominated by the president with the advice and consent of the Senate and whose independence is protected by lifetime tenure and salary protections are called Article III judges.[89] These judges are empowered to exercise the full judicial power of the United States.[90] The judicial power encompasses the power to order remedies for legal wrongs, make factual and

81. *Roell*, 538 U.S. at 582 ("The question is whether consent can be inferred from a party's conduct during litigation, and we hold that it can be.").

82. 538 U.S. 580 (2003).

83. *Id.* at 586 (quoting Petition for Writ of Certiorari app. at 19a, *Roell*, 538 U.S. 580 (No. 02-69)). The parties that had been silent as to their consent filed formal letters of consent with the district court after the circuit court sua sponte remanded the case to the district court to determine whether they had consented. *Id.* at 583–84. The Supreme Court noted that the parties "voluntarily participated in the entire course of proceedings" before a magistrate judge without voicing objections when the magistrate judge made it clear that she thought they had consented. *Id.* at 584.

84. *See* Dapper, *supra* note 4, at 3.

85. U.S. CONST. art. III, § 1.

86. *Id.* art. II, § 2, cl. 2.

87. *See id.* art. III, § 1; *see also* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004).

88. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

89. U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

90. *See id.* art. II, § 2, cl. 2; *id.* art. III, § 1; Pfander, *supra* note 87, at 651.

legal findings,[91] and say with finality what the law is.[92] Importantly, it also encompasses the power to render final and enforceable judgments that are binding between the parties in a case,[93] "subject to review only by superior courts in the Article III hierarchy."[94]

Courts exercise the judicial power by adjudicating the matters that come before them.[95] The judicial power extends to—and federal courts may adjudicate—only cases and controversies of the types listed in Article III, Section 2 of the Constitution.[96] Article III courts are not empowered to provide advisory opinions.[97] The judicial power is distinct from both the executive and legislative powers in that the judicial process is the only means by which an individual may be deprived of life, liberty, or property.[98]

Unlike district judges, the magistrate judge's role is authorized by Congress,[99] magistrate judges are appointed and can be removed by the judges of the district court,[100] and magistrate judges do not enjoy the protection of lifetime tenure[101] or the protection against decreases in salary described in Article III, Section 1 of the Constitution.[102] Because magistrate judges are not formally insulated by these constitutional protections, they are not vested with the judicial power of the United States.[103] Accordingly,

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91. F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720–21 (2018). Professor F. Andrew Hessick argues that parties should not be permitted to consent to adjudication before an Article I tribunal. *Id.* at 718. This Note assumes the constitutionality of magistrate judge jurisdiction in civil consent cases. *See infra* note 118 and accompanying text; *infra* note 261.

92. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

93. Hessick, *supra* note 91, at 720–21.

94. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) (finding that Congress cannot "retroactively command[] federal courts to reopen final judgments" and noting that "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is" (second alteration in original) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

95. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1520 (2020).

96. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'").

97. *See* Massachusetts v. EPA, 549 U.S. 497, 516 (2007).

98. Baude, *supra* note 95, at 1540–42. This concept forms part of a broader discussion on the distinction between private and public rights and its relation to adjudication outside Article III. *See generally id.*; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Pfander, *supra* note 87.

99. *See* 28 U.S.C. §§ 631–639.

100. *See supra* notes 41–42 and accompanying text.

101. *See* U.S. CONST. art III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938 (2015) ("Congress has also authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work."); Hessick, *supra* note 91, at 725; *see also* 28 U.S.C. §§ 631(a), (e) (stating that magistrate judges are appointed by the judges of the district court to eight-year terms).

102. *See* Benjamin P. D. Mejia, *Magistrates After* Arkison *&* Wellness*: The Outer Limits of Consent*, 71 N.Y.U. ANN. SURV. AM. L. 509, 545 n.320 (2016) (noting that 28 U.S.C. § 634(b), which prohibits magistrate judge salaries from being diminished, can be repealed).

103. Pfander, *supra* note 87, at 650–51 ("Article III does not formally invest these [Article I] tribunals with the judicial power of the United States.").

magistrate judges do not exercise independent original jurisdiction.[104] Rather, magistrate judges exercise the judicial power of the district courts,[105] qualified by the fact that magistrate judges do not have the full contempt authority that district judges have.[106] Magistrate judges, while not a court of their own in the constitutional sense, are sometimes described as adjuncts of the Article III constitutional courts[107] or as Article I judges[108] because their role is created by statute.

The distinction between Article I and Article III adjudication and adjudicators has practical implications[109] because the Supreme Court has recognized parties' constitutional right to "Article III's guarantee of an impartial and independent federal adjudication."[110] This likely explains the statutory distinction between types of pretrial matters in § 636(b): "Motions thought 'dispositive' of the action warrant particularized objection procedures and a higher standard of review because 'of the possible constitutional objection that only an article III judge may ultimately

104. *See* Peter G. McCabe, *A Brief History of the Federal Magistrate Judges Program*, FED. LAW., May/June 2014, at 44, 52.

105. At least one scholar argues that, in civil consent cases, magistrate judges do not exercise any judicial power at all because judicial power is unnecessary for adjudication when the parties have waived their right to adjudication within Article III. *See* Baude, *supra* note 95, at 1555–57.

106. Prior to the Federal Courts Improvement Act of 2000, magistrate judges did not have direct authority to impose sanctions for contempt and could only certify contemptuous behavior to a district judge for further proceedings under § 636(e). Lee & Davis, *supra* note 53, at 919. Magistrate judges now have the authority to punish "summarily by fine or imprisonment, or both, . . . misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice." 28 U.S.C. § 636(e)(2). In civil consent cases, they also have the authority to punish in accordance with the "civil contempt authority of the district court" for misbehavior in their presence and can punish "disobedience or resistance to [their] lawful writ[s], process[es], order[s], rule[s], decree[s], or command[s]" outside their presence. *Id.* § 636(e)(3)–(4); *see* Lee & Davis, *supra* note 53, at 919. However, the punishments magistrate judges may impose for contempt are limited to no more than thirty days imprisonment and no more than a $5000 fine, in contrast with district judges, who are not limited as to the fines or imprisonment they may impose. Lee & Davis, *supra* note 53 at 920. Although, magistrate judges may certify contempt to the district court in civil consent and misdemeanor cases where there has been "serious criminal contempt" requiring a heavier penalty. 28 U.S.C. § 636(e)(6).

107. *See* Baude, *supra* note 95, at 1555 (stating that magistrate judges (1) "need not hold life-tenured judgeships because they do not themselves exercise any judicial power," (2) assist the life-tenured Article III judges in the exercise of their judicial power, and (3) are "'adjuncts' to the real subjects of Article III"); *cf.* Elizabeth French, *Respecting the Linchpin: Why Absentee Consent Should Limit Magistrate Judge Jurisdiction*, 3 STAN. J. COMPLEX LITIG. 32, 37 (2015) ("There is . . . debate regarding whether magistrate judges are entirely Article I tribunals, as their pay is set by statute, or if they are adjuncts of the Article III district courts, as they receive their appointments from the judges in each district court.").

108. *See* Mejia, *supra* note 102, at 510–11.

109. For example, Article I judges are prohibited from sitting by designation or presiding alongside Article III judges in constitutional courts. *See* Pfander, *supra* note 87, at 762 ("The issue arises from provisions of the Judicial Code that allow court administrators to address docket problems by naming judges from other federal courts to sit by designation on a particularly busy Article III court.").

110. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1943 (2015) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986)).

determine the litigation.'"[111] However, the Supreme Court recognized in *Wellness International Network, Ltd. v. Sharif*[112] that the parties' right to Article III adjudication "is subject to waiver, just as are other personal constitutional rights . . . that dictate the procedures by which civil and criminal matters must be tried."[113] On this basis, the Supreme Court upheld the constitutionality of bankruptcy court adjudication of "non-core proceedings" when the parties have knowingly and voluntarily waived their right to adjudication by an Article III adjudicator.[114] The Supreme Court recognized that "[a]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process"[115] and that bankruptcy court consent jurisdiction does not involve a congressional attempt to transfer jurisdiction to non–Article III tribunals "'for the purpose of emasculating' constitutional courts."[116] Due to the similarities between bankruptcy judges and magistrate judges,[117] *Wellness International Network* is thought to imply the constitutionality of magistrate judge civil consent jurisdiction.[118]

As the Seventh Circuit has articulated, "[t]he Supreme Court has insisted that core judicial functions may not be given to persons who lack . . . Article III protections, unless all affected parties consent."[119] But once the parties have consented to magistrate judge jurisdiction for their case, the magistrate judge has "all the powers which the district judge had with respect to that case," qualified by the magistrate judge's limited contempt authority.[120]

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111. 12 WRIGHT ET AL., *supra* note 45, § 3068.2 (quoting H.R. REP. NO. 94-1609, at 16 (1976)).

112. 135 S. Ct. 1932 (2015).

113. *Id.* at 1943 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986)). Article III "preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . [and] serves as 'an inseparable element of the constitutional system of checks and balances.'" *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986)).

114. *Id.* at 1940, 1942.

115. *Id.* at 1944.

116. *Id.* at 1945 (quoting Peretz v. United States, 501 U.S. 923, 937 (1991)).

117. *See* MCCABE, *supra* note 2, at 61 (noting that magistrate judges, like bankruptcy judges, are "non-Article III judicial officers of the Article III district courts" because bankruptcy judges (1) may decide with finality "core" bankruptcy matters, just as magistrate judges may decide nondispositive motions; (2) must file proposed findings of fact and conclusions of law for de novo review by a district judge for "non-core" bankruptcy matters, just as magistrate judges must file report and recommendations for dispositive motions; and (3) may decide "non-core" bankruptcy matters with the consent of the parties, just as magistrate judges may rule in civil consent cases with the consent of the parties).

118. 12 WRIGHT ET AL., *supra* note 45, § 3071.1. The Supreme Court in *Wellness International Network* noted that "[c]onsistent with [its] precedents, the Courts of Appeals have unanimously upheld the constitutionality of § 636(c)." *Wellness Int'l Network*, 135 S. Ct. at 1948 n.12 (citing cases from all thirteen circuits).

119. Coleman v. Labor & Indus. Rev. Comm'n, 860 F.3d 461, 465 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 739 (2018).

120. 32 AM. JUR. 2D *Federal Courts* § 133 (2019). This may even include "the power to alter a prior ruling by the district judge, although the exercise of that power should be rare." *Id.*

C. Intervention Under FRCP 24

Third-party intervention is one of the procedural mechanisms that implicates the distinction between Article I and Article III adjudication in the context of magistrate judge civil consent jurisdiction. The FRCP permit third-party litigants to intervene in a lawsuit to represent their own interests.[121] Potential intervenors in civil consent cases may move to intervene as of right[122] or they may move for permissive intervention.[123] This section reviews the purpose of intervention, the differences between intervention as of right and permissive intervention, and details the appealability of a ruling on a motion to intervene.

1. Overview and Purpose of FRCP 24 Intervention

Intervention is a procedural mechanism "by which an outsider with an interest in a lawsuit may come in as a party though the outsider has not been named as a party by the existing litigants."[124] Intervention seeks to balance the preferences of the parties (who wish to control the litigation), the preferences of affected absentee nonparties to be part of the litigation, and the public's interest in ensuring efficient conflict resolution via the courts.[125] Courts explain the purpose of intervention is both to further judicial efficiency and to vindicate absentee-party interests.[126] FRCP 24 sets out the conditions under which a federal court must allow or may permit third-party litigants to insert themselves in a litigation as codefendants or coplaintiffs.[127]

Intervention as of right (FRCP 24(a)) requires a court to permit, on a timely motion, a litigant to intervene after satisfying either of two conditions: (1) the potential intervenor has an unconditional right to do so under federal statute;[128] or (2) the potential intervenor has an interest in the property or

121. *See infra* Part I.C.1.
122. *See* FED. R. CIV. P. 24(a).
123. *See id.* r. 24(b).
124. 7C WRIGHT ET AL., *supra* note 45, § 1901.
125. *Id.*
126. *See, e.g.*, Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977) (noting that the two purposes of intervention are to "foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation"); Buckner v. Schaefer, 14 F.3d 593, Nos. 93-6547, 93-6729, 93-6846 & 93-6983, 1993 WL 542143, at *1 (4th Cir. 1993) (per curiam) (unpublished table decision) (permitting intervention because it was "consistent with the goals of judicial economy, protection of nonparties from adverse judgments entered in their absence, and expeditious resolution of litigation"); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 840 (8th Cir. 2009) ("The purpose of intervention is to 'promote[] the efficient and orderly use of judicial resources by allowing persons, who might otherwise have to bring a lawsuit on their own to protect their interests or vindicate their rights, to join an ongoing lawsuit instead.'" (alteration in original) (quoting Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996)).
127. *See* FED. R. CIV. P. 24.
128. *Id.* r. 24(a)(1). An unconditional statutory right to intervene can apply in situations where there is a challenge to the constitutionality of an act of Congress that affects the public interest pursuant to 28 U.S.C. § 2403 and in some equal protection cases. *See* 7C WRIGHT ET AL., *supra* note 45, § 1906.

transaction at issue in the action, disposing of the action without the potential intervenor's participation would negatively affect the ability to protect that interest, and the existing parties do not adequately represent the potential intervenor's interest.[129] Alternatively, permissive intervention (FRCP 24(b)) leaves it to the court's discretion whether to allow intervention.[130] A court may permit intervention when the potential intervenor has a conditional right to intervene under federal statute[131] but a court is not required to do so even if the party moving to intervene meets the statutory conditions.[132] A court may also permit intervention if the potential intervenor's claim or defense shares common questions of law or fact with the main action.[133] In exercising its discretion under FRCP 24(b), a court must consider whether intervention would "delay or prejudice the adjudication" of the main action.[134] The court's discretion applies regardless of the stated reason for intervention under FRCP 24(b).[135]

Intervention as of right and permissive intervention differ in a number of respects. Importantly, intervention as of right poses questions of law, whereas permissive intervention is at the discretion of the court[136] and looks principally to "whether the intervention [would] unduly delay or prejudice the adjudication of the original parties' rights."[137] They also differ in the standard of review on appeal[138]—intervention as of right is reviewed under the clear error standard, whereas permissive intervention is reviewed under the abuse of discretion standard.[139] The next section discusses the appealability of motions to intervene.

2. Appealability and the Dispositive Nature of Intervention

Rulings on both motions to intervene as of right and on permissive intervention may be appealed.[140] However, the grant of a motion to intervene is not immediately appealable and can only be challenged on appeal after final judgment has been entered in the case[141] because an order granting intervention is not in itself a final judgment.[142] The denial of a motion to

129. FED. R. CIV. P. 24(a)(2).
130. *See Id.* r. 24(b).
131. *Id.* r. 24(b)(1).
132. 7C WRIGHT ET AL., *supra* note 45, § 1910. Some provisions of the Civil Rights Act of 1964 allow a court to permit the U.S. attorney general to intervene in a civil action if he certifies, upon timely motion, that the case is of general public importance. *Id.* (citing 42 U.S.C. §§ 2000a-3(a), 2000e-5(f)(1)).
133. FED. R. CIV. P. 24(b)(1)(B).
134. *Id.* r. 24(b)(3).
135. 7C WRIGHT ET AL., *supra* note 45, § 1913.
136. *Id.* § 1902.
137. FED. R. CIV. P. 24(b)(3); 7C WRIGHT ET AL., *supra* note 45, § 1913.
138. 7C WRIGHT ET AL., *supra* note 45, § 1913.
139. *Id.* § 1923.
140. *Id.* § 1902.
141. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375–77 (1987) (holding that challenges to an order granting permissive intervention but denying intervention as of right were not immediately appealable and could be raised only after judgment).
142. 15B WRIGHT ET AL., *supra* note 45, § 3914.18.

intervene, on the other hand, is generally immediately appealable,[143] but courts differ on how they treat the disposition as a formal matter.[144] Some appeals courts reverse the denial of a motion to intervene if they find that the trial court incorrectly denied the motion.[145] If these courts find that the trial court correctly denied a motion to intervene, they instead dismiss the potential intervenor's appeal for lack of jurisdiction.[146] Courts that reverse the denial of a motion to intervene hold as a formal matter that jurisdiction to review the denial of a motion to intervene turns to some extent on the merits of the motion for both intervention as of right and permissive intervention.[147] Other circuit courts affirm a trial court's denial of a potential intervenor's motion to intervene rather than dismissing it for lack of jurisdiction.[148] These courts treat the denial of a motion to intervene as a final judgment for the purposes of appeal.[149]

Nonetheless, circuit court review of a trial court's denial of a motion to intervene necessarily involves some evaluation of the motion on its merits.[150] And both dismissal and affirmance of a denial have the same practical effect of denying the potential intervenor participation in the litigation with the same status as the original parties.[151] The distinctions and practical similarities in appellate review of the denial of a motion to intervene as of right are also seen in permissive intervention.[152] Additionally, while noting that a motion to intervene is final for the purposes of appeal, some courts have recognized that the motion, overall, is nondispositive, as it does not result in a final disposition of the case itself.[153] Whether intervention is

143. 7C *id.* § 1923.

144. 15B *id.* § 3914.18 ("[S]ome courts have come to the view that final judgment appeal is available from orders denying either intervention as a matter of right or permissive intervention, [while] others continue to adhere to one or another of the older views.").

145. 7C *id.* § 1923.

146. *Id.* In this posture, a circuit court would order dismissal for lack of jurisdiction because the potential intervenor was correctly determined not to have been a party, and thus the circuit court would not have jurisdiction to hear the potential intervenor's appeal, as they are a nonparty. *Id.* Courts following this formal distinction reach the merits of the potential intervenor's motion to intervene. *See id.*

147. *See* Edwards v. City of Houston, 78 F.3d 983, 992 (5th Cir. 1996); EEOC v. E. Airlines, Inc., 736 F.2d 635, 637 (11th Cir. 1984).

148. 7C WRIGHT ET AL., *supra* note 45, § 1923.

149. *See* United States v. Geranis, 808 F.3d 723, 727 (8th Cir. 2015); R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 7 (1st Cir. 2009); Wildearth Guardians v. U.S. Forest Serv., 573 F.3d 992, 994 (10th Cir. 2009); Alt. Rsch. & Dev. Found. v. Veneman, 262 F.3d 406, 409 (D.C. Cir. 2001); League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997); Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc., 54 F.3d 156, 158 (3d Cir. 1995); Shea v. Angulo, 19 F.3d 343, 344–45 (7th Cir. 1994); SEC v. Everest Mgmt. Corp., 475 F.2d 1236, 1238 n.2 (2d Cir. 1972).

150. 7C WRIGHT ET AL., *supra* note 45, § 1923.

151. *See id.* §§ 1902, 1920.

152. *Id.*

153. Coleman v. Labor & Indus. Rev. Comm'n, 860 F.3d 461, 474 (7th Cir. 2017) (recognizing that a magistrate judge can rule on motions to intervene because those motions are nondispositive), *cert. denied*, 138 S. Ct. 739 (2018). In contrast, for example, a motion for leave to proceed in forma pauperis is typically found to be dispositive because denial of that motion is the "functional equivalent" of involuntary dismissal: an indigent party seeking to

dispositive is important to magistrate judges' authority to rule on intervention under § 636[154] and the framework's relationship to parties' right to adjudication before an Article III adjudicator.[155]

II. WHETHER A MAGISTRATE JUDGE MAY RULE ON MOTIONS TO INTERVENE IN CIVIL CONSENT CASES

Some circuits disagree on whether a magistrate judge can rule on a motion to intervene in a civil consent case without the consent of the potential intervenor.[156] In 1993, the Second Circuit in *New York Chinese V*, drawing on the importance of consent to the constitutionality of magistrate judge civil consent jurisdiction,[157] determined that a magistrate judge cannot rule on a motion to intervene when the potential intervenor has not consented and objects to magistrate judge jurisdiction.[158] The Seventh and Ninth Circuits have both held the opposite.[159] In 1999, the Seventh Circuit held in *People Who Care* that a magistrate judge may rule on a potential intervenor's motion to intervene without consent because the potential intervenor is not a party to the litigation.[160] Then, in 2016, the Ninth Circuit in *Robert Ito Farm* also adopted this reasoning when confronted with the same question.[161]

The circuit courts are thus divided between those that permit a magistrate judge to rule on a potential intervenor's motion to intervene in a civil consent case without the intervenor's consent and those that do not. To be clear, the circuit courts discussed in this Note, and other circuit courts as well, are aligned in holding that an intervenor, upon entering the case as a late-coming party, must consent to magistrate judge jurisdiction if the motion to intervene is granted.[162] Specifically, the circuit courts differ as to when that consent is

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proceed in forma pauperis cannot proceed in the litigation, as a practical matter, if the court denies exemption from court filing fees. Thus, courts have held that a magistrate judge cannot rule on a motion for leave to proceed in forma pauperis without the consent of the parties. *See, e.g.*, Hunter v. Roventini, 617 F. App'x 225, 226 (4th Cir. 2015); Lister v. Dep't of Treasury, 408 F.3d 1309, 1312 (10th Cir. 2005); Donaldson v. Ducote, 373 F.3d 622, 623–25 (5th Cir. 2004); Woods v. Dahlberg, 894 F.2d 187, 187 (6th Cir. 1990).

154. *See supra* Parts I.B.1–2.

155. *See supra* Part I.B.3.

156. *See* French, *supra* note 107, at 52 (noting that there is "uncertainty as to whether magistrates or Article III judges have the jurisdiction to decide a motion to intervene when the movant has not consented to magistrate authority").

157. *See infra* notes 181–82 and accompanying text.

158. *See infra* Part II.A.

159. *See infra* Part II.B.

160. *See infra* Part II.B.1.

161. *See infra* Part II.B.2.

162. *See, e.g.*, Robert Ito Farm, Inc. v. County of Maui, 842 F.3d 681, 687 (9th Cir. 2016); Day v. Persels & Assocs., 729 F.3d 1309, 1321–22 (11th Cir. 2013) (noting that the Eleventh Circuit had not yet decided whether late-coming parties must consent after joining a litigation but acknowledging that the prevailing rule of the federal courts requires late-comer consent); Williams v. Gen. Elec. Cap. Auto Lease, Inc., 159 F.3d 266, 268 (7th Cir. 1998); *New York Chinese V*, 996 F.2d 21, 24 (2d Cir. 1993); Caprera v. Jacobs, 790 F.2d 442, 444 (5th Cir. 1986) (holding that the magistrate judge lacked authority to enter final judgment in a case where named parties consented to magistrate jurisdiction and then amended the complaint to

required: the Second Circuit requires a potential intervenor's consent to magistrate judge jurisdiction upon filing a motion seeking leave to intervene,[163] whereas the Seventh and Ninth Circuits do not require the consent of the intervenor until the motion seeking leave to intervene has been granted and the intervenor has become a party to the lawsuit.[164] Thus, this Note concerns who can rule on a motion permitting a potential intervenor to become an intervenor in a civil consent case. To this end, Part II.A analyzes the Second Circuit's jurisprudence, which prohibits a magistrate judge from ruling on a motion to intervene when the potential intervenor has not consented and objects to magistrate judge jurisdiction. Part II.B then evaluates the Seventh and Ninth Circuits' jurisprudence, which permits a magistrate judge to rule on a potential intervenor's motion to intervene without consent.

A. The Second Circuit in New York Chinese V

In 1993, the Second Circuit held in *New York Chinese V* that the importance of consent to the constitutionality of magistrate judge civil consent jurisdiction requires that the potential intervenors consent for a magistrate judge to rule on the motion to intervene.[165] Thus, the district judge must rule on a motion to intervene when the original parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) but the potential intervenors have not.[166]

New York Chinese V was decided as part of a series of appeals and remands in a copyright infringement case brought by Chinese-language television program importers.[167] In this case, the original parties consented to the jurisdiction of a magistrate judge, who ruled in favor of the plaintiff, New York Chinese TV Programs, Inc. ("Chinese TV Programs"), during the liability phase of the litigation.[168] Before the case proceeded to trial to determine damages, three Chinese TV Programs shareholders (the potential intervenors in this case) sold their combined, controlling interest in Chinese TV Programs but retained the right to share in any damages awarded in the lawsuit.[169] Chinese TV Programs, no longer under the potential intervenors' control, then settled the case against the potential intervenors' wishes.[170] The potential intervenors moved to intervene as of right in the lawsuit to

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add defendants). If they do not consent, the case is transferred back to the district judge. *See, e.g.*, *Robert Ito Farm*, 842 F.3d at 685 n.2.

163. *See infra* Part II.A.

164. *See infra* Part II.B.

165. *New York Chinese V*, 996 F.2d at 23–24.

166. *Id.*

167. *New York Chinese V*, 996 F.2d at 22.

168. *Id.*

169. The court noted that these shareholders sought to use this money to pay off their investment in financing the litigation. *See id.*

170. *See id.* at 22–23 (noting that the settlement amount was for less than the amount of damages and attorneys' fees).

challenge the settlement,[171] first in the Second Circuit, which denied their motion because it was not properly before the court,[172] and again in the district court, which, over their objections, referred the motion to a magistrate judge,[173] who denied it as untimely.[174] Treating the magistrate judge's ruling as a report and recommendation to the district judge, the potential intervenors then appealed to the district court and sought de novo review of their motion to intervene.[175] The district court dismissed the appeal, finding that it lacked jurisdiction because the original parties had consented to magistrate judge jurisdiction for all proceedings in the case.[176] Thus, the potential intervenors appealed to the Second Circuit.[177]

On appeal, the potential intervenors again argued that the earlier consent of the original parties did not bind them.[178] They asserted that, because their motion was referred to the magistrate judge over their objections and without their consent, the district judge was required to rule on their motion to intervene, rather than the magistrate judge.[179] The potential intervenors further argued that the magistrate judge's order carried no more weight than a report and recommendation, warranting de novo review by a district court.[180]

The Second Circuit agreed with the potential intervenors, emphasizing the importance of consent to the validity of magistrate judge jurisdiction in civil consent cases and resting its holding on the fact that consent to magistrate judge jurisdiction must be "truly voluntary."[181] The Second Circuit believed this was evidenced because: (1) both notice of the availability of magistrate judge jurisdiction and consent to magistrate judge jurisdiction must be in writing, (2) consent must be clearly and expressly given and cannot be implied from the conduct of the parties, and (3) the voluntariness of consent is prescribed and protected both by statute and through the FRCP.[182] The Second Circuit thus held that "[w]ithout the consent of the 'intervenors', the magistrate judge's order has the effect only of a report and recommendation to the district judge, who upon the filing of objections must review *de novo*

171. *New York Chinese VI*, 153 F.R.D. 69, 70 (S.D.N.Y.), *aff'd*, 43 F.3d 1458 (2d Cir. 1994).

172. *New York Chinese V*, 996 F.2d at 23. The potential intervenors sought permission to intervene in the case from the Second Circuit, as, at the time, the case was on appeal in the Second Circuit. *Id.* Generally, nonparties can petition a circuit court for leave to intervene in an appeal. *See* 15A WRIGHT ET AL., *supra* note 45, § 3902.1.

173. *New York Chinese V*, 996 F.2d at 23.

174. *New York Chinese VI*, 153 F.R.D. at 72.

175. *New York Chinese V*, 996 F.2d at 23.

176. *Id.*

177. The parties did not consent to appeal to the district court. *See id.*; *see also supra* note 49 and accompanying text.

178. *New York Chinese V*, 996 F.2d at 23.

179. *Id.*

180. *Id.*

181. *Id.* at 23–24.

182. *Id.* at 24. This decision occurred before the Supreme Court permitted inferred consent to magistrate judge jurisdiction in *Roell*. *See supra* note 83 and accompanying text; *see also supra* Part I.B.2.

the recommendation,"[183] rather than the effect of an order appealable to a circuit court and subject to more deferential review.[184] The Second Circuit subsequently recognized the validity of this holding in *Stackhouse v. McKnight*[185] in 2006 and in *In re McCray, Richardson, Santana, Wise & Salaam Litigation*[186] in 2016.[187]

B. The Seventh Circuit in People Who Care *and the Ninth Circuit in* Robert Ito Farm

By contrast, two circuit courts have held that a magistrate judge does not need the consent of a potential intervenor to rule on the motion to intervene.[188] In 1999, the Seventh Circuit held in *People Who Care*[189] that, because a potential intervenor is not a party, a magistrate judge in a civil consent case does not need consent to rule on a motion to intervene.[190] The Ninth Circuit in *Robert Ito Farm*[191] also adopted this reasoning in 2016.[192]

1. *People Who Care v. Rockford Board of Education, School District No. 205*

People Who Care was a long-running public school district desegregation case from Rockford, Illinois.[193] The parties consented to magistrate judge jurisdiction for the remedial phase of the litigation after the district court found that the school district had intentionally discriminated against Black and Hispanic students, in violation of the Equal Protection Clause of the

183. *New York Chinese V*, 996 F.2d at 25. The Second Circuit also recognized that the potential intervenors were not parties to the lawsuit. *Id.* at 24 ("Simply put, Doo, Mu, and Cheng were not parties to the action when the original consents to referral were executed and they have not yet, themselves, consented to exercise of plenary jurisdiction by the magistrate judge.").

184. *See supra* Part I.B.1 (noting that a report and recommendation on a dispositive motion from a magistrate judge to a district judge receives less deferential, de novo review); *see also* Part I.C.1 (noting that circuit courts review a trial court order on a motion to intervene under the deferential standards of either clear error or abuse of discretion).

185. 168 F. App'x 464 (2d Cir. 2006) (stating that a district judge must rule on a potential intervenor's motion to intervene in a civil consent case when the potential intervenor has not consented to magistrate judge jurisdiction).

186. 832 F.3d 150 (2d Cir. 2016) (stating that potential intervenors must also consent to magistrate judge jurisdiction).

187. The Eleventh Circuit observed in passing that at least some district courts in its circuit have followed the reasoning of the Second Circuit in *New York Chinese V*. *See* Day v. Persels & Assocs., 729 F.3d 1309, 1322 (11th Cir. 2013) (first citing Newman v. Sun Cap., Inc., No. 09-cv-445-FtM-29, 2010 WL 326069 (M.D. Fla. Jan. 21, 2010); and then citing Smith v. Powder Mountain, LLC, Nos. 08-80820-civ & 08-cv-81185, 2010 WL 5483327 (S.D. Fla. Dec. 8, 2010)); *see also* Carr v. Ocwen Loan Servicing, LLC, No. 13-cv-732, 2013 WL 12383150, at *1 (N.D. Ga. Nov. 26, 2013).

188. *See infra* Parts II.B.1–2.

189. 171 F.3d 1083, 1089 (7th Cir. 1999).

190. *See infra* Part II.B.1.

191. 842 F.3d 681, 684 (9th Cir. 2016).

192. *See infra* Part II.B.2.

193. *People Who Care*, 171 F.3d at 1085.

Fourteenth Amendment.[194] The magistrate judge, aided by a special master, entered an extensive equitable decree to remedy the school district's past discrimination.[195] The special master submitted proposed budgets to fund the decree for two fiscal years, and the magistrate judge entered budget orders after making a few reductions—but fewer than the school board wanted.[196]

The school board had three new members who had run on a platform opposing the use of the school district's tort immunity fund to fund compliance with the decree.[197] This "new" board voted against instituting a levy to fund compliance with the decree.[198] As a result, the magistrate judge ordered the board to vote in favor of the levy.[199] After the board unanimously voted to approve the levy in compliance with the magistrate judge's order, three board members moved to intervene in the litigation to challenge the magistrate judge's order.[200] They asserted that the magistrate judge's order required them to "vote against their consciences" and thus injured them by turning them into "dissembling politician[s] in the minds of [their] constituents."[201] The potential intervenors objected to the magistrate judge's jurisdiction to decide their motion to intervene.[202] The magistrate judge then denied the potential intervenors' motion as untimely[203] and because the potential intervenors lacked a legally cognizable interest and Article III standing.[204]

On appeal, the potential intervenors argued that, because they had not consented to the magistrate judge's jurisdiction, the magistrate judge did not have authority to rule on their motion to intervene.[205] The Seventh Circuit rejected their argument and held that a magistrate judge can rule on a potential intervenor's motion without consent.[206] The court noted that requiring the consent of potential intervenors for a magistrate judge to rule on their motion would unduly erode the power of a magistrate judge to enter binding judgments in civil consent cases.[207] The court further noted that requiring a district judge to rule on intervention in civil consent cases would cause "delay, confusion, duplication of effort, the possibility of inconsistent

194. *Id.*
195. *Id.*
196. *Id.* at 1086.
197. *Id.* at 1088.
198. *Id.*
199. *Id.* at 1088–89.
200. *Id.* at 1089.
201. *Id.*
202. People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 179 F.R.D. 551, 559 (N.D. Ill. 1998), *aff'd*, 171 F.3d 1083 (7th Cir. 1999).
203. *Id.* at 560.
204. *Id.* at 560–63. The magistrate judge observed that the potential intervenors were attempting, in their individual capacities, to appeal his order to approve the levy after the school board voted against bringing an appeal. *Id.* at 561–63.
205. *People Who Care*, 171 F.3d at 1089. The potential intervenors also argued that they had suffered a sufficient injury in fact to confer standing under Article III to challenge the magistrate judge's order. *See id.*
206. *Id.*
207. *Id.*

determinations, and a drain on judicial resources."[208] The Seventh Circuit observed that the "power to rule on motions to intervene is a necessary and proper incident of the magistrate judge's power to decide the underlying case" in civil consent cases.[209] Finally, the court noted that the text of § 636(c)(1) requires only the consent of the "parties" for a magistrate judge to exercise jurisdiction and that it does not "bend" far enough to require the consent of potential intervenors.[210] The court concluded that a potential intervenor is not a "party" but rather a litigant that wishes to *become* a party in civil consent cases.[211] The Seventh Circuit later recognized the validity of *People Who Care*'s holding in 2017 in *Coleman v. Labor & Industrial Review Commission*.[212]

2. *Robert Ito Farm, Inc. v. County of Maui*

Like the Seventh Circuit, the Ninth Circuit held in *Robert Ito Farm* that a magistrate judge can rule on a motion to intervene when the original parties have consented to magistrate judge jurisdiction but the potential intervenor has not.[213] Specifically, after all the original parties had consented to magistrate judge jurisdiction, Moms on a Mission Hui ("MOM Hui") and Shaka Movement moved to intervene in a lawsuit brought by industrial agriculture plaintiffs challenging a county ordinance that prohibited the "growth, testing, and cultivation of genetically engineered crops until the County [of Maui] conducted an environmental and health impact study."[214] The magistrate judge granted Shaka Movement's motion to intervene but denied MOM Hui's.[215] MOM Hui then appealed the magistrate judge's denial of its motion to the district court, which ordered supplemental briefing on the issue.[216] The district judge then held that the magistrate judge had

208. *Id.* "The only effect of allowing [the potential intervenors] into the case would be to slow it down, which is the opposite of what the board wants or should want." *Id.* at 1090.

209. *Id.* at 1089.

210. *Id.*

211. *Id.*

212. 860 F.3d 461 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 739 (2018).

213. Roberto Ito Farm, Inc. v. County of Maui, 842 F.3d 681, 684 (9th Cir. 2016) ("We hold that prospective intervenors are not 'parties' for purposes of § 636(c)(1), and a magistrate judge who has the consent of the named parties to the suit may rule on a prospective intervenor's motion to intervene without the prospective intervenor's consent.").

214. *Id.* at 684.

215. The magistrate judge found that both Shaka Movement's and MOM Hui's motions were timely, identified "significantly protectable interests" that would be impaired if the county ordinance was invalidated, and that the County of Maui would not adequately represent their interests. Robert Ito Farm, Inc. v. County of Maui, No. 14-00511, 2014 WL 7148741, at *3–6 (D. Haw. Dec. 15, 2014). However, Shaka Movement had been involved in the ballot initiative that enacted the ordinance while MOM Hui had not. *Id.* Thus, the magistrate judge reasoned that Shaka Movement would adequately represent MOM Hui's interests. *Id.*

216. Docket Order, Robert Ito Farm, Inc. v. County of Maui, No. 14-00511, 2015 WL 134070 (D. Haw. Jan. 9, 2015), ECF No. 75 ("Proposed Intervenor cites no authority for the proposition that, with the reassignment of the case to a District Judge, rulings made by [the Magistrate Judge] when he was the judge presiding over the case somehow are transformed into rulings appealable to a District Judge. The court invites Proposed Intervenor to submit authority to this effect . . . .").

jurisdiction to rule on MOM Hui's motion to intervene because the original parties to the suit had consented to magistrate judge jurisdiction.[217]

On appeal, the Ninth Circuit focused its analysis on whether potential intervenors are "parties" to the lawsuit in which they seek to intervene and thus whether a magistrate judge needs their consent to decide their motion to intervene in a civil consent case.[218] The Ninth Circuit drew on the Seventh Circuit's analysis in *People Who Care* and relied on Supreme Court precedent in *United States ex rel. Eisenstein v. City of New York*[219] defining "party" in the context of federal litigation as "one by or against whom a lawsuit is brought."[220] From this, the Ninth Circuit held that a "prospective intervenor is not a 'party' as that term is used in § 636(c)(1)" because the intervenor does not become a party until the motion is granted and the intervenor is permitted to enter the litigation.[221] Thus, because potential intervenors are not parties within the litigation context—and so are not parties within the meaning of § 636(c)—the court held that a magistrate judge does not need their consent to decide their motions to intervene.[222]

III. GRANTING MAGISTRATE JUDGES THE AUTHORITY TO RULE ON MOTIONS TO INTERVENE IN CIVIL CONSENT CASES

This part argues that the circuit split between the Second Circuit and the Seventh and Ninth Circuits[223] should be resolved by permitting magistrate judges to rule on a potential intervenor's motion to intervene in civil consent cases when only the original parties to the lawsuit have consented. Part III.A argues that this resolution is consistent with the text and structure of § 636. Part III.B then evaluates the Second Circuit's constitutional counterargument against permitting magistrate judges to rule on a potential intervenor's motion to intervene without consent and observes that this resolution does not infringe on a litigant's constitutional right to adjudication before an Article III judge. Finally, Part III.C discusses how the implications of this resolution promote fairness and the expedient disposition of cases, while

217. *Robert Ito Farm*, 842 F.3d at 685 ("The district court further held that any appeal from the magistrate judge's order needed to be taken to the Ninth Circuit because the magistrate judge, having obtained the consent of the parties, had authority to enter a final decision under 28 U.S.C. § 636(c)(1).").

218. *Id.* at 687.

219. 556 U.S. 928 (2009).

220. *Robert Ito Farm*, 842 F.3d at 688 ("'Party' therefore means the same thing in § 636(c)(3) as 'parties' does in § 636(c)(1): '[o]ne by or against whom a lawsuit is brought.'" (alteration in original) (quoting *Eisenstein*, 556 U.S. at 933)).

221. *Id.* at 687. The Ninth Circuit also noted that "[w]hile later-added parties must give consent for a magistrate judge to exercise jurisdiction, *prospective* parties do not have the same right." *Id.* (citation omitted).

222. MOM Hui also argued that, if it was not a party, it would not have had a right to appeal any decision of a magistrate judge denying a motion to intervene. *Id.* at 687. The Ninth Circuit noted that MOM Hui did have a right to appeal the order denying its motion to intervene under the collateral order doctrine rather than based on its status as a party to the litigation. *Id.* at 687–88.

223. *See supra* Part II.A–B.

avoiding litigation gamesmanship and disincentivizing consent to magistrate judge jurisdiction.

A. There Is No Statutory Bar on Magistrate Judges Ruling on Motions to Intervene

This section argues, consistent with Seventh and Ninth Circuit precedent, that § 636 is a broad authorization of magistrate judge power over civil consent cases. The text and structure of § 636 demonstrate that it is within a magistrate judge's statutory authority to rule on potential intervenors' motions to intervene in civil consent cases without their consent. This section further argues that § 636 implies that magistrate judge rulings are to be treated with the same deference as district judge rulings and that the Second Circuit precedent fails to do so.

1. Section 636 Authorizes the Broad Exercise of Magistrate Judge Control over the Original Parties' Case

First, potential intervenors are not "parties" within the meaning of § 636. The Second, Seventh, and Ninth Circuits all recognize that potential intervenors are not parties to the litigation in which they seek to intervene.[224] The Second Circuit recognized the nonparty status of the potential intervenors in *New York Chinese V* but did not afford this status the same weight as the Seventh and Ninth Circuits,[225] which relied on the nonparty status of the potential intervenors within the meaning of § 636 in their analyses.[226] Within the statutory framework of § 636, the Seventh and Ninth Circuits take the more compelling approach. Magistrate judges derive their authority in civil consent cases from the consent of the parties to an action,[227] who, in providing their consent, waive their constitutional right to adjudication before an Article III adjudicator.[228] However, the term "parties" is not defined in the FMA.[229] As the Ninth Circuit noted in *Robert Ito Farm*, the Supreme Court defines a "party" to litigation as "one by or against whom a lawsuit is brought"[230] and has stated that intervention is a mechanism by which a nonparty is allowed to *become* a party.[231] Using this definition, potential intervenors are not a parties whose consent is required within the framework of § 636(c) because they are not bringing the lawsuit and the lawsuit is not brought against them—they seek to become parties in existing lawsuits.

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224. *See supra* notes 183, 213 and accompanying text; *supra* Part II.B.1.
225. *See New York Chinese V*, 996 F.2d 21, 24 (2d Cir. 1993).
226. *See supra* Part II.B.
227. 28 U.S.C. § 636(c).
228. *See supra* Parts I.B.2–3.
229. *See* 28 U.S.C. § 639.
230. United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 931, 933 (2009) (quoting *Party*, BLACK'S LAW DICTIONARY (8th ed. 2004)) (holding that the United States "is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case").
231. *Id.*

Black's Law Dictionary additionally defines "party" as "anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment."[232] A potential intervenor is a litigant who claims to be "directly interested in a lawsuit" but who does not have a "right to control the proceedings" and thus has no right to "make a defense," as the potential intervenor has not yet been permitted to participate in the litigation.[233] Deciding a motion to intervene necessarily involves evaluating whether a potential intervenor has an interest in the litigation,[234] so it follows that denial of that motion indicates the lack of a right to participate because a court has determined that there is no interest. Potential intervenors can "appeal from an adverse judgment,"[235] but they are only parties to the appeals from denial of their motions—not parties to the underlying actions—as they have not yet been permitted to join in any claims or defenses in the underlying suits or assert their own claims or defenses. Thus, the Seventh and Ninth Circuits aptly describe potential intervenors as litigants seeking to become parties, rather than as parties to a suit, whose consent is required for the magistrate judge to rule on their motion.

Further, § 636(c) authorizes magistrate judges to conduct, "[u]pon the consent of the parties . . . *any or all proceedings* in a jury or nonjury civil matter and order the entry of judgment in the case."[236] This is a broad grant of authority over civil consent cases that by its ordinary meaning should necessarily encompass the authority to rule on a third-party's motion to intervene. And, because magistrate judge control over a civil consent case is the same as a district judge's,[237] it (1) dilutes § 636's broad grant of full magistrate judge control over civil consent cases, (2) treats magistrate judge control over civil consent cases as less extensive than district judge control in normal cases, and (3) thus is inconsistent with the text of § 636 if a magistrate judge has authority to enter final judgment in a case but does not have authority to rule on certain interlocutory decisions in that case. From § 636's broad grant of authority, the Seventh Circuit aptly observes that the "power to rule on motions to intervene is a necessary and proper incident of the magistrate judge's power to decide the underlying [civil consent] case."[238]

232. *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019).
233. *Id.*
234. *See supra* Part I.C.2.
235. *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* Marino v. Ortiz, 484 U.S. 301, 304 (1988) (per curiam) (noting that "denials of [motions to intervene] are, of course, appealable"); *see also supra* note 222 and accompanying text.
236. 28 U.S.C. § 636(c)(1) (emphasis added).
237. *See supra* note 74 and accompanying text; *supra* Part I.B.2. Notwithstanding this, there are differences in magistrate judge contempt authority, as noted above. *See supra* note 106 and accompanying text; *supra* Part I.B.3.
238. People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 171 F.3d 1083, 1089 (7th Cir. 1999).

2. Section 636 Implies Uniformity of Treatment for Motions to Intervene

Second, § 636(c) favors permitting magistrate judges to rule on motions to intervene in civil consent cases without the consent of the potential intervenors because the section implies that these motions are to be treated uniformly. The Second Circuit's precedent creates a structural inconsistency within § 636 regarding the treatment of a potential intervenor's motion to intervene that does not exist under the Seventh and Ninth Circuits' precedent. While the Second Circuit did not explicitly say as much,[239] it treats a motion to intervene as dispositive in a civil consent case under § 636(c). The Second Circuit requires magistrate judges to obtain the consent of the potential intervenors to decide the motion.[240] If potential intervenors do not consent to the magistrate judge's jurisdiction, they can object to the ruling and obtain de novo review by a district judge[241]: this is the same treatment that a dispositive motion receives under § 636(b)(1)(B).[242] However, a motion to intervene, if referred to a magistrate judge under § 636(b), is otherwise treated as nondispositive by courts in the Second Circuit[243] and is reviewed only for clear error by a district judge.[244] As noted by the district court in *Robert Ito Farm*, this distinction in the dispositive nature of the motion to intervene within § 636 affords less deference to a magistrate judge ruling on a motion to intervene under § 636(c)[245]—when they have all the power a district judge would to preside over the parties' case[246]—than a magistrate judge ruling on a motion to intervene referred to them under § 636(b).[247] Further, whether a motion is dispositive or nondispositive does not turn on who decides the motion; rather, it turns on whether deciding the motion involves an evaluation of the merits or fully disposes of a particular claim or the case as a whole.[248] Under this definition, intervention is not a dispositive

239. *See* Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950, 2016 WL 11645644, at *2 (S.D.N.Y. June 6, 2016) ("[T]he Second Circuit did not make an explicit determination in *New York Chinese* as to whether a motion to intervene is dispositive . . . .").

240. *See supra* notes 181–84 and accompanying text.

241. *See supra* notes 181–84 and accompanying text.

242. *See* 28 U.S.C. § 636(b)(1)(B); *supra* Part I.B.2.

243. *See, e.g.*, Rosado v. Pruitt, No. 17-CV-4843, 2018 WL 262835, at *1 n.1 (E.D.N.Y. Jan. 2, 2018), *appeal filed*, No. 20-3188 (2d Cir. Sept. 18, 2020); *Chen-Oster*, 2016 WL 11645644, at *2; Lopez v. Bell Sports, Inc., No. 14-cv-2530, 2014 WL 6473533, at *1 n.1 (E.D.N.Y. Nov. 18, 2014); Grewal v. Cuneo, No. 13 Civ. 6836, 2014 WL 2095166, at *1 n.1 (S.D.N.Y. May 20, 2014); Int'l Chem. Corp. v. Nautilus Ins. Co., No. 09-CV-359S, 2010 WL 3070101, at *1 n.1 (W.D.N.Y. Aug. 3, 2010). *But see, e.g.*, Madison Stock Transfer, Inc. v. Marine Expl., Inc., No. 15-cv-6394, 2017 WL 383351, at *1 n.2 (E.D.N.Y. Jan. 27, 2017); Medina v. Fischer, No. 11 Civ. 0176, 2013 WL 1294621, at *1 n.1 (S.D.N.Y. Mar. 29, 2013) (finding a motion to intervene as of right to be dispositive).

244. *See* 12 WRIGHT ET AL., *supra* note 45, § 3068.1 (noting that motions to intervene are pretrial matters under § 636(b)(1)(A), which do not warrant de novo review by a district judge); *supra* Part I.B.1.

245. *See* Robert Ito Farm, Inc. v. County of Maui, No. 14-00511, 2015 WL 134070, at *2 (D. Haw. Jan. 9, 2015).

246. *See supra* note 120 and accompanying text.

247. *See supra* Part I.B.2.

248. *See* FED. R. CIV. P. 72 (distinguishing between pretrial matters "not dispositive of a party's claim or defense" (FRCP 72(a)) and "pretrial matters dispositive of a claim or defense"

motion[249]: deciding a motion to intervene, while it requires a magistrate judge to evaluate the potential intervenor's interest in the underlying substantive claims or defenses of the case, does not require a magistrate judge to evaluate the merits or dispose of any of the underlying substantive claims or defenses in the case.[250] The Seventh and Ninth Circuits correctly treat a motion to intervene as nondispositive within § 636 and thus avoid the inconsistency created by the Second Circuit.

Further, § 636 implies that a magistrate judge's ruling on a motion to intervene must be treated with the same deference as a district judge's ruling. The Seventh and Ninth Circuits afford a magistrate judge this equal treatment, whereas the Second Circuit fails to do so.[251] As the Supreme Court stated in *Roell*, "a § 636(c)(1) referral gives the magistrate judge *full authority* over dispositive motions, conduct of trial, and entry of final judgment, all without district court review."[252] Judgments entered by a magistrate judge are treated as judgments of the district courts, and § 636 was amended such that appeals from a magistrate judge's orders in a civil consent case are now taken directly to the circuit courts like any other judgment of the district courts.[253] Because magistrate judges have full authority over the matters that come before them in civil consent cases and their orders are appealable in the same manner as the orders of a district court judge, a magistrate judge's ruling on a motion to intervene in a civil consent case should not be afforded less deference than a district judge's on the same motion. For a motion to intervene, a district judge's ruling does not receive de novo review by another district judge upon the objection of a potential intervenor in the Second, Seventh, or Ninth Circuits.[254] In the Seventh and Ninth Circuits, neither does a magistrate judge's ruling on a motion to intervene in a civil consent case receive such de novo review.[255] However, by requiring a district court to review de novo a magistrate judge's ruling

(FRCP 72(b))); 12C WRIGHT ET AL., *supra* note 45, § 3068.2 (noting that a district court found a motion to proceed in forma pauperis dispositive because it "necessarily involved an analysis of the merits of plaintiff's claim"); *see also Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a dispositive motion as: "[a] motion for a trial-court order to decide a claim or case in favor of the movant without further proceedings; specif[ically], a motion that, if granted, results in a judgment on the case as a whole, as with a motion for summary judgment or a motion to dismiss").

249. *See id.*; *supra* Part I.C.2.

250. *See* 18A WRIGHT ET AL., *supra* note 45, § 4438.

251. *See* Robert Ito Farm, Inc. v. County of Maui, No. 14-0511, 2015 WL 134070, at *3 (D. Haw. Jan. 9, 2015) ("[T]he Second Circuit diminishes the ability of a magistrate judge to manage a case that the parties have agreed the magistrate judge may manage."), 842 F.3d 681 (9th Cir. 2016).

252. Roell v. Withrow, 538 U.S. 580, 585 (2003) (emphasis added).

253. *See supra* Part I.B.2; *see also* FED. R. CIV. P. 73(C); *supra* notes 76–77 and accompanying text. Section 636 previously allowed the parties in a civil consent case to consent to have appeals from the orders of a magistrate judge taken to the district court rather than to a court of appeals, but this path of appeal was removed in 1996. *See supra* note 49 and accompanying text. Appealing to the district court was not the default path, though. *See supra* note 49 and accompanying text.

254. *See supra* Part I.C.2.

255. *See supra* Parts II.B.1–2.

upon the objections of potential intervenors,[256] the Second Circuit approach inherently treats a magistrate judge's ruling on a motion to intervene with less deference than a district judge's order, which would not be subject to this level of scrutiny.

The Second Circuit's approach also, in theory, permits two opportunities to appeal a magistrate judge's ruling on a motion to intervene in a civil consent case but only one opportunity to appeal a district judge's ruling on a motion to intervene.[257] And, in the Second Circuit, a district judge's ruling on a motion to intervene is reviewed on appeal under either the deferential clear error or abuse of discretion standard.[258] A magistrate judge's ruling on a motion to intervene in a civil consent case, however, is evaluated under the less deferential de novo standard of review upon objection.[259] By contrast, the Seventh and Ninth Circuits' approach allows for one opportunity to appeal from magistrate judge rulings in civil consent cases—the same as for district judge rulings.[260]

If a magistrate judge's ruling on a motion to intervene in a civil consent case is to be treated with the same deference as a district judge's ruling on a motion to intervene, it then follows that a magistrate judge's ruling should be reviewed under the same standard of review as a district judge's ruling, rather than the de novo standard by a district judge. It also follows that a magistrate judge's order should not be afforded the additional opportunity for review that the Second Circuit's rule creates, as that opportunity is not available for motions to intervene decided by a district judge. Accordingly, the Seventh and Ninth Circuits' precedent best honors the uniformity of treatment magistrate judge orders are supposed to receive. It also avoids creating inconsistencies that the Second Circuit's precedent creates and treats magistrate judge and district judge rulings on motions to intervene with the same deference.

B. There Is No Constitutional Bar Preventing Magistrate Judges from Ruling on Third-Party Intervention

The Constitution does not prevent a magistrate judge from ruling on a potential intervenor's motion to intervene in a civil consent case. This is because the exercise of a magistrate judge's authority over the original parties' case in a civil consent case does not implicate the potential

256. *See supra* notes 181–84 and accompanying text (noting that the Second Circuit treats a magistrate judge's ruling on a motion to intervene in a civil consent case as a report and recommendation to the district judge, subject to de novo review upon the objection of the potential intervenor).

257. *See infra* Part III.C.1.

258. Review is for clear error when a potential intervenor moves to intervene as of right and is for abuse of discretion when a potential intervenor seeks permissive intervention. *See* 7C WRIGHT ET AL., *supra* note 45, § 1923; *supra* Part I.C.2.

259. *See supra* notes 181–84 and accompanying text.

260. *See supra* Part II.B.

intervenors' constitutional right to an Article III adjudicator deciding their motion to intervene.[261]

While the Seventh and Ninth Circuits engaged in a statute-driven analysis and concluded that it is within magistrate judges' authority to rule on a potential intervenor's motion to intervene without consent,[262] the Second Circuit looked to the importance of consent as a bar to magistrate judge authority.[263] In doing so, the Second Circuit identified a constitutional dimension to the question of whether a magistrate judge, in a civil consent case, may decide a potential intervenor's motion to intervene without consent.[264] The Second Circuit requires a potential intervenor's consent to magistrate judge jurisdiction at the outset upon a motion seeking leave to intervene.[265] By requiring consent at the outset, the Second Circuit appears to implicitly recognize that a magistrate judge would exercise the judicial power in ruling on a potential intervenor's motion to intervene. Therefore, the Second Circuit has held that potential intervenors must waive their constitutional right to Article III adjudication by providing consent for a magistrate judge to decide their motion. This position could explain the Second Circuit's focus on the need for and the process by which consent is obtained.[266]

However, as noted above, if a potential intervenor is permitted to participate in a lawsuit, that intervenor is free to withhold consent as a late-coming *party*, thus transferring the case back to a district judge to evaluate the merits and dispose of the case.[267] Further, a motion to intervene is a nondispositive motion[268] that does not require a magistrate judge to dispose of the potential intervenor's underlying substantive claim or defense.[269] A magistrate judge reviews facts and applies law in evaluating the potential intervenor's interest in *someone else's* claim or defense,[270] and no disposition is entered as to the potential intervenor's underlying substantive claim or defense.[271] Accordingly, the potential intervenor is generally not precluded from pursuing claims in a separate action if the motion is denied.[272] Magistrate judges ruling on a potential intervenor's motion to intervene exercises the broad control and discretion granted to them by the original, consenting parties to manage what happens to their case;[273] this power over

261. This Note does not dispute the constitutionality of the magistrate judge's role or of magistrate judges' authority over civil consent cases, which the Supreme Court noted has been upheld by all federal circuit courts of appeals. *See supra* note 118 and accompanying text.

262. *See supra* Part II.B.

263. *See supra* Part II.A.

264. If the late-coming party does not consent, jurisdiction over the case is transferred back from the magistrate judge to the district judge. *See supra* note 162 and accompanying text.

265. *See supra* Part II.A.

266. *See supra* notes 181–84 and accompanying text.

267. *See supra* Part III.B; *supra* note 162 and accompanying text; *see also infra* note 290.

268. *See supra* notes 243–50 and accompanying text; *see also supra* Parts I.C.2, III.A.

269. *See supra* Part I.C.2.

270. *See supra* notes 243–50 and accompanying text.

271. *See supra* notes 243–50 and accompanying text.

272. *See* 18A WRIGHT ET AL., *supra* note 45, § 4438.

273. *See supra* notes 236–38 and accompanying text.

the original parties' case should necessarily encompass the power to decide whether to open the case to a third party, who can always decline to consent, or keep it shut.[274]

Further, even if a magistrate judge decides a potential intervenor's motion without consent, the magistrate judge does so as an adjunct of the district courts, under the complete control of the Article III judiciary and never outside the overall and direct supervision of an Article III court. There is opportunity for direct appellate review,[275] and the magistrate judge's exercise of authority remains inferior to the authority of the Supreme Court, as well as intermediate appellate courts.[276] Magistrate judges are "connected to district judges to a degree far beyond any other non-Article III judge"[277]: the Judicial Conference of the United States authorizes new magistrate judge positions, district judges select magistrate judges and can remove them, and district judges control the cases that magistrate judges receive through referral processes.[278] Moreover, the Supreme Court looks to the risk to the "institutional integrity of the Judicial Branch" created by transfers of jurisdiction from Article III courts to non–Article III adjudicators.[279] But permitting a magistrate judge to rule on a motion to intervene without the potential intervenor's consent does not represent the kind of "emasculating" transfer of jurisdiction to a non–Article III adjudicator that the Supreme Court would deem intolerable[280] when the entire case is *already* within the magistrate judge's jurisdiction after the original parties' consent is given.

Moreover, while the magistrate judge would, in some sense, be declaring the potential intervenor's procedural relationship (or nonrelationship) to the litigation as an intervenor-party or as a nonparty outsider in ruling on the motion, this is not quite a declaratory judgment, which is a remedy with potential for future prophylactic effect.[281] Intervention remains a procedural

274. *See supra* notes 74, 120 and accompanying text.

275. *See supra* note 222 and accompanying text; *see also* Marino v. Ortiz, 484 U.S. 301, 304 (1988).

276. This is consistent with what some scholars term the "appellate review theory" of judicial power, in which "Congress should be viewed as possessing relatively broad power to provide for Article I adjudication in the first instance, so long as sufficiently searching appellate review remains available in Article III courts." Pfander, *supra* note 87, at 666. This also appears to be consistent with the "inferior tribunals" theory of adjudication outside Article III, which recognizes a distinction between Article III "constitutional courts" and non–Article I adjudicative bodies, which must remain hierarchically inferior to the Supreme Court. *See generally id.*

277. *See* Andrew Chesley, Note, *The Scope of United States Magistrate Judge Authority After* Stern v. Marshall, 116 COLUM. L. REV. 757, 792 (2016).

278. *See id.* at 793; *see also supra* Part I.A.

279. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)) (finding no impermissible threat to the "institutional integrity of the Judicial Branch" in permitting bankruptcy judges to decide state-law counterclaims, which would not be an "emasculating" transfer of jurisdiction to non–Article III adjudicators).

280. *Id.*

281. 26 C.J.S. *Declaratory Judgments* § 1 (2019) ("A 'declaratory judgment' declares the rights of the parties or expresses the opinion of the court on a question of law without ordering

mechanism permitting a litigant to join in the prosecution of or defense against a claim,[282] rather than a declaration of the rights, duties, and obligations as to the underlying substantive claims and defenses themselves.[283]

C. Additional Policy Considerations

In addition to the statutory and constitutional explanations for endorsing the Seventh and Ninth Circuits' approach to magistrate judge jurisdiction over potential intervenors' motions to intervene, practical implications and policy also bend in favor of permitting magistrate judges to rule on a motion to intervene in a civil consent case without the potential intervenor's consent. Ultimately, this part argues that the Seventh and Ninth Circuits' precedent is more equitable than the Second Circuit's precedent, avoids possible litigation gamesmanship, and is more efficient than the Second Circuit's precedent.

1. Avoiding Inequities and Disincentivizes to Consent to Magistrate Judge Jurisdiction

The circuits, in theory, differ with respect to the amount of appellate review available for a motion to intervene in civil consent cases, which not only creates inequity across circuits but also within circuits. Because a magistrate judge's ruling on a motion to intervene in civil consent cases in the Seventh and Ninth Circuits receives the same treatment as a district court judge's (i.e., it is not treated as a report and recommendation),[284] a magistrate judge's denial of a motion to intervene in a civil consent case is directly appealable to a circuit court.[285] This presents one opportunity to appeal a motion to intervene in a civil consent case, which is evaluated for clear error if a potential intervenor moves under FRCP 24(a), or for abuse of discretion if a potential intervenor moves under FRCP 24(b).[286] In the Second Circuit, without the potential intervenor's consent, a magistrate judge's ruling on a motion to intervene in a civil consent case is treated as a report and recommendation to the district judge.[287] Accordingly, it receives de novo review by the district court for any portion to which the potential intervenor objects.[288] In theory, a potential intervenor can further appeal the district

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anything to be done. . . . Stated another way, a declaratory judgment declares rights, status, and other legal relationships, whether or not further relief is or could be claimed.").

282. *See supra* note 249 and accompanying text; *supra* Part I.C.1.

283. *See* 26 C.J.S., *supra* note 281, *Declaratory Judgments* § 1; Part I.C.1.

284. *See* Robert Ito Farm, Inc. v. County of Maui, 842 F.3d 681, 688 (9th Cir. 2016); People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 171 F.3d 1083, 1089 (7th Cir. 1999); *supra* Parts II.B.1–2, III.A.

285. *See Robert Ito Farm*, 842 F.3d at 688; *supra* Parts II.B.1–2.

286. *See supra* notes 138–39, 235 and accompanying text; *see also supra* note 222 and accompanying text (noting the Ninth Circuit's treatment, in *Robert Ito Farm*, of MOM Hui's concern that it would not be able to appeal the denial of its motion to intervene if potential intervenors were held not to be parties within the meaning of § 636).

287. *See New York Chinese V*, 996 F.2d 21, 25 (2d Cir. 1993); *see also supra* Part II.A.

288. *See supra* Part I.B.2.

court's review of the report and recommendation to a circuit court, which would review the district court's findings for clear error or for abuse of discretion.[289] The Second Circuit's rule then presents two opportunities to challenge a ruling on a motion to intervene in a civil consent case. This rule creates inequities because the additional opportunity for review is only available to potential intervenors in cases where the original parties happened to consent to magistrate judge jurisdiction. If the same case proceeds before a district judge because the parties happened not to consent to magistrate judge jurisdiction, then the potential intervenor will not receive the additional opportunity for review.

Further, the Second Circuit rule may disincentivize consent to magistrate judge jurisdiction. In the Seventh and Ninth Circuits, a potential intervenor has the same number of opportunities to appeal a denial of a motion to intervene regardless of whether a magistrate judge or a district judge decides the motion. As a result, in the Second Circuit, potential intervenors who are concerned that their motion to intervene may be denied by a magistrate judge should, in theory, be incentivized not to consent to magistrate judge jurisdiction because they know ex ante that they may have two opportunities for review if their motion is denied, one of which would afford de novo review. Further, as discussed in the next section, litigants seeking to delay the proceedings may also be incentivized not to consent to magistrate judge jurisdiction because they know ex ante that they may frustrate the litigation by introducing two stages of review rather than one.[290]

2. Speed of Litigation and Litigation Gamesmanship

The Seventh and Ninth Circuits' rule is also preferable to the Second Circuit rule because it fosters the speedy disposition of litigation. While potential intervenors may believe that they will receive quicker review of the denial of their motion to intervene in a district court than in a circuit court,[291] adding layers of review to the litigation process may make it more inefficient overall.[292] Treating the magistrate's order as a report and recommendation "inserts extra procedural steps (and an additional judge) into the process of deciding a motion."[293] This is a "less efficient means of ruling on a motion than if the motion were decided by one judge with authority to make a final determination."[294] And, additional layers of review for a motion to intervene

289. *See supra* notes 138–39, 235 and accompanying text.

290. An additional area of analysis may include whether the precedents discussed in this Note incentivize magistrate judges to either terminate or protect their jurisdiction. That is, in the context where a magistrate judge's ruling on a motion to intervene is not treated as a report and recommendation to the district judge, are magistrate judges incentivized to decide motions to intervene in order to transfer cases off or keep cases on their dockets?

291. *See, e.g.*, Robert Ito Farm, Inc. v. County of Maui, No. 14-00511, 2015 WL 134070, at *4 (D. Haw. Jan. 9, 2015) ("Proposed Intervenors chose to seek review only under § 636(b). This was, perhaps, a strategic decision, possibly made with the thought that this might result in expedited action by this court . . . ."), *aff'd*, 842 F.3d 681 (9th Cir. 2016).

292. Lee & Davis, *supra* note 53, at 944.

293. *Id.*

294. *Id.*

may make litigation more costly; it increases the amount of legal briefing and advocacy and may inevitably lead to more billable hours charged. As such, any rule regarding who decides a motion to intervene in civil consent cases should not be set to make the overall litigation process slower and more costly by requiring a district judge to review a magistrate judge's ruling on a motion to intervene. This is especially so considering that the magistrate judge role was created, in part, to free district judges to focus on more substantive matters by removing matters better suited for decision by magistrate judges from their dockets.[295]

Treating a magistrate judge's ruling on a motion to intervene as a report and recommendation in civil consent cases also creates the opportunity for unnecessary litigation gamesmanship. The Second Circuit rule interjects a step that could slow the litigation down at critical junctures. In *New York Chinese V*, the proposed intervenors moved to insert themselves in the litigation to challenge a settlement[296]—if they had undone the settlement, the litigation could have continued. In *People Who Care*, the Seventh Circuit noted that requiring the three potential intervenors' motion to be decided by a district judge and allowing them to enter the case would only create "delay, confusion, duplication of effort, the possibility of inconsistent determinations, and a drain on judicial resources"[297] in a case that had been ongoing for nearly a decade.[298] The Seventh Circuit noted that "to rule on the motion [the district judge] would have to familiarize himself with a case pending before another adjudicator, and the case would be frozen, as a practical matter, while he was mulling over his ruling."[299] In *Robert Ito Farm*, the case was moving quickly and the potential intervenors sought to participate in a summary judgment motion pending before the court[300]—the court wished to avoid delay.[301] Further, the Supreme Court has indicated its wariness about litigation gamesmanship involving magistrate judge civil consent jurisdiction.[302] Thus, the rule regarding who may decide third-party motions to intervene in civil consent cases should be set to limit litigation gamesmanship where possible. As a result, the rule of the Seventh and Ninth Circuits, which limits the ability of litigants to slow down the litigation

295. *See supra* note 39 and accompanying text.

296. *New York Chinese VI*, 153 F.R.D. 69, 70 (S.D.N.Y.), *aff'd* 43 F.3d 1458 (2d Cir. 1994).

297. People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 171 F.3d 1083, 1089 (7th Cir. 1999). The Seventh Circuit noted that "[t]he only effect of allowing [the potential intervenors] into the case would be to slow it down, which is the opposite of what the board wants or should want." *Id.* at 1090.

298. *Id.* at 1085.

299. *Id.* at 1089.

300. Robert Ito Farm, Inc. v. County of Maui, No. 14-00511, 2015 WL 134070, at *1 (D. Haw. Jan. 9, 2015), *aff'd*, 842 F.3d 681 (9th Cir. 2016).

301. *Id.* at *4 ("[The court] does not want to see anyone (including, of course, the court itself) put to any waste of time or money, especially in a case that is already proceeding on a fast track.").

302. Roell v. Withrow, 538 U.S. 580, 590 (2003) ("Inferring consent . . . checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority.").

because it does not offer additional opportunities for objection and review, should be the rule of the federal courts.

CONCLUSION

The circuit split described in this Note should be resolved to permit magistrate judges to rule on third-party motions to intervene in civil consent cases without the consent of the potential intervenors. This procedure, permitted by the Seventh and Ninth Circuits, is within the broad statutory grant of magistrate judge authority over the original *parties*' case in a civil consent case. It honors the text and structure of § 636(c) by fostering consistency and ensuring that the rulings of magistrate judges in civil consent cases receive the same treatment as the rulings of district judges. It also does not implicate the constitutional right to adjudication before an Article III adjudicator, identified by the Second Circuit as a constitutional dimension to the issue. Ultimately, permitting magistrate judges to rule on potential intervenors' motions to intervene without their consent promotes fairness by ensuring that litigants receive the same opportunities to challenge the denial of a motion to intervene across the country, no matter whether a magistrate judge or a district judge decides their motion. The Seventh and Ninth Circuits' precedent also allows the courts to preserve resources against litigation gamesmanship, thus increasing judicial efficiency. Accordingly, the circuit split should be resolved in favor of the Seventh and Ninth Circuits' precedent.