

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

BETTE EAKIN, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No.: 1:22-cv-00340
)	
v.)	
)	Judge Susan P. Baxter
ADAMS COUNTY BOARD OF)	
ELECTIONS, <i>et al.</i> ,)	
)	
Defendants.)	

**REPLY IN SUPPORT OF INDIVIDUAL VOTERS’ AND REPUBLICAN
COMMITTEES’ MOTION TO INTERVENE**

No party opposes intervention by the Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania (collectively, the “Republican Committees”), *see* ECF No. 51 at 1, so the Court should grant the Republican Committees’ intervention for the reasons they have explained, *see* ECF No. 35.

Plaintiffs oppose the intervention of David Ball, James D. Bee, Debra Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, and S. Michael Streib (the “Individual Voters”) on three bases. None is persuasive.

First, Plaintiffs argue that the Individual Voters did not demonstrate a significant “interest relating to the property or transaction that is the subject of the action” or that “disposing of the action may as a practical matter impair or impede the” Individual Voters’ “ability to protect their interest.” ECF No. 51 at 1 (quoting Fed. R. Civ. P. 24(a)(2)). But as the Individual Voters already have explained, they have interests in ensuring that their votes are not “debase[d] or dilut[ed]” by the counting of invalid ballots and in maintaining certainty around the rules for casting absentee and mail-in ballot should they choose to do so. *See* ECF No. 35 at 13. Plaintiffs principally contend that the Individual Voters’ interest in protecting the weight of their votes is not cognizable

or merely a “generalized grievance.” ECF No. 51 at 3-5. But the cases on which they principally rely—including the Pennsylvania Supreme Court’s decision in *Ball*, for which no opinions have issued—involve standing under state law or Article III, not intervention under Federal Rule 24.¹ Moreover, the Supreme Court’s vacatur of the Third Circuit’s decision in *Bognet* (cited at ECF No. 51 at 4-5) “deprives . . . that court’s opinion of precedential effect.” *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979). These cases therefore do not rebut the Individual Voters’ showing that they have an interest in this action sufficient to warrant intervention under Rule 24. See ECF No. 35 at 13.

Plaintiffs’ alternative argument that the relief they seek would make it “*easier*” for the Individual Voters to have their ballots counted, ECF No. 51 at 5, is completely unresponsive to the Individual Voters’ interest in certainty regarding the date requirement for future elections and to their interest in knowing how their votes will be affected *now*. This is especially so given that Plaintiffs are seeking to change the election rules “after election day” in the 2022 general election.

¹ *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 356 (3d Cir. 2020) (“Voter Plaintiffs’ ‘dilution’ claim is a paradigmatic generalized grievance that cannot support *standing*.” (internal quotation marks omitted) (emphasis added)), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021)); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 381 (W.D. Pa. 2020) (concluding that “evidence of vote dilution” did “not rise to the level of a concrete harm” for “Article III standing”); *O’Rourke v. Dominion Voting Sys. Inc.*, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (the “veritable tsunami of decisions” found “no Article III standing”); *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020) (“Vote dilution . . . is a paradigmatic generalized grievance that cannot support standing.” (internal quotation marks omitted)); *Donald Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020) (“Plaintiffs’ allegations . . . fail to confer Article III standing.”); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020) (“Plaintiffs have not alleged a concrete harm that would allow the Court to find Article III Standing for their vote dilution claim.”); *Martel v. Condos*, 487 F. Supp. 3d 247, 251 (“Plaintiffs’ case begins and ends with the issue of standing.”); *Moore v. Circosta*, 494 F. Supp. 3d 289, 313 (M.D.N.C. 2020) (vote dilution theory does not provide a “concrete and particularized injury in fact necessary for Article III standing”); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020) (plaintiffs’ argument fails to meet “the first standing prong”).

Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 734–35 (2021) (Thomas, J., dissenting from the denial of certiorari). Plaintiffs’ suit risks “severely damag[ing] the electoral system on which our self[-]governance so heavily depends,” *id.* at 734–35, by engendering “the chaos and suspicions of impropriety” that follow when invalid ballots are counted “after election day and potentially flip the results of an election,” *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). Individual Voters have a clear interest in avoiding that result. *See* ECF No. 35 at 13.

Second, Plaintiffs contend that the Individual Voters’ interests are adequately represented by the existing Defendants. *See* ECF No. 51 at 6. Plaintiffs, however, make no attempt to square this contention with the fact that several of the Defendants took the opposing position on the date requirement’s validity just last month in *Ball*, which alone makes the “minimal” required showing that the Defendants’ representation “may be” inadequate. *See* ECF No. 35 at 15-18; *see also Pennsylvania v. President United States*, 888 F.3d 52, 60 (3d Cir. 2018). In fact, the Individual Voters have identified several “divergence[s] of interest between them and the Defendants that would support intervention” in this case. *Compare* ECF No. 51 at 6–7, *with* ECF No. 35 at 16–17 (listing divergences of interest).

Third, Plaintiffs argue that the Court should deny the Individual Voters permissive intervention on the view that “[a]dding more parties would inevitably prolong almost all aspects of the case.” ECF No. 51 at 8. But, of course, Plaintiffs will decide whether they choose to subject the Individual Voters to “discovery” and “motions practice.” *Id.* Moreover, Rule 24(b) asks about “*undue* delay or prejudice.” “‘Undue’ means not normal or appropriate.” *Appleton v. Comm’r of Internal Revenue*, 430 F. App’x 135, 138 (3d Cir. 2011). Though “any introduction of an intervener in a case will necessitate its being permitted to actively participate, which will inevitably

cause some ‘delay,’” that kind of delay is irrelevant under Rule 24(b). *Id.* The entire point of intervention, after all, is to add parties to a case. Regardless, the Individual Voters’ intervention will not cause any delay or prejudice, undue or otherwise. This case is still in its infancy, and the Individual Voters will “comply with the schedule that would be followed in their absence.” *Nielsen v. DeSantis*, No. 20-cv-236, 2020 WL 6589656, at *1 (N.D. Fla. May 28, 2020).

Finally, of course, the Individual Voters are “uniquely qualified” to intervene in this case because they have “mirror-image” interests of the Voter Plaintiffs. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1505640, at *5 (W.D. Wis. March 28, 2020); ECF No. 35 at 18–19. Plaintiffs, however, say nothing on this point. *See* ECF No. 51.

CONCLUSION

The Court should grant the Individual Voters’ and Republican Committees’ motion to intervene.

Dated: November 11, 2022

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

GALLAGHER GIANCOLA LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

Phone: (412) 717-1900

kag@glawfirm.com

rdg@glawfirm.com

John M. Gore (*Pro hac vice*)

E. Stewart Crosland

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001

Phone: (202) 879-3939

jmgore@jonesday.com

scrosland@jonesday.com

Thomas W. King, III
Thomas E. Breth
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
Phone: (724) 283.2200
tking@dmkcg.com
tbreth@dmkcg.com

*Counsel for Proposed Intervenor-
Defendants*