

IN THE SUPREME COURT OF OHIO

<b>STATE OF OHIO, ex rel.</b>	:	
<b>FRANK MORRIS, et al.,</b>	:	
	:	
<i>Relators,</i>	:	Case No. 2015-1277
	:	
- vs -	:	
	:	
<b>STARK COUNTY BOARD</b>	:	An Original Action in Prohibition
<b>OF ELECTIONS, et al.,</b>	:	
	:	
<i>Respondents.</i>	:	

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**MOTION TO INTERVENE AS RESPONDENT  
BY PUTATIVE CANDIDATE THOMAS M. BERNABEI**

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**MOTION TO INTERVENE AS RESPONDENT  
BY PUTATIVE CANDIDATE THOMAS M. BERNABEI**

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Thomas M. Bernabei (“Bernabei”) is a putative independent candidate for Mayor of Canton. Whether the Respondents in this action – the Stark County Board of Elections and Secretary of State John Husted – may properly place his name upon the November 2015 general election ballot is the sole question at issue in this case. Bernabei, pursuant to Ohio R. Civ. P. 24, respectfully seeks to intervene in this matter, either as of right, or in the alternative permissively.

– a –

Civil Rule 24 provides in part:

**(A) Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

OHIO R. CIV. P. 24(A)(West 2015).

The Rule should be liberally construed to permit intervention. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935. Bernabei meets all the requirements of Rule 24(A)(a)(2), and should accordingly be permitted to intervene as of right.

As an initial matter, this motion is timely. This action was initiated just last week, and because Bernabei was neither named, nor notified, nor provided with a courtesy copy of the pleadings, he only became aware of the filing three days ago. He has worked through counsel to prepare an Answer to the Complaint, which is unusually prolix and contains not only an extensive record but a raft of legal arguments as well. He has acted to intervene as soon as circumstances would reasonably allow.

Allowing intervention now will in no way prejudice the Relators, or the existing Respondents. Bernabei and his counsel are familiar with the record and the governing law, and prepared to abide by the briefing schedule imposed on expedited election cases. If permitted to intervene, Bernabei will file his responsive briefing at the same time as the Respondent Secretary, and will provide additional insight borne of a prior familiarity with the record.

In addition, Bernabei has interests that may well be impaired unless he is permitted to intervene. One Respondent, the Stark County Board of Elections, has already sought to play an inactive role in this case. While Bernabei does not doubt that the other Respondent, Secretary Husted, will endeavor to protect the institutional rights of his office, and the rights of the electors of the City of Canton, ably and with vigor, the Answer filed yesterday by the Secretary demonstrates that his office lacks an expansive command of the record. This is reflected in the many paragraphs of that Answer which deny allegations in the Complaint based on insufficient knowledge as to form a belief as to their veracity.

Bernabei, who has lived the facts of this case, whose good faith is a central issue in this case, and whose counsel is very familiar with the record, has an obvious First and Fourteenth Amendment interest in running for Mayor of Canton as an independent candidate.

That interest will be better defended if is permitted to intervene, and may not be as well defended if he is not. Interpreting the analogous federal civil rule, the United States Supreme Court has observed that “Rule [24] is satisfied if the applicant shows that the representation ‘may be’ inadequate,” so that the applicant’s burden on this matter should be “minimal.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1982). The Sixth Circuit has taken an equally permissive approach. *Stupak-Thrall v. Gliackman*, 225 F.3d 467, 482 (6<sup>th</sup> Cir. 2000); *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999).

Finally, while the other Respondents may have an interest in reaching the same outcome as Bernabei, they do not have the same interests. The institutional interests of a Board of Elections, or of the Secretary of State involve questions of procedural regularity, and official prerogative, that Bernabei does not share.

Bernabei, by contrast, has interests in political affiliation, the freedom to affect partisan disaffiliation, and in political expression that are implicated in this case, none of which the other Respondents share. They are fellow travelers, but their interest are distinct.

For each of these reasons, Bernabei meets the requirements of Civil Rule 24(A)(2) and should be permitted to intervene as of right.

– b –

Civil Rule 24(B) provides:

**(B) Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental

officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As outlined above, this motion is timely, and permitting intervention at this point will not prejudice the Relators or the existing Respondents. And while they may have different interests in a common outcome, it is obvious that Bernabei and the original Respondents will take positions that presents common questions of law and fact, including, without limitation: (a) what deference is due to the tie-breaking vote of the Secretary of State in a ballot-access case; (b) whether any quantum of pre-petition activity can forfend a successful attempt to disaffiliate from a political party prior to a general election, and if so, what quantum is required; (c) whether taking one residence in a jurisdiction, intending to move to another residence in the same jurisdiction prior to the general election, prohibits a person from running for jurisdiction-wide office based; (d) what are sufficient indicia of good faith partisan disaffiliation, and; (e) what is the quantum of evidence necessary to support a tie breaking vote by the Secretary of State. All these questions are raised, in the case of all parties, based upon the factual record involving Bernabei.

A plain text reading of Civil Rule 24(B) strongly militates in favor of intervention on this basis as well. It also bears mention that by Rule, the Secretary would be permitted to intervene in this mater if Bernabei and the Stark County Board of Elections were the only Respondents. This suggests that a commonality of interests sufficient to merit permissive intervention in cases where citizens and constitutional office holders seek to defend the same decision presumptively exists.

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Wherefore Thomas M. Bernabei respectfully moves for an Order allowing his to intervene in this matter, and submits herewith a proposed Answer to be filed, instanter, should this motion be granted.

Respectfully submitted,

/s/ Raymond V. Vasvari, Jr.

**RAYMOND V. VASVARI, JR. (0055538)\***

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## CERTIFICATE OF SERVICE

True and accurate copies of the foregoing Motion to Intervene were served today, August 13, 2015, via email attachment as PDF documents upon the following at the email addresses indicated:

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Respectfully submitted,

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