

## Anonymous Campaign Literature and Keeping a Candidate Off the Ballot

*Davis v. Johnson (2:16-cv-13454) and Simpson v. Garrett  
(2:16-cv-13784) (Arthur J. Tarnow, E.D. Mich.)*

A voter filed a federal complaint in the Eastern District of Michigan on October 3, 2016, seeking a declaration of unconstitutionality for a Michigan statute that would forbid the plaintiff from “print[ing] and distribut[ing] anonymous campaign literature advocating the defeat of certain candidates who were running for the Detroit Community School District Board of Education.”<sup>1</sup> Named as defendants were state and county election officials and a circuit judge for Wayne County.<sup>2</sup> With his counseled complaint, the voter filed an application to proceed in forma pauperis<sup>3</sup> and a motion for a temporary restraining order or a preliminary injunction.<sup>4</sup> Judge Arthur J. Tarnow allowed the voter to proceed without fees<sup>5</sup> and set a telephonic conference for October 6.<sup>6</sup>

The federal case followed unsuccessful filings by the voter in state court. Following the voter’s challenge to the candidacy of Penelope Bailer, the county election commission eliminated Bailer from the November 8 ballot for Detroit’s board of education because her affidavit of identity did not include her precinct number.<sup>7</sup> On September 16, the Wayne County circuit judge who would be named as a defendant in the federal action issued a writ of mandamus putting Bailer back on the ballot.<sup>8</sup> On September 21, Michigan’s court of appeals dismissed an appeal by the voter and his sister, a write-in candidate, because they were not parties to the mandamus action, noting that their interests had been “more than adequately represented.”<sup>9</sup> Michigan’s supreme court denied review on September 22.<sup>10</sup> The voter and the write-in candidate filed

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1. Complaint at 6, *Davis v. Johnson*, No. 2:16-cv-13454 (E.D. Mich. Oct. 3, 2016), D.E. 1 [hereinafter *Davis* Complaint]; see Mich. Comp. Laws § 169.247(1).

2. *Davis* Complaint, *supra* note 1.

3. IFP Application, *Davis*, No. 2:16-cv-13454 (E.D. Mich. Oct. 3, 2016), D.E. 2.

4. Motion, *id.* (Oct. 3, 2016), D.E. 3.

5. IFP Order, *id.* (Oct. 5, 2016), D.E. 4.

6. Notice, *id.* (Oct. 6, 2016), D.E. 8; see Docket Sheet, *id.* (Oct. 3, 2016) (minutes) [hereinafter E.D. Mich. *Davis* Docket Sheet].

7. See Shawn D. Lewis, *2 School Board Candidates Off Ballot*, Detroit News, Sept. 15, 2016, at A5.

8. Writ, *Bailer v. Winfrey*, No. 16-011797-AW (Mich. Cir. Ct. Wayne Cty. Sept. 16, 2016), filed as Ex. F, *Davis* Complaint, *supra* note 1; see Docket Sheet, *id.* (Sept. 14, 2016), cmspublic.3rdcc.org/.

9. Opinion, *Bailer v. Detroit City Clerk*, No. 334823 (Mich. Ct. App. Sept. 21, 2016), 2016 WL 5328522.

10. *Bailer v. Detroit City Clerk*, 884 N.W.2d 788 (Mich. 2016).

their own action in Wayne County's circuit court, which the circuit judge dismissed on September 28.<sup>11</sup>

The voter's federal complaint sought relief from his lack of success in state court and from county election officials' "deliberately and intentionally not appealing the clearly erroneous [mandamus] Order."<sup>12</sup> An October 10 amended complaint added an incumbent candidate as a plaintiff.<sup>13</sup>

Following a second telephonic conference on October 14,<sup>14</sup> Judge Tarnow issued an October 19 opinion dismissing the county circuit judge as a defendant because of judicial immunity and the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state court proceedings.<sup>15</sup> Judge Tarnow also dismissed the incumbent as a plaintiff, because she was pursuing different claims for relief.<sup>16</sup> Because the voter had not pursued administrative procedures for his campaign activities, Judge Tarnow otherwise decided to hold federal court proceedings in abeyance.<sup>17</sup>

The incumbent candidate filed her separate federal complaint on October 24, challenging the state court order putting Bailer on the November ballot.<sup>18</sup> With her complaint, the incumbent filed a motion for a temporary restraining order or a preliminary injunction.<sup>19</sup> Judge Tarnow set a telephonic conference for October 27.<sup>20</sup> At the conference, Judge Tarnow ordered the defendants to respond to the incumbent's motion by November 7.<sup>21</sup>

On October 31, the voter asked Judge Tarnow to reopen his case, because he had received preliminary indications from state election officials that his anonymous campaigning would not be permitted.<sup>22</sup> On the following day, Judge Tarnow denied the motion, because state administrative review was not yet complete.<sup>23</sup>

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11. Order, *Davis v. Garrett*, No. 16-012226-AW (Mich. Cir. Ct. Wayne Cty. Sept. 28, 2016), filed as Ex. H, *Davis* Complaint, *supra* note 1; see Docket Sheet, *id.* (Sept. 23, 2016), cmspublic.3rdcc.org/.

12. *Davis* Complaint, *supra* note 1, at 2–3.

13. Amended Complaint, *Davis v. Johnson*, No. 2:16-cv-13454 (E.D. Mich. Oct. 10, 2016), D.E. 10; see Amended Motion, *id.* (Oct. 11, 2016), D.E. 12 (voter's motion for immediate relief); Motion, *id.* (Oct. 11, 2016), D.E. 11 (incumbent's motion for immediate relief).

14. E.D. Mich. *Davis* Docket Sheet, *supra* note 6 (minutes).

15. Amended Opinion at 3–6, *Davis*, No. 2:16-cv-13454 (E.D. Mich. Oct. 20, 2016), D.E. 25 [hereinafter E.D. Mich. *Davis* Abeyance Opinion], *amended* Opinion, *id.* (Oct. 19, 2016), D.E. 22; see D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); see also Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

16. E.D. Mich. *Davis* Abeyance Opinion, *supra* note 15, at 2–3, 6.

17. *Id.* at 3, 6.

18. Complaint, *Simpson v. Garrett*, No. 2:16-cv-13784 (E.D. Mich. Oct. 24, 2016), D.E. 1.

19. Motion, *id.* (Oct. 24, 2016), D.E. 2.

20. Notice, *id.* (Oct. 27, 2016), D.E. 6.

21. Docket Sheet, *id.* (Oct. 24, 2016) (minutes).

22. Motion, *Davis v. Johnson*, No. 2:16-cv-13454 (E.D. Mich. Oct. 31, 2016), D.E. 28.

23. Opinion, *id.* (Nov. 1, 2016), D.E. 29.

On October 29, three days after the voter's appeal from the dismissal of the state judge as a federal defendant was docketed, the voter filed a motion to expedite the appeal so that it would be decided by election day.<sup>24</sup> The motion also briefed the merits of the appeal.<sup>25</sup> On November 4, two circuit judges concluded that "this entire matter should be in state court" and ordered the district court case dismissed without argument or further briefing.<sup>26</sup> The third judge would have denied the motion to expedite the appeal and left determination of the courts' jurisdiction for decision after briefing on the issue.<sup>27</sup> The majority characterized state and federal court filings by the voter and his attorney as "repetitive, vexatious, and frivolous," although the majority also characterized the observation as "not pertinent to the adjudication of this appeal."<sup>28</sup> The dissenting judge observed that even a vexatious litigant is "entitled to notice and an opportunity to be heard."<sup>29</sup> Judge Tarnow dismissed the voter's case on November 15.<sup>30</sup>

On November 8, neither Bailer nor the incumbent candidate was elected to the school board.<sup>31</sup> Judge Tarnow dismissed the incumbent candidate's federal complaint on December 28.<sup>32</sup>

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24. Motion, *Davis v. Johnson*, No. 16-2499 (6th Cir. Oct. 29, 2016), D.E. 8 [hereinafter 6th Cir. Motion]; see Docket Sheet, *id.* (Oct. 26, 2016).

25. 6th Cir. Motion, *supra* note 24, at 3–7.

26. *Davis v. Johnson*, 664 F. App'x 446, 450–51 (6th Cir. 2016) (opinion by Circuit Judge Eric L. Clay, joined by Circuit Judge Julia Smith Gibbons).

27. *Id.* at 451–52 (concurring and dissenting opinion by Circuit Judge Helene N. White).

28. *Id.* at 450.

29. *Id.* at 452.

30. Order, *Davis v. Johnson*, No. 2:16-cv-13454 (E.D. Mich. Nov. 15, 2016), D.E. 31.

31. See [detroitk12.org/board/members/](http://detroitk12.org/board/members/); Shawn D. Lewis, *Detroit Picks 7 to Lead New District*, *Detroit News*, Nov. 10, 2016, at A6.

32. Opinion, *Simpson v. Garrett*, No. 2:16-cv-13784 (E.D. Mich. Dec. 28, 2016), D.E. 12, 2016 WL 7453763.