

## Unsuccessful Litigation by a Write-In Candidate to Have the Incumbent's Candidacy Declared Illegitimate

*Anders v. Benson* (Matthew F. Leitman, 4:20-cv-11991),  
*Davis v. Wayne County Board of Canvassers*  
(Nancy G. Edmunds, 2:20-cv-12127), and *Davis v. Benson*  
(Robert H. Cleland, 3:20-cv-12130) (E.D. Mich.)

Three district judges managed frequent filings by a write-in candidate in a primary election and a voter seeking to prove illegitimate, among other things, the incumbent's inclusion on another party's ballot. The plaintiffs were unsuccessful in obtaining relief.

*Subject:* Campaign activities. *Topics:* Campaign materials; getting on the ballot; laches; matters for state courts; write-in candidate; primary election; recusal; case assignment; absentee ballots; pro se party.

Litigation before three district judges and a court of appeals arose from an allegation by a county prosecuting attorney write-in candidate in a primary election that the incumbent—a candidate in another party's primary election—should not have been on the ballot. The write-in candidate was unsuccessful in obtaining relief.

### *Judge Leitman's Case*

On Sunday, July 26, 2020, a write-in Republican candidate for Wayne County's prosecuting attorney in Michigan's August 4 primary election filed a federal complaint in the Eastern District of Michigan against state and county election officials and the incumbent, alleging that it was not lawful to include the incumbent on the Democratic Party's primary election ballot.<sup>1</sup>

On the next day, the plaintiff filed a motion for a temporary restraining order or a preliminary injunction enabling the plaintiff to circulate anonymous campaign materials against the incumbent.<sup>2</sup> Judge Sean F. Cox recused himself, and the court assigned the case to Judge Matthew F. Leitman.<sup>3</sup> Judge Leitman ordered service of the complaint and the motion on defendants by the end of the following day and set the case for an afternoon attorneys-only status conference by video on the case's fourth day.<sup>4</sup>

Judge Leitman also ordered the plaintiff to show cause why the court should not decline jurisdiction over the complaint's state claims.<sup>5</sup> At the con-

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1. Complaint, *Anders v. Benson*, No. 4:20-cv-11991 (E.D. Mich. July 26, 2020), D.E. 1.

2. Motion, *id.* (July 27, 2020), D.E. 5.

3. Notice, *id.* (July 27, 2020), D.E. 4.

Tim Reagan interviewed Judge Leitman for this report by telephone on September 18, 2020.

4. Order, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 27, 2020), D.E. 6; Notice, *id.* (July 27, 2020), D.E. 7.

5. Order, *id.* (July 28, 2020), D.E. 12.

ference, Judge Leitman made clear that he was not inclined to accept supplemental jurisdiction over the state claims, and he wanted to give the plaintiff ample time to bring them in state court if the plaintiff regarded them as time-sensitive.<sup>6</sup>

Judge Leitman came to strongly prefer conferences by video rather than by audio alone, because video afforded a greater opportunity for meaningful connections.<sup>7</sup> At the beginning of the conference, Judge Leitman asked one of the attorneys to switch from still photo to live video.<sup>8</sup>

Before the videoconference, the plaintiff moved for partial summary judgment<sup>9</sup> and expedited briefing.<sup>10</sup> Following the conference, Judge Leitman set the case for an August 11 hearing on the injunction motion.<sup>11</sup>

The Court concludes that this schedule fairly balances the need to adjudicate [the plaintiff's] motion on an accelerated basis, while also providing sufficient time for [the defendants] to respond to the motion. In addition, given the numerous other cases on the Court's docket, including other emergency matters, the schedule will provide the Court a full opportunity to review and consider the parties' submissions in advance of the hearing.<sup>12</sup>

Although the plaintiff wanted a ruling before the primary election, Judge Leitman pointed out, "No chance. . . . [T]his is the classic self-created emergency."<sup>13</sup> Contact information for the hearing by videoconference was posted on the public record.<sup>14</sup>

Before the hearing, the plaintiff filed an amended complaint, adding three voters as plaintiffs and adding Detroit election officials as defendants.<sup>15</sup> As the amended complaint excluded the claims on which the plaintiff had sought summary judgment, Judge Leitman terminated that motion as moot and again ordered a showing of cause why the court should take jurisdiction over state claims.<sup>16</sup> Judge Leitman also ordered a showing of why the new plaintiffs and defendants were properly joined to the original complaint.<sup>17</sup> The new plaintiffs promptly and voluntarily dismissed their claims.<sup>18</sup>

At the hearing, Judge Leitman admonished the plaintiff against excessive last-minute filings characterized as emergencies:

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6. Transcript at 9–10, *id.* (July 29, 2020, filed July 31, 2020), D.E. 30 [July 29, 2020, *Anders* Transcript].

7. Interview with Hon. Matthew F. Leitman, Sept. 18, 2020.

8. July 29, 2020, *Anders* Transcript, *supra* note 6, at 6–7.

9. Motion, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 28, 2020), D.E. 11.

10. Motion, *id.* (July 28, 2020), D.E. 9.

11. Order, *id.* (July 29, 2020), D.E. 27.

12. *Id.* at 2.

13. July 29, 2020, *Anders* Transcript, *supra* note 6, at 8 (agreeing to allow the defendants a week to respond).

14. Notice, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 29, 2020), D.E. 28.

15. Amended Complaint, *id.* (Aug. 6, 2020), D.E. 34.

16. Order, *id.* (Aug. 7, 2020), D.E. 36.

17. Order, *id.* (Aug. 7, 2020), D.E. 38.

18. Notices, *id.* (Aug. 7, 2020), D.E. 39 to 43.

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Every . . . filing in this case by you with only a couple of exceptions is designated an emergency and is dropped on me mere moments before I have to deal with them. I've got to tell you, I cannot do business like that. No judge on this Court can. I worked my rear end off to get prepared for this hearing and then I think at 16 minutes before the hearing, I get a new brief. None of the defendants have had an opportunity to respond to it. It's impossible to litigate a case in that fashion.<sup>19</sup>

*Judge Edmunds's Case*

On the day that the three voters voluntarily dismissed their claims in Judge Leitman's case—three days after the August 4 primary election—the voters filed a separate federal complaint in the Eastern District against the Wayne County Board of Canvassers, alleging that the plaintiffs' votes for the incumbent county prosecutor's challenger in the Democratic primary election would be unconstitutionally diluted by the board's counting votes for the incumbent, whom the plaintiffs alleged was improperly on the ballot.<sup>20</sup> Five days later, the plaintiffs filed an emergency motion for a temporary restraining order or a preliminary injunction.<sup>21</sup>

*Judge Cleland's Case*

One of the voters in Judge Edmund's case filed a separate federal complaint in the Eastern District on August 9, alleging that he voted against the incumbent in the Democratic primary election, did not believe that the incumbent was validly on the ballot, supported the original plaintiff in Judge Leitman's case in the general election, and wished to circulate anonymous political literature critical of the incumbent.<sup>22</sup> The court assigned the new case to Judge Mark A. Goldsmith.<sup>23</sup>

After a conversation with Judge Goldsmith, Judge Leitman determined that one count in Judge Goldsmith's case was related to Judge Leitman's case and one count was not.<sup>24</sup> At his August 11 hearing, Judge Leitman instructed the plaintiff's attorney to amend the complaint before Judge Leitman to add the voter's claim and not the other claim to the complaint before Judge Leitman.<sup>25</sup> Judge Leitman received an amended complaint on August 12.<sup>26</sup> Judge Goldsmith received on August 17 an amended complaint omitting the transferred claim and adding a couple of others.<sup>27</sup> One of the added claims chal-

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19. Transcript, at 9 *id.* (Aug. 11, 2020, filed Aug. 17, 2020), D.E. 55 [hereinafter Aug. 11, 2020, *Anders* Transcript].

20. Complaint, *Davis v. Wayne Cty. Bd. of Canvassers*, No. 2:20-cv-12127 (E.D. Mich. Aug. 7, 2020), D.E. 1.

21. Motion, *id.* (Aug. 12, 2020), D.E. 6.

22. Complaint, *Davis v. Benson*, No. 3:20-cv-12130 (E.D. Mich. Aug. 9, 2020), D.E. 1.

23. See Reassignment Order, *id.* (Aug. 17, 2020), D.E. 38 [hereinafter *Davis v. Benson* Reassignment Order].

24. Aug. 11, 2020, *Anders* Transcript, *supra* note 19, at 7.

25. *Id.* at 7–8.

26. Second Amended Complaint, *Anders v. Benson*, No. 4:20-cv-11991 (E.D. Mich. Aug. 12, 2020), D.E. 48.

27. Amended Complaint, *Davis*, No. 3:20-cv-12130 (E.D. Mich. Aug. 17, 2020), D.E. 9.

lenged the mailing of unsolicited absentee voter applications,<sup>28</sup> so the court assigned the case to Judge Robert H. Cleland as similar to an August 9 case before him.<sup>29</sup> On August 20, Judge Cleland ordered the plaintiffs to show cause by August 27 why the case transferred from Judge Goldsmith should not be stayed pending resolution of related actions in state court.<sup>30</sup>

#### *Judge Edmunds's Case Again*

On August 14, in the case by three voters, Judge Denise Page Hood recused herself, and the court reassigned the case to Judge Nancy G. Edmunds.<sup>31</sup> Judge Hood promptly let Judge Edmunds know of the reassignment.<sup>32</sup>

The lead plaintiff—the plaintiff in Judge Cleland's case—was known to the court as a frequent filer, and a few of his cases proved to have merit.<sup>33</sup>

Judge Edmunds denied the plaintiffs a temporary restraining order on August 17 and set the case for a September 16 hearing.<sup>34</sup> In addition to her finding no clear violation of the plaintiffs' legal rights, Judge Edmunds noted that their theory of the incumbent's improper inclusion on the ballot was based on facts they had known for many months.<sup>35</sup>

An amended complaint filed on September 4 named as plaintiffs the voter plaintiff in Judge Cleland's case and the candidate plaintiff in Judge Leitman's case.<sup>36</sup> Four days later, the candidate filed a replacement motion for a temporary restraining order or a preliminary injunction<sup>37</sup> and a motion to expedite resolution of the injunction motion by the following day, "which is the date in which the Wayne County Election Commission is scheduled to convene and meet to approve the printing of the ballots for the November 3, 2020 general election."<sup>38</sup> On the day that the motions were filed, Judge Edmunds denied the motion to expedite consideration of the injunction.<sup>39</sup>

Three days later, the candidate filed with the court of appeals a petition for a writ of mandamus requiring Judge Edmunds to expedite consideration of his injunction motion.<sup>40</sup>

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28. *Id.* at 19–21.

29. *Davis v. Benson* Reassignment Order, *supra* note 23; see Docket Sheet, *Reed-Pratt v. Winfred*, No. 3:20-v-12129 (E.D. Mich. Aug. 9, 2020).

30. Order, *Davis*, No. 3:20-cv-12130 (E.D. Mich. Aug. 20, 2020), D.E. 11.

31. Order, *Davis*, No. 2:20-cv-12127 (E.D. Mich. Aug. 14, 2020), D.E. 11.

Tim Reagan interviewed Judge Edmunds for this report by telephone on September 24, 2020.

32. Interview with Hon. Nancy G. Edmunds, Sept. 24, 2020.

33. *Id.*

34. Order, *Davis v. Wayne Cty. Bd. of Canvassers*, No. 2:20-cv-12127 (E.D. Mich. Aug. 17, 2020), D.E. 12.

35. *Id.*

36. Amended Complaint, *id.* (Sept. 4, 2020), D.E. 21.

37. Motion, *id.* (Sept. 8, 2020), D.E. 25; see Notice, *id.* (Sept. 3), D.E. 17 (withdrawing the previous injunction motion).

38. Motion at 2, *id.* (Sept. 8, 2020), D.E. 23.

39. Docket Sheet, *id.* (Aug. 7, 2020) (docket text order).

40. Mandamus Petition, *In re Anders*, No. 20-1880 (6th Cir. Sept. 11, 2020), D.E. 1.

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On September 15, Judge Edmunds responded to the petition, noting, among other things, “that Plaintiffs have not demonstrated respect for this Court’s time or for the time of other parties in this case.”<sup>41</sup> It was a very rare event for Judge Edmunds to brief the court of appeals about one of her cases, but the circumstances of this writ petition were unusual.<sup>42</sup> Judge Edmunds wanted to make sure the court of appeals was aware of the details of the case’s procedural history.<sup>43</sup>

The court of appeals denied the writ on the following day, noting that the petitioner “is nowhere near qualifying for nomination with only eleven votes.”<sup>44</sup>

On September 21, Judge Edmunds denied a motion to enjoin the destruction of ballots, finding that the defendant was not in possession of the ballots, which the law required the City of Dearborn to keep for twenty-two months.<sup>45</sup> Judge Edmund granted a motion by the county prosecutor to intervene as a defendant on October 28.<sup>46</sup>

*Judge Cleland’s Case Again*

On September 14, Judge Cleland declined jurisdiction over the voter plaintiff’s state law claims and dismissed the claim for unsolicited absentee ballot applications as redundant with pending state court actions.<sup>47</sup>

The defendant county clerk moved on October 6 to dismiss the remaining claim, a claim that the defendant’s office was not kept open all day on the day of the primary election, a claim that the defendant argued was not true.<sup>48</sup> The plaintiff’s response was due three weeks later, but it was filed a week late—the day of the general election—with an emergency motion to excuse the delay.<sup>49</sup>

“Plaintiff and his attorneys’ explanation for their failure to comply with the court’s deadlines is their involvement in other cases. The court is not persuaded that this amounts to excusable neglect.”<sup>50</sup> Even on the merits, “Plaintiff has no legally cognizable interest under the Due Process Clause in having the Clerk’s Office open on election day.”<sup>51</sup>

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41. Edmunds Response at 6, *id.* (Sept. 15, 2020), D.E. 5.

42. Interview with Hon. Nancy G. Edmunds, Sept. 24, 2020.

43. *Id.*

44. Opinion at 3, *In re Anders*, No. 20-1880 (6th Cir. Sept. 16, 2020), D.E. 7.

45. Order, *Davis v. Wayne Cty. Bd. of Canvassers*, No. 2:20-cv-12127 (E.D. Mich. Sept. 21, 2020), D.E. 46.

46. Opinion, *id.* (Oct. 28, 2020), D.E. 66; *see* Amended Intervention Motion, *id.* (Sept. 18, 2020), D.E. 45; Intervention Motion, *id.* (Aug. 21, 2020), D.E. 15.

47. Opinion, *Davis v. Benson*, No. 3:20-cv-12130 (E.D. Mich. Sept. 14, 2020), D.E. 19.

48. Dismissal Motion, *id.* (Oct. 6, 2020), D.E. 21.

49. Dismissal Response, *id.* (Nov. 3, 2020), D.E. 23; Extension Motion, *id.* (Nov. 3, 2020), D.E. 24.

50. *Davis v. Garrett*, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_, 2020 WL 6562091 (E.D. Mich. 2020) (p.2 of opinion filed at *Davis v. Benson*, No. 3:20-cv-12130, D.E. 26).

51. *Id.* at \_\_\_ (p.3 of filed opinion).

*Judge Leitman's Case Again*

Following the August 11 hearing by videoconference,<sup>52</sup> Judge Leitman ruled on August 13 that the candidate was not entitled to violate campaign disclosure requirements and criticize the incumbent anonymously.<sup>53</sup> On August 17, Judge Leitman dismissed the amended complaint's state-law claim.<sup>54</sup>

On September 17, Judge Leitman granted the voter's request to file electronically in the case as a pro se litigant, terminating representation by counsel.<sup>55</sup> The original candidate plaintiff voluntarily dismissed his claims on September 27.<sup>56</sup>

At an October 1 video status conference, Judge Leitman again scolded the plaintiff attorney's filing behavior:

I'm having déjà vu to the last case you and I had together where you filed a complaint, we had a fire drill by a bunch of emergency filings. You then filed a notice of voluntary dismissal in which you were very careful to inform me and everybody else that that divested us of jurisdiction to proceed with the merits. I then reminded you that it didn't divest me of the authority to sanction you. And then I did sanction you, the only time I've imposed sanctions in six and a half years on this job.

I've got to say, this pattern of conduct that we have here raises similar red flags. You came in here with guns blazing, sought a TRO, filed a bunch of amended stuff, a bunch of emergency stuff, and then wa-lah, we've got a voluntary dismissal.

...

I am not comfortable with the way generally that these cases proceed and I want to make that crystal clear. So keep that in mind. You do whatever you're going to do but I want to—I want you to have a heads up before you do whatever you do that I have concerns. And if you go down that route and if I conclude that this is just not an appropriate way to use the judicial system, it will be the second time in my career that I impose sanctions.<sup>57</sup>

The pro se plaintiff filed a third amended complaint on November 2.<sup>58</sup>

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52. Docket Sheet, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 26, 2020) (minutes).

53. Opinion, *id.* (Aug. 13, 2020), D.E. 51, 2020 WL 4700793.

54. Opinion, *id.* (Aug. 17, 2020), D.E. 54, 2020 WL 4799254.

55. Order, *id.* (Sept. 17, 2020), D.E. 64; *see* Motion, *id.* (Sept. 8, 2020), D.E. 57.

56. Notice, *id.* (Sept. 27, 2020), D.E. 67.

57. Transcript at 6–8, *id.* (Oct. 1, 2020, filed Oct. 6, 2020), D.E. 75.

58. Amended Complaint, *id.* (Nov. 9, 2020), D.E. 84; *see* Opinion, *id.* (Nov. 2, 2020), D.E. 83 (granting with limits permission to file a third amended complaint).