

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)
and Davis v. Wayne County Board of Canvassers
(Nancy G. Edmunds, 2:20-cv-12127) (E.D. Mich.)*

Two district judges managed frequent filings by a write-in candidate in a primary election seeking to prove illegitimate the incumbent's inclusion on another party's ballot. The candidate was 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; pro se party.

Litigation before two 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 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 other Democratic Party's primary election ballot.¹

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.² Judge Sean F. Cox recused himself, and the court assigned the case to Judge Matthew F. Leitman.³ 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.⁴ Judge Leitman came to strongly prefer conferences by video rather than by audio alone, because video afforded a greater opportunity for meaningful connections.⁵

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

Judge Leitman also ordered the plaintiff to show cause why the court should not decline jurisdiction over the complaint's state claims.⁶

Before the videoconference, the plaintiff moved for partial summary judgment⁷ and expedited briefing.⁸ Following the conference, Judge Leitman set the case for an August 11 hearing.⁹

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.¹⁰

Contact information for the hearing by videoconference was posted on the public record.¹¹

Before the hearing, the plaintiff filed an amended complaint, adding three voters as plaintiffs and adding Detroit election officials as defendants.¹² 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.¹³ Judge Leitman also ordered a showing of why the new plaintiffs and defendants were properly joined to the original complaint.¹⁴ The new plaintiffs promptly dismissed their claims voluntarily.¹⁵

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.¹⁶ Five days later, the plaintiffs filed an emergency motion for a temporary restraining order or a preliminary injunction.¹⁷

6. Order, *Anders*, No. 4:20-cv-11991 (E.D. Mich. July 28, 2020), D.E. 12.

7. Motion, *id.* (July 28, 2020), D.E. 11.

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

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

10. *Id.* at 2.

11. Notice, *id.* (July 29, 2020), D.E. 28.

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

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

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

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

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

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

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Judge Denise Page Hood recused herself on August 14, and the court re-assigned the case to Judge Nancy G. Edmunds.¹⁸ Right away, Judge Hood let Judge Edmunds know that she had drawn the case.¹⁹

The lead plaintiff was known to the court as a frequent filer, and a few of his cases proved to have merit.²⁰

Judge Edmunds denied the plaintiffs a temporary restraining order on August 17 and set the case for a September 16 hearing.²¹ 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.²²

An amended complaint filed on September 4 named as plaintiffs one of the original plaintiffs and the candidate plaintiff in Judge Leitman's case.²³ Four days later, the candidate filed a replacement motion for a temporary restraining order or a preliminary injunction²⁴ 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."²⁵ On the day that the motions were filed, Judge Edmunds denied the motion to expedite consideration of the injunction.²⁶

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.²⁷

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."²⁸ 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.²⁹ Judge Edmunds wanted to make sure the court of appeals was aware of the details of the case's procedural history.³⁰

18. Order, *id.* (Aug. 14, 2020), D.E. 11.

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

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

20. *Id.*

21. Order, *Davis*, No. 2:20-cv-12127 (E.D. Mich. Aug. 17, 2020), D.E. 12.

22. *Id.*

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

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

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

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

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

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

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

30. *Id.*

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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.”³¹

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.³²

Pending is a motion by the county prosecutor to intervene as a defendant.³³

Judge Leitman's Case Again

Meanwhile, the two plaintiffs in Judge Edmunds's case—the write-in candidate and a voter—filed by stipulation a second amended complaint in Judge Leitman's case on August 12.³⁴

Following the August 11 hearing by videoconference,³⁵ Judge Leitman ruled on August 13 that the candidate was not entitled to violate campaign disclosure requirements and criticize the incumbent anonymously.³⁶ On August 17, Judge Leitman dismissed the amended complaint's state-law claim.³⁷

In September, Judge Leitman granted the voter's request to file electronically in the case as a pro se litigant, terminating representation by counsel.³⁸

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

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

33. Amended Intervention Motion, *id.* (Sept. 18, 2020), D.E. 45; Intervention Motion, *id.* (Aug. 21, 2020), D.E. 15.

34. Second Amended Complaint, *Anders v. Benson*, No. 4:20-cv-11991 (E.D. Mich. Aug. 12, 2020), D.E. 48; *see* Stipulation, *id.* (Aug. 11, 2020), D.E. 47.

35. Docket Sheet, *id.* (July 26, 2020) (minutes).

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

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

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