New Mexico

Gore beat Bush in 2000 by only 366 votes in New Mexico. The *Santa Fe New Mexican* carried a story as early as July 2004 that said: "Toby Moffett, a former Connecticut congressman and former Nader ally, told New Mexico delegates to the Democratic National Convention on Wednesday that the state party should appoint someone specifically to spearhead efforts to keep Nader off the ballot." (Steve Terrell, "Fears of Nader Keep Dems on Offensive," *Santa Fe New Mexican*, July 29, 2004, A4.) New Mexico's petition due date was relatively late in the process, September 7, 2004. In New Mexico the write-in deadline, if you fail to qualify, was bizarrely earlier than the turn-in deadline in New Mexico. (N.M. STAT § 1-12-19.1 (A) [requiring a declaration of intent to be a write-in 63 days prior to election, in this case, Aug. 31, 2004].) By this point we had to stagger the turn-ins in different states, just so that we could stagger the lawyers and the legal appearances. (*See* N.M. STAT § 1-8-52(A) [requiring signatures 56 days prior to the election].) We turned in 31,000, more than twice the 14,257 required, or 3 percent of the vote for governor in the last election. (N.M. STAT § 1-8-51(B).) New Mexico moved up its signature turn-in deadline for independent candidates in 2008 to June 4.

Within two days of turn-in, on September 9, the secretary of state, a Democrat, Rebecca Vigil-Giron, certified Nader and Camejo for the New Mexico ballot. The Democrats were prepared to challenge this with a lawsuit. The Democrats had a motion prepared by Eric Sedillo Jeffries of the Jeffries,

Rugge & Rosales, P.C.,firm and Andrew G. Schultz of the Rodey, Dickason, Sloan, Akin & Robb, P.A., firm, both in Albuquerque. They didn't file their suit and instead wrote a letter to the secretary of state, asking her not to print the New Mexico ballots over the weekend and to instead wait until they filed their complaint on September 13. Jeffries told Secretary of State Vigil-Giron that, under the statute NMSA 1978 Section 1-6-7, "you need not print the absentee ballots until 49 days before the election, that is, Tuesday, September 14, 2004. The way we read N.M. STAT. § 1-6-5(E), it is discretionary when you must start mailing absentee ballots 45 days before the general election." In other words, the Democrats were telling the SOS how to do her job so that they could finish reviewing the 31,000 signatures and have time to file their complaint. Jeffries wrote: "As taxpayers we would prefer the money of taxpayers not be wasted." (Letter from Eric Sedillo Jeffries to Secretary of State Vigil-Giron, dated Sept. 10, 2004, on file with author.) On September 15, the Democrats filed their complaint. The hearing was set for September 17, 2004, at 9:00 a.m., before the Honorable Wendy E. York. What we didn't know at the time was that the Democrats had struck down four other judges before they got York. In New Mexico you can cherry-pick the random assignment of judges by asking a judge to get off the case without prejudice or cause. To help us defend the case, Harry Kresky flew from New York to assist Anne Patterson, a local Democrat trust and estates lawyer properly incensed by the Democrats' tactics.

As Kresky described it in a post-motion recollection on file with me: "The challenge was two fold: (1) a line-by-line analysis of petitions by local Democratic Party operatives and an out-of-state firm hired by them and testimony by a handwriting expert; and (2) a deliberate misconstruction of the New Mexico 'sore loser' law." This law was intended to prevent a candidate who loses a New Mexico major-party primary from running as an independent. The Democratic Party maintained that the statute should also be construed to prevent a candidate—like Nader—who had a party line in one state from running as an independent in another.

That afternoon, at 5:25 p.m., Judge York issued a letter ruling against us (*Griego, et al. v. Vigil-Giron*, CV 2004-5952, withdrawn), concluding that even though Nader was without party affiliation, because he was running in other states under a political party name, he didn't meet the standard of the statute, which we argued should be read as requiring no party affiliation in New Mexico only, and therefore he was to be struck from the ballot. Judge York also concluded that the plaintiffs "have failed to establish that Mr. Nader's petitions contain insufficient valid signatures" and that an order should be prepared for her signature by Monday at 5:00 p.m.

But it turned out the judge was not going to sign that order. By Friday, Carol Miller, our superb state coordinator, had discovered that the judge had made a $1,000 contribution to John Kerry's campaign. The press had also been provided this information, and interest in the Nader/Camejo ballot fight became a lead story in the New Mexico media for the next two weeks. By

Friday afternoon, we were having our opposition research director, a professor and activist from Alaska, Steve Conn, look into every judge in New Mexico's contribution history. On Monday morning, Judge York withdrew her decision and resigned from the bench. She was immediately hired by a well-connected state Democratic Party law firm. York handed the matter over to another judge, the Honorable Teresa Baca, another contributor to the DNC, but not to Kerry specifically. She ruled against us that Monday afternoon.

By Friday night, Miller had already called a number of election law and civil rights lawyers in New Mexico, and they all had either refused to help or ignored her calls. According to Miller, a prominent local civil liberties lawyer actually told her, "It is not clear what the civil liberties issues are. It is hard for me to find one." (Conversation reported by Carol Miller, Sept. 16, 2004, and on file with author.) Such was the antipathy of the local bar.

The Democratic secretary of state's office then announced to the media after the ruling their decision to destroy all the ballots bearing Nader and Camejo's name, while knowing the decision would certainly be appealed. We filed an immediate request for a stay in the New Mexico Supreme Court. We also filed an appeal there pointing out the lower court's decision was against the logic of the statute's construction. It showed how the point of the statute was to prevent individuals who had run in the state's primary under a party ticket to then switch to independent for the general election. The lawyers also noted how this interpretation would bar other third-party candidates in New Mexico who were running under other banners; this would create a disparate

treatment of candidates. They noted that Senator Kerry was appearing on the 2004 New Mexico ballot as the Democratic Party's nominee for president even though he was also appearing in Minnesota as the Democratic-Farmer-Labor (DFL) Party's nominee at the same time. So if the state statute was meant to prohibit different party affiliations from state to state, it would also operate to bar Kerry from the New Mexico ballot.

On September 22, the New Mexico Supreme Court ordered a hearing for the following Tuesday but failed to stay the destruction of the state ballots. So the next morning, in federal court we also filed a Complaint for Injunctive Relief for Deprivation of Plaintiffs' First and Fourteenth Amendment Rights, seeking to get a stay of the destruction of the ballots. We were assigned to Senior District Court Judge John Edwards Conway. He set a hearing for Friday, September 24, 2004, in Civil Case 04-1078.

The New Mexico Supreme Court then issued a stay to prevent the destruction or distribution of the ballots. Finally, there was some good news out of New Mexico. But in the meantime, less than 48 hours later, then–Bernalillo County clerk Mary Herrera was reported in the Albuquerque Journal as having found the time to mail out hundreds of non-Nader ballots to New Mexico troops in Iraq! Another partisan, now the new secretary of state of New Mexico, seemed to have decided whether the military troops had a right to vote for the only candidate who wanted to bring them home.

At the hearing on September 24, the federal court judge asked whether the supreme court stay mooted proceedings, and our lawyers convincingly

argued that this was a separate case, with different plaintiffs, with different—constitutional—rights at stake. Our position was that the federal court would trump whatever any state court decided, as these were federal rights at stake, and that we needed not only the New Mexico Supreme Court's stay but a ruling putting Nader and Camejo on the ballot and sending those ballots out instead. We argued that the New Mexico legislature simply could not tell candidates who they could associate with in other states and that t/he federal rights at stake meant the federal court would trump anything done by a New Mexico court. The attorney general's lawyer, Chris Coppin, argued that the state had an interest because "what if [Mr. Nader is] part of the Nazi party? What if he's part of the Communist Party?" (Transcript of Proceedings Before the Honorable John Edwards Conway, Senior United states District Judge, Albuquerque, New Mexico, commencing at 10:00 a.m. on Friday, Sept. 24, 2004, at lines 24–25, p. 25.) I'm not kidding.

The federal court judge said he expected to issue a ruling Tuesday afternoon "whether or not the New Mexico Supreme Court does act." He told the attorney general's office that he wasn't too impressed with their argument that the New Mexico legislature could tell candidates whom they could associate with—in other states. (Id. at line 21, p. 26.) The judge asked whether the AG's office agreed that the federal court had supremacy in the event the New Mexico Supreme Court "ruled" one way and he ruled the other. He questioned whether the Rooker-Feldman doctrine, which prohibits lower federal courts from hearing cases actually decided by a state court on issues

inextricably intertwined with a prior state court judgment, actually applied. He decided not to issue an injunction but said he would rule on Tuesday if the New Mexico Supreme Court didn't reverse the decision, in order to indicate that we would know immediately whether or not we had immediate relief on the federal issues.

Late Tuesday afternoon, September 28, the New Mexico Supreme Court orally reversed the lower court decision and put us on the ballot. The federal judge, the only one in the country who seemed to recognize constitutional principles also needed a ruling, issued an eight-page order saying that even though the supreme court ruled, "different plaintiffs existed in federal court with different rights asserted and that Rooker-Feldman applies to same parties and cannot be applied against nonparties to the related state court action." (*Gladstone v. Vigil-Giron*, No. CV-04-1078, (D.N.M. Sept. 28, 2004) at 3.) On the merits of the constitutional claims, the New Mexico Supreme Court went on to say that the lower court's interpretation of the statute is "an unconstitutional abridgement of Plaintiffs' rights under the First and Fourteenth Amendment to the United states Constitution." (Order dated Sept. 28, 2004, (*Gladstone v. Vigil-Giron*, No. CV-04-1078, (D.N.M. Sept. 28, 2004) at 6.) On the same day, we had two court orders—federal and state—telling New Mexico to put Ralph and Peter on the ballot.