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ATTORNEY GENERAL

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE STATE OF WEST VIRGINIA, by
DARRELL V. MCGRAW, JR.,
ATTORNEY GENERAL,

Plaintiff,

v.

CIVIL ACTION NO. 04-MISC-332

RALPH NADER,

Defendant.

INTRODUCTION TO HEARING

This is an extraordinary writ brought by the Attorney General of West Virginia to remove Ralph Nader from the General Election ballot in West Virginia for the office of President of the United States.

A hearing which lasted five hours, more or less, was held on August 30, 2004 by the undersigned Judge. The State (Attorney General's office) was represented by William S. Steele, Managing Deputy Attorney General and Silas B. Taylor, Senior Deputy Attorney General. Ralph Nader was represented by Harry Kreskey of New York City, appearing pro hac vice.¹

Witnesses testifying for the State were Michael Clifford, Michael Goldman, Alonda McDonald, Eric Talbert, Daniel Jordan,

¹ Introducing and serving as titular "local counsel" but not participating in the hearing for Nader were Benjamin Bryant, Esq. and David Grubb, Esq.

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COURT'S CLERK
KARLA W. STEVENS
COURT REPORTER

FILED

Marty Glasser, Gary Collias, Johnny Campbell, Jill Miles and James Dalton; witnesses called for the defendant were Frank Young, Ms. Smith and Theresa Amato. Affidavits of Jennifer Taylor and Deidre Purdy were admitted on stipulation. Further exhibits were: two petitions, Jordon affidavit, Campbell affidavit, Glasser affidavit, Dalton affidavit, Callias affidavit, Miles affidavit, "Guidelines", "Official Credentials", nomination petition, and "Getting on the ballot" publication. The defense moved to admit a media release and it, too, was admitted.

**TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

1. The Attorney General, Darrell V. McGraw, Jr., is authorized by West Virginia Code Section 3-5-23(e) to institute this quo warranto proceeding in the name of the State of West Virginia. The purpose of this action is to determine Defendant Ralph Nader's right to a nomination for president of the United States pursuant to the certificate procedure, commonly called "nomination by petition", set forth in West Virginia Code Section 3-5-23.

2. West Virginia Code Section 3-5-23(e) provides, in pertinent part, as follows:

The secretary of state ... may investigate the validity of such certificates [of nomination] and the signatures thereon, and if upon such investigation there may be doubt as to the legitimacy and the validity of such certificate, he

may request the attorney general of the state ... to institute a quo warranto proceeding against the nominee or nominees by certificate to determine his or their right to such nomination to public office, and upon request being made, the attorney general ... shall institute such quo warranto proceeding.

3. Ralph Nader, Defendant herein, has caused there to be submitted to the Secretary of State of West Virginia a certificate of nomination subject to the aforesaid statute, purporting to nominate him as a candidate for the office of President of the United States.

4. From the evidence introduced at the hearing on this civil action it is factually established that:²

(a) Canvassers or solicitors working to obtain signatures on behalf of Defendant Ralph Nader failed to show at least several potential voters the credentials required by West Virginia Code Section 3-5-23;

(b) failed to inform at least several prospective signatories of the purpose of the petition;

(c) actively concealed to at least several voters that the petitions were for Defendant Ralph Nader by folding down the tops of the petitions;

(d) delayed answering, evaded, denied or gave

² The evidence adduced on the conduct of canvassers working on behalf of Ralph Nader must be evaluated on what the sworn testimony is to but the vast majority of the activity of the canvassing and the canvassers cannot be surmised or obtained at this late date by the trial court because of the limitation on disclosure placed upon the identity of those who have signed the Nader petitions.

inconsistent answers to direct questions regarding whether the petition was for Defendant Nader in at least several regards;

(e) strategically placed solicitors at tables that contained signs that said "get out of Iraq" and "raise the minimum wage".

5. Canvassers were paid a certain sum of money per signature obtained. This method of obtaining signatures provides an incentive for canvasser misconduct as demonstrated here.

6. Approximately 15,000 signatures have been identified as registered voters, and presently accepted as such by the Secretary of State.

7. West Virginia Code Section 3-5-23, paragraph ©) requires that petitions submitted in support of the nomination of a minor party or independent candidate contain signatures of qualified voters and that the number of such signatures shall not be less than two percent of the votes cast for president in West Virginia in the last general election.

8. The West Virginia Secretary of State found Mr. Nader filed more than 15,000 valid signatures. 12,962 are required to be placed on the ballot as a candidate for President of the United States.

9. The County Clerks offices verified the signatures as being those of registered voters in the State of West Virginia. Signatures not verified were because of duplicates, non-

registered voters or illegible and were not counted as valid.

10. On August 19, 2004, the Secretary of State, The Honorable Joe Manchin, III, sent a letter dated August 19, 2004, to the Honorable Darrell McGraw, West Virginia Attorney General, stating that "I believe that a measure of doubt exists as to the validity of the petitions submitted on the behalf of Ralph Nader".

11. This letter was sent after the Secretary of State had been sued by complainants seeking the issuance of a writ of mandamus against the Secretary of State to reveal the signatories of the petition and to initiate an investigation of the Nader campaign.

12. Theresa Amato, the national campaign manager and a lawyer, testified that she is familiar with ballot access laws.

13. Amato testified that the Nader campaign routinely requests that its signature gatherers, be they volunteers or paid field coordinators, or a contracted company, visit the Secretary of State's office to discuss and learn the proper rules for circulating nominating petitions.

14. Ms. Amato testified that it is routine for campaigns to hire petitioning companies for a 50-state ballot access drive because of the requirements of individual states.

15. Ms. Amato testified that she hired Ms. Jennifer Breslin and JSM, her company in West Virginia and that West

Virginia was considered by the Nader campaign to be a "tier one" or difficult state.

16. Amato testified that ballot access requirements ranged from mere filing fees in states like Colorado and Louisiana to more than 100,000 signatures in North Carolina or 150,000 plus signatures in California.

17. Amato spoke routinely to the campaign's contractor to keep up to date on the incidents in West Virginia and knew of conflicting instructions regarding the credentialing among the different state entities in West Virginia.

18. Ms. Breslin went to the Secretary of State's office on July 12th and "spent probably two hours there asking questions".

19. Dan Kimble of the Secretary of State's office was present at the July 12th meeting.

20. Ms. Breslin stated that at this meeting "We were instructed on the official credentials. Again, we asked lots of questions about that. And we were told that in each county that a circulator would work and he or she must be credentialed in that specific county, but they could take signatures from any county as long as the voter came into the county the circulator was credentialed in; that if anybody asked to see the credentials that the voter had a right to see them, so always keep them on your person or keep them with you."

21. Jennifer Breslin testified at the deposition that when

she learned that one of the circulators had covered over the name of the candidate and had denied that the petition was for Ralph Nader, she went looking for him and that he was promptly terminated from the drive and the signatures he gathered were isolated and hundred or more signatures he collected were not submitted to the State to count for review.

22. Frank Young, Treasurer of the Mountain Party, and a signer of the Nader petition, testified that he has conducted at least three petitioning efforts for minor party candidates in West Virginia and that he has never been told to display credentials but to have them on him, in his pocket.

23. Ms. Cindy Smith of the Secretary of State's office corroborated Ms. Amato and Ms. Breslin's testimony in that she testified that representatives of the Nader campaign had multiple conversations with her to ascertain the requirements on the face of the petition and the procedures for petitioning in West Virginia.

24. Ms. Smith also testified that the Secretary of State's office informed the Nader campaign that even though the website had the form for the petition on it, that the form on the side was incorrect. Ms. Smith explained that the clause about losing the right to vote in the primary should be deleted as it had been invalidated by a federal lawsuit last year. Ms. Smith also testified that she directed people with questions about the

procedures to the Secretary of State's office website.

25. Ms. Breslin testified that she relied on the Secretary of State's office to provide her with that information about the incorrect clause on the petition, despite contrary information on the official website.

26. Ms. Smith testified that there is no font size requirement for the names of the candidates and that the names of the candidates for the petition were in the appropriate place on the Secretary of State's petition form.

27. The Kanawha County Prosecuting Attorney, Michael Clifford, requested and received the credentials of the Nader petitioners from each county.

28. There was confusion among the state officials, between Mr. Clifford and the Secretary of State's office and the county clerk's offices, as to whether or not a circulator was required to display the credentials at all times or simply have them available should there be an inquiry.

29. Ms. Breslin testified that "not one county registrar's office, but every single county registrar's office [said] 'no, if somebody asks to see them, they have got the right to see them. If they ask, show it to them'".

30. The Secretary of State's representatives told Ms. Breslin that it was sufficient for the credentials to be

available on inquiry.³

31. Michael Clifford was of the opinion that it was necessary to display the credentials at all times while circulating and told Ms. Breslin that on July 19, 2004.

32. After reports in the newspaper prior to the 19th, Ms. Breslin and Mr. Clifford testified that Ms. Breslin sought out Mr. Clifford to understand what the problem was. Breslin testified that she wanted to be "part of the solution" and that after the meeting with Mr. Clifford that she instructed her petitioners to laminate their credentials, punch holes in them and wear them around their necks.

33. Michael Clifford testified that he received no complaints after the July 19, 2004 meeting, and that he had called police officers to ask them to observe the petitioning and that they did not report any wrong doing.

34. At a meeting called by Mr. Kimble of representatives of the Prosecuting Attorney's office and the Secretary of State's office with Ms. Breslin on July 23, 2004, as well as members of the Attorney General's office, a consensus was reached on the credentialing issue and a press release issued by the Secretary of State stating, *inter alia*, "All parties were pleased with the cooperative nature of all of the participants involved. During

³ Ms. Breslin so testified at her deposition and Cindy Smith confirmed this in her testimony.

the meeting it was made clear that harassment by or of petitioners was unacceptable and that the petitioning process is a legal right under West Virginia law."

35. Ms. Amato spoke to Dan Kimble and Cindy Smith after this meeting, and she was told about the release and the nature of the meeting. She testified that she thought the meeting was to make sure everybody was singing from the same songbook on the requirements and that the issue was resolved.

36. The petitioning began on or about July 11, 2004 and ended on or about August 2, 2004.

37. Michael Goldman testified that a circulator denied that Mr. Nader was the candidate and that he signed the petition. He said that the top of the petition was covered up, but that he held the clipboard when signing.

38. Alondra McDonald testified that she could only see the bottom of the petition, that it was the first petition she had signed and that she didn't know it was for a specific candidate or for Ralph Nader.

39. Eric Tolbert testified that he and his wife signed the petition and that the name of the candidate was covered over.

40. Dan Jordan did not sign the petition and testified that he spoke on two occasions with the same circulator who the first time said "not necessarily" when asked if the candidate was Ralph Nader and the second time said it was.

41. Johnny Campbell did not sign but observed that the candidate's name was covered over and, further, testified that while circulators did not volunteer the name of the candidate in the initial interaction with a potential signer, when asked, stated within earshot of the signer that it was Ralph Nader.

42. Jill Miles, an attorney employed by Attorney General's Consumer Protection Division was solicited by a Democratic member of the state legislature, to look into the bona fides of the Nader petitioning operation and to provide an affidavit of complaint. She did and testified that, when asked, circulators said the candidate was Ralph Nader. She testified that no investigation was opened by the Consumer Protection Division.

43. James S. Dalton, a paralegal who also worked in Attorney General's Consumer Protection Division testified that he observed Nader petition circulators opening their conversations by asking voters to "sign a petition to get an independent candidate on the ballot."

44. Martin Glasser testified that the circulators put up a sign with "raise the minimum wage" in large letters and Mr. Nader's name in small letters. He testified that the petition was to put Mr. Nader on the ballot.

45. Gary Collias testified that he is a member of the State Election Commission and a lawyer who prepared his own affidavit, stating, "all the petitions that I saw seeking the

signatures to have Mr. Nader placed on the ballot the work 'minority' appeared large bold print on the upper left-hand corner of the form. He conceded in court that the petition actually reads "Minor Candidate and Independent on the top." Collias said the circulators said the petition was to get a minority candidate on the ballot and, when asked the name, said Ralph Nader. He observed the petitioning from July 12 to July 16 and did not see any effort to cover over the name of the candidate. Mr. Collias stated that Mr. Camejo, Mr. Nader's Vice Presidential candidate, as a Hispanic, was indeed what would be considered a minority candidate by the common use of that term in the state of West Virginia. He didn't know if that would also apply to Mr. Nader as an Arab-American.

46. Jennifer Narog Taylor testified (through a deposition) to being approached by circulators and asked if she would sign to put a minority candidate on the ballot. She did not sign. She further testified that the circulators answered questions in an evasive manner. She was unable to verify that the circulators were working for the Nader campaign.

47. Diedre Purdy testified (through a deposition) that she was approached by two persons stating they were seeking to put a minority candidate on the ballot. The circulators obscured the name of the candidate and one, when asked, said the candidate was Mr. Nader and the other did not. She spoke with several other

circulators who were evasive as to who the candidate was, but one said it was Mr. Nader when asked.

48. Of these 12 witnesses who interacted with circulators, only six testified that he or she observed either covering over the candidate's name or denying that the candidate was Mr. Nader.

49. Ms. Smith testified that the Attorney General's office has had possession of the original petitions for at least a week and a half.

CONCLUSIONS OF LAW

1. The state of West Virginia has a legitimate interest in the regulation of its elections if its elections are to be fair and honest and conducted in an orderly manner. Hess v. Hechler, 925 F. Supp. 1140 (1995).

2. The state of West Virginia has an interest in holding canvassers accountable for improper conduct.

3. The state of West Virginia affirmatively requires one who canvasses signatures for petitions to "exhibit to each voter canvassed or solicited" credentials which have been issued by the Clerk of the County Commission.

4. The requirement that credentials be exhibited to each voter canvassed or solicited serves a substantial state interest in assuring integrity of the signature solicitation process.

5. If credentials are not exhibited to voters canvassed or solicited, the integrity of the specific signatures obtained

without credentials shown is compromised.

6. Five witnesses who observed one, or at most three instances of misrepresentation or obscuring the name of the candidate, does not provide a basis to invalidate a petition signed by some 23,000 persons.

7. There are no West Virginia cases supporting the relief the Attorney General has requested herein.

8. In a New York case, Harris v. Rodriguez, 51 N.Y.2d 737, 411 N.E.2d 777, 432 N.Y.S.2d 358 (1980); the Court of Appeals held that nine signatures that appeared to be have been taken by someone other than the person who purportedly witnessed them, were insufficient to find that a petition containing 6,000 signatures was permeated with fraud.

9. Courts in other jurisdictions have held that a petition cannot be invalidated on the basis of speech between circulators and signers or potential signers. San Francisco Forty-Niners v. Nisjiolka, 89 Cal.Rptr.2d 388 (Cal., Ct. Ap. 1999); In re Initiative No. 142, 55 P.2d 455 (Okla. 1936); Edwards v. Hutchinson, 35 P.2d 90 (Wash. 1934).

10. There is no requirement that the circulators in West Virginia must begin by stating the name of the candidate in conversation with potential signers.

11. As for the question of the failure to display credentials for the early portion of the petition drive, the

statute that appears to impose that requirement says nothing about invalidating a nominating petition as a remedy by the Court in a civil suit such as this.

12. There is no precedent on point cited (in any State in America), for the relief sought by the State in an "access to ballot" challenge such as this.

13. The circulators justifiably relied on instructions given by representatives of the Secretary of State that all that was required was to carry the credentials on their person.

14. The Secretary of State's office was orally correcting instructions on its website, for example, with respect to the removal about the line about losing the right to vote in the primary.⁴

15. In a quo warranto proceeding to strike a presidential candidate from a ballot where that candidate has met the state's signature requirement burden, and where no proceedings were brought under the criminal portion of the statute, the burden of the state is a heavy one but not an impossible one.⁵

16. The state's interests in its processes are balanced

⁴ It was Ms. Breslin who pointed out to the Secretary of State that they were giving out information that conflicted with the instructions from the county prosecutor. Therefore, plaintiffs could be estopped from seeking to invalidate the petition on the basis of the information the defendants relied on as a matter of law but the Court does not and will not make a conclusion of law on estoppel theory herein.

⁵ This is especially true in light of the interests of our citizens - more than 23,000 of them - in signing the petition.

against the interest and rights of the voters and of candidates seeking federal office.

RULING

1. Whatever weight is assigned to the state's interest in the lack of display of credentials for a proven fraction of the petitioning effort, those state interests do not outweigh the harm that would occur from removing these candidates from the ballot.

2. The testimony of a half dozen citizens does not constitute the showing that would be required to invalidate these petitions as a matter of law.

3. The balance of harms and the likelihood of success on the merits both mitigate in the favor of defendants.

4. The proceeding in *quo warranto* is hereby denied.

5. The injunction is hereby denied.

6. The exceptions of the State are hereby noted and preserved for appeal.

7. The Circuit Clerk shall send a certified copy of this Order to the following by FAX:

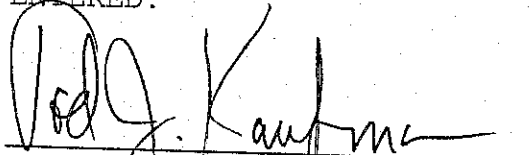
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ENTERED:



Tod J. Kaufman
Judge

DATED: September 2, 2004

STATE OF WEST VIRGINIA
COUNTY OF MARIETTA, SS
I, CLAYTON W. HARRIS, CLERK OF CIRCUIT COURT OF SAID COUNTY
DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE COURT REPORT
FILED IN MY OFFICE AND SOLELY BY COURT THIS
2004
CLAYTON W. HARRIS
CLERK OF CIRCUIT COURT OF SAID COUNTY, WEST VIRGINIA

NOTE: The trial court reporter is hereby directed to begin preparing and complete the transcript of the August 30, 2004 hearing to facilitate the appeal of this case, if any.