

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

Alan Schintzius, et al.,

Plaintiff,

versus

3:16 CV 741

J. Kirk Showalter, et al.,

Defendants

Before: HONORABLE JOHN A. GIBNEY, JR.  
United States District Judge

Motion - TRO

September 12, 2016

Richmond, Virginia

GILBERT F. HALASZ  
Official Court Reporter  
U. S. Courthouse  
701 East Broad Street  
Richmond, VA 23219

APPEARANCES

Mark Paullin, Esq.

Paul Goldman, Esq.

For the plaintiffs

Michael Matheson, Esq.

William Prince, Esq.

for defendants Showalter, Stevens, Dabney

William Etherington, Esq.

for defendant Daniels

Harold Johnson, Esq.

Erica Mitchell, Esq.

for defendants Alcorn

Wheeler, McAllister, Cortes

1 THE CLERK: Case number 3:16 CV 741.

2 Alan Schintzius and others versus J. Kirk Showalter  
3 and others.

4 Plaintiffs are represented by Mr. Mark Paullin and  
5 Mr. Paul Goldman.

6 The defendant Showalter, Stevens and Dabney are  
7 represented by Mr. Michael Matheson and Mr. William  
8 Prince.

9 The defendant Daniels is represented by Mr. William  
10 Etherington.

11 Defendants Alcorn, Wheeler, McAllister and Cortes are  
12 represented by Mr. Harold Johnson and Ms Erica Mitchell.

13 Are counsel ready to proceed?

14 MR. GOLDMAN: Yes, ma'am.

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: All right.

17 We are here today on the plaintiffs' motion for a  
18 temporary restraining order essentially -- well, I am not  
19 entirely sure what they are asking, but the object of this  
20 is to either give them time enough to get Mr. Schintziu's  
21 name on the ballot for the November mayoral election or to  
22 actually have me be on the ballot.

23 I have received voluminous pleadings, and I want to  
24 thank all of you for giving me something to read other  
25 than novels on my vacation.

1           And I have reviewed the complaint, the motion for  
2           temporary injunction, and the oppositions filed by the  
3           various defendants in this case. And I am ready to go  
4           forward at this time.

5           So, I have also entered an order this morning  
6           granting Mr. Goldman's opportunity to appear pro hac vice  
7           in this case.

8           So, Mr. Goldman, let's hear from you first.

9           It is your motion, sir.

10          MR. GOLDMAN: Thank you, Your Honor, for  
11          letting me --

12          THE COURT: Happy to have you. I am surprised you  
13          are not a member of the bar down here. You have been  
14          around for a long time.

15          MR. GOLDMAN: A good and bad thing, right?

16          THE COURT: Well, always good to have good lawyers  
17          here.

18          Move the microphone a little bit so you are talking  
19          into. Thank you, sir. All right.

20          MR. GOLDMAN: First I want to say that we appreciate  
21          the service that everybody -- I know Ms Showalter,  
22          registrar's office, worked extremely hard. We are trying  
23          to get to the facts of the case, and we think basically we  
24          have six African-American plaintiffs who have been denied  
25          their Constitutional rights and petition, a very important

1 right.

2 THE COURT: Before we get to that, let's address the  
3 preliminary issue, which is, the one I mentioned in my  
4 order entered last week, whether there is a conflict in  
5 this case between plaintiffs' counsel and their clients,  
6 really. And the gist of that is --

7 MR. GOLDMAN: I don't think there is any conflict  
8 whatsoever.

9 THE COURT: Let me just say for the record what it  
10 is. Mr. Morrissey, and now you, are counsel -- and thank  
11 you, sir, for your quick appearance in this case,  
12 Mr. Paullin -- have filed this motion on behalf of  
13 Mr. Schintzius, and the issue that concerns me about it is  
14 that Mr. Schintzius and Mr. Morrissey are contesting -- are  
15 trying to get to the same position, and one would argue  
16 that, one, Mr. Morrissey's -- one position he could easily  
17 take in this case would be Mr. Schintzius should not be  
18 admitted because that is one less person he has to knock  
19 off in order to get elected as mayor.

20 MR. GOLDMAN: Well, he is going to address -- he  
21 addressed that. That is why he took the case. He is  
22 perfectly happy to have Mr. Schintzius on the ballot.  
23 Both of us are really just in terms of, we were here  
24 before. I was here in Judge Hudson's court in 2012.  
25 That's why we have the limited -- we won that case, and

1 that led to getting legislation passed, limited right of  
2 hearing. Mr. Morrissey and I were also in Circuit Court of  
3 Richmond in the case of Ryan versus Showalter, which we  
4 won that case, also. That led to the change in the  
5 definition of qualified voter. So we have been doing this  
6 for a particularly long time. Mr. Schintzius came to me  
7 for obvious reasons, there is not that many people who  
8 handle these things any more, if ever. He is perfectly  
9 aware, and there is no conflict in anybody's mind --

10 THE COURT: Well --

11 MR. GOLDMAN: -- in terms of the minds of  
12 Mr. Morrissey, myself and Mr. Schintzius.

13 THE COURT: His name is Schintzius, is it?

14 PLF COUNSEL TWO: Schintzius.

15 THE COURT: Okay.

16 Mr. Schintzius, thank you for coming today, sir. I  
17 appreciate it. You don't have to stand up, that is okay,  
18 but I do appreciate you coming today.

19 You guys may not think there is a conflict, but there  
20 certainly is an appearance that -- I am assuming  
21 Mr. Morrissey wants to be elected. And having the field  
22 pared by one helps him in that respect, doesn't it?

23 MR. GOLDMAN: Going into the politics, I can put on  
24 my own party campaign manager, but the fact of the matter  
25 is there really is no competition between the two. In

1 fact, in the real politics they have discussed it, they  
2 are not even on the same wave length, and --

3 THE COURT: If they are not on the same wave length,  
4 they have got a problem.

5 MR. GOLDMAN: In terms of politics. It may seem like  
6 there is a conflict, but there is no political or any  
7 other consequence, which is why we are doing it, and why  
8 we discussed it. That has been discussed.

9 THE COURT: You have something from Mr. Schintzius  
10 waiving any conflict?

11 MR. GOLDMAN: We have talked to him about that. You  
12 asked he --

13 THE COURT: Does he?

14 MR. GOLDMAN: Excuse me?

15 THE COURT: Do you have something in writing that  
16 does that? Mr. Schintzius was standing up.

17 MR. GOLDMAN: We have never -- we have never asked  
18 for anything in writing.

19 THE COURT: All right.

20 Well, go ahead with your argument.

21 MR. GOLDMAN: Your Honor --

22 THE COURT: This is something that you are going to  
23 have to address as you go long in this case. Okay?

24 MR. GOLDMAN: Yes, sir.

25 THE COURT: All right.

1 MR. GOLDMAN: We will get it in writing.

2 THE COURT: I didn't mean to throw you off.

3 MR. GOLDMAN: The three Constitutional rights at  
4 issue here, right of petition, the right of due process,  
5 and then when you have qualified for the ballot, when you  
6 have met all the requirements of the candidates, the right  
7 of access once he you have met the requirements.

8 THE COURT: The third is another first amendment  
9 right; is that right?

10 MR. GOLDMAN: Valid access right, especially, first  
11 amendment right through the 14th amendment and how the  
12 cases are decided with Bullock and the other cases. And  
13 they have been developed, a little more murky when you  
14 talk about the actual right of the candidates. This is  
15 why you plead the cases with the signatory, it is hard to  
16 get them, not easy to get people to say, yes, go to  
17 federal court. But its important because ultimately it is  
18 their right. They are the associational right. They want  
19 Alan on the ballot. And that is their right. And that is  
20 what is being denied. And it is not just them. All of  
21 the other people who signed his petition. Ms Showalter  
22 found 670 qualified voters. I think that was the number.  
23 They are all having their associational rights denied if  
24 he is off the ballot. And we go through the facts, I  
25 think you see it is very clear.



1           In terms of the right of petition, I believe it is  
2 actually controlled by the case of the Libertarian Party  
3 versus Judd. I don't have to explain that particular fact  
4 in this case.

5           THE COURT: I am pretty familiar with that one. The  
6 is the one where I threw out part of the petition process,  
7 right?

8           MR. GOLDMAN: Right. Having been former party chair,  
9 I followed this case closely as to what was going on in  
10 the Republican Party at that time.

11          The way The Court saw the case, correctly so, the  
12 Libertarian Party was trying to get on the ballot. In  
13 fact, they even know one of the petitioners that was sort  
14 of referenced in the case.

15          And they needed to pay, actually that was only way to  
16 get on the ballot. People might say that is very  
17 complicated, it is a long process, it was ten thousand  
18 votes. It is now five. Myself and Mr. Cuccinelli knocked  
19 it down to five. We, the legislature, agreed it is too  
20 hard.

21          Now, why do they need more circulators? It isn't --  
22 they don't need more circulators really to spread the  
23 message of the Libertarian Party. They could always bring  
24 in people outside the spread the message. But as we know  
25 from the cases, it is through candidacy, just getting

1 people on the ballot because really in our country ever  
2 since, I think the Supreme Court in Illinois versus Social  
3 Workers Party, that is how we do things. You try to get  
4 people on the ballot. That is how you spread the first  
5 amendment core speech. So they needed more circulators.  
6 More circulators, more chance to associate. You can't  
7 circulate your own. You can't sign your own.

8 THE COURT: Getting away from that for a second, it  
9 is pretty clear, isn't it, that a requirement of a certain  
10 number of signatures is a valid requirement.

11 MR. GOLDMAN: Absolutely.

12 THE COURT: And that that -- that the local  
13 government, or state government for that matter, can  
14 insist that you have a certain number of signatures from  
15 each district to show that there is a breadth of support.

16 MR. GOLDMAN: No question that is the way it was  
17 done. That was, obviously --

18 THE COURT: When I talk, you be quiet. And when you  
19 talk, I will be quiet. Okay? Thank you. So let's try  
20 that.

21 Go ahead.

22 MR. GOLDMAN: So that in that particular case besides  
23 not meeting the ten thousand, it was found that the law  
24 that says if you are out of state you couldn't come in,  
25 you had to be a Virginia resident, was too broad. In

1 fact, the Fourth Circuit said the crux of that case was  
2 even though there was a compelling interest of the state  
3 to protect against fraud, and you still had to show that  
4 it was the least onerous, or that wasn't -- it was the  
5 least onerous I would say, way to do it.

6 Also said, Ashcroft said it was the government's  
7 burden to show that proposals, that proposals, say, from  
8 the other side, were in fact more onerous than that they  
9 were doing. So in that particular case, absolutely. And  
10 it has worked perfectly. Worked perfectly. There is no  
11 fraud. Let's take this case. In this case they have  
12 decided to have a petition form and implemented the  
13 petition form, it doesn't warn people. Every single  
14 person that we represented signed that petition form  
15 precisely the way they were instructed to. They put down  
16 the precise information that is required in 24.2-506 (a)  
17 of Virginia code. They did everything right. But they  
18 were denied their Constitutional rights to petition. Why?  
19 I called it a gotcha provision. Referencing, of course,  
20 the Briscoe case where there is a technical rule. They  
21 don't tell you that they really don't want your resident  
22 address as much as they want your registration address.

23 THE COURT: But under Virginia law when you change  
24 your residence you are required to re-register promptly,  
25 are you not?

1 MR. GOLDMAN: Actually --

2 THE COURT: That is the precise wording.

3 MR. GOLDMAN: The truth of the matter is Showalter  
4 will tell you that you can actually go back and vote at  
5 your, if you move, you can go back months later and still  
6 vote at the, where you are no longer live. That is in the  
7 law.

8 THE COURT: I understand. But the law also says you  
9 are required to change your residency, or your  
10 registration promptly when you move. Doesn't it say that?

11 MR. GOLDMAN: Maybe, but that is not the -- the fact  
12 of the matter is, the definition of qualified voter in the  
13 statute says, somebody who is on the system and is active,  
14 you can be -- all these people are on the system and they  
15 are active.

16 THE COURT: Here is what section 24.2-424 (a) says,  
17 "whenever a registered voter changes his place of  
18 residence within the Commonwealth he shall promptly notify  
19 any general registrar of the address of his new  
20 residence."

21 So these people should have had the correct address  
22 on record, shouldn't they?

23 MR. GOLDMAN: The petition forms, it would be nice if  
24 they, if everybody did that quickly. The law recognizes  
25 you don't. That is why the allows you to go back because

1 we are a mobile society and people don't always do things  
2 rapidly. We are also not talking about the right to vote,  
3 we are talking about the right to petition. In a  
4 qualified voter -- put this up -- that is the statute  
5 defining qualified voter. That was asked in 2013 after  
6 the Ryan case. In the Ryan case Judge Hughes over the  
7 objections of the registrar found that people who have  
8 been a resident -- they were residents of the sixth  
9 district, but their registration address was outside.  
10 They had not changed it. He counted all of those folks in  
11 part based on a 1975 Attorney General's opinion which  
12 said, in effect, in the City of Petersburg that people  
13 should be counted where they are residents if they were  
14 registered in the City and still had time to update their  
15 registration before the election.

16 THE COURT: Are you challenging the constitutionality  
17 of the State Board of Election's regulation that deals  
18 with things that are disqualification? Is that what you  
19 are saying, that this reg is unconstitutional?

20 MR. GOLDMAN: What I am saying, Your Honor, is that  
21 24.2-506 "a," which is the state law saying what is  
22 supposed be on your petition, says specifically, signature  
23 of a qualified voter and their residence. Doesn't say  
24 anything about registration address because in Virginia  
25 you have to be a resident.

1 THE COURT: It says "residence."

2 MR. GOLDMAN: Excuse me?

3 THE COURT: Doesn't the petition say your residence?

4 MR. GOLDMAN: It says "residence," not your  
5 registration address. They are different.

6 THE COURT: Then they check. So what they do is they  
7 check, they take, as I understand it, they take the  
8 information on the petition and check it to see where you  
9 are registered because they are required to have people in  
10 each district or area that sign the petition. And that  
11 is -- how else would you do that?

12 MR. GOLDMAN: I will get to that. But your  
13 registration address is not necessarily your residence  
14 address.

15 THE COURT: Well, that's right.

16 MR. GOLDMAN: So, you see --

17 THE COURT: What are you supposed to do, drive out to  
18 everybody's house and see if they are living there?

19 MR. GOLDMAN: There are ways to do it, and I can show  
20 you that.

21 THE COURT: Let's hear that.

22 MR. GOLDMAN: We mention that -- the two real  
23 requirements in the law basically -- probably too small  
24 for people to read -- the law requires you to sign and  
25 requires you to put down your residence address. They

1 don't check the signatures. As we say, they can't check  
2 whether that is your residence address. They don't have  
3 the resources, and we mention that. So for bureaucratic  
4 convenience -- and we don't oppose that -- what they is,  
5 look, we are just going to assume if Paul Goldman's name  
6 appears on a petition and he lists his -- and the  
7 residence address matches your registration address, we  
8 are going to count it. Even though we don't check his  
9 signature. Somebody could have signed it, and we have no  
10 idea whether he actually lives there, and the law requires  
11 that he be a resident. But I understand we say that in  
12 the brief, it -- we are not going to ask people to spend a  
13 lot of money checking signatures.

14 Okay. I have no problem with that. But let's  
15 remember that there are people in there who do not, are  
16 not, you know, they put down the registration address and  
17 they move. Legally they are not entitled to sign a  
18 petition. And they mention that in their opposition. You  
19 have to be a resident. But just because you list your  
20 residence address, they only people that they know who the  
21 residence address are C 6 plaintiffs because they put down  
22 the resident address that was different than the  
23 registration address, which is precisely what the law  
24 requires, precisely what the petition requires, but they  
25 lose their right to vote.

1 THE COURT: They don't lose their right --

2 MR. GOLDMAN: They lose their right to petition.  
3 They lose their right to sign that petition, which is  
4 supposed to -- and they are all qualified voters, all  
5 qualified voters under the definition. And why is that?  
6 Why is their signature, their first amendment petition  
7 right denied? Number one, because there is nothing on the  
8 form to tell them, by the way, yes, you are a qualified  
9 voter, but if want your petition signatures to count, if  
10 you want your petition signatures to count you are an  
11 active member, you are on the registration system, and you  
12 are active, so you qualify. If you don't don't -- they  
13 don't tell you, if you do not update your registration  
14 address by the time they count the signatures you will be  
15 put in a pile of, well, there is a Paul Goldman says XYZ  
16 Street in the eighth district. Well, there is a Paul  
17 Goldman in the eighth district, maybe just one -- I will  
18 show that, but he is listed at a different address, we  
19 can't prove that is the same person, so they put them in a  
20 can't identify pile. I have no problem with. That.  
21 Because it makes sense why do I have any problems with  
22 that? Because what is the goal? The associational right  
23 to get your candidate on the ballot. So if they go  
24 through the list the way they do, and just match up the  
25 names to the registration address, and you get on the



1 ballot, it doesn't -- everybody is happy. The  
2 constitution is fine. I got on the ballot. That is what  
3 may petition is.

4 Let's assume you are in this case and you are down  
5 seven.

6 THE COURT: How many did he protest about in his  
7 appeal?

8 MR. GOLDMAN: He only protested seven or eight.  
9 There were nine. They counted three. There is three more  
10 I think they definitely should have counted, there is  
11 somebody who is --

12 THE COURT: So still a couple short?

13 MR. GOLDMAN: Well, no, there is -- he is three and  
14 there is also, well, there is actually, there is another  
15 person who would be a plaintiff that they could have  
16 signed. She didn't want to be a plaintiff. And also they  
17 said a signature was illegible. It's not, obviously, if  
18 he is one of the plaintiffs in this particular case.

19 The other thing, though I would like to get into  
20 that, they did not give the due process hearing the way it  
21 was envisioned.

22 THE COURT: Let's stick with the first amendment.

23 MR. GOLDMAN: Stick with the first amendment. All  
24 they had to do -- and this is why I say it is just like  
25 the Libertarian Party case versus Judd, all they had to do

1 was put something on the petition. By the way, you have a  
2 protected Constitutional right. But this how we are going  
3 to do it, Mr. Goldman. We are not going to tell you,  
4 though. We aren't not going to tell you.

5 THE COURT: They shouldn't have to tell you,  
6 Mr. Goldman, because when you move, you are supposed to  
7 properly change your address.

8 MR. GOLDMAN: Your Honor, you can still be a  
9 qualified voter, so the average person doesn't know that.

10 THE COURT: But it is like a speed limit sign. The  
11 sign says, doesn't say, by the way you also need to have a  
12 license to drive in Virginia. And if you get stopped and  
13 you don't have a license, you get a double ticket, don't  
14 you?

15 MR. GOLDMAN: At least, Your Honor -- I am a citizen  
16 of.

17 THE COURT: I know you are a citizen.

18 MR. GOLDMAN: I am just metaphorically --

19 THE COURT: Oh, hypothetically.

20 MR. GOLDMAN: -- hypothetically, I am a citizen. I  
21 have a constitutional right to petition. The State has  
22 the right to regulate, but very limited. Can the State  
23 have a mandated form of petition? Absolutely. Can the  
24 State ask for certain information? Absolutely. No  
25 problem. I go to exercise my right of petition. They

1     give me a petition form. It follows precisely what the  
2     law requires me to do. I sign my name. I list my  
3     residence address. I date it. I exercised -- all I know,  
4     however, always in the Brisco case, by the way, there is a  
5     gotcha provision, if you move, even though you are still a  
6     qualified voter, even though you meet definition of a  
7     qualified voter, we are going to put you in a pile. You  
8     will not have your right to have it counted. In terms of  
9     the Judd case, all they had to could was put on the  
10    petition, by the way, if you have moved make sure that you  
11    updated it because if you don't, you may lose your right  
12    to --

13           THE COURT: No, no, the Judd case dealt with the  
14    people who were circulating the petition.

15           MR. GOLDMAN: But --

16           THE COURT: Didn't say anything about what was in the  
17    petition. The Judd case said, you are allowed to bring in  
18    people from out-of-state to circulate petitions to vote.  
19    Right?

20           Am I misremembering that case?

21           MR. GOLDMAN: I am talking about the crux of the  
22    case, not about the facts, the crux of the case.

23           THE COURT: I mean, the facts of the case are sort of  
24    what I decided.

25           MR. GOLDMAN: Well, but, the decision was a challenge

1 to the unconstitutionality of the law.

2 THE COURT: Of the provision.

3 MR. GOLDMAN: Right.

4 Of the out-of-state provision. They said that the  
5 crux of the case, even though the State had a compelling  
6 interest, they had to show that the way they were  
7 regulating this Constitutional right was the least  
8 onerous, so it was decided that a statute that made it  
9 impossible for everybody was too onerous, and they  
10 proposed well, just make people available by subpoena. If  
11 you think that -- and that was accepted. That is why I  
12 say the same thing here. All they had to do was tell  
13 people, instead of disqualifying everybody who moved and  
14 making them prove at a hearing, or all they had to do was  
15 say on the form, by the way, you have a Constitutional  
16 right. We are protecting it.

17 THE COURT: But the thing of it is, they could list  
18 every election requirement known to man on the petition,  
19 but it gets a little cumbersome.

20 MR. GOLDMAN: Not if the number one information they  
21 want to know is your registration address.

22 THE COURT: Well, their number one information that  
23 they might, that Mr. Schintzius might want them to know is  
24 residence versus registration address. But I would  
25 suggest that the people at the Board of Elections would

1 want to know a lot of other things. Electoral Board,  
2 rather.

3 MR. GOLDMAN: Excuse me.

4 THE COURT: I will tell you what. What else do you  
5 have to say about the first amendment aspect, and then due  
6 process?

7 MR. GOLDMAN: In terms of that, when they have these  
8 people they disqualify, they have signatures. They have  
9 other information which would qualify them. But they  
10 never look it up. If they had checked the signature on  
11 the form versus signature in the information they had,  
12 there is only six or seven they have to do, they could  
13 match them up and they could prove that that was the  
14 person. They don't do that either. That is why I say a  
15 de minimus effort on the part of the government would save  
16 somebody's right to petition, and that is why I compared  
17 it to the Judd case, because that is essentially what the  
18 Fourth Circuit cast saying. The crux of it is, yes, you  
19 have the compelling interest to stop fraud, but how are  
20 you doing it?

21 Here, using a Bureaucratic, you know, efficiency.  
22 Well, we are not going to have let you have your right to  
23 petition because we don't want to look up the signature,  
24 it is too much effort there. They are throwing it all  
25 into the hearing. The person who signed the petition is

1 never told their signature has been disqualified.

2 THE COURT: All right.

3 MR. GOLDMAN: Okay. They have a right. They have  
4 done everything the State said they needed to do to fill  
5 out the form. The residence address is what is required  
6 in the law. That is what is required on the form. They  
7 use the registration address to check, but they never tell  
8 me when I am filling out the form. It is just not like  
9 they have got to tell me everything. It is the most  
10 important information.

11 THE COURT: If it is so important, why don't they go  
12 and change the registration when they move? I mean it is  
13 pretty important for your ability to vote, isn't it? Do  
14 you have to live where you vote.

15 MR. GOLDMAN: Let me give you an example.

16 THE COURT: All right. Give me example.

17 Well, now, you have gone beyond my read -- you can  
18 hand it to me. Give it to her, and she will hand it to  
19 me. So this is a chart that says voters wrongly denied  
20 Constitutional rights by the State hidden gotcha -- stay  
21 up there at the podium, please. Thank you.

22 All right.

23 MR. GOLDMAN: I want to use the top one, Your Honor.

24 THE COURT: What?

25 MR. GOLDMAN: Ed Brown as an example. At the top,

1 disqualified.

2 THE COURT: Right.

3 MR. GOLDMAN: Antoinette Brown voted in 2012, 2013,  
4 2014, 2015. At the same address.

5 THE COURT: Okay.

6 MR. GOLDMAN: Decatur Street. However, when she  
7 signed the petition she had moved to Edwards. Signed the  
8 petition and moved to Edwards Street. So when you looked  
9 up Antoinette Brown on the eighth district voter list you  
10 would have found one person named Antoinette Brown in the  
11 whole eighth district. But since the Decatur Street  
12 address appears as the registration address, but our  
13 residence address on the form was Edwards, she was  
14 disqualified. Even though on when she voted on 2015 she  
15 had to show a local election official proof she lived  
16 there. So she definitely lived there, can we agree she  
17 definitely lived there, she showed a local official. All  
18 right.

19 She was disqualified because she put the wrong  
20 address. You put a residence address as required. She  
21 can this November go back to the Decatur Street, assuming  
22 she had not updated, she has yet to update her voter  
23 registration, she can go back to Decatur Street this  
24 November and vote. That is the law in Virginia.

25 THE COURT: Is that in a different precinct?

1           MR. GOLDMAN: The same district.

2           THE COURT: Is Decatur Street a different precinct,  
3 is my question.

4           MR. GOLDMAN: Yes, they are. They are different  
5 precincts, but the law is clear, and she moved after the  
6 November election. She could vote as long as she stays in  
7 Virginia.

8           See, there are other move dates.

9           THE COURT: So if she moves out of the City, she  
10 can't vote in the mayoral election.

11          MR. GOLDMAN: Actually she could. As i understand  
12 it, I believe she could move anyplace in Virginia and  
13 still go back to where she votes. If she moved --

14          THE COURT: Okay.

15          MR. GOLDMAN: And then there is some other less  
16 restrictive rules, but everybody, all these people could  
17 vote. They were qualified voters.

18          THE COURT: Well, let me ask you. Do you have any  
19 case authority that deals with a similar situation to  
20 this?

21          MR. GOLDMAN: Well, the only other authority that I  
22 have was the Hughes case. If I could explain the case,  
23 and Ms Showalter was there, that was not a written  
24 decision, but it was done -- I don't know if you know  
25 Judge Melvin Hughes.



1 THE COURT: I know who Melvin Hughes is.

2 MR. GOLDMAN: We argued this case in front of him,  
3 similar situation. Came down to plaintiffs in the sixth  
4 district, which he, I think used to live in the sixth.

5 THE COURT: Was that a petition case?

6 MR. GOLDMAN: Yes.

7 THE COURT: Okay.

8 MR. GOLDMAN: What they had done was this.

9 They all lived in the eighth district, excuse me, the  
10 sixth. They lived in the sixth district. But their  
11 registration in the City of Richmond was in the other  
12 district outside. So what would I call a jumper. Okay.  
13 it was a big argument. He said, is there any reason why I  
14 can't count them where they are living? Because that is  
15 what the petition says. And he counted them.

16 There is a 1975 Attorney General opinion by Andrew  
17 Miller, and that asked the question, he said, City of  
18 Petersburg, which is also a ward like Richmond, and he  
19 said that if you are living in ward X and that is where  
20 you sign, but you are registered in ward Y, you should be  
21 counted where you are living as long as you can have time  
22 to update your registration before the election. Now,  
23 granted, it is 1975 Attorney General opinion. I  
24 understand that.

25 It is totally consistent with the first amendment,

1 and totally consistent with the scheme here. As I just  
2 showed you, we know in our society people move, and we  
3 know people don't update their registration all the time.  
4 It is not the first thing on their minds. And we know  
5 that they can actually go back to their the old precinct  
6 and even vote if they don't do that. We are trying to get  
7 people to vote, and we worked hard to do that. So a  
8 petition right, that is why we changed it. When you say  
9 as long as you are on the voter registration system, and  
10 active, it doesn't say anything about move date and  
11 signing the petition. Because people don't -- they just  
12 don't do it in our society, particularly -- and let me get  
13 to that because I think it is important -- how come we all  
14 African-American plaintiffs here in ninth district? How  
15 come.

16 THE COURT: I don't know. You are the one that filed  
17 the law suit. Why is it that we have all the  
18 African-American plaintiffs?

19 MR. GOLDMAN: That is all there were. Why were they  
20 all African-American plaintiffs? They were the ones  
21 knocked off that we could find in the Epps case. In the  
22 Ryan case, I believe they are all African-American.

23 THE COURT: Okay. Are you telling me that this is --  
24 that there is a racial element to this?

25 MR. GOLDMAN: I don't claim racial -- absolutely --

1 THE COURT: Then why is it relevant?

2 When I talk, you be quiet, and I will observe your  
3 right to speak.

4 MR. GOLDMAN: I apologize.

5 THE COURT: Why are you raising this specter of the  
6 fact that these folks are African-American?

7 MR. GOLDMAN: I am just stating a fact to get to my  
8 point. It is not racial.

9 THE COURT: What is your point?

10 MR. GOLDMAN: It is that if you are -- who moves  
11 around the most in our society? People that live in  
12 apartments, working class individuals. They are most  
13 prone to be caught by this gotcha provision. Wealthier  
14 people tend to stay in their homes longer. But many of  
15 the people who aren't move every year. And they don't  
16 update. It is not -- in Richmond it just so happens, and  
17 so they get caught in this. They don't necessarily update  
18 their registration until it gets closer to the election or  
19 they know, I can still go back and vote in my own  
20 precinct. So they get caught in it. That is why we have  
21 this repeated, and we tried to do it in 2012, to fix it.  
22 That is why we are here, because we haven't been able to  
23 fix it. It is nobody's fault. It is not bad people. I  
24 am not suggesting that at all. But I am pointing out the  
25 facts. I can't change who the plaintiffs were in these

1 cases. They are working class people. And that is why it  
2 happens.

3 THE COURT: Okay.

4 So let's try to wrap up your argument on the first  
5 amendment point. Have you given me all the points you  
6 want to make on that or is there something else you want  
7 to tell me about the rights to petition and the right to  
8 ballot access?

9 MR. GOLDMAN: I would just want to point out a couple  
10 of things, Your Honor, if I may.

11 Number one, when they passed the first amendment it  
12 only applied to the federal government. It wasn't  
13 connected to the right to vote, because the right to vote  
14 was controlled by the states. So the right to petition at  
15 the time for many citizens was more important than the  
16 right to vote. Because every American citizen had the  
17 right to petition. But the right to vote was severely  
18 limited. Most citizens did not have the right to vote.  
19 So the right to petition is extremely important. It has  
20 been connected up to the right to vote, but we need to  
21 remember it is separate. Also these individuals, as I  
22 pointed out, they did everything the State asked them to  
23 do. The State could have with de minimus effort done some  
24 of the other things to alert them.

25 THE COURT: You have made that point.

1           MR. GOLDMAN: In terms of how do they, and this may  
2           probably is more due process argument --

3           THE COURT: Are you then done with the first  
4           amendment?

5           MR. GOLDMAN: I think of all of the -- I am trying to  
6           think -- yes.

7           THE COURT: Okay. Now tell me this.

8           Are you making a substantive due process argument or  
9           a procedural due process argument?

10          MR. GOLDMAN: You know, as many years I have tried to  
11          figure that out, the difference.

12          THE COURT: Well, procedural has got to do with  
13          whether you get the kind of hearing that you are entitled  
14          to before some right gets taken away from you.

15          MR. GOLDMAN: It is probably both. That is why I was  
16          having trouble --

17          THE COURT: All right.

18          MR. GOLDMAN: I think they are both.

19          THE COURT: Are you then challenging the regulations  
20          and the statute as a violation of the substantive due  
21          process right?

22          MR. GOLDMAN: To the extent that I think the  
23          regulations misinterpret the law, I am challenging their  
24          substance, but --

25          THE COURT: If that -- it has got to be more than

1     that.

2           MR. GOLDMAN:  Absolutely.

3           THE COURT:  Substantive due process violation.

4           MR. GOLDMAN:  To the extent --

5           THE COURT:  It has got to be of such a nature that it  
6     shocks the conscience.

7           Now, that is the burden that you have got to show on  
8     a substantive due process level.

9           Is that the argument you are making?

10          MR. GOLDMAN:  The argument I think is -- I am not --  
11     that is not the sort of the gravamen of my argument.  The  
12     gravamen of my argument is they didn't apply the statute.  
13     As they implemented the statute they have -- they haven't  
14     applied the statute, and therefore violated the clients  
15     due process by not giving him the evidence gathering right  
16     that he had, and by misinterpreting the statute and not  
17     examining evidence they need to exam.

18          THE COURT:  So that is more of a procedural?

19          MR. GOLDMAN:  I really have trouble, you know they  
20     kind of mix in there.  But the statute itself, I am not  
21     challenging.  It is how they have applied it.

22          THE COURT:  So tell me what is wrong with the  
23     procedural process that was followed here.

24          MR. GOLDMAN:  The statute says they have from the  
25     time we got notice of disqualification you have five days

1 to file a notice, calendar days, and according the  
2 regulation then the board is supposed to set the hearing  
3 within five business days of getting the filing.

4 THE COURT: So they -- he got the notice of  
5 disqualification that went out, as I understand it --

6 MR. GOLDMAN: June 21 at 10:00 o'clock.

7 THE COURT: I will be quiet when you talk.

8 MR. GOLDMAN: I apologize.

9 THE COURT: You be quiet when I talk, okay? This is  
10 not a city council meeting where you can debate everything  
11 you want. All right?

12 June 21st the notice of disqualification goes out.

13 MR. GOLDMAN: Correct.

14 THE COURT: And June 27th is when the appeal was due?

15 MR. GOLDMAN: No, Your Honor. The appeal -- yes, he  
16 had to file the appeal and his written evidence.

17 THE COURT: And the written evidence is due the same  
18 day.

19 MR. GOLDMAN: Same time.

20 THE COURT: That is more than five days after he gets  
21 the notice.

22 MR. GOLDMAN: But you don't count -- but you can't  
23 under the law, because the fifth day was Sunday, you go  
24 not next day.

25 THE COURT: That is what I say.

1 MR. GOLDMAN: You are correct.

2 THE COURT: All right.

3 So you get until Monday, and he files it on Monday,  
4 and then they have the hearing three days later. They are  
5 required to have the hearing within five days. So they  
6 comply with all that. So, you know, the point of all that  
7 I guess is that they want to get things resolved quickly  
8 so that candidates can get on with their campaign and  
9 voters can get on with deciding who so vote for. So what  
10 is the problem?

11 MR. GOLDMAN: They didn't comply with it.

12 THE COURT: Okay.

13 So they didn't comply with it because they should  
14 have given him until midnight on the 27th to file his  
15 evidence; is that right?

16 MR. GOLDMAN: There are two ways of looking at that.

17 Number one, if you consider that he had to 11:59,  
18 which would seem to be consistent with how they did it, he  
19 had basically a whole extra day to collect information.  
20 And that is very important, having done this.

21 Number two, according to the regulation they are  
22 supposed to set the date of the hearing after they receive  
23 the notice --

24 THE COURT: The appeal.

25 MR. GOLDMAN: -- the appeal.



1           But they did it backwards. They set the date of the  
2   hearing, and they also said when you had to file  
3   everything.

4           THE COURT: I don't know that either of those things  
5   violates somebody's due process. Remember that when we  
6   talk about due process it is not State law or local law  
7   that defines what process is due. It is federal law. And  
8   in this case isn't it accurate to say that Mr. Schintzius  
9   got a pretty full package of what the information was that  
10   he needed to produce to the board? And isn't that fair  
11   notice of what is going on?

12          MR. GOLDMAN: He didn't get all the  
13   evidence-gathering time he was entitled to by the statute.  
14   However --

15          THE COURT: But, you know, let's go back and remember  
16   that this is due process. They told him what he had to  
17   get, and they told him when he had to get it. And it may  
18   have been shorter than what was required by statute, but  
19   as the Fourth Circuit has pointed out, federal courts are  
20   not supposed to be supervising the conduct of elections.  
21   We are supposed to be looking at the process in making  
22   sure that a constitutionally acceptable process occurs.

23          It seems to me like you are asking more the former,  
24   that I become sort of a super electoral board.

25          MR. GOLDMAN: Well, then giving how you are viewing

1     it, let me look at it the from a different angle to  
2     hopefully make you see it -- I understand your position,  
3     correctly -- okay.

4             Let's look at the statute. The statute says that you  
5     have a hearing that is limited to whether, you know,  
6     whether the rejections of the signatures are -- has been  
7     reasonable. That is all it says.

8             It is nothing in there that says --

9             THE COURT: Says whether the decision is reasonable.  
10    The decision made by the local electoral board.

11            MR. GOLDMAN: I think whether it has been reasonably  
12    objective --is reasonable. Okay.

13            THE COURT: Before you get into this, Mr. Goldman, I  
14    have a criminal matter that will take about 20 minutes at  
15    10:00 o'clock. So we are going to take recess now to  
16    allow me to get ready for that, and to get, to check  
17    everything. Everybody, you can leave your stuff at the  
18    table. Just slide it forward. And I will be back here at  
19    10:00 o'clock to deal with the criminal case. All right.  
20    Sorry to interrupt you.

21            MR. GOLDMAN: Thank you.

22            THE COURT: This was put on the docket at the last  
23    minute. All right. Let's recess.

24    (Recess)

25            Mr. Goldman, you were addressing the due process

1 issue. You were getting ready to tell me -- you were  
2 winding up telling me something. I was not sure what it  
3 was

4 And I have received a document signed by Mr. Schintzius  
5 waiving any conflicts that exist. So, that will take care  
6 of that issue.

7 MR. GOLDMAN: Thank you, sir.

8 I wanted to, based on Your Honor's questions, go back  
9 to due process aspects of the hearing. And to demonstrate  
10 that the let State had the evidence before it to find that  
11 my client had made the ballot, but they don't approach the  
12 due process hearing really the way it was intended in the  
13 statute. The statute says that they will hold a hearing,  
14 and if you can determine whether the citizens that have  
15 been rejected, have been reasonably rejected.

16 But they don't look at evidence that is in their  
17 possession. In fact, the regulation, I think it is  
18 10-20-50 of 30, basically says that the -- that is also in  
19 the instructions of the Green book that they give the  
20 registrar -- that the candidate has the burden of proof.

21 THE COURT: You think that is a violation of due  
22 process?

23 MR. GOLDMAN: No. It would be, but he doesn't have  
24 the burden of proof under the statute.

25 THE COURT: Okay.

1           I think that is a burden of violation of his right to  
2   due process that if he wants to overturn an administrative  
3   decision, he has got the burden of doing that? That is a  
4   violation of due process?

5           MR. GOLDMAN: The statute says that he has,  
6   candidates have been reasonably rejected.

7           In Virginia I believe the burden of due process is  
8   also the burden of producing the evidence. So, if he has  
9   to produce the evidence, that is one thing. But if it is  
10   a question of whether the signatures have been reasonably  
11   rejected, then I would suggest that the State cannot  
12   refuse to look at information that is already in their  
13   possession.

14          THE COURT: Let me try to rephrase this question so  
15   we can get this honed down to some fine points.

16          Do you think it is a violation of his due process  
17   rights to impose the burden of proof of demonstrating that  
18   it is unreasonable on Mr. Schintzius? Yes or no? You do  
19   not? Okay. Thank you. Go ahead.

20          But a lack of discovery is a violation of --

21          MR. GOLDMAN: Yes. Absolutely. I do think it is --  
22   remember the petitioners have had their signatures  
23   disqualified, but they are not giving an independent  
24   chance to show that their signatures have been unfair or  
25   unconstitutionally disqualified. That is being done

1 through the candidate. I can understand the rational for  
2 that. But, Your Honor, if in fact, if the burden of proof  
3 in Virginia requires Mr. Schintzius to produce the  
4 evidence and therefore the board is -- can limit its  
5 review to evidence produced by Mr. Schintzius, then in  
6 effect they can say we don't, we don't have to look at  
7 evidence that is in our possession, even if it is  
8 probative. But that is not the way the statute was  
9 written. The statute says, it has to, the board has to  
10 decide whether it has been reasonably rejected and  
11 therefore they have to look at the government's evidence  
12 that is in their possession.

13 Let's also remember in this particular case it's not  
14 like it is done in certain other states. If I we look at  
15 the Brisco case, Brisco versus Kusper case. In Chicago,  
16 the people that challenge the signatures were the  
17 candidates. The board actually, and the registrar was  
18 sort of the -- you know the candidates challenge the  
19 signatures the way they did, and then the board decides.  
20 Here it is the registrar is the only one challenging the  
21 signature.

22 I don't see how it is consistent with due process  
23 that she could challenge the signatures but not look at  
24 evidence in her sole possession that might show that she  
25 is wrong. And they never checked the signatures. They

1 never checked the electoral history, and that is what I  
2 was pointing out on Ms Brown. Ms Brown voted in 2015.

3 THE COURT: But the question then, it seems to me, is  
4 that they are deciding whether it is reasonable under  
5 Virginia law. Is that right?

6 MR. GOLDMAN: Not to look at the evidence that you  
7 have.

8 THE COURT: Well, whether it is -- whether the -- the  
9 ultimate decision in the hearing before the electoral  
10 board is whether the board made a decision that is  
11 reasonable under Virginia law.

12 MR. GOLDMAN: Yes, sir.

13 THE COURT: In this case Virginia law includes the  
14 regulation that a State Board of Elections, which say at  
15 section 20-50-20, material omission from petitions. And  
16 one of those is if the signer provides an address that  
17 does not match the petitioner signers address in the voter  
18 registration system unless it is within the same precinct.

19 So, I mean, if that is what they are figuring out,  
20 why is their decision unreasonable?

21 MR. GOLDMAN: If I may be permitted to explain.

22 THE COURT: Yes, you can be permitted to explain.  
23 Please.

24 MR. GOLDMAN: One of the reasons you are holding the  
25 hearing is for -- let's take one of the people that they

1     accepted. They initially disqualified Janet Jefferson  
2     because she had put a residence address that was different  
3     than her registration address. But they ultimately  
4     qualified her because Ms Schintzius put in information  
5     to show when she moved. The move date I was talking  
6     about.

7           THE COURT: And apparently she moved within the same  
8     precincts; is that right?

9           MR. GOLDMAN: No. She moved within the same -- they  
10    moved based on, like Ms Brown, you can move anywhere in  
11    Virginia. But if you move a little bit before that then  
12    you have to stay within the City and the congressional  
13    district. So you can move. It is the basic general point  
14    that even if you, even if you put -- you don't put your  
15    registration address on the petition, they will still  
16    count you.

17           You have to -- I have said, that I don't think  
18    that -- I don't think that should be the law because the  
19    definition of the signer doesn't do the move date. We can  
20    disagree with that, I think Ms Showalter and I disagree  
21    with that, so let's use her definition. She counted  
22    Ms Jefferson. Okay. She could determine.

23           THE COURT: More accurate to say the Richmond  
24    Electoral Board.

25           MR. GOLDMAN: Probably more accurate to say on her

1 recommendation. They asked her for her recommendation.

2 Absolutely right, Your Honor.

3 So that, they said, well, we could determine when the  
4 move date was. All right.

5 They couldn't determine whether the move date was,  
6 they said for Ms Brown, because Mr. Schintzius had not put  
7 in that. What I am suggesting is they had evidence they  
8 could have used to reasonably determine when her move date  
9 was.

10 THE COURT: What evidence was that?

11 MR. GOLDMAN: She had voted in 2015 at her  
12 registration address. That means that she had to show up  
13 at the, at the polling place and demonstrate to the  
14 election official that she was entitled to vote there.

15 THE COURT: So, they should go back and look at old  
16 voting records to determine whether or not somebody lives  
17 at the address they say they are at? Is that --

18 MR. GOLDMAN: Accepting her statement they accepted  
19 Ms Jefferson's statement that she moved. Just her  
20 statement. They have no way of knowing whether it is true  
21 or not. But assuming she is telling the truth. The point  
22 is, the move date, you can show that Ms Brown, by the  
23 evidence they had voted at an address where she had to  
24 prove that that was her residence -- in order to vote at  
25 that precinct she had to show that she was still living at



1 her residence address.

2 Now, would it have been more ideal if he had told the  
3 board, yes, but they wouldn't let him saying anything at  
4 the hearing. This is the hearing where he is not allowed  
5 to present any evidence at the hearing. All the evidence  
6 has to written and presented on June 27 nothing at --  
7 nothing -- there is nothing --

8 THE COURT: Did he get something from that lady that  
9 he submitted, the lady, Ms Jefferson?

10 MR. GOLDMAN: Yes, he got --

11 THE COURT: Signed an affidavit or something?

12 MR. GOLDMAN: Yes, she put that in. He forgot to ask  
13 the other person to put it in. He knew -- obviously he  
14 knew when they moved. He forgot to ask them.

15 So --

16 THE COURT: I want to know what evidence he presented  
17 about Ms Jefferson.

18 MR. GOLDMAN: He presented that --

19 THE COURT: What form of document was it?

20 MR. GOLDMAN: It was a written document.

21 THE COURT: Okay. It was a written document. Was it  
22 an affidavit, or a post card?

23 MR. GOLDMAN: It wasn't an affidavit. Affidavits  
24 aren't really -- registrar sort of requires them, but that  
25 is not what the State regulation --

1 THE COURT: What did he submit, Mr. Goldman?

2 MR. GOLDMAN: He submitted --

3 THE COURT: Things would go a lot smoother if you  
4 answer the question.

5 MR. GOLDMAN: Yes, sir. Submitted a piece of paper  
6 she had signed.

7 THE COURT: Was it signed under oath?

8 MR. GOLDMAN: No.

9 THE COURT: Under penalty of perjury?

10 MR. GOLDMAN: Not signed under oath.

11 THE COURT: So he was allowed to submit a document  
12 from her that was not under oath, and they accepted that  
13 as evidence.

14 MR. GOLDMAN: Correct.

15 THE COURT: Okay.

16 So why didn't he do that for the others?

17 MR. GOLDMAN: He did for some of them. Some he  
18 forgot to get them to sign, some he forgot to put in the  
19 move date.

20 THE COURT: Wait a second. How could he forget to  
21 have somebody sign something that he is getting ready to  
22 submit to the Board of Elections, Electoral Board?

23 MR. GOLDMAN: I recognize -- I could report the facts  
24 as they are.

25 THE COURT: Okay. Go ahead.

1           MR. GOLDMAN: But I am saying they could have figured  
2 out what the move date was. If she voted here in 2015,  
3 then she had to move after that date, which turns out to  
4 be true. If they knew that, they would have counted her  
5 signature. And they had electoral history. But they  
6 don't accept -- in order to have voted at that address,  
7 the registration address, in 2015 general election she  
8 would have had to show evidence of that to the election  
9 officials. They could have challenged her under the law.  
10 They could challenge, and they didn't. They accepted it.

11           So I think that shows that she lived there on 2015,  
12 and because of that, she falls under this. She can go  
13 back there as long as she stays in Richmond, she can go  
14 back to that address without ever, you know, could live  
15 some place else in Richmond in this district, which she  
16 does, without updating her registration address and still  
17 vote there. She can go vote where she voted before. If  
18 they now that, they would have counted her. That is why  
19 they counted Jefferson, because she said, I moved, and  
20 they said, well --

21           THE COURT: They counted Jefferson because Jefferson  
22 submitted a sheet of paper that said, this is where I  
23 live. And apparently he didn't do that for the first one,  
24 which is, I can't remember her name Antoinette --

25           MR. GOLDMAN: Brown.

1 THE COURT: -- Brown.

2 MR. GOLDMAN: Except she signed the petition.

3 THE COURT: No, no. Did she submit a paper for the  
4 hearing?

5 MR. GOLDMAN: Did, but it wasn't signed.

6 THE COURT: So it was not signed. So, but --

7 MR. GOLDMAN: Not signed, but they knew --

8 THE COURT: It could have been done by Mr. Goldman.  
9 It could have been.

10 MR. GOLDMAN: Excuse me?

11 THE COURT: You could have prepared it.

12 MR. GOLDMAN: That is true, Your Honor. But anybody  
13 else could sign -- that is part of my point, they approved  
14 signatures that they never checked based on registration  
15 addresses that they don't know whether people moved.

16 THE COURT: Okay. This has moved to a different  
17 level in which the signature -- in which the ability of  
18 somebody to sign a petition is now under challenge seems  
19 to me like it is pretty minimal to ask them to write a  
20 note and sign it to the electoral officials.

21 MR. GOLDMAN: Should have done it better. I am not  
22 suggesting that that isn't the case.

23 THE COURT: These things are designed so that they  
24 can have an election that runs on some sort of orderly  
25 process. And what you are suggesting is that we have a

1 procedure that is outlined in the code, and that the  
2 electoral board outlines, and then a separate election  
3 procedure that applies to Mr. Schintzius. That is just no  
4 way to run a railroad.

5 MR. GOLDMAN: With all respect, I don't think that is  
6 what I am suggesting. I am going through the facts that  
7 they have a system where they assume if somebody's  
8 registration address is given, that that is where they  
9 lived, because that is what the law requires. The law  
10 says you have to sign the petition with the resident  
11 address. Says nothing about a registration address.  
12 Okay. Because you might not live there. So if you sign  
13 that you live at XYZ Street and you are registered at XYZ,  
14 they assume that is your residence. Okay.

15 THE COURT: What else do you have to say about the  
16 due process issue?

17 MR. GOLDMAN: I think that not allowing -- giving an  
18 example -- he was at the hearing and they disqualified one  
19 of the signatures because they wouldn't allow him to point  
20 out the page number and the line as to where that  
21 signature appeared in their petition. He forgot to put  
22 that in the written. She had signed something, but forgot  
23 to put that -- and that is the kind of procedure it was.  
24 Why couldn't they let him at least point that out? That  
25 is certainly de minimus. He is sitting there. They had

1 the petition in front of them. Those are the kinds of  
2 things to my way of thinking when you add it all up, he  
3 didn't get enough gathering time, they didn't look at  
4 evidence that they possessed, which would have shown these  
5 people, even though he had not put in the move date, would  
6 have shown that they moved within a period that allowed  
7 them to be qualified voters, that there is a -- they  
8 required him basically to talk to somebody who was an  
9 ineligible voter in order to make a petition, allowing  
10 illegible signature, when you can point it out it isn't  
11 illegible. All of these things were things were possible,  
12 if they had done that. I am not trying to change any  
13 rules for just him. I am not excusing the fact that he  
14 should have probably have done better. Absolutely.

15 I am not -- but, as I say, if they had just done  
16 that, de minimus, he would have gotten his 50 signatures.  
17 If you had someone like Ms Brown, or in 2012, 2013, 2014,  
18 2015, and she signs the petition and says this is who I  
19 am, and there is one person like that in the whole  
20 district --

21 THE COURT: I understand that he could prove it. The  
22 question is a different one, though.

23 It is, how does it violate his right to due process?

24 MR. GOLDMAN: Because he is defending the  
25 Constitutional rights of the people whose signatures were

1 declined to have that. Were never told that. And he is  
2 just -- and the State has said, look, you have this  
3 hearing, nothing about you can't present evidence at the  
4 hearing. There is nothing about you having to limit this.  
5 There is nothing in the statute that says that you have to  
6 produce all the evidence. The statute says, should the  
7 signature -- is it reasonably rejected? I am suggesting  
8 that if the government doesn't look at probative evidence  
9 in its exclusive possession that it can't possibly be  
10 reasonable. If it is not reasonable, then it violates the  
11 statute in Virginia, and that violates due process.

12 THE COURT: No. If it violates the statute, it  
13 violates the statute. Due process is something else, as  
14 we talked about earlier. Due process is something that is  
15 required by the Constitution, not by the statute.

16 MR. GOLDMAN: I am not --

17 THE COURT: And the Fourth Circuit has cautioned, I  
18 am not here to serve as a super electoral board.

19 MR. GOLDMAN: I am not asking you to do that. What I  
20 am I saying is that when they violate --

21 THE COURT: You are. You are asking me to say that  
22 they are supposed to a different way than they have done  
23 it.

24 MR. GOLDMAN: They should give him the time to  
25 present the evidence or the have to look at evidence that

1 is in their possession. I think it's the government takes  
2 the Constitutional right away from anybody, and they have  
3 evidence in their possession that would show they are  
4 wrong, that, I argue, is a violation of the due process  
5 clause of the Constitution, because it is violation of the  
6 first amendment or first amendment through the due process  
7 clause. That is what they did in this case.

8 They had the evidence, and didn't look at it.

9 THE COURT: Okay. Do you have any other points on  
10 due process?

11 MR. GOLDMAN: No. Just I can show how we can qualify  
12 the voters here were qualified, given the evidence.

13 THE COURT: Apparently if he could just get them to  
14 sign a post card saying that they lived there, that would  
15 have been enough.

16 MR. GOLDMAN: Could it have been done better? Yes,  
17 absolutely.

18 THE COURT: All right. Well, okay.

19 Address then for me, if you will, please, the issue  
20 of latches in this case.

21 MR. GOLDMAN: Yes, Your Honor.

22 I believe the defendants have cited Marcellus, and I  
23 believe Perry One and Perry Two is there. Leading  
24 authorities are basically in those areas.

25 Obviously you are familiar with the Perry One



1 situation.

2 THE COURT: Pretty familiar with that one.

3 MR. GOLDMAN: That was a case where they challenge  
4 the out-of-state circulator statute and they knew that,  
5 they had months to do it. Months before to do it.

6 The statute was there. If they were going to  
7 challenge it they could have done it four or five months  
8 ago and they kind of waited until the very end.

9 THE COURT: Right.

10 MR. GOLDMAN: In Marcellus it had to do, I think,  
11 with the 2001 law where you can list certain people on the  
12 ballot. And some -- that was a big thing in the State.  
13 Some people you could have parties and things or you  
14 others you couldn't. They thought it should apply -- I  
15 believe Powhatan supervisors, and they knew that months  
16 before, and they waited closer to the election to  
17 challenge that. That would have upset all across the  
18 State if that had been ruled unconstitutional.

19 THE COURT: But the issue here is I think simpler  
20 than that. What they are saying is that on June the 30th  
21 Mr. Schintzius knew that he was not going to get on the  
22 ballot, and he waited until a couple weeks before the  
23 ballots had to be printed to go out to soldiers and  
24 sailors overseas in order to file his law suit.

25 Why isn't that latches?

1           MR. GOLDMAN: I mention Marcellus and the others to  
2 show they were challenging the constitutionality of the  
3 statute and would have known that months before. We  
4 couldn't possibly know what his thing would be that he  
5 could challenge until they actually had their quasi  
6 judicial proceeding.

7           THE COURT: That was the 30th.

8           MR. GOLDMAN: That was the 30th.

9           THE COURT: Of June.

10          MR. GOLDMAN: Okay. The statute says it is final.  
11 The statute says you are not supposed to be able to  
12 challenge it. It takes a while to look at that. Takes a  
13 while to find the plaintiffs. If you want to know the  
14 whole process --

15          THE COURT: Mr. Schintzius knew who they were. And  
16 he knew who he is.

17          MR. GOLDMAN: He was looking for someone who would  
18 represent him, which is pretty normal, you know. In this  
19 particular case I had to go out and did all the particular  
20 work, and we filed, I think on the 23rd. So they were  
21 served roughly on the 24th or 25th.

22          All right.

23          In 2012, this is comparison -- in the 2012 case  
24 Justice Hughes -- he wasn't the justice that granted the  
25 actual temporary injunction, I believe it was on September

1 5th. On September 5th they actually they had the final  
2 hearing, the date of the ballot was supposed to be  
3 printed. In between he gave us a couple of days to get  
4 some information, and then -- okay.

5 So basically we had filed for the temporary  
6 injunction before that time in 2012.

7 So for some reason the judges in Richmond, I guess  
8 the first judge recused himself, and took him a while to  
9 find a judge, and when they found a judge the judge  
10 basically said, I can't hear it for another week.

11 In terms of the what the other side -- they have not  
12 filed any motions. I see where, is it Cortes, he filed  
13 something. He could have filed that before. They could  
14 have told --

15 THE COURT: Well, the point is not when they could  
16 have filed something. It is when Mr. Schintzius filed.

17 MR. GOLDMAN: If they were really concerned about the  
18 time, they didn't have to wait until the day before the  
19 hearing to move it to federal court. They could have  
20 moved it right away. In fact, one of the lawyers told me  
21 when he said -- I won't say who -- said, well, this is  
22 nothing, had nothing to do with the fact that the lawyers  
23 couldn't practice in fed, it is what we always do. If you  
24 are always going to do it, why did you wait until the day  
25 before the hearing and then come over here and say, oh

1 everything is waited too long. You could have done it  
2 then. So I don't see any latches on our part. You can't  
3 prepare a law suit overnight. Now, if the argument is  
4 well, he should have filed pro se, I just don't think -- I  
5 don't see anything that requires that.

6 THE COURT: Okay. I understand your point. Anything  
7 else on that point?

8 MR. GOLDMAN: Yes.

9 If there is any dilatoriness, we change the law in  
10 2013. So you would have a kind of hearing where you could  
11 present the evidence. We changed the law in 2013 so you  
12 could recount people. If anybody is being dilatory, they  
13 are here three years later fighting over that. This is  
14 the first case on this particular statute, and on that --

15 THE COURT: Well, obviously it is easy to get on the  
16 ballot because, just evidenced by the number of people  
17 running for mayor.

18 MR. GOLDMAN: I wrote that law. Absolutely, it was  
19 written so you could get on the ballot. The only  
20 remaining procedure you have is 50 in each district, or  
21 should you just have five hundred city wide? And there  
22 are reasons back and forth. Fifty seemed to be  
23 Constitutional. So it was 50.

24 Turns out that is a little harder than you might  
25 think in certain districts, but, yes, it is certainly

1 Constitutional. Certainly fair. And nobody is saying --

2 THE COURT: Well drafted by you.

3 MR. GOLDMAN: I don't know about that, sir. But  
4 thank you.

5 So, no one is suggesting -- they do suggest in the  
6 book, their opposition they had various months to collect  
7 it. It absolutely true --

8 THE COURT: Do you have any additional points to make  
9 on the latches issue?

10 MR. GOLDMAN: Latches, unless I missed something, I  
11 think I handled their cases, and I have laid out the  
12 absolute way we handled the case. You know, those are the  
13 facts.

14 THE COURT: Thank you very much. You may be seated.  
15 Can you move the sign there?

16 I can't read that, unfortunately, from here. That is  
17 okay. I understand.

18 MR. GOLDMAN: This is the move date.

19 THE COURT: All right.

20 So, let's hear from Ms Showalter's attorney first in  
21 this case.

22 MR. MATHESON: Good morning, Your Honor, may it  
23 please The Court.

24 THE COURT: Yes, good morning. Where is Mr. Tunner  
25 today?

1           MR. MATHESON: He was in indisposed and not able to  
2 come to the hearing.

3           THE COURT: Okay.

4           MR. MATHESON: I am standing in for him. He is in  
5 Syracuse.

6           THE COURT: That is certainly indisposed.

7           MR. MATHESON: Your Honor, we are here on a motion  
8 for a temporary restraining order, which I know that The  
9 Court knows is extraordinary remedy.

10          THE COURT: Let me just tell you how I view the  
11 factors that go into a TRO.

12          I tend to agree with Mr. Goldman that if  
13 Mr. Schintzius doesn't get on the ballot he, and possibly  
14 the plaintiffs in this case, are likely to suffer  
15 irreparable harm.

16          I think the balance of equities sort of tips because,  
17 on the one hand we have the needs of the Electoral Board  
18 to have a process that moves forward in an orderly way,  
19 but on the other hand, there is always an interest in  
20 having a variety of candidates on the ballot.

21          And, finally, as to the public interest, I think the  
22 same factors come into play there.

23          So I think that the question is whether he has been  
24 able to establish a strong likelihood of success on the  
25 merits. And that is what I would like you to address. I

1 would like you to address three points on that.

2 One is the first amendment issue. Two is the due  
3 process issue. And third is the latches issue.

4 MR. MATHESON: Yes, Your Honor, I am prepared to  
5 address each of those, but in addition, I would like an  
6 opportunity to talk about the public interest, and I think  
7 it relatedly affects the balancing of the equities in this  
8 case. I want The Court to understand what the general  
9 registrar and the State Board of Elections calendar is  
10 between now and September 23.

11 THE COURT: I have seen it all in the documents you  
12 submitted. I am aware that there is an interest in moving  
13 forward with getting the documents out.

14 Tell me about the things that i mentioned.

15 MR. MATHESON: Yes, Your Honor.

16 Your Honor, I am going to start with the due process  
17 issue, if that is okay.

18 The Court has asked a number of pointed questions  
19 about whether or not this is really a procedural due  
20 process challenge. I cited in the Hutchinson decision in  
21 my brief, and there is number of other decisions in this  
22 circuit that deal with the issue of when something becomes  
23 a Federal Constitutional issue as opposed to when it  
24 becomes an issue of the administration of the State  
25 election law procedures.

1           Your Honor, respectfully, I don't believe that the  
2   issues that they are their raising, Mr. Goldman, for one,  
3   said he is not actually challenging the Constitutionality  
4   of the administrative procedures that are set out not only  
5   in the Code of Virginia, but also are published in  
6   Virginia Administrative Code under 1VAC 20-50-30. He is  
7   saying he doesn't think that the decision at the electoral  
8   board level was correct.

9           There is --

10          THE COURT: Well, that is not the issue in the case.  
11   They could be as wrong as you can be, and my job is not to  
12   correct any mistakes that they might make at the electoral  
13   board level. My job, if anything, is to make sure that  
14   the process that they use comports with due process. It  
15   seems to me that the process that they use told  
16   Mr. Schintzius what the issue was, what their decision was  
17   on that issue, what he had to do to appeal that and when,  
18   he had to file the documents to appeal that.

19          Is it your contention that that complies with due  
20   process?

21          MR. MATHESON: Our contention is that does comply  
22   with due process, and we believe that the procedures that  
23   were published and publicly available through the State  
24   Board of Elections regulations were followed in this case.  
25   There has been a number of issues that have been raised



1 for the first time on August 23rd of 2016 when this law  
2 suit was filed. They are talking about the timing of when  
3 the appeal was actually filed. We are not here on an  
4 issue --

5 THE COURT: You are not here on an issue of timing.  
6 He got notice of what the issues were, and a chance to put  
7 on his evidence. And I don't think I can rule that that  
8 was an unconstitutionally short period of time.

9 What about this issue of what information he was  
10 allowed to have? Under Virginia law isn't he entitled to  
11 a list of who the registered voters are?

12 MR. MATHESON: Yes. For a nominal fee by statute he  
13 is entitled to obtain a list of the registered voters. In  
14 addition to that, Your Honor, the petition process begins  
15 on January 1st of 2016. So from January 1st to June 14  
16 all candidates can have circulators out in the public  
17 collecting signatures. And they are allowed to submit  
18 their petition pages to the general registrar at any time.

19 THE COURT: Okay. But, he is allowed to get a list  
20 of who the registered voters are, and does that have their  
21 registered address, or their residence address on it?

22 MR. MATHESON: It would have the registration  
23 address. If the residence address is different from  
24 registration address the registrar has no way of knowing  
25 that, unless somebody comes in with his own of kind of

1 extrinsic evidence.

2 THE COURT: Unless he gets a petition with a  
3 different residence address on it.

4 MR. MATHESON: If she gets a petition with a  
5 different residence address, and in addition, if there is  
6 an election after somebody moves and they present  
7 themselves at their former precinct to vote, if they  
8 state -- if somebody either challenges their qualification  
9 or if they state have changed their address, they are  
10 required by statute to fill out an affirmation of  
11 eligibility. That forms goes to the registrar. So if any  
12 of these voters had actually done as Mr. Goldman suggests,  
13 had gone to the prior precincts in the last election and  
14 voted, then had they presented their correct residence  
15 address, they would have been listed as qualified voters  
16 under the address that was their residence.

17 THE COURT: Okay. The question is, I am just trying  
18 to get what information he is entitled to, because he says  
19 that there were secrets, there was secret information that  
20 the registrar had that he didn't have access to.

21 MR. MATHESON: Okay. I understand. So, voter  
22 registration information, the actual registration  
23 application that has a signature card with it, that is  
24 submitted to the registrar when the person initially  
25 becomes registered to vote, that is what we are talking

1     about.

2           THE COURT:  Is it available to him?

3           MR. MATHESON:  It is available to him, it is  
4     FOIA-able.  There is certain information that would be  
5     redacted if he had requested a copy of that information,  
6     such as social security numbers and birth dates and stuff  
7     like that.

8           THE COURT:  He can call them up and they will print  
9     out a computer list of names and addresses, right?

10          MR. MATHESON:  Well, print out a list of names and  
11     addresses, but he is entitled to even more information  
12     than that.  If Mr. Schintzius wanted to obtain a copy of  
13     the voter registrar information, he has every opportunity  
14     to do that.  He didn't ask for any of that information in  
15     this case.

16          THE COURT:  All right.

17          Now, was Mr. Schintzius given an opportunity to talk  
18     at the hearing?

19          MR. MATHESON:  Yes.  And the hearing is recorded.  I  
20     have a transcript of the actual hearing that took place.

21          THE COURT:  Let me see the transcript.

22          MR. MATHESON:  Sure.

23          THE COURT:  Mr. Goldman says he wasn't.

24          MR. MATHESON:  Shows he was not only given an  
25     opportunity to speak at the hearing, but this issue of Ms

1 Smith of not -- him not being able to excuse me -- this  
2 issue of him not being being able to augment the record  
3 with the page and line number of where Ms Smith signed the  
4 petition is just not accurate, Your Honor. Ms. Showalter  
5 asks on the record, I think three different times, says,  
6 if Mr. Schintzius will just supply the page and line  
7 number that she signed that she would be happy to count  
8 Ms Smith's signature -- and the time that he addressed the  
9 electoral board he didn't come forward with that  
10 information.

11 THE COURT: All right.

12 Well, it looks like he spoke at the hearing,  
13 Mr. Goldman. What do you think about that?

14 You said he wasn't given a chance to say anything at  
15 the hearing. Unless this transcript is total fabrication  
16 looks like he had a chance to talk.

17 MR. GOLDMAN: Could I have a minute or two?

18 THE COURT: Can you have what?

19 MR. GOLDMAN: Permitted to just talk?

20 THE COURT: Why don't you just ask him whether he got  
21 to talk or not.

22 MR. GOLDMAN: Okay.

23 THE COURT: You need to stand up when you talk.

24 MR. GOLDMAN: I just asked him, and what he said was  
25 because he had been told that he wouldn't be allowed to

1 speak, he wasn't prepared to name the page and line  
2 number. So, apparently -- but he was -- apparently he was  
3 asked --

4 THE COURT: Okay. So he was was allowed to talk.  
5 All right. So he was allowed to talk at the meeting.

6 Thank you for that candid admission.

7 MR. MATHESON: Here is the real issue with the voter  
8 registration information as well. Even -- they are saying  
9 that not that Schintzius -- well, they are saying that  
10 Schintzius was denied access to those materials, which we  
11 dispute. They are also saying that the general registrar  
12 should have reviewed that at the appellate stage.

13 THE COURT: Well, that is in the next question that I  
14 was going ask. Why didn't they just look back at their  
15 own information.

16 MR. MATHESON: Well, number one, what they are saying  
17 is that by looking at the signature cards that are  
18 contained in the voting registration records, that that  
19 would have enabled the registrar to identify the signers  
20 of petitions with persons who appear in the voter  
21 registration system.

22 THE COURT: Let me ask you this. Is it true what he  
23 says that if somebody sent a note in signed by them not  
24 under oath or anything that they would change the -- that  
25 they would use that as admissible evidence in this

1 hearing?

2 MR. MATHESON: There were three signatures, and there  
3 have been a fourth signature had they had the page and  
4 line number that were actually counted on the strength of  
5 unsworn documents that were provided by Mr. Schintzius  
6 that were signed by the voters.

7 THE COURT: Is it true what Mr. Goldman says, that if  
8 somebody had moved and sent in a letter saying they had  
9 moved, but it was still within the district, that they  
10 would count that as a viable legitimate signature for the  
11 petition?

12 MR. MATHESON: Not necessarily. Here is the issue.  
13 Council districts are a creature of the locality.  
14 The State Board of Elections defines the criteria for  
15 whether or not somebody is a registered voter. And the --  
16 or a qualified voter, excuse me -- and the qualifications  
17 are tied to the precincts.

18 THE WITNESS: I understand. The question is, in this  
19 case would the Richmond Electoral Board have used, allowed  
20 somebody's signature on a petition to go forward if they  
21 had moved but it was in the same councilman district?

22 MR. MATHESON: Only if it was intra precinct they  
23 would have. If it was inter precinct, within the same  
24 district, they would have needed information about the  
25 move date to determine whether or not they were qualified

1 to return to their polling place at the time they signed  
2 the petition.

3 THE COURT: Okay.

4 MR. MATHESON: So there is two issues that are raised  
5 there. When the registrar is checking the validity of  
6 these signatures, often times she is unable to identify  
7 the person who signed the petition if there has been a  
8 change of residence address if somebody signs Tom Smith  
9 and they provide a unique address that doesn't appear in  
10 the various, data base of registered voters, she doesn't  
11 know which Tom Smith that is. Even if it is a unique name  
12 like Anquinette King, if there is only one instance of  
13 Anquinette King, she doesn't know if there is another  
14 Anquinette King out there who could register to vote  
15 tomorrow, and she is not able to distinguish between the  
16 two. That is --

17 THE COURT: What else do you have to say about the  
18 due process point in this case?

19 MR. MATHESON: Well, the other point is that they  
20 have conceded in their brief that it would be completely  
21 impracticable for the registrar to be reviewing the  
22 signature cards on voter registration packets as part of  
23 their process. What they are suggesting is that once  
24 things move to the appeal stage it should be incumbent  
25 upon the registrar to go back and redouble her efforts by

1 looking at voter registration materials. Even if the  
2 voter registration materials were dispositive, in a case  
3 where we have nine signatures that are being contested,  
4 then perhaps, you know, there is an argument that could be  
5 made that it is not a huge intrusion to have to look at  
6 this information. But what about the next challenge there  
7 is 2,000 signatures being reviewed on appeal. That is why  
8 the appeal procedure that has been laid down by the State  
9 Board of Elections stated that the appeal is limited to a  
10 review of whether or not the signatures were reasonably  
11 rejected.

12 Ms Showalter did not depart from any of the usual  
13 practices that she follows to determine whether or not the  
14 signers were qualified.

15 As you noted, there were eight candidates.

16 THE COURT: Let's turn to the first amendment issue.

17 MR. MATHESON: Okay.

18 Your Honor, the first amendment issue is, their  
19 primary contention is that essentially that there is a  
20 gotcha provision in the code, because the signers provide  
21 their residence address, and that may not be the same as  
22 the registration address.

23 THE COURT: Well, I don't think the first amendment  
24 requires them to put a notice on the document that says if  
25 your registration is different than your residence, please



1 let us know. There is no authority that that is what the  
2 first amendment requires.

3 MR. MATHESON: I am not aware of any authority that  
4 the first amendment requires that either.

5 Your Honor, there is also a regulation, a material  
6 omissions regulation attached to the complaint, 1 VAC  
7 20-50-20 that lays out exactly what the criteria that  
8 registrars are going to use for passing on the validity of  
9 petition signatures.

10 THE COURT: Section C 5 that says if you have an  
11 address that is different than your residence then you are  
12 not qualified to be on the petition.

13 MR. MATHESON: And C 5 specifically addresses this  
14 issue of cannot identify. The last clause says, and the  
15 signer can be reasonably identified as the same registered  
16 voter. So if they have the last four digits of Social  
17 Security number and that lines up with information related  
18 to a known voter with the same name then that might solve  
19 the problem with five. If it is a new residence we also  
20 have to look at each E 1, which says that the registrar  
21 has to determine that the person is qualified to return to  
22 the polls and vote at the time they sign the petition.  
23 And she can't do that without the move date.

24 All of that information could have been provided by  
25 Mr. Schintzius. And to the extent that he did provide it,

1     again on the strength of unsworn evidence, he was credited  
2     with those signatures.

3             THE COURT: All right. Okay.

4             What other things do you have to say about the first  
5     amendment argument?

6             MR. MATHESON: Well, Your Honor, again, the  
7     fundamental disagreement here is about the -- the  
8     fundamental disagreement is about whether or not certain  
9     petitions should have been counted based on the  
10    administrative code and the practices of the General  
11    Registrar in accordance with those in this locality. I  
12    looked back to the Hutchinson case. This doesn't state a  
13    Constitutional claim. They are not asking for declaratory  
14    relief for The Court to rule that there is a particular  
15    statute or regulation that should be ruled invalid here.

16            I would commend one case to The Court. I don't  
17    promise you this is the only citation I will give you  
18    today, but there is a Second Circuit case. This is  
19    actually Justice Sotomayor, who was Judge Sotomayor in the  
20    Second Circuit. The citation is 470 F 3d 458. And she  
21    actually followed Hutchinson where there was a case of due  
22    process challenge to somebody being removed from the  
23    ballot based on a procedure for voters to test the  
24    candidacy of interested candidates. She raised both  
25    procedural due process and the first amendment. And the

1 exact same argument was made in that case as is made here,  
2 which is that, well, you know, Mr. Goldman was saying we  
3 are here because the petition, the people who signed the  
4 petitions have first amendment rights, and those rights  
5 were taken away. And the reason that it is a federal due  
6 process issue is because of their first amendment rights.  
7 And Sotomayor rejects that. She says, we note that a  
8 contrary would permit any plaintiff to obtain federal  
9 court review of even the most mundane election dispute  
10 merely by adding first amendment claim to his or her due  
11 process claim.

12 THE COURT: All right. I understand that point.

13 MR. MATHESON: Okay.

14 THE COURT: I think that is kind of what they are  
15 asking me to do here is delve down into the intricacies of  
16 the electoral process and second guess the decision made  
17 here. That is what they are trying to do. And that is  
18 what the Fourth Circuit has told my not to do.

19 MR. MATHESON: Your Honor, as far as the latches  
20 argument is concerned, I am going to respond. I think,  
21 the issue is whether or not by the -- whether or not by  
22 the defendants removing the case to federal court  
23 that that is somehow alters the latches framework. I  
24 don't think that it does.

25 THE COURT: Why did you all wait so long to remove

1 it?

2 MR. MATHESON: Well, Your Honor, the service of this  
3 law suit was obtained on either August 24th or August 25,  
4 and we had the intervening holiday weekend. If you look  
5 at the Labor Day weekend, that Monday, which was the sixth  
6 of September, the courts were closed and we moved the case  
7 on the seventh.

8 THE COURT: Well, okay, but that gave you a whole  
9 week in the middle to do it. Well, Okay. go ahead.

10 MR. MATHESON: Well, Your Honor, I mean, I don't  
11 think it can be said we have waited.

12 THE COURT: That is, as I pointed out to Mr. Goldman,  
13 the alacrity with which you removed this isn't the issue.  
14 The issue is whether they waited too long to file it.

15 MR. MATHESON: My client received an e-mail from the  
16 printer on Sunday that said that there may be an order for  
17 ballots coming in from Fairfax today, and if that happens  
18 then they may have their ability to obtain their own test  
19 ballots pushed back an additional 48 hours, which would  
20 put additional pressure. And we are waiting for a ruling  
21 on this TRO. If it comes out favorably, we are going to  
22 be on the phone with the printer because our ability to  
23 comply with the State statute is in serious jeopardy.

24 THE COURT: I understand that it just horrible if I  
25 issue relief in this case.

1 MR. MATHESON: Yes, Your Honor. Thank you.

2 THE COURT: All right. Thank you.

3 All right. Etherington, do you have anything to add?

4 MR. ETHERINGTON: No, sir, Judge.

5 THE COURT: All right. Thank you.

6 Mr. Johnson, do you have anything to add to that?

7 MR. JOHNSON: Unless The Court has questions, I think  
8 Mr. Matheson covered it.

9 THE COURT: Okay. All right.

10 Mr. Goldman, what do you have to say in response?  
11 There is one question I want you to answer, which is, why  
12 is the State Board a party to this case? Am I supposed  
13 order them to do something?

14 MR. GOLDMAN: Your Honor, under the code they are  
15 supposed to supervise the registrars, and we made them a  
16 party in the other case, and it is unclear -- basically  
17 they claim we don't. So, it is unclear, so you have to  
18 put them in for the very reason that if you don't, then  
19 you are stuck on the other side.

20 THE COURT: That is exactly what would happen. If  
21 you had not put them in, they would be crying wolf that  
22 you should have added the State Board as a defendant.

23 Go ahead.

24 MR. GOLDMAN: Thank you, Your Honor.

25 I was happy for them to at least concede that if

1     there is only 9 signatures to check, that may be that  
2     might be something that they could do, de minimus effort,  
3     to make sure somebody had a constitutionally protected  
4     right, which is what I was trying to allowed to in  
5     comparing it to Libertarian Party versus Judd. That you  
6     have a strict -- you have a protected Constitutional  
7     right, and the government is trying to take it away,  
8     and/or put a burden on it. And so the Ashcroft case says  
9     that the government has to justify, it is basically if  
10    somebody proposes an alternative that that is not less  
11    burdensome. What could be less burdensome then looking at  
12    9 signatures to find out whether they match the signatures  
13    so you know that is the person? It is not that hard. He  
14    mentioned what happens if there is 2,000 signatures.  
15    Well, the only way there can be 2,000 signatures basically  
16    would be for a state-wide race.

17           THE COURT: Well, we have those once every four  
18    years.

19           MR. GOLDMAN: In order to have 2,000 signatures  
20    questioned, having done this enough time, you would have  
21    to have an incredible number of signatures -- and that  
22    would be number one. Number two, they would be sent  
23    around, wouldn't be 2,000 from one registrar. The way  
24    they do it is either the party can do it, and the party  
25    can do whatever it wants, actually, if you look at the law.

1 They don't even have to check. They can just say you are  
2 on the ballot. You should that, but the law has kind of a  
3 loophole that way. Or they send the signatures out to 135  
4 registrars. It is not like one person has to look at  
5 2,000.

6 THE COURT: Like in the 2008 election, as I recall,  
7 there were thousands of new voters in Richmond so there  
8 could easily have been hundreds if not thousands of  
9 challenges.

10 MR. GOLDMAN: They would have to be on the ballot.  
11 Of course, in that case the Republicans weren't getting a  
12 lot of signatures in Richmond. But, it doesn't -- the  
13 fact that something might happen doesn't excuse you not to  
14 do something that is in front of you. We are talking  
15 about these plaintiffs not --

16 THE COURT: But their point is that the law has to  
17 address contingencies beyond Mr. Schintzius' case.

18 MR. GOLDMAN: I think they could come in here in  
19 federal court and say it is too much effort for 2,000.  
20 Under that theory, even it is one they could excuse it.  
21 The question is, was it too much to ask in this case. I  
22 think they conceded that it wasn't.

23 THE COURT: The question is, is it too much to ask in  
24 all cases. Because that is what we have to look at when  
25 we are determining the validity of the law.

1           MR. GOLDMAN: They are arguing it would be too much.

2           Well, you don't have to, if you don't have to notify  
3           somebody that your signature might not be counted, and you  
4           don't have to check the signatures, and then when you hold  
5           a due process hearing don't give them enough time. Yes,  
6           any one of those things, if I cut my arm one time, I am  
7           not going to bleed out. But by the time I get to number  
8           seven I will bleed out. What is the cut that kills me?  
9           Was it first one or the seventh one?

10          I think that is a little disingenuous for them. They  
11          set up the system. They don't have to -- they set up the  
12          system this way. That is the government saying, yes, the  
13          law requires, the petition says you have got to have your  
14          signature and your residence. They keep passing over  
15          this. That is what the law says. That is what is on the  
16          petition.

17          Whether you like it or not, that is what the  
18          legislature said. Do they actually ever check the  
19          signature? No. Do they have any idea whether the  
20          registration address is the residence address? No. So it  
21          is an interesting system they set up to -- all I am  
22          proposing here, which is really not that complicated, and  
23          it is based on the Libertarian Party case, is, look, we  
24          all admit it is a constitutionally protected right. We  
25          all know people are going to move. We have move dates.



1 If you had just done the de minus, check the evidence in  
2 in your possession, you would have realized these were  
3 qualified voters. Should my client --

4 THE COURT: That is the real problem. Problem from  
5 his standpoint is he didn't call up Paul Goldman at the  
6 right time.

7 MR. GOLDMAN: I don't know if that is the problem now  
8 or before. But the question is, it shouldn't really  
9 depend upon who you call. The question should depend  
10 upon, there should be some reverence for those important  
11 rights that people have spent a lot of time fighting for.  
12 We thought we had hanged the legislation before, and in  
13 fact, a couple things that he said in terms of, so they  
14 conceded.

15 THE COURT: They made it pretty easy for  
16 Mr. Schintzius. All he had to do was a get a note with  
17 somebody's signature, and they would say, okay, you can be  
18 on it.

19 MR. GOLDMAN: The regulations don't require that.  
20 When talking the regulations, if you look at the  
21 regulation that the board put out it, doesn't require you  
22 to put in any information. It only requires you to talk  
23 about signatures and indicate the specific reason. There  
24 is nothing in the statute which says you can't present  
25 more information about at the hearing. In fact, think

1 about it. Why hold a hearing and not let him present the  
2 information at the time? Absolutely. Nobody told me  
3 that. They gave him a chance to point out a page number,  
4 and I just found that out today, should have known it  
5 before, but at the same time he was told he couldn't  
6 present any evidence at the hearing. That is a good  
7 reason perhaps that he didn't know the page number.

8       What we have shown is a system where people who are  
9 going to exercise their Constitutional rights. The  
10 government knows some people will fall into the gotcha  
11 zone. They know people move. They know it from the Ryan  
12 case. They know it from the fact that they have move  
13 regulations to cover that. They know there are people  
14 that are going to move, not register, and then go back to  
15 their old address. Oh, man, I want to vote for the  
16 president. I can go back. They know that. They know  
17 that.

18       We changed the statute. And the statute says for  
19 signing a petition you just have to be on the voter list  
20 and an active voter. All those people were. What this  
21 case is about is really quite simple. The government is  
22 going to burden first amendment rights of Virginians. How  
23 much burden are we going to allow the government to put?  
24 I have shown how the government had evidence that could  
25 have shown those people were in fact entitled to sign a

1 petition. So what what we are deciding today is not  
2 simply being a super electoral board. We have a good  
3 electoral board, we have a good registrar, I'm not saying  
4 that. I may disagree, but I am not denying that. What we  
5 are saying is, okay, how much burden will we put on these  
6 six people?

7       They want to talk about, well, we don't know what is  
8 going to happen. Maybe I will come in with 5,000  
9 signatures next time. It is only nine. Would it be  
10 different if I had 5,000 people, and they were all of poor  
11 people, and would that -- it should amount to one person,  
12 everybody, write a petition in the Virginia Constitution,  
13 not just in the -- our construction. They took it  
14 probably from Pennsylvania is where they got it. The  
15 bottom line here is the government had the information.  
16 They had an obligation. They cut off the gathering time.  
17 They knew people would fall into the gotcha provision they  
18 cut off allowing someone to present evidence at a hearing.  
19 I suggest you look at all of it, and that is an excessive  
20 burden under the Libertarian Party case on a first  
21 amendment right when they are easier more de minimus ways  
22 to do it.

23       THE COURT: Okay. Thank you very much.

24       MR. GOLDMAN: Thank you.

25       THE COURT: I appreciate your work on this. I

1 appreciate you coming in to take Mr. Morrissey's place,  
2 because it is good to have a lawyer here.

3 I appreciate the work that both sides have done in  
4 submitting written memoranda in this case.

5 I am not going to issue a temporary restraining order  
6 in this case.

7 Let me go through the factors. The first factor is  
8 the likelihood to suffer irreparable harm in the absence  
9 of preliminary relief. Well, if Mr. Schintzius does not  
10 get on the ballot, that is about as irreparable as it can  
11 be. And it certainly hurts the people that have supported  
12 him as well. And in a sense takes away their right to  
13 vote, and not their -- not right to vote, but the right to  
14 petition the government. So I think that there is  
15 irreparable harm in the absence of preliminary relief  
16 because it is possible, I suppose, to change the ballot  
17 between now and the magic moment. But, difficult.

18 Second, the balance of equities. I think that goes  
19 both ways. On the one hand you have the got the Boards  
20 need for some sort of administrative regularity. On the  
21 other hand, the equity which is pointed out by Mr.  
22 Goldman of having just nine people that they could have  
23 checked, and couldn't they have handled it some way  
24 differently here, and the equity of having somebody that  
25 is on the ballot. You know, there are equities both ways

1 in this case.

2 The public interest I think goes pretty much both  
3 ways as well for the same reasons as balance of the  
4 equities.

5 But where we run into problems in this case is  
6 likelihood of success on the merits. The case law is  
7 pretty clear that the plaintiff in order to obtain  
8 preliminary injunctive relief has to produce evidence  
9 showing a strong likelihood of success on the merits. And  
10 when he wants mandatory injunctive relief on a preliminary  
11 basis, that is to say, he wants the defendants to change  
12 something that they have already done, it is an even  
13 stronger requirement of likelihood of success on the  
14 merits.

15 I simply -- with respect to the due process issue, I  
16 think that one -- that just is a non starter in this case.  
17 This gentleman had every opportunity to put in every bit  
18 of evidence that he wanted to. He had access to voting  
19 records or information from the registrar, and all he had  
20 to do was get something from the voters themselves that  
21 said, this is where I live, and this is where I am  
22 registered. And it would have solved the problem. I  
23 don't know whether he would have gotten nine or not, and  
24 we will never know that, will we? Because he didn't  
25 submit the information.

1           It didn't have nobody notarized. It just had to be  
2 a signed letter or note from the person in question.

3           With respect to the first amendment issues in this  
4 case, I think that the requirement that has been imposed  
5 here is more than reasonable. It is that somebody provide  
6 a valid registration address and -- sorry, a valid  
7 residence address and use that as a proxy for the  
8 registration address. They require people to re-register  
9 promptly when they move. So I think they are entitled to  
10 assume that the residence and registration are the same  
11 address.

12          And it is a more than reasonable way of insuring that  
13 the people who sign the petition are the people who are  
14 folks who are allowed to do so.

15          I am not going to do a written opinion in this case.  
16 I will do an order today.

17          Although Mr. Goldman raised the specter of this being  
18 a racial issue, he has admitted, I think, that this is not  
19 a racial question in this case.

20          And I can't help but note that in his petition  
21 Mr. Goldman has cited little, if any, authority for the  
22 positions that he has taken in this case. So I think that  
23 he is skating on thin ice as far as the likelihood of  
24 success on the merits goes. So I will deny the temporary  
25 restraining order.

1           Now, as I understand it the date on which the ballots  
2   need to be finalized is when?

3           MR. MATHESON: Well, Your Honor, ballots were  
4   supposed to be finalized Friday.

5           THE COURT: When do they need to be sent out to these  
6   people overseas in foreign jurisdictions?

7           MR. MATHESON: They need to be mailed by the 23rd,  
8   which is a Friday. But there is actually a deadline  
9   before that that is equally pressing. That is the  
10   deadline for the certification and sealing of the voting  
11   machines. And the registrar cannot perform the logic and  
12   accuracy testing to insure that the voting machines are  
13   ready for the election by the deadline, which is  
14   September 20, if they don't have the test ballot in hand  
15   because the ballot and the software for --

16          THE COURT: How long does it take to get a test  
17   ballot?

18          MR. MATHESON: 48 hours, Your Honor.

19          THE COURT: When is it that they need to have it in  
20   hand?

21          MR. MATHESON: Thursday.

22          THE COURT: Why do they need to have it Thursday.

23          MR. MATHESON: Because they need -- they need two  
24   days for logic and accuracy testing of the ballot. And  
25   then they have to prepare the machines for the Electoral

1 Board inspection on the 19th and 20th. And then from 20th  
2 to the 23rd there will be assembling mailings of absentee  
3 ballots.

4 THE COURT: All right.

5 I am going to set this case down for trial on  
6 Thursday the 15th at 9:00 a.m.

7 If you have any additional evidence, bring it in  
8 then.

9 If you have any additional authority, that would be a  
10 good time to have it to me.

11 I am not going to require you to submit a brief in  
12 advance, because you have already briefed this. But if  
13 you have some cases that support your position a little  
14 better than the ones you have relied on, those would be  
15 helpful.

16 You and you can bring me copies of them or bring me  
17 the citation and my law clerk will get me copies of them.

18 I know that is a short time line. Is there  
19 additional information, Mr. Goldman, that you need to get  
20 from the defendants?

21 MR. GOLDMAN: Excuse me?

22 THE COURT: Is there additional information you need  
23 to get the defendants before the trial of this case?

24 That is not a fair question to ask you right now. I  
25 will give you until -- this is Monday. I will give you



1     until 5:00 o'clock today to give them a written list of  
2     any additional information you need from them. This is  
3     going to be your discovery in this case.

4             MR. GOLDMAN: Thank you, sir. I will give it to Ms  
5     Showalter?

6             THE COURT: Give to it Mr. Matheson, the lawyer. We  
7     are in litigation now.

8             Mr. Matheson, if you have objections to that, or  
9     anybody else has objections to that, they are to get those  
10    objections to me by noon on Tuesday.

11            And your answers are due by 9:00 o'clock Wednesday  
12    morning. We can play with that a little bit. Depending  
13    on what he asks for, although I can't see how a lot of  
14    information is going to change what we have in this case.

15            MR. MATHESON: Your Honor, just to clarify, when you  
16    say answer, are you talking about our exhibit list or  
17    responsive pleadings?

18            THE COURT: This case isn't going to have exhibit  
19    lists and witness lists, or any of that stuff. We are  
20    going to try this case like people used to in the '60s.  
21    Come into court with your witnesses. The answers to his  
22    questions. He is going to give you some questions. Have  
23    you filed an answer in the case yet?

24            MR. MATHESON: We filed a demurrer and special plea  
25    of latches in state court.

1 THE COURT: Have you filed an answer?

2 MR. MATHESON: No, Your Honor.

3 THE COURT: Have the rest of you?

4 MR. JOHNSON: No, Your Honor.

5 THE COURT: Answers are due Tuesday at noon. The  
6 complaint is only 80 pages long. You should be able to  
7 answer that by this time tomorrow.

8 All right. Sorry to put you on such a short time  
9 line, but I can't help but observe that the rights that  
10 the plaintiffs are asserting in this case are important  
11 ones, and I want to give them every opportunity that they  
12 can to get on the ballot in this case. Or to have at  
13 least their petitions fully considered.

14 MR. MATHESON: Your Honor, one thing, if I can  
15 clarify. Are we permitted to print the ballots today?

16 THE COURT: You are permitted to do whatever you want  
17 to today, because there is no TRO, but if you lose on  
18 Thursday, you better be prepared to have yourself in gear.

19 MR. MATHESON: Okay.

20 THE COURT: All right.

21 MR. MATHESON: You know --

22 THE COURT: Let me tell you something, Mr. Matheson.  
23 We are in an age of computers. You can change stuff  
24 overnight, as I have found out from lawyers submitting  
25 revised briefs overnight. So you can do that. You may

1 have to pay some more, but if it turns out you lose this  
2 case, you are going to have to change the ballot. All  
3 right?

4 MR. MATHESON: Yes, Your Honor.

5 THE COURT: Don't look at me with big eyes like it is  
6 horrible. Because I know you can do it. I know Ms  
7 Showalter can do it, because she is able to do it.

8 MR. MATHESON: Very well, Your Honor.

9 THE COURT: All right.

10 Anything else? All right.

11 There was something else I was going to say until  
12 Mr. Matheson got up and diverted my attention.

13 We have got answers due. I know what it is. You  
14 have demurrers and/or motions to dismiss that are filed in  
15 this case. You should be prepared to argue those on  
16 Friday as well. And we will -- they are on Thursday,  
17 rather. And we will take all that as part of closing  
18 argument in this case. What we are going to do is we will  
19 come in, put the evidence on, and then decide essentially  
20 whether there is a legal case to go forward at the end.  
21 All right? Anything else, counsel?

22 All right. Let me thank you all for coming in on  
23 such short notice. I look forward to seeing you all on  
24 Thursday. If you don't have anything to add to what you  
25 have said today, just let us know. All right. Thank you

1 all very much.

2 Let's recess court until 2:00.

3

4 The foregoing is a true and correct transcript.

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6 Gilbert Frank Halasz, RMR

7 Official Court Reporter:

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