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Transcript of Hearing

Date: August 20, 2021

Case: Open FCPS Coalition -v- Tholen

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Transcript of Hearing
Conducted on August 20, 2021

<p>1 VIRGINIA: 2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY 3 -----x 4 OPEN FCPS COALITION, : 5 Petitioner, : Case No.: 6 v. : CL-2021-0010386 7 ELAINE THOLEN, : 8 Respondent. : 9 -----x 10 11 12 HEARING 13 Fairfax, Virginia 14 Friday, August 20, 2021 15 10:45 a.m. EST 16 17 18 19 20 Job: 394330 21 Pages: 1 - 63 22 Transcribed by: Sheila Martin</p>	<p>1 APPEARANCES 2 ON BEHALF OF THE PETITIONER, OPEN FCPS 3 COALITION: 4 CHARLES SPIES, ESQUIRE 5 DICKISON WRIGHT PLLC 6 1825 Eye Street, NW, Suite 900 7 Washington, DC 20006 8 9 ON BEHALF OF THE RESPONDENT, ELAINE THOLEN: 10 STUART A. RAPHAEL, ESQUIRE 11 SONA REWARI, ESQUIRE 12 HUNTON ANDREWS KURTH, LLP 13 2200 Pennsylvania Avenue, NW 14 Washington, DC 20037 15 (202) 419-2021 16 17 ON BEHALF OF THE COMMONWEALTH: 18 JAMES HINGELY, ESQUIRE 19 COMMONWEALTH ATTORNEY 20 410 East High Street 21 Charlottesville, Virginia 22902 22 (434) 972-4072</p>
<p>1 Hearing held at: 2 3 4 Fairfax County Circuit Court 5 4110 Chain Bridge Road 6 Fairfax, Virginia 22030 7 (703) 691-7320 8 9 10 Pursuant to agreement, before Juliet Hooper, 11 Notary Public in and for the Commonwealth of 12 Virginia. 13 14 15 16 17 18 19 20 21 22</p>	<p>1 APPEARANCES (Continued) 2 3 ALSO PRESENT: 4 Elaine Tholen, Respondent 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>

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THE COURT: All right. Do you solemnly swear or affirm to transcribe these matters fully, accurately and completely to the best of your ability?	1 the motion to quash filed by Mr. Raphael. So Mr. Raphael, you have the floor.
COURT REPORTER: Yes, I do.	MR. RAPHAEL: Thank you, Your Honor. May it please the Court. This is hereon our motion to quash the -- both the show-cause rule and the petition to remove this Ms. Tholen as a member of the Fairfax County School Board. This is a proceeding under code Section 24.2-3 -- 233 and 235. The Petitioners have from time to time referred to this as a recall statute. This is not a recall statute like you have in California where if you don't like the performance of the governor you can get people to sign that referendum, have -- have a new election and -- and actually replace the candidate -- the elected official.
THE COURT: All right. For the record, this is Open FCPS Coalition v. Elaine Tholen, CL2021-10386. And if I could have counsel please identify themselves for the record.	THE COURT: Let me make sure. Mr. Spies, can you hear everything all right?
MR. HINGELY: Yes, Judge. I'm James Hingely. This Court appointed me as a special prosecutor in this action.	MR. SPIES: Yes, I can, Your Honor.
THE COURT: Mr. Hingely, good morning. You came all the way up from Charlottesville?	THE COURT: Okay. Very good. I'm sorry, Mr. Raphael.
MR. HINGELY: Good morning, Judge.	MR. RAPHAEL: So -- so it's not a recall statute; it's a removal statute. The early case is
THE COURT: Good morning.	actually called an ouster statute. You're actually ousting an official from office for cause for something that they did that -- that is a breach of duty. We've moved to quash the rule and the position because the -- the [unintelligible] is plainly based on a policy disagreement, not a violation of a law or legal duty. The claim is that the school board should have resumed in-person instruction last October of 2020 during the COVID-19 pandemic, which continues, and before the rollout of any vaccinations.
MR. RAPHAEL: Good morning, Judge. Stuart Raphael for Respondent, Elaine Tholen. And with me is my partner, Sona Rewari. And Ms. Tholen is also sitting with counsel.	THE COURT: And speaking of that, by the way, anybody who has been fully vaccinated -- I should've mentioned this earlier -- may remove the mask in the courtroom, if you wish to. It's up to you.
THE COURT: Okay. Thank you. And this is	MR. RAPHAEL: Thank you very much, Your Honor.
	THE COURT: I probably should have mentioned that earlier. But --
	MR. RAPHAEL: As we've shown in our brief, the petition, there's no law or regulation that was

<p>9</p> <p>1 violated.</p> <p>2 THE COURT: What about there -- the</p> <p>3 allegation that there was a requirement under the</p> <p>4 Code of Conduct to "make policy decisions based on</p> <p>5 the available facts and appropriate public input"?</p> <p>6 MR. RAPHAEL: Right. Well, it gets to the</p> <p>7 question of whether this is a claim for a violation</p> <p>8 of the discretionary duty or a claim for a violation</p> <p>9 of administrative duty. That's the Warren case that</p> <p>10 we cited.</p> <p>11 THE COURT: Right.</p> <p>12 MR. RAPHAEL: And the law in Warren and</p> <p>13 the Grizzard case that we also cited is that when</p> <p>14 you're alleging a breach of the duty that -- that</p> <p>15 involves the exercise of judgment and discretion, you</p> <p>16 have to show willful, corrupt behavior. And I think</p> <p>17 Warren is a really good example of that. In Warren,</p> <p>18 if Your Honor -- I assume you read the case. There</p> <p>19 are actually three charges there. Two of the charges</p> <p>20 related to -- it was a suit against a Commissioner of</p> <p>21 --</p> <p>22 THE COURT: Right. I read the case.</p>	<p>11</p> <p>1 then Judge Compton said, applying -- applying the law</p> <p>2 of Warren that -- that was, you know, it -- it was</p> <p>3 poor judgment, but it's not a basis for removal in</p> <p>4 the statute and Judge Compton dismissed the charge.</p> <p>5 So this is a quasi-criminal statute. It</p> <p>6 has to be strictly construed. The Commonwealth,</p> <p>7 which is represented by the Commonwealth's attorney,</p> <p>8 he does not represent the petitioners any more than a</p> <p>9 Commonwealth's attorney would actually represent the</p> <p>10 victim. Right? And that he requires proof of a</p> <p>11 violation by clear and convincing evidence.</p> <p>12 THE COURT: But that's not something that</p> <p>13 needs to be alleged in this case. I mean, we're sort</p> <p>14 of acting when -- your motion to quash is really --</p> <p>15 it's almost in the nature of a demurrer.</p> <p>16 MR. RAPHAEL: That's -- that's exactly</p> <p>17 right. And although the Court can take judicial</p> <p>18 notice of -- of administrative laws and rules.</p> <p>19 THE COURT: Of course.</p> <p>20 MR. RAPHAEL: But -- but -- but it is</p> <p>21 exactly like that. And so, what we're saying is that</p> <p>22 when you -- when you look at the four corners of the</p>
<p>10</p> <p>1 MR. RAPHAEL: Right. So two of the</p> <p>2 charges were the Commissioner of Revenue signed</p> <p>3 licenses and took money that only the treasurer could</p> <p>4 do plain violation of duty. The Supreme Court said</p> <p>5 that's a proper basis for removal. The third charge</p> <p>6 was that the Commissioner of Revenue failed to assess</p> <p>7 all the properties that the commissioner should have</p> <p>8 assessed. And the Court said that assessment</p> <p>9 involves the exercise of judgment and discretion.</p> <p>10 And that's not a proper basis for removal unless</p> <p>11 there are allegations of corrupt intent, willful</p> <p>12 intent, you know, the Commissioner had no intention</p> <p>13 of -- said he's not going to assess any properties,</p> <p>14 that sort of thing. And therefore that charge</p> <p>15 failed.</p> <p>16 There's a similar example in the</p> <p>17 Commonwealth ex rel. Willis v. Grizzard case from</p> <p>18 1970, which was decided by then Judge Christian</p> <p>19 Compton. And in that case, a prosecutor who was</p> <p>20 specially appointed made intemperate remarks about a</p> <p>21 jury verdict for the defendant. The prosecutor said</p> <p>22 that it was a miscarriage of justice. And the --</p>	<p>12</p> <p>1 petition, there is not an allegation of a breach of a</p> <p>2 legal duty or regulation.</p> <p>3 THE COURT: Your position is that the</p> <p>4 requirement under the code of conduct and school</p> <p>5 board members to make policy decisions based on the</p> <p>6 available facts and appropriate public input is not a</p> <p>7 duty, not a legal duty?</p> <p>8 MR. RAPHAEL: It's -- it's not a legally</p> <p>9 enforceable duty. And it's not -- it certainly at</p> <p>10 best calls for judgment and discretion. And the only</p> <p>11 way you can get passed a demurrer or a challenge to</p> <p>12 would be to -- to plead evil intent, and there's no</p> <p>13 such allegation.</p> <p>14 THE COURT: What if the -- what if the --</p> <p>15 it says -- assume for the moment that it is the duty.</p> <p>16 It says policy decisions are to be based on the</p> <p>17 available facts and appropriate public input. It</p> <p>18 seems to me -- this strikes me as kind of like these</p> <p>19 arguments that are made in federal courts in the last</p> <p>20 couple of years. So on actions of the former</p> <p>21 president and the current president that they were</p> <p>22 acting arbitrarily and capriciously because</p>

<p style="text-align: right;">13</p> <p>1 regulations are being issued without taking into 2 account whatever they were supposed to take into 3 account. 4 And what if it -- what if the, in this 5 case, the Petitioners could show that a policy 6 decision was made but the person just -- and I'm not 7 saying this is what happened here -- that the person, 8 a school board member, said, I don't care what the 9 available facts and I don't -- are and I don't care 10 what the appropriate public input is; I'm not paying 11 any attention to either one of those, but I'm going 12 to make a policy decision? 13 MR. RAPHAEL: Yeah. 14 THE COURT: Can -- can she -- isn't that a 15 breach of a duty then? 16 MR. RAPHAEL: I -- I think you have to 17 satisfy the standard in Warren, which is corrupt, 18 evil intent. So under Warren, if -- if there were a 19 legal duty and that -- that involves judgment and 20 discretion and the decision maker said, you know, I'm 21 not paying any attention to any of this. I'm just 22 going to decide it by flipping a coin, you know, you</p>	<p style="text-align: right;">15</p> <p>1 MR. RAPHAEL: Well -- 2 THE COURT: And Ms. Tholen didn't balance 3 when she said, we're not doing it? 4 MR. RAPHAEL: They disagree with how it 5 was balanced, but they don't allege the kinds of 6 allegations you would need to show that there -- 7 there was a complete indifference to the facts. And 8 I think given you have the minutes, I would -- I 9 would ask the Court to look at the minutes in this 10 case at page A-177. So when you look at the minutes 11 of that July 21, 2020 meeting, Superintendent Braband 12 at the outset recommends an all remote virtual start 13 to the 2020-2021 school year -- 14 THE COURT: Right. 15 MR. RAPHAEL: -- because of the problems 16 with COVID-19. 17 THE COURT: Right. 18 MR. RAPHAEL: He goes on to -- the 19 minutes go on to report that there was a consensus by 20 all school board members that that was appropriate. 21 And then they go on then to talk about the staging 22 for -- thereafter for how they would get back to in-</p>
<p style="text-align: right;">14</p> <p>1 might satisfy Warren. 2 But I would call the Court's attention to 3 the -- the undisputed record in this case, which 4 includes the minutes of the meeting in July of 2020, 5 that the Petitioners are relying on. And in the -- 6 in the brief that was filed in response to our 7 petition by Open FCPS, they admit at page two that 8 the State Health Commissioner and the State 9 Superintendent of Schools put the decision whether to 10 go back to in-person learning "squarely in the hands 11 of local school boards." That's at page A-14 of the 12 record. 13 And the state said, this is a -- this is a 14 "difficult task." They noted that there was no 15 vaccine yet. So the school board members who made 16 these decisions had to balance the -- the -- the -- 17 the -- the benefit of in-person learning against the 18 dangers and risks of being in school during a 19 pandemic before any vaccine had been -- 20 THE COURT: Right. You're right. They 21 have to balance those. But -- but isn't essentially 22 the allegation here that they didn't?</p>	<p style="text-align: right;">16</p> <p>1 person instruction. And of course, you have to 2 remember with six foot distancing, it has a huge 3 effect on seating students on a school bus, going to 4 the classroom. These are -- these are -- these are 5 difficult decisions. 6 THE COURT: They are difficult decisions. 7 But -- but isn't the -- none of that indicates, 8 though, what Ms. Tholen considered when she made her 9 decision. I mean, the fact that the superintendent 10 is recommending something doesn't mean that she made 11 a decision based upon the -- the available facts and 12 appropriate public input. 13 MR. RAPHAEL: Well, I think -- I think -- 14 I mean, hypothetically the school board member relied 15 only on the recommendation of the superintendent who 16 was hired to provide that advice. I think that would 17 be adequate. That would not be a basis for removal. 18 But that is -- that isn't this case, given you have 19 the minutes, you have the discussion. And the -- 20 this petition is identical to the petitions against 21 the school board members, Ms. Cohen and Ms. Omeish. 22 Right? There's no -- there is no distinction between</p>

<p style="text-align: right;">17</p> <p>1 anything that Ms. Tholen did and anything that any 2 other school board member did. Under this theory, 3 all of them would be removable, and -- and -- 4 THE COURT: And why would they all be 5 removable? I mean, maybe some -- there's going to be 6 some evidence that they -- that they didn't take 7 these facts into consideration. But the -- 8 MR. RAPHAEL: Yeah. 9 THE COURT: -- other school board members 10 did. 11 MR. RAPHAEL: I think you have to plead 12 it, Your Honor. It's not the petition. Right? It's 13 a pleading deficiency. They haven't pleaded anything 14 that would be unique to Ms. Tholen that would show 15 that she -- 16 THE COURT: Why does it have to be unique 17 to her? Why couldn't -- why couldn't all three of 18 them have done the same wrong thing? 19 MR. RAPHAEL: Well, I mean, 20 hypothetically, I suppose -- sure. I suppose if 21 you'd say, you know, hypothetically, there was some 22 corrupt deal to do something and they were all part</p>	<p style="text-align: right;">19</p> <p>1 talking about here, though, is always -- always 2 happens in demurrer arguments. The Defendants starts 3 -- or rather the Plaintiff starts -- starts arguing, 4 well, Judge, there's all these other facts that -- 5 that would make it much easier for you to decide this 6 demurrer. But if those aren't before me, -- 7 MR. RAPHAEL: I -- I -- 8 THE COURT: -- before we get into 9 demurrer, I'm -- I'm stuck with the four corners. 10 MR. RAPHAEL: I -- I -- I -- I agree with 11 you halfway. The principle is certainly true on a 12 demurrer. You -- you, you know, you take us through 13 the things that are pleaded in the petition. But we 14 do have the benefit of the judicial notice of the 15 official publications of the school board and the 16 State Board of Education, the state superintendent, 17 the Virginia Department of Health. Those are -- you 18 can consider those on demurrer. 19 But -- but -- and you might have noticed 20 this, you know, in our brief, we -- we did set out 21 this with a factual background. We put it in 22 context. When you get to the argument section of our</p>
<p style="text-align: right;">18</p> <p>1 of it. 2 THE COURT: [Crosstalk] corrupt deal if 3 they all independently, individually, did the same 4 wrong thing. 5 MR. RAPHAEL: Well, it depends on what the 6 wrong thing is. It has to meet the bar of one, and 7 it doesn't in this case. And recalling, Your Honor, 8 Fairfax County was not alone. Right? We -- we 9 submitted the Virginia Department of Education 10 statement that half of all schools in Virginia opened 11 with fully remote learning in the -- in the fall of 12 2020, and all -- all of the large school systems did. 13 So there's nothing in -- there's nothing 14 pleaded that suggests that this board or any member 15 of it did anything that was inappropriate, certainly 16 not anything corrupt, or anything involving evil 17 intent. Now, of course, as we know, the board went 18 on to -- to -- the school system went on to restore 19 an option for in-person learning. And they did by 20 March 16th of 2021, which was months before the 21 deadline of July 1, that the legislature-- 22 THE COURT: Essentially, what we're</p>	<p style="text-align: right;">20</p> <p>1 brief, it's pretty straightforward. They don't 2 allege anything in the petition that identifies a 3 breach of a legal duty that could give rise to a 4 claim under this statute to remove a public official. 5 And it was -- it was plainly a judgment 6 call. And there were -- there were a couple stray 7 arguments in there, violations I do want addressed. 8 They -- they -- they cite the Virginia regulation for 9 special ed that says that you have to provide a free 10 and appropriate public education. But there's 11 nothing that ties that to the timing of returning 12 from virtual learning and in-person learning. They 13 don't cite any actual regulation that was -- that was 14 violated. 15 And there is no response by Mr. Spies to 16 what we said in our brief in -- in footnote 19 that 17 the Virginia Department of Education actually 18 examined whether Fairfax County, whether the distance 19 learning program violated any special ed laws and 20 concluded that it did not. And that was affirmed on 21 appeal by the hearing officer, and you can take 22 judicial notice of that too.</p>

<p style="text-align: right;">21</p> <p>1 There's a significant factual mistake in 2 the -- in the -- in the brief -- in the petition. 3 The Open FCPS says on page two of their brief that 4 Dr. Gloria Addo-Ayensu of the Fairfax Health 5 Department advised on July 23, 2020 that it is safe 6 for students to return to school. So they -- they 7 point to this supposedly in July -- on July 23, 2020. 8 And they cite their Exhibit 1. When you turn to 9 Exhibit 1 -- 10 THE COURT: I saw the same thing. 11 MR. RAPHAEL: -- and look at the date. 12 THE COURT: 2021. 13 MR. RAPHAEL: It's -- last month. 14 THE COURT: Right. 15 MR. RAPHAEL: A full year later. And of 16 course, we're talking about -- by this time you have 17 the law -- the state law that says as of July 1 you 18 have to offer an in-person option. And it goes on to 19 talk about [crosstalk]. 20 THE COURT: That's one of the questions 21 I'm going to be addressing with Mr. Spies, because 22 there seems to be a conflict between the text and the</p>	<p style="text-align: right;">23</p> <p>1 official must exercise judgment and discretion. And 2 of course, the parents were divided on this issue. 3 And parents weren't the only stakeholders. They were 4 -- there were teachers, staff, taxpayers who would 5 have to pay the cost of extreme measures needed to 6 protect public safety. It -- it was a huge balancing 7 act. 8 And school board members have the 9 thankless job of trying to get that balance right. 10 And every large system made the same call, and half 11 of all school systems in Virginia made the same call. 12 And I think the amicus brief here by the Virginia 13 School Board Association is quite good. And I -- I 14 was impressed with the reference to Edmund Burke, who 15 talked about the idea that an elected official 16 betrays his constituency if he fails to exercise his 17 judgment and sacrifices his opinion or her opinion to 18 popular -- to popular opinion. 19 They also do a nice job, I think, of 20 painting the problem with the slippery slope here. 21 If -- if the school board had made the other decision 22 [unintelligible]. Okay. We're going back to -- to</p>
<p style="text-align: right;">22</p> <p>1 footnote. 2 MR. RAPHAEL: That's exactly right. This 3 -- I think this case shows that this is not how 4 representative democracies are supposed to work. Ms. 5 Tholen was elected with nearly 59 percent of the vote 6 in the Dranesville District. Under the statute, you 7 can commence a removal petition with simply getting 8 the signatures of ten percent. So if -- if a policy 9 disagreement were enough, then a small minority 10 faction could always try to overturn the last 11 election. That makes no sense. 12 Open FCPS also references a survey that 13 FCPS did that -- that -- that, according to them, 14 according to the -- Open FCPS, a majority of parents 15 wanted to return to in-person learning. Now, for 16 purposes of this, I'll -- I'll -- I'll assume that's 17 true. It's not. But I'll assume -- I'll assume it's 18 true. 19 But even assuming that's true, an elected 20 official is not an [unintelligible]. who just looks 21 at a poll and decides where the wind is blowing and 22 that's how they're going to vote. An elected</p>	<p style="text-align: right;">24</p> <p>1 in-person learning. And by the way, if you look at 2 their Twitter site, they wanted no masking. Right? 3 So if -- if the school made the decision to go back 4 to all in-person learning with no masking, you'd see 5 another faction here saying, remove these people. 6 They made a terrible policy choice. 7 The FCPS is opening with five-day in- 8 person instruction with masks. The only -- the only 9 issue that the petition raises is how soon should 10 they have made that call, and there was no legal duty 11 to have -- to have an in-person instruction until 12 July 1, 2021. The bottom line is they can't point to 13 a statute or a regulation that was violated with 14 corrupt intent, then -- then you got -- 15 THE COURT: Looking at this corrupt intent 16 -- 17 MR. RAPHAEL: Yes. 18 THE COURT: -- case, -- 19 MR. RAPHAEL: Yes. 20 THE COURT: -- of course it's from 1923. 21 And this -- I know the statute that is at issue there 22 is long gone. And we're -- we're dealing with a</p>

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1 different statute now, which they, for example, that
2 statute talking about gross neglect. The statute now
3 just says neglect of duty and it had malfeasance and
4 misfeasance. All that's gone. So to -- to what
5 extent then should I -- is that really binding here
6 because it dealt with a statute that the legislature
7 years ago got rid of?
8 MR. RAPHAEL: Yeah, that -- that's not
9 quite right. The statute traces to 1874. And you're
10 right, that at one point it was moved out of 24.2.
11 It was entitled -- it was in the 15. -- what is now
12 15.2.
13 THE COURT: Right.
14 MR. RAPHAEL: In 1975, it was moved back.
15 It was actually a helpful footnote in the Townes'
16 case that describes the history of that. And when it
17 was moved back -- back to Title 24.2 in 1975, you're
18 right, the general assembly shortened it. They took
19 out the references to misfeasance and malfeasance.
20 But there's no -- I think they were just
21 shortening it. There's no indication -- I think it
22 would be hard to argue from the difference in text

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1 that they did away with the ruling. Warren, that you
2 could only be removed for a violation of a
3 ministerial duty or the violation of a duty that
4 requires judgment that you violated with willful,
5 corrupt intent. And I think the icing on the cake is
6 that the Supreme Court since 1975 has twice cited
7 Warren as control. It did it in Townes where it
8 followed Warren.
9 And it did it in the -- in the Johnson
10 case. It did it in the Johnson v. Woodard case,
11 which I noted Your Honor cited in your Sangha
12 opinion. That's the very first case that you cited.
13 And there's actually a significant overlap, I think,
14 between the concepts here and -- and what you decided
15 in that opinion about the role -- what is the proper
16 role of the Commonwealth's attorney representing the
17 interests of the Commonwealth?
18 If you let this case go forward, you know
19 that there are more petitions behind this, right?
20 This is a common thing that's developing now. A
21 faction doesn't like the policy choices of elected
22 officials and they start a campaign to -- to remove

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1 them. You cannot let removal petitions go forward
2 based on policy disagreements.
3 Before I sit down, I want to reserve our
4 objection under Johnson that the petitioners here who
5 are represented by Mr. Spies are not a party and do
6 not have standing. But I understand Your Honor said
7 the last time that -- that you would hear from Mr.
8 Spies. So I understand that. But we would ask the
9 Court -- that the Court grant the motion to quash and
10 dismiss the petition with prejudice and I would like
11 to preserve a little bit of time for rebuttal.
12 THE COURT: Yes, sir. Thank you, Mr.
13 Raphael. Mr. Hingely, did you want to be heard on
14 this at this point?
15 MR. HINGELY: I do want to be heard,
16 Judge. But I also would echo Mr. Raphael's objection
17 to Mr. Spies' participation on the grounds that he's
18 not a party or his -- the petitioners are not a party
19 and he's representing the petition. That being said,
20 I understand that the Court is going to hear from
21 him. And I would ask that the Court hear from Mr.
22 Spies first, and then I would go after that.

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1 THE COURT: All right. We'll do it in
2 that order then. Mr. Spies.
3 MR. SPIES: Good morning, Your Honor.
4 THE COURT: Good morning, sir. And just
5 so you're aware, you're on the big screen in the
6 courtroom here. So everybody who's in the courtroom
7 can hear you and see you.
8 MR. SPIES: Thank you, sir. Open FCPS
9 Coalition, as the Court is aware, collected over
10 5,000 signatures according to the provisions of
11 Virginia law. This is, as you noted, a 1975 law and
12 it plainly outlines the requirements for petitions.
13 What the Defendant here is asking you to do is ignore
14 the plain statutory language of the law, which refers
15 to alleging neglect of duty or incompetence in the
16 performance of duties and instead focus on policy
17 issues, which, understandably, Ms. Tholen disagrees
18 with, but all of which should be more appropriately
19 dealt with at the show-cause hearing stage.
20 At this point, I appreciate the reference
21 to the -- to the Townes' decision, which is, I
22 believe, our most recent precedent on point here.

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1 And that talks about the notice -- the notice
2 standard under Virginia civil procedure and says that
3 the point here of a petition is to provide sufficient
4 notice of allegations of material fact to the
5 Defendant so that she can then defend herself in a
6 show-cause hearing.
7 Our petition clearly outlines a duty that
8 Ms. Tholen had, which was pursuant to the state law
9 providing for the Fairfax County Board guidebook,
10 which said she was required to -- to evaluate both
11 the -- to evaluate the scientific facts in front of
12 her and also the opinions of the community.
13 THE COURT: How does that rise to the
14 level --
15 MR. SPIES: That is --
16 THE COURT: How does that rise to the
17 level of a legal duty? Mr. Raphael argues
18 essentially that that's not a legal duty, and
19 therefore, it's not a duty that she can breach and --
20 or -- or a duty that she can neglect or being
21 confident in the conduct of.
22 MR. SPIES: Your Honor, if the Virginia

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1 legislature had wanted Mr. Raphael's standard to be
2 the standard, they could have put that in statute.
3 They did not. So we disagree with what he's -- with
4 the standard that he's citing from a half century --
5 THE COURT: I'm not asking you about that.
6 I'm asking you about the duty word. The statute says
7 that she has to neglect the legal -- has to been
8 neglect a duty or that she has to be incompetent in
9 the -- in the performance of a duty. And my question
10 is, what is -- what is the legal duty that we're
11 talking about here? You say it's the --
12 MR. SPIES: Sure.
13 THE COURT: -- making policy decisions
14 based on available facts and appropriate public
15 input. But Mr. Raphael suggests that's not really a
16 legal duty. And I want to hear --
17 MR. SPIES: Well, it's --
18 THE COURT: -- you speak to that.
19 MR. SPIES: -- two points, Your Honor.
20 First, is that this is outlined in the exact manual
21 that provides the duties for her job. So --
22 THE COURT: And who creates that manual?

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1 Is that -- it's not a legislative document. It's not
2 a law.
3 MR. SPIES: No, sir. It's -- I believe
4 it's created by the Fairfax County educate --
5 administration, but I'm not sure the history of the
6 creation on it. But I believe the important point on
7 that is that the duty was outlined in the petition.
8 And it has, you know, the -- the 5,000 people that
9 signed the petition were presented with the -- with
10 what we believed the duty to be and presented with
11 evidence that she did not -- that she did not
12 consider the scientific evidence that was before her.
13 And that was all four square in front of the people
14 on the petition. So it meets the --
15 THE COURT: Right. But I want to stay on
16 this idea of the duty. You're saying that that
17 requirement to make policy decisions based on the
18 available facts and appropriate public input is
19 enough of a legal -- of a legal duty to be something
20 that she could neglect and therefore be removed?
21 MR. SPIES: In short, yes. But
22 respectfully, this is also the point of the show

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1 cause here. So she can argue this at the show-cause
2 hearing. And, in addition, she could prevent -- she
3 could present evidence at that point that she had --
4 that she actually didn't consider the -- the
5 scientific evidence in front of her or input --
6 THE COURT: I understand that. But -- but
7 there first needs to be legal duty or a duty anyway
8 that -- that's shown that she neglected.
9 MR. SPIES: And that's -- and I think
10 that's an important -- Judge, then in terms of the
11 precise language of the statute, it refers to neglect
12 of duty or incompetence in the performance of duties
13 --
14 THE COURT: Right.
15 MR. SPIES: -- then they have tried to
16 rhetorically tighten that standard to a legally
17 required duty. And that's not what the statute says.
18 And the -- the implication here of what the
19 Plaintiff's -- I'm sorry, the Defendant, Ms.
20 Tholen's, argument is -- is to conflate the
21 evidentiary standard of a show-cause hearing with the
22 legal standard of this motion to quash hearing.

33

1 THE COURT: All right. Before you go on,
2 could you address the point that Mr. Raphael raised
3 about your brief in Exhibit 1, the footnote which
4 indicates 2020, July 23, 2020. It's on page two of
5 your brief, and then you drop to the footnote to
6 reference Exhibit 1, and that Exhibit 1 talks about
7 the document from July 2021.

8 MR. SPIES: I -- I apologize for what
9 appears to be a typo in the footnote, Your Honor.
10 But the important point is what the people who signed
11 the petition were relying upon. And in that it's the
12 July 21, 2020 advice from Dr. Addo-Ayensu as well as
13 the July 10, 2020 American Academy of Pediatrics
14 statement --

15 THE COURT: Okay. So the --

16 MR. SPIES: -- both of which were issued
17 prior to her vote.

18 THE COURT: So the reference in footnote
19 one, your brief to the document, interim
20 recommendations for school board re -- schools
21 reopening starting 25 July 2021, isn't -- is a
22 miscitation; that's not the correct document; is that

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1 right?

2 MR. SPIES: Correct. Because that -- the
3 -- the petition was circulated far in advance of that
4 statement. So I apologize for the, like for the --
5 [crosstalk].

6 THE COURT: Okay. All right. Go ahead,
7 sir.

8 MR. SPIES: So our position is that the
9 petition has adequate signatures and on its face
10 states that Ms. Tholen acted incompetently when
11 performing her duties and/or neglected her duties
12 when she ignored the science and her constituents.
13 And we also properly plead that that was -- had a
14 material adverse effect on the conduct of the office.

15 The Tholen brief and their argument does
16 not squarely address these duties other than to
17 suggest that there's a different standard from, you
18 know, a half century earlier prior to this law. She
19 provides no argument or evidence that she satisfied
20 the duties which we outline in the petition. And
21 despite the fact that the petition explicitly
22 mentions the results of a poll collected -- I'm sorry

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1 -- conducted by the schools in 2020 that showed a
2 preference for in-person learning. Her brief fails
3 to explain how her decision not to implement in-
4 person learning was made with appropriate public
5 input.

6 And these are -- this is -- these are
7 evidentiary issues which should be addressed at the
8 show-cause hearing. And that's exactly why the
9 motion to quash is a different standard than what she
10 is -- than what they're trying to conflate by arguing
11 policy at this point.

12 THE COURT: All right. Anything further,
13 Mr. Spies?

14 MR. SPIES: No, Your Honor. But I'd like
15 to reserve a few moments to respond to Mr. Hingely,
16 if necessary.

17 THE COURT: All right. Mr. Hingely, then,
18 the podium is yours.

19 MR. HINGELY: Thank you, Judge. I'd like
20 to begin by stating that I agree with the argument
21 that has been presented by the school board members
22 and Ms. Tholen with respect to the fact that this is

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1 a policy disagreement, and that the claim should
2 therefore be dismissed or quashed.

3 THE COURT: Well, are you -- as the
4 Plaintiff now, are you making -- are you making a
5 motion to nonsuit this matter?

6 MR. HINGELY: I will be making a motion at
7 the end of my presentation that I'm indicating to the
8 Court at this point in the argument that I do agree
9 with the argument that's been presented by counsel
10 for the Defendant.

11 THE COURT: All right.

12 MR. HINGELY: Thank you. And like counsel
13 for the Defendant, I appreciate very much the
14 Virginia School Board Association amicus brief. And
15 just to -- to punctuate this in addition to the
16 Edmund Burke quote that Mr. Raphael referred to,
17 there's a excerpt from a Pennsylvania case that I
18 think states the -- the matter very clearly. And I'm
19 quoting from that case, one of the prices paid for
20 the creation of the representative democracy is the
21 best thing for the electorate trust and
22 responsibility in its elected representatives.

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1 Discretion is placed within the hands of the
2 municipal legislators. And we must accept the lawful
3 exercise of this discretion. It is at the ballot box
4 that voters may express their disapproval of the
5 legislative programs of elected officials. It is at
6 the ballot box, not at a removal petition.
7 THE COURT: I was expecting a quote from
8 Churchill here somewhere, but -- represented
9 democracy being the worst form of government on the
10 face of the earth except for all others.
11 MR. HINGELY: Well, I would endorse that,
12 Judge. Thank you. Now, let me turn to an issue that
13 I think this Court is concerned that was brought up
14 both in colloquy with the defense counsel and the
15 Petitioner's counsel. And that is this issue of --
16 of making policy decisions based on available facts
17 and appropriate public input.
18 I agree with defense counsel this is not a
19 legal duty. However, supposing that it were a legal
20 duty, the petition is still insufficient. Here's
21 why. Mr. Raphael gave the Court a hypothetical.
22 That is to say how the Court would look at this

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1 knowing that the superintendent of schools reported
2 to the board his conclusion and recommendation that
3 school should not be resumed in person but should
4 continue remotely. And the Court, if I got this
5 correctly, responded by saying, well, that doesn't
6 show that the school board took the superintendent's
7 recommendations into consideration. It's just that
8 the recommendation was made.
9 And so, here's the problem with the
10 Petitioner's argument I would submit. The converse
11 of that is true. That is to say that the allegations
12 do not show that the school board member did not take
13 these recommendations into account. And that's the
14 fatal flaw with petition. Because even if you accept
15 that that's a legal duty, and I don't agree that it
16 is. But if you were, the Petitioner does not show
17 anything in the petition that demonstrates that the
18 school board member did not consider scientific
19 evidence as they've alleged or that the -- the school
20 board member did not take into account the --
21 THE COURT: Well, they allege in the --
22 one, two, three, four, five whereas clause that she

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1 ignored local and national medical experts which has
2 stated keeping schools closed would be detrimental to
3 all children and thereby violating their duty as a
4 school board member. Isn't that a sufficient
5 allegation for purposes of this motion to quash
6 anyway?
7 MR. HINGELY: Well, in Mr. Spies'
8 presentation, he said that the petition has evidence
9 that she did not consider that, not that it was just
10 an allegation. Now, let me turn to that, however.
11 If the Court finds that there's sufficient
12 allegations of not considering the parents'
13 preference or the scientific evidence, one thing that
14 I've had to do as a prosecutor coming into this case
15 is look at what the evidence is. And this is a case
16 that has -- has been referred to and as a lobbyist
17 the Commonwealth's attorney does not represent the
18 Petitioner. The Commonwealth's attorney represents
19 the public interest. So -- and this is not a case
20 that came forward in usual manner by a summons or a
21 warrant or an indictment. So this hasn't been
22 reviewed or considered at all by the Commonwealth's

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1 attorney. So that was one of the duties that I took
2 on when I accepted the role as special prosecutor.
3 And so --
4 THE COURT: And a kind of grand jury --
5 5,000 person grand jury.
6 MR. HINGELY: Yes. Except a grand jury is
7 advised --
8 THE COURT: Right.
9 MR. HINGELY: -- by the Commonwealth's
10 attorney in the form of the indictment that's
11 presented to the grand jury. Now, --
12 THE COURT: Like all analogies, it has a
13 weakness.
14 MR. HINGELY: Thank you, Judge. So let me
15 go point by point. And let's start with a point that
16 you just mentioned. They say that Dr. Gloria Addo-
17 Ayensu -- that she advised -- the Petitioner's
18 alleged that she advised the school board that it was
19 safe to operate in-person learning. And their
20 argument then goes forward that -- that arguably or
21 allegedly, the school member ignored that advice.
22 Now, first of all, there's no showing that

<p style="text-align: right;">41</p> <p>1 if the school member ignored that advice that that is 2 sufficient to show neglect because one of the duties 3 of the school board member is to weigh and balance as 4 we have discussed. But let's say that this Court 5 were to find at least there's an issue of whether 6 that is colorably or arguably within the embrace of 7 the statute when it speaks of neglect. The fact is 8 that the allegation is incorrect. Dr. Addo-Ayensu 9 did not advise the school board that it was safe to 10 operate in-person learning. So that's something the 11 Commonwealth's attorney has to look at is, are the 12 allegations sufficient to be proved.</p> <p>13 And I've gone through the record which -- 14 the record of this case. As well, additionally, I've 15 gone through the school board meeting where this 16 decision was made. And there's a lot to go through 17 but that's the responsibility that I have because I 18 have to know whether I'm going to have sufficient 19 evidence to go to the jury if a jury is selected. So 20 here's some of the things I found out. And we don't 21 have time to go through them all, but I picked out a 22 couple of representative points here.</p>	<p style="text-align: right;">43</p> <p>1 that an unequivocal recommendation was given to the 2 school board as alleged by Dr. Addo-Ayensu that it 3 was safe to operate in-person learning.</p> <p>4 Now, the -- another point raised in the 5 petition is that the school board member ignored 6 local and national medical experts who stated that 7 keeping schools closed would be detrimental to all 8 children. That -- that by itself doesn't really 9 allege anything that's being ignored. It just says 10 that this information was presented. And the 11 petition references the Academy of Pediatrics 12 statement from which that language was drawn.</p> <p>13 And if you look at the whole statement 14 from the American Academy of Pediatrics, you will 15 find this language in that same statement. That is 16 that decision makers must take into account the 17 spread of COVID-19 in their communities and the 18 capacities of school districts to adapt safety 19 protocols to make in-person learning safe and 20 feasible. So on the one hand, the Petitioners are 21 saying that this authority has said it's detrimental 22 to the children to have remote learning instead of</p>
<p style="text-align: right;">42</p> <p>1 The -- Dr. Addo-Ayensu in that school 2 board meeting said that the emphasis -- this is her 3 emphasis -- in on a plan that should be flexible. 4 And she is not saying -- not saying that you should 5 open at all costs. So they're presenting it as the 6 advice given by the scientific expert in this case, 7 the public health official of Fairfax County. Is it 8 -- is it safe to operate in-person learning? It's 9 not. What she said at the meeting. The school board 10 member was listening to her say that I'm saying that 11 you should open at all costs.</p> <p>12 In addition, Dr. Addo-Ayensu said do not 13 look at this as an on/off switch. Some jurisdictions 14 are looking at this as either being safe or unsafe. 15 We are looking at it -- we, the public health offices 16 of Fairfax County, are looking at it, I am looking at 17 it as a fact of life we have to deal with. How can 18 we do that safely? That's all I came to say today, 19 not to force your hand in any way.</p> <p>20 So my review of the available evidence, 21 which would need to be presented if we went to trial 22 on this, is there is no evidence to support the fact</p>	<p style="text-align: right;">44</p> <p>1 in-person learning on the one hand. And yet on that 2 other hand, the same scientific authority is saying 3 it's a balancing test. You have to take into account 4 the spread in the community and the capacities of the 5 school districts to adapt safety protocols which is 6 what Mr. Raphael referred to when he said there are 7 -- there are costs associated with this decision.</p> <p>8 So again, there isn't any evidence by 9 which the Commonwealth can establish that the fact 10 that in-person schooling or not in-person schooling 11 is detrimental to children has a bearing on the 12 decision that was made because it's only one factor. 13 It's not a determining factor.</p> <p>14 Now another point which has been 15 referenced by Mr. Spies and that is that in the 16 petition, it stated that the school board member, Ms. 17 Tholen, violates her duty to make policy decisions 18 based on available facts and appropriate public 19 input. We've talked about that. By "ignoring a 20 clear majority of Fairfax County parents who want to 21 return to in-person education as evidenced by summer 22 2020 poll."</p>

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1 Now that fact -- that assertion is
2 factually incorrect. There has been demonstration in
3 any record that a majority of Fairfax County parents
4 want to return to in-person education. So it's
5 impossible for the school board member to have
6 ignored that because it doesn't exist. What exists
7 is there's some response to a survey. And that
8 survey is whoever received the survey --
9 THE COURT: This is a survey done by the
10 school board?
11 MR. HINGELY: Yes. Yes. But the survey
12 done by the school board is a survey of a subset of
13 parents of Fairfax County. It's not the entire set
14 of parents in Fairfax County. So it cannot be said
15 of a majority -- clear majority, by any means, of
16 Fairfax County parents want to return to in-person
17 education.
18 THE COURT: What did that survey indicate?
19 I have not seen the actual survey.
20 MR. HINGELY: Well, I'll quote from the
21 executive summary of the survey. Of the return to
22 school scenarios proposed -- and that's virtual,

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1 partial return of opt-in schools reopen. And there
2 were two scenarios subdivided it the partial return.
3 So there were four choices. More -- none -- none
4 stood out as an obviously favored approach in either
5 family or staff responses. So the survey itself, the
6 language in the survey, disputes that even the survey
7 has a majority appearance who want to return to in-
8 person education.
9 But let me go back to the point that the
10 survey doesn't survey all parents in -- in Fairfax
11 County. The survey instrument indicates that
12 families with multiple students attending Fairfax
13 County Public Schools were encouraged to complete the
14 survey multiple times, once for each child. So it's
15 not an accurate measure of parents because they've
16 not disaggregated which parents got to vote more than
17 once. So if it's a vote, it's not -- it's not a vote
18 that can tell us what a clear majority of the people
19 want because people are allowed to vote more often.
20 And of course, they determine that themselves.
21 So the other thing is that the exact
22 number of invitations to the family survey is unknown

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1 and response rates cannot be calculated. So in the
2 survey itself, it indicates that we don't know how
3 much this represents the opinion of parents in
4 Fairfax County. It only represents the opinions of a
5 subset of parents. So it's wrong to represent in the
6 petition that there's a clear majority of Fairfax
7 County parents who prefer to return to in-person
8 learning.
9 Now I think that the -- that the
10 Petitioner's counsel acknowledges this in several
11 ways. First of all, as Mr. Raphael has indicated,
12 even if there were a majority of parents -- Fairfax
13 parents who believe in-person learning should be
14 resumed, that's not the only stakeholder. We've got
15 staff. We have taxpayers. We have other people who
16 are interested. The parents are not the only people
17 interested in the administration and operation of
18 Fairfax County Schools. They're not the only people
19 that the school board members have to take into
20 account.
21 But what the -- what the Petitioner's
22 counsel says in his brief in opposition to the motion

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1 to quash is he expands the notion of this expression
2 of preference to encompass a larger group. On page
3 three, he says that the school board member ignored
4 the express will of Fairfax County citizens. And
5 also on page three, he says in his brief in
6 opposition to the motion to quash that Tholen
7 deliberately regarded the will of the people of
8 Fairfax.
9 And I even notice that in the argument
10 this morning, Mr. Spies said that Ms. Tholen ignored
11 her constituents. So what he's basically conceding
12 is while the petition says that parents prefer return
13 to in-person learning, he's acknowledging that more
14 interests than the parents are at stake here because
15 he has three times made a reference to ignoring
16 citizens, will of the people and constituents which
17 is a much broader group than the parents.
18 Now the last thing I will touch on in the
19 petition, Mr. Raphael has already made reference to
20 it. And that is that the claim is made in the
21 petition that Elaine Tholen violated state and local
22 laws and regulations to provide for the free and

<p style="text-align: right;">49</p> <p>1 appropriate public education for students with 2 disabilities. That is not true. As Mr. Raphael 3 indicated and as the record shows, back on August 4 24th of 2020, the Virginia Department of Education 5 found the Fairfax County Public Schools to be in 6 compliance. And on November 12th of 2020, the 7 appeals review of that decision came down. And in 8 the appeal, it was also found that there's no reason 9 to believe that Fairfax County Public Schools were in 10 noncompliance.</p> <p>11 So all of the principle and significant 12 allegations of the petition are factually incorrect. 13 The assertions made are factually incorrect in the 14 Commonwealth's view. And this puts the Commonwealth 15 in the position of how do we go forward from this 16 point because the Commonwealth's attorney has a duty 17 to maintain this proceeding only if it is -- can be 18 factually substantiated.</p> <p>19 And I will turn to the rules of 20 professional conduct in Virginia which the 21 Commonwealth's attorney is bound by. This is the 22 section involving additional responsibilities of the</p>	<p style="text-align: right;">51</p> <p>1 sufficient evidence does not exist. And the guilt 2 that we're talking about in this case is the guilt 3 that there is misconduct on the part of the school 4 board member. And also to that effect, I would quote 5 the case of Johnson v. Woodard 281 Va. 403 in which 6 is indicated that the Commonwealth attorney's duty is 7 to further the best interest of the Commonwealth, not 8 the interest of the prospective petitions.</p> <p>9 And so at this point, I am going to move 10 to dismiss the case because, ethically, I do not 11 believe that it is possible for me to carry the case 12 forward. And I want to have one final concluding 13 comment because I know some of the Petitioners are 14 here today. And I met with the Petitioners, and they 15 understand my role. And they also understand that 16 they have come to this Court looking for answers 17 because they are dissatisfied with this decision that 18 was made.</p> <p>19 And I just want to observe that they have 20 done the right thing to come to this Court for 21 answers. I do not believe they are going to get the 22 answer they want. But nonetheless, this is where</p>
<p style="text-align: right;">50</p> <p>1 prosecutor. That's Rule 3.8. A lawyer engaged in a 2 prosecutorial function shall not file or maintain -- 3 and that's important here because the prosecutor 4 didn't file this. But the prosecutor shall not 5 maintain a charge that the prosecutor knows is not 6 supported by probable cause. And based on my review 7 of the record and the evidence, this is not supported 8 by probable cause.</p> <p>9 In addition, the commentary in the -- to 10 the Rule 3.8 says, a prosecutor has the 11 responsibility as a minister of justice and not 12 simple that of an advocate. This responsibility 13 carries with it specific obligations to see that the 14 defendant is accorded procedural justice and that 15 guilt is decided on the basis of sufficient evidence.</p> <p>16 So procedural justice in this case would 17 be for the motion to quash to be granted for the 18 reasons that are stated by defense counsel and agreed 19 in -- agreed to, concurred in, by the Commonwealth's 20 attorney. Also, I submit that it is impossible for 21 the Commonwealth to have guilt decided on this case 22 on the basis of sufficient evidence because</p>	<p style="text-align: right;">52</p> <p>1 they brought their concern about the school board 2 decision. And as we know from -- sadly, from current 3 events, that's not how it always happens. Just 4 recently -- I'm sure many of us are familiar with the 5 case of the school board meeting in Franklin, 6 Tennessee where the people that opposed the decision 7 of the scientific experts advising the school board 8 on masking followed them into the street and 9 criminally assaulted them. And so that's the wrong 10 way to settle these disagreements.</p> <p>11 Also, we know about the school board 12 meeting in Salt Lake City that was shut down, was 13 disrupted by those who disagreed with the position 14 the school board was taking. They literally took 15 over the meeting and went up onto [unintelligible] 16 and conducted a school board meeting. The disrupters 17 and the audience did that and 11 of them were 18 arrested for disorderly conduct. So that's the kind 19 of thing that we see, sadly, going on because these 20 issues arouse very strong feelings.</p> <p>21 But these Petitioners brought their 22 concern about the school board member conduct and the</p>

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1 school board's decision to this Court. And I commend
2 them for that. I applaud their going about this in
3 the right way. And we see a lot of people who don't
4 do that. Again, I don't believe that they're going
5 to be satisfied with the answer that I trust this
6 Court will give to the motion to quash and to the
7 motion to dismiss that I made. But I'm glad that
8 they're here and glad that they have proceeded in
9 this matter. Thank you.

10 THE COURT: All right. Thank you. Mr.
11 Hingely is Commonwealth attorney having made a motion
12 to dismiss. I think that makes -- essentially makes
13 the motion to quash moot.

14 MR. RAPHAEL: May I address that, Your
15 Honor, before you rule on it?

16 THE COURT: You may.

17 MR. RAPHAEL: We put on the case for why
18 the petition fails as a matter of law to state a
19 valid claim. Mr. Hingely says he agrees with that.
20 Our motion, I think we're entitled to a ruling on our
21 motion. If you deny that motion, then I think his --
22 I think he can't maintain the case and he's going to

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1 move to dismiss it. But I think you should decide it
2 in that order.

3 THE COURT: All right.

4 MR. RAPHAEL: And I think it's really
5 important that you decide it in that order because
6 they are identical petitions backed up and there
7 could be a different special prosecutor next time.
8 We -- I believe that we are entitled to a ruling on
9 our motion to quash.

10 THE COURT: All right. Thank you. Mr.
11 Spies, did you want to speak to that?

12 MR. SPIES: I agree -- I agree, Your
13 Honor, that the motion to quash should be ruled on
14 first and I'd like to briefly note that the citations
15 to Edmund Burke and the importance of dem --
16 representative democracy are really rich here where
17 you have the powerful interest of the school boards
18 and then the Commonwealth's attorney for Fairfax
19 correctly recusing himself but then self-appointing
20 an ideologically aligned Commonwealth's attorney to
21 come in and likely push the same policy agenda he
22 would have and not allow a voice for the over 5,000

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1 people who signed this petition.

2 That is not representative of democracy
3 and the approach that they are aligned with both Ms.
4 Tholen and the Commonwealth's attorney working with
5 her, that approach basically vid -- [unintelligible]
6 -- it just writes out of the law the petition
7 statute. Because how would one ever have a petition
8 move to a show cause hearing based upon the standards
9 that they have presented here?

10 THE COURT: All right. Well, --

11 MR. HINGELY: Judge, may I --

12 THE COURT: You may. I was going to ask
13 Mr. Hingely if he wanted to respond to that.

14 MR. HINGELY: Yeah, I do not agree with
15 and I take offense at the implication that my working
16 this case and the decisions that I have made which
17 have been made on conscientious consideration of the
18 law and the facts in this case are in any way
19 ideologically driven.

20 THE COURT: Thank you, Mr. Hingely. All
21 right. Well, the parties are in agreement that there
22 should be a ruling on the motion to quash first. And

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1 that being the case, I am going to rule on that and
2 then I will follow up as appropriate with Mr.
3 Hingely's motion to dismiss. As far as the motion to
4 quash goes, I would deny the motion to quash. I
5 believe that the petition on its face -- and I'm
6 treating this essentially as a demurrer to the
7 petition. I believe that the petition on its face,
8 and I'm not considering any of the evidence that Mr.
9 Hingely's brought to the Court's attention because
10 that's not appropriate for a demurrer. But the -- or
11 in this case for a motion to quash.

12 But I believe that the -- as I said, the
13 petition on its face is adequate to allege a neglect
14 of duty by Ms. Tholen and a -- to allege incompetence
15 in the performance of the duties. And the reason for
16 that is that what has been alleged is that her duty
17 is to make a policy decision -- make policy decisions
18 based on the available facts and the appropriate
19 public input.

20 And I do find that that is a duty imposed
21 upon her for the -- within the meaning of the word
22 duty in code section 24.2-233. And because it

<p style="text-align: right;">57</p> <p>1 alleges that she "ignored local and national medical 2 experts" which stated that keeping schools closed 3 would be detrimental to all children and thereby 4 violating her duties as school board member. And it 5 also makes other allegations which show -- that 6 contend or allege that she made policy decisions 7 based -- not based on the available facts and the 8 appropriate public input. 9 But I'm -- I want to make clear to those 10 -- those who are not lawyers that my decision is 11 based on -- in a demurrer, we look to the four 12 corners of the -- of the document to determine if 13 there's sufficient and look at those in a light most 14 favorable to the Petitioners. And under that 15 standard, as I said, I believe that the petition is 16 sufficient to -- to go forward with a full show cause 17 here. So the motion to quash is denied. 18 And both parties have also agreed that I 19 should therefore move to the ruling on Mr. Hingely's 20 motion to dismiss. Mr. -- under the law -- and I 21 think the law on this point is very, very clear. The 22 Petitioners are not the party in this case. Under</p>	<p style="text-align: right;">59</p> <p>1 totally up to the Commonwealth whether to move 2 forward. And because I believe that the Court has no 3 discretion to second guess the judgment of the 4 Commonwealth, the motion to dismiss the petition is 5 granted. 6 And I'll ask Mr. Raphael, please, to draft 7 an order implementing both those rulings. And we 8 have a docket at 11:30. I know we're running a 9 little bit late. I apologize to the 11:30 10 participants. The Court's going to take a very -- 11 take a five-minute recess at this point and Mr. 12 Raphael can get the order prepared. I'll sign it 13 when I come back on the bench. Court is in recess 14 for five minutes. 15 (Whereas, a brief recess was taken. 16 THE COURT: Mr. Raphael? 17 MR. RAPHAEL: Yes, Your Honor, we have 18 agreed upon an order which I'd like to hand up that's 19 been endorsed by the Commonwealth's attorney and by 20 me. 21 THE COURT: All right. 22 MR. RAPHAEL: And if would be possible to</p>
<p style="text-align: right;">58</p> <p>1 our law as the legislature has enacted it and the 2 Virginia Supreme Court has interpreted -- interpreted 3 it, the Petitioner at this point or the moving party, 4 if you will, is the Commonwealth attorney. Is the 5 Commonwealth acting in the interest of the 6 Commonwealth? 7 And the Petitioners, as I said earlier, 8 are the ones who brought this matter to the Court. 9 But they are not the party in the case. Now whether 10 you -- whether people think that's a good idea or a 11 bad idea is not for the Court to determine. That's 12 -- that's the framework that the legislature in 13 Richmond has given us by which we make the 14 determinations to remove or not remove public 15 officials. 16 And a key part of that, of course, because 17 the Commonwealth is now the moving -- or now the -- 18 representing, if you will, the petitioning party 19 because he's representing the Commonwealth, as the 20 Commonwealth attorney, if he makes a motion to 21 dismiss a case, in this Court's view, the Court has 22 no discretion at that point. The Court is -- it's</p>	<p style="text-align: right;">60</p> <p>1 get a copy of that after you've entered it. 2 THE COURT: Sure. 3 MR. RAPHAEL: And Your Honor, I'd like to 4 make an oral motion to withdraw as counsel for the 5 Respondent. I'm leaving the practice of law -- 6 THE COURT: Yes, sir. 7 MR. RAPHAEL: -- shortly. And I have an 8 agreed order for that. 9 THE COURT: Why don't you bring it up 10 yourself. Congratulations, by the way. 11 MR. RAPHAEL: Thank you. 12 THE COURT: For leaving the practice of 13 law. 14 MR. RAPHAEL: You're hurting my record. 15 THE COURT: Off the record. 16 (Whereas, a brief recess was taken.) 17 THE COURT: All right. The order is 18 entered allowing you to withdraw. And the order 19 dismissing the case is also entered. 20 MR. RAPHAEL: Thank you, Your Honor. 21 THE COURT: Thank you, gentlemen. 22 (Off the record at 11:58 a.m.)</p>

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1 CERTIFICATE OF NOTARY PUBLIC

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I, Juliet Hooper, the officer before whom the foregoing proceedings were taken, do hereby certify that said proceedings were electronically recorded by me; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

Notary Registration No.: 7905685
My Commission Expires: 3/31/2025



Juliet Hooper, Court Reporter

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1 CERTIFICATE OF TRANSCRIBER

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I, Sheila Martin, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.



Sheila Martin
August 24, 2021

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