

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Edward Harold Schad, Jr.,)
Robert Glen Jones, Jr.,)
)
 Plaintiff,)
) **CV-13-1962-PHX-ROS**
) Phoenix, Arizona
 vs.) October 1, 2013
) 5:58 p.m.
Janice K. Brewer, et al.,)
)
 Defendants.)
-----)

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING - VOLUME II

(Pages 64 through 120, inclusive.)

Official Court Reporter:
Elizabeth A. Lemke, RDR, CRR, CPE
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC. 34
Phoenix, Arizona 85003-2150
(602) 322-7247

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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A P P E A R A N C E S

For the Plaintiff Schad:

Federal Public Defender's Office
By: **Kelley J. Henry, Esq.**
810 Broadway, Suite 200
Nashville, TN 37203

For the Plaintiff Jones:

Federal Public Defender's Office
By: **Dale A. Baich, Esq.**
Sarah E. Stone, Esq.
850 West Adams Street, Suite 201
Phoenix, AZ 85007

For the Defendants:

Office of the Arizona Attorney General
By: **Kelly Elaine Gillilan-Gibson, Esq.**
Brian Patrick Luse, Esq.
1275 West Washington Street
Phoenix, AZ 85007

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P R O C E E D I N G S

(Called to the order of court at 5:58 p.m.)

THE COURT: Thank you for your indulgence. We have had a -- I've had a busy day. You've had a busy day. But there will be no other interruptions. I have rescheduled the remaining of my meetings, so we can go now. Okay. Go on.

MS. HENRY: Thank you, Your Honor. If we could have just -- using the break, we had an opportunity to review some case law regarding the Executive Sessions law.

THE COURT: Well, let me give you my point of view on that.

Number one, I think that there was no objection made, so it has been waived. And they chose not to cross-examine the witnesses on it, so I'm going to take the information as it's written.

Second is that my view is that the federal law preempts the state law on this issue. So that's where we are. So you don't need to do any more than that.

I'm going to consider the affidavits that have been submitted as they have been written. And I will review them based upon the rules of evidence, that which can be taken for the truth of what is asserted, because some of this is direct personal information. I will consider that.

I will also consider whether or not it's hearsay. If it's hearsay, it's hearsay. Okay. Go ahead.

1 MS. HENRY: Thank you, Your Honor.

2 **MARILYN WILKENS, WITNESS, SWORN**

3 **DIRECT EXAMINATION (cont'd)**

4 BY MS. HENRY:

5 Q Ms. Wilkens, when we left off, I believe I had just asked
6 you about your interview and that it was in Executive Session.

7 Given what the Judge has just clarified for all of us
8 on the record, I'm going to speed through your testimony here
9 because we have your declaration.

10 So let me ask you about your declaration --

11 A All right.

12 Q -- which is in front of you and we don't need to introduce
13 it as an exhibit because it's in the record as document 1-7.

14 Did you sign that declaration?

15 A Yes, I did.

16 Q Is everything that's in the declaration true to the best
17 of your knowledge and belief?

18 A Yes, it is.

19 Q Ms. Wilkens, did you want to continue to serve on the
20 Board?

21 A Yes, I did.

22 Q Why did you want to continue to serve on the Board?

23 A You know, I felt that -- I believe my background that I
24 had with the Department of Corrections in both understanding
25 inmates and programs, as well as in healthcare, was a good fit

1 for the Board and being able to use my experience in sitting
2 on the Board and make some very good decisions.

3 Q Ms. Wilkens, when you were sitting on the Board, did you
4 always vote according to your conscience?

5 A Yes. And based on the facts that were in front of me,
6 because there was a considerable amount of reading that you
7 had to do for each case in many instances, such as clemency,
8 and it was based on the facts --

9 Q So you --

10 A -- also and my conscience.

11 Q Why do you believe you were not reappointed to the Board?

12 A Because I did not vote the way the ninth floor wished and
13 the Governor's Office and staff wished me to vote on the case
14 of Mr. Flibotte.

15 MS. HENRY: Thank you, Ms. Wilkens. I don't have any
16 more questions.

17 THE COURT: Cross.

18 **CROSS EXAMINATION**

19 BY MS. GILLILAN-GIBSON:

20 Q Ma'am, it's your testimony that no one influenced your
21 votes when you were on the Board?

22 A That is correct.

23 Q And regarding the Mr. Flibotte case, Ms. Kirschbaum also
24 voted to recommend clemency in that matter, didn't she?

25 A That is correct.

1 Q And Ms. Kirschbaum actually wrote the decision
2 recommending the commutation to the Governor in that case;
3 isn't that correct?

4 A I cannot say for sure.

5 Q Okay. And Ms. Kirschbaum is still on the Board?

6 A That is correct.

7 MS. GILLILAN-GIBSON: I have no further questions.

8 THE COURT: All right. Redirect.

9 MS. HENRY: Nothing further, Your Honor.

10 THE COURT: You may step down and thank you. Next.

11 THE WITNESS: Should I leave this here?

12 THE COURT: Please do.

13 THE WITNESS: Okay.

14 MS. HENRY: Your Honor, Plaintiff Schad rests.

15 **PLAINTIFF RESTS**

16 **DEFENDANTS' ORAL MOTION TO DISMISS**

17 MS. GILLILAN-GIBSON: Your Honor, at this time I
18 would move for the Court to deny plaintiff's request for a
19 TRO.

20 I think if you look at the decision that we cited in
21 our Motion to Quash the subpoena in the *Parker* case, this case
22 is very analogous to that case.

23 It's a very high burden. They have to prove that
24 there is some type of bias. And none of their witnesses have
25 demonstrated any bias as to the Board members. Not a single

1 witness said that these Board members would not vote fair and
2 impartially. None of the witnesses said that these Board
3 members were directed to vote in a certain way.

4 So in light of the lack of testimony establishing any
5 bias for this Board, I think the Court, especially under
6 *Parker*, and the standard for a TRO, needs to deny the TRO at
7 this point in time.

8 THE COURT: All right. Let me hear in response. And
9 as you have all briefed quite well, you understand what the
10 law is.

11 There is the starting point, which was Justice
12 O'Connor's opinion about minimal procedural safeguards to
13 clemency, and then there are a few decisions that have
14 followed that.

15 The Eighth Circuit decision, I suppose, would be the
16 one that is -- you would say would be most analogous. On its
17 face, though, it looks as if it is distinguishable. I do
18 understand and have read that there are regulations in Arizona
19 that would establish without question what the due process
20 requirements are for clemency matters.

21 However here, the Court analogized -- and I'm talking
22 about the *Young* case -- analogized what had occurred, and that
23 is the purported threat to an attorney in the prosecutor's
24 office who was intended to provide information in a clemency
25 hearing that she would be fired.

1 And so what the Court did is analogized that to
2 intimidating a witness before an official proceeding. And I
3 think "official proceeding" there would probably be an
4 "official proceeding" here in accordance with what the
5 Clemency Board guidelines are.

6 They also cite to a criminal statute which is -- and
7 that is a federal criminal statute which is the comparable
8 federal statute for threatening a witness.

9 So but that case is different, isn't it? We don't
10 have threatening a witness here. We're the minimal -- as of
11 right now, based upon what you've presented, the minimal
12 procedural safeguards -- and we all know that there must be
13 minimal procedural safeguards.

14 MS. HENRY: Yes, ma'am. Are we now at a point
15 where -- I'm sorry. I'm not clear. Are the defendants not
16 presenting any testimony?

17 THE COURT: No. No. They're asking -- they're
18 basically -- it's your burden.

19 MS. HENRY: I understand that.

20 THE COURT: Okay. So it's in a sense if this was a
21 trial, it's a Rule 50 JMAL argument that they are making that
22 you haven't made -- on the face of your evidence, you have not
23 made a case that would establish a Temporary Restraining Order
24 is required.

25 MS. HENRY: And I respectfully disagree with the

1 government's position. And I guess if it's all right with the
2 Court, I would like to combine my arguments on the Motion to
3 Quash along with their objections.

4 THE COURT: Well, your Motion to Quash is -- as I
5 indicated to you, I am not going to allow discovery in this
6 case that is tangential or that is tenuous. It's not even
7 tangential. It's really tenuous.

8 It looks as if you're looking for something. And you
9 mentioned -- and I think I understand and I think he did -- he
10 did -- he was candid. He did the best he could -- and that
11 was former Board member Thomas -- what he had been shown.

12 But the authenticity of that is not clear to me. It
13 wasn't clear to him. It's not clear it was a letter. We
14 don't know who sent it.

15 He used the word "implied, implied, implied." So,
16 you know, I don't know where that came from. I don't know
17 what it is. I don't know what you would be subpoenaing in
18 order to -- that would -- that would require that this Court
19 open the doors to discovery before I considered whether or not
20 to grant or deny a Temporary Restraining Order.

21 MS. HENRY: Your Honor, if I may, *Young v. Hayes*, is,
22 in fact, the case that we are relying on. And it is our
23 position that minimal due process includes a guarantee that
24 there be no official intimidation or frustration of the
25 clemency process.

1 It is our position that, yes, we have defendants who
2 say, no, we won't be affected, but that does not have to be
3 taken at face value.

4 What Mr. Thomas told this Court today is that
5 somebody showed him what he took to be and what he signed a
6 declaration saying was a letter. And the purpose of that
7 letter was to intimidate his vote.

8 Now he said he wasn't intimidated.

9 THE COURT: No, he didn't quite say that. He said
10 that the individual implied that there was something at some
11 time from the Governor or somewhere to indicate that there was
12 intimidation coming from the Governor.

13 I mean, it was so vague to me and it was -- and he
14 clarified to me what he said in the affidavit. He was very
15 careful about what he said.

16 Now we would have to look at the transcript, but I
17 think you are extrapolating to a point which is broader than
18 what he actually said.

19 MS. HENRY: And I will agree that, obviously, I'm
20 tired. I have been working a long time. I think I know what
21 I heard and the transcript is going to bear out what I heard.

22 What I heard Mr. Thomas say is that the letter -- and
23 he said more to you than he's ever said to me, which for me
24 made me want that letter even more -- which is that he
25 believed -- and this is my memory of the testimony -- that the

1 person showed him the letter. The letter itself was
2 expressing displeasure with a particular vote on behalf of
3 many Board members. And that the person who showed it to him
4 implied some sort of intimidation factor to him.

5 THE COURT: Well, I'm not sure -- I asked him what
6 the content of the letter was.

7 MS. HENRY: And that's why we need discovery.

8 THE COURT: Okay. No. No. No.

9 He couldn't remember it. What he said was that the
10 individual, whoever this person was, seemed to imply that this
11 was something that came from the Governor.

12 And I don't know. And so it's very vague to me. We
13 don't know who the individual is. We don't know if, in fact,
14 that's what it said. We don't know what the content was. You
15 know, it's unclear to me.

16 MS. HENRY: Your Honor, and again, the testimony is
17 going to be what the testimony is.

18 THE COURT: Let me just short circuit this.

19 This doesn't have to be done overnight. You can
20 subpoena that letter now. I will take it under advisement.

21 If there is such a letter that ever existed, then you
22 are to produce that letter and that's an order of the Court.

23 MS. GILLILAN-GIBSON: Just in order to find the
24 letter, it would be helpful to know who it was sent by,
25 whether any Board members --

1 THE COURT: That's correct.

2 MS. GILLILAN-GIBSON: I mean, if I can --

3 THE COURT: I agree with you. I agree with you.

4 You heard the same testimony I did. So you can look.
5 That was testimony under oath. And he did the best he could.
6 I don't know who the individual is.

7 Mr. Thomas, I'm going to respect what he has said,
8 which is he wants to check with this individual to ask him if
9 it's okay to turn this over.

10 Mr. Thomas, I'm going to order you to check with this
11 individual and ask the individual if it's-- if it's okay to
12 disclose who he is. And then, once you get that information,
13 then you can try to get the letter from this individual.

14 But that's all we have. And, you know, let me check
15 my notes here, but I think as I recall -- I don't have -- so
16 it was sometime between April of 2012 and August of 2013? Is
17 that --

18 MS. HENRY: Yes, ma'am.

19 THE COURT: Is that it?

20 MS. HENRY: Yes, ma'am.

21 THE COURT: So --

22 MS. GILLILAN-GIBSON: Your Honor, may I be heard on
23 your order? I think you need to distinguish the fact that,
24 you know, even if that letter existed, it went to Mr. Thomas.

25 There is no evidence that any of the three --

1 THE COURT: It went to who? It went to who?

2 MS. GILLILAN-GIBSON: It went to Melvin. Melvin is
3 the one who saw the letter. Mr. Thomas did not know whether
4 any of the other Board members received it. He doesn't even
5 know if the letter was sent. I mean, you have three Board
6 members now --

7 THE COURT: That's true. That's true.

8 MS. GILLILAN-GIBSON: There is no evidence they have
9 been threatened.

10 THE COURT: If there's no letter, you have nothing to
11 worry about.

12 Okay. We have enough on the record from Mr. Thomas
13 that someone implied that this letter came from the Governor
14 or the Governor's staff and that it was a letter that was
15 threatening to the Board.

16 And whether that's true or not true, I don't know.
17 Mr. Thomas said I'm not threatened by it. And I don't even
18 know if he really understands what he read. And I'm not sure
19 that he thought the individual who gave it to him was
20 credible.

21 So, all right, I'm going to allow this. If, in fact,
22 it is certainly going to take in -- I'm going to take it into
23 account on the TRO.

24 If there is a letter that was issued by the
25 Governor's Office by the Governor or anyone in her employ that

1 was to the Board members that threatened them about clemency,
2 then that's something I'm going to consider.

3 That doesn't mean I'm going to grant the TRO or I'm
4 going to deny it, but that certainly would be relevant. I
5 can't tell at this point whether it exists. I can't tell if
6 it's relevant. I can't tell anything other than --
7 particularly by the demeanor of Mr. Collins -- or excuse me,
8 Mr. Thomas -- whether or not he believed it was ever written
9 by the Governor. It was something that was said to him.

10 So, okay. So the Motion to Dismiss the Temporary
11 Restraining Order will be taken under advisement. And,
12 Mr. Thomas, you are to determine whether or not that you can
13 disclose the name of this individual. You can ask them
14 whether or not -- and if they don't want their name disclosed,
15 then you're going to have to inform the Court as to why they
16 don't want their name disclosed.

17 And I may even require that the name be disclosed to
18 me in camera depending upon the reasons. And then I will
19 decide at this point whether or not the name should be
20 disclosed. Because, as I said, in the worst case scenario, it
21 could be relevant to the Temporary Restraining Order. But
22 it's so vague at this point that I'm inclined to think that I
23 can't even consider it.

24 So, the motion is taken under advisement and we start
25 with Mr. Thomas contacting this individual, asking the

1 individual whether or not he's willing to have this
2 information disclosed, whether or not he has a copy of the
3 letter. If he has a copy of the letter, then you can let
4 counsel know it can be subpoenaed. A copy, of course, is to
5 go to defense counsel also.

6 And if he doesn't have a copy of the letter, then
7 more information so that that letter can be subpoenaed from
8 defense counsel if it exists at all. Okay. Is it clear?

9 MS. GILLILAN-GIBSON: Your Honor, should we have an
10 opportunity then to put on the current Board members to finish
11 this case and to demonstrate that they have no bias and they
12 have never been threatened?

13 THE COURT: Sure. You can do that now.

14 MS. GILLILAN-GIBSON: Okay. Your Honor, at this time
15 I will call Jack LaSota.

16 THE CLERK: State your name and spell your last name
17 for the record.

18 THE WITNESS: John A. LaSota, Jr. L-A-S-O-T-A.

19 **(Witness duly sworn)**

20 THE CLERK: Thank you. Please have a seat on the
21 witness stand.

22 THE WITNESS: Thank you.

23 THE COURT: So you're also known as John?

24 THE WITNESS: I am, Judge. I am.

25 THE COURT: All right. Go ahead.

1 **JOHN A. LaSOTA, JR., WITNESS, SWORN**

2 **DIRECT EXAMINATION**

3 BY MS. GILLILAN-GIBSON:

4 Q Mr. LaSota, how are you currently employed?

5 A Well, I'm a member of the Arizona Board of Executive
6 Clemency.

7 Q And what is your professional background?

8 A Well, I have an undergraduate degree in business
9 management from Arizona State and I have a law degree from the
10 University of Arizona. And I did some graduate work at
11 Northwestern University Law School and for 40 years was an
12 attorney.

13 Q And as an attorney, did you hold any political positions?

14 A Yes, I did.

15 Q And what did you hold?

16 A Well, I -- as an elected official, elected position, I was
17 Attorney General for nine or ten months in 1978. And then I
18 held a variety of other positions in local and state
19 government.

20 Q Okay. And are you a current member of the Arizona Bar?

21 A I am not.

22 Q Okay. So, Mr. LaSota, when were you appointed to the
23 Board?

24 A I believe that it was April of 2010.

25 Q Okay.

1 A Might have been May.

2 Q Okay. And since you have been on the Board, have you ever
3 been contacted regarding how you voted?

4 A No, ma'am.

5 Q Okay. Have -- has anyone ever threatened you and said
6 you're going to be fired if you don't vote a certain way?

7 A Oh, no.

8 Q And if someone had attempted to influence you, what would
9 you have done?

10 A I have had a tough time doing exactly the opposite of what
11 I was asked to do. I probably would have restrained myself
12 because it might have -- they might have been after the
13 correct result in my view.

14 But my normal inclination, if I were ever threatened
15 or intimidated or suggested how my vote ought to go, I think
16 my basic inclination, I would have to overcome the tendency to
17 do just the opposite.

18 Q Okay. And so when you vote now on the Board, what's the
19 basis for your vote?

20 A Well, I try to base it on what comes before me, what
21 evidence is presented, what arguments are made by counsel.
22 And I sort of weigh that through the crucible of my
23 experience. I try to, you know, achieve a just result, just
24 and lawful result.

25 Q Has anyone contacted you regarding the Schad or the Jones

1 upcoming clemency matters?

2 A No.

3 Q Has anyone told you how to vote?

4 A No.

5 Q Do you know how you're going to vote?

6 A No.

7 Q Okay. Mr. LaSota, did you vote to recommend clemency in
8 the Macumber case?

9 A The one time I heard the Macumber case, yes, I did.

10 Q Okay. And after that case were you threatened or yelled
11 at because you voted to recommend clemency?

12 A No.

13 Q And you weren't removed from the Board, obviously,
14 correct?

15 A That's correct.

16 Q Okay. And then there was another high-profile case,
17 Flibotte. Am I pronouncing it?

18 What was your vote in that case?

19 A I voted to recommend clemency for Mr. Flibotte. And, by
20 the way, it was unanimous. That vote was a unanimous vote.

21 Q Okay. Did anyone contact you either in writing or e-mail
22 or phone call suggesting that you shouldn't have voted that
23 way?

24 A No.

25 Q And so have you ever personally received a letter from the

1 Governor, from Scott Smith, anyone associated with the
2 Governor's Office, threatening you or telling you how to vote?

3 A No.

4 Q Is there anything -- any comments or anything at all that
5 has been said to you that would influence how you would vote
6 on Mr. Schad's clemency hearing tomorrow?

7 A Well, sure. We have documents presented by Mr. Schad that
8 I have read in preparation for the hearing tomorrow. And if I
9 were -- if I vote in favor of Mr. Schad's commutation, it
10 would have to be said that they have had some influence on me.

11 Q Okay. Anyone outside of the materials or his advocate or
12 anyone who has sent letters on his behalf, is there anyone
13 outside of the process that has influenced you or dictated to
14 you how you should vote?

15 A No, ma'am.

16 Q If you vote for clemency, do you think you're going to
17 lose your job?

18 A No. That's ridiculous. I have never been in danger of
19 losing this job. I think the only danger is if one desires to
20 be reappointed, then it becomes a decision on your future is
21 in the hands of the Governor's Office, and correctly so.

22 But my job is protected by the First Amendment and
23 the fact that the law says that I am only removable for cause.
24 And I don't think voting -- I don't think any Court in the
25 land would say that voting in a manner that offended a

1 Governor's Office was itself cause.

2 So I don't consider myself in danger. In addition,
3 I'm not a candidate -- I don't want to have my -- another
4 five-year term anyway.

5 Q Sir, when does your term expire?

6 A I hate to say I'm not quite sure, but I think it's the
7 second Monday in January 2014.

8 Q As a Board member, Mr. LaSota, you're familiar with the
9 Open Meetings law; is that correct?

10 A Yes, I am. Well, not just as a Board member. I have had
11 a long history of exposure to it.

12 Q While on this Board, did a quorum of the Board ever meet
13 and discuss Schad in private?

14 A Not to my knowledge.

15 Q Okay. Did you ever hear anybody from the Board
16 predetermine or voice how they were going to vote on the Schad
17 matter?

18 A No, ma'am.

19 MS. GILLILAN-GIBSON: Your Honor, may I just have a
20 moment?

21 THE COURT: Sure.

22 MS. GILLILAN-GIBSON: I have no further questions,
23 Your Honor.

24 THE COURT: All right. Cross.

25 MS. HENRY: None, Your Honor.

1 THE COURT: Redirect. Just kidding. A little joke.

2 THE WITNESS: Do you want to ask me anything?

3 THE COURT: You may step down.

4 THE WITNESS: Thank you, Your Honor.

5 MS. GILLILAN-GIBSON: Your Honor, I would like to
6 call Ellen Kirschbaum to the stand.

7 THE COURT: All right.

8 THE CLERK: Please state your name and spell your
9 last name for the record.

10 THE WITNESS: Ellen Kirschbaum. K-I-R-S-C-H-B-A-U-M.

11 THE CLERK: Your right hand.

12 THE WITNESS: Oh. I'm left-handed.

13 **(Witness duly sworn)**

14 THE CLERK: Please have a seat on the witness stand.

15 MS. HENRY: May I proceed, Your Honor?

16 **ELLEN KIRSCHBAUM, WITNESS, SWORN**

17 **DIRECT EXAMINATION**

18 BY MS. GILLILAN-GIBSON:

19 Q Ms. Kirschbaum, tell the Court how you're currently
20 employed.

21 A I'm currently a member of the Arizona Board of Executive
22 Clemency.

23 Q Ms. Kirschbaum, who's the current members of the Board
24 right now?

25 A Current members, Chairman Brian Livingston, Mr. Jack

1 LaSota, myself Ellen Kirschbaum, and we currently have a new
2 member Ms. Donna Harris.

3 Q And so Mr. Thomas is not on the Board right now?

4 A No longer.

5 Q Okay. So, Ms. Kirschbaum, do you vote independently when
6 you're sitting on the Board and making decisions?

7 A Absolutely.

8 Q Okay. Has anyone ever contacted you either via e-mail,
9 writing, phone call telling you how to vote?

10 A No.

11 Q Have you received any letters, e-mail, phone calls saying
12 you're going to lose your job if you vote a certain way?

13 A No.

14 Q Ms. Kirschbaum, did you write the recommendation in the
15 Flibotte case to Governor Brewer?

16 A I wrote the recommendation as well as I made the initial
17 motion.

18 Q Okay. And when you say "initial motion," can you just
19 explain to the Court what that means?

20 A I was the person who made the motion to commute his
21 sentence. And then the rest of the Board members would --
22 someone would second it and they would agree or disagree.

23 Q Okay. And after that vote, were you ever contacted by
24 anyone in the Governor's Office complaining that you voted to
25 recommend clemency -- or commutation, excuse me?

1 A No.

2 THE COURT: How long have you been on the Clemency
3 Board?

4 THE WITNESS: I have been on, Your Honor, since
5 December 2010.

6 THE COURT: Thank you.

7 BY MS. GILLILAN-GIBSON:

8 Q And, Ms. Kirschbaum, have you voted to recommend clemency
9 on any other high-profile cases?

10 A Yes. I can recall Betty Smithey. I recall -- I don't
11 know if you would consider it high-profile -- Mr. Erik Oman.
12 And then there was another gentleman in another case with a
13 young African-American woman who had killed her baby.

14 Q And after any of those cases, were you ever confronted
15 regarding your vote?

16 A No.

17 Q Do you have any bias against Mr. Schad?

18 A Absolutely, not.

19 Q Has anyone contacted you to tell you how you should vote
20 as to Mr. Schad?

21 A No.

22 Q Did you ever have a conversation with Mr. Thomas and
23 Mr. Livingston stating how you were going to vote on
24 Mr. Schad?

25 A Absolutely, not.

1 Q And why should we believe you?

2 A Because I'm an honest person. I have integrity. I serve
3 on another -- a number of other boards. I would not do that.
4 It's against my morals.

5 Q What would you do if you heard other Board members
6 predetermining a case?

7 A I would report it.

8 Q And are the allegations made by Mr. Hernandez against
9 you -- how do you feel about those?

10 A I feel terrible.

11 MS. HENRY: Objection.

12 THE COURT: Objection what?

13 MS. HENRY: The witness's feelings are not relevant
14 to the question.

15 THE COURT: I'm going to sustain the question on
16 speculation.

17 BY MS. GILLILAN-GIBSON:

18 Q Can you be fair in the clemency hearing tomorrow?

19 A Yes.

20 Q And, again, I just want to repeat one more time. No one
21 has told you how to vote tomorrow?

22 A No.

23 Q And you take your job very seriously?

24 A Very seriously. These are people's lives.

25 MS. GILLILAN-GIBSON: I have no further questions,

1 Your Honor.

2 THE COURT: Cross?

3 MS. HENRY: Thank you, Your Honor.

4 **CROSS EXAMINATION**

5 BY MS. HENRY:

6 Q Ms. Kirschbaum, you were appointed in 2010; is that
7 correct?

8 A Correct.

9 Q You have not been up for reappointment since you voted for
10 Mr. Flibotte?

11 A No. I'm up January 2015.

12 Q So the votes that you have discussed with the Court where
13 you were a positive or favorable vote, all have occurred
14 within a first term?

15 A Correct.

16 Q In your declaration and affidavit you said:

17 I have never been told that my voting record may be
18 considered cause for dismissal during my term.

19 Do you believe that your votes in the case could be a
20 cause for not -- for you to not be reappointed?

21 A I'm sorry. I don't understand your question. Could you
22 repeat it?

23 Q Do you believe that your votes would be a reason why you
24 would not be reappointed?

25 A No.

1 Q Have you -- did you tell -- well, let me ask you this
2 question. Back up.

3 You penned the letter for Mr. Flibotte; is that
4 correct?

5 A Correct.

6 MS. HENRY: Your Honor, if Ms. Kirschbaum could be
7 shown Plaintiff's Exhibit No. 3?

8 THE COURT: Yes.

9 MS. HENRY: And that letter is the Flibotte letter.

10 THE COURT: All right.

11 BY MS. HENRY:

12 Q Ms. Kirschbaum, the court officer has placed in front of
13 you Plaintiff Schad's Exhibit No. 3.

14 Do you recognize that letter? There are two letters
15 there, actually; one dated May 23, 2012 and one attached to it
16 dated February 2nd, 2012. Do you recognize that there?

17 A I recognize the February 2nd, 2012 letter.

18 Q That is the letter that you authored?

19 A Correct.

20 Q And the positive vote for Mr. Flibotte came on what date?
21 February 2nd, 2012?

22 A No. This was the date the letter was drafted.

23 I don't recall the date -- yes. We met on January
24 26, 2012.

25 Q And all five members signed; is that correct?

1 A Yes.

2 Q And then so as a result of that, that letter was forwarded
3 to the Governor?

4 A Correct.

5 Q For her to make a decision?

6 A Correct.

7 Q Two months later, three members of the Board were not
8 reappointed to their terms; is that correct?

9 A That's correct.

10 Q In April of 2012?

11 A That's correct.

12 Q Three of the signatures to this letter were removed from
13 the Board?

14 A Their term was not reappointed.

15 Q And two of them are good friends of yours?

16 A That's correct.

17 Q And you know they believe they were ousted for their vote?

18 A That's correct.

19 Q And you share that belief?

20 A I don't know.

21 Q The letter on top dated May 23rd, 2012, do you recognize
22 that as the typical letter that would be sent to an inmate who
23 was denied clemency by the Governor?

24 A I suspect it's the typical letter.

25 Q And Mr. Flibotte was, in fact, informed that the Governor

1 had denied him clemency in May of 2012; May 21st of 2012. Is
2 that correct?

3 A Would you please repeat the question?

4 Q The Governor denied Mr. Flibotte clemency on May 21st,
5 2012, the second page.

6 A That's correct.

7 Q And that was one month after Mr. Belcher, Ms. Wilkens, and
8 Ms. Stenson had not been reappointed?

9 A Yes.

10 Q Ms. Kirschbaum, have you joined a pending complaint
11 against Mr. Hernandez that's been filed with the Department of
12 Administration?

13 A Yes.

14 Q And that is still ongoing?

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q And you were quite pleased the day that Mr. Hernandez
19 resigned?

20 A I was happy about the Board being able to move forward in
21 a positive, effective, and fair manner.

22 Q And you were very happy to see Mr. Hernandez go?

23 A I wouldn't say I was happy. It had a great impact on the
24 Board.

25 Q And you are aware, are you not, that efforts have been

1 made to attempt to convince Mr. Thomas to seek reappointment
2 to his position now that Mr. Hernandez is gone?

3 A Mr. Hernandez -- Mr. Thomas was an asset as a member. All
4 of us were very differing in our opinions. And so the fact
5 that we lost someone that was a very good Board member was
6 very disturbing.

7 Q And so the answer to my question is "yes," efforts have
8 been made to get Mr. Thomas to be reappointed?

9 A We have joked around about him reapplying. I wouldn't
10 call it "efforts."

11 Q And the day that Mr. Hernandez resigned, you already knew
12 that his replacement was going to be Donna Harris, didn't you?

13 A No.

14 Q Did you tell someone that Donna Harris would be the next
15 appointee and that she was currently being vetted?

16 A I did not know Donna Harris was going to be the new member
17 until I received a call from Linda Stiles at the Board asking
18 if I would speak to Ms. Harris about being a member of the
19 Board, what transpires when you're on the Board, and what the
20 responsibilities were.

21 Q And do you recall that you knew that on the day that
22 Mr. Hernandez left in August of 2013?

23 A No.

24 MS. HENRY: One moment, Your Honor.

25 BY MS. HENRY:

1 Q Did you send an e-mail on August 17th to Ms. Wilkens and
2 Ms. Stenson indicating -- next page of the e-mail please --
3 right above the "let's plan to get" -- "dinner" -- the line
4 above:

5 I can tell you that a seat is being filled by Donna
6 Harris, a/k/a Donna Knudsen/Clements.

7 A Yes. That was after the phone call from Linda Stiles.

8 Q On August 17th, 2013, which was the day Mr. Hernandez
9 resigned?

10 A August 17th was a Saturday.

11 Q Do you know the day that Mr. Hernandez resigned?

12 A No.

13 MS. HENRY: No further questions, Your Honor.

14 THE COURT: Redirect.

15 MS. GILLILAN-GIBSON: Just briefly.

16 **REDIRECT EXAMINATION**

17 BY MS. GILLILAN-GIBSON:

18 Q Ms. Kirschbaum, Mr. Thomas was already gone prior to
19 Mr. Hernandez's resignation, right?

20 A That's correct. He left sometime in July.

21 Q And didn't Mr. Livingston take Mr. Hernandez's spot as
22 Chairman and Executive Director?

23 A That's correct.

24 Q Okay. So is Ms. Harris taking over for Mr. Hernandez or
25 was she already being vetted because of the vacancy by

1 Mr. Thomas?

2 A That was the vacancy for Mr. Thomas.

3 Q And so I just want to clarify.

4 You responded to a question where she talked about
5 how you felt when Jesse left. And your statement was:

6 I felt like he could not impact the Board anymore.

7 So I want to make sure. Did Jesse impact the voting?

8 A He made attempts, I believe, to impact. We knew when he
9 attended certain hearings that he was -- if he was the first
10 to speak, to initiate, that he wanted to initiate the
11 discussion, I don't know, but I felt it was a means to impact
12 members.

13 Q Okay. Did you let him impact you?

14 A No.

15 Q Did you vote independently?

16 A I vote with my conscience.

17 MS. GILLILAN-GIBSON: I have no further questions.

18 THE COURT: All right. You may step down.

19 THE WITNESS: Thank you.

20 MS. GILLILAN-GIBSON: If I can call Brian Livingston.

21 THE COURT: Yes.

22 THE CLERK: Please state your name and spell your
23 last name for the record.

24 THE WITNESS: Brian L. Livingston.

25 L-I-V-I-N-G-S-T-O-N.

1 **(Witness duly sworn)**

2 THE CLERK: Thank you. Have a seat on the witness
3 stand.

4 THE WITNESS: Thank you.

5 **BRIAN L. LIVINGSTON, WITNESS, SWORN**

6 **DIRECT EXAMINATION**

7 BY MS. GILLILAN-GIBSON:

8 Q Mr. Livingston, can you tell the Court how you're
9 currently employed?

10 A I'm currently employed as the Director and Chairman of the
11 Board of the Arizona Board of Executive Clemency.

12 Q How long have you been Chairman and Director?

13 A Since the 19th of August of this year.

14 Q And you might have said this but I lost it.

15 When were you appointed to the Board?

16 A I was appointed to the Board in April of 2012.

17 Q Okay. Since you have been on the Board, Mr. Livingston,
18 have you ever had any contact with anyone at the Governor's
19 Office concerning how you vote?

20 A Never.

21 Q Have you ever received any directions indicating how you
22 should vote?

23 A No.

24 Q Okay. How is it that you make decisions? How is it that
25 you go about making your voting decisions?

1 A We receive a packet of information that is developed by my
2 staff. That packet of information includes various history
3 from the Corrections Department, as well as letters,
4 information from the public, and verbal testimony, as well as
5 in our final process, a deliberation process between the
6 Board. And my decisions are made after all of that is
7 considered.

8 Q Do you feel that your voting record -- let me take that
9 back.

10 Do you feel like you're going to be fired if you vote
11 the wrong way?

12 A No, I don't. I would care less if that was even implied.

13 Q Okay. Why wouldn't you care?

14 A Because my duties --

15 MS. HENRY: Your Honor, objection. Speculation.
16 Relevance.

17 MS. GILLILAN-GIBSON: It's not speculation.

18 THE COURT: Overruled.

19 BY MS. GILLILAN-GIBSON:

20 Q Why wouldn't you care if someone told you you were going
21 to lose your job?

22 A Because I didn't take this job to be biased. I took this
23 job to give a fair evaluation of the facts and make a
24 determination based on my experiences.

25 Q Have you received any communication regarding Mr. Schad's

1 or Mr. Jones's case?

2 A Would you say that again, please? I didn't hear you.

3 Q Have you received any e-mail communications, phone calls,
4 letters, regarding the upcoming clemency hearings of
5 Mr. Schad's and Mr. Jones case?

6 A I have, indeed.

7 Q Okay. And what have you received?

8 A I have received letters from the public, letters from
9 attorneys, calls from attorneys, and the packet of information
10 developed by my staff for those cases.

11 Q Have you received any information directing you how to
12 vote?

13 A Absolutely, not.

14 Q And if you would receive such information, what would you
15 do?

16 A What would I do? I would -- now as the Director I would
17 inform law enforcement that there is a violation of --
18 potential violation of tampering with somebody who is working
19 as a government official.

20 Q Mr. Livingston, did you participate in a conversation with
21 Ms. Kirschbaum and Mr. Thomas where you indicated how you were
22 going to vote in the Schad matter?

23 A No, because I never made such a determination.

24 Q Did you witness any of the other Board members making that
25 predetermination?

1 A No.

2 Q Do you know how you're going to vote in the Schad matter?

3 A I have no idea.

4 Q Do you have any bias against Mr. Schad or Mr. Jones?

5 A No. I don't.

6 MS. GILLILAN-GIBSON: I have no further questions,
7 Your Honor.

8 THE COURT: Cross.

9 **CROSS EXAMINATION**

10 BY MS. HENRY:

11 Q Mr. Livingston, as the Chairman and Executive Director of
12 the Arizona Board of Executive Clemency, are you responsible
13 for the postings that are placed on your website?

14 A On my website?

15 Q Yes.

16 A I have assumed that responsibility, yes.

17 Q And your website posts calendars?

18 A It does.

19 Q And on today's calendar was noted an Executive Session in
20 the Schad case?

21 A Correct.

22 Q So there was an Executive Session today at the Board
23 regarding the Schad case?

24 A No, there was not.

25 Q It just showed it on the calendar?

1 A Correct.

2 Q Mr. Livingston, as part of your training, you are trained
3 about the importance of the Open Meetings law; is that
4 correct?

5 A Yes, I am.

6 Q And it's your testimony before the Court that you would
7 not violate the Open Meetings Law; is that correct?

8 A That is correct. I would not knowingly violate it.

9 Q Mr. Livingston, since there's only -- there's been these
10 vacancies on the Board, there has been a lot of work to do,
11 right?

12 A A tremendous amount of work to do, yes.

13 Q And there were some times when there were only three
14 members present in the recent past to hear certain
15 individual's request for paroles and commutations; is that
16 correct?

17 A That is correct.

18 Q And there were times when people were coming before the
19 Board who required a total of three votes in order to get the
20 relief in which they sought?

21 A It takes a majority decision of the appointed members to
22 get relief in some cases; that's correct.

23 Q And in some of those cases, because of your new duties as
24 Chairman of the Board, you had to leave the hearings and left
25 Ms. Kirschbaum and Mr. LaSota to hear the rest of the

1 hearings; is that correct?

2 A That has occurred, yes.

3 Q And Mr. -- Mr. LaSota and Ms. Kirschbaum would vote in
4 public, correct?

5 A Correct.

6 Q After those hearings were over, you received requests from
7 the public that your vote be in open meeting; isn't that
8 correct?

9 A That is correct.

10 Q And you did not honor that request but voted in secret?

11 A That is correct.

12 Q In your affidavit you swore that Ms. Kirschbaum and
13 Mr. Thomas both told you that the former members of the
14 Board -- let me get it correct -- felt they were not being
15 reappointed to a Board position because of how they voted in
16 the past?

17 A That is what both of those individuals told me was the
18 reasons, correct.

19 Q Did you send an e-mail to the Board about the Stay of
20 Execution in Mr. Schad's case back in late February, March?

21 A I believe I sent an e-mail, but I can't tell you the
22 contents off the top of my head.

23 MS. HENRY: Thank you. One moment, please.

24 BY MS. HENRY:

25 Q Mr. Livingston, Ms. Harris, the new member of the Board,

1 has she obtained her statutorily-required training in order to
2 sit at Mr. Schad's hearing tomorrow?

3 A No, ma'am.

4 Q Will Ms. Harris be participating in Mr. Schad's hearing
5 tomorrow should it go forward?

6 A She will be as a person who is running the recording
7 device for tomorrow's hearing, but she will not actively
8 participate.

9 Q And she will not vote?

10 A She will not vote.

11 MS. HENRY: Thank you.

12 THE COURT: Redirect.

13 MS. GILLILAN-GIBSON: If I could just have a moment?

14 I have no further questions, Your Honor.

15 THE COURT: All right. You may step down.

16 Your next witness.

17 MS. GILLILAN-GIBSON: I have no further witnesses,
18 Your Honor.

19 **DEFENSE RESTS**

20 THE COURT: Redirect or rebuttal?

21 MS. HENRY: None, Your Honor.

22 THE COURT: All right. Let's hear argument.

23 MS. HENRY: Your Honor, as I understand the standard
24 for a motion for a TRO, the standard is that we must raise
25 serious questions.

1 There is a balancing test under the Ninth Circuit
2 case law where the Court can balance all of the four factors
3 that you have to take into consideration. And when the harm
4 is great, that can weigh more heavily in the Court's balancing
5 of the factors.

6 What we believe we have shown here is enough evidence
7 to warrant us moving further in the process in order to
8 conduct discovery and provide this Court with full testimony
9 and evidence in support --

10 THE COURT: Outline the discovery you're looking for
11 other than the letter.

12 MS. HENRY: Other than the letter I'm looking for,
13 Your Honor, I would seek to conduct discovery by taking the
14 deposition of Mr. Scott Smith, the Chief, the Governor's
15 Deputy, and the defendant.

16 I would seek --

17 THE COURT: And assuming he says what you propose
18 that he did say, how is that going to help?

19 MS. HENRY: The way that helps, Your Honor, is that
20 establishes official interference on the part of the Governor
21 with an independent board.

22 The defendants have stated in their brief today that
23 the Governor -- that the case law in the Ninth Circuit is that
24 a Governor can have a policy of never granting clemency.
25 That's a separate issue.

1 The issue is is someone -- and I don't know if the
2 Governor is acting on her own behalf or if someone is acting
3 as her agent. These individuals are sued in their official
4 capacity.

5 If the Governor's agents are engaging in
6 behind-the-scenes arm twisting -- you won't get your job back
7 if you don't do what I want. Or if you don't do what I want,
8 I will destroy your professional reputation and you'll never
9 get another job -- if that's what's going on here, in order to
10 make sure that for the public it appears that the Clemency
11 Board doesn't believe these individuals are worthy of the
12 Governor's favor so that the controversial case never gets on
13 her desk, that is a violation of minimal due process. That is
14 a violation of *Woodard*.

15 It's the sort of arbitrary interference with the
16 right to access the clemency proceeding that is at issue here.
17 And we believe that a limited TRO with discovery, limited
18 depositions, the Court can put time limits on those
19 depositions, the Court can certainly limit the document
20 request that I sent to the parties today.

21 THE COURT: So if he admits -- if he admits it, you
22 think that you have established as a matter of law that there
23 has been interference with this Board that now exists?

24 MS. HENRY: Yes, I do.

25 THE COURT: And why is that since this Board that now

1 exists never had any contact with him?

2 MS. HENRY: The Board that now exists does have
3 contact with him.

4 THE COURT: No. Did not have contact with him.

5 MS. HENRY: Each of them were interviewed by him.

6 THE COURT: But none of them were threatened.

7 MS. HENRY: In Executive Session, so I didn't ask
8 about their Executive Session interviews.

9 We don't know at this moment without conducting
10 further --

11 THE COURT: Well, okay.

12 Are you suggesting that an Executive Session, when
13 every one of these individuals said that they were not
14 threatened by anyone at any time in Executive Session, they're
15 going to change their position? That they have been lying
16 under oath here?

17 MS. HENRY: Your Honor, what I'm saying is we have a
18 fact dispute at a preliminary stage. They're saying their
19 self-serving statements that they can be fair.

20 THE COURT: Well, self-serving under oath by these
21 individuals? Are you saying that that -- are you asking me to
22 merely, because let's say --

23 Well, do you expect that Mr. Scott Smith is going to
24 say that he told them and that he threatened them?

25 Is that what -- where is the evidence that he's going

1 to say that?

2 MS. HENRY: Your Honor, your order directed
3 defendants to dispute any facts by 9:00 a.m. yesterday.

4 THE COURT: That's true.

5 MS. HENRY: By 9:00 a.m. yesterday, Scott Smith had
6 not denied that he had threatened from the behavior
7 Ms. Wilkens in her interview.

8 THE COURT: But we're talking about the Board that we
9 have now.

10 MS. HENRY: I'm talking about a pattern of conduct on
11 behalf of Mr. Smith.

12 THE COURT: Okay. You already have the statements of
13 the Board members, the previous Board members, and it's quite
14 clear what their position is as to whether or not they were
15 threatened, whether or not they were removed because they
16 voted a certain way.

17 But all the Board members who have now testified have
18 said they would vote their conscience and they have not been
19 threatened.

20 MS. HENRY: I understand.

21 THE COURT: So what are you asking for now in terms
22 of discovery?

23 MS. HENRY: I am asking for the e-mails, the
24 communication that went out to the Board members from
25 Mr. Hernandez, from Mr. Belcher. I'm asking for --

1 THE COURT: Okay. Let's go back. What e-mails?

2 MS. HENRY: Your Honor, I think it's a pretty typical
3 document request to ask for e-mails that go between the
4 parties.

5 THE COURT: No. No. No. Ask for e-mails -- I'm not
6 going to allow a fishing expedition. Under the rules you
7 can't get a fishing expedition, particularly on a TRO.

8 I mean, you can't -- even if we were at the stage
9 where we're having a Rule 16 conference, I wouldn't allow it
10 then. So what evidence do we have now that I can open the
11 door and allow you for -- to obtain any e-mails, any
12 possibility of e-mails ever that existed between anyone when
13 we have unequivocal testimony under oath by these witnesses
14 that are part of the Board now that they have never been
15 intimidated?

16 MS. HENRY: Your Honor, what we have from the
17 evidence --

18 THE COURT: No. The present Board. What do we have?
19 All right. So is that accurate? Have I
20 misunderstood something?

21 MS. HENRY: It's our theory that the Governor,
22 through his -- through her staff, has communicated to these
23 Board members --

24 THE COURT: These present Board members?

25 MS. HENRY: These present Board members.

1 THE COURT: What evidence do you have of that?

2 MS. HENRY: The evidence of that came in the
3 declaration that was not challenged of Mr. Thomas and his
4 testimony here.

5 THE COURT: No. It was challenged.

6 MS. HENRY: Mr. Thomas?

7 THE COURT: It was challenged in what way?

8 It was challenged because basically on direct
9 examination you got everything out of him you could. On
10 cross-examination they basically reestablished precisely what
11 came out on direct examination.

12 He couldn't say anything more than there was a -- you
13 know, something that somebody implied something. They showed
14 him something on a document. He couldn't see what the
15 document was. And the person said, well, this was a threat.

16 It's so obscure. It's absolutely obtuse. It's
17 tenuous.

18 MS. HENRY: Your Honor, I'm just going to have to
19 respectfully disagree with you. I think the evidence shows
20 that the Governor's staff has actively sought to undermine and
21 frustrate access to clemency on behalf of high-profile inmates
22 such as Mr. Schad.

23 I believe that the testimony that Mr. Thomas was
24 shown this letter, e-mail, whatever it is that we can't get
25 our hands on but want desperately -- and I understand the

1 Court has ordered that it be provided -- that that letter was
2 shown to him as an object lesson. This will happen to you
3 too.

4 He was told by Ms. Kirschbaum and -- I'm losing my
5 mind now. Mr. Thomas was told by Ms. Kirschbaum and
6 Mr. Livingston -- I'm sorry. Mr. Thomas was told by
7 Ms. Kirschbaum that the other Board members --

8 THE COURT: Mr. Thomas what?

9 MS. HENRY: That the other Board members had lost
10 their jobs.

11 THE COURT: That's true.

12 MS. HENRY: Mr. Livingston was told that the other
13 members had lost their jobs because of their votes.

14 The evidence shows the Flibotte case that Scott Smith
15 got so up in Ms. Wilkens' face on, wagging his finger angrily,
16 a man that she had known for 25 years, a woman who, you know,
17 served the Board honorably, one vote, she's gone, and two
18 months later, so is everybody else that they can get rid of
19 without getting Mr. LaSota to bring a First Amendment lawsuit.

20 THE COURT: Okay. Okay. I am giving as much credit
21 to the former Board members' testimony as credible as I am
22 giving credit to the present Board members' testimony.

23 But if your reliance -- and as I said the best case
24 you have is the Eighth Circuit Judge Arnold's case is the best
25 case you have really from getting you to a minimal procedural

1 violation -- in that case it was an individual who was
2 threatened who was going to provide testimony in an actual
3 clemency case.

4 At this point we don't have that.

5 MS. HENRY: We have --

6 THE COURT: Assuming all the facts in your favor, as
7 I will on essentially a motion to dismiss or a motion which is
8 essentially a Rule 50 motion, assuming all those facts in your
9 favor, we still don't have a connection.

10 Everything is obscure. We don't have a connection
11 with the Board. Every one of the Board members said they're
12 going to be fair. As a matter of fact, one of them said, you
13 know, if they -- if I was told to vote one way, I would vote
14 the other. So they're all voting their conscience. So
15 where --

16 MS. HENRY: That Board member also said that he never
17 violates the Open Meetings law and then admitted two minutes
18 later that he did violate the Open Meetings law.

19 THE COURT: I'm sorry? Say that again.

20 MS. HENRY: Mr. Livingston's testimony was that he
21 actually has violated the Open Meetings law because he has
22 been voting in secret on cases when members of the public have
23 asked him to vote public.

24 THE COURT: So where are you going? You're going a
25 different direction now.

1 MS. HENRY: Well, I'm going with the credibility of
2 the witnesses at this stage, Your Honor, where you're saying
3 that you are going to presume the facts in the light most
4 favorable to us.

5 But that doesn't presume the facts in the light --

6 THE COURT: He admitted it though.

7 MS. HENRY: He did. He admitted that.

8 And what I want to be able to do is not in a TRO
9 hearing, but I think there is enough here under the TRO
10 standard -- I'm not asking for a yearlong delay. I'm asking
11 for enough time in order to get the documents.

12 Let me get the letter first. And then I can, you
13 know, have some discovery requests that are more tailored.

14 The local Federal Public Defender's Office here,
15 Mr. Jones' counsel, did public records requests to the
16 Governor and they have been stonewalled.

17 They have been coming in in dribs and drabs and they
18 have not responded within the five days they're required by
19 statute.

20 I need the subpoena power of the Court in order to
21 get the letter, to find out the communications, to take
22 Mr. Smith's deposition, and find out exactly who he has talked
23 to and what he said.

24 I can't prove all that here today in a TRO motion
25 with an execution in a week and Ninth Circuit briefing going

1 on, but we have done the best we can.

2 And I believe we have made a prima facie case that
3 there are serious questions, which is the standard, that
4 members of the Governor's staff are interfering with the
5 access to clemency. And just those efforts, even if these
6 people say that they can be fair, that's not enough, you know,
7 to defeat our complaint. Because other complaint goes to the
8 official interference. There's a claim under 1985 about
9 conspiracy to interfere with right to -- for equal protection
10 claims. Claims --

11 THE COURT: So what you're really asking me is to
12 make a finding that when they say they can't be fair, that
13 they're not stating that in good conscience under oath?

14 MS. HENRY: I'm not asking you to make that finding,
15 Your Honor. I'm asking you to make a finding that there is a
16 dispute of facts amongst the parties that warrants further
17 limited discovery and a TRO.

18 I'm not asking for permanent injunction right now.

19 THE COURT: But they are being repetitive. You would
20 have to establish for me that there was a case, some case that
21 all of the now-existing Board members, when they said that
22 they are going to be fair, they're going to review all the
23 documents that are presented to them, that they are not
24 telling the truth, and that they are adversely influenced --
25 they have been adversely influenced and would be by anything

1 that came from the Governor.

2 MS. HENRY: I disagree that that's the standard that
3 we have to prove today. I think that's the standard we have
4 to prove on Count 1 of the Complaint at a permanent injunction
5 hearing.

6 Count 3 of the Complaint has to do with the
7 conspiracy on the part of Mr. Smith and other members of the
8 Governor's staff acting on her behalf to attempt to influence
9 these members.

10 That in and of itself does not require the members to
11 actually be influenced. We have testimony that
12 Mr. Hernandez --

13 THE COURT: All right. You have to have minimal due
14 process violations. And I think -- let's see what we've got
15 here -- flipped a coin. That is, that the Clemency Board
16 flipped a coin, not the Governor flipped a coin.

17 MS. HENRY: The next clause --

18 THE COURT: They have to be minimal procedural
19 violation requirements.

20 MS. HENRY: The next clause of that sentence, Your
21 Honor, is "or some other arbitrary factor" which has been
22 interpreted in other cases as, for example, political reasons,
23 political animus, or pecuniary.

24 THE COURT: It still has to affect the Board.

25 And so let's assume the Governor, taking everything,

1 all inferences in your favor, the government through the agent
2 did something improper. And in engaging in the conduct that
3 Mr. Scott may or may not have done, based upon the testimony
4 of the former Board members, they felt he did, which has
5 adversely influenced them or tell them you're not going to be
6 reappointed because we don't like the way you handled this.

7 If that had been brought to my attention or any
8 judge's attention at the time when they were about to vote, it
9 would be a different case, but we have a new Board.

10 MS. HENRY: It's not a new Board. Two of those
11 members -- three of those members were on that Board that
12 heard that threat. It got back to them. That's our testimony
13 that Mr. Smith communicated through Jesse Hernandez --

14 THE COURT: Okay. I understand.

15 MS. HENRY: Your Honor, it would be our position that
16 if the Court finds that there was -- that Mr. Smith did all
17 the things that we've said he did in our affidavits that he
18 has not denied to date, that that establishes a case of the
19 Governor's Office attempting to exert influence over an
20 independent Board.

21 And that, in and of itself, is a sufficient violation
22 of *Woodard* in order to justify this Court allowing the case to
23 move further under a TRO or a preliminary injunction to put us
24 on an expedited schedule for discovery.

25 And we certainly would request that the Court delay

1 tomorrow morning's 9:00 a.m. clemency hearing in Florence,
2 Arizona, to give us sufficient time to get the letter that the
3 Court has ordered being produced and to allow us to further
4 brief the case for the Court should it be necessary.

5 THE COURT: Thank you.

6 MS. HENRY: Thank you.

7 MS. GILLILAN-GIBSON: Your Honor, is there a
8 particular area you want me to address? I know it's late and
9 I don't want to go on and on. If you have a specific question
10 for me.

11 THE COURT: Everything is important.

12 MS. GILLILAN-GIBSON: First of all, Your Honor, I
13 think a couple factual distinctions.

14 There was absolutely no evidence that the current
15 Board member was threatened or threatened through three
16 people.

17 I think Ms. Henry's misconstruing the evidence that
18 was presented which was Ms. Kirschbaum did say the other
19 members -- the prior members, excuse me -- felt that they had
20 lost their job because they had voted.

21 A TRO is a very drastic measure and it's not
22 something the Court just should grant to give them more time.
23 And that's essentially what she's asking for. She
24 acknowledged in her statement: I can't prove it today.

25 Exactly. She can't meet her burden of proof. She

1 has to show that there's a likelihood to prevail on the
2 merits.

3 You have the three current Board members, a former
4 Attorney General, testify under oath that they have not been
5 threatened, that they have not been told how to vote, that
6 they are fair and unbiased, and that can do the clemency
7 hearing.

8 Under the case law they are presumed to have
9 integrity as officers, especially when no evidence has
10 contradicted them.

11 I mean, Mr. Thomas didn't say they wouldn't vote
12 their conscience. All he said was something about a vague
13 letter.

14 Mr. Belcher didn't say the current Board member was
15 threatened and going to vote.

16 They all talked about what happened to them in their
17 own perceptions. Let's assume that's true. I mean, we're
18 denying that's true, but let's assume for purposes of this
19 case it's true. That doesn't impact Mr. Schad's clemency
20 hearing because you have three Board members who say I take my
21 job seriously, I'm not biased, I don't care, I'm going to vote
22 my conscience.

23 And I think if you look at the case we gave you,
24 which is *Parker v. State Board of Pardons and Paroles*, in that
25 case the Board Chairman came out and said no one is going to

1 be granted clemency while I'm chairman. And then three years
2 later someone challenged him.

3 And the Court said as long as here and now you can
4 tell me you can be fair and unbiased -- you know, fair and
5 impartial -- there's no violation of due process.

6 We're not even that extreme in this case. It's
7 uncontroverted testimony from these three Board Members that
8 they are fair and unbiased. And just because there's an
9 allegation at what happened a couple years ago or with other
10 prior Board members, it doesn't meet the level for the TRO.
11 The TRO should go forward tomorrow.

12 You should also note -- and I disagree with her
13 statement that Mr. Smith didn't deny anything -- your order
14 was to submit what affidavits we plan to rely on for the
15 hearing and that is what we did.

16 Ms. Henry had an opportunity to call Mr. Smith today.
17 It's her burden to prove it. She could have had him and asked
18 all the questions that she supposedly is now saving for a
19 deposition.

20 I e-mailed her. I said Mr. Smith is available. And
21 she chose not to do it.

22 So that should not be a ground to continue this when
23 today was the opportunity for her to present her testimony.
24 Her claim is that Mr. Smith will prove the case. She didn't
25 call Mr. Smith. That was her choice.

1 But you, as a judicial officer, when you have three
2 public officials, appointed members, who all swore under oath,
3 also swore in their affidavits, that they are fair and
4 impartial, they have no bias to Mr. Schad, and there is no
5 evidence to the contrary, Ms. Henry has not proved a reason
6 for the TRO.

7 And we would ask that you deny the TRO and that you
8 let the clemency hearing go forward tomorrow, Your Honor.

9 THE COURT: Thank you.

10 MS. HENRY: Your Honor has her scheduling order, I'm
11 certain. The scheduling order split up hearing from
12 affidavits.

13 The scheduling order could not be more clear that if
14 the defendants disputed any fact, they were to provide
15 affidavits by 9:00 a.m. Monday morning.

16 One presumed -- I certainly presumed -- that the
17 reason for that was because if the Court didn't need to have a
18 hearing because there were no disputed facts, the Court could
19 then cancel the hearing and decide the case on the papers.

20 And so the Court's order did not, absolutely did not,
21 limit the defendant's obligation to dispute facts by 9:00 a.m.
22 Monday morning through affidavits. And that's certainly what
23 I relied on in presenting our case today, as well as the
24 Court's later statements in the hearing.

25 THE COURT: Well, you're saying that's the reason why

1 you didn't call Mr. Scott?

2 MS. HENRY: Mr. Smith? Yes, ma'am.

3 THE COURT: I mean Mr. Smith?

4 MS. HENRY: Yes. They haven't disputed those facts.
5 And I have repeated that fact a couple of times in pleadings
6 with this Court that's not been denied. So that's what I
7 relied on.

8 The rest, Your Honor, I will rest on the brief and
9 legal argument.

10 THE COURT: Thank you. All right. The matter is
11 taken under advisement and we are adjourned.

12 And thank you, counsel, for being so patient.

13 All right. Have a nice evening.

14 (Proceedings adjourned at 7:10 p.m.)

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion
of the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control.

DATED at Phoenix, Arizona, this 2nd day of October,
2013.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE