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*Pro Hac Vice* Appearance  
Appearing for the Plaintiff Daien

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO  
SOUTHERN DIVISION**

DONALD N. DAIEN,	)	Civil Case No. <u>1:09-cv-00022-REB</u>
	)	
Plaintiffs,	)	<b><u>MOTION TO AMEND THE CASE</u></b>
	)	<b><u>MANAGEMENT ORDER TO EXTEND</u></b>
v.	)	<b><u>THE SETTLEMENT CONFERENCE</u></b>
	)	<b><u>DEADLINE TO A DATE AFTER</u></b>
BEN YSURSA, in his official	)	<b><u>SUMMARY JUDGMENT IS</u></b>
capacity as Secretary of State of	)	<b><u>RESOLVED BUT BEFORE THE TRIAL</u></b>
Idaho,	)	<b><u>AND MOTION TO CONTINUE</u></b>
	)	<b><u>SETTLEMENT CONFERENCE UNTIL</u></b>
Defendant.	)	<b><u>AFTER SUMMARY JUDGMENT</u></b>
_____	)	

COMES NOW THE PLAINTIFF, Donald N. Daien (“Daien”), by and through his attorneys, The Bernhoft Law Firm, S.C., (Attorney Robert E. Barnes, admitted *pro hac vice*), and respectfully moves this Court to amend the case management order entered by the Court on April 14, 2009 to extend the settlement conference deadline to a date after summary judgment is resolved, but before the trial on the merits. The current deadline is August 14, 2009. Daien also moves to continue the settlement conference until after summary judgment is resolved. Daien’s counsel has sought Ben Ysursa’s (“Ysursa”) position on this motion by contacting his counsel.

Ysursa disagrees with the assertions Daien makes as a basis for this motion, but Ysursa also has no objection to amending the scheduling order to allow the settlement conference to occur after summary judgment is resolved and continuing the scheduling conference currently scheduled for August 4, 2009.<sup>1</sup>

Daien seeks this amendment to conserve the time and expense associated with a personal appearance in a settlement conference that has little chance of resolution at the settlement conference. The complaint seeks declaratory relief, specifically whether I.C. §§ 34-1807, 34-708A, and 34-1822 (the “offending Idaho Statutes”) violate the equal protection clause and the First Amendment to the U.S. Constitution. There are no damages in this case because the relief sought is prospective. Consequently, the settlement negotiations lack the traditional incremental options that a financial damages demand would entail (the parties cannot “meet half-way”).

Daien’s initial position at settlement is identical to his demand in the Complaint, mainly that the offending Idaho statutes are unconstitutional and should be declared to be so. Given the current state of the law as expressed by the Ninth Circuit in *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (*cert. denied*, March 9, 2009), Daien’s counsel would be hard-pressed, if not committing malpractice, to advise Daien to accept anything less than a full repeal of the offending Idaho statutes notwithstanding any conceivable alternative resolutions Ysursa might propose. *Nader* applied strict scrutiny to some Arizona statutes that are identical in all material respects to the offending Idaho statute at issue here. “Because the restriction [on out-of-state petition circulators] creates a severe burden on plaintiffs’ First Amendment rights, strict scrutiny

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<sup>1</sup> The financial concerns surrounding this settlement conference would be altered significantly if the parties and counsel could appear by telephone rather than in person. It is true that ultimately, many of the costs associated with this settlement conference will be reimbursed to Daien and borne by the Idaho taxpayers pursuant to 42 U.S.C. § 1988 should Daien prevail, but preserving or limiting unnecessary litigation costs is a responsibility for all litigants, including prevailing parties.

applies.” *Nader*, 531 F.3d at 1036. Therefore, Daien’s position is firmly established, and any settlement proposals short of a full repeal of the statute, must be considered in light of *Nader*’s strict scrutiny rule of application.

Furthermore, there are questions whether Ysursa and his counsel are in a position to bind the State of Idaho to any agreement to repeal the offending Idaho statutes, although it is unlikely they have the ability to do so under the Idaho Constitution, even if Daien waived his right to all attorneys’ fees under 42 U.S.C. § 1988 as part of the settlement of this case. *See also Mead v. Arnell*, 117 Idaho 660, 667 (Idaho 1990) (“Enforcing the law of this state is a constitutionally mandated executive department function resting in the office of the Attorney General.”) Only the Idaho legislature may repeal these statutes, and Daien is not required to wait to see if the Legislature will act in conformance with any agreement to repeal. The legislative process can be a long and drawn out process.

Daien believes that these reasons coupled with the financial concerns set out above constitute good cause to postpone the settlement conference until after summary judgment is resolved. While Ysursa has stated that they disagree with these factual and legal assertions, they have stated they have no objection to postponing the settlement conference.

WHEREFORE, for all the foregoing reasons, Daien, respectfully request an order from this Court amending the case management order entered by the Court on April 14, 2009 to extend the settlement conference deadline to a date after summary judgment is resolved, but before the trial on the merits, and to continue the settlement until after the summary judgment motions are complete.

Respectfully submitted on this the 21st day of July, 2009.

THE BERNHOFT LAW FIRM, S.C.  
Attorneys for the Plaintiffs

/s/ Robert E. Barnes  
Robert E. Barnes, Esquire  
*Pro Hac Vice* Counsel

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DONALD N. DAIEN,	)	Civil Case No. <u>1:09-cv-00022-REB</u>
	)	
Plaintiffs,	)	<b><u>CERTIFICATE OF SERVICE</u></b>
	)	
v.	)	
	)	
BEN YSURSA, in his official	)	
capacity as Secretary of State of	)	
Idaho,	)	
	)	
Defendant.	)	
_____	)	

I HEREBY CERTIFY that on the 21st day of July, 2009, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the notice of electronic filing::

<u>Name</u>	<u>Service Address</u>
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Dated on July 21, 2009.

/s/ Robert E. Barnes  
Robert E. Barnes