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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,)	<u>MOTION TO CONTINUE</u>
)	<u>SETTLEMENT CONFERENCE UNTIL</u>
v.)	<u>AFTER SUMMARY JUDGMENT</u>
)	
BEN YSURSA, in his official)	
capacity as Secretary of State of)	
Idaho,)	
)	
Defendant.)	
_____)	

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 vacate the existing settlement conference and continue the settlement conference until after summary judgment is resolved, but before trial, and in any event, before January 31, 2010, as set forth in Judge Bush’s Order of earlier today amending the scheduling conference. (Doc. 24.) Daien’s counsel had sought Ben Ysursa’s (“Ysursa”) position on this motion as part of a combined motion to amend the scheduling conference and to continue

the settlement conference. In response to Daien's inquiry, Ysursa disagreed with the assertions Daien made as a basis for that motion, which constitute the same basis for this motion, but Ysursa also had no objection to continuing the scheduling conference currently scheduled for August 4, 2009.

Procedural Posture

A settlement conference is currently scheduled for August 4, 2009. (Doc. 21.) On July 21, 2009, Daien filed a combined motion to amend the scheduling order, and motion to continue the settlement conference until after summary judgment is resolved. (Doc. 20.) Judge Bush only granted the motion to amend the scheduling order and left Daien to file a motion to Magistrate Judge handling the settlement conference to continue that conference. (Doc. 24.) Daien files that motion here.

Argument

Daien seeks this continuance 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 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. 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 continuing the settlement until after the summary judgment motions are complete, but prior to

trial and in any event, prior to January 31, 2010, in accordance with the amended scheduling conference as ordered by Judge Bush. (Doc. 24.)

Respectfully submitted on this the 28th day of July, 2009.

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