

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF IDAHO**

3 IDAHO STATE DEMOCRATIC PARTY, )  
 4 ) CASE NO. 1:16-cv-00491-BLW  
 5 Plaintiff, ) **MOTION HEARING**  
 6 vs. )  
 7 CHRISTOPHER RICH in his official )  
 8 capacity as Clerk of the County )  
 9 of Ada of the State of Idaho, )  
 10 LAWERENCE DENNEY in his official )  
 11 Capacity as Secretary of State )  
 12 of Idaho, )  
 13 Defendants. )  
 14 \_\_\_\_\_ )

15 **TRANSCRIPT OF PROCEEDINGS**  
 16 **BEFORE THE HONORABLE B. LYNN WINMILL**  
 17 **TUESDAY, NOVEMBER 8, 2016; 4:07 P.M.**  
 18 **BOISE, IDAHO**

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 20  
 21 Proceedings recorded by mechanical stenography, transcript  
 22 produced by computer.  
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24 **TAMARA I. HOHENLEITNER, CSR 619, CRR**  
 25 FEDERAL OFFICIAL COURT REPORTER  
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## I N D E X

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## Proceedings

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## Motion Hearing

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## PROCEEDINGS

November 8, 2016

(Telephonic hearing.)

THE COURT: Counsel, I'm in the middle of a trial; and accordingly, we have got a very limited amount of time to hear this. Plus, given the nature of the request and the factual circumstances, it's clear that a decision has to be made immediately. So I would like to keep arguments to a reasonable length. Would 10 or 15 minutes be sufficient per side? From the plaintiffs?

MS. McCONNELL: Yes, Your Honor. This is plaintiff, Kelly McConnell. Yes, that's sufficient.

THE COURT: Mr. Chacko?

MR. GILMORE: Judge Winmill, the Secretary of State is also on the line. We were a codefendant.

THE COURT: All right. Okay. And do you intend to argue separately?

MR. GILMORE: Yes. There are different issues involved. This is Michael Gilmore and Steven Olsen for the Secretary of State. And Tim Hurst, the Chief Deputy Secretary of State, is here as well.

THE COURT: So, Mr. Gilmore, are you going to argue?

MR. GILMORE: Yes.

THE COURT: Is 15 minutes per side -- that would be that, Mr. Chacko and Mr. Gilmore, you would share that time

between you. Is that going to be sufficient?

MR. GILMORE: I think so. I do not plan to duplicate what he is saying.

THE COURT: That was Mr. Gilmore.

MR. CHACKO: Your Honor --

THE COURT: Counsel, you need to identify yourself.

MR. CHACKO: Your Honor, this is Ray Chacko. Sorry. Go ahead.

THE COURT: Mr. Chacko, go ahead.

MR. CHACKO: Yes. Also, I knew that -- we obviously just got this fairly quickly and haven't had a chance to go over everything yet. But what we did do is we just filed an affidavit of the Chief Deputy for Ada County, Phil McGrane, and it includes a letter that was sent to Mr. Dotters-Katz, which goes through sort of the timeline of everything that occurred. So we think that might be helpful to the court in rendering its decision.

So we wanted to make sure that the court is aware of that. It just got filed right now. So it hopefully should be coming through very quickly here. It's only a little bit over four pages long as part of the actual attachment. So, hopefully, that's -- or actually, I should take that back. Yeah --

THE COURT: All right. We'll --

MR. CHACKO: Sorry. That's actually 12 pages long. Sorry about that. But, anyway, hopefully the court will be

getting that right now, and we can use that at least to set forth some of the evidentiary basis here.

THE COURT: All right. We will be checking for that.

MR. CHACKO: Okay. In lieu of that, Your Honor, if you have questions about factually what's going on, like I said, we have our chief deputy clerk. And he is very knowledgeable about everything that happened with regards to these polling locations, the notices that were provided, when they were provided, and all of that.

So if there is any way you would like to take his testimony with regards to any of that, that would be helpful. He can also point out some of the errors made in the complaint, too, for the benefit of the court.

THE COURT: Is that Mr. Chacko?

MR. CHACKO: Yes.

THE COURT: You need to identify yourself for the court reporter before you speak.

MR. CHACKO: I apologize for that, Your Honor.

THE COURT: All right. Well, let's go ahead and proceed.

Ms. McConnell or Mr. Dotters-Katz, you were the moving party, so let me hear you first.

MS. McCONNELL: Thank you, Your Honor. This is Kelly McConnell for Givens Pursley. And Mr. Dotters-Katz is available to fill in some of the factual information as it has been

developing. This is a fluid situation, obviously, because the election is ongoing right now and votes are being taken.

And we're in front of the court today not only in representation of our client, the Idaho State Democratic Party, but as an advocate for the constitutional rights of Ada County residents who are qualified to cast a ballot in the general election that's happening today.

In fact, in this election year, with the integrity of the election process being challenged, perhaps it's never been more important to uphold the rights of individual voters to participate in a meaningful way.

In fact, the words of the United States Supreme Court over 50 years ago were this: No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. That's from *Wesberry v. Sanders*, 376 U.S. 1.

We have a simple request today. It's a very narrow -- and a narrow request tailored to the specific circumstances of the problems that are happening in the election as we're speaking now.

All we ask is that five locations, five polling locations, remain open for an additional two hours tonight to address confusion created by the County's last-minute and poorly

1 communicated change in the polling locations.  
 2 So the gist of the situation is this: In the -- over the  
 3 summer, Ada County received notice that some of the polling  
 4 locations were not ADA compliant. Rather than acting  
 5 immediately on the situation, the County took no action until  
 6 right before the election, which is happening today, to send out  
 7 notices that the five polling locations had been moved.

8 They did this by sending letters to the affected voters,  
 9 who most likely received those in the stack of fliers and other  
 10 election-related mail that we have all been receiving over the  
 11 last couple of weeks.

12 Some of the polling locations have been unchanged  
 13 previously for several of the last elections. We now have  
 14 reports coming in from the field that Mr. Dotters-Katz can  
 15 address in more specificity as needed or testify that there are  
 16 people showing up to the incorrect polling locations who must be  
 17 redirected.

18 And this is not an insignificant number, Your Honor. We  
 19 have reports of from 40 to 60 people who have shown up today  
 20 thus far to the wrong location confused about where they need to  
 21 be. This fact alone shows us that the County's notification of  
 22 the change did not reach all voters.

23 To compound the confusion of the situation, there -- we  
 24 were able to locate three websites where a prospective voter can  
 25 input their address, their home address, and find their polling

10

1 We have one situation in Precinct 1806, which is Brookdale  
 2 Assisted Living Center on Parkcenter Boulevard, that voting  
 3 location has been moved to Ada County Indigent Services on Front  
 4 Street. That's two-and-a-half miles away.

5 People from the assisted living center may not have  
 6 transportation to the Ada County Indigent Services location. In  
 7 addition, the parking there is insufficient. If there are lines  
 8 at the polling location and people are in line for more than an  
 9 hour, they will have to pay for their own parking. So the  
 10 voting process will not be free for those voters.

11 We are also concerned that additional voters -- more voters  
 12 other than the 40 to 60 that have already been confused and  
 13 shown up at the wrong location will wait until after work to  
 14 cast their ballot. If they come to their usual polling location  
 15 that has been their location for the past several elections and  
 16 learn that it's closed, have they left themselves sufficient  
 17 time to get to the new polling location?

18 And with respect to timing, that's primarily what we would  
 19 like to address. We would like to allow additional two hours  
 20 for each of these locations that have moved. This is not an  
 21 undue burden on Ada County or the State. We would like public  
 22 announcements to be made that the polls at these locations will  
 23 be open for an additional two hours.

24 And with that, I'm going to turn it over to  
 25 Mr. Dotters-Katz, and he is going to explain to the court -- in

1 location. Two of those three -- two of those three websites are  
 2 not giving any polling location. Specifically, Ada County, on  
 3 their website, Adaweb.net, is not providing any polling location  
 4 when a voter inputs their address into the tool feature to  
 5 determine their polling location; the result just shows a blank.

6 The same is true with Google. If you call up the Google  
 7 Chrome page, Google has, as a public service, provided a tool  
 8 for its users to find their polling location. However, if you  
 9 type in the address in the Google tool and it's an address  
 10 within one of the affected districts or precincts, the polling  
 11 location shows up as blank.

12 And we did this -- we polled some test locations where we  
 13 provided -- where we put in the information to determine what  
 14 would happen.

15 Now, I know Ada County is going to argue to the court that  
 16 they have complied with all the statutory requirements imposed  
 17 upon them to change the polling location, which was changed  
 18 about three weeks before this election and less than four weeks.  
 19 That's not the test, Your Honor. The test is: Are the rights  
 20 of prospective voters being protected?

21 Because in order to effectively implement the balancing  
 22 test that's at issue here, the court must take into  
 23 consideration the character and magnitude of the injury against  
 24 these voters who don't know where to go and may not get there in  
 25 time.

11

1 his capacity as a representative of the Idaho State Democratic  
 2 Party, he has been taking direct reports from representatives  
 3 out in the field at the former polling locations, and he can  
 4 convey some of the events that are transpiring.

5 MR. DOTTERS-KATZ: This is Sam Dotters-Katz.

6 In my role as the statewide elections lawyer for the Idaho  
 7 State Democratic Party, I work with a team of about nine lawyers  
 8 who are positioned throughout the state, a few of whom are in  
 9 Ada County. I communicate with them throughout the day-to-day  
 10 and in the last couple of days addressing issues that arose.

11 I'm also in contact with a host of different volunteers,  
 12 precinct captains, Idaho State Democratic Party staff, and  
 13 others who are engaged in this voting process. I can speak  
 14 today in brief about some of the issues that have been brought  
 15 to my attention with specific regards to these five polling  
 16 locations that have been changed as of late.

17 The primary polling location where we're seeing the most  
 18 issues, as was mentioned, is in 1806. 1806 was formerly at the  
 19 Brookdale Assisted Living Center, which also was the polling  
 20 location for 1805. In this election, 1806, as was mentioned,  
 21 was moved to Ada County Indigent Services, but 1805 remained at  
 22 Brookdale. And that has added to the confusion of voters. And  
 23 I can speak to that in a moment.

24 I want to clarify that when we say that 40 to 60 voters  
 25 have turned up confused and not knowing their polling location,

1 that is specifically referencing a number in regards to 1806,  
2 and that is only between the time frames of when the polls  
3 opened and about 1:30 this afternoon.

4 We have had poll-watchers at Indigent Services, who are  
5 reporting that voters in large numbers who are in precinct 1901,  
6 which is also an affected precinct, have been showing up  
7 claiming that they have seen news reports telling them that  
8 their location had been moved Indigent Services.

9 We have had multiple reports that the parking situation at  
10 Indigent Services has gotten so bad that cars are backed up and  
11 idling waiting for parking spaces. And generally speaking, most  
12 of those cars end up driving off without parking and coming in  
13 to vote.

14 In addition, in regard to the 1806 and 1805 issue, I was  
15 just made aware of a report in which a woman showed up, but her  
16 name was not listed on the voter rolls because she lives in  
17 1806. Unaware of the voting location change, she was told to  
18 reregister, and the poll worker did not carefully look at the  
19 address with which she did that. And she submitted that to the  
20 polling log and filled out a registration card and then voted.

21 Ten minutes later, her husband showed up. And when he  
22 presented himself, he was also not on the voter roll. And  
23 his -- he told the election staff that his wife had just voted  
24 there; and when they looked closely at her paperwork, it was  
25 clear that -- he was told that her vote would not be counted,

14

1 the precincts. That was all done timely. We actually went  
2 above and beyond by providing notice through the mail, by making  
3 press releases, doing other things like that in addition that we  
4 didn't need to do, but we did them anyway just to go out there  
5 and try to make sure and give everybody an opportunity to know  
6 that these changes were made.

7 But, again, none of those things were required. Everything  
8 that was required we definitely did do. And I guess there is no  
9 question about us having complied with the law.

10 So what we're really -- what the plaintiffs are asking us  
11 to do here is basically go above and treat them differently or  
12 to treat certain precincts differently. And that causes us some  
13 issue because we think that's fundamentally unfair, because we  
14 have them complaining, and I'm not quite sure, frankly, how they  
15 have standing to make those type of complaints.

16 I don't know that they actually do represent all the voters  
17 of Idaho. I also don't know how that they might say that they  
18 represent even Democratic voters, that Democratic voters are  
19 somehow treated differently under this versus Republican voters.

20 But, moving beyond that, again, I think we just come down  
21 to fundamental fairness here. What I would like to do -- and in  
22 fairness, I think we should be able to do it -- is because  
23 Ms. McConnell turned it over to her colleague to speak about the  
24 facts or at least the claims that they had with regards to  
25 irregularities, I would like to be able to do the same here and

1 and if she tried to vote anywhere else, it would not be counted  
2 because she would be voting twice.

3 So it's clear, Your Honor, that there are significant  
4 issues of confusion that are widespread throughout the county  
5 that can only be addressed with additional time with the polling  
6 locations extended for two more hours.

7 MS. McCONNELL: Thank you, Your Honor. If we have  
8 time, we will reserve the balance for rebuttal.

9 THE COURT: All right. Very well.

10 MS. McCONNELL: And we are happy to address any  
11 questions the court may have.

12 THE COURT: Well, it's difficult for me to ask  
13 questions in a conference -- rather, an audio-call setting. So  
14 I think at this point, I'm going to hear arguments. If I have  
15 questions at the end, I'll ask them. But at this point, I'm  
16 content. Thank you very much.

17 Mr. Chacko or Mr. Gilmore.

18 MR. GILMORE: Mr. Chacko will begin.

19 MR. CHACKO: Okay. Yes. This is Ray Chacko on behalf  
20 of the Ada County Clerk, Christopher Rich.

21 First, I just wanted to begin by saying obviously nobody  
22 has an issue and wants to protect people's rights to vote.

23 The thing we have here, though, this is really about  
24 fairness to us. As opposing counsel acknowledged, we did  
25 actually comply with all the statutes regarding the change in

15

1 turn this over to Phil McGrane so that he can go through this  
2 and explain actually what did happen and some of the errors and  
3 maybe -- maybe some of the misunderstanding that currently have  
4 been presented to the court.

5 So, with that, I'll turn this over to Phil McGrane. He is  
6 the Chief Deputy Ada County Clerk.

7 And if you could, please, Mr. McGrane, could you go through  
8 that and explain some of the errors you have with some things  
9 that were stated earlier in testimony.

10 MR. McGRANE: Yes, Your Honor. This is Phil McGrane.  
11 I'm the Chief Deputy Clerk for Ada County. And the information  
12 I'll provide I'll say is largely firsthand knowledge, being an  
13 integral part of running the elections here in Ada County.

14 I just want to -- I'll go through the timeline as presented  
15 by the plaintiffs in large part. Some of -- two of the polling  
16 locations of the five that were moved were moved due to the  
17 U.S. Attorney's Office looking into ADA compliance.

18 It's true we did receive a letter from the U.S. Attorney on  
19 July 28th. And in the months following that, we worked closely  
20 with the U.S. Attorney's Office to come up with remedies for  
21 those locations, having multiple conversations, email exchanges,  
22 as well as on October 4th, we met with Christine England from  
23 the U.S. Attorney's Office, where we agreed upon specifically  
24 moving these two locations. We had a meeting at 9:30 a.m. that  
25 day.

1 We then made the official change on October 6th at 8:45.  
 2 There was a public hearing here in Ada County to establish all  
 3 polling locations for this upcoming election. That was to meet  
 4 the statutory deadline of October 7th, which is 30 days in  
 5 advance of the election, to make sure that we give adequate  
 6 public notice to any changes that we made.

7 On October 6th is when Ada County updated its website with  
 8 all the new polling place information for voters as well as  
 9 updated our polling locator -- place locator, which I know, from  
 10 the usage today it's been very high -- is working and is  
 11 providing accurate information.

12 Subsequently, to meet the statutory requirements, we  
 13 published notice in The Idaho Statesman on two separate  
 14 occasions listing all the polling locations we would be using.  
 15 That was pursuant to Idaho Code 34-302. In those notices, we  
 16 also added the additional remark in bold, large-caps letters,  
 17 "new" next to the five polling locations, so that any voters  
 18 seeing that notice or any other party would know of the changes.

19 And then we mailed out notices, an additional step that we  
 20 always take, because it's fairly routine for us to need to move  
 21 some polling locations prior to an election. And we typically  
 22 would send out notices. And in this case, we also sent out  
 23 notices to all registered voters, including those voters who had  
 24 just recently registered in the past month.

25 And so we sent those notices out. Those notices did go out

1 here" sign. So we always, at every election, encourage people  
 2 to confirm where they vote.

3 I'll also reference that we took some -- in discussions  
 4 with the Idaho Democratic Party, we made some additional steps,  
 5 particularly at Precinct 1806. The reason for the move in this  
 6 location was the facility was not able to accommodate the high  
 7 turnout. And that's been confirmed.

8 I think there is -- the information previously conveyed is  
 9 actually flipped from the actual information. The reports with  
 10 parking challenges are at the former location. We have had  
 11 representatives both -- we have someone there as well as the  
 12 Idaho Democratic Party where the parking lot has been full. We  
 13 are here at Ada County, and the parking lot in front of the  
 14 Ada County building is actually fairly large.

15 It's -- I think there was a reference to the paid parking  
 16 today because Ada County controls all parking in this general  
 17 corridor. We have removed the arms, and all parking is free to  
 18 those people going to vote today. We opened up a large parking  
 19 lot specifically for today's event to ensure that we wouldn't  
 20 have these issues as well as placed additional signage to help  
 21 voters.

22 In 1806 and 1805, which is the pair precinct that it used  
 23 to be paired up with, we took the additional step of adding  
 24 additional personnel at each location just for the purpose of  
 25 helping voters navigate. We printed a large map showing both

1 last week. Voters received them early to midweek last week. I  
 2 think we know, as well as the plaintiffs know, that many voters  
 3 received those notices.

4 We did receive some calls to confirm those. I think those  
 5 notices are what triggered the interest in the moves in this  
 6 particular election as compared to other elections.

7 In addition to those things, I met with Dean Ferguson from  
 8 the Idaho Democratic Party on the early morning of November 4th,  
 9 which was Friday. In the conversation, he mentioned concerns  
 10 about notice. So we agreed and we sent out a press release on  
 11 Friday, which has drawn a lot of media attention to the issue.

12 Mainly our press release highlighted the change of the five  
 13 locations. But, in addition, we encouraged all registered  
 14 voters to confirm their polling location either at our website  
 15 or at Idahovotes.gov, both of which have the updated  
 16 information.

17 In large part, too, I think it's important to put context  
 18 into this. The vast majority of voters that we're seeing today  
 19 have not voted in the last four years. They are typically the  
 20 voters who only participate in presidential elections.

21 So, for example, the reference to having some voters go to  
 22 a location and not be correct, I'll say just from a professional  
 23 experience, that's happening at other polling locations that are  
 24 not related to these changes and is fairly common in elections.  
 25 People will see a "vote here" sign, and they'll follow the "vote

1 precincts so that voters could easily identify on a map where  
 2 they live and where they should be voting, as well as handed out  
 3 fliers to any voter who may have gotten to the wrong location  
 4 with a map to the new location to help them more quickly access  
 5 where they needed to go.

6 I'll say at 3:00, we called around just to confirm our  
 7 polling locations what participation was like. And  
 8 participation seems to be pretty similar to what we're  
 9 experiencing most places with the exception of one of the moved  
 10 polling locations is seeing exceptionally high participation at  
 11 the moment.

12 We could provide the facts and figures if it would help the  
 13 court. We could submit the information based on the number of  
 14 registered voters at these locations as well as the recorded  
 15 participation throughout the day. They are all fairly similar  
 16 in terms of around 33 percent -- or let me correct  
 17 that -- between 400 to 500 voters for four of the locations, and  
 18 one of locations has seen 800 voters today, which is the one  
 19 that is exceptionally high among the county.

20 So far, we haven't had a large volume of calls. We have  
 21 had calls in terms of concern just moving a location, which is  
 22 typical for us. But as far as we can see, participation in each  
 23 of these locations is reflecting similar to participation  
 24 throughout Ada County so far as it goes today.

25 For those reasons, you know, we see ourselves as a neutral



1 party trying to conduct the election and make it possible for  
2 people to vote. And we try to be as transparent as possible  
3 throughout the process, which I think the letter that was just  
4 recently submitted to the court might help convey that.

5 I think it's in -- you know, it's up to the court on  
6 deciding action. We are just concerned that we don't want to  
7 have any of the various candidates or parties see this as unfair  
8 if we selectively extend the hours at some precincts and not  
9 others.

10 I'll also say, personally, I have logistical concerns,  
11 specifically for our poll workers, in our ability to effectuate  
12 what is being requested. Most of our poll workers at these  
13 locations arrived at between 6:30 a.m. and 7:00 a.m. -- I'll say  
14 all of them arrived in those hours -- to set up a polling  
15 location to be ready for the 8:00 opening of the polls.

16 They have, at a minimum, a 14-hour day. To extend the  
17 hours would put them at 16 to 18 hours working straight. As you  
18 probably are well aware, most of our poll workers are above the  
19 age of 60, and this is going to be an excessive burden for our  
20 office.

21 Unfortunately, I can't say that we have additional people.  
22 We are using about 1500 people out in the field today. It's a  
23 big burden on us just to find sufficient people to conduct the  
24 election. And so we're working through that.

25 I do want to point out in the original complaint a couple

1 that participated in the expanded early voting efforts that we  
2 conducted this election to make it possible for everyone to cast  
3 their ballot.

4 MR. CHACKO: Your Honor, this is Ray Chacko again. I  
5 just wanted to finish up here.

6 So basically, you know, our issue here is fundamental  
7 fairness. We think if we treat these or make a special  
8 exception here, this will create a precedent for us that's going  
9 to cause us problems in the future.

10 And even if we were to abide by this right now and just --  
11 you know, first of all, we have a statutory limitation on doing  
12 it; I should mention that first off. It's 34-1101, which sets  
13 the hours as 8:00 a.m. to 8:00 p.m. So our hands are tied as  
14 far as that goes as far as the state legislature is concerned.

15 But I wanted to express, again, if we were to try to make  
16 this exception, even if we were to try to, you know, to  
17 stipulate to do so, we still have that fundamental fairness  
18 problem because we think then we would have other parties who  
19 would think we made an exception or treated somebody unfairly  
20 and would then potentially expose us to litigation based on  
21 that.

22 THE COURT: Mr. Chacko --

23 MR. CHACKO: And my only last thing to add right now,  
24 Your Honor, too, is that, you know, I went on the Ada County  
25 website earlier today before I went to my polling location, and

1 of just key points. I think they are just facts. I don't think  
2 they were -- it was purposeful. But in the complaint, on items  
3 15 and 16, the dates listed are October 4th and October 7th, and  
4 those should be listed as November 4th and November 7th.

5 It is true that the Idaho Democratic Party requested that  
6 we open at 7:00 a.m., but they made that request of us yesterday  
7 midday. In order to provide adequate public notice, Idaho Code  
8 requires us to give 30 days' notice to make those types of  
9 changes.

10 In this case, we have complied with Idaho Code in each  
11 instance to make sure we are providing adequate notice with the  
12 multiple publications in the newspaper and then the additional  
13 steps that we have taken to publicize. I know that all local  
14 media stations have advertised the changes. And as far as we're  
15 seeing in terms of participation, that has been effective.

16 I think -- you know, we're happy to do whatever is in the  
17 best interest of the democratic process, but I think one of the  
18 key things is fairness -- is also an attribute as well as making  
19 sure we have access for all voters.

20 In addition to this, we have expanded -- one of the good  
21 things, I think, about these changes, in some precincts there  
22 was large participation prior to election day, our early voting  
23 numbers. In some cases, more voters have participated early  
24 than we have even seen so far today, as many as 650 voters in  
25 one of these locations. But in the high numbers in each of them

1 I had no problems using it or finding it. So, with that, I  
2 think the County has stated its piece. Thank you.

3 THE COURT: Mr. Chacko, now I have forgotten the  
4 question I was going to ask. Maybe it will come back to me.  
5 That's why I hate conference calls, because I can't figure out a  
6 way to interject. Give me just a moment. I'll --

7 MR. CHACKO: Sure.

8 THE COURT: You talked about a concern about  
9 fundamental fairness. Now, there is no cherry-picking here.  
10 The plaintiffs have not asked for selected precincts to be  
11 extended based upon any political advantage but, rather, only  
12 those for which the polling place was changed within the last  
13 four weeks. And that's uniform throughout Ada County.

14 So they have requested this change only for precincts in  
15 which there has been a recent change in the polling place, not  
16 selectively apart from that criteria. Is that not true?

17 MR. CHACKO: They have picked those. But, Your Honor,  
18 I guess my observation would be if this were truly a  
19 nonpolitical -- not nonpolitical -- but nonparty-focused  
20 decision, I wonder why they didn't have the Republican party  
21 also stepping in with them to ask that these polling locations  
22 be open for the same amount of time. And that's where --

23 THE COURT: Well, Counsel --

24 MR. CHACKO: Sorry. Go ahead, Your Honor.

25 THE COURT: Parties have different interests. And the



1 Republican party brought a proceeding before me requesting a  
2 closed primary, and the Democratic party refused to join in that  
3 and wanted to have an open primary.

4 So political parties, within their constitutionally  
5 protected associational rights, may take a different perspective  
6 as to whether they want to encourage or discourage  
7 participation. So that's really not an appropriate standard, is  
8 it?

9 MR. CHACKO: Well, I don't want to make an assertion  
10 that the Republican party wants to lower the number of people  
11 who may vote. I don't think that's anywhere we want to go,  
12 Your Honor.

13 But I just think if it was in the interests of everybody to  
14 make these special exceptions, the plaintiffs here would have  
15 reached out and perhaps gotten that, you know, sort of a  
16 bipartisan effort to get this change done.

17 Again, we don't want to treat any party differently than  
18 another. We don't want to treat any people differently than  
19 others. Again, if you cherry-pick -- because I think that's  
20 what's happening here -- even if these were changed locations,  
21 you're basically treating the people at those precincts  
22 different than people at other precincts. We think that goes  
23 back to fundamental fairness.

24 Again, all the changes that occurred with regard to the  
25 precincts were made according to the law; notice was provided.

1 gets to vote.

2 One of the things I find lacking in the memorandum is these  
3 plaintiffs have known about this potential for quite a while,  
4 and they don't cite a case from anywhere in the nation that says  
5 that if a precinct has changed, that is grounds for allowing the  
6 polls to be kept open later in the day.

7 And I have not had any opportunity to research this. I  
8 have been on this case for about an hour-and-a-half or two hours  
9 now. But my gut tells me that if there were a case for anywhere  
10 in the nation where a judge has extended the polling hours  
11 because a polling place has changed, they would have cited it.  
12 They didn't.

13 Now, I don't have any basis to know whether there is such a  
14 case or not because I haven't had any opportunity to research,  
15 but I think that's very telling.

16 Lastly, the whole notion that the election rules should be  
17 changed because a voter or some group of voters is confused is  
18 something that I'm not aware of. The butterfly ballots in  
19 Florida 16 years ago confused a lot of people, but they didn't  
20 redo the elections.

21 I have stood in polling places myself and had people show  
22 up and find out they are in the wrong precinct, and they were  
23 directed to the right precinct. Those things happen. And if a  
24 court has ever held that confusion about where you go to vote,  
25 even though you have received a note in the mail, even though

1 You know, what we really are concerned about is if we make these  
2 changes in locations now, in the future would we always be  
3 subject to having to make extensions just when anybody asks for  
4 them.

5 THE COURT: All right. Mr. Chacko, I'm going to have  
6 to cut you off.

7 MR. CHACKO: Okay. I understand.

8 THE COURT: Because you have used close to 25 minutes  
9 or so, and I think we need to move on.

10 Mr. Gilmore, is there anything you want to add?

11 MR. GILMORE: Yes. The Secretary of State is in a  
12 different position than the county clerk because elections in  
13 Idaho are decentralized. The poll workers don't work for the  
14 Secretary of State. Poll workers don't answer to the Secretary  
15 of State.

16 I suppose it's -- I suppose we could actually, if ordered  
17 to do so, drive out to each of these locations in Ada County  
18 because we are in Ada County. What if the next time it's in  
19 Bonners Ferry or Malad? We have no way of monitoring what's  
20 going on in the local counties, and we have no way of  
21 supervising the poll workers in those local counties.

22 But I think a couple things need to be said. No one is  
23 being denied the right to vote. Anybody who shows up by 8:00 at  
24 any one of these precincts and is line at 8:00 will be entitled  
25 to vote. Idaho law provides for that. Anybody in line at 8:00

1 it's been on the news, is a standard for extending the polling  
2 hours, I'm not aware of it.

3 With that, I'll conclude my argument.

4 THE COURT: Thank you, Mr. Gilmore. I appreciate that  
5 very much.

6 Plaintiffs, a very brief response. I actually have  
7 attorneys waiting to resume the trial. So I would ask you to be  
8 very brief and to the point.

9 MS. McCONNELL: Understood, Your Honor.

10 First, I would like to point out that the Idaho State  
11 Democratic Party has standing. It is a political party  
12 organized under Idaho Law, Code Section 34-501.

13 Next, I would like to address this issue of cherry-picking.  
14 There was no cherry-picking going on, and the locations where  
15 the voters are being treated unfairly were actually decided by  
16 Ada County when they chose who to move, not by -- not by the  
17 plaintiffs in this action.

18 So with respect to somebody in line at 8:00 p.m., with the  
19 confusion that was created by the move in locations, if they go  
20 to the wrong location, they will miss that deadline. And that  
21 is the significant reason why we would like to extend the hours  
22 at the locations that were moved.

23 We did not cite, it's true, precedent for the extension of  
24 hours, but there is precedence for that. That happened in  
25 Miami-Dade County, that polls would be extended by two hours.

1 Judge William Thomas granted an emergency request by the Florida  
2 Democratic Party to give voters more time to cast ballots at the  
3 public library in Lemon City, which is a predominantly black  
4 neighborhood in Miami.

5 So there is precedent out there. There are reasons to  
6 extend poll hours. Somebody referenced a 30-day notice period  
7 that was required and for notice given out for the voters. In  
8 fact, the voters received less than 30 days.

9 Finally, I would like to point out that it is the burden of  
10 the defendants here to point out some harm that they are being  
11 caused that they may have complied with the statutes. That they  
12 think that they have done what they needed to do is not the  
13 standard here. The standard here is: Are there rights of  
14 voters that are being infringed by this change? Are there  
15 people who are confused and frustrated and who won't go the  
16 extra mile to cast their vote? It's the integrity of the  
17 process that is at issue here.

18 And we are here today, yes, on behalf of the Idaho State  
19 Democratic Party but also for the benefit of all voters in the  
20 state, whatever their denomination, whatever their affiliation.

21 Finally, I would like, in closing, just to sum up in the  
22 words of Susan B. Anthony: "In the first paragraph of the  
23 Declaration of Independence is the assertion of the natural  
24 right of all to the ballot, for how can this consent of the  
25 governed be given if the right to vote is denied?"

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1 THE COURT: Mr. Chacko, the question was really  
2 directed at Mr. Dotters-Katz. Let him answer, and then if you  
3 have something else to --

4 MR. CHACKO: I understand, but I may be able to --

5 THE COURT: Mr. Dotters-Katz, could you clarify what  
6 you're requesting?

7 MS. McCONNELL: Sure.

8 MR. DOTTERS-KATZ: Yes, Your Honor. I actually think  
9 Mr. Chacko and I are in agreement here. The provisional ballot  
10 status, I believe that the scrutiny that was given there to a  
11 provisional ballot is just an examination of the affidavit and  
12 to make sure that the individual that is casting that ballot  
13 is -- that the ballot stands up.

14 I do not believe -- and I could be wrong; Mr. Chacko can  
15 correct me -- that that is something that is held over until a  
16 final hearing on the merits in regard to this injunction,  
17 per se, is done.

18 THE COURT: Well, here --

19 MR. CHACKO: Your Honor, I might be able to cut to the  
20 chase real quick here. This is Ray Chacko, by the way.

21 Idaho does not have provisional ballots because we're a  
22 same-day registration state.

23 MS. McCONNELL: Your Honor, there is a process under  
24 the Idaho Code where a voter can submit an affidavit of their  
25 eligibility to vote, and Ada County does have the ability to

1 Your Honor, these are significant rights at issue here, and  
2 we are making a very simple, narrowly tailored request. And  
3 with that, I conclude my argument, and we can answer any  
4 questions the court may have.

5 THE COURT: Ms. McConnell, I actually do have one  
6 question. Now, my understanding is that you are requesting that  
7 the court order that the voting hours be extended by two hours  
8 and that the ballots received within that additional two-hour  
9 period be preserved and not counted, but be made available for  
10 counting after a final hearing on the merits. Is that correct?

11 MR. DOTTERS-KATZ: Your Honor, this is Sam Katz. In  
12 this case, what we're asking, I believe was your question, in  
13 regards to the provisional ballot status of any voter that casts  
14 a ballot during the extended voting period of time, and that is  
15 a provision in the Help America Vote Act, which the provisional  
16 ballot status just requires that the electorate fill out an  
17 affidavit; the votes are segregated; and then after the regular  
18 or normal votes are counted, the provisional ballots undergo  
19 some additional scrutiny, and if they stand up, then they are  
20 counted as well.

21 THE COURT: Well, are they counted after a final  
22 hearing on the merits as to whether or not their constitutional  
23 rights have been violated?

24 MR. CHACKO: Your Honor, this is Ray Chacko. I may be  
25 able (inaudible) --

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1 provide and collect those affidavits from voters. That is in  
2 Title 34 of the Idaho Code. I don't recall the exact provision.

3 MR. CHACKO: Your Honor, again, this is Ray Chacko.

4 That's unrelated to provisional ballots. That's for  
5 registration purposes, yeah, and for voting. But not -- yeah.  
6 Sorry, Your Honor. I think she may be misreading the statute  
7 there.

8 THE COURT: Well, I'm reading the complaint; I wasn't  
9 reading the statute. And I was just trying to understand what  
10 was meant by the reference to casting a provisional ballot. I  
11 took that to mean that it would in some way be sealed to  
12 determine whether or not -- after a decision on the merits,  
13 whether they were entitled to be cast as opposed to just go  
14 ahead and have them counted now with no way of determining later  
15 whether or not there really was -- whether this did constitute a  
16 violation.

17 Apparently, I am misunderstanding what the plaintiff is  
18 requesting. Could the plaintiffs clarify.

19 MR. DOTTERS-KATZ: Your Honor, if I can just very  
20 briefly, you know --

21 THE COURT: Just a second.

22 MR. DOTTERS-KATZ: -- the Help America Vote Act is  
23 something that is --

24 THE COURT: Who is this?

25 MR. DOTTERS-KATZ: Around the country, when the court

1 orders an extension of the polling time, the federal law  
2 contemplates that circumstance in a situation under which  
3 provisional ballots are cast.

4 Now, if that is something that's unavailable here, we are  
5 happy to amend our complaint to allow for the voters that are  
6 casting ballots between 8:00 and 10:00 p.m. to have their votes  
7 fully counted as they should be.

8 MR. CHACKO: Your Honor, this is Ray Chacko. I might,  
9 again, be able to add a little clarification.

10 The Help America Vote Act doesn't apply to Idaho -- well,  
11 it does, but it basically says because you don't have  
12 provisional votes -- maybe I'll -- you know what? I'm going to  
13 let Phil explain it, because he is the expert on this.

14 MR. McGRANE: Your Honor, this is Phil McGrane, Chief  
15 Deputy Clerk for Ada County.

16 We do comply with the Help America Vote Act, but the Help  
17 America Vote Act provides two different courses of action. A  
18 state may either be a same-day registration state where a voter  
19 can register at the polls, which Idaho is. Or the alternative  
20 is provisional ballots.

21 So the section referenced by the plaintiffs, it is  
22 accurate, but it's accurate for other states. And Idaho has no  
23 systems or means in place to do provisional balloting. All  
24 ballots -- when someone fills out the affidavit or registers,  
25 all ballots are voted together and counted at the same time, and

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1 essentially not be reviewable. Am I roughly correct on that?

2 And I'm going to ask Mr. Dotters-Katz -- I think you kind  
3 of weighed in on that -- is that what you're requesting?

4 MR. DOTTERS-KATZ: Your Honor, given that, yeah, I  
5 believe that that is what we would be requesting at this time.

6 THE COURT: All right. And I apologize. I just -- I,  
7 frankly, did not know what it meant to allow someone to vote  
8 provisionally. I assume that meant that, in some way, their  
9 ballot would be segregated and either counted separately, or  
10 being added to the final vote would not occur until after a  
11 final hearing on the merits.

12 All right. I understand that now, so let me take -- I'll  
13 be back in five minutes. We'll just keep an open line until  
14 then. All right.

15 (Recess at 4:54 p.m. until 5:05 p.m.)

16 THE COURT: Counsel, this is Judge Winnill. Do we  
17 still have everyone on the phone?

18 VOICE: You have the County, Your Honor.

19 THE COURT: I'm sorry?

20 MS. McCONNELL: Plaintiffs are here.

21 THE COURT: Mr. Metcalf --

22 VOICES: (Inaudible) here.

23 And you have Chris Rich as contingent here.

24 THE COURT: Okay. Mr. Metcalf, I think I left my  
25 notes in chambers. Would you grab those. It was just copies of

1 there is no separation of those ballots.

2 THE COURT: All right. Counsel, I may want a couple  
3 minutes to reflect on this because it -- perhaps, I think what I  
4 may do is actually have you stay on the line for a few minutes.

5 MR. CHACKO: Certainly.

6 THE COURT: And then I'm going to retire to chambers  
7 for about five minutes, and then I'll come back and visit with  
8 you and issue a decision on this matter.

9 Obviously, we need to move quickly since it's almost 5:00,  
10 but I do want a little time to reflect on this. All right. And  
11 particularly this issue -- frankly, a misunderstanding on my  
12 part as to what was being requested. It was my understanding  
13 that the request was to allow the votes to be cast  
14 provisionally, and I took that to mean that they would be  
15 segregated and then a -- and then a final hearing on the merits  
16 scheduled within a week or so and then those votes either  
17 counted or not counted depending upon the outcome of the court's  
18 final decision.

19 But what I'm hearing you now say is that you are  
20 requesting -- and I'm not sure what a provisional vote means if,  
21 indeed, it's going to be cast now and with no other way of  
22 determining whether it should or should not have been cast,  
23 whether or not there was a violation of any constitutional right  
24 here. My concern is this becomes, in that latter view,  
25 essentially a final decision on the merits that would

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1 the pleadings that have been filed.

2 Counsel, I'm going to announce my decision, but I need my  
3 notes because there are things I wanted to make reference to.

4 First of all, I am going to find that the plaintiffs do  
5 have standing, either associational standing or direct standing.  
6 They clearly have an interest in who votes and the impact of  
7 that vote on the election and I think clearly have an interest  
8 in ensuring that there is no impediment on the casting of  
9 ballots in the general election.

10 Now, just a moment, Counsel.

11 Second, I'm going to find a couple things. First, that I  
12 don't think there is any cherry-picking involved here. It seems  
13 clear to me that the plaintiffs are complaining not about  
14 precincts that were selected based upon possible Democratic -- a  
15 Democratic slant in the voter outcome but only those counties  
16 which were designated -- excuse me -- those precincts in which  
17 the voting location was changed late in the game. And there is  
18 no dispute, apparently, that they have selected all of the  
19 voting locations where that occurred and have not been involved  
20 in any cherry-picking.

21 The second thing I would find is that it does appear to me  
22 that Ada County probably did act in good faith, and I want that  
23 clear that I'm not in any way suggesting that Ada County did not  
24 act in good faith.

25 The problem that we have, though, in considering a

1 resolution of this issue is, of course, the four-prong standard  
2 that applies to injunctive relief. And that's what I need to  
3 apply, and the good or bad faith of a party is really not at  
4 issue.

5 One other comment I want to make before I actually announce  
6 my decision: Obviously, there was some confusion on my part as  
7 to what the plaintiffs were requesting, and the use of the word  
8 "provisional ballot" suggested to me -- and I simply  
9 misunderstood what they were suggesting or requesting -- was  
10 that -- my understanding of their request was that all votes  
11 after 8:00 and before 10:00 would be provisionally cast. And I  
12 took that to mean that they would be segregated, not counted  
13 now, but we would have a final hearing on the merits in the next  
14 week or so, and then those ballots would either be cast or not  
15 cast and counted and included in the final certification issued  
16 by the clerk and the Secretary of State, which usually occurs  
17 some days or weeks after the election itself.

18 It was further my understanding that we would quite likely  
19 take every one of those ballots, and they may have to be the  
20 subject of a hearing to determine whether or not that individual  
21 voter's rights had been violated because of the confusion about  
22 the voting place.

23 But now that I understand that the plaintiff is requesting,  
24 rather, a decision now to allow the ballots to be cast and  
25 counted, that changes the dynamic considerably.

1 right to cast their ballot in an election. And likewise, the  
2 public interest I think is clearly at stake here.

3 But, having said that, I think rather than the two hours  
4 requested by the plaintiff, I think an additional one hour would  
5 be sufficient to capture those individuals who intended on  
6 voting after work, get to the ballots too late to -- excuse  
7 me -- get to the polls too late to find out that the polling  
8 place has changed and then change the location and travel to the  
9 new location.

10 So that will be the court's decision. I'll grant the  
11 relief requested but limit it to one hour from 8:00 until 9:00.  
12 I think that would be sufficient. And I think anything more  
13 than that would be more than is necessary to capture that narrow  
14 band of voters who truly are having their electoral franchise  
15 comprised because of this late change in the place where the  
16 voting is taking place. And I think that also impacts in some  
17 way the balance of hardships by limiting the court's decision in  
18 that manner.

19 As I indicated, if the request had been to segregate the  
20 ballots for those who cast votes after 8:00 and then have an  
21 individual hearing on that to determine whether or not their  
22 right to vote was, in fact, comprised, I would have kept the  
23 polling place open until 10:00. But given the kind of  
24 all-or-nothing nature of this, I think -- and my concern that  
25 the only party whose rights are affected in an irreparable way

1 That being the case, it seems to me that the parties whose  
2 interests are most seriously jeopardized are those who cast  
3 their ballots late in the day and at such a time that they came  
4 to the polling place and particularly where there may be two or  
5 two-and-a-half miles from the original polling place to the  
6 final polling place, but were simply precluded from casting  
7 ballots because they arrived too late, too close to 8:00, to be  
8 able to get to the new polling place before the polls close.

9 And so with that understanding, I'm going to find that as  
10 to that narrow band of individuals, that I think there is a  
11 clear -- not just a likelihood but a clear probability of an  
12 irreparable injury. If that person is deprived of the right to  
13 vote, that cannot be undone. It is truly irreparable.

14 With regard to likelihood of success on the merits, I think  
15 at a minimum, this is probably the weakest part of the  
16 plaintiff's case, but I think they still have shown at least  
17 serious questions going to the merits.

18 The third prong, the balance of hardships, is decidedly in  
19 favor of the plaintiffs, even though there may be some burden  
20 upon the people that are counting votes. I made a note to  
21 myself that I'm more than 60 years old. I routinely work 12- to  
22 14-hour days; and while that is a burden, it's one of the things  
23 we do in public service. And so I don't think that is a  
24 hardship that tips or that comes close to balancing out the  
25 impact upon an individual voter who is deprived of a fundamental

1 that simply could not be cured under any circumstances are those  
2 who arrive late at the voting place thinking that it's going to  
3 be open until 8:00 only to find that the location has been  
4 moved.

5 Everyone else presumably were given not only all the  
6 notices that have been provided here, but I noted from the  
7 materials that were submitted the prominent notices were given  
8 at the old voting places indicating where the new voting place  
9 is. So those individuals presumably had at least the  
10 opportunity and the time to travel to the new voting place.  
11 It's only those who arrive late in the game after, say, 7:00 who  
12 are in jeopardy of not being able to vote. And so I think the  
13 answer to that is just to extend by one hour the voting times in  
14 those five precincts.

15 So that will be the decision of the court. And I will also  
16 require that a notice be prominently displayed at the old voting  
17 places before 7:00 tonight indicating not only the change in  
18 voting place but also that the voting hours for the new voting  
19 location have been extended by one hour so that anyone who  
20 arrives late will realize that they still have time to get to  
21 the new voting place.

22 Any questions from counsel?

23 MS. McCONNELL: Thank you, Your Honor. This is Kelly  
24 McConnell.

25 We had requested that the county make a public statement

1 about the extended hours at the voting location. Can we add  
2 that requirement in addition to the posted notices at the  
3 location, a press release of some sort?

4 THE COURT: Mr. McGrane, is that something that could  
5 be done within the next hour or so? I'm not saying it has to be  
6 published, but you would at least issue a press release to the  
7 local TV and radio stations?

8 MR. McGRANE: Yes, Your Honor. If it's acceptable to  
9 the court, I think within even the next 15 minutes or half hour  
10 we can get it out through social media, which will be picked up  
11 by the press and then widely distributed.

12 THE COURT: Very good. All right. Thank you. I  
13 appreciate that. I assume, likewise, you can have a sign  
14 prominently displayed at the old voting places before 7:00  
15 indicating that -- the new voting place and that the hours have  
16 been extended until 9:00?

17 MR. McGRANE: Yes, Your Honor. I believe we'll take  
18 the step of both posting the notices and trying to post a person  
19 at each location to help make sure voters get to the right  
20 location.

21 THE COURT: And, Mr. McGrane --

22 MR. GILMORE: Your Honor --

23 THE COURT: Yes.

24 MR. GILMORE: This is Mike Gilmore. The Secretary of  
25 State does not have personnel at any of these locations. Is the

1 by 7:00 p.m. advising of the extended hours and the new voting  
2 places, and a public service announcement or press release  
3 issued to local television and radio stations advising of these  
4 extended hours just for the selected precincts.

5 That will be the court's order, and it's effective  
6 immediately, and we will issue a written order to that effect.

7 MR. CHACKO: Understood, Your Honor. Thank you.

8 THE COURT: All right. Anything else?

9 All right. Thank you, Counsel.

10 (Proceedings concluded at 5:17 p.m.)  
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1 County's posting adequate?

2 THE COURT: Yes. I think that will discharge -- I  
3 assume the plaintiffs would be content with just having County  
4 action taking place here and not requiring the Secretary of  
5 State to do anything beyond that.

6 Is that correct, Ms. McConnell?

7 MS. McCONNELL: Yes, sir. Thank you.

8 THE COURT: All right. Counsel, I want to compliment,  
9 you know, the clerk's office and Mr. McGrane specifically with  
10 the way that you handled this. As I indicated, I feel that you  
11 have acted in good faith. The concern is good faith may not be  
12 enough in some circumstances. But I think the way you have  
13 responded to this is admirable and consistent with what we  
14 expect of our elected public officials. So thank you very much.

15 All right. Counsel, is there anything else?

16 MR. CHACKO: Your Honor, this is Ray Chacko.

17 Were you going to actually do a written order at some  
18 point, or how did you want to proceed?

19 THE COURT: We will, but getting it docketed -- let's  
20 see if we can put something together. And I assume we can do an  
21 electronic docketing somehow tonight. But I think the -- my  
22 order, just so it's clear, we're extending the voting place in  
23 these five -- excuse me -- the voting hours in these voting  
24 places. The five places indicated will be extended by one hour,  
25 notices to be prominently displayed at the old voting locations

CERTIFICATE OF OFFICIAL REPORTER

I, Tamara Hohenleitner, Federal Official Realtime Court Reporter, in and for the United States District Court for the District of Idaho, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 19th day of December, 2016.

/S/ TAMARA I. HOHENLEITNER

TAMARA I. HOHENLEITNER, CSR NO. 619, CRR  
FEDERAL OFFICIAL COURT REPORTER



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