

IN THE NOOKSACK TRIBAL COURT

SONIA LOMELI; TERRY ST. GERMAIN;
NORMA ALDREDGE; RAEANNA
RABANG; ROBLEY CARR, individually on
behalf of his minor son, LEE CARR, enrolled
members of the Nooksack Indian Tribe,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack
Tribal Council; RICK D. GEORGE, Vice-
Chairman of the Nooksack Tribal Council;
AGRIPINA SMITH, Treasurer of the Nooksack
Tribal Council; BOB SOLOMON,
Councilmember of the Nooksack Tribal
Council; KATHERINE CANETE,
Councilmember of the Nooksack Tribal Council
and Nooksack General Services Executive;
LONA JOHNSON, Councilmember of the
Nooksack Tribal Council; and ROY BAILEY,
Tribal Enrollment Office official,

Defendants.

NO. 2013-CI-CL-001

EMERGENCY MOTION FOR STAY
PENDING APPEAL

Telephonic Hearing Requested

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1 I. RELIEF REQUESTED¹

2 Pursuant to FED R. CIV. PROC. 62(c) and FED. R. APP. PROC. 8(a)(1), Plaintiffs hereby
3 request a stay of the Court's May 20, 2013, Order Denying Motion for Preliminary Injunction,
4 ("Order"),² thereby preserving the *status quo* pending appeal of that ruling.³

5 II. ARGUMENT

6 A. **Legal Standard.**

7 The factors governing the issuance of a stay "substantial[ly] overlap" with "the factors
8 governing preliminary injunctions, not because the two are one and the same, but because similar
9 concerns arise whenever a court order may allow or disallow anticipated action before the
10 legality of that action has been conclusively determined." *Nken v. Holder*, 556 U.S. 418, 428
11 (2009) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22-23 (2008)). The Ninth Circuit
12 recently clarified the standard for obtaining a stay pending appeal.

13 In *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011), the Court of Appeals started with
14 the "traditional test" for a stay pending appeal in which the moving party must show: (1) that it is
15 likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not
16 granted; (3) granting the stay would not substantially harm the other parties; and (4) granting the
17 stay would serve the public interest. *Leiva-Perez*, 640 F.3d at 964-65 (citing *Hilton v.*

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19 ¹ Plaintiffs bring this motion without waiver of the position that the Court's Order is automatically stayed pursuant
20 to N.T.C. § 80.06.010. Indeed, the Appellate Code automatically stays the Court's Order. Yet out of an abundance
21 of caution, and given the emergent and grave risk of harm to the Nooksack Tribe, Plaintiffs make this alternative
22 request for relief.

23 ² In an odd turn of events, counsel for Plaintiffs were not even made aware of the Order until May 21, 2013, only
24 after they wrote the Court Clerk in request of the Order – although it appears that the Order was distributed to those
25 Nooksacks not proposed for disenrollment on May 20, 2013. See John Stark, *Embattled Nooksacks Face Tough
Fight in Tribal Court*, BELLINGHAM HERALD, May 19, 2013, available at
<http://www.bellinghamherald.com/2013/05/19/3013939/embattled-nooksacks-face-tough.html> (comment of
nooksackmember, May 21, 2013, 12:49 AM) ("[T]he judge ruled today & tribal members prayers have been
answered!!! AMEN!!! The devil never wins!!! & the families that are up for dis enrollment are evil!!!! They also
look evil!!!! I am so glad that the judge knew that the tribal council was doing the right thing . . .").

³ N.T.C. § 80.06.010 grants an automatic stay until the Nooksack Court of Appeals "upholds the judgment or
dismisses the appeal." Because the scope of that statute is not absolutely clear, however, Plaintiffs file this motion
in an abundance of caution to ensure that this Court's Order is not given effect until the Nooksack Court of Appeals
has had an opportunity for review.

1 *Braunskill*, 481 U.S. 770, 776 (1987)). In the wake of *Winter*, while the irreparable injury prong
2 remains an inflexible requirement, a stay is appropriate where the moving party demonstrates
3 “serious questions going to the merits,” so long as the other elements of the *Winter* test are met.
4 *Id.* (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

5 In other words, a district court may still employ a “sliding scale” approach to granting a
6 stay, by which the moving party “need not demonstrate that it is more likely than not that they
7 will win on the merits,” so long as that party demonstrates irreparable injury. *Id.* at 966. As
8 noted by the *Leiva-Perez* Court:

9 [A] flexible approach is even more appropriate in the stay context. Whereas the
10 extraordinary remedy of injunction is the means by which a court directs the
11 conduct of a party . . . with the backing of its full coercive powers, a stay operates
only upon the judicial proceeding itself . . . either by halting or postponing some
portion of the proceeding, or by temporarily divesting an order of enforceability.

12 *Id.* (quotation and citation omitted). In sum, to obtain a stay pending appeal, a moving party can
13 “show either ‘a probability of success on the merits’ or that ‘serious legal questions are raised,’
14 depending on the strength of the . . . showing on the other stay factors.” *Id.* (citing *Abbassi v.*
15 *I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998)).⁴

16 The Court has authority to stay its Order pending Plaintiffs’ appeal to the Nooksack
17 Court of Appeals. FED. R. CIV. PROC. 62(c); see e.g. *Fed. Prescription Serv. v. Am. Pharm.*
18 *Ass’n.*, 636 F.2d 755 (1980). This Court may also, in its sound discretion, authorize an
19 unsecured stay pending appeal in cases it considers a stay to be appropriate. *Id.* In fact, Federal
20 Rule of Appellate Procedure 8(a) directs a party seeking a stay pending appeal to first seek such
21 a stay before the District Court. See FED. R. APP. PROC. 8(a)(1)(A)-(C). Plaintiffs respectfully
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23 ⁴ The Ninth Circuit has explained that “[t]here are many ways to articulate the minimum quantum of likely success
24 necessary to justify a stay.” *Leiva-Perez*, 640 F.3d at 967. The terms “reasonable probability,” “fair prospect,” “a
25 substantial case on the merits,” or “serious legal questions are raised” as used in *Winters* and similar cases “are
essentially interchangeable, [in] that none of them demand a showing that success is more likely than not.” *Id.*
(quotation and citation omitted).

1 request that the Court stay its order while appellate review is sought on the narrow issue of this
2 Court's order.

3 **B. There Are Serious Questions Going To The Merits.**

4 While the Court has determined that Plaintiffs are unlikely to succeed on the merits of its
5 Motion for Preliminary Injunction, it cannot be denied the motion for preliminary injunction
6 required the Court to answer serious questions going to the merits. A "serious question going to
7 the merits" is one on which the moving party has a fair chance of success or one serious enough
8 to require litigation. *Benda v. Grand Lodge of the Int'l Ass'n of Machinists & Aerospace*
9 *Workers*, 584 F.2d 308, 315 (9th Cir. 1978). Plaintiffs have a "fair chance of success" on their
10 claim Defendants have violated the Nooksack Constitution by: (1) initiating disenrollment
11 proceedings upon Nooksacks without an initial showing of evidence that these members are not
12 Nooksack; (2) initiating disenrollment proceedings when they have not been granted that power;
13 and (3) acting in furtherance of unconstitutional laws.

14 1. Subject Matter Jurisdiction And Sovereign Immunity.

15 In *Cline v. Cunanan*, No. NOO-CIV-02/08-5 (Nooksack Ct. App. Jan. 12, 2009), the
16 Nooksack Court of Appeals held that,

17 The Nooksack Constitution grants jurisdiction to the tribal court "over all civil
18 matters concerning members of the Nooksack Indian Tribe; over all matters
19 concerning the establishment and functions of the tribal government" See
20 Article VI §2(A)(3). The Nooksack Constitution did not simply confer civil
21 jurisdiction and leave it at that, the Constitution specifically granted jurisdiction
22 over matters concerning the establishment and function of the tribal government.
23 We interpret this Constitutional grant of jurisdiction to mean that **the Nooksack**
24 **Constitution intended to confer subject-matter jurisdiction to the tribal court**
25 **to hear matters concerning the establishment and functions of the tribal**
government.

Id. at 3. Here, because the actions brought against Defendants undoubtedly concern "functions
of the tribal government," this Court clearly has subject matter jurisdiction. *Id.*

1 In *Campion v. Swanaset*, 4 NICS App. 159 (Nooksack Ct. App. 1996), it was held that
2 although the Court may have subject matter jurisdiction over “matters concerning the
3 establishment and functions of the tribal government,” causes of action triggering this
4 jurisdiction “require[the] Court to find a waiver of sovereign immunity before jurisdiction [can]
5 exist.” *Id.* at 161. In *Cline*, it was held that the doctrine established in *Ex Parte Young*, 209 U.S.
6 123 (1908) – whereby “individual governmental officers may be sued for declaratory or
7 injunctive relief where the actions taken exceed his or her authority” – is to provide the
8 “framework to determine whether injunctive or declaratory relief is available.” No. NOO-CIV-
9 02/08-5, at 6. Yet in *Cline*, it was held that *Young* did not apply because the plaintiffs’ requested
10 relief – a declaration that the Tribal Election Ordinance requirement that tribal members seeking
11 election to Tribal Council must submit to a test for illegal drugs prior to receiving a candidate
12 packet was unconstitutional – did not trigger the *Young* exception. According to the *Cline* court,

13 Simply suing an individual officer as a means of avoiding governmental
14 immunity does not give rise to a right to pursue the case in a court. To interpret
15 *Young* to permit a federal-court action to proceed in every case where prospective
16 declaratory and injunctive relief is sought against an officer, named in his
17 individual capacity, would be to adhere to an empty formalism. The fact that the
18 Plaintiffs named individual officers in their complaint does not automatically give
19 rise to the right to proceed. The Nooksack Tribal Council and its officers need to
20 be able to enact ordinances and conduct business without constantly having to
21 defend themselves against suit. This is one of the fundamental policy reasons
22 behind sovereign immunity. The Court cannot sanction a holding that would
23 allow suits against individual officers to proceed simply because an individual
24 officer is named.

25 *Id.* at 7.

The situation at bar is distinguishable. Here, Plaintiffs are **not** suing governmental actors,
in name only, for merely passing an unconstitutional law or voting to enact such a law.⁵ *Ex*
Parte Young cannot apply to that situation because there would be no action to enjoin – an
unconstitutional law that nobody takes steps to enforce or act upon has no effect. But here,

⁵ Plaintiffs are not, for instance, suing Defendants for merely “vot[ing] in favor of Resolution 13-02.” Order, at 10.

1 Defendants have taken it upon themselves to act *in furtherance* of the already enacted (and
2 unconstitutional) law – Resolution No. 13-02 – by initiating disenrollment proceedings
3 themselves. If, as in *Cline*, Defendants had not acted beyond their capacities as lawmakers,
4 *Young* would surely not apply.⁶ But here, Defendants acted beyond their capacity as legislators.

5 As Judge Clinton made clear in *Terry-Carpenter v. Las Vegas Paiute Tribal Council*,
6 Nos. 02-01, 01-02 (Las Vegas Paiute Ct. App. 2003), the initiation of a disenrollment proceeding
7 is not a mere legislative act:

8 A decision to either enroll or disenroll a person from tribal membership is not a
9 legislative act. Rather it involves a form of adjudication, i.e. taking a general rule,
10 like the tribal membership provisions in the Tribal Constitution and the various
11 enrollment ordinances and resolutions, and applying them to the facts of a particular
applicant's case.

12 *Id.* at 10. To be clear, Plaintiffs are not challenging a vote, or a legislative act; they are
13 challenging Defendants' acts in furtherance of the illegal laws they passed.

14 The novel *Ex Parte Young* doctrine endorsed by the Court – one that would require an
15 “unambiguous[] violat[ion of] official duties in ways more egregious than an error of law” – is
16 not the law in any other jurisdiction and makes no sense given the principles that support the
17 doctrine. Order, at 9. Either the government *qua* government is allowed to act in violation of its
18 Constitution and laws, or it is not. At minimum, there are serious questions going to the merits
19 as to the application of the *Ex Parte Young* doctrine.

20 2. Initiating Disenrollment Proceedings Without An Initial Showing Of Evidence.⁷

21 In *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000), it was held that the power to confer
22 membership does not include the power to revoke that membership at will. *Id.* at 1089. Instead,

23 ⁶ The problem in *Cline* was that Plaintiffs sued the wrong governmental actors. Had Plaintiffs sued the officers in
24 charge of administering the drug tests, *Young* would have applied.

25 ⁷ It appears that the Court did not address this argument, yet still denied the Motion for Preliminary Injunction. This
was an abuse of discretion. *Soc'y for Good Will to Retarded Children v. Cuomo*, 902 F.2d 1085, 1089 (2nd Cir.
1990).

1 membership is safeguarded "from abrogation except by a clearly defined procedure." *Id.* at
2 1097. The due process implications loss of membership were spelled out in *U.S. v. Zucca*, 351
3 U.S. 91 (1956) where it was held that:

4 The mere filing of a proceeding for [disenrollment] results in serious
5 consequences to a defendant. Even if his citizenship is not cancelled, his
6 reputation is tarnished and his standing in the community damaged. [A] person,
7 once admitted to [Nooksack] citizenship, should not be subject to legal
8 proceedings to defend his citizenship without a preliminary showing of good
9 cause. Such a safeguard must not be lightly regarded. We believe that, not only
10 in some cases but in all cases, the [Tribal Counsel] must, as a prerequisite to the
11 initiation of such proceedings, file [evidence] showing good cause.

12 *Id.* at 676 (modified to reflect application to the case at bar); *see also generally U.S. v. Diamond*,
13 255 F.2d 749 (9th Cir. 1958). The purpose of this due process requirement of some pre-hearing
14 evidence "is to give the concrete facts behind the charge as distinguished from its abstract
15 theory." *US v. Costello*, 142 F.Supp. 290, 291 (D.C.N.Y. 1956). "[T]he mere statement of a
16 theory" in a mass-mailing does not provide due process. *Id.*

17 Here, Defendants have provided no evidence that Plaintiffs are not Nooksacks under
18 Article II, Section 1 of the Constitution. None. Absent any written documentation whatsoever,
19 to institute these proceedings against them is a violation of their guaranteed due process rights.
20 Article II of the Nooksack Constitution grants a right of membership to **all persons meeting the**
21 **requirements therein** – it is an absolute right of membership. *Terry-Carpenter*, Nos. 02-01, 01-
22 02, at 10. Absent some initial evidentiary showing – *some* "written documentation"; *some*
23 "evidence to support a statement of fact"; *some* affidavit of good cause – that each individual
24 Plaintiff does not meet the criteria of any of Article II, Sections (A) through (H), the
25 disenrollment proceedings also violate Plaintiffs' absolute right to Nooksack membership as
guaranteed by Articles II and IX of the Constitution.⁸

⁸ Plaintiffs are not arguing that there is not a proper way to disenroll those Nooksacks currently proposed for
disenrollment; or any Nooksacks, for that matter. This would require, though, that the Tribal Counsel, at minimum,

1 Plaintiffs have a “fair chance of success” on this cause of action.

2 3. Acting Beyond The Scope Of Power Granted In The Constitution.

3 The Constitution grants the Tribal Council, the Tribal legislative body that it is, the mere
4 power to enact ordinances that “prescribe rules and regulations governing involuntary loss of
5 membership,” and to “enact ordinances in conformity with this constitution.” Const. Art. II,
6 secs. 2,4. These limited legislative powers simply cannot be read as granting to the Tribal
7 Council the extensive authority initiate disenrollment proceedings. Indeed, the text means the
8 opposite; the Constitution grants only the power to act as lawmakers in this arena.

9 Even assuming that the Tribal Council, in exercising the authority to enact membership
10 ordinances, had the power to grant themselves the authority to initiate disenrollment proceedings
11 in Title 63, it is not found there. N.T.C. § 63.04.001(B) explicitly provides a procedure for
12 initiating the disenrollment process that in no way shape or form involves the Tribal Council.

13 That statute provides:

14 The burden of proof in disenrollment actions rest with the Tribe. However, at no
15 time will staff employed in the Enrollment Department purposely initiate reason
16 for loss of membership. Any tribal member requesting loss of membership of
another tribal member will need to present written documentation on how the
information was obtained that warrants disenrollment. The Tribal Council will
have the final say on loss of membership.

17 N.T.C. § 63.04.001(B). The statute contemplates a separation of powers whereby Tribal
18 Members are able to “vote with their feet” in initiating the disenrollment of a fellow Nooksack.⁹

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20
21 come forward with some “written documentation” or “evidence” that the individual Nooksack does not meet the
requirements of Article II, Section I, of the Constitution *prior to initiating disenrollment proceedings* against that
member. That has not happened. Indeed, all of the Nooksacks currently proposed for disenrollment *do* meet the
requirements of Article II, Section I – and Defendants and their counsel know it. Plaintiffs are not “frauds.” Nor are
22 Plaintiffs’ cogent arguments against their unconstitutional disenrollment “incendiary,” “absurd” or “hyperbole.”
⁹ This procedure is akin to section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), and California’s Unruh Civil
23 Rights Act, CAL. CIV. CODE § 52(c), which allow a citizen to initiate a suit against those persons who they believe
are not in compliance with certain regulations. The theory behind these “citizen suits” is that they give the local
24 community, rather than the state or federal bureaucracy, the power to determine whom these rules and regulations
should be enforced against. In essence, they prevent the wide-sweeping, expensive, and potentially rights-violating
25 strict enforcement of technical rules and regulations against residents who are not harming the population to the
extent that their fellow citizens deem it necessary to take actions against them.

1 Once the disenrollment process is initiated by “[a]ny tribal member” who “present[s]
2 “**written documentation**” or “**evidence**” on how the information was obtained that warrants
3 disenrollment,” *id.*, the Enrollment Department is then free to “conduct genealogical research . . .
4 to verify information presented on enrollment applications” and to “provide recommendations
5 through the Government Services Executive to the Tribal Council regarding necessary changes
6 to the membership rolls based on research findings, as necessary.” Declaration of Roy Bailey, at
7 2.

8 If the Enrollment Department finds that the nominated Tribal Member does not meet the
9 “eligibility requirements” and the Tribal Council agrees with that finding, the Tribal Council
10 issues a resolution to disenroll that tribal member. *Id.* at 2-3. If the Tribal Member disagrees
11 with the Enrollment Department and Tribal Council’s findings, he or she may “request a
12 meeting” with the Tribal Council. N.T.C. § 63.04.001(B)(2). At this meeting, “[t]he burden of
13 proof . . . rest[s] with the Tribe” – likely meaning the Tribe’s Enrollment Department – to prove
14 that the tribal member “fail[s] to meet the requirements set forth for membership in [the]
15 constitution.” N.T.C. § 63.04.001(B); Constitution, Art. II, sec. 4. If the Tribal Council finds
16 that the “Tribe” has met this burden, “[t]he decision of the . . . Tribal Council is final.” N.T.C. §
17 63.04.001(B)(2); *see also* N.T.C. § 63.04.001(B) (“The Tribal Council will have the final say on
18 loss of membership.”).

19 N.T.C. § 63.04.001(B) does not establish that the Tribal Council has the authority to start
20 or stop a loss of membership proceeding. First, as discussed above, they do not. The Tribal
21 Council is only given the “final say on loss of membership.” N.T.C. § 63.04.001(B). Second,
22 even if they could be read in this manner, this Court cannot ignore the plain words *between those*
23 *two sentences* that plainly and unambiguously prescribes a procedure for disenrollment that is
24 devoid of any Council involvement until the very end of the process. *See State v. Borg*, 103
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1 Wash.App. 1040, 1040 (Wash. Ct. App. 2000) (“[A] court cannot ignore the plain language of
2 the statute or the expressed will of the Legislature.”).

3 Because Defendants have acted outside of the scope of authority delegated to them, they
4 must be enjoined from moving forward with the illegitimately initiated disenrollment process.
5 See e.g. *Tribal Ogema v. Tribal Council*, No. 07-091GC, 2007 WL 6900797 (Little River Tribal
6 Ct. July 31, 2007) (where the Tribal “Council has overstepped its [Constitutional] authority by
7 targeting an individual” the Tribal Council must be enjoined); *Young v. Tribal Grievance*
8 *Committee*, 1 Am. Tribal Law 539 (Sac & Fox 1998) (holding that the Nation’s Governing
9 General Council lacks constitutional authority to remove tribal officers and enjoining them it
10 from doing so); *Loy v. Confederated Tribes of Grand Ronde*, 4 Am. Tribal Law 132 (Grand
11 Ronde Ct. App. Dec. 5 2003) (same).

12 Plaintiffs have a “fair chance of success” on this cause of action.

13 4. Violating the ICRA and Article IX of the Constitution.¹⁰

14 The U.S. Supreme Court has sated that “[t]he touchstone of due process is protection of
15 the individual against arbitrary government,” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and
16 that “[p]rotection against governmental arbitrariness is the core of due process, including
17 substantive due process.” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (citations
18 omitted). The Court has further stated that due process, “by barring certain government actions
19 regardless of the sufficiency of the procedures used to implement them . . . serves to prevent
20 governmental power from being used for purposes of oppression.” *Daniels v. Williams*, 474 U.S.
21 327, 331 (1986) (quotation).

22 First, when as here government action affects a fundamental right, the proper standard of
23 review is “strict scrutiny.” *Id.* at 409. Under this standard, “the Government [must] prove that

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25 ¹⁰ It appears that the Court did not address this argument, yet still denied the Motion for Preliminary Injunction. This was an abuse of discretion. *Cuomo*, 902 F.2d 1085 (2nd Cir. 1990).

1 the [law] furthers a compelling interest and is narrowly tailored to achieve that interest.”
2 *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 310 (2010) (quotation omitted). If the
3 government does not so act, it has acted in violation of the due process requirements required by
4 the ICRA. The Supreme Court has long held that the right to membership is one of these
5 “fundamental rights”:

6 As long as a person does not voluntarily renounce or abandon his citizenship, . . .
7 his fundamental right of citizenship is secure. . . . We are oath-bound to defend
8 the Constitution. This obligation requires that congressional enactments be
9 judged by the standards of the Constitution. The Judiciary has the duty of
implementing the constitutional safeguards that protect individual rights. When
the Government acts to take away the fundamental right of citizenship, the
safeguards of the Constitution should be examined with special diligence.

10 *Trop v. Dulles*, 356 U.S. 86, 93, 104 (1958).

11 Here, depriving Nooksacks of membership to which they are constitutionally entitled is
12 arbitrary government action. Resolution No. 13-02 is not narrowly tailored to protect a
13 compelling interest. Plaintiffs do admit that the Tribe has significant and legitimate interests in
14 ensuring that members qualify for citizenship under the Constitution. Depriving members of the
15 benefits of citizenship during the process of ensuring that members are enrolled under the correct
16 membership category, however, is not even rationally related to this interest, let alone narrowly
17 tailored to achieve this interest. Many if not all of the Nooksacks currently enrolled under
18 Section 1(C) of the Constitution qualify for enrollment pursuant to other Sections of the
19 Constitution, most notably Section 1(H). There is simply no reason to disenroll these members
20 while the Enrollment Department determines as much. As such, Resolution No. 13-02 is
21 unconstitutional and violates ICRA.

22 Second, even were Resolution No. 13-02 constitutional on its face, it “impermissibly
23 intrude[s] upon” absolute right of Nooksack membership and is “unconstitutional as applied.”
24 *Randall v. Sorrell*, 548 U.S. 230, 270 (2006). A law or regulation is “unconstitutional as
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1 applied” when, although neutral on its face, as applied to a particular set of Plaintiffs the Court
2 can find no compelling governmental interest to justify interference with a constitutional right.
3 *Gautier Torres v. Mathews*, 426 F.Supp. 1106, 1106 (D.C. Puerto Rico 1977), *overruled on other*
4 *grounds*, 435 U.S. 1 (1978). Here, the purpose of Resolution No. 13-02 is not to ensure that the
5 targeted Nooksacks qualify for citizenship under the constitution or to ensure that targeted
6 Nooksacks are enrolled under the correct membership category. As applied, the purpose is to
7 discriminate against certain families of Nooksacks with Nooksack-Filipino ancestry.

8 On March 1, 2013, Defendant Councilmembers “approved Resolution 13-38, requesting
9 a secretarial election to amend the Constitution to remove Article II, Section 1(H)” of the
10 Constitution. TRO Opp., at 10 (citing authority). Defendant Councilmembers did so knowing
11 that all of the targeted Nooksacks meet the requirements of Article II, Section 1(H): Plaintiffs are
12 of Nooksack ancestry, possess at least one-fourth Indian blood, and have a common Nooksack
13 ancestor.

14 On March 26, 2013, Defendant Councilmembers passed Resolution No. 13-54, “placing a
15 moratorium on enrollment applications” until Resolution No. 13-38 was voted on. Defendants’
16 backhanded, multivalent scheme to divest Plaintiffs of their Constitutional right to Nooksack
17 membership is quite transparent:

18 Step 1: Disenroll Plaintiffs and similarly situated Nooksacks. Resolution No. 13-
19 02

20 Step 2: Prohibit disenrolled members from reapplying for Tribal membership
21 under Article II, Section 1(H), for which they would surely qualify. Resolution
22 No. 13-54.

23 Step 3: Convene an election to amend the Constitution to remove Article II,
24 Section 1(H). Resolution No. 13-38. Plaintiffs and similarly situated Nooksacks,
25 once non-Nooksack per Step 1, will not be able to vote in this proceeding.
Constitution, Art. X.

Step 4: Lift Defendants Councilpersons’ moratorium on enrollment applications.
Resolution No. 13-38.

Step 5: Plaintiffs are no longer Nooksack; Plaintiffs are no longer eligible for
Nooksack membership. Article II, Section 1(H) of the Constitution has been
removed.

1 This Court should not accept Defendant's representation that this attack on Plaintiffs'
2 membership is based on a haphazard "discovery" that the targeted Nooksacks are not eligible for
3 enrollment under the criteria that they were originally enrolled under. Defendants have been
4 devising this strategy to disenroll Plaintiffs for over thirteen years now, for the same proffered
5 reasons cited in Resolution No. 13-02. There is simply no compelling governmental interest
6 that can justify this interference with Plaintiffs' constitutional right to membership. Defendants
7 know full well that by the time Plaintiffs are able to "apply again as a new applicant" Article II,
8 Section 1(H) will no longer exist. TRO Opp., at 30. This is by design. The transparent attempt
9 to obstruct Plaintiffs' right to Tribal membership serves no governmental interest, let alone a
10 compelling one.

11 Defendants, acting in furtherance of these unconstitutional laws, must be enjoined.
12 Plaintiffs have a "fair chance of success" on this cause of action.

13 **C. Plaintiffs Are Being And Will Be Irreparably Harmed.¹¹**

14 Plaintiffs have alleged numerous Constitutional and Tribal statutory violations. These
15 *per se* injuries have already occurred, they are ongoing, and compensation is not an adequate
16 remedy for them. As "Defendants' challenged actions threaten or impair . . . Plaintiffs'
17 constitutional right to due process . . . the Court must find that Plaintiffs will suffer an irreparable
18 injury." *Miller v. Blackwell*, 348 F.Supp.2d 916, 922 (S.D. Ohio 2004) (emphasis added).

19 As to the threat that Defendants pose to the "fundamental right" of Plaintiffs' enrollment
20 in the Nooksack Indian Tribe, it is clearly not compensable. 76 Interior Dec. 353 (D.O.I.), 355,
21 1969 WL 11489 (1969). And the threat that they will be unconstitutionally disenrolled is
22 undoubtedly imminent. Indeed, without an injunction from this Court Plaintiffs will be subject
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25 ¹¹ It appears that the Court did not address this argument, yet still denied the Motion for Preliminary Injunction. This was an abuse of discretion. *Cuomo*, 902 F.2d 1085 (2nd Cir. 1990).

1 to permanent disenrollment, with no remedy. Again, Defendants have designed a legal façade
2 that simulates due process and the availability of legal remedies, while knowing full well that
3 upon disenrollment – vis-à-vis a process initiated illegally, to illegally deprive Plaintiffs of a
4 fundamental right – the ship will have already sailed.

5 **D. Granting The Stay Would Not Substantially Harm Plaintiffs And Serves The Public**
6 **Interest.¹²**

7 The Tribal Council has the obligation to ensure that eligibility requirements are strictly
8 monitored and wastage does not occur. Plaintiffs actually agree on this point – the Tribal
9 Council is tasked with running an efficient and budgeted government. This includes significant
10 and legitimate interests in (1) ensuring that members qualify for citizenship under the
11 Constitution, and (2) ensuring that members are enrolled under the correct membership category.
12 But these legitimate interests cannot come at the expense of the haphazard initiation of a
13 disenrollment proceeding that is rife with violations of Constitutional and Tribal law. Nor
14 should these legitimate interests be utilized as a shield behind which a selected group of
15 Nooksacks are forever divested of their of their constitutional *right* to membership. If
16 Defendants were truly attempting to fulfill their Constitutional obligations, they would do so
17 legally; they would do so without enacting a slew of Resolutions aimed at divesting Plaintiffs of
18 any right be made whole; and they would do so with the *whole* tribal membership in mind.
19 Defendants suffer no hardship in being forced to play by the rules.

20 **III. CONCLUSION**

21 Plaintiffs respectfully request an immediate stay of the Court's May 20, 2013, Order
22 Denying Motion for Preliminary Injunction, pursuant to Fed. R. Civ. Proc. 62(c) and Fed. R.
23

24
25 ¹² It appears that the Court did not address this argument, yet still denied the Motion for Preliminary Injunction. This was an abuse of discretion. *Cuomo*, 902 F.2d 1085 (2nd Cir. 1990).

1 App. Proc. 8(a)(1). In the alternative, the Plaintiffs request a stay of this suit to allow sufficient
2 time to seek a stay from the Nooksack Court of Appeals.

3 DATED this 21st day of May, 2013.

4 

5 Gabriel S. Galanda
6 Anthony S. Broadman
7 Ryan D. Dreveskracht
8 Attorneys for Plaintiffs
9 GALANDA BROADMAN, PLLC
10 8606 35th Ave. NE, Suite L1
11 P.O. Box 15146
12 Seattle, WA 98115
13 (206) 691-3631 Fax: (206) 299-7690
14 Email: gabe@galandabroadman.com
15 Email: anthony@galandabroadman.com
16 Email: ryan@galandabroadman.com
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[illegible]

1. I am over eighteen years of age and am competent to testify, and have personal knowledge of the facts set forth herein. I am counsel of record for Plaintiffs.

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

The foregoing statement is made under penalty of perjury under the laws of the Nooksack Tribe and the State of Washington and is true and correct.


GABRIEL S. GALANDA