Hon. Raquel Montoya-Lewis
Hearing Date
May 31, 2013, 9:00 AM

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 REPLY IN SUPPORT OF SECOND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs respectfully reiterate their request the Court immediately issue a preliminary injunction enjoining Defendants from (1) taking any actions in furtherance of Resolution No. 13-38; (2) further impeding the monthly public General Meetings mandated by Article II, Section 2, of the Bylaws; and (3) further impeding two Special Meetings requested by Tribal Council

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Secretary Rudy St. Germain and Councilmember Michelle Roberts, in violation of Article II, Section 5, of the Bylaws. This Court must restore Constitutional and democratic order to Nooksack Indian Country.

I. ARGUMENT

A. Legal Standard.

"A [party] seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008).[1]

B. Plaintiffs Are Likely To Succeed On The Merits.

1. Sovereign Immunity Does Not Bar This Action.

Defendants misunderstand the *Ex parte Young* fiction. As stated in the leading treatise:

> The basic doctrine of *Ex parte Young* can be simply stated. A [tribal] court is not barred . . . from enjoining . . . officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a . . . statute or regulation that is the supreme law of the land.

Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Scope of the Young Doctrine*, 17A FED. PRAC. & PROC. JURIS. § 4232 (3d ed. 2007) (modification added); *see also Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (holding that "officials who threaten to enforce an unconstitutional . . . statute may be enjoined") (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Not one court, in any jurisdiction, ever, has held that the application of *Ex parte Young* depends on the egregiousness of the constitutional or statutory violation alleged – or on conduct "that verges on bad faith." Indeed, in order for the *Ex parte Young* doctrine to apply, the tribal officer need not take any action at all – the mere threat of commencing an

[1] Plaintiffs rely on persuasive federal court authority, citable pursuant to Nooksack common law. *See e.g. Olson v. Nooksack*, 6 NICS App. 49 (Nooksack Tribal Ct. App. June 20, 2001).

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unconstitutional proceeding is sufficient to trigger the exception. *See Edelman v. Jordan*, 415 U.S. 651, 680 (1974) (*Ex parte Young* applies to "officials with authority to enforce . . . laws '**who threaten and are about to commence proceedings** . . . to enforce against . . . an unconstitutional [law].'") (quoting *Young*, 209 U.S. at 156; emphasis added). "[T]he inquiry into whether suit lies under *Ex parte Young* **does not include an analysis of the merits of the claim**." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 646 (2002) (emphasis added).

It has become readily apparent that Defendants are confusing **sovereign immunity** with **qualified immunity**:

> In a qualified-immunity setting, the plaintiff bears the burden of showing that the constitutional right allegedly violated was clearly established at the time of the challenged conduct. Such a plaintiff can also prevail by showing that the conduct at issue is so egregious that no reasonable person could have believed that it would not violate clearly established rights.

Purvis v. Oest, 614 F.3d 713, 717-18 (7th Cir. 2010). But "an official sued in his **official capacity** may not take advantage of a qualified immunity defense." *Mitchell v. Forsyth*, 472 U.S. 511, 556 n.10 (2006) (citing *Brandon v. Holt*, 469 U.S. 464 (1985)) (emphasis added). That defense applies only to those tribal officials sued in their **personal capacities**. *See Desalle v. Bickham*, No. 00-3562, 2002 WL 1791550, *1 n.2 (E.D. La. Aug. 1, 2002) ("[T]he qualified immunity defense only applies to personal capacity claims."). Here, Plaintiffs have filed suit against Defendants in their **official capacities** and their official capacities only. *See* Complaint at ¶¶ 6-14; First Amended Complaint at ¶¶ 6-14; Second Amended Complaint at ¶¶ 6-13.

Plaintiffs admit that had Defendant Councilmembers done nothing more than enact Resolution No. 13-38 they would likely not be subject to suit. Plaintiffs thus do not dispute that "[t]he Council's actions in approving Resolution Nos. 13-38 and 13-53 were within the scope of

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their official duties."[2] TRO Response, at 10. The plaintiff in an *Ex parte Young* suit must name the state official "demonstrat[ing] a real and immediate threat of future harm." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). A state official that demonstrates a "merely speculative or hypothetical threat" of violating the constitution, statute, or regulation will not suffice. *Id.* Thus, where a tribal official causes a law or regulation to be promulgated, and does nothing more, that official will not be subject to suit. The damage, in other words, has been done in those instances – there is nothing to enjoin; an unconstitutional law, merely sitting on the books, does not cause harm.

Here, however, Defendants have taken affirmative actions, and continue to do so, in furtherance of Resolution No. 13-38. Likewise, defendants have taken affirmative actions, and continue to do so, in impeding the regular monthly Tuesday meetings and two Special Meetings requested by Tribal Council Secretary Rudy St. Germain and Councilmember Michelle Roberts. This is not a question of Defendants "not be[ing] able to enact ordinances and conduct business," as suggested in *Cline v. Cunanan*, No. NOO-CIV-02/08-5 (Nooksack Ct. App. Jan. 12, 2009). This is instead a question of Defendants deliberately prohibiting business consistent with the public, orderly, and democratic process mandated by the Nooksack Constitution.

Defendants' sovereign immunity argument finds no support in law.[3]

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[2] Even so, Defendant Councilmembers violated, *inter alia*, Article II, Section 2 of the Nooksack Tribe's Bylaws and Nooksack Customary Law, by excluding Councilpersons Terry St. Germain and Michelle Roberts from the Special Meeting when Resolution No. 13-53 was passed. Also, query why Resolution Nos. 13-38 and 13-53 were not considered in any Tribal Council General or Special Meeting, open to the Nooksack Membership.

[3] Alternatively, as Plaintiffs' argued to the Court on May 16, 2013, Defendants have waived any right to assert sovereign immunity by (1) seeking affirmative relief from the Court in the form of a motion to strike without preservation of any immunity defense on April 5, 2013, and (2) filing a counterclaim against Plaintiffs on April 19, 2013. Neither argument is "absurd." Indeed, the courts frequently hold that tribal defendants who do not immediately assert sovereign immunity, waive the right to later raise it as a defense. *See e.g. U.S. v. Snowden*, 879 F. Supp. 1054 (D. Or. 1995) (tribe's failure to assert immunity when appearing in court to quash a subpoena operated to waive tribal immunity). Further, by operation of Defendants' counterclaims against Plaintiffs for both legal and equitable remedies, *see* Defendants' Answer, at 14, Defendants have waived any immunity from Plaintiffs' claims. *See* Plaintiffs' Answer, at 3 (citing *Berrey v. Asarco, Inc.*, 439 F.3d 636, 644 (10th Cir. 2006) ("[W]hen the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment-

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2. Neither the Nooksack Indian Tribe, the Bureau of Indian Affairs, the Department of the Interior, nor Judy Joseph are Indispensable Parties.

Plaintiffs are not attempting to "halt" anything that the Secretary of the Interior ("Secretary") is doing or has any interest in doing. TRO Response, at 8. Once the Secretary receives a request to hold an election to ratify proposed amendments, the Secretary supposedly reviews the legality of the proposed amendments and calls an election within 90 days.[4] 25 U.S.C. § 476(c)(1)(B); 25 C.F.R. § 81.5(d). The election results are not binding until the Secretary approves them. 25 C.F.R. § 81.22. The Secretary has 45 days to resolve these election contests, conduct an independent review, and approve or disapprove the election. 25 U.S.C. § 476(d)(1). This is all that the Secretary does.

Here, the Secretary has received a request to hold an election to ratify proposed amendments, and has called an election. Until the election results are turned in, the Secretary does nothing. Defendants, and Defendants only, have an interest in moving forward with the improperly commenced Secretarial Election. Plaintiffs – and, indeed, the entire Nooksack Tribal Community – have an interest in ensuring that if the Nooksack Indian Nation requests a

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arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim . . ."); *see also United States v. Bull*, 295 U.S. 247 (1935); *Rosebud Sioux v. A&P Steel, Inc.*, 874 F.2d 550, 553 (8th Cir. 1989) (denying dismissal of counterclaim that "arises out of the same contractual transaction, seeks similar monetary relief, and is for an amount less than that sought and recovered by the Tribe"); *cf. McClendon v. U.S.*, 885 F.2d 627, 630-31 (9th Cir. 1989) ("a tribe's waiver of sovereign immunity [through initiation of a lawsuit] may be limited to those issued necessary to decide the action brought by the tribe . . ."); *U.S. v. Oregon*, 657 F.2d 1009, 10015 (9th Cir. 1981) (tribe's intervention to establish fishing rights deemed consent to court's jurisdiction to issue and modify equitable decree)). Even the Court expressed its surprise on May 16, 2013, that Defendants had failed to seek dismissal on immunity grounds. The Court should no longer excuse Defendants' dilatory or hapless defense practices.

[4] The Handbook for BIA Personnel, "Developing and Reviewing Tribal Constitutions and Amendments," requires "technical review" as well as review to ensure that a proposed amendment "does not violate Federal law." U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, TRIBAL CONSTITUTIONS: A HANDBOOK FOR BIA PERSONNEL (1995). The BIA Handbook goes on to list "some of the types of provisions that frequently render proposed constitutions inappropriate," including: "Attempts to disenroll members retroactively." *Id.* The proposed constitutional amendment violates federal law, most notably the Fifteenth Amendment of the U.S. Constitution and the equal protection provision of the Indian Civil Rights Act (as incorporated into the Nooksack Constitution). 25 U.S.C. 1302(a)(8).

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Secretarial Election, that it properly do so under the color of Nooksack law. Resolution No. 13-38 fails to meet that standard.

3. Resolution No. 13-38 Does Not Satisfy the Scrutiny Applied Under Section § 1302(a)(8).

"The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

A "facially neutral" law or policy that is "nonetheless applied by government actors in a discriminatory manner" is unconstitutional under the Equal Protection Clause. *Boston's Children First v. Boston School Committee*, 260 F.Supp.2d 318, 331 (D. Mass. 2003); *see also Nunez v. Cuomo*, No. 11-3457, 2012 WL 3241260, at *15 (E.D.N.Y. Aug. 17, 2012) ("Because discriminatory intent is rarely susceptible to direct proof, a party may state an intentional discrimination claim based on circumstantial evidence of intent, such as the disparate impact the complained of conduct has on a particular group.") (quotation omitted). It has long been the case that where a "challenged governmental policy is facially neutral, proof of disproportionate impact on an identifiable group, such as evidence of gross statistical disparities, can satisfy the intent requirement . . . ." *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307–08 (1977)) (quotation omitted).

Here, Defendants cannot deny that Resolution No. 13-38 will have a disparate impact on a particular group. Defendants are currently attempting to disenroll Plaintiffs and those Nooksacks who are similarly situated. These Nooksacks meet, at least, the requisites of Article

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II, Section 1(H), of the Nooksack Constitution.[5] *See* Second Declaration of Gabriel S. Galanda ("Second Galanda Decl."), Exhibit A (a 1972 U.S. Department of the Interior Office of Hearings and Appeals Summary of Family History and Inventory listing Matsqui George, Annie George's biological father, as "Nooksack" by blood); *id.* at Exhibit B (May 7, 2013, Dr. Jay Miller Opinion Letter concluding that "[i]n all, it is my informed professional opinion that because at least Matsqui George was Nooksack by blood, his biological daughter, Annie George Mack James, was too. As such, Annie and her heirs are fully qualified to be enrolled Nooksack, as they have been for decades."); *id.* at Exhibit C (March 28, 2013, Recall Petition Rebuttal Statement of Michelle Roberts stating that "[m]y status as a properly enrolled Nooksack Tribal Member is supported by the October 25, 1996 Legal Opinion of the Tribe's lawyer/counsel of record, Thomas P. Schlosser, Esq., which provides: 'the descendants of Annie George James qualify under other sections of the Constitution, in particular the category in Article II, section 1(H), that 'encompasses 'persons who possess at least 1/4th degree Indian blood and who can prove Nooksack ancestry to any degree.'").[6]

Even so, Defendants plan to disenroll these Nooksacks because they were allegedly enrolled by a prior Tribal Council under a different section of Article II.[7] Defendants then plan

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[5] Contrary to the Court's statement during oral argument on May 16, 2013, Plaintiffs' position in this litigation as to how they qualify as Nooksack has not waivered.

[6] Defendants have thus far denied Plaintiffs access to seven selected enrolled Nooksack member-deceased relatives/ancestors' enrollment files, which are believed to contain additional information establishing Plaintiffs as properly enrolled Nooksacks. Instead, Defendants have been told via counsel: "you and your clients be expected to comply with the rules you are given in this process." Second Galanda Decl., Ex. D. In other words, Plaintiffs must do as Defendants tell them, including complying with Defendants refusal to provide Plaintiffs' copies of their ancestors enrollment files. This Court should not allow Defendants to railroad Plaintiffs out of the Nooksack Tribe.

[7] Again, Defendants have provided absolutely no "written documentation" or "evidence to support a[ny] statement of fact," upon which to commence the disenrollment of Plaintiffs, as required by N.T.C. §§ 63.04.001(B) and .04.004. In the absence of any such showing of good cause, and in the face of, e.g., Second Galanda Decl., Exs. A-C, to the, defense counsel's suggestion on May 16, 2013, that Plaintiffs are "frauds" is especially reprehensible – this Indian Court should not further sustain such rhetoric. Further, Defendants are now borrowing from the Court's rhetoric to describe Plaintiffs' constitutional claims in defense against their illegal disenrollment as "absurd," *see* Motion to Dismiss, at 8, n.1, and also issuing written statements to the media in violation of the Court's April 15, 2013, and thereby flouting the "professionalism and respect inside and outside of the courtroom" that the Court

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to disallow these Nooksacks to reenroll under Article II, Section 1(H), because it will have been removed. It is utterly transparent that Resolution No. 13-38 unconstitutionally targets Plaintiffs and those Nooksacks who are similarly situated. Defendants cannot offer any legitimate governmental interest whatsoever to establish why the Secretarial Election and the disenrollment proceedings must be completed in tandem.[8]

Even if Defendants' argument that Plaintiffs and those Nooksacks who are similarly situated were not targeted because of racial animus had any merit – it does not[9] – they cannot deny that Resolution No. 13-38 unconstitutionally targets an identifiable group. Plaintiffs will prevail on the merits of this claim.

4. Defendants Are Improperly Depriving Plaintiffs Of Rights Guaranteed By Article II, Section 2, of the Nooksack Bylaws.

Article II, Section 2 of the Nooksack Bylaws requires that "[t]he Tribal Council **shall** meet regularly on the first Tuesday of each month." (emphasis added). Here, Defendants admit

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ordered of the parties, on March 28, 2013. *See* John Stark, *Tribal Judge Refuses to Block Disenrollment of 306 Nooksacks*, BELLINGHAM HERALD, May 22, 2013, *available at* http://www.bellinghamherald.com/2013/05/22/3018656/judge-refuses-to-block-disenrollment.html ("In a written statement, Chairman Kelly applauded the ruling. 'The court confirmed what we knew all along: the Nooksack people, through their Tribal Council, decide who is Nooksack and who is not,' Kelly wrote. 'The 306 people that will soon be facing disenrollment hearings . . . could have stopped this slow process at any time by providing us with birth certificates that prove they are lineal descendants of a Nooksack Tribal member. Instead of providing proof, they hired an attorney; filed a lawsuit and are claiming that they are facing disenrollment because of race or politics. This is simply not true. We have been respectful and patient throughout this process, and it would be unfair to our community if we were to allow these people to remain members in the absence of any proof.'"). As Defendant Bob Kelly's written statement to the media indicates, Defendants, now further emboldened by the Court's Order Denying Motion for Preliminary Injunction, are publicly shirking *the Tribe's* burden of proving that Plaintiffs are not Nooksack. And as Exhibits A through C to the Second Galanda Decl. illustrate, there is simply "no absence of any proof" on the part of Plaintiffs that they are – and have always been – fully qualified to be Nooksack Indian.

[8] Were Resolution No. 13-38 passed at any other time, Defendants' argument that it "does not change any currently enrolled member's [sic] rights" might have merit. TRO Response, at 7. But the facts at hand establish otherwise. It simply cannot be argued that Resolution No. 13-38 does not specifically target those Nooksacks currently subject to disenrollment proceedings. The application of Resolution No. 13-38, as exhibited by actions taken by Defendants post-passage – the appointment of Roy Bailey, enrollment staff overseeing the disenrollment action, to the Secretarial Election board; the distribution of propaganda only to those Nooksacks who are not subject to disenrollment; the phone bank used to those telephone those Nooksack who are not subject to disenrollment, just to name a few – clearly establishes a discriminatory intent as to that specific identifiable group.

[9] Defendants' statement that not each and every Nooksack of Filipino ancestry is being targeted for permanent disenrollment under their scheme is of little consequence. The fact that each and every Nooksack that is being targeted for permanent disenrollment is of Filipino ancestry, and is a member of a suspect class, is more than enough to make a facial case.

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that they have not held the regularly scheduled Tuesday meeting for the past four months. TRO Response, at 13. Defendants argue that their choice to impede these meetings from moving forward, however, is not subject to judicial review. *Id.* at 11-12. According to Defendants, "[t]he Constitution and Bylaws of the Nooksack Indian Tribe are two separate documents." *Id.* at 11. Even were violations of the Nooksack Constitution reviewable, Defendants argue, the Tribal Council is free to violate the Bylaws as it so choses. Defendants are mistaken.

If violations of the Nooksack Constitution are actionable, violations of the Nooksack Bylaws are likewise actionable. Every tribal court to analyze the issue has found this logic compelling. In *Garfield v. Coble*, No. ITCN/AC 03–020, 2004 WL 5748178 (Nev. Inter-Tribal Ct. App. June 28, 2004), for instance, plaintiffs argued that certain members of the Tribal Council improperly removed a member from his position as the Tribal Chairman, failed to reimburse him for travel and other expenses he incurred on behalf of the Tribe, and held improperly called meetings that did not comply with the procedural requirements, in violation of the Tribe's Bylaws. *Id.* at *1. The trial court dismissed the case, holding that the Tribe's sovereign immunity protected defendant councilmembers from suits of this nature. *Id.*

On appeal, the Inter-Tribal Court of Appeals of Nevada reversed, holding that "the allegations set forth in the Complaint comes within the exception to the Tribe's sovereign immunity and as such, the Complaint should not have been dismissed." *Id.* at 2; *see also generally Sault Ste. Marie Tribe of Chippewa Indians v. Bouschor*, No. 276712, 2008 WL 4923039 (Mich. Ct. App. Nov. 18, 2008), *aff'd*, 777 N.W.2d 142 (Mich. 2010), *rev'd by statute*, 777 N.W.2d 143 (Mich. 2010). The requirement that councilmembers not impede the monthly meetings – a practice that "provides for open government and informs tribal members of the

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tribal business" – is not waivable. *Yellowbank v. Chingwa*, No. C-018-0300, 2000 WL 35770340, at *3 (Little Traverse Trib. Ct. June 19, 2000).

The case cited by Defendants is inapposite. In *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001), the Miami Nation of Indians of Indiana ("Miami") sought to overturn the Department of the Interior's ruling that the Miami had not satisfied criteria of 25 C.F.R. § 83.7 and therefore would not be recognized by the federal government. *Id.* at 345-46. The question before the Court was whether the criteria of 25 C.F.R. § 83.7 was "invalid because [it was] not authorized by Congress." *Id.* at 346. The Court held that because recognition is "traditionally an executive function, . . . it never requires legislative action." *Id.*

Miami Nation of Indians of Indiana had noting to do with the issues now before the Court. Plaintiffs will prevail on the merits of this claim.

5. Defendants Are Improperly Depriving Plaintiffs Of Rights Guaranteed By Article II, Section 5, of the Nooksack Bylaws.

Article II, Section 5 of the Nooksack Bylaws requires that "[s]pecial meetings of the tribal council **shall** . . . be held upon written request of . . . two (2) members of the tribal council . . . . Such written request shall be filed with the chairman . . . of the tribal council, and he **shall** notify the tribal council members twenty-four (24) hours before the date of such tribal council meetings."

Defendants would have this Court believe that the mandatory language of Article II, Section 5 is somehow preempted by Article II, Section 3 of the Nooksack Bylaws. TRO Response, at 15. Defendants are clearly mistaken. Article II, Section 3 applies to special meetings that are called by the Chairman. Article II, Section 5 applies to special meetings that

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are "called by two (2) members of the tribal council." The modifier, "also" is included in Article II, Section 5 to distinguish between the two processes.

Plaintiffs will prevail on the merits of this claim.

C. Plaintiffs Are Being And Will Be Irreparably Harmed.

When an alleged deprivation of a constitutional right is involved, courts hold that "no further showing of irreparable injury is necessary." 11 FED. PRAC. & PROC. § 2948.1 (2d ed. 2004). Here, because Plaintiffs have alleged that a constitutional right has been deprived, no further showing of irreparable injury is necessary. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 924-25 (S.D. Ind. 2011).

Defendants argue that Resolution No. 13-38 does not affect Plaintiffs; and if it does, "[t]he solution is for those Plaintiffs to vote." TRO Response, at 19. But Plaintiffs have shown that Resolution No. 13-38 does affect Plaintiffs, as members of an identifiable group – and it does so unconstitutionally. If Defendants wish to amend the Constitution, they must do so within the bounds of the Nooksack Constitution and laws. If, for instance, Plaintiffs waited until the disenrollment proceedings have been completed and/or deserted, Resolution No. 13-38 would not be targeting an identifiable group.[10] Plaintiffs would gladly vote in that Secretarial Election, as Defendants' argument that "the proposed removal of [Section 1(H)] would not affect those persons" would be true in fact.

[10] The worst-case scenario in that instance would be that those Nooksacks targeted for disenrollment would be disenrolled as not meeting the criteria on their enrollment forms, despite their constitutional right to be enrolled under Section 1(H). Those Nooksacks could then reapply for enrollment under Section 1(H), as Defendants have repeatedly asserted that these Nooksacks are entitled to do. Once the reenrollment process was complete, a Secretarial Election to remove Section 1(H) would then no longer impermissibly target this identifiable group. If Defendants *actually* have no animus toward those Nooksacks currently targeted for disenrollment – if Defendants are in fact applying Resolution No. 13-38 in a nondiscriminatory fashion – they should have no problem holding off on the Secretarial Election until that process is complete.

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Defendants also submit that no emergency exists because Plaintiffs did not include Resolution No. 13-38 in their first motion for TRO. *Id.* at 18. But Plaintiffs did not have facts to show that Resolution No. 13-38 impermissibly targeted an identifiable group until the instant motion was filed. The actions taken to show that Resolution No. 13-38 is discriminatory as applied – the appointment of Roy Bailey, enrollment staff overseeing the disenrollment action, to the Secretarial Election board; the distribution of propaganda only to those Nooksacks who are not subject to disenrollment; the phone bank used to those telephone those Nooksack who are not subject to disenrollment, just to name a few – were not available when Plaintiffs filed their first motion for TRO.

Plaintiffs' injuries are substantial, immediate, and irreparable.

D. The Balance Of Hardships Mandates An Injunction.

Plaintiffs will suffer irreparable harm if a preliminary injunction does not issue. In contrast, Defendants will suffer minimal, if any, harm by allowing the *status quo* to be maintained pending a final determination in this matter. *See infra.* notes 3, 5. Thus, the balance of harms weighs clearly in Plaintiffs' favor.

E. The Nooksack Public Interest Favors Injunction.

The "public interest" inquiry examines the effect of a proposed restraining order on nonparties rather than on the parties. *Sammartano v. First. Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). "It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir .1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir.2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the

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core [Constitutional] right . . . ."). A preliminary injunction would not be adverse to the public interest, because it would protect against an alleged violation of Plaintiffs' constitutional rights.

What is more, the proposed preliminary injunction will protect those Nooksacks that are similarly situated. "When the constitutional rights of an individual and other members of the public are violated, or are threatened to be violated, public interest concerns are implicated because all citizens have a stake in upholding the Constitution." *Herrera v. Santa Fe Public Schools*, 792 F.Supp.2d 1174, 1199 (D.N.M. 2011). It is well-established that "the public has a strong interest in the vindication of an individual's constitutional rights" when the vindication of those rights will flow to those non-Plaintiffs who are similarly situated. *O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984).

Plaintiffs have established that a preliminary injunction is in the public interest

II. CONCLUSION

Plaintiffs respectfully reiterate its request that this Court temporarily enjoin Defendants from taking any actions in furtherance of Resolution No. 13-3, and further impeding those Nooksack democratic processes mandated by the Nooksack Bylaws, Article II, Section 2, and Article II, Section 5. The future of Constitutional democracy and law and order within Nooksack Indian Country *in fact* weigh in the balance.

DATED this 29th day of May, 2013.

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DECLARATION OF SERVICE

I, Alice Hall, say:

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 employed with Galanda Broadman, PLLC, counsel of record for Plaintiffs.

2. Today, I mailed the following documents:

REPLY IN SUPPORT OF SECOND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER; SECOND DECLARATION OF GABRIEL S. GALANDA WITH EXHIBITS

to the following:

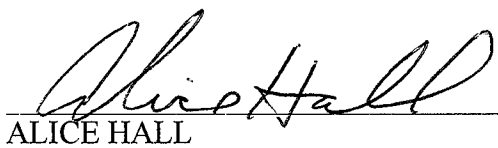
Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A copy was emailed to:

Thomas Schlosser
Morisset, Schlosser, Jozwiak & Somerville
1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

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.

DATED this 29th day of May, 2013.



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