

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

SECOND EMERGENCY MOTION
FOR TEMPORARY RESTRAINING
ORDER

(ORAL ARGUMENT REQUESTED)

I. INTRODUCTION

Plaintiffs Sonia Lomeli, Terry St. Germain, Norma Aldredge, and RaeAnna Rabang
(collectively, "Plaintiffs") – enrolled members of the Nooksack Indian Tribe who bring this
action both on their own behalf and on behalf of those similarly situated – respectfully request

1 the Court enjoin Nooksack Tribal Council Members Robert Kelly, Rick D. George, Agripina
2 Smith, Bob Solomon, Katherine Canete, Agripina "Lona" Johnson ("Defendant Council
3 Members"), and other Nooksack officials and officers who have acted and are acting beyond the
4 scope of their authority as tribal officers, from further unconstitutional behavior.

5 Defendants have conspired to violate the Constitution of the Nooksack Indian Tribe
6 ("Constitution"), the Bylaws Nooksack Indian Tribe ("Bylaws"), and codified and customary
7 laws of the Nooksack Indian Tribe ("Tribe") by taking official actions that are unlawful under
8 those laws, and that have already had an immediate and irreparable effect on the entire Tribal
9 Membership and, in particular, 306 currently-enrolled members of the Tribe, including Plaintiffs.

10 Plaintiffs respectfully request that the Court immediately enjoin Defendants from (1)
11 taking any actions in furtherance of Resolution No. 13-38; (2) further impeding the regular
12 monthly Tuesday meetings mandated by Article II, Section 2, of the Bylaws; and (3) further
13 impeding two Special Meetings requested by Tribal Council Secretary Rudy St. Germain and
14 Councilmember Michelle Roberts, in violation of Article II, Section 5, of the Bylaws.
15 Defendants' violations of the Constitution and Bylaws are harming and will irreparably harm
16 Plaintiffs. The balance of hardships and public interest mandate an injunction.

17 The Court has jurisdiction over Defendants and these claims because non-monetary and
18 non-affirmative relief is sought and because Nooksack Tribal officials are involved in matters
19 affecting fundamental Nooksack Tribal Constitutional and legal rights. This suit does not touch
20 the Tribe's sovereign immunity. Defendants' legislative eugenics are far beyond the scope of
21 their authority as tribal officers.

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II. FACTS

A. **Unlawful Secretarial Election.**

On March 1, 2013, the Nooksack Tribal Council passed Resolution No. 13-38, "Request for Secretarial Election on Amendment to the Tribal Constitution," in a special meeting of the Council. Declaration of Amiliana Johnny ("Johnny Decl."), Exhibit Q (on file with the Court). The proposed amendment seeks to remove Section 1(H) of the Constitution's eligibility for membership, under which Plaintiffs qualify for membership. *See generally id.* On March 26, 2013, immediately before being excluded from the Special Meeting executive session, Tribal Secretary St. Germain read the following objection into the Tribal Council record:

Councilwoman Michelle Roberts and I object to being forced to leave the Special Meeting Executive Session. Nooksack Tribal Council custom, and the Council's tradition of following Robert's Rules of Order, do not preclude our attendance. There is no legitimate conflict of interest or nepotism that precludes our attendance during the Executive Session. Councilwoman Michelle Roberts and I further object that the Tribal Council Chairman has not honored our written Special Meeting request dated March 11, 2013, to discuss his March 6 letter to the Nooksack Tribal Membership regarding the "involuntary disenrollment of numerous members of the Nooksack Tribe." The Chairman has violated Article II, Section 5 of the Nooksack Constitution.

Fourth Declaration of Rudy St. Germain ("Fourth St. Germain Decl."), at ¶ 9. During that March 26, 2013, Special Meeting executive session, Defendants passed Resolution No. 13-53, which appointed a Secretarial Election Board¹ to carry out Resolution No. 13-38 to remove Article II, Section 1(H) from the Nooksack Constitution.

The sole purpose of Resolution No. 13-38 was to further Defendants' attempt to cleanse the Nooksack Tribe of those Tribal members – specifically "large groups or families" – whose heritage they deems undesirable. Second Declaration of Diantha Doucette ("Second Doucette Decl."), Exhibit A; *see also id.* at Ex. C (indicating the Secretarial Election is intended to "close

¹ It is highly suspicious that on March 26, 2013, Defendant Roy Bailey, as enrollment staff, was appointed to an

1 a loophole in our tribal constitution . . . and protect the cultural identity of our Nooksack Tribe”).

2 On April 25, 2013, the BIA mailed out an 11-page packet with the words “ATTENTION
3 NOOKSACK TRIBAL VOTERS” printed atop the document. Second Doucette Decl., at ¶¶ 2-
4 3; *see generally id.* at Ex. A. According that cover document, the packet concerns a “VOTE TO
5 ADOPT OR REJECT A PROPOSED AMENDMENT TO THE CONSTITUTION OF THE
6 NOOKSACK INDIAN TRIBE.” *Id.* at ¶ 2. The document goes on to say: “IT IS CRITICAL
7 THAT YOU PARTICIPATE IN THIS ELECTION.” *Id.* The BIA only have potential Nooksack
8 voters ten business days to complete and return their voter’s registration forms. As Diantha
9 Doucette explains, “[b]ased on her experience” in Nooksack Tribal administration

10 [T]en business days, or less, is simply not enough time to allow each and every
11 Nooksack voter: (1) to receive the Secretarial election information and
12 propaganda in the first instance, especially those members living in Canada; (2) to
13 then read and understand the nearly 40 pages of documentation (much of which
14 reads as legalese) regarding a federal election and proposed Tribal constitutional
15 amendment; (3) to then consult with Nooksack family, community members and
16 Tribal leaders and/or the BIA about the election and proposed amendment to our
17 Tribal Constitution; (4) to in that consultation process somehow decide whether
18 Section H is in fact “harmful” to the Tribe as Chairman Kelly says and the BIA
19 suggests, or not; (5) to eventually decide whether to register to exercise the
20 Nooksack constitutional right to vote in an election being conducted by a non-
21 tribal government; and (6) to finally take action to complete the federal voter
22 registration paperwork and in turn mail it back to the BIA, probably through a
23 visit to the Post Office.

24 *Id.*, at ¶11. Indeed, as of today, many Canadian Nooksacks have yet to receive the BIA’s voter’s
25 registration packet for the Secretarial Election, which means they will not be able to register to
26 vote by mail. *See generally* Declaration of Shawna Williams; Declaration of Gina Rabang;
27 Declaration of Carol Cailing; Declaration of Keith Calling; Second Declaration of Plaintiff Terry
28 St. Germain. *See also* Second Doucette Decl., Ex. B (Chairman Kelly recommending to selected
29 Nooksacks that they “**drop [their] registrations in the mail by May 7th to make sure it gets**
30 **there.**”) (emphasis added).

1 Two business days after the BIA's mailing, Defendant Kelly issued letters to non-Filipino
2 Nooksacks, urging them to vote for the proposed constitutional amendment to delete Section
3 1(H), alleging that Section 1(H) is "harmful" to the Tribe. *Id.* Ex. B. He did so without the
4 authority of the Tribal Council. Fourth St. Germain Decl. at ¶ 11. Chairman Kelly's propaganda
5 packet was sent, via mass mailing, to only those Nooksack who are not currently being subjected
6 to disenrollment – again, those Nooksacks who are not of Filipino descent. Second Doucette
7 Decl., at ¶¶ 8-10. In other words, Chairman Kelly, without the authority of the Nooksack Tribal
8 Council, issued a letter and election materials **only to those members of the Nooksack Tribe**
9 **who are not of "large groups or families" of Filipino descent and not proposed for**
10 **disenrollment**, explaining that the Secretarial election is designed to "protect current and future
11 generations from losing control of the cultural identity of the Nooksack Tribe" by targeting
12 "large groups or families that [allegedly] have much weaker ties to Nooksack than the rest of us
13 who are currently enrolled here."² *Id.* at Ex. B.

14 On or about May 1, 2013, Defendants' caused a postcard to be designed, printed and
15 mailed with Tribal resources, which propaganda indicated that the Secretarial Election is
16 intended to "close a loophole in our tribal constitution . . . and protect the cultural identity of our
17 Nooksack Tribe." Second Doucette Decl., Ex. C; Fourth St. Germain Decl., at ¶ 12. As with
18 Defendant Kelly's April 29, 2013, propaganda packet, Defendants' mailed the postcard
19 propaganda to only those Nooksack who are not currently being subjected to disenrollment;
20 again, to only to those members of the Nooksack Tribe who are not of "large groups or families"

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22 ² See generally Declaration of Francine Adams; Declaration of Plaintiff Norma Aldredge; Declaration of Florentino
23 Barril; Declaration of Angela Bumatay; Declaration of Christina Bumatay; Declaration of Linda Hart; Declaration
24 of Plaintiff Sonia Lomeli; Declaration of Roy Nicol; Declaration of Alex Nicol-Mills; Declaration of Olive Oshiro;
Declaration of Samson Phillips; Declaration of Francisca Rabang; Declaration of Francisco Rabang, Jr.; Declaration
of James Rabang; Declaration of Leonard Rabang; Declaration of Maxina Rabang; Declaration of Mike Rabang;
Declaration of Rachel Rabang; Declaration of Robert J. Rabang, Sr.; Declaration of Brittini Roberts; Declaration of
Michelle Roberts.

1 of Filipino descent. Second Doucette Decl., at ¶¶ 5-6.

2 On May 2, 2103, Defendant Council Members caused the publication of Snee-Nee-
3 Chum, again through use of Tribal resources, with the following headline atop the newsletter:
4 “Upcoming Secretarial Election: Check your mail and register!” Fourth St. Germain Decl., Ex.
5 C. As with the postcard propaganda, the Tribe’s monthly newsletter explains: “In June, you’ll be
6 voting on whether or not to close a loophole in our Tribal Constitution . . . and protect the
7 cultural identity of our Nooksack Tribe.” *Id.*

8 On the morning and again in the evening of May 6, 2013, Defendants caused certain
9 Tribal members to “phone bank” at the Tribal Administration building in regard to the
10 Secretarial Election. *Id.* at ¶ 4. Through use of Tribal facilities and phones, those Tribal
11 members called only those Nooksack who are not currently being subjected to disenrollment, “to
12 remind [those] Nooksack Tribal Members to send in their registrations” in order to vote in the
13 Secretarial Election to remove Article II, Section 1(H) from the Nooksack Constitution. *See Id.*
14 at Ex. A (picturing those Tribal members while phone banking at Tribal headquarters).

15 Since around April 22, 2013, Defendants, including Council Members Defendants
16 Katherine Canete and Bob Solomon, have utilized the Nooksack Indian Tribe Communications
17 Page to create and disseminate additional propaganda concerning the Secretarial Election. *See*
18 *generally id.*³ To give but two examples:

19 • On April 28, 2013, Defendant Canete posted: “I will be voting to remove letter (h)
20 from or Nooksack constitution because Keeping Nooksack alive is what matters most.
Protecting the vitality of our culture and our way of live as Nooksack!” *Id.*

21 • On May 7, 2013, Defendant Solomon shared on his Facebook page a post that
22 reads: “In June Nooksack Tribal members will vote on closing a loophole in our constitution
. . . Voting YES on this upcoming election will strengthen our tribal constitution and protect

23
24 ³ On March 28, 2013, the Court “cautioned” the parties against the use of social media, specifically mentioning
Facebook. *See* March 28, 2013, Order From Scheduling Hearing.

1 the cultural identity of our Nooksack Tribe.” *Id.*

2 Defendants caused the publication at least twenty similar Facebook postings, on April 22, 23, 26
3 and 29, and May 1, 2, 3, 4, 5, 6, and 7, 2013, respectively. *Id.*

4 **B. Illegal Failure to Call Monthly Public Meetings.**

5 On May 6, 2013, Defendant Chairman Robert Kelly caused Defendants Katherine Canete
6 to cancel the monthly “first Tuesday” General Meeting for May required by the Tribe’s Bylaws,
7 without any explanation. *Id.* at ¶ 2. Recall from the Third Declaration of Tribal Council
8 Secretary Rudy St. Germain:

9 On February 4, 2013, Defendant Chairman Robert Kelly canceled the monthly
10 “first Tuesday” regular meeting required by the Tribe’s Bylaws, stating that “a
11 regular meeting would be improper because two of the Council Members were
12 not eligible for Nooksack enrollment.” In March of 2013, Chairman Kelly and
13 his Tribal Council majority have also failed to call monthly “first Tuesday”
14 General Meetings, which are open to the Nooksack public, as required by Article
15 II, Section 2 of the Nooksack Bylaws. As of today [March 29, 2013], they have
not confirmed a public “first Tuesday” General Meeting for April 2013 either; or
at least they have not confirmed that meeting with Councilperson Roberts or me.
I believe that Chairman Kelly and his Tribal Council majority are intent on
keeping the Nooksack Tribal public in the dark and sidelined from any and all
political venues, while they carry out what I believe are unconstitutional
disenrollment proceedings against 306 enrolled Nooksack members.

16 *Id.* As in February and March, Defendant Kelly did not call the General Meeting for April 2,
17 2013. *Id.*

18 Defendant Kelly has now caused the cancellation of or otherwise failed to call the
19 monthly “first Tuesday” meeting required by the Tribe’s Bylaws, for February, March, April and
20 now May of 2013. *Id.* There has deliberately not been a constitutionally required democratic
21 meeting of the Nooksack Tribe for the last four consecutive months. *Id.* Unless enjoined, it is
22 likely that Chairman Kelly will again inhibit or otherwise impede “first Tuesday” regular
23 meeting.

1 **C. Illegal Failure to Call Special Meetings.**

2 Meanwhile, the Council Member Defendants have convened a series of Special Meetings
3 to advance both the he disenrollment of the 306 Enrolled Nooksack Members and the companion
4 Secretarial Election to eliminate those “large groups or families.” Council Member Defendants
5 have now convened Special Meetings on February 12, March 1, March 13, March 26, and April
6 16, and May 6, 2013. Third Declaration of Rudy St. Germain (“Third St. Germain Decl.”), at ¶
7 5; Fourth St. Germain Decl., at ¶ 6. Two Special Meetings were called for April 16, 2013.
8 Also, on March 21, 2013, a quorum of the Tribal Council met at the home of Tribal member
9 Julie Jefferson (who on or around March 14, 2013, commenced recall efforts against Tribal
10 Council Secretary St. Germain and Councilperson Roberts). Third St. Germain Decl., at ¶ 6.

11 Defendant Chairman Robert Kelly excluded Tribal Council Secretary St. Germain and
12 Councilperson Roberts from the Special Meetings on February 12, March 26 and the April 16,
13 2013 afternoon Special Meetings. *Id.* Defendant Kelly and the other Council Member
14 Defendants failed to notify Tribal Council Secretary St. Germain and Councilperson Roberts of
15 the March 13, March 21, April 16 morning, and May 6, 2013 Special Meetings. *Id.*

16 On March 11, 2013, Tribal Council Secretary St. Germain and Councilmember Roberts
17 wrote to Defendant Chairman Robert Kelly in request of a Special Meeting, pursuant to Article
18 II, Section 5 of the Bylaws, “to discuss [his] March 6, 2013 letter to the Nooksack Tribal
19 Membership regarding the ‘involuntary disenrollment of numerous members of the Nooksack
20 Tribe.’” *Id.* at ¶ 9. Mr. St. Germain and Ms. Roberts wrote:

21 As this letter was not properly authorized by a quorum of the Tribal Council, at
22 least to our knowledge, the Tribal Council needs to discuss the matter of your
23 letter. The requested special meeting is further necessitated by your failure to call
24 a regular monthly Tribal Council meeting for both February 5, 2013 and March 5,
25 2013

1 *Id.* Defendant Kelly has yet to honor the March 11, 2013, Special Meeting request. *Id.* at ¶ 7.

2 On April 29, 2013, Tribal Secretary St. Germain and Councilmember Roberts wrote to
3 Defendant Kelly in request of a second Special Meeting:

4 Pursuant to Article II, Section 5 of the Nooksack Bylaws, we hereby request a
5 Special Meeting of the Tribal Council within the next three days to discuss a
6 packet of information dated April 25, 2013, from Bureau of Indian Affairs Puget
7 Sound Region Superintendent and professed "Chairman" of the Nooksack
8 Secretarial Election Board, which was apparently mailed to the Nooksack Tribal
Membership in reference to a June 21, 2013 Secretarial Election. As Tribal
Council Resolution #13-53, which appointed a Nooksack Secretarial Election
Board was not lawful, the Tribal Council needs to discuss the matter of the
Secretarial Election now being orchestrated by Ms. Joseph.

9 The requested Special Meeting is further necessitated by your failure to call a
10 regular monthly Tribal Council meeting for both February 5, 2013, March 5,
11 2013, and April 2, 2013, as required by Article II, Section 2 and Article I, Section
12 1 of the Bylaws, and your failure to call the Special Meeting requested by our
13 March 11, 2013 letter to you, as required by Article II, Section 5 and Article I,
14 Section 1 of the Bylaws. You have yet to confirm the Constitutionally required
"first Tuesday" meeting for May 7, 2013. Of course, on February 12, 2013,
March 26, 2013, and April 15, 2013, you called Special Meetings that you saw fit
to call; yet you either (1) did not notify us of a particular meeting, or (2) when we
arrived, you illegally ordered us out of the meeting, in further violation of the
Nooksack Constitution and Bylaws and other Nooksack Tribal Laws.

15 This Special Meeting is further necessitated by the Nooksack constitutional and
16 democratic crisis you and your Council majority have deliberately caused, by
17 refusing to hold a Constitutionally required or duly noticed public Nooksack
18 Tribal Council meeting of any kind for the last three – going on four – months,
19 especially given all that has transpired (or not transpired) within the Nooksack
Tribe during that time span. Among other things, your and your colleagues' unilateral
changes to Nooksack Tribal judicial, voting and membership ordinances, especially the recent moratorium on any further enrollment into the
Nooksack Tribe, require an open and democratic process.

20 *Id.* at Ex. B. As of the date of this Motion, Defendant Kelly has not yet called either Special
21 Meeting requested by Tribal Secretary St. Germain and Councilmember Roberts. *Id.* at ¶ 9.
22 Indeed, he and the other Council Member Defendants have demonstrated utter disregard for the
23 Tribal Constitution and other Nooksack Tribal Law, since at least February 12, 2013.

III. 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).⁴

B. **Plaintiffs Are Likely To Succeed On The Merits.**

1. Sovereign Immunity Does Not Bar This Action.

Because Nooksack Tribal Council Members and their agents are being sued for nonmonetary injunctive relief in their official capacities and have acted beyond the scope of their authority as tribal officers, the Tribe’s sovereign immunity is not implicated in this action. N.T.C. § 10.03.040(b); *Ex parte Young*, 209 U.S. 123 (1908)); *Combrink v. Allen*, 3 Okla. Trib. 46, 1993 WL 831921 (Tonkawa Ct. App. Mar. 5, 1993); *Vann v. U.S. Dept. of Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012).

2. Defendants Are Conducting An Election In Violation Of Article X of the Constitution.

The procedures for calling and approving an election to amend a tribal constitution are codified at 25 U.S.C. § 476 and are relatively easy to follow. Defendants have completely failed to follow those procedures. Once the Secretary receives a qualifying request to hold an election to ratify proposed amendments, the Secretary reviews the legality of the proposed amendments and calls an election within 90 days. 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

⁴ 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).

1 45 days to resolve these election contests, conduct an independent review, and approve or
2 disapprove the election. 25 U.S.C. § 476(d)(1).

3 Here, **Plaintiffs are not challenging the Secretary's determination that Defendants'**
4 **request was "qualifying" under federal law. Instead, Plaintiffs are challenging *Defendants'***
5 **Secretarial election request – which did and does not comply with Article X of the**
6 **Nooksack Constitution.** As such, any action taken pursuant to that request must be enjoined.

7 Article X of the Constitution requires that an amendment be requested by "the tribal
8 council or upon receipt of a petition signed by one-third (1/3) of the eligible voters of the tribe."
9 Section 102 of P.L. 100-581, "25 U.S.C. § 476 note," states that a "'tribal request' means receipt
10 in the Area Office of the BIA having administrative jurisdiction over the requesting tribe, of a
11 duly enacted tribal resolution requesting a secretarial election." Indian Reorganization Act
12 Amendments, H.R. 2677, 100th Cong. (1988) (quoted in *Split Family Group v. Moran*, 232
13 F.Supp.2d 1133, 1136 (D. Mont. 2002)). Resolution No. 13-38 was the "duly enacted tribal
14 resolution" that granted the Tribal Council the authority to request the Secretarial Election. *See*
15 *generally* Johnny Decl., Ex. Q.

16 But Resolution No. 13-38 is unconstitutional. Article IX of the Constitution requires that
17 "the Nooksack Indian Tribe in exercise of its powers of self-government" afford its citizens the
18 rights and privileges codified in the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §§
19 1302, *et seq.* ("ICRA"). Pursuant to ICRA Section 1302(a)(8), a tribe may not "deny to any
20 person within its jurisdiction the equal protection of its laws or deprive any person of liberty or
21 property without due process of law." 25 U.S.C. § 1302(a)(8). This provision of the ICRA
22 "incorporate[s] . . . the safeguards of the Bill of Rights to fit the unique needs of tribal
23 governments" by guaranteeing the equal protection of tribal laws and regulations. *Long v.*
24

1 *Mohegan Tribal Gaming Authority*, 1 Am. Tribal Law 385, 398 (Mohegan Gaming Trial Ct.
2 1997) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 n.14 (1978)).

3 Discriminatory tribal laws and regulations and/or discriminatory application of tribal law
4 and regulation – particularly where motivated by racial animus – do not satisfy the scrutiny
5 applied under Section § 1302(a)(8). As the U.S. Supreme Court has stated, “if the constitutional
6 conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a
7 bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental
8 interest.” *U.S. v. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Likewise, the Court
9 has stated that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly
10 or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (overturning
11 custody order designed to shield child from the stigma of a mixed-race home). Further, “[i]t is
12 plain that the electorate as a whole, whether by referendum or otherwise, [can] not order . . .
13 action violative of the Equal Protection Clause.” *City of Cleburne v. Cleburne Living Ctr.*, 473
14 U.S. 432, 448 (1985) (invalidating zoning law designed to exclude the mentally disabled).

15 In *Nevayaktewa v. Hopi Tribe*, 1 Am. Tribal Law 306 (Hopi Ct. App. 1998), the Hopi
16 Court of Appeals described the applicable law for analyzing an equal protection claim follows:

17 [T]he equal protection clause of the Indian Civil Rights Act . . . should be
18 interpreted with due regard for the historical, governmental, and cultural values of
19 the Indian tribe. . . . [T]he equal protection clause seeks to assure that people who
20 are similarly situated will be treated similarly. . . . **[G]overnmental action**
21 **violates the equal protection clause of the Indian Civil Rights Act [when**
22 **tribal] authorities have treated an individual different from others and this**
23 **difference is based upon bad faith or impermissible grounds like race,**
24 **religion, or the exercise of other constitutional rights.** . . . There are three
levels of scrutiny that are used in judging whether a governmental classification
violates the equal protection clause: strict scrutiny, middle-level review, and mere
rationality review. Strict scrutiny is reserved for distinctions that are based upon a
“suspect classification” or that impair a “fundamental right.” Where strict
scrutiny is invoked, the classification will be upheld only if it is necessary to
promote a compelling State interest. The three suspect classes are race, national

1 origin, and alienage. The fundamental rights are the right to vote and the right to
2 migrate interstate. Under mid-level review, the classification must be
3 substantially related to an important governmental objective. Mid-level review is
4 applied to classification based upon gender and illegitimacy. All other
classifications are subjected to mere rationality review. Under this review, the
classification is upheld as long as it is conceivable that the classification bears a
rational relationship to a legitimate governmental objective.

5 *Id.* at 314-15 (citation omitted; emphasis added). Here, Plaintiffs – and, indeed, all persons
6 targeted for disenrollment – are of Filipino descent and therefore qualify as a “protected class.”
7 See e.g. *Obico v. Mission Creek Sr. Community*, No. 11-3932, 2013 WL 622937, at *5 (N.D.
8 Cal. Feb. 15, 2013) (“[Plaintiff] is Filipino and, thus, belongs to a protected class . . .”).

9 Resolution No. 13-38 must thus be reviewed under the “strict scrutiny” standard: if
10 Plaintiffs can establish an “intent or purpose to discriminate,” the burden then shifts to
11 Defendants to prove that the tribal law is “necessary to promote a compelling State interest.” See
12 e.g. *Gaalla v. Brown*, 460 Fed.Appx. 469, 478 (5th Cir. 2012) (“[A] finding that [a] Resolution
13 was motivated by a discriminatory purpose dictates that . . . the Resolution [is subjected] to strict
14 scrutiny.”). At the TRO stage, however, generally, **if Plaintiffs can prove intentional**
15 **discrimination to any degree, the TRO must issue.** See *L.A. Unified Sch. Dist. v. U.S. Dist.*
16 *Ct.*, 650 F.2d 1004, 1009 (9th Cir. 1981) (holding that a showing of “discriminatory purpose . . .
17 present[s] a ‘serious question’” that mandates the issuance of a TRO). Plaintiffs have done so.

18 *a. Resolution No. 13-38 Was Enacted With Intent Or Purpose To Discriminate*
19 *Against Plaintiffs.*

20 There are three ways that a plaintiff might demonstrate “intent or purpose to
21 discriminate.” *High*, 168 F.3d at 499. First, a law or policy that is facially “motivated by an
22 animus toward a protected class,” regardless of the actual effect of that law or policy, is violative
23 of the ICRA and will be stricken down. *Hawkins v. Eslinger*, No. 07-1261, 2008 WL 215710, at
24 *8 (M.D. Fla. Jan. 24, 2008). A second alternative is to show that a “facially neutral” law or

1 policy is “nonetheless applied by government actors in a discriminatory manner.” *Boston’s*
2 *Children First v. Boston School Committee*, 260 F.Supp.2d 318, 331 (D. Mass. 2003); *see also*
3 *Nunez v. Cuomo*, No. 11-3457, 2012 WL 3241260, at *15 (E.D.N.Y. Aug. 17, 2012) (“Because
4 discriminatory intent is rarely susceptible to direct proof, a party may state an intentional
5 discrimination claim based on circumstantial evidence of intent, such as the disparate impact the
6 complained of conduct has on a particular group.”) (quotation omitted). And finally, a facially
7 neutral law or policy “may be shown to have been motivated by a discriminatory animus and, as
8 applied, has a discriminatory effect.” *Boston’s Children*, 260 F.Supp.2d at 331 (citing *Soto v.*
9 *Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997)). What each of these showings has in common is
10 “the element of intentional discriminatory conduct on the part of government actors.” *Id.* Thus,
11 if Plaintiffs can prove intentional discrimination to any degree, a TRO must issue. *L.A. Unified*
12 *Sch. Dist.*, 650 F.2d at 1009.

13 In determining animus, courts will look to statements surrounding the adoption of a law.
14 In *Moreno*, the Court struck down a food-stamp regulation where legislative history indicated
15 that it was intended to bar “hippies.” 413 U.S. at 534. Likewise, in *Romer v. Evans*, the
16 Supreme Court invalidated a state constitutional amendment prohibiting government action to
17 protect homosexuals from discrimination, stating that “the reasons offered for . . . the amendment
18 seem inexplicable by anything but animus toward the class it affects.” 517 U.S. 620, 632 (1996).
19 Courts have particularly objected to animus-motivated changes in laws that revoke a privilege or
20 benefit. For instance, in *Romer v. Evans*, the Court noted that the amendment at issue
21 “withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused
22 by discrimination.” *Id.* at 627. The Ninth Circuit similarly struck down a California amendment
23 eliminating the right to marry for same-sex couples, finding it significant that the amendment
24

1 withdrew a legal right “notwithstanding the fact that the Constitution did not compel the state to
2 confer it in the first place.” *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012).

3 Resolution No. 13-38 was clearly motivated by animus toward an identifiable group.
4 Evidence of animus on the part of portions of the Nooksack Tribe toward the descendants of
5 Annie George, based at least in part because of their Filipino heritage, was publicly aired in the
6 media as long as thirteen years ago; and efforts to disenroll her descendants date at least to 1996.
7 See generally Luis Cabrera, *Nooksacks Allege Filipino Family Has Conquered Tribe From*
8 *Inside*, L.A. TIMES, Oct. 15, 2000, available at [http://articles.latimes.com/2000/oct/15/local/me-](http://articles.latimes.com/2000/oct/15/local/me-36765)
9 [36765](http://articles.latimes.com/2000/oct/15/local/me-36765).⁵

10 The current effort to amend the Constitution to restrict tribal membership by eliminating
11 Section 1(H), culminating in the passage of Resolution No. 13-38, was clearly sparked by the
12 most recent attempts to disenroll the 306 Filipino members of the tribe descended from Annie
13 George. Chairman Kelly’s recent mailing of information about the Secretarial Election to all
14 tribal members **except those facing disenrollment** is further proof that the proposed amendment
15 is specifically intended to strip a particular portion of the Nooksack tribe of their membership.
16 See e.g. Declarations of Plaintiffs Sonia Lomeli and Norma Aldredge, at ¶¶ 4-5.

17 Chairman Kelly’s unauthorized letter states that Section 1(H) is detrimental because it
18 “opens up enrollment to large groups or families that have much weaker ties to Nooksack than
19 the rest of us.” Chairman Kelly’s express purpose for the election is to control the “cultural
20 identity of the Nooksack Tribe.” Second Doucette Decl., Ex. B. Likewise, Defendants’ make
21

22 ⁵ Again, defense counsel have interjected that storyline into this dispute, via a March 22, 2013,
23 posting to the “Turtle Talk” Facebook page. See Thomas Schlosser, Comment to *Is Nooksack*
24 *Attempting to Disenroll Filipino Descendants?*, Turtle Talk: Official Blog of the IL&PC, Mar.
22, 2013, <https://www.facebook.com/pages/Turtle-Talk-Official-Blog-of-the-ILPC/53641911011>
(citing Luis Cabrera, *Nooksacks Allege Filipino Family Has Conquered Tribe From Inside*).

1 obvious, in their unauthorized postcard propaganda that was also mailed to all tribal members
2 **except those facing disenrollment**, their efforts to “close a loophole in our tribal constitution . .
3 . and protect the cultural identity of our Nooksack Tribe.” Second Doucette Decl., Ex. C; see
4 also Ex. C to Fourth St. Germain Decl. (“In June, you’ll be voting on whether or not to close a
5 loophole in our Tribal Constitution . . . and protect the cultural identity of our Nooksack Tribe.”).

6 What is more, the fact Defendants have not even made reasonable efforts to notify many
7 Canadian-Filipino Nooksacks of the Secretarial Election in time for them to register to vote via
8 mail, provides even further proof of racial animus in application. *See generally* Declaration of
9 Shawna Williams; Declaration of Gina Rabang; Declaration of Carol Cailing; Declaration of
10 Keith Calling; Second Declaration of Plaintiff Terry St. Germain. *See also* Second Doucette
11 Decl., at ¶¶ 10-11 (“the several hundred Nooksack members living in Canada have not been
12 allowed enough time to register for the Secretarial election being promoted by the BIA and
13 Chairman Kelly.”); *id.* at ¶ 12 (“the rather accelerated pace of this Secretarial election, in
14 addition to the selective mailings and propaganda from Chairman Kelly, make me seriously
15 question whether this election is being conducted for a proper purpose and otherwise in a good
16 way.”).

17 Seldom is such patently discriminatory legislative purpose expressed so clearly by rogue
18 governmental actors. The Tribal Council’s unconstitutional substitution of special meetings for
19 regular monthly meetings, exclusion of councilmembers facing disenrollment, and passage of
20 numerous resolutions designed to exclude dissident voices from participation in tribal politics,
21 such as the new nepotism policy, provide further evidence that the Tribal Council’s actions are
22 motivated by animus toward a protected class.

1 b. *Resolution No. 13-38 Is Not Narrowly Tailored To Advance A Compelling State*
2 *Interest.*

3 As noted above, “[u]nder the strict scrutiny standard, a law ‘must serve a compelling
4 government interest and must be narrowly tailored to serve that interest.’” *Trefelner ex rel.*
5 *Trefelner v. Burrell School Dist.*, 655 F.Supp.2d 581, 596 (W.D.Pa. 2009) (quoting *Blackhawk v.*
6 *Pennsylvania*, 381 F.3d 202, 209 (3rd. Cir. 2004)). Were Plaintiffs required to demonstrate
7 anything more than intentional discrimination in order for a TRO to issue – they are not –
8 Defendants have not offered any compelling interests justifying their decision to pass and
9 discriminatorily apply Resolution No. 13-38.

10 Defendant cannot articulate any compelling reasons for the policy that it advances.
11 Indeed, an examination of the evidence reveals few, if any, articulated, legitimate,
12 nondiscriminatory explanations for the Defendants’ treatment of the targeted Nooksacks.
13 Resolution No. 13-38 proffers vague “best interests of the tribe” in striking Section 1(H) from
14 the Constitution because the provision “is so ambiguous that it cannot be fairly applied and has
15 potential for abuse.” Johnny Decl., Ex. Q. But the record simply does not provide that this is an
16 adequate justification. In fact, there is little or no empirical evidence that establishes a reason to
17 modify the Constitution. *See e.g. Cowan-Watts v. Smith*, 10 Am. Tribal Law 297, 299 (Cherokee
18 Sup. Ct. 2010) (finding an act of the Tribal Council unconstitutional where there was “little or no
19 empirical evidence” to support the “compelling government interest” offered). The Resolution
20 does not provide how provision is “ambiguous” – indeed, Section 1(H) is quite straightforward –
21 or how it “has potential for abuse.” Johnny Decl., Ex. Q.

22 Informed by Chairman Kelly’s and Defendants’ unauthorized mailings to selected tribal
23 members, however, it becomes quite clear that the intent is to *permanently* disenroll the 306
24 Filipino members of the tribe that descended from Annie George. This is not a compelling

1 governmental interest – or, at the least, is not the stated purpose of Resolution No. 13-38 under
2 which the law must be analyzed. The letter from Chairman Kelly represents that the removal of
3 Section 1(H) will have no effect on current enrollment. Second Doucette Decl., Ex. B (“Q: How
4 does this affect my enrollment? [A:] It Doesn’t.”). But this is not true. The 306 Filipino
5 Nooksacks that are all being targeted for disenrollment undoubtedly qualify as Nooksack under
6 at least Section 1(H). Their qualification for membership under Section 1(H) is beyond dispute.

7 Plaintiffs have stated a claim arguing that the deprivation of their right to membership
8 under Section 1(H) vis-à-vis Resolution No. 13-02, regardless of what is written on their
9 application papers, is unconstitutional. Defendants have countered that the purpose of the
10 disenrollment proceedings is merely to “clean up the rolls.” According to Defendants, the most
11 efficient way to do this is to disenroll those Nooksacks who happen to have been enrolled under
12 other Sections of the Constitution – all who just happen to be of Filipino ancestry – and then to
13 have them “submit a new application for membership” under Section 1(H), under which they all
14 qualify. Defendants' Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order,
15 at 28.

16 Defendants have yet to promulgate rules and regulations for the disenrollment
17 proceedings, however, and it is extremely unlikely that they will conduct any disenrollment
18 “meetings” prior to the Secretarial Election in June – not with affording any type of due process
19 anyway. By the time that Plaintiffs are disenrolled, so Defendants’ plan goes, there will be no
20 Section 1(H) under which to reenroll. Thus, even assuming that preventing persons with “much
21 weaker ties to Nooksack” from *new* membership is a compelling governmental interest,
22 Resolution No. 13-38 is not narrowly tailored to advance that interest, as it permanently
23 disenrolls *current* members. See *Blackhawk*, 381 F.3d at 214 (a policy, law, or regulation is not
24

1 narrowly tailored is does not withstand strict scrutiny); *Arizona Right to Life Political Action*
2 *Committee v. Bayless*, 320 F.3d 1002, 1011 (9th Cir. 2003) (even assuming that a statute “bears a
3 substantial relationship to the state’s [compelling] interest . . . , the statute still fails to satisfy
4 strict scrutiny [where] it is not narrowly tailored to serve th[at] interest”). Defendants’ stated
5 compelling interest, therefore, does not pass muster when subjected to strict scrutiny.

6 Since, at this stage, Plaintiffs have demonstrated a reasonable probability that they will
7 succeed on the merits of their argument that Resolution No. 13-38 is not both neutral and
8 generally applicable, and because Plaintiffs have shown a reasonable probability that they will
9 prevail on the merits with respect to the issue whether the policy is narrowly tailored to advance
10 a compelling interest, Plaintiffs will succeed on the merits.

11 *c. Resolution No. 13-38 Does Not Bear A Rational Relationship To A Legitimate*
12 *Governmental Objective.*

13 Even assuming that Plaintiffs are not a protected class – they clearly are – it is not is
14 conceivable that Resolution No. 13-38 bears a rational relationship to a legitimate governmental
15 objective. Plaintiffs simply cannot show a legitimate governmental objective. Resolution No.
16 13-38, in application, as admitted by Chairman Kelly in his letter to non-Filipino-disenrollee
17 Nooksacks, serves only to prevent those Filipino Nooksacks that have been targeted for
18 disenrollment from remaining enrolled members of the Tribe. *See generally* Second Doucette
19 Decl., Ex. B. But “catering to private prejudice is not a legitimate government interest.” *Shahar*
20 *v. Bowers*, 114 F.3d 1097, 1125 (11th Cir. 1997) (citing *City of Cleburne v. Cleburne Living*
21 *Center*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); *see also Philips*
22 *v. Perry*, 106 F.3d 1420, 1438 (9th Cir. 1997) (“[A]ccommodation of the biases of others is not a
23 legitimate government interest.”). Indeed, to the extent that Resolution No. 13-38 works in
24 tandem with other Resolutions to unconstitutionally deprive currently enrolled Nooksacks of

1 tribal membership, “[t]he Tribe can have no legitimate interest in impermissibly applying an
2 invalid law to [limit] Tribal membership.” *Gomez v. Confederated Tribes of Grand Ronde*, 5
3 Am. Tribal Law 117, 121 (Grand Ronde Tribal Ct. 2004).

4 Because Resolution No. 13-38 is an unconstitutional Tribal law, actions taken pursuant to
5 that Resolution, including Defendants’ subsequent establishment of an Election Board, must be
6 enjoined. Plaintiffs will prevail on the merits of this claim.

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

9 Article II, Section 2 of the Nooksack Constitution requires that “[t]he Tribal Council
10 **shall** meet regularly on the first Tuesday of each month.” (emphasis added).

11 On February 4, 2013, Defendant Chairman Robert Kelly canceled the monthly “first
12 Tuesday” General Meeting required by the Tribe’s Bylaws, stating that “a regular meeting would
13 be improper because two of the Council Members were not eligible for Nooksack enrollment.”
14 First Declaration of Rudy St. Germain, at ¶ 6. Since that date, Defendants have inhibited the
15 Tribal Council from holding a regularly scheduled General Meeting on the first Tuesday of each
16 month – now for four consecutive months.⁶ That the Defendants have inhibited the holding of
17 these monthly meetings has been admitted. *See* Defendants’ Brief in Opposition to Plaintiffs’
18 [First] Emergency Motion for Temporary Restraining Order, at 5 (“Council did not hold a
19

20 ⁶ As a Tribal member commented to Defendants on the afore-referenced Nooksack Communications Facebook page
in regard to the disenrollment via Secretarial Election:

21 I understand that Facebook is a way to communicate to some tribal members. What is the “tribe”
22 doing to reach out to those not on facebook? Every single tribal member should have a voice in
this serious matter. Why didn’t council and Chairman have an open discussion with the general
23 council? If council and Chairman are going to make a resolution they should have asked for input.
I believe council and Chairman should be transparent and not make decisions behind closed doors
without disseminating the information to the Tribal membership.

24 Fourth St. Germain Decl., Ex. A.

1 regularly scheduled meeting on the first Tuesday in January 2013.”). Plaintiffs will prevail on
2 the merits of this claim.

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

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

10 On March 11, 2013, Tribal Council Secretary Rudy St. Germain and Councilmember
11 Michelle Roberts wrote to Defendant Chairman Robert Kelly in request of a special meeting,
12 pursuant to Article II, Section 5 of the Bylaws, “to discuss [his] March 6, 2013 letter to the
13 Nooksack Tribal Membership regarding the ‘involuntary disenrollment of numerous members of
14 the Nooksack Tribe.’” Fourth St. Germain Decl.”), at ¶ 9. Mr. St. Germain and Ms. Roberts
15 wrote:

16 As this letter was not properly authorized by a quorum of the Tribal Council, at
17 least to our knowledge, the Tribal Council needs to discuss the matter of your
18 letter. The requested special meeting is further necessitated by your failure to call
19 a regular monthly Tribal Council meeting for both February 5, 2013 and March 5,
20 2013

21 *Id.* As of the date of this Motion, Defendant Robert Kelly has not yet called either Special
22 Meeting. This, despite numerous urges by Mr. St. Germain and Ms. Roberts. *Id.* at ¶¶ 10-11, 16,
23 20, 22, 25-26.

24 Plaintiffs will prevail on the merits of this claim.

1 **C. Plaintiffs Are Being And Will Be Irreparably Harmed.**

2 Plaintiffs have shown that the above acts and actions of Defendants' are preempted by
3 the Constitution. Plaintiffs' Nooksack constitutional rights would be damaged if the acts and
4 actions proposed by Defendants were enforced against them. "The loss of these rights
5 constitutes an irreparable injury that cannot be compensated by remedies at law." *United Food*
6 *& Commercial Workers Local 99 v. Bennett*, No. 11-0921, 2013 WL 1289781, at *39 (D. Ariz.
7 Mar. 29, 2013); *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059
8 (9th Cir. 2009) ("Unlike monetary injuries, constitutional violations cannot be adequately
9 remedied through damages and therefore generally constitute irreparable harm."); *Mills v.*
10 *District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that
11 the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes
12 irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); 11A Wright & Miller,
13 FED. PRAC. & PROC. § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional
14 right is involved, most courts hold that no further showing of irreparable injury is necessary.").

15 **D. The Balance Of Hardships Mandates An Injunction.**

16 The balance of hardships among Plaintiffs and Defendants tip *sharply* in favor of
17 injunction. Plaintiffs seek only to preserve the *status quo*. There is no hardship on Defendants if
18 the *status quo* prevails pending trial. Plaintiffs and similarly situated Nooksacks have been tribal
19 members for decades. Defendants would suffer no harm in being enjoined from enforcing
20 unconstitutional laws, so the balance of hardships tips in favor of the Plaintiffs. *Bennett*, 2013
21 WL 1289781, at *39.


1 **E. The Nooksack Public Interest Favors Injunction.**

2 The Nooksack People have a profound interest in the constitutional and even application
3 of Nooksack Laws, the protection of individuals from the power of Nooksack Tribal
4 Government, and the orderly review by the Court of Defendants' actions or deliberate inaction.
5 It is thus in the public interest to enjoin laws that violate Nooksack Constitutional rights.

6 **IV. CONCLUSION**

7 Plaintiffs respectfully move that this Court temporarily enjoin Defendants from taking
8 any actions in furtherance of Resolution No. 13-3, and further impeding those Nooksack
9 democratic processes mandated by the Nooksack Bylaws, Article II, Section 2, and Article II,
10 Section 5. That in addition to issuance of a preliminary injunction on Plaintiffs' first emergency
11 motion, to enjoin Defendants from proceeding any further in the illegal and unconstitutional
12 disenrollment of 306 Enrolled Nooksack Members.

13 DATED this 7th Day of May, 2013.

14 
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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 for Plaintiffs.

SECOND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER
WITH 24 SUPPORTING DECLARATIONS AND [PROPOSED] ORDER GRANTING
SECOND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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DATED this 7th day of May, 2013.


ALICE HALL