IN THE NOOKSACK TRIBAL COURT

MICHELLE JOAN ROBERTS, et al., 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; and AGRIPINA "LONA" JOHNSON, Councilmember of the Nooksack Tribal Council, in their official capacities, Defendants.	Case No. 2013-CI-CL-003 SECOND MOTION FOR TEMPORARY RESTRAINING ORDER ***Telephonic Hearing Requested By Friday, August 23, 2013, at 10:00AM***

I. INTRODUCTION

On August 6, 2013, this Court issued an Order Granting Defendants' Motion to Dismiss Second Amended Complaint Plaintiffs in *Lomeli v. Kelly*. The August 6 Order held that tribal sovereign immunity prevented injunctive relief against the named Defendants because they did not violate (a) N.T.C. § 63.04.001 when they initiated disenrollment proceedings against Plaintiffs, (b) the Nooksack Constitution when they targeted an identifiable group for disenrollment, and (c) the Nooksack Bylaws when they failed to call a series of First Tuesday

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meetings. The Court also held that the *Lomeli* Plaintiffs lacked standing to bring claims for violations of Article II, Section 5 of the Bylaws.

Emboldened by their win, Defendants began to brazenly disenroll Tribal members. On August 8, 2013, Defendants met in secret and without notice to Tribal Councilpersons Rudy St. Germain or Michelle Roberts, and passed procedures titled "TRIBAL COUNCIL PROCEDURES FOR INVOLUNTARY DISENROLLMENT MEETINGS"[1] that violate due process, codified Nooksack law, and an open-Court promise by Defendants' counsel and a memorialized agreement between the parties. On August 13, Defendants summarily, and without any hearing or meeting whatsoever, disenrolled Plaintiffs Rose A. Hernandez, Cody M. Narte, Nadine L. Rapada, and Kristal M. Trainor. Defendants did so in reaction to the *Lomeli* Plaintiffs' Notice of Appeal, as well as an Emergency Motion to Stay Pending Appeal to the Nooksack Court of Appeals, on August 12.

Also on August 13, Plaintiffs filed the above-captioned action, along with a Motion for Temporary Restraining Order ("TRO"), that seeks to ensure that if disenrollment proceedings are to move forward, they would be conducted in a lawful manner. On August 14, the Nooksack Court of Appeals granted the stay of this Court's August 6 Order in *Lomeli*, ordering that "disenrollment proceedings authorized by the [August 6] order and judgment shall be stayed." On August 15, the Court in this action issued an Order in the above-captioned case, holding that "the Nooksack Court of Appeals has stayed all disenrollment proceedings. Therefore, this Court need not issue a [TRO] enjoining the disenrollment proceedings as they are already stayed." On August 20, however, the Court of Appeals issued an Order on Motion for Clarification in *Lomeli*,

[1] Hereinafter ("Disenrollment Procedures").

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holding that its "August 14 Order was intended to apply only to the [six] named Plaintiffs/Appellants" in that action.[2]

In response, the very next day, on August 21, the Court in this action issued an Order Denying Emergency Temporary Restraining Order, but one that only "applied to [the] three Plaintiffs alone." On that same day, these Plaintiffs filed and served upon Defendants a First Amended Complaint in the above-captioned action, adding 272 plaintiffs and five more causes of action.

On August 13, 2013, Plaintiffs Adeline Gladstone Parker, Anthony Eugenio Rabang, Daniel Rapada, Francine Adams, Gerald Rapada, Gilda Corpuz, Honorato Roberto Rapada, James Dean Rapada, Olive Theresa Oshiro, Priscilla Carr, Reconar Andrew Rapada, Robert James Rabang Sr., and Sonia Marie Lomeli were mailed notices indicating that their disenrollment hearings are set for August 30.[3] Now, those disenrollment hearings are back on.[4] Under one of the response-date requirements — one of three, which are in conflict — written materials for those hearings are due **today, August 22**. Until yesterday, these hearings were stayed by the *Lomeli* appellate court. That means, effectively, Plaintiffs were given a mere two days notice to prepare their responses to the disenrollment hearing notices.

Yesterday, Plaintiffs Michelle Joan Roberts and Rudy St. Germain were served with disenrollment notices that set their hearing for August 28[5] — at 3:00 and 10:10 PM, respectively — leaving mere hours, under the Disenrollment Procedures, to prepare and file written materials

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[2] Defendants object to the notion that only six individuals were Plaintiffs in the *Lomeli* litigation due, in part, to the Stipulation regarding a representation list that Plaintiffs furnished to Defendants in that matter, then supplemented upon Defendants' request, and due to the fact that Plaintiffs always maintained that their lawsuit was on behalf of them individually and all other individuals similarly situated.

[3] Post-Hearing Declaration of Gabriel S. Galanda in Support of Motion for Temporary Restraining Order (filed Aug. 14, 2013) ("First Galanda Decl."), Ex. A.

[4] At least presumably, as Defendants will not confirm or deny that they are.

[5] Declaration of Nooksack Tribal Councilwoman Michelle Joan Roberts (filed Aug. 22, 2013) ("Second Roberts Decl."), Ex. A.

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that will determine the fate of their identity and livelihood, for generations to come. Ms. Roberts was also immediately fired from the position that she held with the Tribe for six years.

Each of the 275 Plaintiffs identified in this matter face imminent disenrollment under accelerated and omnibus telephonic hearings that violate the Nooksack Constitution, Nooksack statute and procedure, and previously agreed upon obligations entered with this Court as a Stipulation. Under the Disenrollment Procedures, Defendants have set hearings on "shortened time" and with virtually no notice. Defendants have also stripped all targeted Nooksacks of their ability to be represented by legal counsel, despite having previously promised and stipulated in open Court that their lawyers could appear at the hearings. Defendants have further provided targeted Nooksacks no more than ten minutes on a telephone to present a case to the Tribal Council. Finally, the standards promulgated by Defendants governing whether the government has met its burden of proof for disenrollment of Nooksacks are entirely arbitrary, unreasonably vague, and ambiguous.

Thus, Plaintiffs request a TRO on an emergency basis and request immediate relief in the form of an explicit order **enjoining Defendants' disenrollment actions against all Plaintiffs until procedures that comply with Nooksack Constitution, codified Tribal law, and stipulations between the parties are fulfilled**. This requested *equitable* relief is not affirmative; it is *prospective*. Plaintiffs are not asking that the Court order Defendants to do anything; only that it order Defendants to maintain the *status quo* pending resolution of the controversy. In other words, Plaintiffs are simply asking that the Court order Defendants to do nothing; to take no action; to maintain the *status quo*. Clearly, maintaining the *status quo* does not mean allowing Defendants to move forward with the same acts and omissions that the TRO seeks to pronounce illegal. Rather, "[t]he *status quo* means 'the last, uncontested status which preceded the pending controversy.'" *Doe v. Samuel Merritt University*, 921 F.Supp.2d 958, 963

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(N.D. Cal. 2013) (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir.2009)). Without a doubt, the "last uncontested status which preceded the existence of the pending controversy" existed at some point prior to the initiation of the disenrollment process and the publication of illegal Disenrollment Procedures.

Plaintiffs have met the four threshold elements for a TRO, and therefore, a TRO is required to immediately preserve fundamental rights and prevent certain irreparable harm that will result if this Court fails to act. Indeed, this case illustrates the very circumstances temporary restraining orders are meant to address: there are serious questions going to the merits; Plaintiffs face extraordinary risk of irreparable harm (Defendants are trying to make Plaintiffs non-Indian); and the balance of hardships is not a balance at all — there is no hardship in Defendants waiting to disenroll Plaintiffs. In addition, and as a result, the Nooksack public interest mandates a stay. The orderly resolution of this intra-Tribal dispute is in the best interests of all Nooksacks. There is no public interest in the chaos of Tribal non-governance being foisted upon the Nooksack people by Defendants and this Court. To ensure that it handles this case correctly, before it is too late, the Court should immediately enjoin Defendants to give all parties the breathing room and time for an orderly disposition of the case at bar.

Alternatively, Plaintiffs ask this Court to issue a short stay of disenrollment proceedings, *i.e.,* until the Court rules upon Defendants' Motion to Dismiss in the next couple weeks. The stay, too, would allow the Court a chance for orderly disposition of this case.

II. FACTS

Plaintiffs incorporate through this reference any and all facts and evidence separately set forth in the brief on Plaintiffs' Emergency Motion for Temporary Restraining Order and its supporting materials as if fully set forth herein. Otherwise, the following additional evidence is respectfully offered as support for this Second Motion for TRO.

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A. The March 2013 Stipulation

On March 20, 2013, the parties previously before this Court on case number 2013-CI-CL-001 and now under appeal, filed with this Court a stipulation ("Stipulation") executed by Mr. Grett Hurley, counsel for Defendants, and Mr. Gabriel Galanda, counsel Plaintiffs.[6] The Stipulation resulted from promises made on Defendants' behalf by Thomas Schlosser, Esq., in open Court, before Pro Tem Judge Randy Doucet on March 18, 2013. In pertinent part, the Stipulation memorializes the following:

- By April 13, 2013,[7] Plaintiffs were to "furnish a list of those individuals for whom [Galanda Broadman, PLLC is] authorized to act in this matter and in the related proceedings regarding disenrollment of certain Nooksack Tribal Members . . . ."[8]
- "No person will be disenrolled prior to completion of the meetings before Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council."[9]

B. The list of individual litigants includes 275 Nooksacks, four of whom have already been disenrolled despite the Defendants' stipulated-to promise that they would provide a meeting with Tribal Council prior to disenrollment of any and all targeted Nooksack Tribal Members.

On April 12, 2013, the Plaintiffs timely submitted a list of 267 individuals whom Plaintiffs represent in that lawsuit and here in the instant litigation.[10] On May 13, 2013, the Plaintiffs furnished a supplement to the April 12 list of individual litigants after Defendants requested assurances that all individual Plaintiffs had been properly named.[11] This list includes, among 271 others: (1) Rose A. Hernandez, (2) Cody M. Narte, (3) Nadine L. Rapada, and (4) Kristal M. Trainor. Defense counsel did not object to the supplementation.

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[6] Stipulation dated March 19, 2013, and entered with this Court on March 20, 2013. *See* Second Declaration of Gabriel S. Galanda (filed Aug. 22, 2013) ("Second Galanda Decl."), at ¶ 4, Ex. A.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* Ex. B.
[11] *Id.* Ex. C.

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Three days after this Court handed down its August 9, 2013 Judgment dismissing Defendants' previous action for declaratory and injunctive relief — principally, to stop the disenrollment efforts against them — Defendants summarily, and without any hearing or meeting whatsoever, disenrolled (1) Rose A. Hernandez, (2) Cody M. Narte, (3) Nadine L. Rapada, and (4) Kristal M. Trainor.[12] In their Notices of Disenrollment, Defendants claim that these individuals did not formally request a disenrollment meeting or hearing with Tribal Council, notwithstanding the unambiguous terms of the Stipulation where Defendants promised that **"[n]o person will be disenrolled prior to completion of the meetings before Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council**."[13] The Stipulation could not be more clear. Rose A. Hernandez, Cody M. Narte, Nadine L. Rapada, and Kristal M. Trainor, however, received no meeting. Instead, Defendants reneged on their promise and disenrolled four Plaintiffs summarily, without even the pretense of due process.

C. Defendants promised to afford Plaintiffs the benefit of legal counsel throughout their disenrollment proceedings, but have now stripped Plaintiffs of the right to counsel in the meeting.

Defendants promised that all individual litigants identified by Plaintiffs' counsel as their clients would be afforded legal representation in the instant litigation "and in the related proceedings regarding [Plaintiffs'] disenrollment."[14] But in the Disenrollment Procedures, Appellees have expressly prohibited Plaintiffs from having the benefit of legal counsel at their disenrollment meetings, which are scheduled for telephonic hearing. Specifically, Section III "DEFINITIONS" of the Disenrollment Hearing Procedures defines "Attendants and Participants" as "those persons authorized to participate in or attend the Meeting. **These persons**

[12] *Id.* Ex. E
[13] *Id.* Ex. A
[14] *Id.*

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are limited to Tribal Council Members, Nooksack Tribe Administrative Officials and Employees approved by the Tribal Council."[15] Thus, in the final administrative meeting involving complex issues of fact and law, Defendants have barred Plaintiffs from having the benefit of legal counsel while allowing Defendants' counsel to attend the hearing as a tribal employee.

Because this is a civil proceeding, it is understood that Plaintiffs are not entitled to appointed counsel. But the right to appointed counsel is not what the Disenrollment Procedures (or Plaintiffs' TRO motions) address. Rather, the Disenrollment Procedures categorically disallow Nooksacks from being represented at their hearing at their own expense — while a team of inside and outside counsel will very likely be present and actively prosecuting these matters for the Tribal Council.[16] It has consistently been held that "[u]nder notions of due process," governments must allow individuals "'the procedures which have traditionally been associated with the judicial process,' such as representation by counsel, 'when government agencies adjudicate or make binding determinations with directly affect the legal rights of individuals.'" *Prestopnik v. Whelan*, 253 F.Supp.2d 369, 374 (N.D.N.Y. 2003) (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)); *see also generally Prosser v. Butz*, 389 F.Supp. 1002 (D.C. Iowa 1974).

D. Defendants are discriminating against certain Appellant Nooksack children who have not yet been disenrolled by barring those children from receiving education funds.

In addition to the foregoing documented willingness of Defendants to renege on promises made under a court-entered stipulation, Defendants are now openly discriminating against children and students, ages 3 through 19, who are facing disenrollment — but who are not yet disenrolled and therefore still members of the Nooksack Tribe — by withholding education

[15] *Id.* Ex. F.

[16] At the least, Defendants' counsel are permitted at the sole discretion of the Tribal Council under the Disenrollment Procedures.

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funds from those children. Not only does this per se violate Article IX of the Nooksack Constitution's mandate that "[a]ll members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law," but this is also being done without notice, a hearing, or an opportunity to be heard.

On a Facebook post uploaded to the "Nooksack Indian Tribe Communications Page" on August 20, 2013, the Appellees (or their agents) make the following announcement:

> Back to School Support for the 2013-2014 school year will be in the amount of $275.00 each. The $275 is to be used for school clothing and school supplies for the Nooksack Tribal Children . . .
>
> Students who are enrolled in the Nooksack Tribe, **and not subject to Nooksack disenrollment proceedings**, and are aged 3-4 years old with proof of head start enrollment will be eligible for a $275 check . . .
>
> Students who are enrolled in the Nooksack Tribe **and not subject to Nooksack disenrollment proceedings**, and are aged 5-14 years old will be eligible for a $275 check . . .
>
> Students who are enrolled in the Nooksack Tribe, **and are not subject to Nooksack disenrollment proceedings**, and are aged 15-19 years old with proof of high school enrollment will be eligible for a $275 check.
>
> Students who are enrolled in the Nooksack Tribe, **and are not subject to Nooksack disenrollment proceedings**, and are aged 15-19 years old with proof of GED enrollment will be eligible for a $275 check.[17]

Numerous Plaintiffs with children have already been and will be continue to be immediately harmed unless Defendants are enjoined from carrying out this plan.

E. The Tribal Council Procedures For Involuntary Disenrollment Meetings.

Defendants' Disenrollment Procedures:

- Forbid a Disenrollee from being represented by counsel during his or her disenrollment meeting[18] — in contravention of a March 20, 2013 Tribal Court-entered Stipulation

[17] *Id.* Ex. G.
[18] Sec. VI, C.

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whereby the Tribe acknowledged that Galanda Broadman, PLLC was "authorized to act in . . . the related proceedings regarding disenrollment" on behalf of Plaintiffs;

- Allow a Disenrollee "a maximum of ten (10) minutes to present his or her case"[19] — which is a wholly insufficient amount of time for a Tribal Member to, on their own, prepare and advocate a final defense against disenrollment;

- Require a Disenrollee's response papers and supporting evidence to be filed "no later than five (5) calendar days prior to the scheduled Meeting"[20] – which time will have already lapsed by the time for at least one Plaintiff; and

- Require that meetings "be held v [sic] telephonically via conference call," rather than in person[21] – thereby practically depriving the Disenrollee from his or her proverbial day in court.

Given the imminent and permanent disenrollment Plaintiffs face under rules that deprive Plaintiffs of the most fundamental of substantive and procedural due process rights, the TRO requested is absolutely and immediately necessary to ensure that the Plaintiffs' rights are not further irreparably violated.

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).

B. Plaintiffs Are Likely To Succeed On The Merits.

1. Sovereign Immunity Does Not Bar This Action.

[19] Sec. VI, H.

[20] Sec. V. Although a regulation titled "What to Expect for Your Meeting" provides that "[a]t least three (3) hours prior to your meeting you must provide a written response, or any documentation you wish the Tribal Council to consider in anticipation of your meeting (no documentation or response will be accepted after this deadline)." So which is it: five days or three hours? Second Galanda Decl., Ex. H.

[21] Sec. VI, B.

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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. Plaintiffs are suing Defendants, ***in their official capacities***, for prospective injunctive relief that that enjoins Defendants from taking affirmative acts that violate Nooksack Law. As this Court has recently acknowledged in its August 21, 2013 Order Denying Emergency Temporary Order: "If the Procedures of Title 63 and Resolution 13-111 violate procedural due process, . . . then the Court may provide injunctive relief, prohibiting the Defendants from proceeding under Title 63 and Resolution 13-111." Here, such relief is necessary to prevent illegal acts and the application of unconstitutional official action and does not implicate the Tribe's sovereign immunity.[22]

2. Defendants' Are Violating Nooksack Law And Plaintiffs' Constitutional Rights.

The August 9, 2013 Notices of Disenrollment Meetings open with the generic salutation "Dear Disenrollee," and dictate that the Disenrollee's "meeting with Tribal Council to consider the current Notice of Intent to Disenroll will be scheduled as follows: DATE: August 16, 2013 — TIME: 10:00 am — PLACE: Teleconference . . ." The Notice conceded that it "[was] called on shortened time," but warns that a "failure to attend [the] meeting at the designated time and date, may result in [the targeted Nooksack's] disenrollment from the Nooksack Indian Tribe." Further, these Notices of Disenrollment Meetings appear to be set in omnibus fashion. Thus, Defendants indented to deprive the Plaintiffs they feel at liberty to disenroll in light of the Nooksack Court of Appeals narrowing of its Stay Order of the Plaintiffs' individually set meeting before Tribal Council on a matter of such fundamental importance, as is their right under Nooksack law.

[22] If the court finds that the doctrine of *Ex parte Young* does not apply in the Nooksack Tribal Courts, Plaintiffs ask that the Court dismiss their lawsuit *sua sponte*, so that the Court's ruling might be immediately appealed.

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At a minimum, Nooksack members have the statutory right within thirty days of receiving a notice of intent to disenroll to request a meeting with the Tribal Council. N.T.C. § 63.04.001(B)(2). The law does not allow Defendants to unilaterally set a meeting on "shortened time" as they, by their own admission, have done. Instead, the applicable law allows the targeted Nooksack set a meeting date with the Tribal Council Secretary that ensures the potential disenrollee has reasonable time to make scheduling arrangements and, for example, seek time to be absent from their place of employment. *Id.*[23] Defendants have set disenrollment meetings that may force Plaintiffs to choose between their job and their tribal identity and/or their family commitments and their tribal identity with no notice whatsoever.

The Disenrollment Procedures also flagrantly violate Plaintiffs' fundamental due process rights. Article IV of the Nooksack Constitution requires that all governmental agencies and agents comply with Title II of the Civil Rights Act of 1968, 82 Stat. 77 ("ICRA"). Relevant sections of ICRA state that the Tribe may not: (a) "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law"; or (b) "make or enforce any law prohibiting . . . the right of the people peaceably to assemble and to petition for a redress of grievances" or "pass any bill of attainder or ex post facto law . . . ." 25 U.S.C. §§ 1302(a)(1),(8)-(9). Defendants are violating these provisions of constitutional and federal law.

Defendants do not seriously contest the applicability of due process principles[24] to the disenrollment hearings in this matter,[25] as the hearings immediately and irreparably affect legal

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[23] The applicable law provides that "[i]f a meeting is requested with the Tribal Council, the member must contact the Tribal Council secretary to obtain a date for the meeting." N.T.C. § 63.04.001(B)(2).

[24] The U.S. Supreme Court has sated that "[t]he touchstone of due process is protection of the individual against arbitrary government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), and that "[p]rotection against governmental arbitrariness is the core of due process, including substantive due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (citations omitted). The Court has further stated that due process, "by barring certain government actions regardless of the sufficiency of the procedures used to implement them . . . serves to prevent governmental

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rights and are not merely investigatory proceedings. *Hannah v. Larche*, 363 U.S. 420 (1960); *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970). What is contested is what scope of process – substantive and procedural – must be afforded to Plaintiffs. *See e.g. Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980).

a. Procedural Due Process

The due process balancing test delineated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is generally utilized to determine the scope of procedural process due in civil proceedings. In *Mathews*, it was held that identification of the specific dictates of due process generally require consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

Here, the Disenrollment Procedures promulgated by Defendants, and their acts and omissions in carrying out the disenrollment process, do not meet the level of due process required by *Mathews*. In the case of *Prosser v. Butz*, for example, a farmer who had been assessed penalty in administrative proceedings brought suit against a government agency, alleging deprivation of his procedural due process. 389 F.Supp. at 1004. The Court was asked

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power from being used for purposes of oppression." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quotation). Tribal courts are in accord. In *Davisson v. Colville Confederated Tribes*, the court stated that this right to "[s]ubstantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." 10 Am. Tribal Law 403, 408 (Colville Tribal Ct. App. 2012).

[25] *See* Defendants' Brief in Opposition to Plaintiffs' Emergency Motion for a Temporary Restraining Order, *Lomeli v. Kelly*, No. 3013-CI-CL-001, at 8 (Nooksack Tribal Ct. Apr. 11, 2013) ("Defendant Kelly informed Council that Resolution 13-02 would start the disenrollment process, and that the process would be fair and provide due process.").

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to determine exactly what was required in administrative proceedings where a mere penalty was at issue. *Id.* at 1004-1005. The *Prosser* Court held as follows:

> Due process entitles plaintiff to the following in the instant situation: (1) notice of the specific charges or allegations at a time reasonably prior to the hearing in order to allow preparation of a defense; (2) right to retain private counsel and be represented by such counsel at a hearing; (3) right to present a reasonable quantum of argument and evidence at a hearing on the charges; (4) right to confront and cross-examine adverse witnesses at the hearing; (5) a brief written statement of reasons and evidence relied upon to support the determination of (6) an impartial adjudicative body.
>
> While it is axiomatic that the elements of due process vary with the situation and the due process clause does not guarantee any unchanging forms, *Dohany v. Rogers*, 281 U.S. 362 (1930), the "fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" mandate a hearing in this case with the safeguards stated above. *Morgan v. United States*, 304 U.S. 1 (1938). Especially is this true where, as here, "the evidence consists of the testimony of individuals whose memory might be faulty . . . or persons motivated by malice, vindictiveness . . . or jealousy." *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959).
>
> The availability here of an extensive administrative appeal process does not remedy the due process deficiency. None of the appellate determinations are *de novo*, and thus the denial of plaintiff's procedural rights is perpetuated through the appeal process. Review, however often repeated, of a determination arrived at by unconstitutional procedure cannot correct the defect unless the review itself includes the requisite procedural safeguards. This is not the case here.

Id. at 1006.[26] Surely, if (1) notice; (2) a right to retain private counsel and be represented by such counsel at hearing; and (3) a right to present a reasonable quantum of argument and evidence at hearing is required when assessing a penalty for permitting cattle grazing on federal lands, a right to these same processes must be required here, where the fate of 275 Plaintiff-Nooksacks — where the fate of a Nation — is at stake.

As to representation by counsel, as Supreme Court noted in *Turner v. Rogers*, the *Mathews* "'private interest that will be affected' argues strongly for the right to counsel." 131

[26] *See also Gardner v. Pierce County Bd. of Com'rs*, 617 P.2d 743, 745 (Wash. Ct. App. 1980) (citing *Prosser* for the proposition that a mere ten days does not constitute sufficient notice).

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S.Ct. 2507, 2518 (2011). Indeed, while it is white clear that tribal governments have no due process obligation to appoint counsel in civil (or criminal)[27] matters, it is also clear that "the government may not deny civil litigants their right to obtain counsel." *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F.Supp.2d 857, 914 (N.D. Ohio 2009). It has been consistently held that a "refusal to hear a party represented by counsel would amount to 'a denial of a hearing, and, therefore, of due process in the constitutional sense.'" *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); *see also Goldberg*, 397 U.S. at 270 (civil litigant "must be allowed to retain an attorney [in benefits termination hearing] if he so desires"); *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942, 945 (5th Cir.) ("The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process, and extends to administrative, as well as courtroom, proceedings.") (citation omitted), *cert. denied*, 452 U.S. 906 (1981); *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) ("[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights."). It is thus clear that, here, Plaintiffs are entitled to be represented by counsel—not that the Tribe appoint counsel, but that, at minimum, Plaintiffs are allowed to retain counsel that might represent them in the disenrollment hearings.

As to notice and the right to present a reasonable quantum of argument and evidence at hearing, the Supreme Court has held, in multiple instances, that the opportunity to be heard must occur at a "meaningful time and in a meaningful manner." *City of Los Angeles v. David*, 538 U.S. 715, 717 (2003) (quoting *Mathews*, 424 U.S. at 333)). This requires, at minimum, that notice "be given sufficiently in advance of scheduled court proceedings so that reasonable

[27] Unlike the broader right recognized under the Sixth Amendment, there is no federal right to appointed counsel in tribal courts. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir.1976).

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opportunity to prepare will be afforded." *In re Gault*, 387 U.S. 1, 33 (1967). When, for instance, an attorney is given a mere twenty four-hour notice, counsel lacks an opportunity to investigate the case in violation of due process principles — "'[t]o decide otherwise, would simply be to ignore actualities.'" *Gray v. Netherland*, 518 U.S. 152, 182 n.10 (1996) (quoting *Powell v. Alabama*, 287 U.S. 45, 58 (1932)). Likewise, where, as here, the "suspension of welfare benefits" will result, the Supreme Court has held that "an evidentiary hearing giving the recipient an opportunity to confront witnesses and present evidence and argument orally" is required. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987) (citing *Goldberg*, 397 U.S. at 266-71). The ability to gather and present evidence actually weighs in favor of Plaintiffs in regard to the *Mathews* test. As the High Court ruled in *Loudermill v. Cleveland Bd. of Educ.*, "[w]ith more information, in particular that provided by the [Plaintiff] whose record is in dispute, the government presumably would be better equipped to make . . . decisions." 721 F.2d 550, 561 (6th Cir. 1983).

Here, the Disenrollment Procedures — as codified, but especially in practice — do not allow Plaintiffs to present a reasonable quantum of argument and evidence at hearing at a "'meaningful time and in a meaningful manner.'" *City of Los Angeles*, 538 U.S. at 717 (quoting *Mathews*, 424 U.S. at 333)). As discussed above, Plaintiffs have been limited to ten minutes to present a plethora of evidence to the decisionmaker; Plaintiffs have been given inadequate time to prepare their evidence (or even determine what timeframe is applied to their hearing); and Plaintiffs' attorneys have been denied access to the hearings at all, and, thus, the ability to adequately prepare their clients for the meetings. Indeed, for Plaintiffs with children and in the cases of disenrolled Plaintiffs Rose A. Hernandez, Cody M. Narte, Nadine L. Rapada, and Kristal M. Trainor, there was no notice or an opportunity be heard even given, let alone a hearing conducted at "meaningful time and in a meaningful manner." *See e.g. Goldberg v. Kelly*, 397

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U.S. 254. And while the Disenrollment Procedures purport to provide twenty-one days notice, the exception has thus far become the rule:

- On August 12, Defendants summarily, and without any hearing or meeting whatsoever, disenrolled Plaintiffs Rose A. Hernandez, Cody M. Narte, Nadine L. Rapada, and Kristal M. Trainor.

- Plaintiffs children are currently being denied welfare benefits, which also occurred summarily, and without any hearing or meeting whatsoever.

- On August 12, 2013, Plaintiffs Adeline Gladstone Parker, Anthony Eugenio Rabang, Daniel Rapada, Francine Adams, Gerald Rapada, Gilda Corpuz, Honorato Roberto Rapada, James Dean Rapada, Olive Theresa Oshiro, Priscilla Carr, Reconar Andrew Rapada, Robert James Rabang Sr., and Sonia Marie Lomeli received notice that their disenrollment hearings were set for August 30. Now, presumably, these previously enjoined disenrollment hearings are now back on. Written materials for those hearings are due today, August 22. Until yesterday, these hearings were stayed. That means, effectively, Plaintiffs were given two days notice to prepare their appeals.

- Yesterday, lead Plaintiffs Michelle Joan Roberts and Rudy St. Germain were served with disenrollment notices that set their hearing for August 28 — leaving mere hours, under the Disenrollment Procedures, to prepare and file written materials that will determine the fate of their identity and livelihood, for generations to come. Ms. Roberts was also immediately fired from her position with the Tribe.

It is quite obvious that the Court is aware that the "private interest that will be affected by the official action" could not be more compelling. *Mathews*, 424 U.S. at 344-35; *see also Wabsis v. Little River Band of Ottawa Indians, Enrollment Com'n*, No. 04-185-EA, 2005 WL 6344603, at *1 (Little River Tribal Ct. Apr. 14, 2005) (holding that tribal membership is "the most important civil right"). There is also a serious risk of an erroneous deprivation of such interest through the procedures used. If not as codified, at least in practice, the notice period required by the Disenrollment Procedures is not "reasonably calculated under all the circumstances to apprise petitioner" of the impending hearing and the charges levied against him, nor does it allow "'meaningful time and in a meaningful manner.'" *City of Los Angeles*, 538

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U.S. at 717 (quoting *Mathews*, 424 U.S. at 333)). On the other hand, affording Nooksacks the right to be represented by counsel of their own expense, allowing Plaintiffs more than ten minutes to present his or her case, providing Plaintiffs with adequate notice of the allegations against them, and respecting Plaintiffs' right to present evidence will come to no expense to Defendants. The fiscal and administrative burdens that upsetting the scheduled and procedurally defective hearings will require will trigger is little to none. Currently, there are only 21 of nearly 300 hearings that will be upset by providing the procedural requirements due to Plaintiffs. Considering what is at stake, an order that does nothing other than order Defendants to maintain the *status quo* pending resolution of the controversy can hardly be deemed invasive.[28]

The Disenrollment Procedures codified by defendants do not — in practice or as codified — meet the minimum procedural due process requirements required by the Nooksack Constitution and the ICRA.

b. Substantive Due Process

Substantive due process involves the "right to liberty and equal protection of . . . law" and prevents laws from being "applied . . . in an unfair and unequal way." *Begay v. Navajo Nation Election Admin.*, 4 Am. Tribal Law 604, 611 (Navajo 2002). The guarantee of substantive due process, in other words, "assures that the law will be fair and reasonable, not arbitrary." *Id.* at 613. In so assuring, "[e]qual protection review is triggered under this where persons similarly situated are treated differently." *Id.* at 613-14; *see also* 25 U.S.C. § 1302(a)(8) ("No Indian tribe . . . shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."). Discriminatory application of tribal policy does not satisfy equal protection scrutiny. *See Boston's Children First v. Boston School*

[28] Again, Plaintiffs are asking that the Court order Defendants to do nothing; to take no action; to maintain the *status quo.*

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Committee, 260 F.Supp.2d 318, 331 (D. Mass. 2003) (a "facially neutral" policy that is "nonetheless applied by government actors in a discriminatory manner" is unconstitutional); *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) (citation omitted).

Here, Defendants have adopted a policy of providing certain public benefits, such as "Back to School Support," to numerous similarly situated Nooksacks.[29] As Defendants have stated repeatedly, the Plaintiffs proposed for disenrollment have not actually been disenrolled at this point — Nooksack-Plaintiffs targeted for disenrollment are on an equal footing with all other Nooksacks. Plaintiffs have been denied these public benefits, in violation of the equal protection guarantee.

2. Defendants Are Violating the March 20, 2013, Stipulation Entered in *Lomeli*.

"An agreement made on the record, in open court, and under the eyes of the Court, is a most solemn undertaking requiring the lawyers and the parties to make every reasonable effort to carry out all the terms to a successful conclusion." *Scharf v. Levittown Public Schools*, 970 F.Supp. 122, 129 (E.D.N.Y. 1997) (internal quotation omitted). Stipulations "are favored by the courts and are not lightly cast aside, and this is all the more so in a case of open court stipulations where strict enforcement not only serves the interest of efficient dispute resolution but is also

[29] Second Galanda Decl., Ex. G.

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essential to management of court calendars and integrity of the litigation process." *Purcell v. Town of Cape Vincent*, 281 F.Supp.2d 469, 473 (N.D.N.Y. 2003). Indeed, "[a]n agreement made on the record, in open court and 'under the eyes of the Court' is a most solemn undertaking requiring the lawyers and the parties to make every reasonable effort to carry out the terms to a successful conclusion." *Id.* (quoting *Warner v. Rossignol*, 513 F.2d 678, 682 (1st Cir. 1975)). It is thus that when a court enters a stipulation into the record, "it does accept some obligations. The clearest obligation is a duty to enforce the stipulation that it has approved." *Id.* (citing *Sanchez v. Maher*, 560 F.2d 1105, 1108 (2nd Cir. 1977)).

Here, as discussed *infra*, it is clear that Defendants are violating the March 20, 2013, Stipulation entered by this Court in the *Lomeli* matter. The Court has a direct duty to enforce that contractual promise, *id.*, and must do so by ordering Defendants to refrain from violating said Stipulation and the related preceding promises made to this Court by Defendants' counsel in the very first hearing in this dispute on March 18, 2013.

3. The Disenrollment Procedures are Void for Vagueness.

A law or regulation is unconstitutionally vague where it fails to clearly indicate to the public how it may comply with the provision. *See Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000) ("The void-for-vagueness doctrine forbids the enforcement of a law that contains 'terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'") (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)).

Here, as discussed *supra*, the procedures and regulations promulgated by Defendants to control disenrollment in no way indicate to the public how it may comply with the procedures. Section V.C of the Disenrollment Procedures, for example, provides that "[a] disenrollee may present evidence supporting his or her case," but qualifies that requirement by stating "[a]ll

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evidence must be received by the Tribe no later than (5) calendar days prior to the schooled Meeting date."[30] The Regulations that were distributed with the Notice of Basis for Disenrollment packet, however, provide: "At least three (3) hours prior to your meeting you must provide a written response, or any documentation you wish the Tribal Council to consider in anticipation of your meeting (no documentation or response will be accepted after this deadline)."[31] Throwing another wrench into Plaintiffs' ability to terse out the proper procedure, the Hearing Notices that were mailed to individual Nooksacks vary: whereas some Notices give a three hours prior to the hearing to present evidence,[32] others provide six days,[33] and still others provide for both five and six days.[34]

4. Defendants are Estopped From Committing Acts and Omissions that Violate Standards They Have Promised to Uphold.

Defendants' actions in recent weeks violate standards that Defendants promised to uphold. The legal proposition that agencies may be required to abide by their own policies is well-established. As the Supreme Court has stated: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). "This is so even where [those] procedures are possibly more rigorous than otherwise would be required." *Id.* Courts have had occasion to recognize this principle in a variety of contexts. *Id.* at 199 (dealing with the Bureau of Indian Affairs); *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir.1990) (noting that "an administrative agency is required to adhere to its own internal operating procedures" and analyzing, in this framework, an IRS policy statement in the Policies of the IRS

[30] *Id.* Ex. F.
[31] *Id.* Ex. H.
[32] Second Roberts Decl., Ex. A.
[33] Third Declaration of Gabriel S. Galanda (filed Aug. 22, 2013), Ex. B.
[34] *Id.* at ¶ 4.

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Handbook); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979) (dealing with an INS operations instruction); *United States v. Sourapas*, 515 F.2d 295, 298 (9th Cir. 1975) (dealing with an IRS agent's failure to comply with IRS internal procedures); *United States v. Leahey*, 434 F.2d 7, 7-8 (1st Cir. 1970) (dealing with "the failure of the [IRS] to follow its own published general procedure, requiring its Special Agents to give certain warnings on initial contacts with taxpayers they are investigating.").

Principally, Defendants promised to abide by the policy that "[n]o person will be disenrolled prior to completion of the meetings before Tribal Council, regardless of whether that individual has requested a meeting with the Tribal Council."[35] But on August 12, 2013, Defendants summarily disenrolled four Nooksacks without any meeting, claiming they never requested a meeting with Tribal Council and, thereby, violating their own policy. Additionally, regardless of any analysis pertaining to a right any person has to seek legal counsel during administrative hearings such as "Disenrollment Meetings," Defendants promised that Plaintiffs' counsel would represent Plaintiffs throughout judicial proceedings "and in the related proceedings regarding [Appellants'] disenrollment."[36] Because Defendants have repeatedly violated their own policies — even policies agreed to and entered by stipulation with this Court — they must be enjoined from further violation of said policies before Plaintiffs suffer additional irreparable harms.

C. Plaintiffs Will Be Irreparably Harmed Absent Immediate Injunctive Relief.

It is black letter law that any government action depriving citizens of constitutional rights "unquestionably constitutes irreparable injury." *Rodriguez v. Robbins*, 715 F.3d 1127, 1143 (9th Cir. 2013) (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); quoting *Elrod v.*

[35] Second Galanda Decl."), at ¶ 4, Ex. A.
[36] *Id.*

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Burns, 427 U.S. 347, 373 (1976)). Hence, a moving party shows a probability that constitutional rights will be violated in the absence of injunctive relief, the irreparable harm is considered *per se*, and consequently the motion for injunctive relief will turn on whether the moving party has met the other elements required for TROs. *Cf. Latino Officers Ass'n, New York, Inc. v. City of New York*, 196 F.3d 458, 462 (2nd Cir. 1999) (citing *Beal v. Stern*, 184 F.3d 117, 123-24 (2nd Cir. 1999)).

Article II of the Nooksack Constitution reserves an absolute right of membership to all persons meeting the requirements therein. *See Terry–Carpenter v. Las Vegas Paiute Tribal Council*, Nos. 02-01, 01-02, 10 (Las Vegas Paiute Ct. App. 2003). It is "the most important civil right." *Wabsis*, 2005 WL 6344603, at *1.

Plaintiffs have alleged — and submitted incontrovertible evidence supporting their allegations that Defendants are now determined to hastily complete a disenrollment process in complete derogation of Plaintiffs' due process rights, in order to purge the Nooksack rolls of hundreds of tribal members who will thereafter stand bereft of recourse or remedy. Accordingly, without this Court's affirmative and immediate injunctive relief, Plaintiffs will suffer irreparable harm.

D. The Equities Tip Sharply In Plaintiffs' Favor.

The Ninth Circuit has determined that injunctive relief may be warranted to prevent removal proceedings of non-citizens. *Leiva-Perez*, 640 F.3d at 963-64. Balancing the equities, that court observed that they weighed "heavily" in the movant's favor because: (1) the government had an interest in ensuring that its actions did not result in unnecessary and irreparable harm — in the movant's case, that the government did not "deliver aliens into the hands of their persecutors"; and (2) the government was incurring "no expense while [the

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movant] seeks judicial review." *Id.* at 971. The situation before this Court is nearly identical with respect to the governmental and personal interests at stake.

Here, it cannot be questioned that the Nooksack government has an interest in ensuring that people are not unnecessarily and wrongly forcibly disenrolled. Nor will the Defendants incur any significant expense due to a temporary moratorium of their efforts to purge Tribal Members. Hence, the equities weigh sharply — if not entirely — in Plaintiffs' favor. Again, Plaintiffs are asking that the Court order Defendants to do nothing; to take no action; to maintain the *status quo*.

E. The Nooksack Public Interest Favors Injunction.

The Nooksack People have a profound interest in the constitutional application of their laws, the protection of individuals from abuse of governmental power, and the orderly review by this Court of Defendants' actions. Indeed, there is no apparent public interest weighing in favor of permitting the Defendants to continue bulldozing their way towards the disenrollment of Plaintiffs. There is no legitimate purpose in expediting a process certain to result in profound and far-reaching injuries.

F. In The Alternative To A Temporary Restraining Order, Plaintiffs Respectfully Request A Stay Of All Disenrollment Proceedings Against All Plaintiffs Until This Court Issues Its Decision On Defendants' Pending Motion To Dismiss.

If this Court declines to issue an order temporarily enjoining Defendants' illegal and rights-violating acts irreparably hundreds of enrolled Nooksack Tribal Members, it should in the alternative consider a temporary stay preserving the *status quo* (i.e., ordering that Defendants take no disenrollment action against Plaintiffs) pending this Court's ruling on the Defendants' Motion to Dismiss.

The Ninth Circuit, whose decisions may be persuasive to this Court, uses a sliding scale test in determining whether a stay is proper; a sliding scale that is akin to the four-factor

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threshold for preliminary injunctions, but is not the same standard used to adjudicate requests for preliminary injunctions. *Leiva-Perez*, 640 F.3d 962. The four factors a moving party must show for a preliminary injunction are: (1) a likelihood of success on the merits; (2) a showing that irreparable injury is probable in the absence of the requested relief; (3) a finding that preliminary injunctive relief would not substantially harm the non-moving parties; and (4) that such an order would serve the public interest. *Id.* at 964-65. Following a Supreme Court decision mandating that a party seeking preliminary injunctive relief must show that irreparable harm is probable — versus merely *possible* — the balance of the sliding scale test set forth below remains the standard for consideration of requests for stays in the Ninth Circuit.[37]

And that sliding scale test provides that so long as a plaintiff makes "a threshold showing that irreparable harm is probable absent a stay," courts must then weigh the remaining equities in determining whether a stay is appropriate — that is, a balancing test "delineated on one end by a showing of a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; and on the other end, by a showing of a substantial case on the merits and that the balance of hardships tips sharply in favor of a stay." *Id.* at 971. In other words, unlike the four-prong test for a preliminary injunction, once a party seeking a stay meets the irreparable harm threshold, that party need not show that it is likely to succeed on the merits if the party can show that it advances a "substantial case on the merits," or "serious legal questions" going to the merits, and can show that the balance of hardships tips "sharply in favor of a stay." *Id.* (citing *Abbassi v. I.N.S.*, 143 F.3d 513 (9th Cir. 1998)).[38]

[37] *See Leiva-Perez*, at 964-66 (discussing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22-23 (2008), and *Nken v. Holder*, 556 U.S. 418 (2009)).

[38] "There are many ways to articulate the minimum quantum of likely success necessary to justify a stay." *Leiva-Perez*, 640 F.3d at 967. The terms "reasonable probability," "fair prospect," "a 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).

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Because (1) absence of a stay in this case will certainly result in irreparable harm, (2) there are serious questions going to the merits, and (3) the balance of equities tips sharply in Plaintiffs' favor, a stay here is justified under federal law.

In fact, none of the factors tips in Defendants' favor. Defendants cannot show, for example, that the public interest weighs against a brief stay. Absolutely no harm will come to the Defendants and they will suffer no prejudice whatsoever by an order maintaining the *status quo* until this Court has its say on Defendants' Motion to Dismiss. Thus, Plaintiffs respectfully request an order staying all disenrollment proceedings while this Court adjudicates the serious issues before it on Defendants' Motion to Dismiss.

IV. CONCLUSION

Plaintiffs respectfully move that this Court temporarily enjoin Defendants from proceeding any further in the illegal and unconstitutional disenrollment of Plaintiffs and request a TRO be issued enjoining Defendants from proceeding with their planned disenrollment meetings until they have enacted rules and procedures governing those meetings that meet, at the very least, the requisite threshold Nooksack Constitutional and legal protections required by the Rule of Law.

DATED this 22nd day of August, 2013.

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DECLARATION OF SERVICE

I, Gabriel S. Galanda, 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 counsel of record for Plaintiffs.

2. Today, I caused the attached documents to be delivered to the following:

Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
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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 22nd day of August, 2013.

GABRIEL S. GALANDA

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