IN THE NOOKSACK TRIBAL COURT

RUDY ST. GERMAIN, et al., Plaintiffs, v. ROBERT KELLY, et al., Defendants.	NO. 2013-CI-CL-005 PLAINTIFFS' BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER RELIEF ***Hearing on December 18, 2013***

I. BACKGROUND

On December 9, 2013, Plaintiffs filed a Motion for Temporary Restraining Order ("TRO") to restrain Defendants, sued in their official capacities,[1] from taking acts in furtherance of an unconstitutional and illegal Resolution. A hearing was held on that TRO Motion on December 11, 2013, where Defendants offered no defense on the constitutionality of the Resolution, but instead made only a jurisdictional deficiency argument. On December 12, 2013, this Court issued an Order "reserving ruling on the Motion for Temporary Restraining Order" until the "initial process" requirements of N.T.C. § 10.05.040 had been met and the six days of lag-time between initial filing and consideration of the motion required by N.T.C. § 10.05.050 had elapsed.[2] *Order*

[1] "'[O]fficial-capacity actions for prospective relief are not treated as actions against the State.'" *In re Ellett*, 254 F.3d 1135, 1138 (9th Cir. 2001) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). Although, in actuality, they are: "'As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity.'" *Schlender v. Quinault Indian Nation*, No. CV-12-078 (Quinault Tribal Ct. Dec. 5, 2013) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-66 & n.11 (1985)).

[2] Plaintiffs continue to object to N.T.C. § 10.05.050's application to Temporary Restraining Orders and encourage the Court to reconsider this holding. Because of the urgent and temporary nature of TROs, as opposed to general civil

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

on Motion for Temporary Restraining Order and Scheduling ("*TRO-Scheduling Order*"), at 2-3. In that Order, the Court also posed the following question:

> If the Court finds an equal protection violation of the Nooksack Constitution by Resolution 13-171 as it applies to the proposed disenrollees, what *specific* legal or equitable remedies are allowed under the legal theories advanced . . . ?

Id. at 2 (emphasis in original). Plaintiffs answer this question below.

II. ARGUMENT

A. Severability

Once a portion of the Resolution is deemed unconstitutional, the burden is on the Defendants to show that the Resolution can be saved. *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 557 (2nd Cir. 1990) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936)). In doing so, courts employ the following test:

> Whether portions of a statute which are constitutional shall be upheld while other portions are eliminated as unconstitutional involves primarily the ascertainment of the intention of the legislature. When part of a statute or ordinance is unconstitutional and yet is not an integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance. However, if an unconstitutional portion of a statute is integral or indispensable to the operation of the statute as the legislature intended, the provision is not severable, and the entire measure must fail.

---

motions addressed by N.T.C. § 10.05.050(e), notice is generally not even required; let alone six days notice that would render the issuance of a TRO essentially useless in emergency circumstances. *See e.g. Watts v. Watts*, 99 So.3d 751, 756 (Miss. Ct. App. 2012) (trial court granting an *ex-parte* temporary restraining order to prevent abuse of a child). Indeed, that is why Tribal Judge Pro Tem Randy Doucet urgently convened a telephonic hearing on the *Lomeli* Plaintiffs' very first hearing TRO motion, on March 18, 2013, without requiring either service of process or six days notice; all that was required was notice to defense counsel, which is typically the only "process" required in TRO proceedings, and which Defendants admitted was provided relative to this particular TRO motion. And as noted by the Court last week, "the Nooksack Indian Tribe Communications Page stated that 'Christmas Checks will be mailed out December 12th.'" *TRO-Scheduling Order*, at 1. Although Plaintiffs have reason to believe that the Christmas Checks may have already been issued — which, if true, would severely limit the ability of this Court to provide prospective relief were it to find Resolution No. 13-171 unseverable — Plaintiffs will assume, for the sake of this brief, that the checks have yet to be issued. *But see* Declaration of Rudy St. Germain, at 1 ("I learned that Treasurer Abby Smith has advised Tribal staff to rush the "Christmas Support" checks today per Resolution No. 13-171, instead of waiting for the Tribal Court's decision on Plaintiffs' Motion . . . ."); Declaration of Ryan D. Dreveskracht, Exhibit A (opposing counsel vague as to whether Christmas Support checks will issue).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

State v. Nielsen, 960 P.2d 177, 181 (Idaho 1998) (citing *Electric Bond & Share Co. v. Securities & Exchange Com.*, 303 U.S. 419 (1938); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Boundary Backpackers v. Boundary County*, 913 P.2d 1141 (1996)).

Generally, in situations similar to the case at bar, courts have found benefits legislation to be severable. In *Smith v. Reynolds*, for example, a three-judge panel of the U.S. District Court for the Eastern District of Pennsylvania was faced with determining whether a statutory provision that required applicants for public welfare to have resided in the State for a period of one year before eligibility for assistance was constitutional. 277 F.Supp. 65, 22 (E.D. Pa. 1967). The court held that it was not, because it did not pass equal protection muster:

> [T]he constitutional test of equal protection is not satisfied by considerations of minimal financial expediency alone. To be sure, the State may reduce or even eliminate entirely welfare payments if it chooses to conserve resources in this fashion; it may turn all beggars from its doors. But it may not arbitrarily turn away some who are in need while bestowing its charitable favors on others. There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws. It is not enough to say that the class is excluded because money is saved.

Id. at 68. As to relief, the court enjoined the state from enforcing the residence requirement, but left the remainder of the benefits legislation intact. *Id.*

In *Westberry v. Fisher*, a three-judge panel of the U.S. District Court for the Southern District of Maine was tasked with determining whether the state's "so-called 'maximum grant' and 'maximum budget' regulations" were constitutional under the equal protection clause. 297 F.Supp. 1109, 1111 (S.D. Me. 1969). The court held that they were not:

> The only apparent purpose to be served by the challenged regulations is to protect the state treasury against the burgeoning costs of public welfare. But the regulations cannot be sustained on this basis. The protection of the public purse is a valid, indeed necessary, purpose relevant to all public programs. But it may not be accomplished by arbitrarily singling out a particular class of persons to bear the entire burden of achieving that end. . . . The Attorney General's position is simply that, since there is no vested right to public welfare, the State may

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

> distribute its largesse in any way it wishes and among any of its citizens it chooses to favor. But the authorities are to the contrary. Unquestionably, there has historically been no vested right to public welfare. However, once a state elects to establish a program of public assistance, it must meet constitutional standards; it cannot arbitrarily deny to a portion of its citizens the benefits of such a program.

Id. at 1115-16 (citation omitted). As to relief, the court enjoined the state from enforcing the "maximum grant and maximum budget regulations," but left the remainder of the benefits legislation intact. *Id.* at 1116.

Finally, in *Johnson v. Robinson*, the plaintiffs sought to enjoin state officials from the enforcement of state statute requiring state welfare aid applicant to have continuously resided for one whole year in the state. 296 F.Supp. 1165, 1167 (N.D. Ill. 1967). In determining that the injunction should issue, Justice Fairchild of the U.S. Court of Appeals for the Seventh Circuit, sitting on a three-judge panel of the U.S. District Court for the Northern District of Illinois, held that, for the same reasons cited in *Smith*, 277 F.Supp. 65, the statute did not pass equal protection muster. *Johnson*, 296 F.Supp. at 1169. As to relief, the court issued a preliminary injunction, "enjoining defendants, their successors, and persons under their control" from acting in furtherance of the specific provisions of the Illinois Public Welfare Code challenged, but left the remainder of the Welfare Code intact. *Id.*

Based upon on-point case law, it appears that the Court must fashion relief that severs the unconstitutional portion of Resolution No. 13-171 out of the Resolution, and that enjoins Defendants from acting in furtherance of that specific portion of the Resolution.

B. Prospective v. Retrospective Relief

Because Plaintiffs have asked the Court "to address a 'continuing violation'" of superior law, "[t]he relief requested must be prospective" and not retrospective. *Corrigon v. Kron*, No. 13-0116, 2013 WL 5442176, at *2 (E.D. Wash. Sept. 27, 2013) (quoting *Seminole Tribe of Florida v.*

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Florida, 517 U.S. 44, 73 (1996)). Thus, Plaintiffs are admittedly barred from seeking "money damages or retrospective equitable relief." *Williams v. Oregon Dept. of Corrections*, No. 12-35091, 2013 WL 5648786, at *1 (9th Cir. Oct. 10, 2013); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287, 289 (1997) (relief requested barred because it was the "functional equivalent" to a "retroactive levy upon funds in [the government's] Treasury" and therefore not prospective).[3]

This does not, however, bar all relief related to the issuance of government funds — money damages for harms already caused (and that are therefore retrospective) are not equivalent to expenses that are ancillary to prospective relief. The former are barred, but the latter are not. *See In re Ellett*, 254 F.3d at 1144 ("**The critical distinction is whether the plaintiff requests prospective or retroactive relief**. . . . The [U.S. Supreme] Court has repeatedly observed that prospective relief . . . may have a substantial ancillary effect on a State's treasury, but has nevertheless consistently held that this fact alone is insufficient to convert such actions into actions against the State . . . .") (citing e.g. *Milliken v. Bradley*, 433 U.S. 267 (1977)) (emphasis added); *C.T. ex rel. Beason v. Bentley*, No. 11-1123, 2013 WL 5231955, at *4 (M.D. Ala. Sept. 16, 2013) (holding that sovereign immunity does not "prohibit a federal court from entering injunctive relief against a state officer, even if such relief may cost the state substantial sums of money," but that sovereign immunity "does, however, prevent a . . . court from awarding retroactive relief paid from the state treasury").

In *Milliken v. Bradley*, for example, the U.S. Supreme Court held that an order requiring the state to pay the costs of education benefits for certain individuals being denied equal

[3] *But see In re Deposit Ins. Agency*, 482 F.3d 612, 620-21 (2nd Cir. 2007) (noting that *Coeur d'Alene* was limited to its facts); *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 616-17 (6th Cir. 2003) (same); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir.2000) (same); *American Exp. Travel Related Services Co., Inc. v. Sidamon-Eristoff*, 755 F.Supp.2d 556, 569-71 (D.N.J. 2010) (same); *Gila River Indian Community v. Winkelman*, No. 05-1934, 2006 WL 1418079, at *2-3 (D. Ariz. May 22, 2006) (same).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

protection was proper because it was "part of a plan that operate[d] prospectively to bring about the delayed benefits" that were required by law, as opposed to damages that could be characterized as retrospective. 433 U.S. at 289-90; *see also Papasan v. Allain*, 478 U.S. 265, 282 (1986) (injunctive relief in equal protection challenge to state's distribution of public school funds allowed because "[a] remedy to eliminate this current disparity, even a remedy that might require the expenditure of statute funds, would ensure compliance in the future with a substantive federal-question determination rather than bestow an award for accrued monetary liability").

Likewise, in *Luckey v. Harris*, the U.S. Court of Appeals for the Eleventh Circuit reversed a trial court's holding that an equal protection remedy that included "increased funding for indigent services" that was borne by the state was barred by sovereign immunity. 860 F.2d 1012, 1014 (11th Cir. 1988). In analyzing the requested relief, the court held:

> [T]he determining factor is the theory of the relief sought. . . . [T]he essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure compliance in the future . . . rather than bestow an award for accrued monetary liability.

Id. at 1015 (quotation omitted); *see also e.g. Antrican v. Odom*, 290 F.3d 178, 185-186 (4th Cir. 2002) (injunction requiring that the state pay for dental screening and treatment not barred by sovereign immunity); *CSX Transp., Inc. v. Board of Public Works of State of W.Va.*, 138 F.3d 537, 541-43 (4th Cir. 1998) (injunction against the collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore not barred by sovereign immunity); *Smith v. Sec. of Dept. of Envtl. Prot. of Penn.*, No. 12-2189, 2013 WL 6388555 (E.D. Pa. Dec. 5, 2013) (injunction that required the state to hire plaintiff, and to spend state funds in doing so, not barred by sovereign immunity).

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

Here, Plaintiffs' "theory of the relief sought" is clearly prospective. *Luckey*, 860 F.2d at 1014. Plaintiffs do not demand that the Tribe issue Christmas Support checks. Plaintiffs simply request that if the Tribe does decide to issue Christmas Support checks, that Plaintiffs be provided the equal protection and due process of law required by the Nooksack Constitution. As currently drafted, Resolution No. 13-171 does not meet these requirements. Plaintiffs have thus requested that the Court order the Tribe to correct the "disparity in the distribution of the benefits" that currently exists under Resolution No. 13-171. *Id.* Plaintiffs do not seek money damages or any type of relief that can properly be construed as retrospective.

III. CONCLUSION

This Court must issue a TRO ordering that Defendants refrain from acting in furtherance of Resolution No. 13-171 as it is currently drafted.

To Plaintiffs, it makes no difference whether Defendants are enjoined from acting in furtherance of the entire Resolution No. 13-171, or merely the unconstitutional portion of the Resolution.

Based upon on-point case law, however, it appears that the Court must fashion relief that severs the unconstitutional portion of Resolution No. 13-171 out of the Resolution, and enjoins Defendants from acting in furtherance of that portion of the Resolution. Plaintiffs thus propose that the Defendants be enjoined as follows:

> Defendants are hereby enjoined from enforcing the portion of Resolution No. 13-171 that restricts the availability of "Christmas Support checks" to Nooksack Tribal members "not subject to pending disenrollment proceedings."

/ / /

/ / /

/ / /

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

A Proposed Order reflecting this language is included with this responsive briefing.

DATED this 17th day of December, 2013.

Gabriel S. Galanda
Anthony S. Broadman
Ryan D. Dreveskracht
Attorneys for Plaintiffs
GALANDA BROADMAN, PLLC

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509

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 co-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
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A courtesy copy was emailed to:

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

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

DATED this 17th day of December, 2013.

GABRIEL S. GALANDA

Galanda Broadman PLLC
8606 35th Avenue NE, Ste. L1
Mailing: P.O. Box 15146
Seattle, WA 98115
(206) 557-7509