IN THE NOOKSACK TRIBAL COURT
NOOKSACK INDIAN TRIBE
DEMING, WASHINGTON

ELEANOR J. BELMONT, et al.,	
Plaintiffs and Counterclaim Defendants,	**No. 2014-CI-CL-007**
vs.	**ORDER DENYING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION, GRANTING PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT, AND DENYING MOTIONS FOR SANCTIONS AND TO STRIKE**
ROBERT KELLY, Chairman of the Nooksack Tribal Council, et al.,	
Defendants and Counterclaimants.	

Defendants, who are members of the Nooksack Tribal Council and Tribal employees, filed a counterclaim and motion for preliminary injunction seeking to prevent Plaintiffs, who are potential disenrollees, from voting in the 2016 Tribal Council elections. Plaintiffs moved for leave to amend their complaint, adding a cause of action seeking to compel Defendants to hold the elections in accordance with the Nooksack Constitution and Nooksack Election Code. Both sides made motions for sanctions and to strike. After oral argument on all matters, the Court denies Defendants' motion for preliminary injunction, grants Plaintiffs' motion for leave to amend complaint, and denies all motions for sanctions and to strike.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Beginning in March 2013, seven lawsuits have been filed in this Court related to pending disenrollment proceedings. Five have been disposed of by this Court, with some going up to the Court of Appeals. This lawsuit is one of two cases pending currently.

Plaintiffs are 272 enrolled members of the Nooksack Indian Tribe who are subject to disenrollment proceedings, suing on behalf of themselves and their minor children. Defendants are members of the Nooksack Tribal Council and employees of the Tribe, sued in both their official and personal capacities.

For purposes of addressing matters currently at issue, the court need not recount the history of all disenrollment

litigation. In order to fully understand the instant case, however, it is useful to look back to *Roberts v. Kelly*, No. 2013-CI-APL-003 (Nooksack Ct. App. 3/18/14).

In August 2013, the Tribal Council passed Resolution 13-111, setting forth procedures for disenrollment. The plaintiffs in *Roberts* challenged the validity of Resolution 13-111 on various grounds and sought to enjoin disenrollments. The Court of Appeals held that "any procedural rules governing disenrollment proceedings must be adopted by ordinance and the ordinance approved by the Secretary of Interior as provided for in the Nooksack Constitution." *Roberts* at 9 (footnote omitted). Further, "[b]ecause Resolution 13-111 was not constitutionally adopted by ordinance, or amendment to an ordinance, and was not approved by the Secretary, the Council cannot use the procedural rules in Resolution 13-111 in Appellants' disenrollment proceedings." *Roberts* at 5. The appellate court remanded to this Court for the sole purpose of enjoining defendants from applying the procedures in Resolution 13-111 to disenrollment proceedings. This Court entered a permanent injunction to that effect on March 31, 2014.

Although not obligated to do so under the circumstances, the Court of Appeals went on in their opinion, in the interests of justice and judicial efficiency, to evaluate the procedures established under Resolution 13-111, which the parties had already extensively briefed. The appellate court "conclude[d] the details of the procedures in Resolution 13-111 do not violate due process under the Nooksack Constitution, except for the provisions that prohibit representation and give the Council the discretion to shorten time." *Roberts* at 9. The appellate court did not decide whether the procedures for disenrollment then contained in the Nooksack Tribal Code, Title 63 - Enrollment, satisfied due process.

Following the appellate decision in *Roberts*, the Tribal Council passed Resolution 13-163 in November 2013 in order to correct deficiencies in Resolution 13-111. Next, on May 16, 2014, Defendants issued "Notice of Meeting" ("Notice") and "Basis for Commencement for Disenrollment Proceedings" ("Basis") to Tribal members Eleanor J. Belmont and Olive T. Oshiro. Each "Notice" set forth disenrollment procedures previously appearing in Resolution 13-111, as amended.

Plaintiffs Belmont, Oshiro, et al., filed the instant lawsuit on May 30, 2014, alleging the "Notice" and "Basis" were vague and did not satisfy due process requirements pursuant to the Nooksack Constitution. Moreover, neither "Notice" nor "Basis" had been approved by the Secretary of the Interior. Plaintiffs sought injunctive relief and a declaratory judgment. At the same time they filed their complaint, Plaintiffs filed a motion for preliminary injunction seeking to halt disenrollment proceedings until Defendants complied with constitutional requirements.

This Court granted Plaintiffs' motion in an order entered June 12, 2014, rejecting Defendants' view that the "Notice" was simply a memo and not an ordinance requiring the Secretary's approval.

> This approach appears to be an attempt to circumvent the very clear holdings of the Court of Appeals that disenrollment procedures that set out the time, place, and manner of disenrollment hearings must be approved by the Secretary of the Interior, so long as that requirement exists in the Nooksack Constitution. That requirement exists and the Tribal Council must comply with it before proceeding.

Decision and Order Granting Plaintiffs' Motion for Preliminary Injunction at 6 (footnotes omitted).

Thereafter, Defendants petitioned the Nooksack Court of Appeals for permission to file an interlocutory appeal, which was denied on July 11, 2014.

On October 10, 2014, the Tribal Council passed Resolution 14-112, amending Nooksack Tribal Code, Title 63 - Enrollment, to include the disenrollment procedures previously appearing in Resolution 13-111, as amended, and previously approved by the Court of Appeals in *Roberts*. Resolution 14-112 and the amended Title 63 were then submitted for approval by the Secretary of the Interior.

By letter dated January 13, 2015, but effective as of October 24, 2014, the BIA Acting Superintendant and the BIA Regional Director, on behalf of the Secretary, approved Resolution 14-112 and the amended Title 63. On February 3, 2015, Plaintiffs appealed the decisions of the Acting

Superintendant and the Regional Director. Their appeal of the Acting Superintendant's decision went before the Regional Director. Their appeal of the Regional Director's decision went before the Interior Board of Indian Appeals (IBIA). The IBIA disposed of the appeal by remanding to the Regional Director for consideration of the Acting Superintendant's approval of Resolution 14-112 and amended Title 63.

On November 17, 2015, the Regional Director affirmed the Acting Superintendant's approval of Resolution 14-112 and amended Title 63. On November 23, 2015, Plaintiffs appealed the Regional Director's decision to the IBIA. That appeal is still pending.

Meanwhile, relying upon the Acting Superintendent's and Regional Director's approvals of Resolution 14-112 and amended Title 63, effective October 24, 2014, Defendants recommenced disenrollment proceedings on January 30, 2015. After a seven-month hiatus in this case, on February 2, 2015, Defendants filed a Notice of Compliance with this Court's order of June 12, 2014, granting Plaintiffs' motion for preliminary injunction.

Plaintiffs responded in opposition to the Notice of Compliance and moved for continuing enforcement of the preliminary injunction in this case, as well as the permanent injunction in *Roberts*. Plaintiffs contended Defendants were obliged formally to move to dissolve the injunctions before recommencing disenrollments. Moreover, due to the pendency of Plaintiffs' appeals, the decisions by the Acting Superintendant and Regional Director were without legal effect in the interim pursuant to 25 C.F.R. § 2.6(b) and 43 C.F.R. § 4.314(a).

In an order entered February 26, 2015, this Court agreed with Plaintiffs that the injunctions remained in effect and directed the parties to maintain the status quo pending final decision on Resolution 14-112 and amended Title 63.

The next action in this case occurred nearly ten months later, on December 18, 2015, when Defendants filed their answer to the complaint, asserted a counterclaim, and moved for a preliminary injunction to prevent Plaintiffs from voting in the 2016 Tribal Council elections. On January 11, 2016, Plaintiffs filed a motion for leave to amend their complaint, along with an amended complaint, seeking to compel Defendants to hold the elections in accordance with the Nooksack Constitution and

Nooksack Election Code. Both motions have drawn opposition and, along the way, both sides have moved for sanctions and to strike.

On January 14, 2016, the Court conducted oral argument on all pending matters. Plaintiffs were represented by Gabriel Galanda. Defendants were represented by Raymond Dodge and Thomas Schlosser, assisted by Rickie Armstrong. The Court set deadlines for further briefing on issues raised by the Court and on Plaintiffs' motion for leave to amend complaint. The Court took all matters under advisement.

DISCUSSION

Jurisdiction

Defendants' requests for injunctive relief — through their motion for preliminary injunction and in their counterclaim seeking a permanent injunction — concern the 2016 Tribal Council elections for Vice-Chairman, Treasurer, and Council Positions C and D. By law, the Primary Election is scheduled for Saturday, February 20, 2016, and the Regular Election is scheduled for Saturday, March 19, 2016. Nooksack Const. art. III, § 4; NTC §§ 62.02.020, 62.02.030(B).

Nooksack Constitution, Article IV, Section 1, provides: "All enrolled members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to vote." *See also* NTC § 62.04.020. Defendants ask the Court to enjoin Plaintiffs, 18 years of age or over, from voting.

Election season begins at Nooksack every other year with the Tribal Council Chairman's appointment of an Election Superintendant by the first Thursday in December in the year preceding the election. Nooksack Const. art. IV, § 4; NTC § 62.03.010(A). Next, the Election Superintendant appoints two Ballot Clerks. Nooksack Const. art. IV, § 4; NTC § 62.03.010(B). Together, the three positions constitute the Election Board. *Id.* "The duties of this election board shall be to supervise and certify the election, and resolve all election disputes." Nooksack Const. art. IV, § 4 (emphasis added). Decisions of the Election Board may be appealed to this Court, sitting as an appellate court, and this Court's decisions are final. NTC §§ 62.01.030, 62.03.030, 62.05.030, 62.07.010-030.

At oral argument on January 14th, the Court pointed to the constitutional provision stating that the Election Board shall "resolve all election disputes." The Court queried whether an issue regarding eligible voters is an "election dispute" requiring determination in the first instance by the Election Board, subject to appeal to this Court. The Court noted that whether the issue properly goes before the Election Board and then this Court, rather than this Court and potentially the Court of Appeals, may have a significant impact upon the proper record, the standard of review, and the length of proceedings.

Because neither side had anticipated the jurisdictional issue, the Court permitted supplemental briefing after the hearing. In their supplemental filing, Plaintiffs view the dispute now before the Court — whether Plaintiffs should be allowed to vote — as an "election dispute" that must be resolved in the first instance by the Election Board. Plaintiffs cite decisions from several Tribal jurisdictions with similar constitutional or statutory provisions requiring a final determination by an election board prior to court involvement. If the court in each case found the matter to be an "election dispute," then the premature lawsuit was dismissed. By the same token, Plaintiffs argue, this Court lacks jurisdiction over this "election dispute" and Defendants' motion for preliminary injunction should be denied.

In their supplemental filing, Defendants argue the opposite: "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2. Defendants cite a decision by the Nooksack Court of Appeals in support of their argument. *Campion v. Swanaset*, No. NOO-C-496-004 (Nooksack Ct. App. 11/12/96), was a post-election challenge to the 1996 Tribal Council elections, involving the same positions as the 2016 elections. Without going first to the Election Board, the plaintiff voters sued the Tribal Council, the Election Board, and various Tribal officials, contending changes to the Election Code violated the plaintiffs' constitutional rights and that the Election Board failed to comply with notice requirements. This Court concluded jurisdiction was lacking due to the constitutional requirement that the Election Board "resolve all election disputes" at the outset.

The Court of Appeals reversed and remanded for trial. The court noted that the trial court had reached conflicting

decisions regarding jurisdiction in other election cases just two years earlier. The court held that the trial court had subject matter jurisdiction pursuant to Nooksack Constitution, Article VI, Section 2(A)(3), providing for jurisdiction "over all civil matters concerning members of the Nooksack Indian Tribe." Finding jurisdiction under that provision, the court declined to decide whether the trial court also had jurisdiction under the provision in Article VI, Section 2(A)(3), conferring jurisdiction "over all matters concerning the establishment and functions of the trial government, provided that nothing herein shall be construed as a waiver of sovereign immunity by the tribal government."

The *Campion* court cautioned:

> In now finding subject matter jurisdiction, this Court strictly limits its conclusion to the facts of this case. We leave it to further cases to develop the parameters of this source of subject matter jurisdiction for cases that go beyond the strict confines of this case.
>
> . . . .
>
> This case raises many important issues which directly touch upon the essence of government — the ability of tribal members to elect their governmental leaders.

Campion at 6-7. From the last sentence quoted, it appears the appellate court reached its decision, in part, based upon the importance of the issues raised. The plaintiffs challenged amendments to the Election Code on constitutional grounds, which the appellate court apparently considered outside the ambit of the Election Board. But, at the same time, the court narrowed its ruling to the facts of *Campion*.

Likewise, in *Cline v. Cunanan*, No. NOO-CIV-02/08 (Nooksack Ct. App. 1/12/09), the Court of Appeals looked to the nature of the election-related dispute in order to decide whether the trial court had subject matter jurisdiction. The plaintiffs challenged a provision in the Election Code requiring tribal members seeking election to Tribal Council to submit to drug testing prior to receiving a candidate packet. At that time, the Election Code contained a provision no longer appearing in the code: "The Nooksack Tribal Court shall not have subject

matter jurisdiction to hear cases under this ordinance." As a result of that provision and the constitutional provision regarding "all election disputes," this Court determined it lacked subject matter jurisdiction. The Court also found that defendants had not waived tribal sovereign immunity.

On appeal, the *Cline* court distinguished between a dispute over election results versus a constitutional challenge to a provision in the Election Code, finding the latter to be outside the ambit of the Election Board. The Court relied, in part, on the decision in *Campion*, although the *Cline* court found subject matter jurisdiction based upon Article VI, Section 2(A)(3), conferring jurisdiction "over all matters concerning the establishment and functions of the trial government." Like the *Campion* court, the *Cline* court reversed the trial court's decision regarding subject matter jurisdiction. However, the *Cline* court affirmed the trial court decision dismissing the action based on tribal sovereign immunity.

In a sense, the question now before the Court concerns who will receive the Notice of Election required by Election Code § 62.04.010(A), which the Election Superintendant mails "to all Tribal members who will be eligible to vote on the scheduled election days." The issue currently before the Court might arrive as an appeal from a challenge to the Election Board regarding the Notice of Election. Perhaps the issue would be most "ripe" at that point. But deciding who will receive the Notice of Election is tantamount to deciding who is entitled to vote. Defendants' counterclaim and motion for preliminary injunction implicate the constitutional question whether, for purposes of voting in Tribal elections, "enrolled members" include members subject to disenrollment proceedings. The determination whether potential disenrollees are "enrolled members" for purposes of voting is likely outside the ambit of the Election Board.

Notably, while the Election Code sets out a step-by-step process for disqualified candidates to seek pre-election redress from the Election Board, the Election Code is silent concerning compilation of the voter list and a process for disenfranchised voters to seek redress pre-election. Nor is there necessarily a process for redress post-election. Chapter 62.07 of the Election Code, governing "Contests, Appeals and Certification of Election Results," sets forth procedures for a post-election challenge by "[a]ny qualified voter or candidate." NTC §

62.07.020. It is not clear whether "[a]ny qualified voter" includes voters disenfranchised from the outset.

Moreover, one can envision a situation where the Election Board obtains a list of enrolled members from which the Enrollment Department has already redacted the names of potential disenrollees. The Court will not speculate as to what sort of challenge might ensue, but it would surely be something beyond the "election dispute" anticipated in the Nooksack Constitution. One can also envision a situation where the elections are held hostage, with election-related issues viewed as "election disputes" but with no Election Board appointed to decide the disputes. As discussed in more detail below, the Court is troubled by Defendants' statement: "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2. In fact, the election process should be underway. By Defendants' own admission, they have already missed several statutory deadlines pertaining to the 2016 elections, including appointment of an Election Superintendant who then appoints other members of the Election Board. More than seven weeks after the statutory deadline for appointment, there is no Election Superintendant. There is no Election Board.

Under the circumstances, it is prudent to follow the precedent of the *Cline* court and the lead, if not the precedent, of the *Campion* court and exercise jurisdiction now. Thus, the Court may exercise subject matter jurisdiction over Defendants' counterclaim under either provision in Nooksack Constitution Article VI, Section 2(A)(3), as a "civil matter[] concerning members of the Nooksack Indian Tribe" or as a "matter[] concerning the . . . functions of the tribal government." Because the counterclaim and motion are brought by Defendants, tribal sovereign immunity is not an issue.

Defendants' Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008)(citation omitted). "A plaintiff 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." *Id.* at 20 (citations omitted).

(1) Defendants' Likelihood of Success on the Merits

Defendants believe Plaintiffs who will be at least 18 years of age on election day intend to vote in the 2016 Tribal Council elections. Plaintiffs agree. Defendants contend Plaintiffs should be enjoined from voting because they are not eligible to be enrolled members and because they continue to be enrolled only because they have delayed disenrollment proceedings through protracted litigation. Of course, Plaintiffs do not agree.

Plaintiffs respond that, despite the pendency of disenrollment proceedings, Plaintiffs remain enrolled members and that denying them the right to vote would violate their right to equal protection under the Nooksack Constitution, Article IX, which provides: "All members of the Nooksack Indian Tribe shall be accorded equal rights pursuant to tribal law." Article IX also expressly guarantees to all members of the Nooksack Tribe protections contained in the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (ICRA). Pursuant to ICRA, "No Indian tribe in exercising powers of self-government 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." 25 U.S.C. § 1302(a)(8).

The United States Supreme Court has established a three-tiered approach to analyzing equal protection cases. Laws or actions that impact certain suspect classes or infringe on a fundamental right are subject to strict scrutiny and must serve a compelling state interest. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944)(racial class); *United States v. Guest*, 383 U.S. 745, 759 (1966)(right to interstate travel). Laws or actions that discriminate based on other suspect classes must withstand an intermediate level of scrutiny, assessing whether they serve important governmental objectives and substantially relate to achievement of those objectives. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-98 (1976)(gender). Laws or actions that do not target a suspect class or burden a fundamental right are subject to rational basis review, requiring that they be rationally related to a legitimate state interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996)(sexual orientation).

Plaintiffs assert the right to vote is a fundamental right and any infringement on their right to vote is subject to strict

scrutiny and may be upheld only if it serves a compelling interest of the Tribe.

The Supreme Court has not treated election cases consistently. Sometimes the Court labels the right to vote fundamental and applies strict scrutiny. *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 194-95 (1992)(law restricting advertising around polling place); *Kramer v. Union Free School District*, 395 U.S. 621, 627-28 (1969)(law limiting who could vote in school district election); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966)(law requiring voter to pay a poll tax). *See* Douglas, *"Is the Right to Vote Really Fundamental?,"* 18 Cornell Journal of Law and Public Policy 143, 143 (2008) ("Regulations involving direct burdens on individuals — such as laws about the value of one's vote or who is eligible for the franchise — impact the fundamental right to vote and deserve strict scrutiny review.") At other times the Court views the right to vote as something less, as illustrated by the two cases upon which Defendants rely in their reply memorandum.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), a registered voter sued Hawaii officials, claiming the state's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth Amendments to the United States Constitution. Rejecting the voter's contention, the Supreme Court held that the prohibition did not impermissibly burden the right to vote. The Court recognized that elections must be regulated and that election laws invariably impose some burden upon voters. *Id.* at 433. "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* The Court distinguished between "severe restrictions" on a voter's First and Fourteenth Amendment rights versus "reasonable, nondiscriminatory restrictions." *Id.* at 434.

The instant case is readily distinguishable from *Burdick*. Although implicating constitutional rights, *Burdick* is not an equal protection case. Petitioner did not contend he was treated differently from other registered voters. He was not denied the franchise but, like all other Hawaii voters, he was simply limited in his choices. The prohibition on write-in

votes was a reasonable, nondiscriminatory restriction, justified by the state's regulatory interest, and not a severe restriction on petitioner's constitutional rights.

In this case, Defendants do not seek simply to limit Plaintiffs' choices. Rather, they seek to extinguish Plaintiffs' right to vote entirely. That is surely a severe restriction, requiring strict scrutiny.

Defendants also rely upon *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), in which the Supreme Court upheld an Indiana election law requiring in-person voters to present government-issued photo identification as a means of avoiding election fraud. Complainants contended the law substantially burdened the right to vote, arbitrarily disenfranchised voters unable to show identification, and was not a necessary or appropriate method of avoiding fraud. The Court disagreed. "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198 (footnote omitted). Under the Indiana law, an in-person voter without government-issued photo ID was allowed to file a provisional ballot and then correct the problem within ten days.

Crawford is more on-point with the instant case than *Burdick* in that voters — those with government-issued ID and those without — were treated differently. Defendants suggest Nooksack elections could proceed along the same lines approved by the Supreme Court in *Crawford*. Thus, Plaintiffs could file provisional ballots, which would be counted if Plaintiffs proved their eligibility for enrollment to the Election Board within ten days thereafter. Defendants maintain they have already met their burden of proof, as required under Section 63.04.001(B) of the Enrollment Code, through the "Basis" issued to Belmont, Oshiro, and other Plaintiffs, demonstrating Plaintiffs are not eligible for enrollment by any means. Defendants insist this disenrollment saga could end quickly if Plaintiffs would just step forward with proof they are eligible.

Although this Court has seriously considered the *Crawford* approach, the Court has concluded that provisional ballots are

not a viable option under the circumstances here. In *Crawford*, the only right impacted was the right to vote, and a voter could readily cure the deficiency. Here, the issue – whether Plaintiffs are eligible for enrollment – impacts many benefits and privileges besides the right to vote.

Moreover, the procedures for addressing the enrollment issue are the subject of Plaintiffs' pending appeal to the IBIA. Unless and until the IBIA says otherwise, Plaintiffs have a right to address their due process concerns in that forum. And they have a right to present their evidence regarding enrollment in a setting that comports with the Nooksack Constitution, Nooksack ordinances, and ICRA. The critical enrollment issue cannot be shifted to another forum, from the Tribal Council to the Election Board, to be resolved in an election context under the Election Code, rather than in a disenrollment context under the Enrollment Code.

Defendants rely upon *Shakopee Mdewakanton Sioux Community v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997), for the proposition that "[w]hen 'members' do not meet the Tribe's membership criteria, they cannot vote in tribal elections." Defendants' Motion for Preliminary Injunction at 8. In that case, the Court upheld the decision by the Secretary of the Interior to reject the results of a Secretarial Election to amend the tribal constitution due to questions about voter eligibility. The Secretary ordered an administrative law judge to determine whether certain individuals possessed sufficient blood lineage to be eligible to vote in a second election. The case is not useful here because it concerned a Secretarial Election and the Secretary's unique responsibilities under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, and federal regulations. Nor was it an equal protection case.

In a sense, the equal protection question has already been answered in the course of this disenrollment litigation. In December 2013, the Tribal Council passed a resolution providing Christmas Support of $250 to each tribal member not subject to disenrollment proceedings. In *St. Germain v. Kelly*, No. 2013-CI-CL-005, Plaintiffs argued they were deprived of equal protection guaranteed by the Nooksack Constitution and ICRA. The Court agreed, rejecting Defendants' argument "that the proposed disenrollees are not similarly situated to those not proposed for disenrollment because they are a group of

individuals [whose] enrollment eligibility is in question." Order Granting Motion for Temporary Restraining Order at 7. The Court was "explicit" that Defendants violated equal protection guarantees by treating Plaintiffs differently regarding Christmas Support. *Id.* at 12-13. But, at the same time, the Court recognized its inability to fashion any relief requiring expenditure of tribal funds. The Court went as far as it could, issuing a temporary restraining order to preserve the status quo, which "means ordering that the Defendants act in accordance with the status quo, by treating the Plaintiff proposed disenrollees as enrolled tribal members." *Id.* at 11.

Later, the Court granted Defendants' motion to dismiss the complaint in *St. Germain*. The Tribal Council had passed a resolution superseding the resolution under which the Christmas Support checks were issued. The new resolution included a carve-out provision ensuring that potential disenrollees would receive checks if they were not disenrolled ultimately. The Court had already approved a carve-out provision regarding Back to School Support checks, which passed muster in the Court of Appeals.

> The children that have been temporarily denied payment of benefits may in fact receive the benefits in the future. This undisputed fact leads to the conclusion that the only relief available to the children is a court order that the Nooksack Tribe make immediate financial payment to Appellants while disenrollment proceedings are pending or stayed. Under our holding in *Lomeli*, the sovereign immunity of the Tribe prevents the Nooksack courts from ordering an immediate payment of funds, or any other remedy that creates a money judgment in favor of Appellants.

Roberts at 10.

In the instant case, Defendants rely upon the decisions regarding Christmas Support and Back to School Support for the proposition that privileges and benefits can be withheld pending the outcome of disenrollment proceedings. Thus, Plaintiffs can be denied the right to vote entirely or they can be required to file provisional ballots, to be counted only after proving they are eligible for enrollment. Putting aside the fact that the fundamental right to vote is hardly equivalent to Christmas Support or Back to School Support, to which no one has a

fundamental right, Defendants' reliance is still misplaced. The Court expressly found that withholding the support monies violated Plaintiffs' right to equal protection. The Court approved the carve-out approach only because the Court was unable to fashion other relief. Here, the Court is able to fashion relief by denying Defendants' motion for preliminary injunction.

When Defendants seek to withhold Plaintiffs' franchise entirely or pending proof of enrollability, the right to vote is fundamental and subject to strict scrutiny. Unequivocally, Plaintiffs are enrolled members of the Nooksack Indian Tribe and, pursuant to the Nooksack Constitution, Article IV, Section 1, "[a]ll enrolled members of the Nooksack Indian Tribe, eighteen (18) years of age or over, shall have the right to vote." *See also* NTC § 62.04.020. As enrolled members, Plaintiffs have the right to vote in the 2016 elections. Whether Defendants have a compelling interest in curtailing Plaintiffs' right to vote is answered by the discussion below related to the other prongs of the test for a preliminary injunction.

(2) Likelihood of Irreparable Harm to Defendants Absent Injunctive Relief

Defendants contend that permitting Plaintiffs to vote in the 2016 elections will irreparably damage the elections and the Nooksack Tribe.

The weak thread running through the fabric of Defendants' arguments, now and throughout the litigation, is the assumption that Plaintiffs are not eligible for enrollment. In fact, in their filings, Defendants have begun referring to Plaintiffs as "Ineligible Plaintiffs," although the matter is yet to be settled. As observed by this Court previously,

> The key problem with the Defendants' argument here is that it assumes that those proposed disenrollees are not properly enrolled. This also impacts their argument that the Plaintiff proposed disenrollees are not similarly situated in relationship to other tribal members. The Court rejects the argument that these individuals may be treated differently because they are proposed for disenrollment. These individuals may or may not be eligible for enrollment. That determination has yet to be

> made. What is clear to this Court, however, is that those who are enrolled with the Tribe must be accorded equal treatment by the Defendants with respect to the Christmas Distribution, under the Nooksack Indian Tribe's Constitution.

St. Germain, Order Granting Motion for Temporary Restraining Order at 8-9.

What is clear to this Court is that Plaintiffs fervently believe they are eligible for enrollment, and Defendants fervently believe they are not. Plaintiffs' counsel noted during oral argument that two experts have declared Plaintiffs are Nooksack. Defendants counter that Plaintiffs are not eligible for enrollment under any category listed in the Nooksack Constitution, Article II, Section 1. Defendants contend Plaintiffs even disavowed their enrollment in complaints filed in two prior disenrollment cases, *Lomeli v. Kelly*, No. 2013-CI-CL-001, and *Adams v. Kelly*, No. 2014-CI-CL-006. Of course, Plaintiffs view things otherwise.

This judge has no preconception and has minimal knowledge of the pros and cons regarding Plaintiffs' eligibility for enrollment. It is not the Court's call to make, now or later. *See* Nooksack Enrollment Code, § 63.00.003 ("The Nooksack Tribal Court shall not have subject matter jurisdiction to hear cases under this ordinance."). Nor is it advisable or appropriate for the Court to consider the constitutional issues raised here with an eye towards the eventual outcome of disenrollment proceedings before the Tribal Council. The process that is due and the equality of protection to be afforded are not dependent upon how things might turn out.

It appears to the Court that the real harm Defendants fear is the outcome of the 2016 elections. Defendants' counsel made statements to that effect during oral argument, and Defendants have submitted a newspaper account of exhortations by Plaintiffs' counsel to his clients regarding the elections. Moreover, as Defendants freely acknowledge, Plaintiffs have been allowed to vote previously, during the pendency of disenrollment proceedings. Disenrollment proceedings began more than a year before the 2014 Tribal Council elections. Defendants already believed Plaintiffs were not eligible for enrollment, well before Plaintiffs' alleged disavowals in *Lomeli* and *Adams*, yet

Plaintiffs voted without issue. It appears Defendants were not worried about the outcome of the 2014 elections. Now, based upon the particular open seats and the incumbents who occupy those seats, Defendants are worried, and they push the envelope of irreparable harm.

Speculative injury is not enough. 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, at 153-54 (2d ed. 1995). In *Winter*, the Supreme Court disapproved the Ninth Circuit's "possibility" standard as too lenient.

> Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction. . . . Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Winter, 555 U.S. at 22 (citations omitted; emphasis in original).

In order to reach irreparable harm here, Defendants must jump two hurdles: First, Defendants must be correct in assuming Plaintiffs are not eligible for enrollment and, therefore, not entitled to vote. If Plaintiffs are eligible for enrollment, then they are entitled to vote, and that is the end of it. Second, assuming Defendants are correct that Plaintiffs are not eligible for enrollment and not entitled to vote, the outcome of the elections, with Plaintiffs voting, must be injurious to Defendants.

The Court is not tasked with the job of examining the assumption regarding enrollment. Even assuming Plaintiffs are not eligible for enrollment and not entitled to vote, whether harm will ensue from their vote is mere speculation. Candidates who are sympathetic to Plaintiffs' cause may or may not run. Individual Plaintiffs 18 or over may or may not vote. Plaintiffs' candidates may or may not win.

(3) Balance of Equities

Injunctive relief — whether temporary restraining order, preliminary injunction, or permanent injunction — is an

equitable remedy. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). A court sitting in equity may look to equitable maxims in order to assess the balance of equities between the parties. Of particular application here, as described by the Supreme Court, is

> the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.

Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945).

In their motion for preliminary injunction, Defendants refer repeatedly to the "upcoming" elections, which would seem to suggest the 2016 elections are proceeding apace. In fact, it appears otherwise.

On January 8, 2016, Plaintiffs filed a declaration of Plaintiff Michelle Roberts, with attached Facebook postings by two Tribal Council members indicating Defendants have cancelled the 2016 elections until after conclusion of disenrollment proceedings. For that reason, Plaintiffs have filed an amended complaint and a motion for leave to amend, adding a prayer for a writ of mandamus directing Defendants to go forward with the elections. Plaintiffs have also filed a new lawsuit with the same aim. *Kelly v. Kelly*, No. 2016-CI-CL-001 (complaint filed 1/14/16, first amended complaint filed 1/21/16).

At oral argument on January 14th, Defendants' counsel took umbrage at Plaintiffs' allegation and their reliance on Facebook postings but, at the same time, responses by Defendants' counsel to the Court's questions seemed to support the truth of the matter. In fact, in post-hearing briefing, Defendants candidly admit the truth. "This is not an election dispute. The election process is not yet underway." Defendants' Supplemental Brief Regarding Jurisdiction at 2.

Pursuant to the Nooksack Election Code, the Tribal Chairman was required to appoint an Election Superintendant by December 3, 2015. NTC § 62.03.010(A); *see also* Nooksack Const. art. IV, § 4. It appears that did not occur. The Superintendant was required to mail a Notice of Election to eligible voters by December 28, 2016. NIT § 62.04.010(A). With no Superintendant appointed, that did not occur. Candidate Packets were to be filed with the Tribal Council Secretary or designee by January 4, 2016, and then transmitted to the Superintendant within one day. NTC § 62.04.060. With no Superintendant to prepare, distribute, and receive packets, the deadline passed without filings. And so on. Plainly, the 2016 elections are not on track as required by Nooksack law, and Defendants do not come to this Court, requesting equitable relief, with "clean hands."

Although it is Defendants who seek equitable relief and must have "clean hands," they accuse Plaintiffs of bad faith. They accuse Plaintiffs of delaying disenrollment through frivolous litigation. When egregious, there are ways for courts to respond — through aggressive case management, through dismissal of frivolous claims, through speedy resolution of issues, through sanctions, and so forth. Although new to the Nooksack Tribal Court, this judge has developed familiarity with all aspects of the cases related to disenrollment. There has certainly been vigorous litigation, resulting in delay, but much of it through no fault of Plaintiffs, e.g., Plaintiffs have little control over the length of IBIA proceedings.

But, Defendants insist, Plaintiffs already got what they wanted and the current appeal to the IBIA is frivolous. In fact, what Plaintiffs got was the scheduling of hearings. What Plaintiffs did not get was the scheduling of hearings that they believe comport with due process. On Plaintiffs' previous appeal, the IBIA simply remanded to the Regional Director to dispose of Plaintiffs' appeal from the Acting Superintendant's decision. Now, Plaintiffs have appealed to the IBIA from the Regional Director's decision on remand, affirming the Acting Superintendant's approval of Resolution 14-112 and amended Title 63. Now, Plaintiffs seek IBIA's review of the merits of the decisions below.

In Defendants' view, the merits were already decided in *Roberts v. Kelly*, in which the Nooksack Court of Appeals examined the procedures now incorporated into the amended Title 63. The court found the procedures complied with due process,

with just two exceptions that were corrected in the amended Title 63 now before the IBIA. Although the appellate court's discussion in *Roberts* is arguably dicta, it is possible the IBIA will defer to the Nooksack Court of Appeals' views, even upon application of different, federal standards. Whatever the possible outcome, however, Plaintiffs have a right to proceed through the BIA hierarchy. Although lengthy, the current appeal to the IBIA does not strike the Court as frivolous.

Defendants seek injunctive relief related to the 2016 elections, but they have already violated several constitutional and statutory mandates regarding the timing of events leading up to the elections. Defendants' counsel stated at the hearing on January 14th that, so far as he is aware, although deadlines have been missed, the primary election will occur on February 20, 2016, and the regular election will occur on March 19, 2016. As of January 14th, more than half the time had already elapsed between the date the Election Superintendant was to be appointed (12/3/15) and the date of the primary election (2/20/16). Given the intricate chain of events in the Election Code, time requirements and deadlines, it is difficult to imagine how voting will take place on schedule.

But even if Defendants are able to make up for lost time and the elections do occur on schedule, they have already violated the law. When Defendants filed their motion for a preliminary injunction on the afternoon of Friday, December 18, 2015, seeking to enjoin Plaintiffs from voting, they had already missed the deadline for appointing the Election Superintendant by 15 days. In the language of *Precision Instrument* quoted above, Defendants are "tainted with inequitableness or bad faith relative to the matter in which [they] seek[] relief." The balance of equities tips sharply against Defendants.

(4) Public Interest

Having already determined Defendants are unlikely to prevail on the merits of their counterclaim, that the likelihood of irreparable harm is too speculative, and that the equities balance against Defendants, the Court will not belabor the public interest prong.

Suffice to say that the public – that is, all enrolled members of the Nooksack Tribe, including those old enough to vote and those not – has a strong interest in fair and timely

elections. Like Defendants, Plaintiffs are still members of that public.

As an alternative to provisional voting, Defendants suggest the Court stay the 2016 elections until disenrollment proceedings have concluded. Perhaps disenfranchising all voters, and not just Plaintiffs, would solve the equal protection problem, but it would certainly not serve the public interest.

Assuming this Court has authority to stay elections, a stay pending the outcome of disenrollment proceedings could be very lengthy. Plaintiffs filed their appeal to the IBIA on November 23, 2015. Plaintiffs' counsel reports he has been informed IBIA proceedings are currently taking one year. With the injunction now in force, Defendants cannot recommence disenrollment proceedings until after the IBIA decision, at the very earliest. With the length of IBIA proceedings, two cases currently pending in this Court, and the possibility of other issues cropping up, it is not a stretch to imagine a scenario in which the 2016 elections, if stayed, could run up against the 2018 elections.

Moreover, as the Court noted at the January 14th hearing, delay of elections may pose other problems. The four members who currently serve as Tribal Council Vice-Chairman, Treasurer, and Council Positions C and D have four-year terms that, presumably, expire sometime in March 2016. *See* Nooksack Const. art. III, § 4. "In the event that any elective tribal office becomes vacant between elections, the tribal chairman, subject to the approval of the tribal council, shall appoint an eligible tribal member to fill the vacant position until the position term." Nooksack Const. art. V, § 3. Questions abound as to the extent of the chairman's authority, when that authority may be exercised, and whether the chairman will have an agreeable Council at that time.

In sum, Defendants have failed to satisfy any of the four prongs for issuance of a preliminary injunction, all of which must be met. Defendants' motion for preliminary injunction, filed December 18, 2015, is denied.

Plaintiffs' Motion to Amend Complaint

Plaintiffs filed their initial complaint in this lawsuit, along with a motion for preliminary injunction, on May 30, 2014.

The Court granted the motion for preliminary injunction less than two weeks later, on June 12, 2014, and later confirmed the ongoing status of the injunction by order entered February 26, 2015. Although not formally stayed, the case has been dormant on the Court's docket for long periods due to the injunction and due to BIA proceedings.

The lawsuit sprang back to life on December 18, 2015, when Defendants filed their answer and counterclaim, along with the motion for preliminary injunction discussed in this order. On December 28, 2015, Plaintiffs filed their answer to the counterclaim. On January 11, 2016, Plaintiffs filed a motion for leave to file an amended complaint, along with an amended complaint. Then, on January 14, 2016, as amended on January 21, 2016, Plaintiffs filed a new lawsuit, *Kelly v. Kelly*, No. 2016-CI-CL-001. In both the sixth cause of action in the amended complaint in this case and the complaint in the new suit, Plaintiffs pray for injunctive relief, declaratory judgment, and writ of mandamus to put the 2016 elections on track.

NTC § 10.05.035(b) provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading, motion to dismiss, or motion for summary judgment is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires . . . .

Because Plaintiffs seek to amend their complaint after Defendants filed an answer, they must have Defendants' consent or leave of court. Defendants oppose Plaintiffs' motion for leave to amend complaint on two grounds.

First, Plaintiffs did not comply with NTC § 10.05.050(e), which requires such a motion to be filed at least six court days before being heard and requires counsel to contact the court clerk and coordinate with opposing counsel to schedule the hearing. The Court had already scheduled the January 14th hearing on other pending matters. Although the motion for leave to amend was filed fewer than six court days before the scheduled hearing, Plaintiffs assumed the motion would be heard that day and did not see the need to follow procedures under NTC § 10.05.050(e).

The Court agrees with Defendants that Plaintiffs' counsel should have followed the rules by properly noting the motion for hearing. At a minimum, he should have contacted the Court Clerk and opposing counsel to ascertain whether January 14th would work. During the January 14th hearing, Defendants' counsel cited a history of non-compliance with NTC § 10.05.050(e) on the part of Plaintiffs' counsel. The Court does not condone such conduct but this single instance, or even a pattern of such conduct, does not override the lenient standard for amendment of pleadings under NTC § 10.05.035(b).

Second, Defendants contend the motion for leave to amend the complaint in this case is moot as a result of the filing of the new lawsuit. As Defendants note, the Court expressed concern during the January 14th hearing that adding 2016 election issues to the instant lawsuit, a longstanding disenrollment case, muddied the litigation waters. Indeed, it appears Plaintiffs' counsel had similar thoughts in that he arrived at the January 14th hearing prepared to file the new suit.

In the Court's view, the filing of the new lawsuit did not moot the motion for leave to amend the complaint in this case. The motion and the amendment would be rendered moot through disposition of the new case, which has not occurred. In their reply regarding the motion to amend, Plaintiffs present sufficient reasons for proceeding along parallel tracks as a protective measure. Although the Court expressed a preference for separate proceedings and the two matters — the new suit and the sixth cause of action in this case — cannot proceed along separate tracks forever, the Court will not force a choice now. Moreover, as Plaintiffs note, it was Defendants who first appended election matters to the instant case through their counterclaim and motion for preliminary injunction.

Plaintiffs' motion for leave to amend complaint, filed January 11, 2016, is granted.

Motions for Sanctions / Motions to Strike

In their response to Defendants' motion for preliminary injunction, Plaintiffs request an award of attorney fees and costs as a sanction against Defendants for filing a frivolous motion and for failing to disclose adverse controlling authority. It appears Plaintiffs view the motion as frivolous based upon Defendants' position that Plaintiffs can be treated

differently from other enrolled members due to the pending disenrollment proceedings. It appears the adverse controlling authority they believe is missing from Defendants' motion is the determination by the Court in *St. Germain* that Defendants violated Plaintiffs' right to equal protection by withholding Christmas Support.

In fact, Defendants do rely upon the cases concerning Christmas Support and Back to School Support in their motion for preliminary injunction although, predictably, from a different perspective than Plaintiffs. As discussed above, the Court believes Defendants' reliance is misplaced, but they were not trying to hide the ball. Nor is it likely they would be successful in doing so regarding a decision from this Court in this very series of disenrollment cases.

Plaintiffs apparently believe Defendants were obliged to bring to the Court's attention a particular passage from the Court's "Order Granting Motion for Temporary Restraining Order," entered December 18, 2013. Thus, as already quoted above in the context of the irreparable harm discussion, the Court said at pages 8-9 of the order in *St. Germain*:

> The key problem with the Defendants' argument here is that it assumes that those proposed disenrollees are not properly enrolled. This also impacts their argument that the Plaintiff proposed disenrollees are not similarly situated in relationship to other tribal members. The Court rejects the argument that these individuals may be treated differently because they are proposed for disenrollment. These individuals may or may not be eligible for enrollment. That determination has yet to be made. What is clear to this Court, however, is that those who are enrolled with the Tribe must be accorded equal treatment by the Defendants <u>with respect to the Christmas Distribution</u>, under the Nooksack Indian Tribe's Constitution.

(Emphasis added.)

The emphasis added is intended to demonstrate a portion of the quote omitted, with ellipsis substituted, in Plaintiffs' response to the motion for preliminary injunction. Defendants failed to acknowledge the passage and probably should have.

Plaintiffs quoted the passage but were a bit disingenuous in their editing. The fact is both sides wished to use the *St. Germain* case to their best advantage. In the balance between candor to the Court and zealous representation of the client, both sides may have stepped a bit over the advocacy line. But the Court does not find conduct outside the bounds of reason. Nor does the Court view Defendants' motion for preliminary injunction as frivolous, despite the Court's conclusion that Defendants have failed all four prongs of the test. A preliminary injunction is extraordinary relief, and a party requesting such relief faces a heavy burden.

Finally, motions to strike:

In a surreply concerning Defendants' motion for preliminary injunction, Plaintiffs move to strike from Defendants' reply their alternative proposal for provisional ballots. Indeed, Defendants stated in their motion that "[i]f Ineligible Plaintiffs vote, there would be no way to adjust the outcome of the elections once Ineligible Plaintiffs are disenrolled." Defendants' Motion for Preliminary Injunction at 10. But in their reply, Defendants suggest a "way to adjust," proposing provisional ballots for the first time. Likely this occurred because, at the outset, Defendants did not view disenfranchisement as an instance of unequal protection. They made various arguments why Plaintiffs should be foreclosed from voting but did not drill down to the equal protection issue raised by Plaintiffs in their response. It was reasonable for Defendants to suggest provisional ballots for the first time in their reply, in response to Plaintiffs' equal protection argument, and Plaintiffs took the opportunity to respond to the proposal in their surreply.

At the beginning of the January 14th hearing, Defendants moved to strike Plaintiffs' suggestions, particularly in Facebook postings, that the 2016 elections have been cancelled, insisting there is no truth to the matter. Perhaps the correct word would be "postponed" rather than "cancelled" but, as discussed above, even Defendants acknowledged in their reply that "[t]he election process is not yet underway," although several statutory deadlines have come and gone.

Also at the beginning of the January 14th hearing, Defendants sought to strike and entirely remove from the record footnote 4 in Plaintiffs' surreply concerning Defendants' motion

for preliminary injunction. The footnote relates to skirmishes over the proper noting of motions, the scheduling of the January 14th hearing, and communications between counsel. The Court fully agrees with Defendants that Plaintiffs went beyond the pale in the footnote, even claiming opposing counsel "lied." Similar accusations appear in emails between counsel, which are attached to a declaration of Plaintiffs' counsel cited in footnote 4. At the January 14th hearing, Defendants' counsel provided a declaration of Nooksack IT staff along with phone records disproving Plaintiffs' claim. While insisting his own office staff and records indicate otherwise, Plaintiffs' counsel apologized and struck the egregious statements. Because the statements are intertwined with other materials necessary to maintain a complete and accurate record, the Court declines to remove the statements from the record entirely.

To a significant degree, the parties and the Court have entered uncharted territory in these lawsuits related to the disenrollment proceedings, and perhaps even more so as disenrollment issues intersect with Tribal Council elections. Plainly, there are high stakes and intense emotions on both sides, and it stands to reason counsel for both sides will sometimes push the envelope as they handle cases and address issues that are sui generis. Going forward, the Court urges counsel to treat one another with both professional and common courtesy.

CONCLUSION

The Court has subject matter jurisdiction over Defendants' counterclaim regarding the 2016 Tribal Council elections as a "civil matter[] concerning members of the Nooksack Indian Tribe" and as a "matter[] concerning the . . . functions of the tribal government." Nooksack Const. art. VI, § 2(A)(3). Defendants' motion for preliminary injunction, filed December 18, 2015, is denied. Plaintiffs' motion for leave to amend complaint, filed January 11, 2016, is granted. All pending motions for sanctions and to strike are denied.

SO ORDERED this 26th day of January, 2016.

Susan M. Alexander
Chief Judge