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IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE

BELMONT, *et al.*,

Plaintiffs,

v.

KELLY, *et al.*,

Defendants.

Case No. 2014-CI-CL-007

DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

Defendants respectfully request that the Court reconsider its January 26, 2016 Order Denying Defendants' Motion for Preliminary Injunction.[1] The Court erred by misinterpreting past decisions of this Court and misinterpreting Defendants' requested relief. This litigation raised a potential equal protection problem, but the provisional ballot process approved by the federal Supreme Court solves any such problem. Defendants are entitled to a preliminary injunction because they are likely to succeed on the merits, the Tribe will suffer irreparable harm absent injunctive relief, the balance of equities tips in Defendants' favor, and injunctive relief is in the public interest.

[1] Defendants do not seek reconsideration of the Court's January 26, 2016 finding of jurisdiction, granting of Plaintiffs' Motion for Leave to Amend Complaint, or denying of Motions for Sanctions and to Strike (except as to this Court's declination to remove the statements in footnote 4 of Plaintiffs' Surreply—*see infra* Section V).

## I. DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS

This Court misinterpreted the relief that Defendants seek and therefore erred in finding that Defendants are not likely to succeed on the merits. Defendants seek to prevent ineligible voters from voting in Nooksack elections; Defendants do not seek to determine the enrollment status of any Plaintiff.[2] This Court erroneously found that "[h]ere, the issue—whether Plaintiffs are eligible for enrollment—impacts many benefits and privileges besides the rights to vote." Order Den. Defs.' Mot. for Prelim. Inj. at 13; *See also id.* at 8 ("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 issue here is not whether Plaintiffs are eligible for enrollment nor whether other benefits are due; rather, the issue is whether Plaintiffs are eligible to vote. In conflating these issues, the Court mischaracterizes the relief Defendants seek and exaggerates the consequences of granting that relief.

In *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), the Supreme Court upheld an Indiana law requiring in-person voters to provide government-issued photo identification against an equal protection challenge. The Indiana law provided that if a voter did not have the proper photo identification, the voter could submit a provisional ballot, which would be counted if the voter presented proper identification within 10 days of the election. *Crawford*, 553 U.S. at 185-86. The *Crawford* Court clarified the balancing test to be applied to government-imposed

[2] Defendants used the term "Ineligible Plaintiffs" to clarify that Defendants only seek relief against those who are subject to pending disenrollment proceedings and who fail to provide evidence of lawful enrollment. The term was intended to distinguish between Plaintiffs, because Defendants have evidence that one Plaintiff is eligible to vote, four Plaintiffs were disenrolled on August 8, 2013, and two Plaintiffs were never enrolled. *See* Counterclaim at 5:2-5 and n.4. Defendants will use the term Plaintiffs here, but Defendants only seek relief against those Plaintiffs who are subject to pending disenrollment proceedings and do not provide evidence of eligibility to vote.

burdens on the voting process. Courts "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 190; *see also ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) ("the appropriate test when addressing an Equal Protection challenge to a law affecting a person's right to vote is to "weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule"). Importantly, the *Crawford* provisional ballot process does not determine whether a person actually lives in Indiana, is over age 18, is a United States citizen, and is not otherwise prohibited from voting; instead, the process provides a means for the state to protect its interests.

The Seventh, Ninth, Tenth, and Eleventh Circuits—as well as many other courts—have followed *Crawford* in upholding voter photo identification requirements against equal protection challenges. *See, e.g., Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014); *Gonzalez v. Ariz.*, 677 F.3d 383, 409-10 (9th Cir. 2012); *ACLU of N.M.*, 546 F.3d at 1325; *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *S.C. v. United States*, 898 F. Supp. 2d 30, 42 (D.D.C. 2012). As the Ninth Circuit explained, the burden of obtaining proper photo identification is not heavy enough to support an attack on the law's constitutionality in light of the state's interests in "deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence." *Gonzalez*, 677 F.3d at 410.

Courts have pointed out that *Crawford* upheld Indiana's law "even absent specific evidence of in-person voter fraud" due to the "general history of voter fraud and the risk that in-person voter fraud 'could affect the outcome of a close election....'" *Green Party of Tenn. v. Hargett*, No. 2:13-cv-224, 2014 U.S. Dist. LEXIS 102706, at *18 (E.D. Tenn. Feb. 20, 2014); *see also Common Cause/Ga.*, 554 F.3d at 1353-54 (upholding Georgia voter photo identification requirement without evidence of voter fraud). Here, the Tribe has specific evidence of voter

ineligibility, and Plaintiffs are aware of that evidence. *See* Decl. of K. Canete (Dec. 18, 2015) at ¶¶5-6; *see also infra* Section II. In addition, the Tribal Council disenrolled 24 former members (Disenrollees) on August 8, 2013 due to failure to meet the Tribe's membership requirements and failure to request a meeting with the Tribal Council or present any evidence of membership eligibility. *See* Exhibits A-X to Decl. of C. Bernard (Feb. 5, 2016). Those Disenrollees' enrollment applications claimed enrollment through Annie George just as Plaintiffs' enrollment applications do. *See infra* Section II; Exhibit Y to Decl. of C. Bernard (Feb. 5, 2016) (tree chart attached to Sonia Lomeli Decl. of March 15, 2013). Annie George was not Nooksack to any degree. *See* Exhibit K to Decl. of G. Galanda (Feb. 9, 2015) (Belmont Notice and Basis documents). Plaintiffs have also admitted that they do not claim a right to membership through a Public Domain Allottee, and there is no evidence Plaintiffs descend from any person listed on the Nooksack Tribe's official census roll dated January 1, 1942 or meet any other membership requirement in the Constitution.[3] *See* Exhibit B to Decl. of R. Dodge (Jan. 13, 2016); *see also infra* Section II.

The Tribe seeks to protect the integrity of the Nooksack election process, deter and detect voter fraud, and ensure that only eligible voters are able to vote. The Tribe shares the same interests as Indiana in *Crawford*. The Tribe also seeks the same solution: requiring confirmation of voter eligibility through presentment of proof and the provisional ballot process. The Tribe does not seek "to extinguish Plaintiffs' right to vote entirely." Order Den. Defs.' Mot. for Prelim. Inj. at 12. The provisional ballot process allows Plaintiffs to come forward with proof of

[3] In order to vote in Indiana, a person must prove they are a U.S. citizen. Failure to provide that proof would affect a person's right to vote in Indiana, but it would not affect whether the person is in fact a citizen. Similarly, requiring proof of Nooksack membership eligibility for voting would not affect a person's membership status.

eligibility to vote.[4] If Plaintiffs show that they meet voter requirements, then their vote would count. If Plaintiffs do not show that they meet voter requirements, then their vote would not count; Plaintiffs would not lose any other benefit or privilege, because failure to show voter eligibility is not equivalent to being disenrolled. This Court erroneously implied that Defendants attempt to shift the enrollment decision from the Tribal Council to the Election Board. *Id.* at 13. The enrollment determination is not at issue here and would not be decided by the provisional ballot process. Defendants seek to impose essentially the same burden that Indiana imposed in *Crawford*: a voter must merely show proof of proper enrollment in order to have their vote count.

The Seventh Circuit explained that voters who lack photo identification can only be described as "disenfranchised" if the state made it impossible or at least difficult for them to obtain photo identification; if, however, photo identification is available for those "willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time." *Frank*, 768 F.3d at748. Inconveniences such as gathering documents and making a trip to a government office do "not quality as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. In other words, governments do not have to count the votes of those who may well be qualified voters if those persons do not make the effort to obtain government-issued identification. Here, Plaintiffs have free access to their enrollment files and have always had such access—including during the entire pendency of the disenrollment litigation. It is not onerous to ask Plaintiffs to present documentation, such as an enrollment resolution and family tree chart, showing voter eligibility.

[4] Those seeking to become candidates or sign candidate petitions must be eligible to vote and could present the same proof to the Election Board.

This Court also erred in dismissing *Shakopee Mdewakanton Sioux Community v. Babbitt* (*Shakopee*), 906 F. Supp. 513 (D. Minn. 1995), *aff'd*, 107 F.3d 667 (8th Cir. 1997) as irrelevant. *See* Order Den. Defs.' Mot. for Prelim. Inj. at 13. There is nothing special about Secretarial elections that would prohibit ineligible voters from voting there but allow them to vote in tribal elections. Under 25 C.F.R. § 81.5, the Secretary of the Interior (Secretary) must authorize a Secretarial election to amend a tribal constitution when requested pursuant to the tribal constitution. Section 81.6 states that tribal members who have duly registered are entitled to vote, and Section 81.7 explains that an amendment will be "adopted, ratified, or revoked if a majority of those actually voting are in favor of adoption, ratification, or revocation." Similar to tribal elections, there is an election board consisting of three people, which must conduct the election and resolve eligibility disputes. 25 C.F.R. §§ 81.8, 81.13. In addition, the Secretary of the Interior is obligated to abide by equal protection principles, and the *Shakopee* Court explained that the "right to vote in this election is a federal right protected by the Federal Constitution and the results of this election may fundamentally affect federal rights guaranteed to federally recognized tribal 'members.'" *Shakopee*, 906 F. Supp. at 520-21. The *Shakopee* Court upheld the Secretary's authority to review voter eligibility determinations based in part on the Secretary's constitutional concerns. *Id.* at 521. Secretarial elections are not inherently distinguishable from tribal elections. While this Court does not have to follow *Shakopee*, it is plainly relevant and provides persuasive authority for ensuring that only eligible voters vote in tribal elections.

This Court misinterpreted *St. Germain v. Kelly*, 2013-CI-CL-005, Order Granting Defendant's Motion to Dismiss and Denying Plaintiffs' Motion for Summary Judgment (Jun. 24, 2014) when it held that the "Court approved the carve-out approach only because the Court was unable to fashion other relief." *See* Order Den. Defs.' Mot. for Prelim. Inj. at 15. The Court in

fact held that the carve-out for Back to School and Christmas Support payments "sufficiently protect[] the interests of the potential disenrollees." *St. Germain*, Order Granting Defs.' Mot. to Dismiss and Den. Pls.' Mot. for Summ. J. at 2-3. In other words, Defendants' interests in protecting the Tribe's treasury and allowing Plaintiffs to obtain Back to School and/or Christmas Support payments only if they are found to be properly enrolled passes equal protection scrutiny.

Similarly here, Defendants' interests in protecting Nooksack elections warrants imposing the burden of the provisional ballot process. The *Crawford* Court stated that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196. Indeed, a government "indisputably has a compelling interest in preserving the integrity of its election process." *Common Cause/Ga.*, 554 F.3d at 1353 (internal quotations omitted). The burden of the provisional ballot process is minimal in comparison to the Tribe's interests in avoiding voter fraud and protecting the integrity of the election process.

## II. DEFENDANTS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF.

This Court erred in asserting that 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." Order Den. Defs.' Mot. for Prelim. Inj. at 15. Defendants do not *assume* Plaintiffs are ineligible; Defendants have convincing evidence demonstrating that Plaintiffs do not meet the Constitution's membership requirements. Defendants have provided this information to Plaintiffs Belmont and Oshiro, among others, as well as Plaintiffs' counsel.[5]

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[5] This Court erroneously stated that "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." *See* Order Den. Defs.' Mot. for Prelim. Inj. at 12. Defendants' burden of proof for enrollment matters is not at issue here. Defendants rely on the Basis

*See* Decl. of K. Canete (Dec. 18, 2015) at ¶¶5-6.

As explained *supra* in Section I, the Tribal Council disenrolled 24 former members on August 8, 2013 because they did not meet the Tribe's membership requirements and they failed to provide evidence of enrollment eligibility or to request a disenrollment meeting under Title 63, Section 63.04.001(B)(2). *See* Exhibits A-X to Decl. of C. Bernard (Feb. 5, 2016). Four of those Disenrollees are named as Plaintiffs here: Rose Hernandez, Cody Narte, Nadine Rapada, and Kristal Trainor. *See* Exhibits G, I, L and O to Decl. of C. Bernard (Feb. 5, 2016). The *Lomeli* plaintiffs challenged the disenrollment of those four Disenrollees; the *Lomeli* plaintiffs alleged that the four should not have been disenrolled based on a stipulation they argued barred all disenrollments. *See Lomeli v. Kelly*, No. 2014-CI-APL-001, Opinion (Jun. 19, 2014) (attached as Exhibit Z to Decl. of C. Beranrd (Feb. 5, 2016)). The Court of Appeals rejected the *Lomeli* plaintiffs' arguments, holding that the *Lomeli* plaintiffs failed to show that the stipulation was violated. *Id.* at 3-4. The Court of Appeals held that the stipulation applied only to the six *Lomeli* plaintiffs and those persons listed on Plaintiffs' counsel's April 12, 2013 Representation List. *Id.* None of the Disenrollees were *Lomeli* plaintiffs or listed on the Representation List, and they remain disenrolled.

The Disenrollees' enrollment applications relied on the same ancestor, Annie George, as Plaintiffs' enrollment applications do. Annie George was not Nooksack. *See* Exhibit K to Decl. of G. Galanda (Feb. 9, 2015) (Belmont Notice and Basis documents). The Disenrollees did not come forward with any evidence of proper enrollment, and Plaintiffs have not provided any such evidence either. Plaintiffs have disavowed their membership by admitting that they "do not 'clam [sic] right to membership based through lineal descendancy of an original Nooksack Public Domain allottee under Article II, Section 1(a) of the Constitution...." *See* Exhibit B to

documents not to show that they have met their burden of proof but to show that Defendants have evidence of corrupted voter rolls and have provided this evidence to Plaintiffs.

Decl. of R. Dodge (Jan. 13, 2016). Plaintiffs claim that they were enrolled pursuant to Section 1(c) of the Constitution, but there is no evidence that Plaintiffs are related to anyone on the Tribe's official census roll dated January 1, 1942, which is required by Resolution No. 13-02 and Title 63. *See id.*; Title 63, §§ 63.00.004 (Base Enrollee definition), 63.02.001(C)(9). Again, the Tribe has evidence that Plaintiffs do not meet any of the Nooksack requirements for membership. *See* Exhibit K to Decl. of G. Galanda (Feb. 9, 2015) (Belmont Notice and Basis documents). Plaintiffs would be in the same position as the Disenrollees but for the fact that they requested disenrollment meetings with the Tribal Council, and those disenrollment meeting have been stayed. Defendants do not recite this evidence to pre-adjudicate Plaintiffs' enrollment status; rather, Defendants recite it to demonstrate that they have concrete evidence of Plaintiffs' ineligibility to vote in Nooksack elections. When the Tribe has evidence that its rolls have been corrupted it must be able to address voter fraud and prevent ineligible voting through a fair process—a process that the Supreme Court has upheld. To force the Tribe to ignore evidence that ineligible voters intend to vote would irreparably harm the integrity of the Nooksack elections.

This Court suggested that Defendants do not face irreparable harm because Plaintiffs were allowed to vote in the 2014 election after their disavowals in *Lomeli* and *Adams*. *See* Order Den. Defs.' Mot. for Prelim. Inj. at 16-17. While the *Lomeli* case began before the 2014 elections, it only involved 6 plaintiffs; it is the disavowal in *Adams II*, filed January 23, 2014, that involved all Plaintiffs. *See* Exhibit B to Decl. of R. Dodge (Jan. 13, 2016). The *Adams II* case began after the 2014 election process was underway, and this Court did not decide the case until June 26, 2014—well after the election process was completed. In addition, Defendants did not know where the disenrollment litigation was headed in December of 2013; the Court of Appeals had not yet ruled on the *Lomeli* or *Roberts* cases. To find that there is no irreparable

harm in allowing Plaintiffs to vote in the 2016 election because they voted in the 2014 election is to miss the context that two more years of litigation provide. The Nooksack Tribe has jumped through every hoop that this Court has required of it, and the Tribe cannot yet complete Plaintiffs' disenrollment meetings. In light of the Tribe's evidence of corrupted rolls and the pending IBIA litigation, this Court must allow the Tribe to protect its elections by utilizing the provisional ballot process.

This Court speculated that Defendants were not concerned about the outcome of the 2014 election but they are concerned about the outcome of the 2016 election. *See* Order Den. Defs.' Mot. for Prelim. Inj. at 16-17. As explained above, the difference in Defendants' posture between the 2014 and 2016 elections has to do with the different phases of litigation and not a difference in concern about election outcomes. Defendants do not worry about the outcome of the 2016 elections; ***they worry about voter fraud, ineligible voting, and the integrity of Nooksack elections***. These interests justified the burden in *Crawford*, and they justify the burden of provisional balloting here.

This Court also erred in finding that any harm to Defendants is speculative. *See* Order Den. Defs.' Mot. for Prelim. Inj. at 17. Plaintiffs intend to vote in the 2016 Nooksack elections. *Id.* at 10. Defendants have evidence that Plaintiffs are not eligible to vote, so Defendants have asked this Court to recognize that requiring Plaintiffs to present evidence of eligibility to vote in order to have their ballots counted satisfies equal protection. This is exactly what the Supreme Court upheld in *Crawford.* The harm does not relate to the outcome of the elections; rather, the harm occurs if voting fraud is unchecked, ineligible voters are able to vote, and the election process lacks integrity. Without provisional balloting, Defendants certainly will suffer concrete, irreparable harm.

## III. THE BALANCE OF EQUITIES TIPS IN DEFENDANTS' FAVOR.

This Court found that the balance of equities tips in Plaintiffs' favor because Defendants did not come with clean hands. Order Den. Defs.' Mot. for Prelim. Inj. at 19-20. Defendants should have filed their Motion for Preliminary Injunction on December 2, 2015 instead of December 18, 2015, but a two-week delay should not bar Defendants from equitable relief.

Defendants came to this Court in order to protect Nooksack elections. This Court should not blame Defendants for failing to initiate the election process prior to receiving this Court's ruling on the matter. Just as Plaintiffs' disenrollment meetings have been stayed during the pendency of the IBIA litigation, the election process should not be forced into operation without this Court's guidance.

## IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING INJUNCTIVE RELIEF.

This Court failed to recognize that all Nooksack members have interests in protecting the integrity of Nooksack elections, preventing voter fraud, and ensuring that only eligible voters participate in Nooksack elections. The provisional ballot process protects Nooksack elections while allowing Plaintiffs to demonstrate eligibility to vote.

## V. THIS COURT SHOULD REMOVE FOOTNOTE 4 FROM THE RECORD.

Plaintiffs accused Defendants' counsel of ignoring Plaintiffs' inquiries and lying in footnote 4 of Plaintiffs' Surreply dated January 13, 2016. This Court acknowledged that "Plaintiffs went beyond the pale in the footnote...." Order Den. Defs.' Mot. for Prelim. Inj. at 26. Yet, this Court declined to remove the offensive statements in footnote 4 from the record because they are "intertwined with other materials necessary to maintain a complete and accurate record...." *Id.* This Court need not remove all materials cited in footnote 4 from the record, but this Court could surely remove the offensive statements in footnote 4 from the record. Since Plaintiffs' counsel struck the "egregious statements," this Court erred in leaving the statements in the record. *See id.*

## VI. CONCLUSION

As explained above, Defendants have met all four injunctive relief requirements. Defendants may also obtain injunctive relief by demonstrating either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [Defendants'] favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). Defendants have at least demonstrated a likelihood of success and the possibility of irreparable injury. Defendants request that the Court reconsider its January 26, 2016 Order Denying Defendants' Motion for Preliminary Injunction and authorize use of the provisional ballot procedure upheld in the *Crawford* case and many other cases.

Respectfully submitted this 5th day of February, 2016.[6]

/s/ Thomas P. Schlosser (approved telephonically)
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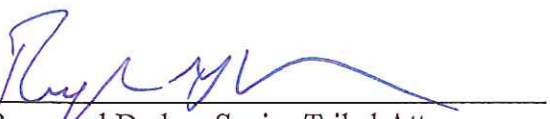

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[6] Defendants conferred with opposing counsel regarding the scheduling of the hearing.

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**IN THE TRIBAL COURT OF THE NOOKSACK TRIBE OF INDIANS FOR THE NOOKSACK INDIAN TRIBE**

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| BELMONT, et al.,<br>Plaintiffs,<br>v.<br>KELLY, et al.,<br>Defendants. | Case No. 2014-CI-CL-007<br><br>DECLARATION OF SERVICE |

I Declare:

That I am over the age of 18 years and competent to be a witness.

On February 5, 2016, I emailed Gabriel Galanda at gabe@galandabroadman.com an electronic courtesy copy of the following documents, which were filed with the Court on the same day:

1. Note for Hearing;
2. Motion for Reconsideration; and
3. Declaration of Charity Bernard.

On February 5, 2016, I duly mailed by first class mail, a copy of the above documents and this Declaration of Service to Galanda Broadman PLLC, Attn: Gabriel Galanda, P.O. Box 15146, Seattle, WA 98115.

Also, on February 5, 2016, I emailed Gabriel S. Galanda at gabe@galandabroadman.com a courtesy copy of the above-referenced documents and this Declaration of Service.



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I declare under the penalty of perjury, under the laws of Nooksack Indian Tribe, that the foregoing is true and correct.

Signed at Deming, Washington on February 5, 2016.

Raymond G. Dodge



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