

IN THE NOOKSACK TRIBAL COURT

SONIA LOMELI; TERRY ST. GERMAIN;
NORMA ALDREDGE; RAEANNA
RABANG; ROBLEY CARR, individually on
behalf of his minor son, LEE CARR, enrolled
members of the Nooksack Indian Tribe,

Plaintiffs,

v.

ROBERT KELLY, Chairman of the Nooksack
Tribal Council; RICK D. GEORGE, Vice-
Chairman of the Nooksack Tribal Council;
AGRIPINA SMITH, Treasurer of the Nooksack
Tribal Council; BOB SOLOMON,
Councilmember of the Nooksack Tribal
Council; KATHERINE CANETE,
Councilmember of the Nooksack Tribal Council
and Nooksack General Services Executive;
LONA JOHNSON, Councilmember of the
Nooksack Tribal Council; JEWELL
JEFFERSON, Tribal Enrollment Officer of the
Nooksack Tribal Enrollment Office; and ROY
BAILEY, Tribal Enrollment Office official,

Defendants.

NO. 2013-CI-CL-001

RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS

Plaintiffs have filed a Motion to Dismiss Plaintiffs' Second Amended Complaint ("MTD"), arguing that (1) FED. R. CIV. PROC. 19 renders the Nooksack Indian Tribe and certain federal agencies indispensable parties, (2) this Tribal Court lacks jurisdiction to interpret and apply the Constitution and Bylaws of the Nooksack Indian Tribe, and (3) Plaintiffs' claims are

1 not ripe. In making this Motion, Defendants' distort the nature of Plaintiffs' claims and
2 misinterpret the law. Defendants' Motion must be **DENIED**.

3 **I. FACTS¹**

4 **A. Overview of Defendants' Egregious Unconstitutional Behavior.**

5 On December 20, 2012, the Nooksack Tribal Council met during a Special Meeting.
6 Declaration of Amiliana Johnny ("Johnny Decl."), Exhibits B, C. The December 20, 2012,
7 Special Meeting Agenda listed "Enrollment Recommendations" as the first item of Tribal
8 Council business. *Id.*, Ex. B. The agenda did not list any matter of disenrollment. *Id.*
9 According to the sworn testimony of former Nooksack Enrollment Officer Jewell Jefferson:

10 On December 20, 2012, Roy Bailey and I were called into a Tribal Council
11 meeting at which the enrollment of tribal member Terry St. Germain's children
12 was being discussed. At that meeting, the Tribal Council asked Roy Bailey and I
13 to look into the enrollment matter. Unbeknownst to me, at some time after
14 December 20, 2012, the Tribal Council asked only Roy Bailey to look into the
15 matter of Terry St. Germain's children's enrollment.

16 Declaration of Jewell Jefferson ("Jefferson Decl."), at 3.

17 What has since ensued is an unconstitutional witch hunt of Plaintiffs, including Nooksack
18 Elders Sonia Lomeli and Norma Aldredge, and Plaintiffs' ancestors, most notably Annie George,
19 which, if not now checked by the Court, threatens to forever harm the Nooksack Tribe. Indeed,
20 as Ms. Jefferson continues: "I still do not know why or how, between December 20, 2012 and
21 February 12, 2013, an inquiry into the enrollment of Terry St. Germain's children, morphed into
22 the disenrollment of over 300 enrollment members of Rapada, Rabang, and Narte/Gladstone
23 families. **I believe those families are being targeted.**" *Id.* at 6 (emphasis added).

24 The Tribal Council has violated, *inter alia*, Article IX of the Constitution, specifically
25 Plaintiffs' equal protection rights guaranteed therein through incorporation of the federal Indian

¹ Much of the facts in this matter have already been articulated by Plaintiffs' previous pleadings, and Plaintiffs incorporate those facts in the instant Response to the extent not restated herein.

1 Civil Rights Act, by targeting Plaintiffs since at least February 12, 2013, as detailed below. *See*
2 *also id.* at 2 (“[M]any Nooksack members’ enrollment letters do not specify a provision of
3 Section 1 of the constitutional membership provision that they were enrolled under, meaning the
4 letters do not specify 1(A), 1(B, (1C), 1(H) and so forth. That problem is not limited to only the
5 Rapada, Rabang, and Narte/Gladstone families. It extends throughout the entire Tribe.”); *id.* at 4
6 (“Before the disenrollment notices were mailed out, I asked Katherine Canete about one person,
7 a minor Nooksack member, who was on the disenrollment list. I explained that although her
8 father was on the disenrollment list as a descendant of Annie George, her mother was enrolled
9 without any affiliation with Annie George, which made the minor properly enrolled irrespective
10 of the proposed disenrollment of the Rapada, Rabang, and Narte/Gladstone families. Despite my
11 concern, Katherine refused to take that minor off of the disenrollment list.”); *id.* (“Some time
12 after February 12, 2013, I also suggested in an email to Katherine Canete that, irrespective of
13 Annie George, all of the Rapada, Rabang, and Narte/Gladstone families could be enrolled
14 through adoption. I reminded her of how an adult member of the Gladstone family adopted four
15 adult siblings.”).²

16 On January 8, 2013, Defendants Bob Kelly and Roy Bailey, and Nooksack Tribal
17 Attorneys Grett Hurley and Rickie Armstrong, first met with the Bureau of Indian Affairs Puget
18 Sound Regional Agency officials “to research Annie George.” Fourth Declaration of Gabriel S.
19 Galanda (“Galanda Decl.”), Exhibit A. Ms. Jefferson was not present, and did not know about
20 the meeting. *Id.*; Jefferson Decl., at 3. Among other information, those Tribal and federal
21 representatives considered a set of federal probate records referred to as: “Louie George Probate
22 Testimony.” *Id.* One of those records is already on file with this Court – a 1972 U.S.

23
24 ² Defendant Bob Kelly is widely known to be a Canadian Indian who was adopted into the Nooksack Tribe, without
any Nooksack blood whatsoever. He threatens to set a precedent that will cause his own disenrollment.

1 Department of the Interior Office of Hearings and Appeals Summary of Family History and
2 Inventory listing Matsqui George, Ms. George's biological father, as "Nooksack" by blood.
3 Second Galanda Decl., Ex. A.

4 Defendants, however, have never disclosed that federal probate record – which bolsters
5 Plaintiffs' status as Nooksacks under *at least* Article II, Section 1(H) of the Nooksack
6 Constitution – to either Plaintiffs or to this Court. *See generally* Fourth Galanda Decl., Exhibit
7 B. Instead, Defendants have commenced disenrollment proceedings against Plaintiffs without
8 producing *any* "present[ation of] written documentation on how the information was obtained
9 that warrants disenrollment" or *any* "evidence submitted to support a statement" that Plaintiffs
10 are non-Nooksack. N.T.C. §§ 63.04.001(B); 63.00.004; *see also* Jefferson Decl., at 2-5 ("Dating
11 back to when I started as Nooksack Enrollment Officer . . . I never received any formal written
12 documentation requesting loss of membership of any other Nooksack tribal member with an
13 explanation as to how that documentation was obtained. . . . **[T]he current disenrollment
14 process was not properly started with a formal documented request for loss of membership
15 of any tribal member by another tribal member, as required by Title 63.**") (emphasis
16 added).

17 What is more, Defendants are (a) "sanitizing Nooksack members and ancestors'
18 enrollment files," [First] Declaration of Diantha Doucette, at 2; (b) violating the confidentiality
19 of enrollment file information, *see* [First] Declaration of Cathalina Barrill, at 2 ("My
20 confidentiality rights were violated. In particular, my rights to have all of my enrollment file
21 information kept confidential by the Tribe and Enrollment Department were violated. I am
22 embarrassed to have had my enrollment file information displayed for all of the Tribe's
23 employees to see."); and (c) refusing to provide Plaintiffs access to seven (and only seven) of
24 their ancestors' enrollment files "in order to properly defend against the disenrollment process

1 that commenced on February 12, 2013 . . . in the face of *the Tribe's* burden of proof.” Fourth
2 Galanda Decl., Exhibits B, C (emphasis in original). Instead of complying with, *inter alia*,
3 N.T.C. §§ 63.04.001(B) and 63.00.004, Defendants have instead essentially told Plaintiffs they
4 are “expected to comply with the rules [they] are given in this process” – meaning new rules to
5 be made up by Defendants as they go along.³ *Id.*, Ex. B. Defendants have essentially told
6 Plaintiffs that “they will do as they are told in the Disenrollment Proceedings.” *Id.*, Ex. D.

7 Meanwhile, Defendants have disregarded the rights of membership guaranteed to
8 Plaintiffs in Title 63 and the due process and other rights guaranteed to all Nooksacks in the
9 Nooksack Constitution and Bylaws and other Nooksack Tribal Law, as discussed below. If, on
10 these facts, this Court refuses to assert *Ex parte Young* jurisdiction over Defendants, there are
11 virtually no facts that a Nooksack member can allege that will allow Nooksack officials to be
12 held accountable in this Court for violation of the Nooksack Constitution and other Nooksack
13 Tribal Law.

14 **B. Background For Defendants' Egregious Unconstitutional Behavior.**

15 From January 11 through February 11, 2013, Defendant Bob Kelly and Messrs. Hurley
16 and Armstrong wrote a number of emails to the BIA, posing questions about Plaintiffs' ancestry.

17 • **January 11** – Mr. Armstrong to BIA: “We are hoping to get a copy of the
18 1952/1954? file with ‘current enrollees’. This file predates NIT [Nooksack Indian Tribe]
19 recognition, so it was the informal enrollment list. I was hoping to come down today if
possible.” Fourth Galanda Decl., Ex. E.

20 • **January 15** – Defendant Bob Kelly to BIA: “All of the other baptismals that we
21 found in the 1868-1880 year range with the name Annie, Mac, Joe, etc. led to different
bands or families. Marie⁴ and Madeline don't seem to be close enough names and

22 ³ Any dismissal by this Court will only empower Defendants to disregard any notion of due process when they
23 promulgate and carry out their own “rules” for disenrollment. Fourth Galanda Decl., Ex. B; *see also id.*, Ex. W
24 (“Unfortunately . . . our clients' due process rights already appear in jeopardy due to, *inter alia*, the Tribe's
destruction or ‘sanitization’ of enrollment records and related confidentiality breach . . .”).

25 ⁴ **Marie Siamat is Annie George's biological mother, and like Annie's father, a Nooksack Indian.** Fourth
Galanda Decl., Ex P, at 2 (June 11, 2013, Dr. Bruce Miller Opinion Letter: “George, Chief of Matsqui (otherwise

1 Matsqui George was married to Madeline Jobe⁵, not Mary Job. During Louie George's
2 probate hearing, two of the people that testified referred to Annie as 'Annie Joe'. There
3 is a Joe family in Matsqui and are guessing that her mother was Marie Joe from
4 Matsqui." *Id.*, Ex. F.

5 • **January 21** – Mr. Armstrong to BIA: "I came across this document and am
6 wondering if you have any information in your files. It is a homestead with the Jobe
7 name attached to it. Do you have any knowledge of what it signifies?" *Id.*, Ex. G.

8 • **February 5** – Mr. Hurley to BIA: "**I need some help explaining a description
9 in the Louie George probate. Can I call you about the attached page from
10 probate?**" *Id.*, Ex. H (emphasis added).

11 • **February 10** – Mr. Armstrong to BIA: "Is it possible to get a copy of the
12 instruction sheet on the 1942 Census for Nooksack? . . . I also wondered if there was
13 someone or some book that describes how the census was taken and what does the blood
14 quantum mean. For example what does Full mean on the Census? Does it mean Full
15 Nooksack or Full Indian, etc." *Id.*, Ex. I.

16 Critically, according to Mr. Hurley's February 5, 2013, email to the BIA, **Defendants
17 were specifically aware of the 1972 federal probate record with a "description" of Matsqui
18 George, Annie George's biological father, was "Nooksack" by blood. Cf. id.**, Ex. H, with
19 Second Galanda Decl., Ex. A. One week later, Defendants proceeded with the disenrollment of
20 Plaintiffs anyway. *See* Resolution No. 13-02. Assuming *arguendo* that non-Tribal member
21 lawyers possess the authority to initiate disenrollment of any Nooksack⁶ – they do not, nor does

22 known as Matsqui George) married Marie Siamat in 1863, a woman of his tribe according to Oblate records. Their
23 offspring included Annie George, born 1875." *Plaintiffs are Nooksack, and Defendants know it.*

24 ⁵ **Madeline Job is Annie George's step-mother via adoption; like Annie's father, Madeline Job is also a full-
25 blooded Nooksack.** *See* Second Galanda Decl., Ex. B ("Matsqui George and Madeline appear in US records as
full-blooded Nooksack Indians"); Fourth Galanda Decl., Ex. P, at 2 (Dr. Miller: "Two days after Annie George's
birth, her mother died. Subsequently, she was adopted by Madeline Jobe, who raised her. Madeline Jobe married
Matsqui George in 1880 (but had children earlier on). The evidence shows that Madeline Jobe (George) and Matsqui
George were Nooksack."); *see also* [First] Lomeli Decl., Ex. A (listing Matsqui George, Madeline Jobe and Annie
George each as "100%" Nooksack). *Plaintiffs are Nooksack, and Defendants know it.*

⁶ Freedom of Information Act (FOIA) records obtained from the Bureau of Indian Affairs (BIA) indicate that both
Mr. Hurley and Mr. Armstrong did not, and still do not, possess actual authority to act on behalf of the Nooksack
Tribe or Tribal Council for want of Secretarial approval of them as the Tribe's chosen "attorneys of record or
representatives" and of their employment and pecuniary relationship with the Tribe, as is required by Article VI,
Section 1(d) of the Nooksack Constitution. ("The Nooksack Indian Tribal Council shall . . . employ attorneys of
record or representatives, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of
Interior."). Galanda Decl., at 1; *id.*, Ex. K. Therefore, consistent with N.T.C. § 63.04.001(B), which prevents the
Tribal Council and Enrollment Department staff from initiating disenrollment, Mr. Hurley and Mr. Armstrong
lacked actual authority to participate in the disenrollment inquest of Plaintiffs. Also, on the topic of FOIA, during

1 the Tribal Council – **the inquiry into Plaintiffs’ status as Nooksacks should have ended in**
2 **early February 2013, when Defendants realized that because Matsqui George is Nooksack**
3 **according to federal records, so is Annie George, and thus so are Plaintiffs, as “persons**
4 **who possess at least one-fourth (1/4) degree Indian blood and who can prove Nooksack**
5 **ancestry to any degree.”** Constitution, art. II, § 1(H); *see also* Second Galanda Decl., Ex. B
6 (May 7, 2013, Dr. Jay Miller Opinion Letter concluding that “[i]n all, it is my informed
7 professional opinion that because at least Matsqui George was Nooksack by blood, his biological
8 daughter, Annie George Mack James, was too. As such, Annie and her heirs are fully qualified
9 to be enrolled Nooksack, as they have been for decades.”⁷); *id.*, Ex. C (March 28, 2013, Recall
10 Petition Rebuttal Statement of Michelle Roberts stating that “[m]y status as a properly enrolled
11 Nooksack Tribal Member is supported by the October 25, 1996 Legal Opinion of the Tribe’s
12 lawyer/counsel of record, Thomas P. Schlosser, Esq., which provides: ‘the descendants of Annie
13 George James qualify under other sections of the Constitution, in particular the category in
14 Article II, section 1(H), that ‘encompasses ‘persons who possess at least 1/4th degree Indian
15 blood and who can prove Nooksack ancestry to any degree.’”); Fourth Galanda Decl., Ex. P, at 2
16 (June 11, 3013, Dr. Bruce Miller Opinion Letter: “Based on the evidence, I conclude that the
17 Annie George was and regarded herself as fully Nooksack, and was taken to be so by others.
18 Her descendants, a number of whom I have met, consider themselves to be fully Nooksack

19
20
21 the June 6, 2013, hearing, the Court made reference to “your lawsuit against the BIA.” While Plaintiffs have not
22 initiated any suit against the BIA, Rudy St. Germain and Michelle Roberts have done so. *See St. Germain v. U.S.*
23 *Dep’t of Interior*, No. C13-845 RSM (W.D. Wa. May 13, 2013). However, no reference to or evidence of that
24 federal FOIA lawsuit was offered into the record of this Tribal Court by June 6, 2013. Should this Tribal Court now
be considering information outside of its own record (e.g., *Bellingham Herald* articles or Turtle Talk or Facebook
postings), for purpose of deciding either Plaintiffs’ claims or Defendants’ defenses or counterclaims in this lawsuit,
Plaintiffs respectfully ask the Court to consider making an appropriate disclosure as it did in its March 28, 2013,
Order and previously during a telephonic status conference, so the parties can proceed before this Court accordingly.
⁷ The entire May 7, 2013, Dr. Jay Miller Opinion Letter, i.e., with attachments, is now offered as Exhibit Q to the
Fourth Galanda Decl.

1 people. . . Further, also as in common with other Coast Salish communities, residence in
2 Canada does not preclude identity as a Nooksack person.”) (emphasis added).⁸

3 Defendants’ formal commencement of this witch hunt on February 12, 2013, without
4 even producing the “written documentation” or “evidence” then in their possession, which
5 clearly shows that Plaintiffs are in fact Nooksack Indian, illustrates the egregious and bad faith
6 nature of Defendants’ conduct over the last seven months. N.T.C. §§ 63.04.001(B); 63.00.004.

7 **C. Defendants’ Egregious Unconstitutional Behavior On February 12, 2013.**

8 On February 11, 2013, Defendant Chairman Robert Kelly called a Special Meeting of the
9 Tribal Council, to be held the next day. Johnny Decl., Exs. F, G; [First] St. Germain Decl., at 2;
10 *id.*, Ex. B. On February 12, 2013, an executive session was held. *Id.*, at 2. At the executive
11 session, Defendant Robert Kelly ordered Tribal Council Secretary Rudy St. Germain and
12 Councilmember Michelle Roberts to excuse themselves from the session, as they were to be
13 disenrolled by Resolution No. 13-02. *Id.*; First Galanda Decl., Ex. 4 (Council “asked Rudy and
14 Michelle to recuse themselves.”).

15 Defendant Kelly’s exclusion of Secretary St. Germain and Councilperson Roberts
16 violated Article III, Section 2 of the Constitution, which provides: “The governing body under
17 this constitution **shall** be composed of one (1) chairman, one (1) vice-chairman, one (1)
18 secretary, (1) treasurer, and four (4) councilman” (emphasis added). Defendant Kelly’s
19 exclusion of Secretary St. Germain and Councilperson Roberts also violated Article VI of the

20 ⁸ Indeed, “the [Nooksack] tribe was considered Canadian until 1973.” *In re Junious M*, 144 Cal.App. 3d 786, 792
21 (Cal. App. 1983). According to Dr. Bruce Miller: “In the case of the Nooksack, tribal members have long lived on
22 both sides of what is now the international border. Richardson reports in his online article, “Nooksack Territory,”
23 (published on the Nooksack tribe website February 6, 2012; <http://nooksackindiantribe.org/about/>, accessed June 3,
24 2013.)” Fourth Galanda Decl., Ex. P, at 3. Further, of high relevance to this disenrollment controversy is recent
25 scholarship published by Allan Richardson and Brent Galloway, with the support of the Nooksack Tribe, which
explains: “[L]ong traditional occupation is implied by the designation of the Nooksack village as Matsqui Indian
Reserve by the Canadian Indian Reserve Commission in June 1880.” NOOKSACK PLACE NAMES: GEOGRAPHY,
CULTURE, AND LANGUAGE (2011), at 67 (appended as Exhibit R). Thus, according to Dr. Bruce Miller, “the name
Matsqui is associated with Nooksack,” which is further evidence that Plaintiffs’ ancestor Matsqui George, and thus
their matriarch Annie George, and thus Plaintiffs, are all unquestionably Nooksack. *Id.*, Ex. P, at 3.

1 Constitution, which defines the powers of the eight-person “Tribal Council.” Defendant Kelly’s
2 exclusion of Secretary St. Germain and Councilperson Roberts also violated Article I, Section 3
3 of the Bylaws, which says that the Tribal Secretary “**shall** be present at all meetings of the Tribal
4 Council” (emphasis added).

5 Defendant Kelly’s exclusion of Secretary St. Germain and Councilperson Roberts further
6 violated Nooksack Tribal Council Custom Law. *See* Declaration of Former Nooksack Tribal
7 Chairman Narcisco Cunanan, at 3 (“[I]t is the custom, tradition and understanding of the
8 Nooksack Tribal Council – including that of following Robert’s Rules of Order – that no Tribal
9 Councilperson is or should be ever told to leave a Council general or special meeting or to
10 refrain from voting on any matter where ‘nepotism’ or ‘conflict of interest’ issues are raised.
11 Instead, that Tribal Councilperson is or should be allowed to stay in the meeting and can decide
12 for him or herself whether to vote or abstain on the matter.”).⁹

14 ⁹ “During general or special meetings of the Tribal Council, since at least 1999, the Council has adhered to a custom,
15 tradition and understanding of following Robert’s Rules of Order.” Cunanan Decl., at 2. Section 45 of ROBERT’S
16 RULES OF ORDER NEWLY REVISED (10th ed. 2000) (“RRNR”), “Voting Procedure,” has a subsection entitled
17 “Rights and Obligations in Voting,” which states:

18 No member should vote on a question in which he has a direct personal or pecuniary interest not
19 common to other members of the organization. For example, if a motion proposes that the
20 organization enter into a contract with a commercial firm of which a member of the organization is
21 an officer and from which contract he would derive personal pecuniary profit, the members should
22 abstain from voting on the motion. **However, no member can be compelled to refrain from
23 voting in such circumstances. The rule of abstaining from voting on a question of direct
24 personal interest does not mean that a member should not vote for himself for an office or
25 other position to which members generally are eligible, or should not vote when other
members are included with him in a motion.** If a member never voted on a question affecting
himself, it would be impossible for a society to vote to hold a banquet, or for the majority to
prevent a small minority from preferring charges against them and suspending or expelling them.

21 *Id.* at 394-95 (emphasis added). It is clear that under the RRNR no member can be compelled to refrain from voting
22 simply because it is perceived that he or she may have some “conflict of interest” with respect to the motion under
23 consideration. RRNR § 45. If a member has a direct personal or pecuniary (monetary) interest in a motion under
24 consideration not common to other members, the rule in RONR is that he *should* not vote on such a motion. *Id.* **But
25 even then he or she cannot be compelled to refrain from voting.** *Id.* It naturally follows that he or she should
also not be compelled to leave the meeting at which the vote is occurring. Case law is in accord. In *Moriarty v.*
Mount Diablo Health Care Dist., No. A112499, 2007 WL 3194805 (Cal. App. Ct. Oct. 31, 2007), it was held that
“read as a whole, [RRNR § 45] **merely recommends** against board members voting on matters in which they have

1 Meanwhile, Defendant Roy Bailey remained present at that session without being
2 properly designated by Defendant Bob Kelly, in violation of Article II, Section 7 of the Bylaws.
3 [First] Rudy St. Germain Decl., at 2. Conspicuously absent from that executive session
4 regarding the disenrollment of Plaintiffs and over 300 of their relatives, was the then Nooksack
5 Enrollment Officer, Ms. Jefferson. Jefferson Decl., at 3.

6 During the executive session, Defendant Kelly spoke at length in support of the Motion
7 to adopt Resolution No. 13-02 – to disenroll the 306 Enrolled Nooksack Members,¹⁰ including
8 Plaintiffs – in violation of Article I, Section 1 of the Bylaws, as well as Nooksack Custom Law.
9 First Galanda Decl., Exhibit 4; *see generally* Cunanan Decl., at 2-3. Defendant Kelly explained:
10 “[W]e’ve given both Council Member Roberts and Council Member St. Germain more than fifty
11 days to help clear up this matter [but] they’ve been unable to do that.” *Id.* Kelly continued:
12 “Though the Council is following their Constitution and by passing this resolution [No. 13-02]
13 they’re initiating the disenrollment process 30 days [sic] . . . [it w]ill be a fair process that will
14 allow them to once against to give them the opportunity to provide official information that will
15 speak to their enrollment with the Tribe.” *Id.*

16 At that moment, Defendants already possessed official information showing Plaintiffs’
17 proper enrollment with the Tribe, most notably the 1972 federal probate record that establishes
18 Plaintiffs, by way of their ancestors Matsqui and Annie George, as “Nooksack” by blood. Fourth
19 Galanda Decl., Ex. H. At that moment, Defendants, especially their non-member lawyers, had

20
21 financial interests, **but does not prohibit such voting.** *Id.* at *6 (emphasis added). The RRNR and thus the custom,
22 tradition and understanding of the Nooksack Tribal Council does not prohibit any Tribal Councilperson from
attending a Tribal Council General or Special Meeting during which it is perceived that he or she may have some
“conflict of interest” with respect to the motion under consideration.

23 ¹⁰ On April 2, 2013, Plaintiffs advised Defendants “that of the 306 enrolled Nooksack members on the disenrollment
24 list prepared by the Tribe at your behest, multiple folks are listed twice, and others are listed but are not known to be
enrolled Nooksack members. The Tribe may want to correct and reissue that list before April 12, 2013, for
everybody’s sake . . .” Fourth Galanda Decl., Exhibit J. Defendants have thus far refused to correct their 306-person
disenrollment list. *Id.*, Exhibit B; *see* Exhibit A to Second Amended Complaint.

1 spent the prior “fifty days” trying to clear up the matter of Plaintiffs’ enrollment – and they had
2 done so. *See id.*; *see also id.*, Exs. A, E-I. At that moment, and today, it was not Plaintiffs’ or
3 Councilpersons St. Germain or Roberts’ burden of proving that they are Nooksack; instead it was
4 and remains *the Tribe’s* burden, upon a *Tribal member’s* proper “present[ation of] written
5 documentation on how the information was obtained that warrants disenrollment,” to prove that
6 Plaintiffs are not Nooksack Indian. N.T.C. § 63.04.001(B).

7 At that moment, Defendants knew Plaintiffs were unquestionably Nooksack. *See* Fourth
8 Galanda Decl., Ex. H. At that moment, the Tribal Council had no authority to commence
9 disenrollment, N.T.C. §§ 63.04.001(B), and they had no good cause upon which to do so – but
10 they did so anyway. *See generally* *U.S. v. Zucca*, 351 U.S. 91, 100 (1956) (requiring that the
11 federal government, “as a prerequisite to the initiation of [denaturalization] proceedings, file an
12 affidavit showing good cause.”)¹¹; *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000).

13 In executive session, a six-person Council comprised of Defendant Council Members
14 passed four Resolutions, Nos. 13-01, 13-02, 13-04, and 13-04. Johnny Decl., Exs. H-L.
15 Resolution No. 13-02 of course “initiate[d] involuntary disenrollment proceedings pursuant to
16 Title 63, Section 62.04.011(B).” *Id.*, Ex. H. At p. 9, ¶72 and p. 10, ¶79 of their May 30
17 Answer, Defendants “admit that [the] Tribal Council initiated disenrollment.” However,
18

19 ¹¹ The *Zucca* Court went on to note that

20 The mere filing of a proceeding for denaturalization results in serious consequences to a
21 defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in
22 the community damaged. [A] person, once admitted to American citizenship, should not be
23 subject to legal proceedings to defend his citizenship without a preliminary showing of good
24 cause. Such a safeguard must not be lightly regarded.

25 351 U.S. at 100. Likewise, the mere initiation of disenrollment proceedings against Plaintiffs has resulted in serious
consequences to them; indeed, they should not even be subject to proceedings to defend their enrollment without a
preliminary “present[ation of] written documentation on how the information was obtained that warrants
disenrollment” or “evidence submitted to support a[ny] statement” that they are not Nooksack – especially when the
written documentation and evidence that we now know was in Defendants’ hands on February 12, 2013,
conclusively established Plaintiffs as Nooksack Indian. N.T.C. §§ 63.04.001(B), 63.00.004.

1 consistent with Article II, Section 4 of the Constitution, Title 63.04.001(B) does not allow the
2 “Tribal Council” to initiate disenrollment.

3 Through passage of Resolution No. 13-03, Defendant Council Members amended Title
4 60 to disallow any person “subject to a disenrollment proceeding” – meaning those persons who
5 had just been subjected to disenrollment via Resolution No. 13-02 – those recall petition rights
6 guaranteed to all Nooksacks per violation of Articles II and IV of the Constitution. *Id.*, Ex. J.
7 Defendant Council Members also amended the recall petition form. *Id.*, Ex. K.

8 Finally, Defendant Council Members passed Resolution No. 13-04 to amend Title 10.
9 *Id.*, Ex. L. The following comparison language illustrates the changes to Title 10 that the
10 Council promulgated:

11 10.00.030 Limited Subject Matter/Personal Jurisdiction

12 The court shall have subject matter jurisdiction over civil and criminal matters
13 specifically enumerated in the Nooksack Code of Laws. ~~The court shall not~~
14 ~~assume personal jurisdiction over any civil or criminal matter which does not~~
15 ~~involve either the Tribe, its officers, agents, employees, property or enterprises,~~
16 ~~a member of the Tribe, or a member of a federally recognized tribe and/or. [sic]~~
17 ~~some other forum exists for the handling of the matter and if the matter is not one~~
18 ~~in which the rights of the Tribe or its members may be directly or indirectly~~
19 ~~affected~~ (struck through language deleted; bold added).

17 10.00.030 Exclusive Original Jurisdiction

18 The court shall have exclusive original jurisdiction in all matters in which the
19 Nooksack Indian Tribe or its officers or employees are parties in their official
20 capacities. Nothing contained in the preceding sentence or elsewhere in this Code
21 shall be construed as a waiver of the sovereign immunity of the Tribe or its
22 officers or enterprises unless specifically denominated as such **and the court is**
23 **expressly prohibited from exercising jurisdiction over the Nooksack Tribe**
24 **without and [sic] express waiver of sovereign immunity** (new language
25 emphasized in bold).

22 *Id.* In addition, the Council added created a brand new provision of Title 10:

23 10.00.100 Sovereign Immunity

24 **Nothing in this Ordinance is intended or shall be construed as a waiver of the**
25 **sovereign immunity of the Nooksack Indian Tribe, its officials, its entities, or**

1 [sic] employees acting within their official or individual capacities. The
2 Court shall have no jurisdiction over any suit brought against the Nooksack
3 Indian Tribe, its officials, its entities, or [sic] employees without the consent of
4 the Tribe. Nothing contained in this code, or other Tribal ordinance, resolution,
5 policy or otherwise shall be deemed to constitute a waiver or renunciation of the
6 sovereign immunity of the Tribe to suit. Such consent or waiver must be
7 expressly made by the Nooksack Tribal Council by majority vote through passage
8 of an ordinance, by resolution, by entering into a written contract, which provides
9 for an express waiver, or other means adopted by the Nooksack Tribal Council 9
10 (emphasis added).

11 *Id.* It is beyond transparent that Defendant Council Members passed Resolution No. 13-04 and
12 thereby overhauled two time-honored provisions of Title 10 and added a third new Sovereign
13 Immunity disclaimer to the Nooksack Tribal Court System And Court Rules, in an attempt to
14 insulate them from legal challenge regarding, *inter alia*, Resolution Nos. 13-02 and 13-03. First
15 Galanda Decl., Ex. 4 (Defendant Kelly: “We’re going to need to go into exec. because there’s
16 probably going to be litigation involved here, there’s a high potential for it and we’re talking
17 about people [sic] enrollment.”). Notably, Resolution No. 13-04 is not an *ex post facto* law that
18 prevents any challenge to Resolution Nos. 13-02 and 13-03. *Id.*

19 If this Court does not somehow prospectively prevent Defendants from further engaging
20 in patently illegal conduct, February 12, 2013, will go down in Nooksack history – for all the
21 wrong reasons. *See* Third Declaration of Gabriel S. Galanda, Exhibit A (“Third. Galanda Decl.”)
22 (Prof. David Wilkins, alluding to the Nooksack disenrollment controversy: “Federal termination
23 of Native nations was the intentional destruction of the political and economic identity of an
24 indigenous people; tribal termination via disenrollment of bona fide native individuals is the
25 purposeful destruction of the political and economic identity of a tribal citizen.”).

26 **D. Defendants’ Egregious Unconstitutional Behavior in February and March of 2013.**

27 On February 4, 2013, Defendants did not convene a General Meeting – in violation of
28 Article II, Section 2 of the Bylaws, which says “the tribal council **shall** meet on the first Tuesday

1 of each month” (emphasis added). At p. 4, ¶27, p. 7, ¶53 and p. 9, ¶65 of their May 30 Answer,
2 Defendants admit as much. Defendants have admitted this constitutional violation.

3 On the morning March 1, 2013, Defendant Bob Kelly convened a Special Meeting, and
4 the Tribal Council passed Resolution No. 13-38, which targets Plaintiffs through request for a
5 Secretarial Election to delete Article II, Section 1(H) of the Constitution, and therefore violates
6 Article IX of the Nooksack Constitution. Johnny Decl., Ex. Q; Jefferson Decl., at 6 (“I believe
7 those families are being targeted.”); Second Declaration of Diantha Doucette, Ex. B (Defendant
8 Bob Kelly’s April 29, 2013, letter to those Nooksacks who are not proposed for disenrollment,
9 begging them to register to vote in the Secretarial Election in an attempt to “control [the] cultural
10 identity of the Nooksack Tribe” and with racial animus by targeting “large groups or families
11 that [allegedly] have much weaker ties to Nooksack than the rest of us who are currently enrolled
12 here.”).

13 Also during that March 1, 2013, Special Meeting, Defendant Council Members also
14 promulgated Title 65 – Nooksack Indian Tribe Conflict of Interest and Nepotism Code via a
15 second Tribal Council Resolution. New Title 65 provides in pertinent part:

16 No member of the Tribal Council . . . shall take part in the deliberation upon or in
17 the determination of, any matter affecting the member’s [various blood relatives
18 or in-laws]. Such member shall withdraw from the Tribal Council . . . meeting
during the deliberation or determination of any matter with respect to which the
member is disqualified and the minutes shall so state.”

19 *See* Third Declaration of Rudy St. Germain, at 2. Title 65 was specifically intended to disqualify
20 Secretary St. Germain and Councilmember Roberts from the Council’s deliberations and
21 determinations concerning Plaintiffs and others targeted by Defendants for disenrollment. *See*
22 *id.* (citing March 25, 2013, email from Defendant Bob Kelly: “Notice is given to Council
23 Members Roberts and St [sic] Germain, that the due to the subject matter of the executive
24 session you will be conflicted out of participating in the executive session. . . . Title 65, the

1 Tribe's Conflict of Interest and Nepotism Code prohibits Council members from participating in
2 matters in which they have conflicts."); *id.* at 2-3 (Secretary St. Germain: "I believe Resolution
3 #13-37 and Title 65, which seek to impose some form of 'conflict of interest' and 'nepotism'
4 policy for the first time in the Tribe's history, violates Nooksack Tribal Constitution and other
5 Tribal law, especially how it was enforced against Councilperson Roberts and I on March 25 and
6 26, 2013."); *see also* Cunanan Decl., at 2-3 ("From those twelve years between 1999 and 2010
7 when I served on the Tribal Council, in any instance where 'nepotism' or 'conflict of interest'
8 issues were raised during the Council's deliberations, not once was a Tribal Councilperson told
9 to leave a Council meeting or to refrain from voting on the matter.").

10 On the afternoon of March 1, 2013, Defendant Bob Kelly hand-delivered the already
11 signed and codified Resolution No. 13-38, to the BIA in Everett. Galanda Decl., Exs. L, M.
12 Defendant Bob Kelly, along with Defendant Kathryn Canete and Grett Hurley, met with the BIA
13 again on March 4, 2013, to accelerate the Secretarial election to delete Article II, Section 1(H) of
14 the Constitution as a proxy for Plaintiffs' disenrollment. *Id.*, Exs. M, N.

15 On March 5, 2013, Defendants once again did not convene a General Meeting – again
16 violating Article II, Section 2 of the Bylaws. At p. 7, ¶53 and p. 9, ¶65 of their May 30 Answer,
17 Defendants admit that the March first Tuesday meeting month was not held – for second
18 consecutive month. Defendants have also admitted this constitutional violation. That same day
19 – and only one working day after Defendants Kelly and Canete and Mr. Hurley's latest visit to
20 Everett – the BIA requested "secretarial authorization to call and conduct the requested
21 secretarial election on the proposed amendment to [the Nooksack] constitution." *Id.*, Ex. O.

22 On March 11, 2013, Councilpersons St. Germain and Roberts requested a Special
23 Meeting request regarding Defendant Bob Kelly's March 6, 2013, letter that threatened the
24 automatic disenrollment of Plaintiffs. Second Declaration of Rudy St. Germain, Ex. E. Article

1 II, Section 5 of the Bylaws says “special meetings of the Tribal Council **shall** be held upon
2 written request of . . . two members of the Tribal Council. . . . Such written request **shall** be filed
3 with the chairman . . . of the tribal council, and he **shall** notify the tribal council members
4 twenty-four (24) hours before the date of such tribal council meetings” (emphasis added). At p.
5 7, ¶51 and p. 8, ¶55 of their May 30 Answer, Defendants “admit that as of the date of filing the
6 Second Amended Complaint, a special meeting concerning a March 6, 2013 letter had not been
7 scheduled.” Defendants have also admitted this constitutional violation. *See also* Fifth
8 Declaration of Rudy St. Germain, at 2.

9 On March 12, 2013, Defendant Council Members admittedly met without Secretary St.
10 Germain and Councilperson Roberts, “to discuss personal matters and matters of tribal concern,”
11 in violation of Article III, Section 2 and Article VI of the Constitution, Article I, Section 3 of the
12 Bylaws, and Tribal Council Custom Law. Declaration of Rick D. George (“George Decl.”), at 2.

13 On March 21, 2013, Defendant Council Members conducted a Special Meeting at the
14 home of Nooksack Tribal Member Julie Jefferson, who as of then had commenced recall efforts
15 against Secretary St. Germain and Councilperson Roberts. George Decl., at 2. Ms. Jefferson’s
16 stated “reason” for her recall efforts against because Secretary St. Germain and is because they
17 and their “her family are not lineal descendants of the Nooksack Indian Tribe.” *See* Second
18 Galanda Decl., Ex. C. By not notifying Secretary St. Germain and Councilperson Roberts of the
19 Special Meeting – or what defense counsel calls Defendants “social gathering” – Defendants
20 violated Article III, Section 2 and Article VI of the Constitution, Article I, Section 3 of the
21 Bylaws, and Tribal Council Custom Law.

22 On March 26, 2013, Defendant Bob Kelly, while ignoring Councilpersons St. Germain
23 and Roberts’ March 11, 2013, proper written request for a Special Meeting, called a Special
24 Meeting of his own. Johnny Decl., Ex. T; Third St. Germain Decl., at 3-9. Defendant Bob

1 Kelly again excluded Councilpersons St. Germain and Roberts from – again in violation of
2 Article III, Section 2 of the Constitution, Article I, Section 3 of the of the Bylaws and Tribal
3 Council Custom Law. *See* George Decl., at 4 (“Councilmembers Roberts and St. Germain were
4 excused due to a conflict of interest.”); *but see* Second Rudy St. Germain Decl. (“I have no
5 pecuniary interest in what I believe was deliberated while Councilpersons Roberts and I were
6 excluded from the room on March 26, 2013. I am no more ‘conflicted’ than Chairman Kelly or
7 any other member of Tribal Council. The suppression of diverse or dissenting voices from
8 Nooksack Tribal governance is a clear attempt to immunize Chairman Kelly’s unconstitutional
9 and illegal official conduct. ”). The remaining six-person Council, specifically Defendant
10 Council Members, proceeded to rescind Resolution No. 13-03, which amended Title 60 to
11 foreclose recall petition rights to any Nooksack “subject to a disenrollment proceeding,”
12 recognizing that Resolution No. 13-03 was unconstitutional. Johnny Decl., Ex. U.

13 In furtherance of Resolution No. 13-38, Defendant Council Members also appointed a
14 Secretarial Election Board to carry out the federal election to delete Article II, Section 1(H) of
15 the Constitution as a proxy for Plaintiffs’ disenrollment. *See generally* Jefferson Decl., at 6;
16 Second Doucette Decl., Ex. B. Defendant Council Members appointed Defendants Kelly,
17 Canete and Lona Johnson, and Defendant Nooksack Enrollment Officer Bailey to the Secretarial
18 Election Board. Defendant Bailey’s appointment to the board represents an obvious tie that
19 binds the disenrollment activities that Defendants are carrying out pursuant to Resolution No. 13-
20 02, with the constitutional amendment activities that they are carrying out against Plaintiffs
21 pursuant to Resolution No. 13-38.

22 Also, having not convened a General Meeting of the Nooksack Tribe since December
23 2012, Defendant Council Members passed Resolution No. 13-54, which imposes a Tribe-wide
24 “moratorium on new enrollment applications . . . until the Secretarial election is finalized.”

1 Johnny Decl., Ex. W. Defendant Council Members' cited "a lawsuit concerning, in part, specific
2 enrollment recommendations and/or decisions made by the defendants" and the Secretarial
3 election to "remove Article II, Section 1(h)" as the reasons for the moratorium. *Id.* Although
4 targeted towards Plaintiffs, Defendant Council Members' decision to prohibit any new
5 Nooksacks from being disenrolled, without any opportunity for public comment, has harmed the
6 entire Tribe. Jefferson Decl., at 5 ("Not long before I was fired, I emailed Katherine Canete
7 expressing concern that the Tribal Council was not processing any enrollment applications at all,
8 meaning not even for folks who were not of the Rapada, Rabang, and Narte/Gladstone families.
9 I suggested that the Tribal Council at least write those other families a letter advising them that
10 new enrollments were put on hold. Katherine replied and asked for a list of proposed new
11 enrollments, which I provided her. She never replied back to me.").

12 **E. Defendants' Egregious Unconstitutional Behavior in April of 2013.**

13 On April 2, 2013, Defendants yet again did not convene a General Meeting – in yet
14 further violation of Article II, Section 2 of the Bylaws. At p. 7, ¶53 and p. 9, ¶65 of May 30 their
15 Answer, Defendants admit that the April first Tuesday meeting of the month was not held – for
16 third consecutive month. Defendants have admitted this constitutional violation.

17 On April 16, 2013, Defendants failed to notify Councilpersons St. Germain and Roberts
18 of a Special Meeting that Defendant Kelly called. Third Rudy St. Germain Decl., at 3. At p. 8,
19 ¶59 of May 30 Answer, Defendants "admit that during the afternoon of the April 16, 2013
20 meeting the Councilpersons St. Germain and Roberts had a conflict of interest and were excused
21 from the meeting." After Councilpersons St. Germain and Roberts "left the April 16, 2013
22 afternoon Special Meeting, Chairman Kelly and his Tribal Council majority went into executive
23 session." Third Rudy St. Germain Decl., at 3. Tribal Secretary St. Germain "attempted to
24 return to the meeting but the meeting room was locked, [he] was told the Council was in

1 executive session, and Chairman Kelly and his Tribal Council majority refused to unlock the
2 door or allow him to return to the Special Meeting.” *Id.* Once again, Defendants violated Article
3 III, Section 2 and Article VI of the Constitution, Article I, Section 3 of the Bylaws, and Tribal
4 Council Custom Law.

5 On April 25, 2013, Defendant Bob Kelly “sent an election propaganda packet to some but
6 not all of the enrolled members of the Nooksack Tribe, begging them to register to vote in the
7 Secretarial election in an attempt to ‘control [the] cultural identity of the Nooksack Tribe’ and
8 with racial animus by targeting ‘large groups or families that [allegedly] have much weaker ties
9 to Nooksack than the rest of us who are currently enrolled here.’” *Id.* at 5; Second Doucette
10 Decl., Ex. B. According to Tribal Secretary St. Germain, Defendant Bob Kelly’s propaganda
11 packet was “mass mailed through use of Tribal resources . . . to only those Nooksack who are not
12 currently being subjected to disenrollment proceedings. Chairman Kelly had no authority from
13 the Tribal Council to mail anything to Nooksack voters, and certainly not only part of the
14 Nooksack electorate.” Third St. Germain Decl., at 3.

15 On April 29, 2013, Councilpersons St. Germain and Roberts again requested a Second
16 Special Meeting regarding Defendant Bob Kelly’s April 25, 2013, propaganda mailing regarding
17 “large groups or families that [allegedly] have much weaker ties to Nooksack than the rest of us
18 who are currently enrolled here.” Fourth St. Germain Decl., Ex. B. According to several
19 witnesses’ undisputed testimony, Defendant Bob Kelly’s propaganda was sent only those
20 Nooksack who are not currently being subjected to disenrollment proceedings, providing further
21 evidence that Resolution No. 13-38 targeted an identifiable group, in violation of Article IX of
22 the Constitution via the federal Indian Civil Rights Act. *Id.* at 4-5; Second Doucette Decl., at 2;
23 [First] Declaration of Francine Adams, at 2; [Second] Declaration of Norma Aldredge, at 2;
24 Declaration of Florentino Barril, at 2; Declaration of Angela Bumatay, at 2; Declaration of

1 Christina Bumatay, at 2; Declaration of Linda Hart, at 2; [Second] Declaration of Sonia Lomeli,
2 at 2; Declaration of Roy Nicol, at 2; Declaration of Alex Nicol-Mills, at 2; Declaration of Olive
3 Oshiro, at 2; Declaration of Samson Phillips, at 2; Declaration of Francisca Rabang, at 2;
4 Declaration of Francisco Rabang, Jr., at 2; Declaration of James Rabang, at 2; Declaration of
5 Leonard Rabang, at 2; Declaration of Maxina Rabang, at 2; Declaration of Mike Rabang, at 2;
6 Declaration of Rachel Rabang, at 2; Declaration of Robert J. Rabang, Sr., at 2; Declaration of
7 Brittini Roberts, at 2; Declaration of Michelle Roberts, at 2 [collectively “Proposed Disenrollee
8 Secretarial Election Declarations”].

9 On or about May 1, 2013, Defendant Council Members caused a postcard to be designed,
10 printed, and mailed with Tribal resources, which postcard indicates that the Secretarial election
11 to amend the Constitution is intended to “close a loophole in our tribal constitution . . . and
12 protect the cultural identity of our Nooksack Tribe.” Third St. Germain Decl., at 12; Second
13 Doucette Decl., Ex. C. As with Chairman Kelly’s April 25, 2009, propaganda packet, “the
14 postcard appears to have been mass mailed through use of Tribal resources, to some but not all of
15 the enrolled members of the Nooksack Tribe.” Third St. Germain Decl., at 12; Proposed
16 Disenrollee Secretarial Election Declarations, at 2. This packet also appears to have been mailed
17 to only those Nooksack who are not currently being subjected to disenrollment proceedings.
18 Proposed Disenrollee Secretarial Election Declarations, at 2. The Tribal Council also did not
19 authorize the production or mailing of the postcard. Third St. Germain Decl., at 12.

20 **F. Defendants’ Egregious Unconstitutional Behavior in May of 2013.**

21 On May 2, 2013, Defendant Council Members caused the publication of *Snee-Nee-Chum*,
22 again through expenditure of Tribal resources, with the following headline: “Upcoming
23 Secretarial Election: Check your mail and register!” Third St. Germain Decl., Ex. C. As with
24 the postcard propaganda, the Tribe’s monthly newsletter explains: “In June, you’ll be voting on

1 whether or not to close a loophole in our Tribal Constitution . . . and protect the cultural identity
2 of our Nooksack Tribe.” *Id.* Like Chairman Kelly’s April 29, 2013, propaganda packet and the
3 postcard, the Tribal Council also did not authorizing use of *Snee-Nee-Chum* as election
4 propaganda. *Id.* It appears Defendant Council Members have also conducted community
5 meetings regarding the Secretarial election they have convened in order to disenroll Plaintiffs
6 through amendment to Article II, Section 1(H) of the Constitution, but not invited Plaintiffs or
7 other proposed disenrollees. *See generally* Fourth Galanda Decl., Ex. S; George Decl., at 4
8 (admitting that the *ad hoc* General Services Executive, Defendant Canete, “took actions in
9 furtherance of the resolution to inform voters” of the proposed amendment).¹²

10 As of today, Defendant Council Members admit that Defendant Bob Kelly has yet to
11 schedule the second Special Meeting requested by Councilpersons St. Germain and Roberts on
12 April 29, 2013, in further violation of Article II, Section 5 of the Bylaws. George Decl., at 7 (“I
13 have been made aware requests for a special meeting from Councilmembers St. Germain and
14 Roberts were submitted to the Chairman. St. Germain’s objections regarding the request have
15 been made known to the Council in a prior meeting. To date, the Chairman has not scheduled a
16 special meeting for those requests . . .”); Fifth Rudy St. Germain Decl., at 2. . Vice Chairman
17 reasons that “the content of these special meeting requests are all about this litigation and are

18
19 ¹² Defendant Canete sees the Secretarial election as follows:

20 Vote YES to remove letter (h) from Article II of our Nooksack Tribal Constitution. I will be
21 voting yes because the way I see it, it is simple . . . You are either Nooksack or you’re Not, and
22 if you’re not then you don’t get to enroll! If you are Nooksack you would qualify under letters
(A) through (G). Our Nooksack ancestors fought so hard and suffered many trials to keep
Nooksack alive for our LINEAL Nooksacks! And I am not going to give our Nooksack away to
anyone who does not descend from Nooksack. #keepitreal!

23 Fourth Galanda Decl., Exhibit T. But of course one can be enrolled Nooksack, like Defendant Bob Kelly, without
24 any Nooksack lineage per adoption via Article II, Section 1(g) of the Constitution. *See also* Jefferson Decl., at 3
25 (“irrespective of Annie George, all of the Rapada, Rabang, and Narte/Gladstone families could be enrolled through
adoption.”). This is further proof that Defendants have targeted Plaintiffs and their families through Resolution No.
13-38 and everything else they have done, or deliberately not done, since at least early February 2013.

1 also issues decided by the Council.” *Id.* The Special Meeting request, on their face, concern
2 matters of disenrollment and Secretarial election, not “litigation,” and the issues may have been
3 “decided by the Council,” but those issues were illegally decided by six, not eight, Tribal
4 Councilpersons during Special Meetings that Councilmembers St. Germain and Roberts were
5 either illegally excluded from or never got notice of in the first instance.

6 On May 6, 2013, Defendant Council Members admittedly met, once again without
7 Secretary St. Germain and Councilperson Roberts, “to discuss personal matters and matters of
8 tribal concern,” in violation of Article III, Section 2 and Article VI of the Constitution, Article I,
9 Section 3 of the Bylaws, and Tribal Council Custom Law. George Decl., at 2; Third Rudy St.
10 Germain Decl., at 2-3. On May 6, both in the morning and late evening, “a group of Tribal
11 members were gathered in the Tribal Council chambers, calling Nooksack members and urging
12 them to register for the June 21, 2013, Secretarial election. . . [T]hose Tribal members were
13 using Tribal facilities and phones to encourage only those Nooksack Tribal members who are not
14 proposed for disenrollment, to register for the Secretarial election and further, to vote in favor of
15 the proposed deletion of Article II, Section 1(H) from the Nooksack Constitution.” Fourth St.
16 Germain Decl., at 2; *id.*, Ex. A (photos posted to the Nooksack Communications Facebook Page
17 of Tribal members using Tribal facilities and phones to “phone bank”); George Decl., at 4
18 (admitting that Defendant Canete, “took actions in furtherance of the resolution to inform voters”
19 – selected voters – of the Secretarial election via “voter phone bank[ing]”).

20 On May 7, 2013, Defendants once again did not convene a General Meeting – in yet
21 further violation of Article II, Section 2 of the Bylaws. At p. 7, ¶53 and p. 9, ¶65 of May 30 their
22 Answer, Defendants admit that the May first Tuesday meeting of the month was not held – for
23 fourth consecutive month. Through sworn testimony of Agripina Smith and Bob Solomon,
24 Defendants further admit that “Council typically holds a meeting the first Tuesday of the month

1 in accordance with the By-laws [but that p]artly as a result of the sensitive enrollment issues
2 becoming public, Council cancelled the February 5, 2013, March 5, 2013, and April 2, 2013
3 meetings.”¹³ Declaration of Agripina Smith, at 2; Declaration of Bob Solomon, at 2; see also
4 George Decl., at 2 (“Council has cancelled the meetings for various reasons.”). The Constitution
5 does not except “sensitive issues” from its public meeting mandates. See Article II of the
6 Bylaws. In fact, “sensitive issues” like the enactment of new laws such as Title 65, the passage
7 of amendments to current laws likes Title 10 and 60 and in turn rescinded amendments to current
8 laws like Title 60, the promulgation of a Tribe-wide enrollment moratorium, and the illegal
9 disenrollment of 15% of the Nooksack Tribal Membership, require public meeting and process.
10 Article II, Section 6 of the Bylaws (“All sessions of the tribal council (except executive) **shall** be
11 open to all members of the public.”) (emphasis added).

12 On May 20, 2013, Defendant Council Members again failed to notify St. Germain and
13 Roberts of a Special meeting. See generally George Decl., at 2. Once again, Defendants
14 violated Article III, Section 2 and Article VI of the Constitution, Article I, Section 3 of the
15 Bylaws, and Tribal Council Custom Law.

16 **G. Defendants’ Egregious Unconstitutional Behavior in June of 2013.**

17
18
19 ¹³ Defendants Smith and Solomon and Rick George generically cite “the possibility of violence” and “public safety
20 issues” and “concerns,” to justify why Defendants Kelly and Defendant Council Members have not convened any
21 form of Nooksack public meeting for the last six months. Smith Decl., at 5; Solomon Decl., at 5; Declaration of Rick
22 D. George, at 2. Defendant Council Members, however, do not provide one iota of admissible evidence to suggest
23 that any of the Plaintiffs – or indeed any of their 300-plus relatives, save one allegedly – are the menace to civil
24 society that Defendants claim they are. On May 16, 2013 and June 6, 2013, several Plaintiffs and their families
25 congregated outside the building. They peacefully drummed and sang, and prayed, along with Plaintiffs’ counsel,
behind a small cordon of tribal police, an orange mesh plastic fence and yellow “restricted area” tape. See John
Stark, *Embattled Nooksacks Await Ruling After Latest Arguments Against Disenrollment*, BELLINGHAM HERALD,
June 7, 2013 (“While the hearing was in progress, about 50 people gathered outside the police line for drumming
and singing, most of them among the 306 whose tribal membership hangs in the balance.”). If security at Nooksack
public meetings is a concern – it should not be, at least by way of Plaintiffs – the Nooksack Tribal Police are fully
capable of keeping the peace. “Public safety” is a red herring, espoused by Defendants to further deprive the entire
Nooksack Tribe of the Tribal democratic process guaranteed to the Nooksack People under the Nooksack
Constitution and Bylaws, and Tribal Custom Law.

1 By June 1, 2013, according to N.T.C. § 60.03.020, Defendant Council Members, sitting
2 as the Petition Review Board, were required to review and validate a recall petition that
3 Nooksack Tribal member Francine Adams had taken out against Defendant Chairman Kelly on
4 March 7, 2013, and returned to the Tribal Council on May 2, 2013. *See* [Second] Declaration of
5 Francine Adams, at 1-2 (“On May 2, 2013, I turned in the completed Recall Petition with all of
6 the required signatures from my fellow Nooksack Tribal members. Approximately 170 of my
7 fellow Nooksack Tribal members signed my Recall Petition against Bob Kelly.”). Defendant
8 Council Members failed to do so by that date, in *per se* violation of Article V, Section 4(a) of the
9 Constitution and N.T.C. § 60.03.020.

10 On June 3, 2013, Defendant Council Members belatedly convened a Special Meeting to
11 consider *Id.* Defendant Council Members rejected Ms. Adams’ petition, and the signatures of
12 approximately 170 Nooksack Tribal members thereon, apparently on some form of technicality
13 regarding her service upon Defendant Bob Kelly on May 14, 2013 – without having asked Ms.
14 Adams for any additional information that may have resolved any procedural defect. *Id.*
15 According to Ms. Adams: “Had the Tribal Council asked me to provide proof that I both hand-
16 delivered and certified mailed Bob Kelly that Petition and my supporting statement on May 14,
17 2013, I would have gladly provided that information. But they did not. Instead they simply
18 rejected by Petition, once again holding themselves and Bob Kelly above Nooksack Tribal law.”
19 *Id.*

20 On June 4, 2013, Defendant Council Members yet again did not convene a General
21 Meeting – for the fifth consecutive month – in yet further violation of Article II, Section 2 of the
22 Bylaws. Fifth Rudy St. Germain Decl., at 1-2. To further the disenrollment of Plaintiffs, chiefly
23 by way of Resolution Nos. 13-02 and 13-38, Defendant Council Members have deliberately and
24 egregiously stifled Nooksack constitutional democracy for the last six months. *See id.*; Fourth

1 Galanda Decl., Exhibit S (Noelani Aure asks: “Is there going to be any type of assembly giving
2 the community a space to engage in open dialogue, where we can address the constitutional
3 amendment at hand?”). Indeed, according to leading tribal disenrollment scholar Prof. Wilkins:
4 “an act that leads to the formal termination of one’s citizenship, should, if it must be carried out,
5 fall upon the shoulders of all the citizens/members of a community and not a handful of tribal
6 officials since such an act reflects the severance of an individual’s political and economic
7 relationship to the entire nation and not just officialdom.” Third Galanda Decl., Ex. A; *see*
8 N.T.C. § 63.04.001(B) (requiring “tribal member”-initiated disenrollment).

9 Unless this Court begins to hold Defendants accountable, now by refusing to dismiss
10 Plaintiffs’ lawsuit for prospective injunctive relief upon Plaintiffs’ clear showing of egregious
11 and bad faith violation of innumerable Nooksack laws, the Rule of Law in Nooksack Indian
12 Country *will* indeed fail and those laws that have governed the Nooksack Tribe for its 40-year
13 existence *will* be rendered dead letter.

14 II. STANDARD OF REVIEW

15 A. Rule 12(b)(7) and Rule 19.

16 Application of Rule 19 determines whether a party is indispensable. The inquiry is a
17 practical, fact-specific one, designed to avoid the harsh results of rigid application. *Makah*
18 *Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Court must determine: (1)
19 whether an absent party is necessary to the action; and (2) if the party is necessary, but cannot be
20 joined, whether the party is indispensable such that in “equity and good conscience” the suit
21 should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991)
22 (quoting *Makah Indian Tribe*, 910 F.2d at 558).

1 **B. Rule 12(b)(1).**

2 The existence of subject matter jurisdiction is a question of law. *Marceau v. Blackfeet*
3 *Housing Authority*, 455 F.3d 974, 977 (9th Cir. 2006). Whether an Indian tribe possesses
4 sovereign immunity is a question of law. *Id.* A party challenging a court's jurisdiction through a
5 Rule 12(b)(1) motion may do so in one of two ways: (1) on the face of the pleading or (2) by
6 presenting extrinsic evidence for the court's consideration. *White v. Lee*, 227 F.3d 1214, 1242
7 (9th Cir. 2000). In resolving a facial attack, such as the one here, the Court accepts the
8 allegations in the petition as true and will only grant the motion if Plaintiffs failed to allege a
9 necessary element for subject matter jurisdiction. As the party invoking this Court's jurisdiction,
10 Plaintiffs have the burden of proving the existence of subject matter jurisdiction. *Thompson v.*
11 *McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).

12 **C. Rule 12(b)(6).**

13 Motions to dismiss for failure to state a claim under Rule 12(b)(6) are viewed with
14 disfavor, and, accordingly, dismissals for failure to state a claim are "rarely granted." *Gilligan v.*
15 *Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). A motion to dismiss
16 under Rule 12(b)(6) requires the Court to read the petition in the light most favorable to the non-
17 moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). All factual
18 allegations in the petition, together with reasonable inferences therefrom, are assumed to be true
19 for purposes of the motion. *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178,
20 1181 (9th Cir. 1998). Inquiry into the adequacy of the evidence is improper. *Enesco Corp. v.*
21 *Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). Dismissal for failure to state a claim
22 pursuant to Rule 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff
23 can prove no set of facts in support of his claim which would entitle him to relief." *Gilligan*, 108
24 F.3d at 248 (internal quotation and citation omitted). The issue before the Court on the motions

1 to dismiss is not whether Plaintiffs will ultimately prevail, but whether Plaintiffs are entitled to
2 offer evidence to support the claims. They are so entitled.

3 III. ARGUMENT

4 A. Neither the Nooksack Indian Tribe Nor The Federal Government Is An 5 Indispensible Party.

6 According to Defendants, the Nooksack Indian Tribe “is a necessary party because. . .
7 [o]nly the Tribe, thorough its Council, may make disenrollment determinations and/or enact
8 ordinances, rules, and regulations governing membership.” MTD at 20. Defendants are
9 mistaken. The only necessary party for the complete and just resolution of this matter are the
10 named Defendants.

11 Plaintiffs are not asking this court to prevent the Tribe from making disenrollment
12 determinations or to interrupt the passage of laws, ordinances, or regulations. That the actions
13 taken by Defendants fundamentally implicate an underlying tribal membership determination
14 does not make them subject to a Rule 19 analysis. Here, the disenrollment decision is not
15 challenged – it is the **unlawful procedure** utilized by Defendants that triggers the Court’s review
16 under the Constitution and Title II of the Indian Civil Rights Act (“ICRA”). *See Poody v.*
17 *Tonawanda Band of Seneca Indians*, 85 F.3d 874, 874-79 (2nd Cir. 1996) (discussing the
18 underlying facts, but exercising jurisdiction over claims alleging ICRA violations concerning the
19 **process** used to disenroll); *Quair v. Sisco*, 359 F.Supp.2d 948, 975-76 (E.D. Cal. 2004) (same).
20 In *Sweet v. Hinzman*, 634 F.Supp.2d 1196 (W.D. Wash. 2008), members of the Snoqualmie
21 Indian Tribal Council, sued in their official capacities, made a similar argument as Defendants
22 herein, which was summarily rejected by the Court:

23 Respondents argue that the absence of the Tribe from the case would prevent the
24 court from according complete relief to Petitioners. They argue that no other
party, besides the Tribe, can grant tribal membership or distribute tribal benefits. .
. . Petitioners are not asking to be reinstated as members; rather, they seek a

1 review of alleged deficiencies in the procedure employed by the Tribal Council in
2 the banishment proceedings. The court also finds that the absence of the Tribe . . .
3 will not impair or impede their ability to protect their interests. Petitioners have
4 sued members of the Tribal Council in their official capacities.¹⁴ The court finds
5 that as elected representatives of the Tribe, Respondents will protect the interests
6 of the Tribe

7 *Id.* at 1201-1202. Faced with the exact same factual scenario, this Court must find the same. *See*
8 *also generally Thomas v. U.S.*, 189 F. 3d 662 (7th Cir. 1999).

9 **B. This Court Possess Subject Matter Jurisdiction Over Plaintiffs' Claims.**

10 Title 63 limits the jurisdiction of this Court in that it may not “hear cases [arising] under”
11 Nooksack Membership Ordinance. N.T.C. § 63.00.003. Defendants argue that this case arises
12 under the Membership Ordinance. MTD at 11. It does not.

13 “Because a plaintiff is considered the master of his complaint, a cause of action generally
14 only ‘arises under’ [a] law where the . . . cause of action appears on the face of the plaintiff’s
15 well-pleaded complaint.” *Husko v. Geary Elec., Inc.*, 314 F.Supp.2d 787, 789 (N.D. Ill. 2003);
16 *see also Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984) (it is “a well-settled,
17 elementary principle [that] a case ‘arises under’ [a] law” only if the cause of action “appears on
18 the face of plaintiff’s well-pleaded complaint”) (citing *Louisville & Nashville R.R. v. Mottley*,
19 211 U.S. 149 (1908)). Here, Plaintiffs have pled the following causes of action:

- 20 (1) Defendants have obstructed and are obstructing the monthly regular meeting required
21 by Article II, Section 2 of the Bylaws. Second Amended Complaint, at 19. Plaintiffs
22 seek a writ of mandamus and injunction to compel Defendants to hold the meeting
23 and to prevent Defendants’ continued obstruction of the meeting. *Id.*
- 24 (2) Defendants have acted and are acting beyond the scope of their constitutional
25 authority by initiating the disenrollment process on their own provocation and
continuing to act in furtherance of that initiation. *Id.* at 20. Plaintiffs seek an
injunction to prevent future unconstitutional acts of this nature. *Id.*

23 ¹⁴ “[I]f it be determined that no statute authorizes the threatened acts, then an injunction against exercising a power
24 not granted by statute is not a proceeding against the state but one against an individual officer who is attempting to
go beyond the powers with which the state has vested him. His unlawful acts are not the acts of the state, and the
state is not a necessary party.” *Modern Woodmen of America v. Casados*, 15 F.Supp. 483, 487 (D.N.M. 1936).

- 1 (3) Defendants are illegally operating an Election Board, with said authority granted via
2 Resolution No. 13-53. *Id.* Defendants installed the Election Board while
3 Councilpersons St. Germain and Roberts were excluded from executive session on
4 March 26, 2013. This was done in violation of, *inter alia*, Article II, Section 2 of the
5 Nooksack Bylaws and Nooksack Customary Law. *Id.* Plaintiffs seek an injunction to
6 prevent the unconstitutionally installed Election Board from taking further actions to
7 harm Plaintiffs. *Id.*
- 8 (4) Defendants have denied, and are continuing to deny, Plaintiffs' rights to procedural
9 and statutory due process. *Id.* at 21. Plaintiffs seek an injunction to prevent future
10 violations of these rights. *Id.*
- 11 (5) Defendants have enacted a Resolution that is facially discriminatory and being
12 applied in a discriminatory fashion, in violation of Article IV of the Constitution and
13 the ICRA. *Id.* at 23. Plaintiffs seek an injunction to prevent Defendants from taking
14 any acts in furtherance of said Resolution. *Id.*
- 15 (6) Defendant Council Members have failed to call a monthly regular Tribal Council
16 meeting for Tuesday, February 5, 2013, Tuesday, March 5, 2013, and Tuesday, April
17 3, 2013 [and Tuesday, May 7, 2013 and Tuesday, June 4, 2013], in violation of
18 Article II, Section 2 of the Nooksack Bylaws. *Id.* Plaintiffs seek a Declaration
19 stating as much. *Id.*
- 20 (7) Defendant Council Members had no constitutional authority to initiate disenrollment
21 proceedings against Plaintiffs. *Id.* Plaintiffs seek a Declaration stating as much. *Id.*
- 22 (8) Defendants have improperly and illegally initiated of disenrollment proceedings
23 against Plaintiffs has deprived them of the protections afforded by the ICRA and
24 Article IX of the Constitution. *Id.* at 24. Plaintiffs seek a Declaration stating as
25 much. *Id.*
- (9) Defendants allowed Defendant Roy Bailey to be present at the February 12, 2013,
executive session without being properly designated, in violation of Article II,
Section 7 of the Bylaws. *Id.* Plaintiffs seek a Declaration stating as much. *Id.*
- (10) Defendants excluded Tribal Council Secretary Rudy St. Germain and Councilperson
Roberts from, *inter alia*, the February 12, 2013, executive session, in violation of
Article I, Section 3 of the Constitution and Nooksack Customary Law, respectively.
Id. Plaintiffs seek a Declaration stating as much. *Id.*

19 Plaintiffs' claims do not "arise under" N.T.C. § 63.00.003. Title 63 does not appear as a cause of
20 action on the face of Plaintiffs' Second Amended Complaint.

21 To the extent that N.T.C. § 63.04.001(B) is implicated, Plaintiffs argue that Defendant
22 Roy Bailey initiated disenrollment on his own provocation, in violation of that statute. *Id.* at 20.
23 This does not mean, however, that Plaintiffs' Third Cause of Action "arises under" N.T.C. §
24 63.04.001(B). Simply put, either the Tribal Council or Roy Bailey initiated disenrollment. If

1 Roy Bailey did it, he did so in violation of N.T.C. § 63.04.001(B). If the Tribal Council did it, as
2 they admit at p. 9, ¶72 and p. 10, ¶79 of their May 30 Answer, they acted outside of the scope of
3 their constitutional authority because they have not drafted a statute that grants them that power.
4 *See also* MTD, at 15 (“The Tribal Council commenced the disenrollment process”).

5 The Nooksack Constitution clearly limits the Tribal Council’s role in disenrollment to
6 legislation. *See* Const. art. II, § 2 (“The Tribal Council shall have the power to enact ordinances
7 in conformity with th[e] constitution, Subject to the approval of the Secretary of the Interior,
8 governing future membership in the tribe, including . . . loss of membership.”); *id.* at § 4 (“The
9 tribal council shall, by ordinance prescribe rules and regulations governing involuntary loss of
10 membership.”). Plaintiffs do not argue that Defendants could not have, should they have chosen,
11 enacted an ordinance that granted them the authority to initiate disenrollment proceedings. But
12 that ordinance simply does not exist. Plaintiffs’ argument, in other words, is that in searching for
13 Tribal Council’s authority to initiate disenrollment, it is not found in Title 63 – nor is it found in
14 any other Title or Section of the Nooksack Tribal Code. This violates the Constitution, not Title
15 63. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit
16 arises under the law that creates the cause of action.”).

17 **C. Defendants Are Not Immune From Suit.**

18 Plaintiffs do not claim that “the Council has waived its sovereign immunity with concern
19 to review of any of the claims [or] issues presented in this case.” MTD, at 6. Plaintiffs have not
20 named the Nooksack Indian Tribe or its Tribal Council as defendants. Nor do Plaintiffs claim
21 that sovereign immunity does not “appl[y] to tribal officials and employees acting within the
22 scope of their authority.” *Id.*

23 But tribal officials and employees are not “acting within the scope of their authority”
24 when they take actions that violate the Constitution, Bylaws, and statutes of the Nooksack Indian

1 Tribe. As noted by the Court in *Watrous v. District Court of U. S. for Dist. of Colo.*, “even the
2 sovereign is amenable to the law and must act within it and . . . an agent of the sovereign cannot
3 act under color of law to invade the rights and properties of a citizen and claim immunity for it as
4 an act of the state.” 207 F.2d 50, 58 (10th Cir. 1953); *see also U.S. v. State of La.*, 225 F.Supp.
5 353, 357 (E.D. La. 1963) (“[I]f the act to be enforced is unconstitutional, it is not the act of the
6 State.”) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *MSA Realty Corp. v. State of Ill.*, 990 F.2d
7 288, 291 (7th Cir. 1993) (sovereign immunity “does not extend to . . . officials sued for
8 violations of federal law; illegal actions by state officials are not the acts of the state and do not
9 share in its immunity. The state official who acts in violation of the federal Constitution is
10 stripped of his official or representative character”); *Arkansas State Highway Commission v.*
11 *Butler*, 105 F.2d 732, 734 (8th Cir. 1939) (“When constitutional rights are invaded by a given
12 action, lawful authority for that action cannot be present. In a situation of that kind the acts of
13 agents are not the acts of the state but of individuals, subject to injunctive restraint
14 notwithstanding [sovereign immunity].”); *Kenney v. Hawaii*, 109 F.Supp.2d 1271, 1277 (D.
15 Hawai‘i 2000) (“[T]he state [can]not authorize its officer to commit an act contrary to the
16 supreme authority of the land; therefore any unconstitutional acts committed by that officer was
17 not an act of the state.”); *Beyer Farms, Inc. v. Brown*, 721 F.Supp. 644, 646 (D.N.J. 1989)
18 (“[E]ven the state-authorized enforcement of an unconstitutional statute is not an act of the State
19 and thus does not affect the State in its sovereign or governmental capacity.”) (quotation
20 omitted).

21 Defendants argue that – although not one court, in any jurisdiction, ever, has held as
22 much – tribal officers may violate the statutory rights of Nooksack citizens at will, with no
23 repercussion, unless that violation raises to some mysterious level of “more egregious than an
24 error of law.” MTD at 9 (citing Order on Plaintiff’s Motion for Preliminary Injunction, at 7, 9-

1 12). While Plaintiffs, as well the rest of the Nooksack People, are only left guess as to how
2 “egregious” a violation of law must be in order to warrant vindication of statutorily guaranteed
3 rights, patent violation of the Constitution and Bylaws of the Nooksack Indian Tribe must surely
4 be deemed so “egregious.” As noted above, Plaintiffs have alleged that Defendants, sued in their
5 official capacity, have violated this most important governing document in virtually countless
6 instances, and are seeking prospective injunctive relief to prevent these violations from
7 continuing.¹⁵ If there is ever to be an instance where the *Ex parte Young* doctrine applies, it is
8 here; if there is ever a time for it to apply, it is now.

9 To the extent this Court still finds Defendants immune, in the face of a record replete
10 with proof of “egregious” violation of Nooksack Tribal Law, Defendants have waived their
11 immunity by filing counterclaims against Plaintiffs for both legal and equitable remedies.
12 Defendants’ First Answer, at 14. By asserting counterclaims against Plaintiffs, Defendants have
13 waived any sovereign immunity from Plaintiffs’ claims for prospective equitable relief and
14 consented to this Tribal Court’s adjudication thereof. *See* Plaintiffs’ Answer to Defendants’
15 “Counterclaims,” at 3; *see also Berrey v. Asarco, Inc.*, 439 F.3d 636, 644 (10th Cir. 2006)
16 (“[W]hen the sovereign sues it waives immunity as to claims of the defendant which assert
17 matters in recoupment-arising out of the same transaction or occurrence which is the subject
18 matter of the government’s suit, and to the extent of defeating the government’s claim . . .”);
19 *United States v. Bull*, 295 U.S. 247 (1935) (same); *Rosebud Sioux v. A&P Steel, Inc.*, 874 F.2d
20 550, 553 (8th Cir. 1989) (denying dismissal of counterclaim that “arises out of the same
21 contractual transaction, seeks similar monetary relief, and is for an amount less than that sought
22 and recovered by the Tribe”); *cf. McClendon v. U.S.*, 885 F.2d 627, 630-31 (9th Cir. 1989) (“a

23 _____
24 ¹⁵ As discussed *infra*, Defendants have done – and are doing – much more than “vot[ing] as Council members.”
25 MTD, at 25. Were this the case, prospective injunctive relief would be impossible and Defendants would have
nothing to worry about.

1 tribe's waiver of sovereign immunity [through initiation of a lawsuit] may be limited to those
2 issued necessary to decide the action brought by the tribe . . ."); *U.S. v. Oregon*, 657 F.2d 1009,
3 10015 (9th Cir. 1981) (tribe's intervention to establish fishing rights deemed consent to court's
4 jurisdiction to issue and modify equitable decree). Realizing their gaffe, Defendants tried to
5 cleverly withdraw their counterclaim by omitting it from their May 30 Answer, by simply not
6 pleading it again. But FED. R. CIV. PROC. 41(a)(2) and (c)(1) require a Court order to accomplish
7 the dismissal of a counterclaim that has been answered, as here.

8 Defendants also waived their immunity by not asserting the defense when Plaintiffs first
9 sued them three months ago – in March of 2013. Instead, they waited until May 29, 2013, to
10 seek dismissal, at which even the Court expressed its surprise upon hearing word on May 16,
11 2013, that Defendants intended to finally seek dismissal. Tribal defendants who do not
12 immediately assert sovereign immunity waive the right to later raise it as a defense. *See e.g. U.S.*
13 *v. Snowden*, 879 F. Supp. 1054 (D. Or. 1995) (tribe's failure to assert immunity when appearing
14 in court to quash a subpoena operated to waive tribal immunity).

15 **D. Defendants Have Violated, And Are Violating, Article II, Section 4, and Article IX**
16 **of the Constitution And NTC § 63.04.001(B).**

17 Defendants conceal the heart of their constitutional violation in a footnote of their
18 briefing. According to Defendants, they “do not have to prove that Plaintiffs fail to meet the
19 criteria in [Section 1(H)] Article II because Plaintiffs were not enrolled under those sections.”
20 MTD, at 16 n.3. Article II, Section 4, and Article IX of the Constitution, NTC § 63.04.001(B),
21 and a surplus of federal case law, contradicts this argument.

22 First, Article II, Section 4 of the Constitution clearly states that the “reasons for [loss of
23 membership] **shall be limited exclusively** to failure to meet the requirements set forth for
24 membership in this constitution” (emphasis added). Defendants would read this provision as

1 stating that reasons for loss of membership include (1) failure to meet the requirements set forth
2 for membership in this constitution, and (2) failure to have the correct box checked on the
3 original enrollment application. Resolution No. 13-02 initiates the disenrollment process against
4 over 300 Nooksacks not because they do not “meet the requirements set forth for membership in
5 this constitution,” but because Plaintiffs were not originally enrolled under “Article II, §1 (A)
6 and (C).”¹⁶ MTD, at 16 n.3.

7 Second, NTC § 63.04.001(B) requires that Defendants produce at least some
8 “proof,” “written documentation,” or “information” prior to the initiation of disenrollment. This
9 comports with the due process requirements of the ICRA, as incorporated into Article IX of the
10 Constitution. In *Gorbach v. Reno*, it was held that the power to confer membership does not
11 include the power to revoke that membership at will. 219 F.3d 1087, 1089 (9th Cir. 2000).
12 Instead, membership must be safeguarded “from abrogation except by a clearly defined
13 procedure.” *Id.* at 1097. As the due process implications loss of membership were spelled out in
14 *U.S. v. Zucca*:

15 The mere filing of a proceeding for [disenrollment] results in serious
16 consequences to a defendant. Even if his citizenship is not cancelled, his
17 reputation is tarnished and his standing in the community damaged. [A] person,
18 once admitted to [Nooksack] citizenship, should not be subject to legal
19 proceedings to defend his citizenship without a preliminary showing of good
20 cause. Such a safeguard must not be lightly regarded. We believe that, not only
21 in some cases but in all cases, the [Tribal Council] must, as a prerequisite to the
22 initiation of such proceedings, file [evidence] showing good cause.

23 351 U.S. at 676 (modified to reflect application to the case at bar); *see also generally U.S. v.*
24 *Diamond*, 255 F.2d 749 (9th Cir. 1958). The purpose of this due process requirement of some
25 pre-hearing evidence “is to give the concrete facts behind the charge as distinguished from its
26 abstract theory.” *US v. Costello*, 142 F.Supp. 290, 291 (D.C.N.Y. 1956). “[T]he mere statement

27 ¹⁶ To the extent that defendants are correct in their interpretation of Title 63 – they are not – it is violative of the
28 Constitution and cannot prevent the issuance of injunctive and/or declaratory relief.

1 of a theory” in a mass-mailing does not provide due process. *Id.* Here, however, Defendants
2 have not produced one scintilla of evidence to prove – nor does Resolution No. 13-02 provide
3 any basis to believe – that Plaintiffs do not “meet the requirements set forth for membership in
4 th[e] constitution.”¹⁷ ***In fact, Defendants know Plaintiffs are Nooksack, and they have***
5 ***known that fact since at least February 5, 2013.*** *Cf.* Fourth Galanda Decl., Ex. H, with Second
6 Galanda Decl., Ex. A. As such, they have egregiously violated Nooksack Tribal Law by
7 commencing disenrollment proceedings against Plaintiffs in the first instance, especially by not
8 having disclosed to anybody their possession of proof that Plaintiffs are Nooksack. *See* Fourth
9 Galanda Decl., Ex. W (“On the topic of evidence, the Tribe has yet to signal that it will ‘produce
10 some evidence that each and every one of the 306 [or other number of] Enrolled Nooksack
11 Members are not Nooksack’ or to ‘produce all records, evidence, and material’ the Tribe intends
12 to reply upon in any disenrollment hearing, as demanded in our March 15, 2013, Notice of
13 Appearance.”).

14 **E. Defendants Have Violated, And Are Violating, Article IX of the Constitution.**

15 Article IX of the Constitution requires that “the Nooksack Indian Tribe in exercise of its
16 powers of self-government” afford its citizens the rights and privileges codified in the ICRA.
17 Pursuant to ICRA Section 1302(a)(8), a tribe may not “deny to any person within its jurisdiction
18 the equal protection of its laws or deprive any person of liberty or property without due process
19 of law.” 25 U.S.C. § 1302(a)(8). This provision of the ICRA “incorporate[s] . . . the safeguards
20 of the Bill of Rights to fit the unique needs of tribal governments” by guaranteeing the equal
21 protection of tribal laws and regulations. *Long v. Mohegan Tribal Gaming Authority*, 1 Am.

22 ¹⁷ Again, to the extent that Defendants provide evidence that that Plaintiffs’ original enrollment files had the wrong
23 box checked, this is not enough to disenroll. *See* Const. art. II, § 4. That is unless they are intent on disenrolling the
24 entire Tribe. *See* Jefferson Decl., at 2 (“[M]any Nooksack members’ enrollment letters do not specify a provision of
Section 1 of the constitutional membership provision that they were enrolled under, meaning the letters do not
specify 1(A), 1(B), 1(C), 1(H) and so forth. That problem is not limited to only the Rapada, Rabang, and
Narte/Gladstone families. It extends throughout the entire Tribe.”).

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

3 Discriminatory tribal laws and regulations and/or discriminatory application of tribal law
4 and regulation – particularly where motivated by racial animus – do not satisfy the scrutiny
5 applied under Section § 1302(a)(8). A “facially neutral” law or policy that is “nonetheless
6 applied by government actors in a discriminatory manner” is unconstitutional under the Equal
7 Protection Clause. *Boston’s Children First v. Boston School Committee*, 260 F.Supp.2d 318, 331
8 (D. Mass. 2003); *see also Nunez v. Cuomo*, No. 11-3457, 2012 WL 3241260, at *15 (E.D.N.Y.
9 Aug. 17, 2012) (“Because discriminatory intent is rarely susceptible to direct proof, a party may
10 state an intentional discrimination claim based on circumstantial evidence of intent, such as the
11 disparate impact the complained of conduct has on a particular group.”) (quotation omitted). It
12 has long been the case that where a “challenged governmental policy is facially neutral, proof of
13 disproportionate impact on an identifiable group, such as evidence of gross statistical disparities,
14 can satisfy the intent requirement” *Committee Concerning Community Improvement v. City*
15 *of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (citing *Village of Arlington Heights v. Metro.*
16 *Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977); *Hazelwood School Dist. v. United States*, 433
17 U.S. 299, 307-08 (1977)) (quotation omitted).

18 Here, Defendants cannot deny that Resolution No. 13-38 will have a disparate impact on
19 a particular group.¹⁸ Defendants are currently attempting to disenroll Plaintiffs and those
20 Nooksacks who are similarly situated. These Nooksacks meet, at least, the requisites of Article
21 II, Section 1(H), of the Nooksack Constitution. Even so, as discussed above, Defendants plan to
22

23 ¹⁸ Defendants argue that their “claim” as to Resolution No. 13-38’s constitutionality “fails for lack of a waiver of
24 sovereign immunity.” MTD, at 17 n.5. Plaintiffs are unsure what this means, but reiterate their argument that “the
25 state [can]not authorize its officer to commit an act contrary to the supreme authority of the land; therefore any
unconstitutional acts committed by that officer was not an act of the state.” *Kenney*, 109 F.Supp.2d at 1277.

1 disenroll these Nooksacks because their application files show that they were enrolled by a prior
2 Tribal Council under a different section of Article II. **Defendants then plan to disallow these**
3 **Nooksacks to reenroll** under Article II, Section 1(H), because it will have been removed.

4 It is utterly transparent that Resolution No. 13-38 unconstitutionally targets Plaintiffs and
5 those Nooksacks who are similarly situated. Jefferson Decl., at 6 (“I believe those families are
6 being targeted.”); Second Declaration of Diantha Doucette, Exhibit B; Proposed Disenrollee
7 Secretarial Election Declarations, at 2. Defendants cannot offer any legitimate governmental
8 interest whatsoever to establish why the Secretarial Election and the disenrollment proceedings
9 must be completed in tandem.¹⁹

10 Even if Defendants’ argument that Plaintiffs and those Nooksacks who are similarly
11 situated were not targeted because of racial animus had any merit – it does not²⁰ – they cannot
12 deny that Resolution No. 13-38 unconstitutionally targets an identifiable group. *See id.*
13 Defendants have acted egregiously, and Plaintiffs will prevail on the merits of this claim.

14 **F. Defendants May Not Violate The Nooksack Bylaws At Will.**

15 Defendants admit that they have violated, and are violating, the Bylaws, but argue that
16 these violations cannot create a cause of action. MTD, at 24. According to Defendants, the
17 Tribal Council and anyone else may violate the Bylaws at will because Plaintiffs “fail to cite to
18 any authority that a violation of [a tribe’s Bylaws] creates a cause of action. *Id.*”

19 ¹⁹ Were Resolution No. 13-38 passed at any other time, Defendants’ argument that it “does not change any currently
20 enrolled member’s [sic] rights” might have merit. TRO Response, at 7. But the facts at hand establish otherwise. It
21 simply cannot be argued that Resolution No. 13-38 does not specifically target those Nooksacks currently subject to
22 disenrollment proceedings. The application of Resolution No. 13-38, as exhibited by actions taken by Defendants
23 post-passage – the appointment of Roy Bailey, enrollment staff overseeing the disenrollment action, to the
24 Secretarial Election board; the distribution of propaganda only to those Nooksacks who are not subject to disenrollment;
25 Defendants’ behind-closed-door meetings with selected members of the Tribe; Defendant Canete’s revealing
Facebook posts, just to name a few – clearly establishes a discriminatory intent as to that specific identifiable group.

²⁰ Defendants’ statement that not each and every Nooksack of Filipino ancestry is being targeted for permanent
disenrollment under their scheme is of little consequence. The fact that each and every Nooksack that is being
targeted for permanent disenrollment is of Filipino ancestry, and is a member of a suspect class, is more than enough
to make a facial case.

1 First, Plaintiffs are not required to cite to authority in their Complaint. Plaintiffs do,
2 however, make the following allegations upon the above-discussed proof, if not Defendants' own
3 admissions, that Defendants have violated, *inter alia*: Article II, Section 2 of the Bylaws (as
4 admitted at p. 4, ¶27, p. 7, ¶53 and p. 9, ¶65 of their May 30 Answer); Article III, Section 2 of
5 the Constitution (as admitted at p. 8, ¶59 of May 30 Answer); Article VI of the Constitution (as
6 also admitted at *id.*); Article I, Section 3 of the Bylaws (as further admitted at *id.*); Article IX of
7 the Constitution, which fully incorporates by reference the ICRA; Article II, Section 5 of the
8 Bylaws (as admitted at p. 7, ¶51 and p. 8, ¶55 of their May 30 Answer); Article VI, Section 1(d)
9 of the Constitution; Article II of the Constitution; and Article V, Section 4(a) of the Constitution.
10 There are few other Constitutional left for Defendants to still violate.

11 Second, in *Garfield v. Coble*, a violation of the Fort McDermitt Paiute and Shoshone
12 Tribe's Bylaws were held to create a of action. No. ITCN/AC 03-020, 2004 WL 5748178 (Nev.
13 Inter-Tribal Ct. App. June 28, 2004). In *Garfield*, plaintiffs argued that certain members of the
14 Tribal Council improperly removed a member from his position as the Tribal Chairman, failed to
15 reimburse him for travel and other expenses he incurred on behalf of the Tribe, and held
16 improperly called meetings that did not comply with the procedural requirements, in violation of
17 the Tribe's Bylaws. *Id.* at *1. The trial court dismissed the case, holding that the Tribe's
18 sovereign immunity protected defendant councilmembers from suits of this nature. *Id.*

19 On appeal, the Inter-Tribal Court of Appeals of Nevada reversed, holding that "the
20 allegations set forth in the Complaint comes within the exception to the Tribe's sovereign
21 immunity and as such, the Complaint should not have been dismissed." *Id.* at 2; *see also*
22 *generally Sault Ste. Marie Tribe of Chippewa Indians v. Bouschor*, No. 276712, 2008 WL
23 4923039 (Mich. Ct. App. Nov. 18, 2008), *aff'd*, 777 N.W.2d 142 (Mich. 2010), *rev'd by statute*,

1 777 N.W.2d 143 (Mich. 2010); *Yellowbank v. Chingwa*, No. C-018-0300, 2000 WL 35770340,
2 at *3 (Little Traverse Trib. Ct. June 19, 2000).

3 **G. Plaintiffs' Claims Are Ripe.**

4 Defendants continue their effort to color Plaintiffs' claims as somehow seeking to
5 overturn disenrollment determinations that have not yet been made and a Secretarial Election
6 that has not yet occurred. The lengthy factual exposition above demonstrates that violations of
7 Nooksack Tribal Law have already taken place and remain rampant. Plaintiffs seek prospective
8 injunctive and declaratory relief in order to prevent further violations of these laws. Defendants'
9 ripeness argument is frivolous and should not be indulged by this Court.

10 **IV. CONCLUSION**

11 If this Indian Court does not deny Defendants' dismissal motion and thereby allows
12 Defendants to proceed on their current course, consider the implications for two of the Plaintiffs:

13 Plaintiff Sonia Lomeli is 74 years old and lives in a house that *she owns* on Nooksack
14 Tribal land. [First] Lomeli Decl., at 1-2. Ms. Lomeli, a diabetic, depends on the Tribe for
15 medical care, including transportation to a kidney dialysis center three times a week. *Id.* Ms.
16 Lomeli has stated "I am afraid I will die if they disenroll me." *Id.* Ms. Lomeli also cares for a
17 daughter with cerebral palsy, who lives with Ms. Lomeli in her house on tribal land and who,
18 likewise, depends on her Nooksack membership for medical care. *Id.*

19 Plaintiff Lee Carr was enrolled by the Nooksack Tribal Council, pursuant to Resolution
20 No. E00-27, in 2000; and apparently Article II, Section 1(H) of the Constitution, as a part of a
21 settlement of the Tribe's liability associated with his physical abuse while in Nooksack Tribal
22 foster care. Fourth Galanda Decl., Ex. U. Due to the Tribe and Tribal Council's culpability –
23 including that of then Councilpersons Rick George and Bob Kelly, *id.* – 5-year-old Lee Carr,
24 while in Nooksack Tribal foster care, was "repeatedly kicked in the stomach will lose three-

1 quarters of his intestine,” which resulted in “permanent injuries [that] will require a special diet
2 the rest of his life.” *Boy Who Was Kicked Suffered Lasting Damage*, SEATTLE TIMES, Oct. 5,
3 2010 (appended as Exhibit V to Fourth Galanda Decl.). Defendants now seek to breach the
4 enrollment promise that some of them and other Tribal Councilpersons made to Lee Carr in an
5 attempt then to at least Band-Aid the deep wounds the Tribe inflicted upon him. Defendants
6 now seek to add blunt insult to Lee’s permanent injury.

7 ***Plaintiffs are Nooksack, and Defendants know it – and have known it all along.*** As
8 enrolled Nooksack Indians, Plaintiffs have been guaranteed various indelible rights pursuant to
9 the Nooksack Constitution. This Tribal Court must now do something to stop Defendants’ witch
10 hunt, and to restore the integrity of the Nooksack Constitution and Rule of Law in Nooksack
11 Indian Country – before it is too late – for Plaintiffs and the entire Nooksack Tribe.

12 Defendants’ Motion to Dismiss must be **DENIED**.

13 DATED this 13th day of June, 2013.

14 
15 _____
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DECLARATION OF SERVICE

I, Alice Hall, 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 employed with Galanda Broadman, PLLC, counsel of record for Plaintiffs.

2. Today, I mailed the following documents:

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, FOURTH DECLARATION OF GABRIEL S. GALANDA WITH EXHIBITS, AND FIFTH DECLARATION OF RUDY ST. GERMAIN

to the following:

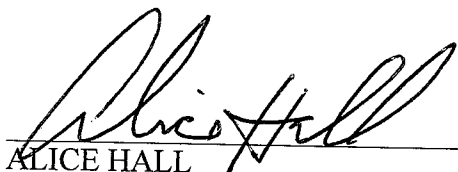
Grett Hurley
Rickie Armstrong
Tribal Attorney
Office of Tribal Attorney
Nooksack Indian Tribe
5047 Mt. Baker Hwy
P.O. Box 157
Deming, WA 98244

A 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 13th day of June, 2013.


ALICE HALL