IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, MARIE DIANE ARANDA, JOSHUA FONTANILLA, YOLANDA FONTANILLA, MICHAEL MENDIBLES, BRONSON MENDIBLES, JASMINE MENDIBLES, LEON MENDIBLES, CHRISTOPHER RUSSELL, ROSALIE RUSSELL, Plaintiffs, v. **DEB HAALAND, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,** Defendants.	Case No. 1:22-cv-01740-JMC

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' motion for preliminary injunctive should be denied. For over 20 years, people claiming to be part of the California Valley Miwok Tribe ("CVMT"), with the assistance of the Department of the Interior, have tried to organize the Tribe. Disputes as to the make-up of the "whole tribal community" have repeatedly thwarted these efforts. ECF No. 29 at 1. In 2015, ASIA Kevin Washburn issued a decision to advance CVMT's organization consistent with evidence that CVMT had hundreds of members, including many descendants of a Miwok named John Jeff. Some of the Plaintiffs in this case presented the Bureau of Indian Affairs ("BIA") with information that a mistake had been made regarding John Jeff's ancestry, and convinced BIA to invalidate the results of an already-completed election on a CVMT constitution. Because of the genealogical mistake, leaving the Washburn Decision in place would exclude most of the CVMT community from participating in the Tribe's organization. ASIA Bryan Newland thus issued a correction in 2022 directing the addition of descendants of the Miwok Indians on the 1929 census of Calaveras County Indians to the eligible groups defined in the Washburn decision.

Plaintiffs initiated the present dispute on June 16, 2022, by filing a Complaint under the Administrative Procedure Act ("APA") challenging ASIA Newland's decision. ECF No. 1. Cross-motions for summary judgment are fully briefed and argued. In the interim, however, Federal Defendants have continued their efforts to assist the several-hundred person CVMT community in organizing. As Federal Defendants noted at the May 2, 2023 summary judgment hearing in this case, "BIA is acutely aware that [the organization process] has taken a long time and wishes to bring it to its conclusion." Hr'g Tr. at 31:24-25, May 2, 2023 ("2023 Tr.) (Ex. 1).

Thus, as Federal Defendants explained, BIA planned to continue engaging in a "process through which a constitution is created and then put to a vote" while the Court considered the Parties' cross-motions for summary judgment. *Id*. at 29:16-20. Federal Defendants further

informed Plaintiffs and the Court that, "with a fair degree of certainty, no election will be finalized" in 2023. *Id*. at 29:10-11. Following the hearing, BIA determined that some applicants were ineligible to participate in CVMT's organization. Administrative appeals of those determinations slowed the organizational process. *See id*. at 28-29. BIA thus revised its timeline and now "expects that the election will not be conducted until May 2024 at the very earliest." ECF No. 37-1 (Ex. F). Plaintiffs now seek a preliminary injunction to prevent BIA from making further progress toward CVMT's much-delayed organization.

Plaintiffs' motion should be rejected because Plaintiffs fail to carry their burden on any element necessary to obtain the extraordinary remedy they seek. First, as set forth in Federal Defendants' summary judgment briefs, Plaintiffs are unlikely to prevail on the merits of their challenge because ASIA Newland's decision was neither arbitrary nor capricious. Second, Plaintiffs fail to establish that they are likely to suffer imminent and irreparable injury if BIA and the greater CVMT community take additional interim steps toward an eventual Secretarial election. For one, it is likely that the Court can rule on the cross-motions for summary judgment prior to May 2024, the earliest date on which BIA estimates an election could occur. And in any event, it is presently far from certain that CVMT will develop a Constitution, Petition for a Secretarial election, ratify any Constitution, or that BIA will approve the Constitution—all of which would need to occur before Plaintiffs' alleged harm could come to pass. Third, even if the greater CVMT community successfully navigates all of those interim steps, Plaintiffs' feared harms are not irreparable because Plaintiffs—assuming all other threshold jurisprudential requirements were met—could obtain judicial review through a subsequent APA challenge to BIA's approval of a Constitution (which would be a final agency action). Fourth, the equities and public interest tip sharply in favor of fostering self-government for the federally recognized

but unorganized CVMT. Plaintiffs fail to establish that delaying interim steps that might lead to a Constitution enabling Tribal self-determination advances the public interest.

FACTUAL BACKGROUND

Federal Defendants set forth the bulk of relevant CVMT history in their summary judgment briefs. ECF No. 29 at 5-27. Rather than repeat that history, Federal Defendants focus here on past efforts by factions purporting to be CVMT to enjoin BIA's efforts to assist CVMT in organizing. *See* ECF No. 29 at 5-7. Remarkably, this is the fourth emergency motion by a CVMT faction to enjoin BIA's efforts to assist CVMT in organizing. Courts, including within this District, rejected each of the three prior motions to enjoin CVMT organizational efforts.

In 2016, the Burley faction sought a preliminary injunction to halt efforts to approve a 2013 Tribal constitution. *CVMT v. Jewel* ("*CVMT IV*"), 2016 U.S. Dist. LEXIS 147053, *5 (E.D. Cal. Oct. 24, 2016). Finding that Burley failed to show a likelihood of irreparable harm, and thus an injunction was not in the public interest, the court denied her motion. *Id*.[1]

In 2019, BIA held a Secretarial election on a Constitution proposed by the whole tribal community, a group of nearly 300 people led at that time by now-Plaintiff Michael Mendibles. *Id*. at 18-22.[2] Two groups sought to enjoin the 2019 Secretarial election.

First, the Burley faction sought "the extraordinary remedy of emergency injunctive relief to prevent [BIA] from conducting a federally supervised election on behalf of the [CVMT] on

[1] Ultimately, the BIA rejected the validity of the 2013 Constitution because the Burleys were excluded from the ratification process. ECF No. 29 at 17.

[2] As elaborated in Defendants' Motion for Summary Judgment, the BIA initiated a Secretarial election in 2018, based on a 2015 decision by Assistant Secretary-Indian Affairs ("ASIA") Kevin Washburn. The 250 – 300 member greater tribal community had been led by Yakima Dixie until his death. Michael Mendibles, a Plaintiff in the current lawsuit, had been a member of Mr. Dixie's Tribal Council, and was the spokesman for the Tribal community as they petitioned for a Secretarial election in late 2018 and early 2019. *Id*.

April 15, 2019, to ratify a Tribal constitution and adopt a Tribal government." Intervenor-Defs.' Opp. to Pls'. Mot. for TRO and Prel. Inj. at 1, ECF No. 11, *CVMT v. U.S. Dept. of the Interior*, 19cv917-RCL (D.D.C. Apr. 11, 2019) ("Mendibles PI Opp.") (Ex. 2). The Tribal community, with now-Plaintiff Michael Mendibles as spokesman, intervened and (with Interior) opposed the Burleys' efforts to enjoin the scheduled Secretarial election. *Id*. The intervenors argued that a CVMT "Faction cannot demonstrate irreparable injury because the injury they fear–the BIA's recognition of a Tribal government–is speculative and uncertain, not imminent." *Id*. at 12 (identifying steps necessary to approve a Constitution). They further argued that the faction's claimed injury was not irreparable because aggrieved factions will have opportunities to challenge any election results. *Id*. at 13-14. And they argued that "each of the 289 Eligible Group members named on the Eligible Voter list . . . will be injured if the election is enjoined" because those CVMT members "will continue to suffer from lack of access to federal programs, services and funding until the election occurs and a Tribal government is recognized." *Id*. at 16.[3]

This Court agreed with the intervenor Tribal community, including then-spokesman and present-Plaintiff Michael Mendibles, and Federal Defendants. It denied the Burley faction's motion for injunctive relief from the bench on April 12, just three days before the election. PI Hr'g Tr. at 38:18-24, ECF No. 18, *CVMT v. U.S. Dept. of the Interior*, 19cv917-RCL (D.D.C. Apr. 12, 2019) ("2019 PI Tr.") (Ex. 3). The Court held, among other things, that the Burley faction would not be irreparably injured absent injunctive relief because "until the election

[3] Plaintiffs' assertion that they have "asked the BIA to conduct a Secretarial Election" for years and that "BIA turned a deaf ear to those please until . . . 2021", Mot. at 1, is, to be charitable, ahistorical. Most of the current Plaintiffs participated in the greater Tribal community's effort to organize in 2018. ECF No. 29 at 14-22. BIA took many steps to assist in and defend that organizational effort, but it was ultimately halted when now-Plaintiff Leon Mendibles came forward with new genealogical information. *Id*. at 19.

results are known, any injury remains speculative. And in any event, Interior regulations" allow them to "challenge the results" after finalization. *Id*. at 44:10-45:1. The Court also agreed that the proposed injunction "would harm other parties," including the "hundreds of potential tribe members'" by delaying their "access to federal programs, services, and funding." *Id*. at 45:5-11.

Second, on April 10, 2019, current Plaintiffs Marie Aranda and Yolanda Fontanilla sought an *ex parte* Temporary Restraining Order to prevent BIA from proceeding with a Secretarial Election. *Aranda v. Sweeney*, 2019 U.S. Dist. LEXIS 64432, at *1-2 (E.D. Cal. Apr. 15, 2019). The United States District Court for the Eastern District of California denied that motion without even requiring Federal Defendants to respond. *Id*. That Court held that "even if the BIA improperly included [individuals] on the Registered Voters List, the Secretarial Election will not harm Plaintiffs in a way that cannot be remedied." *Id*. at *5.[4]

REGULATORY BACKGROUND

Under the Indian Reorganization Act ("IRA"), a Secretarial election is a federal election. 25 U.S.C. § 5123. Under Section 16 of the IRA, Indian tribes have "the right to organize for [their] common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto . . . ." *Id*. at § 5123(a). The Secretary enacted regulations governing the process of calling and conducting Secretarial elections pursuant to the IRA. 25 C.F.R. Part 81. A tribe or petitioner may request an election by submitting an appropriate tribal resolution, ordinance, or petition, along with the language to be voted on and a list of members eligible to vote. *Id*. § 81.6. In response to a valid request, the Secretary "shall call and hold an election as required by subsection (a) [25 U.S.C. § 5123(a)]." 25 U.S.C. § 5123(c)(1).

[4] BIA ultimately invalidated that election on May 30, 2019, in response to new genealogical information. ECF No. 29 at 22

The possible CVMT election Plaintiffs seek to enjoin is still many months away. CVMT must successfully navigate multiple **remaining** regulatory steps to organize before it may organize, several of which incorporate mandatory review or comment periods:

1) CVMT must identify or develop a "governing document," 25 C.F.R. § 81.51;

2) CVMT must gather a sufficient number of signatures on a petition for an election on that governing document, 25 C.F.R. § 81.57-58;

3) CVMT must submit the petition to BIA, which establishes BIA's official date of receipt, 25 C.F.R. § 81.59;

4) **BIA must post the petition for 30 days** and consult with Interior's Office of the Solicitor regarding a legal review of the petition, 25 C.F.R. § 81.60 (emphasis added);

5) CVMT members may challenge signatures on the petition, 25 C.F.R. § 81.61;

6) BIA must validate or invalidate the petition within 60 days of receipt, 25 C.F.R. § 81.62;

7) If the petition is valid, **BIA must hold an election within 180 days of receipt**, 25 C.F.R. § 81.19 (emphasis added);

8) BIA must appoint an Election Board, which must take many steps prior to conducting the election and potentially certifying election results. 25 C.F.R. § 81.19-20, 81.22-23, 81.31-33, 81.38, 81.41.

9) Eligible voters then have five days to "challenge the results of the Secretarial election," 25 C.F.R. § 81.43-44;

10) BIA's Regional Director must "review [the] election results and challenges" and provide notice of his or her "decisions on challenges," "[w]hether the proposed governing document . . . [is] approved," and state that "[t]hat the decision is a final agency action." 25 C.F.R. § 81.45(c).[5]

None of the above steps have been completed. So the election results Plaintiffs fear only materialize *if* the forthcoming process results in a formal petition to hold a Secretarial election, *if* that election results in the majority of CVMT voters approving a Constitution, and *if* the BIA

[5] If the voters ratify the Constitution, but the Regional Director does not issue a decision approving or disapproving the election results within 45 days of the election, "approval . . . must be considered as given." 25 C.F.R. § 81.45(e).

Regional Director approves the election results. And even *then*, the Regional Director's decision would be a final agency action, subject to judicial review. 25 C.F.R. § 81.45(f).

STANDARD OF REVIEW

The grant of a preliminary injunction is an "'extraordinary and drastic remedy.'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation omitted). "As an extraordinary remedy, courts should grant such relief sparingly." *Konarski v. Donovan*, 763 F. Supp. 2d 128, 133 (D.D.C. 2011). A party seeking a preliminary injunction must demonstrate four elements: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that the balance of the equities tips in its favor; and (4) that the public interest would be furthered by the injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs fail to meet their burden on any of the four prongs.

ARGUMENT

I. Plaintiffs have not demonstrated a substantial likelihood that they will prevail on the merits.

Plaintiffs' request for preliminary injunctive relief should be denied because they have not demonstrated a substantial likelihood that they will prevail on the merits. As to the merits, Federal Defendants incorporate and rest on their summary judgment briefs. ECF Nos. 29 and 33.

Federal Defendants nonetheless note that Plaintiffs are incorrect that all Plaintiffs need show to succeed on the merits prong is that their summary judgment briefs raised a "serious question on the merits." Pls'. Mot. for Prelim. Inj. 7, ECF No. 37 ("Mot."). "The D.C. Circuit has, in the past, followed the 'sliding scale' approach to evaluating preliminary injunctions, where 'a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant [preliminary relief] if the movant has made a substantial case on the merits." *Singh v. Carter*, 185 F. Supp. 3d 11, 16 (D.D.C. 2016) (quoting

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). "The continued viability of the sliding scale approach is highly questionable, however, in light of the Supreme Court's holding in *Winter* . . ., that a court may not issue 'a preliminary injunction based only on a possibility of irreparable harm [since] injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Id*. Indeed, following "*Winter*, the D.C. Circuit has suggested, but not decided, that the sliding scale approach does not survive *Winter*'s holding." *Clevinger v. Advocacy Holdings, Inc.*, No. 23-1159 (JMC), 2023 U.S. Dist. LEXIS 121860, at *11 n.2 (D.D.C. July 15, 2023) (citing *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011)).[6] "Whether a sliding-scale analysis still exists or not, courts in our Circuit have held that a failure to show a likelihood of success on the merits alone is sufficient to defeat the motion" for a preliminary injunction. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 83 (D.D.C. 2017).

The Court need not determine whether *Winter* wholly displaced the sliding scale approach here because Plaintiffs fail to: 1) even raise a serious question on the merits; or 2) carry their burden on the other preliminary injunction prongs.

II. Plaintiffs have fallen far short of establishing that they will be imminently and irreparably injured by an election that will not take place until at least May 2024.

Even putting the merits aside, Plaintiffs' motion should be denied because Plaintiffs have not demonstrated an immediate and irreparable harm, and certainly have not demonstrated that

[6] Plaintiffs interpret *Sherley* differently than this Court has, citing it to support their claim that the sliding scale test both survived *Winter* and applies here. Mot. at 7. *Sherley* instead recognized that "*Winter* 'could be read to create a more demanding burden' than the sliding scale analysis." 644 F.3d at 392-93. In fact, the D.C. Circuit stated that "we read *Winter* at least to suggest if not to hold, that a likelihood of success is an independent, free-standing requirement for a preliminary injunction." *Id*. at 393 (internal cites omitted). The Circuit concluded that an injunction was inappropriate in *Sherley* under any potentially applicable test. *Id*.

such harm will occur before the Court has the opportunity to rule on the cross-motions for summary judgment. Plaintiffs seek an order preliminarily enjoining the greater CVMT community's efforts that might: 1) result in a Petition for a Secretarial election, ratification of a Constitution by the majority of CVMT voters, and approval of the election results by the Regional Director; and 2) withstand a potential future legal challenge. But Plaintiffs have not demonstrated that any of that is imminent—the soonest BIA estimates an election could occur would be May 2024. And of course, if the Constitution that Plaintiffs fear is never drafted, submitted, and approved, Plaintiffs would not be injured. In any event, if Plaintiffs are correct on the merits, any injury they would suffer due to the Regional Director's approval of any election results could be remedied by a subsequent challenge to the Regional Director's decision. Plaintiffs thus fail to establish the imminent irreparable harm necessary for them to prevail.

For Plaintiffs to carry their burden, "[f]irst, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'" *Wis. Gas Co. v. Federal Energy Regulatory Com*., 758 F.2d 669, 674 (D.C. Cir. 1985) (citation omitted). "[T]he party seeking injunctive relief must show that '[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* (alterations in original) (citation omitted). "[I]f the moving party fails to carry its burden of showing irreparable injury, a court may deny a motion for preliminary injunction without considering the other factors." *Clevinger*, 2023 U.S. Dist. LEXIS 121860, at *10-11 (citation omitted). To deny a motion for preliminary injunction, "it is sufficient to hold that Plaintiffs will suffer no irreparable injury over the next several weeks." *He Depu v. Oath Holdings, Inc.*, 2021 U.S. Dist. LEXIS 184518, at *14 (D.D.C. Sept. 27, 2021).

"Moreover, an injury that is both likely and substantial is not enough, if that injury can be remedied through 'compensatory or other corrective relief . . . available at a later date.'" *M3 USA Corp. v. Qamoum*, 2021 U.S. Dist. LEXIS 105923, at *70 (D.D.C. June 7, 2021) (citation omitted). And "the certain and immediate harm that a movant alleges must also be truly irreparable in the sense that it is 'beyond remediation.'" *Elec. Priv. Info. Ctr. v. U.S. Dep't of Just*., 15 F. Supp. 3d 32, 44 (D.D.C. 2014).

Plaintiffs' motion must be denied because it is dependent on potential harm from an election that may not occur and whose outcome is both unknowable and challengeable. Plaintiffs fears of harm are thus: 1) speculative and uncertain, rather than imminent; and 2) reversible if Plaintiffs are correct in arguing that the election is based upon an arbitrary and capricious definition of the CVMT community.

A. **Plaintiffs' claimed injury is not imminen**t.

Plaintiffs contend that the CVMT's (by which they mean the nine Plaintiffs) sovereignty is somehow injured if the greater CVMT Community makes progress toward a potential future Secretarial election. Mot. at 8-11. Plaintiffs' claimed injury is speculative and uncertain, rather than imminent. Plaintiffs admit that a Constitution has not even been drafted. Mot. at 10. There are thus many remaining regulatory steps, several of which could halt efforts to organize CVMT. Page 6, above. It is uncertain whether: 1) the drafting committee will successfully draft a proposed Constitution; 2) a sufficient number of eligible voters will sign a petition for an election on that Constitution; 3) the Constitution will pass the legal review process; 4) any vote will be delayed or halted by challenges to signatures; 5) BIA will validate the petition; 6) sufficient eligible CVMT voters will approve that not-yet-drafted Constitution in a not-yet-requested Secretarial election; or 7) the Regional Director will approve the election results. *Id*.

Because Plaintiffs' asserted "injuries depend on actions that may or may not be taken … they are not certain." *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 373 (D.D.C. 2018) (denying relief to tribal faction that sought to enjoin BIA decisions recognizing rival faction as tribe's government). "Injunctive relief will not be granted 'against something merely feared as liable to occur at some indefinite time in the future.'" *United Farm Workers v. Chao*, 593 F. Supp. 2d 166, 170 (D.D.C. 2009) (citation omitted). This, standing alone, is fatal to Plaintiffs' motion.

As Plaintiff Mr. Mendibles argued in successfully opposing a previous injunction motion, a CVMT "Faction cannot demonstrate irreparable injury because the injury they fear – the BIA's recognition of a Tribal government – is speculative and uncertain, not imminent." Mendibles PI Opp. at 12; 2019 PI Tr. at 44:8-45:5. Likewise, in *CVMT IV*, the Court held that the "possibility of injury to plaintiffs is speculative because it is uncertain whether the Regional Director will recognize Dixie's 2013 Constitution in the first place." 2016 U.S. Dist. LEXIS 147053 at * 7. The court concluded that "because plaintiffs have not established that the Regional Director's future decision regarding the 2013 Constitution and any subsequent issuance of tribal money is imminent or likely to occur, they have not met the irreparable harm prong of the preliminary injunction standard." *Id*. To be clear, two separate Courts denied two separate CVMT factions' injunction motions a handful of days before the 2019 Secretarial election because those factions' alleged injuries were based on speculative and uncertain fears. Plaintiffs' current fears that a series of uncertain, theoretical, potential future actions might injure them are even more speculative because the greater CVMT community must negotiate even more steps to potentially obtain a Secretarial election. Plaintiffs' alleged injuries are thus even more insufficient to carry their burden to establish an imminent, irreparable injury.

Plaintiffs' claimed injury is also far from imminent—and unlikely to occur before the Court can rule on the cross-motions for summary judgment—because any election is unlikely to be finalized before May 2024. Plaintiffs contemplated seeking an order preliminarily enjoining "any action to implement any aspect of the Newland Decision" in their June 16, 2022 Complaint. ECF No. 1 at 17. Plaintiffs instead elected to proceed with summary judgment briefing despite the fact that BIA began taking concrete steps to implement the Newland decision by September 30, 2022. ECF No. 37-1 at 2. Nor did Plaintiffs seek extraordinary injunctive relief at or immediately after the May 2, 2023 summary judgment hearing, despite Federal Defendants clearly and repeatedly conveying that they are moving forward with the CVMT reorganization process. Indeed, Federal Defendants stated that BIA would continue engaging in a "process through which a constitution is created and then put to a vote" that "with a fair degree of certainty, [will not] be finalized" in 2023. 2023 Tr. at 28-29. In other words, Federal Defendants conveyed in May 2023 that their ongoing efforts would not yield a CVMT constitution for at least eight months. Plaintiffs did not seek preliminary relief at that time.

Federal Defendants have made certain progress in the interim, but the organizational process is still many months from potentially yielding a vote to ratify a constitution. Plaintiffs do not dispute that no election will be finalized until at least May 2024, more than six months from now. Mot. at 5; ECF No. 37-1, Ex. F.[7] But potential harm from an election that might

[7] Plaintiffs offer several inflammatory, but incorrect and irrelevant, characterizations of Federal Defendants actions since May 2. Plaintiffs' claim that BIA has only "now embarked on a course of action" to carry out ASIA Newland's May 31, 2022 decision, Mot. at 9, is false. Page 14, above. And Plaintiffs' characterization of the interim steps between May and today as "aggressive" and "deliberately hid[den] . . . from Plaintiffs' counsel," *id*. at 2, is incorrect. BIA engaged with the greater CVMT community to allow that community, including Plaintiffs, to participate in an organizational process. *See* ECF No. 37-1, Ex. F and G. The only people who could participate in the organizational meeting were those who met the Newland decision's eligibility criteria. *Id*.

occur in six months is not sufficiently imminent to merit the extraordinary relief of a preliminary injunction. *He Depu*, 2021 U.S. Dist. LEXIS 184518, at *14; *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 6, 9 (D.D.C. 2010) (No irreparable harm from denying emergency relief where purportedly harmful rule would "not have any substantive effect" for months). And even if six months were sufficient to justify preliminary injunctive relief, Plaintiffs faced a similar timeline in May 2023 but did not move for relief. Plaintiffs have not explained why an alleged harm that was not imminent enough to demand preliminary relief in May 2023 has suddenly become so. The many months between now and the possible approval of a Constitution that might injure Plaintiffs, standing alone, is fatal to Plaintiffs' efforts to establish an imminent injury.

To the extent that Plaintiffs claim to be injured because the inclusion of 1929 census descendants in the CVMT organizational process harms CVMT's sovereignty, Mot. at 8-9, Plaintiffs' purported injury fails for three additional reasons. First, Plaintiffs' assertion assumes that they are correct on the core dispute in this case—that Plaintiffs are the only people eligible to take part in CVMT's initial organization. Factions purporting to represent an unorganized tribe do not gain the authority to invoke the Tribe's sovereignty simply by adopting the tribe's name in a Complaint. *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 200-03

Federal Defendants' exclusion of all attorneys from the CVMT meeting was appropriate, regardless of whether, as in Plaintiffs' counsel's view, the meeting was "regarding a matter that is the subject of . . . pending litigation." Plaintiffs' counsel was not allowed to attend the organizational meeting. But neither were attorneys for Defendant Harley Long or CVMT community members. ECF No. 37-1. *See also,* Model Rule of Pro. Conduct 4.2. The goal was to begin efforts at organization, not to discuss the litigation. Moreover, Federal Defendants promptly posted both the powerpoint presented at the meeting and a transcript of the meeting as soon as the transcript was obtained (two weeks after the meeting). ECF No. 37-1, Ex. H; ECF No. 37 at 6. Finally, Plaintiffs' suggestion that BIA's powerpoint "revealed" a nefarious "multi-step plan for forming the Tribe's government" and that BIA had "already undertaken" many steps, Mot. at 6, is misleading. BIA is proceeding exactly as it said it would at the May 2 hearing—by continuing its efforts to implement the Newland decision pursuant to BIA regulations.

(D.D.C. 2006); *Aguayo v. Jewell*, 827 F.3d 1213, 1224 (9th Cir. 2016) ("Secretary properly exercises discretion not to approve a governing document when it does not 'reflect the involvement of the whole tribal community.'") (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266-67 (D.C. Cir. 2008)); *Cayuga Nation*, 302 F. Supp. 3d at 374 (Plaintiff failed to establish injury where "the Court would have to accept Plaintiffs' disputed interpretation of the decisions at issue in this case" to find any injury). And Plaintiffs' reliance on cases in which a Tribe's, as opposed to a tribal faction's, sovereignty was infringed, Mot. at 9, is misplaced. "Plaintiffs have not cited . . . any case law to suggest that the disputed, non-final results of a Secretarial Election pose a risk of irreparable harm by infringing upon a tribe's sovereignty." *Aranda*, 2019 U.S. Dist. LEXIS 64432, at *6 (analyzing and rejecting Plaintiffs Aranda's and Fontanilla's reliance on the same cases). Simply put, Plaintiffs' faction may not invoke the full sovereignty of an unorganized Tribe to feign injury to their faction's interests.

Second, Plaintiffs have known since the May 31, 2022 Newland decision that BIA was moving forward with an organization process for a CVMT community composed of descendants of both the 1915 and 1929 censuses. Indeed, that is the entire substance of Plaintiffs' Complaint. ECF No. 1; ECF No. 28 at 10 (complaining that at a November 28, 2022 meeting "BIA announced its plans to move forward with a Secretarial Election . . . [that] would include descendants of those in the 1929 Census."). Plaintiffs' delay in seeking to enjoin BIA's open efforts to implement the Newland decision "undermines [their] showing of irreparable injury." *Heart 6 Ranch, LLC v. Zinke*, 285 F. Supp. 3d 135, 144 (D.D.C. 2018) (citation omitted); *Jack's Canoes & Kayaks, LLC v. Nat'l Park Serv.*, 933 F.Supp.2d 58, 81 (D.D.C. 2013).

Finally, Plaintiffs fail to establish that they will suffer any injury at all in the coming months. Plaintiffs attach a single declaration in support of their claims that they will be

irreparably injured. ECF No. 37-2. In 2018 and 2019, the declarant, Michael Mendibles, served as spokesperson for a 289-person greater tribal community of eligible CVMT voters. ECF No. 29 at 18. Mr. Mendibles and the Tribal community sought to enact a 2018 Constitution that defined tribal membership to include descendants of a 1929 Census. *Id*. at 18-19. And the Tribal community led by Mr. Mendibles successfully argued to this Court that "each of the 289 Eligible Group members", would be injured if the 2019 election was enjoined because they "will continue to suffer from lack of access to federal programs, services and funding" unless the 2018 Constitution was enacted and a CVMT government recognized. Mendibles PI Opp. at 16. Indeed, this Court held that an injunction delaying the 2019 election would harm the Tribal community led by Mr. Mendibles by "frustrat[ing] hundreds of potential tribe members' attempts to participate in tribal organization[], further denying them access to federal programs, services, and funding." 2019 PI Tr. at 45:5-14.[8]

Mr. Mendibles now contends that the election on the 2018 Constitution that he proposed and supported was "an affront to the sovereignty and dignity of the Tribe and to [his family] because it involved non-members of the Tribe determining the Tribe's government and future." RCF No. 37-2 at ¶ 4. And he similarly reverses his previously-expansive view, stated under oath, of CVMT membership, now claiming that CVMT membership is limited to approximately

[8] Mr. Mendibles' also submitted a sworn affidavit in 2011 to support the greater CVMT community's Tribal Council in their challenge to a previous BIA decision. Mr. Mendibles asserted that CVMT consisted of hundreds of members and signed a 2013 proposed Constitution that extended membership to the 1929 descendants. ECF No. 29 at 14 n. 5, 26, 35 n.16, 41 n.20, 42 n. 22, 46 (citing Aff. of Michael Mendibles (May 3, 2011), CVMT-2532-35 and Letter, R. Uram to ASIA Washburn (Dec. 24, 2013), CVMT-3293.). By contrast, in his affidavit in the current suit he identified no instance in which BIA engaged with the Plaintiffs in this case as though Plaintiffs are the entirety of CVMT, nor any instance in which the Plaintiffs conducted Tribal activities. Notably, in 2018 Mr. Mendibles and the other Plaintiffs signed a petition for a Secretarial election to ratify a Constitution that would have established a Tribal membership of nearly 300 people.

10. Compare *Id*. ¶ 6 with Dec. of M. Mendibles ¶¶ 5-8, 11, 13-14, ECF No. 19-7, *CVMT v. Jewell*, 16cv1345 (E.D. Cal. Aug. 8, 2016) ("2016 Mendibles Dec.") (Ex. 4) and Aff. of Michael Mendibles (May 3, 2011), CVMT-2532-35. Mr. Mendibles' current claims that the CVMT membership criteria he proposed several years ago are an affront and an injury to CVMT sovereignty are not credible and should be accorded no evidentiary weight. Plaintiffs' thus fail to meet their burden of establishing any injury, much less an imminent one.

B. **Plaintiffs' alleged injury is not irreparable**.

Even if Plaintiffs' alleged harm were concrete and imminent, it is not irreparable. If the greater CVMT community successfully navigates all of the remaining organizational steps by developing a Constitution, obtaining an election, ratifying the Constitution, and obtaining BIA approval, Plaintiffs still will not have suffered *irreparable* injury, even if Plaintiffs were correct on the merits that the Newland decision adopted an arbitrary and capricious definition of the CVMT community (they are not). If it comes to pass that the Regional Director approves the outcome of a Secretarial election by which the Tribal community ratifies a Constitution —and assuming the Court had not already ruled on the merits of this case—there is a potential path for Plaintiffs to remedy any potential injury: they can file an APA challenge to BIA's approval of the election results. 25 C.F.R. § 81.45.[9] Plaintiffs' motion thus must be denied because they fall far short of establishing that their purported injuries are irreparable.

"For the purposes of a preliminary injunction, courts will not base a finding of 'irreparable injury' on a procedural violation standing alone." *Am. Ass'n for Homecare v.*

[9] If this court denies Plaintiffs' Motion for Summary Judgement prior to the completion of the Secretarial election process, Plaintiffs may be precluded from raising the same issues in a potential future APA suit. If so, that would not mean that Plaintiffs lack an opportunity to remedy their alleged harms, as they would be free to litigate any other issues that they would believe cause any future approval of a tribal constitutional to be unlawful.

Leavitt, 2008 U.S. Dist. LEXIS 49497, at *14-15 (D.D.C. June 30, 2008). An injunction is thus inappropriate where "any putative procedural violation . . . will be remedied by a decision on the merits." *Id.* at 15. Indeed, injuries from many agency actions are not irreparable because of the possibility that non-compensatory "corrective relief will be available at a later date" through "the ordinary course of litigation." *St. Croix Chippewa Indians v. Kempthorne*, 535 F. Supp. 2d 33, 36-37 (D.D.C. 2008). This is true even where a tribal faction claims an injury to their alleged "sovereign governmental authority." *Cayuga Nation*, 302 F. Supp. 3d at 373-74 ("The Court has the authority to vacate the challenged decisions and order Defendants to reconsider them in a manner consistent with the APA and Plaintiffs' due process rights. This injury is therefore not irreparable."). Plaintiffs fall far short of establishing that they suffer any injury that would not be remedied by a potential future judicial decision.

Plaintiffs are simply incorrect, Mot. at 8, that their claimed injuries are irreparable simply because an award of money damages would not compensate them for their alleged harm. To the contrary, as the court held in rejecting Plaintiffs' effort to enjoin the 2019 Secretarial election, "the question is whether there is an adequate alternative remedy available." *Aranda*, 2019 U.S. Dist. LEXIS 64432, at *5 (citing *Winter*, 555 U.S. at 33). "Monetary damages are just one example of such a remedy." *Id*. Moreover, Plaintiffs may "challenge the BIA's [potential future] decision to finalize the results of the election under the APA with the very same argument" they advance here, "that the BIA improperly allowed non-members of the tribe to vote." *Aranda*, 2019 U.S. Dist. LEXIS 64432, at *7-8.

Again Mr. Mendibles was correct in 2019 when he argued that a CVMT faction failed to establish irreparable injury because the "orderly process of administrative and judicial review . . . protect[s] them from any alleged injury." Mendibles PI Opp. at 14 (citing *Cayuga Nation*, 302 F.

Supp. 3d at 373). The Court agreed with the Tribal community led by Mr. Mendibles and Federal Defendants, holding that the Burley faction failed to establish an irreparable injury because any approval of the 2018 Constitution "constitutes final agency action, which can then be challenged under the Administrative Procedure Act." 2019 PI Tr. at 44:8-45:1. In short, Plaintiffs' asserted injury is not irreparable.

III. The balance of harms and the public interest weigh heavily against a preliminary injunction.

The public interest and balance of harms also weigh heavily against issuing an injunction to further delay BIA's efforts to assist the greater CVMT community in organizing. Congress has stated federal support for tribal self-determination. Plaintiffs' lawsuit and Motion seek to prevent hundreds of people whom the BIA has determined to be eligible to participate in the initial organization of CVMT from having a voice in how that federally recognized tribe "make[s] [its] own laws and [is] ruled by them." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (internal citations and quotation marks omitted). The public interest militates strongly in favor of permitting the greater CVMT community to continue to make what progress it can toward organizing. This is particularly so given the facts that: 1) no final action is likely to occur for at least six months; and 2) Plaintiffs can challenge any such final action.[10]

[10] Plaintiffs' assertion that delaying the greater CVMT community from making progress toward an election somehow "safeguard[s] the legitimacy of elections," Mot. at 11, misses the mark. No election is imminent. Plaintiffs thus seek to delay or prevent, rather than safeguard, an election. And Plaintiffs allege no fraud that might undermine the integrity or legitimacy of any future election. Rather, the actions Plaintiffs seek to enjoin are being taken in compliance with ASIA Newland's May 31, 2022 decision. Plaintiffs can and have made their argument that the AS-IA decision is erroneous as a matter of law. Regardless, Plaintiffs' reliance on *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) is misplaced. In that case, the Supreme Court permitted an election to proceed despite a challenge to voter identification rules that allegedly undermined the election's legitimacy. *Id*. at 5-6. *Purcell* thus suggests that, particularly because ratification of any Tribal Constitution requires another final, challengeable BIA decision, no injunction is appropriate.

Congress has articulated a federal policy of supporting tribal self-government and "a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance." Tribal Self-Governance Amendments of 2000, Pub. L. No. 106- 260, § 2(2), 114 Stat. 711 (2000); Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, § 202(2); 108 Stat. 4250, 4271 (1994). The public interest would thus be best served by permitting the eligible CVMT community members, as determined by a reasonable evaluation of potentially applicable voters by the Department, to exercise their right to vote for their own self-governance and not enjoin the election. Indeed at least two Courts have recognized that "[i]ssuing an injunction preventing the BIA from determining the Tribe's proper government undermines the public policy favoring the promotion of tribal self-governance." *CVMT IV*, 2016 U.S. Dist. LEXIS 147053, at *7-8. This Court likewise agreed with Federal Defendants and the Tribal community led by Mr. Mendibles in 2019 that the public interest would be advanced by allowing that larger CVMT community to move forward with an election rather than allowing a small faction to enjoin that election. Mendibles PI Opp. at 16; 2019 PI Tr. at 45:5-14.

Plaintiffs' equitable arguments are premised upon two fallacies. First, Plaintiffs assume that their injunction would impose no injury. Mot. at 11. Not true. As the greater CVMT community put it in 2016, the "Council members [including Mr. Mendibles], and each of the 200 adult members (and their children) whom the Tribal Council represents, has an interest in being allowed to participate in Tribal organization as guaranteed by the 2015 Decision, and in enjoying the rights and responsibilities of Tribal membership." Mot. to Intervene at 10, *CVMT v. Jewell*, 16cv1345 (E.D. Cal. Aug. 8, 2016) (Ex. 5). And Mr. Mendibles' swore that the CVMT has hundreds of enrolled members who were eligible to participate in a Secretarial election, that that "1929 Census Descendants are eligible for Tribal membership if they choose to affiliate with the

Tribe" and that these hundreds of CVMT members would be harmed by enjoining an election on the 2013 Constitution. 2016 Mendibles Dec. ¶¶ 5-8, 11, 13-14. As the Tribal community led by Mr. Mendibles previously argued, the approximately 289-person greater CVMT community "will continue to suffer from lack of access to federal programs, services and funding" until the Tribe is organized and a government is recognized. Mendibles PI Opp. at 16. Indeed, this Court held that delaying the 2019 election would impose harm because "[i]t would frustrate hundreds of potential tribe members' attempts to participate in tribal organization[], further denying them access to federal programs, services, and funding." 2019 PI Tr. at 45:5-14.[11]

Second, Plaintiffs assume that their motion for summary judgment will be granted and that they are a CVMT of approximately ten people. Mot. at 11. But unless and until the Court rules that the Newland decision erred in extending eligibility to descendants of the 1929 census, the Plaintiffs have no right to exclude them, and thus do not suffer harm to a legally protected interest due to the inclusion of the 1929 Census descendants in the organizational process.

The petition for Secretarial election is just one step in carrying out the ASIA Newland's May 2022 decision. If Plaintiffs are allowed to further delay the election, the whole Tribal community will be prevented from exercising their rights of self-determination and receiving the benefits of a duly organized tribal government. There is no public interest in stalling the Tribe's progress toward organization. And even if CVMT navigates all of the interim steps and a Constitution is approved, any harms to Plaintiffs could (assuming Plaintiffs' view of the merits is correct) be remedied by court order. The balance of equities and public interest tip sharply against a preliminary injunction, particularly because Plaintiffs wholly fail to establish that they

[11] Plaintiffs unsupported assertion that Federal Defendants have been "doing nothing for years," Mot. at 11, is inaccurate. Federal Defendants' decades of efforts to assist CVMT in organizing have been delayed and frustrated by membership and leadership disputes. ECF No. 29 at 12-27.

suffer any harm from Federal Defendants taking additional interim steps that might lead to a Constitution enabling Tribal self-determination.

CONCLUSION

Plaintiffs cannot carry their heavy burden to justify the extraordinary remedy of interrupting BIA's efforts to assist the greater CVMT community to organize. Plaintiffs have not established that they are likely to succeed on the merits of their claims. Nor can they establish irreparable injury because *all* of the injuries they identify are speculative and because any eventual injury could be remedied by court order. Finally, the balance of the equities and the public interest weigh entirely against injunctive relief because the interests of the greater CVMT community, and the interests of the BIA in promoting tribal self-determination, far outweigh Plaintiffs' interest in preventing progress toward a potential future election. Federal Defendants thus respectfully request that the Court deny Plaintiffs' Motion for a preliminary injunction.

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