

OFFICE OF THE ATTORNEY GENERAL
Gilbert J. Birnbrich
Attorney General
Charles E. Brasington
Assistant Attorney General
Hon Juan A. Sablan Mem. Bldg., 2nd Floor
Saipan, MP 96950-8907
Tel: (670) 237-7500
Fax: (670) 664-2349
e-mail: charles.brasington.law@gmail.com

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

JOHN H. DAVIS, JR.

Plaintiff,

v.

**COMMONWEALTH ELECTION
COMMISSION; FRANCES M. SABLAN,
Chairperson of the Commonwealth Election
Commission; ROBERT A. GUERRERO,
Executive Director of the Commonwealth
Election Commission; ELOY INOS,
Governor of the Commonwealth of the
Northern Mariana Islands.**

Defendants.

CIVIL CASE No. 14-0002

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SEQUESTRATION OF BALLOTS
PENDING APPEAL**

Judge: Ramona V. Manglona

Date: October 29, 2014

Time: 2:00 p.m.

1 **I. INTRODUCTION**

2 Defendants Commonwealth Election Commission, Frances M. Sablan, Chairperson of the
3 Commonwealth Election Commission, Robert A. Guerrero, Executive Director of the
4 Commonwealth Election Commission, Eloy S. Inos, Governor of the Northern Mariana Islands
5 (collectively, “the Commonwealth”) hereby move for an order enjoining the Commonwealth
6 Election Commission (“CEC”) from tabulating the votes on House Legislative Initiative 18-1
7 and sequestering the ballots until resolution on appeal.
8

9 As this Court is well aware, Article XII of the Commonwealth Constitution restricts
10 ownership of permanent interests in real property to persons of Northern Marianas descent
11 (“NMD”).¹ Article XVIII, § 5(c), in turn provides that to qualify as a “voter” for purposes of
12 proposed amendments to Article XII a person must be of NMD. House Legislative Initiative 18-
13 1 is a proposed amendment to Article XII.
14

15 Plaintiff-Appellee John H. Davis, Jr. challenged the constitutionality of Article XVIII §
16 5(c). The this Court held that Article XVIII § 5(c) (and related legislation) violated the
17 Fourteenth and Fifteenth Amendments, and 53 U.S.C. § 10101. This Court further held the all
18 qualified and registered voters in the Commonwealth of the Northern Mariana Islands must have
19 the opportunity to cast a vote on ballot initiatives seeking to amend Article XII.
20

21 Tabulating and certifying the votes prior to the disposition of this appeal will set into
22 motion actions that will be difficult and burdensome to undo if the Ninth Circuit reverses the this
23 Court on appeal. The Commonwealth will suffer irreparable harm if the relief is not obtained
24 before the close of business on **November 3, 2014**, the day before the general election, as CEC is
25

26 ¹ As this Court noted in its order: “The acronyms ‘NMD’ and ‘non-NMD’ are commonly
27 used both as adjectives and as nouns. For example, ‘the framers carefully considered what
28 property ownership rights to extend . . . to non-NMD relatives of NMDs.’” (Memorandum
Decision and Order Granting in Part and Denying in Part Plaintiff’s Motion and Defendant’s
Cross Motion for Summary Judgment [hereinafter Order], (quoting *In re Estate of Imamura*, 5
NMI 60, 1997 MP 7 ¶ 13.)

1 mandated by law to begin tabulating all votes when the polls close.

2 The Commonwealth does **not seek to enjoin or otherwise stay the Order**; rather, the
3 Commonwealth seeks to enjoin the tabulation of the votes, and the necessary sequestration of
4 ballots pending the disposition of this appeal. The Commonwealth believes that it is fairest to all
5 citizens to allow all registered voters to cast a ballot on HLI 18-1, but then postpone the
6 tabulation of the votes as to HLI 18-1 until the appeal is resolved. During this time, the ballots
7 will be sequestered as set forth by the Declaration of Robert A. Guerrero, filed
8 contemporaneously herewith.

10 Counsel for the Commonwealth, after consulting with his colleagues, concluded that as
11 the Commonwealth is not seeking to stay the Order that the Ninth Circuit Court of Appeals was
12 the proper tribunal to grant the relief sought. Accordingly, the Commonwealth filed a version of
13 this motion in the Ninth Circuit on October 10, 2014. The Ninth Circuit rejected the motion on
14 October 14, 2014. This Motion before this Court follows.

16 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

17 This Court is already aware of the relevant facts and procedural posture of this case.
18 However, it seems wise to reiterate that information.

19 In 1947, the United States was charged with administering the Trust Territory of the
20 Pacific Islands, which included the Commonwealth of the Northern Mariana Islands (“CNMI”).
21 *See Commonwealth of the N. Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984) (citing
22 *Gale v. Andrus*, 643 F.2d 826, 828–30 (D.C. Cir. 1980)). As part of this charge, the United States
23 was responsible for promoting the development of the Trust Territory toward self-government or
24 independence. *Id.* at 684–85 (citing Trusteeship Agreement for the Former Japanese Mandated
25 Islands, July 18, 1947, art. 6(1), 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189). Importantly,
26 the United States did not have sovereign authority over the Trust Territory. *Id.*
27
28

1 The United States entered into lengthy negotiations with the Trust Territory, and
2 eventually began conducting independent negotiations with the CNMI. *Id.* at 685. From these
3 negotiations came the Covenant to Establish a Commonwealth in Political Union with the United
4 States of America (“Covenant”). *Id.* “The Covenant defines the relationship between the
5 Commonwealth and the United States, sets up a framework and set of mandates for the
6 Commonwealth Constitution, and provides for the eventual termination of the trusteeship.”
7 *Waboll v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990).

8
9 Section 501 of the Covenant governs the applicability of the U.S. Constitution to the
10 Commonwealth. Section 501(a) provides that the 15th and Fourteenth Amendments apply to the
11 Commonwealth. Covenant § 501(a). However, Covenant § 501(b) exempts the applicable
12 provisions of the U.S. Constitution from the U.S. Constitution, including Covenant § 805.

13
14 Section 805 of the Covenant authorized the CNMI to regulation the alienation of
15 permanent and long-term interests in land to restrict the acquisition of such interests to persons
16 of Northern Mariana Islands descent. Covenant, § 805(a), 48 U.S.C. § 1801 note. Embodying
17 this authorization, Article XII of the CNMI Constitution provides that “[t]he acquisition of
18 permanent and long-term interests in real property within the Commonwealth shall be restricted
19 to persons of Northern Marianas descent.” NMI Const. art. XII § 1. “Northern Marianas descent”
20 is defined as follows:

21
22 A person of Northern Marianas descent is a person who is a citizen or national of
23 the United States and who is of at least one-quarter Northern Marianas Chamorro
24 or Northern Marianas Carolinian blood or a combination thereof or an adopted
25 child of a person of Northern Marianas descent if adopted while under the age of
26 eighteen years. For purposes of determining Northern Marianas descent, a person
shall be considered to be a full-blooded Northern Marianas Chamorro or Northern
Marianas Carolinian if that person was born or domiciled in the Northern Mariana
Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands
before the termination of the Trusteeship with respect to the Commonwealth.

27 NMI Const. art. XII § 4.

28 In 1999, with the approval of the voters, the Commonwealth Constitution was amended

1 to limit voting on proposed amendments to Article XII to qualified voters who were of NMD.
2 See NMI Const. art. XVIII § 5(c). To implement section 5(c) of Article XVIII, the Seventeenth
3 Commonwealth Legislature enacted a law to establish a voter registry for persons of NMD. See
4 CNMI Pub. L. No. 17-40 (“PL 17-40”).

5
6 On September 16, 2014, the 18th Commonwealth Legislature passed House Legislative
7 Initiative 18-1 (“H.L.I. 18-1”), which proposes an amendment to Article XII. The proposed
8 amendment would modify the definition of “Northern Marianas descent” to include all persons
9 with “some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a
10 combination thereof” and to exclude adopted children who do not have “any degree of Northern
11 Marianas descent.” (See H.L.I. 18-1, Exh. B.)

12
13 Plaintiff-Appellee John H. Davis, Jr.—a registered voter in the CNMI, but not an
14 NMD—brought suit against the Commonwealth Election Commission (“CEC”) and various
15 Commonwealth officials (collectively “the Commonwealth”) in the U.S. District Court for the
16 Northern Mariana Islands, alleging that section 5(c) of Article XVIII of the Commonwealth
17 Constitution and PL 17-40 violated his rights under the Fourteenth and Fifteenth Amendments of
18 the U.S. Constitution, 42 U.S.C. § 1983, 52 U.S.C. § 10101,² and Commonwealth Constitution
19 Article X, § 9 (“Taxpayer’s Right of Action”).

20
21 This Court ultimately held that section 5(c) and PL 17-40 violated the Fourteenth and
22 Fifteenth Amendments, and 53 U.S.C. § 10101. This Court accordingly enjoined the
23 Commonwealth from enforcing section 5(c) and PL 17-40 insofar as doing so would prevent
24 Davis and other similarly individuals from voting on Article XII ballot initiatives.

25 H.L.I. 18-1 will be put before the voters at the upcoming general election on November
26

27
28 ² Davis’s complaint plead claims under 42 U.S.C. § 1971. However, during the pendency
of the appeal, 42 U.S.C. § 1971 was transferred to 52 U.S.C. § 10101.

4, 2014,³ and pursuant to this Court’s order, all qualified CNMI voters will be allowed to cast a vote on the matter. The Commonwealth Election Commission must begin tabulating all election votes after all election polls are closed and continue tabulating until all votes are counted. *See* 1 CMC § 6524(a)(1). When all votes are tabulated, CEC must make an official public announcement of the election results. 1 CMC § 6524(a)(2). CEC must certify the results of the election within twenty days after the date of the election. 1 CMC § 6509(a).

III. APPLICABLE LEGAL STANDARD

To obtain a preliminary injunction, the movant “must show that ‘he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’” *See Friends of the Wild Swan v. Weber*, __ F.3d __, ___, 2014 WL 4723559, at *3 (9th Cir. 2014) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)); *see also Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 472 F.3d 1097, 1100 (9th Cir. 2006) (analyzing an injunction pending appeal). A sliding scale is incorporated into this approach: “[I]f a plaintiff can only show that there are ‘serious questions going to the merits’—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Friends of Wild Swan*, 2014 WL 4723559, at *3 (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)) (alteration in the original).

If the court grants injunctive relief, it “must be tailored to remedy the specific harm alleged.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (quoting *Lamb–Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir.1991) (internal quotation marks omitted).

IV. ARGUMENT

³ Election Day is on November 4, 2014, but voters may cast votes prior to that day by absentee ballot or during the early-voting period. *See* 1 CMC §§ 6211, 6222.

1 An injunction pending appeal is appropriate here because—(1) the Commonwealth is
 2 likely to succeed on the merits (or at least raises serious questions going to the merits); (2) the
 3 Commonwealth will suffer irreparable harm if an injunction does not issue; (3) the balance of
 4 hardships tips sharply in favor of the Commonwealth; and (4) the public interest will be
 5 furthered by the issuance of an injunction. The requested injunction is narrowly tailored to
 6 address the harm the Commonwealth seeks to prevent.
 7

8 ***A. Likelihood of Success on the Merits***

9 The Commonwealth is likely to succeed on the merits of its appeal because the district
 10 erred in finding the following: (1) Article XVIII, § 5(c) and PL 17-40 violated the Fifteenth
 11 Amendment; (2) that Article XVIII, § 5(c) and PL 17-40 violated the Fourteenth Amendment;
 12 (3) that Article XVIII, § 5(c) and PL 17-40 violated 52 U.S.C. § 10101. At the very least, the
 13 importance of the Covenant’s core provisions and the Commonwealth’s unique position within
 14 the United States raises serious questions.
 15

16 1. Article XVIII, § 5(c) and PL 17-40 do not violate the Fifteenth
 17 Amendment or 52 U.S.C. § 10101

18 This Court erred in finding that Article XVIII, § 5(c) and PL 17-40 violate the Fifteenth
 19 Amendment and 52 U.S.C. § 10101 because the definition of NMD relied on by those
 20 provisions, Article XII, § 4, is not racial. The Fifteenth Amendment reads: “The right of citizens
 21 of the United States to vote shall not be denied or abridged by the United States or by any State
 22 on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV, § 1. 52
 23 U.S.C. 10101(a) reads: “All citizens of the United States who are otherwise qualified by law to
 24 vote at any election by the people in any State, Territory . . . shall be entitled and allowed to vote
 25 at all such elections, without distinction of race, color, or previous condition of servitude; any
 26 constitution, law, custom, usage, or regulation of any State or Territory, or by or under its
 27 authority, to the contrary notwithstanding.” 52 U.S.C. § 10101. As such, the analysis under the
 28

1 Fifteenth Amendment and 52 U.S.C. § 10101 are the same. Article XII, § 4’s definition of NMD
2 relies on race-neutral factors such as birth, domicile, and citizenship to determine whether a
3 person is NMD. Although a disproportionately large number of NMDs are Chamorro or
4 Carolinian, Article XII, § 4’s definition is race-neutral.

5
6 Article XII, § 4’s definition does not violate the Fifteenth Amendment because it relies
7 on race-neutral criteria. To qualify as a “full blooded” NMD, one must: (1) have been “born or
8 domiciled in the Northern Mariana Islands by 1950”; and (2) “was a citizen of the Trust Territory
9 of the Pacific Islands before the termination of the Trusteeship with respect to the
10 Commonwealth.”⁴ NMI Const. art. XII, § 4. On their face, these factors have nothing to do with
11 race.

12
13 This Court found the text of Article XII, § 4’s definition to be racial for two reasons: (1)
14 the fact that “[b]lood, in the first instance defines who is and isn’t and NMD”; and (2) the fact
15 that the definition groups all NMDs into ethnic categories, namely “Northern Marianas
16 Chamorro” or “Northern Marianas Carolinian.” Order at 25–26. The Commonwealth concedes
17 that the use of the term “blood” and the use of ethnic labels make the definition appear racial at
18 first blush. However, reading this unfortunate word choice in isolation ignores the core, race-
19 neutral criteria that determine NMD status. The method for determining whether an individual is
20 a “full blooded” NMD relies exclusively on the race-neutral criteria noted above: citizenship and
21 birth/domicile in 1950. Indeed, this Court found: “Membership in this group became fixed at the
22 moment the Trusteeship terminated on November 3, 1986. People who met the two conditions
23 were grandfathered in as full-blooded without having to prove they descended from Northern
24 Marianas Chamorros and Carolinians.” (Order at 25.) Article XII, § 4’s definition of NMD is
25 therefore race-neutral on its face.

26
27
28 ⁴ The Trusteeship terminated with respect to the Commonwealth on November 3, 1986.
Proclamation No. 5564, 51 Fed. Reg. 40, 399 (Nov. 3, 1986).

1 Article XII, § 4's definition is also race-neutral because the adoption provision allows
2 individuals of any race to acquire NMD status. Adoption is defined as "[t]he creation by judicial
3 order of a parent-child relationship between two parties who usu. are unrelated; the relationship
4 of parent and child created by law between persons who are not in fact parent and child." Black's
5 Law Dictionary 58 (10th Deluxe ed. 2014). It is clear that adoption is a legal relationship, not
6 one based on ancestry, biology, or genetics. It is likewise clear that an individual's race does not
7 change by virtue of adoption. Therefore, the adoption provision shows a clear intent on the part
8 of the framers of the Commonwealth Constitution to include individuals that are not racially
9 Chamorro or Carolinian into the NMD class. What is vitally important here is that the definition
10 allows individuals of any race to acquire the same NMD status as their adoptive parents.
11

12 Article XII, § 4's definition of "NMD," which is used by Article XVIII, 5(c) and PL 17-
13 40, is readily distinguishable from *Rice v. Cayetano*, 528 U.S. 495 (2000). *Rice* involved
14 elections for trustees of the Office of Hawaiian Affairs ("OHA"), which administered various
15 programs for the descendants of the indigenous inhabitants of the Hawaiian Islands. Voting for
16 the OHA trustees was limited to "Hawaiians." *Rice*, 528 U.S. at 509. Under Hawaii statute,
17 "Hawaiian" was defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian
18 Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which
19 peoples thereafter have continued to reside in Hawaii." *Id.*
20
21

22 The U.S. Supreme Court held that the voting restriction violated the Fifteenth
23 Amendment. The State argued that the definitions were not racial, but were based on ancestry,
24 rather than race. *Id.* at 514. Significantly, the Court explained: "Ancestry can be a proxy for race.
25 It is that proxy here." *Id.* The Court reasoned that the Hawaiian islands were isolated until 1778
26 and had formed a distinct culture, which the State was attempting to protect through voting
27 restrictions. *Id.* at 514–15. Furthermore, the legislative history of the definitions in under
28

1 consideration originally used the term “race” instead of “peoples,” and the drafters *expressly*
2 *recognized the racial purpose. Id.* at 515–16.

3 The case at bar is readily distinguishable from *Rice*. The Commonwealth concedes that
4 the voting restriction at issue here has ancestral aspects. However, the restriction is
5 distinguishable from the provision that was struck down in *Rice*. First, Article XII, § 2’s
6 definition of NMD does not rely *exclusively* on ancestry from a dubious date. The definitions at
7 issue in *Rice* referred to 1778, the year Europeans first made contact with Hawaii. 528 U.S. at
8 514. In this case, the operative years are 1950 and 1986. The year 1950 is rational as it
9 corresponds to the period of time after which the Japanese colonizers had been repatriated, and
10 the movement of displaced islanders, including Chamorros in Yap and Palau to the Northern
11 Marianas, had concluded. Office of the Chief of Naval Operations, *Handbook on the Trust*
12 *Territory of the Pacific Islands* 50 (Navy Dep’t 1949). Furthermore, the materials of which the
13 this Court took judicial notice demonstrate that there were individuals, though small in number,
14 domiciled on Saipan in 1950 that were not Chamorro or Carolinian. *See* Alexander Spoehr,
15 *Saipan: The Ethnology of a War-Devastated Island*, *Feldiana: Anthropology* Vol. 41 (1954).

16 Second, Article XII, § 4’s definition does not rely exclusively on race or ancestry. The
17 definitions at issue in *Rice* were clearly racial: in one case, the definition of “Native Hawaiian”
18 used the word “race,” and the committee that drafted the definition of “Hawaiian” explicitly
19 recognized that the term “aboriginal peoples” meant “races.” 528 U.S. at 509–10, 515–16.
20 Article XII, § 4’s definition relies on neutral aspects of birth, domicile, and citizenship which
21 serve to identify the community that rebuilt the Northern Marianas after the devastation of war,
22 and exercised its right to self-determination through its duly elected representatives by
23 negotiating the Covenant.

24 Third, Article XII, § 4’s definition allows for adoption. Adoption of a non-Hawaiian by
25
26
27
28

1 Hawaiian or Native Hawaiian parents would not impart that status on the adoptee. In the present
 2 case, Article XII, § 4's adoption provision grants an adoptee of any race or ethnicity the same
 3 NMD status as the children of the adoptive parents. The voting restriction here is distinguishable
 4 from *Rice*—it is race neutral and does not violate the Fifteenth Amendment or 52 U.S.C. §
 5 10101.

6
 7 2. Article XVIII, § 5(c) and PL 17-40 do not violate the Fourteenth
 8 Amendment

9 This Court erred in finding that Article XVIII, § 5(c) and PL 17-40 violate the Fourteenth
 10 Amendment because the right to vote on amendments to Article XII is not “fundamental in the
 11 international sense.” The U.S. Constitution only applies of its own force to incorporated
 12 territories. *Wabot v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990). Only rights that are
 13 “fundamental in an international sense” apply in unincorporated territories. *Id.* at 1459–60.
 14 Neither the right to own real property nor the “one person, one vote rule” are rights that are
 15 “fundamental in an international sense,” nor are they “rights that are the basis of free
 16 government.” *Id.* at 1462; *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1140 (D.N. Mar. I. 1999).
 17 Article XVIII, § 5(c) is a reasonable application of those principles. If neither the right to own
 18 land, nor the right to “one person, one vote” are rights that are the “basis of free government,”
 19 then it stands to reason that equal voting rights are not “fundamental” as to proposed
 20 amendments to Article XII. Even if equal voting rights are deemed to be fundamental in an
 21 international sense, this Court erred in finding that Article XVIII, § 5(c) and PL 17-40 violate the
 22 Fourteenth Amendment because the voter qualifications are narrowly tailored to serve the
 23 Commonwealth's compelling interest in preserving protections afforded to NMDs under integral
 24 provisions of the Covenant.
 25
 26

27 Fundamental rights are not absolute or inviolable. *See, e.g., Konigsberg v. State Bar of*
 28 *Cal.*, 366 U.S. 36, 49 (1961). When a State places a limitation on a fundamental right, the

1 limitation is valid if the State proves that it is narrowly tailored and necessary to achieve a
2 compelling governmental interest. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Kramer v.*
3 *Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485
4 (1965). The Commonwealth has a compelling interest in ensuring that any change to integral
5 provisions of the Covenant is decided by the individuals the Covenant and Article XII seek to
6 protect. The voter qualifications in Article XVIII, § 5(c) and PL 17-40 are necessary to achieve
7 this objective.

9 The voter qualifications are narrowly tailored to achieve the Commonwealth's
10 compelling interest. "[A] statute is narrowly tailored only if it targets and eliminates no more
11 than the exact source of the 'evil' it seeks to remedy." *Ward v. Rock Against Racism*, 491 U.S.
12 781, 804 (1989). Article XVIII, § 5(c)'s voter qualifications seek to prevent individuals who
13 have no connection to the community protected under Covenant § 805 from deciding the future
14 of Article XII. Article XVIII, § 5(c) accomplishes this task by basing the voter qualifications on
15 Article XII's definition of "person of Northern Marianas descent." NMI Const. art. XVIII, § 5(c).
16 Only those individuals that are protected by Covenant § 805 and Article XII are entitled to vote
17 on a fundamental issue that affects their rights as negotiated under the Covenant.

19 As this Court disagreed with the foregoing arguments during briefing the Court may
20 understandably disagree that the Commonwealth's arguments for reversal are likely to succeed
21 on the merits. However, there are also serious questions going to the merits and the balance of
22 hardships tip sharply in favor of the Commonwealth, and the other two *Winter* factors are
23 satisfied. All in all, this case presents questions that are practically unique in U.S. Constitutional
24 jurisprudence owing to the unique position occupied by the Commonwealth in the U.S. legal
25 system.

27 **B. Irreparable Harm**
28

1 The Commonwealth is likely to suffer irreparable harm if an injunction is not issued.
2 “Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy,
3 such as an award of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir.
4 2014) (citing *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597,
5 603 (9th Cir.1991). The Commonwealth does not have a legal remedy for the harm it is likely to
6 suffer if an injunction is not issued.
7

8 Harm is certain if tabulation and certification proceeds and this Court is later reversed—
9 the votes cast and certified will be nullified. Proponents and opponents alike will suffer in that
10 their certified vote will be reversed—an intangible, irreparable harm that cannot be remedied by
11 monetary damages. *See Ariz. Dream Act Coal.*, 757 F.3d at 1068 (“Because intangible injuries
12 generally lack an adequate legal remedy, ‘intangible injuries [may] qualify as irreparable
13 harm.’”) (quoting *Rent-A-Ctr., Inc.*, 944 F.2d at 603).
14

15 Further, if CEC proceeds to tabulate the votes and the Article XII initiative is approved, it
16 will take effect immediately. *See* NMI Const. art. XVIII § 5(b). The Commonwealth will need to
17 expend resources to implement the amendment. As an example, the Commonwealth has a
18 homestead program under which public land is made available to NMDs for use as a homestead.
19 *See* 1 CMC §§ 2806(b), 2809; 2 CMC § 4303. The amendment—by lowering the blood quantum
20 requirement—will create a new stream of individuals who will be eligible for homesteads. The
21 Commonwealth Department of Public Lands will need to devote resources and employees to
22 handle new applications and to determine whether the applicants have some trace of NMD
23 “blood.” The resources and time expended to implement an approved change to Article XII
24 cannot be recovered if this Court is ultimately reversed.
25

26 Further exemplifying the irreparable effects of an amendment, land transactions that are
27 executed in reliance upon the amendment may very well need to be undone if the Court of
28

1 Appeals reverses this Court. The Commonwealth courts will be burdened by litigation arising
2 from such transactions if buyers and sellers have a dispute about rights and repayment of funds
3 that may have been exchanged. The cost of implementing these changes (*e.g.*, time, wages, etc.)
4 and undoing them cannot be recovered if this Court is ultimately reversed on appeal.

5
6 While it is true that harm to public resources will not be as great if H.L.I. 18-1 is not
7 approved, there will still be the irreparable harm of vote nullification.

8 **C. Balance of Hardships and Public Interest**

9 The balance of hardships tips strongly in favor of the Commonwealth. If the tabulation of
10 votes for H.L.I. 18-1 is not enjoined while the appeal is pending, the harm will be great for the
11 Commonwealth (and the public in general); whereas if the tabulation is enjoined, the Appellee's
12 hardship—merely waiting until the disposition of the appeal—is negligible.

13
14 When the government is a party, the public interest factor merges with the balance of
15 hardships. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing
16 *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The public interest will be furthered by the
17 injunction as it will preserve order and promote the efficient use of the Commonwealth
18 government's limited public resources.

19 As mentioned above, if H.L.I. 18-1 is approved, the public will be able to conduct land
20 transactions in accordance with the new definition of NMD. If this Court is later reversed, the
21 buyers and sellers of affected transactions will be burdened with the impact of the reversal.
22 Enjoining the tabulation of H.L.I. 18-1 will avoid unduly burdening the public with the
23 consequences of a reversal. Further, the public has interest in avoiding the nullification their
24 votes after they are counted and certified. Finally, the public has an interest in preserving the
25 public fisc. *See e.g., Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986) (“the protection of the
26 public fisc is a matter that is of interest to every citizen”). Implementing an amendment to
27
28

1 Article XII and later undoing it if this Court is reversed will waste public funds and time. The
2 balance of hardships and the public interest weigh sharply in favor of issuing an injunction.

3 ***D. Scope of Injunction***

4 The Commonwealth seeks a narrowly tailored injunction to address the irreparable injury
5 and hardship if this Court is reversed on appeal. The injunction sought would direct CEC to
6 refrain from tabulating and certifying the votes cast for H.L.I. 18-1 and to securely store all the
7 ballots while the appeal is pending. The Commonwealth has ensured that it will be able to
8 securely store such ballots, as outlined by the Declaration of Robert A. Guerrero, filed
9 contemporaneously herewith. If the Court of Appeals affirms this Court's order allowing all
10 persons qualified to vote in the Commonwealth to cast a vote on H.L.I. 18-1, the votes would be
11 counted by hand and given effect. If the Court of Appeals reverses this Court's order, the votes
12 would not be counted and the Commonwealth Legislature would need to call a special election
13 for H.L.I. 18-1 where only registered voters of Northern Marianas descent would be eligible to
14 vote on the measure. See 1 CMC § 6505. This narrow injunction allows Appellee to cast a vote
15 on H.L.I. 18-1 while avoiding irreparable harm to the Commonwealth by preserving the status
16 quo pending appeal.

17 **V. POSITION OF OPPOSING COUNSEL**

18 Opposing counsel has indicated that she will oppose this Motion.

19 **VI. CONCLUSION**

20 An injunction pending appeal is warranted. Accordingly, the Commonwealth respectfully
21 requests that this Court issue a preliminary injunction to delay the Commonwealth Election
22 Commission's tabulation and certification of votes cast for House Legislative Initiative 18-1, and
23 sequester the ballots pending the disposition of this appeal.
24
25
26
27
28

1 RESPECTFULLY SUBMITTED.

2 DATED: October 15, 2014

OFFICE OF THE ATTORNEY GENERAL

3 /s/
4 Charles E. Brasington
5 Attorney for Defendants
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been electronically filed this 15th day of October 2014, with service requested to all parties of record.

OFFICE OF THE ATTORNEY GENERAL

/s/
Charles E. Brasington
Assistant Attorney General