

1 vote in violation of the First and Fourteenth Amendments to the United States Constitution. They also
2 allege that “because the resulting burdens on the right to vote disproportionately impact racial and
3 language minorities, any recall elections would also result in the denial and abridgement of the right to
4 vote on account of race and language group, in violation of Section 2 of the Voting Rights Act.” Finally,
5 Plaintiffs allege that “the recall elections threaten to upend the results of legitimate, democratic
6 elections, as well as disrupt and impede a functioning republican form of government in violation of the
7 Guarantee Clause of Article VI, Section 4 of the United States Constitution. *Complaint* (ECF No.1), at ¶
8 4.

9 Plaintiffs’ complaint was filed on October 16, 2017. On November 6, 2017, Plaintiffs filed a
10 motion for preliminary injunction to enjoin the Secretary and Registrar from holding a special election,
11 or otherwise enforcing Nevada’s recall laws with respect to the subject state senators. *Motion for*
12 *Preliminary Injunction* (ECF No. 17). The Registrar filed a motion to dismiss Plaintiffs’ action on
13 November 8, 2017. *Motion to Dismiss* (ECF No. 23). The Secretary filed her opposition to Plaintiffs’
14 motion for preliminary injunction, and motion to dismiss on November 16, 2017. *Response* (ECF No.
15 33); *Motion to Dismiss* (ECF No. 34). The parties have filed their respective responses and reply briefs
16 to the motion for preliminary injunction and motions to dismiss. On November 21, 2017, the Court
17 stayed the hearing on Plaintiffs’ motion for preliminary injunction and Defendants’ motions to dismiss
18 pending resolution of the state court proceeding regarding the recall effort against Senator Woodhouse
19 and the state verification proceedings regarding the recall effort against Senator Cannizzaro. *Order*
20 (ECF No. 42).

21 In her opposition to Plaintiffs’ motion for preliminary injunction and motion to dismiss, the
22 Secretary disputes Plaintiffs’ assertion that Nevada’s constitutional and statutory recall provisions
23 violate the First and Fourteenth Amendments. She also disputes Plaintiffs’ claim that Nevada’s recall
24 laws violate Section 2 of the Voting Rights Act, arguing that recalls do not constitute state action and are
25 therefore outside the ambit of the Voting Rights Act. *Motion to Dismiss* (ECF No. 34), at 2, 8-11. The
26 Secretary argues that the Voting Rights Act implements the Fifteenth Amendment, which forbids the
27 race-based abridgment of voting rights by any state, and that Section 2 of the Act “disallows a voting
28 ‘standard, practice, or procedure’ from being discriminatorily imposed ‘by any State or political

1 subdivision.” *Id.* at 8. She argues that Nevada’s recall law does not operate in any such discriminatory
2 manner. She further argues that four United States Courts of Appeal have “confirm[ed] that the Voting
3 Rights Act does not apply, for lack of state action, to direct-democracy procedures like initiative and
4 recall.” *Id.* at 9 (citing *Padilla v. Lever*, 463 F.3d 1046, 1051 (9th Cir. 2006); *Montero v. Meyer*, 861
5 F.2d 603, 609-10 (10th Cir. 1988); and *Delgado v. Smith*, 861 F.2d 1489, 1496 (11th Cir. 1988)). In her
6 motion to dismiss, the Registrar also argues that recall efforts against the state senators do not implicate
7 state action and therefore do not give rise to claims against the Registrar under the Voting Rights Act or
8 through the Fourteenth Amendment. *Motion to Dismiss* (ECF No. 23), at 2-6.

9 The Secretary also discusses *Smith v. Winter*, 717 F.2d 191 (5th Cir. 1983), in which the court
10 rejected the argument that the State of Mississippi’s recall law violated the rights of African-American
11 citizens under the Voting Rights Act by threatening the removal of officials for whom minority citizens
12 had voted. The court stated that the “right to vote” means the same thing under the Voting Rights Act as
13 under the Fifteenth Amendment. *Id.* at 198. The plaintiffs had pointed to no authority or rationale to
14 support their interpretation of the right to vote and the court found none to support it. *Id.* As partly
15 quoted by the Secretary, the Fifth Circuit stated:

16 It is [as] reasonable to assume that every elected official embodies the vote
17 of at least some minority member. If we followed the plaintiff’s view of
18 the right to vote to its logical conclusion, every elected public official,
19 whether a minority member or not, could [challenge in federal court] any
20 state recall proceeding merely by alleging that the voting rights of an
21 electorate containing at least one minority member were being
22 discriminatorily abridged. Other absurd results are equally possible. For
23 instance, if minority members vote for a candidate on the basis of a
24 campaign promise and the candidate later breaches that promise with
25 discriminatory effects, the minority voters could claim that their rights to
26 vote have been rendered ineffective so as to give rise to claims under the
27 Voting Rights Act.

28 *Motion to Dismiss* (ECF No. 34) at 10 (quoting *Winter*, 717 F.2d at 198-99).

Finally, the Secretary argues that Plaintiffs’ challenge to Nevada’s recall law based on the
Guarantee Clause involves a purely political question which is not justiciable. *Id.* at 11 (citing *Pacific*
States Telephone & Telegraph v. Oregon, 223 U.S. 118, 141, 32 S.Ct. 224 (1912); *State of Nevada v.*
Watkins, 914 F.2d 1545, 1559 (9th Cir. 1990) and *State of Cal. v. United States*, 104 F.3d 1086, 1091
(9th Cir. 1997)).

1 The Foundation states that it is a charitable organization whose “mission includes working to
2 protect the integrity of citizens’ votes from dilution or abridgement, ensuring that voter qualification
3 laws and election administration procedures are followed, and providing assistance to states that seek to
4 enforce their constitutional mandate to determine the rules and laws pertaining to their own state
5 elections.” *Motion to Intervene* (ECF No. 12), at 2. The Plaintiffs assert that the Foundation is an
6 Indiana-based 501(c)(3) nonprofit legal organization that, according to its website, “exists to assist
7 states and others to aid the cause of election integrity and fight against lawlessness in American
8 elections.”” *Opposition* (ECF No. 27), at 4.

9 In its proposed answer in intervention, the Foundation alleges four affirmative defenses which it
10 would like to litigate in this action. First, it alleges that to the extent Plaintiffs’ complaint alleges that
11 Nevada’s recall elections violate the Voting Rights Act because the elections deny or abridge the right to
12 vote on account of membership in a language minority group, the references to “language minorities”
13 and “language minority groups” are facially unconstitutional because they are inconsistent with the
14 purpose of the Fifteenth Amendment and exceed Congress’s authority to enforce the right to vote
15 regardless of race as found in the Fifteenth Amendment. Second, to the extent that Plaintiffs’ complaint
16 alleges that Nevada’s recall laws as applied to the recall efforts against the subject senators violate the
17 Voting Rights Act because the elections deny or abridge the right to vote on account of membership in a
18 language minority group, the references to “language minorities” and “language minority groups” in the
19 Act is unconstitutional as applied because it is inconsistent with the purpose of and exceed Congress’s
20 authority under the Fifteenth Amendment. The Foundation alleges that “speaking a language other than
21 English is not the same, or even congruent to, inherent immutable characteristics such as race.” Third,
22 the Foundation alleges that the Plaintiffs improperly attempt to allege a claim under Section 2 of the
23 Voting Rights Act by relying on a disparate impact standard which, if accepted, would push Section 2
24 beyond constitutional boundaries. In this regard, the Foundation alleges that Plaintiffs are attempting to
25 import into Section 2, a provision of Section 5 of the Voting Rights Act which has never applied to
26 Nevada, and which no longer applies in any state. Fourth, the Foundation alleges Plaintiffs cannot make
27 the required showing of entitlement to relief under the Federal Rules of Civil Procedure by “mere labels
28 and conclusions”” or “a formulaic recitation of the elements of a cause of action.” The Foundation

1 argues that the factual allegations made by Plaintiff are either false or have no relevance to a claim under
2 Section 2 of the Voting Rights Act. *Motion* (ECF No. 12), Exhibit 1, at 13-14.

3 The Foundation argues that its interests in this litigation are different from those of the
4 Defendants. It states that “the Defendants are not likely to press fully the constitutional defenses
5 available in this case. Nor [are they] likely to press against the factual assertions contained in the
6 Complaint as fully as they might.” The Foundation states that it is unrestrained by political concerns and
7 can provide this Court with the full range of potential constitutional and factual defects in Plaintiffs’
8 complaint. *Motion* (ECF No. 12), at 7.

9 DISCUSSION

10 The Foundation argues that it has the right to intervene in this action pursuant to Rule 24(a) of
11 the Federal Rules of Civil Procedure. In the alternative, it argues that it should be permitted to intervene
12 under Rule 24(b). Plaintiffs oppose the Foundation’s intervention. Defendants do not.

13 **1. Intervention of Right.**

14 Rule 24(a) states that “[o]n timely motion, the court must permit anyone to intervene who: (1) is
15 given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the
16 property or transaction that is the subject of the action, and is so situated that disposing of the action may
17 as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties
18 adequately represent that interest.”

19 Rule 24(a)(2) is construed liberally in favor of potential intervenors. *California ex rel. Lockyer*
20 *v. United States*, 450 F.3d 436, 440 (9th Cir. 2006). In determining whether intervention is appropriate,
21 the court applies a four-part test: (1) the motion must be timely; (2) the applicant must claim a
22 “significant protectable interest” relating to the property or transaction which is the subject of the action;
23 (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or
24 impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately
25 represented by the parties to the action. *Id.* (citing *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir.
26 1993)). Here, there is no dispute that the Foundation’s motion is timely— it was filed within two weeks
27 after the filing of the complaint. The issues in dispute are whether the Foundation has a “significant
28 protectable interest” relating to the dispute in this case and whether its interests will be adequately

1 represented by the Defendants.

2 “An applicant has a ‘significant protectable interest’ in an action if (1) it asserts an interest that is
3 protected under some law, and (2) there is a ‘relationship’ between its legally protected interest and the
4 plaintiff’s claims.” *California ex rel. Lockyer*, 450 F.3d at 441 (quoting *Donnelly v. Glickman*, 159 F.3d
5 405, 409 (9th Cir. 1998)). A potential intervenor is not required to demonstrate that it has any specific
6 legal or equitable interest. “Rather, . . . a party has sufficient interest for intervention purposes if it will
7 suffer a practical impairment of its interests as a result of the pending litigation.” *Id.* In *Wilderness Soc.*
8 *v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011), the court stated that “the ‘interest’ test is
9 primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons
10 as is compatible with efficiency and due process.”

11 The Foundation asserts that it is a public interest organization dedicated to protecting or
12 promoting a legal viewpoint regarding the protection of citizens’ votes from dilution or abridgement and
13 ensuring that voter qualification laws and election administration procedures are followed, and providing
14 assistance to the states in such matters. It argues that this purpose qualifies as a “significant protectable
15 interest.” Plaintiffs counter that the Foundation’s alleged national interest in election-related issues is
16 extremely broad and too generalized to give rise to a “significant protectable interest.” They argue that
17 the Foundation has not demonstrated any prior involvement with respect to election matters in Nevada,
18 such as being involved in the formulation of election laws, or any other activity or expenditures of
19 resources in Nevada. Nor has the Foundation shown that it has any Nevada members. *Opposition* (ECF
20 No. 27), at 7. Plaintiffs argue that “accepting [the Foundation’s] assertions and argument at face value
21 would lead to the absurd result that there is no lawsuit, anywhere in the country, relating in any way to
22 elections, in which [the Foundation] does *not* have a sufficiently significant and protectable interest
23 entitling it to intervention as of right. This cannot plausibly be the state of the law.” *Id.* at 7-8. The
24 Foundation counters this latter argument by stating that recognizing its right to intervene in this case
25 “would not grant [it] license to intervene in every lawsuit touching on elections. A recount challenge,
26 for example, that did not involve questions of election integrity or the constitutional authority of the
27 States, would clearly be outside the Foundation’s exempt purpose and interests.” *Reply* (ECF No. 41) at
28 5-6.

1 The Ninth Circuit has held that a public interest organization can have a “significant protectable
2 interest” that satisfies that element for intervention of right. In *Sagebrush Rebellion, Inc. v. Watt*, 713
3 F.2d 525 (9th Cir. 1983), the plaintiff, “a non-profit organization which [was] dedicated to the goal of
4 multiple use management of public lands,” sued the Secretary of the Interior challenging the legality of
5 actions taken by the former secretary in withdrawing nearly 500,000 acres of land from potential
6 development. The Audubon Society, a non-profit organization devoted to the protection of birds and
7 other animals and their habitats, moved to intervene in the action to defend the former secretary’s action.
8 The court noted that the plaintiff and the Audubon Society had participated actively in the administrative
9 process surrounding the former secretary’s action, which the Audubon Society had supported and the
10 plaintiff had opposed. *Id.* at 526-27. In holding that the Audubon Society had a significant protectable
11 interest, the court noted that in *Washington State Building & Trades v. Spellman*, 684 F.2d 627 (9th Cir.
12 1982) (*cert. denied* 461 U.S. 913, 103 S.Ct. 1891 (1983)), it “held that a public interest group was
13 entitled as a matter of right to intervene in an action challenging the legality of a measure it supported.”
14 *Id.* at 527. The plaintiff in that case sought to invalidate a law passed by the initiative process which
15 regulated the transportation and storage of low level radioactive waste in the state. The intervenors had
16 been actively involved in the initiative process that led to the law’s enactment. *Sagebrush Rebellion* also
17 noted *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980), in which the court held that the National
18 Organization for Women had the right to intervene in a suit challenging procedures for ratification of the
19 proposed Equal Rights Amendment to the Constitution, “a cause which the organization had
20 championed.” *Id.* The court stated that “[i]n neither of these cases did this court have any difficulty
21 determining that the organization seeking the intervene had an interest in the subject of the suit and the
22 interest was not adequately represented by an existing party. Further, the court had no question that
23 disposition of either suit might, as a practical matter, impair the ability of the organization to protect its
24 interest.” *Id.*

25 In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), the plaintiffs challenged a law enacted
26 through the initiative process that regulated the manner in which petition signature gatherers are paid for
27 their services. The district court granted the motion to intervene by the state AFL-CIO and its president
28 who had been substantially involved in the campaign that resulted in the adoption of the law. *Id.* at 952.

1 On appeal, the court held that the intervenors had a “significant protectable interest” related to the action
2 which an adverse judgment might impede or impair. *Id.* at 955. The court held, however, that the
3 intervenors’ interests were adequately represented by the state, and, therefore, the district court had erred
4 in granting their motion to intervene. *Id.* at 956-59.

5 This case involves a fresh challenge to an old law. Nevada’s constitutional recall provision was
6 adopted in 1912. It was amended in 1970 and again in 1996. The Foundation obviously cannot show a
7 prior involvement with respect to the adoption of Nevada’s recall provision or its amendments.
8 Likewise, the Voting Rights Act was enacted in 1965 and has been subsequently amended. Although
9 legal challenges to state recall laws have been mounted in other states based on the Voting Rights Act,
10 there is no indication that such challenges have heretofore been brought with respect to Nevada’s recall
11 laws. By virtue of its mission statement, the Foundation appears to have a specific interest in supporting
12 more stringent state regulation of elections and voter qualifications, and in limiting the scope of the
13 Voting Rights Act, including having portions of the Act declared unconstitutional on their face or as
14 applied. This interest does not fit squarely within past Ninth Circuit decisions regarding intervention of
15 right. As discussed above, the court has found that public interest organizations have a significant
16 protectable interest based on their prior involvement in the enactment of the law, regulation or
17 administrative action that is at issue in the lawsuit. Such is not the case here. Nor has the Foundation
18 shown that any of its members are voters in the senate districts involved in the subject recall efforts, or
19 that it has Nevada citizen-members whose rights could be affected by future efforts to preclude or
20 restrict recall elections. Therefore, a finding that the Foundation has a significant protectable interest
21 would expand that concept beyond what the Ninth Circuit has previously held. Such an expansion,
22 however, would not necessarily contradict the basic definition of a “significant protectable interest”—
23 given that the Foundation, in fact, appears to have an established record of involvement in election
24 matters similar to those at issue in this case.²

25
26 ² The Foundation has pointed to cases from other circuits in which public interest groups with purposes
27 similar to those of the Foundation have been permitted to intervene under Rule 24(b). *See Kobach v. United*
28 *States Election Assistance Commission*, 2013 WL 6511874 (D.Kan. Dec. 12, 2013) and *Florida v. United States*,
820 F.Supp.2d 85 (D.D.C. 2011). The Foundation also cites *League of Women Voters v. Newby*, 195 F.Supp.3d

1 Where the court finds that an applicant for intervention has a significant protectable interest in
2 the lawsuit, the court generally has little difficulty in concluding that the disposition of the case may, as a
3 practical matter affect it. *Citizens for Balanced Use v. Montana Wilderness*, 647 F.3d 893, 898 (9th Cir.
4 2011) (citing *California ex rel. Lockyer*, 450 F.3d at 442). So too in this case.

5 The fourth element for intervention of right is whether the applicant’s interests will be adequately
6 protected by the existing parties. When the applicant for intervention and an existing party have the
7 same ultimate objective, a presumption of adequacy of representation arises. *California ex rel. Lockyer*,
8 450 F.3d at 443 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). “Moreover, ‘[t]here
9 is an assumption of adequacy when the government is acting on behalf of a constituency that it
10 represents. In the absence of a ‘very compelling showing to the contrary,’ it will be presumed that a
11 state adequately represents its citizens when the applicant shares the same interest.” *Id.* The court stated
12 that this principle is arguably nowhere more applicable than in a case where the [United States]
13 Department of Justice deploys its formidable resources to defend the constitutionality of a congressional
14 enactment.” *Id.* at 444.

15 In this case, both the Secretary of State and the Registrar are vigorously defending against
16 Plaintiffs’ claims, although not on the basis of the constitutional arguments that the Foundation would
17 like to litigate. The Secretary and Registrar argue Plaintiffs’ complaint should be dismissed because the
18 Nevada recall process does not involve “state action” within the meaning of the First, Fifteenth and
19 Fourteenth Amendments, and the Voting Rights Act. The Secretary has also gone beyond this defense in
20 asserting the Fifth Circuit’s holding in *Smith v. Winter* which stated that the Voting Rights Act does not
21 protect the right of a minority citizen or group to maintain his/its choice in public office if successful.
22 The Secretary and the Registrar have not argued, however, that the Voting Rights Act is unconstitutional
23

24
25 80 (D.D.C. 2016) in which the district court permitted it to intervene in the action in which the plaintiff
26 challenged a decision by the executive director of the Election Assistance Commission that permitted states to
27 modify the instructions on their national mail voter registration forms to require voter registration applicants to
28 submit proof of citizenship. None of these cases involved intervention of right under Rule 24(a)(2). Nor did the
courts engage in an analysis of the requirements for permissive intervention. These cases, however, provide
some support for the proposition that public interest organizations with interests like those of the Foundation
have been permitted to intervene in actions relating to the validity of state election procedures.

1 on its face or as applied.

2 It is not clear that the Court will be required to decide these constitutional issues in this case.
3 Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for
4 decision. In *Northwest Austin Municipal Utility Dist. v. Holder*, 557 U.S. 193, 129 S.Ct. 2504 (2009),
5 for example, the Court expressed doubt as to the constitutionality of Section 5 of the Voting Rights Act,
6 but declined to reach the issue because it could decide the case on nonconstitutional grounds. The Court
7 stated that “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction
8 that normally the Court will not decide a constitutional question if there is some other ground upon
9 which to dispose of the case,” *Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. S.Ct. 1577, 80
10 L.Ed.2d 36 (1984) (*per curiam*).” See also *Zobrest v. Catalin Foothills School Dist.*, 509 U.S. 1, 7, 113
11 S.Ct. 2462, 2465-66 (1993); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2199 (1981); and
12 *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936).

13 Based on Ninth Circuit precedent, it is questionable whether the Foundation has a significant
14 protectable interest in this case such as to entitle it to intervene in this action as a matter of right. Based
15 on that factor, the Court recommends that the Foundation’s motion to intervene pursuant to Rule
16 24(a)(2) be denied. To the extent that the Foundation does have a significant protectable interest,
17 however, it has satisfied the other factors. As stated in *Citizens for Balanced Use v. Montana*
18 *Wilderness*, 647 F.3d 893, 900 (9th Cir. 2011), “intervention of right does not require an absolute
19 certainty that a party’s interest will be impaired or that existing parties will not adequately represent its
20 interests. Rule 24(a) is invoked when the disposition of the action ‘may’ practically impair a party’s
21 ability to protect their interest in the subject matter of the litigation ‘unless existing parties adequately
22 represent that interest.’ Fed.R.Civ.P. 24(a)(2).” The Foundation seeks to challenge the Plaintiffs’
23 complaint on constitutional arguments that neither the State or Registrar have raised. If the Court rejects
24 the Defendants’ arguments that the subject recall efforts do not involve state action, then it may be
25 necessary for the Court to address those constitutional arguments.

26 **2. Permissive Intervention.**

27 Rule 24(b)(B) states that on timely motion, the district court may permit anyone to intervene who
28 has a claim or defense that shares with the main action a common question of law or fact. The applicant

1 must show (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's
2 claim or defense, and the main action, have a question of law or a question of fact in common. *Perry v.*
3 *Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009). Where a putative intervenor has
4 met these requirements, the court may also consider other factors in the exercise of its discretion,
5 including “‘the nature and extent of the intervenor’s interest’ and ‘whether the intervenor’s interests are
6 adequately represented by other parties.’” *Id.* (quoting *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d
7 1326, 1329 (9th Cir. 1977)). Rule 24(b)(3) also requires the court to consider whether intervention will
8 unduly delay or prejudice the adjudication of the existing parties’ rights. *Id.*

9 In *Freedom From Religion Foundation v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011), the court
10 stated that the jurisdictional requirement stems from the concern that intervention might be used to
11 inappropriately enlarge the jurisdiction of the district court, such as by destroying complete diversity
12 between the parties. “But in federal-question cases, the identity of the parties is irrelevant and the
13 district court’s jurisdiction is grounded in the federal question(s) raised by the plaintiff. *See* 28 U.S.C. §
14 1331. The jurisdictional requirement, therefore, prevents the enlargement of federal jurisdiction in such
15 cases only where a proposed intervenor seeks to bring new state law claims.” *Id.* at 844 (citing *Beckman*
16 *Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). In this case, the Foundation
17 seeks only to raise federal constitutional issues, not raised by Defendants, in opposition to Plaintiff’s
18 complaint which is based on federal law. The requirement for an independent grounds for jurisdiction,
19 therefore, is not an issue with respect to the Foundation’s motion to intervene.

20 The other requirements for permissive intervention are satisfied. The Foundation seeks to
21 challenge Plaintiffs’ action under the Voting Rights Act on constitutional grounds that have not, as yet,
22 been raised by the Defendants. Although the Foundation may not have a “significant protectable
23 interest” for purposes of intervention of right under Ninth Circuit precedent, it has demonstrated an
24 interest in the issues involved in this lawsuit sufficient to support permissive intervention. The
25 Foundation also seeks to raise constitutional defenses to Plaintiff’s claims that have not been raised by
26 Defendants and which they may choose not raise. Although the Court may not reach the constitutional
27 questions in deciding this case, permitting the issues to be briefed by the Foundation and responded to by
28 Plaintiffs will not cause any undue delay or prejudice the rights of the existing parties. Should the Court

1 determine that the constitutional questions must be addressed, the fact that they have already been
2 briefed will serve to expedite rather than delay a final decision in this action. Defendants have expressed
3 concern that the Foundation may engage in unnecessary and burdensome discovery if it is permitted to
4 intervene. The issues framed in the proposed answer in intervention, however, do not indicate that
5 significant discovery is likely to be necessary. Such issues can be dealt with in an appropriate
6 scheduling order, or through a motion for protective order if necessary.

7 CONCLUSION

8 Based on existing Ninth Circuit precedent, the Foundation has not demonstrated that it has a
9 significant protectable interest that supports intervention of right under Rule 24(a)(2). The question,
10 however, is a close one. The Foundation has demonstrated that it should be permitted to intervene in
11 this action pursuant to Rule 24(b)(1) for purposes of raising its constitutional defenses to Plaintiffs'
12 claims. Accordingly,

13 RECOMMENDATION

14 **IT IS HEREBY RECOMMENDED** that the Foundation's Motion to Intervene (ECF No. 12)
15 be **denied**, insofar as it is based on intervention of right under Rule 24(a)(2) of the Federal Rules of Civil
16 Procedure.

17 ORDER

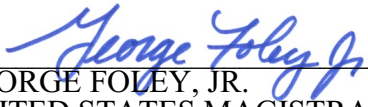
18 **IT IS HEREBY ORDERED** that the Foundation's Motion to Intervene (ECF No. 12)
19 is **granted** insofar as it moves for permissive intervention under Rule 24(b)(1) of the Federal Rules of
20 Civil Procedure. The Foundation may file the proposed answer in intervention. The parties shall
21 promptly confer regarding the need for discovery and/or a briefing schedule regarding the filing of
22 further dispositive motions.

23 NOTICE

24 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
25 writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that
26 the courts of appeal may determine that an appeal has been waived due to the failure to file objections
27 within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1)
28 failure to file objections within the specified time and (2) failure to properly address and brief the

1 objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues
2 from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi*
3 *Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

4 DATED this 20th day of December, 2017.

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6 
7 GEORGE FOLEY, JR.
8 UNITED STATES MAGISTRATE JUDGE
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