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12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 NORA LUNA; BILAL SHABAZZ; DIANE
 15 CRUMP-RICHMOND; SUSAN FLORIAN;
 16 and DEMI FALCON.,

17 Plaintiff

18 vs.

19 BARBARA CEGAVSKE, in her official
 capacity as the Nevada Secretary of State; and
 20 JOSEPH GLORIA, in his official capacity as
 the Clark County Registrar of Voters,

21 Defendants

Case No. 2:17-CV-02666

**MOTION TO INTERVENE AS
 DEFENDANT BY PUBLIC INTEREST
 LEGAL FOUNDATION WITH
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

22 The Public Interest Legal Foundation (the "Foundation"), by and through undersigned
 23 counsel, respectfully moves this Court for leave to intervene as a defendant as a matter of right
 24 under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, in the alternative, permissively
 25 under Rule 24(b)(1). Pursuant to Federal Rule of Civil Procedure 24, the Foundation's proposed
 26 responsive filing is attached to this motion.

1 In support of this motion, the Foundation submits the following supporting memorandum
2 of points and authorities:

3 **Introduction**

4 The Foundation requests that the Court grant it leave to intervene as a Defendant as of
5 right pursuant to Federal Rule of Civil Procedure 24(a)(2). The Foundation has a direct and
6 tangible interest in this litigation that will be necessarily impaired if Plaintiffs prevail and that
7 interest is not adequately represented by any Defendant. This case raises the important
8 constitutional question of whether the Voting Rights Act of 1965 can terminate the power of a
9 state to enact a recall election procedure. The case therefore also raises the important
10 constitutional question whether the Voting Rights Act may extinguish the power of the people of
11 Nevada to recall elected officials under those procedures. Proposed Defendant-Intervenor
12 suggests that such an application of the Voting Rights Act would be wholly beyond
13 constitutional limits.

14 The Foundation's charitable mission includes working to protect the integrity of citizens'
15 votes from dilution or abridgment, ensuring that voter qualification laws and election
16 administration procedures are followed, and providing assistance to states that seek to enforce
17 their constitutional mandate to determine the rules and laws pertaining to their own state
18 elections. The Foundation has sought to advance the interests of maintaining state control over
19 elections as it relates to ensuring that the constitutional balance between a state's power to
20 control its own elections and Congress's legitimate constitutional authority to protect against
21 racial discrimination through the Voting Rights Act is preserved. Preserving this balance serves
22 to protect the interests and rights of citizens to participate equally and fully in our electoral
23 processes, while ensuring that federal statutes are not used to rearrange the constitutional
24 arrangement where states run their own elections.

25 These interests will be directly and adversely impacted by this case, which seeks to
26 override the State of Nevada's prerogative to even hold an election *at all*. The Defendants do not
27

1 adequately represent these interests and will not likely make the particular constitutional
2 challenges to the Plaintiffs' application of the Voting Rights Act as will the Foundation.

3 In the alternative, the Foundation requests the Court grant permissive leave to intervene
4 pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), on the grounds that the Foundation has
5 claims and defenses that share common questions of law and fact with the main action here. As a
6 nonprofit organization with special interest in the administration of election laws, the Foundation
7 should be permitted to intervene permissively as similarly situated organizations have been
8 granted permission in similar prior litigation. *Kobach v. United States Election Assistance*
9 *Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013). Indeed, the Foundation has
10 previously been allowed to intervene as a Defendant-Intervenor. *League of Women Voters of the*
11 *United States v. Newby*, 195 F. Supp. 3d 80, 88 (D.D.C. 2016).

12 If intervention is granted, the Foundation will participate in this case on the schedule that
13 will be established for the existing parties; will avoid unnecessary delays or duplication of efforts
14 in areas satisfactorily addressed and represented by the existing Defendants, to the extent
15 possible; and will coordinate all future proceedings with the existing Defendants, to the extent
16 possible.

17 The Federal Rules of Civil Procedure and the Local Rules of this Court do not require the
18 Foundation to attempt to meet-and-confer with the other parties prior to the filing of this motion.

19 **I. The Court Should Grant Intervention as of Right.**

20 Upon filing of a timely motion, Federal Rule of Procedure 24(a)(2) requires this Court to
21 "permit anyone to intervene" who demonstrates that he has "an interest relating to . . . the subject
22 of the action" that would be impaired "as a practical matter" because of the action, unless the
23 interest is adequately represented by existing parties to the litigation. *Citizens for Balanced Use*
24 *v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011). It is well settled that Rule 24(a)
25 should be construed liberally in favor of permitting intervention. *See Trbovich v. United Mine*
26 *Workers of America*, 404 U.S. 528 (1972).

1 When seeking intervention as of right under Rule 24, an applicant must show that the
2 following four requirements are met:

3 (1) the intervention application is timely; (2) the applicant has a significant
4 protectable interest relating to the property or transaction that is the subject of the
5 action; (3) the disposition of the action may, as a practical matter, impair or
6 impede the applicant's ability to protect its interest; and (4) the existing parties
7 may not adequately represent the applicant's interest.

8
9 *Citizens for Balanced Use*, 647 F.3d at 897. The fourth prong, adequacy of representation, is
10 perhaps the most significant of the four here, as discussed below.

11 These requirements are broadly interpreted in favor of intervention. *Id.* In the end,
12 “intervention as of right does not require an absolute certainty that a party’s interests will be
13 impaired or that existing parties will not adequately represent its interests.” *Id.* at 900.

14 Nevertheless, the Foundation’s Motion satisfies each requirement.

15 **A. The Foundation’s Motion Is Timely.**

16 First, Rule 24 requires that a motion to intervene be timely filed. *Nw. Forest Res. Council*
17 *v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). Courts in this circuit consider three criteria for
18 determining timeliness: the state in the proceedings, whether the parties would be prejudiced,
19 and justification for any delay in the proceedings. *Id.*

20 There has been exceptionally little time since the Foundation became aware of this case,
21 and therefore of its interest in it. The Complaint was filed on October 16, 2017. To date, no other
22 pleadings other than the initial Complaint have been filed. A responsive pleading from the
23 Defendants is due November 6, 2017. The Foundation submits that the time could hardly have
24 been shorter. No scheduling order has been set, no discovery has been undertaken, no dispositive
25 orders have been entered, not trial date has been set, and Defendants have not filed an answer.
26 The Foundation is filing this motion as soon as possible following the filing of the Complaint. A
27 motion to intervene filed just two weeks after the case was initiated is timely.

1 Because the Foundation is seeking intervention so early in the proceedings, there could
2 not be any disruption or delay in the case and no party would be prejudiced.

3 **B. The Foundation’s Strong Interests in Defending the Constitutional**
4 **Regularity of Elections to Ensure Public Confidence and Encourage**
5 **Democratic Participation for Citizens Will Be Impaired if Plaintiffs Prevail.**

6 Second, Rule 24 requires that a movant “claim an interest relating to the property or
7 transaction that is the subject of the action, and [be] so situated that disposing of the action may
8 as a practical matter impair or impede the movant’s ability to protect its interest.” Fed. R. Civ. P.
9 24(a)(2). An intervening party must demonstrate a significant protectable interest, though this
10 interest need not be a “specific legal or equitable interest.” *Nw. Forest Res. Council*, 82 F.3d at
11 836. The Foundation has an interest in ensuring that the constitutional balance vesting state
12 control over elections is preserved and that the democratic right to participate effectively and in
13 state prescribed elections is ensured for all citizens in Nevada.

14 The Foundation is a non-partisan, nonprofit, charity legal foundation that has as its
15 mission the advancement and protection of the integrity of American elections and preserving
16 the constitutional balance giving states control over their own elections. The Foundation helps
17 citizens defend the integrity of their votes by educating them on efforts to erode their right to
18 vote, taking action to ensure that voter registration and election processes are followed and
19 enforced, and by helping states enforce their constitutionally protected voting laws.

20 The Plaintiffs’ lawsuit profoundly threatens state control over structuring their own
21 election system based on a patently flawed application of the Voting Rights Act. The Plaintiffs’
22 lawsuit seeks to impose unconstitutional restrictions on the democratic voice of Nevada citizens
23 by extinguishing a means to hold government accountable and by ultimately seeking to prevent
24 the state from holding an election altogether. This would be the ultimate denial and infringement
25 on the right and freedom of citizens to participate in the electoral process. Therefore, the
26 Foundation has a vested interest in preserving the constitutional balance between the states and
27 the federal government regarding the control of the electoral process.

1 In addition, the Foundation can provide an understanding of the national and
2 constitutional implications of this challenge which Defendants cannot bring, for reasons
3 discussed in greater detail below.

4 **C. The Foundation’s Interests Will be Impaired if Plaintiffs Prevail in this**
5 **Action.**

6 Typically, if a proposed intervenor is found to have a significant protectable interest in a
7 case, courts in this circuit have “little difficulty concluding that the disposition of the case may,
8 as a practical matter, affect it.” *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir.
9 2006). Here, if Plaintiffs prevail, they will have successfully used the Voting Rights Act in an
10 unconstitutional and nakedly partisan manner. If Plaintiffs prevail they will upset the federalist
11 balance struck by the Constitution, in order to derail an entire election process in Nevada.

12 Plaintiffs are misusing civil rights laws as partisan political weapons to determine the
13 outcome of a Nevada election by ensuring that it does not even occur. Plaintiffs seek to eradicate
14 properly enacted Nevada election procedures. Accordingly, the Foundations interests would, by
15 necessity, be impaired.

16 **D. Existing Parties Will Not Adequately Protect the Foundation’s Interests.**

17 Absent the opportunity to intervene, the Foundation’s interests almost certainly will not
18 be adequately represented. The Defendants are unlikely to assert as an affirmative defense a
19 challenge to the constitutionality of the Voting Rights Act as applied in this particular
20 circumstance. 52 U.S.C. §§ 10301-10314. The Defendants are unlikely to assert as an affirmative
21 defense a challenge to the constitutionality of the Voting Rights Act’s language minority
22 provisions as a basis to strike down a state’s recall process. 52 U.S.C. §§ 10301-10314. The
23 Defendants are unlikely to raise all of the same factual defenses that the Proposed-Intervenor is.

24 The controlling law supports intervention when the Defendant is unlikely to raise some of
25 the most potent defenses available to the Defendant—particularly when one defense is the
26 unconstitutional application of a statute. “The burden of showing inadequacy of representation is
27 ‘minimal’ and satisfied if the applicant can demonstrate that representation of its interests ‘may
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1 be' inadequate." *Citizens for Balanced Use*, 647 F.3d at 898. The Court examines three factors in
2 determining the adequacy of representation: "(1) whether the interest of a present party is such
3 that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present
4 party is capable and willing to make such arguments; and (3) whether a proposed intervenor
5 would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*
6 *v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). All three of these factors weigh in favor of the
7 Foundation's motion.

8 First, the Defendants' interests are different and distinct from the Foundation's interests.
9 As such, the Defendants are not likely to press fully the constitutional defenses available in this
10 case. Nor is the Defendant likely to press against the factual assertions contained in the
11 Complaint as fully as they might. The Proposed Defendant-Intervenor is unrestrained by political
12 concerns and can provide this Court with the full range of potential constitutional and factual
13 defects in the Complaint.

14 In addition, the Foundation's ultimate objectives are not necessarily aligned with that of
15 Defendants either, even though they are on the same side of the litigation. The government's
16 representation in this case will likely focus on preserving the status quo and maintaining the
17 functioning of Nevada's elections in accordance with Nevada law. The Foundation's interest and
18 representation, however, will be focused on the broader constitutional implications of Plaintiffs'
19 challenge, its ramifications on the federalism balance of power regarding state elections, and the
20 ultimate effect on the right of the public to participate in the political process. Thus, there will
21 likely be "fundamentally differing points of view between" the Foundation and the Defendants
22 "on the litigation as a whole." *Citizens for Balanced Use*, 647 F.3d at 899. These points of view
23 do not have to be in conflict, they just have to differ.

24 Accordingly, Defendants will undoubtedly *not* make all of the Foundation's arguments.
25 Nor are they capable and willing to make such arguments. In particular, the Foundation will
26 argue that Plaintiffs' challenge to the conduct of the special recall elections is flawed for four
27 reasons unlikely to be echoed by the Defendants.

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1 First, the *foreign language* component of the Voting Rights Act, especially in portions of
2 52 U.S.C. §§ 10301-10314 and 52 U.S.C. § 10503, is constitutionally suspect on its face because
3 it does not comport with Congress's authority to enforce the right to vote regardless of *race* as
4 found in the Fifteenth Amendment. Plaintiffs repeatedly rely on the foreign language provisions
5 of Section 2 of the Voting Rights Act.

6 Second, to the extent that Plaintiffs argue that Nevada's special recall election process
7 violates the Voting Rights Act by denying or abridging the right to vote on account of
8 membership in a *language minority group*, as contrasted with protections to *racial* minorities,
9 the Voting Rights Act would be unconstitutional as applied to these facts and circumstances
10 because it would far exceed the authority to enforce the right to vote regardless of race afforded
11 by the Fifteenth Amendment.

12 Third, the Foundation will also argue that Plaintiffs' application of Section 2 of the
13 Voting Rights Act utilizes an impermissible disparate impact theory that is not supported either
14 by the language of the Voting Rights Act or the critically important cases interpreting those
15 provisions. Plaintiffs rely on a disparate impact statistical analysis borrowed from a different,
16 and currently dormant, provision of the Voting Rights Act, namely Section 5 preclearance
17 standards. 52 U.S.C. § 10304. Statistical disparate impact tests are not adequate to make a claim
18 under Section 2. Instead, a plaintiff must demonstrate some causal nexus between the challenged
19 voting practice and actual electoral harms that have impaired the ability of minorities to elect
20 candidates of their choice or to participate equally in the political process. Plaintiffs' Section 2
21 analysis is an incorrect, and imagined repackaging of the Section 5 standard that was struck
22 down by the Supreme Court in *Shelby County v. Holder*. 133 S. Ct. 2612 (2013).

23 Fourth, and finally, the Foundation will provide factual arguments regarding assertions in
24 the Complaint which Defendants are unlikely to provide.

25 It is extremely unlikely that the Defendants will press arguments regarding the
26 constitutional challenges to the Plaintiffs' theories and the correct application of Section 2. As a
27 result, the Foundation will offer a critically important position for the Court to consider that the
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1 other parties will not. If Plaintiffs seek to repackage Section 2 of the Voting Rights Act beyond
2 constitutional bounds, this Court will benefit from Proposed Defendant-Intervenor's presence in
3 this case.

4 **II. In the Alternative, the Court Should Grant Permissive Intervention.**

5 If the Court nonetheless determines that the Foundation is not entitled to intervene as of
6 right, it should grant permissive intervention. Fed. R. Civ. P. 24(b). Rule 24(b) authorizes the
7 Court to grant permissive intervention to anyone who "has a claim or defense that shares with the
8 main action a common question of law or fact." Rule 24(b) does not impose any additional
9 requirements, but is simply a matter within the sound discretion of the district court. *See*
10 *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011). Three
11 conditions must be met to grant permissive intervention: "(1) the movant must show an
12 independent ground for jurisdiction; (2) the motion must be timely; and (3) the movant's claim
13 or defense and the main action must have a question of law and fact in common." *Venegas v.*
14 *Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989).

15 **A. Independent Grounds for Jurisdiction**

16 Because the Foundation would be able to defend the laws being challenged in this case
17 independent of the state, there are independent grounds for jurisdiction in this case. The
18 Foundation will be raising claims and defenses under the United States Constitution and the
19 Voting Rights Act.

20 **B. Timeliness**

21 In considering the timeliness of the intervention, the Court should consider the totality of
22 the circumstances, *NAACP v. New York*, 413 U.S. 345, 366 (1973), including the length of time
23 since the movant knew of its interest in the case; prejudice to the existing parties cause by any
24 delay in intervening (but not delay caused by the intervention itself); prejudice to the proposed
25 intervenor, and the existence of any unusual circumstances, *United Nuclear Corp. v. Cannon*,
26 696 F.2d 141, 143 (1st Cir. 1982).

1 As is stated above, the Foundation is filing this motion as soon as possible following the
2 filing of the Complaint. The Foundation submits that any additional issues it intends to raise and
3 litigate will cause no delay in this litigation.

4 **C. Common Question of Law or Fact**

5 The movant is not required to assert a separate or additional claim or defense in order to
6 show commonality. Instead, permissive intervention is appropriate where the proposed
7 intervenor's defense raises the same legal questions as the defense of the named defendants.
8 *Kobach v. U.S. Election Assistance Commission*, No. 13-CV-4095-EFM-DJW, 2013 WL
9 6511874, at *5 (D. Kan. Dec. 12, 2013). In *Florida v. United States*, another district court ruled
10 that organizations with "a special interest in the administration of elections laws" should be
11 allowed to intervene permissively in an action wherein Florida sought preclearance of changed to
12 its election laws, including voter registration protections. 820 F. Supp. 2d 85, 86-87 (D.D.C.
13 2011). Here the questions of law and fact raised by the Foundation's defense are certainly the
14 same as that of the existing action between the current parties. The Foundation's interests are
15 different and distinct, but the legal issue is the same.

16 The Foundation's charitable mission and activities involve protecting the constitutional
17 arrangement whereby states are able to structure their own election systems. The Foundation's
18 proposed answer demonstrates that it denies the legal assertions made by the Plaintiffs in their
19 Complaint. The Foundation possesses a unique knowledge, perspective, and expertise regarding
20 election matters, which has been recognized by other courts that have accepted its appearance as
21 Defendant Intervenor elsewhere. Finally, the Foundation's mission and activities fundamentally
22 deal with a special interest in the administration of voting rights. *See Florida*, 820 F. Supp. 2d at
23 86-87.

24 //

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1 **III. Conclusion**

2 For the foregoing reasons, the Court should grant the Foundation's Motion to Intervene
3 as of right or, in the alternative, permissively.

4 DATED: October 30, 2017

5 
6 _____
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CERTIFICATE OF SERVICE

I certify that on October 30, 2017, I caused the foregoing to be filed with the United States District Court for the District of Nevada via the Court's CM/ECF system, which will serve all registered users.

DATED: October 30, 2017

THE O'MARA LAW FIRM, P.C.



DAVID C. O'MARA

EXHIBIT INDEX

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EXHIBIT 1

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11 *Counsel for Proposed Defendant-Intervenor Public Interest Legal Foundation*

12 UNITED STATES DISTRICT COURT
 13 DISTRICT OF NEVADA

14 NORA LUNA; BILAL SHABAZZ; DIANE
 15 CRUMP-RICHMOND; SUSAN FLORIAN;
 16 and DEMI FALCON.,

Case No. 2:17-CV-02666

Plaintiff

**[PROPOSED] ANSWER BY
 DEFENDANT- INTERVENOR PUBLIC
 INTEREST LEGAL FOUNDATION**

17 vs.
 18

19 BARBARA CEGAVSKE, in her official
 capacity as the Nevada Secretary of State; and
 20 JOSEPH GLORIA, in his official capacity as
 the Clark County Registrar of Voters,

21 Defendants

22 Proposed Defendant-Intervenor the Public Interest Legal Foundation ("Foundation"), by
 23 and through counsel, and without waiving any motions or defenses, hereby answers Plaintiffs'
 24 Complaint. (Doc. 1.)

25 Many of the paragraphs in the complaint state conclusions of law, to which no response is
 26 required. Many others make factual allegations related to the Plaintiffs that are outside the scope
 27

1 of the Foundation's knowledge; as a result, they can neither be admitted nor denied by Intervenor
2 and thus are deemed denied. Any other allegations not admitted are deemed denied.

3 1. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
4 or information sufficient to form a basis as to the truth of these allegations. To the extent this
5 paragraph states a legal conclusion, no response is required. Other than as admitted, the
6 allegations contained in paragraph 1 are denied.

7 2. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
8 or information sufficient to form a basis as to the truth of these allegations. To the extent this
9 paragraph states a legal conclusion, no response is required. Other than as admitted, the
10 allegations contained in paragraph 2 are denied.

11 3. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
12 or information sufficient to form a basis as to the truth of these allegations. To the extent this
13 paragraph states a legal conclusion, no response is required. Other than as admitted, the
14 allegations contained in paragraph 3 are denied, and Plaintiffs have not pled facts establishing
15 that the said candidates are the minority preferred candidates, or have been in previous elections.
16 It is admitted that Nevada has chosen to adopt, through proper legislative action, a petition and
17 recall election procedure that permits the citizens of Nevada to exert democratic will at a more
18 frequent interval than in some other states.

19 4. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
20 or information sufficient to form a basis as to the truth of these allegations. To the extent this
21 paragraph states a legal conclusion, no response is required. Other than as admitted, the
22 allegations contained in paragraph 4 are denied. To the extent that the Plaintiffs seek to assert
23 that the Voting Rights Act invalidates a state recall petition and election as it relates to "language
24 minorities," such application would be unconstitutional in this circumstance, as alleged more
25 particularly below.

26 5. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
27 or information sufficient to form a basis as to the truth of these allegations. To the extent this
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1 paragraph states a legal conclusion, no response is required. Other than as admitted, the
2 allegations contained in paragraph 5 are denied.

3 6. Intervenor admits that this Court has subject matter jurisdiction pursuant to 28
4 U.S.C. § 1331.

5 7. Admit.

6 8. Admit.

7 9. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
8 or information sufficient to form a basis as to the truth of these allegations. To the extent this
9 paragraph states a legal conclusion, no response is required. Other than as admitted, the
10 allegations contained in paragraph 9 are denied. Ms. Luna appears from the facts asserted to be a
11 well-educated and capable person. If she would find participation in a special election unduly
12 burdensome, then any person would. Also, it is not impossible or unreasonably burdensome for
13 Plaintiff Luna, in these circumstances, to participate in any recall election, and thus Ms. Luna has
14 suffered no injury in fact and has no standing to bring this action.

15 10. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
16 or information sufficient to form a basis as to the truth of these allegations. To the extent this
17 paragraph states a legal conclusion, no response is required. Other than as admitted, the
18 allegations contained in paragraph 10 are denied. Even accepting all the facts alleged in
19 paragraph 10 on their face, however, they do not amount to a burden that is not common to all
20 the electorate. Every citizen must take time to educate themselves regarding every election, make
21 the minor time commitment to get out and vote, and incur the costs to do so. These are nothing
22 more than the costs of citizenship. Also, it is not impossible or unreasonably burdensome for
23 Plaintiff Shabazz, in these circumstances, to participate in any recall election, and thus Plaintiff
24 Shabazz has suffered no injury in fact and has no standing to bring this action.

25 11. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
26 or information sufficient to form a basis as to the truth of these allegations. To the extent this
27 paragraph states a legal conclusion, no response is required. Other than as admitted, the

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1 allegations contained in paragraph 11 are denied. Even accepting all the facts alleged in
2 paragraph 11 on their face, however, they do not amount to a burden that is not common to all
3 the electorate. Every citizen must take time to educate themselves regarding every election, make
4 the minor time commitment to get out and vote, and incur the costs to do so. These are nothing
5 more than the costs of citizenship. To the extent that the facts in this paragraph convey the
6 Plaintiff's political preferences and ideologies, they have no legal significance whatsoever in a
7 suit under the United State Constitution or under Section 2 of the Voting Rights Act. Instead,
8 they betray the overt political nature of this lawsuit, which seeks to use the Voting Rights Act as
9 a partisan weapon, rather than to actually ensure that individuals are not being denied access and
10 participation in the political process. Plaintiff Crump-Richmond lacks standing because Plaintiff
11 Crump-Richmond has suffered no injury in fact and has not alleged that Plaintiff Crump-
12 Richmond cannot cast a ballot in any recall election and is not unreasonably burdened by
13 participating in the election.

14 12. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
15 or information sufficient to form a basis as to the truth of these allegations. To the extent this
16 paragraph states a legal conclusion, no response is required. Other than as admitted, the
17 allegations contained in paragraph 12 are denied. Even accepting all the facts alleged in
18 paragraph 12 on their face, however, they do not amount to a burden that is not common to all
19 the electorate. Every citizen must take time to educate themselves regarding every election, make
20 the minor time commitment to get out and vote, and incur the costs to do so. These are nothing
21 more than the costs of citizenship. Furthermore, Plaintiff Florian, from the facts alleged, appears
22 to be a well-educated person from a very affluent community, which further undermines any
23 allegation that her need to educate herself regarding an election and to incur transportation costs
24 are a burden at all. Polls in Nevada are open for twelve hours and Plaintiff Florian's school or
25 other obligations do not consume all of those hours or her ability to cast an absentee ballot.
26 Plaintiff Florian lacks standing as she has alleged no injury in fact as she is able to cast a ballot in

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1 any recall election without any unreasonable burden apart from the regular burdens of
2 participating citizenship.

3 13. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
4 or information sufficient to form a basis as to the truth of these allegations. To the extent this
5 paragraph states a legal conclusion, no response is required. Other than as admitted, the
6 allegations contained in paragraph 13 are denied. Even accepting all the facts alleged in
7 paragraph 13 on their face, however, they are speculative and do not amount to a burden that is
8 not common to all the electorate. Every citizen must take time to educate themselves regarding
9 every election, make the minor time commitment to get out and vote, and incur the costs to do
10 so. These are nothing more than the costs of citizenship. Plaintiff Falcon would be entitled to cast
11 an absentee ballot if Plaintiff Falcon were travelling during the election.

12 14. Admitted.

13 15. Admitted

14 16. Admitted.

15 17. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
16 or information sufficient to form a basis as to the truth of these allegations. Admitted that a
17 Recall Notice was filed against the three Senators.

18 18. Denied.

19 19. Denied.

20 20. Denied.

21 21. Admitted.

22 22. Admitted.

23 23. Admitted.

24 24. Admitted.

25 25. Admitted.

26 26. Admitted that the recall election timeline is set by Nev. Const. Article 2, the
27 remainder Denied.

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1 27. This paragraph contains Plaintiffs' characterization of their action, the laws at
2 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
3 a response is required, Intervenor denies the allegations in paragraph 27. A recall election
4 procedure no more burdens the right to vote of those who voted in a previous election than does
5 a regularly scheduled subsequent election where an incumbent risks being voted out of office.

6 28. This paragraph contains Plaintiffs' characterization of their action, the laws at
7 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
8 a response is required, Intervenor denies the allegations in paragraph 28. Nevada has duly chosen
9 to enact recall elections through the Nevada Constitution and laws and any regularly scheduled
10 election subject to recall occurs subject to well-known potential recall procedures. A recall
11 election procedure no more burdens the right to vote of those who voted in a previous election
12 than does a regularly scheduled subsequent election where an incumbent risks being voted out of
13 office.

14 29. This paragraph contains Plaintiffs' characterization of their action, the laws at
15 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
16 a response is required, Intervenor denies the allegations in paragraph 29. Recall elections are
17 well established and well known procedures in the Nevada Constitution and laws and any
18 regularly scheduled election subject to recall always has the potential of a subsequent recall
19 election. These are the structural choices made by the Nevada Constitution, and it is not a matter
20 of federal law to upset this state arrangement.

21 30. This paragraph contains Plaintiffs' characterization of their action, the laws at
22 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
23 a response is required, Intervenor denies the allegations in paragraph 30. Plaintiffs' argument in
24 Paragraph 30 is an argument opposing democracy itself, where any subsequent election upsets
25 the results of a prior election. The only remedy that might satisfy Plaintiffs' concerns is to reduce
26 or even eliminate time consuming, burdensome, bothersome and complicated subsequent and
27

1 recurring elections altogether. Nevada has chosen a more direct form of democracy with the
2 potential of more frequent elections than regularly scheduled elections.

3 31. This paragraph contains Plaintiffs' characterization of their action, the laws at
4 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
5 a response is required, Intervenor denies the allegations in paragraph 31 and demands strict proof
6 besides the opinion of three professors that the costs of voting in recall election are "considerably
7 higher."

8 32. This paragraph contains Plaintiffs' characterization of their action, the laws at
9 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
10 a response is required, Intervenor denies the allegations in paragraph 32.

11 33. This paragraph contains Plaintiffs' characterization of their action, the laws at
12 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
13 a response is required, Intervenor denies the allegations in paragraph 33.

14 34. This paragraph contains Plaintiffs' characterization of their action, the laws at
15 issue, legal arguments, or conclusions of law, to which no response is required. To the extent that
16 a response is required, Intervenor denies the allegations in paragraph 34. In particular, having the
17 opportunity for more frequent recall elections advances the legitimate state interest in shortening
18 the potential interval for the democratic process to occur. A state may legitimately decide to have
19 more frequent elections, even if irregularly scheduled, to shorten the political distance between
20 the governed and the government. It is denied that no legitimate state interest exists for recall
21 elections.

22 35. Denied.

23 36. Denied, particularly as it relates to any use of disparate impact on assessing
24 violations or Constitutionality under federal elections laws. Disparate impact is not the standard
25 of liability under Section 2 of the Voting Rights Act or the Fifteenth Amendment. Any
26 application of Section 2 of Voting Rights Act utilizing a disparate impact standard of liability
27

1 constitutes an unconstitutional application of Section 2. Section 2 imposes causality elements,
2 elements that render Section 2 constitutional, and Plaintiffs' misapplies Section 2.

3 37. Denied. Intervenor demands strict proof of demonstrated cohesion coefficients
4 instead of a poll conducted by a partisan polling company.

5 38. Denied. Intervenor demands strict proof of demonstrated cohesion coefficients
6 instead of rank speculation or a poll conducted by a partisan polling company.

7 39. Denied. Plaintiffs make no allegation that any socio-economic differences alleged
8 have been caused by, or even relate to, impediments to the political process as required to
9 establish a potential violation of Section 2 of the Voting Rights Act. Moreover, Plaintiffs utilize
10 an inapplicable disparate impact allegation that is irrelevant to a claim under Section 2 of the
11 Voting Rights Act. Plaintiffs' own allegations in paragraphs 9-13 undermine Plaintiffs'
12 statements in this paragraph to the extent that the Plaintiffs appear to be well-educated and also
13 from affluent communities.

14 40. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
15 or information sufficient to form a basis as to the truth of these allegations. To the extent this
16 paragraph contains legal arguments or conclusions of law, no response is, or may be, required.
17 To the extent that a response is required, Intervenor denies the allegations in paragraph 40 and
18 demands strict proof besides the opinion of academics. Plaintiffs' own allegations in paragraphs
19 9-13 undermine Plaintiffs' statements in this paragraph to the extent that the Plaintiffs appear to
20 be well-educated and also from affluent communities.

21 41. Denied. Moreover, turnout propensities among various voter populations have no
22 relevance to a claim under Section 2 of the Voting Rights Act. Decisions by citizens to
23 participate or not participate in a particular election are not justiciable issues.

24 42. Denied. Any alleged educational disparities have no bearing or relevance on the
25 capacity to fully participate in a single election with a single question on the ballot: to recall or
26 not to recall. Plaintiffs' own allegations in paragraphs 9-13 undermine Plaintiffs' statements in
27

28

1 this paragraph to the extent that the Plaintiffs appear to be well-educated, including teachers and
2 students, and also from affluent communities.

3 43. Denied.

4 44. Denied, particularly as Plaintiffs' allegation utilizes an impermissible disparate
5 impact theory under Section 2 of the Voting Rights Act.

6 45. Denied.

7 46. Denied. Plaintiffs may not utilize comparatively ancient history that is so far
8 attenuated from modern circumstances. Under the Voting Rights Act, the alleged discrimination
9 must be real and relevant to contemporaneous life. The official discrimination must relate to
10 voting and cannot be so ancient that it has no echoes in modern life.

11 47. Denied. To the extent that these allegations refer to discriminatory practices that
12 occurred when Abraham Lincoln was President of the United States, they are irrelevant and
13 outdated. In *Shelby County v. Holder*, the Supreme Court explained that the Voting Rights Act's
14 encroachment on the States' constitutional authority to regulate elections cannot be based on
15 "decades-old data and eradicated practices," but can be justified only by "current needs" to
16 prevent discrimination. *Shelby County v. Holder*, 133 S. Ct. 2612, 2627 (2013). Similarly,
17 exercising federal oversight of state election procedures based on discrimination that occurred
18 over 150 years ago goes far beyond the constitutional limits of what constitutes an acceptable
19 basis for the exercise of federal power. Moreover, reliance on legislative proposals that were
20 never enacted has no relevance whatsoever in establishing "official discrimination." Finally,
21 enforcement of Section 2 of the Voting Rights Act makes relevant official discrimination related
22 to voting, and not to every aspect of life centuries ago, or even more recently. The "extent of any
23 history of official discrimination in the state or political subdivision that touched the right of the
24 members of the minority group to register, to vote, or otherwise to participate in the democratic
25 process" is deemed relevant. Quoting S. Rep. No. 97-417, at 206-07.

26 48. Denied. To the extent that these allegations refer to discriminatory practices that
27 occurred when Ulysses S. Grant was President of the United States, they are irrelevant and
28

1 outdated. In *Shelby County v. Holder*, the Supreme Court explained that the Voting Rights Act's
2 encroachment on the States' constitutional authority to regulate elections cannot be based on
3 "decades-old data and eradicated practices," but can be justified only by "current needs" to
4 prevent discrimination. *Shelby County v. Holder*, 133 S. Ct. 2612, 2627 (2013). Similarly,
5 exercising federal oversight of state election procedures based on discrimination that occurred
6 over 150 years ago goes far beyond the constitutional limits of what constitutes an acceptable
7 basis for the exercise of federal power.

8 49. Denied, and none of these 58 year old allegations relate to voting or the ability to
9 participate in the political process.

10 50. Denied, and none of these 86 year old allegations relate to voting or the ability to
11 participate in the political process, apart from a wholly irrelevant factual allegation about the
12 entertainment industry in 2012.

13 51. Denied, particularly as it relates to state legislative actions to address illegal
14 immigration, which have utterly no bearing or relevance on a claim brought under the Voting
15 Rights Act.

16 52. Denied, and to the extent that such allegations relate to "language minorities"
17 such reliance on this evidence would be beyond the proper constitutional bounds of Section 2
18 Voting Rights Act or Congressional enforcement powers under the Fifteenth Amendment.

19 53. Denied, and to the extent such allegations are true, are irrelevant to a claim under
20 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
21 process.

22 54. Denied, and to the extent such allegations are true, are irrelevant to a claim under
23 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
24 process.

25 55. Denied, and to the extent such allegations are true, are irrelevant to a claim under
26 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
27 process.

28

1 56. Denied, and to the extent such allegations are true, are irrelevant to a claim under
2 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
3 process.

4 57. Denied, and to the extent such allegations are true, are irrelevant to a claim under
5 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
6 process.

7 58. Denied, and to the extent such allegations are true, are irrelevant to a claim under
8 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
9 process.

10 59. Denied, and to the extent such allegations are true, are irrelevant to a claim under
11 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
12 process.

13 60. Denied, and to the extent such allegations are true, are irrelevant to a claim under
14 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
15 process.

16 61. Denied, and to the extent such allegations are true, are irrelevant to a claim under
17 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
18 process.

19 62. Denied, and to the extent such allegations are true, are irrelevant to a claim under
20 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
21 process.

22 63. Denied, and to the extent such allegations are true, are irrelevant to a claim under
23 Section 2 of the Voting Rights Act as these alleged conditions are attenuated from the political
24 process.

25 64. Denied as the allegations regarding Sharon Angle are patently false, and the
26 remaining allegations are not racial appeals as envisioned as relevant evidence under Section 2 of
27 the Voting Rights Act.

28

1 65. Denied, and the allegations are not racial appeals in elections as envisioned as
2 relevant evidence under Section 2 of the Voting Rights Act.

3 66. To the extent this paragraph states factual allegations; Intervenor lacks knowledge
4 or information sufficient to form a basis as to the truth of these allegations. To the extent this
5 paragraph contains legal arguments or conclusions of law, no response is, or may be, required.
6 To the extent that a response is required, Intervenor denies the allegations in paragraph 66.

7 67-75. To the extent this paragraph states factual allegations, Intervenor lacks knowledge
8 or information sufficient to form a basis as to the truth of these allegations. To the extent this
9 paragraph contains legal arguments or conclusions of law, no response is, or may be, required.
10 To the extent that a response is required, Intervenor denies the allegations in paragraph 67-75.

11 76-82. The allegations in paragraphs 76-82 of the Complaint are legal arguments or
12 conclusions of law, to which no answer is required. If deemed to allege facts, Intervenor denies
13 the allegations in paragraphs 76-82.

14 83-89. The allegations in paragraphs 83-89 of the Complaint are legal arguments or
15 conclusions of law, to which no answer is required. If deemed to allege facts, Intervenor denies
16 the allegations in paragraphs 83-89.

17 90-94. The allegations in paragraphs 90-94 of the Complaint are legal arguments or
18 conclusions of law, to which no answer is required. If deemed to allege facts, Intervenor denies
19 the allegations in paragraphs 90-94.

20 **AFFIRMATIVE DEFENSES**

21 Defendant Intervenor asserts four affirmative defenses:

22 **Facial Challenge: "Language Minority" Provisions of Section 2 Are Unconstitutional**

23 1. To the extent that Plaintiffs' Complaint, specifically Count II, alleges that
24 Nevada's recall elections violate the Voting Rights Act because the elections deny or abridge the
25 right to vote on account of membership in a language minority group, the references to
26 "language minorities" and "language minority groups" are facially unconstitutional because they
27

1 are inconsistent with the purpose of the Fifteenth Amendment and exceed Congress's authority
2 to enforce the right to vote regardless of race as found in the Fifteenth Amendment.

3 **As Applied Challenge: Section 2 is Unconstitutional**

4 **if Applied to Invalidate a State Recall Election in this Circumstance**

5 2. To the extent that Plaintiffs' Complaint, specifically Count II, alleges that
6 Nevada's recall laws as applied to the specific recall efforts related to Senators Woodhouse,
7 Cannizzaro, and Farley violate the Voting Rights Act because the elections deny or abridge the
8 right to vote on account of membership in a language minority group, the references to
9 "language minorities" and "language minority groups" in the Voting Rights Act are
10 unconstitutional as applied to these facts and circumstances because they are inconsistent with
11 the purpose of the Fifteenth Amendment and exceed Congress's authority to enforce the right to
12 vote regardless of *race* as found in the Fifteenth Amendment. Speaking a *language* other than
13 English is not the same, or even congruent to, inherent immutable characteristics such as *race*.

14 **As Applied Challenge: Utilizing a Disparate Impact Standard to Invalidate a State Recall**

15 **Election Would Render Section 2 Unconstitutional**

16 3. Count II of Plaintiffs' Complaint misstates a claim under Section 2 of the Voting
17 Rights Act by relying on a disparate impact standard where statistical differences in how a
18 neutral election law may affect various protected racial classes gives rise to liability. Plaintiffs'
19 claim should be rejected. And if it were accepted, it would push Section 2 of the Voting Rights
20 Act beyond constitutional boundaries. Plaintiff borrows standards from a different provision of
21 the Voting Rights Act—Section 5. 52 U.S.C. § 10304. Section 5—which has never applied to
22 Nevada and which currently applies to no state because its former coverage has been found
23 unconstitutional by the Supreme Court—utilizes an analysis whereby discriminatory impacts
24 give rise to an objection to a new state electoral process—a review that again has never been
25 applicable to Nevada. The standard under Section 5 imposes greater burdens to the federalist
26 structure whereby states control their own electoral systems, than does the higher requirements

1 of proof under a proper Section 2 claim. Utilizing the standards of Section 5 in a Section 2 claim,
2 as Plaintiffs attempt to do, would render that application of Section 2 to be unconstitutional.

3 **Inadequate Facts Alleged**

4 4. Federal Rule of Civil Procedure requires a showing of entitlement to relief. Such a
5 showing cannot be made by mere “labels and conclusions” or “a formulaic recitation of the
6 elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The
7 Amended Complaint is riddled with factual allegations that, even if true, do not entitle them to
8 relief under Section 2 of the Voting Rights Act. Many of these allegations bear no relevance to a
9 claim under Section 2 of the Voting Rights Act properly applied, while others are simply
10 conclusory. Most of the purported facts in the Amended Complaint are a jumble of talking points
11 of various interest groups and academics long opposed to robust state control over elections and
12 laws designed to promote election integrity. Taken together, they fail to state a plausible claim
13 that the Defendants have violated Section 2.

14 DATED: October 30, 2017

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17 _____
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CERTIFICATE OF SERVICE

I certify that on October 30, 2017, I caused the foregoing to be filed with the United States District Court for the District of Nevada via the Court’s CM/ECF system, which will serve all registered users.

DATED: October 30, 2017

THE O’MARA LAW FIRM, P.C.

DAVID C. O’MARA