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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA MCALLISTER, an individual; and BRANDOM SUMMERS, an individual, Plaintiffs, vs. CLARK COUNTY, a political subdivision of the state of Nevada. Defendant(s).	Case No: 2:24-cv-00334-JAD-NJK **DEFENDANT CLARK COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT [1]**

COMES NOW, Defendant CLARK COUNTY (hereinafter "Clark County" or "Defendant"), through its attorney, STEVEN B. WOLFSON, District Attorney, by JEFFREY S. ROGAN and JOEL K. BROWNING, Deputy District Attorneys, and hereby moves the Honorable Court to dismiss Plaintiffs' Complaint [1] against it.

This Motion is brought pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and is based upon all the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and the oral arguments of counsel at the time of the hearing in this matter, if any.

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MEMORANDUM AND POINTS OF AUTHORITIES

I.

PROCEDURAL POSTURE

Plaintiffs filed their initial complaint in this matter on or around February 16, 2024. [ECF No. 1]. Thereafter on February 22, 2024, Plaintiffs filed a Motion for Preliminary Injunction and a Motion for Temporary Restraining Order seeking to enjoin enforcement of Section 16.13.030 of the Clark County Code (hereinafter "CCC 16.13.030"). *See*, *e.g.*, [ECF Nos. 4, 5]. Clark County was served with a copy of Plaintiffs' complaint [1] and motions [4, 5] the same day.

Pursuant to a stipulation between the parties, Clark County had up until March 14, 2024, to respond to Plaintiffs' complaint and motions for injunctive relief. The instant motion to dismiss constitutes Defendant's timely filed response to Plaintiffs' complaint [1].

II.

NATURE OF MOTION

On or around January 2, 2024, the Clark County Board of County Commissioners (hereinafter "BCC") enacted legislation by amending Section 1, Title 16 of the Clark County Code to include a provision for "Pedestrian Flow Zones." *See* CCC 16.13.010, et seq., attached hereto as **Exhibit A**. The legislation is the latest of Clark County's proactive efforts to ensure public safety and the free flow of traffic on its most congested thoroughfare—the Las Vegas Strip.

Pedestrian bridges were first constructed along the Las Vegas Strip and incorporated into the sidewalk system to facilitate safer and more efficient pedestrian crossings of major roadways. Ground level crosswalks were simultaneously removed, thereby forcing all foot traffic to utilize pedestrian bridges where present. Continued analysis of traffic flows and public safety led Clark County to install heavy duty traffic bollards along the Las Vegas Strip thereby further protecting pedestrians from automobile-pedestrian accidents and to pass legislation prohibiting obstructions on the Las Vegas Strip sidewalk system—ordinances which were facially challenged but upheld as constitutional by this Court. *See*, *e.g.*, *Taylor v.*

Las Vegas Metro. Police Dep't, No. 219CV995JCMNJK, 2019 WL 5839255, at *5 (D. Nev. Nov. 7, 2019).

In the intervening years, however, Clark County's population and visitator volume has continued to grow. Clark County has hosted major events like the Super Bowl, NFL draft, BTS and Taylor Swift concerts, the PAC12 Championships, and more. It also now boasts multiple professional sports franchises—many of which play games near the Las Vegas Strip. According to the Las Vegas Convention and Visitors Authority (LVCVA), nearly 41 million visitors came to Clark County in 2023—a 5.2% increase year-over-year. The U.S. Census Bureau statistics indicate that the population of Clark County has increased nearly 20% between 2010 and 2023, with 3.1% of that growth coming between April 2020 and July 2023.

In a study commissioned by Clark County, a UNLV criminal justice and public safety professor, William Sousa, PhD, determined that the pedestrian bridges, many of which are decades old and are unique in their function from the rest of the sidewalk system, were being utilized for purposes other than what was originally intended—facilitating street crossings—and were contributing to an increase in crime and congestion on the Las Vegas Strip sidewalk system. *See*, *e.g.*, CCC 16.13.010. Data cited in the report demonstrated that the number of law enforcement calls to the pedestrian bridges were disproportionately larger than the remaining sidewalk system and that criminals were opportunistically targeting pedestrians on the bridges stuck in the congestion as a captive audience. *Id*. This further raised concerns about emergency responders' ability to access and traverse the pedestrian bridges and the potential for congestion related casualties in the event of a mass panic event or shooting. *Id*.

Based on these concerns, the BCC enacted CCC 16.13.010, et seq. to achieve the substantial government interests of providing safe pedestrian access on the Las Vegas Strip and ensuring the public safety on the pedestrian bridges. *See generally* **Exhibit A**. CCC 16.13.030 makes it unlawful for any person to stand or stop or to intentionally cause another person to stop or stand while on the pedestrian bridge. *See* CCC 16.13.030.

Plaintiffs LISA MCALLISTER and BRANDON SUMMERS, neither of whom who have ever been cited under CCC 16.13.030, bring this action asserting that CCC 16.13.030 is

unconstitutional on its face under the First and Fifth Amendments (and their Nevada State Constitutional equivalents) and that the language of CCC 16.13.030 violates the Americans with Disabilities Act ("ADA"). Plaintiffs also seek injunctive relief enjoining enforcement of CCC 16.13.030.

This sort of action constitutes a disfavored facial challenge to the constitutionality of an ordinance which stretches the bounds of standing and requires a great deal of speculation and second-guessing of legislators' intent by the parties and the Court. For that reason alone, the Court should dismiss this action. But even should the Court elect to review the substance of Plaintiffs' complaint, it will quickly determine that it fails to state a claim upon which relief may be granted.

CCC 16.13.030 constitutes a content-neutral regulation, narrowly tailored to affect only 6% of the total sidewalk system and to achieve a substantial government interest in public safety and the free flow of pedestrian traffic. The ordinance itself doesn't even prohibit expressive conduct—just stopping or standing. People may continue to engage in expressive conduct as they cross the pedestrian bridges so long as they do not stop, and they are left ample opportunities to engage in expressive conduct while stopping anywhere else on the remaining 94% of the Las Vegas Strip sidewalk system. Accordingly, Plaintiffs' First Amendment and Nevada State Constitution Article 1, Section 9 overbreadth challenges of CCC 16.13.030 fail under intermediate scrutiny.

Plaintiffs' due process challenges to CCC 16.13.030 under the Fifth and Fourteenth Amendments and Article 1 Section 8 of the Nevada State Constitution are similarly meritless. It is clear both from the language of CCC 16.13.030 and the context of the accompanying statutes that "stop" and/or "stand" as used in CCC 16.13.030 entails something more substantial than brief or insubstantial variations in movement—something that amounts to an impediment of the free flow of traffic across the bridge. So potential violators are provided fair notice and enforcement by LVMPD and Clark County prosecutors will require no speculation regarding how to define a violation of the ordinance.

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Furthermore, Plaintiff McAllister has not pleaded sufficient facts to infer that CCC 16.13.030 is void under the ADA because it disparately impacts disabled persons and fails to make a reasonable modification to alleviate that systemic discrimination by exempting disabled persons from arrest and prosecution. The subject ordinance may not be enforced against those whose conduct is involuntary or unintentional and Ninth Circuit case law already provides a reasonable accommodation to people with disabilities by prohibiting arrest or citation where the arrest is premised on law enforcement's misperception of the effects of a disability as criminal activity.

Accordingly, and based on the foregoing, all of Plaintiffs' claims fail as a matter of law and the Court must dismiss their Complaint against Defendant Clark County.

III.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim must be granted when the plaintiff fails to plead a cognizable legal theory or fails to plead sufficient facts to support such a legal theory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). To avoid dismissal, a complaint must include enough factual allegations to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

While the Court must accept the factual allegations in the Complaint as true, it must ignore unsupported conclusions, unwarranted inferences, and sweeping legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 678. The Court can consider matters of which it may take judicial notice, documents referenced in the complaint, and any applicable laws or ordinances without converting a motion to dismiss into one for summary judgment. *See*, *e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Issues of statutory construction like statutory interpretation and constitutional challenges are questions of law which are reviewed *de novo* on appeal. *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

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IV.

LEGAL ARGUMENT

A. Plaintiffs' State and Federal Constitutional Causes of Action Constitute "Facial" Challenges to the Constitutionality of an Ordinance which are Disfavored because they Rely on Speculation and Frustrate the Intent of the Elected Representatives of the People

Plaintiffs' Complaint [1] concedes that neither Plaintiff has been cited under the current ordinance or suffered any actual constitutional deprivation. [ECF No. 1] at 3:2-5:2. Accordingly, the causes of action in Plaintiffs' complaint [1] constitute "facial" challenges to the constitutionality of CCC 16.13.030 (as opposed to "as applied" challenges) and are questions of law that can be determined by the Court on their face without the need for additional fact finding or discovery. *See*, e.g., *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 897 (9th Cir.2003); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004). In facial challenges, "the challenger must establish that no set of circumstances exists under which the [ordinance or statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987). For causes of action not implicating First Amendment overbreadth challenges like Plaintiffs' first and second causes of action[1], "the fact that the [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id*.

"Facial challenges are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). Facial challenges frequently rely on speculation or interpretation of ordinances "on the basis of factually barebones records." *See Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). Declaring ordinances unconstitutional "frustrates

[1] While Plaintiffs have alleged First Amendment overbreadth challenges in their Complaint, the reality is that the CCC 16.13.030 is not a restriction on speech at all. Citizens may still march, protest, demonstrate, perform, or speak on the subject pedestrian bridges so long as they do not stop or stand while doing so. Accordingly, it is Defendant's position that case law disfavoring facial challenges applies equally to all the causes of action in Plaintiffs' complaint.

the intent of the elected representatives of the people." *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69, 163 L. Ed. 2d 812 (2006).

The constitutional mandate to the courts encourages judicial restraint such that the courts refrain from "rewrit[ing] state law to conform it to constitutional requirements…." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69, 163 L. Ed. 2d 812 (2006) (citing *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). Invalidating a statute in its entirety, without taking into consideration the intent and desire of the legislature, circumvents the purpose of the legislature. *See Califano v. Westcott*, 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J., concurring in part and dissenting in part); *see also Dorchy v. Kansas*, 264 U.S. 286, 289–290, 44 S.Ct. 323, 68 L.Ed. 686 (1924) (opinion for the Court by Brandeis, J.); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999); *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987).

Plaintiffs' own complaint provides the clearest example of why challenges to statutes are better addressed on an "as applied" basis. Plaintiffs concocted an egregious hypothetical of Plaintiff McAllister, a woman with a disability, being cited for stopping if her wheelchair broke down or if she became too tired to cross the subject pedestrian bridges in a single movement. [ECF No. 1] at 4:12-21. If Plaintiff McAllister were ever to be cited under such circumstances it would certainly shock the conscience and this Court would have no difficulty in finding such an application unconstitutional.

But Plaintiffs' hypothetical is so egregious that it stretches the bounds of credulity. It is far more likely that in the circumstances Plaintiffs have concocted that LVMPD officers would render aid or provide assistance to Plaintiff McAllister—but it's all just speculation at this point. Plaintiffs, the Court, and Defendants could concoct countless examples of the ordinance being enforced unconstitutionally or constitutionally as it suits their needs, and this

sort of rampant speculation is precisely why facial challenges to ordinances like CCC 16.13.030 are disfavored. It is for this reason that the Court should exercise judicial restraint and decline to entertain Plaintiffs' facial challenges of CCC 16.13.030 in the abstract and instead wait until such time as a genuinely justiciable claim is before it.

B. Plaintiffs' First Amendment Challenges are Reviewed under Intermediate Scrutiny because CCC 16.13.030 is a Content-Neutral Regulation of Conduct Applied Evenhandedly to All

While the First Amendment of the Constitution expressly forbids only the abridgement of "speech," the Courts have long held that there are times where other forms of conduct may "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. State of Wash*., 418 U.S. 405, 409, 94 S. Ct. 2727, 2730, 41 L. Ed. 2d 842 (1974); *see also Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539 (1989). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the courts] have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539 (internal citations and quotation marks omitted).

In context, the courts have recognized that certain forms of dress or adornment offered in protest constitute expressive conduct. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969). The courts have similarly found, in context, that a sit-in by black people in a "whites only" area to protest segregation constituted expressive conduct. *Brown v. Louisiana*, 383 U.S. 131, 141–142, 86 S.Ct. 719, 723–24, 15 L.Ed.2d 637 (1966). A recent Ninth Circuit decision also extended the definition of expressive conduct to include honking a horn on an automobile—in context. *Porter v. Martinez*, 68 F.4th 429, 441 (9th Cir. 2023), cert. denied, No. 23-423, 2024 WL 759806 (U.S. Feb. 26, 2024).

In this instance there is no context for the court to determine whether the prohibition on "stopping" or "standing" as used in CCC 16.13.030 is expressive conduct imbued with

sufficient communicative elements to warrant review under the First Amendment—further highlighting why facial challenges are so disfavored. For it is the "[conduct], combined with the factual context and environment in which it was undertaken, [which may] lead to the conclusion that [a person] engaged in a form of protected expression." *Spence v. State of Wash.*, 418 U.S. 405, 410, 94 S. Ct. 2727, 2730, 41 L. Ed. 2d 842 (1974). While Defendant affirmatively denies that the subject ordinance is directed at speech or expressive conduct, it will concede for the purposes of this motion that "stopping" and/or "standing" may implicate expressive conduct in certain situations depending on the context. *See*, *e.g.*, *Porter v. Martinez*, 68 F.4th 429, 440 (9th Cir. 2023), cert. denied, No. 23-423, 2024 WL 759806 (U.S. Feb. 26, 2024).

The Supreme Court has determined that the "crucial first step" in determining whether an ordinance or regulation is unconstitutional is to determine whether it is "content neutral on its face." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165–66, 135 S. Ct. 2218, 2228, 192 L. Ed. 2d 236 (2015); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).When an ordinance is not content-neutral it will face a strict scrutiny analysis, whereas a content-neutral ordinance will be reviewed under intermediate scrutiny. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 163, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.*; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565, 131 S. Ct. 2653, 2663, 180 L. Ed. 2d 544 (2011).

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CCC 16.13.030 provides:

> **16.13.030** – Pedestrian Flow Zones. To maintain the safe and continuous movement of pedestrian traffic, it is unlawful for any person to (1) stop or stand within any Pedestrian Flow Zone, or (2) engage in any activity while within a Pedestrian Flow Zone with the intent of causing another person who is within a Pedestrian Flow Zone to stop or stand. A person is not in violation of this Section if they stop or stand while waiting for access to an elevator or escalator for purposes of entering or exiting a Pedestrian Flow Zone.

CCC 16.13.030.

On its face, CCC 16.13.030 does not prohibit any particular speech based on topic, viewpoint, or otherwise as it is applied even-handedly to all people without regard to speech. Pedestrians may still march, protest, demonstrate, perform, or speak on the pedestrian bridges so long as they do not stop or stand while doing so. Because CCC 16.13.030 only incidentally affects expressive conduct that would require someone to stop or stand exclusively on pedestrian bridges, it is content-neutral on its face.

Courts recognize that facially neutral ordinances may still qualify as content-based where the ordinance cannot "be justified without reference to the content of the regulated speech" or where it was adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015).

CCC 16.13.030, however, is fully justifiable as a measure intended to promote the "safe and continuous movement of pedestrian traffic"—a justification unrelated to any purported burden on expressive conduct. *See* CCC 16.12.030. There is similarly no allegation in the complaint or evidence cited that would indicate that the subject ordinance was enacted because of a disagreement with a certain type or category of speech. *See generally* [ECF No. 1]. Accordingly, CCC 16.13.030 is a content-neutral ordinance under any test applied by the federal courts and, accordingly, intermediate scrutiny applies.

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C. Plaintiffs' Federal and State Overbreadth Challenges Fail because Promoting the Free Flow of Traffic on Public Streets and Sidewalks is a Substantial Government Interest and CCC 16.13.030 is no more Burdensome than is Necessary to Achieve that Aim[2]

For a content-neutral ordinance like CCC 16.13.030 to survive intermediate scrutiny, it must "further[ ] an important or substantial governmental interest," that interest must be "unrelated to the suppression of free expression," and the "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968).

In order to be no more burdensome "than is essential to the furtherance of" the government's interest, an ordinance "need not be the least restrictive or least intrusive means" of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S. Ct. 2746, 2757, 105 L. Ed. 2d 661 (1989). But the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. The ordinance must also "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

Clark County "has a substantial government interest in ensuring public safety on the pedestrian bridges" and "a substantial government interest in providing safe pedestrian access of the Las Vegas Strip." CCC 16.13.010. The United States Supreme Court has recognized that a government "has a **strong interest in ensuring the public safety** and order **[and] in promoting the free flow of traffic** on public streets and sidewalks." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (emphasis added); *see also Kuba v. 1–A Agr. Ass'n*, 387 F.3d 850, 858 (9th Cir. 2004) ("[I]nterests in pedestrian and traffic safety, as well as in preventing traffic congestion, are significant."); *Ruffino v. City of Puyallup*, No. C18-5381

[2] Plaintiffs concede in their Complaint that Article 1, Section 9 of the Nevada Constitution and the First Amendment are co-extensive. [ECF No. 1] at 20:6-9; *see also S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 415–16, 23 P.3d 243, 251 (2001). Accordingly, only a single analysis will be offered for Plaintiffs' third and fourth causes of action arising under the federal and state constitutions, respectively.

BHS, 2018 WL 3752222, at *3 (W.D. Wash. Aug. 7, 2018); *Animal Rts. Found. of Fla., Inc. v. Siegel*, 867 So. 2d 451, 455 (Fla. Dist. Ct. App. 2004).

Pedestrian bridges were built along the Las Vegas Strip to provide "above grade access for visitors, employees, and residents of Clark County to safely cross the roadways." *See*, *e.g.*, CCC 16.13.010. These bridges, which make up only 6% of the Las Vegas Strip sidewalk system, were designed for the specific purpose of facilitating street crossings and the original parameters did not contemplate use "beyond pedestrian traffic crossing from one side to the other side. The parameters included that pedestrians would not stop, stand or congregate other than for incidental and fleeting viewing of the Las Vegas Strip from the pedestrian bridge." *Id*. These pedestrian bridges are distinctly unique from the rest of the sidewalk system in this regard.

As tourist and Clark County resident numbers have increased in recent years, however, there has been a corresponding increase in people congregating and impeding the free flow of traffic on these pedestrian bridges. CCC 16.13.010. Stopping on pedestrian bridges foments disorder, crime, and safety issues. *Id*. It inhibits the ability of first responders to access and traverse pedestrian bridges, it creates a captive audience for criminals to exploit and target, and it creates a traffic bottleneck that could lead to disaster in the event of mass panic following a shooting or other major disaster. *Id*. In fact, data collected for a four-year period from 2018 to 2022 demonstrated that calls for law enforcement services on pedestrian bridges comprised a disproportionately large number of all calls on the Las Vegas Strip sidewalk system. *Id*.

To help alleviate this growing burden on emergency services, to proactively address increasing traffic flow problems, and to provide for the safety of tourists and Clark County residents, the BCC, the elected legislative body for Clark County, enacted CCC 16.13.010, et seq. Among these ordinances enacted by the BCC was CCC 16.13.030, which prohibits people from standing or stopping on pedestrian bridges and from attempting to get others to stop or stand on pedestrian bridges while thereon. *See* CCC 16.13.010; CCC 16.13.030.

This ordinance, by making it unlawful to stop or stand on only a tiny fraction of the total Las Vegas Strip sidewalk system, is narrowly tailored to address the increases in traffic

obstruction and crime identified on these traffic bottlenecks with only an incidental impact on expressive conduct. People remain free to engage in expressive conduct on the pedestrian bridges so long as they continue moving while doing so and may stand or stop while engaging in expressive conduct anywhere else on the remaining 94% of the Las Vegas Strip sidewalk system—leaving more than ample opportunities for expressive conduct and speech.

Accordingly, CCC 16.13.030 constitutes a content-neutral ordinance that is narrowly tailored to achieve a substantial government interest with only an incidental impact on speech and which leaves ample alternative avenues available for expressive conduct.

D. CCC 16.13.030 is Not Unconstitutionally Vague because It Incorporates Fair Notice and Warning to Potential Violators and Reasonably Clear Guidelines for Law Enforcement Officials [3]

Plaintiffs have attempted to create confusion regarding the subject ordinance by asserting that "stop" and "stand" do not have their ordinary meaning or usage in CCC 16.13.030. [ECF No. 1] at 13:18-22. They do this by citing statements or cherry-picking only portions of statements by County commissioners, County employees, and Las Vegas Metropolitan Police Department officers and employees on how the subject ordinance will be enforced moving forward and to a lack of definition for "stop" or "stand" in the subject ordinance. *See*, *e.g.*, [ECF No. 1] at 12:9-13:28.

The void for vagueness doctrine is rooted in the Due Process Clause of the Fifth Amendment, which is applied to the states through the Fourteenth Amendment and the incorporation doctrine. *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). "The Fifth Amendment provides that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law,'" and "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law [1] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or [2] so standardless

[3] Article 1 Section 8 of the Nevada constitution also mirrors the due process language provided in the Fifth and Fourteenth Amendments of the United States Constitution and, accordingly, Defendant will conduct only a single analysis for Plaintiffs' first and second causes of action. *Hernandez v. Bennett-Haron*, 128 Nev. 580, 586–87, 287 P.3d 305, 310 (2012); *see also* [ECF No. 1] at 15:11-21 ("Nevada's due process clause is coextensive with the due process clause found in the United States Constitution.").

that it invites arbitrary enforcement." *Johnson v. United States*, ––– U.S. ––––, 135 S.Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)); *see also Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018).

An ordinance is not void for vagueness where the prohibitions are "clearly defined." *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972). Vagueness doctrine requires that an ordinance or statute provide "fair notice or warning" to potential violators and "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith v. Goguen*, 415 U.S. 566, 572–74, 94 S. Ct. 1242, 1246–48, 39 L. Ed. 2d 605 (1974) (internal quotation marks and citations omitted). "Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 572–74, 94 S. Ct. 1242, 1246–48, 39 L. Ed. 2d 605 (1974) (internal quotation marks and citations omitted); *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

In *Grayned v. City of Rockford*, the Supreme Court of the United States held that an anti-noise ordinance, which expressly prohibited willfully making of any noise or diversion on grounds adjacent to a school "which disturbs or tends to disturb the peace or good order of such school in session thereof" was not unconstitutionally vague. 408 U.S. 104, 108–14, 92 S. Ct. 2294, 2298–302, 33 L. Ed. 2d 222 (1972). Despite the fact that "disturbs or tends to disturb the peace or good order of school" is subjective and open to varying interpretations, the Court found that the vagueness of the terms was dispelled and clarified by the ordinance's other contextual requirements. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–14, 92 S. Ct. 2294, 2298–302, 33 L. Ed. 2d 222 (1972). CCC 16.13.030 shares none of the vagueness issues contained in the anti-noise ordinance upheld in *Grayned*.

While "stand" or "stop" is not defined in statute, CCC 16.13.010 provides clear guidance regarding what constitutes contemplated parameters for pedestrian bridges. *See*, *e.g.*, CCC 16.13.010. Pedestrian bridge parameters provided that pedestrians "**would not stop, stand or congregate other than for incidental and fleeting viewing of the Las Vegas Strip**

from the pedestrian bridge." CCC 16.13.010 (emphasis added). Plaintiffs cite to a statement from Sherrif Kevin McMahill in the press which indicated that people will not be cited for taking photographs under CCC 16.13.030—but this statement is entirely consistent in regard to conduct incidental to walking and falls within the acceptable parameters of the pedestrian bridges. [ECF No. 1] at 9:9-19. This is also consistent with statements from County officials cited by Plaintiffs which provide that the ordinance "does not apply to people who stop or stand" for the purposes of observing the Las Vegas Boulevard. *Id*. at 13:3-5.[4]

Plaintiffs cite other statements by Clark County officials regarding circumstances when a person may or not be cited as purported evidence of vagueness. [ECF No. 1] at 13:6-12. Plaintiffs contend that representations that the ordinance does not apply to people "who stop or stand if they are waiting for picketers and other protests occurring at street level" and "does not apply to people if they are not intending to cause others to stop or stand on the pedestrian bridge" also makes the terms stop or stand somehow vague. *Id*. at 13:6-12. But these statements (while somewhat misstated by Plaintiffs) are consistent with the language of the statute itself which carves out express and implied exceptions for when people are forced to stop for reasons beyond their control while waiting for an escalator or elevator, including stopping due to protests or picketing ongoing below the pedestrian bridges which may back up traffic. *See*, *e.g.*, CCC 16.13.030(2). They are also consistent with the language of CCC 16.13.030(2) which provides that a person on the pedestrian bridge may only be cited for causing another person to stop or stand if that was their intent. *Id*.

Accordingly, it is understood that "stop" and/or "stand" as used in CCC 16.13.030 entails something more substantial than brief or insubstantial variations in movement—something that amounts to an impediment of the free flow of traffic across the bridge. It is also understood that stopping or standing that are beyond one's control or the causing of others to

[4] The entire Board of County Commissioners Meeting is online in video format. The video puts Plaintiff's allegations regarding these statements in their full context, including studies and reports commissioned regarding public safety on the Las Vegas Strip, and are worthy of consideration by the Court though not necessary to resolve the issues in this motion. *See* Clark County, Clark County Board of County Commissioners on 2024-01-02 9:00 AM, Granicus (https://clark.granicus.com/player/clip/7626?view_id=28&redirect=true) (last accessed March 12, 2024).

stop or stand that is unintentional will not be deemed unlawful under CCC 16.13.030.[5] In this regard, stop and stand as used in CCC 16.13.030 have their ordinary meaning when viewed in context and are substantially clearer than the language upheld in *Grayned*. Therefore, potential violators are provided fair notice of what constitutes a violation of CCC 16.13.030 and allegations that the ordinance is unconstitutionally vague are unavailing.

This lack of ambiguity in the terms "stop" and "stand" similarly provide guidance for enforcement of violations of CCC 16.13.030 by LVMPD and its officers. An ordinance only "violates the 'arbitrary enforcement' requirement if it is so indefinite that it encourages arbitrary and erratic arrests and convictions." *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018) (internal quotation marks and citations omitted). Ordinary notions of fair play and the settled rules of law are only violated if police officers, prosecutors, and judges are essentially "defining crimes and fixing penalties" by filling ordinance language gaps "so large that doing so becomes essentially legislative." *United States v. Evans*, 333 U.S. 483, 486–87, 68 S.Ct. 634, 92 L.Ed. 823 (1948); *see also Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018).

As CCC 16.13.030 is easily enforced without any sort of ad hoc legislation by LVMPD and/or Clark County prosecutors, it is not unconstitutionally vague, and the Court must dismiss Plaintiffs' complaint for failure to state a claim.

E. Enforcement CCC 16.13.030 would not Violate the Americans with Disabilities Act because There is No Disparate Impact and CCC 16.13.030 Would be Subject to Modification Even if There Were

Title II of the Americans with Disabilities Act ("ADA" or the "Act") generally prohibits "public entities"—which includes local governments like Clark County—from discriminating against disabled persons. 42 U.S.C. § 12132 *et seq*.; *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999); *see also Cohen v. City of Culver City*, 754 F.3d 690, 694–95 (9th Cir. 2014). It provides:

///

[5] It is upon information and belief that LVMPD's policy for enforcement of CCC 16.13.030 will include verbal warnings as a first act of enforcement and will only result in citations where a pedestrian willfully fails to comply with the verbal warning and an associated order to continue across the pedestrian bridge.

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §§ 12131(1). The Act thereby prohibits a public entity from disparately treating disabled persons—that is, treating disabled persons less favorably because of their disability. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999) ("…facially discriminatory laws present *per se* violations" of Title II). But it also prohibits those "disparate impact cases of discrimination"—that is, it forbids a public entity from effectively denying a disabled person "the benefits of [a public entity's] services, programs, or activities" by the application of facially neutral laws, rules or policies." *Crowder v. Kitagawa*, 81 F.3d 1480, 1483, 1485 (9th Cir. 1996) (citations and quotations omitted); 28 C.F.R. § 35.130(b)(7). Furthermore, under the ADA, "[i]f a public entity's practices or procedures deny people with disabilities meaningful access to its programs or services, causing a disparate impact, then the public entity is required to make reasonable modifications to its practices or procedures." *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021).

To state a claim under Title II, a plaintiff must establish that: "(1) [she] is a 'qualified individual' with a disability; (2) [she] was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of [her] disability." *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 737–38 (9th Cir. 2021) (citations and quotations omitted). As stated above, liability under Title II may be established in one of three ways: "disparate treatment, disparate impact, or failure to make a reasonable accommodation." *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 737–38 (9th Cir. 2021) (citations and quotations omitted).

In this cause of action, McAllister says that she is disabled because she cannot walk or stand and instead must use a wheelchair when crossing the pedestrian bridges located within the resort corridor. [ECF No. 1] at 4:14-15. Moreover, she alleged that "[she] cannot always

cross a pedestrian bridge without" stopping or standing due to her disability. *Id*. at 4:14-21, 22:16-23. For example, she must stop when her wheelchair malfunctions, when her arms tire, and when "limited visibility" in "crowded public areas" requires her to halt to see "where there is space for her to travel in her wheelchair." *Id*. at 4:9-21.

McAllister alleges that the risk of criminal prosecution for this conduct resulting from her disability "is a barrier to… accessing the pedestrian bridges and [deters her] from returning to the area."[6] [ECF No. 1] at 4:21-24. In this way, she claims that, without a reasonable modification to exempt from prosecution those who stop or stand on the pedestrian bridges due to a disability, CCC 16.13.030 effectively denies her (and other similarly disabled persons) "meaningful access" to the public sidewalks, causing a disparate impact. Id. at 22:1-3, 8-21. On that basis, she asks this Court to declare the CCC 16.13.030 void and to enjoin its enforcement. *Id*. at 23:13-16.

But while McAllister has adequately alleged that she is a "qualified individual with a disability" for purposes of the Americans with Disabilities Act because she cannot walk or stand, *see* [ECF No. 1] at 4:9-10. 22:1-4, McAllister has not pleaded sufficient facts to infer that CCC 16.13.030 is void under the ADA because it disparately impacts disabled persons and fails to make a reasonable modification to alleviate that systemic discrimination by exempting disabled persons from arrest and prosecution.

i. CCC 16.13.030 is a Facially Neutral Criminal Law which does not Unduly Burden Disabled Persons

To assert a disparate impact claim, a plaintiff must allege that a facially neutral government policy or practice denies "meaningful access" to public services or benefits to people with disabilities because it burdens disabled persons "in a manner different from and greater than it burdened non-disabled [persons], solely as a result of [a] disabling condition." *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004); *K.M. ex rel. Bright v. Tustin*

[6] Because McAllister has not been prosecuted under the County Ordinance, McAllister's claims must be categorized as a challenge to the CCC 16.13.030 as a "systemic accessibility barrier" that disparately impacts all disabled persons and which would require reasonable modification under the Title II framework. *See Payan v. Los Angeles Cmty. Coll. Dist.,* 11 F.4th 729, 739 (9th Cir. 2021); *see also Raytheon Co.,* 540 U.S. at 53 ("courts must be careful to distinguish between" disparate treatment and disparate impact claims).

Unified Sch. Dist., 725 F.3d 1088, 1102 (9th Cir. 2013); *see also Raytheon Co.*, 540 U.S. at 52 ("disparate-impact claims involve… practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another…" (citations and quotations omitted)).

The requirement that a government law, policy or practice must "unduly burden" a disabled person to be actionable under the ADA stems from prior case law. Notably, in *Crowder v. Kitagawa*, the Ninth Circuit found that a Hawaii law requiring dogs to quarantine upon entry into the state "burden[ed] visually-impaired persons in a manner different and greater than it burden[ed] others." 81 F.3d 1480, 1484 (9th Cir. 1996). This is because visually-impaired persons have a "unique dependence upon guide dogs" and therefore the "quarantine effectively denie[d] these persons ... meaningful access to state services, programs, and activities while such services programs, and activities remain[ed] open and easily accessible by others." *Id.* Similarly, in *Rodde v. Bonte*, the Ninth Circuit held that a California county's closure of the only hospital which provided clinical services to persons with certain severe disabilities "would deny [those] disabled individuals meaningful access to government-provided services because of their unique needs, while others would retain access to the same class of services." 357 F.3d 988, 998 (9th Cir. 2004).

Here, CCC 16.13.030 is undisputably facially neutral, as the text itself treats disabled persons and non-disabled persons equally. *See id.* The claim, however, fails because McAllister did not sufficiently allege that CCC 16.13.030 unduly burdens disabled pedestrians because of a unique need to stop or stand on the pedestrian bridges. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996); *McGary*, 386 F.3d. at 1259; *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004).

Construing her Complaint liberally, McAllister claims that disabled pedestrians who must use a mobility device to traverse the pedestrian bridges are more likely to need to stop or stand on the pedestrian bridge as a result of their mobility disability. [ECF No. 1] at 4:9-21. Accordingly, enforcement of CCC 16.13.030 would therefore disproportionately burden

mobility-impaired persons in a manner different from and greater than others. *See McGary*, 386 F3d at 1266-67, *citing Crowder*, 81 F.3d at 1484.

But McAllister advances no facts supporting an inference that a disabled pedestrian utilizing a mobility device has a *unique need* to stop or stand on a pedestrian bridge due to a disability. The Complaint cites only three circumstances in which a disabled pedestrian who uses a mobility device may need to stop or stand while on a pedestrian bridge: the mobility device may malfunction, the person may tire while crossing the bridge, or the person's path of travel may be obstructed by other pedestrians on the bridge. *See id.* The latter two circumstances are completely unconvincing; both disabled and non-disabled pedestrians may feel the need to stop or stand due to physical exhaustion while traveling on the pedestrian bridges or because the person's intended path of travel is obstructed by other pedestrians. CCC 16.13.030 consequently burdens all such disabled and non-disabled pedestrians identically.

The assertion that enforcement of CCC 16.13.030 is unduly burdensome because a malfunctioning mobility device may also cause a disabled pedestrian to stop or stand on a pedestrian bridge is similarly unavailing. CCC 16.13.030 criminalizes only those persons who stop or stand *voluntarily*. *Anthony Lee R. v. State*, 113 Nev. 1406, 1417, 952 P.2d 1, 8 (1997) ("It goes without saying that if the actor is not acting voluntarily, not acting with *mens rea*, there is no criminal liability."); *see* NRS 193.190. Also, CCC 16.13.030 is a general intent crime, and culpability therefore requires a person to *intentionally* stop or stand. *See Busefink v. State*, 128 Nev. 525, 536, 286 P.3d 599, 607 (2012) (when prohibited conduct is clearly articulated upon the plain reading of a statute, a general intent requirement will be inferred); *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) *receded from on other grounds by Cortinas v. State,* 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008).

The requirements of a voluntary act concomitant to an intentional mental state apply to both disabled and non-disabled pedestrians equally. Any pedestrian who stops or stands on a pedestrian bridge *involuntarily*—for example, due to a seizure—or *unintentionally*—for example, when a wheelchair can no longer move due to a malfunction or when an ambulatory person loses a heel and trips—is not in violation of CCC 16.13.030. McAllister therefore has

not shown how CCC 16.13.030 burdens a disabled pedestrian who utilizes a malfunctioning wheelchair in a manner different and greater than it burdens other pedestrians.

ii. *Even if CCC 16.13.030 were Discriminatory, the Ordinance is Subject to a Modification that Avoids Discrimination on the Basis of Disability*

When a public entity engages in discrimination against the disabled in violation of the ADA, the entity is required to reasonably modify its policies, practices or procedures "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Alexander v. Choate*, 469 U.S. 287, 301 (1985). The reasonable modification test applies only in disparate impact cases of discrimination. *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999). "A reasonable modification in response to a disparate impact finding is focused on modifying a policy or practice to improve systemic accessibility." *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021).

Here, McAllister asserts that CCC 16.13.030 violates the ADA because it discriminates against the disabled and it does not contain a reasonable modification exempting from criminal liability those persons who stop or stand on a pedestrian bridge due to a disability. [ECF No. 1] at 22:14-16. In other words, CCC 16.13.030 *would be valid* under the ADA if the ordinance were not enforced against any disabled person who stops or stands on the pedestrian bridge as a result of a disability because the reasonable modification would ensure access to the county sidewalks by the disabled. *See id.*

Normally, the determination of what constitutes a reasonable modification evades review on a motion to dismiss because it "is highly fact-specific, requiring case-by-case inquiry." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996). But such a fact-intensive inquiry is not necessary here because, *as a matter of law*, CCC 16.13.030 cannot be enforced against a person who stops or stands on the pedestrian bridge due to a disability. *See Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part,*

cert. dismissed in part 575 U.S. 600 (2015). In *Sheehan v. City & Cnty. of San Francisco*, the Ninth Circuit held that Title II applies to enforcement of criminal laws and prohibits "wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity…" *Id.* Under *Sheehan*, an officer who knows or should know that a person is disabled cannot arrest the person for "legal conduct related to [the] disability." *Lawman v. City & Cnty. of San Francisco*, 159 F. Supp. 3d 1130, 1147 (N.D. Cal. 2016). For example, an officer cannot arrest a driver of a vehicle for drunk driving when the officer knows or should know that the driver "was unsteady on his feet, swayed noticeably, slurred his speech, and appeared confused" as a result of complications from a stroke or brain aneurysm. *See Jackson v. Inhabitants of Town of Sanford*, No. CIV. 94-12-P-H, 1994 WL 589617, at *1 (D. Me. Sept. 23, 1994).

Given that *Sheehan* already provides, as a matter of law, the reasonable accommodation sought by McAllister, CCC 16.13.030 comports with the ADA even if it has a disparate impact on disabled persons. The claim must therefore be dismissed.

V.

CONCLUSION

Based on the foregoing, Defendant Clark County humbly requests the Honorable Court hold that CCC 16.13.030 is constitutional on its face and dismiss Plaintiffs' complaint.

DATED this 14th day of March, 2024.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 14th day of March, 2024, I served a true and correct copy of the foregoing **DEFENDANT CLARK COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT [1]** (United States District Court Pacer System or the Eighth Judicial District Wiznet), by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

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