STEVEN B. WOLFSON
District Attorney
CIVIL DIVISION
Bar No. 1565
By: **JOEL K. BROWNING**
Senior Deputy District Attorney
Bar No. 14489
By: **JEFFREY S. ROGAN**
Deputy District Attorney
State Bar No. 010734
500 South Grand Central Pkwy., Suite 5075
Las Vegas, Nevada 89155-2215
Telephone (702) 455-4761
Fax (702) 382-5178
E-Mail: Joel.Browning@ClarkCountyDA.com
E-Mail: Jeffrey.Rogan@ClarkCountyDA.com
Attorneys for Defendant Clark County

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 **DEFENDANT CLARK COUNTY'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [5] AND MOTION FOR TEMPORARY RESTRAINING ORDER [4]**

COMES NOW, Defendant Clark County, by its attorney STEVEN B. WOLFSON, District Attorney, through JEFFREY S. ROGAN and JOEL K. BROWNING, Deputy District Attorneys, and hereby files this Response to Plaintiffs' Motion for Preliminary Injunction [4] and Motion for Temporary Restraining Order [5].

This Response is based upon all the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and oral arguments of counsel at the time of the hearing in this matter, if any.

///

///

///

MEMORANDUM AND POINTS OF AUTHORITIES

I.

PROCEDURAL POSTURE

Plaintiffs filed their Motion for Temporary Restraining Order and Motion for Preliminary Injunction on February 22, 2024. [ECF Nos. 4, 5]. Defendant Clark County was served with a copy of these motions later that same day. Pursuant to a stipulation between the Parties, Defendant Clark County had until March 14, 2014, to file the instant Response. As the Court will be ruling on Plaintiffs' Motion for Temporary Restraining Order ("TRO") [4] and Motion for Preliminary Injunction [5] at the same time, Plaintiffs' Motion for TRO [4] is rendered functionally moot. *See*, *e.g.*, *Schainmann v. Brainard*, 8 F.2d 11, 12 (9th Cir. 1925); *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1068 (9th Cir. 2010).

II.

NATURE OF RESPONSE AND RELEVANT FACTS

Subject Ordinance

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 ("CCC") 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.

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.

See CCC 16.13.030.

Plaintiffs Lisa McAllister and Brandon Sommers

Plaintiff Lisa McAllister is a resident of Clark County. [ECF No. 1-2] at Exhibit 1, p. 2. She suffers from a spinal injury that necessitates the use of a manual wheelchair. *Id*. Plaintiff McAllister asserted that she has used pedestrian bridges in the Las Vegas Strip sidewalk system previously. *Id*. She indicated that on occasion her wheelchair malfunctions or she becomes tired, necessitating that she stops. *Id*. She also indicated that occasionally she must stop due to congestion and traffic on the sidewalk system to successfully navigate her wheelchair. *Id*. She purports to not be able to understand CCC 16.13.030 and fears that she would be accused of a crime if she were forced to stop on a pedestrian bridge. *Id*.

Plaintiff Brandon Sommers is a violin player who has played his violin on the Las Vegas Strip since 2009. [ECF No. 1-2] at Exhibit 2, p. 2. Mr. Sommers has purportedly played his instrument on the pedestrian bridges located on the Las Vegas Strip since 2011. *Id*. Mr. Sommers claims he avoids impeding traffic during performances by standing with his back against the wall of the pedestrian bridge and trying to "condense" his amplifier and backpack to take up as little space as possible. *Id.* He also claims to not understand the subject ordinance but believes he will be cited under CCC 16.13.030 for his performances. *Id*.

Injunctive Relief Sought by Plaintiff

Plaintiffs claim that "[e]mergency relief is necessary to prevent Defendant from infringing upon the rights of Plaintiffs and the public." [ECF No. 5] at 2:5-6. They "seek injunctive relief prohibiting Defendant from enforcing CCC 16.13.030." *Id*. at 2:6-7.

Plaintiffs assert that this relief is warranted so that they have "the opportunity to litigate [their] claims before additional violations occur" and because the subject ordinance "violates the First Amendment and the Americans with Disabilities Act ("ADA")" and is "unconstitutionally vague." *Id*. at 2:7-16.

Nature of Response

Plaintiffs, however, cannot meet the heavy burden necessary to obtain a preliminary injunction enjoining enforcement of CCC 16.13.030 from this Court because a preliminary injunction is an extreme and disfavored remedy where a movant must make a clear showing

that they satisfy all four elements warranting an injunction: (1) that they are likely to succeed on the merits, (2) that they will likely suffer irreparable harm without a preliminary injunction, (3) that the balance of equities tip in their favor, and (4) that the injunction is in the public's interest.

Plaintiffs cannot show that they are likely to succeed on the merits here. First, Plaintiffs have not actually been cited under the ordinance which makes their challenge a disfavored facial challenge as opposed to an "as applied" challenge. On that basis alone, they are unlikely to succeed.

But even an analysis of the merits demonstrates that CCC 16.13.030 is a content-neutral ordinance which serves the substantial government interests of securing the free flow of pedestrian traffic and public safety on pedestrian bridges. It also leaves ample room—94% of the Las Vegas Strip sidewalk system—open to expressive conduct while stopping or standing. Furthermore, the subject ordinance allows expressive conduct on 100% of the sidewalk system, including the pedestrian bridges, so long as the person engaged in expressive conduct is not stopped or standing while doing so. Accordingly, CCC 16.13.030 withstands intermediate scrutiny. The "stop" and "stand" language in CCC 16.13.030 also has its ordinary meaning so there is no vagueness inherent in the ordinance and it will not result in arbitrary or discriminatory enforcement by LVMPD—so Plaintiffs' due process challenge to the ordinance must also fail as a matter of law.

Plaintiffs' ADA claims also fail because the subject ordinance does not have a discriminatory impact as the legislation applies equally to all people. Even if CCC 16.13.030 did have a discriminatory impact, Ninth Circuit case law precludes enforcement of criminal statutes or ordinances where the purported criminal conduct was the result of a person's disability. Accordingly, it is exceedingly likely that Plaintiffs' claims will not prevail on their merits.

Next, Plaintiffs have not shown irreparable injury is likely in the absence of an injunction. They ask this Court to presume irreparable harm merely from the fact that they have alleged that the County has deprived them of constitutional or statutory rights, but the

Ninth Circuit has held that presumptions of irreparable harm are no longer valid in light of *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

In any case, Plaintiffs would not have been able to show a likelihood of irreparable injury because any harm they could have alleged is merely conjectural or hypothetical. Plaintiff McAllister's fear of prosecution for stopping or standing on the pedestrian bridges because "has no choice but to stop due to her disability" is a false hypothetical; pursuant to *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), police cannot arrest someone who stops or stands on the pedestrian bridges because of the effects of a disability. Similarly, Plaintiff Summers's fear that he will not be able to engage in protected speech on the pedestrian bridges is also conjectural because he remains free to do so long as he continues moving and he may stand or stop while engaging in expressive conduct anywhere else on the remaining 94% of the Las Vegas Strip sidewalk system.

Lastly, the balance of the equities and the public interest counsel against the issuance of a preliminary injunction because the County and the public will be harmed by the injunction more than Plaintiffs are helped by the injunction. The ordinance is necessary to address legitimate public safety concerns given the upsurge in the number of visitors who walk on Las Vegas Boulevard, and the dangerous conditions on the pedestrian bridges will continue to persist should this Court enjoin enforcement of CCC 16.13.030.

In contrast, Plaintiffs will not be prejudiced if the request for the injunction is denied because Plaintiffs and the public at large will be able to continue to engage in protected speech on the pedestrian bridges and on the remaining 94% of the sidewalks of the Las Vegas Strip. Also, Plaintiff McAllister and other similarly disabled persons will be able to travel on the pedestrian bridges free from the threat of prosecution should she need to stop or stand due to her disability.

///

///

///

///

III.

LEGAL STANDARD

Fed. R. Civ. P. 65(a) allows a court to issue a preliminary injunction on notice to an adverse party. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs seeking a preliminary injunction must show (1) that they are likely to succeed on the merits, (2) that they will likely suffer irreparable harm without a preliminary injunction, (3) that the balance of equities tip in their favor, and (4) that the injunction is in the public's interest. *Id*.

Plaintiffs must establish each of the aforementioned factors to receive a preliminary injunction because "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winte*, 555 U.S. at 24; *see also Munaf v. Geren*, 553 U.S. 674, 689-690 (2008); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion"); *Tahoe Cabin, LLC v. Fed. Highway Admin*., No. 322CV00175RCJCSD, 2022 WL 19296773, at *2 (D. Nev. Oct. 4, 2022). The Ninth Circuit employs the "serious question test" or "'sliding scale' approach to preliminary injunctions…" *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Serious questions are "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Under this approach,

> the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits. This circuit has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." That test was described in this circuit as one alternative on a continuum.

All. for the Wild Rockies, 632 F.3d at 1131. Nonetheless, the "serious questions test" does not excuse the moving party from establishing at least a likelihood of success on the merits and a likelihood of irreparable injury. *See Winter,* 555 U.S. at 20; *Am. Trucking Associations, Inc*.

v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding that any prior decisional law allowing a "lesser standard" than a likelihood of success on the merits is not viable.)

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982).

A district court's grant or denial of a preliminary injunction for abuse of discretion. *Lands Council v. McNair,* 537 F.3d 981, 986 (9th Cir.2008) (en banc). "An abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *All. for the Wild Rockies*, 632 F.3d at 1131 (*quoting Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir.2008)).

IV.

LEGAL ARGUMENT

A. Plaintiffs are not Likely to Succeed on the Merits of the Underlying Action because their Allegations Fail to State a Claim for Relief or Demonstrate that CCC 16.13.030 is Unconstitutional on its Face

A preliminary injunction may only be granted if Plaintiffs "establish a strong likelihood or 'reasonable certainty' that [they] will prevail on the merits at a final hearing." *P. v. Riles*, 502 F.2d 963, 964 (9th Cir. 1974). Of the four factors this Court must consider under the preliminary injunction framework, "[l]ikelihood of success on the merits is the most important…" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (internal quotations omitted). Even under the "sliding scale" approach to preliminary injunctions, if Plaintiffs fail to make a strong showing of likelihood of success on the merits, the Court "need not consider the other factors." *See id.*; *All. for the Wild Rockies*, 632 F.3d at 1131. Plaintiffs bear the burden of persuasion. *Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 869 (9th Cir. 2003) (moving party bears the burden of persuasion); *see Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009).

Plaintiffs, however, cannot meet their heavy burden to justify extraordinary relief because:

- the likelihood of success on the merits is significantly impaired given that Plaintiffs brought a facial challenge to the County's ordinance rather than "as applied" challenge;

- the ordinance does not violate the First Amendment or Nevada Constitutional provisions guaranteeing freedom of speech because the ordinance is content neutral on its face, furthers the important government interest of public safety, and nonetheless still permits a person to engage in First Amendment freedoms on the pedestrian bridges – as long as the person does not stop or stand while doing so;

- Plaintiffs' state and federal due process arguments are insufficient because the ordinance clearly gives ordinary people fair notice of the prohibited conduct even if the words "stop" and "stand" are undefined, and for that reason, does not invite arbitrary enforcement; and, lastly,

- Plaintiffs have simply failed to state a proper claim under the Americans with Disabilities Act.

1. *Plaintiffs' facial challenges are unlikely to succeed because, to overturn the County ordinance based upon speculative circumstances, Plaintiffs must establish that no set of circumstances exist under which the ordinance would be valid.*

To demonstrate a likelihood of success on the merits, Plaintiffs' first task is to justify the Court's intervention when Plaintiffs admittedly have not been cited under the current ordinance nor have suffered any actual deprivation. [ECF No. 1] at 3:2-5:2. The types of facial challenges brought by Plaintiffs in their first four causes of action are heavily disfavored because they 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 (2004) (internal quotation marks and brackets omitted), and declaring ordinances unconstitutional "frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31 (2006). Courts are cautioned to exercise judicial restraint to avoid supplanting the legislature's prerogatives when, as here, Plaintiffs bring facial challenges to ordinances or statutes in the abstract. *See Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part); *see also Dorchy v. Kansas*, 264 U.S. 286, 289–

290 (1924) (opinion for the Court by Brandeis, J.); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Even if this Court wished to entertain the claims raised by Plaintiffs despite the absence of a genuinely justiciable claim before it, Plaintiffs success on the merits is far from guaranteed. They will bear a heavy burden to obtain a favorable result as they 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 (1987). For causes of action not implicating First Amendment overbreadth challenges like Plaintiffs' first and second causes of action, "the fact that the [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

For these reasons, the likelihood of success must be considered significantly implausible right out of the gate, especially given the absence of a genuinely justiciable claim.

2. *Plaintiffs will not be able to succeed on the merits of their federal and state freedom of speech claims because ordinance is content neutral on its face, furthers the important government interest of public safety, and nonetheless still permits a person to engage in First Amendment freedoms on the pedestrian bridges.*

Next, Plaintiffs are also unlikely to prevail on their claim that CCC 16.13.030 unconstitutionally burdens the right to free speech.

Plaintiffs argue that the ordinance restrains the opportunity for people to engage in expressive activities on the pedestrian bridges, which are traditional public fora, and therefore must be narrowly tailored to serve an important government interest while simultaneously leaving open alternative channels for communication. [ECF No. 4] at 14-15. They then characterize Clark County's concerns about crime and pedestrian traffic congestion on the pedestrian bridges as an insignificant interest based upon "speculative and hypothetical dangers that have not occurred," *id.* at 15, allege that the ordinance goes too far by banning *all* "stopping" and "standing" on the pedestrian bridges, *id.*, and argue that the remaining 94% of the sidewalk along Las Vegas Boulevard is not an acceptable alternative channel for communication because speakers on the pedestrian bridges have the opportunity to reach a broader audience and keep people away from vehicular traffic, *id.*

But the Supreme Court has already held 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 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).

Further, the allegation that the County's concern about public safety, order, and the free flow of traffic are "speculative" or "hypothetical" is also negated by the public record. The County did not conjure up the concerns about the pedestrian bridges, but rather commissioned a study by a UNLV criminal justice and public safety professor, William Sousa, PhD, to confirm whether 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 whether they 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.*

Lastly, Plaintiffs miss the mark with regard to their assertion that banning all "stopping" and "standing" on the pedestrian bridges is an overly broad solution to the public safety and traffic concerns on the pedestrian bridges and which does not leave open other alternative channels for communication. But the 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 also 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. While Plaintiffs consider the remaining 94% of the sidewalks to be an inferior public forum in comparison to the pedestrian bridges, "so long as the means chosen are not substantially broader than necessary to achieve the government's interest, … the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Plaintiffs are therefore unlikely to succeed on their free speech claims against Clark County. CCC 16.13.030 does not prohibit any particular speech based on topic or viewpoint as it is applied even-handedly to all people without regard to speech. It is intended to rectify serious public safety and traffic concerns that *presently exist* on the pedestrian bridges. And 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, or engage in such First Amendment activity on the remaining 94% of the sidewalk frontage along Las Vegas Boulevard.

3. *Plaintiffs' state and federal due process arguments are insufficient because the ordinance clearly gives ordinary people fair notice of the prohibited conduct even if the words "stop" and "stand" are undefined, and for that reason, does not invite arbitrary enforcement.*

Plaintiffs' due process claims fare no better. They contend that, because CCC 16.13.030 does not define the words "stop" or "stand," the ordinance is too vague for the ordinary person to understand what conduct is prohibited. [ECF No. 4] at 10-11. But it is axiomatic that undefined words in statutes and ordinances must be given their ordinary meaning. *Finnegan v. United States*, 2 F.4th 793, 804 (9th Cir. 2021). And federal courts have imparted the ordinary meaning to words contained within statutes more significantly muddled than CCC 16.13.030. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In *Grayned v. City of Rockford*, for example, 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. at 108–14. 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 id.* CCC 16.13.030 shares none of the vagueness issues contained in the anti-noise ordinance upheld in *Grayned*.

This lack of ambiguity in the terms "stop" and "stand" similarly provide guidance for enforcement of violations of CCC 16.13.030. 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 Plaintiffs will not succeed on the merits of these claims, either.

4. Plaintiffs have simply failed to state a proper claim under the Americans with Disabilities Act.

Plaintiffs are also unlikely to succeed on their claim that the ordinance violates the Americans with Disabilities Act (the "ADA"). Title II of the ADA prohibits a governmental entity from treating disabled persons less favorably because of their disability *and* 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." 42 U.S.C. §§ 12131(1); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483, 1485 (9th Cir. 1996) (citations and quotations omitted). Plaintiff McAllister, who is disabled, fears that she will be wrongfully

prosecuted under this ordinance simply because she occasionally needs to stop or stand on the pedestrian bridge due to the effects of her disability. [ECF No. 1] at 4:14-21. As a result, she says she intends to stay away from the pedestrian bridges, which constitutes a deprivation of her right to access the public sidewalks in violation of the ADA. *Id.*

But to be actionable under the ADA, the ordinance must disproportionately burden mobility-impaired persons in a manner different from and greater than others due to the unique needs of the disabled. *See McGary v. City of Portland*, 386 F.3d 1259, 1266-67 (9th Cir. 2004). McAllister simply 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*, 81 F.3d at 1484; *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.

Also, McAllister asserts that CCC 16.13.030 violates the ADA because 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, even if it were discriminatory, 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.*

This argument also fails 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).

For these reasons, Plaintiffs' ADA claim is unlikely to succeed on the merits.

B. Plaintiffs are Unlikely to Suffer Irreparable Harm because there is no Indication that Plaintiff McAllister would ever be Cited under the Statute and Plaintiff Sommers may Continue to Engage in his Expressive Conduct Nearby

This Court must next consider whether Plaintiffs can "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The injury cannot be speculative or based upon an unfounded fear; rather, "[t]o obtain injunctive relief… the threat must be actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

Plaintiffs here fail to articulate how they will suffer an irreparable injury in the absence of an injunction. They instead tell this Court that it should *presume* irreparable harm merely from the fact that they have alleged that the County has deprived them of constitutional or statutory rights. *Pl.'s Mot. for a Preliminary Injunction* [ECF No. 4] at 18-19.

Their reliance on presumptions is fatal to their request for an injunction. The Ninth Circuit has held that presumptions of irreparable harm are no longer valid in light of *Winter v.*

Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008). *See Am. Trucking Associations, Inc. v. City of Los Angeles,* 559 F.3d 1046, 1052 (9th Cir. 2009). In *Winter*, the Supreme Court held that it was error for a district court to evaluate whether a preliminary injunction should be granted "only on a 'possibility' of irreparable harm." 555 U.S. at 21. The Court reiterated that the standard for issuing an injunction "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is **likely** in the absence of an injunction" and, further, that "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* (emphasis in the original).

Since *Winter*, the Ninth Circuit has retreated from its prior decisions articulating any "deferential standard for granting preliminary injunctions." *See Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Loc. 200, AFL-CIO*, 611 F.3d 483, 490 (9th Cir. 2010). In fact, in *American Trucking Associations, Inc. v. City of Los Angeles,* the Ninth Circuit expressly stated that:

> To the extent that our cases have suggested a lesser standard, **they are no longer controlling, or even viable**. The district court applied our pre-*Winter* approach, but because it denied relief that, itself, does not require reversal.

559 F.3d at 1052 (emphasis added). District courts within the Circuit have obviously followed suit and have refused to rely on a presumption of irreparable injury even in the case of an alleged constitutional violation. *See, e.g., Enyart v. Nat'l Conf. of Bar Examiners, Inc.,* No. C 09-5191 CRB, 2010 WL 475361, at *6 (N.D. Cal. Feb. 4, 2010), aff'd, 630 F.3d 1153 (9th Cir. 2011) (rejecting, in light of *Winter*, plaintiff's request to presume irreparable harm "when the offending party engages in acts or practices prohibited by federal statute that provides for injunctive relief."); *Banga v. Kanios*, No. 16-CV-04270-RS, 2018 WL 11360090, at *2 (N.D. Cal. Jan. 16, 2018) ("Courts may not presume irreparable injury simply because a defendant violates a statute that authorizes injunctive relief."); *Stanley v. Gallegos*, No. CV 11-1108 GBW/JHR, 2018 WL 3801247, at *9 (D.N.M. Aug. 9, 2018) (presumption of irreparable harm based upon the existence of a constitutional violation "would be inconsistent with the Supreme Court's seminal decision regarding injunctive relief in *Winter*…").

Here, Plaintiffs have solely relied on the existence of a presumption of irreparable harm despite that such presumptions "are no longer controlling, or even viable" after *Winter. Am. Trucking Associations, Inc*., 559 F.3d at 1052. Plaintiffs needed to articulate how "irreparable injury is likely in the absence of an injunction" but did not do so. *Winter*, 555 U.S. at 22.

Nonetheless, Plaintiffs would not have been able to show a likelihood of irreparable injury anyway. Any alleged harm is merely "conjectural or hypothetical." *See Summers.*, 555 U.S. 488. Plaintiff McAllister fears prosecution for stopping or standing on the pedestrian bridges in violation of the County's ordinance although she "has no choice but to stop due to her disability." *Pl.'s Mot. for a Preliminary Injunction* [ECF No. 4] at 18. But the ordinance cannot be enforced against a person who stops or stands on the pedestrian bridge due to a disability. *See Sheehan*, 743 F.3d at 1232, *rev'd in part, cert. dismissed in part* 575 U.S. 600 (2015) (holding 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…") Similarly, Plaintiff Summers fears that he will not be able to engage in protected speech on the pedestrian bridges; but he remains free to do so long as he continues 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.

C. Plaintiffs Cannot Demonstrate that their Interests in the Injunction outweigh the Improvement in Safety and Traffic Flows that will Result from Enforcement of the Subject Ordinance and Delaying its Enforcement actually Harms the Public

Plaintiffs correctly state that "[w]hen the government is a party, the last two factors [in the preliminary injunction framework] (equities and public interest) merge." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021). This analysis requires the Court to determine whether the County and the public "will not be harmed more than plaintiff is helped by the injunction…" *See William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 526 F.2d 86, 87 (9th Cir. 1975). Plaintiffs argue that the balance of the equities and the public interest favor issuing an injunction to ensure that the Plaintiffs' and the public's right to free speech

and accessible sidewalks are preserved. *Pl.'s Mot. for Preliminary Injunction* [ECF No. 4] at 20-21. And they also argue that Clark County and the public will not be harmed by the issuance of the injunction because it "has other options to regulate [the traffic] on the pedestrian bridges" such as its "obstructive use" ordinance, CCC 16.11.020. *Id.* at 20.

On balance, however, this Court should find that the equities and the public interest counsel against the issuance of a preliminary injunction. The pedestrian bridges are vital infrastructure and are necessary to ensure that the public may safely and efficiently cross major roadways. As the popularity of the Las Vegas Strip as a tourist destination has increased, the relative importance of these bridges for public safety has risen alongside the significant upsurge in the number of visitors who walk on Las Vegas Boulevard. At the same time, the pedestrian congestion on the bridges has contributed to a growth in criminal activity as well as engendered a greater risk of significant dangerous conditions, such as crowd crush. The Clark County Commission, as the elected body having jurisdiction over the Las Vegas Strip, "has a strong interest in ensuring the public safety and order [and] in promoting the free flow of traffic" on these pedestrian bridges that cannot be summarily disregarded, as Plaintiffs seem to do. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994). Indeed, while Plaintiffs contend that other County ordinances are available to address the significant public safety and pedestrian traffic on these bridges, it was the implicit judgment of the elected Clark County Commission that this new ordinance was necessary precisely because existing ordinances fail to rectify the significant public safety and pedestrian traffic flow problems caused by the ever-increasing pedestrian congestion on the pedestrian bridges.

The dangerous conditions on the pedestrian bridges will continue to persist should this Court enjoin enforcement of CCC 16.13.030. In contrast, as noted above, Plaintiffs will not be prejudiced if the request for the injunction is denied. Plaintiff Summers—and the public at large—will be able to continue to engage in protected speech on the pedestrian bridges and on the remaining 94% of the sidewalks of the Las Vegas Strip. Plaintiff McAllister—and other similarly disabled persons—will be able to travel on the pedestrian bridges free from the threat of prosecution should she need to stop or stand due to her disability. Given the foregoing, the

interests of Plaintiffs and the public are better served by denying the request for a preliminary injunction.

V.

CONCLUSION

Based on the foregoing, Defendant Clark County humbly requests the Honorable Court decline Plaintiffs' request to enjoin the enforcement of CCC 16.13.030.

DATED this 14th day of March, 2024.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Jeffrey S. Rogan*
JEFFREY S. ROGAN
Deputy District Attorney
Bar No. 10734
JOEL K. BROWNING
Deputy District Attorney
Bar No. 14489
500 South Grand Central Pkwy., Suite 5075
Las Vegas, Nevada 89155-2215
Attorneys for Defendant

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 RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [5] AND MOTION FOR TEMPORARY RESTRAINING ORDER [4]** (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.

Christopher M. Peterson
Tatiana R. Smith
AMERICAN CIVIL LIBERTIES
UNION OF NEVADA
4362 W. Cheyenne Ave.
North Las Vegas, NV 89032
Attorney for Plaintiffs
Peterson@aclunv.org
tsmith@aclunv.org

Margaret A. McLetchie
Leo S. Wolpert
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
efile@nvlitigation.com

/s/ Christine Wirt
An Employee of the Clark County District Attorney's Office – Civil Division