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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA MCALLISTER, an individual; and BRANDON SUMMERS, an individual, Plaintiffs, vs. CLARK COUNTY, a political subdivision of the state of Nevada, Defendant	Case No.: 2:24-cv-00334 **REPLY TO DEFENDANT CLARK COUNTY'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR TEMPORARY RESTRAINING ORDER (ECF NO. 10) AND IN SUPPPRT OF MOTION (ECF NO.4)**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Clark County's Response supports Plaintiffs request for a preliminary injunction. Plaintiffs are likely to succeed on the merits, have established the CCC 16.13.030 causes irreparable harm due to constitutional violations, and the public interest is served by imposing an injunction.

Because CCC 16.13.030 prescribes criminal penalties and implicates a substantial amount of constitutional conduct, the Plaintiffs do not need to show that the ordinance is vague in every potential application. However, Clark County's own brief, interpretating the terms "stop" and "stand" in CCC 16.13.030 differently than the common meaning of those terms to include an exemption not found in the ordinance's text, supports Plaintiffs position that CCC 16.13.030 is unconstitutionally vague.

CCC 16.13.030 also violates the First Amendment. Even if considered content neutral, the ordinance bans the one-on-one communications identified in *McCullen* as core First Amendment activity on pedestrian bridges. In its opposition, Clark County does not explain how CCC 16.13.030 is narrowly tailored to its stated interests in public safety and sidewalk congestion, a specific factual basis to show its stated concerns are more than speculative, or why its current laws are inadequate to satisfy its interests.

Finally, Clark County misconstrues the law governing ADA violations. It fails to acknowledge that fatigue and other difficulties caused by a disability must be accommodated by the government under the ADA. It also erroneously claims that individual officers refusing to enforce CCC 16.13.030 can render the ordinance valid.

Plaintiffs are entitled to the preliminary injunction requested in their motion.

II. Plaintiffs are likely to succeed on the merits.

In moving for a preliminary injunction, Plaintiffs need not promise a "certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the

merits.'" *W. Exploration L.L.C. v. U.S. Dep't of the Interior*, No. 3:15-CV-00491-MMD-VPC, 2016 WL 54671, at *2 (D. Nev. Jan. 5, 2016) (quoting *Nat'l Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)). Clark County incorrectly claims that Plaintiffs' Fourteenth Amendment, First Amendment, and ADA claims are unlikely to succeed. Clark County errs because it misconstrues the legal standards governing Plaintiffs' constitutional and ADA claims, fails to consider the broad sweep of expressly constitutional activities effectively banned by CCC 16.13.030, and asserts invalid interests or interests with inadequate factual support to justify the ordinance's infringement on First Amendment activities.

A. CCC 16.13.030 is unconstitutionally vague.

1. Clark County relies on the wrong standard for facial vagueness challenges.

Clark County claims that Plaintiffs must "establish that no set of circumstances exists under which the [ordinance or statute] would be valid." [ECF No. 10] at 9:3–7 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That standard only applies "[i]f [the challenged] law implicates no constitutionally protected conduct" such as an "economic regulation." *Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1030 (9th Cir. 2020) (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)); *see Salerno*, 481 U.S. at 746 (determining that the Bail Reform Act is "regulatory" rather than "penal"). However,"[i]n a facial vagueness challenge, the ordinance need not be vague in all applications if it reaches a substantial amount of constitutionally protected conduct." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997) (quotation omitted). "The need for definiteness is greater when the ordinance imposes criminal penalties on individual behavior or implicates constitutionally protected rights than when it regulates the economic behavior of businesses." *Id.* Notably, in *Nunez*, the Ninth Circuit applied this standard to a juvenile curfew ordinance that, similar to CCC 16.13.030, implicated protected First Amendment activity and imposed criminal penalties for violating the ordinance. *See id.* at 940–44; 949–51. As CCC 16.13.030 imposes a criminal penalty on individual behavior

and implicates a swath of First Amendment activity, Plaintiffs may bring a facial vagueness challenge.

2. Clark County claims that certain types of stopping and standing are not "stopping" or "standing".

Clark County claims that a person must do "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" to be subject to criminal penalty. [ECF No. 9] at 15:21–23. Considering that this exemption does not appear in CCC 16.13.030, Clark County's position makes the ordinance more, rather than less, indeterminate.

First, Clark County's position establishes that CCC 16.13.030 can be interpreted two different ways: (1) all stopping and standing is criminalized besides stopping for the elevators or (2) some brief and insubstantial stopping and standing is not criminalized. Second, as other courts have previously observed, "brief" and "insubstantial" are vague terms. *See Est. of Sanchez v. Cnty. of Stanislaus*, 2023 U.S. Dist. LEXIS 203673, *68 (Cal. E.D. Nov. 14, 2023) ("While they describe their involvement as 'brief,' the use of such a vague term cannot entitle them to qualified immunity."); *Tex. Med. Ass'n v. U.S. Dep't of Health & Human Servs.*, 2023 U.S. Dist. LEXIS 135310, *16–*17 (Tex. E.D. Aug. 3, 2023) ("[T]he Eleventh Circuit held that an agency's $250 reporting threshold was interpretive because it represented the agency's interpretation of a vague term, 'insubstantial value.'"). Third, "[w]hen a provision contains express exceptions, [statutory construction] counsels against finding additional, implied, exceptions." *Persian Broad. Serv. Global, Inc. v. Walsh*, 75 F.4th 1108, 1113 (9th Cir. 2023) (quotation omitted); as CCC 16.13.030 already expressly offers an exemption for stopping at elevators, the additional exemption offered by Clark County is necessarily excluded. Finally, to support its exemption, the County quotes CCC 16.13.010 in stating "pedestrians would not stop, stand or congregate other than for incidental and fleeting viewing of the Las Vegas Strip from the pedestrian bridge." (ECF No. 9 at 12:8–9), but CCC 16.13.010 is a section entitled "Purpose" describing the bridges' purpose

when first created in 1995. Unlike CCC 16.13.030, no language in CCC 16.13.010 defines a criminal offense. Clark County's interpretation of CCC 16.13.030 supports Plaintiffs' position: CCC 16.13.030 is subject to multiple interpretations causing confusion, as evidenced by exhibits submitted by labor and advocacy groups. *See* Declaration of Michelle Maese, President of SEIU 1107 at ¶ 5–8, attached as Exhibit 1; Declaration of Amy-Marie Merrell, Co-Executive Director, The Cupcake Girls at ¶ 4–7, attached as Exhibit 2; Declaration of Leo Murrieta, Director, Make the Road at ¶ 4–6, attached as Exhibit 3; Declaration of Quentin Savwoir, President of NAACP of Las Vegas at ¶ 4–7, attached as Exhibit 4.

B. CCC 16.13.030 is not narrowly tailored to a significant government interest.

"Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is very limited.'" *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (internal citation and quotation marks omitted). Even if the intent behind CCC 16.13.030 is not to suppress speech, it must still be narrowly tailored.

1. CCC 16.13.030 bans a broad range of protected First Amendment activity that cannot be conducted without stopping, including activities of particular significance identified in *McCullen*.

Clark County concedes that CCC 16.13.030 impacts protected First Amendment activity but claims that First Amendment activity is allowed "so long as [the actor] do[es] not stop or stand while doing so." [ECF No. 9] at 6:28, 9:5–10, 10:12; [ECF No. 10] at 11:16. However, the County ignores traditional First Amendment activities that cannot be performed while moving and thus barred by CCC 16.13.030. For example, Plaintiff Summers cannot continuously move as he plays his violin with amplified sound and solicits donations, which are protected. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019) ("The United States Constitution . . . protect[s] bullhorns, and other sound-amplifying devices, as 'indispensable instruments' of public speech." (quoting *Saia v. People of State of N.Y.*, 334 U.S. 558, 561, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948))); *Santopietro v. Howell*, 73 F.4th 1016, 1024 (9th Cir. 2023) ("[T]he solicitation

of tips is 'entitled to the same constitutional protections as traditional speech.'" (quoting *Am. C.L. Union of Nev. v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006))). Such street performing with amplified sound are protected activities that requires standing still, if only briefly.

To provide a more specific concern, CCC 16.13.030 effectively bans Plaintiff Summers and others from any "one-on-one" communications such as interacting with persons observing him. It also bars people passing by to stop, observe him, and perhaps pull out their wallet to drop a dollar in his violin case. *McCullen* "observed that 'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" 573 U.S. at 488 (quoting *Meyer v. Grant*, 486 U.S. 414, 424, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)). This would necessarily include engaging with people who stop to observe a performance, soliciting donations, leafleting, tabling, proselytizing, or any other active that prompts conversation and the transmission of ideas, yet all would violate CCC 16.13.030. The scope of CCC 16.13.030 reaches a broader range of protected First Amendment activity than permissible under the Constitution.

2. Clark County offers no evidence that CCC 16.13.030 enhances public safety.

As stated in Plaintiffs' Motion, "[the government] is not free to foreclose expressive activity in public areas on mere speculation about danger." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir.). To support its position that CCC 16.13.030 serves public safety, Clark County relies on a report by a William Sousa [ECF No. 10] at 10:1–16, but the County has not attached the report to its Opposition or any other filing. As the County has not provided the report or citations to the specific portions of said report that the County relies upon, *see* LR IA 7-3(e) (requiring references to exhibits or attachments to documents include citations to specific page numbers), the information the report allegedly contains should not be considered by the Court as Plaintiffs cannot meaningfully challenge the report's contents or conclusions.

Procedure aside, the County only offers vague generalities to support its concerns related to congestion and public safety. The County warns of "crowd crush" despite this having never occurred on a pedestrian bridge in Las Vegas.[1] [ECF No. 10] at 18:10–12. Clark County claims that Souza reports more "law enforcement calls" to the bridges than other sidewalks on the Strip, but the County does not provide any information as to what portions of the Strip the bridges were compared to or whether those calls resulted in criminal convictions, arrests, or even formal allegations. [ECF No. 10] at 10:17–22.

3. Existing laws can adequately satisfy Clark County's stated interests.

To show narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech fail to achieve the government's interests, not simply that the chosen route is easier. *McCullen*, 573 U.S. at 495. Clark County claims the same interests as the government in *McCullen*: public safety and unobstructed walkways. [ECF No. 10] at 10:1–8; *McCullen*, 573 U.S. at 492–93. In finding that a Massachusetts law effectively banning people from stopping on sidewalks near abortion clinics was not narrowly tailored, the *McCullen* Court observed that the government had several less burdensome alternative solutions, such as an ordinance prohibiting anyone from intimidating people away from the clinic and an ordinance making it a crime to follow and harass another person. *Id.* at 491, 494 ("In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it."). Clark County has similar provisions at its disposal to resolve its public safety concerns and should not conflate enforcement failures with a need for broad legislation interfering with First Amendment rights. *See* CCC 16.11.020 (banning the obstruction of sidewalks); CCC 12.33.010(e) (banning disorderly conduct "[i]nterfer[ing] with,

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[1] Clark County, *Clark County Board of Commissioners on 2024-01-02 9:00 AM*, Granicus, at 1:10:39 (Jan. 2, 2024), https://clark.granicus.com/player/clip/7626?view_id=28&meta_id=1560080&redirect=true&h=5b266a8fbbb1c483d61adbf851c5457f.

annoy[ing], accost[ing] or harass[ing] any other person which conduct by its nature would tend to incite a disturbance.").

Clark County suggests CCC 16.13.030 is narrowly tailored because it applies to "only a tiny fraction of the total Las Vegas Strip sidewalk system." [ECF No. 10] at 10:26–28. Even accepting the County's calculations as accurate, 6% of the entire Strip sidewalk system is not "tiny" and the County fails to mention that pedestrian bridges comprise 100% of the sidewalk system not immediately adjacent to vehicular traffic. Furthermore, *McCullen* makes clear that the percentage of sidewalk is restricted is not necessarily relevant in determining whether a restriction on a traditional public forum is narrowly tailored. *See generally id.* (finding that a state law that prevented any person from "remaining" within a 35-foot "buffer zone" around reproductive health care facilities was not narrowly tailored without determining what percentage of the sidewalk system was impacted by the ordinance).

C. Clark County's ADA analysis is incorrect.

1. Stopping due to fatigue or to scan for potential obstacles would satisfy the *mens rea* of general intent.

Clark County argues that CCC 16.13.030 will not be enforced against Plaintiff McAllister because "CCC 16.13.030 is a general intent crime, and culpability therefore requires a person to *intentionally* stop or stand." [ECF No. 9] at 20:15–19. Clark County misconstrues the meaning of intent. Most people can control their movements and choose when to stop or stand. A simple intent to stop moving, no matter the reason, would satisfy the *mens rea* of general intent. Obstruction ordinances, such as CCC 16.11.020, are similarly general intent crimes and may be enforced against people that place themselves or their belongings in an obstructive manner, whether they meant to be obstructive or not. It follows that CCC 16.13.030, as a general intent crime, would also be enforced against people that simply stop because, whatever the reason, they must have intended to stop moving on the pedestrian bridge. While a malfunctioning mobility

device may not satisfy general intent, stopping due to fatigue or to look for a path to travel would be sufficient.

2. CCC 16.13.030 cannot be rendered facially valid by individual officers refusing to enforce the law to comply with the ADA.

Clark County argues that because an individual officer can be held liable for enforcing CCC 16.13.030 in a manner that violates the ADA, the ordinance itself is immunized from an ADA challenge. [ECF No. 10] at 14:26–11. However, "[a] plaintiff can bring a facial challenge and an as-applied challenge under the ADA." *W. Easton Two, LP v. Borough Council of W. Easton*, 489 F. Supp. 3d 333, 354 (E.D. Pa. 2020). Plaintiff McAllister brings a facial challenge against CCC 16.13.030, which does not provide exemptions or accommodations for people who must stop or stand due to disability. How individual officers enforce CCC 16.13.030 is irrelevant as to whether CCC 16.13.030 complies with the ADA on its face.

3. Plaintiff McAllister has a unique need to stop on a pedestrian bridge.

Clark County relies on *Crowder v. Kitagawa* and *Rodde v. Bonte* to claim Plaintiff McAllister does not have a unique need to stop on a pedestrian bridge due to her disability. [ECF No. 9] at 19:5–23; 81 F.3d 1480 (9th Cir. 1996); 357 F.3d 988 (9th Cir. 2004). Clark County, however, misinterprets these cases, which do not support Clark County's position. The *Rodde* court held "[s]tate action that disproportionately burdens the disabled because of their unique needs remains actionable under the ADA." *Rodde*, 357 F.3d at 998. The *Crowder* court held that:

> [b]ecause of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii's quarantine effectively denies these persons . . . meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others. The quarantine, therefore, discriminates against the plaintiffs by reason of their disability.

Crowder, 81 F.3d at 1484. Just as the visually impaired have a unique dependence upon guide dogs, those unable to walk have a unique dependence upon mobility devices. Exceptions to otherwise neutral regulations are necessary to ensure unique needs are accommodated.

Clark County asserts that Plaintiff McAllister's dependence on her wheelchair does not present a unique need, including the need to occasionally stop. [ECF No. 9] at 20:3–5. However, Plaintiff McAllister provided three unique reasons to stop due to her disability in her declaration. [ECF No. 1-2] at 4. This included stopping because her wheelchair malfunctioned, because she needs to rest when her arms are tired due to operating her wheelchair, and because she has limited visibility in pedestrian traffic due to her wheelchair's low vantage point. [ECF No. 1-2] at 4. While an abled person may want to stop from fatigue for a number of reasons, Plaintiff McAllister has a unique need to stop from fatigue because she must use her arms operate her wheelchair due to her disability. While a person without mobility challenges may need to stop to orient themselves, Plaintiff McAllister has a unique need to orient herself because she has a lower vantage point due to her disability. As such, Plaintiff McAllister satisfies both *Crowder* and *Rodde*.

III. Plaintiffs have provided sufficient showing of irreparable injury by establishing that CCC 16.13.030 deprives Plaintiffs of their constitutional rights.

Clark County argues that Plaintiffs cannot demonstrate that irreparable harm is *likely* without injunctive relief. [ECF No. 10] at 17:1–4. However, the Ninth Circuit recently held that courts should "presume that a constitutional violation causes a preliminary injunction movant irreparable harm." *Baird v. Bonta*, 81 F.4th 1036, 1046 (9th Cir. 2023) (emphasis omitted).

> It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation.

Id. at 1040 (reversing district court for failing to apply the proper preliminary injunction standard for a case raising a constitutional challenge under the Second Amendment). Further, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *TGP Communs., L.L.C. v. Sellers*, 2022 U.S. App. LEXIS 33641, *14–15 (9th Cir. Dec. 5, 2022) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). "[W]hen an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary." *Baird*, 81 F. 4th at 1042 (ellipsis in the original).

Clark County claims that irreparable harm must be unlikely because Plaintiffs "solely relied on the existence of a presumption of irreparable harm." [ECF No. 10] at 17:1. This misconstrues Plaintiffs' position. As stated in his declaration, Plaintiff Summers plays a violin using amplified sound on the pedestrian bridges. [ECF No. 1-2], Ex. 2, Declaration of Brandon Summers at 2 ¶ 5–8. As he cannot play his violin using a speaker while simultaneously moving, CCC 16.13.030 necessarily infringes on his First Amendment activities. Furthermore, conducting those activities on a pedestrian bridge as he has done for years would necessarily subject himself to potential prosecution, implicating his Due Process rights.

It is immaterial, however, for the parties to argue how *likely* irreparable harm may be to occur. Plaintiffs have established that irreparable harm will occur by showing that CCC 16.13.030 violates their constitutional rights. If the Court decides that Plaintiffs are likely to succeed on the merits, that demonstrates that Plaintiffs have suffered and continue to suffer irreparable harm. *See Baird*, 81 F.4th at 1040.

IV. There is no evidence that an injunction would negatively impact public safety.

Clark County claims there is an immediate public safety concern that cannot be addressed without the use of CCC 16.13.030, citing the "dangerous conditions" on the bridge. [ECF No. 10] at 18:5–23. Clark County ignores that dangerous conditions also exist on the grade level sidewalks and other alternative paths. Clark County admits there are other ordinances to address

public safety issues yet claims CCC 16.13.030 is necessary to address these concerns. Clark County, however, contradicts itself by suggesting that only stops impeding traffic will result in a violation of CCC 16.13.030, effectively duplicating obstruction ordinance CCC 16.11.020. [ECF No. 9] at 15:21–23. The pedestrian bridges have existed since 1995 without CCC 16.13.030 and Clark County fails to provide justification for why the pedestrian bridges are now deemed dangerous, except for increased calls for service. [ECF No. 4] at 15:23–25; [ECF No. 10] at 10:17–19. Clark County does not indicate how many of these calls for service resulted in arrests or citations, who is making these calls, or whether these calls even described a crime. Clark County selectively presents data solely on increased calls for service, rather than revealing the outcomes of these calls or comprehensive statistics on violent crime, allowing Clark County to create a narrative that benefits its position.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Honorable Court grant Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction.

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Dated this day of March 26, 2024.

/s/Christopher Peterson

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on March 26, 2024. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished on all participants by:

☒Court E-service system

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*/s/*Suzanne Lara
An employee of ACLU of Nevada