CHRISTOPHER M. PETERSON
Nevada Bar No.: 13932
TATIANA R. SMITH
Nevada Bar No.: 16627
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
4362 W. Cheyenne Ave.
North Las Vegas, NV 89032
Telephone: (702) 366-1226
Facsimile: (702) 830-9205
Emails: peterson@aclunv.org
tsmith@aclunv.org

MARGARET A. MCLETCHIE
Nevada Bar No.: 10931
LEO S. WOLPERT
Nevada Bar No.: 12658
MCLETCHIE LAW
602 South Tenth Street
Las Vegas, NV 89101
Telephone: (702) 728-5300
Fax: (702) 425-8220
Email: efile@nvlitigation.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT COURT 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 Number: 2:24-cv-00334 **PLAINTIFFS' RESPONSE TO DEFENDANT CLARK COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Plaintiffs LISA MCALLISTER and BRANDON SUMMERS files this response to Defendant Clark County's Motion to Dismiss Plaintiff's Complaint requesting that the Court deny the Defendant's motion. Plaintiffs' response is made based on the attached Memorandum of Points

and Authorities, the papers and pleadings on file in this action, and any oral argument made in support of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs have sufficiently pled all claims in their Complaint pursuant to the First and Fourteenth Amendments, their respective Nevada counterparts, and the ADA.

Under Plaintiffs' First and Second Causes of Action, Plaintiffs have sufficiently pled claims pursuant to the Fourteenth Amendment and the equivalent provision in the Nevada Constitution. 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, interpreting the terms "stop" and "stand" in CCC 16.13.030 differently than the common meaning of those terms, and even the proposed amicus brief filed by the Nevada Resorts Association, supports Plaintiffs position that CCC 16.13.030 is unconstitutionally vague.

Under Plaintiffs' Third and Fourth Causes of Action, Plaintiffs have sufficiently pled claims pursuant to the First Amendment and the equivalent provision under the Nevada Constitution. As Plaintiffs state in their complaint, CCC 16.13.030 prevents First Amendment activity, including but not limited to one-on-one communications identified in *McCullen* as significant First Amendment activity, on pedestrian bridges. Plaintiffs also allege that (1) Clark County has no legitimate interest justifying this limitation on protected activity, (2) if there was a legitimate interest CCC 16.13.030 is not narrowly tailored to that interest, and (3) CCC 16.13.030 does not provide adequate alternative channels for the activities; all these allegations must be presumed to be true in the context of a motion to dismiss. Notably, Clark County has failed to explain how CCC 16.13.030 is narrowly tailored to its stated interests in public safety and sidewalk congestion, offer a specific factual basis to show its stated concerns are more than speculative, show how there are ample alternative channels of communication comparable to the unique pedestrian bridges, or explain why its current laws are inadequate to satisfy its interests.

Under the Fifth Cause of Action, Plaintiff McAllister has sufficiently pled a claim pursuant to the ADA. Again, all allegations in McAllister's Complaint are presumed to be true, and the Complaint adequately alleges that she has a unique need related to stopping on the pedestrian bridges related to her disability. Clark County misconstrues the law governing ADA violations and 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.

Because the underlying claims were sufficiently pleaded in the Complaint, Plaintiffs request for declaratory and injunctive relief do not warrant a dismissal.

II. Legal Standard

A motion to dismiss "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a 12(b)(6) motion to dismiss, the Court must accept as true all material allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150, n. 2 (9th Cir. 2000). The Court must also construe the allegations of the complaint in the light most favorable to the nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). While it is true that, in light of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a complaint must state "plausible" claims, that does not require a court to determine whether facts alleged are in fact true when considering a motion to dismiss. "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citation and quotation marks omitted).

III. Argument

A. Plaintiffs' have sufficiently pled that CCC 16.13.030 is unconstitutionally vague.

Accepting all allegations as true, Plaintiffs have sufficiently pled that CCC 16.13.030 is unconstitutionally vague because Clark County's briefing makes clear that there are multiple ways to the interpret "stop" and "stand" as used in the ordinance, the County's interpretation of "stop" and "stand" to exempt "brief" and "insubstantial" stops necessarily invites discriminatory enforcement. Furthermore, the County's adoption of Sheriff McMahill's statements cement that discrimination will in fact occur. Clark County also offers the wrong standard in its motion in regards the standard for unconstitutional vagueness in the context of a criminal ordinance like CCC 16.13.030.

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. 9] at 6:13–15 (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"). "In 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). Plaintiffs allege that CCC 16.13.030 reaches a substantial amount of constitutional activity, and in the context of a motion to dismiss, those allegations are presumed true. *See* [ECF No. 1] at 16 ¶ 99 – 100, 16 ¶ 110–13.

Furthermore, "[t]he 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.* Thus, "[t]o avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Id.* (c*iting Kolender v. Lawson*, 461 U.S. 352,

357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)). In *Nunez*, the Ninth Circuit applied this standard to a juvenile curfew ordinance that like CCC 16.13.030, implicated protected First Amendment activity and imposed criminal penalties for violating the ordinance. *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. As set forth below, they sufficiently allege a facial vagueness challenge because the Plaintiffs allege adequate facts in their complaint to allege a facial due process violation.

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. This gloss on CCC 16.13.030 supports Plaintiffs' position that the ordinance is vague because it (1) establishes that CCC 16.13.030 is subject to multiple interpretations, (2) interjects more vague language into CCC 16.13.030, and (3) shows that the County interprets its ordinances at odds with established principles of statutory interpretation.

Clark County's understanding of CCC 16.13.030 establishes that the ordinance can be interpreted at least two different ways: (1) all stopping and standing is criminalized besides stopping for the elevators or (2) "brief" and "insubstantial" stopping and standing is also exempt from CCC 16.13.030 though this exemption is not written into the ordinance. Despite the County's generalized claim that "it is understood"[1] what is prohibited under CCC 16.13.030, [ECF No. 9] at 15:21–23, Clark County's interpretation of CCC 16.13.030 supports Plaintiffs' position that CCC 16.13.030 is subject to multiple interpretations causing confusion, as evidenced by exhibits submitted by labor and advocacy groups. *See* [ECF No. 15-1] at 5–6 (Declaration of Michelle Maese, President of SEIU 1107); [ECF No. 15-1] at 10–11 (Declaration of Amy-Marie Merrell, Co-Executive Director, The Cupcake Girls); [ECF No. 15-1] at 14–15 (Declaration of

[1] Using the passive voice, the County fails to say *who* understands.

Leo Murrieta, Director, Make the Road); [ECF No. 15-1] at 18–19 (Declaration of Quentin Savwoir, President of NAACP of Las Vegas).

When read in conjunction with the County's briefing, the Nevada Resort Association's proposed amicus brief supports Plaintiffs' position that there are multiple possible interpretations. The proposed brief asserts that the terms "stop" and "stand" as used in CCC 16.13.030 are clear because "[f]rom a young age, a person of ordinary intelligence understands what it means to 'stop' and 'stand.'" [ECF No. 11] at 20:6–7. Indeed, ask a child if a person that stood still for a "brief" period, for example three seconds, stopped or did not stop, the child would certainly say they stopped. The ordinary definition of "stop" is understood at a young age to encompass any lack of movement, even if "brief" or "insubstantial." The Nevada Resort Association makes no effort to reconcile the plain language of CCC 16.13.030 and the additional exceptions later provided by public officials, which is where the vagueness problem lies, arguing that "[t]he direction is clear: it is unlawful for any person to stop or stand within a Pedestrian Flow Zone" in agreement with Plaintiffs. [ECF No. 11] at 20:11–12. Those on the same side of this case cannot even agree as to what conduct is encompassed by the terms "stop" and "stand" as used in CCC 16.13.030. By ignoring the additional exceptions provided by public officials, the Nevada Resort Association argues for a different application of CCC 16.13.030 than Clark County, showcasing the confusion surrounding the terms "stop" and "stand" as meant in CCC 16.13.030.

Even if Clark County's interpretation was the viable alternative, 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.'"). Clark County's explanation that "brief" and "insubstantial" stops are not encompassed by the term "stop" as used in CCC 16.13.030 because traffic is not impeded only further muddies the meaning of the terms as used in CCC 16.13.030.

"When 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). Clark County claims that it's statements creating additional exceptions to CCC 16.13.030 "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." [ECF No. 9] at 15:14–16. Because CCC 16.13.030 already expressly offers an exemption for stopping at elevators, the additional exemption offered by Clark County is necessarily excluded.

Relying on *Grayned v. City of Rockford*, Clark County suggests that the terms "stop" and "stand" are not vague in the context of CCC 16.13.030. [ECF No. 9] at 14:15–27; 408 U.S. 104 (1972). In *Grayned*, the Supreme Court determined that the term "tends to disturb," which might otherwise be unconstitutionally vague, was sufficiently modified by its use in a school context to render it constitutionally clear. 408 U.S. at 110–12. Unlike sidewalks, constitutional rights are regularly modified in the context of schools. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 396–97 ("[W]e have held that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and that the rights of students must be applied in light of the special characteristics of the school environment." (quotation omitted)); *N.J. v. T.L.O.*, 469 U.S. 325 (1985) (modifying traditional Fourth Amendment search standard in school setting). Constitutional rights have not been modified in the same way for sidewalks, and Clark County does not offer any authority indicating that legal terms, including "stop" and "stand," change on pedestrian bridges that are part of a sidewalk system.

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. However, 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.

3. Clark County's interpretation of CCC 16.13.030 necessarily requires discriminatory enforcement, and Clark County's adoption of Sheriff McMahill's statement shows that is the County's intent.

Clark County correctly states that "[o]rdinary 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.'" [ECF No. 9] at 16:10–14 (quoting *United States v. Evans*, 333 U.S. 483, 486–87, 68 S.Ct. 634, 92 L.Ed. 823 (1948). However, Clark County has made clear that law enforcement should *not* follow the plain language of CCC 16.13.030 by reading an exemption for "brief" and "insubstantial" stops into the text of CCC 16.13.030 for people engaging in activities that the County deems acceptable, such as taking photographs. Applying this gloss, law enforcement must determine what constitutes a "brief stop" and what constitutes a "stop" as that is where Clark County has drawn the line between criminal and innocent activity. Law enforcement, prosecutors, and judges would therefore be defining crimes and filling language gaps so large that doing so becomes essentially legislative by ignoring the plain language of CCC 16.13.030 and attempting to follow the unclear standards created by Clark County as to what is allowed and what is not under CCC 16.13.030.

That Clark County adopts Sheriff McMahill's statement clarifies that the County intends law enforcement to engage in discriminatory enforcement. Sheriff McMahill said: "Are we going to stop people for stopping and taking a picture at all? Absolutely not. *But those chronic individuals up there that are preying on our tourists and our locals that are visiting the Strip (are) just not going to have a place to do it anymore.*"[2] [ECF No. 1] at 9 ¶52 (emphasis added). This statement clearly indicates that CCC 16.13.030 will be selectively enforced against an undefined category of "chronic individuals" that stop or stand on the pedestrian bridges while people stopping or standing to take pictures will be exempt. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1157 (9th Cir. 2014) ("[The ordinance] has paved the way for law enforcement to target the homeless and is therefore unconstitutionally vague.").

The Nevada Resort Association's proposed amicus brief inadvertently agrees with Plaintiffs, again, on this point. The Nevada Resort Association, again, makes no effort to reconcile

[2] Taylor R. Avery, *Police Won't Stop Photos on Strip Bridges Under New Law, Sheriff Says*, Las Vegas Review-Journal (Jan. 17, 2024), https://www.reviewjournal.com/local/the-strip/ban-on-stopping-on-strip-pedestrian-bridges-wont-be-enforced-for-weeks-2983573 (emphasis added).

the plain language of CCC 16.13.030 and the additional statements provided by public officials, arguing that "[t]he direction to law enforcement under the Ordinance is clear and approaching meticulous specificity: it is unlawful for any person to stop or stand within a Pedestrian Flow Zone" with which Plaintiffs agree. [ECF No. 11] at 21:13–15. It further argues that "[t]he Ordinance's direction is therefore sufficiently clear to not delegate any policy decisions and it provides very little wiggle room for a responding Officer's subjectivity." [ECF No. 11] at 21:15–16. Wiggle room, however, is exactly what Clark County encourages. By publicizing multiple exceptions to the plain language of CCC 16.13.030, law enforcement officers are now required to use their subjective discretion to determine, for example, whether a stop was "brief" enough, whether it matters that a person stopped but did not impede traffic, or whether to exempt a person stopped for several minutes because they took a few pictures. Once again, those on the same side of this case cannot even agree as to the guidelines law enforcement must follow when enforcing CCC 16.13.030. By ignoring the additional exceptions provided by public officials, the Nevada Resort Association argues for a different method of enforcement of CCC 16.13.030 than Clark County, showcasing the confusion surrounding the enforcement of CCC 16.13.030.

B. Plaintiffs sufficiently pled violations of the First Amendment of the United States Constitution and its equivalent under Nevada law.

"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) (quoting *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983)).

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency."

Id. at 486 (quoting *Riley v. Nat'l Fed'n of Blind of N. C., Inc.*, 487 U.S. 781, 795, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* at 489.

Plaintiffs clearly and adequately allege that CCC 16.13.030 effectively bans activities protected under the First Amendment. The County has not even established that it is entitled to intermediate scrutiny at this point as Plaintiffs allege there is no significant interest justifying these restrictions. In turn, the burden is on the County to establish that it has a legitimate interest justifying CCC 16.13.030's impact on First Amendment activity, that the ordinance is properly tailored to those interests, and ample alternative means are available.

1. Plaintiffs have sufficiently pled that 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*.

Plaintiffs have stated both generally and with specificity in their complaint that CCC 16.13.030 infringes on First Amendment Activity. [ECF No. 1] at 16 ¶ 99, 17 ¶ 109–13. Plaintiffs have also identified statements by Clark County Commissioners stating that they expect CCC 16.13.030 to impact people engaging in First Amendment activity. [ECF No. 1] at 7 ¶ 40. Clark County even 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. As this is a Motion to Dismiss, these allegations must be accepted as true.

That said, Clark County ignores in its motion to dismiss traditional First Amendment activities that cannot be performed while moving and are 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 activities. *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))). The ordinance also prevents pedestrians from stopping to observe his performance, an equally protected activity. *See Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak *and listen*, and after reflection, speak *and listen* once more." (emphasis added)). Street performing with amplified sound, soliciting donations, and enjoying the performance are protected activities that require standing still.

McCullen, a case cited by the Nevada Resort Association in its proposed *amicus curiae* brief, [ECF No. 11] at 22:13–18, determined that while the First Amendment covers many types of activity, "some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others." *McCullen*, 573 U.S. at 488. *McCullen* also "observed that 'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" *Id.* (quoting *Meyer v. Grant*, 486 U.S. 414, 424, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988)). The *McCullen* Court found a statute that made "it a crime to knowingly stand on a 'public way or sidewalk'" nearby abortion clinic entrances, like CCC 16.13.030's prohibition on stopping and standing on certain sidewalks, prevented Petitioners from meaningful engagement with passersby in violation of the First Amendment.[3] *Id.* at 469, 489, 497.

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. One-on-one communications would necessarily include engaging with people who stop to observe a performance, soliciting donations, leafleting, tabling, proselytizing, or any other activity 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.

[3] The activities deemed to be protected in *McCullen* would effectively be banned from the pedestrian bridges under CCC 16.13.030.

2. Plaintiffs have sufficiently alleged that CCC 16.13.030 serves no significant interest, is not narrowly tailored to any such interest, and does not offer alternative channels of communication.

Plaintiffs allege that (1) CCC 16.13.030 serves no significant interest, (2) if there is an interest the ordinance is not tailored to that interest, and (3) even if there was tailoring, there are insufficient alternative channels of communication. [ECF No. 1] at 18 ¶ 122, 19 ¶ 125–126. As this is a motion to dismiss, Plaintiffs allegations are assumed to be true regardless of what the County claims in its briefing. And at this stage, it is not clear that the County is even entitled to intermediate scrutiny. *See United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995) ("[A] facially neutral law is nonetheless subject to strict scrutiny if it is an obvious pretext for discrimination."); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 736 (2010) (J. Alito, dissenting) ("The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.").

Considering that the County bears the burden to establish that a law limiting protected activities satisfies the requisite scrutiny, and it has already acknowledged that CCC 16.13.030 burdens First Amendment activity, the County's *best-case* scenario is a factual dispute[4] not entitled to dismissal.

3. Even if the Plaintiffs were not entitled to the assumption that their allegations were true, 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. 1990). To support its position that CCC 16.13.030 serves a public safety interest, Clark County relies on a report by a William Sousa [ECF No. 9] at 3:1–16, 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

[4] After all, if the County fails to dispute Plaintiffs allegations, Plaintiffs are entitled to judgement in their favor.

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.[5] [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. 9] at 3:16–21. The report allegedly further warns of "captive audience[s]" on the pedestrian bridges, although the Ninth Circuit has specifically determined that the government's interest in safeguarding such audiences in traditional public forums is not a significant interest. [ECF No. 9] at 3:16–19; *see Berger v. City of Seattle*, 569 F.3d 1029, 1056 (9th Cir. 2009) ("No governmental interest—and certainly not an interest in protecting [individuals in public forums] from unwanted communications—could justify such a sweeping ban [of First Amendment activities].").

Clark County cannot rely on alleged public safety concerns that could possibly occur at some point in the future and are not specific to the pedestrian bridges. If so, Clark County could restrict constitutional rights in any part of the County by creating various potential public safety concerns that are unlikely to occur. Clark County also cannot base the criminalization of protected First Amendment activities on concerns already determined to be insignificant.

4. 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. 9] at 4:11–13;

[5] 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.

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, annoy[ing], accost[ing] or harass[ing] any other person which conduct by its nature would tend to incite a disturbance"). If CCC 16.13.030 is only meant to be enforced when a person obstructs traffic as Clark County claims, [ECF No. 9] at 15:21–23, it would be a duplicate of Clark County's existing obstruction ordinance, CCC 16.11.020. In that case, CCC 16.13.030 becomes redundant as it criminalizes activity already addressed in CCC 16.11.020. Clark County cannot enact a blanket ban on stopping and standing to address the same concerns already addressed by an existing ordinance. *See McCullen*, 573 U.S. at 494 ("[T]he Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.").

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. 9] at 12:27–28. 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 that 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). Finally, CCC 16.13.030 is more expansive than the statute in *McCullen* as that statute was only in effect during clinic business hours while CCC 16.13.030 bans stopping and standing on pedestrian bridges at all hours of every day.

5. There are inadequate alternative channels for communication.

Clark County claims CCC 16.13.030 leaves open ample alternative channels of communication, while also admitting that the pedestrian bridges are "unique in their function from the rest of the sidewalk system." [ECF No. 9] at 3:11–16, 4:14–17. In *McCullen*, the government argued that Petitioners had ample alternative channels to protest outside of the buffer zones. *McCullen*, 573 U.S. at 489. The Supreme Court found that this argument "misses the point" because Petitioners wanted to have calm conversations with those entering clinics as counselors, not shout at them from several feet away as protesters. *Id.* Because the protected First Amendment activity with which Petitioners wished to engage was completely prohibited (during clinic business hours) specifically in the area where they wanted to engage in the activity, the Supreme Court found "[i]t is thus no answer to say that petitioners can still be 'seen and heard' by women within the buffer zones." *Id.* at 472, 489.

Just as in *McCullen,* Platintiff Summers and others engaging in First Amendment activities choose the pedestrian bridges as their venue due to their unique nature. The pedestrian bridges are unique to the grade level sidewalks because their visibility is increased due to their elevated structure as bridges across Las Vegas Boulevard. The pedestrian bridges also offer a unique space away from an accidental bump or shove into adjacent traffic. Clark County ignores the dangers of grade level sidewalks, despite data showing there were 15 fatal crashes on or adjacent to the Strip between 2017 and 2021[6] as well as 2,257 traffic crashes on or adjacent to Las Vegas

[6] *Nevada Fatal Crash Data*, Nev. Dep't of Transp. https://app.powerbi.com/view?r=eyJrIjoiZThjYmFlMzQtNjhlMC00MzdkLWJkOWYtOTA0N2M0ZWZjZmVjIiwidCI6IjdlMjIwZDMwLTBiNTktNDdlNS04YTgxLWE0YTlkOWFmYmRjNCIsImMiOjN9 (last visited Mar. 22, 2024).

Boulevard between 2015 and 2020.[7]

C. Plaintiff McAllister has sufficiently pled her ADA claim.

"The purpose of the ADA's reasonable accommodation requirement is to guard against the facade of 'equal treatment' when accommodations are necessary to level the playing field." *McGary v. City of Portland*, 386 F.3d 1259, 1267 (9th Cir. 2004). "In the context of disability, therefore, equal treatment may not beget equality, and facially neutral policies may be, in fact, discriminatory if their effect is to keep persons with disabilities from enjoying the benefits of services that, by law, must be available to them." *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998). There exists a factual dispute as to whether CCC 16.13.030 denies Plaintiff McAllister access to the pedestrian bridges because of her disability, favoring the denial of Clark County's motion to dismiss. *See Cohen v. City of Culver*, 754 F.3d 690, 693 (9th Cir. 2014) ("We conclude that a genuine dispute of material fact exists as to whether the City denied Cohen access to the sidewalk by reason of his disability."). Clark County presents an outlandish interpretation of ADA jurisprudence demonstrating Clark County's lack of understanding as to the purpose of the ADA and what constitutes a valid ADA claim.

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. It follows that a person who intentionally stops moving due to fatigue or to look for a path to travel would be liable under CCC 16.13.030.

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

[7] *Traffic Crashes*, City of Las Vegas, https://opendataportal-lasvegas.opendata.arcgis.com/datasets/06f4e6ef75bf493baf661ed96df00385/explore?showTable=true (last visited Mar. 22, 2024).

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. 9] at 21:25–28. 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); *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007) (observing "[t]he hearing standard at issue here is a *facially discriminatory* qualification standard because it focuses directly on an individual's disabling or potentially disabling condition" when analyzing a UPS hiring policy that effectively excluded deaf individuals from employment under the ADA). 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 sufficiently alleged a unique need to stop on a pedestrian bridge related to her disability.

Plaintiff McAllister has stated in the complaint that she is a qualified individual with a disability under the ADA because she cannot walk or stand. [ECF No. 1] at 22 ¶ 142; [ECF No. 9] at 18:13–15. Plaintiff McAllister and Clark County agree that the County is the public entity responsible for the pedestrian bridges as part of the public sidewalk system. [ECF No. 1] at 22 ¶ 143–45; [ECF No. 9] at 2:21–24, 16:21–25. Plaintiff McAllister alleged three different reasons why she would stop moving on the pedestrian bridges in violation of CCC 16.13.030 due to her disability. [ECF No. 1] at 22 ¶ 147. Under the plain language of CCC 16.13.030, there are no exceptions for a violation that occurs as a result of a person's disability. CCC 16.13.030. As this is a Motion to Dismiss, these allegations must be accepted as true, and McAllister has sufficiently alleged a violation of the ADA.

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,this is at best for the County a factual dispute as Plaintiff McAllister has alleged that she must stop due to her disability. [ECF No. 1] at 22 ¶ 147. 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] at 22 ¶ 147.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 to 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*.

Clark County ensures that CCC 16.13.030 will continue to disproportionately burden Plaintiff McAllister and other people with disabilities as law enforcement officers must use their discretion to decide whether someone stopped because of their disability and should be cited under CCC 16.13.030, setting the precedent here that wheelchair users stopping from fatigue due to pushing themselves with their arms are not exempt from CCC 16.13.030.

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CONCLUSION

Plaintiffs request that the Court deny the Defendant's Motion to Dismiss, as described above.

Dated: March 28, 2024

AMERICAN CIVIL LIBERTIES UNION OF NEVADA

/s/ *Christopher Peterson*
CHRISTOPHER M. PETERSON
Nevada Bar No. 13932
4362 W. Cheyenne Ave.
North Las Vegas, NV 89032
Telephone: (702) 366-1226
Facsimile: (702) 830-9205
Email: peterson@aclunv.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT CLARK COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on March 28, 2024.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☐ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

*/s/ Christopher Peterson*_____
An employee of ACLU of Nevada