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-JAD-NJK **DEFENDANT CLARK COUNTY'S REPLY TO PLAINTIFFS' RESPONSE [17] TO ITS MOTION TO DISMISS [9]**

COMES NOW, Defendant CLARK COUNTY (hereinafter "Clark County" or "Defendant"), through its attorney, STEVEN B. WOLFSON, District Attorney, by JEFFREY S. ROGAN and JOEL K. BROWNING, Deputy District Attorneys, and hereby files the instant Reply to Plaintiffs' Response [17] to its Motion to Dismiss [9]. This Reply is brought pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and is based upon all the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and the oral arguments of counsel, if any.

MEMORANDUM AND POINTS OF AUTHORITIES

LEGAL ARGUMENT

A. CCC 16.13.030 is not Unconstitutionally Vague

Plaintiffs erroneously contended that the County applied the wrong standard to Plaintiffs' facial challenge on vagueness grounds because they allege the ordinance involved a prohibition of a

substantial amount of constitutionally protected activity. [17] at 3:27-5:7.

CCC 16.13.030 is not unconstitutionally vague, however, as: (1) the subject ordinance does not prohibit a substantial amount of constitutionally protected activity; and, even if it did, (2) the offense is defined with sufficient definiteness such that ordinary people can understand; and (3) enforcement of the ordinance does not require discriminatory enforcement.

1. CCC 16.13.030 does not Implicate a Substantial Amount of Constitutional Activity and, Accordingly, the Plaintiffs' Proffered Standard is Incorrect

Plaintiffs alleged in their response [17] that Clark County argued the wrong standard because Plaintiffs "allege[d] that CCC 16.13.030 reaches a substantial amount of constitutional activity." [17] at 4:18-22. In support of this position, Plaintiffs' have cited to *Nunez by Nunez v. City of San Diego*. *Id*. at 4:17-22, 5:1-7. The standard in *Nunez*, however, does not apply to CCC 16.13.030 because, unlike the ordinance at issue in *Nunez*, CCC 16.13.030 has a de minimis impact on constitutionally protected speech.

In *Nunez*, the City of San Diego passed a juvenile curfew ordinance that made it unlawful for any minor "to loiter, idle, wander, stroll or play" outside their homes between the hours of 10:00 P.M. and sunrise— functionally trapping minors in their home for more than 8 hours of any given day unless supervised by a parent or guardian. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 938–39 (9th Cir. 1997).

The ordinance in *Nunez* impacted an inordinate amount of constitutionally protected activity by preventing minors from volunteering at homeless shelters, attending concerts, meeting with friends at their homes or in coffee houses, stopping at a restaurant to eat dinner after a school auditioning for theater parts, attending ice hockey practice, practicing astronomy, and dancing at an under–21 dance club, etc. *Nunez* at 114 F.3d at 939. It also interfered with the parents' constitutional rights to raise their children as they saw fit. *Id*. The ordinance was akin to a complete detention of approximately 20% of the population for more than one-third of the day and, accordingly, the Court in *Nunez* couldn't help but find that the ordinance impacted a substantial amount of constitutional activity.

CCC 16.13.030, however, only touches on an infinitesimal amount of constitutionally protected activity. First, CCC 16.13.030 applies only to pedestrian bridges located on the Strip—not

the entire jurisdiction like the ordinance in *Nunez*. Under CCC 16.13.030, all people can still access pedestrian bridges at all hours of the day. They can protest, perform, march, carry signs or engage in other forms of protected speech. *Id*. The only thing that is prohibited is stopping or standing in this extremely unique, bottle-necked space. *Id*.

Notably, in *Nunez* the ordinance was intended to curtail gang activity and so the court found that the sweep of the ordinance was entirely too broad—whereas in this case the County's concern is crime and congestion on pedestrian bridges expressly identified in the ordinance and, accordingly, the ordinance is only directed at those limited unique Pedestrian Flow Zones and the object of concern identified therein. *Nunez,* 114 F.3d at 946; *see also* CCC 16.13.010; CCC 16.13.020.

As CCC 16.13.030 does not implicate a substantial amount of constitutional activity, the Court should not apply the *Nunez* standard proffered by Plaintiffs in their response [17].

2. Plaintiffs' Attempt to Create Confusion Regarding the Terms "Stopping" or "Standing" are Unavailing and Unpersuasive as Those Terms are Easily Understood

Plaintiffs seek to confuse the Court about what is entailed in a constitutional vagueness analysis by obfuscating the issues and inviting the Court to review evidence beyond the scope of the instant motion to dismiss. *See*, *e.g.*, [17] at 5:8-7:26 (attacking Clark County's use of the "passive voice," introducing impermissible declarations from leaders of local political organizations, and attempting to conflate the County's motion with a separate one filed by the Nevada Resorts Association). Plaintiffs do this to create the appearance of confusion over the terms "standing" or "stopping" in such a way that invites the Court to depart from a traditional constitutional analysis.

In this regard, Plaintiffs' response [17] spends so much time walking in circles that it only briefly stops to address the case law cited by Clark County in its motion [9]. [17] at 7:9-21. Plaintiffs misinterpret the opinion in *Grayned* as being one that allows for a lax analysis of constitutional vagueness because constitutional rights in public schools are not coextensive with the rights in other settings. *Id*. But the cases cited by Plaintiff stand for the proposition that *minors* in public school are not necessarily entitled to the same rights as adults in public settings. *Id*; *see also Morse v. Frederick*, 551 U.S. 393, 396–97 (2007). As the anti-noise ordinance in *Grayned* was applied to a public sidewalk, not part of a school, and had no application to minors, Plaintiffs' analysis is flawed.

When *Grayned* held the anti-noise ordinance was constitutional in "context," it did so because one needed to read the "vague" language of the ordinance in the context of "disturbances [that] are easily measured by their impact on the normal activities of the school." *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In other words, if noise on the sidewalk outside the school is so noisy that it disturbs classes then it is prohibited. *Id*.

When viewed in the pedestrian bridge context, CCC 16.13.030 is even clearer and more defensible than the anti-noise ordinance upheld in *Grayned*. Pedestrian Bridges "are bridges located in the Resorts Corridor that allow pedestrians to cross streets." CCC 16.13.020. Accordingly, any stopping or standing which results in a person not crossing the street or preventing others from crossing the street, i.e., "impact[ing] the normal activities of the [Pedestrian Bridge]" is prohibited. *Grayned*, 408 U.S. at 112.

Accordingly, as "stopping" and "standing" are perfectly understandable to any disinterested, reasonably intelligent person in the context of pedestrian bridges as street crossings, the Court should grant Defendant's pending Motion to Dismiss [9].

3. Perfect Clarity and Precise Guidance are not Necessary in an Ordinance to Avoid Discriminatory Enforcement

Plaintiffs' response [17] asserted that enforcement of CCC 16.13.030 necessarily requires discriminatory enforcement. [17] at 7:27-28. Plaintiffs base this assertion on Clark County's motion which indicated that brief and insubstantial stops will not be subject to citation. *Id*. at 8:7-14. Plaintiffs contend that the gap between what constitutes a "brief stop" and a "stop" invites impermissible discriminatory enforcement. *Id*. In this regard, Plaintiffs attempt to conflate discriminatory enforcement with discretionary enforcement—something that exists inherently in evaluating probable cause for enforcement of all criminal laws.

Defendant concedes that guidance is "necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012). "Even for regulations of expressive activity, however, perfect clarity and precise guidance are not required because we can never expect mathematical certainty from our language." *Yamada v. Snipes*, 786 F.3d 1182, 1187–88 (9th Cir. 2015) (internal citations and quotation marks omitted); *see*

also Hum. Life of Washington Inc. v. Brumsickle, 624 F.3d 990, 1019 (9th Cir. 2010); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

CCC 16.13.030 does not require discriminatory enforcement. Considering the pedestrian bridge context and the purpose of those pedestrian bridges in facilitating street crossings and the flow of pedestrian traffic, law enforcement has been provided ample guidance to aid in the enforcement of CCC 16.13.030. A reasonable law enforcement officer could easily distinguish between stopping or standing intended to impede or stop the flow of pedestrian traffic versus that which is unintentional or incidental and which has no functional impact on the free flow of pedestrian traffic.

No precise language and no exhaustive list of exceptions would ever be sufficient to satisfy the demands Plaintiffs are seeking in their response [17] and that is precisely why those demands are unreasonable. Any challenges to CCC 16.13.030 are better addressed on an "as applied" basis.

B. CCC 16.13.030 is not Unconstitutionally Overbroad

Plaintiffs contend that they have sufficiently "pled violations of the First Amendment" in support of their overbreadth argument regarding the constitutionality of CCC 16.13.030. [17] at 9:16-17. However, all Plaintiffs have done is misapplied the standards of review for an overbreadth analysis and 12(b)(6) motions to confuse the court and add the appearance of validity to their arguments.

As Plaintiffs' facial challenge to the constitutionality of CCC 16.13.030 is a question of law, all of Plaintiffs' "allegations" are actually legal conclusions and the court owes them no deference in evaluating Defendant's motion [9]. *Rosenstein v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-1443-JCM-VCF, 2014 WL 2835074, at *5 (D. Nev. June 23, 2014) ("Factual allegations are not entitled to the assumption of truth if they are speculative, merely consistent with liability, amount to nothing more than a formulaic recitation of the elements' of a constitutional claim, or couch legal conclusions as factual allegations.") (Internal quotation marks and citations omitted).

1. Plaintiffs Misconstrue the Standard of Review for Content-Neutral Regulations of Conduct Incident to Speech like CCC 16.13.030, Misstate the Impact on Plaintiff Sommers' Speech, and Analogize to Dissimilar Laws

Plaintiffs contend that the "County has not even established that it is entitled to intermediate scrutiny at this point." [ECF No. 17] at 10:4-9. Plaintiffs, however, do not conduct a strict scrutiny analysis or provide case law supporting why CCC 16.13.030 should be analyzed under a strict scrutiny

standard other one throwaway line asserting that "a facially neutral law is nonetheless subject to strict scrutiny if it as an obvious pretext for discrimination." [17] at 12:1-7 (citing *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995)). Plaintiffs' complaint, however, never asserted that the subject ordinance was merely a pretext to target or discriminate against any person or group of people, so this argument holds no place in a motion on the face pleadings. *See generally* [1].

CCC 16.13.030 is reviewed under intermediate scrutiny because it is content-neutral on its face (a point Plaintiffs apparently concede by citing *Dumas*), the ordinance is justified on safety and traffic concerns without reference to speech, and because its impact on speech is merely incidental—not intended. *See*, *e.g.*, *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000); *Ward*, 491 U.S. at 791.

Plaintiffs alleged that Plaintiff Sommers is denied from certain "traditional First Amendment activities that cannot be performed while moving" like using a sound amplifying device or soliciting donations. [17] at 10:20-28. But nothing about CCC 16.13.030 expressly prohibits this conduct. *See*, *e.g.*, CCC 16.13.030. In fact, with the advent of Bluetooth technology and more efficient amplification systems many street performers regularly wear amplifiers on their person. There is nothing similarly preventing Plaintiff Sommers from soliciting donations as he walks across the bridge.

Plaintiffs further contend that Plaintiff Sommers is denied his constitutionally protected "one-on-one" interactions with others as part of his speech. [17] at 10:20-11:25. But again, nothing about the ordinance prohibits Mr. Sommers from walking alongside pedestrians as they cross the bridge and interacting with them in a more intimate capacity. CCC 16.13.030. Furthermore, Plaintiffs contentions in this regard ignore that Mr. Sommers has access to these same pedestrians while standing outside of the pedestrian flow zones on the remaining 94% of the sidewalk system where the subject ordinance does not apply.

What's more problematic, however, is that Plaintiffs based their position on this one-on-one "right" by analogizing to a statute in *McCullen* in which no one "could knowingly approach within six feet of another person [near an abortion clinic]—without consent—'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.'" *McCullen v. Coakley*, 573 U.S. 464, 470 (2014); *see*, *e.g.*, [17] at 11:7-17.

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While the statute in *McCullen* was found to be content neutral, despite specifically targeting sidewalks near abortion clinics, the court found that it was unconstitutional because it was not narrowly tailored and denied protestors access to their audience on otherwise public forums. *McCullen*, 573 U.S. at 497. CCC 16.13.030 does not deny Plaintiff Sommers or any other performer access to people. Sommers can play his violin as he walks alongside pedestrians on the bridge, and he can play in a fixed position for these same people off the bridges on the remaining 94% of the sidewalk system because these pedestrians don't just magically disappear once they cross the street.

As Plaintiffs have put forth no support for their contention that intermediate scrutiny does not apply and because they have not articulated how the subject ordinance in anyway prohibits or unduly burdens the types of protected activity identified in their complaint [1], the Court should grant Defendant's motion to dismiss [9].

2. Plaintiffs' "Allegations" Alone Cannot Disprove a Substantial Government Interest and CCC 16.13.030 is Narrowly Tailored to Address a Substantial Interest while Leaving Open Ample Alternative Channels of Communication

Plaintiffs claim that because they alleged that "CCC 16.13.030 serves no significant interest" that this allegation is somehow conclusive for the purposes of the Court's analysis in this motion. [17] at 12:1-3. But that's not how questions of law work on motions to dismiss. Whether something constitutes a compelling, substantial, or legitimate governmental interest in facial challenges is a determination left squarely to the Court. *See*, *e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (finding that the government's interest in eliminating restraints on fair competition is always substantial); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 823 (9th Cir. 2013) (finding that promoting safety is undeniably a substantial government interest).

The Supreme Court has 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."). Accordingly, Plaintiffs' contention that Clark County does not have a significant interest in ensuring the safe flow of pedestrian traffic is contradicted by clear Supreme Court precedent. *Id*.

When government has a substantial interest, its regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests but that **it need not be the least restrictive or least intrusive means of doing so**." *Ward*, 491 U.S. at 798 (emphasis added). CCC 16.13.030 is narrowly tailored. It addresses only conduct, not speech, and that conduct is directly related to advancing Clark County's goals of reducing congestion and crime on the bridges. *See* CCC 16.13.010.

"The **final requirement**, that the guideline leave open ample alternative channels of communication, **is easily met**." *Ward*, 491 U.S. at 802 (emphasis added). CCC 16.13.030 is far less restrictive than regulations upheld by the 9th Circuit and the Supreme Court in other cases and, because the remaining 94% of the sidewalk system remain open for standing and the option to engage in protected speech while crossing the bridge remains available, Plaintiffs can make "no showing that the remaining avenues of communication are inadequate." *Id*.

3. There is No Requirement that "Evidence" be Provided in Support of an Ordinance because it is Improper for the Plaintiffs or the Court to Supplant their Wisdom for that of the Democratically Elected Legislative Body

Plaintiffs argue that Clark County has failed to provide "evidence" in support of the efficacy of the ordinance while simultaneously attaching unnecessary and impermissible exhibits of non-parties who are opposed to the same. *See*, *e.g.*, [17] at 12:17-19 ("Clark County offers no evidence that CCC 16.13.030 enhances public safety"), 5:14-6:2 (attaching exhibits of declarations from leaders of prominent political organizations in support of their position)[1]. Plaintiffs would also have this Court find that the subject ordinance is unnecessary because there is already another ordinance which can be used in its place. *Id*. at 13:21-15:5. In this regard, Plaintiff is attempting to re-hash the legislative review of the subject ordinance and the public comment period of the Board of County Commissioners ("BCC") meeting before this Court. They are asking the Court to violate the long-standing practice of exercising judicial restraint and inviting the Court to legislate on behalf of the County.

[1] While Plaintiffs invite the Court to second-guess the BCC's judgment, they simultaneously encourage the Court to disregard a study referenced in Defendant's Motion [9] that the BCC relied upon in passing the subject ordinance. [17] at 12:20-13:2. The findings of this report were summarized and included in the body of the subject ordinance at CCC 16.13.010 and are reviewable as a matter of law by this court. To the extent this Court feels it needs to review the subject report, it may do so as it was identified by Defendant in its motion, by Plaintiff in its response, and attached as an exhibit to an unrelated filing cited by Plaintiffs in their response. *See*, *e.g.*, [17] at 2:12-15, 12:22-13:2. Accordingly the report is incorporated by reference into the instant briefing. However, it is Defendant's position that the Court need not review legislative minutes or evidence relied upon by the BCC in ruling on the clear questions of law presented in this case.

The Supreme Court has opined that it is "loath to second-guess the Government's judgment [regarding whether an ordinance is necessary to further the government's legitimate interests]. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (holding that *United States v. O'Brien* does not grant the judiciary authority or competence to second guess regulations promulgated by a federal agency); *United States v. Albertini*, 472 U.S. 675, 689 (1985) ("Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech."); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) ("facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.").

In this regard, the Court should disregard Plaintiffs' requests that it reevaluate the evidence or make some independent evaluation regarding the efficacy or the merits of the subject ordinance as that would be impermissible overreach on the part of the Court.

C. Plaintiff's ADA Claim Fails because She Failed to Adequately Pleads Either a Disparate Treatment or Disparate Impact Claim

Plaintiff McAllister brings a claim under the ADA which alleges that enactment of CCC 16.13.030 violates Title II of the ADA because, due to disability, it effectively denies mobility-impaired persons the use of the public sidewalk system in the resort corridor. *See* [1] at 22:9-13. She contends that, because the ordinance does not provide statutory immunity for disabled persons such as her, it must be voided. *Id.* at 22:14-15.

1. The County's Ordinance is not Facially Discriminatory

"A disability discrimination claim may be based on one of three theories of liability: disparate treatment, disparate impact, or failure to make a reasonable accommodation." *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 738 (9th Cir. 2021) (citations and quotations omitted). In its motion [9], Defendant Clark County analyzed this claim as one alleging a disparate impact because CCC 16.13.030 is facially neutral. *See generally* [9] at 17-22. Plaintiff McAllister responds by asserting that her claim, in fact, alleges that the ordinance is **facially discriminatory** because it "does not

provide exemptions or accommodations for people who must stop or stand due to disability." [17] at 17:1-12 ("Plaintiff McAllister brings a facial challenge against CCC 16.13.030…)

Plaintiff McAllister's position is truly puzzling because CCC 16.13.030 is not facially discriminatory. "A facially discriminatory policy is one which **on its face** applies less favorably to a protected group." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007) (footnote and citations omitted) (emphasis added). Facial discrimination has been found when a government program "categorically excluded [persons] on the basis of age, blindness, or disability." *See Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002). Likewise, an ordinance banning methadone clinics within 500 feet of residential zoning districts has been deemed facially discriminatory because it singles out methadone clinics for different zoning procedures due to animus toward recovering drug addicts. *See Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733 (9th Cir. 1999); *see Crowder*, 81 F.3d at 1483 (ADA prohibits "outright discrimination").

Here, Plaintiff does not allege that CCC 16.13.030 was motivated by discriminatory animus toward disabled persons, or that the text of the ordinance categorically excludes disabled persons or singles out disabled persons for unequal treatment. As such, it is not facially discriminatory.

Furthermore, McAllister's argument that the ordinance is facially discriminatory because it fails to specifically immunize disabled persons from prosecution is simply unprecedented. Critically, she proffers no support for her radical proposition that the ADA requires a legislative body—federal, state, or local—to specifically immunize disabled persons from the enforcement of a facially neutral criminal law. She cites no provision in the text of ADA itself for such a suggestion. She makes no argument that a regulation promulgated under the authority of the ADA supports her interpretation. She fails to analyze any legislative history of the ADA as persuasive authority for her position. She provides no example from any federal, state, or local criminal code wherein a legislative body has immunized disabled persons from enforcement of a facially neutral criminal law due to the ADA. And, of course, she cites no decisional law from any court, federal or state, holding that facially neutral criminal laws which do not explicitly immunize disabled persons from its enforcement are, in fact, facially discriminatory.

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Given that CCC 16.13.030 does not categorically exclude or single out disabled persons and was not motivated by discriminatory animus towards disabled persons, this Court must dismiss Plaintiff McAllister's ADA claim on the purported theory that it is "facially discriminatory."/

2. Plaintiff McAllister Failed to State an ADA Claim Under the "Disparate Impact" Theory of Liability

Although McAllister disclaims reliance on a "disparate impact" theory of liability for her ADA claim, she nonetheless argued in her response that she adequately pleaded such a claim. *See* [17] at 17:13-18:26. In that response, McAllister seemingly contends that she satisfactorily pleaded a "disparate impact" claim because she alleged that "due to her disability, Plaintiff McAllister must often stop unexpectedly[,] [f]or example [1] when there is a mechanical malfunction with her wheelchair, [2] her arms tire from using the wheelchair, or [3] when her vision of her path is blocked by other people who are walking in front of her." [17] at 17:13-24.

To assert a disparate impact claim against a facially neutral policy under the ADA, a plaintiff must allege in the complaint how the policy burdens the disabled "in a manner different from and greater than it burdened non-disabled residents" because of a disability. *See McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004). These factual allegations must lead to an inference that enforcement of the law "effectively denies [disabled] persons... meaningful access to state services, programs, and activities while such services programs, and activities remain[ed] open and easily accessible by others." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (Hawaii's canine quarantine requirement unduly burdens visually-impaired persons "[b]ecause of the unique dependence upon guide dogs **among many of the visually-impaired**…"); *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004) (closure of hospital violates the ADA because "**many disabled patients** will be unable to find necessary medical treatment elsewhere" while medical care will still be provided for patients without disabilities) (emphasis added).

First, it must be noted that McAllister asserts that she "must stop unexpectedly" on the pedestrian bridges to establish standing to bring suit against the County. It was not proffered to establish that the ordinance unduly burdens similarly situated wheelchair users.

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Even if this Court were to liberally construe McAllister's claim to read that similarly situated disabled persons "must stop unexpectedly" due to their reliance on wheelchairs, "stopping unexpectedly" is not a burden that falls disproportionately upon the disabled. Indeed, McAllister's assertion that wheelchair users must stop unexpectedly due to a mechanical malfunction cannot be considered a burden at all because a person who stops or stands due to a mechanical malfunction of any kind has not "stopped" voluntarily or intentionally, and therefore cannot be criminally cited in the first place. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1417 (1997); *Busefink v. State*, 128 Nev. 525, 536 (2012).

Also, her allegations that users of wheelchairs suffer "must stop unexpectedly" from fatigue and or when their path of travel is obstructed do not establish a unique burden that befalls the disabled disproportionately. *See Alexander v. Choate*, 469 U.S. 287, 302-306 (1985) (holding that reduction in number of days state Medicaid will pay to cover inpatient hospital stays applies equally to handicapped and nonhandicapped Medicaid users even if the handicapped have a "greater need for prolonged inpatient care...") To survive a motion to dismiss, McAllister must instead assert *facts* supporting an inference that mobility-impaired persons, due to their reliance on wheelchairs, must stop unexpectedly due to fatigue or obstruction of their path of travel while the non-disabled do not stop unexpectedly due to fatigue or obstruction of their path of travel. *See id.* This McAllister has not done. At best, she asserts that the *cause* of McAllister's fatigue or obstruction may differ from the *cause* of a non-disabled person's fatigue or obstruction. Nonetheless, in the end, both the disabled and non-disabled alike may "stop unexpectedly" due to fatigue or obstruction.

Resultantly, even if McAllister were asserting a disparate impact claim under the ADA, she has not asserted any facts supporting an inference that, due to a disability, mobility-impaired persons such as herself are unduly burdened by the ordinance due to a unique need to "stop unexpectedly."

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CONCLUSION

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

DATED this 9th day of April 2024.

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: */s/ Joel K. Browning*
JOEL K. BROWNING
Senior 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 9th day of April 2024, I served a true and correct copy of the foregoing **DEFENDANT CLARK COUNTY'S REPLY TO PLAINTIFFS' RESPONSE [17] TO ITS MOTION TO DISMISS [9]** (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