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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 BRIEF OF AMICUS CURIAE, NEVADA RESORT ASSOCIATION, IN SUPPORT OF DEFENDANT CLARK COUNTY, NEVADA**

Plaintiffs LISA MCALLISTER and BRANDON SUMMERS file this response to the Nevada Resort Association's Brief of Amicus Curiae in Support of Defendant Clark County, Nevada [ECF No. 23]. Plaintiffs' response is made based on

the attached Memorandum of Points and Authorities, any attached exhibits, and any pleadings and papers already on file in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Nevada Resort Association ("NRA") filed its amicus brief in support of Clark County on April 11, 2024. [ECF No. 23]. The brief provides a report previously referenced (but not provided) by Clark County, claims a "significant interest" in Las Vegas's economic wellbeing not asserted by Clark County, and legal arguments not previously proffered by Clark County, a few which appear to conflict with Clark County's stated position.

The NRA relies almost entirely on a report by William Sousa that was commissioned by Clark County to justify CCC 16.13.030's existence. This report does not demonstrate that CCC 16.13.030 passes constitutional muster. Instead of narrowing in on crime and actual dangers to the public, the report focuses on "disorder" without defining that term to exclude lawful conduct squarely protected by the First Amendment. The report also relies on data related to "calls for service," which the report acknowledges includes non-criminal activity, but does not provide any information as to how many of those calls were actually related to criminal activity. Further, the report fails to acknowledge the expansive pedestrian studies previously commissioned by Clark County in 2012 and 2015, ignoring that these studies found pedestrian congestion was worse in many sections of the grade-level sidewalk than on the bridges. Finally, the report—authored by an expert in criminology—opines outside the scope of the author's expertise. It comments on the bridges' architecture, and relies on engineering studies regarding concert venues and auditoriums—far different from a public pedestrian bridge—to support its opinions. The report also suggests that "crowd crush" is a risk without any evidence of this event occurring on any bridges anywhere let alone those in Clark County. In sum, the report does not provide sufficient evidence that Clark County's interest in public safety is significant enough to strip pedestrian bridge users of the right to be stationary—and all the expressive conduct, protected by the First Amendment, that being stationary may entail.

The NRA also contends that Clark County has an additional interest in the economic

wellbeing of the state but fails to provide any evidence demonstrating that CCC 16.13.030 will advance that interest. Beyond the Sousa report, the NRA offers only a single incident—which did not occur on a pedestrian bridge and did not result in any injuries or notable congestion on a pedestrian bridge—to support its argument that permitting people to stop and stay still on pedestrian bridges is a grave public danger. Indeed, Clark County tourism continues to increase year-over-year, demonstrating that stopping and on pedestrian bridges is not harming the bottom lines of Clark County or its corporate constituents.

The NRA's brief makes several legal errors. First, the NRA incorrectly claims that courts may not look beyond the plain language of a regulation. The Ninth Circuit Court of Appeals expressly stated that courts are not precluded from considering outside evidence even when the plain language rule may apply in determining whether a provision is unconstitutionally vague. Second, the NRA provides different interpretations of the terms "stop" and "stand" than Clark County, showcasing CCC 16.13.030's vagueness and potential for arbitrary and discriminatory enforcement. Third, despite arguing that existing obstruction ordinances are inadequate, the NRA does not provide evidence as to how they fail to address obstructions on the pedestrian bridges. Under the Supreme Court of the United States's holding in *McCullen v. Coakely*, 573 U.S. 464 (2014), Clark County must first use less intrusive tools (such as an existing obstruction ordinance) and demonstrate their inadequacy. Clark County has not done so. Fourth, the NRA's attempt to assert an interest on behalf of Clark County is barred because the County did not assert that interest itself when provided with multiple opportunities. Finally, the NRA's reliance on CCC 16.13.010, the "purpose" section, as proof that Clark County has a significant interest is misplaced because the government's declaration that an interest exists is not evidence of that interest's actual existence. Simply pointing to Clark County's statements in CCC 16.13.010 does not satisfy the evidentiary burden on the County to show it has a significant interest to infringe upon First Amendment rights.

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II. Argument

A. The Representations in Sousa's Report Are Insufficient to Justify Restrictions on First Amendment Activity on Pedestrian Bridges.

The NRA relies almost exclusively on William Sousa's report to support its position that CCC 16.13.030 is necessary for public safety. However, the report does little to support the contention that the pedestrian bridges are particularly dangerous compared to grade-level sidewalks or CCC 16.13.030 will promote public safety. Rather, the report supports Plaintiffs' position that CCC 16.13.030 impermissibly targets First Amendment activity.

Only eight pages long, the report provides no statistics regarding criminal conduct but rather focuses exclusively on "disorder." [ECF No. 23] at NRA_AM_BRF_0008. The report never clearly defines "disorder"—noting that it "refers to a broad range conditions and behaviors that are not necessarily illegal"—but it does clearly state that "disorder" includes conduct that is expressly permitted (*e.g.*, "alcohol use")[1] or not inherently dangerous (*e.g.*, "trash and litter").[2] [ECF No. 23] at NRA_AM_BRF_0008, NRA_AM_BRF_00015. The report's definition also expressly includes conduct protected by the First Amendment: street performing and solicitation.[3] [ECF No. 23] at NRA_AM_BRF_00010; *Santopietro v. Howell*, 73 F.4th 1016, 1023 (9th Cir. 2023) (finding street performances and solicitation are protected First Amendment activities). In effect, the report encourages the County to ban conduct that is either not criminal or affirmatively protected by the First Amendment.

The report provides no statistics regarding citations, arrests, or convictions for criminal activity on the pedestrian bridges, relying exclusively on "calls for service." [ECF No. 23] at NRA_AM_BRF_00014–15. The report states that calls "often reflect citizen concerns about problematic conditions related to personal health and safety" but admits "many calls are not necessarily crime-related." [ECF No. 23] at NRA_AM_BRF_00015. The report does not provide

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[1] *See* CCC 12.35.010 (providing only three specific locations—none of which are pedestrian bridges or sidewalks—where drinking alcohol outside is prohibited).

[2] Ironically, under CCC 16.13.030, stopping to remediate trash or litter on pedestrian bridges is now a citable offense.

[3] The report refers to "aggressive" panhandling and "aggressive" street performing. [ECF No. 23] at NRA_AM_BRF_00010. The report does not explain the difference between "aggressive" and "non-aggressive" First Amendment activities.

any statistics regarding how many calls were actually "crime-related." [ECF No. 23] at NRA_AM_BRF_00015. The report also provides statistics indicating that calls for service related to unhoused people increased more off the pedestrian bridges than on the bridges between 2018 and 2022. [ECF No. 23] at NRA_AM_BRF_00015.

The NRA cites to the report's claim that "although pedestrian bridges make up less than 6% of the total length of the sidewalk system, 11% of disorder calls on Las Vegas Boulevard occurred on the walkways." [ECF No. 23] at NRA_AM_BRF_00015; *see also* [ECF No. 23] at 5:25–6:2; 9:4–6. However, in making this statement, the report treats the entire Las Vegas Strip Corridor as having the same pedestrian density. [ECF No. 23] at NRA_AM_BRF_00015. Strangely, while claiming that the bridges suffer from pedestrian congestion, [ECF No. 23] at NRA_AM_BRF_00010–11, the report makes no reference to the comprehensive studies that the County previously commissioned in 2012 and 2015 to study pedestrian congestion and sidewalk obstructions on Las Vegas Boulevard.[4] *See generally* 2015 Clark County Pedestrian Study, attached as Exhibit 1. Unlike the report, these studies were based on first-hand observations and focused on pedestrian congestion rather than information collected by third-party law enforcement agencies about tangentially related "calls for service." *Compare* 2015 Clark County Pedestrian Study Ex. 1 *with* [ECF No. 23] at NRA_AM_BRF_00014–15.

These studies, spanning almost 200 pages each, recognize that there is an "Inner Corridor" between Tropicana and Spring Mountain Road with significantly more pedestrian traffic than the "Outer Corridor" comprised of Russell Road to Tropicana and Spring Mountain to Sahara.[5] 2015 Clark County Pedestrian Study Ex. 1, at 2. The pedestrian bridges are all located in the Inner Corridor and, if compared to sidewalks nearby rather than miles away, would most likely have very similar statistics regarding "calls for service" as other walkways in the Inner Corridor. *Id.* at 2, 23. Critically, the last comprehensive pedestrian study conducted in 2015 found that the pedestrian

[4] *See also* Kimley-Horn and Associates, Inc., Clark County Pedestrian Study (Nov. 2012), https://webfiles.clarkcountynv.gov//Public%20Works/Program%20&%20Services/LVB%20Study/2012_Pedestrian_Study_Las-Vegas-Blvd_KHA.pdf [hereinafter 2012 Clark County Pedestrian Study].

[5] 2012 Clark County Pedestrian Study, *supra*, at 31.

bridges encountered significantly less pedestrian traffic than areas of the grade-level sidewalk, finding that the longest period of high pedestrian traffic during a Holiday Saturday on the pedestrian bridges lasted for 1 hour and 45 minutes whereas the longest periods of high pedestrian traffic during the same Holiday Saturday on the grade-level sidewalk lasted for 15 hours and 30 minutes near the Venetian Hotel, 10 hours and 30 minutes near the Cromwell, and 9 hours and 15 minutes near Ceasar's Palace Hotel. *Id.* at 64–66, 71. The study suggested adding at least three additional pedestrian bridges to facilitate pedestrian traffic and alleviate the dangers of grade-level sidewalks. *Id.* at 120, 122–23.

Finally, though he draws conclusions concerning the pedestrian bridges' architecture, Sousa appears to have a background in criminology, not urban planning or architecture.[6] The studies cited in the report regarding crowd dynamics appear to be about concert venues and auditoriums; none appear related to pedestrian walkways. [ECF No. 23] at NRA_AM_BRF_00011–12. The report speculates that "crowd crush" could happen on the bridges but cites only generally to research over 30 years old and identifies no such event ever happening on bridges similar to those crossing Las Vegas Boulevard. [ECF No. 23] at NRA_AM_BRF_00011. In claiming that the "rigid boundaries" of the pedestrian bridges offer dangers unique from grade-level sidewalks,[7] the report offers no research to support the position at all. [ECF No. 23] at NRA_AM_BRF_00011.

B. The NRA's Claim that CCC 16.13.030 is Related to Nevada's Economic Wellbeing is Unsupported by Any Evidence.

The NRA asserts that "Clark County also has a significant government interest in *tourist safety* specifically, as tourism directly impacts to the economic wellbeing of our entire state." [ECF No. 23] at 3:18–20 (emphasis in original). To support its position that tourists must be protected for Nevada's economic wellbeing, the NRA provides a single incident "where a broken window at a resort valet station" resulted in tourists hurriedly crossing a pedestrian bridge. [ECF No. 23] at

[6] *William H. Sousa, Ph.D.*, Univ. Nev., Las Vegas, https://www.unlv.edu/people/william-sousa (last accessed Apr. 29, 2024).

[7] Notably, long stretches of the Strip Corridor's grade-level sidewalk, such as by the Bellagio fountains, have barriers or streets on either side, effectively suffering from the same shortcomings as those identified in the report. Duncan Phenix, *New Views of Bellagio Fountain Club for Las Vegas Grand Prix*, 8 News Now (June 2, 2023), https://www.8newsnow.com/news/local-news/new-views-of-bellagio-fountain-club-for-las-vegas-grand-prix.

5:4–6. Some tourists believed the sound of the breaking window in the valet station was gunfire, creating "a chain reaction of information."[8] However, only "[o]ne person had minor injuries after falling down during the panic [and] no one was transported to a hospital."[9] Las Vegas Metropolitan Police Department ("LVMPD") Captain Branden Clarkson reported at the time that "[w]e were able to quickly tell people that was not the case . . . We had officers on the street saying there was not a shooting."[10] There were no reports that the pedestrian bridges could not handle the flow of pedestrian traffic at that time or a "crowd crush" event occurred. The NRA does not explain how LVMPD's response to the incident was inadequate or how CCC 16.13.030 would have prevented any panic or harm in this situation.

Further, the NRA's assertion that CCC 16.13.030 is necessary to protect tourism and Nevada's economic wellbeing is belied by the record number of tourists that continue visiting Las Vegas at this time.[11] In 2023, over 40.8 million people visited Las Vegas, the highest single-year total since the COVID-19 pandemic began in 2020.[12] Average daily room rates in Las Vegas set records, with a 12 percent increase from 2022 and topping at $191 per night.[13] The hotel occupancy rates averaged 83.5 percent for the year.[14] Las Vegas Convention and Visitors Authority CEO Steve Hill was quoted as saying 2023 "was an epic year" for the Las Vegas tourism industry, citing "the 'totality' of Las Vegas seeing a 20 percent year-over-year increase in convention and conference attendance, increased tourism and top-tier special events, including the inaugural Formula One Las Vegas Grand Prix."[15] Simply showing an increase in "calls for service" on the highly visible pedestrian bridges without additional data as to how many arrests followed or if the calls alleged legitimate crimes does not imply that the pedestrian bridges are inherently more dangerous than

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[8] David Wilson, *Police: No Shooting on Las Vegas Strip; Broken Glass Caused Panic*, Las Vegas Review-Journal (July 16, 2022), https://www.reviewjournal.com/local/police-no-shooting-on-las-vegas-strip-broken-glass-caused-panic-2608865.
[9] *Id.*
[10] *Id.*
[11] Howard Stutz, *In 2023, Las Vegas Saw Its Highest Visitation Totals Since Before the Pandemic*, The Nevada Independent (Jan. 25, 2024), https://thenevadaindependent.com/article/in-2023-las-vegas-saw-its-highest-visitation-totals-since-before-the-pandemic.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

grade-level sidewalks. Las Vegas successfully managed tourism safety and economic viability well before CCC 16.13.030 was enacted, clearly showing that Clark County does not need to implement regressive policies that infringe upon constitutional rights to maintain (if not expand) the tourism economy on the Strip.

C. The NRA Misstates What Evidence the Court Can Consider When Evaluating Whether a Law is Unconstitutionally Vague.

The NRA claims "when an ordinance is plain and unambiguous on its face, there is no need to consider the legislative history as a guide to its meaning." [ECF No. 23] at 10:17–19 (citing *TVA v. Hill*, 437 U.S. 153, 184 (1978)). However, courts have made clear that statements by policymakers may be considered by the Court, even when the plain language rule is applicable. In *Heppner v. Alyeska Pipeline Service Company*, the Ninth Circuit found that the *TVA* decision "does not foreclose a court from looking to legislative history, [. . .] does not require a court to operate under an artificially induced sense of amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of Congressional intent in the legislative history." *Id.* at 871. Courts may look to legislative history even if the plain language of the regulation appears unambiguous when "it is brought to the court's attention that there is within the legislative history something so probative of the intent of [the legislative body] as to require a reevaluation of the meaning of the statutory language." *Id.* Therefore, courts "are not forbidden from considering legislative history." *Id.* at 872.

Clark County has specifically endorsed Sheriff McMahill's statements in its filings when defining CCC 16.13.030 for this Court. [ECF No. 9] at 15:3–5. In *Desertrain v. City of Los Angeles*, the Ninth Circuit considered evidence provided by the Los Angeles Police Department regarding enforcement of the ordinance at issue. 754 F.3d 1147, 1149 (9th Cir. 2014) ("Supervisors instructed officers to look for vehicles containing possessions normally found in a home, such as food, bedding, clothing, medicine, and basic necessities. According to those instructions, an individual need not be sleeping or have slept in the vehicle to violate Section 85.02."). The interpretation of the challenged ordinance by law enforcement was critical in finding the ordinance unconstitutionally vague. *Id.* at 1157 ("[T]he different ways the ordinance was interpreted by

members of the police department make it incompatible with the concept of an even-handed administration of the law to the poor and to the rich that is fundamental to a democratic society."). Because Sheriff McMahill's statement concerns the interpretation of CCC 16.13.030 by law enforcement, and the statements made by Clark County officials are part of the legislative history of CCC 16.13.030, these statements should be considered by the Court when evaluating whether CCC 16.13.030 violates the Due Process Clause for vagueness.

D. The NRA's Descriptions of "Stop" and "Stand" in CCC 16.13.030 Conflict With Clark County's Interpretation of the Terms.

The NRA 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'" emphasizing that "[t]he direction is clear: it is unlawful for any person to stop or stand within a Pedestrian Flow Zone." [ECF No. 23] at 12:6–7; 11–12. The NRA further contends 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. 23] at 13:13–15. Concurrently, Clark County argues that simply stopping and standing is *not* unlawful, and 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.

The NRA's assertion that "stop" and "stand" as used in CCC 16.13.030 should be interpreted to broadly prohibit all stopping and standing clearly conflicts with Clark County's assertion that "stop" and "stand" as used in CCC 16.13.030 should be interpreted to narrowly prohibit stopping and standing only if the free flow of traffic across the pedestrian bridge is impeded. Clark County specifically adopted Sheriff McMahill's statement to the Las Vegas Review-Journal, saying: "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." [ECF No. 1] at 9 ¶ 52. Clark County determined that Sheriff McMahill's "statement is entirely consistent in regard to conduct incidental to walking and falls within the acceptable parameters of the pedestrian bridges."

[ECF No. 9] at 15:3–5. However, the NRA completely ignores Sheriff McMahill's statement and argues that the plain language of CCC 16.13.030 makes clear that all stopping and standing are prohibited on the pedestrian bridges. [ECF No. 23] at 12:6–7, 11–12. By focusing on the plain language of the ordinance instead of incorporating the statements made by public officials, the NRA argues for a different application of CCC 16.13.030 than Clark County. If those on the same side of this case cannot even agree as to what conduct is prohibited under CCC 16.13.030, it is unreasonable to expect the general public to understand what conduct is prohibited and law enforcement officials to apply the ordinance in a nondiscriminatory manner that increases public safety while protecting pedestrians' First Amendment rights.

E. The NRA's Assertion that the Current Obstruction Ordinance is Insufficient is Contradicted by *McCullen*.

The NRA, relying on Sousa's report, claims that Clark County's existing obstruction ordinance, CCC 16.11.020, is "insufficient because it is solely *reacting* to an existing safety concern instead of proactively *preventing* the issue in the first place." [ECF No. 23] at 7:2–7 (emphasis in original). However, neither the NRA nor Clark County has provided instances where the obstruction ordinance was enforced on a pedestrian bridge, ineffectually or otherwise, let alone that the existing ordinance was inadequate to address an obstruction issue on a pedestrian bridge. The NRA provides a single incident from a third-party source where a window broken at a resort valet station that was not on a bridge resulted in tourists rushing across a pedestrian bridge. [ECF No. 23] at 5:4–6. The NRA does not report any obstructions on the pedestrian bridge that caused additional panic, mayhem, or difficulties for law enforcement at the time of the incident. And the NRA has not clarified how this single incident led to the alleged permanent dangerous conditions or obstructions on all pedestrian bridges in the resort corridor nor how existing ordinances were insufficient in addressing the broken window incident.

In *McCullen v. Coakley*, the Supreme Court held that to show narrow tailoring, the government must demonstrate that alternative means burdening substantially less speech will fail to achieve the government's interests.[16] 573 U.S. 464, 495 (2014). The government in *McCullen*

[16] The NRA's reliance on *Honolulu Weekly, Inc. v. Harris* is misplaced because the regulation in *McCullen* is much more analogous to CCC 16.13.030. [ECF No. 23] at 18:2–20; 298 F.3d 1037

asserted the same interests as Clark County, public safety and unobstructed walkways, when it enacted a regulation that prohibited stopping on public sidewalks near the entrance of an abortion clinic. *Id.* at 469, 492–93. The *McCullen* Court determined that there were several less burdensome alternative solutions available to the government instead of prohibiting stopping and standing on public sidewalks near abortion clinic entrances, 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 491–92 ("The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances." (citations omitted)).

McCullen requires the government to attempt to address issues with less intrusive tools before infringing upon constitutional rights. *Id.* at 494 ("In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it."). The Court must assume that Clark County did not seriously undertake to address the problem with less intrusive tools before enacting CCC 16.13.030 because neither Clark County nor the NRA provide any information regarding the inability of the obstruction ordinance or other less intrusive ordinances to address the alleged issues with obstruction on the pedestrian bridges. Because Clark County does not provide any information regarding any attempts to address the alleged issues on pedestrian bridges with less burdensome means, CCC 16.13.030 is not narrowly tailored.

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(9th Cir. 2002). CCC 16.13.030 prohibits stopping or standing on a portion of the public sidewalk just as the regulation in *McCullen* prohibited stopping or standing on a portion of the public sidewalk, whereas the ordinance in *Honolulu Weekly* prohibited only publishers from distributing publications on the public sidewalk. 298 F.3d at 1042; 573 U.S. at 471–72. Alternative channels of communication were found to be sufficient in *Honolulu Weekly* because "publications still [had] the opportunity to distribute their publications" and Plaintiffs did not claim that a certain section of the public sidewalk was unique for distributing its publications. 298 F.3d at 1047. In *McCullen*, the specific locations from which Plaintiffs were excluded from stopping or standing were critical to the analysis because the Plaintiffs' "ability to initiate the close, personal conversations that they view as essential" were compromised by the regulation. 573 U.S. at 487. As in *McCullen*, the specific locations from which Plaintiffs here are excluded from stopping or standing, the pedestrian bridges, are similarly unique and important locations for initiating personal conversations and engaging in First Amendment activity.

F. The NRA Cannot Assert an Interest on Behalf of Clark County that the County Itself Has Not Raised.

The government cannot assert an interest to defend a regulation that infringes on a constitutional right that the government did not assert at the time it passed the ordinance. *Reinlasoder v. City of Colstrip*, 657 Fed. Appx. 636, 639–40 (9th Cir. 2016). "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Id.* (quoting *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016–17 (9th Cir. 1999)). There is no evidence that Clark County considered the economic wellbeing of the state as an interest when passing CCC 16.13.030. Clark County has never provided economic wellbeing as an interest that justifies the restrictions on First Amendment activity found in CCC 16.13.030. The "purpose" section for CCC 16.13.030 does not refer to economic wellbeing, but instead "public safety." CCC 16.13.010. The NRA cannot now assert an interest that Clark County has not previously asserted itself.

G. The NRA Errs in Relying On CCC 16.13.010 as Evidence of an Actual Interest Served by CCC 16.13.030's Restrictions.

A "purpose" declared in a regulation is relevant only in determining whether the government claimed a particular interest at the time it passed a regulation that infringes upon constitutionally protected activity; the government's declaration is not evidence that the stated interest is an actual concern, the regulation is related to that concern, or the regulation is narrowly tailored to that concern. *City of L.A. v. Alameda Books*, 535 U.S. 425, 438 (2002) ("This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. . . . If plaintiffs succeed in casting doubt on a municipality's rationale in either manner [by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings], the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance."). Clark County bears the evidentiary burden to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009); *see Pierce v. Jacobsen*, 44 F.4th 853,

862 (9th Cir. 2022) (finding that the government failed to offer evidence that the challenged regulation could not be more narrowly tailored to its stated objective); *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 746 (9th Cir. 2012) (finding that the interest asserted by the government was compelling but the government offered no evidence to support its proposition that the interest was related to the regulation). Clark County must also show that any infringement upon First Amendment activities serves an interest unrelated to suppressing protected activity. *Roberts v. Jaycee*, 468 U.S. 609, 623 (1984).

Furthermore, the government cannot retroactively change the nature of a traditional public forum through fiat or declare through legislation that an area is no longer a traditional public forum. *Am. C.L. Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003) ("If the government's intent were a factor in determining the existence of a traditional public forum, any new public area, even a new street or park, could be created as a nonpublic forum as long as the government's intent to do so were memorialized in restrictive statutes or statements of purpose. This result would make a mockery of the protections of the First Amendment." (footnote omitted)). CCC 16.13.010 claims that the pedestrian bridges were effectively never meant for First Amendment activity. CCC 16.13.010. The County does not dispute that the pedestrian bridges have, from their inception, been considered part of the Strip Corridors' sidewalk system. They have been used for First Amendment activities since the first bridges were built in 1995, becoming an important and critical fixture for those engaged in First Amendment activities.[17] The pedestrian bridges are traditional public forums regardless of CCC 16.13.010 and the intent of Clark County

[17] *New Pedestrian Bridge Opens on Las Vegas Strip; 17th So Far*, Associated Press (Dec. 23, 2019), https://apnews.com/general-news-f3faa9c119259acbdfff1b23b7ed84e2; FOX5 Las Vegas, *Street Performers Question New Clark County Pedestrian Bridge Ordinance*, YouTube (Jan. 16, 2024), https://www.youtube.com/watch?v=y_3sW6UFxWk&t=139s; Orko Manna & Justin Hopkins, *'My Body, Choice': Hundreds Protest COVID-Related Mandates on the Las Vegas Strip*, 8 News Now (Sept. 7, 2021), https://www.8newsnow.com/news/local-news/my-body-my-choice-hundreds-protest-covid-related-mandates-on-the-las-vegas-strip; Savanna Strott, *Protesters Take to the Las Vegas Strip in Response to George Floyd's Death*, The Nevada Independent (May 30, 2020), https://thenevadaindependent.com/article/protesters-take-to-las-vegas-strip-in-response-to-george-floyds-death; Tiffany Lane, *Protesters March Along Las Vegas Strip Demanding Regime Change in Iran*, 3 News (Sept. 26, 2022), https://news3lv.com/news/local/protesters-march-along-las-vegas-strip-demanding-regime-change-in-iran; Ken Ritter, *Vegas Golden Knights and Fans Celebrate 1st NHL Championship With Parade and Rally*, Associated Press (June 16, 2023), https://apnews.com/article/golden-knights-las-vegas-strip-stanley-cup-parade-e98e02531594894f7241154f9a3a9b08.

to change that.

The NRA's reliance on the statements in CCC 16.13.010 as evidentiary support for the County's burden to show that there is in fact a significant interest at issue, CCC 16.13.030 is related to that interest, and CCC 16.13.030 is narrowly tailored is misplaced. The only evidence both the NRA and Clark County have offered to show Clark County's interest is Sousa's report and an isolated incident that did not occur on a pedestrian bridge. [ECF No. 9] at 3:11–24; [ECF No. 23] at 5:3–6, 5:13–7:7. As discussed previously, neither the report nor the incident show that public safety is an actual problem on the pedestrian bridges, that CCC 16.13.030 is narrowly tailored to resolving that problem, or that CCC 16.13.030 would improve public safety.

Dated: April 29, 2024

/s/ *Tatiana R. Smith*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO BRIEF OF AMICUS CURIAE, NEVADA RESORT ASSOCIATION, IN SUPPORT OF DEFENDANT CLARK COUNTY, NEVADA** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on April 29, 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/ Tatiana R. Smith
An employee of ACLU of Nevada