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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA MCALLISTER, an individual; and BRANDOM SUMMERS, an individual, Plaintiffs, vs. CLARK COUNTY, a political subdivision of the state of Nevada. Defendant(s).	Case No: 2:24-cv-00334 **DEFENDANT CLARK COUNTY'S REPLY TO PLAINTIFFS' RESPONSE [41] TO ITS MOTION TO STAY DISCOVERY [37]**

Defendant CLARK COUNTY, by and through its counsel of record, hereby files this Reply to Plaintiffs' Response [41] to its Motion to Stay Discovery [37].

This Reply is made and based upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and oral arguments permitted by the Court at a hearing on the matter, if any.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENTS

A. Despite Plaintiffs' Arguments to the Contrary, the County has Argued for a Stay under Two Separate Legal Standards and Fully Addressed the Elements of Each and Good Cause Exists to Grant a Stay under Both

Plaintiffs have misstated the justification for a stay in the County's motion [37] by claiming that the County argues only that "the pending motion to dismiss can be decided without discovery." [ECF No. 41] at 2:19-20.

The County in fact argued that a stay is warranted under two separate standards which, as the Ninth Circuit has provided no guidance on a brightline rule for when a stay is appropriate, the Court may adopt in the instant case. *See generally* [ECF No. 37].

A stay in this case is not warranted because the motion to dismiss can be resolved without discovery—a stay is warranted because the entire case can be resolved without the need for discovery. That satisfies the good cause element under both standards cited by the County in its Motion to Stay. *See generally* [ECF No. 37].

Because neither Plaintiff has been cited under the ordinance, there is no body cam footage that needs to be viewed, there are no depositions or citing officers or the plaintiffs that need to be conducted, there is no analysis of damages that need to be performed, etc. This Court will determine, after looking at the face of the ordinance and the legitimate public interests underlying it, whether it is constitutional and valid or not. The result of that order will become immediately appealable. When discovery is unnecessary for any aspect of the case there is good cause to warrant staying discovery to avoid wasting judicial resources. Accordingly, and despite Plaintiffs' attempts to misstate the County's position, a stay is warranted in this case.

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B. Plaintiffs' Claims Lack Merit and the Case the District Court has Chosen to Discuss at the Hearing on the Motion to Dismiss Confirms It

Plaintiffs assert that there must be "no question" about the outcome of a dispositive motion before a motion to stay can be granted under a "preliminary peek" standard. [ECF No. 41] at 4:8. While Defendant disagrees with Plaintiffs' interpretation and application of the "preliminary peek" standard, there is absolutely no question in this case about how the Court will rule on Plaintiff's facial challenges to CCC 16.13.030.

In its minute order [38] entered May 23, 2024, the Court told the parties to come "prepared to discuss the Ninth Circuit's opinion in *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), as amended on denial of rehg and rehg en banc (Sept. 17, 1996), and its application to the plaintiffs' facial First Amendment challenge to CCC 16.13.030." [ECF No. 38].

In *Roulette*, the plaintiff filed a facial challenge to an ordinance passed by the City of Seattle "prohibiting people from sitting or lying on public sidewalks in certain commercial areas between seven in the morning and nine in the evening." 97 F.3d 300, 302 (9th Cir. 1996), as amended on denial of reh'g and reh'g en banc (Sept. 17, 1996). The Ninth Circuit upheld the ordinance as constitutional and denied a petition for rehearing *en banc*—further demonstrating that the majority of the Ninth Circuit judges took no issue with the outcome in that case. Notably, in *Roulette* the Ninth Circuit rejected the plaintiffs' factual assertions and arguments because "[the court] need not reach the merits of these contentions, given the posture of this case: Plaintiffs' substantive due process claim, like their First Amendment claim, **challenges the statute on its face**, not as applied." *Id*. at 306 (emphasis added).

The language of the ordinance in *Roulette* closely mirrors that of Clark County's ordinance in this case—which prohibits standing or stopping on pedestrian bridges (as opposed to sitting or lying down on public sidewalks in *Roulette*). If anything, the County's ordinance is even less restrictive than the ordinance upheld in *Roulette* because it only affects approximately 6% of the sidewalk network on the Las Vegas strip—not the entirety of the sidewalk network of the commercial district as the Seattle ordinance did in *Roulette*.

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In light of the holding of *Roulette* (which also included no discovery at the trial court level) and the Court's expressed intent to view this case in light of *Roulette* at the hearing on Defendant's motion to dismiss [9], it is a near certainty that Plaintiffs' facial challenges will fail as a matter of law and Defendant will prevail on its motion to dismiss [9]. Accordingly, even under Plaintiffs' erroneous interpretation of the "preliminary peek" standard, a stay of discovery is still warranted in this case.

C. In further support of the Fact that Plaintiff's Case Lacks Merit, Far More Restrictive Ordinances have Received Favorable Treatment from this and other Courts

Unlike the ordinance in this case which does not restrict any type of speech or protected conduct, many jurisdictions around the country are implementing free speech zones or free speech prohibited areas—including notably the City of Las Vegas on the Fremont Street Experience, Times Square in New York, and the Santonio Riverwalk. Those ordinances involve municipalities blocking off large sections of public right-of-way expressly to First Amendment protected conduct.

In the case of San Antonio, its ordinance "permits busking in downtown public areas controlled by the City **except for the River Walk, Alamo Plaza, Main Plaza, and outdoor places owned and controlled by the City for other purposes**." *Valadez v. City of San Antonio*, No. SA-21-CV-0002-JKP, 2021 WL 411148, at *1 (W.D. Tex. Feb. 5, 2021) (emphasis added). Despite this clear restriction of public forums to protected conduct, the court in that case has denied a motion for preliminary injunction finding that "Plaintiff has not carried his burden to show a substantial likelihood of success on any claim" and that "the City has carried its burden to justify the Policy." *Valadez v. City of San Antonio*, No. SA-21-CV-0002-JKP, 2021 WL 411148, at *12 (W.D. Tex. Feb. 5, 2021). The case is currently stayed pending a determination of the cross motions for summary judgment. *See*, *e.g.*, *Valadez v. City of San Antonio*, 5:21CV00002 Docket of Proceedings.

In 2016, the City of New York adopted Section 4-20 of Chapter 4 of Title 34 of the Rules of the City of New York which prohibited all activities in the Theatre District Zone "for

any purpose other than the safe and continuous movement of pedestrian traffic." *See* Rules of the City of New York 34-4-20(b). It restricted non-pedestrian activity to "Designated Activity Zones" and other blocks "not within a Pedestrian Flow Zone." *Id*. 34-4-20(c). 8 years later this law which specifically restricts non-pedestrian activities—including panhandling and performing—to limited zones remains valid and in effect.

The City of Las Vegas' ordinances have been challenged in this court (and the case was handled by the same judge assigned to the instant matter) and the City of Las Vegas was granted summary judgment on all of the facial challenges alleged against them. *See* Order in Part Motion for Summary Judgment in Case No. 2:15-cv-02070-JAD-PAL, attached hereto as **Exhibit A**. The Court in that case found that "the City has met its burden to justify the buffer zone, performance zone, lottery system, portions of the performer registration, and sound restrictions." *Id*. at 2:6-17.

The County's ordinance in this case, on the contrary, doesn't restrict speech to performance zones or prohibit speech in buffer zones. People can continue to engage in all kinds of speech in the County's pedestrian flow zones so long as they continue moving while doing so.

When you contrast these very restrictive laws discussed above—which have been upheld as constitutional and still remain in effect to this day—with CCC 16.13.030, it is clear that the County's ordinance at issue in this case is not directed at speech and is far more defensible and friendly to First Amendment principles. Accordingly, it is a near certainty that Clark County will prevail on its pending motion to dismiss.

D. Plaintiffs Attempt to Distinguish the Cases Cited by Clark County, but Provide none of their Own in Support of their Contention that Discovery is Necessary

Plaintiffs take issue with a handful of the numerous cases cited by Clark County in its Motion [41] and attempt to distinguish them from this case.

For example, they assert that "*Mitchell v. Duval County Sch. Bd.*, 107 F.3d 837, 838, n. 1 (11th Cir.1997) does not appear to address discovery", but the footnote and citation in *Mitchell* and the cases that cite to it (and expand upon it) like *Chudasama* stand for the

proposition that "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should […] be resolved before discovery begins." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997); *see also* [ECF No. 41] at 6:14-16. Plaintiffs, other criticisms include arguments that the cases are "out of circuit," "inapplicable," "very different procedural posture," "[a] Voting Right Act case," etc. [ECF No. 41] at 6:15-7:12.

And while none of the cases cited by Clark County are identical to this case—they all stand for the general proposition that questions of law are resolved de novo, by the court and on their face and that it is in the interests of judicial economy to resolve these questions of law before engaging in discovery—if any. As facial challenges to ordinances are also questions of law, these same principles apply. If fact discovery were necessary to resolve the facial validity of ordinances, they would instead be mixed questions of law and fact—which they are not.

Plaintiffs point to no first amendment facial challenge case where discovery was conducted or deemed necessary by the court—they instead point to a handful of cases where a government entity "has the burden" or cannot rely on "mere conjecture" to demonstrate that an ordinance or statute is constitutional under the First Amendment—but neither of those things require discovery. One can read the ordinance and the stated purpose for the ordinance without relying on conjecture. One can judicial notice of the public statements of the County Commissioners and the transcripts of public meetings on the ordinance without engaging in discovery. One can rely on any logically stated government interest without resorting to discovery.

One cannot, however, notice depositions of legislators or people who lobbied for or against a law to analyze the necessity of a law or attack the validity, efficacy or methodology of studies upon which legislators may have relied in forming their opinions. That puts the Court—and Plaintiffs—in a super legislative role that violates the separation of powers and deprives the legislature of its ability to address matters of local concern through legislation.

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The Supreme Court of the United States had this to say on the matter:

> We are not concerned with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

Ferguson v. Skrupa, 372 U.S. 726, 730–31, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963) (internal citations and quotation marks omitted); *see also Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952).

Plaintiffs and their counsel had the opportunity to oppose the ordinance when it was under consideration by the Board of County Commissioners ("BCC") through the political process. That was the time for them to persuade the BCC commissioners that LVMPD's concerns were overstated or that First Amendment concerns trumped the need for this ordinance. Plaintiffs' counsel's organization did in fact appear and argue their case at this public hearing. It is based on information and belief that the ACLU also continued to communicate with BCC commissioners ahead of the hearing to make their complaints and criticisms of the ordinance known. The fact that their position did not prevail in that public policy debate does not give them the right to re-open the debate here and try to get the court to supplant its wisdom with that of the local legislative body.

The burden on facial challenges is not met in a battle of experts like some professional negligence tort case and the government does not have an affirmative duty to engage in such meaningless, unhelpful, and irrelevant discovery on questions of law just because the Plaintiffs demand it. Ordinances and statutes are presumed constitutional—much like a business decision is deemed to be valid under the Business Purpose Rule—where a valid reason is given unless the challenger can point to something on its face or effect that would make it unconstitutional or in violation of some federal statute. Plaintiffs cannot do that here.

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Plaintiffs cite no case in support of their contentions that discovery is necessary to resolve facial challenges and, accordingly, have not substantively opposed this Defendant's motion. Accordingly, the Court should grant the requested stay for good cause appearing.

E. Plaintiff McAllister's ADA Claim is also a Facial Challenge, does not Articulate a Legitimate Challenge under the ADA, and She Lacks Standing to Bring it Anyway

Plaintiffs have alleged that the County did not address the ADA claim in its Motion to Stay [37]. [ECF No. 41] at 14:4-13. But as the ADA is also a facial challenge—a fact Plaintiffs have conceded in their briefing—the question of law and facial challenge arguments raised by Clark County in its Motion apply equally to the ADA claims as they do the First Amendment and Fourteenth Amendment claims.

Plaintiff McAllister alleged in her Complaint that, by adopting the County Ordinance, Clark County has "denied [her] the use of the pedestrian bridges" because "[she] cannot always cross a pedestrian bridge without… risking a criminal infraction" due to her disability. [ECF No. 1] at 22:16-23. Plaintiff is essentially arguing that she has been denied meaningful access to the use of the Las Vegas Strip sidewalk system because she is afraid that she will be charged with a crime as a result of her disability in violation of Title II and the ADA on the off chance her wheelchair malfunctions. *See*, *e.g.*, *Lawman v. City & Cnty. of San Francisco*, 159 F. Supp. 3d 1130, 1147 (N.D. Cal. 2016); *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), rev'd in part, cert. dismissed in part sub nom. *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015) ("Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity").

But a fear that is premised on two extremely unlikely events (one of which itself is a violation of the ADA) is per se unreasonable.

Plaintiff has not requested an exemption to the ordinance, nor has she requested a reasonable modification to the language of the ordinance. This sort of injury-in-fact is critical to qualify for standing under most ADA claims. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631

F.3d 939, 946–47 (9th Cir. 2011). Where a specific modification or accommodation has not been requested and/or denied, a person relies on so-called "deterrent standing" to bring challenges under the ADA. *See*, *e.g.*, *C.R. Educ. & Enf't Ctr. v. Hosp. Properties Tr.*, 867 F.3d 1093, 1098–99 (9th Cir. 2017).

But as Plaintiff's fear is per se unreasonable she cannot demonstrate that a failure by the County to comply with the ADA has reasonably deterred her from using the County's facilities. The pedestrian bridges have access by elevator, a wheelchair may freely cross them from side to side and, in the unlikely event that Plaintiff McAllister's wheelchair breaks down and/or she becomes too tired to move, she can cite her disability as the cause and request an exemption from enforcement of the ordinance or a reasonable accommodation from LVMPD.

Accordingly, in addition to being a facial challenge under the ADA not requiring discovery, Plaintiff can't even demonstrate deterrent standing sufficient to continue pursuing her ADA claims in this action—regardless of how the motion to dismiss [9] is decided. Accordingly, the Court need not give any special consideration to the ADA claim as it pertains to the need for discovery.

DATED this 6th day of June, 2024.

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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 6th day of June, 2024, I served a true and correct copy of the foregoing **DEFENDANT CLARK COUNTY'S REPLY TO PLAINTIFFS' RESPONSE [41] TO ITS MOTION TO STAY DISCOVERY [37]** (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.

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