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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 **12(b)(1) MOTION TO DISMISS PLAINTIFF LISA MCALLISTER AND HER ADA CLAIMS FOR LACK OF STANDING**

Defendant CLARK COUNTY, by and through its counsel of record, hereby files this 12(b)(1) Motion to Dismiss Plaintiff Lisa McAllister and her ADA Claims for Lack of Article III Standing.

This Motion 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 AND POINTS OF AUTHORITIES

I.

RELEVANT ALLEGATIONS AND NATURE OF MOTION

Procedural Posture of the Case

Plaintiffs filed their initial complaint in this matter on or around February 16, 2024. [ECF No. 1]. Plaintiffs' complaint includes five causes of action. *Id*. at 10:1-22:26. These causes of action are comprised of five facial challenges to CCC 16.13.030 under the Fourteenth Amendment of the United States Constitution, Article 1 Section 8 of the Nevada Constitution, the First Amendment to the United States Constitution, Article 1 Section 9 of the Nevada Constitution, and Title II of the Americans with Disabilities Act ("ADA"). *Id*.

Defendant Clark County has filed a motion to dismiss [9] all of these disfavored facial challenges which is currently pending a ruling by the Court.

Causes of Action in the Complaint

The first four causes of action in Plaintiffs' complaint [1] are brought on behalf of Plaintiff Brandon Summers who Plaintiffs allege has standing to bring claims under the United States and Nevada State Constitutions because he "has engaged in street performance on the pedestrian bridges [affected by CCC 16.13.030] on the Las Vegas Strip since 2011" and purportedly has "an injury in fact because [he] has an interest in engaging in protected First Amendment activity on pedestrian bridges." [ECF No. 1] at 3:1-4:2.

However, Plaintiffs' fifth cause of action, brought under Title II of the ADA, is brought on behalf of Plaintiff Lisa McAllister. [ECF No. 1] at 4:3-5:2. McAllister contended that she "is disabled due to a spinal injury and uses a manual wheelchair" and claims to have standing to challenge CCC 16.13.030 under the ADA because "the risk of criminal penalties under CCC 16.13.030 is a barrier to [her] accessing the pedestrian bridges and she is deterred from returning to the area." *Id*.

Plaintiff McAllister's Asserted Basis for Standing to Bring ADA Claim

Plaintiff McAllister's attempt to challenge the validity of a criminal ordinance facially under Title II of the ADA—while certainly a novel and creative legal theory—is not based on

any provision of the ADA or citation to case law supportive of the contention that the ADA provides such a remedy. *See generally* [ECF No. 1]. Plaintiff's only citation regarding standing to bring an ADA claim was to an inapposite case, *Kirola v. City and County of San Francisco*, which involved a Title II ADA claim brought by a wheelchair-bound person against the City and County of San Francisco because physical barriers in infrastructure like "bumps in the sidewalk," insufficient "curb ramp[s]", "inaccessible pools", etc. allegedly precluded her access to portions of public facilities. *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1175 (9th Cir. 2017).

Plaintiff McAllister also asserted the following allegations and legal conclusions in asserting Article III standing to facially challenge the validity of CCC 16.13.030 under the ADA:

1. "Ms. McAllister is disabled due to a spinal injury and uses a manual wheelchair to travel." [ECF No. 1] at 4:9-11. (Factual Allegation)[1].
2. "Ms. McAllister has used the pedestrian bridges on the Las Vegas Strip to travel through the resort corridor in her wheelchair." *Id*. at 4:12-13. (Factual Allegation).
3. "Ms. McAllister **has needed** to stop in public places **because her wheelchair malfunctioned**." *Id*. at 4:14-16 (emphasis added). (Factual Allegation).
4. "Ms. McAllister **has needed** to stop in public areas to rest **when her arms are tired**." *Id*. at 4:17-18 (emphasis added). (Factual Allegation).
5. "Ms. McAllister has **needed to stop in crowded public areas due to limited visibility** in order to determine where there is space for her to travel in her wheelchair." *Id*. at 4:19-21. (emphasis added). (Factual Allegation).[2]
6. "Ms. McAllister has [allegedly] established injury in fact because the risk of criminal penalties under CCC 16.13.030 **is a barrier to Ms. McAllister accessing**

[1] In a motion to dismiss, the "court must […] accept as true all well-pled factual allegations in the complaint, recognizing that **legal conclusions are not entitled to the assumption of truth**." *AAA v. Clark Cnty. Sch. Dist.*, No. 220CV00195JADBNW, 2022 WL 293236, at *8 (D. Nev. Feb. 1, 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)) (emphasis added).

[2] Plaintiff McAllister's factual allegations in support of her standing in this matter actually highlight the importance of keeping the pedestrian bridges free from congestion—the express purpose of CCC 16.13.030.

the pedestrian bridges and she is <u>deterred</u> from returning to the area." *Id*. at 4:21-24. (Legal Conclusion).

7. "Ms. McAllister has established a causal connection between her injury and Defendant's actions as she is at risk of prosecution under CCC 16.13.030 for stopping on a pedestrian bridge due to her disability." *Id*. at 4:25-28. (Legal Conclusion).
8. "A favorable decision will redress Ms. McAllister's injury by eliminating her risk of prosecution under CCC 16.13.030." *Id*. at 5:1-2. (Legal Conclusion).

Accordingly, and based on the foregoing factual allegations, Plaintiff McAllister's basis for standing is first premised on one of three infrequent, speculative, and hypothetical situations arising at the exact moment when she happens to be crossing a pedestrian bridge on the Las Vegas Strip: 1. Her wheelchair malfunctions; 2. She becomes too tired to continue pushing her wheelchair across the bridge; or 3. She is forced to stop out of necessity due to a crowded bridge. *Id*. at 4:14-21.

Once one of these infrequent hypothetical situations has occurred at the exact moment Plaintiff McAllister is crossing one of the pedestrian bridges, she then needs to be observed by an LVMPD officer who elects to impermissibly cite Plaintiff McAllister in violation of Title II of the ADA for conduct occasioned by her disability. *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) ("We agree with the majority of circuits to have addressed the question that Title II applies to arrests. […] Courts have recognized [that] […] Title II claims [are] applicable to […] wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity"); *Lawman v. City & Cnty. of San Francisco*, 159 F. Supp. 3d 1130, 1147 (N.D. Cal. 2016) ("To prevail on a theory of wrongful arrest under the ADA, Lawman must prove that 1) he was disabled; 2) the officers knew or should have known he was disabled; and 3) the officers arrested him because of legal conduct related to his disability.").

Establishing Standing

To qualify for Article III standing the courts apply a three-element test formulated by the Supreme Court:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.
>
> Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks, citations, and footnote omitted).

Injury in Fact under the ADA

To have a legally protected interest sufficient to support "injury in fact", "the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question." *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 954 (9th Cir. 2013).

Particularized "mean[s] that the injury must affect the Plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130. "In the context of the ADA[3], we understand that to mean that [the complainant] must [herself] suffer an injury **as a result of the [entity's] noncompliance with the ADA**." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137–38 (9th Cir. 2002) (emphasis added). In context, the courts have held that physical barriers may serve as deterrents—like a store's failure to post ADA compliant

[3] While the standard for standing under the ADA for Title II (government) and Title III (private entity) claims appears to be similar (particularly given the dearth of Title II standing case law), it is much more difficult to prevail on the merits of a Title II ADA claim against a government entity. Government entities may still prevail on the merits of a Title II because "28 C.F.R. § 35.150 requires only that the program as a whole be accessible, not that all access barriers—and not even all of those at the most iconic locations—be remedied." *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1184 (9th Cir. 2017). Accordingly, even if Plaintiff McAllister could demonstrate standing under the ADA and the court were to adopt her novel theory that a criminal ordinance constitutes a "barrier", she would still fail on the merits of her claims because she has access on the whole to the Las Vegas Strip's sidewalk system where street level crossings are located generally half a block to a block away from many of the pedestrian bridges and all locations are accessible in one form or another without the use of pedestrian bridges. *See*, *e.g.*, Diagrams of Street Level Crossings in Relation to Pedestrian Bridges, attached hereto as **Exhibit A**.

bathroom signage with Braille writing indicating the proper bathroom a blind person may use or architectural barriers that physically prevent a person in a wheelchair from entering a grocery store. *See*, *e.g.*, *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040 (9th Cir. 2008); *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir.2000).

In regard to the "actual or imminent" requirement, the Ninth Circuit has held "that a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'" *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002). "Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers 'imminent injury'" for the purposes of injunctive relief standing. *Id*.

Causal Connection under the ADA

"[T]he 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). "[T]hey are distinct in that traceability 'examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested relief.'" *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022) (quoting *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013)).

In order for a plaintiff to establish traceability, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, **and not the result of the independent action of some third party not before the court**." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (emphasis added). "In cases where a chain of causation 'involves numerous third parties' whose 'independent decisions' collectively have a 'significant effect' on plaintiffs' injuries, the Supreme Court and [the Ninth Circuit Court of Appeals] have found the causal chain too weak to support standing at the pleading stage." *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), abrogated on other

grounds by *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (explaining causation as "a fairly traceable connection between the plaintiff's injury and the complained-of-conduct of the defendant").

To satisfy redressability on the other hand, the Plaintiff must allege facts sufficient to "demonstrate a likelihood that the primary relief Plaintiffs request […] will redress their alleged injuries […]." *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1028 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020); *see also Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding that redressability is satisfied if the relief requested "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.").

Nature of Motion

Plaintiff McAllister seeks to have CCC 16.13.030 declared invalid and permanently enjoined under the ADA. However, given the nature of her factual allegations and the nature of the ADA itself, Plaintiff has failed demonstrate that she has standing under the ADA to achieve these aims because she has suffered no "injury in fact", did not allege a causal relationship between CCC 16.13.030 and her alleged harm, and has not plausibly demonstrated that an invalidation of CCC 16.13.030 would provide her the relief she seeks to be free from unlawful enforcement of traffic laws in violation of Title II of the ADA.

First, Plaintiff cannot demonstrate an injury in fact because she cannot show that she has a legally protected interest to bring this claim because the ADA is intended to ensure equal protection under the law—not invalidate or enjoin laws which may have a discriminatory effect. While Plaintiff may certainly be entitled to seek a reasonable accommodation for any law or regulation that discriminatorily impacts her or other disabled persons, she cannot enjoin or invalidate a law in its entirety on the basis of the ADA alone.

Additionally, Plaintiff cannot demonstrate a particularized or concrete injury because CCC 16.13.030 is facially neutral and applies equally to people both with and without disabilities. She also cannot show that her purported harm is actual or imminent because she

has not been cited under CCC 16.13.030, is not likely to ever be cited under CCC 16.13.030, and her fear of being cited under 16.13.030 is *per se* unreasonable and based on nothing more than conjecture.

In terms of causation, Plaintiff cannot demonstrate causation because her theory of deterrence standing is based on three infrequent occurrences which must trigger bad faith enforcement of the law by LVMPD and this hypothetical theory of causation that incorporates conjectural bad acts by non-parties is too attenuated and not fairly traceable to CCC 16.13.030. Furthermore, because it is apparent from the language of Plaintiff McAllister's allegations that her true concern is bad faith enforcement of traffic regulations against her on the basis of her disability—the mere invalidation of a single ordinance will not provide her the redress she seeks.

As Plaintiff cannot demonstrate an injury in fact, traceability, or redressability, she lacks Article III standing to bring her ADA claims and the Court lacks subject matter jurisdiction to entertain them.

II.

STANDARD OF REVIEW

"Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face that are sufficient to establish subject matter jurisdiction." *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1025 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020) (citing *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir. 2008)).

"Although the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly in federal court." *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1025 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020); *see also McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)).

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III.

LEGAL ARGUMENT

A. Plaintiff McAllister Cannot Show an "Injury in Fact" because she does not Allege a Legally Protectible Interest, a Concrete and Particularized Harm, or an Actual or Imminent Injury Arising from a Purported Failure by Clark County to Comply with the ADA

1. Plaintiff McAllister has no Legally Protected Interest in Enjoining or Invalidating Facially Neutral Laws like CCC 16.13.030 under the ADA

Plaintiff McAllister identified in her Complaint [1] that she is making a facial challenge to CCC 16.13.030 by seeking "Declaratory Relief that CCC 16.13.030 violates Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq." and "Injunctive relief prohibiting Defendant from enforcing CCC 16.13.030." [ECF No. 1] at 23:13-16. Plaintiff contended that CCC 16.13.030 is invalid because "stopping or standing on a pedestrian bridge due to her disability is not exempted in CCC 16.13.030," yet in the body of her Complaint [1] Plaintiff identifies no mechanism in the ADA or case law supporting that the ADA provides a remedy to facially challenge enacted ordinances and statutes in this regard. *See generally id*.

On the contrary, nearly all the ADA cases cited in Plaintiff's Complaint [1] reference ADA non-compliant physical barriers or limitations with infrastructure as a basis for initiating a Title II action against a government entity under the ADA. *See* [ECF No. 1] at 20:14-21:28; *see also Cohen v. City of Culver City*, 754 F.3d 690, 693 (9th Cir. 2014) (temporary structures for an auto show blocking ADA curb access to sidewalk); *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002) ("failing to install curb ramps in newly-constructed or altered sidewalks"); *Chapman v. Pier 1 Imports* (U.S.) Inc., 631 F.3d 939, 943 (9th Cir. 2011) ("architectural barriers existing at the [private store]" that allegedly impeded access of a motorized wheelchair); *Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 984 (9th Cir. 2014) (football bleachers constructed prior to the ADA which were not ADA compliant and had no wheelchair access).

To have a legally protected interest sufficient to support an "injury in fact" a complainant must articulate a protected right under the statute by which she brings her action.

Ass'n of Pub. Agency Customers v. Bonneville Power Admin., 733 F.3d 939, 954 (9th Cir. 2013). While the ADA certainly requires that people with disabilities receive equal treatment under the law—there is no language in the ADA or its associated regulations that require that the language of government statutes, ordinances, or regulations be drafted in a way that precludes all disparate impact to people with disabilities—only that people with disabilities are provided accommodations for their unique situations to receive equal access to benefits and services under the law as drafted and enforced. *See*, *e.g.*, *Lewis v. Truitt*, 960 F. Supp. 175, 177 (S.D. Ind. 1997) (discussing courts that "have held that a plaintiff may recover under the ADA where he can show that (1) he was disabled, (2) the defendants knew or should have known he was disabled, and (3) the defendants arrested him because of legal conduct related to his disability.").

Intuitively this makes sense as there is no end to the number of statutes, ordinances, or regulations that would require exceptions and carve-outs for people with disabilities. Criminal trespass ordinances do not contain carve-outs for visually impaired persons who may inadvertently wander into private property. Driving statutes do not include exceptions for individuals suffering from epilepsy who may lose control of their vehicles through no choice of their own. Zoning ordinances regarding property setbacks or temporary structures do not include exceptions for wheelchair ramps or other potentially necessary ADA additions to a home. Airport regulations regarding animal quarantines similarly do not need to include express exceptions for service animals for people suffering from a disability. In fact—more often than not—criminal statutes and ordinance provide no exception for people with disabilities because of the massive undertaking and speculation that would require. The way a government entity complies with the ADA and provides equal treatment under its laws is on the enforcement end when a disability is identified, and reasonable accommodation is requested. This permits the government entity to review each case individually and to provide reasonable accommodations specifically tailored to the government service or benefit a person with a disability has been purportedly denied.

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Crowder v. Kitagawa highlights this. In *Crowder*, the Hawaii Department of Agriculture enacted regulations requiring a mandatory 120-day quarantine for all "dogs, cats, and other carnivorous animals entering Hawaii from the United States mainland." 81 F.3d 1480, 1482 (9th Cir. 1996). This regulation was challenged by two people who suffered from visual impairment and required the use of service dogs in their everyday life. *Id.* at 1482. The two Plaintiffs proposed and requested various accommodations from the State of Hawaii exempting the visually impaired from the disparate burden the regulation placed on the blind but were denied. *Id*. at 1485.

The court in *Crowder* found that "Although Hawaii's quarantine requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others." *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Despite identifying this disparate impact of the regulation on the visually impaired, the court in *Crowder* did not invalidate the quarantine regulation (which served a substantial agricultural interest) or hold that it violated the ADA[4]—rather the court remanded the case for findings from the trial court on the reasonableness of the accommodations requested by the plaintiffs and denied by the State of Hawaii. *Id*. at 1486.

Plaintiff has not requested and been denied reasonable accommodation exempting her from enforcement of CCC 16.13.030 for reasons arising from her disability here.[5] *See generally* [ECF No. 1]. Clark County's ordinance similarly does not preclude the use of wheelchairs on its pedestrian bridges the same way the regulation in *Crowder* deprived visually impaired individuals of their service animals. *See* CCC 16.13.03. Instead, Plaintiff has instead requested this court invalidate CCC 16.13.030 and completely enjoin its enforcement because she concludes it violates the ADA by "serving as a barrier to Ms. McAllister accessing the pedestrian bridges and […] deter[ing] [her] from returning to the

[4] Notably, it appears that in response to this remand the State of Hawaii amended their regulations to include a regulation exempting certain animals from quarantine thereby placing the burden of proving that an animal was rabies-free prior to entry on the owner in order to qualify for an exemption. *See*, *e.g.*, Haw. Code R. 4-29-10 (Weil)

[5] Realistically speaking such an accommodation would need to be requested at the time of the attempted enforcement of CCC 16.13.030 by LVMPD as there are numerous fact patterns where Plaintiff McAllister could be validly cited under CCC 16.13.030 for reasons completely unrelated to her disability. This again highlights the importance of bringing these challenges on an "as applied" basis as opposed to facially.

area. [ECF No. 1] at 4:21-24, 23:13-16. As there is no remedy under the ADA to completely invalidate an ordinance for an allegedly discriminatory impact on a class of disabled person, Plaintiff McAllister has not articulated a legally protected interest and lacks standing to proceed with her ADA claims.

2. Plaintiff has No Concrete or Particularized Harm because she has Suffered no Individual Injury and CCC 16.13.030 has no Disparate Impact on Wheelchair Users

Concrete or particularized harm "mean[s] that the injury must affect the Plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n. 1, 112 S.Ct. 2130. "In the context of the ADA[6], we understand that to mean that [the complainant] must [herself] suffer an injury as a result of the [entity's] noncompliance with the ADA." *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137–38 (9th Cir. 2002). Plaintiff contended that her standing arises from the fact that she "cannot always cross a pedestrian bridge without violating CCC 16.13.030 and risking a criminal infraction" and that she "and other people with disabilities that are physically unable to travel across the bridge without stopping no longer have an accessible path to travel the in the resort corridor." [ECF No. 1] at 22:8-27.

"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) (citing *Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016)). As Plaintiff McAllister has not been cited under CCC 16.13.030 and has not requested a reasonable accommodation to the enforcement of CCC

[6] While the standard for standing under the ADA for Title II (government) and Title III (private entity) claims appears to be similar (particularly given the dearth of Title II standing case law), it is much more difficult to prevail on the merits of a Title II ADA claim against a government entity. Government entities may still prevail on the merits of a Title II claim because "28 C.F.R. § 35.150 requires only that the program as a whole be accessible, not that all access barriers—and not even all of those at the most iconic locations—be remedied." *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1184 (9th Cir. 2017). Accordingly, even if Plaintiff McAllister could demonstrate standing under the ADA and the court were to adopt her novel theory that a criminal ordinance constitutes a "barrier" to be invalidated, she would still fail on the merits of her claims because she has access on the whole to the Las Vegas Strip's sidewalk system where street level crossings are located generally half a block to a block away from many of the pedestrian bridges and all locations are accessible in one form or another without the use of pedestrian bridges. *See*, *e.g.*, Diagrams of Street Level Crossings in Relation to Pedestrian Bridges, attached hereto as **Exhibit A**.

16.13.030, her pleadings provide notice that her claim is one for disparate impact only. *See generally* [ECF No. 1].

In context, the courts have found particularized harm occurs when a physical barrier disparately impacts the claimant by barring them from reasonably accessing the same services or benefits as non-disabled people. *See*, *e.g.*, *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040 (9th Cir. 2008); *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir.2000); *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Accordingly, it follows that where there is no disparate or discriminatory impact on a plaintiff, she cannot establish a concrete or particularized harm under the ADA sufficient to maintain standing.

To demonstrate a discriminatory impact a Plaintiff must plausibly allege that government conduct will reduce or eliminate access to government benefits or services for people with disabilities while continuing to provide those same services to people without disabilities. *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004). In *Rodde*, the County proposed closing one of their six medical centers—a "County hospital dedicated primarily to providing inpatient and outpatient rehabilitative care to disabled individuals." *Rodde v. Bonta*, 357 F.3d 988, 990 (9th Cir. 2004). The Court in *Rodde* found that a closure of that facility would "reduce, and in some instances eliminate, necessary medical services for disabled Medi–Cal patients while continuing to provide the medical care required and sought by Medi–Cal recipients without disabilities." *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004). Accordingly, the court held "the district court did not abuse its discretion in concluding that closing Rancho without continuing to provide medically necessary services to disabled individuals elsewhere would constitute discrimination on the basis of disability." *Id*.

Unlike the government action in *Rodde*, CCC 16.13.030 does not have any discernable discriminatory impact. People without disabilities often frequently tire and need to take breaks while walking the same as Plaintiff alleged that she does. People without disabilities frequently suffer "mechanical" or wardrobe failures—losing contact lenses, dropping glasses, breaking heels, losing flipflops, tearing pants or dresses, etc. that would necessitate stopping the same

way a hypothetical wheelchair failure would. Similarly, people without disabilities must frequently and unavoidably stop and plot their course through crowds of people to arrive at their destination. Furthermore, both disabled and non-disabled alike people may need to stop for any number of reasons including uncooperative toddlers, weather related conditions, natural disasters, hazards, etc.

Accordingly, it follows that an unreasonable subjective fear that one would be cited in bad faith by LVMPD for stopping under any of these unavoidable conditions under CCC 16.13.030 would be felt to the same extent by people both with and without disabilities equally. Therefore, there is no particularized harm plausibly alleged by Plaintiff McAllister to support discriminatory impact or Article III standing in this matter.

3. The Injury Alleged by Plaintiff as a Result of CCC 16.13.030 is not Actual or Imminent because it Hypothetical and Relies on Unreasonable Conjecture

To satisfy the "injury in fact" requirement to qualify for Article III standing, Plaintiff must argue that the invasion of her legally protected right is "actual or imminent, **not conjectural or hypothetical.**" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (emphasis added). In regard to the "actual or imminent" requirement, the Ninth Circuit has held "that a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'" *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002). "Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers 'imminent injury'" for the purposes of injunctive relief standing. *Id*. The Ninth Circuit has indicated that standing to sue under the ADA requires a Plaintiff satisfy that their claim for discrimination based on deterrence must be "reasonable to infer" from the allegations in the complaint or the evidence in discovery. *See*, *e.g.*, *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 949 (9th Cir. 2011) (citing *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir.2008)). Here, we accept the Plaintiff's allegations in the complaint as true.

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It is important to note that Plaintiff McAllister's allegations already start from a point of speculation not seen in other ADA cases where deterrence standing was found. Plaintiff McAllister purported that her disability *sometimes* causes her to stop for a rest, that her wheelchair *sometimes* breaks down, and that she *sometimes* needs to stop to get her bearings. *Id*. at 4:14-21.

In *Pickern*, the Plaintiff had deterrence standing under the ADA because "architectural barriers" physically completely prevented him from accessing a store with his wheelchair—not just some of the time. *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002); *see also Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1038 (9th Cir. 2008). In *Steger*, the Plaintiff was deemed to have standing because a first-floor bathroom lacked the proper ADA-compliant signage for a blind person to ever be able to identify the correct bathroom independently. *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000).[7] In cases where standing was found, the alleged barriers could objectively and intuitively be inferred as a physical bar to accessing the facilities. Plaintiff's allegations, on the other hand, hinge on one of several unfortunate events occurring which then serves as a precursor to a chain of events involving bad faith enforcement activities by non-parties--clearly demonstrating how attenuated her claim for "harm" is.

Even if one of those three unfortunate events alleged by Plaintiff in the complaint occur, her theory of standing still relies on conjecture that a non-party LVMPD officer will be present to witness this event and elect in bad faith to cite her for a violation of CCC 16.13.030 without probable cause to believe that she had the requisite *mens rea* and in violation of Title II of the ADA by citing her for conduct arising from her disability. *See*, *e.g.*, *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) ("Title II claims [are] applicable to […] wrongful arrest, where

[7] Notably, Plaintiffs' complaint alleged no structural barriers to access as Clark County pedestrian bridges on the Las Vegas Strip as they are readily accessible, ADA compliant, and include elevator access at all points of entry. Accordingly, the "deterrence" alleged in the complaint is strictly based on Plaintiff's subjective fear of being improperly cited under CCC 16.13.030.

police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity"); *Lawman v. City & Cnty. of San Francisco*, 159 F. Supp. 3d 1130, 1147 (N.D. Cal. 2016) ("To prevail on a theory of wrongful arrest under the ADA, Lawman must prove […] the officers arrested him because of legal conduct related to his disability.").; *Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D.Ind.1997); *Barber v. Guay*, 910 F.Supp. 790, 802 (D.Me.1995); *Orr v. California Highway Patrol, No. 2:14-585 WBS EFB, 2015 WL 9305021, at *1 (E.D. Cal. Dec. 22, 2015), vacated sub nom. Orr v. Brame, 727 F. App'x 265 (9th Cir. 2018)* (citations omitted); *Jackson v. Inhabitants of the Town of Sanford*, No. 94–12–P–H, 1994 WL 589617, at *6 (D.Me. Sept.23, 1994); *Gorman v. Bartch*, 925 F.Supp. 653, 656 (W.D.Mo.1996).

Furthermore, for the purposes of establishing "imminent" harm to maintain standing for injunctive relief, the Supreme Court has "reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)) (emphasis in original); *see also Charleston v. Nevada*, 830 F. App'x 948, 949 (9th Cir. 2020). As Plaintiff McAllister's unreasonable expectations regarding improper conduct by all LVMPD officers is not "certainly impending" she cannot satisfy the imminent harm requirement to seek an injunction under the ADA.

Accordingly, Plaintiff's theory of deterrence standing in this action is unreasonable because it is conditioned on hypothetical and infrequent triggers which then require independent conduct in violation of Title II of the ADA by a bad actor non-party to this action before the harm contemplated could ever become a reality. The allegations, on their face, do not provide a reasonable inference of deterrence sufficient to support standing for Plaintiff's ADA claims. In other words, Plaintiff's claims that she is subjectively deterred from visiting the pedestrian bridges are *per se* unreasonable on their face because of their speculative and attenuated nature.

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B. Plaintiff McAllister's Theory of Causation is Not Fairly Traceable to CCC 16.13.030 nor Would an Invalidation or Permanent Injunction of the Ordinance Provide Redress to Plaintiff

1. The Deterrent Standing Alleged by Plaintiff McAllister is not Fairly Traceable to CCC 16.13.030, but Rather Speculative Violations of Title II of the ADA by LVMPD—a non-Party to this Action

"To survive a motion to dismiss for lack of Article III standing, plaintiffs must establish a line of causation between defendants' action and their alleged harm that is more than attenuated." *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1027 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020) (internal quotation marks and citations omitted); *see also Maya v. Centex Corp.,* 658 F.3d 1060, 1070 (9th Cir. 2011). The Ninth Circuit has held that it must be "possible to draw a causal line" between the alleged conduct and the outcome. *O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023). "In cases where a chain of causation involves numerous **third parties whose independent decisions** collectively **have a significant effect on plaintiffs' injuries**, the Supreme Court and this court have found the causal chain too weak to support standing at the pleading stage." *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (internal citations and quotation marks omitted) (emphasis added).

As was discussed, *supra*, LVMPD is prohibited by Title II of the ADA from enforcing criminal laws against people when the conduct giving rise to the violation was occasioned by their disability. *See 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); *Lawman v. City & Cnty. of San Francisco*, 159 F. Supp. 3d 1130, 1147 (N.D. Cal. 2016); *Lewis v. Truitt*, 960 F.Supp. 175, 178 (S.D.Ind.1997); *Barber v. Guay*, 910 F.Supp. 790, 802 (D.Me.1995).

Even in the absence of Title II of the ADA, however, LVMPD would still be prohibited from effecting detention of a citizen where they lacked probable cause. *Gernstein v. Pugh*, 420 U.S. 103, 114 (1975); *Roberson v. Henderson Police Dep't*, No. 222CV00541JADEJY, 2022 WL 4110896, at *2 (D. Nev. Sept. 7, 2022). Accordingly, where the conduct at issue was occasioned by necessity, a physical impairment or something like a wheelchair malfunction—

there is not probable cause to believe that a person had the requisite intent to stop or stand in violation of CCC 16.13.030 (again highlighting the importance of as applied challenges versus facial challenges) and such enforcement would arguably be in violation of both the Fourth Amendment and Title II of the ADA. *Id*.

In *Charleston*, the Plaintiffs, former sex trafficking victims, brough suit against the State of Nevada alleging that the statute permitting prostitution in rural Nevada counties created an environment where people were confused about the legality of sex work in larger counties and where sex traffickers could engage in criminal conduct with impunity. *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1023 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020). The court found that the plaintiffs' claims were too attenuated and that there was not a line of causation between the subject law and the sex traffickers' unlawful conduct. *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1027 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020).

Here Plaintiff McAllister's theory of standing rests on three unlikely factual scenarios which purportedly trigger some bad faith enforcement of CCC 16.13.030 by LVMPD officers. But similar to the facts in *Charleston*, there is no causal line between the language and scope of the ordinance in question and the hypothetical bad faith enforcement by LVMPD officers. In fact, if LVMPD officers were going to engage in bad faith enforcement of laws in violation of Title II of the ADA they could already do so under any number of existing statutes or ordinances. Furthermore, unlike the bad actor sex traffickers in *Charleston* who were actually engaged in wrongful conduct, LVMPD's purported bad conduct in this scenario is strictly hypothetical and speculative making traceability in this matter even more tenuous.

Accordingly, and as Plaintiff McAllister's theory of causation is not fairly traceable to CCC 16.13.030 under the ADA, the Court should find that she lacks standing and dismiss her and her ADA claims pursuant to FRCP 12(b)(1).

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2. A Permanent Injunction or Invalidation of CCC 16.13.030 would not Provide Redress to Plaintiff's Speculative Claims of Bad Faith Enforcement of Laws by LVMPD against Plaintiff based on her Disability

To satisfy the redressability prong of causation, Plaintiff must allege facts sufficient to "demonstrate a likelihood that the primary relief Plaintiffs request […] will redress their alleged injuries […]." *Charleston v. Nevada*, 423 F. Supp. 3d 1020, 1028 (D. Nev. 2019), aff'd, 830 F. App'x 948 (9th Cir. 2020); *see also Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding that redressability is satisfied if the relief requested "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.").

Plaintiff in this case, by the factual allegations in the complaint [1], is seeking to be free from discriminatory enforcement of laws by LVMPD on the basis of her disability. But enjoining or invalidating one single County ordinance will have no effect on curtailing bad faith enforcement by employees of LVMPD—a separate legal entity.

Even if this Court were to invalidate or enjoin CCC 16.13.030, an LVMPD officer could still cite Plaintiff in bad faith under CCC 16.11.050—070 by arguing that her wheelchair is prohibited equipment or that it constitutes an actual obstruction to the flow of traffic. *See*, *e.g.*, CCC 16.11.010, et seq. They could still cite her in bad faith under CCC 14.08.020 for failing to obey a police officer if a police officer ordered her to move along when she is unable due to a broken wheelchair. CCC 14.08.020. LVMPD officers could similarly cite Plaintiff for conduct occasioned by her disability if she was unable to timely comply with traffic control devices or signage at street-level crosswalks. CCC 14.12.010, et seq.

Invalidating CCC 16.13.030 will not redress Plaintiff McAllister's irrational and unreasonable fear that she will suffer criminal penalties from law enforcement acting outside the bounds of existing law and, accordingly, the relief she seeks in the instant matter will not redress her actual concerns. As Plaintiff cannot demonstrate redressability, she lacks Article III standing to maintain her ADA claims against Clark County and the Court should dismiss them and her from this action.

IV.

CONCLUSION

Based on the foregoing, the Honorable Court should grant the instant 12(b)(1) Motion to Dismiss Plaintiff Lisa McAllister and her ADA Claims for Lack of Standing.

DATED this 14th 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 14th day of June, 2024, I served a true and correct copy of the foregoing **12(b)(1) MOTION TO DISMISS PLAINTIFF LISA MCALLISTER AND HER ADA CLAIMS FOR LACK OF STANDING** (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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