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UNITED STATES DISTRICT COURT

DISTRICT 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 No.: 2:24-cv-00334-JAD-NJK

RESPONSE TO DEFENDANT CLARK COUNTY'S MOTION TO DISMISS (ECF NO. 45)

Plaintiffs hereby file this Response to Defendant Clark County's Second Motion to Dismiss. (ECF No. 45.) This Response is made and based upon the following Memorandum of Points and Authorities as well as the papers and pleadings on file herein, and any arguments the Court permits.

DATED: June 28, 2024

By: /s/ *Margaret A. McLetchie*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The County's serial dismissal effort is improper and should be rejected. Ms. McCallister has standing, and her claim survives. The County's arguments to the contrary just reflect the same lack of understanding of and willingness to discriminate against disabled people that animated the passage of the Ordinance. The Court should deny the Motion to Dismiss.

II. PRODCEDURAL HISTORY

On February 16, 2024, Plaintiffs filed their initial complaint alleging five causes of action. (ECF No. 1.) On February 22, 2024, Plaintiffs filed a Motion for Preliminary Injunction (ECF No. 4) and a Motion for Temporary Restraining Order (ECF No. 5); all three documents were served on the same day. (ECF No. 6.) Clark County filed its first Motion to Dismiss on March 14, 2024 (ECF No. 9 (the "First Motion")) pursuant to ***both*** FRCP 12(b)(1) and 12(b)(6). (ECF No. 9, p. 1:23-24.) After full briefing, the Court conducted a hearing on the Motion for Preliminary Injunction, Motion for Temporary Restraining Order, and Defendant's Motion to Dismiss on June 5, 2024. The Court did not issue a ruling, nor did the Court ask for supplemental briefing. (ECF No. 42 (Minutes of Proceeding).) The County filed a second Motion to Dismiss pursuant to FRCP 12(b)(1) on June 14, 2024. (ECF No. 45 (the "Second Motion").)

III. LEGAL ARGUMENT

A. The Second Motion to Dismiss Is Not Properly Before this Court.

The Court should deny Defendant's second motion to dismiss because it was not properly brought before the Court. The Federal Rules (and common sense) generally limit serial motions to dismiss: a party that files any motion pursuant to FRCP 12 from filing any further motion that was available but omitted from the first motion. FRCP 12(g)(2). There are exceptions: relevant to this case, the Rules require the court to dismiss an action if it determines at any time it lacks subject matter jurisdiction. FRCP 12(h)(3). Thus, a party may file a second motion to dismiss for lack of subject matter jurisdiction even if it filed a previous

motion and did not raise that defense (since subject matter jurisdiction is not waivable). However, nothing in the rules permits what the County has done here: filing a second motion to dismiss raising subject matter jurisdiction after already raising that issue in a motion that is pending before the Court.

The First Motion, just like the Second Motion, cites FRCP 12(b)(1). While presented differently with regards to the ADA, both motions essentially contend that CCC 16.130.030 does not really impact disabled people, and, therefore Ms. McCallister does not have standing under the ADA and the Court lacks jurisdiction. (*See, e.g.,* ECF No. 9, p 9:1-7.) Indeed, the below examples show how duplicative the serial motions to dismiss are:

First Motion	**Second Motion**
Both motions argue that Ms. McCallister can challenge any citation in a criminal case if the law is enforced against her:	
"Plaintiffs concocted an egregious hypothetical of Plaintiff McAllister, a woman with a disability, being cited for stopping if her wheelchair broke down or if she became too tired to cross the subject pedestrian bridges in a single movement. [] If Plaintiff McAllister were ever to be cited under such circumstances it would certainly shock the conscience and this Court would have no difficulty in finding such an application unconstitutional." (ECF No. 9, p. 7:17-23 (citation omitted).)	"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." (ECF No. 45, pp. 17:27 -18:4.)
Not being able to stop does not impact disabled people like Ms. McCallister more than people without such disabilities:	
"But McAllister advances no facts supporting an inference that a disabled pedestrian utilizing a mobility device has a unique need to stop or stand on a pedestrian bridge due to a disability. The Complaint cites only three circumstances in which a disabled pedestrian who uses a mobility device may need to stop or stand while on a pedestrian bridge: the mobility device may malfunction, the person may tire while crossing the bridge, or the person's path of	"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

travel may be obstructed by other pedestrians on the bridge. [] The latter two circumstances are completely unconvincing; both disabled and non-disabled pedestrians may feel the need to stop or stand due to physical exhaustion while traveling on the pedestrian bridges or because the person's intended path of travel is obstructed by other pedestrians." (ECF No. 9, p. 20:3-11.)	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." (ECF No. 45, pp. 13:26 - 14:5.)

FRCP 12(h)(3) does not permit the County to get a second bite at the apple and reassert arguments it already made. While FRCP 12 may not explicitly prohibit such conduct, the County's filing of the Second Motion is not consistent with FRCP 1, which makes crystal clear that "[the rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Indeed, if the County's effort to file a duplicative motion were countenanced, the Local Rules' limitations on page limits would be rendered meaningless. Further, when considering the appropriateness of the County's Second Motion. it is noteworthy that this is a First Amendment case, which should be resolved "quickly without chilling speech through the threat of burdensome litigation." *Fed. Election Comm'n v. Wisc. Right To Life, Inc*., 551 U.S. 449, 469, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (controlling plurality op. of Roberts, C.J.) Yet the County, just as it has failed to participate in discovery and has sought to stay discovery, has additionally protracted this litigation by filing its Second Motion.

B. Ms. McCallister Sufficiently Alleged an ADA Claim and Has Standing.

1. Ms. McCallister's Claim Survives Dismissal.

Because there has been confusion by the County as to how the ADA works and because it conflates standing and the merits of a claim (and makes arguments relating to both in its Second Motion), it is worth making it clear what the ADA requires. Title II of the ADA prohibits Clark County from discriminating against people with disabilities by denying them access to or participation in those the County's benefits, services and programs. *See* ADA

Title II, 42 U.S.C. § 12132; 29 U.S.C. § 794. To allege a violation under Title II of the ADA, a plaintiff must simply allege:

> (1) she is a 'qualified individual with a disability'; (2) she was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability.

Weinreich v. L.A. Cnty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (internal citations and emphasis omitted). These are the only elements Ms. McCallister needs to allege[1], and Ms. McCallister has sufficiently alleged them.

As for the first element, Ms. McCallister has sufficiently alleged that she is a qualified individual with a disability. (ECF No. 1 at ¶ 16, p. 4:9-11.)[2] As for the second element, it is beyond possible dispute (even by Clark County) that the pedestrian bridge sidewalks are a public service provided by the County (*see, e.g., id.* at ¶ 30, p.6:5-7 (explaining, *inter alia,* that the pedestrian bridges are part of the Strip's sidewalk system)) or that the County is a public entity.

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[1] Contrary to the imaginings of Clark County, Ms. McCallister was not required to seek an accommodation from Clark County, as she is not an employee. Indeed, while the County failed to cite it, both the ADA's language and Ninth Circuit precedent make clear that the County should be aware of this. *See, e.g., Tauscher v. Phx. Bd. of Realtors, Inc*., 931 F.3d 959, 964 (9th Cir. 2019) (making plain that "[t]he ADA does not make [the] 'interactive process' requirement [found in the employment context] applicable to public accommodations and services" as "Title III and its implementing regulations make no mention of an 'interactive process' that mirrors the process required in the employment context.") Likewise, under Title II of the ADA, regulations require *the County* to consider disabled people, mandating that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR 35.130(7)(i). And, importantly, a Title II ADA claim has no exhaustion requirement. *See Zimmerman v. Or. DOJ*, 170 F.3d 1169, 1177-78 (9th Cir. 1999) (explaining that allowing public employees to sue pursuant to Title II instead of Title I would render Title I's exhaustion requirement "completely superfluous" because there is no requirement to seek administrative relief under Title II).

[2] *See* 42 U.S.C. § 12102(1)(A) (defining disability to include "a physical . . . impairment that substantially limits one or more major life activities"),

Ms. McCallister has also sufficiently alleged that the Ordinance acts as a barrier to access for her due to her disability: she alleges that she uses a wheelchair (ECF No. 1 at ¶ 16, p. 4:12-13), has previously used the pedestrian bridges in her wheelchair (*id.* at ¶ 17, p.6:12-13), and that she needs to stop when in public areas to rest due to using a wheelchair for multiple reasons: her arms get tired (*id.* at ¶ 19, p. 6:16-18), her wheelchair malfunctions from time to time (*id.* at ¶ 18, p. 6:14-15), and she needs to stop and assess where she can move in her wheelchair when such spaces are crowded. (*id.* at ¶ 20, p.6:19-20.) Ms. McCallister "often must stop unexpectedly." (*Id.* at ¶ 147, p. 22:9-10.)

Indeed, 28 CFR § 35.137 explicitly provides as follows:

> **A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities, in any areas open to pedestrian use.**

(emphasis added). By criminalizing any stopping, the Ordinance effectively bars not only wheelchairs like Ms. McCallister's, it also effectively bans "walkers, crutches, canes, braces, or other similar devices." It violates the ADA. To hold otherwise would mean that public entities could enact bans on any stopping on pedestrian areas, which would of course effectively prohibit the use of wheelchairs and other devices.

The County's characterization of Ms. McCallister's theory as "novel" shows a disregard for this regulation and its obligations under the ADA. Further, one only need to have basic common sense and respect for other human beings to understand that a law that criminalizes any and all stopping on the pedestrian bridges serves a barrier to persons who use wheelchairs such as Ms. McCallister (ECF No. 1 at ¶¶ 149-151, p. 22:17-26)—for the reasons explicitly spelled out in the Complaint and detailed above.[3] The County's efforts to minimize the impact on disabled people thus fails. While it is true that other persons may

[3] Notably, while CCC 16.13.030 includes an exception for people that "stop or stand while waiting for access to an elevator or escalator for purposes of entering or exiting a Pedestrian Flow Zone (ECF No. 1 at ¶ 32, p. 6:10-13), the County failed to include an exception to allow access by disabled people.

sometimes have to stop for other reasons, Ms. McCallister has to stop—frequently and expectedly—**because she uses a wheelchair**. CCC 16.13.030 thus serves as a barrier to her full and equal enjoyment of the pedestrian bridges on account of her particular disability. *See Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 947 (9th Cir. 2011) (quoting 42 U.S.C. § 12182(a)) (an ADA barrier "need only interfere with the plaintiff's 'full and equal enjoyment' of the facility . . . on account of his particular disability.") Even if other people might have to stop under some set of facts, it is not possible for Ms. McCallister to use the pedestrian bridges due to her likelihood of having to stop due to her disability, and the barrier must "mak[e] his use of the facility more difficult than a nondisabled person's." *Id* at 947, n.4.

While the County suggests otherwise, Ms. McCallister was not required to cite cases in the Complaint and the text of the ADA applies to any barrier, not just literal physical ones or sidewalk design issues. Indeed, the findings and purpose of the ADA is to end discrimination against people with disabilities (42 U.S.C. § 12101(b)(1)-(2)) and reflects that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination[.]" 42 U.S.C. § 12101(a)(1). Title II is applicable to public services and plainly states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." While the County wishes to nonetheless read the ADA narrowly, the prohibition against exclusion of benefits of public services such as the pedestrian bridges is thus not limited to literal physical barriers.[4]

[4] Limitations on wheelchair use, whether direct or indirect, can of course violate the ADA. *See, e.g,* W*right v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 69, 79 (2d Cir. 2016) (prisoner with cerebral palsy alleged prison ban on motorized wheelchair violated the ADA and interfered with his ability to access programs and services; Second Circuit reversed summary judgment in favor of prison, holding a "reasonable fact-finder could also

Likewise, contrary to the County's claims, she need not risk criminal sanctions or actually face criminal sanctions before she challenges CCC 16.13.030. The fact that Ms. McCallister could also assert a Title II claim if she faced arrest does not change this analysis. Further, while the County argues it is speculative for Ms. McCallister to think she will get caught if she has to violate CCC 16.13.030, she has alleged she often has to stop due to her wheelchair. Moreover, Ms. McCallister is simply not required to hope she does not get caught if she stops, and risk criminal sanction before challenging CCC 16.13.030.

C. The County's Argument that Ms. McCallister Does Not Have Standing Fails.

1. Applicable Legal Standard.

The County ignores a key point recognized by the Ninth Circuit regarding standard: context matters, and the "Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act." *Doran v. 7-Eleven*, Inc., 524 F.3d 1034, 1039 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 209, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972)). Thus, in the ADA context a plaintiff necessarily suffers an "actual and imminent" injury sufficient to establish standing when she alleges "(1) that [she] visited an accommodation in the past; (2) that [she] was currently deterred from returning to the accommodation because of ADA violations; and (3) that he would return if the ADA violations were remedied" *Doran*, 524 F.3d at 1041 (citing *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947 (C.D. Cal. 2005)); *see also Kirola v. City & Cty. of S.F.*, 860 F.3d 1164, 1174, n. 3 (9th Cir. 2017).[5] This "deterrence" standing is so broad that, once standing based on encountering one barrier is established, *Doran* held that, once a plaintiff establishes that he encountered a barrier which deterred him from use and enjoyment of a facility or service, that plaintiff could then challenge other ADA violations learned through an expert and was then deemed to have

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find for [a prisoner]—determining that [the prison] would not be unduly burdened by allowing [him] the use of his motorized wheelchair.")

[5] *Kirola* explains that the standing analysis is the same for places of public accommodation (Title III) as it is for public services (Title II).

standing to challenge all discovered violations affecting his or her disability. 524 F.3d at 1043-44.

Very recently, the Ninth Circuit took the opportunity to reaffirm its commitment to these broad standing of principles in response to a district court that had found standing but voiced concerns about a serial ADA "tester" litigant's standing:

> Today we make clear that district courts cannot use the doctrine of standing to keep meritorious ADA cases out of federal courts simply because they are brought by serial litigants. Nor can district courts use improper adverse credibility determinations to circumvent our holding in *CREEC* allowing tester standing for ADA plaintiffs. Courts must "take a broad view" of standing in civil rights cases, particularly in the ADA context where private enforcement is the primary method" of securing compliance with the act's mandate. *Doran*, 524 F.3d at 1039-40 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972); *see also* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 Minn. L. Rev. 2329, 2375 (2021) ("[A] system that relies on private attorneys general should respect and value the work done by those who take up the mantle . . . rather than expecting every disabled person to use whatever spare time and energy they have to litigate each trip to the movies.").

Langer v. Kiser, 57 F.4th 1085, 1099 (9th Cir. 2023). To argue for dismissal, the County largely ignores these explicit directives regarding the broad scope of ADA standing.

Ms. McCallister has alleged that (1) she visited pedestrian bridges in the past; (2) that she was currently deterred from returning because of ADA violations; and (3) that she would return if the ADA violations were remedied.[6] Thus she has standing. Each of the County's arguments to the contrary fails.

2. *Ms. McCallister Has a Legally Protected Interest, and the Ordinance Disparately Impacts Her.*

While CCC 16.13.030 has exceptions for persons who stop on the pedestrian bridges for certain other reasons, it does not exempt persons who need to stop by reason of their disability. As a result, Ms. McCallister is deterred from accessing the pedestrian bridges

[6] While the County (fn 1) appears to suggest (but does not cogently argue) that Ms. McCallister's factual assertions are conclusory, they are sufficient; further, the County does not discuss Ms. McCallister's declaration in its Motion and ignores pertinent allegations such as ¶ 147.

due to her disability and the County has effectively prohibited her from using her wheelchair on the pedestrian bridges, in violation of 28 CFR § 35.137. This is discrimination in violation of the ADA, and Ms. McCallister has a legally protected interest in equal access to the pedestrian bridges for the reasons discussed above.[7]

As discussed above, it is not just physical barriers to access that are actionable under Title II. As the County's own authority explains:

> Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity. Due to the insertion of "or" between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena. Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.

Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996). As this reflects, contrary to the County's unsupported musings, disparate impact on disabled people is actionable. Likewise, if exclusion is effectuated or barriers are created by a policy or law, they are actionable. Indeed, contrary to the County's patently false claim that *Crowder* did not hold that the quarantine regulation violated the ADA[8], the court did so find—and the case reflects that more than physical barriers are actionable. That Court held:

> We conclude that **Hawaii's quarantine requirement is a policy, practice or procedure which discriminates against visually-impaired individuals** by denying them meaningful access to state services, programs and activities by reason of their disability **in violation of the ADA**.

Id. at 1485 (emphasis added). Here, as detailed above, CCC 16.030 acts to exclude Ms. McCallister from the sidewalk. Just as the quarantine requirement in *Crowder*—despite being generally applicable—was a "policy, practice or procedure [that] discriminates against

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[7] *Cf. LA All. for Human Rights v. Cty. of L.A.*, 14 F.4th 947, 959 (9th Cir. 2021) (citing 42 U.S.C. § 12132; *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002)) (plaintiffs in wheelchairs had standing to sue Los Angeles because of obstructions on Skid Row sidewalks because Skid Row area sidewalks are a service, program, or activity of the City within the meaning of Title II of the ADA.)

[8] Thus, the claim that the "court in Crowder did not invalidate the (which served a substantial agricultural interest) or hold that [the quarantine regulation] violated the ADA" is false.

visually-impaired individuals by denying them meaningful access to state services, programs and activities by reason of their disability in violation of the ADA" due to its disproportionate impact on them (*id.* at 1485), CCC 16.030 denies persons such as Ms. McCallister meaningful access to the pedestrian bridges and it violates the ADA. Thus, far from suggesting that Ms. McCallister's claim should be dismissed, *Crowder* requires finding for Ms. McCallister.[9]

In *Crowder*, after the determination that the quarantine policy violated the ADA, the only remaining question was the remedy (which of course need not be resolved at the motion to dismiss stage). Contrary to the false claim by the County, the case does not support the suggestion that Ms. McCallister was required to go through the interactive process applicable to the employment law context and request a special accommodation, as explained above and as the County argues.[10] Instead, 28 CFR § 35.130(7)(i) requires *the County* to consider disabled people; the regulation mandates that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." As *Crowder* explains:

> When a state's policies, practices or procedures discriminate against the disabled in violation of the ADA, Department of Justice regulations require reasonable modifications in such policies, practices or procedures "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

[9] Indeed, *Crowder* forces a finding by this Court that CCC 16.030 violates the ADA, and Ms. McCallister not only survives dismissal, she is entitled to declaratory relief.

[10] In *Crowder*, during the litigation, the plaintiffs had proposed a modification to the quarantine policy, and there remained "a genuine dispute of material fact as to whether the plaintiffs' proposed modifications to Hawaii's quarantine amount to 'reasonable modifications; which should be implemented, or 'fundamental[] alterations,' which the state may reject." *Id.* at 1485. Here, there is no potential argument that an exemption for people with disabilities.

Crowder, 81 F.3d at 1485 (citing 28 CFR § 35.130(b)(7)). Thus, *the County* should have provided an exception for disabled people who have to stop, just like it provided an exception for other stopping. As written, CCC 16.13.030 would thus additionally invalid and violative of the ADA for this reason, even if the Ordinance did not violate 28 CFR § 35.137.

3. *The Factual Issues Raised by the County Do Not Show Ms. McCallister Lacks Standing or Otherwise Support Dismissal.*

Continuing its serial effort to demonstrate its callousness towards people with disabilities, the County claims that Ms. McCallister lacks standing "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." (ECF No. 45, p. 5, n. 3.) While Defendants cite *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1184 (9th Cir. 2017) to support the proposition that excluding Ms. McCallister from the pedestrian bridges is lawful, the case does not support the County's position. First, *Kirola* is procedurally inapposite: it was a class action. *Id*. at 1169. Further, while the County has obstructed Plaintiffs' efforts to access discovery here, the plaintiff in that case was afforded the opportunity to obtain and present evidence: the case involved an appeal of factual determinations made at a **bench trial**, after discovery concluded and the court heard expert testimony. *Id*. at 1174.

Even if the *Kirola* analysis were applicable here (which it is not, for the reasons discussed below), there are factual disputes as to the impact of exclusion form the pedestrian bridges, which contrary to the NRA's assertions, constitute far more than 6% of the sidewalks in the "core" areas of the Las Vegas Strip. (*See* ECF No. 23, p. 3:25-26 (the NRA contends that "pedestrian bridges make up only 6% of the ***overall sidewalk infrastructure***" (emphasis added) which includes areas with scant foot traffic.) Further, while the County pays extensive lip service to pedestrian concerns, the fact that the pedestrian bridge sidewalks were created to separate pedestrians from vehicular traffic[11] only supports Ms. McCallister's claims: she

[11] *See. e.g.,* CCC 16.13.010 (Purpose) ("The pedestrian bridges located within the world-famous Las Vegas Strip provide above grade access for the visitors, employees, and residents

should not be *de facto* excluded from the safest sidewalks on the Strip because she is in a wheelchair. The County's putative strategy of refusing to participate in discovery and, at the same time, seeking dismissal based on its factual claims should not be rewarded by this Court.

Third and more substantively, *Kirola* did not involve a violation of 28 CFR § 35.137 or a blanket rule that made it impossible for persons in wheelchairs to utilize whole areas like the pedestrian bridges. Instead, it involved extensive claims the application of specific ADA physical design requirements regarding physical curb ramp access barriers on pedestrian rights-of-way, as well as barriers to programs and services pursuant to 28 CFR § 35.150 caused by said design issues. When the court evaluated the claims, at trial, and after taking evidence, the class representative was only able to establish a few stray barriers. The County relies on the portion of the decision discussing allegations of violations of 28 CFR § 35.150, which states that: "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." *Id.* at 1182-84. However, it also states the requirement does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." 28 CFR § 35.150(a)(1). Here, the issue is not a design issue but rather a law that criminalizes stopping on a pedestrian bridge, which disproportionately impacts people in wheelchairs. The County is not being asked to redesign an existing facility but rather not to create a rule that effectively bars use of a significant portion of the core sidewalks on the (and the safest of them with regard to vehicular traffic). Indeed, the County misrepresents *Kirota*'s holding and ignores the more relevant portion, where the Ninth Circuit found the district court erred in dismissing the class representative's expert because he "dwelled on minor variations" rather than "focusing on overall accessibility." *Id.* at 1228. The Ninth Circuit explained:

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of Clark County to safely cross the roadways located within the Las Vegas Strip. The pedestrian bridges are part of the sidewalk system of the Las Vegas Strip and were created for the purpose of separating pedestrian traffic from vehicular traffic to facilitate pedestrian crossing in those locations.")

> While, as explained below, focusing on overall accessibility is acceptable when evaluating *existing* facilities, avoiding 'minor variations' is exactly what ADAAG requires of new or altered facilities. *See Chapman*, 631 F.3d at 946 (compliance with ADAAG "is often a matter of inches").

Id. at 1181. Here, we are not addressing a physical barrier or violation of ADAAG design requirement. But, even if we were, the changes due to the Ordinance would be considered an alteration, not an existing.

Thus, not only is *Kirola* procedurally inapplicable and in no way supports dismissal at this stage—especially where the County has been refusing to participate in discovery—it does not support the County's absurd proposition that people in wheelchairs can be effectively refused access to the pedestrian bridges because there are other sidewalks in the Las Vegas Resort Corridor. Indeed, the County's proposition cannot be reconciled with 28 CFR § 35.137.

4. *The Harm to Ms. McCallister Is Not Attenuated or Speculative, and Her Remedies Are Not Limited to Asserting a Defense to a Citation or Suing for Wrongful Arrest.*

The County argues that the harm Ms. McCallister alleges "rests on three unlikely factual scenarios which purportedly trigger some bad faith enforcement of CCC 16.13.030 by LVMPD officers" and therefore there is "no causal line between the language and scope of the ordinance in question and the hypothetical bad faith enforcement by LVMPD officers." (ECF No. 45, p. 18:13-16.) Not only does the County fail to cite authority that this precludes ADA relief, facing citations are not mere unlikely occurrences, but regular occurrences that could happen ***because*** of Ms. McCallister's disability. And a mistaken arrest—whether performed in good faith or bad faith—only requires one actor: a police officer who believes[12]—as most police officers do—that he is following the law.

This distinguishes the instant matter from the cases the County cites where a causal link was lacking. For instance, the plaintiffs in *Maya v. Centex Corp.*, 658 F.3d 1060 (9th

[12] Arguably qualified immunity could deny Ms. McCallister any potential redress, so long as the officer *believes* she has the requisite *mens rea* for stopping on a pedestrian bridge. *See Dillberg v. Cty. of Kitsap*, 76 F. App'x 792, 796 (9th Cir. 2003) (granting defendants qualified immunity on warrantless arrest claim because they reasonably believed plaintiff had committed a felony and they acted in good faith on that belief).

Cir. 2011) were homebuyers who alleged injuries stemming from developers' "practice of marketing neighboring homes to individuals who presented a high risk of foreclosure and abandonment of their homes, financing those high-risk buyers, concealing that information, and misrepresenting the character of the neighborhoods." *Id.* at 1065. There, the court held the connection between defendant's conduct and decreased home values (and decreased neighborhood desirability) was too tenuous to support standing, as "the decreased-value injury does not occur until the risk posed by defendants' lending and disclosure practices comes to fruition in foreclosure." *Id.* at 1072. As a decrease in home values relies on many foreclosures occurring—and thus many independent evens happening in close succession, such as during the 2000s national housing crisis—it stands to reason that plaintiffs' claims in that matter were too attenuated.[13] Here, by contrast, all it would take for Ms. McCallister to sustain injury from arrest or citation based on CCC 16.13.030 are three extremely foreseeable events: (1) she is on a pedestrian bridge; (2) she stops due to her disability; and (3) a police officer, perhaps acting in good faith, erroneously believes Ms. McCallister had the requisite *mens rea*. This is sufficient to demonstrate causality.

The facts of *Charleston v. Nevada*, 423 F. Supp. 3d 1020 (D. Nev. 2019) are also distinct from those presented here. There, the plaintiffs argued that laws legalizing prostitution in Nevada caused them to be sex trafficked, alleging: "(1) that third-party sex traffickers take advantage of the 'misconception' that prostitution is legal in all of Nevada, (2) that the 'advertising and marketing from legal brothels . . . persuade, induce and entice people to travel in from across the country and all over the world to purchase prostituted persons in Nevada,' and (3) that sex buyers travel to Nevada for the sole purpose of purchasing sex." *Id.* at 1027-28. The Court rejected this argument, expressing skepticism that

[13] Notably, the Ninth Circuit permitted plaintiffs to amend their complaint in *Maya* to allege "an expert report distinguishing the effect of defendants' actions from general economic influences" that could establish "a sufficient causal connection between defendants' actions and the decreased value and desirability of their homes." *Id.* at 1072-73. Should this Court grant the County's motion to dismiss, it should be without prejudice and permit Plaintiffs to seek leave amend their complaint to further establish the causal connection between CCC 16.13.030 and Ms. McCallister's injuries.

"legal prostitution in Nevada's counties … is anything more than the attenuated cause of Plaintiffs' alleged injuries" as evidenced by the fact that all but one plaintiff alleged they were "sex trafficked in other states aside from Nevada" and their unlawful sex trafficking was "not sufficiently traceable to Nevada laws permitting legal prostitution as opposed to other factors, namely the illicit behaviors of private bad actors." *Id.* at 1028. Here, as noted above, Ms. McCallister's harms would not be caused by the "illicit behaviors of private bad actors" but the presumptively legal behavior of an agent of the state enforcing a law. Ms. McCallister has explained that CCC 16.13.030 effectively precludes her from going back to the pedestrian bridges. Thus, Ms. McCallister establishes a causal link between CCC 16.13.030 and her alleged injuries.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the Second Motion to Dismiss.

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