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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'S REPLY TO PLAINTIFF'S RESPONSE [46] TO ITS 12(b)(1) MOTION TO DISMISS [45] PLAINTIFF LISA MCALLISTER AND HER ADA CLAIMS FOR LACK OF STANDING**

Defendant CLARK COUNTY, by and through its counsel of record, hereby files this Reply to Plaintiff's Response [46] to its 12(b)(1) Motion to Dismiss [45] Plaintiff Lisa McAllister and her ADA Claims for Lack of Article III Standing.

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 AND POINTS OF AUTHORITIES

I.

RELEVANT ALLEGATIONS AND NATURE OF MOTION

A. Defendant's Motion to Dismiss is Proper because it is Based on Distinct Legal Theories not Addressed in Defendant's Initial Motion to Dismiss and Issues of Subject Matter Jurisdiction may be Raised Successively and at any Time

Plaintiffs, without citing any supportive case law, statute, or Rule of Federal Procedure, contended that Defendant's Motion to Dismiss [45] is improper because it is a prohibited "serial motion." *See* [ECF No. 46] at 1:22-3:20. Plaintiffs argued that such motions are barred by "common sense" and cited to similarities between arguments put forth in Defendant's first motion to dismiss [9] and the instant motion [45] in support of its claims that "both motions essentially contend that CCC 16.130.030 does not really impact disabled people, and **therefore Ms. McAllister does not have standing** under the ADA and the Court lacks jurisdiction." *Id*. at 2:5-8 (emphasis added).

First it must be pointed out that Article III standing—which implicates the Court's subject matter jurisdiction—is not subject to waiver. *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635. Plaintiff McAllister, as the party invoking federal jurisdiction, bears the burden of establishing the elements of standing and since "[these elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required **at the successive stages** of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (emphasis added). To be certain, "Article III standing is a jurisdictional question that may be raised at any time." *Castellanos v. City of Reno*, No. 319CV00693MMDCLB, 2024 WL 229669, at *1 (D. Nev. Jan. 22, 2024) (citing *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011). Given that subject matter jurisdiction motions may be raised at any time and at each successive stage of litigation, serial motions are contemplated in the very nature of Article III. Accordingly, if for whatever reason the instant motion is denied and this case proceeds to discovery, Defendant will be fully within

its rights to raise yet another Article III standing motion if the evidence produced supports that Ms. McAllister also lacks standing at the next successive stage of litigation.

The foregoing notwithstanding, the instant motion is not a serial motion because it is distinct from the legal theories and procedural rules invoked in Defendant's initial motion to dismiss [9]. Defendant's first motion [9] is based on Fed. R. Civ. P. 12(b)(6) and Plaintiffs' failure to state a claim. *See generally* [ECF No. 9]. In fact, that motion only addresses Article III standing one single time in a throwaway line critical of facial challenges in the introduction. *See*, *e.g.*, [ECF No. 9] ("This sort of action constitutes a disfavored facial challenge to the constitutionality of an ordinance which stretches the bounds of standing […]"). Defendant's initial motion to dismiss [9] does not address the elements of Article III standing or assert such as a basis for dismissal.

While there are certainly similarities in the arguments between the two motions, this is unavoidable as both motions are based on the same set of fixed allegations in Plaintiff McAllister's complaint [1] and whether or not Plaintiff's complaint [1] states a claim is a critical component of a 12(b)(1) analysis; because establishing whether Plaintiff McAllister has a legally protected interest and a justiciable case and controversy (i.e., whether Plaintiff's complaint states a claim on its face) is critical to a standing analysis.

Plaintiff attempts to avoid addressing the substance of Defendant's motion by hanging her hat on some purported procedural defect and casting irrelevant aspersions on the County for "fail[ing] to participate in discovery." [ECF No. 46] at 3:17-20. But these arguments are spurious, not supported by the case law on Article III standing motions or the substance of Defendant's motions to dismiss.

Accordingly, the Court should disregard Plaintiff's arguments in this regard and find that Plaintiff McAllister lacks standing under the ADA and dismiss her claims—something it has the power to do *sua sponte* at any time. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir.2002).

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B. Plaintiff McAllister has not been Denied Access to the Pedestrian Bridges—let alone Denied Access because of her Disability—and her Allegations that She has been Are not Plausible on their Face

Plaintiff contended that she has "**sufficiently alleged** that the Ordinance acts as a barrier to access for her due to her disability" and that 28 CFR § 35.137 requires Clark County to "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." [ECF No. 46] at 4:9-5:13 (citing 28 CFR § 35.137) (emphasis added).

While we accept Plaintiff's allegations as true for the purposes of a motion to dismiss—the Court is not bound to accept legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 664, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009). Furthermore, factual allegations and claims that are not plausible on their face fail—even at the motion to dismiss to level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929 (2007) (Where "plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Plaintiff has not been denied access to Clark County's pedestrian bridges on the basis of her disability. All the pedestrian bridges are wheelchair accessible--being equipped with elevators and being wide enough to accommodate wheelchairs and other ambulatory-assistance devices. CCC 16.13.030 does not prohibit the use of pedestrian bridges by people with disabilities nor does it disproportionately affect Plaintiff McAllister. Plaintiff's purported denial of access to the bridges is based on her own irrational fear that she will be cited in violation of the ADA by LVMPD officers and not on the condition of her alleged disability.

To be certain, if Plaintiff McAllister were operating a shell game targeting tourists or having a picnic on a pedestrian bridge, she would be eligible for citation under CCC 16.13.030. But claims that Plaintiff McAllister is denied access because of her own subjective fear (not her disability) that she may be cited because her wheelchair broke down or she became too tired to continue in violation of the ADA by LVMPD has no factual or legal basis in the

plausible universe. As such, these allegations are insufficient to establish standing and for Plaintiff McAllister to maintain her ADA claims in this action.

C. Despite Plaintiffs' Claims to the Contrary—Reasonable Accommodations and Modifications are a Critical Part of an Analysis of a Title II Claims under 42 U.S.C. § 12132 and Plaintiff has Made no Modification Request to Date

Plaintiffs asserted that "[c]ontrary to the imaginings of Clark County, Ms. McCallister was not required to seek an accommodation from Clark County, as she is not an employee." [ECF No. 46] at 4:17-19.

However, the Ninth Circuit has clearly articulated a Plaintiff's burden in asserting a Title II claim and it involves making a claim for reasonable accommodation or modification. *See*, *e.g.*, *Weinreich v. Los Angeles Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978–79 (9th Cir. 1997); *see also Dick v. City & Borough of Sitka*, No. 3-23-CV-00041-HRH, 2023 WL 9045495, at *3 (D. Alaska Dec. 29, 2023). In *Dick v. City & Borough of Sitka*, The United States District Court for the District of Alaska summarized this burden as follows:

> The Ninth Circuit has explained the plaintiff's burden of proof under Title II. *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). […] Exclusion or denial on the basis of disability includes situations where a public service, program, or activity is not accessible to and useable by an individual because of his or her disability. In **a failure to accommodate claim**, the plaintiff has the burden to show the existence of **a reasonable accommodation not provided by the public entity** that would make the service at issue readily accessible to him and to show that any accommodation offered by the public entity did not reasonably facilitate access. *See Memmer v. Marin Cty. Courts*, 169 F.3d 630, 633-34 (9th Cir. 1999); *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1137 (9th Cir. 2001). If the plaintiff can show as much, the burden switches to the public entity to demonstrate that the requested accommodation would fundamentally alter the nature of the program. 28 C.F.R. § 35.130(b)(7); *see Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999).

Dick v. City & Borough of Sitka, No. 3-23-CV-00041-HRH, 2023 WL 9045495, at *3 (D. Alaska Dec. 29, 2023) (emphasis added).

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Given the wide range of government services, facilities, and benefits offered—many of which were instituted prior to the enactment of the ADA—it is impossible to anticipate (and often economically unfeasible to prepare) for all potential modifications required by various disabilities. Accordingly, governments are responsive to requests for reasonable modifications or accommodations from people suffering from disabilities when they feel they have been denied access to a government service or benefit within the meaning of the ADA[1].

Such modifications might include providing sign language interpreters for hearing impaired people to access services or participate in public forums. They may include additional technology to allow hearing impaired inmates to call their loved ones using teletype machines or video conferencing software. It might include the provision of motorized wheelchairs or ramps for specific locations.

While it is certainly the County's position that CCC 16.13.030 does not discriminate against anyone on the basis of their disability (thereby precluding Plaintiff from advancing to a stage where she might request a modification anyway), Plaintiff McAllister has in fact made no modification request for relief from the subject ordinance and, accordingly, her Title II claim is not ripe as against Clark County.

Accordingly, Plaintiffs' claims that reasonable accommodations or modifications only apply to the employment context are erroneous. Plaintiff McAllister's ADA claims are not ripe, nor can she shift the burden to the County because she has not even requested a modification to CCC 16.13.030. Therefore, the Court should grant Defendant's Motion to Dismiss [45] her ADA claims.

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[1] *See* Clark County ADA/Title II/Sec. 504 website providing for modification requests (https://www.clarkcountynv.gov/government/departments/office_of_diversity_division/ada_title_ii_sec._504/index.php) ;*see also* City of Henderson Accessibility and Accommodation Request website (https://www.cityofhenderson.com/residents/accessibility).

D. A Broad View of Constitutional Standing does Not Encompass Hypothetical Burdens that Don't Actually Deter on the Basis of Disability

Plaintiff argued in her Opposition that the County has ignored critical Ninth Circuit case law that takes the position that the courts should take a "broad view" of constitutional standing in civil rights cases. [ECF No. 46] at 7:10-15.

In doing so, Plaintiff cites to *Doran*—a case for a Title III ADA claim (not a Title II claim against a government entity like the one involved in this case and, accordingly, subject to a different standard) in which a gentleman who used a wheelchair identified nine physical barriers at a 7-Eleven more than 550 miles from his home—but which he had visited previously—that he contended barred him from accessing the facility in violation of the ADA. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1038 (9th Cir. 2008). The court granted standing to the Plaintiff in that case for not only the barriers he had encountered, but those of which he was aware at the same facility through other sources. *Id*. at 1045–46. The Court granted this standing extension to barriers not yet encountered as a matter of judicial economy because to allow otherwise would allow piecemeal litigation that wasted judicial resources—not because it wanted to allow a person to challenge hypothetical barriers all around the country that someone had not yet encountered, or which were triggered by conduct of third parties. *Id*.

In explaining its reasoning, the court presented a hypothetical where a man in a wheelchair challenged the lack of accessible parking only to go back to the same location later and find out there were also stairs inside that prevented access to the facility. *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1045–46 (9th Cir. 2008). The court reasoned that it made sense to allow the plaintiff to challenge all ADA violations in a single place in a single suit—even when he may not have physically encountered some of those barriers yet due to other existing barriers. *Id*. The barriers discussed by the Court in this regard consisted of physical barriers that completely blocked access for a person in a wheelchair like "no place to park a wheelchair accessible van," "only entry to the restaurant is up a flight of stairs," "inside the restaurant is an additional flight of stairs preclude[ing] wheelchair access to the dining room," and the "table layout does not permit wheelchair egress." *Id*.

First, it is worth noting that Title II and Title III claims analyses are distinct, so *Doran* is inapposite to the case at bar. But to the extent the Ninth Circuit's holding on standing can be analogized to Plaintiff McAllister's claims it should be clear that having no place to take a wheelchair out of a van, no ramp to access a building with a wheelchair, and narrow pathways which prevent wheelchair egress are **all actual physical barriers which prevent access** each and every time absent modification. This is not comparable in the slightest to Plaintiff's purported basis for standing which relies on her already being on the pedestrian bridge (which would certainly prove difficult if it were truly inaccessible) and then suffering one of three different hypothetical situations which are then in turn witnessed by an LVMPD officer who then issues a citation to Plaintiff in violation of the ADA. The two scenarios are just completely unanalogous and, accordingly, the Ninth Circuit's "broad view" on standing never intended to encompass such attenuated claims as Plaintiff McAllister's.

E. Plaintiff's Position would Require Criminal Statutes and Ordinances to be Loaded with a List of Potential Exceptions and Waivers and Seeks to Impermissibly Legislate through the Courts

In support of their contention that CCC 16.13.030 violates the ADA, Plaintiff asserted that "[w]hile 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." [ECF No. 46] at 8:21-25.

Following such arguments to their logical conclusion would require that the legislature include a laundry list of exceptions for each and every criminal statute or ordinance before they could be valid under the ADA, United States Constitution, the Civil Rights Act, and other federal legislation. However, that is not how the law works.

Local criminal statutes and ordinances are interpreted within the framework of existing federal constitutional and statutory law. This federal law serves as a backdrop of exceptions for the legislation, application, and enforcement of these laws. A criminal statute or ordinance cannot be enforced against someone on the basis of their free exercise of religion. They may not be enforced against someone on the basis of their race or ethnic background. They may not be enforced against someone on the basis of their gender. And the courts widely agree that

the ADA functions the same way in that criminal statutes and ordinances may not be enforced against someone when the conduct at issue was occasioned by a person's 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 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).

Accordingly, and based on the foregoing, the Court should reject Plaintiff's arguments that CCC 16.13.030 is invalid, and that Plaintiff has standing because CCC 16.13.030 does not include carve out exceptions based on specific disabilities. Instead, the court should find that, pursuant to the doctrine of preemption, all federal statutory and constitutional law is an inextricable part of any and all criminal laws and their enforcement and that CC 16.13.030 does not offend the ADA sufficient to grant Article III standing to Plaintiff to make a facial challenge in this case.

F. Plaintiff doesn't Meet her Burden of Showing the ADA authorizes the Invalidation of an Ordinance, and her Purported Harm is too Attenuated because Plaintiff Conceded it would Hinge on a Mistaken Arrest by a Third Party

First, Plaintiff criticized the County for "fail[ing] to cite authority that precludes ADA relief" from ordinances based on unreasonable fears of potential citation based on disability. [ECF No 13] at 13:14-23. But that criticism goes to the very heart of this case—there are no cases authorizing a Court to completely invalidate or enjoin a statute or ordinance under the

ADA in these circumstances. This lends credence to Clark County's position that Plaintiff has no legal right. Notably, Plaintiff also cites to no cases in support of the opposite position. Establishing Plaintiff's legal right and standing is Plaintiff's burden, and she should not be permitted to benefit from her own novel attempt to stretch the ADA beyond what it was intended and the absence of case law relevant to the same.

Plaintiff conceded in her Response that for Plaintiff to suffer an actual injury would require her to be the victim of a "**mistaken arrest**—whether performed in good faith or bad faith" and would be dependent on "a **police officer** who believes—as most police offers do—that he is following the law." [ECF No. 46] at 13:14-23 (emphasis added). Accordingly, Plaintiff acknowledged in her response that for the harm contemplated in the complaint to occur it would be contingent on the bad act of a third party. *Id*.

Plaintiff made attempts to distinguish the cases cited by Defendant in support of its contention that Plaintiff's alleged harm is too attenuated based on the factually disparate nature of the cases—again attempting to profit from the dearth of case law surrounding her novel legal theory. [ECF No. 46] at 13:23-15:10. Ultimately, however, Plaintiff has openly conceded the core element precluding standing in those cases—the existence of third parties and bad acts unrelated to the claims against Clark County or CCC 16.13.030 that severe a rational causal link.

Because Plaintiff concedes that her purported injury could only happen as the result of a bad act by a LVMPD officer, acting in good faith or otherwise, the causal chain between CCC 16.13.030 and her alleged harm is broken, and she cannot demonstrate standing. LVMPD officers could misapply literally every criminal statute or ordinance in effect, but the potential for such misapplication does not warrant the wholesale invalidation or enjoinment of criminal ordinances and, accordingly, Plaintiff McAllister's claims must fail for wont of standing due to an inability to prove traceability.

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II.

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 11th day of July, 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 11th day of July, 2024, I served a true and correct copy of the foregoing **DEFENDANT CLARK'S REPLY TO PLAINTIFF'S RESPONSE [46] TO ITS 12(b)(1) MOTION TO DISMISS [45] 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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