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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA MCALLISTER, an individual; and BRANDON SUMMERS, an individual; JORDAN POLOVINA, an individual, Plaintiffs, vs. CLARK COUNTY, a political subdivision of the state of Nevada. Defendant(s).	Case No: 2:24-cv-00334 **DEFENDANT CLARK COUNTY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS [67] AND COUNTERMOTION FOR PROTECTIVE ORDER AND FOR SANCTIONS**

Defendant CLARK COUNTY, by and through its counsel of record, hereby files the instant Opposition to Plaintiffs' Motion to Compel and for Sanctions [67] and Countermotion for Protective Order and for Sanctions.

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This Motion is made and based upon the attached Declaration, 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.

DATED this 7th day of February 2025.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

CLAIMS AT ISSUE IN THIS LITIGATION

The instant lawsuit is a facial constitutional challenge to an ordinance, CCC 16.13.030, passed by the Clark County Board of Commissioners in January 2024, which prohibits stopping or standing on or near Pedestrian Bridges in the Las Vegas Resort Corridor or for intentionally causing another to stop or stand on the same. *See*, *e.g.*, [51] at 5:1-6:3; *see also* CCC 16.13.030. Plaintiffs contend essentially that CCC 16.13.030 is "impermissibly vague in violation of the Fourteenth Amendment" and "facially overbroad in violation of the First Amendment, too." *Id*. at 5:3-4, 11-12; *see also* [ECF No. 61] at 13:4-17:15, 18:2-19:7, 22:20-25:23. Plaintiffs also bring the equivalent facial challenges under the constitution of the State of Nevada in their First Amended Complaint—but concede the analyses between the federal and state claims are nearly identical. [61] at 17:16-26, ("Nevada's due process clause is coextensive with the due process clause found in the United States Constitution"), 25:24-26:9 ("The protections offered by Article 1, Section 9 are 'co-extensive to' those offered by the First Amendment of the United States Constitution.").

While the Plaintiffs' initial complaint [1] made it clear that all of their constitutional challenges in this action were facial challenges as opposed to as-applied challenges, following a throwaway line[1] by the Court in an order [51] denying in part, granting in part Clark County's initial motions to dismiss [9], [45], Plaintiffs sought to amend their complaint to expand their claims to nominally allege as-applied challenges on behalf of Plaintiffs Summers and Polovina. *See* [51] at 6:1-3 ("And because Summers is a street performer who has performed on the bridges in the past, he brings an as applied challenge because his future ability to

[1] In this regard, the Court appeared to conflate whether the Plaintiffs had standing to bring their facial challenges with bringing an as applied constitutional challenge. Clark County continues to contend that neither Plaintiffs Summers nor Polovina have valid as applied challenges given that neither of them have been cited under CCC 16.13.030 under a specific set of circumstances and neither is seeking damages other than the complete invalidation of CCC 16.13.030. *See*, *e.g.*, [61] at 19:8-22:19. As applied challenges require a specific factual scenario to which the court can apply a limited remedy—circumstances which do not exist here.

perform on the pedestrian bridges is prohibited by the ordinance."); *see also* [61] at 19:8-22:19.

Based on assertions made by Plaintiffs' counsel in the meet and confer conference prior to this motion work, it is upon information and belief that Plaintiffs' counsel feels that by including as-applied challenges to this action they are somehow entitled to additional discovery. But this marks a fundamental misunderstanding of what an as-applied challenge is.

The Supreme Court has indicated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 893, 175 L. Ed. 2d 753 (2010). Fundamentally the distinction between these two types of challenges is the "breadth of the remedy employed by the Court" *Id*.

Accordingly, Plaintiffs' so-called "as applied" challenges in this case only allow the court to tailor a remedy that would invalidate CCC 16.13.030 under the specific set of circumstances as it applies to Plaintiffs Summers and Polovina rather than the entire ordinance, it does not functionally change the nature of Plaintiffs' facial challenges or the scope of discovery in this case. *See*, *e.g.*, *United States v. Lane*, 689 F. Supp. 3d 232, 237 (E.D. Va. 2023); *United States v. Mgmt. Consulting, Inc.*, 636 F. Supp. 3d 610, 619 (E.D. Va. 2022) ("When a court reviews an "as-applied" challenge, **it must examine only the application of the law to the particular parties and the facts of the case before it**, without considering whether the statute theoretically could be construed as unconstitutional in another hypothetical case.") (emphasis added); *United States v. Stevens*, 559 U.S. 460, 473 n.3, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (observing that case-specific "factual assumptions ... can be evaluated only in the context of an as-applied challenge.").

Notably, as Plaintiffs Summers and Polovina so-called "as-applied" challenges are based on their contention that they would be subject to citation under CCC 16.13.030 if they intentionally stop or stand in the Pedestrian Flow Zones defined by CCC 16.13.020 to play their instruments, a fact that Clark County concedes, no additional discovery on these "as

applied" challenges is necessary except to the extent Plaintiffs feel they need to produce evidence in support of their claims that they cannot perform their instruments while moving—evidence that is not within the custody or control of Clark County and, accordingly, does not alter the scope of discovery. *See*, *e.g.*, [61] at 3:21-4:28, 5:20-6:20.

II.

FACIAL CHALLENGES ARE QUESTIONS OF LAW

Facial challenges like those brought by Plaintiffs in this action are questions of law which are reviewed *de novo* by the appellate courts. *United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003); *see also United States v. Carranza*, 289 F.3d 634, 643 (9th Cir.2002); *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) (citing Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)) (emphasis added).

There is consensus across the jurisdictions that questions of law like those raised by Plaintiffs' facial challenges here require little to no discovery. *See*, *e.g.*, *Shelby County v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) ("Because Shelby County **brings only a facial challenge** to the [Voter Registration Act], **discovery into that claim is unwarranted**.") (emphasis added); *Briggs v. Yi*, No. 3:22-CV-00265-SLG, 2023 WL 2914395, at *5 (D. Alaska Apr. 12, 2023) ("Mr. Briggs' **facial challenge to the constitutionality of [statute] is a pure question of law** and Mr. Briggs has not identified any discoverable facts that would be relevant to resolving this question.") (emphasis added); *Doherty v. Wireless Broad. Sys. of Sacramento, Inc.*, 151 F.3d 1129, 1131 (9th Cir. 1998) (recognizing that "[t]he district court concluded that Pacific **did not need to undertake discovery because the issue in this case involved a purely legal question**.") (emphasis added); *Pullman Co. v. Knott*, 235 U.S. 23, 26, 35 S.Ct. 2, 59 L.Ed. 105 (1914) (A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are"); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455, 128 S. Ct. 1184, 1193–94, 170 L. Ed. 2d 151 (2008) ("Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused."); *Shelby Cnty., Ala. v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) ("**Because Shelby County**

brings only a facial challenge to the VRA, **discovery into that claim is unwarranted**.") (emphasis added); *Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 337 (D.D.C. 2005), aff'd sub nom. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) ("**a facial challenge to the text of a statute does not typically require discovery for resolution** because the challenge focuses on the language of the statute itself.") (emphasis added); *Cafe Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1282 (11th Cir. 2004) ("When analyzing a facial challenge, we must analyze the statute as written."); *New Hampshire Motor Transp. Ass'n v. Rowe*, 324 F. Supp. 2d 231, 232 (D. Me. 2004) ("**discovery** or an 'evidentiary showing' on the effect of the challenged provisions of [a law] **is not necessary to a ruling on a facial preemption challenge**.") (emphasis added); *Fund Texas Choice v. Deski*, No. 1:22-CV-859-RP, 2023 WL 8856052, at *14 (W.D. Tex. Dec. 21, 2023) ("For this reason, **district courts have commonly held that parties do not need discovery to defend a law's facial validity**.") (emphasis added); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. 2:19-CV-50, 2019 WL 13020440, at *2 (S.D. Ga. Aug. 5, 2019) ("These remaining arguments represent facial attacks which likely will not require additional discovery to resolve.").

III.

SCOPE OF DISCOVERY

Case law on the scope of discovery for challenging the constitutionality of statutes and ordinances is clear. In determining the constitutional validity of a statute or ordinance, the court "**may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect**." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 484, 97 S. Ct. 2777, 2811, 53 L. Ed. 2d 867 (1977) (emphasis added); *see also SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002); *Citizens Union of City of New York v. Att'y Gen. of New York*, 269 F. Supp. 3d 124, 140 (S.D.N.Y. 2017) ([The government defendants] correctly point out that, in other First Amendment cases**, numerous courts have recognized that the bill text, legislative record and other public materials are the primary source for discerning the governmental interest in the legislation** (regardless of the standard of review applied).")

(emphasis added); *New York v. Ferber*, 458 U.S. 747, 757–59, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (relying on the legislative history and other public sources as supplying the governments' basis for enacting the challenged law and holding "[w]e shall not second-guess this legislative judgment"); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (for a First Amendment case, "[t]he **relevant governmental interest is determined by objective indicators** as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings.") (emphasis added); *Allstate Ins. Co. v. Serio*, No. 97-cv-620 (SS) (THK), 1998 WL 477961, at *5 (S.D.N.Y. Aug. 13, 1998) ("[a]s is traditionally done, **inquiry into the constitutionality of [the challenged provision] can be conducted on the basis of the statutory scheme, the legislative history, [and] other publicly available material** ....") (emphasis added); *All. of Auto. Mfrs., Inc. v. Jones*, No. 4:08-cv-555 (MCR) (CAS), 2013 WL 4838764, at *4–5 (N.D. Fla. Sept. 11, 2013) ("**Legislative history is the primary source for determining legislative intent**") (emphasis added); *see also Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 13–13 (D.C. Cir. 2009) (**courts may look to the legislative history to discern the government's interest, but should only do so when the statutory text itself is ambiguous**); Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887, 1903 (1970) ("Examining motives, it is said, involves inquiry into the subjective reasons for legislative action; purpose, on the other hand, denotes what the legislature sought to achieve, and not why. Purpose is derived from the terms of a statute, its operation, and the legal and practical context in which it was enacted. **To determine purpose, the court may consider both the language of the statute and general public knowledge about the evil which the legislature sought to remedy; prior law; accompanying legislation; enacted statements of purpose; formal public pronouncements; and internal legislative history**.") (emphasis added); *City of Seattle v. Webster*, 115 Wash. 2d 635, 640, 802 P.2d 1333, 1337 (1990) ("Facts are not essential for consideration of a facial challenge to a statute or ordinance on First Amendment grounds. Constitutional analysis is made upon the language of the ordinance or statute itself.") (footnotes omitted).

Accordingly, when evaluating Plaintiffs' Motion to Compel and for Sanctions [67] the Court should keep in mind that the only admissible evidence in resolving the claims raised in Plaintiffs' First Amended Complaint is the language of the ordinance itself, the legislative history, and other matters of actual fact in the public domain of which the Court may take judicial notice. Any discovery sought in excess of that threshold, e.g., like excessive demands for the production for inadmissible records, demands that Clark County define terms or provide legal conclusions, attempts to notice the depositions of County Commissioners or individuals who spoke during the legislative hearings, demands for legislator e-mails, IT searches of County employee e-mails that tie up resources, or demands for documents for which Clark County is not the custodian of records, etc., is not reasonably calculated to lead to the discovery of admissible evidence and is per se oppressive and places an undue burden and expense on Clark County in violation of Fed. R. Civ. P. 26(c)(1)(A).

IV.

REASONS FOR LIMITED SCOPE OF DISCOVERY

To be certain, "Statutes [and ordinances like CCC 16.13.030] are **presumed constitutional**." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002) (emphasis added); *see also Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Accordingly, facial challenges like the instant one, that seek to invalidate an ordinance in the abstract are ***highly disfavored***. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). This is because facial challenges rely on speculation or interpretation of ordinances "on the basis of **factually barebones records**." *See Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted) (emphasis added); *see also Washington State Grange*, at 450. Declaring ordinances unconstitutional "frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69, 163 L. Ed. 2d 812 (2006).

Another reason facial challenges like those brought in this case are disfavored is because it invites the courts to serve as a super legislature---placing it and its wisdom above that of elected officials and second-guessing their determinations. As already discussed, *supra*, The Supreme Court of the United States has indicated that it is not its place to act as a super legislature and, accordingly, that it should "not [be] concerned with the wisdom, need, or appropriateness of the legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 730–31, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963) (internal citations and quotation marks omitted).

It is the opinion of the Supreme Court of the United States that "Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure." *Id*; *see also Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952); *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations […].").

The reason for the court's deference to the legislature for the enactment of statutes and ordinances is rooted in the separation of powers doctrine which is designed to prevent one branch of government from encroaching on the powers of another branch. *Clinton v. Jones*, 520 U.S. 681, 700, 117 S. Ct. 1636, 1647, 137 L. Ed. 2d 945 (1997) ("These restrictions on judicial activities 'help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches.'") (quoting *Morrison v. Olson*, 487 U.S. 654, 678, 108 S. Ct. 2597, 2612, 101 L. Ed. 2d 569 (1988)). The Supreme Court has indicated that while the separate branches of the government have been put in place to defend the Constitution from overreach by the other branches, "'that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.'" *Mistretta v. United States*, 488 U.S. 361, 381, 109 S. Ct. 647, 659, 102 L. Ed. 2d 714 (1989) (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original)).

In other words, the Court has determined that its role is strictly to review legislation for its compliance with Constitutional mandates, not to subvert the whole power of the legislature acting as a super legislature by rehashing policy debates already made before the legislature, offering alternative legislation, or unduly inquiring into the subjective motives of legislators or questioning the wisdom of their legislation.

V.

THIS COURT'S VIEW ON NECESSARY DISCOVERY

In its Order [51] denying Plaintiffs' Motions for Preliminary Injunction and for TRO and granting in part and denying in part Defendant Clark County's Motions to Dismiss, the Court provided clear guidance on the relative remaining burdens of the parties that required additional support before the Court could properly rule on them.

In the Court's view, and in line with permissible discovery/admissible evidence in facial challenges detailed above, the Plaintiffs' burden in this litigation is "to demonstrate 'from the **text of [the law] and from actual fact**' that substantial overbreadth exists." [ECF No. 51] at 25:15-17 (citing *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988)) (emphasis added). In this regard, substantial overbreadth can only be demonstrated by pointing to areas where the ordinance is in effect versus areas where it is not and by identifying the types of speech, if any, that would be implicated by enforcement of the subject ordinance.

As it pertains to the County, the Court indicated that the County's duty is to "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" [ECF No. 51] at 30:9-11 (citing *Porter*, 68 F.4th at 443); *see also id* at 32:10-11 ("While **the burden on the County is not heavy**, it requires more than the County offers here.") (emphasis added).

Again, the Court has indicated that the County's burden in demonstrating its government interest is low and is satisfied by demonstrating from the language of the ordinance, the legislative history, and public statements from legislators that the harms underlying the enactment of the subject ordinance are real and that the ordinance will alleviate those harms underlying the enactment of the ordinance.

In light of the foregoing, the discovery sought by Plaintiffs in this action is per se overly burdensome, oppressive, and not reasonably calculated to lead to the discovery of admissible evidence and, accordingly, the Court should deny Plaintiffs' Motion to Compel [67] and grant Defendant Clark County's Countermotion for Protective Order.

VI.

PLAINTIFFS' OVERBROAD AND ABUSIVE DISCOVERY AND CLARK COUNTY'S GOOD FAITH EFFORTS TO MEET AND CONFER

From the onset of this case, and despite this case only involving questions of law, Plaintiffs have been in a rush to bully Defendant to get a scheduling order in place and to conduct expansive discovery. *See*, *e.g.*, Declaration of Deputy District Attorney Joel K. Browning, attached hereto as **Exhibit A**, at pp. 6, 17. The County made it clear from the beginning that it was the County's position that Plaintiffs' causes of action consisted exclusively of questions of law and facial challenges to the constitutionality of ordinances which required minimal discovery, if any, and which are resolved on the basis of the language of the ordinance, the legislative history, and actual fact. *Id*. at p. 7, 18. Given that counsel for Plaintiffs' counsel had litigated a similar facial challenge involving another ordinance with Defendant before, a case which was completely resolved on a motion to dismiss without the need for additional discovery, counsel for Defendant assumed that Plaintiffs would also understand that this case involved similar questions of law not requiring discovery. *See*, *e.g.*, *Larime Taylor v. LVMPD, et al.*, Case No: 2:19-CV-00995-JCM-NJK.

Despite this, however, Plaintiffs' counsel continued to maintain their unreasonable position regarding an overly broad scope of discovery, including their contention that they would need to conduct depositions of County employees, retained experts who provided testimony during the legislative hearings on the subject ordinance, LVMPD leadership and its officers, and potentially even the Clark County commissioners themselves. **Exhibit A** at pp. 17-22. Plaintiffs also indicated that they would need to request or subpoena documents from Clark County, LVMPD, and others who provided testimony in the legislative hearing to reevaluate the weight of the harms discussed during the legislative hearing on CCC 16.13.030

and the accuracy of the statements offered therein—functionally seeking to impermissibly re-hash the policy debate underlying the wisdom of the ordinance in the courts by reviewing information that even the legislators themselves potentially never saw and to inject additional evidence, inadmissible for consideration in facial challenges, into this instant litigation. *Id*.

Plaintiffs submitted a proposed scheduling order and discovery plan for review to Defendant which far exceeded the scope of discovery in facial challenges like this case and refused to further reduce those terms to the scope of discovery detailed in substantial case law provided by Defendant's counsel. Ultimately, when Defendant refused to jointly submit the scheduling order and discovery plan [35] as written, indicating its intent to file a motion to stay discovery instead, Plaintiffs unilaterally filed the same in violation of a pending court order [33] providing that any discovery plans must be jointly submitted. **Exhibit A** at pp. 26-31. In response, Clark County was forced to file an objection on or around May 10, 2024, followed shortly thereafter by its Motion to Stay [37] on or around May 13, 2024. *Id*. The Court ultimately issued an order [42] denying Plaintiffs' unilaterally submitted proposed scheduling order and discovery plan and told the parties to revisit the issue of discovery after the pending motion to dismiss was resolved. [42].

Ultimately the Court ruled on the pending motion to dismiss, indicating that it needed slightly more information from Clark County (which had relied exclusively on a recognized government interest in the Ninth Circuit and the language of the ordinance only, but did not cite to the legislative history) before Clark County could satisfy its burden (which was not heavy) and told Plaintiffs that they would need to demonstrate overbreadth from the language of the ordinance itself and actual fact. *See*, *e.g.*, **Exhibit A** at p. 35; *see also* [ECF No. 51] at 32:6-13.

Despite this, the very next day Plaintiffs' counsel reached out to schedule an FRCP 26(f) conference and insisted on discussing the same overly broad scheduling order and discovery plan it had proposed previously that could potentially include discovery far beyond that contemplated in the Court's order [51] and in facial challenge cases like this one. **Exhibit A** at p. 36. Plaintiffs refused to withdraw from this position during the FRCP 26(f) call. *Id*. at

p. 37. Counsel for Defendant indicated that it would be best to address the issue of scope in the discovery plan from the onset so the guidelines were clear moving forward in the interests of judicial economy (to avoid motions to compel and motions for protective order like those currently before the Court) and provided ample case law in support of its position on the scope of discovery in facial challenge cases. *Id*. Plaintiffs provided no meaningful rebuttal or case law to these arguments and seemed to intentionally misconstrue the holdings of the cases they did cite, cherry-picking words and phrases without considering the context in which they were offered.

Plaintiffs refused to concede Clark County's point, arguing only that some of the cases cited by Clark County were for different types of statutes or ordinances, and representing that they had seen cases where legislators had been deposed—but the only case law they provided in support of their position stood for the proposition that the County had a burden to demonstrate that its harms are real; a point which Clark County conceded, but believed must be demonstrated through the language of the ordinance and the legislative history. **Exhibit A** at p. 37. None of the cases cited by Plaintiffs stood for the proposition that they would be entitled to the level of discovery they intended to seek, including requests for records and communications not contained in the legislative history or depositions of legislators, County staff, police officers or experts retained by Clark County to research issues of safety and crime on the Las Vegas Strip. *Id*.

Ultimately, after Plaintiffs assured Defendant that the scope of discovery would be limited, Clark County agreed to the Plaintiffs' proposed topics for discovery subject to its right to object or move for a protective order later if Plaintiffs sought discovery beyond the language of the ordinance, the legislative history, and matters of actual fact. **Exhibit A** at p. 37. Thereafter, Plaintiffs then unilaterally added another topic to the proposed discovery plan not discussed during the call—essentially seeking to force Clark County to concede to it under duress to comply with the court's order regarding the timeline for the submission of joint discovery plan. *Id*. at p. 38.

After the discovery order was in place, Plaintiffs then turned around and slammed Defendant with 82 overly broad and unduly burdensome requests for production—which included "any and all" language, were not limited in time or scope, included discrete subparts and sub-searches, and which far exceeded the scope of discovery in facial challenges and cases involving questions of law. *See*, *e.g.*, Defendant Clark County's First Supplemental Responses to Plaintiff's First Request for Production of Documents, attached hereto as **Exhibit B**; *see also* **Exhibit A** at p. 39. The sheer volume of these requests is unconscionable given the nature of this case and rivals even some of the most complex litigation Clark County has been involved in during the past decade. **Exhibit A** at p. 39. Plaintiffs also propounded interrogatories which, while fewer in number, were no less objectionable due to their attempt to impermissibly seek the subjective motive of legislators and definitions of words undefined in statute ordinance rather than matters of actual fact as interrogatories are intended. *Id*. at p. 40; *see also* Defendant Clark County's Answers to Plaintiffs' First Interrogatories, attached hereto as **Exhibit C**.

Counsel for Defendant Clark County attempted to respond to these disproportionate and unduly burdensome requests in good faith, despite dealing with illness and other pressing litigation facing the County in November around the elections, but ultimately found the vast majority of Plaintiffs' requests to be beyond the scope of permissible discovery in the case. **Exhibit A** at p. 41-57. Accordingly, this discovery propounded by Plaintiffs and the subsequent requests for supplementation, meet and confer conferences, supplemental discovery responses, and ultimately this motion to compel and motion for protective order have been precipitated by Plaintiffs' bad faith refusal to acknowledge that their fishing expedition is neither permissible nor proportionate to the needs of this case and have wasted countless hours of Defense counsel's and now the Court's time. *Id*.

Now, even as these issues are pending before the Court, Plaintiffs continue their bad faith attempt to conduct irrelevant and disproportionate discovery by issuing notices of subpoenas to LVMPD and Dr. Sousa, seeking a back door to circumvent this discovery dispute and obtain communications of Clark County commissioners and staff which are irrelevant to

the matters in this case as they are not admissible for consideration in a facial challenge or to assist Plaintiffs in carrying their burden. *See*, *e.g.*, Notice of Intent to Serve Subpoenas for the Production of Documents to Las Vegas Metropolitan Police Department, attached hereto as **Exhibit D**, at 10:12-14 ("ALL COMMUNICATIONS between YOU and DEFENDANT RELATED TO Clark County Code Chapter 16.13"); Notice of Intent to Serve Subpoenas for the Production of Documents to Dr. William H. Sousa, attached hereto as **Exhibit E**, at 10:12-14 ("ALL COMMUNICATIONS between YOU and DEFENDANT RELATED TO the FINAL SOUSA REPORT and drafts thereof."). Plaintiffs also propounded additional Requests for Production, Requests for Admission, and Interrogatories on or around February 6, 2025, further seeking to expand the scope of discovery in this matter. Accordingly, due to Plaintiffs' abuse of the discovery process, Clark County humbly requests the Court grant its protective order and establish clear parameters for discovery in this case to prevent further attempted abuses by Plaintiffs and their counsel.

VII.

OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

A. It is Plaintiffs' Burden to Demonstrate that the Discovery they Seek is Relevant, Proportional, and not Privileged and they Have not Done that

First, it must be noted that the party seeking discovery has the primary duty to demonstrate that the evidence they seek is relevant and discoverable. *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 667 (D. Ariz. 2016); *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 81 (D. Ariz. 2022).

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1) (emphasis added).

/ / /

Here there are only three categories of evidence admissible for consideration in this case:

1. The language of the ordinance which requires no discovery;
2. The legislative history which has already been disclosed by Counsel for Defendant; and
3. Issues of actual fact, including measurements of the bridges and sidewalk network to identify how much area is affected by the ordinance and identification of types of speech which require standing and stopping in the covered area, e.g., setting up a table to gather signatures, playing a cello or set of drums, etc.

Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 484, 97 S. Ct. 2777, 2811, 53 L. Ed. 2d 867 (1977); *Allstate Ins. Co. v. Serio*, No. 97-cv-620 (SS) (THK), 1998 WL 477961, at *5 (S.D.N.Y. Aug. 13, 1998).

Anything that is not reasonably calculated to lead to the discovery of evidence within these three categories is irrelevant, disproportionate to the needs of the case, and inherently unduly burdensome. *See Henrickson v. Nevada*, No. 220CV01014APGEJY, 2021 WL 1845279, at *3 (D. Nev. Apr. 15, 2021) ("discovery requests that seek irrelevant information are inherently unduly burdensome."); *see also Rivera v. NIBCO*, 364 F.3d 1057, 1072 (9th Cir. 2004) ("[d]istrict courts need not condone the use of discovery to engage in fishing expeditions"); *Monte H. Greenawalt Revocable Tr. v. Brown*, Case No. 2:12-cv-01983-LRH, 2013 WL 6844760, at *3 (D. Nev. Dec. 19, 2013) ("Discovery requests seeking irrelevant information are inherently undue and burdensome.").

Here the documents Plaintiffs seek are not reasonably calculated to lead to discovery of admissible evidence and, accordingly, they are irrelevant in facial challenges making the requests unduly burdensome and barred by Fed. R. Civ. P. 26(b)(1). Documents not part of the legislative history, depositions of legislators and government employees, private communications involving deliberative process, communications with constituents, prosecutorial charging documents, etc. are not likely to lead to the discovery of the three

categories of evidence identified above and, accordingly, Plaintiffs' abusive attempt to compel disclosure of this irrelevant discovery should be denied.

B. Seeking Definitions of Terms Undefined in Ordinance is an Impermissible attempt to Compel Discovery of the Subject Intent or Motives of Legislators

In Plaintiffs' Motion to Compel [67], they assert that they are entitled to seek definitions of the terms contained in the subject ordinance by interrogatory and that the County's objections regarding these interrogatories do not stand. [67] at 9:1-7. Specifically, Plaintiffs sought to compel Clark County to define terms like "disorderly offenses," "criminal disorder," "captive audiences," and "stop" that are used in Clark County Code Chapter 16.13 but are undefined therein. *Id*.

When each of the seven Clark County Commissioners unanimously voted to enact Chapter 16.13, none of them defined the terms contained in the ordinance and, as each of them are very distinct people with unique life experiences, it is anticipated that each of them may have had different understandings of the terms used therein. By seeking to have the County define terms which are undefined in Chapter 16.13, Plaintiffs seek to discover the subjective legislative motives behind the enactment of the subject ordinance by either forcing Clark County's counsel to poll the County commissioners to ascertain their collective understanding of the definitions of these terms or to have counsel for Clark County step into the roles of these commissioners and provide definitions to these terms, undefined by ordinance, in their stead. Neither outcome is permissible.

"The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). Legislators may vote to enact legislation for any reason at all and the diverse nature of these motives and the impossibility of penetrating into the minds and hearts of these legislators functionally precludes inquiry into the same. *United States v. O'Brien*, 391 U.S. at 384, 88 S.Ct. at 1683; *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469–70, 101 S.Ct. 1200, 1204–05, 67 L.Ed.2d 437 (1981); *Soon Hing v. Crowley*, 113 U.S. 703, 710–11, 5 S.Ct. 730, 734–35, 28 L.Ed. 1145 (1885).

Allowing discovery of legislative motives in First Amendment cases "would not only create a major departure from the precedent rejecting the use of legislative motives, but is also inconsistent with **basic analysis under the First Amendment which has not turned on the motives of the legislators, but on the effect of the regulation**." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (emphasis added).

When terms are undefined in statute or ordinance the courts presume that "[the legislature] intended that the words used be given their plain and ordinary meaning." *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020). Courts, including the United States Supreme Court, frequently refer to dictionaries to define such undefined terms in statute. *See*, *e.g.*, *United States v. Santos*, 553 U.S. 507, 511, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) (utilizing dictionary definitions).

Accordingly, Clark County's objections to Plaintiffs' interrogatories seeking the definitions of undefined terms in the ordinance are appropriate and grounded in sound case law and policy. The purpose of the instant action is to determine whether the effect of CCC 16.13.030 is impermissibly vague or unconstitutionally overbroad as written when the undefined words used therein are given their plain and ordinary meaning and Plaintiffs' bad faith attempts to somehow compel Clark County to limit itself to anything other than the plain and ordinary meaning of these terms or somehow waive its legislators' deliberative process and legislative privileges are unavailing.

C. Plaintiffs Requests for Production Largely Fall Outside the Permissible Scope of Discovery and Clark County has Worked in Good Faith to Respond to Those that Do Not

Plaintiffs contend that all their requests for production are proper and seek non-privileged matter that is relevant and proportional to the needs of the case. [67] at 12:11-13. The language of the requests themselves, however, and Plaintiffs' own justification for why they are relevant clearly demonstrate why they are neither relevant nor proportional.

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1. Plaintiffs Openly Admit that their Requests Seek Evidence to Challenge the Accuracy of the Information Provided in the Legislative Hearings and to Have this Court Re-evaluate this Evidence by Acting as a Super Legislature

In Plaintiffs' Motion to Compel [67], they openly acknowledge to the Court that they believe they are "entitled to **challenge the accuracy of the information presented before the Commission**, and **that Commission may not rely on inaccurate information in passing CCC 16.13.030 even if the information appeared accurate**." [67] at 6:18-19:4 (emphasis added).

But case law confirms that unless the legislature's decision, based on the legislative history, is arbitrary or capricious, the fact that they may have relied on inaccurate information is not sufficient to establish a constitutional violation. *Marino v. State of N.Y.*, 629 F. Supp. 912, 914 (E.D.N.Y. 1986) ("even if the legislature based its decision in part on information that could be shown to be inaccurate, its action could not be regarded as capricious, and a constitutional violation could not be established."); *Halgren v. City of Naperville*, 577 F. Supp. 3d 700, 738 (N.D. Ill. 2021), aff'd sub nom. *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587 (7th Cir. 2022). Even where the Court determines there are valid arguments against the reasons underlying the enactment of legislation or in support of the enactment of alternative legislation, those "**arguments are properly addressed to the legislature**, not to [the courts]. [The court] refuse[s] to sit as a 'superlegislature to weigh the wisdom of legislation,' and [the court] emphatically refuse[s] to go back to the time when courts used the Due Process Clause 'to strike down state laws." *Ferguson v. Skrupa*, 372 U.S. 726, 731–32, 83 S. Ct. 1028, 1032, 10 L. Ed. 2d 93 (1963) (emphasis added). The Court's analysis ends at whether the ordinance being challenged is unconstitutional on its face and in its effect—it does not seek to look beyond the harms identified in the legislative history and the connection between those purported harms and the effect of the ordinance.

Plaintiffs rely on *Colacurcio v. City of Kent* in support of their contention they are entitled to "facts surrounding [the] enactment" of the subject ordinance in their RFPs. [67] at 13:10-15. But in *Colacurcio*, the City of Kent's ordinance on nude dancing "was based on a comprehensive study of adult entertainment businesses and their secondary impacts. In

formulating the ordinance, the City **relied on the study**, concluding that regulation of adult uses was an important factor in controlling prostitution, drug dealing, and other criminal activity." 163 F.3d 545, 553 (9th Cir. 1998) (emphasis added). In that case, the court found it was sufficient that the legislative body expressly relied upon the study it commissioned prior to enacting its legislation. The Court did not pick apart the study, second-guess the conclusions of the study, require the researchers produce the raw data or communications used to obtain the raw data underlying the study, or allow the challengers of the ordinance to depose the researchers who conducted the study. *See generally id*.

Similarly in this case the Board of County Commissioners discussed legislation to address issues on the pedestrian bridges in 2022, but wanted more information about the dangers on the bridges before they did so. Accordingly, they declined to enact the legislation proposed in 2022, instead commissioning a study of public safety and crime on the bridges with Dr. Sousa at UNLV. In 2024, a new ordinance, Chapter 16.13, was proposed and the Clark County Board of County Commissioners incorporated findings from Dr. Sousa's study directly into the ordinance. Just like the City of Kent in *Colacurcio*, the Commissioners here never saw Dr. Sousa's raw data. They never saw his communications with various entities requesting information. They never hired an expert to double-check his methodology.

To allow Plaintiffs to seek this information, which the County commissioners never even saw, and introduce it for evaluation by the courts would be wholly improper. To allow Plaintiffs to retain an expert to argue the accurateness of this study, when they already unsuccessfully attempted to stop its enactment in 2024 during the legislative process, would exceed the scope of this Court's mandate when reviewing facial challenges and run counter to public policy and the separation of powers.

2. Clark County has Disclosed Pre-existing Code and the Associated Legislative History, but Documents outside of the Legislative History Pertaining to the same are barred for the reasons already discussed above

Plaintiffs assert that their RFPs 57-59 and 69 are relevant because they involve gathering documents regarding the enforcement of Chapter 16.11 and statistics regarding the

enforcement of Chapter 16.11 because they are entitled to a "comparison to prior law." [67] at 13:16-20. In doing so they again cite to *Colacurcio v. City of Kent*.

When one looks at *Colacurcio*, however, it is apparent how Plaintiffs are twisting the meaning of the court's use of the phrase "comparison to prior law." In *Colacurcio* the court looked to the legislative record of past ordinances to determine that the City of Kent's approach to dealing with nude dancing clubs in its zoning ordinances had actually grown more lenient over time and that it was apparent that the legislative "record indicates that the City devoted considerable resources to developing an ordinance that would be constitutionally sound." *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998).

Like the court in *Colarcurcio*, Defendant Clark County agrees that its past ordinances and proposed amendments to the same, contained in Chapter 16.11, are relevant to the current ordinance, Chapter 16.13. In fact, Clark County has disclosed these ordinances and their associated legislative history and, where applicable, associated traffic studies on the Las Vegas Strip. These ordinances show that, going back to at least as far as 1994, Clark County has sought to improve pedestrian flow and safety on the Las Vegas Strip. They show that when an amendment was proposed to Chapter 16.11 in 2022, the Clark County Commissioners reviewed the proposed ordinance skeptically, declined to pass the ordinance, and commissioned a study about safety on pedestrian bridges instead to find out more information. The record shows then that in 2024, two years later, the Commissioners revisited the issue and passed a more restrictive ordinance than the one in Chapter 16.11, but specifically limited in scope to pedestrian bridges which are structurally distinct and serve as choke points for pedestrian traffic. All of this is admissible, and Clark County has attempted to disclose all of the associated legislative history in good faith (though Plaintiffs' counsel was involved in this process at every step and already likely has these documents anyway).

What Plaintiffs' counsel is seeking here, however, is not "comparison to prior law." They are seeking to take the data from the enforcement of Chapter 16.11 (enforcement data which again was not disclosed to the County Commissioners in the hearing on Chapter 16.13 and which is not even in the possession or control of Clark County) to argue to the Court that

the existing ordinance is sufficient and there is no need for additional legislation like Chapter 16.13—again calling on this Court to act as a super legislature—despite this sort of analysis being clearly precluded in all case law on First Amendment facial challenges.

Accordingly, Plaintiffs' appeals to "comparison to prior law" are unavailing and inconsistent with case law on the same and the Court should deny their motion to compel discovery accordingly.

3. Implementation and Enforcement Policy Documents are not in the Custody of Clark County as it is a Separate Legal Entity from LVMPD

Plaintiff contends that they are entitled to "documents and communications relating to First Amendment activities on pedestrian bridges and in the resort corridor" and "trainings and policies relating to the implementation and enforcement of Bridge Ordinances" in response to its RFPs 77, 78, 51, and 52. [67] at 14:3-11. They argue they are entitled to this information because it is relevant to whether the subject ordinance reaches a substantial amount of constitutionally protected conduct. *Id*.

The County does not have a substantial amount of dispute with Plaintiffs on this issue, but unfortunately due to the oppressive number of RFPs Plaintiffs sent to Defendant it was difficult to discuss each RFP with the care it was owed in light of Plaintiffs' larger problems of proportionality. The County expressed that it didn't feel extensive discovery on this issue of "overbreadth" was really necessary because arguments regarding overbreadth largely consist of the area affected by the ordinance and the types of speech which the ordinance might impact—two things that require little to no discovery. However, it conceded that citations issued by LVMPD and its policy on enforcement are likely discoverable because they could lead to Plaintiffs' counsel identifying different types of speech which might be affected by the ordinance that they had previously not considered. *See*, *e.g.*, **Exhibit A** at p. 50 ("The parties discussed the relevance of the citations in the case and Clark County agreed that actual evidence of enforcement by LVMPD and LVMPD's policy on enforcement would likely be admissible as actual fact of overbreadth that Plaintiff could cite to in support of its position and agreed to try and obtain lists of citations or prosecutions to provide to Plaintiffs in order

for them to confirm that they were receiving a comprehensive list of citations and arrest reports from LVMPD in response to their public records requests/subpoenas."). Accordingly, Clark County agreed to provide limited documentation in its possession or to seek other documentation through public records requests to the courts to facilitate Plaintiffs' records requests to LVMPD. *Id*.

Clark County, however, is not LVMPD and is not the custodian of record for any of these documents sought. And to the extent Plaintiffs continue to seek disclosure of communications between Clark County and LVMPD—which are not reasonably calculated to lead to additional information on overbreadth and are not included in the type of evidence the Court may evaluate when reviewing a facial challenge under the First Amendment—those documents remain beyond the scope of discovery in this case and should be denied.

4. Plaintiffs' IT Search Requests are Entirely Overly Broad and the Searches would be Unduly Burdensome because those E-mails are not Admissible for Consideration

The RFPs contained in Plaintiffs' "other requests" section are the least defensible of any of their requests. *See* [67] at 14:12-21.

In Plaintiffs' RFPs 62 – 65 they seek numerous internal e-mails and documents, not part of the legislative history, from Clark County. Considering that these requests all include boilerplate "ALL DOCUMENTS and COMMUNICATIONS" and various search terms (which constitute discrete subparts and searches) and these requests are not limited in scope or time at all, they would be unduly burdensome and overly broad even if these documents were eligible for consideration in a First Amendment facial challenge. *See*, *e.g.*, **Exhibit B** at 69:20-75:28.

Plaintiffs' other Requests seek to compel Clark County disclose evidence in support of a quote from the sheriff (who is not a Clark County employee and, as an elected official, is beyond Clark County's control) and blanket overly broad requests that Clark County produce all documents it intends to rely on. The County's responses and objections to these frivolous requests were entirely appropriate.

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D. Plaintiffs Arguments Regarding Privilege and Privilege Logs are not Made in Good Faith and Would Require the County Expend Substantial Resources on Searches for Documents which Are neither Relevant nor Proportional to the Needs of this Case before its Objections Regarding the Same are Resolved

Because Plaintiffs' motion to compel lacks any substantive arguments to establish that the discovery sought is relevant, proportional, and not unduly burdensome, Plaintiffs expend extensive time attacking the County's failure to include a "privilege log" to its responses which assert privilege, including, but not limited to, attorney-client privilege, legislative privilege, deliberative process privilege, and work product doctrine for criminal prosecution case files in the possession of DA Criminal. *See*, *e.g.*, [67] at 15:1-28:21.

In this regard Plaintiffs expect the County to expend all the manpower and resources required to respond to their irrelevant and unduly burdensome discovery—when its objections regarding the same are still outstanding. Requiring the County to actually perform searches for the boilerplate "Any and all DOCUMENTS and COMMUNICATIONS" not limited by time, scope, or person, would functionally deprive Clark County of its right to seek a protective order on the grounds that Plaintiffs' fishing expedition for irrelevant documents will cost it substantial time and resources.

Plaintiffs have sought from the very beginning to paint Clark County as a bad actor who refuses to participate in discovery—but that could not be further from the truth. The County has worked with Plaintiffs to provide them with discovery, to assist them in obtaining relevant documents from LVMPD, and sought diligently to seek a stipulated discovery plan on the scope of discovery before this case got into discovery to avoid bothering the Court with motions like this. *See generally* **Exhibit A**.

Plaintiffs attempt to hang procedural missteps on Clark County to avoid discussing the elephant in the room, namely how their unconscionably overbroad discovery requests in this case are irrelevant and disproportionate, are blatant. If the courts reject Clark County's position regarding the limited scope of discovery in this case, it will perform required searches in line with the courts' directions in good faith and work with Plaintiffs' counsel to narrow the scope of the requests to appropriate individuals and timeframes. But requiring these extensive

searches to be conducted now, when all the case law Clark County has cited indicate they are not discoverable or eligible for consideration, would be akin to forcing a party a party with absolute or qualified immunity to completely litigate and try a case before issues of their immunity could be raised and resolved.

Accordingly, the Court should disregard Plaintiffs' arguments on the matter of privilege logs and address that at a later time, if necessary, after the scope of discovery in this case is clearly established because Plaintiffs have demonstrated a complete refusal to acknowledge that discovery on questions of law and facial constitutional challenges is de minimis at best and this has resulted in undue burden to the County in violation of the discovery guidelines provided in the Federal Rules of Civil Procedure.

VIII.

DEFENDANT'S MOTION FOR PROTECTIVE ORDER

A. There is Good Cause to Issue a Protective Order on the Scope of Discovery because Plaintiffs Refuse to Acknowledge the Proper Scope of Discovery for Questions of Law and Facial Challenges and their Discovery to-date in this Matter has Caused Annoyance, Oppression, and Undue Burden on Clark County

The "Trial court has wide discretion in determining scope and effect of discovery." *Amey, Inc. v. Gulf Abstract & Title, Inc.*, C.A.11 (Fla.) 1985, 758 F.2d 1486, certiorari denied 106 S.Ct. 1513, 475 U.S. 1107, 89 L.Ed.2d 912, rehearing denied 106 S.Ct. 2267, 476 U.S. 1153, 90 L.Ed.2d 712. A "party may move for a protective order, including an order prohibiting the discovery, on a showing of good cause, to protect the party from "annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c)(1)(A). The burden is on the party seeking the order to make the showing of good cause "by demonstrating harm or prejudice that will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (citing *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)); *see also Guillen v. B.J.C.R. LLC*, 341 F.R.D. 61, 66 (D. Nev. 2022).

Here, the scope of discovery is clear. Defendant has cited substantial and nearly identical case law in support of the contention that facial challenges and questions of law

require almost no discovery and that anything which is not the language of the ordinance, the legislative history, or a matter of public fact bears no relationship on an analysis by the Court when reviewing an ordinance for constitutionality.

Despite this, Plaintiffs have maintained a borderline frivolous position that they get to compel disclosure of all the e-mails and documents in the County's possession potentially relating to pedestrian bridges, pedestrian safety, or the pedestrian bridge ordinance in any way and to compel the depositions of lobbyists, researchers, legislators, County employees or other public officials to replay the policy debates they failed to carry before the Board of County Commissioners. The very notion is preposterous.

If such a thing were allowed, one can only imagine the chilling effects on future legislation and the frank and honest communication between legislators and their staff on the merits of legislation. Controversial statutes like the Affordable Care Act or the Patriot Act would have resulted in bitter, drawn-out litigation with discovery including countless depositions of federal legislators and disclosure of millions of e-mails of U.S. Senators and members of the House of Representatives so the courts could sit in judgment of the merits of that legislation. Under a constitution that guarantees the separation of powers, the Court can no more intrude into this sphere than the legislature can tell the courts how to rule on a motion or discipline its own judges.

Accordingly, Clark County seeks a protective order from the Court establishing the scope of discovery in this matter as the language of the subject ordinance, the associated legislative history, and matters of actual fact of which the Court may take judicial notice and order Plaintiffs to cease their abusive attempts to conduct depositions, retain experts to debate the merits of the subject ordinance, or to annoy or harass Clark County and its employees with requests for "any and all documents and communications" that do not fall within one of the three aforementioned categories.

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B. In Cases Involving Strictly Questions of Law, Expert Testimony is not Permitted because it Intrudes on the Province of the Court and the Court should Order the no Experts be Disclosed in this Case

In a Stipulation and Order to Extend Discovery Deadlines [63] in this matter, Plaintiffs represented to the Court that they "**need additional time to disclose an expert** due to the discovery disputes between the parties regarding records and information **Plaintiffs believe they need access to (including for expert disclosures and a Fed. R. Civ. P. 30(b)(6) deposition)** and intend to pursue motion practice to obtain." [63] at 3:20-23 (emphasis added).

Accordingly, Plaintiffs are making it clear that they intend to not only disclose an expert to support their position that the subject ordinance is unconstitutional, but also to compel the deposition of a 30(b)(6) witness from Clark County.

An expert's testimony is only warranted where they can provide scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–90, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993). But in a facial constitutional challenge which constitutes a pure question of law there is no "fact," let alone a trier of fact. As there are only questions of law at issue in this matter, disclosure of experts is improper. Because "Resolving doubtful questions of law is **the distinct and exclusive province of the trial judge**." *United States v. Weitzenhoff,* 35 F.3d 1275, 1287 (9th Cir.1993) (emphasis added); *see also Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008).

Not only would an expert not assist the Court in understanding questions of law, but if courts begin allowing the constitutionality of ordinances to be determined by the battle of experts—allowing losers of policy debates to drag legislative bodies through the Courts in an attempt to challenge legislation a second time—legislation would become cost-prohibitive which would serve to chill legislation and deprive communities of legislative remedies to the issues facing them contrary to public policy.

Accordingly, and given the foregoing, the County requests that the Court include in its protective order language indicating that expert disclosures and retention is prohibited in this case given that it includes only questions of law and facial constitutional challenges.

C. Depositions in Facial Challenges to the Constitutionality of Ordinances are Unnecessary, particularly Depositions of Legislators and 30(b)(6) Witnesses Expected to Speak on their Behalf and the Court should Issue a Protective Order Memorializing the Same

Plaintiffs have repeatedly expressed their intent to depose individuals in this case including Dr. Sousa who conducted research on crime and safety on the pedestrian bridges for Clark County, LVMPD officers and the Clark County Sherriff, Clark County employees and Commissioners, and an FRCP 30(b)(6) witness for Clark County. *See*, *e.g.*, **Exhibit A** at pp. 21, 37, 53, 55; *see also* [ECF No. 63] at 3:20-23.

The bar to subpoenaing witnesses in facial challenge cases is almost insurmountable. "Even where a plaintiff must prove invidious purpose or intent, as in racial discrimination cases, the Court has indicated that **only in extraordinary circumstances might members of the legislature be called to testify**, and even in these circumstances the testimony may be barred by privilege." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (emphasis added) citing *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268, 97 S.Ct. 555, 565, 50 L.Ed.2d 450 (1977); *see also Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); *May v. Cooperman*, 572 F.Supp. 1561, 1564 n. 2 (D.N.J.1983) (state legislators could not be deposed to determine the purpose of a "moment of silence" law challenged under the First Amendment).

For facial challenges that allege racial animus or invidious discrimination the court has indicated that the court must first "determine whether and to what extent deposition testimony [from non-legislators] may be useful" but must strictly limit such testimony to "to establishing relevant objective circumstances under which the ordinance was enacted" by protective order. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984).

Accordingly, at a minimum, the depositions of Clark County Commissioners and depositions of their agents, retained experts, staff or employees that may be used to infer or impute their legislative motives must be prohibited by protective order. Here, Plaintiffs have not even alleged racial animus or invidious discrimination in the First Amended Complaint

making depositions even less likely to lead to the discovery of admissible evidence, if even at all. *See generally* [ECF No. 61].

Therefore, Clark County humbly requests the Court issue a protective order prohibiting the use of depositions in discovery to address the questions of law raised in this case.

IX.

OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS AND COUNTERMOTION FOR SANCTIONS

Plaintiffs, despite being the primary cause of the ongoing discovery disputes due to their unreasonable unwillingness to acknowledge the limitations of discovery in this case and to stipulate to an appropriate discovery order at the onset of the case, have sought sanctions from the County. While counsel for Defendant generally has great respect for the work performed by the ACLU and their counsel, in this case it is their actions—not that of the County—that have delayed a resolution of this case and which have resulted in an undue burden to Clark County and the Court not warranted in facial challenges dealing with pure questions of law.

Accordingly, it goes without saying that the Court should deny Plaintiffs' requests for sanctions against Clark County.

While the County does not seek sanctions of its own accord from Plaintiffs in this matter, if the Court should deem Plaintiffs' counsel's unreasonableness and abuse of the discovery process in this matter sanctionable and believes that such a sanction may deter future incidents of discovery abuse in Plaintiffs' counsel's future constitutional challenges to ordinances (of which there promises to be many in the future), the County would be amenable to a sanction issued against them made payable to other worthy entities engaged in good work in the legal community like the Legal Aid Center of Southern Nevada or the UNLV Immigration Clinic.

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CONCLUSION

Based on the foregoing, Defendant Clark County humbly requests the Court deny Plaintiffs' Motion to Compel and for Sanctions [68] and grants Defendant' Countermotion for Protective Order establishing the scope of discovery in this case and precluding expert disclosures and depositions. If the Court is also so inclined, Defendant would request that it Grant its Countermotion for Sanctions against Plaintiffs for their unreasonableness to stipulate to the scope of discovery in this case thereby necessitating the instant Motion for Protective Order.

DATED this 7th day of February 2025.

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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 7th day of February, 2025, I served a true and correct copy of the foregoing **DEFENDANT CLARK COUNTY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS [67] AND COUNTERMOTION FOR PROTECTIVE ORDER AND FOR SANCTIONS** (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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