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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; and STEVEN B.
 WOLFSON, in his official capacity as Clark
 County District Attorney.
 Defendant(s).

Case No: 2:24-cv-00334

**REPLY TO PLAINTIFFS’
 RESPONSE [167] TO
 DEFENDANT’S SUBSTANTIVE
 JOINDER [165] TO DEFENDANT
 CLARK COUNTY’S MOTION FOR
 SUMMARY JUDGMENT [103] AND
 REPLY TO PLAINTIFFS’
 RESPONSE [168] TO
 DEFENDANT’S MOTION TO
 DISMISS [166]**

Defendants CLARK COUNTY and STEVEN B. WOLFSON, in his official capacity as District Attorney for Clark County (hereinafter “Defendant Wolfson”), by and through his counsel of record, hereby files the instant Reply to Plaintiffs’ Response [167] to his Substantive Joinder [165] to Defendant Clark County’s Motion For Summary Judgment [103] and Reply to Plaintiffs’ Response [168] to Defendant’s Motion to Dismiss [166] pursuant to Fed. R. Civ. P. 56 and Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

The instant Replies are made and based upon the attached Memorandum of Points and

1 Authorities, all papers and pleadings on file herein, and oral arguments permitted by the Court
2 at a hearing on the matter, if any.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **LEGAL ARGUMENTS TO RESPONSE [167] TO SUBSTANTIVE JOINDER**

6 **A. DA Wolfson also Raises all Arguments Raised on Reply and Opposition in the** 7 **Summary Judgment Litigation**

8 Plaintiffs have re-raised the arguments raised in their corrected Response to Defendant
9 Clark County's Motion for Summary Judgment, [ECF No. 149], as well as their Motion for
10 Summary Judgment [ECF No. 142] and the related Reply [ECF No. 157] in the briefing in
11 opposition to Defendant Wolfson. To the extent it may be procedurally necessary, Defendant
12 Wolfson also raised all arguments in Defendant Clark County's Opposition [ECF No. 123] to
13 Plaintiffs' Motion for Summary Judgment and Reply [ECF No. 154] in support of its motion
14 for summary judgment.

15 **B. Plaintiffs Misstate Clark County's Position and the Law with Respect to their** 16 **As-Applied Challenges**

17 Plaintiffs have mischaracterized Defendant Wolfson's arguments by stating that "if the
18 facial challenge fails for any reason, the Court cannot provide relief to Summers and Polovina
19 for their as-applied challenges" implying that DA Wolfson interprets the two claims as always
20 being co-extensive. *See, e.g.*, [167] at 4:13-25. But that is not what Defendant Wolfson argued
21 in his motion—he argued that they are coextensive in this case because Plaintiffs conceded in
22 the First Amended Complaint that their conduct was violative of the subject ordinance, i.e.,
23 that it involved them stopping and standing in the pedestrian flow zones in violation of CCC
24 16.13.030. [165] at 5:3-15. Where conduct is in express violation of a facially constitutional
25 statute or ordinance—regardless of whether the conduct has an expressive purpose—that
26 conduct is prohibited. One could not spray paint the side of a public building where statutes
27 prohibit defacing property are in effect and prevail on an as-applied challenge any more than
28 one could conduct a sit down protest on the interstate where pedestrian access is prohibited by

1 law. Violative conduct of constitutional ordinances remains prohibited even where that
2 violative conduct has an expressive element.

3 Situations where as-applied challenges are upheld in the face of a constitutional statute
4 or ordinance involve unconstitutional misapplication of the ordinance (and frankly highlights
5 why as-applied challenges with specific fact patterns to analyze are much preferred to facial
6 challenges based on hypothetical facts or scenarios).

7 The case cited by Defendant Wolfson in his Substantive Joinder makes this case clearly.
8 [165] at 5:3-15. *Menotti* dealt with various Plaintiffs who had been cited under emergency
9 orders issued by the City of Seattle in response to unruly protests opposing globalization
10 during the 1999 World Trade Center Conference. *Id.* In *Menotti*, the Court held that the
11 emergency orders were constitutional and that Plaintiff Sellman whose conduct was facially
12 violative of the orders (despite being expressive) was constitutionally cited under the
13 emergency orders. *Menotti v. City of Seattle*, 409 F.3d 1113, 1150–51 (9th Cir. 2005).

14 In the same case, however, the Court found that a genuine issue of material fact existed
15 in three of the as-applied challenges which asserted that people had been discriminatorily cited
16 based on their specific viewpoint in a restricted park where others were not being cited or
17 because local law enforcement had not properly determined that the individuals cited did not
18 fall within one of the exception categories provided in the emergency order—essentially
19 finding that as-applied challenges could proceed where facts existed indicating that the law
20 had been unconstitutionally misapplied beyond its terms or discriminatorily misapplied.
21 *Menotti v. City of Seattle*, 409 F.3d 1113, 1156 (9th Cir. 2005). All four as-applied challenges
22 in *Menotti* involved actual enforcement action and specific facts of enforcement that the court
23 could analyze—unlike the threadbare factual scenarios raised by Plaintiffs in this case that
24 require more speculation than analysis.

25 Another case that helpfully demonstrates this point (again based on a clear factual
26 background) is *Lavelle v. City of Las Vegas*. *Lavelle v. City of Las Vegas*, 447 F. Supp. 3d
27 1015 (D. Nev. 2020), *aff'd sub nom. Lavelle v. Las Vegas Metro. Police Dep't*, No. 21-16666,
28 2022 WL 3334634 (9th Cir. Aug. 12, 2022).

1 In *Lavelle*, a street preacher was cited under City of Las Vegas Municipal Code
 2 9.16.050, an ordinance prohibiting the use of sound amplification devices on Fremont Street
 3 for commercial purposes but leaving an exception for non-commercial First Amendment
 4 purposes. 447 F. Supp. 3d at 1019. The Court in *Lavelle* held that “LVMC § 9.16.030(K) is a
 5 facially constitutional regulation aimed at addressing commercial noise pollution on non-
 6 public property” but that in the case of the street preacher LVMPD had “unconstitutionally
 7 applied LVMC § 9.16.030(K) to plaintiff’s conduct” because it fell within an exception. *Id.* at
 8 1029.

9 In this case, however, Plaintiffs’ First Amended Complaint conceded that the basis for
 10 Plaintiffs Summers’ and Polovina’s so-called as-applied challenges arises from their past
 11 stopping and standing in the Pedestrian Flow Zones (conduct in violation of CCC 16.13.030)
 12 when no exception applies for such conduct and fears that they may be cited again in the future
 13 if they continue to engage in such violative conduct. [61] at 4:13-18, 6:3-12. Had Plaintiffs
 14 presented facts of misapplication of CCC 16.13.030, like facts that they were cited while
 15 continuing to move through the Pedestrian Flow Zone while performing (where such conduct
 16 is not prohibited) or had been cited for stopping or standing outside the Pedestrian Flow Zone
 17 (area not covered by the ordinance) they could arguably maintain a First Amendment as-
 18 applied claim—but here, because they concede their conduct is in violation of the ordinance,
 19 a failure to prove the ordinance unconstitutional on its face will also result in Plaintiffs’ failing
 20 to maintain their as-applied challenges.

21 **C. Even the Case Cited by Plaintiff Demonstrates Defendant Wolfson’s Point that**
 22 **an Order Granting an As-Applied Challenge based on Facial Challenge**
 23 **Standards Invalidates both**

24 Plaintiffs cited *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174 (9th Cir. 2018) for
 25 the proposition that they have a lower burden on an as-applied challenge because they only
 26 need to demonstrate that the “statute unconstitutionally regulates plaintiffs’ own speech.”
 27 [167] at 5:5-14.

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1 In *Italian Colors Rest.*, the Court only viewed the plaintiffs’ claims under an as-applied
 2 challenge because “the plaintiffs disclaimed any facial challenge.” *Italian Colors Rest. v.*
 3 *Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018). Accordingly, the Ninth Circuit could only rule
 4 on the constitutionality of the California statute to the extent it applied to the plaintiffs—but
 5 the ruling functionally found it unconstitutional on its face anyway—though it limited its
 6 remedy exclusively to the plaintiffs in that case because they disclaimed a facial challenge. *Id.*
 7 at 1179 (“This restriction does not directly advance the Attorney General’s asserted state
 8 interest in preventing consumer deception, nor is it narrowly drawn to achieving that
 9 interest.”).

10 But for the procedural idiosyncrasy in the plaintiffs’ pleading—the statute at issue in
 11 *Italian Colors Rest.* would have also been declared facially unconstitutional given that the
 12 facial challenge standard was applied.

13 **D. Plaintiffs’ Misrepresent to the Court the Data they Rely Upon in Support of**
 14 **their As-Applied Challenges and, Notably, Ignore that this Data was Not**
 15 **Specifically what the Board of County Commissioners Relied Upon in Enacting**
 16 **CCC 16.13.030**

16 Plaintiffs contend that they “focus on different evidence to support their respective
 17 facial and as-applied challenges” to establish their facial challenges—namely “data from the
 18 County’s pedestrian studies showing that **most, if not all, people stopping on the bridges**
 19 **were engaged in protected First Amendment activity** prior to the passage of CCC
 20 16.13.030.” [167] at 5:15-22.

21 The pedestrian studies conducted by Kimley-Horn looked at only a narrow group of
 22 people stopped on bridges which they designated as Non-Permanent Obstructions (“NPOs”)
 23 for the purposes of their studies. NPOs **expressly included only** “Hand Billers,” “Performers,”
 24 “Solicitors,” and “Vendors.” [103-13] at 29:4-30:4.

25 Kimley-Horn did not collect data on people stopping or obstructing traffic who did not
 26 fit into one of these categories, so the numbers of people sleeping, sitting, standing, camping,
 27 passed out, engaging in illegal table games, etc. are not even captured or represented in the
 28 Kimley-Horn Pedestrian studies so it seems disingenuous at best to argue that “most” people

1 stopping were engaged in protected First Amendment activity when the denominator in that
2 analysis is an unknown. *See, e.g.*, [103-13] at 32:23-33:3 (“There were -- there are other
3 temporary obstructions or non-permanent obstructions that we did not include in here. So, for
4 example, if somebody sat down on a bench to take a phone call, for example, they weren't out
5 there for this express -- one of these express reasons to be out there”), 40:22-41:11 (Explaining
6 how someone sleeping or seated not engaged in one of those four activities would not be
7 captured in their study).

8 Notably, Plaintiffs ignore that the primary driver behind the enactment of CCC
9 16.13.030 was the presentation made by LVMPD (not the Kimley-Horn studies) which
10 included a large number of people stopping and standing with no permissible or identifiable
11 expressive purpose like those engaged in arson, those engaged in illicit drug use, those
12 sleeping, those engaged in lewd conduct and indecent exposure, those engaged in fights or
13 violent encounters, those engaged in illegal table games, those engaged in pick pocketing and
14 theft, those individuals carrying weapons, those engaged in public urination or defecation,
15 those engaged in unlicensed commercial activities, those sitting without a purpose and often
16 with pets, etc. *See generally* [103-15].

17 Accordingly, the vast majority of the obstructions presented to the Clark County
18 Commissioners had no relation to expressive conduct at all and Plaintiffs’ attempt to rely on
19 a study that only looks at a subset of obstructions—ignoring all others—is a misrepresentation
20 of the reality of the condition on the pedestrian bridges and the evidence reviewed in the
21 legislative session when enacting CCC 16.13.030.

22 **E. Evidence of Enforcement of CCC 16.13.030 shows that Most Citations**
23 **Implicate a Relatively Small Amount of Persons Engaged in Protected Speech**

24 Plaintiffs assert that their as-applied challenge rests on their contention that CCC
25 16.13.030 primarily impacts people engaging in protected speech—but these assertions are
26 belied by the record. In addition to their flawed analysis of the data detailed, *supra*, actual
27 enforcement of CCC 16.13.030 and Plaintiffs’ own interpretation of the enforcement data
28

1 show that expressive conduct makes up a very small fraction of all enforcement of CCC
2 16.13.030. See, e.g., [123] at 23:27-24:28; [154] at 19:24-21:4; [154-2].

3 **II.**

4 **LEGAL ARGUMENTS TO RESPONSE [168] TO MOTION TO DISMISS**

5 **A. Defendant Wolfson's Motion to Dismiss is not a Motion for Reconsideration**

6 Plaintiffs contend that Defendant Wolfson's Motion to Dismiss [166] should be treated
7 as a motion for reconsideration and then argue against the same based on the motion for
8 reconsideration standards—arguing that a motion for reconsideration should not be used to
9 “relitigate the same issues and arguments.” [168] at 8:11-21.

10 But Defendant Wolfson's motion to dismiss [166] is not an attempt to relitigate the
11 underlying motion to dismiss, but rather to place objections on the record to Defendant
12 Wolfson's inclusion in this matter when the elements for joinder were not met and because
13 the Court's decision to *sua sponte* include Defendant Wolfson as a party poses a dangerous
14 precedent to the extent it conflates parties with their counsel of record and blurs the lines
15 between two distinct statutory jural entities under Nevada law.

16 Defendant Wolfson's motion does not “relitigate the same issues and arguments”
17 because the matter of joinder was never put to the parties and the parties were never allowed
18 to brief the issue. To the extent the Court wishes to reclassify Defendant Wolfson's motion to
19 dismiss [166] as an objection to the joinder or a motion to drop pursuant to Fed. R. Civ. P. 21
20 it may certainly do so, but it should be clear that the instant motion is not asking for
21 reconsideration of arguments put before the Court previously—but is raising them for the first
22 time in order to preserve them for appeal—objections regarding the joinder of Defendant
23 Wolfson because the joinder did not satisfy the requisite elements for when joinder is
24 appropriate and failing to timely raise these objections would constitute a waiver on appeal.

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B. Defendant Wolfson is not Moving to Dismiss the Action—merely his Joinder—and the Action would not be Rendered Meaningless if he was Dropped

In their Opposition [168], Plaintiffs contend that Defendant Wolfson has misrepresented the holding in *Melendres* as it pertains to joinder and that joinder is not a basis for dismissing an action. [168] at 11:7-11.

First, Plaintiffs seem to imply that Defendant Wolfson has miscited *Melendres* for a proposition that it does not support. [168] at 11:7-11. Plaintiffs contend that the language cited by Defendant to support that late joinder is only appropriate where it would avoid rendering the entire proceeding “meaningless” is nowhere to be found in *Melendres*—a point Defendant Wolfson concedes. Fortunately, Defendant Wolfson did not cite *Melendres* in reference to that quote—he cited *Bain*. *See* [166] at 9:11-18.

But the same reasoning applied to the *Melendres* case because it was determined belatedly in that case that the only named entity was a non-jural entity. If the Court were to dismiss the action on appeal because the only named entity was actually a non-jural entity—a mere matter of semantics—it would have rendered the entire proceeding meaningless. *Melendres v. Arpaio*, 784 F.3d 1254, 1260 (9th Cir. 2015). While Defendant Wolfson agrees with the *Melendres* Court that misjoinder in name only is not the basis for dismissing an action—it is certainly a basis for dropping the party which was subject to the misjoinder. In *Melendres* the Court functionally reformed the caption to replace (drop) MSCO with Maricopa County to avoid rendering the proceeding meaningless. *Id.*

Joinder is inappropriate in this case because Clark County is already a jural entity and is the proper entity to answer facial challenges for ordinances passed by its commissioners. Clark County, a political subdivision of the State of Nevada established by statute in NRS Chapter 244, is the entity authorized to enact ordinances and to answer challenges to the County Code. *See, e.g.*, NRS 244.095, et seq; NRS 244.115, et seq. It is not the entity tasked with making prosecuting decisions nor does it appoint the Clark County district attorney. *See generally* NRS Chapter 244.

1 The District Attorney is also a jural entity who has been granted statutory authority to
 2 prosecute crimes in Clark County in the name of the State—but also to serve as counsel to
 3 Clark County and its employees as County attorneys. *See, e.g.*, NRS 252.050; NRS 252.080.

4 They are not coextensive and they are not both necessary in this action to avoid
 5 rendering it meaningless nor should they be conflated or treated coextensively. The Plaintiffs
 6 did not intend to add Defendant Wolfson to this action any more than they intended to add
 7 LVMPD and the time for them to have added an enforcement agency has lapsed and the Court
 8 should not remedy Plaintiffs' failures where the elements for joinder are not met otherwise.

9 III.

10 CONCLUSION

11 Based on the foregoing, Defendant Wolfson humbly requests the Honorable Court
 12 grant his Substantive Joinder [165] to the pending Motion for Summary [103] and Motion to
 13 Dismiss for Improper Joinder [166].

14 DATED this 29th day of June, 2026.

15 STEVEN B. WOLFSON
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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 29th day of June, 2026, I served a true and correct copy of the foregoing **DOCUMENT** (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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