

Rose Daly-Rooney, AZ Bar #015690
Maya Abela, AZ Bar #027232
Tamaraingsey In, AZ Bar #035208
Meaghan Kramer, AZ Bar #029043
ARIZONA CENTER FOR DISABILITY LAW
5025 E. Washington Street, Suite 202
Phoenix, AZ 85034
(602) 274-6287
E-mail: rdalyrooney@azdisabilitylaw.org
mabela@azdisabilitylaw.org
sin@azdisabilitylaw.org
mkramer@azdisabilitylaw.org

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kathleen Hoffard,

Plaintiff,

v.

Cochise County, Arizona; Lisa Marra,
in her official capacity as Director of
Cochise County Elections
Department,

Defendants.

Case Number: 4:20-cv-00243-SHR

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

(Assigned to the Hon. Scott H. Rash)

Plaintiff Kathleen Hoffard, by and through her undersigned counsel, submit this response in opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint for Injunctive and Declaratory Relief (Doc. 11) ("Motion to Dismiss"). Plaintiff respectfully requests that the Court strike the Motion summarily for failing to comply with L.R.Civ.P. 12.1(c), which requires that counsel meet and confer, and certify that they have done so, before filing a motion to dismiss.

If the Court declines to do so and hears the Motion on the merits, the Motion should be denied because Plaintiff has pled claims upon which relief can be granted and Defendants have failed to meet their burden under Fed. R. Civ. P. 12(b)(6). In completing its analysis, the Court should disregard all extrinsic evidence improperly alleged by

Defendants in the Motion to Dismiss.

For these and the following reasons, the Court should deny Defendants' motion and allow this case to proceed. This Response is supported by the following Memorandum of Points and Authorities, and by the Declaration of Rose Daly-Rooney Esq., which is attached hereto as Exhibit 1.

MEMORANDUM OF POINTS AND AUTHORITIES

RULE 12(b)(6) STANDARD

Pursuant to Fed. R. Civ. P. 8(a), a pleading that states a claim for relief must contain: "1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; 2) a short and plain statement of the claim showing the pleader is entitled to relief; and 3) a demand for the relief sought, which may include relief in the alternative or different types of relief." "[A] complaint must contain sufficient factual matter...to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads facts sufficient to permit the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citations omitted). For the purposes of evaluating and ruling on a motion to dismiss under Rule 12(b)(6), the court will "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

LEGAL ANALYSIS

I. Defendants Failed to Comply with L.R.Civ.P. 12.1(c), and the Motion to Dismiss May be Stricken Summarily.

The Local Rules of the United States District Court for the District of Arizona have been amended to require that the moving party filing a motion to dismiss must first meet and confer with the nonmoving party in order to determine whether alleged deficiencies in the complaint can be cured. Specifically, the Rule states:

No motion to dismiss for failure to state a claim or counterclaim, pursuant to Federal Rule of Civil Procedure 12(b)(6)...will be considered or decided unless the moving party includes a certification that, before filing the motion, the movant notified the opposing party of the issues asserted in the motion and the parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by the pleading party. The movant may comply with this rule through personal, telephonic, or written notice of the issues that it intends to assert in a motion.

L.R.Civ.P. 12.1(c). The consequences for not following the Rule are clear – the Court may strike the Motion summarily. “A motion that does not contain the required certification may be stricken summarily.” *Id.*

After Plaintiff’s First Amended Complaint for Injunctive and Declaratory Relief (Doc. 6) (“Complaint”) was filed on August 27, 2020, and before filing their Motion to Dismiss, Defendants did not contact counsel for Plaintiff, in person, by phone, or in writing, in an attempt to comply with this Rule. *See* Ex. 1 at ¶¶ 4-7. Defendants did not notify Plaintiff of their plans to file a motion to dismiss in advance of filing the Motion. *See* Ex. 1 at ¶ 5. In fact, Defendants could not have complied with L.R.Civ.P. 12.1(c) because the Parties had no contact at all between the time that Plaintiff filed the Complaint (August 27, 2020), and when Plaintiff’s counsel notified Defendants of the failure to comply with the local rule in the Motion to Dismiss (October 2, 2020). *See* Ex. 1 at ¶ 7. Defendants did not include a certification that they attempted to comply with L.R.Civ.P. 12.1(c) with their Motion to Dismiss. *See* Doc. 11.

Before filing this Response, undersigned counsel informed Defendants of their obligations under L.R.Civ.P. 12.1(c) and gave them the opportunity to withdraw the Motion to comply with the Rule. *See* Ex. 1 at ¶¶ 7-8. As of the filing of this Motion, Defendants have not done so and have not indicated an intent to do so. *See* Ex. 1 at ¶ 10. Accordingly, Plaintiff respectfully requests that the Court strike the Motion summarily for failing to comply with L.R.Civ.P. 12.1(c). However, Plaintiff has fully briefed the matter should the Court decline to strike the Motion.

II. Defendants Motion to Dismiss Must Be Denied as Plaintiff Has Stated a Viable Legal Theory for Curbside Voting as a Reasonable Modification.

The gravamen of Defendants’ Motion to Dismiss is that: “federal and state law do not specifically mandate that the County provide curbside voting – only that the County provide “accessibility” and make “reasonable modifications to rules, policies or practices” and “remove architectural and communication barriers” - which the County has done by providing ADA accessible and ADA compliant Vote Centers throughout the County and by providing several alternative means to vote.” Doc. 11 at 4. However, Defendants misapprehend the legal obligations under the ADA, Section 504, and ACRA. Accessible Vote Centers do not equate to full compliance as the U.S. Department of Justice’s ADA Checklist for Polling Places (“ADA Checklist”) addresses architectural barriers¹ and not the reasonable modification requirements. Blanket rules that prevent an individualized determination of whether a reasonable modification is reasonable and necessary are *per se* unlawful. The availability of mail-in or early voting for all voters is not a reasonable modification for meaningful access to *in-person* voting. Therefore, Plaintiff has stated plausible claims that Defendants violate the ADA, Section 504, and ACRA because they have denied—and continue to deny—curbside voting or a substantially equivalent reasonable modification for meaningful access to *in-person* voting on Election Day.²

¹ Plaintiff by no means concedes that all of Defendants’ Vote Centers are fully compliant with physical accessibility requirements of the ADA Checklist for Polling Places, and as such this is a matter of contested fact. Defendants’ Motion fails to include any actual evidence to support the assertions of counsel that ADA physical compliance has in fact be achieved at every Vote Center used in the County. “[T]he arguments and statements of counsel are not evidence.” *Barcamerica Int’l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n. 4 (9th Cir. 2002) (internal quotation marks omitted).

² Claims under Section 504 of the Rehabilitation Act, 29 U.S.C. §794 *et. seq.*, against federally funded entities, are generally given the same analysis as claims under the ADA. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001). Similarly, claims under the voting rights provision of the Arizona Civil Rights Act (“ACRA”), A.R.S. § 41-1421, are given the same analysis as the ADA. *See* A.R.S. § 41-1421(D) (“[c]ompliance with title II of the Americans with disabilities act [sic] (42 United States Code §§ 12131

A. Accessible Vote Centers Do Not Equate with Full Compliance Under the ADA, Section 504, and ACRA.

Plaintiff's claim is based on the reasonable modification provision of the ADA, Section 504, and ACRA, not on the ADA accessibility requirements. Therefore, Plaintiff has stated a viable claim even if Defendants could prove all their Vote Centers are fully accessible. Federal and state law require reasonable modifications be provided to policies and procedures where necessary to avoid discrimination against people with disabilities. *See* 28 C.F.R. § 35.130(b)(7)(i) (ADA); 11 C.F.R. §.2; A.R.S. § 41-1421(C)(ACRA); *Crowder v. Kitagwa*, 81 F.3d 1480, 1485 (9th Cir. 1996) ("When a state's policies, practices or procedures discriminate against the disabled in violation of the ADA, Department of Justice regulations require reasonable modifications in such policies, practices or procedures 'when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity'"); *Mary Jo C. v. N.Y. State & Local Retirement Sys.*, 707 F.3d 144, 163 (2d Cir. 2013) ("the ADA's reasonable modification requirement contemplates modification to state laws, when necessary to effectuate Title II's reasonable modification provision").

Compliance with the affirmative obligation to offer program access in existing facilities under 28 C.F.R. § 35.150 and to design and construct new or altered facilities in compliance with accessibility standards under 28 C.F.R. § 35.151 does not relieve a public entity of its obligation to comply with other regulations.³ While covered entities may choose the methods to provide program access in existing facilities (e.g. provide

through 12134) and its implementing regulations and the voter accessibility for the elderly and handicapped act [sic] (42 United States Code §§ 1977ee through 1977ee-6) is deemed in compliance with this article"). Therefore, arguments about Plaintiff's claims under the ADA, Section 504, and ACRA are consolidated. Statutory or rule citations are provided for each statute.

³ *See also* 11 C.F.R. §§ 9420.5 (program access in existing facilities) and 9420.6 (new construction) (Section 504 regulations); A.R.S. § 41-1421(D) (compliance with Title II regulations is deemed compliance with A.R.S. § 41-1421 (D)).

1 structural changes or offer rolling stock or alternative accessible locations for services),
2 they may not choose whether to comply with the reasonable modification regulation.
3 Otherwise, covered entities could justify denying a voter the right to bring their service
4 animal in the voting center or to provide a sign language interpreter to a voter who was
5 deaf in a discussion about how to fill out their voter registration paperwork on the grounds
6 their facility was accessible. *See Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 119
7 (2nd Cir. 2011) (stating an entity may be in full compliance with one section of the ADA
8 but may be in violation of another section); *cf. Fortune v. Am. Multi-Cinema, Inc.*, 364
9 F.3d 1075, 1085 (9th Cir. 2004) (rejecting movie theater chain’s insistence that the
10 ADA’s accessibility guidelines controlled in a reasonable modification claim about a
11 policy regarding reserving companion seating prior to a movie showing).

12 Defendants mistakenly rely on the ADA Checklist as establishing that they are
13 fully compliant with the ADA. *See* Doc. 11 at 4. However, the ADA Checklist itself
14 contemplates requirements beyond physical accessibility of voting centers to ensure
15 compliance and avoid discrimination against people with disabilities. 28 C.F.R. §
16 35.130(b)(7)(i); *see also* 11 C.F.R. § 9420.2 (Section 504); A.R.S. § 41-1421(C), (D)
17 (ACRA). The ADA Checklist refers to other DOJ guides, mainly “The Americans with
18 Disabilities Act and Other Federal Laws Protecting the Rights of Voters with
19 Disabilities.” This guide states “the ADA requires public entities to *modify their voting*
20 *policies, practices, and procedures* when such modifications are necessary to avoid
21 discrimination on the basis of a voter’s disability.” DOJ, *The Americans with Disabilities*
22 *Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, available
23 at https://www.ada.gov/ada_voting/ada_voting_ta.htm (last visited Oct. 4, 2020)
24 (emphasis added). The ADA Checklist is also guidance and is not codified in law. It is
25 not authoritative on whether Defendants have fully complied with the law. On the face
26 of the ADA Checklist itself it also states that it “has no legally binding effect.” ADA
27 Checklist, available at <https://www.ada.gov/votingchecklist.htm#toc1>.

Further, Defendants’ reliance on the 2019 Elections Procedures Manual (EPM) published by the Arizona Secretary of State’s Office is also misplaced. The EPM does not trump federal law requiring reasonable modifications be provided to policies and procedures where necessary to avoid discrimination against people with disabilities. See 28 C.F.R. § 35.130(b)(7)(i) (ADA); 11 C.F.R. § 9420.2 (Section 504); A.R.S. § 41.1421(C) (ACRA). Moreover, an excerpt of the EPM not directly cited by Defendants undercuts their position that full compliance with physical accessibility requirements of the ADA makes it unnecessary for an election director from providing curbside voting at a polling location, and supports Plaintiff’s position that when curbside voting be made available as a reasonable modification where necessary. The EPM states: “Curbside voting may also be provided to senior citizens or voters with disabilities as a reasonable accommodation or when the county officer in charge of elections determines that a voting location is inaccessible, that no accessible sites are available, and that no temporary measures can make it accessible.” EPM at 185, available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (last visited Oct. 4, 2020) (emphasis added).

For all these reasons, Plaintiff has stated a plausible claim of denial of curbside voting or a substantially equivalent reasonable modification.

B. Blanket Bans Are Per Se Unlawful.

Notwithstanding Defendants’ argument that it may lawfully deny all curbside voting on Election Day, Plaintiff has stated a claim for denial of reasonable modifications under the ADA, Section 504, and ACRA. Reasonable modification requests are highly specific, and each case requires a case by case examination of the facts at issue, and the reasonable modification requested. *Kitagwa*, 81 F.3d at 1486; *Bircoli v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007). Blanket prohibitions, which by their nature remove any individualized assessment, violate the ADA. *Wright v. New York State Department of Corrections*, 831 F.3d 64, 68 (2nd Cir. 2016) (“Defendant’s blanket ban

on motorized wheelchairs violate[d] the ADA and [Rehabilitation Act]” because Defendants failed to make an individualized inquiry to examine the risks of the reasonable modification); *Stillwell v. Kansas City, Mo. Bd. of Police Com’rs*, 872 F. Supp. 682, 685 (W.D. Mo, 1995) (Department’s ban on one-handed applicants violated the ADA); *Cf. McGregor v. Nat’l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) (holding that a policy requiring an employee to be “100% healed” before returning to work does not allow a case-by-case assessment of an individual’s ability to perform essential functions of the individual’s job, with or without accommodation) (Title I ADA).

As a matter of law, Plaintiff is entitled to an individualized assessment of the reasonable modification claims under ADA, Section 504, and the ACRA. As stated fully in Section III, *infra*, Plaintiff stated plausible facts that she asked for a reasonable modification of curbside voting, was denied curbside voting, and was told that curbside voting was not available in any voting location in the County because the Vote Centers were all ADA complaint. Plaintiff further alleged facts that curbside voting is necessary and reasonable modification. Plaintiff claims that the existence of the blanket ban on curbside voting, and failing to make an individualized assessment to determine if such a modification, or a substantially equivalent reasonable modification, was necessary for Plaintiff to be able to vote in person, violates the ADA, Section 504, and ACRA.

C. The Availability of Mail-In or Early Voting for All Voters Is Not A Reasonable Modification for In-Person Voting.

Defendants argue that because Cochise County offers “several other options to vote,” Plaintiff cannot as a matter of law state plausible claims under the ADA, Section 504, and ACRA for the denial of curbside voting as a reasonable modification. Defendants are wrong because the existence of other ways to vote in no way demonstrates that Defendants have provided reasonable modifications to voters, such as Plaintiff, who prefer to vote in person. Voting by early ballot, by mail, and in person at the Cochise County Recorder’s Office are established voting programs, activities, and services

1 available in the County. These other voting programs, services, and activities are open to
2 everyone and therefore not provided as a modification based on disability-related need.
3 Voters with disabilities must have meaningful access to each of these programs, services,
4 and activities available to all voters.

5 If Defendants offer in-person voting to any voters, they must make that procedure
6 accessible to voters with disabilities and cannot require people with disabilities to rely on
7 other methods of voting to cast their ballots. Many voters with disabilities, including
8 Plaintiff, choose to participate in in-person voting on Election Day, and Defendants' legal
9 inobligation under the ADA is to ensure that process is as available for voters with
10 disabilities as it is for all other voters. *See Crawford v. Marion County Election Bd.*, 553
11 U.S. 181, 213 n. 4 (2008) ("It is one thing (and a commendable thing) for the State to
12 make [alternatives to in-person voting] available to the elderly and disabled; but it is quite
13 another to suggest that, because the more convenient but less reliable [alternative] is
14 available, the State may freely deprive the elderly and disabled of the option of voting in
15 person."); *People First of Alabama v. Merrill*, 2:20-CV-00619-AKK, 2020 WL 3207824
16 at *26 n. 46 26 (N.D. Ala. June 15, 2020), appeal dismissed, 20-12184-GG, 2020 WL
17 5543717 (11th Cir. July 17, 2020) ("The ADA is not so narrow that the plaintiffs' rights
18 only extend to voting at some time and in some way. The plaintiffs have the right to fully
19 participate in [the state's] voting program, including by casting a vote in person. The
20 plaintiffs demonstrate that by prohibiting curbside voting, the state excludes them from
21 voting in person based on their disability, thereby failing to provide them with
22 meaningful access to the benefit that it offers") (internal citations and quotations
23 omitted); U.S. Dep't of Justice, *The Americans with Disabilities Act and Other Federal*
24 *Laws Protecting the Rights of Voters with Disabilities*, available at
25 https://www.ada.gov/ada_voting/ada_voting_ta.htm (Sept. 2014) (discussing Title II
26 requirements) ("While early voting or absentee balloting can be offered to voters with
27 disabilities, it cannot take the place of in-person voting for those who prefer to vote at
28

the polls on Election Day”).

Therefore, the existence of other voting programs, activities, and services in the County is not grounds for dismissing Plaintiff’s reasonable modification claims under the ADA, Section 504, or ACRA for curbside voting or a substantially equivalent modification for in-person voting.

III. Plaintiff’s Complaint Clearly Sets Forth Claims Upon Which Relief Can Be Granted Based on a Denial of Reasonable Modifications for In-Person Voting.

Defendants’ Motion to Dismiss under Rule 12(b)(6) is entirely without merit and has failed to demonstrate Plaintiff’s Complaint is insufficiently pled. Plaintiff’s Complaint clearly meets the standard for stating claims upon which relief may be granted, as it recites in detail Plaintiff’s factual and legal assertions, and more than adequately satisfies the pleading requirements of Fed. R. Civ. P. 8(a).

A. Count I – Americans with Disabilities Act Claim.

To prove a violation of Title II of the Americans with Disabilities Act (“ADA”), a party must establish the following: 1) they are a qualified individual with a disability, and qualified to participate in or receive the benefit of the public entity’s services, programs, or activities; 2) they were either excluded from participation in or denied the benefits of the public entity’s services, programs, or activities, or were otherwise discriminated against by the public entity; and 3) such exclusion, denial of benefits, or discrimination was by reason of their disability. 42 U.S.C. § 12132; *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014); *see also Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

Plaintiff has clearly pled all the necessary elements of an ADA Title II discrimination claim, including sufficient detail in the Complaint to establish that she has met her pleading burden of stating a claim that is plausible on its face and upon which relief can be granted. *See generally* ¶¶ 6-22, 46-59. Plaintiff has set forth sufficient facts to establish that she is a person with a disability (Complaint at ¶¶ 6-8, 34-35), and that

1 she is a qualified elector registered to vote in Cochise County, and therefore qualified to
2 participate in the County's public service of voting. Complaint at ¶¶ 3, 9, 36. She has also
3 set forth that she has participated in in-person voting in the past, and intends to do so in
4 the future, including the General Election on November 3, 2020. Complaint at ¶¶ 10-11,
5 15. The information pled is sufficient to establish that, if accepted to be true and construed
6 in the light most favorable to Plaintiff, would establish the first element of an ADA Title
7 II claim has been met.

8 Plaintiff has also adequately pled the second element of an ADA Title II claim,
9 that she was denied the benefits of and discriminated against in Cochise County's public
10 service of voting, when Defendants denied her a reasonable modification in the voting
11 process sufficient to meet her needs as a voter with a disability. Complaint at ¶¶ 11-17,
12 39-45. Specifically, the Complaint alleges that Defendants denied Plaintiff a reasonable
13 modification of curbside voting and failed to offer a substantially equivalent reasonable
14 modification, despite her disability-related need for the modification, and that this
15 discrimination will occur again in the future due to Defendants' unlawful policies and
16 practices. *Id.*

17 Plaintiff has also adequately pled the third element of an ADA Title II claim, that
18 Defendants' denial of benefits and discrimination was on the basis of her disability.
19 Plaintiff requires the reasonable modification of curbside voting, or a substantially
20 equivalent reasonable modification, as a result of her disability. Complaint at ¶¶ 10, 12-
21 14, 42-45. The denial of such a reasonable modification is therefore made on the basis of
22 disability. *Id.* The information pled in Count I of Plaintiff's Complaint is sufficient to
23 establish that, if accepted to be true and construed in the light most favorable to Plaintiff,
24 would establish the elements of an ADA Title II claim have been met. Therefore, Plaintiff
25 has met her pleading burden under Fed. R. Civ. P. 8(a), and her ADA Title II claim should
26 be permitted to go forward.

27 **B. Count II – Section 504 of the Rehabilitation Act Claim.**
28

1 To prove a claim under Section 504 of the Rehabilitation Act, a party must show:
2 1) they are an individual with a disability; 2) they are otherwise qualified to receive the
3 benefit; 3) they were denied the benefits of the program solely by reason of their
4 disability; and 4) the program receives federal financial assistance. 29 U.S.C. § 794;
5 *Weinreich*, 114 F.3d at 978 (internal citations omitted).

6 Plaintiff has clearly pled all the necessary elements of a Section 504 of the
7 Rehabilitation Act claim, including sufficient detail in the Complaint to establish that she
8 has met her pleading burden of stating a claim that is plausible on its face and upon which
9 relief can be granted. *See generally* ¶¶ 6-22, 46-59. Plaintiff has set forth sufficient facts
10 to establish that she is a person with a disability (Complaint at ¶¶ 6-8, 52), and that she
11 is a qualified elector registered to vote in Cochise County, and therefore qualified to
12 participate in the County's public service of voting. Complaint at ¶¶ 3, 9, 53. She has also
13 set forth that she has participated in in-person voting in the past, and intends to do so in
14 the future, including the General Election on November 3, 2020. Complaint at ¶¶ 10-11,
15 15.

16 Plaintiff has also adequately pled the third element of a Section 504 claim, that
17 she was denied the benefits of and discriminated against in Cochise County's public
18 service of voting, when Defendants denied her a reasonable modification in the voting
19 process sufficient to meet her needs as a voter with a disability. Complaint at ¶¶ 11-17,
20 56-59. Specifically, the Complaint alleges that Defendants denied Plaintiff a reasonable
21 modification of curbside voting and failed to offer a substantially equivalent reasonable
22 modification, despite her disability-related need for the modification, and that this
23 discrimination will occur again in the future due to Defendants' unlawful policies and
24 practices. *Id.* Plaintiff has also sufficiently pled the final element of a Section 504 claim,
25 that the voting services provided by Defendants receive federal financial assistance.
26 Complaint at ¶ 54. The information pled in Count II of Plaintiff's Complaint is sufficient
27 to establish that, if accepted to be true and construed in the light most favorable to
28

Plaintiff, would establish the elements of a Section 504 claim have been met. Therefore, Plaintiff has met her pleading burden under Fed. R. Civ. P. 8(a), and her Section 504 claim should be permitted to go forward.

C. Count III – Arizona Civil Rights Act Claim.

A claim under the voting provision of the Arizona Civil Rights Act (“ACRA”) can be established by a party showing: 1) they are a qualified individual with a disability, and 2) they were excluded from voting or discriminated in voting by reason of the disability. A.R.S. § 41-1421(B). Plaintiff has clearly pled all the necessary elements of an ACRA claim, including sufficient detail in the Complaint to establish that she has met her pleading burden of stating a claim that is plausible on its face and upon which relief can be granted. *See generally* ¶¶ 6-22, 60-67. Plaintiff has set forth sufficient facts to establish that she is a person with a disability, and that she is a qualified elector registered to vote in Cochise County, and therefore qualified to participate in the County’s public service of voting. Complaint at ¶¶ 6-8, 64. Plaintiff has also adequately pled that she was discriminated against in Cochise County’s public service of voting, when Defendants denied her a reasonable modification in the voting process sufficient to meet her needs as a voter with a disability. Complaint at ¶¶ 11-17, 62-66. Count III of Plaintiff’s Complaint is sufficient to establish allegations that, if accepted to be true and construed in the light most favorable to Plaintiff, would establish a claim under A.R.S. § 41-1421(B). Plaintiff has therefore met her pleading burden under Fed. R. Civ. P. 8(a), and her claim under A.R.S. § 41-1421(B) should be permitted to go forward.

IV. Defendants Have Impermissibly Relied on Intrinsic Evidence

As a general rule, “a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). Rule 12(b)(6) expressly provides that when:

matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all

1 parties shall be given reasonable opportunity to present all
2 material made pertinent to such a motion by Rule 56.

3 When a defendant includes fact outside of the pleadings in a motion to dismiss, the Court
4 has two options under Fed. R. Civ. P. 12(d): (A) disregard the extrinsic evidence alleged
5 in the motion, or (B) convert the motion to dismiss to a motion for summary judgment.

6 Here, the Court should deny Defendants' Motion because many of the facts relied
7 upon are appropriately disregarded as outside of the pleadings pursuant to Fed. R. Civ.
8 P. 12(d). If, however, the Court determines that it should convert the motion to a motion
9 for summary judgment pursuant to Fed. R. Civ. P. 12(d), the Court should deny the
10 motion for two reasons: (1) pursuant to Rule 56(d), granting a motion for summary
11 judgment at this early stage will deny Plaintiff an opportunity to present facts essential
12 to a response, which can only be determined by conducting discovery; and (2) there are
13 genuine issues of material fact which preclude judgement as a matter of law.

14 **A. The Court should disregard all extrinsic evidence alleged by Defendants.**

15 When applying Rule 12(d), the court engages in a two-step inquiry. First, the court
16 must determine whether the extraneous material is considered "matters outside the
17 pleadings." Second, the court must decide whether to exclude the extraneous matter or
18 convert the motion to dismiss into a motion for summary judgment. In general, the court's
19 discretionary decisions are governed by Federal Rule of Civil Procedure 1, which
20 provides that courts should construe and administer the rules "to secure the just, speedy,
21 and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see*
22 *also Collins v. Palczewski*, 841 F.Supp. 333, 335 (D. Nev. 1993) (Reed, J.); Wright &
23 Miller, 5C Fed. Prac. & Proc. Civ. § 1366 (3d ed.) (the court's discretion "generally will
24 be exercised on the basis of the district court's determination of whether or not the
25 proffered material, and the resulting conversion from the Rule 12(b)(6) to the Rule 56
26 procedure, is likely to facilitate the disposition of the action.").

27 Defendants improperly included references almost a dozen new factual allegations,
28

which are outside of the pleadings and inappropriate in a motion to dismiss. Among these issues of fact, the Court should disregard any and all references to:

- When the County started using Vote Centers, whether paper ballots are used, the number of ballot styles.
- The cost and weight of Express Vote Machines, how they are designed, whether they are stable.
- Whether site assessments have been performed on each Vote Center before each election cycle, whether the polling places have been assessed using the Department of Justice's required documentation (*see* <https://www.ada.gov/votingchecklist.htm>).
- Any reference to a May 2, 2018 press release issued by the County and its contents, which is attached to the Motion to Dismiss as Exhibit A.
- Any reference to the County's Facebook page and its contents.

There are two exceptions to whether a court may properly consider extrinsic evidence in a motion to dismiss pursuant to Rule 12(d). *Lee*, 250 F.3d at 688–89. These include: documents submitted with the complaint, or those for which authenticity is not contested, *id.*; and a court may take judicial notice of “matters of public record.” *Id.* (citing Fed.R.Evid. 201; *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

Neither of these exceptions are present here. No fact referenced above was included in Plaintiff's Complaint. Furthermore, the contents of a press release do not constitute a “matter of public record” as it relates to judicial notice. To the extent the court can take judicial notice of press releases and news articles, it can do so only to “indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (citations omitted).

Much of Defendants' Motion relies on facts that constitute extrinsic evidence that do not meet either exception under Rule 12(d). Accordingly, the extrinsic evidence should be disregarded, and Defendants' Motion should be denied.

B. If the Court converts the motion to a motion for summary judgment, it should be denied, because discovery is needed, and there are genuine issues of material fact.

1 If the Court construes Defendants' self-styled Motion to Dismiss under Fed. R.
2 Civ. P. Rule 12(b)(6) as a Rule 56 motion for summary judgment pursuant to Rule 12(d),
3 the Court should deny the motion for two reasons: (1) pursuant to Rule 56(d), granting
4 a motion for summary judgment at this early stage will deny Plaintiff an opportunity to
5 present facts essential to a response, which can only be determined by conducting
6 discovery; and (2) there are genuine issues of material fact which preclude judgement as
7 a matter of law.

8 Rule 56(d) provides that a court may deny a motion for summary judgment if a
9 non-movant can establish by declaration that it cannot present facts essential to justify its
10 opposition. This lawsuit was served on Defendants on August 28, 2020. See Ex. 1 at ¶ 3.
11 Defendant has not answered the lawsuit. The parties have not attended a scheduling
12 conference. The parties have not engaged in any discovery, including depositions of lay
13 or expert witnesses, written discovery, or document production. No party has disclosed a
14 single document in this action.

15 If the Court declines to deny the Motion, or alternatively, to defer ruling until
16 adequate discovery has been conducted pursuant to Rule 56(d), Plaintiff respectfully
17 requests that the Court order a briefing schedule for the motion so that Plaintiff can fully
18 brief the Court on the various genuine issues of material fact which will preclude
19 judgement as a matter of law, which include, *but are not limited to*, the following:

- 20 • Voting Centers are not fully ADA accessible, nor accessible for Plaintiff;
- 21 • Paper ballots can be produced for voters in need of curbside voting;
- 22 • The ways in which other municipalities use paper ballots to assist voters in
23 need of curbside voting;
- 24 • The stability of the Express Vote Machines;
- 25 • The components of the Express Vote Machines;
- 26 • The County's ability to move the Express Vote Machines using a cart or
27 other reasonable means; and
- 28

- The ways in which other municipalities use carts and other reasonable means to move the Express Vote Machines in order to accommodate curbside voters.

See Ex. 1 at ¶ 11.

For the foregoing reasons, if the Court converts the Motion to a motion for summary judgment, Plaintiff respectfully requests that the Court deny the Motion pursuant to Rule 56(d). Alternatively, if the Court converts the Motion but determines that no discovery is needed, the Plaintiff respectfully requests an opportunity to fully brief the genuine issues of material fact.

CONCLUSION

Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss summarily for failing to comply with L.R.Civ.P. 12.1(c), which requires that counsel meet and confer and certify that they have done so before filing a motion to dismiss. If the Court declines to do so and hears the Motion on the merits, Defendants' Motion to Dismiss should be denied because it does not establish any failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Pursuant to Rule 12(d), the Court should disregard all extrinsic evidence improperly included in the Motion to Dismiss. Alternatively, if the Court elects to consider the motion as a motion for summary judgment under Fed. R. Civ. P. 12(d), Plaintiff also respectfully requests that the Court deny the motion, either: (1) pursuant to Rule 56(d); and (2) upon further briefing because there are genuine issues of material fact which preclude judgement as a matter of law.

Accordingly, and for the above reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion.

DATED this 5th day of October, 2020.

ARIZONA CENTER FOR DISABILITY LAW

/s/Maya Abela

Rose Daly-Rooney

Maya Abela

Tamaraingsey In

Meaghan Kramer

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically transmitted the above document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

COCHISE COUNTY ATTORNEY
CHRISTINE J. ROBERTS
Chief Civil Deputy County Attorney
Arizona Bar No. 033718
P.O. Drawer CA
Bisbee, AZ 85603
CVAttymeo@cochise.az.gov
*Attorney for Cochise County, and Lisa Marra, in her
official capacity as Cochise County Elections Director*

By: /s/ Christina Gutierrez