

1 BRIAN M. MCINTYRE
2 COCHISE COUNTY ATTORNEY
3 By: CHRISTINE J. ROBERTS
4 Chief Civil Deputy County Attorney
5 Arizona Bar No. 033718
6 P.O. Drawer CA
7 Bisbee, AZ 85603
8 (520) 432-8700

9 CVAttymeo@cochise.az.gov

10 *Attorney for Cochise County and Lisa Marra, in her official capacity as Cochise County*
11 *Elections Director*

12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION**

14 Kathleen Hoffard,

15 Plaintiff,

16 vs.

17 Cochise County, Arizona; Lisa Marra,
18 In her official capacity as Director of
19 Cochise County Elections Department,

20 Defendants.

) **No. 4:20-CV-00243-SHR**

) **DEFENDANTS' REPLY TO**
) **PLAINTIFF'S RESPONSE IN**
) **OPPOSITION TO DEFENDANTS'**
) **MOTION TO DISMISS**
) **FIRST AMENDED COMPLAINT**

) **Assigned to the Honorable**
) **Judge Scott H. Rash**
)

21 **COMES NOW** Defendants Cochise County (the "County") and Lisa Marra, in her
22 official capacity as Director of Cochise County Elections (collectively "Defendants"),
23 through the undersigned counsel, hereby replies to Plaintiff's Response in Opposition to
24 Defendants' Motion to Dismiss, and moves this court for dismissal of the First Amended
25 Complaint ("FAC") with prejudice, pursuant to Federal Rules of Civil Procedure, Rule
12(b)(6) for failure to state a claim upon which relief can be granted. As more fully
discussed below, the County has not discriminated against Plaintiff based on her disability

1 because all of the County's Vote Centers are fully ADA accessible and ADA compliant,
2 which provide Plaintiff with equal *in-person* access to vote on Election Day, and
3 therefore, under the law, both Arizona and Federal, Defendants are not required to offer
4 curbside voting as a reasonable accommodation. Further, the County offers various
5 additional ways for its citizens to exercise their right to vote and fully participate in the
6 voting process, including early in-person voting at the Cochise County Recorder's Office.
7

8 Defendants also request that the Court waive their counsel's procedural oversight
9 in failing to comply with L.R.Civ.P. 12.1(c), which was not intentional or done with
10 malice, and denies Plaintiff's request to strike the Motion to Dismiss. Undersigned
11 counsel had a discussion about the lawsuit, Complaint (not the FAC), settlement and
12 potential alternatives with Plaintiff's counsel on July 29, 2020 and believed that
13 Defendants' position, that under the law Defendants were not required to offer curbside
14 voting, had been made clear to Plaintiff. However, undersigned counsel, did not have a
15 specific conversation with Plaintiff's counsel about the FAC, as specified under the local
16 rule. And, by the time Plaintiff's counsel spoke with the undersigned counsel about the
17 procedural deficiency on October 1, 2020, it was already past this Court's deadline to file
18 a responsive pleading, under L.R.Civ.P. 7.2(c). Therefore, the undersigned counsel could
19 not withdraw her motion without waiving or jeopardizing Defendants' opportunity to
20 respond.
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23 If the Court decides to strike Defendants' Motion for procedurally deficiencies
24 under L.R.Civ.P. 12.1(c), Defendants request that the Court give Defendants an
25

1 opportunity to comply with the local rule and refile their responsive pleading. This Reply
 2 is supported by the following Memorandum of Points and Authorities, and by the
 3 Declaration of Christine J. Roberts, which is attached hereto, as Exhibit A.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. THE COURT SHOULD WAIVE THE PROCEDURAL DEFICIENCY** 6 **BECAUSE IT WAS NOT INTENTIONAL OR MALICIOUS AND** 7 **STRIKING THE MOTION TO DISMISS ON A PROCEDURAL** 8 **DEFICIENCY PREJUDICES THE DEFENDANTS AND UNDERMINES** 9 **THE PUBLIC POLICY IN FAVOR OF HEARING CASES ON THE** 10 **MERITS**

11 L.R.Civ.P. 12.1(c) provides that the moving party discuss the issues asserted in
 12 the motion with the opposing party before filing a 12(b)(6) motion to dismiss. L.R.Civ.P.
 13 12.1(c). Defendants' counsel did not do so in this case, but the oversight was not
 14 intentional or malicious. See Exhibit A, ¶¶ 5, 6.

15 On July 29, 2020, Defendants' counsel had previously had a detailed discussion
 16 with Plaintiff's Counsel about the Complaint that was filed on June 3, 2020, but not yet
 17 served on Defendants. *Id.*, ¶ 3. Plaintiff's counsel and Defendants' counsel discussed our
 18 respective positions in the lawsuit and whether we could reach a settlement. At that time
 19 Defendants' counsel explained to Plaintiff's counsel that under the law Defendants were
 20 not required to offer curbside voting because the fully ADA accessible and ADA
 21 compliant allowed Plaintiff to vote in-person on Election Day and that the County would
 22 be defending the lawsuit. Plaintiff's did not agree. Counsels agreed that we saw the matter
 23 differently and that Plaintiff would go ahead and serve process and the Court would
 24 decide. *Id.*, ¶ 3.
 25

1 On August 31, 2020, Plaintiff served process of the FAC, while Defendants'
2 counsel was out of the office for a period of eleven (11) days. *Id.*, ¶ 4. 5. Upon
3 Defendants' counsel's return to the office, she reviewed the FAC and did not find that it
4 was substantially different than the original Complaint. Defendant counsel did not believe
5 that she needed to call Plaintiff's counsel to discuss the FAC in light of their July 29, 2020
6 conversation and inadvertently overlooked L.R.Civ.P. 12.1(c) that provides that the
7 moving party must discuss the issues with opposing party before filing a motion to dismiss
8 under Federal Rule of Civil Procedure, Rule 12(b)(6). Therefore, Defendant counsel did
9 not have any discussions with Plaintiff's counsel about the FAC. *Id.*, ¶ 5. The oversight
10 was neither intentional nor malicious. *Id.*, ¶ 6.

12 On September 21, 2020, Defendants' counsel filed a Notice of Appearance (Doc.
13 10) and Defendants' Motion to Dismiss Plaintiff's First Amended Complaint for
14 Injunctive and Declaratory Relief (Doc. 11). *Id.*, ¶ 7. On October 1, 2020, Defendants'
15 counsel had a telephone conversation with Plaintiff's counsel, in which Plaintiff's counsel
16 informed her that Plaintiff was going to ask the Court to strike the Motion to Dismiss
17 because Defendants' did not comply with L.R.Civ.P. 12.1(c) and asked Defendants'
18 counsel to withdraw the Motion to Dismiss, but did not offer to stipulate to extend
19 Defendants' time to respond. *Id.*, ¶ 8. Defendants' counsel declined to withdraw the
20 Motion to Dismiss and said she would address and explain Defendants position to the
21 Court. Because the Court's deadline for Defendants to file a responsive pleading under
22 L.R.Civ.P. 7.2 (c) had already passed, Defendant's counsel did not believe that she could
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24
25

1 or should withdraw the motion without waiving or jeopardizing Defendants' opportunity
2 to respond. *Id.*, ¶ 9.

3 Whether to strike a pleading for failure to comply with a local rule is within the
4 discretion of the Court – it is permissive, not mandatory. “Before dismissing the action,
5 the district court is required to weigh several factors: ‘(1) the public's interest in
6 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk
7 of prejudice to the defendants; (4) the public policy favoring disposition of cases of their
8 merits; and (5) the availability of less drastic sanctions.’ *Henderson v. Duncan*, 779 F.2d
9 1421, 1423 (9th Cir.1986).” *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).
10

11 Here, if the Court strikes Defendants' Motion to Dismiss, Defendants will be
12 prejudiced by not having their case for dismissal heard by the court due to a procedural
13 deficiency. Additionally, striking the Motion to Dismiss would undermine the public
14 policy favoring disposition of cases on the merits. Because the oversight was not
15 intentional or malicious and in considering the weight of these two factors, the Court
16 should deny Plaintiff's request to strike Defendant's Motion to Dismiss. In the alternative,
17 should the Court be inclined to grant Plaintiffs' request, Defendants request that this Court
18 give Defendants an opportunity to comply with the local rule and refile their responsive
19 pleading to avoid the prejudicial impact on Defendants.
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21

22 **II. COCHISE COUNTY OFFERS EARLY IN-PERSON VOTING AT THE**
23 **COUNTY RECORDER'S OFFICE, IN ADDITION TO HAVING FULLY**
24 **ADA ACCESSIBLE AND ADA COMPLIANT VOTE CENTERS, AND**
25 **UNDER THE LAW, IS NOT REQUIRED TO OFFER CURBSIDE**
VOTING.

1 State and Federal law prohibits discrimination in voting based on disability. This
2 requires the County to make alternative means of voting available, but however, does not
3 require the County to provide every conceivable means possible. “A ‘reasonable
4 accommodation’ is one that gives the otherwise qualified plaintiff with disabilities
5 ‘meaningful access’ to the program or services sought. *Henrietta D. v. Bloomberg*, 331
6 F.3d 261, 282 (2d Cir. 2003). Further, “[s]tates are not constitutionally mandated to make
7 **special accommodations** for their disabled citizens. *See Garrett*, 121 S.Ct. at 964. Rather,
8 States must refrain from irrational discrimination against the disabled.” *Doe v. Div. of*
9 *Youth & Family Servs.*, 148 F. Supp. 2d 462, 488 (D.N.J. 2001) (emphasis added).

10 Cochise County ensures that individuals with disabilities are not discriminated
11 against based on their disabilities by making sure that all of its Vote Centers are ADA
12 accessible and ADA compliant. These fully ADA accessible and ADA compliant Vote
13 Centers provides individuals with disabilities equal access to **in-person** voting on Election
14 day.

15 In the 2019 Election Procedures Manual (“EPM”), which carries the force of law,
16 it specifies that curbside voting is an alternative voting option at vote centers **only** if
17 available at the voting location and **only** when: (1) no accessible sites are available; and
18 (2) no temporary measures can make them accessible. *See* 2019 Elections Procedures
19 Manual, Chapter 5: Accommodating Voters with Disabilities, Section IV, Alternative
20 Voting Options, pp. 105-106. The EPM further explains that it is the election director
21 who determines if a voting location is not accessible. *Id.* The EPM also provides that
22 curbside voting **may** be made available as a reasonable accommodation, but it **does not**
23 mandate that it must be made available as a reasonable accommodation.

24 Here, Cochise County Elections Director, Lisa Marra determined that all of the
25 County’s 17 Vote Centers are ADA accessible and ADA compliant. Therefore, under the

1 Arizona law, and pursuant to the EPM, the County was not legally obligated to offer
2 curbside voting as a reasonable accommodation to Plaintiff.

3 Further, the County has made reasonable accommodations to ensure voters with
4 disabilities are not disenfranchised by also providing alternative ways to vote, including
5 **early in-person** voting. This provides full, equal and meaningful access to the voting
6 process for everyone, which is ultimately the goal of anti-discrimination laws in voting.
7 Plaintiff demands that the County make special accommodations for her by insisting that
8 the County offer her curbside voting – no matter what the cost – so that she may vote in-
9 person on Election Day. The Vote Centers already provide her with that means of voting
10 in-person on Election Day. Additionally, the County has already provided a reasonable
11 accommodation and an alternative means for Plaintiff to vote in-person before Election
12 day - specifically, at the Cochise County Recorder's Office. Plaintiff puts too fine a point
13 and too stringent a requirement on what it means provide individuals with disabilities
14 meaningful and equal access the voting process. The Constitution protects the right to
15 vote, but not the right to vote in any manner one chooses. *See Burdick v. Takushi*, 504
16 U.S. 428, 433 (1992). Here, Plaintiff wants what she wants. Period.

17 Because Cochise County has provided a meaningful and equal access to voting,
18 there is no disability discrimination under the law and therefore, Plaintiff cannot plead
19 facts sufficient to support any allegation that the County excluded her from participation
20 in or denied her the benefit of voting. Consequently, this Court should dismiss Plaintiff's
21 FAC with prejudice, under F.R.C.P., Rule 12(b)(6), for failure to state a claim upon which
22 relief can be granted.

23
24 **III. SHOULD THE COURT CONVERT THE MOTION TO DISMISS TO A**
25 **MOTION FOR SUMMARY JUDGMENT DEFENDANTS REQUESTS**
CONSIDERATION OF ADDITIONAL FACTS

1 If Defendants' Motion to Dismiss is converted to a motion for summary judgment,
2 the Court should consider the following facts:

- 3 • All 17 Vote Centers are fully ADA accessible and ADA compliant,
4 following all federal guidelines and standards;
- 5 • There are no paper ballots at the Vote Centers because there are over 500
6 different ballot styles, making it impossible and impracticable for the County to
7 store paper copies of each ballot style at every one of its vote centers.
- 8 • The County does not have ballot on demand, nor does it have the required
9 wi-fi capability to have ballot on demand at its 17 Vote Centers throughout the
10 rural county; and
- 11 • The County offers early in-person voting at the County Recorder's Office.

12 **IV. CONCLUSION**

13 For the reasons stated above, Plaintiff's First Amended Complaint for Injunctive
14 and Declaratory Relief should be dismissed with prejudice, pursuant to Rule 12(b)(6) and
15 we respectfully ask this Court to do so.

16 DATED this 13th day of October, 2020.

17 BRIAN M. MCINTYRE,
18 COCHISE COUNTY ATTORNEY

19 By: /s/ Christine J. Roberts
20 Christine J. Roberts
21 Chief Civil Deputy County Attorney

1 A copy of the foregoing emailed
2 this 13th day of October 2020, to:

3 Rose Daly-Rooney
4 rdalyrooney@azdisabilitylaw.org

5 Maya Abela
6 mabela@azdisabilitylaw.org

7 Tamaraingsey In
8 sun@azdisabilitylaw.org

9 Meaghan Kramer
10 mkramer@azdisabilitylaw.org