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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Kathleen Hoffard, Plaintiff, vs. 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 TO THE COURT'S FEBRUARY 26, 2021 ORDER REQUESTING SUPPLEMENTAL BRIEFING** *(Assigned to the Hon. Scott H. Rash)*

Plaintiff Kathleen Hoffard, by and through counsel, respectfully submits this Memorandum of Points and Authorities in response to the Court's February 26, 2021 Order requesting that the parties submit supplemental briefing on two issues: 1) whether the Court should convert Defendants' Motion to Dismiss into a motion for summary judgment; and 2) any genuine issues of material fact. (Doc. 24). Plaintiff requests that the Court:

1) decline to convert Defendants' Motion to Dismiss (Doc. 11) to a motion for summary judgement, and deny Defendants' Motion to Dismiss; and 2) if the Court decides to convert the Motion, deny Defendants' Motion for Summary Judgement because there are genuine issues of material fact still in dispute that preclude judgment as a matter of law, or defer ruling to allow Plaintiff to submit an affidavit pursuant to Fed. R. Civ. P. 56(d) and conduct discovery so she is not prejudiced, because the determination of whether Plaintiff's proposed modification would fundamentally alter Cochise County's voting system should only be made after discovery, expert testimony, and evidentiary hearing, or trial.

MEMORANDUM OF POINTS OF AUTHORITIES

INTRODUCTION

On August 27, 2020, Plaintiff filed a fifteen page Amended Complaint alleging that Defendants failed to provide her a reasonable modification of curbside voting or a substantially equivalent modification in the exercise of her fundamental right to vote, in violation of Title II of the Americans with Disabilities Act (Title II), Section 504 of the Rehabilitation Act (Section 504), and the Arizona Civil Rights Act (ACRA). Instead of filing an Answer and alleging applicable affirmative defenses, Defendants filed a motion to dismiss, including extrinsic evidence outside the pleadings, that they now ask this Court to convert to a motion for summary judgment.

Defendants' motion relies exclusively on their Election Director's declaration, which included, in part, legal conclusions, opinions, and bare allegations largely without supporting extrinsic evidence. Defendants contend that this Court can rely solely on the declarations of the County's Election Director and declarations filed in support of Plaintiff's Reply in Support of Motion for Preliminary Injunction.[1] (Doc. 25).

[1] Plaintiff had 3 days to develop evidence in response to Defendants' Opposition of Motion for Preliminary Injunction under an expedited briefing schedule that did not include any discovery or evidentiary hearing.

Despite this limited record or opportunity to test Defendants' evidence, Plaintiff set forth facts sufficient to establish that at least 10 (out of 15) Arizona counties offer curbside voting as an option for in-person voting. Some of the counties use paper ballots printed by a vendor, others purchased Ballot on Demand systems that allow them to print ballots, and still others use the same voting equipment that Cochise County uses. The fact that most Arizona counties, including counties with rural areas, can and do provide curbside voting creates a genuine issue of material fact that Cochise County could provide curbside voting as a reasonable modification.

However, in any event, summary disposition of Plaintiff's civil rights claims is not appropriate prior to discovery because the matter involves highly fact-specific inquiries about the reasonableness of a proposed modification and the validity of Defendants' affirmative defenses. Any decision to grant the County's motion, if converted, should be deferred until discovery has been conducted to avoid prejudice to Plaintiff. Defendants have not provided an Answer to the Amended Complaint or pled facts supporting that the proposed modification would fundamentally alter their voting system, result in undue financial or administrative burden, or pose a direct threat to poll workers relied upon in Defendants' motion. (Doc. 25). There has been no exchange of disclosure statements, document production in response to production requests, answers to interrogatories, inspections of voting centers, and no depositions, including remarkably, of the Election Officer whose declaration is the only evidence supporting Defendants' motion, to cite to in opposition of summary judgment. There was also no discovery authorized during the expedited briefing schedule for the Motion for Preliminary Injunction to rely upon.

ARGUMENT

I. THE COURT SHOULD NOT CONVERT DEFENDANTS' MOTION TO DISMISS AND SHOULD DENY THE MOTION.

When, as here, a moving party includes extrinsic evidence from outside the pleadings in its motion to dismiss, a Court has two options: (A) exclude the extrinsic

evidence and rule on the remainder of the motion to dismiss, or (B) treat the motion as one for summary judgment under Rule 56:

> Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

A. The Court Should Exclude Defendants' Extrinsic Evidence and Deny Defendants' Motion to Dismiss Pursuant to Rule 12(d).

In Plaintiff's Response in Opposition to Defendants' Motion to Dismiss ("Response") (Doc. 12), Plaintiff asked that this Court exclude all extrinsic evidence improperly included in Defendants' Motion to Dismiss ("Motion") (Doc. 11), and deny the Motion. Plaintiff renews that request here.

Though styled as a motion to dismiss, Defendants improperly included references to almost a dozen new factual allegations, which were outside of the pleadings and inappropriate in a motion to dismiss. (Doc. 12 at 15:3-10). There are two exceptions to whether a court may properly consider extrinsic evidence in a motion to dismiss pursuant to Rule 12(d): (1) documents submitted with the complaint, or those for which authenticity is not contested; and (2) a court may take judicial notice of "matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001) (citing Fed. R. Evid. 201; *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Neither of these exceptions apply here. The Motion relies on multiple material facts which were not included in Plaintiff's Complaint, and the content of a press release does not constitute a "matter of public record" as it relates to judicial notice.

As set forth in her Response, Plaintiff pled claims upon which relief can be granted and Defendants cannot meet their burden under Fed. R. Civ. P. 12(b)(6). Because Defendants improperly included extrinsic evidence in their Motion (Doc. 11), and failed to meet their burden under Fed. R. Civ. P. 12(b)(6), Plaintiff renews her request that the

Court disregard all extrinsic evidence improperly alleged by Defendants pursuant to Fed. R. Civ. P. 56(d), and deny Defendants' Motion to Dismiss.

II. IF THE COURT CONVERTS DEFENDANTS' MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, THE COURT MUST DENY THE MOTION OR DEFER RULING TO ALLOW PLAINTIFF TO CONDUCT DISCOVERY.

A. Summary Judgment Is Improper Because Defendants Have Failed to Meet Their Burden and Genuine Issues of Material Fact Remain.

A motion for summary judgment may be granted only where there are no genuine issues as to any material fact such that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A fact is material if it could have an effect on the outcome of a suit under governing law, and a dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented. *Id.* at 248. In determining whether a jury could reasonably render a verdict in the nonmoving party's favor, all justifiable inferences are to be drawn in its favor. *Id.* at 255.

On a motion for summary judgment, it is the moving party's burden to prove that there are not genuine issues of material fact such that judgment as a matter of law is proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.").

Here, Defendants base their motion for summary judgment on two grounds: 1) Cochise County is not legally required to provide curbside voting if all their Voting Centers are fully ADA compliant and they offer alternative means for citizens to vote other than in-person voting, and 2) Plaintiff failed to prove that curbside voting is a reasonable modification that will not impose a fundamental alteration. If the Court

decides to convert Defendants' Motion to Dismiss to a motion for summary judgment, the Court should deny the motion as Defendants cannot meet their burden of showing there are no genuine issues of material fact, precluding summary judgment based on these grounds.

i. There are genuine issues of material fact as to whether Defendants' Vote Centers are accessible, and Defendants are not otherwise relieved of their legal obligations.

The first basis of Defendants' motion for summary judgment is that curbside voting is not required when "all of Cochise County's Vote Centers are ADA accessible and ADA compliant." (Doc. 25 at 5). Defendants have produced the party's declaration and unauthenticated site surveys from 2 of the 17 Vote Centers in support of the factual allegation that all of Cochise County's Vote Centers are ADA accessible. Lisa Marra has not been qualified as an accessibility expert. However, even an accessibility expert's testimony that a facility meets all ADA accessibility standards or a feature of the facility meets a specific standard would be inadmissible because it is a legal conclusion. Mere "legal conclusions without underlying factual support ... constitute 'unsupported speculation' and are therefore inadmissible." *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nevada Inc.*, 371 Fed.Appx. 719, 720 (9th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993)).

In an ADA case about whether a retailer met accessibility standards, the district court sustained objections to the admissibility of the retailer's expert's conclusory opinions that the "facility is free of non-compliant issues," or that particular features, e.g., the accessible parking or point of sale, "compl[y] with all applicable access requirements," because they constituted improper legal conclusions. *See Kalani v. Starbucks Corp.*, 81 F. Supp. 3d 876, 882–83 (N.D. Cal. 2015), *aff'd sub nom. Kalani v. Starbucks Coffee Co.*, 698 Fed. Appx. 883 (9th Cir. 2017)[2]; *see also Sharp v. Islands Cal.*

[2] In contrast, the *Kalani* court noted that Plaintiff properly did not object to a statement in which the expert opined that "[t]he pick-up counter ... as modified now provides a length of 36 inches and a height of 34 inches, as such it complies with access regulations." *Id.*

Ariz. LP, 900 F.Supp.2d 1101, 1112 (S.D. Cal. 2012) (statement that the "waiting area is accessible to wheelchair users and complies with all ADAAG requirements" constituted improper legal conclusions).

Moreover, the unsupported opinion as the accessibility of all 17 Vote Centers has not been tested and the validity of the unauthenticated site surveys has not been evaluated through discovery, including by entry upon land. A self-serving declaration with two site surveys is not sufficient to establish Defendant's position that all 17 Vote Centers meet all the standards for compliance with the Americans with Disabilities Act Accessibility Standards (ADAAG). *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (noting that "[a]bsent substantiation, self-serving affidavits from petitioner and her immediate family are of limited evidentiary value"); *see also Cunanan v. I.N.S.*, 856 F.2d 1373, 1375 (9th Cir. 1988) (reliance on affidavit for adjudication deprives opposing party the right to cross examine the declarant).

Defendants alleged compliance with the Arizona Election Procedure Manual does not relieve them of their obligation under federal law to provide reasonable modifications as needed to avoid discrimination. Arizona law does not trump federal law, and state law cannot be lawfully applied to deny a person a federally guaranteed right (here, to receive reasonable modifications in voting). *Ansley v. Banner Health Network*, 248 Ariz. 143, 151 ¶ 33, 459 P.3d 55, 63 (Ariz. 2020) (state law that stands as an "obstacle to the achievement of a federal statute's purpose" is preempted); *see also id*. at 147 ¶ 11 ("Under the Supremacy Clause, federal statutes enacted pursuant to a power conferred by the Constitution preempt conflicting state laws.").

Nor does the provision of other methods of voting (available to all voters regardless of disability-related need) relieve Defendants of their obligation under the ADA and Section 504 to provide reasonable modifications to voters with disabilities who wish to vote in person. A public entity may only lawfully deny reasonable modifications for in-person voting if they cease providing in-person voting as a service altogether and

do not allow individuals to drop off their ballots at a voting center, which Arizona has not done.[3] It is not, as Defendant mischaracterizes, that Plaintiff's claims are based upon "vot[ing] in any manner one chooses"[4] – they are based on denial of a reasonable modification to the voting activities and services available to her as a registered voter in Cochise County. As long as in-person voting is a public service that the County offers to any voters, it is the County's legal obligation under the ADA and Section 504 to make that service accessible to all voters, including those with disabilities.

Therefore there are genuine issues of material fact as to whether Defendants' Vote Centers are accessible, and Defendants are not otherwise relieved of their legal obligations.

ii. Plaintiff has met her *prima facie* burden concerning the facial reasonableness of curbside voting.

Defendants misapprehend Plaintiff's light burden in proving the requested modification is reasonable in the general run of cases and Defendants' burden in establishing an absence of genuine issues of material fact regarding the existence of their affirmative defenses. Defendants incorrectly argue that Plaintiff has not proven elements of her *prima facie* case, specifically by failing to establish that curbside voting is a facially

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[3] Nearly all jurisdictions that have moved to automatic vote by mail for all registered voters still offer in-person voting opportunities: (Colorado, https://www.sos.state.co.us/pubs/elections/FAQs/GeneralInfoFAQ.html ("If you wish to vote in-person, you may do so at a voter service and polling center"); Utah, https://voteinfo.utah.gov/wp-content/uploads/sites/42/2020/10/Utah-VIP-2020-General-FIN.pdf at 2 ("Every county in Utah will have an opportunity for in person voting (early, and on Election Day)"); Washington, https://www.sos.wa.gov/elections/faq_vote_by_mail.aspx ("Can I vote in person? Each county opens an accessible voting center prior to each primary, special election, and general election"); Hawaii, https://elections.hawaii.gov/voters/voting-in-hawaii/ ("Can I still vote in-person? Yes, you may vote in-person by visiting any voter service center in your county").

[4] Defendants cite *Burdick v. Takushi*, 504 U.S. 428 (1992), for this proposition. *Burdick* is inapposite to the present case because there the Court examined whether the constitutional rights of a voter seeking to add a write-in candidate to the ballot were infringed by a state law prohibiting write-in candidates. *Id*. The Court was not analyzing the federally protected right to reasonable modifications in voting activities and services.

reasonable modification. (Doc. 25 at 4-6). Establishing that curbside voting is a reasonable modification on its face does *not* require proving that it is necessarily reasonable for Defendants specifically to offer it, simply that it is a reasonable modification offered in the ordinary run of cases. *See US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) ("a plaintiff/employee (to defeat a defendant/employer's summary judgment motion) need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases") (internal citations omitted).

At this point in the litigation, Plaintiff's burden is to have pled and put forth information sufficient to establish on the record that the requested reasonable modification – curbside voting – is facially reasonable.[5] This is a relatively light burden, and one that Plaintiff has met. Plaintiff has filed an Amended Complaint that fully satisfies the pleading standards of Fed. R. Civ. P. 8(a) (Doc. 12). Plaintiff has further set forth facts in the record sufficient to establish that curbside voting is a facially reasonable modification by showing that at least 10 Arizona counties, including some with similarly rural areas, offer curbside voting as an option for in-person voters. (Doc. 21-2 (declaration setting forth curbside voting practices in other counties in Arizona); *see also* Doc. 14 at 8 (citing counties that use the same voting equipment and offer curbside voting); Doc. 21 at 7).[6] Showing that the service or reasonable modification is available by others is

[5] It should be noted that Plaintiff specifically has pled that Defendants failed to provide curbside voting, or a substantially equivalent reasonable modification. (Doc. 6).

[6] Plaintiff endeavors to respond directly to the Court's Order and requested topics for additional briefing, and as such does not file this Memorandum of Points and Authorities as formal response brief to Defendants' supplemental brief, styled as a Motion for Summary Judgment. Plaintiff also did not file a controverting statement of facts in response to Defendants' Separate Statement of Facts (Doc. 26). Plaintiff believes that Defendants' original Motion to Dismiss is the motion that would be converted, rather than Defendants' recently-filed motion (Doc. 25). Further, if this were summary judgment briefing, Plaintiff would be entitled to 30 days to respond, would have the benefit of facts currently unavailable to her, and would have a fully developed record with which to elaborate on the genuine issues of material fact. Fed. R. Civ. P. 56. If the Court orders a response to Defendants' Motion for Summary Judgment (Doc. 25), and Separate Statement of Facts (Doc. 26) Plaintiff will comply.

evidence that it is reasonable in the general run of cases. *See e.g. Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1267 (D.C. Cir. 2008) (Council could show proposed reasonable modification to print U.S. currency in different sizes to make bills of different denominations distinguishable to people who are blind or have low vision would be facially reasonable because, in part, it had identified accommodations that other countries use in practice and that the National Research Council recommended for consideration).

After the plaintiff has shown the accommodation is reasonable on its face, "the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship [or other alleged affirmative defense] in the particular circumstances." *US Airways, Inc. v. Barnett* at 402. It is Defendants' burden on summary judgment to prove that there is no genuine issue of material facts as to each of its affirmative defenses of undue burden, fundamental alteration, or direct threat.

iii. Defendants have failed to set forth sufficient facts to establish that there is an absence of genuine issue of material facts as to their affirmative defenses of undue burden, fundamental alteration, or direct threat.

Defendants have taken the request for supplemental briefing by the Court as an opportunity to submit a new motion for summary judgment.[7] It is Defendants' burden on their motion for summary judgment to prove that there is no genuine issue of material fact precluding judgment as a matter of law. Defendants have raised multiple affirmative defenses in their argument, and bear the burden of proving there are no genuine issues of material fact as to whether curbside voting would result in undue burden, pose a fundamental alteration of the voting process, or pose a direct threat to poll workers or the voter requiring curbside service. As set forth in detail below, Defendants' burden is heavy

[7] As Fed. R. of Civ. P. 12(d) calls for conversion of the motion to dismiss, submission of a new motion is procedurally improper because it allows Defendants to have two bites at the apple. However, Plaintiff will provide a response to the extent it aligns with the Court's request that the parties submit additional briefing regarding "any genuine issue of material fact." (Doc. 24).

and they have failed to establish the absence of any genuine issue of material fact as to their affirmative defenses.

Defendants assert that offering curbside voting as a reasonable modification would fundamentally alter their voting program, result in administrative or financial costs, and pose a safety risk to poll workers and voters. (Doc. 25). Fundamental alteration and undue burden are affirmative defense under the ADA providing that governmental entities need not accommodate disabled individuals if doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens" (28 C.F.R. § 35.164.3) or be a direct threat to safety of others (28 C.F.R. § 35.139). ADA affirmative defenses are typically fact-based. *See Mary Jo C. v. N.Y. State & Local Ret. Sys.,* 707 F.3d 144, 153 (2d Cir. 2013) ("It is a factual issue whether a plaintiff's proposed modifications amount to 'reasonable modifications' which should be implemented, or 'fundamental alterations,' which the state may reject." (alterations & citations omitted)); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 609–14 (7th Cir. 2004) (discussing the difficulty in resolving the fundamental alteration question on the pleadings); *cf. Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015) (describing the " 'highly fact-specific' nature of the [ADA] reasonableness inquiry").

Public entities bear the burden of proof of proving affirmative defenses. *See* 28 C.F.R. § 35.150(a)(3) ("a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens"); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004); *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2013). Plaintiffs assert that the evidence showing that 10 out of the 15 Arizona counties, including counties with rural areas, provide curbside voting for in-person voting is sufficient at this stage of the process to establish a genuine issue of material fact that providing curbside voting (either by printing paper ballots or moving

the Express Vote machines to the voter's car) does not fundamentally alter the voting program, result in undue financial or administrative burden, or pose a direct threat to poll workers in light of the limited record developed by Defendants. Indeed, Defendants have failed to bring forward sufficient facts necessary for the Court to conduct the analysis required by the ADA.

Undue Burden. To invoke the undue burden defense, the head of the public entity must make this decision "after considering all resources available for use in the funding and operation of the service, program, or activity, and [the decision] must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.150(a)(3). Notwithstanding the undue burden defense, the public entity "shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity." *Id.* In analyzing undue financial burden, courts consider factors such as the nature of the costs of the proposed action and the resources of the public entity. *See Am. Council of Blind of New York, Inc. v. City of New York*, 18 CIV. 5792 (PAE), 2020 WL 6151251, at *17 (S.D.N.Y. Oct. 20, 2020) (city failed to meet procedural requirements, and failed to adequately examine nature and costs of accommodation); *Hamer v. City of Trinidad*, 441 F. Supp. 3d 1155, 1173 (D. Colo. 2020) (city failed to adequately examine nature and costs of accommodation). *Cf.* 42 U.S.C. § 12111(10)(B)(i)-(iv) (definition of undue hardship under Title I, examining (i) nature and cost of accommodation, (ii) financial resources of facility, (iii) financial resources of covered entity, and (iv) covered entity's operations); 28 C.F.R. § 36.104 (definition of undue burden under Title III listing similar factors).

When evaluating whether an entity has met its burden of demonstrating that a requested reasonable modification would pose an undue financial burden, the entity must consider all its available resources, including its entire operational budget. 28 C.F.R. § 35.150(a)(3); *see also Searls v. John Hopkins*, 158 F.Supp.3d 427, 438 (D. Md. 2016)

(concluding that $120,000 cost of a full-time American Sign Language interpreter as an accommodation for a nurse who was deaf did not impose an undue hardship because it constituted only .007%, of Defendant's operational budget in an ADA Title I case).

Here, Defendants have asserted that they are not like other counties because they do not have Ballot on Demand, WiFi capability, and would be required to pay increased costs to repair damaged machines to provide curbside voting as a reasonable modification. (Doc. 25 at 6-9). However, these factual assertions—alone—do not set forth facts sufficient to support the existence of an undue burden defense. The issue is not whether there would be costs, but whether those costs are attributable to the reasonable modification and would be undue in light of Defendants' total operational budget and resources. Lisa Marra's Declaration (Doc. 19-1) contains no evidence of the actual cost of the reasonable modification, the County's total resources and budget, and why that amount would be unduly burdensome. Rather, the Declaration contains conclusions of law (*Id.* at ¶¶ 6, 20, 25), mere opinions unsupported by experts or evidence (*Id.* at ¶¶ 8, 15, 17), and alleged facts unsupported by anything other than Marra's own statements (*Id.* at ¶¶ 10, 11, 14). For example, Marra declares that there have been repair costs to the Express Voting machines related to moving them (*Id.* at ¶16), but she does not state whether those costs can be minimized if moved on a specially designed cart or if those costs could be contained if only 1-2 voting machines in a Voting Center, rather than all voting machines, were used in providing the reasonable modification of curbside voting.

Defendants assert that they do not have an electrical supply, (Doc. 25-1 at ¶ 5; 19-1 at ¶18), not that they could not have access to an electrical supply if they used alternative ways to keep the voting machines and e-pollbooks charged, such as extension cords, or for the voting machines, charging them when they are not in use for curbside voting. If offered as a reasonable modification, curbside voting would only be provided for those individuals who request and require it as a reasonable modification. Defendants have not provided facts about why the machines could not be returned inside to be charged when

not in use. Again, Defendants provide no evidence that these or other reasonable options to address the concern have been considered or analyzed by the County.

Also, rural counties have options to expand their network connectivity. Defendants claim that the CurbExpress by ReadyVote cart is not a reasonable solution because of lack of consistent and reliable Wi-Fi does not take into consideration the numerous technological devices which provide internet coverage to rural areas (e.g., internet hotspots, Wi-Fi extenders). (Doc. 25-1 at ¶ 4). Defendants have not provided any evidence as to whether they considered such solutions to their alleged Wi-Fi connectivity problems, or whether they have actually tested the voting machines outside and whether the machines in fact lose internet connection when they are brought to the parking lots of the Vote Centers.

Defendants failed to meet the burden of establishing there are no genuine issues of material fact that it would be an undue burden to provide curbside voting as do 10 other Arizona counties.

Fundamental alteration. Defendants state in their Supplemental Brief that Plaintiff failed to show that curbside voting would not fundamentally alter the nature of the voting system. (Doc. 25 at 6). However, as stated *supra*, the fundamental alteration defense is an affirmative defense, and Cochise County, not the Plaintiff, bears the burden of coming forward with the facts to establish that making the requested reasonable modification would result in a fundamental alteration and show an absence of genuine issues of material fact as to that affirmative defense.

Defendants argue that the use of Ballot on Demand, or provision of paper ballots for curbside voting, would be a fundamental alteration of their voting system because they do not currently own the technology to allow them to print ballots on demand, and that there are too many different ballot styles to have all of them printed and available to voters at the Vote Centers. (Doc. 25 at 8-10). Defendants also claim that they do not have

sufficient Wi-Fi to allow for consistent and reliable use of a Ballot on Demand system. (Doc. 25 at 9).

Courts have held that financial constraints are not enough to prove a fundamental alteration defense. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 604 (1999), *Penn. Protection & Advocacy, Inc. v. Penn. Dep't of Pub. Welfare*, 402 F.3d 374, 380 (3d Cir. 2005) ("Though clearly relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense."). As set forth, *supra*, Defendants do not set forth sufficient facts to make an initial showing that purchasing the Ballot on Demand system or investing in additional technology to upgrade the Wi-Fi would result in undue financial costs. Defendants further state that curbside voting would be a fundamental alteration because the electronic e-pollbooks cannot be disconnected from inside the voting location without the entire voting system shutting down, requiring a restart which takes up to 20 minutes. (Doc. 25 at 9-10). As discussed, *supra*, this record is insufficient to show the absence of a genuine issue of material fact.

Defendants fail to explain why the use of paper ballots would fundamentally alter the County's voting procedures. The nature of the service offered by the County is to collect votes from registered county voters. Collecting a vote on a paper ballot, as it is done for voters in the county that vote by mail, does not fundamentally alter the nature of the voting system. Defendants have also not established that they have considered technological options that will result in minimal change to their current process, including an Election Systems & Software (ES&S) machine, which is easily transported to a car window and prints a paper ballot. (Doc. 21-2 at 2, ¶ 3). For example, at least five Arizona counties use pre-printed paper ballots for curbside voting on election day, which are pre-printed by a vendor, sometimes the same vendor that prints mail-in ballots for the county. (Doc. 21-2 at ¶¶ 4, 6-10). Even if it is determined that unplugging the e-pollbook system shuts down the entire system and would inconvenience other voters, the paper ballots and the Ballot on Demand are options that would not interfere with the entire electronic voting

system. In light of the record of the availability of curbside voting in 10 of the 15 counties, there are genuine issues of material fact regarding whether curbside voting is a fundamental alteration, precluding summary judgment on this issue.

Direct Threat. Defendants have made cursory allegations that moving the ExpressVote machines poses a safety risk for poll workers and voters who may wish to vote curbside. (Doc. 25 at 7-8). According to the regulations implementing the ADA, a public entity may "impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." 28 C.F.R. § 35.130(h); *see also* 28 C.F.R. § 35.139 (a public entity need not allow an "individual to participate in or benefit from the services, programs, or activities of that public entity" if it concludes, after "an individualized assessment," that the individual "poses a direct threat to the health or safety of others."). Decisions based on safety risks, however, must be "based on actual risks, not mere speculation." 28 C.F.R. § 35.130(h). A direct threat is a "significant risk to the health or safety of others that *cannot be eliminated or reduced* to an acceptable level by the public entity's modification of its policies, practices, or procedures." ADA Title II Technical Assistance Manual, II-2.8000 (emphasis added).

If Defendants propose to deny a reasonable modification on the basis that it would pose a safety threat, it must conduct a direct threat analysis. To determine whether there is a direct threat to the safety of others, a public entity must consider: "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures… will mitigate the risk." 28 C.F.R. § 35.139.

Defendants state that curbside voting would pose a direct threat to the safety to a poll worker or voter because the ExpressVote machines are too heavy, are not designed to be moved from the voting location, and tend to tip over. (Doc. 25 at 7). Plaintiff contests these facts, which are outside of the pleadings and have not been verified through discovery. Whether transporting ExpressVote machines on a ReadyVote (or another) cart

could injure a poll worker or curbside voter is mere speculation at this point, and Defendants claims are unfounded and not supported by facts in the record. Further, this potential safety concern would only rise to the level of a direct threat if the risk could not be mitigated, eliminated, or reduced by modifying procedures. For example, using a cart that is sturdier or more effectively securing the machine to the cart could prevent the machine from tipping and reduce or eliminate the risk of harm to others. Because Defendants have not established that any alternatives, including those mentioned above, have been considered or analyzed, there are genuine issues of material fact as to whether curbside voting using the ExpressVote machines constitutes a direct threat that cannot be mitigated by other reasonable modifications. Therefore, summary judgment should not be granted on this issue.

B. If the Court Does Not Find Genuine Issues of Material Fact on the Record Before the Court, Plaintiff Requests Deferral of a Ruling and an Opportunity to Conduct Discovery to Develop the Record.

i. The purpose of discovery is to develop the record and evaluate factual assertions.

"The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Fed.R.Civ.P. 26 advisory committee notes on 1946 amendments.[8] The plaintiff is generally entitled to a fair opportunity to develop the record. *Burlington N. Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Ft. Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003) (where a plaintiff "had no fair opportunity to develop the record" in discrimination matter, the Ninth Circuit has concluded that that district court erred in denying Rule 56(d) requests).

[8] "While Rule 26 was subsequently amended to grant broader authority to courts to narrow the scope of discovery, this 1946 advisory committee note on the general spirit of discovery continues to hold true today." *In Re Natl. W. Life Ins. Deferred Annuities Litig.*, 05-CV-1018-AJB WVG, 2011 WL 1304587, at *4, n. 3 (S.D. Cal. Apr. 6, 2011).

To the extent that any "record" has been developed before the commencement of discovery, self-serving affidavits have little evidentiary value. *Zheng*, 546 F.3d at 72 (noting that "[a]bsent substantiation, self serving affidavits from petitioner and her immediate family are of limited evidentiary value"); *see also Cunanan*, 856 F.2d at 1375 (reliance on affidavit for adjudication deprives opposing party the right to cross examine the declarant).

ii. The unusual procedural posture of this briefing must not prejudice Plaintiff.

This supplemental briefing on the issue of whether to convert Defendants Motion to Dismiss (Doc. 11) to a motion for summary judgment, and any genuine issues of material fact, has created an unusual procedural posture for Plaintiff in which she is defending a motion for summary judgment without any opportunity to undertake discovery. *See* Introduction, *supra*. For this reason, if the Court decides to convert Defendants' Motion to Dismiss to a motion for summary judgment, and does not find that there are genuine issues of material fact that preclude summary judgment, Plaintiff respectfully requests that the Court defer ruling on Defendants' motion and allow Plaintiff to conduct discovery and respond formally to the motion.[9]

"The Supreme Court has made clear that summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery." *Dunkin' Donuts of America v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). Indeed, summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986); *see also Program Engr., Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980) (citations omitted) ("Generally, where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in

[9] *See supra* at FN 6-7.

the case, discovery should be allowed before the trial court rules on a motion for summary judgment.")

Whether a requested accommodation is a fundamental alteration "is a fundamentally factual question, inappropriate for disposition prior to discovery." *Martinez v. County of Alameda*, 2021 WL 105771 (N.D. Cal. 2021). Here, Plaintiff has not had any opportunity to discover information related to Defendants' allegations about the existence of affirmative defenses such as undue financial and administrative burden, fundamental alteration, and direct threat. Nor has Plaintiff had the opportunity to depose the Elections Director who provides the sole evidence supporting Defendants' dispositive styled motion.

Pressing Plaintiff to come forward with genuine issues of material facts to avoid summary disposition of Plaintiff's civil rights claim addressing her fundamental right to vote is premature without the opportunity to conduct full discovery. "[T]he purpose of Rule 56([d])[10] is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *U.S. ex rel. Fisher v. Network Software Associates*, 227 F.R.D. 4, 9 (D.D.C. 2005) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (additional citations omitted)); *see Natl. Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975) (summary judgment is a "drastic device" and should not be granted when there are major factual contentions in dispute, and particularly when one party has yet to exercise its opportunities for pretrial discovery) (citations omitted).[11]

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[10] Rule 56, Fed.R.Civ.P. was amended in 2010. The text of the late Rule 56(f) was simplified and now appears as Rule 56(d). *See* Fed.R.Civ.P. 56, advisory committee's notes (2010 amends.) ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).").

[11] *See also Zell v. Intercapital Income Securities, Inc.*, 675 F.2d 1041 (9th Cir. 1982) (summary judgment premature where nothing in the record precluded the possibility that relevant information might be discovered by nonmovant's requests); *Portland Retail Druggists Assoc. v. Kaiser Found. Health Plan*, 662 F.2d 641, 646 (9th Cir. 1981) (summary judgment premature where pretrial schedule precluded discovery), cert.

Therefore, if the Court decides to convert Defendants' Motion to Dismiss to a motion for summary judgment, and plans to rule on the motion before the Court, Plaintiff respectfully requests that the Court either deny the motion or defer ruling and permit Plaintiff an opportunity to submit an affidavit pursuant to Fed. R. Civ. P. 56(d) and conduct discovery.

CONCLUSION

For the foregoing reasons, Plaintiff Kathleen Hoffard respectfully requests that this Court: 1) decline to convert Defendants' Motion to Dismiss (Doc. 11) to a motion for summary judgement, and deny Defendants' Motion to Dismiss; and 2) if the Court decides to convert the Motion, deny Defendants' Motion for Summary Judgement because there are genuine issues of material fact still in dispute that preclude judgment as a matter of law, or defer ruling to allow Plaintiff to submit an affidavit pursuant to Fed. R. Civ. P. 56(d) and conduct discovery so she is not prejudiced.

DATED this 12th day of April, 2021.

ARIZONA CENTER FOR DISABILITY LAW

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denied, 469 U.S. 1229 (1985); *XRT, Inc. v. Krellenstein*, 448 F.2d 772 (5th Cir. 1971) (per curiam) (summary judgment premature where district court failed to require production of documents held by defendants).

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, and sent a copy by email, to the following:

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By: */s/Christina Gutierrez*