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

11 Kathleen Hoffard,)
12 Plaintiff,)
13 vs.)
14 Cochise County, Arizona; Lisa Marra,)
15 In her official capacity as Director of)
16 Cochise County Elections Department,)
17 Defendants.)

No. 4:20-CV-00243-SHR

**DEFENDANTS' REPLY TO
PLAINTIFF'S RESPONSE TO
THE COURT'S FEBRUARY
26, 2021 ORDER REQUESTING
SUPPLEMENTAL BRIEFING**

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

18 **COMES NOW** Defendants, Cochise County (the "County") and Lisa Marra, in
19 her official capacity as Director of Cochise County Elections (collectively "Defendants"),
20 by and through undersigned counsel, hereby replies to Plaintiff's Response to the Court's
21 February 26, 2021 Order Requesting Supplemental Briefing and moves this Court to
22 convert Defendants' Motion to Dismiss to a Motion for Summary Judgment and GRANT
23 Defendants' Motion for Summary Judgment because there are no genuine disputes as to
24 any material facts:
25

I. THE COURT SHOULD CONVERT THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT AND GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. There Are No Genuine Disputes as to Any Material Facts

While in Plaintiff's Response brief, Plaintiff glances over the fact that Arizona law does not require the County to offer curbside voting, Plaintiff wrongly focuses her argument on the contention that Lisa Marra's Declaration (Doc. 19-1, 19-2, 19-3, 19-4, 19-5) is insufficient to provide the evidence needed to demonstrate that the County's 17 Vote Centers are ADA compliant, alleging that Ms. Marra's statements constitute mere legal conclusions. Ms. Marra's statements are not legal conclusion but rather are facts. What Plaintiff fails to recognize is that Ms. Marra is the County's Election Director and in that role she is in the best position (and it is her job) to determine: (1) if the County's Vote Centers are ADA Accessible and ADA compliant; (2) what type of impact the Plaintiff's proposed modification of curbside voting would have on the County's election system; and (3) whether the Plaintiff's proposed modification is reasonable. She has clearly determined that the County's Vote Centers are ADA compliant and that curbside voting is not reasonable as it would fundamentally alter the County's voting system.

Here, Ms. Marra gave a sworn declaration under penalty of perjury. Doc 19-1. In that declaration she stated that all of the Vote Centers are ADA compliant and were physically inspected in accordance with the Department of Justice guidelines.¹ 19-1, ¶¶

¹ The Department of Justice does not require that Ms. Marra have a license, be an accessibility expert, or that an accessibility expert perform the physical site inspection. Therefore, whether Ms. Marra has been qualified as an accessibility expert is irrelevant, contrary to Plaintiff's assertions. *See* Plaintiff's Response to Court's February 26, 20021 Order Requesting Supplemental Briefing, p. 6, 6:11-6:14.

1 6-7. These are facts – not legal conclusions. And, she provided the ADA checklist that
2 was used during the inspections and the ADA inspection reports for the two (2) Vote
3 Centers that Plaintiff allegedly visited on November 6, 2018. *Id.*, ¶ 25, Exhibit D. Again,
4 these are facts – not legal conclusions. Any attempt to categorize them as such is
5 disingenuous. The reports contain all of the objective measurements used in the physical
6 site inspection, as well as photographs of the two Vote Centers. Plaintiff has offered no
7 facts to dispute or controvert these facts.
8

9 Further, Ms. Marra clearly stated in her declaration the facts establishing the undue
10 burden that would be placed on the County if it was forced to offer curbside voting, in
11 light of the County's technology and WIFI limitations. *Id.*, ¶¶ 8-11, 15-18. Plaintiff has
12 produced no facts to the contrary other than to keep repeating that other Counties offer
13 curbside voting. Quite frankly, what the other Counties offer as voting alternatives cannot
14 be used as a standard to judge the County because of the differences in the technology and
15 WIFI capacity.
16

17 Moreover, Plaintiff's proposed modification would fundamentally alter the
18 County's voting system and is infeasible. *See Id.*, ¶¶ 9-11. Again, these are facts – not
19 legal conclusions. The County does not have ballot on demand – fact. The County does
20 not have any technology that would allow for specific, individualized ballots to be printed
21 on demand - fact. The County does not have the WIFI or internet capability and/or
22 capacity to have reliable and consistent ballot on demand at its 17 Vote Centers – fact.
23
24 When an e-pollbook is disconnected from the system, the ***entire voting system*** shuts down
25

1 and has to be restarted before voting can resume, which can take up to 20 minutes – fact.
 2 Plaintiff has not and cannot provide any evidence to dispute or controvert these facts.

3 Because there are no genuine disputes of material facts, defendants are entitled to
 4 judgment as a matter of law. Consequently, this Court should GRANT Defendants’
 5 Motion for Summary Judgment.
 6

7 **II. EVEN IF THE COURT CHOOSES NOT TO CONVERT THE MOTION TO**
 8 **DISMISS, THE PRESS RELEASE SHOULD NOT BE EXCLUDED**
 9 **BECAUSE THE COURT MAY TAKE JUDICIAL NOTICE OF THE PRESS**
 10 **RELEASE**

11 Federal Rule of Evidence, Rule 201 allow the Court to take judicial notice of a fact
 12 that is not subject to dispute because it: (1) is generally known within the trial court’s
 13 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
 14 accuracy cannot reasonably be questioned. Fed. R. Evid. 201. Courts have taken judicial
 15 notice of government publications, public records maintained on government websites,
 16 newspaper articles, and press releases. *See Williams v. Emps. Mut. Cas. Co.*, 845 F.3d
 17 891, 903 (8th Cir. 2017) (judicial notice of EPA fact sheet); *Clappier v. Flynn*, 605 F.2d
 18 519, 535 (10th Cir. 1979)(judicial notice of publication in Federal Registry); *Comm. to*
 19 *Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1153
 20 (E.D. Cal. 2017)(judicial notice of government publication and *press release* from
 21 governor’s office; *press release* is a matter of public record having been prepared and
 22 made public by an official government agency).
 23

24 Here, Defendants included a May 2, 2018, News Release entitled “Cochise County
 25 ensures voting process is accessible and convenient,” as Exhibit A to their Motion to
 Dismiss. *See* Doc. 11-1. The News Release is an official publication of Cochise County

1 (a government entity) that was made public. Therefore, it is a matter of public record. The
2 News Release specifies the date the public was notified that the County would no longer
3 offer curbside voting and the reason why – because all of the County’s Vote Centers are
4 fully ADA Compliant. Because the News Release is a matter of public record, this Court
5 may take judicial notice of the News Release and the Court should not exclude it in the
6 Court’s analysis of either the Motion to Dismiss or the Motion for Summary Judgment,
7 should the Court decide to convert the Motion to Dismiss to a Motion for Summary
8 Judgment.
9

10 **III. CONCLUSION**

11 For the reasons stated above, Defendants request that this Court convert
12 Defendants’ Motion to Dismiss to a Motion for Summary Judgment under Rule 56 of the
13 Federal Rules of Civil Procedure and that the Court GRANT Defendants’ Motion for
14 Summary Judgment because there are no disputes as to any genuine issues of material fact
15 and Defendants are entitled to judgment as a matter of law.
16

17 DATED this 19th day of April, 2021.

18
19 BRIAN M. MCINTYRE,
COCHISE COUNTY ATTORNEY

20
21 By: /s/ Christine J. Roberts
Christine J. Roberts
22 Chief Civil Deputy County Attorney
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1 A copy of the foregoing emailed
this 19th day of April 2021, to:

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION**

8 Kathleen Hoffard,) **No. 4:20-CV-00243-SHR**
9 Plaintiff,)
10 vs.) **[PROPOSED] ORDER GRANTING**
11 Cochise County, Arizona; Lisa Marra,) **DEFENDANTS' MOTION FOR**
12 In her official capacity as Director of) **SUMMARY JUDGMENT**
13 Cochise County Elections Department,)
14 Defendants.) **Assigned to the Honorable**
) **Judge Scott H. Rash**

15 Having reviewed the Defendants' Motion to Dismiss and Defendants' Response to
16 the Court's February 26, 2021 Order Requesting Supplemental Briefing on Converting
17 Defendants' Motion to Dismiss to a Motion for Summary Judgment, Plaintiff's responsive
18 briefing on both and good cause appearing to the Court:
19

20 **IT IS HEREBY ORDERED** Defendants' Motion to Dismiss is converted to a
21 Motion for Summary Judgment.

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DATED this _____ day of _____, 2021.

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