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Attorneys for Plaintiff Kathleen Hoffard

**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 REPLY IN SUPPORT OF
MOTION TO COMPEL SITE
INSPECTION**

(Assigned to the Hon. Scott H. Rash)

Plaintiff Kathleen Hoffard, by and through her undersigned counsel, respectfully submits *Plaintiff’s Reply in Support of Motion to Compel Site Inspection*. Plaintiff seeks an order permitting Plaintiff’s counsel and Plaintiff’s accessibility expert to return to one vote center—Shiloh Christian Ministries (Shiloh Christian)—for no more than one hour to complete the unfinished site inspection of the path of travel, parking lot, and one restroom. For the foregoing reasons, the Court should grant Plaintiffs’ Motion to Compel Site Inspection.

1 **I. LEGAL ARGUMENT**

2 **A. The Motion to Compel is Properly Before this Court**

3 Defendants incorrectly argue that Plaintiff did not appropriately confer in good
4 faith regarding this discovery dispute prior to filing her Motion. Doc. 55 at 5-6. The
5 obligation to meet and confer under Local Rule of Civil Procedure 7.2(j) requires
6 “personal consultation” and “sincere efforts” to attempt to satisfactorily resolve the
7 matter. Plaintiff’s counsel met this requirement when Plaintiff attempted multiple times
8 to resolve this dispute through personal consultation with Defendants, brought the
9 discovery dispute to the Court’s attention while in Sierra Vista, and when the Court
10 declined to rule on the discovery dispute on the same day, offered another proposal to
11 Defendants. Only after all sincere efforts failed did Plaintiff file a Motion to Compel Site
12 Inspection (Doc. 53) (Motion). The Motion is therefore properly before this Court.

13 In their Response, Defendants ignore the fact that Plaintiff met and conferred with
14 Defendants several times to resolve this discovery dispute, to no avail. Plaintiff’s counsel
15 first spoke in person with counsel for Defendants during the site inspection of Shiloh
16 Christian and requested Defendants adhere to their agreement to be flexible concerning
17 the site inspection schedule and allow the Plaintiffs’ expert team to stay onsite to complete
18 the inspection when Defendants’ counsel interrupted the inspection and demanded that
19 the team leave the grounds. Defendants refused. Doc. 53-1 (Kramer Decl.) at ¶¶ 14-16.
20 During the scheduled lunch break, Plaintiff’s counsel then sent a follow-up email to
21 Defendants’ counsel, and asked to be permitted to return to Shiloh Christian after the
22 other two inspections to complete the site inspection, and stated resolving the issue that
23 day would avoid unnecessary costs and not burden the church. *Id.* at ¶¶ 20-23. Defendants
24 again refused, stating only “the answer is no.” Doc. 53-2 at ¶ 5.

25 After Defendants’ second refusal, Plaintiff’s counsel complied with this Court’s
26 Scheduling Order, and sent an email to the Court copying counsel for Defendants and
27 requesting the Court’s assistance with resolving the dispute so Plaintiff could complete
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1 the inspection of Shiloh Christian while still in Sierra Vista. Kramer Decl. at ¶ 24.
2 Defendants decided not to submit a written position statement to the Court. *Id.* at ¶ 25. In
3 discussing undersigned counsel's email to the Court, at the inspection of the third and
4 final vote center, when counsel for the parties discussed the possibility of returning to
5 Shiloh Christian to complete the inspection, counsel for Defendants Mr. Correa responded
6 "[o]h, there won't be a second trip." *See* Supplemental Declaration of Meaghan K.
7 Kramer (Supp. Kramer Decl.), attached as Exhibit "1", at ¶ 14.

8 Counsel then had a telephonic discovery conference with the Court seeking to
9 resolve this issue, where the Court declined to rule on the matter at that time but
10 encouraged the parties to resolve the dispute, or alternatively file a motion. Kramer Decl.
11 at ¶ 26-27. Following this telephonic conference, Plaintiff's counsel emailed Defendants
12 in a third and final attempt to resolve the issue and seek a cost-effective resolution. *Id.* at
13 ¶ 28. Plaintiff's counsel stated in the email "[i]f we can't reach an agreement today, we
14 intend to file a motion and seek sanctions, which will include time for attorneys and
15 experts to travel to and from Sierra Vista. We'd much prefer to work this out if possible.
16 Please give me a call if you'd like to discuss." *Id.* Plaintiffs' counsel also sent a text
17 message to alert counsel for Defendants that the email had been sent and requesting a
18 response. Kramer Decl. at ¶ 29. When Plaintiff's counsel reached Mr. Correa, he informed
19 them that the parties would not reach resolution and that Plaintiff would have to file her
20 motion. *See* Supp. Kramer Decl. at ¶ 15.

21 The purpose of the meet and confer requirement is to give the opposing party the
22 opportunity to review and consider the disputed issue and arguments regarding the same,
23 and give an opportunity for resolution. *Reynolds v. Liberty Mutual Ins. Co.*, 2017 WL
24 6415360 at *2 (D. Ariz., May 23, 2017) (finding meet and confer obligation not met
25 where opposing party had "not had an opportunity to review and consider Plaintiffs'
26 objections" on the material that was at issue in the motion). Here, Plaintiff made several
27 good faith efforts on the date of the inspection that satisfy the purpose of the meet and
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1 confer requirement. Defendants were fully aware of Plaintiff's position regarding
2 completion of the inspection at Shiloh Christian following several discussions and an
3 email, as well as arguments before the Court in the telephonic discovery conference. At
4 no time during the inspection date or following the conference before the Court did
5 Defendants give any indication that they were willing to consider any compromise
6 regarding this dispute; they simply said no, repeatedly.

7 If Defendants are suggesting that Plaintiff should have given them one more
8 opportunity to reject the proposal to return to Shiloh Christian to complete the unfinished
9 inspection of the path of travel, parking lot, and an additional restroom available to female
10 voters, the meet and confer obligation does not require engaging in acts of futility. *See*
11 *Pickett v. Nev. Bd. of Parole Com'rs*, 2012 WL 1376969, at *3 (D. Nev. Apr. 19, 2012)
12 (“a responding parties' complete failure to respond can obviate a requesting parties' need
13 to meet and confer” and citing cases); *see also Feldman v. Pokertek, Inc.*, 2011 WL
14 4543990, at *2 (D. Nev. Nov. 30, 2010) (addressing merits of motion to compel despite
15 plaintiff's failure to meet and confer and noting defendant's utter failure to produce
16 requested documents); *cf. Yue v. Storage Tech. Corp.*, 2008 WL 4185835, at *7 (N.D.
17 Cal. Sept. 5, 2008) (declining to strike motion for attorney fees despite failure to meet
18 and confer as required by local rules after finding that ordering the parties to meet and
19 confer would be futile); *Thomas v. Baca*, 231 F.R.D. 397, 404 (C.D. Cal. 2005)
20 (explaining that failure to meet and confer, as required by local rule, was not a sufficient
21 reason to deny class certification motion because informal resolution of motion was not
22 possible). Moreover, if Defendants permit Plaintiff to return to Shiloh Christian to
23 complete the unfinished inspection at any time before this motion is decided, Plaintiff
24 will withdraw this motion.

25 In conclusion, Plaintiff's only avenue to complete the properly noticed unfinished
26 inspection of the path of travel, parking lot, and restroom at Shiloh Christian was to file
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1 this motion as the Court instructed. *See* Docs. 43, 50-1; 50-2. This matter is therefore
 2 properly before the Court, and the Court should consider Plaintiffs' Motion on its merits.

3 **B. Plaintiff Diligently Undertook the March 31, 2022 Inspection, Which**
 4 **Defendants Ended Without Substantial Justification**

5 Defendants' argument that Plaintiff should not be allowed to return to Shiloh
 6 Christian because the expert "wasted time" inspecting one of the restrooms available to
 7 voters fails on three grounds. First, Defendants waived any objections to the areas being
 8 inspected by not timely raising those objections. Second, inspecting restrooms available
 9 to voters during the elections meets the low bar of the relevancy standard for discovery,
 10 particularly when Defendants allege 100% accessibility of all voting centers as a non-
 11 affirmative defense. Third, Defendants do not dispute that the path of travel and parking
 12 lot are relevant inspection areas, and inspection of these areas also remains to be
 13 completed.

14 **1. Defendants' arguments as to the scope of Plaintiff's inspection**
 15 **are untimely.**

16 The time to object to the scope of the inspection at Shiloh Christian has passed and
 17 Defendants may not use their response as another bite at the apple. Defendants' time to
 18 object to the scope of Plaintiff's inspection has expired. *Richmark Corp. v. Timber Falling*
 19 *Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to
 20 object to discovery requests within the time required constitutes a waiver of any
 21 objection.") (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981)).¹ While
 22 Defendants objected to the number of vote centers that Plaintiff could inspect, Defendants
 23 raised no objections to the scope of Plaintiff's inspections, as set forth in the Notice which

24
 25 ¹ Although Rule 34 does not include a provision that states that the failure to timely
 26 object is a waiver, courts that have considered the issue generally agree that there is no
 27 reason to treat waiver under Rule 34 any different than Rule 33. *See Liguori v. Hansen*,
 28 2:11-CV-00492-GMN, 2012 WL 760747 at *11 (D. Nev. Mar. 6, 2012). Rule 33(b)(4)
 provides that "[a]ny ground not stated in a timely objection is waived unless the court, for
 good cause, excuses the failure." Fed.R.Civ.P. 33(b)(4).

was served on Defendants on January 21, 2022. Doc. 43, 50-1 at 3 (specifying that the expert “will evaluate compliance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG), including the parking and passenger drop-off area, the accessible route from the parking lot and the nearest public transportation stop to the entrance, the entrance(s), the area(s) where lines are formed to enter the Vote Center, and the interior of the Vote Center that the public and voters may enter on election days, including the restrooms”). Therefore, Defendants have waived any objection to the scope of the inspection.²

2. Even if Defendants had not waived their objection, accessibility of restrooms is discoverable.

As has been briefed thoroughly in the Motion, restrooms are not beyond the scope of discovery in this action,³ and Plaintiff was entitled to inspect all three restrooms available to female voters on election day. Doc. 53. At each inspection location, Defendant Lisa Marra informed Plaintiff’s experts which restrooms each vote center made available to voters on election day. *See* Supp. Kramer Decl. at ¶ 9; *see also* 55-2, Video 0331220937 at 7:35. Of those, Plaintiff’s experts limited the restrooms inspected to those available to women voters on election day. *See* Supp. Kramer Decl. at ¶ 10.

² Had Defendants timely raised the issue of relevancy or undue burden before the inspection, the Court would have been asked to apply the *Belcher* test, which balances “the degree to which the proposed inspection will aid in the search for truth ... against the burdens and dangers created by the inspection.” *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978). Again, Defendants failed to do so. But if they had, Defendants’ arguments would not meet the lofty standard applied by Ninth Circuit courts; another hour or so of inspection time would not give rise to the “burdens and dangers” contemplated in *Belcher*. *Lopez v. United States*, 2017 WL 1062581, at *3 (S.D. Cal. Mar. 21, 2017) (stating district courts in the Ninth Circuit have applied the balancing test articulated in *Belcher*, 588 F.2d at 908, in deciding whether to allow a Rule 34 inspection); *K.C.R. v. Cty. of L.A.*, 2014 WL 12725471, at *2 (C.D. Cal. Aug. 7, 2014) (stating that courts weigh the same interests when a party objects to an inspection).

³ In their central defense in this action, Defendants allege the vote centers Cochise County uses in its elections are accessible and ADA compliant. Doc. 31, at ¶ 42 (“curbside voting is no longer offered in Cochise County because all of the County’s seventeen (17) Vote Centers are fully ADA accessible and ADA compliant ...”).

1 While churches are exempt under Title III of the ADA which applies to public
2 accommodations, Defendants are well aware that the County's programs, services, and
3 activities are subject to Title II of the ADA and Section 504 of the Rehabilitation Act,
4 even when conducted in a church. As such, the County must take steps to ensure
5 compliance, including physical accessibility and reasonable modification provisions.
6 Should a polling location be inaccessible, or should a person with disabilities require a
7 reasonable modification in voting, it is the public entity's duty to provide that
8 modification. *See e.g., Disabled in Action v. Bd. of Elections in City of New York*, 752
9 F.3d 189, 200-02 (2d Cir. 2014) (deeming reasonable an order requiring New York City
10 to make polling places accessible to disabled persons, assign workers to aid disabled
11 individuals on election day, and relocate services to accessible voting locations to remedy
12 the problem of 80% of polling places containing a barrier to accessibility by disabled
13 voters).

14 When the U.S. Department of Justice (DOJ) conducts compliance reviews or
15 investigations of public entities' compliance, the DOJ applies the ADAAG to inspect
16 restroom accessibility at polling locations, just as Dr. Odell did on March 31, 2022. *See*
17 *e.g., Settlement Agreement between the United States of America and Santa Fe, New*
18 *Mexico* at ¶ 36, <https://www.ada.gov/santafe.htm> (last visited May 25, 2022); *Settlement*
19 *Agreement Between the United States of American and the City of Bowie, Maryland* at ¶
20 17, <https://www.ada.gov/bowiemd.htm> (last visited May 25, 2022). The fact that the ADA
21 Checklist for Polling Places (the DOJ guidance Defendants cite) does not specifically
22 mention restrooms is not dispositive on this issue as it "provides informal guidance" and
23 "has no legally binding effect." *ADA Checklist for Polling Places*, DOJ,
24 <https://www.ada.gov/votingchecklist.pdf> at 29.

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3. By failing to address the issue, Defendants concede that Plaintiff is entitled to complete inspection of the paths of travel and parking lot at Shiloh Christian.

Defendants attempt to make this dispute solely about evaluation of restroom facilities, but that is not accurate. Defendants prevented Plaintiff from completing the inspection of Shiloh Christian's restrooms as well as the parking lot and paths of travel from the accessible parking spaces to the voting location.

As plainly set forth in Plaintiffs' Motion, Dr. Odell was not able to complete the survey of parking spaces and paths of travel at Shiloh Christian due to Defendants' insistence that the inspection was over and the Parties had to leave. Doc. 53 at 12; Kramer Decl. at ¶ 34. These elements are critical for not only general accessibility of the vote center for voters, but particularly for Plaintiff, who has disabilities that impact her mobility and ability to safely navigate such areas. Doc. 15-1 at ¶¶ 4-5. Without the ability to complete the inspection of the Shiloh Christian parking lot and paths of travel, Plaintiff will be unable to fully assess ADAAG compliance of these essential elements of polling location accessibility. Defendants failed to refute that Plaintiff's completion of the inspection of the parking lot and paths of travel at Shiloh Christian is warranted or that Dr. Odell was not able to complete her inspection of the accessible parking and paths of travel at Shiloh Christian on the inspection date. *See* Kramer Decl. at ¶ 18 and Ex. I, Expert Report of Nanette Odell at p. 7.

4. Plaintiff's efforts to complete the inspection in a reasonable and cost-saving manner were thwarted by Defendants.

The Court's March 8, 2022 *Order Extending Deadlines Re: Entry Upon Land and Disclosure of Expert Reports Following Inspection*⁴ specifically did not include times that

⁴ Before undertaking the inspection, Plaintiff sought Defendants' agreement to file a stipulation regarding the parties' March 31, 2022 inspection. *See* Supp. Kramer Decl., at ¶ 2. When Defendants had not yet approved of Plaintiff's draft stipulation by March 4, 2022, Plaintiff's original expert report deadline, Plaintiff filed its request in the form of a

1 the parties would begin and end at each inspection site. Doc. 49. And Defendants
2 themselves repeatedly concede that the parties had agreed to be flexible in completing the
3 inspection. Doc. 53-1 at ¶¶ 5-6, 21; Exs. D-E. As set forth in the Motion and at argument
4 on March 31, 2022, the inspection at Shiloh Christian took longer than the other two sites
5 because Shiloh Christian had three times the number of restrooms available to voters –
6 two large multi-stall restrooms, and one family/companion restroom. *See* Supp. Kramer
7 Decl. at ¶ 11. As is apparent in the video, both multi-stall women’s restrooms were
8 roughly equidistant from the entrance to the main voting room. *See* Supp. Kramer Decl.
9 at ¶ 12; 55-2, Video 0331220955. The other vote centers had only one multi-stall restroom
10 per location, each with fewer stalls than Shiloh Christian. *See* Supp. Kramer Decl. at ¶
11 13. Defendants’ untimely substantive attack on Plaintiff’s inclusion of restrooms in the
12 inspection, and the alleged “wasting of time” in evaluating these elements, is unsupported.

13 Plaintiff undertook the site inspection on March 31, 2022 in a diligent and
14 appropriate manner. *See* Supp. Kramer Decl. at ¶ 4. Plaintiff’s experts did not commence
15 any portion of the inspection of any site until they were specifically given permission by
16 counsel for both parties to begin. *Id.* at ¶ 5. The inspection of Shiloh Christian started late
17 because a representative from the County was late to the inspection site. *Id.* at ¶ 6.

18 When Defendants abruptly demanded that Plaintiff end the inspection of Shiloh
19 Christian before the inspection was complete, counsel for Plaintiff had no choice but to
20 ask its experts to leave the property. *See* Supp. Kramer Decl. at ¶ 7. Counsel’s
21 communications with Plaintiff’s experts as seen in the video are not “admissions” but
22 rather were evidence of real time professional communications between an attorney and
23 expert attempting to triage the situation in the face of heated threats from opposing
24 counsel. *Id.* at ¶ 8; 55-2, Video 0331220955 at 32:40 (Plaintiff’s counsel reassessing with
25 expert about bathroom inspections). Accordingly, Defendants actions—and absolute
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27 motion with the Court to preserve its right to inspect as the parties had previously agreed.
28 *Id.* at ¶ 3.

1 refusal to allow Plaintiff's team to stay at the site longer or return after the other two
 2 inspections—denied Plaintiff her only means of discovering facts regarding the
 3 accessibility and compliance of Shiloh Christian – an issue central to Defendants'
 4 defenses in this action.

5 **C. Defendants' Suggestions of Abuse of Process are Unfounded and Strain**
 6 **Reason.**

7 Defendants conjecture that Plaintiff's inspection of three vote centers in Sierra
 8 Vista is a backdoor strategy to shut down polling places in Cochise County. This scare
 9 tactic is pure speculation without a hint of a fact. *Defendants* put the full accessibility of
 10 their vote centers at issue in this litigation when they claimed their legal obligation to
 11 provide a reasonable modification of curbside voting is relieved because their polling
 12 locations are allegedly fully accessible. Doc. 32 (Defendants' Answer) at ¶ 42 (polling
 13 locations are "fully ADA accessible and ADA compliant, all equipment utilized at the
 14 Vote Centers are fully ADA accessible, and the County is not required to offer curbside
 15 voting in this circumstance"). Through these site inspections, Plaintiff seeks to evaluate
 16 the actual accessibility of Defendants' polling locations, which will provide the Court
 17 with expert evidence as to whether Defendants' vote centers are in fact "fully ADA
 18 accessible and ADA compliant," as they alleged in their Answer and briefs. If a polling
 19 place is not fully compliant with ADAAG, under Defendants' own logic and the law,
 20 they are obligated to remove barriers to voting, including curbside voting as a reasonable
 21 modification.⁵

22 Finally, Plaintiff's lawsuit does not seek injunctive relief to shut down inaccessible
 23 polling places; it seeks an end to an unlawful policy that bans provision of curbside voting
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25 ⁵ As Plaintiff has set out in briefing throughout this case, reasonable modifications
 26 to policies and procedures are required even if the polling locations provide program
 27 access and meet the physical accessibility requirements of the ADAAG (28 C.F.R. §
 28 35.150; 28 C.F.R. § 35.151) because the obligation to provide reasonable modifications
 is an independent obligation under the ADA (28 C.F.R. § 35.130(b)(7)).

1 as a reasonable accommodation when necessary to provide access to in-person voting and
2 allowing access to voting for a voter with a disability. The solution to inaccessible polling
3 locations is not to shut them down, it is to make them accessible, and this can be achieved
4 through a variety of means, including temporary corrective measures and reasonable
5 modifications.

6 II. CONCLUSION

7 For the foregoing reasons, Plaintiff Kathleen Hoffard respectfully requests that this
8 Court grant the Motion to Compel Site inspection and issue an order: (A) compelling
9 Defendants to permit Plaintiff to complete her inspection of Shiloh Christian Ministries;
10 (B) granting Plaintiff permission to supplement Dr. Odell's Expert Report within ten days
11 of completion of the inspection; (C) awarding Plaintiff sanctions and requiring
12 Defendants to pay attorneys fee' and costs, and (D) granting any other relief this Court
13 deems proper.

14 DATED this 26th day of May, 2022.

15 **ARIZONA CENTER FOR DISABILITY LAW**

16 /s/ Meaghan K. Kramer

17 Rose Daly-Rooney

18 Maya Abela

19 Tamaraingsey In

Meaghan Kramer

20 *Attorneys for Plaintiff Kathleen Hoffard*

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2022, 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

EXHIBIT 1

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

**SUPPLEMENTAL DECLARATION OF
MEAGHAN K. KRAMER**

(Assigned to the Hon. Scott H. Rash)

I, Meaghan K. Kramer, declare as follows:

1. I am an attorney licensed to practice in the State of Arizona. I am a Managing Attorney at the Arizona Center for Disability Law, and I am an attorney of record for the Plaintiff, Kathleen Hoffard, in this action. If called as a witness, I could and would testify competently to the facts stated below, all of which are within my personal knowledge.

1 2. Before undertaking the inspection, Plaintiff sought Defendants' agreement
2 to file a stipulation regarding the parties' March 31, 2022 inspection.

3 3. When Defendants had not yet approved of Plaintiff's draft stipulation by
4 March 4, 2022, Plaintiff's original expert report deadline, Plaintiff filed its request in the
5 form of a motion with the Court to preserve its right to inspect as the parties had
6 previously agreed. The Court granted that motion.

7 4. Plaintiff undertook the site inspection on March 31, 2022 in a diligent and
8 appropriate manner.

9 5. Plaintiff's experts did not commence any portion of the inspection of any
10 site until they were specifically given permission by counsel for both parties to begin.

11 6. The inspection of Shiloh Christian Ministries (Shiloh Christian) started late
12 because a representative from the County was late to the inspection site.

13 7. When Defendants abruptly demanded that Plaintiff end the inspection of
14 Shiloh Christian before the inspection was complete, counsel for Plaintiff had no choice
15 but to ask its experts to leave the property.

16 8. Counsel's communications with Plaintiff's experts as seen in the video are
17 not "admissions" but rather were evidence of real time professional communications
18 between an attorney and expert attempting to triage the situation in the face of heated
19 threats from opposing counsel. *See* 55-2, Video 0331220955 at 32:40 (Plaintiff's counsel
20 reassessing with expert about bathroom inspections).

21 9. At each inspection location, Defendant Lisa Marra informed Plaintiff's
22 experts which restrooms each vote center made available to voters on election day. *See*
23 *e.g.*, 55-2, Video 0331220937 at 7:35 (conversation regarding voter access to restrooms
24 at Shiloh Christian: Dr. Odell to Defendants' Attorney and Ms. Marra: "those bathrooms
25 are not closed off, correct [referring to the restrooms across the lobby]?" Ms. Marra: "no,
26 they can use those, they can use the side ones [referring to the restrooms further away
27 from the voting area].")
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