

Dear Honorable Swartzle:

This letter serves as O'Halloran plaintiffs' response to the four questions posed by the Court.

**Question 1:** *“Does the prohibition on the possession of electronic devices stated in the Manual apply not only to a challenger or poll watcher but also to an election inspector, election official, or other election worker in an absent voter ballot processing facility? In other words, does the prohibition extend to all persons in such facility on election day, or is it limited to a challenger or poll watcher?”*

**Answer 1:**

To the best of plaintiffs' belief and understanding, poll challengers and poll watchers (i.e., including media representatives) are subject to the aforementioned prohibition, with expressed punishment for violations. However, election inspectors, election officials, and other election workers present at the same facilities are not or may not be subject to the prohibition. This conclusion was formed after reviewing numerous election manual instructions published online by defendants.

**Answer 1 Background:**

In the order dated October, 14, 2022, the Court referenced the defendants' instruction manual *“The Appointment, Rights, and Duties of Election Challengers and Poll Watchers”* (May 2022) (“Manual”). The order included the following Manual page 9 citation:

*“No electronic devices capable of sending or receiving information, including phones, laptops, tablets, or smartwatches, are permitted in an absent voter ballot processing facility while absent voter ballots are being processed until the close of polls on Election Day.”*

Taken alone, the previous statement in the Manual is misleading in that it implies broad application of the prohibition at an AVP Facility. However, the next line of the Manual punishes only election challengers for such transgressions:

*“A challenger who possesses such an electronic device in an absent voter ballot processing facility between the beginning of tallying and the close of polls may be ejected from the facility.”*

Similar guidance for AVP Facility video and cell phone prohibitions is also found on page 21:

*“Challengers may not: ... Use a device to make video or audio recordings in a polling place, clerk's office, or absent voter ballot processing facility;*

*... If serving at an absent voter ballot processing facility, possess a mobile phone or any other device capable of sending or receiving information between the opening and closing of polls on Election Day; ...”*

These restrictions/punishments extend to poll watchers per the Manual page 23-24 statement:

*“If the location is an absent voter ballot processing facility, the poll watcher must take the same oath as a challenger present at such a facility and is bound by all the same restrictions as a challenger present at such a facility.”* No further explicit prohibition or related penalties are stated or implied for others in attendance of an AVP Facility.

Plaintiffs found numerous polling place video recording restrictions within the election manual. Such restrictions aim to maintain individual voters' privacy while present at a polling location. Despite the recording restrictions, universal possession and non-recording usage of phones and other electronic recording devices is allowed. To plaintiffs' best belief and understanding, there is but one other publicly accessible election instruction manual currently in force, detailing cell phone and electronic recording device prohibitions and restrictions at AVP Facilities. This document is posted at the 'Election administrator information' website:

Document received by the MI Court of Claims.

[sos/elections/admin-info](#), This manual is titled “CHAPTER 8 ABSENT VOTER BALLOT ELECTION DAY PROCESSING” (October 2020) (“AVP Manual”), and may be found at the following link: ([AVP Manual](#)).

Curiously, the AVP Manual makes no general statement of cell phone possession or usage prohibitions, except for the statement on page 3:

*“Cell Phones: Challengers and poll watchers may not be in possession of or have access to cell phones or other communication devices in an AVCB during the sequestration period. The enforcement of this policy is critical to the integrity of the election process.”*

A deeper look into the AVP Manual yields an embedded page 15 link to a training video titled “ABSENT VOTER COUNTING BOARDS” (July 2020) (“AVP Video”): ([AVP Video](#)). This video provides additional, albeit confusing “guidance” regarding allowable possession and usage of cell phones. At first glance, the graphic present at timestamp 3:19 may precondition the viewer to believe that cell phones are universally prohibited at an AVP Facility. However, an accompanying narration provides “*election inspectors[,] poll challengers[,] poll watchers[,] or media entering the absent voter counting board must be provided the understanding that they will be sequestered until 8pm[,] [A]n exception to the sequestration is made for election officials delivering ballots or resolving processing questions[,] ...*”

The ability to evade strict (physical) sequestration for certain ‘authorized officials’ is in agreement with provisions in MCL 168.765a(13). Separate from legislated sequestration requirements, is the matter of cell phone possession and usage prohibitions. This matter is addressed in the AVP Video at timestamp 4:05: “*also worth noting the only cell phone allowed in an absent voter counting board is the phone used by election inspectors to communicate with election officials. ...*”

The narrated statement provides no further clarifications to qualify which election inspectors or election officials to which the statement applies (i.e., within or outside the AVP Facility, or both). In this void, the statement is reasonably interpreted as blanket authorization for cell phone possession for all election inspectors and election officials present at the AVP Facility. Aside from compliance with the ‘non-disclosure’ oath taken by all AVP Facility sequesterates, no stated restriction appears to influence the usage of those cell phones (or other electronic devices). The absence of explicit or implicit digital recording restrictions in the training manuals (as well as corresponding statutes) suggests use of digital recording features is not prohibited. **Put another way, there is a class of ‘authorized individuals’ described in election manuals for which cell phone possession and usage is allowed – and this class includes all election inspectors and other election officials.**

Challenger cell phone restriction are reiterated at timestamp 5:56: “*challengers have the same rights and responsibilities as precinct challengers ... [.] [T]hey must take an oath with the chair upon entering the counting board[,] and are sequestered until 8 pm[,] and are restricted from using a cell phone[,] [C]hallengers should be provided with this information upon entrance[.]”* The AVP Video instructions give insight as to why election inspectors require access to cell phones. Quite simply, there are some situations where immediate clerk input is needed.

The AVP Video narration at timestamp 9:05 follows: “*if the voter is not on the printed av voter list from the qvf[,] check to ensure that the ballot is in the correct precinct if the avcb is processing multiple precincts[,] [I]f you are unable to locate the voter on the list for any precinct[,] contact the clerk as soon as possible[.]”*

Document received by the MI Court of Claims

MCL 168.765a(13) similarly suggest (direct) communication with clerks is required by both election inspectors and challengers. Immediate resolution of concerns identified by these individuals in part drives the need for ‘authorized individuals’ sequestration exemptions:

“A person described in this subsection [*a local election official who has established an absent voter counting board or combined absent voter counting board, the deputy or employee of that local election official, an employee of the state bureau of elections, a county clerk, an employee of a county clerk, or a representative of a voting equipment company*] may enter an absent voter counting board or combined absent voter counting board only for the purpose of responding to an inquiry from an election inspector or a challenger or providing instructions on the operation of the counting board.”

As there are no statutory (or election manual guidance) restrictions for the communication path, it can reasonably be assumed the legislature did not intend there to be any.

Plaintiffs are unaware of any published rules that deal with the matter of cell phone restrictions, as the term ‘cell phone’ is not present in any of the properly promulgated rules for election conduct posted at the site:

Similarly, plaintiffs are unaware of any additional ‘inter-agency’ communicated rules or instructions providing further guidance for related AVP Facility conduct, aside from the following reference at page 5 of “*Electronic Pollbook Refresh Clerk’s Manual For Windows 10 & BitLocker Flash Drives*” (September 2020) ([EPB Manual Link](#)) which directs election inspectors to place laptop computers into ‘airplane mode’ on election day – presumably preventing accidental EPB or election data disclosure with an electronic device:

“**Wireless internet access** – Connect the laptop to the internet periodically to perform the necessary software and antivirus updates before election day; however, ***the laptop must be in airplane mode on election day***. To verify airplane mode is enabled, click the notifications icon and make sure the Airplane mode is blue and that the Wi-Fi button is gray.”

**Question/Answer 2, Question/Answer 3:** Not applicable based on response to Question 1.

**Question 4:** “*If the answer to #1 is that the prohibition on the possession of electronic devices applies to all persons in such facility except for “authorized individuals” (Brater Aff. ¶ 47), then: (a) who are the “authorized individuals”; (b) where are “authorized individuals” identified in the Manual, promulgated rule, or other instructional guidance; and (c) where is the exception for “authorized individuals” identified in the Manual, promulgated rule, or other instructional guidance?*”

**Answer 4:** As indicated in the response to Question 1, in the totality of election manuals and other instructional guidance relative to cell phone possessing, one can arrive at a definition of “authorized individuals.” In this context “authorized individuals” means any or all election officials and election inspectors, and excludes all election challengers and watchers.

RESPECTFULLY SUBMITTED BY COUNSEL:

/s/Ann M. Howard

Ann M. Howard (P49379)

Attorney for O’Halloran Plaintiffs

October 17, 2022