

STATE OF MICHIGAN
COURT OF CLAIMS

PHILIP M. O'HALLORAN, M.D., BRADEN
GIACOBAZZI, ROBERT CUSHMAN, PENNY
CRIDER, and KENNETH CRIDER,

Plaintiffs,

v

Case No. 22-000162-MZ

JOCELYN BENSON, in her Official Capacity as
Secretary of State for the State of Michigan and
JONATHAN BRATER, in his Official Capacity as
Director of the Michigan Bureau of Elections,

Hon. Brock A. Swartzle

Defendants.

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RICHARD DEVISSER, MICHIGAN
REPUBLICAN PARTY, and REPUBLICAN
NATIONAL COMMITTEE,

Plaintiffs,

v

Case No. 22-000164-MM

JOCELYN BENSON, in her Official Capacity as
Secretary of State, and JONATHAN BRATER, in
his Official Capacity as Director of Elections,

Hon. Brock A. Swartzle

Defendants.

_____/

ORDER OF THE COURT

Plaintiffs in these consolidated cases challenge the legality of certain provisions in defendants' instructional manual, "The Appointment, Rights, and Duties of Election Challengers and Poll Watchers" (May 2022) ("Manual"). Currently before the Court are, among other things, defendants' joint motion for summary disposition and response to this Court's show-cause order, as well as plaintiffs' responses thereto. Also before this Court is the Michigan Democratic Party's motion for leave to file an amicus-curiae brief. On this latter motion, the Court has reviewed the motion and proposed brief and found the arguments cogent and helpful in resolving these matters, and the Court appreciates the party's involvement.

To resolve this matter fairly and efficiently on a sufficient record, the Court, on its own motion, directs the parties to address the following questions:

Our Legislature has prohibited all persons in attendance at an absent voter processing facility on election day from “communicat[ing] in any way any information relative to the processing or tallying of votes that may come to [that person] in this counting place until after the polls are closed.” MCL 168.765a(9). Our Legislature has also imposed certain physical sequestration requirements, restricting who can leave such a facility on election day. MCL 168.765a(10). A person who violates the physical-sequestration requirement or “discloses an election result or in any manner characterizes how any ballot being counted has been voted” before the polls close is guilty of a felony. *Id.*

On page 9 of the Manual, the following is stated: “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.” Defendants have justified the prohibition on the *possession* of such devices—and not just their *impermissible use*—on the following grounds: “Thus, photographing or recording the processing of absent voter ballots could also result in voters’ selections being revealed at these locations. In addition, phones are not permitted in the processing facility because of the sequestration provisions prohibiting communication outside the counting board, which apply to anyone present in a counting board aside from authorized individuals. MCL 168.765a(9)-(10).” (Brater Aff. ¶ 47.)

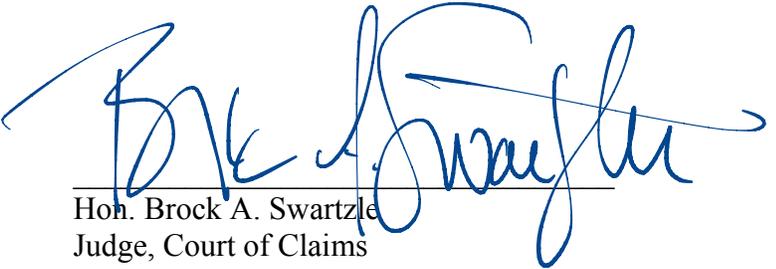
1. Does the prohibition on the possession of electronic devices stated in the Manual apply not only to a challenger or poll watcher but also to an election inspector, election official, or other election worker in an absent voter ballot processing facility? In other words, does the prohibition extend to all persons in such facility on election day, or is it limited to a challenger or poll watcher?
2. If the answer to #1 is that the prohibition on the possession of electronic devices applies to all persons in such facility, then where is that broad prohibition explained in the Manual? Is there some promulgated rule or other instructional guidance where this is explained?
3. If the answer to #1 is that the prohibition on the possession of electronic devices applies to all persons in such facility, then where is the penalty for an election inspector, election official, or other election worker who violates that prohibition explained in the Manual? Is there some promulgated rule or other instructional guidance where this is explained?
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?

IT IS ORDERED that each party shall respond, to the best of their knowledge, information, and belief, to these questions no later than 12:00pm on Tuesday, October 18, 2022. The response shall be filed with the Court in letter form, not to exceed three pages, single spaced. Exhibits can be attached to a party's letter.

IT IS FURTHER ORDERED that the Michigan Democratic Party's motion to participate as amicus curiae is GRANTED and the brief attached to its motion shall be accepted as-filed.

IT IS SO ORDERED.

Date: October 14, 2022



Hon. Brock A. Swartzle
Judge, Court of Claims

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