

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMAZON.COM SERVICES LLC,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 10-RC-269250
	)	
RETAIL, WHOLESALE AND	)	
DEPARTMENT STORE UNION,	)	
	)	
Petitioner.	)	
	)	

**EMPLOYER’S REQUEST FOR REVIEW OF THE ACTING REGIONAL DIRECTOR’S  
DECISION AND DIRECTION OF ELECTION**

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## TABLE OF CONTENTS

	Page
<b>I. INTRODUCTION AND SUMMARY OF ARGUMENT .....</b>	<b>1</b>
<b>II. SUMMARY OF RELEVANT FACTS .....</b>	<b>5</b>
<b>III. ARGUMENT .....</b>	<b>11</b>
A. Standard of Review.....	11
B. The Board Should Clarify the Criteria for Directing Mail-Ballot Elections in Light of the Acting Regional Director’s Faulty Application of <i>Aspirus</i> . .....	12
1. The Board Has Compelling Reasons to Answer Critical Questions Left Unanswered in the <i>Aspirus</i> Decision. ....	12
2. <i>Aspirus</i> Condition 2 Has Swallowed—and Will Continue to Swallow—the Board’s Presumption in Favor of Manual Elections. ....	14
a. <i>Aspirus</i> Does Not Provide Sufficient Guidance to Regional Directors to Determine the Appropriate Geographic Area and Timeframe for Considering Infection Rates. ....	14
b. In Applying <i>Aspirus</i> Condition 2, the Acting Regional Director Mistakenly Used Outdated County-Level Data and Should Have Relied on More Precise, Up-to-Date Localized Data. ....	16
(i) The Acting Regional Director Relied on the Wrong Testing Positivity Data By Considering Jefferson County Rather Than the BHM1 Site Testing Results.....	17
(ii) The Acting Regional Director Used Outdated Information to Conclude That Jefferson County Has Increasing Infection Trends. ....	19
3. <i>Aspirus</i> Condition 5 Contains No Definition of “Outbreak” and Allowed the Regional Director to Eliminate the Presumption Favoring Manual Elections. ....	23
a. The Acting Regional Director Had No Evidentiary Basis to Conclude, Under <i>Aspirus</i> Condition 5, That Amazon’s BHM1 Fulfillment Center Is Experiencing an “Outbreak.” .....	23
b. The Board Should Adopt a Workable Standard That Promotes Manual Elections or, Alternatively, Mixed Manual-Mail Elections, Rather Than the Prolonged Use of Mail-Ballot Elections. ....	24
4. <i>Aspirus</i> Condition 4 Risks Discouraging Employers From Proposing Robust Safety Protocols, Despite the Board’s Goal of Promoting Safe Manual Elections. ....	25

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
5. <i>Aspirus</i> Does Not Explain How Regional Directors Are Supposed to Assess the <i>Aspirus</i> Conditions if Parties Are Precluded From Introducing Relevant Evidence.....	27
C. The Board Should Reconsider the <i>Aspirus</i> Framework Given Its Misalignment With the Evolving Nature of the Pandemic and Inability to Balance Numerous Competing Statutory Objectives. ....	28
1. The <i>Aspirus</i> Framework Does Not Reflect the Most Recent Scientific Approach to Balancing Safety and a Well-Functioning Society During the Pandemic.....	28
2. The Board Must Promote Increased Voter Participation, and the Board’s Own Analysis of the Relevant Data Confirms That Mail-Ballot Elections Do the Opposite.....	30
3. The Board Must Process Election Petitions Timely and Efficiently, and Mail-Ballot Elections Routinely Result in Unnecessary Delays and Disputes.....	33
4. The Board Must Promote Balanced Free Speech Rights Under the Act, and Current Law Restricts Employer Free Speech During Mail-Ballot Elections.....	36
D. The Board Has Compelling Reasons to Adopt New Minimum Standards for Mail-Ballot Elections to Protect Voters and the Election Process.....	39
<b>IV. CONCLUSION .....</b>	<b>42</b>

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>AFL-CIO v. NLRB</i> , 471 F. Supp. 3d 228 (D.D.C. 2020) .....	34
<i>Allegheny Ludlum Corp.</i> , 333 NLRB 734 (2001) .....	36
<i>Aspirus Keweenaw</i> , 370 NLRB No. 45 (Nov. 9, 2020) .....	<i>passim</i>
<i>Brink’s Armored Car</i> , 278 NLRB 141 (1986) .....	35, 40
<i>Chamber of Commerce of U.S. v. Brown</i> , 554 U.S. 60 (2008).....	36
<i>Clement-Blythe Cos.</i> , 182 NLRB 502 (1970) .....	32
<i>Dal-Tex Optical Co.</i> , 137 NLRB 1782 (1962) .....	36
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	32
<i>Guardsmark, LLC</i> , 363 NLRB No. 103, slip op. (2016).....	37, 38
<i>In re Baker Victory Servs., Inc.</i> , 331 NLRB 1068 (2000) .....	30
<i>Int’l Total Servs.</i> , 272 NLRB 201 (1984) .....	32
<i>JDRC Managed Servs.</i> , Case 25-RC-265109, Board Order Granting Review (Oct. 13, 2020).....	17
<i>Mission Indus.</i> , 283 NLRB 1027 (1987) .....	34
<i>NLRB v. A.J. Tower Co.</i> , 329 U.S. 324 (1946).....	33, 34, 41

<i>NLRB v. Cedar Tree Press, Inc.</i> , 169 F.3d 794 (3d Cir. 1999).....	35
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969).....	36
<i>NLRB v. Va. Elec. &amp; Power Co.</i> , 314 U.S. 469 (1941).....	36
<i>Nouveau Elevator Indus., Inc.</i> , 326 NLRB 470 (1998) .....	13
<i>Oregon Washington Telephone Company</i> , 123 NLRB 339 (1959) .....	37
<i>Peerless Plywood</i> , 107 NLRB 427 (1953) .....	37, 38
<i>Plant City Welding &amp; Tank Co.</i> , 119 NLRB 131 (1957), <i>rev'd on other grounds</i> , 133 NLRB 1092 (1961).....	38
<i>Professional Transportation, Inc.</i> , Case 32-RC-259368 (Dec. 2, 2020) (not reported in Board volumes) .....	41
<i>Promowest Prods., Inc.</i> , Case 09-RC-261089 (Nov. 25, 2020) .....	29
<i>San Diego Gas &amp; Elec.</i> , 325 NLRB 1143 (1998) .....	14, 38
<i>Shepard Convention Servs., Inc. v. NLRB</i> , 85 F.3d 671 (D.C. Cir. 1996).....	32
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	36
<i>Thompson Roofing, Inc.</i> , 291 NLRB 743 (1988) .....	35, 40
<i>Versail Mfg., Inc.</i> , 212 NLRB 592 (1974) .....	30
<i>Wilson &amp; Co., Inc.</i> , 37 NLRB 944 (1941) .....	35
<b>STATUTES</b>	
29 U.S.C. § 158(c) .....	36

Ala. Code § 11-40-6.....	17
<b>OTHER AUTHORITIES</b>	
29 C.F.R. § 102.66(g) .....	27
29 C.F.R. § 102.67(c).....	1
29 C.F.R. § 102.67(d) .....	1, 11, 12
29 C.F.R. § 102.67(j) .....	5
Alabama’s COVID-19 Data and Surveillance Dashboard, Alabama Dep’t of Public Health, <a href="https://arcg.is/0brSGj">https://arcg.is/0brSGj</a> (“Data and Surveillance” menu) (last visited Jan. 21, 2021).....	20
Alabama’s COVID-19 Risk Indicator Dashboard, Alabama Dep’t of Public Health, <a href="https://arcg.is/0brSGj">https://arcg.is/0brSGj</a> (“Risk Indicator” menu) (last visited Jan. 21, 2021) .....	21, 29
Alabama’s COVID-19 Vaccine Distribution Dashboard, Alabama Dep’t of Public Health, <a href="https://arcg.is/0brSGj">https://arcg.is/0brSGj</a> (“Vaccine Distribution” menu) (last visited Jan. 21, 2021) .....	22
COVID-19 Status Report (Jefferson Alabama), Johns Hopkins University, <a href="https://bao.arcgis.com/covid-19/jhu/county/01073.html">https://bao.arcgis.com/covid-19/jhu/county/01073.html</a> (last visited Jan. 16, 2021) .....	22
Eli Rosenberg, <i>The Latest Frontier in Worker Activism: Zoom Union Meetings</i> , Washington Post (Sept. 11, 2020), <a href="https://www.washingtonpost.com/business/2020/09/10/unions-zoom-pandemic">https://www.washingtonpost.com/business/2020/09/10/unions-zoom-pandemic</a> .....	34, 35
Election Report for Cases Closed (10/01/2019 to 09/30/2020), NLRB, <a href="https://www.nlr.gov/sites/default/files/attachments/pages/node-3617/total-closed-cases-fy-2020-pdf.pdf">https://www.nlr.gov/sites/default/files/attachments/pages/node-3617/total-closed-cases-fy-2020-pdf.pdf</a> .....	38
Johns Hopkins Coronavirus Resource Center, <a href="https://coronavirus.jhu.edu/testing/differences-in-positivity-rates">https://coronavirus.jhu.edu/testing/differences-in-positivity-rates</a> (last visited Jan. 15, 2021) .....	29
Memorandum GC 20-07, Guidance Memorandum on Representation Case Procedure Changes (June 1, 2020).....	30
<i>NLRB Casehandling Manual, Part 2, Representation Proceedings</i> (Sept. 2020) .....	34
Recent Election Results, NLRB, <a href="https://www.nlr.gov/reports/graphs-data/recent-election-results">https://www.nlr.gov/reports/graphs-data/recent-election-results</a> (last visited Jan. 16, 2021) .....	31
Representation—Case Procedures, Final Rule, 79 Fed. Reg. 74,308 (Dec. 15, 2014).....	34, 38, 39
Representation—Case Procedures, Final Rule, 84 Fed. Reg. 69,524 (Dec. 18, 2019).....	34

Pursuant to Section 102.67(c) and (d) of the National Labor Relations Board's ("NLRB's" or "Board's") Rules and Regulations, the Employer, Amazon.com Services LLC ("Amazon") requests the Board's review of the Acting Regional Director's January 15, 2021 Decision and Direction of Election ("D&DE," attached as Exhibit A) ordering a mail-ballot election.

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

On page one of *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 1 (Nov. 9, 2020), the Board reaffirmed its longstanding preference for manual ballot elections based on considerations that "remain valid today," even with the pandemic. In particular, manual elections "permit in-person supervision of the election, promote employee participation, and serve as a tangible expression" of employees' statutory rights. *Id.* Without retreating from its longstanding preference, the Board identified five conditions in which Regional Directors should consider, and might even justifiably order, a mail-ballot election for safety-related reasons. *Id.* at 4–8. At the same time, the Board recognized that "[t]here are also now circumstances, however, in which manual election[s] can be safely conducted." *Id.* at 4.

This case shows that, in practice, *Aspirus's* exceptions are swallowing its rule. As just one example, the Board should grant review because the Acting Regional Director deemed county infections to be *increasing*, but she looked at the wrong data to reach this erroneous conclusion. Had she cited more recent data, as the Board instructed her to do, she would have found county infections *decreasing*. Even assuming this error never occurred, the Board should clarify and refine its *Aspirus* framework for the benefit of Regional Directors, who must ensure efficient, fair elections that turn out the greatest vote possible. Otherwise, without clarification, the *Aspirus* framework, as it has been applied in this case and in other regions across the country, will ensure manual elections go extinct for the foreseeable future. If a manual election is

improper here, it is hard to imagine any circumstances in which a Regional Director would allow manual elections until COVID-19 is eradicated. That result is directly at odds with *Aspirus* itself and, even more importantly, the policies and goals of the National Labor Relations Act (“NLRA” or the “Act”).

This election matter involves more than 5,800 employees and is by far the largest election matter before the NLRB in the COVID-19 era. Since the pandemic began, moreover, these employees have been reporting to work and successfully working in person at Amazon’s BHM1 Fulfillment Center in Bessemer, Alabama, providing—like Board agents—essential services to the United States population. Drawing on a wealth of experience operating safely in pandemic conditions, Amazon proposed manual election protocols that, as its medical experts explained, would have fully minimized any risk of transmission, thereby marginalizing any differential in risk of virus spread between a manual election and mail-ballot election. The union’s own medical expert did not disagree.

Yet the D&DE—while superficially following the Board’s *Aspirus* framework—contained errors, took an expansive approach to several of the conditions that *Aspirus* identified, and flatly rejected Amazon’s proposed manual election. It deemed a mail-ballot-only election the “safest” approach, not based on the record, but based on speculation and conjecture, and without ever balancing the purported risk of virus spread against the public policy that “strongly favors” allowing employees to vote in person. Review is warranted for multiple reasons:

- The Board should provide guidance for determining the most “applicable” and “best available geographic statistical measure” for purposes of *Aspirus* Condition 2, which evaluates local COVID-19 statistics. The need for guidance is particularly striking in this case. The Acting Regional Director *rejected* the best available statistics on testing positivity rates—which showed case numbers and a test positivity rate of just 2.88% at the BHM1 facility itself (the size of three Alabama “cities”)—based on the premise that Board agents and employees would travel through other parts of the county, state, or region with higher rates. Such a

premise—**effectively overruling this part of *Aspirus***—eliminates the use of intracounty data in all cases, no matter how accurate, because opponents of manual elections can cherry-pick whatever statistics make a manual election look riskier, regardless of the availability of more precise data. The Acting Regional Director also applied an *outdated* 14-day trend showing a slight increase in infections, when if she had run the same calculation as of the decision date, as the Board directed, it would have shown a 14-day trend of *declining* infections.

- The Board should explain what constitutes an “outbreak at the facility” under *Aspirus* Condition 5. Here, the Acting Regional Director noted that *Aspirus* had failed to offer a definition of “outbreak” and reached the remarkable conclusion that *any* level of infection or potential infection among employees counts as an “outbreak.” For the Acting Regional Director, 40 infections in a facility of more than 6,000 employees over a period of 14 days before December 28, 2020 was enough to constitute an outbreak.<sup>1</sup> If true, facilities will be in a constant state of “outbreak” unless and until the virus all but disappears, with no manual elections occurring until that unknown time.
- The Board should clarify employers’ ability to implement safety measures to facilitate a manual election above and beyond GC Memo 20-10. *Aspirus* Condition 4 envisions an employer proposing safety protocols that build on procedures the General Counsel and Board already have found allow for a safe election. Nonetheless, the Acting Regional Director rejected Amazon’s proposed protocols in this case, finding that they suggested too much influence by Amazon over the election. Since *Aspirus* endorses and indeed requires employer commitments to making the election site safe, the Board should forcefully repudiate the Acting Regional Director’s Catch-22 approach. At a minimum, the Board should direct Regional Directors that they must engage with the parties to assess and adjust proposed protocols before rejecting them out of hand based on speculation regarding the potential impression to voters.
- The Board should explain how Regional Directors are supposed to assess the *Aspirus* conditions if parties are precluded from introducing relevant evidence because they cannot “litigate” the issue.
- Finally, the Board should reassess aspects of the *Aspirus* framework in light of the most current scientific approaches that most governmental agencies are using to balance safety and other aims. As applied in practice, *Aspirus* gives insufficient weight to fundamental Board goals, such as increasing voter participation, processing election petitions speedily and efficiently, and ensuring that employees

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<sup>1</sup> As Amazon reported in its post-hearing brief, out of the 7,575 individuals (including Amazon employees and third parties) in the BHM1 facility during the 14-day period ending on January 7, 2021, 218 (2.88%) fell into the category of “individuals present in the facility within the preceding 14 days [who] have tested positive for [COVID],” self-reported confirmed positives, and presumptive positive numbers. See E. Brief at 30.

make a free and informed choice in elections.

As the Board knows, the calculus when ordering an NLRB mail-ballot election is unique, in part because statistics show that NLRB mail-ballot elections *reduce* voter turnout. *See Aspirus*, 370 NLRB No. 45, slip op. at 2. Employee voters are deprived of the choice to cast their ballots in person at their place of work—even where, as here, they are already physically present in that workplace every day. In fact, mail balloting in NLRB elections presents the exact opposite phenomenon for voter turnout than it does in a governmental election. Here, a mail-ballot election will depress turnout, in stark contrast to a governmental election, where mail balloting increases turnout. In both instances, Amazon favors increasing turnout. Voters in political elections generally have multiple options about how to cast their votes, with the state creating and maintaining a continuously updated voter address roll. These features promote security and voter turnout in a mail-ballot or hybrid political election. But none of these features is present in typical Board mail-ballot elections under existing procedures. In this case, moreover, concerns about election security run particularly high: here, the Retail, Wholesale and Department Store Union (“Petitioner” or “Union”) relied on an unreliable electronic “signature” platform to satisfy the showing-of-interest requirement, without obtaining all of the information that GC Memo 15-08 requires, and the Region refused to provide assurance that the Union actually obtained the required number of signatures. In light of the critical differences between NLRB elections and political elections, as well as the particular history of this election matter, the Acting Regional Director’s invocation of CDC guidance about voting by mail in political elections provides no justification for restricting Amazon employees to mail-ballot voting only. *See D&DE* at 4.

Amazon’s request for review seeks the Board’s involvement to correct the errors in the D&DE, address critical gaps in the *Aspirus* framework, and ensure that the Board and its

Regional Directors are properly balancing the competing statutory goals at issue as the nation moves into the mid- and post-vaccine phase of the COVID-19 pandemic.<sup>2</sup>

## II. SUMMARY OF RELEVANT FACTS

On November 20, 2020, the Union filed its petition for election (“Petition”). (B. Ex. 1(a)).<sup>3</sup> The Petition seeks to represent a unit of hourly associates employed at Amazon’s BHM1 Fulfillment Center in Bessemer, Alabama. Even though the holiday season was approaching and public health officials worried that increased travel and social gatherings would cause an increase in COVID-19 transmission, the Union’s Petition proposed a four-day *manual* election, with 24-hour polling stations, scheduled just after the Christmas holiday (December 27–30, 2020). (*Id.*).

Amazon requested a check of the Union’s showing of interest on November 24, 2020. The Union had represented that the petitioned-for unit of “fulfillment center employees” consisted of 1,500 associates. But as Amazon demonstrated to Region 10 over the next two weeks, the true number of associates in the petitioned-for unit was *much* larger: between 5,500 and 5,800 at that time.<sup>4</sup> On December 10, 2020, however, the Region announced that it was “administratively satisfied” with the Union’s showing of interest. And on December 15, 2020,

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<sup>2</sup> Amazon also has filed a Motion to Stay the Election Pending Review pursuant to 29 C.F.R. § 102.67(j).

<sup>3</sup> References to the Hearing Transcript are in the form of “Tr. \_\_,” references to the Board Exhibits are in the form of “B. Ex. \_\_,” references to the Employer’s Exhibits are in the form of “E. Ex. \_\_,” and references to the Employer’s January 7, 2021 Post-Hearing Brief are in the form of “E. Brief.” Certifications submitted in support of the Employer’s December 28, 2020 Offer of Proof or January 7, 2021 Post-Hearing Brief are abbreviated as “Cert.”

<sup>4</sup> The D&DE’s opening paragraph indicates that “[t]he Employer took the position that the unit should, instead, include approximately 6,000 employees.” D&DE at 1. That is not accurate, or at least, it is incomplete. Amazon took the position with Region 10 that, for the hourly classifications included in the Union’s original petition, the Union had grossly undercounted—by a magnitude of almost four—the number of employees in the classifications it sought to represent.

the Region told Amazon that the Union had met the 30% showing-of-interest requirement based on a unit consisting of 5,591 employees. But even if the Union had somehow obtained authorization cards from *every one* of the 1,500 associates that the Union believed were in the petitioned-for unit, the Union still could not have cleared the required 30% threshold. The Region has never said whether it permitted the Union to supplement with post-petition cards. Nor has the Region otherwise explained to Amazon how the Union satisfied the requirement.<sup>5</sup>

In their statements of position, Amazon and the Union agreed that regular full-time and part-time Fulfillment Associates were properly in the unit; but they disagreed about whether to include 951 other employees in over 20 job classifications. *Compare* Amazon Statement of Position (Dec. 11, 2020) (B. Ex. 3(a)), *with* Union Responsive Statement of Position (Dec. 15, 2020) (B. Ex. 3(b)). The Union also did an unexplained about-face on its manual election proposal and started to advocate for a mail-ballot election. (B. Ex. 3(b)).

On December 18, 2020, Region 10 Hearing Officer Kerstin Meyers opened the pre-election hearing. By the third and final day, December 22, the parties had formally stipulated to the bargaining unit's employee job classifications, with the Union agreeing to all of Amazon's positions on which job classifications to include. (Tr. 185–86).

The only remaining dispute was whether to conduct a manual or mail-ballot election. Roughly an hour before the start of the third hearing day, and with no prior notice, the Hearing Officer directed Amazon to make a written offer of proof. The Hearing Officer denied Amazon's request to present witness testimony on the method-of-election issue or any further evidence about plant operations beyond the testimony heard on the first hearing day. Instead, the

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<sup>5</sup> Amazon filed a FOIA request for Form NLRB-4069 on December 21, 2020. It has received no response to date.

Hearing Officer gave Amazon only the Christmas holiday weekend to prepare a perfected offer of proof and position on the mail-ballot issue. (Tr. 189). Amazon submitted its perfected offer of proof (“Offer of Proof”) on December 28, 2020, which included four supporting certifications and a detailed summary of Amazon’s proposed protocols for a safe and efficient manual election at the location nearest and most convenient to its affected employees.

Amazon’s detailed proposal addressed all issues and protocols required by the Hearing Officer, GC Memo 20-10, *Aspirus*, and GC Memo 21-01. (E. Brief, Attachments 1, 2). Notably, the Board stated in *Aspirus* that GC Memo 20-10 “protocols are designed to ensure manual elections can be conducted safely and efficiently . . . .” *Aspirus*, 370 NLRB No. 45, slip op. at 7. Amazon went above and beyond to further minimize any risk of spread and to limit as much as possible the number of Board agents that would be required to conduct the election. To summarize, Amazon proposed using BHM1’s outdoor parking lot as a single voting location, with two daily voting periods for up to four days, and employees able to vote before, after, or even during their shifts. Voting would occur in a heated and well-lit tent covering about 3,600 square feet, depending on the Region’s requirements, with the tent’s sides able to open or close to increase airflow. In addition, Amazon planned to make its existing free COVID testing for employees also available to Board agents and union observers, with additional free rapid COVID testing available for all employees, Board agents, and Union observers on election day. Amazon proposed temperature screening (using thermoscan technology) for those entering the site, and social distancing measures for those standing in line. Ample personal protective equipment, such as gloves, masks, and hand sanitizer, would also be available—along with disposable pencils for the actual voting. Indeed, Amazon proposed various safeguards specifically for the observers and Board agents, including plexiglass shields around their areas, individualized voter

lists, walkie-talkies for ease of communication, designated tables, chairs and pencils, and pass-thru boxes for passing materials to voters. Other than the fact that the election would be on Amazon’s property—as with most NLRB elections—nothing about the protocol would have suggested that Amazon had control over the process.<sup>6</sup>

Amazon’s medical experts all agreed that a manual election would present near zero risk of virus spread among voters and participating agents. *See, e.g.*, Gupta Cert. ¶ 11 (“In my expert medical opinion, the voting protocol as designed, along with the high degree of COVID risk prevention protocols already in place at the [BHM1] Fulfillment Center, mitigates any marginal risk associated with participating in an in-person election for anyone participating in the election process from voters to observers to NLRB personnel.”); *id.* ¶ 12 (stating that “the measures Amazon proposes to protect individuals and reduce the spread of COVID-19 have made the risk of transmission during the election negligible”); *id.* ¶ 14 (opining that “participating in the election at [BHM1] as proposed by Amazon would be of lesser risk than if an individual entered an uncontrolled setting to pick up a curbside meal, went to a grocery store, pumped gasoline, or, most likely, a federal government office that is not subject to the strict protocols that Amazon follows and which would be implemented for the election”); *id.* ¶ 15 (stating that “the risk of COVID-19 transmission is minimal” assuming Board agents adhere to the guidelines established in Amazon’s proposed protocols); *id.* ¶ 16 (stating that Amazon’s proposed plan for conducting the election “is suitably designed to minimize COVID-19 transmission risk to the fullest extent

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<sup>6</sup> That said, Amazon also proposed that if the Acting Regional Director had any concerns about employee perception, Amazon was open to discussions about how to resolve any such concern. *See* E. Brief at 61–62; *see also id.* at 18 n.10 (reaffirming that “Amazon’s proposed protocols are not intended to suggest” that any party but the Board controls the election and that Amazon’s proposed manual election details “assume[d] that the Board will supply and utilize enough Board banner, signage, insignia, etc. to ensure all attendees will understand that this is a Board election and not an Amazon event”).

that is reasonably feasible”); *id.* ¶ 18 (“It is my opinion that Amazon’s proposals for the election minimizes fully the risk of COVID-19 transmission to the observers.”); *id.* ¶ 20 (“Amazon’s proposals for the election provide the safest environment that is reasonably possible for voters presenting a negligible risk of COVID-19 transmission.”); Lipkin Cert. ¶ 8 (“[I]t is my medical opinion that these [proposed logistics and safety] protocols should protect participants from becoming infected as a consequence of attending the election. I have no additional recommendations for reducing the risk further.”); *id.* ¶ 9 (noting that “[t]here would be minimal increased risk for the voters under the proposed protocols”).

On December 31, 2020, in response to Amazon’s Offer of Proof and proposed manual election protocols, the Union submitted the declaration of its own medical expert, Dr. Suzanne E. Judd. *See* Declaration of Suzanne E. Judd (“Judd Decl.”), Union Response to Employer’s Offer of Proof, Ex. 2. Dr. Judd’s declaration focused primarily on the state of the pandemic in “Alabama and specifically in Jefferson County,” *see* Judd Decl. ¶ 4, but not BHM1. Dr. Judd agreed that Amazon’s protocols “help to reduce transmission” and did not contest the testimony of Amazon’s expert witnesses that the intra-zone risk would be “minimal,” “negligible,” “minimized,” or “minimized fully.” *See* Gupta Cert. ¶¶ 12, 15, 18; Lipkin Cert. ¶ 9. Moreover, Dr. Judd conceded that her own institution, the University of Alabama-Birmingham, which she advises on COVID-19 protocols, was scheduled to bring back college students beginning on January 19, 2021. Judd Decl. ¶ 11.

On January 7, 2021, the parties submitted post-hearing briefs. Amazon also submitted a supplemental certification from Director of Workplace Health and Safety Mike Stone, who certified that the 14-day COVID-19 positivity rate for the BHM1 facility was 2.88% and decreasing as compared to the previous 14 days. (E. Brief, Attachment 1 ¶ 4).

On January 15, 2021, the Acting Regional Director issued her D&DE and directed that the Region would conduct the election by mail ballot, with ballots to be mailed on February 8, 2021. D&DE at 10. Using outdated data, the Acting Regional Director found that a mail-ballot election was appropriate based on *Aspirus* Condition 2, on the ground that, as of January 11 (four days before issuing the D&DE), the testing positivity rate in Jefferson County was above 5% and that the 14-day trend in the number of new confirmed COVID-19 cases (again, using a 14-day period ending January 11—four days *before* the D&DE would issue) was very slightly increasing. *Id.* at 6. The Acting Regional Director rejected Amazon’s argument, based directly on *Aspirus*, that she could and should consider the more precise intracounty data (rather than the county-level data) showing COVID-19 levels and trends within BHM1 itself because “[n]either employees nor party representatives nor Board agents exist entirely within [Amazon’s] facility.” *Id.* at 8.

The Acting Regional Director also relied on *Aspirus* Condition 5, which considers whether there is currently an “outbreak” at the facility. While acknowledging that “[t]he Board has not defined an in-facility outbreak,” the Acting Regional Director found that “*any* presence of COVID-19 in an employer’s facility” weighed “in favor of conducting a mail ballot election[.]” *Id.* at 5 (emphasis added); *see also id.* at 10 (“Based on the high and still-rising positivity rate in Jefferson County, and the undeniable presence of COVID-19 both inside and outside the Employer’s facility, I find that a mail-ballot election is warranted in keeping with the Board’s decision in *Aspirus Keweenaw*.”).

In addition, the Acting Regional Director downplayed Amazon’s concern that a mail-ballot election would lead to considerably lower voter turnout because, in her view, a mail-ballot election would promote voting of an unspecified number of employees who could not enter the

voting location “for health reasons or due to positive COVID tests.” *Id.* at 9. The Acting Regional Director similarly rejected Amazon’s remaining arguments focusing on inherent downsides of mail-ballot elections, such as delays, risks of fraud or coercion, and restrictions on employer free speech. *Id.* at 8–9.

Much of the Acting Regional Director’s discussion relied on the assumption that any form of manual election would pose a material risk of virus spread, and that a mail-ballot election, including Board agent time necessary to prepare, distribute, and count thousands of ballots, mail delivery service (presumably USPS) time to deliver and return such ballots, and employee time necessary to retrieve, complete, and return ballots, involves no risk at all. But the undisputed evidence—including both parties’ medical experts—revealed that the election protocols Amazon proposed, over and above those required by GC Memo 20-10, had strong and overlapping scientific support for no material risk of virus spread. Rather than treating this evidence as supporting a manual election, the Regional Director, with no real explanation, criticized the enhanced safety protocols as giving the impression that the employer had control over the election instead of the Board. D&DE at 9. The Acting Regional Director never once, however, engaged with Amazon regarding whether the Board and the parties might make any adjustments to the proposed election protocols to ameliorate any such concerns.

### **III. ARGUMENT**

#### **A. Standard of Review.**

Under Section 102.67(d) of its Rules and Regulations, the Board may grant a request for review on one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
  - (i) The absence of; or
  - (ii) A departure from, officially reported Board precedent.

- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d).

The Board should grant Amazon's Request for Review because, as detailed below, each of these grounds for review is present here.

**B. The Board Should Clarify the Criteria for Directing Mail-Ballot Elections in Light of the Acting Regional Director's Faulty Application of *Aspirus*.**

1. The Board Has Compelling Reasons to Answer Critical Questions Left Unanswered in the *Aspirus* Decision.

The overwhelming and undisputed record evidence shows that BHM1 presents a striking example of "circumstances . . . in which [a] manual election can be safely conducted." *Aspirus*, 370 NLRB No. 45, slip op. at 4. The Acting Regional Director's unwillingness to accept that evidence, based on an expansive misinterpretation of *Aspirus*, glaringly highlights that the *Aspirus* framework, as Regional Directors seem to be interpreting it, currently provides insufficient guidance to Regional Directors as to how to strike the balance between fair elections and safety. Regional Directors, in practice and as demonstrated here, have mistakenly interpreted what appears on its face as a limited set of exceptions to the usual *strong* presumption in favor of manual elections in light of the current pandemic as a grant of unfettered authorization for mail-ballot procedures in almost any scenario imaginable. For example, the Acting Regional Director here treated Condition 5 as allowing mail ballots because of "the undeniable presence of COVID-19 both inside and outside the Employer's facility." D&DE at 10. But manual elections should not be off limits until COVID-19 is completely eradicated from

the workplace. The Board and General Counsel, and many employers, have adopted stringent safety protocols that minimize the risk of virus spread. Where the evidence shows that such protocols will successfully reduce the additional risk posed by an election to zero or nearly zero, a manual election should be ordered, as *Aspirus* itself seemed to envision.

The Board's purpose in *Aspirus* was "to set forth the guidelines and parameters applicable to determining the propriety of a mail-ballot election under the current [pandemic] circumstances." *Aspirus*, 370 NLRB No. 45, slip op. at 1. There is no indication that the Board meant for that framework to preclude manual elections for the foreseeable future. If anything, the Board appeared to have been careful to ensure that mail-ballots still were the exception to the general rule favoring manual elections. In that regard, the Board reaffirmed and stressed the Act's "strong" historical preference for *manual* elections:

While the [COVID]-19 pandemic indisputably warrants mail-ballot elections in appropriate circumstances, *the Board's existing precedent strongly favors manual elections*. Manual elections permit in-person supervision of the election, promote employee participation, and serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so. *These reasons remain valid today and continue to support the Board's longstanding preference for manual elections*.

*Id.* (emphases added); *see also id.* at 2 (stating that "the applicable presumption favors a manual, not mail-ballot, election" (citing *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998))); *id.* ("Given the value of having a Board agent present at the election—a circumstance which is not possible in mail-ballot elections—the Board's longstanding policy is that representation elections should, as a general rule, be conducted manually . . ."); *id.* at 1 (noting that, although Regional Directors have discretion, such "discretion must be exercised within the guidelines and parameters established by the Board, which include its preference for manual elections"); *id.* at 2 n.6 (noting that "generally lower voter turnout in mail-ballot elections supports the Board's

historic preference for manual elections”); *id.* at 4 (noting “longstanding preference for manual elections”).<sup>7</sup>

Yet, the Acting Regional Director’s sweeping decision here illustrates that Regional Directors have misinterpreted *Aspirus* as a blank check to disregard this longstanding presumption. The presumption receives lip service at best, but easily gives way to statistics or information that reveal little or nothing about the severity of local conditions or marginal risk of spread at an election site. The Board should squarely address foundational questions about the “conditions” that support mail-ballot elections. As this case illustrates, *Aspirus* leaves those questions unanswered and permits Regional Directors to misinterpret those standards and simply ignore the relevant considerations.

2. *Aspirus* Condition 2 Has Swallowed—and Will Continue to Swallow—the Board’s Presumption in Favor of Manual Elections.
  - a. *Aspirus* Does Not Provide Sufficient Guidance to Regional Directors to Determine the Appropriate Geographic Area and Timeframe for Considering Infection Rates.

The Board should begin by, at a minimum, reversing the Acting Regional Director’s errors under Condition 2, but also by clarifying *Aspirus* Condition 2 because it is susceptible to manipulation. According to *Aspirus*, Regional Directors may consider mail-ballot elections if “the 14-day trend in the number of new confirmed cases of [COVID]-19 in the county where the facility is located is increasing or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.” *See* 370 NLRB No. 45, slip op. at 5. This formulation presents the default measure of new cases and positivity rates as county-level data over a 14-day

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<sup>7</sup> Then-Member McFerran agreed with the three authors of the majority opinion that Board precedent established a “traditional preference” for manual elections. *Aspirus*, 370 NLRB No. 45, slip op. at 9 (McFerran, concurring) (“[In *San Diego Gas & Electric*, t]he Board reiterated its traditional preference for manual elections . . .”).

period, but the Acting Regional Director’s decision in this case shows that both aspects of this inquiry—the geographic level and timeframe—need clarification from the Board.

While county-level data may have been what the parties and the Region relied upon in *Aspirus*, the Board’s decision in *Aspirus* makes clear that Regional Directors are not required to rely on county-level data.<sup>8</sup> On the contrary, *Aspirus* allows Regional Directors to use “better, more applicable, data” and “encourage[s] . . . Regional Directors to cite . . . the best available geographic statistical measure in making their determination.” *Id.* at 6.

Regarding both of the above measures, we recognize there may be some instances where the use of either broader regional data or *narrower intracounty data* is more relevant to a particular case. For example, if some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas; conversely, where the county covers a large geographic area or has widely varying [COVID]-19 rates, *city-level* or *other intracounty data* may be more relevant than countywide data. Although we have identified county-level data as our preferred metric, *we do not mandate that Regional Directors use any particular geographic level of data where better, more applicable, data exists, and we encourage the Regional Directors to cite with explanation the best available geographic statistical measure* in making their determinations.

*Id.* (emphases added). In fact, *Aspirus* even held that parties favoring a manual election may present “a different geographic metric” and that a Regional Director’s refusal to consider such alternative metrics may be “an abuse of discretion.” *Id.* Notably, the Board held that “city-level” data was an appropriate type of intracounty data. *Id.*

While *Aspirus* supports the use of more precise data, it offers little direction on how or when Regional Directors should determine which data is “better” or “more applicable.” *See id.*

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<sup>8</sup> *Aspirus* simply stated this guideline in terms of what would “normally be appropriate”: “Thus, a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.” 370 NLRB No. 45, slip op. at 5. As Amazon’s proposed protocols and demonstrated commitment to safety through the pandemic attest, this election is not the norm.

(“The question of whether geographically broader or narrower statistical measures provide a better basis for making a mail-ballot determination will necessarily be determined on the specific facts of each case.”). As a result, in cases like this one, where the intracounty data points in a different direction than broader county-level data, and the Regional Director must choose between them, the Regional Director has insufficient guidance for making that choice. The Board should take this opportunity to clarify this aspect of *Aspirus* Condition 2.

The Board should also clarify *Aspirus*’s statement that “the 14-day period should be measured from the date of the Regional Director’s determination, or as close to that date as the available data allow.” 370 NLRB No. 45, slip op. at 5 n.20. As explained in detail below, the Acting Regional Director found that the 14-day trend in the number of new COVID-19 cases in Jefferson County, Alabama was rising very slightly, but that conclusion rests on reviewing the data as of January 11, four days before the D&DE issued. *See* D&DE at 6.

For both the geographic level and timeframe, the Board should instruct Regional Directors to use available data that supports the long-standing preference for manual elections rather than less precise or outdated data that departs from that preference.

- b. *In Applying Aspirus Condition 2, the Acting Regional Director Mistakenly Used Outdated County-Level Data and Should Have Relied on More Precise, Up-to-Date Localized Data.*

The Acting Regional Director ordered a mail-ballot election in large part because of *Aspirus* Condition 2. But her conclusion that Condition 2 was satisfied improperly rests on her insistence on looking at county-level positivity data for Jefferson County as a whole rather than accepting Amazon’s proffered intracounty data (i.e., the data from BHM1 itself), which showed a 2.88% positivity rate of those tested—below the Board’s 5% threshold. And it further rests on her unexplained decision to look at the data on 14-day trends as of four days before she released the D&DE rather than updated trends that showed decreasing new cases. In both respects, the

Acting Regional Director’s application of *Aspirus* Condition 2 was erroneous and warrants review.<sup>9</sup>

- (i) The Acting Regional Director Relied on the Wrong Testing Positivity Data By Considering Jefferson County Rather Than the BHM1 Site Testing Results.

On the issue of testing positivity rate, *Aspirus* did not require the Acting Regional Director to rely on the Jefferson County positivity rate. On the contrary, it supported using the most applicable and “best available geographic statistical measure.” 370 NLRB No. 45, slip op. at 6. Here, that data came from the BHM1 facility itself. That massive facility is home to an on-site total workforce (employees and contractors) of more than 7,500—nearly four times the size of a city in Alabama. *See* Ala. Code § 11-40-6 (defining “cities” as “[m]unicipal corporations . . . containing 2,000 or more inhabitants”). Moreover, Amazon proposed detailed protocols that, when implemented, would have made everything outside of the election zone (including the Jefferson County infection data) all but irrelevant, as one medical expert noted. *See* Gupta Cert. ¶ 18 (“This [election] activity is far safer than a normal public activity given these precautions.”).

The reasonable and scientifically driven measures that Amazon proposed for a manual election undisputedly would have resulted in conditions far superior to baseline Jefferson County conditions and indeed would have made transmission inside the election zone “minimal,” “negligible,” “minimized,” or “minimized fully.” *See* Gupta Cert. ¶¶ 12, 15, 18; Lipkin Cert. ¶ 9. The Union’s own medical expert did not contend otherwise. Far from disagreeing with Amazon’s medical experts, the Union’s expert agreed that Amazon’s protocols “help to reduce

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<sup>9</sup> Notably, even before the Board decided *Aspirus*, it had granted review where a Regional Director was alleged to have used an overbroad geographical standard for infection rates. *JDRC Managed Servs.*, Case 25-RC-265109, Board Order Granting Review (Oct. 13, 2020) (not reported in Board volumes) *in response to* Employer’s “Emergency Motion To Stay Mail Ballot Election” (Oct. 6, 2020). The need for review on this issue is even more pressing in light of the Acting Regional Director’s misinterpretations of *Aspirus* Condition 2.

transmission.” Judd Decl. ¶ 4. The Acting Regional Director thus had no objective basis for concluding that Jefferson County offered a superior measure of whether a manual election would be safe. *Cf. Aspirus*, 370 NLRB No. 45, slip op. at 6 (stating that the purpose of *Aspirus* Condition 2 is to assess “whether safety needs dictate a mail-ballot election”); *see also id.* at 5 (“[B]road trends like statewide statistics may be of questionable use in assessing the safety of conducting a manual election at a specific facility, at least when more localized data is available.” (emphasis added)). Frankly, it defies belief that, when three medical experts essentially agree that the conditions at BHM1 are safer than in another geographic area, a reasonable factfinder would ignore that consensus to concentrate on that other geographic area in making a safety-related determination.<sup>10</sup>

Without explaining why—and underscoring that she was not focusing upon the safety of the election site itself or voters (who would be coming to work anyway)—the Acting Regional Director asserted that “Board agents would be required to travel to the election site from other states.” D&DE at 8. Based on that assumption, she further assumed that they would be exposed to “Jefferson County” infections—even if the election site itself had no material risk of transmission. *Id.* This rationale makes little sense.<sup>11</sup> If, as the evidence showed here, the election site itself presents *no material risk of transmission*, that fact alone establishes “the safety

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<sup>10</sup> The same is true of the Acting Regional Director’s reliance on “[i]nfection rates for the State of Alabama as a whole” and “the cumulative positive test rate throughout Alabama.” D&DE at 6–7. The Board in *Aspirus* specifically cast doubt on the usefulness of statewide data, especially where “more localized data is available.” *See Aspirus*, 370 NLRB No. 45, slip op. at 5 (“[B]road trends like statewide statistics may be of questionable use in assessing the safety of conducting a manual election at a specific facility, at least when more localized data is available.”).

<sup>11</sup> It further fails to acknowledge that Board agents engaged in travel to conduct elections are “performing an essential service” like many other federal, state, local, and private-sector employees traveling and working throughout the pandemic—not discretionary personal travel. *Id.* at 6 n.31 (discounting the relevance of general travel advisories or restrictions imposed by state or local governments for federal employees performing essential services).

of conducting a manual election at [that] specific facility.” *Aspirus*, 370 NLRB No. 45, slip op. at 5. At a minimum, facility-specific statistics would present the “best available geographic statistical measure” since the facility would be the nearest source of any possible risk. The facility, several times larger than an Alabama “city,” also was the most appropriate measure because *Aspirus* makes clear that “city-level data” is an appropriate measure. *Id.* at 6. Here, the Acting Regional Director abused her discretion in ignoring all of that. Instead, she improperly favored the county-level statistics and refused to rely on the BHM1 facility’s testing positivity rate of 2.88% throughout the 14 days prior to January 7, the most recent date that information could possibly be submitted by Amazon via Amazon’s post-hearing brief.<sup>12</sup>

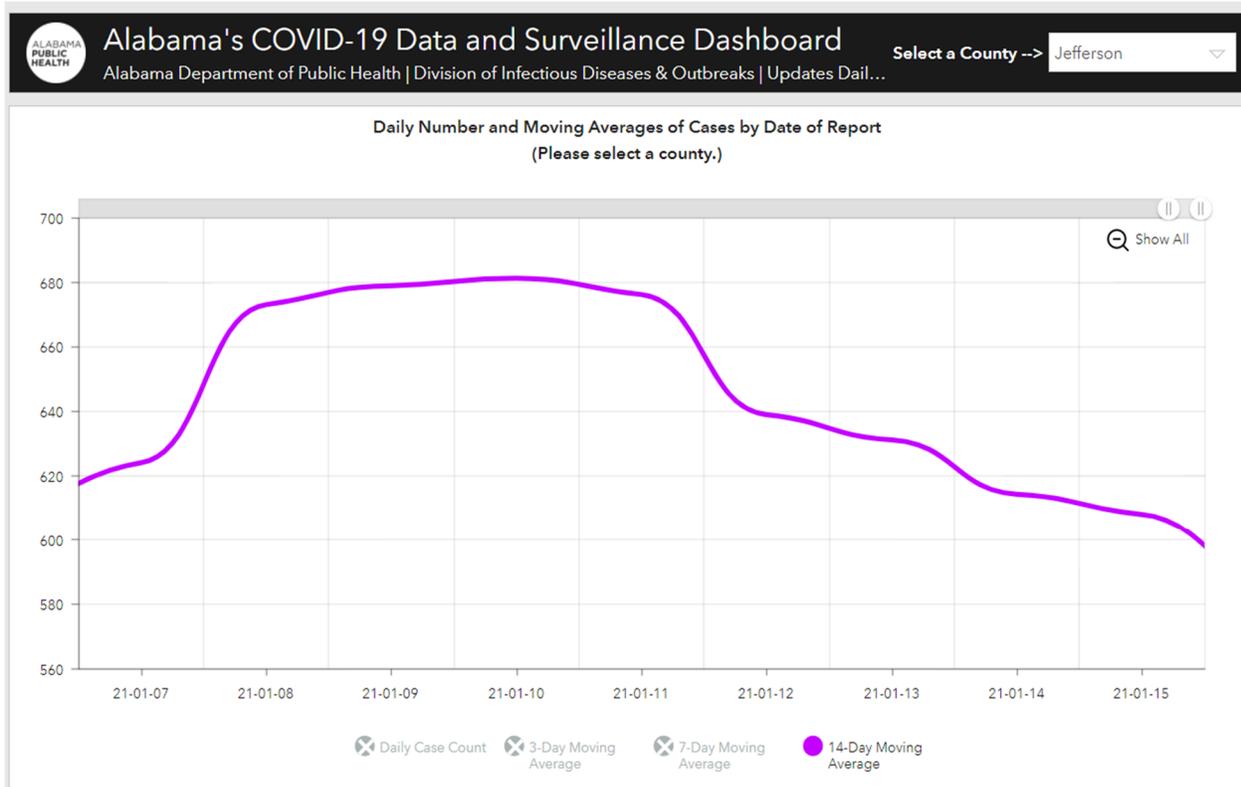
(ii) The Acting Regional Director Used Outdated Information to Conclude That Jefferson County Has Increasing Infection Trends.

The Acting Regional Director’s conclusion that the number of new daily COVID-19 cases in Jefferson County was *increasing* is also impossible to defend. It hinges on looking at the data “[a]s of January 11,” four days before the date of the decision. D&DE at 6. But *Aspirus* requires that “the 14-day period should be measured *from the date of the Regional Director’s determination, or as close to that date as available data allow.*” *Id.* at 5 n.20 (emphasis added).

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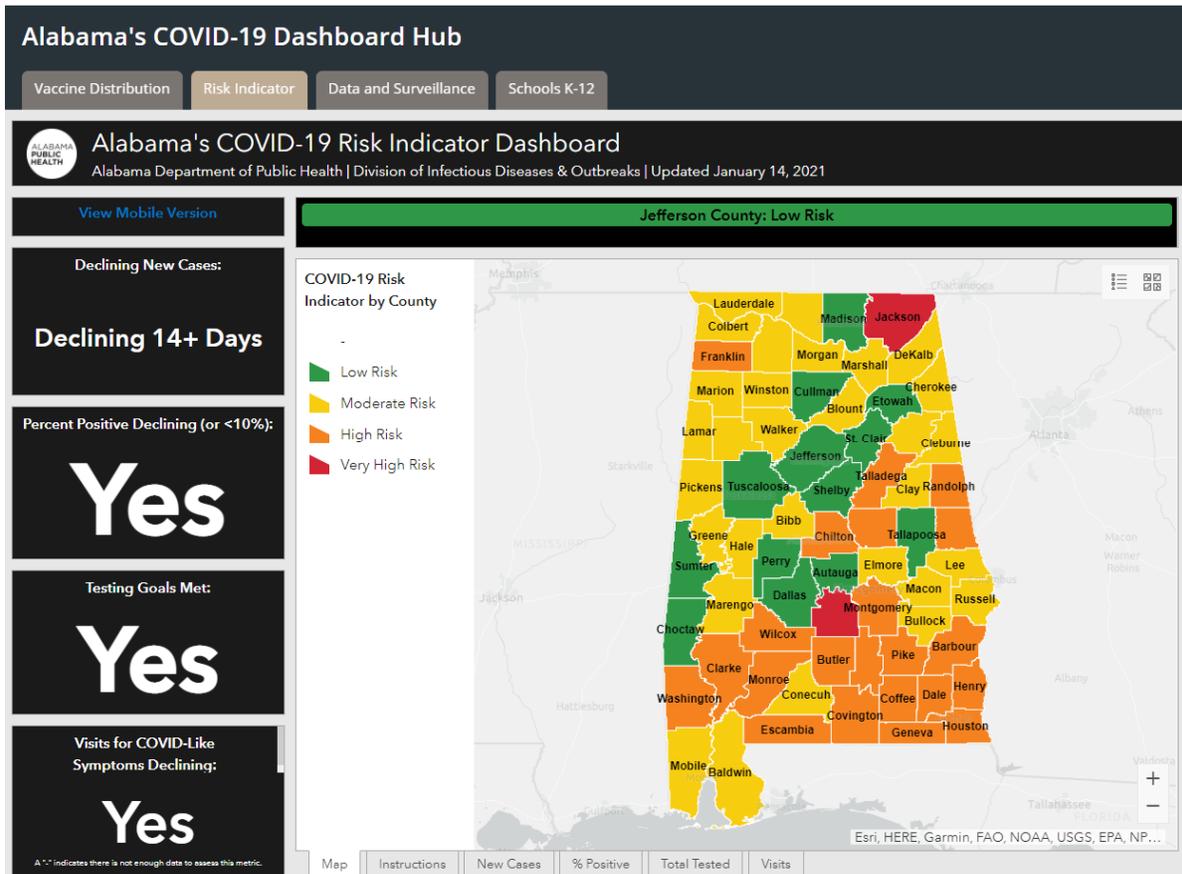
<sup>12</sup> The Acting Regional Director observed in the D&DE that, in order to have a manual election at BHM1, “Board agents would be required to travel to the election site from other states.” D&DE at 8. Amazon estimates, however, that its proposed manual election protocols would require just six Board agents to conduct the election, and Region 10’s resident office in Birmingham, Alabama is approximately 21 miles (a 25-minute drive) from BHM1. Even if additional Board agents were needed on some or all election days, the Regional Office in Atlanta, Georgia is just a 2.5-hour drive from BHM1. The Acting Regional Director also did not cite any evidence that the mere act of traveling to the location through any state or county materially increases risk.

Here, the overall number of new cases in Jefferson County was clearly *decreasing* as of January 15, 2021 (the date of the D&DE). The 14-Day moving average depicted on the Alabama Department of Public Health’s (“ADPH’s”) COVID-19 Data and Surveillance Dashboard<sup>13</sup> shows that the Acting Regional Director arbitrarily selected the date, January 11, on which the 14-day new cases trend was at a peak:



<sup>13</sup> See Alabama’s COVID-19 Data and Surveillance Dashboard, Alabama Dep’t of Public Health, <https://arcg.is/0brSGj> (“Data and Surveillance” menu) (last visited Jan. 21, 2021). The 14-day moving average for Jefferson County can be found by clicking on the “Data and Surveillance” menu, selecting “Jefferson” as the relevant county, and then navigating to Tab 8.

In fact, *as of January 14, 2021* (the day before the D&DE issued), the ADPH labeled Jefferson County as presenting a “low risk” of COVID-19 spread, in large measure because the county had declining cases over a 14-day timeframe:



See Alabama’s COVID-19 Risk Indicator Dashboard, ADPH (“Our main indicator for limiting the risk of COVID-19 spread in the community is the number of days a county has a downward trend of new cases each day. Whether the case counts are increasing or decreasing influences a county’s level (e.g., low risk). . . . If a county is in a downward trajectory of 14 or more days (or has a rate of 10 or less over the previous 2 weeks), they will begin in the Low Risk (green)

category.”), <https://arcg.is/0brSGj> (“Risk Indicator” menu) (last visited Jan. 21, 2021).<sup>14</sup>

The Johns Hopkins University website that the Acting Regional Director cited confirms that the 14-day trend was decreasing when she actually issued the D&DE on January 15. On January 11 and the days that followed, new case numbers remained below the average seen during the post-holiday 14-day period between December 29 and January 10.<sup>15</sup>

Only by inexplicably limiting her calculation to that older period was the Acting Regional Director able to find a slightly increasing 14-day infection trend in Jefferson County. The decision to hold a mail-ballot election rather than a manual election should not rest on the arbitrary selection of an outdated 14-day snapshot.

The Board should take this opportunity to reverse the error and provide additional guidance on how Regional Directors should calculate the 14-day trend and weigh statistics like these. An objective consideration of the best available data here did not justify overriding the strong presumption in favor of a manual election.

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<sup>14</sup> The ADPH COVID-19 Vaccine Distribution Dashboard also gives reason to hope that Jefferson County and the State of Alabama have already seen the worst of the pandemic. *See* Alabama’s COVID-19 Vaccine Distribution Dashboard, ADPH, <https://arcg.is/0brSGj> (“Vaccine Distribution” menu) (last visited Jan. 21, 2021). Alabama has administered more than 180,000 doses of the COVID-19 vaccine, and the number of doses administered has increased every week since December.

<sup>15</sup> Between December 28 and January 10 (the Acting Regional Director’s chosen timeframe), the average daily number of new cases in Jefferson County was approximately 661. *See* D&DE at 6. New case numbers after January 10 were all lower: 352 new cases on January 11, 619 new cases on January 12, 402 new cases on January 13, and 573 new cases on January 14. *See* COVID-19 Status Report (Jefferson Alabama), Johns Hopkins University, <https://bao.arcgis.com/covid-19/jhu/county/01073.html> (last visited Jan. 16, 2021). These lower numbers helped lower the 14-day trends leading up to January 15.

3. *Aspirus* Condition 5 Contains No Definition of “Outbreak” and Allowed the Regional Director to Eliminate the Presumption Favoring Manual Elections.

- a. *The Acting Regional Director Had No Evidentiary Basis to Conclude, Under Aspirus Condition 5, That Amazon’s BHM1 Fulfillment Center Is Experiencing an “Outbreak.”*

There are also compelling reasons for the Board to clarify *Aspirus* Condition 5, under which Regional Directors have discretion to direct a mail-ballot election in the event of a COVID-19 “outbreak” at the facility. *See Aspirus*, 370 NLRB No. 45, slip op. at 7. As the Acting Regional Director recognized, the Board did not define “outbreak,” and there is no generally accepted medical definition. D&DE at 5; *see also* Gupta Cert. ¶ 24 (explaining that there is no general definition of “outbreak”). The absence of any parameters in *Aspirus* allows Regional Directors to decide that a facility is experiencing an outbreak based on whatever they want to consider.

This case well illustrates the need for clarification. The Acting Regional Director ostensibly found that BHM1 is experiencing an “outbreak” because 40 positive tests out of more than 6,000 employees was an “outbreak.”<sup>16</sup> The Acting Regional Director observed that “any presence of COVID-19 in an employer’s facility has been cited as a factor in favor of conducting a mail ballot election in multiple Directions of Election,” and she opted to “do so here.” D&DE at 5 (emphasis added). Notably, Amazon had provided updated figures as part of its post-hearing brief on January 7, the percentage of affected individuals was only 2.88%—218 individuals out of a BHM1 total site population of more than 7,500 tested positive, self-reported confirmed positive results, and presumptive positive numbers within 14 days of Amazon’s post-hearing

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<sup>16</sup> The Acting Regional Director actually cited Amazon’s earlier certification, submitted on December 28, 2020, that just 40 individuals had tested positive in the 14 days prior to that date. Thus, the Acting Regional Director actually found that *40 cases out of more 7,500 on-site individuals constituted an outbreak.*

brief. Although the Regional Director ignored these updated figures, Amazon submits that 2.88% of the total population is not an outbreak, either. Regardless, “any presence of COVID-19” cannot be an “outbreak” under any reasonable definition of the term and is erroneous. If an outbreak occurs whenever one or more employees test positive, Regional Directors will have free rein to order mail-ballot elections until COVID-19 is completely eliminated from the United States. That cannot be the law.

- b. *The Board Should Adopt a Workable Standard That Promotes Manual Elections or, Alternatively, Mixed Manual-Mail Elections, Rather Than the Prolonged Use of Mail-Ballot Elections.*

Rather than green-lighting mail-ballot elections for the duration of the pandemic, the Board should clarify what constitutes an “outbreak” for purposes of Condition 5. This is an especially good case for that clarification because the size of the BHM1 facility shows the imprudence of a standard that relies on raw numbers, rather than percentages. 218 cases might be an outbreak in a workplace of 750, but not a workplace of more than 7,500 total individuals.

Extrapolating from the Board’s discussion of positivity rates in *Aspirus*, Amazon submits that where, as here, intra-facility rates are lower than county-level rates, the Board should consider setting a minimum, percentage-based standard for declaring an “outbreak”—perhaps 5% or more of the total combined unique population of a facility being infected (as measured over 14 days). By comparing the number of positive (and presumptive positive) individuals to the total number of individuals who have been in the facility over a two-week span, this standard would align with the preferred approach of Johns Hopkins University in calculating testing positivity rates (“Approach 4”). As explained by Johns Hopkins, the preferred Approach 4 positivity rate calculates the number of cases over all results: “the number of people who test positive . . . divided by either unique people, encounters, or tests (depending on availability

. . .).” *Id.* This “people-centered” testing methodology is readily calculable and allows for meaningful comparisons based on statistics that all states currently report.

Fortunately, American workers are increasingly becoming immune to COVID-19 through vaccination and natural immunity. But it will take many months, and perhaps years, until there is literally *no* presence of COVID-19 in any given workplace. Until then, having a clear definition of “outbreak” for purposes of Condition 5 grows ever more important. The Board should provide that guidance now should the “outbreak” exception to manual elections remain in effect.

4. *Aspirus* Condition 4 Risks Discouraging Employers From Proposing Robust Safety Protocols, Despite the Board’s Goal of Promoting Safe Manual Elections.

In directing a mail-ballot election, the Acting Regional Director briefly cited (but summarily dispensed with) Amazon’s proposed manual election safety protocols even though the undisputed evidence showed they would make the election safe—i.e., zero or approaching zero marginal risk in increased spread. *See* D&DE at 3, 9. As noted above, two epidemiology experts in the COVID-19 field stated that the risk inside the election zone would be “minimal,” “negligible,” “minimized,” or “minimized fully.” Gupta Cert. ¶¶ 12, 15, 18; Lipkin Cert. ¶ 9. Neither expert had any other suggestions for enhancing safety further. *See* Lipkin Cert. ¶ 9. Nor did the Union’s own medical expert.

Yet the Acting Regional Director counterintuitively and wrongly used this evidence as a further ground to reject a manual election. She worried that, “in practice, utilization of the Employer’s extensive resources would tend to give the appearance to voters that the Region is accepting benefits from the Employer and is no longer a neutral party,” as well as “give the impression of surveillance or tracking.” D&DE at 9. She also was troubled by “use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines.”

*Id.* Cognizant of this potential concern, Amazon made clear in its post-hearing brief that the proposed protocols were not intended to suggest that any party but the Board was in control of the election process. E. Brief at 18 n.10. Amazon also noted that all of its proposed protocols were being presented with the assumption “that the Board will supply and utilize enough Board banner, signage, insignia, etc. to ensure all attendees will understand that this is a Board election and not an Amazon event.” *Id.* Amazon further stated that it “remain[ed] open to any amendments or additions to the proposed protocols that the Board deems necessary.” *Id.*; *cf.* *Aspirus*, 370 NLRB No. 45, slip op. at 7 n.33 (“If, notwithstanding the employer’s stated willingness to abide by all protocols, the Regional Director deems the employer’s initial submission to be lacking in sufficient specificity, the Regional Director should offer the employer an opportunity to promptly cure any such defects.”). The Acting Regional Director simply ignored all of this. This was another error.

The Board should take this opportunity to clarify the boundaries of permissible employer support for making manual elections safe. While *Aspirus* warned that Regional Directors must “be careful not to approve manual election arrangements . . . that would create the impression that any party controls employee access to the Board’s election processes,” *see* 370 NLRB No. 45, slip op. at 7, the Board did not provide Regional Directors any guidance for deciding when employer-proposed protocols create such an impression or how to mitigate or eliminate such concerns. It is thus unclear what a party can do beyond implementing the minimum suggested protocols defined in GC Memo 20-10—which apparently are inadequate because Regional Directors almost always reject them—to facilitate a safe manual election.

5. *Aspirus* Does Not Explain How Regional Directors Are Supposed to Assess the *Aspirus* Conditions if Parties Are Precluded From Introducing Relevant Evidence.

The Board should clarify *Aspirus*'s statement that hearing officers "shall not permit litigation" on the question of whether an election should be conducted manually or by mail ballot, as related to 29 C.F.R. § 102.66(g). *See Aspirus*, 370 NLRB No. 45, slip op. at 1, 1 n.3, 6 n.27. It is not feasible, and indeed violates due process, for the Board to create a fact-intensive framework, but then have Regional Directors bar a party from presenting evidence *at a hearing* to make its case in relation to that framework. This is especially true as it pertains to *Aspirus* Condition 2, which invites parties to present alternative data to the Regional Director and which depends "on the specific facts of each case." *See id.* at 6.

The Acting Regional Director here acknowledged that she "did not permit the Employer to present evidence in support of its position regarding the election type at the hearing," though allowed Amazon to submit an offer of proof (which it did on December 28). D&DE at 2. However, the Acting Regional Director entirely discounted the facts presented in the Offer of Proof related to safety, risk reduction, and thus the ultimate Condition 2 question of whether the facility was the "best available geographic statistical measure." To prevent the introduction of relevant factual evidence, but later make factual determinations and decisions on the very same issues, is illogical. And it offends due process to disallow a party's otherwise undisputed evidence relating to safety issues so that the factfinder can conveniently disregard that evidence. If the Board would like the parties to provide input and evidence about the election format and what constitutes the "best available geographic statistical measure," under a multi-factor test that considers *factual* information regarding the (a) severity of the outbreak and (b) efficiency of manual election safety matters to reduce or eliminate virus spread, then it should allow such

evidentiary submissions at a pre-election hearing. The Board’s current approach is unworkable, preventing the very evidence needed to apply the *Aspirus* framework.

**C. The Board Should Reconsider the *Aspirus* Framework Given Its Misalignment With the Evolving Nature of the Pandemic and Inability to Balance Numerous Competing Statutory Objectives.**

1. The *Aspirus* Framework Does Not Reflect the Most Recent Scientific Approach to Balancing Safety and a Well-Functioning Society During the Pandemic.

The Board decided *Aspirus* in November 2020—at the height of predictions that the pandemic would be at its worst in the wake of Thanksgiving and the holiday season.<sup>17</sup> The Board did not suggest that its decision was intended to be non-responsive to real world developments—such as vaccine distribution and anticipated case reductions—or scientifically supported protocols to provide a safe polling place for voters, Board agents, and observers. More than two months have passed since the Board issued *Aspirus*, and it has become clear that the Board should adjust its framework to keep up with changing circumstances. It also fails to address whether manual elections that present zero or near zero risk of a material increase in virus spread should proceed regardless of whether some form of Condition 2 or Condition 5 exists.

That should concern the Board, because the ostensible goal of *Aspirus* Condition 2 is to assess “the severity of the outbreak in the specific locality where the election will be conducted.” *Id.* at 5. The Board identified two categories of statistics—the 14-day trend and the positivity rate—as relevant to assessing the severity of the outbreak. But the Board notably conceded that both categories only “suggest” unacceptable local rates. *Id.*<sup>18</sup>

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<sup>17</sup> Notably, the Union apparently was not fazed when it filed the Petition and proposed—nine days after the Board issued *Aspirus*—that the election be conducted manually.

<sup>18</sup> And, again, local rates raise no direct concern if manual election protocols greatly reduce the risk of transmission as compared to almost all other forms of in-person activity.

These two metrics are ill suited for assessing the actual “severity of the outbreak.” Positivity rates are reliable only if the overall testing group is large *and* has not already self-selected as “sick.” *See, e.g.*, Johns Hopkins Coronavirus Resource Center (a site the Board refers to in GC 21-01) (“It is important to note that test positivity is a measure of testing capacity and while it can provide important context about case totals and trends, it is NOT a measure of how prevalent the virus is in communities. **Policy decisions, like openings and closings or interstate travel, should not be determined based on test positivity alone.**”), <https://coronavirus.jhu.edu/testing/differences-in-positivity-rates> (last visited Jan. 15, 2021). And (as this very case shows) a relatively stable level of infection may trend marginally upward or downward over a particular 14-day span without providing meaningful information about conditions in the area. More importantly, whether the *surrounding* area is seeing increased infections over a 14-day period or at least 5 out of 100 positive test results says nothing about whether *the election site* itself will lead to more virus spread. The Board’s one-size-fits-all, national standard also discounts state and local pandemic management decisions regarding how many residents to test and risk assessment. Here, for example, Alabama has deemed Jefferson County a locality with decreasing infections, sufficient testing, decreasing positivity rates, and overall “low risk” compared to other jurisdictions. *See* Alabama’s COVID-19 Risk Indicator Dashboard, ADPH, *supra*. And as to minimizing or eliminating virus spread at election sites, *Aspirus* at best addresses the latter through Condition 4, which, as at least the Acting Regional Director in this case interpreted it, seems to penalize employers for suggesting protocols to eliminate risk at the election site.

The time is now to set new or clarified standards, which the Board already has signaled a willingness to consider. *See Promowest Prods., Inc.*, Case 09-RC-261089 (Nov. 25, 2020) (“The

Board is open to addressing the normal criteria for mail balloting in a future appropriate proceeding.”). Such standards would ensure the Board’s framework is aligned with the projections for 2021 on COVID-19, including ongoing vaccine distribution, and the most current scientific data on how the virus spreads. All the objective evidence *shows that the virus does not spread* through in-person events that observe rigid protocols like those in GC Memo 20-10 and those proposed by Amazon.<sup>19</sup>

2. The Board Must Promote Increased Voter Participation, and the Board’s Own Analysis of the Relevant Data Confirms That Mail-Ballot Elections Do the Opposite.

The Board also should reevaluate *Aspirus* because, as currently applied, the decision severely undermines the Act’s goal of maximizing voter participation in an election. *See In re Baker Victory Servs., Inc.*, 331 NLRB 1068, 1070 (2000) (referencing “the Board’s goal of ensuring maximum voter participation”); *Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that elections are to be scheduled “at times and places, including whatever special provisions appear to be appropriate, that will best [e]nsure maximum participation in light of what is known at the time the procedures are set up”); *see also* Memorandum GC 20-07, Guidance Memorandum on Representation Case Procedure Changes, at 6 n.10 (June 1, 2020) (“Elections scheduled pursuant to election agreements will continue to be scheduled for the earliest date practicable following the approval of the agreement, taking into account employee participation.

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<sup>19</sup> Even assuming that there is some marginal increase in virus spread, with sufficient airflow (including outdoor spaces), social distancing of six-plus feet, masks, no touching of common surfaces, and potentially temperature checks and further screening mechanisms, a Board election under this scheme is perhaps one of the safest or the safest in-person activities possible, especially as compared to all of the in-person and/or discretionary activities allowed in much of the United States at present, including shopping, indoor dining, indoor exercise, and other similar activities regularly engaged in by the public.

Thus, the dates selected for the election should be those that enhance the opportunity for employees to vote.”).

The Board recognized in *Aspirus* that manual elections are vastly superior to mail-ballot elections in this regard. Manual elections, among other things, “promote greater participation in the election process” and “serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so.” *Aspirus*, 370 NLRB No. 45, slip op. at 1–2. After surveying more than 1,000 Board-conducted elections since October 1, 2019, the Board concluded that voter participation rates in mail-ballot elections were, on average, 20% to 30% lower than in manual elections:

Internal Board statistics reflect that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent.

*Id.* at 2. As the Board observed, while “the mail-ballot participation rate has increased during the [COVID]-19 pandemic . . . [it] continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since).” *Id.*<sup>20</sup>

Issues with voter turnout in mail-ballot elections are well established, and previous elections have had such low turnout that federal courts and the Board have had to overturn them.

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<sup>20</sup> This trend of lower voter turnout in mail-ballot elections has continued. Based on data (as of January 15, 2021) from the Board’s website and 170 total elections since *Aspirus* for which there was information available regarding voter turnout and the method election, it appears turnout in Board elections is *decreasing*. The average turnout rate for 164 Board mail-ballot elections held post-*Aspirus* is just 68.47%, well below the 86.8% average turnout rate for the 6 manual elections held during the same period. See Recent Election Results, NLRB, <https://www.nlr.gov/reports/graphs-data/recent-election-results> (last visited Jan. 16, 2021) (information regarding voter turnout was collected by downloading the available CSV file, and information regarding the method of election was obtained by reviewing relevant filings on the public dockets).

*See, e.g., Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 675 (D.C. Cir. 1996) (“[T]he Board’s reversal of the Regional Director’s discretionary decision to conduct a manual election cannot be upheld. Had the Board left the decision intact . . . voter turnout might well have been higher. . . . It could hardly have been lower.”); *see id.* at 673 (noting that only 77 out of 438 eligible employees—or 17.5%—cast ballots during two-week mail-ballot election); *see also Int’l Total Servs.*, 272 NLRB 201, 201 (1984) (setting aside mail-ballot election where only 19% of eligible voters returned their ballots and 23% of eligible voters never received their ballots and urging the Regional Director and the parties “to work together to explore alternative election procedures in order to ensure that all eligible voters have an opportunity to vote and to maximize the probability of a representative vote”).

Indeed, the Board and the courts have long recognized the importance of balancing “the objective of [e]nsuring maximum employee participation in the election of a bargaining agent against the goal of permitting employees to be represented as quickly as possible.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 48 (1987); *see also Clement-Blythe Cos.*, 182 NLRB 502, 502 (1970) (“The Board must often balance what are sometimes conflicting *desiderata*, . . . [ensuring] maximum employee participation in the selection of a bargaining agent, and permitting employees who wish to be represented as immediate representation as possible.”).

Yet the Acting Regional Director failed to balance these statutory objectives and—perhaps taking her cue from *Aspirus* itself—simply punted on her order’s all-but-certain dramatic depression of voter turnout. D&DE at 9 (stating that any party “is, of course, free to present evidence of any actual disenfranchisement of voters in post-election objections”). As a result, at least without the Board’s intervention, it is likely that between 1,100 and 1,700 more employees

will not cast votes or do so incorrectly as compared to the number in a manual election.<sup>21</sup> The Acting Regional Director’s focus on “enfranchising” those who cannot vote “for health reasons” or “due to positive COVID tests” places the votes of, based on averages, *several dozen* employees over those of *several thousand* employees. This outcome is unacceptable to Amazon and should be to the Board as well. It would be much easier, and desirable, to adopt a system (as many state governments have) that promotes *greater overall voting* and, if necessary, a special alternative mechanism for the smaller group of voters restricted due to health or other reasons like a mixed manual-mail election (which Amazon proposed to Region 10 in its post-hearing brief, in the alternative). E. Brief at 66–67.

3. The Board Must Process Election Petitions Timely and Efficiently, and Mail-Ballot Elections Routinely Result in Unnecessary Delays and Disputes.

The *Aspirus* standard has and will continue to lead to unnecessarily long election cases, especially in larger units. Here, the Petition was filed on November 20, 2020, but the Acting Regional Director’s decision does not even set a virtual ballot count date *until March 30, 2021*—a count process that will take a significant amount of manpower and time *before* turning to potential post-count disputes and litigation that will take even longer to resolve. Such issues and delay would disappear with a manual election conducted by February.

The Act requires the Board to adopt election procedures that ensure that employees’ votes are “recorded accurately, efficiently and speedily.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324,

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<sup>21</sup> Turnout may be even worse. *Aspirus* recounts that voter participation for mail-ballot elections pre-COVID was only 55% on average. 370 NLRB No. 45, slip op. at 2 (analyzing October 2019 to March 2020 statistics). Thus, if there were a mail-ballot election at BHM1 with voter turnout returning to those levels, which could easily (and, in fact, is likely to) happen given a gradual “return to normal” as the holiday season is over and vaccines are distributed, *Aspirus* signals that there would be a turnout rate of *only 55%* at BHM1. This would amount to *more than 2,600 employees (45% of potential voters) whose votes—and voices—will not be counted.*

331 (1946); *see also* Representation—Case Procedures, Final Rule, 79 Fed. Reg. 74,308, 74,400 (Dec. 15, 2014) (“2014 Final Rule”) (referring to the Board’s “goal of expeditiously resolving questions of representation” and “interest in certainty and finality of election results”). Mail-ballot elections fall short:

- **Mail-ballot elections almost always take longer to conduct than manual elections.** That risk is especially pronounced in this case, where the Board will have to manage the process of mailing more than 5,800 ballots, with the necessary follow-up work associated with re-mailing to new addresses and providing duplicate or replacement ballots. Moreover, in contrast to mail-ballot elections, where the voting period alone extends over several weeks (here, the voting period will extend for nearly two months), manual elections typically take place on a single day or, at most, a few days. *See NLRB Casehandling Manual, Part 2, Representation Proceedings* (Sept. 2020) § 11336.2(d) (deadline for returning mail ballots should usually be two weeks from the date of mailing to the date of return); *id.* § 11302.1 (manual elections should be scheduled “on the earliest date practicable” and “may stretch over several days, where necessary”); *see also* Eli Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Meetings*, *Washington Post* (Sept. 11, 2020) (counting mail ballots added three weeks to election process for unit of only 89 employees), <https://www.washingtonpost.com/business/2020/09/10/unions-zoom-pandemic>. The additional requirements and complexities associated with mail ballots also extend the length of the ballot count process because each envelope and signature has to be examined—which, as discussed below, can give rise to additional issues and delays—before the ballots can even be extracted and counted.
- **Mail-ballot elections, by design, increase the potential for post-election disputes and conflict with the Board’s goals of accuracy and efficiency.** *See* Representation—Case Procedures, Final Rule, 84 Fed. Reg. 69,524, 69,529 & n.20 (Dec. 18, 2019) (stating that “certainty and finality must wait until the conclusion of post-election litigation” and the “pendency” of election disputes that “could linger on after the election for weeks, months, or even years before being resolved” is “a barrier to reaching certainty and finality of election results”); *A.J. Tower*, 329 U.S. at 332 (affirming election policy adopted by the Board because the policy gave “a desirable and necessary finality to elections”); *see also* *AFL-CIO v. NLRB*, 471 F. Supp. 3d 228, 242 (D.D.C. 2020) (generally agreeing with the Board’s reasoning that the pendency of post-election disputes is a detriment to “finality in terms of definitiveness” of election results).
- **Mail-ballot elections increase the risk of delay due to elevated and prolonged opportunities for coercion and other interference with the voting process.** The lack of direct Board supervision over the mail-ballot voting process increases opportunities for improper coercion and interference. *See Mission Indus.*, 283

NLRB 1027, 1027 (1987) (“[M]ail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees’ voting.” (citing *Brink’s Armored Car*, 278 NLRB 141, 141 (1986)); *Thompson Roofing, Inc.*, 291 NLRB 743, 743 n.1 (1988) (same); *Wilson & Co., Inc.*, 37 NLRB 944, 944 (1941) (mail balloting “has frequently raised material and substantial issues relating to the conduct of the ballot and the election”); see also *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 797–98 (3d Cir. 1999) (discussing absentee mail-ballot procedures in NLRB elections and noting that they “would add an additional layer of bureaucracy and complexity which, if not handled properly, could compromise the fair election process”). The risk of coercion or interference is especially problematic here, given the size of the BHM1 unit, the length of the mail-ballot voting period, and the serious concerns around how the Union obtained a sufficient showing of interest with validated signatures. The NLRB procedures lack many of the safeguards that state elections have.

- **Mail ballots may be—and frequently are—lost or delayed, causing a prolonged election process.** This has occurred in numerous NLRB election matters already. While one can anticipate the widely reported backlog and/or delays to improve in 2021, mail delivery is not perfect and even a marginal failure rate in a unit of more than 5,800 employees could disenfranchise dozens or hundreds of voters. The NLRB does not have the resources that state election officials have to process ballots.
- **Mail-ballot elections impose additional procedural instructions that are more numerous and complex than in manual elections and, at the same time, there is no Board agent immediately available to assist with questions.** Such complexities include, for example, disputes arising from technical issues with virtual vote count procedures, disputes arising from incomplete or incorrect ballot or voting information, disputes about the existence and validity of voter signatures and compliance with voting instructions, and concerns about disenfranchising voters who experience confusion within the mail-ballot instructions and process. See Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Meetings*, *supra* (union organizer describing recent mail-ballot election where ballots had to be sent out to multiple addresses for workers who had moved during the pandemic—the addresses their employer had on file, plus their new addresses—and noting that if two ballots had been returned for a person, the completed ballots would have been contested). Amazon is especially concerned given the demographics of the proposed unit skew towards a younger population less reliant on receiving and/or responding to physical mail. Again, this is different from a state election, where voters can go to vote in person and obtain immediate guidance from election officials.

The attached Appendix (“Exhibit B”) includes additional examples of how these issues have arisen in recent mail-ballot elections, which should be helpful to the Board as it deliberates this Request for Review.

4. The Board Must Promote Balanced Free Speech Rights Under the Act, and Current Law Restricts Employer Free Speech During Mail-Ballot Elections.

*Aspirus* also requires reconsideration because, by effectively making mail-ballot elections the norm, the Board exacerbated wrongful restrictions on employers’ free speech rights and ability to communicate with their employees during lengthy mail-ballot periods. The Acting Regional Director’s dismissive and minimal consideration of those rights signals that the Board must weigh in on this important issue. *See* D&DE at 9.

The Supreme Court has recognized “that an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008) (noting the Supreme Court’s recognition of “the First Amendment right of employers to engage in noncoercive speech about unionization” (citing *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941) and *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945))). Likewise, the Board has held that, “while [Section] 8(c) [of the Act] is not by its terms applicable to representation cases, ‘the strictures of the [First Amendment], to be sure, must be considered in all cases.’” *Allegheny Ludlum Corp.*, 333 NLRB 734, 737 n.20 (2001) (citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 n.11 (1962)).<sup>22</sup>

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<sup>22</sup> Section 8(c) provides as follows: “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c).

Despite these well-established principles, the Board in 2016 changed over 50 years of precedent by prohibiting employers and unions, in mail-ballot elections, from conducting “captive audience” meetings with employees within 24 hours of when the ballots are to be mailed by the Regional Office. *Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 2–4 (2016) (purporting to align the prohibition on captive audience speeches in mail-ballot elections with that established for manual elections in *Peerless Plywood*); *see also Peerless Plywood*, 107 NLRB 427, 429 (1953) (prohibiting parties from holding mass captive-audience speeches within 24 hours of the start of a manual election). Previously, under *Oregon Washington Telephone Company*, parties could continue with captive audience meetings until “the time and date on which the ‘mail in’ ballots [were] scheduled to be dispatched by the Regional Office[.]” 123 NLRB 339, 341 (1959).

The massive size of the unit, the timing of the petition (filed during Amazon’s busiest season), and the safety protocols that Amazon has implemented in response to the COVID-19 pandemic means that Amazon has had only a limited opportunity to date to communicate with its employees “in person” about the potential election. Now, because of the Board’s decision *Guardsmark*, Amazon has just two weeks—until 24 hours before the ballots are mailed—to hold

certain employee meetings with its exceptionally large workforce.<sup>23</sup> *See also San Diego Gas & Elec.*, 325 NLRB 1143, 1151–52 (1998) (Hurtgen & Brame, dissenting) (noting “that a mail ballot does not simply change the method of voting; rather, by extending the *Peerless Plywood* period, a mail ballot imposes a significant limitation on one party’s acknowledgeably [sic] effective means of communicating with the employees”); *see also Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 7 n.18 (Miscimarra, dissenting) (observing that, “in a mail-ballot election, captive-audience-speech prohibition . . . continues for considerably longer than the 24-hour prohibition period in advance of a manual election under *Peerless Plywood*”).

Member Miscimarra’s dissent is particularly poignant here, where the bargaining unit consists of more than 5,800 employees—well above an average Board-conducted election. 2014 Final Rule, 79 Fed. Reg. at 74,322 (“Most elections involve a small number of employees. . . . [T]hree-quarters of all Board elections have 60 or fewer employees in the unit.”). This case does not fall into the category of “most elections.” The more than 5,800 potential voters here represent *nearly 100 times* the average number of eligible voters in RC elections during the 2020 fiscal year. *See Election Report for Cases Closed (10/01/2019 to 09/30/2020)*, NLRB, <https://www.nlr.gov/sites/default/files/attachments/pages/node-3617/total-closed-cases-fy->

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<sup>23</sup> As the Acting Regional Director noted in the D&DE, and consistent with the robust safety protocols that Amazon has implemented to keep its employees safe, Amazon has severely limited holding in-person group stand-up meetings. *See* D&DE at 9. However, *Guardsmark* also restricts Amazon’s ability to hold *remote* captive audience meetings—for example, through video calls or other digital mediums. Moreover, and as a general matter, these limitations undermine the Board’s traditional justification for allowing unions to visit employees at their homes—i.e., because “[u]nlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers,” *see Plant City Welding & Tank Co.*, 119 NLRB 131, 133–34 (1957), *rev’d on other grounds*, 133 NLRB 1092 (1961). The fact that Amazon now has a much more limited opportunity to address employees in assembled or informal groups further tilts the free-speech playing field in the Union’s direction.

[2020-pdf.pdf](#) (indicating that 51,127 employees were eligible to vote in 827 RC elections, an average of 61.82 eligible voters per election).<sup>24</sup> Consequently, it will take significantly more time than it would take in an average election to engage employees and ensure that they make an informed choice as to whether they want union representation. *See* 2014 Final Rule, 79 Fed. Reg. at 74,438 (Miscimarra & Johnson, dissenting) (“Employers and unions have protected rights to engage in protected speech prior to an election. This right only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation.”). This curtailment of Amazon’s free speech rights under the current Board standards, and an almost two-month long voting period after Region 10 releases mail ballots, presents yet another reason to reevaluate the Acting Regional Director’s ruling.

**D. The Board Has Compelling Reasons to Adopt New Minimum Standards for Mail-Ballot Elections to Protect Voters and the Election Process.**

Finally, even if the Board Members decline to grant review for any or all of the above reasons, the Board should acknowledge that mail ballots will remain the norm for almost all elections for the indefinite future and adopt enhanced protocols for such elections. The Board has relatively limited experience with mail-ballot-only elections (let alone elections of this size), and *Aspirus* still leaves a substantial gap in the law, leading to yet another error by the Acting Regional Director when she rejected the numerous efficiencies and protections Amazon proposed. *Aspirus* discusses at length the superiority of manual elections directed by the Board, including in relation to turnout, *but gives no guidance or suggestions to Regional Directors*

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<sup>24</sup> Moreover, the Board’s website indicates that since the start of the pandemic in early 2020, only six mail-ballot elections were conducted in units involving more than 1,000 eligible voters; none of those cases involved more than 2,000 voters. Thus, this voting unit would be, by far, the largest voting unit to participate in a Board election since the beginning of the COVID-19 pandemic.

*about COVID-19 mail-ballot standards that can help avoid the problems of a typical mail-ballot election held by the NLRB.*

Again, the Acting Regional Director erred by declining to accept *any* of Amazon’s proposed safeguards to protect voters, reduce disputes, and increase voter turnout, despite the widespread mail-ballot election issues discussed above and the Board’s recognition that “mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections.”<sup>25</sup> *Thompson Roofing*, 291 NLRB at 743 n.1; *see also Brink’s Armored Car*, 278 NLRB at 141 (“The danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations than in manual elections.”). The Acting Regional Director *did not even acknowledge* those legitimate concerns, even though one could plausibly believe that fraud already has occurred in this case, given the circumstances surrounding the showing of interest, and that if left unchecked more fraud will occur.<sup>26</sup> The

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<sup>25</sup> For example, Amazon made several proposals aimed at ensuring that *all employee-voters* receive their ballots and have maximum opportunity to return their ballots. These proposals included sending out an official NLRB notice via Amazon’s electronic communication platform, AtoZ; requesting that all associates update their mailing addresses by a certain date; having the NLRB place a mail-ballot drop box at BHM1; and scheduling automatic extensions to the due date for the submission of ballots based on the percentage of votes received. *See E. Brief* at 64–66.

<sup>26</sup> Instead of compiling signed authorization cards, the Union gathered electronic “signatures” through an electronic authorization card platform that did not require individual authentication—meaning there was no way to ensure that each “signature” came from one associate. The Union’s website also allowed persons to submit cards without all of the information required per GC Memo 15-08 and, when Amazon requested that the Acting Regional Director check the cards against those specific requirements, Amazon received a cursory response that the Region was satisfied with the cards and without any description of the process used to verify the cards. Further, when it became apparent that the bargaining unit total was not 1,500 associates but approximately 5,600 associates, the Union then supposedly garnered a sufficient showing of interest—likely through this electronic platform—for a unit nearly *four times the size of the petitioned-for unit*, in the span of less than two weeks. Under these circumstances, it cannot be said that concerns regarding potential fraud in this Board election matter are irrational and, in fact, Amazon submits that those concerns are legitimate in the context of how this matter has evolved and how it should be concluded.

Acting Regional Director also inexplicably had no interest in Amazon’s suggestion of a prospective schedule extending deadlines until a certain level of turnout had been reached, even after *Aspirus* illustrated the Board’s intense concern over increasing turnout.<sup>27</sup>

The Board recently signaled its concern with possible fraudulent or coercive conduct in NLRB mail-ballot elections when it granted review in *Professional Transportation, Inc.*, Case 32-RC-259368 (Dec. 2, 2020) (not reported in Board volumes) on the issue of mail-ballot solicitation. There, the employer’s request for review protested the Regional Director’s failure to find objectionable solicitation despite allegations that the union had repeatedly called, left voicemail messages for, or sent text messages to employees asking if they had voted and if they needed help completing their ballots. In granting review, the Board stated its intent to revisit current Board policy concerning mail-ballot solicitation.

Here, Amazon explained in its post-hearing brief that the Acting Regional Director, if inclined to order a mail-ballot election, must respond to the greater potential for administrative inefficiencies and potential party fraud and coercion that is characteristic of mail-ballot elections under current Board procedures. *See* E. Brief at 62–66. Amazon’s proposals sought to increase the likelihood that *all* voters received ballots and increase voter turnout. *See id.* These are goals that the Board should share, and the Acting Regional Director’s decision to proceed with “business as usual” without a single modification to the existing mail-ballot procedure despite the extraordinary size of this bargaining unit, and the other particular circumstances exposing the

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<sup>27</sup> Then-Member McFerran also acknowledged in *Aspirus* that there could be room for improvement here: “The significant increase in mail-ballot participation rates during the pandemic versus pre-pandemic suggests that there may be room to improve employee participation in mail ballot elections as they become normalized and the Board gains more experience administering mail ballot elections.” 370 NLRB No. 45, slip op. at 10 n.3 (McFerran, concurring). Now would be an excellent time to announce new standards, whichever way the law goes.

need for additional protections for voters and the process, further warrants review. It is no answer, as the Acting Regional Director dismissively wrote, that the number of voters affected is irrelevant, because this election is the largest “only until, inevitably, a petition is filed covering a still greater group of employees.” D&DE at 9. The Acting Regional Director dodged the entire point of the election determination: what election process best enables employees *in this election* to have their votes “recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. That question ultimately is the Board’s charge. Under the Act, discretion afforded by the Board to Regional Directors “must be exercised within guidelines and parameters established by the Board, which include its preference for manual elections.” *Aspirus*, 370 NLRB No. 45, slip op. at 1.

#### IV. CONCLUSION

For these reasons, Amazon respectfully requests that the Board grant its Request for Review of the Acting Regional Director’s Decision and Direction of Election.

Dated: January 21, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election was filed today, January 21, 2021, using the NLRB's E-Filing system and was served by email upon the following:

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# **EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**AMAZON.COM SERVICES LLC<sup>1</sup>**

**Employer**

**and**

**Case 10-RC-269250**

**RETAIL, WHOLESALE AND DEPARTMENT  
STORE UNION**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION<sup>2</sup>**

Amazon.com Services LLC (the Employer) is an Internet-based business that sells books, music, housewares, electronics, and other goods. On November 20, 2020, Retail, Wholesale and Department Store Union (the Petitioner) filed a petition seeking to represent approximately 1,500 fulfillment center employees at the Employer's facility in Bessemer, Alabama. The Employer took the position that the unit should, instead, include approximately 6,000 employees. The Petitioner has agreed to proceed to an election in the larger unit. The parties stipulate, and I find, that this unit is appropriate:

All hourly full-time and regular part-time fulfillment associates, seasonal fulfillment associates, lead fulfillment associates, process assistants, learning coordinators, learning trainers, amnesty trainers, PIT trainers, AR quarterbacks, interior handlers, hazardous waste coordinators, sortation associates, WHS specialists, onsite medical representatives, data analysts, dock clerks, transportation associates, interim transportation associates, transportation operations management support specialists, field transportation leads, seasonal learning trainers, seasonal safety coordinators, seasonal process assistants, and warehouse associates (temporary) employed by the Employer at its Bessemer, AL facility; excluding all truck drivers, office clerical employees, professional employees, managerial employees, engineering employees, maintenance employees, robotics employees, information technology employees, loss prevention specialists, guards, and supervisors as defined by the Act.

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<sup>1</sup> I have corrected the Employer's name to conform with the parties' stipulation in Board Exhibit 2.

<sup>2</sup> The Petitioner filed this petition under Section 9(c) of the Act. I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I make the following preliminary findings: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is an employer engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

The parties have further stipulated that the appropriate standard for determining eligibility should be the *Davison-Paxon* formula.<sup>3</sup> Therefore, eligible to vote are all employees in the unit who have worked an average of four hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

A hearing officer of the National Labor Relations Board conducted the hearing in this matter via videoconference on December 18, 21, and 22, 2020.<sup>4</sup> When the hearing closed, the only matter remaining in contention was whether to conduct a manual (in-person) or mail ballot election. The Petitioner takes the position that a mail ballot election is warranted during the present COVID-19 pandemic, while the Employer prefers a manual election.

It is well understood that election arrangements, including election type, are non-litigable matters,<sup>5</sup> and I did not permit the Employer to present evidence in support of its position regarding the election type at the hearing. Rather, I directed the Employer to make an offer of proof in writing by December 28, 2020. I permitted the Petitioner to submit any rebuttal evidence by December 31, 2020. Thereafter, the parties' post-hearing briefs were due on January 7, 2021. The offer of proof, rebuttal, and briefs were all timely filed.

Having considered the parties' positions and the entire record, and as explained below, I have directed a mail ballot election because this is the safest and most appropriate method of conducting an election in view of the extraordinary circumstances presented by the COVID-19 pandemic.

#### *The Employer's Business and Facility*

The Employer sells various goods through its website. The Employer's Bessemer, Alabama, facility, which is the sole facility at issue here, is a "Robotics Sortable Fulfillment Center." Employees at the facility receive, pick, pack, and ship "sortable" packages, which are defined as packages not exceeding 25 pounds. The first floor of the facility alone measures 855,000 square feet.<sup>6</sup>

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<sup>3</sup> *Davison-Paxon Co.*, 185 NLRB 21 (1970).

<sup>4</sup> See *Morrison Healthcare*, 369 NLRB No. 76 (2020). The ongoing global COVID-19 pandemic constitutes extraordinary circumstances necessitating the Region to conduct the hearing by videoconference technology.

<sup>5</sup> See Board's Rules and Regulations Sec. 102.66(g)(1). Likewise, it has been well-settled and established that a party in a representation case may not litigate the sufficiency, validity, or authenticity of the showing of interest at a hearing. *River City Elevator Co.*, 339 NLRB 616 (2003); *General Dynamics Corp.*, 175 NLRB 1035 (1969); *Allied Chemical Corp.*, 165 NLRB 235, fn. 2 (1967); *O.D. Jennings & Co.*, 68 NLRB 516 (1946). The determination of the sufficiency of the showing of interest is purely an administrative matter and not dispositive as to whether a question concerning representation exists. *Sheffield Corp.*, 108 NLRB 349, 350 (1954).

<sup>6</sup> Travis Maynard, the Director of Operations at the Employer's Bessemer facility, testified that that the first floor is the same size as 14 football fields. He further testified that the building is over 1000 feet long, and thus longer than the battleship USS ALABAMA, which measures only 680 feet.

As of January 7, 2021, the Employer employed nearly 6,200 hourly associates at the Bessemer facility. As an essential business, the Employer has continued to operate throughout the pandemic. Accordingly, the Employer has enhanced cleaning and sanitization; implemented daily temperature checks of all employees; provided personal protective equipment, including gloves and masks, to its employees; installed hand-sanitizing stations; erected protective barriers; implemented staggered shifts; and engaged in quarantining and contact tracing procedures. Additionally, the Employer has designated eleven employees per shift along with dedicated leadership, known as the social-distancing team, to promote social distancing and act as coaches throughout the facility. The Employer has also developed a tool known as the “Distance Assistant” which uses a television screen with a mounted camera to show and alert associates when they are not meeting social-distancing requirements.

As of December 28, 2020, the Employer certified that only forty (40) individuals fell into the category of “present in the facility within the preceding 14 days [who] have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days).”

When an employee is diagnosed with COVID-19, the Employer determines whether additional deep cleaning is necessary by evaluating where the diagnosed employee was in the building, for how long, how much time has passed since the employee was on-site, and with whom the employee interacted, among other factors. If an employ informs the Employer of the diagnosis while on-site, the site shuts down the associate’s workstation and any adjacent work areas for a deep cleaning.

#### *The Employer’s Proposal*

The Employer proposes the parking lot adjacent to the facility as the voting location. The Employer asserts that it can erect a tent equipped with heating and lighting to cover approximately 3,600 square feet. The size of the tent may be adjusted as needed or desired, and the sides may be raised and lowered to control the flow of fresh air. Voting would take place between 6:00 a.m. and 11:00 a.m. and between 1:00 p.m. and 6:00 p.m. for up to four days.

In addition to providing all requested health certification and personal protective equipment, the Employer is willing to make free COVID testing available to election participants; conduct temperature screening utilizing thermoscan technology; make its digital “Distance Assistant” or human social distancing team available to monitor the line leading to the voting tent; provide pass-through boxes or vending machines to ensure that ballot distribution is contactless; provide restroom trailers so that Board agents need not enter the Employer’s facility; arrange for food delivery services to be received at a separate tent near the voting area so that Board agents need not seek meals elsewhere; arrange for Board agent transportation to the voting location using drivers who have received negative COVID tests; arrange for an private, independently sanitized floor or wing of a local hotel for Board agents staying in the area overnight; and/or arrange for Board agents who wish to stay on-site in recreational vehicles during the course of the election.

Analysis

Although it has not directly addressed Board elections, the Centers for Disease Control (CDC) has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”<sup>7</sup> The CDC further states the virus can survive for a short period on some surfaces, and it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>8</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”<sup>9</sup>

In response to the evolving realities of the ongoing pandemic, the Office of the General Counsel issued Memorandum GC 20-10 on July 6, 2020. The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer’s certification in writing that polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agent; and provision of masks, hand sanitizer, gloves and disinfecting wipes.

Memorandum GC 20-10 also requests an employer’s written certification of how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19.

The Board offered further guidance regarding the direction of manual elections during the COVID-19 pandemic in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020). In *Aspirus*

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<sup>7</sup> CDC, *Considerations for Election Polling Locations*, (as updated October 29, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”).

<sup>8</sup> CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (as updated October 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

<sup>9</sup> CDC, *Running Errands* (as updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

*Keweenaw*, the Board set forth six situations under which a Regional Director should consider directing a mail-ballot election. As additional guidance the Office of the General Counsel issued Memorandum GC 21-01 on November 10, 2020. While *Aspirus Keweenaw* does not require a Regional Director to direct a mail ballot election where one or more of the six factors are present, the Board stated that Regional Directors who direct mail-ballot elections under those circumstances will not be found to have abused their discretion.

The six situations are:

- 1) The Agency office tasked with conducting the election is operating under “mandatory telework” status;
- 2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
- 3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
- 4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols;
- 5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
- 6) Other similarly compelling considerations.

As the Board acknowledged, no Regional Office, including Subregional and Resident Offices, has been in a mandatory telework status since mid-June. The Employer’s proposed polling place does not appear to violate any mandatory state or local health orders, and the Employer’s proposed precautions exceed those contemplated by GC Memo 20-10.

The Board has not defined an in-facility outbreak, nor is there a standard medical definition of “outbreak.” The Employer posits that 5% of a facility’s total population of individuals must test positive over the course of the prior 14-day period before a Regional Director may determine that the presence of COVID-19 inside an Employer’s facility constitutes an outbreak. The Petitioner suggests that the Harvard Global Health Institute’s recommendation of less than 25 daily cases per 100,000 in order to consider in person activities safe should be the controlling metric. However, I note that any presence of COVID-19 in an employer’s facility has been cited as a factor in favor of conducting a mail ballot election in multiple Directions of Election, and I shall do so here.

Finally, the Board instructed Regional Directors to focus their evaluations on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be

conducted and stated that “a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.”

The Employer’s facility is located in Bessemer, Alabama, which is in Jefferson County. According to the Centers for Disease Control, the testing positivity rate for Jefferson County was over 17 percent as of January 11, 2021.<sup>10</sup> That is to say, the testing positivity rate in Jefferson County is *more than three times higher* than the threshold set forth by the Board. Also, the 14-day trend in the number of new confirmed COVID-10 cases in Jefferson County is also rising according to the Johns Hopkins COVID-19 status report.<sup>11</sup>

As of January 11, Johns Hopkins University’s website showed the following number of new cases in Jefferson County for each day for the preceding fourteen days:

<b>Date</b>	<b>Number of New Cases</b>
January 10	502
January 9	785
January 8	786
January 7	792
January 6	687
January 5	995
January 4	337
January 3	391
January 2	563
January 1	719
December 31	663
December 30	990
December 29	705
December 28	336

In averaging the change in the number of new daily cases, the number of new daily cases rose at an average rate of 12.77 additional cases per day in Jefferson County.

Infection rates for the State of Alabama as a whole are equally troubling. In December 2020, Governor Kay Ivey issued a twentieth supplemental emergency proclamation extending the Safer at Home Order which recommends, inter alia, that individuals minimize travel outside the home. The Mayo Clinic’s COVID-19 map, which shows a rolling average of daily cases for the past week, deemed every county in Alabama a “hot spot” as of January 11, 2021.<sup>12</sup>

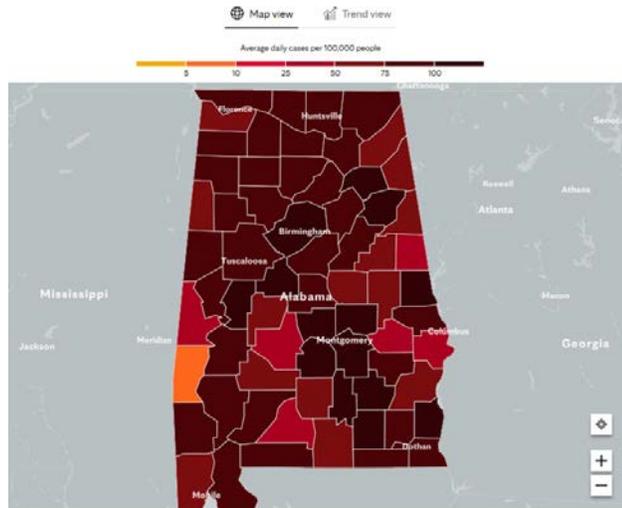
<sup>10</sup> See <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited January 11, 2021).

<sup>11</sup> See <https://bao.arcgis.com/covid-19/jhu/county/01073.html> (last visited January 11, 2021).

<sup>12</sup> See <https://www.mayoclinic.org/coronavirus-covid-19/map/alabama> (last visited January 11, 2021).

### Hot spots in Alabama

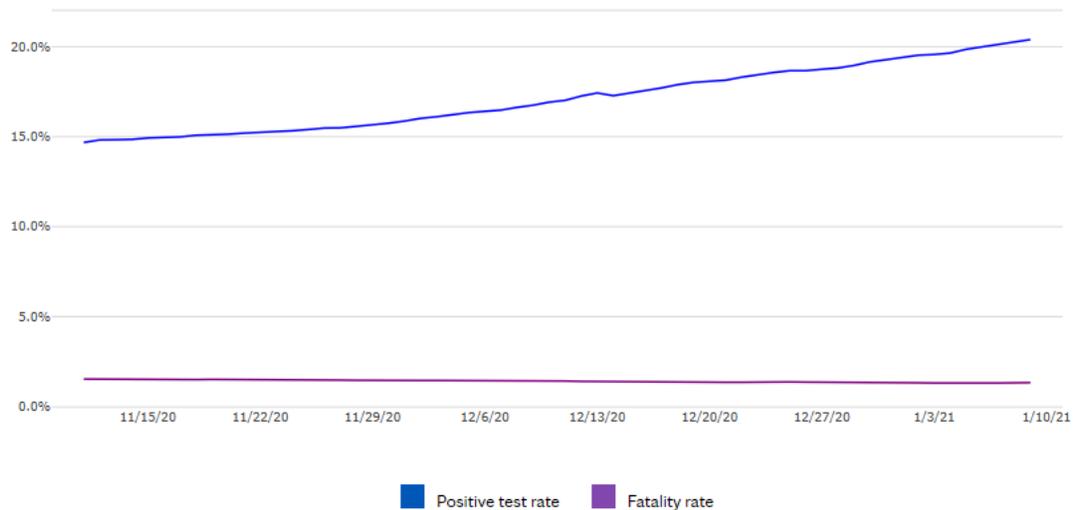
This map shows a rolling average of daily cases for the past week. This is the best sign of hot spots.



The Mayo Clinic’s website also demonstrates that in the past two months, the cumulative positive test rate throughout Alabama has risen from below 15 percent to above 20 percent.

### More trends for Alabama

See how the number of coronavirus tests, cumulative positive test rate and cumulative fatality rate have changed over time.



As of January 6, 2021, Alabama had the nation’s third highest number of people per capita hospitalized with COVID-19. Alabama hospitals lacking capacity to treat COVID patients are presently seeking to transfer patients to out-of-state hospitals; in the past month, the number

of people hospitalized for COVID-19 statewide has nearly doubled. Only five percent of the state's ICU beds are available.<sup>13</sup> Neighboring states may be unable to provide aid to Alabama as their own COVID-19 infections, like those of the nation as a whole, continue to rise.

As of January 11, over 22.5 million people in the United States have been infected with COVID-19 and over 374,000 people have died.<sup>14</sup> These deaths have occurred despite unprecedented measures taken to stem transmission. Current evidence suggests that asymptomatic and pre-symptomatic transmission may account for more than fifty percent of new infections.<sup>15</sup> The Centers for Disease Control has published reports regarding pre-symptomatic and asymptomatic transmission of COVID-19, including in the *Emerging Infectious Disease Journal* (Online Report) for July, "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic."<sup>16</sup> The Online Report emphasizes, "transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious."

The Employer argues that the virus spread in Jefferson County is irrelevant where the positivity rate within the Employer's facility is only 2.88 percent. This argument is not persuasive. Neither employees nor party representatives nor Board agents exist entirely within the Employer's facility. Employees venture into Jefferson County, and other parts of Alabama, each day. Board agents would be required to travel to the election site from other states. Given the prevalence of asymptomatic transmission and the presence of COVID-19 both inside and outside the Employer's facility, the overall state of crisis in Jefferson County cannot be ignored.

Additionally, the Employer argues that a manual election would be appropriate despite the presence of multiple *Aspirus Keweenaw* factors in Jefferson County because mail services may be delayed; because the mechanics of running such a large election via mail are prohibitively complex; because a mail ballot election would restrict the Employer's right to communicate with its employees; and because a mail ballot election is not otherwise justified by *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998).

The Board affirmed in *Aspirus Keweenaw* that, while it has a general preference for manual elections, "the Covid-19 pandemic indisputably warrants mail-ballot elections in appropriate circumstances." Where, as here, multiple *Aspirus Keweenaw* factors are present, I need not perform an independent analysis under *San Diego Gas and Electric*.

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<sup>13</sup> See <https://wbhm.org/feature/2021/overwhelmed-with-covid-patients-alabama-hospitals-near-crisis-level/> (last visited January 11, 2021), as cited in Petitioner's brief.

<sup>14</sup> See <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited January 11, 2021).

<sup>15</sup> See <https://abcnews.go.com/Health/asymptomatic-presymptomatic-people-transmit-covid-19-infections-study/story?id=71647268> (last visited January 11, 2021).

<sup>16</sup> See [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article) (last visited January 11, 2021).

Regarding any delay in mail services, the articles regarding potential delays cited by the Employer pertain to the holiday season, which results in an increase in demand for mail services. The holiday season has now ended and will not affect the mailing of ballots in this matter. The Board noted in *Daylight Transport*, 31-RC-262633 (August 19, 2020) that while concerns about potential disenfranchisement of voters could be relevant to whether a mail-ballot election is appropriate, such concerns do not automatically require a manual election. Any party is, of course, free to present evidence of any actual disenfranchisement of voters in post-election objections.

Next, the Employer expresses a concern that the Region is not equipped to handle the administrative burdens which would necessarily accompany the largest mail ballot election run by the NLRB during the present pandemic. It is true that this will be an unusually large election, and that large elections, whether held manually or by mail, come with additional administrative burdens. However, the Board has never placed a limit on the size of a voting unit due to administrative burdens. Each “largest election” remains the largest only until, inevitably, a petition is filed covering a still greater group of employees.

The Employer objects to a mail ballot election on the ground that it will not be able to hold certain employee meetings at any time within 24 hours of when the ballots are mailed until the ballots are counted. The Employer argues that this unfairly gives the Petitioner a greater opportunity to communicate with employees where the Employer has ceased holding large in-person meetings due to the pandemic. I note that the Employer has ceased holding large in-person meetings for the same reasons that a manual election is inappropriate. I further note that many methods of digital communication are available in equal measure to the employees, the Petitioner, and the Employer.

Meanwhile, the Petitioner objects to the Employer’s proposal, in part, because the Region would appear to cede an inordinate amount of control over election proceedings to the Employer. While the Employer’s creativity in seeking new ways to protect the health of election participants is laudable, I agree that, in practice, utilization of the Employer’s extensive resources would tend to give the appearance to voters that the Region is accepting benefits from the Employer and is no longer a neutral party. Certainly, the use of the Employer’s digital “Distance Assistant” or human social distancing team to monitor the line leading to the voting tent would give the impression of surveillance or tracking. The use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines, likewise implies a problematic amount of Employer involvement in election proceedings.

The most important factors in my decision are the safety of all election participants and the enfranchisement of all voters. Both of these factors weigh in favor of a mail ballot election. A mail ballot election will enfranchise employees who cannot enter the voting location for health reasons or due to positive COVID tests. In addition, a mail ballot election will protect the health and safety of voters, Agency personnel, the parties’ representatives, and the public during the current health crisis.

Based on the high and still-rising positivity rate in Jefferson County, and the undeniable presence of COVID-19 both inside and outside the Employer's facility, I find that a mail-ballot election is warranted in keeping with the Board's decision in *Aspirus Keweenaw*.

### Conclusion

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Also eligible to vote are all employees in the unit who have worked an average of four hours or more per week during the 13 weeks immediately preceding the eligibility date for the election. The record evidence indicates that the payroll period ends every Saturday.

Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Retail, Wholesale and Department Store Union.

### **A. Election Details**

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **Monday, February 8, 2021**, at 2:00pm, ballots will be mailed to voters by the National Labor Relations Board, Region 10. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 10 office by close of business on **Monday, March 29, 2021**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by February 22, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 10 Office at 404-331-2896 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

A Board agent from the Region will count the ballots beginning at **10:00am (Central Time), on Tuesday, March 30, 2021**. Due to the extraordinary circumstances of the COVID-19 pandemic and the directions of state or local authorities including Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, Zoom, etc.) to be determined by the Acting Regional Director. The ballot count will continue on consecutive business days until completed. Each party will be allowed to have four observers attend the virtual ballot count.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by January 20, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

**D. Posting of Notices of Election**

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. The Employer must also distribute the Notice of Election electronically to any employees in the unit with whom it customarily communicates electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on February 3, 2021. If the Employer does not receive copies of the notice by January 29, 2021, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after

Amazon  
Case 10-RC-269250

issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: January 15, 2021

A handwritten signature in black ink, appearing to read 'L. Henderson', with a long horizontal line extending to the right.

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LISA Y. HENDERSON  
ACTING REGIONAL DIRECTOR  
Region 10  
National Labor Relations Board  
Harris Tower Suite 1000  
223 Peachtree Street N.E.  
Atlanta, GA 30303-1531

# **EXHIBIT B**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMAZON.COM SERVICES LLC,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 10-RC-269250
	)	
RETAIL, WHOLESALE AND	)	
DEPARTMENT STORE UNION,	)	
	)	
Petitioner.	)	
	)	

**APPENDIX**

**ISSUES IN RECENT MAIL-BALLOT ELECTIONS  
(SELECTED CASES)**

- A. Mail-ballot elections increase the risk of delay due to elevated and prolonged opportunities for coercion and other interference with the voting process.**
1. ***Profl Transp., Inc., Case 32-RC-259368 (Dec. 2, 2020) (not reported in Board volumes)*** (granting review of issues regarding improper mail-ballot solicitation, in a unit of 113 eligible voters, in order to reconsider the standards set by *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004) on objectionable collection of ballots and whether solicitation of ballots is, itself, objectionable).
  2. ***GreenWaste Recovery, Inc., Case 32-RC-260301 (Decision and Order, Aug. 28, 2020) (not reported in Board volumes)*** (after mail-ballot election with 83 eligible voters, union alleged that the secrecy of ballots was compromised based on a number of incidents where anti-union employees allegedly asked other employees for their ballots, offered to collect other employees’ ballots, requested other employees’ ballots to photograph them, and offered to help fill out other employees’ ballots).
- B. Mail ballots may be—and frequently are—lost or delayed, thereby prolonging the election process.**
1. ***Residence Inn By Marriott at The Johns Hopkins Med. Campus, Case 05-RC-268024, Union’s Objections to Election (Dec. 31, 2020)*** (objecting to mail-ballot election based on Region’s failure to “allow enough time for mail ballots to arrive at the Region 5 Office”).

2. ***St. Luke's Hosp., Case 01-RD-267972, Employer's Objections to Conduct of the Election (Dec. 22, 2020)*** (stating that "a number of eligible voters reported not receiving ballots and not being able to reach [Region 1] to request a new ballot" during the voting period; alleging that employees' "inability to reach the Board to request a duplicate ballot disenfranchised voters"; and "[e]ven when employees were able to get through and request duplicate ballots, they either did not receive them or did not receive them in time to vote").
3. ***Tredroc Tire Servs., LLC, Case 13-RC-263043 (Dec. 8, 2020) (not reported in Board volumes)*** (in an election with 13 eligible voters that was decided by a single vote, one employee mailed a ballot that never arrived at the Regional Office); *see id.* (Board holding that "the possibility that ballots may be lost or delayed in the mail" is "one reason why manual elections are, and should be, preferred").
4. ***Promowest Prods., Inc., Case 09-RC-261089 (Nov. 25, 2020) (not reported in Board volumes)*** (in election with 46 eligible voters, 7 employees mailed ballots that did not arrive in time for the tally).
5. ***Allied Universal Sec. Servs., Case 05-RD-266913, Union's Objections to the Election (Nov. 24, 2020)*** (objecting to mail-ballot election based on "widespread mail delays and irregularities during the time frame that ballots were due to be sent and returned").
6. ***Quickway Transp., Inc., Case 09-RC-257491 (Oct. 26, 2020) (not reported in Board volumes)*** (in election with 69 eligible voters, at least 8 employees mailed ballots that did not arrive in time for the tally).
7. ***Ingalls Mem'l Hosp., Case 13-RC-260919 (Second Notice of Election issued, Sept. 29, 2020)*** (mail-ballot election with 337 eligible voters had to be repeated due to lost ballots).
8. ***Fontanini Foods, Case 13-RC-257636, Employer's Request for Review (July 13, 2020)*** (a mail-ballot election with 401 eligible voters where the employer asserted that it received several complaints from employees regarding the mail-ballot election procedure, including at least 5 employees who experienced issues reaching the NLRB via the distributed contact information; at least 2 employees who were charged fees by USPS to receive the NLRB's mail-ballot kit; several employees who failed to receive a ballot kit; and other employees who received multiple ballot kits).
9. ***W. Wall Sys., LLC, Case 28-RC-247464 (Apr. 16, 2020)*** (employer asserted that most, if not all, of the seven mail ballot voters did not receive ballots by the date specified by the Region; one of the voters who requested a duplicate ballot never received one; three duplicate ballots were unsigned and were voided; two duplicate ballots were returned after the day of the count and not included in the tally; and one voter's original and duplicate ballots were returned to sender).

**C. The massive administrative burden and voter confusion with mail ballots will lead to delays compared to a manual election.**

1. ***Newburg Egg Corp., Case 03-RC-267766 (Dec. 10, 2020) (not reported in Board volumes)*** (concerns about the potential disenfranchisement of voters where many employees received mail at post office boxes or multi-family dwellings, which could decrease the likelihood of timely delivery of the mail-ballot packages and “could be relevant to whether a mail-ballot election is appropriate”).

**D. Delays can or will result from a host of other technical and administrative issues that do not exist with manual elections.**

**1. Disputes arising from technical issues with virtual vote count procedures.**

- a. ***Stericycle, Inc., Cases 04-RC-260408 and 04-RC-260851, ALJ Report and Recommendation (Nov. 10, 2020) (not reported in Board volumes)*** (Zoom video feed cut out for several minutes during the mail-ballot count).

**2. Disputes arising from incomplete or incorrect ballot or voting information.**

- a. ***Brink’s Global Servs., Case 29-RC-260969 (Nov. 25, 2020)*** (Regional Director used a confusing and contradictory mail-ballot procedure, which led to a “dispute over the proper election procedures and unfortunate questions about the manner in which the election was conducted” where two ballots were received before the ballot count, but Regional Director had set a due date by which ballots had to be mailed and one ballot was not postmarked and the other was postmarked after the due date indicated by Regional Director).

**3. Disputes about the existence and validity of voter signatures and compliance with voting instructions and the related potential for Regions to have to void and not count large percentages of ballots.**

- a. ***Stericycle, Inc., supra*** (dispute over voiding of unsigned mail ballot in election with eight eligible voters; the case was transferred to Region 18, and the Regional Director for Region 18 ordered a rerun election).
- b. ***Brink’s Global Servs., supra*** (voter marked and returned the sample ballot sent in the voting kit, instead of the official ballot).
- c. ***Kings Sec. Servs., Inc., Case 02-RC-261519 (2020)*** (55 votes voided out of 153 cast (36%).
- d. ***Del. Valley Residential Care, LLC, Case 04-RC-257634 (2020)*** (10 votes voided out of 38 cast (26%).

- e. *Flex-N-Gate Chi., LLC, Case 13-RC-265966 (2020)* (38 votes voided out of 203 cast (19%).
4. **Concerns about disenfranchising voters who experience confusion within the mail-ballot instructions and process.**
- a. *Newburg Egg Corp., supra* (concerns about the potential disenfranchisement of voters due to misunderstanding the mail-ballot instructions and process “could be relevant to whether a mail-ballot election is appropriate”).