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**Starbucks Corporation and Workers United, Petitioner.** Case 19–RC–295849

September 29, 2022

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,  
RING, WILCOX, AND PROUTY

In *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), the Board identified six factors to guide Regional Directors in exercising their discretion to direct mail-ballot elections, rather than manual elections, based on circumstances associated with the ongoing COVID-19 pandemic. The Board held that the presence of any one factor would justify—though not require—the direction of a mail-ballot election. Today, we make a technical update to *Aspirus* factor 2 based on a metric developed by the Centers for Disease Control and Prevention (CDC). Currently, *Aspirus* factor 2 asks whether, based on data collected by Johns Hopkins University and/or state and local governments, the 14-day trend in the number of new confirmed COVID-19 cases in the county encompassing the employer’s facility is increasing, or the 14-day testing positivity rate in that county is 5 percent or higher. For the reasons discussed below, we have decided to realign *Aspirus* factor 2 to track the CDC’s county-based Community Level system. Under this system, we hold that a Regional Director will not abuse their discretion by directing a mail-ballot election whenever the relevant Community Level is “high.”<sup>1</sup>

<sup>1</sup> No other *Aspirus* factor is at issue in this case, but for reference the factors in their entirety are: (1) the Agency office tasked with conducting the election is operating under “mandatory telework” status; (2) either the 14-day trend in 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 reasonably 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 GC Memo 20-10, “Suggested Manual Election Protocols”; (5) there is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or (6) other similarly compelling circumstances.

Our dissenting colleagues say we should invite briefing from the parties, interested amici, and the CDC itself on whether to make this technical update to *Aspirus* factor 2 and on the broader questions of whether Regional Directors should be directing mail-ballot elections at all at this stage of the pandemic and how best to ensure the safety of in-person elections. As explained below, however, it is readily apparent that the CDC’s Community Level metric is an improvement over the current data points underlying *Aspirus* factor 2, so we do not see a need for briefing on the merits of making this modest change. Nor are we

I.

The Employer operates a nationwide chain of retail coffeehouses. On May 13, 2022,<sup>2</sup> the Petitioner filed a petition seeking to represent the employees working at the Employer’s store at 4115 4th Avenue S., Seattle, Washington. The only disputed issue was whether the election should be conducted manually or via mail ballot, with the Employer seeking the former and the Petitioner the latter.

On June 14, the Regional Director issued a Decision and Direction of Election. Applying *Aspirus*, the Regional Director determined that a mail-ballot election was appropriate. The Regional Director based this decision exclusively on the second contingency of *Aspirus* factor 2, finding that the testing positivity rate in King County, Washington, where the Employer’s facility is located, had been above 5 percent during the most recent 14-day period.<sup>3</sup> It is undisputed that no other *Aspirus* factor was present. The Employer filed a timely request for review, and the Petitioner filed an opposition.

The Employer’s Request for Review of the Regional Director’s Decision and Direction of Election is granted as it raises substantial issues warranting review. On the merits, the Employer’s request is denied.<sup>4</sup>

II.

The Employer contends generally that *Aspirus* is outdated and should be abandoned, but primarily criticizes the continuing viability of factor 2. Specifically, the Employer argues that testing positivity rates alone (again, the decisive factor in this case) do not accurately indicate community risk of contracting the virus. We reject the Employer’s suggestion that the Regional Director abused his discretion in relying on the testing positivity rate established in *Aspirus* to determine that a mail ballot election was appropriate here. As explained below, we also decline at this time to revisit *Aspirus* altogether. However, we agree that developments following *Aspirus* warrant refinement of factor 2. Thus, as stated, we have de-

inclined to delay making this update for the lengthy period of time required to receive and assess such briefing. As also discussed below, we find that it is premature to consider stripping Regional Directors of their discretion to conduct mail-ballot elections based on pandemic-related factors.

<sup>2</sup> All dates are in 2022 unless otherwise noted.

<sup>3</sup> At the time the Decision and Direction of Election issued, the most recent available data reflected a 7-day average positivity rate of 18.6 percent for the 7-day period ending on June 5 and 17.8 percent for the 7-day period ending on May 29. The first contingency identified under *Aspirus* factor 2—the 14-day trend in number of new confirmed cases in the county where the facility is located—was not present here.

<sup>4</sup> We deny the Union’s request, set forth in its opposition brief, for the Board to issue a formal reprimand of the Employer on the grounds that it is willfully taking a frivolous legal position and abusing the Board’s processes.

cided to update factor 2 in accordance with the CDC’s recently established Community Level tracker.

In *Aspirus*, the Board recognized that statistical data regarding COVID-19 infection rates “may often have some bearing on the appropriateness of a mail-ballot election.”<sup>5</sup> Recognizing that broader (e.g., statewide) trends in statistics were of questionable usefulness in assessing the safety of conducting a manual election at a specific facility, and that longer-term trends offered only limited insight into current conditions in a locality, the Board concluded that Regional Directors should “generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted.” *Id.*

We reject the Employer’s suggestion that recent statistical data concerning local COVID-19 infection rates—including the data points that currently underlie *Aspirus* factor 2—is not relevant to the appropriateness of conducting a mail-ballot election. Certainly, as the *Aspirus* Board acknowledged, testing positivity rates alone do not precisely measure the prevalence of the virus in a community. But precision is not the standard. Rather, as the Board explained in *Aspirus*, it is enough that positivity rates, which look at the number of positive and total tests in a locality, are “at least suggestive of transmission rates in the locality among people who have not been tested.” *Id.* We emphasize again that *Aspirus* does not mandate a mail-ballot election whenever a factor is present, but holds only that a Regional Director does not abuse their discretion in directing one. Accordingly, we reject the Employer’s argument that the Regional Director in this case abused his discretion in directing a mail-ballot election based on the relevant 14-day testing positivity rate.

Nevertheless, we recognize that, as the pandemic has evolved since the issuance of *Aspirus*, so too have public health authorities’ responses to it, and that it is therefore appropriate for the Board to adapt accordingly. We thus take this opportunity to reorient factor 2 from its current data points to the CDC’s recently established Community Level tracker. While adequate data was available for the Regional Director to make an assessment of the 14-day positivity rate under *Aspirus* factor 2 in this case, as the Employer points out, state and local governments often no longer consistently provide all of the testing data needed to reliably calculate the 14-day positivity rate for all counties. Moreover, even when testing data is available, its value as a stand-alone indicator of community risk may be diminished by the expanded use of at-home tests (so-called “rapid tests”), the results of which frequently go unreported to state and local health authori-

ties.<sup>6</sup> Similarly, the number of new confirmed cases in a given county may no longer be reported regularly enough to permit a reliable calculation of the 14-day trend in new confirmed cases.<sup>7</sup>

Meanwhile, the CDC has now adopted the COVID-19 Community Level metric, which the CDC explains “provides an integrated, county view of key data for monitoring the COVID-19 pandemic in the United States [and] allows for the exploration of standardized data across the country.”<sup>8</sup> Unlike the stand-alone data points that currently underlie *Aspirus* factor 2, the Community Level measure is grounded in a collective assessment of three data points: new COVID-19 cases; new COVID-19 hospital admissions; and the percent of staffed inpatient beds in use by COVID-19 patients.<sup>9</sup> Also, these indicators are calculated weekly, rather than on a trailing 14-day basis, thereby providing a more recent picture of trends in the community. Moreover, the CDC’s data sourcing is not solely dependent on reporting by individual localities. Rather, the CDC pulls data from aggregate sources and, for hospital admissions and inpatient beds in use, draws on data collected by the United States Health and Human Services Unified Hospital Data Surveillance System.<sup>10</sup> Taken together, these features of the CDC Community Level tracker suggest that it can be a more reliable—and more consistently available—tool for gauging community risk. Indeed, the CDC has reported that its analyses have shown “that the COVID-19 Community Levels provide a sizeable improvement over community transmission levels in identifying regions that will experience severe outcomes—including ICU admissions and deaths—in the weeks ahead.”<sup>11</sup>

<sup>6</sup> <https://www.nytimes.com/2021/12/30/us/at-home-rapid-covid-tests-cases.html>.

<sup>7</sup> As the Regional Director recounted in his Decision and Direction of Election, King County, Washington now publishes COVID-19 data (including the number of new confirmed cases) on Mondays, Wednesdays, and Fridays. Further, we observe that the Johns Hopkins COVID-19 dashboard, which *Aspirus* directed Regional Directors to consult in considering factor 2, indicates that some counties—such as Clark County, Nevada—only report the number of new confirmed cases once a week. See <https://bao.arcgis.com/covid-19/jhu/county/32003.html>. And the Johns Hopkins COVID-19 dashboard does not contain any data for some counties. See <https://coronavirus.jhu.edu/us-map>.

<sup>8</sup> [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=all\\_states&list\\_select\\_county=all\\_counties&data-type=CommunityLevels&null=CommunityLevels](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels&null=CommunityLevels).

<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

<sup>10</sup> [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=all\\_states&list\\_select\\_county=all\\_counties&data-type=CommunityLevels&null=CommunityLevels](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels&null=CommunityLevels).

<sup>11</sup> <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/faq-surveillance.html> (“Why were these specific indicators selected to

<sup>5</sup> 370 NLRB No. 45, slip op. at 5.

Based on all of the above, we find it appropriate to realign *Aspirus* factor 2 with the CDC Community Level tracker. We hold that a Regional Director will not abuse their discretion by directing a mail-ballot election when the county encompassing the employer’s facility is in the “high” Community Level category. “Medium” and “low” Community Levels will not be independently sufficient to support a mail-ballot determination under factor 2 (but, of course, other *Aspirus* factors may still support such a determination). Our decision to focus on the “high” level recognizes that, although all three levels are grounded in objective data reflecting both transmission rates (new cases) and likelihood of poor outcomes (new hospital admissions and the percent of staffed inpatient beds in use by COVID-19 patients), these risks are greatest when a community is in the “high” zone.<sup>12</sup>

Our holding today is only that, under factor 2, whenever the relevant county is at the “high” Community Level it will not be an abuse of discretion for a Regional Director to order a mail-ballot election. A Regional Director who directs a mail-ballot election for this reason should cite directly to the relevant Community Level shown on the CDC’s COVID-19 data tracking page<sup>13</sup> or COVID-19 by County page<sup>14</sup> as of the date the Decision and Direction of Election issues.<sup>15</sup>

### III.

Although we have found some merit to the Employer’s arguments regarding *Aspirus* factor 2, we disagree with its remaining contentions. There is no basis for the Em-

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[define COVID-19 Community Levels?](#)). It merits notice that the CDC data is readily available, easy to interpret, and maintained in a manner that allows for a Regional Director to determine definitively what the Community Level was at any point in the past since the system was implemented. It is the Board’s hope that these attributes will minimize unnecessary disputes or litigation about how to apply *Aspirus* factor 2 in any particular case.

<sup>12</sup> Not surprisingly, the CDC recommends individuals and communities take additional precautions whenever their county is at the “high” level. While our collective response to the pandemic and the recommendations of public health authorities about appropriate precautions have evolved over time, we continue to believe that conducting an election by mail ballot is an appropriate precaution for Regional Directors to consider in determining how to proceed with an election scheduled to take place in a high-risk area.

<sup>13</sup> <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

<sup>14</sup> <https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.html>.

<sup>15</sup> Although Regional Directors should normally focus on the Community Level in the county where the employer’s facility is located, we shall maintain *Aspirus*’s acknowledgment that broader or narrower geographic data may be more or additionally relevant to a particular case. 370 NLRB No. 45, slip op. at 6. Moreover, Regional Directors retain their current discretion to revisit the appropriate format of a directed election in the event the CDC Community Level changes in the time period between the Decision and Direction of Election and the election date.

ployer’s contention that the Regional Director “appeared to believe . . . that if he determined any one factor existed, he was required to order a mail ballot election.” The Regional Director clearly understood that the presence of an *Aspirus* factor meant he had the *discretion* to direct a mail-ballot election.

We also reject the Employer’s broader contention, which appears to resonate with our dissenting colleagues, that the other *Aspirus* factors are now “largely irrelevant” and that the Board should “return” to the standard set forth in *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Although we certainly hope that the public health risks presented by the pandemic will continue to diminish sufficiently to permit the Board to consider moving beyond *Aspirus*, at the present time we are persuaded that the better course is to err on the side of caution. As of mid-September, a little over 13 percent of U.S. counties are in a “high” Community Level,<sup>16</sup> but it is widely anticipated that the Nation may face a resurgence of the virus this fall and winter.<sup>17</sup> In these circumstances, we find it appropriate to continue deferring to Regional Directors’ discretion to conduct mail-ballot elections to protect the health and safety of the public and Agency employees when the Regional Director – who is more familiar than the Board with local conditions and safety considerations – deems it appropriate.

In reaching that decision, we are not unmindful, as our colleagues point out, that nothing in the CDC’s guidance forecloses manual elections simply because the relevant locality is in a “high” Community Level. Not surprisingly, the CDC guidance does not speak to the appropriate format of NLRB elections, nor could it. It is the Board’s prerogative to set the standards governing whether elections should be held in-person, by mail, via a mixed manual-mail ballot, or through some other means. As a result, while generalized CDC guidance is a helpful metric to guide our assessments, it is the Board’s prerogative to decide as a policy matter how the Agency should respond to the ongoing pandemic, and it is the Board’s prerogative to determine – as we do today – that the best approach at present is to update *Aspirus* to incorporate the CDC’s Community Level metric, but otherwise preserve *Aspirus* intact as we head into the fall and winter months.

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<sup>16</sup> See [https://covid.cdc.gov/covid-data-tracker/#county-view?list\\_select\\_state=all\\_states&list\\_select\\_county=all\\_counties&data-type=CommunityLevels](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels) (last accessed September 20, 2022).

<sup>17</sup> See generally <https://www.cncb.com/2022/09/01/us-health-officials-brace-for-another-fall-covid-surge-but-with-fewer-deaths.html>; <https://www.washingtonpost.com/health/2022/09/03/fall-covid-surge-booster-2022/>.

Last, we note that to the extent the pandemic *does* continue to dissipate more significantly, there likely will be fewer occasions in which any *Aspirus* factor is present. That development would naturally lead to a gradual, facts-on-the-ground-driven return to more manual elections, a far preferable scenario in our view than anticipatorily discarding *Aspirus* altogether.<sup>18</sup>

Nor are we persuaded that any other particular *Aspirus* factor requires adjustment at this time. As to *Aspirus* factor 1, although none of the Agency's regional offices is currently on mandatory telework due to the pandemic, we cannot exclude the possibility that the still-evolving pandemic could potentially necessitate reinstatement of such measures. Similarly, with respect to *Aspirus* factor 3, although localities have relaxed or rescinded gathering restrictions, the better course is to preserve Regional Directors' discretion in the event such restrictions were to be reinstated. The Employer has not specifically challenged factor 4, concerning the safety protocols set forth in GC Memo 20–10 (to which the Employer has agreed to adhere), so we do not revisit them here. Last, regarding factor 5, we are firmly of the view that Regional Directors should continue to have the discretion to direct mail-ballot elections based on a current outbreak at the facility (or if the employer refuses to disclose and certify its current status).

Last, we find no merit to our colleagues' suggestion that *Aspirus* warrants wholesale reexamination based on a perceived "surge in voting irregularities" in mail-ballot elections. Our colleagues have presented no evidence of any increase in the *frequency* of meritorious objections in mail-ballot elections. Unsurprisingly, the raw number of such cases may have increased simply because the Board has held many more mail-ballot elections since the onset of the pandemic.<sup>19</sup>

Still, our colleagues express concern that the percentage of void ballots in mail ballot elections exceeds the percentage in manual elections.<sup>20</sup> Although the available

data reflects that there are slightly more void ballots in mail elections, it is clear the Agency, with the assistance of our dedicated field staff, is and has been administering mail ballot elections in an effective manner to ensure every eligible voter has an opportunity to be heard.<sup>21</sup> Further, we observe, as then-Member McFerran noted in her separate opinion in *Aspirus*, manual elections certainly are not immune from their own "irregularities."<sup>22</sup> In the end, no form of election is always perfect in execution, but there is no basis for our colleagues' suggestion that any problems associated with mail ballots warrant an immediate pivot back to manual elections without preserving adequate discretion for Regional Directors to hold mail-ballot elections when they deem them appropriate for safety-related reasons.

#### IV.

The question remains whether to retroactively apply the updated factor 2 to this case and other pending cases presenting the same issue. Although the Board's usual

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2020, through September 30, 2020 (the period of Fiscal Year 2020 affected by the COVID-19 pandemic), there were 1.9 void ballots per mail election, from October 1, 2020, through September 30, 2021 (Fiscal Year 2021 in its entirety), there were 1.6 void ballots per mail election, and from October 1, 2021, through September 17, 2022 (nearly all of Fiscal Year 2022), there were only 0.9 void ballots per election.

<sup>21</sup> To the extent that delays in the mail service cause or contribute to void or missing ballots, those concerns could be ameliorated were the Board free to administer elections electronically. Since 2011, however, the Agency's annual budget appropriation from Congress has included a prohibition on the Agency using funds to issue any directive or regulation providing employees any means of voting electronically.

<sup>22</sup> See *Aspirus*, 370 NLRB No. 45, slip op. at 10 fn. 10 (citing cases); see also, e.g., *Concrete Express, Inc.*, 368 NLRB No. 135 (2019) (finding that Board agent's acceptance of a ride from the polling place with union officials while in possession of unsealed, potentially determinative challenged ballot raised substantial issue regarding integrity of election); *Bronx Lobster Place, LLC*, 2018 WL 721396 (2018) (setting aside election based on polls opening 7 minutes late and potential disenfranchisement of a determinative number of voters); *Y-Tech Services*, 362 NLRB 13 (2015) (setting aside election because determinative number of voters were prevented from casting ballots because of their work assignments); *Garda CL Atlantic, Inc.*, 356 NLRB 594 (2011) (election set aside because Board agent closed polls early and turned away several voters, telling them to vote under challenge or at another session); *First Student, Inc.*, 355 NLRB 410 (2010) (employer's choice of observer objectionable because observer would reasonably be perceived as management representative); *Hollingsworth Management Service*, 342 NLRB 556 (2004) (setting aside election based on electioneering at and near polling area prior to and during voting periods); *Pearson Education, Inc.*, 336 NLRB No. 92 (2001) (employer interfered with election by displaying antiunion poster near polling area on day of election); *Renco Electronics, Inc.*, 330 NLRB 368 (1999) (setting aside election based on interpreter's question to employee waiting in line whether employee knew where to put "yes" vote); and *Hallandale Rehabilitation and Convalescent Center*, 313 NLRB 835 (1994) (union's election observer engaged in objectionable conduct including list-keeping, commenting on how employees would vote, and making derogatory remarks to employer's observer).

<sup>18</sup> Although Chairman McFerran did not join the majority opinion in *Aspirus*, she observes that maintaining, as opposed to abandoning, *Aspirus* at this time is more consistent with her views expressed in that case.

<sup>19</sup> Since March 15, 2020, the Agency has conducted 2,432 mail-ballot elections, or approximately 81 per month, thanks to our dedicated field staff's flexibility and resolve to ensure that the Agency's representation processes remain available to employees to express their wishes regarding union representation. By comparison, in the 6½ months immediately preceding March 15, 2020, the Agency held a total of 48 mail-ballot elections, less than 8 per month.

<sup>20</sup> From March 15, 2020, through September 17, 2022, the Agency conducted a total of 2964 elections: 2432 by mail, 521 manually, and 11 by mixed mail-manual balloting. Over the same period, there was an average rate of 1.4 void ballots per mail election, 0.26 per manual election, and 1.2 per mixed mail-manual election. From March 15,

practice in both unfair labor practice and representation cases is “to apply all new policies and standards retroactively “to all pending cases in whatever stage,” the Board will not do so when retroactive application would work a manifest injustice. *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019) (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). In determining whether retroactive application will work a manifest injustice, the Board typically considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *SNE Enterprises*, above.

Based on those considerations, we find that retroactive application of the CDC Community Level tracker would be manifestly unjust. *Aspirus* has been existing law for nearly 2 years now, has reliably guided parties and Regional Directors in hundreds of representation cases, and the parties in this case relied on it in litigating the appropriateness of a mail-ballot election, notwithstanding that the Employer alternatively requested that we revisit *Aspirus*.<sup>23</sup> Further, retroactive application of our decision would frustrate the timely and efficient resolution of questions concerning representation—a key purpose of the Act—and would unfairly impact employees, as demonstrated by the present case. The Regional Director clearly did not abuse his discretion in directing a mail-ballot election under *Aspirus* factor 2, as it then stood, and the ballots in this case have already been cast and impounded. Retroactive application, then, would unnecessarily delay this proceeding and similarly delay other mail-ballot elections already in progress that were clearly not an abuse of discretion at the time they were ordered. Especially where voting has already occurred, moreover, the potentially disruptive effects of retroactive application would be a disservice to the employees who cast their ballots in good faith, and result in a waste of the Board’s resources.<sup>24</sup> Last, there is no basis for concluding that the manner of the election compromised any employee’s opportunity to cast a ballot or tainted their decisionmaking. For all of these reasons, we shall apply our reorientation of *Aspirus* factor 2 prospectively only to Decisions and Directions of Election that issue after the issuance of this decision.

<sup>23</sup> Compare *Providence Portland Medical Center*, 369 NLRB No. 78, slip op. at 6 (2020) (finding no manifest injustice in retroactive application where relevant Board precedent had been “inconsistent, speculative, and subjective.”).

<sup>24</sup> Cf. *Ryder Memorial Hospital*, 351 NLRB 214, 216 (2007) (applying prior law regarding altered sample ballots to any case arising before new sample ballots were in use).

Dated, Washington, D.C., September 29, 2022

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN and RING, dissenting.

We wholeheartedly agree with our colleagues that it is time to revisit *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). At the time when the Board was considering *Aspirus*, the nation was at the height of an unprecedented public health emergency. The Board was faced with the very real concern that applying the long-standing preference for in-person elections could have devastating health consequences for employees who exercised their fundamental right under the Act to choose whether or not to be represented by a union. Consistent with those concerns, public health measures in place at that time prohibited or restricted the size of public gatherings and imposed limitations on travel, among other extraordinary measures. By any reasonable standard, the Covid-19 pandemic was at that time an “extraordinary circumstance” warranting a departure from the Board’s venerable policy of favoring in-person manual elections. *Id.*, slip op. at 1.

With the evolution of the Covid-19 pandemic, however, we now have the opportunity to revisit *Aspirus* with the benefit of public input and expert advice. Because election processes are fundamental to the protection of employee rights under the Act, we owe it to the public to formulate a fully considered, coherent standard that appropriately balances the competing interests at stake.<sup>1</sup>

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<sup>1</sup> We agree with our colleagues that “it is the Board’s prerogative to set the standards governing whether elections should be held in-person, by mail, via a mixed manual-mail ballot, or through some other means,” and “to decide as a policy matter how the Agency should respond to the ongoing pandemic.” Our point is that the Board should exercise that prerogative with the benefit of public input and expert advice, and in a manner that is consistent with the Board’s long-standing policy that, to best protect employees’ rights under the Act, in-person manual elections are and should be the presumptively appropriate norm. See *San Diego Gas & Electric*, 325 NLRB 1143 (1998) (endorsing the Board’s long-standing preference for manual elections

Rather than seek input and advice, however, our colleagues charge ahead, believing, apparently, that they are qualified to determine independently the effect that the ongoing Covid-19 public health concerns is having on elections and how those concerns should be balanced against the clear Board preference for in-person elections. We respectfully dissent from this flawed procedure and the new mail-ballot policy that follows from it.<sup>2</sup>

Foremost, the Board should acknowledge that we do not have knowledge or expertise that qualifies us, uncounseled, to make this determination. As previously recognized, “the Board is expert in federal national labor relations policy,” not public health. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). Then-Member McFerran acknowledged as much in her *Aspirus* concurrence:

The Board's expertise (and the General Counsel's) is labor law, not epidemiology or public health policy. We should be extremely reluctant then to substitute our judgment for that of real experts by attempting to craft our own standards for determining whether it is safe to hold a manual election. This is especially so when any standards the Board establishes may be quickly overtaken by events. A pandemic does not stand still.

370 NLRB No. 45, slip op. at 9–10. We are perplexed, then, why our colleagues have failed to heed this advice by refusing to take the needed step of soliciting expert guidance.

When the Board issued *Aspirus*, the circumstances were much different than they are today. At the outset of the Covid-19 pandemic, confronted with mandatory shutdowns, the Board briefly suspended all elections for a two-week period. *Id.*, slip op. at 3. After the Board lifted the suspension, many workplaces were still closed, no vaccines were available, and quarantines from any exposure were to last a minimum of 14 days. In that uncertain environment, Regional Directors had to determine in the first instance whether the pandemic constituted “extraordinary circumstances” within the meaning of *San Diego Gas & Electric*, above, the Board’s seminal case on mail-ballot elections. *Aspirus*, above, slip op. at

and limiting regional directors’ discretion to order mail-ballot elections to three specific situations as well as “extraordinary circumstances”). In our view, the majority’s decision today falls short in these respects.

<sup>2</sup> We reject any implication in the majority opinion that we are prematurely seeking to strip Regional Directors of their discretion to direct mail-ballot elections while pandemic risks remain. We appreciate that mail-ballot elections will still be reasonable in some circumstances because of ongoing health concerns. We are merely disappointed that the majority has chosen not to take this opportunity to seek input and make the effort to provide more meaningful guidance for the Regional Directors’ exercise of their discretion.

3. When the decisions directing mail-ballot elections started to come before the Board on requests for review, we were able to offer little guidance, relying broadly on the “extraordinary Federal, State, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework.” *Id.*, slip op. at 3 (quoting *Atlas Pacific Engineering*, 27–RC–258742, 2020 WL 2374506 (May 8, 2020) (not reported in Board volumes)). On July 6, 2020, the General Counsel issued GC Memo 20-10, also in the absence of expert guidance, as conditions had temporarily improved that summer to a point where some manual elections seemed likely to be possible again, and there was, accordingly, a need for guidance in conducting such elections safely. That guidance, in turn, laid the foundation for the resumption of manual elections in appropriate circumstances. Thereafter, and against that backdrop, the Board provided its first specific guidance on mail-ballot determinations in *Aspirus*.<sup>3</sup>

Much has changed since *Aspirus* issued in November 2020, just one month before the emergence of the Delta variant. Today, with the evolution of the virus toward less virulent (if more transmissible) strains, the prevalence of vaccines, and the loosening of most government restrictions and guidance, much of the country is now fully open. The current Centers for Disease Control and Prevention (CDC) guidance rates each county as having “Low,” “Medium,” or “High” community transmission.<sup>4</sup> The only CDC recommendation that changes when community transmission moves from “Low” to “Medium” is that individuals “at high risk of getting very sick, [should] wear a well-fitting mask or respirator when indoors in public,” and those in their household or in social contact with them should also consider wearing a mask and testing. *Id.* “High” community transmission, the CDC advises, warrants “[w]ear[ing] a well-fitting mask

<sup>3</sup> In *Aspirus*, the Board defined six circumstances under which directing a mail-ballot election would not be an abuse of the Regional Director’s discretion: (1) “[t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status”; (2) “[e]ither the 14-day trend in 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) “[t]he 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) “[t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols”; (5) “[t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status”; or (6) “[o]ther similarly compelling considerations.” *Id.*, slip op. at 4-7.

<sup>4</sup> *Covid-19 by County*, <http://www.cdc.gov/coronavirus/2019-nCoV/science/community-levels.html> (last visited Aug. 12, 2022).



or respirator” and, if “at high risk of getting very sick, consider[ing] avoiding non-essential indoor activities in public.” Id. Notably, nothing in the CDC guidance suggests that individuals should generally avoid workplaces or public spaces; instead, it sets forth safety precautions people should consider when they are in the community. The current CDC guidelines have also shortened quarantine duration to 5 to 10 days, dropped the six-foot distancing standard and the emphasis on social distancing, and find it unnecessary for anyone to quarantine at all after exposure if they have no symptoms.<sup>5</sup> Consistent with this guidance, employees throughout the country are reporting to their workplaces to a far greater extent than when *Aspirus* issued.<sup>6</sup> That includes all the employees eligible to vote in this case who are working at the store location where a manual election would normally be held. Under these circumstances, it stands to reason that requiring a manual election would not create any material health risk for these and other employees different from the risk of exposure they encounter every day on the job. For all these reasons, it is reasonable to question whether mail-ballot elections are as necessary now as they were when *Aspirus* issued.<sup>7</sup>

The massive expansion of mail-ballot elections because of the Covid-19 pandemic has also revealed many problems in their administration.<sup>8</sup> Ballots have potential-

<sup>5</sup> *Isolation and Precautions for People with COVID-19*, <http://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html> (last visited Aug. 12, 2022); see also Lena H. Sun & Joel Achenbach, *CDC Loosens Coronavirus Guidance, Signaling Strategic Shift*, Washington Post (Aug. 11, 2022), <https://www.washingtonpost.com/health/2022/08/11/cdc-coronavirus-recommendations>.

<sup>6</sup> As the majority also acknowledges, the circumstances *Aspirus* set forth are becoming outdated. Factor 2 directed Regional Directors to reference whether (a) the 14-day trend in confirmed cases in the facility’s county is increasing or (b) the testing positivity rate in the facility’s county is 5 percent or higher. Many counties no longer report confirmed cases daily, and it has become apparent that testing positivity is not a reliable metric of infection risk in a community, especially with the ubiquity of unreported at-home tests.

<sup>7</sup> In the absence of public input and expert guidance, Member Ring is unpersuaded by his colleagues’ decision to permit mail ballots for elections in areas designated “Red” by the CDC when the CDC’s own guidance does not recommend limiting workplace interactions in those areas. He suspects that this decision will prove unpersuasive to employees who have worked throughout the pandemic emergency and are expected to continue reporting to work regardless of the CDC level in effect in their county. And he notes that any workplace-specific Covid concerns are already addressed by *Aspirus* factor 5 and by the protocols specified in current GC Memo 20-10, both of which remain in force.

Member Kaplan declines to reach the merits of the majority decision, but he also notes that the CDC’s own guidance does not recommend limiting workplace interaction in areas designated “Red.”

<sup>8</sup> This, in some measure, is to be expected because “[t]he Board has repeatedly acknowledged that ‘mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elec-

ly been lost in the mail<sup>9</sup> and have arrived at the Board’s regional office too late to be counted because of mail delays.<sup>10</sup> Ballots have been voided because, on the outer envelope, the signature could not be validated,<sup>11</sup> the employee printed (rather than signed) their name,<sup>12</sup> or the employees did not sign at all.<sup>13</sup> Controversies have arisen over a voter failing to put their vote in the provided inner envelope,<sup>14</sup> a voter using the sample instead of the actual ballot,<sup>15</sup> and a voter mailing an original and a duplicate ballot.<sup>16</sup> There have been allegations of a party soliciting employees’ ballots that, if proven and determinative, could have resulted in the election being set aside.<sup>17</sup> Remote ballot counts via Zoom have encountered technical difficulties.<sup>18</sup> Board agents have also misplaced ballots,<sup>19</sup> commingled improper ballots,<sup>20</sup> and given imprecise instructions.<sup>21</sup> Overall, mail-ballot elections have a lower participation rate and a significantly higher percentage of void ballots than do manual elections.<sup>22</sup> These issues with mail-ballot elections reinforce the Board’s strong preference for in-person manual elections, but at the very least, we should learn from these

tions, due to the absence of direct Board supervision over the employees’ voting.” *Professional Transportation, Inc.*, 370 NLRB No. 132, slip op. at 2 (2021) (quoting *Mission Industries*, 283 NLRB 1027, 1027 (1987)). The Board has complete control over ballots cast in person, including the ability to address some concerns relating to ballots contemporaneously. By contrast, the Board has no control whatsoever over ballots coming through the mail system.

<sup>9</sup> See *Antioch Tire, Inc. d/b/a Tredroc Tire Services, LLC*, 13-RC-263043, 2020 WL 7625004 (Dec. 8, 2020) (not reported in Board volumes); *Promowest Productions, Inc.*, 09-RC-261089, 2020 WL 6955655 (Nov. 25, 2020) (not reported in Board volumes).

<sup>10</sup> See *Centrio Energy South LLC*, 371 NLRB No. 94 (2022).

<sup>11</sup> See *College Bound Dorchester, Inc.*, 01-RC-261667, 2021 WL 2657318 (June 25, 2021) (not reported in Board volumes).

<sup>12</sup> See *Starbucks Corp.*, 18-RC-291082, 2022 WL 3138545 (Aug. 4, 2022) (not reported in Board volumes).

<sup>13</sup> See *MJ Melo Painting, Ltd.*, 29-RC-279096, 2022 WL 159186 (Jan. 7, 2022) (not reported in Board volumes).

<sup>14</sup> See *Starbucks Corp.*, 03-RC-289801, 2022 WL 3082500 (Aug. 2, 2022) (not reported in Board volumes).

<sup>15</sup> See *Brink’s Global Services USA, Inc.*, 29-RC-260969, 2020 WL 6955654 (Nov. 25, 2020) (not reported in Board volumes).

<sup>16</sup> See *Troy Grove Quarry*, 25-RD-269960, 2021 WL 4458849 (Sep. 28, 2021) (not reported in Board volumes).

<sup>17</sup> See *Professional Transportation*, above.

<sup>18</sup> See *Stericycle, Inc.*, 04-RC-260851, 2021 WL 738731 (Feb. 22, 2021) (not reported in Board volumes).

<sup>19</sup> See *MJ Melo Painting*, above.

<sup>20</sup> See *id.*

<sup>21</sup> See *Brink’s Global Services*, above.

<sup>22</sup> As of September 13, 2022, the participation rate for mail-ballot elections held in fiscal year 2022 was 64.5 percent, while the participation rate for manual elections was 75.3 percent. The void-ballot percentages were 2.8 and 0.40 percent for mail and manual elections, respectively. The issues with voter signatures and improper envelopes and ballots are a major cause of voided mail ballots and result in the disenfranchisement of the employees whose ballots are voided. As noted above, those issues do not arise in manual elections.

experiences that this area deserves particularly special attention, thought, and input.<sup>23</sup>

The Board has always endeavored to provide employees the opportunity to cast their votes in representation elections according to a strict, “laboratory conditions” standard. Today, our colleagues, in revising *Aspirus* factor two, fail to even consider the surge in mail-ballot voting irregularities that have been brought before the Board post-*Aspirus*.<sup>24</sup> Instead, without any consideration of the long-standing Board preference for manual elections, they determine—based on no expert opinion or input from stakeholders—that simply substituting one imperfect basis for calculating voter risk with a different imperfect basis is sufficient to guarantee the statutory rights of employees to vote and to ensure that, if they do vote, their vote will count. Rather than take this step, we

<sup>23</sup> In her *Aspirus* concurrence, then-Member McFerran suggested that the Board should consider abandoning its long-standing preference for manual elections:

[T]he Board would be well served to reevaluate both its preference for manual elections and its related antipathy toward absentee voting. The Board's preference for holding manual elections at an employer's facility made sense historically: that was where the voters were, and in-person voting was the standard for public elections. But many workers now work at home or away from any central employer facility, and public elections are increasingly conducted by mail.

....

Notably, other Federal labor agencies have modernized their election procedures accordingly. . . . The Board should consider following suit to the extent that it is permitted to do so.

370 NLRB No. 45, slip op. at 10–11. If Chairman McFerran and our other colleagues indeed intend to reject the long-standing preference for manual elections and, in effect, make mail balloting the default method for holding Board elections, we hope they recognize the significance of such a change and that, unlike in the instant case, they provide stakeholders with direct experience in Board elections an opportunity to fully brief the issue.

<sup>24</sup> Our colleagues assert that we cannot say there has been a “surge” in mail-ballot voting irregularities because there is no way to tell whether issues with mail-ballot elections have been arising more “frequently” post-*Aspirus* due to the change in “sample size.” They miss the point. Regardless of whether the rate of occurrence of these irregularities has or has not increased, void-ballot percentages are significantly higher for mail-ballot elections than for manual elections, and mail-ballot elections have become the rule rather than, as before, the exception. As a result, void ballots have multiplied, and each void ballot represents an employee who attempted to vote but whose vote was not counted. Untimely mail delivery—a serious problem in and of itself, given the problems with timely delivery over the past few years—obviously affects only mail-ballot elections, and this plus the other mail-ballot voting irregularities discussed above warrant greater consideration than our colleagues are presently willing to give them.

In addition, although we concede that manual elections are not problem-free, the numerous mail-ballot cases we are reviewing where either simple regional errors (such as mailing the wrong ballot to a voter) or untimely mail delivery (a ballot arriving at the regional office weeks after it was mailed), or both, are undermining our critical election processes cannot be ignored.

should instead seize the opportunity to solicit robust public and expert input by inviting briefing from the parties and interested amici as well as by directly asking the experts at the CDC.<sup>25</sup> We should comprehensively explore both when it is or is not appropriate for Regional Directors to direct mail-ballot elections at this stage of the Covid pandemic, and also what safeguards can now be implemented to make in-person elections appropriately safe.<sup>26</sup>

We have a weighty responsibility in conducting representation elections. Employees deserve a thorough consideration of how current conditions are affecting employees’ ability to exercise their fundamental right to choose, or not to choose, representation. Our colleagues fail to give them that today.

Dated, Washington, D.C., September 29, 2022

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Marvin E. Kaplan, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>25</sup> While we fully consider these important issues, we would continue to apply *Aspirus*, imperfect though it is.

<sup>26</sup> We take judicial notice of the fact that every state in the United States has deemed present conditions sufficiently safe for in-person elections, as demonstrated by the fact that every primary election held in 2022 thus far has allowed in-person voting.