



U.S. Chamber of Commerce

# Maligned Mail Ballots and Whistleblowers: The NLRB's Credibility Comes into Question

By Employment Policy Division, U.S. Chamber of Commerce



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In 2020, the National Labor Relations Board (NLRB or “Board”) significantly increased the frequency of elections conducted by mail-ballot rather than traditional in-person secret balloting by employees. This was a significant departure from the Board’s prior position disfavoring the use of mail-ballots as a flawed, ineffective, and unfair process for elections in most circumstances. In some ways, the Board’s decision at the time was reasonable—the country was in the midst of the COVID-19 pandemic, and there was concern that in-person elections might put voters and Board agents at risk.

Unfortunately, the Board has hung on to the widespread use of mail-ballot elections for far too long. Three years later, it has become clear that its historic wariness of mail-ballot elections was correct and justified. Election data and anecdotal evidence demonstrate that the experimental increase of mail-ballot elections has prejudiced the rights of both employees and employers by stifling voter participation and skewing outcomes in favor of union representation.

Most alarming are recent allegations<sup>1</sup> that mail-ballot elections open the door to substantial interference and election manipulation by both labor unions and the Board—the agency tasked with protecting the fairness and integrity of union elections. These allegations, brought to light by Starbucks Corporation and levied by an NLRB whistleblower, are a case study on how flaws in the mail-ballot election process could be exploited by both labor unions and biased agents of the Board to favor union representation.

It is important to note that while there are similarities between elections for public office and NLRB elections, such as using a voting booth to vote in secret ballot elections, there are also some important differences. Unions are not being elected to a specific term of office and generally don’t have to run for reelection, unions that win an election are given the power to levy dues on specific workers, in non-right to work states employees can be terminated for not paying union dues or fees, and there are specific limits around campaign periods for NLRB elections that have no parallel in campaigns for public office. And while mail-in ballots seem to have increased opportunities for people to vote in elections for public office, the opposite has occurred NLRB elections.

As covered in this report, election data and the allegations in the Starbucks case demonstrate that the Board’s longstanding suspicion of mail-ballot elections was fully justified and highlight the need for an urgent return to in-person secret balloting outside of extraordinary circumstances.

# I. An Overview of the National Labor Relations Act and the Use of Mail-Ballot Elections

## a. The National Labor Relations Act

The National Labor Relations Act (the “Act”) became law in 1935, and set forth the policy of the United States to protect “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>2</sup> The Act imparted a number of distinct rights to workers, known as Section 7 rights, one of the primary rights being a worker’s right to form or join a labor organization (colloquially, a “union”).<sup>3</sup> In 1947, Congress amended Section 7 of the Act to explicitly establish a worker’s right to “refrain” from exercising Section 7 rights, which included a right to refrain from forming or joining a labor union.<sup>4</sup>

In furtherance of these Section 7 rights, Congress created an Executive agency, the National Labor Relations Board, to ensure Section 7 rights are protected from infringement.<sup>5</sup> Among the powers delegated to the Board is the power to direct and oversee how a worker exercises the right to join a labor union, or refrain from joining a labor union.<sup>6</sup> In doing this, Congress established some parameters for the Board. For example:

- Congress established the method by which a worker exercises the right to join or refrain from joining a labor union. Initially, the method

was an election by “a secret ballot of employees or ... any other suitable method.”<sup>7</sup> In 1947, Congress revised the Act to clarify that the only permitted election method was “by secret ballot.”<sup>8</sup>

- Congress gave the Board instructions for determining when to hold these secret ballot elections: When a petition for an election has been filed with the Board by an employee, group of employees, or union (or by an employer, subject to a modified standard) alleging that a substantial number of employees wish to either (1) be represented by a union, or (2) be represented by a different union, the Board generally must first hold a hearing to determine whether an election is appropriate, and then, if the Board determines that an election is appropriate, it “shall direct” an election.<sup>9</sup>
- Congress described how a union wins a secret ballot election, which occurs when “the majority of the employees in a unit appropriate for such purposes” vote in favor of appointing the union as “the exclusive representative of all the employees in such unit....”<sup>10</sup>

The “unit appropriate for such purposes” is commonly referred to as a “bargaining unit,” which is usually comprised of two or more employees of an employer who are readily identifiable and share common employment interests.<sup>11</sup>



Congress also delegated power to the Board to determine the finer points of the union election procedure.<sup>12</sup> As an answer to this call, the Board's Rules and Regulations provide additional detail on what is required before the Board will hold a hearing to determine whether an election is appropriate:

- Petitions for election must contain a variety of information (such as the employer's name and nature of business, a description of the types of employees and job positions the union seeks to represent (a "proposed bargaining unit"), the number of employees in the proposed bargaining unit, and the proposed timing of the election).<sup>13</sup>
- Petitions for election must be supported by a "substantial number of employees," which is typically recognized as 30% of the employees in the proposed bargaining unit.<sup>14</sup>

If the Board determines a hearing is appropriate, it will hold the hearing primarily to determine if the proposed bargaining unit is "appropriate for the purpose of collective bargaining."<sup>15</sup> Whether a proposed bargaining unit is "appropriate for the purpose of collective bargaining" is a complex question that falls outside the scope of this paper, but it is important to note that, just like the pre-hearing procedures, the Board has crafted detailed procedures for handling the hearing itself.

Generally, if the Board determines that the proposed bargaining unit is appropriate, the Board will direct an election, for which the Board has also crafted detailed policies and procedures.<sup>16</sup> Of primary relevance to this paper is the Board's "longstanding policy [] that [union] elections should, as a general rule, be conducted manually," that is, in person.<sup>17</sup> There are exceptions to this general policy of in-person union elections, such as where the circumstances render an in-person election difficult, impractical, or not easily done.<sup>18</sup>



In these circumstances where an in-person election is deemed not to be the best vehicle, the Regional Director—the head of one of the Board’s 26 geographic regions spread throughout the country—has discretion to direct either (1) a mail-ballot election, whereby the Board mails election ballots to employees, employees vote in favor of or against the union, and then employees mail their ballots to the Board; or (2) a combination election comprised of both in-person and mail-ballot voting.<sup>19</sup>

The reason behind the Board’s longstanding policy favoring in-person elections is twofold, but simple: First, while the Act states that a union is to be designated or selected “by the majority of the employees in a [proposed bargaining unit],”<sup>20</sup> in practice, it is not a majority of employees in a proposed bargaining unit that select or reject a union—instead it is the majority of the employees in a proposed bargaining unit who actually vote that hold such power.<sup>21</sup> Second, a mail-ballot election generally results in much lower voter participation than an in-person election, thus increasing the likelihood that the election is not representative of the preferences of a majority of employees, but is instead representative of the preferences of only the most ardent union supporters or detractors.<sup>22</sup> This is the primary reason why the Board has traditionally considered in-person elections to be the gold standard.

Notwithstanding its established policy of favoring in-person elections whenever possible, over the last few years the Board has, despite the end of the COVID-19 pandemic and pandemic-related restrictions, continued to rely on mail-ballot elections. As mentioned above and discussed in detail below, this is problematic because mail-ballot elections are more likely to disenfranchise workers and undermine the purposes of the Act.

## b. Mail-Ballot Elections are Traditionally Rare

Historically, mail-ballot elections have been a rare procedure, utilized only in extreme circumstances.<sup>23</sup> Indeed, as the Board has stated:

The manual election lies at the heart of our system of workplace democracy. It is the cornerstone of [the Board’s] contribution to the successful workings of that democracy. Because of this, the [Board’s] historic practice has been to hold manual elections, except in rare circumstances where such elections are not feasible.<sup>24</sup>

Examples of instances when the Board has departed from its “historic practice” of directing in-person elections include:

- When the voters (those in the proposed bargaining unit) are scattered across different work locations.<sup>25</sup>
- When the voters have such different shift schedules that an in-person election would require significant alternations to the work schedules of a substantial proportion of employees.<sup>26</sup>
- When many of the voters are seasonal employees and the election is held at a time when a significant number of the seasonal employees are not currently active.<sup>27</sup>
- When voters do not work at a particular facility (such as in the case of home health aides or teleworkers).<sup>28</sup>

In 1998, the Board recognized three situations in which mail-ballot elections may be preferable to in-person elections: (1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; (3) where there is a strike, a lockout or picketing in progress at the employer’s facility.<sup>29</sup> The Board recognized that other factors may be relevant in determining whether an in-person or mail-ballot election would be preferable, but cautioned that, “in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the [Board’s] guidelines,” which consisted primary of the three situations enumerated above.<sup>30</sup>

A common thread throughout the Board’s past departure from the “historic practice” of using in-person elections is that mail-ballot elections are typically used in the rare circumstance where a mail-ballot election will likely result in a greater number of employees voting than would an in-person election.<sup>31</sup> In such an instance the use of the mail-ballot election is sensible, considering that under current law union elections are decided the same way most political elections in the United States are decided: the majority of voters who cast a ballot decide a union election, not the majority of employees.<sup>32</sup> Accordingly, the greater the voter participation rate, the more likely the vote represents the will of a majority of employees, and not merely the will of those who are most passionate about the subject. This is particularly impactful in the union context, because the decision to form or join a union, or refrain from doing so, often comes with immediate and substantial consequences for all workers in the bargaining unit regardless of whether they voted.<sup>33</sup>

## i. The Many Problems with Mail-Ballot Elections

As a general matter, mail-ballot elections result in 15-20% less voter participation than in-person elections—a fact the Board has long recognized.<sup>34</sup> More recently, immediately prior to the COVID-19 pandemic, voter participation in mail-ballot elections was abysmal when compared to voter participation in in-person elections. Internal Board statistics reveal that, from October 1, 2019, through March 14, 2020, voter participation for in-person elections was nearly 30% higher than turnout for mail-ballot elections.<sup>35</sup> While mail-ballot election participation improved during the worst of the COVID-19 pandemic, voter participation for in-person elections was still approximately 20% higher than participation in mail-ballot elections.<sup>36</sup>

The Board has similarly recognized that mail-ballot elections “are more vulnerable to the destruction of” the conditions ideal for determining the uninhibited desires of employees (known as “laboratory conditions”).<sup>37</sup> This is largely because, unlike in-person elections, the Board is unable to directly supervise the actual voting process (when employees ‘tick the box’) in mail-ballot elections.<sup>38</sup> To help guard against this vulnerability, the Board has developed unique procedures for mail-ballot elections that include:

- Prohibiting parties to an election from collecting employees’ completed mail-ballots.<sup>39</sup>
- Including Ballot instructions specifically tailored for mail-ballot elections, which include information on a designated Board agent tasked with remaining “readily available” to provide instructions and information to voters should the need arise.<sup>40</sup>



- Preparing voters’ ballots with a unique identification number (a “key number”) to ensure all votes cast are cast by eligible voters.<sup>41</sup>
- Requiring voters to sign their ballot envelopes, and protocols for providing voters new ballots if they failed to sign the ballot envelope (“if sufficient time remains before the [expiration of the voting] deadline”).<sup>42</sup>
- Declining to count mail ballots that arrive after the votes have been tallied, even if those ballots would have been determinative of the election.<sup>43</sup>

Nevertheless, procedural irregularities that undermine the validity of mail-ballot elections commonly arise, including:

- Board agents failing to timely issue a replacement ballot where it had the potential to change the election results.<sup>44</sup>
- Ballots being lost in the mail, resulting in voters losing the chance to have their voices heard.<sup>45</sup>
- Ballots not being counted because voters inadvertently print rather than sign their name on the ballot envelope, or because voters’ signatures are incapable of validation.<sup>46</sup>
- Unions mailing voters sample ballots altered in favor of the union.<sup>47</sup>
- Votes being submitted on incorrect sample ballots.<sup>48</sup>
- Ballots being misplaced by the Board, resulting in a measurable disparity between the number of ballots counted and the number of ballots received in the mail.<sup>49</sup>

Indeed, mail-ballot elections suffer from a myriad of problems and complications that render them, in many instances, inconsistent with the purposes of the Act (that is, to ensure the greatest number of employees are able to partake in the decision to form or join a union, or refrain from doing so, in a secret-ballot election that ensures fair and free employee choice).<sup>50</sup> Nevertheless, one party to union elections traditionally favors the use of mail-ballot elections—the union itself.

## ii. Unions’ Preference for Mail-Ballot Elections

Unions have traditionally favored mail-ballot elections over in-person elections. The reason is simple: There is a correlation between low participation rates and union victories—in other words, unions enjoy a greater success rate in Board-conducted representation elections when fewer workers vote.<sup>51</sup> As such, unions expect to win more mail-ballot elections than in-person elections by virtue of the fact that fewer workers cast a ballot.

In contrast, the Board has historically favored in-person elections over mail-ballot elections not only because of increased voter participation in in-person elections—which more accurately reflects the will of the workers—but also because election integrity is more easily assured in in-person elections. “[T]he voter in a manual election stands in the privacy of the voting booth. No one can see how he or she votes. In a mail ballot, the marking of the ballot can occur at any place, public or private, and it can occur in the presence of another person or indeed scores of persons.”<sup>52</sup> At in-person elections “the Board agent will not permit... coercion to occur during the balloting process.

By contrast, such coercion can easily occur in a mail ballot situation. An employer or union agent can stand over the employee and even inspect his ballot to make sure that the vote is 'right.' An 'election party' where mail ballots actually are marked can be held in which there is peer pressure to vote the 'right' way. Votes can be bought, with money or promises, and the purchaser can make sure that he or she gets what was paid for."<sup>53</sup>

Mail-ballot elections also hinder the parties' ability to communicate with employees during the period beginning 24 hours before ballots are mailed through the date on which ballots are to be returned (the Peerless Plywood period).<sup>54</sup> This rule operates to prevent unions and employers from presenting election campaign speeches to groups of employees (two or more employees) during the Peerless Plywood period, which can last multiple weeks.<sup>55</sup> This has an especially harsh impact on the employer, whose primary means of communicating with employees about its position in a union election is via group meetings.<sup>56</sup> In contrast, unions do not heavily rely on group communications campaigns, and are allowed to visit employees in their homes and otherwise engage in their usual non-group communications campaigns.<sup>57</sup> This can be particularly problematic because under the Act a union can essentially promise employees anything, and with employers unable to rely on their main method of communicating with employees to correct misinformation, employees are much more susceptible to deceptive tactics.<sup>58</sup>

Recently, employers have also alleged that unions are taking advantage of the unique structure of mail-ballot elections in an objectionable way by collecting employees' completed mail ballots and transporting them, unsupervised, to the Board for counting; this is a practice the Board considers to both impugn election integrity and "cast[] doubt on the secrecy of the employees' ballots."<sup>59</sup> Unions have engaged in additional election misconduct unique to mail-ballot elections by providing biased instructions to voters about the mail-ballot election process; this is a practice the Board has deemed objectionable where it has "the objective and foreseeable effect of confusing voters and reducing turnout...."<sup>60</sup>

As discussed in detail below, mail-ballot elections have flipped from being a rarely used procedure prior to the COVID-19 pandemic, to the norm. Should the increased use of mail-ballot elections continue, it is a virtual certainty that more instances of misconduct unique to mail-ballot elections will come to light.<sup>61</sup>

## c. The Board's New Reliance on Mail-Ballot Elections

Historically, the Board has utilized mail-ballot elections only in rare circumstances.<sup>62</sup> However, with the onset of COVID, a Republican-majority Board had the unenviable task of fulfilling its statutory mandate to conduct representation elections during a ravaging pandemic. On March 19, 2020, to buy it some breathing room to determine next steps, the Board suspended all representation elections, including mail-ballot elections, until April 3, 2020.<sup>63</sup> On April 1, 2020, the Board announced it would not extend its representation election moratorium.<sup>64</sup> The Board issued an update on its operating status on April 17, 2020, which addressed representation elections and stated in relevant part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.<sup>65</sup>

Several months into the pandemic, on July 6, 2020, General Counsel Peter Robb, who had been appointed by President Trump, issued a memorandum, which set forth suggested safety protocols for conducting in-person elections during the COVID-19 pandemic.<sup>66</sup> The suggested protocols were substantial in light of the pandemic and fell mainly on employers.<sup>67</sup> During this time—mid-April of 2020 through November of 2020—the Board began directing unprecedented numbers of mail-ballot elections.

In November of 2020, the Republican-majority Board formally addressed its increased willingness to direct mail-ballot elections as a result of the COVID-19 pandemic by acknowledging that in “virtually all” representation elections conducted since mid-April, the Board directed mail-ballot elections.<sup>68</sup> The Board also provided a temporary framework comprised of five factors to determine when a mail-ballot election would be appropriate in response to conditions created by the COVID-19 pandemic.<sup>69</sup> Under this framework, a mail-ballot election is appropriate when:

- The Agency office tasked with conducting the election is operating under “mandatory telework” status.
- 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.
- The proposed in-person election site cannot be established in a way that avoids violating mandatory state or local health order relating to maximum gathering size.
- The employer fails or refuses to commit to abide by the Board’s safety protocols.
- There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.<sup>70</sup>

This framework, called the Aspirus framework,<sup>71</sup> was intended to serve as temporary guidance to enable the Board to continue directing representation elections during the extraordinary circumstances caused by COVID-19.<sup>72</sup> Yet even as the circumstances morphed from extraordinary to exceedingly ordinary, the Aspirus framework remained in place.

Then, in September 2022, the Board, led by a Democratic majority, revisited the Aspirus framework—rather than acknowledging that the pandemic was all but over, the Board doubled down on the Aspirus framework and the use of mail-ballot elections. The Board left the Aspirus framework essentially untouched, revising only the second factor to no longer take into account 14-day COVID-19 infection trends, but to instead consider whether the county in which the election would occur is in the Centers for Disease Control’s (CDC) “high” Community Level risk category (a veritable lowering of the bar).<sup>73</sup> Otherwise, even today, the Board looks to the five-factor framework to determine whether a mail-ballot election is appropriate.

However, the circumstances precipitating the need for mail-ballot elections are no longer present.

When the Board issued Aspirus, the circumstances were much different than they are today....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....Notably, nothing in the CDC guidance suggests that individuals should generally avoid workplaces or public spaces....Consistent with this guidance, employees throughout the country are reporting to their workplaces to a far greater extent than when Aspirus issued. 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.<sup>74</sup>

Indeed, President Biden announced in September of 2022 that “the pandemic is over.”<sup>75</sup> The Board’s General Counsel, Jennifer Abruzzo, was embroiled in a dispute in late 2022 with the labor union that represents Board agents when she announced that the Board would be ending its telework policy and returning to pre-pandemic remote working arrangements.<sup>76</sup> The Board’s website confirms that there is not a single Board Regional office in “mandatory teleworking status.”<sup>77</sup> Yet somehow the Board continues to rely on the COVID-19 pandemic to justify its ongoing, frequent use of mail-ballot elections.<sup>78</sup>

As mentioned above, as recently as September 2022 the Democratic majority explicitly doubled down on its use of mail-ballot elections, using the COVID-19 pandemic as a justification.<sup>79</sup> Shockingly, the Board admitted that it had experienced an increase of objectionable conduct in mail-ballot elections, but dismissed the surge as having occurred “because the Board has held many more mail-ballot elections since the onset of the pandemic.”<sup>80</sup> In discussing the merits of the continued increased use of mail-ballot elections, the majority argued that the procedure suffers from irregularities just as in-person elections do.<sup>81</sup> However, the Democratic-majority entirely ignored the significant reduction in voter participation rates in mail-ballot elections compared with in-person elections.<sup>82</sup>

The Board’s (1) full-speed-ahead approach with respect to its continued and widespread use of mail-ballot elections; (2) failure to acknowledge the significant difference in voter participation rates between mail-ballot and in-person elections; and (3) position that mail-ballot and in-person election methods are essentially equivalent, are all but a tacit admission that the Board has abandoned its “statutory goal [of] insuring [sic] the integrity of a free and secret ballot election with maximum participation.”<sup>83</sup>



## d. The Board's Present-Day Reliance on Mail-Ballot Elections is Unjustified

Undoubtedly, the onset of the COVID-19 pandemic forced the Board's hand in conducting more mail-ballot elections—and rightly so. But the current Democratic Board appears to view COVID-19 in opportunistic terms, leaning on procedures necessary during the midst of a ravaging, global pandemic to justify a significant change in the way the Board has historically conducted union elections—disregarding the well documented, unique problems with mail-ballot elections.<sup>84</sup>

To drive the point home, in June of 2021, the Board issued a decision setting aside an election due to a union's misconduct that could only occur

in a mail-ballot election—soliciting voters to provide completed ballots to union personnel for transmittal to the Board.<sup>85</sup> Unbelievably, despite recognizing the existence of objectionable conduct unique to mail-ballot elections, Chairman McFerran opined that “it is time for the Board to reevaluate its historic preference for manual elections and to consider expanding and normalizing other ways to conduct elections on a permanent basis, including mail, telephone, and electronic voting” (the last of which has been prohibited by Congress).<sup>86</sup>

This is something Chairman McFerran pushed for as a Member of the Republican-majority Board at the end of 2020, at the same time she expressed optimism that, as mail-ballot elections become normalized, voter participation will increase.<sup>87</sup> But the 2022 election data is in—and that opinion has been proven wrong.





## II. January 3, 2022, Through February 3, 2023, Representation Election Data

### a. Mail-Ballot Election Data Reveals Problematic Voter Participation Numbers

Three years after the onset of the COVID-19 pandemic, as mail-ballot elections have become normalized, the negative impact of the procedure on the election process is plain. We analyzed data<sup>88</sup> from January 3, 2022, through February 3, 2023, and found that not only do mail-ballot elections result in a lower mean participation rate, but they also lead to a higher variation in participation rate.<sup>89</sup> Additionally, mail-ballot elections result in a larger number of void ballots being cast than do in-person elections.<sup>90</sup>

There are publicly available records for 1,772 Board-conducted representation elections whose tallies of ballots were completed between January 3, 2022, and February 3, 2023.<sup>91</sup> Of these 1,772 Board-conducted representation elections, 1,230 were mail-ballot elections, and 542 were in-person elections. Accordingly, between January 3, 2022, and February 3, 2023, 69.4% of the representation elections conducted by the Board were mail-ballot elections, and 30.6% were in-person elections. Compared to the numbers immediately prior to the COVID-19 pandemic, these recent figures show a dramatic increase in the proportion of mail-ballot

elections (69.4% currently, compared to just under 9%).<sup>92</sup> Compared to the numbers during the heart of the COVID-19 pandemic, these recent figures show a decrease in the number of mail-ballot elections, but demonstrate the Board's reluctance to return to its "historic practice" of heavily favoring in-person elections (mail-ballot elections currently comprise 69.4% of Board-conducted elections, compared to approximately 90% during the heart of the pandemic).<sup>93</sup>

The data further shows that, contrary to then-Member McFerran's admonition in November 9, 2020, the Board would not "be well served to reevaluate [] its preference for manual elections...."<sup>94</sup> Participation rates in mail-ballot elections with tallied results between January 3, 2022, and February 3, 2023, demonstrate that participation rates in mail-ballot elections will not "improve...as they become normalized and the Board gains more experience administering mail-ballot elections."<sup>95</sup> During the analysis period, most of which was more than two years after the Board began conducting significantly more mail-ballot elections, mail-ballot elections had a mean participation rate of 67%,<sup>96</sup> compared to a mean participation rate of 83.8% for in-person elections—in other words a 17 percentage point drop in voters in mail-ballot elections. (see Figure 1).

Figure 1, Voter Participation  
January 3, 2022–February 3, 2023

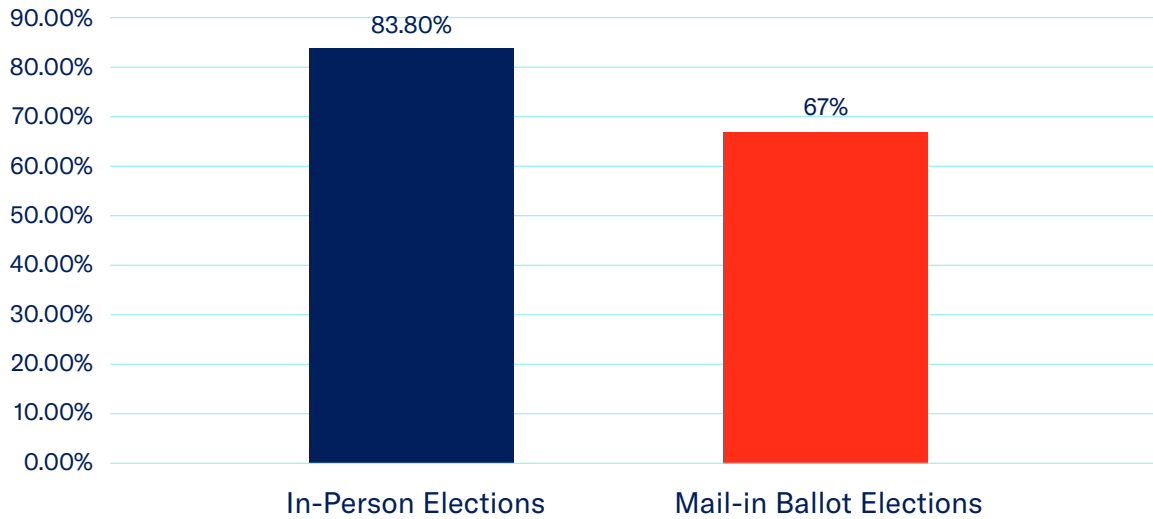
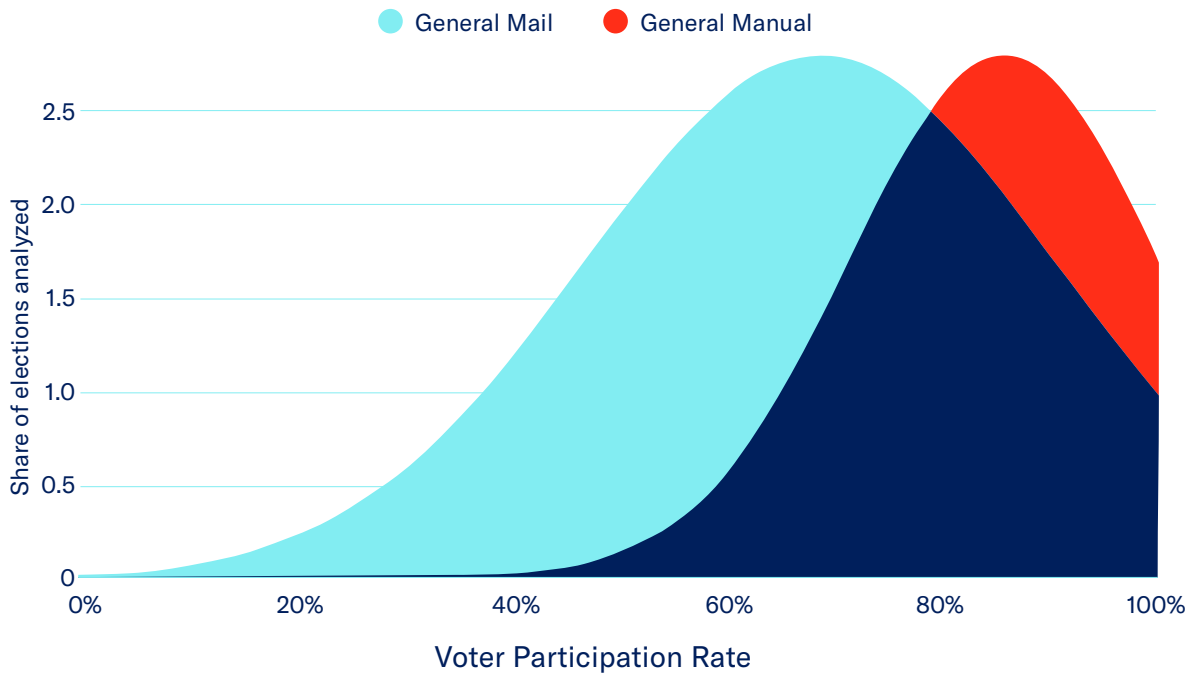


Figure 2<sup>97</sup>



Moreover, participation rates in mail-ballot elections had a standard deviation—that is, the variation in participation rates when compared

to the mean participation rate of 67%—of 23.7%, compared to a standard deviation of 19.9% for in-person elections (see Figure 2).

Thus, not only do in-person elections have a higher mean participation rate, but there is also less variance in the higher participation rate with each election. Accordingly, in-person elections not only result in more employees voting overall, but more employees vote more consistently, increasing the chance that each election is actually representative of the preference of a majority of employees. In contrast, then, mail-ballot elections result in greater employee disenfranchisement overall when compared to in-person elections, with greater variation in the level of disenfranchisement from election to election when compared to in-person elections.

Voter disenfranchisement in mail-ballot elections is further increased when factoring in void ballots. For example, from January 1, 2022, through September 13, 2022, the percentage of void ballots in mail-ballot elections was 2.8%, compared to .4% for in-person elections.<sup>98</sup> In other words, mail-ballot elections suffered from a 700% increase in the number of void ballots compared to in-person elections. Contrary to the Board's recent characterization, this is more than a "slight[]" increase in void ballots in mail-ballot elections.<sup>99</sup>

In light of the data illuminating greater employee disenfranchisement, and the decreased severity of the COVID-19 pandemic, the Board's increased fervor for mail-ballot elections is perplexing.<sup>100</sup> Any continued preference for unnecessary mail-ballot elections is, in effect, a recognition by the Board that maximizing voter participation is not of particular importance in Board-conducted representation elections.

## b. Putting It All Together

As established above, lower voter participation heavily favors one party to union elections—the union.<sup>101</sup> This is presumably because the people most motivated to vote are those who want to change the status quo, and union elections are decided by a majority of participating voters, not a majority of employees.<sup>102</sup> Thus, the lower the ballot count, the more likely the union is to win an election. It follows then, that mail-ballot elections—which suffer from dramatically lower turnout, a higher variance in participation rate, and a seven-fold increase in the number of void ballots—favor unions and prejudice employers, not to mention workers themselves, the very people the Act was intended to protect, and whose rights the Board is tasked with preserving.

But unions cannot be blamed for seeking every possible advantage in Board-conducted elections, so long as they do so lawfully. However, it would be extremely problematic—a violation of its statutory mandate—if the Board itself were to engage in conduct designed to favor one party over the other. In August of 2022, allegations were brought to light by a Board whistleblower of this very conduct—Board agents acting in concert with unions to ensure union election victories and tampering with evidence to cover their tracks.

These allegations are the most illustrative example of the severity of the problems with mail-ballot elections. Not only are mail-ballot elections far more likely to result in employee disenfranchisement during the best of times, but they are also far more susceptible to manipulation by parties, including the Board itself, further robbing employees of their statutory right to form or join labor unions—or to refrain from doing so.

# III. Starbucks: A Case Study in Board Bias and Manipulation of Mail-Ballot Elections

Recent allegations by a Board whistleblower have come to light in a case involving Starbucks Corporation and indicate that the Board is indeed engaging in conduct designed to favor unions in representation elections, including colluding with unions to bring about union victories and fabricating evidence to obscure their actions.

## a. The Starbucks Letter: Process Manipulation by Biased Board Agents

On August 15, 2022, Starbucks sent a letter to the Board and the General Counsel for the Board, Jennifer Abruzzo, outlining egregious conduct allegedly engaged in by Board agents to ensure union victories in a number of recent mail-ballot elections involving Starbucks.<sup>103</sup> The allegations are said to have been made by a “career NLRB professional” who was “concerned by the [Board’s] failure to ensure appropriate neutrality and laboratory conditions...in connection with a Board-conducted election.”<sup>104</sup> The allegations, which are alleged to be supported by documentary evidence (and appear to be supported by such evidence, considering the detailed factual recitations, including the times and manners of, and parties to, various communications), detail a conspiracy between the Board and the union to secure a union victory without regard to the actual desires of employees.<sup>105</sup>

In a nearly ten-page portion of the letter, Starbucks methodically explains how three distinct Board Regions acted improperly to secure union election victories in three separate mail-ballot elections and manufactured evidence in an effort to conceal the misconduct.

### In Region 14:

- Board agents made secret arrangements with union representatives to allow certain employees—who were hand-picked by the union—to cast their votes in person at the Region’s office, in violation of the election agreement mandating an all-mail-ballot election.<sup>106</sup>
- Board agents permitted these hand-picked voters to vote in person, without Starbucks’s knowledge, and without a single Starbucks witness present, rendering it impossible to know whether the Board agents had prohibited conversations with voters (including telling voters how they should vote).<sup>107</sup>
- Board agents provided voters additional ballots at the request of the union in contravention of the election agreement (which instructed that additional ballots would only be provided upon request by an “eligible voter”).<sup>108</sup>

- Board agents disclosed non-public, real-time information to the union concerning (1) when certain employees’ ballots were received by the Board, (2) how many ballots in total had been received by the Board, which enabled the union to determine (1) who had already voted, and (2) who had not yet voted, thus enabling the union to target specific employees in an effort to (1) influence their vote in favor of the union, and, if successful (2) convince the employees to transmit a vote.<sup>109</sup>
- Board agents mishandled employees’ ballots, including by (1) losing ballots on multiple occasions during the same day, only to later discover the lost ballots; (2) marking ballots as received on wrong dates and at the wrong times; and (3) taking seven unopened, uncounted ballots into a back room, outside the view of the parties, for a period of 15 minutes, during which time all manner of improper conduct could have occurred.<sup>110</sup>
- Board agents took after-the-fact steps to conjure memoranda that falsely portrayed their conduct as “routine Board ‘protocol,’” in an effort to conceal their efforts to secure a union victory from Starbucks, the public, and many of the voters in the election.<sup>111</sup>

### In Region 3:

- Board agents failed to account for seven timely mail-ballots—the agents simply ignored the ballots when tallying the elections votes, which resulted in a union victory (eight votes in favor of the union, 7 votes opposing the union). Starbucks objected, and a different Board Region, Region 10, investigated whether Region 3 engaged in misconduct. Region 10 found that Region 3 did engage in misconduct, but rather than directing Region 3 to hold a new election, Region 10 directed Region 3 to hold a second

ballot count before the parties to count all ballots received in the election (including the seven previously uncounted ballots).<sup>112</sup> Region 3 held the second ballot count and, when all votes had been counted, the results were a 10 to 10 tie, rather than a union victory.<sup>113</sup> Then, and only then, did Region 10 direct Region 3 to hold a new election.<sup>114</sup>

### In Region 19:

- Board agents collaborated with the union to afford pro-union voters special treatment by making secret arrangement with the union for hand-picked employees to vote in-person, and unsupervised, at a Board office (the same conduct in which Region 14 allegedly engaged).<sup>115</sup>

Also on August 15, 2022, Starbucks sent a copy of the letter to the Board’s Inspector General,<sup>116</sup> David Berry, requesting that he open a full investigation into “all NLRB representation election cases...involving Starbucks over the past 12 months regarding actions by Board personnel to improperly influence the outcome of NLRB representation elections and unfair labor practice cases,” and further requesting that he release his findings to the public.<sup>117</sup> That same day, Education and Labor Committee Republican Leader, Virginia Foxx, urged Congress to get involved:

When a statutorily neutral agency actively informs organizers which employees should be targeted and coerced, something has gone terribly wrong. This country has never seen the NLRB act so openly—or brazenly—to drive American workers into unions. Collusion among seasoned NLRB officials and the Workers United agents driving the Starbucks union campaign is disturbing. I urge the majority to hold a hearing on these troubling reports.<sup>118</sup>



On August 24, 2022, Virginia Foxx, Richard Burr,<sup>119</sup> Rick Allen,<sup>120</sup> and Mike Braun<sup>121</sup> sent a letter to Inspector General Berry, requesting that he “immediately investigate [Starbucks’s] allegations, protect all whistleblowers from retaliation, and ensure the NLRB is fulfilling its obligations under the law to safeguard the rights of workers to engage in or refrain from organizing activity.”<sup>122</sup> The letter summarized the allegations levied against the Board, and requested that, because the allegations “suggest more widespread problems at the NLRB,” the Office of Inspector General “not only investigate the allegations in the August 15 Starbucks letter, but that it also conduct an audit to review whether the NLRB has been neutral and objective in administering representation elections since January 2021 as required by the NLRA.”<sup>123</sup>

On October 13, 2022, the Office of Inspector General confirmed that it was initiating an audit in order to:

- Evaluate the Regional Offices’ compliance with the Agency’s mail ballot election procedures.
- Determine if any external factors are impeding the Agency’s mail ballot elections.
- Evaluate the efficiency of consolidated election decision writing.
- Determine if the Agency’s internal controls for mail ballot elections and representation decision writing are effective.<sup>124</sup>

The Office of Inspector General estimated that its audit report concerning mail-ballot elections would be issued in March of 2023.<sup>125</sup>

It is unclear from the Office of Inspector General’s audit summary if the Inspector General intends to audit or investigate whether Board agents manufactured evidence (or its accompanying analogue, destroyed evidence) to cover up misconduct or otherwise obstructed employees’ efforts to obtain fair and free elections. Given the serious allegations against the Board, which involve tampering with evidence, this should be a significant part of the Inspector General’s audit (which could involve, at a minimum, forensic data recovery and examinations of metadata). While the results of the Office of Inspector General’s audit are currently being prepared, it would tell very little if the Office of Inspector General is unable to substantiate Starbucks’s allegations without a detailed investigation into the Board’s alleged evidentiary malfeasance, considering that the core of Starbucks’s allegations is that the Board will do anything to (1) ensure union election victories, and (2) cover its tracks after the fact to obscure its misconduct.

Another element that should feature in the Inspector General’s audit summary is a report issued by a Board Hearing Officer on February 24, 2023.<sup>126</sup> The report followed a hearing on Starbucks’ objections to the Region 14 election referenced in the letter.

The Hearing Officer found merit to Starbucks’ allegations that Region 14: (1) made special arrangement with the union to allow certain voters to vote in person rather than by mail; (2) misrepresented to Starbucks that the Region had mailed ballots to voters when it had in reality allowed those voters to pick their ballots up in person; (3) failed to explain to Starbucks why the Region was not concerned about voter disenfranchisement and election integrity; and (4) lost custody of one of the ballots for an unspecified length of time prior to the ballot count.<sup>127</sup> In recommending sustaining these objections, the Hearing Officer relied on Board precedent which prohibits Board agents conducting elections from engaging in conduct which calls into question the Board’s neutrality in the proceedings.<sup>128</sup> One would certainly hope that these conclusions are included in the Inspector General’s audit.

## b. Election Data Shows Unique Impact on Starbucks Elections

Setting aside the whistleblower’s allegations, data analysis reveals something unusual with the Starbucks elections. During the time period analyzed above (January 3, 2022, through February 3, 2023), we analyzed 303 Board-conducted representation elections involving Starbucks.<sup>129</sup>

Of these 303 Board-conducted representation elections for Starbucks, 247 (81.25%) were mail-ballot elections, and 56 (18.48%) were in-person elections. During the analysis period, mail-ballot elections for Starbucks had a mean participation rate of 57.79%, compared to a mean participation rate of 81.96% for in-person elections—in other words, a 24 percentage point drop in voters in Starbucks mail-ballot elections (see figure 3).

Figure 3, Starbucks Voter Participation  
January 3, 2022–February 3, 2023

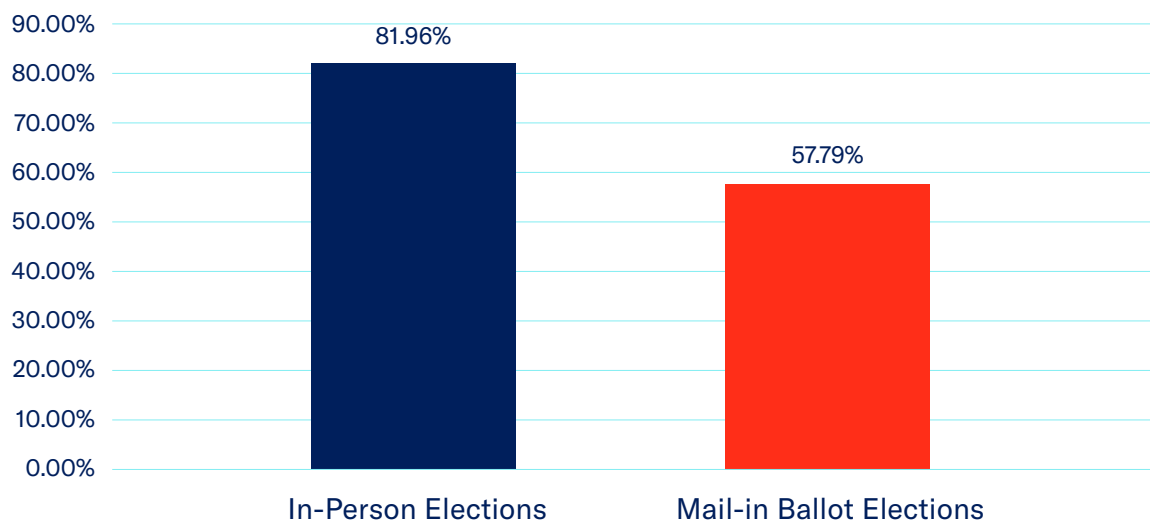
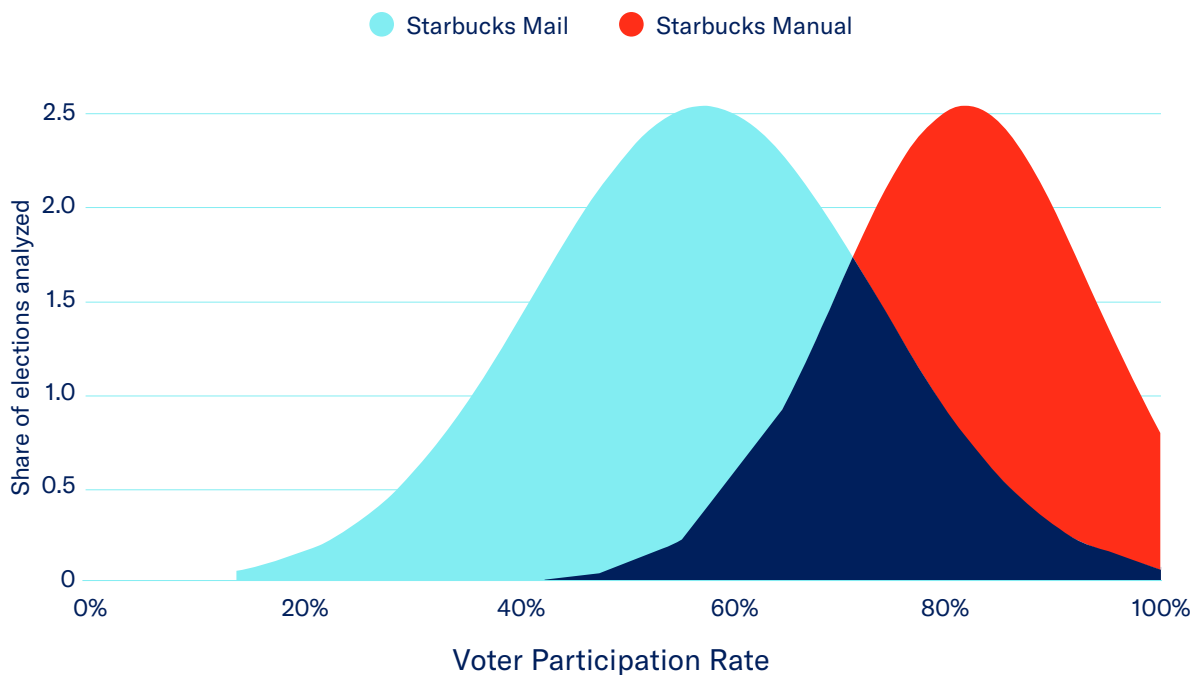


Figure 4<sup>130</sup>



Moreover, participation rates in mail-ballot elections for Starbucks had a standard deviation of 16.12%, compared to a standard deviation of 12.11% for in-person elections (see Figure 4).

A comparison to the general election statistics reveals both an increased use of mail-ballot elections in the case of Starbucks, as well as a decrease in the already low voter participation rate for mail-ballot elections. For example, as illustrated in Figure 5, mail-ballot elections comprised 69.4%

of Board-conducted elections during the analysis period, while mail-ballot elections for Starbucks comprised 81.52% (an increase in the use of mail-ballot elections of 11.85%).

As illustrated in Figure 6, the voter participation rate in Board-conducted mail-ballot elections was 67% during the analysis period, while the voter participation rate in Starbucks mail-ballot elections was 57.79% (a decrease of 9.21%).

Figure 5, The Use of Mail-ballot Elections: General vs. Starbucks  
January 3, 2022–February 3, 2023

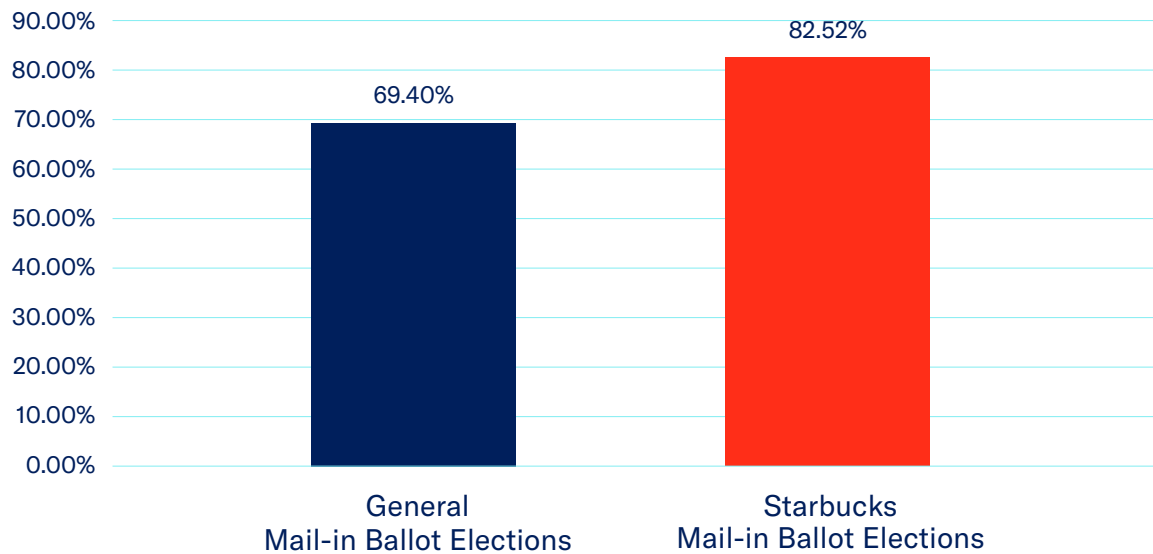
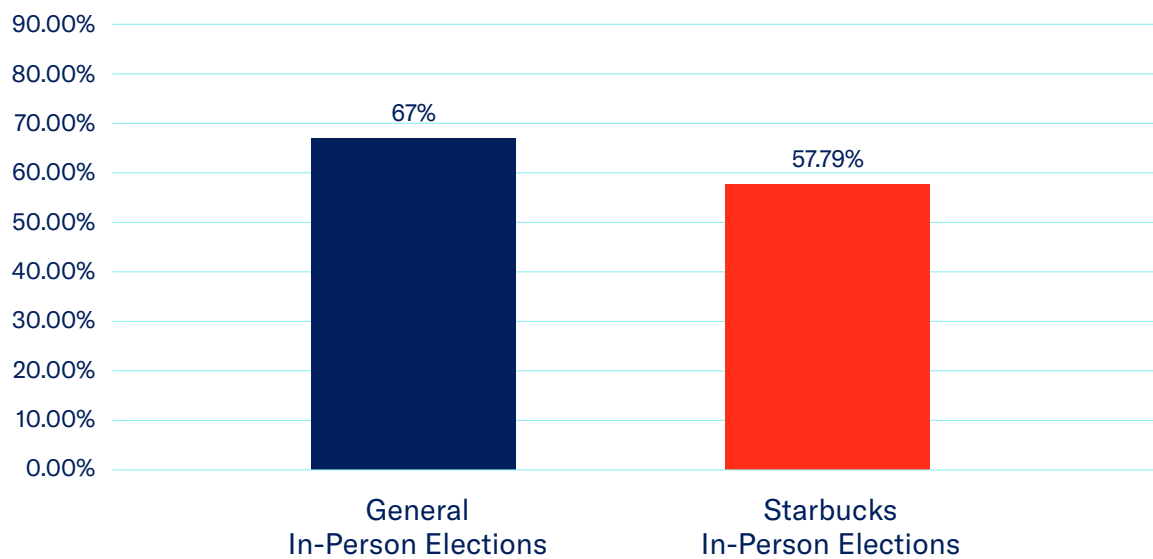


Figure 6, Voter Participation: General vs. Starbucks  
January 3, 2022–February 3, 2023



Additionally, the difference in variation of voter turnout between mail-ballot and in-person Board conducted elections during the analysis period was 3.8% (23.7% standard deviation for mail-ballot elections, and 19.9% for in-person elections), while the difference in variation of voter turnout for Starbucks elections was 4.01% (16.12% standard deviation for mail-ballot elections, and 12.11% for in-person elections).<sup>131</sup> Thus, voter participation in Starbucks mail-ballot elections was even less consistent than participation in general mail-ballot elections by 0.21% when compared to the respective in-person elections.

Perhaps most curious of all, is the whiplash reversal the Board made in conducting mail-ballot elections for Starbucks following the August 15, 2022, letter. For Board-conducted representation elections from January 3, 2022, to August 15, 2022, 97.11% of Starbucks elections were conducted via mail-ballot, while 8.89% were conducted in-person.

From August 15, 2022, through February 3, 2023, 3.03% of Starbucks elections were conducted via mail-ballot, while 96.97% were conducted in-person.<sup>132</sup> If nothing else, the sharp reversal makes almost certain that the Board took Starbucks's August 15, 2022, letter very seriously.

The recently exposed Starbucks election experience provides an unvarnished illustration of the myriad problems with mail-ballot elections. This should serve as a wake-up call to good faith actors at the Board—mail-ballot elections hurt workers in the majority of instances, and should not be used outside the historically recognized extraordinary circumstances.



# IV. Conclusion

The facts and data outlined in this paper demonstrate that the primary beneficiary of mail-ballot elections is the union, not the workers whose rights the Act is designed to protect. Yet the current Board continues to push for the unnecessary and widespread use of the mail-ballot election procedure despite having access to data (and prior Board decisions acknowledging) the disenfranchising effect mail-ballot elections have on workers. Doing so is simply inconsistent with

the NLRB's statutory mandate. Moreover, it lends credence to recent whistleblower allegations that the Board is actively undermining its sacrosanct election procedures to ensure that unions win elections, not to ensure fairness in the process. It is long past time for the Board to return to its long-established preference for in-person elections, and to ensure that the electorate is no longer disenfranchised.



# Endnotes

- 1 As will be explored further below, the Board's own Hearing Officer recently issued a report which recommended setting an election aside based on some of the allegations made by Starbucks.
- 2 29 U.S.C. § 151.
- 3 *Id.* § 157.
- 4 See Labor Management Relations Act, 1947 (“Taft-Hartley Act”), Pub. L. No. 80-101, § 101, 61 Stat. 136, 140 (1947).
- 5 See 29 U.S.C. § 153(a).
- 6 See *id.* § 153(b).
- 7 National Labor Relations Act (“Wagner Act”), Pub. L. No. 74-198, 49 Stat. 449, § 9(c) (1935).
- 8 See 29 U.S.C. § 159(c)(1) (dropping the “other suitable method” language from the Act). Additionally, signed cards signifying employee support for a union (authorization cards) can, when signed by a majority of employees, enable an employer to recognize the union as the employees’ bargaining representative without the need for an election. See 29 C.F.R. § 103.21(a); *Island Constr.*, 135 NLRB 13, 15 (1962) (“A union obtains exclusive representative status by establishing that a majority of the employees in an appropriate unit have selected it as their representative, either in a Board-conducted election, pursuant to Section 9(c) or by other voluntary designation, pursuant to Section 9(a). A union selected under either subsection of Section 9 is entitled to recognition as the representative of the employees and to negotiate an agreement on their behalf.”).
- 9 29 U.S.C. § 159(c)(1).
- 10 *Id.* § 159(a).
- 11 *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *Am. Steel Constr., Inc.*, 372 NLRB No. 23 (2022).
- 12 29 U.S.C. §§ 153(c)(1), 156; see also *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”).
- 13 29 C.F.R. § 102.61(a).
- 14 See *id.* § 102.61(a)(7); 79 FR 74308-01, 2014 WL 7007229, at \*74421 (Dec. 15, 2014) (confirming the 30% figure); *Local 3, Intern. Broth. of Elec. Workers, v. NLRB*, 845 F.2d 1177, 1181 (2nd Cir. 1988) (same); *NLRB, Your Right to Form a Union*, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/your-right-to-form-a-union> (last accessed Feb. 22, 2023) (hereafter “NLRB Union Formation”) (same); see also *NLRB: An Outline of Law and Procedure in Representation Cases Sec. 5-100* (clarifying that under the 2014 amendment to the Board’s election procedures, evidence that a substantial number of employees support the union must generally be submitted at

- the time the petition is filed with the Board); NLRB, CASEHANDLING MANUAL, Part Two, Representation Proceedings § 11030.1 (Sept. 2020) (hereafter “CASEHANDLING MANUAL”) (requiring evidence that a substantial number of employees support the union be filed at the time the petition is filed or, when the petition is e-filed or faxed, within two days of filing).
- 15 29 C.F.R. § 102.64(a).
- 16 See *id.* § 102.69.
- 17 CASEHANDLING MANUAL § 11301.2.
- 18 *Id.*
- 19 *Id.*; see also *id.* § 11301.1.
- 20 29 U.S.C. § 159(a).
- 21 See *R.C.A. Mfg. Co.*, 2 NLRB 159, 173-178 (1936) (“[T]he phrase, ‘majority of the employees’, in the Act must be interpreted as meaning a majority of the employees who participate in the election, so that the organization receiving a majority of the votes cast is entitled to certification.”); NLRB Union Formation (“If a majority of those who vote choose the union, the NLRB will certify the union as your representative for collective bargaining.”) (emphasis added); see also *Lemco Constr., Inc.*, 283 NLRB 459, 460 (1987) (“[E]lection results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation,” and elections will be overturned “[o]nly if it can be shown by objective evidence that eligible employees were not afforded an adequate opportunity to participate in the balloting”) (internal quotations omitted) (emphasis added).
- 22 See *infra* Section I(b)(ii).
- 23 See *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 (2020) (citing *London’s Farm Dairy, Inc.*, 323 NLRB 1057, 1057 (1997)) (“[T]he Board has a long and proud tradition of conducting elections by manual balloting.”); *Willamette Indus., Inc., Duraflake Div.*, 322 NLRB 856, 856 (1997) (noting that “Board precedent and policy [establishes a] presumption [in] favor[] [of] a manual election, not a mail-ballot election”).
- 24 *San Diego Gas and Elec.*, 325 NLRB 1143, 1153 (1998) (*Members Hurtgen and Brame*, dissenting).
- 25 *Sutter W. Bay Hosps.*, 357 NLRB 197, 198 (2011) (mail-ballot election appropriate because voters worked at four different facilities); *Masiongale Electrical-Mechanical, Inc.*, 326 NLRB 493, 493 (1998) (same, except voters were scattered across eight different worksites).
- 26 *GPS Terminal Servs., Inc.*, 326 NLRB 839, 839 (1998) (mail-ballot election appropriate where employees had substantially varied work scheduled).
- 27 *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) (mixed in-person and mail-ballot election appropriate where the election was set outside of “peak season,” because an in-person election would have denied nearly 50% of employees in the proposed bargaining unit the chance to vote).
- 28 *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126-27 (D.C. Cir. 1996) (“[T]he Board sensibly opted for a mail-ballot” election where an in-person election would have required voters (home health aide workers) “to make a special trip to one of the employer’s offices”).



- 29 San Diego Gas, 325 NLRB at 1145; see also CASEHANDLING MANUAL § 11301.2.
- 30 San Diego Gas, 325 NLRB at 1145.
- 31 Sitka Sound, 206 F.3d at 1182 (use of mixed in-person and mail-ballot election appropriate to “attempt to avoid the predictably substantial disenfranchisement that would have otherwise occurred”); San Diego Gas, 325 NLRB at 1146 (“[B]ecause mail ballot elections have, by design, largely been limited to situations where factors were present which were likely to inhibit voter participation if the election were conducted manually, there is no reason to believe that participation in those particular elections would necessarily have been higher had they been manual elections.”) (emphasis added); Kwik Care, 82 F.3d at 1126 (recognizing that “the Board had every reason to believe that the voter participation rate would have been significantly lower if it had opted for a manual election”) (emphasis in original); compare GPS Terminal, 326 NLRB at 839 (mail-ballot election was the superior choice where an in-person election “would not be an efficient use of limited available Board resources”), and Masiongale Electrical-Mechanical, 326 NLRB at (1998) (mail-ballot election appropriate where in-person election would require Board agents to travel “a significant number of miles and possibly conduct the election on more than 1 day”), with San Diego Gas, 325 NLRB at 1152-53 (Members Hurtgen and Brame, dissenting) (noting that the expenditure of extra Board resources for an in-person election “is money that is well spent for the attainment of...[e]nsuring the integrity of a free and secret ballot election with maximum participation,” which is best “ensured by the presence of a Board agent at a manual election,” and that the Board “would not sacrifice employee participation for the sole purpose of saving money”).
- 32 See supra note 21.
- 33 For example, the decision to form or join a union brings with it the costs of union dues, which are typically deducted from workers’ paychecks. It also alters the relationship between employers and employees from a direct working relationship, to one where a third party (the union) is involved in many decisions that impact both employers and employees.
- 34 See, e.g., San Diego Gas, 325 NLRB at 1146 (“The Board’s experience with representation elections has shown that the voter participation rate is generally higher in elections conducted manually than in mail ballot elections.”); Kwik Care, 82 F.3d at 1126 (same); see also 2 Sisters Food Group, Inc., 357 NLRB 1816, 1829 n.3 (2011), abrogated by The Boeing Company, 365 NLRB No. 154 (2017) (Member Hayes, dissenting in part) (noting that the data shows mail-ballot elections have around a 15% to 20% lower participation rate than manual elections); Nouveau Elevator Indus., Inc., 326 NLRB 470, 470 (1998) (denying appeal of Regional Director’s decision to direct a manual election, the basis of which was, in-part, the “well known [fact] that voter turnout is considerably higher in manual as opposed to mail-ballot elections”); San Diego Gas, 325 NLRB at 1151 (Members Hurtgen and Bram dissenting) (referencing study showing that mail-ballot election turnout was nearly 20% lower than in-person election turnout).

- 35 *Aspirus Keweenaw*, slip op. at 3 (analyzing data comprised of 508 in-person elections with an 85.2% turnout, and 48 mail-ballot elections with a 55.0% turnout).
- 36 *Id.* at 3 (analyzing data from March 15, 2020, through September 30, 2020, comprised of 46 in-person elections with a 92.1% turnout, and 432 mail-ballot elections with a 72.4.0% turnout).
- 37 See *Thompson Roofing*, 291 NLRB 743, 743 n.1 (1988); *Mission Indus.*, 283 NLRB 1027, 1027 (1987); *Brink’s Armored Car*, 278 NLRB 141, 141 (1986); see *Gen. Shoe Corp.*, 77 NLRB 124, 127 (1948), enforced sub nom. *NLRB v. Gen. Shoe Corp.*, 192 F.2d 504 (1951). The maintenance of “laboratory conditions” in the context of representation elections is the concept whereby unions, employers, and the Board are prohibited from improperly influencing employee voters. See e.g., *Gen. Shoe Corp.*, 77 NLRB at 127.
- 38 See *Thompson Roofing*, 291 NLRB at 743 n.1; *Mission Indus.*, 283 NLRB at 1027; *Brink’s Armored Car*, 278 NLRB at 141.
- 39 *Pro. Transp., Inc.*, 370 NLRB No. 132, slip op. at 4 (2021); *Fessler & Bowman, Inc.*, 341 NLRB 932, 934 (2004).
- 40 CASEHANDLING MANUAL § 11336.2(c).
- 41 See *id.*; *Davis & Newcomer Elevator Co.*, 315 NLRB 715, 715 (1994).
- 42 See CASEHANDLING MANUAL § 11336.4(b); *Davis & Newcomer Elevator*, 315 NLRB at 715; see also *Cannery Workers Local 20707*, 65 NLRB 890, 891 (1946).
- 43 See *Promowest Prod., Inc.*, 09-RC-261089, 2020 WL 6955655, at \*1 n.1 (Nov. 25, 2020); *Classic Valet Parking, Inc.*, 363 NLRB 249, 249 (2015). This procedure is understandably controversial as it requires the Board to disregard actual, valid votes cast by workers.
- 44 See, e.g., *Davis & Newcomer Elevator*, 315 NLRB at 715 (Board agents failed to issue a replacement ballot to a voter prior to the expiration of the voting deadline in an election that was decided by a single vote).
- 45 See, e.g., *Antioch Tire, Inc.*, 13-RC-263043, 2020 WL 7625004, at \*1 n.2 (Dec. 8, 2020); *Promowest Prod.*, 2020 WL 6955655, at \*1 n.1.
- 46 See, e.g., *Coll. Bound Dorchester, Inc.*, 01-RC-261667, 2021 WL 2657318, at \*1-2 (June 25, 2021); *Thompson Roofing*, 291 NLRB at 743.
- 47 *Kwik Care*, 82 F.3d at 1125.
- 48 *Reliable Trucking, Inc.*, 349 NLRB 812, 816 (2007); *In Re Aesthetic Designs, LLC*, 339 NLRB 395, 395 (2003).
- 49 *New York Tel. Co.*, 109 NLRB 788, 789-91 (1954).
- 50 See, e.g., 29 U.S.C. § 157; *A.J. Tower Co.*, 329 U.S. at 330; *San Diego Gas*, 325 NLRB at 1144.
- 51 See Robert Combs, ANALYSIS: Amazon Votes Reveal Unions’ Secret Helper—Low Turnout, BLOOMBERG LAW (May 3, 2022, 4:00 AM), <https://news.bloomberglaw.com/bloomberglaw-analysis/analysis-amazon-votes-reveal-unions-secret-helper-low-turnout> (analyzing the trend where, between 2000 and 2022, “[t]he lower the turnout, the better the results—for labor, not for management”).

- 52 San Diego Gas, 325 NLRB at 1150 (Members Hurtgen and Brame, dissenting).
- 53 *Id.*
- 54 See Peerless Plywood, 107 NLRB 427, 430 (1953).
- 55 *Id.*; San Diego Gas, 325 NLRB at 1151 (Members Hurtgen and Brame, dissenting).
- 56 See San Diego Gas, 325 NLRB at 1151 (Members Hurtgen and Brame, dissenting).
- 57 See *id.*
- 58 See e.g., Smith Co., 192 NLRB 1098, 1101 (1971). In contrast, employers run afoul of the Act if they promise benefits (or actually provide such benefits) during an election campaign, which substantially restricts the types of messaging employers can lawfully use during a campaign. See e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969).
- 59 Pro. Transp., slip op. at 4; see also 3067 Orange Ave., LLC, 21-RC-264740, 2022 WL 2130668, at \*1 n.2 (2022) (employer alleging that union engaged in objectionable ballot solicitation); Imp. Motors II, Inc., 32-RC-272003, 2021 WL 4990701, at \*1 (Oct. 25, 2021), petition for review dismissed sub nom. Imp. Motors II, Inc. v. NLRB, 21-1242, 2022 WL 102559 (Jan. 7, 2022) (same).
- 60 See Paragon Sys., 2022 WL 767827, at \*1 n.1 (2022) (union sent email to voters stating “IF YOU SHOULD RECEIVE A NLRB BALLOT IN THE MAIL PLEASE DISREGARD IT[]’ had the objective and foreseeable effect of confusing voters and reducing turnout”).
- 61 It is not just the parties to the election that undermine the validity of mail-ballot elections. For example, in Nat’l Hot Rod Ass’n v. NLRB, 988 F.3d 506 (D.C. Cir. 2021), the Board certified the petitioner union as the representative, despite the fact that Board delays in sending out replacement ballots made it impossible for certain employees to vote in the election. *Id.* at 508. The D.C. Circuit refused to enforce the Board’s bargaining order in the case. *Id.* at 509-10. See also *infra* Section III.
- 62 See e.g., Nat’l Van Lines, 120 NLRB 1343, 1343 (1956).
- 63 See NLRB, National Labor Relations Board Suspends Representation Elections Through April 3, 2020 (Mar. 19, 2020), <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>.
- 64 See NLRB, NLRB Resumes Representation Elections (Apr. 1, 2020), <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>.
- 65 See NLRB, COVID-19 Operational Status Update (Apr. 17, 2020), <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.
- 66 NLRB Gen. Couns. Mem. 20-10 (July 6, 2020).
- 67 *Id.* at 1-3.
- 68 Aspirus Keweenaw, slip op. at 3.
- 69 *Id.* at 4-7.
- 70 *Id.*



- 71 First established by the Board in *Aspirus Keenaw*, 370 NLRB No. 45, slip op at 3 (2020)
- 72 See generally, *id.*
- 73 See *Starbucks Corp.*, 371 NLRB No. 154, slip op. at 1 (2022).
- 74 *Id.* at 8 (Members Kaplan and Ring, dissenting).
- 75 Scott Pelley, President Joe Biden: The 2022 60 Minutes Interview, CBS NEWS (Sep. 18, 2022), <https://www.cbsnews.com/news/president-joe-biden-60-minutes-interview-transcript-2022-09-18/>.
- 76 Robert Iafolla, Top Labor Board Lawyer Blasted by Agency’s Field Staff Union, BLOOMBERG LAW (Nov. 17, 2022), <https://news.bloomberglaw.com/daily-labor-report/top-labor-board-lawyer-blasted-by-agencys-field-staff-union>.
- 77 NLRB, Office Status, <https://www.nlr.gov/field-office-status> (last updated Feb. 17, 2022).
- 78 The two mail-ballot elections in Amazon.com Servs. LLC, No. 10-RC-269250 (Nov. 20, 2020) are illustrative of the harm caused by the unjustified use of mail-ballot elections. In the initial election, there was a 43.2% voter participation rate. NLRB, Amazon.com Servs. LLC, Case No. 10-RC-269250, <https://www.nlr.gov/case/10-RC-269250> (last accessed Feb. 22, 2023) (listing tally of ballots on April 9, 2021 as 5,867 eligible voters and 2,536 total ballots counted). In the re-run election approximately one-year later, the voter participation rate dropped to 30.4%. *Id.* (listing tally of ballots on March 31, 2022, as 6,153 eligible voters and 1,868 total ballots counted). Critically, the total number of votes for the union was effectively unchanged, while the number of votes against the union was effectively halved. *Id.* (listing for the April 9, 2021 tally 738 votes in favor of the union, 1,798 votes against the union; listing for the March 31, 2022 tally 875 votes in favor of the union, 993 votes against the union). These results are also illustrative of why unions advocate for the widespread use of mail-ballot elections—not to enhance the enfranchisement of workers, but quite the opposite—unions advocate for the widespread use of mail-ballot elections because the disenfranchisement of workers benefits unions.
- 79 See *Starbucks Corp.*, slip op. at 3-4.
- 80 *Id.* at 5.
- 81 *Id.* at 5 (“Further, we observe, as then-Member McFerran noted in her separate opinion in *Aspirus*, manual elections certainly are not immune from their own ‘irregularities.’ 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”).
- 82 *Id.* at 1-7. The Democratic-majority also ignored the many mail-in ballot election irregularities for which there is no in-person analogue. See *supra* Section I(b)(i).
- 83 *San Diego Gas*, 325 NLRB at 1152 (emphasis added).

- 84 See e.g., *Rush Univ. Med. Ctr.*, 370 NLRB No. 115, slip op. at 3 (2021) (Chairman McFerran, concurring) (“I continue to believe a default preference for mail ballots for the duration of the COVID pandemic is warranted”); *Starbucks Corp.*, 19-RC-296544, 2022 WL 3225608, at \*1 n.1 (Aug. 9, 2022) (“Member Wilcox...is open to considering arguments regarding modernizing the Board’s election methods in a future appropriate proceeding”); *OS-DB-JF-2 LLC*, 12-RC-294302, 2022 WL 2191115, at \*1 n.1 (June 16, 2022) (Member Prouty...is open to considering arguments regarding modernizing the Board’s election methods in a future appropriate proceeding”); *Centrio Energy S. LLC*, 371 NLRB No. 94, slip op. at 3 (2022) (“mail-ballot union-representation elections are likely to remain common for the foreseeable future”).
- 85 *Pro. Transp.*, slip op. at 1-2.
- 86 *Id.* at 3 n.10; see also Consolidated Appropriations Act, Pub. L. 116–260, § 407, 134 Stat. 1617 (2021) (“None of the funds provided by this Act or previous Acts making appropriations for the National Labor Relations Board may be used to issue any new administrative directive or regulation that would provide employees any means of voting through any electronic means in an election to determine a representative for the purposes of collective bargaining.”).
- 87 *Aspirus Keweenaw*, slip op. at 14 n.3 (Member McFerran, concurring).
- 88 There are limits on publicly available information. For example, in some elections it is unclear whether the election was mail-ballot or in-person. Other election records are not publicly available.
- Nevertheless, we are confident that, given the large amount of accurate, complete data we were able to compile, the figures are representative of the disparities between mail-ballot and in-person elections.
- 89 The variation in participation rate is concerning in and of itself, setting aside the lower overall participation rate. The variance we found indicates that mail-ballot elections are all but a crapshoot, as participation rates are unpredictable. In-person elections, in contrast, enjoy higher participation rates on a much more consistent and reliable basis than do mail-ballot elections.
- 90 A voter’s ballot could be voided for any number of reasons, the result of which is a voter—who actually cast a ballot in an election—being disenfranchised as their vote is not counted.
- 91 During this period, the Board appears to have conducted 2,008 representation elections. However, 235 of the elections do not contain public information indicating whether they were mail-ballot or in-person elections, and one election was a mixed-manual elections, which was not factored into our analysis.
- 92 See *Aspirus Keweenaw*, slip op. at 3 (detailing that, between October 1, 2019, and March 14, 2020, the Board conducted 508 in-person elections and 48 mail-ballot elections).
- 93 See *id.* at 3 (detailing that, between March 15, 2020, and September 30, 2020, the Board conducted 46 in-person elections and 432 mail-ballot elections); see also *San Diego Gas*, 325 NLRB at 1153 (Members Hurtgen and Brame, dissenting).

- 94 See *Aspirus Keweenaw*, slip op. at 14 (Member McFerran, concurring).
- 95 See *id.* at 14 n.3.
- 96 Data for 10 of the 1,230 mail-ballot elections we analyzed was corrupted, so our analysis of participation rates and corresponding variation is based on the 1,220 mail-ballot elections with uncorrupted data.
- 97 Figure 2 and Figure 4 below are illustrations of the variation in voter participation rates. The top of each “bell” curve represents the mean participation rate, and the width of each curve represents the varied spectrum of participation rates. The wider the curve, the greater the variation in voter participation. Similarly, the further each curve extends to the right of the chart, the higher the participation rates.
- 98 *Starbucks Corp.*, slip op. at 8 n.22 (Members Kaplan and Ring, dissenting).
- 99 *Id.* at 6.
- 100 See *supra* section I(c); *supra* notes 75, 79-86.
- 101 See *supra* section I(b)(ii); see also *supra* note 82.
- 102 See *supra* note 21.
- 103 Letter from Starbucks Corporation to Lauren McFerran, Chairman NLRB and Jennifer Abruzzo, General Counsel NLRB (Aug. 15, 2022) (hereafter “Starbucks Letter”) (on file with author).
- 104 *Id.* at 1, 5.
- 105 *Id.*
- 106 *Id.* at 1-2, 8-11.
- 107 *Id.* at 2, 8-11, 13.
- 108 *Id.* at 2, 7.
- 109 *Id.* at 1-3.
- 110 *Id.* at 3, 11-12.
- 111 *Id.* at 3, 12-13.
- 112 Starbucks Corporation, No. 03-RC-285929, Decision and Order on Objection, at 1-3 (April 12, 2022).
- 113 One additional vote was challenged by Starbucks as it belonged to an employee who was not employed by Starbucks when the employee cast their ballot. Starbucks Corporation, No. 03-RC-285929, Report on Objections, Order Setting Aside Election and Order Directing Rerun Election, at 2, 2 n.1 (May 18, 2022).
- 114 See *id.* at 3-4; Starbucks Letter at 3, 13-14.
- 115 Starbucks Letter at 2-3, 8, 13, 15.
- 116 According to the NLRB’s website, the Board’s Inspector General “is an independent office created within the NLRB by the Inspector General Act Amendments of 1988. As set forth in the Act, the [Office of Inspector General] is to prevent and detect fraud, waste, abuse, and mismanagement, and to promote economy and efficiency in government. [The Office of Inspector General] carries out its responsibilities by conducting audits, investigations, and other inquiries relating to NLRB programs and operations. [The Office of Inspector General] also reviews proposed and existing laws, regulations, and internal guidance concerning NLRB.” NLRB, FAQs—Inspector General, What is the Office of Inspector General?, <https://www.nlr.gov/resources/faq/inspector-general> (last accessed Feb. 22, 2023).

- 117 Letter from Starbucks Corporation to David Berry, Inspector General NLRB, at 1 (Aug. 15, 2022) (on file with author).
- 118 Committee on Education & The Workforce, Foxx Calls for Hearing Following Reports of NLRB Misconduct (Aug. 15, 2022), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408483>.
- 119 Senate Committee on Health, Education, Labor, and Pensions, Ranking Member.
- 120 Subcommittee on Health, employment, Labor, and Pensions, Ranking Member.
- 121 Subcommittee on Employment and Workplace Safety, Ranking Member.
- 122 Letter from Foxx et al. to David Berry, Inspector General NLRB, at 1 (Aug. 24, 2022) (on file with author).
- 123 *Id.* at 2.
- 124 NLRB Office of Inspector General, Memorandum re. Representation Decisions and Mail Ballot Election Audit (OIG-AMR-101) (Oct. 13, 2022).
- 125 *Id.*
- 126 Starbucks Corp., Case 14-RC-289926, Hearing Officer’s Report and Recommendations on Objections (Feb. 24, 2023).
- 127 *Id.* at 9-10.
- 128 *Id.* at 10 (citing Hudson Aviation Services, 288 NLRB 870 (1988)).
- 129 During this period, the Board appears to have conducted 351 representation elections involving Starbucks. However, 48 of the elections do not contain public information indicating whether they were mail-ballot or in-person elections.
- 130 See *supra* note 101.
- 131 The data revealed a decrease in the overall variation of voter participation between Starbucks mail-ballot elections (16.12%), when compared to the overall statistics (23.7%). However, considering that voter participation in Starbucks elections was nearly 10% below the mean participation rate of all Board-conducted mail-ballot elections during the analysis period, the decrease in variation provides little comfort.
- 132 To date, the union win rate in Starbucks elections for election petitions filed after the August 15, 2022 whistleblower letter declined by more than 5% (from a win rate of 83.3% before the letter, to 77.8% after). The decline in the union win rate after the letter is to be expected, given the accompanying decline in the use of mail-ballot elections.



U.S. Chamber of Commerce