



COALITION FOR A
DEMOCRATIC WORKPLACE

Online Voting in Union Representation Elections: The Latest Attempt to Eliminate Workers' Right to Secret Ballots

*Congress Should Reject and the Labor Board Should Abandon Proposals to Allow
Online Voting in Union Representation Elections as It Would Invite Coercion,
Fraud and Intimidation and Threaten the Validity and Security of the Vote*



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Executive Summary

The U.S. House of Representatives appropriations bill for the Departments of Labor, Health and Human Services, Education, and Related Agencies for the fiscal year ending September 30, 2023, contains a provision requiring the National Labor Relations Board (“NLRB”) to use “no less than \$1,000,000 ... to develop a system and procedures to conduct union representation elections electronically.” The provision, which would allow for remote online voting via smartphone or computer, is the latest attempt in a two-decade-long effort by unions and their allies in government to force workers to cast their vote for or against union representation in front of union organizers and coworkers.

The NLRB has historically held in-person union representation elections to determine if a workplace will be unionized. These in-person elections provide the privacy of the ballot booth, the security of government-overseen elections, and the accessibility of voting in the workplace. Now, however, unions and their allies in government are pressuring the NLRB to implement online voting despite the well-documented disadvantages and dangers of doing so, jeopardizing the security and validity of union elections and infringing on workers’ right to a secret ballot.

Online voting is a particularly poor match for NLRB-regulated representation elections. The National Labor Relations Act (“NLRA”) specifically mandates that employees be allowed to cast secret ballots free from coercion or interference by employers and unions. The use of online voting in representation elections not only would be a significant departure from NLRB precedent but would also present a myriad of implementation issues.

- **Authorizing Online Voting Would Break with NLRB Precedents:** Although the Board has sometimes permitted “mail-ballot” elections, the use of mail ballots has consistently been disfavored in comparison to manual elections. The shortcomings of mail ballots are even more prevalent in online voting. The Board’s *Casehandling Manual for Representation Proceedings* demonstrates the extensive control, monitoring and safeguards that are uniquely available when voters physically appear for the purpose of casting votes in a manual secret-ballot election, but none of those safeguards would be possible under NLRB-permitted online voting. Online voting would occur in dispersed locations, without identity verification to ensure the correct person is casting a ballot, without protection from electioneering or third-party observation while individuals mark and submit their votes, and without government supervision to ensure employers and unions are not interfering with the process.
- **Online Voting Increases the Risk of Coercion and Fraud in Elections:** Numerous NLRB decisions have emphasized the Board’s concerns with voter coercion by either union organizers or employers, and these concerns would be exacerbated with online voting. Employees would have access to their online ballots from any location with internet service, increasing the risk that a party to an election could pressure employees to cast their ballots a particular way. It would be difficult to detect when or to what extent this might



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occur. These vulnerabilities undermine voter privacy and leave the election susceptible to intimidation or vote buying, with punishments or payments to be doled out after an individual has exploited the online voting system.

- **Online Voting Presents Serious Cybersecurity Concerns:** At this time online voting systems cannot guarantee cast votes will remain secret. The complex and highly technical nature of online voting platforms also makes it harder to ensure total confidence in the integrity of a vote conducted using an online voting system, even where there is not necessarily any evidence of a hack, and the inability to audit online elections can greatly increase the perception of potential malfeasance. The potential for fraud, lack of confidence in the integrity of the vote, and the inability to audit the vote leave such systems wanting.
- **The Cost of Administering and Securing Online Voting Systems Would Not Be an Efficient Use of NLRB Resources:** Past efforts to implement online voting demonstrate that such systems do not reduce the cost of administering elections but in fact significantly raise them. The NLRB operates with a limited budget, and the cost of implementing and operating a sufficiently secure online voting platform may prove prohibitive, if such a platform is even possible.

In-Person Voting Ensures Higher Voter Turnout, Ensures Voter Privacy, and Protects against Fraud

Statistics routinely show that participation rates in mail-ballot elections are consistently and significantly lower than those seen with in-person voting, and we can assume online voting would result in similar depressed turnout. If the NLRB's goal is to advance employees' right to choose to organize or refrain from doing so, then the Board should make every effort to achieve the greatest worker turnout possible. Manual, in-person elections are therefore the best option.

In-person elections with secret ballots also guarantee freedom from coercion and ensure individuals' votes will remain private, protecting the integrity of the vote and workers' privacy. They provide the Board with the opportunity to physically monitor and supervise elections to guarantee neither the employer nor union organizers have the ability to coerce or influence workers' votes. These safeguards ensure workers have the right to freely vote their conscience. In-person voting also removes the threat of cybersecurity vulnerabilities or malicious actors trying to change the outcome of the election via hacks or stolen votes. If all else fails and concerns about an election's integrity are raised, in-person elections can always be audited, guaranteeing the NLRB can review the results and identify mistakes or fraudulent activity if they occur.

As it has done on several previous occasions, Congress should reject proposals that undermine workers' right to vote in complete privacy on union representation.



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Full Report

The U.S. House of Representatives appropriations bill for the Departments of Labor, Health and Human Services, Education, and Related Agencies for the fiscal year ending September 30, 2023, contains a provision in the section covering the National Labor Relations Board (“NLRB”) that requires that the NLRB to use “no less than \$1,000,000 ... to develop a system and procedures to conduct union representation elections electronically.” The provision, which would allow for remote online voting via smartphone or computer, is the latest attempt in a two decade-long effort by unions and their allies in government to force workers to cast their vote for or against union representation in front of union organizers and coworkers that support the union. This online voting would not only deprive workers of privacy and invite bullying, harassment, and coercion, but it would also substantially increase the risk of fraud and cyber-attacks in representation elections.

The NLRB’s primary mission is to protect employees’ “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection [and] to refrain from any or all such activities.” Key to this mission is providing a secure, private, and accessible method for employees to decide whether they wish to vote for union representation, which the NLRB has historically facilitated through in-person elections at the workplace. These in-person elections provide the privacy of the ballot booth, the security of government-overseen elections, and the accessibility of voting in the workplace.

Unions and their allies in government, however, are pressuring the NLRB to implement online voting for union representation elections despite the well-documented disadvantages and dangers of doing so. This effort is at the expense of the security and validity of union elections as well as workers’ right to privacy and a secret ballot. Countless other agencies, governments, and corporate entities have tried to shift elections from in-person voting to remote voting via electronic devices, but each and every one of them has dealt with substantial challenges that have undermined the integrity of the election process, including the inability to protect the system from cyber threats and malicious actors, a lack of confidence in the integrity of the results, exorbitant costs associated with ensuring the cybersecurity of the systems, voter coercion, and the inability to ensure the secrecy of the ballots. The NLRB should not pursue online voting but should focus instead on continuing to conduct its in-person elections at the workplace. In-person elections provide private and secure voting and yield vastly greater voter participation relative to electronic mechanisms and other remote voting. Strong voter turnout is an essential element of an effective and sustainable industrial democracy and should be a key focus of the NLRB.

In this memorandum we provide (I) a brief background on union elections, card check, and reasons behind the union push for online voting; (II) a history of online voting in other legally binding elections, identifying the specific strengths, weaknesses, and vulnerabilities of online voting as revealed by these experiences and decisions to use online voting in certain contexts; (III)



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an analysis of the potential problems that could arise if the agency pursues such a policy; and (IV) an overview of the significant advantages of in-person voting in union elections.

Before proceeding, however, it is worth noting that some semantic ambiguity has infiltrated the discussion of online voting. Unions and their allies often refer to “*electronic voting* for union representation elections” when lobbying in support of online voting. For example, bills introduced by Congressional Democrats and the NLRB’s 2010 Request for Information (“RFI”) discussed below refer to “electronic voting” in connection with representation elections. As it is commonly used, however, “electronic voting” is a broader term that encompasses any voting system in which votes are cast or tabulated by a computerized or electronic device, even if that device is located in a regular polling place, the device is not connected to the internet, and the device produces a paper record contemporaneous with the vote being cast or tabulated. What unions and their allies are currently trying to impose is a system that enables electors to cast their votes from a remote location via the use of telecommunications technology, such as a phone or the internet.

As used in this memorandum, that type of voting will be referred to as “online voting.” “Online voting” is sometimes also referred to as “internet voting” or “i-voting.” To be clear, online voting involves remote voting using a device—usually a computer or a smartphone—connected to the internet or another telecommunications system. That device then transmits the vote over either an open or secured connection to the authority or entity¹ administering the election or vote. While online voting typically involves internet use, voting by telephone can also be considered online voting. By contrast, this memorandum will use the term “remote voting” to refer generally to any regime that allows voters to cast a ballot from somewhere other than a supervised polling location and typically involves either voting by mail, voting by proxy, online voting, or some combination thereof.

I. VOTING, “CARD CHECK” AND “ONLINE VOTING” IN UNION REPRESENTATION ELECTIONS

The National Labor Relations Act (“NLRA”) provides that the NLRB shall certify and designate a union as “the exclusive representatives of all the employees in [a bargaining] unit for the purposes of collective bargaining” if the union is “designated or selected . . . by the majority of the employees in [the] unit.”² Under current law, the NLRB will certify a union as representative in the following situations: (1) if the union wins a secret ballot election conducted upon request of 30% of workers via signed authorization cards; (2) as a result of voluntary recognition by the employer, if a majority of workers have signed authorization cards; or (3) upon request of a majority of workers via signed authorization cards and a finding by the NLRB that the employer

¹ Sometimes these entities are private third-party vendors.

² 29 U.S.C. § 159(a).



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has engaged in unfair labor practices that make a fair election unlikely.³ Pursuant to its statutory authority, the NLRB has promulgated and occasionally revised a set of procedures by which secret ballot votes on certification of a union—often referred to as representation elections—are conducted.⁴

The Wagner Act – as enacted in 1935 – originally provided that the NLRB could certify unions based on “a secret ballot of employees or . . . any other suitable method.”⁵ However, as part of the Taft-Hartley amendments enacted as part of the Labor Management Relations Act (“LMRA”), the reference to “any other suitable method” was dropped in 1947, and the current language states the NLRB “shall direct an election *by secret ballot*.”⁶ When underscoring the importance of NLRB-conducted elections in all cases involving NLRB certification, Congress clearly intended that the NLRB would conduct and supervise in-person secret ballot elections.

A. Efforts to Eliminate Secret Ballots in Representation Elections – First Through Card Check and Now Through Online Voting

Organized labor and their allies in government, however, have long sought to force employers to recognize a union based on signed authorization cards—a process known as card check—rather than via secret ballot elections. The Employee Free Choice Act (“EFCA”), which was rejected by Congress on a bipartisan basis, was the most notable effort to do away with secret ballot elections.⁷ The bill would have required that employers recognize and bargain with a union based on signed authorization cards alone, making “voluntary” recognition (option 2 for union certification listed above) mandatory in almost all circumstances. While the union could have opted for a secret ballot election under EFCA, it would have little incentive to do so as support for union representation tends to erode when workers cast their votes privately versus signing cards in front of coworkers and organizers. This erosion of support is why organized labor continues to seek mandatory card check and why it is pushing for online voting.

Like card check, online voting provides no privacy guarantees and invites voter intimidation, coercion, and fraud. With the advent of technology making smartphones ubiquitous, unions and their allies in government are pursuing online voting as an alternative to card check. In fact, we are already seeing unions pressure employers to agree to online voting through “corporate

³ CONGRESSIONAL RESEARCH SERVICE, THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION 7-8 (Dec. 11, 2013) (*available at* https://www.everycrsreport.com/reports/RL32930.html#_Toc412559565).

⁴ See generally 29 C.F.R. § 102.69; NLRB, *Casehandling Manual, Part Two: Representation Proceedings* (rev. Sept. 2020) (*available at* <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf>).

⁵ National Labor Relations Act (“Wagner Act”), 49 Stat. 449, § 9(c) (1935).

⁶ Labor Management Relations Act (“LMRA”), 61 Stat. 136, Title I, Sec. 101, §9(c) (1947) (emphasis added).

⁷ See Greenhouse, Steven, *Democrats Drop Key Part of Bill to Assist Unions*, New York Times, July 26, 2009 accessed on June 28 at https://www.nytimes.com/2009/07/17/business/17union.html?_r=1&hp.



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campaigns,” which is how unions pressure employers to agree to voluntary recognition.⁸ As the AFL-CIO explained, “a coordinated corporate campaign applies pressure . . . by seeking vulnerabilities in all the company’s political and economic relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals.”⁹ The late Richard Trumka said, “Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.”¹⁰

A good example of such a campaign that focused on online voting is captured in a recent *New York Times* article. The *Times* reported on June 12, 2022, that Microsoft had come to an agreement with the Communications Workers of America (“CWA”) to forgo a secret ballot election in favor of card check and/or online voting.¹¹ Under the agreement, the applicable “workers will have access to an expedited process for unionizing, overseen by a neutral third party, in which they will indicate their support for a union either by signing cards or confidentially through an electronic platform.”¹² The *Times* failed to note, however, that the expedited process comes at the expense of workers’ right to vote for or against the union in private.¹³

The union brought considerable pressure on Microsoft to agree to these terms, including by using government agencies and the threat of increased government oversight against the company. On March 1, the CWA along with several other groups wrote to the Federal Trade Commission (“FTC”) expressing concern over Microsoft’s proposed acquisition of Activision Blizzard.¹⁴ The CWA stated in the letter that they “believe that the transaction may lead to an undue concentration of market power when viewed as a vertical or horizontal merger, threaten data privacy and security, undermine consumer protection online, impinge on the consumer right

⁸ See generally, *Hearing on Compulsory Union Dues and Corporate Campaigns* before the U.S. House of Representatives Subcommittee on Workforce Protections, July 23, 2002, accessed on June 28 at <https://www.govinfo.gov/content/pkg/CHRG-107hrg82142/pdf/CHRG-107hrg82142.pdf>.

⁹ Testimony of Daniel V. Yager, *Hearing on Compulsory Union Dues and Corporate Campaigns* before the U.S. House of Representatives Subcommittee on Workforce Protections, July 23, 2002, accessed on June 28 at <https://www.govinfo.gov/content/pkg/CHRG-107hrg82142/pdf/CHRG-107hrg82142.pdf>.

¹⁰ *Id.*

¹¹ Scheiber, Noam and Weise, Karen, “Microsoft Pledges Neutrality in Union Campaigns at Activision,” *New York Times*, June 13, 2022, accessed on June 28 at <https://www.nytimes.com/2022/06/13/business/economy/microsoft-activision-union.html>.

¹² *Id.*

¹³ While the electronic platform may be “confidential” in that votes may be collected by a third party, policing whether union organizers and coworkers pressure workers to cast the electronic vote in front of them or share some receipt, confirmation email, or text indicating voting preference is impossible. Thus, the process is notably and utterly inferior to the guaranteed privacy of an NLRB-operated ballot booth.

¹⁴ The CWA also sent a letter to the Securities and Exchange Commission in January 2022 calling on the agency to investigate Activision Blizzard for “inaccurate and misleading disclosures” related to its workforce in the company’s Agreement and Plan of Merger with Microsoft. Letter accessed on July 7 at https://cwa-union.org/sites/default/files/20220127_atvi_sec_complaint_filed_by_communications_workers_of_america.pdf.



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to repair and exacerbate worker disempowerment and wage suppression.”¹⁵ Thirty days later, the union’s allies in Congress, Senators Elizabeth Warren, Bernie Sanders, Sheldon Whitehouse, and Cory Booker, sent a letter to the FTC, echoing the CWA’s points.¹⁶ Interestingly enough, the *Times* article reported that “the union said that the neutrality agreement resolved the antitrust concerns it had with the acquisition, and that it now supported the deal, which Microsoft has said will close by the end of next June.” The CWA codified its support for the deal in a June 30 letter, asserting that CWA and Microsoft reached an agreement “to ensure the workers of Activision Blizzard have a clear path to collective bargaining” and that “workers can now be assured that this transaction will not undermine that legal principle or the broader antitrust laws pertaining to labor markets.”¹⁷

The effort by the unions and their allies to leverage the FTC was not a stab in the dark; the FTC and, in particular, FTC Chair Lina Kahn appear committed to leveraging the agency’s powers to increase union density.¹⁸ According to one recent article in Law360, the FTC has been asking companies subject to merger review a variety of unusual and possibly unlawful questions about workers and unions:

“The questions covered subjects such as the presence of unions within the company, as well as on whether noncompete agreements are used in worker contracts and highly granular probes into the numbers and types of workers within a company, including whether any of those groups are unionized.... If the matter were to wind up in front of a judge or lawmakers, the attorney said, “there would be a serious question if the agencies really have the authority” to demand the new information.... “The HSR Act is not a license to ask questions just because you’re curious [about matters] that have nothing to do with the Clayton Act,” the attorney said.”¹⁹

¹⁵ Letter to the Federal Trade Commission from Public Citizen, Center for Digital Democracy, Communications Workers of America, The Repair Association, Public Knowledge, American Economic Liberties Project, The Revolving Door Project, National Employment Law Project, Open Markets Institute, Towards Justice, People’s Parity Project, Institute for Local Self-Reliance, Main Street Alliance, Fight for the Future, Demand Progress Education Fund accessed on June 28 at <https://www.citizen.org/article/microsofts-activision-blizzard/>.

¹⁶ March 31 letter from Senators Warren, Whitehouse, Booker and Sanders to FTC, accessed on June 28, 2022 at <https://www.warren.senate.gov/imo/media/doc/2022.03.31%20Letter%20to%20FTC%20re%20Activision%20Microsoft%20Deal.pdf>

¹⁷ June 30 letter from CWA to FTC, accessed on July 5, 2022 at https://cwa-union.org/sites/default/files/20220630_cwa_to_ftc_updated_position_msft_atvi.pdf.

¹⁸ See *Making Competition Work: Promoting Competition in Labor Markets*, FTC Workshop, December 6 and 7, 2021 accessed on June 28 at <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>

¹⁹ Koenig, Bryan, ‘*Nontraditional Questions*’ *Appearing In FTC Merger Probes*, Law360, September 24, 2021, accessed on June 28 at <https://www.law360.com/articles/1425218>.



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Additionally, on January 18, 2022, the FTC and Department of Justice specifically requested stakeholder input with respect to potential changes to their merger review guidance, including a series of questions about labor markets.²⁰

The FTC's efforts are consistent with the Biden administration's "all of government" approach to facilitate union organizing²¹ and Biden's historic support of card check and other efforts to limit worker privacy in the face of union organizing.²² Organized labor has taken their cues accordingly.²³

The coordinated effort by unions and their allies in government to replace secret ballots and their attendant privacy in representation elections with more public online voting or card check is alarming both in its ends and in its means. The means recklessly rely on agencies designed by Congress for other purposes to implement or influence national labor policy, even though these agencies lack the necessary expertise and tools do so.²⁴ The ends, which is the elimination of

²⁰ Accessed on June 28 at <https://www.regulations.gov/document/FTC-2022-0003-0001>.

²¹ FACT SHEET: Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment, APRIL 26, 2021 accessed on June 28 at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment/>.

²² See Smith, Ben, *Biden Supports EFCA*, Politico, March 5, 2009 accessed on June 28 at <https://www.politico.com/blogs/ben-smith/2009/03/biden-backs-efca-016590>; Statement by President Joe Biden on the House Taking Up the PRO Act, March 9, 2021 accessed on June 28 at

²³ In a similar vein, the Securities and Exchange Commission ("SEC") announced it would consider proposing rules requiring registrants to disclose certain information related to its "human capital management" practices See *Spring 2022 Unified Regulatory Agenda*, SEC, RIN: 3235-AM88, Human Capital Management Disclosure, accessed on July 1 at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM88>. Shortly, thereafter, unions petitioned the SEC to ensure any such rule include disclosures related to the types and number of workers within a company, including whether any are unionized and whether workers material to a registrant are classified as independent contractors rather than employees. Letter to the Securities and Exchange Commission from the AFL-CIO, IBT, AFSCME, SEIU, CWA, and UNITE-HERE, accessed on July 1 at <https://www.sec.gov/comments/4-711/4711-20112177-265269.pdf>.

²⁴ See *Comments of the U.S. Chamber of Commerce in Response to U.S. Department of Justice's Antitrust Division and Federal Trade Commission in response to the request for information on merger enforcement*, April 19, 2022 pages 32-42, Accessed on July 3 at https://www.uschamber.com/assets/documents/FINAL-220404_Comments_MergerGuidelines_FTCDJOJ.pdf. The comments note that Congress has set national labor policy and details on how the federal government should and should not regulate labor markets through a series of laws, such as the National Labor Relations Act, the Fair Labor Standards Act, the Family Medical Leave Act and the Affordable Care Act, which are enforced by specific agencies, such as National Labor Relations Board and Department of Labor. The laws and agencies are best equipped to implementing federal labor policy objectives and labor market regulation. As noted in the comments on pages 36-37:

[I]n the eyes of Congress, competition has its limits in labor markets. Congress has decided that competition alone cannot guarantee worker welfare. In fact, according to the theory outlined in the statutes, competition may even harm individual workers, who might otherwise be driven to compete at levels harmful to their wellbeing. So rather than emphasize competition, as it has in product markets, Congress has introduced countervailing distortions. It has suppressed competition to promote other policy aims.



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private voting for workers, invites coercion and reveals an administration that seems bent on delivering workers a union whether they want one or not.

Moreover, repeated arguments by unions and their allies that somehow secret ballot elections are an unfair barrier for workers have always fallen flat but are particularly absurd in the wake of the recent organizing campaigns at Starbucks and Apple. These elections have largely resulted in high voter turnout, where sizable majorities of the employees voted for union representation despite the employers' sophistication with federal labor law and deep resources.²⁵ In short, while secret ballots help inoculate workers against intimidation, coercion, and peer pressure, they clearly do not prevent workers for choosing union representation.

B. The Growing Push for Online Voting

With the defeat of EFCA in 2009, organized labor and their allies sought new methods to do away with secret ballot elections. The 2007 invention of the iPhone and the subsequent ubiquity of smartphones gave labor and their allies what they needed—card check on a mobile device. In 2010, a Democrat-majority NLRB issued a RFI seeking “a proven solution that supports mail, telephone, web-based and/or on-site electronic voting” in connection with “conducting secret-ballot elections to determine representation issues.”²⁶ The NLRB never moved beyond this initial inquiry in 2010, as Congress expressed their disapproval via the inclusion of an appropriations rider forbidding the use of appropriated funds “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.”²⁷

For that reason, it would be misguided to address perceived labor-market imbalances through merger review. The merger review process focuses on a merger's expected effect on competition. It aims to enhance competition and thus the welfare of consumers, but national labor policy points in the opposite direction. It presumes that too much competition is inconsistent with the welfare of workers. It therefore suppresses competition and promotes welfare through mechanisms that, in the product market, would be treated as bald restraints on trade. It raises labor prices not through market forces, but through legal minimums. It also expressly forbids parties from competing by offering prices below those minimums.

Reasonable people can disagree about whether modern employment and labor laws sufficiently promote worker welfare. Both regimes have been the subject of significant discussion. Even if one concludes that labor and employment law are no longer doing their jobs, the answer is not to rebalance labor markets through merger review. It is instead to address those shortcomings directly, by reforming those laws.

(footnotes omitted).

²⁶ NLRB Solicitation No. RFI-NLRB-01 (2010) (available at <https://sam.gov/opp/6783a7abb80efc44eff9609c5d225742/view>).

²⁷ See, e.g., Consolidated Appropriations Act, Pub. L. 116–260, § 407, 134 Stat. 1617 (2021).



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Union allies in government, however, have recently renewed the effort to mandate the online voting process. In 2020, Congressmen Andy Levin and Brian Fitzpatrick introduced the Secure and Fair Elections for Workers Act (“SAFE Workers Act”), which would have eliminated the appropriations rider that bars the NLRB from using electronic voting in representation elections and authorized \$1 million for the NLRB to develop an online voting system.²⁸ In a concurring opinion to a 2020 NLRB decision allowing the expanded use of mail-ballot elections during the COVID-19 pandemic, now-Chairman Lauren McFerran advocated for “modernizing” representation election procedures by following the examples of the NMB and Federal Labor Relations Authority (“FLRA”) and allowing remote electronic voting. In its 2022 budget proposal, the NLRB requested that Congress eliminate the rider barring the use of electronic voting in representation elections.²⁹ Additionally, the Build Back Better Act of 2021 would not only remove the rider but also affirmatively appropriate \$5 million “for the implementation of systems to conduct electronic voting for union representation elections.”³⁰ Finally, and as discussed at the outset, the U.S. House of Representatives appropriations bill for Departments of Labor, Health and Human Services, Education, and Related Agencies for the fiscal year ending September 30, 2023, contains a provision in the section covering the NLRB that requires the agency use “no less than \$1,000,000 ... to develop a system and procedures to conduct union representation elections electronically.” This persistent and growing drumbeat from union allies in government suggests that the current NLRB may authorize and implement online voting in representation elections in the near future.

II. HISTORY OF ONLINE VOTING

The NLRB would not be the first body to authorize the use of online voting in connection with legally binding elections. In American labor relations, the NMB and the FLRA both use online voting in their representation elections due to the distinct circumstances of the sectors they regulate. While democratic governments have generally been more hesitant to adopt online voting than remote voting by means such as mail, there are a few notable examples of governments implementing online voting in politically binding elections for office or referenda. In the corporate governance context, an increasing number of shareholder meetings employ online voting to facilitate broader and more direct shareholder participation.

In each of these three situations, the bodies utilizing online voting have recognized that it entails a distinct set of weaknesses, vulnerabilities, and strengths. These combined experiences suggest that: online voting makes more sense in situations where centralized voting is impossible or impractical; relying on more traditional methods of remote voting like voting by mail is overly

²⁸ Secure and Fair Elections for Workers Act, H.R. 7485, 116th Cong. (2020).

²⁹ NLRB, *FY 2022 Justification of Performance Budget for the Committee on Appropriations*, at 6 (May 28, 2021) (available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-155/fy-2022-nlr-congressional-budget-justification.pdf>).

³⁰ Build Back Better Act of 2021, § 21002, H.R. 5376, 117th Cong. (2021) (available at <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>).



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cumbersome or impractical; budgetary concerns are less of an issue; and there are fewer concerns over the integrity of the election or the confidence of the voters.

A. Non-NLRB Union-Related Elections

The most obvious potential analog to online voting in NLRB-regulated representation elections is the online voting system used by the NMB and the FLRA. The NMB, which regulates representation elections in the railroad and airline industries, has used a Telephone Electronic Voting (“TEV”) system in regulated elections since 2002.³¹ That system allows qualified employees to vote by phone using a unique PIN they receive from the NMB.³² While this system is not what we might first think of as online voting in 2021, it uses a device—in this case a telephone—connected to phone lines, which are a vulnerable telecommunications system. At some later point, the NMB contracted with BallotPoint to administer true internet voting using a computer or a smartphone.³³ The FLRA, which regulates labor relations for non-postal federal employees, has used similar systems for phone and internet voting in representation elections since 2010.³⁴

On September 3, 2021, the NMB announced that it would temporarily cease online voting and conduct all of its elections by mail-in ballot for a period of time.³⁵ The NMB was forced to take this drastic step after the NMB’s online voting vendor failed to “provide requested information” as part of an “ongoing federal government cybersecurity evaluation process,” and “the agency [decided to] transition[] to a new electronic voting system.”³⁶ The NMB reaffirmed

³¹ *Tel. Elec. Voting*, 29 NMB 482 (2002) (available at https://nmb.gov/NMB_Application/wp-content/uploads/2019/10/30n080.pdf). The NMB’s statutory grant of power to conduct representation elections specifically states that “the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize *any other appropriate method* of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.” 45 U.S.C. § 152 (emphasis added). This language is mirrored in the NMB’s regulatory qualified guaranty of a secret ballot. 29 C.F.R. § 1202.4.

³² *Id.*

³³ See NMB, *Telephone and Internet Voting instructions* (2011) (available at https://nmb.gov/NMB_Application/wp-content/uploads/2019/11/new-sample-voting-instructions.pdf).

³⁴ FLRA, *FLRA Successfully Completes Representation Election With Internet and Telephone Voting*, (Feb 23, 2010) (available at <https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/Press%20Releases/Press%20Release%20--%20Electronic%20Voting.pdf>). Like the NMB and the NLRB, the FLRA’s organic statute contains a reference to secret ballots, but it is much sparser, which 5 U.S.C. § 7105(e)(1)(D) simply stating that the authority may delegate its “authority” to “supervise or conduct secret ballot elections and certify the results thereof.” There is no broader statutory guaranty of the right to a secret ballot in representation elections. In fact, there appear to be no other statutory references to secret ballots in the Federal Service Labor-Management Relations Statute. The FLRA has, however, promulgated a very direct regulatory guarantee of secret ballot in all elections. 5 C.F.R. § 2422.23(d) (“All elections shall be by secret ballot.”).

³⁵ Press Release, NMB, NMB Electronic Voting Notice (Sep. 3, 2021) (available at https://nmb.gov/NMB_Application/index.php/press-releases/nmb-electronic-voting-notice).

³⁶ *Id.*



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its “unified commitment to return to internet voting as soon as possible” but recognized that it would first have to “build a new safe and secure electronic voting system that totally complies with all federal security standards.”³⁷ This includes the Federal Information Security Modernization Act (“FISMA”), which requires agencies to implement cybersecurity programs and perform risk assessments to protect systems and information controlled by the agency or managed by contractors or subcontractors. It’s likely that no current e-voting systems are FISMA-compliant.

The similarities between these types of elections and NLRB-regulated union elections are superficial at best, based on factors of most NMB and FLRA elections that are inapplicable to elections conducted by the NLRB. The NLRB has traditionally preferred in-person elections, while both the NMB and the FLRA “have historically conducted mail-ballot elections, reflecting the particular characteristics of the industries, worksites, and bargaining units under their respective jurisdictions.”³⁸ The railroad and airline industries regulated by the NMB “are characterized by multiple worksites often located throughout the country, with very large, often national, units containing workers who are commonly away from their designated worksites for long periods.”³⁹ As clarified by the NMB, “the [Railway Labor Act] requires groups of employees to organize in crafts or classes on a system-wide basis and, therefore employee groups frequently cover large geographic territory.”⁴⁰ Similarly, the FLRA “often holds elections for nation-wide units.”⁴¹ Accordingly, “on-site elections are extremely difficult and costly to supervise because they require multiple and scattered voting sites with balloting held on multiple days to ensure a reasonable ability for unit employees to participate in the election.”⁴² The same is not true for most NLRB-governed elections. While NLRB bargaining units can consist of employees spanning two or more locations for the same employer, the NLRB has a long history of strongly favoring single-facility bargaining units, which prompted the NLRB – many decades ago – to hold that single-facility bargaining units are considered “presumptively appropriate.”⁴³ In fact, the Board has held that any party that disputes the appropriateness of a single-facility bargaining unit shoulders a “heavy burden of overcoming the presumption” that single-facility voting – rather than voting among employees in a more expansive bargaining unit – is appropriate.⁴⁴

³⁷ *Id.*

³⁸ Sara Slinn & William A. Herbert, *Some Think of the Future: Internet, Electronic, and Telephonic Labor Representation Elections*, 56.1 ST. LOUIS U. L.J. 171-208, 187 (2011).

³⁹ *Id.*

⁴⁰ Press Release, NMB, NMB Electronic Voting Notice (Sep. 3, 2021) (available at https://nmb.gov/NMB_Application/index.php/press-releases/nmb-electronic-voting-notice).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631 (19962); *Red Lobster*, 300 NLRB 908, 912 (1990); *Foodland of Ravenswood*, 323 NLRB 665, 666 (1997); *Sutter West Bay Hosp.*, 357 NLRB 197, 200 (2011). See also CONGRESSIONAL RESEARCH SERVICE, *supra* n.3, at 3.

⁴⁴ *Sutter West Bay Hosp.*, 357 NLRB at 200 (emphasis added).



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There is also a much higher statutory bar for implementing any online voting in NLRB-governed elections. The NMB’s organic statute provides for only a qualified right to a secret ballot,⁴⁵ and the Federal Service Labor-Management Relations Statute contains only an oblique reference to the FLRA’s ability to delegate its “authority” to supervise or conduct secret ballot elections and certify the results thereof. The NLRA, on the other hand, contains a clear and unequivocal statutory guarantee that upon the filing of a petition sufficient to trigger a representation election, “the Board *shall* take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.”⁴⁶

Another agency within the Department of Labor (“DOL”), the Office of Labor-Management Standards (“OLMS”), issued a Compliance Tip in 2016 stating that online voting could theoretically be acceptable in elections for union officers and delegates under the Labor-Management Reporting and Disclosure Act (“LMRDA”).⁴⁷ However, in 2017, DOL won summary judgment against the Association of Professional Flight Attendants in an action challenging a union election conducted using online voting on the grounds that the online voting system, the above-referenced BallotPoint, failed to comply with the LMRDA’s statutory requirements that the election be conducted by “secret ballot” and that candidates be allowed “to have an observer at the polls and at the counting of the ballots.”^{48 49} The district court’s emphasis on the plain meaning of the LMRDA’s statutory language runs in contrast to the flexible reading urged by the OLMS compliance tip.⁵⁰ At the very least, the ruling in *Acosta v. Association of Professional Flight Attendants* suggests that any online voting system approved by the NLRB faces a high statutory bar in terms of required functionality.⁵¹

⁴⁵ 45 U.S.C. § 152 (“the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize *any other appropriate method* of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.”).

⁴⁶ 29 U.S.C. § 159(e)(1).

⁴⁷ DOL, OLMS Compliance Tip, *Electing Union Officers Using Remote Electronic Voting Systems*, <https://www.dol.gov/agencies/olms/compliance-assistance/tips/remote-electronic-voting-systems>. The OLMS is charged with enforcing the LMRDA in the context of intra-union elections once a union has already been certified or otherwise recognized.

⁴⁸ *Acosta v. Ass’n of Prof. Flight Attendants*, No. 4:16-cv-1057-A, 2017 WL 4326094, at *2-3 (N.D. Tex. Sep. 26, 2017) (quoting 29 U.S.C. § 481).

⁴⁹ The system permitted an observer with access to its servers to link the names of voters with their votes, violating the LMRDA.

⁵⁰ *Ass’n of Prof. Flight Attendants*, 2017 WL 4326094, at *2-3.

⁵¹ As discussed further *infra*, at Section IV.B.2, this statutory guarantee of a secret ballot may be useful in any litigation challenging the authorization or use of online voting in representation elections.



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B. Online Voting in Corporate Shareholder Meetings

Online voting is more widespread in the context of corporate shareholder meetings. The United Kingdom has allowed online voting in shareholder meetings for at least 10 years.⁵² Domestically, 45 states and the District of Columbia allow a form of online voting in virtual shareholder meetings.⁵³

Shareholder meetings, however, pose a distinct set of incentives and risk when it comes to online voting that make it a poor analogue for unionization elections. While smaller retail investors are generally not required to publicly disclose how they have voted in U.S. shareholder elections, shareholder elections are not required to be secret either.⁵⁴ This lower emphasis on voter privacy is reflected in the fact that vendors who facilitate online voting in shareholder elections are free to store and share account voting history for research or commercial purposes.⁵⁵

In addition to the lower emphasis on secrecy, shareholder meetings often involve structural dynamics that make it more difficult for individual shareholders to participate directly. Shareholders are often spread across the country or the globe, making it impractical or impossible for individual shareholders to cast their own vote at meetings that take place at a single location without some form of remote voting.⁵⁶ The norm in shareholder elections has long been remote voting by proxy with the proxy holder typically exercising some degree of discretion as to how he or she should cast the shareholder's vote.⁵⁷

C. Government Elections

Unlike non-NLRB union elections and corporate elections, governmental elections for office and referenda implicate many of the same security and privacy issues raised by NLRB-governed representation elections. Although remote voting by mail is relatively widespread, and

⁵² See, e.g., Companies Act 2006, § 360A (U.K.) (as amended by the Companies (Shareholders' Rights) Regulations 2009 (S.I. 2009/1632), reg. 8) (available at: <https://www.legislation.gov.uk/ukpga/2006/46/contents>).

⁵³ RUTGERS CENTER FOR CORPORATE LAW AND GOVERNANCE, REPORT OF THE 2020 MULTI-STAKEHOLDER WORKING GROUP ON PRACTICES FOR VIRTUAL SHAREHOLDER MEETINGS, 4 (Dec. 10, 2020) (available at https://cclg.rutgers.edu/wp-content/uploads/VSM-Working-Group-Report-12_10_2020.pdf).

⁵⁴ ALON BRAV ET AL., RETAIL SHAREHOLDER PARTICIPATION IN THE PROXY PROCESS: MONITORING, ENGAGEMENT, AND VOTING 12 (Nov. 2019) (available at <http://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Retail.pdf>).

⁵⁵ *Id.* (Explaining that the dataset used to conduct the study came from an online voting vendor and “contains the voting records, including failures to vote, for each retail shareholder account” and that while the data was “anonymized,” the vendor retained a key tying each account to a user “so voting can be tracked across firms and over time.”).

⁵⁶ See Elizabeth Boros, *Virtual Shareholder Meetings*, 3 DUKE LAW & TECH. REV. 1-10, at 4 (2004).

⁵⁷ See, e.g., Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor* (available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2759&context=faculty_scholarship).



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most in-person polling places use some form of electronic voting equipment, online voting remains very rare in politically binding governmental elections. The use of online voting in American governmental elections has been quite limited, and its track record has been poor thus far.⁵⁸ Abroad, the International Institute for Democracy and Electoral Assistance (“International IDEA”) reports that there are presently only 12 countries utilizing online voting in politically binding elections governed by a central electoral management body (“EMB”).⁵⁹ Several countries that experimented with online voting have recently moved away from it, citing concerns over the security of the system used, the ability to ensure confidence in the integrity of the result, the cost of administering online voting systems relative to the cost of existing in-person and vote-by-mail systems, voter coercion, and an inability to ensure the secrecy of the ballot.⁶⁰

1. Online Voting in American Elections

In the United States, several state and local jurisdictions have recently explored or experimented with online voting, but there remains little support for online voting due to serious privacy and security issues. These experiments have thus far been limited to municipal elections, party primaries, or voters covered by the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).⁶¹ Other states, like Utah, have explored online voting but ultimately decided that “sufficiently secure internet voting systems do not yet exist” or, going further, that “the unconstrained nirvana of Internet voting from any device, entirely online is so impossible, or at least infeasible, as to be a fool’s errand.”⁶²

Even in the context of UOCAVA voters, who are entitled by law to vote remotely, a 2011 report prepared by the National Institute of Standards and Technology (“NIST”)⁶³ for the Election

⁵⁸ *Infra* at Section II.C.1.

⁵⁹ International IDEA, *ICTS in Elections Database*, <https://www.idea.int/data-tools/question-view/743> (identifying Armenia, Australia, Canada, Estonia, France, Mexico, New Zealand, Oman, Pakistan, Panama, the Russian Federation, and the United Arab Emirates as utilizing online voting in at least some capacity).

⁶⁰ *See, e.g., France Drops Electronic Voting For Citizens Abroad Over Cybersecurity Fears*, REUTERS (Mar. 6, 2017) (available at <https://www.reuters.com/article/us-france-election-cyber-idUSKBN16D233>); *E-Voting Experiments End in Norway Amid Security Fears*, BBC (Mar. 6, 2017) (available at <https://www.bbc.com/news/technology-28055678>); Scott Neuman, *Norway Does a Ctrl+Alt+Delete E-Voting Experiment*, NPR (June 27, 2014) (available at <https://www.npr.org/sections/thetwo-way/2014/06/27/326221089/norway-does-a-ctrl-alt-delete-on-e-voting-experiment?t=1636453984378>); *Internet Voting in Australian Election Systems*, ELECTORAL COUNCIL OF AUSTRALIA & NEW ZEALAND § 3.17 (Sep. 10, 2013) (available at https://www.ecanz.gov.au/sites/default/files/internet-voting-australian-election-systems.pdf?acsf_files_redirect).

⁶¹ U.S. ELECTION ASSISTANCE COMM’N, *A Survey of Internet Voting* (Sep. 14, 2011) (available at https://www.eac.gov/sites/default/files/eac_assets/1/28/SIV-FINAL.pdf).

⁶² UTAH I VOTE ADVISORY COMM., *Final Report* § 5 (Aug. 21, 2015) (available at <https://elections.utah.gov/Media/Default/Documents/Report/iVote%20Report%20Final.pdf>).

⁶³ NIST is a non-regulatory agency of the Department of Commerce and is responsible for the development of “cybersecurity standards, guidelines, best practices, and other resources to meet the needs of U.S. industry, federal agencies and the broader public.” NIST, *Cybersecurity: Overview*, <https://www.nist.gov/cybersecurity> (last visited Nov. 30, 2021). It is also “charged by statute with helping to improve US election systems by focusing on technical



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Assistance Commission (“EAC”) recognized that online voting carried with it a unique set of vulnerabilities and challenges.⁶⁴ The NIST’s report specifically pointed to difficulty auditing online elections, difficulty validating voter identity, and an increased risk of voter coercion as issues that “remain . . . significant challenges faced by remote electronic voting systems,” though it noted that many of these issues are mitigated with the use of a “supervised kiosk model.”⁶⁵ That same year, the Department of Defense cancelled a \$22 million program that would have created an online voting system for overseas military voters after security audits demonstrated that the system was vulnerable to cyberattacks.⁶⁶ More recently, in the run up to the 2020 presidential election, the Cybersecurity and Infrastructure Security Agency (“CISA”),⁶⁷ NIST, EAC, and the Federal Bureau of Investigation (“FBI”) issued a joint report stating that the cybersecurity risk associated with “[e]lectronic transmission of [a] voted ballot” remained “high” with systems that rely on the internet to return voted ballots facing “significant security risks to the confidentiality, integrity, and availability of voted ballots” that could “ultimately affect the tabulation and results and can occur at scale.”⁶⁸ Reporting at the time suggested that earlier drafts of this report went further and would have actively “discourage[d] electronic ballot return technologies.”⁶⁹

a. Online Voting in Washington, D.C.

The vulnerabilities inherent in online voting systems were laid bare in 2010 when the District of Columbia attempted to launch an online voting portal, only for that system to be hacked and completely compromised by a University of Michigan team of computer scientists within 48 hours of launching during a pre-election test period.⁷⁰ The hackers were able to reprogram the

aspects of voting and related activities,” including “[t]he security of computers, computer networks, and compute data storage used in voting systems.” NIST, Voting Systems: Overview, <https://www.nist.gov/voting-systems> (last visited Nov. 30, 2021).

⁶⁴ NELSON HASTINGS ET AL., SECURITY CONSIDERATIONS FOR REMOTE ELECTRONIC UOCAVA VOTING, NAT’L INST. STAND. & TECH. 1-2 (Feb. 2011).

⁶⁵ *Id.* at 1-2, 22, 59.

⁶⁶ David Talbot, *Why You Can’t Vote Online*, MIT TECH. REV. (Nov. 5, 2012) (available at <https://www.technologyreview.com/2012/11/05/181896/why-you-cant-vote-online>).

⁶⁷ CISA is an agency of the Department of Homeland Security tasked with understanding and reducing the risk to the United States’ cyber and physical infrastructure. CISA, *About CISA* <https://www.cisa.gov/about-cisa> (last visited Nov. 30, 2021).

⁶⁸ CISA ET AL., RISK MANAGEMENT FOR ELECTRONIC BALLOT DELIVERY, MARKING, AND RETURN 1 (2020) (available at https://s.wsj.net/public/resources/documents/Final_%20Risk_Management_for_Electronic-Ballot_05082020.pdf?mod=article_inline).

⁶⁹ Joseph Marks, *The Cybersecurity 202: Internet-Based Voting Is The New Front In The Election Security Wars*, WASH. POST (May 11, 2020) (available at <https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2020/05/11/the-cybersecurity-202-internet-based-voting-is-the-new-front-in-the-election-security-wars/5eb85e4e602ff11bb1179347>).

⁷⁰ SCOTT WOLCHOK ET AL., ATTACKING THE WASHINGTON, D.C. INTERNET VOTING SYSTEM, PROC. 16TH CONF. ON FINANCIAL CRYPTOGRAPHY & DATA SECURITY (Feb. 2012) (available at <https://jhalderm.com/pub/papers/dcvoting-fc12.pdf>); *D.C. Hacking Raises Questions About Online Voting*, PEW (Oct. 22, 2010) (available at



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voting portal to play the University of Michigan’s fight song and would have been able to reveal individual voters’ choices or undetectably change votes on ballots if they had desired to do so.⁷¹ Perhaps even more concerningly, the University of Michigan team noticed that there were other hackers actively targeting the District of Columbia’s system, including attacks originating in Iran and China.⁷²

b. Online Voting in West Virginia

Despite these well-documented concerns, West Virginia implemented an online voting program in 2018 that allows overseas military voters to cast their ballots using Voatz, an online voting smartphone application.⁷³ Voatz was also used in connection with state and municipal elections in 2018 in Utah, Oregon, and Denver, and it had previously been used to facilitate remote voting for absentee voters in the 2016 Massachusetts Democratic Convention and the 2016 Utah Republican Convention.⁷⁴ A post-election audit of Voatz by a team of cybersecurity experts at MIT found “vulnerabilities that allow different kinds of adversaries to alter, stop, or expose a user’s vote, including [an attack] . . . which can potentially recover a user’s secret ballot.”⁷⁵ The audit also found “a number of privacy issues stemming from their use of third-party services for crucial app functionality.”⁷⁶ The issues identified by this audit have led to public concern over the continued use and security of Voatz, but West Virginia continues to allow overseas military personnel to cast their ballots via Voatz as of the date of this paper.⁷⁷

c. Online Vote Reporting in Iowa

While West Virginia has thus far managed to avoid disaster, the Iowa Democratic Party was not as lucky when it used an online vote reporting system to calculate preliminary results in the 2020 Democratic Caucuses. This highly publicized catastrophic breakdown demonstrated that technological and user errors can be just as damaging as a hacked system when online systems are used in the voting and counting process.

<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2010/10/22/dc-hacking-raises-questions-about-future-of-online-voting>).

⁷¹ *Id.*

⁷² *Id.*

⁷³ MICHAEL SPECTER ET AL., THE BALLOT IS BUSTED BEFORE THE BLOCKCHAIN: A SECURITY ANALYSIS OF VOATZ, THE FIRST INTERNET VOTING APPLICATION USED IN U.S. FEDERAL ELECTIONS 1 (Aug. 12, 2020) (available at https://internetpolicy.mit.edu/wp-content/uploads/2020/02/SecurityAnalysisOfVoatz_Public.pdf).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., Eric Geller, *Some States Have Embraced Online Voting. It’s a Huge Risk*, POLITICO (Jun. 8, 2020) (available at <https://www.politico.com/news/2020/06/08/online-voting-304013>).



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The partially-online reporting system used in the 2020 Iowa Democratic Caucuses involved a mobile phone application, Shadow, to report preliminary results and automatically calculate the number of delegates awarded to each candidate at a caucus.⁷⁸ Shadow was not used to cast votes nor was it used to tabulate final vote counts or report final results, which were still recorded by hand.⁷⁹ On the night of the caucuses, the application was crippled by a series of procedural and technical failures, including the inability of many intended users to log onto the platform and a coding error in the application that caused distorted reports.⁸⁰ These failures and garbled preliminary counts caused severe delays in reporting the final results of the caucus and caused the initial results—those released three days after the caucuses—to be “marred by apparent reporting or mathematical errors,” necessitating a recanvass that did not conclude until February 18, 2020—fifteen days after the caucuses had taken place.⁸¹ As reported at the time, this recanvass likely did “little to restore public confidence in the Iowa caucuses” after the initial results were “riddled with inconsistencies and other flaws.”⁸² An audit commissioned by the Iowa Democratic Party ultimately determined that the flawed reports were caused by technological errors,⁸³ and cybersecurity experts who reviewed the application “found potentially concerning code within it” that could have made it vulnerable to a hack.⁸⁴ The substantial discrepancies in the initial reporting due to Shadow’s technical failures were compounded by secrecy surrounding the technical details of the application, which “made it hard [for the public] to have complete confidence” in the results of the caucuses.⁸⁵

2. Online Voting in Foreign Elections

Insecurity and privacy concerns have also surfaced in countries that have adopted more widespread online voting in governmental elections. After permitting online voting for a limited period, several of these countries have decided to abandon it altogether. Several of the most high-profile governmental uses of online voting illustrate the flaws inherent to online voting and the

⁷⁸ NICK KLINEFELDT ET AL., INTERNAL REVIEW REPORT FOR THE IOWA DEMOCRATIC PARTY: 2020 IOWA CAUCUSES 5 (Nov. 10, 2020) (available at <https://iowademocrats.org/wp-content/uploads/2020/12/2020-11-10-Internal-Review-Report-for-the-Iowa-Democratic-Party-2020-Iowa-Caucuses.pdf>).

⁷⁹ *Id.*; see also Jason Koebler et al., *An ‘Off-the-Shelf, Skeleton Project’: Experts Analyze the App That Broke Iowa*, VICE (Feb. 5, 2020) (available at <https://www.vice.com/en/article/3a8ajj/an-off-the-shelf-skeleton-project-experts-analyze-the-app-that-broke-iowa>).

⁸⁰ NICK KLINEFELDT ET AL., *supra* n.81, at 22-23.

⁸¹ Zach Montellaro, *Buttigieg, Sanders Separated by Thousandths of a Point After Iowa Recanvass*, POLITICO (Feb. 18, 2020) (available at <https://www.politico.com/news/2020/02/18/buttigieg-sanders-iowa-recanvass-gap-115898>).

⁸² Nate Cohn et al., *Iowa Caucus Results Riddled With Errors and Inconsistencies*, N.Y. TIMES (Feb. 6, 2020) (available at <https://www.nytimes.com/2020/02/06/upshot/iowa-caucuses-errors-results.html>).

⁸³ KLINEFELDT ET AL., *supra* n.81, at 23.

⁸⁴ Koebler et al., *supra* n.82.

⁸⁵ Avie Schneider, *What We Know About the App that Delayed Iowa’s Caucus Results*, NPR (Feb. 4, 2020) (available at <https://www.npr.org/2020/02/04/802583844/what-we-know-about-the-app-that-delayed-iowas-caucus-results>).



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limited effectiveness of ways in which government representatives in different countries have attempted to address the problems.

a. Risk Mitigation Efforts in Online Voting Abroad

Concerns over security, verifiability, the secrecy of the ballot, voter coercion, and administrability remain in online voting abroad. While these concerns have not deterred Estonia from conducting online national elections,⁸⁶ other nation-states that utilize online voting have generally taken two approaches to address these issues. The first approach, which might be called “desirability minimization,” limits the use of online voting to elections with smaller stakes—such as county or municipal elections—that are less likely to attract the attention of a well-resourced attacker. Accordingly, Australia, Canada, and Mexico all permit online voting in sub-national, state, or provincial elections but do not allow online voting in connection with federal or national elections.⁸⁷

The second approach, which might be called “exposure minimization,” limits the use of online voting to a subset of voters with a special need to vote online due to either disability or physical absence from the jurisdiction during the election period. Armenia, France, New Zealand, Pakistan, Panama, and the Russian Federation all limit the use of online voting to certain voters who reside abroad on election day.⁸⁸ Yet, even in these limited circumstances, online voting has proven difficult to implement securely. In its 2017 parliamentary elections, France was forced to abandon online voting for expatriates due to an “extremely high risk” of a cyberattack targeting the integrity of those ballots.⁸⁹

b. Estonia

Of the 12 nation-states that utilize online voting in EMB-regulated elections, only Estonia currently offers online voting to all its citizens in national elections. Estonia moved to its online election system in 2005 as part of a broader “e-governance” effort.⁹⁰ Estonia’s online voting system relies on the country’s broader e-governance infrastructure, with voters using their digital ID card to verify their identity.⁹¹ Recognizing the potential that online voting creates for vote buying and voter coercion, Estonia allows voters to change their vote as many times as they want

⁸⁶ See *infra* Section II.C.2.b.

⁸⁷ International IDEA, *ICTS in Elections Database*, <https://www.idea.int/data-tools/question-view/742>.

⁸⁸ International IDEA, *ICTS in Elections Database*, <https://www.idea.int/node/306991>, <https://www.idea.int/node/298306>, & <https://www.idea.int/node/304713>; OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *Republic of Armenia Early Parliamentary Elections: ODIHR Election Observation Mission Final Report*, at 9 (Dec. 9, 2018) (available at <https://www.osce.org/files/f/documents/b/7/413555.pdf>).

⁸⁹ *France Drops Electronic Voting for Citizens Abroad Over Cybersecurity Fears*, *supra* n.63.

⁹⁰ E-ESTONIA, E-GOVERNANCE, <https://e-estonia.com/solutions/e-governance/i-voting/>.

⁹¹ *Id.*



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up until the conclusion of election day, with later votes canceling out previous votes.⁹² However, a 2014 report by an international team of security experts identified serious security flaws in Estonia’s online voting system that could enable “a well-resourced attacker, such as a nation-state like Russia,” to “undetectedly steal votes in an election using the Estonia e-voting system.”⁹³

c. Australia

Australia has experimented with both the exposure minimization and desirability minimization approaches to online voting. In its 2007 federal election, Australia attempted to mitigate security concerns by allowing military personnel deployed to East Timor, the Solomon Islands, Afghanistan, or Iraq to vote using its “Defence Restrict Network,” a preexisting secure intranet that was not available on the world wide web.⁹⁴ However, the Australian government ultimately decided to abandon online voting for deployed personnel, primarily due to the extremely high cost per voter of operating and maintaining the secure portal.⁹⁵

Several Australian states allow online voting. Tasmania allows the return of paper absentee ballots via email or fax for disabled voters or voters in remote locations. New South Wales has a remote phone and internet voting system known as “iVote” that allows disabled voters, voters living more than 20 kilometers from a polling place, voters who applied for a mail ballot but have not received them, and voters who will be outside of their council area on polling day to vote via telephone or internet.⁹⁶ However, the use of online voting in New South Wales has proven very contentious, with reports of major security vulnerabilities in both 2015 and 2019.⁹⁷ Despite these reports and ongoing concerns over the security of online voting, New South Wales proceeded with

⁹² *Id.*

⁹³ Drew Springall et al., *Our Response to the National Election Committee’s Statement* (May 14, 2014), <https://estoniaevoting.org/press-release/response-national-election-committees-statement>; See also DREW SPRINGALL ET AL., SECURITY ANALYSIS OF THE ESTONIAN INTERNET VOTING SYSTEM, PROCEEDINGS OF THE 21ST ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY (CCS ’14) (Nov. 2014) (available at <https://jhalderm.com/pub/papers/ivoting-ccs14.pdf>).

⁹⁴ ELECTORAL COUNCIL OF AUSTRALIA & NEW ZEALAND, *supra* n.63, § 3.17.

⁹⁵ *Id.* § 3.33 (internal citations omitted).

⁹⁶ IAN BRIGHTWELL ET AL., NSW ELECTORAL COMMISSION: AN OVERVIEW OF THE iVOTE 2015 VOTING SYSTEM 4-5 (2016) (available at [https://www.elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/iVote%20reports/An-overview-of-the-iVote-2015-voting-system-\(PDF-1.6MB\).pdf](https://www.elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/iVote%20reports/An-overview-of-the-iVote-2015-voting-system-(PDF-1.6MB).pdf)).

⁹⁷ J. ALEX HALDERMAN & VANESSA TEAGUE, THE NEW SOUTH WALES iVOTE SYSTEM: SECURITY FAILURES AND VERIFICATION FLAWS IN A LIVE ONLINE ELECTION (Apr. 2015) (identifying major flaws with the security of the 2015 election) (available at https://www.researchgate.net/publication/275364229_The_New_South_Wales_iVote_System_Security_Failures_and_Verification_Flaws_in_a_Live_Online_Election); Press Release, ScytI, Re: Inquiry into the 2019 NSW state election Response to questions on notice (Mar. 3, 2020), <https://www.parliament.nsw.gov.au/ladocs/other/13160/ScytI%20Australia%20Pty%20Ltd%20-19%20February%202020.PDF> (answering questions from Australian legislative committee on security of ivote system in 2019 election).



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online voting in its 2021 elections, and an unknown number of voters fell victim to technological failures with iVote, leaving them unable to cast their ballots.⁹⁸

d. Norway

Norway experimented with online voting in its 2011 and 2013 local elections, with some municipalities allowing voters to cast a vote over the internet.⁹⁹ The municipalities that allowed online voting experienced a slight increase in voter turnout, but Norway ultimately abandoned the project, citing concerns that internet voting was difficult to secure and potentially incompatible with the secret ballot.¹⁰⁰

e. The Netherlands

In 2005 and 2007, the Netherlands allowed expatriate voters to use the Rijnland Internet Election System (“RIES”), an online voting platform that required a long, unique voter identification number to vote through a state-managed website.¹⁰¹ The Organization for Security and Cooperation in Europe (“OSCE”) criticized the use of RIES in the 2007 election, noting that it was impossible for third-party observers to observe critical parts of the system, and they therefore, could not be certain of the integrity of the system.¹⁰² In 2008, the Eindhoven Institute for the Protection of Systems and Information (“EiPSI”) issued a report that revealed several serious security vulnerabilities in RIES.¹⁰³

f. Canada

The Canadian provinces of Ontario and Nova Scotia have used online voting in municipal elections since 2003.¹⁰⁴ Ninety-seven of 414 eligible municipalities use online voting in Ontario,

⁹⁸ Campbell Kwan, *NSWEC finds iVote system failure may have impacted three local election outcomes* (Jan. 3, 2022) (available at <https://www.zdnet.com/article/nswec-finds-ivote-system-failure-may-have-impacted-three-local-election-outcomes/>).

⁹⁹ SIGNE BOCK SEGAARD ET AL., INTERNETTVALG: HVA GJØR OG MENER VELGERNE, English Summary at 137-39 (2014) (available at https://www.regjeringen.no/globalassets/upload/kmd/komm/rapporter/isf_internetvalg.pdf).

¹⁰⁰ *Id.*; see also *E-Voting Experiments End in Norway Amid Security Fears*, *supra* n.63; *Norway Does a Ctrl+Alt+Delete E-Voting Experiment*, *supra* n.63.

¹⁰¹ U.S. VOTE FOUNDATION, THE FUTURE OF VOTING: END-TO-END VERIFIABLE INTERNET VOTING SPECIFICATION AND FEASIBILITY ASSESSMENT 21 (July 2015) (available at https://usvotefoundation-drupal.s3.amazonaws.com/prod/E2EVIV_full_report.pdf).

¹⁰² *Id.* (citing OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, THE NETHERLANDS PARLIAMENTARY ELECTIONS 22 NOVEMBER 2006: OSCE/ODIHR ELECTION ASSESSMENT MISSION REPORT (Nov. 2006) (available at <https://www.osce.org/files/f/documents/b/1/24322.pdf>).

¹⁰³ *Id.* (citing ENGELBERT HUBBERS ET AL., DESCRIPTION AND ANALYSIS OF THE RIES INTERNET VOTING SYSTEM (2008)).

¹⁰⁴ NICOLE GOODMAN, ONLINE VOTING: A PATH FORWARD FOR FEDERAL ELECTIONS § 5 (Jan. 2017) (available at <https://www.canada.ca/en/democratic-institutions/services/reports/online-voting-path-forward-federal-elections.html>).



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and 23 of 51 eligible municipalities use online voting in Nova Scotia.¹⁰⁵ Because the stakes of these elections are considered to be quite low, “[t]here are no minimum standards or regulations regarding online voting use at the municipal level.”¹⁰⁶ In 2016, the Canadian Special Committee on Electoral Reform, a special committee of the Canadian House of Commons, issued its Third Report, a sweeping document analyzing the state of the Canadian electoral system and evaluating proposed reforms.¹⁰⁷ Chapter six of the report dealt with online voting, ultimately recommending “that online voting not be implemented at this time.”¹⁰⁸ En route to this recommendation, the Committee found that “the strongest arguments against online voting were technical in nature, citing the transparency, reliability and security concerns of enabling and protecting a secret vote to take place electronically or over the Internet.”¹⁰⁹

III. ONLINE VOTING IN REPRESENTATION ELECTIONS WOULD BREAK WITH NLRB PRECEDENTS, INCREASE THE RISK OF COERCION, PRESENT SERIOUS CYBERSECURITY CONCERNS, AND BE AN INEFFICIENT USE OF NLRB RESOURCES

Although the NLRA does not require representation elections use a particular voting system, it does mandate that employees be allowed to cast secret ballots free from coercion or interference by employers and unions.¹¹⁰ The past experiences with online voting in the contexts discussed above demonstrate that online voting systems remain vulnerable to cybersecurity attacks and cannot adequately safeguard elections from tampering or protect the secrecy of ballots.¹¹¹ The nature of online voting also presents unique coercion concerns that are not as acute with mail voting.¹¹² As explained below, online voting is a poor match for NLRB-regulated representation elections. The use of online voting in representation elections not only would be a significant departure from NLRB precedents but also would present a myriad of implementation issues.

A. Authorizing Online Voting Would Break with NLRB Precedents

It has been the NLRB’s “longstanding policy . . . that representation elections should, as a general rule, be conducted manually, either at the employees’ workplace or some other appropriate

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ CANADA HOUSE OF COMMONS, STRENGTHENING DEMOCRACY IN CANADA: PRINCIPLES, PROCESS AND PUBLIC ENGAGEMENT FOR ELECTORAL REFORM (Dec. 2016) (*available at* <https://www.ourcommons.ca/Content/Committee/421/ERRE/Reports/RP8655791/errerp03/errerp03-e.pdf>).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See* 29 U.S.C. §§ 157, 158, 159(e)(1).

¹¹¹ *Supra* Section II.C.

¹¹² *Supra* Section III B.



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location.”¹¹³ This general presumption “favor[ing] a manual, not mail-ballot, election” stems from the Board’s recognition of “the value of having a Board agent present at the election—a circumstance which is not possible in mail-ballot elections.”¹¹⁴ Mail elections are generally only conducted where employees are “scattered” over a wide geographic area, where employees’ work schedules greatly vary and they are not at a common location at a common time, or where there is a strike, a lockout, or picketing in progress.¹¹⁵ Even in this new age of remote work following the COVID-19 pandemic, in-person elections can and should be used for any and all workers who can be present at the voting location, while those individuals who cannot be present could potentially have access to mail ballots.

While the use of mail ballots increased during periods of enforced telework at the beginning of the COVID-19 pandemic, the NLRB was quick to note that “the Board, throughout its history, has zealously safeguarded the integrity of its elections against irregularity and even the appearance of irregularity.”¹¹⁶ This zealous safeguarding of the integrity of elections recently led the Board to hold that solicitation of mail ballots (*i.e.*, offers to collect and return mail ballots) is barred in representation elections;¹¹⁷ that signature inconsistencies on a mail-in ballot can be sufficient to require voiding the ballot, even where there is no other evidence of fraud;¹¹⁸ and that regional directors should avoid any speculation whatsoever regarding a mail ballot’s intent or validity, erring on the side of discounting the ballot where a partial ballot calls for speculation on either front.¹¹⁹

The NLRB General Counsel’s *Casehandling Manual for Representation Proceedings* (“Manual”), which sets forth step-by-step procedures for conducting and resolving disputes concerning representation elections and is based on Board precedents, reflects the importance of privacy and integrity in representation elections.¹²⁰ For the NLRB’s entire history, spanning more than 80 years, the agency has maintained a nearly unblemished track record regarding the careful process that it has followed when *conducting* and *monitoring* secret ballot elections, including procedures for *meaningful review* in those cases involving election-related objections and challenges.

¹¹³ *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 2 (Nov. 9, 2020) (citing *San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998)).

¹¹⁴ *Id.* (citing *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998)).

¹¹⁵ See *San Diego Gas & Elec.*, 325 NLRB at 1145; *Willamette Indus., Inc.*, 322 NLRB 856 (1997); *London’s Farm Dairy, Inc.*, 323 NLRB 1057 (1997); *Reynolds Wheels Int’l*, 323 NLRB 1062 (1997).

¹¹⁶ *Id.* at *1.

¹¹⁷ *Id.*

¹¹⁸ *College Bound Dorchester, Inc.*, Case 01-RC-261667 (Jun. 25, 2021).

¹¹⁹ *XPO Logistics Freight, Inc.*, 370 NLRB No. 99 (2021).

¹²⁰ NLRB, *Casehandling Manual, Part Two: Representation Proceedings* (rev. Sept. 2020) (available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019published-9-17-20.pdf>) (hereinafter, “*Casehandling Manual*”).



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Online voting procedures would discard virtually all election procedures and safeguards that the Board has adopted for good reasons. As noted above, the Board has repeatedly favored “manual” elections in which employees physically appear at the designated voting location(s), on the designated date(s) and time(s), to cast their secret ballots. Although the Board has sometimes permitted “mail-ballot” elections, the use of mail ballots has consistently been disfavored in comparison to manual elections, even resulting in limitations and guidelines that were adopted during the COVID-19 pandemic.¹²¹ Moreover, although one of the arguments used to support online voting involves efforts to *increase* voter participation, the Board’s experience with mail-ballot elections reveals that voter participation in mail-ballot elections has consistently been *lower* in comparison to in-person voting.¹²²

The Board’s Manual regarding representation cases demonstrates the extensive control, monitoring, and safeguards that are uniquely available when voters physically appear for the purpose of casting votes in a manual secret-ballot election:

- *Place of Election.* The place of election is typically “somewhere on the employer’s premises,” which is considered the “best place . . . from the standpoint of accessibility to voters.”¹²³ However, the Board’s Manual provides that the “actual polling place” should normally be “spacially and visually separated from the scene of any other activity during the voting period,” which provides privacy for voters.
- *Board Agent(s) “In Charge.”* In all in-person elections, a designated Board agent or agents are “in charge,” and the Board’s Manual admonishes that conducting elections – as provided in Section 9 of the NLRA – “constitutes one of the most important aspects of the Agency’s work.”¹²⁴
- *Equipment Used in Casting Secret Ballots.* The Board’s Manual provides for the same equipment – including the same type of “voting booth” and “official ballot bag or box” – to be provided by the Board’s Regional Office in all manual elections.¹²⁵

¹²¹ *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4-8.

¹²² Thus, in *Aspirus Keweenaw*, the Board stated that “manual elections tend to promote greater participation in the election process.” *Id.*, slip op. at 2. For example, the Board reported that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent. Although these statistics reflect that the mail-ballot participation rate has increased during the Covid-19 pandemic, they also reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since).

Id. (emphasis added). See also Part IV below (text accompanying notes 161 et seq.).

¹²³ Casehandling Manual, Part Two, Representation Proceedings, § 11302.2.

¹²⁴ *Id.* § 11308 ¶ 2.

¹²⁵ *Id.* §§ 11304.3, 11304.4, 113.40.5.



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- *Handling of Ballots.* In an in-person election, the Board’s Manual provides that “[b]efore, during and after an election, no one should be permitted to handle any ballot except a Board agent and the individual who votes that ballot.”¹²⁶
- *Observers.* Not only does a designated Board agent physically supervise everything that happens during an in-person election, but the Board’s Manual provides that the participating union and employer are each permitted to have an equal number of observers, who likewise can visually inspect everything that happens in the voting area (except, of course, the casting of each voter’s secret ballot).¹²⁷
- *Election Monitoring.* Everything that occurs in the voting area is subject to the “important functions” that include “monitoring the election process” by the parties’ observers, among other things,¹²⁸ as well as monitoring by the Board agent(s) in charge.
- *Confirming Identity of Voters and Voter Privacy.* When each voter arrives in the voting area, they report to the “checking desk,” where the Board agent and observers are typically seated, and each voter receives a ballot after the observers are “satisfied as to the voter’s identity.”¹²⁹ However, the observers are *not* permitted to “maintain a list of those who do or do not vote.”¹³⁰
- *Ballot Box in Open View.* Although Board elections involve casting secret-ballot votes, where the identity of voters and how they voted remain confidential, the “ballot box” – which is sealed¹³¹ – remains in open view at all times, and the observers and other individuals – except for the person who is casting his or her own ballot – must “remain at least 3 feet away.”¹³²
- *No Electioneering in Voting Area.* The Board’s procedures provide that “agents of the parties (other than observers) should not be allowed in the polling area during the election hours,” and “[n]o electioneering will be permitted at or near the polling place during the hours of voting, nor should any conversation be allowed between an agent of the parties and the voters in the polling area or in the line of employees waiting to vote.”¹³³

¹²⁶ *Id.* § 11306.1.

¹²⁷ *Id.* § 11310.1. Both the union and the employer observers are typically non-supervisory employees, and the Board’s Manual provides that the observers typically cannot be non-employee union officials or supervisors who work for the employer. *Id.* § 11310.2.

¹²⁸ *Id.* § 11310.3.

¹²⁹ *Id.* § 11322.1 ¶ 4.

¹³⁰ *Id.* § 11312.3(c). See also *id.* § 11322.1.

¹³¹ The Board’s procedures call for the ballot box to be sealed before voting (except for the slot that permits cast ballots to be inserted by each voter) and at the conclusion of voting. *Id.* §§ 11324, 11334.3.

¹³² *Id.* § 11322.4.

¹³³ *Id.* § 11326.



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- *Counting of Ballots in Open View.* The Board’s procedures also call for the counting of ballots to occur – usually immediately “after the close of voting,” which is done in open view by the Board agent(s), in the presence of the parties’ observers, which can also be attended by all “interested persons” as well as “members of the press,” to the extent permitted by the physical facilities.¹³⁴

The above procedures demonstrate it is no accident that an extremely high degree of reliability and public confidence exists – on the part of employers, employees, and unions alike – regarding the integrity of in-person elections conducted by the NLRB. Conversely, none of the safeguards referenced above would exist under NLRB-permitted online voting. Unlike all of the characteristics associated with in-person secret ballots cast in manual NLRB elections, online voting would occur in completely dispersed locations, with no open monitoring of the casting of secret ballots by the Board agent(s) and observers, without the same type of monitoring regarding who is casting what ballots, without protection from electioneering (or third-party observation) while individuals mark their ballots and submit their votes, and without having any ballot box or counting of ballots remaining in open view throughout the process.

B. Online Voting Increases the Risk of Coercion and Fraud in Elections

Numerous NLRB decisions have emphasized the centrality of concerns over voter coercion by either union organizers or employers to its election policies and procedures.¹³⁵ This is why, for example, the Manual recognizes that “[t]he best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer’s premises,” but “[i]t may also be necessary to conduct an election off the employer’s premises where there are egregious or pervasive employer unfair labor practices.”¹³⁶ Because secret ballots are themselves a safeguard against coercion, NLRB agents require that voters mark their ballots in voting booths “that not only provide[] privacy but also demonstrate[] the appearance of providing privacy.”¹³⁷

In mail elections, NLRB procedures protect the secrecy of mail ballots by instructing voters to place their ballots in an inner privacy envelope when returning their ballots. After a voter’s eligibility is verified, the inner privacy envelope is removed from the outer envelope. The inner

¹³⁴ *Id.* § 11340.2.

¹³⁵ *See, e.g., Nelson, N. P., Iron Works, Inc.*, 78 NLRB No. 181 (1948) (noting that “[i]t is well established that preelection conduct will void an election if it operates to restrain, coerce, or in any other manner to prevent, the employees from exercising a free choice in the election of a bargaining representative,” but finding that particular conduct alleged did not rise to the level of coercion); *Sonoco of Puerto Rico, Inc.*, 210 NLRB No. 72 (1974) (voiding election due to pro-union coercion via threat of physical harm); *Richland Co. & Assoc.*, 256 NLRB No. 26 (1981) (coercive behavior by employer in build up to election constituted unfair labor practices); *Harborside Healthcare Inc.*, 343 NLRB No. 100 (2004) (finding coercion by pro-union supervisor with power to recommend termination of employees); *Wismettac Asian Foods, Inc.*, 370 NLRB 35 (2020) (finding coercive conduct by employer in build up to representation election).

¹³⁶ *Casehandling Manual*, § 11302.2.

¹³⁷ *Id.* at § 11304.3.



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privacy envelopes are “mixed thoroughly before the envelopes are opened and ballots are extracted,” and the ballots themselves are “mixed again before being counted.”¹³⁸ As a safeguard against coercion in mail elections, “the Board has held that a party engages in objectionable conduct if it collects or otherwise handles mail ballots.”¹³⁹ Most recently, coercion concerns even led the Board to roundly reject offers by a party to collect and return a voter’s ballot in mail elections.¹⁴⁰ The Board explained that “the solicitation of mail ballots casts doubt on the integrity of the election and the secrecy of employees’ ballots.”¹⁴¹ Mail ballot “[s]olicitation also suggests to employees that the soliciting party is officially involved in running the election, which the Board has found ‘incompatible with [its] responsibility for assuring properly conducted elections.’”¹⁴²

Although coercion concerns increase whenever a voter casts their ballot outside a voting booth, these concerns are exacerbated with online voting. In NLRB mail elections, the NLRB sends mail ballot kits to employees’ homes.¹⁴³ Employees complete their mail ballots in the privacy of their homes and return their voted ballots via mail. Employers and unions are strictly prohibited from collecting or handling mail ballots, and “the Board has set aside an election where, despite the absence of evidence that any party had actually touched a ballot, circumstances made it impossible to be certain the parties had not done so.”¹⁴⁴ With online voting, employees may access their online ballots from any location with internet service, which increases the risk that a party to an election could pressure employees to cast their ballots a particular way in their presence. It would be difficult to detect when or to what extent this might occur given that casting an online ballot appears to witnesses like an employee using his or her smartphone or computer. In other online voting contexts, election authorities have attempted to address concerns over voter intimidation by allowing voters to cast multiple votes prior to the close of polls with the last vote overwriting all previous votes. These measures, however, have only limited effectiveness as online voting systems are almost always vulnerable to *ex post* attacks revealing how individuals have voted.¹⁴⁵ As explained below, these vulnerabilities undermine voter privacy and leave the election susceptible to intimidation or vote buying, with punishments or payments to be doled out after a motivated miscreant has exploited the online voting system to confirm each voter’s individual vote. Regardless of whether in-person voter intimidation or *ex post* cyberattacks actually occur, the mere perception that they could occur is problematic.¹⁴⁶

¹³⁸ *Id.* at § 11336.5(b).

¹³⁹ *Professional Transp.*, 370 NLRB No. 132, at *1 (citing *Fessler & Bowman, Inc.*, 341 NLRB 932, 932 (2004)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *3.

¹⁴² *Id.* (quoting *Alco Iron & Metal Co.*, 269 NLRB at 591-92 (1984)).

¹⁴³ *Casehandling Manual*, §§ 11312.2, 11336.2(c).

¹⁴⁴ *Professional Transp.*, 370 NLRB No. 132, at *2.

¹⁴⁵ UTAH iVOTE ADVISORY COMM. *supra* n.65, § 5.

¹⁴⁶ *Professional Transp.*, 370 NLRB No. 132, at *2 (“Even the appearance of irregularity in election procedures may cast doubt on the validity of an election and its results. . . . The Board has [] found objectionable conduct where



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The risk of coercive activity and peer pressure, however, is not the singular disadvantage of online voting; it is also highly susceptible to fraud, as is card check. For example, in a 2015 attempt to represent Delta Air Lines flight attendants, the International Association of Machinists and Aerospace Workers (“IAM”) filed an application with the National Mediation Board (“NMB”)¹⁴⁷ to initiate representation election proceedings, delivering signed authorization cards of roughly 60% of the 20,000-employee bargaining unit – a number that exceeded the requirement for a showing of interest of at least 50% of the proposed bargaining unit.¹⁴⁸ Hundreds of complaints from Delta Flight Attendants who did not sign authorization cards followed. Their reports detailed experiences and communications with the IAM that raised serious questions around the validity of the cards the union provided to the NMB – allegations the IAM initially characterized as a “desperate” attempt by Delta “to deprive its Flight Attendants of a free and fair vote on representation.” Despite that rhetoric and amid an NMB investigation, IAM eventually withdrew its application, stating it had “recently discovered” that authorization cards submitted to the agency contained questionable signatures or insufficient information, which rendered their showing of interest “borderline.”¹⁴⁹ The NMB announced shortly thereafter that it had reason to believe some unknown person or persons knowingly submitted authorization cards with fraudulent signatures and was therefore submitting the matter to the Department of Justice. Given the size of the bargaining unit and IAM’s admission of a borderline showing of interest, it’s possible that at least 2,000 of the authorization cards submitted to the NMB were fraudulent.¹⁵⁰

C. Online Voting Presents Serious Cybersecurity Concerns, Compromising Ballot Secrecy and Making Elections More Vulnerable to Tampering

Online voting presents obvious cybersecurity and hacking concerns. Time and time again, even sophisticated online voting systems have proven vulnerable to attack.¹⁵¹ These cybersecurity concerns present two challenges to implementing online voting in NLRB representation elections.

actions in the course of the election conveyed the impression to voters that the Board was not in complete control of the election process.”).

¹⁴⁷ The NMB regulates representation elections in the rail and airline industries and has a different organic statute than the NLRB. That statute requires a signed authorization card threshold of 50 percent for NMB elections. 45 U.S. Code § 152

The NMB’s organic statute sets the signed authorization card threshold.

¹⁴⁸ International Association of Machinists and Aerospace Workers, *12,000 Delta Flight Attendants request IAM representation*, 142 Observer publication of IAMAW District Lodge 142, Spring 2015, accessed on July 1 at <https://atd142.org/wp-content/uploads/2015/05/DL142-Observer-SPRING-2015FINAL.pdf>

¹⁴⁹ Reuters Staff, *Machinists withdraw bid to unionize Delta flight attendants*, Reuters, April 6, 2015, accessed on July 1 at <https://www.reuters.com/article/us-delta-air-lines-unions/machinists-withdraw-bid-to-unionize-delta-flight-attendants-idUSKBN0MX18920150406>

¹⁵⁰ See generally, *NMB Case No. R-7418 responsive documents*, accessed on July 1 at

https://nmb.gov/NMB_Application/wp-content/uploads/2019/10/Delta-IAM-responsive-documents.pdf.

¹⁵¹ See, e.g., WOLCHOK ET AL., *supra* n.73; D.C. *Hacking Raises Questions About Online Voting*, *supra* n.73; SPECTER ET AL., *supra* n.76; Geller, *supra* n.80; HALDERMAN & TEAGUE, *supra* n.100; U.S. VOTE FOUNDATION, *supra* n.104; *France drops electronic voting for citizens abroad over cybersecurity fears*, *supra* n.63; SPRINGALL ET AL., *supra* n.96.



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First, as discussed above, it is functionally impossible to ensure that voter privacy is maintained when voters cast ballots using an online voting system.¹⁵² Employees have a right under the NLRA to cast secret ballots in representation elections, and at this time online voting systems cannot guarantee that cast votes remain secret.

Second, the NLRB historically has been concerned with the potential for fraud or other forms of vote rigging in its elections, recently reaffirming its duty to “zealously safeguard[] the integrity of its elections against irregularity and even the appearance of irregularity.”¹⁵³ As past experience demonstrates, and as experts have repeatedly asserted, online voting systems are inherently less secure than manual elections.¹⁵⁴ The complex and highly technical nature of online voting platforms also makes it harder to ensure total confidence in the integrity of a vote conducted using an online voting system, even where there is not necessarily any evidence of a hack.¹⁵⁵ It is also notoriously difficult, or even impossible, to audit online voting systems.¹⁵⁶ The inability to audit online elections can greatly increase the perception of potential malfeasance even where no fraud actually took place.¹⁵⁷ Importantly, these concerns are equally applicable to the electronic collection of authorization or showing of interest cards. The potential for fraud, lack of confidence in the integrity of the vote, and the inability to audit electronic authorization cards leave such systems wanting.

D. The Cost of Administering and Securing Online Voting Systems Would Not Be an Efficient Use of NLRB Resources

While some proponents tout online voting as a way to reduce the cost of administering an election over the long run,¹⁵⁸ Australia has expressly cited the high cost-per-vote of ensuring cybersecurity as a major reason behind their decision to terminate their federal online voting program.¹⁵⁹ The experience in Australia is particularly telling with both the highly secure, customized online voting platform utilized in its experiment with online voting for deployed military personnel and the less secure, more widely available online platform used in New South Wales costing exponentially more per vote than traditional in-person voting or remote voting by

¹⁵² See, e.g., *Ass’n of Prof. Flight Attendants*, 2017 WL 4326094, at *2-3; SEGAARD ET AL., *supra* n.102; *E-voting experiments end in Norway amid security fears*, *supra* n.63; *Norway Does a Ctrl+Alt+Delete E-Voting Experiment*, *supra* n.63.

¹⁵³ *Professional Transp.*, 370 NLRB No. 132, at *1.

¹⁵⁴ See Talbot, *supra* n.69; CISA ET AL., *supra* n.44.

¹⁵⁵ See Koebler et al., *supra* n.82; U.S. VOTE FOUNDATION, *supra* n.104.

¹⁵⁶ See HASTINGS ET AL., *supra* n.67, at 1-2; Springall et al., *Our Response to the National Election Committee’s Statement*, *supra* n.96; U.S. VOTE FOUNDATION, *supra* n.104, at 21.

¹⁵⁷ See, e.g., Schneider, *supra* n. 88; Cohn et al., *supra* n.85.

¹⁵⁸ GOODMAN, *supra* n.107 § 3Error! Hyperlink reference not valid. (noting that while “there is no certainty that online voting will inevitably bring the cost of elections up or down,” experts who favor online voting contend that “direct comparison between the cost of paper ballots per elector and online ballots shows a cost savings over time”).

¹⁵⁹ ELECTORAL COUNCIL OF AUSTRALIA & NEW ZEALAND, *supra* n.63, § 3.33.



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mail.¹⁶⁰ The NLRB operates with a limited budget, and the cost of implementing and operating a sufficiently secure online voting platform may prove prohibitive, if such a platform is even possible.

IV. IN-PERSON VOTING INCREASES WORKER TURNOUT IN REPRESENTATION ELECTIONS, ENSURES VOTER PRIVACY, AND PROTECTS AGAINST FRAUD

The NLRB strives to “maintain and protect the integrity and neutrality of its [representation election] procedures,”¹⁶¹ and it does so by using voting methods that have the best chance at providing safe and secure elections that protect the privacy of individuals’ votes. These methods are undeniably in-person elections. As the NLRB explained in its decision in *Aspirus Keweenaw* (2020), “Manual elections permit in-person supervision of the election, promote employee participation, and serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so.”¹⁶²

Statistics routinely show that participation rates in mail-ballot elections are consistently lower than those seen in manual voting. As was explained in the Board’s *Aspirus* decision, statistics “reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate,” despite modest increases seen during the COVID-19 pandemic.¹⁶³

“Internal Board statistics reflect that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent. Although these statistics reflect that the mail-ballot participation rate has increased during the Covid-19 pandemic, they also reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since).”¹⁶⁴

The Board concluded that “manual elections tend to promote greater participation in the election process.”¹⁶⁵ While the *Aspirus* decision did not discuss the potential voter turnout of online

¹⁶⁰ *Id.* The total average cost per vote in the 2007 Australian federal election was \$8.36. The average cost per vote cast via the online voting portal in Australia’s 2017 federal election was \$1,159.

¹⁶¹ *NLRB v Superior of Missouri*, 351 F.3d 805 (8th Cir. 2003).

¹⁶² *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020) at 1.

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.* at 2.



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voting, it likely would not compare to that of in-person, NLRB-supervised elections at the workplace, disenfranchising workers of their right to choose their own labor representation. If the goal of the Board is to advance employees’ right to choose to organize or refrain from doing so under Section 7 of the NLRA, then the Board should make every effort to achieve the greatest worker turnout. Manual, in-person elections should therefore be used whenever possible.

Manual elections are preferred, in part, because they “permit in-person supervision of the election”¹⁶⁶ and allow the Board to “conduct[] elections ‘under conditions as nearly ideal as possible’—so-called laboratory conditions—in order to provide employees the opportunity to express their uninhibited desires regarding representation.”¹⁶⁷ In-person elections with secret ballots guarantee freedom from coercion and ensure individuals’ votes will remain private, protecting the integrity of the vote and workers’ privacy. In-person elections provide the Board the opportunity to physically monitor and supervise elections to guarantee neither the employer nor union organizers have the ability to coerce or influence workers’ vote in any way. Board agents can “police the [voting] booth to see that there are no cross-conversations between occupants and that there is no more than one occupant per booth,”¹⁶⁸ as well as strictly enforce prohibitions against electioneering at or near the polling place and solicitation of ballots.¹⁶⁹ These safeguards ensure workers have the right to freely vote their conscience.

In-person voting also removes the threat of cybersecurity vulnerabilities or malicious actors trying to change the outcome of the election, as discussed above. There is no means by which an interested party could change votes or interfere with the technology used by workers to cast their ballots. If all else fails and concerns about an election’s integrity are raised, in-person elections can always be audited, guaranteeing the NLRB can review the results and identify mistakes or fraudulent activity if they exist.

V. CONCLUSION

The NLRB strives to “maintain and protect the integrity and neutrality of its [representation election] procedures”¹⁷⁰ and “conduct[] elections ‘under conditions as nearly ideal as possible’—so-called laboratory conditions—in order to provide employees the opportunity to express their uninhibited desires regarding representation.”¹⁷¹ The NLRA requires secret ballots and votes that are free of coercion to guarantee the credibility of the election. Time and time again, however, online voting has demonstrated that it cannot meet those requirements, and the history of online

¹⁶⁶ *Id.* at *1.

¹⁶⁷ *Professional Transp., Inc.*, 370 NLRB No. 132, at *2 (2021) (citing *General Shoe Corp.*, 77 NLRB 124, 127 (1948)).

¹⁶⁸ *Casehandling Manual*, § 11302.2

¹⁶⁹ *Casehandling Manual*, § 11326.

¹⁷⁰ *NLRB v Superior of Missouri*, 351 F.3d 805 (8th Cir. 2003).

¹⁷¹ *Professional Transp., Inc.*, 370 NLRB No. 132, at *2 (2021) (citing *General Shoe Corp.*, 77 NLRB 124, 127 (1948)).



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voting to date proves that moving to such a system would jeopardize the ability of the NLRB to meet its goals. Such a system cannot protect the secrecy or integrity of the vote; cannot protect against cybersecurity threats and malicious actors; and cannot protect voters from intimidation or coercion. Online voting is, therefore, inappropriate for union representation elections.

It is important to recognize the outstanding track record maintained throughout the NLRB's history spanning more than 85 years regarding the integrity of secret ballot elections conducted by the Board. This is one area in which there have been remarkably few problems, and the process by which the Board conducts elections instills a high degree of confidence in virtually everyone, including employers, unions, employees, and the public. Any movement away from in-person elections is a "solution" in search of a "problem."

If the goal of the NLRB is to protect the rights of workers to join or refrain from joining a labor organization, then in-person elections must be the primary method used. The NLRB must halt their efforts to implement an online voting system, and Congress should oppose legislation permitting the Board to establish such a system in order to protect the credibility of union representation elections.