

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**SAMARITAN PACIFIC HEALTH SERVICES d/b/a  
SAMARITAN MEDICAL GROUP**

**Employer**

**and**

**Case 19-RC-272292**

**SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 49<sup>1</sup>**

**Petitioner**

**DECISION AN DIRECTION OF ELECTION**

Samaritan Pacific Health Services d/b/a Samaritan Medical Group (Employer) operates five non-acute care medical clinics in Lincoln County, Oregon. On February 5, 2021,<sup>2</sup> Service Employees International Union Local 49 (Petitioner) filed the instant Petition seeking to represent a bargaining unit of approximately 60 non-professional employees, in a variety of classifications, employed at these Lincoln County facilities.

The appropriateness of the bargaining unit is not in dispute. The only issue in this case is the method of election, whether the election should be conducted in-person or by mail ballot, and the date, time, and place of election. The parties agreed by stipulation to file their written position on this issue, and both did so in a timely manner. Both the Employer and Petitioner seek a manual election.

The National Labor Relations Board (Board) has delegated its authority in this proceeding to me under Section 3(b) of the National Labor Relations Act (Act). Applying the Board's recent *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) decision to the circumstances in the instant case, I am directing a mail ballot election.

**I. METHOD OF ELECTION**

**A. The COVID-19 Pandemic**

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last year. Despite unprecedented efforts to limit transmission, to date almost 30 million people in the United States have been infected with COVID-19 and over 500,000 people have died.

The best ways to limit transmission are well known at this point in the pandemic. The Centers for Disease Control and Prevention (CDC) notes that COVID-19 is “spread mainly through close contact from person to person,” and can be spread through respiratory droplets by

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<sup>1</sup> The names of the parties appear as amended by stipulation.

<sup>2</sup> All dates 2021 unless otherwise indicated.

individuals within 6 feet or through airborne transmission to individuals “who are further than 6 feet away from the person who is infected or after that person has left the space.”<sup>3</sup> According to the CDC, the most important ways to slow the spread of COVID-19 are wearing a mask, staying at least 6 feet away from others, and avoiding crowds, as “the more people you are in contact with, the more likely you are to be exposed to COVID-19.”<sup>4</sup>

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its guidance on *Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”<sup>5</sup> The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes, but “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>6</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”<sup>7</sup>

Recent developments regarding the pandemic have been both positive and negative. A positive development has been the rapidly expanding nationwide vaccination effort; as of March 17, almost 40 million individuals, or about 12 percent of the United States population, has been fully vaccinated.<sup>8</sup> A negative development has been the unfortunate emergence of new variant strains of COVID-19, including the B.1.1.7, B.1.351, and P.1. strains.<sup>9</sup> The CDC has stated that these variants, “have mutations in the virus genome that alter the characteristics and cause the virus to act differently in ways that are significant to public health (e.g., causes more severe disease, spreads more easily between humans, requires different treatments, changes the effectiveness of current vaccines).”<sup>10</sup> Initial research suggests, as stated by the CDC, “[t]hese variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19.”<sup>11</sup> The CDC further cautions that we do not yet know how widely these new variants have spread, how the disease caused by these new variants differs from the disease caused by other variants that are currently circulating, and how these variants may affect existing

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<sup>3</sup> CDC, *Ways COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last viewed March 17, 2021).

<sup>4</sup> CDC, *Protect Yourself*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed March 17, 2021).

<sup>5</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last viewed March 17, 2021).

<sup>6</sup> *Am I at risk for COVID-19 from mail, packages, or products?* <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last viewed March 17, 2021).

<sup>7</sup> *Running Errands*. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last viewed March 17, 2021).

<sup>8</sup> <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last viewed March 17, 2021).

<sup>9</sup> <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html> (last viewed March 17, 2021).

<sup>10</sup> *Ibid.*

<sup>11</sup> <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> ((last viewed March 17, 2021).

therapies, vaccines, and tests.<sup>12</sup> As of March 17, the B.1.1.7 and P.1. variants have been confirmed as present in Oregon.<sup>13</sup> The B.1.351 variant, while not yet confirmed in Oregon, is confirmed as present in Washington, Idaho, Nevada, and California.

## **B. Background and Position of the Parties**

The Employer operates five non-acute health care facilities in Lincoln County, Oregon. These include two clinics adjacent to one another in Newport, and clinics in Depoe Bay, Toledo, and Waldport, Oregon. From Newport, the Depoe Bay facility is approximately 14 miles, the Toledo clinic is approximately 7 miles, and the Waldport clinic is approximately 16 miles.

Approximately 40 employees in the petitioned-for bargaining unit (Unit) are employed in the Newport facilities, 5 in Depoe Bay, 5 in Toledo, and 10 in Waldport. The facilities involved are open from 8:00 a.m. or 9:00 a.m. to 5:00 p.m. or 6:00 p.m., Monday to Friday. Only the Employer's walk-in clinic, one of the Newport facilities, is open on Saturday and Sunday. The employees in the Unit have continued to work on-site during the current pandemic.

The Employer proposes holding a manual election in a conference room at a Newport facility, and in the break rooms at the other clinics. The proposed election would occur on a single day, on or after March 31, beginning at 8:30 a.m. in Depoe Bay, progressing to Newport and Waldport, and then concluding at 4:15 p.m. in Toledo. The Employer commits to provide all necessary supplies for the election, including floor markings, pencils, glue and tape, as well as personal protective equipment such as plexiglass barriers, hand sanitizer, gloves, and wipes. The Employer also provides an open-ended commitment to comply with all certifications addressed in *Memorandum GC 20-10*, "Suggested Manual Election Protocols."

Petitioner proposes a manual election that differs from the Employer's proposal in some details, although the structure of an election taking place on a single day, moving between facilities, remains the same. Petitioner asserts using outdoor tents in the parking lots of the clinics is preferable to utilizing an interior space. Petitioner similarly offers to provide masks, gloves and hand sanitizer for all participants, as well as 10-foot by 10-foot tent canopies.

There is no contention that an outbreak is ongoing at the Employer's clinics. Oregon utilizes a four-step scale to assign risk levels to counties, with the risk of virus transmission rated as "lower," "moderate," "high," and "extreme" risk.<sup>14</sup> Lincoln County is currently in the "lower" risk category and the 14-day testing positivity rate is 2.2 percent for the period of February 21 to March 6.<sup>15</sup> Data published by Johns Hopkins University & Medicine Coronavirus Resource Center, as of March 17, reflects 14-day positivity rate of 2.02 percent in Oregon as a whole.<sup>16</sup> The

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> <https://coronavirus.oregon.gov/Pages/living-with-covid-19.aspx> (last viewed March 17, 2021).

<sup>15</sup> Ibid.

<sup>16</sup> <https://coronavirus.jhu.edu/testing/testing-positivity> (last viewed March 17, 2021).

same data demonstrates an increase in positive cases in Lincoln County during the last 14 days, increasing from 0 to 3 cases.<sup>17</sup>

### C. Board Standard

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.*, 325 NLRB at 1144-45.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.<sup>18</sup> However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region's, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

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<sup>17</sup> <https://bao.arcgis.com/covid-19/jhu/county/41041.html> (last viewed March 17, 2021).

<sup>18</sup> I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by *GC Memorandum 20-10*, “Suggested Manual Election Protocols;”
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

*Id.* slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” *Id.* slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” *Id.* slip op. at 3 (citing *National Van Lines*, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, 370 NLRB No. 45, slip op. at 3 (citing *San Diego Gas & Elec.*, 325 NLRB at 1144 n. 4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, 370 NLRB No. 45, slip op. at 8.

## II. DETERMINATION

After careful examination of the record, the parties’ respective positions, and the current state of the COVID-19 virus in Lincoln County, I have determined that a mail ballot election is the appropriate option.

Several of the *Aspirus* factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by GC 20-10, and there is no evidence of a current outbreak at the Employer’s facilities. Ultimately, I have determined that a mail ballot election is appropriate in this case due to the remaining two factors: the increasing trend in Lincoln County and the existence of other compelling circumstances.

Regarding the second *Aspirus* factor – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data is not available, Regional Directors should look to state level data.

Here, it is not in dispute that the 14-day positivity rate in Lincoln County is below 5 percent, the Board’s threshold, and I agree with the parties that this does not support conducting the election by mail. However, the 14-day trend in Lincoln County, the other factor the Board references regarding this consideration, is increasing. I recognize the number of cases involved is very small, the data shows an increase from 0 cases to 3 cases, but Lincoln County is sparsely populated.

I additionally find the sixth factor - whether other compelling circumstances exist - also supports directing a mail ballot election. Specifically, I find recent changes in the COVID-19 pandemic, and specifically the emerging variants that may pose a greater risk of transmission and serious complications, present such a compelling circumstance. While it is impossible to know how great a threat these variants pose currently that is precisely the point. At this time the CDC indicates that it is working to learn more about these variants and is studying them to assess how to control their spread, what dangers they pose, and just how prevalent the variants are within impacted communities. What is known is that two of the variants are confirmed to be present in Oregon and the third has been confirmed in all the states bordering Oregon. Because the discovery of the variants followed the Board's November 2020 Decision in *Aspirus*, and as such was not considered by the Board in that Decision, I find the variants constitute a compelling circumstance that is sufficient to support conducting an election by mail.

Petitioner has proposed holding the election outside, and I recognize this arguably could mitigate some of the concerns involved with conducting a manual election in a small, enclosed space. However, I do not find this eliminates any risk, as the benefit of an election held outside with greater ventilation is balanced by the risk of locating the election in a publicly accessible parking lot. Finally, I note that while vaccination efforts continue, and the employees involved in this case may well be currently eligible, almost all the staff in the Regional office responsible for conducting the election are not eligible for vaccination under the current guidelines. For these reasons, I have directed a mail ballot election.

### III. CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>19</sup>
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

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<sup>19</sup> The parties stipulated to the following commerce facts:

The Employer, Samaritan Pacific Health Services d/b/a Samaritan Medical Group, an Oregon nonprofit corporation, is engaged in the business of providing non-acute medical care and services in its facilities located throughout Lincoln County, Oregon. During the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000. During the same period, the Employer purchased goods and materials valued in excess of \$50,000 directly from entities located outside the State of Oregon. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time, regular part-time and per diem non-professional employees employed by the Employer at its clinics located at 930 SW Abbey St., Newport, OR; 720 SW 9th St., Newport, OR; 920 SW Range Dr., Waldport, OR; 199 W Highway 20, Toledo, OR; and 531 N Highway 101, Ste. A, Depoe Bay, OR; in the following job classifications: Clinic CMA-RMA, Clinic CMA Lead, CMA/RMA Specialist, Clinic Care Coordinator - Peds, Clinic Phlebotomist Certified, Clinic Documentation Tech, Clinic Technician Specialist, Clinic Rx Refill PA Specialist, Clinic Med Office Receptionist, Clinic Med Office Specialist, Clinic LPN, MA Apprentice, Clinic Medical Office Reception – Lead, Clinic CMA Lead Back Office Support, Clinic CMA Ld-Back Office Sup, Occupational Medical Receptionist, and Occupational Medicine Assistant – Certified.

**Excluded:** All other employees, professional employees, managerial employees, and guards and supervisors as defined by the Act.

#### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 49**.

##### **A. Election Details**

The election will be conducted by mail. The ballots will be mailed to voters by a designated official of the National Labor Relations Board, Subregion 36, 1220 SW 3<sup>rd</sup> Avenue, Suite 605, Portland, OR 97204 on **Thursday, April 8, 2021 at 4:30 p.m.** Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by, Thursday, April 22, 2021, should communicate immediately with the National Labor Relations Board by either calling the Subregion 36 office at 503-326-3085 or our national toll-free line at 1-866-762-NLRB (1-866-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 36 office by **4:30 p.m. on Thursday, May 6, 2021**. All ballots will be commingled and counted by an agent of Subregion 36 of the National Labor Relations Board on **Monday, May 10, 2021, at 2:00 p.m.** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date,

it is determined that a ballot count can be safely held in the Subregion 36 office, the Region will inform the parties with sufficient notice so that they may attend.

## **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **March 14, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

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

## **C. Voter List**

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

To be timely filed and served, the list must be *received* by the regional director and the parties by **Monday, March 22, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

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

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

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

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

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

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

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

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Seattle, Washington on the 18<sup>th</sup> day of March, 2021.



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