



COALITION FOR A
DEMOCRATIC WORKPLACE

July 25, 2024

The Honorable Bernie Sanders

Chair

U.S. Senate Committee on Health, Education,
Labor & Pensions
Washington, D.C. 20510

The Honorable Bill Cassidy

Ranking Member

U.S. Senate Committee on Health, Education,
Labor & Pensions
Washington, D.C. 20510

Dear Chair Sanders, Ranking Member Cassidy, and members of the Senate Committee on Health Education, Labor, and Pensions (“HELP”):

The [Coalition for a Democratic Workplace](#) (“CDW”) and the 40 undersigned organizations write to urge the Senate Health, Education, Labor, and Pensions (“HELP”) Committee to reject Chair Lauren McFerran’s re-nomination to the National Labor Relations Board (“NLRB” or “Board”) due to the malfeasance and mismanagement of the Board during her tenure, her extreme policy agenda, and because Senator Sanders has chosen to proceed without a formal confirmation hearing, leaving Senators with no opportunity to question McFerran on her troubling record. Under McFerran’s leadership, the Board’s activity has been the subject of an Office of the Inspector General (“OIG”) report finding gross mismanagement and a lack of candor; condemnation in court opinions; Congressional hearings and oversight letters; bipartisan and bicameral rejection of Board rules; and numerous press reports and editorials highlighting the agency’s failures. The Committee has held hearings on nominees to serve as the NLRB Chair since 2012,¹ and breaking precedent in the current circumstance is a failure by the Senate to fulfill its advice and consent responsibilities.

Over the last several months, the Office of the Inspector General released multiple reports on the Board’s mail ballot election procedures under Chair McFerran’s leadership. **The initial [report](#) found the Board guilty of “gross mismanagement” and a “lack of candor” that “created the risk of great reputational harm that could negatively impact the ability of the Agency to carry out [its] mission.”** The [subsequent report](#) provided more detail on errors and the Board’s response to the Inspector General’s findings. Unfortunately, the Board’s response to these findings was to claim it is not bound by its own procedures,² and while it admitted there were some “documentation issues,” it dismissed many of the Inspector General’s findings. Moreover, the Board attempted to draw misleading conclusions that the reports proved their actions were not biased and did not impact the outcome of any elections - even though the report specifically noted, “The objectives of the audit did not include determining whether any Region or its staff was bias in performing any duties related to the conduct of the election... The absence of those specific findings or statements of effect regarding election outcome or bias should not be considered an OIG determination.”

¹ Every NLRB Chair since 2011 has been subject to a hearing before assuming the role, including the renomination of President Obama’s nominee, Chair Mark Pearce, in 2013.

² “In sum, the guidelines in the [Board’s Case Handling Manual] are not intended to be binding procedural rules, but rather are a framework for the application of the Board’s decisional law, rulings and policies to the facts of the situations presented to Regional Directors and their staffs.”



COALITION FOR A DEMOCRATIC WORKPLACE

The Senate should not be considering this nomination without McFerran first providing a detailed explanation and being subject to questions by the Senate HELP Committee members about the gross mismanagement outlined in the reports and her plan to prevent similar failures in the future.

In addition, the Board's unprecedented decisions and expansive interpretations of the National Labor Relations Act ("NLRA") have raised policy issue concerns expressed in hearings,³ news articles,⁴ and oversight letters⁵ and have been invalidated by the Supreme Court and other federal courts, providing ample reasoning to conduct a hearing. The Board's [new joint employer standard](#), for example, was [nullified by a federal court](#) in March 2024, which said the rule was "arbitrary and capricious" and "contrary to law." Moreover, Congress passed a [Congressional Review Act challenge](#) to nullify the rule on a bipartisan basis.⁶ At the very least, McFerran should have been required to answer in a hearing why she deemed it appropriate to appeal the court's decision to the 5th Circuit despite the strong, bipartisan opposition to the rule. The Board has since abandoned its defense of the rule, but McFerran's original decision to continue to defend the rule is deeply concerning.

Many courts have questioned the legitimacy of the NLRB's interpretations under McFerran's leadership. On June 13, the Supreme Court [ruled](#) against the NLRB in *Starbucks Corporation v. McKinney*,⁷ issuing a unanimous decision reining in the NLRB's unlawful use of 10(j) injunctions against employers. The D.C. Circuit criticized the Board for ignoring evidence in *Absolute Healthcare v. NLRB*, saying the Board "ground its decisions in a skewed or 'clipped view' of the record,"⁸ while its *Tesla* decision "rest[ed] on erroneous legal foundations."⁹ The 5th Circuit called the Board's *Thryv, Inc.* decision "the epitome of arbitrary,"¹⁰ and the Board's *Stern Produce* decision was "nonsense" and "cannot be squared with any reasonable understanding" of the NLRA.¹¹ These condemnations from the judicial branch should give pause to the Senate on this controversial nominee.

³U.S. House Subcommittee on Health, Education, Labor, & Pensions, "NLRB Overreach: Trampling on Workers' Rights and Fostering Unfairness," June 12, 2024; U.S. House. Subcommittee on Health Education, Labor, & Pensions. Protecting Workers and Small Businesses from Biden's Attack on Worker Free Choice and Economic Growth (December 13, 2023).

⁴ See Editorial Board, "A Reckoning for Biden's Lawless Labor Chief," *The Wall Street Journal*, June 10, 2024; Editorial Board, "A Joint-Employer Legal Smackdown," *The Wall Street Journal*, March 12, 2024; Ackley, K. and Munhoz, D., "Business Coalition Wages War Against Biden's Joint Employer Rule," *Bloomberg*, November 13, 2023; Iafolla, R., "Fifth Circuit Blasts NLRB in Protected Worker Misconduct Case," *Bloomberg*, April 29, 2024; Iafolla, R., "Labor Board's Worker Status Ruling Faces Hurdle at DC Circuit," *Bloomberg*, June 15, 2023.

⁵ U.S. House Committee on Education and the Workforce, Letter to The Honorable Lauren McFerran, January 12, 2023, available at https://edworkforce.house.gov/uploadedfiles/01.12.23_follow_up_letter_-_nlrb_mcferran.pdf; U.S. House Committee on Education and the Workforce, Letter to The Honorable Jennifer Abruzzo, January 12, 2023, available at https://edworkforce.house.gov/uploadedfiles/01.12.23_follow_up_letter_-_nlrb_abruzzo.pdf.

⁶ President Biden, unfortunately, vetoed the legislation.

⁷ *Starbucks v. McKinney*, *Regional Director of Region 15 of the National Labor Relations Board*, 2024 No. 23-367 (Supreme Court), June 13, 2024.

⁸ *Absolute Healthcare v. National Labor Relations Board*, 2024 WL 2789317 (D.C. Cir.), May 31, 2024.

⁹ *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir.), Nov. 14, 2023.

¹⁰ *Thryv, Inc. v. National Labor Relations Board* (5th Cir.), May 24, 2024.

¹¹ *Stern Produce Company, Inc. v. NLRB*, No. 23-1100 (D.C. Cir.), March 26, 2024.



CDW strongly urges the Senate HELP Committee to reject her nomination outright based on the malfeasance and mismanagement of the Board during her tenure and her extreme policy agenda as well as Senator Sanders' decision to proceed without a formal confirmation hearing, blocking any opportunity to question McFerran on her troubling record.

Sincerely,

Coalition for a Democratic Workplace
Air Conditioning Contractors of America
American Bakers Association
American Hotel and Lodging Association
American Pipeline Contractors Association
American Trucking Associations
AR State Chamber of Commerce
Argentum
Associated Builders and Contractors
Center for Individual Freedom
Center for the Defense of Free Enterprise
Construction Industry Round Table
Consumer Technology Association
Foodservice Equipment Distributors Association
Global Cold Chain Alliance
Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
Independent Electrical Contractors
Independent Lubricant Manufacturers Association
International Foodservice Distributors Association
International Franchise Association
National Armored Car Association
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Federation of Independent Business
National Grocers Association
National Marine Distributors Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
Nevada Manufacturers Association
Outdoor Power Equipment and Engine Service Association
Power & Communication Contractors Association



COALITION FOR A **DEMOCRATIC WORKPLACE**

Small Business & Entrepreneurship Council
The Transportation Alliance
Tile Roofing Industry Alliance
Truck Renting and Leasing Association
Western Electrical Contractors Association
Workforce Fairness Institute
Workplace Policy Institute
Workplace Solutions Association

CC: all members of the U.S. Senate