



COALITION FOR A
DEMOCRATIC WORKPLACE

December 3, 2024

Members of the U.S. Senate

Dear Senator:

The Coalition for a Democratic Workplace¹ (CDW) and the 53 undersigned organizations write to urge you to reject the nomination of Lauren McFerran to serve another term as Chair of the National Labor Relations Board (NLRB or Board) due to the malfeasance and mismanagement of the Board during her tenure as identified by federal courts and the NLRB's own Office of the Inspector General (OIG), her extreme policy agenda, the decision by the Chair of the Senate Health, Education, Labor, and Pensions (HELP) Committee Bernie Sanders not to hold a confirmation hearing on her nomination, and the fact that this nomination is an effort by the Biden administration to control the Board well into President Trump's second term. CDW and the undersigned organizations, therefore, urge you to oppose this nomination.

The Board's extreme and expansive interpretations of the National Labor Relations Act (NLRA) under McFerran have overturned decades of precedented and been invalidated and even condemned by the Supreme Court and other federal courts. For example, over the last two weeks alone, the Board drastically hindered employer speech rights during union organizing campaigns, including banning employer-sponsored meetings in which the employer expresses their views on unionization² and preventing employers from explaining to employees how unionization will alter their relationship.³ The former decision overruled precedent that had stood since 1948, while the latter overruled a 40-year-old precedent. Employer speech rights during union organizing drives have been protected by Congress, the Supreme Court, and the Board itself for decades, but these decisions directly conflict with that history.

McFerran's extreme policies do not end there, however. In a recent *Tesla* case, the Board infringed on CEO Elon Musk's speech rights by forcing him to delete a post on X, but that decision was invalidated by the 5th Circuit,⁴ which said the decision violated Musk's First Amendment rights and was "light on law and facts." In another example, the Board under McFerran also moved to eliminate secret ballots in union representation elections⁵ and instead utilize signed authorization cards to determine workers' desires on unionization. The Supreme Court and numerous Courts of Appeals have consistently recognized that authorization cards are "admittedly inferior to the

¹ CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a longstanding effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers, and the economy. CDW was formed in 2005.

² *Amazon.com Services LLC.*, 373 NLRB No. 136 (2024)

³ *Siren Retail Corp.*, 373 NLRB No. 135 (2024)

⁴ *Tesla, Inc. v. NLRB*, No. 21-60285 (5th Cir., Oct. 25, 2024)

⁵ *Cemex Construction Materials Pacific, LLC.*, 372 NLRB No. 130 (2023)



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election process” and are subject to “abuses” and “misrepresentations.” The Board has also made it more difficult for workers to work independently⁶ and issued a new standard that forces employers to tolerate racist, sexist, and other discriminatory language and behavior in the workplace.⁷ This policy change is in direct conflict with federal antidiscrimination laws and basic common sense and exposes workers to hostile and unsafe work environments.

Many courts have questioned the legitimacy of the NLRB’s interpretations of the Act under McFerran’s leadership. The U.S. Court of Appeals for the D.C. Circuit said the Board “ground its decisions in a skewed or ‘clipped view’ of the record” in *Absolute Healthcare v. NLRB*,⁸ while its *Tesla*⁹ decision “rest[ed] on erroneous legal foundations.” The 5th Circuit called the Board’s *Thryv, Inc.*¹⁰ decision “the epitome of arbitrary,” and the Board’s *Stern Produce*¹¹ decision was “nonsense” and “cannot be squared with any reasonable understanding” of the NLRA. The 8th Circuit said the Board relied on “unreasonable inferences” in *Strategic Technology Institute*,¹² and the 11th Circuit said the Board “did not engage in reasoned decisionmaking” in its *UPS* decision.¹³ The U.S. District Court for the Eastern District of Texas invalidated¹⁴ the Board’s joint employer rulemaking,¹⁵ saying the rule was “arbitrary and capricious” and “contrary to law.” The Board originally appealed this decision but later abandoned its defense of the rule, recognizing its efforts would be futile. These condemnations from the judicial branch are severe and should give pause to the Senate on this controversial nominee.

Congress itself has rejected the McFerran Board’s actions. In April, Congress passed – on a bipartisan basis – a Congressional Review Act challenge to the Board’s joint employer rulemaking,¹⁶ attempting to nullify the rule in its entirety and prohibit the NLRB from issuing a substantially similar rule in the future. Moreover, Congress found it necessary to conduct significant oversight over the McFerran Board. In June and December 2023, the House Subcommittee on Health, Education, Labor, and Pensions held two hearings to criticize the Board’s actions.¹⁷ Moreover, numerous letters have been sent to the NLRB by the House and

⁶ *Atlanta Opera*, 372 NLRB No. 95 (2023)

⁷ *Lion Elastomers LLC*, 369 NLRB No. 88 (2020)

⁸ *Absolute Healthcare v. NLRB*, 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. NLRB* (5th Cir., May 24, 2024)

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

¹² *Strategic Technology Institute, Inc. v. NLRB*, 87 F.4th 900, 907 (8th Cir., Dec. 6, 2023)

¹³ *United Parcel Service, Inc. v. National Labor Relations Board*, 2024 WL 4003051 (11th Cir., Aug. 30, 2024)

¹⁴ *Chamber of Commerce v NLRB* (U.S. District Court for the Eastern District of Texas), March 8, 2024, decision available at <https://www.uschamber.com/cases/labor-and-employment/chamber-of-commerce-v-nlr>.

¹⁵ NLRB, “Standard for Determining Joint Employer Status” (RIN 3142-AA21), October 27, 2023, available at <https://www.federalregister.gov/documents/2023/10/27/2023-23573/standard-for-determining-joint-employer-status>.

¹⁶ H.J.Res. 98, available at <https://www.congress.gov/bill/118th-congress/house-joint-resolution/98>.

¹⁷ U.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,” Dec. 13, 2023.



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Senate labor committees questioning the agency on its expansive policies and allegations of wrongdoing by the OIG.¹⁸

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.”¹⁹ The subsequent report provided more detail on the Board’s errors and its response to the Inspector General’s findings.²⁰ Unfortunately, the Board’s response to these findings was to claim it is not bound by its own procedures,²¹ 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 report proved their actions were not biased and did not impact the outcome of any elections even though the OIG specifically noted in its report, “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.”

Despite McFerran’s alarming track record running the NLRB, Senator Sanders chose to push her nomination through without a confirmation hearing. His colleagues on the Committee were not provided an opportunity to question McFerran on her tenure or the allegations made about the Board’s mismanagement and malfeasance under her watch. McFerran should have been required to answer questions about her record or at least required to outline her plans to fix the mistakes the Board has made over the last three and a half years. Senator Sanders’ decision not to hold a confirmation hearing breaks with long-standing precedent. Every NLRB Chair since 2011 has been subject to a hearing before assuming the role, including the renomination of President Obama’s nominee, Mark Pearce, in 2013.

¹⁸ Letter from bicameral members of Congress to Chair McFerran on potential conflicts of interest of NLRB members, October 13, 2021, available at https://edworkforce.house.gov/uploadedfiles/nlr_recusal_letter_final_10.13.21.pdf; Letter from Reps. Foxx and Allen to Chair McFerran regarding Board’s overreliance on mail ballot elections, October 20, 2022, available at https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjkgogovr/EMPLOYMENT_NLRB_ELECTIONS_letter.pdf; Letter from Sen. Cassidy to Chair McFerran regarding political bias at the NLRB, July 15, 2023, available at https://www.help.senate.gov/imo/media/doc/2024-07-15_letter_from_bc_to_nlr_chair_mcferran_re_election_integritypdf.pdf; Letter from Senator Cassidy to Chair McFerran and General Counsel Abruzzo regarding misconduct and lack of neutrality in litigation against prominent employers, March 7, 2023, available at https://www.help.senate.gov/imo/media/doc/nlr_weaponization_letter.pdf.

¹⁹ NLRB OIG, “Report of Investigation – OIG-I-569,” July 8, 2023, available at https://edworkforce.house.gov/uploadedfiles/corrected_oig.pdf.

²⁰ NLRB OIG, “Mail Ballot Elections,” June 6, 2024, available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-151/mail-balot-elections-oig-amr-101-24-03.pdf>.

²¹ *Id.*, “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.”



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McFerran's nomination is being rushed through the confirmation process by the Biden administration and Senator Sanders for a simple reason. If confirmed, McFerran would lock in Democratic control of the NLRB for over a year and a half into President Trump's second term in office. Her confirmation would block the Trump administration from putting their own preferred candidates onto the Board and give the Biden administration control of the NLRB's agenda well beyond President Biden's time in office. This inappropriate power grab from an outgoing president should not be permitted.

For these numerous and very concerning reasons, CDW and the undersigned organizations urge the Senate to reject Lauren McFerran's nomination to the NLRB.

Sincerely,

Coalition for a Democratic Workplace
Air Conditioning Contractors of America
American Hotel and Lodging Association
American Pipeline Contractors Association
American Trucking Associations
APCA - American Pipeline Contractors Association
Argentum
Arkansas State Chamber of Commerce
Asian American Hotel Owners Association
Associated Builders and Contractors
Association of Bi-State Motor Carriers
Center for Individual Freedom
Center for the Defense of Free Enterprise
Competitive Enterprise Institute
Construction Industry Round Table
Foodservice Equipment Distributors Association
Global Cold Chain Alliance
Heating, Air-conditioning, & Refrigeration Distributors International
Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
Independent Bakers Association
Independent Electrical Contractors
Independent Lubricant Manufacturers Association
Independent Women's Forum
Institute for the American Worker
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association (IWLA)
Iowa Association of Business and Industry
Job Creators Network



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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
PCCA - Power & Communication Contractors Association
Power & Communication Contractors Association
Small Business & Entrepreneurship Council
TechNet
Technology & Manufacturing Association
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
World Millwork Alliance