The Honorable Bernie Sanders
Chair
U.S. Senate Committee on Health, Education, Labor & Pensions
Washington, D.C. 20510

The Honorable Bob Good
Chair
House Subcommittee on Health, Employment, Labor, and Pensions
Washington, DC 20510

The Honorable Bill Cassidy
Ranking Member
U.S. Senate Committee on Health, Education, Labor & Pensions
Washington, DC 20510

The Honorable Mark DeSaulnier
Ranking Member
House Subcommittee on Health, Employment, Labor, and Pensions
Washington, DC 20510

Dear Chairs Sanders and Good, Ranking Members Cassidy and DeSaulnier, and members of the U.S. Senate Committee on Health, Education, Labor & Pensions ("HELP") and House Subcommittee on HELP:

The Coalition for a Democratic Workplace ("CDW") and the undersigned organizations are very concerned by the recent re-nomination of Lauren McFerran to the National Labor Relations Board ("NLRB" or "Board") due to her tenure on the Board, which has been riddled with radical and expansive interpretations of the National Labor Relations Act ("NLRA"), as well as the ill-natured timing of the nomination. By nominating McFerran now, six months before the expiration of her term, President Biden is attempting to hijack the NLRB and solidify Democrat control of the Board well into the next administration, regardless of who wins the 2024 presidential election.[1] Additionally, during her tenure as Chair of the Board, McFerran has supported decisions that defy precedents set by the Board and federal courts in favor of partisan policy changes at the expense of worker and employer rights. Based on the concerns detailed below, we urge the Senate HELP Committee to conduct a confirmation hearing on Lauren McFerran's nomination. Failing to do so would break with precedent where every NLRB Chair since 2011 has been subject to a hearing before assuming the role, including the renomination of Chair Mark Pearce in 2013. We thank the House Subcommittee for holding the June 12 hearing to examine the NLRB under McFerran's poor leadership, which will demonstrate the policy and management failures at the Board.

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.

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[1] Iafolla, Robert. "Biden's NLRB Picks Set Up Clash Over Agency Future If Trump Wins." *Bloomberg*, May 24, 2024, available at https://news.bloomberglaw.com/daily-labor-report/bidens-nlrb-picks-set-up-clash-over-agency-future-if-trump-wins.

President Biden has nominated McFerran six months before the end of her current term (December 2024) in an effort to keep the Board under Democratic control until August 27, 2026, at least a year and a half into the next administration. By making this premature nomination, the president hopes to secure Senate confirmation prior to potentially becoming a lame-duck president and avoid pushing Senators to support the nomination during a lame-duck session. In short, a McFerran confirmation would deny a potential Trump administration the opportunity to appoint his own nominees and set the policy agenda for the NLRB.

McFerran's tenure on the Board has been riddled with mismanagement of the agency and radical and expansive interpretations of the NLRA. Further, her policy choices have been repeatedly rejected by Congress and struck down by federal courts. Some of the more egregious examples are explained below.

In October 2023, the McFerran Board issued a new joint employer standard, which dramatically expanded the definition of a "joint employer" under the NLRA. Under the broader definition, the NLRB would find a business a joint employer of another company's workers if they have just indirect or reserved control over the workers' terms and conditions of employment. The new standard ropes in essentially every contractual relationship between businesses, decimates the franchise model, and destroys small businesses. That is why a federal court nullified the rule in March 2024, saying the rule "would treat virtually every entity that contracts for labor as a joint employer because virtually every contract for third-party labor has terms that impact, at least indirectly… essential terms and conditions of employment." Congress also passed on a bipartisan basis a Congressional Review Act challenge to nullify the rule.[2] Despite opposition from Congress and the courts, McFerran has deemed it appropriate to appeal the district court's decision to the U.S. Court of Appeals for the 5th Circuit. The decision to appeal flies directly in the face of Congress. At the very least, McFerran should be required to answer in a hearing why she deems the appeal warranted despite the bipartisan rejection of the rule by Congress and the courts.

In May 2023, the NLRB under McFerran's leadership issued a decision in the case *Lion Elastomers v. NLRB*, which altered the standard for determining when an employer may discipline or fire a worker for inappropriate and offensive misconduct in the workplace while engaging in activity protected by the NLRA. The decision sets a dangerous precedent for allowing racist, sexist, and bigoted language and conduct in the workplace. The repercussions of this decision are already being felt. In 2022, in a case against Amazon, the Board ordered the company to rehire a male worker and cofounder[3] of the Amazon Labor Union, Gerald Bryson, who was fired for shouting sexually charged and offensive insults at a female coworker through a bullhorn while protesting outside the Amazon facility. Bryson called the female worker a "gutter bitch," "ignorant and stupid," "crack-head ass," "crack ho," and "queen of the slums" and accused her of being "high" and on "fentanyl." The abuse was captured on video and posted on social media. Despite the obvious vulgarity of the language, a Board administrative law judge found that based on *Lion Elastomers*, Bryson's behavior constituted protected speech under the NLRA.[4] This new standard will make it much more difficult for employers to maintain a workplace free from profanity, discrimination, and other abusive behavior.

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[2] President Biden, unfortunately, vetoed the legislation.

[3] Bryson refers to himself as a cofounder of the Amazon Labor Union (ALU) in his Twitter biography available here https://x.com/brysonbrice?lang=en

[4] The *Bryson* case has been appealed to the U.S. Court of Appeals for the 2nd Circuit.

Further, the decision creates tension between the NLRA and federal antidiscrimination laws, which require employers to ensure safe, hostility-free workplaces. Employers are now in the impossible position of being required to tolerate abusive, discriminatory misconduct under the NLRA while prohibiting such misconduct under federal antidiscrimination laws.

In a similar vein, the Board issued its decision in *Home Depot* that forces employers to permit political activity in the workplace to the potential detriment of the professionalism and safety of the workplace. In the case the Board expanded what constitutes protected political activity under the NLRA. As CDW explained in its amicus brief in the case currently before the U.S. Court of Appeals for the 8th Circuit, the Board is now granting employees a federal right to use their workplace as a political soapbox, regardless of how controversial the issue or their stance may be.

In August 2023, the McFerran Board issued another problematic decision in a case called *Cemex*, in which the Board is attempting to eliminate secret ballots in union representation elections. The decision effectively makes "card check" the default process for determining whether workers want union representation in the workplace. Under card check workers sign authorization cards to indicate their support for union representation with no guarantee of privacy. Card check is notoriously flawed, exposing workers to harassment, intimidation, and coercion. The superiority of secret ballot elections and inherent flaws of card check have been acknowledged by the Supreme Court, the NLRB itself, and Congress. In *Gissel*, the Supreme Court stated that card check is "admittedly inferior to the election process" and subject to "abuses" and "misrepresentations," and in *Linden Lumber*, the Court acknowledged that employers "concededly may have valid objections to recognizing a union on that basis." Moreover, federal legislative attempts to pass card check requirements, including the Employee Free Choice Act of 2009 and 2016, have repeatedly failed.[5] Despite the widespread understanding that secret ballot elections are the gold standard for determining union representation, McFerran and the NLRB under her tenure continue to force decisions that undermine the use of secret ballots and deny employees their right to a private vote in fair union representation elections. CDW filed an amicus brief before the U.S. Court of Appeals for the 9th Circuit challenging the legality of the Board's *Cemex* decision.

Again, we thank the House Subcommittee for holding such an important hearing and urge the Senate HELP Committee to question McFerran in a formal hearing about her policy decisions and the Board's actions. The Senate HELP Committee should at the very least hold the Biden administration accountable for attempting to control the NLRB well into a potentially new administration. If no hearing is held, the Committee should reject her nomination outright based on her poor record, which puts the safety and rights of workers and employers at risk.

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[5] The failed EFCA would have required the NLRB to develop guidelines and procedures for card check.