COALITION FOR A
DEMOCRATIC WORKPLACE

February 27, 2023

Senator Bernie Sanders
Chair
Senate HELP Committee

Senator Bill Cassidy
Ranking Member
U.S. Senate HELP Committee

Representative Virginia Foxx
Chair
House Education and the Workforce Committee

Representative Bobby Scott
Ranking Member
U.S. House Education and the Workforce Committee

Dear Chairs Sanders and Foxx, Ranking Members Cassidy and Scott, and members of the U.S. Senate Health, Education, Labor, and Pensions Committee and the U.S. House Education and the Workforce Committee:

The Coalition for a Democratic Workplace's ("CDW") members look forward to working with you in the 118th Congress. 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 focused on legislative and regulatory changes that impact national labor policy. While members of Congress and the public at large hold a wide range of views on the proper direction of U.S. labor policy, CDW members have grown increasingly concerned that the National Labor Relations Board ("NLRB" or "Board") and its General Counsel, Jennifer Abruzzo, are promoting changes that are contrary to the bedrock principles of our democracy, like free speech, open debate, the right to cast a vote privately, and the promise of a workplace free from harassment.

These efforts are particularly troubling given the public's limited right to provide input on or legally challenge changes to labor policy made by the Board.[1] The Board makes policy through rules subject to the Administrative Procedure Act ("APA") or through adjudication of individual cases. When the NLRB issues a rule, the public has an opportunity to comment on the proposed changes through the APA's notice and comment procedures and may challenge those rules in federal district court. When the Board makes policy changes through adjudication, however, the Board does not always seek or even allow public input through amicus briefs,[2] and the public has

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[1] The NLRB is a quasi-judicial agency that enforces the National Labor Relations Act ("NLRA"). The NLRA is the federal law that establishes a protected right for employees in the private sector to collectively bargain and otherwise engage in concerted activities or refrain from doing so. The Board makes policy through rules subject to the Administrative Procedure Act or through adjudication of individual cases. Parties with disputes file charges with the Board's presidentially appointed and Senate confirmed General Counsel, who acts as a prosecutor and has the discretion to bring or not bring a case before the Board's system of administrative law judges ("ALJ"), who implement policy set by the Board. ALJ decisions may be appealed by parties to the five-member, presidentially appointed and Senate confirmed Board.

[2] While the Board has a tradition of requesting public input in cases that involve "reconsideration of an important Board policy," it has recently not only failed to seek input but denied amicus requests in cases where the General

no mechanism for challenging these policy changes.[3] This limit on input and legal challenges is particularly troubling when the Board attempts to limit or chill fundamental rights, such as secret ballot elections, free speech, or the right to protect workers from harassment in the workplace.

With respect to free speech, the General Counsel has argued in two cases pending before the Board, *Cemex Construction Materials Pacific, LLC*[4] and *Starbucks Corporation*[5], for changes that would greatly limit employers' ability to speak with employees on "company time" about issues involving union representation or the specific union seeking to represent the employees.[6] The General Counsel also sent a memorandum to NLRB field offices[7] arguing employers do not have the right to hold mandatory meetings to discuss representation issues with workers. Additionally, within the last year she has issued complaints alleging statements by company heads expressing lawful views or opinions constitute unfair labor practices. The General Counsel's position is contrary to the NLRA, which protects employer speech rights, and the First Amendment, which guarantees freedom of speech for all Americans, regardless of whether or not they happen to be business owners or leaders. The Supreme Court noted that the NLRA "implements the First Amendment" and described the NLRA as "favoring uninhibited robust, and wide-open debate in labor disputes."[8] This sentiment is captured in the 1959 statement by then-Senator John F. Kennedy, who said, when working on the Labor Management Reporting and Disclosure Act, it is essential to have representation election campaigns "in which *both parties* can present their viewpoints."[9] As one corporate leader recently noted in an interview, employees have the right to petition for union representation, "but, we as a company, have a right also to say we have a different vision that is better, more dynamic, and we have a history to prove it."[10] The efforts by the General Counsel to silence debate is contrary to the principles of democracy, which support an informed electorate, and free speech, both of which are captured in the NLRA and the Constitution.

The NLRB General Counsel also advocated in her briefs in *Cemex* and *Starbucks* that the Board should replace secret ballots in most union representation elections with card check – a method by

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Counsel has requested the Board make substantial changes to national labor policy. *See Cemex* case docket, available at https://www.nlrb.gov/case/28-CA-230115.

[3] While parties to a case may appeal a Board decision setting policy to a U.S. Court of Appeals, the public may not do so. Thus, if the parties do not appeal the case, the Board policy could go unchallenged for some time. As a result, in most cases, the public must operate under the threat of prosecution under the Board policy set through caselaw without a mechanism for challenging such policy. This is particularly concerning where the Board policy is aimed at chilling First Amendment rights, denying the right to private ballots, or interfering with an employers' right to combat unlawful or otherwise abusive harassment in the workplace.

[4] The case docket is available at https://www.nlrb.gov/case/28-CA-230115.

[5] The case docker is available at https://www.nlrb.gov/case/14-CA-290968.

[6] In both cases CDW has asked the Board to seek public input. The Board refused CDW's request in *Cemex,* and our request in *Starbucks* is still pending. The briefs are available for download at https://myprivateballot.com/wp-content/uploads/2022/05/CDW_Motion-for-Amici-Invitation-in-Cemex-.pdf and https://myprivateballot.com/wp-content/uploads/2023/02/Motion-and-Amicus-Brief_Starbucks_Feb-2023.pdf.

[7] Memo available for download at https://apps.nlrb.gov/link/document.aspx/09031d458372316b.

[8] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (citation omitted).

[9] 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 (statement of Sen. Kennedy) (emphasis added).

[10] Wiener-Bronner, Danielle, *Starbucks CEO says things have gone sour for young people*, CNN, February 22, 2023, available at https://www.cnn.com/2023/02/21/business/howard-schultz-unions.

which employees cast their vote for or against a union by signing authorization cards in front of union organizers or coworkers. The General Counsel's position relies on an NLRB case from the 1940s called *Joy Silk*, which has since been overturned and abandoned by the Board. General Counsel Abruzzo's argument is contrary to two Supreme Court cases – *Gissel Packing*[11] and *Linden Lumber*[12] – where the Court rejected the theory she has put forward. Additionally, the Supreme Court and numerous courts of appeals have consistently held that authorization cards are "admittedly inferior" to elections and are subject to "abuses" and "misrepresentations," and employers "concededly may have valid objections to recognizing a union on that basis."[13]

The Board itself is also attacking private ballots. The NLRB recently proposed a rule to limit employees' right to petition the agency for a secret ballot election when a union claims majority support via card check.[14] Current law allows employees 45 days to petition the Board for a secret ballot election following an employer announcement that it has voluntarily recognized a union based on signed authorization cards. Without this short 45-day window, employees would not have the opportunity to access the Board's election process (and thereby secret ballots) for as long as *four years.*[15] The Board fails to provide any rationale for this new rule, which strips employees of the fundamental right to vote privately.

Additionally, current NLRB Chair Lauren McFerran is advocating for the adoption of electronic voting in union representation elections, which is, in essence, card check by another name. Electronic voting provides no NLRB supervision of the voting process, which will needlessly expose workers to intimidation, harassment, and coercion as they vote, jeopardizing the integrity of union representation elections. Please see our 2022 report outlining the various failed and costly attempts by governments and government agencies to implement electronic voting and the dangerous potential consequences of implementing electronic voting in union representation elections.[16]

Lastly, we draw your attention to what Judge Patricia Millet, an Obama-appointee who sits on the U.S. Court of Appeals for the D.C. Circuit, has described as the Board's "too-often cavalier and enabling approach... toward the sexually and racially demeaning misconduct of some employees" during labor disputes in her 2016 concurring opinion in *Consolidated Communications v NLRB*.[17]

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[11] *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969).
[12] *Linden Lumber v. NLRB*, 419 U.S. 301 (1974).
[13] *Gissel*, 395 U.S. at 603-604; *Linden Lumber*, 419 U.S. at 306.
[14] Information on proposed rule available at https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-fair-choice-and-employee.
[15] See CDW's comments a full discussion of the proposed rule, available at https://myprivateballot.com/wp-content/uploads/2023/02/CDW-Comments-re-Proposed-Fair-Choice-Employee-Voice-NPRM.pdf.
[16] Report available at http://myprivateballot.com/wp-content/uploads/2022/07/Online-Voting-in-Union-RepresentationElections_Latest-Attempt-to-Eliminate-Secret-Ballots_July-2022.pdf.
[17] *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016), available at https://www.cadc.uscourts.gov/internet/opinions.nsf/D5F4F5FEE8FFE9098525802D004D14AC/$file/14-1135-1635356.pdf.

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Judge Millet noted the Board's decisions "have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace."

Unfortunately, the General Counsel has ignored Judge Millet's warning. She brought suit in court to force Amazon to reinstate a male worker who was fired for shouting defamatory and sexually charged obscenities at a female coworker over a bullhorn at the company's Staten Island facility where the two individuals worked. Video evidence proves the individual called the female coworker 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" – all because she disagreed with him about their working conditions.[18] This video was live-streamed and posted on social media, further disseminating the harassment and abuse. CDW submitted a letter[19] to the Senate HELP Committee on this case a year ago. Such clearly inappropriate language and conduct should not and cannot be tolerated in any workplace. Allowing it creates unsafe and hostile workplaces, which is specifically prohibited by federal antidiscrimination laws. Yet, just last week the General Counsel has taken what the union has called a "historic" and "incredibly rare" procedural step to defend a worker that "was terminated for slapping and directing a derogatory comment at a female manager."[20] Abruzzo's continued defense of those who harass and physically assault others in the workplace forces employers to choose to comply with either federal labor law or federal antidiscrimination law.

Again, while members of Congress and the public at large hold a wide range of views on the proper direction of U.S. labor policy, the General Counsel and Board's actions put ends over means and, in doing so, attack principles we all should support, such as free speech, open debate, the right to cast a vote privately, and the right of employees to work in a workplace free of harassment. We look forward to working with the committees on these critical issues and ensure appropriate oversight is conducted over the Board and General Counsel moving forward.

Sincerely,

Kristen Swearingen
Chair
Coalition for a Democratic Workplace

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[18] Video available at https://www.youtube.com/watch?v=8wAgw0KEZjI.
[19] Letter available at https://myprivateballot.com/wp-content/uploads/2022/05/Letter_EEOC-Nom-Hearing_May-2022.pdf.
[20] Mach, Jessica, *NLRB Appeals Office Oks Labor Complaint Against Amazon,* Law360, February 21, 2023 available at https://www.law360.com/employment-authority/articles/1578528/nlrb-appeals-office-oks-labor-complaint-against-amazon.