COALITION FOR A
DEMOCRATIC WORKPLACE

July 11, 2023

Honorable Bernie Sanders
Chair
Senate HELP Committee
428 Senate Dirksen Office Building
Washington, D.C., 20510

Dear Chairman Sanders:

The Coalition for a Democratic Workplace ("CDW") and the 12 undersigned organizations write to urge you to delay the Senate Health, Education, Labor, and Pensions ("HELP") Committee vote scheduled for July 12 on the nomination of Gwynn Wilcox to serve another term on the National Labor Relations Board ("NLRB" or "Board"). Prior to any vote on her nomination, the Committee should carefully review Wilcox's record as she has supported policy changes during her tenure as a Board member that ignored decisions by the U.S. Court of Appeals for the D.C. Circuit on independent contractor status and the extent to which the Board will protect sexually and racially charged language by employees during organizing. In addition, Wilcox has participated in decisions that overturned long-standing NLRB precedent in favor of partisan policy changes and did so without requesting input from the public, violating NLRB norms. The Committee should question Wilcox about these decisions before voting on her nomination. We also urge the Committee to delay the vote on her nomination until President Biden names a Republican nominee to fill the seat vacated by Republican John Ring in December of 2022.

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.

On June 13, 2023, Wilcox joined the Board majority decision in *The Atlanta Opera*,[1] which reinstates the Obama-era *FedEx Home Delivery*[2] independent contractor standard, despite the D.C. Circuit's rebuke of that decision. The D.C. Circuit said the Board overstepped its authority by creating a standard that did not align with the common law, as required by the National Labor Relations Act ("NLRA"). The Board in *The Atlanta Opera* completely ignored the D.C. Circuit's ruling and has opened itself up to judicial reproach and legal challenges.

On May 1, 2023, Wilcox also joined the Board majority decision in *Lion Elastomers*,[3] which reversed the Board's 2020 decision in *General Motors*[4] and, in doing so, granted employees who

[1] *The Atlanta Opera*, 372 NLRB No. 95 (2023)
[2] *FedEx Home Delivery*, 361 NLRB No. 610 (2014)
[3] *Lion Elastomers*, 372 NLRB No. 83 (2023)
[4] *General Motors*, 369 NLRB No. 127 (2020)

are engaged in collective activity "some leeway" for using abusive, harassing, and racially and sexually charged language. The opinion Wilcox joined in *Lion Elastomers* conflicts with guidance the NLRB has received on this very issue from the U.S. Court of Appeals for the D.C. Circuit[5] and the Equal Employment Opportunity Commission.[6]

Wilcox has also joined in other efforts by the Board majority to pursue radical policies that infringe on workers and employers' rights and will have devastating consequences for the economy. These policy changes have raised serious concerns among the regulated community.[7] In September 2022, the NLRB issued a new notice of proposed rulemaking that dramatically expands the joint employer standard beyond anything we've seen previously. The rulemaking would make indirect or even unexercised, reserved control over workers' terms and conditions of employment sufficient to trigger joint employer status. This standard would put every contractual relationship across the economy in jeopardy, needlessly exposing employers to significant liability under the law when they do not have a meaningful role in setting workplace conditions. The standard would put at serious risk the franchise model that has been used by millions of entrepreneurs to achieve the American Dream of owning their own small business and being their own boss.

[5] In 2016, in a concurring opinion in *Consolidated Communications v NLRB*, 837 F.3d 1 (D.C. Cir. 2016), Judge Patricia Millet, an Obama-appointee who sits on the U.S. Court of Appeals for the D.C. Circuit, excoriated the Board for their "too-often cavalier and enabling approach... toward the sexually and racially demeaning misconduct of some employees during strikes." She explained:

> Those 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. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status...Conduct that is designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop...Such language and behavior have nothing to do with attempted persuasion about the striker's cause... Indeed, such behavior is flatly forbidden in every other corner of the workplace because it is dangerously wrong and breathes new life into economically suffocating and dehumanizing discrimination that we have labored for generations to eliminate. Brushing that same behavior off when it occurs during a strike simply legitimates the entirely illegitimate, and it signals that, when push comes to shove, discriminatory and degrading stereotypes can still be a legitimate weapon in economic disputes. *Id.* at 34.

[6] In 2019, in an amicus brief before the Board in *General Motors*, the Commission explained, "[E]mployers should be able to address and take corrective action vis-à-vis workers who use this kind of racist and sexist language while otherwise lawfully exercising their rights under the NLRA." The EEOC explained that, in denying employers this authority, employers would face liability under Title VII of the Civil Rights Act; "Under [Title VII's] negligence standard employers bear the obligation of preventing and correcting harassment in the workplace... if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability."

[7] Letter to Chairs and Ranking Members of House and Senate labor committees, February 27, 2023, available at https://myprivateballot.com/wp-content/uploads/2023/02/CDW_Letter_NLRB-Oversight_Feb-2023_FINAL.pdf.

Similarly, Wilcox joined in the Board majority's effort to limit workers' right to a secret ballot, despite the clear dangers of doing so.[8] The Board 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. 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. The Board did not provide any rationale for this new rule, which strips employees of the fundamental right to vote privately.

Additionally, during Wilcox's tenure, the Board has moved away from its historical precedent of obtaining public input prior to making significant changes to federal labor policy. Typically, the Board issues a request for amicus briefs in any case in which they are considering altering precedent or making policy that could have an outsized impact on the economy and regulated community. This Board, however, has chosen to make such changes without soliciting feedback and even ignored the stakeholder community's repeated requests that they accept amicus briefs in certain cases. CDW filed such a request with the Board in cases against Starbucks Corporation[9] and Armaz Products.[10] The Board has chosen not to accept our requests and, therefore, did not hear from the regulated community, even though the Board is considering abandoning significant, decades-long precedent in these cases. The Board also chose to issue a significant policy change in *McLaren Macomb*,[11] in which the Board claims that simply offering a severance agreement that contains confidentiality or nondisparagement provisions that the Board deems overly broad violates the NLRA. These provisions have long been upheld by the Board and federal courts, but nonetheless, the NLRB adopted this extreme change without hearing from the regulated community about its potential impact.

The HELP Committee should question Wilcox in a formal hearing about her policy decisions and the Board's actions. If no hearing is held, the Committee should reject her nomination outright unless and until a Republican nominee is named and attached to her nomination. The HELP Committee should take this opportunity to send a message to the Board that the agency cannot and should not proceed with its radical policies that infringe on the rights of the individuals the NLRA was designed to protect.

Sincerely,

Coalition for a Democratic Workplace

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[8] CDW White Paper, "How Neutrality and Card Check Agreements Hurt the American Worker," May 2023, available at https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf.
[9] CDW Motion for Leave to File Amici Curiae Brief before the NLRB, February 8, 2023, available at https://myprivateballot.com/wp-content/uploads/2023/02/Motion-and-Amicus-Brief_Starbucks_Feb-2023.pdf.
[10] CDW Amicus Brief before the NLRB, August 26, 2022, available at https://myprivateballot.com/wp-content/uploads/2022/08/Armaz_Amicus-brief_Aug-2022.pdf.
[11] *McLaren Macomb*, 372 NLRB No. 58 (2023)

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Associated Builders and Contractors
Center for the Defense of Free Enterprise
Franchise Business Services
Independent Electrical Contractors
International Franchise Association
International Warehouse Logistics Association
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Franchisee Association
National Lumber & Building Material Dealers Association
National Restaurant Association
National Retail Federation
Small Business & Entrepreneurship Council
Truck Renting and Leasing Association

cc: Ranking Member Cassidy