COALITION FOR A
DEMOCRATIC WORKPLACE

September 6, 2023

Dear Senator:

The Coalition for a Democratic Workplace ("CDW") urges you oppose the nomination of Gwynn Wilcox to serve another term on the National Labor Relations Board ("NLRB" or "Board"). During her tenure on the Board, Wilcox enacted policy changes that ignored decisions by the U.S. Supreme Court and the U.S. Court of Appeals for the D.C. Circuit and overturned longstanding NLRB precedent in an effort to placate unions without regard to the impact on employees, employers, or the economy. The policy changes include depriving workers of secret ballot elections when choosing whether or not to be represented by a union in favor of "card check," greatly limiting opportunities to work as independent contractors, and protecting employees who target coworkers or customers with sexually and racially charged language. Wilcox and her colleagues frequently made these changes without seeking any input from the public, violating NLRB norms and good government practices captured in the Administrative Procedure Act. Furthermore, if she's confirmed, the Board will immediately issue its new joint employer final rule that will threaten the franchise business model and put in jeopardy nearly every contractual relationship across the economy. The Senate should reject her renomination.

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 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

[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)

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 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, and they have done so without soliciting public input, moving away from its historical precedent. 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. These policy changes have raised serious concerns among the regulated community.[7]

On August 25, 2023, Wilcox joined the Board majority in its decision in *Cemex*,[8] imposing a new framework which greatly expands the Board's ability to force unions on employees without a secret ballot election, instead relying on controversial and notoriously flawed[9] card check where employees are forced to vote for or against the union in front of coworkers and union organizers by signing or not signing authorization cards. The Board's decision reverses a half-century of

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[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.

[8] *Cemex Construction Materials Pacific*, Cases 28–CA–230115, et al

[9] CDW White Paper, "How Neutrality and Card Check Agreements Harm 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.

NLRB precedent and is at odds with long-standing Supreme Court rulings. The Board made this major policy change without soliciting input from the public via comment or amicus briefs and rejected CDW's request[10] to allow for amicus briefs.

Similarly, Wilcox joined in the Board majority's effort to limit workers' right to a secret ballot. 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.

Other cases in which CDW filed motions with the Board to solicit amicus briefs include *Starbucks Corporation*[11] and *Armaz Products*.[12] The Board chose not to accept our requests and, therefore, has not heard 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*,[13] 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.

Finally, as soon Wilcox is confirmed, the NLRB will issue its final rule implementing a dramatically expanded joint employer standard. While specific details about the final rule are not yet available, we expect it will closely mimic the Board's notice of proposed rulemaking that expanded the standard beyond anything we've seen previously. The proposal made indirect or even unexercised, reserved control over workers' terms and conditions of employment sufficient to trigger joint employer status. If finalized, 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.

Due to this concerning tenure, the Senate should unequivocally reject her nomination.

Sincerely,

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[10] CDW Motion requesting the Board to Solicit Amicus Briefs (May 3, 2022), available at https://myprivateballot.com/wp-content/uploads/2022/05/CDW_Motion-for-Amici-Invitation-in-Cemex-.pdf.
[11] 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.
[12] 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.
[13] *McLaren Macomb*, 372 NLRB No. 58 (2023)

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