United States Senate
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
WASHINGTON, DC 20510–6300

June 30, 2024

**VIA ELECTRONIC TRANSMISSION**

The Honorable Lauren McFerran
Chair
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20003

Chair McFerran:

As Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, I write concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, and the significant changes that federal agencies will make to their rulemaking and other processes in its aftermath. For 40 years, Congress and federal courts have ceded their respective responsibilities to write and interpret statutes to federal agencies. Under the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts were required to give broad deference to agencies' interpretations of ambiguous provisions in statutes.[1] The Court has now overturned that deference, reinforcing that Congress and the courts are responsible for writing and interpreting the laws, respectively; not agencies.[2] The Court held that such deference defies the Administrative Procedure Act, and that agency interpretations are no longer entitled to deference.[3]

This decision is an opportunity for executive agencies to re-examine their role relative to Congress, and to return legislating to the people's elected representatives. For too long, *Chevron* deference has let agencies make broad decisions governing a diverse country of over 330 million people. Instead of engaging in the hard work of making tradeoffs and building coalitions needed to legislate, unelected agency bureaucrats exploit statutes to impose policy decisions that exceed their authority from Congress and exercise discretion far outside their core expertise and purpose.

Such unfettered agency power by the unelected is a perversion of the Constitution. *Loper Bright* makes clear that no agency is above the law or should be afforded special treatment when its authority is challenged. Moreover, the Court has separately confirmed that agencies need clear, specific statutory authorization from Congress to take action on issues of "vast 'economic and

[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).
[3] *Id.* at *3.

political significance.'"[4] Agencies cannot seize broad power based on authorities that Congress intended to be exercised narrowly—subtle, vague, or ambiguous statutory provisions provide no foundation for sweeping action.[5] Even then, Congress cannot delegate its Article I legislative powers to agencies.[6]

Congress is the most politically accountable branch in our government, and should be responsible for making the most important policy decisions that affect the American people. The Court also makes clear that Congress makes law, not agencies. When the Executive Branch does make law, such as promulgating new regulations, it does so to implement the laws Congress makes and only within the clearly established guardrails that Congress sets. In *Loper Bright*, the Court makes clear that the role of federal courts is to "independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[7]

Despite the Court's decision, given your agency's track record, I am concerned about whether and how the National Labor Relations Board (NLRB) will adapt to and faithfully implement both the letter and spirit of this decision. NLRB has created a regulatory environment that undermines the intent of the National Labor Relations Act (NLRA). Congress passed the NLRA "to encourage collective bargaining by protecting workers' full freedom of association."[8] The Taft-Hartley amendments also ensure that labor relations between unions and businesses remain balanced.[9] NLRB, however, has abused its rulemaking authority to disrupt this statutory mandate.

First, NLRB has implemented rules to tilt the scales of federal labor law towards big labor unions and against franchisors, contractors, and other entities that rely on contracted service. NLRB's 2023 joint employer rule creates this imbalance by increasing liability for contracting companies, even when that company does not exercise any operational control over the workers at issue.[10] Instead, the rule gives labor unions broad power to force entities with little, if any, control over employees' day-to-day working conditions to the bargaining table. It also hurts employees by removing incentives for franchisor companies to ensure that franchisees implement policies that benefit employees, such as standard health and safety rules.

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[4] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[5] *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
[6] *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 135 (2019) ("Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))).
[7] *Loper Bright*, 2024 WL 3208360 at *2.
[8] Rights We Protect, *The Law*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law (last visited June 18, 2024).
[9] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187.
[10] Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

Further, NLRB's rules have created an imbalance between unions and workers by denying workers' rights in a variety of ways, including by limiting their access to balanced information during a unionizing campaign and effectively stripping their ability to remove an ineffective union. NLRB's 2023 "ambush elections" rule significantly shortens the time in which workers are able to gather relevant information from both the union and their employer about the consequences of unionization—both positive and negative.[11] Then, to make matters worse, after limiting the information workers can receive before voting for a union, NLRB has proposed a new rule that would ensure that the workers are forever incapable of removing that union when the union proves too expensive or ineffective.[12] This politically-driven rulemaking is unacceptable, and NLRB's digressions from the NLRA require a significant course correction in light of the Supreme Court's decision in *Loper Bright*.

Moreover, NLRB's responses to congressional oversight have not been satisfactory in light of the revelations about NLRB's case adjudication, rulemaking, and internal mismanagement over the past three years. For example, I sent a letter to General Counsel Jennifer Abruzzo asking what actions she would take to ensure that all union elections are run fairly for all parties without any interference from politically driven employees.[13] Despite the serious concerns detailed and the specific questions asked, NLRB's paltry response provided little information about how it planned to correct the underlying problems and no reassurance that NLRB would correct the perception that it is little more than a political vessel for labor unions.[14]

Agency responses to congressional oversight are not optional. Constructive dialogue between Congress and Executive agencies is critical to both branches serving the American people and fulfilling their respective constitutional responsibilities. To facilitate this dialogue, agencies cannot simply shrug off oversight or side-step legitimate inquiries by providing only the information the agency wants to share. Congress is constitutionally mandated to perform oversight over federal agencies, and NLRB must change its perspective to be more accountable to Congress moving forward.

To understand how NLRB will abide by and implement the Court's new framework, I ask that you answer the following questions, on a question-by-question basis, **by July 19, 2024**:

1. How will NLRB change its current practices to enforce the laws as Congress writes them, and not to improperly legislate via agency action?

[11] Representation-Case Procedures, 88 Fed. Reg. 58076 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102).
[12] Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 87 Fed. Reg. 66890 (proposed Nov. 4, 2022) (to be codified at 29 C.F.R. pt. 103).
[13] Letter from Sen. Bill Cassidy, Ranking Member, S. Comm. on Health, Educ., Lab. & Pensions, to Jennifer Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd. (Jan. 8, 2024), https://www.help.senate.gov/final-nlrb-letter-to-abruzzo.
[14] Letter from Matt Hayward, Deputy Dir., Off. of Cong. & Pub. Affs., Nat'l Lab. Rels. Bd., to Sen. Bill Cassidy, Ranking Member, S. Comm. on Health, Educ. Lab. & Pensions (Jan. 22, 2024) (on file with Committee).

a. Will NLRB be conducting a systematic, action-by-action review of its ongoing activities to identify opportunities where NLRB needs to make changes to comply with or otherwise account for the decision?

b. Will NLRB pause or stop any existing rulemaking activities in light of the Court's decision? If so, what rule(s) is NLRB halting? If not, why does NLRB feel it is legally able to continue existing rulemakings without considering the impacts of the Court's decision?

2. How does NLRB plan to facilitate greater congressional involvement in policy issues under the agency's purview? Please be as specific as possible with respect to oversight responses, regular briefings, trainings and seminars, and other actions you plan to take.

3. Does NLRB plan to revisit its union election rules to ensure that all unit employees are able to obtain all relevant information related to the positive and/or negative consequences of joining a labor union?

    a. If so, in what ways does NLRB plan to address these concerns within its rule?

    b. If not, why does NLRB not believe it is necessary to revisit this rule?

4. Does NLRB plan to abandon its attempt to block workers from decertifying a union through rescission of the 2020 decertification rule in light of its contrast to the statutory language in the National Labor Relations Act? If not, why not?

5. What are your current policies about when your staff may or may not provide briefings to congressional staff? Where are such policies codified?

6. How do you plan to increase NLRB's responsiveness to oversight and technical assistance requests from Congress?

    a. For example, how do you plan to streamline NLRB's process for clearing technical assistance to reduce response times to congressional requests?

7. Moving forward, will you commit to providing a substantive response to congressional oversight requests within 30 days of receipt of the request? If not, why not?

Thank you for your prompt attention to this important matter.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions