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March 31, 2020

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

I write in reference to the National Labor Relations Board's (NLRB) announcement on March 19, 2020 that it has suspended "all representation elections, including mail ballot elections, [until at least April 3] effective immediately."¹ Given the uncertain timing and geographic spread of the coronavirus, this action postpones—potentially indefinitely—workers' right to choose their union.² This postponement includes elections the NLRB is well-equipped to conduct while coping with the COVID-19 pandemic, such as representation elections that were already scheduled in which the union, the employer, and the Regional Director planned to proceed with a mail ballot election

In addition, this blanket decision by the NLRB stripped Regional Directors of their discretion to direct that representation elections be conducted by mail ballot, which would allow scheduled elections to proceed as appropriate. Regional Directors are best equipped to decide, on a case by case basis, whether and how to proceed with a mail ballot election. Instead, the NLRB's announcement denies Regional Directors any discretion and sidelines their expertise.

The COVID-19 pandemic has imposed an extraordinary strain on labor relations. Employers around the country are making important decisions regarding terms and conditions of

¹ Office of Public Affairs, "National Labor Relations Board Suspends Representation Elections Through April 3, 2020" (Mar. 19, 2020), <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>.

² The NLRB's announcement stated that it "will continue to monitor this evolving situation and determine whether additional extension of this suspension may be neces

employment, such as safety standards and access to paid leave, and employees are petitioning for union representation in order to collectively bargain over these issues. During this time of crisis, the NLRB serves a critical role in protecting workers' right to collectively bargain with their employers. This right is especially important for workers who are designated as essential and therefore required to continue working during the outbreak. By forfeiting its duty to safely conduct representation elections, the NLRB has undermined its statutory purpose of "protecting the exercise by workers of full freedom of association, self-organization, and the designation of representatives of their own choosing."³

The NLRB's suspension is especially damaging when coupled with its decision in *Johnson Controls, Inc.*⁴ This decision held that an employer can announce that it will unilaterally withdraw recognition of a union at the expiration of a collective bargaining agreement, and may withdraw recognition unless the union is recertified in a new representation election. Because the NLRB's suspension delays those elections beyond the agreements' expiration dates, it extinguishes workers' right to union representation even when the union has proof that it has majority support at the date of expiration, and deprives employees of the "fullest freedom in exercising the rights guaranteed by" the National Labor Relations Act (NLRA).⁵ The NLRB must issue an emergency order delaying the implementation of *Johnson Controls* and recertifying any unions that employers have withdrawn recognition from as a result of the suspension.

Moreover, I am concerned that this decision originated with a March 16, 2020 directive from the Division of Operations-Management, which is under the Office of the General Counsel and not the Board itself. Such an action is contrary to Section 3 of the NLRA and the NLRB's own Rules and Regulations, which provide Regional Directors with discretion over the conduct of elections unless directed otherwise by the Board.⁶ This raises serious questions as to whether the General Counsel usurped the Board's authority, and whether the Board simply acquiesced to the General Counsel's conduct when the Board issued its announcement.

I therefore urge you to permit the Regional Directors to direct elections to take place as soon as practicable if, in their discretion, the elections can safely be done, especially when considering the possibility of mail ballots. Regional Directors are best equipped to determine whether mail ballot elections are still appropriate and administratively feasible in the current agency-wide telework arrangement and limited staff presence. Because the NLRB's suspension is particularly harmful to workers' rights under the NLRA, I also request the NLRB produce the following:

1. A list, by name and case number, of all representation elections that any Regional Director has postponed or plans to postpone pursuant to any directive, guidance, or instruction by the Board or the Office of the General Counsel, including any division under that office, which relates to the COVID 19 national emergency. Please include the

³ 29 U.S.C. §151.

⁴ 368 NLRB No. 20 (July 3, 2019).

⁵ 29 U.S.C. § 159(b).

⁶ *Id.* § 153 (governing the delegation of powers to Regional Directors); 29 C.F.R. § 102.69 (placing with Regional Directors the discretion to supervise elections "[u]nless otherwise directed by the Board").

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dates these elections were originally scheduled, and the notices issued to the parties postponing the representation elections

2. A written description of the Board's actions between when it learned of the General Counsel's directive and when it released its press release on March 19, 2020. Please include whether the Board voted before issuing the press release, and please produce any written order issued by the Board.

3. A written description of what actions the Board is taking to prevent the Office of the General Counsel from undermining its authority over matters governing representation elections in violation of the NLRA and of the NLRB's Rules and Regulations.

4. A written description of what actions the NLRB and the Regional Directors are taking to ensure that any postponed representation elections will be rescheduled as early as practicable.

5. A written description of what actions the NLRB is taking to assist Regional Directors in being able to safely continue to process representation election cases, including guidance on increasing use of mail ballots, and use of telecommunications technology to facilitate the observation of ballot counting.

6. A written description of whether the NLRB will halt the implementation of *Johnson Controls* for the duration of the national emergency, and what actions the NLRB will take to remedy employees in representation cases where the employer announced its intent to withdraw recognition of the union and the NLRB's suspension prevented a representation election from being held prior to the expiration of the collective bargaining agreement.

Please provide the requested information and documents as soon as possible, but no later than April 3, 2020. The NLRB can easily meet this deadline given the short timeframe in which it developed this suspension. If you have any questions, please contact Kyle deCant at Kyle.deCant@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk at Tylease.Fitzgerald@mail.house.gov. Thank you for your attention to this matter, and I look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Chairman