

Congress of the United States

Washington, D.C. 20515

November 22, 2021

Delivered via Email

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570-0001

Dear Chairman McFerran:

On October 13, 2021, we wrote to you expressing our concerns regarding the ability of National Labor Relations Board (NLRB) Members Gwynne Wilcox and David Prouty to take part ethically and impartially in certain NLRB decisions and rulemakings due to conflicts of interest.¹ Your November 5 response to our letter fails to provide sufficient explanation or documentation that the NLRB has performed the necessary due diligence to uphold important ethical obligations dictating whether Members Wilcox and Prouty should appropriately recuse themselves on NLRB activity regarding joint employment policy. Given your completely inadequate response to our concerns, we write seeking more information about your decision.

Members Wilcox and Prouty have conflicts of interest due to their previous roles advising individual chapters of the Service Employees International Union (SEIU), the former as a senior partner at Levy Ratner, and the latter as general counsel to SEIU Local 32BJ. These prior affiliations are especially relevant because of SEIU's lawsuit, filed on September 17, challenging the NLRB's February 2020 final rule. We remain concerned that Members Wilcox and Prouty are unable to be impartial in this matter.

Your November 5 response stated that "Members Wilcox and Prouty have carefully considered this issue, in accordance with the agency's internal ethics protocols, and have sought and received appropriate guidance from [the NLRB's] Designated Agency Ethics Official (DAEO)."² You further state, "In agreement with the DAEO's conclusions and recommendation, they have each determined that their participation in the Board's decision-making regarding this matter is appropriate." However, you have failed to provide any corresponding documentation or substantive details from the DAEO's report to support the NLRB's contention that, despite their

¹ Letter from Sen. Mike Braun et al. to Lauren McFerran, Chairman, NLRB (Oct. 13, 2021), https://republicans-edlabor.house.gov/uploadedfiles/nlr_recusal_letter_final_10.13.21.pdf.

² Letter from Lauren McFerran, Chairman, NLRB, to Sen. Mike Braun et al. (Nov. 5, 2021), <https://www.nlr.gov/sites/default/files/attachments/pages/node-166/mcferran-ltr-re-oversight-on-members-participation-in-seiu-lawsuit-final-for-nov-5-002.pdf>.

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previous advocacy for and relationship with the SEIU, Members Prouty and Wilcox can ethically participate in policy matters on which SEIU has directly lobbied or in litigation in which SEIU is a named party. In a press release celebrating Mr. Prouty's confirmation, SEIU Local 32BJ telegraphed its belief that Member Prouty would do their bidding, stating that "[a]s much as it saddens us that [Prouty] will no longer work with us day to day as 32BJ's General Counsel, we are excited to see how his righteous advocacy for workers will help build back up the NLRB as a robust defender of the rights of workers in our country."³

Given these close ties, the notion that Members Prouty and Wilcox can serve impartially on matters involving SEIU's joint employment lawsuit strains credulity. Therefore, in accordance with our oversight responsibilities, we seek more information regarding Member Wilcox and Prouty's exchanges with the DAEO regarding potential conflicts related to joint employment policy and their previous work with the SEIU. We request that you provide copies of all memoranda or other written material issued by the DAEO regarding the DAEO's conclusions and recommendation on this matter by December 7.

If you have any questions, please contact Joe Wheeler with the House Committee on Education and Labor at (202) 225-4527 or Matt Mimnaugh with the Senate Committee on Health, Education, Labor, and Pensions at Matt_Mimnaugh@help.senate.gov.

Sincerely,



Virginia Foxx
Ranking Member
House Committee on Education and Labor



Richard Burr
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions



Rick W. Allen
Subcommittee on Health, Employment,
Labor, and Pensions



Mike Braun
Subcommittee on Employment
and Workplace Safety

cc: The Honorable David P. Berry, Inspector General
National Labor Relations Board

Lori Ketchum, Associate General Counsel, Ethics Office
National Labor Relations Board

³ SEIU 32BJ Statement on Senate Confirmation of David Prouty to NLRB Board (July 29, 2021), <https://www.seiu32bj.org/press-release/senateconfirmation/>.