

Congress of the United States

Washington, D.C. 20515

December 17, 2021

Delivered via Email

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

Dear Chairman McFerran:

On October 13 and November 22, 2021, we wrote expressing our deep concern over Members Gwynne Wilcox's and David Prouty's participation in National Labor Relations Board (NLRB) matters concerning joint employer issues and the Service Employees International Union (SEIU).¹ These concerns stem from the previous employment of Members Wilcox and Prouty with the SEIU, which creates conflicts of interest for these new Board members on a number of issues that come before the NLRB—including, but not limited to, the SEIU's lawsuit challenging the NLRB's February 2020 final rule regarding joint employer status under the *National Labor Relations Act*. Unfortunately, your responses to our letters have not allayed our concerns.

In our October 13 letter, we requested that you secure in writing “the intent of both Member Prouty and Member Wilcox to recuse themselves from all Board activity regarding joint employment policy.”² In your November 5 response, you stated that “the NLRB's Designated Agency Ethics Official (DAEO) concluded that there are no ethics rules, regulations, or considerations that require Members Wilcox and Prouty to recuse themselves from Board consideration of the SEIU lawsuit.”³

On November 22, we wrote questioning your assertion on the DAEO's conclusion and requesting information regarding the exchanges of Members Wilcox and Prouty with the DAEO regarding potential conflicts related to joint employment policy and their previous work with the SEIU.⁴ In your December 7 response, you again declined to provide the materials we requested

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; Letter from Rep. Virginia Foxx et al. to Lauren McFerran, Chairman, NLRB (Nov. 22, 2021), https://republicans-edlabor.house.gov/uploadedfiles/11-22-2021_letter_to_chairman_mcferran.pdf.

² Letter from Sen. Mike Braun et al., *supra* note 1, at 5.

³ 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>.

⁴ Letter from Rep. Virginia Foxx et al., *supra* note 1, at 2

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stating that “the Board’s longstanding policy has been to keep internal deliberation and other pre-decisional materials related to ongoing litigation, such as the SEIU lawsuit, in the strictest of confidence.”⁵

However, your response said you might consider a request to provide access to information, but only tentatively and conditioned on the conclusion of the SEIU lawsuit through an *in camera* review.⁶ This nod toward some future accommodation is unsatisfactory as it allows Members Wilcox and Prouty to deliberate on joint employment policies through the conclusion of SEIU’s lawsuit. This is clearly a conflict of interest that will taint the proceedings. We therefore request you contact our staff immediately to arrange for an immediate *in camera* review of the documents we requested.

If you have any questions, please contact Joe Wheeler with the House Committee on Education and Labor at (202) 225-4527 and 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
Ranking Member
Subcommittee on Health, Employment,
Labor, and Pensions



Mike Braun
Ranking Member
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

⁵ Letter from Lauren McFerran, Chairman, NLRB, to Rep. Virginia Foxx et al. (Dec. 7, 2021).

⁶ *Id.* at 2.