

VIRGINIA FOXX, NC
Chairwoman

MAJORITY – (202) 225-4527



ROBERT C. "BOBBY" SCOTT, VA
Ranking Member

MINORITY – (202) 225-3725

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

January 12, 2023

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

Dear Chairman McFerran:

The Members of the 118th Congress were recently sworn in and, with this new Congress, we have new leadership in the House of Representatives. As the newly elected Chair of the Committee on Education and the Workforce, it is my responsibility to ensure accountability and transparency from federal agencies under the Committee's jurisdiction. With this letter, I am officially putting you on notice that your agency has an obligation to provide timely and complete responses to inquiries and requests made by the Committee.

During the first two years of the Biden administration, agencies have failed to comply fully with congressional oversight letters. I hope that this will end and we can expect robust responses from you in a timely manner to every letter sent from the Committee or its members. Enclosed are copies of letters Committee Republicans sent to which the National Labor Relations Board (NLRB) chose not to provide full responses:

1. Letters dated October 13, November 22, and December 17, 2021, and September 30, 2022, on the potential conflicts of interest of NLRB members related to certain Board decisions and rulemakings;
2. An October 27, 2021, letter on NLRB's failure to swear in properly Member David M. Prouty;
3. A June 15, 2022, letter requesting information about NLRB's implementation of Executive Order 14019, "Promoting Access to Voting"; and
4. An October 20, 2022, letter on NLRB's increased use of mail-ballot procedures.

The Committee expects NLRB to provide timely and complete responses to each letter enclosed. You are instructed to respond in writing by no later than January 27, 2023, with your plans for responding to each letter. Enclosed is a copy of the Committee's instructions to be followed for responses to oversight requests. NLRB is expected to comply with them as it responds to each of the letters cited in this letter and all others issued by the Committee during the 118th Congress.

The Honorable Lauren M. McFerran

January 12, 2023

Page 2

Failure to do so may result in the Committee taking more robust actions to ensure compliance with its oversight requests.

Sincerely,

A handwritten signature in blue ink that reads "Virginia Foxx". The signature is written in a cursive, flowing style.

Virginia Foxx
Chairwoman

Enclosures

Congress of the United States
Washington, DC 20510

October 13, 2021

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

Dear Chair McFerran:

We write to request your prompt action to resolve conflicts of interest at the National Labor Relations Board (the “Board”) regarding Member Gwynne Wilcox and Member David Prouty, and select issues they are likely to consider. As an independent federal agency, the Board is entrusted to impartially carry out provisions of the National Labor Relations Act (NLRA) of 1935 in a manner that safeguards the rights of both employers and employees. When Board members with conflicts of interest fail to recuse themselves from consideration of matters active before the Board, the American public’s trust in the Board’s impartiality is deeply eroded.

Our letter follows a recent lawsuit filed in the U.S. District Court for the District of Columbia. Specifically, on September 17, 2021, the Service Employees International Union (SEIU) filed a complaint¹ challenging a final rule which altered how “joint employer” status is defined under the NLRA (the “Final Rule”).² The Final Rule has significant consequences for both employers and employees throughout the nation.

SEIU takes aim at the Final Rule that was carefully considered by the Board and considered with robust public input. On September 13, 2018, the Board issued a Notice of Proposed Rulemaking (NPRM) concerning joint-employer status under the NLRA, which led to nearly 29,000 comments being filed.³ On February 26, 2020, the Final Rule was issued and subsequently; it became effective April 27, 2020.⁴ Following promulgation of the Final Rule,

¹ *Service Employees International Union v. National Labor Relations Board; Lauren McFerran, John Ring, Marvin Kaplan, Gwynne Wilcox, David Prouty*, Civil Action No. 21-2443; Case 1:21-cv-02443 (filed Sept. 17, 2021), https://fin.gfx.thomsonreuters.com/gfx/legal/docs/movankqjbpa/EMPLOYMENT_JOINTEMPLOYER_SEIU_complaint.pdf (hereinafter the “SEIU Litigation”).

² 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. Part 103 Subpart D).

³ Press Release, National Labor Relations Board, NLRB Issues Joint-Employer Final Rule (Feb. 25, 2020), <https://www.nlr.gov/news-outreach/news-story/nlr-is-sues-joint-employer-final-rule>.

⁴ Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. Part 103 Subpart D) <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-03373.pdf>.

many commenters asserted the rule provided clarity and predictability to the regulated community.⁵

Nearly 18 months after the Final Rule took effect, the SEIU filed a lawsuit to realign the law in favor of union interests. While litigation plays out in the judicial system, we are concerned that Members Wilcox and Prouty, both former employees of the SEIU, have significant conflicts of interest. As such, Members Wilcox and Prouty should not take part in activity before the Board concerning the joint employer rule, including the Final Rule.

As you know, Member Prouty was confirmed by the U.S. Senate on July 28, 2021, and sworn in on both August 28, 2021, and September 22, 2021.⁶ From April 2018 until his recent confirmation, Mr. Prouty served as the General Counsel of SEIU Local 32BJ, the largest labor union for property service workers in the country.⁷ Under Mr. Prouty's legal counsel, SEIU has attempted to utilize the powers of the federal government, including the NLRB, to attack companies to force unionization of workers and demand union dues. For example, Mr. Prouty was the individual who signed and filed Local 32BJ's comments in opposition to the Joint Employer Rule.⁸

The working relationship between Member Prouty and the SEIU is documented as positive in nature, and the closeness of the relationship is demonstrated in SEIU's support of Prouty during the Senate confirmation process. For example, upon his nomination by President Biden, SEIU 32BJ President Kyle Bragg stated:

We consider David Prouty's nomination to the National Labor Relations Board a home run for strengthening labor rights and worker-centered standards in our country, and restoring the NLRB's core function to protect the interests of workers. [sic] ...we're thrilled at the possibility that he'll put his ardent commitment to workers in the service of millions of families in our nation.⁹

Following Prouty's confirmation, the SEIU celebrated, stating:

Our union couldn't be prouder to see David Prouty confirmed to serve on the National Labor Relations Board, along with Gwynne Wilcox. As much as it

⁵ Allen Smith, *DOL Rescinds Prior Administration's Joint Employer Rule*, SHRM (July 29, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-rescinds-joint-employer-rule.aspx>.

⁶ Press Release, National Labor Relations Board, Statement on Administrative Error During Member Prouty's Swearing-in (Oct. 08, 2021), <https://www.nlr.gov/news-outreach/news-story/statement-on-administrative-error-during-member-proutys-swearing-in>.

⁷ *Id.*

⁸ Comments submitted by the Service Employees International Union Local 32BJ, in response to the Board's Notice of Proposed Rulemaking on the joint employer rule, signed by David Prouty, Jan. 28, 2019 (Exhibit on file with office and available upon request).

⁹ Press Release, Service Employee International Union, 32BJ Statement on David Prouty Nomination to the National Labor Relations Board (June 22, 2021), <https://www.seiu32bj.org/press-release/32bj-statement-on-david-prouty-nomination-to-national-labor-relations-board/>.

saddens us that he 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.¹⁰

Therefore, it is apparent that the SEIU counts on now-Member Prouty to be a continued ally in his new capacity as a Board member.

Moreover, while Member Prouty's ethics agreement requires him to recuse himself from cases involving his former employer, SEIU Local 32BJ, Mr. Prouty is closely connected to both the SEIU as a whole and also to lawyers trying its case challenging the Final Rule. This unquestionably raises concerns about Member Prouty's ability to be fair and impartial, necessitating further recusals. In the case recently filed by the SEIU, the union is represented by in-house counsel and lawyers from Bredhoff & Kaiser,¹¹ and a lead attorney in the case for the firm is Mr. Leon Dayan.¹²

Importantly, Member Prouty and Mr. Dayan are both active members of the Peggy Browning Fund, a "union activist organization funded solely with donations from organized labor."¹³ Member Prouty has served as an advisory board member¹⁴ and Mr. Dayan an active, prominent donor.¹⁵ Additionally, both participate regularly in annual panels and award receptions for the Fund.¹⁶ Member Prouty and Mr. Dayan are also prominent donors to another organization, the North Star Fund, a leftist organization.¹⁷

Similarly, Member Wilcox also has notable conflicts that warrant her recusal from matters involving the joint employer rule and the Final Rule. By way of background, Member Wilcox was confirmed by the U.S. Senate on July 28, 2021, and sworn in as a Board member on August 4, 2021.¹⁸ Prior to her confirmation, Member Wilcox served as associate general counsel

¹⁰ Press Release, Service Employee International Union, SEIU 32BJ Statement on Senate Confirmation of David Prouty to NLRB Board (July 29, 2021), <https://www.seiu32bj.org/press-release/senateconfirmation/>.

¹¹ Daniel Wiessner, *SEIU Mounts Challenge to NLRB's Trump-Era Joint Employer Rule*, Reuters (Sept. 17, 2021), <https://www.reuters.com/legal/transactional/seiu-mounts-challenge-nlrbs-trump-era-joint-employer-rule-2021-09-17/>.

¹² SEIU Litigation, *supra* note 1.

¹³ Bill McMorris, *NLRB Official Suspended for Pro-Union Conflict of Interest*, The Washington Free Beacon (Apr. 11, 2016), <https://freebeacon.com/issues/nlrbs-official-suspended-conflict-of-interest/>.

¹⁴ Peggy Browning Fund, Board of Directors, <https://www.peggybrowningfund.org/about-us/board-of-directors> (last visited Sept. 28, 2021).

¹⁵ Peggy Browning Fund, *2020 Friends of Peggy Browning Fund*, <https://www.peggybrowningfund.org/friends-of-pbf> (last visited Sept. 28, 2021).

¹⁶ For example, for the 2016 Peggy Brown Fund San Francisco Awards Reception, Mr. Dayan was a sponsor of the reception of the Peggy Brown Fund, for which Mr. Prouty was a member of the host committee planning the event, <https://www.peggybrowningfund.org/events/event/50/San-Francisco-Awards-Reception>. As another example, Mr. Dayan is a donor to the Peggy Browning Fund in 2020, the same timeframe during which Mr. Prouty served as an Advisory Board member, <https://www.peggybrowningfund.org/friends-of-pbf>.

¹⁷ NorthStar Fund, 2015 Annual Report, https://northstarfund.org/wp-content/uploads/2018/03/North_Star_Fund_2015_Annual_Report.pdf.

¹⁸ Press Release, National Labor Relations Board, The National Labor Relations Board Welcomes New Board Member Gwynne Wilcox (Aug. 4, 2021), <https://www.nlr.gov/news-outreach/news-story/the-national-labor->

of 1199SEIU United Healthcare Workers East and was a partner at union-side law firm Levy Ratner, P.C.¹⁹ Upon her confirmation, the SEIU publicly announced its excitement over her nomination. Specifically, the SEIU tweeted: “Congratulations to Gwynne Wilcox, on her new role on the National Labor Relations Board and as the first Black woman to serve on the Board. We’re excited to see you continue your career standing up for working people.”²⁰

At Levy Ratner, Ms. Wilcox was an attorney representing “Fight for \$15,” an activist group affiliated with SEIU, which undertook a years-long legal campaign to hold McDonalds jointly liable. Ms. Wilcox “represented the union-backed Fight for \$15 group that accused the fast-food giant of labor law violations in the biggest joint employer liability case in the agency’s history” and “has said the McDonald’s case was one of her proudest equal rights achievements.”²¹

As is the case with Mr. Prouty, Ms. Wilcox has interactions with a principal counsel at Bredhoff & Kaiser, Mr. Dayan, who is representing the interests of the SEIU in the case against the joint employer Final Rule.²² Ms. Wilcox and Mr. Dayan are both active supporters of the Peggy Browning Fund. Ms. Wilcox has served on the Board at a time when Mr. Dayan has actively participated in panels,²³ and they have served on the same host committee for the Peggy Browning Fund Reception.²⁴

The working relationships between Members Prouty and Wilcox and the SIEU, as well as the relationships between Member Prouty to counsel trying the case, is evident. The Office of Government Ethics (OGE) establishes the floor by which federal employees and officers must comply to avoid conflicts of interests. OGE guidance, enshrined in a memorandum issued in 1999 and reiterated in 2004,²⁵ makes clear that employees and officers are expected to avoid any official involvement in a covered matter, and OGE further advises ethics counselors:

For those of you who counsel employees who may not fully appreciate the meaning of the term ‘recuse,’ here is something you could share with them. An employee should refrain, abstain, refuse, relinquish, forbear, forgo, hold off, keep

[relations-board-welcomes-new-board-member-gwynne-wilcox#:~:text=Wilcox%20was%20nominated%20by%20President,will%20last%20until%20August%202023](#)

¹⁹ *Id.*

²⁰ SEIU (@SIEU), Twitter (July 28, 2021, 4:44PM), <https://twitter.com/SEIU/status/1420485350372233219?s=20>.

²¹ Robert Iafolla & Ian Kullgren *Bloomberg* (May 27, 2021, 4:22 PM), <https://news.bloomberglaw.com/daily-labor-report/ethics-questions-await-bidens-federal-labor-board-nominee>.

²² SEIU Litigation, *supra* note 1.

²³ Peggy Browning Fund Newsletter, Fall/Winter 2013 edition, <https://docplayer.net/196079704-This-summer-a-number-of-peggy.html> (last visited Sept. 28, 2021).

²⁴ Peggy Browning Fund, Regional Workshops – Upcoming Events, <https://www.peggybrowningfund.org/workshops/category/1> (last visited Sept. 28, 2021).

²⁵ Office of Government Ethics 99 X 8 Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements,

[https://www.oge.gov/Web/OGEnsf/0/52E2FAA1B3F454D2852585BA005BEDC0/\\$FILE/99x8.pdf](https://www.oge.gov/Web/OGEnsf/0/52E2FAA1B3F454D2852585BA005BEDC0/$FILE/99x8.pdf). See also, OFFICE OF GOVERNMENT ETHICS 04 x 5 Memorandum to Designated Agency Ethics Officials, General Counsels and Inspectors General dated June 1, 2004,

[https://www.oge.gov/web/OGEnsf/0/F8A7059769DBCC6F852585BA005BED3C/\\$FILE/04x5.pdf](https://www.oge.gov/web/OGEnsf/0/F8A7059769DBCC6F852585BA005BED3C/$FILE/04x5.pdf).

away, give up, decline, desist, discontinue, end, cancel, close, quit, terminate, stop, halt, cease, drop, stay away, shun, avoid participation in the matter before him or her. In other words, just don't do it.²⁶

OGE further states that,

[u]nder 5 C.F.R. § 2635.502, an employee is required to consider whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons, with certain personal or business relationships with the employee are involved. If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance question and received authorization from the agency.²⁷

Taking the above into consideration, one thing is clear: Members Wilcox and Prouty cannot be neutral arbiters on cases involving issues or policies concerning the Final Rule. This conflict raises concerns that each will predetermine policy outcomes, and at a minimum, their involvement in such matters would create the appearance of a conflict of interest. While the obligation to recuse is the personal responsibility of the individual employee,²⁸ we encourage you as Chair to take steps to secure, in writing, the intent of both Member Prouty and Member Wilcox to recuse themselves from all Board activity regarding joint employer policy. Recusal of both Members Prouty and Wilcox will ensure the Board continues to remain an independent and neutral body.

Thank you for your prompt attention to this matter.

Sincerely,



Mike Braun
U.S. Senator



Virginia Foxx
Member of Congress



Richard Burr
U.S. Senator



Rick W. Allen
Member of Congress

²⁶ Office of Government Ethics 99 X 8 Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, [https://www.oge.gov/Web/OGEnsf/0/52E2FAA1B3F454D2852585BA005BEDC0/\\$FILE/99x8.pdf](https://www.oge.gov/Web/OGEnsf/0/52E2FAA1B3F454D2852585BA005BEDC0/$FILE/99x8.pdf).

²⁷ *Id.*

²⁸ *Id.*



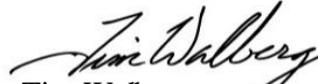
Bill Cassidy, M.D.
U.S. Senator



Joe Wilson
Member of Congress



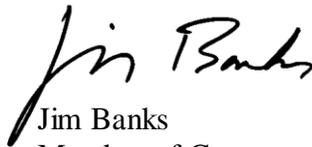
Roger Marshall, M.D.
U.S. Senator



Tim Walberg
Member of Congress



Tommy Tuberville
U.S. Senator



Jim Banks
Member of Congress



Jerry Moran
U.S. Senator



Diana Harshbarger
Member of Congress



Mary Miller
Member of Congress



Scott Fitzgerald
Member of Congress

Cc: Board Member Gwynne Wilcox; Board Member David Prouty

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>.

The Honorable Lauren M. McFerran

November 22, 2021

Page 2

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/>.

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

The Honorable Lauren M. McFerran

December 17, 2021

Page 2

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.

MAJORITY MEMBERS:

ROBERT C. "BOBBY" SCOTT, VIRGINIA,
Chairman

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GREGORIO KILILI CAMACHO SABLÁN,
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MARK POCAN, WISCONSIN
JOAQUIN CASTRO, TEXAS
MIKIE SHERRILL, NEW JERSEY
ADRIANO ESPAILLAT, NEW YORK
KWEISI MFUME, MARYLAND



COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 30, 2022

MINORITY MEMBERS:

VIRGINIA FOXX, NORTH CAROLINA,
Ranking Member

JOE WILSON, SOUTH CAROLINA
GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
GLENN GROTHMAN, WISCONSIN
ELISE M. STEFANIK, NEW YORK
RICK W. ALLEN, GEORGIA
JIM BANKS, INDIANA
JAMES COMER, KENTUCKY
RUSS FULCHER, IDAHO
FRED KELLER, PENNSYLVANIA
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BURGESS OWENS, UTAH
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LISA C. MCCLAIN, MICHIGAN
DIANA HARSHBARGER, TENNESSEE
MARY E. MILLER, ILLINOIS
VICTORIA SPARTZ, INDIANA
SCOTT FITZGERALD, WISCONSIN
MADISON CAWTHORN, NORTH CAROLINA
MICHELLE STEEL, CALIFORNIA
CHRIS JACOBS, NEW YORK
BRAD FINSTAD, MINNESOTA
JOE SEMPOLINSKI, NEW YORK

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

Dear Chairman McFerran:

We write to bring to your attention *West Virginia v. Environmental Protection Agency* (EPA), a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1, of the United States Constitution vests “all legislative powers” in Congress, the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year in office, President Biden issued more executive orders² and approved more major rules³ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats. Given this administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your agency’s authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the EPA to exceed its statutory authority.⁴ As the Court explained, “precedent teaches that there are ‘extraordinary cases’ ... in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁵ Under this doctrine, an agency “must point to ‘clear congressional authorization’ for the power it claims.”⁶ However, the EPA could not point

¹ 142 S. Ct. 2587 (2022).

² FED. REGISTER, EXECUTIVE ORDERS, <https://www.federalregister.gov/presidential-documents/executive-orders>.

³ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg L. (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>

⁴ *West Virginia*, 142 S. Ct. at 2608-2614.

⁵ *Id.* at 2608 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160 (2000)).

⁶ *West Virginia*, 142 S. Ct. at 2609 (citation omitted).

to such authorization. Rather, the EPA “‘claim[ed] to discover ... an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority’ ... in the vague language of an ‘ancillary provision’ of the Act ... that was designed to function as a gap filler.”⁷ Notably, such discovery “‘allowed [EPA] to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.’”⁸ As a result, the Court rejected the EPA’s attempt to exceed its statutory authority so plainly.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden administration. Recently, the Court struck down both the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium⁹ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹⁰ Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹¹ In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹²

Since Inauguration Day, the Biden administration has displayed an open hostility to worker choice and to employers, abandoning any semblance of impartiality in rushing to carry out the agenda of its union allies. Hours after taking office, President Biden took unprecedented action by firing the Senate-confirmed National Labor Relations Board (NLRB or Board) General Counsel (GC), Peter Robb—10 months before the expiration of his statutory term. The administration selected Jennifer Abruzzo, a former union lawyer with a highly partisan track record, to replace General Counsel Robb. During her tenure, GC Abruzzo has advocated for denying workers access to a secret ballot, preventing workers from making informed decisions on unionization, and silencing employers.¹³ These actions contradict the *National Labor Relations Act* (NLRA) and overturn longstanding precedent as interpreted by both the Board and the courts.

Unfortunately, there are other examples of the Biden NLRB’s inability to follow the law. On October 8, 2021, the NLRB notified Congress that one of the President’s nominees to the NLRB, David Prouty, was improperly administered the oath of office and erroneously served as a Board member for 25 days.¹⁴ In addition, Member Gwynne Wilcox and Member Prouty are likely unable to participate ethically and impartially in certain NLRB decisions and rulemakings due to conflicts of interest related to their prior

⁷ *Id.* at 2610 (citation omitted).

⁸ *Id.*

⁹ *Alabama Ass’n of Relators v. HHS*, 141 S. Ct. 2485 (2021).

¹⁰ *NFIB v. OSHA*, 142 S. Ct. 661 (2022).

¹¹ *West Virginia*, 142 S. Ct. at 2626 (Gorsuch, J., concurring).

¹² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

¹³ *See, e.g.*, PERKINS COIE, NLRB GC ABRUZZO SIGNALS SIGNIFICANT CHANGES FOR EMPLOYERS IN CEMEX BRIEF (Apr. 22, 2022), <https://www.perkinscoie.com/en/news-insights/nlr-gc-abruzzo-signals-significant-changes-for-employers-in-cemex-brief.html>; NLRB, MEMORANDUM GC 22-04, THE RIGHT TO REFRAIN FROM CAPTIVE AUDIENCE AND OTHER MANDATORY MEETINGS (Apr. 7, 2022), <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>.

¹⁴ Letter from Lauren McFerran, Chairman, NLRB, to Sen. Patty Murray (Oct. 8, 2021), <https://www.nlr.gov/sites/default/files/attachments/pages/node-166/letter-to-oversight-committees-regarding-appointment-of-member-prouty.pdf>.

union employment.¹⁵ Further, and most recently, an NLRB employee whistleblower alleged that NLRB officials interfered in representational election cases involving the Starbucks Corporation and Workers United.¹⁶ The NLRB is mandated to administer the NLRA in a neutral manner, and we are concerned the current Board majority and GC are undermining the agency's impartiality.

Taken together, these concerns demonstrate the clear need for us to conduct oversight on the NLRB's decisions and rulemakings, particularly as the Biden administration and House Democrats continue to strengthen and promote the coercive power of labor unions. In March 2021, House Democrats passed H.R. 842, the so-called *Protecting the Right to Organize Act* (PRO Act)—a far-reaching wish list of union bosses' most cherished priorities. Among its many provisions, the legislation nullifies state right-to-work laws, forces employers to turn over workers' personal information to union organizers, and undermines workers' right to vote by secret ballot.

While the PRO Act is unlikely to pass in the Senate, we are concerned the NLRB may attempt to skirt the legislative process altogether by enacting its provisions through rulemaking. On September 6, the NLRB issued a notice of proposed rulemaking related to the definition of a joint employer.¹⁷ The NLRB also plans to revise procedures for conducting representational elections.¹⁸

The NLRB, through case law and rulemaking, can significantly impact national labor policies. It is critical for us to understand the extent to which the NLRB is following the law in its decision-making.

As the committee of jurisdiction overseeing the NLRB, we assure you we will exercise our robust investigative and legislative powers not only to reassert our Article I responsibilities forcefully but also to ensure the Biden administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please provide the following information no later than October 17, 2022:

1. A list of all pending rulemakings and the specific Congressional authority for each pending rulemaking;
2. A list of all expected rulemakings and the specific Congressional authority for each expected rulemaking;
3. An explanation of how the NLRB determines whether a Board member is obligated to recuse himself or herself during a rulemaking;
4. A list of all instances when a Board member has recused himself or herself related to a pending rulemaking or expected rulemaking that you identified in response to numbers 1 and 2;

¹⁵ 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.

¹⁶ Letter from Zarina Jenkins, Acting Exec. Vice President & Gen. Couns., Starbucks Corp., & Kimberly J. Doud, Couns. for Starbucks Corp., to Lauren M. McFerran, Chairman, NLRB, & Jennifer A. Abruzzo, Gen. Couns., NLRB (Aug. 15, 2022).

¹⁷ Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54,641 (proposed Sept. 7, 2022).

¹⁸ OFF. OF INFO. & REG. AFF., ELECTION PROTECTION RULE, RIN 3142-AA22, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3142-AA22>.

5. An explanation of how the NLRB determines whether Board members are obligated to recuse themselves from deciding cases;
6. All Board member conflicts of interest identified by the Ethics Office;
7. All Board members' nominee reports that contain a list of recusals;
8. All instances of a Board member's Chief Counsel or Deputy Chief Counsel seeking the advice of the Designated Agency Ethics Official (DAEO) regarding recusal issues;
9. All Board member recusal lists held by the Ethics Office;
10. All DAEO recusal determinations and guidance to Board members;
11. All Board member recusal issues identified by the Office of the Solicitor;
12. All Office of the Executive Secretary's records relating to Board member recusal information;
13. All instances when a Board member has challenged a DAEO recusal determination; and,
14. What formal process, if any, the NLRB uses to ensure that its decisions follow the authority granted to it under the NLRA.

Sincerely,



Virginia Foxx
Ranking Member



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

Cc: The Honorable John F. Ring, Member
The Honorable Marvin E. Kaplan, Member
The Honorable Gwynne A. Wilcox, Member
The Honorable David M. Prouty, Member
The Honorable Jennifer A. Abruzzo, General Counsel

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your agency's possession, custody, or control, whether held by you or other past or present employees of the executive branch, or a representative acting on your behalf. Your response should also produce documents that you have a legal right to obtain, that the agency has a right to copy or to which you have access, or that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee on Education and the Workforce (the "Committee").
2. If any entity, organization, or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., email, CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box, or folder is produced, each CD, hard drive, memory stick, thumb drive, box, or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph, question number, or request number in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity—either inside or outside of the executive branch—also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), the agency's staff should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
12. In the event that a document or portion of a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document or redaction: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject, and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or other agency employees, or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 20, 2021, to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information, not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery. Such submission shall include an explanation as to why the information was not produced originally.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. If physical documents are to be delivered, two sets of documents should be delivered, one set to the Majority Staff in Room 2176 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building during Committee office

hours (9am-5pm, unless other arrangements are made) and signed by members of the respective staffs upon delivery.

19. Upon completion of the document production, the agency's written response should include a written certification, signed by the agency head or his or her designee, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.
20. If the agency does not expect to produce all documents responsive to this letter by the date requested, the agency's staff shall consult with the Committee as soon as it is known the agency cannot meet the deadline, but no later than 24 hours before the due date to explain: (1) what will be provided by the due date, (2) why the agency believes certain materials cannot be produced by the due date, and (3) the agency's proposed timeline for providing any omitted information.
21. The agency's response to questions and request should be answered or provided in separate document and not included inside a narrative response.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or

otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business, or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
7. The term “agency” means any department, independent establishment, or corporation of the federal government. For the purposes of responding to oversight requests, the Committee expects information to be provided from all sub-agencies of an agency and not just the information that is immediately available to the addressee or the addressee’s immediate sub-agency.