

**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 complaint<sup>1</sup> challenging a final rule which altered how “joint employer” status is defined under the NLRA (the “Final Rule”).<sup>2</sup> 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.<sup>3</sup> On February 26, 2020, the Final Rule was issued and subsequently; it became effective April 27, 2020.<sup>4</sup> Following promulgation of the Final Rule,

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<sup>1</sup> *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](https://fin.gfx.thomsonreuters.com/gfx/legal/docs/movankqjbpa/EMPLOYMENT_JOINTEMPLOYER_SEIU_complaint.pdf) (hereinafter the “SEIU Litigation”).

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

<sup>3</sup> 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>.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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

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<sup>5</sup> 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>.

<sup>6</sup> 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>.

<sup>7</sup> *Id.*

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup>

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,<sup>11</sup> and a lead attorney in the case for the firm is Mr. Leon Dayan.<sup>12</sup>

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."<sup>13</sup> Member Prouty has served as an advisory board member<sup>14</sup> and Mr. Dayan an active, prominent donor.<sup>15</sup> Additionally, both participate regularly in annual panels and award receptions for the Fund.<sup>16</sup> Member Prouty and Mr. Dayan are also prominent donors to another organization, the North Star Fund, a leftist organization.<sup>17</sup>

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.<sup>18</sup> Prior to her confirmation, Member Wilcox served as associate general counsel

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<sup>10</sup> 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/>.

<sup>11</sup> 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/>.

<sup>12</sup> SEIU Litigation, *supra* note 1.

<sup>13</sup> 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/>.

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

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

<sup>16</sup> 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>.

<sup>17</sup> NorthStar Fund, 2015 Annual Report, [https://northstarfund.org/wp-content/uploads/2018/03/North\\_Star\\_Fund\\_2015\\_Annual\\_Report.pdf](https://northstarfund.org/wp-content/uploads/2018/03/North_Star_Fund_2015_Annual_Report.pdf).

<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup>

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.”<sup>21</sup>

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.<sup>22</sup> 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,<sup>23</sup> and they have served on the same host committee for the Peggy Browning Fund Reception.<sup>24</sup>

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,<sup>25</sup> 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

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

<sup>19</sup> *Id.*

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

<sup>21</sup> 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>.

<sup>22</sup> SEIU Litigation, *supra* note 1.

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

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

<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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,<sup>28</sup> 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

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<sup>26</sup> 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).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



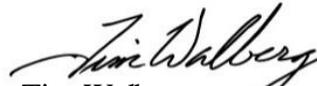
Bill Cassidy, M.D.  
U.S. Senator



Joe Wilson  
Member of Congress



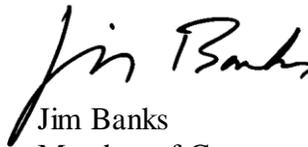
Roger Marshall, M.D.  
U.S. Senator



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