UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC.
Employer,

and Case No. 10-RC-276292

MAKE-UP ARTISTS and HAIR STYLISTS UNION, LOCAL 798, IATSE
Petitioner.

BRIEF OF *AMICI CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, AMERICAN BAKERS ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, ASSOCIATED BUILDERS AND CONTRACTORS, HR POLICY ASSOCIATION, INDEPENDENT BAKERS ASSOCIATION, INDEPENDENT ELECTRICAL CONTRACTORS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL RETAIL FEDERATION, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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INTERESTS OF THE *AMICI*

The **Coalition for a Democratic Workplace** ("CDW") represents hundreds of organizations that employ tens of millions of individuals working in every industry and every region in the United States. CDW members do business with millions of independent contractors, whose flexibility, special skills, and entrepreneurial opportunities are essential to economic growth. CDW provides a collective voice to its membership on issues related to labor law reform, including the protection of independent contractor status in a wide variety of industries.

The **American Association of Advertising Agencies** ("4A's") was established in 1917 to promote, advance, and defend the interests of its member agencies, employees and the advertising and marketing industries overall. Today the organization serves more than 600 member agencies across 1,200 offices, which help direct more than 85% of total U.S. advertising spend. Independent contractors known as "freelancers" in the industry are critical to flexible staffing solutions allowing agencies to scale up or down with temporary expertise and creative resources beyond the normal scope of member agencies. The freelancers benefit from these entrepreneurial opportunities, which should continue to be treated as a significant part of the common law agency test of independence.

The **American Bakers Association** ("ABA") is a national trade association representing the interests of the wholesale baking industry, including more than 300 companies with a combined 1600-plus facilities. The wholesale baking industry currently operates the fourth largest fleet of vehicles (behind the United States Postal Service, FedEx, and UPS) for the distribution of their products to market as well as the distribution of supplies to baking facilities.

The **American Trucking Associations** ("ATA") is the voice of the industry America depends on most to move our nation's freight. ATA is an 86-year-old federation with state trucking association affiliates in all 50 states. ATA represents every sector of the industry, from LTL to truckload, agriculture and livestock to auto haulers, and from large motor carriers to small mom-

and-pop operations. Independent owner-operators in trucking are a vital part of the nation's supply chain and have been for almost 100 years. ATA has formed the Independent Contractor Policy Committee, whose mission is to recommend the development, advocacy, and implementation of strategies and solutions to protect the independent contractor truck driver workforce model.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. ABC believes independent contractors and the specialized skills they provide are essential to the industry's productivity and efficiency, helping maintain stability during fluctuations of work and creating entrepreneurial opportunities for the contractors themselves.

HR Policy Association ("HRPA") is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The **Independent Bakers Association** ("IBA") is a national trade association of mostly small to medium sized family-owned regional wholesale bakeries and allied industry trades. IBA's membership often utilizes independent contractors on its bakery routes handling direct store deliveries. This practice started in the 1970s and grew to almost half of the industry using independent contractors for route delivery operations.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,700 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition, and economic opportunity for all.

The **National Association of Wholesaler-Distributors** ("NAW") is an employer and a non-profit trade association that represents the wholesale distribution industry - the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small to medium size, closely held businesses. The wholesale distribution industry generates about $6 trillion in annual sales volume and provides stable and well-paying jobs to more than 5.9 million workers.

The **National Federation of Independent Business** ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The **National Retail Federation ("NRF")** is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs — 52 million working Americans. Contributing $3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy.

The foregoing associations, who represent both unionized and non-union businesses across the country, are collectively referred to below as the "**CDW *Amici***." As further explained below, the questions presented by the Board in the Notice are of great importance to the CDW *Amici*, as the Board's determination will have immediate long-lasting effects on their members' labor relations, relationships with independent contractors as defined by Congress and the courts, and the rule of law.

SUMMARY OF ARGUMENT

On two separate occasions, the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has expressly rejected the Board's attempt to rewrite the standard for determining whether an individual is an employee or independent contractor under the National Labor Relations Act, as amended (the "NLRA" or the "Act"). *See FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*") (requiring the Board to adhere to Congressional intent by applying all of the common law factors set forth under the Restatement (Second) of Agency test to determine whether single-route drivers were "employees"); *see also FedEx Home Delivery*, 361 NLRB No. 55 (2014), *vacated*, 849 F.3d 1123 (D.C. Cir. 2017) ("*FedEx II*") (vacating the Board's order which failed to acquiesce to the court's holding in *FedEx I*); *see also* 29 U.S.C. § 152(3).

Notwithstanding the aforementioned decisions - and the controlling Supreme Court precedent of *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1968) - the Board is now proposing again to disregard judicial authority by reinstating the Board's discredited *FedEx* standard, or some version of it. To accomplish that misguided objective, the Board has asked whether it should overrule the standard applied in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019).

In *SuperShuttle*, the Board overruled its 2014 decision in *FedEx Home Delivery* and returned to the application of the common-law agency test that predated *FedEx I*. *See* 367 NLRB No. 75 (2019). Additionally, the *SuperShuttle* Board correctly explained how the Board's prior rulings in *FedEx I and II* "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities . . . .", thereby violating the Act and multiple court rulings. *Id.* at 7.

Overruling *SuperShuttle* now would violate the Act and binding judicial precedent, inevitably subjecting the Board to overruling by the courts, and perhaps even judicial sanctions. As further discussed below, adopting a more restrictive standard converting long established independent contractors into employees, would also be bad policy, destabilizing a number of industries represented by the *amici*, and depriving many independent contractors of their preferred flexible work methods and entrepreneurial opportunities. The CDW *Amici* therefore submit that: (1) the Board should adhere to the independent contractor standard in *SuperShuttle*, (2) the Board should certainly not return to the discredited and vacated *FedEx* standard or any version of it that prioritizes "economic realities" or "economic dependence" to the detriment of the statutorily mandated common-law agency test for independent contractor status under the NLRA.

ARGUMENT

I. OVERRULING *SUPERSHUTTLE* WOULD VIOLATE CONGRESSIONAL INTENT AND CONTROLLING FEDERAL COURT AUTHORITY.

A. The Board's *FedEx* Standard Violated the Taft-Hartley Act and Numerous Court Rulings.

In the Taft-Hartley amendments of 1947, Congress unambiguously carved out independent contractors from the NLRA's definition of "employee." 29 U.S.C. § 152(3). In so amending the NLRA, Congress reacted to rulings of the Board and the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). *See also U.S. v. Silk*, 331 U.S. 704 (1947) (SSA decision explaining *Hearst's* broad holding). Those decisions purported to determine "employee" status expansively under the Act based upon a test of "economic dependence" and/or "economic reality," rather than so-called "technical concepts" under the common law of agency. *See FedEx Home Delivery*, 361 NLRB at 629-642 (Member Johnson, dissenting) (setting forth detailed legislative history of the Taft-Hartley amendment).

"To correct what the Board has done," Congress "exclude[d] 'independent contractors' from the definition of 'employee.'" H.R. Rep. 245, 80th Cong., 1st Sess., on H.R. 3020, at 17 (1947). Congress expressly cited to the need for correction of the *Hearst* case as the primary reason for its decision to pass the "independent contractor" amendment, thereby providing strong evidence of congressional intent. *See also* H.R. Rep. 245, 80th Cong., at 17-18 (1947) ("[B]y this bill, Congress makes clear once more what it tried to make clear when, [] passing the act,…." * * * "In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.").

In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the Supreme Court definitively recognized Congress's intent that the legal standard for determining whether an individual is an "employee" or an "independent contractor" under Section 2(3) of the Act requires

application of the common-law agency test, as set forth in the Restatement (Second) of Agency § 220(2) (1958). The rationale behind the Court's decision was clear: Congress squarely intended the Board to "apply the common law agency test. . . in distinguishing an employee from an independent contractor." *United Insurance Co. of America*, 390 U.S. at 256; *see also Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992) ("Congress amended. . . [section 2(3)] . . . to demonstrate that the usual common-law principles were the keys to meaning.").

More than forty years later, the D.C. Circuit reaffirmed the holding of *United Insurance Co. of Am.* in *FedEx I*. *See generally* 563 F.3d 492. In *FedEx I*, the Board found delivery route drivers to be employees of the company, rather than independent contractors, notwithstanding strong evidence of the drivers' entrepreneurial opportunities. The D.C. Circuit "vacate[d]" the Board's decision outright, in accordance with the Court's interpretation of "clear congressional will" to recognize individuals with the entrepreneurial opportunities made available to FedEx home delivery drivers as independent contractors. 563 F.3d 492, 496, 504. As the court held: "[W]hile all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." *Id*. at 497 (*quoting Corp. Express Delivery Sys*., 332 NLRB 1522 (2000), *aff'd* 292 F.3d 777 (D.C. Cir. 2002).

Several years after *FedEx I*, the Board again found FedEx route drivers to be employees and not independent contractors, on virtually identical facts. 361 NLRB 610 (2014). In the face of the D.C. Circuit's previous ruling, the Board in *FedEx II* purported to "refine" its standard for finding employee status in spite of clear entrepreneurial opportunities. Thus, the Board added a new requirement to the common-law agency tests it purported to apply, *i.e*., that "entrepreneurial

opportunity represents merely one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor must be rendering services as part of an independent business." *Id*. at 610.

Not surprisingly, upon the employer's petition for review to the D.C. Circuit, that court *again* vacated the Board's orders, finding that the Board "cannot effectively nullify [a court's] decision . . . by asking a second panel of this court to apply the same law to the same material facts but give a different answer." *FedEx II*, 849 F.3d 1123, 1127 (D.C. Cir. 2017). The court added: "It is as clear as clear can be that 'the *same issue* presented in a later case in the *same court* should lead to the *same result*.'" *Id*. (quoting *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (emphasis in original).[1]

It is also significant that the D.C. Circuit, after reviewing the Board's rewrite of the independent contractor standard in *FedEx I* and *FedEx II*, did not merely deny enforcement of the Board's rulings; the Court also *vacated* them. *See FedEx I*, 563 F.3d at 492; *FedEx II*, 849 F.3d at 1123. An order to "vacate" means "[t]o nullify or cancel; make void; [and] invalidate." *Vacate*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (admonishing another agency that ignored the Court's order to vacate a rule: "To 'vacate' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" (citations omitted)).

[1] In both *FedEx I* and *FedEx II*, the Board chose not to appeal the D.C. Circuit's decision to the Supreme Court, thereby waiving its right to refuse to comply with the court's orders. *See Johnson v. U.S. R.R. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (finding that when the Board believes the D.C. Circuit court has erred in interpreting the law, "there are [only] two places it can go to correct the error: Congress or the Supreme Court.").

B. The Board in *SuperShuttle* Properly Overruled the Discredited *FedEx* Standard, and The Board is Required to Adhere to Its Decision.

Under the foregoing circumstances, the Board in *SuperShuttle* had no choice but to overrule the previously vacated *FedEx* independent contractor standard. The Board properly did so, finding that *FedEx* "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." 367 NLRB No. 75, slip op. at 1. The Board acted in accordance with the D.C. Circuit's clear admonition against enforcement of the unlawful *FedEx* standard, which the court had rejected. As further noted at the outset of this brief, the Board in *SuperShuttle* correctly found the Board majority's decision in *FedEx* "fundamentally shifted the independent-contractor analysis, for implicit policy-based reasons, to one of economic realities, …." 367 NLRB No. 75, slip op. at 7 (2019) (quoting *FedEx Home Delivery*, 361 NLRB at 629 (Member Johnson, dissenting).

In agreement with the D.C. Circuit's analysis of the significance of entrepreneurial opportunity, the *SuperShuttle* Board further explained:

> entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" . . . . Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather . . . entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.

Id., 361 NLRB No. 75*,* slip op. at 9.

The dissenting opinion of the current Board Chair in *SuperShuttle* challenged the D.C. Circuit's reasoning, mischaracterizing the court's holdings while doing so. *See Id*., 361 NLRB No. 75, slip op. 10-11. But the Chair's disagreement with the court is insufficient ground for reinstating the Board's vacated *FedEx* standard. The D.C. Circuit having spoken (twice), there is no reason to

expect a different result if the Board ignores the D.C. Circuit's *FedEx* holdings yet again by returning to the Board's previously vacated *FedEx* standard.

Indeed, any attempt by the new Board majority to reinstate the *FedEx* standard could subject the Board to judicial sanctions, as occurred only a few years ago in *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016). There, the D.C. Circuit awarded attorneys' fees against the Board for bad faith litigation due to the Board's refusal to acquiesce to binding D.C. Circuit precedent. *Id.* at 28-29. *Heartland* reaffirmed the long-standing position of the D.C. Circuit that the Board's refusal to acquiesce to the decisional standards of the circuit must result in denial of enforcement. *See Douglas Foods Corp v. NLRB*, 251 F.3d, 1056, 1067 (D.C. Cir. 2001); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997).[2] It is also well recognized that D.C. Circuit holdings have greater force because any Board ruling can automatically be appealed to that circuit. 29 U.S.C. § 10(f).

The Supreme Court has also made clear that the Board is entitled to no special deference in interpreting the law of agency, which the Court has held requires "no special administrative expertise that a court does not possess." *United Insurance Co*., 390 U.S. at 991. To the same effect is *FedEx II*, 849 F.3d at 1128: "We do not accord the Board [] breathing room when it comes to new formulations of the legal test to be applied." (quoted in *SuperShuttle*, 361 NLRB No. 75, slip op. at 8.). For this reason as well, the Board will be entitled to no deference by any court if it decides to return to the *FedEx* standard or any modified version of that discredited test.

[2] This principle is not unique to the D.C. Circuit. *see Johnson v. U.S. R.R. Bd.*, 969 F.2d at 1091 ("Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it."); *see also NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F.3d 102, 107, n.4 (1st Cir. 2002); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (rejecting NLRB's argument for nonacquiescence).

II. OVERRULING *SUPERSHUTTLE* WOULD HARM THE REGULATED COMMUNITY AND DAMAGE THE INSTITUTIONAL INTEGRITY OF THE BOARD.

The new Board majority has failed to identify any compelling reason to grant review for the purpose of overruling *SuperShuttle*. *See Atlanta Opera House, Inc*., 371 NLRB No. 45, slip op at 3. There has been no judicial criticism of *SuperShuttle*, and certainly there has been no criticism comparable to the D.C. Circuit's outright vacatur of the *FedEx* standard. There have been no intervening changes in Board law, nor any conflicting precedents regarding the proper application of *SuperShuttle*. Nor has *SuperShuttle* posed a significant obstacle to the Board's determination of employee status. *See Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2 (2020) (upholding ALJ finding of employee status after applying *SuperShuttle* standard); *Intermodal Bridge Transport*, 369 NLRB No. 37 (2020) (same); *Velox Express, Inc*., 368 NLRB No. 61 (2019) (same).

In a footnote to the Notice and Invitation to File Briefs in this matter, the Board majority members have asserted that it is "premature" for them to address the relative merits of *SuperShuttle* and *FedEx* because they were not members of the Board when one or both cases were decided. *Atlanta Opera, Inc*., 371 NLRB No. 45, slip op. at 1, n. 2. This is a novel claim, which implies that the Board's precedents are somehow less binding on new members. Any such implication is misguided, however, and improperly derogates the Board as an institution. To the contrary, in the absence of any justification for the overruling of precedent by a new Board majority, the new members are sworn to uphold the institutional integrity of the Board. Otherwise, the Board's precedents will have no meaning, and the never-ending fluctuation resulting from each new member's interpretation of the Act will cause great harm to labor stability in the regulated business and labor community. *See Mountaire Farms, Inc*., 370 NLRB No. 110, slip op. at 7 (2021) (Chair McFerran, concurring) (declining to overturn precedent where "making a change in this area would

likely cause more confusion, rather than improve clarity."). *See also Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, ….").

As has been commented upon by CDW and others, the pace of overruling precedents at the Board has significantly increased in recent years, beginning with the Obama Administration.[3] In reaction to the excessive number of precedents overturned during that time period, the Trump Board restored some but by no means all of the previously overruled precedents.[4] Now the Biden Board appears to be intent on returning the favor, in the present case (and others), for no justifiable reason other than ideology. Such ideological "ping pong," carried to its extreme in the present case, greatly diminishes the Board's standing as a governing agency. Repeated reversals of the Board's independent contractor standards also threaten the constitutional due process rights of unfair labor practice respondents, by making it impossible for millions of businesses, employees, and independent contractors to know what rules they are supposed to follow.[5]

Contrary to the majority's stated views in the present Notice and Invitation to *Amici*,

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[3] "Was the Obama NLRB the Most Partisan Board in History?" Coalition for a Democratic Workplace and Littler's Workplace Policy Institute (Dec. 6, 2016) (documenting how the Obama Board upended 4,559 total years of established law."), *available at* http://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf.

[4] *SuperShuttle* itself is one such example. Other similar cases which have been targeted for another round of overrulings by the current Board include *Boeing Co*., 365 NLRB No. 154 (2017), and subsequent cases dealing with work rules; *PCC Structurals, Inc*., 365 NLRB No. 160 (2017), and subsequent cases dealing with bargaining units, and numerous cases targeted by the General Counsel for overruling in her recent Memorandum GC 21-04.

[5] The Due Process issue will become even more acute if the General Counsel succeeds in her professed goal of convincing the Board to overrule the *Velox* decision so that employers who misclassify workers as independent contractors would for the first time be found to independently violate the Act.

adherence to basic principles of *stare decisis* is required of the Board, regardless of whether the current members participated in creating the earlier precedents now threatened with overruling. Otherwise, the Board will fail in its duties to provide guidance to the regulated community, to promote stability in the law, and to maintain the appearance of justice. *See* Davis, "Doctrine of Precedent as Applied to Administrative Decisions," 59 W.Va. L. Rev. 111, 128-136 (1957).

Any overruling of *SuperShuttle* in this case likewise would fail to conform to the Administrative Procedure Act's "scheme of reasoned decision making." *Allentown Mack* Sales & Service v. NLRB, 522 U.S. 359, 374 (1998) (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 52 (1983). Courts have rejected the Board's reasoning under this scheme where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). *Southcoast Hosp. Grp., Inc. v. NLRB*, 846 F.3d 448 (1st Cir. 2017). ("A decision is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (*quoting State Farm*, 463 U.S. at 43). Overruling *SuperShuttle* in the face of the D.C. Circuit's contrary holding in *FedEx* would be arbitrary and capricious under this settled standard. *See also Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 140 S. Ct. 1891 (2020).[6]

[6] Contrary to an argument made by another *amicus* in this proceeding, antitrust law has no bearing on how the Board should determine who is properly classified as an independent contractor. The Board is bound to adhere to Section 2(3) of the Act, which the courts have held incorporates common law of agency principles for the reasons explained above and in *SuperShuttle.*

III. OVERRULING *SUPERSHUTTLE* IN ORDER TO EXPAND THE SCOPE OF "EMPLOYMENT" UNDER THE ACT WOULD HARM INDEPENDENT WORKERS.

As the Board observed in *SuperShuttle,* the policy objective of the overruled *FedEx* standard was to improperly narrow the ability of many businesses to classify workers as "independent" and conversely to expand the types of individual service providers considered to be "employees" under the Act. 367 NLRB No. 75, slip op. at 7-8. The *FedEx* test was based on the false premise that classifying individuals as independent contractors is somehow disfavored by the Act and is harmful to workers who are so classified. But that is *not* the majority viewpoint held by independent contractors themselves or the important industries that rely on independent contractors to be successful.

Numerous studies show that independent workers overwhelmingly prefer remaining independent and do not want to be treated as "employees," when the law does not require such treatment.[7] "From the workers' perspective, for many, independent work is the most viable or the only viable option, particularly where they are balancing work with other personal or family obligations."[8] Independent contractor status provides greater flexibility to individuals seeking entrepreneurial opportunities rather than "employment" under the Act. According to the Direct Selling Association's 2020 Consumer Attitudes and Entrepreneurship Study, "77% of Americans

[7] Many such studies can be found in the public Administrative Record of the Department of Labor's 2020 rulemaking proceeding pertaining to independent contractors under the Fair Labor Standards Act. The studies' findings are equally pertinent to this proceeding. Unless otherwise specified, the studies cited below – and many more - are publicly available in the administrative record created by DOL at https://www.regulations.gov/document/WHD-2020-0007-0001.

[8] Public Comments of Littler's Workplace Policy Institute, p.3 (Oct., 24, 2020), available at https://www.regulations.gov/document/WHD-2020-0007-0001 (citing Upwork, "Freelance Forward 2020: The U.S. Independent Workforce Report" (Sept. 2020), available at https://www.upwork.com/i/freelance-forward.

are interested in flexible, entrepreneurial/income-earning opportunities."[9] Furthermore, flexibility allows independent contractors to be their "own boss" and exercise total control over when and how work is performed. *Id*.

Flexibility is also important because it provides opportunities to those who cannot seek traditional jobs due to their lack of the necessary qualifications. In a 600-person study conducted by the Coalition for Workforce Innovation ("CWI"), 88 percent of respondents "agree[d] that advances in technology have made it easier for all people - regardless of their college education or background - to find well-paying and satisfying work that fits around their lives, rather than having to fit their lives around their work."[10] Ninety percent of individuals in the previously-mentioned study "favor affirming the right of individuals to choose an independent style of work."[11]

Studies have also shown that independent contractors earn more than employees. Relying on such studies, the U.S. Department of Labor found in 2021 that "independent contractors tend to earn more per hour; Employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour…."[12] In addition, the Bureau of Labor Statistics has noted the responses of independent contractors to the 2017 Contingent Worker Supplement to the Current Populations Survey were "indicative of non-monetary value derived

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[9] Public Comments of Direct Sellers Association, p.2 (Oct.26, 2020), available at https://www.regulations.gov/document/WHD-2020-0007-0001.

[10] Public Comments of CWI, Ex. A, p. 10 (Oct. 26, 2020), available at https://www.regulations.gov/document/WHD-2020-0007-0001.

[11] *Id*., Ex. A, p. 17.

[12] *See* 86 Fed. Reg. at 1,219 (Jan. 7, 2021), *citing inter alia* Katz & Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States (2018).

from independent contractor status."[13]

For these and other reasons, many industries represented by the CDW *Amici*, who are responsible for much of the growth in the U.S. economy before and during the pandemic, have relied significantly on independent contracting for their success. These industries include but are not limited to the "On-Demand Economy" (including delivery and transportation logistics, tourism, advertising, freelance work, manufacturing, food production, and home care), the "Alternative Workforce" (the millions of workers identified by the BLS as independent contractors, on-call workers, temporary help, and workers provided by contract firms);[14] the construction industry;[15] traditional and e-commerce retailing; direct selling and financial services; and staffing agencies.

Finally, studies have shown that forcing businesses to reclassify independent contractors as employees does not typically result in net replacement of one category by the other. Instead, what often happens is a severe reduction in the number of job opportunities available, because of the loss of flexibility and higher scheduling costs attributable to employment. Narrowing the independent contractor classifications has resulted in higher unemployment and lack of growth in the industries affected.[16]

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[13] "Contingent and Alternative Employment Arrangements Summary," U.S. Bureau of Labor Statistics, May 2017, https://www.bls.gov/news.release/conemp.nr0.htm.

[14] *Id.*

[15] Public Comments of Associated Builders and Contractors, Inc. (Oct. 26, 2020), available at https://www.regulations.gov/document/WHD-2020-0007-0001 ("Millions of [construction] workers choose to perform their work as independent contractors so that they can retain flexibility and control over their work lives, take advantage of entrepreneurial opportunities and structure their own working arrangements.").

[16] *See* https://medium.com/uber-under-the-hood/independent-couriers-reaction-to-employee-reclassification-learnings-from-geneva-e3885db12ea3 (case study of

As Congress intended in amending the NLRA to exclude independent contractors from the Act's coverage, workers should be free to choose to benefit from entrepreneurial opportunities available through independent contracting, without government interference. The Board should avoid imposing a regulatory regime that so burdens the choice of independent contracting that the industries represented in this brief – and the contractors themselves - are irreparably harmed. The Board should therefore resist overruling *SuperShuttle*, because the confusion that will result from deliberately provoking such a direct confrontation with the courts will harm many industries in their efforts to invest and grow out of the pandemic, in addition to harming the institutional integrity of the Board itself.

CONCLUSION

For the reasons set forth above, the Board should adhere to the independent contractor standard applied in *SuperShuttle* and should not return to the discredited *FedEx* standard or any version of that judicially vacated test.

Respectfully submitted,

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reclassification of independent drivers as employees, resulting in dramatically reduced employment in the reclassified positions).

CERTIFICATE OF SERVICE

Pursuant to the Board's "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing amicus brief in Case 10-RC-276292 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 10th day of February 2022.

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