**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE ATLANTA OPERA, INC.,

Employer,

and 10–RC–276292

MAKE-UP ARTISTS AND HAIRSTYLISTS
UNION LOCAL NO. 798, IATSE,

Petitioner.

# BRIEF OF THE STATES OF NEW JERSEY, PENNSYLVANIA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW YORK, OREGON, RHODE ISLAND, VERMONT AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE*

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## INTRODUCTION

The Attorneys General of New Jersey, Pennsylvania, California, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, Rhode Island, Vermont, and the District of Columbia submit this *amicus curiae* brief in response to the National Labor Relations Board's Order Granting Review and Notice and Invitation to File Briefs dated December 27, 2021, pursuant to 29 C.F.R. § 102.46(i)(5). The Board solicited briefs addressing two questions:

> 1. Should the Board adhere to the independent contractor standard in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019)?
>
> 2. If not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

*Amici* Attorneys General urge the Board to abandon *SuperShuttle*, which represents a novel and radical departure from the Board's longstanding practice and precedents, and to adopt a standard at least as protective of workers' rights to organize and collectively bargain as that adopted in *FedEx Home Delivery*. Nominally, both *FedEx* and *SuperShuttle* recognized that the ultimate inquiry, consistent with U.S. Supreme Court precedent, remains whether workers should be deemed employees or independent contractors under traditional common-law principles; however, the decisions sharply differed on the significance of an eleventh factor (in addition to the ten non-exclusive factors listed in the Restatement (Second) of Agency), "entrepreneurial opportunity," which *SuperShuttle* described as a "prism" through which to analyze all others.

*Amici* believe that was wrong both for reasons explained in *FedEx*, and because such an "entrepreneurial opportunity" standard is particularly vulnerable to evasion through provision of largely theoretical opportunity. But rather than simply returning to *FedEx*, which was rejected by the D.C. Circuit and in practice failed to provide the clarity the Board intended, *Amici* suggest re-

summarizing and restating the Board's approach, including the following principles which *SuperShuttle* either rejected or undermined: 1) the burden of proof rests on the proponent of independent contractor status; 2) no single factor—and certainly not "entrepreneurial opportunity" as defined by *SuperShuttle*—is either independently decisive, or a "prism" for evaluating the many factors traditionally looked to by the Board and at common law; 3) in evaluating entrepreneurial opportunity, workers' actual exercise of and ability to exercise opportunity is more significant than theoretical opportunity; and 4) while no single factor will always be decisive, several of the ten non-exhaustive factors listed in the Restatement, especially three which are key to the so-called "ABC" test enacted by many States to distinguish employees from independent contractors for statutory purposes, will typically be a better starting-point for analysis than "entrepreneurial opportunity" as defined in *SuperShuttle*.[1]

The need for robust protections against independent contractor misclassification is especially urgent now, with the steep decline in union membership and the sharp rise in misclassification across our States and the nation. The *SuperShuttle* standard—and its confused reliance on entrepreneurial opportunity as its animating principle—inappropriately shrinks the

[1] As discussed below, over 26 States employ variations of the "ABC" test, which generally provides that individuals who provide services in exchange for remuneration are employees unless all three of the following elements are proven: (A) such individual is free from control over the performance of such service; (B) such service is outside the putative employer's usual business; and (C) such individual is customarily engaged in an independent trade, profession or business. While the "ABC" test is statutory and the Board must use a more flexible common-law test, it is noteworthy that these "ABC" elements are among the ten factors specified in the Restatement (Second) of Agency, which include: (a) the extent of the putative employer's control over the work, (h) whether the work is part of the putative employer's regular business, and (b) whether the worker is engaged in a distinct occupation or business. The last of these (whether the worker is engaged in a distinct business) was emphasized in *FedEx*, which noted that the forthcoming Restatement of Employment Law summarizing current common-law principles also suggests not "entrepreneurial opportunity" but whether a worker is engaged in an independent business as the key factor distinguishing independent contractors from employees. *See* 361 NLRB at 620 n.33, 621 & n.42 (discussing the draft Restatement).

coverage of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, and provides neither accuracy for workers nor clarity for employers. That standard's broad and amorphous expansion of the independent contractor exemption excludes from the NLRA's coverage millions of workers that Congress intended the statute to protect. Without the right to organize, these workers are more vulnerable to exploitation in the workplace and less likely to report misclassification and violations of state labor and employment laws to our offices, compounding the harms of misclassification to workers, state and local governments, and the citizenry at large.

At minimum, we urge the Board to return to its *FedEx* standard, which appropriately focused on an employer's control of a worker's performance of their duties, and more accurately considered "entrepreneurial opportunity" as part of the broader analysis of whether a worker is, in fact, operating an independent business. As a practical matter, the clarity and predictability of the *FedEx* standard assists labor enforcers, protects employees, and evens the playing field for employers. However, our preference, in light of important policy considerations raised by the evolution of the modern workplace and the fissuring of many traditional workplaces, is for the Board to consider adopting an even more predictable and protective standard than FedEx, informed by the ABC test factors and other standards used in many of our States.

## STATEMENT OF INTEREST

This matter is of particular importance to *Amici* Attorneys General, who urge the Board to consider the threat independent contractor misclassification poses not only to workers, but also to state treasuries. When employers misclassify workers, they shirk their responsibilities to fund vital social insurance programs administered by state and local governments, and the public pays the price. In light of their experience, *Amici* Attorneys General are grateful for the opportunity to share their view with the Board.

Our States perform various functions designed to protect the health and safety of our residents, including enforcing labor standards like minimum wage and overtime laws, and administering social insurance programs like unemployment and temporary disability insurance. Every day, we confront the substantial challenge of enforcing these measures in the face of increasing misclassification. The impacts of misclassification ripple far beyond individual workers, including harms to law-abiding employers, state and local treasuries, and safety-net programs for workers and citizens at large.[2] Employers that misclassify their employees as independent contractors fail to contribute their fair share to unemployment systems, workers' compensation, and state income taxes, resulting in billions of dollars in lost state revenue.[3] As a result, States must divert already limited public resources and cut spending in other areas, to the detriment of all of our residents and our employers that play by the rules.[4] When the workers the *Amici* Attorneys General protect can bargain collectively for fair pay and good workplace standards, the States are relieved of some of this enforcement burden.

At the same time, misclassification deprives workers of a litany of core workplace rights, including protections against wage theft, harassment and discrimination, health and safety

[2] It is the experience of the *Amici* Attorneys General that employers who misclassify employees do so universally, not just for the purposes of discrete labor and employment laws.

[3] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020) at 4, 6-11 https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

[4] *See* Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, Dep't of Economics, University of Missouri, Kansas City (Sept. 12, 2010) at 5-6 (study estimating $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums annually lost to misclassification).

violations, workers' compensation, unemployment insurance, paid leave, and other benefits,[5] leaving them with the worst of both worlds——all of the precarity of the independent contractor, but none of the control. These harms are not conjectural. A study commissioned by the Department of Labor found that up to 95% of workers who claimed they were misclassified as independent contractors were reclassified as employees following review.[6] Thus, workers can benefit enormously from a robust standard for independent contractor classification.

A growing number of States, including *Amici*, have sounded the alarm by enacting measures designed to combat independent contractor misclassification. At least twenty-eight States have created interagency taskforces studying the scope of and damage inflicted by misclassification.[7] States audit and assess taxes against employers that have misclassified employees.[8] Still others have enacted legislation or taken executive actions to empower

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[5] Testimony of Catherine Ruckelshaus, National Employment Law Legal Co-Director, before the U.S. Senate Committee on Health, Education, Labor & Pensions (June 17, 2010) at 6.

[6] Lalith De Silva, et al., *Prevalence and Implications for Unemployment Insurance Programs*, a report prepared by Planmatics, Inc. for the U.S. Department of Labor (Feb. 2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[7] These States include Colorado, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Jersey, New York, Vermont, Virginia, Wisconsin (by Executive Order); California, Connecticut, Illinois, Indiana, Maine, Minnesota, New Hampshire, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington (by State legislation). *See* Rebecca Smith, *Public Task Forces Take on Employee Misclassification: Best Practices*, National Employment Law Project (Aug. 2020) at 21 nn. 9 & 10, available at https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf.

[8] *See, e.g.*, Pennsylvania Department of Labor and Industry, *Administration and Enforcement of the Construction Workplace Misclassification Act* (Mar. 2020) at 5, available at https://www.dli.pa.gov/Individuals/Labor-Management Relations/llc/act72/Documents/2019%20Act%2072%20Report-final.pdf.

enforcement against misclassification.[9] Using the variety of tools at their disposal, *Amici* Attorneys General are committed to protecting their residents from independent contractor misclassification.

Independent contractor misclassification also deprives workers of the right to organize and the right to collectively bargain. *See* 29 U.S.C. § 152(3) (excluding independent contractors from the NLRA). *Amici* Attorneys General have a strong interest in protecting these rights, which have long been enshrined in some of our State Constitutions. *See, e.g.*, N.J. Const. art. 1, § 19 ("Persons in private employment shall have the right to organize and bargain collectively"); N.Y. Const. art. 1, § 17 ("Employees shall have the right to organize and to bargain collectively through representatives of their own choosing").[10] However, given the NLRA's preemptive effect in this area, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), States must rely on the Board to provide robust protection of these rights, and to prevent employers from depriving them through misclassification.

[9] For example, New Jersey enacted legislation creating a centralized office for coordinating workforce and labor-related efforts, simplifying the process for identifying misclassified workers, implementing stop-work orders for worksites where misclassification is found, and creating a Statewide database to track payroll projects. *See* Press Release, Governor Murphy Signs Legislation to Protect New Jersey Workers, Employers From Unlawful Misclassification (July 8, 2021), available at https://www.nj.gov/governor/news/news/562021/20210708a.shtml.

Pennsylvania has enacted legislation that prohibits employers from misclassifying construction workers, and grants the State enforcement powers to bring criminal and administrative penalties. *See* 43 PA. STAT. §§ 933.1– 933.17.

[10] As explained by New York precedent, "the broad and expansive word 'employees'… was meant to afford the constitutional right to organize and collectively bargain to any person who fits within the plain and ordinary meaning of that word," without its being "narrowed or limited in any way." *Hernandez v. State*, 173 A.D.3d 105, 112 (3d Dep't 2019).

## ARGUMENT

a. The Board Should Adopt a Strong and Clear Standard That Protects Employees from Misclassification Consistent With the NLRA's Purpose and Precedent

This is not the time to weaken protections against independent contractor misclassification. A litany of studies indicate that misclassification continues to affect millions of American workers, and that number is increasing. These elevated numbers are a result of a growing phenomenon of misclassification, with one estimate finding the rate of independent contractor misclassification has risen by over 40% from 2005 to 2015. *Amici*'s experiences mirror this data. For example, New Jersey reports that misclassification has increased by over 40% in the last ten years, and some States have reported even higher increases.[11] Misclassification rates are also disproportionately high in rapidly-growing industries, such as the app-based economy,[12] as well as industries with large numbers of low-wage and vulnerable workers, such as janitorial services, trucking and transportation, retail, hospitality, home care, and construction.

In enacting the NLRA, Congress recognized the harms caused by "[t]he denial by some employers of the right of employees to organize," and expressly stated its intent to "encourag[e] the practice and procedure of collective bargaining and [] protect[] the exercise by workers of full freedom of . . . self-organization." 29 U.S.C. § 151. One way that an employer can deprive employees of these rights is to misclassify them as independent contractors. Misclassified workers may never even attempt to organize, believing that they have no rights under the NLRA. Similarly, misclassified workers are less likely to file complaints with state labor enforcers, often believing

[11] Report of Governor Murphy's Taskforce on Employee Misclassification (July 2019) at 1, available at https://www.nj.gov/labor/assets/PDFs/Misclassification%20Report%202019.pdf.

[12] *See supra*, note 1.

they have no workplace rights. Thus, independent contractor misclassification is an obstacle to effective enforcement of labor protections at both the state and federal levels. Moreover, as union membership continues to decline year after year,[13] fewer workers are able to engage in collective action and organizing efforts to secure adequate wages, benefits, and working conditions. This means that an independent contractor standard that is accurate—and protects workers from misclassification while excluding from statutory protection only those workers who are genuinely independent contractors—is as important as ever. It is also important, especially in light of the evolving modern workplace, to adopt a standard that is clear, so employers are on notice as to what types of classification are permissible and can compete on a level playing field.

It was purportedly in the name of these goals of accuracy and clarity that the *SuperShuttle* Board acted—and faltered, departing from longstanding precedent and creating from whole cloth a new "animating principle" to govern the independent contractor analysis. In doing so, the Board created a new test that is neither accurate nor clear—one that should be quickly abandoned.

b. The *SuperShuttle* Standard Is Too Narrow to Protect Workers From Misclassification and Too Amorphous to Provide Clarity to Employers

Any test adopted by the Board must be grounded in "the common law agency test[14] [for] distinguishing an employee from an independent contractor," which evaluates the control the employer has over the worker's performance of their duties. *NLRB v. United Insurance Company*

[13] News Release, Bureau of Labor Statistics (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf.

[14] In *United Insurance*, the Supreme Court notes that the parties "agree that the proper standard here is the law of agency." 390 U.S. at 256. The parties' briefs frame the question of employee status in terms of the Restatement (Second) of Agency § 220. Brief of the National Labor Relations Board, *NLRB v. United Insurance Company*, 390 U.S. 254 (1968), 1967 WL 129612; Brief for Insurance Workers International Union, AFL-CIO, *NLRB v. United Insurance Company*, 390 U.S. 254 (1968), 1967 WL 129590; Brief for United Insurance Company of America, *NLRB v. United Insurance Company*, 390 U.S. 254 (1968), 1967 WL 113761.

*of America*, 390 U.S. 254, 256 (1968). The Restatement (Second) of Agency provides a "non-exhaustive ten-factor test [that] is not especially amenable to any sort of bright-line rule," and "'there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (quoting *United Ins. Co.*, 390 U.S. at 258). The primary distinction agency principles make between employees and independent contractors is that the independent contractor controls her work, and the employee does not. *See* Restatement (2d) of Agency § 220(1) ("[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.").[15]

In a 2009 decision, the U.S. Court of Appeals for the D.C. Circuit lamented what it saw as the "potential uncertainty" of the fact-specific, multi-factor analysis under the Restatement test and made what it called a "subtle refinement." It was anything but; the court ruled that the Restatement factors must be all viewed in light of an "animating principle"—namely, whether "putative independent contractors have 'significant entrepreneurial opportunity for gain or loss'"— which the court viewed as a "more accurate proxy" for independent contractor status than lack of employer control. *FedEx Home Delivery*, 563 F.3d at 497 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002)). In its 2014 *FedEx* decision, the Board rejected the D.C. Circuit's analysis, and reiterated the principle of *United Insurance* that the Restatement analysis has no single animating principle. The *FedEx* Board held that entrepreneurial

[15] The Restatement factors include the extent of control the master may exercise over the details of the work, the kind of occupation, the method of payment, whether the work is part of the regular business of the employer, and whether the worker is engaged in a distinct business, among others.

opportunity—which must be "actual" and not just "theoretical," it clarified—should be viewed "as part of a broader analysis that—in the context of weighing all relevant, traditional common-law factors identified in the Restatement—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." *FedEx*, 361 NLRB No. 55 at 619. Only five years later, in *SuperShuttle*, the Board reversed course, overruling its prior determination and adopting the D.C. Circuit's analysis in its entirety, and expounding that "entrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors." 367 NLRB No. 75 at 3. Applying this standard, a majority of the Board held that the SuperShuttle airport drivers at issue in the case were independent contractors, based largely on their ownership or lease and control of their vans, control over their schedules, and fee arrangement with SuperShuttle. *Id.* at 15-16.

*SuperShuttle*'s application of entrepreneurial opportunity as an animating principle is totally untethered from any Board precedent. *United Insurance* instructs that agency principles govern—where the inquiry focuses on control and does not mention entrepreneurial opportunity—and cautions against the use of any shorthand formula, 390 U.S. at 258, which is precisely what the *SuperShuttle* standard is. The standard is also illogical, as ably explained by the dissent, because entrepreneurial opportunity does not actually "animate" most of the Restatement factors. *See* 367 NLRB No. 75 at 25 (then-Member McFerran, dissenting) ("'Entrepreneurial opportunity' does not inform (in any clear and direct way, at least): 'extent of control;' 'distinct occupation or business;' 'kind of occupation;' 'skill required;' who supplies the instrumentalities; 'length of time . . . employed;' 'method of payment;' 'part of the regular business;' the parties' belief in what relationship they are creating; and the 'business' of the principal.").

Most important, the vagueness of the *SuperShuttle* standard could result in employees being denied the NLRA's protections. While it may be true that "the lack of 'entrepreneurial opportunity' is enough to establish employee status," that "would not mean that the presence of some 'entrepreneurial opportunity,' no matter how limited, would be enough to establish independent-contractor status," especially if the employer was otherwise exercising significant control over the relationship. *Id.* In other words, despite the opportunity for gain or loss, a person who "can affect their remuneration or other economic interest only by working harder or more skillfully on their employer's behalf" is an employee; "they are not entrepreneurs operating as independent businesspersons." Restatement of Employment Law § 1.01 comment f. Many workers could be said to have some—often significant—entrepreneurial opportunity, but that alone should not obscure the fact that the workers are not in business for themselves. Take, for example:

- A salesperson who earns commissions;
- A personal trainer working for a gym;
- A personal services worker, such as a hairdresser or cosmetologist; and
- Any service worker who earns tips.

For that matter, even a worker who is simply paid a piece-rate wage or has an opportunity for an incentive bonus could be said to have "independence to pursue economic gain," which *SuperShuttle* implies is the touchstone to "evaluate the common-law factors through the prism of entrepreneurial opportunity." *Id.* at 9. Employers and workers will have great difficulty applying the vague *SuperShuttle* standard to these situations, which are increasingly common in the modern economy, where an employer exerts significant control but an employee has some control over gain or loss. More generally, *SuperShuttle* impermissibly elevates entrepreneurial inquiry above the other common law factors and adds to the confusion by providing no clear guidance on how to employ it as a "prism" in connection with the other factors.

A significant number of employees nationwide no longer have a traditional relationship with their employer. By way of example, the Board's General Counsel issued an Advice Memorandum, applying the *SuperShuttle* standard to approximately one million transportation network drivers nationwide and concluding that they are independent contractors for NLRA purposes, giving substantial weight to their flexible schedules and locations, use of their own vehicles, and other facts showing their potential entrepreneurial opportunity. *See* Advice Memorandum, *Uber Technologies, Inc.*, Case Nos. 13-CA-163062, 14-CA-158833, and 29-CA-177483, at 5-15 (2019). However, the analysis does not take into account the extensive control exercised by the employer over the drivers' performance of their duties (including setting fares, assigning passengers, supplying routes, and penalizing certain conduct), the prohibition on drivers' ability to generate their own business from riders outside the platform, or the fact that the employer's revenue is directly tied to fares collected by drivers. Indeed, these very same factors have resulted in employment classifications in some States. *See, e.g.*, *Lowman v. Unemployment Comp. Bd. of Rev.*, 235 A.3d 278, 304, 307 (Pa. 2020) (holding that the plaintiff was not self-employed); *Matter of Lowry*, 189 A.D.3d 1863, 1865 (N.Y. App. Div. 2020). This is just one example among many of how the *SuperShuttle* standard has the effect of denying millions of workers the benefits of employment in the modern economy.

While the *SuperShuttle* standard is deficient for the reasons just discussed, it is important to note—and the Board should reiterate in promulgating any new or modified standard—that certain basic principles are undisputed. First, the burden of proof rests on the proponent of independent contractor status. Second, the Board's ultimate focus is on the question whether workers are employees or independent contractors based on the multi-factor common-law test, not on any particular factor or aspect of that test. Third, in evaluating entrepreneurial opportunity,

workers' actual exercise of and ability to exercise opportunity is more significant than theoretical opportunity.

c. The Board Should Look to the Experiences of State Enforcers for Guidance in Adopting a Standard at Least as Protective as the *FedEx* Standard

While the Board must adopt an independent contractor standard that is consistent with general agency principles, *United Insurance*, 390 U.S. at 256, that instruction does not prohibit the Board from looking to States for guidance in developing any further refinements to its approach to misclassification. Many of the *Amici* Attorneys General enforce labor laws and other workplace protections in conjunction with state labor regulators, including enforcement against misclassifying employers. While the tests for independent contractor misclassification under particular statutes vary among, and often even within, the States, all of them ultimately derive from the same Restatement (Second) of Agency test, and thus share common elements with the tests used by the Board.

The majority of States plus the District of Columbia have adopted a test in various contexts that affords even greater protection to workers than the more flexible common-law Restatement test, by definitively requiring proof of certain specific factors in addition to placing the burden of proof on the employer rather than the employee. Over 26 of these States employ a variation of the "ABC" test,[16] which generally provides that if an individual provides services in exchange for

[16] *See* ALASKA STAT. § 23.20.525(a)(8); CAL. UN. INS. CODE § 621(b); CAL. LAB. CODE § 2775; CONN. GEN. STAT. § 31- 222(a)(1)(B); DEL. CODE ANN. TIT. 19 § 3302(10)(K); D.C. CODE § 32-1331.04(c) (construction industry); HAW. REV. STAT. § 383-6; 820 ILL. COMP. STAT. 405/212; IND. CODE § 22-4-8-1(b); LA. STAT. ANN. § 23:1472(12)(E); ME. STAT. TIT. 26, § 1043.11.E; MD. CODE ANN., LAB. & EMPL. § 8-205(a); MASS. GEN. LAWS CH. 151A § 2; NEB. REV. STAT. § 48-604(5); NEV. REV. STAT. § 612.085; N.H. REV. STAT. ANN. § 282- A:9(III); N.J. REV. STAT. § 43:21- 19(i)(6); N.M. STAT. ANN. § 51-1- 42(F)(5); N.Y. LAB. LAW § 861-c(1) (presumption of employment for purposes of New York State Construction Industry Fair Play Act); VT. STAT. ANN. TIT. 21 § 1301(6)(B); WASH. REV. CODE § 50.04.140(1); W. VA. CODE § 21A-1A-16(7).

remuneration, they will be presumed to be an employee, unless all three of following elements are met:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
> (B) Such service is outside the usual course of the business for which such service is performed; and
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

If the employer fails to carry the burden to establish any of the three elements, the individual is deemed an employee. Only if all three elements are met, will the individual be determined to be an independent contractor. Another six States employ a version of the tests that only uses the (A) and (C) elements—i.e., the individual is an employee unless they are free from employer control and also customarily engaged in an independently established business.[17]

States opting for the ABC Test or A&C Test are often seeking enhanced predictability as well as protection for workers. For example, in *Hargrove v. Sleepy's, LLC*, the New Jersey Supreme Court determined which test to apply for purposes of the state's Wage Payment Law. 220 N.J. 289 (2015). The court compared various tests, considered the views of state regulators, and ultimately opted for the ABC Test not only because its broader protection is consistent with

[17] *See* 43 PA. STAT. § 753(l)(2)(B). This test under Pennsylvania's Unemployment Compensation Law is similar to prong A and C of the ABC test. *See also* COLO. REV. STAT. ANN. § 8-70-115; IDAHO CODE § 72-1316(4) (unemployment compensation); MONT. ADMIN R. 24.35.202(1) (minimum wage and overtime laws); WIS. STAT. §§ 108.01-108.26 (unemployment compensation, considering whether employee is free from employer control and satisfies at least six of nine factors); WYO. STAT. ANN. § 27-3-104 (unemployment compensation, considering factors that correspond to factors A and C.).

legislative intent, but also because it is "designed to yield a more predictable result[.]" *Id.* at 316. Such a broad presumption of employment helps these workers and others who "are separated from employment through no fault of their own" access critical social safety nets in times of acute need. *See Lowman*, 235 A.3d at 300.

While the Board cannot adopt a standard that makes one element dispositive, *United Insurance*, 390 U.S. at 256, there are nonetheless useful lessons to be drawn from these standards that can be incorporated into the Board's new standard. First, the Board should maintain the presumption of employment and continue to require the employer to carry the burden to rebut it. Second, the traditional common-law questions which have been incorporated in the ABC test, particularly as compared with the amorphous "entrepreneurial opportunity" factor given excessive weight in *SuperShuttle*, are difficult for an employer to manipulate or misuse, and will typically have clear and predictable answers.

In weighing the impact of entrepreneurial opportunity, the Board should look to Prong C of the ABC Test—whether an individual is customarily engaged in an independently established business—for guidance. Under Prong C, mere entrepreneurial opportunity for gain or loss itself is insufficient; the worker must operate a "stable and lasting" enterprise that "will clearly continue despite termination of the challenged relationship." *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 125 N.J. 567, 585-86 (1991). Thus, the worker's income cannot be disproportionately dependent on the employer's business. *Id.* Moreover, even if a worker is shown to be customarily engaged in an independently established business, they are not automatically deemed an independent contractor, and may still be deemed an employee if, for example, they are not free from the employer's control. *Id.* at 582-83. Such control need not be of "every facet of a person's responsibilities," but rather could be "some control" or even "the right to control the individual's

performance" reserved by contract. *Id*. at 582. Understanding the role of weighing entrepreneurial opportunity in this way—consistent with the Board's *FedEx* decision, as part of a larger inquiry—is essential to avoid radically expanding the independent contractor exemption in the way *SuperShuttle* did, as it helps distinguish between an established independent business and an ephemeral or theoretical moneymaking opportunity.

d. At a Minimum, the Board Should Return to Its *FedEx* Standard

Should the Board decide not to adopt a new standard, we would urge the Board to return to the independent contractor standard in *FedEx*. The fundamental distinction between employees and independent contractors under agency principles is that an independent contractor is an independent businessperson, not a part of the employer's business subject to the employer's control. *See* Restatement (Second) of Agency, ch. 7, topic 2, tit. B, introductory note.[18] In addition to evaluating the indicia of employer control as required by the Restatement test, the *FedEx* standard properly examines whether a worker is rendering services as part of an independent business in determining the worker's status as an employee or independent contractor. This inquiry is not "new," contrary to the *SuperShuttle* Board's characterization, 367 NLRB No. 75, at 2; rather, it derives directly from the common-law test. *See* Restatement (Second) Agency § 220(2)(b), (c), (h) (listing as factors "whether or not the one employed is engaged in a distinct occupation or business," the "kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision," and "whether or not the work is a part of the regular business of the employer.").

[18] "Another way to contrast the servant with the non-servant agent is to say that the servant is one within the personal or business household of the principal, whereas the non-servant is on the outside. The servant is, thus an integral part of his master's establishment; the non-servant aids in the business enterprise but is not a part of it."

As discussed above, fissured workplaces and the rise of the platform economy have exacerbated the problem of misclassification. Although *FedEx* presents an appropriate standard, it can be an awkward fit for much of the modern workplace. A more protective and broadly applicable standard would ensure that adopting modern technologies will not enable employers to evade workplace protections by making superficial changes to work arrangements. The Board could consider the insight provided by the Restatement of Employment Law. The Restatement of Employment Law clarifies the general common law principles that bind the Board in crafting an independent contractor standard and does not depart from the Restatement (Second) of Agency § 220. Ch. 1, introductory note, comment a ("we are restating common-law principles" in the context of the "rights and duties of employees"). It states that an employment relationship exists if "the individual acts, at least in part, to serve the interests of the employer; the employer consents to receive the individual's services; and the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson." Restatement of Employment Law § 1.01(a). The Restatement focuses on defining "employee" instead of attempting to define both "employee" and "independent contractor" in the same breath. This approach is sensible, because the precise nature of an independent contractor's relationship with a principal is not important in the context of employment protections; what matters is that they are not employees.[19]

[19] The Board has already looked to a draft version of the Restatement. *See FedEx*, 361 NLRB at 620 n.33, 621 & n.42. Several federal courts of appeals have endorsed the Restatement of Employment Law as stating the common law of agency in the employment context. *See Walsh v. Zurich Am. Ins. Co.*, 853 F.3d 1, 11 (1st Cir. 2017); *Anicich v. Home Depot USA, Inc.*, 852 F.3d 643, 653 (7th Cir. 2017); *Atterbury v. U.S. Marshals Serv.*, 805 F.3d 398, 408 n.6 (2d Cir. 2015); *Cardoni v. Prosperity Bank*, 805 F.3d 573, 587 (5th Cir. 2015); *Downs v. Bel Brands USA, Inc.*, 613 F. App'x 515, 521 (6th Cir. June 2, 2015) (Merritt, J., dissenting).

Finally, as regulators and enforcers of workplace protections ourselves, we understand the appeal of streamlined tests, which can be more practical for purposes of enforcement to protect workers and education to provide clarity to employers—and the common-law Restatement test provides the opposite, a non-streamlined, fact-specific, multi-factor analysis. But, for better or worse, that is what the Taft-Hartley Act and *United Insurance* require. When the *SuperShuttle* Board, in pursuit of streamlining, put a gloss on the Restatement by creating a new "animating principle" of entrepreneurial opportunity and applying it in such a vague way as to potentially deprive significant numbers of misclassified workers of the NLRA's protections, they did not promote clarity and departed from the statute. In accordance with the NLRA's purpose of "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of . . . self-organization," 29 U.S.C. § 151, any further gloss on the Restatement analysis should operate in a direction that *protects* workers, not one that threatens to carve them out of the statute. In any case, whatever standard is adopted should be at least as protective as the *FedEx* standard. [20]

[20] Not all workplace standards, even within the same state, will be the same or even equally protective. However, endowing these standards with the same basic orientation—to protect, rather than exclude workers—should facilitate efforts like the NLRB's recent Memorandum of Understanding with the U.S. Department of Labor's Wage and Hour Division, which focuses, in relevant part, on potential joint "investigations of . . . business models designed to evade legal accountability, such as the misclassification of employees." *See* Memo. of Understanding (Dec. 8, 2021), https://www.dol.gov/sites/dolgov/files/WHD/MOU/MOU_NLRB.pdf. They will also facilitate any current or future joint enforcement efforts with States and task forces.

## CONCLUSION

For the reasons stated above, the *Amici* Attorneys General urge the Board to reject the *SuperShuttle* independent contractor standard. The *Amici* Attorneys General further encourage the Board to adopt *FedEx* or a more protective standard as the appropriate independent contractor analysis.

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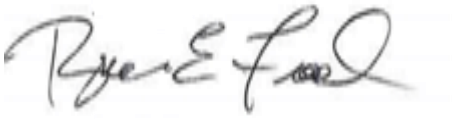

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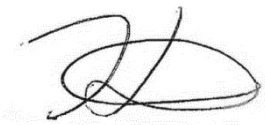

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## STATEMENT OF SERVICE

I, Lisa E. Eisenberg, hereby certify pursuant to 29 C.F.R. § 102.5(h), that a true and correct copy of the Brief of the States of New Jersey, Pennsylvania, California, Colorado, Connecticut, Delaware, Illinois, Maryland, Michigan, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, and the District of Columbia as *Amici Curiae* was electronically filed with the National Labor Relations Board on February 10, 2022, and that I caused to be served a true and correct copy of the same via email on the following parties:

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