UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC.

and Case No. 10-RC-276292

MAKE-UP ARTISTS

and

HAIR STYLISTS UNION, LOCAL 798, IATSE

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE

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The *Amici* are the 12 undersigned United States Senators that are concerned with the potential attempt by the National Labor Relation Board ("NLRB" or the "Board") to revise the definition of independent contractor under the National Labor Relations Act ("NLRA" or "Act"). Such a revision would constitute significant overreach and circumvention of Congress. Further, the questions posed by the Board are of great importance to our constituents, as the Board's determination will have both immediate and long-term effects on millions of workers currently classified as independent contractors.

SUMMARY OF ARGUMENT

The Board's Notice asks two questions: (i) Should the Board adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 37 NLRB No. 75 (2019); and (ii) 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? For the foregoing reasons, the Board should adhere to the independent contractor standard in *SuperShuttle* and no standard should replace it.

ARGUMENT

I. In response to Question 1, the Board should adhere to the independent contractor standard outlined in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).

The Board should adhere to its previously articulated multi-factor test that it has been applying for decades. The common law principles of agency embodied in the multi-factor test emphasize precisely those elements, such as the importance of entrepreneurial opportunity, that are integral to differentiating between an independent contractor and employee. Attempts to return to the independent contractor standard in *FedEx Home Delivery (FedEx II)*, 361 NLRB 610, 611

(2014) contradict two binding D.C. Circuit opinions, criticizing the Board for failing to fully consider entrepreneurial opportunity.[1] This action by the Board is a thinly-veiled attempt to institute via regulatory command worker classification changes contained within the Protecting the Right to Organize ("PRO") Act that Congress could not enact.

The National Labor Relations Act explicitly excludes "any individual having the status of an independent contractor" from the definition of "employee." 29 U.S.C. § 152(3). In applying the NLRA, the Board follows a common law agency test to determine if a worker is an employee or independent contractor, and those common law factors are set forth in the Restatement (Second) of Agency.[2]

The Supreme Court has noted that "there is no shorthand formula or magic phrase" to determine a worker's classification; rather, the determination of whether an individual is an independent contractor "is assessed in light of the pertinent common-law agency principles." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968). For decades, the Board took into account entrepreneurial opportunity for economic gain or loss as an integral factor worthy of great weight in determining independent contractor status. *See, e.g.*, *Dial-a-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (finding that separateness from the employer "is manifested in many ways, including significant entrepreneurial opportunity for gain or loss.").

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[1] *See FedEx v. NLRB*, (*FedEx I*) 563 F.3d 492 (D.C. Cir. 2009) (classifying single route drivers at FedEx's Wilmington, MA facilities as independent contractors under the NLRA following application of the common law agency test); *FedEx v. NLRB* (*FedEx III*), 849 F.3d 1123 (D.C. Cir. 2017) (holding that the Board, under the law-of-the-circuit doctrine, could not nullify *FedEx I*'s holding classifying FedEx drivers as independent contractors when confronting identical facts and parties).

[2] These factors include: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) 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; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. Restatement (Second) of Agency § 220(2) (Am. Law Inst. 1958)

In both D.C. Circuit cases, entrepreneurial opportunity has proven a factor that outweighs any indicia favoring employee classification. In *FedEx Home Delivery* (*FedEx I*), 563 F.3d 492, 497 (D.C. Cir. 2009), the court held that even the showing of theoretical entrepreneurial opportunity supports a finding of independent contractor status. Indeed, the D.C. Circuit was quite explicit that entrepreneurial opportunity "best captures the distinction between an employee and an independent contractor" as it is "the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder, that better illuminates one's status." *FedEx I*, 563 F.3d at 503 (quoting *Corporate Exp. Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (internal quotation marks omitted). However, in *FedEx II*, the Board minimized the consideration of entrepreneurial opportunity resulting in a broader definition of "employee" under the NLRA and an expansion of the Board's reach. It is important to note that in both cases the Board failed to appeal the case to the Supreme Court.

In response to the D.C. Circuit's findings in *FedEx I* and *FedEx III*, the Board correctly addressed the issue in its 2019 *SuperShuttle* decision by reconsidering and overruling the *FedEx II* decision. In *SuperShuttle*, the Board considered whether drivers who provided contracted services to a shared-ride van company should be classified as independent contractors. The Board ultimately held that entrepreneurial opportunity 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." *SuperShuttle*, 367 NLRB No. 75 (2019). Applying this standard, the Board found that SuperShuttle drivers were independent contractors due to their "ownership (or lease) and control of their vans, the principal instrumentality of their work, the nearly complete control [drivers] exercise over their daily work schedules and working conditions, and the method of payment." *Id.*

By using entrepreneurial opportunity to "help evaluate the overall significance of the [common law] agency factors", the Board found that SuperShuttle drivers have a "significant opportunity for economic gain and significant risk of loss." *Id*. The Board has continued to adhere to this precedent when deciding worker classification cases and issuing guidance, including a 2019 memorandum involving Uber in which the Board classified Uber drivers as independent contractors.[3] This standard has been a victory for workers who prefer flexibility and are budding entrepreneurs that operate as independent contractors, and to abruptly change how the Board classifies workers not only endangers the consistency of Board precedent, but also implicates decades of stakeholder reliance interests.

Moreover, it is ultimately Congress's obligation, as a political branch of government, to amend the NLRA and make any drastic changes to how and when workers are classified as independent contractors. Congress has indeed attempted to clarify the classification of independent contractors in the past. Most recently, Members in the House and Senate introduced the PRO Act, which would amend the NLRA by adopting the "ABC test" to determine employee status in relation to the National Labor Relations Act.[4] The proposed statutory change in the PRO Act, and Congress declining to adopt it, shows that Congress has neither delegated nor ignored its sole constitutional authority to amend the standard; Congress is just unwilling to do so at this

[3] *See* Advice Memorandum from Jayme L. Sophir, Assoc. Gen. Couns., Div. of Advice, Nat'l Lab. Rel. Bd, to Jill Coffman, Reg'l Dir., Region 20 (Uber Tech., Inc.) (Apr. 16, 2019), https://www.nlrb.gov/guidance/memosresearch/advice-memos.

[4] Specifically, the ABC test, as articulated in the PRO Act, states that:

> An individual performing any service shall be considered an employee . . . and not an independent contractor, unless—
> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
> (B) the service is performed outside the usual course of business of the employer; and
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

H.R. 842, 117th Cong. § 101(b) (2021).

time. Congressional opposition to the change is, in part, because many Members believe that the current approach is best adapted to a twenty-first century economy.

The Senate has been unable to pass the PRO Act due to a lack of broad support. Particular concern has been raised by individuals currently classified as independent contractors regarding the regulatory burdens they would be forced to assume as employees, and the subsequent damage the obliteration of the independent contractor model would have on their livelihood. Our offices have heard from various individuals and groups worried about losing the flexibility and entrepreneurial opportunity inherent to the status of an independent contractor. Attempts to restrict independent contracting by Congress or the Board overwhelming hurt individuals who have taken advantage of the "gig economy" particularly during the COVID-19 pandemic. Innovations and on-demand companies have opened doors for these individuals as freelance workers able to make their own hours and pursue other economic opportunities. Individuals such as ride-share drivers, financial advisors, direct sellers, truckers, franchisers, and others view their independent contractor status as permitting the full pursuit of the American dream by endowing them with the flexibility to make their own schedule, extricate them from strict, impractical obligations to the company, and seek supplemental economic opportunities.

A study by Upwork found that 68 percent of new freelancers say that 'Career Ownership' is a top draw and that 78 percent cited 'schedule flexibility' as a key reason for freelancing. Forty-four percent say they earn more from freelancing than as a traditional employee and 56 percent of non-freelancers say they are likely to freelance in the future. Dr. Adam Ozimek, *Freelance Forward Economist Report*, UPWORK, https://www.upwork.com/research/freelance-forward-2021 (Last visited February 2, 2022). A 2018 Bureau of Labor Statistics Contingent Worker Survey found that less than 1 out of every 10 independent contractors would prefer a traditional

employment status. *See* U.S. Bureau of Labor Statistics, *CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS*, (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf. As a result of this opportunity we have seen rapid growth in the "gig economy" and other freelance work.

While there is not a formal definition or classification of the "gig economy" some estimate that in 2018 independent contractors contributed $1.28 trillion to the U.S. economy. A labor union study estimated that 57 million Americans engaged in freelance work in 2019. *See The Changing Gig Economy*, SENATE REPUBLICAN POLICY CONFERENCE (Aug. 13, 2020), https://www.rpc.senate.gov/policy-papers/the-changing-gig-economy. A different study estimates that 59 million Americans performed freelance work in 2021 and contributed $1.3 trillion to the U.S. economy in 2020. *Freelance Forward Economist Report*, UPWORK, https://www.upwork.com/research/freelance-forward-2021 (Last visited February 2, 2022). This diversification and twenty-first century flexibility had led to a growth in direct sellers, who are currently under threat from being reclassified as employees. According to the Direct Selling Association, in 2020 there were record highs in retails sales ($40.1 billion), sellers (7.7 million), and customers (41.6 million). *Direct Selling in the United States: 2020 Industry Overview*, DIRECT SELLING ASS'N, (last visited Jan. 21, 2022), https://www.dsa.org/statistics-insights/overview. Of the 7.7 million direct sellers, who are considered independent contractors under current standards, 75% were women. *Id.*

The "ABC test" included in the PRO Act, like any attempts to return to the *FedEx II* standard, fails to address worker classification issues. Attempting to place the burden on the independent contractor to prove that their work fits into three restrictive elements attempts to apply a narrow, restrictive test to the vibrancy of a twenty-first century economy. Such a restrictive test,

which in essence operates under the presumption that most workers are employees unless they can prove otherwise, would greatly disrupt industries that rely on independent contractors. Former Board Chairman Philip Miscimarra and former Board Member Harry Johnson, III contend that the changes to independent contractor status in the PRO Act "would substantially unravel and change large segments of the U.S. economy and cause millions of jobs to be eliminated or restructured." Philip Miscimarra & Harry Johnson, III, *The Pro Act's Changes to Independent Contractor Status: Unraveling the U.S. Economy*, MORGAN LEWIS (Apr. 20, 2021), https://www.morganlewis.com/pubs/2021/04/the-pro-acts-changes-to-independent-contractor-status-unraveling-the-us-economy. The American Action Forum conservatively estimates the "ABC test" could add $3.6 billion to $12.1 billion in costs to businesses and put 8.5 percent of gross domestic product (GDP) at risk. Isabel Soto, *Economic Costs of the PRO Act*, AMERICAN ACTION FORUM, January 21, 2020, https://www.americanactionforum.org/research/economic-costs-of-the-pro-act/. SIFMA, which represents the nation's securities industry, has 150,000 independent financial advisors across the country that would be impacted by changes to the independent contractor definition. *See* SIFMA, *The PRO Act and ABC Test Briefing*, (Spring 2021), https://www.sifma.org/wp-content/uploads/2021/05/SIFMA-Debrief-on-PRO-ACT-May-2021-1.pdf. Further, changes that result in the reclassification of millions of workers by Congress or the Board will result in significant litigation over and alleged misclassification violations and destroy any distinction between an employee and independent contractor.

One of the primary goals of the PRO Act is to expand the NLRA and promote organized labor membership, which in 2021 was reported as making up 6.1 percent of the private sector workforce. *See* U.S. Bureau of Labor Statistics, *Union Members Summary 2021*, (January 20, 2022), https://www.bls.gov/news.release/union2.nr0.htm. A key component to this expansion is

accomplished through the reclassification of workers from independent contractors to employees. It is clear that "the PRO Act seeks to revise the NLRA to incorporate the 'ABC test' and reclassify millions of traditional independent contractors as 'employees' subject to union representation." Alan Model, Kevin Burke, Maury Baskin, and Michael Lotito, *PRO Act Would Upend U.S. Labor Laws for Non-Union and Unionized Employers Alike*, LITTLER (Feb. 10, 2021), https://www.littler.com/publication-press/publication/pro-act-would-upend-us-labor-laws-non-union-and-unionized-employers. In a press release, the AFL-CIO even stated that the 0.5 percent drop in union membership from 2020-2021 showed the need for enactment of the PRO Act. *See Union Membership Numbers Reflect Broken Labor Laws*, AFL-CIO (Jan. 20, 2022), https://aflcio.org/press/releases/union-membership-numbers-reflect-broken-labor-laws. In other words, it is clear that many unions seek enactment of the PRO Act as a vehicle for requiring millions of independent contractors to be subject to union dues, which have dwindled with the drop in union membership. According to the Institute for the American Worker, if the PRO Act passes unions could collect $9 billion more in annual dues. Nathan Mehrens, *The PRO Act and Union Finances: Likely Effects on Union Income and Spending from Enactment of the Protecting the Right to Organize Act of 2021*, INSTITUTE FOR THE AMERICAN WORKER (April 2021), http://i4aw.org/wp-content/uploads/2021/05/The-Pro-Act-and-Union-Finances-1.pdf. Any attempt by the Board to return to the *FedEx II* independent contractor standard would constitute a blatant attempt to meet this goal of the PRO Act, while also circumventing Congress and going against established precedent to achieve this goal.

In conclusion, the Board should adhere to the *SuperShuttle* independent contractor standard. This standard correctly weighs the importance of entrepreneurial opportunity when determining a worker's status as an independent contractor or employee. Any significant changes

that would shift the classification of millions of workers from independent contractors to employees must be left for Congress to decide.

II. In response to Question 2, the board should not replace the *SuperShuttle* standard.

As outlined above, the Board should not replace the *SuperShuttle* standard for independent contractor classification and, thus, should not return to the standard set forth in *FedEx II*, either in its entirety or with modifications.

CONCLUSION

For the foregoing reasons, the Board should adhere to the independent contractor standard articulated in *SuperShuttle* and decline to revisit the *FedEx II* standard, either in its entirety or with modifications.

Respectfully submitted,

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