UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC. And JEANNIE EDGE, An Individual	Case 15-CA-184006

BRIEF OF *AMICUS CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

The Coalition for a Democratic Workplace ("CDW") and Chamber of Commerce of the United States of America ("Chamber") submit this *amici curiae* brief in response to the National Labor Relations Board's ("NLRB's" or "Board's") February 15, 2018 Notice and Invitation to File Briefs in response to *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501 (Sept. 25, 2017) (herein "ALJD"). The Board's invitation presents the following issue for consideration:

> Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?

The Board should decline to revisit or revise the existing standard and should reject the novel theory that misclassifying a worker as an independent contractor, alone, violates Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §158(a)(1). The Board has never before held that an employer's misclassification of employees as independent contractors in itself violates the Act, and it should decline any invitation to do so. Instead, *amici* urge the Board to adhere to its current standard, which has governed the law in this area for approximately 70 years. Indeed, current General Counsel Peter Robb has now formally rescinded previously-issued guidance in support of a "misclassification-as-violation" theory of the Act. *See* Peter B. Robb, General Counsel Memorandum 18-02 (Dec. 1, 2017) ("Memo 18-02"), *available at* https://www.nlrb.gov/reports-guidance/general-counsel-memos (rescinding Advice memoranda arguing that an employer's misclassification decision, in and of itself, violates Section 8(a)(1)). This rescission, further outlined in the General Counsel's April 25, 2018 brief in this matter ("GC's Brief"), is well-founded.

There is no good reason to deviate from existing precedent, and doing so would threaten the stability of valid independent contractor relationships. Over 54 million people perform work as independent contractors in the United States, including many individuals and entities that

contract with the *amici*'s members. *See* McKinsey Global Institute, *Independent Work, Choice, Necessity, and the Gig Economy* (Oct. 2016), *available at* https://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy (estimating there are 54 million to 68 million independent earners in the U.S.). Establishing a standard that would treat a classification error as *ipso facto* an unfair labor practice would chill and constrict the willingness of businesses to engage such contractors, particularly where an honest mistake would be treated as a strict-liability violation of the Act under Section 8(a)(1).

This case presents no new or compelling reason for modifying the Board's standard. The concept of an unfair labor *practice* requires that an employer take some additional steps beyond simply taking a legal position regarding the classification of a worker in order for liability to attach under the Act. Indeed, without such additional acts, the Board's entire evidentiary standard in Section 8(a)(1) charges will be upended, resulting in an impossible conflict between a business's burden of proof to establish independent contractor status and the burden of proof on the underlying unfair labor practice ("ULP"). Thus, the Board's current standard of requiring both misclassification and some *additional* ULP before finding a violation of the Act strikes an appropriate balance between the need to classify workers and the prohibition on coercive conduct. Without this two-step process, every act of contractor classification turns into a potential violation of the Act, implicating not just contractor designations, but also, potentially, the identification of statutory supervisors under Section 2(11), as well as other legal determinations and labels under the statute. The Act simply cannot function, as detailed below, with each such decision posing a risk of an unfair labor practice and its attendant consequences.

Nor is such a change supported by the legislative history of the Act. Congress added the statutory exclusion for independent contractors embodied in Section 2(3) of the Act, 29 U.S.C.

§152(3), during the Taft-Hartley amendments of 1947. These amendments arose because Congress sought to rebuke the Board for creating an overly broad definition of "employee." Accordingly, the legislative history demonstrates Congressional intent to *restrain* the Board and conclusively place certain categories of individuals outside of the Act. Creating a new "misclassification unfair labor practice" will only serve to chill employers from engaging in legitimate economic relationships that Congress *explicitly* sought to preserve and protect.

Furthermore, the misclassification-as-violation standard adopted by the ALJ significantly restricts a company's free speech rights. At its core, the ALJ's decision treats communication of the employer's legal conclusion regarding independent contractor status as a *de facto* coercive statement, rather than evidence of the parties' own subjective intent. Treating such communications as freestanding violations of the Act would therefore run afoul of Section 8(c), 29 U.S.C. §158(c). The General Counsel cannot circumvent Section 8(c)'s restrictions by simply declaring valid business-related communications to be coercive, and the Act cannot sustain a reading that treats any good-faith mistake regarding classification as coercive speech.

For all of these reasons, the Board's decision in this matter will have an impact far beyond the parties to this case. *Amici* urge the Board to carefully weigh the potential costs of a change in the law and to reject this drastic departure.

II. SUMMARY OF THE CASE

This case involves an unfair labor practice charge filed by an individual worker, Jeannie Edge ("Edge") against Velox Express ("Velox" or the "Company"), which operates a courier service. *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501, at slip op. 3 (Sept. 25, 2017) (herein "ALJD"). Edge and Velox had executed an independent contractor agreement, under which Edge served as a driver / medical courier for Velox.

Edge filed a charge with the Board after Velox terminated her contract in August 2016. As is relevant here, the General Counsel alleged that Velox violated Section 8(a)(1) of the Act by misclassifying its drivers as independent contractors, rather than employees. *Id.* On September 25, 2017, the ALJ issued his decision, validating, *inter alia*, the General Counsel's argument that the misclassification itself was a ULP. *See id.* at 14 ("By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 . . . ."). On October 23, 2017, Velox filed exceptions with the Board, which remain pending.

III. ARGUMENT

A. Introduction

One key purpose of the NLRA is to create a national system to regulate collective bargaining. *See* 29 U.S.C. § 151. That federal system, however, deliberately excludes independent contractors from its ambit. *See* 29 U.S.C. §152(3). Although disputes over the classification of particular workers as either contractors or statutory employees are not new, this case presents a significant and unprecedented diversion from established Board law. Indeed, as the General Counsel expressly recognizes, never before has the NLRB held that an employer's misclassification of employees as independent contractors in itself violates Section 8(a)(1). *Menard, Inc.*, 18-CA-181821, 2017 WL 5564295, at n.6 (NLRB Div. of Judges Nov. 17, 2017). Despite the absence of any such precedent, former General Counsel Richard Griffin announced in 2016 his interest, as a policy matter, in changing Board law. *See* General Counsel Memorandum 16-01 (Mar. 22, 2016), *available at* https://apps.nlrb.gov/link/document.aspx/09031d4582055664 (instructing Regions to send to the Division of Advice cases involving the question of whether the misclassification of employees alone violates Section 8(a)(1)). *Id.* As noted above, the Board's current General Counsel, Peter Robb, has rescinded this position.

See GC's Brief, at 5 (rejecting ALJ's conclusion "that the Employer's misclassification, standing alone, was unlawful"); Peter B. Robb, Memo 18-02, *supra* (rescinding Advice memoranda arguing that an employer's misclassification decision, in and of itself, violates Section 8(a)(1)).

The undersigned *amici* submit that this case presents a significant policy concern. The Taft-Hartley Act's amendment removing both supervisors and independent contractors from the definition of employees indicates Congressional intent to secure a class of persons unregulated by Section 7, making wholly inappropriate the attempt to chill businesses in their use of valid contractor relationships. As explained below, the position outlined in the ALJ's decision would drastically alter the parties' burden of proof, create substantial risks of unintended practical consequences, ignore the Act's own legislative history, violate free speech rights protected under Section 8(c) of the Act, and inappropriately interfere with legitimate private commercial relationships.

B. Establishing Misclassification as a "Standalone" Unfair Labor Practice Requires a Radical and Inappropriate Change to the Parties' Respective Burdens Of Proof.

The new "misclassification-as-violation" standard set forth by the ALJ essentially collapses a two-step inquiry into a single question. Specifically, under current Board law, to prove an employer unlawfully chilled protected concerted activity, at least two prerequisites are required: (1) the individual workers must be employees covered by the Act, and (2) the employer must take some adverse action or engage in some kind of conduct or omission that might chill protected conduct. *See, e.g., Sisters Camelot*, 363 NLRB No. 13 (Sept. 25, 2015) (holding employer violated Section 8(a)(1) of the Act by, *inter alia*, making coercive statements to individuals deemed to be misclassified employees). There can be no unfair labor practice without both statutory employees and relevant employer conduct.

The proposed new standard adopted by the ALJ, which would collapse these two prerequisites into a single question of whether any workers were misclassified, presents a particular problem regarding the applicable burden of proof. A respondent asserting independent contractor status, for example, has the burden of proof on that issue. *FedEx Home Delivery*, 361 NLRB 610, 610 (Sept. 30, 2014), *vacated*, 849 F.3d 1123 (D.C. Cir. 2017).[1] In contrast, the General Counsel has the burden to establish the conduct underlying unfair labor practices, as recognized by Section 10(c) of the Act itself. *See* 29 U.S.C. §160(c) (requiring a Board order to be based on the preponderance of the testimony). Such standards are particularly incompatible where—as ALJ Arthur Amchan's own opinion recognizes—agencies and courts often "**err** on the side of finding employee status." ALJD, at 8 (emphasis added).[2]

The burden of proof becomes even more significant given that Section 8(a)(1) charges over coercive conduct need not rely on the employer's actual intent. *See El Rancho Market*, 235 NLRB 468, 471 (1978) (finding it "too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion") (citing *American Freightways*, 124 NLRB 146, 147 (1959)); *see also Homer D. Bronson Co.*, 349 NLRB 512, 539 (2007) ("Because the [employer's

[1] *Amici*'s reference to the *FedEx* decision should not be construed as an endorsement of the Board's approach in that case. The Board has not addressed the D.C. Circuit's decision vacating its decision in that case. *See FedEx Home Delivery v. N.L.R.B. ("FedEx II")*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) ("Having chosen not to seek Supreme Court review in *FedEx I*, the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer.").

[2] ALJ Amchan's observation illustrates the point that the contractor classification decision would be especially perilous, if, standing alone, it could be an unfair labor practice. Because there is no enhanced burden of proof written into the Act for an employer seeking to prove independent contractor status, the ALJ's observation that judges often "err" in favor of finding employee status demonstrates how widespread a problem a new "misclassification ULP" would be. To be clear, *amici* are opposed to the Board creating any enhanced evidentiary standard or adverse presumption against businesses in this area.

actions] are alleged only as violations of Section 8(a)(1), motive is irrelevant."). Accordingly, there is no rebuttable burden-shifting analysis in such cases. *Cf. Wright Line, Inc.*, 251 NLRB 1083 (1980) (discussing shifting presumption in Section 8(a)(3) cases).

Thus, the standard adopted by the ALJ essentially seeks to eliminate the requirement of any coercive act or conduct, collapsing the established test into a single question of whether the respondent properly classified independent contractors. That burden would fall on the respondent and, if employee status is established—or once a judge *errs* on the side of finding such status—it would create an irrebuttable presumption that the employer had chilled protected activity in violation of § 8(a)(1). Such an approach violates the NLRA. 29 U.S.C. §160(c).

C. The Practical Effect: Treating Worker Classification Alone as an Unfair Labor Practice Would Turn the Act On Its Head.

Not only would such a radical change in the standard conflict with established precedent, it also would have significant negative effects on the administration of the Act. The standard adopted by the ALJ essentially seeks to characterize any misclassification *ipso facto* as an unfair labor practice. Such an approach ignores the fact that that making classification decisions is an unavoidable part of the day-to-day reality of all businesses.

In the course of establishing a comprehensive set of rules for industrial relations in this country, the NLRA includes a number of statutory definitions and classifications regulated in some way by the Act. These labels, including "supervisor," "employee," "independent contractor," and "labor organizations," define what type of rule or regulation under the Act applies to what type of person, and, as even the Supreme Court has recognized, interpreting such statutory terms is "far from self-explanatory." *Marine Eng'rs Beneficial Assn. v. Interlake*, 370 U.S. 173, 178 (1962) (recognizing that "the task of interpreting and applying the statutory definition of a 'labor organization' … is one which may often require the full range of Board

competence."); *see also NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968) (noting that "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor").

Indeed, millions of businesses in the United States use independent contractors on a day-to-day basis and must regularly make such decisions. Companies, for example, regularly require services that they, themselves, are not in the business of providing. There are a multitude of examples, including delivery services, repair services, or even consulting or legal services. And it is wholly beneficial to the U.S. economy to allow businesses to contract out for work that they would prefer not to directly handle themselves. In making those decisions, the companies must evaluate how to structure those arrangements, make a legal determination regarding contractor status, and communicate about those decisions.

Moreover, while this case focuses only on independent contractors, the logic applied by the ALJ could be invoked regarding every labelling decision that excludes an individual from the full ambit of Section 7 protections afforded to statutory employees. Therefore, labeling an individual as a supervisor, or even as a security guard, could create a risk of an automatic unfair labor practice. *See, e.g.,* 29 U.S.C. §152(3) (excluding supervisors from the definition of employees); 29 U.S.C. § 159(b) (no mixed guard/non-guard unions). Accordingly, legal determinations that are a necessary part of legitimate business operations—such as evaluating who is or is not supervisor, an employee, an agricultural laborer, a worker in the domestic service of any family, or an employer subject to the Railway Labor Act—would all become fraught with risk of unfair labor practice charges. *See* 29 U.S.C. § 152(3).

Take, for example, the identification of statutory supervisors, which is a commonly litigated issue in election proceedings. Despite the complexity and evolution of the law in this

area,[3] both large and small businesses must make such determinations on a daily basis. Should, however, the Board adopt the ALJ's proposed test—creating unlawful coercive conduct any time an individual is misclassified—the Board could create a scenario where any misclassification could also require the election to be set aside. Specifically, in determining whether to set aside an election, the Board analyzes whether the employer's conduct has a tendency to interfere with employees' free choice. *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 2 (Mar. 28, 2011) ("the election must be set aside if the maintenance of these rules 'could…reasonably have affected the results of the election'"). In cases in which a representation petition and unfair labor practice charge are consolidated, the Board has stated that the election must be set aside unless it is "virtually impossible" to conclude that the misconduct could have affected the election results." *Airstream, Inc.*, 304 NLRB 151, 152 (1991) (second election ordered because employer's conduct was more than de minimis, and thus it was not "virtually impossible to conclude that [the violation] could have affected the results of the election"); *Super Thrift Mkts., Inc.*, 233 NLRB 409, 410 (1977) (ordering a new election because it was not "virtually impossible to conclude that [the employer's statements] could have affected the results of the election"). If misclassification itself is treated as coercive, the Board would likely have to set aside any election in which classification (either as to supervisors or independent contractors) is at issue. *See, e.g., Pearson Educ., Inc.*, 336 NLRB 979 (2001) (invalidating an election based on employer's coercive leaflet). In short, it is impossible to have any kind of well-functioning

[3] The Board Members themselves, in fact, disagree on the proper standard for identifying such positions. *See, e.g., Veolia Transp.*, 363 NLRB No. 188, at slip op. 14 (May 12, 2016) (Miscimarra, dissenting) (calling the Board majority's analysis of supervisory status "increasingly abstract and out of touch with the practical realities of the workplace"); *Buchanan Marine, L.P.*, 363 NLRB No. 58, at slip op. 4 (Dec. 2, 2015) (Miscimarra, dissenting) (same).

system if businesses are chilled from communicating supervisory status, independent contractor relationships or other legitimate business classifications to those individuals they affect.

D. Treating Classification Decisions as Unfair Labor Practices Violates the Intent of Congress.

The misclassification-as-violation standard adopted by the ALJ, moreover, lacks any basis in the legislative history of the Act and would only serve to chill and chip away at valid economic activity that Congress *explicitly* wanted to preserve. Prior to the Taft-Hartley amendments in 1947, neither supervisors nor independent contractors were expressly excluded from the NLRA's definition of "employee." Following a decision in *Hearst Publications,* 322 U.S. 111 (1944), in which the Board and the Supreme Court held "newsboys" were covered by the Act, Congress reacted and unambiguously carved out independent contractors from the NLRA. Expressly reproaching the Board and the Supreme Court, the House Report declared, "there has always been a difference, and a big difference between 'employees' and 'independent contractors.'" H.R. Rep. No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 309. "It is inconceivable[,]" the Report explained, "that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished." *Id*. Accordingly, Congress intended independent contractors to be left to the free market, given their "demonstrated . . . ability to care for themselves without depending upon the pressure of collective action," especially since someone is typically an independent contractor because he "believe[s] the opportunities thus opened to [him] to be more valuable" than traditional employment. H.R. Rep. No. 80-245, at 17. "To correct what the Board has done," Congress thus "exclude[d] 'independent contractors' from the definition of 'employee.'" *Id.* Accordingly, the legislative

history of the Taft-Hartley amendments demonstrates the legislature's intent to *restrain* the Board and conclusively place certain categories of individuals outside of the Act.

Thus, unlike other exemptions from the Act, such as the "agricultural laborer" classification at issue in *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996), the legislative history of Section 2(3) of the Act proves Congress was concerned with the independent contractor exemption being too narrowly interpreted. *See FedEx Home Delivery,* 361 NLRB 610, 630 (2014) (Johnson, dissenting). Notably, in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), the Supreme Court explicitly rejected the principle that the exemptions to the FLSA should be narrowly construed. As the Supreme Court explained: "Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." *Id.* at 1142 (internal citations omitted). The same should hold true for the independent contractor exemption under the Act. Indeed, it is actually an unfair labor practice itself to force an independent contractor to join a union, further demonstrating congressional intent to leave such contractors outside the Act's coverage. *See* 29 U.S.C. § 158(b)(4)(ii) (providing it is an unfair labor practice to force a "self-employed person to join any labor…organization"); *Wilson & Co. Inc.*, 143 NLRB 1221, 1226 (1963) (Union ordered to cease conduct aimed at forcing self-employer operators to join labor organization).

Thus, the proposed test as articulated by the ALJ would ignore this intent and further shrink the scope of legitimate independent contractor relationships.

E. Adopting the Approach Adopted by the ALJ Violates Free Speech Rights in Violation Of Section 8(c) of the Act.

At its core, the ALJ decision concludes that misclassification is in itself an unfair labor practice because of the message it communicates to workers. The Company's classification

decision, the ALJ argued, was "effectively telling [the workers] that they are not protected by Section 7…" ALJD, at 14. Merely telling workers how the Company seeks to structure its economic relationship, however, cannot violate the Act. Section 8(c) of the Act "specifically prohibits [the Board] from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice." *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 405 (1953). Section 8(c) commands that the "expressi[on] of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

When deciding how to structure relationships with various categories of workers, a business *must* communicate about its views with those workers. There is no other way to discuss issues like pay rates and economic terms of a relationship. A contractor classification decision, at its core, is merely an opinion about a legal status, and such opinions are expressly protected by the Act. 29 U.S.C. § 158(c); *see also*, *e.g.*, *Children's Center for Behavioral Dev.*, 347 NLRB 35, 36 (2006) (holding that "[a]lthough the [employer's] position has now been rejected, there is nothing unlawful in stating a legal position, even if it is later rejected**.**"); *North Star Steel Co.*, 347 NLRB 1364, 1367 n.13 (2006) ("8(c) does not require fairness or accuracy").

The proposed test adopted by the ALJ targets communications that, in its view, communicate a mistake about the employee's status, converting good-faith mistakes into coercive speech. In the election setting, for example, the Board has refused to intervene in policing the veracity of employer statements. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (refusing to "probe into the truth or falsity of the parties' campaign statements"). When reflecting on standards pre-*Midland*, during which the Board attempted to evaluate the veracity of campaign statements, the NLRB held that such efforts, *inter alia*, restricted free speech,

increased litigation, and decreased the finality of election results. *Id.* at 131. The Board rejected such a "counterproductive" standard, *id.* at 132, which it should do here as well. Simply stated, the General Counsel should not be permitted to circumvent Section 8(c)'s restrictions by declaring legitimate, even if ultimately mistaken, business-related communications to be coercive.

F. The Board Should Not Chill Independent Contractor Relationships And Their Important Role.

It cannot be disputed that independent contractors play an important role in the U.S. economy. Businesses may use contractors, for example, where they have the need for particular expertise or flexibility. Such arrangements, accordingly, provide a means of contracting where fixed employment is unnecessary, increasing the available opportunities for workers, and, often, prospects to build small businesses. *See* Jeffrey A. Eisenach, Navigant Econ., *The Role of Independent Contractors in the U.S. Economy* (2010), *available at* https://www.aei.org/wp-content/uploads/2012/08/-the-role-of-independent-contractors-in-the-us-economy_123302207143.pdf (discussing economic benefits of contractor relationships). Moreover, many independent contractors report higher levels of satisfaction than those in traditional employment relationships. McKinsey Global Institute, *supra*, at 10 (noting independent workers by choice reported higher levels of satisfaction than any other group involved in the survey).

All of this, of course, benefits economic growth and can lead to innovation and expanded opportunities for business, workers, and consumers. As Congress recognized, this entrepreneurial opportunity is a significant aspect of such independent contractor arrangements, noting that contractors "depend for their income not upon wages, but upon…profits." H.R. Rep. No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 309.

Such contractor relationships, however, rely on consistency in the law. Established precedent creates the backdrop against which businesses can structure their private agreements and economic terms. Changing the law in this area, particularly to a standard never before used, creates instability, unpredictability, and uncertainty. The Board should not disrupt approximately 70 years of established precedent without a compelling reason to do so.

Specifically, Board precedent makes clear that the NLRB should not do unnecessary violence to valid economic business decisions. *See, e.g., First Nat. Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 686 (1981) (considering the "harm likely to be done to an employer's need to operate freely"). The Board has even recognized as a valid goal the need to "protect[ ] the autonomy of employers in their selection of independent contractors with whom to do business." *Computer Assocs. Int'l, Inc.*, 324 NLRB 285, 286 (1997) (discussing *Malbaff Landscape Construction*, 172 NLRB 128 (1968)). For this very reason, the Board has refused to find a violation where a business substitutes one independent contractor for another. *Id.* at 129. Nor is the NLRB empowered to "second-guess" legitimate business decisions. *Sams Club*, 349 NLRB 1007, n.10 (2007). Yet that is exactly what will happen here.

Indeed, as previously noted, the ALJ in this case explicitly recognized that there are times when a court or agency itself simply will "err" on the side of finding employee status. ALJD, at 8. Such Monday-morning quarterbacking creates a scenario where classification decisions will be evaluated *post-hoc* and, therefore, potentially based on evidence of control, statements, and/or circumstances that arose *after* a company's initial classification determination. In other words, the law will no longer allow for good-faith mistakes or legitimately close calls. There will only be, in effect, strict liability. Such a standard will significantly restrict the number of businesses

willing to accept the risk of using independent contractors, creating the kind of "obstruction[ ] to the free flow of commerce" that the Act opposes. *See* 29 U.S.C. § 151 *et seq.*

IV. **Conclusion**

For the foregoing reasons, the *amici curiae* respectfully request that the Board reject the position that a respondent violates Section 8(a)(1) of the Act solely by misclassifying an employee as an independent contractor. To the extent that the Board does take account of such misclassification at all, as argued in the GC's Brief and contrary to the views of *amici curiae*, the Board should be cautious not to effect accidentally the misclassification-as-violation theory by creating an overbroad legal standard. Instead, there must first exist a clear nexus between the misclassification and the unfair labor practices. Further, that nexus must also be apparent to the employer at the time of those unfair labor practices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a copy of the foregoing Brief of *Amici Curiae* Coalition for a Democratic Workplace and Chamber of Commerce of the United States of America was e-filed with the National Labor Relations Board, and a copy was served, via email, upon the following participants identified on the Board's website:

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