UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MAKE-UP ARTISTS AND HAIR STYLISTS UNION, LOCAL 798, IATSE,

And **Case No. 10-RC-276292**

THE ATLANTA OPERA, INC.

AMICUS CURIAE BRIEF OF

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber submits this brief in response to the Notice and Invitation to File Briefs in this case, which asks whether—and if so, how—the National Labor Relations Board ("NLRB" or the "Board") should modify its independent-contractor standard. *See The Atlanta Opera, Inc.* (Case No. 10-RC-276292), 371 NLRB No. 45 (Dec. 27, 2021). This question is of significant concern to the Chamber, many of whose members are subject to the National Labor Relations Act ("NLRA" or the "Act"). The Chamber has a significant interest in ensuring the Board continues to use an independent-contractor standard that adheres to the Act and well-established legal principles, protects economic stakeholders, and provides predictability to businesses and workers alike.

I. Introduction

On December 27, 2021, the Board solicited *amicus* briefs on 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?

The Chamber answers the first question in the affirmative, and the second question in the negative. The Board's *SuperShuttle* decision properly restored its independent-contractor standard to accord not only with decades of precedent, but with controlling common law principles, congressional intent, and the Act itself. It should adhere to that standard. And in *Super Shuttle*, the Board rightly rejected the flawed standard it had previously adopted in *FedEx II*. It should do so again. Among its many errors, the Board's *FedEx* decisions wholly misapplied common law and implicitly endorsed the long-rejected "economic realities" test. The Board sought to cast "entrepreneurial opportunity" as simply a new factor among many used to determine independent contractor status, rather than as a "lens" through which those traditional factors should be viewed. This effort—meant to limit independent contractor status—deviated from well-established precedent, congressional intent, and the legitimate considerations inherent to independent contractor arrangements. That the Board should now consider a return to its prior errors is untenable.

Reversing *SuperShuttle* after only three years would exacerbate stakeholder uncertainty and undermine agency credibility. More importantly, it would directly conflict with D.C. Circuit precedent. The court has repeatedly endorsed the standard set out in *SuperShuttle*, and it has rejected attempts to develop new standards clearly aimed at yielding pre-determined conclusions. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*") (outlining independent contractor standard later adopted by the Board in *SuperShuttle*); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) ("*FedEx II*") (reaffirming prior standard and criticizing the Board for adopting a contrary standard). The Board would be prudent to abide by this precedent, particularly where doing otherwise leads to confusion and disarray for stakeholders, and reinforces the perception of the agency as a results-driven partisan body.

Beyond these important legal and practical reasons, the current circumstances present no reason for the Board to deviate from *SuperShuttle*. Indeed, no party in this case has asked the Board to modify its approach. And nothing, beyond a change in the Board's membership, has happened since *SuperShuttle*'s issuance to justify a departure.

For these reasons, the Board should continue to apply the framework outlined in *SuperShuttle* for determining independent contractor status.

II. Background of the Board's Independent-Contractor Standard

A. The Common-Law Agency Test

To start, and as discussed more below, the Board is constrained in the standard it applies to determine independent contractor status by the common-law agency test. *See NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968) ("*United Insurance*"). The Board must apply the common law test of agency as delineated in the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957). *See Roadway Package System*, 326 NLRB 842, 850 (1998) ("*Roadway III*"). The RESTATEMENT provides the following non-exhaustive list of factors for evaluating putative independent contractor status:

(1) the extent of control the employer has over the work;

(2) whether the worker is engaged in a distinct occupation or business;

(3) whether the kind of occupation is usually done under the direction of the employer or by a specialist without supervision;

(4) the skill required in the particular occupation;

(5) whether the putative employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) the length of time for which the person is employed;

(7) whether the putative employer pays by the time or by the job;

(8) whether the worker's work is a part of the regular business of the employer;

(9) whether the putative employer and worker believe they are creating an employer-employee relationship; and

(10) whether the putative employer is or is not in business.

In construing these factors, the Board and the courts have long used the availability of entrepreneurial opportunity as an animating principle and have expressly rejected other analytical frameworks. *See SuperShuttle*, 361 NLRB No. 75, slip op. at 9 ("entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors"). The sole exception was the Board's short-lived (ultimately discredited) *FedEx II* decision that mischaracterized the weight given entrepreneurial opportunity, and sought instead to use "economic realities" as the appropriate "standard." *SuperShuttle* reversed this error and restored the appropriate standard. This Board should do the same.

B. Congress Rejects the "Economic Realities" Test in Favor of the Common-Law Agency Test

The Board's rejection of "economic realities" in *SuperShuttle* was well-founded. Less than a decade after passage of the Act, the Supreme Court examined the term "employee" (as defined in Section 2(3)) to consider whether newsboys were independent contractors or employees. *See NLRB v. Hearst Publications*, 322 U.S. 111 (1944) ("*Hearst*") (examining 29 U.S.C. § 152(3)). The Court rejected exclusive consideration of common law tests, and instead applied the "economic realities" test. *Id*. at 127. Specifically, the Court focused on whether "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the [Act]." *Id*. at 127-28. The Court read the term "employee" "broadly" and explained that it should be understood "in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously

established legal classifications." *Id*. at 129 (citation omitted). As applied in *Hearst*, the Court looked to the "economic realities" of the newsboys' reliance on their earnings for their livelihoods, and the publishers' influence over the supply of newspapers, and held the newsboys were employees. *Id*. at 131.

That interpretation drew a swift rebuke from Congress. Only three years later, Congress overwhelmingly adopted the 1947 Taft-Hartley Act, which rejected the Court's broad "economic realities" approach to independent contractor determinations. Congress added a provision to Section 2(3) that removed independent contractors from the Act's definition of the term "employee." 29 U.S.C. § 152(3). The relevant House of Representatives' Report left no doubt about Congress's frustration with the Board and the Court for adopting an "economic realities" definition of "employee":

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passes the act, not new meanings that, nine years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." . . . It is inconceivable that Congress, when it passes the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words, not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee."

H.R. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

Congress therefore confirmed its rejection of the "economic realities" test as contrary to its understanding of the term "employee" as set out in the Act. The Supreme Court later acknowledged this clear congressional rejection of the "economic realities" test in *United Insurance*, explaining:

> Congressional reaction to this construction of the Act [in *Hearst*] was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees

> and independent contractors under the Act . . . [T]he proper standard here is the law of agency. Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.

United Insurance, 390 U.S. at 256.

Thus, in *United Insurance*, the Court went on to apply common law agency principles to assess the status of the "debit agents" at issue. *Id*. And in weighing the common law factors and holding the debit agents were employees, the Court relied heavily on the lack of entrepreneurial opportunity, noting that "the agents do not operate their own independent businesses;" "the agents account to the company for the funds they collect under an elaborate and regular reporting procedure;" and the agents' participation in company vacation, group insurance, and pension fund plans. *Id*. at 259.

In short, Congress definitively rejected any use of the "economic realities" approach with its passage of the Taft-Hartley Amendments. The Supreme Court confirmed this fact in *United Insurance*, and thereafter it applied the "lens" of entrepreneurial opportunity in analyzing the common law of agency. Accordingly, the use of entrepreneurial opportunity in the common law analysis, like the invalidity of the "economic realities" standard, is well-settled. It reflects the common law test as adopted by Congress in the Taft-Hartley Act in 1947. It is not a later invention by the Board, nor subject to the political changes in Board membership. Indeed, as noted above, one of the primary purposes of the Taft-Hartley Act was to fix the definition of employee as distinct from independent contractor. The Board in *SuperShuttle* adhered to that congressional intent.

C. The Board's Application of the Common-Law Agency Test Until *FedEx*

Following *United Insurance*, the Board assessed independent contractor issues in accordance with these principles for decades. For example, in *Young & Rubicam International, Inc.*, 226 NLRB 1271, 1276 (1976), the Board found photographers who worked with an advertising agency to be independent contractors based on a conclusion that they "operate as

independent businessmen rather than serving as employees." Entrepreneurial considerations plainly informed the Board's analysis, as the Board noted the photographers maintained studios at their own expense, made capital investments in their enterprises, worked with other companies, received pay on a per-job basis, and were generally incorporated. *Id*.

In *Big East Conference*, 282 NLRB 335 (1986), the Board used entrepreneurial opportunity to find basketball referees independent contractors, noting:

> [M]ost of the officials have other full-time jobs and many of them referee games for schools not affiliated with the [putative employer]. They are paid, on a per game basis and by the home team, a lump sum for fees, travel, and per diem. There are no deductions for income tax withholding, workmen's compensation, unemployment insurance, social security taxes, or fringe benefits. The officials pay for their own uniforms and they pay their own expenses in connection with attendance at the annual [training] clinics. The officials must purchase their own medical insurance and they assume responsibility for injury or damages sustained in the course of their work.

Id. at 343.

Likewise, in *Argix Direct, Inc.*, 343 NLRB 1017, 1020-21 (2004), the Board found owner-operator drivers to be independent contractors. It relied on considerations such as: "some of the owner-operators are entrepreneurs who have their own independent companies, several of which are incorporated;" "[o]wner-operators are not penalized in any manner for electing not to work;" and owner-operators were compensated based on work performed, rather than an hourly rate, salary, or any form of guaranteed income.

These cases show that consideration of the individual's opportunities for entrepreneurship permeated the Board's independent contractor decisions in the decades following *United Insurance*. Any room for argument otherwise vanished in the wake of the D.C. Circuit's seminal *FedEx I* decision, where the court soundly rejected the Board's attempt to employ an economic dependence analysis in assessing whether certain drivers were employees, rather than independent

contractors. *FedEx Home Delivery*, 351 NLRB 16 (2007). The Board had affirmed a Regional Director's finding of employee status, despite the Director's refusal to permit evidence of "the number of route sales and the profits on these sales" after FedEx argued that "such evidence may be relevant to whether the drivers have an entrepreneurial interest in their positions." *Id*. at n. 3.

Unsurprisingly, the D.C. Circuit disagreed with the Board's analysis and its failure to consider the disputed evidence. The court explained that the history of independent contractor cases shows a consensus that the correct approach, while "retaining all of the common law factors, 'shift[ed the] emphasis' away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have significant entrepreneurial opportunity for gain or loss.'" *Id*. (quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (internal quotations and citations omitted). "Thus," it continued, "while 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*. (citing RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. d) (internal citations omitted).

The *FedEx I* court also pointed out an important limitation on the Board's authority in this area. It explained the Board's approach "is particularly problematic because the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors." *FedEx I*, 563 F.3d at 496. This jurisdictional limitation underscores the deference the Board must give to articulations of the independent-contractor standard by federal courts.

In so holding, *FedEx I* served as the capstone on *United Insurance*. Its approach confirmed decades of Board precedent that viewed entrepreneurial opportunities as the animating principle

behind the independent contractor analysis and that maintained fidelity to congressional rejection of the "economic realities" test.

D. In *FedEx II* the Board Deviates From Precedent, Common-Law Principles, Congressional Intent, and the Act.

Dissatisfied with the D.C. Circuit in *FedEx I*, the Board attempted again to rewrite the independent-contractor standard in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*). Faced with virtually the same facts, the Board deviated from the D.C. Circuit decision in *FedEx I* and its well-reasoned explanation of the role of entrepreneurial opportunities. Under the guise of "more clearly defin[ing] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss," the Board purported to add a new requirement to the common law agency test. *Id*. at 610. The Board provided scant rationale for this departure, stating only in conclusory fashion that, "the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." *Id*. This argument, however, fails to explain how consideration of entrepreneurial opportunities elevates "theoretical" opportunities over "actual" ones, nor how it excludes company-imposed constraints from the analysis.

In effect, the Board sought to resuscitate the "economic realities" test originated in *Hearst*, rejected by Congress, and reversed in *United Insurance*. By manufacturing a straw man out of "theoretical" versus "actual" entrepreneurial opportunity, the Board in *FedEx II* returned to "economic dependence" as the touchstone of independent contract analysis. A worker who does not seize on the entrepreneurial opportunities available to her necessarily becomes more dependent on the putative employer. For the Board to disregard "theoretical" opportunities therefore skews the analysis toward the extent to which the individuals in question economically depend upon the

putative employer. This is the "economic realities" or "economic dependency" test dressed in different rhetorical clothing.[1]

Similarly, the Board's relegation of entrepreneurial opportunities to merely one factor of many devalues its importance and harkens back to the "economic realities" test. Consigning entrepreneurial opportunity to a separate analytical box skews the independent contractor analysis. For example, an individual that owns her own equipment is more likely to be an independent contractor not because of such ownership, but because of what ownership signals—the entrepreneurial opportunity to earn compensation from multiple sources. *See* Eric Posner, HOW ANTITRUST FAILED WORKERS 155–57 (2021) (explaining that a worker's ownership of equipment—e.g., a car—gives her greater "exit" options and thus strengthens her position to offer services to multiple clients). In other words, the common law factors must be understood in conjunction with potential entrepreneurship, not divorced or separated from it. Doing otherwise departs from precedent and reintroduces the rejected economic realities test.

Fittingly, after reviewing *FedEx II*, the D.C. Circuit again vacated the Board's decision. It rightly noted that: "[h]aving already answered this same legal question involving the same parties and functionally the same factual record in *FedEx I*, we give the same answer here." 849 F.3d at 1124. The court further admonished the Board, "[h]aving 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." *Id*. at 1127. Importantly, the court also observed that the Board is entitled to no deference on this

[1] It bears noting that the notion of economic dependence is devoid of any utility since all persons or entities engaged in business are "dependent" on their proximate counterparts within the chain of commerce. That reality does not transform one into a statutory "employee."

issue, because it involves interpretation of the common law and requires "no special administrative expertise that a court does not possess." *Id*. at 1128 (quoting *United Insurance*, 390 U.S. at 260).

E. In *SuperShuttle* the Board Properly Returned to the Correct Independent-Contractor Standard.

Against this background, in 2019, the Board corrected the *FedEx II* errors in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) and found shared-ride van franchisees were independent contractors.

In *SuperShuttle*, the Board correctly observed that its earlier *FedEx II* decision, far from "clarifying" Board law, made wholesale changes by treating entrepreneurial opportunity as only a single analytical factor. In doing so, *FedEx II* impermissibly shifted the analysis away from the common law factors, and towards the "economic realities" approach explicitly rejected by Congress. *Id*., slip op. at **7-8. The Board also explained that its *FedEx II* decision mischaracterized the D.C. Circuit decision in *FedEx I* as treating entrepreneurial opportunities as the *only* decisive factor. The court, however, was clear in explaining the "animating principle" approach to analyzing *all* factors. *Id*., slip op. at *8.

Thus, *SuperShuttle* overruled the Board's *FedEx II* decision, and explicitly acknowledged that the DC Circuit decision in *FedEx I* did not "depart[] in any significant way from the Board's traditional independent-contractor analysis." *Id*. Importantly, *SuperShuttle* restored to the Board's analysis the appropriate consideration of entrepreneurial opportunity as the animating principle of all independent contractor factors under the common law. Perhaps equally as significant, the Board also flatly rejected the "economic realities" test that the prior Board attempted to revive. *Id*. at 9.

SuperShuttle corrected the Board's errors in *FedEx II*, aligned the Board's independent-contractor framework with prevailing court and Board precedent, as well as with congressional intent and the NLRA. Moreover, it provided stability and predictability to stakeholders and

reflected fidelity to the law. Indeed, as a policy matter, all stakeholders benefit from the ability to rely on a consistent and long-standing standard, one that reflects the full nature of the relationship between employee and employer. Consideration of entrepreneurial opportunity as the animating principle in the standard, as in *SuperShuttle*, adds further predictability by directing focus to the core nature of the relationship. Such a focus also properly accounts for the economic dynamics at hand. Real independent contractor relationships occur where there exists a high degree of entrepreneurial opportunity. Full consideration of those opportunities therefore allows the Board's standards to properly assess the nature of the relationship in question. As a result, the decision in *SuperShuttle* properly takes practical policy and legal considerations into account, and should not be disturbed.

III. No Reason Exists for the Board to Reconsider Its Independent-Contractor Standard.

One of the most telling aspects of the Board's solicitation here is that it cites *no changed circumstances* warranting reconsideration of *SuperShuttle*. Indeed, there have been no changes (factual or legal) that would prompt reconsideration of the case so soon after its issuance. This stands in contrast to the circumstances justifying *SuperShuttle*'s reversal of *FedEx II*. There, the D.C. Circuit had issued its *FedEx II* decision, overruling the Board's operative independent contractor standard. Not so here. Indeed, the only changed circumstance seems to be new Board membership. That is an insufficient reason to revisit long-standing and legally-supported precedent.

Though some may assert otherwise, the question of whether the number of independent contractors has increased or decreased is irrelevant to the proper application of the law. Such a development would not constitute either a reason or license for the Board to disregard the common law or the binding precedent of superior federal courts.

In a similar vein, the foray of some states into the law of independent contractor has no effect on the proper interpretation of the NLRA. For example, actions such as the adoption of AB-5 in California, seeking to apply the "ABC" test for independent contractor status are inapposite here. First, states may proscribe their own laws, but they cannot alter federal law, like the NLRA. Such matters are exclusively reserved to the federal legislature and federal courts. Second, the California "ABC" test is predicated on the "economic realities" theory that, as demonstrated above, Congress has expressly rejected. Third, California's use of the ABC formulation was first articulated in the California Supreme Court's decision in *Dynamex*. *Dynamex Operations West, Inc. v. Superior Court*, (2018) 4 Cal.5th 903. Although that decision preceded *SuperShuttle*, it was properly given no consideration by the *SuperShuttle* Board.

To make matters worse, the Board has decided to consider changes to the *SuperShuttle* standard *sua sponte*. 371 NLRB No. 45, slip op. at 2, n. 2, n. 2 (Members Kaplan and Ring, dissenting). Although the Board may examine potential changes in law on its own accord, its "sua sponte reconsideration of precedent in unfair labor practice and representation-election cases has been limited in practice to certain circumstances" that are not present here. *Id*. at n. 2 (Members Kaplan and Ring, dissenting). And the majority's response to the dissent belies the political nature of this present undertaking, as if the change in personnel allows the agency to ignore court decisions and controlling law. *See id*. at n. 2 ("Chairman McFerran was not a member of the Board when *FedEx* was decided. Member Wilcox and Member Prouty were not Board members when either *FedEx* or *SuperShuttle* were decided.").

The Board certainly has responsibility for "applying the general provisions of the Act to the complexities of industrial life" and to "adapt the Act" where necessary, but such responsibility is not license for new Board majorities to jettison the settled meaning of the NLRA. The Board

may not overturn decades of its own precedent—precedent that accords with controlling federal cases and congressional intent—without relevant and significant factual and legal predicates. It is this very type of whipsaw that has diminished the Board's credibility and rightly opened it to criticism.[2]

IV. Refusal to Apply the Independent-Contractor Standards Established by the Federal Courts would Constitute Misuse of the Board's Non-Acquiescence Policy.

The interest of the current Board in changing the "standard"[3] for determining independent contractor status is a plain instance of its policy reach far exceeding its legitimate regulatory grasp. As detailed above, the "standard" for this determination has already been established by the Supreme Court in *United Insurance*. The current Board is bound by this determination. This standard requires application of the common law test as outlined in the Restatement; and is consistent with the view of the D.C. Circuit that such factors, most especially the "right of control",

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[2] *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 226 (2005); William B. Gould IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB--A MEMOIR 15 (2000); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707 (2006).

[3] This is but one in several agency actions that contemplate the wholesale reversal of extant and consequential Board precedent. Beginning shortly after her confirmation the current General Counsel took actions calling into question the stability of Board law and procedure with respect to more than three dozen significant matters. *See*, GC Memos 21-01 through 21-08, inclusive. And the Board itself has joined in too. Shortly after the installation of new Board membership it has solicited briefing as the prelude to changing current Board law on the legality of employer rules and handbooks, the configuration of bargaining units, mandatory arbitration clauses, damage assessments, and independent contractor status. *See*, Briefing Invitations, dated 11/10/21, 12/7/21, 12/17/21, 1/6/22 and 1/18/22. In addition, it announced in December 2021 that it would re-visit the final rule on joint employer status, which it issued just a year earlier. See, Fall 2021 Regulatory Agenda, at RIN 3142-AA21. These are not isolated policy "oscillations." Quite to the contrary. They constitute an attempt to upend the most fundamental principles of extant Board law, and promise to destabilize the most longstanding of precedents to the detriment of employers and workers alike.

are best viewed through the lens of "entrepreneurial opportunity." Any attempt to alter this standard is beyond the Board's legal authority.

To the extent *United Insurance* provides interpretive "leeway," it is so sharply circumscribed as to be non-existent. In this regard, it is important to note that since the independent contractor determination is a function of common law, the NLRB has no special expertise in making such interpretations. *United Insurance*, 390 U.S. at 260. Indeed, the Supreme Court in *United Insurance* specifically explained, "[i]t should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess." *Id.* As a result, the Board's view is thus entitled to no deference by any reviewing court. *Id.*; *FedEx II*, at 1128 (stating that due to the absence of special administrative expertise as explained in *United Insurance*, "[w]e do not accord the Board such breathing room [as utilized by the Board in *FedEx II*] when it comes to new formulations of the legal test to be applied."). The courts, and not the Board, possess the requisite expertise to interpret the common law.

Reviewing courts, most especially the D.C. Circuit, have done precisely this in the context of the NLRA. Courts have made clear that the correct legal standard requires application of the common law factors viewed through the lens of entrepreneurial opportunity. *See supra [add in correct cite]*. As the D.C. Circuit has noted, this was the historical view of the Board up until its aberrational decision in *FedEx*, and this view was rightly re-established by the Board in *SuperShuttle*.[4] The decisions of the D.C. Circuit in *FedEx I* and *II* are consistent with the Supreme Court's decision in *United Insurance*, and with the prevailing view among its sister circuits.[5] *See,*

[4] *BFI Newby Island Recyclery*, 362 NLRB 1599, 1609 (2015) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)) (internal citations omitted).

[5] For example, see *Crew One Productions Inc. v. NLRB*, 811 F.3d 1305 (1lth Cir. 2016).

e.g., Associated Diamond Cabs Inc. v. NLRB, 702 F2d 912 (11th Cir. 1983); *Lorenz Schneider Co., Inc. v. NLRB*, 517 F.2d 445 (2d Cir. 1975); *Meyer Dairy, Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970); *Air Transit v. NLRB*, 679 F.2d 1101 (4th Cir. 1982).

For at leave five reasons, the current Board cannot and should not attempt to alter the framework mandated by the D.C. Circuit in *FedEx I* and *FedEx II*:

First, it must be noted (as the D.C. Circuit observed in *FedEx II*) that the Board never sought *certiorari* to the Supreme Court after either *FedEx* decision, nor has it sought *certiorari* with respect to other determinations predicated on the same or similar view.

Second, the D.C. Circuit exercises plenary jurisdiction over all Board determinations and is the likely venue for review of the instant case. 29 U.S.C. § 160(f). *SuperShuttle* reflects the view of the D.C. Circuit regarding the determination of independent contractor status. *FedEx* does not. Thus, any "new standard" articulated by the Board in the present case likely would not withstand judicial review. Indeed, the D.C. Circuit has already twice rebuked the Board when it has attempted to do so. *See FedEx I* and *II*.

Third, the Board would fare no better in the Eleventh Circuit, where the instant case arises. Like its sister circuit, the Eleventh Circuit has made clear that "entrepreneurial interest" is the lens through which the common law element of right to control must be assessed. *See Crew One Productions, Inc. v. NLRB*, infra and *Associated Diamond Cabs Inc.*, at 919 (11th Cir. 1983).[6] Its view is aligned with that of the D.C. Circuit, and it has shown similar displeasure with the Board for attempting to construct new "standards" or "factors" in assessing the common law question of independent contractor status. *See id*. at 924 (criticizing the Board for being "[s]eemingly

[6] For example, in *Crew One*, *supra*, the court noted that the stagehands at issue had "entrepreneurial interests", were "free to accept or reject offered work" and "free to accept work from other [entities]". 811 F.3d at 1311.

undaunted" by contrary holdings from courts on relevant considerations in independent contractor assessments).

Fourth, to the extent the Board would ultimately rely on a policy of "non-acquiescence" to justify the adoption of a "new standard" at odds with the D.C. Circuit, the Eleventh Circuit, and others, such reliance would be completely misplaced. Non-acquiescence is justified, if at all, only when it is utilized in conjunction with a clear attempt by the Board to achieve nationwide unanimity with respect to labor policy. Where, as here, the Board has not previously availed itself of the opportunity to seek *certiorari*, it cannot be engaged in any legitimate exercise of non-acquiescence. Rather, it is merely acting in untenable disregard of circuit court law. When it does so, the consequence is both predictable and problematic. *See Heartland Plymouth Court v. NLRB*, 838 F.3d 16, 25-29 (D.C. Cir. 2016) (ordering the Board to pay attorneys' fees for its unjustifiable non-acquiescence with D.C. Circuit precedent).

Finally, even if non-acquiescence were otherwise justified, it simply would not apply here and would be of no avail to the Board. Non-acquiescence draws its limited viability from the role of the Board in establishing a "national labor policy." However, the standard for determining independent contractor status under the Act is ultimately not a matter of labor "policy," it is a matter of common law. As such, the Board has no expertise and is entitled to no deference from the courts on this matter. *See FedEx I*, 563 F.3d at 496 (declining to defer to Board because Board has "no authority whatsoever over independent contractors"). Indeed, its views on matters of common law are wholly subservient to the determinations of the federal courts. Thus, there is no "policy" matter over which the Board can claim ownership and thus, no legitimate basis for simply acting in defiance of the federal courts.

V. Conclusion

For these reasons, the Board should adhere to the independent contractor standard articulated in *SuperShuttle*, and avoid repeating the mistakes of its *FedEx* decisions. *SuperShuttle* correctly applies the common law of agency factors and, consistent with court and Board precedent, treats entrepreneurial opportunity as an animating principle behind each aspect of the analysis. *FedEx*, on the other hand, improperly diminished the importance of entrepreneurial opportunity by treating such considerations as only one factor in the analysis, without any precedential basis for doing so. *FedEx* further treads on unacceptable ground by relying on the "economic realities" standard once endorsed by the Supreme Court in *Hearst*, but subsequently rejected by Congress in the Amendments to the Taft-Hartley Act.

Moreover, *FedEx* created numerous problems by rejecting the approach endorsed by the D.C. Circuit. Another such attack on that court's authority would be legally unjustified and would constitute a misuse of the Board's non-acquiescence policy. It would also introduce unnecessary uncertainty into the Board's proceedings by ensuring application of different standards at different stages of review. All stakeholders—businesses, unions, and workers alike—deserve a legally tenable standard upon which they can rely. *SuperShuttle* provides such a standard, and the Board must not disturb it.

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CERTIFICATE OF SERVICE

CASE NO.: 10-RC-276292

The undersigned certifies that on the 10th day of February 2022, the foregoing**, *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,** was filed via electronic filing with the National Labor Relations Board and served via e-mail upon:

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