UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: VELOX EXPRESS, INC. Respondent, and JEANNIE EDGE, An Individual	Case 15-CA-184006

APPLICATION OF COALITION FOR A DEMOCRATIC WORKPLACE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the National Labor Relation Board ("Board" or "NLRB")'s Rules and Regulations, the Coalition for a Democratic Workplace ("CDW") and Chamber of Commerce of the United States of America ("Chamber") hereby request leave to file the attached *amici curiae* brief in support of Respondent's exceptions to the decision of Administrative Law Judge Arthur Amchan. *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501 (Sept. 25, 2017). The Respondent filed exceptions on October 23, 2017, and this request is therefore timely under Section 102.46 of the Board's Rules.

The CDW and the Chamber make this request because the instant case presents the question of whether, for the first time in history, the Board should treat the act of misclassifying statutory employees as an independent "standalone" violation of the National Labor Relations Act ("NLRA" or "Act"). Specifically, the ALJ's decision concluded that "[b]y misclassifying its drivers, [Respondent] restrained and interfered with their ability to engage in protected activity

by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection." *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501, at *14. Not only is such a test unprecedented, but as recently as Friday, the current General Counsel has disavowed such a view. *See* Peter B. Robb, General Counsel Memorandum 18-02 (Dec. 1, 2017), *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)).

As outlined in the attached proposed brief, such an approach marks a drastic departure from established precedent, ignoring Congressional legislative history, economic policy considerations, and the employer's free speech rights under Section 8(c) of the Act, 29 U.S.C. §158(c). Perhaps even more significantly, such a standalone violation has widespread practical implications on the administration of the Act, potentially creating unintended consequences not simply with respect to independent contractor cases, but also as to other matters that involve statutory classifications of any kind. Accordingly, decisions which 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—may all become fraught with risk of unfair labor practice charges. See 29 U.S.C. § 152(3).

INTERESTS OF THE AMICUS CURIAE

The CDW represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW members are joined by their mutual concern over regulatory overreach and actions that threaten entrepreneurs,

other employers, employees, and economic growth.

The Chamber is the world's largest business federation. The Chamber represents 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.

Amici's members include businesses that maintain independent contractor relationships in the course of their operations. The proposed change in law presented in *Velox Express*—namely, the assertion that a company violates Section 8(a)(1) of the National Labor Relations Act solely by misclassifying an employee as an independent contractor—is of special importance and significance to these members. The Board's decision could fundamentally change the legal underpinnings of existing relationships between *amici*'s members and their contractors.

REASONS FOR ACCEPTING THIS BRIEF

The accompanying brief will assist the Board in resolving questions raised by the Respondent's exceptions. The undersigned seeks to address the portion of the ALJ's decision concluding that misclassification is a *per se* violation of Section 8(a)(1) of the Act. The brief outlines the very significant concerns that would be created by such a change in the law, including (1) practical effects on the administration of the Act, (2) Congressional intent outlined in the legislative history, (3) policy-based concerns on the potential economic impact, and (4) restrictions imposed by Section 8(c) of the Act, 29 U.S.C. §158(c).

For the foregoing reason, this application for leave to file the accompanying amicus brief should be granted.

Respectfully submitted,

/s/ Harry I. Johnson

Dated: December 4, 2017

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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Date Submitted: December 4, 2017

I. STATEMENT OF INTEREST

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 decision of Administrative Law Judge Arthur Amchan in *Velox Express, Inc.*, 15-CA-184006, 2017 WL 4278501, at slip op. 3 (Sept. 25, 2017) (herein "ALJD"). The CDW represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW members are joined by their mutual concern over regulatory overreach and actions that threaten entrepreneurs, other employers, employees, and economic growth.

The Chamber is the world's largest business federation. The Chamber represents 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.

The CDW's and the Chamber's members include businesses that maintain independent contractor relationships in the course of their operations. The proposed change in law adopted by the Administrative Law Judge in this case—namely, the holding that a company violates Section 8(a)(1) of the National Labor Relations Act by misclassifying an employee as an independent contractor—is of special importance and significance to these members. As discussed below, the National Labor Relations Board's decision could fundamentally change the legal underpinnings of existing relationships between *amici*'s members and their contractors. The proposed change could force some of the *amici*'s members to restructure these relationships or to terminate them entirely, which could have substantial consequences on many contractors, as well as the workers they employ.

II. INTRODUCTION

The CDW and the Chamber submit this *amici curiae* brief in response to the decision of ALJ Amchan, which adopted the former General Counsel Richard Griffin (the "General Counsel")'s 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 the invitation by the former General Counsel 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), *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)). We think this recession 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), regardless of the intent of the contracting parties.

This case presents no new or compelling reason for modifying the Board's standard. The concept of an unfair labor *practice* ("ULP") 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 onus on the General Counsel to prove conduct underlying the alleged ULP. Thus, the Board's current standard of requiring both misclassification and some *additional* unfair labor practice before finding a violation of the Act strikes an appropriate balance between the need to classify or designate workers and the prohibition on coercive or unlawful 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 and constrict employers from engaging in legitimate economic relationships, which 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 Section 8(c), 29 U.S.C. §158(c) and the common law test for independent contractor status. The General Counsel cannot circumvent such standards 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 such an unprecedented and drastic departure from established standards.

III. 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. This job involved collecting medical samples from different facilities, such as doctor's offices and hospitals, and delivering those

samples to a diagnostic medical laboratory. *See id.* at 2. Velox entered into similar independent contractor agreements with other drivers throughout 2016. *See id.*

Edge filed a charge with the Board after Velox terminated her contract in August 2016. The General Counsel alleged that Velox violated Section 8(a)(1) of the Act by cancelling Edge's contract, as well as by promulgating to its drivers "unlawful rules" and a "discriminatory route driver agreement." *Id.* at 1. The General Counsel further alleged that Velox violated 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 . . . .").[1] On October 23, 2017, Velox filed exceptions with the Board, which remain pending.

IV. **ARGUMENT**

A. **Introduction**

One key purpose of the NLRA is to create a national system to regulate collective bargaining at a national level. *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.

[1] *Amici* address only this portion of the ALJ's decision and take no position on the remaining ALJ findings.

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 formally—and wisely—rescinded this position as of Friday, December 1, 2017. Peter B. Robb, General Counsel Memorandum 18-02 (Dec. 1, 2017), *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)).

The undersigned *amici* submit that this case presents a significant policy concern, especially given that the General Counsel has reversed his position on the issue. 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 former General Counsel's attempt to chill businesses in their use of valid contractor relationships. This well-established standard is simply not a subject which the General Counsel or the Board should alter. As explained below, the position outlined in the ALJ's decision would drastically alter the parties' burden of proof, create high 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. Simply stated, misclassification is—at most—a threshold question.

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).[2] In contrast, the

[2] Although the Board's standard for determining independent contractor status is beyond the scope of this brief, *amici*'s reference to the *FedEx* decision should not be construed as an endorsement of or support for the majority's approach in that case. The Board has not, for example, even addressed the view of the D.C. Circuit vacating and rebuking the logic of 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."). Such disagreement over the legal standard between the Board and Court further illustrates that private businesses' classification decisions should not be the potential basis for a freestanding "misclassification unfair labor practice."

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 Amchan's own opinion recognizes—agencies and courts often "**err** on the side of finding employee status." ALJD, at 8 (emphasis added).[3]

The burden of proof becomes even more significant given that Section 8(a)(1) charges over coercive conduct have been established regardless of 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 actions] are alleged only as violations of Section 8(a)(1), motive is irrelevant."). Accordingly, there is no rebuttable burden-shifting analysis in such

[3] 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 we know that there is no enhanced burden of proof written into the Act for an employer seeking to prove independent contractor status, the ALJ's concession that judges already "err" in favor of finding employee status amply shows the Board how widespread a problem a new "misclassification ULP" would be. And, just so the Board is clear, *amici* are opposed to the Board creating any enhanced evidentiary standard or adverse presumption against businesses in this area. The Board's recent suggestion that it should somehow add a thumb on the scale in favor of employee status in the contractor context, for example, is wildly misplaced. *See, e.g., FedEx Home Delivery*, 361 NLRB 610 (Sept. 30, 2014). The majority opinion in *FedEx* relied upon *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996), as does ALJ Amchan. *See, FedEx*, 361 NLRB at 618; *see also* ALJD, at slip op. 8. The *Holly Farms* decision, however, focused on the agricultural laborer exclusion, while the independent contractor exemption was the product of a conscious reaction against the Board regulating in this area. *See FedEx*, 361 NLRB at 629 (Johnson, dissenting). As discussed further, *infra*, the Board should not ignore Congressional concern with NLRB overreach here, and it most certainly should not create any adverse presumption against businesses in classification decisions.

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 concerted activity in violation of Section 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, IT support, event-planning, 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 the course of making those decisions, the companies, of course, must evaluate how to structure those arrangements, make a legal determination regarding contractor status under the federal law, 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) (providing that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."). 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,[4] 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) (employer's statements warranted ordering a new election because they were so coercive as to violate Section 8(a)(1), and it was not "virtually impossible to conclude that they could have affected the results of the election"). If misclassification itself

[4] 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).

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 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). 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, rather than—as suggested by the ALJ—taking steps to ensure businesses will read such exclusion as narrowly as possible. *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 or requiring self-employer operators to join respondent union or any other 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. Namely, the misclassification-as-violation standard necessarily chills and constricts the conduct of businesses who may otherwise engage in valid contractor relationships, due to fear of charges and potential liability. Such a return to the type of conduct criticized in *Hearst Publishing* is neither merited, nor permitted.

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 simply is no other way to discuss issues like pay rates and economic terms of a relationship. Indeed, a contractor classification decision, at its core, is merely an opinion about a legal status. As the Board knows, 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 essentially 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 a period of time 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. Accordingly, 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, albeit mistaken, business-related communications to be coercive.

Perhaps even more significantly, the proposed approach adopted by the ALJ runs afoul of the common law of agency test for independent contractor status itself. *See United Insurance Co. of America*, 390 U.S. 254 (1968); *see also FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017). Under this test, the Board is required to evaluate a multi-factor test, one prong of which is "whether the employer and worker **believe** they are creating an employer-employee relationship." *Id*. quoting Restatement (second) sec. 220(2) (emphasis added); *see also Pa. Interscholastic Athletic Ass'n, Inc*., 365 NLRB No. 107 (July 11, 2017). The Board should not turn the entire independent contractor analysis on its head by using one of the *indicia* of contractor status itself to prove a violation of the Act. Accordingly, communicating the business' subjective belief about the type of relationship created cannot be the basis, alone, for an unfair labor practice charge. Such an approach would be an extreme case of circular reasoning.

F. As a Matter of Policy, the Board Should Not Deter Independent Contractor Relationships.

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 market 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—including *amici*'s members—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 employers' legitimate business judgments." *Sams Club*, 349 NLRB 1007, 1016 (2007) (Liebman, concurring). 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. Such chilling of valid economic activity establishes the kind of "obstruction[ ] to the free flow of commerce" that the Act intends to eliminate. *See* 29 U.S.C. § 151 *et seq.*

V. **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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, a copy of the foregoing application to file a brief amici curiae, as well as the proposed brief attached thereto, was served, via email, upon the following:

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