

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

The Atlanta Opera, Inc.	)	
	)	
Employer,	)	
	)	
and	)	Case 10– RC–276292
	)	
Make-Up Artists and Hair Stylists Union,	)	
Local 798, IATSE,	)	
	)	
Petitioner.	)	
	)	

**BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION  
ON THE NLRB’S INDEPENDENT CONTRACTOR STANDARD**

Pursuant to the Notice and Invitation to File Briefs of the National Labor Relations Board (“NLRB”) dated December 27, 2021 in the above-captioned case, Americans for Prosperity Foundation respectfully submits this amicus curiae brief on the question of the proper standard to be applied by the NLRB for determining independent contractor status.

**ARGUMENT**

**I. The policy aims of the NLRB’s independent contractor standard should be to expand the right and freedom of individuals to choose the kind and type of work they wish to pursue.**

It is appropriate, before turning to the applicable law, to understand the ends to which the NLRB’s independent contractor standard should be aiming. What are the appropriate goals for this type of rule?

The focus of the NLRB under the National Labor Relations Act is, or should be, the protection and promotion of worker freedom. As the NLRB itself acknowledges, it exists to

“protect workers’ full freedom of association.”<sup>1</sup> That is the touchstone. Too often the rights and interests of individual workers are neglected in the face of the entrenched interests and power of both labor unions and government bureaucracy. An appropriate independent contractor standard should therefore be structured to give individuals the ability to choose how to arrange their own work relationships on their own terms. Freedom to choose the kind and type of work they wish to pursue, and under what conditions, is crucial to worker empowerment.

Policy and rules that support and expand the opportunities for independent contracting help make these goals possible, as they give individuals the ability to enjoy flexible working arrangements and to chart their own career success. That means working mothers and fathers, college students, recent graduates, and more can provide valued services in transportation, medical, food delivery, construction, and many other industries, while also tending to other priorities in their lives. In short, the aim of the NLRB standard should be to foster freedom of contract and association; it should promote the right of people to offer their time and skills as independent contractors and thereby empower them to direct their own schedules and provide services to a broader range of businesses and customers as they see fit.

By the same token, existing workers pursuing self-employment on their own terms and businesses contracting with such workers should not have their arrangements up-ended by new NLRB employment definitions that would contradict the National Labor Relations Act, longstanding policies of the NLRB, and independent contractor standards as applied by other agencies such as the Internal Revenue Service and the Department of Labor. Misunderstandings

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<sup>1</sup> NLRB, *National Labor Relations Act*, <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> (last visited Feb. 7, 2022).

and confusion occasioned by novel reclassifications of work arrangements threaten the livelihoods of millions of workers and simply are not warranted.

In testimony provided to the U.S. House Committee on Education and the Workforce in June 2018, Jared Meyer, Senior Fellow at the Foundation for Government Accountability, explained that independent contracting creates greater employment opportunities, job satisfaction, and economic efficiencies:

[T]oday, lower transaction costs, driven by advances in technology, have led to more opportunities for firms to use outside workers rather than in-house employees. Independent contractors are the driving force behind this change. Working as an independent contractor allows someone to choose his or her hours and benefit from flexible work arrangements. Across all sectors of the economy, technology creates entrepreneurial opportunities for anyone with productive resources. These resources can be anything from physical or intellectual services (such as handyman jobs, academic tutoring, and legal advice) to the use of property (be it a drill, car, or spare room). . . . Though the employee-employer model of work is still the most common work relationship, further advances in technology and changing worker preferences should lead to steadily-increasing levels of alternative work arrangements.<sup>2</sup>

In establishing and applying its rules governing independent contractor status, the NLRB should therefore protect the right of individuals to provide their services in and through voluntary agreements without restrictions. The greater the freedom, the greater the opportunity workers and businesses have to create flexible worker arrangements that meet the needs of both workers and those who seek their services.

Perhaps most importantly, a standard favoring independent contractors is proper because workers themselves want the freedom and opportunity to work as independent contractors. In a 2015 report, the U.S. Government Accountability Office explained that 56.8 per cent of independent contractors were “very satisfied” with their jobs compared to just 45.3 per cent of

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<sup>2</sup> Jared Meyer, Testimony on Growth, Opportunity, and Change in the U.S. Labor Market, U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions at 1, (June 21, 2018), <https://thefga.org/wp-content/uploads/2018/06/Meyer.EWTestimony.pdf>.

standard full-time workers.<sup>3</sup> A 2017 survey conducted by the Department of Labor’s Bureau of Labor Statistics reported that 79 per cent of independent contractors prefer their existing arrangement to traditional employment.<sup>4</sup> By contrast, only 44 per cent of on-call workers and 39 per cent of temporary agency workers preferred their alternative work arrangements,<sup>5</sup> demonstrating that easier access to independent contractor jobs would improve job satisfaction and opportunities even for alternative arrangement workers. And these trends likely will only increase because, as Mr. Meyer concluded in his testimony before Congress, the younger generation of workers is looking to independent contracting as a preferential option:

Deloitte’s 2018 millennial survey finds that 78 percent of people born from the beginning of to the end of 1994 would consider short-term contracts or freelance work to supplement full-time employment. Furthermore, 57 percent would consider this type of alternative work instead of full-time employment. Beyond the potential for higher income, flexibility and work/life balance are the top reasons why young workers are interested in alternative work arrangements.<sup>6</sup>

By contrast, the creation of barriers and requirements that limit the ability to work as an independent contractor undermine the entrepreneurialism and freedom that benefits both individual workers and the wider economy. The proper role of government is to protect rather than inhibit individual freedom, including in the decisions people make about their work arrangements. The creation of a confused and overly complicated regulatory framework undermines economic prosperity, limits consumer choice, burdens both employers and workers,

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<sup>3</sup> U.S. Gov’t Accountability Office, *Contingent Workforce* 24 (April 20, 2015), <https://www.gao.gov/assets/670/669766.pdf>.

<sup>4</sup> Bureau of Labor Statistics, Dep’t of Labor, *Contingent and Alternative Employment Arrangements — May 2017*, at 6, <https://www.bls.gov/news.release/pdf/conemp.pdf>.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Meyer, *supra* note 2, at 3–4. Meyer also notes: “The value of independent contractor work as supplemental income cannot be ignored. For the 70 percent of Americans ages 18 to 24 who experience an average change of over 30 percent in their monthly incomes, the opportunity to smooth out earnings to meet rent, pay down student loans, or fund a new business venture is a clear benefit of alternative work arrangements.” *Id.*

and stands in stark contrast to the ideals of liberty embodied in this country’s founding documents.

In determining and applying its standard, the NLRB accordingly should work to protect the right and freedom of individuals to choose to work as independent contractors and arrange their work relationships in the manner they determine best meets their needs and desires.

**II. The proper standard, as stated and applied in *SuperShuttle DFW*, was made applicable to the NLRB as binding precedent by the D.C. Circuit, and this Board has no authority to change it.**

In its Notice, the NLRB asks whether it should “return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications,” or whether it “should adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?” That question already has been answered by the D.C. Circuit. The NLRB may not resurrect its *FedEx* standard, either in its entirety or under modification, because binding federal court precedent, as the *SuperShuttle DFW* decision recognizes, requires application of the standard articulated in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*), and *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1124 (2017) (*FedEx II*).

In *FedEx I*, the D.C. Circuit explained that, to determine independent contractor status, the NLRB must “apply the common-law agency test, a requirement that reflects clear congressional will.” 563 F.3d at 496. That conclusion does not simply reflect the views of the D.C. Circuit. As the U.S. Supreme Court held in *United Insurance Co. of America*:

The obvious purpose of this amendment [to the National Labor Relations Act] was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. And both petitioners and respondents agree that the 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.

*NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

The NLRB has acknowledged this decision and others in its line as binding precedent. In *St. Joseph News Press*, 345 NLRB 474, 478 (2005), for example, the Board explained that its decisions have noted “particularly ‘*United Insurance*’s observations about the appropriateness of using the common law of agency as the test for determining employee status’ and found that Supreme Court precedent ‘teach[es] us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*’” (emphasis in original) (quoting *Roadway Package System*, 326 NLRB 842, 849 (1998)).

The D.C. Circuit in *FedEx I* acknowledged the common-law non-exhaustive “ten-factor test is not especially amenable to any sort of bright-line rule.” 563 F.3d at 496. Nevertheless, it explained that, by application over time, a standard (applied by both the courts and the NLRB) has emerged “to identify the essential quantum of independence that separates a contractor from an employee” *Id.* at 497. That standard “became explicit—indeed, as explicit as words can be—in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002). In that case, both this court and the Board, while retaining all of the common law factors, shifted 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.* (cleaned up).

To sum up, the D.C. Circuit formulated the applicable standard as follows:

Thus, 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.* See also *id.* at 502 (“[I]t is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of

determining whether he is an independent contractor.” (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995)).

In *SuperShuttle DFW*, the NLRB properly glossed this standard by explaining that the focus on “entrepreneurial opportunity” was not a “super-factor” or to be taken as single-factor replacement of the usual common law elements. Rather:

[E]ntrepreneurial opportunity, like employer control, is a principle to help evaluate the overall significance of the agency factors. Generally, common-law factors that support a worker’s entrepreneurial opportunity indicate independent-contractor status; factors that support employer control indicate employee status. The relative significance of entrepreneurial opportunity depends on the specific facts of each case.

*SuperShuttle DFW, Inc.*, 367 NLRB No. 75, at 2 (2019). This is consistent with the D.C.

Circuit’s approach in *FedEx I*, which, in overturning the NLRB, found the workers in question to be independent contractors:

We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status.... Because the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views.

*Id.* at 504. *See also FedEx II*, 849 F.2d at 849 (“Examining the factual record, *FedEx I* noted that some of the common-law factors supported employee status, while others were consistent with the drivers being independent contractors. Looking at those factors through the lens of entrepreneurial opportunity, however, this court concluded that the indicia of independent contractor status clearly outweighed the factors that would support employee status.”) (cleaned up).

Further application of these principles can be seen in the way *FedEx I* characterized *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 857 (D.C. Cir. 1995), which it cited as an exemplary

application of the standard. As the D.C. Circuit described its holding, that case focused on how the opportunity for entrepreneurial gain or loss illuminated all relevant facts:

[W]e decided drivers for a cartage company who owned their own tractors, signed an independent contractor agreement, retained the rights, as independent entrepreneurs, to hire their own employees and could use their tractors during non-business hours, and who were paid by the job and received no employee benefits, should be characterized as independent contractors. We also noted the company did not require specific work hours or dress codes, nor did it subject workers to conventional employee discipline.

*FedEx I*, 563 F.3d at 497–98 (cleaned up).

The NLRB was therefore correct when, in *SuperShuttle DFW*, it characterized the applicable standard, as set forth by the D.C. Circuit, in the following way:

Properly understood, entrepreneurial opportunity is not an independent common-law factor, let alone a “superfactor” as our dissenting colleague claims we and the D.C. Circuit treat it. Nor is it an “overriding consideration,” a “shorthand formula,” or a “trump card” in the independent-contractor analysis. Rather, as the discussion below reveals, entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa. Moreover, we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case. Instead, consistent with Board precedent as discussed below, the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.

*SuperShuttle DFW*, 367 NLRB No. 75 at 9.

As this Board is aware, the NLRB during the Obama Administration chose to disregard the above D.C. Circuit precedent. In *FedEx II*, a case between the same parties on almost identical facts as *FedEx I*, the Board nevertheless had held the workers in question to be employees. The D.C. Circuit rejected this attempt to ignore binding caselaw:

Having 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. The Hartford single-route FedEx drivers are independent contractors to whom the National Labor Relations Act’s protections for collective action do not apply. We



accordingly grant FedEx's petitions, vacate the Board's orders, and deny the Board's cross-application for enforcement.

*FedEx II*, 849 F.3d at 1124.

*FedEx II* is a direct and complete rejection of the NLRB's approach in *FedEx Home Delivery*, 361 NLRB 610 (2014) and it precludes this Board from "returning" to the standard articulated therein. Indeed, the D.C. Circuit took the Board to task for attempting to do reach a result contrary to *FedEx I* by resort to a newly articulated standard:

This case is the poster child for our law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law. 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.

*Id.* at 1127; *see also id.* 1126–27 (outlining in detail, for purposes of rejecting, the reasoning and holding of the 2014 NLRB decision in *FedEx Home Delivery*); *id.* at 1127 n.3 ("The Board, however, does not assert such an exception [to the law-of-the-circuit doctrine] in this case, *nor does it claim that its revised view of the common-law agency test is grounded in any prior decision of this court.*") (emphasis added).

Furthermore, to forestall any attempt by the Board to argue that it has the right change its interpretation and implementation of the independent contractor standard pursuant to the Supreme Court's *Brand X* decision, or that the federal courts should exercise deference to the Board on such a question, the *FedEx II* court explained to the contrary:

But the Supreme Court held in *United Insurance* that the question whether a worker is an "employee" or "independent contractor" under the National Labor Relations Act is a question of "pure" common-law agency principles involving no special administrative expertise that a court does not possess. Accordingly, this particular question under the Act is not one to which we grant the Board *Chevron* deference or to which the *Brand X* framework applies.... We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied.

*Id.* at 1128. The “pure common-law agency principles” as incorporated into the independent contractor standard—first articulated expressly twenty years ago in *Corporate Express Delivery Systems* and forcefully reiterated in *FedEx I* and *FedEx II*—means this particular question is answered. The NLRB may not revisit it or change it. It is for that reason the Board, in *SuperShuttle DFW*, stated expressly that it was overruling its approach as articulated in the 2014 *FedEx Home Delivery* decision. See *SuperShuttle DFW*, 367 NLRB No. 75, at 8 (“Today, we overrule this purported “refinement.”); *id.* n.14 (“[W]e find that the *FedEx* majority’s purported ‘refinement’ was an impermissible (or at least an unwarranted) diminution of the importance of entrepreneurial opportunity for the reasons discussed below.”); *id.* at 12 (“We therefore overrule the Board’s *FedEx* decision and return the Board’s independent-contractor test to its traditional common-law roots.”).

### CONCLUSION

For all the above reasons, the NLRB must adhere to the independent contractor standard articulated by D.C. Circuit precedent and recognized by the Board in *SuperShuttle DFW*.

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Respectfully submitted,

/s/ Lee A. Steven

Lee A. Steven  
AMERICANS FOR PROSPERITY FOUNDATION  
1310 N. Courthouse Road, Ste. 700  
Arlington, VA 22201  
(571) 329-1716  
lsteven@afphq.org

*Counsel for Americans for Prosperity  
Foundation*

**CERTIFICATE OF SERVICE**

I certify that today, February 10, 2022, I e-filed the Amicus Brief of Americans for Prosperity Foundation in the above captioned matter with the National Labor Relations Board and served via email the following persons:

Nicholas J. Johnson  
SPIVAK LIPTON LLP  
1700 Broadway, 21<sup>st</sup> Floor  
New York, NY 10019  
njohnson@spivaklipton.com

Daniel Shea  
Michelle Johnson  
Amy Cheng  
Elliott Henigan  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
201 17th Street NW, Suite 1700  
Atlanta, GA 30363  
daniel.shea@nelsonmullins.com  
michelle.johnson@nelsonmullins.com  
amy.cheng@nelsonmullins.com  
elliott.henigan@nelsonmullins.com

*/s/ Lee A. Steven* \_\_\_\_\_

Lee A. Steven  
AMERICANS FOR PROSPERITY FOUNDATION  
1310 N. Courthouse Road, Ste. 700  
Arlington, VA 22201  
(571) 329-1716  
lsteven@afphq.org

*Counsel for Americans for Prosperity  
Foundation*