UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC., Respondent, & JEANNIE EDGE, an Individual.	CASE 15-CA184006

BRIEF OF *AMICUS CURIAE*
WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT

Cory L. Andrews
Marc B. Robertson
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
mrobertson@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

April 13, 2018

QUESTION PRESENTED

Under what circumstances, if any, should the National Labor Relations Board (NLRB or the Board) consider an employer's act of misclassifying employees as independent contractors a violation of § 8(a)(1) of the National Labor Relations Act (NLRA)?

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest, nonprofit law firm and policy center with supporters nationwide. WLF devotes much of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as *amicus curiae* before federal courts and regulatory agencies in cases deciding a company's legal duties to those claiming to be its "employees." For example, WLF has participated in litigation over whether a company is a "joint employer" of individuals principally employed by another firm. *See Browning-Ferris Indus. of California, Inc. v. NLRB*, No. 16-1028 (D.C. Cir. 2017, dec. pending).

WLF's Legal Studies division, the publishing arm of WLF, regularly produces papers on employment law issues—including worker classification—arising from federal regulation of labor practices. *See, e.g.,* Nathaniel Glasser & Stuart M. Gerson, *ISO: Uniform, Transparent Regulatory Standard to Distinguish Independent Contractors from "Employees,"* WLF Legal Backgrounder (July 28, 2017); John J. Park, Jr., *Eleventh Circuit Reins in NLRB's Mischaracterization of*

Independent Contractors as "Employees," WLF Legal Opinion Letter (April 29, 2016).

WLF strongly supports use of the independent-contractor model as an important catalyst for the nation's continued economic vitality. By recognizing that individuals often provide services for others while maintaining independent control over the means and methods of their own work, the NLRA fosters an entrepreneurial spirit while giving firms that contract with such individuals an increased flexibility that promotes efficiency. WLF fears that use of the independent-contractor model will suffer greatly, however, if the Board were suddenly to treat a company's mere misclassification of an employee as the basis for an independent violation of the NLRA. As shown below, the Board should reject that unprecedented theory of liability.

STATEMENT OF THE CASE

This case arises from a charge by a former independent contractor, Jeannie Edge (Edge), alleging that Velox Express, Inc. (Velox), a medical logistics provider, engaged in unfair labor practices under the NLRA. In June 2016, Edge executed an independent contractor agreement with Velox to provide courier services. In her capacity as an independent contractor, Edge drove her privately owned vehicle, collected medical samples from various facilities, and delivered those samples to medical laboratories.

After her contract was terminated in August 2016, Edge filed a charge with the NLRB. The Board's General Counsel alleged and the ALJ found that Velox

violated Section 8(a)(1) of the NLRA by cancelling Edge's contract and promulgating "unlawful rules and a discriminatory route driver agreement." ALJ Dec. slip op. at 1. The ALJ also found that Velox violated the NLRA by simply misclassifying some of its drivers (including Edge) as independent contractors rather than employees. *Id.* Glaringly, the ALJ's decision offered no justification for (and cited no precedent to support) that novel legal theory.

The ALJ issued its decision while the General Counsel's March 22, 2016 advice memo, which identified the novel liability theory at issue here as a "priority initiative" of the General Counsel, was still in effect. *See* GC 16-01 (Mandatory Submissions to the Division of Advice). That "priority initiative" has since been expressly rescinded by the General Counsel's December 1, 2017 advice memo. *See* GC 18-02 (Mandatory Submissions to Advice). In that now-effective advice memo, the General Counsel advises that although an employer's active use of employee misclassification to affirmatively interfere with § 7 activity may violate the NLRA, the simple act of misclassification "in and of itself" should not be construed as a violation. *Id.* The Board invited *amicus* briefs to address the question presented.

INTRODUCTION

For more than 70 years, federal court precedent and this Board's own decisions have consistently treated a worker's employment status as a threshold, jurisdictional question rather than as a standalone basis for an independent violation of the NLRA. The Board should retain that jurisdictional approach and decline to expand § 8(a)(1) liability any further. If, instead, an employer's mere

misclassification of an employee suddenly becomes a per se violation of the NLRA, that newfound statutory construction will impose novel, unprecedented liability on vast numbers of American businesses to the detriment of the nation's economy.

As shown below, converting a company's mistaken employee classification into an unfair labor practice would also allow the Board to effectively shift its own jurisdictional burden onto the respondent company, which (under the Board's precedent) bears the burden of proving that its workers are independent contractors outside the reach of the NLRA. In sole misclassification cases, the Board's new standard would allow the Board to essentially *presume* its jurisdiction unless the respondent successfully establishes (to the Board's satisfaction) that its workers are independent contractors. By relieving the Board of its own statutory burden, such jurisdictional bootstrapping would drastically expand the Board's jurisdiction well beyond the bounds of the NLRA.

The Board's new theory of liability would also represent an unwarranted expansion of the agency's jurisdiction over noncoercive conduct that Congress never intended the NLRA to reach. From a § 7 vantage, there is nothing even remotely "coercive" about a mistaken employment classification. Because classifying workers is inherently fact-intensive and often fraught with difficulty, the ease with which good-faith misclassifications often occur weighs heavily against imposing liability. Reasonable minds can differ in applying the relevant common-law agency factors, and they often do. This Board, for example, has been reversed many times for its initial, erroneous classification decisions. Given employers' inherent difficulty in

making complicated classification determinations, the Board should not make every misclassification an automatic violation of federal law.

In all events, imposing such liability would undoubtedly abridge employers' constitutionally protected free speech in violation of § 8(c) of the NLRA. That is no trivial matter. Congress enacted § 8(c) to "implement the First Amendment" by carefully balancing an employer's right to speak freely with its employees' § 7 rights. Under § 8(c), a company's "express[ion] of any views, argument, or opinion … shall not constitute or be evidence of an unfair labor practice." 29 U.S.C. § 158(c). That categorically includes a company's considered legal opinion about whether its workers are independent contractors.

Section 8(c) thus limits the Board's regulatory authority over speech strictly to cases where the company's speech contains "a threat of reprisal or coercion." Yet there is nothing remotely "coercive" about identifying a worker, even mistakenly, as an independent contractor. And nothing in the record here suggests that respondent ever used the requisite threats, force, or promises of benefits necessary to strip the company's speech of its § 8(c) protections. As shown below, any fair reading of the federal case law applying § 8(c) confirms that the Board is strictly prohibited from converting purely uncoercive speech into an unfair labor practice.

The interests of fairness, predictability, and stare decisis were all injured in this case. WLF urges the Board to reject the ALJ's determination below that an employer's mere misclassification of its employees as independent contractors violates § 8(a)(1) of the NLRA.

ARGUMENT

I. MERE EMPLOYEE MISCLASSIFICATION CANNOT SERVE AS A STANDALONE VIOLATION OF THE NLRA

A. Because Classification Is a Threshold, Jurisdictional Question, It Is Not a Proper Basis for an Independent Violation

The Board's jurisdiction under the NLRA extends "only to an employer's acts directed at its 'employees.'" *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 597 (D.C. Cir. 1989). It does ***not*** extend to "independent contractors." *Id.*; *see* 29 U.S.C. § 152(3) ("The term 'employee' … shall not include … any individual having the status of an independent contractor."). At bottom, "the line between worker and independent contractor is jurisdictional—the Board has no authority whatsoever over independent contractors." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009). Only if the Board first determines that a worker is an employee does it have jurisdiction to rule on whether the employer's conduct constitutes an unfair labor practice under § 8(a)(1).

Courts have routinely held that "[t]he characterization of a group of workers as 'employees' or as 'independent contractors' is dispositive of the question" whether they enjoy § 7 rights under the NLRA. *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 857 (D.C. Cir. 1995). In *C.C. Eastern*, the NLRB rejected a company's determination that some drivers were independent contractors and not employees covered by the NLRA. *Id.* The Board subsequently issued an order holding that the company violated the NLRA by refusing to bargain. *Id*. Applying the law of agency, the D.C. Circuit reversed the Board's order, concluding "that the Eastern drivers are

independent contractors." *Id.* at 861. Because "they are not 'employees' within the meaning of the Act," the appeals court explained, they "therefore are not within the jurisdiction of the Board." *Id.*

This Board's own decisions further confirm that determining employment status is a separate and distinct inquiry from the substantive merits of any alleged NLRA violation. *See, e.g, The Trustees of Columbia Univ. in the City of New York*, 364 N.L.R.B. 90, 2016 WL 4437684, at *1 (August 23, 2016) ("The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the [NLRA]."). Indeed, the Board has always required ***both*** a misclassification and ***some additional*** coercive or unlawful conduct before finding a violation of the NLRA. *See, e.g*, *Green Fleet Systems, LLC*, 2015 WL 1619964 (Div. of Judges April 9, 2015) (first analyzing the employment status of the respondent's drivers as a "threshold issue" before turning to the substance of the underlying alleged violations). Consistent with these jurisdictional "first principles," the act of misclassifying an employee as an independent contractor—with no attendant or underlying unfair labor practice—cannot violate the NLRA.

A contrary view would be especially problematic in sole misclassification cases because the Board unquestionably bears the burden of establishing its own jurisdiction in every case. *Precision Concrete v. NLRB*, 334 F.3d 88, 91-92 (D.C. Cir. 2003) ("Because the issue before the Board in this case was its jurisdiction, the Board erred by placing the burden of proof upon the Company."). Yet the Board has

always placed the burden on ***company respondents*** to prove independent-contractor status as an affirmative defense. *BKN, Inc.*, 333 N.L.R.B. 143, 144 (2001) ("[T]he party asserting that an individual is an independent contractor has the burden of establishing that status."). By improperly shifting its jurisdictional burden to respondents in sole misclassification cases, the Board would essentially presume its own statutory jurisdiction unless the respondent ultimately defeats that presumption by—at great expense in time and resources—proving its worker's independent-contractor status. Such jurisdictional "bootstrapping" would drastically expand the Board's jurisdiction under the NLRA well beyond the bounds intended by Congress.[1]

Neither the Board nor its General Counsel can point to ***any*** authority establishing that misclassification by itself violates the NLRA. Adopting such a standard now would not only represent an unwarranted expansion of the agency's jurisdiction over noncoercive conduct that Congress never intended for the NLRA to reach, but it would also make every company's classification decision a potential violation—regardless of that company's union or non-union status. That is far afield from what Congress could have ever intended.

In sum, because the NLRA's statutory language and federal case law interpreting it do not allow it, the Board may not bootstrap a jurisdictional, threshold inquiry into a freestanding violation.

---

[1] This jurisdictional problem is particularly salient given the ALJ's contention below that, "where it is a 'close call,'" agencies like the NLRB "should err on the side of finding employee status." ALJ Dec. slip op. at 8.

B. The Ease with Which Good-Faith Misclassifications Occur Weighs Heavily Against Imposing Liability

Because an independent-contractor classification is not even remotely "coercive" from a § 7 vantage, the Board's historical standard requiring misclassification *plus* some additional coercive or unlawful conduct before finding a violation strikes the right statutory and public-policy balance. This is especially so given how difficult it can often be to distinguish between independent contractors and employees under the mandatory common-law test of agency. *St. Joseph News Press*, 345 N.L.R.B. 474, 478 (2004) ("Supreme Court precedent 'teaches 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.'") (quoting *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 849 (1998)).

Classifying workers is inherently fact-intensive and fraught with difficulty. The common-law factors include (among others): "the extent of control which, by the agreement, the master may exercise over the details of the work"; "the kind of occupation"; whether the worker "supplies the instrumentalities, tools, and the place of work"; "the method of payment, whether by the time or by the job"; "the length of time for which the person is employed"; whether "the work is part of the regular business of the employer"; and the intent of the parties. RESTATEMENT (SECOND) OF AGENCY § 220(2). While applying these factors may seem simple enough, "the Restatement's non-exhaustive ten-factor test is not especially amenable to any sort of bright-line rule, a long-recognized rub." *FedEx Home Delivery*, 563 F.3d at 496.

As the Supreme Court has recognized, "[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." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). Indeed, "[n]ot only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors." *Austin Tupler Trucking, Inc.*, 261 N.L.R.B. 183, 184 (1982). Reasonable minds can differ in applying the relevant common-law-agency factors, and they often do.

Perhaps the best evidence of the precarious nature of worker classification is the veritable mountain of federal appeals court decisions overturning this Board's initial, erroneous classification determinations. *See, e.g., Crew One Prod., Inc. v. NLRB*, 811 F.3d 1305, 1311 (11th Cir. 2016) (holding that the Board improperly applied the "control" test in finding that stagehands were employees, not independent contractors); *FedEx Home Delivery*, 563 F.3d at 286 ("Because the drivers are independent contractors and not employees, we grant FedEx's petition, vacate the [NLRB's] order, and deny the cross-application for enforcement."); *C.C. Eastern, Inc.*, 60 F.3d at 861 (concluding that there is "a great deal of evidence to support the Company's claim that the drivers are independent contractors, while the primary evidence upon which the Board relies to reach the contrary conclusion does not hold up under scrutiny"); *N. Am. Van Lines, Inc.*, 869 F.2d at 604 (holding that "the ALJ applied the incorrect legal test, miscast the burden of proof, and otherwise unduly narrowed the statutory exclusion of 'independent contractor[s]'

from the Board's jurisdiction"); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 925 (11th Cir. 1983) (holding that "the daily lessees are independent contractors and not employees of the Company and the contrary finding of the Board is unsupported by substantial evidence"); *Brown v. NLRB*, 462 F.2d 699, 706 (9th Cir. 1972) ("We cannot conscientiously say that the Board was correct in finding that the Dealers were employees. We hold that they are independent contractors.").

What's more, the Board's own indecisive approach to the question presented weighs heavily against adopting such an unprecedented basis for new liability. This whole controversy finds its genesis in the General Counsel's March 22, 2016 advice memo, which identified the novel liability theory at issue here as a "priority initiative." *See* GC 16-01 (Mandatory Submissions to the Division of Advice). But that "priority initiative" has since been expressly rescinded by the General Counsel's December 1, 2017 advice memo. *See* GC 18-02 (Mandatory Submissions to Advice). Of course, "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991) ("[T]he case for judicial deference is less compelling [for] agency positions that are inconsistent with previously held views."). The Board can be certain that, if challenged in court, its newfound construction of the NLRA would be entitled to no judicial deference.

Given how easily good-faith worker misclassifications can occur, the Board should decline to make mere misclassification a new basis for § 8(a)(1) liability.

II. PREMISING LIABILITY ON A COMPANY'S MISCLASSIFICATION OF AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR WOULD CONTRAVENE § 8(C) OF THE NLRA

In the NLRA's early "Wagner Act" years, among the issues most often litigated were claims that an employer's efforts to persuade employees not to join a union amounted to a form of coercion under § 8(a)(1). Reasoning that any employer speech about unions would interfere with employees' rights, the Board began interpreting § 8(a)(1) too expansively, "condemn[ing] almost any anti-union expression by an employer." *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1138 (D.C. Cir. 1994). Concerned that the Board's overly aggressive enforcement had "made it excessively difficult for employers to engage in any form of noncoercive communications with employees," *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1361 (D.C. Cir. 1997), Congress enacted the Labor Management Relations Act of 1947 (Taft-Hartley Act) to limit the scope of § 8 liability. *See* 29 U.S.C. § 158(c).

Under § 8(c) of the amended NLRA, a company's "express[ion] of any views, argument, or opinion … whether in written, printed, graphic, or visual form, 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). Section 8(c) "was enacted in part to redress what was believed to be an imbalance against employers and in favor of unions and to define the First Amendment rights of both." *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 313 n.6 (9th Cir. 1977). Because threats of reprisal by an employer further none of those objectives, § 8(c) offers no safe harbor for statements that "could easily and understandably be perceived as

veiled threats of retaliation." *Peabody Coal v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984). Above all, § 8(c) encourages "freewheeling use of the written and spoken word." *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).[2]

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), the Supreme Court explained that § 8(c) "implements the First Amendment" by appropriately balancing an employer's right to express "any views, argument, or opinion" against its employees' § 7 rights. *Gissel* clarifies that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Crown Cork & Seal*, 36 F.3d at 1140 (citing *Gissel Packing*, 395 U.S. at 617). Since *Gissel*, the Supreme Court has characterized § 8(c) as an "explicit direction from Congress to leave noncoercive speech unregulated." *Brown*, 554 U.S. at 68. Stated differently, § 8(c) "specifically prohibits [the Board] from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 946 (9th Cir. 2008) (quoting *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 405 (1953)). Section 8(c) is dispositive of the question presented here.

Attaching liability to a company's mere classification of its agents necessarily abridges that company's core speech rights. Indeed, the ALJ found below that respondent—by simply *communicating* its classification decision—was "effectively telling [its drivers] that they are not protected by Section 7 and thus could be

[2] "The burden rests on the *Board* to prove that § 8(c) does not protect a particular statement, *not* on the employer to prove the opposite." *DTR Indus., Inc. v. NLRB*, 297 Fed. Appx. 487, 499-500 (6th Cir. 2008) (emphasis in original).

disciplined or discharged for trying to form, join or assist a union." ALJ Dec. slip op. at 14. Yet even a perfunctory familiarity with § 8(c) confirms that the Board is strictly prohibited from converting purely uncoercive speech into an unfair labor practice: all employer "speech is privileged if it contains no threat or promise." *UAW v. NLRB*, 834 F.2d 816, 820 (9th Cir. 1987).

By its own terms, § 8(c) does not cabin the subject matter of an employer's noncoercive speech that is entitled to protection. Instead, § 8(c) commands that the "express[ion] of ***any*** views, argument, or opinion" is not "evidence of an unfair labor practice." 29 U.S.C. § 158(c) (emphasis added). That categorically includes a company's considered legal opinion about whether its drivers are independent contractors. This Board itself has recognized that legal opinions—even if later found to be mistaken—are fully protected under the NLRA. *See, e.g., Children's Center for Behavioral Dev.*, 347 N.L.R.B. 35, 36 (2006) ("Although the [employer's] position has now been rejected, there is nothing unlawful in stating a legal opinion, even if it is later rejected."); *Optica Lee Borinquen, Inc.* 307 N.L.R.B. 705, 708 (1992), enfd. 991 F.2d 786 (1st Cir. 1993) ("Section 8(c) does not require fairness or accuracy.").

Simply put, § 8(c) "limit[s] the Board's regulatory authority to cases where the employer's speech contained a threat of reprisal or coercion." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386 (1998). There is nothing even remotely "coercive" about mistakenly identifying a worker as an independent contractor; only a statement that "conveys that the employer will act on its own initiative to punish its employees as the results of anti-union animus" falls outside

of § 8(c)'s safe harbor. *NLRB v. Pentre Elec., Inc.*, 998 F.2d 363, 371 (6th Cir. 1993), *abrogated on other grounds by NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. 1997). And nothing in the record below reveals the kind of threat, force, or promise of benefits that would strip respondent's speech of its § 8(c)'s protections.

Contrary to the ALJ's legal theory, "[o]therwise lawful statements do not become unlawful … [under § 8(a)(1)] merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union." *Lee Lumber & Bldg. Material Corp.*, 306 N.L.R.B. 408, 409-10 (1992). The notion that a bare misclassification inherently operates as a restraint on and interference with employees' exercise of their § 7 rights is "the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act." *Brown*, 554 U.S. at 69. To frame the issue distinctly is to answer it decisively: no independent liability is available for mere employee misclassification.

CONCLUSION

The Board should reject any notion that an employer's mere misclassification of its employees as independent contractors violates § 8(a)(1) of the NLRA.

Dated: April 13, 2018

Respectfully submitted,

/s/ Cory L. Andrews

Cory L. Andrews
Marc B. Robertson
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

Counsel for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF SERVICE

Pursuant to the Board's February 15, 2018 "Notice and Invitation to File Briefs," I certify that on April 13, 2018, I electronically delivered a true copy of the foregoing brief to the following case participants:

Julie Gutman Dickinson
BUSH GOTTLIEB
801 North Brand Boulevard
Suite 950
Glendale, CA 91203-1260
jgutmandickinson@bushgottlieb.com
Counsel for Charging Party

Benjamin Fultz
E. Rachael Dahlman Warf
FULTZ MADDOX DICKENS PLC
101 South 5th Street, 27th Floor
Louisville, KY 40202
bfultz@fmdlegal.com
rwarf@fmdlegal.com
Counsel for Respondent

Harry Johnson
MORGAN, LEWIS & BOCKIUS LLP
2049 Century Park East, Suite 700
Los Angeles, CA 90067-3109
harry.johnson@morganlewis.com
Counsel for Amicus Curiae

Julia Sturniolo
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2903
julia.sturniolo@morganlewis.com
Counsel for Amicus Curiae

/s/ Cory L. Andrews
Cory L. Andrews