UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC.,

and **Case 10-RC-276292**

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE*

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QUESTIONS PRESENTED

(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 modification?

INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation is a public-interest, nonprofit law firm and policy center with supporters nationwide. WLF promotes 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 whether contracting individuals qualify as "employees" of a company. For example, WLF has opposed the Board in litigation over whether a company is a "joint employer" of individuals mainly employed by another firm. *See Browning-Ferris Indus. Of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). And WLF has opposed efforts to punish an employer's mere misclassification of employees as a freestanding violation of § 8(a)(1) of the National Labor Relations Act. *See Velox Express*, 368 NLRB No. 61 (2019).

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 supports use of the independent-contractor model as a crucial catalyst for the nation's economic vitality. WLF fears that the independent-contractor model will suffer greatly, however, if the Board suddenly were to jettison *SuperShuttle*'s "entrepreneurial opportunity" as a significant factor in deciding independent-contractor status.

INTRODUCTION

The NLRA makes it "an unfair practice for an employer . . . to refuse to bargain collectively with the representative of his employees." 29 U.S.C. § 158(a)(5). The term "employee" under Section 2(3) of the Act "shall not include . . . any individual having the status of independent contractor." 29 U.S.C. § 152(3). For more than 50 years, the Supreme Court has held that the "obvious purpose" of Section 2(3) "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). Congress supplied that common-law test in the 1947 Taft-Hartley amendments.

The Board now proposes to nullify those amendments and the Supreme Court's decision by replacing the common-law test with a new, more expansive test. But as the D.C. Circuit recognized more than a decade ago in vacating the Board's first attempt to impose a new test, the common-law agency test is "not merely

quantitative"; "there is also a qualitative assessment." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 n.3 (D.C. Cir. 2009). A key part of this qualitative analysis is "whether the putative independent contractors have 'significant entrepreneurial opportunity for gain or loss.'" *Id.* at 497 (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)). To conform with settled law, the Board in *SuperShuttle* enshrined entrepreneurial opportunity into its independent-contractor analysis. Three years and one presidential election later, however, the Board proposes to abandon that principle altogether.

Businesses "crave certainty as much as almost anything: certainty allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). Issue a reliable, stable rule for classifying workers as independent contractors and—even if it is not the rule a company would have wanted—the company will adjust. But cavalierly changing the rule back and forth whipsaws the company between either abandoning its longstanding business model or facing potentially ruinous enforcement actions and penalties. The Board's latest action threatens to do just that.

Yet not even *Chevron* gives the Board the ability to rotate its legal position 180 degrees anytime there is a change in administration. Indeed, "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). The Board can be sure that, if challenged in court, an erratic, novel construction of the NLRA would receive little or no deference.

Nor is that all. The independent-contractor model is a key contributor to America's economic health. By allowing individuals to provide services for others while maintaining independent control over the means and methods of their own work, the NLRB's standard in *SuperShuttle* gives firms that contract with such individuals an increased flexibility that promotes efficiency and spurs productivity. Abandoning *SuperShuttle* would seriously erode that efficiency and productivity.

ARGUMENT

I. THE BOARD'S ARBITRARY AND CAPRICIOUS CHANGE OF POSITION WOULD BE ENTITLED TO NO DEFERENCE.

An agency must give adequate reasons for its decisions. Agencies may change their existing rules, but an agency's action is arbitrary and capricious if it fails to consider "serious reliance interests." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). That is why, when deciding questions of deference, the Supreme Court has long looked to whether an agency's interpretation matches that agency's own earlier pronouncements. *See, e.g.*, *Good Samaritan Hosp.*, 508 U.S. at 417 ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to an agency's interpretation that was "contrary to [its] narrow view . . . advocated in past cases"); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30 (1987) (stating that an "agency interpretation of a relevant provision which conflicts with the agency's earlier

interpretation is 'entitled to considerably less deference' than a consistently held view") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

An employer "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). In the Taft-Hartley amendments to the NLRA, Congress excluded independent contractors from the definition of "employee" under Section 2(3) of the Act. It did so in response to the Board's and the Supreme Court's more expansive interpretations of "employee" in the early years of the Act. *See SuperShuttle*, 367 NLRB No. 75 at 9. Congress sought to preserve independent-contractor relationships, not upend them.

Any Board decision to jettison *SuperShuttle* will thus be subject to legal challenge. And any "[u]nexplained inconsistency" in an agency's policy is "a reason for holding an interpretation to be arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005). Yet the Board offer nothing in the way of explanation. No party to this case has asked the Board to revisit *SuperShuttle*. And nothing has occurred since *SuperShuttle* to justify re-examining that decision. No adverse judicial decision exists, and there has been no intervening change in relevant law. Simply put, an arbitrary and capricious change to a legally binding agency standard receives no deference. *Id.*

To the extent the Board's standard for independent contractor status derives from the Board's analysis of the common law of agency, rather than the NLRA itself,

it is entitled to zero deference. That is because an agency's analysis of the common law is one for which it lacks any special expertise that the courts lack. *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75 (D.C. Cir. 1990). "[S]uch a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." *United Ins. Co.*, 390 U.S. at 260.

What's more, an agency's "fair and considered judgment" is one that is in harmony with the agency's prior interpretations. *See, e.g.*, *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C. Cir. 2002) (whether an agency's interpretation is "fair and considered" hinges on whether the agency has "ever adopted a different interpretation"). Deference is generally available only when the agency's "position is not inconsistent with [its] prior statements and actions," *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002), or when the agency's interpretation is "constant and unchanging." *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004); *see also Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007) (declining to defer to the Department of Labor's inconsistent interpretation).

This is especially true when the agency's about face creates an "unfair surprise" for regulated entities who, as here, had come to rely on the agency's earlier interpretation. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007). For while it may be possible for several industries to violate federal labor law for many years without some regulatory bureaucrat noticing, the "more plausible hypothesis" is that they have "been left alone" because they were fully compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007). Here, not only

would the Board's new standard likely pose an unfair hardship to firms who have come to rely on entrepreneurial opportunity as a vital part of the independent-contractor analysis, it would also have a devastating impact on independent contractors themselves. Such an "unfair surprise" on stakeholders would give courts a valid reason to disregard the new interpretation altogether. *Id.*

II. JETTISONING *SUPERSHUTTLE*'S STANDARD FOR INDEPENDENT-CONTRACTOR STATUS WOULD DAMAGE THE ECONOMY AND UPEND WORKERS.

The independent contractor is key to free enterprise. Over 15 million Americans choose to work as independent contractors. *See* Yuki Noguchi, *1 in 10 Workers SI An Independent Contractor, Labor Department Says* (June 7, 2018) <https://n.pr/3oEbom3>. Yet by ignoring the economic realities that accompany such decisions, a Board decision to overturn *SuperShuttle* would discourage the use of independent contractors and promote economic inefficiency. Many industries would be affected by such a decision, including various "gig economy" companies. Those companies would face an uphill battle to compete against companies using employees to perform the same job.

A standard that no longer considers "entrepreneurial opportunity" a significant factor in deciding independent-contractor status simply ignores the key reasons why a company might want to hire contractors to perform a portion of the company's work (and why workers might prefer the flexibility of *not* being an employee). For example, if the contractor performs highly specialized work, it is likely far more efficient for a company to contract out that work than to create its own specialized workforce.

Worse still, a new standard that deviates from *SuperShuttle* would likely hit small businesses the hardest. After all, "there is a strong relationship between independent contracting, entrepreneurship, and small business formation." Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S.* Economy 36 (Dec. 2010) <https://bit.ly/3v68vwF>. Small businesses often start by finding niches where they can provide a larger company with services at a cost lower than the company's cost of performing those services itself.

If the Board were to adopt a standard that deters larger companies from hiring niche firms to perform such work, the Board would end up destroying many valuable business opportunities for start-up firms. These "entrepreneurial small businesses are critical to our economy." Steven H. Hobbs, *Toward A Theory of Law and Entrepreneurship*, 26 Cap. U. L. Rev. 241, 297 (1997).

Workers could suffer too, especially in app-based companies where the workers are free to log on and off "the clock" at will. Independent contractors enjoy many advantages over employees. The greatest of these is the ability to choose one's own schedule. A large chunk of the American workforce does not want to become employees. Rather, people naturally want to retain their independence and flexibility in scheduling their work. As *SuperShuttle* explained, "[f]ranchisees' discretion in deciding when to work and which trips to accept weighs in favor of independent-contractor status." *SuperShuttle*, 367 NLRB No. 75 at 17.

According to the Bureau of Labor Statistics, over 82% of independent contractors prefer their status to that of employees. Eisenach, *supra*, at i. Only 9% of

independent contractors would prefer classification as employees. *Id.* This is unsurprising because, according to Pew Research Center, 39% more independent contractors than employees are satisfied with their jobs. *See id.* at i-ii.

CONCLUSION

The Board should reaffirm *SuperShuttle* and retain "entrepreneurial opportunity" as a significant factor in deciding independent-contractor status.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 10, 2022, I e-filed the Brief of Washington Legal Foundation as *Amicus Curiae* with the National Labor Relations Board and Acting Regional Director Lisa Y. Henderson and served via email the following persons:

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