Case 10–RC–276292

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

The Atlanta Opera, Inc.

and

Make-Up Artists and

Hair Stylists Union, Local 798, IATSE

BRIEF OF *AMICUS CURIAE*

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Shannon Liss-Riordan
Zachary L. Rubin
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, Massachusetts 02116
(617) 994-5800
sliss@llrlaw.com

Michael T. Anderson
Counsel of Record
Mark Hanna
Adam C. Breihan
Roseann R. Romano
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com

Counsel for *Amicus Curiae*
National Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

TREATISES

INTEREST OF *AMICUS CURIAE*

Amicus Curiae National Employment Lawyers Association (NELA) is a national advocacy organization of over 4,000 attorneys committed to protecting the rights of workers under labor, employment, anti-discrimination and wage/hour law.

INTRODUCTION AND SUMMARY

This brief addresses the broader implications of the "gig economy" raised by the Board's reexamination of the employee/contractor distinction.

First, the Board should recognize that "independent contractor" claims in NLRA litigation create indefensible conflicts with antitrust, trademark, and tort law. If the business models of the gig economy do in fact amount to the coordinated activity of independent entrepreneurs, respondents are potentially asking the Board to bless horizontal price-fixing and "naked licensing" of trademarks. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (independent contractors' collective activity is illegal price-fixing); *Meyer v. Kalanick*, 174 F.Supp.3d 817, 824 (S.D.N.Y. 2016) (allegations that Uber platform established fare-fixing agreements among Uber drivers stated claim for violation of Sherman Act); *Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 515 (9th Cir. 2010) (app-driven networks lost trademark protection by allowing independent operators to use the mark without sufficient control). Furthermore, many "independent contractor" defenses run headlong into the emerging consensus in tort law that gig employers are liable for their agents' torts under *respondeat superior* doctrine based on the very agency principles that the gig employers deny before the Board.

Because the Board is obligated to consider the implications of non-labor statutes on its rules, *e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002), the Board should therefore apply the employee/contractor distinction mindful of the implications that respondents' arguments for "entrepreneurial freedom" would have in antitrust, trademark and tort cases. Although the Board has no authority to enforce external law, it must frame its rules cognizant of non-NLRA law. *See BASF Wyandotte*, 274 NLRB 978, 978-979 (1985).

Second, the Board should explain that *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*) is contrary to the common law of agency defined in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 448 (2003) (applying the *Restatement (Second) of Agency*) and in multiple D.C. Circuit decisions before and after *FedEx I,* like *Browning-Ferris Industries v. NLRB*, 911 F.3d 1195, 1211 (D.C. Cir. 2018) and *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995). While the *FedEx I* majority detected an "evolution" of the common law away from a control test, this is simply not the reality anywhere else in the law.

Under the D.C. Circuit's own rules for resolving intra-circuit conflicts, *FedEx I* is not good law. The "law of the case" doctrine applied to the same facts and parties in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (*FedEx II*) does not control the more permissive "law of the circuit" rule recognized in *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 n.7 (D.C. Cir. 1996) (*en banc*). The Board should not reject *FedEx I* under the non-acquiescence doctrine; it should reject *FedEx I* as inconsistent with Supreme Court and D.C. Circuit law.

ARGUMENT

I. The Board Should Evaluate "Independent Contractor" Status in Light of Antitrust, Trademark and Tort Law.

A. Congress intends that the common law of agency will evolve in response to a changing legal and economic background.

The 1947 Taft-Hartley amendments to Section 2(3) adopted the "general principles of the law of agency." 93 Cong. Rec. 6441—6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947, p. 1537. But nothing in the NLRA or its legislative history freezes the common law of master and servant set forth in Blackstone's *Commentaries*. Congress intended that the common law of agency would evolve in response to social and economic changes. In *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), the Court stressed: "Whether the term 'employee' includes (particular) workers must be answered primarily from the history, terms and purposes of the legislation.' Thus the standard was one of economic and policy considerations within the labor field."

When Congress expects the common law of agency to be applied in a statute, it does so with the understanding that the common law evolves over time against a background of external laws and economic realities. *See Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. ___, 141 S.Ct. 2298, 2309 (2021) (changing principles of assignor estoppel in patent law were not eviscerations of prior rights, "but only the kind of doctrinal evolution typical of common-law rules."); *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 613 (2009) ("Congress intended the scope of liability to "be determined from traditional and evolving principles of common law."). This is equally true in labor law. *See Bowen v. U.S. Postal Service*, 459 U.S. 212, 224 (1983)

("In defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy.").

As we show in Part II below, the D.C. Circuit itself relied on the doctrine that the common law of agency evolves over time in *FedEx I*, 563 F.3d at 502. It merely assumed arbitrarily that this evolution has stopped as of 2002.

B. The Board is not free to ignore external law, including the Sherman and Lanham Acts and tort law, in framing the boundaries of "independent contractor" exemption.

In considering the common law of agency, therefore, the Board may not ignore the background of non-labor law that shapes it. The Board not only has the <u>discretion</u> to consider the antitrust, trademark and tort-law implications of an "independent contractor" claim; it has the <u>duty</u> to consider such implications. *See BASF Wyandotte*, 274 NLRB 978, 978-979 (1985), *enf'd*, 798 F.2d 849 (5th Cir. 1986) (even where Board is not charged with enforcing external law, it must take that external law into account in interpreting NLRA duties).

The Courts have repeatedly criticized the Board for deciding NLRA cases without due consideration for other non-labor laws. The Board has been forbidden from applying the NLRA to trench on the Immigration and Naturalization Act, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) or the law of mutiny, *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) or the Federal Arbitration Act, *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S.Ct. 1612, 1630 (2018) (citing *Hoffman Plastic*). "[T]his Court has never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA . . . In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objectiv[e],'" *Southern S.S. Co. v. NLRB*, 316 U.S. at 47—to wit, the objective of deterring unauthorized immigration that is embodied in the INA. *Hoffman Plastic Compounds,* 535 U.S. at 144.

This duty applies here where the Board considers arguments that alleged employees are really independent businesses acting in concert. We analyze antitrust, trademark, and tort law in turn:

C. Antitrust law

1. Coordination and rate-fixing among independent enterprises raise important antitrust concerns.

The perils of asserting that workers are really independent businesses are illustrated by *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990), (concerted activity among workers amounted to per se price-fixing because the defendants were independent contractors). The peril is not merely for the subordinate contractors, but also for the business that coordinates their allegedly independent activity. *See American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010).

Member Miscimarra unwittingly made this point in his dissent in *Pennsylvania Interscholastic Athletic Ass'n*, 365 NLRB No. 107 (2017), slip op. at 18: "Any effort by independent contractors to collectively set minimum rates would be a *per se* violation of the antitrust laws. *H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 fn. 20 (1981) (labor antitrust exemption inapplicable to "independent contractor or entrepreneur"); *Meyer v. Kalanick*, 174 F.Supp.3d 817

(S.D.N.Y 2016) (allegations that Uber platform established agreement among Uber drivers to set fares stated claim for violation of Sherman Act where drivers were alleged to be independent contractors). Accordingly, the prohibition on officials collectively setting minimum fees is not only consistent with independent contractor status but does no more than what the antitrust laws require." The D.C. Circuit upheld Member Miscimarra's dissent in *Pennsylvania Interscholastic Athletic Ass'n v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019).

Yet neither Member Miscimarra nor the D.C. Circuit acknowledged the glaring antitrust problem raised by some respondents' assertion of their subordinates' "independent entrepreneurial" status. In the case Member Miscimarra cited, *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 824 (S.D.N.Y 2016), Judge Rakoff held that Uber's business model may constitute illegal horizontal price-fixing precisely because its drivers are held out as independent contractors.[1] He distinguished cases analyzing *bona fide* vertical price restraints under the more permissive "rule of reason," holding that "where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade." 174 F. Supp. 3d at 824 (citing *Interstate Circuit v. United States*, 306 U.S. 208 (1939), *U.S. v. Apple, Inc.*,

[1] The Second Circuit later held that the private suit in *Meyer* was barred by the arbitration clause in drivers' contracts. *Meyer v. Uber Technologies*, 868 F.3d 66 (2017). A private arbitration clause could not bar a government enforcement action. *See EEOC v. Waffle House*, 534 U.S. 279, 291 (2002).

791 F.3d 290, 319-320 (2d Cir. 2015), and *Laumann v. Nat'l Hockey League*, 907 F.Supp.2d 465, 486–87 (S.D.N.Y. 2012)). In *U.S v. Apple*, the Second Circuit explained the *per se* rule in terms that would directly apply to most gig-economy employers asserting "independent contractor" status: "it is well established that vertical agreements, lawful in the abstract, can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel,' particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently." 791 F.3d at 319-320 , *quoting Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007).

This unacknowledged antitrust problem looms large in many of the Board's "independent contractor" cases, including *SuperShuttle DFW*, 367 NLRB No. 75 (2019) and *FedEx I.* Since these firms set prices charged to customers, and because individual drivers are not free to compete with each other in offering lower prices, these respondents might only escape Sherman Act liability if they admitted the employee status of their drivers. The Board is obligated to take cognizance of this problem under external law. *BASF Wyandotte*, 274 NLRB at 978-979.

2. The Board may not develop its own doctrine of "entrepreneurial freedom" at odds with antitrust law.

At least once before, the NLRB has had to scale back expansive doctrines of separate employer status in response to intervening antitrust law.

In *Los Angeles Newspaper Guild Local 69 (Hearst Corp.),* 185 NLRB 303, 304 (1970), *enf'd per curiam* 443 F.2d 1173 (9th Cir. 1971), the Board reasoned that separate division of the same company could be "neutrals" as to picketing arising from a dispute with a sister division. This decision was untethered to antitrust law. It merely reflected the Board's own construction of the law of corporate form.

The underpinnings of this *Hearst* doctrine were removed in *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 771-772 (1984). The *Copperweld* Court held, contrary to the *Hearst* Board's reasoning, that a parent and sister subsidiaries are <u>not</u> separate economic entities capable of conspiring with each other. *Copperweld*, 467 U.S. at 771-772. The antitrust principle in *Copperweld* was decisive in *Painters and Allied Trades District Council No. 51 (Manganaro Corp.)*, 321 NLRB 158, 174 (1996), where the Board held that an anti-dual-shop clause restraining the formation of double-breasted subsidiaries was not an illegal secondary restraint, notwithstanding the *Hearst* doctrine, precisely because of the contrary antitrust principle subsequently declared in *Copperweld*. *Manganaro*, 321 NLRB at 174, *quoting Copperweld*, 467 U.S. at 771-772.

In other words, the Board has already recognized that it is not free to develop its own, more pro-business doctrine of corporate separateness if that doctrine is at odds with the Supreme Court's application of the same concepts in antitrust law.

3. At a minimum, the NLRB should refer cases where "independent contractor" status is established to the FTC and DOJ Antitrust Division for review.

To be sure, the Board is not authorized to enforce antitrust law on its own. That is the duty of the Federal Trade Commission and the Department of Justice Antitrust Division. However, where a respondent in any R or C case successfully establishes that it presides, not over employees, but over allegedly independent entrepreneurs in a coordinated plan to fix prices and rates for service, the NLRB owes it to its sister law enforcement agencies to refer the record in that case to permit appropriate review. This is the basis of interagency coordination over many subjects where issues cross the jurisdictional lines of separate agencies. *See* NLRB Memorandum GC 22-01; NLRB Memorandum GC 19-02 (directing "Memorandums of Understanding (MOU) with other agencies related to co-extensive investigations.")

D. "Naked" licensing in the Lanham Act

In many independent-contractor cases, the Board has relied on the use of the respondent's common logo. *See FedEx Home Delivery*, 361 NLRB 610, 622 & ns. 46-47 (2014), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017); *Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enf'd,* 292 F.3d 777 (D.C. Cir. 2002). "By virtue of their uniforms and logos and colors on their vehicles, drivers are, in effect, doing business in the name of FedEx rather than their own. Even those drivers who operate as incorporated businesses do business in FedEx's name." *FedEx Home Delivery*, 361 NLRB at 622.

The Board's reasoning has been correct, but the Board has unnecessarily weakened its rationale by neglecting to connect it to external trademark law. In cases like *FedEx*, the Board simply offered its own opinion that the use of a common logo indicates control, without any reference to the strong support this argument has in trademark law. 361 NLRB at 622.

This unnecessarily weakens the Board's analysis. The intuitive point the Board was articulating in *FedEx* and *Corporate Express* is a well-established doctrine of trademark law. The Lanham Act, 15 U.S.C. §§1111 *et seq*., condemns "naked licensing," defined as the practice of allowing third parties to use a trademark without retaining sufficient control to ensure the public's source-identifying association between the mark and a centralized guarantee of quality control. *See Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 515 (9th Cir. 2010) (citing 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:48 (4th ed. 2010); *Eva's Bridal Ltd. v. Halanick Enterprises, Inc.*, 639 F.3d 788, 790 (7th Cir. 2011)).

A customer who orders an Uber driver or a Supershuttle ride relies on the source-identifying nature of the trademark to ensure known quality standards: cleanliness, vetting of the driver's background, and above all a fixed rate structure that does not vary among drivers using the mark. But in NLRB cases, respondents frequently assert that workers who wear the company logo are entirely independent entrepreneurs. This is contrary to the reality of the marketplace and to trademark law. The mere fact that the drivers are organized through some central software platform is not enough to avoid "naked" licensing, as the Ninth Circuit held in *Freecycle*, 626 F.3d at 516-517.

The consequence of uncontrolled "naked" licensing is that the trademark owner loses its exclusive rights to the trademark. *Id. See also* 3 J. McCarthy, *Trademarks & Unfair Competition* § 18:48, p. 18–112 (4th ed. 2012) ("[U]ncontrolled and 'naked' licensing can result in such a loss of significance of a trademark that a federal registration should be cancelled."); *Restatement (Third) of Unfair Competition* § 33(c). Courts rely on the use of a common trademark as a strong indication that the worker is in fact the servant of the trademark owner under general agency principles. *See Huggins v. FedEx Ground Package System, Inc.*, 592 F.3d 853, 859 (8th Cir. 2010) (holding that FedEx driver made a triable case of employee status in part because his agreement required "its drivers to look and act like FedEx employees while they performed FedEx services, and we believe that these provisions show the extent of FedEx's control over some details of [their] work, see Restatement (Second) of Agency, § 220(2)(a).") *Huggins* was not cited in the Board's 2014 *FedEx* decision and therefore was not considered in the D.C. Circuit's 2019 decision denying enforcement. The Board should invoke trademark decisions like *Huggins* that contradict claims of "independent contractor" status.

E. *Respondeat superior* doctrine in tort law

The common law of agency defined in the Restatements of Agency is normally developed in tort cases. Common-law courts routinely must decide whether a defendant company is liable for torts committed by someone the defendant maintains is an independent contractor. For example, if a Supershuttle driver negligently crashes her van in an accident, may the injured customer sue Supershuttle in addition to the driver on the theory of *respondeat superior*?

The answer is determined by the common law of agency. But here, the very gig-economy employers who assert "independent contractor" status before the NLRB face substantial *respondeat superior* liability under the common law of agency in ordinary tort cases. *See, e.g., Murray v. Uber Technologies*, 486 F.Supp.3d 468, 477 (D. Mass. 2020) (denying motion to dismiss *respondeat superior* claim against Uber where customer adequately pled sufficient control to establish agency for tort purposes); *Search v. Uber Technologies*, 128 F.Supp.3d 222, 231-232 (D.D.C. 2015) (under District of Columbia law, passenger sufficiently alleged that Uber was the employer of driver committing a tort pursuant to *respondeat superior* doctrine, where operator screened new drivers, paid drivers weekly, and, upon threat of termination, subjected drivers to a host of specific requirements, and exercised control of its drivers by controlling the rate of refusal of ride requests, the timeliness of drivers' responses to requests, the display on vehicles of its logo, the drivers' interactions with passengers, and the quality of drivers via its rating system.)

Fed Ex Home Delivery is now <u>admitting</u> its *respondeat superior* liability for drivers as its employees in tort cases, in order to preclude a more damaging theory of negligence liability. *See Bogdanski v. Budzik,* 408 P.3d 1156, 2018 WY 7 (Wyo. 2018); *see also Craig v. FedEx Ground Package System*, 300 Kan. 788, 335 P.3d 66 (2014) (finding Fed Ex drivers to by employees under common law).

The Board should therefore analyze whether the respondent in an NLRB case would be liable under a *respondeat superior* theory under the state common law of agency for torts committed by the workers in dispute. If the answer is yes, then the Board has its answer that these are not independent contractors for NLRA purposes. *See Buffalo Cab Co.*, 189 NLRB 410, 411 (1971) (employer's "independent contractor" claim rejected where "[t]he company occupies the legal relation of principal and agent with respect to liability to the public and assumes responsibility for the driver's tort actions").

II. *FedEx I* Is Not the Current Law of the D.C. Circuit.

A. The *FedEx I* majority inexplicably allowed the Board to "evolve" the common law until 2002, but not thereafter.

The 2-1 majority in *FedEx I* took an inconsistent approach to the evolution of the common law of agency. In explaining why it applied a different "entrepreneurial freedom" standard than the "control" test it had applied in *North American Van Lines, Inc. v. NLRB (NAVL)*, 869 F.2d 596, 598 (D.C. Cir. 1989), and *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995), the *FedEx I* majority held that it had "retained the common law test (as is required by the Court's decision in *United Insurance*), but merely 'shift[ed our] emphasis to entrepreneurialism,'" seven years later in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002). *See Fed Ex I*, 563 F.3d at 503. Yet the *FedEx I* majority then described its snapshot of the common law as frozen in time as of 2002, an external law that the Board had no authority to vary thereafter. 563 F.3d at 496 (holding that the Board has no expertise and deserves no deference in construing common-law of agency). The latter holding appears to conflict with *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968), where the Supreme Court held that while the Board lacks special expertise in the common law of agency, it is still entitled to choose between "two fairly conflicting views" of that law.

B. The *FedEx I* Court's view of the common law as of 2002 is no longer correct.

Even accepting the *FedEx I* majority's claim that the Board lacks any power to decide between competing views of the common law, the fact remains that the perceived shift away from a "control" test that the *FedEx I* identified with *Corporate*

Express Delivery in 2002 does not comport with the reality of Supreme Court law and the views of the American Law Institute after that date. This point was thoroughly made in Judge Garland's *Fed Ex I* dissent, 563 F.3d at 507-510 and in Member McFerran's dissent in *Supershuttle*, 367 NLRB No. 75 at pp. 15-19.

1. *Clackamas*

Remarkably, neither the *FedEx I* majority nor the *Supershuttle* Board majority cited the Supreme Court's articulation of the common law of agency in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 448 (2003). Contrary to the "shift" perceived by FedEx I away from a control test, *Clackamas* articulated the control test as the primary factor, as the circuits now confirm. "[C]ircuits relying on *Clackamas* to resolve disputes similar to the present one have not deviated from the 'principal guidepost' of common-law control." *Lemon v. Myers Bigel, P.A.*, 985 F.3d 392, 396 (4th Cir. 2021), *citing von Kaenel v. Armstrong Teasdale, LLP*, 943 F.3d 1139 (8th Cir. 2019; *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005).

While the *FedEx I* majority chided that the Board may not ignore higher authority in determining the common law of agency, neither may the D.C. Circuit. That is, the D.C. Circuit may not announce a "shift" in that common law that the Supreme Court did not.

2. The *Restatement (Third) of Agency*

Even more remarkably, the *FedEx I* majority cited the *Restatement (Second) of Agency* (1958) without acknowledging that there has been a superseding *Restatement (Third) of Agency* issued in 2006. The *Restatement (Third)* is now recognized as the most current statement of the federal common law of agency.

Bilek v. Federal Insurance Co., 8 F.4th 581, 587 (7th Cir. 2021); *Henderson v. United Student Aid Funds*, 918 F.3d 1068, 1073 (9th Cir. 2019).

The Restatement's change is material here. The *Restatement (Third)* simplifies the complicated multi-factor analysis that the *FedEx I* Court identified with the *Restatement (Second)*, and replaces it with a more straightforward "control" test. *Restatement (Third) of Agency* § 7.07 (2006). *See Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013) ("An essential element of agency is the principal's right to control the agent's actions." (citing 1 *Restatement (Third) of Agency* § 1.01, Comment f (2005).)); *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286, 296 & n.5 (Me. 2009) ("Comment b to section 7.07 explains the changes in the formulation of the scope-of-employment doctrine between *Restatement (Third) of Agency* § 7.07(2) (2006) and its predecessors, *Restatement (Second) of Agency* §§ 228, 229 (1958), including that section 7.07(2) is stated in more general terms and takes into account changes in workplace practices."); *Schweikert v. Franciscan Health System-West*, 149 Wash. App. 1038 (Wash. Ct. App. 2009) ("Rather than list factors to weigh, the Third Restatement of Agency defines what an employee is and focuses on the degree of control the principal exercises over the agent."); *Life Investors Ins. Co. of Am. v. Corrado*, 804 F.3d 908, 911 (8th Cir. 2015), after certified question to 838 N.W.2d 640, 642 (Iowa 2013) (abandoning *Restatement (Second) of Agency* for more modern test of principal's ratification of an actor's unauthorized act.*) See also Matter of Vega*, 149 N.E.3d 401, 411, 125 N.Y.S.3d 640, 651 (2020) (Rivera, J. concurring). Since the survey of the American Law Institute is deemed authoritative on the evolution of the common law,[2] it is inappropriate to cite the *Restatement (Second)* as though there were no superseding *Restatement (Third).*

3. The control test dominates common law since 2017

The *FedEx I* majority's view is even less defensible in light of the overwhelming weight of common-law agency decisions in the past few years. 19 Williston on Contracts § 54:3 (4th ed. 2021). According to the 2021 Cumulative Supplement to Williston § 54:3, a consensus of common-law courts in dozens of decisions since 2017 identify the right of control as the determinative factor in distinguishing employees from independent contractors. *Id.* (citing cases from three federal Circuits and 11 state appellate courts since 2017).

If the *FedEx I* majority perceived a shift away from a control test under the common law of agency, the evolution of the actual common law has not borne its view out. Indeed, FedEx itself is now <u>conceding</u> its master-servant relationship to its drivers in common-law courts to avoid even greater tort liability. *See Bogdanski v. Budzik,* 408 P.3d 1156, 1157 2018 WY 7 (Wyo. 2018); *see also Craig v. FedEx Ground Package System*, 300 Kan. 788, 335 P.3d 66 (2014) (finding FedEx drivers to by employees under common agency law). The Board should not allow gig employers like FedEx to maintain inconsistent positions by accepting its drivers' master-servant relationship in all other legal contexts, but claiming some unique pro-

[2] Some commentators have complained that the American Law Institute should not be made a *de facto* legislator of federal common law. See, e.g., *Wilson v. Good Humor Corp.,* 757 F.2d 1293, 1312 (D.C. Cir. 1985) (Bork, J, concurring). However, so long as the Supreme Court treats the Restatements as an authoritative view of general common law, the ALI's evolving views are entitled to great weight.

employer doctrine isolated to the NLRA. If the general common law of agency applies, the right of control is the test.

C. *FedEx I* is not good law under the D.C. Circuit's own rules for resolving intra-circuit conflict.

FedEx I rejected a view of agency common law that has been accepted by other D.C. Circuit panels both before and after it. *Browning-Ferris Industries v. NLRB*, 911 F.3d 1195, 1211 (D.C. Cir. 2018) states that the "common-law element of control is the principal guidepost" in determining whether an entity is an employer of another, *citing Clackamas*, 538 U.S. at 448. As Judge Garland noted in his *FedEx I* dissent, 563 F.3d at 508, *N. Am. Van Lines (NAVL) v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989), and *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) both applied the control test that the *FedEx I* majority held was superseded in *Corporate Express*. If in fact the common law of agency is static and un-evolving, the *FedEx I* panel was not free to read *Corporate Delivery* as overruling prior panel decisions in *NAVL* and *C.C. Eastern*. *Id*., citing *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys*., 195 F.3d 28, 34 (D.C.Cir.1999) ("In the event of conflicting panel opinions ... the earlier one controls, as one panel of this court may not overrule another.").

Here, *FedEx I* predated *Browning-Ferris*, but *NAVL* and *C.C. Eastern* predate *FedEx I*. If the common-law principles of agency evolve, the D.C. Circuit must recognize that the evolving consensus of the common law of agency contradicts *FedEx I*. If they do not evolve, *FedEx I*'s rejection of the control test of earlier panel decisions was itself incorrect.

D. The D.C. Circuit's adherence to *FedEx I* in 2017 was dictated by law of the case, not the general law of the Circuit.

In *FedEx Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017), the D.C. Circuit refused to revisit *FedEx I* because the case involved the same facts and parties. It acknowledged the Board's general right to revise its rules, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001–1002 (2005), but held that the Board could not change the outcome in the same case on identical facts.

This was an application of the law of the case, not the more permissive law of the Circuit. But the case cited by the *FedEx II* court, *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 n.7 (D.C. Cir. 1996) (*en banc*), explained that the "law of the case" doctrine applicable to the same parties and facts is much more rigid than the law of the Circuit:

> There are situations in which the law-of-the-case doctrine but not the law-of-the-circuit doctrine applies. If a party fails to raise a point he could have raised in the first appeal, the "waiver variant" of the law-of-the-case doctrine generally precludes the court from considering the point in the next appeal of the same case. The law-of-the-circuit doctrine would not, however, bind another panel. Without a holding on the point, the first panel's decision would have no precedential effect. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

This is powerfully illustrated by the fact that Judge Millett, who authored *Fed Ex II*, rejected the legal underpinnings of *Fed Ex I* one year later, writing for the same Court in *Browning-Ferris Industries v. NLRB*, 911 F.3d 1195, 1211 (D.C. Cir. 2018) (holding that "common-law element of control is the principal guidepost" in determining whether an entity is an employer of another, citing *Clackamas*, 538 U.S. at 448). *Browning-Ferris* correctly applies the common law of agency permitting the Board to consider "direct" or "indirect" control and the "right-to-control," so long as the Board is focused on "control over the essential terms and conditions of the workers' employment." 911 F.3d at 1209. This is consistent with the D.C. Circuit's approach in *NAVL* (1989) and *C.C. Eastern* (1995), but entirely contrary to *FedEx I*, which now stands as an outlier contradicted by Circuit decisions both before and after it. While the Board may have been barred by the law of the case in the same *FedEx* litigation, the law of the Circuit is not as inflexible.

As a result, the Board should not reject *FedEx I* based on the defiant doctrine of non-acquiescence. It should reject *FedEx I* as obsolete under the common law of agency and the D.C. Circuit's own rules for resolving intra-Circuit conflicts.

CONCLUSION

In framing its test for independent-contractor status, the Board should ground its analysis of "independent contractor" claims, not merely on its own evaluation of the common-law, but on the external law of antitrust, trademark and tort law. Employers should not be allowed to assert "entrepreneurial freedom" where that argument would imply an antitrust violation, or "naked licensing" of its trademark. Nor should employers be allowed to assert independent-contractor status where that claim would be rejected in common-law courts in tort cases.

The Board should further explain that *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) is inconsistent with Supreme Court law and D.C. Circuit decisions both before and after its decision, and is therefore not good law under the D.C. Circuit's own rules.

January 28, 2022 /s Michael T. Anderson

Michael T. Anderson
Counsel of Record
Mark Hanna
Adam C. Breihan
Roseann R. Romano
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
(202) 223-2620
manderson@murphypllc.com

Counsel for *Amicus Curiae*
National Employment Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing brief was electronically filed with the National Labor Relations Board on January 28, 2022, using the Board's E-filing system and was served via e-mail upon the following persons:

Daniel Shea, Esq.
Michelle Johnson, Esq.
Amy Cheng, Esq.
Elliott Henigan, Esq.
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

Nicholas J. Johnson, Counsel
Spivak Lipton LLP
1700 Broadway, 21st Floor
New York, NY 10019
njohnson@spivaklipton.com

/s/ Michael T. Anderson
Dated: January 28, 2022 Michael T. Anderson