BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-RC-276292

The Atlanta Opera, Inc.

and

Make-Up Artists and

Hair Stylists Union, Local 798, IATSE

BRIEF OF *AMICUS CURIAE* MARKETPLACE INDUSTRY ASSOCIATION

Camille A. Olson
Joshua L. Ditelberg
Richard D. Lapp
Joseph Vento
SEYFARTH SHAW LLP
233 S. Wacker Drive
Suite 8000
Chicago, Illinois 60606-6448
(312) 460-5000
(312) 460-7000 (facsimile)
colson@seyfarth.com
jditelberg@seyfarth.com
rlapp@seyfarth.com
jvento@seyfarth.com

February 10, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Marketplace Industry Association respectfully submits this brief *amicus curiae* in response to the National Labor Relations Board's invitation for amicus briefs regarding whether the Board should reconsider its standard for determining the independent contractor status of workers.

For the reasons set forth below, the Association urges that the Board should continue to adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).

STATEMENT OF INTEREST

Established in 2018, the Marketplace Industry Association (www.marketplaceassociation.org) is the first and only trade association representing technology-enabled marketplace platforms, also known as internet marketplaces or digital marketplaces. The mission of the Association is to represent, educate and advocate for the benefit of the marketplace industry, and to better serve those who exchange goods, services and property through marketplaces. An important function of the Association is to represent the interests of its members in matters before courts and legislatures throughout the country. To that end, the Association files amicus briefs in cases that raise issues of concern to marketplaces operating in the United States.

Whether service providers are properly classified as independent contractors instead of employees is vitally important to our members. The Association represents a wide variety of marketplaces transacting for a multitude of services, including ride share (adult and youth), home services, childcare (babysitters and

nannies), senior care, information technology support, coaching, tutoring and delivery services, among many others.

In all, the Association's members have facilitated transactions for more than 300 million customers and have provided economic opportunities for more than 60 million workers. In all cases, little to no control is exerted over the workers transacting for goods and services through these marketplaces. As a result, the workers transacting through these marketplaces are properly classified as independent contractors. In fact, the explosion of marketplaces in the US has, in large part, been driven by the efficient, flexible and cost-effective opportunities afforded to independent contractors transacting for goods and services through these marketplaces.

SUMMARY OF ARGUMENT

Ensuring a permitted delineation of independent contractors under the Act is essential because it is jurisdictional. Independent contractors are excluded from the definition of statutory employees, 29 U.S.C. § 152(3).

Consistent with the Act, independent contractors are defined according to the common law. The common law is judicially determined, and reviewing courts do not defer to the Board in establishing the fundamental elements of common law tests. *SuperShuttle* appropriately embodies judicial pronouncements of independent contractor relationships under the Act. The Board's prior standard in *FedEx Home Delivery*, 361 NLRB 610 (2014) *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017) did not; and, indeed, was denied enforcement by the D.C. Circuit.

Were the Board to depart from *SuperShuttle*, or otherwise from judicial definitions of independent contractor status, the Board's orders presumably likewise would not be enforced. Such non-acquiescence is wasteful for parties; and, indeed, could subject the Board to sanctions. This especially is so as to a return to the Board's *FedEx Home Delivery* standard.

As any party adversely affected by a Board order may obtain review in the D.C. Circuit, its doctrine regarding the basis for an independent contractor relationship should be given great weight. That Court's delineation is addressed *infra*. In particular, as *SuperShuttle* does and *FedEx Home Delivery* did not, the Board should continue to give effect to the emphasis that the D.C. Circuit ascribes to potential entrepreneurial opportunity.

ARGUMENT

I. Assuring An Allowable Delineation Of Independent Contractors Under The Act Is Essential Because It Is Jurisdictional

The Act "is explicit … that the term 'employee' … shall not include … any individual having the status of an independent contractor[.]' [29 U.S.C.] § 152(3). Accordingly, '[t]he jurisdiction of the NLRB extends only to the relationship between an employer and its 'employees'; it does not encompass the relationship between a company and its 'independent contractors.'" *FedEx Home Delivery v. NLRB*, 849 F.3d 1123,1124-1125 (D.C. Cir. 2017) (*FedEx II*) (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 857 (D.C. Cir. 1995)).

II. The Common Law Fundamentally Is A Matter For Judicial Determination, And The Courts Do Not Defer To The Board

In *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968), the Supreme Court held that the determination of whether a worker is a statutorily protected "employee" or an exempt "independent contractor" is governed by "common-law agency" principles.[1]

However, "[t]he content and meaning of the common law is a pure question of law that [courts] review de novo without deference to the Board." *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1206 (D.C. Cir. 2018). As the Act does not define the term "independent contractor," and that term traditionally is delineated by the common law, it should be presumed that "Congress intended to incorporate those meanings, unless the statute, directs otherwise." *Id.* at 1207 (citations omitted). And establishing the relevant common law "requires 'no special

[1] Following *United Insurance*, the D.C. Circuit and other courts have consulted the Restatement (Second) of Agency's non-exhaustive list of ten factors to consider in deciding whether a worker is an independent contractor: (1) 'the extent of control' the employer has over the work; (2) whether the worker 'is engaged in a distinct occupation or business'; (3) whether the 'kind of occupation' is 'usually done under the direction of the employer or by a specialist without supervision'; (4) the 'skill required in the particular occupation'; (5) whether the employer or worker 'supplies the instrumentalities, tools, and the place of work for the person doing the work'; (6) the 'length of time for which the person is employed'; (7) whether the employer pays 'by the time or by the job'; (8) whether the worker's 'work is a part of the regular business of the employer'; (9) whether the employer and worker 'believe they are creating' an employer-employee relationship; and (10) whether the employer 'is or is not in business.' *See, e.g., Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 565-566 (D.C. Cir. 2016); *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599-600 (D.C. Cir. 1989)(citing Restatement (Second) of Agency) § 220(2) (1957)). In its recognition of the common law of independent contractor relationships, the D.C. Circuit has not relied upon the Restatement (Third) of Agency (2017).

administrative expertise that a court does not possess.'" *Id.* (quoting *United Insurance*, 390 U.S. at 260.).[2]

Notably, the D.C. Circuit in *Browning-Ferris* was explicit that its analysis of the common law of joint employment was distinct from that Court's treatment of independent contractor status. *See* 911 F.3d at 1212-1215. Rather, the D.C. Circuit's *FedEx* decisions govern.[3]

III. Because The Act Provides That Any Party Adversely Affected By A Board Order May Obtain Review In The D.C. Circuit, Its Independent Contractor Doctrine Should Be Given Great Weight

As Congress built into the Act the right of any adversely affected party to obtain review of a Board order in the D.C. Circuit, 29 U.S.C. § 160(f), its doctrine regarding independent contractor relationships should be given great weight.

---

[2] *See also FedEx II*, 849 F.3d at 1128 (D.C. Cir. 2017) ("[T]his particular question [regarding who is an employee or independent contractor] under the Act is not one to which we grant the Board *Chevron* deference[.]"); *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990) ("Deference under the *Chevron* [*Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] doctrine … does not apply" to the Board's analysis of the common law.); *Int. Longshoreman's Ass'n v. NLRB*, 56 F.3d 205, 212 n. 4 (D.C. Cir. 1995) ("'When Congress indicated that it wanted the judge-made common law of agency to govern the construction of a [statutory provision], it rejected the basis of [*Chevron*'s] presumptions.'") (citation omitted).

[3] Should the Board purport to rely upon the Supreme Court's decision in *Clackamas Gastroenterology Assoc. P.C. v. Wells*, 538 U.S. 440 (2003) as supposedly instructing the D.C. Circuit on the issue, that case did not address the foundation of common-law independent contractor relationships. Rather, it concerned whether shareholders and directors of a professional corporation could be employees. Thus, the Court was explicit that "right to control" factors are not relevant to the former: "These particular factors are not directly applicable to this case because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer." *Id.* at 445 n. 5.

If the Board does not conform to the D.C. Circuit's views, any losing party aligned with that Court's approach could pursue review there, and presumably the Board's order would be denied enforcement. As the Board never is inherently the last word regarding the common law, failing to adhere to the D.C. Circuit's indicia of independent contractor status is wasteful to parties.

IV. The Boards' Return To Its *FedEx Home Delivery* Standard Presumably Would Be Denied Enforcement By The D.C. Circuit And Such Action Could Result In Sanctions

The D.C. Circuit already has rejected the Board's *FedEx Home Delivery* standard. As that Court made sufficiently clear, *FedEx II*, 849 F.3d at 1128, any return to that discredited independent contractor test presumably would be denied enforcement again.

Moreover, the Board's expressed interest in considering a return to its previously rejected *FedEx Home Delivery* standard might well result in sanctions. In *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016), the D.C. Circuit rebuked the Board nonacquiescence to its conflicting interpretation of governing law. One of the situations in which that Court considered the Board's divergence to be defiant was "[w]hen a case's facts result in only two venue choices for the party appealing the adverse order, and one circuit's precedent is in agreement with the agency's legal interpretation while the other is adverse to it, the agency knows any appeal will be to the adverse circuit." *Id.* at 23 (citing *Ithaca Coll. v. NLRB*, 623 F.2d 224, 227 (2d Cir. 1980) ("Certainly the College was not going to seek review in the D.C. Circuit when it had a favorable precedent in the Second Circuit.").

As, per 29 U.S.C. § 160(f), any rational party that loses because of the Board's failure to categorically recognize and properly weigh independent contractor indicia given effect by the D.C. Circuit will, if review is sought, obtain it in that Court. And that intrinsic availability of favorable review establishes grounds for sanctioning the Board:

> '[T]he Board's policy of nonacquiescence has fostered a bifurcated system in which litigants willing to pursue their case to the appellate level are able to avoid [the] Board['s] orders. Thus, the Board's policy has had the effect of needlessly protracting litigation, establishing a two-tiered system of labor law in the same jurisdiction, encouraging disrespect for [the] Board['s] orders, and antagonizing the courts . . . Even worse, it compels litigants to expend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order.' … Our Court shares these concerns.

Heartland, 838 F.3d at 24 (citation omitted). *See also Johnson v. U.S. Railroad Ret. Bd.,* 969 F.2d 1082, 1091 (D.C. Cir. 1992) ("Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it.").

The D.C. Circuit was explicit in identifying the primary evil of willful Board nonacquiescence, and what that Court will not tolerate:

> It is clear enough that the Board's conduct was intended to send a chilling message to … others caught in the Board's crosshairs: 'Even if we think you will win, we will still make you pay.' This roguish form of nonacquiescence assures the Board's gambit is virtually cost-free—the Board either enjoys the fruits of a settlement, or it dares a party to employ 'the money and power [needed] to pay for and survive the process of fighting with an agency through its administrative processes and into the federal courts of appeals.' … [A]dministrative hubris does not get the last word under our Constitution. And citizens can count on it.

Heartland, 838 F.3d at 28-29 (citation omitted).

V. The D.C. Circuit Gives Primary Emphasis To Potential Entrepreneurial Opportunity

In assessing whether an independent contractor relationship exists, the D.C. Circuit gives primary emphasis to potential entrepreneurial opportunity. As that Court held in *Fedex Home Delivery v. NLRB*, 563 F.3d 492, 503 (D.C. Cir. 2009) (*FedEx I*):

> [In *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002)][w]e explicitly 'agree[d] with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor,' because, as reflected by the Restatement's comment, it is not 'the degree of supervision under which [one] labors but . . . the degree to which [one] functions as an entrepreneur — that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder,' that better illuminates one's status. *Id.* We retained the common law test (as is required by the Court's decision in *United Insurance*), but merely 'shift[ed our] emphasis to entrepreneurialism,' using this 'emphasis' to evaluate common law factors such as whether the contractor 'supplies his own equipment,' *id. Corporate Express* is thus doctrinally consistent with *United Insurance* and the Restatement.'

Thus, the D.C. Circuit holds that "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.* at 497 (citing *Corporate Express,* 292 F.3d at 780).

The D.C. Circuit underscores that:

> The common law test, after all, is not merely quantitative. We do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins. Instead, there also is a qualitative assessment to evaluate which factors are determinative in a particular case, and why. In *Corporate Express*, we said this qualitative evaluation 'focus[es] not upon the employer's control of the means and manner of the work but instead upon whether

> the putative independent contractors have a 'significant entrepreneurial opportunity for gain or loss.'

Id. n. 3 (citations omitted). *FedEx II* reiterated the D.C. Circuit's analysis in *FedEx I*. *See FedEx II*, 849 F.3d at 1128 ("But, as we indicated in *Lancaster Symphony*, *FedEx I* did consider all of the common-law factors as the law requires. *See Lancaster Symphony*, 822 F.3d at 565").

VI. The D.C. Circuit's Other Independent Contractor Boundaries Similarly Should Be Followed

The D.C. Circuit's other independent contractor boundaries similar should be expressly acknowledged and followed by the Board.

Among others, that Court has found the following factors to be irrelevant to an independent contractor determination:

(i) regulating work flow because of business conditions, market forces, or customer demand, *see, e.g.*, *Aurora Packing.*, 904 F.2d at 75-76 (finding if "the primary operator must slow down, curtail, or fundamentally change its own operation, that is actually no control at all.");

(ii) "constraints imposed by customer demands," including monitoring and assessment of whether the alleged contractor's agents are satisfying service goals or agreed-upon performance criteria, *see, e.g., FedEx I*, 563 F.3d at 501 ("'[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.' Employer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee.'")(citation omitted);

(iii) providing review and information of results to ensure the client is appropriately charged, cost control initiatives, tracking contractor worker productivity, reviewing contractor records, and auditing contractor expenses -- including headcount and overtime, *see, e.g.*, *ICWU Local 483 v. NLRB*, 561 F.2d 253, 256-257 (D.C. Cir. 1977), *Aurora Packing*, 904 F.2d at 75, *FedEx I*, 563 F.3d at 501, *N. Am. Van Lines* 896 F.2d at 598-599, *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB*, 603 F.2d 862, 873, 891 (D.C. Cir. 1978), *reh'g denied*, 603 F.2d 898, 899, 904 (D.C. Cir. 1979).

(iv) establishing minimum qualifications for a contractor and the workers who provide services prior to their performance, including employment eligibility verification, drug screens, background checks, clean driving records and other forms of safety compliance, and other basic competencies, *see, e.g., N. Am. Van Lines* and *Aurora Packing*, *supra*; *Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 505 (D.C. Cir. 1978);

(v) satisfying government regulations, legal standards, recognized standards of care, and efforts to otherwise avoid liability risk, *see, e.g. FedEx I*, 563 F.3d at 501 (finding "constrains imposed by … government regulations do not determine the employment relationship"), *N. Am. Van Lines*, 896 F.2d at 599 ("employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the means and manner of performance, do not weigh in favor of employee status.");

(vi) the ability to cancel a service contract, including at will, *see, e.g.*, *N. Am. Van Lines*, 896 F.2d at 598-599, *Local 777*, 603 F.2d at 873, 899, 904.

To the extent that worker control is being assessed, in *Aurora Packing Co.,* the D.C. Circuit found that "'the extent of the actual supervision exercised by a putative employer over the 'means and manner' of the workers' performance is the most important element to be considered in determining whether or not one is dealing with independent contractors or employees.'" 904 F.2d at 76 (quoting *Local 777,* 603 F.2d at 873) (emphasis in original and supplied).[4]

In *Local 777*, the D.C. Circuit emphasized that "pervasive control" over the manner and means of job performance was necessary for an employer finding. 603 F.2d at 898, 901-904.[5] *See also NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689–690 (1951) ("[T]hat the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent

---

[4] *See also Lancaster Symphony*, 822 F.3d at 566 (finding "'the extent of control' … requires that we examine 'the extent of the actual supervision exercised by a putative employer over the means and manner of the workers' performance.") (citation omitted); *Webb*, 580 F.2d at 504 (stressing importance of supervision, meaning day-to-day "control of the individual workman's physical conduct") (citations omitted).

[5] The D.C. Circuit has found that Taft-Hartley's legislative history provides "clear evidence that Congress did not intend that an unusually expansive meaning should be given to the term 'employee' for the purpose of the Act," and has noted the fact that the "statutory definition that has not been changed in any respect since it was significantly amended in 1947[.]" *Local 777*, 603 F.2d at 880, 893. Further, "Congress was so incensed with the fanciful construction of its legislative intention [by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944)] that in 1947 it specifically excluded 'independent contractors' from the coverage of the Act and condemned the Court's rationale in *Hearst Publications* as giving 'far-fetched meanings' to the words Congress has used." *Id.* at 905.

contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.") (emphasis supplied).

VII. If An Enterprise Does Not Control Employee "Wages" And "Hours" It Cannot Be An Employer For Purposes Of The Act Consistent With Section 8(d)

Section 8(d), 29 U.S.C. § 158(d), defines what constitutes collective bargaining under the Act: "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" (emphasis supplied).

"Wages" and "hours" are the essential mandatory bargaining subjects expressly referenced in the statutory text. Thus, to be an "employer" for purposes of the Act as opposed to an independent contractor or other enterprise, a party must have sufficient control over and therefore be capable of negotiating as to wages, hours "and" other terms and conditions — not "or." Such a textual analysis reflects the Supreme Court's recent approach interpreting the Act in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) at slip op. at 12, which focuses on what Congress actually enumerated as the essential core of the statute's purpose and parameters.

VIII. *SuperShuttle* Is Consistent With The D.C. Circuit's Prior Decisions While The Board's *FedEx* Decision Was Not And Already Has Been Expressly Rejected

SuperShuttle is consistent with the D.C. Circuit's formulation of the independent contractor standard under the Act. *FedEx* was not, and so twice was denied enforcement.

As the dissenters to the Board's Order Granting Review and Notice and Invitation to File Briefs emphasized, in *FedEx I*, 563 F.3d at 497, the D.C. Circuit noted that "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." *The Atlanta Opera, Inc.* 371 NLRB No. 45 (2021), slip op. 3.

The dissenters underscored that the Board's approach in *SuperShuttle* "represents an appropriate response to the D.C. Circuit's twice-made criticism of the Board's failure [in *FedEx*] to adequately consider the significance of entrepreneurial opportunity in a matter of legal interpretation as to which the court owes the Board no deference. *See FedEx II*, 849 F.3d at 1128." *Id.* The dissenters rightly cautioned that the new Board majority offers no reason or guidance to the parties for reconsidering *SuperShuttle* and potentially returning to the standard in *FedEx II*—an approach that will invariably put the Board at odds with the D.C. Circuit, a forum with national jurisdiction to hear appeals from parties adversely affected by Board decisions." *Id.*[6]

[6] In *SuperShuttle*, the Board appropriately "shifted the prism through which it evaluates the significance of the common-law factors to what the D.C. Circuit has deemed a 'more accurate proxy' to '"capture[] the distinction between an employee and an independent contractor."' *See FedEx I*, 563 F.3d at 497 (citing *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (2002)). As the D.C. Circuit has made clear, the Board's independent-contractor analysis is qualitative, rather than strictly quantitative; thus, the Board does not merely count up the common-law factors that favor independent contractor status to see if they outnumber the factors that favor employee status, but instead it must make a qualitative

IX. *SuperShuttle*'s Focus On Potential Entrepreneurial Opportunity Fosters Marketplaces, While The Board's *FedEx* Approach Did Not

SuperShuttle's focus on potential entrepreneurial opportunity fosters marketplaces, while the Board's *FedEx* approach did not.

Marketplaces operate as third-party, passive venues in the form of websites and/or mobile phone applications that enable participants to freely transact services. For example, a gig economy marketplace facilitates the purchase and sale of services, often referred to as 'gigs.' According to Pew Research Center, 16% of Americans have earned income from gig economy marketplaces, including through rideshare apps; shopping for or delivering groceries and household items; performing household tasks like cleaning, furniture assembly or running errands; restaurant delivery; package pickup and delivery, among many others.[7]

The benefits to marketplaces are:

Low barrier to entry

- Marketplaces are designed to be easy to use. Sellers can quickly and easily begin transacting for services and with the full benefits of payment processing, advertising, and even distribution channels in a fraction of the time of sourcing and registering for those tools on their own.

---

evaluation of those factors based on the particular factual circumstances of each case. *See FedEx I*, 563 F.3d at 497 fn. 3." 367 NLRB No. 75, slip op. at 11. Accordingly, the Board found that "the Board majority in *FedEx*, based on a mischaracterization of the D.C. Circuit's opinion in *FedEx I*, impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis." *Id.*

[7] https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/#:~:text=In%20total%2C%209%25%20of%20U.S.,money%20through%20online%20gig%20platforms.

- Everything from marketing to customer service resolutions is handled on the same platform through a single dashboard.

- Selling on marketplaces is inexpensive and almost immediate, allowing sellers to begin monetizing services almost instantaneously.

More inclusive and flexible

- Entrepreneurial opportunity for everyone regardless of socio-economic background or other characteristics that would prevent or make employment challenging, including people with disabilities and mobility issues, family situation or personal care situations (children, aging parents, disabled family members, etc.)

- Persons without college or advanced degrees can access income opportunities almost immediately.

- Formerly incarcerated people can engage without restrictions that many employers put on hiring them.

- Enables income opportunities for those in areas with limited employment prospects.

- Provides economic opportunities to those recovering from substance abuse or veterans suffering from PTSD.

Immediate access to a large customer base without the commensurate cost of separately advertising or acquiring customers.

Sustainable – a single platform can host thousands of sellers without an increase in impact to the environment or overhead because they don't require physical real estate, additional technology, etc.

Economic opportunity to earn supplemental income for those already employed full time.

In addition to full-time service enterprises, the gig economy also comprises a vital facet of the national economy. The Advancing Gig Economy Act (HR 3774) reflects broad recognition of the importance of the gig economy, and a desire to foster the continued availability of related independent platforms.[8] Fifty-two (52)

[8] https://www.congress.gov/bill/117th-congress/house-bill/3774/text?r=43&s=1

million Americans performed gig work in 2020, contributing around $1.21 trillion to the US economy in 2020 (*i.e.*, roughly 5.7% of US GDP).[9]

The trajectory of online platforms and marketplaces has been a remarkable engine of economic activity. In 2011, only 3% of independent workers reported using an online talent platform in the previous 12 months. As recently as 2017, only 20% did. But in 2021, an impressive 40% said they had done so in the past year. And an even higher number—43%—said they planned to do so in the coming 12 months.[10] Moreover, 97% percent of contractors feel that they are happier than their employed counterparts. *See* Zippia study, *supra* n. 9.[11]

SuperShuttle's (and the D.C. Circuit's) identification of potential entrepreneurial opportunity as a critical factor in independent contractor analysis reflects its indispensable role in sustaining and growing the American economy. Thus, ensuring the continued existence of robust independent platforms and marketplaces is wholly consistent with the purpose of the common law, and the Board should continue to support such an understanding.

---

[9] https://www.zippia.com/advice/gig-economy-statistics/ and https://www.smallbizgenius.net/by-the-numbers/gig-economy-statistics/#gref; https://www2.staffingindustry.com/Research/Research-Reports/Americas/The-US-Gig-Economy-2021-Edition

[10] https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf

[11] *See also* https://www.mbopartners.com/state-of-independence/ (87% of American gig workers say they are happier working independently and 78% say they are healthier working independently).

CONCLUSION

For the reasons described above, the Board should continue to adhere to its independent contractor standard in *SuperShuttle*.

Respectfully submitted,

MARKETPLACE INDUSTRY ASSOCIATION

By its attorneys,

/s/ Camille A. Olson
Camille A. Olson
Joshua L. Ditelberg
Richard D. Lapp
Joseph Vento
SEYFARTH SHAW LLP
233 S. Wacker Drive
Suite 8000
Chicago, Illinois 60606-6448
(312) 460-5000
(312) 460-7000 (facsimile)
colson@seyfarth.com
rlapp@seyfarth.com
jditelberg@seyfarth.com
jvento@seyfarth.com

February 10, 2022

CERTIFICATE OF SERVICE

I certify that on February 10, 2022, I caused the foregoing amicus brief to be served via electronic mail upon the following counsel of record representing case participants:

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

Lisa Y. Henderson
Regional Director
NLRB Region 10
401 W. Peachtree St. NW
Suite 472
Atlanta, GA 30308-3525
lisa.henderson@nlrb.gov

/s/ Joshua L. Ditelberg
Joshua L. Ditelberg