ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 14-1196, 15-1066 and 15-1166

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC., *Petitioner/Cross-Respondent,*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Review of Orders of the National Labor Relations Board
361 NLRB No. 55 (September 30, 2014); 362 NLRB No. 29 (March 16, 2015)

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS & NATIONAL ASSOCIATION OF MANUFACTURERS

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

Except for *amici curiae* The Chamber of Commerce of the United States of America, American Trucking Associations, National Association of Manufacturers, and American Federation of Labor and Congress of Industrial Organizations, all parties, intervenors, and *amici* appearing before the National Labor Relations Board and in this Court are listed in the Brief for Petitioner.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* state that:

Amicus curiae Chamber of Commerce of the United States of America ("the Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus curiae the American Trucking Associations, Inc. ("ATA"), is a District of Columbia non-profit corporation, and is the national trade association of the trucking industry. ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and

services, and in conjunction with its affiliated organizations, ATA represents over 30,000 companies and every size, type, and class of motor carrier operation. ATA has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus curiae National Association of Manufacturers (" NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. NAM has no parent corporation, and no publicly held company owns 10% or more of its stock.

B. Ruling Under Review

References to the rulings at issue appear in the Brief for Petitioner.

C. Related Cases

This Court's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (hereafter "*FedEx I*") is part of the record of this case. Also related to the present appeal is a petition for review filed by the Petitioner from the National

Labor Relations Board's previous decision in Cases Nos. 34-CA-012735 and 34-RC-002205. *FedEx Ground Packaging System, Inc. v. NLRB*, C.A. No. 10-1354 (petition for review docketed Nov. 1, 2010).

/s/ E. Michael Rossman
E. Michael Rossman

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GLOSSARY

ATA	American Trucking Associations, Inc.
Chamber	Chamber of Commerce of the United States of America
DA	Deferred Appendix
FedEx	FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package System, Inc.
NAM	National Association of Manufacturers
NLRA	National Labor Relations Act
NLRB or Board	National Labor Relations Board

INTEREST OF THE *AMICI CURIAE*[1]

This brief is submitted on behalf of the Chamber of Commerce of the United States of America ("the Chamber"), the American Trucking Associations, Inc. ("ATA"), and the National Association of Manufacturers ("NAM") as *amici curiae* in support of petitioner FedEx Home Delivery ("FedEx").

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

ATA is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA's direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services, and in

[1] No Party's counsel authored this brief in whole or in part. No person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties have stated that they consent to the filing of this brief.

conjunction with its affiliated organizations, ATA represents over 30,000 companies and every size, type, and class of motor carrier operation.

NAM is the largest association of manufacturers in the United States. Its membership comprises small and large manufacturers in every industrial sector, including motor carriers, in all 50 states. Manufacturing employers nearly 12 million men and women, contributes more than $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development.

Through and on behalf of their respective members, *amici* have strong interests in ensuring that the accepted legal standards for worker classification are employed reasonably, uniformly, and predictably by administrative agencies and courts. Worker classifications have a significant impact on motor carrier operations and carry significant financial consequences for the trucking industry and the economy as a whole.

This case is of significant interest to *amici* because it may have broad ramifications concerning the use of independent contractors not only in the package-delivery business but also in the trucking industry more generally, as well as other sectors of the economy. In the trucking industry, the use of commercial vehicle drivers known as "owner-operators" – independent businesspersons who contract their services and lease their motor vehicle equipment to trucking

companies pursuant to 49 U.S.C. § 14102 and related regulations set forth at 49 C.F.R. Part 376 – is widespread and economically significant.

In light of their extensive involvement with many of the issues pertinent to this case, *amici* are uniquely positioned to explain the context in which worker classification issues in the trucking industry arise and the practical implications of the issue presented by this case.

SUMMARY OF ARGUMENT

In 2009, this Court determined that a group of delivery service contractors were not FedEx employees, but independent contractors for purposes of Section 2(3) of the NLRA. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009) ("*FedEx I*"). Today, the Court is faced with the same legal question, applied to a set of facts that is indistinguishable from those in *FedEx I*. The contractors at issue here have the same entrepreneurial opportunities and flexibility that the contractors in *FedEx I* enjoyed. Congress has not amended the NLRA since this Court issued *FedEx I*. And, of course, the Board remains bound to follow this Court's controlling precedent. As such, there can be but one conclusion in this case: the service contractors at issue, like those in *FedEx I*, are independent contractors.

Against this backdrop, the Chamber, ATA, and NAM submit this brief to address the apparent premise behind the Board majority's contrary position: that

independent contractor arrangements are a disfavored "loophole" to the NLRA, which the Board should recast as employment relationships without regard to the facts presented. Such hostility ignores the express will of Congress, which enacted the NLRA's independent contractor exclusion to bring a level of predictability to this area of labor law and to curb Board efforts to expand its jurisdiction beyond congressional limits. Further, it ignores the many benefits that independent contractor arrangements have for contractors and businesses alike, and it would deprive businesses in the trucking industry and elsewhere of their well-established rights to choose to hire independent contractors.

Independent contractors benefit from substantial independence and autonomy, including the freedom to decide whether and when to work for themselves or hire others to perform tasks, which multiple studies have linked to increased job satisfaction. Independent contractors typically have control over their own schedule, including whether they or someone else will perform the work associated with their contracts, and they typically have the opportunity to earn substantial additional income based on their own entrepreneurial decisions. Where, as here, an independent contractor has substantial entrepreneurial opportunities, not to mention substantial control over whether and with whom to work, both the Board and the Courts should be exceedingly cautious before

disregarding the parties' decision to structure the relationship as an independent contractor arrangement.

For its part, the Board majority below concedes that it has disregarded this Court's controlling case law. *See FedEx Home Delivery*, 361 NLRB No. 55, at *1 (2014) ("Board Dec.") ("[W]e decline to adopt the District of Columbia Circuit's recent holding."). It contends that this defiance is excusable because it has "restat[ed] and refin[ed]" its approach to independent contractor cases. *Id.* at *12. But the only change in the Board's approach this time around is that it now *concedes* that it will not place weight on entrepreneurial opportunity in this case and adopts a malleable "standard" that is effectively no standard at all.

In this respect, the Board's decision joins a long line of decisions – many involving appellate court enforcement of congressional limits on the Board's jurisdiction – in which the Board has attempted to manipulate its analysis to achieve preferred, but impermissible ends. In doing so, the Board has ignored the common law of agency and has failed to make a reasoned choice between two "fairly conflicting views" of that body of law. *FedEx I,* 563 F.3d at 496 (internal quotations omitted). Because the Board has "no special administrative expertise" with respect to the law of agency, *id.*, its departure from that body of law (like its decision in *FedEx I*) is not worthy of deference.

Hostility toward independent contractor relationships is unjustified as a matter of law as well as policy. Here, as in *FedEx I*, this Court should grant FedEx's petition for review, vacate the Board's Order and deny the Board's cross-application for enforcement.

ARGUMENT

I. The D.C. Circuit Effectively Decided This Matter Six Years Ago, And Its Prior Decision May Not Be Disregarded.

The appropriate outcome of this case should be a foregone conclusion. When an appellate court reviews a Board decision, the circuit's precedent is controlling. *See, e.g., NLRB v. Attleboro Assocs.,* 176 F.3d 154, 160 (3d Cir. 1999) (holding that a circuit court's "own jurisprudence" dictates its decision in NLRA cases) (internal quotes and citation omitted); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 131 (7th Cir. 1989) (holding that the validity of the Board's determination was "controlled by two [Seventh Circuit] decisions rendered on the same day six years ago"); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983) (denying enforcement of Board order, citing prior court decision that "held the drivers to be independent contractors" and that "controls the disposition of this case"); *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (holding that the NLRB is "bound to follow the law of the Circuit"). If the Board has failed to follow controlling circuit court precedent, the Board's decision must be reversed, particularly if the case involves a question (such as independent contractor status)

over which the Board possesses "no special administrative expertise." *FedEx I*, 563 F.3d at 496 (quoting *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989)).

Here, *FedEx I* clearly controls. In that case, this Court vacated a Board determination that service delivery contractors were FedEx employees, rather than independent contractors, for purposes of the Act. *See FexEx I,* 563 F.3d at 495, 504. In this case, there is no material difference from the issue or facts presented in *FedEx I*. *See generally* Pet'r's Br. at 8-18, 29-31. This case involves the same contracting company, FedEx. (DA __.) The drivers at issue here contract with FedEx under the same Operating Agreement. (DA __.) They have the same ability to hire helpers, to transfer or sell their routes, and to purchase multiple routes. (DA __.) They are subject to the same vehicle, uniform, and other requirements. (DA __.) This case cannot be distinguished from *FedEx I*, and as in that case the Board's Order should be vacated.

II. The Board's Decision Ignores Congressional Intent And The Mutually Beneficial Nature Of Independent Contractor Arrangements.

In addition to flouting this Court's precedent, the Board's decision also ignores the statutory dictates of Congress and, relatedly, the historical and mutually beneficial nature of independent contractor relationships.

A. Congress Made A Deliberate Choice To Exclude Independent Contractors From The Act's Coverage.

In 1947, Congress amended the NLRA to expressly exclude "any individual having the status of independent contractor" from the Act's definition of "employee." 29 U.S.C. § 152(3). It added this exclusion not only to reverse prior Board decisions, but also to bring a level of predictability to independent contractor cases and to curb attempts by the Board to expand its jurisdiction beyond proscribed limits. This Court's decision in *FedEx* I effectuates these congressional purposes, as would reversal of the Board in this case.

When Congress enacted the NLRA in 1935, the Act applied to "employees," as that term was defined by the Act. *See* 29 U.S.C. §§ 152(3), 157. There was no express exclusion for independent contractors, largely because it was inconceivable to Congress that the definition of "employee" would be extended to "independent contractors." *See* H.R. No. 80-245, at 18 (1947) ("In the law, there has always been a difference, and a big difference, between 'employees' and 'independent contractors.'"). The Board proved to have other ideas. In the early years of the Act, the Board held that the term "employee" was fluid and could change depending on the Board's own views of economics and labor policy. *See NLRB v. Hearst Publ'ns*, 322 U.S. 111, 124 (1944) (affirming the Board's then-current position that it should determine whether an individual falls within the definition of employee based on its own assessment of the "the history, terms and

purposes of the [Act]"). Applying this malleable standard, the Board concluded nine years after the NLRA's passage that independent contractors in fact were covered by the Act, *see id.*, at least in cases where the Board determined that coverage necessary to "eliminat[e] labor disputes and industrial strife," *United States v. Silk*, 331 U.S. 704, 713 (1947).

Congress quickly expressed significant dismay that the Board now felt "authorized . . . to give to every word in the act whatever meaning it wished." H.R. No. 80-245, at 18. Congress' strong preference was that the words of the statute "have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up." *Id.* Accordingly, in 1947, Congress passed the Taft-Hartley Act to make clear that the term "employee" in the NLRA, like term in the common law whence it came, does not include independent contractors. *See NLRB v. United Ins. Co.*, 390 U.S. 255, 256 (1968) ("The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors."). Thus, Congress prohibited the Board from invoking its "theoretic 'expertness'" in matters of labor law, H.R. No. 80-245, at 18, to expand the Act's definition of employee, and correspondingly the Board's jurisdiction, beyond Congress' intended limits.

FedEx I fully reflects Congress' directives and purposes in enacting this exclusion. In stating clearly that common law agency principles control independent contractor questions, thereby ending the Board's practice of basing decisions in this area on malleable policy positions, Congress provided a level of predictability for employers, the public, and courts. *FedEx I* is faithful to this common law agency test, and it enhances predictability by clearly identifying entrepreneurial opportunity as the "animating principle" behind the common law agency factors – something merely implicit in prior cases from the Court and the Board. Specifically, *FedEx I* provided useful and needed guidance on how to "evaluate [common law] factors in cases where some factors cut one way and some the other." *FedEx I*, 563 F.3d at 497 (noting that its guidance should make "line drawing . . . easier," but would by no means "make applying the test purely mechanical"). [2]

[2] In its decision below, the Board majority quibbles (Dec. at *13) that it "has never held that entrepreneurial opportunity, in and of itself, is sufficient to establish independent contractor status." That is a straw man. This Court in *FedEx I* did not elevate any single factor to controlling status. Rather, it recognized the animating principles underlying the multifactor inquiry. Moreover, the Board has historically urged the Court to recognize entrepreneurial opportunity as an animating principle, a position that it took even in its *FedEx I* papers. *See FedEx I*, 563 F.3d at 497 (noting that "[t]his subtle refinement was done at the Board's urging"); Brief of the National Labor Relations Board, 2008 WL 4425831, at *33 ("Thus, this Court has found reasonable the Board's focus on the existence of significant entrepreneurial opportunity for gain or loss.") (internal quotes omitted). The Board offers no principled basis to abandon that position now.

B. The Mutually Beneficial Nature Of Independent Contractor Relationships In The Trucking Industry.

Independent contractor relationships are voluntary arrangements mutually beneficial to individuals and companies in the trucking industry and other sectors of the economy. Where, as here, an independent contractor has substantial control over whether and with whom to work, and can earn substantial return on a meaningful investment, courts (and the Board) should be exceedingly cautious before disregarding the parties' decision to enter an independent contractor relationship.

In choosing whether to work as or hire an independent contractor, a worker and a trucking company both face a set of tradeoffs. Workers who choose to act as independent contractors give up the additional contractual commitments that employers give their employees, along with the protections of state and federal employment laws applicable only to employees. In return, self-employment brings with it a wide array of benefits. Self-employed individuals generally "have more control over their economic destiny." Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013) (hereinafter *Independent Contracting*).[3] They exhibit "greater independence and autonomy" than other workers in the

[3] *Available at* http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf (last visited August 17, 2015).

economy, Matthias Benz & Bruno S. Frey*, Being Independent Raises Happiness at Work*, 11 Swedish Economic Policy Review 95, 98 (2004),[4] and as a result they report greater job satisfaction. *See Independent Contracting* at 17; *see also* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, at 4 (Feb. 2005) ("Fewer than 1 in 10 independent contractors said they would prefer a traditional work arrangement.").[5]

Independent contractors in the trucking industry reap these benefits, along with others that arise from long-standing practices in the trucking industry. Business start-up costs are comparatively modest in the industry, consisting principally of the cost of a power unit and various licensing and insurance fees, and so trucking affords independent contractors a great opportunity to enter and build their own businesses. In addition, enterprising owner-operators can often purchase additional trucks and trailers and hire other drivers to carry out their business. Independent contracting in the trucking industry allows owner-operators to live out their own version of the American dream, enabling them to be their own bosses, obtain capital and assistance necessary to succeed as independent business people, and determine how much time they want to devote to work.

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[4] *Available at* http://brunofrey.com/articles/409_04.pdf (last visited August 17, 2015).

[5] *Available at* http://www.bls.gov/news.release/pdf/conemp.pdf (last visited August 17, 2015).

For a trucking company, entering an independent contractor relationship means foregoing the extensive control that otherwise would come with hiring an employee. Subject to federal and state law, an employer can determine when and for how long employees will work (including whether they may work part time or full time), may prohibit employees from working for other employers, may direct in minute detail how they perform their job, and may pay the employees a fixed salary, capturing any additional profit for himself or herself. A company that enters an independent contractor relationship foregoes such benefits, but it gains other offsetting ones. Independent owner-operators tend to be mature drivers who are skilled and motivated. For the trucking companies, the availability of skilled and motivated owner-operators and their equipment (through leases of equipment to carriers with operating authority) enables the companies to save on equipment and capital costs and provides flexibility to meet fluctuations in demand for trucking services. *See, e.g.*, *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975) (because of fluctuations in demand, and to avoid "[k]eeping expensive equipment operating at capacity, . . . [i]t is natural . . . that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate").

Given the mutually beneficial nature of independent contracting, it is hardly surprising that it is a long-standing feature of the trucking industry. Indeed, over 60 years ago, the Supreme Court noted the extensive use by the trucking industry of leased equipment supplied and operated by owner-operator truckers. *See American Trucking Ass'ns v. United States*, 344 U.S. 298, 303 (1953) ("Carriers subject to [Interstate Commerce] Commission jurisdiction have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands."). Likewise, today there are hundreds of thousands of owner-operator truckers in the United States.[6] Independent contractors are used in most, if not all, sectors of the trucking industry, including long-haul trucking, household goods moving, intermodal operations, and package delivery services.

How best to balance the above tradeoffs is an individual judgment by each worker and each business. And it is a judgment that each is free to make. There is nothing suspect about workers choosing to go into business for themselves,[7] or about employers choosing to hire them.

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[6] The Census Bureau's 2002 Vehicle Inventory and Use Survey – the most recent comprehensive inventory of trucks nationwide – counted over 545,000 trucks primarily operated by owner-operators. *See* U.S. Census Bureau, 2002 Economic Census: Vehicle Inventory and Use Survey 15, 39 (Dec. 2004), *available at* http://www.census.gov/prod/ec02/ec02tv-us.pdf (last visited August 17, 2015).

[7] That drivers in fact have a free choice in this regard is something that cannot be gainsaid. The trucking industry is facing an acute driver shortage, and one byproduct is that an employee-driver position is available to virtually any

III. The Board's Arguments To The Contrary Are Unavailing.

The Board presents several arguments in support of its supposedly "restated" and "refined" approach to determining whether the service delivery contractors in this case are employees or independent contractors. None of them has any merit.

A. The Board's "Restated and Refined" Approach Is Little More Than Opportunistic Gloss On Positions This Court Has Rejected.

Below, the Board majority attempted to justify its disregard for *FedEx I* by suggesting, Board Dec. at *1, 12, that it has employed a "refined" analysis, and this

(continued…)

qualified individual who wants one. *See*, *e.g.*, Sean Kilcarr, *New Solutions Being Aimed at Driver Shortage*, Fleet Owner (Aug. 4, 2014), available at http://www.fleetowner.com/fleet-management/new-solutions-being-aimed-driver-shortage (last visited August 17, 2015); Michael Calia, *Con-Way Beefs Up Driver Pay Packages for Freight Carrier*, Wall Street Journal (Sept. 30, 2014), *available a*t http://online.wsj.com/articles/con-way-beefs-up-driver-pay-packages-for-freight-carrier-1412087980 (last visited August 17, 2015); Lynn Adler, *Companies Pile on Perks to Keep Drivers Truckin'*, Reuters (Aug. 10, 2012), *available at* http://www.reuters.com/article/2012/08/10/uk-usa-truckers-shortage-idUSLNE87900X20120810 (last visited August 17, 2015). One recent survey of independent contractors in the trucking industry revealed that 80% said it would be "very easy" or "easy" for them to obtain an employee driver position if they so wished. Steven L. Johnson, *Relative Advantages and Disadvantages of Independent Contractor Status: A Survey of Owner-Operators' Opinions and Rationale*, at 16 (Jan. 2012), *available at* http://ntl.bts.gov/lib/ 47000/47800/ 47878/MBTC_20DOT_203026.pdf (last visited August 17, 2015). And because 85% of the surveyed independent truckers had previously worked as employee drivers, they were in a position to meaningfully compare their actual experiences with both models, not just to idly speculate about the differences. *Id.* at 15, 55. It stands to reason, then, that drivers who choose independent contracting do so not out of economic compulsion or lack of other options, but because they want to try to reap the potential advantages of contracting over employment.

"restat[ed]" methodology is entitled to deference. Not so. There is no practical difference between the Board's approaches in *FedEx I* and in this case. The Board is entitled to no more deference here than it was in *FedEx I*.

The Board has a long and unfortunate history of end runs around circuit court decisions, particularly those that enforce statutory limits on the Board's jurisdiction. In many instances, these end runs involve transparent manipulation of stated standards and attempts to bootstrap the Board's previously rejected positions. For example, in the 1980's and 1990's, a repeated point of contention between the Board and the courts was the Act's exclusion of supervisors from NLRA coverage. *See* 29 U.S.C. § 152(3), (11). Multiple courts criticized the Board's "biased mishandling of cases involving supervisors," *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997), and "inconsistent determinations" which stemmed from "an institutional or policy bias on the part of the Board's employees," *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992) (internal quotation marks omitted). In case after case, the Board ignored circuit court directives, and in case after case circuit courts reversed Board decisions. *See*, *e.g.*, *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (noting "the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor'"); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) ("In the context of classifying

supervisors, the NLRB's manipulation of the definition provided in § 152(11) has earned it little deference."); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982) (noting "the inconsistency in the Board's application of the statutory definition and of the factors to be used in determining" supervisory status).

In recent years, the Board's disregard for circuit court instruction appears to have intensified. For example, the Board recently ignored circuit court reversals of its newfound position that arbitration agreements waiving class claims violate the Act. *Compare D.R. Horton v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013) (vacating the Board, concluding that its "decision did not give proper weight to the Federal Arbitration Act"), *with Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (stating that "we are not persuaded by the Fifth Circuit's view"). The Board has ignored this Court's rejection of its assumption of jurisdiction over certain religious institutions. *See, e.g., Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 574 (D.C. Cir. 2009) (denying enforcement, noting that in light of prior circuit court case law the Board "should have known immediately that the college was entitled to a[n] . . . exemption from the NLRA's collective bargaining requirements"). And the Board likewise rejected this Court's ruling – later affirmed by the Supreme Court – that certain recess appointments to the Board were invalid. *Compare Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (holding invalid action taken by

Board members confirmed following constitutionally impermissible recess appointment process), *with* Statement [8] by Chairman Pearce on Recess Appointment Ruling (NLRB Office of Public Affairs Jan. 25, 2013) (stating that the Board "disagree[d]" with the Court's decision and would ignore its import).

Particularly against this backdrop, the Board majority's "restat[ed] and refin[ed]" approach appears to be little more than opportunistic gloss on the positions that this Court rejected in *FedEx I*. In both cases, the Board's central thesis is that it believes that service delivery contractors lack "actual" entrepreneurial opportunity. *Compare* NLRB Br., *FedEx I*, 2008 WL 4425831, at *45-46 (arguing that contractors lack "meaningful entrepreneurial opportunity"), *with* Board Dec. at *14 (dismissing entrepreneurial opportunity as "merely theoretical"). But this thesis is possible only if the Board ignores the overwhelming evidence that the contractors do possess substantial entrepreneurial opportunity, including evidence that the contractors can, if they choose, expand or sell their business. *See FedEx I*, 563 F.3d at 500, 503 (criticizing the Board for improperly "discount[ing]" evidence of the drivers' entrepreneurial opportunity); Board Dec. at *20 (dismissing, in the Board majority's words, the "limited evidence of actual entrepreneurial opportunity for drivers").

[8] *Available at* https://www.nlrb.gov/news-outreach/news-story/statement-chairman-pearce-recess-appointment-ruling (last visited August 17, 2015).

The practical distinction between the Board's approaches in the two cases is nonexistent. In *FedEx I*, this Court held that, despite purporting to acknowledge the importance of entrepreneurial opportunity, the Board gave insignificant weight to the substantial evidence of such opportunity. *See* NLRB Br., *FedEx I*, at *33. In this case, the Board majority simply *admits* that it will not place significant weight on the very same evidence of entrepreneurial opportunity. *See*, *e.g.*, Board Dec. at *16-17. The Board majority's "refined" approach is therefore nothing more than a concession. In both cases, the Board has refused to apply the required standard and accordingly has not made anything approaching a reasoned choice between "two fairly conflicting views." *FedEx I*, 563 F.3d at 504.

B. The Board's "Refined" Standard Is No Standard At All.

The Board's "refined" approach would also make the results in independent contractor cases more unpredictable and inconsistent. *Cf. Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 612 (7th Cir. 1983) (en banc) (denying enforcement of Board decision noting that "by twice during this proceeding changing its mind as to the applicable standard the Board has put [the employer] through the hoops, subjecting it to protracted legal expense and uncertainty"). Specifically, the Board contends that it should be permitted to reformulate the common law agency test on a case-by-case basis, and that "the weight to be given a particular factor or group of factors" should depend "on the factual circumstances of each case." Board Dec. at

*3. In other words, the Board seeks license to apply the common-law factors differently in different cases, presumably based on a determination of which amalgamation would best serve its policy goals.

Allowing the Board to "reformulate" the common law agency test on a case-by-case basis, however, would grant it the power to do precisely what Congress rejected in 1947 – make independent contractor determinations based on its assessment of "policy" rather than established common law standards. *See*, *e.g.*, *NLRB v. United Ins. Cos.*, 390 U.S. at 256 (noting that Taft-Hartley rejected a standards based on malleable "economic and policy considerations within the labor field"). And, clearly, it is contrary to this Court's goal in *FedEx I* of making "line drawing" more predictable under the common law standards. *See* 563 F.3d at 497.

C. The Board's Efforts To Ignore Evidence In This Case Were Even More Egregious Here Than In *FedEx I*.

If anything, the Board's efforts to disregard the overwhelming evidence of independent contractor status were more egregious in this case than they were in *FedEx I*. In *FedEx I*, this Court made clear that with respect to entrepreneurial opportunities, the key question is whether they exist, not whether drivers choose to *exercise* them. *See FedEx I*, 563 F.3d at 517 ("[T]he fact that many [drivers] choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so.") (emphasis in original) (citations omitted); *see also C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860

(D.C. Cir. 1995) (stating that the Board may only disregard evidence of "entrepreneurial opportunities that [workers] cannot realistically take"). The Court also chastised the Board in *FedEx I* for failing to consider "national data" related to entrepreneurial opportunities. *FedEx I*, 563 F.3d at 504; *see also Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998) ("When the Board purports to be engaged in simple factfinding . . . it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands."); *NLRB v. Seawin, Inc.*, 248 F.3d 551, 556 (6th Cir. 2001) (vacating Board decision and holding that the Board's conclusion "ignores such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached") (quotations omitted).

Nevertheless, the Board majority here made the same mistakes. It again stressed the purported absence of exercise over the existence of opportunity, and it failed to give due weight to evidence from individuals outside the unit. *See* Board Dec. at *20 (finding that evidence related to individuals outside the bargaining unit "has limited bearing on the status of drivers who remain in the unit"). Worse, as to its view of what constitutes "outside-the-unit" evidence, the Board majority rigged the game from the start. The approved bargaining unit in this case consists solely of "single-route contractors." *See id.* Thus, if a contractor chose to exercise entrepreneurial opportunity by purchasing a second route, or chose to cash in

equity by selling a route, he or she is excluded from the unit – and, in the Board majority's view, evidence pertaining to that individual instantly becomes less consequential. Thus, as dissenting Board Member Johnson noted, under the Board majority's construct evidence of route sales "can *never be consequential*" for the majority because that evidence necessarily involves non-unit personnel. Board Dec. at *26 (Johnson, dissenting) (emphasis in original).

CONCLUSION

For the above reasons, FedEx's petitions for review should be granted and the Board's orders should be vacated and denied enforcement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,079 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of August 2015, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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