UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

The Atlanta Opera, Inc.
Employer,

& **Case No. 10–RC–276292**

Make-Up Artists and Hair Stylists
Union, Local 798 IATSE,
Union.

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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QUESTIONS PRESENTED

On December 27, 2021, the National Labor Relations Board ("Board") issued a notice and invitation to file briefs in this matter, *The Atlanta Opera, Inc.*, 371 NLRB No. 45 (2021), asking: (1) Whether the Board should adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and (2) whether, in the event that *SuperShuttle* is overruled, the Board should return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications, or adopt some other standard.

INTEREST OF AMICUS

The Service Employees International Union ("SEIU") is one of the largest unions in North America, representing more than two million people working in health care, property services, and public service. SEIU actively supports workers organizing across the United States with the Fight for $15 and a Union campaign, including fast food workers, retail workers, home health aides, airport workers, and adjunct professors. SEIU also works directly with and in coalition with gig economy workers organizing throughout the United States to obtain better wages, benefits, and working conditions.

SEIU is keenly aware that the increasing trend of employers misclassifying workers as independent contractors rather than employees has been a major impediment to achieving the goals of the National Labor Relations Act ("NLRA" or "the Act"). The misclassification of workers as independent contractors has become endemic in the very industries in which workers are particularly vulnerable to exploitation, such as the gig economy sector and the low-wage, immigrant-dominated industries in which many of our members work. The misclassification of workers as independent contractors not only deprives those workers of NLRA rights but also places downward pressure on the wages and benefits of workers who have been classified as

employees. Thus, SEIU has an abiding interest in the Board's overruling its misguided decision in *SuperShuttle* and adopting an independent-contractor standard that reflects the language of the Act and does not incorrectly exclude workers from the Act's protections.

SUMMARY OF ARGUMENT

The Board should overrule the misguided independent-contractor test articulated in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019), and return to the common law independent-contractor standard that gives equal weight to all the factors set forth in the Restatement (Second) of Agency. A proper test is critical to ensuring that workers receive the organizing and collective bargaining protections they are entitled to as employees under the Act. The Board in *SuperShuttle* impermissibly deviated from the traditional common law test by imposing an overriding super-factor of "entrepreneurial opportunity" that effectively trumps all other factors. That revision cannot be reconciled with Board precedent, Supreme Court precedent, the common law, or the intended scope and purposes of the NLRA. The Board should overrule *SuperShuttle* and reinstate the common law standard.

The harms to workers who are misclassified as independent contractors underscore the importance of rejecting *SuperShuttle*'s cramped test for employee status. Misclassification forces workers to face wealthy corporate employers alone, without the Act's protection of collective action, worsening the "inequality of bargaining power" the Act was meant to redress.[1] Not surprisingly, this dynamic has led to exploitative and unstable conditions, exactly as Congress expected it would.[2] In addition, workers misclassified under the NLRA are almost

[1] 29 U.S.C. § 151.

[2] *Id.* ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate

always also misclassified under other important labor laws and thereby lose protections including minimum wage and overtime pay, occupational health and safety standards, unemployment insurance, and workers' compensation.[3] When workers are denied these protections and also denied their collective-action rights under the NLRA, employer power is essentially unchecked.[4]

ARGUMENT

I. THE BOARD SHOULD OVERRULE *SUPERSHUTTLE* AND RETURN TO THE COMMON LAW STANDARD FOR INDEPENDENT-CONTRACTOR STATUS.

The Supreme Court has held that common-law agency principles must be used to determine whether a worker is an independent contractor and, thus, excluded from the protections of the Act. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); *see also Roadway Package Sys., Inc*., 326 NLRB 842, 849 (1998). Abiding by the Supreme Court's dictate, the Board has consistently applied the Second Restatement of Agency's common-law test for determining independent-contractor status. *See* Restatement (Second) of Agency, §220. That test requires consideration of a non-exhaustive list of multiple factors, with no one factor being determinative.[5] *See Roadway*, 326 NLRB at 849 (citing *Nationwide Mutual Insurance Co.*

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recurrent business depressions, by *depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions* within and between industries.") (emphasis added).

[3] David Weil, *Lots of Employees Get Misclassified as Contractors. Here's Why It Matters*, Harv. Bus. Rev. (July 5, 2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters.

[4] *Id*. (Describing the significant scope of harms to workers who have little control over their work, but are misclassified as independent contractors).

[5] The factors are: "(a) The extent of control which, by the agreement, the master may exercise over the details of the work. (b) Whether or not the one employed is engaged in a distinct occupation or business. (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. (d) The skill required in the particular occupation. (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. (f) The length of time for which the person is employed. (g) The method of payment, whether by the time or by the job. (h) Whether or not the work is part of the regular

v. Darden, 503 U.S. 318 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)); *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017); *SuperShuttle DFW, Inc*., 367 NLRB No. 75, at *2 (Jan. 25, 2019). As the Supreme Court has explained, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *United Insuranc*e, 390 U.S. at 258. "What is important is ... the total factual context[.]" *Id*.; *see also Roadway*, 326 NLRB at 849; *FedEx Home Delivery*, 361 NLRB at 611.

The Board impermissibly departed from these principles in *SuperShuttle* when it over-emphasized one new factor in its independent-contractor analysis. *SuperShuttle*, 367 NLRB No. 75, at *2-4, *12-14. Although the *SuperShuttle* Board purported merely to be applying the common-law test, it actually articulated a new factor, "entrepreneurial opportunity," that is not included in the Restatement's list. *See* Restatement (Second) of Agency, §220; *SuperShuttle*, 367 NLRB No. 75, at *24-25 (McFerran, dissenting). The Board then committed further error by allowing its new factor effectively to override all others. *See SuperShuttle*, 367 NLRB No. 75, at *24-25 (McFerran, dissenting); *FedEx Home Delivery*, 361 NLRB at 617-18.

This revision of the independent-contractor standard is irreconcilable with precedent and the common law. Although the Board has in the past appropriately considered facts relevant to the Restatement test that might also be said to fall under an "entrepreneurial opportunity" umbrella, the Board "has never held that entrepreneurial opportunity, in and of itself, is sufficient

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business of the employer. (i) Whether or not the parties believe they are creating the relation of master and servant. (j) Whether the principal is or is not in the business." Restatement (Second) of Agency, §220.

to establish independent-contractor status." *FedEx Home Delivery*, 361 NLRB at 618.[6] Indeed, by allowing that factor to take precedence over other considerations, *SuperShuttle* contravenes the Supreme Court's instruction that no one factor should be considered "decisive." *United Insuranc*e, 390 U.S. at 258; *see also Roadway*, 326 NLRB at 849; *SuperShuttle*, 367 NLRB No. 75, at *24-25 (McFerran, dissenting).

The effect of *SuperShuttle*'s prioritizing "entrepreneurial opportunity" is to create "a broader exclusion from statutory coverage than Congress actually intended, denying the protections of the Act to workers who are, in fact, employees under common-law agency principles." *FedEx Home Delivery*, 361 NLRB at 618-19. For example, in *SuperShuttle* itself, the Board held drivers to be independent contractors on the basis that they can choose to make more money by working more hours (which the Board deemed to be "entrepreneurial opportunity"). 367 NLRB No. 75 at *17, *19. But many often-exploited workers who are certainly not independent contractors and have always been protected by the Act, like sweatshop workers, are paid at piece rates and can also "choose" to work more hours to earn more money. As the Board explained in *In Re Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011), *enf'd* 822 F.3d 563 (D.C. Cir. 2016), it has long held that "[t]he choice to work more hours or faster" does not turn an employee into an independent contractor," *Id*. at 1765; *see also id*. ("To find

[6] While enforcement was denied, this aspect of the Board's holding in *FedEx Home Delivery* is still good law. *See, e.g., In Corporate Express Delivery Systems*, 332 NLRB 1522 (2000), *enfd*. 292 F.3d 777 (D.C. Cir. 2002) (The Board did not give more weight to entrepreneurial opportunity than any of the other factors that it assessed); *BKN, Inc*., 333 NLRB 143, 144 (2001) (applying the common law agency test factors and indicating that "no single factor is controlling in making this determination."); *Dial-a-Mattress Operating Corp*., 326 NLRB 884, 891 (1998) (finding workers to be independent contractors after evaluating the common law factors, as well as their "significant entrepreneurial opportunity for gain or loss.").

otherwise would suggest that employees who volunteer for overtime [or] employees who speed their work in order to benefit from piece-rate wages ... would be independent contractors.").

For all these reasons, the Board should overturn *SuperShuttle* and reject its attempt to re-write the law to exclude workers entitled to the Act's protections.[7]

II. INDEPENDENT CONTRACTOR MISCLASSIFICATION LEADS TO WORKER EXPLOITATION AND FRUSTRATES THE PURPOSES OF THE ACT.

SuperShuttle is not only wrong as a legal matter but also harmful as a matter of policy and inconsistent with the Act's stated purpose of "restoring equality of bargaining power between employers and employees." 29 U.S.C. §151. As explained in greater detail below, *SuperShuttle* makes it easier for employers to misclassify workers, and misclassification leads to worker exploitation. A recent study estimates that as many as 30% of employers misclassify some employees as independent contractors, especially in the in-home care, residential construction, housekeeping, delivery, and janitorial industries.[8] And SEIU has seen firsthand the harms that result, particularly when corporations exploit inadequate legal protections to prevent workers from exercising collective power.[9]

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[7] This brief does not address at length the Board's further question about whether to return to *FedEx Home Delivery*. We note, however, that the D.C. Circuit denied enforcement in *FedEx Home Delivery*, which militates against re-adoption of that standard. Instead, and consistently with the D.C. Circuit's analysis in *FedEx I*, the Board should adopt a standard affirming that the putative employer has the burden of demonstrating independent contractor status, that the Board will give equal weight to all factors set forth in the Restatement as appropriate in each case, and that there is no magic formula or shortcut.

[8] *See* Sharon Block & Benjamin Sachs, *Clean Slate for Worker Power: Building A Just Economy and Democracy*, Labor and Worklife Program, Harvard Law School (2019), at 25, https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf (citing Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On Demand Economy*, Nat'l Emp. L. Project (2015), at 3, https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf).

[9] *See, e.g.*, National Employment Law Project (NELP), *Remote Control: The Truth and Proof About Gig Companies as Employers* (2020), https://s27147.pcdn.co/wp-content/uploads/NELP-PWF-Fact-Sheet-Remote-Control-Truth-Proof-Gig-Companies-Employers.pdf.

A. Janitorial Services Companies Often Use Misclassification as a Strategy to Cut Labor Costs and Interfere with Workers' Right to Organize.

Misclassification is a particularly common problem in low-wage, labor-intensive industries where women, workers of color, and immigrants are often overrepresented.[10] The janitorial services industry provides a good example.[11]

A 2019 study in California found that janitors' median hourly salary was $12.22; more than 80% of janitors were Latino; and the majority were women and immigrants.[12] The study also found that almost one quarter of janitors were classified as independent contractors.[13] Meanwhile, the janitorial industry's business model suggests that many of these workers are likely misclassified: Janitorial firms tend to spend a majority of their operating budgets on labor, and, as a result, the industry is singularly focused on cutting labor costs. To achieve that goal employers use various strategies, including out-sourcing, multiple layers of subcontracting, and misclassification.[14] Misclassification reduces labor costs by avoiding minimum-wage and overtime pay and by eliminating the costs of unemployment insurance, workers' compensation, and payroll taxes.[15]

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[10]National Employment Law Project (NELP), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 26, 2020), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/.

[11] *See, e.g.* Weil, *supra* note 3.

[12] Ratna Sinroja, Sarah Thomason & Ken Jacobs, *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, U.C. Berkley Lab. Ctr. (Mar. 11, 2019), https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/.

[13] *Id.*

[14] Sara Hinkley, Annette Bernhardt, & Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, U.C. Berkley Lab. Ctr. (Mar. 8, 2016), https://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf.

[15] *Id*. at 21.

SEIU Local 32BJ, an SEIU affiliate with more than 175,000 property service members, regularly encounters employers who misclassify janitors as independent contractors. For example, when a group of janitors in South Florida recently sought to organize, Local 32BJ discovered that the company they worked for, Clean Space, Inc., classified them as independent contractors. Clean Space required individual janitors to sign a document titled "Agreement for Performance of Services by Independent Contractor," which stated that janitors had to provide their own workers' compensation insurance and liability insurance and assume responsibility for all payroll taxes.[16] But despite these and other Agreement terms intended to create the appearance of an independent-contractor relationship on paper, Clean Space exerted employer-like control over the janitors' terms and conditions of work.

Evidence of the true employer-employee relationship was legion. A Clean Space supervisor assigned individual janitors to a specific building complex to clean, set their hours of work, told the janitors they would be paid $10 an hour, and provided cleaning supplies equipment, and a uniform (i.e. a Clean Space t-shirt) to wear while working. Clean Space did not negotiate with janitors as independent contractors and, indeed, did not inform the janitors that they were to be considered temporary workers or independent contractors at the time of hiring. Instead, when janitors sought payment for hours worked, Clean Space conditioned payment on their signing the Agreement.[17]

Misclassification harms workers in a number of ways, including by making it more difficult to bargain collectively over wages and working conditions. Misclassified workers like the Clean Space janitors must challenge their status as independent contractors in order to

[16] SEIU Local 32BJ Complaint Filed with the Florida Division of Workers Compensation (Jun. 16, 2021).
[17] *Id.*

exercise their organizing rights, and challenging misclassification is no easy task—especially when an employer engages in a virulent anti-union campaign. Challenging independent contractor status while also trying to organize a work site requires workers to simultaneously gather a showing of interest *and* evidence to defeat the employer's fraudulent misclassification scheme.

SEIU Local 32BJ's experience at George Mason University shows how this works. George Mason janitors are organizing to form a union. One of the University's cleaning subcontractors, H & E Cleaning Services, has settled multiple unfair labor practice allegations, including allegations that H & E Cleaning intimidated, surveilled, and threatened janitors in retaliation for legally protected union activity.[18] H & E Cleaning also classifies workers as independent contractors, and SEIU believes at least some of those workers are misclassified. The combination of the unfair labor practices and misclassification understandably has a chilling effect on workers, who face the constant threat of being replaced by cheaper "independent contractors" who may be less likely to exercise their rights.

Even after workers successfully organize, misclassification harms the collective bargaining process. When an employer party to a collective bargaining agreement misclassifies workers who would otherwise be covered by the agreement, the employer effectively circumvents the union contract. And by reducing unit size, misclassification weakens the bargaining power of those workers who are properly classified as employees.[19]

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[18] Ian Kullgren, *George Mason University Contractor Settles SEIU Janitors Dispute*, Bloomberg Law (Nov. 30, 2020), https://news.bloomberglaw.com/daily-labor-report/george-mason-university-contractor-settles-seiu-janitors-dispute; Ian Kullgren, *SEIU Reaches Second Settlement with George Mason Contractor*, Bloomberg Law (Jan. 11, 2021), https://news.bloomberglaw.com/daily-labor-report/seiu-reaches-second-settlement-with-george-mason-contractor.

[19] Françoise Carré, *(In)dependent Contractor Misclassification*, Econ. Pol'y Inst. (Jun. 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification.

B. Misclassified Home Care Workers' Experiences Illustrate the Harms to Workers Who Already Face Substantial Challenges in Exercising NLRA Rights.

Home care employees also experience above-average rates of misclassification.[20] Similar to other industries where misclassification is rampant, home care is an industry with many workers who are women, people of color, immigrants, and people at the intersection of one or more of those categories.[21] The median wage for home care aides in 2020 was only $13.02 per hour.[22]

SEIU represents more than 700,000 home care workers across the country. Home care workers typically work alone in the homes of consumers to whom they provide care. For this reason, home care workers rarely encounter other workers in the same field, which makes collective action and bargaining difficult. Misclassification then adds an extra hurdle to overcome for home care workers who want to exercise their NLRA rights.

Homecare workers who are not able to overcome these obstacles and to form a union are left to fight misclassification on their own. Some homecare workers have been able to file wage-and-hour lawsuits, and the success of those lawsuits, including millions of dollars recovered, shows how significant a problem misclassification is.[23] But lawsuits are not an adequate vehicle

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[20] National Employment Law Project (NELP), *Surveying the Home Care Workforce: Their Challenges and the Positive Impact of Unionization* (Sept. 2017) (finding 23 percent of surveyed home care workers may be misclassified as independent contractors), https://s27147.pcdn.co/wp-content/uploads/surveying-home-care-workforce.pdf.

[21] Kezia Scales, *It's Time to Care: A Detailed Profile of America's Direct Care Workforce*, PHI (Jan. 2020) (finding the composition of the home care workforce to be 87 percent women, 62 percent people of color, and 31 percent born outside the United States), http://phinational.org/wp-content/uploads/2020/01/Its-Time-to-Care-2020-PHI.pdf.

[22] *Occupational Outlook Handbook, Home Health and Personal Care Aides*, U.S. Bureau of Lab. Stats. https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm (last modified Sept. 8, 2021).

[23] *See, e.g.*, News Release, U.S. Dep't of Lab., *Federal Court Orders Christian Home Healthcare to Pay More than 500 Workers $1.6 Million in Back Wages, Damage*s (Mar. 3, 2021),

for achieving industry-wide change: Pursuing litigation is time-consuming and burdensome for already overly burdened workers, and lawsuits are available only to those workers who have attorneys and are able to meet all the evidentiary requirements for success.[24] From the employer perspective, the risk of facing a successful wage-and-hour lawsuit is attenuated compared to the immediate cost savings of misclassification. For these reasons, lawsuits cannot achieve the systemic change available via organizing and collective bargaining.

C. Endemic Misclassification in the Growing Gig Economy Denies NLRA Rights to Millions of Employees.

The gig economy is characterized by a labor market in which companies' online platforms connect remote workers with customers, on a short-term and payment-by-task basis, to exchange services for money. Common examples of gig workers include drivers for app-based ride-share, grocery, and restaurant-delivery services and workers who perform household tasks or run errands on demand. More than 30% of the U.S. workforce—or more than 55 million people—are part of the gig economy through either their primary or secondary jobs, and that number is expected to increase.[25] Gig workers are disproportionately young, Black and Latino,

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https://www.dol.gov/newsroom/releases/whd/whd20210303-0; News Release, U.S. Dep't of Lab., *U.S. Department of Labor Recovers More Than $358K in Back Wages for 50 Workers at Tennessee Home Healthcare Service* (Apr. 20, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210420-3.

[24] *Id*.

[25] Gallup, *The Gig Economy and Alternative Work Arrangements* (2018), at 3, 5-6, https://acrip.co/contenidos-acrip/gallup/2020/mayo/gallup-perspective-gig-economy-perspective-paper.pdf; Monica Anderson *et al*., *The State of Gig Work in 2021*, Pew Rsch. Ctr. (Dec. 8, 2021), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2021/12/PI_2021.12.08_Gig-Work_Final.pdf; Statista, *Gig Economy in the U.S. - Statistics & Facts* (Jan. 21, 2021), https://www.statista.com/topics/4891/gig-economy-in-the-us/.

and immigrants.[26] Lower income workers are also overrepresented on gig platforms and disproportionately rely on gig platforms as their primary means of income.[27]

Like many janitorial and home care employers, gig economy companies misclassify their workers as independent contractors to maximize profit.[28] In fact, the gig economy business model often *depends* on misclassification for success, which has resulted in the sweeping misclassification of millions of gig workers.[29] Members of gig worker organizations affiliated with SEIU Local Unions, such as Mobile Workers Alliance[30] and We Drive Progress,[31] have been organizing to demand better pay and working conditions for gig workers. But pervasive misclassification frustrates their efforts to form unions and assert their right to negotiate for better working conditions.

Gig companies exercise significant control over their workers, notwithstanding the companies' misleading narratives about gig worker "flexibility" and "entrepreneurial

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[26] National Employment Law Project (NELP), *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs* (2021), at 4, https://s27147.pcdn.co/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf.

[27] *Id.*

[28] Steven Gandel, *Uber-nomics: Here's What It Would Cost Uber to Pay Its Drivers as Employees*, Fortune (Sept. 17, 2015), http://fortune.com/2015/09/17/ubernomics/.

[29] *See e.g.*, Marshall Steinbaum, *Monopsony and the Business Model of Gig Economy Platforms*, Org. for Econ. Coop. & Dev. (Sept. 17, 2020), at 7-9, https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf; National Employment Law Project (NELP), *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It* (March 25, 2019), at 2-4, https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf.

[30] Mobile Workers Alliance is an organization of gig workers sponsored and supported by SEIU Local 721. Mobile Workers Alliance includes approximately 20,000 Southern California app drivers, including Uber, Lyft, and Doordash drivers, and provides drivers with resources to organize for better employment protections and benefits.

[31] We Drive Progress is an organization of gig workers sponsored and supported by SEIU Local 1021. We Drive Progress includes over 10,000 drivers working for Uber, Lyft, Instacart and DoorDash drivers, and fights for better wages, benefits, and working conditions for drivers.

opportunity" that help obscure the extent of their control. For example, companies such as Uber and Lyft do not negotiate with individual drivers over pay rates; instead, they unilaterally dictate the fares charged to customers and the portion of those fares that are paid to drivers.[32] And because drivers are misclassified as independent contractors, they struggle to aggregate their collective strength to negotiate for better wages, leaving Uber and Lyft with the power to set wages in the parties' unequal relationship. The end result is predictable: Ride share drivers' median net pay is estimated at less than $10/hour (after accounting for expenses and unpaid time required to perform gig work).[33]

Mobile Workers Alliance member Neide Tameirão is one among many workers who struggles to get by on her gig economy pay. Tameirão drives for Uber and feels intense pressure to accept rides since Uber, like many gig companies, penalizes workers for declining too many rides or deliveries.[34] Due to an Uber policy change, however, Tameirão cannot accurately determine whether any particular fare will be profitable or cause her to lose money. In 2020, Uber briefly instituted a policy that allowed drivers like Tameirão to set a minimum fare they would be willing to accept for a particular ride. This feature helped Tameirão determine whether driving a long distance outside of her area was worth her time. Then in 2021, Uber abruptly ended the policy, citing concerns over increased wait times and drivers' declining too many

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[32] *Remote Control: The Truth and Proof About Gig Companies as Employers*, *supra* note 9.

[33] *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*, *supra* note 26, at 4; Nicole Karlis, *DoorDash Drivers Make an Average of $1.45 an Hour, Analysis Finds*, Salon (Jan. 19, 2020), https://www.salon.com/2020/01/19/doordash-drivers-make-an-average-of-145-an-hour-analysis-finds (citing Working Washington, *No Free Lunch, But Almost: What DoorDash Actually Pays, After Expenses, and What's Happening with Tips* (Jan. 16, 2020), https://payup.wtf/doordash/no-free-lunch-report).

[34] Carolyn Said, *Uber, Lyft Drivers Fear Getting Booted from Work*, S.F. Chron. (Oct. 14, 2018), https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-feargetting-booted-from-work-13304052.php.

rides.[35] Uber's lack of transparency means that Tameirão has found herself accepting rides that take her far from her home and for which she earns as little as $2.

This has not been Uber's only unilateral, anti-driver policy change resulting in lower pay. Also in 2021, Uber ended a policy in California where drivers received compensation on the basis of customer fares.[36] Now driver earnings are solely dictated by Uber, not what riders pay for their trips.

Tameirão estimates these two changes in Uber policy have substantially reduced her pay. She and other gig workers who want better working conditions are organizing with Mobile Workers Alliance in the hope that they can use their collective power to make change. But without NLRA-protected employee rights, Tameirão and her fellow drivers do not have a legal mechanism to force gig companies to negotiate.

In addition to dictating pay, gig companies have the employer power to fire (or "deactivate") gig workers without explanation, and workers are typically unable to protest or appeal—even when termination decisions are based on false facts.[37] Individual We Drive Progress members who work for DoorDash have presented evidence to the company that incorrect ratings resulted in their deactivation, but DoorDash has declined to address the mistakes or reverse deactivations.[38] The inability to negotiate or count on any job security is

[35] Uber.com, *Upcoming Changes to the Driver app* (May 18, 2021), https://www.uber.com/blog/california/upcoming-changes-to-the-driver-app/.

[36] Faiz Siddiqui, *You May Be Paying More for Uber, but Drivers Aren't Getting Their Cut of the Fare Hike*, Wash. Post (June 10, 2021), https://www.washingtonpost.com/technology/2021/06/09/uber-lyft-drivers-price-hike/.

[37] *Remote Control: The Truth and Proof About Gig Companies as Employers*, *supra* note 9; Said, *supra* note 34.

[38] Press Release, We Drive Progress, *"Share the Wealth, Tony!:" Gig Workers in San Francisco Protest Doordash CEO's Greed and Call For an End to Proposition 22 and Gig Economy Abuses* (Sept. 2,

extraordinarily difficult for workers who rely on gig work to support themselves and their families.[39] We Drive Progress member Saori Okawa described her fears over possible "deactivation" by saying: "If I don't accept low-paying deliveries, my score on the DoorDash app goes down. A lower score means I could be paid less money, or get worse deliveries, or even be deactivated with no warning."[40] In contrast to Okawa's powerlessness, NLRA-protected employees who form a union have the right to negotiate over discipline and termination procedures as mandatory subjects of bargaining. *N.K. Parker Transport, Inc*., 332 NLRB 547, 551 (2000).

The conditions gig workers face are so intolerable that some have begun to engage in collective action *despite* the risk that they could be subject to termination if their companies' misclassification schemes succeed. Over the last several years, gig workers have gone on strike, engaged in work stoppages and protests, and demanded that gig companies improve their pay, benefits and working conditions.[41] Without an effective path to form a union, however, workers

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2020), https://www.wedriveprogress.org/press/share-the-wealth-tony-gig-workers-in-san-francisco-protest-doordash-ceos-greed-and-call-for-an-end-to-proposition-22-and-gig-economy-abuses.

[39] We Drive Progress member Aung Tun Oo has worked as an Uber driver for three years and solely relies on her Uber driving to earn a living. We Drive Progress member Francean Kennedy is a single mom whose only source of income is working as a DoorDash to care for herself and her family, often working long hours to "barely makes ends meet."

[40] *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*, *supra* note 26, at 5 (quoting Saori Okawa).

[41] *See, e.g*., Mike Snider, *More than 150K Instacart Workers Threaten National Strike Over Coronavirus Hazard Concerns*, USA Today (March 27, 2020), https://www.usatoday.com/story/money/business/2020/03/27/coronavirus-instacart-workers-plan-strike-over-health-hazards/2925735001/; Kate Conger, Vicky Xiuzhong Xu & Zach Wichter, *Uber Drivers' Day of Strikes Circles the Globe Before the Company's I.P.O.*, NY Times (May 8, 2019), https://www.nytimes.com/2019/05/08/technology/uber-strike.html; Li Jin *et al*., *A Labor Movement for the Platform Economy*, Harv. Bus. Rev. (Sept. 24, 2021), https://hbr.org/2021/09/a-labor-movement-for-the-platform-economy; Press Release, Mobile Workers Alliance, *On Anniversary of Prop 22's Passage, Gig Workers Descend on Uber Hub in Los Angeles and Demand Fair Pay, Adequate Worker Protections* (Nov. 3, 2021), https://mobilealliance.org/2021/11/nov3mwarally/.

who engage in these actions often get little response from the companies they work for—or, at best, limited, inadequate, temporary and superficial responses. Some gig companies responded to worker protests over unsafe conditions during the pandemic by providing limited PPE and cleaning supplies, but drivers did not have the right to negotiate over what supplies they actually needed and how long they would need them.[42] Again, workers are forced to accept a wholly unequal bargaining position vis-à-vis companies that dictate their terms and conditions of work, a result in conflict with the policies and purposes of the Act.

Of course, "gig jobs" are only the latest manifestation of a very old problem. Misclassification is not new because employers throughout history have designed business models that they hope will allow them to dictate terms and avoid negotiating with their workers.[43] Indeed, Congress recognized in 1935 that, if given the chance, employers will "den[y] . . . the right of employees to organize" and "refus[e] . . . to accept the procedure of collective bargaining." 29 U.S.C. § 151.

What Congress understood years ago about worker power is equally true today: Because "the individual unorganized worker is commonly helpless to exercise actual liberty of contract," and does not possess "[]equality of bargaining power" with highly organized corporate employers, the individual worker cannot effectively resist erosion of his or her rights alone. 29 U.S.C. § 102; 29 U.S.C. § 151. The number of gig workers in the economy is rapidly growing, as are their grievances, [44] and their one route to decent working conditions is the same as it has

[42] *See, e.g.*, Musadiq Bidar, *San Francisco Rideshare and Delivery Drivers Demand More PPE*, CBSNews.com (Feb. 21, 2021), https://www.cbsnews.com/news/san-francisco-rideshare-and-delivery-drivers-demand-more-ppe-equipment/.

[43] *See supra*, Section II. A. and B.

[44] The number of Uber drivers and couriers grew roughly 70 percent from January to October 2021, or by nearly 640,000. The number of DoorDash workers more than doubled during the pandemic, to over three

always been for workers across industries—collective action and organization. For this reason among many others, it is critically important that the Board adopt an independent-contractor test broad enough to protect against continued misclassification in the gig economy, as well as in other sectors where employers exploit low-wage and vulnerable workers.

CONCLUSION

The proper classification of workers as employees is essential to ensuring that those workers receive the rights and benefits the Act provides. Accordingly, the Board should overrule *SuperShuttle* and return to the Restatement's common-law independent contractor test.

It is important to realize, however, that for most low-wage workers, overruling *SuperShuttl*e will not be enough. Their efforts to organize are hindered not only by misclassification but also by the contingent and precarious nature of work in increasingly fissured workplaces, where power imbalances are becoming ever more extreme.[45] Reversing the errors of the last several years (like *SuperShuttle*) is certainly important, but we will see the same rights erosion again over time unless we implement fundamental and long-lasting reform. SEIU therefore encourages the Board to explore all avenues for strengthening workers' position, including by considering rulemaking and issuing new decisions that protect more workers across all sectors of the economy, that remove barriers to organizing and collective bargaining, that

million. Noam Scheiber, *Despite Labor Shortages, Workers See Few Gains in Economic Security*, NY Times (Feb. 3, 2022), https://www.nytimes.com/2022/02/01/business/economy/part-time-work.html.

[45] See, e.g., Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2, at 6, 9, 21-33 (2016) ("[L]abor law, developed during and after the New Deal, has been rendered inapt by contemporary managerial strategies and fails to provide tools capable of redressing today's inequities"); Block & Sachs, *supra* note 8, at 37-40; David Madland, *The Future of Worker Voice and Power*, Ctr. for Am. Progress (Oct. 2016), at 8-11 https://cdn.americanprogress.org/wpcontent/uploads/2016/10/06051753/WorkerVoice2.pdf.

facilitate sectoral and multi-employer bargaining, and that better protect workers' right to strike and engage in other concerted activity.[46]

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[46] Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today's Economy*, Roosevelt Inst. (Aug. 9, 2018), at 5-12, 26, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amicus Curiae Brief of Services Employees International Union in Case 10–RC–276292 was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 10th day of February, 2022.

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