Case 10-RC-276292

THE NATIONAL LABOR RELATIONS BOARD

The Atlanta Opera, Inc.

and Make-up Artists and Hair Stylists Union, Local 798, IATSE

BRIEF OF MISCLASSIFIED WORKER CLIENTS OF PHILADELPHIA LEGAL ASSISTANCE AS AMICI CURIAE

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INTERESTS OF THE AMICI CURIAE

Amici Curiae are four workers who have been misclassified by their employers in various sectors and experienced ongoing harms as a result. In particular, *Amici* have had to seek legal counsel to access unemployment insurance and address tax consequences of misclassification; as a result, all are clients of Philadelphia Legal Assistance, a non-profit legal aid organization. *Amici* continue to work in the same types of jobs in which they have been misclassified—indeed, at least one is currently misclassified—and so have a direct personal interest in the Board's decision. *Amici* share the interests of so many other workers, including colleagues at their jobs, who have been misclassified, and have an interest in those workers' proper classification as well.

INTRODUCTION

As the Board considers the independent contractor standard set forth in *SuperShuttle DFW, Inc.*, 367 NLRB 75 (2019), and whether it should be replaced by the standard from *FedEx Home Delivery*, 361 NLRB 610 (2014), or by something else, *Amici* misclassified workers urge the Board to consider misclassification in the wider legal context. *Amici* understand that numerous parties will submit briefs and comments on the relevant standards and the workplace effects on employment relationships, and agree with arguments that misclassification often impairs workers' ability to earn living wages, agitate for workplace safety, and otherwise thrive at their jobs. In this brief, however, *Amici* describe some of the collateral legal consequences of misclassification in the lives of workers outside the workplace—which the Board must account for in crafting an appropriate test.

Amici's experience spans economic sectors, but has key common features. *Amici* have delivered luggage for an app, provided home healthcare, served as a certified nursing assistant, and delivered food—substantially different sorts of work. But each has had virtually no control over their assignments, each has had their employers monitor them closely and hold them accountable to employer-imposed rules, and each has had their pay determined entirely by their employer. Each has been misclassified as an independent contractor. And each has faced collateral legal consequences outside the workplace from that misclassification.

Each of the *Amici* had to seek out legal aid services for assistance with the effects of misclassification outside of the workplace—a common problem for people in their position. For many workers, misclassification prevents them from seeking unemployment insurance when they are laid off or involuntarily separated from their employers—compensation to which many would have a legal entitlement if properly classified. Barring access to the social safety net particularly harms misclassified workers because they often live and work in precarious circumstances. Mass layoffs during the pandemic only exacerbated this problem, and while federal changes to expand access to unemployment benefits temporarily papered over the issue, those programs have since lapsed.

Misclassification also imposes enormous tax challenges on misclassified workers. While paradigmatic independent businesses expect, plan, and have resources to comply with tax law, misclassified workers suffer hardships from having to pay employer and employee side Social Security and Medicare taxes (payroll taxes). In addition to paying more payroll taxes than properly-classified workers, despite living

in more economic precarity, misclassified workers have more complicated filings and are often hit with unexpected tax bills. Unlike properly-classified workers, they cannot rely on their employers to withhold and transmit expected income tax liabilities to the IRS, states, and municipalities. Misclassification also undermines their long-term financial stability, as workers do not have simple ways to take advantage of retirement and health care benefits that utilize pre-tax wage deductions. Moreover, even if their classification is corrected after the fact, they still owe their own share of payroll and income taxes, and untangling prior employer-side payroll tax overpayments can take years and require more effort—including, often, legal representation.

In reconsidering *SuperShuttle* and *FedEx*, *Amici* urge the Board to consider not only the workplace-specific implications of the test it uses to assess classification of employees, but the implications for employees outside of the workplace. When employers exert control over workers, those workers should be properly classified as employees not only so that they can seek out workplace protections under applicable law, but so that they can qualify for unemployment insurance in the event of involuntary separation, have their employers pay employer-side taxes and withhold their own taxes from their paychecks, and, generally, experience more security and less economic precarity.

ARGUMENT

I. Misclassification occurs across industries and economic sectors.

Amici have substantially varying experience in different sectors of the economy. All, however, have been misclassified as independent contractors despite performing the work of employees. The consequences of this misclassification forced *Amici* to seek out legal help from Philadelphia Legal Assistance, which provides free representation to low-income Philadelphians and their families in civil legal matters. *Amici*'s common experiences across industries underscore the need for the Board to reconsider *SuperShuttle*; the commonalities of their experience demonstrate that the Board should reject arguments that some categories of workers defy inclusion in a workable legal framework.

Abdelmoula Nasria was misclassified while working a part-time job with a luggage delivery service. Mr. Nasria is 56 years old and married with six children, and his full-time job did not pay enough to provide for his family. Like many low-wage workers, years of wage suppression made it impossible for Mr. Nasria to survive on one job, forcing him to pick up a second part-time job in the gig economy. Delivering luggage was not his business; he is a machinist by trade. All of the work was assigned by the company through a mobile application ("app"), and he could not proactively select or choose assignments. He had no interaction with the customers; instead, all payments were made through the app and then paid to him by the company. The company had the power to monitor his work closely and could fire him if customers complained. However, the company classified him as an independent contractor, which meant he was denied Pennsylvania unemployment benefits when he lost the

job during the pandemic. He was only able to secure benefits after months of waiting and a three-hour hearing with his attorney from Philadelphia Legal Assistance.

Fanny Williams was misclassified while working with a home health care agency, a common problem among the home care workers that Philadelphia Legal Assistance serves. Ms. Williams is a 61-year-old married woman, who has worked in the home health field for much of her career. While she worked for Human Touch Home Care, the company assigned her to provide home care to a specific patient, required her to submit a detailed timesheet, and paid her directly (however, they took a twenty-five percent fee out of her pay). The company had also performed a robust screening before hiring her and assigning her patients. During her career, Ms. Williams had always worked as a full-time employee with employer-provided health insurance when serving as a home health aide. Despite little difference in the operations of this new job, and a supervisor that controlled how she provided care, the company misclassified Ms. Williams as an independent contractor. This sudden misclassification left her confused about filing taxes and with a large tax burden. When she ultimately left, she was denied unemployment benefits until a successful appeal by her attorney.

Crystal Major has similarly been misclassified while working as a certified nursing assistant for Immediate Medical Staffing. In that job, she meets with patients during shifts scheduled by her employer and she provides for patients' needs based upon close instructions. Ms. Major has to punch time clocks to report her hours, and her company sets both her schedule and her hourly pay rate. Despite exerting substantial control over her working life, her employer has misclassified her as an

independent contractor. Because of that misclassification, her employer underpaid her and refused to pay her overtime—an error that was not corrected until after a substantial legal process resulted in a settlement for over $12,000 in backpay. Even then, her misclassification continues to have collateral effects, as she has required additional legal representation to correct tax filings. Ms. Major's experience also shows how deeply entrenched misclassification can be among companies—even after successful legal action, her employer is *still* paying her as an independent contractor and not withholding the appropriate taxes on her behalf.

Erin Mahon worked for three different food delivery companies as she tried to piece together a living wage. She was immediately taken aback by how the apps tracked her and reviewed her work based on customer feedback. She had no way to fight back when one company deactivated her because a customer claimed she did not deliver a food order, despite her having a photo of the delivery. The companies also required her to accept certain assignments in order to make decent pay. She worried about getting injured on the job, as she knew the three companies considered her an independent contractor and would not provide workers' compensation. That problem mattered even more because she had no access to health care through her jobs, and during the pandemic she feared for her life because of health conditions that made her high risk for COVID-19. It felt like she was constantly living on the edge with no support or safety net. When she started to reject delivery assignments that would not pay enough to even cover the gas expenses, the companies all deactivated her from the apps, with no recourse. Her application for Pennsylvania unemployment compensation was also initially rejected because of the misclassification. She

advocated for herself, along with her attorney, and ultimately the agency recognized that she had been working as an employee—but the process took nine months and kept her from getting unemployment when she needed it most.

II. Misclassification causes problems for workers even outside of the workplace.

As *Amici*'s experiences show, some of the most pervasive and pernicious harms of misclassification happen outside of the workplace, especially at the time a worker might be most vulnerable—after separation from the employer. The parties and numerous other *amici* discuss implications of this standard within the workplace, but *Amici* draw the Board's attention to two particular out-of-workplace issues. First, misclassified employees, when involuntarily separated, often cannot qualify for unemployment insurance. This lack of access to the safety net compounds the economic harms of misclassification. Second, misclassified employees also face challenges with tax law—both having to pay more taxes, and having to do so without the benefit of automatic withholding or the resources of employers. For some workers, tax issues can linger for years. And both of these problems often require that misclassified workers find legal representation.

A. Misclassified workers face problems accessing unemployment insurance.

In many states, misclassification of workers as independent contractors prevents them from accessing unemployment insurance when their employer lays them off or they are otherwise separated from employment. Employers save a modest amount by not having to pay into the unemployment insurance system in their state, but for

workers, lacking access to the social safety net can be catastrophic. Misclassified workers rarely have a mechanism to preserve or fight for their jobs back, and many have been living paycheck to paycheck. And although workers can sometimes get this fixed through appeals processes, that often requires legal representation, which many workers cannot afford or otherwise obtain.

In Pennsylvania, where *Amici* are from, employers regularly contest determinations by the Commonwealth's Department of Labor & Industry that they must pay unemployment compensation contributions, claiming that their workers are independent contractors and not employees. Last year, the Supreme Court of Pennsylvania rejected the assertions of a nail salon that several of its workers were independent contractors in a case that highlights the insidious dependence by companies on "entrepreneurial opportunity." *A Special Touch v. Dep't of Labor and Indus.*, 228 A.3d 489 (Pa. 2020). The employer argued that if a worker is "merely capable of performing services for more than one person [or entity]" then they are "customarily engaged" in a business or trade. Finding that such an interpretation was inconsistent with the statutory language and the remedial nature of the law, the Court held that an employer had to prove "actual, rather than hypothetical, involvement [by a worker] in an independent trade or business," to establish them as independent contractors. 228 A.3d at 504.

Employers do this partly because they have significant financial incentives to avoid making contributions to a state's unemployment insurance fund. In Pennsylvania, employers in just the construction industry alone save as much as $10 million a year by misclassifying workers and avoiding unemployment contributions.

See Russel Ormiston & Stephen Herzenberg, *Illegal Labor Practices in the Philadelphia Regional Construction Industry: An Assessment and Action Plan*, Keystone Research Center (Jan. 11, 2019). In other industries, it is far more. With more than 60,000 app-based drivers in Pennsylvania, where employers pay an average employer contribution of $610 per employee to the unemployment compensation fund; misclassification leads to more than $36 million in missing contributions.[1] These savings also give such businesses a market advantage—either more profits or lower pricing—over other competitors that properly classify workers and thus pay into the system. *See Dynamex Operations West v. Superior Court*, 416 F.3d 1, 33 (Ca. 2018). That advantage comes at the expense of the system, which loses out on millions per year, *and* makes it harder for companies that properly classify workers and pay good wages to compete and thrive.

When employers do not contribute to the unemployment fund because they've misclassified someone as an independent contractor, that person faces an arduous road to obtaining unemployment benefits. Some workers will never even try to apply, after years of being told by the employer that they are not eligible. Others will apply

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[1] The average annual unemployment compensation contribution in Pennsylvania is $610 and there are an estimated 62,189 platform workers in the state. *See* U.S. Department of Labor, Office of Unemployment Insurance, Division of Fiscal and Actuarial Services, State Unemployment Tax Measures Report (March 2019), https://oui.doleta.gov/unemploy/pdf/sigmeasures/sigmeasuitaxsys18.pdf; *see* Bureau of Labor Statistics, Economy at a Glance, https://www.bls.gov/eag/eag.pa.htm; Bureau of Labor Statistics, Electronically Mediated Work: New Questions in the Contingent Worker Supplement (Sept. 2018), https://www.bls.gov/opub/m1r/2018/article/electronically-mediated-work-new-questions -in-thecontingent-worker-supplement.htm.

and receive denials because there is no wage history for them in the system, which in every state relies exclusively on quarterly reports from employers that make contributions to the fund. At this stage, many workers will give up; only a determined few will file appeals to argue they have been misclassified and that their wages should be included. This process is an uphill battle, and involves issues usually litigated by attorneys in court, not *pro se* litigants in administrative proceedings. To make matters worse, the process can take months, delaying the receipt of benefits during the most critical time—the catastrophic drop in income directly following job loss.

Historically, workers who were "self-employed," often referred to colloquially as "independent contractors," were excluded from unemployment benefits. In theory, they had control over the operations of their business, and therefore controlled whether their work ceased. But as misclassification has perniciously expanded, more and more workers are automatically excluded from the unemployment safety net despite lacking that control. Unlike the business owners whom legislators had in mind, misclassified workers do not actually have an ongoing, independently-functioning business enterprise that they ceased by choice. Instead, their ability to work for wages is completely at the whim of their employer.

Amici's experience is that involuntary separation as a misclassified worker can make their entire income vanish overnight. And *Amici* also know from experience that the jobs they lost and others like them do not pay enough to establish a robust personal rainy-day fund or other savings that could make up for the exclusion from unemployment compensation. Although the federal government briefly expanded access to unemployment for independent contractors—properly classified or

otherwise—through the CARES Act in 2020, that program ended in September 2021. When misclassified low-wage workers lose their jobs, they cannot rely on the social safety net and often have nowhere to turn.

B. Misclassified workers face problems with their tax filings.

In many states, misclassification of workers as independent contractors also poses short and long-term issues with tax filings. In the short term, misclassified workers are excluded from the normal process by which employees' taxes get paid—automatic withholding by the payroll processor of their employer. Beyond that, they must also pay, at the federal level, *more* Social Security and Medicare taxes, covering both the employer and employee side of the federal payroll tax. Misclassified workers must often seek out accounting and legal services to deal with these issues. As one *Amici*'s personal experience demonstrates, even obtaining outstanding legal aid counsel and engaging in successful legal action can have ongoing tax consequences that require corrections and further filings.

Misclassified workers cannot utilize their employers' automatic withholding to transmit their taxes directly to the government. Misclassified workers paid via IRS Form 1099-NEC must, if they do not contest their misclassification, track their income, calculate estimated taxes themselves, and pay the government in an ad hoc way. They lack the expertise of payroll processors, and, when misclassified, have not even made an active choice to embrace a more complicated tax regime in exchange for other business advantages. Instead, misclassified workers often spend much more time thinking about taxes, may face large tax bills in the filing season, and may only

be able to deal with this by hiring tax professionals or attorneys to help—things they can little afford to do.

Misclassification also results in workers paying *more* taxes. Employers who properly classify their employees must pay an employer's share of payroll taxes, which includes Social Security taxes of 6.2%, Medicare taxes of 1.45%, and make the required contributions to unemployment compensation systems discussed in Section I, which vary by state. And while properly classified employees pay their own 6.2% in Social Security tax and 1.45% in Medicare tax, mechanically, when workers are classified as W-2 wage earners, this 7.65% share is automatically withheld from their pay. But when employees are misclassified as independent contractors paid via 1099, they must pay both the employer and employee side—12.4% and 2.9% for a combined 15.3% self-employment tax—of those taxes, on top of income taxes and other applicable taxes. And none of those taxes are automatically withheld. The people who can often least afford it end up paying more in taxes by virtue of misclassification.

Even when workers fight for proper classification and win, tax complications can dog them for years. One of the *Amici* continues to experience exactly this problem. Initially misclassified, her employer reached a settlement with the U.S. Department of Labor that resulted in substantial back pay that she had earned but had not been paid. But for tax purposes, she still had to challenge her 1099 status with the IRS through the SS-8 process and file federal returns listing her income as "wages" so that she would only owe her own share of taxes. In 2022, she remains mired in U.S. Tax Court based upon her misclassification in tax year 2018. And she is luckier than

most—she qualified for legal aid and was able to work with a tax expert. Absent that assistance, she would likely not have been able to engage in this process alone.

III. In reconsidering *SuperShuttle*, the Board should consider the broader harms of misclassification.

Amici urge the Board to account for the out-of-workplace effects of its decision as it reconsiders *FedEx* and *SuperShuttle*. Indeed, many workers nationally suffer these problems *because* of *SuperShuttle*, which has facilitated misclassification of millions of workers across industries. *Amici* urge the Board to reject *SuperShuttle* regardless of what replaces it. But *Amici* also offer some recommendations about crafting a replacement.

First, *FedEx* is better than *SuperShuttle*, but not ideal. Employers have warped the concepts of "entrepreneurial opportunity" and "flexibility" beyond recognition, and the standard this Board adopts must protect people from abuse of those often-deceptive descriptors. Especially in the "gig economy," companies refer to flexibility, around when to sign onto the app or opt into shifts, as a defining feature of an individual's entrepreneurial independence—but that flexibility is often illusory. The Pennsylvania Supreme Court recently weighed in on this point when it found that an UberX driver was not self-employed. *Lowman v. Unemployment Comp. Bd. of Review*, 235 A.3d 278 (Pa. 2020). The Court held that the driver was not engaged in an independently established business, and rejected the argument that a drivers' "flexibility," their ability to choose when to drive, controlled the analysis. Recognizing that "this type of discretion on the part of an individual in the traditional workforce is unusual," the Court nevertheless held that:

> [T]he world in which Uber and Lowman operate is not the usual workforce. Traditionally, hours of work are set and required by an employer (or putative employer) because the operations of the enterprise are dependent on a set number of workers to accomplish a defined task. In contrast here, the fact that Uber allows all of its licensed drivers to work at their own discretion evidences a decision that there are a sufficient number of individuals with access to the Driver App to ensure that, despite erratic schedules, there will always be a driver available to service passengers requesting Uber's service. The fact that Uber's business model does not require regularly scheduled work hours from its workforce does not translate into an automatic independent contractor relationship.

235 A.3d at 307.

The Pennsylvania Supreme Court's decision in *A Special Touch* demonstrates the other necessary point of analysis, by looking deeper than just whether the employer placed express limitations on outside work, and focusing instead on whether a worker actually engaged in an independent business separate from their work for the employer. Despite the employer's contention that the nail technicians had the *opportunity* to work elsewhere, the Court found that none of the workers at issue were providing services outside of the salon as part of their own businesses, or held themselves out as having their own businesses. *A Special Touch*, 228 A.3d at 505. The Board should incorporate the analysis of whether there was actual involvement in an outside and independently established business, not just outside work or the opportunity for work. This avoids the problem of employers offering workers an illusory opportunity to work elsewhere—around the employer's schedules and time demands or other requirements—and thereby justifying misclassification.

To be clear, an employee could actually work for multiple companies without being or becoming an independent businessperson. *Any* worker can find more hours at a

second job—a line cook working a full 35 hours a week at one restaurant could also work additional hours at another restaurant; a certified nursing assistant employed by one agency to care for one patient for 50 hours per week could seek out 10 additional hours for another agency. There is always more work. And for *Amici*, money from one job is barely enough to survive. This is why control—both actual control and the right to control—must be the center of the analysis. If the employer ultimately has control, it has employees, not independent contractors. If *Amici* were to work at Gap, H&M, and Macy's all within the same time period, *Amici* do not become independent salespersons. All of *Amici* have had employers misclassify them as contractors despite exerting substantial control over their working hours, their clients, the rates they could obtain for their services, how they provided those services, their training and skills, and ultimately, whether or not they could continue providing those services at all.

Amici also urge the Board to maintain a standard that can recognize how technology changes the workplace. Some *Amici* have experience with platforms that connect their customers to workers—like drivers—through apps in the "gig economy." Companies argue, and will argue before the Board, that they do not control their workers because their workers use an app to control their own work. However, the digital tracking and feedback from the apps actually allow an employer to exert more control over workers, not less. *See* Alex Rosenblat, *When Your Boss Is an Algorithm*, The New York Times, Oct. 12, 2018 (describing Uber using drivers' phones to remotely monitor smoothness of driver acceleration, braking habits, and other granular characteristics of driving). The Court in *Lowman* also focused on the role of

the app for the factors of both supervision and who provided the tools for the work. Although the UberX driver had his own car and cellphone, the Court found that such "'tools and equipment' . . . were useless without the predicate tool necessary to provide driving services, Uber's Driver App. This fundamental tool for the provision of the service was provided by Uber—without it, Lowman could provide no service. It was the sole means by which he connected, met, or interfaced with a passenger." *Lowman*, 235 A.3d at 304. As the world changes, the standards we use to evaluate conduct in the workplace must account for the power of technology. While workers may have fewer middle managers poking their head into an office, they now contend with GPS tracking and digital management that happens remotely but is more invasive. The *Lowman* Court addressed this effect of technology on the work relationship, too:

> Uber's interaction with its drivers is through its technology. While there is no training in the more traditional mode of office or conference room meetings, regular emails and text messages advising on the manner in which rides and Lowman's earnings (and by definition, Uber's) could be maximized and approaches to providing positive experiences for customers were utilized by Uber in lieu of face-to-face encounters in brick and mortar meeting rooms.

235 A.3d at 305.

CONCLUSION

Misclassified workers face enormous challenges both inside and outside of the workplace. *Amici* have experienced them personally— especially problems accessing unemployment compensation and handling their tax burdens. These problems stem from the misclassification that *SuperShuttle* has facilitated for other low-wage workers, and the Board should change it. As the Board reconsiders *SuperShuttle*,

Amici urge the Board to consider out-of-workplace collateral effects of misclassification, and adopt a new standard that limits those problems.

Respectfully submitted,

/s/ Jim Davy

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CERTIFICATES

I certify that this brief:

(i) is submitted in response to the Board's order of Dec. 27, 2021, soliciting amicus briefs in this matter;

(ii) complies the rules set forth in § 102.46(i) of the Board's regulations; including that it

(iii) has been served by email on counsel for the parties to this proceeding.

/s/ Julia Simon-Mishel

Julia Simon-Mishel