UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ATLANTA OPERA, INC. and MAKE-UP ARTISTS AND HAIR STYLISTS UNION, LOCAL 798, IATSE	Case 10-RC-276292

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AMERICAN COUNCIL OF LIFE INSURERS, FINANCIAL SERVICES INSTITUTE, FINSECA, INSURED RETIREMENT INSTITUTE, AND NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS AS AMICI CURIAE

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TABLE OF CONTENTS

Page

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT AND RESPONSES TO THE BOARD'S QUESTIONS 4

ARGUMENT 5

I. THE BOARD SHOULD REAFFIRM THE *SUPERSHUTTLE* TEST BECAUSE IT BETTER PROMOTES THE COMMON LAW AGENCY TEST'S CONSIDERATION OF ENTREPRENEURIAL OPPORTUNITY 5

A. Entrepreneurial Opportunity Is a Hallmark Element of the Financial Advisor, Insurance Agent and Many Other Business Models. 5

B. The Board's Decision in *SuperShuttle* Correctly Applies a Flexible Model for Consideration of Entrepreneurial Opportunity Under the Common-Law Agency Test. 7

C. Numerous State and Federal Courts Have Recognized That Entrepreneurial Opportunity in the Financial Services, Insurance, and Other Industries Is a Reliable Indicator of Independent Contractor Status. 11

II. ANY REGRESSION FROM THE *SUPERSHUTTLE* FRAMEWORK THAT PLACES A GREATER EMPHASIS ON "CONTROL" OR "DEPENDENCY" ELEMENTS COULD LEAD TO ADVERSE AND UNINTENDED CONSEQUENCES IN HIGHLY REGULATED INDUSTRIES. 13

A. Financial Advisors and Insurance Agents Operate in Highly Regulated Industries, and Thus, for Good Reason, Broker-Dealers and Insurance Companies Must Maintain a Certain Degree of Control. 13

B. Viewing Such Extensive Regulatory-Based "Control" or "Dependency" Through the *FedEx* Lens, Where Entrepreneurial Opportunity is Minimized, Could Result in Misleading Analyses or Conclusions. 15

C. Numerous State and Federal Courts Have Recognized That "Control" in Our Industries Has a Different Meaning When Applied to Employee/Contractor Disputes, and the Board Should Join Those Courts if It Alters or Reverses *SuperShuttle*. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Air Transit, Inc.,
248 NLRB 1302 (1980) 8

Air Transit, Inc.,
271 NLRB 1108 (1984) 15, 16, 17

Corp. Express Delivery Sys.,
332 NLRB 1522 (2000), *enforced sub nom. Corp. Express*, 292 F.3d 777
(D.C. Cir. 2002) 8

Corp. Express Delivery Sys. v. NLRB,
292 F.3d 777 (D.C. Cir. 2002) 8, 10

FedEx Home Delivery,
361 NLRB 610 (2014), *enf't denied*, 849 F.3d 1123 (D.C. Cir. 2017).....4, 7, 8

FedEx Home Delivery v. NLRB,
849 F.3d 1123 (D.C. Cir. 2017) 7, 9

FedEx Home Delivery v. NLRB,
563 F.3d 492 (D.C. Cir. 2009) 4, 8, 10

Hennighan v. Insphere Insurance Solutions, Inc.,
38 F. Supp. 3d 1083 (N.D. Cal. 2014), *aff'd*, 650 F. App'x 500 (9th Cir. 2016) 12

Holden v. Nw. Mut. Fin. Network,
No. 07–C–0930, 2009 WL 440937 (E.D. Wis. Feb. 23, 2009) 13

Intermodal Bridge Transport,
369 NLRB No. 37 (2020) 10, 11

Monell v. Boston Pads LLC,
471 Mass. 566 (2015) 16, 20

N. Am. Van Lines, Inc.,
288 NLRB 38 (1988) 8

NLRB v. Hearst Publications,
322 U.S. 111 (1944).....9

NLRB v. United Ins. Co.,
390 U.S. 254 (1968).....7, 9

Nolan Enterprises, Inc. d/b/a Centerfold Club,
370 NLRB No. 2 (2020) 11

Oakwood Healthcare, Inc.,
348 NLRB 686 (2006) 11

Patel v. 7-Eleven, Inc.,
485 F. Supp. 3d 299 (2020) 16, 20

Roadway Package Sys., Inc.,
326 NLRB 842 (1998) 8

Santangelo v. New York Life Insurance Company,
No. 12–11295, 2014 WL 3896323 (D. Mass. Aug. 7, 2014), *aff'd*, 785 F.3d 65
(1st Cir. 2015) 18

Schwieger v. Farm Bureau Ins. Co. of NE,
207 F.3d 480 (8th Cir. 2000) 13

Seafarers Local 777 (Yellow Cab) v. NLRB,
603 F. 2d 862 (D.C. Cir. 1978) 16

Sofranko v. Northwestern Mutual Life Insurance Company,
No. 2:06cv1657, 2008 WL 145509 (W.D. Pa. Jan. 14, 2008) 12

St. Joseph New-Press,
345 NLRB 474 (2005) 8

Strange v. Nationwide Mut. Ins. Co.,
No. CIV. A. 93–6585, 1997 WL 550016 (E.D. Pa. Aug. 21, 1997) 19

SuperShuttle DFW, Inc.,
367 NLRB No. 75 (2019) ..... *passim*

Taylor v. Waddell & Reed, Inc.,
No. 09–cv–02909, 2013 WL 435907 (S.D. Cal. Feb. 1, 2013) 12, 18

Walfish v. Nw. Mut. Life Ins. Co.,
No. 2:16-cv-4981, 2019 WL 1987013 (D.N.J. May 6, 2019) 18

Statutes

Cal. Labor Code §§ 2775 *et seq* 19, 20

Cal. Labor Code § 2783 .....19, 20

Investment Adviser Act, §§ 202(a)(11), 203 14

Other Authorities

FINRA Rule 1210 14

FINRA Rule 1240 14

FINRA Rule 2210(b)(4) 14

FINRA Rule 2040 14

FINRA Rule 3110 14

FINRA Rule 3120 14

FINRA Rule 3270 14

FINRA Rule 3310 14

FINRA Rule 4511 14

FINRA Rule 4511(a) 14

FINRA Rule 4512 14

Independent Contractors in the U.S.: New Trends from 15 Years of Admin. Tax Data, at 38 fig.6 (July 2019), www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf 6

NAIFA Continues to Work for Changes (Mar. 9, 2021), https://advocacy.naifa.org/news/as-the-house-considers-the-pro-act-naifa-continues-to-work-for-changes (last visited Jan. 31, 2022) 6

Restatement (Second) of Agency § 220(1) cmt. d 10

SEC Rule 17a-3(17) 14

INTERESTS OF THE AMICI CURIAE

This brief is submitted by the Securities Industry and Financial Markets Association ("SIFMA"), the American Council of Life Insurers ("ACLI"), the Financial Services Institute ("FSI"), Finseca, the Insured Retirement Institute ("IRI"), and the National Association of Insurance and Financial Advisors ("NAIFA") (collectively, the "Amici"), which are leading trade associations representing members from each side of the insurance and financial services industries—from the broker-dealers, investment banks, and companies offering financial and retirement security solutions to the financial professionals who sell those solutions directly to their clients.

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the United States and global capital markets. On behalf of nearly 1 million employees, SIFMA advocates on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed-income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

ACLI is the leading life insurance industry trade association representing approximately 280 member companies operating across the United States and abroad. ACLI advocates in state, federal, and international fora for public policy that support the industry marketplace and the policyholders that rely on life insurers' products for financial and retirement security. ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. Over ninety million American families depend on ACLI's members for life insurance, disability income insurance, long-term care insurance,

annuities, retirement plans, pension products, dental and vision insurance, and reinsurance. In the United States, these members represent more than 95% of industry assets, 93% of life insurance premiums, and 98% of annuity considerations of the life insurance and annuity industry.

FSI is a trade association advocating on behalf of the independent financial services industry. More than eighty independent financial services firms and almost 30,000 independent financial advisors are members of FSI. Since 2004, through advocacy, education, and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Americans. FSI's mission is to ensure that all Americans have access to competent and affordable financial advice, products, and services, delivered by a growing network of independent financial advisors, who serve as independent contractors to independent financial services firms.

With nearly 6,000 members, Finseca represents and serves the entire financial security profession, regardless of role, marketplace, or experience. Finseca members provide life insurance and retirement planning solutions that protect the dreams and promote the prosperity of the American people. Finseca's mission is to advocate for the financial security profession, develop and grow its leaders, and promote the noble and necessary work its members do to provide financial and retirement security for the individuals, families, and businesses they serve.

IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90% of annuity assets in the United States, including the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

NAIFA is the preeminent membership association for the multigenerational community of financial professionals in the United States. NAIFA members subscribe to a strong code of ethics and represent a full spectrum of financial services practice specialties. They work with families and businesses to help Americans improve financial literacy and achieve financial security. NAIFA provides producers a national community for advocacy, education and networking along with awards, publications and leadership opportunities to allow NAIFA members to differentiate themselves in the marketplace. NAIFA has fifty-three state and territorial chapters and thirty-five large metropolitan local chapters. NAIFA members in every congressional district advocate on behalf of producers and consumers at the state, interstate and federal levels.

SIFMA, ACLI, FSI, Finseca, IRI, and NAIFA's members all operate in the highly regulated insurance and financial services industries. Their regulatory obligations often impose the duty to provide some degree of "supervision," or control, over affiliated agents and advisors. Despite such regulatory and public policy-based obligations, for nearly a century the independent contractor model has been a hallmark model of those industries, providing those who choose to operate as independent financial advisors and insurance agents with the flexibility to develop their own clients and offer those clients a wide range of financial services and planning and investment solutions. Although the National Labor Relations Board (the "Board") does not have an extensive history of addressing representation or unfair labor practice issues within the insurance and financial services industries, Amici's members have a substantial interest in, and reliance on, a balanced approach to the independent contractor tests under a variety of labor, employment, and tax legal regimes. Amici, therefore, seek to ensure that the Board's independent contractor test is consistent with long-established frameworks and properly weighs the critical considerations inherent in independent contractor status—the ability of contractors to realize gains and losses through entrepreneurial opportunity and the exercise thereof that benefits

our members, industries, consumers, and the overall economy.

SUMMARY OF ARGUMENT AND RESPONSES TO THE BOARD'S QUESTIONS

1. Should the Board adhere to the independent contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?

2. If not, what standard should replace it? Should the Board return to the standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?

Amici urge the Board to adhere to its decision in *SuperShuttle*, and to continue evaluating the ten-factor common law agency test of independent contractor or employee status "through the prism of entrepreneurial opportunity." *SuperShuttle*, 367 NLRB No. 75, slip op. at 15. As the U.S. Court of Appeals for the District of Columbia Circuit correctly observed, weighing the common-law factors through the analytical lens of entrepreneurial opportunity allows the Board to more accurately – and consistently – assess whether an individual is truly able to make strategic choices to realize economic gains (or losses). *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*).

As discussed in detail below, should the Board decide to modify or overturn *SuperShuttle*—and Amici believe the Board should not—it must recognize how a greater emphasis on "control" or "dependency" focused elements would distort any evaluation in the context of highly regulated industries like the financial services and insurance sectors. Broker-dealers and insurance companies are *required* by a vast network of state and federal regulators to exert a degree of control over independent contractors to comply with legal and regulatory mandates. But court after court have held that such "control" does not negate the independent contractor status of financial advisors and insurance agents in light of the significant entrepreneurial opportunities they possess. Those courts have recognized that "control" has a very different meaning when applied to the financial services and insurance sectors. As such, if the Board adopts a new test placing a greater emphasis on "control" or "dependency" factors, it

must articulate a clear standard for Regional Directors, Administrative Law Judges, and the Board to follow that adequately accounts for, and clearly distinguishes, the degree of statutory and regulatory-mandated oversight within all highly regulated industries.

ARGUMENT

I. The Board Should Reaffirm the *SuperShuttle* Test Because It Better Promotes the Common Law Agency Test's Consideration of Entrepreneurial Opportunity

A. Entrepreneurial Opportunity Is a Hallmark Element of the Financial Advisor, Insurance Agent and Many Other Business Models.

The independent contractor model has long been essential to how the insurance, financial services, and many other industries operate. Historically, insurance companies' business has consisted of underwriting, issuing, and servicing various insurance policies and products. Insurance companies traditionally do not sell their products directly to clients. Instead, independent contractors, contracted with a company or an independent local agency, to sell the products. In the financial services industry, broker-dealers, which are licensed with the Financial Industry Regulatory Authority ("FINRA"), provide a required regulatory platform for financial advisors and registered investment advisors. Those advisors then offer investment solutions, education, products and guidance directly to their clients.

Financial advisors, registered investment advisors, and insurance agents who choose to operate as independent contractors thrive, or fail, based on this entrepreneurial opportunity. These advisors and agents *own the relationship with their clients*—the most valuable asset in these industries—and *make strategic decisions on which investment and planning solutions to offer* based on *their* clients' needs. The public benefits substantially from this independent contractor framework, as independent advisors and agents have the freedom to access the investment solutions and plans that meet individual investors' needs, and regardless of which company created the product or solution. The ability to access a variety of investment solutions also allows independent advisors and agents to serve investors across the economic spectrum.

Independent advisors and insurance agents may also engage in outside business activities to further protect their clients' financial well-being, such as offering retirement and financial planning strategies, tax planning advice, and other services. These advisors and agents regularly own and operate their own small business (formed as sole proprietorships, professional corporations, partnerships, LLCs, or other legal entities) and control the manner and means of its operation. They buy or rent their own office space, employ their own staff, select and manage vendors, and are responsible for their own expenses and benefits. They decide which clients to pursue, as well as when, where, and under what circumstances they perform their professional services.

In short, these independent advisors and agents are entrepreneurs who assume the risks and seek out the rewards of entrepreneurship. They control their own profit or loss. One recent study concluded that, in 2016, there were nearly 600,000 independent contractors in the financial and insurance industries.[1] More recently, in 2021 it was estimated that approximately 160,000 financial advisors, or 25% of the securities industry, operated as independent contractors to serve millions of clients across the country. In March 2021, NAIFA reported results of a survey in which 95% of its members who work as independent contractors stated that they wanted to remain independent contractors.[2] Among their top concerns with losing their independent contractor status, NAIFA members reported "loss of business deductions; loss of ability to set one's own schedule; loss of renewal income if current clients were reassigned; nullification of existing agent contracts; and diminished product offerings due to inability to offer products outside of a primary carrier."[3]

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[1] *See* Katherine Lim, et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Admin. Tax Data*, at 38 fig.6 (July 2019), www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.

[2] NAIFA, *As the House Passes the PRO Act, NAIFA Continues to Work for Changes* (Mar. 9, 2021), https://advocacy.naifa.org/news/as-the-house-considers-the-pro-act-naifa-continues-to-work-for-changes (last visited Jan. 31, 2022).

[3] *Id*.

Thus, broker-dealers, insurance companies and independent advisors and agents all strongly support the continued existence of the independent contractor designation, rather than an employee designation, to enhance their own flexibility to operate businesses, generate and service their own clients, and establish customer and market goodwill in a manner incompatible with employee status. Entrepreneurial opportunity is a critical element in maintaining that designation.

B. The Board's Decision in *SuperShuttle* Correctly Applies a Flexible Model for Consideration of Entrepreneurial Opportunity Under the Common-Law Agency Test.

Current Board precedent and federal court case law agree on several *core principles* concerning independent contractor status. First, the Board must apply the common-law agency test. *See, e.g.*, *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) ("there is no doubt that we should apply the common[-]law agency test here in distinguishing an employee from an independent contractor"); *SuperShuttle*, 367 NLRB No. 75, slip op. at 1 ("To determine whether a worker is an employee or an independent contractor, the Board applies the common-law agency test."); *FedEx Home Delivery*, 361 NLRB 610, 611 (2014) (*FedEx*), *enf't denied*, 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx II*) (holding that when "applying the independent-contractor exclusion, the Board is bound by the Supreme Court's decision in *United Insurance*"). Second, when applying the common-law test, the Board must weigh all factors "with no one factor being decisive". *SuperShuttle*, 367 NLRB No. 75, slip op. at 2 (quoting *United Ins. Co.*, 390 U.S. at 258); *FedEx*, 361 NLRB at 611 (same).

However, despite these well-established principles, it has long been recognized that applying the common-law agency factors presents significant challenges for the Board and courts, and for regulated entities like Amici's members, in part based on how to interpret and apply the factors in a given case. *See, e.g.*, *United Ins.*, 390 U.S. at 258 ("There are innumerable situations which arise in the common law where it is difficult to say whether a particular

individual is an employee or an independent contractor"). In *FedEx I*, the D.C. Circuit, citing these inherent challenges, sought to aid the Board with identifying an overarching analytical framework to support a review of the common law factors. The court first acknowledged the Board's and court's shift "away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss." *FedEx I*, 563 F.3d at 497 (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)) (internal quotation marks omitted).[4] The D.C. Circuit then made clear that, when considering the common-law agency factors, "an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." *Id.* (citation omitted). In other words, using entrepreneurial opportunity as an "animating principle" would not create a "purely mechanical" test, but would make "the line drawing [] easier." *Id.*

The Board in *FedEx*, however, refused to adopt the court's holding in *FedEx I*, opting instead to relegate entrepreneurial opportunity to just "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business." *FedEx*, 361 NLRB at 620. In other words, the Board "fundamentally shifted the independent contractor analysis" to "a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency." *Id.* at 629 (Member

[4] *Compare Air Transit, Inc.*, 248 NLRB 1302, 1306 (1980) ("in determining whether an individual is an employee or an independent contractor under the Act, the Board has consistently applied the common-law test of 'right to control'"), *and N. Am. Van Lines, Inc.*, 288 NLRB 38, 42 (1988) (applying "the common[-]law 'right to control' test"), *with Roadway Package Sys., Inc.*, 326 NLRB 842, 851 (1998) (holding drivers were employees not independent contractors because, in part, "they have no significant entrepreneurial opportunity for gain or loss"), *Corp. Express Delivery Sys.*, 332 NLRB 1522, 1522 (2000) (finding that drivers had "no significant opportunity for entrepreneurial gain or loss" where employer determined routes, base pay, and amount of freight on each route, and did not allow drivers to add or reject customers), *enforced sub nom. Corp. Express*, 292 F.3d at 777, *and St. Joseph New-Press*, 345 NLRB 474, 479 (2005) (applying common-law agency factors and holding "[t]hese conditions permit a carrier to be an entrepreneur—enabling carriers to take economic risk and reap a corresponding opportunity to profit 'from working smarter, not just harder'") (quoting *Corp. Express*, 292 F.3d at 780).

Johnson dissenting). Member Johnson, in his dissenting opinion, further observed that by minimizing entrepreneurial opportunity and instead emphasizing right-to-control factors that address economic dependence, the Board was, in essence, reinstating the "economic realities" test—which Congress (through the Taft-Hartley Act) and the Supreme Court (in *United Insurance*) rejected over fifty years prior. *Id*. at 630.[5] On appeal, the D.C. Circuit again rejected the Board's approach, affording no deference to *FedEx*'s "new formulation[] of the [independent contractor] test" and reaffirming its holding in *FedEx I*. *See FedEx II*, 849 F.3d at 1128.

In *SuperShuttle*, the Board embodied the D.C. Circuit's repeated decisions emphasizing the importance of entrepreneurial opportunity as an "animating principle." *SuperShuttle, supra* at 10-11. The Board in *SuperShuttle* made clear that it would evaluate the common-law agency factors through the prism of entrepreneurial opportunity, holding that entrepreneurial opportunity "is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id*. at 9.

This formulation of the common-law agency test strikes the proper balance between a mechanistic application of common-law factors with lessons that administrative agencies and courts have learned over many decades in applying this test—entrepreneurial opportunity, or lack thereof, matters. As *SuperShuttle* makes clear, the Board "will continue to adhere, as we must, to the [*United Insurance*] decision, considering all of the common-law factors in the total factual context of each case and treating no one factor (or the principle of entrepreneurial

[5] In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the U.S. Supreme Court applied the economic realities test to independent contractor analysis under the Wagner Act. The United States Congress responded in 1947 by amending the National Labor Relations Act to expressly exclude independent contractors from the coverage of the NLRA. The Supreme Court reinforced this rejection of the economic realities test through its application of the common-law agency test in *United Insurance*, rather than an economic realities test. *See United Ins*., 390 U.S. at 256 ("Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. 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 under the Act.").

opportunity) as decisive." *Id*. at 11. Utilizing entrepreneurial opportunity as an "animating principle," instead of control, "better captures the distinction between an employee and an independent contractor." *Corp. Express*, 292 F.3d at 780. Indeed, the Restatement (Second) of Agency offers an example that elucidates the inherent complications with focusing on control: "the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking." Restatement (Second) of Agency § 220(1) cmt. d. In other words, "a master-servant relationship can exist in the absence of the master's control over the servant's performance of work." *SuperShuttle, supra* at 11. Therefore, although "control and entrepreneurial opportunity are opposite sides of the same coin" (*id*. at 9), entrepreneurial opportunity offers a more accurate analytical framework because it considers "whether the position presents the opportunities and risks inherent in entrepreneurialism." *FedEx I*, 563 F.3d at 497. As such, instead of completely ignoring "entrepreneurial opportunity," or burying it in a newly constructed single factor, as the Board did in *FedEx*, utilizing "entrepreneurial opportunity" as a prism greatly assists in properly weighing the common-law factors. "Where a qualitative evaluation of common-law factors shows significant opportunity for economic gain (and, concomitantly, significant risk of loss), the Board is likely to find an independent contractor." *SuperShuttle, supra* at 11.

Board cases decided after *SuperShuttle* illustrate the utility, and undisputedly balanced approach, of this construction. For example, in *Intermodal Bridge Transport*, 369 NLRB No. 37 (2020), the Board evaluated all of the common-law agency factors through "the prism of entrepreneurial opportunity" and concluded that the drivers at issue were employees under the National Labor Relations Act because they had "little opportunity for economic gain or, conversely, risk of loss." *Id*., slip op. at 2. In so doing, the Board concluded:

> [T]he record establishes that the Respondent's drivers themselves perform the work of hauling shipping containers to the Respondent's customers, as assigned by the Respondent and not on routes in which they have a proprietary interest,

> with only limited ability to select or reject work, during shifts specified by the Respondent on the days they choose to work, and, for performing those services, they receive compensation at rates set by the Respondent over which they have no real ability to negotiate. On these facts, we find that the drivers do not have *any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative*, which weighs heavily against a finding that they are independent contractors.

Id. at 3 (emphasis added).

Similarly, in *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2 (2020), the Board again made clear that entrepreneurial opportunity "is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id*., slip op. at 1. Evaluating all of the common-law factors through that prism, the Board concluded that the dancer in that case was an employee, not an independent contractor, because the factors clearly demonstrated that "[a]lthough the dancers certainly have some opportunity to influence their income through their own efforts and ingenuity, the Respondent, through various measures . . . substantially limits their entrepreneurial opportunity." *Id*.

Both in legal principle and as applied in practice, the *SuperShuttle* framework properly assesses all common-law agency factors through a foundational lens—entrepreneurial opportunity—that best captures the essential distinction between independent contractors and employees an individual's ability to realize economic gain or loss. Moreover, that test is not outcome-determinative—its application has resulted in findings of both employee and independent contractor status. Just as the *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), supervisory status test was once criticized but was left in place because it faithfully applied court precedent while not prejudging any outcome, so it should follow with the *SuperShuttle* test. That test should be maintained by the Board going forward.

C. Numerous State and Federal Courts Have Recognized That Entrepreneurial Opportunity in the Financial Services, Insurance, and Other Industries Is a Reliable Indicator of Independent Contractor Status.

The Board's reaffirmation of *SuperShuttle* would also align with analogous federal and

state court precedent in our and other industries. Courts have assessed whether independent advisors and insurance agents are independent contractors under a wide range of statutory frameworks. While the specific statutes and tests may differ, one constant in the varying analyses is that financial advisors and insurance agents have significant entrepreneurial opportunity. For example, in *Hennighan v. Insphere Insurance Solutions, Inc.*, the U.S. District Court for the Northern District of California held that an insurance agent was an independent contractor under California state wage and hour laws because, in part, the insurance agent position is inherently entrepreneurial. 38 F. Supp. 3d 1083, 1100 (N.D. Cal. 2014), *aff'd*, 650 F. App'x 500 (9th Cir. 2016). The court in *Hennighan* emphasized that the insurance agent retained the ability to recognize economic gain or loss through setting "his own schedule and determin[ing] the extent to which he wanted to work" and selling as many policies as he wanted or "choos[ing] not to work at all." *Id*. at 1100-01. S*ee also Taylor v. Waddell & Reed, Inc.*, No. 09–cv–02909, 2013 WL 435907, at *6-7 (S.D. Cal. Feb. 1, 2013) (holding financial advisor properly classified as independent contractor under California law because, in part, advisor "ran his own business providing financial planning services, investment products, and insurance," including selling financial plans and insurance products from different companies).

In *Sofranko v. Northwestern Mutual Life Insurance Company*, the U.S. District Court for the Western District of Pennsylvania determined that an insurance agent was properly classified as an independent contractor under the Fair Labor Standards Act and Pennsylvania state wage and hour laws because, in part, the agent generated his own clients and decided from whom to solicit business and what types of investment solutions and mutual funds to sell. No. 2:06cv1657, 2008 WL 145509, at *4 (W.D. Pa. Jan. 14, 2008). *Id*. In other words, "the plaintiff's opportunity for profit or loss depended on his skill in generating commissions and controlling expenses, not on [the insurance company]." *Id*. at *6.

Similarly, the U.S. Court of Appeals for the Eighth Circuit held that an insurance agent

was an independent contractor under Title VII and state anti-discrimination laws because she "was responsible for all her own taxes, rented her own office space, hired and paid her own assistants, and was essentially free to conduct her business when, how, and with whomever she chose." *Schwieger v. Farm Bureau Ins. Co. of NE*, 207 F.3d 480, 487 (8th Cir. 2000). *See also Holden v. Nw. Mut. Fin. Network*, No. 07–C–0930, 2009 WL 440937, at *6 (E.D. Wis. Feb. 23, 2009) (same under Americans with Disabilities Act because insurance agent "was individually responsible for deciding which clients to pursue . . . whether and where to advertise to prospective clients, whether and when to purchase gifts for his clients, and when and how to entertain his clients").

The common theme in these cases, and in many others, is that when evaluating the independent contractor status of financial advisors and insurance agents the courts routinely recognize—across numerous statutes—that the entrepreneurial opportunities afforded advisors and agents distinguish them from "employees," who lack such opportunities.

II. Any Regression from the *SuperShuttle* Framework That Places a Greater Emphasis on "Control" or "Dependency" Elements Could Lead to Adverse and Unintended Consequences in Highly Regulated Industries.

A. Financial Advisors and Insurance Agents Operate in Highly Regulated Industries, and Thus, for Good Reason, Broker-Dealers and Insurance Companies Must Maintain a Certain Degree of Control.

Federal and state governments highly regulate the financial services and insurance industries (among others) for numerous public policy reasons. *See, e.g.*, FINRA, *About FINRA*, www.finra.org/about (last visited Jan. 31, 2022) ("[T]o protect investors and ensure the market's integrity, FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers").[6] The following is an illustrative, but far from exhaustive, list of FINRA and other federal laws regulating the types of "supervision" that insurers and financial services

[6] FINRA, under the supervision of the U.S. Securities and Exchange Commission, is tasked with writing, enforcing, and ensuring compliance with federal rules governing the conduct of broker-dealers.

companies must exercise over financial advisors and insurance agents.

- Maintain a system to supervise the activities of each associated person who is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA Rules. *See* FINRA Rule 3110.

- Ensure that their affiliated agents comply with licensing requirements. *See, e.g.*, FINRA Rule 1210.

- Provide certain continuing education programs. *See, e.g.*, FINRA Rules 1240 and 3310.

- Capture and supervise the client communications of financial advisors. *See* FINRA Rule 3110.

- Require financial advisors and brokerage firms to maintain specific information about investment advisors' clients. *See, e.g.*, FINRA Rule 4512; SEC Rule 17a-3(17).

- Conduct periodic examinations of customer files and associated records. *See, e.g.*, FINRA Rules 2040, 3110, and 4511.

- Make and preserve books and records as required under various rules, laws, and regulations. *See* FINRA Rule 4511(a).

- Require disclosure of outside business activities by all associated persons. *See* FINRA Rule 3270.

- Maintain all retail communications and institutional communications for particular periods and in a particular format and media. *See* FINRA Rule 2210(b)(4).

What is more, financial advisors and/or insurance agents must, among other requirements:

- Register with the federal Securities and Exchange Commission and FINRA. *See* Investment Adviser Act, §§ 202(a)(11), 203; FINRA Rule 1210.

- Notify FINRA of the principal who will maintain "supervisory control policies and procedures" over the financial advisor. *See* FINRA Rule 3120.

As these mandates demonstrate, federal and state statutes and regulations require that financial institutions and insurance companies exert a certain degree of control over the operations of financial advisors and insurance agents. Yet, in practice, such government-mandated control does *not* interfere with the entrepreneurial opportunity afforded the impacted roles, nor the independent contractor status of the individuals. "Control" or "supervision" in that context is thus very misleading as a factor in any independent contractor analysis.

B. Viewing Such Extensive Regulatory-Based "Control" or "Dependency" Through the *FedEx* Lens, Where Entrepreneurial Opportunity is Minimized, Could Result in Misleading Analyses or Conclusions.

Replacing *SuperShuttle*'s framework with *FedEx,* or some variant test that minimizes the significance of entrepreneurial opportunity and focuses on the more ambiguous concept of "control," could lead to inconsistent, misleading, or unfair analysis when applied to highly regulated industries like the financial, insurance, real estate, and franchise sectors. As discussed in detail above, financial advisors and insurance agents are subject to certain oversight based solely on statutory and regulatory requirements. It is entirely possible that a Regional Director, Administrative Law Judge, or the Board could apply a greater control-focused test to find that the supervisory requirements imposed upon broker-dealers and insurance companies support an employment relationship.

However, the Board in *SuperShuttle* properly acknowledged that compliance with legal requirements does not necessarily constitute "control" for the purposes of determining independent contractor status. *See* slip op. at 3 ("the Board has held that requirements imposed by governmental regulations do not constitute control by an employer; *instead, they constitute control by the governing body*") (emphasis added).[7] The Board must now reaffirm that principle. But it should do even more to avoid problematic and inconsistent evaluations of independent contractor status in industries impacted by varying degrees of governmental regulations. Specifically, the Board must emphasize the principle articulated in *Air Transit, Inc.*, 271 NLRB 1108 (1984), that "more extensive governmental regulations afford *less* opportunity for control by the putative employer 'because the employer cannot evade the law [] and in requiring

[7] The Board also acknowledged this principle when promulgating its final rule on joint employer status, "Joint Employer Status Under the National Labor Relations Act." *See* 85 FR 11184 (2020). The Board specifically recognized that joint employer status is not triggered by "contractual provisions obligating the third party to maintain certain practices to comply with legal requirements," and amended Board regulations to make clear that setting certain hiring and performance standards "such as those required by government regulation" does not create a joint employment relationship. *Id*. at 11227, 11236.

compliance with the law he is not controlling the [contractor].'" *Id*. at 1110 (quoting *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F. 2d 862, 875 (D.C. Cir. 1978)). Without an explicit acknowledgment of, and emphasis on, the *Air Transit* principle, a new standard that minimizes entrepreneurial opportunity and stresses control could unfairly disadvantage companies (and individual business owners) that operate in highly regulated industries where state and federal governments have chosen to, directly or indirectly, impact alleged terms/conditions of "employment" through a supervisory or control framework.

The U.S. District Court for the District of Massachusetts recently highlighted the incongruity inherent in applying a control-focused independent contractor test to a highly regulated industry. In *Patel v. 7-Eleven, Inc.*, the court found that franchisees were independent contractors under Massachusetts wage and hour laws, which utilize the control-focused "ABC" test,[8] because the Federal Trade Commission required franchisors to exercise a "significant" degree of control over franchisees, making it impossible for franchisors to satisfy the "control" prong of the test. 485 F. Supp. 3d 299, 309-10 (2020). The court further noted the absurd result that would follow from determining employee status based on the degree of government-mandated control, stating that "such a ruling by this Court would eviscerate the franchise business model, rendering those who are regulated by the FTC Franchise Rule criminally liable for failing to classify their franchisees as employees." *Id*. at 310. *See also Monell v. Boston Pads LLC*, 471 Mass. 566, 575 (2015) (holding state regulations requiring real estate brokers to supervise and/or control salespersons rendered "it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status" under control-centric independent contractor test).

Federal and state mandates in the financial services and insurance industries indisputably

[8] *See* discussion *infra* Section II(C).

impact how financial advisors and insurance agents operate their businesses. For example, broker-dealers and/or insurance companies are mandated by federal law to, among other things, "supervise" the activities of independent financial advisors or agents to ensure compliance with federal law, audit advisors' records, ensure that advisors comply with licensing requirements, and require advisors to disclose any outside business activities. *See* Section II(B), *supra*. Regardless of the extent of government oversight, these government-imposed requirements do not—and cannot—establish "control" for the purposes of determining independent contractor status. To find otherwise would force broker-dealers, insurance companies, and independent advisors and agents alike to choose between complying with state and federal mandates (as they must) or ignoring regulatory requirements in an effort to retain independent contractor status—effectively eviscerating the independent contractor framework that has been a staple of these industries for over a century. Should the Board adopt a control-focused standard, therefore, it must avoid weighing the type or degree of governmental regulation when determining "control" but, instead, highlight the fundamental and common-sense notion that "more extensive governmental regulations afford *less* opportunity for control." *Id.*

Adopting an independent contractor test with greater emphasis on control elements also could create inconsistent results, with some decisions recognizing, correctly, that broker-dealers and insurance companies' "control" over independent advisors and agents is derived solely from regulatory mandates, while in other cases Regional Directors, ALJs, or the Board could find employee status based on the same external regulatory control—especially if the Board fails to reemphasize the *Air Transit* principle that employers in highly regulated industries have even "*less* opportunity for control." *See id.* Amici, therefore, urge the Board to provide certainty and clarity on this important issue to avoid such avoidable and unnecessary results.

C. Numerous State and Federal Courts Have Recognized That "Control" in Our Industries Has a Different Meaning When Applied to Employee/Contractor Disputes, and the Board Should Join Those Courts if It Alters or Reverses *SuperShuttle*.

Due to the substantial degree of federal and state regulation of the financial services and insurance industries, courts have repeatedly held that "control" for the purposes of determining independent contractor status must be viewed differently for positions in the financial sector. For example, in *Santangelo v. New York Life Insurance Company*, the insurance company argued "that its rules against selling certain annuities, requirements with respect to background checks of assistants and signage and review of his correspondence and sales documents were all mandated by state and federal law or rules promulgated by [FINRA]." No. 12–11295, 2014 WL 3896323, at *9 (D. Mass. Aug. 7, 2014), *aff'd*, 785 F.3d 65 (1st Cir. 2015). Rejecting the plaintiff's claims that these requirements demonstrated sufficient "control" to create an employer-employee relationship, the U.S. District Court for the District of Massachusetts held that "[a] company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements." *Id*.

The court in *Taylor* reached a similar conclusion. In *Taylor*, a financial advisor argued that because he was subject to a certain degree of oversight by the broker-dealer, this established an employment relationship. 2013 WL 435907, at *6. The court disagreed, noting that "[a]s members of [FINRA], W & R and financial advisors are subject to FINRA regulations, as well as a variety of other securities requirements," and finding that "the vast majority of [plaintiff's] misclassification allegations relate to W & R's conduct mandated by FINRA and SEC requirements, including licensing requirements and other regulations." *Id*. at *6 n.27. Because the plaintiff's allegations of "control" stemmed from federal and state law mandates, the court rejected the plaintiff's argument, finding that "terms of a putative employment relationship

imposed by legal requirements do not suggest control by W & R." *Id*. (citation omitted). *See also Walfish v. Nw. Mut. Life Ins. Co.*, No. 2:16-cv-4981, 2019 WL 1987013, at *7 (D.N.J. May 6, 2019) (rejecting insurance agent's argument that insurance company maintained control over agent because "he was required to keep current and accurate records, provide accurate marketing materials to his clients, maintain proper licensing, submit to compliance reviews, make electronic devices [] available for inspection, use company email accounts, and seek approval for outside business activities," where those requirements were "based on applicable state law, federal law, or agency regulations"); *Strange v. Nationwide Mut. Ins. Co.*, No. CIV. A. 93–6585, 1997 WL 550016, at *5 (E.D. Pa. Aug. 21, 1997) (ensuring compliance with licensing criteria "is not inconsistent with maintaining a company and independent contractor relationship"). If the Board alters or reverses *SuperShuttle*, which the Board should *not* do, it must at least recognize, as courts have, that the exercise of control over an individual for the purpose of ensuring compliance with regulatory requirements does not render the individual an employee.

The State of California's adoption of the rigid "ABC" test, a test for determining independent contractor status that also focuses on control, serves as another cautionary tale for adopting control-focused tests.[9] In 2019, California passed AB-5, which amended the state's labor code to codify an "ABC" test and eliminate many independent contractor relationships within the state. Recognizing that this control-focused test was ill-suited for certain industries, California exempted several industries and occupations at the outset, including financial advisors and insurance agents, which are subject to a different, multi-factor test. *See* Cal. Labor Code §

[9] The "ABC" test presumes employee status unless:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) The person performs work that is outside the usual course of the hiring entity's business; and

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. *See* Cal. Labor Code § 2755.

2783. Recognizing the problems caused by a one-size-fits-all control test, California subsequently amended AB-5 multiple times, exempting at least forty-eight additional industries and occupations. *See id*. §§ 2775 *et seq.*[10] This counsels in favor of reaffirming and reinforcing the understanding, expressed in numerous Board decisions, that regulatory-based "control" should not be overly relied upon to find employee status where the alleged "employer" is simply meeting legal mandates imposed by federal or state governments.

CONCLUSION

For the reasons explained above, Amici respectfully submit that the Board should reaffirm *SuperShuttle*. If the Board decides to overturn, or otherwise modify the *SuperShuttle* standard, the Board must consider the practical implications of imposing a one-size-fits-all test that focuses more on control or dependency elements, and less on entrepreneurial opportunity, on highly regulated industries such as the financial services and insurance sectors.

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[10] Other states that utilize the "ABC" test have similarly concluded that its control-focused approach may not be appropriate when applied to highly regulated industries. As discussed in Section II(B), the Massachusetts Supreme Judicial Court highlighted the conflict between state regulations requiring real estate brokers to exert some degree of supervision over real estate salespersons and the "ABC" test's emphasis on control, concluding that the regulatory requirements rendered "it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status." *See Monell*, 471 Mass. at 575. The court in *Patel* similarly found that the regulatory requirements placed upon franchisors to "control" franchisees made it impossible for franchisors to satisfy the "control" prong of the "ABC" test, concluding that finding employment status under those circumstances "would eviscerate the franchise business model, rendering those who are regulated by the FTC Franchise Rule criminally liable for failing to classify their franchisees as employees." 485 F. Supp. 3d at 310.

CERTIFICATE OF SERVICE

The undersigned counsel certifies this 10th day of February 2022 that a copy of the foregoing BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AMERICAN COUNCIL OF LIFE INSURERS, FINANCIAL SERVICES INSTITUTE, FINSECA, INSURED RETIREMENT INSTITUTE, AND NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS AS AMICI CURIAE was filed electronically and served on the following parties by email on February 10, 2022:

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