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The Atlanta Opera, Inc. ***and*** **Make-Up Artists and Hair Stylists Union, Local 798, IATSE.** Case 10–RC–276292

June 13, 2023

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

In *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*), the Board restated and refined its approach to assessing whether workers are employees covered under Section 2(3) of the National Labor Relations Act or, instead, are independent contractors, excluded from coverage. The Board there reaffirmed longstanding principles—consistent with the previous instructions of the Supreme Court—and asserted that its inquiry would be guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958), and that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[1] The Board expressly rejected the notion—which had been endorsed by the United States Court of Appeals for the District of Columbia Circuit—that entrepreneurial opportunity for gain or loss should constitute the "animating principle" of the test.[2] The Board further undertook a careful and measured effort to clearly define the analytical significance of a putative contractor's entrepreneurial characteristics—a consideration that it had previously assessed in varying formulations. To this end, the Board clarified that it would (a) give weight only to actual, not merely theoretical, entrepreneurial opportunity; and (b) consider the "full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism" by asking whether the evidence tends to show that a putative independent contractor is, in fact, rendering services as part of an independent business.[3]

Less than 5 years later, the Board in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)—without public notice or an invitation to file briefs—repudiated this approach and purported to "return the Board's independent-contractor test to its traditional common-law roots."[4] Specifically, the Board in that case held that "entrepreneurial opportunity . . . has always been at the core of the common-law test"[5] and, accordingly, "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."[6] But, as we will explain, this approach cannot be squared with Board precedent, with the common law, or with Supreme Court precedent. Indeed, any approach that purports to elevate a single factor or designate an animating principle necessarily runs counter to the Supreme Court's admonition that "[t]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[7]

In granting the Employer's request for review in this case, we invited the parties and interested amici to file briefs addressing the following questions:

1. Should the Board adhere to the independent-contractor standard in *SuperShuttle DFW*?

2. If not, what standard should replace it? Should the Board return to the standard in *FedEx II*, either in its entirety or with modifications?

Various parties filed briefs in response to the Board's invitation, and the Employer and Petitioner filed responsive briefs.[8]

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1 361 NLRB at 618.

2 Id.

3 Id. at 619–621.

4 367 NLRB No. 75, slip op. at 12.

5 Id., slip op. at 2 fn. 4.

6 Id., slip op. at 9.

7 *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

8 Specifically, the Board received and reviewed briefs by Advocates to Protect the Rights of Gig Workers; AFL-CIO; American Trucking Associations, Inc., California Trucking Association & Customized Logistics & Delivery Association; Americans for Prosperity; Buckle Corporation; Central South Carpenters Regional Council, UBC and Southern States Millwright Regional Council, UBC; Coalition for a Democratic Workplace; Coalition for Workplace Innovation; Coalition to Protect Workers' Rights; Construction Employers of America; District Council of New York City & Vicinity of the United Brotherhood of Carpenters and Joiners of America; Eastern Atlantic States Regional Council of Carpenters; Economic Policy Institute; Fight for Freelancers et al.; Hawaii Regional Council of Carpenters; the Honorable Jim Banks and 29 other Members of the United States House of Representatives; Indiana/Kentucky/Ohio Regional Council of Carpenters; International Brotherhood of Teamsters; Institute for Research on Labor and Employment; Joseph Taylor; Marketplace Industry Association; Misclassified Worker Clients of Philadelphia Legal Assistance; National Employment Law Project; National Employment Lawyers Association; National Home Delivery Association; Owner-Operator Independent Drivers Association; Rideshare Drivers United; Securities Industry and Financial Markets Association et al.; Service Employees International Union; Society for Human Resource Management; States of New Jersey, Pennsylvania, California, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, Rhode Island, Vermont, and the District of Columbia; Temp Worker Justice, et al.; the Chamber of Commerce of the United States of America; United States Department of Justice; United States Senator John Barrasso and 11 other Senators; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry

Having carefully reviewed the entire record, including the parties' briefs and the amicus briefs on review, we have decided to overrule *SuperShuttle* and to reinstate the Board's *FedEx II* standard as extant law. Applying this reinstated standard, we find that the workers at issue in this case—makeup artists, wig artists, and hairstylists who work at The Atlanta Opera—are employees under Section 2(3) of the Act and not independent contractors.

I.

Section 2(3) of the Act excludes independent contractors from statutory coverage.[9] The starting point for independent-contractor determinations under the Act is the Supreme Court's 1968 decision in *NLRB v. United Insurance Co. of America*, supra. There, the Court held that the Act incorporated the "common-law agency test . . . in distinguishing an employee from an independent contractor."[10] Upholding the Board's determination that insurance-company "debit agents" were statutory employees (and reversing the Seventh Circuit's contrary determination), the Court explained that:

> 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 . . . . [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.[11]

In later decisions also involving application of the common-law agency test to employee-status determinations under federal statutes, the Supreme Court has been guided by the multifactor test articulated in Section 220 of the Restatement (Second) of Agency, which addresses the relationship between "masters" and "servants."[12] To this end, Section 220(2) of the Restatement identifies a list of factors to be considered "[i]n determining whether one acting for another is a servant or an independent contractor." It provides that:

> [T]he following matters of fact, among others, are considered:
>
> (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;
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> 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;
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> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
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> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

No Supreme Court decision has cast doubt on the continuing viability of *United Insurance* or the later cases that look to the Restatement for authoritative guidance. In fact, the District of Columbia Circuit has more recently affirmed that

> This court too has relied specifically on Section 220 of the Restatement (Second) of Agency to determine whether a worker is an employee or independent contractor under traditional common-law principles in National Labor Relations Act cases . . . . Accordingly, controlling precedent makes the Restatement (Second) of Agency a relevant source of traditional common-law agency standards in the National Labor Relations Act context.[13]

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of the United States and Canada; United Brotherhood of Carpenters and Joiners of America; United Food and Commercial Workers International Union; Washington Legal Foundation; and Weinberg, Roger & Rosenfeld.

[9] Sec. 2(3) provides that "[t]he term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor." 29 U.S.C. § 152(3).

[10] 390 U.S. at 256.

[11] Id. at 258 (footnote omitted).

[12] See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-324 (1992) (addressing employee status under the Employee Retirement Income Security Act).

Beginning in the late 19th century, American legal commentators began to use the terms ''master-servant'' and ''employer-employee'' interchangeably. See, e.g., Horace Gray Wood, *A Treatise on the Law of Master and Servant; Covering the Relation, Duties and Liabilities of Employers and Employees* (1877). The Restatement (Second) of Agency and other secondary sources from the early to mid-20th century similarly treat these sets of terms as synonymous. See id., sec. 2 cmt. d (''The word 'employee' is commonly used in current statutes to indicate the type of person herein described as servant.''). We use the archaic "master-servant" terminology where it appears in quotations or historical materials and refer elsewhere to "employer-employee" relations and the "employer-employee" relationship.

[13] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1213 (D.C. Cir. 2018).

The Board's seminal modern independent-contractor case is *Roadway Package System*, 326 NLRB 842 (1998), a unanimous full-Board decision that endorsed the use of the open-ended, multifactor Restatement test. There, relying heavily on the Supreme Court's decision in *United Insurance*, the Board (1) rejected the argument that "those factors which do not include the concept of 'control' are insignificant when compared to those that do";[14] (2) correctly noted that the Restatement "specifically permitt[ed] the consideration of . . . relevant factors" other than those identified by the Restatement;[15] and (3) concluded that the "common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control."[16]

In addition to those factors specifically enumerated in the Restatement, the Board has historically considered whether putative contractors have a "significant entrepreneurial opportunity for gain or loss."[17] Related to this particular question, the Board has assessed whether purported contractors had the ability to work for other companies,[18] could hire their own employees,[19] and had a proprietary interest in their work.[20] Crucially, the Board has weighed these considerations alongside the Restatement factors without assigning to them any special significance or weight. In no case did the Board find that "entrepreneurial opportunity" was sufficient to establish independent-contractor status by itself. Indeed, the unanimous Board in *Roadway* expressly reaffirmed in the Supreme Court's directive that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[21] And the Board in that case considered whether the putative contractors had "significant entrepreneurial opportunity for gain or loss" only as one factor among the other relevant common-law factors.[22]

But the District of Columbia Circuit, in a divided decision, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (*FedEx I*), nevertheless characterized Board law as having, over time, shifted "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."'"[23] The court explained that it endorsed this shift "at the Board's urging . . . . "[24] "Thus," the panel majority announced, "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism."[25]

This description of the Board's independent-contractor case law was not accurate, as then-Circuit Judge Garland explained in his detailed dissent.[26] First, the Board had *not* treated "control" as an "animating principle" or master factor. The *Roadway* decision makes this plain. There, the Board rejected the argument that the Restatement factors that did not involve the right to control were relatively insignificant. Second, the Board decisions cited by the Circuit panel majority as marking the Board's posited shift in emphasis—away from control and to "entrepreneurial opportunity"—reveal no such shift.[27] In

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[14] 326 NLRB at 850.

[15] Id.

[16] Id.

[17] Id. at 851; *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998). See also *Standard Oil Co.*, 230 NLRB 967, 971 (1977) (finding that "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss are controlled by the [c]ompany"). In *United Insurance*, immediately after recognizing that "[w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principles," the Supreme Court noted that the putative contractors in that case "do not operate their own independent businesses." 390 U.S. at 258-259. The Board has at times, alongside the Restatement factors, considered whether putative contractors operate their own independent businesses by assessing whether they have significant entrepreneurial opportunity. See, e.g., *Standard Oil Co.*, supra, 230 NLRB at 971 (finding that the putative contractors "have no significant entrepreneurial opportunity" because their "limited opportunities to take risks and influence their profits by their own business decisions are more consistent with an employment, than with an independent contractor, relationship").

[18] See *C.C. Eastern*, 309 NLRB 1070, 1070-1071 (1992), enf. denied 60 F.3d 855 (D.C. Cir. 1995); *Stamford Taxi*, 332 NLRB 1372, 1373 (2000).

[19] See *C.C. Eastern*, supra, 309 NLRB at 1071; *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000).

[20] See *Roadway*, supra, 326 NLRB at 853.

[21] Id. at 850 (quoting 390 U.S. at 258).

[22] Id. at 851.

[23] 563 F.3d at 497 (quoting *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)).

[24] Id.

[25] Id.

[26] Id. at 504-519 (Garland, J., dissenting).

[27] In *Corporate Express*, 332 NLRB 1522, 1522 (2000), one of the cases cited by the Circuit and our dissenting colleague, the Board found that driver "owner-operators" working for a delivery company were statutory employees, not independent contractors, but gave no special emphasis to the concept of "entrepreneurial opportunity." In *Arizona Republic*, 349 NLRB 1040 (2007), meanwhile, a divided Board also reaffirmed *Roadway* and considered several factors (including "entrepreneurial potential" in connection with "method of compensation") in determining that the newspaper carriers at issue were independent contractors. But here, too, there was no hint of a shift in emphasis or the elevation of "entrepreneurial opportunity" into an "animating principle."

The same is true of two other Board decisions briefly cited by the Circuit panel majority as well as our dissenting colleague. In *St. Joseph News-Press*, 345 NLRB 474 (2005), a divided decision involving newspaper carriers, a Board majority reaffirmed *Roadway*, observing that "both the right of control and other factors, as set out in the Restatement, are to be used to evaluate claims that hired individuals are independent contractors." Id. at 478. The Board majority concluded that

fact, post-*Roadway* Board decisions were wholly consistent (until *SuperShuttle*) in their emphasis on common-law agency principles, including the Restatement's multifactor test, and a corresponding adherence to the Supreme Court's admonition in *United Insurance* that "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[28] Significantly, the Circuit panel majority relied primarily on Board decisions—not the Restatement, the Supreme Court's decisions, or some other source—as support for its own interpretation of the common law.

The Board's subsequent decision in *FedEx II* was a direct response to the District of Columbia Circuit's misperception that the Board had already adopted a new approach, and to the Circuit's endorsement of that supposed shift. To this end, the *FedEx II* Board first reaffirmed the Board's longstanding commitment to the principles articulated by the Supreme Court in *United Insurance*, to the "seminal" *Roadway* decision, and to the "nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency."[29] Second, the Board "more clearly define[d] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered."[30] But it expressly "decline[d] to adopt the District of Columbia Circuit's . . . holding, insofar as it treat[ed] entrepreneurial opportunity . . . as an 'animating principle' of the inquiry."[31]

"Entrepreneurial opportunity," the Board held, "represents 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."[32] The Board carefully explained *why* it chose not to adopt the District of Columbia Circuit's approach, observing that this approach was not mandated by the Act, by the Supreme Court's decision in *United Insurance*, or by Board precedent, and that "adopting it would mean a broader exclusion from statutory coverage than Congress appears to have intended."[33] The Board observed, in turn, that the "Restatement makes no mention at all of entrepreneurial opportunity or any similar concept," a "silence [that] does not rule out consideration of such a principle, but . . . cannot fairly be described as requiring it."[34] Further, the Board correctly noted that the *United Insurance* Court's admonition against relying on a "shorthand formula or magic phrase" weighed against the District of Columbia Circuit's approach.[35]

In sum, the Board's decision in *FedEx II* represented a carefully calibrated, precedent-based effort to both reaffirm the Board's commitment to core common-law principles—as required by the Supreme Court—and to align the Board's prior approach to assessing entrepreneurial characteristics with those principles.[36] But in *SuperShut-*

"[o]n balance . . . under the common law test . . . the factors weigh in favor of finding independent contractor status." Id. at 479. Among the five factors relied upon, but given no special weight, was the "method of compensation, which allowed for a degree of entrepreneurial control." Id. In *Dial-A-Mattress Operating Corp.*, supra, the companion case to *Roadway*, the Board observed that the "list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive." 326 NLRB at 891. The Board observed that the "separateness" from the company of the owner-operator drivers was "manifested in many ways, *including* significant entrepreneurial opportunity for gain or loss," id. at 891 (emphasis added), but the decision relied on multiple factors, id. at 891-893, none of which was treated as having overriding importance.

[28] 390 U.S. at 258. Notably, the District of Columbia Circuit itself has repeatedly emphasized that the Board's "interpretation of its own precedent is entitled to deference." *Ceridian Corp. v. NLRB*, 435 F.3d 352, 355 (D.C. Cir. 2006); see also *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016).

[29] 361 NLRB at 610-611.

[30] Id. at 610.

[31] Id.

[32] Id. (emphasis omitted). The Board explained that it "should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Id. at 610. Accordingly, the Board overruled two prior decisions by divided Board panels—*St. Joseph News-Press*, supra (decided in 2005), and *Arizona Republic*, supra (decided in 2007)—"[t]o the extent that . . . [they] may have mistakenly suggested that" the constraints effectively imposed on a putative contractor's ability to render services as part of an independent business "are *not* relevant to the Board's independent-contractor inquiry." Id. at 621 (emphasis in original).

[33] Id. at 617.

[34] Id. at 618.

[35] Id.

[36] The District of Columbia Circuit, meanwhile, denied enforcement of the Board's *FedEx II* decision, applying the law-of-the-circuit doctrine and holding that the issue addressed there—the independent-contractor status of the company's drivers—had already been resolved by the Circuit's earlier decision. *FedEx Home Delivery v. NLRB II*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (*FedEx III*).

Significantly, however, the District of Columbia Circuit also enforced the Board's decision in *Lancaster Symphony Orchestra*, 357 NLRB 1761 (2011), enfd. 822 F.3d 563 (2016), where the Board had determined that symphony orchestra musicians were statutory employees, not independent contractors, based on an analysis that seemingly departed from the court's own preferred approach. The court there described "entrepreneurial opportunity" as a "factor which does not appear in the Restatement but which the Board and this court use in assessing whether workers are employees or independent contractors." 822 F.3d at 569. The court analyzed the Restatement factors, then seemed to consider "entrepreneurial opportunity" as a separate factor, concluding that in the case of the musicians, it was "limited" and "provide[d] only miniscule support for independent contractor status." Id. at 570. "Summing up," the court determined "that the relevant factors point in different directions" and accordingly "defer[red] to the Board's conclusion that the . . . musicians [were] employees." Id.

tle DFW, a newly constituted Board overruled *FedEx II* and essentially (as well as belatedly) adopted the Circuit's flawed view of Board law as the Board's own position. For the reasons explained below, we overrule the *SuperShuttle* decision today.

We turn first to the factual background of this case.

II.

The specific issue before us is whether the workers whom the Petitioner seeks to represent—makeup artists, wig artists, and hairstylists (collectively known as stylists)—are employees of The Atlanta Opera, Inc. (the Employer), or independent contractors. On April 28, 2021, Make-up Artists and Hair Stylists Union, Local 798, IATSE (the Petitioner) filed a petition to represent the stylists. The Employer asserted that the stylists are independent contractors and therefore not covered by the Act.

A. Operations

The Employer has planned and presented opera performances for 42 years. Tomer Zvulun, the Employer's general and artistic director, is responsible for artistic quality, planning, and managerial duties; he reports to the Employer's board of directors. Zvulun oversees a managing director; a chief of marketing and audience development; a chief finance officer; a chief advancement officer; a director of production; and an artistic administrator. The Employer asserted that it employs a total of 32 full-time staff members, including senior management, as well as 16 seasonal employees, including company players and studio artists. The Employer's main venue is the John Williams Theater at the Cobb Energy Performing Arts Center in Northwest Atlanta; for each season—which runs from autumn through spring—the Employer usually offers four performances of four productions on this main stage. In addition, the Employer offers four to eight seasonal productions of smaller operas in other venues.

The Employer spends several years planning each production. Each production generally requires contributions from 40 to 90 orchestra members; carpenters and electricians who work with scenery and lighting; choristers, soloists, actors, and other performers; stage managers; dressers; and makeup artists. For each production, the Employer selects a director, who coordinates the artistic vision and selects a design team, which usually includes lighting designers, a costume designer, a set designer, a sound designer, a wig designer, and/or a makeup designer. Although the director of a specific production need not be the Employer's artistic director, Zvulun was the director for each of the Employer's four productions during the Fall 2020/Spring 2021 season.

B. Makeup Artists, Wig Artists and Hairstylists

For each production, the director chooses a wig and makeup designer, who is part of the director's design team and who works closely with the lighting and costume designers to effectuate the director's vision. The wig and makeup designer works with a wig and makeup department head, who seeks out other qualified hair, wig, and makeup artists to execute the styles for each character. Director of Production Kevin Mynatt creates a budget, including a wig and makeup budget, for each production. Mynatt discusses the budget and the design of the show with the wig and makeup designer. The wig and makeup department head then selects and hires the stylists that are needed for the production. Stylists do not work pursuant to written contracts; they agree to an hourly pay rate with the wig and makeup department head and fill out timesheets accordingly.[37] Stylists are not on the Employer's payroll; they are designated as vendors and may not all receive the same pay rate. The Employer does not provide benefits to the stylists, nor does it withhold taxes from their pay. The Employer requires that each stylist sign a W-9 tax form and a direct-deposit form; stylists are not given the option to sign a W-2 tax form.[38] The Employer keeps financial records regarding the work of the stylists, but it does not keep any other records or personnel files for them. The Employer does not provide any information, training, or orientation to stylists. Stylists do not generally wear uniforms, although they are expected to wear black during productions to minimize their visibility to the audience. Stylists are not subject to the Employer's rules and regulations, save for its infectious disease policies.

For its most recent productions, the Employer has engaged Frandresha "Brie" Hall as both its wig and makeup designer and its wig and makeup department head. (The two positions had not been combined previously.) Hall is a member of the petitioned-for unit.[39] Un-

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The District of Columbia Circuit similarly analyzed entrepreneurial opportunity as a separate, nondeterminative factor in *Pennsylvania Interscholastic Athletic Assn. v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019). In that case, the court analyzed record evidence and found that a group of lacrosse officials had little opportunity for entrepreneurial gain, favoring employee status. Id. at 842. Nevertheless, relying on other factors, the court found that the weight of the evidence favored a finding that the officials were independent contractors. Id. at 843.

[37] The record shows that for the Employer's Spring Fest 2021 stylists were paid $25/hour, but for one stylist designated as an assistant who was paid $27.50/hour.

[38] One stylist provided an LLC name ("Coiffure Etc. LLC") on her W-9 form.

[39] The Employer takes the position that Hall is a statutory supervisor while the Petitioner takes the position that she is not. The Acting Re-

like other stylists in the unit, Hall signed agreements with the Employer—for both positions—stating that she is an independent contractor and that "[t]he parties acknowledge that the Services being performed are outside the usual course of the business of the Company." Hall assigns work to each of the stylists (such as assigning each stylist to cover a specific character) and schedules them accordingly. Stylists' overall schedule is dictated by the Employer's rehearsal and performance schedule. Hall selects stylists who are available for the entirety of a production, which generally spans 8 days of work for rehearsals and public performances; the Employer cannot control whether a particular stylist is available for any specific production. Once hired for a production, a stylist commits to a schedule for the entire course of the show. If a stylist is not available for a specific performance, Hall seeks a replacement and notifies the Employer that she is doing so. Stylists cannot hire or find their own substitutes if they are not available for a particular date.

C. *Job Responsibilities*

Stylists' primary responsibility is to execute the wig, hair and makeup looks that each production requires. To this end, stylists apply makeup; prepare, fit, and fasten wigs; style performers' natural hair; create special makeup effects (such as wounds, aging effects, or facial hair); work with the audio department to attach performers' microphones; work with the wardrobe department to integrate wig styles with costumes; and remove the performers' makeup, wigs, and microphones after the performance. At the Employer's home venue, stylists work in a room in the backstage hallway. Stylists are responsible for setting up their chairs in the space; loading in equipment; setting up the tables, mirrors, peg boards, and wig stands; cleaning their stations; and locking up the wigs and equipment after the performances. Stylists are expected to arrive knowing how to do the hair, wig, and makeup work that is required for the job, and department head Hall testified that she specifically seeks stylists who have the appropriate skills and who have worked on previous productions by the Employer. Stylists' work requires specialized knowledge of makeup, hair, and wigs for stage productions, including the appropriate way to apply makeup so that it is not washed out by theater lighting and the ability to execute and recreate various looks and styles. Hairstylists must be certified in Georgia. Some of the stylists take continuing education classes.

gional Director noted in the decision that the issue has not been litigated and ruled that Hall was permitted to vote subject to challenge.

Stylists perform their day-to-day hair, wig, and makeup work largely free from immediate or direct supervision by the Employer. But in so doing, they are expected to effectuate Director Zvulun's creative vision for each character. Zvulun generally communicates his directives via verbal or written notes to department head Hall, which Hall then passes to the stylists. Hall testified that she never "disregards" the Director's instructions, and that characters' respective looks evolve over the course of rehearsals as Zvulun provides ongoing feedback. The record includes, among others, the following examples of Zvulun's directives to Hall:

- "Regarding [a performer's] drag look: it should have simple, natural make-up (not Drag Race), a wig that is easily removed onstage without a wig cap."

- "Carmen [ ] and the Flamenco Dancer [ ] should have the same color red nail polish for the show."

- "Regarding Carmen's . . . hair & make-up look: we would like for her to be similar in look to the Flamenco Dancer [ ]. We would like to use [the dancer's] real hair, which will most likely mean a wig for both [performers playing] Carmen[ ]."

- "Regarding the Escamillo look: [one performer] should have hair & make-up reminiscent of Elvis; [another performer] should have hair & make-up reminiscent of Steven Tyler."

- "Regarding Don Jose's . . . hair: he should not have a haircut at this point. He should start the show with his hair slicked back. Then, after his exit in Scene 2, he should mess up his hair so that he looks unkempt."

- In a *Pagliacci* production, a clown character's wig and makeup should be less "clowny" or "comedy" and more "dark [and] dystopic." (A stylist testified that "we went through various clown makeup looks to land on the right one that executed [Zvulun's] vision.").

- In a *Porgy and Bess* production, the performers look "almost sallow" under the stage lights; use "different hues and tones to counteract the lighting . . . for the show, which was a blue light."

Zvulun also directed stylists to use more eyeliner, tighten ponytails, pull a wig up so that ribbons fit around a performer's head, change the placement of a performer's microphone, and ensure that blush shows above a performer's mask.

Once stylists are informed of the desired looks, they are expected to use their skills to achieve the looks.

Based on the testimony of one stylist, Hall does not "stand over" stylists to tell them how to do "this or that," but Hall does come by to check in after stylists are finished styling the performers to make sure that their looks are consistent with the Director's "guidelines." The stylists testified that the Employer provides all necessary tools and that they bring their own tools only when they prefer to do so. The Employer generally provides the makeup itself, although some performers prefer to use their own makeup; the Employer also provides prosthetics, wig clamps, wig heads, pins, brushes, hairspray, gel, shampoo, conditioner, sponges, blocking ribbons, "blood" for special effects, and makeup remover. The Employer rents wigs from Hall's contacts in the industry.

Stylists' hours of work on a given day are dictated entirely by the Employer's master schedule and each production's specific hair, wig, and makeup needs. department head Hall testified that by the time stylists are scheduled to begin wig and makeup work (i.e., during the final week of rehearsals), she already knows what times the various performers are onstage, what kind of preparations they need before going onstage, how long each type of preparation should take, and when the performers will need readjustment of their hair, makeup, or microphones between scenes. Based on that knowledge, she assigns and schedules the stylists to work with performers at specific times. All stylists generally wait until the last one has completed their work before leaving the premises. While stylists wait for others to finish, they prepare for the next show, particularly where different shows are performed on alternate nights. Director of Production Mynatt sometimes walks around after performances telling stylists that it is nearly time to leave or asking them how long it will take for them to complete their work. Stylists are eligible for, and have received, overtime pay, but their ability to earn overtime is dictated by the Employer's needs; they cannot unilaterally choose to work more hours.

Stylists, all of whom live in the Atlanta area, are bound to the Employer for only a single production and may choose not to work on future productions without harming their chances of working again with the Employer. Although Hall prefers to work with stylists from previous productions, the Employer makes no commitment to rehire for future productions stylists it has previously used.[40] The Employer places no restrictions on stylists' ability to work with other performing-arts entities; the record makes clear that stylists are participants in a wider creative economy in which they routinely market and apply their skills for a variety of clients, i.e., theater, film, and private clients. Stylists may develop professional relationships with the performers in the Employer's productions, which, in turn, may lead to outside opportunities for work, e.g., styling for other productions or photoshoots. Although stylists are free to do other jobs during the course of a production with the Employer, stylists' time commitment on show days usually runs from 7 to 9 hours. Stylists neither receive a percentage of the Employer's revenues from ticket sales nor sustain profits or losses based on the relative success of a production. The record does not indicate that stylists have independent access to the revenue source (i.e., ticket buyers/audience members). Stylists do not have any proprietary interest in their positions or the hair, wig, and makeup services they provide in the context of the Employer's productions.[41] And stylists cannot subcontract or hire anyone else to do hair, wig, and makeup work for them.

III.

On June 17, 2021, the Acting Regional Director issued a Decision and Direction of Election finding the stylists to be statutory employees. In so doing, the Acting Regional Director concluded that, viewed in its entirety, the record established that stylists do not choose where and when they will work; they have little independent authority over the details of their work; they do not supply equipment or tools; their work is part of the Employer's regular business; they do not render services to the Employer as independent businesses; and they enjoy no entrepreneurial opportunity and take on no risk in their work for the Employer. Notably, the decision was imprecise in its application of independent-contractor principles; indeed, the Acting Regional Director cited the Board's independent-contractor formulation in *FedEx II* (which had already been overruled) and did not cite *SuperShuttle DFW* (which represented the controlling law) at all.[42] In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a request for review of the Acting Regional Director's Decision and Direction of Election, which the Board granted in tandem with its Notice and Invitation to File Briefs.

[40] Between April 2019 and May 2021, 23 stylists worked during seven production periods. Department head Hall worked all seven productions; one stylist worked six productions; two stylists worked five productions; two stylists worked three productions; and four stylists worked two productions. The other stylists worked only one production.

[41] Hall's unique contract for her work as the Employer's wig and makeup designer includes provisions that indicate that she retains an intellectual property interest in her work.

[42] In addition, the Acting Regional Director considered entrepreneurial opportunity as an individual factor in apparent contravention of *SuperShuttle*'s admonition that "entrepreneurial opportunity is not an individual factor in the test," 367 NLRB No. 75, slip op. at 2.

The Petitioner contends that the Board should, on review, affirm the Acting Regional Director's finding that the stylists are statutory employees; in so doing, it argues that the Acting Regional Director properly found that most common-law factors weigh in favor of employee status or are inconclusive. In addition, the Petitioner argues that the stylists have limited opportunities for entrepreneurial opportunity—as evidenced by their fixed hourly wages, set schedule requirements, and inability to hire replacements—and that the ultimate result would be the same under any formulation of the independent-contractor test. The Employer argues that the stylists are independent contractors under the totality of the common-law factors, and that they have significant entrepreneurial characteristics, based on their overall ability to choose when and where to work, freedom to accept or reject opportunities with the Employer, and short-term single production commitments. The Employer also asserts that the outcome would be the same under either *FedEx II* or *SuperShuttle*.

Amici in support of the Petitioner argue generally that *SuperShuttle* should be overruled, with a majority favoring a return to the Board's approach in *FedEx II*. A number of amici cite then-Member McFerran's dissenting position in *SuperShuttle*, arguing that the Board's extant approach does not comport with the requirements of the common-law test and cannot be squared with the Supreme Court's directive that all incidents of the relationship must be assessed, with no one factor being decisive. They also posit that the current approach impermissibly broadens the Act's independent-contractor exclusion. Amici in support of the Employer argue generally that the *SuperShuttle* approach should be retained; they contend, consistent with the majority position in that case, that the *SuperShuttle* approach properly adheres to the common-law standard and that there is no compelling reason to revisit it after only 4 years. They also question the enforceability of any decision that fails to adhere to the District of Columbia Circuit's position in *FedEx I*.[43]

IV.

Having considered the record in its entirety, including the parties' briefs and the amicus briefs on review, we have decided to overrule *SuperShuttle*, to reinstate the Board's *FedEx II* approach, and to apply that standard in this case, consistent with the Board's established approach to retroactivity. First, we explain why the Board's decision in *SuperShuttle* cannot be reconciled with common-law agency principles or Supreme Court and Board precedent. Next, we explain how the Board's *FedEx II* approach, unlike *SuperShuttle*, properly rejected the notion that entrepreneurial opportunity is an "animating principle" of the independent-contractor test and correctly set forth a comprehensive framework for assessing the entrepreneurial characteristics of putative contractors. Finally, seeing no obstacle to retroactivity, we apply that approach here and find the Employer's stylists to be statutory employees under Section 2(3).

A.

In *SuperShuttle*, the Board overruled *FedEx II* and essentially adopted the District of Columbia Circuit's position, agreeing after the fact that the Board had, indeed, shifted its perspective to consider entrepreneurial opportunity as a "principle by which to evaluate the overall

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[43] Other amici have proposed other tests for independent contractor status that we decline to adopt.

Several amici—Weinberg, Roger & Rosenfeld and Fight for Freelancers et al., for example—urge the Board to adopt the "ABC test" codified by the California courts and legislature in which the independent-contractor analysis turns on the following questions: (1) Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact? (2) Does the worker perform work that is outside the usual course of the hiring entity's business? (3) Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity? See *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018). It is unclear whether this three-part analysis is compatible with the traditional common-law, multifactor test that Supreme Court precedent requires us to apply.

Similarly, we reject proposals by amici, including National Employment Lawyers Association and the U.S. Department of Justice, that the Board reconcile its approach in this context with antitrust and trademark considerations. Supreme Court precedent requires us to apply common law principles and to consider all of the incidents of the employment relationship; antitrust and trademark law considerations fall outside the scope of the common-law test. Nor are such considerations encompassed by the statutory policies of the National Labor Relations Act, to the extent they might apply. While the Act must accommodate other federal statutes as necessary, we see no clear occasion here for doing so.

Other amici, including National Employment Law Project, urge the Board to draw from the 2015 Restatement of Employment Law, which postdates the Supreme Court precedent that must guide us and that supports our reliance on Section 220 of the Restatement (Second) of Agency and other established sources of common-law agency principles that existed when Congress enacted the Act in 1935 and the Taft-Hartley amendments in 1947. See, e.g., *Browning-Ferris*, supra, 911 F.3d at 1208.

Temp Worker Justice, et al. argues that the Board should adopt an "economic dependence" or "economic realities" test, whereby the Board assigns weight to a worker's economic so-called dependence upon the hiring party when it examines employment relationships. Inasmuch as that formulation mirrors the Supreme Court's holding in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly overruled in codifying the common-law test as the analysis that we are required to apply, we are constrained to reject it.

To the extent that other amici propose modifications of the *FedEx II* and *SuperShuttle* approaches, we hold today, for the reasons set forth, that the *FedEx II* approach better captures the correct understanding of the common law, and we therefore reinstate that formulation.

effect of the common-law factors on a putative contractor's independence to pursue economic gain."[44] The *SuperShuttle* Board justified its view by asserting that

> control and entrepreneurial opportunity are two sides of the same coin: the more of one, the less of the other. Indeed, entrepreneurial opportunity often flowers where the employer takes a "hands off" approach. At the end of the day, the Board has simply shifted the prism through which it evaluates the significance of the common-law factors to what the D.C. Circuit has deemed a "more accurate proxy" to "'capture[] the distinction between an employee and an independent contractor.'"[45]

In explaining how entrepreneurial opportunity would be considered going forward, the Board explained that it would "evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate."[46]

The *SuperShuttle* Board accordingly overruled *FedEx II*, including that decision's consideration of entrepreneurial opportunity as one aspect of a factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.[47] Specifically, the *SuperShuttle* Board asserted that the *FedEx II* formulation had "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[48] In contrast, the *SuperShuttle* Board repeatedly characterized its decision as "return[ing] the Board's independent-contractor test to its traditional common-law roots."[49]

B.

We find today that *SuperShuttle* cannot be reconciled with the mainstream of Board law, the common law, or Supreme Court precedent. In our view, the *SuperShuttle* Board tried, and failed, to have it both ways: it could not claim fidelity to both the common-law test and the District of Columbia Circuit's description of Board law, which departed from the traditional test. On the one hand, the Board stated that it was required to apply the multifactor, common-law agency test for ascertaining employee status, as articulated in the Restatement (Second) of Agency, Section 220. On the other, the Board held that "entrepreneurial opportunity . . . has always been at the core of the common law test"[50] and thus the Board must treat "entrepreneurial opportunity" as "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."[51] Simply put, these two principles are contradictory: "entrepreneurial opportunity" is demonstrably not "at the core of the common law test" as it has traditionally been understood.

First, the *SuperShuttle* approach cannot be reconciled with Board precedent. The *SuperShuttle* Board adopted the District of Columbia Circuit's characterization of "entrepreneurial opportunity" as a "more accurate proxy" than the "unwieldy control inquiry."[52] But the *Roadway* Board's seminal 1998 decision clarified that there is an "insufficient basis for the proposition that those factors which do not include the concept of 'control' are insignificant when compared to those that do."[53] In so holding, the Board made clear that there is no singular "animating principle" (to use the phrase of the Circuit and the *SuperShuttle* Board) of the independent-contractor doctrine. In supposedly replacing "control" with "entrepreneurial opportunity," then, the *SuperShuttle* Board adopted the court's incorrect reading of prior Board law.

Contrary to the *SuperShuttle* Board's assertion, the Board has never afforded special weight or significance to "entrepreneurial opportunity," nor has it treated it as a trump card, as erroneously suggested by the District of Columbia Circuit in *FedEx I*.[54] As we have explained, the Board decisions that the court relied on for this claim did not actually support it; in fact, both decisions treated the relevant evidence as simply one aspect of a common-law factor ("method of compensation") that was itself part of a multifactor test, with no factor receiving determinative weight.[55] And the *SuperShuttle* Board failed to cite a single Board decision that employed "entrepreneurial opportunity" as the Circuit did: to "evaluate" the common-law factors, and to ask—as the decisive question—"whether the position presents the opportunities and risks inherent in entrepreneurialism."[56] *SuperShuttle* echoed the Circuit in asserting that "entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors

[44] 367 NLRB No. 75, slip op. at 9–10.
[45] Id., slip op. at 11 (quoting *FedEx I*, supra, 563 F.3d at 497).
[46] Id., slip op. at 9.
[47] Id., slip op. at 11–12.
[48] Id.
[49] Id., slip op. at 12.

[50] Id., slip op. at 2 fn. 4.
[51] Id., slip op. at 9.
[52] Id., slip op. at 11 (citing *FedEx I*, supra, 563 F.3d at 497).
[53] 326 NLRB at 850.
[54] Indeed, the court in *FedEx I* explicitly rejected the Board's view that the drivers in that case were employees "[b]ecause the indicia favoring a finding [that] the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity." 563 F.3d at 504.
[55] See *Arizona Republic*, supra, 349 NLRB at 1042–1046; *St. Joseph News-Press*, supra, 345 NLRB at 478–479.
[56] *FedEx I*, supra, 563 F.3d at 497.

on a putative contractor's independence to pursue economic gain."[57] But this is simply not how the Board had ever before approached independent-contractor determinations applying the common-law agency test.

The *SuperShuttle* Board also failed in its attempt to explain how the District of Columbia Circuit's approach comported with *Roadway* or other Board precedent. Tellingly, *SuperShuttle* and our dissenting colleague cite with apparent approval two cases—*Roadway* itself, as well as its companion case, *Dial-A-Mattress*—in which the *absence* of "entrepreneurial opportunity"—a function of constraints imposed by the employer—was relied upon as one factor among others in finding that drivers were employees, not independent contractors. In *Roadway*, supra, the Board explained:

> As in *United Insurance*, the drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; *and they have no significant entrepreneurial opportunity for gain or loss. All these factors* weigh heavily in favor of employee status . . . . [58]

Of course, finding that disputed individuals are employees because—among other factors considered—they lack "entrepreneurial opportunity" does not mean that the presence of some "entrepreneurial opportunity," however limited, would establish independent-contractor status. In any event, nothing in *Roadway* suggests that if the drivers there had enjoyed "significant entrepreneurial opportunity for gain or loss," this alone would have been decisive.[59] The *Roadway* Board clearly did not use "entrepreneurial opportunity" to "evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain" (as the *SuperShuttle* Board and our dissenting colleague suggest).[60]

Nor did the Board do so in the companion case to *Roadway*, *Dial-A-Mattress*, supra, where it found delivery drivers to be independent contractors. The Board there, citing *Roadway*, observed that the "list of factors differentiating 'employee' from 'independent contractor' status under the common-law agency test is nonexhaustive, with no one factor being decisive" and found that in the case before it, the "factors weigh[ed] more strongly in favor of independent-contractor status."[61] To be sure, the Board found that the drivers' "separateness from [the company was] manifested in many ways, including significant entrepreneurial opportunity for gain or loss," but the Board also distinguished *Roadway* in several respects, including by observing that the employer there "exercise[d] more control over its drivers' manner and means of accomplishing their work."[62] Critically, as in *Roadway*, the Board did not elevate entrepreneurial opportunity above other common-law agency factors in order to simplify an analysis for which no "shorthand formula or magic phrase can be applied to find the answer . . . ."[63] Instead, the Board engaged in a nuanced analysis and weighing of multiple factors. For all of these reasons, the *SuperShuttle* Board's assertion that that the District of Columbia Circuit's decision did not "depart[] in any significant way from the Board's traditional independent-contractor analysis"[64] is simply incorrect.[65]

Significantly, the Circuit's *FedEx I* decision did not cite either *Roadway* or *Dial-A-Mattress* as evidence of

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[57] 367 NLRB No. 75, slip op. at 2.

[58] 326 NLRB at 851 (emphasis added).

[59] The *SuperShuttle* Board posited that "employer control and entrepreneurial opportunity are opposite sides of the same coin." But *Roadway* cannot fairly be read to hold that "entrepreneurial opportunity" (any more than "control") diminishes the weight to be given to factors that do not implicate either control or its supposed obverse.

[60] Likewise, in *Corporate Express*, also cited in *SuperShuttle*, the Board, in the course of addressing the usual range of traditional factors, observed:

> [The drivers] have no proprietary interest in their routes *and no significant opportunity for entrepreneurial gain or loss*. The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by the [employer], and owner-operators have no right to add or reject customers.

332 NLRB at 1522 (emphasis added). But the Board did not treat "entrepreneurial opportunity" as the analytical key to the case.

Nor did the Board do so in *Slay Transportation Co.*, supra, also cited by the *SuperShuttle* Board and our dissenting colleague. There, the Board examined all of the traditional common-law factors in holding the drivers to be employees, observing (among other things) that the drivers were "given specific instructions as to the manner in which they [were] to perform their tasks," that they did not "operate independent businesses," and that they performed functions that were "the very core of [the employer's] business." 331 NLRB at 1293–1294. "Having considered *all* of the incidents of the [drivers'] relationship with the [e]mployer," the Board concluded "that the various factors of the common law agency test weigh[ed] heavily in favor of employee status." Id. at 1294 (emphasis in original).

[61] 326 NLRB at 891.

[62] Id. at 893.

[63] *United Insurance*, supra, 390 U.S. at 258.

[64] 367 NLRB No. 75, slip op. at 9.

[65] By citing *Roadway* and *Corporate Express* with approval, the *SuperShuttle* Board tacitly recognized that to the extent that the "entrepreneurial opportunity" of purported independent contractors is, as a practical matter, constrained by the company they work for, it is entitled to correspondingly lesser weight in the analysis. If a purely theoretical "entrepreneurial opportunity" were enough to make a worker an independent contractor, then the *Roadway* Board would not have found the drivers there to be employees.

the Board's supposed focus on "entrepreneurial opportunity." As a result, the *SuperShuttle* Board was constrained to describe the supposed "shift[]" in the Board's "perspective" as having occurred "particularly *since Roadway*" (emphasis added).[66] But as shown, this "shift" never happened at all, until *SuperShuttle*. As the District of Columbia Circuit has itself explained, "[a]n agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'"[67] This is just what the *SuperShuttle* Board did: it departed from Board precedent—that is, the precedent before *FedEx II*—without ever acknowledging that prior precedent conflicted with its decision.

The *SuperShuttle* Board claimed that "the Board's precedent in this area . . . has not been entirely consistent" and that its decision was "intended to eliminate any ambiguity over how to treat entrepreneurial opportunity in the Board's independent-contractor analysis in the future."[68] In fact, it was the Board's *FedEx II* decision that, responding to the District of Columbia Circuit, actually eliminated ambiguity and clarified Board doctrine, within the permissible bounds of the precedent that it preserved. The *SuperShuttle* Board, in contrast, adopted an approach that cannot be reconciled with what came before and that provided no clear guidance for the future.

C.

In addition, the *SuperShuttle* Board failed to reconcile its new approach with common-law principles and the Supreme Court's decision in *United Insurance*. Like the Circuit in *FedEx I*, the *SuperShuttle* Board claimed that its approach was faithful to *United Insurance* and paid lip service to the settled principle that the "ten-factor [Restatement] test is not amenable to any sort of bright-line rule."[69] But the approach adopted by the Circuit and the *SuperShuttle* Board is precisely the kind of "shorthand formula" that both the common law and the *United Insurance* decision expressly reject.

The *SuperShuttle* Board asserted that it was *required* to overrule the Board's *FedEx II* decision because that decision "impermissibly altered the Board's traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[70] According to the *SuperShuttle* Board, the *FedEx II* Board effectively abandoned the common-law agency test in favor of the "economic realities" test endorsed by the Supreme Court's 1944 *NLRB v. Hearst Publications* decision, which was legislatively overruled by Congress in 1947.[71] This claim (repeated by our dissenting colleague) is baseless. Indeed, it was the *SuperShuttle* approach—with its endorsement of "entrepreneurial opportunity" as a sort of super-factor—that subordinated the common law to a particular vision of supposed "economic reality" where workers are deemed "entrepreneurs."[72]

The Board's position in *SuperShuttle* rested on the premise that "entrepreneurial opportunity" is the core concept of the traditional common-law agency test. But there is no support for such a claim. The Restatement certainly does not define a "servant" as a "person employed to perform services in the affairs of another and who in the performance of the services lacks *entrepreneurial opportunity for gain or loss*." But the *SuperShuttle* Board, embracing the District of Columbia Circuit's characterization of Board law, effectively rewrote the definition this way. None of the Restatement Section 220(2) factors, meanwhile, explicitly or implicitly incorporate the concept of "entrepreneurial opportunity." "Entrepreneurial opportunity" does not inform (in any clear and direct way, at least): "extent of control"; "distinct occupation or business"; "kind of occupation"; "skill required"; who supplies the instrumentalities; "length of time . . . employed"; "method of payment"; "part of the regular business"; the parties' belief in what relationship they are creating; and the "business" of the principal. To be clear, the Supreme Court has never suggested, let alone held, that "entrepreneurial opportunity" is the principal guidepost in the common-law analysis.

In addition, *SuperShuttle*'s description of "employer control" and "entrepreneurial opportunity" as "opposite sides of the same coin"[73] is not analytically sound. The common-law agency factors focus on a range of dimensions of the employer-employee relationship and cannot be reduced to a simple comparison between employer

[66] 367 NLRB No. 75, slip op. at 10.

[67] *NLRB v. CNN America, Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017).

[68] 367 NLRB No. 75, slip op. at 11 fn. 22.

[69] Id., slip op. at 8 (quoting *FedEx I*, 563 F.3d at 496).

[70] Id., slip op. at 11–12.

[71] Id., slip op. at 9 (citing *Hearst Publications*, supra, 322 U.S. 111).

[72] Neither the common law, nor the policies of the Act, support the *SuperShuttle* Board's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage. Indeed, the explicit policy of the Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ." Sec. 1, 29 U.S.C. § 151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly, not expansively, as the Supreme Court has made clear. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). In examining the agricultural laborer exemption to Sec. 2(3), the Supreme Court there observed that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." Id.

[73] 367 NLRB No. 75, slip op. at 9.

control and entrepreneurial opportunity. *SuperShuttle*'s mistaken attempt to group and classify the common-law agency factors was a prelude to short-circuiting the comprehensive analysis the common law requires of "all of the incidents of the relationship."[74] Indeed, by equating control and entrepreneurial opportunity and concluding that "in general, the more control, the less scope for entrepreneurial initiative, and vice versa,"[75] *SuperShuttle* offered precisely the kind of "shorthand formula" the Supreme Court has cautioned the Board not to adopt. Here, as in the joint-employer context, the Board "must color within the common-law lines identified by the judiciary," as the District of Columbia Circuit has observed.[76] This means weighing evidence regarding all factors that may inform the Board's analysis, not relying on a shorthand formula to collapse the nuanced, multi-factor inquiry into a comparison of two factors alone.

Quoting former Member Johnson's dissent in *FedEx II*, the *SuperShuttle* Board claimed that the Board's *FedEx II* approach "greatly diminishe[d] the significance of entrepreneurial opportunity and selectively overemphasize[d] the significance of 'right to control' factors relevant to perceived economic dependency."[77] But the Board in *SuperShuttle* failed to explain where, how, and why traditional common-law agency doctrine not only incorporates the concept of "entrepreneurial opportunity,"[78] but also subordinates the "control" factors (along with the remaining Restatement factors) to it. The *SuperShuttle* Board approvingly cited the supposed "evolving emphasis on entrepreneurial opportunity" in the decisions of the District of Columbia Circuit and the Board, as described by the *FedEx I* court. But the Board there did not explain how the common-law agency test could evolve in a fundamental way and yet still adhere to the common law as reflected in the Restatement, a legal source treated as authoritative by the Supreme Court.[79] Indeed, in recently upholding the Board's joint-employer standard, the District of Columbia Circuit "look[ed] first and foremost to the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947." *Browning-Ferris Industries*, supra, 911 F.3d at 1208. There is no clear indication that in adopting the "independent contractor" exclusion in 1947—and thus incorporating the common-law agency test into the National Labor Relations Act (as the Supreme Court held in *United Insurance*)—Congress intended for the test to evolve over time in any fundamental way. *United Insurance*, meanwhile, contains no hint that "entrepreneurial opportunity" was an "animating principle" of the common-law test.

In sum, the *SuperShuttle* "entrepreneurial opportunity" test cannot be reconciled with the Board's pre-*FedEx II* precedent or with Supreme Court precedent and the common law of agency to which the Board must adhere.

V.

For these reasons, we overrule *SuperShuttle* and return to the Board's approach in *FedEx II*. First, consistent with the discussion above, we reaffirm the Board's longstanding pre-*SuperShuttle* position—based on the Supreme Court's *United Insurance* decision—that, in evaluating independent-contractor status "in light of the pertinent common-law agency principles," "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." This involves a qualitative assessment of which factors are determinative in a particular case and why.[80] Consistent with Supreme Court precedent, our inquiry will be guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220.

Second, we more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss in a manner that is consistent with Board precedent, the common law, and Supreme Court precedent. To this end, we explain the place of "entrepreneurial opportunity" in the Board's analysis. In the context of weighing all relevant, traditional common-law factors, including those identified in the Restatement, the Board also considers whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.

Third, we find that the Board should give weight only to actual (not merely theoretical) entrepreneurial opportunity, and that it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity.

A.

We reaffirm today that the Board will consider evidence of entrepreneurial opportunity when assessing whether a putative contractor is, in fact, rendering services as part of an independent business. This formulation is grounded in established law. In *United Insurance*, for example, the Supreme Court observed that the insur-

[74] *United Insurance*, supra, 390 U.S. at 258.
[75] 367 NLRB No. 75, slip op. at 9.
[76] *Browning-Ferris Industries*, supra, 911 F.3d at 1208.
[77] 367 NLRB No. 75, slip op. at 7.
[78] Id., slip op. at 8.
[79] See, e.g., *Nationwide Mutual Insurance*, supra, 503 U.S. at 323–324.
[80] *FedEx I*, supra, 563 F.3d at 497 fn. 3.

ance agents involved did "not operate their own independent businesses."[81] And citing *United Insurance*, the Board in *Roadway* explained that the drivers did not operate an independent business but rather "perform[ed] functions that are an essential part of one company's normal operations."[82]

This independent-business analysis encompasses considerations that the Board has examined in previous cases. For example, the Board will consider not only whether the putative contractor has a significant entrepreneurial opportunity, but also whether the putative contractor: (a) has a realistic ability to work for other companies;[83] (b) has proprietary or ownership interest in their work;[84] and (c) has control over important business decisions,[85] such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital.[86] This factor synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism.[87] At the same time, the Board will continue to give full consideration and appropriate weight to all of the traditional common-law factors. As with all other relevant factors, the weight given to whether a putative contractor renders services as part of an independent business will depend upon the factual circumstances of the particular case.

In performing this analysis, the Board must necessarily consider evidence (as it has previously) that the employer has effectively imposed *constraints* on an individual's ability to render services as part of an independent business.[88] Such evidence would include limitations placed by the employer on the individual's realistic ability to work for other companies,[89] and restrictions on the individual's control over important business decisions.[90] Pursuant to this inquiry, the Board will consider whether the terms or conditions under which the individuals operate are "promulgated and changed unilaterally by the company."[91]

To the extent that the Board's decisions in *Arizona Republic*, supra, 349 NLRB at 1045, and *St. Joseph News-Press*, supra, 345 NLRB at 481-482, may have mistakenly suggested that such considerations are not relevant to the Board's independent-contractor inquiry, the two decisions are in tension with prior precedent, as well as inconsistent with the view articulated today. Those decisions are now overruled.

B.

We also reaffirm today the principle that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the [c]ompany's claim that the workers are independent contractors."[92] As the Board noted in its *FedEx II* decision, the Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer. In *Roadway*, supra, for instance, the Board rejected the employer's argument that delivery drivers' proprietary interest in their routes and their ability to sell their routes made them independent contractors. The Board noted that the employer "imposed substantial limitations and conditions on both . . . features of the driver's relationship such that neither one retains any significant entrepreneurial characteristics."[93] Specifically, the employ-

[81] 390 U.S. at 259.

[82] 326 NLRB at 851.

[83] See *DIC Animation City*, 295 NLRB 989, 991 (1989) (noting that "for 10 months out of the year, the writers do not work for the [e]mployer and do work for other companies"); cf. *C.C. Eastern*, supra, 309 NLRB at 1070–1071 (noting that "[t]he drivers are not permitted to work for competitor employers or accept work from other employers during normal weekday business hours" and "[t]he record shows no instances of drivers working for other companies during evening or weekend hours").

[84] *Roadway*, supra, 326 NLRB at 846–848, 853; *BKN, Inc.*, 333 NLRB 143, 143–145 (2001).

[85] See *Penn Versatile Van Division of Penn Truck*, 215 NLRB 843, 845 (1974) ("One of the basic factors in determining that an individual is an independent contractor is his opportunity to make business decisions affecting his profit or loss.").

[86] See, e.g., *AAA Cab Services*, 341 NLRB 462, 465 (2004) (weighing these considerations); *R. W. Bozel Transfer*, 304 NLRB 200, 200-201 (1991) (same); *Daily Express*, 211 NLRB 92, 94 (1974) (same).

[87] Contrary to our dissenting colleague's assertion, this new factor does not "attempt[] to cabin consideration of entrepreneurial opportunity to one aspect of a single factor." As explained, this factor is intended to capture all considerations that the Board and courts have historically considered under the heading of entrepreneurialism or entrepreneurial opportunity. To this end, our revised standard represents an effort to regularize and explain how entrepreneurial characteristics are to be considered alongside other factors rather than an attempt to modify the balance of factors or to devalue any specific elements.

[88] See *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1098 (9th Cir. 2008) ("[The employer's] restrictions against its drivers' operating independent businesses or developing entrepreneurial opportunities strongly supports the NLRB's determination that [its] drivers are employees.").

[89] See *Time Auto Transportation*, 338 NLRB 626, 638–639 (2002) ("The witnesses['] credited testimony reveals that [the employer's] procedures and its policies prevented drivers from performing similar services for other companies, a factor relied on by the Board and courts in concluding that individuals are statutory employees."), enfd. 377 F.3d 496 (6th Cir. 2004).

[90] See *Standard Oil*, supra, 230 NLRB at 971 (finding employee status where the company made all "significant business decisions").

[91] *United Insurance*, supra, 390 U.S. at 259; see also *Stamford Taxi*, supra, 332 NLRB at 1373 (noting that employer's ability to unilaterally draft, promulgate, and change the terms of the driver's lease arrangements "weigh[s] heavily in favor of employee status").

[92] *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 861 (D.C. Cir. 1995).

[93] 326 NLRB at 853.

er exercised control over whether drivers could sell their routes, to whom, and under what circumstances.[94] In addition, the employer retained the right to unilaterally reconfigure all routes, and it was unclear whether any drivers had ever realized any gain or profit from the sale of their routes.[95]

Unlike the District of Columbia Circuit in *FedEx I*, we are reluctant to accept an employer's assertions of entrepreneurial opportunity with little weight given to these countervailing considerations. In finding, for example, that drivers had a genuine entrepreneurial opportunity to assign their routes without the employer's permission, the court relied solely on the fact that two drivers were able to sell their routes for a nominal profit.[96] In fact, drivers' opportunities in this area were significantly constrained: drivers could sell only to buyers that the employer accepted as qualified; the employer awarded routes to drivers without charge; and the employer retained the unilateral right to reconfigure routes. Nonetheless, the court concluded that the drivers' ability to assign their routes was a "significant . . . and novel" indicator of contractor status.[97]

Insofar as the Circuit's decision holds that even a showing of theoretical entrepreneurial opportunity supports a finding of independent-contractor status—and, indeed, will prove decisive if other factors point in conflicting directions—we disagree. Such an expansive approach departs from the mainstream of Board precedent, lacks clear support in traditional common-law principles, and could dramatically broaden the independent-contractor exclusion under the Act without justification. The fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity tends to show that it is not, in fact, a significant aspect of their working relationship with the putative employer.[98] Indeed, if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees.[99]

C.

The *SuperShuttle* Board's primary criticism of the formulation set out here—which is endorsed by our dissenting colleague—was that it was somehow illegitimate to treat "entrepreneurial opportunity" as a factor, or as an element of a factor, in the independent-contractor analysis. To this end, the Board insisted that "[p]roperly understood, entrepreneurial opportunity is not an independent common-law factor;"[100] rather, it 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"[101] and thus (according to *SuperShuttle*), the *FedEx II* approach "impermissibly altered the Board's traditional common law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis."[102] We disagree. As explained already, it is the *SuperShuttle* Board's treatment of "entrepreneurial opportunity" as a sort of super-factor that contradicted the common-law agency test. As for today's approach, in contrast, the Restatement explicitly states that the factors listed in Section 220(2) are nonexhaustive and to be considered "among others." The *Roadway* Board, in turn, accurately described the Restatement as "specifically permitting the consideration of other relevant factors as well, depending on the factual

[94] Id.

[95] Id. Similarly, in *Slay Transportation*, supra, the Board rejected the Regional Director's finding that drivers possessed entrepreneurial opportunities via their ability to hire drivers and control costs to enhance their income. 331 NLRB at 1294. The Board noted that the employer established and controlled the rates of compensation, leaving little room for drivers to increase income through their own efforts. Id. Moreover, although drivers were permitted to hire other drivers, they could do so only at the wage rates set by the employer. Id. Accordingly, the Board concluded that "despite this theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer over the other aspects of its relationship with the owner-operators severely circumscribes such opportunity. In reality, there is little economic independence realized by the owner-operators." Id. See also *Stamford Taxi*, supra, 332 NLRB at 1373 (finding that rules maintained and enforced by the employer "severely restrict[ed] the drivers' entrepreneurial opportunities to engage in taxicab business independent of the [employer]").

[96] 563 F.3d at 500.

[97] Id.

[98] In *Arizona Republic*, supra, 349 NLRB at 1045, the Board stated that "the fact that many carriers choose not to take advantage of [an] opportunity to increase their income does not mean that they do not have the entrepreneurial *potential* to do so." Applying this principle, the Board determined that newspaper carriers were independent contractors after finding that 363 carriers, or 29 percent of them, had multiple routes. Id. at 1045 fn. 6. As mentioned above, to the extent that the Board's approach in *Arizona Republic* is inconsistent with today's holding, it is overruled.

[99] For similar reasons, we disagree with the weight the Circuit in *FedEx I* accorded to systemwide evidence of the number of route sales and the amount of profit, if any, on such sales. We find instead that to be relevant and probative, evidence of entrepreneurialism must pertain directly to the individuals that the petitioner actually seeks to represent. Indeed, our focus on actual opportunity demands that we assess the specific work experience of those individuals in the petitioned-for unit. Evidence that goes only to employees who are outside of the petitioned-for unit is simply unlikely to have probative value and should not outweigh countervailing considerations specific to individuals in the petitioned-for unit.

[100] 367 NLRB No. 75, slip op. at 9.

[101] Id.

[102] Id., slip op. at 11–12.

circumstances presented."[103] Pre-*FedEx II* decisions by the Board, as noted, have treated "entrepreneurial opportunity" as a factor. And, as earlier pointed out, the District of Columbia Circuit itself, in a post-*FedEx I* decision, has described "entrepreneurial opportunity" as a "factor" to be considered, along with those identified in the Restatement.[104]

As already explained, the *SuperShuttle* Board's insistence—also reiterated by our dissenting colleague—that today's approach impermissibly abandoned common-law agency principles to return to the "economic realities" test articulated by the Supreme Court in *Hearst*, supra, is baseless—as demonstrated by any fair reading not only of *FedEx II* and today's decision, but of the Board decisions in which it applied *FedEx II*,[105] all of which reflected a careful analysis of the Restatement factors and the independent-business factor articulated in *FedEx II*.[106]

VI.

Consistent with the preceding discussion, and with the Board's long-established approach to the retroactivity of new standards, we now apply the standard adopted today, carefully consider all relevant factors, and find that the Employer's stylists are employees under Section 2(3) of the Act.[107] Our discussion tracks the factors set out in Section 220 of the Restatement (Second) of Agency—cited with approval by the Supreme Court and routinely applied by the Board—before concluding with the reaffirmed independent-business factor. Under established law, the burden of proof is on the party asserting independent-contractor status, here the Employer.[108]

A. Extent of Control by Employer

The Employer here exercises substantial control over the essential details of stylists' day-to-day work. At its core, the stylists' job is to effectuate the relatively detailed artistic vision of Zvulun and the Employer's creative team, including their visual interpretation of the characters.[109] The fact that the Employer has dictated

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[103] 326 NLRB at 850. The District of Columbia Circuit is in agreement on this point. See, e.g., *FedEx III*, supra, 849 F.3d at 1125 (describing Restatement as "provid[ing] a non-exhaustive list of ten factors to consider").

[104] *Lancaster Symphony*, supra, 822 F.3d at 569–570. See also *Pennsylvania Interscholastic Athletic Assn.*, 926 F.3d at 842–843.

[105] See *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124 (2017); *Pennsylvania Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017), enf. denied 926 F.3d 837 (D.C. Cir. 2019); *Sisters' Camelot*, 363 NLRB 162 (2015); *Porter Drywall, Inc.*, 362 NLRB 7 (2015).

[106] In *Porter Drywall*, for example, the Board followed this approach and determined that "crew leaders" hired as drywall-installation subcontractors were independent contractors, not employees. *Porter Drywall*, supra, 362 NLRB at 7. Then-Member Johnson (who had dissented in *FedEx II*) concurred, observing that the result would have been the same under the test he had advocated in his *FedEx II* dissent. Id. at 12. If *FedEx II* had actually left the common law behind, one might think it would yield different results.

[107] The Board's customary practice—including in representation cases—is to apply new policies and standards "to all pending cases in whatever stage." *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958) (both representation cases). See also *SuperShuttle*, supra (applying revised independent-contractor standard retroactively). Accordingly, the Board applies a new rule to the parties in the case in which the rule is announced so long as doing so would not work a "manifest injustice." *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993). In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application. *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010).

We find it appropriate to apply our refined standard in this case. See *FedEx Home Delivery*, 362 NLRB 250 (2015). As discussed above, today's approach does not represent a marked departure from well-settled precedent: the longstanding "all incidents of the relationship" approach to evaluating independent-contractor status, guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220. Moreover, the independent-business factor that we have restored to the analysis encompasses considerations that the Board has examined in previous cases.

As to the first factor of the retroactivity analysis, we see no harm to any reliance interest of the Employer. Even assuming that the Employer had relied on existing precedent in structuring its relationship with the stylists, our considerations here are substantially similar to those that the Board has assessed in prior decisions. In addition, the Board provided notice that its independent-consideration standard was under consideration in this case and thus provided the parties with an opportunity to brief the case under both the *SuperShuttle* and *FedEx II* standards. Tellingly, the Employer argued that the result would be the same under either approach.

Regarding the second factor, we find that retroactivity aids in accomplishing the purposes of the Act, which grants rights to workers properly regarded as statutory employees, such as the stylists in this case. Applying our clarified independent-contractor standard here provides guidance to employers and employees by illustrating how that standard is to be applied in future decisions.

As to the third factor, we do not find that any particular injustice would arise from retroactive application of the refined standard in this case. Indeed, all of the factors that we analyze were litigated at the hearing.

[108] See, e.g., *BKN*, supra, 333 NLRB at 144. Accord: *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof). The Board's assignment of the burden of proof to the party asserting independent-contractor status has been consistent throughout its jurisprudence, including in *SuperShuttle*. See 367 NLRB No. 75, slip op. at 1.

[109] We find no merit in the Employer's argument that the creative personnel and stage directors who hand down directives to the stylists are independent contractors and not management officials. The Employer, in its request for review, cited only conclusory testimony in support of this argument and made no meaningful effort in the record to demonstrate that Zvulun and other creative directors are independent contractors. In any event, the record makes clear that ultimate creative authority is vested with Zvulun, who is the Employer's general director and highest ranking creative and managerial official and who has acted

every aspect of a character's look—from overall aesthetic to hairstyle and nail polish color—is indicative of the degree of control that it "may exercise over the details of the work" (in the words of the Restatement), even if that control is not exercised in every instance.[110] In addition, the Employer dictates the time and place of rehearsals and performances, the stylists' daily schedules, and the availability of breaks and overtime.[111]

Accordingly, we find that this case is akin to *Lancaster Symphony*, supra, and *Musicians (Royal Palm Theatre)*, 275 NLRB 677, 681–682 (1985), cases where the Board, in finding substantial employer control, emphasized that employees' work was guided by the detailed creative agenda and process of a director. In *Lancaster Symphony*, the Board found—with approval of the District of Columbia Circuit—that the Employer's director had "complete and final authority over how the musicians perform at both rehearsals and concert performances."[112] To this end, the Board emphasized that the employer retained the right to control the content of each performance; how the music was performed; the musicians' rehearsal and worktime schedules; and their attendance requirements.[113] The Board also underscored that "[u]nlike a soloist who is hired to render a piece of music in the manner of his or her choice, here, the music director makes the artistic choices and directs the musicians accordingly."[114]

Similarly, in *Royal Palm Theatre*, the Board found that an employer exercised control over the work of musicians where the theater's music director selected the music, the instruments, the time and place of sessions, and dictated rehearsal times, seating arrangements, and breaks.[115] The Board there underscored that musicians were subject to the director's "complete discretion and artistic interpretation and taste" in making a recording.[116] We find the scenario in this case—where the Employer dictates the creative and logistical components of stylists' work in all major respects—to be substantially similar to those cases. If anything, the Employer's control is more definitive, where the stylists work in a behind-the-scenes subsidiary capacity, rather than onstage, to support the director's vision.

For these reasons, we find that this factor weighs in favor of employee status.

B. Whether or not Individual is Engaged in a Distinct Occupation or Business

We find that the stylists are generally engaged in a distinct occupation as theatrical makeup artists and wig and hair stylists: they have specific training in this area, and they are hired by the Employer to work in this professional niche. Such a finding is consistent with other Board decisions involving creative professionals.[117] At the same time, we note that, unlike in those cases, the stylists here are fully integrated into the Employer's company and productions, do not display any signifiers of engaging in an independent business, and work in tandem with the Employer's other departments, including the costume and sound departments.[118] And as Board has cautioned in a similar context, "consideration of this factor also provides little guidance" where the putative contractors at issue "work in many settings and perform as employees in some and independent contractors as others."[119] Accordingly, we find that this factor weighs in favor, but not heavily in favor, of contractor status.

C. Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision

Although stylists perform their manual hair, wig, and makeup work largely free from the Employer's immediate oversight, they exercise only negligible discretion in completing the details of their work. To this end, the Employer essentially directs stylists by communicating a continuous stream of detailed feedback and instructions through wig and makeup department head Hall. Telling-

on the Employer's behalf in promulgating directives to the stylists on his own.

[110] See Restatement (Second) of Agency, Section 220, comment d ("Although control or right to control the physical conduct of the person giving service is important and in many situations is determinative, the control or right to control needed to establish the relation of master and servant may be very attenuated.").

[111] *Lancaster Symphony*, supra, 357 NLRB at 1764 ("Unlike a true independent contractor, for example, a roofer, who is hired to do a job but can mutually arrange with the owner or general contractor when to do it and control how long it takes, once they sign up for a program, the musicians have no control over their worktime.").

[112] Id.

[113] Id. at 1763–1764.

[114] Id. at 1764. In enforcing the Board's decision, the District of Columbia Circuit emphasized that the employer's conductor "exercise[d] virtually dictatorial authority over the manner in which the musicians play," noting that conductor's directives to musicians regarding timing, volume, pitch, and other techniques. 822 F.3d at 566–567.

[115] 275 NLRB at 681–682.

[116] Id. at 682.

[117] See, e.g., *Pennsylvania Academy*, supra, 343 NLRB at 847 (models at art academy "engaged in the distinct occupation of modeling," supporting contractor status); *The Comedy Store*, 265 NLRB 1422, 1448 (1982) (stand-up comedians pursuing "distinct vocation," supporting contractor status); *Puerto Rico Hotel Assn.*, 259 NLRB 429, 444 (1981) (hotel musicians engaged in distinct occupation), enf. denied *Hilton International Co. v. NLRB*, 690 F.2d 318 (2d Cir. 1982).

[118] Cf. *FedEx II*, supra, 361 NLRB at 622 (factor weighs in favor of employee status where drivers are fully integrated into organization and rely on employer's infrastructure to perform work).

[119] *Lancaster Symphony*, supra, 357 NLRB at 1766.

ly, Hall testified that she never disregards this input and that she inspects the stylists' completed looks to ensure that they conform with the Employer's directives.[120] Accordingly, we find that this factor weighs in favor of employee status.[121]

D. Skill Required in the Occupation

The record establishes that stylists exercise considerable skill in executing the Employer's artistic vision for hair, wig, and makeup designs; indeed, the Employer relies on the stylists to perform at a proficient level so that it can focus solely on creative direction rather than close technical direction. In addition, stylists do not receive in-house training and are expected to arrive with the requisite skills and training.[122] The Board has recognized that specialized skillsets in similar creative contexts are indicative of contractor status.[123] Significantly, while comment i to Section 220 of the Restatement (Second) of Agency emphasizes that those performing unskilled labor are generally regarded as employees, it notes that even skilled workers can be considered employees when performing an "incident of the business establishment of the employer." Here, where stylists employ their skills in furtherance of the Employer's core business—staging operas—they are arguably more like employees than contractors. Nonetheless, in light of the stylists' specialized skills and their personal investment in training and certification, we find that this factor weighs in favor of contractor status.

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

The Employer here provides all equipment, supplies, and workspaces necessary for stylists to do their jobs. In an employer-employee relationship, the employer generally supplies the instruments and tools of work.[124] Accordingly, we find that this factor weighs in favor of employee status.[125]

F. Length of Time for which Individual is Employed

Stylists work on a single-production basis rather than for an ongoing or indefinite period. Although there is evidence that stylists have worked on multiple productions, there is no indication that stylists have any expectation of continuous or future employment. Nor do they make any commitment to the Employer beyond a single production. Indeed, this arrangement appears to be central to stylists' professional identity, as they commit only for a specified term and are otherwise free to seek other opportunities. The Board has found that this factor weighs in favor of contractor status where workers used on "project basis rather than for an indefinite time period," may decline future work, and routinely work for other companies.[126] Accordingly, we find that this factor weighs in favor of contractor status.

G. Method of Payment

The Employer pays stylists an hourly wage with the potential for overtime, an arrangement that suggests employee status.[127] We recognize that the Board has found the absence of tax withholding and benefits—also present here—to be indicative of contractor status.[128] But in *Lancaster Symphony*—a case with multiple parallels to this one—the Board found that the method of payment factor weighed in favor of employee status where the payment scheme for musicians approximated an hourly wage, even though the employer did not deduct payroll taxes or provide fringe benefits.[129] Accordingly, we find that, on balance, this factor weighs slightly in favor of employee status.

H. Whether or not Work is Part of the Regular Business of the Employer

The Employer's regular business is to stage operas, and stylists perform a function—providing makeup, hair, and wig treatments to onstage performers—that is integral to that endeavor; indeed, the Employer's witnesses could not cite an instance where the Employer has oper-

[120] See *FedEx II*, supra, 361 NLRB at 622 (finding that, "[a]lthough drivers are ostensibly free of continuous supervision in their work duties," the employer directs them through tracking mechanisms and guidelines).

[121] We note that the Acting Regional Director analyzed this factor in tandem with the extent of control factor, and that the Employer did not separately request review of her finding that this factor weighed in favor of employee status.

[122] Cf. *Pennsylvania Interscholastic*, supra, 365 NLRB No. 107, slip op. at 6 (reasoning that the skill factor "tend[ed] to favor employee status, or is at least inconclusive" based in large part on the fact that officials received all training and certification in-house, thereby "undermin[ing] the impression that the officials are selling their skills and expertise on the open market"). Here, in contrast, stylists pursue all training and certification on their own initiative *in order* to sell their skills on the open market.

[123] *Royal Palm Theatre*, supra, 275 NLRB at 681 (the fact that musicians "were picked on their ability to sight read music so that they could rely on their own skill and ability" suggests contractor status).

[124] *Pennsylvania Academy*, supra, 343 NLRB at 847.

[125] The Employer in its request for review did not contest the Acting Regional Director's finding that this factor weighed in favor of employee status.

[126] See *Porter Drywall*, supra, 362 NLRB at 10.

[127] See, e.g., *K-Air Corp.*, 360 NLRB 143, 150 (2014) (method of payment factor indicative of employee status where worker was "told what hours and days to work . . . and was paid by the hour").

[128] See, e.g., *Argix*, 343 NLRB 1017, 1021 (2004) (method of payment factor indicative of contractor status where employer "takes no deductions from the owner-operators for taxes, social security contributions, state disability, fringe benefits, health insurance benefits, or vacations").

[129] 357 NLRB at 1765–1766, 1769.

ated without stylists. We find the stylists' contributions here to be comparable to those of the video crew members in *Minnesota Timberwolves*, supra, where the Board found that their work broadcasting video content on the scoreboard was integral to employer's presentation of professional basketball events.[130] If anything, stylists' contributions are more central here, as they work directly with the onstage performers.[131] Accordingly, we find that this factor weighs in favor of employee status.

I. Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship

Here, all stylists except Hall entered into informal oral agreements that did not specify stylists' relationship to the Employer, and there is no basis for any shared understanding between the parties. The fact that the Employer asked stylists to provide W-9 forms, without further explanation, does not establish they knew or should have known they were entering into putative contractor relationships (and, indeed, a number of stylists testified to the contrary). Accordingly, we find this factor to be inconclusive.[132]

J. Whether the Principal is or is not in Business

The Employer is in the business of presenting operas, and the styling of costumed performers constitutes a "key element" of that presentation.[133] The stylists play an essential role in facilitating the experience that the Employer provides to audiences.[134] Accordingly, we find that this factor weighs in favor of employee status.[135]

K. Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business

In their work with the Employer, stylists are fundamentally constrained in their ability to make entrepreneurial decisions. Because the Employer controls stylists' schedules, dictates the precise number of hours to be worked, and decides unilaterally when overtime is needed, there are no opportunities during productions for stylists to employ strategies or take risks that could result in additional (or less) income.[136] Stylists agree to a fixed hourly wage; they do not receive a percentage of ticket sale revenues, nor do they lose or benefit based on the relative success of a production.[137] Likewise, the Employer makes all business decisions, including those related to hiring, allocation of labor, and commitment of capital.[138] In addition, stylists have no proprietary or ownership interest in their positions or their work.[139] And they lack the ability to subcontract their positions, hire helpers, or find replacements for even a single rehearsal or performance.[140] These considerations demonstrate that stylists are not rendering services for the Employer as part of their own independent businesses.

We recognize that stylists have a realistic opportunity to work for other employers and that they regularly pursue jobs in the broader creative economy when they are not working for the Employer. Such evidence might suggest that stylists work for the Employer with a measure of entrepreneurial opportunity. But we infer here that the primary reason that stylists work for multiple employers is the fact that the Employer's productions occur on a seasonal and intermittent basis, making exclusive employment with the Employer unrealistic.[141] Indeed, the Board has held that the significance of such evidence is diminished where, as here, employment in the relevant industry is consistently part-time.[142] In this case, having

[130] 365 NLRB No. 124, slip op. at 11–12.

[131] See also *Lancaster Symphony*, supra, 357 NLRB at 1765 ("The [employer] is in the business of providing live music in its region. The musicians are in the business of performing music, and thus their work is part of the employer's regular business.").

[132] See *Minnesota Timberwolves*, supra, 365 NLRB No. 124, slip op. at 12.

[133] Id., slip op. at 12–13. Cf. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989) (treating the fact that a putative employer was "not a business at all" as relevant in finding that an individual who rendered services to that entity was an independent contractor).

[134] *Minnesota Timberwolves*, supra, 365 NLRB no. 124, slip op. at 12-13.

[135] In *Minnesota Timberwolves*, the Board observed that "the Board and some other tribunals have analyzed this factor by assessing whether the principal is in *the* business—i.e., the *same* business as the disputed individuals," though it acknowledged that "Sec. 220(2)(j) of the Restatement (Second) of Agency itself frames the relevant consideration as simply 'whether the principal is or is not in business.'" Id., slip op. at 12 fn. 48 (emphasis in original). As in *Minnesota Timberwolves*, we find it unnecessary to resolve this issue in the present case. The Employer is obviously "a business," and the evidence shows that the Employer's business involves styling costumed performers as part of its presentation of stage performances. Under either formulation, therefore, we find this factor weighs in favor of employee status.

[136] Id., slip op. at 13–14 (evidence weighs against independent-business finding where employer dictates schedule and crew members have no control over specific work hours); *BKN*, supra, 333 NLRB at 145 (no entrepreneurial opportunity where writers "have no ability to increase their compensation through the exercise of discretion in how they perform their work").

[137] See *Lancaster Symphony*, supra, 357 NLRB at 1766 ("Further, the musicians do not bear any entrepreneurial risk of loss or enjoy any opportunity for entrepreneurial gain; their service is part of the [employer's] regular business; and they are paid on a modified hourly basis.").

[138] *Minnesota Timberwolves*, supra, 365 NLRB No. 124, slip op. at 13-14.

[139] Id., slip op. at 13; *BKN*, supra, 333 NLRB at 145.

[140] *Minnesota Timberwolves*, supra, 365 NLRB No. 124, slip op. at 13.

[141] Id.

[142] *Sisters' Camelot*, supra, 363 NLRB at 166; *Lancaster Symphony*, supra, 357 NLRB at 1765.

considered the evidence that stylists do have the opportunity to work for other employers, we find that circumstance is plainly outweighed by the other considerations cutting against a finding that the stylists render their services as independent businesses.

VII.

Determining the status of the stylists here "requires more than a quantitative analysis based on adding up the factors on each side; it requires the difficult task of assessing the relative significance of each factor, and ultimately each set of factors, in light of the impact of each factor on the overall relationship" between the parties.[143] Having considered all the incidents of the relationship with this in mind, we find that the Employer has failed to carry its burden to establish that the stylists are independent contractors.

As explained, the majority of the traditional common-law factors, as incorporated in the Restatement (Second) of Agency, point toward employee status:

> the Employer controls the details of stylists' work;
>
> the Employer directs stylists' work via continuous feedback from Director Zvulun;
>
> the Employer supplies all instrumentalities, tools, and places of work;
>
> the Employer pays the stylists at an hourly rate with a fixed number of working hours;
>
> the work of the stylists is part of the regular business of the Employer; and
>
> the Employer is in business (which, moreover, is the same business as the stylists are in).

Three of the traditional factors—distinct occupation, skill, and length of employment—weigh in favor of independent-contractor status. Another traditional factor—the parties' belief as to the nature of the relationship—is inconclusive. Finally, we have carefully considered whether the evidence tends to show that the stylists render services to the Employer as part of their own, independent businesses. We have determined that, on the whole, it does not, given that stylists do not have a proprietary interest in their work; stylists cannot assign their positions or hire replacements; the Employer makes all business decisions; and there are no opportunities during productions for stylists to employ entrepreneurial strategies or take risks that could result in more (or less) income.

Weighing the evidence concerning all incidents of the stylists' relationship with the Employer, in light of the Employer's burden of proof, we conclude that the stylists are statutory employees and not independent contractors. The evidence related to the three factors favoring independent-contractor status here does not outweigh the evidence tending to show an employment relationship, including (but not limited to) the evidence demonstrating the Employer's control over the work performed by the stylists. That the stylists do not render services to the Employer as part of their own, independent businesses supports our ultimate conclusion.

VIII.

Our dissenting colleague does not take issue with our conclusion that the stylists here are statutory employees. Indeed, in agreeing that they are, our colleague largely relies upon the same considerations that we do. Instead, our colleague disagrees with the independent contractor standard that we reinstate today—particularly the assessment of whether a putative independent contractor is, in fact, rendering services as part of an independent business. But his dissent is less a criticism of this approach than it is a defense of the prior Board's *SuperShuttle* decision. We have already fully explained why our approach is compatible with Supreme Court precedent, the main current of Board law, and the common law—and why *SuperShuttle* is not.

Our colleague's main concern with our decision to reinstate *FedEx II* appears to be prudential: he contends that the District of Columbia Circuit has already rejected our formulation of the standard for determining independent-contractor status and that today's decision will "face an uphill battle" and "will not withstand judicial review." To this end, he asserts that "there is no reason for my colleagues to expect a different result where they have ignored the court's *FedEx* holdings yet again by reinstating the previously vacated *FedEx II* standard."

Here, however, our colleague misinterprets, or at least overstates, the court's previous *FedEx* holdings. He first suggests that the District of Columbia Circuit's "chosen standard" in *FedEx I*, 563 F.3d 492—which described entrepreneurial opportunity as the "animating principle" of the independent contractor analysis—is binding on the Board. But, as our colleague readily acknowledges, the court's decision in that case was premised expressly on its view of how *the Board* analyzed independent-contractor issues under our own law; indeed, the court stated that it endorsed this approach "at the Board's urging."[144] Thus, *FedEx I* was not a prescription for how the

[143] *Austin Tupler Trucking, Inc.*, 261 NLRB 183, 184 (1982).

[144] 563 F.3d at 497. To the extent the District of Columbia Circuit began articulating this interpretation of Board law in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, we note that the court in *Corporate Express* also purported to be taking its cue from the Board. Id. at 780 ("We agree with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor."). Moreover, contrary to our colleague's sugges-

Board *must* approach entrepreneurial opportunity under Supreme Court precedent or the common law. For the reasons explained, we have decided today to disavow the court's characterization of Board precedent (which the *SuperShuttle* Board embraced), just as we previously did in *FedEx II*.[145] To the extent that the Circuit takes the Board's analysis as a starting point in this area—as it has routinely over decades[146]—we disagree with our colleague's assertion that we are bound by the *FedEx I* court's interpretation of our own precedent.

It is certainly true, as our colleague emphasizes, that the District of Columbia Circuit in *FedEx III* vacated the Board's underlying order based on its earlier opinion in *FedEx I*. 849 F.3d at 1124. But the court was explicit that, in so doing, it relied solely on the "law-of-the-circuit" doctrine: that "the *same issue* presented in a *later case* in the *same court* should lead to the *same result*." Id. at 1127 (emphasis in original).[147] But the *FedEx III* court did *not* (as our colleague claims) "vacate[] [the] *FedEx II* standard," reject the Board's legal reasoning, or make any clear statement about the validity of independent-contractor formulation that we reinstate today. The court instead made clear that its law-of-the-circuit holding was based on the fact that *FedEx I* and *FedEx III* involved "the same material facts." Id. In response to the argument that *FedEx I* had failed to weigh all of the common-law factors, *FedEx III* responded that *FedEx I* had in fact done so.[148] Despite this dicta, the court said nothing about the independent-contractor standard articulated in *FedEx II*.[149] Given the limited scope of the court's decision, it is simply unwarranted to assign any broader significance to *FedEx III* beyond that narrow circumstance involving the FedEx drivers at issue in that case.

Likewise, we reject our colleague's assertion that the Board's approach here will undoubtedly be met with hostility in other circuits that "have also recognized that entrepreneurial opportunity is an important consideration in evaluating the traditional common-law agency factors." Tellingly, all of the court decisions that our colleague cites in support of this argument merely assess a putative contractor's entrepreneurial potential as a single consideration among other common-law factors—which is exactly what we do here.[150] Nothing in these decisions augurs a poor judicial reception for *FedEx II*'s modest effort to formalize and clarify the role of this consideration, because none of them mirror the *SuperShuttle*

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tion, the fact that the court developed its reading of Board precedent over the course of two decisions does not preclude us from interpreting our decisions and the issues emanating from them differently.

[145] See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 508 (1978) (recognizing the "authority of the Board to modify its construction of the Act in light of its cumulative experience").

[146] See, e.g., *C.C. Eastern, Inc.*, 60 F.3d at 858 (quoting with approval the Board's own detailed definition of the "right to control" in the independent-contractor context); *Building Material v. NLRB*, 669 F.2d 759, 764 (D.C. Cir. 1981) ("In applying agency principles *the Board* and the courts look at all aspects of an individual's relationship with the putative employer.") (emphasis added); *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1326 (D.C. Cir. 1971) (affirming the independent-contractor test that the Board "clearly articulated in its opinion."). Significantly, the court's deference to the Board's formulation of the standard in these cases, even where the Board did not expressly consider entrepreneurial opportunity as part of its analysis, suggests that the court has followed the Board in this respect rather than vice versa.

[147] As the court explained,

> [t]his case is the poster child for our law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law . . . the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer.

Id. Accordingly, the outcome in *FedEx III* turned solely on the fact that the court had "already answered this same legal question involving the same parties and functionally the same factual record." Id. at 1124.

[148] Id. at 1128.

[149] Further, in describing the holding of *FedEx I*, *FedEx III* once again made clear that the court in *FedEx I* was characterizing the Board's own independent-contractor precedent. Id. at 1125-1126.

[150] In *Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002), the court, in affirming the Board's finding of employee status, emphasized that the employer determined where individuals would work, provided tools and equipment, and used its own painters to supervise the individuals. The court then stated that the putative contractors did not "exhibit[] any meaningful entrepreneurial or proprietary characteristics that would lead one to believe that they controlled the terms of the work they completed." Id.

In *Friendly Cab Co.*, 512 F.3d at 1097–1101, the court, in affirming the Board's finding of employee status, engaged in a rigorous, detailed analysis of the common-law factors and existing caselaw. In so doing, the court relied on, among other things, the employer's strict disciplinary regime; its extensive, mandatory dress code; its requirements that drivers carry advertisements and accept vouchers; and its directives regarding how drivers should accelerate and stop their vehicles. Id. at 1099–1101. In addition to these considerations, the court found that the employer-imposed limitations that restricted drivers' "entrepreneurial freedom to develop their own business interests," such as its restriction on accepting dispatches for outside business and prohibition on soliciting customers and use of personal cellphones. Id. at 1098–1099.

Finally, in *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 918–925 (11th Cir. 1983), the court, in reversing the Board and finding that the drivers were independent contractors, engaged in a comprehensive review of the Board's findings and the relevant caselaw. In so doing, the court emphasized that the employer's guidelines did not significantly affect the details of the drivers' work; that fees paid to the employer by drivers were not related to driver profits; and that drivers lost revenue based on declining dispatched calls. Id. at 920-923. In the course of its analysis, the court found that displaying the employer's logo served "entrepreneurial interests of the drivers." Id. at 923. Notably, the court relied extensively on the now-repudiated "right-to-control" test; disclaimed reliance on certain facts that were not relevant to the issue of control; repudiated other findings that were not supported by the evidence; and found that certain elements of the relationship were dictated by government regulations.

Board in defining entrepreneurial opportunity as the "animating principle" of the inquiry or as "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." Indeed, none of the proponents of entrepreneurial opportunity as the "animating principle" identifies support for this approach in judicial decisions applying the common law, the Restatement of Agency, treatises, or any other recognized authority.[151]

We strongly disagree with our colleague's suggestion that we have misconstrued the Board's own caselaw. We maintain that prior to *SuperShuttle*, the Board at no time elevated entrepreneurial opportunity above all other common-law factors. Ultimately, while the Board's decisions speak for themselves, there can be no doubt that the decisions that our colleague relies on most emphatically here (*Roadway*, *Dial-A-Mattress*, and *Corporate Express*) do not support his core contention, for the reasons discussed above. Indeed, our colleague himself concedes that "[i]t is true that the post-*Roadway* Board decisions did not explicitly describe whether the putative contractors had significant entrepreneurial opportunity for gain or loss in this manner."[152] It is perhaps for this reason that our colleague chooses to cite the District of Columbia Circuit's characterization of statements that the General Counsel made in briefs to the court.[153] We question whether these are accurate characterizations in the first instance, but even if they are, they are hardly persuasive; as the District of Columbia Circuit itself has emphasized, "counsel's explanation to this court cannot substitute for 'reasoned decision-making *at the agency level*.'"[154]

Finally, we reject our colleague's apparent attempt to use two of the Board's post-*SuperShuttle* decisions (*Velox Express, Inc.*[155] and *Intermodal Bridge Transport*[156]) to show that *SuperShuttle* was more aligned with the common law than it appears, because the Board did not treat entrepreneurial opportunity as a "super-factor" in those cases. While emphasizing that the Board there nominally applied *SuperShuttle* by "evaluating the common-law factors through the prism of entrepreneurial opportunity," our colleague effectively depicts each as involving a routine multifactor inquiry where the Board assessed and weighed all incidents of the parties' relationship with no one factor being decisive. But our colleague cannot obscure that *SuperShuttle* said what it said: that entrepreneurialism is "an important animating principle" of the inquiry and "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain."[157]

Whether or not the Board's post-*SuperShuttle* cases can be read to mitigate the *SuperShuttle* decision, the Board cannot revise the independent-contractor standard so indirectly. Rather, as the Supreme Court has held, the Board must apply the test that it articulates, and not some other standard, to engage in reasoned decisionmaking. See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 372–377 (1998). In any event, the fact that the Board found employee status in two cases where it applied *SuperShuttle* does not mean that the standard there was consistent with Supreme Court precedent or the common law. Accordingly, rather than nominally apply *SuperShuttle* again today in a way that might be more defensible, we overrule that decision outright.

ORDER

The case is remanded to the Regional Director for further action consistent with this Decision.

Dated, Washington, D.C. June 13, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

[151] Our colleague repeatedly asserts that District of Columbia Circuit's formulation in *Corporate Express Delivery Systems v. NLRB* regarding entrepreneurialism and economic risk was based on comments to the Restatement (Second) of Agency. See 292 F.3d at 780-781. The court in that decision was in fact referring to comment d on Sec. 220(1), which says nothing at all relating to entrepreneurial opportunity; in addition, the court cited that comment solely for the proposition that "the full-time cook is regarded as a servant [rather than as an independent contractor] although it is understood that the employer will exercise no control over the cooking." Accordingly, our colleague's attempt to root his favored approach in the Restatement is unpersuasive.

[152] Our colleague instead posits a "subtle shift in emphasis" in Board decisions in this area. This shift was apparently so subtle that the Board itself did not detect it prior to *SuperShuttle*. But however subtle, if there was in fact such a shift, it departed from the Board's own established precedent in, e.g., *Roadway*, supra. The Board accordingly would have been obligated to explain its failure to follow established precedent. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–809 (1973). There is no such explanation in any of the pre-*SuperShuttle* cases our colleague cites.

[153] See *Corporate Express Delivery Systems v. NLRB*, 292 F.3d at 780.

[154] *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006) (quoting *Kansas City v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991)) (emphasis in original). See also *Village of Bensenville v. FAA*, 376 F.3d 1114, 1121 (D.C. Cir. 2004) ("We do not ordinarily consider agency reasoning that 'appears nowhere in the [agency's] order.'") (quoting *PanAmSat Corp. v. FCC*, 198 F.3d 890, 897 (D.C. Cir. 1999)).

[155] 368 NLRB No. 61 (2019).

[156] 369 NLRB No. 37 (2020).

[157] 367 NLRB No. 75, slip op. at 9.

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part and concurring in part.

In 2019, the Board issued *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019) (*SuperShuttle)*, which, in effect, adopted the independent-contractor standard found appropriate by the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit). For the reasons set forth in *SuperShuttle*, in which I participated, and as discussed further below, that standard—which is consistent with the common law, court precedent, and the Act—provides the most effective measure for determining the important issue of whether individuals should be considered employees, in which case they fall within the jurisdiction of the Act, or independent contractors, in which case they do not. Applying *SuperShuttle* here, I find that_the workers at issue in this case—makeup artists, wig artists, and hairstylists who work at The Atlanta Opera—are employees under Section 2(3) of the Act and not independent contractors.

I imagine that my colleagues would also conclude that these workers are employees under the test set forth in *SuperShuttle*, which could decide the matter. Instead, my colleagues, apparently with the optimism of Sisyphus, have decided to try their luck yet again at revising the common-law standard for determining independent contractor status. Given the position of the D.C. Circuit and other courts of appeals on this issue, they undoubtedly recognize that they face an uphill battle.

Prior to the Board's issuance of *SuperShuttle* in 2019, it was settled law in the D.C. Circuit that entrepreneurial opportunity was "an important animating principle by which to evaluate" the traditional common law factors used to differentiate employees from independent contractors. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I)*, denying enforcement of *FedEx Home Delivery*, 351 NLRB No. 16 (2007); see *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002)). Unhappy with the D.C. Circuit's decision in *FedEx I*, the Board issued a new decision 5 years later. Although the case presented nearly identical facts to *FedEx I*, the Board rejected the court's analysis as well as its prior determination that the drivers at issue were independent contractors. *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II)*. Not surprisingly, the D.C. Circuit was not persuaded. In denying enforcement of the Board's "second try" decision, and once again finding the drivers at issue to be independent contractors, the D.C. Circuit expressly found that the court's earlier decision *FedEx I* was consistent with both the common law and Supreme Court precedent. *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127–1128 (D.C. Cir. 2017) (*FedEx III*).

Today, my colleagues overrule the independent-contractor standard in *SuperShuttle* and return to the flawed standard in *FedEx II* without any substantive modification of it.[1] My colleagues assert that *SuperShuttle*, which incorporated the court's standard, cannot stand because it is inconsistent with the common law, Board precedent, and Supreme Court precedent. In short, my colleagues' position relies on one conclusion: the D.C. Circuit is wrong. I do not agree, nor have my colleagues presented compelling reasons for reaching their conclusion. Accordingly, although I concur in the result in this case, I must otherwise dissent.

I. LEGAL FRAMEWORK

A. The Common-Law Agency Test

Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, provides that the term "employee" shall not include "any individual having the status of independent contractor." 29 U.S.C. § 152(3). The Supreme Court has long mandated that independent-contractor status be determined by applying the common law of agency. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). In conducting the analysis under the common-law agency test, the Board and the courts apply the non-exhaustive factors set forth in the Restatement (Second) of Agency §220 (1958):

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.

[1] At the outset of their decision, my colleagues find that they are reinstating the *FedEx II* standard and they have not disavowed any aspect of that decision. But at footnote 87, they say that they have implemented a "revised standard [that] represents an effort to regularize and explain how entrepreneurial characteristics are to be considered alongside other factors." It is true that my colleagues have dressed up the *FedEx II* standard with some new phrasing. For example, my colleagues emphasize that their *FedEx II* reboot no longer considers evidence of entrepreneurial activity as "one aspect of a relevant factor." In another part of their decision, the majority refers to their new consideration of entrepreneurial opportunity as an "independent-business analysis" rather than an "independent-business factor." But then my colleagues, tracking the language from *FedEx II*, go on to state: "This *factor* synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism." (Emphasis added.) And the majority concludes its analysis by stating that its "discussion tracks the factors set out in Section 220 of the Restatement (Second) of Agency . . . before concluding with the reaffirmed independent-business factor." Thus, it is clear that my colleagues have returned to *FedEx II* without any modification.

(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 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 business.

In construing these factors, the Court held that there is no "shorthand formula" and that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." 390 U.S. at 258.

B. The Board and the Courts' Consideration of Entrepreneurial Opportunity in their Independent-Contractor Analysis

In the decades following the issuance of *United Insurance* in 1968, the Board and the courts have revised and clarified the application of the common-law agency factors in assessing whether workers are employees or independent contractors. Many decisions during this time either considered an employer's right to exercise control as being "foremost" among the common-law agency principles or described the entire independent-contractor analysis as being a "right of control test." See, e.g., *American Federation of Musicians (Royal Palm Dinner Theater)*, 275 NLRB 677, 682 (1985) (finding that musicians who were hired to pre-record music for dinner-theater productions were employees primarily because they worked under the direct supervision of the theater's music director who had "complete control" over "every note" they played, the number and types of instruments they used, and the time and place where they recorded the music).[2] Despite this focus on the "right of control" aspect of the common law of agency, the Board has also historically considered an individual's opportunities for entrepreneurship as part of its approach to assessing whether workers are employees or independent contractors. For example, in *Young & Rubicam International, Inc*., 226 NLRB 1271, 1276 (1976), the Board found that photographers who worked with an advertising agency were independent contractors because they "operate as independent businessmen rather than serving as employees." In doing so, the Board considered the photographer's opportunities for entrepreneurship, reasoning that the photographers maintained studios at their own expense, made capital investments in their enterprises, worked with other companies, received pay on a per-job basis, and were generally incorporated. Id. Similarly, in *Standard Oil Co*., 230 NLRB 967, 971 (1977), the Board found that the putative contractors "ha[d] no significant entrepreneurial opportunity" because their "limited opportunities to take risks and influence their profits by their own business decisions" was indicative of employee status. The Board reasoned that the employer controlled "all meaningful decisions of an entrepreneurial nature which affect profit or risk of loss" where the employer established the drivers' pay and delivery territories, the prices of the products, and the customers to whom they could deliver. Id.[3]

Significantly, in *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the Board's approach in assessing whether workers are employees or independent contractors to focus "not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss." Id. at 780.[4] The court expressly "agree[d] with the Board's suggestion that the latter factor better captures the distinction between an employee and an independent contractor." Id. Further, drawing on the comments in the Restatement (Second) of Agency, the court reasoned that

[2] See also *Roadway Package Systems, Inc*., 288 NLRB 196, 198 (1988) ("*Roadway I*").

[3] See also *DIC Animation City*, 295 NLRB 989, 991 (1989) (finding independent-contractor status where writers bear some entrepreneurial risk in that they "exert time, effort, and travel to solicit work, but may have their ideas rejected"); *Roadway I*, 288 NLRB at 198 (finding that the drivers "[bore] few of the risks and enjoy[ed] little of the opportunities for gain associated with an entrepreneurial enterprise" where the employer controlled the number of packages and stops for each driver and their service areas, did not give drivers a proprietary interest in the areas they serviced, and determined the drivers' compensation).

[4] As discussed infra, the D.C. Circuit's decision in *Corporate Express* was influential. For example, it was cited by *NLRB v. Friendly Cab Co*., 512 F.3d 1090, 1097 (9th Cir. 2008), in its discussion of the application of the common-law agency factors to determine independent contractor status.

it is not "the degree of supervision under which [one] labors but . . . the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder," that better illuminates one's status. Id. Emphasizing entrepreneurialism, the court concluded that where the owner-operators were not allowed to hire others to do the job or to use their vehicles for other work, they "lacked all entrepreneurial opportunity and consequently functioned as employees rather than as independent contractors." Id. at 780–781.

In *FedEx I*, the D.C. Circuit again considered the role of entrepreneurialism in its independent-contractor analysis, as previously acknowledged in *Corporate Express*. The court, based on its review of the Board's and its own independent-contractor jurisprudence, recognized that application of the common-law agency test had shifted over time. 563 F.3d at 496–497. The court concluded that the determination whether the "'putative independent contractors have significant entrepreneurial opportunity for gain or loss'" was "a more accurate proxy" to use in evaluating independent contractor status under the common law. Id. at 497 (quoting *Corporate Express*, 292 F.3d at 780).[5]

Applying its chosen standard, the court vacated the Board's order finding that FedEx unlawfully refused to bargain with the union and held that single-route FedEx drivers working out of Wilmington, Massachusetts, were independent contractors. Id. at 504. After pointing out that several common-law factors indicated that the drivers were independent contractors, such as that FedEx did not control when the drivers worked, for how long, or when they could take breaks, the court emphasized that the record revealed "many of the . . . characteristics of entrepreneurial potential." Id. at 498. Specifically, FedEx permitted the drivers to contract with the company to serve multiple routes, to hire their own employees and replacement drivers, to assign their employment obligations without company permission, and to use their vehicles for other jobs. Id. at 498–500. Looking at those common-law factors through the lens of entrepreneurial opportunity, the court concluded that the indicia of independent contractor status "clearly outweighed" the factors that would support employee status. Id. at 504.

C. The Board's Decision in FedEx II and the D.C. Circuit's Response

As mentioned above, the Board refused to acquiesce in the D.C. Circuit's holding in *FedEx I* and, in response, issued its decision in *FedEx II*, creating a new standard for evaluating the common-law agency factors.[6] In so doing, the Board majority expressly rejected the D.C. Circuit's holding in *FedEx I.* 361 NLRB at 610. Instead, under the guise of "more clearly defin[ing] the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss," the *FedEx II* Board found that entrepreneurial opportunity represents merely "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*." Id. at 620 (emphasis in original). The Board framed entrepreneurial activity "as part of a broader factor . . . in the context of weighing all relevant, traditional common-law factors identified in the Restatement." Id. at 617. The *FedEx II* decision further asserted that the "independent-business factor" should not receive any special weight in the overall common-law agency analysis. Id. at 621.

Applying its new standard, the Board held, on a materially indistinguishable factual record from *FedEx I*,[7] that

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[5] The court further indicated that the Board and the court's shifting focus on entrepreneurial opportunity was a "subtle refinement . . . done at the Board's urging." Id. at 497 (quoting *Corporate Express*, 292 F.3d at 780).

[6] My colleagues assert that the Board's decision in *FedEx II* "was a direct response to the District of Columbia Circuit's misperception that the Board had already adopted a new approach, and to the Circuit's endorsement of that supposed shift." To be clear, regardless of whether or not the D.C. Circuit had correctly perceived any shift at the Board, the court decided for itself that a "significant entrepreneurial opportunity for gain or loss . . . . better captures the distinction between an employee and an independent contractor." *Corporate Express*, 292 F.3d at 780 (internal quotation marks omitted). As noted above, the court, drawing on a comment in the Restatement (Second) of Agency, compared the status of a full-time cook, a corporate executive, and a lawn-care provider, concluding that "[t]he full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder." Id. My colleagues criticize the court for drawing this conclusion from the Restatement, asserting that the comment "says nothing at all relating to entrepreneurial opportunity." I am not inclined to question the D.C. Circuit's interpretation of the common law, nor do I expect that my colleagues' suggestion that the Board is better positioned than the courts to interpret and apply the common law of agency will meet with any more success here than it did in *FedEx II*. See *FedEx III*, 849 F.3d at 1128 (rejecting the argument that the court should enforce the decision in *FedEx II* because it owed deference to the Board's formulation of the independent contractor test under the common law or because the Board had "made a choice between two fairly conflicting views") (internal quotations omitted).

[7] The drivers in *FedEx II* operated out of Hartford, Connecticut, whereas the drivers in *FedEx I* operated out of Wilmington, Massachusetts.

single-route FedEx drivers were employees under the Act. The Board emphasized that FedEx maintained "pervasive control over the essential details of [its] drivers' day-to-day work," and the "core" nature of the drivers' work to FedEx's business operations. Id.

Not surprisingly, after reviewing *FedEx II*, the D.C. Circuit in *FedEx III* again vacated the Board's decision. In particular, the court expressly rejected two aspects of the *FedEx II* decision. First, the court emphasized that, consistent with the Supreme Court's holding in *United Insurance* and contrary to the conclusion set forth in *FedEx II*, the Board was not entitled to deference from the court regarding its interpretation of the common-law agency factors. Second, the court addressed the suggestion in *FedEx II* that the decision in *FedEx I* was potentially impermissible under *United Insurance* due to its application of entrepreneurial opportunity as an animating principle for evaluating the traditional common-law agency rules. The court found that *FedEx I* was consistent with *United Insurance*, noting that the analysis in that case "did consider all of the common-law factors as the law requires." 849 F.3d at 1128.

D. The Board's decision in SuperShuttle

In response to the D.C. Circuit's twice-made criticism of the Board's failure to adequately consider the significance of entrepreneurial opportunity in its independent-contractor formulation, the Board attempted to formulate a standard that, consistent with the traditional common law, best distinguished independent contractors from employees and, further, could survive judicial review. In its 2019 decision in *SuperShuttle*, the Board overruled the flawed standard set forth in *FedEx II*, explaining in detail why the *FedEx II* Board improperly altered the Board's independent-contractor test by significantly limiting the importance of entrepreneurial opportunity to the analysis, without any basis in common law for doing so. 367 NLRB No. 75, slip op. at 1, 7–8. Accordingly, the Board decided that, "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism." Id., slip op. at 8, quoting *FedEx I*, 563 F.3d at 497.

For the reasons set forth in that decision, in which I participated, I believe that the Board's standard therein is not only consistent with the common law but, as the D.C. Circuit recognized, "better captures the distinction between an employee and an independent contractor." *Corporate Express*, 292 F.3d at 780.[8]

II. MY COLLEAGUES' CRITICISMS OF SUPER SHUTTLE ARE WITHOUT MERIT AND THAT DECISION SHOULD NOT BE OVERRULED

My colleagues' criticism of *SuperShuttle*, as well as the D.C. Circuit decisions assessing entrepreneurial opportunity as an animating principle in determining independent contractor status, is that they "cannot be reconciled with the mainstream of Board law, the common law, or Supreme Court precedent." Working backwards from these premises, I will explain why none is accurate.

Before turning to that analysis, however, I note that my colleagues assert that my primary concern with their decision to reinstate *FedEx II* is that it won't be enforced. It is true I do not believe my colleagues' return to *FedEx II* will survive judicial review. But make no mistake: my chief disagreement with my colleagues' return to the *FedEx II* standard is that *FedEx II* wrongfully diminished the significance of entrepreneurial opportunity to the Board's independent-contractor formulation by "creating a new factor ('rendering services as part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor." *SuperShuttle*, 367 NLRB No. 75, slip op. at 1. However, because my objections to the standard my colleagues reinstate today, as well as my explanation of why it is inappropriate, have already been fully addressed in *SuperShuttle*, I find it unnecessary to repeat that analysis here. Instead, I am focusing my dissent on what I have not already addressed, namely the assertions made by my colleagues in

[8] Further, I believe that the Board in *SuperShuttle* rightly found that the *FedEx II* decision improperly revived the "economic realities" test that the Supreme Court adopted in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which was thereafter rejected by Congress in the amendments to the Taft-Hartley Act. 367 NLRB No. 75, slip op. at 9. In *Hearst*, the Supreme Court set forth a policy-based economic reality test for determining independent-contractor status in cases involving New Deal social legislation. The Supreme Court examined the term "employee" (as defined in Sec. 2(3)) to consider whether newsboys were independent contractors or employees. The Court focused on whether "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the [Act]." Id. at 127–128. The Court read the term "employee" "broadly" and explained that it should be understood "in doubtful situations, by underlying economic facts, rather than technically and exclusively by previously established legal classifications." Id. at 129. Only 3 years later, Congress rejected the Court's broad "economic realities" approach to independent-contractor determinations when it adopted the 1947 Taft-Hartley Act. See *United Insurance*, 390 U.S. at 256. As set forth in *SuperShuttle*, the *FedEx II* Board emphasized the FedEx drivers' "economic dependency" on the employer by failing to make a meaningful distinction between FedEx drivers and any sole proprietor of a small business that contracts its services to a larger entity. The *SuperShuttle* Board stated "[l]arge corporations such as Fed-Ex or SuperShuttle will always be able to set terms of engagement in such dealings, but this fact does not necessarily make the owners of the contractor business the corporation's employees." 367 NLRB No. 75, slip op. at 9.

support of their position that *SuperShuttle* must be overruled.

A. *SuperShuttle* is Consistent with Supreme Court Precedent

1. The D.C. Circuit has rejected the argument, proffered by my colleagues, that viewing entrepreneurial opportunity as an animating principle in analyzing the common-law agency factors is inconsistent with *United Insurance*.

My colleagues assert that recognizing "entrepreneurial opportunity" as an animating principle in application of the common-law agency factors cannot be reconciled with the Supreme Court's decision in *United Insurance*, 390 U.S. at 256 (1968). With all due respect to my colleagues, the D.C. Circuit has expressly addressed this argument already and rejected it. In *FedEx III*, the panel, consisting of Judges Henderson, Millett, and current-Justice Kavanaugh, decided as follows:

> The Board contends that [the D.C. Circuit's decision in] *FedEx I* transgressed the Supreme Court's command in *United Insurance* to consider and weigh all of the common-law factors in evaluating employee status. But, as we indicated in *Lancaster Symphony*, *FedEx I* did consider all of the common-law factors as the law requires.

849 F.3d at 1128. Unlike my colleagues, I would not presume to have a better understanding of what the Supreme Court required in *United Insurance* than the D.C. Circuit, especially considering that a current Supreme Court justice did not find any conflict between the D.C. Circuit's standard and that case.[9]

Because so much of my colleagues' decision centers on their assertion that *SuperShuttle*—which adopted the D.C. Circuit's "animating principle" test—cannot be reconciled with *United Insurance*, they understandably refuse to accept that the D.C. Circuit has already rejected this assertion and attempt to distract from this fact. But their attempts are not successful. To begin, my colleagues suggest that the statement cited above in *FedEx III* is *dicta* because "the court was explicit that . . . it relied *solely* on the 'law-of-the-circuit' doctrine" in deciding *FedEx III*" (emphasis added). With all due respect to my colleagues, that is, at best, an inaccurate oversimplification of the holding in *FedEx III*. Although the court inarguably relies on "law-of-the-circuit" in reaching its decision, the decision does not stop there. Rather, the court expressly considers and decides three issues that could provide justifications for not applying the "law of the circuit" doctrine to the case. Because it is clear that, had it found any of these three issues to have merit, the court could have rejected the "law of the circuit" doctrine and possibly reached a different outcome, the court's conclusions regarding these issues had a material effect on the court's decision and are decidedly not *dicta*.[10]

Two of the issues involved whether, due to the nature of the Board's decision in *FedEx II*, that decision was entitled to deference that would warrant an exception from the "law-of-the-circuit" doctrine. First, the court addressed whether it should defer to the new Board decision because the Board had changed its interpretation and implementation of the law where the change is "reasonable, within the scope of the statutory designation, and the departure from past precedent is sensibly explained." *FedEx III*, 849 F.3d at 1128 (internal citations omitted). The court found that this possible exception to the "law-of-the-circuit" doctrine was without merit, as common-law agency principles do not involve any special administrative expertise and, therefore, no *Chevron* deference was owed. Similarly, the court considered and rejected the assertion that the Board in *FedEx II* had made a "choice between two fairly conflicting views" and that, therefore, the new decision was entitled to deference. Id.

The third issue, as noted above, was the Board's contention that *FedEx I* could not be reconciled with the Supreme Court's decision in *United Insurance*. And, as noted above, the *FedEx III* court, including current-Justice Kavanagh, expressly rejected that proposition. My colleagues take two approaches to seek to avoid this express finding by the court. First, my colleagues assert that the Board should ignore that holding because the *FedEx III* court "solely" relied on the "law-of-the-circuit" doctrine. And that, accordingly, this statement was merely dicta. As discussed above, that is not an accurate representation of the *FedEx III* decision. But even beyond that, my colleagues are apparently suggesting that, even had the *FedEx III* court determined that *FedEx I* was in fact inconsistent with Supreme Court law, it would have nevertheless adopted *FedEx I* based on the "law-of-the-circuit" doctrine. This cannot be true. Indeed, I do not take such a dim view of the D.C. Circuit to assume that it would not recognize that its duty to apply

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[9] If the D.C. Circuit's decisions were in fact inconsistent with *United Insurance*, it is puzzling that the Board chose not to file a petition for rehearing *en banc* or a petition for *certiorari* in *Corporate Express Delivery*, *FedEx I*, or *FedEx III*.

[10] Not only is this view of the case consistent with the language in the court's decision, it is also consistent with common sense. Had the court solely been relying on the "law-of-the-circuit" doctrine in deciding the case, any further analysis would have been *irrelevant*. And I am not inclined to read irrelevant analysis into a decision by the D.C. Circuit.

Supreme Court precedent, and to overrule any decision that runs contrary to that precedent, trumps any duty created by the "law-of-the-circuit" doctrine.

Relatedly, my colleagues seem to assert that the court's statement regarding *United Insurance* is of no moment because it was limited to a finding that the court in *FedEx I* had weighed all the common-law factors. But that is precisely the point. The court in *FedEx I* had weighed all the common-law factors in light of its view that entrepreneurial opportunity was an "animating principle by which to evaluate those factors . . . ." *FedEx I*, 563 F.3d at 497. Indeed, the court expressly found that, having considered all the common law factors, "[b]ecause the indicia favoring a finding the contractors are employees are clearly *outweighed by evidence of entrepreneurial opportunity*, the Board cannot be said to have made a choice between two fairly conflicting views." Id. at 504 (emphasis added). Accordingly, the question before the court in *FedEx III* was not whether the court in *FedEx I* had actually considered all the common-law factors—it clearly had, and the Board in *FedEx II* did not argue otherwise. Rather, the obvious question was whether the analysis in *FedEx I*, considering the common-law factors in light of entrepreneurial opportunity, ran afoul of *United Insurance*. By finding that because the court in *FedEx I* had met the requirement of considering all the common-law factors, and therefore its analysis was not at odds with *United Insurance*, the court in *FedEx III* clearly found that the *FedEx I* decision, including its focus on entrepreneurial opportunity, was consistent with *United Insurance*.

But even under my colleagues' erroneous reading of *FedEx III*, their argument still fails. As detailed above, the D.C. Circuit in *FedEx I* expressly relied on the earlier holding in *Corporate Express*, which it characterized as "emphasizing entrepreneurialism" and from which it gleaned that entrepreneurialism was "an important animating principle by which to evaluate those factors . . . ." *FedEx I*, 563 F.3d at 497. The *FedEx I* court then held that "*Corporate Express* is . . . doctrinally consistent with *United Insurance* and the Restatement." Id. at 503. Therefore, even assuming that the court in *FedEx III* had only addressed the issue in *dicta*, the D.C. Circuit had already expressly found that there was no conflict between the consideration of entrepreneurial opportunity as "an important animating principle" and Supreme Court precedent.

For the reasons set forth above, my colleagues' assertion that the "animating principle" doctrine, set forth in *FedEx I* and adopted in *SuperShuttle*, cannot be reconciled with *United Insurance* can only be true if the D.C. Circuit is simply wrong: wrong about what the Supreme Court held in *United Insurance* and wrong about what the common law of agency requires. Effectively, by asserting that their interpretation of *United Insurance* should trump that of the D.C. Circuit, my colleagues are taking the position that the Board knows better than the courts when it comes to interpreting the scope and meaning of Supreme Court decisions as well as interpreting the common law. I do not share that view.

2. Neither *SuperShuttle*, nor the application of *SuperShuttle,* treated "entrepreneurial opportunity" as the deciding consideration, to the exclusion of the other traditional common-law agency factors.

As the *SuperShuttle* Board carefully explained, the *FedEx II* Board mischaracterized the D.C. Circuit's analysis of entrepreneurial opportunity in *FedEx I* as treating entrepreneurial opportunities as the "the overriding consideration in all but the clearest cases" and as the "single animating principle in the inquiry." Id., slip op. at 8 (quoting *FedEx II*, 361 NLRB at 617-618). In my view, the *SuperShuttle* Board rightly found that based on the *FedEx II* Board's misreading of the D.C. Circuit's analysis of entrepreneurial opportunity, the *FedEx II* Board greatly diminished the significance of entrepreneurial opportunity to the Board's independent-contractor formulation by "creating a new factor ('rendering services as part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor." 367 NLRB No. 75, slip op. at 1.

To begin, the majority repeatedly asserts that the Board in *SuperShuttle* elevated consideration of entrepreneurial opportunities to an undue level of prominence, reasoning that the Board treated it as a sort of "super-factor." These assertions are erroneous. In *SuperShuttle*, the Board stated:

> [W]e will continue to adhere . . . to the [Supreme] Court's 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 opportunity) as decisive. And where the common-law factors, considered together, demonstrate that the workers in question are afforded significant entrepreneurial opportunity, we will likely find independent-contractor status. Thus, our approach is faithful to *United Insurance* and the common-law agency test that it requires.

The *SuperShuttle* Board further emphasized that "'the ten-factor test is not amenable to any sort of bright-line rule'" and that "'there is no shorthand formula or magic phrase that can be applied to find the answer, but all the incidents of the relationship must be assessed and weighed with no

one factor being decisive.'" Id., slip op. at 8 (quoting *United Insurance*, 390 U.S. at 258).

Importantly, the cases applying *SuperShuttle* demonstrate that the Board did not treat entrepreneurial opportunity as a "super-factor" but rather applied and considered all of the relevant common-law factors to determine whether the workers at issue do or do not possess entrepreneurial opportunity. In *Velox Express*, *Inc.*, 368 NLRB No. 61, slip op. at 1, 3–4 (2019), after evaluating the common-law factors through the prism of entrepreneurial opportunity, the Board concluded that many factors supporting employee status substantially outweighed the two factors supporting independent-contractor status, and the drivers had little entrepreneurial opportunity for economic gain. Specifically, the Board reasoned that the drivers did not have the authority to determine their work schedule, their routes, or their customers. Id., slip op. at 3. The Board indicated that the employer assigned routes with specific stops that drivers had to service on designated days and during specific time periods. Id. In addition, the Board explained that the drivers did not have "a proprietary interest in their routes, and thus they [could not] sell or transfer them, nor [could] they hire employees to service their routes." Id. The Board also reasoned that the employer's method of compensation did not provide the drivers significant entrepreneurial opportunities because they received the same amount of compensation regardless of their efforts. Id. Thus, the Board concluded that the drivers did "not have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative" and were deemed employees under the Act. Id. at 4.

Similarly, in *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1–2 (2020), the Board found that the employer's drivers had little opportunity for economic gain or risk of loss after considering the common-law factors through the prism of entrepreneurial opportunity, which weighed heavily against a finding of independent-contractor status. The Board observed that the drivers had little control over when and how long they worked and what loads to haul. Id. slip op. at 2. The Board further noted that the drivers did "not have their own routes, let alone a proprietary interest in routes that they can sell or transfer, nor can they hire employees to work in their stead." Id. The Board further explained that the employer determined the drivers' compensation and expenses. Id., slip op. at 2–3. The Board also noted that the drivers did not have to make "a significant initial investment or take on a serious risk of loss to enter into a relationship" because the employer provided the truck, which was leased to the drivers for an assigned shift. Id. slip op. at 3. Under these circumstances, the Board found that the drivers did not "have any meaningful opportunity for economic gain (or run any meaningful risk of loss) through their own efforts and initiative." Id. These cases show that the *SuperShuttle* standard "consider[s] how the evidence in a particular case, viewed . . . in light of all the common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity." 367 NLRB No. 75, slip op. at 11.[11] Moreover, the application of *SuperShuttle* in these cases, makes clear that the test poses no great bar to finding that individuals are employees rather than independent contractors.[12]

B. The standard set forth in SuperShuttle was not contrary to Board Precedent

My colleagues further maintain that the *SuperShuttle* standard must be reversed because it is contrary to Board precedent. To begin, it is rather bold for my colleagues to take this position when their decision today requires them to overrule two cases: *Arizona Republic*, 349 NLRB 1040 (2007), and *St. Joseph News-Press*, 345 NLRB 474 (2005). Indeed, my colleagues want to have it both ways. They criticize *SuperShuttle* for failing to apply established Board precedent, yet they do not have enough faith in that established precedent to revert back to it. Instead, they choose to create new law. They set forth new, limiting factors to be used to determine whether a putative contractor has a significant entrepreneurial opportunity. They suggest that only evidence that

[11] See also *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (2020) (finding that the judge correctly analyzed the common-law factors through the prism of entrepreneurial opportunity, as required under *SuperShuttle*, in determining that a worker lacked sufficient opportunity for economic gain to render her an independent contractor).

My colleagues maintain that my citations to *Velox Express* and *Intermodal Bridge Transport* do not support a finding that *SuperShuttle* was consistent with the common law because, by its own terms, *SuperShuttle* treated entrepreneurial opportunity as a "super factor." But, as discussed above, *SuperShuttle* said no such thing. And despite my colleagues' assertion to the contrary, these cases are in fact significant because they demonstrate that *SuperShuttle* meant what it actually said: that entrepreneurial opportunity is an animating principle for evaluating all of the traditional common-law factors. See *FedEx III*, 849 F.3d at 1128 (finding that *FedEx I*, which was adopted in *SuperShuttle*, "consider[ed] all of the common-law factors as the law requires").

[12] Likewise, contrary to my colleagues' assertion, the court in *FedEx I* did not treat entrepreneurial activity as a "trump card." Indeed, in finding that the FedEx drivers were independent contractors, the court considered all the common law factors, and indicated that it was the balance of the factors that led to its finding of independent-contractor status. 563 F.3d at 504.

In response to the *SuperShuttle* Board's position that that the *FedEx II* decision improperly revived the "economic realities" test, my colleagues maintain that it is the *SuperShuttle* standard that in fact "subordinated the common law to a particular vision of supposed 'economic reality' by treating entrepreneurial opportunity" as a sort of "super-factor." As discussed above, however, *SuperShuttle* did not treat entrepreneurial opportunity as a "super-factor."

the employer has effectively imposed constraints on an individual's ability to render services as part of an independent business is relevant.[13] They "reaffirm" the principle that, even where individuals have exercised an entrepreneurial opportunity—and realized a profit—they will not credit that exercise if an employer has placed "significant constraints" upon that entrepreneurial opportunity. Yet, even though it requires the overruling of Board precedent, they assert that their decision today merely "clarifies" existing precedent. I leave it to the reader to decide whether that is an accurate representation of today's decision. I also note that, in making this point, my colleagues must "disavow" the D.C. Circuit's characterization of Board precedent. In other words, the D.C. Circuit was wrong yet again.

In support of their contention that *SuperShuttle* is contrary to the Board's traditional independent-contractor analysis, my colleagues state that the Board's independent-contractor case law has historically considered whether the putative contractors had significant entrepreneurial opportunity for gain or loss only as one factor among the other relevant common-law factors.[14] They note that the Board decisions post-*Roadway* never examined "whether the position presents the opportunities and risks inherent in entrepreneurialism" and that the Board has never shifted its emphasis to entrepreneurial opportunity as an animating principle.

It is true that the post-*Roadway* Board decisions did not explicitly describe whether the putative contractors had significant entrepreneurial opportunity for gain or loss in this manner. And some cases relied on by my colleagues simply cite to the language whether the purported contractors have significant entrepreneurial opportunity for gain or loss alongside the Restatement factors. However, my colleagues have misconstrued the principle whether the putative contractors have significant entrepreneurial opportunity for gain or loss and have misread the post-*Roadway* cases by simply highlighting the Board's explicit reference to this language. Contrary to my colleagues' assertions, since *Roadway*, the Board has considered a number of common-law factors to determine whether workers were provided with the entrepreneurial opportunity for gain or loss.

In *Roadway*, the Board found that the employer's demanding schedules for the drivers and detailed specifications for the drivers' trucks effectively precluded drivers from pursuing business activity during their off-work hours and therefore constrained the "entrepreneurial independence" that ownership of a truck provides its driver. 326 NLRB at 851, fn. 36. The Board observed that the employer "has simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." Id. at 851. Moreover, the Board found that the drivers' potential for "entrepreneurial profit" was suppressed by the employer's control over their routes, the number of packages and stops on their routes, and the prices charged to customers, and their compensation. Id. at 852–853. Finally, the Board found that the employer's "considerable control" over whether the drivers can sell their routes imposed significant limitations on the drivers' potential to "influence their profits like entrepreneurs." Id. at 853.[15]

In addition, contrary to my colleagues' position, the Board in *Corporate Express Delivery Systems*, 332

[13] In support of that suggestion, they cite a Ninth Circuit case where, in fact, the respondent exercised restrictions against its drivers. Of course, the fact that constraints that are exercised are relevant does not mean that constraints that have not yet been exercised are not.

[14] As noted above, the Board's interpretation of the common-law agency test does not fall within the Board's area of expertise and, accordingly, is not entitled to deference upon judicial review. As the court in *FedEx III* recognized:

> [T]he Supreme Court held in *United Insurance* that the question whether a worker is an "employee" or "independent contractor" under the National Labor Relations Act is a question of "pure" common-law agency principles "involv[ing] no special administrative expertise that a court does not possess." 390 U.S. at 260. Accordingly, this particular question under the Act is not one to which we grant the Board *Chevron* deference . . . .

Id. at 1128.

Further, the fact that the D.C. Circuit has expressly stated that the Board is not due deference with regard to this issue renders my colleagues' statement that "[n]otably, the [D.C. Circuit] itself has repeatedly emphasized that the Board's "interpretation of its own precedent is entitled to deference" a bit puzzling. But, more importantly, because the Board is not entitled to deference, it is not clear to what extent the Board's past interpretation of the common-law test is even relevant to the fundamental question of whether the test set forth in *SuperShuttle* is consistent with traditional common-law agency analysis. Nevertheless, for the reasons I will explain, *SuperShuttle* did not conflict with Board precedent.

Somewhat relatedly, my colleagues highlight the fact that "then-Circuit Judge Garland" explained in "his detailed dissent" that the *FedEx I* court's "description of the Board's independent-contractor case law was not accurate." Putting aside the importance of that issue to his dissent, which primarily focused on the majority's interpretation of in-Circuit law, Judge Garland's dissent turned on his position that "[w]hile the NLRB may have the authority to alter the focus of the common-law test, this court does not." *FedEx I*, 563 F.3d at 404 (J. Garland, dissenting) (citing *Chevron USA, Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842–843, 863–864 (1984)). In the *FedEx III* decision, however, the D.C. Circuit expressly found that the Board is not entitled to any deference on its interpretation of the common-law agency test.

[15] The majority says that in *Roadway*, the Board merely considered whether the putative contractors had significant entrepreneurial opportunity for gain or loss as one factor among the other relevant common-law factors. As discussed above, the *Roadway* Board emphasized how specific common-law factors restricted the drivers' entrepreneurial opportunity for gain or loss in finding that the disputed drivers were employees rather than independent contractors. 326 NLRB at 851–853.

NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002), relied on entrepreneurial opportunity in evaluating the overall effect of the common-law factors. There, the Board found that the drivers had "no significant opportunity for entrepreneurial gain or loss" where the employer controlled the routes, the base pay, and the amount of freight on each route, and did not permit the drivers to add or reject customers and hire others to drive their route. Id. Although it is true that the Board did not expressly indicate that there was a shift in its analysis, it is clear that the "extent of control" common law factor was interpreted through the lens of entrepreneurial opportunity.[16]

In other cases, the Board has found that specific common-law factors favored independent-contractor status because they afforded workers with significant entrepreneurial opportunity for gain or loss. In *Dial-A-Mattress Operating Corp*., 326 NLRB 884, 891 (1998), the companion case to *Roadway*, the Board, in finding that the drivers were independent contractors, emphasized that the drivers had significant entrepreneurial opportunity for gain or loss where they could own multiple trucks and hire their own employees over whom they had complete control, they were not guaranteed minimum compensation, they could decline orders, and they were not expected to provide delivery services on every workday.[17] Similarly, in *St. Joseph News-Press*, 345 NLRB 474 (2005), the Board, found that certain conditions "permit[ted] 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.'" Id. at 479 (quoting *Corporate Express*, 292 F.3d at 780). Specifically, the Board reasoned that the carriers could hire full-time substitutes over whom they had complete responsibility, hold contracts on multiple routes, deliver other products (including for competitors) while delivering the employer's newspaper, and solicit new customers. 345 NLRB at 479. Likewise, in *Argix Direct, Inc*., 343 NLRB 1017, 1020 (2004), the Board, at the outset, emphasized that the "owner-operators ha[d] a significant proprietary interest in the instrumentalities of their work." In this respect, the Board noted that the employer's drivers owned or leased the trucks and the employer permitted the drivers to use their trucks for purposes other than delivering for the employer. Id. The Board further reasoned that some of the employer's drivers were entrepreneurs who owned multiple trucks and hired their own drivers and that all of the drivers could "choose to maximize or minimize their income" because they determined their work schedules and therefore chose when and when not to work. Id. at 1021.[18]

In sum, my colleagues are clearly incorrect when they assert that the post-*Roadway* Board decisions show no shift in emphasis away from control and to entrepreneurial opportunity. As discussed above, the Board has since *Roadway* found that specific common-law factors may or may not demonstrate entrepreneurial opportunity depending on the overall circumstances of the case. Indeed, as noted above, in *St. Joseph News-Press*, 345 NLRB at 479, the Board relied on the key language from the D.C. Circuit's decision in *Corporate Express*, in addressing the entrepreneurial nature of the carriers' employment. Board precedent simply does not support the *FedEx II* standard reinstated by my colleagues today that attempts to cabin consideration of entrepreneurial opportunity to one aspect of a single factor.

Further, the *SuperShuttle* Board and D.C. Circuit's approach of treating entrepreneurial opportunity as a principle to help evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain**,** is consistent with other courts of

[16] Likewise, in *Slay Transportation Co*., 331 NLRB 1292, 1294 (2000), the Board found that the drivers did not have a significant entrepreneurial opportunity for financial gain or loss where the drivers did not operate independent businesses but instead performed work exclusively for the employer and the employer determined the drivers' compensation and the prices charged to the customers. The Board further noted that even though the drivers were permitted to hire other drivers, they could only do so at wage rates set by the employer. Id. In those circumstances, the Board found:

> Despite this theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer over the other aspects of its relationship with the owner-operators severely circumscribes such opportunity. In reality, there is little economic independence realized by the owner-operators. Thus, there has been no demonstration that this ability has resulted in true economic gain, or even the chance for such gain.

Id.; see also *Stamford Taxi, Inc*., 332 NLRB 1372, 1373 (2000) (finding that the employer's rules "severely restrict[ed] the drivers' entrepreneurial opportunities to engage in taxicab business independent of the [employer]").

[17] My colleagues argue that the Board in *Dial-A-Mattress* did not place any more importance on entrepreneurial opportunity for gain or loss than other factors it considered. To the contrary, the Board emphasized that the employer had "structured its relationship with the owner-operators to allow them (with very little external controls) to make an entrepreneurial profit beyond a return on their labor and their capital investment." Id. at 891.

[18] My colleagues maintain that, in *Arizona Republic*, 349 NLRB 1040 (2007), the Board merely considered entrepreneurial potential in connection with method of compensation. However, the Board found that the newspaper carriers had entrepreneurial potential to increase their income where they could hire full-time substitutes and control the substitutes' terms and conditions of employment, hold contracts on multiple routes, deliver other products while on their routes, negotiate the piece rate for delivering the employer's newspaper, solicit new customers, and receive tips. Id. at 1044-1045. And the D.C. Circuit and Board have made clear that the determination as to whether putative independent contractors have significant entrepreneurial opportunity for gain or loss includes these other considerations as well.

appeals that have also recognized that entrepreneurial opportunity is an important consideration in evaluating the traditional common-law agency factors.[19] In *Painting Co. v. NLRB*, 298 F.3d 492, 500 (6th Cir. 2002), the Sixth Circuit Court of Appeals agreed with the Board that the two individuals at issue were "not independent contractors, especially because they did not have any meaningful entrepreneurial or proprietary component to their employment." The court reasoned that neither individual "exhibited any meaningful entrepreneurial or proprietary characteristics that would lead one to believe that they controlled the terms of the work they completed." Id. Similarly, in *NLRB v. Friendly Cab Co*., 512 F.3d 1090, 1097 (9th Cir. 2008), the Ninth Circuit Court of Appeals, in finding that drivers were employees "place[d] particular significance on Friendly's requirement that its drivers may not engage in any entrepreneurial opportunities." Citing the D.C. Circuit's decision in *Corporate Express*, 292 F.3d at 780, the Ninth Circuit recognized

> The ability to operate an independent business and develop entrepreneurial opportunities is significant in any analysis of whether an individual is an "employee" or an "independent contractor" under the common law agency test. Friendly's restrictions against its drivers' operating independent businesses or developing entrepreneurial opportunities strongly supports the NLRB's determination that Friendly's drivers are employees.

512 F.3d at 1098. And the Eleventh Circuit Court of Appeals in *NLRB v. Associated Diamond Cabs, Inc.* stated that "Congress intended for the line between employees and independent contractors to be drawn by reference to the traditional principles of agency law and, within those principles, the degree to which agents have only a vicarious interest in the work as opposed to an independent entrepreneurial interest in the venture." 702 F.2d 912, 919 (11th Cir. 1983) (internal quotation marks omitted).[20] Accordingly, what my colleagues attempt to depict as one aberrant decision in *FedEx I*, is anything but that.

Further, I take issue with my colleagues' position that the court in *FedEx I* pulled the approach of treating entrepreneurial opportunity as a principle to evaluate the significance of the common-law factors in determining whether a worker is an employee or an independent contractor out of thin air.[21] Not only do my colleagues misread the Board's post-*Roadway* precedent as detailed above, but they fail to acknowledge that it was the Board itself that advocated for this approach before the D.C. Circuit in the first place. In the Board's brief to the court in *Corporate Express*, the General Counsel said that "[a] related consideration, as Judge Learned Hand made plain, is the extent to which the service provider has a significant proprietary interest in a business and possesses significant entrepreneurial prerogatives that influence his remuneration." *Corporate Express Delivery Systems v. NLRB*, 2001 WL 36039100, at 22 (November 16, 2001). The General Counsel further observed that "the fact that a service provider is subject to significant manner-and means controls cannot convert a bargain that was struck by an independent businessman into a basis for finding an employer-employee relationship." Id. Conversely, the General Counsel noted that "where there is no ownership or proprietary interest in a business and minimum entrepreneurial prerogatives, it is more likely that an employer-employee relationship will be found to

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[19] The majority points to the D.C. Circuit's decision in *Lancaster Symphony Orchestra*, 822 F.3d 563 (D.C. Cir. 2016), where the court enforced the Board's finding that symphony orchestra musicians were statutory employees, observing that the court's analysis of entrepreneurial opportunity was inconsistent with its approach in *FedEx I.* But the court in *Lancaster Symphony* explicitly stated that "[i]n considering what counts as entrepreneurial opportunity, we are guided by our decisions in *Corporate Express* . . . and *FedEx [I]*." 822 F.3d at 569 (internal citations omitted). Significantly, quoting *FedEx I*, the court stated that "[w]e too have considered 'whether the position presents the opportunities and risks inherent in entrepreneurialism.'" Id. The *Lancaster Symphony* court further explained that it held that the FedEx drivers in *FedEx I* were independent contractors because "we emphasized that the record revealed 'many of the . . . characteristics of entrepreneurial potential.'" Id. (citation omitted). But the court found that "[u]nlike in *FedEx [I]*—but as in *Corporate Express*—the record here reveals few "characteristics of entrepreneurial potential." Id. Citing to *Pennsylvania Interscholastic Athletic Assn. v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019), the majority makes the same argument. But again, the court there relied on its decision in *Corporate Express*, in stating that it considers whether the workers have a significant entrepreneurial opportunity for gain or loss. 926 F.3d at 840.

[20] My colleagues reject my position that these circuit courts have recognized that entrepreneurial opportunity is a significant consideration in assessing the traditional common-law agency factors. Pointing variously to the courts' "rigorous, detailed analysis of the common-law factors" and their "comprehensive review of the Board's findings," my colleagues represent these cases as "merely assess[ing] a putative contractor's entrepreneurial potential as a single consideration among other common-law factors." My discussion of these cases above, which includes specific quotations from those cases, demonstrates otherwise. In any event, I am confident that readers can decide for themselves which view of these cases is more accurate.

My colleagues also observe that the Eleventh Circuit in *Associated Diamonds* "relied extensively on the now-repudiated 'right-to-control' test." However, it is clear from that decision that the court effectively shared the *SuperShuttle* Board's view that control and entrepreneurial opportunity are two sides of the same coin. 702 F.2d at 924 ("A fortiori the annual lessees, over whom the Company concededly exercises even less control and who have a greater investment and entrepreneurial interest in the taxicabs than the daily lessees also are independent contractors.").

[21] If anything, one might say that the *FedEx II* majority's revision of the common-law agency test in *FedEx II*, which was not based on any particular formulation set forth in an earlier Board decision or a court of appeals decision, could be said to have come out of thin air.

exist." Id. As set forth above, the D.C. Circuit in *Corporate Express* adopted the General Counsel's argument, stating it was reasonable of the Board "to focus not upon the employer's control of the means and manner of the work but instead upon whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss." 292 F.3d at 780. Building on *Corporate Express*, the General Counsel emphasized to the court in *FedEx I* that it had previously found "that a significant factor bearing on an employer's control over a worker is the extent to which the worker can be said to have an entrepreneurial interest in his business." *FedEx Home Delivery v. NLRB*, 2008 U.S. D.C. Cir. Briefs LEXIS 28, at 41-42 (June 20, 2008). The General Counsel further pointed to "the Board's focus on the existence of 'significant entrepreneurial opportunity for gain or loss.'" Id. at 42. Accordingly, contrary to my colleagues' position, this was not the D.C. Circuit's "misperception that the Board . . . adopted a new approach." Rather, the court reasonably adopted and endorsed the Board's characterization of entrepreneurial opportunity. And as explained above, this approach of treating entrepreneurial opportunity as a principle to help evaluate the overall effect of the common-law factors that was advocated to the court comports with the Board's independent-contractor case law.[22]

C. SuperShuttle is consistent with common-law agency principles

Finally, the majority asserts that the independent-contractor standard in *SuperShuttle*, based on the standard adopted by the D.C. Circuit, cannot be reconciled with common-law agency principles. Again, by taking this position, the necessary conclusion is that the D.C. Circuit is wrong. And again, I disagree. This position is especially remarkable given that no court has rejected the *SuperShuttle* decision's assessment of the role entrepreneurial opportunity plays in evaluating independent contractor status. In fact, as discussed above, several courts have recognized entrepreneurial opportunity as an important consideration in evaluating the common-law agency principles.

As detailed above, the Board's subtle shift in emphasis from control to entrepreneurial opportunity as a principle to help evaluate the overall effect of the common-law factors did not fundamentally revise the Board's independent-contractor test. As set forth in *SuperShuttle*, employer control and entrepreneurial opportunity are opposite sides of the same coin: the more of one, the less of the other. 367 NLRB No. 75, slip op. at 9. The Board in *SuperShuttle* simply shifted the lens through which the Board considers the importance of the common-law factors to what the D.C. Circuit independently determined to be a "more accurate proxy" to "'capture[] the distinction between an employee and an independent contractor.'" Id., slip op. at 11 (quoting *FedEx I*, 563 F.3d at 497).[23]

The majority repeatedly states that "SuperShuttle rested on the premise that entrepreneurial opportunity is the core concept of the traditional common-law agency test." The majority has mischaracterized a comment in a footnote in *SuperShuttle* stating that "as our review of the Board's case law shows, entrepreneurial opportunity, however it is *characterized*, has always been at the core of the common-law test." 367 NLRB No. 75, slip op. at 2 fn. 4 (emphasis added). The *SuperShuttle* Board did not say, as my colleagues claim, that any of the Restatement Section 220(2) factors expressly cite the principle of entrepreneurial opportunity. Rather, the point the footnote was making was that the Board's case law post-*Roadway*

[22] My colleagues attempt to minimize the D.C. Circuit's reliance on the General Counsel's arguments made in briefs to the court, noting that such arguments did not appear in Board decisions. However, the General Counsel's arguments in this regard were consistent with post-*Roadway* Board decisions in which the Board, as set forth above, considered a number of common-law factors to determine whether workers were provided with the entrepreneurial opportunity for gain or loss. And although this refinement was done at the Board's urging, the D.C. Circuit decided for itself that a consideration of a "significant entrepreneurial opportunity for gain or loss" was an effective means of "captur[ing] the distinction between an employee and an independent contractor." *Corporate Express*, 292 F.3d at 780 (internal quotation marks omitted).

[23] My colleagues assert that *SuperShuttle*'s characterization of employer control and entrepreneurial opportunity as opposite sides of the same coin is without support, reasoning that the common-law agency factors "cannot be reduced to a single comparison." However, as detailed above, *SuperShuttle* made clear that its analysis considers all of the common-law factors, observing that it would "consider how the evidence in a particular case, viewed . . . in light of all the common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity." 367 NLRB No. 75, slip op. at 11. This principle from *SuperShuttle* that employer control and entrepreneurial opportunity are opposite sides of the same coin is illustrated in the cases applying the standard. For example, in *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 1–2, the Board, in finding that the evaluation of common-law factors showed that the employer's drivers had little opportunity for economic gain or risk of loss, emphasized common-law factors showing the employer's control. The Board observed, among other things, that the drivers had little control over when and how long they worked and what loads to haul. and the employer determined the drivers' compensation and expenses. Id., slip op. at 2-3. The Board further noted that the employer maintained a progressive discipline policy with several policies and procedures, which it used to control the details of the driver's work. Id., slip op. at 3. Thus, the Board emphasized that the employer's extensive control over the drivers and "their attendant lack of entrepreneurial activity" evidenced that the drivers were employees. Id.; see also *Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (observing that the employer, through various measures substantially limited the dancers' entrepreneurial opportunity).

shows that the Board, in evaluating entrepreneurial opportunity, has considered a number of common-law factors to determine whether workers were provided with the entrepreneurial opportunity for gain or loss. Further, the footnote is consistent with *Corporate Express*, where the D.C. Circuit drawing on the comments in the Restatement (Second) of Agency, reasoned that whether the putative independent contractors have a significant entrepreneurial opportunity for gain or loss "better captures the distinction between an employee and an independent contractor," because it is not "the degree of supervision under which [one] labors but . . . the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder," that better illuminates one's status. 292 F.3d at 780.

Tracking the language in *FedEx II*, my colleagues reiterate that the Board will consider only actual (not merely theoretical) entrepreneurial opportunity, and the constraints on the individual's ability to take such opportunities. In so finding, they disagree with the court's finding in *FedEx I* that the FedEx drivers' right to sell their routes provided evidence of actual entrepreneurial opportunity, reasoning that the drivers' ability to assign their routes was constrained. I agree with my colleagues that the Board should give weight only to actual (not merely theoretical) entrepreneurial opportunity. The Board has long considered whether entrepreneurial opportunities are actual and not merely theoretical.[24] Indeed, the D.C. Circuit has stated that "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the company's claim that the workers are independent contractors." *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995). Further, the Board has analyzed entrepreneurial opportunity for gain or loss in terms of constraints on the ability to take such opportunities (e.g., whether a putative contractor has the ability to work for other companies or hire employees without approval).[25] But contrary to the majority's position, I do agree with the court in *FedEx I* that the FedEx drivers' right to sell their routes provided evidence of actual entrepreneurial opportunity. The *FedEx I* court found that drivers had significant entrepreneurial opportunity where two drivers were able to sell their routes for a profit ranging from $3,000 to $16,000, drivers could operate multiple routes, and drivers could use their trucks to conduct other business outside of FedEx work. 563 F.3d at 499-500. The court found the fact that at least one person had seized an opportunity was sufficient to establish that an actual opportunity exists because "there is no unwritten rule or invisible barrier" preventing others from taking such opportunities. Id. at 502 (quoting *C.C. Eastern*, 60 F.3d at 860). The majority further argues that in *FedEx I*, the FedEx drivers' opportunities to assign their routes was "significantly constrained" because they could only sell to buyers that FedEx "accepted as qualified." But as the court found, being qualified simply meant that the buyer met Department of Transportation regulations. *FedEx I*, 563 F.3d at 499. And the Board has held that government-imposed rules and regulations generally do not constitute control by the employer. *A.K.A. Metro Cab Co*., 341 NLRB 722, 724 (2004).

Finally, the majority contends that *SuperShuttle*'s approach to entrepreneurial opportunity is not supported by the Act's policies. The majority reasons that the policy of the Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" and that "exclusions from statutory coverage should be interpreted narrowly, not expansively." They further cite the Supreme Court's admonition that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). But as discussed above, the Board made clear in *SuperShuttle* that Congress rejected the *Hearst* approach of deciding "independent contractor" issues based on policy considerations. In its place, Congress decided that such issues are to be resolved on the basis of the common law.

D. The Majority's Return to FedEx II will Likely Not Survive Judicial Review

As I have already highlighted, the majority's decision to overturn *SuperShuttle* and return to the standard in *FedEx II* likely will not withstand judicial review.[26] The

[24] See, e.g., *Slay Transportation*, 331 NLRB at 1294 (finding employee status where, "despite [a] theoretical potential for entrepreneurial opportunity, the control exercised by the [e]mployer over the other aspects of its relationship with the owner-operators severely circumscribed such opportunity"); *Roadway*, 326 NLRB at 853 (finding employee status where employer "imposed substantial limitations and conditions").

[25] See, e.g., *Stamford Taxi, Inc*., 332 NLRB at 1373 (noting that employer's rules "severely restrict[ed] the drivers' entrepreneurial opportunities to engage in taxicab business independent of the [employer]"); *Corporate Express*, 332 NLRB at 1522 (finding that the drivers had "no significant opportunity for entrepreneurial gain or loss" where the employer controlled the routes, the base pay, and the amount of freight on each route, and did not permit the drivers to add or reject customers and hire others to drive their route).

[26] My colleagues insist that, by making this and similar statements, I am incorrectly asserting that *FedEx I*, and similar cases in other cir-

D.C. Circuit having (twice) found that a standard using entrepreneurial opportunity as an "animating principle"—as set forth in *Corporate Express* and *FedEx I* and adopted by *SuperShuttle*—is consistent with Supreme Court law, Board precedent, and the common law, there is no reason to expect the court to reach a different conclusion this time. Because the D.C. Circuit has plenary jurisdiction to review Board decisions, it is a possible venue for review of the instant case.[27] Nor, for that matter, do I believe my colleagues' assertions that *SuperShuttle* must be overruled will be welcomed by the Eleventh Circuit, which would also have jurisdiction over any petition for review in this case. See *Associated Diamond Cabs*, 702 F.2d at 924.

In addition, as discussed above, the Board's return to the *FedEx II* standard for determining independent-contractor status is entitled to no deference by a reviewing court. In *United Insurance*, in applying the common-law agency test, the Supreme Court specifically held that the statutory exclusion from the Act of those "having the status of independent contractor" is a "determination of pure agency law" that involves "no special administrative expertise that a court does not possess." 390 U.S. at 260; accord *FedEx III*, 849 F.3d at 1128.

For all of these reasons, as well as the reasons already set forth in *SuperShuttle*, it is my view that *SuperShuttle* Board properly overruled the Board's *FedEx II* decision and restored to the Board's analysis the appropriate consideration of entrepreneurial opportunity as the animating principle of all independent-contractor factors under the common law.

III. APPLICATION OF STANDARD TO FACTS OF THIS CASE

Nonetheless, turning the facts of this case, I agree with my colleagues that the workers whom the Petitioner seeks to represent—makeup artists, wig artists, and hairstylists (collectively known as stylists)—are employees of The Atlanta Opera, Inc. (the Employer). I believe that the result in this case is the same under the *FedEx II* standard, which my colleagues have reinstated today, or the *SuperShuttle* standard.

A. Essential Facts

The Employer presents live operatic performances at theatrical venues in the Atlanta, Georgia area. The process of planning each operatic production starts years in advance. Tomer Zvulun, the Employer's general and artistic director, is charged with artistic quality and planning as well as managerial duties. The Employer employs a total of 32 full-time staff, including senior management, as well as 16 seasonal employees, including company players and studio artists. The Employer typically offers four performances of four productions on its main stage each season in addition to four to eight performances of two smaller operas. Each season runs from autumn to spring. The Employer begins the planning of a particular opera by choosing a director who determines the artistic vision of the production. The director selects a design team, which is comprised of lighting designers, a costume designer, a set designer, a sound designer, a wig designer, and/or a makeup designer.

The wig and makeup designer collaborates with a wig and makeup department head, who hires the stylists that are needed for the production. Stylists do not work under written contracts. They are paid an hourly rate and submit written timesheets to account for their hours worked. Stylists are also able to earn overtime pay based on the Employer's needs. The Employer does not share any of its revenues from ticket sales with stylists. And stylists do not make any profit or risk loss based on the production's success. None of the stylists are on the Employer's payroll but rather are considered vendors. The Employer does not pay for unemployment insurance, and stylists are not eligible for health insurance or any other benefits. And the Employer does not withhold taxes from stylists' pay and stylists complete a W-9 tax form. Stylists are not required to wear uniforms, although they wear black during performances to minimize their visibility to the audience. Stylists are not covered by the Employer's personnel policies except for its infectious disease policies.

Frandresha Brie Hall, who is a member of the petitioned-for unit, has been the wig and makeup designer and wig and makeup department head for the Employer's most recent productions. For both positions, unlike the other stylists, Hall signed agreements with the Employer indicating that she is an independent contractor. Hall chooses stylists who can commit to the entire production, which typically comprises 8 days of work for rehearsals and public performances. A stylist commits to a schedule for the entire course of the show after being hired for a production. If a stylist is unavailable for a specific performance, Hall informs the Employer that she is finding

cuits, establish how the Board *must* approach entrepreneurial opportunity under Supreme Court precedent or the common law. That, of course, is not what I am suggesting. I am noting that the majority here is taking the position that the Board's decision in *SuperShuttle*—which adopted the test set forth by the D.C. Circuit in *FedEx I*—*must* be overruled. To the extent that the D.C. Circuit and other courts have, in fact, embraced the same standard that was adopted in *SuperShuttle*, I do not think it is a stretch to suggest that it may not be an easy task to convince those courts to ignore their in-circuit precedent.

[27] See Sec. 10(f) of the Act: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . "

a substitute. Stylists cannot hire or find their own replacements if they are not available for a particular date.

Hall assigns work to each of the stylists. Stylists' main duty is to implement the performers' wig, hair, and makeup looks required for each production. Specifically, stylists apply makeup for the performers, prepare wigs to fit them to the specific performers, style performers' natural hair based on the desired looks, prepare special makeup effects, and take off the performers' makeup, wigs, and microphones after the performance. The Employer provides no training nor orientation for stylists. Rather, stylists are required to have the skills to do the hair, wig, and makeup work that is necessary for the job. Hall looks to hire stylists who have the requisite skills and who have worked on past productions by the Employer. Stylists' work entails specific knowledge of makeup, hair, and wigs for stage productions, including the skill to achieve specific looks and styles. Hairstylists are required to be certified in Georgia.

Although no one directly monitors or instructs stylists while they do their wig and makeup work, they are expected to implement the vision that director Zvulun has created for each character. Zvulun typically provides instruction in the form of verbal or written notes to Hall, which Hall relates to the stylists. Hall always follows the director's directives, and with Zvulun's constant feedback throughout rehearsals, the characters' respective looks are created. After stylists are finished styling the performers, Hall checks their work to make sure that their looks comport with the Director's guidelines. Zvulun also provided directives directly to the stylists, including, among other things, instructing stylists to use more eyeliner, tighten ponytails, and modify a wig. The Employer supplies stylists with all requisite tools but if they prefer, stylists can bring their own tools. Stylists' hours of work are determined solely by the Employer's master schedule and the specific hair, wig, and makeup needs for each production. Based on knowledge of the performers' needs, Hall schedules stylists based on the Employer's rehearsal and performance schedule.

Stylists work for the Employer for only one production. The Employer does not commit to rehire stylists it has used for past productions for future productions. Nor does the Employer limit the stylists' ability to work with other performing-arts entities. Stylists are able to commit to other jobs during a production with the Employer. However, on show days, stylists are working from 7 to 9 hours.

B. Applying the Common-Law Factors

I find that under either the common-law agency test as stated in *SuperShuttle* or the reinstated *FedEx II* standard, the Employer failed to meet its burden of establishing that the stylists are independent contractors. I therefore agree with my colleagues that the Employer's stylists are employees under Section 2(3) of the Act.

1. Extent of control by Employer

I agree with my colleagues that this factor weighs in favor of employee status. The Employer exercises substantial control over the essential details of stylists' day-to-day work. In this respect, the stylists' main duty is to execute director Zvulun's artistic vision for each character. The Employer controls every detail of a character's look. Moreover, the Employer determines the time and location of rehearsals and performances, the stylists' daily schedules, and the availability of breaks and overtime. See *Centerfold Club*, 370 NLRB No. 2, slip op. at 1 (finding that unlike the drivers in *SuperShuttle* that had a high degree of autonomy, the employer maintained substantial control over the dancers' day-today work which limited the dancers' opportunities for economic gain); *Velox Express*, 368 NLRB No. 61, slip op. at 3-4 (finding that the employer's drivers were employees where, among other things, they did not have the ability to determine their schedules).[28]

2. Method of payment

I find that this factor weighs heavily in favor of employee status. The Employer pays stylists an hourly wage with the potential for overtime. Because stylists are guaranteed the same rate of compensation for a performance, over which they have no control, they do not have any real opportunity for economic gain (or, conversely, risk of loss) through their own efforts and initiative. See *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 2 (finding that employer's method of compensating the drivers did not provide them entrepreneurial opportunity where they were paid a per-load rate); *Velox Express*, 368 NLRB No. 61, slip op. at 3 (finding that where the drivers were paid a flat rate, they "[could not] work harder, let alone smarter, to increase their economic gain" and they "receive[d] the same amount of compensation no matter what they d[id]").[29]

[28] See also *BKN, Inc*., 333 NLRB 143, 145 (2001) (finding that the employer exercised extensive control over the details of the writers' work based on its revisions and suggestions to the writer's work in the development of the script); *Royal Palm Dinner Theatre*, 275 NLRB at 682 (finding that where the employer exercises complete control over the manner and means by which the desired result is accomplished, the person performing the service is an employee).

[29] See also *BKN*, 333 NLRB at 145 (finding that employee-writers had no substantial proprietary interest and no significant entrepreneurial opportunity for gain or loss when they were paid a per script fee determined by the employer and had no means to increase their compensation through the use of discretion in their work performance).

3. Instrumentalities, tools, and place of work

I agree with my colleagues that this factor weighs in favor of employee status.

The Employer furnishes all equipment, supplies, and workspaces that is required for stylists to do their jobs. Unlike in *SuperShuttle*, where the franchisees made significant initial investment, including paying the franchise fee and acquiring a van, and then continued to make ongoing investments to maintain and operate the van, stylists' investment is minimal. See *Centerfold Club*, 370 NLRB No. 2, slip op. at 1, 17 (noting that the employer's dancers made minimal investment where the employer provided the building, furniture, lighting, sound system, stages, and music).

4. Supervision

I agree with my colleagues that this factor weighs in favor of employee status. Although the Employer doesn't directly monitor or instruct stylists while they do their wig and makeup work, the Employer controls their work by relating constant detailed feedback and instructions. See *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 3 (noting that although the drivers were free from in-person supervision, the employer controlled the details of their work through a several policies and procedures).

5. Whether or not the parties believe they are creating an independent-contractor relationship

I agree with my colleagues that this factor inconclusive. Aside from Hall, all stylists entered into informal oral agreements that did not address stylists' relationship to the Employer, and there was no mutual understanding between the parties. Compare *St. Joseph News-Press*, 345 NLRB at 479 (noting that the parties believed that they were creating an independent contractor relationship where the carriers' contracts indicated that there was an independent contractor relationship).

6. Whether or not individual is engaged in a distinct occupation or business

I find that this factor weighs in favor of contractor status. As recognized by my colleagues, stylists work in a distinct occupation as theatrical makeup artists and wig and hair stylists. They have specialized knowledge in this field and are hired by the Employer for their professional skills. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB 846, 847 (2004) (finding that models at art academy "engaged in the distinct occupation of modeling" supported contractor status). However, I disagree with my colleagues that stylists are fully integrated into the Employer's company and productions. In this respect, stylists do not engage in business in the Employer's name. Nor are they subject to the Employer's rules and regulations. See *Minnesota Timberwolves Basketball, LP*, 365 NLRB No. 124, slip op. at 6 (2017) (finding that crewmembers were not well integrated into the employer's organization where they did conduct business in the employer's name, identify themselves out as the employer's employees, were not issued employer credentials, or handbook, and did not attend employer meetings or events such as holiday parties); compare *Intermodal Bridge Transport,* 369 NLRB No. 37, slip op. at 13 (finding that the drivers were fully integrated into the employer's operations where the drivers operated in the employer's name and they used the employer's insurance).

7. Whether or not work is part of the regular business of the employer & the principal's business

I agree with my colleagues that these factors weigh in favor of employee status. These two factors are closely related. As my colleagues observe, the stylists' job in providing makeup, hair, and wig treatments to onstage performers is necessary to the Employer's regular business of presenting opera performances. The Employer cannot conduct its business without stylists. See *Intermodal Bridge Transport*, slip op. at 3 (finding employee status where drivers' work was an essential part of employer's logistics, drayage, and container-storage business); *BKN, Inc.*, 333 NLRB at 145 (holding that employee-writers clearly performed functions that were an essential part of the employer's normal business).

8. Length of employment

I agree with my colleagues that this factor weighs in favor of contractor status.

Stylists are hired for a single-production and there is no evidence that they have any expectation of continuous employment. See *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (finding that the employer and the models did not have an ongoing relationship indicative of employee status where the model's contract was limited to a single a semester).

9. Skill required in the occupation

I agree with my colleagues that this factor weighs in favor of contractor status. As set forth above, stylists exercise considerable skill in achieving the wig, hair and makeup looks that is required for each production. Further, the Employer does not provide training for stylists; they are expected to know how to do the work required for the job.

10. Determination

Evaluating the common-law factors through the prism of entrepreneurial opportunity, I find that on the facts of

this case, stylists have little opportunity for economic gain or, conversely, risk of loss. As set forth above, the Employer exercises significant control over stylists' work, which in turn, results in a significant degree of control over stylists' opportunities for economic gain. The Employer controls stylists' schedules and determines the hours to be worked, including the need for overtime. Further, the Employer's method for compensating stylists does not afford them entrepreneurial opportunity. Stylists are paid an hourly rate and do not receive a percentage of the Employer's revenues from ticket sales, nor do they sustain profits or losses based on the relative success of a production. Further, stylists are unable to subcontract or hire anyone else to do hair, wig, and makeup work for them. See *Intermodal Bridge Transport*, 369 NLRB No. 37, slip op. at 2 (finding that employer's drivers have little opportunity for economic gain where, among other things, they could not hire others to work for them). In addition, unlike the drivers in *SuperShuttle*, who made a significant economic investment and faced significant economic risk, stylists make minimal investment and have minimal economic risk. Therefore, stylists do not have a proprietary interest in their work. Finally, that stylists routinely work for several employers does not so much reflect significant entrepreneurial opportunity as it does the fact that the Employer's productions occur on a seasonal and intermittent basis, and therefore exclusive employment with the Employer is not possible. See *Velox Express*, 368 NLRB No. 61, slip op. at 4.

Therefore, I agree with my colleagues that the Employer failed to establish that the stylists are independent contractors. The stylists are thus employees under Section 2(3) of the Act.

CONCLUSION

As set forth above, I believe that *FedEx II* was wrongly decided and that my colleagues' return to that standard is entirely unjustified. In *SuperShuttle*, the Board acted in response to the D.C. Circuit's rejection of the Board's operative independent-contractor standard set forth in *FedEx II*. The *SuperShuttle* decision incorporated the established standard used by the D.C. Circuit, which, as the court found, was both consistent with common law and Supreme Court precedent. By contrast, since the issuance of *SuperShuttle*, no court has indicated disagreement with the D.C. Circuit's standard. To the contrary, other courts have similarly recognized that entrepreneurial opportunity is an important consideration in evaluating the traditional common-law agency factors. Because I believe that *SuperShuttle* was correctly decided, and further, because I am far less optimistic than my colleagues that the standard they set forth today will find success in the courts of appeals, I dissent.

Dated, Washington, D.C. June 13, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD