FOR IMMEDIATE RELEASE: **Contact:** James Hallinan

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AG Balderas Files Brief in Support of Misclassified Employees' Rights to Organize

Albuquerque, NM – Today, Attorney General Hector Balderas, as a part of a coalition of 12 state attorneys general, filed a brief to the National Labor Relations Board in support of a decision against Velox Express Inc. that concluded its misclassification of employees as independent contractors constituted an unfair labor practice in violation of the National Labor Relations Act.

The Administrative Law Judge in the case *Velox Express Inc. vs. Jeannie Edge* determined that Velox Express, an Indiana-based company that performs medical specimen pick-ups, retail deliveries, home infusions and long-term care pharmacy work, misclassified its drivers as independent contractors and restrained them from exercising their right to unionize.

"We must protect workers' rights to be properly classified to ensure they get the benefits and protections they deserve, but we must also protect New Mexico small businesses following the rule of law so they are not unfairly positioned against those businesses that are not," said Attorney General Balderas.

According to the brief, misclassification is an increasingly common way for employers to avoid their legal obligations to employees and to unfairly compete in the marketplace. When employers misclassify their workers as independent contractors, it is harder for those employees to assert their workplace rights, including protections from wage theft, harassment and discrimination. Misclassified workers are also denied Occupational Health and Safety Act protections, and are unable to form unions, collectively bargain, or join in concerted efforts to improve conditions in their workplace without fear of reprisal from employers.

Employers that misclassify their workers are able to avoid paying unemployment insurance and contributing to the worker's compensation system, which poses significant cost in terms of lost revenue for state, local, and federal government.

The coalition of state attorneys general submitted today's brief at the invitation of the National Labor Relations Board. Joining Attorney General Balderas in today's coalition are attorneys general from Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Oregon, Virginia and Washington.

Please see attached for a copy of the brief that was filed this morning.

# # #

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC.

and **Case 15-CA-184006**

JEANNIE EDGE, an Individual

BRIEF OF THE STATES OF MASSACHUSETTS, PENNSYLVANIA, CONNECTICUT, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, VIRGINIA, AND WASHINGTON AS AMICI CURIAE, IN SUPPORT OF THE GENERAL COUNSEL'S REQUEST TO AFFIRM THE ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF INTEREST

In response to the National Labor Relations Board's invitation, the *Amici* States of Massachusetts, Pennsylvania, Connecticut, Illinois, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Virginia, and Washington submit this brief in strong support of the Administrative Law Judge's ("ALJ") decision concluding that misclassification can constitute an unfair labor practice under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. *Amici* States appreciate the opportunity to share their views with the Board on an issue that is of particular importance to them, and urge the Board to consider the threat misclassification poses to the States, their treasuries, and their residents.

Our States enforce laws in the public interest, including those that set fair labor standards and affect the health and safety of working people. We enforce some of the most basic employee rights, including minimum wage and overtime laws, and administer unemployment and worker's compensation systems. And we share interests in protecting those who are most vulnerable to workplace exploitation and ensuring that workers may exercise their rights. *Amici* States recognize that access to a host of legal protections depends upon the proper classification of employees.

Although these laws and systems vary among *Amici* States, each confronts the considerable challenge of enforcing labor standards and administering public programs in the face of growing employee misclassification. Many employers who misclassify employees as independent contractors do so to avoid their legal obligations as employers and to discourage employees from asserting their rights. These employers fail to contribute to unemployment systems, maintain adequate worker's compensation coverage, shoulder their share of employment taxes, observe workplace safety standards, or pay according to the minimum

standards set by law. Misclassification has become ordinary, harming not just misclassified workers but the public at large. Employers' tax avoidance costs the States hundreds of millions in revenue annually. As a result, States must divert already limited public resources and cut spending in other critical areas, all to the detriment of local communities.

At the same time, misclassified employees, having been told that they are independent contractors, believe that they are ineligible for workplace protections and therefore do not attempt to assert their rights or report violations to state agencies. Misclassification thus makes it significantly more difficult for States to detect and redress the concomitant labor and tax violations. Employers who misclassify workers also have an unfair advantage over employers who follow the law and we, the undersigned States, have an interest in ensuring a level playing field for all employers in our respective states.

Collective action and organizing efforts play an important role in securing adequate wages, benefits, and working conditions. To that end, it is critically important that workers are free to avail themselves of the workplace protections guaranteed to them as employees under the NLRA. Employers who misclassify their employees deny them access to the right to engage in collective action for mutual protection and impede employees' access to a host of other workplace protections. When misclassification is not accidental, but clear and obvious as it is in this case, it constitutes an unfair labor practice in violation of Section 8(a)(1) of the NLRA. Accordingly, the ALJ's decision should be upheld.

ARGUMENT

Illegal employment misclassification is a major and growing problem that harms workers, law-abiding employers, and all levels of government. Misclassification not only denies workers the most basic statutory protections, such as the right to be paid a minimum wage and to be paid

on time, but it also contravenes their right to organize for better pay and working conditions. Section 7 of the NLRA guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." 29 U.S.C. § 157. When employers purposefully misclassify their employees, they commit an unfair labor practice. *See Wal-mart Stores, Inc*. 340 NLRB 220, 225 (2003) (finding employer's instruction to four employees that they could not participate in union activities constituted an unfair labor practice where employer failed to demonstrate that these nominal "managers" were, in fact, supervisors who are exempt from the NLRA's protections). Proper classification of employees allows them greater influence over their working conditions and has positive consequences for the economy more broadly.

I. Employment Misclassification Hurts Employees, Responsible Businesses, and Communities.

A. Misclassification Affects a Large and Growing Proportion of American Workers.

A growing proportion of American workers are classified as contractors, rather than employees, and many of them are intentionally misclassified. The last national study, conducted in 1984, found that employers misclassified their employees 15% of the time, but the rate was significantly higher in the construction industry at 19.8%.[1] Employers misclassify workers for a

[1] This 1984 Internal Revenue Service study is referenced in Tax Administration: Issues in Classifying Workers as Employees or Independent Contractors, Statement of Natwar Gandhi, GAO/T-GGD-196-130, at 13 (Jun. 20, 1996). There have been numerous state-level studies since then that show employment misclassification is increasing. For example, researchers who conducted a Massachusetts-based study found that employment misclassification is most prevalent in certain industries such as in construction where the rates were as high as 25-39% of all workers. Françoise Carré and Randall Wilson, *The Social and Economic Costs of Employee Misclassification in Construction* (Massachusetts), Report of the

variety of reasons, but a 2000 study commissioned by the U.S. Department of Labor found that the "number one reason" employers misclassify employees as independent contractors "is the savings in not paying workers' compensation premiums and not being subject to workplace injury and disability-related disputes."[2] As a number of studies have concluded, and as our experience enforcing state employment laws has demonstrated, misclassification is rarely accidental. Rather, in most cases, the misclassification was "done on purpose in order to gain a competitive advantage over employers that obey the law."[3]

Amici States, as the primary enforcers of workplace protections, frequently see employment misclassification of low-wage workers not only in the construction industry, but also in commercial cleaning, nail salons, and the gig economy. Increasingly, misclassification also affects professionals such as teachers, nurses, and psychologists. In our experience, people rarely choose to work as "independent contractors." Typically, they apply for a job and are told that the employer is only hiring independent contractors. Some employers will help unsophisticated workers start their own "business" by assisting them in registering their own corporation or LLC and in buying their own worker's compensation insurance. Some workers do not even know that they are being treated as an independent contractor (and not an employee)

Construction Policy Research Center, Labor and Worklife Program at Harvard Law School, and Harvard School of Public Health, (Dec. 2004); Françoise Carré, *(In)dependent Contractor Misclassification*, Economic Policy Institute (Jun. 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/. *See also* Dale L. Belman and Richard Block, *Informing the Debate: The Social and Economic Costs of Misclassification in the Michigan Construction Industry*, Institute for Public Policy and Social Research, Michigan State University (2009); Michael P. Kelsay, James I. Sturgeon, and Kelly D. Pinkham, *Employee Misclassification in the State of Illinois*, Department of Economics, University of Missouri-Kansas City (Dec. 2006).

[2] Lalith De Silva, et al., *Prevalence and Implications for Unemployment Insurance Programs*, a report prepared by Planmatics, Inc. for the U.S. Department of Labor (Feb. 2000), http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[3] David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, Rutgers J.L. & Pol'y 12:1 at 141 (2015).

until it is time to file tax returns and their employer gives them a Form 1099 instead of a Form W-2. In many cases, *Amici* find that these workers are not operating an independent business, nor are they entrepreneurial beyond their need to piece together a number of temporary, part-time jobs to support themselves and their families. In fact, it is not unusual to find "independent contractors" working side-by-side with employees, doing the same work under the same supervisors, but without any employment protections.

B. Misclassification Typically Results in Less Pay and Fewer Benefits and Always Reduces Statutory Protections for Workers.

Employment misclassification negatively impacts workers in a number of ways.[4] Under both federal and state law, employers have far more responsibilities toward their employees than independent contractors. In each of our States, employers must comply with laws that regulate the timing, manner, and amount of wage payments to their employees. Employers cannot discriminate against or harass their employees based on a protected status, and they must contribute to certain safety net programs for their employees, such as worker's compensation and unemployment insurance. Employers must also provide certain benefits to employees, which they need not provide to independent contractors.

For example, the Affordable Care Act requires employers above a certain size to provide health insurance to their employees, but not to their independent contractors.[5] 26 U.S.C.

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[4] For a good summary, *see* Sarah Leberstein and Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why independent contractor misclassification matters and what we can do to stop it*, National Employment Law Project (May 2016) at 3, http://www.nelp.org/content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf and U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, GAO-09-717 (Aug. 2009), at 5, https://www.gao.gov/new.items/d09717.pdf.

[5] The ACA does include additional misclassification penalties. Patient Protection and Affordable Care Act, 26 U.S.C. § 4980H. *See also* Mario K. Castillo, *Independent Contractor Misclassification Penalties under the Affordable Care Act*, Hous. J. Int'l L. 36:2 at 340 (2014),

§ 4980H(a)-(b). In Massachusetts, employers who do not provide affordable health insurance may need to pay a fee (up to $750 per employee per year) to the State when their employees enroll in the State's healthcare plan. There is no equivalent requirement for independent contractors. Similarly, the tax implications of misclassification are quite significant: employers must pay a Social Security and Medicare tax on behalf of their employees, but no such payments are made on behalf of independent contractors.[6] Instead, independent contractors are required to pay double their share of Social Security and Medicare because they must pay the employer and employee contributions under the Self-Employment Contributions Act (SECA).[7] 26 U.S.C. §§ 1402-03.

What is more, independent contractors, unlike employees, are not covered by the anti-discrimination protections of Title VII of the Civil Rights Act of 1964 and other federal and state laws prohibiting employment discrimination.[8] *See, e.g.*, 42 U.S.C. § 2000e(f). As misclassification rises, fewer workers benefit from hard-won protections from employment discrimination based on race, national origin or ancestry, gender, disability, religion, age, and other protected characteristics. A misclassified worker has no recourse under employment laws, no human resources department to complain to, and no protection from job loss or other forms of retaliation when resisting workplace harassment. This is especially troubling given that 82% of independent contractors work for only a single business in the course of a year and, therefore,

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http://heinonline.org/HOL/LandingPage?handle=hein.journals/hujil36&div=14&id=&page=; Bauer, *supra* note 3, at 146.

[6] Bauer, *supra* note 3, at 147–48.

[7] *Id.* at 148. Under SECA, independent contractors pay the full 15.3% Social Security and Medicare tax, but only on the first 92.35% of their income.

[8] *See* EEOC, *Coverage*, https://www.eeoc.gov/employers/coverage.cfm.

economically depend on that business as much as those workers classified as employees of that same business.[9]

Misclassification also increases risks to workers' health and safety. Independent contractors are not covered by the Occupational Safety and Health Act, which requires access to employer-provided safety equipment, protection from known worksite hazards, and assistance from the Occupational Safety and Health Administration, including the right to address safety concerns without fear of retaliation.[10] 29 U.S.C. §§ 654-655, 660. The absence of these particular protections for misclassified employees is especially significant, given that misclassification is rampant in construction, transportation, and other industries with high rates of occupational injury and fatality.[11] Employers that misclassify their workers are able to avoid paying into the worker's compensation system,[12] and misclassified workers who are injured on the job are often unable to access those benefits.[13] Some States, such as Massachusetts, New

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[9] James B. Rebitzer and David Weil, *Technical Advisor Board Report: Findings and Implications of the RSI Report to the Joint Task Force on Employee Misclassification and the Underground Economy: Contractor Use, Analysis, and Impact Results* (Mar. 31, 2014) at 9 (hereinafter, "TAB Report"), https://www.mass.gov/files/2017-07/technical-advisory-board-report_0.pdf.

[10] OSHA, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* (Mar. 4, 2015) at 8, https://www.dol.gov/osha/report/20150304-inequality.pdf.

[11] U.S. Department of Labor, OSHA, *Commonly Used Statistics*, https://www.osha.gov/oshstats/commonstats.html; Bureau of Labor Statistics, *Occupational Injuries and Illnesses (Annual) News Release* (Oct. 26, 2016), https://www.bls.gov/news.release/archives/osh_10272016.htm; Kendall Jones, *Construction Leads all Industries in Total Worker Deaths*, Construction Connect, (Dec. 20, 2016), https://www.constructconnect.com/blog/construction-news/construction-leads-industries-worker-deaths/.

[12] Kevin Druley, *Worker misclassification*, Safety + Health (Oct. 23 2016), http://www.safetyandhealthmagazine.com/articles/14774-worker-misclassification; The Misclassification of Workers as Independent Contractors: What Policies and Practices Best Protect Workers?, Joint Hearing before the Subcommittee on Health, Employment, Labor, and Pensions (Jul. 24 2007) at 5, 12, https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36728/pdf/CHRG-110hhrg36728.pdf.

[13] This situation may be even worse because more than 90% of workers who are not covered by workers' compensation also do not have health insurance. Valerie J. Nicholson, Terry L. Bunn, and Julia F. Costich, *Disparities in Work-Related Injuries Associated with Worker Compensation Coverage Status*, Am. J. Indus. Med. 51:6 (2008) at 3.

York, and Pennsylvania, do pay out workers' compensation to workers who are found to have been misclassified when injured. While this system benefits workers, it is funded by law-abiding employers, who thus subsidize employers who misclassify employees.[14] In other States, where misclassified workers cannot access workers compensation if injured, it is the workers' families and taxpayers who are left footing the bill when injured workers receive medical care for their injuries.[15]

Moreover, *Amici* States know firsthand that misclassification makes wage theft easier for employers.[16] Recognizing the uneven bargaining power between employers and their employees, each of our States has enacted statutes that set basic labor standards for employees. In contrast, independent contractors are not guaranteed even the most basic labor protections such as minimum wage, overtime, and timely payment of wages. Independent contractors may need to wait until the end of a project, or longer, to be paid. Moreover, employers are not required to keep time records for independent contractors, nor must they provide them with pay slips. Something as simple as a pay slip allows an employee to identify mistakes in pay rates or hours paid on a weekly or biweekly basis, which may result in a quick resolution when wage theft occurs. In contrast, we find that most "independent contractors" do not have a professional bookkeeper to help them prepare invoices and to track irregular payments, which makes proving wage theft all the more challenging.

Without these protections, it is unsurprising that misclassified workers make less than their employee counterparts. The magnitude of the disparities is striking: for example, according

[14] OSHA, *supra* note 10, at 8, 15 n.23.

[15] OSHA, *supra* note 10, at 6.

[16] Leberstein and Ruckelshaus, *supra* note 4.

to the Economic Roundtable, misclassified California construction workers make on average 64 cents for every dollar that a properly classified employee makes, and payroll fraud[17] costs these workers $1.2 billion each year.[18] Firms not only pay misclassified workers less, but they also shift ordinary business costs onto such workers. While an employee may be compensated for travel time and reimbursed for expenses like gas and wear and tear on a personal vehicle, independent contractors bear these costs themselves. This can have a substantial impact on net earnings. For example, recent research out of the MIT Center for Energy and Environmental Policy suggests that as many as 54% of Uber and Lyft drivers—classified by those companies as independent contractors—make less than the applicable minimum wage when expenses are taken into account.[19] Regardless of whether these drivers are properly classified, they are certainly making less than what an employee would be paid under basic state labor standards.

Employers who misclassify weaken the collective power of all their workers, even properly classified employees. Studies have found that companies that illegally misclassify employees tend to pay lower wages than law-abiding employers—both to their employees and to their properly classified contractors. One study found that companies that misclassified some workers paid their properly classified employees 15% less than comparable companies that did

[17] "Payroll fraud" refers to an employer's misclassification of its employees as independent contractors and/or its failure to report earnings to the appropriate tax authorities. *See* Testimony of Catherine K. Ruckelshaus, General Counsel of National Employment Law Project, before the United States Congress, Senate Committee on Health, Education, Labor & Pensions, Subcommittee on Employment and Workplace Safety, *Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses* (Nov. 12, 2013) at 2.

[18] Yvonne Yen Liu, Daniel Flaming and Patrick Burns, *Sinking Underground; The Growing Informal Economy in California Construction*, Economic Roundtable Research Report (2014) at 2, 12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772783.

[19] Stephen Zoepf, The Economics of Ride Hailing, Revisited, http://ceepr.mit.edu/files/papers/2018-005%20Authors%20Statement.pdf.

not engage in misclassification.[20] That same study concluded that misclassifying companies also paid their contractors 16% less than comparable companies.[21]

C. Misclassification of Employees as Independent Contractors Reduces Costs and Allows Companies to Gain an Unfair Competitive Advantage over Law-Abiding Firms.

The ability to misclassify—and get away with it—creates a competitive advantage. Lower labor costs allow firms that misclassify to pocket larger profits and to gain access to more opportunities by, for example, putting in lower bids for contracts.[22] Law-abiding employers are forced to bear many of the costs these businesses avoid, which places them at a further disadvantage. For example, economist Dr. Michael P. Kelsay found that $831.4 million in unemployment taxes and $2.54 billion in workers' compensation premium losses are shifted annually to responsible employers because their competitors use misclassification to avoid paying those costs.[23] As a result, high rates of misclassification drive out responsible employers and create a "norm of noncompliance," as labor standards deteriorate for all workers.[24]

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[20] TAB Report, *supra* note 9, at 15.

[21] *Id*.

[22] Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, U.C. Davis Bus. L.J. 9:1 at 112 (2008); Nik Theodore, Bethany Boggess, Jackie Cornejo, and Emily Timm, *Build a Better South: Construction Working Conditions in the Southern U.S.*, Partnership for Working Families (2017) at 15, http://www.forworkingfamilies.org/sites/pwf/files/publications/BBS%20Full%20Report.pdf.

[23] Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, Department of Economics, University of Missouri, Kansas City (Sept. 12, 2010) at 5-6. For further discussion of cost shifting see Frank Neuhauser and Colleen Donovan, *Fraud in Workers' Compensation Payroll Reporting: How Much Employer Fraud Exists and How are Honest Employers Impacted*, Report to the Fraud Assessment Commission, California Department of Insurance (Jan. 2009), https://www.dir.ca.gov/chswc/Reports/2011/Final_Report_FAC_Premium_Avoidance.pdf and OSHA, *supra* note 10, at 15 n.23.

[24] Andrew Elmore and Muzaffar Chishti, *Strategic Leverage: Use of State and Local Laws to Enforce Labor Standard in Immigrant-Dense Occupations*, Migration Policy Institute (Mar. 2018) at 11–12, https://www.migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant.

D. Misclassification of Employees as Independent Contractors Costs Billions of Dollars in Annual Tax Revenue, Harming Resource-Deprived Communities.

Perhaps the most significant financial cost of misclassification is borne by local, state, and federal treasuries. The most recent study, from 2009, pegs the total federal cost of misclassification at $54 billion annually in unreported taxes. That number includes $15 billion in unpaid Federal Insurance Contributions Act (FICA) and unemployment insurance taxes.[25] Researchers have made similar estimates for the cost of misclassification to the States. One study estimates that Illinois loses $400 million in tax revenue annually because of misclassification.[26] Two different studies estimate that Massachusetts loses between $259 and $278 million annually, of which approximately $87 million is unpaid unemployment insurance taxes.[27] Another study estimates that New York lost $176 million in annual unemployment taxes *alone*.[28] In testimony before the U.S. House of Representatives, the Pennsylvania Deputy Secretary for Unemployment Compensation Programs estimated that Pennsylvania lost an average of $200 million in tax dollars per year.[29] Finally, a Maryland state official gave testimony estimating that her state lost $103 million in taxes annually.[30] Such revenue declines

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[25] Michael Phillips, *While Actions have been taken to address worker Misclassification, an Agency-Wide Employment Tax Program and Better Data are Needed*, Treasury Inspector General for Tax Administration, U.S. Treasury Department, 2009-30-035 (Feb. 4, 2009) at 8, http://www.treas.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[26] Kelsay, *supra* note 1, at 4–8, 15.

[27] Carré and Wilson, *supra* note 1, at 1; TAB Report, *supra* note 9, at 17- 19.

[28] Linda H. Donohue, James Ryan Lamare, Fred B. Kotler, *The Cost of Worker Misclassification in New York State*, Cornell Univ., ILR School, (Feb. 2007) at 2, https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?&article=1009&context=reports.

[29] Testimony of Patrick T. Beaty, Deputy Secretary for Unemployment Compensation Programs, Pennsylvania Department of Labor and Industry, before the House of Representatives Commonwealth of Pennsylvania, Labor Relations Committee on HB 2400, The Employee Misclassification Prevention Act (Apr. 23, 2008) at 3.

[30] Testimony of Carolyn Quattrocki, Deputy Legislative Officer, Thomas Perez, Secretary of labor, Licensing and Regulation, Vicki Schultz, Senior Advisor for Consumer Protection, Labor Licensing and

also affect local and municipal governments.[31] And some scholars have concluded that the actual economic costs of misclassification are significantly higher than these estimates.[32]

II. Purposeful Misclassification of Employees as Independent Contractors Violates Section 8(a)(1) of the NLRA.

A. The Growing Trend of Misclassification Subverts the Purpose of the NLRA.

As with many other workplace protections, only employees are protected by the NLRA; independent contractors are not. The NLRA was passed in the depths of the Great Depression to give American workers the right to organize for better working conditions. When employees are misclassified as independent contractors, they are denied the Act's most fundamental rights: to form unions, collectively bargain, and engage in concerted action in the workplace for mutual aid and protection without fear of reprisal. 29 U.S.C. § 157. Not only do misclassified workers lack the right to unionize, they also can be fired for taking concerted actions to improve their working conditions, such as asking for improved health and safety conditions on behalf of a group of workers. These are among the pernicious reasons that some employers choose to misclassify employees as independent contractors.

The NLRA recognizes that unregulated relations between workers and employers, who enjoy the advantage of superior bargaining power and act out of their own reasonable business interests, will in the aggregate depress wages and hamper economic growth. *See* 29 U.S.C. § 151. By contrast, protecting employees' ability to gain bargaining power by engaging in

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Regulation on House Bill 819, Workplace Fraud Act of 2009, House Economic Matters Committee (Mar. 3, 2009) at 2.

[31] *See* Bauer, *supra* note 3, at 149–150; National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Sept. 2017) at 7, http://www.nelp.org/content/uploads/NELP-independent-contractors-cost-2017.pdf.

[32] *See, e.g.*, National Employment Law Project, *supra* note 31, at 6.

concerted activity in the workplace without fear of reprisals from management advances the interests of both workers and the broader economy. On average, unionization raises a worker's wage by 12%[33] and generally contributes to improved wages and working conditions.[34] The benefits of unionization are not limited to the employees who are union members or are covered by collective bargaining agreements; increased unionization lifts wages and improves working conditions for all workers through a "union equality effect."[35] Assuring workers of their right to unionize will thus have ripple effects across the economy, broadly improving working- and middle-class incomes and making more families economically secure.

B. Purposeful Misclassification Restrains Employees' Exercise of Their Rights Under Section 7 of the NLRA.

The growing trend of treating statutory employees as independent contractors exacerbates the imbalance that, at its heart, the NLRA seeks to eliminate. This trend is the result of increasing numbers of individual employers, like Respondent, seeking to remove themselves and their employees from the ambit of workplace regulations without regard to the patent realities of

[33] John Schmidt, *The Union Wage Advantage for Low-Wage Workers*, Center for Economic and Policy Research (May 2008), http://cepr.net/documents/publications/quantile_2008_05.pdf at 4.

[34] John Logan, *The Union Avoidance Industry in the United States*, British J. of Indus. Rel. 44:4 at 663 (Dec. 2006), http://www.jwj.org/wp-content/uploads/2014/03/JohnLogan12_2006UnionAvoidance.pdf. *See also* David Weil, Boston University School of Management Research Paper No. 2010-20, *Improving Workplace Conditions through Strategic Enforcement*, A Report to the U.S. Department of Labor's Wage and Hour Division (May 2010) at 19, http://www.dol.gov/whd/resources/strategicEnforcement.pdf (absence of unions "reduces bargaining pressures to raise wages and improve working conditions, and also hinders the initiation of enforcement actions arising from worker complaints").

[35] Henry S. Farber, *Nonunion Wage Rates and the Threat of Unionization*, Indus. &Lab. Rel. Rev. 58:3 (2005) at 335; Jake Rosenfeld, Patrick Denice, and Jennifer Laird, *Union decline lowers wages of nonunion workers*, Economic Policy Institute (Aug. 30, 2016), https://www.epi.org/publication/union-decline-lowers-wages-of-nonunion-workers-the-overlooked-reason-why-wages-are-stuck-and-inequality-is-growing/; Bruce Western and Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, Am. J. Soc. 76:4 at 513 (2011), http://journals.sagepub.com/doi/abs/10.1177/0003122411414817.

their workplaces. It is a bold attempt to nip protected concerted action in the bud, clearly at odds with the Board's decision in *Parexel International, LLC*, 356 NLRB 516, 518 (2011).

When an employer engages in a "pre-emptive strike" by firing an employee who it anticipates will engage in protected activity, the employer violates Section 8(a)(1) of the NLRA. *Parexel*, 356 NLRB at 520. Employers who purposefully misclassify their employees as independent contractors go a step further to curtail protected activity by denying that a worker is an employee covered by the NLRA in the first place. In the matter at hand, the employer's intent to misclassify is evident from the lack of circumstances upon which it could reasonably have concluded that its drivers were anything other than statutory employees. Velox controlled how its drivers carried specimens, directed how they should ensure that pickups were complete and prompt, and prevented drivers from finding their own substitutes. ALJ Decision ("ALJD") at 3, 5. Indeed, in determining that Velox had misclassified Jeannie Edge and other drivers, the ALJ found that only one factor favored a finding of independent contractor status: the drivers used their own vehicles to perform their work and were not provided equipment by Velox. ALJD at 11. All other factors weighed in support of employee status, including Velox's extensive control over its drivers, the minimal training that the job required, and the inclusion of specimen collection as part of Velox's regular business. ALJD at 9-14.

Velox could not have perceived that it had a business-to-business, rather than an employment, relationship with its drivers. Rather, Velox sought the benefits of an employment relationship without the attendant obligations, which include those of Section 7 of the NLRA. Therefore, the ALJ properly concluded that the employer committed an unfair labor practice in violation of Section 8(a)(1) when it clearly misclassified its workers as independent contractors and restrained those employees from exercising their rights under Section 7 of the NLRA.

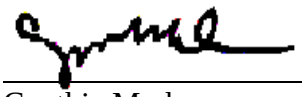
CONCLUSION

Each *Amici* State has laws that require employers to properly classify their workers as employees. These laws ensure that all employees are afforded their employment rights, including but not limited to being paid all earned wages in a timely manner, being paid the minimum wage and overtime, and working in a safe and healthy workplace free from discrimination or harassment. All workers have a similar right to be properly classified so that they may engage in concerted activities for their mutual aid and protection as is their right under the NLRA. Proper employment classification ensures a level playing field for honest, law-abiding employers, and protects our States from lost tax revenues and other costs.

For the reasons stated above, *Amici* States respectfully ask the Board to uphold the decision of the ALJ, who correctly determined that employers who purposefully misclassify workers as independent contractors, thereby denying those workers the protections of the NLRA, commit an unfair labor practice.

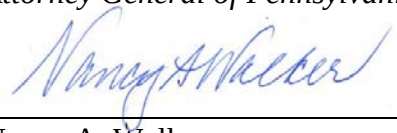
Respectfully submitted,

MAURA HEALEY
Attorney General of Massachusetts



Cynthia Mark
Division Chief
Kate Watkins
Assistant Attorney General
Fair Labor Division
One Ashburton Place
Boston, MA 02108
(617) 727-2200
cynthia.mark@state.ma.us

JOSH SHAPIRO
Attorney General of Pennsylvania



Nancy A. Walker
Chief Deputy Attorney General
Michael J. Fischer
Chief Deputy Attorney General
Fair Labor Section
1600 Arch Street, Suite 300
Philadelphia, PA 19103
(215) 560-2704
nwalker@attorneygeneral.gov

Dated: April 30, 2018

ADDITIONAL AMICI CURIAE

GEORGE JEPSEN
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

LISA MADIGAN
Illinois Attorney General
100 West Randolph Street
Chicago, IL 60601

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

LORI SWANSON
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

GURBIR S. GREWAL
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, 8th Floor, West Wing
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ERIC SCHNEIDERMAN
Attorney General of New York
28 Liberty Street
New York, NY 10005

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street N.E.
Salem, OR 97301

MARK HERRING
Attorney General of Virginia
202 N 9th Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General of Washington
PO Box 40100
Olympia, WA 98504-0100

CERTIFICATE OF SERVICE

I, Kate Watkins, hereby certify that on this 30th day of April 2018, the foregoing brief, filed with the Board through its electronic system, will be sent electronically to the below named participants identified on the Board's website.

For Respondent:

Benjamin C. Fultz, Esq. and
E. Rachel Dahlman Warf, Esq.
Fultz Maddox Dickens PLC
101 S. 5th Street, 27th Floor
Louisville, KY 40202
bfultz@fmdlegal.com
rwarf@fmdlegal.com

For the General Counsel:

Linda M. Mohns
National Labor Relations Board
Region 15, Subregion 26
80 Monroe Avenue, Suite 350
Memphis, TN 38103
linda.mohns@nlrb.gov

For the Charging Party:

Julie Dickinson
Bush Gottlieb
801 North Brand Boulevard, Suite 950
Glendale, CA 91203-1260
jgutmandickinson@bushgottlieb.com

For Amici:

Harry Johnson
Julia Sturniolo
Morgan, Lewis & Bockius LLP
2049 Century Park E Ste 700
Los Angeles, CA 90067-3109
harry.johnson@morganlewis.com
julia.sturniolo@morganlewis.com

Cory L. Andrews
Marc B. Robertson
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org
mrobertson@wlf.org

A. Jack Finklea
Scopelitis Garvin Light Hanson & Feary, P.C.
10 West Market Street
Suite 1400
Indianapolis, IN 46204
jfinklea@scopelitis.com

Prasad Sharma
Scopelitis Garvin Light Hanson & Feary, P.C.
1850 M Street, N.W.
Suite 280
Washington, DC 20036-5804
psharma@scopelitis.com

Jessica S. Mendoza Uriel
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1015 Half St. SE
Washington, D.C. 20003
202-971-7853
jessica.mendoza@nlrb.gov