

Nos. 14-1196, 15-1066, 15-1116

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX
GROUND PACKAGE SYSTEM, INC.**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**PETITION FOR REHEARING EN BANC ON BEHALF OF
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT IN SUPPORT OF REHEARING EN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and the Rules of this Court, the National Labor Relations Board (“the Board”) respectfully petitions for rehearing en banc of a decision by a panel of this Court (Circuit Judges Henderson, Kavanaugh, and Millett) denying enforcement of a Board order issued against FedEx Home Delivery, an Operating Division of FedEx Ground Package System, Inc. (“the Company”). The panel reversed the Board’s finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 158(a)(5) and (1), when it refused to bargain with the exclusive representative of a unit of its single-route drivers at a facility in Hartford, Connecticut. That reversal was based on the panel’s holding that, pursuant to the law-of-the-circuit doctrine, it was bound by a prior decision of a three-judge panel of this Court, *FedEx Home Delivery v. NLRB* (“*FedEx I*”), 563 F.3d 492 (D.C. Cir. 2009), *rehearing en banc denied*, No. 07-1391 (Sept. 4, 2009) (5-4 vote), which held that a different unit of the Company’s single-route drivers with functionally-equivalent terms of employment were independent contractors rather than employees. Addendum, slip op. 1-10 (“*FedEx II*”).

1. Although the Board disagrees that the law-of-the-circuit doctrine compelled the panel to find *FedEx I* controlling in this case, the Board does not seek rehearing with respect to that holding. Instead, the Board contends that

rehearing en banc is warranted because the Court's holdings in *FedEx I*, and the panel's affirmation of those holdings here, directly conflict with Supreme Court precedent and with coequal decisions of this Court. Rehearing by the full Court is necessary to correct the Court's disregard of binding precedent and to secure uniformity of the Court's decisions regarding the common-law test for independent-contractor status.¹

2. As now-Chief Judge Garland observed, dissenting in relevant parts in *FedEx I*, the controlling issues do not simply involve a "factual dispute" but instead there is "something more important at stake." 563 F.3d at 504, 516 (Garland, J., dissenting in part). *FedEx I* radically departed from precedent by holding that entrepreneurial opportunity is now the "animating principle" for distinguishing employees from independent contractors. In addition, *FedEx I* transformed the inquiry into whether there are mere "potential" opportunities for entrepreneurial gain, no matter how unrealistic or insignificant in practice. Those holdings conflict with established precedent and the governing common-law

¹ The Company urged the panel to hold that *FedEx I* is the law of the case (Opening Br. 32-33), but the panel implicitly rejected that argument and instead held that *FedEx I* controls as the law of the circuit. *FedEx II*, slip op. at 8; see *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (discussing parallel doctrines). Although for purposes of a common-law agency analysis the relevant facts are largely the same, the present case involves a separate unit of drivers attempting to exercise their rights, and a separate unfair-labor-practice finding. Thus, the Board emphasizes that it is not seeking review of the Court's denial of enforcement in *FedEx I*.

analysis. En banc review is of exceptional importance because the Court's flawed approach threatens to strip countless workers of their rights under federal law.

ARGUMENT

I. *FedEx I's* Holding that Entrepreneurial Opportunity Is the Focus of the Common-Law Test for Employee Status Is Inconsistent with Supreme Court and Circuit Precedent

Section 2(3) of the Act, as amended by Congress in 1947, contains a broad definition of "employee" that excludes "any individual having the status of independent contractor." 29 U.S.C. § 152(3). In *NLRB v. United Insurance Co.*, the Supreme Court held that the "obvious purpose" of the independent-contractor exclusion was to have the Board and the courts apply "general agency principles" in distinguishing between the two types of workers. 390 U.S. 254, 256 (1968). The Supreme Court has endorsed the nonexhaustive list of factors contained in the Restatement (Second) of Agency, and emphasized that under the common-law agency test "there is no shorthand formula" to determine independent-contractor status—instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 258; *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 & n.31 (1989). Although not enumerated in the Restatement factors or the Supreme Court's statements of the common-law test, the Board and this Court have at times considered workers' "entrepreneurial

opportunity” as an additional relevant factor. *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 569 (D.C. Cir. 2016).

In accordance with *United Insurance*, the Board has repeatedly affirmed that no specific factor is “more or less indicative of employee status,” and that the common-law test requires a “careful examination of all factors” including “all the incidents of the individual’s relationship to the employing entity.” *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998). Thus, while the Board examines entrepreneurial opportunity as one relevant consideration, entrepreneurial opportunity is not itself “sufficient to establish independent-contractor status.” *Deferred App. (“DA”)* 373. However, in *FedEx I*, the Court departed from precedent in order to reverse the Board’s finding of employee status and to reject the Board’s practice of considering all of the common-law factors without emphasizing one particular factor. The Court instead held that a “verbal formulation” had emerged over time establishing entrepreneurial opportunity as the “emphasis” of the inquiry, the “essential quantum of independence,” and “a more accurate proxy” for independent-contractor status. 563 F.3d at 497. Although *FedEx I* acknowledged that all of the common-law factors “remain in play,” it held that entrepreneurial opportunity is the “animating principle by which to evaluate those factors.” *Id.*

As Chief Judge Garland observed in dissent, *FedEx I*'s central holding—that entrepreneurial opportunity is, as a matter of law, the emphasis or animating principle for distinguishing employees from independent contractors—was a major departure both from *United Insurance* and from virtually all prior precedent. 563 F.3d at 507-10 (Garland, J., dissenting in part); *see, e.g., N. Am. Van Lines, Inc. v. NLRB* (“*NAVL*”), 869 F.2d 596, 599-600, 604 (D.C. Cir. 1989) (holding that inquiry requires “broad examination of all facets of the relationship” by applying common-law agency principles as set forth in Restatement factors). Insofar as this Court has emphasized a specific factor, previous decisions have focused on the extent of control the employer exercises over the means and manner of the worker’s performance. *E.g., NAVL*, 869 F.2d at 599. *FedEx I* cited “only one case from this (or any) Circuit” that even arguably designated entrepreneurial opportunity as the emphasis of the common-law analysis. 563 F.3d at 508 (Garland, J., dissenting in part). Furthermore, in another recent case the Court has seemingly abandoned, without comment, the legal proposition that entrepreneurial opportunity is the emphasis of the inquiry. *See Lancaster Symphony Orchestra*, 822 F.3d at 569-70 (evaluating entrepreneurial opportunity as one factor among many). Rehearing en banc is necessary to resolve these important inconsistencies and to correct the *FedEx I* Court’s misstatements of law—which were ultimately determinative in the present case.

The *FedEx I* Court claimed that there had been a gradual evolution toward entrepreneurial opportunity as the emphasis of the inquiry. 563 F.3d at 496-97. The Court cited just three circuit cases in support of this alleged “shift,” *id.*, none of which stand for that proposition and the majority of which expressly contradict it. The Court’s decision in *NAVL* held that various factors, including opportunity for entrepreneurial gain, were “of far *less importance* than the central inquiry of whether the corporation exercises control over the manner and means” of work. 869 F.2d at 599-600 (emphasis added). Likewise, *C.C. Eastern, Inc. v. NLRB* held that certain entrepreneurial opportunities had “some probative weight” but were “*less important* to [the] determination of the drivers’ status” than the lack of supervision over the means and manner of work. 60 F.3d 855, 859 (D.C. Cir. 1995) (emphasis added). Thus, “[t]he contention that *C.C. Eastern* and *NAVL* implicitly signaled the advent of an evolutionary process . . . is simply incorrect.” *FedEx I*, 563 F.3d at 508 (Garland, J., dissenting in part).

FedEx I also incorrectly relied on *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), as having established that entrepreneurial opportunity is the predominant focus for distinguishing employees from independent contractors. As Chief Judge Garland explained, *Corporate Express* did not purport to overrule longstanding precedent regarding common-law principles. *FedEx I*, 563 F.3d at 508 (Garland, J., dissenting in part). A proper

regard for the uniformity of circuit law counsels against reading the three-judge panel in *Corporate Express* as having done so when the decision can be read in a manner consistent with precedent. *Id.* Accordingly, as Chief Judge Garland persuasively argued, *Corporate Express* is more appropriately read “as merely holding that the Board was reasonable in determining that entrepreneurial opportunity tipped the balance in *that case*,” *id.*, which is logical given that in *Corporate Express* the Court found the other common-law factors somewhat unclear, *Corp. Express*, 292 F.3d at 780 & n.*. Moreover, the Board’s decision there plainly did not exhibit a doctrinal “shift” to entrepreneurial opportunity. Instead, the Board applied *Roadway Package*, 326 NLRB 842, to find that the drivers were employees based on weighing “all” of the factors, including lack of entrepreneurial opportunity as one factor among many. DA373; *Corp. Express Delivery Sys.*, 332 NLRB 1522, 1522 (2000).²

Nor was *FedEx I*’s departure from precedent justified, as the Court implied, simply because emphasizing entrepreneurial opportunity would allegedly make for

² *FedEx I* also mischaracterized several other Board decisions in support of its reframing of the common law, 563 F.3d at 498, 502, none of which could fairly be read as supporting that conclusion. *See id.* at 509 (Garland, J., dissenting in part). In any event, the Board has since unequivocally clarified that its prior decisions do not stand for that proposition, and to the extent certain decisions could have been interpreted in an inconsistent manner the Board has overruled them. DA373-76 & n.26. The panel found the Board’s clarification of its position irrelevant, *FedEx II*, slip op. at 9, despite *Corporate Express* and even *FedEx I* indicating some reliance on the Board’s purported position.

“easier” line drawing. 563 F.3d at 497. The Supreme Court has held that the common-law agency test governs and that there is no “shorthand formula,” even though “[t]here 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.” *United Ins.*, 390 U.S. at 258; *cf. Drukker Commc’ns, Inc. v. NLRB*, 700 F.2d 727, 737 (D.C. Cir. 1983) (noting that adjudicating employee status “necessarily causes elements recited as determinative in an earlier case to be found nondeterminative in a later case,” which is “the very nature of the adjudicatory, ‘case law’ process”). It is implausible that the Supreme Court, in holding that the total factual context must be weighed with no specific factor being decisive, intended for individual courts to establish “proxies” for independent-contractor status—much less to do so by emphasizing a factor which neither the Supreme Court nor the Restatement ever even identified.

Rehearing en banc is especially warranted in the present case because the panel’s ultimate holding that the Company’s drivers are independent contractors was a direct result of *FedEx I*’s improper reframing of the common law and its flawed application of the law to these facts. As the panel noted in this case, the *FedEx I* Court examined the common-law factors as applied to the Company’s single-route drivers “through the lens of entrepreneurial opportunity,” and reversed the Board’s finding of employee status after concluding that entrepreneurial

opportunity is “a more accurate proxy” for independent-contractor status. *See FedEx II*, slip op. at 5. The *FedEx I* Court was no less explicit, holding that the common-law factors indicating employee status discussed by the Board were “outweighed by evidence of entrepreneurial opportunity,” and that the case was in fact “relatively straightforward” due to the presence of potential opportunities for entrepreneurial gain. 563 F.3d at 502, 504.

Thus, while the panel here repeated the claim in *FedEx I* that the Court had considered all of the required common-law factors, *FedEx II*, slip op. at 9, it is clear that the entirety of the Court’s analysis was colored by the weight it accorded entrepreneurial opportunity as the proxy for “what is meant by abstractions like ‘independence,’” 563 F.3d at 498. The Court marginalized all evidence showing that the “great majority” of the common-law factors indicate employee status. *See* DA376-82; *FedEx I*, 563 F.3d at 510-16 (Garland, J., dissenting in part).³

³ *FedEx I*, followed by the panel here, also gave inadequate deference to the Board, despite the Supreme Court’s admonition that, although the Board has no special expertise in agency law, it is still the primary factfinder and thus courts may not displace the Board’s choice between two “fairly conflicting” views of employee status in a given case. *United Ins.*, 390 U.S. at 260. The Court’s earlier decisions manifested the level of deference that was contemplated by the Supreme Court. For example, in *Construction Drivers Union, Local No. 221 v. NLRB*, the Court upheld the Board’s finding of independent-contractor status despite a previous Board case finding employee status on “scarcely distinguishable” facts, which had also been upheld by the Court; the Court explained its sustaining the Board’s later view on the grounds that the Board had subsequently “turned away” from its previous analysis and the “evolution” of the Board’s position was “rational.” 899 F.2d 1238, 1241-43 (D.C. Cir. 1990). Significantly, *Construction*

II. *FedEx I* Improperly Redefined the Entrepreneurial-Opportunity Consideration by Treating Mere Potential Opportunities for Entrepreneurial Gain as Decisive

FedEx I further erred in an important respect by redefining the concept of entrepreneurial opportunity such that the mere potential to engage in activities for entrepreneurial gain is sufficient to demonstrate independent-contractor status even if most workers cannot realistically or practically make use of those opportunities. As Chief Judge Garland noted in dissent, the Court improperly elevated “theoretical opportunities” in its analysis and improperly held that just a few examples of workers engaging in entrepreneurial activity would be sufficient to decide the entrepreneurialism factor, so that “an insubstantial exercise may, in effect, tilt the entire outcome.” *FedEx I*, 563 F.3d at 516-17 (Garland, J., dissenting in part). The approach in *FedEx I*, and the panel’s affirmation of that

Drivers involved the Board’s attempt to harmonize its analysis with Supreme Court guidance by engaging in a “wider inspection” that considered all incidents of the employment relationship, rather than focusing on a specific factor. *Id.* at 1242; *see also Corp. Express*, 292 F.3d at 780 (upholding as “reasonable” Board’s purported reliance on lack of entrepreneurial opportunity as tipping the balance in that case rather than relying on the means-and-manner factor as determinative). In contrast, in cases like *FedEx I* the Court has taken it upon itself to independently reweigh the common-law factors and to set aside reasonable inferences drawn by the Board that the Court disagrees with. *E.g.*, *FedEx I*, 563 F.3d at 500-02; *see id.* at 512 (Garland, J., dissenting in part) (noting that there was “no basis” for the majority’s decision to “discount[] the significance of the traditional factors” relied upon by the Board). *FedEx I* also suggested, despite the lack of any such consideration in *United Insurance*, that the Court’s review is somehow more searching simply because independent-contractor status is a jurisdictional question. *Id.* at 501 n.7 (“Our standard of review here is unusual. Though not *de novo*, we must enforce the bounds on the Board’s jurisdiction set by Congress.”).

approach here, are inconsistent with precedent and are especially problematic because the Court's incorrect formulation of the law was once again determinative to the flawed holding that the drivers at issue are not employees.

In this case, the Board reiterated that the relevant consideration is whether there are “actual opportunities . . . for the exercise of genuine entrepreneurial autonomy,” as opposed to theoretical opportunities “that are circumscribed or effectively blocked” in practice. DA374; *see, e.g., C.C. Eastern*, 60 F.3d at 860 (referring to “substantial” and “real” opportunities). The *FedEx I* Court, in contrast, based its holding largely on isolated examples of drivers engaging in limited entrepreneurial activities or having the mere “potential” to do so, and suggested that even “one instance” of a worker doing something would qualify it as a significant opportunity. 563 F.3d at 498-502. In support of this dramatic expansion of what constitutes relevant entrepreneurial opportunity, *FedEx I* relied almost exclusively on the Court's opinion in *C.C. Eastern*. *See FedEx I*, 563 F.3d at 502-03. However, *C.C. Eastern* plainly held that “[t]he Board's premise is correct; if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to [a] claim that the workers are independent contractors.” 60 F.3d at 860. *FedEx I* nonetheless disregarded the Board's findings concerning the substantial constraints that in practice the Company placed on drivers' opportunities for entrepreneurial gain, and

conflated “realistic” opportunities with those that are merely not impossible, regardless of how impractical or unlikely they are for most of the workers at issue.

FedEx I's departure from prior circuit precedent becomes clear when the facts of *C.C. Eastern* are examined. Those facts demonstrate that actual opportunities and not merely theoretical ones are the proper focus of analysis under this Circuit's law. The Board had determined that certain drivers were employees despite an earlier Board case finding that drivers working for a corporate affiliate under the “very same [employment] contract” were independent contractors. *See C.C. Eastern*, 60 F.3d at 861. One of the Board's only grounds for distinguishing its earlier case, in the Court's view, was the argument that comparatively few of the drivers at issue in *C.C. Eastern* actually took advantage of the contract by engaging in entrepreneurial activities. *Id.* at 860-61. In rejecting that argument, the *C.C. Eastern* Court agreed with the Board's legal standard but found the standard had been misapplied to the facts. The Court noted that at least one driver's conduct belied the notion that there were additional constraints on drivers' contractual rights in the later case, and that, moreover, “drivers operating under [the] same contract [in the earlier case] *commonly* hired assistants.” *Id.* at 860 (emphasis added). The Court thus concluded that the drivers retained entrepreneurial opportunities that were “substantial” and “real,” and merely held that the Board erred by “discount[ing] to zero” those opportunities due to the lack

of the same “regular” exercise in the later case. *Id.*; *see also FedEx I*, 563 F.3d at 516 (Garland, J., dissenting in part).

Neither *C.C. Eastern* nor any other decision cited in *FedEx I* purported to overrule established precedent holding that the entrepreneurial-opportunity analysis must take into account the practical realities of a theoretical opportunity. For example, in *City Cab Co. of Orlando, Inc. v. NLRB*—cited approvingly in *C.C. Eastern*—the Court observed that drivers “technically” retained entrepreneurial freedom to select passengers, but held that such independence was “illusory” and did not suggest independent-contractor status where “in practice” drivers “probably would not” select their own passengers due to a variety of practical considerations. 628 F.2d 261, 264-65 (D.C. Cir. 1980). Likewise, *NAVL* held that the entrepreneurial discretion at issue indicated independent-contractor status only because it led to “significant independence in practice.” 869 F.2d at 602. In contrast, *NAVL* stated that the mere *ability* to exercise entrepreneurial discretion does not negate employee status where, for example, workers would bear “a heavy burden” for exercising such right, or would “have little incentive in practice” to do so. *Id.* As the Court aptly summarized in *NAVL*, the relevant inquiry “is, of course, a contextual one, producing the result that a particular element of worker discretion . . . will yield different consequences . . . in different contexts.” *Id.*

Consistent with *NAVL*, the Board in this case noted that one indication that an entrepreneurial opportunity is not significant is that only a small percentage of the workers at issue have pursued or even could pursue such opportunity as part of an ongoing employment relationship. DA379. However, *FedEx I* held that the actual practice of the workers at issue is “beside the point,” given the Court’s overriding focus on the mere ability to engage in entrepreneurial activity. 563 F.3d at 502-03. That approach again conflicts with circuit precedent. For example, in holding that lessee taxi drivers were independent contractors in *Local 777, Seafarers International Union v. NLRB*, the Court discounted the importance of a limitation on the number of miles drivers could drive each day, because the limit was greater than the actual mileage “in an average day” for the drivers at issue. 603 F.2d 862, 902 (D.C. Cir. 1978). The Court therefore held that on the facts of that case the impact of the limitation on entrepreneurial gain was “more theoretical than real.” *Id.* As the Board similarly clarified in this case, entrepreneurial opportunity is relevant to the broader question of whether particular workers are, in fact, rendering services as independent businesses. DA375-76; *cf. United Ins.*, 390 U.S. at 259 (focusing on “the reality of the actual working relationship” at issue, including fact that workers in question were not operating “their own independent businesses”).

Nonetheless, the Board considers all aspects of a particular opportunity for entrepreneurial gain in its analysis, which indicated here that drivers' ability to sell their routes is substantially constrained by the Company and of very limited significance in practice. DA381. The panel held that it was bound by *FedEx I*, in which the Court downplayed the Board's findings of fact and ignored much of the countervailing evidence indicating employee status—a consequence of the Court's mistaken focus on “potential” entrepreneurial opportunity, and its unsupportable emphasis of that factor as the “animating principle” for the entire common-law analysis. Rehearing en banc is necessary to correct those errors. Moreover, under extant precedent it is not even clear which test the Court will choose to apply in future cases. *Compare FedEx II*, slip op. at 5 (requiring emphasis on entrepreneurial opportunity), *with C.C. Eastern*, 60 F.3d at 858 (requiring emphasis on means-and-manner control), *and Lancaster Symphony Orchestra*, 822 F.3d at 565-70 (evaluating all factors with no stated emphasis).

CONCLUSION

The Board respectfully requests that the Court grant rehearing en banc to resolve important inconsistencies in circuit precedent, and requests that if rehearing en banc is granted the parties be given an opportunity to file new briefs to assist the full Court in resolving these issues.

Respectfully submitted,

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National Labor Relations Board
April 2017

Addendum

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 21, 2016

Decided March 3, 2017

No. 14-1196

FEDEx HOME DELIVERY, AN OPERATING DIVISION OF FEDEx
GROUND PACKAGE SYSTEM, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1066, 15-1116

On Petitions for Review and Cross-Application
for Enforcement of Orders of
the National Labor Relations Board

Maurice Baskin argued the cause for petitioner. With him on the briefs was *Joshua Waxman*.

Michael J. Gray, E. Michael Rossman, Steven P. Lehotsky, Warren Postman, Richard Pianka, and Linda E. Kelly were on the brief for *amici curiae* Chamber of Commerce

of the United States of America, American Trucking Associations & National Association of Manufacturers in support of petitioner.

Kellie Isbell, Attorney, National Labor Relations Board, argued the cause and filed the brief for respondent. With her on the brief were *Richard F. Griffin, Jr.*, General Counsel, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, and *Robert Englehart*, Supervisory Attorney.

James B. Coppess argued the cause and filed the brief for *amicus curiae* AFL-CIO in support of respondent. With him on the brief were *Lynn K. Rhinehart*, *Matthew J. Ginsburg*, and *Laurence Gold*.

Before: HENDERSON, KAVANAUGH, and MILLETT,
Circuit Judges.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: FedEx Home Delivery (“FedEx”) offers package-delivery services to residential customers throughout the United States. In *FedEx Home Delivery v. NLRB (FedEx I)*, 563 F.3d 492 (D.C. Cir. 2009), this court held that single-route FedEx drivers working out of Wilmington, Massachusetts are independent contractors, not employees, as the latter term is defined in the National Labor Relations Act, *id.* at 504. In this case, the National Labor Relations Board held, on a materially indistinguishable factual record, that single-route FedEx drivers are statutorily protected employees, not independent contractors, when located in Hartford, Connecticut. Both cannot be right. Having already answered this same legal question involving the same parties and functionally the same factual record in *Fed Ex I*, we give the same answer here. The Hartford single-route FedEx drivers are independent contractors to whom the National Labor

Relations Act's protections for collective action do not apply. We accordingly grant FedEx's petitions, vacate the Board's orders, and deny the Board's cross-application for enforcement.

I.

A.

The National Labor Relations Act, 29 U.S.C. §§ 151–169, offers a variety of protections to “employees” in workplaces across the United States. The Act is explicit, however, that the term “‘employee’ * * * shall not include * * * any individual having the status of an independent contractor[.]” *Id.* § 152(3). Accordingly, “[t]he jurisdiction of the NLRB extends only to the relationship between an employer and its ‘employees’; it does not encompass the relationship between a company and its ‘independent contractors.’” *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 857 (D.C. Cir. 1995).

In *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968), the Supreme Court held that the determination whether a worker is a statutorily protected “employee” or a statutorily exempt “independent contractor” is governed by “common-law agency” principles, *id.* at 256. In applying the common law, the Supreme Court stressed that “there is no shorthand formula or magic phrase that can be applied to find the answer.” *Id.* at 258. Rather, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.* “What is important,” the Supreme Court explained, “is that the total factual context is assessed in light of the pertinent common-law agency principles.” *Id.*

Following *United Insurance*, the Board and this court have generally consulted the Restatement (Second) of Agency for guidance in conducting the common-law agency analysis.

See *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 565–566 (D.C. Cir. 2016); *North Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599–600 (D.C. Cir. 1989).¹ The Restatement (Second) of Agency provides a non-exhaustive list of ten factors to consider in deciding whether a worker is an independent contractor: “(1) ‘the extent of control’ the employer has over the work; (2) whether the worker ‘is engaged in a distinct occupation or business’; (3) whether the ‘kind of occupation’ is ‘usually done under the direction of the employer or by a specialist without supervision’; (4) the ‘skill required in the particular occupation’; (5) whether the employer or worker ‘supplies the instrumentalities, tools, and the place of work for the person doing the work’; (6) the ‘length of time for which the person is employed’; (7) whether the employer pays ‘by the time or by the job’; (8) whether the worker’s ‘work is a part of the regular business of the employer’; (9) whether the employer and worker ‘believe they are creating’ an employer-employee relationship; and (10) whether the employer ‘is or is not in business.’” *Lancaster Symphony*, 822 F.3d at 565–566 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957)).

B.

FedEx operates a package-delivery terminal in Hartford, Connecticut. Drivers for FedEx deliver packages along certain “routes” that are designated by FedEx. A driver may serve a single route or multiple routes. Both single-route and multi-route drivers operate out of the Hartford location. In 2007, the Hartford single-route drivers elected Teamsters

¹ See also, e.g., *Local 777, Democratic Union Org. Comm. Seafarers Int’l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 870 n.22 (D.C. Cir. 1978); *Arizona Republic*, 349 N.L.R.B. 1040, 1042 (2007); *St. Joseph News-Press*, 345 N.L.R.B. 474, 477–478 (2005); *Argix Direct, Inc.*, 343 N.L.R.B. 1017, 1020 & n.13 (2004).

Local 671 (“Union”) to represent them. FedEx subsequently filed objections to the election with the Board.

While that administrative appeal was pending, this court decided *FedEx I*, holding that FedEx drivers at the company’s Wilmington, Massachusetts terminals were “independent contractors” within the meaning of the National Labor Relations Act. 563 F.3d at 504. In so holding, *FedEx I* explained that application of the common-law agency test by both the Board and this court had shifted over time. *See id.* at 496–497. For a period, the Board had focused on “an employer’s right to exercise control” over the workers’ performance of their jobs. *Id.* at 496. Gradually, however, the Board began to place “emphasis” on what this court described as “a more accurate proxy: whether the ‘putative independent contractors have significant entrepreneurial opportunity for gain or loss.’” *Id.* at 497 (quoting *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)).

Examining the factual record, *FedEx I* noted that some of the common-law factors supported employee status, while others were consistent with the drivers being independent contractors. *See* 563 F.3d at 503–504. Looking at those factors through the lens of entrepreneurial opportunity, however, this court concluded that the indicia of independent contractor status “clearly outweighed” the factors that would support employee status. *Id.* at 504; *see id.* at 498–502.

FedEx subsequently filed a motion with the Board in the Hartford case to dismiss the order against it, principally arguing that *FedEx I* compelled a ruling in its favor. The Board, however, issued a decision certifying the Union as the exclusive representative of the Hartford single-route drivers, without addressing *FedEx I* or FedEx’s motion to dismiss. FedEx then filed a motion for reconsideration, which the Board rejected in relevant part as “untimely” and “lack[ing] merit.” D.A. 359–360 & n.2.

FedEx then refused to bargain with the Union, prompting the Union to file unfair labor practice charges against the company. On October 29, 2010, the Board ruled that FedEx violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by refusing to bargain.

FedEx then filed in this court a petition for review of the Board's October 2010 unfair-labor-practice decision, seeking summary disposition based on *FedEx I*. Before this court ruled, the Board *sua sponte* vacated its decision and order. We accordingly dismissed FedEx's petition and motion as moot.

Three years later, the Board issued a revised decision and order. *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sept. 30, 2014). Accepting that *FedEx I* and the case at hand dealt with "virtually identical" facts, the Board admitted that *FedEx I* "[could not] be squared with the Regional Director's determination" that the FedEx drivers at the Hartford terminal were "employees" under the Act. *Id.* at 8. Nevertheless, the Board "decline[d] to adopt [*FedEx I*'s] interpretation of the Act." *Id.* Specifically, the Board disagreed with *FedEx I*'s treatment of "entrepreneurial opportunity * * * as an 'animating principle'" for determining whether a worker is an "employee" or an "independent contractor" under the Act. *FedEx Home Delivery*, 361 N.L.R.B. No. 55, at 1 (quoting *FedEx I*, 563 F.3d at 497). In the Board's view, entrepreneurial opportunity should merely be one "part of a broader factor that * * * asks whether * * * [a] putative independent contractor is, in fact, rendering services as part of an independent business." *Id.* at 10.

The Board added that the "independent-business factor" should not receive any special weight in the overall common-law agency analysis. Rather, in light of the Supreme Court's instruction in *United Insurance* that "all of the incidents of the relationship must be assessed and weighed

with no one factor being decisive,” *FedEx Home Delivery*, 361 N.L.R.B. No. 55, at 9 (quoting *United Insurance*, 390 U.S. at 258), the Board reasoned that “the weight given to the independent-business factor will depend upon the factual circumstances of the particular case,” *id.* at 12. To the extent that past Board decisions were inconsistent with those principles, the Board declared them to be overruled. *Id.*

Applying its newly announced approach, the Board concluded that the single-route FedEx drivers based at the Hartford terminal were “employees” under the Act. *FedEx Home Delivery*, 361 N.L.R.B. No. 55, at 12–16. The Board emphasized, in particular, the “pervasive control” FedEx exerts “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.* at 12, 14.

FedEx again filed a petition for review in this court, as well as a motion for reconsideration with the Board, which the Board denied. *FedEx Home Delivery*, 362 N.L.R.B. No. 29 (Mar. 16, 2015). FedEx then filed a second petition for review challenging the Board’s denial of reconsideration. The Board filed a cross-application for enforcement of its order.

II.

As FedEx correctly argues, the question before this court was already asked and answered in *FedEx I*. This case involves the exact same parties—the Board and FedEx Home Delivery—as *FedEx I*. The facts are acknowledged by the Board to be “virtually identical,” *see FedEx Home Delivery*, 361 N.L.R.B. No. 55, at 8, and the Board makes no effort to distinguish the two cases factually. The purely legal question to be decided also is exactly the same: whether the same materially indistinguishable facts that added up to independent-contractor status in *FedEx I* add up to independent-contractor status in *FedEx* round two.

It is as clear as clear can be that “the *same issue* presented in a *later case* in the *same court* should lead to the *same result*.” *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)). Doubly so when the parties are the *same*. This case is the poster child for our law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law. *See LaShawn*, 87 F.3d at 1393 & n.2.² Having chosen not to seek Supreme Court review in *FedEx I*, 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.³

² *Cf. Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir. 1979) (per curiam) (“*Stare decisis* compels adherence to a prior *factually indistinguishable* decision of a controlling court.”) (emphasis added); *United States v. Cardales-Luna*, 632 F.3d 731, 734 (1st Cir. 2011) (“[E]ven the narrowest conception of *stare decisis* demands that two panels faced with the same *legal* question and identical facts reach the same outcome.”).

³ An exception to law-of-the-circuit doctrine applies “when a conflict exists within our own precedent,” in which case a subsequent panel is “bound by the earlier” of the two conflicting decisions. *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011); *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (“[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail.”); *Independent Cmty. Bankers of America v. Board of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (“[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.”) (alteration in original) (quoting *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996)). The Board, however, does not assert such an exception in this case, nor does it claim that its revised view of the common-law agency test is grounded in any prior decision of this court.

To be sure, on matters to which courts accord administrative deference, agencies may change their interpretation and implementation of the law if doing so is reasonable, within the scope of the statutory delegation, and the departure from past precedent is sensibly explained. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001–1002 (2005). But the 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 or to which the *Brand X* framework applies. *See Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75–76 (D.C. Cir. 1990) (“Deference under the *Chevron* doctrine * * * does not apply here because of the * * * direction that the Board and the courts apply the common law of agency to the issue.”).

The Board contends that *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. *See Lancaster Symphony*, 822 F.3d at 565 (citing *FedEx I*, 563 F.3d at 492 & n.1, for the common-law factors that “the Board, like this court, considers” “[i]n conducting th[e] employee-or-independent-contractor] inquiry”); *see also FedEx I*, 563 F.3d at 504 (“We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status.”).

Finally, the Board argues that our precedent requires us to enforce a finding of employee status if the Board “made a choice between two fairly conflicting views.” *C.C. Eastern*, 60 F.3d at 858 (quoting *North Am. Van Lines*, 869 F.2d at 599).

But that standard applies only to the Board's application of established law to a particular factual record. *See Aurora Packing*, 904 F.2d at 75 (“[D]eference would only be extended to the Board's determination of employee status—an ‘application of law to fact’—insofar as [the Board] made a ‘choice between two fairly conflicting views’ in a particular case.”) (quoting *United Insurance*, 390 U.S. at 260); *see also C.C. Eastern*, 60 F.3d at 858 (characterizing the Board's employee-or-independent-contractor determination as an “application of the law of agency to established and undisputed findings of fact”). We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied. In addition, given *FedEx I*, we cannot say that this case involves “two fairly conflicting views” of how the law should apply to these facts.

III.

In sum, we hold that *FedEx I* answers the case before us, and we accordingly grant FedEx's petitions for review, vacate the Board's orders, and deny the Board's cross-application for enforcement.⁴

So ordered.

⁴ FedEx also argues that the Board erred in overruling two objections to the conduct of the election. As FedEx acknowledges, “it is unnecessary to reach this issue” if the Hartford single-route drivers are “independent contractors” under the Act, Pet'r's Br. 50, as we hold they are.

**UNITED STATES COURT OF APPEALS
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SYSTEM, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1196, 15-1066,
)	& 15-1116
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case Nos.
)	34-CA-012735 &
Respondent/Cross-Petitioner)	34-RC-002205
)	

CERTIFICATE OF PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 28(a)(1)(A) and 35(c), counsel for the National Labor Relations Board (“the Board”) certifies the following:

FedEx Home Delivery, an Operating Division of FedEx Ground Package System, Inc., was the respondent before the Board in the underlying unfair-labor-practice proceeding and is the Petitioner/Cross-Respondent in this court proceeding. The Board is the Respondent/Cross-Petitioner in this court proceeding, and the Board’s General Counsel was a party before the Board. International Brotherhood of Teamsters, Local No. 671 was the charging party before the Board. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) participated as amicus curiae in support of the Board in this court proceeding; the Chamber of Commerce of the United States of America, the American Trucking Associations, Inc., and the National Association of

Manufacturers participated as amici curiae in support of FedEx Home Delivery in this court proceeding.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, S.E.

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(202) 273-2960

Dated at Washington, D.C.

this 17th day of April, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), counsel for the National Labor Relations Board (“the Board”) certifies that the petition for rehearing en banc contains 3,756 words of proportionally-spaced, 14-point type, prepared using the word-processing system Microsoft Word 2010.

/s/ Linda Dreeben
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Dated at Washington, D.C.
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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, D.C.
this 17th day of April, 2017