No. APL-2018-00143

To be argued by:
Joseph M. Spadola
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State of New York
Court of Appeals

LUIS A. VEGA,

Respondent,

v.

POSTMATES, INC.,

Respondent,

COMMISSIONER OF LABOR,

Appellant.

BRIEF FOR APPELLANT

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Third Department No. 525233

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Cornell University Worker Institute, *On-Demand Platform Workers in New York State: the Challenges for Public Policy* (2019), *available at* https://www.ilr.cornell.edu/sites/default/files/OnDemandReport. Reduced.pdf .... *passim*

Julia Beckhusen, "About 13M U.S. Workers Have More Than One Job," U.S. Census Bureau (June 18, 2019), *available at* https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html 52n

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PRELIMINARY STATEMENT

Postmates Inc. operates a website and a smartphone application (app) that allows customers to order food from local restaurants or other items from local stores and to have them delivered within a short period of time by one of Postmates' couriers. Luis A. Vega worked as a courier for Postmates until his termination in 2015. The Unemployment Insurance Appeal Board (Board) found that Mr. Vega was an employee of Postmates, rather than an independent contractor, and was thus eligible to receive unemployment benefits. The Appellate Division, Third Department, annulled the Board's decision for lack of substantial evidence. Two Justices dissented, and the Commissioner of Labor (Commissioner) appealed as of right.

This Court should reverse. Substantial evidence supports the Board's finding that Postmates exercised sufficient control over its couriers' delivery work to create an employer-employee relationship. Among other things, Postmates (1) unilaterally set the fees charged to customers and the commissions paid to couriers, (2) controlled the timing of deliveries by sending customers an

estimated delivery time and allowing customers to track their couriers' location in real time, (3) controlled the assignment of deliveries through a "blind dispatch" system that precluded couriers from seeing the details of a delivery job until after it was assigned, (4) precluded couriers from delegating assignments to subcontractors, (5) possessed the right to unilaterally terminate couriers for poor performance, (6) handled all aspects of marketing and customer relations, and (7) bore the risk of loss when customers failed to pay for delivered items.

In reversing the Board's finding of an employment relationship, the Third Department departed from a long line of cases, including several from this Court, recognizing such indicia as sufficient to support a Board finding that couriers or other delivery persons were employees. Indeed, Postmates exercised more control than the employers did in those cases, by virtue of an online platform that allowed it to track and control virtually every aspect of the delivery process. Like other on-demand platforms, Postmates' system of algorithmic management allowed it to give workers the

nominal freedom to set their own working schedule, while retaining strict control over the work actually performed.

The Third Department also misapplied the substantial evidence standard. This Court has recently reiterated that the substantial evidence standard is a deferential standard that gives agencies broad discretion to weigh the evidence and only requires that their ultimate conclusion have a rational basis in the record. Ignoring this settled rule, the Third Department majority substituted its own judgment for that of the Board by discounting the evidence that supported the Board's finding and focusing instead on the evidence that suggested a contrary result. Applying the appropriate deference to the Board's view of the evidence, this Court should reverse the Third Department's judgment and sustain the Board's finding that Postmates' couriers were employees eligible to receive unemployment benefits.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that Mr. Vega was an employee of Postmates for unemployment insurance purposes, where Postmates controlled key aspects of its couriers' delivery work, including fees and commissions, the timing and assignment of deliveries, the ability to delegate work, the screening and termination of couriers, all aspects of marketing and customer relations, and assumption of the risk of loss when customers failed to pay for delivered items.

STATEMENT OF THE CASE

A. The State's Unemployment Insurance Law

Eighty years ago, the New York Legislature determined that "[i]nvoluntary unemployment" and its resulting financial insecurity were a threat to the "health, welfare, and morale of the people" of the State. Labor Law § 501. The Legislature enacted the State's unemployment compensation law, L. 1935, ch. 468, to "alleviat[e] the adverse financial condition that frequently accompanies . . . the cessation of income from an employer," *Matter of Van Teslaar v. Levine*, 35 N.Y.2d 311, 316 (1974).

The State's unemployment compensation law is a "remedial statute designed to protect the wage earner from the hazards of unemployment by providing money benefits to individuals 'unemployed through no fault of their own.'" *Matter of Ferrara (Catherwood)*, 10 N.Y.2d 1, 8 (1961) (quoting Labor Law § 501). Through compulsory contributions from a worker's employer, *see* Labor Law § 570, the State maintains "financial reserves" for the benefit of those who become unemployed, *id.* § 501. In most instances, an employer must contribute to this unemployment fund on behalf of all employees once the employer pays $300 or more in wages in a calendar quarter. *See id.* § 560(1).

The Commissioner of Labor is charged with administering the State's unemployment insurance law, including making initial determinations of workers' eligibility for benefits. Labor Law § 520. The Commissioner's determinations are subject to review by the Unemployment Insurance Appeal Board. *Id.* §§ 620–626. The Board consists of five members who are appointed by the Governor for a term of six years, and no more than three of such members may belong to the same political party. *Id.* § 534. The Board has the

power to convene evidentiary hearings before an administrative law judge, *id.* § 620, and its factual findings are binding on the courts if supported by substantial evidence, *see In re Electrolux Corp.*, 288 N.Y. 440, 446 (1942). Labor Law § 623 specifically provides that a "decision of the appeal board shall be final on all questions of fact and, unless appealed from, shall be final on all questions of law."

B. The Board's Discretion to Determine Whether a Worker Is an Employee Eligible to Receive Unemployment Benefits

Unemployment benefits are available only to employees. *See* Labor Law § 511 (defining employment). Accordingly, in assessing whether a worker is eligible to receive unemployment benefits, the Board must determine whether the worker is an employee, or rather is an independent contractor operating a separate business. This question "necessarily is a question of fact," *Matter of Villa Maria Inst. of Music (Ross)*, 54 N.Y.2d 691, 692 (1981), which requires considering all aspects of the relationship to determine whether the employer retains the right to control "the results produced or the means used to achieve the results." *Matter of 12*

Cornelia St (Ross), 56 N.Y.2d 895, 897 (1982). For eight decades, the Board has decided this highly intensive fact question in hundreds of cases across a range of industries, applying a deep expertise to which courts have long accorded deference. *See, e.g.*, *Claim of England*, 38 N.Y.2d 829, 830 (1976); *In re Electrolux Corp.*, 288 N.Y. at 446.

When the Legislature has seen fit to restrict or eliminate the Board's discretion to decide whether workers in a particular industry are employees entitled to receive unemployment benefits, it has done so explicitly. The Legislature has thus enacted several laws excluding various classes of workers from the definition of employment for purposes of unemployment benefits, including agricultural laborers, Labor Law § 511(6), freelance shorthand reporters, *id.* § 511(18), and licensed insurance agents or brokers, *id.* § 511(21), among others. *See generally id.* § 511(6)–(23). Conversely, the Legislature has declared certain workers to be employees for unemployment insurance purposes, regardless of what the Board might otherwise have found. This includes certain musicians, *id.* § 511(1)(b)(1-a), and professional models, *id.*

§ 511(1)(3). *See also id.* § 511(1)(b)(1-b) (creating rebuttable presumption that construction workers are employees); *id.* § 511(1)(b)(1-c) (same as to workers in the commercial goods transportation industry).

Following the lobbying efforts of technology companies, including respondent Postmates, as well as Uber, Lyft, Handy, and TaskRabbit, legislatures in a number of other states have recently enacted laws categorizing the workers of the so-called "gig economy" (sometimes called "gig workers")[1] as independent contractors for the purpose of specified labor protections. *See* National Employment Law Project, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It* (2019), *available at* https://s27147.pcdn.co/wp-content/uploads/ Rights-at-Risk-4-2-19.pdf. In New York, the Legislature has enacted no such carve-out

[1] The "gig economy" refers to a sector of the economy where online platforms hire workers to perform one-off jobs or "gigs" requested by consumers through those platforms. *See* Cornell University Worker Institute, *On-Demand Platform Workers in New York State: the Challenges for Public Policy* (2019), *available at* https://www.ilr.cornell.edu/sites/default/files/OnDemandReport. Reduced.pdf.

for gig workers. Instead, the Legislature has chosen to leave in place the Board's discretion to decide in particular cases whether such workers are employees eligible to receive unemployment benefits.[2]

C. The Work Performed by Postmates' Couriers

Postmates provides on-demand pickup and delivery services to customers via a proprietary online platform. (Appellant's Appendix [A.] 9, 16-18.) Customers can access the platform via Postmates' website or by downloading Postmates' app on a

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[2] The New York Assembly recently considered, but did not advance, a bill that would have assured gig workers treatment as employees for purposes of specified wage protection and collective bargaining laws. A8343 (2019). The bill would also have required the Commissioner of Labor to hold public hearings and draft a report recommending whether such workers should similarly be assured treatment as employees for purposes of, among other things, unemployment insurance. The proponents of the bill explained that gig workers are often misclassified as independent contractors even though they are "wholly dependent on the control and direction of their employer" and "experience low and unstable earnings." Assembly Mem. in Support, A8343. The bill thus sought to eliminate for such workers "the uncertainty, delay and denial that may result when their employment status is disputed." A8343, § 2. The bill remained under committee review at the close of the last legislative session.

smartphone. (A. 20.) Once logged on to the platform, customers can request that a Postmates courier pick up items at a local venue—for example, food from a local restaurant or merchandise from a store—and deliver the items to their homes or other designated locations. (A. 16-18.) The advantage that Postmates offers over other delivery methods is speed. (A. 18-19.) Postmates markets itself to customers as completing most deliveries within an hour. (A. 19.)

1. Courier Recruitment and Orientation

Postmates acknowledges that couriers are indispensable to its business. (A. 69.) Postmates recruits couriers through online advertisements. (A. 63-64.) It requires prospective couriers to fill out an online form with their name, phone number, driver's license number, date of birth, and social security number. (A. 14, 37.) Using this information, Postmates engages a third party to conduct a criminal background check on prospective couriers. (A. 10, 15, 36-37.) Postmates assures its customers via its app that it has conducted a criminal background check on all of its couriers. (A. 37.)

Postmates' couriers attend orientation sessions to learn how to use the smartphone app. (A. 15, 21, 26, 37, 55, 68.) While the record does not definitively establish that such sessions are mandatory, Postmates explains that couriers "would have no way of knowing how to utilize [the] app" without attending a session. (A. 68.) At the session, Postmates also provides couriers with prepaid-expense ("PEX") cards for those customers who choose to have couriers pay for delivered items initially and then to reimburse them upon delivery, and Postmates advises the courier on the use of these cards. (A. 52-56.) Postmates also advises its couriers that if they choose not to use the PEX card for such deliveries, they can pay for customers' items with their own money and seek reimbursement from Postmates. (A. 55.)

Postmates requires couriers to sign a written agreement entitled "Postmates PEX Card Usage and Independent Contractor Acknowledgement Agreement." (A. 58-59, 117.) Section 1 of the agreement provides that couriers can "only use the Postmates provided PEX card for purchases dispatched or assigned to [them] by Postmates" and that couriers may be suspended or subject to

penalties if they "use the PEX card for any reason other than Postmates job related duties." (A. 117.) Section 2 of the agreement requires couriers to acknowledge that they are "an independent contractor, and not an employee, of Postmates." (A. 117.) And Section 3 of the agreement requires couriers to select the mode of transportation they will use while performing services for Postmates. (A. 117.)

2. Courier Assignments

Couriers log in and out of the Postmates platform at their discretion and are considered available to handle on-demand requests only when logged in. (A. 21, 26-27, 34, 61, 64-66, 69.) Postmates asks couriers to provide information regarding their expected availability and uses this information to "maximize [its] software to make sure that resources are appropriate." (A. 65-66, 83.) Couriers are not penalized, however, if they do not log in during the times they indicated they would be available. (A. 66, 83.)

Once a customer submits a delivery request, Postmates sends the request to available couriers located within a geographic area determined by an algorithm. (A. 21-23.) Postmates provides the

couriers selected by the algorithm with some, but not all, of the information about the delivery request; notably, it does not provide the pickup and delivery addresses at this stage. (A. 17, 20, 28.) The selected couriers must decide whether to accept, reject, or ignore the request based on the information provided. (A. 17, 20-21, 24.) Postmates assigns the delivery to the first courier to accept the request. (A. 25, 38-39, 69.)

If none of the originally selected couriers accepts the request within the timeframe set by Postmates, Postmates sends the request to a progressively broader group of couriers. (A. 24-25, 38, 85.) If a courier accepts a request and then withdraws from the request, Postmates informs the customer and seeks to find another available courier. (A. 48-49, 69.) If no courier accepts the request, it is considered lost and no revenue is generated. (A. 24, 85.) Although couriers are not subject to a minimum or maximum number of deliveries (A. 28, 75), Postmates keeps track of couriers' responses to delivery requests (A. 25-26, 28).

3. Logistics of Deliveries

Once Postmates assigns a delivery to a courier, it sends the courier further details regarding the customer's delivery request, including the pickup and delivery addresses. (A. 17, 28-30, 64, 76.) It sends the customer a photograph of and contact information for the assigned courier. (A. 47-48, 73.) And it calculates and sends the customer an estimated time of delivery based on the average completion time for similar past deliveries. (A. 46-47, 66-67, 82-83.) Postmates then tracks the assigned courier's location in real time and permits the customer to view that location on the platform throughout the delivery process. (A. 19.)

Postmates does not allow couriers to arrange for substitutes or subcontractors to handle deliveries. (A. 49-50, 73.) Postmates explains that customers would complain if the person who shows up to make a delivery is different from the person in the photo Postmates provides. (A. 73.) Postmates also believes that allowing substitutes would "defeat[] the whole purpose of doing a background check" on couriers. (A. 73.)

Customers can modify requests en route, for example by asking the courier to pick up a soda from a store if none was available at a restaurant. (A. 70-72.) Couriers cannot charge customers extra for any such added stops. (A. 72.)

Couriers must designate in advance the mode of transportation they will use to perform deliveries. (A. 58-59, 117.) Couriers are permitted to take any route they choose and to stop off en route. (A. 30-31.) They are also permitted to accept more than one delivery request and to complete the requests in any order they wish. (A. 75.) Postmates requires couriers to report on the platform when they have picked up a customer's items and again when they have delivered those items. (A. 41, 64.)

Postmates allows its couriers to deliver for other companies, including while logged on to the Postmates platform. (A. 28-29, 72-73.) But when couriers deliver an item for Postmates, they are advised not to accept payment from the customer for any services not requested through the Postmates platform. (A. 86-87.)

4. Financial Aspects of the Platform

Once the courier reports that a delivery is complete, Postmates charges a delivery fee to the customer's credit card. (A. 39-40, 42.) Postmates unilaterally sets the fee based solely on the delivery distance; couriers have no ability to adjust the fee to account for the number of stops or items that the customer requests. (A. 71-72.) Postmates pays the courier a non-negotiable commission equal to 80% of the delivery fee by depositing this sum directly into the courier's bank account within four to seven business days of the delivery. (A. 10, 39-40, 42-44, 59, 69-70, 84-85, 117.)

As noted above, Postmates offers its customers a payment service whereby customers can choose to have a Postmates courier pay for delivered items at the pickup locations and then reimburse the courier upon delivery, rather than arrange to pay the vendors directly. (R53-54.) Postmates advises its couriers during their orientation sessions that they can provide this additional service one of two ways. (A. 55-56.) First, they can use the PEX card that Postmates provides them. If the courier chooses this method, Postmates loads the purchase amount onto the PEX card, the

courier makes the purchase using the card, and Postmates charges the customer's credit card for the purchase amount. (A. 54-55.) Alternatively, couriers can make customer purchases with their own credit cards. Postmates then reimburses the couriers for the purchase amount after they present Postmates with a sales receipt. (A. 55-56.) Couriers are not otherwise reimbursed for delivery-related expenses, nor are they provided with fringe benefits, uniforms, telephones, or business cards. (A. 32, 43, 51, 60, 70, 86.) They are provided with bags bearing Postmates' logo to use for carrying delivery items, but they are not required to use the provided bags for that purpose. (A. 68, 82.)

If Postmates is unable to collect the delivery fee from a customer, Postmates assumes the loss and the courier still earns the fixed commission. (A. 44-45, 56.) Similarly, when an item is lost or damaged en route, Postmates considers itself responsible and works directly with customers to resolve the issue. (A. 30, 61-62, 74-75; *see also* A. 62 ["[W]e'll have a conversation with the requester and see how they want to handle the situation."]).

5. Termination of Couriers

Customers can rate couriers' services on Postmates' platform. (A. 32-33, 41.) Postmates monitors customer ratings of couriers and contacts customers who have given their couriers poor ratings. (A. 36, 41, 50, 67.) Postmates also handles all customer complaints. (A. 46-47.)

Postmates terminates its relationship with couriers for a variety of reasons, including negative customer feedback, fraudulent activity, or use of the PEX card "for any reason other than Postmates job related duties." (A. 36, 41, 74, 108, 117.) When it has decided to discontinue a courier's services, Postmates blocks the courier from logging on to the platform. (A. 36, 74, 117.)

6. Mr. Vega's Work as a Courier

Consistent with the above framework, Postmates engaged Mr. Vega as an on-demand courier. (A. 12-13, 117.) Mr. Vega indicated on his written agreement with Postmates that his mode of transportation would be walking. (A. 58, 117.) He logged on to the Postmates platform during the period June 8 through June 15, 2015. (A. 33-34, 120.) He rejected or ignored about 50% of the

assignments offered by Postmates through the platform. (A. 25-26.) Postmates terminated Mr. Vega's relationship based on negative consumer feedback or fraudulent activity. (A. 107-109.)

D. Administrative Proceedings and the Board's Decision

Mr. Vega filed an application for unemployment benefits, effective June 15, 2015. (A. 118-119.) Based on the information that Mr. Vega provided, the Commissioner determined that Postmates exercised sufficient control over Mr. Vega's work to create an employer-employee relationship. The Commissioner thus credited Mr. Vega with remuneration from Postmates in connection with his claim for unemployment benefits and determined that Postmates was liable for additional unemployment insurance contributions, effective the third quarter of 2014, on the remuneration paid not only to Mr. Vega, but also to other persons similarly employed. (A. 118-119.) The Commissioner had the power to determine that liability because, under Labor Law § 620(1)(b), the Commissioner's determination that a claimant is an employee "shall be deemed a

general determination of such questions with respect to all those employed by such person or employer."

Postmates objected that Mr. Vega was an independent contractor and requested a hearing before an ALJ. Although the ALJ sustained Postmates' objections and overruled the Commissioner's determination (A. 121-123), the Board thereafter reversed the ALJ's decision and sustained the Commissioner's initial determination that Mr. Vega and others similarly situated were Postmates employees. (A. 124-127.[3])

Rejecting Postmates' argument that Postmates is simply a "technology platform that connects persons who need things delivered ('Requesters') with delivery professionals available to make deliveries" (Postmates Br. to the Board at 2), the Board found sufficient evidence that Postmates exercised, or reserved the right

[3] The Board issued its initial determination on September 29, 2016, but issued a resettled decision on October 11, 2016 (A. 124-127), correcting a sentence that mistakenly referred to Postmates' couriers as "teaching artists."

to exercise, sufficient supervision, direction, or control over the services of Mr. Vega to create an employment relationship.

In addition to reciting the facts discussed above (A. 124-125), the Board relied on evidence that Postmates (1) advertised for and screened on demand couriers via an online application and criminal background check, (2) provided and educated the drivers regarding its proprietary software and PEX cards, (3) controlled the amount of information passed along to its couriers before and after accepting a request, (4) chose which couriers to offer a request, (5) kept track of a courier's rate of acceptance, (6) handled replacement of couriers, (7) calculated and provided an estimated time of delivery, (8) procured and sent the courier's photo of the consumer, (9) deposited the requisite amount of money into the account associated with the PEX card provided, (10) established the delivery fee and the courier's non-negotiable rate of pay, (11) handled collections and paid couriers on a regular basis even if a delivery fee was uncollected, (12) provided a monetary referral incentive, (13) retained liability for incorrect or damaged deliveries,

and (14) fielded complaints and monitored consumer satisfaction ratings. (A. 126.)

Acknowledging this Court's mandate to decide like cases in a like manner, *see Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 517 (1985), the Board cited numerous cases involving on-demand couriers or delivery drivers where similar factors were deemed sufficient to create an employment relationship, including this Court's decision in the three appeals consolidated in *Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987).[4] (A. 126-127.) The Board distinguished *Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor)*, 125 A.D.3d 1152 (3d Dep't 2015), on the grounds that the luggage delivery drivers at issue in that case, unlike Postmates' couriers,

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[4] The three appeals consolidated in this Court's *Matter of Rivera* decision are appeals from the Third Department's decisions in *Matter of Rivera (State Line Delivery Service, Inc.—Ross)*, 120 A.D.2d 852 (3d Dep't 1986); *Matter of Ross (Majestic Messenger Service, Inc.—Roberts)*, 119 A.D.2d 857 (3d Dep't 1986); and *Matter of Fox (Whalen's Service—Roberts)*, 119 A.D.2d 868 (3d Dep't 1986).

negotiated their rates of pay, received no training, and bore responsibility for lost or damaged luggage. (A. 127.)

E. The Third Department's Decision

Over a two-judge dissent, the Third Department annulled the Board's determination for lack of substantial evidence. *Matter of Vega v. Postmates Inc.*, 162 A.D.3d 1337 (3d Dep't 2018). (A. 128-133.) The Third Department majority relied on evidence that Postmates' couriers (1) did not undergo an application or interview process, (2) were not required to report to any supervisor, (3) decided whether and when to log on to the platform and whether to accept delivery requests, (4) had no set work schedule or delivery quota, (5) chose their own route and mode of transportation, (6) were not required to wear a uniform or carry an identification card or logo, (7) were paid only for completed deliveries, and (8) were not reimbursed for delivery-related expenses. *Id.* at 1338-89. The court acknowledged some of the indicia of employer control cited by the Board—including that Postmates determined the customer's fee and the courier's rate of pay, tracked the deliveries in real time, and handled customer

complaints—but characterized those factors as demonstrating merely "incidental control." *Id.* at 1339.

The two dissenting Justices would have affirmed the Board's finding of an employment relationship based on the numerous indicia of employer control cited by the Board. *Id.* at 1339-40. The dissent cited multiple cases relying on similar indicia to affirm Board findings that couriers or delivery drivers were employees, even where the record contained evidence that could support a contrary conclusion. *Id.* at 1340.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT COURIERS LIKE MR. VEGA WERE EMPLOYEES OF POSTMATES

As the Third Department dissent would have found, substantial evidence supports the Board's determination that Postmates exercised sufficient control over Mr. Vega's delivery work to create an employment relationship. Applying the proper deference to the Board's resolution of this fact-intensive question, this Court should reverse the Third Department's judgment and reinstate the Board's determination.

Whether an employer-employee relationship exists is a question of fact that turns on whether the alleged employer "exercises control over the results produced or the means used to achieve the results." *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521 (quoting *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897). Although control over the means is the more important factor to be considered, *Matter of Ted Is Back Corp. (Roberts)*, 64 N.Y.2d 725, 726 (1984), no one factor is determinative. *Matter of Concourse Ophthalmology Assoc., P.C.*, 60 N.Y.2d 734, 736 (1983); *see also Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 521. Rather, "[a]ll aspects" of the arrangement must be examined to determine whether the degree of control and direction reserved to the employer establishes an employment relationship. *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692.

The Board's determination of this question of fact must be upheld if it is supported by substantial evidence. *Matter of Rivera*, 69 N.Y.2d at 682; *see also Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692 (explaining this principle). As this Court recently reiterated, the substantial evidence standard is "a minimal

standard," demanding only that a given inference is "reasonable and plausible, not necessarily the most probable." *Matter of Haug v. State Univ. of New York at Potsdam*, 32 N.Y.3d 1044, 1046 (2018) (internal quotations marks, citations, and alterations omitted). Where the record contains evidence that rationally supports an agency's determination, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently. *Id.* That is, where conflicting inferences may be drawn from the evidence, "the duty of weighing the evidence and making the choice rests solely upon the Board." *In re Electrolux Corp.*, 288 N.Y. at 443.

Here, while acknowledging that the Board's determination "will be upheld if supported by substantial evidence," *Matter of Vega*, 162 A.D.3d at 1338, the Third Department failed to apply these settled principles. Instead, it usurped the Board's duty to weigh the evidence by discounting the factors that supported the Board's finding of an employment relationship, focusing instead on the evidence that suggested a contrary result, and thereby

substituting its own judgment for that of the Board.[5] In so doing, the court departed from a long line of cases upholding Board findings that couriers or other delivery persons were employees under substantially similar circumstances. Indeed, Postmates exercised even more control than the employers in those cases: Its online platform allowed it to track and control the delivery process in ways that are not feasible for a traditional delivery service.

A. The Record Contains Numerous Well-Recognized Indicia of an Employer-Employee Relationship.

The record before the Board permitted a rational conclusion that Postmates was not simply an "online marketplace" connecting "requesters" with independent "delivery professionals," as Postmates argued (A. 11, 13, 20, 51, 98), but rather a delivery

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[5] The approach of the Third Department majority in this case appears to perpetuate the mistaken view that this Court's decision in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)*, 28 N.Y.3d 1013 (2016), implicitly "refin[ed] the substantial evidence standard" in unemployment cases to require "a more detailed, qualitative and arguably less deferential analysis of the various employment factors." *In re Mitchell*, 145 A.D.3d 1404, 1406 & n.1 (3d Dep't 2016) (Egan, J.). But after *Mitchell*, this Court in *Matter of Haug*, 32 N.Y.3d at 1046, confirmed that *Yoga Vida* had not altered the basic principles of the substantial evidence inquiry.

company that depended vitally on the services of its couriers and unilaterally controlled the key aspects of their work. In an open marketplace, requesters and independent delivery professionals would negotiate terms. Postmates, by contrast, precluded its couriers from negotiating their own fees and commissions, establishing their own delivery times, competing with other couriers on price or speed, bidding on jobs outside their geographic area, or hiring subcontractors to complete those jobs, among many other restrictions. Postmates could also modify any aspect of its delivery platform or discharge any of its couriers unilaterally and without advance notice.

Taken together, these and other related factors discussed below demonstrate significant "control over the results produced or over the means used to achieve the results." *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897. More than twenty appellate cases have relied on similar factors to sustain Board findings that couriers or other delivery persons were employees. (*See* Addendum, listing these cases.) Indeed, this Court's decision in the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 679-82, upheld such

Board findings based on a mere subset of the factors present in this case. That decision controls here.

1. Postmates controlled the cost and speed of deliveries.

Postmates unilaterally controlled the two most important aspects of any delivery business: cost and speed. Courts have upheld Board findings of an employment relationship in every courier case in which the employer controlled these two critical aspects. *See, e.g.*, *Matter of Rivera*, 69 N.Y.2d at 679-82; *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638, 641 (1983); *Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor)*, 28 A.D.3d 1044, 1045 (3d Dep't 2006), *lv. dismissed*, 7 N.Y.3d 844 (2006); *Matter of Alfisi (BND Messenger Service, Inc.—Hartnett)*, 149 A.D.2d 883, 883 (3d Dep't 1989); *cf. Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 517 (reversing Board finding of independent contractor relationship where employer controlled these aspects of business). And here, Postmates' algorithms and continuous GPS tracking allowed it to exercise even greater control over these aspects of the business.

First, it is undisputed that, as in all three *Rivera* appeals, Postmates unilaterally set the fee charged to the customer and the commission paid to the courier. Postmates' algorithms calculated the fee based exclusively on delivery distance, precluding couriers from modifying the fee to account for the number of stops, the time required to complete the delivery, the travel conditions, or the time of day (e.g., late at night or during rush hour). (A. 71-72.) Postmates' algorithm also dictated the percentage of the customer fee that it permitted couriers to retain as a commission, imposing this percentage on a take-it-or-leave-it basis and precluding any further negotiation. (A. 30-31.) Postmates also handled all aspects of customer billing, from collecting customers' credit card information to charging customers following delivery (A. 30-31, 39-42, 42, 71-72), thus ensuring that couriers could not depart from its rigid fee structure.

If Postmates were truly an online marketplace mediating between customers and delivery professionals, its couriers could set their own fees and compete with other couriers on factors such as price, speed, or reputation. Postmates could then take a small

service fee from whatever price the customer and the courier agreed upon—like the online auction company eBay, to which Postmates repeatedly sought to compare itself at the hearing (A. 11, 32-33, 98, 101). But Postmates' platform precluded any such negotiation or competition. Instead, Postmates unilaterally controlled *all* financial aspects of the delivery process, using its outsize bargaining power to extract the maximum utility from its couriers' labor.

Second, as in all three *Rivera* appeals, Postmates unilaterally controlled the other most critical aspect of the delivery process—timing. Although couriers were nominally free to deliver items when they wished (A. 17, 24), Postmates placed significant constraints on that freedom. Most obviously, Postmates marketed itself based on its speedy deliveries, typically within an hour, explaining that speed is the primary reason customers choose their platform over traditional delivery methods. (A. 18-19.) Consistent with this core feature of its business model, Postmates sent customers an estimated time of delivery for each delivery request. Couriers had no input into or ability to modify this estimated time.

Postmates also tracked couriers' location in real time and allowed customers to view that location throughout the entire delivery process. (A. 19, 46-47, 66-67, 82-83.) And Postmates closely monitored customer feedback and unilaterally terminated couriers for, among other things, negative customer reviews. (A. 36, 41, 74, 108.)[6]

Postmates thus gave customers an expectation of virtually immediate delivery, and it enforced that expectation by allowing consumers to track couriers and terminating couriers who received bad customer reviews. This Court has long acknowledged that such indirect compulsion carries the same or even greater weight than a direct command. In *In re Electrolux Corp.*, the Court sustained the Board's finding of an employment relationship in large part because

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[6] Postmates did not explain how many negative reviews it viewed as sufficient to terminate a courier, leaving the Board to draw its own inference from this lack of detail. In concluding that various Postmates couriers were employees under the National Labor Relations Act, the National Labor Relations Board's (NLRB) Office of General Counsel found that Postmates' managers had unfettered discretion to terminate couriers whose average customer rating fell below 4.7 out of 5. *See* Advice Mem., NLRB Case No. 13-CA-163079 (Sept. 19, 2016), at 3, *available at* apps.nlrb.gov/link/document.aspx/09031d45826e0080.

the employer's practice of discharging workers for poor performance "effectively regiment[ed] the activities of its representatives into a pattern desired by respondent of minute and detailed control." 288 N.Y. at 446.

Postmates' control over timing was far more restrictive than in other delivery cases where courts nonetheless sustained the Board's finding of an employment relationship. For example, in the *Fox* appeal consolidated in *Matter of Rivera*, 69 N.Y.2d at 682, the courier had to complete delivery within a 24-hour window imposed by the customer. *See also Matter of Kelly*, 28 A.D.3d at 1045 (noting employer control over deliveries completed within a "reasonable time on the same day"); *cf. Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d at 517 (reversing Board finding of independent contractor relationship where deliveries had to be "completed on the day received"). Here, by contrast, Postmates' couriers were expected to complete deliveries almost immediately, and this expectation was enforced by continuous GPS tracking. A more invasive form of control is hard to imagine.

To understand the extent of Postmates' control over timing, consider a courier who, consistent with the example Postmates gave at the hearing (A. 67, 76), accepts an assignment to deliver a burrito bowl. Based on Postmates' marketing, the customer expects a speedy delivery and may even have chosen to forego the restaurant's own delivery service for the speed and tracking function offered by Postmates. (A. 18-19.) As soon as the courier accepts the job, Postmates sends the customer an estimated time of delivery—say, a half hour—and allows the customer to track the courier's location continuously. If the courier exercises his supposed freedom to "stop for lunch" or "take a longer route . . . to drop off a sweater" for his child (A. 30), as Postmates suggested at the hearing, the courier will arrive with a cold burrito bowl and undoubtedly receive a negative review. With enough such reviews, Postmates will terminate his employment. (A. 36.)

A courier subject to these conditions has no real discretion as to timing, or even as to delivery route or order of deliveries. At a minimum, a reasonable factfinder could conclude that Postmates'

couriers lacked any meaningful discretion with respect to these key delivery parameters.

2. Postmates controlled the assignment of deliveries.

Postmates also exercised significant control over the assignment process—another crucial aspect of any delivery system. As in all three *Rivera* appeals, Postmates' couriers received all the details of their assignments from Postmates, and not from customers directly. (A. 17, 28-30, 64-66, 76.) Postmates told couriers where and when to pick up and drop off requested items, precluding couriers from negotiating these critical delivery parameters with the customer.

Postmates' algorithms allowed it to exercise even more control over the assignment process than in the *Rivera* appeals or other traditional delivery cases. Postmates used a "blind dispatch" system under which it did not provide the most critical information about the delivery—including the pick-up and drop-off locations—until after the job was assigned. (A. 17, 28-30, 64, 76.) As a result, couriers had to decide whether to accept or reject a job without even knowing the nature of the job. By thus controlling the flow of

information, Postmates ensured that couriers could not reject delivery jobs that were undesirable or unprofitable, which in turn allowed Postmates to maximize the number of deliveries from which it could extract a fee. *See* Cornell University, *supra*, at 10, 23-26 (explaining how blind dispatch systems decrease worker autonomy). Postmates also offered delivery jobs only to couriers within a narrow geographic area (A. 21-23), limiting couriers' freedom of choice in order to ensure speedier deliveries.

Similarly, Postmates' algorithms unilaterally set the rule for assigning deliveries—i.e., "first come, first served"—rather than allowing couriers to bid on delivery jobs, or allowing customers to choose their courier based on, say, past customer ratings. (A. 25, 38-39, 69.) And Postmates kept track of the rate at which couriers accepted delivery requests. (A. 26.) Given that Postmates retained the right to unilaterally terminate a courier at its discretion, a reasonable factfinder could infer that Postmates gathered this

information for the purpose of penalizing couriers whose rate of acceptance was too low.[7]

3. Postmates precluded couriers from delegating assignments or otherwise operating as independent businesses.

Postmates precluded couriers from delegating assignments to subcontractors (A. 49-50, 73). Such authority to delegate is the hallmark of an independent contractor relationship. The ability to delegate was a critical factor in the only three unemployment cases where courts found delivery persons to be independent contractors. *See Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor)*, 140 A.D.3d 1217, 1219-20 (3d Dep't 2016); *Matter of Jennings*, 125 A.D.3d at 1153; *Matter of Werner (CBA Industries, Inc.—Hudacs)*, 210 A.D.2d 526, 526-28 (3d Dep't 1994), *lv. denied*, 86 N.Y.2d 702 (1995).

By precluding Postmates' couriers from delegating their assignments, Postmates constrained their ability to determine "the

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[7] This inference is consistent with the finding of the NLRB's Office of General Counsel that Postmates terminated couriers based on what individual managers subjectively considered to be "poor performance." NLRB Advice Mem., *supra*, at 19-20.

means used to achieve the results." *Matter of Ted Is Back Corp.*, 64 N.Y.2d at 726. Independent contractors are commonly understood to be professionals with the judgment and resources to "choose the method for accomplishing" the tasks entrusted to them. Black's Law Dictionary, "Independent Contractor" (11th ed. 2019). This includes the ability to hire, train, and delegate all or part of the work to subcontractors whom the contractor believes, in her independent business judgment, to be qualified and trustworthy to perform the delegated tasks.

In the context of a delivery service, the right to delegate implies the right of an independent contractor to hire a network of couriers who could perform deliveries on the contractor's behalf in different locations and during different times of day. With the proper vetting and training, the contractor could build a team of couriers whose deliveries are generally faster and more reliable than those of competitors. And with the proper marketing, the contractor could leverage these qualities to attract more customers. In short, like a true independent business person, the contractor would possess "the opportunity for profit from sound management."

United States v. Silk, 331 U.S. 704, 719 (1947). Conversely, the contractor would bear all the legal and business risks associated with entrusting work to others, confirming that the contractor is running an independent business rather than working for another company.

But Postmates' couriers enjoyed no such freedoms. Postmates did its own vetting and training of couriers (A. 15, 36-37, 55-56, 68), and precluded couriers from delegating any delivery jobs or even employing an occasional substitute (A. 49, 73). And Postmates enforced this rule by sending customers a photograph of their assigned courier, ensuring that the customer would leave a negative review or simply refuse to accept delivery if another courier showed up. (A. 49, 73.)

Indeed, Postmates admitted that its couriers lacked the ability to operate their own delivery platform and were thus wholly dependent on Postmates' platform to monetize their labor. (A. 97 [acknowledging that couriers lacked "the time or skills to make a Website" or "to figure out how to get connected to customers"]). And Postmates further limited couriers' ability to develop an

independent business by precluding them from competing with other couriers on price, speed, or reputation (A. 17, 28-30, 64-66, 76); bidding on delivery jobs outside their narrow geographic area (A. 21-23); or accepting payment from customers for services not requested through Postmates' platform (A. 86-87).

These factors permit—if they do not require—a rational conclusion that Postmates' couriers were not independent contractors running their own businesses, but rather employees providing unskilled labor for Postmates' delivery business.

4. Postmates handled all aspects of customer relations.

Postmates also controlled all aspects of customer relations—a form of employer control recognized in *Rivera* and other cases. Postmates handled all marketing and customer acquisition, demonstrating that the customers obtained were customers of Postmates rather than any individual courier. *See Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Alfisi*, 149 A.D.2d at 883. Postmates also tracked customer feedback and handled all customer complaints, communicating to the public that Postmates retained ultimate responsibility for the quality of its deliveries. (A. 32, 41,

46-47, 50, 67.) *See Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor)*, 136 A.D.3d 1079, 1080 (3d Dep't 2016) (sustaining Board finding that courier was employee where employer handled customer feedback); *Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor),* 134 A.D.3d 1186, 1187 (3d Dep't 2015) (same); *Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor),* 133 A.D.3d 1156, 1157 (3d Dep't 2015) (same); *Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep't 2015) (same).

Similarly, Postmates worked directly with customers to resolve issues relating to lost and damaged deliveries, explaining that it is responsible in such situations. (A. 61-62.) *See Matter of Di Martino*, 59 N.Y.2d at 641 (sustaining Board finding that courier was employee where employer assumed responsibility for incorrect deliveries); *Matter of Youngman*, 126 A.D.3d at 1226 (same); *Matter of Kelly*, 28 A.D.3d at 1045; *cf. Matter of Jennings*, 125 A.D.3d at 1153 (holding that a delivery driver who bore sole responsibility for lost or damaged items was an independent contractor).

Postmates also assumed the risk that customers would fail to pay for delivered items. (A45-46.) Courts have long found this fact probative of an employment relationship because employees, unlike independent contractors, do not typically assume business risks, including the risk of customer nonpayment, and instead are paid for their labor regardless of whether that labor ultimately generates revenue. *See Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor),* 134 A.D.3d 1362, 1363-64 (3d Dep't 2015); *Matter of Voisin,* 134 A.D.3d at 1187; *Matter of Watson (Partsfleet Inc.—Commissioner of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015); *Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor)*, 133 A.D.3d 1073 (3d Dep't 2015); *Matter of Alfisi*, 149 A.D.2d at 883.

5. Postmates could unilaterally alter any aspect of its delivery platform.

As noted above, this Court has emphasized that "control over the means is the more important factor to be considered" in assessing the existence of an employment relationship. *Matter of Ted Is Back Corp.*, 64 N.Y.2d at 726. Here, a critical means by which couriers carried out their delivery jobs was Postmates' online

platform. That platform dictated virtually every aspect of the delivery process, from the assignment and timing of deliveries to the fees assessed and the collection of payment.

There is no dispute that Postmates exercised complete and unilateral control over its platform. It therefore had the ability to modify any aspect of its delivery service without notice to or input from its couriers. For example, Postmates could decide tomorrow that it will guarantee all deliveries within 20 minutes, terminate all couriers who receive a single bad review, give priority in the assignment of deliveries to those couriers with the fastest delivery times, require its couriers to wear uniforms or carry liability insurance, or cut couriers' commissions in half.

In short, with the proverbial click of a button, Postmates could impose on couriers, on a take-it-or-leave-it basis, virtually any work rule it desires. This absolute right of control demonstrates the existence of an employer-employee relationship, regardless of whether Postmates actually exercised the full extent of its control. *See In re Morton*, 284 N.Y. 167, 172-73 (1940) (explaining that "[t]he test is the existence of a *right* of control over the agent") (emphasis

added); *see also MNORX, Inc. v. Ross*, 46 N.Y.2d 985, 988 (1979) (Jones, J., dissenting) (acknowledging majority's premise "that a finding of employer-employee relationship may properly be predicated on a reserved right to control, even though there be no evidence that such right was in fact ever exercised by the 'employer'").

6. Postmates possessed the ability to unilaterally discharge couriers.

Postmates also possessed the ability to discharge a courier at any time, without advance notice and without giving the courier an opportunity to contest their removal from the platform. (A. 36, 74, 108.) This Court has long recognized that a unilateral power of discharge is probative of an employer-employee relationship because it reflects the employer's ability to enforce its desired method of performing the work. *See, e.g.*, *Matter of Rivera*, 69 N.Y.2d at 682; *In re Electrolux Corp.*, 288 N.Y. at 446.

7. The record contains additional well-recognized indicia of employer control.

Under this Court's decision in *Rivera*, the numerous indicia of employer control set forth above are more than sufficient to support

the Board's determination that Mr. Vega was an employee. But the record here contains at least three additional indicia of employer control that courts have cited in sustaining Board findings that delivery persons were employees.

First, Postmates screened and trained all of its couriers, refuting the claim that it operated as a mere "middleman." (A. 20.) Postmates conducted a criminal background check on all new couriers and assured customers that it had thus vetted its couriers. (A. 15, 36-37). *See Matter of Watson*, 127 A.D.3d at 1462 (upholding Board finding of employment relationship where employer screened prospective drivers by checking their motor-vehicle records). Postmates also held an orientation session where it taught couriers how to use its online platform and instructed them on the use of its PEX card (A. 55-56, 68). *See id.* at 1462 (upholding Board finding of employment relationship where employer "trained [the delivery driver] on the operation of a scanner used to schedule and track customer deliveries"); *Matter of Mitchum,* 133 A.D.3d at 1157 (same, where employer provided "orientation and training" to delivery drivers). Because couriers had to handle all delivery

requests through Postmates' online platform, this training reflected a form of direct control over the "means used to achieve the results." *Matter of 12 Cornelia St.*, 56 N.Y.2d at 897. Indeed, Postmates acknowledged that couriers "would have no way of knowing how to utilize [the] app" without attending the training session. (A. 68.)

Second, Postmates sought to find a back-up courier when the courier originally assigned became unavailable. (A. 24-25, 48-49, 69.) This fact provides evidence of an employment relationship because, unlike independent contractors, employees are not typically responsible for finding their own substitutes. *See Matter of Werner*, 210 A.D.2d at 527 (delivery person responsible for finding his own replacement was an independent contractor). The fact that Postmates undertook to find substitutes also confirms that it did not act as a mere marketplace or middleman, but rather as a delivery company responsible for ensuring that customers receive prompt delivery.

And third, Postmates required couriers to report via its online platform when they picked up an item and again when they delivered it. (A. 41, 64.) Courts have repeatedly held that such

reporting requirements—which reflect direct control over the manner of performing the work—support Board findings that delivery persons are employees. *See Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor)*, 150 A.D.3d 1595 (3d Dep't 2017); *Matter of Gill*, 134 A.D.3d at 1363-64; *Matter of Mitchum*, 133 A.D.3d at 1157; *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996); *Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney),* 233 A.D.2d 704, 704 (3d Dep't 1996)*, lv. denied,* 89 N.Y.2d 810 (1997); *Matter of CDK Delivery Service, Inc. (Hartnett)*, 151 A.D.2d 932, 932 (3d Dep't 1989).

Taken together, these indicia provide ample evidence to support a rational finding that Postmates exercised predominant control over both the means and results of couriers' delivery work.

B. The Factors Cited by Postmates Do Not Render the Board's Decision Irrational.

To be sure, the record also contains some indicia of courier independence. But these indicia do not render irrational the Board's

finding of an employer-employee relationship based on all the countervailing evidence. As this Court has repeatedly explained, where the record as a whole contains substantial evidence supporting the Board's determination of an employment relationship, the determination must be upheld, even if the record also contains evidence that would support a contrary conclusion. *Matter of Rivera*, 69 N.Y.2d at 682; *Matter of Villa Maria Inst. of Music*, 54 N.Y.2d at 692. Here, the Board's determination is amply supported by the numerous indicia of employer control cited above.

Postmates relies heavily on couriers' purported freedoms to (1) determine their own work schedule—i.e., when to log on to the platform and what delivery jobs to accept; (2) choose their own delivery method and route; and (3) work for other companies. Postmates argues that, collectively, these factors compel the finding of an independent contractor relationship as a matter of law—i.e., that *no* reasonable factfinder could find an employment relationship where these factors are present. In fact, however, Postmates constrained couriers' freedoms in important respects. And this Court has in any event already rejected the same extreme

position, a position that would categorically deprive almost all "gig workers" and many other contingent and temporary workers of unemployment benefits. It should do so again here.

1. Postmates constrained couriers' purported freedoms.

As an initial matter, the record shows that Postmates imposed three important constraints on couriers' purported freedoms.

First, Postmates constrained couriers' ability to meaningfully exercise discretion to accept or reject delivery jobs by withholding the details of such jobs until *after* assignment to particular couriers. (A. 17, 28-30, 64, 76.) As explained *supra* at 35-36, this type of "blind dispatch" system limits couriers' autonomy by forcing them to accept deliveries based on incomplete information and to take on low-value deliveries they might have otherwise rejected. Postmates also precluded couriers from accepting delivery jobs outside their narrow geographic area or from bidding on jobs based on price or delivery time. (A. 21-23.) The couriers' freedom was thus limited to accepting or rejecting a narrow subset of delivery jobs about which

they knew little and whose main parameters were dictated by Postmates.[8]

Second, Postmates constrained couriers' freedom to choose a particular delivery route by giving customers an expectation of nearly immediate delivery and allowing customers to track their courier's location in real time, creating a significant disincentive for couriers to take an indirect route. *See supra* at 31-35. And because couriers could accept deliveries only within their narrow geographic area, any discretion they retained to choose their route—e.g., to take Fifth Avenue instead of Sixth Avenue—was minimal. Similarly, as to mode of transportation, Postmates' adhesion contract required couriers to select a particular mode of transportation in advance (i.e., walking, biking, or car), limiting

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[8] Couriers' nominal freedom to "work when they want" was further undermined by the reality that on-demand platforms like Postmates create "an excess supply of labor, resulting in significant underemployment for app workers and downward pressure on their earnings." As a result, their scheduling flexibility "is largely a false sense of freedom, as platform workers need to be on-call and available when demand for their services will surge." Cornell University, *supra*, at 27.

their ability to vary their mode of transportation from delivery to delivery. (A. 117.)

Third, Postmates constrained couriers' ability to work for other companies by advising them not to accept payment from customers for services not offered through Postmates' platform. (A. 86-87.) Postmates' rigorous timing constraints reinforced this restriction: A courier subject to a narrow delivery window and constant GPS tracking could not feasibly perform other delivery work while completing a delivery for Postmates.

2. This Court in *Rivera* affirmed the Board's finding of an employment relationship despite the presence of the same freedoms Postmates' couriers enjoyed.

In any event, this Court has already rejected the blanket rule Postmates advocates. In the three appeals consolidated in *Matter of Rivera*, 69 N.Y.2d at 682—*Rivera*, *Ross*, and *Fox*—this Court affirmed the Board's determination that couriers were employees, even though those appeals involved each of the three purported freedoms on which Postmates relies, among others. Those freedoms mainly reflect the couriers' ability to decide *when* to work, but say little about the control exercised over *how* they work.

In rejecting the employers' reliance on such freedoms, this Court recognized that workers who lack a fixed working schedule or work for multiple employers may nonetheless remain subject to many other forms of employer control, including those present here. This holding has even more force in today's economy, where the traditional nine-to-five job is on the wane and new forms of fragmented and temporary work, like the "gig economy," are on the rise. *See* Cornell University, *supra*, at 6 (citing estimates that contingent or on-demand work accounts for up to a third of the American workforce).[9]

Rivera involved a courier who worked for a package delivery service called State Line. Like Postmates' couriers, the courier in

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[9] In recent years, there has been a steady trend toward working arrangements in which employees have scheduling flexibility. *See* Human Resource Management, *National Study of Employers* (2017), *available at* https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/National-Study-of-Employers.aspx. There has likewise been an increase in the number of employees who work for more than one employer; such employees now represent over 8% of the American workforce. *See* Julia Beckhusen, "About 13M U.S. Workers Have More Than One Job," U.S. Census Bureau (June 18, 2019), *available at* https://www.census.gov/library/stories/2019/06/about-thirteen-million-united-states-workers-have-more-than-one-job.html.

Rivera "committed himself to no particular amount of services"; rather, "when he wished to make himself available, he telephoned State Line's dispatcher and accepted such work as he desired from that made available by the dispatcher." *Matter of Rivera*, 120 A.D.2d at 853. Moreover, the courier "was free to choose any route to perform the services" and "was not prohibited from carrying on his business with one or more additional companies while performing services for State Line." *Id.* He paid his own expenses and received no fringe benefits. *Id.* And unlike here, he was "free to hire helpers without notification to the company." *Id.*

Despite these factors, this Court annulled the Third Department's contrary ruling and affirmed the Board's finding that the *Rivera* courier was an employee in light of the facts that, like those here, provided indicia of an employment relationship. 69 N.Y.2d at 680-82. As explained in the Third Department's two-Justice dissent, the employer unilaterally set the courier's rate of pay, separately billed the customer, assumed the risk of customer nonpayment, and had couriers complete bills of lading on employer letterhead. 120 A.D.2d at 854 (Yesawich, J., dissenting). Moreover,

the employer told the courier when and where to make pickups and deliveries, and the courier often had to comply with a time limitation for deliveries imposed by the customer. 120 A.D.2d at 853.

In *Ross*, this Court affirmed a Third Department ruling sustaining a Board finding that drivers for a similar delivery service were employees where the drivers had even more freedom. The drivers in *Ross* "had no schedule or specific route to follow and no directions were given to them as to method or route of delivery." *Matter of Ross*, 119 A.D.2d at 857-58 (Mikoll, J., dissenting). Moreover, the drivers could turn down assignments at their option, bore their own expenses, carried their own business cards, could engage substitutes, and could work for competitors even when working for the employer. *Id.* Nonetheless, this Court upheld the Board's finding that the delivery drivers were employees based on evidence that (1) the employer unilaterally set the customer's fee and the courier's commission; (2) couriers received the details of their assignments from the employer's dispatchers upon calling in

to seek work; and (3) the clients were clients of the employer and not the individual driver. *Matter of Rivera*, 69 N.Y.2d at 682.

And in *Fox*, this Court reversed the Third Department and affirmed the Board's finding that delivery drivers for a photographic film pickup and delivery service were employees, despite evidence that the drivers "set up [their] own schedule of pickups and delivers," "accepted or declined to take [deliveries] at their option," were not required to wear uniforms or other employer insignia, and were free to work for competitors. *Matter of Fox*, 119 A.D.2d at 869. Indeed, in *Fox*, unlike here, drivers could delegate work to substitutes, and they individually negotiated their compensation, received no training, made their own delivery arrangements directly with customers, and handled customer complaints. *Id.* at 869-870. Despite these factors, this Court held that the Board's finding of an employment relationship was supported by evidence that (1) the employer provided delivery drivers with the names of customer outlets; (2) drivers were required to comply with a 24-hour guaranteed delivery window imposed by customer stores; and (3) the employer named its drivers

on its workers' compensation policy as a precautionary measure. *Matter or Rivera*, 69 N.Y.2d at 680-82.

The *Rivera* appeals thus involved all of the key indicia of courier independence that Postmates relied upon below, as well as additional indicia of independence not present here. This Court nonetheless upheld the Board's determinations that the couriers in those appeals were employees, not independent contractors. For example, unlike here, the couriers in all three appeals could delegate their assignments. Unlike here, the *Ross* couriers had business cards "holding themselves out to the public as self-employed messenger service drivers." *Matter of Ross*, 119 A.D.2d at 858 (Mikoll, J., dissenting). Unlike here, the couriers in *Fox* could individually negotiate their rates of pay and handled customer complaints directly. And the 24-hour window within which *Fox* couriers had to complete deliveries was far less restrictive than the expectation of nearly immediate delivery on which Postmates' business model is predicated, as explained *supra* at 31-35.

3. Many other cases are in accord.

Many other appellate cases have affirmed Board findings that delivery persons were employees, notwithstanding evidence that such persons:

- determined their availability for work, *see Matter of Voisin,* 134 A.D.3d at 1187; *Matter of Scott (CR England Inc.—Commissioner of Labor)*, 133 A.D.3d 935, 938-939 (3d Dep't 2015); *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932; *Matter of Alfisi*, 149 A.D.2d at 883;

- could accept or reject assignments at their option, *see Matter of Wilder*, 133 A.D.3d at 1073; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Caballero (Reynolds Transport, Inc.—Hudacs)*, 184 A.D.2d 984, 984 (3d Dep't 1992); *Matter of Alfisi*, 149 A.D.2d at 883; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;

- could choose their own delivery route, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987);

- were permitted to work for other companies, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Watson*, 127 A.D.3d at 1462; *Matter of Kelly*, 28 A.D.3d at 1045; *Matter of Gray*, 134 A.D.2d at 791; *Matter of Caballero*, 184 A.D.2d at 984; *Matter of Alfisi*, 149 A.D.2d at 883;

- were paid on a per-delivery basis, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Wells* appeal); *Matter of Kelly*, 28 A.D.3d at 1045;

- did not receive fringe benefits or expense reimbursements, *see Matter of Kelly*, 28 A.D.3d at 1045; *Matter of CDK Delivery Service*, 151 A.D.2d at 932;
- signed a contract specifying that they were independent contractors, *see Matter of Di Martino*, 59 N.Y.2d at 641 (addressing *Di Martino* and *Wells* appeals); *Matter of Scott*, 133 A.D.3d at 938-939; *Matter of Kelly*, 28 A.D.3d at 1045; and
- were not required to wear uniforms or bear other employer insignia, *see Matter of CDK Delivery Service*, 151 A.D.2d at 932.

Many of these factors merely reflect the respective employers' disproportionate bargaining power and ability to dictate the terms of the employment relationship on a unilateral basis. For example, the fact that an employer declines to provide employees with any fringe benefits, or forces employees to sign an adhesion contract stating that they are independent contractors, as Postmates did here, simply confirms the extent of the employer's economic leverage over its workers. This Court has long held that such formalistic factors "may not preclude an examination to determine whether *the actual relationship* is such as to bring the parties within the scope of the law." *In re Morton*, 284 N.Y. at 175 (emphasis added).

By contrast, there are only three cases in which courts have annulled Board findings that couriers or other delivery persons were employees—specifically, the Third Department's decisions in *Bogart*, *Werner*, and *Jennings*. (Addendum at 3.) Even assuming that these cases can be reconciled with this Court's decision in the *Rivera* appeals—and the nearly twenty Appellate Division cases that accord with that decision—all three of these cases are readily distinguishable from the present case. In *Bogart* and *Werner*, the delivery drivers could negotiate higher rates of pay and were free to delegate jobs to other drivers, and the drivers in *Bogart* also carried their own independent business cards. *Matter of Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner*, 210 A.D.2d at 526-28. In *Jennings*, the drivers could similarly negotiate their own rates of pay, and they also contacted customers directly to establish delivery times and assumed ultimate liability for lost or damaged luggage. *See Matter of Jennings*, 125 A.D.3d at 1153. None of those circumstances are present here.

Finally, contrary to Postmates' contention below, this Court's decisions in *Matter of Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1013-16,

and *Matter of Ted is Back Corp.*, 64 N.Y.2d 725 (1984), do not support a contrary result. Those cases involved jobs—yoga teacher and sales agent, respectively—that differ from courier work in ways that significantly alter the analysis. Fees and timing, for example, are a much less significant part of the yoga and sales businesses than they are of the delivery business. Moreover, unlike yoga teachers or salespeople, Postmates' couriers perform unskilled labor that involves little to no discretion. The threshold for establishing their lack of independence is correspondingly lower. *See* Restatement (Second) of Agency § 220, cmt. i (under the common-law test, "[u]nskilled labor is usually performed by those customarily regarded as servants [i.e., employees], and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price").

In sum, the record as a whole contains substantial, indeed ample, evidence to support the Board's determination that Mr. Vega was an employee of Postmates rather than an independent contractor operating his own businesses. The Third

Department's judgment should therefore be reversed and the Board's determination reinstated.

C. The Remedial Purpose of the Unemployment Insurance Law Supports the Board's Decision.

It is well settled that remedial legislation should be construed liberally to effectuate its purpose. *See Matter of Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 676 (1997). Because the unemployment insurance law is "a remedial statute designed to protect the wage earner from the hazards of unemployment," *Matter of Ferrara*, 10 N.Y.2d at 8, close cases should be resolved in favor of recognizing an employment relationship to give full effect to this remedial purpose. Here, the statute's broad remedial purpose supports the Board's finding that Mr. Vega was an employee eligible to receive unemployment benefits.

Postmates' couriers suffer from precisely the type of "[e]conomic instability" that the unemployment insurance law was intended to alleviate. Labor Law § 501. A recent study conducted by Cornell University found that on-demand platform workers like Postmates' couriers "[e]xperience low and unstable earnings" and

rely "on second or third jobs, other family members' incomes, and various types of public aid" to survive. Cornell University, *supra*, at 3. Of the Postmates couriers surveyed, none could cover living expenses with their app work; as a result, 50% held other jobs and 38% resorted to other forms of income support. *Id.* at 55. Many gig workers also belong to vulnerable populations excluded from the traditional labor market. And because of unpredictable pay and the lack of workplace benefits and protections, they have "very high turnover rates, with estimates ranging from 50 to 100% annually." *Id.* at 6.

In sum, not only is the Board's determination amply supported by evidence that Postmates unilaterally controlled its couriers' delivery work, but also that determination advances the broad remedial goal of the unemployment insurance law to assist workers unemployed through no fault of their own. The Court should uphold the Board's determination for this additional reason.

D. The Existence of Divergent Views About the Employment Status of Gig Workers Heightens the Importance of Judicial Deference.

As courts have long recognized, "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing." *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 121 (1944). The advent of new working arrangements, such as the "gig economy," have only increased the possibility of divergent conclusions. *See, e.g.*, Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 Harv. L. & Pol'y Rev. 479 (2016) (describing conflicting views as to employment status of gig workers). The fact that reasonable minds can differ on this fact-intensive issue lends still greater importance to the policy of deference that courts apply in reviewing agency determinations.

Whether a worker is classified as an employee or independent contractor determines the worker's coverage under a host of labor protections, including unemployment insurance, workers

compensation, family and medical leave, wage and hour protection, workplace health and safety, pension security, anti-discrimination statutes, and statutes protecting the right to organize and bargain collectively, among other things. Under this mosaic of laws, "an individual may be considered an employee for some purposes but an independent contractor for others." 19 Williston on Contracts § 54:2 (4th ed.). This can happen in either of two ways. First, the Legislature can deem certain workers to be employees or independent contractors for the purpose of specified labor laws but not others, as explained *supra* at 7-8. And second, different agencies or factfinders can weigh the evidence differently and draw different inferences from the same or similar facts. Indeed, different agencies applying the same common-law test may develop a practice over time of emphasizing certain factors more than others, creating a body of administrative precedent that can lead agencies to reach different outcomes in similar cases.

Postmates' operation provides an example of such divergent outcomes. In the decision under review, the Board found that a Postmates courier was an employee for unemployment insurance

purposes. The NLRB's Office of General Counsel likewise concluded under the same common-law test that various Postmates couriers in Chicago were employees for purposes of the National Labor Relations Act (which protects, among other things, the right to unionize). *See* NLRB Advice Mem., *supra*. By contrast, the New York Workers' Compensation Board recently found on the record created in that case that a Postmates courier (not Mr. Vega) was an independent contractor for workers' compensation purposes after weighing many of the same factors that were considered here. *See* *Postmates Inc.*, N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350 (Jan. 31, 2019). (The courier in that case did not seek judicial review of the Workers' Compensation Board's decision.)

The possibility of divergent outcomes is part and parcel of an administrative system under which different agencies are authorized to determine a worker's employment status for the purpose of specific statutory protections based on the specific administrative records before them. The fact that agencies may reasonably reach different conclusions in resolving this fact-intensive question is a natural consequence of the deference that

courts accord to each agency's determination. As explained above, under New York's longstanding administrative law, an agency's factfinding is upheld if it is supported by substantial evidence—that is, if it has a rational basis in the record—even if a contrary result might also be reasonable. *Matter of Haug*, 32 N.Y.3d at 1046. This deferential standard acknowledges not only that "[o]ften there is substantial evidence on both sides of an issue disputed before an administrative agency," *id.* (quoting *Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047 [2018]), but also that different agencies are entrusted with different policy goals and must generally follow their own precedent, regardless of how other agencies may have ruled in similar cases, *Matter of Charles A. Field Delivery Serv.,* 66 N.Y.2d at 517.

If the Legislature disagrees with the way an agency exercises its discretion for some class of cases, or believes that the policies entrusted to it would be better served by a bright-line rule, the Legislature may enact legislation to address the issue, as it has done repeatedly in both limiting and expanding the definition of

employment as applied to specific industries. *See supra* 7-8. Gig workers like Mr. Vega, however, are currently subject to no such legislation. The Board thus retains discretion to determine under the common-law test whether such workers are employees eligible to receive unemployment benefits, regardless of how other agencies or factfinders may come out in other cases involving different statutory schemes or different evidentiary records.

Postmates, by contrast, advocates a per se rule that would effectively eliminate the discretion reserved to the Board and other agencies to determine whether gig workers like Mr. Vega are employees. Postmates seeks a ruling that no rational agency or factfinder could conclude that such workers are employees, notwithstanding that both a state and federal agency have already reached precisely that conclusion. This result is directly at odds with the deference accorded to administrative factfinders under settled New York law. If Postmates seeks a bright-line rule that all of its couriers—and, by extension, all workers in the gig economy—are independent contractors for all purposes, its remedy is with the Legislature, not the courts.

CONCLUSION

The Third Department's judgment should be reversed and the Board's determination reinstated.

Dated: Albany, New York
July 15, 2019

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Joseph M. Spadola, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 11,990 words, which complies with the limitations stated in § 500.13(c)(1).

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ADDENDUM

A. Cases Affirming Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Rivera (*State Line Delivery Serv., Inc.—Roberts*), 69 N.Y.2d 679 (1986), *cert. denied*, 481 U.S. 1049 (1987),

> *reversing Matter of Rivera (State Line Delivery Service, Inc.—Ross)*, 120 A.D.2d 852 (3d Dep't 1986),
>
> *affirming Matter of Ross (Majestic Messenger Service, Inc.—Roberts)*, 119 A.D.2d 857 (3d Dep't 1986),
>
> *reversing Matter of Fox (Whalen's Service—Roberts)*, 119 A.D.2d 868 (3d Dep't 1986);

Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross), 59 N.Y.2d 638 (1983),

> *affirming Matter of Di Martino (Buffalo Courier Express Co.—Ross)*, 89 A.D.2d 829 (3d Dep't 1982),
>
> *affirming Matter of Wells (Utica Observer-Disptach & Utica Daily Press, Inc.—Roberts)*, 87 A.D.2d 960 (3d Dep't 1982);

Matter of Crystal (Medical Delivery Servs.—Commissioner of Labor), 150 A.D.3d 1595 (3d Dep't 2017);

Matter of Garbowski (Dynamex Operations East, Inc.—Commissioner of Labor), 136 A.D.3d 1079 (3d Dep't 2016);

Matter of Gill (Strategic Delivery Solutions LLC—Commissioner of Labor), 134 A.D.3d 1362 (3d Dep't 2015);

Matter of Voisin (Dynamex Operations East, Inc.—Commissioner of Labor), 134 A.D.3d 1186 (3d Dep't 2015);

Matter of Mitchum (Medifleet, Inc.—Commissioner of Labor), 133 A.D.3d 1156 (3d Dep't 2015);

Matter of Wilder (RB Humphreys Inc.—Commissioner of Labor), 133 A.D.3d 1073 (3d Dep't 2015);

Matter of Scott (CR England Inc.—Commissioner of Labor), 133 A.D.3d 935 (3d Dep't 2015);

Matter of Watson (Partsfleet Inc.—Commissioner of Labor), 127 A.D.3d 1461 (3d Dep't 2015);

Matter of Youngman (RB Humphreys Inc.—Commissioner of Labor), 126 A.D.3d 1225 (3d Dep't 2015);

Matter of Kelly (Frank Gallo, Inc.—Commissioner of Labor), 28 A.D.3d 1044 (3d Dep't 2006), *lv. dismissed*, 7 N.Y.3d 844 (2006);

Matter of Varrecchia (Wade Rusco, Inc.—Sweeney), 234 A.D.2d 826 (3d Dep't 1996);

Matter of McKenna (Can Am Rapid Courier, Inc.—Sweeney), 233 A.D.2d 704 (3d Dep't 1996)*, lv. denied,* 89 N.Y.2d 810 (1997);

Matter of Caballero (Reynolds Transport, Inc.—Hudacs), 184 A.D.2d 984 (3d Dep't 1992);

Matter of Alfisi (BND Messenger Service, Inc.—Hartnett), 149 A.D.2d 883 (3d Dep't 1989);

Matter of CDK Delivery Service, Inc. (Hartnett), 151 A.D.2d 932 (3d Dep't 1989);

Matter of Gray (Glens Falls Newspapers—Roberts), 134 A.D.2d 791 (3d Dep't 1987);

Matter of Webley (Graphic Transmissions, Inc.—Roberts), 133 A.D.2d 885 (3d Dep't 1987).

B. Cases Reversing Board Findings That Couriers or Delivery Drivers Were Employees

Matter of Bogart (LaValle Transportation, Inc.—Commissioner of Labor), 140 A.D.3d 1217 (3d Dep't 2016);

Matter of Jennings (American Delivery Solution, Inc.—Commissioner of Labor), 125 A.D.3d 1152 (3d Dep't 2015);

Matter of Werner (CBA Industries, Inc.—Hudacs), 210 A.D.2d 526 (3d Dep't 1994), *lv. denied*, 86 N.Y.2d 702 (1995).

C. Other Cases

Matter of Charles A. Field Delivery Service, Inc. (Roberts), 66 N.Y.2d 516 (1985) (reversing Board finding that delivery drivers were independent contractors, because facts were similar to cases in which Court affirmed Board finding that delivery drivers were employees).