No. 2022AP000013

SUPREME COURT OF WISCONSIN

AMAZON LOGISTICS, INC.,

Plaintiff-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

DEPARTMENT OF WORKFORCE DEVELOPMENT
UI DIV. BUREAU OF LEGAL AFFAIRS,

Defendant-Co-Appellant.

On Review from the Circuit Court of Waukesha County,
Case No. 2020CV000579, Hon. Michael O. Bohren

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER AMAZON LOGISTICS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulatory Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the Court of Appeals erred in construing three distinct statutory conditions for determining independent-contractor status under Wis. Stat. § 108.02(12)(bm)2—conditions (a), (c), and (i)—to collapse into one in the context of gig workers in the modern economy.

   The Circuit Court did not answer this question, and the Court of Appeals answered in the negative.

2. Whether the Court of Appeals erred in deferring to LIRC's legal conclusions about whether evidence was admissible and sufficient to satisfy Amazon Logistics's burden of proof.

   The Circuit Court did not answer this question, and the Court of Appeals answered in the negative.

3. Whether the Court of Appeals erred in holding that Amazon Logistics was required to present evidence about each of the 1,000-plus workers at issue during the single-day hearing set for its appeal of the underlying unemployment benefits determination, in violation of due process.

   The Circuit Court did not answer this question, and the Court of Appeals answered in the negative.

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE

This case presents an important question about how to interpret and apply the statutory test for independent-contractor status to gig workers—the growing segment of the workforce using smart phone applications ("apps") to pursue flexible, freelance work opportunities in various industries. Here, in a single ruling after a one-day hearing, an administrative agency decided that over 1,000 workers who use the Amazon Flex app to find work (called "Delivery Partners") are employees of Amazon Logistics under Wis. Stat. § 108.02(12)(bm) rather than independent contractors. In upholding that administrative determination, the Court of Appeals committed three independent errors, each of which warrants reversing the judgment below, setting aside the administration determination, and finding that Delivery Partners are independent contractors.

First, the Court of Appeals erroneously construed the statute to collapse three distinct factors into a single inquiry that, when applied to gig workers, improperly tips the scale in favor of employee status. Second, the Court of Appeals erroneously deferred to the agency's legal conclusions on the admissibility and legal sufficiency of evidence and deemed itself "bound" to discount Amazon Logistics's evidence about how Delivery Partners as a class operate. Third, the Court of Appeals erroneously approved an impossible evidentiary burden that, in this case, would have required Amazon Logistics to submit individualized evidence concerning each of more than 1,000 Delivery Partners in a single-day hearing, in violation of basic due process.

The statutory test for independent-contractor status has two parts. The first part was not at issue in the agency proceedings below and is not at issue on judicial review. Both the administrative law judge and the Labor Industry Review Commission ("LIRC") concluded that Delivery Partners provide delivery services free from Amazon Logistics's direction or control. *See* Wis. Stat. § 108.02(12)(bm)1. The Department of Workforce Development ("DWD"), which

is prosecuting this administrative proceeding, did not seek judicial review to challenge that determination.

The second part of the test, which focuses on independence and entrepreneurial risk, provides that workers are independent contractors if at least six of nine statutory conditions—labeled (a) through (i)—are present:

> **(a)** The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
>
> **(b)** The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
>
> **(c)** The individual operates under multiple contracts with one or more employing units to perform specific services.
>
> **(d)** The individual incurs the main expenses related to the services that he or she performs under contract.
>
> **(e)** The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
>
> **(f)** The individual performs services that do not directly relate to the employing unit retaining the services.
>
> **(g)** The individual may realize a profit or suffer a loss under contracts to perform such services.
>
> **(h)** The individual has recurring business liabilities or obligations.
>
> **(i)** The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

Wis. Stat. § 108.02(12)(bm)2.

Decisionmakers have yet to agree on how this test should apply to Delivery Partners (or other gig workers). In this case alone, the question has divided agency decisionmakers and the courts. DWD determined that Delivery Partners are employees, but never identified the bases for that determination. R16:5; Appx-104. The ALJ, serving as the "appeal tribunal," found one condition present: condition (e). R16:95–98; Appx-166–69. LIRC, on administrative appeal, also

found one condition present, but a different one: condition (d). R16:11–22; Appx-109–20. On Amazon Logistics's petition for judicial review, after argument, the Circuit Court found all nine conditions present and vacated LIRC's decision. R53:2–5; Appx-72–76. The Court of Appeals then found five (one short of the requisite six) conditions present—conditions (b), (d), (e), (g), and (h)—and reversed. Appx-69–70 ¶ 141.

II. FACTUAL BACKGROUND

Amazon Logistics is a logistics-planning company that designs the complex networks that facilitate the distribution of products sold on Amazon.com. R16:3; Appx-101. It is not a delivery service provider. Rather, Amazon Logistics contracts with delivery service providers of various types and sizes, including major carriers (like UPS and the U.S. Postal Service), smaller regional or local delivery service providers, and individual entrepreneurs who opt to participate in a program called "Amazon Flex." *Id.* Amazon Logistics developed the Amazon Flex program to offer delivery service opportunities to workers in the rapidly evolving "gig" economy. *Id.*

Delivery Partners enter into independent-contractor agreements with Amazon Logistics to perform delivery services identified and made available through the Amazon Flex app, which they download on their personal smartphone devices. *Id.* After downloading the app and agreeing to the Amazon Flex Independent Contractor Terms of Service, an individual inputs basic personal information only. *Id.* Amazon Logistics does not collect resumes or conduct interviews. *See id*. "Individuals are not [even] required to watch the videos" that show them "how to navigate through and use the Amazon Flex app." *Id.*

Like all service providers, Delivery Partners are expected to complete the contracted-for services satisfactorily. If they do not, the Terms of Service obligate them "to defend, indemnify, and hold harmless [Amazon Logistics] . . . from any third-party allegation or claim based on, or any loss, damage, settlement, cost, expense and any other liability arising out of or in connection with," the Delivery Partner's actions or inactions. R16:235; Appx-209.

Amazon Logistics does not set Delivery Partners' schedules or make work assignments for them. Rather, Delivery Partners can log in to the Amazon Flex app when they want to view available delivery service opportunities or "blocks" and, if interested, select whichever blocks they want. R16:4; Appx-102. Delivery Partners are never obligated to select particular blocks, a minimum number of blocks, or any blocks at all. *Id.* They may choose or forgo opportunities at their discretion. *Id.* Delivery Partners market their delivery services and, by selecting a block, communicate to Amazon Logistics that they are available to provide delivery services. R16:11–12; Appx-109–10.

Delivery Partners use their own vehicles to pick up packages and may follow whichever routes they like. Under the Terms of Service, Delivery Partners "are free to map out [their] own routes, sequence [their] deliveries and in every other way control the means and manner in which [they] deliver." R16:230; Appx-206. Amazon Logistics only asks, as "a matter of courtesy and safety," that Delivery Partners "deliver packages before 9 p.m. or return them to the warehouse." R16:9; Appx-107. Delivery Partners "are not required to wear uniforms or place any [Amazon] signage or decals on their vehicles." R16:9; Appx-103.

Delivery Partners are paid a fee for their services, which is generally $36 for a two-hour block and $72 for a four-hour block. R16:4; Appx-101–02. Fees may be higher when there is a price surge—i.e., when there is high demand for delivery services. R16:4; Appx-102. The extent of a Delivery Partner's profits or losses depends on how that Delivery Partner structures his or her schedule, activities, and resources and manages expenses, including unexpected expenses. Delivery Partners have the flexibility to do this. For example, if a Delivery Partner wanted to maximize earnings, the Delivery Partner could focus on available blocks that offer surge pricing or finish a block before its listed time. R16:4,19; Appx-102, 117.

A Delivery Partner could also suffer losses. Delivery Partners must manage their expenses; Amazon Logistics does not reimburse them. R16:231; Appx-207. Delivery Partners are responsible for their own vehicles (whether they choose to

operate a fuel-efficient car or a gas guzzler), cellular phones, insurance, and any delays that occur in bringing the packages to customers. R16:3; Appx-101. Their expenses can encompass fuel, cellular data, unexpected traffic or parking tickets, or accidents. R16:5; Appx-7 ¶ 116; Appx-103. If these expenses are greater than the service fee for any particular block, the Delivery Partner may suffer a loss from taking that block.

III. PROCEDURAL HISTORY

In 2018, an unemployment insurance field auditor from DWD reviewed Amazon Logistics's payroll and IRS 1099 Forms issued in Wisconsin. R14:29; Appx-184–85. The auditor mailed out questionnaires to over 400 Delivery Partners but received responses from just more than 100. R14:29; Appx-185–86. Based on the audit's subset of returned questionnaires, DWD concluded that more than 1,000 Delivery Partners in Wisconsin were employees of Amazon Logistics. R16:6; Appx-5 ¶ 2; Appx-158.

Amazon Logistics challenged the audit and was afforded a one-day administrative hearing before an administrative law judge. Amazon Logistics presented as witnesses two managers. R14; Appx-173. DWD also presented two witnesses: the field auditor and one former Delivery Partner. *See id*.

After the hearing, the ALJ found the first part of the two-part independent-contractor test satisfied. R16:95–98; Appx-166–69. Specifically, the ALJ found that Amazon Logistics does not exercise control over the manner and means by which Delivery Partners make the contracted-for deliveries. R16:95; Appx-166. Moving to the second part of the test, however, the ALJ found that Amazon Logistics met only one of the nine conditions—that Delivery Partners were "required to redo unsatisfactory work for no additional compensation or [are] subject to a monetary penalty for similar work under the indemnification agreement for the Flex Program" (condition (e)). *Id.*

Amazon Logistics appealed the ALJ's decision to LIRC, which largely backed the ALJ's determinations yet still disagreed on two of the nine conditions:

LIRC concluded that Delivery Partners *do* satisfy condition (d)—because they incur the main expenses related to their delivery services—but do *not* satisfy condition (e). R16:11–22; Appx-109–20.

Amazon Logistics petitioned for judicial review. Upon a more rigorous review of the administrative record and following oral argument, the Circuit Court found that Amazon Logistics satisfied *all nine* conditions under Wis. Stat. § 108.02(12)(bm)2, held that Delivery Partners are independent contractors, and accordingly, vacated LIRC's decision. R53:2–5; Appx-73–76.

LIRC and DWD appealed. The Court of Appeals concluded that Amazon Logistics met only five of the nine conditions (just one short of the required six) in the second part of the independent-contractor test. Appx-69–70 ¶ 141. Specifically, the Court of Appeals held that condition (c) and condition (i) had not been satisfied for the exact same reason: Amazon Logistics supposedly provided no evidence that Delivery Partners had other work. Appx-35–36 ¶ 69; Appx-69 ¶ 139. And the Court of Appeals held that condition (a) had not been satisfied because Amazon Logistics supposedly failed to show that Delivery Partners who communicate their availability for business to Amazon Logistics through the Amazon Flex app also communicate their availability to the public or a class of customers. Appx-21 ¶ 37. Furthermore, in construing the statutory conditions, the Court of Appeals deferred to the LIRC's legal determination about the admissibility and legal sufficiency of Amazon Logistics's evidence concerning how Delivery Partners as a class operate. Appx-36–37 ¶¶ 70–71; Appx-68–69 ¶¶ 138–39. Finally, the Court of Appeals declined to review Amazon Logistics's challenge to the requirement that it present individualized evidence of each of the more than 1,000 Delivery Partners in a single-day hearing. The Court of Appeals deemed the argument forfeited because Amazon Logistics failed to raise it before the administrative law judge, Appx-37–38 ¶ 72, even though Amazon Logistics could not have raised it until after the ALJ imposed this requirement, Appx-158, Appx-166–69, and even though Amazon did challenge

the requirement before LIRC and the Circuit Court. R16:43–44 Appx-141–42; R25:14–15; R30:6–7.

Amazon Logistics timely filed a Petition for Review on May 8, 2023, which this Court granted on August 17, 2023.

STANDARD OF REVIEW

A LIRC decision must be set aside if LIRC acted without or exceeded its authority. Wis. Stat. § 108.09(7)(c)6.a. LIRC exceeds its authority when it issues a decision premised upon an erroneous interpretation of the applicable statute. *DWD v. LIRC*, 2018 WI App 77, ¶ 12, 382 Wis. 2d 611, 914 N.W.2d 625 ("Because we determine that LIRC based its order on an incorrect interpretation of [the statute], we conclude that LIRC acted without or in excess of its powers."). LIRC also exceeds its authority when it wrongly determines that the facts satisfy a particular legal standard. *Nottelson v. Wis. Dep't of Indus., Lab. & Hum. Rels.*, 94 Wis. 2d 106, 114–16, 287 N.W.2d 763 (1980). The Court reviews LIRC's legal conclusions, including the proper interpretation and application of the governing statute, *de novo*. *See* Wis. Stat. § 108.09(7)(c); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21; *Nottelson*, 94 Wis. 2d at 115–16 ("the meaning of the statute" and "the determination of whether the facts fulfill a particular legal standard" are questions of law).

ARGUMENT

I. DELIVERY PARTNERS ARE INDEPENDENT CONTRACTORS, NOT AMAZON LOGISTICS'S EMPLOYEES.

The LIRC decision should be reversed because Delivery Partners are independent contractors, and DWD cannot lawfully assess unemployment insurance taxes for pay to independent contractors. It is undisputed that Delivery Partners provide delivery services free from Amazon Logistics's control and direction. As a consequence, Delivery Partners are independent contractors as long as six of nine conditions set out in Wis. Stat. § 108.02(12)(bm)2 are present. The Circuit Court found all nine conditions present, but the Court of Appeals found only five—one

short of the sixth condition necessary to affirm the Circuit Court. En route to that conclusion, the Court of Appeals misconstrued the statute, improperly deferred to LIRC's legal conclusions, and held Amazon Logistics to an impossible legal and evidentiary burden that violated constitutional due process. Reversing any one of those errors requires setting aside the administrative determination and finding that Delivery Partners are independent contractors.

A. The Court Of Appeals Misconstrued The Governing Statute.

The Court of Appeals erroneously collapsed and conflated three of the four distinct statutory conditions it found absent: conditions (a), (c), and (i). These conditions demand distinct inquiries. Condition (a) is present if the worker "advertises or otherwise affirmatively holds himself or herself out as being in business." Wis. Stat. § 108.02(12)(bm)2.a. Condition (c) is present if the worker "operates under multiple contracts with one or more employing units to perform specific services." Wis. Stat. § 108.02(12)(bm)2.c. And condition (i) is present if the worker is "not economically dependent upon" the putative employer. Wis. Stat. § 108.02(12)(bm)2.i.

Each of these conditions serves a distinct function and can be satisfied with different evidence. Condition (a) is broadly worded to capture any manner or means by which the worker communicates the worker's availability for work; it does not require any particular form of communication or number of listeners. By its plain terms, it could encompass traditional print advertisement, word-of-mouth, or Internet postings, or it could encompass affirmative downloading and use of gig-economy apps. *See Varsity Tutors LLC v. LIRC*, 2019 WI App 65, ¶¶ 22–25, 2019 WL 5151324 (unpublished) (Appx-267). Condition (c) captures both the worker's ability to provide *and* practice of providing services to more than one customer. Like condition (a), condition (c) does not require any particular form of evidence to show that this requirement is satisfied. And condition (i) captures the worker's ability to continue providing specific services to other customers if the putative employer ceased to exist, independent of whether the worker in fact provides such

services to other customers now. *See Keeler v. LIRC*, 154 Wis. 2d 626, 634, 453 N.W.2d 902 (Ct. App. 1990) (concluding that there was "no evidence" that workers were "economically dependent" where evidence showed that, "if [the relevant company] were to go out of business, the woodcutters would find work elsewhere"). To be sure, if the worker *does* provide such services to other customers, that is strong evidence of the worker's *ability* to do so if the putative employer ceased to exist. *See Larson v. LIRC*, 184 Wis. 2d 378, 393, 516 N.W.2d 456 (Ct. App. 1994). But the absence of such services to other customers now does not imply an inability to provide them in the future should that become necessary or desirable, especially given the expansion and flexibility of the gig economy.

Despite these plain differences, the Court of Appeals stacked the deck against a finding of independent-contractor status by construing conditions (a) and (i) to ask the exact same question as condition (c)—*i.e.*, whether Delivery Partners engage in work outside the Amazon Flex program. In discussing condition (c), the Court of Appeals faulted Amazon Logistics for not producing evidence "directly from the delivery partners themselves" that they had contracts with other employing units—even though Amazon Logistics *had* provided evidence that Delivery Partners were expressly permitted to contract with other companies, including Amazon Logistics's competitors, *and* that some Delivery Partners did so. Appx-35–38 ¶¶ 69–72. Then, in discussing condition (i), the Court of Appeals faulted Amazon Logistics for not producing the same evidence to show that Delivery Partners are economically independent. *Id.*; Appx-68–69 ¶¶ 137–39. And in discussing condition (a), the Court of Appeals similarly required evidence that each Delivery Partner "actually advertises" their availability for work to the world at large, Appx-21–22 ¶ 38—even though the statute contains no such requirement and gig work, by its nature, means that workers communicate directly with companies like Amazon Logistics through apps that the workers download and use. The Court of Appeals thus found all three conditions lacking for the same reason: a purported lack of evidence that Delivery Partners had, or advertised for, other work. *See id.* (condition (a)); Appx-35–36 ¶ 69

(condition (c)); Appx-69 ¶ 139 (condition (i)). With that one overarching error, the Court of Appeals knocked out three of the nine factors on which Amazon Logistics had prevailed before the Circuit Court. The Court of Appeals's construction is untenable.

The three conditions are related, to be sure. All nine statutory conditions generally concern the worker's independence and undertaking of entrepreneurial risk. *See* Wis. Stat. § 108.02(12)(bm)2. But that contextual relationship does not justify collapsing separate conditions into one. These conditions are *statutory* and thus reflect the legislature's choice about how independent-contractor status must be determined. That choice must be respected, particularly when the legislature also set a numeric threshold for the ultimate determination (meeting six out of nine conditions). *See Fleming v. Amateur Athletic Union, Inc.*, 2023 WI 40, ¶ 14, 407 Wis. 2d 273, 990 N.W.2d 244 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language." (citation omitted)). Respecting legislatures' choices is the aim of every rule or mode of statutory construction, including the settled rule that, "[i]n interpreting a statute, courts give effect to every word so that no portion of the statute is rendered superfluous." *Marotz v. Hallman*, 2007 WI 89, ¶ 18, 302 Wis. 2d 428, 734 N.W.2d 411; *see State v. Rector*, 2023 WI 41, ¶ 19, 407 Wis. 2d 321, 990 N.W.2d 213 ("[S]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."); *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981) ("When construing statutes, meaning should be given to every word, clause and sentence in the statute, a construction which would make part of the statute superfluous should avoided whenever possible.").

The Court of Appeals's construction and conflation of conditions (a), (c), and (i) violates that rule. It renders conditions (a) and (i) duplicative of condition (c) and, therefore, superfluous. Analyzed properly as distinct conditions, the conditions the Court of Appeals found absent are present here, as the Circuit Court decision

and this brief explain. Amazon Logistics's evidence established that Delivery Partners can and do engage in other work (condition (c)), that they are not economically dependent on Amazon Logistics (condition (i)), and that they do hold themselves out as being in business when they download and use the Amazon Flex app and other gig economy apps (condition (a)).

1. Amazon Logistics Proved That Delivery Partners Engage In Other Work (Condition (c)).

As discussed, only condition (c) asks whether the worker "operates under multiple contracts with one or more employing units to perform specific services." Wis. Stat. § 108.02(12)(bm)2.c. This factor is present because, as the Circuit Court correctly recognized, Amazon Logistics presented *uncontroverted* evidence that Delivery Partners may—and often do—pursue other business opportunities, even with Amazon Logistics's competitors. R53:12; Appx-88. Specifically, Amazon Logistics showed that Delivery Partners were free to enter into employment or independent-contractor agreements with other companies, including Amazon Logistics's competitors. The Amazon Flex agreement expressly stated that "[n]othing in this Agreement will prohibit [Delivery Partner] from providing Services or using [Delivery Partner's] Vehicle on behalf of any other person or entity, including competitors of Amazon." R16:232–33; Appx-208–09. And Amazon Logistics also showed that Delivery Partners exercised that freedom. Two management-level employees testified in detail about their first-hand knowledge of the Amazon Flex program. An Area Manager in Wisconsin testified that she frequently observed Delivery Partners with "window clings in their car[s] for Lyft, Uber, Dropoff, [and] other kind[s]" of gig-work services. R14:68; Appx-200. This testimony was entirely appropriate for a large class of Delivery Partners in a single-day hearing and provided admissible evidence to show that Delivery Partners engaged in other work. There is no justification for the Court of Appeals's statement that evidence of condition (c) was missing from the record.

LIRC wrongly disregarded this testimony. Though it was uncontroverted, LIRC concluded—summarily and in a footnote—that the Area Manager's testimony "was largely based on hearsay, speculation, and conjecture" and that such testimony could "not sustain the burden of proof which was placed on [Amazon Logistics] by statute." R16:15 n.22; Appx-113 n.22. Instead, according to LIRC, "the best and most comprehensive evidence" was individualized proof as to each of the 1,000-plus Delivery Partners at issue. *Id.* Absent a stipulation that the testimony of one Delivery Partner (cherry-picked by DWD) was representative of all 1,000-plus Delivery Partners, LIRC concluded "it was necessary that sufficient proof be presented *as to each delivery partner whose status is at issue*." *Id.* (emphasis added).

Nothing in the plain text of the statute, however, limited the type of evidence Amazon Logistics was permitted to introduce. DWD itself declined to present evidence as to each Delivery Partner. It relied instead on the testimony of just one Delivery Partner, who had made the personal choice not to pursue other work, to determine the employment status of over 1,000 individuals. But the experience of each driver's relationship with Amazon Logistics inherently varies—often significantly—based on how often they provide services for Amazon Logistics, the manner in which they provide the services, whether they work for other companies, and myriad other factors relevant to the employment determination. DWD's lone witness could only testify as to his own experience in the Amazon Flex program. Amazon Logistics's evidence was far better than DWD's single data point because Amazon Logistics's witnesses testified as to how Delivery Partners as a class operate, and their testimony showed that DWD's witness was not representative of the class. Amazon Logistics's rebuttal evidence showing that other Delivery Partners could and did seek out other gig work was entirely consistent with the statute's text and appropriate in the circumstances.

2. Delivery Partners Are Not Economically Dependent Upon Amazon Logistics (Condition (i)).

Condition (i) asks whether a worker is "economically dependent upon" the putative employer. Wis. Stat. § 108.02(12)(bm)2.i. Economic dependence "refers to the survival of the individual's independently established business if the relationship with the putative employer ceases to exist." *Larson*, 184 Wis. 2d at 392 (citing *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 70, 330 N.W.2d 169 (1983)). If the worker's business would survive, such as when a worker could "sometimes turn[] down work" from the putative employer and take work from others, the condition is met. *Id.* at 393.

Although courts first articulated this standard decades ago, it is flexible enough to account for the rise of the modern gig economy. As early as 1955, commentators cautioned against using a "'mechanical test'" in assessing the survivability of the entrepreneur's business. *See Princess House*, 111 Wis. 2d at 70 (quoting Alanson W. Willcox, *The Coverage of Unemployment Compensation Laws*, 8 Vanderbilt L. Rev. 245, 264 (1955)). Today, Internet-based apps allow individual entrepreneurs to supply services (such as delivery services) to a variety of industries and companies, including competitors, in a manner not envisioned decades ago. The fluidity and low transaction costs of this modern gig economy, if anything, make it easier than ever to satisfy condition (i).

Under this standard, Delivery Partners are not economically dependent upon Amazon Logistics. Amazon Logistics demonstrated, with testimony and documents, that, as a matter of contract, Delivery Partners may provide delivery services to any other entity, including Amazon Logistics's competitors. R16:232–33: Appx-208–09 ("Nothing in this Agreement will prohibit [Delivery Partner] from providing Services or using [Delivery Partner's] Vehicle on behalf of any other person or entity, including competitors of Amazon."). And Amazon Logistics demonstrated, in fact, that Delivery Partners did have gig-work relationships with other companies,

including Uber, Lyft, and others. R14:68; Appx-197 (manager testifying to the same). This was sufficient to satisfy condition (i).

The Court of Appeals and LIRC reached the contrary conclusion based on a supposed lack of evidence "as to the source and amount of any other compensation" received by each of the 1,000-plus Delivery Partners at issue. R16:14; Appx-112; 69 ¶ 139. That is not the proper analysis. *Larson*, 184 Wis. 2d at 392 ("economic dependence is not a matter of how much money an individual makes from one source or another"). Condition (i) focuses on economic dependence—that is, whether workers have the ability to pursue other work and could likely obtain that work if necessary, not whether they exercise that ability at present. If condition (i) looked to whether workers in fact earn other income, then it would precisely duplicate condition (c), which looks to whether workers engage in other work. Condition (i) must instead be interpreted to avoid that superfluity. *Marotz*, 2007 WI 89, ¶ 18. There is no economic dependence here because Delivery Partners could easily transition to one of the many other driving-related package-delivery or passenger services. Contrary to LIRC's incorrect interpretation, condition (i) is present when the record shows that a worker could easily continue performing services through other avenues.

Consider, for example, an independent painter who finds a fruitful business relationship with a prolific developer. While free to take on other jobs, the painter prefers taking on the many jobs offered by the developer for a time; she enjoys the flexibility and remuneration the relationship offers. Still, this painter does not depend on the developer for her livelihood. Instead, she has simply made an entrepreneurial decision to fill her time painting the developer's houses in lieu of other opportunities. Her business would continue even if the developer were to go bankrupt, or decide to start working with another painter, precisely because she has the freedom and ability to do other work at any time. Yet no one would suggest that the painter was the developer's employee.

Like the hypothetical painter, every Delivery Partner is free to pursue other gig work or any other business opportunities at any time—even with Amazon Logistics's competitors. Regardless of whether they exercise that option or fill their time accepting Amazon Flex delivery blocks, Delivery Partners are not in any way economically dependent on Amazon Logistics. The undisputed evidence shows that Delivery Partners can, do, and would continue to operate as delivery drivers after their relationship with Amazon Logistics ended. So condition (i) is present.

3. Delivery Partners, Like All Gig Workers, Affirmatively Hold Themselves Out As Being In Business By Registering To Use One Or More Gig-Work Apps (Condition (a)).

Condition (a) is present when the worker "advertises or otherwise affirmatively holds himself or herself out as being in business." Wis. Stat. § 108.02(12)(bm)2.a. This is not a demanding condition. It is met by a worker's affirmative conduct that suggests "the existence of [his or her] independent business." *Keeler*, 154 Wis. 2d at 633.

In the gig economy equivalent to advertising in a local newspaper, on a placemat at a diner, or in the Yellow Pages, participants in the gig economy advertise their availability to provide services by registering to use the app-based companies that suit them. They might sign up to provide rides using Uber's and Lyft's apps; to shop for groceries using Instacart's app; and/or to do odd home repair jobs using Task Rabbit's app. Whatever apps they choose to use, gig workers hold themselves out as being in business by signing up. The Delivery Partners at issue thus held themselves out as being in business by signing up to use the Amazon Flex App.

The Court of Appeals disagreed, holding that independent workers must "communicate[] to the *public* or a certain *class of customers*" that they are in business. Appx-21 ¶ 37 (emphases added). Applying this standard, the Court of Appeals found condition (a) absent because, by using the Amazon Flex app, Delivery Partners hold themselves out as being in business to Amazon Logistics

alone. *Id.* (unlike some other gig-work apps, such as Uber or Instacart, which connect workers with multiple potential customers, the Flex app connects workers with only Amazon Logistics).

The Court of Appeals misconstrued the statute. Its test hinges on words that do not appear in the statute: "the public or a certain class of customers." *Id.* Condition (a) is not concerned with how many clients a worker solicits (at all or per app) or the types of apps he or she chooses to use. Condition (a) requires only that a worker "affirmatively holds himself or herself out as being in business." Wis. Stat. § 108.02(12)(bm)2.a. And Delivery Partners do just that.

The Court of Appeals's erroneous construction also disregards the features that make gig work so attractive to workers and businesses alike. It is estimated that more than 73 million Americans work in the gig economy. Michael Handren, *What You Need to Know About Gig Work: Key Statistics, Demographics & Facts 2023*, Credit Summit (2023).[1] With the rise of the gig economy and the modern technology that powers it, independent workers are able to solicit and accept opportunities at the tap of a button. Some workers prefer to seek jobs using multiple apps—selling rides using Uber or Lyft on weeknights, delivering groceries using Instacart on weekdays, and working odd jobs using Task Rabbit on weekends. Others choose to use one app at a time, supplementing employment income or hustling to fill their schedules with a single category of delivery service jobs or ride requests. Such flexibility has dramatically expanded opportunities for entrepreneurship. *See 2022 U.S. Gig Economy study: Part 1 – The Gig Economy is here to stay*, LEGAL & GENERAL (2022).[2] And the way that workers in this gig economy advertise and hold themselves out as engaged in these lines of business is to download and sign up to use one or more apps to find work that suits them. *See id.* That new technologies allow such workers to advertise and hold themselves out to various companies, as

[1] https://mycreditsummit.com/gig-economy-statistics/

[2] https://group.legalandgeneral.com/media/iydkvmwl/legal-general_u-s-gig-economy-study-part-1_the-gig-economy-is-here-to-stay-12-6-2022.pdf

opposed to the broader public or the companies' ultimate customers, hardly implies a lack of independence or entrepreneurship.

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The Court of Appeals construed three distinct statutory conditions to collapse into one in the context of the gig-work relationship. In so doing, the Court of Appeals erroneously discounted Amazon Logistics's evidence that satisfied a correct interpretation of the statute. Correcting that error for *any one* of these three factors would mean that Amazon Logistics has satisfied the minimum six factors needed for an independent-contractor relationship, requiring the LIRC's contrary determination to be set aside.

B. LIRC's Legal Conclusions Are Not Entitled To Deference.

Not only did LIRC adopt an erroneous construction of the statute, but the Court of Appeals erred in deferring to LIRC's legal conclusions in misapplying that construction. This error is an independent ground for reversal.

In *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21, this Court ended the "practice of deferring to administrative agencies' conclusions of law." Instead, an agency's legal conclusions must be reviewed *de novo* and without deference. *Id.* ¶ 84. But in *Tetra Tech*, this Court recognized that *if* judicial review is taken pursuant to Chapter 227, an agency's decision must be accorded "due weight" because that is what the governing statute expressly requires. *Id.* ¶ 79; *see* Wis. Stat. § 227.57(10). Chapter 227 does not apply to judicial review of all administrative decisions. *Tetra Tech*, 2018 WI 75, ¶ 11 n.8.

Consistent with *Tetra Tech*, the correct view is that "due weight" deference does not apply where Chapter 227 does not apply. *See id.* ¶ 81 (returning "'due weight' to its statutory roots"). The Court Appeals so held in *Anderson v. LIRC*, 2021 WI App 44, 398 Wis. 2d 668, 963 N.W.2d 89, where judicial review was sought under Wis. Stat. § 102.23(1)(a)1, which "specifically states that Wis. Stat. ch. 227 is not applicable." *Id.* ¶ 11 n.5. Nevertheless, some Court of Appeals decisions have erroneously applied the "due weight" deference standard to

proceedings that are *not* subject to Chapter 227. *See Mueller v. LIRC*, 2019 WI App 50, ¶ 17, 388 Wis. 2d 602, 933 N.W.2d 645 ("[I]n evaluating the persuasiveness of an administrative agency's arguments, we give 'due weight' to the agency's experience, technical competence, and specialized knowledge.").

The statute that governs judicial review in this case, Wis. Stat. § 108.09(7), states unambiguously that Chapter 227 does not apply: "The order of LIRC is subject to review only as provided in this subsection *and not under ch. 227* or s. 801.02." Wis. Stat. § 108.09(7)(c)1 (emphasis added). Nevertheless, earlier this year, the Court of Appeals designated for publication a decision holding that *Tetra Tech* somehow requires that LIRC's legal conclusions be given "due weight" in proceedings under Wis. Stat. 108.09(7). *See Catholic Charities, Inc. v. LIRC*, 2023 WI App 2, ¶ 20 (unpublished), *withdrawn* (Appx-226). Following the parties' submissions in this case about *Catholic Charities*, the Court of Appeals abruptly reconsidered and revised the decision in that case to omit the "due weight" holding. *See Catholic Charities, Inc. v. LIRC*, 2023 WI App 12 ¶ 19 n.9, 406 Wis. 2d 586, 987 N.W.2d 778 (acknowledging this change in the decision and concluding that the case did not present the question whether "due weight" deference was appropriate).

There is no statutory basis for "due weight" deference or any other form of deference under Wis. Stat. 108.09(7). Accordingly, under *Tetra Tech*, LIRC's legal conclusions must be reviewed *de novo*.[3] The Court of Appeals nevertheless deferred to LIRC's legal conclusions. Mischaracterizing LIRC's decision to ignore the Area Manager's testimony as a determination about "the weight or credibility of the evidence on a[] finding of fact," the Court of Appeals held that "LIRC properly

[3] LIRC argued otherwise in this case. The Court of Appeals declared "the parties' dispute on this point is immaterial" because everyone seemed to agree that LIRC's legal conclusions should be reviewed *de novo*. Appx-14 ¶ 24. The parties, however, were not in agreement. Recognizing the thumb on the scale that it received by a "due weight" deference, LIRC argued that its legal conclusions were entitled to special "due weight" persuasive force as part of a *de novo* review. In all events, the Court of Appeals in fact deferred to LIRC's legal conclusions. Without that thumb on the scale, the outcome here should change.

determined that the testimony of the former area manager did not satisfy Amazon Logistics' burden," Appx-36 ¶ 70, and deemed itself "bound by LIRC's determination in that regard," Appx-36–37 ¶ 71. *See also* Appx-68–69 ¶¶ 138–39 (making same error). But LIRC did not make any weight or credibility findings. LIRC did not question the Area Manager's credibility or find the testimony controverted in any way. Indeed, as the Circuit Court recognized, the testimony was "credible and probative and further was not found to be unreliable during the course of the hearing." R53:12; Appx-88.

Rather, LIRC based its determination that Amazon Logistics had not carried its burden of proof—a legal conclusion—on its determination that the Area Manager's testimony was "hearsay, speculation, and conjecture," R16:15 n.22; Appx-113 n.22—more legal conclusions. *See Larson*, 184 Wis. 2d at 387 ("LIRC's determination that Larson failed to bear his burden of proof is a conclusion of law.").[4]

Indeed, the rules governing the hearing in this case allow hearsay evidence, so long as it has "reasonable probative value." Wis. Admin. Code § DWD 140.16(1). There is no doubt that the Area Manager provided highly probative testimony—testimony based on what the Area Manager observed and matter within the Area Manager's personal knowledge. That testimony, along with the testimony of another managerial employee, was the only evidence about how Delivery Partners as a class operate, as opposed to the single Delivery Partner witness presented by DWD. That "many delivery partners drove into the petitioner's warehouse to pick up packages in vehicles displaying signs for Uber, Lyft, Grub Hub and similar businesses," R16:14; Appx-112, leads to the inescapable

[4] Even if these were factual findings (and they are not), deference is unwarranted where LIRC's finding of fact "is not supported by credible and substantial evidence." Wis. Stat. § 108.09(7)(f); *see Currie v. State Dep't of Indus., Lab. & Hum. Rels.*, 210 Wis. 2d 380, 386–87, 565 N.W.2d 253 (Ct. App. 1997). LIRC offered no basis for its determinations that the Area Manager's testimony about her first-hand observations of Uber, Lyft, and other decals constituted hearsay or that such testimony was speculative or conjectural. Nothing in the record supports LIRC's unreasoned decision to characterize the testimony in this manner.

conclusion that many Delivery Partners operated under multiple contracts with other entities (condition (c)), and that they were not economically dependent on Amazon Logistics (condition (i)). And if it were necessary to show that Delivery Partners publicly advertised their services for companies other than Amazon Logistics (it is not, s*ee supra* Section I.A.3) this evidence shows that they did so (condition (a)).

C. LIRC Held Amazon Logistics To An Impossible Burden That Violates Due Process.

LIRC's related conclusion that Amazon Logistics could not have met its burden of proof because it did not enter into a "stipulation that one delivery partner's testimony be taken as 'representative' of all the others" or present testimony from all 1,000-plus Delivery Partners themselves, Appx-37–38 ¶ 72, also should have been reviewed *de novo* and rejected. This was an unreasonably high evidentiary burden under the circumstances. During a hearing, the Appeal Tribunal (presided over by an ALJ) is tasked to "secure the facts in *as direct and simple a manner as possible*." Wis. Admin. Code § DWD § 140.16(1) (emphasis added). Demanding individualized proof on a worker-by-worker basis is anathema to that directive. It would have been impractical, if not impossible, to subpoena all or even a majority of the 1,000-plus Delivery Partners at issue.

LIRC also faulted Amazon Logistics for not presenting evidence "as to the source and amount of any other compensation" received by each of the 1,000-plus Delivery Partners at issue. Appx-119. The Court of Appeals imposed a similar requirement. Appx-69 ¶ 139. Even if LIRC and the Court of Appeals had construed the statutory conditions correctly, they still erred in subjecting Amazon Logistics to an impossible evidentiary burden. Amazon Logistics had no realistic opportunity to obtain nonpublic and highly personal income information for all these Delivery Partners—who chose to have an independent relationship with Amazon Logistics—much less present that information in a one-day hearing.

More fundamentally, no one ever gave Amazon Logistics notice that it would be required to present worker-by-worker evidence. Parties "should know what is

required of them so they may act accordingly." *FCC v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012). Even when a party has notice, it must also be given the right to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (the right to present evidence only after a decision has been made and the burden of proof has shifted violates due process); *see In re S.M.H.*, 2019 WL 14, ¶19, 385 Wis. 2d 418, 922 N.W.2d 807 (explaining that "[t]he value of having one's day in court . . . depends entirely on what the defendant may do with it" and condemning "structural barriers in presenting [the parties'] respective cases to the decision-maker"). Here, DWD determined, in one stroke and without worker-by-worker evidence, that over 1,000 Delivery Partners are employees. The agency required Amazon Logistics to rebut that decision at a one-day hearing without any indication that worker-by-worker evidence would be necessary. Then it faulted Amazon Logistics for lack of individualized proof even though the scheduled hearing was nowhere near long enough to hear from 1,000-plus Delivery Partners. The process afforded here shows either that no one at the agency anticipated or expected worker-by-worker evidence or, if they did, that they had no interest in giving Amazon Logistics notice and a meaningful opportunity to present such evidence. That is a textbook deprivation of constitutional due process. *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . And no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.'" (citation and brackets omitted)); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (a hearing cannot "exclude[] consideration of an element essential to the decision"); *see also, e.g.*, *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974) ("[O]ur entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute."); *Sims v. Green*, 161 F.2d 87, 88 (3d Cir. 1947) ("Notice implies an opportunity to be heard. Hearing requires trial of an issue or

issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy.").

To sidestep this denial of due process, the Court of Appeals found that Amazon Logistics forfeited the argument because it "did not raise this concern during the proceedings before the Administrative Law Judge." Appx-37–38 ¶ 72. But this approach merely compounds the due process problems. It is well established, as a matter of due process, that a party cannot forfeit an argument it never had an opportunity to make. *See, e.g.*, *Paris v. HUD*, 713 F.2d 1341, 1347 (7th Cir. 1983) (there can be no waiver when an appeal is a party's "first opportunity to object"); *Anderson v. Davila*, 125 F.3d 148, 158 (3d Cir. 1997) ("The district court did not state its intention to treat the hearing as a trial on the merits until after all testimony had been taken and all evidence had been submitted. No objection by the [appellant] at such a late stage in the proceedings could have cured the court's failure to provide notice."). Amazon Logistics did not know that the administrative law judge would subject it to such an onerous evidentiary burden until the judge's *decision after the hearing*. *See* Appx-158, Appx-166–69. It was impossible for Amazon Logistics to object at the hearing to this post-hearing determination. Amazon Logistics did object, moreover, to this individualized-evidence requirement in its briefing before LIRC and the Circuit Court. Appx-141–42; R16:43–44; R25:14–15; R30:6–7.

II. THE ASSERTED ALTERNATIVE GROUNDS FOR AFFIRMANCE LACK MERIT.

In its response to Amazon Logistics's petition for review, DWD previewed that it will press this Court to affirm on the alternative ground that, contrary to the Court of Appeals's and Circuit Court's rulings, none of the conditions is present here. These arguments lack merit. The Court of Appeals was correct to conclude that conditions (b), (d), (e), (g), and (h) are present, as explained next.

A. Delivery Partners Performed Most Of The Services In A Location Of Their Choosing (Condition (b)).

Condition (b) requires that the worker "maintains his or her own office or performs most of the services in a facility or location chosen by the individual." Wis. Stat. § 108.02(12)(bm)2.b. As the Circuit Court correctly recognized, Delivery Partners do both because a "vehicle can be an office" and "is a facility chosen by the partner for performing the work involved." R53:11; Appx-87. For its part, the Court of Appeals concluded that Delivery Partners at least perform most services from locations of their choosing, which is enough to show that condition (b) is present. Appx-29 ¶ 53. Indeed, their right to make that choice is memorialized in the Terms of Service, which makes clear that Delivery Partners "are free to map out [their] own routes, sequence [their] deliveries and in every other way control the means and manner in which [they] deliver." R16:230; Appx-206.

That Delivery Partners arrive at an Amazon Logistics delivery station to retrieve packages to deliver is not controlling. All deliveries start somewhere. Yet Delivery Partners spend relatively little time at the pickup locations. What matters for this part of condition (b) is where Delivery Partners "perform[] *most* of the services" (i.e., deliveries). Wis. Stat. § 108.02(12)(bm)2.b (emphasis added); *see Ball v. Dist. No. 4, Area Bd. of Vocational, Tech. & Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984) ("[The] presumption is that the legislature chose its terms carefully and precisely to express its meaning."); *Cramer v. Eau Claire Cnty.*, 2013 WI App 67, ¶ 4, 348 Wis. 2d 154, 833 N.W.2d 172 (canon against surplusage). As the Court of Appeals found, "most" of the services provided by Delivery Partners are the actual delivery of packages: the "undisputed facts demonstrate[d] that the bulk of each delivery partner's services for Amazon Logistics involved the transportation of packages from the pick-up location to multiple delivery destinations along a route chosen by the delivery partner." Appx-32–33 ¶ 61.

Condition (b) also requires that Delivery Partners "use[] [their] own equipment or materials in performing the services." Wis. Stat. § 108.02(12)(bm)2.

Delivery Partners use their own phones and vehicles to make deliveries. Appx-34 ¶ 65. This undisputed fact suffices to meet condition (b) for the statute "does not require that any specific amount of the equipment or materials used in performing the services belong to the individual." Appx-34–35 ¶ 66. Amazon Logistics does convey a software license to use the Amazon Flex app. But this free piece of software only reinforces that Delivery Partners use their own equipment and materials. As in any independent-contractor relationship, the parties need a way to communicate back and forth, and the Amazon Flex app helps the contracting parties do so. Yet the app requires equipment to function—a smartphone—and Delivery Partners supply that equipment by using their own smartphones.

In short, because Delivery Partners use their own equipment and materials to perform delivery services and drive on their chosen routes in their own chosen vehicles, condition 2(b) is present here.

B. Delivery Partners Incur The Main Expenses Related To The Services (Condition (d)).

Condition (d) is a rare point of near-consensus in this case. LIRC, the Circuit Court, and the Court of Appeals all concluded that this condition is present. As LIRC concluded, Delivery Partners "bore all costs associated with their services"—*i.e.*, "the costs of their smartphones, including a data plan to utilize the smartphones' technologies and capabilities," and "the costs of operating, maintaining, and insuring their vehicles." R16:15; Appx-113.

In the Court of Appeals, DWD asserted for the first time that this condition is absent because Delivery Partners do not incur the expenses related to creating and maintaining the Amazon Flex app, Amazon warehouses, or commercial insurance policies. The argument is meritless because it depends upon a gross misreading of the statute, which focuses on "the 'main' expenses for performing the *delivery partners' services* under the contract," not the general expenses Amazon Logistics incurs to run its own business. Appx-39–40 ¶ 77 (emphasis in original) (quoting Wis. Stat. § 108.02(12)(bm)2.d). And as the Court of Appeals held, the word "main"

in this factor plainly means expenses that are "are more important, or more directly related to, the services performed by the individual under the contract." *Id*. The Amazon Flex app is not as integral to the services Delivery Partners provide Amazon Logistics as the smartphones they use to access the app and the vehicles they use to make deliveries. Indeed, on DWD's theory, nearly every modern opportunity for gig workers would suggest an employment relationship simply because an app is involved. That would be an absurd result, unmoored from the statutory text.

C. Delivery Partners Are Subject To A Monetary Penalty For Unsatisfactory Work (Condition (e)).

Condition (e) is present when the worker "is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work." Wis. Stat. § 108.02(12)(bm)2.e. Delivery Partners are subjected to a monetary penalty for unsatisfactory work: Amazon Logistics has the contractual right to call on Delivery Partners for defense and indemnification for any claims arising out of the delivery services when those services result in any loss or damages—*e.g.*, unsatisfactory performance. R16:233; Appx-209 (Amazon Flex Terms of Service, Section 9, entitled "Indemnification"). A promise to indemnify sets independent contractors apart from employees because, in an employment relationship, the employer may be liable for an employee's torts committed within the scope of employment. *See Kerl v. Dennis Rasmussen, Inc.*, 2004 WI 86, ¶¶ 21–22, 273 Wis. 2d 106, 682 N.W.2d 328 (independent contractors fall outside respondeat superior).

Contrary to DWD's assertions, DWD Resp. 24, the Court of Appeals rightly held that this broad indemnification agreement addresses and penalizes unsatisfactory work because it identifies work "conduct that triggers the delivery partners' obligation to defend and indemnify Amazon Logistics." Appx-44–45 ¶ 87. That conduct includes "negligence, misconduct, breach of the agreement, and action and inaction causing personal property damage,"—all of which can be properly

categorized as "unsatisfactory work." *Id*. The Court of Appeals also correctly held that the indemnification provision subjected Delivery Partners to a monetary penalty because "delivery partners who provide unsatisfactory work are subject not only to the revocation of their eligibility to participate in the program, but also to the monetary obligations to defend and indemnify Amazon Logistics." Appx-45 ¶ 88. That result is consistent with the plain language of the statute and a long line of LIRC decisions.[5]

D. Delivery Partners May Realize Profits Or Suffer Losses (Condition (g)).

Condition (g) asks a simple question: whether a worker "may realize a profit or suffer a loss under contracts to perform [the] services." Wis. Stat. § 108.02(12)(bm)2.g. The answer here is, and must be, "yes."

Delivery Partners may realize a profit because "the service fees earned by delivery partners could—and often did—exceed the expenses incurred in performing the services over the course of the acceptance of multiple delivery blocks." Appx-54–55 ¶ 112. Delivery Partners may also "suffer a loss" performing services because they are "responsible for paying the expenses related to performing delivery services, such as the costs of gas, vehicle wear and tear, auto insurance, and data for his smartphone," Appx-56 ¶ 115 (cleaned up), and the "expenses incurred in completing delivery blocks could have exceeded the income they received for performing those services," Appx-55 ¶ 113.

DWD's position that this condition requires worker-by-worker evidence that a particular worker actually did earn a profit or suffer a loss—beyond being

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[5] *See, e.g.*, *Nature's Pathways, LLC*, UI Dec. Hearing No. S0800258AP (LIRC Feb. 5, 2010) ("Condition 6 requires liability by the individual for a failure to perform satisfactorily. The fact that Walla's agreement with Nature included an indemnification provision establishes that this condition is satisfied.") (Appx-262); *Nations Carelink, LLC*, UI Dec. Hearing No. S0800037MD (LIRC Dec. 17, 2008) (same) (Appx-258); *MSI Servs.*, UI Dec. Hearing No. S0600129AP (LIRC Sept. 5, 2008) (same) (Appx-253); *Zoromski v. Cox Auto Trader*, UI Dec. Hearing No. 07000466MD (LIRC Aug. 31, 2007) (same) (Appx-275); *Lyft*, UI Dec. Hearing No. 160002409MD (same) (Appx-245).

inconsistent with DWD's position that their proffered testimony from one Delivery Partner could be representative of all the other Delivery Partners—is irreconcilable with the statute's language. DWD Resp. 26. The statute asks only whether a worker "*may* realize a profit or suffer a loss," not that the worker *must* do so. Wis. Stat. § 108.02(12)(bm)2.g (emphasis added). By use of the permissive "may," this condition requires only the *possibility* that a Delivery Partner could realize a profit or suffer a loss, not evidence of *actual* profit or loss. *See City of Wauwatosa v. Milwaukee Cnty.*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963) ("Generally in construing statutes, 'may' is construed as permissive."). This interpretation also avoids the constitutional due process problems that arise in requiring a company to provide, in a cursory administrative proceeding, individualized proof concerning each member of a large, independent class of workers. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"). As the Court of Appeals correctly concluded, this condition is present here.

E. Delivery Partners Have Recurring Business Liabilities Or Obligations (Condition (h)).

Condition (h) is met if the worker "has recurring business liabilities or obligations." Wis. Stat. § 108.02(12)(bm)2.h. The Court of Appeals rightly rejected as "too narrow" an interpretation that would limit this condition to exclusively business expenses—such that a Delivery Partner's vehicle expenses would not satisfy the condition if the worker used the vehicle for personal and business use. Appx-59 ¶ 123; *see* Appx-59–60 ¶ 123 ("Nothing in the text of this factor indicates that the individual's recurring liability or obligation must be incurred for business purposes alone. Rather, this factor may be satisfied even if the recurring business liability or obligation is also incurred for personal purposes."). Contrary to DWD's assertions, DWD Resp. 26, there is no dispute that Delivery Partners have recurring obligations relating to their gig-work business—including vehicle costs, fuel costs,

mobile phone data plans, and more. This condition is present, as the Court of Appeals correctly concluded.

CONCLUSION

The Court of Appeals's decision should be reversed, the Circuit Court's judgment should be affirmed, and LIRC's decision should therefore be vacated.

Dated this 18th day of September, 2023.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,148 words.

Dated this 18th day of September, 2023.

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