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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13559

MARTIN EL KOUSSA, et al.,
Plaintiffs/Appellants,

v.

Attorney General and Secretary of the Commonwealth,
Defendants/Appellees,

AND

CHARLES ELLISON, et al.,
Intervenors/Appellees.

On Reservation and Report from the
Supreme Judicial Court for Suffolk County

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Jonathan B. Miller, BBO #663012
PUBLIC RIGHTS PROJECT
490 43rd Street, #115
Oakland, CA 94609
T: 646-831-6113
E: jon@publicrightsproject.org

<u>CORPORATE DISCLOSURE STATEMENT</u>

Pursuant to Mass. R. App. P. 17(c)(1), each *amicus curiae* certifies that it has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

Dated: April 26, 2024

<u>/s/ Jonathan B. Miller</u>
Jonathan B. Miller

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STATEMENT OF INTEREST

Amici[1] are organizations and legal scholars committed to empowering workers and combating racial discrimination in our law and society. Collectively, we have advocated in support of and against countless legislative actions as well as brought or participated in hundreds of lawsuits both here in Massachusetts and nationwide. At the core of our work, *amici* believe that the law should be a tool to uplift and ensure equal opportunity, rather than the means to stifle and oppress.[2]

We write separately because the five initiative petitions (the "Petitions") at issue in this case are fundamentally about the rights of people of color, immigrants, and other historically underserved groups. Black, Indigenous, and People of Color ("BIPOC") drivers and delivery workers make up the majority of gig workers nationally and are disproportionately represented in these industries. We submit this brief in full support of the rights of these essential workers. We do not believe that

[1] A complete list of all organizations and legal scholars who have joined this brief as *amici curiae* can be found at Appendix A.

[2] Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no other person contributed money intended to fund preparation or submission of this brief. Neither *amici* nor their counsel represents or has represented one of the parties in this case or in another proceeding involving similar issues. Neither *amici* nor their counsel was a party or represented a party in a proceeding or legal transactions that is at issue in the present case.

the companies pushing these initiatives should diminish the rights of workers through a flawed initiative process that relies on the deception of voters.

BIPOC drivers and delivery workers are who will be most affected by the Petitions. Uber, Lyft, and other companies advocating for these Petitions seek to enshrine a second-class employment category in Massachusetts law by cobbling sub-minimum job protections together (or nothing at all) with an altogether separate classification of these workers as independent subcontractors. In doing so, the Petitions violate a core requirement of Article 48—that initiative petitions contain only subjects "which are related or which are mutually dependent"—in a manner that would have disastrous consequences for workers, especially BIPOC workers.

SUMMARY OF ARGUMENT

This is a case about a core concern articulated repeatedly by the drafters of Article 48 of the Amendments to the Massachusetts Constitution. For the initiative petition process to reflect the will of the people, the people must know and understand what they are voting for. Intervenors have advanced five separate initiatives to this point of the process, setting the stage for significant voter confusion at the ballot box this November. It is unsurprising that companies such as Uber and Lyft are advancing a process that is bound to be misleading: they have a history of such actions.

In recent memory, in particular, this Court has played a crucial role in elevating the drafters' concerns about voter confusion. Combating misdirection in the initiative process is paramount, and those guiding principles should be followed here, especially given the nature of the overall similarities, nuanced differences, and stark contrasts among the Petitions. As a result, the Petitions should be invalidated as a collective. It is of no moment that Article 48 contemplates the possibility of competing and contrasting versions of initiatives, because here all five are from the same interest groups, the distinctions are not entirely clear to voters, and the proponents have created the confusion on their own.

In addition, should the Court need to analyze the petitions in a more traditional method, the relatedness requirement of Article 48 has not been met. The repeal-and-replace Long-Form Petitions contain far too many disparate provisions and unlawful sweeteners intended to induce voters. The Short-Form Petitions lack coherence, given the various relationships impacted across the statutory codes. Accordingly, these five petitions should be set aside individually as well.

ARGUMENT

I. THE PETITIONS IN THE AGGREGATE VIOLATE ARTICLE 48 BECAUSE THEY COLLECTIVELY CAUSE VOTER CONFUSION

The five petitions at issue in this litigation are in keeping with a history of deception by the companies backing this effort. The proponents have created an

unprecedented situation (or unlike any from recent memory) in which potentially five ballot measures on the same topic—all of which are different in at least certain ways—could be before the voters. Among other problems, voters will not understand the implications of their votes, will struggle to grasp some of the key distinctions, and may feel an obligation to vote for at least one of the measures. The situation is all of the proponents' making. Despite their assurances to narrow the field, there is no guarantee that the proponents or the General Court resolve these issues in time for November. Accordingly, the five petitions, taken as a whole, violate a core tenet of Article 48: voters must understand what they are voting for and against at the ballot box.[3]

A. An Original Purpose Of Article 48 Is To Avoid Manipulation Of The Process Through Voter Confusion

Article 48 provides a mechanism for the public to participate directly in the lawmaking process, subject to certain and important limitations safeguarding the process. The Constitutional Convention creating Article 48 imposed requirements to ensure the initiative process would not be abused by special and monied interests. *See* 2 *Debates of the 1917-18 Constitutional Convention* ("*Debates*"). In fact, in comparison to initiative amendments adopted by other states at the same time,

[3] While Article 48 permits the General Court to act to group initiatives as "conflicting" or "alternative" measures, it is not required to do so. Art. 48, Part VI. In the absence of such action to date, this Court is left to confront the situation as it currently stands and as it may proceed directly to the voters. *See also* Part I.B, *infra*.

Article 48 is more modulated and places "significant limits on [Massachusetts citizens'] initiative power." *Bates v. Director of the Office of Campaign & Political Fin.*, 436 Mass. 144, 159 n.24 (2002).

The restrictions on the initiative power emerging from the debates provide clear evidence of the drafters' intention to protect principally against voter confusion. Specifically, the drafters were wary of well-financed, self-interested entities exploiting the initiative process to their own ends by intentionally packaging proposed laws in ways that would confuse the voter. *Carney v. Att'y Gen.*, 447 Mass. 218, 228 (2006). Because proposers "can frame any measure he chooses… as trickily as he wishes," the delegates expressed concerns that voters would be presented with confusing and misleading petitions. *Koussa v. Att'y Gen.*, 489 Mass. 823, 838 (2022) (quoting *Debates* at 532) (hereinafter, "*Koussa I*"). The drafters worried entities would conceal their actual interests by presenting initiatives that would "puzzle," "seduce," "cajole," "perplex" or "wheedle and deceive" the public into "granting the privileges that our representatives never would permit." *Debates* at 535, 567; *see also Hurst v. State Ballot L. Comm'n*, 427 Mass. 825, 828 (1998) ("Article 48 provides means for the public to participate directly in the lawmaking process, but also safeguards against abuse of those means by special interests to invalidate acts by the people's elected representatives in the Legislature.").

As the drafters of Article 48 understood, direct democracy does not work if voters are left without a meaningful choice. It is essential that the initiative and referendum process "get the practical results that the people really want" and the people pass whatever measure "makes, not for a hasty, snap, popular judgment, but for the expression of that sound and settled popular will, fair to minorities, sane as to its consequences, which in a democracy ought to govern." *Debates* at 941

The delegates feared that "because of a failure to understand the proposition," "lack of instruction," or "lack of opportunity to learn," the results of an initiative that confused voters would not reflect the will of the people. *Id.* at 54. Accordingly, the drafters of Article 48 emphasized the need to ensure proposed measures are not "misleading in [their] phraseology" and sought solutions to the potential misuse of the initiative process. *Id.* at 537.

B. The Supreme Judicial Court Has Repeatedly Interpreted Article 48 To Block Ballot Initiatives And Revise Ballot Summaries That Would Result In Voter Confusion

While no precedent speaks to this specific scenario of five similar ballot measures, this Court has repeatedly applied the delegates' gatekeeping principles to ensure the initiative process is not exploited. In assessing challenges around relatedness, or the accuracy of ballot summaries, this Court is likewise principally concerned about confusion of the voters. *See, e.g.*, *Anderson v. Att'y Gen.*, 479 Mass.

780, 786 (2018) (Article 48 creates parameters “to avoid ‘abuse’ of the process and confusion among voters”).

As explained in *Koussa I*, Article 48 was “constructed to include ‘safeguards against potential voter confusion in the initiative process.’” 489 Mass. at 834 (quoting *Carney*, 447 Mass. at 230). In the precursor to this litigation, this Court blocked two related ballot initiatives authored by the very same proponents. Those proposed initiatives violated Article 48 because “the petitions contain at least two substantively distinct policy decisions, one of which is buried in obscure language at the end of the petition.” *Id.* at 824. As this Court explained: “petitions that bury separate policy decisions in obscure language heighten concerns that voters will be confused, misled, and deprived of a meaningful choice.” *Id.* at 838. Because the tort-liability provision was worded vaguely and placed in a separate section near the end of the initiative petitions, this Court held the two initiatives were an effort to “mislead and confuse voters by concealing controversial provisions in obscure language.” *Id.* at 834.

Similarly, in *Carney*, this Court relied on the drafters’ deliberations around the passage of Article 48 in explaining that “the relatedness limitation is one of many restrictions on the popular initiative process intended to avoid confusion at the polls and to permit citizens to exercise a meaningful choice when voting to accept or reject a proposed law.” 447 Mass. at 220. There, the petition in question included a

controversial proposition (dismantling parimutuel dog racing) with non-controversial amendments to existing criminal laws against animal fighting and cruelty to animals. *Id.* at 219. To determine whether the petition violated the relatedness limitation of Article 48, the Court looked at the context in which the relatedness limitation was adopted and concluded that it was "[added] to the original draft amendment" to "foreclose the kinds of abuses and misapplications of initiative petitions that the delegates determined had occurred in other States," and to "cull out misleading or confusing initiative measures." *Id.* at 229. Thus, the Court held that the petition at issue in *Carney* violated Article 48 because presenting voters with multiple subjects may operate to confuse or deceive voters. *Id.* at 230 (citing *Opinion of the Justices*, 422 Mass. 1212, 1221 (1996)).

When assessing ballot summaries and titles, this Court also considers confusion or misleading effects on voters. Article 48, as amended by Article 74, requires the Attorney General to prepare a "fair, concise summary" of each certified initiative petition. Article 48, Part II, § 3. A "fair" summary "is free from any misleading tendency, whether of amplification, of omission, or of fallacy." *In re Opinion of the Justices*, 309 Mass. 571, 589 (1941). It should not be "clouded by undue detail, nor yet so abbreviated as not to be readily comprehensible." *Id.* at 589.

The basic legal principles used to evaluate whether a summary is "fair" were further elaborated on in *Sears v. Treasurer & Receiver General*, where this Court

explained, “[the summary] must not be partisan, colored, argumentative, or in any way one-sided, and it must be complete enough to serve its purpose of giving the voter who is asked to sign a petition or who is present in a polling booth a fair and intelligent conception of the main outlines of the measure.” 327 Mass. 310, 324 (1951). There, the initiative summary in question was found to violate Articles 48 and 74 because it merely pointed out the differences between existing law and the proposed measure but was “wholly silent,” on various important matters of express provision in the measure itself.[4] *Id.* at 325.

In *Koussa I*, although this Court did not need to resolve the issue, it noted that “the failure to even discuss the provisions narrowing third parties’ tort recovery here would have rendered the summaries unfair.” 489 Mass. at 839, n.12. Similarly, in *Hensley v. Attorney General*, this Court held that the ballot title and one-sentence statements violated Article 48 because they were “misleading” and amended both to ensure that “the election is not marred by misunderstanding or confusion.” 474 Mass. 651, 669 (2016). There, the initiative had three main features (legalization, regulation, and taxation), however the title solely characterized the initiative as,

[4] *Sears* was clarified in *Opinion of the Justices*, 357 Mass. 787 (1970), where this Court noted omitting certain details from a ballot summary does not result in a *per se* violation of Article 48. *Id.* at 799. This subsequent decision underscores this Court’s animating concern relating to voter confusion: “Any other conclusion as to this summary would facilitate a return to the over-elaborate description which tended to confuse rather than to clarify.” *Id.* at 799–800.

"Marijuana Legalization," which the Court held as "unfair and clearly misleading," and amended it. *Id.* at 669. Additionally, this Court held that the one-sentence "yes" statement was misleading for various reasons, including its failure to make clear that the new law would allow the possession and use of certain marijuana. *Id.* at 670. Several revisions were required to ensure voters were protected in the process.

C. Presenting Citizens With Multiple, Related Initiatives, Authored By the Same Entity, Will Result in Voter Confusion

Massachusetts voters may be presented with, not just one, but as many as five initiative petitions that seek to alter the relationship between the Network Companies and Delivery Workers as well as Drivers. If presented with these five initiatives, voters will wonder why they are authored by the same entity, what the outcome will be if they vote differently on initiatives that contain the same or similar sections, and how they differ (if at all). As stated in the Constitutional Convention, "it is obvious that when you get a large number of [initiatives] on the ballot there is bound to be confusion." *Debates*, 741. This Court's precedent and core tenants of Article 48 do not permit this type of deception to proceed to the ballot.[5]

[5] Article 48, Part VI creates mechanisms for the General Court to group and organize competing ballot measures, though it is not required to intervene. Moreover, the premise behind this provision is to support a robust initiative process with different measures arising from different groups with different interests. Here, however, the confusion is all the making of one special interest. Accordingly, the safety valve that Article 48 provides, which has not been utilized by the General Court, should not absolve the proponents of the errors of their own making.

1. The Differences Among the Initiatives Are Complex

When presented with these five ballot questions, voters will want to understand the differences among the initiatives to cast meaningful votes. However, this will prove to be a complex task. Voters will need to identify the slight and significant differences between the initiatives and consider whether those differences will result in different outcomes. This is a task for lawyers steeped in employment law, not the voters.

In some instances, voters may not be able to perceive important distinctions. For example, Versions B, G, and H all include identical terms that would be incorporated into contracts between Workers and the Network Companies. However, Version B states that the change in employee status would be effective "notwithstanding any general or special law, or any rule or regulation promulgated thereunder." Petition No. 23-25, § 3(a). Version G does not include this language. Thus, Version B would change every Massachusetts law that uses employment status to determine eligibility, while Version G would focus its changes on several chapters of the General Laws. The average voter will not have the expertise to understand the impact of the minute differences in language. For example, Version B may implicate anti-discrimination laws under Chapter 151B, while Version G may not.

In other instances, differences in language might not result in differences for the Workers and the Network Companies. For example, Version F and G contain

different language but ultimately seek to change chapters 149, 151, 151A, and 152, as well as the regulations and common law rules interpreting those chapters. The most obvious difference is that Version G includes the contractual terms found in Long-Form Petitions. Voters may think what appears to be a significant difference between Versions F and G indicates a significant difference in their outcome. They will need to carefully analyze the text of each initiative to realize they share similar outcomes: reclassification of the Workers. At bottom, voters may have trouble understanding the particular impacts of each of their votes.[6]

2. Citizens Will Be Confused About the Outcome of Their Votes

Voters are not readily familiar with encountering multiple, related initiatives on the same ballot. Because the five initiatives are not completely distinct from one another, voters will have to consider how the various combinations of provisions interact to cast five meaningful votes. They will be confused about what the outcome of their vote will be if they vote "yes" on all initiatives or vote "yes" on an initiative that contains sections they voted "no" on elsewhere. Voters will wonder about the interaction of their votes and may also feel pressure to vote "yes or "no" on at least

[6] As another example of this point, the anti-discrimination clause in the Long-Form Petitions appears to operate as a form of a liability shield which not only exempts the Network Companies from actions in court under G.L. c. 151B, but also as a matter of contract between businesses under G.L. c. 93, § 102. It is unlikely that voters will notice this nuanced issue.

one measure simply to differentiate. This confusion will result in votes that are not consistent with the will of the voters as Article 48 demands.

Voters may believe they need to rank their preferences between initiatives and only vote "yes" on the initiative they agree with most rather than considering each initiative individually. For example, Versions F and I change existing law in different ways. Version F changes the employee status test contained in Chapters 149, 151, 151A, and 152, while Version I makes unique changes to the employee status test in each of those chapters. Despite that difference, their effect appears to be the same. They both exempt Workers from the protections contained in those chapters. It is possible that a voter wants to vote "yes" on both Versions F and I because they agree with their common effect, but prefer that Chapters 149, 151, 151A, and 152 are amended in the way Version F suggests over Version I. A voter may believe they have to vote "no" on Version I thinking they have to vote to reflect their preference between initiatives, rather than voting "yes" on multiple measures that reflect the overarching change the initiatives ensure. Similarly, Version B, G, and H contain identical terms that must be "incorporated into every contract made, modified or renewed" between a Worker and a Network Company. Even if a voter may want to vote "no" on Version B, they may believe they should not out of concern that it would negate their "yes" vote on Versions G and H.

D. Other Portions Of Article 48 Do Not Cleanup Proponents' Mess

The drafters contemplated that voters might consider multiple initiatives on the same topic at once. However, five initiatives from one special-interest source falls outside of the bounds. Neither of the safety valves available in Parts III and VI of Article 48 can save proponents from a problem of their own making.

1. Part III Allows the Legislature to Offer an Alternative

Article 48 expressly contemplates one initiative from the people and one from the General Court. Part III, § 2, provides "The general court may…submit to the people a substitute for any measure introduced by initiative petition, such substitute to be designated on the ballot as the legislative substitute for such an initiative measure and to be grouped with it as an alternative therefor." This permissive structure underscores the folly of proponents' approach and offers a scenario clearly distinguishable from the current situation.

To start, the multiple related measures contemplated in Article 48 would be introduced by two very different entities: the legislature and the people. Here, the five ballot measures are all introduced by the same entity—a special interest with a pecuniary goal in mind. There is no reason for voters to perceive a difference based on the author. Additionally, Article 48, Part III considers two related ballot initiatives. Here there are five initiatives. Two initiatives are simply easier to compare and contrast, and differences can be distinguished in real-time in the voting

booth. Finally, Article 48, Part III contemplates a "substitute" version from the legislature, which assumes key distinctions for voters to parse. In these circumstances, there are long-form and short-form petitions, but within each category it is hard to decipher meaningful distinction even with a deep understanding of Massachusetts employment law. *See* Part I.C, *supra*. Accordingly, in contrast to the clarity that would arise from a legislative substitute, here the choices add to voter confusion.

2. Part VI Was Not Intended to Help Special Interests Capture the Initiative Process

Article 48, Part VI provides direction on the situation in which multiple alternative laws are submitted to the people at any one election. However, Part VI was not drafted with the intention of allowing one author to present multiple initiatives to confuse voters. In fact, the drafters were clear about their wariness of one entity introducing multiple initiatives that accomplish the same results in various and overlapping ways. Considering a very different issue about a century ago, the delegates contemplated a similar scenario and rejected it soundly:

> [S]uppose one group of people put upon the ballot through the initiative question: Shall women suffrage be granted? The same group may put upon the ballot a question: Shall municipal suffrage for women be granted? And the same group or another group may put another suffrage question upon the ballot.

Debates at 801. The drafters concluded that allowing "jokers" to utilize the initiative process this way would undermine its purpose. Moreover, the delegates wanted to ensure that Part VI would guard against "moneyed interests" introducing rival petitions solely "designed to confuse the voters." *Id.* at 665. While the delegates trusted the ability of Massachusetts voters to accurately express their will when voting on two conflicting measures, they believed "it would be very unwise for the voters to vote for, say, five or six conflicting [or alternative] measures, when they should be limited to a choice of one." *Id.* at 926.

* * *

The drafters of Article 48 were wary that the people's initiative power would not accurately reflect the expression of their will. They noted that "the more complications we have in the proposition submitted to the voters, the more difficult it is for them to act upon it." *Carney*, 447 Mass. at 227 (quoting *Debates* at 701). They considered the voters' ability to wade through multiple measures presented by "a special group… tak[ing] advantage of the initiative," and decided "there ought to be some check upon them." *Debates* at 843.

Because Massachusetts voters are not familiar with encountering multiple, related ballot initiatives—all of which derive from one special-interest source—they will be confused about how to effectively cast their votes to reflect the outcome they desire. Accordingly, given this Court's established precedent and the drafters' clear

intention to guard against confusion, these five measures cannot be allowed to proceed.

II. REPEALING A WIDE RANGE OF EMPLOYMENT, SOCIAL SAFETY-NET, AND HEALTH PROVISIONS AND REPLACING THEM WITH SUBSTANDARD PROTECTIONS, OR NOTHING AT ALL, VIOLATES ARTICLE 48'S MUTUAL DEPENDENCE REQUIREMENT

On an individual basis, none of the Petitions meets Article 48's mutual dependence requirements and each should be found to violate the Massachusetts Constitution. The Long-Form Petitions contain the exact type of logrolling the drafters found troublesome and reflects an underlying effort by Network Companies to hide the negative impact of the petitions on App-Based Workers and induce votes through unlawful sweeteners. The Constitutional Convention adopted this requirement to protect against "the dangers of 'log-rolling,'" or the "practice of including several propositions in one measure . . . so that the . . . voters will pass all of them, even though these propositions might not have passed if they had been submitted separately." *Anderson*, 479 Mass. at 787 (citation omitted). [7]

[7] The Long-Form Petitions have another mutual dependence problem. They seek to put before the voters in a single ballot question multiple provisions designed to repeal and replace employment, labor market competition, social welfare, and health insurance protections guaranteed through multiple chapters of the General Laws. This type of broad-ranging revision is impermissible, because the minimum compensation floor provision is completely unrelated to the anti-discrimination provision which is unrelated to their health and vehicle accident insurance provisions, just as each of these provisions operates independently.

Regarding the Short-Form Petitions, the across-the-board repeal of protections does not comport with precedent relied upon by both the Attorney General and Intervenors. Instead, upon closer inspection, the Short-Form versions violate core tenets of mutual dependence because of the wide range of issues that falls within its sweep including employment, public health, and social safety-net provisions. *See Weiner v. Att'y Gen.*, 484 Mass. 687, 693 (2020).

A. The Long-Form Petitions' Impermissible Logrolling Is An Attempt To Obscure Significant And Broad Harms To Workers

The Long-Form Petitions obscure the serious consequences that these massive legal changes portend to Workers, by inducing voters to believe that they will be protected through unlawful and deceptive sweeteners contained within the lengthy terms of the initiatives. This is precisely the harm that the mutual-dependence requirement seeks to prevent. The effect of the combination of multiple subjects in these Long-Form Petitions is to create a risky and new class of worker—someone that is not an employee but also not quite an independent contractor (someone with sufficient economic power and independence in the market to bargain for their own terms and conditions) as that term has been understood. This new class of worker would be very susceptible to exploitation and largely unprotected by law, and this exploitation will fall especially heavily on BIPOC communities.[8]

[8] Although Article 48 does not explicitly forbid petitions which negatively impact minorities and other historically marginalized groups, it is an open question whether

1. **The Long-Form Petitions Codify Sub-Minimum Wage Standards for Drivers**

The Long-Form Petitions would codify a subminimum wage model where Workers are paid for only a portion of the time they actually spend working. Given that Workers must cover all of their own costs, their anticipated wages would fall far below what Workers would receive as employees under current state law, which presumes that Workers are employees given the operation of the independent contractor law. This reality underscores the deception of these inducements for voters. Many voters likely believe that they are guaranteeing minimum income to Workers, the reality is much less kind.

i. **Compensated Time**

By redefining what qualifies as working time, the Long-Form Petitions attempt to codify the systematic underpayment of wages and benefits to App-Based Workers. Massachusetts law requires that workers (including Drivers and Delivery Workers) are paid for "working time." Working time includes "[a]ll on-call time," such as the time between when a Driver has completed one delivery and is waiting for the next, and "all time during which an employee is required to be . . . on duty .

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a petition may "purposefully discriminate[] against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by art. 1 of the Massachusetts Declaration of Rights." *Schulman v. Att'y Gen.*, 447 Mass. 189, 199 (2006) (Greaney, J. concurring).

. . including rest periods of short duration." 454 C.M.R. §§ 27.02; 27.04(2). Working time is used for calculating wages and benefits that are based on total working time or meeting a minimum hours threshold.[9] Working time is a crucial lynchpin. The Long-Form Petitions effectively repeal and replace "working time" with "engaged time." They define engaged time as the time "from when an app-based driver accepts a request for delivery or transportation services to when the driver fulfills that request." *See, e.g.*, Petition No. 23-30, § 4.

The use of engaged time allows the Network Companies to codify a system of wage theft and make meager benefits available to only a small subset of gig workers.[10] One estimate provides that, in the Boston area, drivers will be paid for only 47% of their working hours.[11] "Uber's own data indicate that engaged time amounts to only 67 percent of the drivers' actual working time. [Under the Petitions], the companies would not pay for the approximately 33 percent of the time that

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[9] For example, access to paid sick leave under state law is determined by the number of overall hours worked by the employee. *See* G.L. c. 149, § 148C(d)(1).

[10] The Petitions are an attempt to codify digital piecework by compensating drivers only for engaged time. Without safeguards and real minimum wage protections, Drivers and Delivery Workers will be exploited in the same way that workers paid by the piece from their homes were in the early 20th Century. *See, e.g.*, Veena Dubal, *The Time Politics of Home-Based Piecework*, c4ejournal, (May 15, 2020), https://c4ejournal.net/2020/07/04/v-b-dubal-the-time-politics-of-home-based-digital-piecework-2020-c4ej-xxx/.

[11] Drivers Demand Justice, *The real economics of ridehail work: What it's like to work for Uber and Lyft in Massachusetts*, 22 (2023), https://driversdemandjustice.org/wp-content/uploads/2023/10/Gig-Worker-Report-Design_780.pdf.

drivers are waiting between passengers or returning from trips to outlying areas."[12] Even this conservative number underestimates the amount of time that Drivers will not be paid—it does not include time spent sanitizing, gassing up, and maintaining the vehicle.

The Network Companies assert that engaged time is the correct measure for tracking work because Workers can work for multiple apps at the same time or complete other work in between engaged time. However, Workers generally do not fill gaps in their time working for other companies. The Network Companies' algorithms penalize Drivers who do not accept most, or all, of the rides offered to them and it is therefore in a Drivers' best interest to work one app at a time.[13] Accordingly, the Long-Form Petitions' creation of the new category of "engaged time" will have catastrophic impacts on Drivers and Delivery Workers, their wages, and their ability to access core state benefits.

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[12] Ken Jacobs & Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as $4.82 an Hour*, UC Berkeley Lab. Ctr., (Sept. 29, 2021), https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage.

[13] *See, e.g.*, Emma McDaid, Paul Andon, Clinton Free, *Algorithmic management and the politics of demand: Control and resistance at Uber*, 109 Accounting, Organizations and Society, 101465, 8 (Aug. 2023). https://www.sciencedirect.com/science/article/pii/S0361368223000363; Ross Eisenbrey and Lawrence Mishel, *Uber business model does not justify a new 'independent worker' category*, Economic Policy Institute (March 17, 2016), https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/.

ii. Minimum Wage

The Long-Form Petitions purport to offer minimum wage protections, but that rings hollow. The interplay between compensated time and the actual costs incurred by Workers (such as wear-and-tear, mileage, etc.) results in a wage far below the state's minimum wage (not to mention overtime standards, when applicable). Three of every five Massachusetts drivers (59.7%) have monthly net pay rates that are less than the minimum wage.[14] One study concluded that most Drivers' effective hourly wage could be closer to $5.[15] Even where experts disagree about overall compensation, they do agree that there is huge variation in actual take-home pay and that some workers receive sub-minimum wage compensation from these companies.[16]

The negative effects are especially harmful for BIPOC workers who are already paid less than white workers on average.[17] In addition, Black and Latinx workers are more likely to be paid poverty-level wages than white workers and to

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[14] Drivers Demand Justice, supra n.11.

[15] Jacobs & Reich, *supra* n.12.

[16] Veena Dubal, *On Algorithmic Wage Discrimination*, 123 Colum. L. Rev. 1929, 1939 (2023).

[17] *Paid Family and Medical Leave: A Racial Justice Issue – And Opportunity*, National Partnership for Women and Families, at 4 (Aug. 2018), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf.

experience wage theft.[18] Minimum wage protections are therefore "an especially important tool for raising the earnings and decreasing the economic precarity of the working poor."[19] Among other things, depressed wages leave workers vulnerable to other economic consequences. Many Drivers have reported deactivation by one or more companies. As a result, many lose their cars—and their abilities to earn more money—or their homes.[20]

2. Many Essential Health and Safety Protections Included in the Long-Form Petitions Are Illusory

The Long-Form Petitions also purport to dramatically change access to health insurance benefits, paid sick time, and occupational vehicle accident insurance—all of which Workers should already be entitled to under current Massachusetts law. The Long-Form Petitions do not mention this as a change. Instead, they attempt to gain Workers' and other voters' support by including supposed pathways to health and safety protections. They rely on the fact that the companies currently misclassify their workforces and are thus not providing these required protections currently. As

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[18] Ellora Derenoncourt et al., *Why minimum wages are a critical tool for achieving racial justice in the U.S. labor market*, Washington Ctr. for Equitable Growth, (Oct. 29, 2020), https://equitablegrowth.org/why-minimum-wages-are-a-critical-tool-for-achieving-racial-justice-in-the-u-s-labor-market/.

[19] *Id.*

[20] Asian Law Caucus, *Fired by an App: The Toll of Secret Algorithms and Unchecked Discrimination on California Rideshare Drivers* (Feb. 2023), https://www.advancingjustice-alc.org/media/Fired-by-an-App-February-2023.pdf.

it turns out, these "new" benefits would be difficult to access and, when available, would be of lesser quality and quantity than those under existing law.

i. Health Insurance

The Long-Form Petitions provide for a reimbursement stipend that Workers can use toward health insurance, but only a small number of Workers would be eligible and even fewer would receive the higher amount.[21] The Long-Form Petitions state that "a network company shall provide a quarterly healthcare stipend to app-based drivers" based on the average number of hours of engaged time each week per quarter. *See, e.g.*, Petition No. 23-30, § 6. Using the finding that one-half of drivers' work time is between rides, and thus not "engaged time" under the definition, a typical driver would need to average at least 30 hours a week of actual work time during a quarter to receive the lower stipend, and 50 hours a week for the higher stipend.[22]

Several sections of the Long-Form Petitions, including the healthcare provisions, are like those offered under California Proposition 22, which passed in 2020 after gig companies spent over $224 million in campaigning. The experience of California drivers proves that the healthcare stipends promised by these petitions

[21] The myriad health provisions implicated by the Long-Form Petitions further underscore the mutual dependence problem, given the social safety-net and public health implications of any change in the regulatory scheme.

[22] Drivers Demand Justice, *supra* n.11.

are elusive. According to one study, 90% of California drivers do not receive the stipend outright due to initiative terms that limit access to the stipend.[23] Making health insurance accessible for BIPOC Workers is especially crucial given historic and existing structures that otherwise stymie access to healthcare. Despite nationwide gains in coverage after passage of the Affordable Care Act, people of color and low-income individuals are still at greater risk of being uninsured.[24] Among other things, racial disparities in coverage result in inconsistent access to services and poorer health outcomes. Given these underlying disparities and the likely effects, this Court should be wary of permitting the advancement of these Long-Form Petitions with hollow promises designed to be attractive to voters without offering tangible, material benefits to most of the affected workforce.

ii. Protected Sick Leave

The Long-Form Petitions will further place meaningful paid sick time out of reach for most Workers. They propose that a Network Company will provide Workers with one hour of paid time to every 30 hours of engaged time. *See, e.g.*, Petition No. 23-30, § 7(c). Current Massachusetts law however provides that "an

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[23] Eliza McCullough & Brian Dolber, *Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22*, Nat'l Equity Atlas (Aug. 19, 2021), https://nationalequityatlas.org/prop22.

[24] Bobbi M. Bittker, *Racial and Ethnic Disparities in Employer-Sponsored Health Coverage*, A.B.A. Hum. Rts. Mag. (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/.

employer shall provide a minimum of one hour of earned sick time for every thirty hours worked by an employee." G.L. c. 149 § 148C(d)(1) (emphasis added). As a result, the Long-Form Petitions would effectively reduce a Worker's earned paid sick leave by 33% or more given that "engaged time" captures less hours than "working time." Paid sick leave is vital for a myriad of social, economic, and health reasons: losing a job due to sickness "leads not only to short-term housing and food insecurity, but persistently reduces future earnings. It also worsens mental health, aggravates chronic health conditions, and results in academic disruption for children."[25]

Reductions in access to health care coverage as well as sick time is especially problematic for Drivers and Delivery Workers given the perils they face in their lines of work. By any assessment, the Drivers especially face extraordinary occupational danger, which is exacerbated by the legal fiction that the workers are not employees but operate their own independent businesses. U.S. Bureau of Labor statistics finds that workers who are classified as "gig workers"—those engaged in short term jobs and who are classified by firms as "independent contractors"—suffer the highest rate of on-the-job fatalities.[26] A 900-person national survey of Uber and Lyft drivers

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[25] Dilini Lankachandra, *Sick Without a Safety Net*, A Better Balance, (Mar. 2022), https://www.abetterbalance.org/sick-without-a-safety-net.

[26] Stephen Pegula and Matt Gunter, *Fatal occupational injuries to independent workers*, U.S. Bureau of Labor and Statistics, 8 Beyond the Numbers: Workplace

conducted in 2023 by the Solidarity Organizing Center found that 67% of drivers reported violence, harassment, and/or abuse on the job. Food delivery couriers report similarly violent on-the-job experiences.

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The Long-Form Petitions contain too many far-ranging and disparate aspects to meet this Court's predominance standard. Several core provisions fundamentally alter the nature of the relationship between Workers and the Network Companies, leaving voters in an untenable position. The impermissible sweeteners—provisions that seem to provide Workers with more protections—are elusive and leave Workers further vulnerable to exploitation.

B. *Albano* And *Hensley* Do Not Save The Short-Form Petitions' Flaws On Mutual Dependence

It is well-established that "[a] measure does not fail the relatedness requirement just because it affects more than one statute." *Albano v. Att'y Gen.*, 437 Mass. 156, 161 (2002). But this Court has "cautioned that '[a]t some high level of abstraction, any two laws may be said to share a common purpose.'" *Dunn v. Att'y Gen.*, 474 Mass. 675, 680 (2016) (quoting *Abdow v. Att'y Gen.*, 468 Mass. 478, 500 (2014)). Accordingly, a key inquiry is whether the similarities of the provisions "predominate." *Weiner*, 484 Mass. at 692. Here, they do not. The Short-Form

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Injuries no.10, (Aug. 2019), https://www.bls.gov/opub/btn/volume-8/fatal-occupational-injuries-to-independent-workers.htm.

Petitions not only repeal the App-Based Workers' status as employees of the Network Companies, but impact health, social safety-net, and other obligations to the state. Their brevity should not obscure their regulatory complexity, which has far-ranging effects on the companies, their workforce, competitors, state programs, and consumers.

Defendants and Intervenors point to *Albano*, which upheld the certification of an initiative relating to the definition of marriage. 437 Mass. at 162. While it is certainly true that marriage and spousal status impact rights and benefits on an array of statutes that is where the comparisons to these Petitions end. The Short-Form Petitions are not simply about the legal relationship between the companies and their drivers. The Short-Form Petitions impact the companies' obligations to participate in state programs and contribute to health care programs (G.L. c. 149 § 189), unemployment insurance (G.L. c. 151A), workplace safety (G.L. c. 152), and paid family medical leave (G.L. c. 175M). In addition, the Petitions implicate the companies' financial, reporting, and recordkeeping obligations for the state.[27] The Petitions also impact the companies' relationships with—and competition against—other players in the delivery and transportation fields. *Albano* offers superficial

[27] As an example, Massachusetts law requires companies to provide prompt reports to the Department of Public Health relating to all diseases affecting "health of community" in industrial establishments. G.L. c. 149, § 4.

appeal, but is not relevant given the broader and multilateral implications of these Short-Form Petitions.

Similarly, Defendants and Intervenors rely on *Hensley*, which concerned an initiative to legalize the recreational use of marijuana. 474 Mass. at 652. There, this Court focused specifically on an attack relating to a provision allowing entities dispensing medical marijuana to also be involved in the recreational market. That provision did not defeat the initiative. *Id.* at 658 (The "possible participation of medical marijuana treatment centers in the commercial distribution of marijuana is adequately related to this overall detailed plan."). Here, the Petitions do not suffer from a single additional tack-on, but rather from an overall scheme issue. *Hensley* cannot save these Short-Form Petitions either.

CONCLUSION

For all of the foregoing reasons and for the reasons provided by Plaintiffs-Appellants, the Petitions at issue in this litigation should be set aside and should not be permitted to appear on the 2024 ballot in Massachusetts.

Respectfully submitted,

/s/ Jonathan B. Miller
Jonathan B. Miller, BBO #663012
Counsel of Record
PUBLIC RIGHTS PROJECT
490 43rd Street, #115
Oakland, CA 94609
T: 646-831-6113
E: jon@publicrightsproject.org

Dated: April 26, 2024

Appendix A—List of *Amici Curiae*

Public Rights Project (PRP) works at the intersection of community advocacy and government enforcement, with a specific focus on catalyzing equitable and community-based enforcement. Spurred by a mission to bridge the gap between the promise of laws and the lived experiences of historically underserved groups, PRP has focused considerable attention advocating for enforcement of needed protections against businesses exploiting workers in the fissured economy as well as connecting government enforcement agencies with organizations that support affected workers.

The **Jewish Alliance for Law and Social Action** (JALSA) is a membership-based non-profit organization based in Boston working for social and economic justice, civil and constitutional rights, and civil liberties for all. JALSA has a long history of supporting workers' rights and racial justice, and strongly believes that workers do not forfeit their right to a living wage and workplace protections by participating in the gig economy.

Lawyers for Civil Rights (LCR) fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. As part of this work, LCR has long represented employees of color and immigrant employees seeking to enforce their rights under

employment laws. Increasingly in recent years, many of LCR's low-wage worker clients are employed in the gig economy. LCR thus has a strong interest in ensuring that these vulnerable workers are not relegated to second-class employment status in Massachusetts.

The **Massachusetts Law Reform Institute** (MLRI) is a statewide non-profit law and poverty center. Its mission is to advance economic, social and racial justice for low-income persons and communities. For more than 50 years, MLRI has engaged in legislative, administrative, and judicial advocacy on behalf of its clients and as part of that advocacy has participated as amicus curiae in numerous appellate cases concerning employment issues. MLRI has a strong interest in ensuring that the extensive worker protections now codified in state law not be weakened by means of a deceptive initiative petition supported by transportation network companies that would nullify many of those protections while purporting to advance the interests of the persons of color, immigrants and other historically underserved groups who are disproportionately represented among the workers at these companies.

People's Parity Project (PPP) is a movement of attorneys and law students organizing for a democratized legal system which values people over profits, builds the power of working people, and opposes subordination of any form. PPP is working to dismantle a profession that upholds corporate power and build a legal system that is a force for justice and equity. PPP's work focuses on building power

for working people in the civil legal system through organizing, policy innovation, political education, and solidarity.

PowerSwitch Action (formerly the Partnership for Working Families) is a community of leaders, organizers, and strategists forging multi-racial feminist democracy and economies in cities and towns. PowerSwitch Action's network of 20 grassroots affiliates weaves strategic alliances and alignments amongst labor, neighborhood, housing, racial justice, faith, ethnic-based, and environmental organizations. All too often, workers face abuse and exploitation on the job. Those experiences are made more harmful when employers evade their responsibilities through worker misclassification. PowerSwitch Action's affiliates witness and confront the direct and daily impact of misclassification, which encompasses not only loss of wages, but also the loss of vital protections of the basic dignity, safety, and health of individuals at work.

Rideshare Drivers United (RDU) is a driver-led organization founded in 2018 by a group of Los Angeles Uber and Lyft drivers. The organization's values are deeply rooted in worker democracy, grassroots action, and labor rights. RDU has grown from 400 members in Fall 2018 to over 20,000 California driver members with three California-based chapters, in Los Angeles, San Diego, and the Bay Area.

Professor Veena Dubal is a Professor of Law at the University of California, Irvine School of Law. Professor Veena Dubal's research focuses broadly on law, technology, and precarious workers, combining legal and empirical analysis to explore issues of labor and inequality. Her work encompasses a range of topics, including the impact of digital technologies and emerging legal frameworks on workers' lives, the interplay between law, work, and identity, and the role of law and lawyers in solidarity movements.

Professor Leticia Saucedo is a Professor of Law at the University of California, Davis School of Law. She is an expert in employment, labor, and immigration law. Professor Saucedo's research interests lie at the intersections of employment, labor, and immigration law. She has focused her research on the impact of employment and labor laws on conditions in low-wage workplaces, and on the responses of immigrant workers to their conditions.

Professor Noah Zatz is a Professor of Law and Labor Studies at UCLA School of Law. Professor Zatz's interests include employment and labor law, welfare law and antipoverty policy, critical race and feminist theory, and liberal political theory. His writing and teaching address how work structures both inequality and social citizenship in the modern welfare state. Professor Zatz's primary focus is on which activities become recognized and protected as "work," how work is defined in relationship to markets, and how the boundaries of markets are themselves mediated by gender and race, among other things.

**Law school and university affiliation of *amici* are provided for identification purposes only.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of the Court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Mass R. App. P. 16, Mass. R. App. P. 17, and Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limit in Mass. R. App. P. 20 because it uses 14-point Times New Roman font and is 6,950 words long, not including the portions of the brief excluded under Mass. R. App. P. 20, counted with the word-count function on Microsoft Word for Office 365.

Dated: April 26, 2024

/s/ Jonathan B. Miller
Jonathan B. Miller (BBO #663012)
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I filed this brief electronically through the Supreme Judicial Court's e-filing system and caused service to be provided by the e-filing system to the following counsel of record:

Jennifer Grace Miller
John M. Stephan
Hemenway & Barnes, LLP
75 State Street 16th Floor
Boston, MA 02109-1466
jmiller@hembar.com
jstephan@hembar.com

Anne Sterman, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Anne.Sterman@mass.gov

Thaddeus Heuer
Andrew London
Seth Reiner
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
theuer@foleyhoag.com
alondon@foleyhoag.com
sreiner@foleyhoag.com

Dated: April 26, 2024

/s/ Jonathan B. Miller
Jonathan B. Miller (BBO # 663012)
Counsel of Record