COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13559

MARTIN EL KOUSSA, ET AL.,

Plaintiffs/Appellants,

v.

ANDREA JOY CAMPBELL, in her official capacity as Attorney General of the Commonwealth of Massachusetts, and WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts,

Defendants/Appellees,

CHARLES ELLISON, ET AL.,

Intervenors.

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

BRIEF FOR *AMICUS CURIAE* NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

CORPORATE DISCLOSURE STATEMENT

The National Employment Law Project (NELP) is a nonprofit, nonstock advocacy organization. NELP does not have a parent corporation or issue stock, and therefore no publicly-held corporation owns 10 percent or more of its stock.

MASS. R. APP. P. 17(C)(5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), amicus and its counsel declare that: (a) no party or a party's counsel authored this brief in whole or in part; (b) no party or a party's counsel contributed money to fund preparing or submitting of the brief; (c) no person or entity except amicus provided money intended to fund preparing or submitting of a brief; and (d) amicus counsel has not represented any party in this case or in other proceedings involving similar issues, and was not a party and did not represent a party in a proceeding or legal transaction that is at issue in this present appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Employment Law Project (NELP) is a non-profit legal organization with more than 50 years of experience advocating for the employment and labor rights of underpaid and unemployed workers. For decades, NELP has focused on the ways in which various work structures, such as calling workers "independent contractors," exacerbate income and wealth inequality, the segregation of workers by race and gender into poor quality jobs, and the ability of workers to come together to negotiate with business over wages and working conditions.

SUMMARY OF ARGUMENT

Article 48 of the Massachusetts Constitution requires that a measure proposed by an initiative petition must "contain[] only subjects . . . which are related or which are mutually dependent." El Koussa v. Attorney General, 489 Mass. 823, 827 (2022) (El Koussa I) quoting Art. 48, The Initiative, II, § 3, as amended by Art. 74. "[T]he core of the related subjects requirement is the condition that the initiative petition's provisions … must present a 'unified statement of public policy' that the voters can accept or reject as a whole." Gray v. Attorney General, 474 Mass. 638, 645-46 (2016), quoting Carney v. Attorney General, 474 Mass. 218, 231 (2006). The requirement guards against the possibility of voter confusion caused by obfuscation. El Koussa I, 489 Mass. 823 at. 829.

We write primarily to make the argument that the five initiative petitions at issue here impermissibly combine changes to distinct provisions on dissimilar subjects for an up-or-down vote.[1] The Petitions would statutorily purport to classify the hundreds of thousands of workers who drive for companies like Uber, Lyft, Instacart, and DoorDash as independent contractors. Doing so will—among other

[1] The five petitions include two shorter ones, Nos. 23-29 and 23-32 and three longer ones, Nos. 23-25, 23-30, and 23-31. Amici refer to them collectively as "the Petitions" or individually by the designations each was given by the Attorney General, —i.e., Versions F and I (short versions) and Versions B, G, and H (longer versions), respectively.

things—exempt those workers from the Commonwealth's uniquely broad Independent Contractor Law ("ICL") and thereby deny them the wage and hour protections guaranteed by the state's Minimum Fair Wage Law ("the Wage Act").

As the Legislature and courts in Massachusetts have made clear time and again, the ICL is a deliberately broad remedial statute, focused on eliminating schemes that strip workers of bedrock wage and hour protections. Indeed, it is perhaps the strongest misclassification statute in the nation—one which other states' legislatures and judiciaries have looked to as a model in developing their own worker protection laws. In adopting the strict "ABC" test that forms the bedrock of the ICL, the Legislature made the distinct policy choice to ensure that workers in the Commonwealth are shielded from misclassification and guaranteed the robust protections of the Wage Act.

As demonstrated below and elsewhere[2], the Petitions would simultaneously but comprehensively undermine not only the Legislature's policy preference for strong wage protections and the rights of ridehail and delivery drivers under other distinct Massachusetts labor and employment laws, but they also would alter

[2] *See*, *e.g.*, Br. of Pls/Appellants at 37-44 (distinguishing distinct policy choices among laws regulating employer obligations to employees, and employer obligations to the state); Br. of Amicus EPI at 13-14, 25-28 (noting the Petitions would "fundamentally alter the relationship between drivers and the [companies] and the relationship between these companies and the state of Massachusetts."); Br. of Massachusetts Worker Centers (explaining how UI embodies dissimilar policy decisions from other policies affected by the Petitions).

distinct policies regulating the relationships of the Network Companies with the Commonwealth. In so doing, they place voters "'in the untenable position of casting a single vote on two or more dissimilar subjects,'" El Koussa v. Attorney General, 489 Mass. 823, 827 (2022) (El Koussa I) citing Weiner v. Attorney Gen., 484 Mass. 687, 691 (2020). Taken together, the Petitions necessarily create voter confusion and are insufficiently related under Article 48.

We also write to draw the Court's attention to the deeply damaging impacts of the Petitions on ridehail and delivery drivers in Massachusetts, should any of the Petitions pass. App-based drivers would lose the protection of minimum wage, overtime pay, unlawful wage deductions, and sick time laws. In exchange, they would be left either totally without recourse to any wage laws, or—under some of the longer versions of the Petitions—with a minimum wage guarantee far below the state wage floor. At the same time, the Petitions impermissibly alter not only an array of distinct employment laws, but also social insurance laws that implicate relationships among all workers, the public, and the Commonwealth.

These are not abstract concerns. Rather, these dynamics have already played out with California's Prop. 22, where Uber and Lyft succeeded in leveraging their largesse to confuse voters into repealing Assembly Bill 5 ("AB5"), which codified the California Supreme Court's adoption of the Massachusetts ABC test in Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 956 n.23 (2018), and

designating app-based drivers as independent contractors for purposes of California's employment laws (despite the California Court of Appeal having recognized that the drivers were likely employees under the adopted Massachusetts ABC test), see People v. Uber, 56 Cal. App. 5th 266, 292 (2020) ("Although we need not conclude that Uber and Lyft's position that they are not in the transportation business is frivolous, we find no abuse of discretion in the trial court's conclusion that the People have shown a probability of prevailing on the merits based on prong B [of the state's ABC test for employment status]."). As discussed at length below, the results have been disastrous, just as they will be if any of the Petitions at issue here succeed.

The Petitions fail to meet the requirements of Article 48 because they would require voters to make a single "yes or no" choice on an array of distinct policies and create inevitable and impermissible voter confusion. Accordingly, the Court should order that the Secretary is barred from placing them on the November 2024 ballot.

ARGUMENT

I. Massachusetts' Independent Contractor Law is Uniquely Broad and Reflects a Distinct Policy Choice; Amending it by Ballot Initiative Alongside Multiple Other Workplace and Social Insurance Laws Would violate Art. 48's Relatedness Requirement.

As the Attorney General has recognized, the need for "proper classification of individuals in the workplace is of paramount importance to the Commonwealth." An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1 AGO 1 (2008). Businesses that misclassify their workers not only deprive them of "the many protections and benefits" that employees enjoy; they also "deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes", as well as contributions to the Commonwealth's social insurance programs. Id. Indeed, ensuring that employees are properly classified has "long been an issue of great concern in the Commonwealth." Id.

A. The Strict "ABC" Test Provides Intentionally Broad Access to the State's Strong Wage and Hour Protections.

In 1990, the Legislature took the bold step of enacting the ICL. See St. 1990, c. 464, St. 2004, c. 193, § 26. The ICL, M.G.L. c. 149 § 148B, "establishes a standard to determine whether an individual performing services for another shall be deemed an employee or an independent contractor for purposes of our wage statutes." It presumes employee status as long as the individual performs *any* service for the putative employer and puts the burden on the putative employer to

affirmatively demonstrate that the individual is not an employee. Somers v. Converged Access, Inc., 454 Mass. 582, 589 (2009). Specifically, the statute uses the "ABC" test, which requires a putative employer prove that:

> **[A]** the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> **[B]** the service is performed outside the usual course of the business of the employer; and
>
> **[C]** the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. c. 149, § 148B(a).

Under this strict "ABC" test, workers who may be properly classified as independent contractors for the purposes of other laws containing more lenient tests may nonetheless prove to be misclassified under the ICL. As this Court has explained, "the statute evidences the Legislature's intent to cast a wider net." Patel v. 7-Eleven, Inc., 489 Mass. 356, 360 (2022).

In choosing such broad coverage, the Legislature sought to "protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." Somers, 454 Mass. at 592 (2009); see also Patel, 489 Mass. at 360 ("[The ICL] evinces the Legislature's broad, remedial intent 'to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances

indicate that they are, in fact, employees.'") (quoting Depianti v. Jan-Pro Franchising Int'l, Inc., 465 Mass. 607, 620 (2013)). The presumption of an employment relationship "plac[es] the onus on employers to proactively establish their workers as independent contractors", thus "root[ing] out common misclassification tactics." Deknatel & Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. Pa. J.L. & Soc. Change 53, 71 (2015) (ABC On the Books).

The deliberately broad coverage established by the "ABC" test is critical to fostering broad access to the Commonwealth's strong wage and hour protections. As this Court has recognized: "Proper classification is important to the determination of the protections afforded to an individual under the wage statutes" Patel, 489 Mass. at 359. Thus, the ICL promotes the Commonwealth's commitment to ensuring a suite of robust wage and hour protections for a deliberately broad swath of workers. It works hand in glove with the Wage Act and reflects the Legislature's intent to broaden the "scope of employees covered, the type of eligible compensation, and the remedies available" in recognition of the need to "prevent the unreasonable detention of wages." Lipsitt v. Plaud, 466 Mass. 240, 245–46 (2013) (citations omitted). The minimum wage laws and corresponding regulations, meanwhile, reflect a commitment to ensuring that workers do not receive an "unreasonable and oppressive wage" and that employers

compensate employees for all the time they work. M.G.L. c. 151, § 1; 454 CMR 27.02. Likewise, the overtime requirement of G.L. c. 151, § 1A reflects the Legislature's effort to "reduce the number of hours worked, encourage the employment of more persons, and compensate employees for the burden of a long workweek." Arias-Villano v. Chang & Sons Enterprises, Inc., 481 Mass. 625, 627 (2019) (citation omitted).

B. The Independent Contractor Law is Considered a Model for Combatting the Particular Harms of Misclassification.

As this Court has recognized, the misclassification of employees as independent contractors imposes significant harms on workers, law-abiding employers, and the public coffers. Patel, 489 Mass. at 359–60 (citing S. Leberstein & C. Ruckelshaus, NATIONAL EMPLOYMENT LAW PROJECT, Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It, at 1 (May 2016)). The ICL is specifically designed to prevent such harms. In addition to protecting worker access to wage and hour protections, the statute prevents employers from gaining an "unwarranted windfall" by unlawfully evading their "statutory obligations to the workforce", "shifting financial burdens to the […] government" and gaining "an unfair competitive advantage" through misclassification. Id. at 359.

Indeed, the Commonwealth has repeatedly recognized the importance of the ICL and the particular harms of misclassification on the state. The Legislature has

repeatedly rejected attempts to weaken the law's "ABC" test.[3] Opinions from this Court have likewise noted the statute's broad coverage and remedial purposes. See Somers, 454 Mass. 582; Depianti, 465 Mass. at 620, 621. Advisories of the Massachusetts Attorney General[4] and the creation of a Massachusetts Joint Task Force to combat misclassification[5] similarly reflect the state's commitment to ensuring broad access to the Wage Act and ending independent contractor misclassification.

The ICL is so protective that courts and legislatures in other states seeking to strengthen worker protections have looked to it in fashioning their own employment misclassification laws. See ABC on the Books, at 65 ("Massachusetts did not create the ABC test, but … the ABC formulation and variations on it has come to dominate reform of independent contracting definition laws in other states."). Notably, in 2018, the California Supreme Court explicitly adopted

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[3] See, e.g., Massachusetts 2021 Legislature bills, including H.B. 1234 (app-based driver bill); H.B. 2001 (proposing requiring the employer to prove Prong A and either Prong B or C); MA H.B. 2007 and S.B. 1229 (proposing to exempt certain freelancers, for example those who meet the IRS independent contractor test); see also S.B. 1253.

[4] An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1 AGO 1 (2008), https://www.mass.gov/files/2017-08/independent-contractor-advisory_1.pdf.

[5] On March 12, 2008, the Governor issued Executive Order No. 499: Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, (Mass Register 1101).

Massachusetts' version of the ABC test because of its strength. Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 956 n.23 (2018) ("The version [of the ABC test] we have set forth in text … tracks the Massachusetts version of the ABC test."); see also Vazquez v. Jan-Pro Franchising International, Inc., 986 F.3d 1106, 1122 (9th Cir. 2021) ("Dynamex embraced the Massachusetts version of the test. … Thus, by judicial fiat, California incorporated Massachusetts's employment classification statute into its labor laws.") (internal citation omitted). In doing so, the court remarked on the particular strength of Massachusetts' ABC test, which "permits the hiring entity to satisfy part B *only* if it establishes that the work is outside the usual course of the business of the hiring entity", unlike versions used in some other states' unemployment insurance statutes, "which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity." Id. (citing N.J. Stat. Ann. 43:21-19(i)(6)(A-C)) (emphasis supplied). The court found that Massachusetts' more protective ABC test was consistent with the remedial purposes of California's wage laws and better suited to contemporary work practices.

The California legislature later followed suit by codifying Dynamex's adoption of Massachusetts' ABC test, with the specific intent of stopping

companies from exploiting their workers through the guise that they are independent contractors.

C. The Petitions Would Undermine the Power of the Independent Contractor Law and Strip Drivers of a Wide Array of Wage Act Protections, with Disastrous Results.

The Petitions' attempt to redefine workers as independent contractors does not, of course, simply create a corporate-backed loophole that limits the broad scope of the ICL to the benefit of Uber, Lyft, DoorDash and Instacart. The Petitions also ask voters to strip these companies' workers of the following Wage Act protections: (1) minimum wage; (2) overtime pay; (3) prohibition on wage deductions; (4) minimum break periods; (5) regular time periods for payment; (6) reimbursement for business expenses; (7) entitlement to all tips; (8) protection against retaliation for raising wage complaints; (9) Earned Sick Time Leave, and other protections. See M.G. L. c. 149 §§ 100, 148, 148A,148C, 150A, 152A.

The long versions—versions B, G, and H—attempt to obfuscate some of these consequences by pretending to provide what would appear at first blush to be similar benefits to those that Commonwealth employees enjoy. For example, they misleadingly promise a "Guaranteed Earnings Floor" at 120% of minimum wage to drivers. But that 'guarantee' would compensate workers *solely* for the time they are "engaged," legalizing these corporations' practice of refusing to pay their

workers for all work time, as required under Massachusetts law.[6] Uber's own data indicates that engaged time represents only 67 percent of a driver's working time, meaning drivers would not be paid for the 33 percent of the time they must spend waiting for passenger assignment or returning from drop-off locations.[7] Similarly, delivery workers for companies like Instacart would not be paid for time they spent shopping, packing, and loading good for delivery. Because the promise of 120% of minimum wage does not apply to one-third of drivers' time, the Petitions effectively promise ridehail drivers only $12.06 per hour including unpaid wait time—below the state's fifteen-dollar minimum wage.

But the Petitions' guaranteed earnings floor also fails to adequately account for the substantial expenses of driving a car—expenses that are reimbursable for employees under the ICL—and for the loss of other mandatory employee benefits under Massachusetts law. Taking this all into account, and as shown in the image below, the majority of Massachusetts drivers could earn a guaranteed minimum

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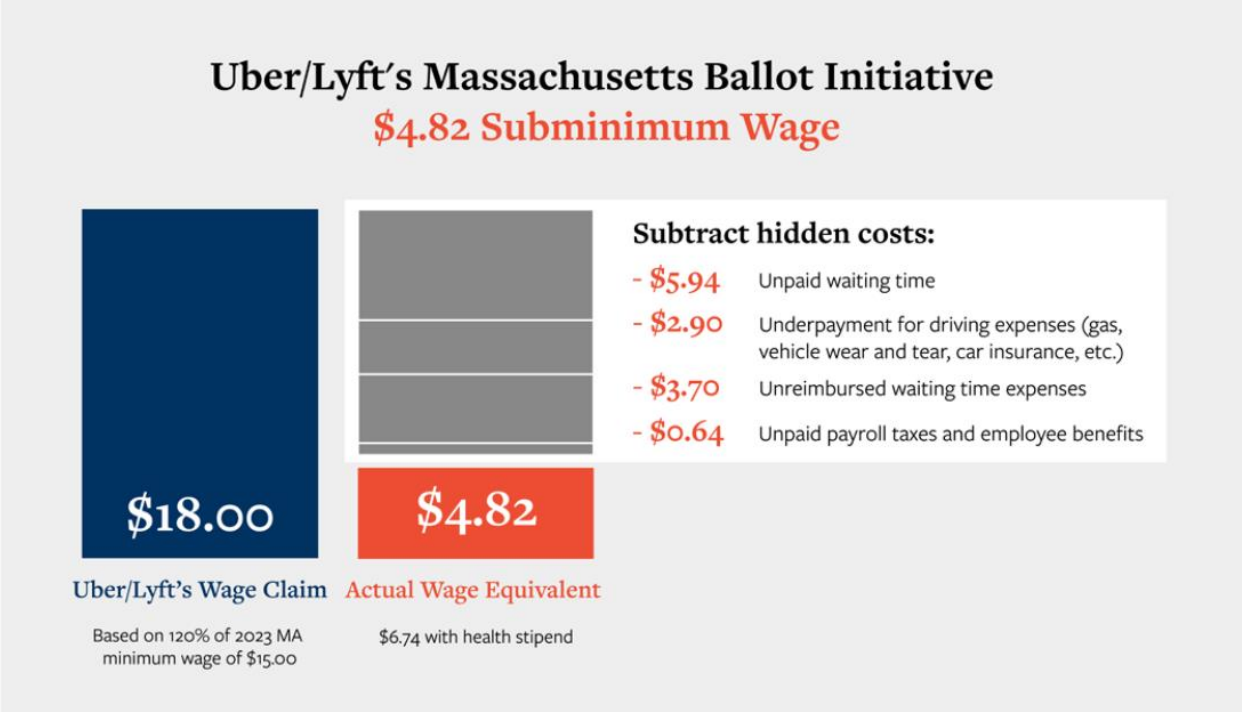
[6] Under Massachusetts law, all employees are entitled to compensation not only for time in which revenue is directly produced or that may be easily commodified (i.e., engaged), but for all working time in which they are on call at the pleasure of their employer. See 454 CMR 27.04. The petitions would legalize the companies' unpaid work policies.

[7] Ken Jacobs, Michael Reich, Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage, Inst. for Research on Lab. & Empl. (Sept. 2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/09/Massachusetts-Uber-Lyft-Ballot-Proposition-Would-Create-Subminimum-Wage-1.pdf

wage of "as little as the equivalent of $4.82 wage, while the minority of drivers. . . could earn the equivalent of $6.74 per hour."[8]



All told, the Petitions would effect a massive bait-and-switch that rejects the Commonwealth's steadfast commitment to ensuring robust Wage Act protections via its remarkably broad ICL in favor of a set of inferior wages and benefits for one subset of workers.

In sum, the Petitions represent a threat to ridehail and delivery workers in the Commonwealth and to the state's commitment to prohibiting misclassification and ensuring comprehensive and effective Wage Act protections.

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8 Id. The image on this page is also taken from id. at 2.

D. Altering the Scope and Coverage Among Other Employment and Social Insurance Laws Violates Art. 48's "Relatedness" Requirement.

In addition to stripping app-based drivers of the protections of the ICL and Wage Act, the Petitions exempt the Network Companies from their obligations under multiple other distinct employment statutes and social insurance programs. These include, for example, the anti-discrimination and harassment laws as well as the Workers' Compensation Act, Unemployment Compensation Act, and Paid Family and Medical Leave.

Massachusetts' anti-discrimination and anti-harassment statutes empower a commission to fashion remedies to "protect and promote the broader public interest in eradicating systemic discrimination." Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 541, 563 (2004). Yet rather than the strict ABC test embodied in the ICL, the narrower common law "right to control" test applies to application of Chapter 151B and similar statutes providing anti-discrimination and harassment protections. Comey v. Hill, 387 Mass. 11, 16 (1982). The Legislature made a different policy choice regarding coverage under these laws than it made regarding its policy of ensuring against misclassification and providing broad wage protections.

Likewise, the Massachusetts Workers' Compensation Act reflects a distinct set of policy choices. The workers' compensation system was established as an

entirely separate administrative system of no-fault insurance, intended to replace the tort regime and provide compensation to employees injured in the course of their employment. See generally Workmen's Compensation Act, Stat. 1911, Introduction; G.L. c. 152, §§ 1 *et seq.* Unlike under the ICL, eligibility analysis under the Workers Compensation Act is also focused on the "right to control" for distinguishing between employee and independent contractor. See Ives Camargo's Case, 479 Mass. 492, 495 (2018).

Further, the proposed changes to Commonwealth social insurance programs would alter far more than relationships between workers and their employers. Unemployment insurance (UI) and paid family and medical leave ("PFML) are state programs that involve the relationships between all employers and the Commonwealth, workers, and the Commonwealth itself. UI, for example, is a social insurance program designed to "spread and mitigate the economic risk of unemployment in the workforce and society as a whole, to encourage and facilitate re-employment, and to stabilize the economy during recessions."[9] And PFML is designed to promote public health and labor force attachment.[10] Both of these

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[9] Brief of Amici Curiae Massachusetts Worker Centers, at 20, El Koussa, et al. v. Attorney General, No. SJC-13559 (Apr. 26, 2024).

[10] Id.

insurance programs implicate relationships far beyond employment relationships between individual workers and their employers.

In short, there is not simply one law governing the rights, protections, and benefits of employees in Massachusetts—or the obligations of their employers to the Commonwealth and its citizens—that can be amended by a single ballot initiative. There are multiple laws, each reflecting separate and distinct areas of Massachusetts law, with different eligibility requirements created to advance distinct public policies, and as to each of which a voter may wish to register a different preference.

Because they would simultaneously but comprehensively alter not only the Legislature's policy preference for strong wage protections, but the distinct policy choices for regulating relationships among workers, employers, the public, and the Commonwealth, the Petitions are bound to create voter confusion and are insufficiently related under Article 48.

II. The Blueprint for these Petitions, California's Prop. 22, Caused Widespread Voter Confusion and Demonstrates the Harm the Petitions Will Inflict on Massachusetts Drivers.

The abovementioned concerns regarding the impacts that the Petitions will have on Massachusetts' ICL and wage protections, on voters forced to make a "yes or no" choice on multiple distinct policies, and ultimately on impacted drivers are not abstract or attenuated. One need look no further than California, which had

adopted the Massachusetts ABC test in an attempt to strengthen its own worker protections. There, a nearly identical corporate-sponsored ballot initiative—which rolled multiple distinct policy judgements into one overbroad and confusing "yes or no" vote—left voters deeply confused as to which side represented the interests of workers, and which side the interests of the Network Companies. Amidst this confusion, voters were ultimately bamboozled into saying "yes," with predictably disastrous results for app-based drivers.

A. California's Voters Were Misled and Deeply Confused by Prop. 22.

In 2020, Uber, Lyft, DoorDash, Instacart and Postmates proposed a ballot initiative to exempt themselves from their obligations to comply with California labor and employment law, including under the state's newly-passed anti-misclassification law—a law mirroring Massachusetts' ICL, known as Assembly Bill 5 ("AB5").[11] They then spearheaded a massive and unprecedently-expensive campaign to get the initiative, Proposition 22 ("Prop. 22"), passed.[12]

Like the Petitions at issue here, Prop. 22 was a fundamentally anti-worker policy proposal backed by deep-pocketed corporate financing. By pairing this

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[11] AB5 was enacted to codify the decision in Dynamex which, as detailed *supra* [ ], looked to the Commonwealth's Misclassification Law a model "ABC" test.

[12] Cal. Bus. & Prof. Code, §§ 7448-7467.

massive, self-serving statutory carveout with "sweeteners" in the form of some extremely limited worker benefits—including a minimum wage much below the existing state wage floor, private accident insurance in place of workers' compensation, and some difficult-to-access health benefits—the companies sold Prop. 22 as actually pro-worker. With more than $200 million in ad-buys and campaign expenditures, and push notifications sent directly to millions of voters through their consumer apps, the companies were able to effectively push the misleading narrative that Prop. 22 was about protecting the state's app-based workers.[13]

They touted the proposal's "Guaranteed Earnings Floor," which purported to establish a wage floor at 120% of the state's minimum wage, just like the long petitions here.[14] But, as here, they failed to explain that this guaranteed worker earnings only during "engaged time"— which, as explained above, means that approximately one third of drivers' working time can go legally unpaid.[15] They also

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[13] Andrew Hawkins, Uber and Lyft Had an Edge in the Prop 22 Fight: Their Apps, Verge (Nov. 4, 2020), https://www.theverge.com/2020/11/4/21549760/uber-lyft-prop-22-win-vote-app-message-notifications.

[14] Irving & Maredia, Prop. 22: Improving the Lives of California Drivers and Couriers, Uber Newsroom (Dec. 8, 2022), https://www.uber.com/newsroom/prop-22-benefits/ (last accessed Mar. 27, 2024).

[15] Jacobs & Reich, The Uber/Lyft Ballot Initiative Guarantees Only $5.64 an Hour, U.C. Berkeley Labor Center (Oct. 31, 2019),

failed to explain that the earnings floor did not account at all for the substantial expenses of driving a car. Unlike employees guaranteed the state's minimum wage, app-based drivers were entitled to only a minimal expense reimbursement that significantly under-counted the costs of driving and the number of miles the average driver would spend driving as part of their work.[16] The upshot of Prop. 22's guaranteed earnings promise is that drivers were guaranteed a "minimum wage" of only about $5 an hour, after accounting for expenses and non-driving

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https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/ (last accessed of Mar. 28, 2024) (estimating that 33 percent of driver time is spent waiting between passengers or returning from trips to outlying areas).

[16] Prop. 22's guaranteed earnings provision underestimates the substantial expenses of app-based driving by almost $5 an hour, requiring drivers to bear the costs of owning and operating a vehicle. See id.

wait times,[17] a far cry from the companies' promise of "20% over the current prevailing minimum wage anywhere in California."[18]

While the companies' Prop. 22 messaging was deeply misleading, both in the details and in the overall picture it conveyed, it proved stunningly effective.[19] With their deep pockets, they flooded airwaves, mailboxes, and cell phones with "Yes on Prop. 22" messages. Many recipients did not realize that they were lobbying *against* employment protections when responding to in-app messages

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[17] One 2021 study found that Prop. 22's wage floor was just **$4.10 per hour**. McCullough et al., Prop. 22 Depresses Wages and Deepens Inequities for California Workers, National Equity Atlas (Sep. 21, 2022), https://nationalequityatlas.org/prop22-paystudy (last accessed Mar. 28, 2024). Another study found a wage floor of **$5.64 an hour**. Jacobs & Reich, *supra* [note: this figure is based on the 2021 minimum wage of $13 per hour; the math is slightly different now that California minimum wage is $16.00]. The minimum wage is higher in many other California jurisdictions. See Inventory of California City and County Current Minimum Wages, U.C. Berkeley Labor Center (Jan. 1, 2024), https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2 (last accessed Mar. 28, 2024).

[18] Interview by Alisa Chang with Anthony Foxx, Chief Pol'y Off., Uber, National Public Radio (Dec. 9, 2020), https://www.npr.org/2020/12/09/944739738/lyft-execon-debate-over-classifying-drivers-as-employees-or-contractors.

[19] Edward Ongweso, Lyft is Getting a Slap on the Wrist for Misleading Prop 22 Ads, Vice (Feb. 10, 2021), https://www.vice.com/en/article/v7mj5a/lyft-is-getting-a-slap-on-the-wrist-for-misleading-prop-22-ads.

urging them to fight for flexibility and an earnings floor for drivers.[20] One early voting survey found that forty percent of "yes" voters believed that they were voting to help workers.[21]

The basic problem the companies were able to exploit—using their incredibly well-funded campaign war chest, and their direct access to millions of California voters through their apps—was that the initiative itself was deeply confusing. Like the Petitions here, Prop. 22 rolled up a series of discrete and complex policy choices into one simple yes-or-no vote. After being primed by extensive, misleading campaign literature, voters were presented with a lengthy ballot summary that explained that drivers would now be entitled to minimum earnings, healthcare subsidies, and vehicle insurance.[22] It did not, however, adequately inform voters that drivers would also lose access to a multitude of workplace protections already afforded them—a real state minimum wage,

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[20] Aarian Marshall, With $200 Million, Uber and Lyft Write Their Own Labor Law, Wired (Nov. 4, 2020), https://www.wired.com/story/200-million-uber-lyft-write-own-labor-law/.

[21] John Howard, An Early Voting Survey of the Ballot Propositions, Capitol Weekly (Oct. 28, 2020), https://capitolweekly.net/an-early-voting-survey-of-the-ballot-propositions/.

[22] California General Election, November 3, 2020, Official Voter Information Guide: Proposition 22, https://web.archive.org/web/20201030214917/https://voterguide.sos.ca.gov/propositions/22/arguments-rebuttals.htm.

overtime pay, workers' compensation, paid sick days, unemployment insurance, state health & safety regulation, and anti-discrimination protections.[23]

The outcome was foreseeable: the companies successfully took advantage of the proposition's complexity and resulting voter confusion to mislead the public as to what it would actually do, and to get it enacted into law. Because the Petitions here are effectively Prop. 22 copycats, the California experience should be illuminating. As in 2020, the deck is stacked in favor of the multi-billion-dollar corporations determined to slash labor costs and nip worker organizing in the bud. Allowing these companies to move forward with the unnecessarily complicated Petitions threatens workers' interests, the integrity of Massachusetts labor and employment law, and, indeed, the democratic process.[24]

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[23] The Massachusetts ballot summaries are similarly devoid of any reference to the loss of employee status or concomitant protections and benefits, instead referring only to "alternative" (rather than lesser or fewer) benefits.

[24] Notably, the California Supreme Court has recently granted review to decide whether Prop. 22 is constitutional. See Castellanos v. State, 530 P.3d 1129 (Cal. 2023). To date, two judges have held that it is, and two have held that it is not. See Castellanos v. State, 2021 WL 3730951 (Cal. Sup. Ct. Aug. 20, 2021) (J. Roesch, holding Prop. 22 unconstitutional); Castellanos v. State, 89 Cal. App. 5th 131 (Cal. Ct. App. 2023) (J. Brown and J. Pollak, holding Prop. 22 constitutional, with J. Streeter, dissenting). In California, unlike Massachusetts, constitutionality of ballot initiatives are more often challenged after passage, rather than before.

B. Prop. 22 Has Been a Disaster for California Workers, as the Petitions Would be for Massachusetts Workers.

While Prop. 22 itself was confusing, its results have been straightforward. App-based ridehail and delivery workers in California have been shut out of the state's statutory employment law regime, and stuck with an inferior set of sub-standard wages and benefits.

For example, Prop. 22 carves app-based ridehail and delivery drivers out of the workers' compensation system, instead requiring app-based companies to offer occupational accident insurance coverage that is inferior and incomplete compared to what they were required to provide under the law prior to Prop. 22's enactment.[25] Where California workers' comp is offered on a strict-liability, no-fault basis, coverage under Prop. 22's occupational accident insurance is left in

[25] Cal. Bus. & Prof. Code, §§ 7451, 7455, subd. (a). For instance, the occupational accident insurance under Prop. 22 is silent as to whether it is offered on a strict liability, no-fault basis. Unlike coverage under California's workers' compensation program, the platform companies argue that coverage can be denied—or left in doubt—if a company says a driver was at fault. Fuentes et al., Rigging the Gig: How Uber, Lyft, and DoorDash's Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers, National Employment Law Project (Jul. 2020). Moreover, Prop. 22 only requires coverage to extend to accidents occurring while the driver is actively engaged with a passenger or in making a delivery. It exempts accidents that occur while the driver is "online but outside of engaged time, where the injured app-based driver is in engaged time on one or more network company platforms, or where the app-based driver is engaged in personal activities." (Cal. Bus. & Prof. Code § 7455, subd. (d).)

doubt when the companies claim that a driver was at fault.[26] Where workers' comp coverage applies as long as the employee is "performing service growing out of and incidental to his or her employment,"[27] Prop. 22 only requires coverage to extend to accidents occurring while the driver is actively engaged with a passenger or in making a delivery.[28] Further, companies governed by the Prop. 22 regime are permitted to cap medical expenses, are not required to provide vocational training, and need only pay disability payments for up to the first 104 weeks following injury.[29]

Prop. 22 also stripped covered drivers of the protection of the California Division of Occupational Health and Safety (Cal/OSHA). In response to worker complaints filed during the pandemic, Cal/OSHA issued citations to both Uber and Lyft for failure to adequately train workers, failure to inspect worksites, failure to

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[26] Fuentes et al., Rigging the Gig: How Uber, Lyft, and DoorDash's Ballot Initiative Would Put Corporations Above the Law and Steal Wages, Benefits, and Protections from California Workers, National Employment Law Project, at 2 (Jul. 2020), https://s27147.pcdn.co/wp-content/uploads/Rigging-the-Gig_Final-07.07.2020.pdf.

[27] Cal. Lab. Code, § 3600, subd. (a)(2). See also, e.g., Pacific Indem. Co. v. Industrial. Acc. Commission, 26 Cal. 2d 509, 513 (1945) ("mere fact that employee is performing a personal act when injured does not *per se* bring him without the purview of the compensation law").

[28] Cal. Bus. & Prof. Code, § 7455, subd. (d).

[29] Cal. Bus. & Prof. Code, § 7455, subd. (a)(2)(A).

communicate with workers about health and safety, and a number of other violations.[30] But the companies have appealed the citations and taken refuge behind Prop. 22's independent contractor language, claiming that as non-employers they owe their workers none of these obligations. And although Prop. 22 does in theory guarantee drivers a minimal health care stipend, in practice, remarkably few drivers can actually access it. Drivers are required to meet a narrow and difficult set of qualifying criteria to receive the stipend,[31] and according to a 2021 survey, the vast majority of California app-based drivers did not have enough information about how the stipend works or how to receive it.[32]

The final warning Massachusetts courts should heed from the Prop. 22 example is that, in addition to the significant harm Prop. 22 has inflicted on app-based workers, the policy landscape in California continues to be confused but essentially stuck. While workers across the country are mobilizing around policy campaigns focused on ensuring access to a minimum compensation standard and transparency protections, California's app-based workers are trapped by Prop. 22's preemptive reach, which prevents any modification of its terms except by a *seven-*

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30 Citations on file with authors.

31 Cal. Bus. & Prof. Code, § 7454.

32 McCullough & Dolber, Most California Rideshare Drivers Are Not Receiving Healthcare Benefits Under Proposition 22, National Equity Atlas (Aug. 19, 2021).

eighths vote of each house of the state legislature.[33] In Colorado, Connecticut, Chicago, Minnesota, New York, Washington, and here in Massachusetts, organized groups of app-based workers are fighting for meaningful policy solutions to their most pressing concerns: low and falling pay; having their pay and access to work determined by opaque, company-controlled algorithms; unfair and arbitrary "deactivations" (or firings); and worsening safety conditions. But in California, policy development has been stopped in its tracks, and workers are stuck in a holding pattern. And, again, the constitutionality of Prop. 22 itself remains an open question.[34]

In short, the Prop. 22 experience in California illustrates the risks of putting an overly-complex, multi-faceted, multiple-policy ballot initiative to a popular "up or down" vote, especially when corporate interests are lined up uniformly on one side of the issue. The app-based companies were able to seize on the confusion there to seed their own narrative about the initiative, and there is no reason to believe they would not do the same here—and it is Massachusetts' app-based

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[33] Cal. Bus. & Prof. Code, § 7465.

[34] See supra n.26; Bob Egelko, California Supreme Court to Decide the Fate of Prop. 22, Carving Gig Workers out of State Labor Law, San Francisco Chronicle (Jun. 28, 2023), https://www.sfchronicle.com/politics/article/prop-22-supreme-court-18175705.php.

workers who will bear the consequences, in the form of worsened working conditions and permanent exclusion from the state's robust workplace protections.

CONCLUSION

In sum, the Petitions call upon voters to enact a wholesale exclusion of tens of thousands of workers from the Massachusetts Independent Contractor Law, denying them the bedrock protections of the Wage Act while simultaneously and aggressively enacting sweeping changes across other disparate areas of state safety net and employment laws. The Legislature has separately weighed the different costs, benefits, and policy choices involved in each of these areas of employment law and has come to differing conclusions, creating varying standards for distinguishing between employees and independent contractors. This Court should not permit proponents of the Petitions to bypass the Legislature and confuse Massachusetts voters by introducing Petitions that contain disparate policy amendments to the Legislature's longstanding differing approaches to multiple areas of the law.

Nor should the Court permit these corporate-sponsored Petitions to work the same widespread voter confusion in the Commonwealth as they did in California. Past is prologue, and allowing the Petitions on the ballot will inevitably result in the same disastrous impacts on Commonwealth ridehail and delivery drivers as they have inflicted on California's drivers.

The Court should declare that the Petitions fail the "relatedness" requirement of Article 48 and order that the Petitions not be placed on the November 2024 ballot.

Dated: April 26, 2024

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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 5,970 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/ Matthew Carrieri
Matthew Carrieri

CERTIFICATE OF SERVICE

I, Matthew Carrieri, hereby certify that on the 29th day of April 2024, I caused a true and accurate copy of the Brief for Amicus Curiae to be served by email on all counsel of record.

/s/ Matthew Carrieri
Matthew Carrieri