COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13237

MARTIN EL KOUSSA, ET AL.,
Plaintiffs/Appellants

v.

ATTORNEY GENERAL AND SECRETARY OF THE COMMONWEALTH,
Defendants/Appellees

and

CHRISTINA M. ELLIS-HIBBERT, ET AL.,
Intervenors

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

BRIEF OF *AMICI CURIAE* THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), THE NATIONAL EMPLOYMENT LAW PROJECT, AND MASSACHUSETTS WORKER CENTERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is an unincorporated association of national and international labor unions that does not have any parent corporations or issue stock, meaning that there are no publicly held corporations that own 10 percent or more of its stock.

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.

Massachusetts Worker Centers — Brazilian Women's Group, Brazilian Worker Center, Chinese Progressive Association, Dominican Development Center, La Colaborativa, Lynn Worker Center, Massachusetts Coalition for Occupational Safety and Health, Massachusetts Jobs with Justice, MetroWest Worker Center/Casa del Trabajador, New England United for Justice, Pioneer Valley Workers' Center, Somerville Worker Center, and Women's Institute for Leadership Development — are each non-profit organizations that do not have any parent corporations or issue stock, meaning that there are no publicly held corporations that own 10 percent or more of the stock in any of the organizations.

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

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women. The AFL-CIO and its affiliate unions have a strong interest in upholding workplace standards for all working people at both the federal and state level.

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.

Massachusetts Worker Centers — Brazilian Women's Group, Brazilian Worker Center, Chinese Progressive Association, Dominican Development Center, La Colaborativa, Lynn Worker Center, Massachusetts Coalition for Occupational Safety and Health, Massachusetts Jobs with Justice, MetroWest Worker Center/Casa del Trabajador, New England United for Justice, Pioneer Valley Workers' Center, Somerville Worker Center, and Women's Institute for

Leadership Development — are organizations whose members are low-wage, immigrant workers. The centers help workers enforce their rights and advocate for protective workplace laws. As organizations comprised of low-wage and immigrant workers who disproportionately comprise the "gig-economy" workforce, the worker center amici are in a unique position to explain the impact of the ballot initiatives on Massachusetts workers.

SUMMARY OF ARGUMENT

Ballot initiatives 21-11 and 21-12[1] violate Article 48 of the Massachusetts Constitution because they contain multiple subjects which are not related or mutually dependent. Rather than allow voters to "enact a uniform statement of public policy," the petitions put them in the untenable position of voting on unrelated subjects. *Carney v. Attorney General*, 447 Mass. 218, 232 (2006). The initiatives create exemptions for "app-based" drivers from six disparate statutory schemes, excluding workers from wage and hour protections, antidiscrimination laws, tax withholding, and access to unemployment insurance, paid family and medical leave, and workers' compensation benefits. Because these statutes were designed to effectuate different policies, they use distinct employment-status tests, and therefore constitute independent, insufficiently related subjects. (pp. 18-25).

[1] The petitions are largely identical, except § 4 of Petition 21-11 contains a training requirement. This brief's references will be to Petition 21-11.

The petitions ask voters to approve not just exemptions from multiple statutory regimes, but also "alternative" minimum pay and benefits across some, but not all, of these distinct policy areas, each of which "involves a complex allocation of costs and benefits for individuals, companies, and State government itself." *Camargo's Case*, 479 Mass. 492, 501 (2018). Indeed, while several states have addressed app-based drivers' employment status and access to benefits, *none* have enacted the mix of minimum compensation and alternative benefits proposed by these initiatives. All these questions — how to classify drivers, whether to provide minimum compensation and benefits, and if so, how much and which benefits — are separate policy decisions. By including each in a single initiative, the petitions deprive voters of the chance to exercise a meaningful choice in the initiative process (pp. 26-30).

Further, the petitions' summaries violate Article 48 because they do not provide a fair summary of the initiatives. The importance of providing voters a fair, clear-eyed summary of these petitions cannot be overstated. They will not provide benign "alternative" benefits or guarantee flexibility, but rather enshrine a subordinated, second-class status into law for a largely BIPOC (Black, Indigenous, and People of Color) and immigrant workforce — replicating the worst legacies of the New Deal's racialized exclusion of workers from foundational employment protections. The petitions will also prompt more companies to misclassify workers

to slash costs, and externalize the cost of injuries and economic downturns to the Commonwealth and drivers by exempting network companies from contributing their fair share to the social safety net. (pp. 30-36).

What the Attorney General characterizes as measured neutrality leaves voters in the dark about the true impact of the initiatives — codification of a misclassification scheme that will make app-based companies unaccountable to workers, the public, and the Commonwealth. Far from necessitating legal analysis or speculation, accurately describing the initiatives requires only looking to the aftermath of the companies' "Prop 22" initiative in California. That initiative passed with similar promises of alternative benefits and "flexibility" disguising carve-outs from century-old, bedrock workplace protections and incorrectly leading California voters to believe they were helping app-based workers. The reality is that benefits promised by Prop 22 have proven illusory, and — free from accountability when they exert control — the companies have reneged on the sliver of flexibility they once granted drivers. Absent fair summaries of the petitions, Massachusetts workers will face similar consequences. (pp. 36-45).

ARGUMENT

I. The petitions violate Art. 48 because they contain subjects which are not related or mutually dependent.

Article 48, The Initiative, II, § 3, as amended by art. 74, requires that a petition "contain only subjects which are related or which are mutually dependent." *Anderson v. Attorney General*, 479 Mass. 780, 786-87 (2018) (citations omitted). This "relatedness" requirement balances the interests of petitioners and voters, recognizing that a petition containing unrelated subjects "might confuse or mislead voters, or ... place them in the untenable position of casting a single vote on two or more dissimilar subjects. *Abdow v. Attorney General*, 468 Mass. 478, 499 (2014). Of particular concern is "logrolling," with the relatedness requirement "intended to protect against petitions that include as alluring a combination of what is popular with what is desired by selfish interests as the proposers of the message may choose." *Anderson*, 479 Mass. at 787 (citations omitted). Indeed, these petitions reflect the precise type of harm the relatedness requirement was meant to prevent: that "an unpopular provision could be hidden or made less apparent by a more attractive proposal that catches voters' attention. *Oberlies v. Attorney General*, 479 Mass. 823, 830 (2018).

The initiatives violate Article 48 because they contain multiple subjects which "exist independently," and are thus "not mutually dependent." *Id*. at 829.

By declaring "app-based drivers" independent contractors "for all purposes," the petitions ask voters to approve exemptions for "app-based drivers" from at least six employment-status tests, each of which serve different purposes. Second, the petitions ask voters to decide whether, if app-based workers are deemed independent contractors for these purposes, their hours of work should be calculated in a specific manner, and they should be provided minimum compensation and benefits based on that calculation. Finally, the petitions ask voters to approve a minimum rate of compensation and mix of benefits as an "alternative" to some, but not all, of the benefits from which independent contractors are ordinarily excluded. Each of these questions present separate policy decisions regarding subjects that are not mutually dependent, as reflected by other states' differing choices in addressing each of these issues.

A. The petitions create exemptions to several distinct statutes, which are not mutually dependent.

The petitions deem all workers who fall within their definition of "app-based driver[s]" an "independent contractor and not an employee or agent for all purposes with respect to [their] relationship with the network company." Petition §§ 3, 11(b).[2] What at first appears to be a simple directive disguises the broad

[2] The petitions define "app-based drivers" as both transportation network company (TNC) drivers, who transport passengers, and delivery network company (DNC) couriers, who deliver goods. Petition, § 3. This further demonstrates that the petitions contain independent subjects, as employment protections for TNC drivers and DNC couriers implicate distinct policy

sweep of the petitions' consequences for a host of distinct state policies. This places voters in the untenable position of modifying "very different sets of laws" in one fell swoop, depriving them of the chance to exercise a "meaningful choice in the initiative process." *Carney*, 447 Mass. at 220.[3]

As this Court recognized, Massachusetts laws "have imposed differing, and not uniform, definitions of employees and independent contractors," because "the purposes of the respective statutes are different;" each must balance distinct policy considerations governing the relationship between workers, employers, and government. *Camargo's Case*, 479 Mass. at 500-01. Because these analyses function independently, workers may simultaneously be considered "employees" for purposes of some statutory protections, but not others. *Athol Daily News v. Board of Review of Div. of Employment and Training*, 439 Mass. 171, 175 (2003). By declaring app-based drivers independent contractors "for all purposes," the petitions would exempt app-based drivers from the distinct employment status tests

considerations (such as passenger safety with regard to TNC drivers) and are "related" only at a high level of abstraction (i.e., both sets of workers receive assignments through online applications). *Carney*, 447 Mass. at 226.

[3] That the petitions frame these modifications as a single requirement to classify app-based drivers as independent contractors "for all purposes" should have no bearing on the Court's recognition that they in fact regulate multiple, independent policy areas. There is "no requirement ... that the [Court's] analysis be controlled by the structure of the petition imposed by its proponents" — Article 48 "speaks of subjects, rather than provisions." *Anderson*, 479 Mass. at 803-04 (Lenk, J., concurring).

of at least six different policy areas in state law.[4] As the different purposes served by several of these statutory regimes demonstrate, the petitions will require voters to cast a "single vote" on dissimilar subjects which "exist independently" and are thus not "mutually dependent. *Oberlies*, 479 Mass. at 829.[5]

1. Wage and Hour. Employment status for purposes of Massachusetts' wage and hour laws is determined by application of M.G.L. c. 149, § 148B. The statute presumes employee status, requiring employers to prove three elements to demonstrate a worker is an independent contractor. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 589 (2009). This statute guarantees access to wage protections, including timely payment, minimum wages, and overtime, and is meant "to protect employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." *Id.* at 592.

The statute's expansive definition of employment status stems from the legislature's intent to broaden the "scope of employees covered, the type of eligible

[4] While a measure does not fail the relatedness requirement "just because it affects more than one statute," *Albano v. Attorney General*, 437 Mass. 156, 161 (2002), the petitions do not merely change the meaning of a uniformly-defined term, causing incidental consequences in multiple statutes. Rather, they exempt app-based drivers from and substitute lesser "alternatives" to multiple statutes serving distinct purposes and using unique employment-status tests.

[5] The employment-status tests used and purposes served by wage and hour, unemployment insurance, and workers' compensation laws are examined below. For state tax withholding, Massachusetts adopted the 20-factor IRS test. *Camargo's Case*, 479 Mass. at 500. The petitions also exempt app-based drivers from the Paid Family and Medical Leave Act's employment-status test and coverage formula, M.G.L. c. 175M, § 1, and the common-law test used for M.G.L. c. 151B's antidiscrimination protections, *Comey v. Hill*, 387 Mass. 11, 15-16 (1982).

compensation, and the remedies available" under the Wage Act 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, ensure 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 legislature enacted the overtime requirement of M.G.L. c. 151, § 1A 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).

2. Unemployment Insurance. Unlike the wage and hour laws' focus on ensuring employers pay their workers fully and timely, unemployment insurance (UI) is a joint federal and state social-insurance program designed to spread "the risk of common but catastrophic events broadly". Catherine Albiston and Catherine Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 Berkeley J. Emp. L. 257, 265 (2021). The UI statute does not merely regulate the relationship between workers and their employers — it is a social insurance program funded partially by employer contributions and administered by the Commonwealth, with coverage, benefit, and funding formulas serving the program's anti-poverty and economic

stabilization objectives. *See* Jeremy Pilaar, *Reforming Unemployment Insurance in the Age of Non-Standard Work*, 13 Harvard Law & Policy Review 327, 331 (2018). UI benefits are meant to provide households income when a worker loses a job through no fault of their own, limiting the severity of recessions and keeping workers connected to the workforce by enabling them to search for suitable work, *id.* at 331-32, while encouraging employers to keep workers employed by tying contribution rates to the number of UI claims their employees file. Albiston and Fisk at 267.

The Commonwealth sets the substantive eligibility criteria for UI to further the statute's unique purposes. *See Garfield v. Director of Division of Employment Sec.*, 377 Mass. 94, 95 (1979) (When a worker "seeks [unemployment] compensation, the issue ... is not whether the employer was justified in discharging the claimant but whether the Legislature intended that benefits should be denied in the circumstances."). The statute uses an employment-status test similar to § 148B, but with a distinct second prong that employers may satisfy by showing a worker's service is performed outside the employer's "places of business." M.G.L. c. 151A, § 2. The petitions would not only eliminate any entitlement to UI app-based drivers have based on their work for the network companies, but would exempt the companies' from the contribution and reporting obligations that facilitate the Commonwealth's administration of the program. M.G.L. c. 151A, § 14. Thus, the

petitions regulate not only the terms of the relationship between drivers and the companies, but also the distinct subject of social insurance, which implicate the companies' and drivers' relationship to the Commonwealth.

3. Workers' Compensation. Workers' compensation is a "system of insurance intended to replace in part the wages lost by workers or their dependents as a result of injuries suffered in connection with their work." *Wright's Case*, 486 Mass. 98, 114 (2020) (citations omitted). It balances "protection for workers with certainty for employers" by guaranteeing statutory remedies for workplace injuries, regardless of fault and paid for by insurance employers must provide, in exchange for the waiver "of any common-law right to compensation for injuries." *Mendes's Case*, 486 Mass. 139, 140-41 (2020) (citations omitted). To be covered, the worker must be considered an "employee" under the 12-factor "*MacTavish-Whitman*" test, which, unlike the wage and hour and unemployment insurance laws, places the burden of proof on the individual seeking benefits. *Camargo's Case*, 479 Mass. at 495 & n.4.

Covered employers must contribute to a state-administered trust fund from which workers' compensation benefits are paid when an injured worker's employer failed to obtain insurance, M.G.L. c. 152, § 65(2), or when payments are made to previously injured employees. *Id.*, § 37. The law also requires adjudication of disputed claims between workers and insurers through a multi-stage

administrative procedure, which in certain circumstances requires appointment of an impartial medical examiner. *Id.*, § 11A. The petitions would thus not just regulate the relationship between drivers and the companies, but would eliminate the companies' and their insurers' accountability for required contributions and externalize the cost of injuries to other employers and the Commonwealth when claims are wrongfully denied absent the law's public-facing procedural safeguards.

4. Conclusion. As these examples demonstrate, the petitions regulate multiple subjects, exempting app-based drivers from statutory protections and benefits whose employment-status tests "exist independently" and are thus "not mutually dependent," *Oberlies*, 479 Mass. at 829. While each of these statutory protections and benefits is broadly tied to work, this Court has recognized it is insufficient that initiative subjects share a merely conceptual bond, as at "some high level of abstraction, any two laws may be said to share a common purpose." *Carney*, 447 Mass. at 230-31. Here, the statutes from which app-based workers would be exempted serve disparate purposes — ranging from ensuring fair terms of compensation, cushioning the impact of economic downturns, and providing adequate insurance coverage across the Commonwealth to compensate all workers for workplace injuries — and are thus not sufficiently related.

B. Other states' differing policy choices concerning the treatment of app-based drivers demonstrate the petitions' subjects are not related or mutually dependent.

The initiative petitions ask voters to approve of: app-based drivers being treated as independent contractors, which would exempt them from a broad swath of generally-applicable state employment protections and benefits, Petition § 11; a minimum compensation requirement based on some, but not all, hours worked with no eligibility for overtime pay, *id.* § 5; entitlement to a healthcare stipend, but only upon meeting a threshold of compensable hours that most drivers are unlikely to attain, § 6; entitlement to paid sick time, but on a less-favorable basis than employees receive under state law, § 7; entitlement to paid family and medical leave, but only if drivers meet more stringent eligibility requirements, § 8; and occupational accident insurance that is limited to coverage during a driver's engaged time and is thus less protective than the workers' compensation coverage employers generally must provide to employees, § 9. Taken together, these provisions would leave app-based drivers worse off than as employees under Massachusetts laws. Other states have addressed these same issues and arrived at a variety of policy solutions different from those posed by the petitions here.

The heterogeneity of state approaches to the classification of and benefits provided to app-based drivers further illustrates that the petitions do not "contain[] only subjects which are related or which are mutually dependent." Art. 48. Because

some voters doubtless would prefer the particular set of policies adopted by other states — for instance, full coverage under workers' compensation law in order to better promote public safety, or an entirely different mix of policies altogether — the petitions do not "'permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy.'" *Anderson*, 479 Mass. at 780 (quoting *Carney*, 447 Mass. at 230-31).

To illustrate, the State of Washington requires companies to provide workers' compensation insurance coverage to any person "who is working under an independent contract, the essence of which is his or her personal labor," RCW 51.08.180, and to provide unemployment compensation to workers who provide "personal service, of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship," RCW 50.04.100. Washington's workers' compensation law has been deemed to apply to drivers for an on-call courier company that dispatches "on demand" drivers through a "dispatcher 'app,'" even though, by contract, "the drivers are deemed independent contractors providing transportation services to [the company's] customers." *Delivery Express, Inc. v. Wash. State Dept. of Labor and Industries*, 9 Wash.App.2d 131, 134-35 (Ct. of Appeals, Div. 1 2019).[6] On the other hand,

[6] On March 31, 2022, Washington Governor Jay Inslee signed a law that treats Transport Network Company drivers as independent contractors, but the scope of coverage, definition of

independent contractors are not covered by Washington's minimum wage or paid sick leave statutes. *See* RCW 49.46.010(3).

The State of New York has created a special injury compensation fund, akin to the state's workers' compensation system, for drivers of so-called "black cars," "includ[ing] a TNC driver that is engaged in a TNC prearranged trip," many of whom are classified as independent contractors. New York Black Car Operators' Injury Compensation Fund, Inc., N.Y. Executive Law §§ 160-cc – 160-oo (McKinney 2022); *id.* at § 160-cc(1)(a) (TNC coverage).

New Jersey and Oregon state enforcement agencies consider Uber drivers eligible for state unemployment insurance coverage despite the company classifying them as independent contractors. In 2019, New Jersey billed Uber $649 million for unpaid unemployment and disability insurance taxes. Matthew Haag & Patrick McGeehan, *New Jersey is Demanding $649 Million From Uber*, N.Y. Times A21 (Nov. 15, 2019). Oregon considers app-based workers eligible for "traditional benefits from the state's unemployment insurance trust fund." Kate Davidson, *Many Oregon gig workers got regular unemployment benefits. Here's why it matters.*, Oregon Public Broadcasting (Jan. 14, 2021).

work hours, minimum compensation levels, and benefit mix provided by the Washington law all differ from what the petitions propose here. Wash. H.B. 2076 (2021-22).

As each of these examples illustrates, the policy decisions about whether to treat app-based drivers as independent contractors under state law, how to calculate the work hours of such drivers, whether to mandate that independent contractor drivers receive minimum levels of compensation or statutory benefits, and, if so, what level or compensation and which benefits should be provided, are all separate policy decisions. Many Massachusetts voters might prefer the particular mix of policy choices made in Washington, New York, New Jersey, or Oregon over those set forth in the initiative petitions here. Yet, the inclusion of a range of different policy decisions in a single initiative petition prevents Massachusetts voters from expressing their policy preferences concerning the distinct matters involved when deciding whether to vote "yes" or "no" on the petition as a whole.

"[A]ggregat[ing] . . . very different sets of laws into one petition that the voter must accept or reject" in its entirety, as the initiative petition does here, violates Article 48. *Carney*, 447 Mass. at 220. "Unlike a legislator, the voter has no opportunity to modify, amend, or negotiate the sections of a law proposed by popular initiative" and thus "cannot sever the unobjectionable from the objectionable." *Id.* at 230 (footnote omitted). The inclusion of multiple policies in the ballot initiative "which are [*not*] related or . . . mutually dependent," Art. 48, and about which many States — and, therefore, doubtless, many individual Massachusetts voters — will disagree, "operate[s] to deprive voters of their right

under art. 48 to enact a uniform statement of public policy through exercising a meaningful choice in the initiative process." *Carney*, 447 Mass. at 220.

II. Petitioners' misclassification model degrades working conditions, exacerbates race inequity, and erodes the social compact.

Misclassifying their employees as independent contractors, network companies like Uber, Lyft, and DoorDash deny their drivers minimum wage and overtime protections, access to unemployment insurance, state disability insurance, work**e**rs' compensation, anti-harassment and discrimination protections, the right to organize and bargain collectively, employer contributions to Social Security, and the chance to access retirement savings plans. Their business model degrades working conditions for their disproportionately BIPOC workforce and erodes the social compact. What is needed is more enforcement of laws protecting these workers, not the carve-outs sought by the petitions.

A. App-based companies pay low wages and shift expenses to workers.

App-based drivers often earn subminimum wages while incurring unreimbursed expenses. Research estimates that Uber drivers earn just $9.21 per hour after deducting Uber's fees and drivers' expenses, accounting for payroll taxes drivers are required to pay, and taking other deductions.[7] Further, many

[7] Lawrence Mishel, *Uber and the Labor Market*, Economic Policy Institute (May 15, 2018), https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/; National Employment Law Project, *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs* 3-4 (Oct.

workers incur debt to pay for car maintenance or vehicle leasing costs.[8] Meanwhile, ride-hail drivers spend nearly half their time waiting between rides, but that time is not compensated.[9] One driver sums it up:

> We drive under the constant threat of one bad week, one car repair, one illness away from missing a rent payment or putting food on the table. If I have to stop driving to go to a doctor's appointment, I don't get paid sick days, I just have to work extra to make up for the lost time. After I pay my expenses, I barely make ends meet….[10]

Delivery drivers fare no better.[11] Indeed, independent contractor status generally means lower pay than employee status for all but professional self-employed businesspeople, like lawyers or plumbers.[12]

The COVID-19 pandemic further exposed this work's precarity. Access to traditional unemployment insurance benefits was a key lifeline, but these drivers

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2021), https://s27147.pcdn.co/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf. [*App Workers Speak*].

[8] *More than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA Institute for Research on Labor and Employment 3, 22 (May 2018), https://irle.ucla.edu/wp-content/uploads/2018/05/Final-Report.-UCLA-More-than-a-Gig.pdf; *App Workers Speak*, supra n. 7, at 6.

[9] *App Workers Speak*, supra n. 7 at 5-6 (citing research on wait time); Petition, § 3 (defining "Engaged Time" to exclude wait time).

[10] *App Workers Speak*, supra n. 7 at 8 (Mike Robinson, Mobile Workers Alliance).

[11] Los Deliveristas Unidos, *et al.*, *Essential but Unprotected* 27 (Sept. 2021), https://img1.wsimg.com/blobby/go/6c0bc951-f473-4720-be3e-797bd8c26b8e/09142021CHARTSLos%20Deliveristas%20Unidos-v02.pdf [*Essential but Unprotected*].

[12] Corey Husak, *How U.S. companies harm workers by making them independent contractors*, Center for Equitable Growth (July 31, 2019), https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/.

were told they were ineligible,[13] with potentially deadly consequences.[14] In one survey, 62 percent of ride-hail drivers and delivery workers reported earning less because they could not work as much for fear of contracting COVID-19, while 28 percent reported continuing to accept jobs out of financial necessity, despite fear of the deadly virus. Nearly 80 percent reported *losing more than half of their income* because of COVID-19.[15]

B. These corporations perpetuate and exacerbate race inequity through independent contractor misclassification.

Companies set up sham arrangements in low-wage, labor-intensive industries, such as delivery services, janitorial services, and domestic and home care work[16] in which people of color, including Black, Latino, and Asian

[13] Many app-based drivers contested their eligibility for traditional UI successfully, but eligibility was uncertain. While many gig-workers received Pandemic Unemployment Assistance, that program expired in September of 2021, and offered far less generous benefits based on *net* rather than *gross* income. *See* CARES Act § 2102(d)(1); 20 C.F.R. § 625.6(a)(2).

[14] *See* Janet Burns, "*He Was Coughing up Blood:" Uber And Lyft Drivers Face Illness and Confusion Amid COVID-19 Outbreak*, Forbes (Mar. 17, 2020), https://www.forbes.com/sites/janetwburns/2020/03/17/he-was-coughing-up-blood-uber-and-lyft-drivers-face-illness-and-confusion-amid-covid-19-outbreak/?sh=21d408c97b31; *Essential but Unprotected*, supra n. 11, at 39.

[15] Chris Benner et al., *On-demand and on-the-edge: Ride hailing and Delivery workers in San Francisco*, UC Santa Cruz Institute for Social Transformation, 58, 61-63 (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemand-n-OntheEdge_MAY2020.pdf

[16] *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project 2 (Oct. 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [*Misclassification Costs*].

workers, are overrepresented.[17] For example, in home care work, where misclassification is widespread, the majority of workers are people of color, with 28 and 23 percent Black and Latina workers, respectively, and a disproportionate share of immigrant workers.[18] Likewise, 76 percent of workers in the nail salon industry are Asian.[19] Data on app-based drivers mirror these racial patterns: BIPOC workers comprise a majority of the Uber and Lyft's drivers, with Black workers particularly overrepresented, and workers of color are overrepresented in app-based work generally.[20]

These disparities are stark, but numbers alone cannot tell the story of inequality. Any misclassified driver experiences an unjust deprivation of their employee rights. What *race* does, in its pernicious way, is underwrite the practice of misclassification, stepping in to ensure that the unseemly business of enabling a subclass of precarious work is more easily accepted when its injustices are borne by people of color.

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[17] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 924 (2017) (finding that "seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color").
[18] *U.S. Home Care Workers: Key Facts*, PHI (Sept. 3, 2019), https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/.
[19] *Nail Files: A Study of Nail Salon Workers and Industry in the United States*, UCLA Lab. Ctr. (Nov. 2018), https://www.labor.ucla.edu/wp-content/uploads/2018/11/NAILFILES_FINAL.pdf (noting also that "[m]isclassification is a key concern in the sector").
[20] *See* Brief of Civil Rights Organizations as *Amici Curiae* at 4-5; Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor force characteristics by race and ethnicity, 2020*, https://www.bls.gov/opub/reports/race-and-ethnicity/2020/pdf/home.pdf.; *App Workers Speak*, supra n. 7, at 2.

Capitalizing on this, these companies appeal to notions of "opportunity,"[21] suggesting a race-neutral level playing field on which their drivers might, through enough hard work, achieve individual prosperity. Pretending their drivers enjoy equal opportunities, these companies promote a narrative legitimizing the poor conditions of their Black, Latino, Asian, and immigrant drivers.[22] Though some drivers, working full-time schedules, are homeless and live in their cars,[23] the narrative faults those drivers, not the companies' exploitative business model.

Yet when the theoretical promise of "opportunity" meets the lived experiences of primarily BIPOC workers without rights, the truth is there for all to see: these companies weaponize "opportunity" to justify drivers' unjust working conditions. Their model perpetuates occupational segregation by color and race under a benign pretense of entrepreneurship. The petitions recall campaigns for exclusions from New Deal protections, when "early twentieth century industrialists campaigned for differential wage regulations and even

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[21] *See, e.g.*, *Uber Driving Opportunities*, Uber, https://www.uber.com/us/en/drive/driving-opportunities/ (promoting a "flexible earning opportunity" for drivers); *The Drivers Guide to Pay*, Lyft, https://www.lyft.com/driver/pay#driving-smarter (discussing "additional opportunities to earn").

[22] *See* Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1380 (1988) ("After all, [if] equal opportunity *is* the rule, and [if] the market *is* an impartial judge; if Blacks are on the bottom, it must reflect their relative inferiority. Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.").

[23] Carolyn Said, *He drives 60 hours a week for Uber. He's still homeless*, San Francisco Chronicle (Sept. 22, 2019), https://www.sfchronicle.com/business/article/He-drives-60-hours-a-week-for-Uber-He-s-still-14457115.php.

sectoral carveouts in domestic and agricultural work for majority Black workforces…."[24] As with those *race-neutral* but *racist* exclusions, a successful effort here will create "exacerbated racialized economic immiseration."[25]

C. These schemes undermine honest businesses, starve social programs, and compromise public safety.

The petitions would bless these companies' calculated business decision to misclassify employees as independent contractors: avoiding taxes and other costs, businesses can reduce payroll expenses by as much as thirty percent.[26] The practice, as the United States Treasury Inspector General found, "plac[es] honest employers and businesses at a competitive disadvantage."[27] Businesses that misclassify their employees pressure their competition to shed labor costs, creating a "race to the bottom" where firms remain competitive by following suit.[28] A 2010 study estimated that misclassifying employers shift $831.4 million

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[24] Veena Dubal, *The New Racial Wage Code*, 16 Harvard L. and Pol'y Rev. 7-8 (forthcoming spring 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855094; *see also Essential but Unprotected*, supra n. 11 at 15-16 (noting app-based delivery companies "are engaging in a long history of minorities' racial exclusion" from protections).

[25] *Id.* at 19.

[26] *Misclassification Costs*, supra n. 16, at 1.

[27] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* 1 (Feb. 20, 2018), https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf.

[28] *See* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It,* 139-41 (2017).

in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses annually.[29]

Misclassification of drivers as independent contractors particularly threatens public health and safety. Law-abiding businesses provide protections and time to recover in the event of illness or injury. Denial of workers' compensation, paid sick leave, and paid family and medical leave to a workforce operating several-thousand-pound vehicles in communities throughout the state undermines such policies. Excluded and under financial strain from poverty wages, drivers face pressure to work longer than is safe or while ill,[30] delay needed vehicle maintenance, and operate vehicles at unsafe speeds to make more trips.

III. California's Proposition 22 should set off alarm bells for Massachusetts.

The petitions at issue here are part of a coordinated national strategy by app-based companies to immunize themselves from responsibility while boosting their own capital.[31] Uber's CEO boasted in the wake of its blueprint California effort

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[29] Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, Dep't of Econ., Univ. of Mo., Kan. City 5-6 (Sept. 12, 2010).
[30] LeaAnne DeRigne et al., *Workers Without Paid Sick Leave Less Likely to Take Time Off For Illness or Injury Compared to Those with Paid Sick Leave*, 35:3 HEALTH AFFAIRS 520–25 (Mar. 2016), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2015.0965.
[31] *See* Theron Mohamed, *Uber and Lyft gain $13 billion in combined market value after Californians approve Prop 22*, Markets Insider (Nov. 4, 2020), https://markets.businessinsider.com/news/stocks/uber-lyft-stock-prices-california-votes-for-prop-22-2020-11-1029764137.

that it would "more loudly advocate for new laws like Prop 22…."[32] Yet the constitutionality of California's Proposition (Prop) 22 is now in question, and hindsight is chilling: Prop 22 was approved in the wake of the companies' highly successful disinformation campaign and problematic ballot summaries. Early signs suggest that Prop 22 is working as planned: as a bait and switch, with drivers' wages plummeting and few able to access the minimal 'benefits' advertised.

A. Prop 22, the blueprint for these Petitions and others, was a bait and switch fueled by a massive disinformation campaign.

Massachusetts need not speculate on the petitions' effects: they are plain to see in the aftermath of Prop 22 in California. As an initial matter, Prop 22 not only provided a roadmap to carveout *drivers* in other states, it incentivized *other sectors* to contract-out their workforce and shed employer obligations. Just as Prop 22 took effect, a major grocery retailer replaced union delivery employees with app-based drivers.[33] Similarly, a copycat measure submitted to the California Attorney General would have stripped employee rights from nurses, dental hygienists, occupational therapists and other healthcare workers who secure their assignments

[32] Wilfred Chan, *Can American Labor Survive Prop 22?,* The Nation (Nov. 10, 2020), https://www.thenation.com/article/politics/prop-22-labor/.

[33] Jelisa Castrodale, *California supermarkets fire union delivery drivers, replace them with gig workers as Prop 22 takes effect,* Food & Wine (Jan. 5, 2021), https://www.foodandwine.com/news/california-supermarkets-fire-union-drivers-prop-22.

through a digital platform.[34] Prop 22 opened the floodgates for degraded working conditions, even as hindsight confirmed its dangers.

i. Broken promises, decreased pay, illusory benefits

During the California campaign, Uber enticed drivers to support Prop 22 by temporarily granting them a modicum of control over rates and rides. Drivers could set minimum acceptable fares and see how long a particular ride might take before accepting.[35] However, after Prop 22 passed, Uber reneged, taking away flexibility options because they led drivers to refuse more trips.[36] At the same time, Uber slashed pay, reducing airport trips from 60 cents per mile to just 32 cents per mile, well below the 56 cents per mile deductible rate set by the Internal Revenue Service. Not surprisingly, "A lot of drivers were gung-ho about Prop 22. Now they feel completely deceived."[37]

Meanwhile, definitional loopholes regarding what constitutes compensable 'engaged time' also mean that — far from the 120% of the minimum wage

[34] *See* Levi Sagaysay, *'Uber for nurses?': Initiative targets healthcare for a 'gig work' law*, MarketWatch (Jan. 31, 2022), https://www.marketwatch.com/story/uber-for-nurses-initiative-targets-healthcare-for-a-gig-work-law-11643404860. The initiative has been withdrawn, for now.
[35] Michael Hiltzek, *Commentary: Uber reneges on the 'flexibility' it gave drivers to win their support for Prop 22*, The Los Angeles Times (May 28, 2021), https://www.latimes.com/business/story/2021-05-28/uber-flexibility-prop-22.
[36] *Id.*
[37] *Id.*

advertised, pay is closer to a dismal $5.64 per hour.[38] The companies narrowly defined drivers' work time to exclude "the approximately 33 percent of the time that drivers are waiting between passengers or returning from trips to outlying areas."[39] Many drivers who believed they would receive mileage reimbursement have not because that too is based on 'engaged time': "A lot of drivers were duped because they expected they were magically going to be able to qualify for benefits" and reimbursement for mileage.[40]

Likewise, the much-touted health care stipend vanished through the same loophole.[41] Recent research reveals that only ten percent of drivers surveyed were receiving the stipend, and a disturbing forty percent had never heard of it or were not sure they had received notice of it.[42] Nearly thirty percent were relying on public healthcare, while others were foregoing healthcare altogether. Latinx drivers were less likely to know about the health stipends and more likely to be

[38] Ken Jacobs and Michael Reich, *The Uber/Lyft ballot initiative guarantees only $5.64 an hour*, U.C. Berkeley Labor Center (Oct. 31, 2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/.
[39] *Id.*
[40] Michael Sainato, *"I can't keep doing this. Gig workers say pay has fallen after California's Prop 22*, The Guardian (Feb. 18, 2021), https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california.
[41] Jacobs and Reich, *supra* n. 38.
[42] Eliza McCullough and Brian Dolber, *Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22,* Rideshare Drivers United, (August 19, 2021), https://www.policylink.org/prop22.

uninsured than other drivers surveyed.[43] Putting the threat to public safety in stark relief, drivers' rate of uninsurance was twice the national average.[44]

ii. Voters and drivers were misled

California voters headed to the polls primed by a massive corporate-backed advertising campaign falsely suggesting that Prop 22 would benefit drivers. Communications suggested it would create a higher earnings floor, "20% over the current prevailing minimum wage anywhere in California."[45] Critically, this framing glossed over narrow definition limiting the basis for pay and benefits:

> Though this sounded even better than existing minimum wage protections, these guaranteed earnings and benefits were determined by the time that followed the algorithmic allocation of work, rather than the actual amount of time the workers spent laboring. In reality, the law took away all basic employment rights—including the minimum wage and overtime protections and in a few instances, replaced them with lesser versions.[46]

Sinking a record-breaking $200-plus million dollars into their campaign, the companies flooded airwaves, mailboxes, cell phones, and delivery bags with "Yes on Prop 22" messages.[47] Lyft was fined for failing to include proper disclosures on

[43] *Id.*
[44] *Id.*
[45] Dubal, supra n. 24. at 21, n. 78 (quoting Uber policy official in radio interview).
[46] *Id.* at 21.
[47] 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/.

its electronic media and text advertisements.[48] Uber was accused of misleading drivers by exaggerating their earnings potential.[49] Drivers also alleged they were forced to read and click "OK" on "Prop 22 is Progress" messages in order to sign into work.[50] Many did not realize they were lobbying against their own employee protections when responding to app messages urging them to fight for their "flexibility."[51]

Unbeknownst to many, the companies' suggestion that the "flexibility" to choose when to work means that drivers must be classified as independent contractors was false.[52] Even Instacart, an app-based company of delivery persons, once recognized as much.[53] And research on one platform delivery business found that: "following the switch to employment, drivers were able to retain their

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[48] 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.

[49] Tyler Sommermaker, *Uber and Lyft have long said they pay drivers fairly, but they haven't shared all the data that could prove it,* BusinessInsider.com (June 17, 2021), https://www.businessinsider.com/how-much-uber-lyft-drivers-earn-mystery-company-pay-data-2021-6.

[50] Kim Lyons, *Uber accused in lawsuit of bullying drivers in its app to support Prop 22*, *The Verge* (Oct. 4, 2020), https://www.theverge.com/2020/10/22/21529082/uber-drivers-lawsuit-prop-22-alerts-california-gig-workers.

[51] Shirin Ghaffary, *Some Uber and Lyft drivers say they were misled into petitioning against their own worker rights*, Recode (June 27, 2019), https://www.vox.com/recode/2019/6/27/18759387/uber-lyft-drivers-misled-companies-political-campaign.

[52] *See* M.G.L. c. 149 § 148B (presumption of employee status only overcome if employer satisfies each of three factors showing worker runs independent business).

[53] *See* Davey Alba, *Instacart Shoppers Can Now Choose to Be Real Employees*, Wired (June 22, 2015), https://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/ ("[E]mployees will still have flexibility when it comes to picking their own shifts….").

working time flexibility, they experienced an increase in working time, and firm efficiency improved."[54] Further, the so-called "flexibility" lauded by these companies is not as advertised. [55] Companies use a host of behavioral tricks to manage their drivers' schedules, availability, and activities.[56] Drivers, subject to a range of pressure and penalties, are far from "free" to work whenever they want.[57]

Against this backdrop of misinformation on flexibility, pay, and benefits, voters were presented with a ballot summary that required significant education to understand.[58] It explained that drivers would be entitled to minimum earnings,

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[54] Hannah Johnston, Ozlem Ergun, et al., *Is employment status compatible with the on-demand platform economy? Lessons from a natural experiment*, 26 (2021), *available at* https://cpb-us-w2.wpmucdn.com/sites.northeastern.edu/dist/2/204/files/2022/02/Johnston-et.-al-2022-Employment-Status-and-Gig-Economy-1.pdf.

[55] *See* Rebecca Smith, *Flexibility in the On-Demand Economy*, Nat'l Emp. L. Project 4 (June 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf ("In the end, a job with Uber or other on-demand companies comes with roughly the same degree of freedom as a job with a staffing agency or as a substitute teacher or day laborer: while a worker is ostensibly free to decide not to work on a particular day, she may not get a call the next time she wants to work, and she may be short on cash at the end of the month.").

[56] *See* Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. Times (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (describing Uber's use of "psychological inducements and other techniques unearthed by social science to influence when, where and how long drivers work"); Instacart is similar. *See* Kathleen Griesbach, Adam Reich, Luke Elliott-Negri & Ruth Milkman, *Algorithmic Control in Platform Food Delivery Work*, 5 Socius: Sociological Research for a Dynamic World 1, 9-11 (2019), https://journals.sagepub.com/doi/pdf/10.1177/2378023119870041.

[57] *See* Ross Eisenbrey and Larry Mishel, *Uber business model does not justify a new 'independent worker' category*, Economic Policy Institute (Mar. 2016) (discussing control over drivers) https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/

[58] California's ballot summary was drafted at a readability level of 18 years *See* Dubal, supra n. 24, at 20 (explaining that readability score estimates the number of years of U.S. education required to understand a text).

healthcare subsidies, and vehicle insurance.[59] It did not inform voters of what drivers would lose — the rights and benefits that they already had as employees.[60] The misinformation campaign coupled with the lack of clarity on the ballot summary created the perfect storm: an early voting survey found that forty percent of "yes" voters believed that they were voting to help workers.[61]

B. Given this context, the ballot summaries are not "fair."

Under Article 48, the Attorney General must prepare a "fair, concise summary" of each initiative petition she certifies. Art. 48, Init., pt. II, § 3, as amended by Art. 74, § 1. What constitutes "fair," however, depends on the context. *See Massachusetts Teachers Ass'n v. Sec. of the Com.*, 384 Mass. 209, 234 (1981) (summary "must be assessed in the context of the entire proposal and its likely impact on the voters"). The Attorney General's summary ignores context, fails to meaningfully inform voters, and cannot be considered fair.

The Attorney General claims to be prohibited from doing more than simply parroting the claims of the corporate-backed Petitioners, and that to do more would not be fair because "[t]he ways in which a not-yet-enacted measure may interact

[59] *Id.*
[60] 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) benefits.
[61] 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/.

with existing law, and the possible consequences of those interactions, are often difficult to assess in the absence of factually concrete disputes…." Appellee's Br. at 40. Yet there is no such difficulty assessing the impact. In addition to the known harms laid out in Section II, *supra*, Prop 22 provides an example nearly identical to the petitions whose impacts are plain to see. The same loopholes impacting driver pay in California mean Massachusetts drivers will be paid for only 35 to 50 percent of their working hours.[62] Research suggests that they will likely earn a subminimum wage of only $4.62 per hour.[63] Since benefits like mileage reimbursement and a healthcare stipend similarly depend on a narrow definition of compensable work, Massachusetts drivers will suffer the same fate as their California counterparts.

The societal harms of widespread misclassification and the success of the false advertising campaign in California demand that Massachusetts' summaries adequately "insure…that the voters understand the law upon which they are voting." *Op. of the Justices to the House of Representatives*, 357 Mass. 787, 800 (1970) (quoting *Barnes v. Sec'y of the Commonwealth*, 348 Mass. 671, 674

[62] Dara Kerr, *Can Uber and Lyft's Copycat Ballot Measure Win in Massachusetts?*, The Markup (Aug. 19, 2021), https://themarkup.org/ask-the-markup/2021/08/19/can-uber-and-lyfts-copycat-ballot-measure-win-in-massachusetts.

[63] Ken Jacobs and Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*, U.C. Berkeley Labor Center (Sept. 2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/09/Massachusetts-Uber-Lyft-Ballot-Proposition-Would-Create-Subminimum-Wage-1.pdf.

(1965)). Describing the petitions' inferior and illusory set of benefits as "alternative" is not, as the Attorney General claims, remaining "neutral." It is hiding the ball. The petitions offer an elusive set of half measures for which few drivers will qualify, and the summaries should so state. In this context, a "fair and concise summary" that ensures "voters understand the law" would explain that drivers would receive "lesser," rather than "alternative," benefits.[64] Lest voters and drivers be misled about the impact of the petitions, the summaries should be set aside.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court declare the petitions and summaries do not comply with Article 48, and bar the Secretary from placing them on the ballot.

[64] The Massachusetts summaries require 12-years of education to be readily understood. Readability scores should be 8 or below to be understood by 85% of the public. *See* Readable io, https://app.readable.com/text/. Any summary should be easy to read and understand, but these are not.

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CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a) (contents of briefs);

Rule 16(e) (references to the record);

Rule 16(f) (reproduction of statutes, rules, regulations);

Rule 16(h) (length of briefs);

Rule 17 (amicus briefs); and

Rule 20 (typesize, margins, and form of briefs, appendices, and other papers).

I also certify that the foregoing brief complies with Mass. R. App. P. 20(a)(2)(C). The brief contains 7,494 non-excluded words in Times New Roman, size 14 font, and was produced using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under penalties of perjury, that on April 13, 2022, I have made service of this Brief and Attachments upon the attorney of record for each party by this Court's electronic filing system and by first-class mail.

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