

COMMONWEALTH OF MASSACHUSETTS

**Supreme Judicial Court**

No. SJC-13237

MARTIN EL KOUSSA, MELODY CUNNINGHAM,  
JULIET SCHOR, COLTON ANDREWS, DORCAS BETHSAIDA  
GRIFFITH, ALCIBIADES VEGA, JR.,  
GABRIEL CAMACHO, EDWARD MICHAEL VARTABEDIAN,  
FRED TAYLOR, RENEELEONA DOZIER,  
JANICE GUZMAN, AND YAMILA RUIZ,

Plaintiffs/Appellants

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,  
Defendants/Appellees

and

CHRISTINA M. ELLIS-HIBBET, KATHERINE MARY WITMAN,  
ABIGAIL KENNEDY HORRIGAN, RICHARD M. POWER,  
MEGHAN J. BOROWSKI, CHAD B. CHOKEL, DANIEL SVIRSKY,  
MICHAEL STRICKMAN, MARCUS ALAN COLE, and JAMES WILLIAM  
ISAAC HILLS,

Intervenors

**BRIEF OF CHAMBER OF PROGRESS**  
**AS AN AMICUS CURIAE**

IN SUPPORT OF DEFENDANTS/APPELLEES AND INTERVENORS AND ALL  
RELIEF REQUESTED

Dated: April 13, 2022

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Mass. R. App. 17(c)(1) and Supreme Judicial Court Rule 1:21, Amicus Curiae, by its undersigned counsel, hereby disclose the following:

1. Parent Corporation(s) of Chamber of Progress: None
2. Publicly Held Corporation(s) Owning More Than ten percent of Chamber of Progress: None.

/s/ Gary J. Lieberman  
Gary J. Lieberman

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## **IDENTITY AND INTERESTS OF AMICUS CURIAE**

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. The Chamber of Progress' work is supported by corporate partners, some of whom are impacted by two Initiative Petitions entitled, "A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers" ("Petitions").<sup>1</sup>

The Chamber of Progress has a significant interest in the Petitions and offers its perspective on the benefits of app-based drivers retaining their independent contractor status, including the flexibility afforded to them, and to receive additional benefits. The Chamber of Progress' amicus brief also provides insight into the far-reaching implications of not allowing the voters of Massachusetts to decide the Petitions on the November 2022 ballot and determine whether to preserve this vital independent contractor relationship.

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<sup>1</sup> Chamber of Progress' Partners are available at: <https://progresschamber.org>. Chamber of Progress' Partners do not sit on its board of directors and do not have a vote on or veto over its positions.

**RULE 17(C) (5) DECLARATION**

Amicus and its counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

None of the conduct described in Appellate Rule 17(c) (5) has occurred:

- a. No party or party's counsel authored this brief in whole or in part;
- b. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;
- c. No person or entity other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief; and
- d. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

## INTRODUCTION

Each and every day, Massachusetts app-based drivers for Delivery Network Companies ("DNC") or Transportation Network Companies ("TNC") deliver food to families, provide accessible transportation options for people without nearby public transportation to Bay State residents, and offer convenience to people in need of everyday goods and supplies. Gig work, or work that is allocated through online platforms, plays an increasingly important role in the Massachusetts' economy, and the emergence of these platforms are providing work to residents with flexibility and mobility not found in the traditional labor market.

In the pandemic, hundreds of thousands of Massachusetts residents rely on gig-based work as a source of income, a large portion of whom are people of color. Women in particular have relied heavily on app-based driving employment during the pandemic, having been disproportionately impacted due to an increasing need for childcare and homeschooling, as well as job cuts in other industries such as home cleaning, hospitality and other services.

Numerous surveys have repeatedly confirmed that the vast majority of app-based drivers, including drivers in Massachusetts, enjoy and want to maintain the flexibility



they have now as independent contractors, and prefer not to be classified as employees. A recent survey demonstrated that eighty-one percent of Massachusetts' app-based drivers support the Petitions, and prefer to maintain their status as independent contractors, retaining their flexibility. See Beacon Research, *Key Findings from Massachusetts app-based drivers poll*, February 16, 2022. The Petitions, if passed by Massachusetts voters, would preserve this flexibility, but also bring better wages and benefits to app-based drivers.

The Massachusetts' electorate should be given the opportunity to vote on this critical issue as it would reveal the preference of both voters and app-based drivers. If the voters of the Commonwealth are not furnished this opportunity, the independent contractor status of app-based drivers would be jeopardized and their flexibility, choice and independence -- often the primary reasons workers pursued this work in the first place -- would be lost.

The Petitions at issue, if passed by Massachusetts voters, would provide app-based drivers with new benefits. Specifically, the Petitions seek to establish an earnings floor, ensuring app-based drivers never earn less than 120 percent of the Massachusetts' minimum wage, plus twenty-six cents per mile toward vehicle maintenance and gas while performing rides or deliveries. The Petitions also would

require companies to offer company-paid healthcare stipends for drivers who work fifteen hours per week on average, and cover the costs of occupational accident insurance for drivers injured on the job. App-based drivers would also earn company-paid sick time and be eligible for paid family and medical leave. Massachusetts voters should have an opportunity to vote on the Petitions and decide whether to improve app-based drivers' flexible work, including new benefits, as opposed to ending it.

Studies also shown that switching to a business model in which app-based drivers are classified as employees, rather than independent contractors, will have far reaching implications for drivers, and for the rideshare and delivery companies, including a loss of significant TNC and DNC jobs in the Commonwealth. This amicus brief focuses on both the significant public policy considerations and economic implications that the Court should consider in deciding whether to permit Massachusetts' voters to determine whether a new statutory worker classification for app-based drivers should be established, with an array of new benefits, while preserving their independent contractor status.

## ARGUMENT

### **I. Gig-based workers in Massachusetts play an increasingly important role in the Commonwealth's economy.**

Participation in the "gig economy" has grown rapidly over the past few years, and have expanded exponentially during the pandemic. Although nontraditional, short-term contract work existed prior to smartphones and web-based applications, the gig economy has ushered in a new way to connect people with services to offer to those who want to hire them. The emergence of rideshare services, like Uber and Lyft, and delivery services, like DoorDash and Instacart, provides convenient services to Massachusetts residents at nearly any time of the day. These services also expand the way people earn money, adding another dimension to the labor force. These digital platforms reflect workers' desires for flexibility and mobility, which cannot be found in the traditional labor market; in other words, to be able to work when they want to and where they want to. Underserved workers ranging from students, single parents, and caregivers, among others, seeking flexible hours have flocked to working as independent contractors through these platforms.

The gig economy is growing across the country, and in Massachusetts. In 2021, sixteen percent of American workers

earned money through an online gig platform. See Pew Research Center, December 2021, *The State of Gig Work in 2021*, p. 16. By 2027, the majority of the United States workforce will be freelancers. See Edelman Intelligence, *Freelancing in America: 2017*, at 5 (Oct. 17, 2017). Massachusetts alone has approximately more than 200,000 app-based drivers on platforms. See [www.wbur.org/news/2021/06/22/uber-lyft-coalition-to-protect-workers-rights-massachusetts](http://www.wbur.org/news/2021/06/22/uber-lyft-coalition-to-protect-workers-rights-massachusetts).

**II. The COVID-19 pandemic forced women out of the workforce at disproportionately high numbers and impacted minority workers and communities.**

The COVID-19 pandemic had rapidly increased the adoption of digital platforms, and the industry simultaneously experienced a surge in demand during a period of unprecedented challenges. At the same time, the COVID-19 pandemic has forced women out of the workforce at disproportionately higher rates compared to men. See National Bureau of Economic Research, *The Impact of COVID-19 on Gender Equality*, April 2020, p. 12. Because of continuing COVID-19 challenges like school closures, remote learning and limited day care operations, Women, have had to take on the lion's share of extra childcare and education for their families. Women app-based drivers are able to choose when and how much to work, working on different platforms, or

elect when and where they are comfortable providing services, enabling them to supplement income from their jobs.

Accordingly, women now make up fifty-eight percent of DoorDash and fifty percent of Uber delivery drivers.

Requiring app-based drivers to classify as employees would eliminate the work-life flexibility for women that independent contractors enjoy.

App-based platforms also offer income opportunities to other groups of workers who have been disproportionately impacted by the pandemic. For example, Hispanic and Black Americans have been more likely to have lost jobs or income from the economic impacts stemming from the pandemic. See <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/>. For example, "Latinx workers, many of whom work in hospitality and food services jobs vulnerable to the new restrictions on businesses, the unemployment rate spiked to an estimated 27.9 percent" during the pandemic. [https://www.bostonindicators.org/reports/report-website-pages/covid\\_indicators-x2/2021/april/latinx\\_impact](https://www.bostonindicators.org/reports/report-website-pages/covid_indicators-x2/2021/april/latinx_impact). App-based platforms not only provide an option for earning income while searching for a new job, but they also provide an option to supplement income from a job where pandemic-related closures resulted in reduced hours and reduced pay.

### **III. App-based drivers value flexibility of having independent contractor status and the ability to set their own hours.**

Given this rapid growth in the gig economy, along with opportunities for app-based drivers, it is critical to understand what app-based drivers value and the reasons why they pursued this work in the first place. Studies have demonstrated that, although the work serves as full-time employment for some, the majority of app-based drivers rely on gig work as a second source of income and value the flexible hours that it offers. See Pew Research Center, December 2021, *The State of Gig Work in 2021*, p. 16.

Traditional employment relationships typically involve set schedules determined by the employer, whereas app-based drivers allow the worker to set their own schedule. See National Bureau of Economic Research, *The Value of Flexible Hours: Evidence from Uber Drivers*, June 2017, p. 2.

In fact, a majority of Americans who have earned money through a digital platform spend less than ten hours in a typical week performing these tasks (forty-one percent) or do not do work on digital platforms most weeks (twenty-three percent). See Pew Research Center, December 2021, *The State of Gig Work in 2021*, p. 16. Most Massachusetts app-based drivers are not looking for traditional 9 A.M. to 5 P.M. jobs that have rigid schedules, and more than two-thirds of

drivers report that their work on app-based platforms is either part-time (thirty-four percent) or occasional (thirty-three percent). Beacon Research, *Key Findings from Massachusetts app-based drivers poll*, May 28, 2021. A flexible work schedule is not only a preference for many app-based drivers. Many gig workers are unable to accept jobs with strict schedules because of disabilities, chronic illness, or other obligations. See Shapiro & Stuttgen, *The Many Ways Americans Work*, p. 6. Another study showed that gig workers derived only twenty percent of annual income from gig work, and in certain months, gig work could account for up to fifty percent or more of specific month's income. *Id.*, p. 18. The study suggests that the flexibility of gig work permits individuals to supplement earnings when other sources have temporary declines. *Id.*

Surveys of app-based drivers have repeatedly confirmed that flexibility is the overwhelming reason app-based drivers are drawn to app-based platforms. Nationally, a 2020 survey of Uber drivers found that eighty-six percent of drivers say a reason they chose app-based driving was to have flexibility in scheduling, with seventy-one percent responding that this was a *major* reason. See Berenson Strategy Group, *Findings from Survey of 2020 Voters and app-based Drivers* (August 25, 2020). Similarly, Massachusetts app-based drivers are also

motivated by the flexibility in scheduling and hours as independent contractors. Almost nine-in-ten Massachusetts app-based drivers say that flexibility in scheduling (eighty-eight percent) and flexibility in the number of hours worked (eighty-seven percent) are the major reasons why they drive with a rideshare or delivery platform. See Beacon Research, *Key Findings from Massachusetts app-based drivers poll*, May 28, 2021.

These surveys demonstrate that the majority of app-based drivers gravitate to gig work because of flexibility, allowing them to set their own hours and make their own schedule. Moreover, for many rideshare and delivery drivers, this flexibility is not simply a preference. Rather, students, parents, and workers with other full-time jobs often rely on gig work as supplementary income, and require the flexibility that gig work affords them. Consistent with these findings, the highest support for the Petitions at issue in Massachusetts comes from women drivers (eighty-six percent), drivers of color (eighty-three percent), those without college degrees (eighty-seven percent) and drivers who are parents with school-aged children (eighty-seven percent). See Beacon Research, *Key Findings from Massachusetts app-based drivers poll*, February 16, 2022.

Stripping independent contractor status for rideshare



and delivery drivers would have devastating effects for the large majority of workers who drive on app-based platforms part-time. One likely consequence of eliminating independent contractor status is that app-based drivers would be required to work fixed schedules. Therefore, the flexible work arrangements that attracted app-based drivers in the first place would no longer exist, resulting in many of these app-based drivers unable to continue working in the industry. A 2020 survey of 718 California app-based drivers revealed that two-thirds surveyed said that “they wouldn’t continue driving if they didn’t have the flexibility they have now” as independent contractors and were required to “work a fixed shift” as employees. See Edelman Intelligence, *California App-Based Driver Survey*, June 2020, p. 10.

A better alternative is to permit Massachusetts’ residents to vote on the Petitions, and voice their preference whether a new statutory worker classification for app-based drivers should be established, with an array of new benefits, while preserving their independent contractor status.

**IV. Important public policy considerations as reflected in app-based drivers’ preference to maintain independent contractor status.**

Surveys of app-based drivers across the country, and in Massachusetts, have repeatedly confirmed their preference to

maintain their status as independent contractors. A 2021 poll of New Jersey app-based drivers revealed that ninety-eight percent of app-based drivers want their flexibility protected, and seventy-one percent would stop driving if they were forced to become employees and lose their flexibility. See [newjerseyglobe.com/state-government/poll-shows-overwhelming-support-in-n-j-for-app-based-drivers-remaining-as-independent-contractors](https://www.newjerseyglobe.com/state-government/poll-shows-overwhelming-support-in-n-j-for-app-based-drivers-remaining-as-independent-contractors). App-based driver polls reveal that sixty-five percent of United States drivers on DNC and TNC platforms see themselves as independent contractors. See Pew Research Center, December 2021, *The State of Gig Work in 2021*, p. 13. Also, a majority of Americans (sixty-two percent) say app-based drivers are most appropriately described as independent contractors. See *id.*

App-based drivers in Massachusetts also have voiced a strong preference for maintaining their independent contractor status. A recent survey of 400 Massachusetts app-based rideshare and delivery drivers found that eighty-one percent of drivers would vote "yes" on the Petitions that would protect their flexibility as independent contractors while adding new benefits. See Beacon Research, *Key Findings from Massachusetts app-based drivers poll*, February 16, 2022. Among the ten percent of drivers who would vote "no" on the Petition, more than half (fifty-nine percent) indicate they

would vote “no” because they “want to keep the current driving situation as it is,” nearly double the portion that vote “no” because “they would rather be an employee” (thirty-one percent). *Id.*

Other states, including voters in California, one of the most progressive states in the country, and the legislature in Washington State, are showing their preference for the balance struck in the Massachusetts’ Petitions between preserving independent contractor status for app-based drivers while providing enhanced benefits. On November 3, 2020, California voters overwhelmingly approved Proposition 22, the App-Based Drivers as Contractors and Labor Policies Initiative, undoing lawmakers’ efforts to classify gig workers as employees under Assembly Bill No. 5 (AB5).<sup>2</sup> The vote on the California initiative was 58.63% in favor, and 41.37% opposed, indicating that a substantial majority of voters in California opposed stripping app-based drivers of their independent contractor status and benefits. Notably, Proposition 22 received higher support in California’s ten counties with the highest share of Black residents, where

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<sup>2</sup> In a lawsuit brought by the Service Employees International Union and several drivers, Alameda County Superior Court Judge Frank Rosch ruled that Proposition 22 is unconstitutional and unenforceable. See Castellanos, et al. v. State, Cal. Sup. Ct., Case No. RG21088725 (Alameda County August 20, 2021). The decision is currently on appeal.

voters approved the measure by an average margin of 20.7%. See Berkley Research Group, *Analysis of Voter Support of Proposition 22 in California and Los Angeles County*, February 10, 2022, p. 3. Proposition 22 underscored the gap between the California legislature in enacting AB5 and the views of the state's voters, who overwhelmingly supported Proposition 22.

A law enacted in Washington State (HB2076 - 2021-2022 - Concerning Rights and Obligations of Transportation Network Company Drivers and Transportation Network Companies) on March 31, 2022, protects app-based rideshare drivers' independent contractor status, and extends workers new benefits such as paid sick leave and minimum pay rate. The Washington law, which takes effect in phases beginning on December 31, 2022, is the first law by a state legislature in the country to preserve gig worker independent contractor status. Notably, HB2076 was supported by worker organizations such as Teamsters Local 117 and the Washington-based Drivers Union, and received bi-partisan support. See <https://news.bloomberglaw.com/daily-labor-report/lyft-uber-washington-drivers-get-benefits-no-employee-status?context=article-related>. The enactment of HB2076 marks the emergence of a political consensus between legislators, organized labor, voters, and drivers, that

respects app-based drivers' preference for independent contractor status.

As discussed above, all indications are that the same is true among Massachusetts' voters and app-based drivers. Namely, surveys demonstrate that voters in the Commonwealth want to maintain the independent contractor status of app-based drivers for TNC and DNC companies, with enhanced benefits, and the Petitions should be on the November 2022 ballot to reveal Bay State voters' preferences on this issue.

**V. Impact of reclassification and loss of app-based driver's independent contractor status.**

A change to employee status for app-based drivers would negatively impact app-based drivers and the services they provide to millions of Massachusetts residents each year. First, forcing DNC and TNC's to fundamentally alter the way it does business would harm the public as a whole -- including restaurants, grocery stores, customers, and the app-based drivers who need the supplementary income. A recent study has found that reclassifying Massachusetts rideshare and delivery drivers as employees would likely result in the loss of at least fifty-eight percent of these positions (49,270) and could result in the loss of up to eighty-seven percent (73,657) of all rideshare and delivery positions in the state. See Beacon Economics, *How Many App-*

*Based Jobs Would be Lost by Converting Rideshare Drivers from Independent Contractors to Employees in the Commonwealth of Massachusetts* (Feb. 2022). A study based on the nationwide impact of forced reclassification of independent contractors to employees found that between seventy-two and eighty-six percent of 4.44 million contractors would lose jobs. See Shapiro & Stuttgen, *The Many Ways Americans Work*, p. 3.

The Beacon Economics report also found that a portion, or potentially all of the cost increases for companies associated with a change in classification of app-drivers from independent contractors to employees, including administrative overhead costs, accounting, onboarding, and recruiting, will likely be passed on to consumers. *Id.*

There are other implications that are difficult to predict or quantify if app-based drivers lose their ability to work when they are able, including limiting their ability to drive on platforms as a means to supplement their income.

**CONCLUSION**

For the foregoing reasons, the Chamber of Progress respectfully requests that the Court permit the citizens of Massachusetts to vote on the Petitions in November 2022.

Respectfully submitted,

Chamber of Progress

As Amicus Curiae,

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**CERTIFICATE OF SERVICE**

I, Gary J. Lieberman, hereby certify that on this 13th day of April 2022, I served the foregoing Brief of Chamber of Progress as an Amicus Curiae in Support of Defendants/Appellees and Intervenors and all relief requested in Martin el Koussa and others v. Attorney General and Secretary of the Commonwealth and Christina M. Ellis-Hibbet, et al. SJC-13237, by causing it to be delivered by eFileMA.com to counsel for Plaintiffs-Appellants:

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**CERTIFICATE OF COMPLIANCE**

I, Gary J. Lieberman, hereby certify pursuant to Mass. R. App. P. 17 that this brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Rules 15 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit because it contains 2,867 words in 12-point Courier New font (not including 1,072 words in the portions of the brief excluded under Rule 20(a)(2)(D)), as counted in Microsoft Word.

/s/ Gary J. Lieberman

Gary J. Lieberman