

**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 CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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<i>Albano v. Att’y Gen.</i> , 437 Mass. 161 (2002)	20, 35
<i>Anderson v. Att’y Gen.</i> , 479 Mass. 787 (2018)	19
<i>Barnes v. Sec’y of the Commonwealth</i> , 348 Mass. 674 (1965)	33
<i>Burbank Apartments Tenant Ass’n v. Kargman</i> , 474 Mass. 121–122 (2016).....	40
<i>Comey v. Hill</i> , 387 Mass. 11 (1982)	37
<i>Cuddyer v. Stop & Shop Supermarket Co.</i> , 434 Mass. 536 (2001)	43
<i>Dahill v. Police Dep’t of Boston</i> , 434 Mass. 239–240 (2001)	36
<i>Dunn v. Att’y Gen.</i> , 474 Mass. 679–680 (2016)	19, 20, 21
<i>Flagg v. AliMed, Inc.</i> , 466 Mass. 28–29 (2013)	36
<i>Gasior v. Massachusetts Gen. Hosp.</i> , 446 Mass. 653–654 (2006)	43
<i>Gyulakian v. Lexus of Watertown, Inc.</i> , 475 Mass. 300 (2016)	37
<i>Joule, Inc. v. Simmons</i> , 459 Mass. 95 (2011)	43
<i>Katz v. Massachusetts Comm’n Against Discrimination</i> , 365 Mass. 366 (1974)	36
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<i>Massachusetts Teachers Ass’n v. Sec. of the Com.</i> , 384 Mass. 234 (1981)	34
<i>Modern Cont’l/Obayashi v. Mass. Comm’n Against Discrimination</i> , 445 Mass. 116 (2005)	37
<i>Oberlies v. Att’y Gen.</i> , 479 Mass. 836 (2018)	20
<i>Op. of the Justices to the House of Representatives</i> , 357 Mass. 800 (1970)	33
<i>Psy-Ed Corp. v. Klein</i> , 459 Mass. 707–708 (2011).....	39
<i>Rock v. Massachusetts Comm’n Against Discrimination</i> , 384 Mass. 204 (1981)	36
<i>Schulman v. Att’y Gen.</i> , 447 Mass. 199 (2006)	22
<i>Stonehill Coll. v. Massachusetts Comm’n Against Discrimination</i> , 441 Mass. 563 (2004)	43
<i>Weiner v. Att’y Gen.</i> , 484 Mass. 691–92 (2020)	15, 21

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MASSACHUSETTS STATUTES

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CODE OF MASSACHUSETTS REGULATIONS

454 C.M.R. § 27.02.....	22
454 C.M.R. § 27.04(2).....	22

OTHER AUTHORITIES

- 47 Lyft Statistics in 2022: Data on Revenue, Riders & Drivers, Finances
Online, <https://financesonline.com/lyft-statistics/>16
- Akil Vicks, *Gig Companies Are Disguising Exploitation as Social Justice*,
Jacobin (Feb. 19, 2022), <https://www.jacobinmag.com/2022/02/gig-prop-22-flexibility-contractors-anti-racism-social-justice-lyft-uber-instacart>.26
- Alex Rosenblat et al., *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, Data & Society (Oct. 2016), https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf.....40
- Alison Stein, *Unpacking Pay Standards: a response to the UC Berkeley Labor Center*, Uber, (Nov. 7, 2019), <https://medium.com/uber-under-the-hood/unpacking-pay-standards-a-response-to-the-uc-berkeley-labor-center-aa5549871040>.24
- Anna Belts, *Women who Drive for Uber and Lyft are Being Left to Fend for Themselves*, The Verge (Jan. 18, 2022),
<https://www.theverge.com/2022/1/18/22878214/uber-lyft-women-drivers-sexual-assault-harassment-safety>38
- Barbara Grzincic, *Uber drivers must arbitrate Mass. misclassification claims – 9th Circuit*, Reuters (Aug. 2, 2021),
<https://www.reuters.com/legal/transactional/uber-drivers-must-arbitrate-mass-misclassification-claims-9th-circuit-2021-08-03/>44
- Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 20, Fed. Rsrv., (May 2019),
<https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>17
- Bobbi M. Bittker, *Racial and Ethnic Disparities in Employer-Sponsored Health Coverage*, A.B.A. Hum. Rts. Mag. (Sept. 7, 2020),
https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/.....29
- Brian Callaci, *Disguised Unemployment*, Data & Society (Jan. 19, 2021),
<https://points.datasociety.net/disguised-unemployment-4a2985653f78>17

Caroline O’ Donovan, *Uber And Lyft Spent Hundreds Of Millions To Win Their Fight Over Workers’ Rights. It Worked*, BuzzFeed News (Nov. 21, 2020), <https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>.....29

CDC, *Health Equity Considerations and Racial and Ethnic Minority Groups*, (Updated Jan. 25, 2022),<https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>18

Chris Benner et al., *On-demand and on-the-edge: Ride hailing and Delivery workers in San Francisco* at 2, UC Santa Cruz Institute for Social Transformation, (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf. 16, 18

Chris Lisinski & Chris Van Buskirk, *Gig Workers At Center Of Emerging Labor Law Fight*, WBUR (Updated June 22, 2021), <https://www.wbur.org/news/2021/06/22/uber-lyft-coalition-to-protect-workers-rights-massachusetts>.16

Courtney Francisco, et al., *Cincinnati man charged with racial abuse of Uber driver, whom he threatened with slurs and violence*, WCPO Cincinnati (June 9, 2021), <https://www.wcpo.com/news/local-news/hamilton-county/muslim-advocacy-group-calls-on-hamilton-county-to-prosecute-man-who-allegedly-attacked-uber-driver>39

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>.....23

Dave Lee, *‘Thrown to the wolves’ - the women who drive for Uber and Lyft*, BBC (Jan. 29, 2019), <https://www.bbc.com/news/technology-46990533>38

Dan Papsun and Ervin Mulvaney, *Uber Driver’s Ratings Bias Class Action Dismissed by Judge*, Bloomberg News (Aug. 2, 2021), <https://news.bloomberglaw.com/social-justice/uber-drivers-ratings-race-bias-class-action-dismissed-by-judge>.....40

Dilini Lankachandra, *Sick Without a Safety Net*, A Better Balance, (Mar. 2022), <https://www.abetterbalance.org/sick-without-a-safety-net>.31

Elise Gould et al., *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality*, Economic Policy Institute, (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>18

Eliza McCullough & Brian Dolber, *Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22*, Nat'l Equity Atlas (Aug. 19, 2021), <https://nationalequityatlas.org/prop22>30

Ellora Derenoncourt et al., *Why minimum wages are a critical tool for achieving racial justice in the U.S. labor market*, Washington Ctr. for Equitable Growth, (Oct. 29, 2020), <https://equitablegrowth.org/why-minimum-wages-are-a-critical-tool-for-achieving-racial-justice-in-the-u-s-labor-market/>.....26

Evan Symon, *Class Action Lawsuit Filed Against Uber in San Francisco Over Discrimination Claims*, California Globe (Oct. 26, 2020), <https://californiaglobe.com/articles/class-action-lawsuit-filed-against-uber-in-san-francisco-over-discrimination-claims/>.40

Forced Arbitration in a Pandemic: Corporations Double Down, American Association for Justice, (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>44

Frank Chung, *'40 per cent drop overnight': UberEats bicycle riders say algorithm change preferences motorbikes and cars*, News.com.au (June 29, 2020), <https://www.news.com.au/finance/work/at-work/40-per-cent-drop-overnight-ubereats-bicycle-riders-say-algorithm-change-preferences-motorbikes-and-cars/news-story/ef3d3a0bc8ee9a7374616b5d2c4a67eb>41

Gal Tziperman Lotan, *Soaring gas prices squeeze drivers*, Boston Globe (Oct. 26, 2021), <https://www.bostonglobe.com/2021/10/26/business/soaring-gas-prices-squeeze-drivers/>.27

Heidi Groover, *Did Uber Shut a Seattle Driver Out of Its System Because He Spoke In Favor of Unionizing?*, The Stranger (Sept. 1, 2015), <https://www.thestranger.com/blogs/slog/2015/09/01/22794150/did-uber-shut-a-seattle-driver-out-of-its-system-because-he-spoke-in-favor-of-unionizing>42

Jackie Syrop, *Massachusetts Healthcare Reform, 10 Years Later*, AJMC (Sept. 17, 2016), www.ajmc.com/view/massachusetts-healthcare-reform-10-years-later.....28

Jessica Mason and Paula Molina Acosta, *Called to Care: A Racially Just Recovery Demands Paid Family and Medical Leave*, Nat’l P’ship for Women & Families (March 2021),
<https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/called-to-care-a-racially-just-recovery-demands-paid-family-and-medical-leave.pdf>.32

Kathleen Dailey, *Lyft Drivers Lose Arbitration Appeal in California Sick Pay Suit*, Bloomberg Law (Feb. 16, 2022),
<https://news.bloomberglaw.com/daily-labor-report/lyft-drivers-lose-arbitration-appeal-in-california-sick-pay-suit>.....44

Ken Jacobs & Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour*, UC Berkeley Lab. Ctr., (Sept. 29, 2021).
<https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage>.....23

Levi Sumagaysay, *Uber, Lyft drivers say new California law isn’t solving their health care needs*, Mkt. Watch (June 16, 2021),
<https://www.marketwatch.com/story/uber-lyft-drivers-say-new-california-law-isnt-solving-health-care-needs-11623788327>30

Nambi Ndugga & Samantha Artiga, *Disparities in Health and Health Care: 5 Key Questions and Answers*, Kaiser Fam. Found. (May 11, 2021),
<https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/>.....29

Paid Family and Medical Leave: A Racial Justice Issue – And Opportunity, National Partnership for Women and Families, at 4 (Aug. 2018),
<https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>.....26

Paul Zilly, *Uber Driver Wins Reinstatement, Credits Community, Teamsters*, Teamsters 117 (Feb. 25, 2016),
https://www.teamsters117.org/seattle_uber_driver_wins_reinstatement.....42

Risa Gelles-Watnick & Monica Anderson, *Racial and ethnic difference stand out in the U.S. gig workforce*, Pew Research (Dec. 15, 2021),
<https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/> 16, 38

Robert L. Hale, <i>Coercion and Distribution in a Supposedly Non-Coercive State</i> , 38 Pol. Sci. Quart. 470, 472 (1923)	17
Ross Eisenbrey and Lawrence Mishel, <i>Uber business model does not justify a new ‘independent worker’ category</i> , Economic Policy Institute (March 17, 2016), https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/	24
Shannon Bond, <i>Uber Received Nearly 6,000 U.S. Sexual Assault Claims In Past 2 Years</i> , NPR (Dec. 5, 2019), https://www.npr.org/2019/12/05/785037245/uber-received-nearly-6-000-u-s-sexual-assault-claims-in-past-2-years	38
Steph Solis, <i>Mass is the Latest Battleground for Gig Worker Rights</i> , Government Technology (June 2021), https://www.govtech.com/workforce/mass-is-the-latest-battleground-for-gig-worker-rights	27
<i>Summary of No. 21-11</i> , https://www.mass.gov/doc/21-11-final-summary/download	34
Telephone Interview by Nicolette Del Palacio with Stephen Levine (Apr. 5, 2022).....	24
Tony Lee, <i>Uber bans rider after racist attack on Asian driver at LAX</i> , NBC (Mar. 12, 2021), https://www.nbcnews.com/news/asian-america/uber-bans-rider-after-racist-attack-asian-driver-lax-n1261018	39
Tyler Sommermaker, <i>Uber and Lyft have long said they pay drivers fairly, but they haven’t shared all the data that could prove it</i> , BusinessInsider.com (June 17, 2021), https://www.businessinsider.com/how-much-uber-lyft-drivers-earn-mystery-company-pay-data-2021-6	26
<i>Uber driver says he was fired after being in protest photo</i> , Honolulu Star Advertiser (Dec. 11, 2019), https://www.staradvertiser.com/2019/12/11/breaking-news/uber-driver-says-he-was-fired-after-being-in-protest-photo/	42
Veena Dubal, <i>The Time Politics of Home-Based Piecework</i> , c4ejournal, (May 15, 2020), https://c4ejournal.net/2020/07/04/v-b-dubal-the-time-politics-of-home-based-digital-piecework-2020-c4ej-xxx/	23

Yeshimabeit Milner and Amy Traub, *Data Capitalism + Algorithmic Racism*,
Data for Black Lives and Demos,
https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf41

CORPORATE DISCLOSURE STATEMENT

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

Dated: April 13, 2022

/s/ Jonathan B. Miller

Jonathan B. Miller

STATEMENT OF INTEREST

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

We write separately because the initiative petitions at issue in this case, 21-11 and 21-12 (hereinafter, the “Petitions”), impact people of color, immigrants, and other historically underserved groups. Black, Indigenous, and People of Color (“BIPOC”) drivers make up the majority of gig workers nationally and are disproportionately represented as drivers or in delivery services. BIPOC drivers and delivery workers are who will be most affected by the Petitions. We therefore submit this brief to center their experiences and to make plain the true impact of these

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

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

Petitions. Uber, Lyft, and other companies advocating for these Petitions seek to enshrine a second-class employment category in Massachusetts law by cobbling sub-minimum job protections together with a wholly separate classification of these workers as independent contractors. In doing so, the Petitions violate a core requirement of Article 48—that initiative petitions contain only subjects “which are related or which are mutually dependent”—in a manner that would have disastrous consequences for workers, especially BIPOC workers.

SUMMARY OF ARGUMENT

The Petitions enable the exploitation of BIPOC Drivers³—precisely the workers that Massachusetts laws are intended to protect. The creation of a second-tier worker status should not be countenanced or permitted to go to the voters. The Petitions fail for both reasons argued by Plaintiffs/Appellants.

First, the Petitions’ attempt to repeal extensive, state-guaranteed worker protections and replace them with weaker contractual provisions violates the mutual dependence requirement of Article 48. None of the benefits offered by the Network Companies is dependent on making the gig workers independent contractors. The Petitions’ impermissible logrolling is an attempt to recategorize workers alongside these separate, unrelated provisions that are not integral to the core recategorization.

³ *Amici* use the terms “Network Companies” and “Drivers” as defined in Plaintiffs’/Appellants’ Brief. *See* Pls. Br. 14.

As written, the Petitions would put voters in “the untenable position” of voting “yes” or “no” on the entirety of Petitions that raise distinct issues. *Weiner v. Att’y Gen.*, 484 Mass. 687, 691–92 (2020). This is precisely the quandary that the relatedness/mutual-dependence requirement seeks to prevent, and the resulting harm threatened here would be severe. These Petitions would lock workers into sub-minimum wages and make access to basic worker protections illusory.

Second, the summaries prepared by the Attorney General fail to meet the fairness standard required by Article 48. Here, *amici* focus specifically on changes to the state’s anti-discrimination laws under G. L. c. 151B. Among other things, the Petitions curtail protections against harassment, eliminate protections for retaliation, and remove the Massachusetts Commission Against Discrimination’s role in enforcement. The summaries’ failure to account in any way for these changes eliminates the possibility that voters can fully understand what they are voting for (or against). Instead, the Attorney General’s summaries nearly adopt the Network Companies’ framing and impermissibly fail to highlight the substantial ways in which the Petitions will erode fundamental protections. Such an omission demands this Court’s intervention.

ARGUMENT

I. BIPOC WORKERS MAKE UP THE MAJORITY OF THE NETWORK COMPANIES' WORKFORCES AND WILL BE DISPROPORTIONATELY IMPACTED BY THE PETITIONS

In Massachusetts, there are over 200,000 drivers working for gig companies, “a sizable portion of whom are immigrants or people of color.”⁴ According to the Pew Research Center, about 69% of all gig workers are people of color (Black, 20%; Hispanic, 30%; and Asian, 19%).⁵ Another study by the University of California-Santa Cruz found that 78% of gig workers are people of color and more than half are immigrants.⁶ They are also economically vulnerable. A study by the Federal Reserve found that more than half of gig workers would struggle to afford an unexpected \$400 expense and approximately 25% of gig workers rely on alternative financial

⁴ Chris Lisinski & Chris Van Buskirk, *Gig Workers At Center Of Emerging Labor Law Fight*, WBUR (Updated June 22, 2021), <https://www.wbur.org/news/2021/06/22/uber-lyft-coalition-to-protect-workers-rights-massachusetts>.

⁵ Risa Gelles-Watnick & Monica Anderson, *Racial and ethnic differences stand out in the U.S. gig workforce*, Pew Research (Dec. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/>. Similarly, according to a 2021 report from Lyft, 69% of its drivers are BIPOC: Hispanic (29%), Black (22%), or Asian (13%). *47 Lyft Statistics in 2022: Data on Revenue, Riders & Drivers*, Finances Online, <https://financesonline.com/lyft-statistics/> (last accessed Apr. 13, 2022).

⁶ Chris Benner et al., *On-demand and on-the-edge: Ride hailing and Delivery workers in San Francisco* at 2, UC Santa Cruz Institute for Social Transformation, (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf.

services like pay-day loans (compared to 16% of non-gig workers).⁷ According to one analysis, at least 15% of gig workers rely on public assistance.⁸

There is a history of systemic racial barriers that prevent workers of color from securing stable and higher paying jobs. Consequently, BIPOC Drivers' decisions to work for Network Companies are regularly compelled by external forces—such as the lack of availability of other work or unemployment benefits—that disproportionately affect workers of color.⁹

On top of these underlying economic inequities, the COVID-19 pandemic has had devastating effects on BIPOC workers in general. BIPOC workers are at higher risk of contracting the disease and dying because they often work in essential worker settings, such as transportation, and essential workers have a much higher risk of

⁷ Bd. of Governors of the Fed. Rsrv. Sys., *Report on the Economic Well-Being of U.S. Households in 2018*, at 20, Fed. Rsrv., (May 2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> (“For those doing gig work as their primary source of income, 58 percent would have difficulty handling the unexpected expense, compared to 44 percent of those doing gig work to supplement their income.”).

⁸ *Id.*

⁹ Brian Callaci, *Disguised Unemployment*, Data & Society (Jan. 19, 2021), <https://points.datasociety.net/disguised-unemployment-4a2985653f78> (“[I]f driving for sub-minimum wages at Uber is a better option than applying for unemployment insurance, that says more about the stinginess and inaccessibility of the current unemployment system than it does about the virtues of Uber.”); *see also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Quart. 470, 472 (1923) (describing forms of coercion underlying ostensibly free choices about employment).

contracting COVID-19.¹⁰ The COVID-19 pandemic has further caused an economic crisis for BIPOC workers. Black workers, for example, have suffered record numbers of job losses.¹¹ Gig workers “were financially vulnerable before the [COVID-19] outbreak, and the crisis is pushing many of them to the brink.”¹² The Drivers’ current economic precarity thus makes them even more vulnerable to the exploitation these Petitions will codify if successful.

II. THE PETITIONS’ ATTEMPT TO REPEAL A WIDE RANGE OF EMPLOYMENT PROVISIONS AND REPLACE THEM WITH SUBSTANDARD PROTECTIONS VIOLATES ARTICLE 48’S MUTUAL DEPENDENCE REQUIREMENT

The Petitions do not meet Article 48’s mutual dependence requirements, because the provisions are related at only a high level of abstraction. This type of logrolling is troublesome and hides the negative impact of the Petitions on Drivers.

A. The Petitions Violate the Mutual Dependence Requirement by Putting an Unintegrated Scheme Before Voters

Under Article 48, an initiative petition must contain only subjects “which are related or which are mutually dependent.” *Weiner*, 484 Mass. at 693. The constitutional convention adopted this requirement to protect against “the dangers

¹⁰ CDC, *Health Equity Considerations and Racial and Ethnic Minority Groups*, (Updated Jan. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (last accessed Apr. 13, 2022).

¹¹ See Elise Gould et al., *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality*, Economic Policy Institute, (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/>.

¹² See Benner, *supra* n.6, at 1.

of ‘log-rolling,’” or the “practice of including several propositions in one measure . . . so that the . . . voters will pass all of them, even though these propositions might not have passed if they had been submitted separately.” *Anderson v. Att’y Gen.*, 479 Mass. 780, 787 (2018) (citing *Dunn v. Att’y Gen.*, 474 Mass. 675, 679–680 (2016)). Here, the Petitions not only seek to classify workers as independent contractors but also to replace the affirmative employment protections guaranteed by current Massachusetts law.¹³

This approach violates the mutual-dependence principle because none of the benefits offered by the Network Companies is dependent on making the Drivers independent contractors. The Petitions seek to put before the voters in a single ballot question multiple provisions designed to replace employment protections guaranteed through multiple laws; the provisions can thus be voted on separately (*e.g.*, “Instead of receiving paid sick time under G. L. c. 149 § 148C, should app-based drivers receive what is now listed as Section 7?”) and are not mutually dependent. To put it another way, the minimum compensation provision is not mutually dependent on the anti-discrimination requirements, just as neither is mutually dependent on the independent contractor clause.

¹³ It is of no moment that the Network Companies currently dispute whether Drivers are employees under Massachusetts law. The misclassification statute, at a minimum, creates a presumption of employment status which is lost through the Petitions. In addition, the Attorney General has filed affirmative litigation to enforce the misclassification laws against Uber and Lyft.

“A measure does not fail the relatedness requirement just because it affects more than one statute.” *Albano v. Att’y Gen.*, 437 Mass. 156, 161 (2002). But this Court has “cautioned that ‘[a]t some high level of abstraction, any two laws may be said to share a common purpose.’” *Dunn*, 474 Mass. at 680 (quoting *Abdow v. Att’y Gen.*, 468 Mass. 478, 500 (2014)). Accordingly, one of the key inquiries is whether the similarities of the provisions “predominate.” *Weiner*, 484 Mass. at 692. The Petitions only cohere in entrenching exploitative terms on Drivers. Otherwise, the provisions affect a vulnerable workforce in varied and disparate ways, stripping a number of crucial protections under state law and leaving illusory promises in their place.

The Petitions’ provisions affect the contractual relationship between Drivers and the Network Companies at a high level of abstraction, but this is too generalized to meet the predominance standard. In a similar way, the generalized concern for “patient safety” was too broad to save a financial disclosure requirement as part of petition 17-8 in *Oberlies v. Attorney General*, 479 Mass. 823, 836 (2018). *See also Opinion of the Justices*, 422 Mass. 1212, 1220–21 (1996) (“accountability to the people” considered too broad). Nor can the provisions be justified as anticipating ancillary harms such as in the petitions involving animal cruelty (*Dunn*, 474 Mass. at 676) or liquor sales (*Weiner*, 484 Mass. at 692). The Petitions impermissibly ask

voters to enact broad changes to numerous areas of Massachusetts employment law with a single vote, despite the provisions' lack of mutual dependence.

B. The Petitions Obscure Significant and Broad Harms to Drivers

The effect of this violation of the relatedness or “mutual dependence” requirement is to obscure the serious consequences that the Petitions portend to workers, including and especially BIPOC workers. The Petitions’ impermissible logrolling is the recategorization of Drivers alongside separate, unrelated provisions which are not integral to this recategorization. This is precisely the harm that the mutual-dependence requirement seeks to prevent. The effect of the combination of multiple subjects in these Petitions is to create a risky and new class of worker—someone that is not an employee but also not quite an independent contractor as that term has been understood (*i.e.*, someone able to bargain for their own terms and conditions). This new class of worker would be very susceptible to exploitation and largely unprotected by law, and this exploitation will fall especially heavily on BIPOC communities.¹⁴

¹⁴ Although Article 48 does not explicitly forbid petitions which negatively impact minorities and other historically marginalized groups, it is an open question whether a petition may “purposefully discriminate[] against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by art. 1 of the Massachusetts Declaration of Rights.” *Schulman v. Att’y Gen.*, 447 Mass. 189, 199 (2006) (Greaney, J. concurring).

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

The Petitions would codify a subminimum wage model where workers are paid for only a portion of the time they actually spend working. Given that Drivers must cover all of their own costs, their anticipated wages would fall far below what Drivers would receive as employees under current state law (which presumes that Drivers are employees).

i. Compensated Time

By redefining what qualifies as working time, the Petitions attempt to codify the systematic underpayment of wages and benefits to Drivers. Massachusetts law requires that workers, including Drivers, are paid for “working time.” Working time includes “[a]ll on-call time,” such as the time between when a Driver has completed one delivery and is waiting for the next, and “all time during which an employee is required to be . . . on duty . . . including rest periods of short duration.” *See* 454 C.M.R. §§ 27.02; 27.04(2). Working time is used for calculating wages and benefits that are based on total working time or meeting a minimum hours threshold.¹⁵ The Petitions effectively repeal and replace “working time” with “engaged time.” The Petitions define engaged time as the time “from when a driver accepts a request for services to when the driver fulfills that request.” 21-11, § 3.

¹⁵ For example, access to paid sick leave under state law is determined by the number of overall hours worked by the employee. *See* G. L. c. 149, § 148C(d)(1).

The use of engaged time allows the Network Companies to codify a system of wage theft and make meager benefits available to only a small subset of gig workers.¹⁶ Drivers will be paid for between 50 and 67 percent of their working hours.¹⁷ “Uber’s own data indicate that engaged time amounts to only 67 percent of the drivers’ actual working time. [Under the Petitions], the companies would not pay for the approximately 33 percent of the time that drivers are waiting between passengers or returning from trips to outlying areas.”¹⁸ Even this conservative number underestimates the amount of time that Drivers will not be paid—it does not include time spent sanitizing, gassing up, and maintaining the vehicle.

Stephen Levine, a gig-worker from Lynn, has worked for various Network Companies since 2015.¹⁹ A father of four, Levine reports that driving and delivery

¹⁶ The Petitions are an attempt to codify digital piecework by compensating drivers only for engaged time. Without safeguards and real minimum wage protections, Drivers will be exploited in the same way that home workers were when paid by the piece in the early 20th Century. *See, e.g.,* Veena Dubal, *The Time Politics of Home-Based Piecework*, c4ejournal, (May 15, 2020), <https://c4ejournal.net/2020/07/04/v-b-dubal-the-time-politics-of-home-based-digital-piecework-2020-c4ej-xxx/>.

¹⁷ 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>.

¹⁸ Ken Jacobs & Michael Reich, *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour*, UC Berkeley Lab. Ctr., (Sept. 29, 2021), <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage>.

¹⁹ Telephone Interview by Nicolette Del Palacio, Senior Community Organizer at Public Rights Project, with Stephen Levine (Apr. 5, 2022).

work for the Network Companies are his primary source of income. He estimates that approximately one-third of his working time is spent idling: “It’s the same as working any other job where you have slow periods, but those other jobs still have to pay you. When I’m online waiting for a job, I’m still performing labor [for the companies].”²⁰

The Network Companies assert that engaged time is the correct measure for tracking Drivers’ work because Drivers can work for multiple apps at the same time or complete other work in between engaged time.²¹ However, Drivers generally do not fill gaps in their time working for other companies.²² The Network Companies’ algorithms penalize Drivers who do not accept most, or all, of the rides offered to them and it is therefore in a Drivers’ best interest to work one app at a time.²³

The Petitions’ creation of the new category of “engaged time” will have catastrophic impacts on Drivers, their wages, and their ability to access core state benefits. The inclusion of this dramatic change alongside the Petitions’ independent

²⁰ *Id.*

²¹ *See, e.g.,* Alison Stein, *Unpacking Pay Standards: a response to the UC Berkeley Labor Center*, Uber, (Nov. 7, 2019), <https://medium.com/uber-under-the-hood/unpacking-pay-standards-a-response-to-the-uc-berkeley-labor-center-aa5549871040>.

²² Ross Eisenbrey and Lawrence Mishel, *Uber business model does not justify a new ‘independent worker’ category*, Economic Policy Institute (March 17, 2016), <https://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/>.

²³ *Id.*

contractor provision is impermissible as neither provision is dependent on the other. The Petitions' grouping of unrelated, yet equally significant, provisions is precisely what Article 48 attempts to prevent and why the Petitions must fail.

ii. Minimum Wage

The Petitions purport to offer minimum wage protections, but that rings hollow. The interplay between compensated time and the actual costs incurred by Drivers (such as wear-and-tear, mileage, etc.) results in a wage far below the state's minimum wage (not to mention overtime standards, when applicable). One study concluded that most Drivers' effective hourly wage could be closer to \$5:

The Massachusetts proposition claims drivers will receive a guaranteed pay equal to 120 percent of the minimum wage, which would calculate to \$18 when the proposition would take effect . . . we find that the majority of Massachusetts drivers could earn as little as the equivalent of a \$4.82 wage, while the minority of drivers who qualify for a health care stipend could earn the equivalent of just \$6.74 per hour.²⁴

Artificial promises of compensation are a hallmark of the gig work economy.²⁵ One study found that the average Driver earns well under \$400 a month per Network Company, which is why most gig workers provide services for multiple companies.²⁶

²⁴ Jacobs & Reich, *supra* n.18.

²⁵ See, e.g., 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>.

²⁶ Akil Vicks, *Gig Companies Are Disguising Exploitation as Social Justice*, Jacobin (Feb. 19, 2022), <https://www.jacobinmag.com/2022/02/gig-prop-22-flexibility-contractors-anti-racism-social-justice-lyft-uber-instacart>.

The negative effects are especially harmful for BIPOC workers who are already paid less than white workers on average.²⁷ In addition, Black and Latinx workers generally are more likely to be paid poverty-level wages than white workers and to experience wage theft.²⁸ Minimum wage protections are therefore “an especially important tool for raising the earnings and decreasing the economic precarity of the working poor.”²⁹

The pattern of wage exaggeration has real consequences for Massachusetts Drivers. For example, Mutwaly Hamid, a Lynn resident and driver in the Boston Independent Drivers Guild, reported that he started working at Uber part-time in 2018 while taking community college classes. At the time, he stated that he made enough to cover rent, groceries, and other bills as well as to send money to his family in Sudan. In 2020, Hamid claimed that he had to work well over 40 hours a week to make as much as he did in 2018.³⁰ Today, as gas prices and expenses continue to

²⁷ *Paid Family and Medical Leave: A Racial Justice Issue – And Opportunity*, Nat’l P’ship for Women and Fams., at 4 (Aug. 2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-family-and-medical-leave-racial-justice-issue-and-opportunity.pdf>.

²⁸ Ellora Derenoncourt et al., *Why minimum wages are a critical tool for achieving racial justice in the U.S. labor market*, Washington Ctr. for Equitable Growth, (Oct. 29, 2020), <https://equitablegrowth.org/why-minimum-wages-are-a-critical-tool-for-achieving-racial-justice-in-the-u-s-labor-market/>.

²⁹ *Id.*

³⁰ Steph Solis, *Mass is the Latest Battleground for Gig Worker Rights*, Government Technology (June 2021), <https://www.govtech.com/workforce/mass-is-the-latest-battleground-for-gig-worker-rights>.

rise, Driver pay has not. According to Beth Griffith, executive director and chairperson of the Boston Independent Drivers Guild, Drivers “are already working on slim margins” and “[n]ow they’re also paying more at the pump.”³¹

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

The Petitions will also dramatically change access to health insurance benefits, paid sick time, and paid family and medical leave—all of which Drivers are entitled access to under current Massachusetts law. The Petitions attempt to gain Drivers’ and other voters’ support by including supposed pathways to health and safety protections. These “new” benefits would be difficult to access and, when available, would be of lesser quality and quantity than those under existing law.

i. Health Insurance

The Petitions provide for a reimbursement stipend that Drivers can use toward health insurance, but only a small number of Drivers would be eligible. The Petitions state that “a network company shall provide a quarterly healthcare stipend to app-based drivers” based on the average number of hours of *engaged time* each week per quarter.³² Using the finding that one-third of drivers’ work time is between rides,

³¹ Gal Tziperman Lotan, *Soaring gas prices squeeze drivers*, Boston Globe (Oct. 26, 2021), <https://www.bostonglobe.com/2021/10/26/business/soaring-gas-prices-squeeze-drivers/>.

³² The Network Companies will contribute 100% of the average monthly Health Connector premium if a Driver works an average of 25 or more engaged hours per

and thus not “engaged time” under the Petitions’ definition, one analysis estimates “that a typical driver would need to average at least 22.5 hours a week of actual work time during a quarter to receive the lower stipend, and 37 hours a week for the higher stipend.”³³

Making health insurance accessible for BIPOC Drivers is especially crucial given historic and existing structures that otherwise stymie access to healthcare. Even a decade after Massachusetts created its first-in-the-nation healthcare system, a 2016 study noted that uninsurance was particularly high for immigrants, minorities, those with less than a high school education, and those with family income near the federal poverty level.³⁴ Despite nationwide gains in coverage after passage of the Affordable Care Act, people of color and low-income individuals are still at greater risk of being uninsured—a gap that has worsened during the COVID-19 pandemic as people have lost jobs and seen their incomes decline.³⁵ Black Americans are also most likely to fall into a “coverage gap” with earnings that are

quarter and 50% of the average premium if a Driver averages between 15 and 25 engaged hours per quarter. *See* 21-11, § 6.

³³ Jacobs & Reich, *supra* n.18.

³⁴ Jackie Syrop, *Massachusetts Healthcare Reform, 10 Years Later*, AJMC (Sept. 17, 2016), www.ajmc.com/view/massachusetts-healthcare-reform-10-years-later.

³⁵ Nambi Ndugga & Samantha Artiga, *Disparities in Health and Health Care: 5 Key Questions and Answers*, Kaiser Fam. Found. (May 11, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/disparities-in-health-and-health-care-5-key-question-and-answers/>.

“too high for Medicaid eligibility, but not high enough to take advantage of subsidies under marketplace plans.”³⁶ Racial disparities in coverage result in inconsistent access to services and poorer health outcomes.³⁷

Several sections of the Petitions, including the healthcare provisions, are like those offered under California Proposition 22, which passed in 2020 after gig companies spent over \$224 million in campaigning.³⁸ The experience of California Drivers proves that the healthcare stipends promised by the Petitions are elusive. According to one study, 90% of California Drivers do not receive the stipend outright due to initiative terms that limit access.³⁹

³⁶ Bobbi M. Bittker, *Racial and Ethnic Disparities in Employer-Sponsored Health Coverage*, A.B.A. Hum. Rts. Mag. (Sept. 7, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/.

³⁷ *Id.*

³⁸ Caroline O’ Donovan, *Uber And Lyft Spent Hundreds Of Millions To Win Their Fight Over Workers’ Rights. It Worked*, BuzzFeed News (Nov. 21, 2020), <https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights>.

³⁹ Eliza McCullough & Brian Dolber, *Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22*, Nat’l Equity Atlas (Aug. 19, 2021), <https://nationalequityatlas.org/prop22>; see also Levi Sumagaysay, *Uber, Lyft drivers say new California law isn’t solving their health care needs*, Mkt. Watch (June 16, 2021), <https://www.marketwatch.com/story/uber-lyft-drivers-say-new-california-law-isnt-solving-health-care-needs-11623788327> (“[Lyft] promised good wages and health care. They have not kept their promise.”).

ii. Protected Sick Leave

The Petitions will further place meaningful paid sick time out of reach for most Drivers. They propose that a Network Company will provide a Driver with one hour of paid time to every 30 hours of engaged time. 21-11, § 7. Current Massachusetts law however provides that “an employer shall provide a minimum of one hour of earned sick time for every thirty hours *worked* by an employee.” G. L. c. 149 § 148C(d)(1) (emphasis added). As a result, the Petitions would effectively reduce a Driver’s earned paid sick leave by 33% or more given that “engaged time” captures less hours than “working time”.

This reduction in what work counts towards accrued paid sick time is particularly egregious. BIPOC workers are less likely to have paid sick leave in the first place. For example, “[f]orty-three percent of working mothers—a number that encompasses 54% of Latina and 42% of Black mothers—do not have access to paid sick leave, which is of particular concern given that women shoulder a disproportionate share of caregiving duties.”⁴⁰ Paid sick leave is vital for a myriad of social, economic, and health reasons: losing a job due to sickness “leads not only to short-term housing and food insecurity, but persistently reduces future earnings.

⁴⁰ Dilini Lankachandra, *Sick Without a Safety Net, A Better Balance*, (Mar. 2022), <https://www.abetterbalance.org/sick-without-a-safety-net>.

It also worsens mental health, aggravates chronic health conditions, and results in academic disruption for children.”⁴¹

The Petitions also target paid family and medical leave (“PFML”) benefits. 21-11, § 8; 21-12, § 7.⁴² In a departure from the current Commonwealth program, the Petitions add an additional eligibility requirement: Drivers would not be eligible to access PFML benefits until Network Companies made contributions on their behalf for at least two quarters of the driver’s last four completed quarters. The Petitions also create a new “opt-out” feature but do not explicitly include an opportunity to “opt back in” at a later date. Typically, employers are exempt from contributing to the PFML program only if they provide workers with comparable paid leave benefits through an approved private plan. Under the Petitions, Drivers may therefore opt out of the PFML program initially and then be left without any future access to PFML program should their circumstances later change.

Access to state PFML is critical for BIPOC workers. Multiple studies have demonstrated that PFML programs reduce food insecurity, encourage vaccination rates, support elder care, reduce nursing home utilization, and increase overall

⁴¹ *Id.*

⁴² The brief submitted by the National Women’s Law Center includes an extensive analysis of the ways in which these provisions depart from the PFML program.

maternal health, including and especially within BIPOC communities.⁴³ The Petitions cut off what would otherwise be guaranteed access to state PFML for Drivers, endangering the positive health and social benefits created by PFML.

In sum, the Petitions contain too many far-ranging and disparate aspects to meet this Court’s predominance standard. Several core provisions fundamentally alter the nature of the relationship between Drivers and the Network Companies—and in some instances those Drivers’ interactions with state programs such as PFML—leaving voters in an untenable position.

III. THE ATTORNEY GENERAL’S SUMMARIES INADEQUATELY DESCRIBE THE MONUMENTAL SHIFT IN PROTECTIONS FOR DRIVERS

Under Article 48, the Attorney General must provide “a fair, concise summary . . . of the proposed measure.” Amend. art. 48, The Initiative, II, § 3. The Attorney General’s summaries fail to meet her obligations under Article 48, because fair and concise summaries in these circumstances require greater explanation of the Petitions’ impact on Drivers’ rights and protections. As described below, the monumental shift in protections under Massachusetts anti-discrimination law alone warrant further explanation. In the name of neutrality, the Attorney General is

⁴³ Jessica Mason and Paula Molina Acosta, *Called to Care: A Racially Just Recovery Demands Paid Family and Medical Leave*, Nat’l P’ship for Women & Fams. (March 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/called-to-care-a-racially-just-recovery-demands-paid-family-and-medical-leave.pdf>.

allowing the Network Companies' framing of the Petitions to take hold from an early stage without fair regard for the actual effects on the Drivers whose lives and livelihoods are at stake.

A. The Attorney General Failed to Provide Fair Summaries to Voters

The Attorney General is obliged “to 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 (1965)); *see also Abdow v. Att’y Gen.*, 468 Mass. 478, 505 (2014) (the Attorney General’s summary must provide “a fair and intelligent conception of the main outlines of the measure”). The summary description must be “complete enough to convey an intelligible idea of the scope and import of the proposed law.” *Opinion of the Justices*, 309 Mass. 631, 643 (1941) (citation omitted). Plaintiffs as well as other *amici*, particularly the National Women’s Law Center, note several inadequacies with the Attorney General’s summaries of these Petitions. *Amici* separately focus here on the massive and consequential changes to Drivers’ rights under G. L. c. 151B to further underscore the summaries’ inadequacies.

The summaries fail to explain that the Drivers will be permanently placed outside the coverage of G. L. c. 151B and detail what protections they will consequently lose. Instead, the summaries only highlight the small set of safeguards the Petitions offer in their place following the wholesale repeal and replacement of

G. L. c. 151B.⁴⁴ The failure to address this monumental shift is fatal to the adequacy of the summaries. The unmentioned existing protections are not a discretionary “omission,” but instead has the type of significant impact on the views of voters that necessitates the Petitions’ removal from the ballot. *See, e.g., Massachusetts Teachers Ass’n v. Sec. of the Com.*, 384 Mass. 209, 234 (1981) (noting that a summary “must be assessed in the context of the entire proposal and its likely impact on the voters”). Building off the Network Companies’ unjustified position that their Drivers are independent contractors, the summaries create a perception that there is no dispute regarding the status of Drivers under current law. The summaries are inadequate because they take the Network Companies’ position on this issue as a given, rather than conveying a more complete understanding to voters. The summaries cannot stand without providing broader context and clarity on what is being replaced.

The prudential considerations and other examples offered by the Attorney General do not address these concerns. For example, the Attorney General points to the exclusionary marriage petition at issue in *Albano v. Attorney General*, 437 Mass.

⁴⁴ The summaries’ reference to anti-discrimination protections is limited as follows: “The proposed law would prohibit rideshare and delivery companies from terminating the contract of a driver, or refusing to contract with a driver, based on race, sex, sexual orientation, or other protected characteristics unless based upon a bona fide occupational qualification or a safety need.” *Summary of No. 21-11*, <https://www.mass.gov/doc/21-11-final-summary/download> (last accessed Apr. 13, 2022).

156 (2002), and contends that the summary there was proper even though it did not account for all legal impacts on couples. AG Br. 41 n.11. To start, marriage equality was not the law of Massachusetts then (*Goodridge v. Department of Public Health* was decided in 2003), so there was no change at issue, and, more consequentially, there was no confusion among voters (or generated by the proponents of the petition) about the broad legal implications of marriage. The Attorney General’s assertion that further explanation in her summaries might create *greater* voter confusion is likewise off base. The summaries, without greater detail about the impacts of the legal changes, create confusion by making it seem as though Drivers are getting a windfall of rights and protections to which they are not currently entitled. Similar concerns of being unfair or partisan by adding modest changes to the summaries are unfounded. The Network Companies would certainly complain about the drafting of more thorough summaries, but the Attorney General’s obligation is to voters. Voters’ understanding of the Petitions is undermined without further accounting for the Petitions’ proposed fundamental shifts in the law—the rights at stake are too foundational to err on the side of brevity. Fairness dictates disclosure.

B. The Impacts on State Anti-Discrimination Laws Are Significant and Not Fully Disclosed

“Chapter 151B was enacted in 1946 to provide remedies for employment discrimination, a practice viewed as harmful to ‘our democratic institutions’ and a ‘hideous evil’ that needs to be ‘extirpated.’ The Legislature determined that

workplace discrimination harmed not only the targeted individuals, but the entire social fabric.” *Flagg v. AliMed, Inc.*, 466 Mass. 23, 28–29 (2013) (footnotes omitted). The Court has noted that “the clear purpose of G. L. c. 151B is to implement the right to equal treatment guaranteed to all citizens by the constitutions of the United States and the Commonwealth; that the Legislature specifically provided in s 9 of c. 151B that the statute is to be liberally construed to meet its goals.” *Katz v. Massachusetts Comm’n Against Discrimination*, 365 Mass. 357, 366 (1974). Accordingly, this Court has further explained that the parameters and understanding of the state anti-discrimination law remains a work in progress and that the remedial aims of the statute are “only broadly set out.” *Dahill v. Police Dep’t of Boston*, 434 Mass. 233, 239–240 (2001) (quoting *Rock v. Massachusetts Comm’n Against Discrimination*, 384 Mass. 198, 204 (1981)).

As set forth below, the Petitions cut sharply against this firmly established grain by substantially narrowing protections and eliminating any role for the Massachusetts Commission Against Discrimination (“MCAD”), while the summaries make no specific mention of this fundamental shift. The Petitions would remove virtually all anti-discrimination protections available to Drivers as employees under Massachusetts law.⁴⁵ In their place, they offer a very narrow set of

⁴⁵ Chapter 151B applies to employees, not independent contractors. *See, e.g., Comey v. Hill*, 387 Mass. 11 (1982).

requirements relating to Driver hiring and termination while not protecting the terms and conditions of the relationship between Drivers and Network Companies. Among other things, the Petitions would place Drivers permanently outside the state's existing protections against harassment, disparate treatment in work terms and conditions, and retaliation for participating in an anti-discrimination remedy process or invoking the authority of the MCAD. The MCAD's role is severely restricted as well. This is unprecedented—in the decades since the passage of Chapter 151B, the protections it affords only have been expanded and have not been contracted. The summaries do not provide even a hint of this essential context.

1. Harassment by Customers and Other Third Parties

Chapter 151B protects workers from harassment by their employers as well as third parties, such as customers. *See, e.g., Modern Cont'l/Obayashi v. Mass. Comm'n Against Discrimination*, 445 Mass. 96, 116 (2005). Massachusetts law obliges employers to intervene—or at least investigate—when they become aware of conduct that could create a hostile work environment. *Gyulakian v. Lexus of Watertown, Inc.*, 475 Mass. 290, 300 (2016). Because BIPOC Drivers regularly face harassment and mistreatment at the hands of customers and other third parties, the elimination of these protections and obligations is quite significant.

Uber and Lyft released separate reports in 2019 and 2022 that tallied roughly 3,500 incidents of reported sexual *assaults*, not just sexual harassment, against

Drivers by customers as well as other third parties.⁴⁶ Female Drivers and female Drivers of color are particularly at risk. Per a 2021 survey of gig workers conducted by the Pew Research Center, gig workers who are not white “are more likely to report troubling encounters, specifically feeling unsafe or experiencing unwanted sexual advances, while on the job.”⁴⁷ Non-white Drivers are also more likely to say that they have experienced an unwanted sexual advance on the job.⁴⁸ Beyond the immediate harms presented by sexual harassment, female Drivers have reported receiving lower customer ratings after resisting sexual advances from customers.⁴⁹ These lower ratings place Drivers at risk of punishment, lower wages, and even termination. Additionally, countless Drivers have been subject to racial slurs and insults by customers.⁵⁰ The bias exhibited in these incidents harm Drivers psychologically and emotionally and can affect their earnings (via their ratings).

⁴⁶ Anna Belts, *Women who Drive for Uber and Lyft are Being Left to Fend for Themselves*, The Verge (Jan. 18, 2022), <https://www.theverge.com/2022/1/18/22878214/uber-lyft-women-drivers-sexual-assault-harassment-safety>; see also Shannon Bond, *Uber Received Nearly 6,000 U.S. Sexual Assault Claims In Past 2 Years*, NPR (Dec. 5, 2019), <https://www.npr.org/2019/12/05/785037245/uber-received-nearly-6-000-u-s-sexual-assault-claims-in-past-2-years>.

⁴⁷ Gelles-Watnick & Anderson, *supra* n.5.

⁴⁸ *Id.*

⁴⁹ Dave Lee, *‘Thrown to the wolves’ - the women who drive for Uber and Lyft*, BBC (Jan. 29, 2019), <https://www.bbc.com/news/technology-46990533>.

⁵⁰ See, e.g., Tony Lee, *Uber bans rider after racist attack on Asian driver at LAX*, NBC (Mar. 12, 2021), <https://www.nbcnews.com/news/asian-america/uber-bans-rider-after-racist-attack-asian-driver-lax-n1261018>; Courtney Francisco, et al., *Cincinnati man charged with racial abuse of Uber driver, whom he threatened with*

The Petitions offer no protections against harassment of Drivers by customers, other third parties, or even the Network Companies themselves. In fact, the Petitions' only reference to sexual harassment specifically is in relation to required training for Drivers. *See* 21-11, § 4(b)(1). Drivers are thus held to account under the Petitions to ensure safe rides for themselves, customers, and other third parties while Network Companies evade all responsibility.

2. Discrimination and Disparate Treatment in Terms and Conditions

Chapter 151B's protections extend well beyond an employee's hiring and firing by covering the terms and conditions of their work, including their promotions, their compensation, and other decisions that affect their standing at work. *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 707–708 (2011) (describing an “adverse employment action” where it is “substantial enough to have materially disadvantaged an employee”). In fact, employment discrimination under Chapter 151B can arise because of intentional mistreatment as well as neutral policies with a disparate impact on a protected group. *See, e.g., Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 121–122 (2016). The Petitions negate this wide swath of

slurs and violence, WCPO Cincinnati (June 9, 2021), <https://www.wcpo.com/news/local-news/hamilton-county/muslim-advocacy-group-calls-on-hamilton-county-to-prosecute-man-who-allegedly-attacked-uber-driver>.

protections with provisions that would only protect the groups identified under Chapter 151B from discrimination in hiring and firing. *See, e.g.*, 21-11, § 10(e).

Among other things, BIPOC Drivers have to grapple with implicit bias from their customers, which may lead to lower ratings that in turn may lead to lower wages and even termination. A class-action lawsuit filed against Uber alleged that the company’s system of evaluating, and terminating, Drivers is influenced by passenger racial and ethnic bias.⁵¹ The suspicion that implicit bias against BIPOC Drivers leads to lower ratings is shared elsewhere in both professional research⁵² and anecdotal evidence—as one Black female Lyft Driver reported: “There is no question in my mind that passenger animus has infected the ratings I received on the app.”⁵³ BIPOC Drivers also have to contend with the serious concerns that the code governing Network Companies’ operating may be threaded with racial bias, a phenomenon

⁵¹ The case was dismissed with permission to file a new complaint pleading disparate impact claims. Dan Papsuncun and Ervin Mulvaney, *Uber Driver’s Ratings Bias Class Action Dismissed by Judge*, Bloomberg News (Aug. 2, 2021), <https://news.bloomberglaw.com/social-justice/uber-drivers-ratings-race-bias-class-action-dismissed-by-judge>.

⁵² *See, e.g.*, Alex Rosenblat et al., *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, Data & Society (Oct. 2016), https://datasociety.net/pubs/ia/Discriminating_Tastes_Customer_Ratings_as_Vehicles_for_Bias.pdf.

⁵³ Evan Symon, *Class Action Lawsuit Filed Against Uber in San Francisco Over Discrimination Claims*, California Globe (Oct. 26, 2020), <https://californiaglobe.com/articles/class-action-lawsuit-filed-against-uber-in-san-francisco-over-discrimination-claims/>.

called algorithmic discrimination.⁵⁴ For instance, Uber once responded to complaints by workers regarding sudden and seemingly random drops in numbers of delivery assignments by noting that it does not have manual control over assignments and instead is at the mercy of its algorithm to assign out work.⁵⁵ The Petitions would leave Drivers without recourse to remedy such systemic discrimination.

3. Retaliation and Other Procedural Safeguards

Chapter 151B further empowers workers to bring claims under the statute and provides additional procedural safeguards. For example, Chapter 151B prohibits retaliation against an employee for opposing any employer’s practices that violate Chapter 151B or because the employee filed a complaint, testified, or assisted in any proceeding. *See* G. L. c. 151B, § 4(4). Chapter 151B also makes it unlawful for “any person to coerce, intimidate, threaten, or interfere with another person in the exercise

⁵⁴ *See, e.g.,* Yeshimabeit Milner and Amy Traub, *Data Capitalism + Algorithmic Racism*, Data for Black Lives and Demos, https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf (“The entire work experience of people working for digital platform companies like Uber, TaskRabbit, and Instacart—from task allocation to performance ratings, to pay and wage setting—is governed automatically by means of digital surveillance and data extraction.”).

⁵⁵ Frank Chung, ‘40 per cent drop overnight’: UberEats bicycle riders say algorithm change preferences motorbikes and cars, News.com.au (June 29, 2020), <https://www.news.com.au/finance/work/at-work/40-per-cent-drop-overnight-ubereats-bicycle-riders-say-algorithm-change-preferences-motorbikes-and-cars/news-story/ef3d3a0bc8ee9a7374616b5d2c4a67eb>.

or enjoyment of any right granted or protected by this chapter” or assisting another person in doing so. G. L. c. 151B, § 4(4A).⁵⁶ In contrast, the Petitions do not include any protections for Drivers from retaliation by the Network Companies, even if the Network Companies violate the Petition’s rudimentary anti-discrimination language included in 21-11, §10(e). These protections are essential to Drivers, as many have reported retaliation by Network Companies for seeking better working conditions, including increased wages and protections from harassment. For example, three different Uber Drivers who each spoke to the press, testified before local governments, and participated in labor organizing in support of better worker conditions all reported being suspended after their activism.⁵⁷

4. The Role of the MCAD

Recognizing that legal protections are only as good as their potential for enforcement, the Massachusetts Legislature created the MCAD and placed it at the

⁵⁶ This section has been interpreted to allow for disparate impact claims as well as part of this Court’s liberal construction of the remedies available under Chapter 151B,. *Lopez v. Commonwealth*, 463 Mass. 696, 711 (2012).

⁵⁷ See, e.g., Heidi Groover, *Did Uber Shut a Seattle Driver Out of Its System Because He Spoke In Favor of Unionizing?*, *The Stranger* (Sept. 1, 2015), <https://www.thestranger.com/blogs/slog/2015/09/01/22794150/did-uber-shut-a-seattle-driver-out-of-its-system-because-he-spoke-in-favor-of-unionizing>; *Uber driver says he was fired after being in protest photo*, *Honolulu Star Advertiser* (Dec. 11, 2019), <https://www.staradvertiser.com/2019/12/11/breaking-news/uber-driver-says-he-was-fired-after-being-in-protest-photo/>; and Paul Zilly, *Uber Driver Wins Reinstatement, Credits Community, Teamsters*, *Teamsters* 117 (Feb. 25, 2016), https://www.teamsters117.org/seattle_uber_driver_wins_reinstatement.

center of Chapter 151B. These Petitions eliminate the MCAD’s role entirely for Drivers. As recognized by this Court, “the primary purpose of an administrative proceeding before the MCAD is to vindicate the public’s interest in reducing discrimination in the workplace by deterring, and punishing, instances of discrimination by employers against employees.” *Stonehill Coll. v. Massachusetts Comm’n Against Discrimination*, 441 Mass. 549, 563 (2004); *see also Cuddy v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 536 (2001) (recognizing “the MCAD [is] to act forcefully to implement the statute in order to eliminate discrimination at root level”). The MCAD enjoys wide authority to initiate proceedings on its own, to engage in rulemaking, offer guidance and interpretations, and to investigate claims brought to its attention. *See, e.g., Gasior v. Massachusetts Gen. Hosp.*, 446 Mass. 645, 653–654 (2006) (MCAD’s authority stands as “part of a scheme to vindicate a broader public interest in eradicating systemic discrimination”). Notably, the MCAD can pursue investigations even when an individual worker has signed an arbitration agreement with their employer. *See Joule, Inc. v. Simmons*, 459 Mass. 88, 95 (2011). Under the Petitions, the MCAD will have none of these powers with respect to Drivers, even though such engagement and involvement by the Commission is needed as Network Companies repeatedly force Drivers out of court and into private

arbitration.⁵⁸ Claimants are rarely successful in forced arbitration, with one study demonstrating that from 2016-2020 the average win rate for claimants before the nation's two largest arbitration providers was only 5.3%.⁵⁹ By denying Drivers access to the MCAD, and curtailing the MCAD's role, the Petitions further minimize any meaningful protection from discrimination.

All told, the Petitions reflect a foundational shift in the scope and extent of anti-discrimination protections for Drivers. Such a change stands in stark contrast to this Court's understanding of Chapter 151B as a remedial, expanding, and evolving law. Under these circumstances, a summary of the *measure* demands more context. Otherwise, voters will fundamentally misunderstand the Petitions.

⁵⁸ See, e.g., Kathleen Dailey, *Lyft Drivers Lose Arbitration Appeal in California Sick Pay Suit*, Bloomberg Law (Feb. 16, 2022), <https://news.bloomberglaw.com/daily-labor-report/lyft-drivers-lose-arbitration-appeal-in-california-sick-pay-suit>; Barbara Grzincic, *Uber drivers must arbitrate Mass. misclassification claims – 9th Circuit*, Reuters (Aug. 2, 2021), <https://www.reuters.com/legal/transactional/uber-drivers-must-arbitrate-mass-misclassification-claims-9th-circuit-2021-08-03/>.

⁵⁹ *Forced Arbitration in a Pandemic: Corporations Double Down*, American Association for Justice, (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

CONCLUSION

For all of the foregoing reasons, Plaintiffs'/Appellants' petition should be allowed and the Petitions should be set aside.

Respectfully submitted,

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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 7,462 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 13, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, I filed this brief electronically through the Supreme Judicial Court's e-filing system and that all counsel of record are shown as having received electronic notice.

Dated: April 13, 2022

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APPENDIX A – LIST OF AMICI ORGANIZATIONS

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

The **American Civil Liberties Union of Massachusetts, Inc.** (ACLUM), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to defending the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Consistent with this mission, ACLUM participates in amicus in matters involving racial and economic justice.

Chicago Gig Alliance is a project of the People’s Lobby started in 2019 with the goal of organizing workers in the gig economy to win better pay, worker protections, and treatment from companies like Uber and Lyft. The People’s Lobby is a membership-driven organization of people across the Chicago region that work together to build widespread support for public policies and candidates – including

people from our communities – that put racial and gender justice and the needs of people and the planet before the interests of big corporations and the very rich.

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

Lawyers for Civil Rights (LCR) fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy, in collaboration with law firms and community partners. As part of this work, LCR has long represented employees of color and immigrant employees seeking to enforce their rights under employment laws. Increasingly in recent years, many of LCR's low-wage worker clients are employed in the gig economy. LCR thus has a strong interest in ensuring that these vulnerable workers are not relegated to second-class employment status in Massachusetts.

The **Massachusetts Law Reform Institute** (MLRI) is a statewide non-profit law and poverty center. Its mission is to advance economic, social and racial justice for low-income persons and communities. For more than 50 years, MLRI has

engaged in legislative, administrative, and judicial advocacy on behalf of its clients and as part of that advocacy has participated as amicus curiae in numerous appellate cases concerning employment issues. MLRI has a strong interest in ensuring that the extensive worker protections now codified in state law not be weakened by means of a deceptive initiative petition supported by transportation network companies that would nullify many of those protections while purporting to advance the interests of the persons of color, immigrants and other historically underserved groups who are disproportionately represented among the workers at these companies.

The **New England Area Conference** is an Area Conference of the National Association For The Advancement Of Colored People (NAACP). The NAACP is the oldest, largest and arguably the most highly regarded civil rights advocacy organization in the country. The New England Area Conference (NEAC) is the coordinating and governing entity of the NAACP for Branches, College Chapters and Youth Councils in the states of Rhode Island, Massachusetts, New Hampshire, Maine, and Vermont. NEAC is also responsible for addressing state legislative and policy issues in the afore indicated states.

People's Parity Project is a nationwide network of law students and new attorneys organizing to unrig the legal system and build a justice system that values people over profits. As members of the legal profession, the People's Parity Project network believes that it has a responsibility to demystify—and dismantle—the

coercive legal tools that have stacked the system against the people. People's Parity Project is fighting for a civil legal system that works for working people, especially workers of color, women, low-wage, immigrant, disabled, and LGBTQ+ workers.

PowerSwitch Action (formerly known as Partnership for Working Families) is a national network of leading regional advocacy organizations that support innovative solutions to the nation's economic and environmental problems. Together, the network serves as a voice for working families, promoting policies that create quality jobs and thriving, healthy communities. PowerSwitch Action advances innovative campaigns, provides issue-specific resources, and shares winning strategies and lessons with allies dedicated to creating a new economy that creates opportunity for all.

The **Union of Minority Neighborhoods** ("UMN") is a Boston-based community organization founded in 2002 to increase activism, empowerment, and opportunity in communities of color. UMN provides skills and leadership training to community activists and technical assistance to community-based organizations in a number of areas, including housing, employment, CORI reform, economic development and voting rights. UMN has organized and led successful coalitions that include labor organizations, non-profits, government agencies, and businesses to address issues that directly affect communities of color, including, in particular, the problems of discrimination in employment and housing.