

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13237**

Initiated in Suffolk Superior Court, C.A. No. 2084CV01519-BLS1

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EDWARD MICHAEL VARTABEDIAN, FRED TAYLOR,
RENEELEONA DOZIER, JANICE GUZMAN, AND YAMILA
RUIZ,**

Plaintiffs-Appellees,

v.

**ATTORNEY GENERAL AND SECRETARY OF THE
COMMONWEALTH,**

Defendants-Appellants,

**CHRISTINA M. ELLIS-HIBBET, KATHERINE
MARYWITMAN, ABIGAIL KENNEDY HARRIGAN,
RICHARD M. POWER, MEGHAN J. BOROWSKI, CHAD B.
CHOKEL, DANIEL SVIRSKY, MICHAEL STRICKMAN,
MARCUS ALAN COLE, AND JAMES WILLIAM ISAAC HILLS,**

Intervenors.

**BRIEF OF *AMICI CURIAE* APP-BASED DRIVERS
JON PAUL PRUNIER, SHEPARD COLLINS, RACHEL
BROWN, EVER BARRERA, AND OCTAVIO MEJIA-SUAREZ**

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April 13, 2022

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae Jon Paul Prunier, Shepard Collins, Rachel Brown, Ever Barrera, and Octavio Mejia-Suarez are “app-based drivers” under the proposed initiatives challenged here. They have been using apps like Uber, Lyft, Instacart, and DoorDash to find work transporting passengers and delivering food.

Their independence is central to their work. App-based drivers run their own small businesses, often (though not always) on their own. They choose to work as independent contractors because they need freedom to work whenever they want, accept or decline any ride or delivery request, and stop work at any point—even to leave for months or years at a time, only to return later. Many drivers attend university and are looking to make some extra money when they have time, but how much time they have varies immensely. For example, they may not drive at all when studying for finals but want to work as much as possible over summer break. Others care for loved ones, and need to be able to stop work at a moment’s notice. Still others are semi-retired and choose app-based work to meet people and explore their

¹ No party or counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel contributed money to fund this brief’s preparation or submission. Neither *amici curiae* nor their counsel represent or have represented one of the parties to the present appeal in another proceeding involving similar issues, nor were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal. See Mass. R. App. P. 17(c)(5).

towns. And some love the opportunity to be their own bosses, run a business, and make as much money as their own time, effort, and skill can earn them.

Yet app-based drivers also deserve economic security. The proposed initiatives would guarantee them an earnings *floor* of 20% more than minimum wage, plus mileage—but still allow them to earn much more than that. Drivers need health care, without working 30+ hours for a boss every week. The initiatives give them health benefits, which belong to them—and do not bind them to use any one app. Drivers require insurance in case of on-the-job accidents, which the initiatives also provide. And they would get all of this *without losing the independence that led them to app-based work in the first place.*

The proposed initiatives represent a “third way”—neither the loyalty and rigidity that come with being someone’s employee, nor a complete absence of regulation. It is a comprehensive reform, a new model that drivers have been demanding for years. California voters approved a similar reform by an overwhelming margin in 2020. Massachusetts voters deserve the chance to do the same.

INTRODUCTION

Plaintiffs argue that the People lack the power to comprehensively reform the relationship between app-based drivers and network companies. As Plaintiffs see it, because existing law bundles certain regulations together under the umbrella of

employment—such as minimum wage, health benefits, respondeat superior liability, a duty of loyalty to one’s employer, and family and medical leave—these features simply cannot be a part of an independent contractor relationship. But this package is not set in stone. For years, drivers and industry commentators have called for a new model—a “third way” that combines elements of both independent work (such as freedom and flexibility) and employment (such as minimum earnings, health benefits, and accident insurance).

This bundle of rights and responsibilities is somewhat different than existing employment law. But it is an entire coherent model—one adopted, in similar forms, by other states and countries. Plaintiffs cannot deprive the voters of their ability to enact such reform by slicing and dicing the model into individual components and then claiming that each pillar is unrelated to the others. The law focuses not only on “what each segment provides separately,” but allows those pieces to add to a “coherent” whole. *Hensley v. Att’y Gen.*, 474 Mass. 651, 658 (2016). If accepted, Plaintiffs’ arguments would strike a blow to both the sovereignty of the electorate and the interests of drivers who fervently support the proposed initiatives.

ARGUMENT

I. App-Based Drivers Overwhelmingly Reject Rigid Employment Models

The gig economy²—of which app-based platforms are a part—has become a significant part of the American economy. It includes a variety of highly skilled services such as “computer programming” and “business consulting,” as well as other services like “dog walking,” “ridesharing,” “selling goods,” and “other activities.”³ In 2019, 57 million Americans—roughly one out of every six people in the country—performed independent freelance work, contributing nearly one trillion dollars of income to the U.S. economy.⁴

Freelancing gives workers the unprecedented autonomy to decide when, where, and for how long they want to work on any given day, to make their own schedules, and to take an hour, a day, a week, or even months off if they desire.

² Although some people colloquially use “gig economy” as limited to those who use a digital “platform” like a “ridesharing” or “handyman app ... to get work,” other “freelance and independent workers consider themselves part of the gig economy.” See, e.g., Katy Macek, *The Gig Economy And What’s In It For Women*, Brava Magazine (Sept. 5, 2019), <https://bravamagazine.com/gig-economy-and-women/>.

³ Press Release, *Sixth annual “Freelancing in America” study finds that more people than ever see freelancing as a long-term career path*, Upwork & Freelancers Union (Oct. 3, 2019), <https://www.upwork.com/press/2019/10/03/freelancing-in-america-2019/>.

⁴ *Id.*

App-based drivers can use any combination of platforms they choose, work for themselves, and stop work whenever they want.

Drivers appreciate the opportunity to choose which app they will use to find work. Some compare how much they can earn from the opportunities available at each app at a given time and choose the highest price—a common practice called “multi-apping.” Others pick offers that allow them to drive them back toward their house. Another driver might prefer to use a delivery app at night because the driver feels safer without a passenger in the car, but that same driver might use a ridesharing app during the day because the driver can pick up more work during a short period of time. Still others simply appreciate the opportunity to try various apps for a limited time to determine which they like best, and then use their favorite consistently. This flexibility cherished by drivers would be impracticable, if not impossible, if one must secure employment with a platform before one can “test-drive” the app and evaluate its relative merits. One does not typically get to try on a job for size.

Freelancing also allows people to “turn to gig work to deal with financial hardships” or “to meet basic needs ... to pay bills.”⁵ In addition, the gig economy

⁵ Gig Economy Data Hub, *What are the experiences of gig workers?*, <https://www.gigeconomydata.org/basics/what-are-experiences-gig-workers> (last visited April 5, 2022).

offers workers an attractive way to earn supplemental income without coming out of retirement or leaving school. For example, approximately 80 percent of all rideshare drivers work less than 20 hours per week, and approximately 70 percent work less than 20 weeks per year.⁶

Freelance work is also important to caregivers, as it allows flexibility to earn money while accommodating child- or elder-care. According to a 2018 survey of women who work in the gig economy, more than half of those with children under the age of five said they chose gig work to increase the amount of time to spend with their children.⁷ Gig economy services have also proved to be a valuable resource empowering older adults to achieve personal independence, whether by working beyond retirement age for supplemental income or by using gig economy services (such as rideshares or delivery services) to address mobility challenges.

⁶ David Lewin, William Hamm, and Mia Kim, *Analysis of Driver Job Losses if Gig Economy Companies Must Re-Classify Drivers as Employees Rather than Independent Contractors*, Report of the Berkeley Research Group (BRG), at 1 (May 14, 2020), available at https://media.thinkbrg.com/wp-content/uploads/2020/06/01111225/BRG-REPORT-JOB-LOSS-SUMMARY-MAY-14-2020_FINAL_website.pdf (last visited April 5, 2022).

⁷ See Fran Maier, Lynn Perkins and Anna Zomosa, *Can't Stop, Won't Stop Her Side Hustle: Women in the Gig Economy 2018*, at 10 (Sept. 5, 2018), https://blog.urbansitter.com/wp-content/uploads/2018/09/Cant-Stop-Wont-Stop-Her-Side-Hustle_-Women-in-the-Gig-Economy-2018.pdf.

Perhaps unsurprisingly, 84 percent of freelance workers report that they are “living their preferred lifestyle,” compared to 54 percent of traditional employees.⁸ Similarly, 75 percent of freelancers say they prefer freelancing over a full-time job as a traditional employee.⁹ These results are consistent nationwide. “The best available evidence suggests that independent contractors prefer alternative work arrangements over traditional ones.”¹⁰

Drivers stand to lose all of this if they are forced into employment relationships with the apps they use. The consequences are hard to overstate. A recent analysis finds that well over half of drivers’ work opportunities would evaporate if they could not use apps as independent contractors in Massachusetts.¹¹

⁸ See Damjjan Jugovic Spajic, *The Future of Employment—30 Telling Gig Economy Statistics*, SmallBizGenius (Jan. 11, 2021), <https://www.smallbizgenius.net/by-the-numbers/gig-economy-statistics/#gref>.

⁹ Philip Garrity, *We Polled 573 Freelancers About AB5. They’re Not Happy*, The Freelance Creative, (Jan. 30, 2020), <https://contently.net/2020/01/30/resources/we-polled-573-freelancers-about-ab5-theyre-not-happy/>.

¹⁰ Tanner Osman, *How Many App-Based Jobs Would Be Lost by Converting Rideshare and Food Delivery Drivers from Independent Contractors to Employees in the Commonwealth of Massachusetts?*, Beacon Economics, at 3 (Feb. 2020), https://yesformassdrivers.org/wp-content/uploads/2022/03/Massachusetts_Drivers_Design-Final.pdf.

¹¹ *Id.* at 6.

II. Drivers Have Long Clamored for a “Third Way” Approach to the Relationship Between App-Based Drivers and Network Companies

Traditional employment models are fundamentally incompatible with workers who use new digital platforms. Whereas gig workers prize independence and autonomy, the employment model thrives on rigid structures, an emphasis on shift work, and strong employer control. Bosses simply do not let their workers work if and when they want. But this freedom is central to app-based workers, who can schedule work around their lives and not the other way around.

For too long, drivers have been forced to choose between independence and security. Many have sought to fill this gap with a new comprehensive approach to structuring work. Nothing should stop workers from retaining their freedom while also receiving some of the benefits traditionally associated with employment, such as health benefits, minimum earnings guarantees, and accident insurance.

Commentators have labeled this combination of independence and economic security a “third way” to guarantee app-based drivers the best elements of both worlds—many of the benefits traditionally available to employees, and the autonomy of app-based work.¹² The “third way” is not a cheap slogan or marketing

¹² See, e.g., Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The “Independent Worker,”* The Hamilton Project, at p. 2 (Dec. 2015) (proposing a new classification called “independent worker” where workers in the gig economy “would qualify for many, although not all, of the benefits and protections that employees receive” but still enjoy “the

rebrand. This idea came from drivers and those advocating for their interests. And it is a coherent reform of app-based work, not an eclectic medley of unrelated provisions.

The proponents who put forth the ballot initiatives were not breaking new ground. In California, a host of diverse organizations joined network companies and app-based drivers in advocating for an initiative, Proposition 22, on the 2020 ballot.¹³ This coalition spanned the political spectrum, from the Chamber of Commerce and the California Farm Bureau Federation to the National Diversity Coalition and Mothers Against Drunk Driving. And the coalition included over 120,000 app-based drivers who signed up to actively support the campaign. Their efforts paid off when Californians overwhelmingly approved Proposition 22. The

ability to choose when to work, and whether to work at all”); Andre Andoyan, *Independent Contractor or Employee: I’m Uber Confused! Why California Should Create an Exception for Uber Drivers and the “On-Demand Economy”* 47 Golden Gate Univ. L. Rev. 153, 168 (2017) (advocating for states to adopt “a hybrid classification between the employee and independent contractor laws” for app-based workers); Alex Chriss, *Real Solutions For On-Demand Worker Classification*, Tech Crunch (Jan. 2, 2016), <https://techcrunch.com/2016/01/02/real-solutions-for-on-demand-worker-classification/> (“It’s not black or white – employee or contractor – it’s a rainbow of options.”).

¹³ See, e.g., Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, NY Times (Aug. 10, 2020) (“There has to be a ‘third way’ for gig workers.”).

initiative garnered nearly 10 million “yes” votes, won in 50 of 58 counties, and passed by a 17% margin.

The initiatives proposed here share many of the same features that made Proposition 22 so popular among drivers. They comprehensively reform the relationship between app-based drivers and network companies, guaranteeing the flexibility and independence drivers have long enjoyed *and* the protections and benefits they have long demanded.¹⁴ Drivers and commentators have long advocated for pairing worker independence with the minimum guarantees that Plaintiffs paternalistically cast as “simple ‘sweeteners’ designed to induce the electorate into voting for Drivers to be classified as independent contractors.” Pls. Br. 26. Drivers aren’t dupes, and the electorate isn’t either. The People have the power to enact the comprehensive reform embodied in the proposed initiatives.

In response, Plaintiffs make a puzzling argument. They say that independent-contractor status is *unrelated* to minimum benefits, respondeat superior, and family and medical leave because *current* law imposes one regime for independent contractors and another for employees. Pls. Br. 31–32. But the whole point of an initiative is to let the People *change* the law. And an initiative need not change all

¹⁴ Other countries likewise recognize more categories than just “employee” or “not employee” (i.e., independent contractor). *See, e.g.,* <https://www.gov.uk/employment-status> (listing the United Kingdom’s various employment classifications).

to change one. Some laws work incrementally, others comprehensively. Article 48 expresses no preference for either approach, so long as the provisions are “operationally related.” *Anderson v. Attorney General*, 479 Mass. 780, 793 (2018) (related subjects “need not be mutually dependent”).

Consider the drivers’ perspective, which makes clear how the proposed initiatives represent unified reform. Many drivers do not want to tolerate the rigidity of employment, forgo their entrepreneurial acumen, or submit to bosses’ dictates. Many of those same drivers want guarantees of a minimum wage, health benefits, and job accident insurance. Current law forces drivers to take one path or the other. But not anymore, if the proposed initiatives successfully open up a “third way.” Under this approach, drivers can use whichever apps they want, without worrying that they won’t get benefits unless they work for one app full-time. An extreme dichotomy between employees and independent contractors is not a law of nature, unalterable by the political process. A worker relationship is a bundle of rights, benefits, and obligations; drivers want to take the good and leave the bad from the traditional employment relationship. No one could say with a straight face that these issues “have only a marginal relationship to one another” for the drivers whose independence and economic security hang in the balance. *Abdow v. Attorney General*, 468 Mass. 478, 499 (2014). And this new independent status is “logically

related” to (indeed, intertwined with) the question whether app-based drivers can be considered employees or agents of network companies. *Id.* at 504.

This marriage of independence and economic security is *one* subject, *one* policy, *one* comprehensive reform. Undoubtedly, the provisions of the proposed initiatives are “related to or mutually dependent on each other.” *Weiner v. Attorney General*, 484 Mass. 687, 693 (2020). The People of the Commonwealth should get to decide whether to exercise their “prerogative to initiate and adopt laws.” *Abdow*, 468 Mass. at 487. That is a policy decision for them, not for the courts.

CONCLUSION

The People have the power to enact comprehensive reform. This Court should affirm the Attorney General’s certification of the Petitions as compliant with Article 48 of the Constitution.

Respectfully submitted,

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Certificate of Compliance

I, Michael Holecek, certify that the foregoing Brief of *Amici Curiae* Jon Paul Prunier, Shepard Collins, Rachel Brown, Ever Barrera, and Octavio Mejia-Suarez in Support of Defendants-Appellants complies with the requirements of Massachusetts Rules of Appellate Procedure 17 and 20. The Brief is in 14-point Times New Roman Font and consists of 2,616 non-excluded words. The Brief was created using Microsoft Word 2019.



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Certificate of Service

I, Michael Holecek, certify that on April 13, 2022, a true and correct copy of the foregoing Brief of *Amici Curiae* Jon Paul Prunier, Shepard Collins, Rachel Brown, Ever Barrera, and Octavio Mejia-Suarez in Support of Defendants-Appellants was electronically filed in *El Koussa v. Attorney General*, No. SJC-13237, with the Clerk of Court for the Massachusetts Supreme Judicial Court, and electronically served on the following counsel of record:

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