

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MARTIN EL KOUSSA, MELODY CUNNINGHAM, JULIET SCHOR,
COLTON ANDREWS, DORCAS BETHSAIDA GRIFFITH, ALCIBIADES
VEGA, JR.,

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

Plaintiffs

V.

ATTORNEY GENERAL AND SECRETARY OF STATE OF THE
COMMONWEALTH OF MASSACHUSETTS

Defendants/Appellees

And Christina M. Ellis-Hibbert, et al., Interveners
On Reservation and Report from the Supreme Judicial
Court for Suffolk County

CIVIL ACTION NO. SJ-2022 13237

Brief for *Amicus Curiae*
Massachusetts Budget and Policy Center

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INTERESTS OF THE *AMICUS CURIAE*

The initiative petition that is the subject of this litigation proposes to reclassify a broad group of workers in the app-based driver and delivery businesses as independent contractors, rather than employees. This change will dramatically reduce the employment-related benefits available to these workers and separately will erode the Commonwealth's social safety net - which represents a compact between the Commonwealth, its taxpayers, and its citizens in need. This amicus brief argues that these wide-ranging changes in existing law will have a broad range of severe negative impacts both on the affected workers and on the Commonwealth's system of employment-related safety-net programs.

The Massachusetts Budget and Policy Center is a nonpartisan nonprofit organization that has conducted research and analysis for three decades with the aim of improving economic and budget policies in the Commonwealth.

Amicus's interest in this matter is for

sound policies that support a thriving, high quality of life for individuals and families residing in Massachusetts. Towards that ends, we are concerned that exempting workers in the so-called "gig economy" would compromise protection under the Commonwealth's social insurance policies. Evidence strongly suggests that if these workers are denied the full support provided to employees, then they will suffer hardship and displacement, which will place additional burdens on existing social safety net programs. These fiscal strains are likely to place additional strain on the Commonwealth's budget, and indirectly to require Massachusetts taxpayers to subsidize the increased public costs.

ARGUMENT

- I. IN MASSACHUSETTS, STATE ADMINISTERED FORMS OF SOCIAL INSURANCE, WHICH PROTECT AGAINST ECONOMIC INSECURITY CAUSED BY ILLNESS, INJURY AND TEMPORARY UNEMPLOYMENT, ARE FUNDED BY EMPLOYER CONTRIBUTIONS FOR HOURS WORKED BY THEIR EMPLOYEES; THE COMMONWEALTH'S SOCIAL INSURANCE PROGRAMS ARE COMPLEMENTED BY ROBUST STATUTES MANDATING PAID SICK LEAVE, DOMESTIC VIOLENCE LEAVE AND A HOST OF OTHER BENEFITS. EXEMPTING NETWORK COMPANIES, WHO IN TURN REPRESENT A SIZEABLE AND GROWING SECTOR OF THE ECONOMY, FROM MAKING THESE CRITICAL CONTRIBUTIONS TO THE SAFETY NET AND PROTECTING THEIR WORKERS FROM HARM AND EXCLUDING THOUSANDS OF APP-BASED DRIVERS, WILL NECESSARILY INCREASE ECONOMIC AND SOCIAL INSECURITY OVER TIME.**

Social insurance programs, such as unemployment insurance and paid family and medical leave, provide a bulwark against unforeseen unemployment, injury and illness. While these programs are not necessarily dependent on employment with a specific employer; funding, benefit levels, and eligibility are drawn from an employees' past work history in the Commonwealth. Social insurance programs that insure against income loss also benefit the whole economy because the programs act countercyclically to the business cycle. When a recession hits and workers lose employment income, the payments from these programs allow workers to continue spending, ensuring that retail businesses in the community don't go into a tailspin with each income loss contributing to further economic decline.

Additionally, under Massachusetts' comprehensive scheme of laws covering employment, workers are provided a host of employment related benefits including paid sick leave, job protected leave related to domestic violence, workers compensation, and health

insurance.¹ Employment-based protections that insure against risks also protect employees' families and communities.

II. THE DOWNSIDE OF TYING BENEFITS AND PROTECTIONS TO THE EMPLOYMENT RELATIONSHIP IS THAT WORKERS WHO ARE NOT RECOGNIZED AS "EMPLOYEES" ARE CUT OFF FROM SUCH BENEFITS. REMOVING WORKERS FROM EMPLOYMENT STATUS DEPRIVES INDIVIDUAL WORKERS AND THEIR FAMILIES FROM IMPORTANT SOCIAL PROTECTIONS.

By re-classifying all app-based drivers and delivery workers operating in the Commonwealth as independent contractors rather than employees for all purposes under Massachusetts law, the ballot question would remove tens of thousands of workers² from the protections afforded by employment status. In particular:

a) Lower wages: Hourly income received by app-based workers pursuant to the initiative would not meet current minimum wage standards. Unlike employees who are paid for their working time, app-

¹ Fully 54 percent of Americans receive healthcare coverage through their employers. Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. (2004), note 10 at page 6. In 2018, 71 percent of Massachusetts employers offered health insurance to their employees. Center for Health Information and Analysis, "Massachusetts Employer Survey" (2019), <https://www.chiamass.gov/massachusetts-employer-survey>.

² Office of the State Auditor, "Audit of the Department of Public Utilities" (November 23, 2021), available at <https://www.mass.gov/audit/audit-of-the-department-of-public-utilities>.

based workers' wages would only compensate them for time they are "engaged." This arrangement would be akin to not paying nurses for the time they are not directly interacting with patients. Independent analysis (not commissioned by the gig-industry or organized labor organizations) of the projected earnings for Uber and Lyft workers, depending on part of full-time work, would be between \$4.82 to \$6.74 per hour when considering various loopholes, unpaid time, and unreimbursed expenses.³ This is a fraction of the \$15 hourly basic minimum wage required by law in Massachusetts as of January 1, 2023. See G.L. c. 151 § 1B. The impact of this inferior earning structure will be lower incomes. It can also mean longer hours to make up for lost income, which may have indirect but profound impact over time. Longer hours due to reduced earnings may mean less care and guidance for children and other dependents at home. Longer hours may also mean that workers who are students can not complete their studies to achieve upward mobility. Longer hours and greater stress may also make it more likely that workers become injured, sick or that they damage their vehicles - misfortunes that can be covered for employees, but not for independent contractors.

b) Inferior or nonexistent health insurance coverage: The ballot question proposes a health care subsidy for some app-based workers in line with the arrangement created by Proposition 22 in

³Ken Jacobs and Michael Reich, "Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour" Berkeley Labor Center (September 2021), available at <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/> Unlike this independent study, a study commissioned by the ballot committee calculated higher average wages. See State House News, "Committee Touts Study on App-Based Driver Wages" SHNS Campaign Tracker, March 28, 2022, available with paywall at <https://www.statehousenews.com/news/2022576>; and Mass Insight, "Hourly Earnings of App-Based Rideshare Drivers and Food Delivery Drivers in Massachusetts" , available at <https://www.statehousenews.com/content/docs/2022/03-24appdriverresearch.pdf>.

California. According to a University of California study, only about 10 percent of Uber and Lyft drivers in California receive the health care subsidy.⁴ A survey of 531 California gig drivers showed they were more likely to rely on state provided insurance or were uninsured, especially among Latino drivers.⁵ Terri Gerstein, Director of the State and Local Enforcement Project at the Harvard Labor and Worklife Program, explained the inadequacy of the gig-companies' healthcare offering in California as follows, "In sum, workers will get a subsidy based on two-thirds of work time, that covers at best 82% of 100% of California's lowest-tier plan. They'll get that money long after their health insurance premiums are due, and only if they're already covered by health insurance, but it has to be exactly the right kind of health insurance."⁶

c) Other reduced social supports: In addition to the limited health care subsidy, under the ballot question workers would receive Occupational Accident Insurance from the companies, which is inferior to workers' compensation for comparable workers. Likewise, workers would receive fewer sick days than an employee would be entitled to. Separately, the ballot question would change workers' relationship to the Commonwealth and its entitlement programs by depriving workers access to unemployment insurance, emergency leave,

⁴ Ken Jacobs and Michael Reich, "Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage: Drivers Could Earn as Little as \$4.82 an Hour" Berkeley Labor Center (September 2021), Appendix, available at <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/>.

⁵ National Equity Atlas, "Most California Rideshare Drivers Are Not Receiving Health-Care Benefits Under Proposition 22," (August 19, 2021) available at <https://nationalequityatlas.org/prop22>

⁶ Terri Gerstein, "Why Coloradans should be skeptical about gig companies' promises" Colorado Sun, January 21, 2021, available at <https://coloradosun.com/2021/01/21/gig-workers-opinion/>

parental leave, or disability payments.

Gig companies should not be relied upon to administer an adequate parallel system of benefits for gig workers. The app-based companies such as Uber and Lyft have a direct fiduciary obligation to their shareholders against diverting more of their resources- especially if they view their workers as merely arms-length contractors rather than employees. They are likely to seek ways to provide the least possible resources to beneficiaries as possible.

The track record of transportation network companies (TNC's) such as Uber and Lyft does not inspire confidence in how well they would implement their own independent benefit systems for workers if they are not utilizing the employee benefit system. Auditor Suzanne Bump's review of Transportation Network Company Division of the Department of Public Utilities in 2021 found that rideshare companies were not necessarily "ensuring the safety of their riders by conducting background checks, imposing sanctions against drivers with suspended or revoked permissions, and investigating and resolving complaints."⁷ The

⁷Office of the State Auditor, "Audit Finds Lapses of Department of Public Utilities' Oversight of

companies' significant shortfalls were further obscured because they passed on only a small fraction of the complaint reports required by law to the Department of Public Utilities.

III. THE SUBSTANDARD WAGES AND BENEFITS PERMITTED BY THE BALLOT QUESTION WILL PLACE STRAINS ON OTHER COMMONWEALTH PUBLIC PROGRAMS AND ULTIMATELY ON OTHER EMPLOYERS AND TAXPAYERS.

The shortcomings of the gig companies' compensation arrangements and the inferior social safety net provided to these workers under the initiative proposal would transfer greater burden onto the Commonwealth's social welfare system. By depriving gig-workers of important protections from life's risks, the misfortunes faced by gig workers would ultimately also place a burden on other public programs, the businesses that compete with app-based companies, and the taxpayers that support these programs. This is likely to take a variety of forms.

It has long been recognized that the misclassification of workers as independent contractors is costly to state revenues. As the Massachusetts Attorney General observed in 2008,

Transportation Network Companies," Press release, November 23, 2021, available at <https://www.mass.gov/news/audit-finds-lapses-in-department-of-public-utilities-oversight-of-transportation-network-companies>.

"entities that misclassify individuals deprive the Commonwealth of tax revenue that the state would otherwise receive from payroll taxes."⁸ Likewise, gig companies will not contribute to employment-based social insurance programs. The amounts that go unpaid as a result to public funds are very significant.

a) Studies of companies' misclassification of employees as independent contractor enable businesses to pocket as much as thirty percent of payroll costs.⁹

b) A University of Massachusetts study found that misclassification of employees as contractors just in the Massachusetts residential construction industry in 2019 alone led to a \$24.5 million to \$40.6 million shortfall in the state's Unemployment Insurance trust fund.¹⁰

c) An academic study from the University of California estimated that if Uber and Lyft had contributed to the state's unemployment insurance fund as the law at the time mandated, they would

⁸Advisory 2008/1, Attorney General's fair labor and business division, at 1, <https://www.mass.gov/doc/an-advisory-from-the-attorney-generals-fair-labor-division-on-mgl-c-149-s-148b-20081/download>.

⁹Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project (Sept. 2017), <https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf>.

¹⁰University of Massachusetts Amherst Labor Center, "The Social and Economic Costs of Illegal Misclassification, Wage Theft and Tax Fraud in Residential Construction in Massachusetts," Working Paper Series, June 28, 2021, Available at <https://www.umass.edu/lrrc/sites/default/files/Juravich%20Wage%20Theft%206%2028%2021.pdf>.

have paid \$413 million to the unemployment fund between 2014 and 2019.¹¹

d) In 2019, New Jersey fined Uber \$649 million for unpaid unemployment and disability insurance contributions for the period between 2014 to 2018.¹²

e) A national study in 2010 estimated that employer misclassification of their workers shifts \$831 million in unemployment insurance taxes and \$2.5 billion in workers' compensation premiums to other law-abiding businesses annually.¹³

Drivers and deliverers for app-based companies who are unable to receive a living wage will be more likely to turn to the Supplemental Nutrition Assistance Program ("food stamps"), programs for the homeless, soup kitchens, and other publicly- and non-profit- supported safety nets.

In addition, exemptions from minimum wage law will leave app-based workers less able to build

¹¹ Ken Jacobs and Michael Reich, "What Would Uber and Lyft Owe to the State Unemployment Fund," Berkeley Labor Center, available at <https://laborcenter.berkeley.edu/pdf/2020/What-would-Uber-and-Lyft-owe-to-the-State-Unemployment-Insurance-Fund.pdf>

¹² New York Times, "Uber Fined \$649 million for saying drivers aren't employees," November 19, 2019 available at <https://www.nytimes.com/2019/11/14/nyregion/uber-new-jersey-drivers.html>

¹³ Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, Dep't of Econ., Univ. of Mo., Kan. City 5-6 (Sept. 12, 2010).

savings that would help them weather misfortune through private savings. These workers will be more vulnerable to economic downturns and in greater need of emergency public support in future recessions, pandemics, or natural disasters. Insofar as funding must be increased to help these programs keep up with increased needs, Massachusetts taxpayers will foot some of the bill from excluding gig workers from employment protections.

Gig workers who are inadequately provided for by app-based social supports will inevitably seek other means of public support. The public resources used to sustain that additional support will constitute a form of public subsidy for gig-companies through their exemption from providing robust benefits under employment law. In doing so, the Commonwealth would also establish an unlevel playing field between companies, creating an artificial competitive advantage for companies that assign work tasks through a phone app-based work.

Over time, this corrosive impact and cross-subsidization will not be limited to transportation and delivery companies. Companies from other industries will also have a strong incentive to shift

to a model that reclassifies employees as independent contractors.¹⁴ The effective public subsidy of gig-based companies will artificially encourage more growth of app-based companies over companies whose works are classified as employees - further shifting the workforce outside of the employment relationships and further compounding the effects detailed above.

The United States Treasury Inspector General identified this pernicious pattern when employees are misclassified as independent contractor, finding that doing so "plac[es] honest employers and businesses at

¹⁴ See Babak Babali, *What is Uberization?*, TheBusinessYear (Aug. 6, 2019), available at <https://www.thebusinessyear.com/what-is-uberization-and-how-will-5g-technology-change-work/focus>. Additionally, the Virginia State Bar noted that "online legal services companies have 'Uberized' the legal services market" Virginia State Bar, *Report of the Study Committee on the Future of Law Practice*, 8 (Sept. 14, 2016), available at https://www.vsb.org/docs/FINAL_Report_of_the_Study_Committee.pdf. Only two (2) weeks ago, a proposed ballot initiative was filed in California to classify nurses, technicians, physical therapists and other medical professionals who receive work through an app or website independent contractors. Levi Sumagaysay, 'Uber for nurses?': Initiative targets healthcare for a 'gig work' law, MarketWatch (Jan. 28, 2022), available at <https://www.marketwatch.com/story/uber-for-nurses-initiative-targets-healthcare-for-a-gig-work-law-11643404860>; see CA Office of Att. Gen., *Request for Title and Summary for Proposed Initiative Statute* (Jan. 24, 2022), available at <https://oag.ca.gov/system/files/initiatives/pdfs/22-0003%20%28Health%20Care%20Workers%20%29.pdf>.

a competitive disadvantage.”¹⁵ Businesses that misclassify their employees “free ride” at the expense of other businesses, creating pressure on their competition to shed labor costs, and creating a “race to the bottom” where firms remain competitive by following suit.¹⁶

IV. THE VULNERABILITY OF GIG WORKERS WITH INADEQUATE EMPLOYMENT PROTECTIONS WAS EXPOSED BY THE COVID-19 PANDEMIC. THE FEDERAL GOVERNMENT WAS FORCED TO CREATE UNPRECEDENTED NEW PROGRAMS TO COVER DISPLACED GIG WORKERS, DESPITE THEIR LACK OF PRIOR CONTRIBUTIONS TO UNEMPLOYMENT INSURANCE. THERE IS, HOWEVER, NO ASSURANCE THAT THE FEDERAL GOVERNMENT WOULD INTERCEDE SIMILARLY IN FUTURE RECESSIONS.

The coronavirus pandemic that began in March 2020 created tremendous social dislocation for independent contract workers. Due to their large numbers, the federal government was compelled to provide extraordinary benefits at tremendous cost.¹⁷ Under the

¹⁵ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success 1* (Feb. 20, 2018), <https://www.treasury.gov/tigta/iereports/2018reports/2018IER002fr.pdf>.

¹⁶ See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, 139-41 (2017).

¹⁷ Albiston, Catherine R.; Fisk, Catherine L., “Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net,” 42 *Berkeley J. Emp. & Lab. L.* 257 (2021)

CARES Act in March 2020, Congress for the first time ever made independent contractors temporarily eligible for unemployment payments by creating a new temporary Pandemic Unemployment Assistance (PUA) program paid for by the federal government, which lasted for eighty-six weeks until it expired in March 2021. The federal government provided \$5.9 billion to Massachusetts for PUA during this period.¹⁸ Uber and Lyft reportedly advised their workforce to apply for the new federal Pandemic Unemployment Assistance benefit because they were ineligible for employment-based Unemployment Insurance.¹⁹

¹⁸U.S. Department of Labor, "Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security (CARES) Act Funding to States through April 2, 2022" available at https://oui.doleta.gov/unemploy/docs/cares_act_funding_state.html

¹⁹ See note 329 on page 309, citing Albiston, Catherine R.; Fisk, Catherine L., "Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net," 42 Berkeley J. Emp. & Lab. L. 257 (2021), citing Greg Iacurci, *Some Uber, Lyft Drivers Fear Companies Will Use Unemployment Benefits Against Them*, CNBC (May 23, 2020, 10:15 AM), <https://www.cnbc.com/2020/05/23/uber-lyft-driversfear-unemployment-benefits-will-be-used-against-them.html> [<https://perma.cc/99H8-WRV3>]; *How the CARES Act Can Help Drivers Who Are Unemployed Due to COVID-19*, LYFT (Apr. 20, 2020), <https://www.lyft.com/hub/posts/how-the-cares-act-can-help-drivers-who-are-unemployed-due-to-covid-19> [<https://perma.cc/3VLU-3N7C>].

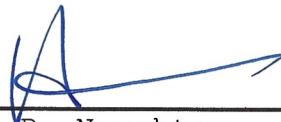
Outside the extraordinary conditions of the unprecedented pandemic, there is no reason to believe that the federal government can be relied upon to rescue gig workers in the future. In the event of serious disruption, downturn, or catastrophe, the misfortune and social dislocation of gig workers will fall to the state safety net.

CONCLUSION

For the reasons discussed above, the proposed initiative measure would make a wide range of dramatic changes to numerous dimensions of the Commonwealth's system of worker protections, which would not only damage the well-being of covered workers but would also impose serious harms on other businesses and taxpayers and on the Commonwealth's economy.

Respectfully Submitted,

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DECLARATION

Pursuant to Mass. R. App. P. 17 (c)(5), amici certify that not party's counsel authored this brief in whole or in part, no party's counsel 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 another proceeding involving similar issues or represented a party in a proceeding or legal transaction that is at issue in the present case.

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Dated: April 14, 2022

Certification of Compliance

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.

Respectfully Submitted,

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Certificate of Service

I, Harold P. Naughton, Esq., certify that on this day I caused to be served by hand an original and 7 copies of the foregoing brief with the clerk of this Court. I further certify that I caused to be served a copy of the foregoing brief on counsel for each party separately represented in this matter by electronic mail service to:

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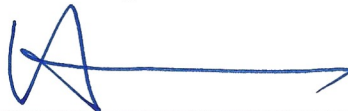
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Signed this 15th day of April, 2022.

Respectfully Submitted,

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