COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13237

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

Plaintiffs/Appellants,

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,

Defendants/Appellees,

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

Intervenors

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

BRIEF FOR *AMICUS CURIAE* MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Massachusetts Employment Lawyers Association (MELA) is an organization of lawyers who regularly represent employees in labor, employment, and civil rights disputes in Massachusetts. In recent years, MELA members have increasingly focused their efforts on combating wage and hour violations, as they have responded to a growing demand for their services in this area. MELA members have been extensively involved in litigating claims on behalf of gig economy workers who have been misclassified as independent contractors under various state employment laws, and thus deprived of their statutory right to employee protections provided under the laws of the Commonwealth.

MELA submits this brief on behalf of its members and their clients, because permitting the Petitions 21-11 and 21-12 (hereinafter "the Petitions"), to be placed on the November 2022 ballot would unfairly mislead and confuse voters on the subject of independent contractor misclassification and Massachusetts state employment laws and the Petitions are in violation of Article 48 of the Massachusetts Constitution. MELA is particularly interested in the outcome of this case, as the Court's decision could permit Petitions to be placed on the ballot that, if passed, would significantly alter multiple areas of employment law areas, and each alteration would adversely impact gig economy employees.

SUMMARY OF ARGUMENT

Proponents of the Petitions are "well-financed 'special interests'" groups, who seek to "exploit the initiative process to their own ends by packaging proposed laws in a way that would confuse the voter." Carney v. Attorney General, 447 Mass. 218, 228 (2006) (Carney). The "relatedness" requirement of Article 48 was designed to protect against such manipulation of the ballot initiative process; it requires that provisions included in a Petition be "operationally related" to each other and bound by a "common purpose". Gray v. Attorney General, 474 Mass. 638, 647-48 (2016). This requirement ensures that voters may exercise right "under art. 48 to enact a uniform public policy". Carney, 447 Mass. at 228. See pp. 14-17.

The Petitions at issue here, "A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers", are paradigmatic of the concerns that animate the relatedness requirement of Art. 48. See pp. 17-19. The Petitions' proponents, Uber, Lyft, Instacart, and Doordash, have already spent in excess of $14 million in promoting the Petitions, and are expected to spend at least $100 million in full.[1] The Petitions seek to create a statutory carve-

[1] See 95481 Flexibility and Benefits for Massachusetts Drivers, Report, Massachusetts Office of Campaign and Political Finance, available at https://www.ocpf.us/Filers?q=95481 (last accessed Apr. 12, 2022); Nik DeCosta-Klipa, *"They're going to try to do here what they did in California': A potential gig worker ballot fight is looming in Massachusetts"*, Boston.com, June 22, 2021,

out that defines these companies' drivers as independent contractors -- for the purposes of *multiple employment laws* of the Commonwealth that each have unique language, history, and purpose.

As this Court has recently recognized, "[o]ur [employment] laws have imposed differing, and not uniform, definitions of employees and independent contractors. … This **lack of uniformity** [] reflects differences in the particular laws." Ives Camargo's Case, 479 Mass. 492, 500-01 (2018) (emphasis supplied). Each different "employee" definition represents a different "allocation of costs and benefits" for stakeholders. Ives, 479 Mass. at 501. "Currently, there are at least four distinct methods used to determine employment status in the Commonwealth", id. at 500, the history and development of which are detailed in this brief. Whether a driver falls under the "employee" definition for the purposes of workers' compensation, for example, has ***no*** effect on whether the driver is entitled to the anti-discrimination protections of Chapter 151B, and vice versa. See Athol Daily News v. Board of Review of the Div. of Employment & Training, 429 Mass. 171, 177 n. 10 (2003). Indeed, following this Court's decision in Ives Camargo's Case, in which the late Justice Gants in a concurrence invited the Legislature to make the "employee" definition uniform across different legal areas,

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available at boston.com/news/local-news/2021/06/22/Massachusetts-ballot-fight-uber-lyft/.

the Legislature declined to do so, thus confirming that these are separate areas of law for which different policy purposes underlay their statutory history. See pp. 19-39.

By mandating that app-based drivers be uniformly classified as independent contractors under all the various employment law statutes (in effect repealing the application of distinct "employee" definitions to these drivers), the proposed Petitions seek to revise these disparate areas of employment law. In the place of employee protections provided to workers under these statutes, the Petitions offer watered-down, quasi-protections, such as a "Guaranteed Earnings Floor" in place of a minimum wage. The Petitions also lack comprehensive enforcement mechanisms to ensure these quasi-protections are delivered, bar drivers' access to existing enforcement mechanisms, and erroneously posit that drivers' "freedom and flexibility" is dependent on independent contractor status, which is not correct under Massachusetts law.[2] See pp. 39-41.

In sum, the Petitions misleadingly hitch onto the popular desire to see drivers ***gain*** employee protections (many of which they should already enjoy under existing law, which the companies are not following), while maintaining "freedom and flexibility", and unfairly call upon voters to vote on multiple, distinct policy

[2] See, e.g., Cunningham v. Lyft, 2020 WL 2616302 *12 (D. Mass. May 22, 2020) ("Nothing in the relief sought by Plaintiffs [who sought to be declared employees] would interfere with drivers' flexible schedules.")

determinations by repealing the application of ***at least five different "employee" definitions*** to drivers. This endeavor violates Article 48 because the employee status tests and attendant protections provided for under various state employment laws are not "operationally related" and do not constitute a "uniform public policy".

Because the Petitions fail to meet the requirements of Article 48, the Court should order that the Secretary is barred from placing the Petitions on the November 2022 ballot.[3]

ARGUMENT

I. The "Relatedness" Requirement of Article 48 of the Massachusetts Constitution Was Designed to Protect Against Well-Financed Special Interests Exploiting the Ballot Initiative Process and Misleading Voters

In Carney v. Attorney General this Court provided a comprehensive history of the Massachusetts State Constitutional Convention of 1917-18 debates regarding a ballot initiative process. Delegates were concerned that special interest groups would exploit a ballot initiative process to override policy determinations these groups had failed to persuade the legislature to amend or otherwise abandon. The "relatedness" requirement of Article 48 was borne out of these concerns.

As detailed in Carney, the original measure that became Article 48 contained no relatedness requirement. 447 Mass. at 226. Delegates expressed concerns about

[3] This Court solicited *amicus* briefs on the question of "whether the Attorney General erred in certifying the initiative petitions as compliance with amend art. 48 of the Massachusetts Constitution".

an unchecked initiative process and the "dangers of 'logrolling'" -- the practice of "'hitching' alluring provisions at the beginning of an initiative petition" to several other propositions included in the initiative that may be less popular or more controversial, id. at 229, so that "voters will pass ***all*** of the propositions, even though these propositions might not have passed if they had been submitted separately", id. at 219 n. 4 (quoting Black's Law Dictionary 960 (8th ed. 2004)) (emphasis supplied).

"A recurring topic of concern [at the convention] was the possibility that well-financed 'special interests' would exploit the initiative process to their own ends by packaging proposed laws in a way that would confuse the voter." Id. at 228 (quoting 2 Debates in the Massachusetts Constitutional Convention 1917-1918 (1918) (Debates)). The delegates therefore "add[ed] gatekeeping measures that would cull out misleading or confusing initiative measures," in the form of Article 48. Id. at 229.

"To clear the relatedness hurdle [of Article 48], the initiative petition must express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy." Carney, 447 Mass. at 230-31. This requirement may be analyzed pragmatically, by examining how the proposed policy changes contained in the Petition interact. For example, in Carney, this Court found that no "meaningful

operational relationship" existed between modifying criminal law and abolishing an entirely separate industry of dog racing that had its own regulatory scheme voters. Id. In Anderson v. Attorney General, this Court found that the imposition of a graduated income tax did not operationally relate to provisions earmarking those tax revenues for public education and transportation spending; the legislature could conceivably prioritize spending on public transportation *without* prioritizing spending on public education and could make *either* prioritization without making them dependent on a graduated income tax. 479 Mass. 780, 799-800 (2018). Likewise, in Gray v. Attorney General, this Court concluded the Petition provisions were ***not*** "operationally related" (nor "mutually dependent" and did not share a common purpose), because proposed revisions to curriculum content could exist entirely independent of a mandate that schools annually publish their diagnostic assessments. 474 Mass. 638, 647-48 (2016). The Court may also examines whether the provisions are bound by a "common purpose" that reaches beyond a "conceptual level". Id. at 648. See, e.g., Anderson, 79 Mass. at 798.

The emphasis on the "operational" link related back to the delegates' interest in preventing special interests from placing voters in the "untenable position of either supporting or rejecting" multiple "important, but diverse" provisions. Anderson, 79 Mass. at 799. Disparate provisions rolled into a single Petition raises the specter of logrolling, as it coerces a voter into voting up or down on *all*

provisions, even if ***that voter may vote differently on each provision*** if given the opportunity to consider each separately. See, e.g., Carney, 447 Mass at 231 ("The voter who favors increasing criminal penalties for animal abuse should be permitted to register that clear preference without also being required to favor eliminating parimutuel dog racing. Conversely, the voter who thinks that the criminal penalties for animal abuse statutes are strong enough should not be required to vote in favor of extending the reach of our criminal laws because he favors abolishing parimutuel dog racing.").[4]

II. Proponents of the Petitions Currently Misclassify Their Drivers as Independent Contractors; Their Petitions Exploit the Popular Desire to Provide Drivers Certain Employee Protections

The proponents of the Petitions, primarily Uber and Lyft, are "well-financed" special interest groups, who are attempting to buy their way out of their current obligations to comply with state employment laws. As the Massachusetts Attorney General has recognized, Uber and Lyft drivers should be classified as employees at least for purposes of the Wage Act. See Healey v. Uber Technologies, 2021 WL 1222199 *1 (Mass. Super. March 25, 2021); see also People v. Uber, 56 Cal. App. 5th 266 (2020) (California Court of Appeal recognized that Uber and Lyft are

[4] See also Anderson, 79 Mass. at 799 ("[A] voter who favored a graduated income tax but disfavored earmarking any funds for a specific purpose, for example, [would be] in the untenable position of choosing which issue to support and which must be disregarded. ...").

likely to be violating California ABC test, which was recently adopted from Massachusetts); Rogers v. Lyft, 452 F. Supp. 3d 904, 911 (N.D. Cal. 2020) (chiding "companies like Lyft" for "thumbing their noses at the [California state] Legislature").

Rather than complying with existing laws, Uber and Lyft seek to revise the laws to their liking by attempting to replicate Proposition 22 ("Prop 22"), their successful California state ballot, across various states, to create a patchwork of state laws in their favor. Prop 22 was the ***costliest*** ballot initiative in California history, with proponents spending in excess of $224 million dollars to promote it.[5] Like the Petitions at issue here, Prop 22 created a statutory carve-out for app-based drivers, defining them as independent contractors by statute and promising drivers a menu of ad hoc quasi-employee benefits, such a "Guaranteed Earnings Floor" in place of minimum wage and a health care stipend in place of employer contributions to health care insurance.

[5] See Ryan Menezes, Maloy Moore & Phi Do, *Billions have been spent on California's ballot measure battles. But this year is unlike any other*, L.A. Times, Nov. 13, 2020, available at latimes.com/projects/props-california-2020-election-money/.

III. The Petitions Alter *Five* Separate Employee Status Tests That Were Adopted by the Legislature in Connection with Specific Employment Laws That Each Have Their Own Unique History, Context, and Purpose

The Petitions seek to amend *at least five separate employment-related statutes*, as shown in the attached Exhibit A. These statutes operate in separate and distinct areas of employment law that each utilize a different test to determine employee status. Each of these tests were created for different purposes and have their own legislative history. As demonstrated by Exhibit A, if passed, the Petitions would change multiple areas of employment law that each provide discrete protections, the right to and provision of which are ***not*** operationally related or mutually dependent on each other (in addition to deriving from unique histories and purposes).

The Petitions thus improperly put voters in the "in the untenable position of casting a single vote on two or more dissimilar subjects", Weiner v. Attorney General, 484 Mass. 687, 691 (2020), by forcing them to "address[] separate public policy issues" in a single Petition. Anderson, 79 Mass. at 797. While these issues all relate to various employment laws, these laws address entirely different issues, including:

- Whether drivers should have access to wage protections like minimum wage and overtime and be able to receive treble damages and the benefits of the Attorney General's enforcement efforts, when pay is unlawfully withheld;

- Whether drivers should receive unemployment benefits ***and*** whether app-based companies should be required to contribute to the state unemployment fund;

- Whether drivers should be eligible for paid family and medical leave;

- Whether companies should be protected from tort law when drivers are injured in the course of their employment and thus whether drivers should be eligible to receive workers' compensation benefits, under the comprehensive administrative system developed to resolve disputed claims, including all its attendant procedural safeguards and the benefit of developed case law;

- Whether drivers should be entitled to anti-discrimination, retaliation, and harassment protections and whether drivers should have access to the enforcement efforts of the Massachusetts Commission Against Discrimination and the courts to vindicate their civil rights;

- Whether app-based driver companies should be required to make payroll withholdings for tax purposes, which would also lead them to contribute the employer share of federal payroll taxes.

See Ex. A.

The same voter may hold different views on these questions. For instance, one can easily imagine a voter who has spent their career working in a traditional, office space, but who lost their job during the pandemic, believing that, after the experience of the pandemic, drivers who have risked their lives as essential workers should have access to state unemployment assistance, but otherwise be treated as independent contractors. Likewise, a voter may believe that these companies should be required to make unemployment fund contributions to the state but that drivers should be otherwise treated as independent contractors. Or a voter may believe that

the drivers should receive the protections of the state anti-discrimination laws but otherwise be treated as independent contractors. Or a voter may believe that drivers should be eligible for minimum wage (for all time worked, not just "engaged time") and be able to sue for *triple* damages for wage law violations but otherwise be treated as independent contractors.

In short, there is not simply one "employment law" in Massachusetts, but multiple laws each of which a voter may wish to register a different "employee" definition preference. As this Court recently made clear in Ives Camargo's Case, each area of employment law is different, and the various employment statutes were enacted for separate policy reasons. For example, the Legislature has chosen to utilize a very strict "ABC" test for the Wage Act and a modified, somewhat looser version of the "ABC" test for unemployment compensation. In contrast to these areas, the Legislature has maintained a multi-factor "right to control" test for workers' compensation, which follows from the Act's purpose of protecting employers from tort actions when workers are injured at work and providing an alternate source of recovery to those workers. As the Court recognized in Ives Camargo's Case, the "goal of workers' compensation laws are not in pari material with wage laws"; the Court thus concluded that different tests apply to each area and the "ABC" test would *not* apply to workers compensation. 479 Mass. at 501.

Despite the late Justice Gants expressly inviting the Legislature to take up the question of whether to impose uniformity of employee status across these laws, see id. at 505 (Gants, J., concurring), the Legislature has declined the invitation, further confirming this Court's conclusion that each employment test requires separate policy determinations and different approaches. The Petitions nevertheless call upon voters to amend these disparate areas of employment law at once, in violation of Article 48's relatedness requirement.

The approaches and unique histories of the employment tests that the Petitions seek to alter are discussed below.

A. The Massachusetts Wage Act Employee Status Test: The "ABC Test" Creates a Presumption of Employee Status and Places the Burden on the Employer to Prove that Those Providing Services are Independent Contractors

i. The "ABC" Test Forwards the Independent Contractor Law's Purpose of Protecting Employees' Wage Act Protections and Combatting Misclassification

Enacted in 1990 and amended in 2004, see St. 1990, c. 464, St. 2004, c. 193, § 26, the Independent Contract Law for the Wage Act, M.G.L. c. 149 § 148B, "establishes a standard to determine whether an individual performing services for another shall be deemed an employee or an independent contractor for purposes of our wage statutes." Somers v. Converged Access, Inc., 454 Mass. 582, 589 (2009). The Act places the burden on the entity receiving services to justify classifying the

worker as an independent contractor by meeting each prong of a conjunctive ABC test. See M.G.L. c. 149 § 148B.

The Law "protect[s] employees from being deprived of the benefits enjoyed by employees through their misclassification as independent contractors." Somers, 454 Mass. at 592 (2009). As this Court recently explained:

> Classification as an 'employee' [under the Wage Act] generally entitles an individual to [] timely payment of wages earned, and holiday and vacation payments due; a minimum wage; overtime pay; and a private cause of action to enforce these rights, along with the ability to recover the costs of litigation, attorney's fees, and liquidated damages (in the form of treble damages for lost wages and other benefits) for violations of the wage statutes.

Patel v. 7-Eleven, Inc., 2022 WL 869486, at *2 (Mass. March 24, 2022) (internal citations omitted). The Legislature has expressly provided for mandatory treble damages for Wage Act violations, M.G.L. c. 149 § 150, evincing its determination that unlawfully withheld wages are so detrimental "to maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers ... that [treble] payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well-being." Reuter v. City of Methuen, 2022 WL 996270, at *3 (Mass. Apr. 4, 2022); (quoting George v. National Water Main Cleaning Co., 477 Mass. 371, 376 (2017) and citing St. 2008, c. 80, § 5).

The I.C.L. prevents employers who misclassify their workers as independent contractors from gaining an "unwarranted windfall" by unlawfully evading their "statutory obligations to the workforce", "shifting financial burdens to the […] government", and gaining an unfair competitive advantage through misclassification. Patel, 2022 WL 869486, at *2-3. The Commonwealth has repeatedly recognized the importance of the I.C.L. and the harms of worker misclassification on the Commonwealth: by the Legislature rejecting repeated attempts to weaken the law's ABC test;[6] in opinions from this Court, see Somers, 454 Mass. 582; Depianti v. Jan-Pro Franchising, Intern., 465 Mass. 607, 620, 621 (2013); in statements by the Massachusetts Attorney General[7]; and through creation of a Massachusetts Joint Task Force to combat misclassification.[8]

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[6] See, e.g., Massachusetts 2021 Legislature bills, including H.B. 1234 (app-based driver bill); H.B. 2001 (proposing requiring the employer to prove Prong A and either Prong B or C); MA H.B. 2007 and S.B. 1229 (proposing to exempt certain freelancers, for example those who meet the IRS independent contractor test); see also S.B. 1253.

[7] *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2008/1* AGO 1 (2008), https://www.mass.gov/files/2017-08/independent-contractor-advisory_1.pdf.

[8] On March 12, 2008, the Governor issued Executive Order No. 499: Establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, (Mass Register 1101).

The I.C.L. uses the strict "ABC test", known to be the strongest law in the country to combat misclassification. To justify independent contractor status, it requires the potential employer prove that:

> **[A]** the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
>
> **[B]** the service is performed outside the usual course of the business of the employer; and
>
> **[C]** the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

M.G.L. c. 149, § 148B(a). The law "excludes far more workers from independent contractor status than are disqualified under the traditional state and federal law tests, including the 20 Factors Test set forth in Internal Revenue Service ("IRS") Revenue Ruling 87-41, the Fair Labor Standards Act ("FLSA") and the Massachusetts common law." *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B, 2004/2* AGO 2 (2004).

In enacting the law, "the Legislature intended to provide greater protection than did the common-law 'right to control' test that previously governed misclassification claims". Patel, 2022 WL 869486, at *2-3. The Law's presumption of an employment relationship "plac[es] the onus on employers to proactively establish their workers as independent contractors", thus "root[ing] out common misclassification tactics" such as subcontracting or exploiting the

franchise model. Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U. Pa. J.L. & Soc. Change 53, 71 (*ABC On the Books*). This Court has recognized the importance of applying the test to mitigate against these common tactics. Patel, 2022 WL 869486 (holding that "ABC" test applied to determine franchisees' employee status); Awuah v. Coverall North America, Inc., 707 F. Supp. 2d 80 (D. Mass. 2010) (applying "ABC" test to janitorial franchisees).[9]

ii. The Petitions Would Deny Drivers of Wage Protections Currently Owed Under the Law and Reject the Legislature's Use of the "ABC" Test for Extending Massachusetts Wage Act Protections to Workers

By asking voters to find that app-based drivers are independent contractors, the Petitions are asking voters to strip these workers of the following protections under current law: (1) minimum wage; (2) overtime pay; (3) prohibition on wage deductions; (4) minimum break periods; (5) regular time periods for payment; (6) reimbursement for business expenses; (7) entitlement to all tips; (8) protection against retaliation for raising wage complaints; (9) Earned Sick Time Leave, and other protections. See M.G. L. c. 149, §§ 100, 148, 148A,148C, 150A, 152A.

[9] But see Jinks v. Credico (USA) LLC, 488 Mass. 691 (2021) (ruling that independent contractor test of § 148B does ***not*** supply the standard for determining whether the entity is a joint employer for purposes of minimum wage and overtime statutes and holding that the separate "right to control test" applies).

The Petitions obfuscate this consequence by promising to provide a quasi-minimum wage to drivers in the form of a "Guaranteed Earnings Floor", which guarantees a minimum wage ***solely*** for the time when a driver is "engaged" and not including drivers' other working time between rides (waiting to pick up another passenger or make another delivery). Thus, the Petitions' proposal would lower minimum wages drivers are owed under the Wage Act. See Section 5, R.A.15-16' Section 4, R.A.26-27. Under Massachusetts law, all employees are currently entitled to compensation not only for time in which revenue is directly produced or that may be easily commodified (i.e., engaged), but for all working time in which they are on call at the pleasure of their employer. See 454 CMR 27.04. Whether drivers should be guaranteed minimum wage rate for only a fraction of their total working time, distinguishing them both from independent contractors in the Commonwealth—who are not guaranteed any minimum wage rate—and the Commonwealth's employees who are guaranteed hourly wages for all working time—represents an independent, and unrelated policy question from whether drivers should be classified as independent contractors.

Further, the Petitions are silent with regard to the fact that voting Yes on the Petitions would also constitute voting to repeal drivers' rights to mandatory ***treble*** damages that they would be owed on any unlawfully withhold earnings under the Wage Act. The Legislature has purposefully adopted the strict "ABC" test to

bolster the deterrent effect in regard to misclassification; the Legislature has consistently rejected almost annual attempts to modify this test. Supra note 12.

B. The Unemployment Compensation Act: The Modified "ABC Test" Is Intended to Ensure Employer Contributions to the State Unemployment Fund

i. Massachusetts Unemployment Laws Establish A Comprehensive System Of Benefits Intended To Lighten The Burden On Those Involuntarily Thrown Out Of Work

Massachusetts Unemployment Insurance laws, M.G.L. c. 151A, provide unemployment benefits to eligible individuals.[10] Unemployment insurance originated during the Depression era, as a means of social reform to address mass unemployment and the national hunger crisis.[11] Unemployment benefits are funded by taxes assessed to the employer. See M.G.L. c. 151A, §14.

The purpose of the unemployment insurance statutory scheme is to "afford benefits to [individuals] who are out of work and unable to secure work through no fault of their own." LeBeau v. Director of the Dept. of Employment & Training, 422 Mass. 533, 538 (Mass. 1996). The system is premised on community values

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[10] The unemployment insurance chapter was codified in 1935 and the section defining employment enacted in 1941. See St. 1935, 1479 §5; St. 1941, 685 §1.

[11] See Edwin Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 22-23 (1945).

and seeks to ensure that communities do not collapse under the weight of an economic downturn or mass unemployment.[12]

For an employer to be exempt from making contributions on behalf of its employees into an unemployment fund, the employer has the burden of proving that its workers are independent contractors. This determination is made using a modified version of the "ABC" test, codified in M.G.L. c. 151A, §2, which mirrors that contained in the Wage Act, except that Prong B retains the earlier, less strict language, which provides that an employer may prove either the service performed by the worker "is performed either outside of the usual course of business for which the service is performed **or is performed outside of all the places of business of the enterprise for which the service is performed**." (emphasis supplied.) See also Ives Camargo's Case, 479 Mass. at 493 (citing Athol Daily News v. Board of Review of the Div. of Employment & Training, 429 Mass. 171 (2003). The unemployment statute expressly distinguishes itself from independent contractor definitions in other statutes: "The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an

[12] For a discussion of the unemployment compensation as a "new community response" intended to supplant the uncertainty and stigma of charity, see Note: Charity Versus Social Insurance in Unemployment Compensation Laws, 73 Yale L.J. 357 (1963).

individual's wages shall not be used for the purposes of making a determination under this section." M.G.L. c. 151A §2.

The statute originally defined employee under the common law definition, which centers on freedom from control. See Athol Daily News, 439 Mass. at 177. In 1971, it was amended to adopt the modified ABC test, "***expressly reject[ing]*** the previously applied—and potentially more open ended—standard of employment that rested on common law analysis." Boston Bicycle Couriers v. Deputy Director of Div. of Employment and Training, 56 Mass. App. Ct. 473, 476-77 (2002) (citing St. 1971, c. 940, § 2.). Prong C of the test represented a "radical departure from common-law criteria" and has "the most relevancy" to "the purposes of the unemployment compensation program," id. at 477 n. 15, as it seeks to demarcate those workers dependent on the company for financial survival. Id. at 481 n. 15. Since 2004, the Legislature has had occasion to consider amending the ABC test in the unemployment laws to align with the § 148B and has thus far declined.[13]

ii. The Petitions Would Exclude Drivers From and Excuse Employers from Contributing to Unemployment Insurance

The Petitions would alter the careful policy of workers' compensation in three ways. First, any drivers who worked exclusively as a driver for app-based such as Uber, Lyft, Instacart, and Doordash, may be rendered ineligible for

[13] See 2021 Bill Text MA H.B. 2015; 2021 Bill Text MA S.B. 1215.

unemployment due to independent contractor status. Second, even if these drivers were to qualify for unemployment (if they worked part-time in an employee position or had previous employment that qualified them, for example), the drivers will not receive the full measure of benefits due to them. Finally, the Petitions would have the effect of permitting these companies to flout their responsibilities as corporate citizens to make unemployment insurance contributions on behalf of their Massachusetts workforce. Indeed, when drivers' income drastically dropped in the wake of a sharp decline in ridership during the pandemic, drivers relied on government assistance programs that these companies have never paid into.[14]

C. The Massachusetts Workers' Compensation Act Employee Status Test: The 12-Factor MacTavish-Whitman Test

i. The Massachusetts Workers' Compensation Act Established a New, No-Fault System for Compensating Employees Injured During the Course of Employment and Protecting Employers from Tort Liability

In 1911, the Legislature enacted the Massachusetts Workers' Compensation Act, an ***entirely new and separate*** administrative system of no-fault insurance, intended to provide compensation to employees who are injured in the course of

[14] See Faiz Siddiqui & Andrew Van Dam, *As Uber avoided paying into unemployment, the federal government helped thousands of its drivers weather the pandemic*, The Wash. Post, March 16, 2021, available at https://www.washingtonpost.com/technology/2021/03/16/uber-lyft-unemployment-benefits/ (citing study that Uber and Lyft were the most common company name on Economic Injury Disaster Loan applications to the SBA, reflecting drivers' reliance on the program after an 80% drop in ridership).

employment. See generally The Workmen's Compensation Act, Stat. 1911, Introduction; G.L. c. 152, §§ 1 *et seq.*; see also CNA Ins. Companies v. Sliski, 433 Mass. 491, 493 (2001) ("[T]he workers' compensation statute was enacted as a 'humanitarian measure' in response to strong public sentiment that the remedies afforded by actions of tort at common law did not provide adequate protection to workers who were the victims of industrial accidents."). Significantly, the workers' compensation law protects companies from tort liability. Dakin v. OSI Restaurant Partners, LLC, 100 Mass. App. Ct. 92 (2021).

Under the Act, employers are obligated to obtain workers compensation insurance pursuant, G.L. c. 152, § 25A, to pay out benefits on covered claims.[15] The process to resolve a disputed claim follows its own administrative procedure. See Neff v. Commissioner of the Dept's of Indus. Accs., 421 Mass. 70, 74 (1995) (describing process). There is an entirely separate body of case law elucidating the applicable employee status test under the Act. See MacTavish v. O'Connor Lumber Co., 6 Mass. Workers' Comp. Rep. 174, 177 (1992) ("The issue of who is

[15] Pursuant to M.G.L. c. 152, § 25C, private citizens may sue an employer for failure to obtain or pay premiums on its workers compensation insurance. If found liable, the employer must pay the premiums it should have paid, with the plaintiffs recovering 25% of that amount or $25,000 (whichever is lower), and the remainder going to the Workers Compensation Trust Fund. G.L. c. 152, § 25C (11). Employees may submit claims to the Workers Compensation Trust Fund where the employer has failed to obtain the appropriate insurance.

an independent contractor and who is an employee has bedeviled the bar and bench since the beginning of workers' compensation.").

The Legislature sought to strike a balance between compensating injured workers and imposing the burdens of traditional fault-based tort liability on employers. See Stat. 1911, Introduction. Recognizing that longstanding tort and agency law were no longer "reasonably nor logically applicable to existing conditions of employment" and had proved inadequate in addressing workplace injuries, *Report of the Commission on Compensation for Industrial Accidents* 46-47 (1912), the Legislature selectively displaced some elements of the longstanding common law in these areas.[16]

Over the Act's history, the Legislature has moved toward more inclusive coverage. See 29 Mass. Prac., Workers' Compensation § 2.3 (3d ed.). Despite some extensive legislative overhauls, the Legislature chose not to cast away the traditional focus on the "right of control" for distinguishing between employee and independent contractor. A 12-factor test known as the "MacTavish-Whitman" test, drawn in part from the Restatement of Agency (used to assess this "right of control) has been used in some form since 1992. See Ives, 479 Mass. at 495

[16] The Act of 1911, for example, provided that an employer may be responsible for workers' compensation for employees of independent contractors performing work for the employer. See Stat. 1911, c. 751, pt. III, § 17. (An amended version of this provision currently codified at M.G.L., c. 152, § 18.)

(noting that "[t]he department has consistently applied some formulation of the MacTavish-Whitman factors for over one-quarter century" and concluding that the independent contractor statute "does not determine whether a claimant is an employee for the purposes of workers' compensation benefits").

ii. The Petitions Would Eliminate Drivers' Access to Workers' Compensation by Statutorily Exempting Drivers From Application of the MacTavish-Whitman Test

The Petitions would eschew the entire workers compensation system and its "employee" test. See Section 9, R.A.18-19; Section 8 R.A30-31. In its place, the Petitions would simply require that companies purchase occupational accident insurance for drivers. This insurance coverage would only extend to what the Petitions define as "engaged time" spent driving passengers and deliveries—and ***not*** time driving between passenger rides or deliveries. In effect, as soon as the app-based "meter" is off, insurance coverage will not apply; for example, an assault by a passenger exiting the vehicle would not be covered under the provisions of the Petitions. The Petitions' substitute insurance provision does not replicate the safeguards of the workers compensation laws, such as procedural safeguards provided to that make it less burdensome on drivers to access the mandated insurance. There is also no clear method by which a driver can challenge the company if the company is not paying out benefits is provided by the Petition.

This policy decision is entirely separate from the determination of whether drivers should receive minimum wage under the Wage Act, or overtime, or expense reimbursement, or be eligible to access unemployment.

D. Massachusetts Anti-Discrimination and Harassment Law: The Common Law Test Centers on the "Right to Control"

i. Massachusetts Anti-Discrimination and Harassment Statutes Seek to Eradicate Systemic Discrimination in Employment

"General Laws c. 151B is an antidiscrimination statute originally enacted in 1946." Thurdine v. SEI Boston, LLC, 452 Mass. 436 (2008) (citing St.1946, c. 368, § 4). The Massachusetts Commission Against Discrimination is the agency responsible for prosecuting administrative proceedings under the law, which have "the primary purpose of" of "vindicat[ing] the public's interest in reducing discrimination in the workplace." Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 541, 563 (2004). "During the administrative process, the commission, not the complainant, prosecutes the claim, and 'the commission is empowered to fashion equitable remedies designed chiefly to *protect and promote the broader public interest in eradicating systemic discrimination*'" (emphasis added)." Id.

This Court has held that the protections of M.G.L. c. 151B exclude independent contractors and has refused to "depart from the common law definition of employee absent a legislative substitute." See Comey v. Hill, 387

Mass. 11, 16 (1982).[17] Chapter 151B does not provide a statutory definition of "employee". See G.L. c. 151B § 1(6). Comey v. Hill held that "[i]n the absence of any indication to the contrary, we will not assume that the Legislature intended to cover relationships outside the traditional common law employer employee relationship." 387 Mass. at 15. Thus, the common law "right to control" test applies to application of Chapter151B and similar statutes providing anti-discrimination and harassment protections. "[T]he MCAD and the courts have adopted a functional approach" that considers ten factors, although the right to control remains paramount. See Weston v. Town of Middleborough, 2002 WL 243197, at *6 (Mass. Sup. Ct., Feb. 15, 2002) (citing Silvia v. Woodhouse, 356 Mass. 119, 124 (1969)). Under the test a narrower subset of workers are classified as "employees", as compared to the "ABC" (and modified "ABC") test. Thus far, the Legislature has declined to broaden this definition.[18]

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[17] Chapter 151B also excludes from its definition of "employer", those with fewer than six employees, G.L. c. 151B §1(5) (in contrast to other employment laws discussed herein, such as workers' compensation G.L. c. 152 §§1(4-5)).

[18] Recognizing this limited reach, proposed Mass. Senate Bill 1079 sought to amend Chapter 151B adopt the language of the "ABC" test as set forth in the I.C.L., G.L. c. 149 § 148B; it has not been adopted by the Legislature.

ii. The Petitions Would Deprive Drivers of Anti-Discrimination and Harassment Protections

The Petitions replace these factors of the right to control test with its uniform determination that app-based drivers are independent contractors not entitled to these protections. The Petition purports to prohibit discrimination only in the formation and termination of contracts between app-based drivers and companies (but not in the actual performance of their work) and containing none of the enforcement mechanisms of c. 151B, thus barring access to MCAD proceedings; the Petition also does not protect against discrimination on the basis of age or disability, meaning that drivers would have no right to reasonable accommodation if needed by virtue of their disability. See Section 10, R.A.20-21. As briefs submitted by fellow *amici* make clear, the protections these statutes provide would be dramatically undermined by the Petitions.

E. Massachusetts Tax Law and the Department of Revenue: Massachusetts Applies the IRS 20-Factor Test

Finally, M.G. L. c. 62B, § 1 provides yet another definition of employee, "for the purposes of withholding taxes on wages, and the department of revenue applies the Internal Revenue Code's twenty-factor analysis to determine employment status." Ives, 479 Mass. at 500. Following the Legislature's establishment of the three-factor test for purposes of the Wage Act, the Commissioner of Revenue reiterated that this test does not apply to employee

status for purposes of state taxes. See Technical Information Release 05-11 (Sept. 13, 2005), Official MassTax Guide, at PSW-206 (Thomson Reuters 2018). This policy choice reflects that, rather than be consistent with other state law definitions of employee status, c. 62B is intended to be consistent with federal law. In re Coveney, 217 B.R. 362, 364 (D. Mass. 1998) (string cite).

As such, like with the other definitions of employee and independent contractor status, by purporting to supplant this definition, the Petitions purport to legislate in yet another disparate area of law presenting entirely different policy choices. The Petitions would declare app-based drivers to be independent contractors, so that companies would not be required to make employer payroll contributions, nor would they be required to withhold payroll contributions from app-based drivers' paychecks; in addition, drivers would be responsible for paying self-employment taxes.

This determination would alter the Commonwealth's longstanding policy of following federal law on employee status for tax determinations. Rather than follow the IRS 20-factor test, the Petitions would simply mandate that app-based drivers be independent contractors for tax purposes.

IV. The Petitions Fail the "Relatedness" Requirement Because the Alteration of Each Employee Status Tests Is ***Not*** "Operationally Related" to the Common Purpose of the Petitions to Provide "Freedom and Flexibility" to App-Based Drivers

In sum, the Legislature has, over the course of decades, differently defined "employee" for the purposes of each law. See Ives Camargo's Case, 479 Mass. at 500-01. A voter may agree with all, some, or none, of the Legislature's policy conclusions making legislating these definitions. The Petitions propose, however, repealing the application of ***all*** of these multiple "employee" definitions under state law as applied to app-based drivers, despite these varying definitions not being operationally related to each other or mutually dependent. Pursuant to Article 48, a voter who favors defining drivers as independent contractors for the purposes of Chapter 151B or the tax laws "should be permitted to register that clear preference without also being required to favor", for example, eliminating drivers' access to unemployment compensation benefits and state wage protections. See Carney, 447 Mass at 231; Anderson, 79 Mass. at 799.

In addition, the Petitions then call upon the voters to take the further step of establishing an entirely new regulatory framework that would change multiple areas of employment law and provide drivers with partial protections, see Exhibit A, despite independent contractor status involving none of the benefits and protections afforded to employees under state laws. It does not follow that because the Petitions propose classifying app-based drivers as independent contractors, that

the Petition must propose alternative regulations.[19] This proposed regulatory framework is ***in no way*** "mutually dependent on" app-based drivers' independent contractor status and is in fact inimical to independent contractor status. Weiner, 484 Mass. at 691

The Petitions' various policy proposals also do not bear a clear relation to the Petition's goal of "guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work." See Section 2, R.A.10, 23. Courts have recognized that flexibility is completely consistent with employee status. Cunningham, 2020 WL 2616302, at *12 ("Nothing in the relief sought by Plaintiffs [who sought to be declared employees] would interfere with drivers' flexible schedules. Absent a collective bargaining agreement, employers may choose to schedule employees on a fixed schedule, may require them to be 'on-call' and to report to work on the employer's demand, or may allow them to set their own schedule.").[20] As such, the Petitions' purported purpose fails at

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[19] The Petition purports to regulate all of the following: setting an "earnings floor" for app-based drivers, § 4; requiring a "healthcare stipend" for limited drivers that meet certain criteria, § 5; requiring occupational accident insurance, § 8; and requiring that contracts between companies and drivers be formed in a specific way, § 9.

[20] See also O'Connor v. Uber Technologies, 2015 WL 5138097 *13 (N.D. Cal. Sept. 1, 2015) ("Uber has not definitely established that all (or even much) of this "flexibility" would necessarily be lost," if drivers were classified as employees); Cotter v. Lyft, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) ("a sparse work

connecting their proposed change to drivers' employee status under various laws to the Petition's stated purpose of "guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work", which is certainly too broad to bind legislating varying pieces of employment law together, beyond at a "conceptual level". Gray, 474 Mass. at 648.

Moreover, the Petitions' disparate proposals are likely to "confuse or mislead voters" voters in a way that improperly benefits the proponents of the Petitions. Abdow v. Attorney General, 468 Mass. 478, 499 (2014); see also Carney, 447 Mass. at 227 ("the more details, the more complications we have in the proposition submitted to the voters, the more difficult it is for [voters] to act upon it") (quoting remarks of Mr. Churchill at the convention). Article 48 requires "relatedness" as a "mechanism to safeguard against [such] potential voter confusion". Id. at 230.

CONCLUSION

In sum, under the guise of providing paltry benefits to app-based drivers, the Petitions call upon voters to enact a sweeping change across disparate areas of

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schedule does not necessarily preclude a finding of employee status."), citing Burlingham v. Gray, 22 Cal. 2d 87 (Cal. 1943); see also James v. Uber Technologies Inc., 338 F.R.D. 123, 133 n.3 (N.D. Cal. 2021) (noting that declarations proffered by Uber "are insufficient to definitely establish 'that a victory for Plaintiffs in this lawsuit would require Uber to use 'less flexible' work schedules going forward.'"), quoting O'Connor, 2015 WL 5138097 *13.

employment law. The Legislature has separately weighed the different costs, benefits, and policy choices are involved in each of these areas of employment law and has come to differing conclusions, creating varying standards for distinguishing between employees and independent contractors. This Court should not permit proponents of the Petitions to bypass the Legislature and confuse Massachusetts voters by introducing Petitions that contain disparate policy amendments to the Legislature's longstanding differing approaches to multiple areas of the law.

The Court should declare that the Petitions fail the "relatedness" requirement of Article 48 and order that the Petitions not be placed on the November 2022 ballot.

Dated: April 12, 2022

Respectfully submitted,

MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION,

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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 7,496 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 12, 2022

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that on the 12th day of April 2022, I caused a true and accurate copy of the Brief for Amicus Curiae to be served by email on all counsel of record.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

ADDENDUM

Exhibit A:
Chart comparing employee's benefits under Massachusetts
law with alleged replacement benefits in the Petitions. ADD002

EXHIBIT A

Chart comparing employee's benefits under Massachusetts law with alleged replacement benefits in the Petitions.

Wage Protections	
Independent contractor statute: M.G.L c. 149 §148B Uses the ABC test to define independent contractor, putting the burden on the employer to prove that the worker is an independent contractor. This definition applies to MGL chapters 148 and chapter 151. M.G.L. 149, §148B(a). Creates civil and criminal liability for misclassification of workers. M.G.L.A. 149, §148B(d). For employers who willfully misclassify their workers, they can be punished by a fine of nor more than $25,000 and not more than a year in prison for the first violation, and not more than $50,000 and two years of prison for the second violation. M.G.L. c.149, §27C(1). For violations where an employer did not act willfully, the punishment is not more than $10,000 and six months imprisonment, and not more than $25,000 or one year for subsequent offenses. M.G.L. c.149, §27C(2).	**Section 3. Definitions** Declares that every app-based driver 'shall be deemed an independent contractor and not an employee or agent for all purposes." This would eliminate the ABC test for app-based drivers and shield driving companies from criminal or civil liability for misclassification of drivers, as all drivers would be considered independent contractors.

M.G.L. c. 151 § 1, Minimum Fair Wages provides that an employer may not pay an employer less than the minimum wage of $13.50 an hour. Employees must earn this wage for all hours of all hours of "working time", which includes "all time during which an employee is required to be . . . on duty" and "includes rest periods of short duration". See 454 CMR 27.02. This includes waiting periods between assignments because the employee is "on duty" waiting for the next assignment. Under M.G.L. c. 151, § 1A Overtime Pay, employees are also entitled to a rate of 1.5 times their usual wage for hours worked in excess of 40 per week.	**Guaranteed Earnings Floor (Section 4, Petition 21-12)/ (Section 5, Petition 21-11)** sets out a "guaranteed earnings floor" "for all engaged time, the sum of 120 per cent of the minimum wage for that engaged time." However, because this floor only applies to engaged time (i.e. time when an app-based driver has accepted a ride and is carrying it out) it does not cover the time in between rides (when a driver is waiting to accept the next offered ride) that would be covered for employees. As such, while the "guaranteed earnings floor" that the Petition sets out *seems* like it is higher than the minimum wage, it is in practice far lower than the minimum wage because the app-based driver receives it for far less hours than if the driver was classified as an employee. The Petition does not provide for any overtime pay.
M.G.L. c. 149 § 148C Earned sick time is a benefit available to employees, that provides "a minimum of one hour of earned sick time for every thirty hours worked by an employee." §148C(d)(1). Employees can use accrued earned sick time for the statute's specified purposes. §148C(c)(1)-(3). Employees earn sick time for all hours of "working	**Paid Sick Time (Section 6, Petition 21-12)/ (Section 7, Petition 21-11)** largely follows M.G.L. c. § 148C, with some key differences. The Petition provides that network company shall provide a minimum of one hour of earned paid sick time for every 30 hours of engaged time recorded on or after the effective date of this section by an app- based driver in the network company's online-enabled application or platform." **However,** because this only applies

time", which includes "all time during which an employee is required to be . . . on duty" and "includes rest periods of short duration". See 454 CMR 27.02. Employees can begin using earned sick time after they have been working for the employer for 90 days. §148C(d)(1). Employees can use up to 40 hours of earned sick time in a calendar year. §148C(d)(4). An employer can require certification if more than 24 hours of earned sick time are used at once. §148C (f). Employees are required to use their earned sick time in the minimum increment that the employer's payroll system provides for. §148C(d)(7).	to **engaged time** (i.e. time when an app-based driver is transporting a customer) it does not cover the time in between rides (waiting time) that is considered to be "working time" for who are workers classified as employees. As such, the time that app-based drivers are "engaged" is far less than they are actually working, and the value of this benefit is significantly deflated. The Petition also uses "engaged time" to calculate the 90-hour (as opposed to 90-day) vesting period for earned sick time. Further, the Petition allows companies to require that drivers use their earned paid sick time in increments of up to 4 hours.
Family and Medical Leave	
M.G.L. c. 175M Family and Medical Leave applies to both employees and contract workers and provides for the worker to receive weekly benefits during their leave for specified purposes, which is based on a percentage of their regular earnings. See § 3(b)(1).	**Paid Family and Medical Leave (Section 7, Petition 21-12)/ (Section 8, Petition 21-11)** incorporates M.G.L. c. 175M but, again, aspects of the rest of the Petition lead to this benefit being devalued for app-based drivers. Because app-based drivers will effectively be paid less than minimum wage for all hours actually worked (as opposed to merely "engaged time"), their weekly Family and Medical

	Leave benefit will also resultantly be deflated, because it is based on income. Further, the Petition states that an app-based driver won't be eligible for Family and Medical leave "until contributions have been made in the driver's last 4 completed quarters." This does not seem to be a requirement in Ch. 175B itself.
Worker's Compensation	
Worker's Compensation, M.G.L. c. 152 sets out an extremely detailed regulatory framework for administering the Worker's Compensation system in Massachusetts. Provides for employees to receive weekly disability benefits during periods of inability to work due to workplace injury, see § 7, equal to 60% of the gross average weekly wage in the prior year, see § 34. The statute includes various procedural requirements, some of which lessen the burden on an employee contesting an adverse benefits determination. For example, § 13A allows employees to recover attorney's fees from an insurer in certain situations if they successfully challenge a denial of coverage.	**Occupational Accident Insurance (Section 8, Petition 21-12)/ (Section 9, Petition 21-11)** provides that a company will purchase occupational accident insurance for app-based drivers. However, this insurance would only apply to "engaged time" and thus not protect drivers for injuries that occur between passenger rides or deliveries. Provides for app-based drivers to receive 66% of their average weekly earnings in disability benefits. Again, for the reasons noted above, app-based drivers' lowered incomes (because they are only paid for "engaged time") will significantly reduce the amount of benefit coverage from what the app-based driver would receive as an employee. The added 6% of coverage will almost certainly not cover this difference. Does not include the same procedural safeguards that make it less burdensome on employees to access these benefits. For example, no clear

	method by which an employee can challenge the company if the company is not paying out benefits according to the Petition. No provision that an employee is entitled to attorney's fees if the employee successfully challenges a denial of benefits in court.
Unemployment Compensation	
Unemployment Compensation, M.G.L. c.151A A modified ABC test is used to determine if a worker is an independent contractor and thus exempt from unemployment compensation. For covered employees, the employer is required to make contributions towards the Unemployment Compensation Fund and the Workforce Training Fund. M.G.L.A. ch. 151A §13; §14L. Eligible employees may receive benefits from the fund in order to provide stability during periods of unemployment. 151A §22, §24	The proposed statute has no protections for unemployment. For app-based workers that may have otherwise qualified for unemployment compensation under §151A's ABC test, they no longer would qualify from unemployment. App-based driving employers would not be required to contribute to unemployment for any employee covered under the proposed law, and no employee would be able to benefit from unemployment compensation. Even if app-based drivers qualify for unemployment due to other employment (that pre-dates or was concurrent with their work for app-based driver companies), benefits received would be less due to being calculated on the basis of "engaged time".
Right to Organize: M.G.L c. 150A §3 Employees have the right to self-organization, i.e. to form or join a	The proposed statute has no protections for workers participating in collective bargaining or self-organization, even though workers may have qualified as employees under 150A §3.

union, and participate in collective bargaining.	
Unlawful discrimination protections M.G.L c. 151B Makes it unlawful to refuse to hire or to terminate an individual due to discrimination based on "race, color, religious creed, national origin, sex, gender identity, sexual orientation," genetic information, pregnancy, breast-feeding, ancestry, or veteran status. M.G.L.A ch.151B, §4(1). Protects against discrimination in "compensation or terms." "conditions or privileges of employment, Makes it unlawful for an employer to dismiss or refuse to rehire or promote an employee due to a disability if the person is "capable of performing the essential functions of the position involved with a reasonable accommodation." 151B §4(16) This section only applies to employees under the common law definition. See Comey v. Hill, 387 Mass. 11, 15, 438 N.E.2d 811 (1982). **Sexual harassment 151B, §3A, §4(16A)**	**Contract Formation & Termination (Section 9(e), Petition 21-12)/ (Section 10(e), Petition 21-11)** "A network company shall not, **unless based on a bona fide occupational qualification or public or app-based driver safety need**, refuse to contract with or terminate the app-based driver based upon race, color, religious creed, national origin, sex, gender identity, genetic information, ancestry, status as a veteran", etc. Prohibits companies from refusing to hire or terminating workers for discriminatory reasons, unless a bona fide occupational qualification or app-based driver safety need. It is unclear what an "app-based driver safety need" would constitute in this context and the proposed legislation does not define it. Moreover, it does not protect drivers from discrimination in compensation or terms of employment, only in hiring or firing. Does not provide any protections or reasonable accommodation requirements for workers with disabilities. **Paid Occupational Safety Training Requirement (Section 4, Petition 21-11)** Does not ban sexual harassment or dictate consequences for sexual harassment.

Makes it unlawful for an employer, "personally or through its agents, to sexually harass any employee." 151B, §4(16A). Requires that every employer should adopt a policy that includes "a statement that sexual harassment in the workplace is unlawful," that it is unlawful to retaliate against an employee for filing a complaint for sexual harassment, "a description and examples of sexual harassment", "a statement of consequences for employees who are found to commit sexual harassment," a description of the internal process for filing complaints about sexual harassment, information regarding appropriate state and federal employment discrimination agencies. M.G.L. c. 151B, §3A.	Requires **"**Recognition and prevention of sexual assault and misconduct, including, at a minimum, a description and specific examples of sexual assault and misconduct; techniques for bystander intervention; and standards of professionalism." §4(b)(1). Does not lay out any statement for consequences for sexual harassment or resources for employees who have experience sexual harassment.