

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13237

MARTIN EL KOUSSA, et.al.,

Plaintiff/Appellants

V.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,
Defendants/Appellees

CHRISTINA M.ELLIS-HIBBET, et.al.,

Intervenors

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

BRIEF FOR *AMICUS CURIAE* MATAHARI: WOMEN'S WORKER
CENTER IN FAVOR OF THE PLAINTIFFS/APPELLANTS

Date: [04/13/2022]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass.R.App. P.17(c)(1), Matahari Women's Worker Center certifies that it has no parent corporation and no publicly held corporation owns 10 percent of its stock.

MASS. R. APP. P. 17(C) (5) DECLARATION

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that: (a) no party or a party's counsel authored this brief in whole or in part; (b) no party or a party's counsel contributed money to fund preparing or submitting of the brief; (c) no person or entity except amicus provided money intended to fund preparing or submitting of a brief; and (d) amicus counsel has not represented any party in this case or in other proceedings involving similar issues, and was not a party and did not represent a party in a proceeding or legal transaction that is at issue in this present appeal.

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INTEREST OF THE AMICUS CURIAE

Matahari Women's' Worker Center is a Massachusetts organization is a membership based nonprofit worker center dedicated to representing organizing and advocating on behalf of vulnerable workers in the underground economy. The organization has been successful in increasing workers' rights and fighting for domestic workers, workers who are trafficked, and undocumented people.

The Amicus Curiae have expanded rights to domestic workers granting them full access to the Massachusetts Commission Against Discrimination and removing a decades long industry specific exclusion from worker protections. The Amicus Curiae have been part of coalitions to expand workplace protections against pregnancy discrimination, pay equity for women, and are on the precipice of passing additional protections against natural hair discrimination.

The Amicus Curiae regularly aid workers through public education, consultation and individual cases and provide a bridge to state agencies such as the Massachusetts Commission Against Discrimination and the Attorney General's Fair Labor Division.

The *Amicus Curiae* file this brief with great interest as all the above rights, protections and enforcement infrastructure flow naturally to employees. The ballot petition, if successful, would remove network drivers ("App-based drivers") from any of these protections. Upon passage, the ballot petitions strips App-drivers from protections they are presumed to have as a matter of Massachusetts law and create a sub class of workers based on the industry and self-serving, non-negotiated contracts. The Petitions also create a minimum wage and deductions specific to these workers. These policies are traditionally reserved for the Legislature and not special interests like Big Tech.

Finally, the Amici is especially concerned about the precedent that will be set if the Petitions are allowed to go forward. It will demonstrate a way for well-funded special interests to come into the Commonwealth and purchase a law that suits their financial interest and usurps the power delegated to legislative branch of the Commonwealth.

BACKGROUND

Big Tech companies such as Uber and Lyft contract with App-based drivers to transport people or deliver food and goods. The App-based drivers do not negotiate the contracts and must accept all the terms. The Attorney General has filed a lawsuit against these companies arguing that they have misclassified the App-based drivers in violation of Chapter 149, § 148B. The lawsuit is still pending.¹

To work around Massachusetts laws and to exclude workers from protections and rights based on *how they* receive work (i.e. through the app) Big Tech filed two initiative petitions² (hereinafter "Petitions") for inclusion on the November 2022 ballot. Big Tech has filed disclosures noting they have thus far spent or are willing to spend tens of millions of dollars to carve out their drivers from Section 148B. In fact, Big Tech has spent the most in one-time political contributions in Massachusetts history.³ The Attorney General approved the Petitions to be placed on the

¹ Attorney General v. Uber Technologies, Inc. and Lyft, Inc., 2084 CV 01519 (Suffolk County Superior Court).

² Record Appendix ("R.A.") R.A. 0010 and R.A. 0023

³ "The Fight over Gig Work is ugly, expensive, and nowhere near over. No: Massachusetts is not for sale. Gig companies: Wanna Bet?" Protocol available at <https://www.protocol.com/policy/gig-work-prop-22-fight-massachusetts> (Feb. 4, 2022).

ballot and provided summaries of each of the Petitions.⁴

SUMMARY

Statewide ballot initiatives must comply with Article 48 of the Massachusetts Constitution to strike a balance between direct and representative democracy. See *Hurst v. State Ballot Law Comm'n*, 427 Mass.825, 828(1998). All subjects of the proposed initiative must be "related to or mutually dependent on each other." See *Weiner v. Attorney Gen.* 484 Mass 687, 693 (2020). A constitutional statewide ballot petition cannot be a means to invalidate the acts of the "people's elected representatives in the legislature." *Hurst v. State Ballot Law Comm'n*, 427 Mass.at 828. Article 48 Section 2 also prohibits certain matters from a referendum or initiative.⁵ Specifically, Section 2 prohibits matters that are *inconsistent with the*

⁴ R.A.0007

⁵ Art. 48 section 2. Excluded Matters. No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

"right to access to and protection in the courts of justice."

Article 48 further requires that the Attorney General's summaries of the Petitions be sufficient to explain not only the language but the impact of the Petition. See *Weiner v. Attorney Gen.* 484 Mass 687 at 693. The Attorney General cannot ignore the factual impacts of a petition in determining a petition's constitutionality. *Yankee Atomic Elec. Co. v. Secretary of Com.*, 402 Mass. 750,755 (1988). Summaries of the proposed law must be written so that the citizens understand the law upon which they are voting. *Op. of Justices to the House of Representatives*, 357 Mass. 787, 800 (1970).

Big Tech's Petitions do not comply with Article 48 of the Massachusetts Constitution because they are confusing and contain several policy initiatives that are not related. The Attorney General's summaries violate Article 48 because they are not "fair" as they do not inform the electorate of the policy decisions they are truly making. The summaries fail to explain that (a) the electorate is voting to take away workers' rights from a specific class of workers and

(b) the Petitions would have substantial implications for and impose costs on the Commonwealth and its taxpayers, most notably by substituting a new, taxpayer-funded safety net to cover the obligations of a class of employers whose present failure to contribute to parental and family leave, unemployment insurance, and employment taxes is legally suspect.

This court has interpreted Art. 48 to contain safeguards prohibiting special interests from abusing the initiative process. *Hurst v. State Ballot Law Comm'n*, 427 Mass. 825, 828 (1998). Big Tech has targeted Massachusetts as part of a nationwide campaign to weaken the rights of App-based drivers. Multiple Acts of the Legislature would be invalidated by the Petition in violation Art. 48 because the Petitions:

(a) Impose industry-based restrictions on worker protections despite the Legislature removing barriers to protect all workers;

(b) Interfere with the police powers of anti-discrimination agencies;

(c) Exclude App-based drivers from multiple, separately established legislative protections including anti-discrimination, harassment, and retaliation protections under G.L. c. 151B, as well as equal pay⁶, abuse leave⁷, and CROWN Act⁸; and

(d) Eliminate "access to and protection in courts of justice" for an entire industry of workers in Massachusetts for matters concerning their civil rights, including redressing discrimination and retaliation in employment.

ARGUMENT

I. THE ATTORNEY GENERAL'S SUMMARIES ARE NOT FAIR AND VIOLATE ARTICLE 48 OF THE MASSACHUSETTS CONSTITUTION.

The Attorney General has "several responsibilities" when considering the constitutionality of an initiative petition. See *Yankee Atomic Elec. Co. v. Secretary of Com.*, 402 Mass. at 755. Along with assessing the legality of a petition Article 48 requires the Attorney General to prepare a "fair, concise summary" of a proposed law.

⁶ Massachusetts Equal Pay Act (MEPA) M.G.L.c. 149, Section 105A.

⁷ M.G.L.c. 149 Section 52E

⁸ Senate Docket (S.2796) and House Docket (H.4554) both unanimously passed version of the law prohibiting discrimination based on natural hair.

Amend. art. 48, The Initiative, II, § 3, as appearing in art. 74. The summary must be clear about the impact of the proposed law change and policy implications. *Abdow v. Attorney Gen.*, 468 Mass. 478, 487 (2014). The subjects of the initiative must be related in such a way that a reasonable voter could affirm or reject the entire petition as a *"unified statement of public policy."* *Anderson v. Attorney General*, 479 Mass. 780, 789 (2018). The Attorney General in assessing the legality and preparing fair concise summaries also is expected to look beyond the facial language of the petition and assess whether the factual impact of the legislation proposed by the petition will involve an excluded subject such as being *"inconsistent with the right to access and protection of courts of justice."* *Albano v. Attorney General*, 437 Mass. 156 (2002).

The Petition summaries fail to mention the goal or the factual impact of the petitions: to deny App-based drivers employee status and remove the myriad rights of employees that flow from that status. Moreover, there is no mention of the total cost to the Commonwealth or the citizens if they choose to deny a specific class of workers employee status. It can

hardly be suggested that any person let alone the average voter can make an informed decision if they are not told upfront the costs of the decisions they are making and the Attorney General does not engage in even a cursory summary of the factual impact of the petition.

A. The Attorney General's Summaries Fail to Summarize Fact that the Petitions would take away workers' rights from App-Based Drivers.

App-Based drivers, like all workers, are presumed to be employees in Massachusetts. See M.G.L. c. 149 and c. 151. The Attorney General filed suit to enforce Chapter 149's requirements against Big Tech because Big Tech so egregiously violated workers' rights.⁹ It is doubtful the Attorney General could have summarized the breadth of workers' rights that will be denied to App-based drivers if Big Tech is successful. However, the Attorney General should have at least stated that the proposed law would reverse the presumption that App-based drivers are employees and are entitled to same rights as all other employees in the Commonwealth. Failing to mention that the

⁹ AG Healey: Uber and Lyft Drivers are Employees Under Massachusetts Wage and Hour Laws, Press Release <https://www.mass.gov/news/ag-healey-uber-and-lyft-drivers-are-employees-under-massachusetts-wage-and-hour-laws>

Petition would permanently remove a plethora of rights¹⁰ from the App-based workers makes the summary unfair and unclear about the impact of the Petitions.

B. The Attorney General's Summaries Fail to Summarize or Mention the cost or impact on the Commonwealth or cost to voters.

The Attorney General's summaries do not explain or mention the financial cost of the ballot initiative thereby preventing the voters from making an informed decision. The Attorney General has documented that misclassification of workers costs the Commonwealth between \$259 and \$278 million in revenue.¹¹ An

¹⁰ Example of some of the employee rights that will be denied to App-based drivers M.G.L. c. 149 § 148 (guaranteeing the timely, accurate, and complete payment of wages, and prohibiting "special contracts" and continue its status quo operations in Massachusetts); M.G.L. c. 149 § 148A (anti-retaliation protections with regard exercise of c. 149); M.G.L. c. 149 § 148C (earned sick time); M.G.L. c. 149 § 150A (notice of deductions on compensation); M.G.L. c. 149 § 150C (penalizing employers who deduct wages but fail to purchase health insurance as promised); M.G.L. c. 149 § 100 (meal breaks) ; M.G.L. c. 151, *et seq.*(guaranteeing minimum wages and overtime, anti-retaliation protections, requiring accurate recordkeeping); M.G.L. c. 151A, *et seq.* (unemployment insurance); Special UI funds and assessments: Workforce Training Fund and the COVID-19 Recovery Assessment; M.G.L. c. 149 § 189 (employer medical assistance contribution related to Health Safety Net Fund also known as EMAC and supplemental EMAC); M.G.L. c. 151B, *et seq.* (discrimination, sexual harassment, related retaliation); M.G.L. c. 152, *et seq.* (workers compensation) ; M.G.L. c. § 175M, *et seq.* (paid family and medical leave) ; M.G.L. c. 149 § 52C (the personnel records law); M.G.L. c. 149 § 52D (the small necessities leave act) and c. 149 § 52E (domestic violence related leave); M.G.L. c. 149 § 105D (parental leave); and M.G.L. c. 149 § 159B (medical exam required as condition of employment) .

¹¹ Françoise Carré & Randall Wilson, *The Social and Economic Costs of Employee Misclassification in the Construction Industry, Construction Policy Research Center, Labor & Worklife Program, Harvard*

estimated \$87 million is unpaid unemployment insurance taxes.¹²

Misclassification of workers and the fact that the Big Tech did not contribute to unemployment was particularly glaring during the Covid-19 pandemic. Nationally, the independent contractors were extended an extraordinary form of unemployment insurance under the federal Pandemic Unemployment Assistance (PUA) program.¹³ This was particularly necessary because independent contractors traditionally do not receive unemployment.

Notwithstanding Massachusetts' strong presumption of employment, Big Tech has serially misclassified its App-based drivers since their entry into the

Law School & Harvard School of Public Health, at 2 (2004), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1042&context=csp_pubs; James B. Rebitzer & David Weil, *Technical Advisor Board Report: Findings and Implications of the RSI Report to the Joint Task Force on Employee Misclassification and the Underground Economy: Contractor Use, Analysis, and Impact Results*, at 17-19 (Mar. 31, 2014), https://www.mass.gov/files/2017-07/technical-advisory-board-report_0.pdf.

¹² Id.

¹³ Massachusetts received approximately \$11 billion dollars of PUA under the CARES Act. See How much Coronavirus Funding Has Gone to your State, Peter G. Peterson Foundation, available at <https://www.pgpf.org/understanding-the-coronavirus-crisis/coronavirus-funding-state-by-state>; See Pandemic Unemployment Assistance (PUA) Learn about Pandemic Unemployment Assistance at <https://www.mass.gov/pandemic-unemployment-assistance-pua>

Commonwealth. Both prior to and after the COVID-19 pandemic began, Big Tech did not make unemployment contributions on behalf of its Massachusetts drivers.

During the pandemic, many App-based drivers were forced to apply for PUA to make ends meet. Any other company employing tens of thousands of workers in the Commonwealth would have had to contribute to the unemployment system. Big Tech ended up passing the cost of employment to the federal government, and ultimately to taxpayers of Massachusetts.¹⁴

II. THE FACTUAL IMPACT OF THE PETITIONS ARE INCONSISTENT WITH THE RIGHT TO ACCESS AND PROTECTION IN COURTS OF JUSTICE AND THEREFORE THE PETITIONS ARE PROHIBITED FROM GOING FORWARD.

Article 48 Section 2 lists several matters that are constitutionally excluded or prohibited from being an initiative petition. Section 2 prohibits initiatives or referendums that are "inconsistent with the right of the individual" specifically, the "right to access to and protection in courts of justice."

¹⁴ See for example, "UC Berkeley also estimated that in California for example, Uber and Lyft would have had to pay \$413 million into California's UI trust fund between 2014 and 2019." UC Berkeley Labor Center available at <https://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/>

Art. 48 Section 2.¹⁵ This Court has examined the constitutionality of a petition based on whether it was "inconsistent with the right to access and protection of court of justice." *Horton v. Attorney Gen.*, 269 Mass. 503, 511 (1929). To analyze whether a matter should be excluded from an initiative petition this Court has found that "the general approach of the court in cases reviewing Attorney General

¹⁵ Art. 48 Section 2. Excluded Matters. No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the [eighteenth amendment of the constitution](#), as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition **inconsistent with any one of the following rights** of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; **the right of access to and protection in courts of justice**; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

certification decisions regarding excluded subjects has been to consider the apparent factual impact flowing from a petition's language." *Yankee Atomic Elec. Co. v. Secretary of Com.*, 402 Mass. 750, 756 (Mass. 1988). The factual impact however must be more than incidental it must be the main focus of the ballot initiative. See e.g. *Mazzone v. Attorney General*, 432 Mass. 515 (2000) citing *Horton v. Attorney General supra*.

The factual impact and the main focus of the ballot initiative is to legally define App-based drivers as independent contractors. The impact flowing from independent contractor status is that App-based drivers will not be afforded rights and protections under Chapter 151B, which include access to the Massachusetts Commission Against Discrimination. In order to file a discrimination claim in the courts in Massachusetts a worker *must* first file a claim with the MCAD. Denying App-based workers access to the MCAD is denying them access to the rights and protections of the courts of justice in the commonwealth.

A. THE PETITIONS LEAVE APP-BASED DRIVERS WITH FEWER ANTI-DISCRIMINATION PROTECTIONS AND DENY APP-BASED WORKERS ACCESS TO THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION AND ARE THEREFORE INCONSISTENT WITH THE FUNDAMENTAL INDIVIDUAL RIGHT TO ACCESS AND PROTECTION OF THE COURTS OF JUSTICE OF THE COMMONWEALTH IN VIOLATION OF SECTION 2 OF ARTICLE 48.

General Laws c. 151B¹⁶ includes some of the most robust anti-discrimination laws in the country. Chapter 151B outlines the legal procedures for pursuing a discrimination claim in the court of law.¹⁷ Chapter 151B sets the jurisdiction for the Massachusetts Commission Against Discrimination (“MCAD”) which is the statewide agency tasked with enforcing the Commonwealth’s anti-discrimination laws.¹⁸

The MCAD is the first required step in accessing the protection of courts in Massachusetts against discrimination.¹⁹ The MCAD’s jurisdiction is expansive. The MCAD is tasked with drafting regulations, sample training, and mediation. A worker’s access to the MCAD *is key to the workers* protection against discrimination. The bar is also

¹⁶ M.G.L.c.151B

¹⁷ M.G.L.c.151B § 9.

¹⁸ See M.G.L.c 151B § 3.

¹⁹ See M.G.L.c. 151 § 9.

low to access this agency. A person does not have pay a filing fee, there are no rules of evidence, it is designed for *pro se* individuals. It also provides an attorney in cases where the agency finds probable cause.²⁰

The Legislature, in understanding the vital role of the MCAD, gave it robust police powers.²¹ The MCAD can prosecute a claim, demand responses and make

²⁰ See M.G.L.c. 151B § 5.

²¹ See M.G.L.c. 151B § 3:

5. To adopt, promulgate, amend, and rescind rules and regulations suitable to carry out the provisions of this chapter, and the policies and practice of the commission in connection therewith.

6. To receive, investigate and pass upon complaints of unlawful practices, as hereinafter defined, alleging discrimination because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, children, marital status, veteran status or membership in the armed services, the receiving of public assistance, or handicap of any person alleging to be a qualified handicapped person. The term "sexual orientation" shall mean having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality. The commission through its chairman may appoint a single commissioner to hold public hearings, as hereinafter provided, and to otherwise act on its behalf in connection therewith; provided, however, that a person aggrieved by the decision of said single commissioner may, within ten days of said decision, file an appeal for rehearing or review by the commission.

7. To hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission. The commission may make rules as to the issuance of subpoenas by individual commissioners.

binding findings.²² The Legislature recently expanded its jurisdiction to include domestic workers. Indeed, the Legislature has only expanded the MCAD's jurisdiction and added additional protections for workers to root out discrimination in the Commonwealth. Recent successful legislative protections such as equal pay²³, abuse leave²⁴, and CROWN Act²⁵ are all examples of the legislatures

²² M.G.L.c. 151B § 5.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice.

²³ Massachusetts Equal Pay Act (MEPA) M.G.L.c. 149 § 105(A)

²⁴ M.G.L.c. 149, § 52E.

²⁵ See, Massachusetts Senate unanimously passes the CROWN Act, banning discrimination against natural hair at <https://www.bostonherald.com/2022/03/31/massachusetts-senate-unanimously-passes-the-crown-act-banning-discrimination-against-natural-hair/Massachusetts> is on the verge of becoming the 15th state to pass sweeping legislation to protect against natural

reflecting the will of the electorate to *expand* workers' protections against discrimination.

Massachusetts' anti-discrimination laws were first conceived in 1855, with the MCAD established in 1946.²⁶ The architecture of laws and public and nonprofit partnerships built on education, advisement, adjudication and enforcement are in many ways predicated on these statutes. The statutes contemplate an involved partnership of state and municipal entities, including municipal human rights commissions, able to hear and refer complaints of discrimination. The Petitions would create a parallel and incomplete system of protections against discrimination, remove the ability of App-based workers to access adjudicatory justice and relief, and exclude workers from numerous protections.

Despite the Legislature's long fight to expand protections, remediate and prevent discrimination, Big

hair discrimination. This law would apply to students and *employees*. It does not apply to independent contractors. This new law passed unanimously in the house and senate. It is enforced by the MCAD. If it were to be interpreted that "race" included natural hair discrimination App-based drivers would still be without recourse as they could not go to the MCAD to enforce the anti-discrimination provisions of their contract.

²⁶ See History of the MCAD available at <https://www.mass.gov/service-details/history-of-the-mcad>

Tech seeks to exclude App-based drivers from the protections of the MCAD, as well as new laws concerning equal pay, abuse leave and natural hair. By excluding App-Based drivers from employee status, Big Tech not only prohibits App-based drivers from seeking redress at the Massachusetts Commission Against Discrimination, by default they are *preventing* App-based drivers from having *access and protection from the courts* in violation of Article 48 section 2. It is a factual impact of the Petitions that this court must consider. Moreover limiting the scope of available discrimination claims and depriving drivers of access to the MCAD, and the courts, is not incidental, but rather a significant provision of the Petitions. The Petitions also prevent any future protections from being applied to App Based drivers. The petitions invalidate acts of the Legislature in order to benefit special interests and therefore violating Article 48 of the Massachusetts Constitution.

Big Tech's Petitions fall incredibly short in offering anti-discrimination protections, effective access to redress, and provide no remedies comparable to those afforded under G.L. c. 151B. First, although

the Petitions adopt c. 151B's enumerated protected classes, they limit the anti-discrimination protections to two circumstances: (1) a refusal to hire—a.k.a. to contract with, and (2) a termination.²⁷

In doing so, the Petitions would, among other changes, remove critical anti-discrimination and harassment protections covering drivers over the course of their employment.²⁸ For instance, the Petitions would effectively invalidate anti-discriminatory protections during disciplinary hearings or during promotional opportunities, eliminate legislative protections guaranteeing reasonable accommodations for App-based drivers, and eliminate written notice requirements which are meant to effectuate civil rights and prevent discriminatory conduct by employers.²⁹

²⁷ See R.A. 0021 and R.A. 0032 "(e) A network company shall not, unless based upon a bona fide occupational qualification or public or App-based driver safety need, *refuse to contract with or terminate the contract* of an App-based driver based upon race, color, religious creed, national origin, sex, gender identity, genetic information, ancestry, status as a veteran, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object."

²⁸ G.L. 151B §3A

²⁹ G.L. 151B §4

Under the Petitions, Big Tech would be prohibited from firing a worker with a disability or a pregnant worker on the basis of his/her/their protected status but could establish working conditions that would make it functionally impossible for such worker to perform their job without any accommodation process. For example, Big Tech could set a requirement of a minimum number of riders or miles per hour as an occupational standard, and would not be obligated to provide accommodation, or educate workers about the ability to obtain any accommodation, based on their need to take a break due to a disability, to pray in accordance with their religious beliefs, or for a working parent to lactate. In fact, such workers would be penalized by being paid less because such time would not count as "engaged time" and thus not be paid.

Big Tech is also excluding itself from responsibility for how the App-based worker is treated while driving, when they are being tipped, and also when they are being rated.³⁰ What few protections Big Tech provides (if any) will need to be enforced by the App Based worker who will need to pay out of pocket,

³⁰ See, Rosenblat, Alex et. al. "Discriminating Tastes: Customer Ratings as Vehicle for Bias", Intelligence and Autonomy (October 2016).

secure an attorney, and pay court fees in order to hold Big Tech accountable.

III. THE PETITIONS INVALIDATE MULTIPLE, DISTINCT ACTS OF THE PEOPLE'S ELECTED REPRESENTATIVES AND THEREBY VIOLATE ARTICLE 48.

Initiative Petitions cannot be a means to invalidate acts by the "people's elected representatives in the legislature", *Hurst v. State Ballot Law Comm'n*, 427 Mass.825, 828(1998). This Court has recognized the delicate balance between the majority's ability to express itself and representative democracy. *Id.* However, a ballot initiative cannot turn a voter into a legislator. *Carney v. Attorney Gen.* 447 Mass. 218, 230-231 (2006). "Unlike a legislator, the voter has no opportunity to modify, amend, or negotiate the sections of a law proposed by popular initiative. He or she cannot sever the unobjectionable from the objectionable. He or she must vote the measure "up or down as one piece." *Anderson*, 479 Mass. 780, 786. citing *Carney v. Attorney Gen.* 447 Mass. 218, 230-23.

A ballot petition when dealing with numerous unrelated issues concerning workers' rights fails this balance test. Workers' rights inherently require a

debate in the legislature that weighs costs, loss in protections, and weighs whether the petitions are in line with the moral compass of the state. The Legislature sets that moral compass and resets the course of any law through the transparent, open debate process. This process simply cannot be replicated with an up or down vote on 5 or more complex statutes, each of which represents a comprehensive legislative scheme based in its own unrelated legislative history and public policies.

The petitions in question seek an up or down vote on multiple, distinct areas of law, including worker classification, compensation, benefits, training standards, family and medical leave, workplace accident insurance, and other issues. Where the Commonwealth has authorized initiative petitions on these matters in the recent past, it has done so through narrowly targeted initiatives. In 2014, for example, workers' rights proponents submitted separate questions on the minimum wage and earned sick time. The former question was withdrawn after the legislature acted favorably, and the latter proceeded

as a distinct ballot measure solely focusing on sick time.³¹

A. THE PETITIONS IMPOSE INDUSTRY-BASED RESTRICTIONS ON WORKER PROTECTIONS INVALIDATING ACTIONS BY THE LEGISLATURE TO REMOVE BARRIERS TO WORKER PROTECTIONS

In Massachusetts the laws distinguish employees from independent contractors through a conjunctive three-part test that presumes all workers are employees. M.G.L. c. 149 § 148B. The burden is on companies to show they are not employers. *Id.* As explained throughout this brief, having employee status provides a plethora of rights and protections automatically.

Big Tech is creating a carve out for App-based drivers and changing the test and standards for when a worker is excluded from employee standards. Essentially, Big Tech is trying to exclude App based drivers from the protections the legislature has provided for them based solely on how the workers receive their work (through the app).³² Big Tech is not seeking any exemptions for all drivers or delivery personnel in the transportation service industry.

³¹ See Massachusetts Voters Approve Question 4 allowing workers legal right to earned sick time. https://www.masslive.com/politics/2014/11/massachusetts_voters_approve_workers_legal_right_to_earned_sick_time.html

³² See Fn.8

They are seeking only the drivers and deliver personnel that use their apps to receive work from being excluded from worker protection in Massachusetts. It is a dangerous precedent to set as App-based work continues to expand, affecting millions of workers and making hundreds of millions of dollars for Big Tech.³³

Creating an exception to Chapter 149 based exclusively on how workers receive their work invalidates the actions of the Legislature to use its process and unique position to craft legislation takes all the interests into consideration. Considering the increasing growth of the gig economy and App-based work as well growing amount of women and people of color working in the gig economy, the Amicus Curiae

³³ See 26 Best Gig Economy Apps: Make Quick Money with a Legit Side Hustle, at <https://gigsmart.com/blog/26-best-gig-economy-apps-make-quick-money-with-a-legit-side-hustle/> (documenting top gig economy apps for workers (Last updated April 16, 2021) ; see also "The Ultimate List of Gig Economy Apps" Financial Panther, <https://financialpanther.com/the-ultimate-list-of-gig-economy-apps/> (Last updated January 20, 2022)).

are particularly concerned about a lack of protections for App-based workers.³⁴

Big Tech consistently argues that they cannot offer workers "flexibility" without stripping the workers of the rights of employees. However, Big Tech's arguments sit on a false premise. In fact, The Legislature has routinely increased rights for workers whose jobs require the flexibility (changing hours and conditions) that characterize Big Tech's jobs.

For example after years of advocacy of the Amici, legislature recently added protections for domestic workers. See M.G.L.c. 149, sec. 190.³⁵ Domestic workers (nannies care workers) were excluded from many workplace protections because of where they worked. They often had irregular hours, could be asked to do different things throughout the day and often were subject to changing work conditions. The Legislature

³⁴ See Racial and ethnic differences stand out in the U.S. gig workforce, Pew Research Center available at <https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/> (December 15, 2021)

³⁵ See also "Domestic Workers: Domestic Workers have the right to minimum wage, overtime, time off from work, and other protections. Under state law there are additional rules and added protections for domestic workers related to working and living conditions", Attorney General, at <https://www.mass.gov/info-details/domestic-workers>

stepped into to regulate that industry to assure that working in a private home in fluctuating circumstances did not make a person less deserving of the full measure of employees' rights. In fact, due to the unique power dynamic in people's homes, the Legislature provided domestic workers *with more protections*. The Commonwealth now requires that domestic workers have a written contract that they must negotiate with their employers.³⁶ The Attorney General created a sample contract, informed by domestic workers and the Amici for domestic workers and their employers.³⁷

³⁶ M.G.L.c. 149 §190(1) An employer who employs a domestic worker shall keep a record of wages and hours pursuant to section 15 of chapter 151. In addition to the information required pursuant to said section 15 of said chapter 151, an employer who employs a domestic worker for 16 hours or more a week shall provide the following information: (i) the rate of pay, including overtime and additional compensation for added duties or multilingual skills; (ii) working hours, including meal breaks and other time off; (iii) if applicable, the provisions for days of rest, sick days, vacation days, personal days, holidays, transportation, health insurance, severance and yearly raises and whether or not earned vacation days, personal days, holidays, severance, transportation and health insurance are paid or reimbursed; (iv) any fees or other costs, including costs for meals and lodging; (v) the responsibilities associated with the job; (vi) the process for raising and addressing grievances and additional compensation if new duties are added; (vii) the right to collect workers' compensation if injured; (viii) the circumstances under which the employer will enter the domestic worker's designated living space on the employer's premises; (ix) the required notice of employment termination by either party; and (x) any other rights or benefits afforded to the domestic worker. Failure to comply with this paragraph shall constitute a violation of paragraph (3) of section 19 of chapter 151.

³⁷ See Model Domestic Worker Employment Agreement at <https://www.mass.gov/doc/sample-employment-agreement-for->

This is in stark contrast to Big Tech which would require a contract that does not include protections, is not vetted by the Attorney general and is not negotiated with the App-based drivers.

The legislature also expanded laws for temporary workers,³⁸ M.G.L. c. 149, sec. 159C, and provided expanded rights for workers that receive work from temporary agencies.³⁹ The very nature of temporary work is its flexibility the adaptability of the workers who can go from different industries, different time schedules and skill sets. Still, the Legislature in attempting to regulate that industry *increased*

domestic-workers/download#:~:text=Domestic%20workers%20who%20are%20employees,departure%20and%20intention%20to%20return.

³⁸ See also Temporary Workers: Understand the rights of temporary workers (or "temp" workers), Attorney General, at <https://www.mass.gov/service-details/temporary-workers#:~:text=Temp%20workers%20have%20the%20right,number%20of%20the%20staffing%20agency>

³⁹ Id. Explaining that Temporary and staffing agencies must give workers certain important information in writing before each new assignment. This written information, called a "job order," must include, among other things: (a) the name, address, and phone number of the staffing agency (b) the name, address, and phone number of the agency's workers' compensation insurance carrier (c) the name, address, and phone number of the company where the employee will be working (d) the job the employee will be doing (d) work hours and pay. Also noting that certain charges not allowed included charges for: (a) registering with the agency (b) getting work assignments (c) drug tests (d) CORI (criminal background) checks (e) debit cards or other means of payment (f) transportation that the employer requires the worker to use (g) transportation costs that are more than 3% of daily wages

workers' rights. The temporary quick nature of work of some work did not prevent workers from being treated with dignity and respect and having rights. Big Tech is doing the exact opposite in their attempts to "regulate" App-based drivers: they are giving them fewer right and protections. Big Tech is literally reversing decades of work by the Legislature and rerouting the moral compass of the Commonwealth for its workers, the App-based drivers.

B. THE PETITIONS REMOVE MINIMUM WAGE PROTECTIONS AND PREVENT WORKERS FROM ACCESSING THE ATTORNEY GENERAL'S FAIR LABOR DIVISION TO COMBAT WAGE THEFT.

When creating the minimum wage or any exceptions therefrom the Legislature weighs the economic implications, projected growth of the economy and the cost of living. In Massachusetts, the Legislature has created, minimum wages⁴⁰, sub minimum wages⁴¹ and tipped minimum wages⁴². In short, the Legislature is uniquely and best positioned to determine if an industry or set of workers should be excluded from the state minimum wage laws and if so at what rate. Moreover, the

⁴⁰ See Generally M.G.L.c. 151

⁴¹ M.G.L.c. 151 §§ 7 and 9 (Certificate authorizing employment at less than the minimum fair wage rates)

⁴² M.G.L.c. 149 § 152A

Legislature and state agencies have defined working time, time off, and when meals and breaks can be excluded from minimum wages.⁴³ The Legislature, as with anti-discrimination laws, created a dual enforcement mechanism that tasks the Attorney General's Fair Labor Division office with the enforcement of the Commonwealth's wage and hour laws but also permits aggrieved individuals to seek a private right of action.

Through the Petitions, Big Tech is attempting to usurp and invalidate protections for a specific class of App-based workers to serve its own economic interests. First, the Petitions unilaterally set a pay rate for App-based drivers different from the generally applicable basic minimum wage under G.L. c. 151 § 1B. The Petitions' wage rates are based on Big Tech's financial interest, while the Commonwealth's minimum wage is based on studies, deliberation, and weighing of the economic reality of workers and businesses. Second, Big Tech defines compensable time differently from the Commonwealth. Instead of paying

⁴³ 454 CMR 27.05: Wage Payments and Deductions from Wages "No deduction, other than those required or expressly allowed by law, and those allowed for lodging and meals listed in 454 CMR 27.05(2) and (3) shall be made from the basic minimum wage.

App-based drivers based on their "working time",⁴⁴ under the Petitions, App-based drivers will only be paid for "engaged time", when they are directly making money for Big Tech. Third, the Petitions unilaterally permit Big Tech, in contravention of existing law, to require drivers to pay for a portion certain business expenses—i.e., mileage-- thereby further diminishing their proposed "minimum earnings floor."

Finally, the Petitions prevent App-based drivers from filing a wage claim with the Attorney General or filing a lawsuit for earned but unpaid wages. Instead upon passage of this the Petitions, App-based drivers will have to figure out how to enforce their rights. App-based drivers will not be able to avail themselves of the police powers of the Attorney General. Similar to the MCAD, the Attorney General's complaint process is free and designed for *pro se* parties to learn about and enforce their rights.⁴⁵ Big Tech's Petitions strip

⁴⁴ See Minimum Wage 454 CMR 27.02 Working Time. Includes all time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site or at any other location, and any time worked before or after the end of the normal shift to complete the work. Working time does not include mealtimes during which an employee is relieved of all work-related duties. Working time includes rest periods of short duration, usually 20 minutes or less.

⁴⁵ M.G.L.c. 149 § 150

An employee claiming to be aggrieved by a violation of sections 33E, 52E, 148, 148A, 148B, 148C, 150C, 152, 152A, 159C or 190 or

that system away from App-based drivers and fundamentally impair their access to justice. Moreover Big Tech's Petitions make clear that they may continue to unilaterally include contract terms depriving drivers of access to the courts, i.e., requiring arbitration, to resolve any and all disputes that may emerge.

CONCLUSION

The Amici file this brief in support of the Plaintiff/Appellant's argument that Big Tech's Petitions should not be placed on the ballot. Amici have fought to protect vulnerable workers and to assure that no matter the immigration status or flexibility of their job workers are considered employees and entitled to the plethora of rights and protections that status creates. The Petitions deal

section 19 of chapter 151 may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits; provided, however, that the 3 year limitation period shall be tolled from the date that the employee or a similarly situated employee files a complaint with the attorney general alleging a violation of any of these sections until the date that the attorney general issues a letter authorizing a private right of action or the date that an enforcement action by the attorney general becomes final. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

with multiple unrelated topics, are not summarized in a fair way and deny workers access to and protection of the court of Massachusetts. They are an attempt at invalidating the work of the legislature and excluding workers from much needed and ever-growing workers' rights solely for the benefit of well-funded special interests.

This violates the spirit and goals of Article 48 of the Massachusetts Constitution. They are therefore not appropriate for the ballot and are unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

**Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure**

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. This brief produced in monospaced font and contains 33 pages.

CERTIFICATE OF SERVICE

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

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