No. SJC-13237

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

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

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,

Defendants-Appellees

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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Dated: April 13, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), amicus curiae New England Legal Foundation (NELF) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

This case is of concern to NELF because it involves the regulation of business and in particular the kind of legal status Massachusetts workers may have in relation to the businesses with which they work. In a wide variety cases in this Court and other courts, NELF has briefed legal issues arising from the relationship between workers and businesses. Because the ballot initiatives in this case involve constitutional issues and attempt to modernize the kinds of

[1] No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither Amicus nor its counsel has ever represented any party to this appeal on similar issues, or has been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

working relationships permissible in Massachusetts, it important that the Court evaluate this appeal in a manner that takes full cognizance of the proposed novel changes to be made to Massachusetts employment law. For these reasons, NELF believes that its views may be of assistance to the Court and has filed this brief in response to the Court's amicus announcement.

ISSUE PRESENTED

Did the Attorney General correctly certify that the petitions do not deal with unrelated subjects?

ARGUMENT

I. The Petitions Seek to Modify Traditional Independent Contractor Status in Order to Define a New Form of Employment Relationship, One Without Precedent in Massachusetts Law.

No constitutional analysis of the petitions can be adequate unless the Court has an accurate conception of what exactly is being proposed. Unfortunately, the plaintiffs offer the Court a profoundly mistaken view of the aims of both petitions, and that error runs through their arguments like a red thread and vitiates them. Contrary to their view, the petitions do *not* seek to enshrine a traditional, common law independent contractor status for the drivers.

Had the petitioners sought merely to bestow on the drivers independent contractor status as it exists now in Massachusetts law, they could have done so in far fewer words. Rather, they wish to put before the voters a new form of employment relationship hitherto unknown in Massachusetts law, one possessing its own distinctive legal features and adapted to a specific new technology-based industry. This unique employment status is not the old independent contractor relationship with bolt-on "sweeteners," s*ee* Brief of Plaintiffs/Appellants (Pl. Br.) at 25, 34, 35, nor is it the same as the status of being an employee minus certain features.

The petitioners define this novel legal status in the only way they can, through a series of legal restrictions, rights, benefits, obligations, and the like incorporated into proposed changes to current law. Indeed, they have set out for voters an integrated scheme of legal changes aimed at thoroughly defining and establishing the new employment relationship within the framework of Massachusetts law. *See infra* pp. 17-25. Hence, the petitions include provisions of various kinds dealing with the topic exhaustively in order to make clear to voters in what regards this novel employment status would remain like traditional

independent contractor and in what regards it would differ by possessing characteristics similar, but not identical, to employee status.

Properly understood, therefore, the fully developed legal scheme found in the petitions offers voters a meaningful choice of a unified statement of public policy. *See Carney v. Attorney General*, 447 Mass. 218, 232 (2006) ("question we must answer is whether their petition offers fellow citizens a meaningful choice to express a uniform public policy").

How then do the parts of the initiative petitions, properly understood, fail to serve a "common purpose," *id*. at 225, as the plaintiffs complain, *see*, e.g., Pl. Br. at 41? How do the initiative petitions fail to "express an operational relatedness among [their] 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.

The plaintiffs cannot answer these questions in an informed way because they fail to confront the petitions on their own terms. Instead, the plaintiffs obscure the true purpose of the petitions by slicing and dicing them into as many separate pieces as possible. Their brief enumerates two "main features" of the petitions, two additional

features, and three "unrelated" subjects based on three "unrelated" relationships. Pl. Br. at 22-26, 31-45. The plaintiffs then declare the results of their own handiwork to be "unrelated" to each other. *Id*. at 31-45. By plaintiffs' reasoning, a three-legged dog consists of unrelated parts — a number, legs, and a dog — rather than being one thing that *must* be defined in relation to its three key features if it is to be described at all adequately and understood by others.

Similarly, here the provisions that the plaintiffs call "unrelated" are in fact legal features that *must* be set out in the proposals because they are necessary in order to define for voters what this novel hybrid employment status would be and what it would entail in various legal contexts. *Cf. Albano v. Attorney General*, 437 Mass. 156, 161 (2002) (common purpose where petition sought to define legal status subject to "benefits[s] or responsibilit[ies] that arise[]" under variety of affected statutes). Absent these defining features, the proposed new status would not exist and there would be nothing to vote on.

So when the plaintiffs object that to provide certain compensation guarantees and the like to drivers is not related to their being independent contractors because these subjects have not been related in the past, *see*, e.g., Pl. Br. at 32, they are correct that up to now such

things have not been related to that legal status. *That's the whole point.* That is precisely what the petitioners openly aim to change.

Essentially, the plaintiffs are saying that the Court should not permit these petitioners, or any petitioners, ever to define a new employment status because even one step away from the traditional independent contractor status would be a forbidden foray into an unrelated subject. As the plaintiffs would have it, then, it is impossible *constitutionally* to use the initiative to make any legal modification to the independent contractor relationship. Period. On its face, that is a very surprising conclusion, and the plaintiffs do not even attempt to make it appear less so.

It is obvious that plaintiffs do not like the hybrid status that the two ballot proposals would create. Indeed, in some parts of their brief they fall into argumentation that sounds like canvassing for a "No" vote on the merits of the ballot questions themselves, advocacy which is entirely out of place in a forum concerned with the constitutional soundness of the petitions and not with the merits of what they propose. *See Bogertman v. Attorney General*, 474 Mass. 607, 612 (2016) ("We do not weigh the wisdom of the policies underlying a proposed measure, but only whether the petition conforms to the constitutional

requirements of art. 48."); *Sears v. Treasurer and Receiver General*, 327 Mass. 310, 321 (1951) (judges "must determine that question . . . without the slightest regard to their own personal views as to the desirability or otherwise of the law involved").

The plaintiffs are free to vote "No" in November. What they should not be allowed to do now is to rewrite the ballot proposals by sundering "independent contractor" status from the integrated scheme of legal provisions needed to define for the voters the novel, unprecedented form of that status that the petitioners propose to create in Massachusetts for one specific industry.

II. The Plaintiffs Misstate the Standard for Art. 48 Relatedness.

A ballot initiative is limited to dealing with "only subjects . . . which are related or which are mutually dependent." Article 48, Initiative and Referendum, Pt. II, § 3, of the Articles of Amendment of the Massachusetts Constitution, as amended by arts. 74, 81, and 108. The plaintiffs are as mistaken about the applicable legal standard for determining relatedness as they are about what the petitioners propose. *See supra* pp. 7-12.

What might be called their "relatedness plus" standard rests on a misreading of *Anderson v. Attorney General*, 479 Mass. 780 (2018), for

that case does not require some generic form of relatedness *plus* mutual dependence among the subjects, as the plaintiffs suppose. *See* Pl. Br. at 30-31. The Court has developed and has come to rely on a much different, two-part test. That is all the test that is needed.

As this Court has many times acknowledged, there is "no bright-line analysis" by which to judge relatedness. *Carney*, 447 Mass. at 226. Initially the Court used a test that was largely summed up in a single sentence: "If, however, one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane, the relatedness test is met." *Massachusetts Teachers Ass'n v. Secretary of Commonwealth*, 384 Mass. 209, 219-20 (1981) (*MAT*).

Over the years, the Court added interpretive glosses; without abandoning the core principle that subjects must be "germane" to a common purpose, the Court elaborated on the test. *See Anderson*, 479 Mass. at 788-89. In *Abdow v. Attorney General*, the Court extracted from a previous case a two-part test for relatedness, one which it used there and has continued to use in subsequent cases. 468 Mass. 478, 500-01 (2014) (quoting *Carney*). *See Weiner v. Attorney General*, 484 Mass. 687 (2020); *Anderson, supra; Oberlies v. Attorney General*, 479 Mass. 823 (2018); *Dunn v. Attorney General*, 474 Mass. 675 (2016);

Gray v. Attorney General, 474 Mass. 638 (2016); *Hensley v. Attorney General*, 474 Mass. 651 (2016). This test has become, for all intents and purposes, the Court's test for relatedness. *See Oberlies*, 479 Mass. at 837 (calling it "the two-part relatedness test").

Here is the test as set out in *Dunn*.

> [W]e have posed two questions to be considered in addressing the related subjects requirement: First, "[d]o the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters?" . . . . Second, does the initiative petition "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"?

474 Mass. at 680 (citations to *Abdow* and *Carney* omitted).

There can be no doubt of the centrality of these two questions to the Court's art. 48 inquiry. Not only have they been used in all the recent cases, but *Carney* also dubbed the first question "[t]he salient inquiry" and the "crux of the relatedness controversy." 447 Mass. at 226. *Accord Abdow*, 468 Mass. at 500. The second question is no less central, for the Court has described that question and the first one as "two sides of the same coin." *Anderson*, 479 Mass. at 791.

Most relevant here is that the Court has stated that art. 48's phrase "or which are mutually dependent" does *not* impose a "separate requirement" from that of ordinary relatedness, *id*., for to "eliminate[e]

the requirement of relatedness" with that phrase, the Court said, would be to "vitiate" art. 48's protection of voters, *id*. at 793. Obviously, then, the phrase denotes, at most, a particular form of relatedness and not anything other than or in addition to relatedness.

Remarkably, the plaintiffs misread *Anderson* on that simple point and conclude that the Court meant that "relatedness" and mutual dependence are *cumulative* requirements; in other words, a petition must satisfy *both* requirements separately for each and every subject in relation to each and every other subject. Pl. Br. at 30-31 ("*both*") (original emphasis). This Court has never endorsed such a "relatedness plus" test, and it certainly did not do so in *Anderson*. Indeed, if that were the standard, a number of this Court's recent decisions on art. 48 would be wrongly decided.

In a telling sentence whose import appears lost on the plaintiffs, the Court said in *Anderson*: "In other words, while operationally related subjects need not be mutually dependent, 'we need not pause to consider whether any subjects which are mutually dependent could ever be said not also to be related.'" 479 Mass. at 792 (quoting *MTA*). In the first half of that sentence the Court makes a direct verbal allusion ("operationally related") to the two-part test, *see supra* p. 14, and the

Court states that if subjects are found to be related under that test, they "need *not* be mutually dependent" too (emphasis added). So much for the plaintiffs' theory. There are not two cumulative requirements; there is a single requirement — relatedness — and that requirement need be met in one and only one way, via the two-part test.

In the second half of the sentence quoted, the Court dismisses even the possibility that mutual dependence could be anything other than a form of relatedness, just as we described it earlier. *See supra* p. 15. By way of explanation the Court examined the history of art. 48. It noted that: (i.) during the constitutional debates, the name given to what became the relatedness provision of art. 48 was simply the "unrelated matters" provision; (ii.) the words "or which are mutually dependent" were a "last moment" addition made by a committee on style (i.e., a committee lacking the power to make substantive alterations); and (iii.) when the voting delegates received the final version from the style committee, none of them perceived any change in meaning from the text as originally drafted. *Anderson*, 479 Mass. at 793. All of these facts persuaded the Court that the phrase adds nothing new or different to the relatedness requirement. *Id*.

What then are we to make of the phrase? Significantly, the Court concluded that the phrase should function simply as an interpretative aid to what is now the two-part test:

> Thus, the words "or which are mutually dependent" were added as a means of assisting, first, the Attorney General and, thereafter, the court, in language that was then well understood, to examine a petition to determine if its core purpose "dominate[s] what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters."

Id. (quoting *Carney*). Here again the Court's verbatim reference to the two-part test, *see supra* p. 14, shows conclusively that there is only one test and that it is not the plaintiffs' "relatedness plus" test.

Because the plaintiffs' argument about relatedness rests on an entirely erroneous standard, the Court should reject it entirely.

III. The Petitioners Have Set Out a Detailed Scheme of Legal Reform for One New Sector of the Labor Market.

Much as they did when they set out an overly burdensome relatedness test, the plaintiffs entertain a far too constricted view of what mix and scope of subjects an initiative may deal with. For this reason, they fail to recognize that the petitions propose an integrated scheme of legal changes, one directed at fully implementing in Massachusetts law the new employment relationship they would create.

The Court has repeatedly recognized that petitioners have the discretion to choose the scope of their own proposals, i.e., how extensively or thoroughly they develop the proposed changes of law. *See Dunn*, 474 Mass. at 682 ("scope" "matter for the petitioners, not the courts") (quotation marks omitted). *See also Mazzone v. Attorney General*, 432 Mass. 515, 528-29 (2000). Should petitioners choose an enlarged scope, as those here have, they are free to set out an entire "scheme" of legal reform. *See Hensley*, 474 Mass. at 658, 659 ("system," "detailed plan," "integrated scheme").

They may include subjects that are relevant to achieving their purpose either "directly or indirectly." *See Mazzone*, 432 Mass. at 529; *Carney*, 447 Mass. at 232. They may include not only provisions intended to clarify the limits of the principal changes proposed, but also those intended to anticipate secondary or ancillary legal issues that might arise later in connection with the principal changes. *See Oberlies*, 479 Mass. at 832 (provision related where it "anticipates and addresses a potential consequence" of principal provision).

Here the petitioners have plainly intended to create a "detailed plan" or "integrated scheme" around the new employment relationship they envision. They define various aspects of the relationship and then

work through a host of ancillary employment-related issues arising in connection with it. The choice of such an enlarged scope is theirs to make.

In determining the purpose of such a scheme, the Court is guided by certain other principles also ignored by the plaintiffs.

First, the Court has "acknowledge[d] the firmly established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws." *Abdow*, 468 Mass. at 487 (quotation marks omitted). Hence, this Court has not hesitated to look beyond petitioners' own declaration of purpose if to do so would reveal a petition's underlying common purpose. *See Carney*, 447 Mass. at 224 n.19 (evaluating petition by broader purpose proposed by AG, rather than that suggested by petition's sponsors). So, too, the title chosen for the petition by its sponsors need not encompass all aspects of the proposed law. *See Oberlies*, 479 Mass. at 831 n.8. (adopting Attorney General's characterization of petition's purpose though different from purpose in petition's title); *Nigro v. Attorney General*, 402 Mass. 438, 445 (1988) (in art. 48 "[n]owhere is it provided that the title of a proposed law shall be descriptive of it to any particular degree, or wholly accurate so far as it is descriptive") (emphasis omitted) (quoting

Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 240-241 (1946)).

In short, "[t]he proper approach . . . is to assess what a proposed initiative *does* in its various aspects or subjects" and then determine their common purpose. *MTA*, 384 Mass. at 221 (emphasis added). As we said earlier, the two-part test, which focuses on the subjects themselves rather than on what is said about them, has proven to be the Court's touchstone.

All of the foregoing principles have played a crucial role in past decisions on art. 48, and the Court should apply them here too.

For example, in *MTA*, the Court found a common purpose in a sweeping initiative petition that sought to place limitations on taxes. 384 Mass. at 220. Although the initiative ranged widely over various subjects, the Court noted that all the provisions related "directly or indirectly" to a common purpose of limiting taxes. *Id*. at 220, 221. Directly, limits were placed on local tax assessments and a tax deduction was allowed for residential rent payments. *Id*. at 220. Indirectly, the initiative limited taxes "by giving authority to municipalities to control expenditures or by restraining the Commonwealth and certain political subdivisions from imposing costs

on cities and towns." *Id*. at 221. There were remoter, but still related, measures as well, such as those eliminating the fiscal autonomy of school committees and ending use of binding arbitration for police and firefighters. *Id*. The Court observed that while one could conceive of general purposes to which not all of these and the other subjects would be related, "[t]he proper approach, however, is to assess what a proposed initiative does in its various aspects or subjects" and then assess their degree of relatedness to a common purpose. *Id*.

In *MTA* what might otherwise have appeared to be a farrago of policy decisions applying at different levels of government, to different persons, in regards to different activities or kinds of property, the Court ruled were all related, directly or indirectly, to the common purpose of limiting taxation.

In *Hensley* the petitioners sought primarily to legalize the use of marijuana for personal use, but they chose to do so through a set of "comprehensive statutory changes" that were so thorough and "detailed" that the Court referred to them as a "system" and "integrated scheme." 474 Mass. at 653, 658, 659. The initiative's subjects ranged widely, dealing with use, quantities, derivatives, cultivation, manufacture, retail licensing, testing, taxation, an advisory board, a

regulatory commission, and even zoning. *Id*. at 653-55, 658. The initiative was challenged on the grounds that legalization for adult use was unrelated to the provision permitting medical marijuana treatment centers to participate in the legalization as retail-sale establishments. *Id*. at 656. Applying the two-part test, the Court decided that the entire initiative petition "easily" satisfied art. 48. *Id.* at 658. Listing some of the numerous subjects dealt with in the petition, the Court said, "The possible participation of medical marijuana treatment centers in the commercial distribution of marijuana is adequately related to this over-all detailed plan." *Id*. The Court ruled that a voter who disliked the commingling of legalization with the commercial role granted to medical centers by the "proposed integrated scheme" is "free to vote 'no,'" for "the proposed act does not place anyone 'in the untenable position of casting a single vote on two or more *dissimilar* subjects.'" *Id*. at 659 (quoting *Abdow,* 468 Mass. at 499 and adding emphasis). *See also Dunn*, 474 Mass. at 682 (unified statement of public policy even when voters are unhappy with parts of choice given them because of initiative's "scope"). In other words, an "integrated scheme," such as those in this case, is voted up or down as a package deal.

Finally, in *Weiner* an initiative petition sought to create a new type of liquor license, but other proposed changes were challenged as involving four unrelated subjects. 484 Mass. at 691. In two of them, for example, the petition imposed new procedures to prevent underage liquor sales and established a special fund to pay for augmented enforcement of liquor laws. *Id*. Employing the two-part test, the Court found the subjects all "operationally related" to the common purpose of "lifting restrictions on the number and allocation of licenses for the retail sale of alcoholic beverages to be consumed off the premises." *Id*. at 691, 692 (quotation marks omitted). The Court found the age-verification and law enforcement provisions to be related to the purpose, albeit "not directly," because, as "one piece of a proposed scheme," they anticipated and addressed foreseeable consequences that might flow from adoption of the initiative's principal provision, which aimed to increase the number of liquor licenses. *Id*. at 692-93. *See Oberlies*, 479 Mass. 832 (provisions related when one "anticipates and addresses a potential consequence" of another; both "simply one piece of the proposed integrated scheme"). Observing that the "provisions of an initiative petition need not be drafted with strict internal consistency," the Court explained that the petitioners' choice of

subjects went to the "scope" of the proposed changes and did so without "vitiat[ing] the relatedness of [the petition] as a whole." *Weiner*, 484 Mass. at 694 (quotation marks omitted).

Cases such as these teach that drafters of initiative petitions have discretion in choosing the scope of their intended reforms. They may propose a comprehensive scheme that includes laws that relate to the common purpose directly or indirectly and even laws that anticipate and dispose of ancillary legal issues that may arise in the future in connection with the proposed changes in the law.

Just as *Hensley*, for example, proposed a major restructuring of the marijuana market through legalization, regulation, taxation, and so on, the petitioners here propose to restructure comprehensively one burgeoning sector of the state's labor market. They could have adopted a narrower scope for their reforms. Instead, they exercised their discretion to widen the scope of reform and enact a comprehensive scheme of employment law changes. Examined in this light, the petitions merely fit the new employment relationship into its own unique legal framework for such things as compensation, benefits, entitlements, terms of employment, employment-related tort liability, and the like. Essentially they do not more than deal with many of the

same important legal subjects that already apply to other parts of the labor market, but they do so in a distinctive way appropriate to the new employment relationship they would create.

CONCLUSION

The Court should therefore affirm that the Attorney General correctly certified the petitions.

Respectfully submitted,

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April 13, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. A. P. 16, 17, 18, 20, and 21, where pertinent. The document was composed on Microsoft Word 2003 in 14-point Times New Roman. As determined by Word's word-count tool, the number of **non-excluded words** in this brief is **3792** and the number of **excluded words** is **1044**. *See* Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F).

Dated: April 13, 2022 /s/ John Pagliaro
John Pagliaro

CERTIFICATE OF SERVICE

In *Martin El Koussa & others vs. Attorney General & another*, pending in the Supreme Judicial Court, No. SJC-13237, I certify that on the date subscribed below, on behalf of New England Legal Foundation, I served the Brief of Amicus Curiae New England Legal Foundation by e-file on counsel for Appellees and Interveners.

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Signed under the penalties of perjury on April 13, 2022.

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