COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13237

MARTIN EL KOUSSA, et al.,

Plaintiffs-Appellants.

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONEALTH,

Defendants-Appellees,

CHRISTINA M. ELLIS-HIBBET, et al.,

Intervenor-Appellees.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF AMICUS CURIAE WILLIAM GOOD, GEORGE GARCIA, & ANNE LUEPKES IN SUPPORT OF APPELLANT

M. Patrick Moore, Jr. (No. 670323)
Jennifer Grace Miller (No. 636987)
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109
(617) 227-7940
pmoore@hembar.com
jmiller@hembar.com

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INTRODUCTION[1]

The foremost concern of the framers of Article 48 was that special interests would misuse the popular initiative to accomplish factional objectives that a deliberate legislative process would reject. As the primary safeguard against that misuse, the framers mandated that an initiative must contain only related subjects, to ensure that an affirmative vote would serve as effective consent to each of its parts. The framers believed accurately that no amount of spending could fool the voters, as long as they are asked to consider a uniform and unadorned question of public policy.

The Initiatives before the Court, Numbers 21-11 and 21-12,[2] purport to ask voters to "define and regulate the contract-based relationship between network companies and app-based drivers." *See* Initiative § 2. This

[1] Amici affirm under Mass. R. App. P. 17(c)(5) that: no party or party's counsel authored this brief in whole or in part, nor contributed money that was intended to fund this brief; no person, other than amici or their counsel, contributed money that was intended to fund this brief; and none of the amici nor their counsel represents or has represented one of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[2] This brief will cite to Initiative 21-11, which includes driver-training provisions. Other than that section, the Initiatives are indistinguishable; the network companies have not indicated which they will attempt to place on the 2022 ballot.

purpose is so abstract as to be meaningless; and it does not lend itself to a yes or no resolution, which are the only choices offered on the ballot. The scope of the affected subject matter is staggering. There are more than 850,000 network company drivers in the Commonwealth, who provided 91.1 million rides in 2019 alone.[3] Each year, network companies provide an increasing share of the state's transportation and appear to be doing the same for deliveries.

Buried in the Initiatives—each containing nearly 5,000 words—are two phrases meant to protect network companies from liability for the conduct of their drivers. Those phrases address not the responsibilities that the network companies have to their drivers, but instead the responsibilities of the network companies to the general public. Not one of the many millions in advertising dollars that the network companies have publicly committed to these Initiatives, *infra* note 7, will be spent informing voters about that issue. The network companies know well that if thce

[3] The Transportation Network Division ("TND") of the Department of Public Utilities reports annually on network companies that provide transportation services; this brief uses 2019 report because the services documented in it were not affected by pandemic. E.g., TND, "2019 Data Report: Rideshare in Massachusetts."

The Commonwealth does not collect data on delivery network drivers, so publicly available data understates the number of app-based drivers in the Commonwealth and the rides and deliveries they perform.

voters were asked only whether they support limiting their responsibility for injuries caused by their drivers, the answer would be a resounding no. So, in the language of the Delegates to the 1917-18 Constitutional Convention, they have attempted to "hitch" that issue to others regarding (purported) benefits to drivers, including minimum compensation, health and disability insurance, and eligibility for certain state social welfare programs.

Amici are individuals, or the personal representatives of individuals, who have been killed or badly injured by network companies and who believe from their own experiences that network companies need more financial incentive, not less, to ensure public safety. And that network companies should have more responsibility, not less, to compensate those harmed by the day-to-day operation of their businesses. Amici believe that the hundreds, if not thousands, of Bay Staters who will be injured next year by network companies should be able to recover damages against them. And, most important in the context of Article 48, they believe that the network companies would lose badly a debate about their public safety responsibilities if the public were permitted to have that debate.[4] Instead,

[4] In such a debate, the public would learn that network companies' predecessors—taxi companies—were held absolutely liable for their drivers' conduct as common carriers. *E.g.*, *Gilmore v. Acme Taxi Co.*, 349 Mass.

by these Initiatives, the network companies attempt to limit their liability to the injured public by packaging that issue with many others about which the public may have markedly different views. That the proponents may not do.

The relatedness requirement of Article 48 stands athwart these Initiatives—and the countless of copycats they will yield in the future—yelling stop, just as its drafters intended.

INTEREST OF AMICI

Amici are individuals, or the personal representatives of individuals, who have been killed or severely injured by network companies—like Uber, Lyft, Instacart and DoorDash—and the drivers who work for them.

William Good was injured and rendered paraplegic by the erratic driving of an Uber driver.[5] The driver had more than 20 driving citations oh his record before the incident and should not have been working as a professional driver, for Uber or anyone else.

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651 (1965); Perlin & Blum, "Common Carriers—In General," 10 *Mass. Prac.* § 24:1 (6th ed.)

[5] *See* Complaint, *Good v. Uber Tech., Inc.*, Suffolk County Superior Ct. No. 2284CV00173, included in the addendum.

George Garcia is the personal representative for the estate of his brother, Alberto Garcia, who was a pedestrian when he was struck and killed by an Uber driver on one of the Commonwealth's most heavily foot-trafficked streets (Bradford Street), which runs through the heart of Provincetown. Mr. Garcia was 61-years-old at the time of the incident (May 2021), which left him in a coma; he died 8 days later. Mr. Garcia's personal representative imminently will file a suit against Uber to recover damages for its role in causing Mr. Garcia's death.

Anne Luepkes's right leg was shattered in March 2019 by an Uber Eats driver who was racing through a residential development in Quincy, seeking to deliver a warm McDonald's order within the timeframe estimated by the app. She now has Complex Regional Pain Syndrome, which will forever affect her quality of life and has compromised her career as a licensed social worker.[6]

Amici currently are, or imminently will be, seeking damages in Massachusetts courts to make them whole for injuries they have sustained as a result of their interactions with network companies and their drivers.

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[6] *See* Complaint, *Luepkes v. Philogene*, Norfolk County Superior Ct. No. 2082CV01015, included in the addendum.

The Initiatives seek to alter the relationship network companies have with injured individuals like amici to preclude or limit future recoveries.[7]

BACKGROUND

By these Initiatives, the network companies attempt to restructure the "contract-based" relationship between them and the drivers at the heart of their respective businesses. The activity of those drivers likely accounts for more than 100 million trips annually on the roads of the Commonwealth, creating considerable liability for the network companies. In the lengthy text of the Initiatives, the network companies have inserted a few words intended to mitigate that liability.

A. The Network Companies and Their Initiatives

Often, the proponents of an initiative are difficult to discern, because the effort is partly grassroots (e.g., Question 2 in 2012, which addressed physician-assisted suicide), or so many varied interests support the initiative that no one interest predominates (e.g., Question 4 in 2016, which

[7] Amici will be able to recover against network companies in pending or imminent lawsuits because the Initiatives are not retroactive. If the network companies claim otherwise, the Initiatives deprive amici of property interests in their recoveries without compensation, and the Initiatives were improperly certified for the ballot on that basis alone. *See* Mass. Const. Articles of Amend. art. 48, c. 2, § 2.

legalized the use, possession and sale of marijuana in the Commonwealth). But there is no mystery here.

The network companies are the proponents. They have said so publicly.[8] And they have spoken with their checkbooks. Every cent of the $17.85 million raised by the political committee supporting the Initiatives has come from a network company: Lyft, Uber, DoorDash, and Instacart.[9] Many months before a single vote is cast, Lyft already has made the largest political contribution ($14.4 million) in state history to support the campaign.[10] Disclosures required by the Commonwealth's campaign finance law indicate that the companies spent nearly $2 million on signature-gathering alone, to ensure the Initiatives would meet the thresholds established by Article 48. Much more is to come; this same

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[8] E.g., Raymond, "Group backed by Uber, Lyft pushes Massachusetts gig worker ballot measure," *Reuters* (Aug. 4, 2021); Platoff, "With ballot question, tech companies could put the future of the gig economy in voters' hands," *Boston Globe* (Aug. 2. 2021).

[9] An entity that raises or expends funds in support of a ballot initiative must register as a political committee. G.L. c. 55, §§ 1, 5, 6B. The network companies' committee is called "Flexibility and Benefits for Massachusetts Drivers," reflecting the topics on which the proponents would like to focus their messaging. Their public disclosures are available at https://www.ocpf.us/Filers?q=95481.

[10] Stout, "Lyft makes largest one-time political donation in Massachusetts history, fueling gig worker ballot fight," *Boston Globe* (Jan. 18, 2022).

coalition of companies spent more than $220 million on a legally-flawed initiative in California.[11]

"Neither the Attorney General nor this Court is required to check common sense at the door" when assessing ballot initiatives. *Carney v. Attorney General*, 447 Mass. 218, 232 (2006). Accordingly, it is worth a moment to understand the roles the network companies play in the Commonwealth and what they hope to accomplish with their Initiatives.

As defined in the Initiatives, network companies comprise transportation network companies and delivery network companies. Initiative § 3. Transportation network companies are defined by G.L. c. 159A1/2, § 1 as companies that "use[] a digital network to connect riders to drivers to pre-arrange and provide transportation." They must be licensed by the Commonwealth, and there are only three: Lyft, Uber, and Via.[12] Delivery network companies transport things, rather than people, and they are neither defined by existing law nor currently regulated by the state. The Initiatives define them as companies "that (a) maintain[] an online-enabled

[11] *See generally* Marshall, "With $200 Million, Uber and Lyft Write Their Own Labor Law," *Wired* (Nov. 4, 2020).

[12] The permits are available at https://www.mass.gov/service-details/tnc-permits.

application or platform used to facilitate delivery services within the Commonwealth and (b) maintain[] a record of the amount of engaged time and engaged miles accumulated by [delivery network company]" drivers. Initiatives § 3.

Under existing law, transportation network drivers must carry insurance to compensate to those they injure, with limits varying in amount depending on when the injury occurs. G.L. c. 159A1/2, § 5; G.L. c. 175, § 228. There is no such requirement for delivery network drivers. By virtue of using their personal vehicles for commercial services, those drivers may not be covered under their existing, individual insurance policies; recognizing this, delivery network companies purport to require them to obtain commercial liability insurance, but neither advertise nor enforce the requirement.[13]

There is an active public debate about whether network company drivers are employees of the companies (or, instead, independent contractors). By contrast, whether drivers are *agents* of network companies when transporting customers or delivering goods has received no discernible public attention; nor has the question of whether network

[13] Metz, "Navigating Auto Insurance for Delivery Drivers," *Forbes* (Mar. 31, 2021).

companies are responsible for injuries caused by their drivers. As the network companies know from their ample polling, members of the public simply assume that when they "call an Uber" to pick them up, then an *Uber* arrives—not John Q. Driver, individually and solely responsible for their wellbeing. Likewise, when the public orders groceries through Instacart, they expect *Instacart* to deliver those groceries—not Susie Q. Driver, individually and solely responsible for not injuring the toddler playing in the driveway. The network companies have no desire to cloud that public perception; quite the contrary, their brands and profits depend on it.

B. Substance of the Initiatives.

The cornerstone of the network companies' Initiatives is defining drivers as independent contractors, while also committing the companies to certain minimum compensation and benefits. Initiative §§ 3, 5-7, 10. Then, because classifying the drivers as contractors rather than employees would compromise their eligibility for the state-administered paid leave program, the Initiatives alter the eligibility criteria for that program. *Id.*, § 8. For reasons extensively addressed in other briefing, these provisions are not related and require close attention to reveal that the purported benefits are scant or illusory for most drivers.

Even greater attention still is required for a voter to uncover the liability protections subtly woven into the Initiatives. The Initiatives state that a network company driver "shall be deemed to be an independent contractor and *not* an employee or *agent for all purposes with respect to his or her relationship with the network company*." Initiative § 3 (emphasis added). They incorporate that provision into the definition of "app-based" driver.[14] Then, the Initiatives provide that in all settings, and for all purposes, a network company driver will be presumed by law to be a contractor, not an employee or agent, unless proven otherwise. *Id.*, § 11(b) ("Notwithstanding any general or special law to the contrary . . . any party seeking to establish that a person is not an app-based driver [i.e., a contractor, rather than an employee or agent] bears the burden of proof").

The inclusion of the word "agents" in the definition of network company driver is telling. Initiative § 3. After all, it is not surprising that the Initiatives define network company drivers as independent contractors and not employees. That is issue has been the subject of considerable public debate, specifically whether network companies exercise sufficient control over their drivers to classify them as employees under G.L. c. 149, §

[14] This brief does not adopt the term "app-based" driver, which connotes the driver as they appear on an app—navigating a digital map—rather than as they are, i.e., drivers on the roads of the Commonwealth.

148B or whether app-based drivers are, instead, independent contractors under that statute. *See, e.g.*, *Healey v. Uber Techs., Inc.*, Suffolk Superior Ct. No. 2084CV01519-BLS1.

But the fight has never been about whether app-based drivers are agents. Being an *agent* of a company does not involve questions of employment conditions or benefits. Agents do not earn a minimum wage, overtime or sick leave. Agents are, instead, outward-facing: they are the medium through which a company interacts with the rest of the world. *E.g., Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736, 742 (2000) ("An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf of and for the benefit of the principal, and subject to the principal's control"). An agent's actions bind the company and create duties and responsibilities. *See, e.g.,* Restatement of (Third) of Agency, § 7.03 (principal directly and vicariously liable to third-parties harmed by agent's conduct).

Under settled Massachusetts law, these responsibilities attach irrespective of whether the agent is an independent contractor. *E.g.*, *Sarvis v. Boston Safe Deposit & Trust Co.*, 47 Mass. App. Ct. 86 (1999) (company vicariously liable for actions of agents who were independent contractors). Otherwise stated, independent contractors can be agents; and, when they

are, vicarious liability follows. *Corsetti v. Stone Co.*, 396 Mass. 1 (1985). In the eyes of the proponents, that is a problem, because network company drivers appear to the world to be agents of the network companies; and the network companies are vicariously liable for the harm caused by their agents. *E.g.*, *Merrimack College v. KPMG,* 480 Mass. 614, 620 (2018) ("if an agent negligently injures a third party while acting within the scope of the agency, the principal will be held vicariously liable for that negligence"); *see generally* Restatement (Third) of Agency § 3:03 (apparent agency); *id.*, § 7:08 ("A principal is subject to vicarious lability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal").

So, having chosen to spend tens of millions of dollars on the Initiatives, the network companies decided to insert language to limit their vicarious liability, too. Plaintiffs so demonstrated in their brief. Plaintiffs'. Brief at 19-20, 36-44. Notably, proponents do not challenge the import of the language meant to protect them from vicarious liability for their drivers, but instead seek to waive it away as "incidental," "ancillary," or "follow-on." Proponents' Br. at 38-41. Limiting the liability of the Commonwealth's largest providers of transportation services is hardly an ancillary consequence, as amici's catastrophic injuries illustrate.

Meanwhile, the Attorney General appears to misinterpret entirely proponents' intent, suggesting that the term "agent" is simply a "mere antonym for 'independent contractor.'" Attorney Gen. Br. at 35. But that is not the law. *See Sarvis*, 47 Mass. App. Ct. at 97 (regardless whether independent contractors, agents subject to direction of company give rise to vicarious liability); *see also Corsetti*, 396 Mass. at 11-12 (question of agency, and thus vicarious liability, was fact-question for the jury, even where actions undertaken by independent contractor); *Peters v. Haymarket Leasing, Inc.*, 64 Mass. App. Ct. 767, 774-75 (2005) (same). Where the network companies are prepared to spend tens of millions of dollars on these Initiatives, a declaration that their drivers are not "agent[s] for all purposes" must not be wished away as surplusage. *Cf. Carney*, 447 Mass. at 226 ("Attorney General [must] scrutinize the aggregation of laws proposed in the initiative"). That goes double when the declaration is so core to the Initiatives that it is in the *very first sentence* of the Attorney General's summary of them. *See* RA 35 ("This proposed law would classify drivers . . . as 'independent contractors,' and not 'employees' or 'agents' for all purposes under Massachusetts law").

In sum, the proponents have included this provision in an attempt to create a liability shield, protecting the network companies from

accountability for harm caused by their drivers.[15] Currently, amici can argue that network companies are vicariously liable for the conduct of their drivers, because the drivers are the employees *or* agents of those companies. The Initiatives attempt to eliminate both pathways to vicarious liability, thereby significantly narrowing potential recoveries against the network companies.

C. The Scope of Liability Network Companies Are Seeking to Avoid is Significant.

The scope of third-party liability the network companies seek to avoid is significant. In 2017 through 2019, transportation network companies provided 237.2 million rides in the Commonwealth alone (and still provided 35 million in 2020, during the heart of the pandemic).[16] This outsized presence on the road has affected public safety. As the National Bureau of Economic Research has documented, the introduction of transportation network companies "marked an increase in fatalities among both motor vehicle occupants and non-occupants," which "revers[ed] a

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[15] At this stage, the Court need not determine the precise impact of the Initiatives, if they are adopted. *See Oberlies v. Attorney General,* 479 Mass. 823, 835 (2018). But, in applying the relatedness requirement, the Court must consider that the proponents' language could have—and likely was intended to have—certain consequences. *Id.* at 835.

[16] TND, 2020 Data Report: Rideshare in Massachusetts.

decades-long trend" of decreasing traffic fatalities. J. Roche, "Ride-Hailing Services Associated with Uptick in Traffic Deaths," *National Bureau of Economic Research Digest* (Jul. 2020); J. M. Barrios, "The Cost of Convenience: Ridehailing and Traffic Fatalities," *National Bureau of Economic Research Working Paper 26783* (Feb. 2020). The nationwide jump in "motor vehicle-related fatalities is correlated with the arrival of ride hailing, particularly in large urban areas"—like Greater Boston, where 64% of the Commonwealth's population resides. *Id.*

The State Auditor has found that the transportation network companies fail to adequately check their divers' past motor vehicle infractions; and, even when they do perform that check, disqualified drivers sometimes maintain access to their platforms. Official Audit Report: Department of Public Utilities (Nov. 23, 2021). A public debate on this issue would result in the voters placing more responsibility on the network companies for the public safety problems posed by their drivers, not less.

SUMMARY OF ARGUMENT

In its wisdom, Article 48 requires that an initiative submitted to the voters present a uniform public policy proposal, consent for which is sufficient to convey approval for each of its constituent parts. Here, the proponents seek to present an abstraction to the voters—*i.e.*, whether they

support "defin[ing] and regulat[ing] the contract-based relationship between network companies and [their] drivers"—in an attempt to garner consent for various and disparate default contract terms. Unlike initiatives previously approved by this Court, these Initiatives ask voters to support an integrated scheme for its own sake, rather than to accomplish a concrete, identifiable policy end (e.g., marijuana legalization, paid leave, or assisted suicide) susceptible to a yes-or-no ballot question. Pp. 23–29.

If this Court allows ballot initiatives to define and regulate contractual relationships, it will have opened the door to mischief; the lone remaining break will be the creativity of the Commonwealth's election law bar. Pp. 29–30. Moreover, and unsurprisingly, the various goals sought by the proponents—driver classification, minimum compensation and benefits, state social program eligibility, and liability limitations—range from the possibly popular to the doubtlessly not. In a classic example of logrolling, they impermissibly attempt to use public approval of the former as consent for the latter. Pp. 30–33.

Proponents' gambit was foreseen by the Delegates to the 1917-18 Constitutional Convention. Their debates demonstrate that the relatedness requirement was installed to prevent precisely what these Initiatives propose. Pp. 34–40. Proponents have identified legal uncertainty on the

horizon—whether their drivers should be classified as employees—and have proposed a lengthy and multi-faceted compromise to resolve it. Pp. 40–41. The text of Article 48, as illuminated by the Delegates who drafted it, provides that such a negotiation belongs in the Legislature, not on the ballot.

ARGUMENT

I. THE INITIATIVES FAIL TO PRESENT A UNIFORM POLICY QUESTION TO THE VOTERS, AND INSTEAD EXEMPLIFY PROHIBITED LOGROLLING.

The relatedness requirement is Article 48's "line of defense against confusing, misleading or otherwise initiative provisions." *Carney*, 447 Mass. at 225-26. It "protect[s] the voters, who must ultimately 'legislate' the proposal" by rendering an up-or-down verdict. *Id.*

The Initiatives violate two principles this Court has held to be foundational to a relatedness assessment. *First*, the purported "common purpose" sought to be achieved by the Initiatives—"defin[ing] and regulat[ing] the contract-based relationship between network companies and [their] drivers," Initiative § 2—is the type of conceptual abstraction this Court has rejected time and again. *Gray v. Attorney General*, 474 Mass. 638, 644-48 (2016); *see Anderson v. Attorney General*, 479 Mass. 780, 795-96 (2018); *Carney*, 447 Mass. at 231; *Opinion of the Justices*, 422

Mass. 1212 (1996). If this Court opens the door to initiatives tied together only by their impact on "contract-based relationship[s]," each successive state election will relegate the relatedness requirement further into the dustbin of history. *Second*, by using Initiatives pitched as guaranteeing driver flexibility and benefits to pass a liability shield, proponents attempt logrolling of the type Article 48 prohibits. *E.g.*, *Oberlies v. Attorney General*, 479 Mass. 823, 830 (2018). Proponents may not use the initiative to gain approval for a provision that, unless hitched to other proposals, would be deeply unpopular. *See Anderson*, 479 Mass. at 787 (art. 48 prohibits "alluring combination[s] of what is popular with what is desired by selfish interests as the proposers of the measures may choose").

Consequently, the Initiatives should not have been certified.

A. The Initiatives' Provisions Do Not Share A Specific and Concrete Common Purpose on Which Voter Sentiment May Be Measured.

To be submitted to the voters, an initiative "must contain a single common purpose and express a unified public policy." *Anderson*, 479 Mass. at 791. It is not enough for "the provisions in an initiative petition [to] 'relate' to some broad topic at some conceivable level of abstraction." *Carney*, 447 Mass. at 447.

This requirement achieves two complimentary goals. First, voters do not have yes or no views on abstractions, and must not be asked to conjure them. *E.g.*, *Gray*, 474 Mass. at 644-46 (requiring "sufficient cohere[cy] too be voted on 'yes' or 'no' by the voters"). Second, where voter consent to an initiative is sought, it must be sought in a way that allows the consent for each provision in that initiative. *Anderson*, 479 Mass. at 786; *Carney*, 447 Mass. at 230-31.

1. Proposing Default Terms in a "Contract-Based" Relationship is Not a Uniform Statement of Public Policy.

Where voters are presented with a uniform public policy proposal, they have a view; and an affirmative answer serves as consent for the details to implement the policy they have approved. So, voters may be asked whether marijuana should be legalized and treated like alcohol. *Hensley v. Attorney General*, 474 Mass. 651, 653, 670 (2016). Or whether grocery stores should be permitted to sell beer and wine. *Weiner v. Attorney General*, 484 Mass. 687, 691-92 (2020). Or whether they support paid sick time; or a program of assisted suicide. *See* Question 4, 2014 Ballot; Question 2, 2012 Ballot. Each of these initiatives, previously submitted to the public, are uniform policy questions answerable yes or no. Because the answers predominate over the details of implementation, voter consent to

the proposal serves as consent to the implementation scheme. *See Gray*, 474 Mass. at 648; *Carney*, 447 Mass. at 231.

Here, by contrast, voters are being asked to consent to a scheme for its own sake—a collection of provisions without an overarching policy proposal. As proponents would have it, the question is whether voters support "defin[ing] and regulat[ing] the contract based relationship between network companies and their drivers." Initiative § 2. What, pray tell, does that question mean to the average voter? Put one way, it is an abstraction that cannot be answered without first addressing the various questions it begs: what will the definition be, and how will the newly-defined relationship be regulated? *See Merriam Webster* (2022) (defining abstract as "existing in thought or as an idea but not having a . . . concrete existence"). Put another way, proponents recognized that the true purpose of these Initiatives—"we, the network companies, do not desire our drivers to be employees nor to be liable for their conduct, so will you, the public, accept this catalogue of other things we offer instead?"—required an euphemistic gloss even to be considered for certification.[17]

[17] Because proponents style their Initiatives after *Hensley*, it is worth comparing that initiative with those here. In *Hensley*, the question was whether voters supported legalizing marijuana and treating it like alcohol; each component of the initiative was part of an "integrated scheme" to accomplish that end. 474 Mass. at 660. Here, proponents suggest that

This Court has rejected similar concoctions. For example, *Gray* held that voters could not be asked in the same initiative whether they supported public school curriculum changes and standardized test transparency. 474 Mass. at 647. The purported common purpose—"new procedural requirements on the development and implementation of educational standards"—was too "conceptual or abstract." *Id.* Like here, the purported purpose begged other questions: what procedural requirements and which educational standards? *Id.* In *Oberlies*, the Court rejected an initiative that would have joined together staffing ratios and financial reporting for hospitals under the "general common purpose" of "regulation of hospitals." 479 Mass. at 836. That purpose, too, was meaningless absent inspection of its underlying provisions. *Id*; *see also Anderson*, 479 Mass. at 796 (relatedness "not satisfied by the ability to articulate a 'conceptual or abstract bond' between diverse subjects, such as . . . 'keys to inclusive growth.'").

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establishing an "integrated scheme" between network companies and drivers can be the purpose itself, rather than the means to accomplish a uniform policy. Where proponents purport establish an integrated scheme, the this Court must ask "to do what?" Evincing the Initiatives' unrelatedness, the only answer proponents can give is too abstract (i.e., to define and regulate a contract-based relationship) or too narrow to encompass all of the Initiatives' components (e.g., to preserve driver flexibility).

A look at the Initiatives illustrates why the purpose affixed to them by the proponents—and embraced by the Attorney General, *see* AG Br. at 24-29—is a hollow construction with no inherent meaning. The core question presented by the Initiatives is whether drivers should be classified as independent contractors. Initiative § 3. Because proponents know that policy will cause public concern about whether their drivers are treated fairly, they have adorned the Initiatives with purported benefits promised to the drivers as default contract terms. *See* Initiative §§ 5-7, 9. Then, because default terms do not establish eligibility for the Commonwealth's paid leave program, the Initiatives alter that program to bring the drivers within its scope. *Id.*, § 8. These are all different policy questions, on which voters may have disparate views, relating to the drivers' employment status, compensation, and eligibility for state programs. *See Anderson*, 479 Mass. at 799 (voter cannot be placed "in the untenable position of choosing which issue to support and which must be disregarded"). In the middle of it all, the Initiatives weave in language disavowing their drivers as agents, attempting to shield the network companies from vicarious liability. Initiative §§ 3, 11(b).

There is no coherent line through all of these components. But proponents know that failure to articulate a common purpose is fatal to

relatedness. *Cf. Anderson*, 479 Mass. at 795 ("[T]he Attorney General has not articulated a common purpose between these spending priorities, beyond the abstract determination that both are 'broad areas of public concern'"). Their solution is the tying together of the Initiatives' various facets with the purported common thread of defining and regulating a contract based relationship. Initiative § 2.

2. If These Initiatives Are Approved, Future Possibilities for Mischief Will Be Boundless.

Almost anything can define or regulate a contract-based relationship, as this Court will see every two years should these Initiatives be allowed. The past illuminates future problems. Initiatives previously found unrelated could be reframed easily as efforts to define and regulate contract-based relationships. The proponents in *Oberlies* could have styled their attempt to impose on hospitals nurse-staffing ratios and financial disclosure requirements as default terms of the contract-based relationship between health-care providers and their patients. *See* 479 Mass. at 835-37. Most of proponents' plans to foster the "more humane treatment of dogs" in *Carney* could be recast as default conditions in the contract-based relationship between dog buyer and dog breeder. 447 Mass. at 224-25. Of course, such framing would not have saved those initiatives; it should not sustain these, either.

Otherwise, future possibilities for mischief will be boundless. Insurance, after all, is nothing but a contract-based relationship between carrier and policyholder. Consumer debt likewise is a contract-based relationship between the debtor and the short-term lender. Car, appliance, and television sales are just contract-based relationships between the buyer and the seller. Our homes are the product of contract-based relationships: landlord-tenant or buyer-seller. Every time we use a tablet, smartphone or app—including network companies' own—we agree to terms of use, giving rise to a contract-based relationship. If proponents' theory is correct, each of these relationships—and who is responsible for any harm to the public caused by them—can be rewritten entirely by a single ballot initiative promising alluring public benefits. Volumes of the General Laws will be set aside, and in their place will stand a new class of law: adhesion contracts adopted by ballot initiative.

Thankfully, Article 48 stands in the way, because it demands that an initiative "offer the voters a '*unified* statement of public policy'" that may be meaningfully affirmed or rejected as a whole, which proponents have failed to do. *Oberlies*, 479 Mass. at 825 (emphasis in original).

B. The Initiatives Are Prohibited "Logrolling."

The relatedness requirement also protects the voters from logrolling, because the framers recognized that "a voter, unlike a legislator, 'has no opportunity to modify, amend or negotiate the sections of a law proposed by popular initiative.'" *Anderson*, 479 Mass. at 786, quoting *Carney*, 447 Mass. at 230. Because a voter cannot "sever the unobjectionable from the objectionable," she must not be put in the position of having her consent to the former used as assent for the latter. *Id.*

Here, the Initiatives join more "alluring" provisions—which proponents pitch as an assurance of driver flexibility and minimum benefits—with an unpopular shield from vicarious liability. *Anderson*, 479 Mass. at 787. This is classically prohibited logrolling. *Id*; *see Debates* at 815 (log-rolling described as "offering under the guise of specious grounds or reasons a proposition which looks like a popular proposition and which, nevertheless, is a proposition really for the benefit of a particular association or corporation"); *id.* at 139 (Mr. Lummus warning of "monstrous omnibus bills drafted by theorists and schemers, who insert some one simple and popular idea as bait for the voters, to induce them to swallow the whole").

A promise of flexibility and benefits, however illusory, for network company drivers can be popular. A similar proposition passed in California with 68% support, and proponents suggest this one is popular in Massachusetts, too.[18, 19] By contrast, there is significant reason to believe that shielding network companies from liability for harm caused by their drivers would be deeply unpopular. Nearly 70% of Massachusetts voters support raising taxes on corporate profits; ensuring corporate responsibility for grievous accidents would be more popular still.[20] Nationally, the public is forming a negative view of technology companies as too powerful and influential; a request to shield these tech companies from liability would be markedly unpopular.[21]

That is why the network companies have styled these Initiatives as purported gifts to their drivers. The proponents' recent $2 million

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[18] California Secretary of State, *Statement of Vote: General Election Nov. 3, 2020*, at 64.

[19] Proponents' political committee so claims via a poll available at https://yesformassdrivers.org/news/81-of-massachusetts-app-based-rideshare-and-delivery-drivers-support-a-proposed-ballot-question/

[20] MassINC, "Massachusetts State Budget Issues Survey" (Dec. 8-20, 2020).

[21] Auxier, "How American see U.S. tech companies," Pew Research Center (Oct. 27, 2020).

advertising flight, for example, pitches the Initiatives as ensuring the drivers' ability to choose their hours.[22] The public would be surprised to learn that elsewhere in the petitions, the network companies' liability is offloaded onto their drivers, such that the companies will be excused from their obligation to compensate those injured by their businesses. This Court should "not check common sense at the door" when considering just how unpopular that concept would be were the voters asked to consider it alone. *E.g.*, *Carney*, 447 Mass. 232. Proponents' instead attempt to package it with other issues in the hope that "being voted on together[,] one would carry the other by." *Debates* at 826. This is the "precise type of wheedling and deceiving that the delegates had in mind when they adopted the relatedness requirement." *Anderson*, 479 Mass. at 801-02.

Indeed, because of their complexity, the Initiatives exemplify what the framers recognized as the most pernicious form of logrolling. Each comprises more than 13 pages of technical text. *See Debates* at 862, 1060 (Delegates expressing concern with 10 and 13 page initiatives). The liability protections are buried at the beginning and end Initiatives, using language

[22] Kashinsky, "Gig-worker fight heads to the airwaves," *Politico* (Apr. 8, 2022). The advertisement is available at https://vimeo.com/696313467.

only lawyers would recognize. *See Carney*, 447 Mass. at 229. Few voters will find them, let alone understand their importance.

II. THE INITIATIVES PRESENT THE ILLS THE DRAFTERS OF ART. 48 SOUGHT TO PROHIBIT: UNRESTRAINED "SELFISH INTERESTS" AND AVOIDABLE VOTER CONFUSION.

When applying Article 48's relatedness requirement, this Court consults the Debates of the 1917-18 Constitutional Convention. *E.g.*, *Carney*, 447 Mass. at 228 (construing relatedness "in light of the conditions under which it was framed [and] the ends designed to be accomplished"). More than any other previously presented to the Court for review, these Initiatives would have drawn objection from the Delegates as the very thing they intended to prevent. *See Anderson*, 479 Mass. at 801.

The drafters of Article 48 were acutely concerned with potential abuse of the initiative. *Carney*, 447 Mass. at 228. The two primary concerns were: (1) the influence of "selfish interests"; and (2) the specter of voters being confused or deceived by multifaceted initiatives. Ultimately, the Delegates determined that solving the second issue would address the first. *See Anderson*, 479 Mass. at 786-94. They reasoned that if voters were presented with uniform public policy question, free from "tricks and jokers," they would see right through—and reject—any "selfish interests"

sought to be accomplished by the proponents. *E.g.*, *Debates* at 12, 139-40, 531-38, 564-70, 721.

A. The Initial Draft of Art. 48, Which Contained No Relatedness Requirement, Was Criticized As Subject to the Abuse Proponents Now Attempt.

The initial draft of Article 48 did not contain a relatedness requirement, which drew pointed criticism that it contained:

> No assurance that the measures initiated would be within the scope of the interest or information of the average voter; they may be as abstruse, as complicated, as interesting, as full of tricks and jokers,[23] as alluring a combination of what is popular with what is desired by selfish interests, as proposers of the measures may choose.

Debates at 12. How to address this concern dominated weeks of debate, canvassed below, before the Convention settled on the relatedness requirement as its remedy.

B. The Delegates' Pervasive Concern With "Selfish Interests" Misusing the Initiative Is Exemplified Here.

The "recurring topic of concern 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." *Carney*,

[23] As used throughout the Debates, a "joker" is "an unsuspected, misleading or misunderstood clause, phrase or word in a document that nullifies or greatly alters it." *See Merriam Webster* (2022).

447 Mass. at 228; *see, e.g.*, *Debates* at 532-34, 567-68. After all, the Convention knew that resourced interests could easily pay signature gatherers to collect the requisite number of signatures, ensuring their chosen policy would be laid before the voters. *E.g.*, *Debates* at 878 (Mr. Montague noting that obtaining sufficient signatures "would be just as easy as rolling off a log, if one only has the money he wants to spend"); *id.* at 533 (Mr. Balch lamenting the same).

Unless appropriate safeguards were adopted, Mr. Luce predicted dire consequences:

> Throw this to the people, and you put it within the power of every special interest in the State with unlimited means at its command, to seduce, to harass, to cajole, to betray, to perplex the people into granting privileges that could not be secured from a legislative body.

Debates at 567. These Initiatives would make a prophet of Mr. Luce, as they ask voters to enact into law the network companies' wish list of policies to mitigate their largest cost (drivers) and largest exposure (vicarious liability for the acts of those drivers), by wrapping that list in rhetoric about driver flexibility and benefits. Of course, Mr. Luce had a solution to avoid those consequences: the relatedness requirement for which he successfully advocated, and which today bars what the network companies attempt.

C. The Adoption & Intent of the Relatedness Requirement.

The Convention realized its concern with special interests could not be addressed by excluding them from the initiative process; instead, the Convention designed the initiative to protect it from manipulation. As explained by Mr. Anderson, the Convention "should provide such wholesome checks and balances as will *tend* to subordinate private interests to public—and make legislation as far as possible act in the general public interest. Beyond such checks and balances you never can go." *Debates* at 282 (emphasis in original).[24]

The central check on the process was aimed at preventing voter confusion. *Carney*, 447 Mass. at 228. "[T]he more details, the more complications we have in the proposition submitted to the voters, the more difficult it is for them to act on it." *Debates* at 701. And, the Convention believed, the greater the complexity, the greater the opportunity for subterfuge. *E.g.*, *Debates* at 535 (Mr. Balch's worries of a corporation attempting to "puzzle the people with any technical question it wishes"); *id.*at 139 (Mr. Lummus doubting "the willingness [of voters] knowingly to

[24] Mr. Anderson was prescient, as the Supreme Court would later strike down attempts to prohibit corporate spending on, or paid signature gathering to support, popular initiatives. *See Meyer v. Grant*, 486 U.S. 414 (1988); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

undertake . . . , the arduous task proposed for them . . . to fight, year after year against pernicious doctrines persistently pressed by selfish interests, which expect with good reason that the voters ultimately will be overwhelmed by the mass of measures which they must give their hasty and flagging attention").

So, supporters and opponents of the initiative at the Convention joined together on "gatekeeping measures" to "cull out misleading or confusing initiative measures." *Carney*, 447 Mass. at 229; *e.g*. *Debates* at 701. Voters would be presented with a straightforward yes or no question described on the ballot. All provisions of the initiative would be related to that straightforward question, such that consent to the question would accurately reflect support of each component part. *Debates* at 856-57.

The relatedness requirement thus was designed to prevent those initiatives that would "puzzle," "seduce," "cajole," "perplex" or "wheedle and deceive" the public into "granting the privileges that our representatives never would permit." *Debates* at 535, 567. The Convention recognized that special interests may buy their way onto the ballot—and, once there, may spend vast sums in support of their initiative. But, as long as a measure was required to present a uniform question of policy on which voters had a "meaningful" choice, the initiative would be protected against

misuse. *See Carney*, 447 Mass. at 230-31. If an unpopular public policy were presented clearly to the people, rather than hidden in a complicated measure, it would be soundly rejected. *E.g*. *Debates* at 861 (exchange between Mr. Balch and Mr. Creamer). With the relatedness safeguard, the initiative makes "for the expression of that sound and settled popular will, fair to minorities, sane as to its consequents, which in a democracy ought to govern." *Debates* at 941.

The Debates are a marvel, as they extensively address the very questions with which this Court is asked to grapple every other year. *E.g*., *Anderson*, 479 Mass. at 792-802. If presented with these Initiatives, the Convention would have been: (a) surprised to learn of "apps" and the profit to be made by providing rides and deliveries through them; but (b) wholly unsurprised that the profiting companies would seek "privileges and favors," *Debates* at 576, from the voters in a multi-faceted initiative. The Delegates would have identified readily the relatedness requirement as aimed at just such misuse. *See Carney*, 447 Mass. at 226-32 (collecting Convention commentary). That requirement should be applied in light of the "evils which it was hoped to remedy." *Anderson*, 479 Mass. at 791. "In rigorously enforcing the procedural and subject-matter requirements in the state constitution's initiative provision, the state judiciary is therefore

carrying out the will of the people as expressed in the initiative provision's past framing and present implementation." *See* S. Kafker & D. Russcol, "The Eye of a Constitutional Storm: Pre-Election Review By the State Judiciary of Initiative Amendments to State Constitutions," 2012 MICH. ST. L. REV. 1279, 1326-27 (2012)

III. ARTICLE 48 MADATES THAT PROPOSALS LIKE THESE ARE FODDER FOR THE LEGISLATURE, NOT THE INITIATIVE.

This Court should scrutinize carefully what the network companies attempt. *See Carney*, 447 Mass. at 226. Faced with the uncertainty that their drivers may be classified as employees, they have said: we cannot accept that outcome, but we will commit to numerous other steps to avoid it. This legislative negotiation happens daily in the Commonwealth. But the network companies' opening offer would be rejected—the Legislature would not countenance the companies' efforts to mitigate their liability nor their promise of threadbare benefits. Knowing this, the network companies have taken their offer to the people, instead, to be accepted or rejected in its entirety. *See Anderson*, 479 Mass. at 786.

Article 48 bars such maneuvering. The constitution protects the voters from being presented with a multi-pronged proposal, indescribable in accessible language, that will not be popularly understood; and, if it

were, would result in calls for a blue pencil, rather than expressions of opposition or support. The constitution also protects members of the public injured by the network companies from having their ability to recover against those companies impacted by Initiatives sold to the public as efforts to improve driver working conditions.

CONCLUSION

For the foregoing reasons, this Court should declare the Initiatives unrelated and, accordingly, enjoin their certification for the ballot.

Respectfully Submitted,

WILLIAM GOOD, GEORGE GARCIA, & ANNE LUEPKES

By their attorneys,

/s/ M. Patrick Moore, Jr.
M. Patrick Moore, Jr.
BBO No. 670323
Jennifer Grace Miller
BBO No. 636987
HEMENWAY & BARNES LLP
75 State Street
Boston, MA 02109-1466
Tel: (617) 557-9715
pmoore@hembar.com
jmiller@hembar.com

Dated: April 20, 2022

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

I, M. Patrick Moore, Jr., hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 17 (amicus curiae briefs); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the proportional font Georgia at size 14 point, and contains 7,499 total non-excluded words as counted using the word count feature of Microsoft Word.

/s/ M. Patrick Moore, Jr.

CERTIFICATE OF SERVICE

I, M. Patrick Moore, Jr., counsel for William Good, Anne Luepkes, and George Garcia, hereby certify that I have served a copy of this Brief by causing it to be delivered to all parties through the E-File system.

/s/ M. Patrick Moore, Jr.
M. Patrick Moore, Jr.

DATED: April 20, 2022

ADDENDUM

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

1/25/2022

WILLIAM GOOD,
Plaintiff,
v.

UBER TECHNOLOGIES, INC., RASIER, LLC and JONAS YOHOU,
Defendants.

CIVIL ACTION NO.

COMPLAINT and DEMAND FOR TRIAL BY JURY

1. In the early morning hours of April 30, 2021, Plaintiff William Good was severely injured and rendered quadiplegic by the dangerous, erratic driving of UBER driver, Defendant Jonas Yohou in Somerville, Massachusetts. Defendant Jonas Yohou was working as an UBER driver at all times relevant to this Complaint. Plaintiff Good sustained life-altering injuries including quadriplegia that have derailed his life and his career. This case has been brought as a result.

2. UBER and RASIER, LLC (hereinafter, the "UBER Defendants" or "UBER") together form a multi-billion-dollar transportation company and common carrier that employed Mr. Yohou as an UBER driver at the time of the Incident described herein. UBER incentivized its drivers, including Defendant Yohou, to engage in life-threatening driving practices on public roads in order to more quickly reach fare paying passengers, and more quickly complete fares, in furtherance of increased revenue and ratings. UBER drivers, such as Defendant Yohou, are penalized for delays and face potential termination if they do not meet UBER expectations. UBER failed to appropriately screen, interview, train and supervise its employee drivers including Defendant Yohou. UBER negligently hired Defendant Yohou, a driver with an extensive, troublesome, driving history who had previously been required to undergo driver safety re-training through the Commonwealth of Massachusetts. UBER has flooded the streets of the Commonwealth with unsafe drivers like Defendant Yohou, and have put customers like Plaintiff Good at immense risk as a result.

3. Despite repeated efforts to internally label drivers merely as independent contractors, the UBER Defendants exercised substantial control over their drivers at all relevant times such that their drivers, including Defendant Yohou, are employees of the corporation. The UBER Defendants are liable to Plaintiff Good under the theory of *respondeat superior*, and directly liable for negligence separate and apart from that of their employees.

THE PARTIES

4. Plaintiff, William Good, is a resident of the City of Boston, Suffolk County, Commonwealth of Massachusetts.

5. Defendant UBER Technologies, Inc. is a corporation organized under the laws of Delaware, and registered and authorized to do business in the Commonwealth of Massachusetts, with a principal place of business at 1455 Market Street, San Francisco, California.

6. Defendant RASIER, LLC is a wholly-owned subsidiary of the Defendant UBER. Defendant RASIER, LLC is a corporation organized under the laws of Delaware, and authorized to do business in the Commonwealth of Massachusetts, with a principal place of business at 1455 Market Street, San Francisco, California.

7. Defendant Jonas Yohou, the driver and employee of the UBER Defendants, is a resident of the City of Dorchester, Suffolk County, Commonwealth of Massachusetts.

JURDISDICTION

8. This Court has jurisdiction over the foreign UBER Defendants under Mass. Gen. L. c. 223A §3 because Plaintiff's causes of action arise from the UBER Defendant's:

   a. transacting business in the Commonwealth of Massachusetts;

   b. contracting to supply services or things in the Commonwealth of Massachusetts;

   c. causing tortious injury by an act or omission in the Commonwealth of Massachusetts; and/or

   d. causing tortious injury in the Commonwealth of Massachusetts by an act or omission outside of the Commonwealth of Massachusetts and regularly doing and soliciting business, and engaging in other persistent courses of conduct, and deriving substantial revenue from goods used or consumed or services rendered in the Commonwealth of Massachusetts; and

   e. contracting to insure any person, property or risk located within this commonwealth at the time of contracting.

FACTUAL BACKGROUND

9. Defendant UBER is a widespread and rapidly expanding transportation network company whose digital smartphone application (the "App"), called "UBER," allows individual consumers to order and pay for transportation through their mobile phones. The consumer

relationship is created, and maintained, solely between UBER and the fare-paying passenger directly, not between the passenger and the driver.

10. Individual consumers who have downloaded the App make a request through the App and UBER dispatches an UBER driver who, also signed into the UBER App, picks up the consumer ("passenger") at the location indicated in the App and then drives them to the destination indicated in the App. Any person with a smartphone can download the UBER app free of charge.

11. On April 30, 2021, at approximately 12:57a.m., Plaintiff William Good was a passenger in an UBER vehicle driven by UBER employee Jonas Yohou. Defendant Yohou was driving a 2018 blue Toyota RAV4.

12. Mr. Good requested transportation through UBER so he could safely return home to his apartment in Somerville, MA. Defendant Yohou's speed was so fast as to be noticeably frightening to Mr. Good, who had just finished working for the night as a chef at UNI in Boston, MA. Mr. Yohou expressed his excitement to Mr. Good about driving to Somerville because there was less traffic and he could "fly around."

13. As Defendant Yohou entered the Somerville neighborhood, Plaintiff Good again noticed Mr. Yohou's excessive speed.

14. Plaintiff Good then heard the driver state an expletive and felt the car swerve back and forth. Plaintiff Good felt the collision and heard the unnerving sounds of metal on metal as the vehicles collided.

15. Plaintiff Good struck his head on the headrest of the passenger side seat and then slumped over. He knew immediately he was paralyzed.

16. Inexplicably, Defendant Yohou attempted to move the Plaintiff while Mr. Good repeatedly asked him to stop and told Defendant Yohou that he thought he had broken his neck. Plaintiff Good was unable to move. Eventually, Defendant Yohou called for emergency services.

17. Tragically, Mr. Good suffered devastating and debilitating injuries as a direct result of this collision, including a severe spinal cord injury. Mr. Good will remain a quadriplegic for life.

18. Defendant Yohou's driving history shows an excessive number of moving violations dating back to 1996, including many citations for failure to stop and failure to yield. Defendant Yohou had at least twenty (20) driving citations on his publicly available driving record.

19. As a result of his extensive driving history, Defendant Yohou has previously been required by the state of Massachusetts to undergo the driver re-training course provided through the National Safety Council.

20. Given Defendant Yohou's lengthy driving history and the need for him to undergo driver re-training, under no circumstances should the Defendant Yohou have been hired as a professional driver by the Defendant UBER as he posed an unreasonable danger to the residents of the Commonwealth of Massachusetts, including cyclists, pedestrians and all of the people he transported on behalf of Defendant UBER, including the Plaintiff Mr. Good.

21. UBER knew or should have known that Defendant Yohou posed an unreasonable risk to riders in his vehicle, including Plaintiff Good, as well as other drivers, pedestrians and cyclists, given his extensive driving history and prior driver re-training.

22. UBER's memorandum with the Commonwealth of Massachusetts specifically provides UBER with discretionary decision-making power: "UBER specifically retains the right to not hire a driver if "A presumptive negative suitability determination may issue if reliable information demonstrates that a Driver acted in a manner that resulted in jeopardy to the health, safety, or welfare of any person, or that a Driver's provision of Services is not consistent with the public interest."

23. Defendant Yohou was under the direction and control of the UBER Defendants and was acting within the course and scope of his employment. UBER drivers, including Defendant Yohou at the time of the subject collision, are employees of UBER including but not limited to the following employment conditions:

    a. UBER performs background checks on drivers before hiring them. It performs other ***activities rendering UBER an employer of drivers*** including requiring the uploading of driver's license information, vehicle registration, inspection and insurance documentation. Drivers must agree to UBER's detailed rules and oversight before beginning their employment for UBER. UBER also retains the right to terminate drivers at will;

    b. ***UBER handles and adjudicates all passenger disputes*** and/or complaints and may reduce a passenger's fare, and therefore a driver's income, in its sole discretion;

    c. The ***relationship is directly between UBER and the fare-paying passenger***: UBER maintains ongoing relationships with its passengers through in-app advertisements and solicitations, reduced fares and myriad, constant marketing and promotions; all payment information is handled through the UBER app, including

any tip ultimately intended for the driver. UBER chooses what information about fares and passengers to provide to its drivers and when to provide it. UBER does not disclose the passenger's destination until the transport begins;

d. ***UBER controls the finances*** and unilaterally establishes the rate for a given ride (without driver input), collects the fare, pays the driver a share of the fare collected, and retains the remainder. Drivers may not negotiate fares. UBER drivers are generally unaware of the total amount UBER collects for a particular ride. UBER drivers have no opportunity to collect fares directly from passengers and, in fact, are prohibited by UBER from doing so.

e. ***UBER imposes requirements on its drivers including guidelines for quality, cleanliness, behavior and acceptance of fares.*** Drivers are required to follow a litany of detailed requirements imposed on them by UBER and they are graded, and are subject to termination, based on their failure to adhere to these requirements (such as rules regarding their conduct with customers, the cleanliness of their vehicles, their timeliness in picking up customers and taking them to their destination, what they are allowed to say to customers, etc.). UBER requires drivers to accept all ride requests when logged into the app or face potential discipline;

f. ***UBER provides benefits to drivers***, including paid liability and comprehensive collision insurance, as well as rights to participate in health insurance offerings. If a driver does not own a smartphone, UBER will provide one for business use; and

g. ***UBER controls branding and marketing by and through its employee drivers.*** UBER drivers are required to display an UBER-provided logo in their vehicle, drivers are prohibited from soliciting rides outside of the UBER App. UBER actively markets its service as "safe" and "reliable" and that UBER "has peace of mind designed into every ride."

24. UBER is a common carrier, statutorily and/or under common law principles, as it holds itself out as furnishing transportation to any and all members of the public who desire such service.

a. UBER is available to the general public through the App available for anyone to download to a smartphone[1]. UBER sells transport and receives compensation in the same way that a private taxi service sells transportation services and receives compensation.

[1] In coastal Northern U.S. cities, this accounts for nearly all of the populace. According to the Pew Research Center, nearly 90% of people living in these urban areas own smartphones. https://www.pewresearch.org/internet/fact-sheet/mobile/

b. UBER policy prohibits drivers from refusing to provide services based on the passenger's destination. By its own admission, UBER provides safe, affordable rides around the clock— regardless of what a person looks like, their income, background, or where they are going.

c. UBER takes advantage of the failings of inadequate public transit systems, and provides transport to parts of cities where public transit and/or taxis do not go.

d. Neither drivers nor passengers are charged a fee to download the UBER App. UBER's sole source of revenue is from fare charges to passengers for trips taken.

e. UBER policy prohibits drivers from refusing to provide services based on race, religion, national origin, disability, sexual orientation, sex, marital status, gender identity, age or any other characteristic protected under relevant federal, state or local law.

f. UBER expects its drivers to comply with all relevant state, federal and local laws governing the transportation of passengers with disabilities, including transporting service animals. UBER specially instructs its drivers on accessibility for passengers with disabilities.

25. Defendant Yohou, as an employee driver, was a transportation agent for UBER. As a common carrier, UBER is subject to heightened responsibility to the public in the hiring, training and oversight of its drivers. UBER must ensure its drivers have exhibited a safe driving record and ensure that their drivers continue to exhibit the utmost care in operating vehicles safely on the public roads in the Commonwealth of Massachusetts.

26. UBER negligently incentivizes its driver to never miss a fare under threat of being fired, thereby encouraging unsafe driving and speeding. UBER negligently fails to incentivize safe driving in order to protect the public.

27. UBER knew or should have known that its driver policies would result in unsafe driver conduct on public roads. UBER's partnership agreement with its employee drivers is silent as to safety.

28. UBER negligently hired Defendant Jonas Yohou as a professional driver on the public roads in the Commonwealth of Massachusetts despite his extensive and alarming driving history and prior driver re-training course. UBER knew or should have known that hiring Defendant Yohou as a driver employee would result in jeopardy to the health, safety, and/or welfare to residents of the Commonwealth of Massachusetts including Plaintiff William Good. UBER knew or should have known that Defendant Yohou's provision of transportation services was not consistent with the public interest.

29. As UBER employees, drivers are provided the protection of comprehensive liability insurance when they are working. The insurance coverage increases dramatically when the driver employee has accepted a fare. This coverage continues while the driver is traveling to pick up the fare, throughout the fare's trip, and until the fare exits the vehicle and the trip is concluded in the UBER app.

30. Moreover, UBER failed to implement safety policies and protocols, train its drivers on those policies and protocols, and enforce compliance with its policies and protocols including, but not limited to, through the incentives it creates for its employee drivers. Specifically, UBER failed to implement safety measures that would protect the public, including, but not limited to:

a. Failing to prioritize safe operation of all UBER-affiliated motor vehicles by incentivizing safety instead of the maximization of rider fares;

b. Failing to expressly allow drivers, without fear of penalty or retaliation, to alert passengers if they are lost or stuck in traffic; and

c. Failing to permit UBER drivers a reasonable number of missed and/or delayed fares without the threat of penalty, retaliation or termination.

d. Failing to appropriately train UBER drivers how to respond after a serious motor vehicle collision causing personal injury, including reporting the incident immediately and calling first responders as soon as possible.

COUNT I
Negligence v. UBER Technologies, Inc. and Raiser, LLC ("The UBER Corporate Defendants")

31. Plaintiff incorporates and reasserts paragraphs 1 through 30 above as if set forth fully herein.

32. The UBER defendants owed the general public, including the Plaintiff, a duty to provide safe means and methods of operating motor vehicles on public roads in the Commonwealth of Massachusetts.

33. The UBER defendants breached their duty of care when, while riding as a passenger in Defendant Yohou's vehicle, Plaintiff Good suffered severe injuries in a motor vehicle accident. The UBER defendants also breached their duty of care by failing to implement adequate safety and security measures, including adequate driver screening, hiring, training and/or supervision practices, and/or adequate driver options and safety incentivization without threat of retaliation or termination so that all employee drivers may operate UBER vehicles safely on public roads in the Commonwealth of Massachusetts

34. As a direct and proximate result of the negligence of the UBER Defendants, Plaintiff was caused to suffer severe physical, mental and emotional injuries, extraordinary pain and suffering, permanent disability, loss of enjoyment of life and medical, psychological, financial and economic damages. Plaintiff will suffer these damages for the rest of his life.

WHEREFORE, Plaintiff prays that judgment enter against the UBER Defendants in an amount which will fairly and adequately compensate the Plaintiff, plus interest, costs, attorneys' fees and such other relief as the Court may deem appropriate.

COUNT II
Negligence v. Individual UBER Driver Jonas Yohou

35. Plaintiff incorporates and reasserts paragraphs 1 through 34 above as if set forth fully herein.

36. At the time of the collision, Defendant, Jonas Yohou, was operating a motor vehicle in a negligent and careless manner when he was speeding through a residential area of Somerville and collided with another vehicle, all while Plaintiff Good was seated in the back seat.

37. As a direct and proximate result of the negligence of Defendant Yohou, Plaintiff was caused to suffer severe physical, mental and emotional injuries, extraordinary pain and suffering, permanent disability, loss of enjoyment of life and medical, psychological, financial and economic damages. Plaintiff will suffer these damages for the rest of his life.

WHEREFORE, Plaintiff prays that judgment enter against the Defendant, an employee-driver for UBER, in an amount which will fairly and adequately compensate the Plaintiff, plus interest, costs, attorneys' fees and such other relief as the Court may deem appropriate.

COUNT III
***Respondeat Superior* v. Both Corporate and Individual UBER Defendants**

38. Plaintiff incorporates and reasserts paragraphs 1-37 above as if set forth fully herein.

39. The Defendant Jonas Yohou was acting within the course and scope of his employment with the UBER Defendants when he negligently and carelessly caused the collision which injured the Plaintiff.

40. As aforesaid, Defendant Yohou was an employee and agent of The Corporate UBER Defendants, he was under the direction and control of the UBER Defendants and was providing transportation services within the scope of his employment with the UBER Defendants.

41. The Corporate UBER Defendants are liable for the actions of their agents and employees directly and under the doctrine of *respondeat superior*.

42. As a direct and proximate result of the negligent and careless conduct of UBER Driver, Defendant Yohou, Plaintiff was caused to suffer severe physical, mental and emotional injuries, extraordinary pain and suffering, permanent disability, loss of enjoyment of life and medical, psychological, financial and economic damages. Plaintiff will suffer these damages and for the rest of his life.

WHEREFORE, Plaintiff prays that judgment enter against the Defendants in an amount which will fairly and adequately compensate the Plaintiff, plus interest, costs, attorneys' fees and such other relief as the Court may deem appropriate.

COUNT IV
Negligence as Common Carrier v. UBER Corporate Defendants

43. Plaintiff incorporates and reasserts paragraphs 1-42 above as if set forth fully herein.

44. The Corporate UBER defendants, as common carriers, owed the general public, including the Plaintiff, a heightened and non-delegable duty to provide safe means and methods of operating motor vehicles on public roads in the Commonwealth of Massachusetts.

45. UBER breached the duty of care it owed Plaintiff when, while riding as a passenger in Defendant Yohou's vehicle, Plaintiff Good suffered severe injuries in a motor vehicle accident. UBER further breached its duty of care by failing to implement adequate safety and security measures, including adequate driver screening, hiring, training and/or supervision practices, and/or adequate driver options and safety incentivization without threat of retaliation or termination so that all employee drivers may operate UBER vehicles safely on public roads in the Commonwealth of Massachusetts

46. As a direct and proximate result of the negligence of the UBER Defendants, Plaintiff was caused to suffer severe physical, mental and emotional injuries, extraordinary pain and suffering, permanent disability, loss of enjoyment of life and medical, psychological, financial and economic damages. Plaintiff will suffer these damages for the rest of his life.

WHEREFORE, Plaintiff prays that judgment enter against the UBER Defendants in an amount which will fairly and adequately compensate the Plaintiff, plus interest, costs, attorneys' fees and such other relief as the Court may deem appropriate.

PLAINTIFF'S DEMAND FOR TRIAL BY JURY AND VOIR DIRE

Plaintiff demands a trial by jury on each claim asserted, and on each defense so triable,

and Plaintiff further makes demand for attorney-conducted voir dire to the greatest extent permissible.

The Plaintiff, By His Attorneys,

SWEENEY MERRIGAN LAW, LLP

/s/ Bradley M. Henry
/s/ Victoria Santoro Mair
/s/ Jessica M. Gray

Bradley M. Henry, BBO No. 559501
brad@sweeneymerrigan.com
Victoria Santoro Mair, BBO No. 679120
victoria@sweeneymerrigan.com
Jessica M. Gray, BBO No. 697533
jessica@sweeneymerrigan.com
268 Summer St. - LL
Boston, MA 02210
617-391-9001

Date: January 25, 2022

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

NORFOLK SUPERIOR COURT
CIVIL ACTION NO.:

ANNE LUEPKES,

Plaintiff,

v.

RAPHAEL PHILOGENE, UBER TECHNOLOGIES, INC., and PORTIER, LLC,

Defendants.

COMPLAINT

PARTIES

1. The plaintiff Anne Luepkes (hereinafter "Plaintiff") is an individual who resides at 51 Presidential Drive, Quincy, Massachusetts.

2. The defendant Raphael Philogene (hereinafter "Philogene") is an individual who, upon information and belief, resides at 12 Summer Street, Holbrook, Massachusetts.

3. The defendant Uber Technologies, Inc. (hereinafter "Uber") is a Delaware corporation with a principal place of business located at 1455 Market Street, San Francisco, California.

4. The defendant Portier, LLC (hereinafter "Portier") is a Delaware limited liability company with a principal place of business located at 1455 Market Street, San Francisco, California.

JURISDICTION

5. Plaintiff incorporates all preceding and subsequent paragraphs herein.

6. The subject motor vehicle crash occurred in Quincy, County of Norfolk.

7. Both Plaintiff and Philogene reside in County of Norfolk.

8. Norfolk Superior Court has jurisdiction to hear this action pursuant to G.L. c. 223, §1.

FACTS

9. Plaintiff incorporates all preceding and subsequent paragraphs herein.

10. On or about March 27, 2019, Plaintiff was walking down Presidential Drive in Quincy, Massachusetts.

11. Presidential Drive is a residential driveway that serves the Presidential Estates Apartment Complex.

12. Plaintiff was walking down a portion of Presidential Drive which has no sidewalk; however, Plaintiff was walking close to the curb.

13. As Plaintiff was walking down Presidential Drive, Philogene was driving up Presidential Drive at a high rate of speed.

14. As Philogene was driving up Presidential Drive at a high rate of speed, he struck Plaintiff.

15. As a result of being struck by Philogene, Plaintiff suffered serious injuries.

16. At all relevant times, Uber was engaged in the business, acting in its own business capacity and through subsidiary and/or affiliate business entities, of providing online food ordering and delivery services through the Uber Eats Application.

17. At all relevant times, Portier was engaged in the business of providing online food ordering and delivery services through the Uber Eats Application in the Commonwealth of Massachusetts.

18. The Uber Eats application and pertinent services are the confidential and intellectual property of Uber and Portier and provide services that are controlled by Uber and Portier which include, but are not limited to, setting delivery prices for customers, collecting payment from customers, dispersing payment to restaurants, dispersing payment to delivery drivers, and requiring the use of the Uber Eats application to set up food deliveries.

19. At all relevant times, Philogene was operating his motor vehicle in the scope of his employment as a driver hired and employed by Uber and Portier to provide food delivery services.

COUNT I—NEGLIGENCE v. PHILOGENE

20. Plaintiff incorporates all preceding and subsequent paragraphs herein.

21. As a result of Philogene's negligence, Plaintiff was caused to suffer personal injuries, great pain and suffering, mental anguish, lost wages and/or diminished earning capacity, and past, present, and future medical expenses.

22. Plaintiff is entitled to recover from Philogene a monetary award representing all damages proximately caused by the negligence of Philogene.

WHEREFORE, Plaintiff demands judgment against Philogene for the full amount of her damages, plus interest, costs, expenses, and attorney's fees.

COUNT II—VICARIOUS LIABILITY v. UBER and PORTIER

23. Plaintiff incorporates all preceding and subsequent paragraphs herein.

24. Philogene's actions and omissions were committed within the scope of his employment for Uber and Portier.

25. Uber and Portier are vicariously liable for the tortious actions of its employees and agents, including Philogene.

WHEREFORE, Plaintiff demands judgment against Uber and Portier for the full amount of her damages, plus interest, costs, expenses, and attorney's fees.

COUNT III—NEGLIGENT HIRING, TRAINING, SUPERVISION, AND RETENTION v. UBER and PORTIER

26. Plaintiff incorporates all preceding and subsequent paragraphs herein.

27. Philogene came into contact with members of the public within the scope of his employment with, or as the agent of, Uber and Portier.

28. Uber and Portier failed to use reasonable care in training, supervising, and retention of Philogene as their employee and/or agent.

29. Uber and Portier were negligent in hiring Philogene as they failed to determine that he was not qualified to safely operate a motor vehicle while using the Uber Eats application.

30. Uber and Portier were negligent in retaining Philogene when they knew or should have known that he was not competent to operate a motor vehicle with reasonable care while using the Uber Eats application to provide food delivery.

31. Uber and Portier were negligent in training and supervising Philogene to ensure that he was competent to operate a motor vehicle with reasonable care while using the Uber Eats application to provide food delivery.

32. Uber and Portier breached their duty of care by negligently hiring, training, supervising, and retaining Philogene as their employee and/or agent.

33. As a result of Uber and Portier's negligence, Plaintiff was caused to suffer personal injuries, great pain and suffering, mental anguish, lost wages and/or diminished earning capacity, and past, present, and future medical expenses.

34. Plaintiff is entitled to recover from Uber and Portier a monetary award representing all damages proximately caused by the negligence of Uber and Portier.

WHEREFORE, Plaintiff demands judgment against Rasier and Uber for the full amount of her damages, plus interest, costs, expenses, and attorney's fees.

PLAINTIFF DEMANDS TRIAL BY JURY

Respectfully Submitted
By Plaintiff's Counsel:

/s/ J. Tucker Merrigan

Erin E. McHugh, BBO #703701
J. Tucker Merrigan, BBO #681627
Sweeney Merrigan Law, LLP
268 Summer Street, LL
Boston, MA 02210
Tel.: (617) 391-9001
Fax: (617) 357-9001
Email: tucker@sweeneymerrigan.com