COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-13559

MARTIN EL KOUSSA, YESSENIA ALFARO, FRANCIS X. CALLAHAN, JR., MELODY CUNNINGHAM, ADAM KASZYNSKI, KATIE MURPHY, JULIET SCHOR and ALCIBIADES VEGA, JR.,

Plaintiffs/Appellants,

v.

ANDREA JOY CAMPBELL, in her official capacity as Attorney General of the Commonwealth of Massachusetts, and WILLIAM FRANCIS GALVIN, in his official capacity as Secretary of the Commonwealth of Massachusetts,

Defendants/Appellees,

CHARLES ELLISON, ABIGAIL KENNEDY HORRIGAN, BRIAN GITSCHEIR, DANIEL SVIRSKY, SEAN ROGERS, CAITLIN DONOVAN, BRENDAN JOYCE, TROY MCHENRY, KIM AHERN and CHRISTINA M. ELLIS-HIBBETT,

Intervenors/Appellees.

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

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS

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April 26, 2024

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INTEREST OF THE *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

The five proposed initiatives that would legalize the otherwise unlawful business models of Uber, Lyft, Instacart, and DoorDash (collectively "Network Companies") do not concern a single related subject and violate Article 48 of the Commonwealth's Constitution. The proponents are guilty of what the Court warned against in 2022: "Presenting voters with a petition that combines 'substantively distinct' policy issues, thereby yoking together disparate policy

[1] In accordance with Mass. R.A.P. 17(c)(5), counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus curiae* and its counsel do not represent and have not represented one of the parties to the present appeal and were not a party and did not represent a party in a proceeding or legal transaction that is at issue in the present appeal.

decisions into a single package that voters are only able to approve or disapprove as a whole, is to engage in 'the specific misuse of the initiative process that the related subjects requirement was intended to avoid.'" *El Koussa v. Att'y Gen.*, 489 Mass. 823, 829 (2022) (quoting *Gray v. Att'y Gen.*, 474 Mass. 638, 649 (2016)).

The proponents insist to Commonwealth officials and the public that their initiatives concern a single related subject—the Network Companies' relationship with their drivers. But that relationship consists of a bundle of distinct rights and protections for drivers. Accordingly, the proposed initiatives would restructure the relationship between Network Companies and their drivers in multiple ways. Further, the proposed initiatives would remake the competitive landscape between the Network Companies and their rivals and subvert longstanding Commonwealth public policy on labor and employment.

First, the proposed initiatives reconstruct the relationship between the Network Companies and their workers in several ways. By declaring the Network Companies' workers not to be employees under Massachusetts laws, the initiatives would carve out the Network Companies and their workers from wage-and-hour laws, unemployment insurance, and workers' compensation, as well as many other provisions of the Massachusetts General Laws. The exemptions that the Network Companies seek would modify both their employment relationships with their workers and, pointedly, their relationship with the Commonwealth as corporations

doing business in Massachusetts, by exempting them from making critical contributions to state social insurance. In the Commonwealth, these topics are covered in four different chapters of the General Laws of the Commonwealth. G. L. c. 149; G. L. c. 151; G. L. c. 151A; G. L. c. 152.

Second, the proposed initiatives remake the competitive landscape in the markets in which the Network Companies participate. By exempting the Network Companies from the Commonwealth's employment laws, the proposed initiatives would confer on them a significant cost advantage. Among other privileges, they would not have to pay their workers a minimum wage for all working time. By contrast, rivals not covered by the proposed initiatives, including van services, limousines, and public transit agencies, would incur the compliance costs associated with the Commonwealth's employment laws. The Network Companies, by virtue of their exemption, would enjoy an important competitive advantage that would empower them to, among other things, outcompete their rivals on price. In the words of this Court, the proposed initiatives would give the privileged Network Companies "an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (2009). The Network Companies have already taken over many markets by flouting labor and employment laws across

the country. The proposed initiatives seek to legalize and perfect their unscrupulous competitive methods.

Third, the proposed initiatives constitute a direct attack on the Commonwealth's labor market standards. Public policy in the Commonwealth has established strong rights and protections for working people. Given the Network Companies' unfair competitive advantage, they would capture market share from high-road rivals that comply with Massachusetts employment laws. As a result, more workers lose the protections enacted by the General Court. The Supreme Court recognized the pernicious competitive dynamic unleashed by unfair labor practices. In striking down Florida's debt peonage statute as unconstitutional, the Court wrote, "When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition." *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

The proposed initiatives do not address a single subject and should fail on Article 48 grounds. They reconstruct the relationship between the Network Companies and their workers in several ways, eliminate critical obligations to the Commonwealth in maintaining the Commonwealth's social safety net, remake

their relationship with rivals, and represent an attack on the Commonwealth's public policy on labor and employment.

ARGUMENT

I. The Proposed Initiatives Would Harm the Commonwealth's Workers and the Commonwealth in Several Ways

The proposed initiatives would inflict serious injury on a significant number of workers in the Commonwealth. The General Court enacted a robust set of employment laws to protect workers in the Commonwealth. Among other things, these laws guarantee minimum wage and overtime pay; health, disability, and unemployment insurance; as well as require employers to pay into a workers' compensation fund. They assure that workers in the Commonwealth make a living wage, receive protection when things go wrong, and have recourse if exploited by unscrupulous employers. For instance, with regard to wage-and-hour laws, violation through employee misclassification carries serious legal liabilities. This Court wrote, "An individual who successfully shows that he or she has been misclassified 'shall be awarded treble damages, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.'" *Patel v. 7-Eleven, Inc.*, 489 Mass. 356, 361 (2022) (citing G. L. c. 149, § 150).

Under the proposed initiatives, the favored Network Companies would be exempt from Massachusetts employment and social insurance laws. Even though the Network Companies employ hundreds of thousands of Commonwealth residents on a part- or full-time basis, they would not be required to pay their workers the minimum wage and overtime for all working time or contribute to the Commonwealth's unemployment insurance, PFML, and health insurance safety net funds. Thus, they would have the right to opt out of the robust protections that the Commonwealth enacted to protect workers and ensure livable wages and compensation in the event of unemployment or injury on the job.

By seeking to deprive the Commonwealth's workers of critical legal rights under Massachusetts laws and deprive the Commonwealth of critical revenue to ensure Massachusetts' vital social safety net insurance programs, the proponents of the five initiatives aim to sweep distinct and unrelated questions into a single initiative in violation of Article 48. These defects are compounded in the Network Companies' three long versions, in which they offer weak, worm-eaten alternatives to the rights, benefits, and protections already conveyed by Massachusetts law and do nothing to provide the Commonwealth revenue to secure its safety net programs.

If the proposed initiatives pass, the injuries to the Commonwealth's workers, as well as the Commonwealth itself, would be substantial. The laws that the

Network Companies seek to exempt themselves from are designed to protect workers from substandard terms and conditions of work and ensure that all employers pay their fair share of revenue to maintain Massachusetts' social safety net, as determined by the people of the Commonwealth. In either direct violation of the law or through exploitation of ambiguities in the law, the Network Companies across the nation have misclassified their workers who transport passengers and deliver meals as independent contractors. Veena B. Dubal, *Economic Security & the Regulation of Gig Work in California: From AB5 to Proposition 22*, 13 Eur. Lab. L. J. 51, 57 (2022). Indeed, the Attorney General alleged that Uber misclassifies its drivers in violation of Massachusetts wage-and-hour laws. *Healey v. Uber Techs., Inc.*, 2021 WL 1222199 (Mass. Super. Ct. Mar. 25, 2021). Now, the Network Companies seek to legalize and make legitimate their long-running violations of Massachusetts law. The three principal effects of the proposed initiatives are described below.

First, many Network Company drivers would make less than the Commonwealth's minimum wage. Those drivers incur substantial costs on their own, including vehicle payments, fuel, and insurance, to work for the Network Companies. Once these costs are considered, many drivers make less than the minimum wage. Research has found that a substantial fraction of Uber and Lyft drivers earn a net income that is lower than the relevant minimum wage. Lawrence

Mishel, *Uber and the Labor Market: Uber Drivers' Compensation, Wages, and the Scale of Uber and the Gig Economy* 14, Econ. Pol'y Inst. (May 15, 2018), https://files.epi.org/pdf/145552.pdf. A 2020 study of Uber and Lyft drivers in California found that a majority make less than the state's minimum wage. Michael Reich, *Pay, Passengers, and Profits: Effects of Employee Status for California TNC Drivers* 3, 16, Inst. for Rsch. on Lab. & Emp. (Oct. 5, 2020), https://irle.berkeley.edu/wp-content/uploads/2020/10/Pay-Passengers-and-Profits-1.pdf. Even an analysis performed by Uber itself was in accord with these findings of sub-minimum wages for drivers. Alison Stein, *Analysis on Impacts of Driver Reclassification*, Uber Under the Hood (May 28, 2020), https://medium.com/uber-under-the-hood/analysis-on-impacts-of-driver-reclassification-2f2639a7f902.

Stripped of the legal protection of the Commonwealth's wage-and-hour laws, Network Companies' drivers would suffer deprivation without any legal recourse. The resulting deprivation would mean more drivers and their families would experience economic hardship. Empirical economic research has found that raising the minimum wage significantly reduces the rate of poverty. Arindrajit Dube, *Minimum Wages and the Distribution of Family Incomes*, 11 Am. Econ. J. 268, 299-300 (2019). On the other hand, lowering the minimum wage—or eliminating the minimum wage entirely—for Network Companies' drivers would significantly increase household hardship in the Commonwealth.

Second, the Network Companies' drivers would also suffer during periods of unemployment. Under the proposed initiatives, the Network Companies would not pay into the state unemployment insurance fund, and so drivers would not be eligible for unemployment insurance in the event of job loss. Wages and salaries are the principal source of income for most people in the United States. Only a minority of households own *any* bonds, stocks, and certificates of deposits, examples of assets that might allow someone and their family to subsist on their own without working for extended periods. Bd. of Governors of Fed. Rsrv. Sys., Changes in U.S. Family Finances from 2019 to 2022, at 15 (Oct. 2023), https://www.federalreserve.gov/publications/files/scf23.pdf. Unemployment insurance is critical for protecting workers and their families from destitution. Without this protection, Network Companies' drivers would have to turn to other public benefits and likely would face greater challenges in meeting basic needs. As with the exemption from minimum wage and overtime rules, the practical effect is going to be greater hardship for hundreds of thousands of people in the Commonwealth.

Third, exempting the Network Companies from providing the full measure of workers' compensation through these initiatives would have serious, deleterious effects on the Network Companies' drivers. Driving a taxicab is among the riskiest occupations in the United States. Cab drivers are frequently injured in crashes and

attacked by belligerent riders. According to data published by the Bureau of Labor Statistics in 2017, cab driving was in that year the 11th deadliest occupation in the United States. Jessica Learish, *The 20 Deadliest Jobs in America, Ranked*, CBS News (July 19, 2017), https://www.cbsnews.com/pictures/the-20-deadliest-jobs-in-america-ranked/. And while food delivery presents a lower risk of injury and fatality for workers, the killing of delivery network companies' drivers on the job is tragically familiar to the people of the Commonwealth. Jessica Goodman, *Officials: Uber Eats Driver Killed, Dismembered While Delivering an Order*, Boston 25 News (Apr. 25, 2023), https://www.boston25news.com/news/trending/officials-uber-eats-driver-killed-dismembered-while-delivering-an-order/NVITZCUO4NGHRJBMKLH6JUVVZM/. Examining the broader class of workers to which the Network Companies' drivers belong, the Bureau of Labor Statistics reported that "transportation and material moving occupations had the most fatalities in 2022 (1,620) up from 1,523 in 2021." *Causes of Fatal Occupational Injuries, Summary, 2022*, U.S. Bur. of Lab. Stats. (Dec. 19, 2023), https://www.bls.gov/news.release/cfoi.nr0.htm.

The denial of workers' compensation would mean these workers' job-related injuries and fatalities would be uncompensated. The General Court sought to "guarantee that workers would receive payment for any workplace injuries they

suffered, regardless of fault." *Mendes' Case*, 486 Mass. 139, 140 (2020) (quoting *Benoit v. City of Bos.*, 477 Mass. 117, 122 (2017)). Stripped of workers' compensation, Network Companies drivers would need to cover loss of income and medical expenses on their own, thereby compounding the denial of employment rights described above.

The proponents are attempting to force unrelated subjects into a single initiative—and stripping Network Companies' workers of several sticks in their bundle of employment rights and relieving themselves of their obligations as employers to contribute to the Commonwealth's social and health insurance programs and secure Massachusetts' social safety net.

The independence of these laws is evident in the structure of the General Laws. The issues of minimum wage, unemployment insurance, and workers' compensation are distinct and separate. These laws are in different chapters of the Massachusetts code. G. L. c. 151, § 1; G. L. c. 151, § 1A; G. L. c. 152. The legislature of the Commonwealth could raise, and has raised, the minimum wage without modifying the unemployment insurance or workers' compensation statutes, or vice versa. Underscoring the three distinct areas of law, the legislature adopted different tests for employment for wage-and-hour laws, unemployment insurance, and workers' compensation. G. L. c. 149, § 148B; G. L. c. 151A, § 2; G. L. c. 152, § 1(4); *see also Camargo's Case*, 479 Mass. 492, 500 (2018) ("Currently, there are

at least four distinct methods used to determine employment status in the Commonwealth."). As the Court stated in 2022, "Each statute and its associated definition of employees and independent contractors involve a distinct and 'complex allocation of costs and benefits for individuals, companies, and State government itself.'" *El Koussa v. Att'y Gen.*, 489 Mass. 823, 830 (2022) (quoting *Camargo's Case*, 479 Mass. at 501).

Federal law is further illustrative. The Fair Labor Standards Act establishes a national minimum wage. 29 U.S.C. § 206. The law, however, says nothing about unemployment insurance or workers' compensation. Lawmakers in the Commonwealth and Congress alike recognized wage-and-hour laws, unemployment insurance, and workers' compensation as distinct subjects for policymaking. *See* Catherine R. Albiston & Catherine L. Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 Berk. J. Emp. & Lab. L. 257, 264-67 (2021) (describing policy choices informing different social insurance programs).

The proponents place voters in the difficult position that Article 48 is meant to prevent. The minimum wage, workers' compensation, and unemployment insurance are distinct protections for workers and distinct obligations for employers to both their workers and the Commonwealth and are not policy questions that should be swept into a single initiative. This Court has admonished

proponents of ballot initiatives from trying to combine disparate policy questions into a single initiative. The proposed initiatives implicate what this Court stated in 2016: "[B]ecause the issues combined in the petition are substantively distinct, it is more likely that voters would be in the 'untenable position of casting a single vote on two or more dissimilar subjects,' which is the specific misuse of the initiative process that the related subjects requirement was intended to avoid." *Gray v. Att'y Gen.*, 474 Mass. 638, 649 (2016) (quoting *Abdow v. Att'y Gen.*, 468 Mass. 478, 499 (2014)).

II. The Proposed Initiatives Would Restructure the Relationship between Network Companies and Their Rivals and Codify Unfair Competition in Law

The proposed initiatives would fundamentally change the competitive landscape in several markets. Contrary to the assertions of the proponents, the proposed initiatives would not only change the Network Companies' relationship with their drivers in multiple ways but would also restructure their relationship with law-abiding competitors. If the proposed initiatives were to pass, Network Companies would be granted a critical—and unfair—advantage over their rivals because they would be exempt from Massachusetts' employment and social insurance laws, while their competitors would still be required to comply with these obligations. Thus, the proposed initiatives would harm rivals of Network

Companies, including van and livery services, public transit authorities, restaurants, and supermarkets.

By formally shedding the duties and responsibilities of employers, the Network Companies would obtain significant cost savings. They seek to have their cake and eat it too—reserving and exercising employer-like control while renouncing the legal responsibilities of employers. Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960 – 1980*, 22 Enter. & Soc'y 156 (2021). Under the proposed initiatives, the Network Companies would not need to pay their workers a minimum wage and overtime based on all time worked. Additionally, they would not be obligated to contribute to unemployment insurance and worker compensation programs. This Court labeled such advantages a "windfall" that "permits an employer to avoid its statutory obligations to its workforce . . . and to shift certain financial burdens to the Commonwealth and the Federal government." *Patel*, 489 Mass. at 359. Misclassification is estimated to grant firms a 20 to 40 percent cost savings on their labor expenses. Françoise Carré, *(In)dependent Contractor Misclassification* 5 (Econ. Pol'y Inst., EPI Briefing Paper No. 403, June 8, 2015), https://files.epi.org/pdf/87595.pdf. To illustrate the dollars at stake, the State of New Jersey sought $640 million for four years of back taxes, as well as interest and penalties, from Uber for misclassifying its workers. *New Jersey Hits Uber with $640 Million Tax Bill for Misclassifying*

Workers, NBC News (Nov. 14, 2019), https://www.nbcnews.com/news/us-news/new-jersey-hits-uber-640-million-tax-bill-misclassifying-workers-n1082666.

By contrast, law-abiding competitors who are not covered by the proposed initiatives would still be obligated to comply with the established duties and responsibilities of employers in the Commonwealth. They would be required to pay their workers minimum wage and overtime based on all time worked. Similarly, they would be obligated to contribute to unemployment insurance and worker compensation programs. By complying with their legal responsibilities, these high-road rivals of the Network Companies would have substantially higher labor costs.

By legitimizing their failure to pay legally compliant wages and to meet their revenue obligations to the Commonwealth, Network Companies could capture market share in downstream service markets from competitors who must comply with the Commonwealth's otherwise-applicable employment and social insurance laws. Network Companies could use their cost advantage to undercut their rivals on prices. Accordingly, many consumers would patronize Network Companies instead of their competitors who must comply with existing law.

A market in which some market participants must comply with employment laws and others are exempt is manifestly unfair. In enacting the Fair Labor Standards Act, Congress declared that paying workers a sub-living wage

"constitutes an unfair method of competition." 29 U.S.C. § 202(a)(3). The Supreme Court recognized that labor exploitation was one form of unfair competition, and one that the federal government and the states had the authority to prevent. In upholding the Fair Labor Standards Act, the Court wrote, "[T]he evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce." *United States v. Darby*, 312 U.S. 100, 122 (1941); *see also W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) ("The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.").

If the proposed initiatives are adopted, the Network Companies would not be outcompeting their rivals on the merits, but rather would do so by exempting themselves from abiding by the legal rights, protections, and benefits guaranteed to Massachusetts employees in the Commonwealth and by avoiding their obligations to remit social insurance contributions to the Commonwealth. Indeed, on the efficiency point, one industry expert examined Uber's operations and concluded

the corporation is likely *less efficient* than licensed taxicab companies at providing transportation. Hubert Horan, *Will the Growth of Uber Increase Economic Welfare?*, 44 Transp. L.J. 33, 103 (2017) ("Analysis of taxi industry cost structures shows that Uber is a much less efficient producer of urban car services than the traditional operators it has been driving out of business."). Instead, the Network Companies would have the advantage of competing without the burden of the Commonwealth's employment and social insurance mandates to which their competitors are subject. Holding down wages and other labor costs to gain an advantage is not fair competition. In the words of this Court, the proposed initiatives would give the privileged Network Companies "an unfair competitive advantage over employers who correctly classify their employees and bear the concomitant financial burden." *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593 (2009).[2]

In a speech in February, Federal Trade Commissioner Alvaro Bedoya stressed the distinction between fair and unfair methods of competition in the

[2] To further illustrate the point, consider a retailer who obtained an exemption from a state sales tax, while its competitors remained obligated to collect this tax. With this tax advantage, the favored retailer could underprice its competitors and capture market share. This competition, however, would hardly reflect the favored retailer's superior operational efficiency but rather be a function of its privileged legal status.

context of labor rights.[3] He described how businesses' misclassification of workers as independent contractors injured both the affected workers and the rivals that comply with employment law. Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, *"Overawed": Worker Misclassification as a Potential Unfair Method of Competition*, 2024 WL 472664, at *8-9. He offered the powerful example of a construction business in Florida that honestly complied with labor and employment laws—and subsequently lost most of its business to low-road competitors that flouted public policy and denied workers their basic rights as employees. *Id.* at *8.

This unfair competition is real and has already injured private and public rivals of the Network Companies. Despite not being legally permitted to do so in much of the country, Network Companies have disowned the responsibilities of employers. Here, the Attorney General's Office determined that Uber illegally misclassified its drivers. *Uber Techs.*, 2021 WL 1222199, at *5. As a result, Uber and other Network Companies have obtained a cost and competitive advantage that gives them the ability and the incentive to undercut rivals on price.

[3] Congress charged the Federal Trade Commission with stopping "unfair methods of competition." 15 U.S.C. § 45(a). The Supreme Court wrote, "The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (citations omitted).

The effects of the proposed initiatives on multiple classes of rivals can be predicted with a high degree of confidence. Competitors that comply with the law have already lost substantial market share to Uber and Lyft, with many taxicab drivers losing their livelihoods and some even taking their own lives out of desperation and hopelessness. Emma G. Fitzsimmons, *Why Are Taxi Drivers in New York Killing Themselves?*, N.Y. Times (Dec. 2, 2018), https://www.nytimes.com/2018/12/02/nyregion/taxi-drivers-suicide-nyc.html.

Uber and Lyft have also captured passengers from public transit. While the results are mixed, some research shows that public bus and subway systems may have lost ridership due to unfair competition from Uber and Lyft. Yash Babar & Gordon Burtch, *Examining the Heterogeneous Impact of Ride-Hailing Services on Public Transit Use*, 31 Info. Sys. Rsch. 820 (2020); Gregory D. Erhardt, et al., *Do Transportation Network Companies Increase or Decrease Transit Ridership? Empirical Evidence from San Francisco*, 49 Transp. 313 (2022); Gregory D. Erhardt, et al., *Why Has Public Transit Ridership Declined in the United States?*, 161 Transp. Res. Part A 68 (2022). Similarly, restaurants and supermarkets that employ drivers would struggle to compete in food delivery with Network Companies that would be entitled to renounce the duties of employers and obtain a major cost advantage.

The proposed initiatives would only exacerbate the existing unfair methods of competition that Network Companies currently employ to weaken their rivals. These companies have pursued violation of public policy as a method of competition and now they seek to perfect the strategy through these proposed initiatives.

Moreover, the effect of the proposed initiatives on competitors of the Network Companies undercuts the proponents' narrative. While they insist to Commonwealth officials and the public that their initiatives concern a single related subject—the Network Companies' relationship with their drivers—the initiatives would also restructure the companies' relationship with competitors. Business rivalry would no longer occur on a level playing field in which *all* firms in the markets are required to comply with the Commonwealth's employment laws. Instead, the proposed initiatives would codify a two-tiered market: high-road firms that must continue to comply with Massachusetts law and respect its public policy on workers' rights versus the Network Companies that do not. To put the point differently, if the proposed initiatives became law, shortchanging minimum wages for workers would be considered illegal wage theft when done by restaurants that employ delivery drivers and yet perfectly legal behavior for the Network Companies delivering food from the same restaurants to the same customers.

The proposed initiatives would reconstruct markets including local transportation and food delivery and place high-road firms at a permanent disadvantage. Thus, the initiatives should not be on the ballot because they do not cover a single related subject as required by Article 48. In addition to "yoking together disparate policy decisions" concerning employment policy, the proposed initiatives "combine[] 'substantively distinct' policy issues'" of employment and unfair competition. *El Koussa*, 489 Mass. at 829 (quoting *Gray*, 474 Mass. at 649).

III. The Proposed Initiatives, If Enacted, Would Erode the Commonwealth's Labor Market Standards

The practical effect of the proposed initiatives would be to undermine the Commonwealth's labor market standards. Massachusetts has established strong rights and protections for working people. Given the Network Companies' unfair competitive advantage, they would capture market share from high-road rivals that comply with otherwise-applicable employment laws. As a result, more workers would labor *without* the protections enacted by Massachusetts voters' elected representatives. The proposed initiatives constitute an assault on the Commonwealth's public policy on labor and employment.

As described in Section II, the proposed initiatives would empower Network Companies to engage in unfair competition. By disowning the duties and responsibilities of employers, they would reduce their wage and other labor costs. They could cut prices and outcompete rivals still subject to existing law. Over time,

as businesses that abide by the laws close or reduce services, Network Companies would account for a larger share of business in taxicabs and food delivery. Indeed, this has already happened in many cities, in part, because Uber and Lyft flouted labor and employment laws. Shelly Hagan, *Uber Takes Majority of Ground Transport Market for U.S. Business Travelers*, Bloomberg (Jan. 26, 2017), https://www.bloomberg.com/news/articles/2017-01-26/uber-takes-majority-of-ground-transport-market-for-u-s-business-travelers.[4]

With Network Companies capturing and increasing market share, proportionately more workers would lose the benefits of this state's strong protections for working people. Network Companies—i.e., Uber, Lyft, and their successors—would increasingly become the option for securing work in the transportation sector. Fewer riders on the T may force the MBTA to lay off workers. More people would deliver food for Doordash and Instacart, compared to being drivers for the local pizza joint or supermarket as employees. As more residents of the Commonwealth labor for Network Companies, rather than companies defined as employers under the law, a larger fraction of Massachusetts workers would labor without important employment rights and protections.

[4] Uber also captured market share by violating municipal taxicab rules and deliberately running losses for many years. Katie J. Wells, Kafui Attoh & Declan Cullen, DISRUPTING D.C.: THE RISE OF UBER AND THE FALL OF THE CITY 31, 92 (2023).

To the extent high-road rivals remain in business, they would feel extraordinary pressure to follow the Network Companies' lead in their employment practices. It follows reason that some of these rivals would be tempted to stay competitive by committing wage theft and avoiding statutory requirements to pay into the Commonwealth's unemployment and workers' compensation funds. In other words, some may feel compelled to break employment laws to keep up with Network Companies because the only other option is being driven out of business.

Decades ago, the Supreme Court recognized that permitting the exploitation of *some* workers triggers a race to the bottom in labor market standards. In a 1944 decision, the Court ruled that a Florida law permitting debt peonage violated the Thirteenth Amendment and federal statutory law. The Court described the effects of such coercive labor practices as follows: "When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition." *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

The practical effect of the proposed initiatives would be to undercut Massachusetts public policy on employment and social and health insurance. More drivers would labor outside the protections established by the people of the

Commonwealth and their elected representatives. While they are portrayed as targeted measures only modifying the relationship between Network Companies and their drivers, they are radical in nature. In addition to stripping workers of several sets of protections and placing the high-road rivals of Network Companies at a permanent and unfair competitive disadvantage, the proposed initiatives would functionally weaken the democratic policy choices made by the people of Massachusetts.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully requests that the Court declare that the Petitions and Summaries do not comply with Article 48 of the Massachusetts Constitution, and bar the Secretary of the Commonwealth from placing the Petitions on the November 2024 ballot.

Dated: April 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joel Fleming, hereby certify that on the 26th day of April 2024, I caused a true and accurate copy of the Brief of the *Amicus Curiae* Open Markets Institute to be served by email on all counsel of record.

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CERTIFICATE OF COMPLIANCE

I, Joel Fleming, hereby certify that this brief complies with the rules of Court that pertain to the filing of *amicus curiae* briefs, including, but not limited to: Mass. R.A.P. 17 (brief of an *amicus curiae*); Mass. R.A.P. 20 (form of briefs, appendices, and other documents).

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/s/ Joel Fleming
Joel Fleming