MEMORANDUM

To: Attorney General Maura Healey, and AAG Jesse Boodoo

From: Thomas O. Bean

Re: Initiative Petitions 21-11/21-12 – "A Law Defining and Regulating the Contract-Based Relationship Between Network Companies and App-Based Drivers"

Date: August 13, 2021

Thank you for giving us the opportunity to address the suitability of the above-referenced petitions for certification by the Attorney General under amend. Art. 48 of the Massachusetts Constitution. This memorandum describes the reasons we believe the AG should not certify those Petitions. Should you have any questions concerning this memorandum, please do not hesitate to email me (tbean@verrill-law.com) to set up a time to talk.

Executive Summary

The Attorney General should not certify petitions 21-11/21-12 (the "Petitions") because the Petitions address multiple subjects that are not "related" to "or mutually dependent" on each other, in at least two respects:

First, the Petitions--as the title and purpose clauses expressly state--seek to define and regulate the contract-based relationship between Network Companies and App-Based Drivers ("Drivers"). All sections of the Petitions, other than their last section and two words in section 3, contribute to defining and regulating that relationship. Those two words in section 3 and the last section of the Petitions, however, seek to regulate not only the relationship between the Network Companies and the App-Based Drivers, but to regulate and limit the Network Companies' liability for tortious acts committed by Drivers against members of the public such as customers of Network Companies and persons injured in automobile accidents with Drivers. Inclusion of the last section and the two words in section 3 places voters in the untenable position of having to decide whether to vote for or against Petitions that would, (x) define and regulate the relationship between the Network Companies and Drivers while (y) limiting those companies' liability for tortious acts committed by drivers against members of the public. As such, the Petitions contain subjects that are not "related" to or "mutually dependent" on their stated purpose. Accordingly, the AG should not certify the Petitions under art. 48.

Second, the Petition declares app-based drivers to be independent contractors and not employees under *multiple and disparate* areas of employment law in one fell swoop.[1] Each area

[1] Under current law, app-based drivers should be classified as employees under the Wage Act, as the Attorney General recognizes, but are misclassified as independent contractors by Uber and Lyft. See Healey v. Uber Technologies, 2021 WL 1222199 *1 (2021).

of employment law utilizes a different test for employee status, based on the vastly different policy considerations at play in each area. These vastly different policy considerations almost certainly lead voters to have differing opinions on the issues, thus putting voters in the untenable position of having to vote for or against the Petitions.

I. THE PETITIONS CONTAIN SUBJECTS THAT ARE NOT "RELATED AND MUTUALLY DEPENDENT" TO THE STATED PURPOSE OF THE PETITIONS.

A. The Sections Preceding the Last Section of the Petitions Focus on the Contract-Based Relationship Between Network Companies and Drivers.

The "Purpose" clause of the Petitions states:

> **Section 2. Purpose.** The purpose of this Act is to define and regulate the contract-based relationship between network companies and app-based drivers as independent contractors with required minimum compensation, benefits, and training standards that will operate uniformly throughout the commonwealth, guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work.

Taking the Purpose clause on its face,[2] the Purpose of the Act is limited to defining and regulating the contract-based relationship between Network Companies and Drivers as "independent contractors." The Purpose clause does not, either explicitly or implicitly, suggest that the Act regulates or limits the liability of the Network Companies to members of the public for tortious acts committed by Drivers.

The last sentence of the definition, "App-based driver" or "driver" in section 3 of the Act, is consistent, in most respects, with the stated Purpose. It states:

> Notwithstanding any other law to the contrary, a DNC courier and/or TNC driver who is an app-based driver as defined herein 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.

Two points are worth noting about this sentence. First, the phrase at the end of the sentence, "with respect to his or her relationship with the network company" limits the scope of this definition: it applies only the relationship between the Network Company and the Driver. Second, the sentence goes beyond treating Drivers as independent contractors and not employees by saying that Drivers are also not "agents" of the Network Company. Drivers could be independent contractors, and thus not employees, but still be "agents" of the Network Companies. See Paradoa v. CNA Ins. Co., Mass. App. Ct. 651, 653-54 (Ct. App. 1996) ("That

[2] While the Attorney General should be "guided" by the proposed law's "Statement of Purpose," it is not bound to accept it at face value. Dunn v. Att'y Gen., 474 Mass. 675, 683–84, 54 N.E.3d 1, 9 (2016) ("where we have been called upon to interpret the meaning of laws adopted by initiative petition, we have been guided by statements of purpose.") (emphasis added).

PME, Claims, and Century were independent contractors in relation to CNA is not the end of the inquiry. A person who hires an independent contractor to do certain work may be liable for the tortious conduct of the independent contractor if the employer has retained control of part of the work that the independent contractor performs."), citing Corsetti v. Stone Co., 396 Mass. 1, 9–11, 483 N.E.2d 793 (1985). Thus, companies working with independent contractors may still be liable for the tortious acts of the independent contractors who are their "agents."

Sections 4-9 of Petition 21-11 also address some of the terms and conditions of the contract-based relationship between Network Companies and Drivers. Section 4 covers training.[3] Section 5 addresses wages while sections 6-9 cover benefits.[4] Section 10 addresses formation and termination of the contracts. Similarly, sections 4-8 of Petition 21-12 address the terms and conditions of the contract-based relationship, while section 9 addresses formation and termination of contracts. Section 10(b) of Petition 21-11, and section 9(b) of Petition 21-12, specifically provide, "[e]very contract between an app-based driver and a network company with regard to delivery services or transportation services shall be deemed to include terms incorporating the requirements in sections 4 through [8 or 9 depending on the petition number] of this chapter."

B. The Last Section of the Petitions Address Two Subjects and Two Relationships Not Addressed by the Preceding Sections.

The last section of the Petitions, entitled "Interpretation of this chapter" (the "Interpretation Section"), addresses two subjects different from and in addition to that of the contract-based relationship between the Network Companies and the Drivers. It states:

> (b) Notwithstanding any general or special law to the contrary, compliance with the provisions of this chapter shall not be interpreted or applied, either directly or indirectly, in a manner that treats network companies as employers of app-based drivers, or app-based drivers as employees of network companies, and any party

[3] Inclusion of the training requirements bolster the argument that this initiative is about more than one subject. Independent contractors and employees are sometimes subject to statutory training and safety requirements. These are subjects of federal and state public safety regulations-- e.g., licensure and certification requirements for doctors, nurses, electricians, gas workers; occ safety requirements like the OSHA 10 safety requirement; they have nothing to do with establishing the core employer-employee or business-independent contractor relationship.

[4] While the proposed law claims to provide family and medical leave benefits to the Drivers, the benefits it would provide are inferior to those provided to independent contractors under state law. G.L. c. 175M--the paid family and medical leave statute--covers self-employed individuals. That means that, absent a family and medical leave provision under the proposed law, Drivers would be covered by c. 175M. The benefit earned under c. 175M is based on the amount the individual earns up to the maximum weekly benefit offered by unemployment insurance. Because Drivers would not be entitled to minimum wage under the proposed law, and are paid only for "engaged time" rather than "all time" worked, the amount of family and medical leave benefit they would earn under the proposed law is likely to be substantially less than they would earn as self-employed individuals under c. 175M. A chart comparing worker protection laws under existing statutes with those appearing in the Petitions is attached as Exhibit A.

seeking to establish that a person is not an app-based driver bears the burden of proof.

The first subject this section addresses regulating and limiting the Network Companies' liability to members of the public for tortious acts of Drivers, as well as limiting the Network Companies' liability to Drivers themselves. Three phrases and words make this clear. First, the section states that compliance with this chapter shall not be "applied" "directly or indirectly" in a manner that treats network companies as employers of drivers. The word "directly" refers to application of the Act to a suit brought by a Driver directly against a Network Company. The word "indirectly" refers to application of the Act to a suit by a member of the public who seeks to hold a Network Company vicariously, i.e., "indirectly," liable for the torts of a Driver. Dias v. Brigham Med. Assocs., 438 Mass. 317, 319–320, 780 N.E.2d 447 (2002) ("Broadly speaking, respondeat superior is the proposition that an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment."); Elias v. Unisys Corp., 410 Mass. 479, 481, 573 N.E.2d 946, 947–48 (1991) (the employer of driver who injured Ms. Elias in an automobile accident was without fault; "the liability of the principal arises simply by the operation of law and is only derivative of the wrongful act of the agent.") (emphasis added).

Second, the phrase "any party seeking to establish that a person is not an app-based driver bears the burden of proof" makes two things clear: that the section contemplates (1) a lawsuit, as is evident by the use of the phrase, "burden of proof" and the word, "party"; and (2) a lawsuit by a member of the public against a Network Company, and not just by a Driver, as is apparent by the use of the phrase "any party." If the section were to apply only to suits by Drivers against Network Companies, the Petitions would have used the word "Driver" instead of the much broader phrase, "any party."

Third, the prefatory phrase, "[n]otwthstanding any general or special law to the contrary," and subsequent reference to Network Companies not being employers of Drivers and Drivers not being employees of Network Companies, makes explicit that this chapter is to take precedence over any other contrary law, such as the law of respondeat superior. As noted above, the law of respondeat superior would generally apply to impose liability on an employer for the tortious acts of an employee. Yet, the Interpretation Section provides for the Act to regulate and shield Network Companies from liability based on theories of vicarious liability to members of the Public for torts committed by Drivers.

If the Network Companies had believed they had been relieved of vicarious liability for torts committed by Drivers simply by defining Drivers to be independent contractors (and not agents),[5] they would not have needed to draft the Interpretation Clause as broadly as they did.

[5] The common law has long imposed vicarious liability upon principals arising from torts committed by their agents. In re Atl. Fin. Mgmt., Inc., 784 F.2d 29, 31 (1st Cir. 1986). For example, in transactions with third parties, an agent's conduct will be imputed to the principal if the agent acted with actual or apparent authority, or if the principal ratified the agent's conduct. See Fergus v. Ross, 477 Mass. 563, 566-568, 79 N.E.3d 421 (2017). See also Restatement (Third) of Agency, supra at §§ 2.01-2.03, 4.02.

Because they drafted it to include references to "indirect" application of the proposed law, parties in addition to Drivers, and "burden of proof," it is fair to infer—as is apparent from the language of the Interpretation Clause—that the Network Companies are proposing to receive a broader shield from liability to members of the public than they would have received simply by defining Drivers to be independent contractors.

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Based on the foregoing, it is clear that the Interpretation Section of the Petitions covers a separate subject—Network Company liability for Drivers' torts to the public—and a separate relationship—that between the Network Company and a member of the public–that was not specifically addressed in or necessarily follows from defining and regulating the contract-based relationship between a Driver and the Network Company.

C. Analysis of the Petitions Under amend. Art. 48 Shows That Because the "Additional" Subject of the Petitions Can Exist Independently of Those that Purportedly Address the Stated Purpose, the Petitions Do Not Show a Unified Statement of Public Policy; They Place Voters in the Untenable Position of Having to Vote on Two Different Policies That are not "Mutually Dependent".

Under amend. Art. 48, if a petition addresses multiple subjects, those subjects must be "related or . . . mutually dependent." Art. 48, The Initiative, II, § 3, as amended by art. 74. While amend. Art. 48 uses the word "or" between the words "related" and "mutually dependent," the Supreme Judicial Court has held that the phrases "related" and "mutually dependent" are to be read conjunctively. Anderson v. Att'y Gen., 479 Mass. 780, 791–94, 99 N.E.3d 309, 320 (2018) ("To construe the phrase 'or which are mutually dependent' as eliminating the requirement of relatedness would be to vitiate the purpose of protecting the voters from misuse of the petitioning process for which it was enacted."). Accordingly, for the AG to certify the Petitions, the subjects of the Petitions must all be related to and mutually dependent on each other.

In determining whether the subjects of a petition are related to and mutually dependent on each other, the SJC has posed two questions: First, "[d]o the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on 'yes' or 'no' by the voters? Second, does the initiative petition express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy?" Oberlies v. Att'y Gen., 479 Mass. 823, 830–31, 99 N.E.3d 763, 71 (2018) (internal quotation marks and citations omitted). The Court has "held that two provisions that 'exist independently' of each other are not mutually dependent." Id. (emphasis added).

Here, the sections of the Petitions that precede the Interpretation Section purport to describe and regulate the contract-based relationship between the Network Company and the Driver. The Interpretation Section and the inclusion of the phrase "as agent," in the definition of Drivers, however, describes how the Act should be construed as between the Network Company and members of the public as well as between Network Companies and Drivers. Thus, all of the sections in the Petitions could exist independently of the provisions that address the relationship between Network Companies and members of the public arising from tortious acts committed by Drivers.

Specifically, but without limitation, the Act could readily have narrowed the application of the Interpretation Section to "direct" suits and not included "indirect" suits. Instead of using the phrase "any party," it could have limited the clause to actions by Drivers. It did neither. It went so far as to regulate a lawsuit by a member of the public against Network Companies arising from tortious acts of Drivers. Because the sections of the Act preceding the Interpretation Section may exist independently of the subject of the Interpretation Section that regulates the relationship between Network Companies and members of the public, the subjects of the Petition are not "mutually dependent" within the meaning of amend. Art. 48.

Further, because the Interpretation Section regulates and limits actions by members of the public against Network Companies arising from tortious acts of Drivers, the Petition does not permit a reasonable voter to affirm or reject it as a unified statement of public policy. Whether Network Company drivers (A) should have the "flexibility to choose when, where, how and for whom they work" while still receiving some measure of benefits, is a "separate public policy issue[]" from (B) whether the Network Companies should be liable to members of the public for tortious acts committed by their Drivers. See Oberlies, 479 Mass. at 837; 99 N.E.3d at 775; Gray v. Attorney General, 474 Mass. 638, 648-49, 52 N.E.3d 1065, 1073 (2016). There are doubtless some voters who support classifying Drivers as independent contractors but who oppose protecting the Network Companies from tortious liability to the general public for acts of Drivers committed while engaged in the business of the Network Companies. The very structure of the proposed Petitions emphasizes the point. The Petitions soften the classification of Drivers as independent contractors by requiring the Network Companies to provide certain baseline benefits, thereby attempting to assure a skeptical voter that the Network Companies still must shoulder some social responsibility. (Sections 4-9 of 21-11, and Sections 3-9 of 21-12). But, the last section of the Petitions regulate, and virtually relieves from the social responsibility imposed by tort law to members of the general public injured by their Drivers committed during the performance of Network Company business. A voter supportive of the first policy may blanche at the second. Under amend. Art. 48, voters must not be placed "in the untenable position of casting a single vote on two or more dissimilar subjects." (emphasis in original). Oberlies, 479 Mass. at 833, 99 N.E.3d at 773 (internal quotation marks and citations omitted).

The Attorney General's role at the certification stage is an "obligation to protect the voters, who ultimately must 'legislate' the proposal." Carney v. Attorney General, 447 Mass. 218, 232, 850 N.E.2d 521, 533 (2006). In carrying out this role, the Supreme Judicial Court has long instructed that "[n]either the Attorney General nor th[e] [C]ourt [in its review] is required to check common sense at the door when assessing the question of relatedness." Id. This "common sense" is required because Attorney General review was intended, in part, to prevent "well-financed 'special interests'][from] exploit[ing] the initiative process to their own ends by packaging proposed laws in a way that would confuse the voter." Id. at 228-29; 850 N.E.2d at 530. Will a voter who is asked to consider whether Network Company drivers should be "guarantee[d] the freedom and flexibility to choose when, where, how, and for whom they work," also realize that they are being asked to consider a liability shield for Network Companies? Common sense dictates that the answer is no, particularly when the Petitions conspicuously fail to mention the liability shield in the Purpose clause, bury the language of the shield in the last section, and use language like "direct and indirect" application only a lawyer

would begin to understand. Where Petitioners seek to benefit from that confusion, they have engaged in the "practice of 'hitching' alluring provisions at the beginning of an initiative petition and burying more controversial proposals further down." Carney, 447 Mass. at 229; 850 N.E.2d at 531. While there may be disagreement as to how "alluring" the proposal to make Drivers independent contractors is, there is little doubt that shielding Network Companies from Driver tort liability is not. The relatedness requirement was designed to prohibit that practice.

II. THE PETITIONS REQUIRE VOTERS TO UNIFORMLY ACCEPT OR REJECT VARIOUS POLICY PROPOSALS TO CHANGE EXISTING LAW THAT ARE NOT MUTUALLY DEPENDENT ON ONE ANOTHER AND ARE LIKELY TO CONFUSE AND MISLEAD VOTERS.

As noted above, the Petitions declare app-based drivers to be independent contractors and not employees under *multiple and disparate* areas of employment law. As the SJC has recognized, each different "employee" definition represents a different "allocation of costs and benefits" for stakeholders. Ives Camargo's Case, 479 Mass. 492, 500-01 (2018). Yet the Petitions propose supplanting the definition of "employee" under all of these laws at once. Id. This change to multiple policy areas in one Petition is impermissible, as voters who may agree to replace the "employee" definition for app-based drivers in *one* of these areas may vehemently reject doing so in another.

The Petitions also fail the relatedness requirement because its purported goal of increasing drivers' "freedom and flexibility" does not tie together their disparate policy proposals and adds nothing. See, e.g., Cunningham v. Lyft, 2020 WL 2616302 *12 (D. Mass. May 22, 2020) ("Nothing in the relief sought by Plaintiffs [who sought to be declared employees] would interfere with drivers' flexible schedules. Absent a collective bargaining agreement, employers may choose to schedule employees on a fixed schedule, may require them to be 'on-call' and to report to work on the employer's demand, or may allow them to set their own schedule.").[6]

In addition to rendering app-based drivers independent contractors for every different state law purpose, the Petitions propose an entirely new regulatory scheme. However, this regulatory scheme does not follow from independent contractor status, which strips all benefits and protections from app-based drivers. By asking voters to agree that app-based drivers be classified as independent contractors, then offering a smattering of replacement benefits to these workers, the Petitions place voters "in the untenable position of casting a single vote on two or more dissimilar subjects." Weiner v. Attorney General, 484 Mass. 687, 691 (2020). Voters may

[6] See also O'Connor v. Uber Technologies, 2015 WL 5138097 *13 (N.D. Cal. Sept. 1, 2015) ("Uber has not definitely established that all (or even much) of this "flexibility" would necessarily be lost," if drivers were classified as employees, "nor has Uber even established that a victory for Plaintiffs in this lawsuit would require Uber to use 'less flexible' work schedules going forward."); Cotter v. Lyft, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) ("a sparse work schedule does not necessarily preclude a finding of employee status."), citing Burlingham v. Gray, 22 Cal. 2d 87 (Cal. 1943) ("The fact that the employee chooses his own time to go out and return and is not directed where to go or to whom to sell is not conclusive of the relationship and is not inconsistent with the relation of employer and employee."); see also James v. Uber Technologies Inc., 338 F.R.D. 123, 133 n.3 (N.D. Cal. 2021) (noting that declarations proffered by Uber "are insufficient to definitely establish 'that a victory for Plaintiffs in this lawsuit would require Uber to use 'less flexible' work schedules going forward.'"), quoting O'Connor, 2015 WL 5138097 *13.

agree that companies should provide app-based drivers with various benefits, yet disagree that these workers be classified as independent contractors in order to obtain such benefits.

By combining two disparate policy issues, the Petitions are likely to "mislead and confuse" voters, by suggesting that app-based drivers must be classified as independent contractors to receive any benefits, when drivers are *already* entitled to far more benefits as misclassified employees. Abdow v. Attorney General, 468 Mass. 478, 499 (2014). Indeed, this outcome is exactly what the relatedness requirement is intended to prevent: a petition using a perceived "popular" proposal as a trojan horse for one that advances the proponents' "selfish interests". Carney v. Attorney General, 447 Mass. 218, 227 (2006).

A. The Petitions Alter and Regulate in Various Areas of Employment Law that Each Implicate Extremely Different Public Policy Considerations

The SJC stated in Ives Camargo's Case, 479 Mass. at 500-01:

> Our laws have imposed differing, and not uniform, definitions of employees and independent contractors. Currently, there are at least four distinct methods used to determine employment status in the Commonwealth. [. . .] This lack of uniformity also reflects differences in the particular laws. The laws governing workers' compensation, unemployment insurance, minimum wages, and tax withholding serve different, albeit related, purposes. Each involves a complex allocation of costs and benefits for individuals, companies, and State government itself.

Despite this recognition by the Court that the different definitions of employees and independent contractors reflect different policy determinations, the Petitions seek to supplant all of these definitions in one fell swoop. In replacing each one of these "employee" definitions, the Petitions are disturbing different public policy determinations and legislating in very different areas of law. Ives, 479 Mass. at 501. It is thus improper to ask voters to simply answer "yes" or "no" on this panoply of policy proposals.

1. *The Wage Act's presumption of employee status and ABC test for independent contractor status furthers the policy of protecting employees.*

The Massachusetts Wage Act, enacted in 1886, "was intended and designed to protect wage earners from the long-term detention of wages by unscrupulous employers as well as protect society from irresponsible employees who receive and spend lump sum wages." Boston Police Patrolmen's Ass'n v. Boston, 435 Mass. 718, 720 (2002); Cumpata v. Blue Cross Blue Shield of Massachusetts, Inc., 113 F. Supp. 2d 164, 167 (D. Mass. 2000) (citing American Mutual Liability Insurance Co. v. Commissioner of Labor and Industries, 340 Mass. 144, 147 (1959)).

In 2004, the Legislature amended the Massachusetts Independent Contractor Law, the statute that sets out a three-factor test for determining whether a worker is an employee entitled to the benefits of the Massachusetts Wage Act, or an independent contractor who is entitled to none of these benefits or protections. See M.G.L. c. 149, § 148B. See St. 1990, c. 464; see also Somers v. Converged Access, Inc., 454 Mass. 582, 588-89. "The purpose of the independent

contractor statute is 'to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees.'" Depianti, 465 Mass. at 620 (quoting Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191, 198 (2013)) (emphasis added).[7]

By asking voters to agree that app-based drivers be considered independent contractors for purposes of the Wage Act, the Petitions are asking voters to strip app-based drivers of all of the following protections under current law: (1) minimum wage; (2) overtime pay; (3) prohibition on wage deductions; (4) minimum break periods; (5) regular time periods for payment; (6) reimbursement for business expenses; (7) entitlement to all tips; (8) protection against retaliation for raising wage complaints; and other protections. See G. L. c. 149, §§ 100, 148, 148A, 150A, 152A. In the place of these protections, the Petitions propose that app-based drivers earn a "Guaranteed Earnings Floor" that functions like a minimum wage solely for the time when a driver is "engaged", and not including time that the drivers work between rides waiting to pick up another passenger or make another delivery. See Section 5.

2. The Unemployment Compensation Act includes a different ABC test for independent contractor status that is intended to lighten the burden on unemployed workers and require contributions by employers to a state unemployment fund, but with less force than the Wage Act

The worker classification test contained in the Unemployment Compensation Act has the "overriding purpose 'to lighten the burden which now falls on the unemployed worker and his family.'" Athol Daily News v. Board of Review Of Div. Of Employment and Training, 439 Mass. 171, 174 (2003), quoting G.L. c. 151A, § 74. Yet the test for independent contractor status under the Unemployment Compensation Act is slightly less strict than the test under the Wage Act. While the tests are similar in form, G.L. c. 151A, § 2 provides a more liberal way for alleged employers to satisfy the second prong of the test, by showing that the worker performs work "outside of all the places of business" of the employer. This test for independent contractor status reflects that the Unemployment Compensation Act does not go so far as the Massachusetts Wage Act in protecting employees in the Commonwealth. See Depianti, 465 Mass. at 623-24.

This difference in the tests for Wage Act purposes and for unemployment purposes reflects a different policy judgment by the Legislature regarding which workers should be entitled to this benefit and which employers should be required to contribute to the Commonwealth's unemployment fund. Voters may agree that app-based drivers should be independent contractors for Wage Act purposes (so as not to subject the companies to potential treble damage liability for Wage Act violations) but believe that the companies should be required to make contributions to the unemployment fund, so as to relieve the burden on taxpayers for support that may be necessary for these workers should they become unemployed.

[7] The statute also seeks to prevent harm to the public: "[m]isclassification not only hurts the individual employee; it also imposes significant financial burdens on the Federal government and the Commonwealth in lost tax and insurance revenues. Moreover, it gives an employer who misclassifies employees as independent contractors 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).

Or, vice versa, voters may believe that app-based drivers should have the rights of employees to obtain the protections of the Wage Act but not believe that the companies should bear the burden of making unemployment contributions.

3. The Worker's Compensation Act, and its 12-factor "employee" test, is intended to protect employers from tort liability

In contrast to the M.G.L. c. 149, § 148B, which is designed to further the Wage Act's policy of protecting employees, the test for employee status under the Worker's Compensation Act furthers the purpose of limiting private litigation between employers and employees by shielding employers from tort liability. "Originally enacted in 1911, the [workers' compensation] act guarantees workers certain benefits as the exclusive remedy for injuries they suffer in the course of employment, regardless of the wrongfulness of the employer's conduct." See Dakin v. OSI Restaurant Partners, LLC, 2021 WL 3281967, at *3. The act "was intended to guarantee that workers would receive payment for any workplace injuries they suffered, regardless of fault; in exchange for accepting the statutory remedies, the worker waives any common-law right to compensation for tort injuries." Id. (quoting Estate of Moulton v. Puopolo, 467 Mass. 478, 482083 (2014)).

The underlying purpose of workers compensation, and the pursuant test for employee status, "to limit 'private controversy and litigation between employer and employee' and to give workers the right to compensation regardless of fault—is distinct from that of the statutory minimum wage scheme, which seeks to safeguard" the welfare of workers. Terry v. Sapphire Gentlemen's Club, 336 P.3d 952, 957-58 (Nev. 2014) (internal citation omitted) (cited favorably in Ives, 479 Mass. at 501). Accordingly, many states including Massachusetts "utilize different tests for employment under their respective minimum wage and workers' compensation schemes". Id. (collecting cases).

Under the Petitions, app-based drivers would become independent contractors ineligible for worker's compensation under the Act even though, as discussed above, independent contractors are now eligible for it. Presumably, this change would allow app-based workers to sue the companies in tort. Voters may agree that app-based drivers should have the protections of the Wage Act or be entitled to unemployment compensation but not agree that the companies be liable to them for costly tort injuries.

4. Courts apply the common law "right to control" test to determine employment status under antidiscrimination law

The common law multi-factor "right to control" test is used to determine who is an employee entitled to the benefits of the Commonwealth's law prohibiting discrimination, harassment, and retaliation, M.G.L c. 151B, as opposed to independent contractors, who are not. See Comey v. Hill, 387 Mass. 11, 15 (1982). The Petitions replace these factors of the right to control test with its uniform determination that app-based drivers are independent contractors not entitled to these protections. The Petitions purport to prohibit discrimination only in the formation and termination of contracts between app-based drivers and companies (but not in the actual performance of their work) and contain none of the enforcement mechanisms of c. 151B;

the Petitions also do not protect against discrimination on the basis of age or disability, meaning that drivers would have no right to reasonable accommodation if needed by virtue of their disability. See Section 10.

Voters may not agree that companies should be subject to treble damage liability under the Wage Act but believe that app-based drivers should have the protections of the Commonwealth's discrimination laws, or vice versa. The tests evolved as they have for differing policy reasons, but the Petitions seek to legislate simultaneously in these disparate areas.

5. The Commonwealth's employment test for tax purposes shares none of the policy goals of the previous three tests and is intended to be consistent with federal law

"Finally, a fourth definition of employee is provided in G. L. c. 62B, § 1, for the purposes of withholding taxes on wages, and the department of revenue applies the Internal Revenue Code's twenty-factor analysis to determine employment status." Ives, 479 Mass. at 500. Following the Legislature's establishment of the three-factor test for independent contractor status in c. 149, § 148B for purposes of the Wage Act, the Commissioner of Revenue reiterated that this test does not apply to employee status for purposes of tax withholding. See Technical Information Release 05–11 (Sept. 13, 2005), Official MassTax Guide, at PSW–206 (Thomson Reuters 2018); see also Massachusetts Delivery Ass'n v. Healey, 117 F. Supp. 3d 86, 94 (D. Mass. 2015) ("The Attorney General maintains that Section 148B does not mandate the application of other employment laws, namely Chapter 62B, the state income tax withholding laws, and Chapter 152, the workers' compensation laws, because each provides its own definition of 'employee.'"). Indeed, this policy choice reflects that, rather than be consistent with other state law definitions of employee status, c. 62B is intended to be consistent with federal law. See In re Coveney, 217 B.R. 362, 364 (D. Mass. 1998) (string cite).

As such, like with the other definitions of employee and independent contractor status, by purporting to supplant this definition, the Petitions are legislating in yet another disparate area of law with different policy choices undergirding it. The Petitions would declare app-based drivers to be independent contractors, so that companies would not be required to make payroll withholdings from app-based drivers' paychecks and drivers would be responsible for paying self-employment taxes.

This determination would alter the Commonwealth's longstanding policy of following federal law on employee status for tax determinations and instead adopt a policy that voters who support employee status for app-based drivers for other purposes may or may not agree with.

B. The Petitions' Purported Purpose Is Insufficient to Bind Its Disparate Policy Proposals, and is Extremely Likely to Mislead and Confuse Voters

In addition to stripping app-based drivers of the benefits and protections that they are owed as employees under different areas of Massachusetts law, the Petitions purport to establish an entirely new regulatory framework. However, independent contractor status involves **none** of the benefits and protections afforded to employees under state laws. As such, it does not follow that because the Petitions propose to classify app-based drivers as independent contractors, the

Petitions must propose alternative regulations.[8] This proposed regulatory framework is in no way "mutually dependent on" app-based drivers' independent contractor status and is in fact inimical to independent contractor status. Weiner v. Attorney General, 484 Mass. 687, 691 (2020). As such, the Petitions cannot be voted on as a unified policy proposal. Id.

These various policy proposals do not even bear a clear relation to the Petitions' goal of "guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work." See Section 2: Purpose. Courts have recognized that flexibility is completely consistent with employee status. O'Connor, 2015 WL 5138097 *13 ("Uber has not definitely established that all (or even much) of this "flexibility" would necessarily be lost," if Uber drivers were classified as employees, "nor has Uber even established that a victory for Plaintiffs in this lawsuit would require Uber to use 'less flexible' work schedules going forward.").[9] As such, the Petitions' purported purpose fails at connecting the two disparate policy proposals at a non-abstract level.

Indeed, the Petitions are more akin to past petitions that did not meet the relatedness requirement. Anderson, 479 Mass. at 322. In Anderson, the SJC held that a petition proposing a graduated income tax on incomes over $1 million and earmarking all revenues therefrom for "education and transportation" were not sufficiently related policy proposals. Id. While the proponents of the petition argued that these disparate policy proposals would both contribute to "inclusive growth", this justification was too "conceptual and abstract" to satisfy the related subjects requirement. Id. at 796.[10]

Here, too, the Petitions' stated purpose of "guaranteeing drivers the freedom and flexibility to choose when, where, how, and for whom they work" is far too broad to bind the Petitions' proposals of classifying app-based drivers as independent contractors under every different employee test in the Commonwealth, and implementing an entirely new regulatory scheme that has no logical relation to worker flexibility nor independent contractor status. A voter may agree that app-based drivers should be provided with the benefits and protections

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

[9] See also Cunningham, 2020 WL 2616302 *12; Cotter, 60 F. Supp. 3d at 1081; James, 338 F.R.D. at 133 n.3.

[10] Similarly, in Gray, the SJC determined that the relatedness requirement was not met by a petition that included various proposals relating to education in the Commonwealth. 474 Mass. at 647. While the SJC recognized that "at a conceptual level, curriculum content and assessment are interconnected", "[a]t the operational level, this petition joins a proposed policy of rejecting a particular set of curriculum standards, common core, with a proposed policy of increasing transparency in the standardized testing process . . . These are two separate public policy issues." Id. at 648-49. Likewise, in Carney, the SJC found that the Petition's purported policy of "promoting the more humane treatment of dogs" was too broad to tie together its proposals of expanding criminal sanctions against dog abusers; and dismantling the dog racing industry. 447 Mass. 219-222.

commonly associated with employee status, without agreeing that such drivers should first be classified as independent contractors, or vice versa.[11]

Moreover, the Petitions' disparate proposals are highly likely to "confuse or mislead voters" in a way that improperly benefits the proponents of the Petitions. Abdow, 468 Mass. at 499. As noted above, in Massachusetts, workers who are classified as independent contractors are not entitled to any of the protections and benefits associated with employment status. Currently, however, app-based companies like Uber and Lyft are "ignoring an obvious legal obligation" by classifying drivers as independent contractors in violation of the law. Rogers v. Lyft, 452 F. Supp. 3d 904, 909, 911 (N.D. Cal. 2020); Healey v. Uber Technologies, 2021 WL 1222199 at *1.

The Petitions are misleading because they suggest that voters who support increased protections and benefits for app-based drivers must also agree that these drivers be classified as independent contractors before they can obtain such protections. But of course, a voter may want app-based drivers to obtain benefits and protections, *without knowing* that app-based drivers should be (but are not) currently benefitting from statutory employment protections that far exceed the Petitions' regulatory proposals. As a result, these voters may vote for the Petitions based on the Petitions' false suggestion. It is specifically the combination of these two proposals that is likely confuse voters.

This is the exact outcome that the relatedness doctrine is intended to prevent. By catering to the "popular desire" of voters in Massachusetts to see app-based drivers obtain more benefits and protections, the proponents of the Petitions seek to advance their "selfish interests" through "log-rolling". Carney v. Attorney General, 447 Mass. 218, 227 (2006). Under the guise of providing paltry benefits to app-based drivers, the Petitions seek to advance a sweeping change in the classification of app-based drivers that absolves them of their duty to comply with any area of state employment law, no matter that different costs, benefits, and policy choices are involved.

Conclusion

For the foregoing reasons, the Petitions offend multiple tests the SJC has established under art. 48 to determine whether the subjects of a petition are "related" to or "mutually dependent" on each other, and therefore should not be certified.

[11] On the flip side, a voter may agree with the portion of the Petitions that purport to classify Drivers as independent contractors but reject the balance.

EXHIBIT A

Chart comparing employees' benefits under Massachusetts law with alleged replacement benefits in the Petitions

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

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

	leave “until contributions have been made on the driver’s behalf for at least 2 quarters of the driver’s last 4 completed quarters.” This doesn’t seem to be a requirement in Ch. 175B itself.
Worker's Compensation, M.G.L. c. 152 sets out an extremely detailed regulatory framework for administering the Worker’s Compensation system in Massachusetts. Provides for employees to receive weekly disability benefits during periods of inability to work due to workplace injury, see § 7, equal to 60% of the gross average weekly wage in the prior year, see § 34. The statute includes various procedural requirements, some of which lessen the burden on an employee contesting an adverse benefits determination. For example, § 13A allows employees to recover attorney’s fees from an insurer in certain situations if they successfully challenge a denial of coverage.	**Section 8. Occupational Accident Insurance** provides that a company will purchase occupational accident insurance for app-based drivers. However, this insurance would only apply to “engaged time” and thus not protect drivers for injuries that occur between passenger rides or deliveries. Provides for app-based drivers to receive 66% of their average weekly earnings in disability benefits. Again, for the reasons noted above, app-based drivers' lowered incomes (because they are only paid for "engaged time") will significantly reduce the amount of benefit coverage from what the app-based driver would receive as an employee. The added 6% of coverage will almost certainly not cover this difference. Does not include the same procedural safeguards that make it less burdensome on employees to access these benefits. For example, no clear method by which an employee can challenge the company if the company is not paying out benefits according to the Petition. No provision that an employee is entitled to attorney’s fees if the employee successfully challenges a denial of benefits in court.