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

and

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

BRIEF OF CHAMBER OF PROGRESS AS AN AMICUS CURIAE

IN SUPPORT OF DEFENDANTS/APPELLEES AND INTERVENORS AND ALL RELIEF REQUESTED

Dated: April 26, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. 17(c)(1) and Supreme Judicial Court Rule 1:21, Amicus Curiae, by its undersigned counsel, hereby disclose the following:

1. Parent corporation(s) of Chamber of Progress: None

2. Publicly held corporation(s) owning more than ten percent of Chamber of Progress: None.

/s/ Gary J. Lieberman
Gary J. Lieberman

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Chamber of Progress' work is supported by corporate partners, many with interests in promoting innovative, technology-driven labor-market solutions such as the solutions reflected in the five Initiative Petitions at issue here.[1]

Chamber of Progress has a significant interest in the petitions and offers its perspective on preserving the autonomy and flexibility of app-based workers in retaining non-employee status and receiving additional benefits. Chamber of Progress' amicus brief also provides insight into the far-reaching implications of not allowing the voters of Massachusetts to decide the Petitions on the November 2024 ballot and determine whether to preserve this vital relationship.

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[1] Chamber of Progress' Partners are available at: https://progresschamber.org. Chamber of Progress' Partners do not sit on its board of directors and do not have a vote on or veto over its positions.

RULE 17(C)(5) DECLARATION

Amicus and its counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

None of the conduct described in Appellate Rule 17(c)(5) has occurred:

a. No party or party's counsel authored this brief in whole or in part;

b. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

c. No person or entity other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

d. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION

There are few policy questions more significant than worker classification. At the federal, state, and municipal level, policymakers have been engaged in a debate over the merits of traditional employment regulation and its connection to new models of independent work. *See, e.g.*, Diane M. Ring, *Silos and First Movers in the Sharing Economy Debates*, 13 LAW & ETHICS HUM. RTS. 61, 61 (2019) (describing "significant debate" over classification of workers in "sharing economy"); Samantha J. Prince, *The Ab5 Experiment-Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43, 53–54 (2022) (describing development of modern classification debate). That debate has now come to the Commonwealth, where a series of petitions asks whether certain "app-based drivers" should be classified as employees. The petitions propose that drivers should not be employees; instead, they should remain independent. *See* Initiative Petitions Nos. 23-25, 23-29, 23-30, 23-31, 23-32 (the "Petitions"). This November, Massachusetts voters could decide the issue.

Voters will not get that chance, however, if Appellants have their way. Appellants seek to block the

petitions on procedural grounds, arguing that the petitions violate Article 48 of the Massachusetts Constitution. *See* App. Br. 24–25, 32. Article 48 requires that each petition contain only subjects that are "related" or "mutually dependent." Mass. Const. art. 48, § 3. Appellants argue that the petitions contain unrelated subjects because they classify app-based drivers as non-employees for the purposes of multiple employment laws. *See* App. Br. 24–25, 32. And because those laws serve different substantive purposes, Appellants say, the petitions embed multiple, unrelated policy judgments. *Id.*

But that argument conflates substantive law with classification law. Whereas substantive law gives eligible workers certain protections, classification law decides which workers are eligible in the first place. Substantive law obviously differs from statute to statute; a minimum-wage law offers different protections from those offered by a workers'-compensation law. *Compare* M.G.L. ch. 152, §§ 1–86 (providing for workers'-compensation insurance in case of workplace injury), *with* M.G.L. ch. 151, § 1 (proving a minimum hourly wage). Both kinds of laws, however, apply only to a certain kind of worker. *See* M.G.L. ch. 151, § 1; M.G.L. ch. 149,

§ 148B. And that kind of worker can be identified across multiple laws. That is because substantive employment laws apply to workers who, generally speaking, are systematically disadvantaged when bargaining for their own protections. *See* Eric Posner, *How Antitrust Failed Workers* 143–151 (2022). These workers have fixed ties with their jobs and so cannot easily walk away. *See id.* In other words, they cannot easily exercise their "exit" options and find better a better deal on the market. *See* Ronald G. Ehrenberg & Robert Smith, *Modern Labor Economics: Theory and Public Policy* 143–44 (13th ed. 2018) (observing that employees cannot exercise exit options without cost because of search frictions, including imperfect matching, search costs, and higher wages owed to tenure). Employment law therefore provides them with a backstop and ensures that they are not harmed by their systemic bargaining disadvantage. *See, e.g.*, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945) (explaining that the purpose of the Fair Labor Standards Act was to correct the "unequal bargaining power as between employer and employee"); *Mullally v. Waste Mgmt. of Massachusetts, Inc.*, 452 Mass. 526, 531 (2008) (recognizing that Massachusetts' wage and hour laws were designed to serve the same purpose as the FLSA). *See*

also Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 Ala. C.R. & C.L.L. Rev. 1, 32–33 (2019) (describing purposes of minimum-wage, overtime, child-labor, and equal pay laws) ("And all four standards are designed to benefit the U.S. economy as a whole, by correcting for unequal bargaining power between employer and employee . . . .").

But not all workers fit that description. Some workers, because of their relative independence, resources, or transferrable skills, can move easily from client to client. These independent workers can transfer their services from job to job and buyer to buyer without sacrificing their investments or accepting a lower price. That is, they can adequately protect themselves on the market. *See* E. Posner, *supra*, at 151 ("The market protects contractors because their discrete skills are valued similarly by numerous labor buyers."). So unlike the typical employee, the do not need the backstop of substantive employment law. And for that reason, employment laws uniformly exclude them from coverage. *See, e.g.*, *Athol Daily v. Bd. of Rev. of Div. of Emp. and Training*, 439 Mass. 171, 175-76 (2003) (finding that newspaper carriers were not employees in part because they had independent trades and could offer the

same services to other clients); M.G.L. ch. 148, § 149B (distinguishing between employees and independent contractors for purposes of coverage under Commonwealth's wage-and-hour laws). *See also* Richard Posner, *Economic Analysis of Law* 352–53 (6th ed. 2002) (explaining that worker-protection standards are justified by externalities in the labor market calling for government intervention; when those externalities are not present, intervention is unnecessary (and potentially harmful)).

That distinction is endemic to classification law. Though classification tests differ in their details, they all attempt to sort dependent workers from independent ones. *See, e.g.*, *In re Whitman*, 80 Mass. App. Ct. 348, 352 (2011) (classifying workers for workers' compensation according to factors bearing on the worker's independence, such as whether the worker is engaged in a distinct occupation and owns his or her own tools); *Athol Daily*, 439 Mass. at 181 (emphasizing evidence showing that workers could market their services to multiple clients and were thus not employees). And often, the tests do not differ even in their details. In many states, a uniform classification test categorizes workers for the purposes of multiple

substantive laws. *See, e.g.*, Cal. Labor Code § 2750.5 (adopting three-part "ABC" classification tests for most purposes under California employment law); Oregon Rev. Stat § 670.600 (adopting two-step classification test for workers'-compensation, unemployment, and income-tax laws). And indeed, Massachusetts itself applies a uniform test for multiple wage-and-hour statutes, including minimum-wage, overtime, and timely pay laws. *See* M.G.L. ch. 149, § 148B.

Those provisions show that classification standards and substantive protections are different issues. It also shows that classification can be addressed across multiple statutory schemes. Classification is not, as Appellants claim, a series of atomized choices about substantive employment rights. It is instead a single question about whether a group of workers needs legislative intervention. It is a question that can be answered logically, coherently, and with one test. *Cf. In re Ives Camargo's Case*, 479 Mass. 492, 500-04(Mass. 2018) (observing that nothing prevents the Legislature from adopting a single classification test for multiple employment laws) ("If the Legislature intends to impose a uniform standard definition of employee or independent

contractor across all employment related statutes in the Commonwealth, it may of course do so.").

The Petitions therefore present a single question: how to classify app-based drivers. The voters should have a chance to answer it.

ARGUMENT

I. The Petitions' classification standards present a single, coherent policy choice.

Worker classification is a principle of division. It divides workers into two broad groups. In one group are workers who qualify for certain rights and protections, which are usually set out in a rule or statute. In the other group are all other workers. These other workers fall outside the rule or statute's scope and so do not qualify its substantive rights and protections. *See, e.g.*, *In re Ives Camargo's Case*, 479 Mass. at 494-95 (observing that workers'-compensation laws apply only to "employees" so defined); *Fallon Cmty. Health Plan, Inc. v. Acting Dir. of Dep't of Unemployment Assistance*, 493 Mass. 591, 592 n.4 (2024) (same for unemployment laws). *See also* Prince, *supra*, at 49 – 50 (explaining that classification as an employee determines coverage under laws covering diverse

subjects, including income tax, labor, wages, and discrimination).

Classification standards come in several forms. Some standards are conjunctive, which means that a worker must meet all the specified criteria. A common example is the "ABC" test, which specifies that a worker is an employee unless she meets three specified conditions. *See* M.G.L. ch. 151A, § 2 (adopting three-part conjunctive test for unemployment laws). *See also* Cal. Labor Code § 2750.5 (adopting ABC test under California Labor Code). Other standards are contextual, which means that all relevant factors must be weighed and taken into account. A common example is the "economic realities" test, which balances multiple factors, none of which controls the outcome. *See, e.g.*, *Freadman v. Mass. Port Auth.*, No. 2084CV02211, 2022 WL 2180237, at *11 (Mass. Super. Jan. 6, 2022) (applying economic-realities test to determine classification under Massachusetts Equal Pay Act, M.G.L. ch. 149, § 105A); *Danio v. Emerson Coll.*, 963 F. Supp. 61, 63 (D. Mass. 1997) (same).

Massachusetts uses both kinds of tests. For example, General Laws chapter 149, § 148B adopts a three-part conjunctive test. Those parts consider whether the

worker is free from control, whether she works in a company's usual course of business, and whether she works in an independently established trade or profession. *Id.* Unless she meets all three criteria, she is an employee. *Id.* By contrast, General Laws chapter 152, § 1 defines an employee as someone "in the service of another under any contract of hire, express or implied, oral or written." Courts have interpreted that language as embodying a multi-factor contextual test. *See Case of Whitman*, 80 Mass.App.Ct. at 352-53 & n.3. The relevant factors include factors similar to those set out in many conjunctive tests, such as control and independent establishment. *See id.* They also include others, such as the worker's skill, the parties' intent, and length of the relationship. *See id.* (drawing factors from Restatement (Second) of Agency § 220(2) (1958)). None of these factors determines the outcome; they must all be considered and balanced. *See Jinks v. Credico (USA) LLC*, 488 Mass. 691, 703 (2021) (explaining that determination under economic-realities test is not "mechanical," but rather accounts for the "totality of the circumstances").

While the specific factors of these tests differ, the tests themselves play the same role. They draw a

line between workers who receive statutory benefits and those who do not. *See* Prince, *supra*, at 51 (explaining that employee status dictates coverage under an array of employment laws); E. Posner, *supra*, at 151 (same). And they do so for the same fundamental reasons. They recognize that not all workers have the same structural relationship with work. Some workers perform "relational" work—i.e., work that is most valuable when performed for a single client over an extended period of time. E. Posner, *supra*, 143. An example might be a store manager, who becomes more valuable to the store as she learns its systems and its customer base. *See id.* Other workers perform "discrete" work—i.e., work that has equal value to multiple clients when delivered in one-off engagements. *Id.* at 143, 148. An example might be a locksmith, who can repair locks for multiple clients for equal (or similar) value each time. *Id. See also Bos. Bicycle Couriers, Inc. v. Deputy Dir. of Div. of Emp. & Training*, 56 Mass.App.Ct. 473, 480 (2002) (explaining that under certain classification tests, the "essential determination" is whether the "the worker is an entrepreneur and service is performed by him or her in that capacity" (quoting James C. Hardman, *Unemployment Compensation and Independent Contractors: The Motor*

Carrier Industry As A Case Study, 22 TRANSP. L.J. 15, 29 (1994))). *Cf. generally* Gary Becker, Human Capital: A Theoretical and Empirical Analysis (3d ed. 1994 (differentiating between specific human capital, which makes the worker's services more valuable only to that employer, and general human capital, which makes the worker valuable to multiple potential buyers of her services).

Classification standards tend to treat relational workers as employees and discrete workers as non-employees. E. Posner, *supra*, at 151–53. Again, the reason is structural. *Id.* at 151. Because relational workers perform services that are most valuable to a single buyer, they cannot easily shift from one buyer to another. *Id.* That is, they cannot transfer their services to another buyer on the market without sacrificing some of their value. *Id.* That dynamic leaves them with systematically weakened bargaining power. *Id. See also O'Neil*, 324 U.S. at 707 n.18 (observing that the FLSA was designed to protect "employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage"). And so their single customer—their employer—can offer them lower compensation without losing them on the market. *See*

Ehrenberg & Robert Smith, *supra*, at 144. The employer can offer them just a little bit more than someone else would pay and thereby capture the surplus value of their work. *See id.* (describing market frictions that prevent employees from leaving their jobs for better conditions elsewhere). Without some protection, then, relational workers would be systemically paid less than their true value. *See id.*; E. Posner, *supra*, at 151; Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 628 (2009) (explaining that disparity in bargaining power stems in part from asymmetric option sets: employers have more options in filling an empty position than employees have in finding a new job); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 Mich. L. Rev. 8, 13–14, 20–21 (1993) (explaining role that employee "lock-in" plays in justifying legal limitations on employer discretion_).

Policymakers address that imbalance through employment law. Employment law provides the workers with certain backstops, including minimum wages, mandatory benefits, and social insurance. *See, e.g.*, M.G.L. ch. 151, §§ 1 (providing a minimum wage to prevent "oppressive and unreasonable" wage rates); M.G.L. ch.

149, §§ 148C (providing employees with minimum paid sick time); M.G.L. ch. 151A, §§ 1–74 (providing employees with unemployment insurance). These backstops ensure that the workers capture a fair proportion of the true value of their services. *See* E. Posner, *supra*, at 151 (explaining that employees "benefit from legal protection because they are subject to labor monopsony and hence are not protected by market competition. Employment law protections prevent employers from using their monopsony power to push down wages and worsen conditions"). In effect, it ensures them a fair return on their work by counterbalancing their systemic lack of bargaining power. *See* Tosh Anderson, *Overwork Robs Workers Health: Interpreting OSHA's General Duty Clause to Prohibit Long Work Hours*, 7 N.Y. City L. Rev. 85, 143 (2004) (explaining that one purpose of the Occupational Health and Safety Act was to "rebalance the unequal bargaining power of workers vis-à-vis their employers"); Bornstein, *supra*, at 32 – 33 (explaining that the same concern motivated federal wage-and-hour laws); Jessica Weltge, *Blue Penciling Noncompete Agreements in Arkansas and the Need for A Public Policy Exception*, 2017 Ark. L. Notes 1954 (2017) (arguing that same concern drives

uneasiness over lopsided employee noncompete agreements).

But that justification doesn't apply to discrete workers. Unlike relational workers, discrete workers can shift between multiple buyers on the market. E. Posner, *supra*, at 151. If a buyer offers a discrete worker suboptimal compensation, the worker can find another buyer. *Id.* The discrete worker loses no value by resorting to the market, as her services offer the same value to multiple buyers. *Id.* That is, the worker does not suffer from the same systemic disadvantage in bargaining power. *See id.* ("The market protects contractors because their discrete skills are valued similarly by numerous labor buyers."). The worker therefore does not need the intervention of minimum employment and labor standards. *Id.* She can capture the true value of her labor simply by resorting to the market. *Id.* (explaining that independent contractors "do not benefit from employment law protections because market competition already protects them"). *See also Athol Daily*, 439 Mass. at 182 (finding that newspaper carriers were not employees in part because "[b]y its very nature, the business of delivering newspapers is not limited to a single employer").

This fundamental distinction explains much of classification law. Classification law focuses on factors like control, independent organization, and transferrable equipment because those factors help distinguish between discrete and relational workers. E. Posner, *supra*, at 151. That is, they divide workers who have adequate bargaining power from those who do not. *Id.* They may differ in detail, but they all aim at that fundamental distinction. *See, e.g.*, 29 C.F.R. § 795.105 (explaining that U.S. Department of Labor's six-part economic realities test aims to distinguish workers who are "economically dependent on the potential employer" from those who are "in business for" themselves); *Athol Daily*, 439 Mass. at 182 (finding that workers were not employees in part because they did or could maintain independent businesses); *Tiger Home Inspection, Inc. v. Dir. of Dep't of Unemployment Assistance*, 101 Mass.App.Ct. 373, 381-82 (2022) (finding that certain inspectors were not employees because they did not "depend on a single employer for their services" but could instead offer services to multiple clients and "in fact operated their own businesses").

For that reason, voters could rationally decide that an identifiable group of workers should be treated

as nonemployees. If the workers perform discrete work, they can adequately protect their interests by dipping into the market. E. Posner, *supra*, at 151 ("The market protects contractors because their discrete skills are valued similarly by numerous labor buyers."). They do not need the backstop of substantive employment law and could instead be regulated and protected under an alternative scheme. *See* Initiative Petitions Nos. 23-25, 23-29, 23-30, 23-31, 23-32 (guaranteeing app-based drivers right to serve multiple clients while classifying them as nonemployees). *Cf.* Justin Azar, *Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy*, 27 GEO. J. ON POVERTY L. & POL'Y 409, 412 (2020) (discussing value of alternative portable-benefits systems for independent app-based workers).

App-based drivers are one such group. Though hardly monolithic, app-based drivers share many features common to discrete workers. For example, unlike relational workers, they can sell their services to multiple clients for similar values. Through platform technology, they can efficiently connect with thousands of customers seeking similar services. *See* U.S. Chamber of Commerce, Ready, Fire, Aim: How State Regulators Are Threatening

the Gig Economy and Millions of Workers and Consumers 12–13 (2019) (describing common features of app-based work models). And those customers pay rates determined by, among other things, the supply and demand for services on the market. *See id.* What's more, modern smartphones allow the drivers to switch between platforms almost instantly. *See id.*; Kathryn Shaw, *Economics of Flexible Work Schedules in the App-Based Economy*, Stanford Univ. Inst. For Econ. Pol'y Research (2022) (reporting that 65% of Lyft drivers also used another app-based platform). In a matter of seconds, they can jump from one online marketplace to another in search of the best price for their services. *See* Uber Platform Access Agreement ¶ 1.2 (Jan. 2022)[2] (leaving drivers with discretion over when, where, and how often to provide services, as well as to use competing platforms simultaneously); Lyft Terms of Service ¶ 19 (Jan. 2024)[3] (same). *See also* U.S. Chamber of Commerce, *supra*, at 12–13. That is, they have low-friction access to customers across multiple markets. *See* Laura Katsnelson & Felix Oberholzer-Gee, *Being the Boss: Gig*

[2] Available online: https://tb-static.uber.com/prod/reddog/country/UnitedStates/licensed/f5f1f4a9-4e6d-4810-8aa3-21b663290294.pdf.
[3] Available online: https://www.lyft.com/terms.

Workers' Value of Flexible Work, Harv. Bus. Sch. Working Paper No. 21-124 (2021) ("Gig workers get to set their own schedule, flexibly supplement their income, and work for multiple platforms at the same time."). And that ease of access allows them to protect their interests by resorting to market forces—a hallmark of discrete workers. *See* E. Posner, *supra*, at 151. *See also* Jeremias Adams-Prassl, *What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work*, 41 Comp. Lab. L. & Pol'y J. 123, 129 (2019) ("In terms of 'search frictions,' first, technological innovation has drastically reduced this friction: from location tracking and user ratings in the gig economy to sophisticated algorithms that match employers, consumers, and workers on job websites, whether purely online or in the real world."); Alexander Kondo & Abraham Singer, *Labor Without Employment: Toward A New Legal Framework for the Gig Economy*, 34 ABA J. Lab. & Emp. L. 331, 351 (2020) ("[W]hat these businesses do is reduce transaction costs in new ways--not through hierarchical direction, but by making market-based coordination less costly than it had previously been.").

That mobility is made even stronger by the absence of platform-specific investments. App-based drivers

rarely invest in training, capital resources, or equipment tied to one platform. *See* E. Posner, *supra*, at 157 (observing that app-based drivers "are not economically dependent in the sense of being dependent on just one company, or even the occupation of driving"). Instead, they have transferrable skills like driving, customer service, and knowledge of local markets. *Cf. Athol Daily*, 439 Mass. at 178-79 (finding that newspaper carriers were not employees in part because they performed services that could be transferred readily to other clients). They also provide their own equipment, including cars and cell phones. *See* Uber Platform Access Agreement, *supra*, ¶ 2.3 (providing that drivers provide the equipment, tools, and other materials they deem necessary for their services). And they can redeploy that equipment for work on other platforms, off-platform work, or even personal use. *See* Shaw, *supra*, at 8, 12 (observing that more than 62% of app-based drivers use app-based platforms ten hours or fewer per week, and nearly seven in ten have full-time jobs). In other words, they have no sunk costs in any one platform. They can transfer their investments to other kinds of other platforms and other kinds of work, which only strengthens their mobility and independence. E. Posner,

supra, at 157 ("The drivers do not make relationship-specific investments in Uber's platform, and so the drivers are protected by competition—they can find work with other platforms or independently find clients—and so do not need protection of the law."). *Cf.* Azar, *supra*, at 412 (This is all made possible by the fact that more people utilize these convenient and easy-to-navigate virtual marketplaces because of increased access to requisite technology like smartphones and tablets with 'ever-increasing high-speed connectivity.'").

To be sure, some of these features are hotly debated. *See id.* (noting that the status of app-based drivers is contested). But the existence of that debate does not make a single answer impossible. To the contrary, it shows that such a choice is readily available. A voter could rationally decide that, on balance, app-based workers share more in common with relational or discrete workers. That decision would recognize—or reject—the proposition that app-based workers are sufficiently independent to pursue their own interests on the market. Whatever the answer, it is a single, coherent choice. *Abdow v. Attorney General*, 468 Mass. 478, 499-500 (2014) (finding that petition passed

the relatedness test when it presented voters with a coherent policy choice capable of a yes or no vote).

This choice can significantly affect certain disadvantaged communities. Among the most frequent users of app-based work platforms are women and people of color. *See* Risa Gells-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce*, Pew Research Center (Dec. 15, 2021). These workers often face barriers in traditional labor markets. They may have other jobs, caregiving responsibilities, or limited language skills. App-based work platforms help them navigate those barriers by providing low-friction, flexible access to work opportunities. *See* Ready, Fire, Aim, *supra*, at 12, 37. The platforms' flexibility helps them fit work within their schedules and find work not otherwise available to them. *See* Beacon Strategy Group, Findings from Survey of 2020 Voters and App-Based Drivers (2020) (reporting that about eight in ten drivers preferred independent status because of its flexibility). They have a special interest in protecting access to the platforms. *See* David Lewin & Mia Kim, Analysis of Voter Support of Proposition 22 in California & Los Angeles County, Berkeley Research Group 5–8 (2022) (reporting that

above-average share of Black, Latino, and women voters supported measure to protect independent status of app-based workers while offering minimum-earnings guarantees and new benefits). So they, like all Massachusetts voters, should have a chance to make their voices heard this November.

II. Appellants conflate classification standards with substantive protections.

In their brief, Appellants try to atomize that choice. They claim that because different employment laws protect employees in different ways, the laws reflect different policies. *See* App. Br. 24–25, 32. So, they say, it is impossible to classify a group of workers under multiple employment laws without making multiple, disparate policy judgments. *Id.*

But that argument conflates substantive protections with classification standards. It is true that different employment laws pursue different substantive ends. For example, Massachusetts' unemployment-insurance laws seek to protect employees from unexpected losses of work and income. *See Fallon Cmty. Health Plan*, 493 Mass. 591 at 592 n.4. Its workers'-compensation laws seek to protect employees from lost earning capacity resulting from workplace injuries. *See Wright's Case*, 486 Mass.

98, 114 (2020). Its wage-payment laws seek to ensure employees receive their compensation on time. *Lipsitt v. Plaud*, 466 Mass. 240, 245 (2013). Its minimum-wage laws seek to protect employees from oppressively low wages. *See* M.G.L. ch. 151, § 1. And its overtime laws seek to increase employment, reduce work hours, and compensate employees for long workweeks. *Sullivan v. Sleepy's LLC*, 482 Mass. 227, 233-34 (2019).

But though these substantive goals are different, their classification standards serve the same purposes. Again, classification deals not with what protections workers receive; it deals with which workers receive those protections at all. *See* Prince, *supra*, at 51. And the dividing principle is the same across employment law. The law extends protections to workers who lack sufficient bargaining power. *See O'Neil*, 324 U.S. at 706–07; E. Posner, *supra*, at 143–51. These workers need legislative protections because they cannot bargain for those protections themselves. *See O'Neil*, 324 U.S. at 707 n.19 (explaining that FLSA protects "those employees who lacked sufficient bargaining power to secure for themselves"); *Mullally*, 452 Mass. at 531 (recognizing that Massachusetts wage law was designed to serve same purposes). That overarching justification is

consistent, regardless of the specific statute at issue. *See* E. Posner, *supra*, at 143, 151. Employment law in general specifies certain substantive protections; classification law dictates to whom the protections apply. *See In re Ives Camargo's Case*,479 Mass. at 500-04 (distinguishing between benefits provided by workers'-compensation law and test for determining which workers received the benefits).

That distinction is common and pervasive. Classification is frequently treated as a distinct issue—one that can be addressed across multiple laws using a single standard. To cite only a few examples, Oregon has adopted a single classification test for its workers'-compensation, unemployment, and income-tax laws. Oregon Rev. Stat § 670.600. California has adopted a single test for an even broader set of laws, applying the "ABC" test across most of its labor code. Cal. Labor Code § 2750.5. And even Massachusetts applies chapter 148, § 149B's ABC test to multiple substantive laws, including its wage-payment, minimum-wage, and overtime laws. While those laws each serve a different substantive purpose, lawmakers nevertheless chose a single classification test. They recognized that a single test could sort eligible from ineligible workers,

regardless of the differences in the underlying substantive provisions. *See* Report to the Cal. Senate Committee on Labor, Public Employment and Retirement 8 (July 10, 2019)[4] (justifying extension of ABC test in part to bring "clarity" in classification standards); Or. Leg. Pol'y & Research Office, Background Brief: Worker Classification 3–4 (2021)[5] (explaining that lawmakers adopted a single definition of "independent contractor" in part to ensure "consistent interpretation and application" across multiple employment laws).

Voters could make the same choice. They could decide that, on balance, app-based workers are independent, perform discrete work, and so do not need the same legislative support offered to employees. Or at minimum, voters could decide that app-based drivers have enough in common with prototypical discrete workers (e.g., the lockmaker) that a different system would best match their relationship to work. Such a choice would be coherent, uniform, and understandable. *In re Ives Camargo's Case*, 479 Mass at 500 ("If the Legislature

[4] Available online: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5.

[5] Available online: https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Worker-Classification.pdf.

intends to impose a uniform standard definition of employee or independent contractor across all employment related statutes in the Commonwealth, it may of course do so.").

Appellants, of course, contest that judgment. They argue that app-based workers are employees and should be treated as such. *See* App. Br. at 9 (arguing that the Petitions would "eliminate" drivers' rights as employees). But that argument reflects nothing more than a policy disagreement. It shows only that, if given the choice, appellants would fold app-based workers into the Commonwealth's employment-law system. But the Constitution does not give Appellants that choice; it gives the choice to the voters. *See* Mass. Const. art. 48, § 3 (requiring only that all parts of a petition be related or mutually dependent). The Court should affirm that principle and let the voters decide.

CONCLUSION

The Petitions present a single, coherent policy choice about classification. Appellants try to slice that choice into discrete issues by pointing to certain related employment statutes. But that approach only confuses the issue. It conflates classification with substantive rights. The latter differ from statute to

statute; the former deals with a single group of workers. Appellants argument fails to grasp that distinction. It should be rejected.

Respectfully submitted,

Chamber of Progress

As Amicus Curiae,

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CERTIFICATE OF SERVICE

I, Gary J. Lieberman, hereby certify that on this 26th day of April 2024, I served the foregoing Brief of Chamber of Progress as an Amicus Curiae in Support of Defendants/Appellees and Intervenors and all relief requested in *Martin el Koussa et al.* v. *Attorney General and Secretary of the Commonwealth and Christina M. Ellis-Hibbet, et al.* SJC-13559, by causing it to be delivered by eFileMA.com to counsel for Plaintiffs-Appellants:

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CERTIFICATE OF COMPLIANCE

I, Gary J. Lieberman, hereby certify pursuant to Mass. R. App. P. 17 that this brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements imposed by Rules 15 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit because it contains 5235 words in 12-point Courier New font (not including 1161 words in the portions of the brief excluded under Rule 20(a)(2)(D)), as counted in Microsoft Word.

/s/ Gary J. Lieberman
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