MEMORANDUM

To: **Jaime Hoag, Chief of Staff and Assistant Attorney General**
Office of the Attorney General Andrea Joy Campbell

From: **Thomas R. Kiley, Carl Valvo and Meredith G. Fierro (CEK Boston, P.C.) on Behalf of Voters Who Are Members of the Greater Boston Real Estate Board, Home Builders & Remodelers Association of Massachusetts, Inc., and the Massachusetts Housing Coalition, Inc.**

Re: **Opposition to Certification of Initiative Petition 23-42**

Date: **August 11, 2023**

Overview of Initiative Petition 23-42

Initiative Petition 23-42 is fatally flawed for a variety of reasons and should not be certified. This memorandum focuses on the simplest and most direct routes to the decision not to certify: its express reference to convents and monasteries and its boundless scope.[1]

Initiative Petition 23-42, styled by its proponents as proposing a "Law Relative to Local Options for Tenant Protections," provides for the repeal of the current Chapter 40P, "The Massachusetts Rent Control Prohibition Act," to be replaced by a new Chapter 40P, the "Tenant Protection Act" (herein, the "TPA"). Section 1 of the TPA confers "plenary power", coextensive with that of the General Court, on municipalities in order to regulate, among other unspecified matters[2] and notwithstanding the application of otherwise preemptive state laws, the subjects of residential rents and fees, residential evictions, and the removal of rental housing units from the

[1] Cognizant of the fact that Initiative Petition 23-42 has generated widespread opposition that will undoubtedly result in multiple opposition filings, we do not raise every certification issue in this memorandum. We reserve the right to supplement this memorandum in response to arguments about the petition's certifiability discussed by your office or the proponents.

[2] The plenary power conferred by TPA § 1 is expressly "not limited to" the subjects listed in that section, except as provided by § 2.

market. TPA § 1(a)-(c). Such regulatory measures, to be adopted as ordinances or by-laws, may include a full range of "civil, administrative, and criminal remedies[3], including money damages, civil penalties, declaratory and injunctive relief, and criminal fines," notwithstanding G.L. c. 40, §§ 21 and 2ID, and G.L. c. 40U. TPA § 5. Municipalities may also vest the power to administer and enforce any such ordinances or by-laws, as well as to promulgate further regulations, on an administrative officer or board. TPA § 4.

The broad and open-ended scope of authority conferred by TPA § 1, as well as the exercise of administrative implementation and enforcement of any regulatory measures adopted under such authority, is limited by various exemptions listed in TPA § 2. These exemptions may be grouped as follows:

- limitations imposed by the Federal or Massachusetts Constitutions (TPA § 2(a) and (b));
- dwelling units operating under a first-time residential certificate of occupancy issued less than 15 years ago (TPA § 2(c));
- certain kinds of dwelling units (TPA § 2(d)), including in a "convent [or] monastery" (TPA § 2(d)(5)); and
- situations governed by "further local exemptions [that] have been established by applicable ordinance or by-law." (TPA § 2(d)(6).[4]

[3] "Criminal remedies" presumably includes terms of imprisonment, as "criminal fines" is a separately identified remedy.

[4] It's not clear whether a § 2(d)(6) exemption must relate to a kind of dwelling unit, as is suggested by its placement in subsection (d), or whether it refers to an exemption framed on any basis the municipality may find appropriate, as is suggested by its language.

I. Initiative Petition 23-42 May Not Be Certified Because It Contains a Provision Relating to "Religion, Religious Practices or Religious Institutions."

Amendment article 48, *Init*., II, § 2 ("Excluded Matters"), provides that "[n]o measure that relates to religion, religious practices or religious institutions … shall be proposed by an initiative petition. Further, for a proposed initiative to advance, § 3 requires the Attorney General to certify, among other things, "that it contains only subjects not excluded from the popular initiative." Because Initiative Petition 93-42 contains a subject — the exemption for convents and monasteries[5] — that relates to religion, religious practices or religious institutions, it is excluded from the initiative and the Attorney General should therefore decline to certify that it qualifies for the ballot under art. 48's criteria.

There can be no doubt that the exemption of convents and monasteries from the regulatory scope of the TPA injects a religious subject into the proposed initiative. First, the dominant, if not exclusive, understanding of the terms "convent" and "monastery" includes a religious element. In fact, it is difficult to find a dictionary definition of the terms that does not refer to religion in some way.[6] The terms implicate religious *practice*, as convents and

[5] According to Mantra.com, there are 126 convents and monasteries in Massachusetts. *See* https://www.manta.com/mb_45_F029505L_22/convent/massachusetts.

[6] Merriam-Webster defines "convent" as "a local community or house of religious order or congregation; especially: an establishment of nuns." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/convent. *See* American Heritage Dictionary of the English Language 291 (1973) (defining "convent" as "a community, especially of nuns, bound by vows to a religious life under a superior. 2. The building or buildings occupied by such a community; especially a nunnery"); Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2020) (defining "convent" as "a local community or house of a religious order or congregation; *esp*., an establishment of nuns"); Collins English Dictionary 441 (13th Ed. 2018) (defining "convent" as "1. a building inhabited by a religious community, usually of nuns. 2. The religious community inhabiting such a building."). "Monastery" is defined as "a house for persons under religious vows; especially: an establishment for monks." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/monastery. *See* American Heritage Dictionary of the English Language 847 (1973) (defining "monastery" as "the dwelling place of a community of persons under religious vows, especially monks. 2. The community of monks living in such a place"); Merriam-Webster's Collegiate Dictionary 800 (11th ed. 2020) (defining "monastery" as "a house for persons under religious vows; *esp*., an establishment for monks"); Collins English Dictionary 1270 (13th Ed. 2018)

monasteries are much more than residential facilities; they serve as the dedicated or sanctified places for communal prayer and meditation, liturgical practice, industry, and other disciplines as may be prescribed by particular monastic order or faith tradition.[7] Equally important is the understanding of the terms as referring to religious *institutions*, in the sense of being residential facilities owned and operated (at least in modern times) by a religious organization for the use of a community of persons living under religious vows. In either case, the TPA's exemption of convents and monasteries necessarily implicates the religious institutions with which the convents and monasteries are associated.

Second, the fact that the terms are used to describe an exemption from an otherwise generally secular law does not defeat art. 48's mandate to exclude the entire petition. In this regard, *Collins v. Sec'y of Comm.*, 407 Mass. 837 (1990), is virtually dispositive. In that case the Supreme Judicial Court held that the provision of art. 48 that excludes from the referendum process any law that "relates to religion, religious practices, or religious institutions"—the identical phraseology in the excluded matters provision applicable to initiatives—excluded a law making it unlawful to discriminate on basis of sexual orientation because the law contained a limited exemption for a "religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or

(defining "monastery" as "the residence of a religious community, esp. of monks, living in seclusion from secular society and bound by religious vows.").

[7] The website of a Buddhist monastery puts it this way: "The life of a monastery revolves around following the instructions of the Buddha: practicing generosity, practicing virtue, and developing the mind." BUDDHA MEDITATION CENTRE SASKATOON AT MAHAMEVNAWA BUDDHIST MONASTERY - Buddha Meditation Centre Saskatoon (mahamevnawasaskatoon.com). Much the same is true for Christian monasteries: "Christian monasticism is a structured, ascetic pursuit of the Christian life. It involves a return to God through attention to the classic spiritual disciplines of silence, chastity, prayer, fasting, confession, good works, obedience, and vigils. … The nature of the monastic pursuit is one that involves *ora et labora* (Lt. "prayer and work"), a submission of every aspect of one's life to a practiced awareness of God's presence." Overview of Medieval Monasticism | Dr. Philip Irving Mitchell | Dallas Baptist University (dbu.edu)

controlled by or in connection with a religious organization." *Id.* at 840. Notwithstanding the relatively minor scope of the exemption when compared with the application of the anti-discrimination provisions in the areas of housing, employment, the granting of credit, and public accommodations, *id.* at 839, the exemption for religious institutions was sufficient to bar the measure from the referendum process.[8]

As explained by the Court, the potency of art. 48's exclusion from popular consideration of laws containing any measure of religion-related provisions stems from the strong desire of art. 48's framers to put an end to the toxic political wrangling over actual and perceived preferential treatment based on sectarian considerations. Indeed, the exclusion of religious matters in what became art. 48 was only a comparatively faint reflection of the political judgments of the same delegates to the 1917-1918 Constitutional Convention that also birthed the Anti-Aid Amendment.

> It is plain from the face of art. 48 that the Massachusetts Constitutional Convention of 1917–1918, and the people of the Commonwealth who adopted art. 48 in November, 1918, determined that "[s]ome matters are naturally unsuitable for popular lawmaking ... for various reasons. The people for their own protection have provided that the initiative [and the referendum] shall not be employed with respect to certain matters. Unless the courts ... enforce those exclusions, they would be futile, and the people [w]ould be harassed by measures [and laws] of a kind that they had solemnly declared they would not consider."
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> With respect to the religion exclusion in art. 48, the reasons underlying the determination that such matters ought not be submitted to the people for their consideration become apparent when the debates of the Constitutional Convention are examined. … The debates of the Constitutional Convention confirm that, with respect to the provisions excluding measures and laws relating to religion, religious practices, or religious institutions from the initiative and referendum, the intent and understanding of the

[8] In a brief submitted to the First Circuit Court of Appeals in *Wirzburger v. Galvin*, 412 F.3d 271 (2005), the then Attorney General advised the Court that "the religious institutions exclusion was not intended to be hostile to religion, but merely to keep out of the initiative law-making process *those proposals affecting such institutions in any way.*" Brief of Appellees, 2004 WL 5684167 (C.A.1) (emphasis added).

> convention was to avoid the consequences of permitting State-wide public political discussion of matters relating to religion.
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> *Collins*, 407 Mass. at 844-845 (citations omitted).

The Court cited the remarks of the delegates that illustrated their strong desire to "protect the initiative and referendum from the efforts" of "the religious fanatics and … the professional religionists" and that "we ought to make it as difficult as possible to bring religious questions into the politics of this State." *Id.* at 845, citing 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917–1918, 766–770 (1918). See also *id*. at 353, citing *Bloom v. School Comm. of Springfield,* 376 Mass. 35, 39 (1978) (noting that proponents of the Anti–Aid Amendment in the Constitutional Convention of 1917–1918 urged "that to promote civic harmony the irritating question of religion should be removed from politics as far as possible"). While one may debate whether "the religious fanatics and … the professional religionists" have entirely disappeared from the political scene, the belief that they have is no reason to relax the robust exclusions that the framers of art. 48 wisely put into place a century ago.[9]

II. Initiative Petition 23-42 May Not Be Certified Because It Contains Subjects That Are Not "Related or Mutually Dependent."

Amendment article 48, *Init*., II, § 3 further requires the Attorney General to certify that an initiative petition "contains only subjects. . . which are related or which are mutually dependent."

[9] That the religious matter exclusion and the Anti-Aid Amendment are still in place is no accident. The framers purposely made both immune from amendment or repeal via the initiative process. Art. 48, *Init.,* pt. 2, § 2, ¶¶ 2, 4. They were the two dominant matters considered in the Constitutional Convention. Bridgman, Raymond L., *The Massachusetts Constitutional Convention of 1917: its causes, forces, and factions: its conflicts and consequences...* (MOML Legal Treatises, 1800-1926). The oft quoted debates relating to the initiative and referendum were interrupted for a period of weeks in August of 1917 to allow the Anti-Aid Amendment to move forward toward a November 6, 2017, vote of the people. *Id.* at 48. As that election approached, the public discourse was indeed dominated by religious fanatics and professional religionists. *Id.* at 33-39. At that election, the Anti-Aid Amendment was approved by a wide margin. *Id.* at 40.

Initiative Petition 23-42 contains multiple subjects—*e.g.*, rent control, evictions, authority of municipalities to regulate any number of unspecified matters that "protect residential tenants" and provide for criminal penalties—that only have a marginal relationship with each other. For this additional reason, the Attorney General should decline to certify that it qualifies for the ballot under art. 48's criteria.

The Supreme Judicial Court has held that "[t]he related subjects requirement is met where one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane." *Weiner v. Attorney General*, 484 Mass. 687, 691 (2020) (internal quotations and citations omitted). Of course, "[a]t some high level of abstraction, any two laws may be said to share a common purpose." *Id.* Accordingly, "[r]elatedness cannot be defined so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another, which might confuse or mislead voters, or which could place them in the untenable position of casting a single vote on two or more dissimilar subjects." *Id.*

Initiative Petition 23-42 is most analogous to the initiative petition at issue in *Carney v. Attorney General*, 447 Mass. 218 (2006). There, the Supreme Judicial Court held that an initiative petition to eliminate pari-mutuel dog racing, increase the criminal sanctions against those who mistreat dogs, and require that dogs confiscated in the enforcement of laws against dog fighting be forfeited to the custody of a humane society violated the relatedness limitation of art. 48. *Id.* at 218-232. While all of these subjects dealt with, or were motivated by, concern for the welfare of dogs, the Court determined that there was no "meaningful operational relationship" between amending criminal statutes penalizing dog abuse and dismantling the business of pari-mutural dog racing, opining that voters who favored increasing the criminal

penalties for animal abuse should not be required to vote in favor of eliminating pari-mutuel dog racing. *Id.* at 231. The Court also emphasized that it was rare to mix criminal law and administrative overhaul in an initiative petition. *Id.*

Although the Attorney General articulated a common purpose tying together the petition's provisions—"the humane treatment of dogs"—the Court rejected it as insufficient to clear the relatedness hurdle. In a subsequent decision discussing *Carney*, the Court characterized the articulated common purpose as overly broad. *See Gray v. Attorney General*, 474 Mass. 638, 647 (2016) ("We rejected as too broad the Attorney General's argument that these were sufficiently related subjects based on a mutual connection to the goal of promoting more humane treatment of dogs.").

Here, as in *Carney*, there is an insufficient operational relationship between the subjects addressed in Initiative Petition 23-42. Specifically, the elimination of rent control has no meaningful operational relationship with the grant of "plenary power" to municipalities to regulate evictions and other subjects relating to the protection of tenants, some of which are left unspecified, leaving the voter free to imagine the possibilities. *Id.* at 220. Initiative Petition 23-42 thus places voters in the untenable position of having to vote in favor of granting regulatory authority over evictions and other subjects to municipalities if they support eliminating rent control. Although these provisions may fall under the umbrella of "protecting residential tenants," this "common purpose" is akin to the articulated common purpose rejected in *Carney*, *i.e.*, the humane treatment or "protection" of dogs. Also similar to *Carney*, Initiative Petition 23-42 mixes the elimination of a civil law reflecting a major policy of the Commonwealth, *i.e.*, rent control, with provisions conferring authority to impose criminal penalties on other property-owner behavior, such as converting a rental property to a condominium.

Furthermore, as the Court stated in *Carney*, art. 48 is intended to "carefully construct[] safeguards against potential voter confusion in the initiative process." 447 Mass. at 431. Initiative Petition 23-42's inclusion of the language "includes, but, except as provided by section 2, is not limited to" in § 1 creates a high likelihood of "voter confusion" or, at least, voter misapprehension about the subjects affected by the proposed law. One could imagine any number of controversial policies that municipalities would have the plenary power to regulate under § 1, such as a tenant's right of first refusal, which is pending in the Legislature as S. 880/H. 1350. One way a petition can lead to voter confusion is to include language—like Initiative Petition 23-42's "including … but not limited to" phraseology—that makes it impossible for voters to have a common understanding of exactly what the petition would accomplish. Yet the initiative petition provides no notice to voters as to what subjects not specified could be regulated under the authority of the proposed law. "The language, structure, and history of art. 48 all suggest that any initiative presenting multiple subjects may not operate to deprive the people of a meaningful way to express their will." *Carney*, 447 Mass. at 532 (internal quotation and citation omitted). Such a deprivation is inevitable if voters misunderstand the exact nature and scope of the petition.[10]

[10] As a final note, thank you for providing us with a copy of the declination letter the Attorney General issued with respect to Initiative Petition 99-2. Petition 99-2 was the petition in issue in *Weizberger v. Galvin,* referenced in the argument above. The declination letter indicates that the Attorney General rejected similar petitions by the measure's proponents on the same grounds on two prior occasions. The reasons for rejection were put in issue in state and federal court, briefed and argued by Peter Sacks, who was then spearheading the certification process. If additional non-privileged material exists concerning the rejection or subsequent litigation, we request access to it prior to the Attorney General's determination concerning certification of Initiative Petition 23-42.