August 15, 2025

Andrea Campbell, Esq.
Attorney General
1 Ashburton Place
Boston, MA 02108

Re: Comments of the Fiscal Alliance Foundation on Initiative Petition 25-21

Dear Attorney General Campbell:

The Fiscal Alliance Foundation[1] is pleased to provide comments in response to the solicitation of the Attorney General regarding whether the proposed initiative petition 25-21 ("Initiative Petition to Protect Tenants by Limiting Rent Increases") (the "Petition") meets the criteria for certification under Article 48 of the Amendments to the Massachusetts Constitution. For the reasons below, it does not.

The Petition cannot be certified as a matter of law because it violates the excluded matters clause of Article 48 of the Amendments to the Massachusetts Constitution. That clause provides that "[n]o proposition inconsistent with any one of the following rights of the individual . . . shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use . . . ." Mass. Const. amend. Art. 48, The Initiative, II, § 2.

I. The Petition Violates the Excluded Matters Clause of Article 48 Because It Repeals the Express Right to Compensation Currently Afforded by G.L. 40P.

Rent control is currently prohibited by law in Massachusetts by G.L. c. 40P, the Massachusetts Rent Control Prohibition Act. The Act unambiguously "broadly prohibits any regulatory scheme based upon or implementing rent control," *id.* § 2, including "any regulation that in any way requires below-market rents for residential properties," *id.* § 3(a). The Act further provides that it "shall be liberally construed to effect this purpose," *id.* § 2.

Of particular (and dispositive) importance here, G.L. c. 40P, § 4 also provides that if a city or town *does* adopt a rent control regulation, that regulation must not only be i) "entirely voluntary and uncoerced" (§ 4(a)), but that ii) "a municipality adopting such regulation **shall compensate owners of rent controlled units for each unit in the amount of the difference between the unit's fair market rent and the unit's below market rent controlled rent . . . .**"

[1] The Fiscal Alliance Foundation is a 501(c)(3) non-partisan, non-profit organization whose mission is to increase public awareness about the public benefits to be derived from greater fiscal responsibility, transparency, and accountability in government.

(§ 4(c)). Put simply, under existing state law the owner of residential rental property has the express and affirmative right to receive just compensation if rent control is ever imposed.

The Petition amends the General Laws by "striking out chapter 40P and inserting in place thereof the following chapter:- CHAPTER 40P. LIMITING RENT INCREASES." In doing so, the Petition expressly and affirmatively repeals the existing G.L. c. 40P, § 4(c) rights of residential rental property owners to receive compensation for their private property upon the imposition of rent control.

In short: Residential rental property owners currently have a right to compensation for the appropriation of their private property if rent control is imposed. The Petition not only repeals that right without replacing it, but subjects owners who continue charging market-rate rents to civil penalties under G.L. c. 93A.[2] As a result, if the Petition passes, owners of private residential rental property will be deprived of their individual right to receive compensation for the appropriation of their private property to public use — <u>a right they currently and indisputably possess</u>.

It is hard to conceive of a clearer violation of Article 48's prohibition on any initiative petition "inconsistent with any one of the following rights of the individual . . .: The right to receive compensation for private property appropriated to public use . . . ." Mass. Const. amend. Art. 48, The Initiative, II, § 2.

II. The Petition Violates the Excluded Matters Clause of Article 48 Because It Contravenes the Right to Compensation Established by the Supreme Judicial Court in *Dimino v. Secretary of the Commonwealth*.

Even if G.L. c. 40P, § 4(c) did not already grant a right to compensation that the Petition would repeal, the Petition would still violate Article 48. This is because the Petition here is controlled by the Supreme Judicial Court's comprehensive analysis of petitions inconsistent with the right of just compensation in *Dimino v. Secretary of the Commonwealth*, 427 Mass. 704 (1998).

The petition challenged in *Dimino* sought to provide financial relief to Massachusetts drivers by eliminating the collection of tolls on the Massachusetts Turnpike, *id.* at 705. Nevertheless, the Court overturned the Attorney General's certification of the petition, holding that because "the petition, if enacted, would <u>eliminate part of . . . bondholders' security interest</u>" in toll revenue (emphasis supplied), it "offend[ed] art. 48's prohibition of initiatives which are 'inconsistent with the right to receive compensation for private property appropriated to public use.'" *Id.* at 706–07.

In so concluding, the Court determined that "the Attorney General should have considered the security interest" held by the bondholders, given the "sheer magnitude" of the

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[2] The Petition is equally deficient because it provides no compensation for such appropriations. "It is not sufficient for a statute to authorize a taking and then provide a *possibility* of compensation in a later proceeding." *Dimino* at 711 (emphasis in original) (quoting *Opinion of the Justices*, 365 Mass. 681, 691 (1974)). A statute must provide "a ready means of compensation." *Id.* at 710.

$1.7 billion worth of bonds, which the Court called "indisputably true" and "a matter of 'common knowledge or observation.'" *Id.* at 707 (quoting *Yankee Atomic Elec. Co. v. Secretary of Commonwealth*, 402 Mass. 750, 759 n.7 (1988) (*Yankee I*)). Considering that security interest, the Court determined that "[t]he petition's elimination of toll revenue constitutes a full-blown appropriation of the bondholders' right to that property," given the deprivation of "an interest which was expressly bestowed on them by contract." *Id.* at 709.

The same is true here. Within the strictures of Article 48, the Petition can no more use the power of the initiative petition to appropriate security interests held by mortgage lenders on residential rental properties in order to grant financial relief to the Commonwealth's renters, than the petition challenged in *Dimino* could use the power of the initiative petition to appropriate security interests held by Turnpike bondholders in order to grant financial relief to the Commonwealth's drivers.

A. Mortgages are Both Security Interests and Contracts in Massachusetts.

There is no dispute that as a matter of law, mortgages are security interests in Massachusetts: "The function of a mortgage is to employ an interest in real estate as security for the performance of some obligation. . . . Unless it secures an obligation, a mortgage is a nullity." *Eaton v. Fannie Mae*, 462 Mass. 569, 584–85 (2012) (quoting Restatement (Third) of Property (Mortgages) § 1.1 comment (1997)).

Nor is there any dispute that mortgage loans are, as were the bonds in *Dimino*, interests "expressly bestowed on [lenders] by contract." *Cf. Dimino*, 427 Mass. at 709; *United States Bank Nat'l Ass'n v. Ibanez*, 17 LCR 679 (Mass. Land Ct. 2009) ("A mortgage is a contract."); *Goldsmith v. Woodman*, 497 B.R. 668 (Bankr. D. Mass. 2013) (as between lender and mortgagee, the "mortgage was a fully enforceable contract").

B. It Is "Indisputably True" that Commercial Residential Multifamily Properties are Commonly Secured by Mortgages.

Besides being required to take notice of facts "implicit in the language of the petition," the Attorney General is also required as part of the Article 48 certification process to take notice of facts that are "indisputably true," which "include matters of common knowledge or observation," *Dimino*, 427 Mass. at 707 (quoting *Yankee Atomic Energy Co. v. Sec'y of the Commonwealth*, 402 Mass. 750, 759 n.7 ("*Yankee I*")).

It is "indisputably true" evidence of "common knowledge or observation" that as a fundamental and basic tenet of real estate finance, commercial loans for multifamily properties (i.e., mortgages) are commonly secured by the rental properties themselves, the capitalized cash flow of the rents those properties are expected to generate, or a combination of the two.[3] *See*

[3] For example, as the federal Office of the Comptroller of the Currency advises commercial lenders in its *Handbook on Commercial Real Estate Lending* (Mar. 2022, Version 2.0), "A high-volatility [Commercial Real Estate] (HVCRE) is a credit facility secured by land or improved real property that meets the following criteria: [1] Primarily finances or refinances the acquisition, development, or construction of real property. [2] Provides financing to acquire, develop, or improve such real property into income-producing real property. [3] **Depends on**

APPRAISAL OF REAL ESTATE (15th Ed. 2020) at 67 ("The financial aspects of property interests have a major effect on real estate investment practices. The analysis of mortgage and equity components is of particular importance. Mortgage funds are secured debt positions, while equity investments are venture capital.").

A significant number of residential rental properties (and the rental income streams they generate) are themselves "security interests": securing loans and mortgages held by commercial lenders on a multibillion-dollar scale — $480 billion nationally in 2022 for multifamily property loans alone, according to the Mortgage Bankers Association.[4] In Massachusetts, illustrative commercial lending for multifamily residential projects in recent years includes $110 million in loans by the private Cambridge Trust to develop multifamily housing,[5] $84.5 million in loans by Cambridge Savings Bank to develop a portfolio of market-rate and affordable multifamily apartments in Winchester,[6] and $35.6 million in loans by First Citizens Bank to assist a buyer in acquiring 107 rental units in Haverhill and Lowell.[7]

Adding non-commercial lenders increases these numbers by billions more. For instance, MassHousing reported that, in FY2024 alone, its "[m]ultifamily business line closed 30 transactions totaling $648.4 million, supporting the creation and preservation of 3,263 rental housing units" in Massachusetts.[8] Nationwide, the Federal Housing Finance Agency announced $146 billion in multifamily residential loans nationally for 2025.[9]

C. It is "Indisputably True" that the Petition Will Adversely Affect Mortgage-Based Security Interests Secured by a Presumption of Market-Rate Rental Income Streams.

When not artificially constrained, it is Economics 101 that market-rate rental values are established by supply and demand: when supply is plentiful, rents decline; when supply is limited, rents increase. Indeed, given the affirmative existence of G.L. c. 40P, "The Massachusetts Rent Control Prohibition Act," every such lender has been able to rely for three decades on the fact that the law allows owners to decide upon the rents they will charge without legislative interference. It is hard to conceive of a stronger reasonable investment-based expectation.

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future income or sales proceeds from, or refinancing of, such real property." (Emphasis supplied.) *Available at* https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/commercial-real-estate-lending/pub-ch-commercial-real-estate.pdf.

[4] *Available at* https://newslink.mba.org/mba-newslinks/2023/august/mba-newslink-thursday-aug-3-2023/mba-forecast-higher-rates-uncertainty-to-slow-commercial-multifamily-lending/.

[5] *Available at* https://www.prnewswire.com/news-releases/cambridge-trust-commits-110-million-to-finance-affordable-housing-through-the-massachusetts-housing-partnership-301372449.html.

[6] *Available at* https://www.cambridgesavings.com/newsroom/cambridge-savings-bank-provides-strategic-land-ventures-845-million-funding-support.

[7] *Available at* https://newsroom.firstcitizens.com/2022-03-31-CIT-Provides-35-6-Million-for-Acquisition-of-Two-Massachusetts-Residential-Complexes

[8] *Available at* https://www.masshousing.com/-/media/Files/Financials/FY24_AnnualReport.pdf

[9] *Available at* https://www.fhfa.gov/sites/default/files/2024-11/2025-multifamily-loan-purchase-caps-fact-sheet.pdf

Here, it is “indisputably true” that according to the U.S. Bureau of Labor Statistics, the annual increase in the Consumer Price Index — which the Petition uses to establish the maximum annual rent increase permissible — has been *below* 5% for four of the past five years (1.2% in 2020, 4.7% in 2021, 8.0% in 2022, 4.1% in 2023, and 3.0% in 2024).[10] As a result, any market-rate rent increase above these percentages that owners of residential rental properties would otherwise make to satisfy the mortgage-based security interests held by their mortgage lenders will be prohibited. It is plain that those mortgage lenders will be directly and adversely affected.

Importantly for the Article 48 analysis, it is also plain from the Petition that artificially limiting such market-based rent increases is its central and intended purpose. As the Supreme Judicial Court made clear in *Dimino*, the Attorney General’s review under Article 48 *must* consider “what facts are implicit in the language of the petition,” in addition to facts “subject to official or judicial notice,” *id*. at 707. Here, the Petition itself affirmatively declares that addressing the fact of a “housing shortage and affordability crisis in Massachusetts” can be accomplished by prohibiting annual market-rate rent increases that exceed the proposed annual cap.[11] The Supreme Judicial Court has held that it will not “impute to the voters who enact [laws by initiative] an intention to pass an ineffective statute.” *Bates v. Dir. Of the Office of Campaign & Political Fin.*, 436 Mass. 144, 173-74 (2002). And it is indisputable that effecting the Petition’s stated purpose will by definition (and indeed, intent) directly and adversely impact mortgage-based security interests that rely on market-rate rental income streams.

D. The Petition Fails to Protect Mortgage Holders from Being Deprived of the Value of their Security Interests.

The Supreme Judicial Court rejected the petition in *Dimino* after observing that “the Attorney General should have considered the security interest” held by the bondholders, given the “sheer magnitude” of $1.7 billion of Turnpike bonds at issue. *Id.* at 707. Here, it is “indisputably true” that, per U.S. Census Bureau data, residential rents in Massachusetts are valued at least at $23.2 billion annually (and likely much more).[12] This is more than *thirteen times* the $1.7 billion of bonds at issue in *Dimino*. The “sheer magnitude” of the impacts of the Petition here cannot be overlooked during the Article 48 process.

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[10] U.S. Bureau of Labor Statistics, *Consumer Price Index Historical Table for U.S. City Average, available at* https://www.bls.gov/regions/mid-atlantic/data/consumerpriceindexhistorical_us_table.htm

[11] *See, e.g.*, Andrew Brinker, *Massachusetts is the third most expensive state in the US to rent a home, new study says*, BOSTON GLOBE (June 14, 2023) (noting that housing studies “put new numbers on *a reality that Massachusetts residents have long known*:” that “living here, especially for renters, costs ever more, stretching even moderate earners to the limit” (emphasis added)).

[12] According to U.S. Census Bureau data (https://www2.census.gov/programs-surveys/popest/tables/2020-2024/housing/totals/CO-EST2024-HU-25.xlsx), in 2024, there were 3,058,052 housing units in Massachusetts and an average owner-occupied rate of 62.6%. Thus, the average renter rate was 37.4%, or 1,143,711 rental units. The Census Bureau also reports an average median monthly gross rent in Massachusetts between 2019 and 2023 of $1,687. Multiplying this median gross rent amount ($1,687) by 12 months by 1,143,711 rental units results in a total value of rents of at least $23.2 billion annually. And this is likely a significant underestimate, as it does not include rent data for 2024 or 2025.

Yet as in *Dimino*, nothing in the Petition protects mortgage lenders from being deprived of the value of their security interests in residential rental properties. As a result, any action that artificially caps rents would, as in *Dimino*, "deprive [loanholders] of their security interest in [rents]" or in the security interest of the value of the rental properties. *Dimino*, 427 Mass. at 709. And the Petition here would have an even greater indisputable, significant, and uncompensated adverse financial effect: artificially reducing rents *across a multibillion-dollar market*.

E. The Petition is Plainly Distinguishable from *Yankee II* and the Initiative Petition that Established G.L. c. 40P.

Finally, this Petition is distinguishable from that in *Yankee Atomic Electric Co. v. Secretary of Commonwealth*, 403 Mass. 203, 210–11 (1988) (*Yankee II*), which upheld the Attorney General's certification of a petition prohibiting nuclear power plants in the Commonwealth. There, the Court agreed with the Attorney General's conclusion that the potential "residual use" of existing regulated nuclear plants, as well as a "determination of [their] diminution in value," were "undetermined factual issues" not susceptible to judicial or official notice — and critical to analyzing whether the petition would cause an impermissible taking. *Id.* at 209–10.

Yankee II, however, involved properties that were used for the generation of nuclear power and, therefore, subject to complex "regulatory processes" affecting potential alternative uses through which the Court noted that "**<u>owners may be permitted to recover their investments</u>**." *Id.* at 209–10 & n.7 (emphasis supplied). In sharp contrast, here there are no regulatory processes that would allow lenders (or owners) to similarly "recover their investments" and escape the adverse financial consequences of the Petition's intended purpose: forcing owners and their lenders to subsidize residential rents across the Commonwealth. As the United States Supreme Court declared in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the takings clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." That prohibition is precisely what this Petition attempts to circumvent.

Nor is it of relevance to the Article 48 analysis that the *abolition* of rent control over thirty years ago was achieved via initiative petition (creating G.L. c. 40P, the "Massachusetts Rent Control Prohibition Act").[13] The language of Article 48 only excludes from consideration any petition that is "inconsistent with" an enumerated right. The abolition of rent control was not "inconsistent with" any excluded matter, and certainly not inconsistent with the "right to

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[13] To the extent proponents contend that the holding in *Steinbergh v. City of Cambridge*, 413 Mass. 736, 742 (1992) implies that the imposition of rent control is <u>not</u> "inconsistent with the right to receive compensation for private property appropriated to public use," the facts of *Steinbergh* are readily distinguishable on their face. First, *Steinbergh* was not an Article 48 case, and was decided before G.L. c. 40P, § 4(c) reiterated an owner's right to compensation upon imposition of rent control. Second, the Court observed that the *Steinbergh* plaintiffs had "acquired the property when the [rent control] regulation was already in effect," so "<u>[t]he price that they paid for the property should have reflected whatever adverse impact the regulation had on the fair market value of the property.</u>" *Id.* at 742–43 (emphasis added). That certainly is not true here: it is axiomatic that every current owner of residential rental property who would be harmed by the Petition's artificial ceiling on rents acquired that rental property *prior* to the Petition becoming effective.

receive compensation for private property appropriated to public use." Mass. Const. amend. Art. 48, The Initiative, II, § 2. Indeed, as noted previously, G.L. c. 40P expressly affirms that such a right inures in owners at present. In sharp contrast, the *imposition* of rent control via initiative petition is inconsistent with exactly that protected right.

CONCLUSION

The Petitions' repeal of the Massachusetts Rent Control Prohibition Act (G.L. c. 40P) repeals the existing express protection of just compensation for owners of residential rental properties. This is precisely what the excluded matters clause of Article 48 forbids. Even if that express protection of their individual rights did not exist, the Petition would still violate the excluded matters clause, since the same result the Supreme Judicial Court reached in *Dimino* is required here.

That the Petitioners sincerely believe they are pursuing a salutary policy goal does not entitle them to ignore the requirements of Article 48, which "are not mere technicalities." *Opinion of the Justices*, 422 Mass. 1212, 1219 (1996). When the people "seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions." *Id.* (quoting *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 321 (1951)). For the above reasons, the Petition fails Article 48's requirements and cannot lawfully be certified.

The Fiscal Alliance Foundation appreciates the opportunity to submit these comments. Please do not hesitate to contact us if we can provide further clarity or insight on the positions we have provided.

Sincerely,

Danielle Webb
Chair, Fiscal Alliance Foundation

Cc: Phoebe Fischer-Groban, Esq., Assistant Attorney General