

Inside the Strategy 2 Mintz Attorneys Used to Strike a Mass. Rent Control Initiative From the November Ballot

By Marianna Wharry

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Getting a ballot initiative before Massachusetts voters is no easy feat. The process requires a yearslong campaign of signature gathering and approvals from state officials before a proposal can appear on the November ballot. Removing a measure from the ballot, however, can be even more difficult.

Under state law, initiative petition proponents must submit a proposal, including at least 10 voter signatures, to the attorney general by the first Wednesday in August of an odd-numbered year for consideration in the following year's election. By September, the attorney general certifies eligible proposals, and petitioners then have until the first Wednesday in December to gather nearly 75,000 signatures for a submission to the secretary of state's office. If lawmakers decline to act, supporters must collect nearly 12,500 additional signatures by the first Wednesday in July to qualify the measure for the statewide ballot.

Most attorneys who become involved in ballot initiative campaigns join at the outset, often in August of the prior year or earlier, as the measures gain momentum. Few attorneys enter the fray midway through the process. But Mintz attorneys Elissa Flynn-Poppey and Edmund P. Daley did just that.



Elissa Flynn-Poppey, left, and Edmund P. Daley, right, of Mintz.

Courtesy photos

Flynn-Poppey, chair of the firm's government law practice, teamed up with Daley to challenge a proposed Massachusetts ballot measure that would have created one of the strictest rent control laws in the nation. Massachusetts voters approved a statewide ban on rent control in 1994, and current law still broadly prohibits local governments from adopting rent-control measures.

The pair entered into the process in January when Housing for Massachusetts recruited them to join the opposition. The late entry posed an additional challenge: The pair did about eight months of work in six weeks.

"We had many hours in a conference room, going through good ideas, great ideas and bad

ideas, to figure out the right formula here,” Daley said. “We did a lot of research. We spent a lot of time working with that petition to figure out: what does this mean if it’s put in front of the voters?”

In a case centered on rent control, neither attorney expected religion to be the cornerstone of their legal challenge, Daley said. In February, they sued Massachusetts Attorney General Andrea Joy Campbell, arguing that the proposed measure violated Article 48 of the Massachusetts Constitution because of it exempted «facilities operated solely for religious purposes.» The pair pointed to topics excluded from initiative petitions under Article 48, specifically its exclusion of petitions that relate to religion, religious practices or religious institutions.

The six-week push paid off in June when the Massachusetts Supreme Judicial Court unanimously sided with those opposing the measure, aligning with Daley and Flynn-Poppey’s Article 48 exclusion argument and removing the initiative from voters’ input in November.

While the petition concerned the secular matter of rent control, the court found that the initiative created a religious classification since it would require officials to determine whether an institution was religious and whether it operated housing solely for religious purposes. Religious institutions would also receive preferential treatment, the top court said, since those facilities could raise rents without the restrictions imposed on many secular landlords.

According to Daley, the roots of the argument stretch back over a century to the Massachusetts Constitutional Convention of 1917. Delegates did

not want any discussion of religion in the initiative petition process and adopted the broad categorical exclusion barring petitions that relate to religion, religious practices or religious institutions.

“There’s not a lot of case law on that exemption, so that’s actually one thing that makes this case even more unique,” Flynn-Poppey said. “By the petitioners adding that exemption, the initiative petition really got it into the purview of Article 48.”

The pair have previously challenged ballot initiatives, even going as far to limit their involvement to one ballot question at a time. Flynn-Poppey said their involvement arises through existing client relationships and requires careful consideration. It’s often a wide-ranging opportunity for the pair, with some examples including representing Uber and Lyft in ballot measure disputes to helping preserve transgender protections in Massachusetts in 2018.

“That’s what makes it so much fun because they’re all so different,” Daley said. “Since these are a pure legal challenge, we’ve gotten to know the case law really well. The more you do them, I don’t want to say they get easier, but you can move a little bit quicker through the initial process because you know the law.”

“It’s a ton of fun when these cases come in and it’s something brand new, a petition you’ve never seen before. Then we have to go back through our checklist of where are the excluded matters, where are they hiding in this petition, and decide how to address them,” Daley said. “We put together a good plan for not just getting an argument to the Supreme Judicial Court, but getting the winning argument to the Supreme Judicial Court.”