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Plaintiffs are Massachusetts parents and their children who filed suit challenging two provisions of Article 48 of the Massachusetts Constitution on the grounds that these provisions, on their face and as applied, silence Plaintiffs' core political speech on the basis of viewpoint, exclude Plaintiffs from access to the Massachusetts initiative process on the basis of religion, and shut Plaintiffs out of equal participation in the political process on the basis of religion in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. For the reasons set forth below, Plaintiffs respectfully request the Court to enter summary judgment in their favor on these constitutional claims.

### **I. STATEMENT OF FACTS<sup>1</sup>**

Plaintiff Susan Wirzburger and her son Michael Wirzburger are Catholic. *See* Declaration of Susan Wirzburger, ¶ 1 (“Wirzburger Decl.”).<sup>2</sup> Her son Michael attends a private Catholic school in Massachusetts. *Id.* The vast majority of Massachusetts' private primary and secondary schools are religious, and approximately 250 of them are Catholic schools. *See* Declaration of Derek L. Gaubatz, ¶¶ 10-11 and Exs. J-K (“Gaubatz Decl.”). As a result of Massachusetts' Anti-Aid Amendment,<sup>3</sup> neither the school

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<sup>1</sup> This Statement of Facts serves to comply with Local Rule 56.1.

<sup>2</sup> The Wirzburger Declaration was previously submitted to the Court as part of Plaintiffs' Motion for Preliminary Injunction. Plaintiffs attach it here for the convenience of the Court.

<sup>3</sup> Amendment Article 18 of the Massachusetts Constitution, as amended by Amendment Article 46 in 1917 and Amendment Article 103 in 1974, of the Massachusetts Constitution. The Anti-Aid Amendment, as originally passed in 1855, together with its amendments in 1917 and 1974, are reproduced for the convenience of the Court in the Appendix (tab 1).

Michael Wirzburger attends, nor any other private primary and secondary school in Massachusetts may receive certain public funds. *See* Appendix Tab 1.

**A. History of the Anti-Aid Amendment**

The Anti-Aid Amendment was approved by the Massachusetts legislature in 1854 and ratified by the people on May 23, 1855. It stated that “moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.” Amendment Article 18. As described at length in the Declaration of John R. Mulkern (“Mulkern Decl.”) (tab 4),<sup>4</sup> an historian who is an authority on this period of Massachusetts history, *id.* ¶ 2, this amendment was passed by the legislature and approved by the people in 1854-55 during the height of the power of the Know-Nothing party in Massachusetts.

The Know-Nothing party was a secret society characterized by Nativism and anti-Catholicism that seized political control of the state in 1854, and aggressively used its political power to impose its agenda to “Americanize America” and preserve Protestant hegemony in “a state-sponsored attack on the civil and political rights of the foreign-born and Roman Catholics that went beyond anything else found in the country.” Mulkern Decl. ¶ 11.

The Know-Nothings’ official acts in pursuit of these ends included dismissing Irish state workers, vigorously enforcing the Pauper Removal Act to ship poor

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<sup>4</sup> The Mulkern Declaration was previously submitted to the Court as part of Plaintiffs’ Motion for Preliminary Injunction. Plaintiffs attach it here for the convenience of the Court.

immigrants back to their homelands, passing proposed constitutional amendments that would have barred Roman Catholics from public office, restricting suffrage to residents who had lived in the country for 21 years, among many others. *Id.* ¶¶ 11, 12. With regard to the schools, the Know-Nothings mandated the reading of the King James (Protestant) Bible in the public schools (which was offensive to Catholics), barred foreign language instruction, and passed the Anti-Aid Amendment, which was sent to and approved by the voters.<sup>5</sup> *Id.* ¶¶ 11, 13. These measures were intended to preserve the "Americanizing" influence of the public schools and at the same time suppress the cultural threat thought to be posed by Catholic schools. *Id.* ¶¶ 10, 11, 13.

In 1917-18, a Constitutional Convention was convened and the Massachusetts Constitution was amended. As part of those amendments, the Anti-Aid Amendment was extended to encompass not just private schools, but also private charitable institutions and certain other private institutions.<sup>6</sup> *See* Appendix Tab 1.<sup>7</sup>

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<sup>5</sup> The Anti-Aid Amendment was initially approved by the Constitutional Convention of 1853, shortly before the Know-Nothings came to power, but was rejected by the voters in 1853 by a narrow margin. Mulkern Decl. ¶¶ 4-6. The rejected Anti-Aid Amendment was "a gratuitous swipe, under the guise of separation of church and state, at Catholic Bay Staters," because no aid for Catholic schools had been sought. *Id.* ¶ 4. The defeat of the constitution was widely blamed on Catholics. *Id.* ¶ 6. The Know-Nothings, upon winning the legislature, took the defeated Anti-Aid Amendment, approved it, and submitted it to the people, who ratified it. *Id.* ¶ 13.

<sup>6</sup> Plaintiffs have set forth in detail in the materials supporting their motion for preliminary injunction the evidence detailing the evidence that the 1917 amendment to the Anti-Aid Amendment was also a product of religious bigotry. *See also* Declaration of Charles L. Glenn ¶ 14 ("the action of the Massachusetts Constitutional Convention in 1917-18 in adopting the 'Anti-Aid Amendment' was clearly motivated by a prejudicial understanding of the place of ethnic and religious minorities in order to impose a state-endorsed orthodoxy of beliefs and loyalties.") (This declaration is attached for the convenience of the Court at Tab 5. Plaintiffs hereby incorporate that evidence herein. However, Plaintiffs do not rely on the fact that the 1917 amendment to the Anti-Aid Amendment was motivated by religious bigotry as a basis for relief in this motion.

## **B. History of the Religious Exclusion and Anti-Aid Exclusion**

The 1917-18 Massachusetts Constitutional Convention added Article 48 to the Massachusetts constitution, which establishes the initiative petition process in Massachusetts. *See* Appendix Tab 1. Article 48 excludes certain matters from being presented to voters by the initiative petition process. Two of those exclusions, the Religious Exclusion and the Anti-Aid Exclusion, are at issue in this case.

The Religious Exclusion excludes any initiative petition “that relates to religion, religious practices or religious institutions.” *See id.* The Religious Exclusion was introduced in the Constitutional Convention as its own amendment to Article 48 and was debated on its merits and adopted on its own. *See II Debates in the Massachusetts Constitutional Convention 1917-1918 (“II Debates”)* at 766-770.

The Anti-Aid Exclusion insulates the Anti-Aid Amendment from repeal through the initiative petitions process by excluding any initiative petitions that attempt to amend the Anti-Aid Amendment. *See* Appendix Tab 1 (“Neither the eighteenth amendment of the constitution [*i.e.*, the Anti-Aid Amendment], as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.”). The Anti-Aid Exclusion was similarly introduced in the Constitutional Convention as its own amendment to Article 48 and was debated on its merits and adopted on its own. *See II Debates* at 981-997.<sup>8</sup>

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<sup>7</sup> The Anti-Aid Amendment was amended again in 1974. *See* Appendix Tab 1.

<sup>8</sup> On November 10, 1917, 4 days after the voters approved the Anti-Aid Amendment, *The Pilot*, the official newspaper of the Archdiocese of Boston, published an editorial entitled “Nothing is Settled.” Declaration of Carmen M. Guerricigoitha, Attachment B (Tab 6). The editorial decried the Anti-Aid Amendment as based on anti-

### **C. The Anti-Aid Amendment Has Been Applied in a Discriminatory Manner.**

The refusal to certify Plaintiffs' initiative petition because it sought state funding for students attending private schools, *see infra*, is only the latest example of the Commonwealth's strict and rigorous enforcement of the Anti-Aid's prohibition of state funds going to private primary and secondary schools. *See Opinion of the Justices*, 401 Mass. 1201 (Mass. 1987) (holding that proposed bill to allow parents of children attending private schools to receive a tax deduction for educational expenses is not permitted under the Anti-Aid Amendment); *Haddad v. School Committee of Worcester*, 376 Mass. 51 (Mass. 1978) (prohibiting, under Anti-Aid Amendment, loan of textbooks to private schools); *Bloom v. Springfield*, 376 Mass. 35 (Mass. 1978) (prohibiting, under Anti-Aid Amendment, the provision of textbooks to private primary and secondary schools); *Opinion of the Justices*, 357 Mass. 846 (Mass. 1970) (holding that proposed bill authorizing payment of \$100 a year to all students attending primary and secondary schools, public and private, is not permitted under the Anti-Aid Amendment); *Opinion of the Justices*, 357 Mass. 836 (Mass. 1970) (holding that proposed bill that would reimburse private schools for cost of providing secular educational services is not permitted under the Anti-Aid Amendment).

But although the Commonwealth strictly enforces the terms of the Anti-Aid Amendment when it comes to the funding of private schools, the Commonwealth regularly flouts the terms of the Anti-Aid amendment with respect to other private

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Catholic bigotry, and called on Catholics to work to amend the Constitution to remove it. On November 14th—four days after the editorial was published—Mr. Curtis, the chairman of the committee that reported the Anti-Aid Amendment, *see* Bridgman, *The Massachusetts Constitutional Convention of 1917* (Boston 1923) at 23, introduced the language cited above excluding the Anti-Aid Amendment from the initiative, and it was adopted. *II Debates*, at 996.

institutions that should, under the plain language of the Anti-Aid Amendment, be precluded from receiving public funds.

Undisputed evidence provides numerous examples of such funding. For example, an examination of the fiscal year 2000 and 2001 budgets for the Commonwealth revealed at least 50 instances of appropriations of public funds for charitable and other private institutions (but not private primary and secondary schools) that are barred from receiving such funds by the Anti-Aid Amendment by its own terms. *See* Gaubatz Decl. ¶ 2 and Ex. A.<sup>9</sup> Examination of the Commonwealth budgets for fiscal years 1998, 1999, and 2002 reveals a similar pattern of appropriations for charitable and other private institutions (but not private and primary secondary schools) barred from receiving funds by the Anti-Aid Amendment. *See id.* ¶ 2. Similarly, an examination of the list of grantees of the Massachusetts Historical Commission (a public instrumentality) for the years 1995-2000<sup>10</sup> and the Massachusetts Cultural Council (an instrumentality of the Commonwealth) for fiscal year 2001<sup>11</sup> reveals hundreds of examples of public funds being provided to private charitable and other institutions that are barred from receiving public funds by the Anti-Aid Amendment. *See id.* ¶¶ 5-6 and Exs. E-F. *See also id.* ¶ 7 and Ex. G (detailing funding of non-profit immigrant and refugee domestic violence

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<sup>9</sup> Among others, the Commonwealth funded the New England Shelter for Homeless Veterans in the City of Boston, the YWCA, Billerica Boys and Girls Club, Boston Rescue Mission, Our Father's House, Cambridge Salvation Army, American Red Cross, Quincy Interfaith Sheltering Coalition, Somerville Homeless Coalition, Big Brothers and Sisters of Cape Cod and the Islands, Freedom Trail Foundation, Friendly House Center of Worcester. *See* Gaubatz Decl. ¶ 2 and Ex. A.

<sup>10</sup> Among hundreds of others, the Massachusetts Historical Commission funded numerous churches, despite the Anti-Aid Amendment's facial restriction on funding of "religious" undertaking[s]." Gaubatz Decl. Ex. E.

<sup>11</sup> Among hundreds of others, the Massachusetts Cultural Council funded numerous museums and various performing art associations. Gaubatz Decl. Ex. F.

centers by the Massachusetts Department of Public Health, an instrumentality of the Commonwealth); *id.* ¶ 8 and Ex. H (detailing funding of non-profit Rape Crisis Centers by the Massachusetts Department of Public Health); Wirzburger Decl. ¶ 13 (describing the provision of public funds by the Massachusetts Health and Educational Facilities Authority, a public instrumentality, and the Massachusetts Development Finance Agency, also a public instrumentality, to private charitable and other institutions barred from receiving public funds by the Anti-Aid Amendment).

So pervasive is the Commonwealth's violation of the terms of the Anti-Aid Amendment when it comes to funding private institutions (other than private schools), that in response to a request by the Plaintiffs, the Commonwealth, to date, *has not been able to identify a single example in the last five years of a non-school, non-public entity ever being denied funds by an agency of the Commonwealth in order to comply with the Anti-Aid Amendment.* See Gaubatz Decl. ¶ 9 and Ex. I.

Although seemingly *ultra vires*, the Commonwealth's routine violation of the terms of the Anti-Aid Amendment by funding private institutions (other than private schools) is done with the explicit approval of the Massachusetts Supreme Judicial Court. See *Helmes v. Commonwealth*, 406 Mass. 873 (1990) (permitting appropriation of public funds to a private charitable organization restoring a battleship despite the terms of the Anti-Aid Amendment). In *Helmes*, the Court held that despite the express terms of the Anti-Aid Amendment, it would permit public funding of a private charitable institution in violation of the explicit language of the Anti-Aid Amendment. Though recognizing that the Anti-Amendment on its face bars appropriations to all private charitable groups, the Court held that "[t]he anti-aid amendment was focused on the practice of granting public

aid to private schools,” *id.* at 877, and that therefore the criteria for determining the permissibility of an appropriation “must be redefined” consistent with its original focus. *Id.* at 878. In holding that the Anti-Aid amendment must be interpreted consistent with its historical focus of prohibiting public aid of private schools, the Court could only have been referring to the original Know-Nothing amendment (which did exclusively focus on the funding of private schools), for the 1917 debates involved revisions that *extended* the Anti-Aid amendment to *other* types of private charitable institutions. Thus, the indisputable bigotry of the Know-Nothings continues to taint the Commonwealth’s interpretation of its constitutional provisions.

**D. Plaintiffs’ Initiative Petition Is Excluded from the Initiative Petition Process**

On July 28, 1999, Plaintiff Susan Wirzburger, along with fourteen others, submitted a citizen initiative petition (“Initiative Petition 99-2”) to the Attorney General that would modify Massachusetts’ Anti-Aid Amendment by adding a sentence stating that nothing in the Anti-Aid amendment shall prevent the Commonwealth from providing loans, grants, or tax benefits to students attending private schools, regardless of the religious affiliation of those schools. *See* Wirzburger Decl., ¶ 8 and Ex. F. On September 1, 1999, Attorney General Reilly issued a letter denying certification of that petition on the basis of the Religious Exclusion and the Anti-Aid Exclusion. *Id.* ¶ 8 & Ex. G. Attorney General Reilly’s predecessor had issued similar letters in response to two previous similar initiative petitions submitted by Plaintiffs and other signers. Wirzburger Decl. ¶¶ 2-4.

This Court, on September 2, 1999, issued an injunction requiring the Attorney General to release a summary of Initiative Petition No. 99-2 to the Secretary of the

Commonwealth and ordering the Secretary to release blank petition forms to the Plaintiffs and take all other steps he would have been required to take under Amendment Article 48 had the petition been certified.

Plaintiffs were given signature forms pursuant to the injunction, and they and others gathered more than 80,000 signatures. Wirzb. Decl. ¶ 11. On December 15, 1999, Secretary Galvin sent them a letter stating that they had submitted 78,342 properly certified signatures, substantially more than the 57,100 signatures required. *Id.* Secretary Galvin then, pursuant to this Court’s injunction, transmitted Initiative Petition 99-2 to the Clerk of the House of Representatives. *Id.* The Counsel to the Senate sent a letter to the Senate Clerk stating that the Clerk should take no action on the Petition, relying on the Attorney General’s letter of September 1, 1999 that he could not certify the petition because to do so would violate Article 48’s Religious Exclusion and Anti-Aid Exclusion. Wirzb. Decl. ¶ 12. The Senate Counsel concluded that “so long as this determination by the Attorney General remains in force, I advise you to take no further action with respect to this initiative petition.” *Id.* As a result, a joint session of the Legislature did not act on Initiative Petition 99-2 and, as this Court noted, it “is therefore ‘dead.’” February 12, 2001 Memorandum and Order at 9.<sup>12</sup>

## II. STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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<sup>12</sup> This Court ruled in its February 12, 2001 order that Plaintiffs have been injured by the Religious Exclusion and the Anti-Aid Exclusion and therefore have standing to pursue their claims that those provisions of Article 48 of Massachusetts’ Constitution violate their rights under the First and Fourteenth Amendment. *Id.* at 8-10.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the court must examine the record evidence “in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party.” *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir.2000).

### III. ARGUMENT

Plaintiffs’ fundamental right to freedom of expression, free exercise of religion and equal protection of the laws are at stake in this case. Plaintiffs’ core political speech is afforded the highest protection under the First Amendment’s Free Speech Clause. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988). The Free Speech Clause provides that this political speech may not be suppressed on the basis of viewpoint discrimination, the most invidious and egregious of all types of censorship. *See, e.g., Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). The Free Exercise Clause requires neutral treatment of religion and forbids excluding Plaintiffs from access to a government benefit on the basis of religion. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978). The Equal Protection Clause protects Plaintiffs from distortions in the political process that make it more difficult for a suspect class, like religion, to achieve beneficial legislation. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982). For the reasons set forth below, Plaintiffs are entitled to summary judgment because the undisputed evidence establishes that the Religious Exclusion and the Anti-Aid Exclusion violate each and every one of these bedrock constitutional principles.

**A. The Religious Exclusion and the Anti-Aid Exclusion Suppress Core Political Speech in a Viewpoint Discriminatory Manner in Violation of the Free Speech Clause.**

No speech is given higher protection under the First Amendment’s Free Speech Clause than “core political speech.” *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988). No form of censorship is more egregious and invidious than viewpoint discrimination. *See Rosenberger v. Rectors and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). Massachusetts, however, employs these shameful tools of viewpoint discrimination to suppress the right of Plaintiffs and other citizens of Massachusetts to engage in this most protected form of free expression under the First Amendment. Specifically, both the Religious Exclusion and the Anti-Aid Exclusion bar political expression from the Massachusetts initiative petition process based on its viewpoint.

What is at stake in this case, then, is the Plaintiffs’ fundamental constitutional right to engage in core political expression that is free from the shackles of viewpoint discrimination. Before describing the exact nature of the viewpoint discrimination practiced by the Religious and Anti-Aid Exclusions, it is necessary to fully describe the constitutional importance of the speech suppressed by Massachusetts in this case.

Supreme Court precedent leaves little doubt that vital First Amendment principles are at stake when the restricted speech involves political expression. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 196 (1966) (political expression is at the center of the rights protected by the First Amendment). “It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (citation and quotations omitted). The First Amendment ensures that “debate

on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369 (1931). “[T]here is practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Burson*, 504 U.S. at 196 (citations and quotations omitted). In short, the First Amendment’s protection of speech is “at its zenith” when the speech at issue is “core political speech.” *Meyer*, 486 U.S. at 422, 425.<sup>13</sup>

Massachusetts’ initiative petition process creates a forum<sup>14</sup> for core political speech in which groups of citizens may attempt to persuade their fellow citizens to enact

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<sup>13</sup> As one learned commentator has written: “An insistence that government’s burden is greatest for regulating political speech is based on a sensible view of government’s incentives. It is in this setting that government is most likely to be biased or to be acting on the basis of illegitimate, venal, or partial considerations. Government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake. It follows that the premise of distrust of government is strongest when politics is at issue. And when the premise of distrust is strongest, the burden of justification is highest.” CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 134 (1993).

<sup>14</sup> Although the initiative petition process may be “more a forum [in which speech occurs] in the metaphysical than in a spatial or geographic sense, . . . the same [First Amendment] principles are applicable.” *Rosenberger*, 515 U.S. at 830 (describing a state-funded university’s student activity fund as a forum in which speech, protected by the First Amendment, occurred); see also *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 842-46 (6<sup>th</sup> Cir. 2000) (City’s Internet home page constituted a forum); *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, No. CIV A. 96-1834, 1996 WL 296538, at \*11-12 (E.D. Pa. June 4, 1996).

laws that will implement political change. In particular, Massachusetts' initiative petition process provides avenues for political expression in at least four different ways. *First*, though it is an obvious point, the language of a proposed initiative is itself political speech. *Cf. James v. Valtierra*, 402 U.S. 137, 141 (1971) (initiative process “gives citizens a voice on matters of public policy”).

*Second*, the initiative petition process provides an opportunity for citizens to circulate initiative petitions to try and qualify a particular measure for the ballot. Petition circulation is “core political speech” protected by the First Amendment because it represents “interactive communication concerning political change.” *Meyer*, 486 U.S. at 422.

*Third*, once the requisite number of signatures have been secured and the Attorney General has certified a petition, the initiative petition process provides an opportunity for citizens to engage in the quintessential political speech of lobbying legislators, as the process requires the vote of at least 25% of the members of two successive Massachusetts Legislatures in order to qualify for the ballot. Attempting to persuade legislators to vote for the initiative necessarily involves “the expression of a desire for political change and a discussion of the merits of the proposed change” which are “core political speech.” *Meyer*, 486 U.S. at 421.

*Fourth*, once an initiative petition is on the ballot, there is the opportunity to engage in political expression of all sorts—*e.g.*, one-on-one direct communication, leafleting, paid political advertising, public debate—in attempting to persuade citizens to vote for the petition. Again, such speech will involve the expression of a desire for political change and a discussion of the merits of the proposed change” which are “core

political speech.” *Meyer*, 486 U.S. at 421. In sum, the initiative petition process creates a forum for political expression that lies “at the heart of the First Amendment’s protection.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Having created the initiative petition process as a forum for core political speech, the regulation of that forum, like any other, is subject to constitutional constraints.<sup>15</sup> See *Velazquez*, 531 U.S. at 547-48 (holding that although Congress had not been required to create the Legal Services Corporation, it could not create a forum to speak and then impermissibly regulate that speech based on content or viewpoint); *Widmar*, 454 U.S. at 267-68 (holding that the University, having created a forum, “assumed an obligation to justify its discriminations and exclusions [of speech] under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, *even if it was not required to establish that forum in the first place.*”) (emphasis added); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (once a government creates a forum for expressive activity it would “violate the First Amendment [if] it denies access to a speaker solely to suppress the point of view he espouses”). And one of those constraints that Massachusetts must respect, regardless of whether the initiative petition process is deemed to be a limited or non-public forum, is that access to that forum may not be restricted upon the basis of viewpoint. See, e.g., *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 385, 392-94 (1993) (holding that First Amendment’s prohibition against viewpoint discrimination

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<sup>15</sup> It is true, of course, that Massachusetts could have elected not to have an initiative petition process at all, but having elected to provide that forum, the Commonwealth must abide by the Constitution when it seeks to regulate access to that forum. See *Meyer*, 486 U.S. at 425 (expressly rejecting the argument that “the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.”)

applies even in non-public forums). *See also Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11<sup>th</sup> Cir. 1996) (“We obviously would be concerned about the free speech and freedom-of-association rights were a state to enact initiative regulations that were *content based or had a disparate impact on certain political viewpoints.*”) (emphasis added).<sup>16</sup>

The First Amendment generally prohibits government from forbidding speech “because of disapproval of the ideas expressed.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger*, 515 U.S. at 828. Viewpoint discrimination is “an egregious form of content discrimination. The government must abstain from regulating speech when, as here, the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Id.* at 829.

Because of the core political speech interests involved, the Supreme Court has consistently held that even minor restrictions on access to a local ballot initiative process violate the First Amendment. For instance, in *Meyer* the Supreme Court overturned a state prohibition against paying circulators of initiative petitions because it unduly “restrict[ed] *access* to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” 486 U.S. at 425 (emphasis added). And, the Supreme Court recently reaffirmed in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999), that courts must be “vigilant” to “guard [local ballot initiative processes] against undue hindrances to

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<sup>16</sup> Though Plaintiffs do not believe the Court need reach the question whether the initiative petition process is a limited or non-public forum, the standard set out in *Cornelius* clearly establishes that it is a limited public forum in which all forms of content restrictions, not just viewpoint discrimination, are subject to strict scrutiny.

political conversations and the exchange of ideas.” The vigilance courts must practice to protect core political speech is even more heightened when the government seeks to censor speech based on viewpoint.

Here, the Religious Exclusion and the Anti-Aid Exclusion are the heaviest of all possible encumbrances on Plaintiffs’ First Amendment right “freely to engage in discussions concerning the need for [political] change” in the forum of their choice, *Meyer*, 486 U.S. at 421, because, as explained below they deny altogether Plaintiffs’ access to the initiative petition process based on *viewpoint*.

1. The Religious Exclusion Constitutes Impermissible Viewpoint Discrimination.

- a. *The Religious Exclusion Triggers Strict Scrutiny.*

The Supreme Court’s holding in *Rosenberger* requires a conclusion that the Religious Exclusion of the Anti-Initiative Amendment constitutes impermissible viewpoint discrimination. In *Rosenberger*, the Court concluded that a University’s categorical exclusion of religious ideas, whether favorable or unfavorable to religion, from an otherwise broad forum constituted viewpoint discrimination. *Id.* at 831. The Court described the proper analytical framework to take to suppression of religious ideas as follows: “It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint. . . . We conclude, nonetheless that here, as in *Lamb’s Chapel*, viewpoint discrimination is the proper way to interpret the University’s objections to [the Christian publication]” pursuant to its policy. *Id.* at 831. *See also Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 393 (“total ban” of religious

viewpoints in forum constituted viewpoint discrimination); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (same).

Here, as a result of the Religious Exclusion, Defendants categorically exclude religious ideas – “an entire class of viewpoints,” *Rosenberger*, 515 U.S. at 831 – from the government forum that is the initiative petition process. Under this exclusion, the government examines the content of an initiative to determine whether that speech may be permitted in the forum. If that examination reveals any religious ideas, the speech is purged from the forum for that very reason. None of these facts is in dispute.

Moreover, the fact that the Religious Exclusion may act to exclude speech expressing viewpoints both favorable and unfavorable to religion, far from insulating it from a finding of viewpoint discrimination, only points out that the Religious Exclusion discriminates against an entire class of viewpoints. That conclusion follows from *Rosenberger*, where it was undisputed that the University’s policy excluded viewpoints that were both favorable *and* hostile to religion. *See id.* at 831-32. Nonetheless, the Court rejected the argument that “no viewpoint discrimination occurs because the [policy] discriminate[s] against an entire class of viewpoints.” *Id.* at 831. The Court emphatically stated that the “declaration that debate is not skewed so long as multiple voices are silenced is simply wrong: the debate is skewed in multiple ways.” *Id.* at 831-32.

Although the terms of the Religious Exclusion are sufficient alone to find that it targets speech based on a religious viewpoint, the record of the 1917-18 Constitutional Convention confirms that the purpose of the exclusion was to drive religious ideas out of

public discourse involving initiatives, if not more broadly. Mr. Swig of Taunton, the sponsor of the Religious Exclusion, expressed his purpose as being to:

protect the initiative and referendum against the religious fanatics and against the professional religionists. We have some men in politics who make religion a profession. *They try to get their political preferment because of their religious belief, and get on the housetops and instead of proclaiming their political beliefs proclaim their religious beliefs.* I am endeavoring, by means of my amendment, to protect the initiative and referendum from the efforts that will be made by religious fanatics and these professional religionists, to drag constantly before the people these religious fights.

*II Debates in the Massachusetts Constitutional Convention of 1917-18*, 767 (emphasis added).

Mr. Anderson of Newton affirmed Mr. Swig's hostility to religious speech in the initiative petition process in explaining the supposed virtues of the Religious Exclusion: "religion has no place in politics at all. I think that we ought to make it as difficult as possible to bring religious questions into the politics of this State. I shall vote for this Amendment." *Id.* at 769. *See also Collins v. Secretary of the Commonwealth*, 407 Mass. 837, 845 (Mass. 1990) (finding that the "intent and understanding" of the Constitutional Convention in adopting the religious exclusion was to "avoid . . . political discussion of matters related to religion.").

In short, in the words of the exclusion's sponsor, the Religious Exclusion's intent is to permit initiative petition speech proclaiming so-called "political beliefs," but to prohibit from the forum speech "proclaim[ing] . . . religious beliefs." *II Debates* at 767. In other words, secular political ideas and messages are permitted in the initiative petition process, but as soon as the ideas involve religion, that entire class of viewpoints is excluded. This type of prohibition on speech, which targets some political messages for

exclusion but not others, is viewpoint discrimination.<sup>17</sup> See *R.A.V.*, 505 U.S. at 392 (the government “has no . . . authority to license one side of a debate to fight freestyle while requiring the other to follow Marquis of Queensberry rules.”); see also *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”).<sup>18</sup>

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<sup>17</sup> That the exclusion from the initiative petition process of any measures or laws relating to “religion, religious practices, or religious institutions” amounts to viewpoint discrimination can also be readily seen by substituting the word “religion” with “socialism.” Just as excluding speech that relates to “socialism, socialist practices, or socialist institutions” amounts to viewpoint discrimination, so too does excluding speech because it relates to religion, religious practices, or religious institutions.

<sup>18</sup> Moreover, the vastly under-inclusive and selective approach Massachusetts has taken to promote its supposed interest of protecting the initiative petition process from “potentially controversial and divisive issues,” see Defs. Opp to Prelim. Inj. at 63, also demonstrates the viewpoint discrimination implemented by the Religious Exclusion. That conclusion follows from *Aids Action Comm. of Mass, Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1 (1<sup>st</sup> Cir. 1994). At issue in that case was the government’s practice of refusing, on the grounds that its policy was not to run any sexually suggestive advertisements, to display condom advertisements in public subway and trolley cars, while it was simultaneously running sexually suggestive movie advertisements. *Id.* at 10. The First Circuit held that the government practice gave rise to an impermissible inference of viewpoint discrimination because the proscribed speech and the permitted speech were alike in ways that undermined the justification asserted in support of the restriction. *Id.* at 11. Here, Massachusetts has opened the initiative petition process to several controversial issues and viewpoints, such as initiatives addressing affirmative action, see Gaubatz Decl. Ex. O (Initiative 95-22); term-limits, see *id.* Exs. M & O (Initiatives 91-4, 97-2, and 97-3), proper taxation, see *id.* Ex. O (Initiatives 97-6, 99-7, and 01-21) defense of marriage, see *id.* Ex. O (Initiative 01-09) and English as a second language instruction in schools, see *id.* Ex. O (Initiative 01-12). See also Gaubatz Decl. ¶¶ 12-15 Exs. L-O (setting forth initiative petitions that have been certified). Therefore, because, like *Aids Action*, the proscribed speech and the permitted speech are alike in ways that undermine the justification (*i.e.*, avoiding controversy) asserted in support of

b. *The Religious Exclusion Cannot Withstand Strict Scrutiny.*

Viewpoint based restrictions are “presumptively invalid” and rarely, if ever, will withstand strict scrutiny review. *R.A.V.*, 505 U.S. at 382; *Rosenberger*, 515 U.S. at 830 (viewpoint restrictions are “presumed impermissible”). Moreover, the burden of justifying such limitations on speech is even higher where, as here, there is a restriction of “core political speech” for which the First Amendment’s protection is “at its zenith.” *Meyer*, 486 U.S. at 422, 425.<sup>19</sup> To pass strict scrutiny a law must be necessary to serve a compelling governmental interest by the least restrictive means available. *See R.A.V.*, 505 U.S. at 395.

The Religious Exclusion cannot withstand strict scrutiny.<sup>20</sup> The Supreme Court of Massachusetts has identified the primary interest served by the Religious Exclusion to be “prevent[ing] the initiative and referendum process from becoming a vehicle for public political debate, and enactment or rejection of laws involving religion, religious practices, or religious institutions.” *Collins v. Secretary of the Commonwealth*, 407

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the restriction, the Religious Exclusion amounts to impermissible viewpoint discrimination.

<sup>19</sup> The full and free exchange of ideas is vital to the democratic process and viewpoint discrimination that interferes with such an exchange severely undermines that process. As the Court found in *Rosenberger*, “[f]or the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.” 515 U.S. at 836. The disfavored viewpoint in *Rosenberger* was religion, as it is here, and the risk from state disapproval of religious viewpoints is arguably even greater than in *Rosenberger* because here the risk is not just to the Nation’s intellectual life, but to the democratic process by which people determine what laws will govern them.

<sup>20</sup> Even if this Court were to conclude that the Religious Exclusion does not discriminate based on viewpoint or content, its restrictions on speech must still be reasonable. *See Cornelius*, 473 U.S. at 800. None of the interests asserted by the Defendants meets even that hurdle.

Mass. 837, 849 (1990). The Defendants have explained that preventing such political debate is necessary to “prevent direct popular lawmaking on potentially controversial and divisive issues.” Defs. Opp. to Prelim. Inj. at 63. This does not remotely approach a compelling governmental interest.

As an initial matter, it is well-established that:

[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.

*Lukumi*, 508 U.S. at 547 (citing several First Amendment cases) (internal quotation omitted); *see also Aids Action Comm.*, *supra* at 10-11 (underinclusive regulatory approach to achieving a government interest will not suffice to justify viewpoint discrimination). Here, Massachusetts has opened up the forum that is the initiative petition process to numerous controversial issues and viewpoints, such as initiatives expressing viewpoints on such as initiatives addressing affirmative action, *see* Gaubatz Decl. Ex. O (Initiative 95-22); term-limits, *see id.* Exs. M & O (Initiatives 91-4, 97-2, and 97-3), proper taxation, *see id.* Ex. O (Initiatives 97-6, 99-7, and 01-21) defense of marriage, *see id.* Ex. O (Initiative 01-09); regulating medical marihuana use, *see id.* Ex. O (Initiative 99-14); and English as a second language instruction in schools, *see id.* Ex. O (Initiative 01-12).<sup>21</sup> Allowing these other controversial initiatives, which do appreciable damage to the supposed interest of avoiding popular law-making on controversial and

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<sup>21</sup> Any review of past initiatives that have been certified reveals that the initiative petition process has consistently been open to controversial topics from the time it was first instituted. *See* Gaubatz Decl. ¶¶ 12-15 Exs. L-O (setting forth initiative petitions that have been certified).

divisive issues, fatally undermines Defendants' assertion that the Religious Exclusion serves a compelling interest.

Not only is the Religious Exclusion fatally underinclusive, but it is impermissibly *overbroad* as well. *See Lukumi*, 508 U.S. at 546 (“the absence of narrow tailoring” where a law suppresses more protected activity than necessary to protect an asserted interest “suffices to establish the invalidity of the ordinances”) (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987)). It is self-evident that not every possible initiative relating to religion, religious practices, or religious institutions has the potential to create controversy and divisiveness. For example, an initiative petition setting forth generally applicable fire codes for different classes of buildings, including churches, would be unlikely to produce great political strife.

Moreover, far from justifying the differential treatment, the assertion that there is something about religious ideas and speech that makes them more suited for being discussed in forums other than the initiative petition process only serves to highlight the disfavored status of and discrimination against religious viewpoints. The Supreme Court has certainly rejected this argument. *See McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978) (“That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and association.”) (Brennan, J. concurring). Though the Constitutional Convention may have believed religious ideas presented a danger that

should be kept out of the initiative petition process, the government may not now<sup>22</sup> “[a]im at the suppression of dangerous ideas.” *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983).<sup>23</sup> See also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”). Instead, the purpose of the First Amendment is to “assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” *Velazquez*, 531 U.S. at 548 (citation and quotations omitted), and “debate on public issues” that is “uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S. at 270.

The other reason advanced by Defendants for the Religious Exclusion—avoiding the passage of laws that “might” violate the Establishment Clause, *see* Defs. Opp. to Prelim. Inj. at 63—also fails to satisfy strict scrutiny. As an initial matter, separationist concerns over government action that falls short of an actual Establishment Clause violation are not sufficiently compelling to justify viewpoint discrimination. *See Widmar v. Vincent*, 454 U.S. 263, 277-78 (1981) (“greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise

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<sup>22</sup> Of course, the Free Speech Clause of the First Amendment did not apply against Massachusetts at the time of the 1917-18 Constitutional Convention, as it was not incorporated against the states until 1927. *See Fiske v. Kansas*, 274 U.S. 380. However it is unquestionable that the Religious Exclusion and Anti-Aid Exclusion, like any other state law, are now subject to those constraints.

<sup>23</sup> The Supreme Court has also stated that the notion that religious people must be forced to stick to their business and stay out of politics—the basis identified by the Constitutional Convention for the Religious Exclusion—is invalid under the First Amendment. *See Bellotti*, 435 U.S. at 784-85. (“If a legislature may direct business corporations to ‘stick to business,’ it may also limit other corporations—*religious*, charitable, or civic—to their respective ‘business’ when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.”) (emphasis added).

Clause . . . [and] by the Free Speech Clause”); *see also Good News*, 533 U.S. at 112-119; *Rosenberger*, 515 U.S. at 837-46; *Lamb’s Chapel*, 508 U.S. at 394-95. In all of those cases, the government urged that the discrimination furthered the interest of separation of church and state. And in all of those cases, the Court rejected that argument that this could be a compelling justification.

Moreover, because there is no basis for finding that any significant proportion of initiatives relating to religion, religious practices, or religious institutions would violate the Establishment Clause, excluding *all* such initiatives from the forum that is the initiative petition process is not the most narrowly tailored means of advancing an interest in avoiding Establishment Clause violations, even assuming that interest is a compelling one. A more narrowly tailored means would be to exclude only those measures and laws that would *actually* violate the Establishment Clause.<sup>24</sup>

2. The Anti-Aid Exclusion Constitutes Impermissible Viewpoint Discrimination.

a. *The Anti-Aid Exclusion Triggers Strict Scrutiny.*

In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Supreme Court found viewpoint discrimination in circumstances directly analogous to those presented here. At issue in *Velazquez* was a provision of the Legal Services Corporation Act that barred legal aid lawyers who received federal funds from seeking to “amend or otherwise challenge existing welfare laws.” *Id.* at 538. The Court held that this prohibition on

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<sup>24</sup> Obtaining a judicial opinion as to whether any proposed initiative violated the Establishment Clause before it was certified for consideration by the Legislature or put before the people could be easily accomplished through the means the Massachusetts Constitution provides for the Supreme Judicial Court to offer advisory opinions on potential laws. *See* Mass. Const. Pt. 2, C. 3, Art. 2.

private speech—*i.e.*, speech seeking to amend existing law—constituted impermissible viewpoint discrimination. *Id.* at 538, 540. The Court conceded that Congress was not required to establish the forum at issue, *i.e.*, a fund for attorneys to represent indigent clients. *Id.* at 548. Nonetheless, the Court held that once Congress did so, the First Amendment’s proscription of viewpoint discrimination prohibited it from restricting speech designed to amend or change existing law. *See also Velazquez v. Legal Services Corp.*, 164 F.3d 757, 770 (2d Cir. 1999), *aff’d* 531 U.S. 533 (2001) (the restriction forbidding speech to amend existing law constitutes viewpoint discrimination because it “discourages challenges to the status quo”). “Where private speech is involved,” the government “cannot aim[] at the suppression of ideas thought inimical to the Government’s own interest.” *Velazquez*, 531 U.S. at 549 (citation omitted).

This case is indistinguishable from *Velazquez*. Massachusetts was not required to create an initiative petition process. Having done so, however, Massachusetts may not close that forum to exclude *viewpoints* that it finds unsuited for the initiative petition process. But the Anti-Aid exclusion does precisely that, explicitly and categorically excluding the “Pro-Aid” viewpoint<sup>25</sup> from the initiative process. Just like the provision in *Velazquez*, the Anti-Aid Exclusion prohibits private speech in the initiative petition process that challenges the status quo by expressing the viewpoint that existing law should be *amended*. Specifically, it prohibits attempts to change the status quo by amending the Anti-Aid Amendment to allow institutions (such as private schools) identified in the Anti-Aid Amendment to receive public funds.

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<sup>25</sup> That is, the viewpoint that the institutions identified in the Anti-Aid Amendment as being precluded from receiving public funds should not be so restricted from receiving funds.

This viewpoint discrimination is even more apparent when one considers that Massachusetts otherwise allows initiatives on the *subject* of which institutions or types of institutions may receive or not receive public money.<sup>26</sup> For example, an initiative could be brought to restrict (or remove restrictions on) public funds going to such entities as tobacco companies, private sports teams, or private, for-profit companies generally. However, the Anti-Aid Exclusion singles out those viewpoints expressing a desire to amend public funding restrictions for the institutions identified in the Anti-Aid Amendment and prohibits only those viewpoints from the initiative petition process. That disparate treatment is viewpoint discrimination. *See Cornelius*, 473 U.S. at 806 (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”).

As the Court in *Velazquez* pointed out, the viewpoint discrimination present in the suppression of speech that would amend existing law undermines core values of the First Amendment. *See Velazquez*, 531 U.S. at 548 (“It is fundamental that the First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (quoting *Sullivan*, 376 U.S. at 269). *See also Texas v. Johnson*, 491 U.S. 397, 411 (1989). (“[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values.”); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of

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<sup>26</sup> It is true that Massachusetts citizens may not use the initiative petition process to pass laws compelling specific appropriations. *See Associated Industries of Mass. v. Secretary of the Commonwealth*, 595 N.E.2d 282, 285 (Mass. 1992) (citing Article 48 § 2). However, that exclusion does not preclude citizens from using the initiative process to pass laws determining what institutions or what general categories of institutions may or may not receive appropriations.

the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”) (Jackson, J., concurring). Moreover, the viewpoint discrimination implemented by the Anti-Aid Exclusion is even more egregious than in *Velazquez* because the speech restricted here is not just speech by legal advocates, but “core political speech” by the people themselves. *See Meyer, supra*.

b. *The Anti-Aid Exclusion Cannot Withstand Strict Scrutiny.*

None of the interests asserted by Defendants is sufficient to withstand strict scrutiny.<sup>27</sup> The Anti-Aid Exclusion According to Defendants, the Anti-Aid exclusion “was adopted for the express purpose of preventing direct popular action to repeal that portion of the Anti-Aid Amendment barring public aid to private, non-religious institutions.” Defs. Opp. to Prelim. Inj. at 16. This explanation hardly amounts to a compelling interest sufficient to satisfy strict scrutiny. To the contrary, the explanation again serves only to highlight a deliberate decision to single out a particular viewpoint for disfavored treatment.

Defendants also suggest that the Anti-Aid Exclusion was somehow necessary because the “inflexibility” of the initiative petition process is ill-suited for the “complexity of the issues” presented by an initiative relating to the Anti-Aid Amendment. *See* Defs. Opp. to Prelim. Inj. at 62. This is not a compelling government interest. Massachusetts allows all sorts of “complex” issues to be debated and decided in

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<sup>27</sup> Even if this Court were to conclude that the Anti-Aid Exclusion does not discriminate based on viewpoint or content and decides that these provisions are merely time, place or manner restrictions, such restrictions on speech must still be reasonable. *See Cornelius*, 473 U.S. at 800. None of the interests asserted by the Defendants meets even that hurdle.

the initiative petition process. For example, a review of past initiatives that have been certified by the Attorney General as appropriate for the initiative petition process reveals numerous “complex” issues, including such issues as determining the proper income tax rate, *see* Gaubatz Decl. Ex. O (Initiatives 97-6 and 99-7), regulating public campaign financing, *see id.* Ex. O (Initiatives 97-20, 21, 22, 23, and 24); term limits, *see id.* Ex. O (Initiatives 97-2 and 97-3); providing compensation for patients injured during medical treatment, *see id.* Ex. M (Initiative 91-13), and act to regulate coal ash as solid waste 01-19). *See also* Gaubatz Decl. Exs. L-O. There is no basis for finding that initiatives amending the Anti-Aid Amendment would be any more complex than other initiatives that Massachusetts has allowed in the initiative petition process. Because the initiative petition process is open to all sorts of complex issues which do appreciable damage to the supposed interest of avoiding popular law-making on complex issues in the inflexible initiative petition process, Defendants’ assertion that the Anti-Aid Exclusion serves a compelling interest must be rejected. *See Lukumi*, 508 U.S. at 547 (“It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”).

**B. The Religious Exclusion Violates the Free Exercise Clause.**

The Religious Exclusion violates the most basic and fundamental requirement of the Free Exercise Clause, neutrality. The principle of neutrality and equal treatment of religion generally is firmly embedded in Free Exercise jurisprudence: “the First Amendment forbids an official purpose to disapprove of a particular religion *or of religion in general.*” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.

520, 532 (1993) (emphasis added). The Religious Exclusion, passed as protection “against the religious fanatics and against the professional religionists,” see *II Debates* at 767 and *infra*, fails this test.

As the Supreme Court has explained, “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs . . . or regulates or prohibits conduct because it is undertaken for religious reasons.” *Id.* See also *id.* at 534-35 (“The Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs”); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not . . . impose special disabilities on the basis of religious views or religious status”); *Davey v. Locke*, 299 F.3d 748, 750 (9<sup>th</sup> Cir. 2002) (“classification [that] facially discriminates against religion” and therefore “lacks neutrality” is void under the Free Exercise Clause). A law lacking the neutrality guaranteed by the Free Exercise Clause must be struck down unless it survives strict scrutiny. See *Lukumi*, 508 U.S. at 533.

An analysis of whether the Religious Exclusion fails neutrality begins with an examination of its text. See *Lukumi*, 508 U.S. at 533 (“To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.”). Here, the plain text of the Religious Exclusion betrays a facial purpose to disfavor religion by forbidding any initiatives relating to “religion, religious practices, or religious institutions” from the initiative petition process. There is no comparable exclusion disfavoring initiatives relating to all *secular* interests, practices, and institutions. As this Court pointed out in its prior order in this case, the language of

the Religious Exclusion “appears to disfavor religion explicitly.” February 12, 2001 Memorandum and Order at 8.

Moreover, although the discrimination against religion is clear from the face of the Religious Exclusion, the history of the Constitutional Convention’s adoption of the Religious Exclusion also reveals an intent to disfavor religion. *See Lukumi*, 508 U.S. at 542. (inquiry into whether a law lacks the neutrality required by the Free Exercise Clause may extend beyond the text of the law). Mr. Swig, the Religious Exclusion’s sponsor,

made his intent to single out religion for special disfavor clear: Now, then, why do I propose this amendment? I propose it because I feel that we are a Constitutional Convention met to adopt regulations governing the body politic, and not the body religious, and from the very first day that I crossed over the threshold of this floor I have been unable to understand why religion had anything to do with a body politic and that is why you found me among those who argued for the passage of the anti-aid amendment. ***Now I would protect the initiative and referendum against the religious fanatics and against the professional religionists.*** We have some men in politics who make religion a profession. They try to get political preferment because of their religious belief, and get on the housetops and instead of proclaiming their political beliefs proclaim their religious beliefs. I am endeavoring by means of my amendment, to protect the initiative and referendum from the efforts that will be made by religious fanatics and these professional religionists, to drag constantly before the people these religious fights.

*II Debates* at 767 (emphasis added). *See also id.* at 769 (“feeling, as I do, that religion has no place in politics at all, I think that we ought to make it as difficult as possible to bring religious questions into the politics of this State”) (statement of Mr. Anderson); *id.* at 768 (“all religious subjects would be handled better by considering them before the Legislature than . . . [by] making them the subject of a general discussion by the people at large.”) (statement of Mr. Curtis).

That the Religious Exclusion fails the neutrality requirement of the Free Exercise Clause also follows from the Supreme Court’s decision in *McDaniel v. Paty*, 435 U.S.

618 (1978). That case makes clear that a law that excludes access to a government benefit on the basis of religion violates the Free Exercise Clause. The *McDaniel* Court struck down a provision in the Tennessee Constitution that barred clergy members from serving as constitutional delegates. The Court held that the clergy disqualification provision imposed an impermissible disability on the basis of religion because individuals could not exercise their right to be a minister and to hold office at the same time. *See McDaniel*, 435 U.S. at 626 (“McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other . . . . In so doing, Tennessee has encroached upon McDaniel’s right to the free exercise of his religion.”).

The Ninth Circuit recently applied *McDaniel* in the context of a government scholarship program. *See Davey v. Locke*, 299 F.3d 748 (9<sup>th</sup> Cir. 2002). In *Davey*, the Ninth Circuit struck down a state statute that “facially discriminat[ed] on the basis of religion” by prohibiting students from receiving state scholarship funds simply because they chose to study religion. *Davey*, 299 F.3d at 750. The court held that a law conditioning eligibility for a scholarship on giving up the study of religion “lack[ed] neutrality for the same reason that Tennessee’s disqualification of ministers from public office, invalidated in *McDaniel*, lacked neutrality.” *Id.* at 753. “[T]he point of *McDaniel*,” the court held, is that “[a] state law may not offer a benefit to all (there to hold a public position; here to hold a Promise Scholarship), but exclude some on the basis of religion.” *Id.* at 754.

Thus, *McDaniel* and *Davey* establish that a state may not offer a benefit to all but exclude some from access to that benefit on the basis of religion. In this case, there is no

doubt that the initiative petition process affords Plaintiffs and other Massachusetts citizens a valuable benefit: citizens interested in passing a law that promotes their interests or ideas may bypass the normal legislative process and put the law directly to the people for approval. The Religious Exclusion, however, excludes citizens from access to that benefit on the basis of religion. While those who wish to pass laws addressing secular interests, secular practices, or secular institutions may take full advantage of the benefit afforded by the initiative petition process, the same benefit is not afforded those who wish to pass laws dealing with “religion, religious practices, or religious institutions.” In sum, just as the provisions in *McDaniel* and *Davey* explicitly and impermissibly conditioned access to a general benefit on the basis of religion, so too does the Religious Exclusion explicitly and impermissibly condition eligibility for access to the general benefit of the initiative process on the basis of religion.<sup>28</sup>

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<sup>28</sup> Justice Brennan also observed in *McDaniel* that in addition to violating the Free Exercise Clause, Tennessee’s exclusion may violate the Establishment Clause’s requirement of government neutrality toward religion, since the provision “manifests patent hostility toward, not neutrality respecting, religion.” *McDaniel*, 435 U.S. at 636 (Brennan, J., concurring). “The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion . . . It may not be used as sword to justify repression of religion or its adherents from public life.” *Id.* at 641. The Supreme Court has long stated that government action disfavoring religion violates the Establishment Clause, *see, e.g., Lukumi*, 508 U.S. at 532 (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”) (collecting cases), and lower courts have so held. *See, e.g., Johnston-Loehner v. O’Brien*, 859 F.Supp 575, 580 (M.D. Fla. 1994) (“the Establishment Clause forbids government to inhibit as well as to advance religion . . . It follows that, regardless of an avowed purpose to the contrary, the Polk County school policy, as applied violates the Establishment Clause.”); *but cf. Strout v. Albanese*, 178 F.3d 57(1<sup>st</sup> Cir. 1999) (Establishment Clause not a basis for mandating subsidies to state schools). The Religious Exclusion violates the Establishment Clause for the same reasons expressed in *Lukumi* and by Justice Brennan in *McDaniel*.

Moreover, the disfavor visited upon religion and religious speech by the Religious Exclusion is particularly pernicious in light of the Supreme Court’s instruction that citizens seeking accommodation for their religious beliefs in the form of exemptions from generally applicable laws should primarily seek such “accommodation . . . [in] the political process” rather than in the courts. *Smith*, 494 U.S. at 890.<sup>29</sup> *See also Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (noting that when the political process acts to accommodate religious exercise, that “follows the best of our traditions[, f]or it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”). The Supreme Court’s instruction that the democratic process is *precisely* the place where religious accommodations and other matters relating to religion should be discussed and addressed is of course completely at odds with the views of the Religious Exclusion’s adopters that religion does not have “anything to do with a body politic” and should be banished from the initiative petition process. *See II Debates* at 767 (statement of Mr. Swig).

Laws such as the Religious Exclusion that fail to comply with the Free Exercise Clause’s bare minimum requirement of facial neutrality will be sustained only if they survive strict scrutiny. *See Lukumi*, 508 U.S. at 533. As discussed above at § III(A)(1)(b), the Religious Exclusion cannot survive such scrutiny. Moreover, in

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<sup>29</sup> The Supreme Court further explained that although it does not fall to courts to create exemptions from generally applicable laws to promote the free exercise of religion, that fact does not mean that “[v]alues that are protected against government interference through enshrinement in the Bill of Rights are . . . thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.” *Smith*, 494 U.S. at 890.

addition to the reasons discussed above, *McDaniel* precludes Defendants from justifying the Religious Exclusion based on the governmental interest that the Massachusetts Supreme Court identified in *Collins*—*i.e.*, “prevent[ing] the initiative and referendum process from becoming a vehicle for public political debate, and enactment or rejection, of laws involving religion, religious practices, and religious institutions.” 407 Mass. at 849. In *McDaniel*, Tennessee asserted an essentially identical interest “in avoiding the divisiveness and tendency to channel political activity along religious lines, resulting from clergy participation in public affairs” to try and justify its discriminatory exclusion of ministers. *McDaniel*, 435 U.S. at 622. But the Court held that Tennessee had failed to demonstrate any “interests of the highest order,” and therefore the provision failed strict scrutiny. *Id.* at 628.

**C. The Religious Exclusion and the Anti-Aid Exclusion Violate the Equal Protection Clause.**

The Religious Exclusion and the Anti-Aid Exclusion also violate the Equal Protection Clause by erecting discriminatory barriers in the political process. The Supreme Court “always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws.” *Crawford v. Bd. of Educ.*, 458 U.S. 527, 546 (1982) (Brennan, J. concurring). This principle finds its clearest expression in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

In *Hunter*, the Supreme Court struck down, on Equal Protection grounds, a city charter amendment that distorted the political process by requiring any proposed law seeking to regulate real property transactions on the basis of race, religion, or ancestry to clear a special hurdle that was not imposed on laws regulating real property transactions

on any other basis. *See Hunter*, 458 U.S. at 386. In particular, the charter amendment barred the city council from passing “any ordinance” regulating real property transactions on the basis of race, religion, or ancestry without the approval of the majority of the voters. *Id.* at 386-87 (emphasis added). In contrast, the city council was free to pass laws regulating real property transactions on any other basis without clearing any additional hurdle. *Id.* at 390.

The Court held that the charter amendment impermissibly “drew a distinction between those groups who sought the law’s protection against racial, *religious*, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends.” *Id.* at 390 (emphasis added). That was so, the Court found, because only laws regulating real property transactions on the basis of race, religion, or ancestry were forced to “run [the charter amendment’s] gantlet.” *Id.* Other controversial measures, such as laws regarding “housing discrimination on sexual or political grounds, or against those with children or dogs” and laws “seeking rent control, urban renewal, public housing, or new building codes” did not. *Id.* at 391. The Court concluded that structuring the political process so as to place a special burden in the way of enacting laws dealing with race, religion, and ancestry was the equivalent of diluting voting rights: “the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote.” *Id.* at 393. Because the charter amendment denied equal protection of the law on the basis of a suspect classification, the Court applied strict scrutiny and held that the charter amendment was unconstitutional. *Id.* at 391-92.

Similarly, in *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982), the Supreme Court struck down a law because it impermissibly distorted the political process by allocating decision-making authority in such a way as to ““make it *more* difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest.”” *Washington*, 458 U.S. at 470 (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)) (emphasis in original). Specifically, the law prohibited local school boards from enacting desegregative busing laws and provided that a desegregative busing plan could only be enacted if approved by the statewide electorate. In contrast, the law allowed school boards to pass laws concerning other educational goals without the necessity of overcoming the hurdle of obtaining approval by a statewide electorate.

The Court held that while

[i]t is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner[,]. . . the Fourteenth Amendment also reaches a political structure that treats all individuals as equals, *yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.*

*Id.* at 467 (citation omitted, emphasis added). Although the law did not explicitly mention race, the Court found that “there is little doubt,” *id.* at 471, that the challenged law visited its harm on racial minority groups by “requir[ing] those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action.” *Id.* at 474. The Court concluded that requiring proponents of desegregative busing to seek legislative change at the more difficult statewide level, *id.* at 483, in contrast with those seeking other educational goals who could obtain relief before local school boards, denied equal protection: “one group cannot be subjected to a

debilitating and often insurmountable disadvantage.” *Id.* at 484. Because the state failed to offer any explanation that could withstand the strict scrutiny analysis applicable to laws depriving equal protection on the basis of a suspect classification, the Court struck down the law. *Id.* at 485.

In sum, both *Hunter* and *Washington* establish that distortions of the political structure that impose a hurdle on one group seeking legislation in the political process that is not similarly imposed on other groups constitutes a denial of equal protection. *See also Romer v. Evans*, 517 U.S. 620, 633 (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”);<sup>30</sup> *Crawford v. Bd. of Educ.*, 458 U.S. 527, 546 (1982) (distortions of the political process, like those involved in *Hunter* and *Washington*, deny equal protection because “if a class cannot participate effectively in the process by which the rights and remedies that order society are created, that class necessarily will be relegated, by state fiat, in a most basic way to second-class status.”) (Brennan, J., concurring) (internal citations and quotations omitted). *Hunter* and *Washington* also establish that where that denial of equal protection is based on a suspect classification, strict scrutiny applies. *Hunter*, 393 U.S. at 391-92; *Washington*, 458 U.S. at 485 & n.28.

*Hunter* and *Washington* directly control this case and require the invalidation of both the Religious Exclusion and the Anti-Aid Exclusion.

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<sup>30</sup> In *Romer*, the Court struck down a state law that prohibited all legislative, executive, or judicial action designed to protect homosexuals from discrimination because the law violated the core principle of equal protection that “government and each of its parts remain open on impartial terms to all who seek its assistance.” *Romer*, 517 U.S. at 633. The Court applied rational basis scrutiny, rather than strict scrutiny because the law did not implicate a suspect classification or fundamental right.

1. The Religious Exclusion Violates the Equal Protection Clause

The Religious Exclusion distorts the political process on the basis of a suspect classification—religion<sup>31</sup>—by erecting a hurdle that subjects Plaintiffs and other citizens seeking to enact laws dealing with religion to “a debilitating and often insurmountable disadvantage,” that is not similarly visited on those seeking to pass laws dealing with other issues. *Washington*, 458 U.S. at 484. The hurdle is clear: because the Religious Exclusion bars those seeking to enact laws dealing with religion from utilizing the initiative petition process to pass such laws, the Religious Exclusion forces them to use other, more difficult legislative means to try and enact those laws. That hurdle is indistinguishable from the discriminatory barrier found to violate equal protection in *Hunter* and *Washington*. Indeed, like the unconstitutional provision struck down in *Hunter*, the additional hurdle imposed on those seeking laws dealing with religion is made clear on the *face* of the Religious Exclusion itself.

Moreover, the distortion of the political process effected by the Religious Exclusion is even greater than what the Court found impermissible in *Hunter* and *Washington*. Whereas the discriminatory barriers erected in those cases applied only to somewhat discrete subject-matters—*i.e.*, real property transactions and school busing—the Religious Exclusion sweeps much more broadly by making it more difficult to enact laws dealing with religion on *any* subject. In sum, just as in *Hunter* and *Washington* the

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<sup>31</sup> Religion, like race, is a suspect classification. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (suspect classifications triggering strict scrutiny include “race, religion [and] alienage”). Religion is also a fundamental right under the Equal Protection Clause, which also triggers strict scrutiny. See *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8<sup>th</sup> Cir. 1987) (“[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny”).

“political process or the decisionmaking mechanism used to address *racially* conscious legislation” was “singled out for peculiar use and disadvantageous treatment,” *Washington*, 458 U.S. at 458 (emphasis added), here the political process which could be used to address *religion* conscious legislation is singled out for disadvantage.

Any argument advanced by the Defendants that the Religious Exclusion is nevertheless permissible because it theoretically prohibits laws that are both favorable and unfavorable to religion is squarely foreclosed by *Hunter*. The unconstitutional provision in *Hunter* erected a barrier to “[a]ny ordinance,” whether favorable or unfavorable to racial and religious groups, seeking to regulate real property on the basis of race or religion. *Hunter*, 458 U.S. at 386. The Court specifically rejected the notion that such ostensibly evenhanded treatment was cause to reject an equal protection claim. The Court took pains to point out that “although the law on its face treats Negro, and white, Jew and gentile in an identical manner,” this fact was irrelevant. *Id.* at 391. Instead, the Court found that the “reality” of making laws dealing with race and religion clear a special hurdle is “that the law’s impact falls on the minority[; t]he majority needs no protection . . . .” *Id.*

And so it is with the Religious Exclusion. Indeed, this case is a prime illustration of the problem described in *Hunter*, as the Religious Exclusion has been applied precisely to the detriment of the religious citizens and their schools. In addition, it is precisely the religious who the Supreme Court has recognized have special cause to use the democratic process to obtain accommodations that better enable religious citizens to practice their religion free of government interference. *See Smith* discussed *supra* in § III(B).

Accordingly, because the Religious Exclusion denies equal protection on the basis of a suspect classification, it will only be upheld if it withstands strict scrutiny. For the reasons set forth above, *see* § III(A)(1)(b), the Religious Exclusion fails strict scrutiny.

2. The Anti-Aid Exclusion Violates the Equal Protection Clause.

Article 48's Anti-Aid Exclusion erects a barrier that applies uniquely to those seeking to change the Anti-Aid Amendment to allow Massachusetts' private schools, the vast majority of which are religious, *see* Gaubatz Decl. ¶¶ 10-11 and Exs. J-K (detailing the religious nature of most Massachusetts private schools), to receive public funds. As discussed above, *see* § I(C), the Anti-Aid amendment is discriminatorily applied. Specifically, the Anti-Amendment is rigorously applied<sup>32</sup> to prevent public funding of private schools, the vast majority of which are religious, but is not applied with equal vigor to prevent funding of other private charitable institutions. Instead, Massachusetts regularly flouts the plain language of the Anti-Aid Amendment by providing public funds to charitable and other private institutions that are ostensibly barred from receiving such funds under the explicit language of the Anti-Aid Amendment. *See* Gaubatz Decl. ¶¶ 1-8 and Exs. A-H (detailing hundreds of examples of public funds going to charitable and

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<sup>32</sup> *See Opinion of the Justices*, 401 Mass. 1201 (Mass. 1987) (holding that proposed bill to allow parents of children attending private schools to receive a tax deduction for educational expenses is not permitted under the Anti-Aid Amendment); *Haddad v. School Committee of Worcester*, 376 Mass. 51 (Mass. 1978) (prohibiting, under Anti-Aid Amendment, loan of textbooks to private schools); *Bloom v. Springfield*, 376 Mass. 35 (Mass. 1978) (prohibiting, under Anti-Aid Amendment, the provision of textbooks to private primary and secondary schools); *Opinion of the Justices*, 357 Mass. 846 (Mass. 1970) (holding that proposed bill authorizing payment of \$100 a year to all students attending primary and secondary schools, public and private, is not permitted under the Anti-Aid Amendment); *Opinion of the Justices*, 357 Mass. 836 (Mass. 1970) (holding that proposed bill that would reimburse private schools for cost of providing secular educational services is not permitted under the Anti-Aid Amendment).

other private institutions that are barred by the Anti-Aid Amendment’s plain language from receiving public funds). But where, as here, a petition is proposed that could work to the benefit of religious schools, Massachusetts suddenly embraces the principles of literalism and zero tolerance.<sup>33</sup>

Indeed, the Commonwealth has not identified *a single example* of a non-public, non-school entity ever being denied funds by an agency of the Commonwealth in order to comply with the Anti-Aid Amendment. *See* Gaubatz Decl. Ex. I. Moreover, as discussed above, *see* § I(C), this discriminatory application of the Anti-Aid Amendment occurs with the explicit approval of the Massachusetts Supreme Judicial Court. *See Helmes v. Commonwealth*, 406 Mass. 873 (1990) (permitting public funding of a private charitable institution in violation of the explicit language of the Anti-Aid Amendment). Thus, even to this day, the Anti-Aid Amendment is *actually applied* according to its original, more patently discriminatory terms adopted by the Know-Nothings out of rank religious bigotry in 1854-55.

Accordingly, Article 48’s Anti-Aid *Exclusion* serves only to preserve and protect from alteration by initiative petition the bigoted contribution of the Know-Nothings to the

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<sup>33</sup> Two federal courts have recently found religion-based discrimination in the *application* of a law under similar circumstances, even where the law may have been neutral on its face. In *Tenafly Ervu Ass’n. v. Borough of Tenafly*, \_\_\_F.3d\_\_\_, 2002 WL 31388923, at \*14-15 (3d Cir. Oct. 24, 2002), the Third Circuit recently found that a facially neutral ordinance against posting items on government property was applied in a religiously discriminatory manner when the government generally failed to enforce the law, but enforced it with new-found vigor in order to prohibit religious items from being posted. Similarly, in *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1225 (C.D. Ca. 2002), the court found a likelihood of proving the City’s intent to discriminate based on religion where the City had done nothing to improve property in a redevelopment zone for almost a decade, but suddenly became “a bundle of activity” – even to the point of using the eminent domain power to take the property – once a church bought the property and proposed a religious use.

Anti-Aid Amendment, *i.e.*, a legacy of excluding religious school students from even *requesting* equal participation in the school fund. The Anti-Aid Amendment’s provisions that nominally restrict funding of private charitable institutions *other than schools* have been effectively repealed through selective non-enforcement. Those institutions, therefore, are unaffected by the Anti-Aid Exclusion. It is only citizens like the Plaintiffs here who desire public funding of private schools, the vast majority of which are religious, who bear the brunt of the Anti-Aid Exclusion’s barrier to changing the Anti-Aid Amendment through the initiative petition process. *See Washington*, 458 U.S. at 484 (“one group cannot be subjected to a debilitating and often insurmountable disadvantage.”).

The Supreme Court made clear in *Washington* that the Equal Protection Clause prohibits “a political structure that treats all individuals as equals, *yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.*” *Id.* at 467. Application of the Anti-Aid Exclusion to bar initiative petitions like the one presented by Plaintiffs in this case creates just such a distortion of government process that uniquely burdens a suspect class of petitioners—religious petitioners—in their pursuit of beneficial legislation. That is, religious children and religious parents who use religious schools like the Plaintiffs here, face additional hurdles in the process of amending a law (*i.e.*, the Anti-Aid Amendment) that has been discriminatorily applied almost exclusively to their disadvantage.<sup>34</sup>

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<sup>34</sup> Put another way, because the *Anti-Aid Amendment* is applied in a religiously discriminatory way that targets a class that consists overwhelmingly of religious schools, their students, and their parents, the *Anti-Aid Exclusion* that protects the *Amendment* from change distorts the political process in a religiously discriminatory way.

Because that distortion of the political process burdens a suspect class, it violates the Equal Protection Clause unless it can withstand strict scrutiny.

Furthermore, it is irrelevant that the Anti-Aid Exclusion formally prohibits both religious and secular petitioners from changing the Anti-Aid Amendment. In *Washington*, the law at issue prohibited people of all races, not just minority races, from enacting laws that would bring about integrated busing. But although the law at issue did not even mention race, the Court had no trouble concluding that a law erecting barriers to integrated busing plans visited its greatest harm on racial minorities. *See Washington*, 458 U.S. at 471, 485; *see also Hunter*, 393 U.S. at 391 (“although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.”) Similarly here, there should be no doubt that erecting a barrier to amending a law that is discriminatorily applied to prevent only the funding of private schools, the vast majority of which are religious, has its most harmful impact on the religious. Thus, as in *Washington* and *Hunter*, the Anti-Aid exclusion employs a suspect class, and should be subjected to the most demanding constitutional scrutiny. As discussed above, *see* § III(A)(2)(b), it fails that scrutiny, and so violates the Equal Protection Clause.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request this Court to enter summary judgment in their favor on their claims that the Religious Exclusion and the Anti-Aid Exclusion violate the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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Dated: November 7, 2002