

APPEAL NO. 04-1625

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MICHAEL WIRZBURGER, *et. al.*,
Plaintiffs/Appellants

v.

WILLIAM F. GALVIN, *et. al.*,
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, CIVIL ACTION No. 98-CV-10377
(HONORABLE GEORGE A. O'TOOLE, U.S.D.J.)

**BRIEF OF PLAINTIFFS-APPELLANTS
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CORPORATE DISCLOSURE STATEMENT

None of the plaintiffs in this case are corporate parties, and none have stock holdings to report under Federal Rule of Appellate Procedure 26.1.

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STATEMENT OF JURISDICTION

This action was brought in the United States District Court for the District of Massachusetts pursuant to 42 U.S.C. § 1983. Jurisdiction was founded upon 28 U.S.C. § 1331 (federal question). Jurisdiction in this Court is founded upon 28 U.S.C. § 1291, as this appeal results from a final judgment of the District Court. Final judgment in the District Court was entered on April 1, 2004, and a timely notice of appeal was filed on April 29, 2004.

STATEMENT OF THE ISSUES

Whether the district court erred in granting Defendants summary judgment on Plaintiffs' claims that the Religious and Anti-Aid Exclusions of Massachusetts' Constitution violate the Free Speech, Free Exercise, and Equal Protection Clauses.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs are members of a religious minority in Massachusetts: those whose religious beliefs compel them to send their children to religious schools to reinforce the faith instilled at home. Plaintiff Susan Wirzburger sends her son Michael to a Catholic school in Massachusetts, where he can receive a religious education unavailable in public schools. Apx. 498. Plaintiff Rita Zubricki sends her daughter to a Catholic school in Massachusetts to benefit her daughter's spiritual development.¹ Apx. 29.

This case concerns Plaintiffs' attempt to use Massachusetts' initiative process to effect political change to their advantage, by allowing public educational funds to follow needy students to religious schools, thus reducing the burden Plaintiffs face in paying for both a religious education and public, non-religious schools. Plaintiffs tried to modify by initiative a provision of Massachusetts' constitution known as the Anti-Aid Amendment,² that prevents *any* public funds from ending up at private schools, even indirectly.³

¹ Another plaintiff, Patricia Boyette, is deceased. She and her minor children are not parties to this appeal.

² Mass. Const. art. 18, as amended by art. 46 & 103. Apx. 66-68.

³ Massachusetts' general education private schools are overwhelmingly religious. There are 536 private general education schools serving elementary and secondary

Specifically, on July 28, 1999, Plaintiff Wirzburger, along with fourteen others, submitted an initiative petition to the Attorney General to modify the 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 schools' religious affiliation. Apx. 520.

On September 1, 1999, Attorney General Reilly denied certification of that petition because of the content of its speech. Apx. 522. The Attorney General cited parts of § 2 of Article 48 of the Massachusetts constitution, which bars from the initiative process any initiatives relating to religion (the "Religious Exclusion")⁴ and any initiatives seeking to change the Anti-Aid Amendment (the "Anti-Aid Exclusion").⁵

Plaintiffs sought relief in federal court. On September 2, 1999, the district court ordered the Attorney General to release a summary of their initiative petition

students, 370 (about 70%) of which have a religious affiliation. Apx. 608. Approximately 250 of these religiously affiliated schools are Catholic. Apx. 72, 247-342. More than 70% of the 134,000 primary and secondary students attending private schools in Massachusetts attend religious schools. Apx. 602, 605-06.

⁴ The Religious Exclusion provides that "no measure that relates to religion, religious practices, or religious institutions ... shall be proposed by an initiative petition." Apx. 67-68.

⁵ The Anti-Aid Exclusion provides: "Neither the eighteenth amendment of the constitution [*i.e.*, the Anti-Aid Amendment], ... nor this provision for its protection, shall be the subject of an initiative amendment." Apx. 67-68.

to Secretary of the Commonwealth William Galvin and ordered Galvin to release blank petition forms to the Plaintiffs and take all other steps he would have been required to take had the petition been certified.

Plaintiffs were given signature forms, and they soon gathered more than 80,000 signatures. On December 15, 1999, Secretary Galvin informed them that they had submitted more than enough properly certified signatures. Accordingly, consistent with the court's order, Galvin transmitted their petition to the Clerk of the House of Representatives. Apx. 501-02

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 and Anti-Aid Exclusions. Apx. 502. 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.* The joint session of the Legislature then declined to act on Plaintiffs' initiative petition, and it therefore died as a result of the barrier posed by the Exclusions.⁶

⁶ Under Article 48 of Massachusetts' constitution, the initiative would have appeared on the ballot with the consent of one-fourth of two consecutive legislatures.

Plaintiffs’ amended complaint in this action challenges the Religious and Anti-Aid Exclusions on their face, and as applied to exclude Plaintiffs’ political expression from the initiative process, as a violation of their rights under the Free Speech, Free Exercise, and Equal Protection Clauses. After the district court ruled that Plaintiffs had standing to pursue these claims, Plaintiffs and Defendants⁷ filed cross-motions for summary judgment. The District Court granted the Defendants summary judgment. Plaintiffs now appeal.

II. HISTORY RELEVANT TO EVALUATING PLAINTIFFS’ CLAIMS

In evaluating this appeal, Plaintiffs believe this Court will be aided by an understanding of the discriminatory history of the Anti-Aid Amendment and of the Exclusions.

A. History of the Anti-Aid Amendment

1. *The Anti-Aid Amendment Originally Targeted Catholics for Disfavor*

The Anti-Aid Amendment was added to the Massachusetts constitution in 1855 at the height of the Know-Nothings’ power. Apx. 66-67. It provided 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

⁷ Defendants are the Secretary of the Commonwealth and other Massachusetts officials who enforce the Exclusions.

common schools ... shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.” MASS. CONST. art. 18.

The Know-Nothings were a secret society characterized by nativism and anti-Catholicism that seized political control of the state in 1854, and used their political power to impose their 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.” Apx. 573. The Know-Nothings’ official acts in pursuit of these ends included dismissing Irish state employees, vigorously enforcing the Pauper Removal Act to ship mostly Catholic immigrants back to their homelands, and passing proposed constitutional amendments that would have barred Roman Catholics from public office. *Id.*

With regard to schools, the Know-Nothings mandated the reading of the Protestant Bible in public schools, barred foreign language instruction, and passed the Anti-Aid Amendment, which was sent to and approved by the voters. Apx. 573-74. These measures were intended to preserve the “Americanizing” influence of public schools and at the same time suppress the cultural threat thought to be posed by Catholic schools. Apx. 572-74. Notably, the Amendment did not prohibit public funding of “nonsectarian” (*i.e.*, Protestant) religious schools, which included public schools. Apx. 574-75.

2. ***The 1917-18 Changes to the Anti-Aid Amendment Were Also Prompted By Discriminatory Animus***

Beginning in 1900, nativists in the legislature each year proposed an “Anti-Sectarian Amendment” that would have expanded the Anti-Aid Amendment to prohibit funding of *any* institution under sectarian (*i.e.*, Catholic) control. *See I Debates in the Massachusetts Constitutional Convention 1917-1918 (“Debates”),* at 182. The 1917-18 amendments to the Anti-Aid Amendment grew out of these Anti-Sectarian Amendments, which were introduced during a period of resurgence of organized Anti-Catholicism, and were sponsored by secret, religiously bigoted patriotic societies. *See Lord et al., III History of the Archdiocese of Boston* 583 (1944); Apx. 574. Although a few Massachusetts Catholics supported the 1917-18 amendments to the Anti-Aid Amendment, “the underlying agenda [of the Constitutional Convention] continued to be the creation of uniformity of belief.” Apx. 587-88. This agenda was part of a pattern “of fear of and hostility, in elite circles, toward Catholic immigrants.” *Id.* The supporters of the Anti-Aid Amendment believed “that the children of immigrants would become ‘real Americans’ only by being subjected to schooling that took no notice of their religious background and the convictions of their parents.” *Id.*

Indeed, the Convention’s consideration of the anti-sectarian amendment was a reaction to growing Catholic power. As one delegate stated after election of a Catholic governor in Massachusetts, “there were certain forces in the State that felt

his election was a great menace, and so that helped to the securing of a following for this anti-sectarian amendment.” *Debates* at 183.

In the Constitutional Convention itself, “the real cause of the collision over the anti-aid amendment was the antagonism of Catholic and Protestant.”

Bridgman, *The Massachusetts Constitutional Convention of 1917* at iv (1923). The *New York Times*⁸ wrote upon the opening of the convention that “[t]he so called ‘sectarian’ or ‘non-sectarian’ amendment, directed in reality against the Catholic Church, is a fine bit of political bigotry. Somehow, the [American Protective Association] spirit ... lingers in Massachusetts, otherwise so mightily different from her seventeenth century self.” The A.P.A. was a virulently anti-Catholic organization that was politically active in the 1890’s. *See Debates* at 185; John Higham, *Strangers in the Land: Pattern of American Nativism, 1860-1925*, at 62-63, 80-87 (1998).

The delegates who supported the new Anti-Aid Amendment saw themselves as completing the work left unfinished by their predecessors in the 1850’s. *See id.* at 159-160 (the 1853 Convention “lacked both in courage and in vision[.] ... They did not see how important it was to clear up this whole question, and they dealt only with public schools, leaving higher educational and charitable institutions entirely out of the question.”) Like their Know-Nothing predecessors, they sought

⁸ “Bay State Constitution Patchers,” pg. 10, col. 2 (June 7, 1917).

to preserve the Americanizing influence of public schools. *See Debates* at 71. (“I believe in the public school system. ... I had a gentleman visiting me the other day from Iowa, who said he was brought up in a community of Poles ... and he said almost invariably in the third generation you could not tell them from Yankees, ... except that they had more children. ... They came over here more or less dirty, immoral and thriftless, and in the third generation they were changed to Native Americans.”)

In addition, an alternative measure introduced by Delegate Anderson was a more virulent anti-sectarian amendment directed at Catholic institutions, targeting only appropriations to institutions under “sectarian or ecclesiastical control.” Bridgman, *supra*, at 23. Anderson’s measure “was supposed to embody the views of those who were especially desirous of preventing appropriations of public moneys to Roman Catholic institutions.” *Id.* The measure that was adopted by the Committee (and later enacted), which bars using public money to benefit any private institutions, was characterized by some as a compromise measure. However, the Archdiocese of Boston vigorously denounced this “compromise” as a “vicious faction ... impos[ing] its will upon the less violent adherents of the sect of anti-Catholicity.” Apx. 593-94.

Catholics were forced to accept this so-called “compromise” under threat of having Mr. Anderson’s anti-sectarian amendment aimed at the Catholic church imposed on them:

Mr. Anderson[], who introduced the anti-sectarian resolution, said in the course of his argument that there were a hundred thousand minute-men who stood to advocate and advance his amendment. He told us that if we did not take this amendment he would give us the anti-sectarian amendment

Debates at 209. This “compromise” measure did nothing to cut back on the discrimination inherent in funding public schools that had a mainstream religious bent, but continued to deny funding to private “denominational” religious schools. *Id.* at 71. The end result of this “compromise” was the extension of the Anti-Aid Amendment to encompass not just private schools, but also private charitable institutions and certain other private institutions. Apx. 66-67.⁹

In light of this history, an expert historian has concluded that “[t]he 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.” Apx. 591.

3. *The Anti-Amendment Is Discriminatorily Applied Today in Accordance With Its Original Discriminatory Intent*

⁹ The Anti-Aid Amendment was amended again in 1974. Apx. 66-68.

Massachusetts strictly enforces the Anti-Aid Amendment's prohibition of state funds going to private schools. *See Opinion of the Justices*, 401 Mass. 1201 (Mass. 1987)(proposed bill to allow parents of children attending private schools to receive a tax deduction for educational expenses is not permitted under Anti-Aid Amendment); *Haddad v. School Comm.* 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 schools); *Opinion of the Justices*, 357 Mass. 846 (Mass. 1970)(proposed bill authorizing payment of \$100 a year to all students, public and private, is not permitted under Anti-Aid Amendment); *Opinion of the Justices*, 357 Mass. 836 (Mass. 1970)(proposed bill reimbursing private schools for cost of providing secular educational services not permitted under the Anti-Aid Amendment).

But although Massachusetts strictly enforces the Anti-Aid Amendment's terms when it comes to the funding of private schools, it regularly flouts those terms with respect to the plain language added in 1917-18 requiring that other private institutions be precluded from receiving public funds.

The record reveals 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. Apx. 74-77.¹⁰ Examination of the budgets for fiscal years 1998, 1999, and 2002 reveals a similar pattern. Apx. 69. Similarly, an examination of the list of grantees of the Massachusetts Historical Commission for the years 1995-2000 and the Massachusetts Cultural Council for fiscal year 2001 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. Apx. 70-71, 204-27. *See also* Apx. 71-72, 228-44, 502-03 (detailing other examples).

So pervasive is the Commonwealth's violation of the Anti-Aid Amendment's terms 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.* Apx. 72, 245-46.

¹⁰ Among others, the Commonwealth funded the New England Shelter for Homeless Veterans, the YWCA, Billerica Boys and Girls Club, Boston Rescue Mission, Cambridge Salvation Army, American Red Cross, Somerville Homeless Coalition, Big Brothers and Sisters of Cape Cod and the Islands, Freedom Trail Foundation, Friendly House Center of Worcester. Apx. 69, 74-77.

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 Court. In *Helmes v. Commonwealth*, 406 Mass. 873 (1990), the Court permitted public funding of a private charitable institution in violation of the explicit language of the Anti-Aid Amendment. Though recognizing that the Anti-Aid 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 **redefined** 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 taints the Commonwealth's present-day application of the Anti-Aid Amendment.

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

Article 48 of the Massachusetts constitution establishes the initiative process as a means for citizens to initiate legislation and secure political change. Apx. 66-68. The Religious Exclusion was introduced in the 1917-18 Constitutional Convention as an amendment to Article 48 designed to close off to the religious the otherwise generally available benefit of the initiative process as a means to secure beneficial legislation. *See II Debates* at 766-70. In the words of its sponsor, it was necessary to “protect the initiative and referendum against the religious fanatics and against the professional religionists.” *Id.* at 767. The Exclusion’s language effects this hostility to religion by closing the initiative process to any political expression “that relates to religion, religious practices or religious institutions.”

The Anti-Aid Exclusion was likewise introduced in the Constitutional Convention as an amendment to Article 48, debated on its merits, and adopted on its own. *See II Debates* at 981-87, 97. Its adoption followed quickly on the heels of the Anti-Aid Amendment. On November 10, 1917, four days after the voters approved the Anti-Aid Amendment, the official newspaper of the Archdiocese of Boston, published an editorial entitled “Nothing is Settled.” Apx. 595-96. The editorial decried the Anti-Aid Amendment as based on anti-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, introduced language insulating the Anti-Aid Amendment from change through the initiative, and it was adopted. *II Debates*, at 996. Thus, the Anti-Aid Exclusion entrenched the entire Anti-Aid Amendment, the intent and effect of which—both then and now—is to target private, religious schools for special disfavor.

SUMMARY OF ARGUMENT

Core political speech is afforded the highest protection under the Free Speech Clause. Accordingly, regulations of the initiative process that impose severe burdens on political expression trigger strict scrutiny. Both Exclusions trigger strict scrutiny because they restrict political expression in ways that courts deem severe: (1) both prohibit political expression based on content and (2) both directly inhibit initiative proponents from making the ideas for political change expressed in their initiative a matter of statewide discussion on the ballot.

The Free Exercise Clause requires neutral treatment of religion and subjects to strict scrutiny laws like the Exclusions at issue here, which deny access to an otherwise generally available political process on the basis of religion. The Religious Exclusion—on its face and by the purposeful design of its drafters—violates this neutrality requirement by excluding Plaintiffs from use of the initiative process on the basis of religion.

Strict scrutiny review under the Equal Protection Clause is triggered by distortions in the political process that make it more difficult for a suspect class to achieve beneficial legislation. The Religious and Anti-Aid Exclusions both erect such discriminatory barriers that close off the initiative process on the basis of religion.

Finally, the Religious and Anti-Aid Exclusions both fail strict scrutiny review because Defendants have not advanced any compelling interests to justify the Exclusions' violations of Plaintiffs' rights to Free Speech, Free Exercise of religion, and Equal Protection.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' FREE SPEECH CLAIM.

It is undisputed that the Religious and Anti-Aid Exclusions restrict certain political expression from gaining access to the initiative process. Pursuant to the Exclusions, the government examines the content of the political expression that appears in an initiative petition. Where that expression, like Plaintiffs' proposed initiative, relates to either religion or the Anti-Aid Amendment, it is completely forbidden. This case then, raises the important question of what protections the Free Speech Clause affords to regulations of the initiative process that prohibit certain political speech from ever gaining access to the ballot.

As this Court recently observed, “a fine line separates permissible regulation of state election processes from impermissible abridgement of First Amendment rights.” *Perez-Guzman v. Gracia*, 346 F.3d 229, 239 (1st Cir. 2003). The difficulty of drawing this line, particularly in the initiative process, arises from the important interests on both sides of the line. On the one hand, the initiative process is a means to enact laws. Accordingly, “[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” *Buckley v. ACLF*, 525 U.S. 182, 191 (1999). Such “regulation is a prophylactic that keeps the democratic process from disintegrating into chaos,” *Perez-Guzman*, 346 F.3d at 238, and

allows elections “to remain free from fraud.” *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000).

On the other hand, elections are “a means of disseminating ideas,” *Perez-Guzman*, 346 F.3d at 239, and “the [initiative] petition process is ... an avenue for political expression.” *ACLF v. Meyer*, 120 F.3d 1092, 1097 (10th Cir. 1997).

Indeed, it is undeniable that an initiative petition consists of political speech, *i.e.*, speech that directly sets forth the ideas of political change advocated by its proponents. *See Meyer v. Grant*, 486 U.S. 414, 421 (1988) (“the expression of a desire for political change” constitutes “core political speech”); *James v. Valtiera*, 402 U.S. 137, 141 (1971) (initiative process “gives citizens a voice on matters of public policy”). No speech warrants higher protection under the Free Speech Clause than “core political speech.” *Meyer*, 486 U.S. at 414, 421 (the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”). Thus, because the initiative process is an avenue for making political speech the “focus of statewide discussion,” regulations that make an initiative and its attendant speech “less likely” to appear on the ballot are carefully scrutinized. *Meyer*, 486 U.S. at 423; *Perez-Guzman*, 346 F.3d at 239 (“an overly stringent regulatory scheme may place an intolerably heavy burden on freedom of political expression.”).

To address these competing concerns, the Supreme Court and this Court have developed an analytic framework to distinguish legitimate regulations that ensure the reliability of the electoral process from regulations that reach too far and impermissibly burden political expression. This analysis begins by examining the challenged regulation to determine how severe a burden it imposes on political expression. *Perez-Guzman*, 346 F.3d at 239 (“we start with an assessment of the severity of the restriction” on political expression); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)(requiring courts to “weigh the character and magnitude of the asserted injury to [protected First Amendment] rights”). “The rigorousness of the ensuing judicial inquiry depends upon the extent to which the challenged regulation burdens First Amendment rights.” *Perez-Guzman*, 346 F.3d at 239. “Exacting scrutiny” applies “to severe restrictions on ballot access.” *Id.* See also *Timmons v. TCANP*, 520 U.S. 351, 358 (1997)(“Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest.”). In contrast, “[l]esser burdens trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Id.* at 358.

Application of this two-step analysis reveals that the district court erred in granting Defendants summary judgment on Plaintiffs’ Free Speech claim. First, the Religious and Anti-Aid Exclusions exemplify two types of burdens that courts

routinely find “severe,” warranting strict scrutiny. Second, the interests that the Exclusions assertedly serve do not withstand strict scrutiny.

A. The Religious and Anti-Aid Exclusions Are Severe Burdens on Political Expression, Triggering Strict Scrutiny.

1. *Caselaw Provides Guidelines for Determining Which Burdens on Political Expression Are Severe.*

The Supreme Court has noted that there is “no litmus-paper test” for determining which regulations amount to severe burdens on political expression. *Buckley*, 525 U.S. at 192. Nonetheless, the decisions of the Supreme Court, this Court, and other lower courts indicate that certain types of burden are typically deemed “severe” and so trigger strict scrutiny.

First, content-based restrictions on political expression are consistently found to be “severe” burdens that trigger strict scrutiny. Indeed, numerous courts have held that states may not condition access to the initiative petition process (or other electoral processes) based on the content of the speech advanced in the initiative and by its proponents. *See, e.g., Buckley*, 525 U.S. at 210 (Thomas, J, concurring)(initiative process restrictions that “burden[] speech ... by its content” require strict scrutiny review); *Burdick*, 504 U.S. at 438 (upholding ban on write-in candidates because it was not “content-based”); *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996)(“a state’s broad discretion in administering its initiative process is subject to strict scrutiny only in certain narrow circumstances.

We obviously would be concerned ... were a state to enact initiative regulations that were content-based.”); *Krislov*, 226 F.3d at 862 (permissible regulations of political expression in the electoral process are those that regulate speech “in a content-neutral way”); *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000)(less exacting scrutiny is reserved for a “content-neutral regulation” of the initiative process); *Dobrovolny v. Moore*, 126 F.3d 1111, 1112-13 (8th Cir. 1997)(provision limiting use of initiative process to initiate legislation permissible because it did not “regulate the content of appellants’ political speech”); *Taxpayers United v. Austin*, 994 F.2d 291, 297 (6th Cir.1993)(upholding regulation of initiative process because it was a “content-neutral limitation[] on the plaintiffs’ ability to initiate legislation”); *Delgado v. Smith*, 861 F.2d 1489, 1494 (11th Cir. 1988)(“[a]ny degree of governmental hindrance on the freedom of a given group of citizens to pursue the initiative petition process ... concerning whatever they choose must be viewed with some suspicion.”); *Limit v. Maleng*, 874 F.Supp. 1138, 1140 (W.D.Wash. 1994)(holding that regulations of the initiative process must be “content-neutral”); *Henry v. Connolly*, 743 F.Supp. 922, 931 (D.Mass. 1990)(Massachusetts is permitted to “maintain reasonable, content-neutral regulations to protect the integrity of the [initiative] process”).

A second type of severe burden is a regulation that directly inhibits initiative proponents from making the ideas for political change expressed in their initiative

a matter of statewide discussion on the ballot. For example, in *Meyer*, the Court struck down a state’s restriction on the use of paid petition circulators to qualify an initiative petition for placement on the ballot. The Court held that the restriction severely burdened political expression because it made it “less likely” that the initiative proponents could “place the [initiative petition] on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” *Id.* at 423.¹¹

Similarly, in *Buckley*, 525 U.S. at 194-95, the finding of a severe burden hinged on the fact that the regulation at issue—a law prohibiting non-registered voters from circulating petitions to qualify an initiative for the ballot—made it more difficult for the political expression of the initiative proponents to gain ballot access. The Court applied strict scrutiny because the regulation produced a severe “speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*.” *Id.* See also *Buckley*, 525 U.S. at 231 (Rehnquist, CJ, dissenting)(identifying, but refusing to endorse, majority’s holding that “any ballot initiative regulation is unconstitutional if it ... *makes it more difficult for a given issue to ultimately appear on the ballot.*”)(emphasis added).

¹¹ The Court also noted that the restriction “limited the number of voices who could convey appellee’s message” in the initiative petition and “therefore limit[ed] the size of the audience they [could] reach” with that message. *Id.*

In addition to these two categories, other “severe” burdens on political expression include: limits that “restrict[] the overall quantum of speech available to the election or voting process,” *Campbell*, 203 F.3d at 745; discriminatory application of laws governing ballot access, *see, e.g., Taxpayers United*, 994 F.2d at 297; and limits on anonymous political speech in support of an initiative, *see, e.g., Buckley*, 525 U.S. at 199.

Courts have also set guideposts for determining which regulations governing the initiative process amount to only *minor burdens* on political expression. The hallmarks of such regulations are content-neutrality, a focus on the mechanics of the electoral process, and the imposition of, at most, indirect burdens on speech. Examples of these, which are subjected to less exacting scrutiny, include the following:

- A content-neutral requirement that signers of Massachusetts initiative petitions have physical custody of the proposed initiative, *Henry*, 743 F.Supp. at 931;
- A content-neutral single subject requirement for initiative proposals, *Biddulph*, 89 F.3d at 1494;
- A content-neutral process for setting the titles of initiative proposals, *Campbell*, 203 F.3d at 746;
- A content neutral requirement that initiatives obtain a certain percentage of signatures from registered voters to ensure grassroots support, *Dobrowolny*, 126 F.3d at 1112-13;

- A content-neutral requirement that initiative proponents have a six-month window for obtaining the necessary signatures on a petition, *ACLF v. Meyer*, 120 F.3d 1092, 1099 (10th Cir. 1997);
- A content-neutral signature-verification method, *Buckley*, 525 U.S. at 205;
- A content-neutral requirement that petition signers be registered voters, *Hoyle v. Priest*, 59 F.Supp.2d 827, 836-37 (W.D.Ark. 1999);
- A content-neutral ban on write-in candidates, *Burdick*, 504 U.S. at 438;
- A content-neutral ban on multiple party candidates, *Timmons*, 520 U.S. at 363;

Applying *less* exacting scrutiny to regulations like these respects the Court’s admonition that “[s]tates allowing initiatives have considerable leeway to protect the integrity and reliability of the initiative process.” *Buckley*, 525 U.S. at 191.

2. *The Religious Exclusion and Anti-Aid Exclusion Are Both Severe Burdens on Political Expression, Because Both Are Content-Based and Both Directly Inhibit Statewide Discussion of Plaintiffs’ Political Views.*

Under the Religious and Anti-Aid Exclusions, any initiative with political expression whose content relates to “religion” or to the Anti-Aid Amendment may *never* appear on the ballot, and so *never* become the focus of statewide discussion through the initiative process. Unlike regulations that have been upheld, the Exclusions are not content-neutral, not focused on the integrity and reliability of the process, and burden expression, not in an indirect way, but directly and substantially. The Exclusions operate with reference to the content of the petition,

and by content alone.¹² They have nothing to do with the integrity, reliability, or mechanics of the initiative process (*e.g.*, requiring the initiative to have a certain number of signatures, a single subject, or that its supporters be registered voters). And their impact on the political expression they cover is not incidental, but direct¹³ and absolute.

Thus, as set forth in further detail below, both Exclusions violate the Free Speech Clause.

First, the Exclusions severely burden speech because they expressly condition access to the initiative petition process on the *content* of the political speech set forth in the initiative. A content-based regulation is one that either prohibits speech on an entire subject or topic, or prohibits particular viewpoints on an otherwise includible subject. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (“The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”).

¹² Apx. 66-68 (“No measure that relates to religion, religious practices, or religious institutions ... shall be proposed by an initiative petition. ... [T]he eighteenth amendment to the constitution [*i.e.*, the Anti-Amendment] ... shall [not] be the subject of an initiative”).

¹³ *See Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996)(upholding restriction because “law has no direct impact on ballot access ... It is generally thought that indirect effects are less burdensome than direct restraints”).

Both Exclusions restrict the political expression that may appear in an initiative petition based on content. Pursuant to the Exclusions, the government examines the content of the political expression that appears in an initiative petition. With regard to the Religious Exclusion, if that examination reveals political expression that relates to “religion,” that speech is forbidden precisely because of that impermissible religious content. Similarly, with regard to the Anti-Aid Exclusion, if that examination uncovers political expression relating to the Anti-Aid Amendment, then that speech is barred from the initiative process because of that content.

Though the lower court struggled to assess whether the Exclusions at issue are subject-matter or viewpoint-based restrictions, there can be no doubt that they are one of these two. Indeed, this Court need not resolve whether the Exclusions are subject-matter or viewpoint-based. The burden on political expression from either type of content-based restriction is severe: none of the cases requiring content-neutrality in the initiative process have distinguished between these two sub-types. (Nonetheless, should this Court somehow find it necessary to determine whether the Exclusions are subject-matter or viewpoint based, application of controlling Supreme Court precedent makes clear that both the Religious

Exclusion¹⁴ and the Anti-Aid Exclusion¹⁵ are viewpoint based.) Accordingly, because courts have uniformly condemned content-based restrictions (whether

¹⁴ The Supreme Court’s holding in *Rosenberger v. Rectors and Visitors*, 515 U.S. 819 (1995), requires a conclusion that the Religious Exclusion constitutes *viewpoint* discrimination. In *Rosenberger*, the Court concluded that a University’s categorical exclusion of religious ideas, whether favorable or unfavorable to religion, from a 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, . . . viewpoint discrimination is the proper way to interpret the University’s objections to [the Christian publication]” pursuant to its policy. *Id.* at 831. 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 initiative process.

Moreover, the fact that the Exclusion may exclude speech expressing viewpoints both favorable and unfavorable to religion, far from insulating it from a finding of viewpoint discrimination, only demonstrates 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 held 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.

Finally, the record of the Religious Exclusion’s adoption confirms its intent was to drive religious ideas out of public discourse involving initiatives. The remarks of the Exclusion’s sponsor demonstrate that its intent was to permit initiative petition speech proclaiming so-called “political beliefs,” but to prohibit speech “proclaim[ing] . . . religious beliefs.” *II Debates*, at 767. In other words, secular political ideas and messages are permitted in the initiative process, but when the ideas involve religion, that entire class of viewpoints is excluded. This type of prohibition, which targets some political messages for exclusion but not others, is viewpoint discrimination.

¹⁵ In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court found viewpoint discrimination in circumstances directly analogous to those presented by the Anti-Aid Exclusion. At issue in *Velazquez* was a statute 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 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

subject-matter or viewpoint) on political speech in the initiative process, the Exclusions here must undergo strict scrutiny.

Second, like the restrictions in *Meyer* and *Buckley*, the Exclusions directly inhibit initiative proponents from making the ideas for political change expressed in their initiative a matter of statewide discussion on the ballot. The plaintiffs in this case, like the initiative proponents in those cases, “seek by petition to achieve political change.” *Meyer*, 486 U.S. at 421. Just as the restrictions on who could be

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 existing law. *See also Velazquez v. Legal Services Corp.*, 164 F.3d 757, 770 (2d Cir. 1999)(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.

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

petition circulators in *Meyer* and *Buckley* made it “less likely” that the initiative proponents could “place the [initiative petition] on the ballot, thus limiting their ability to make the matter the focus of statewide discussion,” *Meyer*, 486 U.S. at 423, so too do the Exclusions prevent political expression about religion and the Anti-Aid Amendment from being included in an initiative petition on the ballot and becoming the focus of statewide discussion.

Indeed, the burden on political expression at issue here is even greater than the burden in *Meyer* and *Buckley*. There, the restrictions simply made it “less likely” for an initiative expressing a particular desire for political change to appear on the ballot and become the focus of statewide discussion. With enough (volunteer) effort, it was still possible to overcome that burden, and achieve access to the ballot through the initiative process. Thus, the burden was found “severe,” even though it created a headwind rather than a total ban. But here, the Exclusions **completely** preclude an initiative (like the Plaintiffs’) from **ever** appearing on the ballot through the initiative process. If the initiative either relates to religion or the Anti-Aid Amendment, it is excluded. This is unmistakably more severe than the burdens in *Meyer* and *Buckley*.

Perez-Guzman also requires a holding that the Exclusions are a severe burden. There, this Court evaluated the requirement that a petition circulator seeking to form a new political party have every signature notarized and witnessed

by a lawyer. This Court held that the burden on political expression was severe, because the requirement increased the cost and difficulty of gathering sufficient signatures to qualify the new party for the ballot. *See Perez-Guzman*, 346 F.3d at 240. Here, the burden created by the Exclusions is even more severe: whereas it was at least possible for the plaintiff in *Perez* to overcome the burden and qualify the new party for inclusion on the ballot, the Exclusions at issue here absolutely preclude plaintiffs' political expression from appearing as an initiative on the ballot.

Thus, because the Exclusions directly inhibit statewide political expression in a way that is indistinguishable from the restrictions in *Meyer*, *Buckley*, and *Perez-Guzman*, they trigger strict scrutiny.

3. *The District Court Erred in Failing to Apply Strict Scrutiny*

Remarkably, the district court found the Exclusions did not impose any burden at all on political expression, and therefore declined to subject the Exclusions to strict scrutiny under the Free Speech Clause. 311 F.Supp.2d at 240. The court offered essentially two lines of reasoning for refusing to subject the Exclusions to strict scrutiny. Both are foreclosed by binding precedent.

The court's reasoning begins by pointing out that although the initiative process does involve speech, it also has a "functional" aspect: it is a means of enacting amendments to a state's constitution. *Id.* When citizens invoke the

initiative process in Massachusetts, they “want to do more than just *say* something; they want to *do* something—achieve electoral approval of an amendment to the Massachusetts constitution.” *Id.* The court then reasoned that because the initiative process has a functional lawmaking aspect, the First Amendment does not protect against “any restrictions on ... speech” that may occur when a state limits access to the initiative process. *Id.* Thus, on this view, the fact that the Exclusions completely prevent Plaintiffs’ political speech from ever appearing on the ballot as an initiative does not even implicate Free Speech protections.

The lower court cited no cases in support of this novel rollback of First Amendment protections for political speech. The absence of authority is unsurprising, as both the Supreme Court and this Court have repeatedly held that First Amendment protections of political speech remain in force, especially where that speech is inextricably intertwined with the functional aspects of the initiative process, or other electoral process.

For example, had the Court in *Meyer* and *Buckley* followed the district court’s view in this case, it would have found that the restrictions on who could circulate petitions merely regulated a functional lawmaking process, and that any restrictions on speech were purely incidental and not protected by the Free Speech Clause. However, the Court declined to adopt that view. Instead, it held that limiting the ability of the plaintiffs to introduce their political expression into the

lawmaking initiative process was a severe burden on core political speech that called for strict scrutiny.

This Court’s recent decision in *Perez-Guzman* similarly rejects the district court’s approach, holding instead that a restriction making it more difficult for a political party to qualify for the ballot was subject to strict scrutiny. This Court made clear that “election campaigns ... are as much a means of disseminating ideas as a means of attaining political objectives. Given this duality, an overly stringent regulatory scheme may place an intolerably heavy burden on freedom of political expression.” *Id.* at 238-39. This reasoning is equally applicable to the initiative process, particularly because *Perez-Guzman* made clear that the First Amendment requires identical scrutiny for measures that limit ballot access in the initiative process, and for measures that limit access for political parties in candidate electoral processes: “We see no principled basis for distinguishing party-petition signature gatherers from the initiative-petition circulators in *Buckley*. The common denominator is that both seek ballot access.” *Id.* at 239 n.6.

In sum, though the lower court in this case was correct to recognize the dual aspect of the initiative process—*i.e.*, it is both a means to communicate political views and a functional lawmaking process by which political views may be enacted into law—it erred by concluding that restrictions on the political expression aspect are somehow immune from strict scrutiny in this context.

The district court's second reason for not applying strict scrutiny is equally meritless. The court claimed it was simply "unworkable" to prohibit content-based restrictions on political expression in the initiative process. 311 F.Supp.2d at 241. The court's reasoning began with the unremarkable assertion that "at least some topical exclusions must be okay." *Id.* But the court then made the logic-defying leap that, because *some* content-based restrictions are permissible, then *all* content-based restrictions must be permissible under the Free Speech Clause. According to the court, this is because it is impossible to determine "what standards could be used for judging" a permissible content-based restriction from an impermissible one. *Id.*

This reasoning is deeply flawed. As an initial matter, the Supreme Court has emphasized that 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 425. Accordingly, the Court has instructed that "the First Amendment requires [courts] to be vigilant in making those judgments" as to which restrictions on political expression in the initiative process are valid. *Buckley*, 525 U.S. at 192. Though conceding that there is "no litmus-paper test" for making those judgments, the Court has nonetheless stressed that "we have come upon no substitute for the hard judgments that must be made." *Id.* (quotations omitted). The district court's decision to simply throw up its hands and allow *all* content-based restrictions of

political expression in the initiative process, because it might be hard to separate the wheat from the chaff, is an abdication of its constitutionally assigned role to make those hard judgments.

Nor can the district court's endorsement of content discrimination in the initiative process be justified on the grounds that Massachusetts was not required to establish an initiative process at all. *See* 311 F.Supp.2d at 241 (asserting that limiting Massachusetts' ability to engage in content-discrimination poses "a fundamental conflict with the proposition that the initiative procedure need not be universally available.") In *Meyer*, the Supreme Court expressly rejected the argument that a State's greater power to decommission its entire initiative process includes the lesser power to regulate the content of the speech in any process once established. To the contrary, the Court held that once a State creates the initiative process, regulation of that process is subject to the constitutional constraints of the First Amendment. *Meyer*, 486 U.S. at 425 (rejecting argument that "the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions").

Moreover, the district court ignored that applying strict scrutiny to content-based restrictions *is* workable. Indeed, Plaintiffs do not disagree that at least some content-based restrictions on political expression in the initiative process may be permissible. For example, a restriction prohibiting any initiative that would violate

the federal Constitution is a content-based restriction that would readily satisfy strict scrutiny: a state has a compelling interest in complying with the Supremacy Clause, and not passing laws that violate the federal constitution is a narrowly tailored means to advance that interest.¹⁶ Thus, the lower court's reasons for refusing to apply strict scrutiny should be rejected.

B. The Religious Exclusion and Anti-Aid Exclusion Cannot Withstand Strict Scrutiny

1. *The Religious Exclusion Fails Strict Scrutiny.*

In order to survive strict scrutiny, a law must be necessary to secure a compelling governmental interest by the least restrictive means available. *See Perez-Guzman*, 346 F.3d at 239.

The Religious Exclusion fails that test. The Massachusetts Supreme Court has identified the primary interest served by the Religious Exclusion: “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 Mass. 837, 849 (1990). Defendants have explained that preventing such political debate is necessary to “prevent direct popular lawmaking

¹⁶ Or, to use an example raised by the district court, excluding initiatives that advocate abolishing a jury trial would easily be found legitimate under strict scrutiny. A compelling government interest exists of not violating the federal constitution which guarantees a jury trial.

on potentially controversial and divisive issues.” Docket Entry 101, at 43-44. 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 (citations and quotations omitted).

Here, Massachusetts has made the initiative process available for numerous controversial matters, such as initiatives relating to affirmative action, Apx. 482; term-limits, Apx. 434, 486; proper taxation, Apx. 486, 490, 496; defense of marriage, Apx. 495; and regulating medical marijuana use, Apx. 490. To allow these other controversial initiatives, which do appreciable damage to the supposed interest of avoiding popular law-making on controversial and divisive issues, fatally undermines Defendants’ assertion that the Religious Exclusion serves a compelling interest.

Further, the Religious Exclusion is not only fatally underinclusive, but also impermissibly overbroad. *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”)(citation

omitted). It is obvious 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 setting forth fire codes for churches is unlikely to produce political dispute.

Moreover—far from justifying differential treatment—the assertion that something about religious ideas and speech makes them peculiarly unsuited for discussion through the initiative process only underscores the illegitimacy of excluding all matters that relate to religion. The Supreme Court has certainly rejected such a conception. *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 in fact believed that religious ideas presented a danger that should be purged from the initiative process, the government may not now “[a]im at the suppression of dangerous ideas.” *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550 (1983).¹⁷ *See also Citizens Against Rent Control v. Berkeley*, 454 U.S.

¹⁷ The Court has also declared the notion that religious people must be confined to their religious business and shut out of politics—the very notion adduced as a basis for the Religious Exclusion—invalid under the First Amendment. *See Bellotti*, 435 U.S. at

290, 295 (1981)(“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”).

The other reason advanced by Defendants for the Religious Exclusion—avoiding the passage of laws that “might” violate the Establishment Clause, *see* Docket Entry 101, at 43—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 constraints on protected free expression. *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 Clause ... [and] by the Free Speech Clause.”). In *Widmar*, the government urged that the discrimination served the state’s interest in avoiding the risk of violating separation of church and state. The Court rejected that argument that this could be a compelling justification.

Moreover, because there is no basis to assert that any significant proportion of initiatives relating to religion, religious practices, or religious institutions would in fact violate the Establishment Clause, to exclude *all* such initiatives from the

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.”)(emphasis added).

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.

2. *The Anti-Aid Exclusion Fails Strict Scrutiny.*

None of the interests asserted by Defendants in defense of the Anti-Aid Exclusion is sufficient to withstand strict scrutiny. 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.” Docket Entry 101, at 13. This explanation hardly amounts to a compelling interest sufficient to satisfy strict scrutiny. On the contrary, the asserted interest again serves only to highlight a deliberate decision to restrict access to the initiative process without compelling reason.

Defendants also suggest that the Anti-Aid Exclusion was somehow necessary because the “inflexibility” of the initiative petition process is poorly adapted to the “complexity of the issues” presented by an initiative relating to the Anti-Aid Amendment. Docket Entry 101, at 42-43. This is not a compelling government interest. Massachusetts allows all sorts of “complex” issues to be debated and decided in the initiative process. For example, a review of past initiatives which the Attorney General has certified as appropriate for the initiative

petition process reveals numerous “complex” issues, including such issues as determining the proper income tax rate, Apx. 486, 490; regulating campaign financing, Apx. 486 term limits, Apx. 486; providing compensation for patients injured during medical treatment, Apx. 445; and act to regulate coal ash as solid waste, Apx. 496.

There is no basis to assert that initiatives concerning the Anti-Aid Amendment would be any more complex than other initiatives which Massachusetts has admitted to the initiative process. Because the initiative process is open to all sorts of complex issues which do appreciable harm to the supposed interest of avoiding popular law-making on complex issues by means of the inflexible initiative process, Defendants’ assertion that the Anti-Aid Exclusion serves a compelling interest must be rejected. *See Lukumi*, 508 U.S. at 547 (“[A] law cannot be regarded as protecting an interest ‘of the highest order’” if “it leaves appreciable damage to that supposedly vital interest unprohibited.”).

II. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS’ FREE EXERCISE CLAIM.

The Religious Exclusion violates the most basic requirement of the Free Exercise Clause: religious neutrality. The principle of neutrality—equal treatment among religions, and between the religious and the secular—is firmly embedded in Free Exercise jurisprudence. *Church of the Lukumi Babalu Aye, Inc. v. City of*

Hialeah, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion *or of religion in general.*”) (emphasis added). The Religious Exclusion, passed as protection “against the religious fanatics and against the professional religionists,” *see II Debates* at 767, 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.” *Lukumi*, 508 U.S. at 532. *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”). A law lacking the neutrality guaranteed by the Free Exercise Clause must be struck down unless it survives strict scrutiny. *See id.* at 533.

An analysis of whether the Religious Exclusion fails neutrality begins with an examination of its text. *See id.* (“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 Exclusion’s plain text betrays a facial purpose to disfavor religion by forbidding any initiatives relating to “religion, religious practices, or religious institutions” from the initiative process. There is

no comparable exclusion disfavoring initiatives relating to all *secular* interests, practices, and institutions.

Moreover, although the discrimination against religion is clear from its face, the history of the Constitutional Convention's adoption of the Religious Exclusion also reveals an intent to exclude religious voices from public life. *See id.* at 542. (inquiry into whether a law lacks neutrality may extend beyond the law's text). Mr. Swig, the Religious Exclusion's sponsor, made his intent to single out religion for special disfavor clear:

[W]hy 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.*** ... 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 ... 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”). These

expressions of intent serve only to confirm the hostility to religious perspectives in public life, which is apparent from the face of the Religious Exclusion.

The Supreme Court has found the kind of *animus* toward religion reflected in the Religious Exclusion's history relevant in evaluating Free Exercise neutrality. In *Locke v. Davey*, 124 S.Ct. 1307 (2004), the Court held that the Free Exercise Clause was not violated by a Washington State scholarship program that funded the study of secular college degrees, but did not also fund clergy training in the form of theology studies. Important to the Court's reasoning was that the plaintiff did not demonstrate that Washington's decision to exempt clergy training from its program was the result of any "hostility toward religion." *Id.* at 1313. By contrast, Plaintiffs in this case *have* shown that the Exclusion's sponsor and its supporters made no attempt to hide their hostility toward religion.

The Religious Exclusion differs from the funding program in *Locke* in still another respect relevant to the Court's reasoning: it lacks a pedigree traceable back to the Founding. *See Locke*, 124 S.Ct. at 1313-14 (noting that "formal prohibitions against using tax funds to support the ministry" have been a feature of many state constitutions since the Founding). By contrast, the Exclusion, which targets religion for exclusion from the political process, first arose in the early 20th Century under historical conditions marked by bigotry, not high principle, and seems to be unique to Massachusetts.

Notably, moreover, the lower court failed even to mention the Supreme Court's decision in *McDaniel v. Paty*, 435 U.S. 618 (1978), which serves only to confirm that the Religious Exclusion fails the neutrality requirement. *McDaniel* makes clear that a law that limits access to participation in public life on the basis of religion violates the Free Exercise Clause. *McDaniel* struck down a provision in the Tennessee Constitution that barred clergy members from serving as constitutional delegates, a political office otherwise available to other citizens. *See McDaniel*, 435 U.S. at 626.¹⁸

Thus, *McDaniel* establishes that a state may not offer a political process generally but exclude some from access to that process on the basis of religion. In this case, there is no doubt that the initiative process affords Plaintiffs and all 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

¹⁸ Likewise, this Court has noted that neutrality demands evenhanded treatment of religion where public benefits are in fact generally available. *See Gary v. Manchester Sch. Dist.*, 2004 U.S. App. LEXIS 13593, *8-*9 (1st Cir. 2004)(rejecting claim that Free Exercise Clause entitled private school students to IDEA benefits, because benefits under IDEA are *not* generally available but designated for sole use of public school students).

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* explicitly and impermissibly conditioned access to a generally available process on the basis of religion, so too does the Religious Exclusion explicitly and impermissibly condition eligibility for access to the general initiative process on the basis of religion. That is, only if Plaintiffs and other citizens of Massachusetts are willing to submit to the condition of purging “religion, religious practices, or religious institutions” from an initiative petition may they have access to the benefits afforded by the initiative process.

Contrary to the lower court’s suggestion, the basic principle that a state may not offer a benefit generally but exclude some from access to that benefit on the basis of religion is neither mitigated nor renounced in *Locke*. In holding that the Free Exercise Clause did not require a state to fund clergy training, the Court recognized that a state’s interest in avoiding compelled support is unique because of its long history. *See Locke*, 124 S.Ct. at 1315. Moreover, the Court emphasized that this was *not* a case where either religious people had to choose between their beliefs and receiving a government benefit, or one like *McDaniel*, where the law impaired the right of religious people to “participate in the political affairs of the community.” *Id.* at 1308.

In contrast, the Religious Exclusion, like the clergy exclusion in *McDaniel*, **does** impair the right of religious people to “participate in the political affairs of the community.” Just as the provision in *McDaniel* prevented religious people from fully participating in the state’s political affairs by excluding clergy from being constitutional delegates, so too does the Religious Exclusion cripple the ability of religious people to engage fully in Massachusetts’ political affairs to pursue interests related to their religion.¹⁹

Furthermore, the Religious Exclusion’s lack of neutrality is not saved by the disingenuous assertion that it ostensibly “precludes both proposals that would be friendly to religion ... and proposals that would be hostile to religion,” *Boyette*, 311 F. Supp. 2d at 244. This assertion calls to mind Anatole France’s comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges, to beg in the streets, and to steal bread.²⁰ It is true that, at least in theory, the Exclusion may operate to help or hurt the religious in a given case. But the one group that the Exclusion **always** hurts are those who believe that

¹⁹ For example, religious individuals are precluded from proposing initiatives granting a religious exception for sacramental use of peyote, requiring employer accommodation of employee religious dress, or permitting municipalities to waive parking requirements for Orthodox Jewish synagogues. The Religious Exclusion thus leaves religious individuals, especially members of minority religions with little representation in the legislature, with virtually no access to the political process for matters essential to their free exercise rights.

²⁰ A. France, *Le Lys Rouge* (1894), *quoted in* J. Bartlett, *Familiar Quotations* 655 (15th ed. 1980).

religious expression has at least some legitimate role in political discourse, including in the initiative process. And it scarcely requires saying, but those who stand to suffer most from the suppression of religious expression in a meaningful segment of public life are those who engage in religious expression (*i.e.*, the religious). And in any event, the Religion Exclusion was unmistakably applied in this case to the disadvantage of religious individuals. This is not religious neutrality, but instead a special disability based on religion.

Indeed, the disfavor (as opposed to evenhanded treatment) visited upon religion and religious speech by the 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. *See also Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)(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 completely at odds with the views of the Religion Exclusion's adopters that religion does not have "anything to do with a body

politic” and should be banished from the initiative process. *See II Debates* at 767.²¹

Similarly flawed is the district court’s attempt to claim that the Religious Exclusion is as neutral in effect as the First Amendment itself, *Boyette*, 311 F. Supp. 2d at 244. This argument willfully ignores that the First Amendment, through both the Free Exercise and Establishment clauses, was designed to *protect* and facilitate religious expression, including religious expression within the political process. By contrast, the Religious Exclusion, both in its design and in its operation, *excludes* from the political process the same religious expression the First Amendment was designed to protect. Its exclusion of all initiatives relating to religion is therefore not “balanced and neutral[.]” *Id.*

Laws such as the Religious Exclusion that fail to comply with the Free Exercise Clause’s bare minimum requirement of neutrality must satisfy strict scrutiny. *See Lukumi*, 508 U.S. at 533. Because the Religious Exclusion fails that scrutiny, *see supra*, the district court erred in not striking it down under the Free Exercise Clause.

²¹ In addition, a wholesale exclusion of religion from the initiative process results not in neutrality, but in a process “skewed in multiple ways.” *Rosenberger*, 515 U.S. at 832.

III. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM.

The Exclusions violate the Equal Protection Clause by erecting discriminatory barriers in the political process that were originally passed to target—and to this day still primarily harm—religious individuals. 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 *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982). *Romer v. Evans*, 517 U.S. 620 (1996), is the latest affirmation of this principle.

In *Hunter*, the Court found an equal protection violation in a city charter amendment that distorted the political process by requiring “*any* ordinance” seeking to regulate real property transactions on the basis of race, religion, or ancestry—whether for or against—to clear a special hurdle that was not imposed on laws regulating real property transactions on any other bases. *See Hunter*, 458 U.S. 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 amendment’s] gauntlet.” *Id.* Other controversial measures, like laws regarding “housing discrimination on sexual or political grounds,” 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 or religion 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.

Similarly, in *Washington*, the 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 community members] to achieve legislation that is in their interest.” 458 U.S. at 470. Specifically, the law prohibited school boards from enacting busing desegregation laws, and provided that a busing desegregation 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 overcoming the hurdle of obtaining statewide approval.

Although the law did not explicitly mention race, the Court found “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; *id.* at 467 (“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.”) 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.

The Supreme Court’s decision in *Romer* also affirms that “[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.” 517 U.S. at 633 In *Romer*, the Supreme Court struck down a state law that prohibited all

legislative, executive, or judicial action designed to protect homosexuals from discrimination, because the law violated this core principle of equal protection.²²

In sum, *Hunter*, *Washington*, and *Romer* establish that equal protection is denied where implicit or explicit distortions of the political structure raise an obstacle to one group seeking legislation that is not similarly imposed on other groups. Where that denial of equal protection is based on a suspect classification, strict scrutiny applies. *See, e.g., Hunter*, 393 U.S. at 391-92. *Hunter*, *Washington*, and *Romer* directly control this case and require the invalidation of both Exclusions.

A. The Religious Exclusion Violates the Equal Protection Clause

The Religious Exclusion distorts the political process on the basis of a suspect classification—religion.²³ It erects a hurdle that subjects Plaintiffs and

²² The lower court noted correctly that the *Romer* plaintiffs were similarly situated to the Plaintiffs in the case at bar, as both faced the hurdle of amending the state constitution in order to secure beneficial legislation. *Boyette*, 311 F. Supp. at 243. However, the lower court wrongly distinguished *Romer* on the grounds that the Plaintiffs are contesting the Religious and Anti-Aid Exclusions to the initiative process, rather than the Anti-Aid Amendment itself. But *Romer*'s logic still applies to the two Exclusions: The religious "are forbidden the safeguards that others enjoy *and may seek without constraint.*" *Id.* at 631. (emphasis added). At issue here is not the particular type of constraint but rather that a group of citizens is purposely given a political hurdle not placed in the way of other citizens. In this case, Plaintiffs are *more* constrained than the plaintiffs in *Romer*, as they may not even "enlist the citizenry" of Massachusetts to amend the harmful portions of the constitution in the initiative process, as others are allowed to do. *Id.* The political process is thus distorted against the interests of religious individuals.

²³ Religion, like race, is a suspect classification. *See City of New Orleans v. Duke*s, 427 U.S. 297, 303 (1976)(suspect classifications triggering strict scrutiny include

fellow religious citizens seeking to enact laws addressing their religious interests to “a debilitating and often insurmountable disadvantage,” that is not similarly visited on those seeking to pass laws addressing 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 process to pass such laws, the Religious Exclusion forces them to use other, more difficult legislative means to try to 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. Apx. 66.

Moreover, the distortion of the political process affected 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 “political process or the decision-making mechanism

“religion”). Religion is also a fundamental right under the Equal Protection Clause, which also triggers strict scrutiny. *See Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8th Cir. 1987)(“[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny”).

used to address racially conscious legislation” was “singled out for ... disadvantageous treatment,” *Washington*, 458 U.S. at 485, here the political process which could be used to address *religion* conscious legislation is even more expansively singled out for disadvantage.

Hunter forecloses the district court’s suggestion that the Religious Exclusion is nevertheless permissible because it theoretically prohibits laws that are both favorable and unfavorable to religion. 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 emphasized that the law’s facially equal treatment of majority and minority races was irrelevant. *Id.* at 391. Instead, the Court found that the “reality” of requiring race and religion-related laws to clear a special hurdle is “that the law’s impact falls on the minority, [t]he majority needs no protection.” *Id.*

The case at bar is a prime illustration of the problem described in *Hunter*, as the Religious Exclusion has been applied precisely to the detriment of a religious minority whose faith motivates them to send their children to religious schools. When they seek use of the democratic process to secure beneficial legislation that

would aid them in the practice of their faith, the Religious Exclusion specially closes off that democratic process to them and thus denies Equal Protection.

Because the Religious Exclusion denies equal protection on the basis of a suspect classification, it must meet strict scrutiny. As discussed *supra*, it cannot.

B. The Anti-Aid Exclusion Violates the Equal Protection Clause by Entrenching the Religiously Discriminatory Anti-Aid Amendment.

Article 48's Anti-Aid Exclusion erects a barrier that applies uniquely to those seeking to amend the Anti-Aid Amendment so that Massachusetts' private schools, most of which are religious and overwhelmingly filled with students seeking a religious education,²⁴ can receive public funds. As discussed extensively *supra*, the Anti-Aid Amendment is discriminatorily applied to prevent public funding of private schools, but is not applied with equal vigor to prevent funding of other private charitable institutions.²⁵ This pattern of application confirms and perpetuates the discrimination that prompted the passage and revision of the Anti-Aid Amendment. Because the intent and effect of the Anti-Aid *Amendment* is to

²⁴ Apx. 69, 72, 247-342, 602, 605-06, 608 (detailing that about 70% of private general education schools serving elementary and secondary students have a religious affiliation, and more than 70% of the 134,000 primary and secondary students attending all private schools in Massachusetts attend religious schools).

²⁵ Other federal courts have found religion-based discrimination in the *application* of a law even where the law may have been neutral on its face. *See, e.g., Tenafly Ervu Ass'n. v. Tenafly*, 309 F.3d 144 (3d Cir. 2002)(finding that facially neutral ordinance against posting items on government property was applied in a religiously discriminatory manner when government generally failed to enforce the law, but enforced it with new-found vigor in order to prohibit religious items from being posted).

specially burden the religious, the Anti-Aid *Exclusion's* enforcement and entrenchment of the Anti-Aid *Amendment* distorts the political process according to the suspect category of religion.

Although the 1917 revision of the Anti-Aid Amendment replaced the term “sectarian”—the most conspicuous sign of the discriminatory motive behind the 1854-55 Amendment—with “private,” the Amendment was still intended to target the religious. The revision actually expanded the scope of the Anti-Aid Amendment to disenfranchise other religious institutions. Given the context of repeated attempts by the legislature to expand the Anti-Aid Amendment from the sectarian (*i.e.*, Catholic) *schools* to all sectarian (*i.e.*, Catholic) *institutions*, partial Catholic support of the 1917 revision can best be understood as an effort to stave off attacks that could further disadvantage their institutions. *See Debates* at 182. Catholics at the time lacked the power to repeal the Anti-Aid Amendment altogether, and so relieve the burden of exclusion from the school fund—a burden that, by design, fell disproportionately on their community. *Apx.* 568.

The 1917 changes that were eventually adopted allowed Protestants to preserve the exclusion of Catholic schools from the school fund, but allowed Catholics to visit a similar burden on “private” institutions, more of which were Protestant than Catholic. Thus, Catholics used what power they had at the Convention to engage in an equally illegitimate “religious gerrymander” of their

own, *Lukumi*, 508 U.S. 534. Far from removing any taint of anti-religious bigotry, this maneuver only compounded the hostility embodied in the Anti-Aid Amendment and broadened its scope to a wider range of targets.²⁶ *See id.* This same 1917 Constitutional Convention adopted the Anti-Aid Exclusion to insulate from amendment the bigotry that was enshrined in the Anti-Aid Amendment.

Notably, the lower court did *not* address the history of the Anti-Aid Exclusion, or the Anti-Aid Amendment it protects. Instead, it attempted to whitewash the discriminatory history by manufacturing a non-discriminatory reason that theoretically could have motivated support for the Anti-Aid Exclusion. *See* 311 F.Supp.2d at 244 (suggesting that Anti-Aid Exclusion passed because of judgment that some topics are better suited for the legislature). This approach, however, ignores the controlling precedent of *Hunter v. Underwood*, 471 U.S. 222, 231 (1985), which holds that when a discriminatory motivation is a “but for” cause of a law’s adoption, the existence of a “permissible motive” does not change the fact that the law embodies discriminatory intent.

Even if many years have passed, the historical discriminatory intent still violates the discriminatory intent prong of the test established under Equal Protection jurisprudence. *Id.* at 227-228 (citation omitted). In *Hunter*, the

²⁶ *See Underwood*, 471 U.S. at 232 (“an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks”).

unconstitutional law was facially neutral and possibly based on more than one motivation, but one intent when adopted in 1901 was to disenfranchise blacks. *Underwood*, 471 U.S. at 228, 232. As in *Underwood*, the history of the Anti-Aid Amendment and Exclusion shows that the 1917 Constitutional Convention adopted the Anti-Aid Exclusion primarily out of religious bigotry. Even if the Convention had some other reason for adopting the Anti-Aid Exclusion, the exclusion still violates the discriminatory intent prong of the equal protection test.

The Anti-Aid Exclusion also violates the discriminatory impact prong of the test. The 1917 expansion of the Amendment to bar the funding of “institutions” beyond schools has been a dead letter. 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. Apx. 245. Instead, Massachusetts regularly flouts the plain language of the Anti-Aid Amendment by providing public funds to charitable and other private institutions that, it would seem, should be barred from receiving such funds by the Anti-Aid Amendment’s explicit language.²⁷ Moreover, the Commonwealth does so with the explicit approval of the Massachusetts Supreme Court, openly applying the Amendment according to its original bigoted 1854-55 purpose of singling out

²⁷ See *supra* at 10-13.

religious *schools* for special disfavor.²⁸ Present-day, selective enforcement of the Anti-Aid Amendment—freely funding private religious and nonreligious institutions *except* in the school context—does nothing to mitigate the discriminatory intent or effect of the Amendment. Instead, it shows that the contemporary pattern of application squares especially well with the original, bigoted language of the Amendment, and confirms that the 1917 changes were nominal only, and meaningless in practice.

As the selective non-enforcement of the Anti-Aid Amendment’s provisions against funding charitable institutions *other than schools* has effectively repealed those provisions, non-school institutions are unaffected by the Anti-Aid Exclusion. It is only members of a religious minority like the Plaintiffs who desire public funding of private schools, most of which are religious and overwhelmingly populated with students seeking a religious education, who bear the brunt of the Exclusion’s barrier to changing the Anti-Aid Amendment through the initiative process. As can be seen in the history and application of the Anti-Aid Amendment, the intent and impact of the Amendment are discriminatory—

²⁸ See *Helmes*, 406 Mass. at 877-78 (permitting public funding of a private charitable institution in violation of the Anti-Aid Amendment’s explicit language). The Massachusetts Supreme Court’s own test for applying the Amendment “redefines” its plain language that would ostensibly bar all private institutions from receiving funds and instead focuses exclusively “on the practice of granting public aid to private schools.” *Id.*

imposing a special burden on religious adherents.²⁹ To insulate that special burden from repeal by initiative as the Anti-Aid Exclusion does is to distort the political process across religious lines, in violation of the Equal Protection Clause by hindering a religious minority like the Plaintiffs in their pursuit of beneficial legislation. *See Washington*, 458 U.S. at 467 (Equal Protection prohibits political structure that “distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”).³⁰ Because that distortion of the political process burdens a suspect class and cannot withstand strict scrutiny, it must be struck down.³¹

CONCLUSION

The lower court’s judgment should be reversed and judgment entered in Plaintiffs’ favor.

²⁹ *See Underwood*, 471 U.S. at 227-28 (facially neutral law violates Equal Protection Clause where plaintiff shows disproportionate impact and discriminatory intent or purpose).

³⁰ Put another way, because the Anti-Aid *Amendment* is applied in a religiously discriminatory way, targeting a class that consists overwhelmingly of religious schools, their students, and their parents, the Anti-Aid *Exclusion’s* protection of the *Amendment* from change distorts the political process in a religiously discriminatory way.

³¹ Even if the Court were for some reason to apply rational basis scrutiny, neither Exclusion satisfies that level of scrutiny. Hostility to some or all religions, like hostility based on race, is not a legitimate governmental interest. *See Romer*, 517 U.S. at 634 (“a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest.”). Laws like the Exclusions which are based on such impermissible hostility are irrational even if they could theoretically be explained “by reference to legitimate public policies that justify the incidental disadvantages they impose on certain persons.” *Id.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I, DEREK L. GAUBATZ, attorney for Plaintiffs-Appellants, hereby certify that I am duly authorized to make this certification—that on the 6th day of July, 2004, I did cause two (2) true and correct copies of Brief of Plaintiffs-Appellants and one (1) copy of the Appendix to be delivered by Federal Express to the following:

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